IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-1334

ANTHONY A. SPANN

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Anthony A. Spann, Defendant below, will be referred to as "Spann" and Appellee, State of Florida, will be referred to as "State". References to the appellate records are:

1. "ROA" for the record on direct appeal
2. "PCR" for the postconviction record and
3. "S" before the record cite for supplemental materials.

Each will be followed by the appropriate volume and page number(s). Spann's initial brief will be notated as "IB."

STATEMENT OF THE CASE AND FACTS

On December 16, 1997, both Defendant, Anthony A. Spann, ("Spann"), and co-defendant, Lenard James Philmore ("Philmore"), were indicted for the November 14, 1997 first-degree murder of Kazue Perron; conspiracy to commit robbery with a deadly weapon (bank robbery); carjacking with a deadly weapon; kidnapping; and robbery with a deadly weapon; and grand theft. The trials of Philmore and Spann were severed June 23, 1999 and Spann's trial commenced May 15, 2000. On May 24, 2000, the jury convicted Spann as charged. See Spann v. State, 857 So.2d 845, 850, 925 (Fla. 2003). Following the verdict, Spann waived both the presentation of mitigation and a penalty phase jury. Id. On June 23, 2000, he was sentenced to death. See Spann, 857 So.2d at 858. Spann chose not to seek certiorari review with the United States Supreme Court.

Instead, on August 2, 2004, Spann filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 with a supporting appendix, to which the State responded with appendix. (PCR.6-11 569-1210, 1211-1492). Subsequently, the pleading was amended three times, with the first amendment being filed on or about October 15, 2004 and the State responding on October 25, 2004. (PCR.12 1493-1559, 1560-1623). During the December 9, 2004 Huff v. State, 622 So.2d 982 (Fla. 1992)/Case Management Hearing (PCR.1 28-53; PCR.1624-25), Spann elaborated upon his Claim 3 addressed to the effectiveness of penalty phase counsel in advising Spann about the mitigation available which, he asserted, in turn impacted his decision to waive mitigation and to waive the penalty phase jury. Spann was granted the opportunity to plead this claim more fully (PCR.12 1639-41). Such amendment was filed on or about January 3, 2005, followed by his verification signed on January 6, 2005 and the State responded on January 19, 2005. (PCR.12 1645-68) Spann's final amendment, filed on or about March 9, 2005, added legal claims addressed to the constitutionality of the death penalty. (PCR.12 1679-92). On March 22, 2005, the State filed its response. (PCR.13 1695-1769) An evidentiary hearing was held on March 30 and 31, 2005, during which the court took evidence on all of Spann's claims of ineffectiveness of counsel except for Claim 6, and the three purely legal issues challenging the

constitutionality of the death penalty. (PCR.2-5 63-568). Post-hearing written closing arguments were submitted by Spann (PCR.13 1831-54; PCR.14 1947-72) and the State. (PCR.14 1855-1945). On July 1, 2005, the court denied relief on all of Spann's claims. (PCR.14 1973-2007) The Notice of Appeal was filed on July 25, 2005 (PCR.14 2043).

On direct appeal, this Court found the following factual and procedural history:

> On November 13, 1997, Anthony Spann (Spann) drove his blue Subaru as the getaway car for the robbery of a pawn shop. Leonard Philmore (Philmore) and Sophia Hutchins (Hutchins) robbed the pawn shop. They took handguns and jewelry, but little or no money. That evening, Spann, Philmore, and two women, Keyontra Cooper (Cooper) and Toya Stevenson (Stevenson), spent the night in a local motel.
>
> The next morning, on November 14, 1997, while the four were still at the motel, Cooper's friend paged her to tell her that police were looking for Philmore. Spann and Philmore decided to leave town and planned to rob a bank for the money to do so. They planned to use the Subaru as the getaway car from the bank robbery. Since they assumed police would be looking for the Subaru, they planned to carjack a different vehicle to use as transportation to leave town. They specifically targeted a woman for the carjacking to make it easier, and then planned to kill her so that she could not identify them later.
>
> At about noon, Spann and Philmore took Cooper and Stevenson home to get ready to leave town. Spann and Philmore then went to a shopping mall to search for a victim. When their attempts failed, they went to what Spann described as "a nice neighborhood" where they spotted a gold Lexus with a woman driver. They followed her to a residence. When she pulled into the driveway, Philmore approached her, asked to use her cell phone, then forced her back into the car at

gunpoint.

Philmore rode in the Lexus with the victim, Kazue Perron, and Spann followed in the Subaru. The victim was nervous and crying. She offered Philmore her jewelry, which he took and then later threw away because he was afraid it would get him in trouble. They drove down an isolated road, and when they stopped, Spann motioned to Philmore, a motion which Philmore understood to mean that he should kill the woman. Philmore told the victim to go to the edge of a canal, but according to him, the woman instead came toward him. Philmore testified that he shot her in the forehead using a gun he had stolen the day before from the pawn shop. Philmore picked up the victim's body and threw it into the canal, and got blood on his shirt.

Philmore and Spann left together in the Subaru to rob a bank. In the car, Philmore took off his bloody t-shirt, which was later recovered by police, and put on Spann's t-shirt. Philmore went into the bank, grabbed approximately one thousand dollars cash from the hand of a customer at the counter, and got back into the passenger's side of the blue Subaru. As planned, Spann and Philmore abandoned the Subaru and picked up the Lexus. They then went to pick up Cooper and Stevenson.

Stevenson testified that between 2:30 and 3:00 that afternoon, Spann and Philmore picked her up in the Lexus. They picked up Cooper, then headed back to Sophia Hutchins' house. Stevenson and Cooper questioned Philmore and Spann about the car and they were told not to worry about it.

Before they reached Hutchins' house, at around 3:15 p.m., Officer Willie Smith, who was working undercover for the West Palm Beach Police Department, saw Spann driving the gold Lexus. Smith knew Spann had an outstanding warrant so he signaled surveillance officers, who began to pursue him. Spann tried to outdrive the police and a chase began at speeds of up to 130 miles per hour through a residential neighborhood. They drove onto the interstate, and the police lost Spann. Eventually the Lexus blew a tire and went off the road at the county line. A

motorcyclist saw the Lexus drive off the road and four people get out and run into an orange grove. The motorcyclist called 911 on his cell phone.

The grove owner was working with a hired hand that day trapping hogs in the grove. He saw people come into the grove from the road and later identified one of the men as Spann. The grove owner heard a helicopter overhead and saw that the men had guns. He told them to hide in the creek brush, then he called 911. The grove owner met troopers by the road and helped search for Spann and the others. Six hours after the manhunt began, Spann, Philmore, Cooper and Stevenson were found in the grove. Days later, the grove owner found a gun and beeper in the water near the creek brush where the four were hiding. Police recovered a second gun in the same water.

Spann and Philmore were both indicted on the charge of first-degree murder, but their trials were severed. Spann was also indicted for the crimes of conspiracy to commit robbery with a deadly weapon, carjacking with a deadly weapon, kidnapping, robbery with a deadly weapon, and grand theft. Philmore was tried first and convicted of first-degree murder. *See Philmore v. State,* 820 So.2d 919 (Fla.2002), *cert. denied*, 537 U.S. 895, 123 S.Ct. 179, 154 L.Ed.2d 162 (2002). Before his sentencing phase trial, Philmore testified for the State against Spann. Philmore was eventually sentenced to death and the conviction and sentence were affirmed on appeal. *See id.*

As for Spann, the jury returned verdicts of guilty on each count, including the first-degree murder of Kazue Perron. Spann waived both the presentation of mitigating evidence and a jury advisory recommendation. The trial court conducted hearings on these matters, found that Spann's decision was made knowingly and intelligently, and discharged the jury. Defense counsel proffered evidence in mitigation, and the State presented three witnesses in support of certain aggravating circumstances. The parties filed sentencing memoranda, and the trial court conducted a *Spencer* hearing. The trial court then sentenced Spann to death for first-degree murder; fifteen years for conspiracy to commit robbery with a deadly weapon; life for carjacking; life for

> kidnapping; life for robbery with a deadly weapon; and five years for grand theft.

Spann, 857 So.2d at 849-51 (footnote omitted).

Spann raised seven issues on direct appeal. Each was rejected in this Court's April 3, 2003 opinion. In his motion for rehearing, Spann challenged the rulings on Points II, V, and VI. He argued in Point II that the record demonstrated counsel did not fully investigate mitigation because the Presentence Investigation Report ("PSI") cited mitigation not proffered by counsel. His challenge to Point V was that this Court required preservation of the issue. The challenge to Point VI was that this Court did not recognize that the trial court had not considered Spann's drug use, unhealthy relationship with his mother, need for an appropriate male role model, institutionalization as a juvenile, and low level of education. Only the challenge to Point V was accepted and a revised opinion was issued October 16, 2003. In that opinion, this Court resolved Spann's appellate claims as follows:

Point I – whether there was error in ruling handwriting analysis satisfies the Frye standard and in permitting testimony that certain handwriting samples showed evidence of intentional distortion so as to prevent comparison. Although the issue was found unpreserved, Spann, 857 So.2d at 852, this Court found:

> Florida does not follow *Daubert*. Florida courts follow the test set out in *Frye v. United States*, 293 F. 1013

> (D.C.Cir. 1923). ... Courts will only utilize the *Frye* test in cases of new and novel scientific evidence....
>
> Forensic handwriting identification is not a new or novel science. ... In 1993, the United States Supreme Court decided Daubert, which interprets a federal rule of evidence and is not binding on the states....
>
> ... Because expert forensic handwriting identification is not new or novel, *Frye* has no application. Therefore, even if the issue Spann raises here had been properly preserved for review, it would be without merit. The *Frye* hearing in this case was limited to the issue of whether the expert could testify that Spann distorted or disguised his handwriting. The trial court properly admitted the testimony.

Spann, 857 So.2d at 852-53.

Point II – whether the court erred in failing to follow the procedures adequately with respect to Spann's waiver of mitigation. In finding the dictates of Koon v. Dugger, 619 So.2d 246 (Fla. 1993) were met, this Court concluded:

> Defense counsel notified the court on the record that Spann did not wish to present mitigating evidence. Spann told the court that he had been thinking about this decision since he was in jail in 1997. On two separate occasions-- at the time Spann waived his presentation of mitigation and again when he waived a jury at the penalty phase--the trial judge inquired in detail, and defense counsel indicated on the record what the mitigating evidence would be if it were presented. The court inquired whether Spann's decision was against the advice of counsel, and counsel said it was. The court inquired directly of Spann whether he wished to waive mitigation and whether he understood the consequences of a waiver. The defense also submitted a written sentencing memorandum, and the court ordered a presentence investigation. The judge heard penalty phase arguments and conducted a *Spencer* hearing. During the proceedings, Spann maintained his position that he did not wish to be present for the

penalty phase and did not wish to present mitigation or even to have a penalty phase jury.

...

... Spann argues that his counsel did not thoroughly indicate the mitigation that existed in the record. The trial court solicited both statutory and nonstatutory mitigating evidence from defense counsel. Defense counsel advised the court that Spann was an accomplice with a relatively minor role in the murder, that Spann's mother, sister, and brother would testify that Spann was a good son and brother when he was a young man, and that at some point, Spann fell in with a bad crowd. Counsel also submitted that prison records show that Spann would be capable of living in an open prison environment without being a threat to himself or anyone else. Counsel indicated that a mental health expert was hired to examine Spann, but Spann failed to cooperate. The trial court questioned counsel as to what evidence they sought to present as a result of the mental health evaluation. Counsel also stated that they examined school records, social records, and criminal records, and that they met with Spann's family. The trial court specifically inquired about potential mitigating evidence discovered after meeting with Spann's family members. The trial court acted cautiously, followed the requirements of *Koon*, and conducted a colloquy similar to that in *Overton*, which was approved by this Court. The trial court did not abuse its discretion when it granted Spann's request to waive presentation of mitigation. ... **The record supports the trial court's finding that Spann acted knowingly and intelligently when he waived presentation of mitigation, and that he did so on his own accord and not because his counsel failed to adequately investigate existing or available mitigation**. Because there was no abuse of discretion, relief is hereby denied.

...

Spann waived the presentation of mitigation, argued that the trial court did not consider all of the mitigation, and now argues that the mitigation the court did consider and found to exist was not given sufficient weight. The “weight assigned to a

mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard." *Elledge v. State*, 706 So.2d 1340, 1347 (Fla. 1997) (finding trial court did not abuse its discretion in providing weight to the mitigating circumstances because the Court could not "say that no reasonable person would give this circumstance [little] weight in the calculus of this crime"); accord *Huff v. State*, 569 So.2d 1247, 1249 (Fla. 1990) ("[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court.").

Spann argues that the trial court abused its discretion in assigning weight to three of the mitigating circumstances: that Spann was a good son, good brother, and good student (little weight); that Spann had a good jail record (some weight); and that Spann was a good husband and father (slight weight).

As stated above, it is well-settled law that it is within the discretion of the sentencing court to assign relative weight to each mitigating factor, and the sentencing court's finding will not be disturbed absent a showing of abuse of discretion. *See Trease v. State*, 768 So.2d 1050, 1055 (Fla. 2000); *see also Elledge v. State*, 706 So.2d 1340, 1347 (Fla. 1997). In this case, the trial court evaluated the nonstatutory mitigation based on the information available in the record. If there was other information the trial court could have used to evaluate a potential mitigating factor, the defendant refused to present it. *Cf. LaMarca v. State*, 785 So.2d 1209, 1216 (Fla. 2001) ("Because appellant waived the presentation of mitigating evidence, he cannot subsequently complain on appeal that the trial court erred in declining to find mitigating circumstances that might otherwise have been found....") **It is illogical to accept the defendant's argument on appeal that a mitigating factor should have been found or greater weight should have been assigned based on evidence the defendant failed or refused to submit. Spann tied the hands of his trial counsel by refusing to allow any evidence in mitigation, and now argues the trial court should have sought a more detailed proffer concerning mitigation. The trial court did not abuse its discretion. Thus, this claim does not warrant a new penalty phase trial**.

Spann, 857 So.2d at 853-54, 859-60 (emphasis supplied).

Point III – whether the court erred in finding Spann had freely, voluntarily, and knowingly waived his penalty phase jury and abused its discretion by allowing Spann to waive the advisory jury. Based on Griffin v. State, 820 So.2d 906, 912-13 (Fla. 2002), this Court concluded Spann was foreclosed from challenging the voluntariness of his waiver of the penalty phase jury as he had not sought to withdraw his waiver below.

Point IV – whether the court improperly used Spann's conviction for misdemeanor battery as an aggravator of prior violent felony. In rejecting the claim, this Court reasoned:

> The State presented testimony from the driver of the vehicle into which Spann shot several times, as well as the judgment and sentence. The State also presented testimony from the homicide investigator who testified that Spann shot a man in 1997, and subsequently pleaded guilty to manslaughter. Either one of these crimes alone would support the finding of this aggravating circumstance. If there was any error in relying on the prior crime of battery to support this aggravating circumstance, it was harmless since Spann had two other prior felony convictions involving the use of violence to another person....
>
> ... Although the trial court did not specifically indicate the weight given to the battery conviction, it is clear from a close reading of the sentencing order, especially that portion discussing the first nonstatutory mitigating factor, that the battery conviction was given only some weight. The trial court considered the fact that the defendant was a juvenile when the battery incident occurred and found this to be a mitigating factor. Relief is not warranted on this issue.

Spann, 857 So.2d at 855-56.

Point V – whether the court impermissibly doubled the aggravating factors of felony murder (kidnapping), pecuniary gain, and avoid arrest. After noting "the facts of a case may support multiple aggravating factors 'so long as they are separate and distinct aggravators and not merely restatements of each other.'" Spann, 857 So.2d at 856, this Court reviewed each aggravator before denying relief upon finding "[t]he three aggravators are based on separate and distinct aspects of the criminal enterprise and were properly found." Id., at 857.

Point VI – whether the court failed to consider and weigh all mitigation contained in the record. This Court reasoned:

> Mitigating evidence must be considered and weighed when it is contained anywhere in the record, to the extent it is uncontroverted and believable. ... This requirement applies with equal force when the defendant asks the court not to consider mitigating evidence, as Spann did in this case. ... The sentencing court must "expressly evaluate in its written order each mitigating circumstance proposed by the defendant." ... However, because nonstatutory mitigation is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigation it is attempting to establish....
>
> Spann claims there are nineteen items of mitigation supported by the record that are believable and uncontroverted, including: (1) Spann was capable of living in a prison population without serious difficulty or doing harm to another; (2) at a certain age Spann came under the influence of a bad crowd; (3) available mental health mitigation; (4) school records; (5) social records; (6) Spann's criminal history records; (7) Philmore's criminal history records; (8) Spann was in a car accident in 1989 or 1990; (9) Spann's drug use during the episode; (10)

Spann's low level of education as referenced in the PSI; (11) Spann's skills as a welder; (12) Spann's current or most recent employer is unknown; (13) Spann left home at an early age; (14) Spann had an unstable residential history; (15) Spann has two other children besides the one referenced in the sentencing order; (16) Spann has sinus and hayfever problems; (17) Spann has an unhealthy relationship with his mother; (18) Spann needed an appropriate male role model; and (19) Spann was institutionalized as a juvenile.

In the sentencing order, the trial court stated:

> 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 PSI.

The trial court then considered and weighed the mitigating evidence that was established in the record. The trial court found no statutory mitigation but specifically found the following nonstatutory mitigation: (1) the defendant had been a good son according to his mother, a good brother according to his siblings, and a good student up to a point (little weight); (2) the defendant was not the person who fired the fatal shots in the murder for which he is to be sentenced (very little weight); (3) the defendant is capable of living in a prison population without serious difficulty or doing harm to another (some weight); (4) the defendant's wife would testify that he was a good husband and father (slight weight); and (5) the PSI reflects that the defendant's father was shot to death when the defendant was two to four years old (moderate weight).

...

Spann argues that all mitigating evidence, even if it was not explicitly proffered but contained somewhere in the record, should have been individually listed in the sentencing order and discussed. Evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be

> considered as extenuating or reducing the degree of moral culpability for the crime committed. ...
>
> Many of the items Spann now lists as mitigation were considered by the trial court and were included in the trial court's discussion of mitigation in the sentencing order. For example, the sentencing court found that Spann was capable of living in a prison population without serious difficulty, and gave this nonstatutory mitigator some weight. The sentencing court also discussed Spann's assertion that at some point he came under the influence of a bad crowd. The sentencing court referenced the presentence investigation report, which would have included facts such as Spann's low level of education. Furthermore, the transcript indicates that the judge specifically inquired about Spann's school records, social records, and criminal history records, as well as any mitigation that would be revealed through a mental health evaluation. Other items Spann now lists as mitigation are not extenuating or do not reduce the degree of moral culpability for the crimes committed. For example, the evidence fails to show that Spann's alleged history of sinus and hayfever problems is mitigating. Likewise, Spann's skills as a welder, the fact that he left home at an early age, and his unstable residential history are not extenuating and do not reduce the degree of moral culpability for the crime committed. We find that the mitigating evidence was properly considered and weighed by the trial court, and we therefore deny relief on this issue.

Spann, 857 So.2d 857-59 (citations omitted).

Point VII - whether the court abused its discretion with respect to the weight assigned to the mitigators. Rejecting the issue, this Court reasoned:

> Spann waived the presentation of mitigation, argued that the trial court did not consider all of the mitigation, and now argues that the mitigation the court did consider and found to exist was not given sufficient weight.
>
> ...

> In this case, the trial court evaluated the nonstatutory mitigation based on the information available in the record. If there was other information the trial court could have used to evaluate a potential mitigating factor, the defendant refused to present it. ... It is illogical to accept the defendant's argument on appeal that a mitigating factor should have been found or greater weight should have been assigned based on evidence the defendant failed or refused to submit. Spann tied the hands of his trial counsel by refusing to allow any evidence in mitigation, and now argues the trial court should have sought a more detailed proffer concerning mitigation. The trial court did not abuse its discretion. Thus, this claim does not warrant a new penalty phase trial.

Spann, 857 So.2d at 859-60.

Proportionality - Independently, this Court found Spann's death sentence proportional. Spann, 857 So.2d at 860.

In his postconviction motion, Spann raised several allegations of ineffectiveness of guilt and penalty phase counsel as well as claims that the death penalty was unconstitutional. An evidentiary hearing was held on the following ineffectiveness claims identified in the motions as "Factual Claims": Claim 1 – failing to object to the racial make up of the jury; Claim 2 – failing to conduct a thorough penalty phase investigation; Claim 3 – failing to advise Spann of all available mitigation evidence before permitting him to waive mitigation and for not advising Spann to withdraw his waiver of his penalty phase jury; Claim 4 – failure to object to prosecutorial misconduct in referring to the prosecutor's

grandmother; Claim 5 – failing to challenge co-defendant Lenard Philmore's multiple confessions pre-trial and his testimony during the trial; Claim 7 – failing to advise Spann not to testify; and Claim 8 – failing to present evidence in support of an alibi defense. (PCR.2 - PCR.5; PCR.12 1493-1559, 1645-68, 1679-92). In support of his claims, Spann called Robert Udell, Esq. ("Udell"), Dr. Andrew Scanameo, Willie Alma Brown ("Brown"), Rory Little, Esq. ("Little"), Leo Spann, Dr. Fred Petrilla, Yolanda Spann, and Dr. Bill Mosman. (PCR.2 - PCR.5). The court concluded neither counsel rendered ineffective assistance in the guilt or penalty phases. Further, the court rejected the claim of mental health problems having any impact on Spann's decision making ability, and concluded Spann had not established additional mitigation which would prove prejudice under Strickland v. Washington, 466 U.S. 668 (1984) regarding his sentence or trial mental health experts. (PCR.14 1973-2007).

Further, a summary denial was entered on the following issues: Factual Claim 6 - counsel was ineffective in the manner he presented the defense motion for judgment of acquittal; Legal Claim 1 - the death penalty is not constitutional under Ring v. Arizona, 122 S.Ct 2248 (2002) and Blakely v. Washington, 124 S.Ct. 2531 (2004); Legal Claim 2 - the death sentence violated the Eighth Amendment under Emund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987) because Spann was not

the actual shooter; and Legal Claim 3 - the death sentence is unconstitutional because the aggravating and mitigating factors should have been alleged in the indictment. (PCR.14 1973-2007). This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I – Spann received effective assistance from his counsel as found by the trial court. The court's factual findings are supported by substantial, competent evidence, and the appropriate law was applied. Counsel decisions were made after proper investigation of the facts and witness accounts with regard to: (A) presenting an alibi defense; and (B) deciding not to highlight Philmore's multiple confessions.

ISSUE I(C) and ISSUE II – The trial court properly denied postconviction relief based on the evidence produced and trial record. The proper law was applied and the record supports the finding that Spann did not receive ineffective assistance of counsel regarding the investigation and legal advice upon which the decision to waive mitigation was based. There was no competent, substantial evidence that Spann was suffering from a mental condition or was misadvised to the point that his waiver of mitigation was not knowing and voluntary. This Court should affirm the denial of postconviction relief.

ARGUMENT

ISSUE I

THE COURT PROPERLY REJECTED SPANN'S CLAIM OF INEFFECTIVE ASSISTANCE WITH RESPECT TO AN ALIBI DEFENSE, CHALLENGING CO-DEFENDANT PHILMORE'S TESTIMONY WITH PRIOR CONFESSIONS, AND INVESTIGATION OF MITIGATION AND THE WAIVER OF A MITIGATION CASE. (restated)

Spann asserts his counsel was deficient in three areas which prejudiced his case under Strickland v. Washington, 466 U.S. 668 (1984). According to Spann, his counsel: (A) failed to call Leo Spann ("Leo"), Spann's cousin, as an alibi witness or to object to the State's alleged bolstering of the testimony of Spann's Great-aunt, Willie Alma Brown ("Brown"); (B) failed to Philmore's credibility based on his multiple "conflicting" police confessions; and (C) failed to advise Spann of all of the possible mitigation available before Spann waived his mitigation case and counsel failed to withdraw the waiver. (IB 44, 55, 61). The trial court conducted an evidentiary hearing on these claims and rejected each based upon substantial competent evidence as well as the proper application of Strickland.

It is the State's position that postconviction relief was denied properly. As the trial court found, with respect to the use of Leo as an alibi witness to support Spann's police statement, his decision regarding the State's argument allegedly bolstering Brown, and decision not to use Philmore's multiple

police confessions against him, Spann's counsel, Robert Udell ("Udell") rendered effective assistance. The alibi offered by Leo would not assist Spann, Brown's testimony was rendered neutral through Udell's cross-examination, there was no basis to challenge the State's closing argument regarding Brown, and Udell made a reasoned decision not to cross-examine Philmore on his multiple confession. Further, the record supports shows that Udell considered each area of contention, investigated the different options, and made tactical decisions. This Court should affirm the denial of postconviction relief.

The standard of review for ineffectiveness claims following an evidentiary hearing is *de novo*, with deference given the court's factual findings. "For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence, and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003).

> ... we review the deficiency and prejudice prongs as mixed questions of law and fact subject to a *de novo* review standard but ... the trial court's factual findings are to be given deference. So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence.

Arbelaez v. State, 889 So.2d 25, 32 (Fla. 2005)[1]

To prevail on an ineffectiveness claim, the defendant must prove (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, the defendant bears the burden of proving counsel's representation fell below an objective standard of reasonableness, was not the result of a strategic decision, and that actual, substantial prejudice resulted from the deficiency. See Strickland; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's conduct was "outside

[1] Reed v. State, 875 So.2d 415 (Fla. 2004); Davis v. State, 875 So.2d 359, 365 (Fla. 2003); State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000).

the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. The ability to create a more favorable strategy years later does not prove deficiency. See Patton v. State, 784 So.2d 380 (Fla. 2000); Cherry v. State, 659 So.2d 1069 (Fla. 1995). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986).

Expounding upon Strickland, the Supreme Court cautioned in Wiggins v. Smith, 539 U.S. 510, 533 (2003):

> In finding that [the] investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at

> sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*.... We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." ... A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances."

Wiggins, 539 U.S. at 533. From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a strategy was chosen over another. Investigation (even non-exhaustive, preliminary) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 ("[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

A – Counsel's decision regarding presenting alibi witnesses Leo Spann ("Leo) and decision not to object to the State's argument regarding Willie Alma Brown ("Brown") were well investigated, reasoned, and professionally sound – In rejecting Spann's Grounds 4 and 8 below that Udell should have called Leo in support of his alibi defense and that he should have challenged the State's attempted bolstering of Brown, the trial court reasoned:

> **Ground 4 – Trial counsel was ineffective for failing to object to the improper bolstering of a State**

witness, Willie Maw Brown.

Spann claims that counsel as ineffective for failing to object to the improper bolstering of State witness, Willie Alma Brown, Spann's aunt. Spann contends that in light of counsel's failure to present an alibi defense, the prosecutor's statement prejudiced the outcome of the guilt phase.

Spann's claim must be denied for two reasons. First, the prosecutor's argument does not constitute improper bolstering. In Ground 8, *infra*, the Court outlined the content of Spann's alibi statement to the police. In the statement, Spann told police that he was at Brown's house at the time of Perron's murder but Spann also claimed that no one saw him there and that he did not talk to anyone while he was on Brown's property.

At trial Brown's videotaped deposition was presented by the State. At deposition Brown initially claimed that Spann was not living in the small house behind Brown's main house, but Brown later admitted that she did not know whether Spann was living there because it was possible for someone to walk to the small house without Brown seeing them from the porch where she usually sat. In closing argument the prosecutor reminded the jury that Spann's aunt could not substantiate where Spann was on the day of Perron's murder. The prosecutor claimed that Spann's aunt could not say that Spann was living with her or living in the small house behind the main house. In commenting on the evidence the prosecutor argued:

> I had a Grandma Bakkedahl. She sat on her front porch in Rochester, Minnesota for the last 20 years for her life. And I'm telling you what, there ain't a single thing that went on in that neighborhood that she didn't know about. And they want you to believe that he's coming and going through this gate into the back of this lady's house and she never knew it. Maybe in a world where there is no common sense. That works.

(ROA.29 3022)

The Court finds this argument fair comment where Udell had made Spann's whereabouts an issue in closing argument contending that Spann was at Brown's home at the time of Perron's murder. Further, the comment did not amount to improper bolstering because taken in context, the prosecutor's comment was not vouching for the credibility of Brown's testimony, or placing the prestige of the government behind Brown, but was merely an appeal to the jury to use their common sense in considering the plausibility of Spann's statement to the police. *Hutchinson v. State*, 882 So2d 943, 953-53 (Fla. 2004); *Gorby v. State*, 630 So.2d 544, 547 (Fla. 1993). Thus, Spann has failed to demonstrate improper bolstering warranting objection by counsel required to satisfy the performance prong of the *Strickland* standard. And even if the prosecutor's comments were objectionable, in light of the overwhelming evidence presented at trial, the comments would not have changed the outcome of the trial.

Ground 4 must be denied because there is no other evidence demonstrating prejudice in failing to present an alibi defense. Clearly, Spann does not claim that Brown saw Spann on Brown's property during the time of Perron's murder. And any damage that arose from Brown's statement that Spann was not staying on her property was neutralized by Brown's admission that Spann could have been on her property without her knowledge. Further, in Ground 7, *infra*, the Court found that there was not prejudice in Spann's waiver of his right to testify concerning his alibi. And in Ground 8, *infra*, the Court found that Spann's alibi was not corroborated by his brother, Leo Spann, who was living in Brown's home at the time of Perron's murder. Thus, Spann has failed to demonstrate any prejudice to the outcome of the guilt phase required to satisfy the second prong of the *Strickland* standard.

...

Ground 8 – Trial counsel was ineffective for failing to file a notice of alibi and for failing to present an alibi witness, Leo Spann.

Spann claims that counsel was ineffective for failing to file a notice of alibi and for failing to

present an alibi witness, Leo Spann. Spann contends that Leo Spann would have corroborated Spann's statement to police that Spann was at his aunt's house in West Palm Beach at the time of Perron's murder in Indiantown. Spann avers that the outcome of the guilt phase was prejudiced because the testimony of his co-defendant, Lenard Philmore was the only evidence that placed Spann's involvement (sic) in Perron's murder.

To analyze whether Spann was prejudiced by counsel's failure to present Leo Spann to corroborate Spann's alibi statement to police, the Court must first determine from the evidence presented at trial the time-line of the relevant sequence of events that occurred on the day of Perron's murder, November 14, 1997.

Summary of sequence of events and time-line

The Court summarizes the sequence of events and time-line for November 14, 1997, as follows. Philmore's testimony puts Spann at the scene of all of the events. The time-line was corroborated by the testimony of other witnesses.

12:00 – 12:30 p.m. - Spann and Philmore deliver girlfriends, Toya and Kiki to their homes (ROA.22 2203; ROA.24 2381).

12:40 – 12:45 p.m. – Perron leaves for 1:00 p.m. appointment and is never heard from again (ROA.22 2214; 2219-21, 2224).

1:00 – 1:20 p.m. – Abduct Perron in Lake Park (ROA.22 2230-31).

1:20 – 1:58 p.m. – Drive Perron's Lexus and Spann's Subaru to Indiantown (ROA.22 2240-48).

- Kill Perron and hide Perron's Lexus in Indiantown

1:58 p.m. – Rob bank in Indiantown while driving Subaru (ROA.23 2287-88).

1:58 – 2:28 p.m. – Transfer to Lexus and ditch Subaru in Indiantown (ROA.23 2307-09, 2324)

2:28 p.m. – Spann and Philmore pick up Toya in Riviera Beach (ROA.23 2347-52).

2:28 – 3:15 p.m. – Spann and Philmore pick up Kiki (ROA.24 2382-85).

- All go to Burger King

- All see police at Sophia's house

3:15 p.m. – All flee police, high speed car chase starts in West Palm Beach and proceeds north on Interstate 95 (Roa.24 2395-97).

Later – Chase ends when Lexus blew a tire, eventually all are arrested (ROA.24 2385-93).

Spann's alibi statement

Spann's alibi is inconsistent with the sequence of events and time-line presented at trial. Although the defense did not present any testimony or evidence at trial, Spann's alibi came into evidence through a tape of Spann's November 20, 1997, statement to police. (ROA.27 2816-2842).

In his statement, Spann claims that on the morning of November 14, 1997,Philmore and Spann left the Inns Motel and dropped girlfriends, Kiki and Toya, off at their homes. Then Philmore and Spann went to Sophia's house. Spann left Sophia's house alone and drove the Subaru to his aunt's house in West Palm Beach. Spann stated that about five minutes after he arrived at his aunt's house he noticed the Subaru was missing. (ROA.27 2831) Spann assumed that Sophia had taken the car because she had previously asked to borrow it. Spann stated that no one saw him while he was at his aunt's house and Spann did not talk to anyone while he was there. Spann contended that about an hour later, around 12:00 or 1:00 p.m., Philmore picked Spann up at his aunt's house. (ROA.27 2830) Spann claims that Philmore was driving a white Lexus. Spann stated that it was the same Lexus that Spann was driving during the police chase later that afternoon.

In sum, Spann's alibi places Spann at his aunt's

house in West Palm Beach for an hour sometime between 11:00 a.m. and 1:00 p.m., where Spann claims Philmore picked him up sometime between 12:00 and 1:00 p.m. on the day Perron was murdered in Indiantown. Further, the alibi explains why Spann was not responsible for the Subaru ditched in Indiantown.

Leo Spann's testimony concerning Spann's alibi

Spann's brother, Leo Spann, has testified twice concerning Spann's whereabouts on the day of Perron's murder. Leo Spann testified at deposition on May 23, 2000, and at the postconviction hearing on March 30-31, 2005. (ETH.II 212-245)

At the postconviction hearing, Leo Spann explained that in 1997 he lived at the house of Willie Mae Brown, Spann's aunt. Leo Spann came to live with Brown in 1995 or 1996, when Brown's memory started failing and she could no longer take care of herself. Leo Spann testified that while he was living with Brown, Spann would sometimes stay in the small house in the backyard of the main house. The small house was set up as an efficiency apartment. The small house was powered by an electric cord that Spann would plug into the back of the main house when he was staying there, and would unplug when he left the property. Spann would access the small house through the gated fence, not by coming into the main house. It was possible for Spann to access the small house without anyone in the main house being able to see that he came onto the property.

Spann sometimes received mail at his aunt's house. Leo Spann doubted that Brown knew about Spann's mail. The unopened mail was placed on the television until Spann came to collect it.

At the postconviction hearing, Leo Spann testified that Spann came to his aunt's house on November 14, 1997, the day of Perron's murder. Leo Spann knew Spann was there because the lights were on in the small house between 9:00 and 10:00 a.m. And later that day, Leo Spann heard the gate creak between 1:00 and 2:00 p.m. while he was at the telephone checking his pager messages. Leo Spann looked out the window and saw Spann coming onto the property.

Fifteen minutes later Leo Spann heard the gate squeak again. Leo Spann looked out the window again and saw a gold Lexus or Acura parked about 20 feet away from the house in front of an open lot. Because of the car's tinted windows Leo Spann could not see anyone in the car. Leo Spann reiterated his deposition testimony that he did not see Philmore pick up Spann from his aunt's house on the day of Perron's murder.

Leo Spann did not talk to Spann while he was on the property. Brown was watching television and did not hear or see Spann come onto the property. Leo Spann did not tell Brown that Spann was on the property.

Leo Spann's postconviction hearing testimony differed from his deposition testimony where he testified that Spann came onto his aunt's property between 2:00 and 3:00 p.m. on the day of Perron's murder, even though during the deposition Leo Spann conceded that Spann could have come onto the property an hour earlier or later. (EHT.II 236-37) Leo Spann claims that the time testified to in his deposition testimony was in error because he was confused about the dates and Udell had not prepared him for the deposition.

In addition, Leo Spann's postconviction testimony differed from his deposition testimony in that Leo Spann did not testify at deposition that he saw a gold car parked 20 feet away from his aunt's house on the day of Perron's murder. Leo Spann attributes the omission to the failure of the State or Udell to question him at deposition about a gold car, asking him only about Spann's Subaru.

Findings of fact – Corroboration of Spann's alibi

The Court makes the following findings of fact concerning Leo Spann's corroboration of Spann's alibi. Leo Spann first puts Spann at his aunt's house between 9:00 and 10:00 a.m. on the morning of November 14, 1007. Leo Spann's statement does not corroborate Spann's statement to the police that Spann spent the night of November 13, 1997, at a hotel and arrived at his aunt's house the next morning after delivering Toya and Kiki to their homes and after going to

Sophia's house. Spann's alibi would have put him at his aunt's house no earlier that 11:00 a.m. However, since Kiki's testimony had Spann dropping the girls off between 12:00 and 12:30 p.m., by Spann's own sequence of events. Spann could not have gotten to his aunt's house before 12:00 or 12:30 p.m. Therefore, the Court finds Leo Spann's testimony that Spann was at his aunt's house between 9:00 and 10:00 a.m. incredible.

Leo Spann next put Spann at his aunt's house between 2:00 and 3:00 p.m. but later testified that Spann came onto the property between 1:00 and 2:00 p.m. and that 15 minutes after Spann arrived, Leo Spann saw the gold car 20 feet away from his aunt's house. Leo Spann's second statement is contradicted by the evidence that Philmore was seen robbing the bank in Indiantown at 1:58 p.m. So even if Philmore had driven the gold Lexus to pick Spann up at his aunt's house in West Palm Beach over 30 miles away from Indiantown, the Court calculates based on the distance testimony presented at trial that Philmore would have had to pick Spann up before 1:30 p.m. or after 2:30 p.m. (ROA.27 2791-95,2842-49). If Philmore picked Spann up before 1:30 p.m., Spann would be implicated in the time period of Perron's murder between 1:00 and 1:58 p.m.. If Philmore picked Spann up after 2:30 p.m. the facts would not fit Spann's alibi that Philmore picked him up at his aunt's house between 12:00 and 1:00 p.m. Therefore, Leo Spann's second statement is inconsistent with Spann's statement to the police and does not corroborate Spann's alibi.

Conclusion of law – Leo Spann's corroboration of Spann's alibi

Leo Spann's statements concerning Spann's alibi on the day of Perron's murder are contradicted by evidence presented at trial through witnesses to the time-line other than Spann's co-defendant, Philmore. Further, Leo Spann's statements are also in conflict with Spann's own statement to police. Absent testimony or other evidence rebutting the contradiction and conflict, the Court finds that Leo Spann's equivocal statements do not provide sufficiently complete or consistent evidence to

> corroborate Spann's alibi. Therefore, Spann has failed to meet his burden of showing that the outcome of the guilt phase was prejudiced by counsel's failure to present alibi witness, Leo Spann, required to satisfy the second prong of the *Strickland* standard.

(PCR.14 1993-95, 1998-2004) (footnotes omitted)

The court's findings and conclusion are supported by the evidence from the trial and evidentiary hearing. Likewise, the legal conclusions conform with Strickland and its progeny. Although, the thrust of the court's analysis was addressed to the prejudice prong and the fact that the new alibi evidence did not assist Spann's defense, the record also shows counsel investigated this matter fully and made informed decisions, thus, no deficiency was shown. The record establishes that Udell investigated and pondered calling Leo Spann ("Leo"), however, he determined that Leo would not be of assistance to the defense given the time frame he offered. While Udell did not contact experts to discuss Brown's competency, he did neutralize her testimony by having her admit that she did not know whether or not Spann was at her home on the day in question. The record evidence refutes any value of having Leo testify about seeing a gold car after Spann arrived at their aunt's home or the need to put on evidence showing the inside of Brown's home. Udell did a thorough investigation of the alibi defense and determined the best way to proceed was to use Spann's confession and cross-examination. Such decisions meet

the professional norms and cannot be labeled deficient. Furthermore, given the strength of the State's case, showing that an elderly aunt was confused about when her nephew was at her home, or using a brother, who at best could not identify with certainty when he saw Spann on the day in question, no prejudice has been shown. There is no reasonable probability a different result would have been obtained.

At the evidentiary hearing, Udell explained that he met with Leo at Brown's Adams Street home to take photographs, check the electrical situation to determine if Spann lived in the back shed, and to discuss the case. They also spoke a few times on the phone and during the car ride to Leo's deposition, which is Udell's general practice to prepare witnesses for what the prosecutor will ask. (PCR.2 113-14, 116-18, 122-25, 158). Udell testified he would have discussed with Leo any information he could provide about Spann's whereabouts on November 14th. The inspection of the Adams Street property confirmed someone could have been living in the shed, and that they could walk through the back yard without being seen. This was part of the defense Udell presented at trial. (PCR.2 124-31).

Udell recalled that Perron's husband testified he last saw his wife alive near 12:45 p.m. on November 14th. The alibi

defense was based on Spann's police statement[2] (PCR.2 152-54). Spann's statement was that Philmore arrived at Brown's home at 1:00 p.m. driving a gold Lexus.[3] Leo's deposition confirmed for Udell that it was not going to help the defense. Leo stated in his deposition that **on November 14th**,[4] he awakened between 11:00 a.m. and noon. He saw Spann entering the back yard between 2:00 and 3:00 p.m.; this was the first and last time Leo saw Spann that day. (Defense exhibit 7 at 11-12, 15-16). While Spann would go to the back shed, he was not living there. (Defense exhibit 7 at 13). Leo did not see Philmore at all on November 14th; he did not see the Subaru or a Lexus. (Defense exhibit 7 at 19-20). Also confirmed in the deposition was that, in Leo's presence, Brown told the police Spann did not live on her property. Leo did not correct her at the time, and did not tell the police of his seeing Spann. Leo tried to excuse this, by

[2] Udell recalled there was a good possibility the statement could have been suppressed, however, Udell chose not to seek suppression, because the statement was the alibi defense which could be presented even though Spann had decided not to testify. Udell would have something to point to the jury in closing to support the alibi defense.

[3] In response to the State's question on cross-examination, Udell testified it would be of no assistance to the defense if Leo were willing to testify Philmore had the Lexus at 11:30 a.m. (PCR.2 152-54). The State asked this question because the defense witness list for the 2005 evidentiary hearing identified Leo's anticipated testimony to be that he saw Spann at 11:30 a.m. when Philmore arrived driving a gold Lexus.

[4] Initially, Leo was confused about the date in question. When discussing November 13th, he was referring to November 14th. (Defense exhibit 7 at 15-16).

claiming Brown, Spann's aunt, did not know Spann as Anthony Spann only as Tony, and Leo may not have heard the question. (Defense exhibit 7 at 24-26). With regard to the time Leo heard/saw Spann enter the Adams Street property on November 14th, he was "exactly sure" of the time, but then stated it could be an hour earlier or later (Defense exhibit 7 at 27).

Given Leo's deposition, Udell felt his testimony would not be helpful. This was especially true with respect to the testimony that Leo did not know where Spann was until 2:00 or 3:00 p.m. Udell realized the State's time-line was very tight, and he tried to use it to Spann's advantage, yet, when he drove the route, it seemed to match the State's case. (PCR.2 156-57).

Leo testified at the evidentiary hearing that **he did not disclose to Udell** Brown's memory problems, although he had moved into her home for that reason. (PCR.3 275; PCR.4 385). Initially, Leo said Udell did not know what he would say at the deposition, but then admitted they discussed the alibi and in response to Udell's questioning, Leo disclosed he first saw Spann between 2:00 and 3:00 p.m. on November 14th. Leo later claimed the time was earlier, "between 1:00 and 2:00." As an explanation for the 2:00 to 3:00 p.m. time given in the deposition, Leo asserted he did not understand the question (PCR.3 279-81, 302). Yet, Leo confirmed that on several occasions in his deposition, he reiterated it was between 2:00

and 3:00 p.m. that he first saw Spann. It was not until the end of Udell's cross-examination, and at Udell's prompting, that Leo finally said the time-frame could possibly be 1:00 to 2:00 p.m. (PCR.3 298-301).

Not until the evidentiary hearing did Leo assert people were able to enter Brown's yard without being seen, but only heard due to the gate squeaking. It was that noise, Leo claimed allowed him to note Spann's entry onto the property, while Brown did not hear Spann. (PCR.3 282-83). Also, Leo noticed lights on in the shed near 9:00 or 10:00 a.m.[5] on November 14th, and he saw Spann between 1:00 and 2:00 p.m. Fifteen minutes later, Leo heard the gate squeak again and noticed a car, a gold Lexus or Acura parked out front (PCR.3 285-91, 303). At no time on November 14th did Leo see Philmore. Leo agreed he denied in his deposition seeing Philmore at 3:00 or 4:00 p.m. pick up Spann in a Lexus. By way of explanation for the change in testimony, Leo asserted the tortured explanation that he had seen the Lexus at 2:00 p.m., but because the prosecutor asked him if the car were parked in front, and it was parked away from the house, Leo denied seeing it. (PCR.3 299-303).

[5] It matters not that Leo saw lights on in the shed that morning, for as Spann admitted, and as Kiki, Toya, and Philmore confirmed, they had spent the night together in a hotel and did not part company until 12:00 to 12:30 p.m. Moreover, Spann claimed in his police statement that he did not get to Adams Street until 12:00 to 12:30 p.m. Lights on in the morning does not further Spann's alibi defense.

Udell also had a phone conversation and conference with Brown before her deposition. Although unsure if the family noted any memory problems with Brown, Udell was able to converse with her and receive appropriate response, but he was aware she was elderly and could forget things. Udell did not do any follow-up medical investigation into Brown's competency. (PCR.2 113-16). Prior to Brown's deposition, she stated she had seen Spann in her back yard, but during the deposition, Brown changed her account to not having seen him, but he may have been there. In Udell's estimation, he would not be able to counter Brown's under oath account, therefore, he successfully minimized her account to become that Spann may have been at Brown's anyway. (PCR.2 134-35, 159-60). Udell did not feel there was any need to do follow-up medical investigation of Brown, because he believed the jury would merely draw the conclusion Brown did not have a recollection. Her testimony did not close out Spann's alibi defense. Udell feared challenging Brown's competency on the possibility she would become more confused, thus allowing the jury to conclude they could not rely on Brown for anything. (PCR.2 136-38, 159-65, 217).

Dr. Scanameo testified he first evaluated Brown on August 8, 2000 and again on September 20, 2000.[6] The doctor estimated

[6] Spann was convicted in May, 2000, and sentenced June 23, 2000.

Brown had been suffering from dementia for approximately six years. He admitted some patients stabilize for a time, but without having seen Brown, he could not comment, yet, was confident Brown had moderate to advanced dementia in April, 2000. (PCR.2 221-26).

In her evidentiary hearing testimony, Brown stated that in November, 1997, she was living on Adams Street and Spann would visit her and stay in the back shed. It was Brown's estimation that her memory was better in 2000. (PCR.2 233-37).

Based upon the foregoing, it is clear Udell investigated the alibi defense, and made strategic decisions based upon that investigation. It must be remembered counsel's performance is viewed from the perspective of what was known at the time the decision was made; hindsight is not permitted. See Strickland, 466 U.S. at 689 (reasoning high level of deference must be paid to counsel's performance; distortion of hindsight must be limited as the standard is to evaluate performance based on the facts known at time of trial); Cherry, 659 So. 2d at 1073 (finding standard is not how current counsel would have proceeded in hindsight). Udell spoke with Brown and Leo about Spann's whereabouts on November 14th. He also took photographs of the home where Spann claimed he had been since noon on the day of the murder. Leo's clear deposition testimony was that he did not see his brother until 2:00 to 3:00 p.m. This time-frame

did not further the alibi defense as it was not complete. Clearly, Spann did not have an alibi, based on Leo's deposition testimony, for the 1:00 to 2:00 p.m. time-frame when Perron was abducted and taken to Indiantown, and only a weak, incomplete alibi for the 2:00 to 3:00 p.m. time. This was further undercut by the testimony of Kiki and Toya as well a Philmore because they agreed all were together in West Palm Beach at 2:30 p.m. Further, at no time did Leo see Philmore that day. Again, this would not further the defense. See Reed v. State, 875 So.2d 415, 429-30 (Fla. 2004) (noting it is not ineffective assistance to decline to present witness who would not confirm alibi); Wike v. State, 813 So.2d 12, 18-19 (Fla. 2002) (same); Rivera v. State, 717 So.2d 477, 484 (Fla. 1998) (rejecting claim of ineffective assistance as witness could not support alibi). As such, Udell did not see a purpose of presenting such equivocal testimony from the defendant's brother. Cf. Breedlove v. State, 692 So.2d 874, 877-78 (Fla. 1997) (holding counsel was not ineffective for failing to present testimony of friends and family members that would have been subject to cross-examination, and therefore, would have countered any value defendant might have gained from favorable evidence). This is a reasonable, professional decision made after investigation.

Also, it was reasonable for Udell to forego calling Leo to contradict his deposition testimony. It was logical for Udell

to conclude that calling Leo would weaken the defense case based on the jury's anticipated perception of Leo as one brother protecting another by changing his clear deposition testimony noting a 2:00 to 3:00 p.m. time frame to one that would fit the defense case. Indeed, there was testimony from Yolanda Spann that Leo had protected Spann while they were growing up. (PCR.4 377). Hence, not putting on testimony that was an incomplete alibi, coupled with the fact Leo's motivation for changing his deposition testimony could further undermine his credibility, Udell was not deficient. Regardless of the decision not to present Leo, Udell had Spann's police statement as alibi evidence and the police report that a witness has seen two black males in a Lexus followed by a Subaru with two black females. As a result, under a Strickland analysis, there is no prejudice arising from the decision to not call Leo.

Likewise, not presenting photographs of the home to support the alibi defense was again a reasonable decision. First, Leo was not able to corroborate that Spann was at the home during the critical time, and Brown, likewise, was equivocal about having seen Spann. To decline to present photographs which would not add to the alibi is not unreasonable or deficient.

Not investigating the medical history of Brown was not ineffective as Udell neutralized her testimony. While she had informed the police, and later gave a deposition, that Spann was

not living in her back shed at the time, Udell countered this testimony by having her admit she did not know whether or not Spann had been to Adams Street on November 14th, and that he could have been there without her knowledge. The alibi defense was intact through Spann's own statement. Moreover, Udell successfully utilized hearsay testimony that Detective Carl interviewed witness, Majerczak, because she had reported seeing a gold Lexus with two black males in the vicinity and near the time of the abduction followed by a blue/gray Subaru with two black females (ROA.28 2875-80). This was evidence the defense could rely upon to support Spann's alibi that he was at his aunt's home and a female, Sophia, had taken his Subaru. Cf. Jennings v. State, 583 So.2d 316, 321 (Fla. 1991) (finding "It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position.").

Nonetheless, given the strength of Philmore's testimony, the time-frame offered by Kiki and Toya,[7] as well as Spann's own

[7] Kiki testified Spann drove a blue manual transmission Subaru and Philmore did not know how to drive that type of vehicle. (ROA.22 2198-99). On the night before the murder, November 13, 1997, Spann and Philmore were in possession of guns (ROA.22 2199-2200). Between 12:00 and 12:30 p.m. on November 14, 1997, the day of the crimes, Philmore and Spann left Kiki at her home.

statement, there is no reasonable probability an acquittal would have been obtained had Leo testified. Philmore placed Spann at each step of this criminal episode, from planning to execution. Moreover, Kiki and Toya agreed that Spann and Philmore left them by 12:30 p.m. and returned for them by 2:28 p.m. During this time, near 1:00 p.m., Ms. Solis saw two black males at the abduction scene, near 2:00 p.m. Leo Gomez was almost struck by two black males driving away from the bank, and Lysle Linsley saw Spann's Subaru followed by a Lexus. Leo confirmed he told the State that he did not see Spann until 2:00 to 3:00 p.m. on November 14th, and that he did not see Philmore at all that day. Spann's statement claimed he did not see Philmore until 12:00 - 1:00 p.m. on November 14th, which was refuted by Kiki and Toya, when Philmore arrived at the Adams Street residence driving a white Lexus. Ms. Solis and the known facts refute this. Perron was not abducted until 1:00 p.m., therefore, Philmore would not have had time to carjack Perron, dispose of her body in Martin

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(ROA.22 2203; ROA.24 2381). At 2:28 p.m. on November 14th, Kiki returned Philmore's page and learned he was at Toya's home and would be at her home is a few minutes. Philmore and Kiki, with Spann driving a gold Lexus, arrived at Kiki's home near 2:35 p.m. When she asked about the car, Spann told her not to worry, "we got it" and admitted the car was stolen (ROA.24 2382-85). The group proceeded to a Burger King for food and for Kiki to get her check. Afterward, they stopped for gasoline before proceeding to "Sophia's" home. When they approached Sophia's home, they saw a van with police parked in front, so they sped away and a high speed chase ensued north on Interstate 95. The chase ended when the Lexus blew a tire and Spann told the group to run. Eventually, all were arrested. (ROA.24 2385-93).

County, and be at Adams Street by 1:00 p.m. The testimony from Leo does not undermine this overwhelming evidence of Spann's guilt nor does Brown's dementia establish prejudice under these circumstances.

Like the decision regarding the alibi defense, Udell's choice not to object to the State's alleged bolstering of Brown's testimony in guilt phase closing was not ineffective assistance. The court's ruling on the matter is supported by the following evidence and analysis.

It is Spann's position that the failure to object is deficient performance, and that he was prejudiced as improper argument was placed before the jury. Because Udell had a reasonable strategic basis for not presenting Leo Spann to support the alibi as noted above, and any negative aspects of Brown's testimony had been neutralized by counsel, it was neither deficient nor prejudicial representation for Udell not to have objected to the prosecutor's argument. Moreover, when the prosecutor's comments are read in context, they do not improperly bolster a State witness. Instead, the argument suggested common sense should be used. Given the evidence adduced at trial, no prejudice can be shown. Relief was denied properly, and this Court should affirm.

In his closing argument, the prosecutor reminded the jury that Brown could not substantiate where Spann was on the day of

the murder, and she could not say he was living with her or in the shed. The prosecutor then argued:

> I had a Grandma Bakkedahl. She sat on her front porch in Rochester, Minnesota for the last 20 years of her life. And I'm telling you what, there ain't a single thing that went on in that neighborhood that she didn't know about And they want you to believe that he's coming and going through this gate into the back of this lady's house and she never knew it. Maybe in a world where there's no common sense that works.

(ROA.29 3022). Udell did not find the comment objectionable. (PCR.2 145). Moreover, Udell agreed that the prosecutor could make arguments, but it did not change Brown's testimony. While she initially claimed Spann was not living there, she admitted she did not know whether or not Spann was living in the shed. (PCR.2 160-65; ROA.28 2889-90, 2894-95, 2900). The prosecutor's comments did not require an objection, and even if one could have been asserted, the failure to do so was not prejudicial under Strickland.

"Wide latitude is permitted in arguing to a jury. [c.o.] Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). In arguing to a jury "prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws." Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961). "Any error in prosecutorial

comments is harmless, however, if there is no reasonable possibility that those comments affected the verdict." King v. State, 623 So.2d 486, 488 (Fla. 1993); Watts v. State, 593 So. 2d 198 (Fla. 1992). Reversal is not required for comments which do not vitiate the entire trial or "inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985). The harmless error analysis applies to prosecutorial misconduct claims. State v. Murray, 443 So.2d 955, 956 (Fla. 1984).

> ... prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." [c.o.] The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in *Chapman v. California*, 386 U.S. 18 ... and its progeny.... Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

Murray, 443 So.2d at 956. In determining whether an error is harmless, the court must determine beyond a reasonable doubt that the comment did not contribute to the guilty verdict. Id. "In order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or

be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Spencer v. State, 645 So.2d 377, 383 (Fla. 1994).

Spann's defense at trial was that he was at his aunt's home in West Palm Beach at the time of Perron's abduction, murder, and related crimes (ROA. 2172-78; ROA.27 2818-32, 2841; ROA.28 2883-2900; ROA.29 2989, 2992-94). In his taped police statement, Spann claimed, near noon, he left Philmore at another's home and went to Brown's house on Adams Street. An hour later, Philmore arrived at Adams Street driving a Lexus. (ROA.27 2818-20, 30). Spann denied going to Indiantown or having anything to do with the crimes against Perron (ROA.27 2821-22, 2841). According to Spann, he had driven his Subaru to his aunt's home, but later Sophia had taken it which could account for it being found in Indiantown. (ROA.27 2825-27, 2829-30). Spann asserted that no one would have known he was at his aunt's home; he did not talk to anyone. (ROA.27 2830, 2832).

In Brown's videotaped deposition, played for the jury, she identified Spann as her nephew, and that in November, 1997, she lived on Adams Street in a property with a small apartment/shed in the backyard. (ROA.28 2886, 2893-94). Initially she stated Spann did not live in her home or shed and that she had never seen him entering/exiting the yard, but later admitted Spann had mail delivered to her home and that she did not know **whether or**

not Spann lived there. (ROA.28 2889-90, 2894-95, 2898-2900).

In closing argument, Udell made Spann's whereabouts an issue. He contended Spann told the police, the prosecution, and the jury he was at Brown's home at the time the crimes were committed (ROA.29 2989, 2992-94). The prosecutor, in his response, asked the jurors to use their common sense when it came to analyzing Spann's defense that he lived in the apartment behind Brown's home. The comments that Brown could not establish Spann's presence at her home are supported by the record and are reasonable comments based on her statement. While Brown testified that it was possible someone could walk toward the shed without her knowledge, she also stated she sat on her front porch and never saw Spann enter the back area. (ROA.28 2897-99).

As the trial court found, the prosecutor's comments did not amount to improper bolstering. "[I]mproper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." Hutchinson v. State, 2004 WL 1469327 at 6 (Fla. Jul. 1, 2004). See Gorby v. State, 630 So.2d 544, 547 (Fla. 1993) (opining "[i]t is improper to bolster a witness' testimony by vouching for his or her credibility."). Any reference to what other elderly matriarchs do, in this case "Grandma Bakkedahl", was merely a method of asking the jury to

consider whether it was plausible for Spann to get into the back area of Brown's property without her knowledge, considering Brown would spend her days sitting on the front porch. The prosecutor was not bolstering his witness. He was not placing the prestige of the government behind her nor was he intimating that the State had some information, unrevealed to the jury, which legitimized its case.

The prosecutor was merely making a fair comment upon the evidence, questioning the credibility of Spann's alibi, requesting the jury to use common sense, and replying to the defense argument. Rimmer v. State, 825 So.2d 304, 325 (Fla. 2002) (finding no prosecutorial misconduct and rejecting claim that referencing military service was improperly personalizing prosecution); Hamilton v. State, 703 So.2d 1038, 1043-44 (Fla. 1997) (finding prosecutorial comment during closing argument fair comment when based on evidence presented at trial); Barwick v. State, 660 So.2d 685, 694 (Fla. 1995) (finding argument proper where it is fair reply and directs jury to consider evidence); Breedlove, 413 So.2d at 8 (noting "[w]ide latitude is permitted in arguing to a jury.... counsel is allowed to advance all legitimate arguments."). In arguing to a jury "[p]ublic prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws" and

"[l]ogical inferences from the evidence are permissible" Spencer v. State, 133 So.2d 729, 731 (Fla. 1961). Udell's failure to object did not amount to deficient performance under Strickland because the State's argument here was proper.

Even if the comment should have drawn an objection, no prejudice has been shown. The result of the trial would not have been different absent counsel's alleged omission. The evidence was overwhelming that Spann was a major participant/principal in the planning and completion of the crimes against the victim and her eventual murder. In addition to other witnesses' reporting that two men were involved in Perron's abduction and bank robbery, Philmore outlined the complete series of events. As Philmore testified, and as found by this Court, Spann planned and directed the carjacking, kidnapping, robbery, and murder of Perron. (ROA.22 2227, 2229-31; ROA23 2282-83; 2240-48, 2289, 2292-93, 2347-52; ROA24 2382-93, 2395-2402, 2414-19; ROA.26 2667-81, 2683-87, 2735-37, 2748-58, 2760-61, 2785-86, 2687-90, 2761-66, 2691-93, 2766-69); Spann, 857 So.2d 849-51. The single reference to the prosecutor's grandmother and her awareness of what transpired in her neighborhood was not a statement which would cause Spann to be denied a fair trial. Rimmer, 825 So.2d at 325; Bertolotti, 476 So.2d at 134 (noting reversal not required for comments which do not vitiate whole trial or "inflame the minds and

passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant."). With or without an objection, there is no reasonable likelihood of a different result. The prejudice prong of Strickland has not been met and relief was denied properly.

B – Udell made a reasonable strategic choice after consideration of the evidence not to cross-examine Philmore on his multiple confessions as a way of challenging Philmore credibility where Philmore became more detailed in his confessions and progressed from blaming Spann for everything to admitting he was involved in every aspect of the crimes including being the actual shooter as such is evidence in and of itself of Philmore veracity and undercut Spann's claim of innocence – Spann asserts Udell rendered ineffective assistance for failing to utilize Philmore's multiple police confessions to challenge his credibility. The trial court rejected this claim (Ground 5 below) ruling:

> Spann claims that counsel was ineffective for failing to adequately cross-examine co-defendant, Lennard, on eleven evolving and conflicting statements. Spann contends that the outcome of the guilt phase was prejudiced because Lennard's testimony was the only evidence that linked Spann to Perron's murder and counsel should have cross-examined Lennard on the discrepancies to challenge Lennard's credibility.
>
> It is uncontested that Philmore's multiple statements began with no knowledge of the crime, and evolved into Philmore being involved but Spann was the

> shooter, then into the final version where Philmore was the shooter and Spann the mastermind. At the evidentiary hearing Udell explained why he did not cross-examine Philmore on the inconsistencies. Udell stated that he made a strategic decision not to present Lennard's earlier inconsistent statements because the statements would only make Lennard appear more credible as Lennard implicated himself more fully with each statement. Udell testified that as Lennard admitted more of his own culpability and admitted being the shooter, Spann's culpability was actually reduced even though the final version had Spann as a major participant and orchestrator of the crimes. So Udell considered his options in attacking Lennard's testimony and decided that it did not make sense to challenge Lennard's admission that he was the triggerman. Instead, Udell portrayed Philmore as an untruthful witness who was attempting to implicate Spann to gain mitigation for Philmore's sentence. (EHT.I 77-83, 106-114).
>
> At the evidentiary hearing, Udell was examined on the inconsistencies in Lennard's statements. It was evident that Udell was knowledgeable concerning the various inconsistencies and that Udell had thoroughly considered alternatives in challenging Lennard's credibility before rejecting the alternative of challenging the prior inconsistent statements. The Court finds Udell's evidentiary hearing testimony credible and Udell's strategic decision reasonable under the norms of professional conduct. Therefore, Spann fails to satisfy the first prong of the *Strickland* standard. *Occhione v. State*, 768 So.2d 1037, 1048 (Fla. 2000); *State v. Bolander*, 503 So.2d 1247, 1250 (Fla. 1987).

(PCR.14 1995-96)

These conclusions are supported by the record and should be affirmed as Udell considered his options and made a reasoned decision based upon his investigation. As revealed at the evidentiary hearing, Udell had considered Philmore's various confessions, and made the strategic decision not to present the

earlier statements, as they would only make Philmore look all the more credible as he eventually implicated himself fully. Such is a sound strategic basis for examination of Philmore. Neither deficiency nor prejudice have been established, thus, Spann has failed to carry his burden under Strickland.

It is well settled "[c]ounsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000). See State v. Bolender, 503 So.2d 1247, 1250 (Fla. 1987) (holding "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected").

On direct examination during the evidentiary hearing, Udell noted that Philmore's motivation for testifying against Spann was that after Spann had called him a "big dummy", Philmore was not happy and he was not "going down alone on this" and he expected to get a benefit (PCR.2 139-41). Udell relied on the record to determine if he had filed any motions challenging Philmore's statements, although he had all of those statements. (PCR.2 140). Acknowledging that there were many inconsistencies

in Philmore's police statements which began with no knowledge of the crime, to Philmore being involved, but Spann being the shooter, to the final version where Philmore was the shooter, but Spann the mastermind (PCR.2 140-43), Udell explained why he did not cross-examine Philmore on the inconsistencies:

> I think the answer to your question is why not? The answer is very simple. Mr. Philmore clearly lied in those statements, kept changing, there's no doubt about that. We could have proven that, but the problem was he kept - as each statement came out, he kept implicating himself more and more and it became more and more, well, if he's lying, why is he implicating himself.
>
> It was better strategically to argue look at the first statement, look at the trial testimony which is inconsistent, you can't believe the trial testimony than to bring out 42 different versions. But he's getting - he seems to be telling more and more the truth because he's implicating himself. That was the theory.
>
> ...
>
> That was the theory on not bringing out the evolution of the five different statements. It was strategically better to say look at the first statement, he doesn't know anything, and now he's telling he's seeing everything.

(PCR.2 144-45). Udell's well reasoned, professional strategy and effective examination of Philmore is even more evident from the following colloquy with the prosecutor:

> Q. I want to move on to claim five, that which is your cross examination of Mr. Philmore. As you testified, you were fully aware that Mr. Philmore had made a series of statements to the police in this case?

A. Correct.

Q. And you obviously had them in discovery, correct?

A. Every one of them.

Q. And it would be fair to infer that because Mr. Philmore was the key witness in the case you would have gone over those statements with a fine tooth comb and considered what to do with them?

A. We did.

Q. And after doing so, you made a strategic decision, which you've testified to somewhat already, that it would be better to go from point A to point F or G, wherever it was directly, rather than bring out before the jury that Mr. Philmore had originally lied to the police, then he said something else, and as it evolved, he finally got to the version that now he's telling the jury about, correct?

A. **That's what I was trying to say before. We did it that way because to point out all the statements would have said, "Yeah, he's inconsistent. But if he's lying, he's got a funny way of lying because he's implicating himself." Now to argue he's lying but, yeah, I was involved didn't make lot of sense. People lying don't usually implicate themselves**.

Q. Not only implicating himself, but let me do this. Let me go through - put out their proffer to you if you will as a witness, the evolution of Mr. Philmore's statements to the police and see if it's consistent with your memory.

That he first talked to an investigator Gary Bach, who investigated the bank robbery in Indiantown, and he had actually confessed to that bank robbery when he was asked about abducting a woman and killing her and he said, "I had nothing to do with it."

A. Correct.

Q. That was on November 15th of 1997. Then

three days later he again spoke with the police after consulting with his lawyer. Tony (sic) [Philmore] admitted to the bank robbery but denied having involvement or disappearance of Ms. Perron. He was basically saying the same thing before, but significantly agreed to a polygraph exam?

A. That's correct.

Q. Then on November 20, 1997 there was an attempt at a polygraph where the polygraph was not actually conducted. They were doing some type of prepolygraph examination, precursor to the exam, and in that prepolygraph he then changed his story and acknowledged that he was present when Ms. Perron was abducted. Do you recall that?

A. That's correct.

Q. He said at that time that Mr. Spann abducted her and prior to the bank robbery had left with her. He claimed he was not present when she was killed, and when Mr. Spann returned to him Mr. Spann was alone?

A. Correct.

Q. Does that sound correct?

A. That's exactly right.

Q. Then on November 22nd, pursuant to that statement, he agreed to cooperate with the police and he showed the police where the victim's body was.

A. That's correct.

Q. And subsequent to that, that same day, he gave another statement to the police where he - an official statement where he told the story that he was present at the murder but Mr. Spann was the killer, and he again agreed to go undergo a polygraph test to corroborate the veracity of that statement.

A. That's correct.

Q. Then on November 23, 1997, the police actually administered the polygraph. And after the

polygraph was finished, Mr. Philmore asked Detective Fritchie how did the polygraph look, whether he was telling the truth. And Mr. Fritchie responded something along the lines, "You know you are not being honest." And then Mr. Philmore, for the first time, acknowledged that he was, in fact, the murderer of Ms. Perron, that he in fact shot Ms. Perron.

A. That's correct.

Q. Then on November 26th he gave a final statement to the police which he confessed to being the shooter and detailed his involvement and Mr. Spann's involvement. All throughout he was saying Mr. Spann was calling the shots but, yes, I'm the one who actually shot her. He then testified at the grand jury on December 16, 1997. Does that fairly depict the evolution of his statements?

A. That's exactly the evolution of his statements.

Q. **So you could have given that version to the jury which spells out not only that he was implicating himself, but as the stories evolved he gets caught lying and he admits more and more to his own culpability and Mr. Spann's culpability as actually going down somewhat, because in his prior stories Mr. Spann is actually the shooter**?

A. **Correct**.

Q. **So your other way of presenting it, which is the way you did, would be that first, he lied to the police and said he had nothing to do with it, he was innocent. Then he confessed and then admitted "I shot her, but Mr. Spann had a lot to do with it.**"

A. **Right**.

Q. And you apparently made a determination that would be better as far as jury appeal to go with that version of events rather than spell it out, is that correct?

A. **It didn't make sense to argue that the man's testimony was a lie when he was not only saying**

he was present, not only saying "I'm an active participant in the robbery, but I in fact pulled the trigger," it was hard to say that that was the man who was lying?

Q. Right. To turn it on its head, had Mr. Philmore's statement evolved and each time he was lessening his own culpability and making Mr. Spann more responsible, would it behoove you to portray that before the jury and say, "Look, this is just a series of lies; this guy did it and he's just trying to pawn it off on my client," correct?

A. Had that been the way it would have panned out, that's the theory we would have had.

Q. When, in fact, you didn't just skip cross examination of Mr. Philmore, you did cross examine Mr. Philmore?

A. My memory is pretty extensive, quite honestly.

Q. And in his testimony he had already admitted he lied to the police and the statement brought out he's - below that on page 2695 and on page 2690 - he was convicted and the jury had recommended the death sentence for him. When you cross examined him, do you recall you did bring out first of all he's a convicted felon, correct?

A. **Yes**.

Q. And he had, in fact, lied to the police. You did, in fact, bring out that he was addicted to cocaine, do you recall that?

A. Yes.

Q. And this may get a little confusing - that before this crime, there was a crime that preceded it the day before, a few days before another robbery, correct?

A. A pawn shop or something like that.

Q. And you had pointed out that with regard -- and there was already evidence of that in the trial

related to the gun, I believe.

A. Right.

Q. Where the gun came from, that prior robbery.

A. Right.

Q. **You had pointed out that Mr. Philmore meant in that robbery he had instructed Sophia, who's the mystery woman if you will, that you were trying to say Mr. Spann or Mr. Philmore and Sophia Hutchins, I think her name was, that they did this crime you pointed out that that preceding robbery he had instructed her what to do which corroborated Mr. Spann's story. Do you recall that**?

A. **Yes, I do.**

Q. **He had testified on direct, do you recall, that he was afraid of Mr. Spann**. Do you recall that?

A. Yes.

Q. And you thoroughly cross examined him on that. **In fact, it was a physical difference in sizes between the two individuals**. Do you recall that?

A. **He was an easy target on that issue because he clearly was going to be inconsistent with physical observation. So, yeah, he opened that door, made it easy**.

THE COURT: I'm sorry. He was an easy target?

THE WITNESS: He was an easy target to cross examine because he wasn't that believable, did not appear to be believable.

Q. (By Mr. Mirman) Mr. Philmore's nickname was Tree, if I remember correctly, because he was a very large, big individual?

A. Correct.

Q. You're saying he was afraid of Mr. Spann, he was noticeably skinnier and somewhat smaller than he is?

A. I didn't think anybody was going to believe that.

Q. **You also questioned him about his whereabouts and some cross examination regarding the timeline with regard to his testimony**.

A. **We tried to fit it into the defendant's timeline**.

Q. **And you also brought out not only was there a death recommendation for him, but it was a 12 to nothing death recommendation. The point being, obviously, whether he said it was some prior testimony, he would testify if it benefits himself, it didn't take a rocket scientist to figure out what his motive would be in this case. He's already had a jury recommend 12 to nothing for death, and he's there to possibly overcome the Judge with mitigation and now he's cooperating with the State, right**?

A. **Correct**.

(PCR.2 168-176).

From the foregoing, it is clear Udell had considered his options with respect to Philmore's testimony and multiple police statements. It was his reasoned judgment that showing the prior inconsistent statements would serve to make Philmore's final account only that much more believable. That final statement made Spann a major participant and orchestrator of the crimes against Perron. By not highlighting Philmore's gradual confession from Spann doing everything, to Philmore being the shooter and Spann the major participant, Udell was able to portray Philmore as an untruthful witness, who was attempting to implicate someone else to gain mitigation for his sentencing.

Clearly, presenting Philmore's evolving confession would not help exonerate Spann. See Occhicone, 768 So.2d at 1048 (noting "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct"). Cf. Marquard v. State, 850 So.2d 417, 427 (Fla. 2002) (finding reasonable counsel's strategy of not calling certain witnesses who would have implicated the defendant instead of exonerating him). Under this standard, Udell rendered effective assistance of counsel.

Furthermore, although the court did not make a specific finding on prejudice, having found no deficiency, no prejudice has been shown. Philmore's powerful testimony was admitted into evidence. As Udell noted, showing the evolution of that testimony would have made it only that much more powerful. Philmore's testimony explained fully the actions, intentions, and motivations of both defendants from the robbery of the pawn shop the day before the eventual murder of Perron and the later bank robbery. See Spann, 857 So.2d at 854-55. Moreover, the other witnesses placed two black males at the scene of the abduction and bank robbery with Spann's Subaru. Perron's gold Lexus was connected to the Subaru at the abduction scene with Perron as a passenger, and was seen being driven erratically near the bank which had been robbed in Indiantown. Philmore's

bloody shirt and cash/deposit ticket from the bank robbery were found near the secreted Subaru. Spann and Philmore were spotted driving the Lexus, which contained Perron's blood, and were captured, in an orange grove adjacent to where they abandoned the Lexus after a high speed chase. Guns connected to the pawn shop robbery and murder were recovered from where Spann and Philmore were hiding in the grove. This evidence establishes that no prejudice arose from Udell's failure to bring out the fact that Philmore initially denied involvement in Perron's carjacking and murder, later blamed Spann for all of the crimes, but eventually confessed his involvement, including that he was the shooter and Spann was the planner/participant. Relief was denied correctly and should be affirmed by this Court.

C – Spann's counsel, Robert Udell and Rory Little thoroughly investigated possible mitigation and complied with the dictates of Wiggins. Further, they properly advised their client of his options and saw no mental health basis to question that decision. The trial court properly rejected this claim. – Because this claim is intertwined with Issue II on postconviction appeal, the State will address the matters together below.

ISSUE I(C) AND ISSUE II

COUNSEL RENDERED EFFECTIVE ASSISTANCE THROUGH HIS INVESTIGATION OF MITIGATING FACTORS TO PROPERLY PREPARE THE MENTAL HEALTH EXPERT AND TO ADVISE SPANN ON HIS DECISION TO WAIVE MITIGATION (restated)

Spann asserts counsel failed to adequately investigate the possible mitigation available, fully prepare the defense mental health expert, and properly advise Spann about his waiver of a mitigation case. Further, Spann claims that he was suffering from a mental disorder, thus, his waiver of mitigation was not voluntary, knowing and intelligent, and counsel was ineffective in failing to withdraw the waiver. The records from the trial and evidentiary hearing refute these allegations and support the trial court denial of postconviction relief. While the trial court focused more on the prejudice prong of Strickland, and failed to take into account fully, counsel's performance or Spann's prior waiver, it properly concluded that none of the new mitigating factors would undermine confidence in the sentence. However, the record shows that Udell and co-counsel, Rory Little ("Little"), investigated possible mitigation thoroughly and passed those records onto Dr. Petrilla, Spann's mental health expert, and that counsel advised Spann on all aspects of presenting and/or waiving mitigation. The evidenced shows that Spann refused to cooperate with Dr. Petrilla, exhibited no reason to question his mental capacity to make a decision

regarding mitigation, fully understood his options regarding mitigation, and knowing, intelligently, and voluntarily waived the mitigation presentation as this Court found on direct appeal. As this Court found on direct appeal, the dictates of Koon v. Dugger, 619 So.2d 246 (Fla. 1993) were followed. See Spann, 857 So.2d at 853-54. Spann's new expert, Dr. Mosman, failed to show that Spann had a mental defect which would impair his ability to waive mitigation. Also, Dr. Mosman did not uncover any new mitigation that was not known to the original sentencing court or would undermine confidence in the sentence in this case. Postconviction relief was denied properly and that decision should be affirmed.

The standard of review for an ineffectiveness claim following an evidentiary hearing is *de novo*, with deference given the court's factual findings supported by competent, substantial evidence. Freeman, 858 So.2d at 323. To prevail on an ineffectiveness claim, the defendant must prove (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89. In Wiggins, the Supreme Court, expounding upon Strickland, cautioned:

> In finding that [the] investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate

> every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*.... We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." ... A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances."

Wiggins, 539 U.S. at 533. From Williams v. Taylor, it is clear the focus is on **what** efforts were undertaken and **why** a strategy was chosen over another. Investigation (even non-exhaustive, preliminary) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 (“[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.”).

The trial court denied Spann's claims based on the following reasoning:

> **Ground 2 – Trial counsel was ineffective for failing to adequately investigate mitigation evidence to prepare for the penalty phase.**
>
> Spann claims that counsel was ineffective for failing to adequately investigate mitigating evidence to prepare for the penalty phase. Spann alleges that counsel conducted only a cursory investigation of Spann’s social and family history; and that counsel failed to obtain relevant medical records, school

records, employment records, training records, jail records, and prison records. Spann contends that these records contained additional mitigating evidence that was not provided to the mental health expert for pre-trial evaluation and was not provided to the trial court for consideration during the penalty phase. Further, Spann avers that the mental health expert was ineffective in dealing with Spann's non-compliance with the pre-trial psychological evaluation.

As proof of these penalty phase deficiencies, Spann relies on the evidentiary hearing testimony and report of forensic psychologist, Dr. Bill E. Mosman. ... Based on his evaluation, Dr. Mosman concluded that the mental health expert was ineffective for failing to follow American Psychological Association guidelines for dealing with a resistive patient; and that trial counsel was ineffective for failing to discover and present evidence of two statutory mitigations and none additional non-statutory mitigators.

Findings of Fact – Trial counsel and psychologist

The Court makes the following finds (sic) of fact with respect to trial counsel and the defense psychologist.

At trial, Robert Udell, Esq., was the lead defense counsel. He tried the case with Rory Little, Esq. Udell made the decisions regarding the guilt phase. In addition, Udell retained the mental health expert for the penalty phase and consulted and advised Little on the decisions regarding the penalty phase.

At the time of trial, Udell had been practicing law and doing capital defense work in Florida for over twenty years. Udell has tried approximately 20 capital cases and over 100 homicides, and is recognized as one of the most experienced capital defense attorneys on the Treasure Coast.

At the time of trial, Little had been doing defense work for ten years. He had served as co-counsel on one prior death penalty case and one prior murder case. In addition to this practical experience, Little's capital training consisted of

attending one Life Over Death seminar. During the representation, Little did not have any individual contact with Spann, all contact included Udell. Little had no contact with the mental health expert.

In preparation for trial, Udell retained psychologist, Dr. Fred J. Petrilla to assist counsel in determining potential mitigating evidence. Udell had worked with Dr. Petrilla on prior cases. At the time of trial, Dr. Petrilla had been practicing as a psychologist for 25 years. Dr. Petrilla has worked on over 20 death penalty cases and has completed over 2000 competency exams.

Dr. Petrilla met with Spann on two occasions. Dr. Petrilla began the initial psychological evaluation of Spann in February 2000. Initially Spann was cooperative but when Dr. Petrilla returned a second time in March 2000, Spann insisted that he did not want to complete the evaluation. Dr. Petrilla conferred with Udell and the evaluation was terminated. Dr. Petrilla had no further contact with Spann; however, Dr. Petrilla continued to consult with Udell. None of Dr. Petrilla's records on Spann were available for the postconviction proceedings because all of Dr. Petrilla's old patient files were destroyed in the 2004 hurricanes.

Findings of Fact – Mitigating evidence considered by the trial court

The Court makes the following findings of fact with respect to mitigating evidence considered by the trial court. The Court has considered, and finds credible, Udell's evidentiary hearing testimony concerning records reviewed pre-sentencing and on-record representations made to the trial court concerning the investigation into mitigating evidence.

Trial counsel conducted an investigation of potential mitigating evidence in Spann's case including interviews with Spann's mother, and a review of some of Spann's medical records, school records, and criminal history records. There is no evidence that counsel reviewed any jail records, prison records, training records, or employment records. Trial counsel proffered to the trial court that the

following mitigating evidence would have been presented if Spann had not waived the presentation of mitigation. Spann had been a good son according to his mother, his brother, and his siblings, and a good student up to a point. Spann fell in with the wrong crowd. Spann suffered a head injury in a 1989-90 car accident although there was no evidence that such was significant. The family did not mark any significant childhood illnesses. Spann was a good husband/father with a four year old child. Spann was a relatively young man at the time of all of his relevant prior and current offenses. Spann was 23 years old at the time of Perron's murder. Spann had a minor role in the crime. Spann was not the person who fired the fatal shots. Spann is capable of living in a prison population without serious difficulty. Dr. Petrilla did not form an opinion for trial or sentencing, however counsel had no questions about Spann's competency based on over two years of cooperative interactions with Spann prior to trial.

In addition to counsel's proffer, the trial court considered the Pre-Sentence Investigation finding that Spann's father was shot to death when Spann was two to four years old.

Findings of Fact - Dr. Mosman's evaluation

The Court makes the following findings of fact with respect to Dr. Mosman's evaluation.

Both sides stipulated that Dr. Mosman is qualified as an expert in the field of forensic psychology. Dr. Mosman is also a licensed attorney in the State of Florida. Dr. Mosman conducted his evaluation based on the cross-indexing of trial counsel's and co-counsel's files, court records and transcripts, fee statements, and other agency documentation provided by collateral counsel; and by interviewing Spann and Spann's siblings - Leo Spann and Yolanda Spann.

Dr. Mosman personally interviewed Spann and administered psychological tests to Spann. Dr. Mosman testified that test results show that Spann has an IQ of 94 that is within the normal range, with no evidence of organic brain damage or psychosis. (EHT

Vol. IV, 438 & 439.) In his report, Dr. Mosman states that Spann functions at skill levels ranging from the 7th grade in arithmetic to the high school level in reading and writing. (Defense Exhibit 14, p. 16)

Dr. Mosman did not interview trial counsel, Udell or Little, or mental health expert, Dr. Petrilla. Dr. Mosman relied on counsel's files and fee statements. Dr. Mosman did not have access to Dr. Petrilla's files on Spann because the records were destroyed in the 2004 hurricanes. However, Dr. Mosman did have access to, and relied upon, Dr. Petrilla's fee statement.

Underlying much of Dr. Mosman's opinion was a determination that Spann was diagnosed with depression and had been prescribed anti-depressants by the Martin County Jail during pre-trial incarceration at least one year prior to the imposition of Spann's death sentence and transfer to prison. In support of this determination, Dr. Mosman relies on the July 17, 2000, Bio-Psycho-Social Assessment prepared by the Department of Corrections after Spann arrived at prison. (Defense Exhibit 17) The comments section on the last page of the assessment states that Spann was depressed and had been taking Elavil for almost one year. However, no testimony or evidence was offered at the evidentiary hearing to identify the source of the information in the comments section or to demonstrate the validity of the information. Further, the only evidence offered to corroborating the Martin County Jail diagnosis and treatment for depression was the Medical Information Transfer Form prepared post-sentencing by the Martin County Jail on July 12, 2000, in preparation for Spann's transfer to the Department of Corrections. The transfer form shows that Spann was diagnosed with depression disorder and adjustment disorder. However, the form does not report any date of diagnosis and treatment for depression prior to June 9, 2000, when Elavil was prescribed by the Martin County Jail. (State's Exhibit 3) Therefore, absent other evidence establishing an earlier date of diagnosis and treatment,[5] the Court finds that June 9, 2000, is the date that the Martin County Jail first diagnosed and treated Spann for depression.

In his evaluation, Dr. Mosman concluded that a reasonable penalty phase investigation would have

resulted in the discovery and presentation of eleven additional mitigating circumstances. Neither Dr. Mosman or (sic) collateral counsel assigned a relative weight to any of the additional mitigating circumstances. The Court will address findings of fact with respect to each additional mitigator in Dr. Mosman's report.

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[5] At the evidentiary hearing there was no evidence presented demonstrating that Spann was chronically depressed at anytime prior to the Martin County Jail diagnosis. Collateral counsel presented no school or medical records diagnosing depression. Further, Spann's active role in making major life decisions during the pendency of the proceedings in this case belies symptoms of chronic depression where Spann cooperated with trial counsel, where Spann refused HIV treatment and medication, where Spann initially cooperated with Dr. Petrilla and later decided to terminate the mental health evaluation, and where Spann knowingly and intelligently terminated his parental rights. And even after the Martin County Jail diagnosis, the situational depression did not substantially impair Spann. Spann was treated as an out-patient by the Department of Corrections for only for (sic) a few months when Spann made a decision to terminate the depression medication.

Statutory mitigating circumstances - Dr. Mosman's report

1. Felony committed while the defendant was under the influence of extreme mental or emotional disturbance.

... Dr. Mosman identifies the extreme emotional disturbance as caused by stress related to Spann's running and hiding from the authorities to evade arrest on another homicide committed two months earlier in Tallahassee. ...

The Court declines to recognize these facts as mitigating circumstances where Dr. Mosman testifies that the emotional distress was a direct product of Spann's flight for first-degree murder charges in

Tallahassee. There was no testimony or other evidence presented that demonstrated that the anxiety and panic generated by Spann's unlawful flight from the Tallahassee homicide made Spann less culpable for Perron's murder. To the contrary, these facts tend to show that Spann was more culpable by demonstrating further motive for the crimes associated with Perron's murder.

2. Age of the defendant at the time of the crime

Dr. Mosman opines that despite Spann's chronological age of 23 years, Spann was emotionally immature at the time of Perron's murder. ... Dr. Mosman contends that because of the circumstances associated with Spann's mother's debilitating illness, Spann's development was arrested in adolescence. The facts are discussed in Dr. Mosman's non-statutory mitigating circumstances 2, 3, and 4, *infra*. Although these facts are sufficient to support a finding of deprived childhood, these same facts are insufficient to corroborate Dr. Mosman's conclusion of arrested development. Further, the facts are insufficient to rebut the trial court's finding in its sentencing order that Spann was married and living on his own; and that Spann showed criminal sophistication in planning and carrying out the carjacking. kidnapping, bank robbery, and murder.

Non-statutory mitigating circumstances - Dr. Mosman's report

1. Emotional distress even if not extreme

... The Court relies on its finding of fact in Dr. Mosman's statutory mitigating circumstance 1, supra. ...

...

2. Family life
3. Abuse/neglect
4. History of growing up

Spann experienced a deprived childhood. The mitigating circumstance of deprived childhood is supported by facts related to Spann's mother's chronic

illness and corroborated in part by the evidentiary hearing testimony of Spann's siblings. Starting when Spann was about 9 - 11 years old, Spann's mother suffered from ... Myasthenia Gravis. For several years, Spann's mother was too ill to care for Spann and his siblings. ... If all of the school records had been obtained by counsel, the records would have shown that Spann's grades and attendance deteriorated significantly during this period of Spann's mother's illness when Spann was 12 years old and in the 6th grade.[8] The Court finds this evidence of deprived childhood mitigating and assigns the mitigator moderate weight.

...

5. Good prison record
6. Ability to be rehabilitated and a productive member of a confined society
9. Not an anti-social personality disorder

... the Court adopts the trial court's non-statutory mitigating circumstance, "d) The defendant is capable of living in a prison population without serious difficulty or doing harm." No testimony or other evidence was (sic) presented to distinguish Dr. Mosman's non-statutory mitigators 5, 6, and 9, from non-statutory mitigator "d" found by the trial court ... Therefore this Court finds Dr. Mosman's non-statutory mitigators 5, 6, and 9, merely cumulative to non-statutory mitigator "d" found by the trial court....

7. Medical difficulties

... Although the Court is not clear on which medical difficulties formed the basis of Dr. Mosman's opinion, the Court analyzes three medical conditions presented at the evidentiary hearing.

... Spann was in an automobile accident in the late 1980's. No testimony or other evidence was presented to show that Spann suffered a major head injury or

[8] The record also reflects that the trial court was informed that Spann was a good student up to a point. Spann, 857 So.2d 857-59. Clearly, defense counsel obtained school records.

that Spann experienced any on-going impairment....

... Spann was diagnosed as HIV positive ... sometime prior to November 9, 1999 .... No testimony or other evidence was presented that knew of, or was impaired by his HIV status at the time of Perron's murder. And Spann did not assert how his HIV status would otherwise mitigate to a life sentence. ... the Court construes Spann's post-offense HIV status as potentially mitigating ... on the basis that a shortened life-span could obviate the need for a death sentence. However even though the Court finds Spann's post-offense HIV status to be a non-statutory mitigator, since the mitigator lacks a nexus to the crime, the Court gives this mitigator little weight....

... Spann was diagnosed with depression disorder and adjustment disorder while incarcerated in the Martin County Jail. ...the Court has established that Spann was first diagnosed with depression on June 9, 2000, two and a half years after Perron's murder and a week after the Spencer hearing.

Therefore, as to the mitigator ... no testimony or other evidence was presented to demonstrate any medical difficulties affecting Spann at the time of Perron's murder. However, the Court does find the additional non-statutory mitigating circumstance of Spann's post-offense HIV status but awards it little weight.

8. Utilization of alcohol or drugs

Dr. Mosman contends that Spann may have been using alcohol or drugs at the time of Perron's murder ... [based on the sentencing court's inquiry] "I believe the evidence may tend to show that it may support an argument from (sic) drug use during the end, so is that anything that was going to be raised or no?" ... Although Dr. Mosman testified ... that Spann had used drugs since he was 12, neither Dr. Mosman or (sic) collateral counsel offered any testimony or other evidence corroborating a history of alcohol or drug use at the time of Perron's murder, or at any other time. Further, Florida State Prison records rebut this claim where Spann denies alcohol or

drug use. ...this Court finds the trial court's question an insufficient basis for Dr. Mosman to conclude that Spann's alcohol or drug use was a factor at the time of Perron's murder.

Conclusions of Law - Dr. Mosman's additional mitigating circumstances

Much of Dr. Mosman's evaluation and testimony is a critique of counsel's failure to obtain records that contain potential mitigating evidence. Assuming, but not deciding, that trial counsel did not obtain some records that typically are potential sources for mitigating evidence, the Court concludes that Spann has failed to show by a preponderance of the evidence the existence of actual mitigating evidence to support all but two additional mitigating circumstances in Dr. Mosman's report. Thus, with the exception of the non-statutory mitigating circumstances of deprived childhood and Spann's post-offense HIV status, Spann fails to demonstrate prejudice to the outcome of the penalty phase required to satisfy the second prong of the *Strickland* standard.

In considering the two additional non-statutory mitigating factors, the Fourth finds counsel deficient in failing to discover one of the factors. On the first factor, absent evidence that counsel investigated the circumstances of Spann's deprived childhood and made a reasonable strategic decision not to present the mitigating evidence, the Court finds counsel deficient.[9] However, as to the mitigating

[9] Although it does not alter the result of the proceeding because no prejudice was found, the State submits that counsel should not have been labeled deficient under these circumstances. The trial court failed to give proper weight to the fact that counsel did a large amount of investigation, that Spann was uncooperative in part, and had been considering for over two years waiving mitigation. This was not a situation where a penalty phase was held and witnesses called. Instead, Spann chose to withhold all mitigating evidence from the trial court. Counsel cannot be deemed deficient for not presenting every aspect of what a witness may say had they been called and testified fully. As Udell and Little testified, they investigated all areas of Spann's background including talking to family and friends, getting medical, school, and criminal

factor of Spann's post-offense HIV status, the Court finds that counsel knew about Spann's medical condition, decided that disclosing the condition was a two-edged sword, made a reasonable strategic decision not to disclose Spann's condition, thus counsel was not deficient.

Further, the Court also finds that counsel's failure to present these two additional non-statutory mitigating factors resulted in no prejudice to the outcome of Spann's penalty phase because the addition of these factors would not have resulted in the imposition of a life sentence. In making this determination, the Court considered the nature and quality of all of the aggravating and mitigating factors. In reweighing the aggravating factors against the mitigating factors including the additional mitigating factors of deprived childhood and Spann's post-offense HIV status, this Court finds that the five aggravating circumstances still far outweigh the seven non-statutory mitigating circumstances. The "moderate weight" and "little weight" assigned to these additional factors are insufficient when added to the weight of the other non-statutory mitigators found by the trial court to counter the appalling aggravating circumstances of this case – Spann's prior convictions for violent crimes; and Spann's cold, calculated, and premeditated participation in the kidnapping and murder of Perron for pecuniary gain and to avoid arrest. Therefore, the Ground 2 claim of ineffective assistance of

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records. If Spann's family, including Spann and his mother, did not disclose a deprived childhood, that is not counsel's error. Likewise, those witnesses were available to testify, but Spann refused to allow a mitigation presentation, thus, again, counsel should not be faulted in this case. Once the postconviction court found that Spann failed to prove that he was suffering from a mental deficiency which would render his waiver invalid, then the inquiry should have been over. Moreover, when Spann raised a similar claim on direct appeal this Court stated that: "the fact that [Spann] left home at an early age, and his unstable residential history are not extenuating and do not reduce the degree of moral culpability for the crime committed. We find that the mitigating evidence was properly considered and weighed by the trial court, and we therefore deny relief on this issue." Spann v. State, 857 So.2d 845, 859 (Fla. 2003).

counsel is denied because Spann fails to satisfy both prongs of the Strickland standard for any of the alleged additional mitigators.

Conclusions of Law – Dr. Mosman's opinion of ineffective assistance of mental health professional

Dr. Mosman concludes that Spann received ineffective assistance of a mental health professional because Dr. Petrilla failed to follow American Psychological Association (APA) guidelines for dealing with a resistive patient when Spann prematurely terminated the pre-trial psychological evaluation in March 2000. Dr. Mosman claims that Dr. Petrilla should have determined that Spann was depressed and that Spann had discontinued taking the anti-depressants prescribed by the Martin County Jail. Also, Dr. Mosman asserts that trial counsel failed to advise Dr. Petrilla of Spann's HIV status and counsel failed to provide Dr. Petrilla records containing potential mitigating evidence. Dr. Mosman determined that counsel's failures contributed to Dr. Petrilla's ineffectiveness.

. . . the Court finds that Spann fails to demonstrate prejudice to the outcome of the guilt and penalty phases. The Court has already established that Spann was not diagnosed and treated for depression prior to June 9, 2000. This was several months after Dr. Petrilla's last interview with Spann in March 2000. Absent evidence to the contrary, it is reasonable to conclude that Spann became depressed after the guilty verdict was rendered on May 24, 2000, and after the trial court conducted the Spencer hearing on June 2, 2000. Further, there was no prejudice in counsel's failure to inform Dr. Petrilla of Spann's post-offense HIV status or failure to provide records containing potential mitigating evidence because in this order the Court has determined that neither of these factors would have mitigated to a live sentence, *supra*. Therefore, the Ground 2 claim of ineffective assistance of a mental health professional is denied because Spann fails to demonstrate prejudice to the outcome of the proceeding.

Ground 3 – Trial counsel was ineffective for (a) failing to adequately advise the Defendant of all

mitigating evidence prior to the Defendant waiving his right to present mitigation, and for (b) failing to withdraw the Defendant's waiver of the penalty phase jury.

Spann claims that counsel was ineffective for failing to adequately advise the Defendant of all mitigating evidence prior to Spann waiving his right to present mitigation.... Spann contends that his waivers were unknowing due to counsel's deficiencies and due to Spann's on-going depression. Further, Dr. Mosman opines that Spann's on-going depression rendered Spann incompetent to be sentenced.

...

Spann now claims that the waivers were unknowing because counsel did not advise Spann of the mitigating evidence discovered during the pre-sentence investigation and the additional mitigating evidence determined by Dr. Mosman. To the extent that Spann is contending he would have changed his mind about presenting mitigation to the trial court if he had been advised that the death of his father when he was young and the additional factors focused upon by Dr. Mosman could be considered as mitigating circumstances, there is no evidence to support that contention. Given the firmness with which Spann rejected the advise of his counsel and Dr. Petrilla to present mitigation,[7] the Court does not find such information would have changed Spann's mind about waiving mitigation.

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[7] Udell and Dr. Petrilla testified Spann was firm and matter-of-fact in his position he did not want to present mitigation. Udell testified Spann was likewise firm in his position ... he did not want a presentence investigation done, and he did not want to attend the penalty phase of trial or the *Spencer* hearing. Little testified Spann refused to cooperate and give any information to DOC for the presentence investigation.

Further, it is undisputed that the trial court considered mitigating evidence concerning the death of

> Spann's father not presented by counsel but discovered during the pre-sentence investigation. This mitigating evidence was considered by the trial court as non-statutory mitigating factor "f" in the sentencing order but the evidence did not mitigate to a life sentence. At the evidentiary hearing no additional evidence was presented to demonstrate the long-term impact of Spann's father's death other than the fact that the household was fatherless supporting the mitigating circumstance of Spann's deprived childhood, *supra*. Therefore, since the outcome of the sentencing proceeding was not prejudiced by counsel's failure to discover non-statutory mitigator "f," it follows that no prejudice can now be found for counsel's lack of advice on the same mitigator.
>
> As to the additional mitigating evidence in Dr. Mosman's report, this Court found in Ground 2, *supra*, that only the non-statutory mitigator of deprived childhood should have been presented by counsel. Further, because this Court also found no prejudice where Spann's deprived childhood and Spann's post-offense HIV status would not have mitigated to a life sentence, it follows that no prejudice can now be found for counsel's lack of advice on these mitigators.
>
> Spann also claims that his on-going depression rendered Spann's waivers involuntary and rendered Spann incompetent to be sentenced. These claims are not supported by the evidence. Dr. Petrilla saw no evidence of depression during two interviews with Spann or during the tests Dr. Petrilla conducted. Further, in Ground 2, *supra*, the Court established that Spann was first diagnosed and treated for depression on June 9, 2000. This diagnosis was after Spann waived his rights on May 30, 2000; after the sentencing memoranda were submitted on June 1, 2000; and after all aggravating and mitigating evidence was argued at the *Spencer* hearing on June 2, 2000. Thus, there is no evidence that Spann's depression adversely impacted his waivers or rendered Spann incompetent to be sentenced.

(PCR.14 1977-93)(footnotes 4 and 6 omitted).

The forgoing factual findings are supported by the record,

and the denial of postconviction relief should be affirmed based upon the following analysis. This Court has affirmed that Spann's waiver of mitigation was proper,[10] and there is no

[10] The record reflects that this Court considered Spann's waiver of mitigation and new factors raised for the first time on appeal. This Court found the dictates of Koon v. Dugger, 619 So.2d 246 (Fla. 1993) were met and reasoned:

> Defense counsel notified the court on the record that Spann did not wish to present mitigating evidence. Spann told the court that he had been thinking about this decision since he was in jail in 1997. On two separate occasions-- at the time Spann waived his presentation of mitigation and again when he waived a jury at the penalty phase--the trial judge inquired in detail, and defense counsel indicated on the record what the mitigating evidence would be if it were presented. The court inquired whether Spann's decision was against the advice of counsel, and counsel said it was. The court inquired directly of Spann whether he wished to waive mitigation and whether he understood the consequences of a waiver. The defense also submitted a written sentencing memorandum, and the court ordered a presentence investigation. The judge heard penalty phase arguments and conducted a Spencer hearing. During the proceedings, Spann maintained his position that he did not wish to be present for the penalty phase and did not wish to present mitigation or even to have a penalty phase jury.
>
> ...
>
> Although the colloquy and repeated questioning of Spann is almost identical to the colloquy in *Overton*, which was found to be sufficient, Spann argues that his counsel did not thoroughly indicate the mitigation that existed in the record. The trial court solicited both statutory and nonstatutory mitigating evidence from defense counsel. Defense counsel advised the court that Spann was an accomplice with a relatively minor role in the murder, that Spann's mother, sister, and brother would testify that Spann was a good son and brother when he was a young man, and that at some

evidence that Spann was not competent to waive because he was not aware of all possible mitigation or due to some mental condition. Although the postconviction court focused on the prejudice prong of *Strickland*, the State will also point to the performance prong as further support that defense counsel was not deficient and rendered the constitutionally mandated assistance to Spann regarding the investigation of mitigation as well as informing Spann on his right to waive mitigation.

> point, Spann fell in with a bad crowd. Counsel also submitted that prison records show that Spann would be capable of living in an open prison environment without being a threat to himself or anyone else. Counsel indicated that a mental health expert was hired to examine Spann, but Spann failed to cooperate. The trial court questioned counsel as to what evidence they sought to present as a result of the mental health evaluation. Counsel also stated that they examined school records, social records, and criminal records, and that they met with Spann's family. The trial court specifically inquired about potential mitigating evidence discovered after meeting with Spann's family members. The trial court acted cautiously, followed the requirements of *Koon*, and conducted a colloquy similar to that in *Overton*, which was approved by this Court. The trial court did not abuse its discretion when it granted Spann's request to waive presentation of mitigation. ... The record supports the trial court's finding that Spann acted knowingly and intelligently when he waived presentation of mitigation, and that he did so on his own accord and not because his counsel failed to adequately investigate existing or available mitigation. Because there was no abuse of discretion, relief is hereby denied.

Spann v. State, 857 So.2d 645, 853-54 (Fla. 2003).

Udell explained[11] that from the first day he met Spann, it was Spann's decision that he was not going to make a mitigation presentation because he was HIV positive, and because he believed he would die from the disease, he did not care if he were sentenced to death, because the State would never get to him before the disease. Further, Spann professed his innocence, and because he did not believe he would live that long he did not want to bother because it would also signify guilt. (PCR.2 104-05, 177-78, 196). In spite of Spann's attitude, Udell investigated possible mitigation. (PCR.2 107).

According to Udell, generally he tries to put on as much mitigation evidence as possible because he not only considers the jury and sentencing judge, but later appellate review. However, in Spann's case, this was one of the lesser mitigated cases, and his client did not want to present mitigation. (PCR.2 176-77, 194). Nonetheless, Udell advised Spann to consider putting on mitigation. In fact, they discussed whether the HIV

[11] Rory Little was second chair on this case and worked on the penalty phase investigation, however, Udell was lead counsel, oversaw all aspects of the case, and directed penalty phase strategy. He told Little that even though Spann was waiving mitigation, an investigation must be conducted. This was based on the chance Spann would change his mind, and because it is required by case law to conduct an investigation regardless of the clients decision to waive mitigation (PCR.2 178).

status might be mitigating[12] (PCR.2 178-79). It was Udell's opinion, based on his 20 years of experience at the time of Spann's trial, that Spann was competent; "there was no question he understood what was going on." Udell rejected Dr. Mosman's[13] conclusion that Spann was not competent, averring that Spann "clearly was competent, he understood the issues, he understood the aggravating circumstances of the statute. We had no problems talking with [Spann], and I got along very well." Spann and Udell discussed mitigation together; they spoke of Spann's schooling, relationships, and family members. Nothing Udell told Spann about mitigation changed his mind regarding the decision to waive. (PCR.2 180-82, 197). Spann's attitude about waiving mitigation was the same as his attitude to waiving the jury. (PCR.2 216).

Dr. Petrilla, a psychologist with whom Udell had worked with on several capital cases and who is well experienced in what to look for in mitigation not only at the time of the

[12] Udell did not recall why he did not inform the sentencing court of Spann's HIV status. (PCR.2 179). Even so, it is Spann's burden to prove that counsel's decision was unprofessional and prejudicial. The court must afford a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. Hence, absent evidence to the contrary, even a silent record as to counsel's decision making process, will not suffice to find counsel deficient. Instead, counsel's conduct will be deemed to fall within the wide range of professional conduct.

[13] Dr. Mosman was Spann's postconviction mental health expert.

crime, but in the defendant's background, was appointed as a defense expert. It is Udell's standard practice to hire a mental health expert, and deliver to him copies of all records collected, such as school and social records. Udell and Dr. Petrilla spent many hours on this case and Dr. Petrilla billed for psychological evaluation of medical records. Before hiring Dr. Petrilla, Udell would have asked Spann about his mental history so he could pass that information onto the doctor. Spann discussed a possible head injury, but Udell has no recollection about antidepressants. (PCR.2 182-84, 195, 197-98, 207-08) Had Spann disclosed the use of antidepressants, Udell would have revealed that to the trial court during the Koon hearing. (PCR.2 185). Even had Spann not limited Udell's use of a mental health expert, there was no prior mental health history of significance. (PCR.2 195).

During the penalty phase investigation, Udell, and co-counsel, Little spent time with Spann's family. This was for the purpose of gathering mitigation evidence and to see if they would talk Spann into presenting such evidence. The mitigation investigation was started early in the case. Udell relied on his representation to the sentencing judge that the defense team did receive Spann's school records, social records, family records, and criminal history. (PCR.2 185-86). The medical records related to Spann's head injury were obtained, however,

there was nothing significant in them; the car accident was not serious. (PCR.2 167).

Preliminary testing was done by Dr. Petrilla, but Spann refused to submit to further evaluation. Because of Spann's actions, Dr. Petrilla could not render an opinion. Based on everything Udell observed of Spann, he was confident Spann was making a deliberate, conscious, intelligent analysis of his case and choice about his future. (PCR.2 188-90, 193). Spann was so set on not presenting mitigation, he did not want a presentence investigation report prepared. In fact, when the sentencing court was inquiring about mitigation, Spann did not want to be in court. (PCR.2 192-93).

Little[14] followed Udell's lead during discovery; but closer to trial, he took over the penalty phase preparation, and followed Udell's strategy and directions on what to do next. (PCR.3 242, 248). During his representation of Spann, it became known Spann was waiving mitigation. Little was going to accept Spann's decision because he seemed to understand and know what he was doing, however, Udell advised that a complete investigation had to be done as the court would need to know what could have been offered had Spann not waived mitigation (PCR.3 244-45, 272-73). As a result, Little spoke to family

[14] Little recalls attending the Life Over Death Seminar and retaining the materials the Seminar provided. (PCR.3 257).

members and obtained school records. Hospital records were sought, but not obtained as none were kept of Spann's emergency room treatment following a car accident. This was all Little could remember, but he and Udell had split the responsibility of getting the records. However, in the billing for the February 25th and March 29th conferences with Udell, Little noted that he had obtained Spann's school records, social records, and family records, and had requested medical records and Orange House (Orange County Jail) records. However, Little was not sure of his record documentation or where certain notes/files were stored. The records could have been delivered to Udell, or they could have been retained, in which case, most were destroyed during the hurricanes of 2004. (PCR.3 259-60). Udell retained Dr. Petrilla because Udell just wanted to be cautious even though Spann was claiming innocence and waiving mitigation. (PCR.3 245-46, 258-59, 261-63, 273).

From Little's meeting with the family in West Palm Beach and Tallahassee, he discovered information about Spann as a husband and father. Little relied upon Udell to give him personal information about Spann (PCR.3 261-62). He was confident that he met with Spann, but not without Udell being present. Spann had a better rapport with Udell and confided in him more than Little. (PCR.3 249, 268). Little believed he was in the process of getting jail records, because he recalled

asking Spann if he had any disciplinary reports or problems in jail, and being told he did not. With regard to Department of Children and Families ("DCF"), Little could not recall getting these records (PCR.3 250, 261-63). Whatever Little informed Judge Angelos at trial would be accurate.[15]

Little spent time reviewing transcripts and researching mitigation. He also counseled/urged Spann to cooperate and present a mitigation case. Judge Angelos also so advised Spann. In spite of this, Spann refused to present mitigation and even objected to the ordering of a Presentence Investigation Report, and refused to give input when the report was being complied. (PCR.3 263-65, 268). Spann did not want to be in court following the guilt phase; he told this to his counsel and to the trial judge. (PCR.3 266).

Throughout his representation, Little found Spann to have

[15] The record reflects that Little reported to the trial court that he had family members ready to testify, and that the prison records indicated Spann was capable of living in a prison environment without being a threat to others. Also, Dr. Petrilla had examined Spann and conducted some neurological testing, but could not reach a firm conclusion because Spann refused to cooperate further. Udell added that he had looked at Spann's school and social records, met with Spann's family members in West Palm Beach and Tallahassee, reviewed Spann's criminal history records as well as those of Philmore. Also reported to this Court was the investigation into Spann's head injury in a car accident, but no hospital records were available. Significant was that fact Spann advised that the injury was not serious. He suffered no adverse consequences and the family saw no behavioral changes. Also, they did not report any significant childhood illnesses. (ROA.30 3161-63, 3169-70).

no complaints, except that he did not want Little to do any mitigation. Spann was able to communicate with counsel intelligently at all times; Little and Udell "never suspected that [Spann] was not rational and aware of anything that was going on the whole time." Spann never acted emotionally or as though he could not handle the stress. Spann always knew what he wanted. (PCR.3 265-67). Judge Angelos gave Spann more time (four days) to consider his decision to waive mitigation, and re-inquired at that time. Extra steps were taken by the court to make sure Spann's decision was voluntary. (PCR.3 267-68).

Dr. Petrilla, a 25 year practicing psychologist at the time of Spann's trial, who worked on some 20 death penalty cases, confirmed that he evaluated Spann in February, 2000, just a few months before trial. (PCR.4 313-14, 329, 336, 340). He had been retained to ascertain IQ, personality type, memory function, neurological functioning, as well as delving into the psychological effects from Spann's family background, lifestyle and related issues. At that time, Dr. Petrilla saw nothing to give him reason to think Spann was laboring under a depression which could impair his ability to cooperate with his counsel or doctor. When evaluated by Dr. Petrilla, Spann's demeanor/behavior was cooperative initially. He answered the doctor's questions and took the tests offered. However, on the return visit, Spann refused to participate. "At no time did he

appear depressed. He just matter of factly didn't want to do it. I tried to talk him into it. He said it wouldn't do any good." (PCR.4 316, 325-28, 330-31, 340-41). **Dr. Petrilla had administered the WAIS-R which can detect depression in the subject by revealing inconsistencies in elevation and excess cynicism and negativism on the responses on comprehension and vocabulation. Dr. Petrilla noted no depression.** Had he seen depression, he would have notified counsel and sought medication for Spann. (PCR.4 316-18, 331-32, 347-49, 351).

After Spann "shut down" the mental health evaluation, Dr. Petrilla called Udell, and they conferred for a period. Udell later advised the doctor to cease his evaluation. Dr. Petrilla had wanted Spann to continue, but he was "matter of fact" and did not want to waste his time, or the time of the doctor. Dr. Petrilla explained the pro/cons of the process, but could not push Spann to cooperate. Spann was his first client who refused to go through with the evaluations; others had been talked into continuing. However, even after Spann stopped cooperating, Dr. Petrilla continued to consult with Udell regarding whether he could be of use in the case (PCR.4 317-21, 323, 326-27, 332-33, 341-42). Spann trusted Dr. Petrilla, and communicated intelligently. He was not in a state of denial, shock, or depression. Spann was not suffering from any type of mental illness; there was no clinical depression. (PCR.4 335-37).

Up to the point where Spann halted the evaluation, Dr. Petrilla had found nothing. Given his years of experience and work on 20 capital cases, Dr. Petrilla was familiar with both statutory and non-statutory mitigating factors in Florida. On the two occasions, Dr. Petrilla and Udell reviewed records obtained by the defense.[16] Some were reviewed at the doctor's office, other at Udell's office. The records were two to three inches high, and they reviewed each document. During these meetings, Udell revealed information he garnered from other sources, such as the family, and the doctor took such into consideration. Dr. Petrilla has testified in other capital cases where he discussed more than just mental disorders; he explained the psychological consequences of the defendant's upbringing and other psychological factors. (PCR.4 318, 321-23, 333-35, 340).

With respect to Dr. Mosman's opinion, Dr. Petrilla thought it was easy to be a "Monday morning quarterback" and comment on another doctor's actions five years after the fact, and not having seen Spann close to the time of the crime. Had Spann been depressed at the time of his trial, Dr. Petrilla would have seen it. (PCR.4 336-38). Moreover, merely because someone is

[16] Dr. Petrilla attempts to get records pertaining to a defendant's occupational, social, medical, developmental, school, educational, and family histories. He had already noted that his files were also destroyed in the 2004 hurricanes. (PCR.4 319-21).

depressed about their criminal situation, it does not mean that they cannot communicate with their lawyers or are incompetent to stand trial. Dr. Petrilla completed over 2000 competency examinations and he saw no "red flags" with Spann. (PCR.4 338-39). It is typical, very common, to see a diagnosis of adjustment disorder with anxiety and depression in those faced with a bad situation such as conviction and sentence to death row. Such a diagnosis is the mildest form of the reactive disorder. (PCR.4 339, 353-57).

Dr. Mosman took issue with counsel's investigation, specifically, the alleged failure to obtain jail records to show Spann had been on antidepressants before waiving mitigation and failure to turn these records over to Dr. Petrilla. **However, Dr. Mosman did not even look at Martin County Jail medical records**. (PCR.4 473-74). Rather, to show antidepressants were actually administered, Dr. Mosman pointed to Department of Corrections ("DOC") documents, dated July 17, 2000, which made reference to antidepressants being given for a year. Yet, there is no source for this notation in the DOC file. Dr. Mosman claimed the stressor triggering Spann's alleged depression was his testing positive for HIV in December, 1997 while in Martin County Jail, yet Dr. Mosman could locate only a **July 17, 2000** report which, if based on medical records and not self-reporting, showed a commencement date in 1999. Countering the

time-frame for the first prescription is the **July 12, 2000** transfer form from Martin Correctional to DOC which indicated the antidepressants were prescribed in **June 9, 2000**, after sentencing. (PCR.4 470-78).

Taking the testimony of Udell, Little, Dr. Petrilla, and Dr. Mosman, together with the trial record and evidentiary hearing evidence, it is clear that a constitutionally sound investigation was conducted in spite of the trial court criticism for failing to find two minor areas of potential mitigation and failure to obtain all school records. Moreover, Spann was not suffering from any mental problem. Instead, he was instrumental in stopping further investigation and refused to permit presentation of mitigation to the sentencing court after waiver of his penalty phase jury. Dr. Mosman's complaints all stem from his belief Spann was depressed at the time of his waivers, however, the record does not bear this out. As the trial court found, the diagnosis of depression did not come until after the *Spencer* hearing. Moreover, counsel strove to obtain, and did acquire records pertinent to sentence mitigation and any missed documents did not cause Spann prejudice.

The record reflects that counsel conducted a professional and thorough investigation of mitigation, in spite of Spann's decision not to offer such evidence. Lead counsel Udell either collected or had Little collect family history, social history,

school/educational records, criminal history, and medical history. Such comports with Wiggins, 539 U.S. at 533 (emphasizing "Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case."). See Spann, 857 So.2d at 853-54. (opining "[t]he record supports the trial court's finding that Spann acted knowingly and intelligently when he waived presentation of mitigation, and that he did so on his own accord **and not because his counsel failed to adequately investigate existing or available mitigation**") (emphasis supplied). Moreover, Udell and Little had many conversations with Spann and he never gave any indication he could not make decisions competently about his case or converse intelligently with counsel. Nonetheless, and with the intent of developing mitigation, Udell hired Dr. Petrilla, a 25 year practicing psychologist to evaluate Spann. Initially, Spann complied, but upon the second visit he refused to proceed. At no time did this experienced mental heath expert, one who had done over 2000 competency evaluations, see any indication of depression or metal illness in Spann.

It is well settled that merely because years later, the defendant finds a new expert to opine differently or to

criticize a prior expert's work does not establish ineffective assistance of counsel. See Damren v. State, 838 So.2d 512, 517 (Fla. 2003) (reasoning that the finding of a new doctor "does not equate to a finding that the initial investigation was insufficient."); Asay v. State, 769 So.2d 974, 986 (Fla. 2000) (finding counsel's investigation of mental health mitigation was reasonable and not deficient "merely because the defendant has now secured the testimony of a more favorable mental health expert."); Elledge v. Dugger, 823 F.2d 1439, 1446 (11th Cir.) (opining "[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel, or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort"), modified on other grounds, 833 F.2d 250 (11th Cir. 1987).

Moreover, Spann confirmed during the first Koon hearing, that he was **not on drugs** at the time, nor throughout the trial; he acknowledged that the waiver of mitigation would not be a basis to reverse the conviction, and that he would have to live with his decision. He reported that **he had been thinking about this decision since he entered jail in 1997**. (ROA.30 3167-68). Clearly, this statement, along with the **July 12, 2000** transfer form from Martin Correctional to DOC which indicated that

antidepressants were prescribed in **June 9, 2000**, supports a finding that Spann was not on antidepressants until after sentencing. (PCR.4 470-78). This coupled with Udell's testimony that Spann, from day-one, had determined, due to his HIV status, that it would be a waste of time to present mitigation which might infer guilt, when the HIV would overtake him before the State could carry out an execution. There were no depressive thoughts in this analysis. Furthermore, Dr. Petrilla saw no depression. In fact, as the court inquired, **Dr. Mosman agreed Spann "freely, voluntarily and knowingly" waived his parental rights in January 1998**. (PCR.5 544-45). Clearly, this was after Spann had been diagnosed as HIV positive. Such further undermines any recent claim that the HIV status so depressed Spann that he could not knowingly, intelligently, and voluntarily waive his rights.

Dr. Mosman should not be permitted, years later, to develop a new theory based upon his interpretation of an ambiguous reference in the prison records to dismiss the observations and conclusions of Udell and Dr. Petrilla, who had combined, 45 years experience in over 40 death penalty cases. This is especially true where Udell and Dr. Petrilla were making timely observations, whereas, Dr. Mosman was approximately five years removed from the events. Moreover, the sentencing court had made findings as to Spann's competency, which were affirmed on

appeal; those cannot be discarded lightly for the same reasons.

Having shown that Spann was not depressed at the time he made his decision to waive testifying, mitigation, and a penalty phase jury, or at the minimum, any depression was so minor it did not interfere with those decisions, Spann's argument dissipates and the inquiry should be over. In fact Spann has nothing to point to in support of his claim of ineffectiveness of counsel, or a basis to overturn the knowing, voluntary, and intelligent waivers.

Also, Spann should not be heard to complain if counsel did not uncover every piece of mitigation possible as it was Spann who ended Dr. Petrilla's evaluation and inquiry regarding mitigation. Dr. Petrilla cannot be faulted for not completing an evaluation when Spann terminated the session and refused to participate. Cf. Gore v. State, 784 So.2d 418, 438 (Fla. 2001) (finding no ineffectiveness where counsel acted reasonably in seeking out and evaluating potential mitigating evidence, but the defendant thwarted those efforts by refusing to cooperate with mental health experts); Rivera v. State, 717 So.2d 477, 485 (Fla. 1998) (opining, "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made."). Likewise, Dr. Petrilla cannot be faulted for not being able to convince an adamant Spann to submit to testing. The doctor tried to reason

with Spann, but as with the rejection of counsel's advice to present mitigation, Spann rebuffed Dr. Petrilla and refused to comply. Nonetheless, Dr. Petrilla continued to consult with Udell after the evaluation was suspended, thus, there was no abandonment by this expert. The additional conferences were for the purpose of further assisting with the development of mitigation.

The direct appeal record refutes any claim of prejudice and such is supported by the evidentiary hearing testimony and findings of the trial court. During the May 25, 2000 hearing prior to sentencing, Little reported that Spann wished to waive mitigation. Little noted that his investigation revealed the statutory mitigator that Spann was an accomplice with a minor role and offered non-statutory mitigation was available from Spann's mother, sister, and brother who would testify that he was a good son/sibling who had fallen in with a bad crowd. Counsel noted that prison records indicated Spann was capable of living in a prison environment without being a threat to others. It was disclosed that Dr. Fred Petrilla examined Spann and conducted some neurological testing, but could not reach a firm conclusion because Spann refused to cooperate further; therefore, no mental health information would be presented as it was valueless (ROA.30 3161-63). Udell added that he had looked at Spann's school and social records, met with Spann's family

members, and reviewed Spann's criminal history records as well as those of Philmore. (ROA.30 3163). Little explained that he and Udell had advised Spann that mitigation was available to be presented, and that without such a presentation, in all likelihood, the aggravation would result in a death recommendation. This information did not sway Spann to present mitigation. (ROA.30 3164-65)

In his colloquy with Judge Angelos, Spann admitted counsel spoke to him about mitigation which was the same as reported to the Court. He confirmed that counsel recommended mitigation be offered. Judge Angelos advised Spann of the law regarding aggravation and mitigation in addition to requiring the State to identify the aggravation it would offer. (ROA.30 3165-66). Spann reaffirmed his decision to waive mitigation even in light of counsel's recommendation otherwise. He also averred he was not on drugs, acknowledged the waiver would not be a basis to reverse the conviction, and that he would have to live with his decision. Spann reported he had been thinking about this decision since he entered jail in 1997. (ROA.30 3167-68).

In addition to the mitigation outlined earlier, counsel added Spann had been in a car accident in 1989-90 based on emergency room medical records reviewed. No hospitalization was reported, but Spann had advised that the injury was not serious and had not complained of head injury or adverse consequences

afterwards. Counsel also noted there were no behavior changes observed by the family following the accident. Also, the family did not mark any significant childhood illnesses. (ROA. 30 3169-70). Even with this added information, Spann persisted in his desire to waive. Udell confirmed that he and Spann had been considering the issue for the past two years and had had numerous conversations. Following a discussion of Spann's added wish to waive the penalty phase jury recommendation, the trial court gave Spann more time to consider the waiver of mitigation, and refused to excuse the jury until he had additional time to contemplate his decision. (ROA.30 3176-79)

The following Monday, Little reported he had readdressed the mitigation waiver with Spann and the decision was unchanged. This Court again questioned Spann directly. Spann confirmed he and counsel revisited the matter, that he understood the jury's role, but steadfastly maintained he wanted to waive mitigation and was prepared to put his decision in writing. Spann was permitted to waive mitigation and a jury recommendation (ROA.30 3183-86).

Another proffer of available mitigation was received from counsel. This included: (1) Spann's minor role in the crime; (2) mother, sister, and brother would report that Spann was a good son/sibling when young; (3) Spann fell in with the wrong crowd; (4) Spann was a good student up to a point in school; (5)

Spann had good prison behavior; (6) Dr. Petrilla did not form an opinion, but counsel had no questions about Spann's competency; (7) counsel would have presented Spann's school records; (8) Spann had suffered a head injury in 1989-90 although there was no evidence that such was significant; (9) Spann's age (23 years old at time of the crime); and (10) Spann was a good husband/father with a four year old child. Spann's written waiver was filed as a court exhibit. (ROA.30 3188-94). The defense sentencing memorandum included the following that Spann: (1) was young man at time of crimes; (2) had been good son/sibling; (3) was a good student; (4) did not fire the fatal shots; and (5) is capable of living in prison without serious difficulty.

No prejudice can be shown from the failure to offer the single mitigator of the death of Spann's father because Judge Angelos ordered a presentence investigation; the death of Spann's father was included in the report, and given moderate weight when sentencing Spann. Spann, 857 So.2d 857-59. As the trial court found, Spann has not shown that absent counsel's failure to inform him that this is mitigating he would have changed his mind an offered a mitigation case. Spann had rejected all other aspects of a mitigation presentation, and he offered nothing at the evidentiary hearing to show that his adamant position would have been changed had he been advised of

this mitigator. Likewise, because the judge took the mitigator into account, there is no basis to suggest a life sentence would have been obtained. Under either scenario, prejudice, as defined in Strickland has not been shown.

Furthermore, the fact that Spann had deprived childhood could have been gleaned from the fact his father was deceased, and that he fell in with a bad crowd, but even as a separate mitigator along with Spann's HIV status, neither a mitigation presentation or a life sentence would have resulted. As the court noted, Spann's HIV status was discovered after the murder, and while it is part of Spann's history, he was able to make significant life decision, i.e., giving up parental rights, knowing he was HIV positive, such would not alter his decision regarding mitigation nor would it undermine confidence in this most aggravated case. As this Court is aware, the sentencing court found five aggravators: (1) prior violent felony, felony murder (kidnapping); (3)avoid arrest; (4) pecuniary gain; and (5) cold, calculated, and premeditated. The possibility that Spann's life may be shortened due to this illness, clearly does not mitigate the sentence to life.

Additionally the failure to gather jail records to show Spann was depressed has not been established by the evidence. While the records were not obtained, their review shows that any depression was of the mildest form and was not evidence until

after the Spencer hearing. As such, it would have no impact on Spann's decision to waive mitigation and counsel, even if he had gotten the records before the Spencer hearing and used them to advise Spann and the trial court, such would not have included the June 9, 2000 diagnosis. Hence, no prejudice for either the decision to waive mitigation or for sentencing can be shown as required by Strickland and the sentence remains proportional. See Stewart v. State, 872 So.2d 226 (Fla. 2003) (finding proportionality where victim forced to drive to woods where defendant robbed and killed him, and court found three aggravating factors, including prior violent felony conviction and that capital felony was committed for pecuniary gain, and mitigation in form of two statutory mitigating factors and twenty-three nonstatutory mitigating factors); Johnston v. State, 841 So.2d 349, 361 (Fla. 2002) (finding death sentence proportional where four aggravators were found, including prior violent felony conviction and murder committed during commission of sexual battery and kidnapping; moderate weight was given one statutory mitigator; and slight weight or no weight was ascribed to twenty-six nonstatutory mitigators); Singleton v. State, 783 So.2d 970, 979 (Fla. 2001) (finding sentence proportional where two aggravators were found, including prior violent felony conviction; three statutory mitigators were found, including defendant's age (69), impaired capacity, and extreme mental or

emotional disturbance; and several nonstatutory mitigators were found, including that defendant suffered from mild dementia).[17] The trial court properly denied postconviction relief, and this Court should affirm.

[17] See also England v. State, 940 So.2d 389, 408-09 (Fla. 2006) (finding sentence proportional for the murder of the victim by bludgeoning during the court of a robbery where four aggravators and four non-statutory mitigators including mental mitigation); Buzia v. State, 926 So.2d 1203, 1217 (Fla. 2006) (finding sentence proportional based on four aggravators, two "catch-all statutory mitigating factors, and seven non-statutory factors); Pope v. State, 679 So.2d 710 (Fla.1996) (holding death penalty proportionate where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed two statutory mitigating circumstances of commission while under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct and several nonstatutory mitigating circumstances); Pope v. State, 679 So.2d 710 (Fla.1996) (holding death penalty proportionate where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed two statutory mitigating circumstances of commission while under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct and several nonstatutory mitigating circumstances).

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Baya Harrison, III, Esq., 310 North Jefferson Street, Monticello, FL 32344 this 30th day of July, 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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