IN THE SUPREME COURT OF FLORIDA

ANTHONY A. SPANN,

Appellant,

vs.

Case No. SC05-1334
LC No. 97-1672-CFB

STATE OF FLORIDA,

Appellee.
_____/

AMENDED INITIAL BRIEF OF APPELLANT

On Direct Appeal From A Final Order of the Circuit Court Of The Nineteenth Judicial Circuit, in and for Martin County, Florida, In Case No. 97-1672-CFB, That Denied Spann's Florida Rule of Criminal Procedure 3.851 Motion For Post Conviction Relief.

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PRELIMINARY STATEMENT REGARDING RECORD REFERENCES

Anthony A. Spann, the defendant in the trial court, is the appellant here. He will be referred to as "the defendant" or "Spann." The State of Florida was the plaintiff in the trial court and is the appellee here. It will be referred to as "the state."

The record on appeal regarding the post conviction proceedings is in 14 volumes. The court reporter has placed a page number in the bottom right hand corner of each page of the record. When referring to that post conviction record, the appellant will cite the letter "R" for record, followed by a volume and page number.

There are two supplemental volumes of exhibits. They will be referred to by exhibit number.

The record regarding Spann's original direct appeal of his judgments and sentences, including a death sentence, rendered in Florida Supreme Court Case No. SC 00-1498 contains 32 volumes. There is a page number provided in the upper right hand corner of each volume. When referring to this original record, Spann will cite the letters "OR" (for original record) followed by a volume and page number.

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case:

This is a direct appeal from a July 1, 2005 final circuit court "Order Denying Second Amended Initial Motion for Post Conviction Relief" (the final order) (R. Vol. XIV, pp. 1973-2007) filed per the provisions of Florida Rule of Criminal Procedure 3.851.

B. Jurisdiction:

This Court has jurisdiction to review the lower court order denying Spann's Florida Rule of Criminal Procedure 3.851 motion for post conviction relief per the provisions of Article V, Section 3(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(a)(1)(A)(I), and Florida Rule of Criminal Procedure 3.850(g).

C. Course Of The Proceedings:

On December 16, 1997, Spann and his co-defendant, Leonard Philmore, were indicted by a Martin County, Florida grand jury on a charge of the first-degree murder of Mrs. Kazue Perron, allegedly committed on November 14, 1997. (R. Vol. XIV, p. 1973) Their trials were severed. *Id*. The defendants were 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 (and after the jury recommended death by a vote of 12-0), Philmore testified for the state against Spann. Philmore was eventually sentenced to death and the conviction and sentence were affirmed on appeal. *See id.*

On May 24, 2000, after a jury trial, Spann was convicted on all counts as charged in the indictment. Following the verdicts, Spann waived both the presentation of mitigating evidence and a penalty phase jury. (R. Vol. XIV, p. 1973) The trial court heard from defense counsel as to what mitigating evidence defense counsel would have presented had there been a penalty phase trial -- and heard from the state as to evidence in support of various aggravating factors. (R. Vol. XIV, p. 1974) On June 2, 2000, the trial court conducted a *Spencer*[1] hearing where both sides made arguments for and against the imposition of the death penalty. On June 23, 2000, the trial court read the order pronouncing Spann's death sentence. In so doing, the trial court found that five aggravating circumstances[2] had been proven and that five non-

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

[2] (1) Spann had previously been convicted of a violent felony, (2) the murder was committed during the course of a kidnapping, (3) the murder was committed

statutory mitigating circumstances had been established.[3] (R. Vol. XIV, p. 1974) The trial court also sentenced Spann to fifteen years for conspiracy to commit robbery with a deadly weapon, life in prison for carjacking; life in prison for kidnapping, life in prison for robbery with a deadly weapon and five years in prison for grand theft.

Spann appealed, raising seven issues not including this Court's required proportionality review. The issues were restated by this Court as follows: (1) whether the trial court erred in admitting expert testimony as to handwriting identification because the expert testimony did not satisfy the test set forth in *Frye v. United States*, 54 U.S. App. D.C. 46, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923); (2) whether the trial court failed to adequately follow the procedures required for granting the defendant's request to waive mitigation as set forth in *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993); (3) whether the trial court erroneously found that Spann freely and voluntarily made a knowing and

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in order to avoid arrest, (4) the murder was committed for pecuniary gain, and (5) the murder was committed in an especially cold, calculated and premeditated manner (the CCP aggravator) without any pretense of moral or legal justification.

[3] Spann had been a good son and brother (assigned little weight), Spann did not fire the fatal shots (assigned very little weight), Spann could live in a prison setting without doing harm to others (given some weight), the defendant's wife believed that he was a good husband (given slight weight), and the defendant's father was killed when Spann was very young (assigned moderate weight). (R. Vol XI, p. 1307; R. Vol. XIV, p. 1974; OR., Vol. III, pp. 388-89)

intelligent waiver of the advisory jury in the penalty phase trial; (4) whether the trial court improperly found and considered Spann's conviction for misdemeanor battery as an aggravating factor; (5) whether the trial court improperly doubled three separate aggravating circumstances; (6) whether the trial court failed to consider and weigh all the mitigating evidence in the record; (7) whether the trial court abused its discretion in the weight assigned to the mitigating factors; and (8) although not raised by Spann, whether the sentence of death was proportional. On April 3, 2003, this Court affirmed Spann's judgments of conviction and sentences, including the death sentence. *Spann v. State*, 857 So. 2d 845 (Fla. 2003). Rehearing was denied on October 16, 2003. The Court's mandate was issued on October 31, 2003. (R. Vol. VI, p. 572)

On August 2, 2004, Spann filed an initial motion for post conviction relief per the provisions of Florida Rule of Criminal Procedure 3.851 along with a memorandum of law in support of the motion and an appendix. (R. Vol. VI, pp. 569-736; R. Vol. VII, pp. 737-911; R. Vol. XIII, pp. 912-1047; R. Vol. IX, pp. 1048-1210) Spann raised seven issues for which an evidentiary hearing was requested. The issues were: (1) trial counsel was ineffective by failing to object to the racial makeup of the jury panel and the jury pool from which it was selected; (2) trial counsel failed to conduct a thorough investigation in preparation for the penalty phase of the trial; (3) trial counsel failed to advise Spann of all available

mitigating evidence before Spann waived his right to present mitigating evidence and to have a jury render an advisory opinion; (4) trial counsel failed to object to the prosecutor's closing argument which improperly vouched for a certain state witness' (Mrs. Willie Alma Brown's) credibility, (5) trial counsel was ineffective for failing to thoroughly impeach Lenard Philmore based upon his multiple pretrial falsehoods; (6) trial counsel was ineffective by presenting a "boilerplate" motion for judgment of acquittal, thus the preventing the issue (the denial of the motion for judgments of acquittal at the conclusion of the state's case-in-chief) from being preserved for appellate review; and (7) trial counsel was ineffective during the guilt phase for failing to properly advise the defendant regarding his waiver of the right to testify. (R. Vol. VI, pp. 574-84) Spann also raised a claim that Florida's death penalty scheme violated *Ring v. Arizona*, 536 U.S. 583 (2002) and *Blakley v. Washington*, 542 S.Ct. 2531 (2004). In addition, he asserted that Florida's death penalty procedure violated the cruel and unusual punishment provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States. (R. Vol. VI, pp. 609-19). No evidentiary hearing was requested regarding these last two claims.

On October 4, 2004, the state filed a detailed response to the motion for post conviction relief with an appendix. (R. Vol. X, pp. 1211-1294; R. Vol. XI, pp. 1295-1492)

On October 20, 2004, after obtaining permission to do so, Spann filed an amended initial motion for post conviction relief. (R. Vol. XII, pp. 1502-1525) In so doing, Spann raised the additional claim that his trial counsel was ineffective for failing to call an alibi witness (his brother, Leo Spann) and for not complying with the notice provisions of the alibi witness rule. (R. Vol. XII, p. 1518-21) On October 25, 2004, the state filed a response to the amended motion. (R. Vol. XII, pp. 1560-1623)

On December 9, 2004, the trial court held a *Huff*[4] hearing. (R. Vol. XIII, p. 1695)

On December 17, 2004, the trial court rendered an order granting Spann an evidentiary hearing regarding post conviction claims 1-5, 7 and 8. The trial court also authorized Spann to amend Claim III, allowing the state to respond thereto. (R. Vol. II, pp. 1639-40) On January 3, 2005, Spann filed a second amended original motion for post conviction relief. (R. Vol. XII, pp. 1645-68). On March 14, 2005, Spann filed a motion to amend the second amended motion for post conviction relief. (R. Vol. XII, pp. 1679-82) The essence of this motion was that aggravating and mitigating factors are elements of first-degree murder and the failure to include these facts in the indictment violated Spann's constitutional

[4] *Huff v. State*, 622 So. 2d 982 (Fla. 1992).

rights. (R. Vol. XIII, p. 1697) On March 22, 2005, the state filed a response to Spann's motion to amend the second amended original motion for post conviction relief. (R. Vol. XIII, pp. 1695-1769) On March 28, 2005, the trial court rendered an order per a stipulation of the parties allowing Spann to amend his January 3, 2005 second original amended motion for post conviction relief to include the additional issue that was filed by Spann on or about March 9, 2005. Thus, the claims ultimately considered by the trial court during the post conviction proceedings were:

1. Whether Spann was denied constitutionally effective assistance of trial counsel for allegedly; (Claim 1) failing to challenge the racial composition of the jury panel and venire pool; (Claim 2) failing to adequately investigate mitigating evidence; (Claim 3) failing to adequately advise the defendant of all mitigating evidence prior to his waiver of the right to present mitigation and failing to move to withdraw the defendant's waiver of the penalty phase jury; (Claim 4) failing to object to the bolstering of the Willie Alma Brown testimony; (Claim 5) failing to adequately cross-examine the co-defendant (Philmore) on multiple conflicting pretrial statements; (Claim 6) making an insufficient, boilerplate motion for judgment of acquittal at the conclusion of the guilt/innocence phase of the trial; (Claim 7) failing to adequately advise the defendant prior to him waiving

his right to testify; and (Claim 8) failing to file a notice of alibi and present all available alibi witness testimony.

2. (Ground 9) Whether Florida's jury advisory system violates the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16, Florida Constitution, in light of *Ring v. Arizona* and *Blakely v. Washington*.

3. (Ground 10) Whether Florida's death penalty statute constitutes cruel and unusual punishment as prohibited by the federal and Florida Constitutions.

4. (Ground 11) Whether the aggravating and mitigating factors were required to be set forth in the indictment.

See the trial court's final order of July 1, 2005, denying Spann post conviction relief, R. Vol. XIV, pp. 1976-2007.

D. Disposition In The Lower Tribunal:

On July 1, 2005, the trial court rendered a final order that denied Spann's second amended original motion for post conviction relief filed per the provisions of Florida Rule of Criminal Procedure 3.851. (R. Vol. XIV, pp. 1973-2007) The trial court's findings and ruling as to each claim are discussed in the argument section of this brief. Spann filed a timely notice of appeal to this Court. (R. Vol. XIV, p. 2043)

E. Statement Of The Facts:

The Basic Facts Of The Case As Found By Supreme Court Of Florida

The basic facts of the case as found by the Supreme Court of Florida are set forth in the opinion of this Court in *Spann v. State*, 857 So. 2d 845 (Fla. 2003):

> 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.
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> 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.
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> 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.
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> 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 out drive 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 v. State, supra, 857 So. 2d at 849-50.[5]

Evidence Presented During Rule 3.851 Post Conviction Proceedings

Robert Udell, Esq., was Spann's lead trial counsel. (R. Vol. II, p. 77) Udell had no recollection of filing any motions or doing any research addressing the ethnic makeup of Martin County, the jury pool, or the jury panel itself, but he thought he looked at the statistics in that regard and found them within accepted guidelines. (R. Vol. II, pp. 78-9, 81) Udell acknowledged, however, that had he looked at the statistics, he would have billed his client, and this fee would have appeared in his fee affidavit (Defense Ex. 5), but there was no such fee in the affidavit. (R. Vol. II, p. 80) The trial court stated that she would judicial notice as to whether a motion attacking the venire was filed by defense counsel. [6]

Udell assigned his co-counsel, Rory Little Esq., to handle the penalty phase of the trial, but he monitored and consulted with Little, since he (Udell) was much more experienced in capital litigation. (R. Vol. II, pp. 84, 92)

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[5] Spann denied in his post conviction filings that these findings were correct and maintains that same position here as explained below.

[6] The court's words were: "I will take judicial notice as to whether or not there was any motion filed addressing the racial composition of the jury panel." (R. Vol. II, pp. 82-3)

Udell retained Dr. Fred Petrilla, a mental health expert, to assist with mental health mitigation issues, such as the defendant's competency to stand trial and his mental health status at the time he committed the crime, since the state was seeking the death penalty. (R. Vol. II, pp. 85-6) However, Spann refused to confer with Petrilla on the doctor's second visit (which was right after Spann had been convicted by the jury). (R. Vol. II, p. 86) Spann's defense was that he did not commit the crime, and under those circumstances Udell did not see much sense in amassing mental health mitigation relating to the defendant's mental health status at the time of the crime. (R. Vol. II, pp. 86-7, 109) Thus, Udell told Dr. Petrilla to respect Spann's wishes and desist with the evaluations. (R. Vol. II, pp. 87-8) Udell did not recall if he personally subpoenaed Spann's prison or DCF records. (R. Vol. II, pp. 93-4) He vaguely remembered looking at Spann's school records, in which he found no relevant information. (R. Vol. II, p. 95) He had Spann's criminal history records, though these did not appear in the list of documents that Udell provided Ms. Simpson in his trial counsel box. (R. Vol. II, pp. 96, 101)

Spann informed Udell early in his representation that he did not want to present mitigation if he were convicted of first-degree murder, because he was HIV-positive. (R. Vol. II, pp. 103-05) In this regard, Dr. Petrilla could nor or would not indicate the existence of any mental health mitigation statutory factors

based upon his meeting with the defendant and limited review of Spann's records. (R. Vol. II, p. 110)

Udell talked to Spann's mother several times. (R. Vol. II, pp.112-13) He also spoke to his aunt, Mrs. Willie A. Brown, and one or more of Spann's brothers. (R. Vol. II, p. 113-14)

With regard to Spann's alibi defense, Udell acknowledged that the state used Mrs. Brown's videotaped deposition in an attempt to refute Spann's alibi. (R. Vol. II, pp. 133-34) Udell went out to Mrs. Brown's residence and took some pictures. (R. Vol. II, pp. 117) According to Udell, Mrs. Brown was "getting up there in age" and not well educated. (R. Vol. II, p. 114) She had some memory problems, but he did not do any follow up to determine her medical condition. (R. Vol. II, pp 115-16)

Udell was present with Leo Spann when his deposition was taken toward the end of the trial. (R. Vol. II, p. 117-18) Udell believed that he and Leo discussed what Leo was going to be asked during his deposition, but the deposition contained a statement by Leo (Defense Ex. 7) to the effect that Udell did not know what he was going to testify to. (R. Vol. II, pp. 119-22) Udell explained that Leo was just trying to make the point that Udell had not told him what to say. (R. Vol. II, p. 122) He could not recall whether Leo had personal knowledge about the alibi

defense. (R. Vol. II, pp 123-25) He had to be reminded that Mrs. Brown testified for the state. (R. Vol. II, pp 124) He admitted that the defense theory of the case was that Spann was in the back house at the time of the homicide. (R. Vol. II, pp. 128) He was shown a series of photographs (Defense Ex. 8) that he had taken and that were presented during the trial to show that it was possible that Spann could have been in the back house unnoticed by Mrs. Brown on November 14, 1997. (R. Vol. II, pp. 128-30) Udell acknowledged that Philmore was the only person who testified at trial that Spann was present when Mrs. Perron was shot. (R. Vol. II, pp. 132-33) He also agreed that the prosecutor used Mrs. Brown's testimony in his closing argument to refute the alibi defense. (R. Vol. II, pp. 136-38)

As far as cross-examining Philmore was concerned, Udell said that he obtained all his pretrial statements. (R. Vol. II, p. 140) He acknowledged that in a November 19, 1997, statement, Philmore said that he was using cocaine at the time of the homicide. (R. Vol. II, pp. 140-41) Yet Udell made no reference to this admission in his cross-examination of Philmore. (R. Vol. II, p. 141-44) Also, Philmore said in the statement that testifying against Spann would benefit him, yet Udell thought that Philmore testified in order to get back at Spann for stating that he was stupid, or words to that effect. (R. Vol. II, p. 139-41) Again, Udell admitted that he did not bring up this issue on cross-examination. (R. Vol. II, pp. 141-42) Udell acknowledged that in one statement, Philmore said that he never

intended to hurt Mrs. Perron, that Spann never touched her and that nothing was discussed as to what was going to happen to the victim. (R. Vol. II, p. 142) In a later statement, Philmore said that Spann shot Mrs. Perron and told Philmore to throw her in the water. At another point Philmore said that he did not see blood in the car, and then later in another statement said that he did. Finally, in his last pretrial statement, Philmore contended that Spann was the mastermind behind the entire episode. (R. Vol. II, p. 143) Udell's response was that, as a matter of strategy, it became more and more clear in through Philmore's various pretrial statements that Philmore admitted greater and greater responsibility for what had happened and, therefore, Udell did not attack the inconsistent statements. (R. Vol. II, p. 144)

Udell stated that he saw nothing objectionable about the prosecutor's reference to Spann's grandmother in the closing argument. (R. Vol. II, p. 145) He said it was possible that he had advised Spann to write Philmore while they were in jail in an effort to draw him (Philmore) out about his involvement in the homicide and other offenses. (R. Vol. II, p 146) Udell indicated that Spann's decision not to testify was his own. (R. Vol. II, pp. 146-47)

On cross-examination, the prosecutor brought out Udell's extensive experience in capital litigation in the 19th judicial circuit. (R. Vol. II, pp. 149-50)

As far as how the alibi defense was handled in general and Udell's decision not to call Leo Spann as a witness in particular was concerned, Udell agreed that Mr. Perron (the victim's husband) testified that he last saw his wife alive about 15 to 20 minutes before 1:00 p.m. on November 14, 1997, as she was leaving their residence in West Palm Beach. (R. Vol. II, p. 152) Spann had given a recorded exculpatory statement to law enforcement that contained an alibi, and Udell wanted to let that go in evidence so that Spann would not have to take the witness stand and face cross-examination. [2] (R. Vol. II, pp. 151-52) Spann agreed to this strategy. (R. Vol. II, p. 153) In the statement, Spann said that Philmore came to his aunt's house between noon and 1:00 p.m on the 14th and picked him up in the gold Lexus. (R. Vol. II, p. 154) Udell could not remember clearly, but he stated that if in fact Leo Spann stated that he had not seen Anthony at all on the day of the murder of Mrs. Perron, this would be a strong reason not to call him to the witness stand. Similarly, if Leo had at no time seen Anthony in a gold Lexus, this would have added to Udell's reason not to call him as a witness. (R. Vol. II, p. 156) Later in the deposition, Leo said that he saw Anthony on the 14th possibly between 2:00 and 3:00 p.m., although it could have been an hour earlier or later. (R. Vol. II, pp. 157-58) Udell stated that he took pictures of Mrs. Brown's residence. (R. Vol. II, p 158) He also participated in the deposition to perpetuate the testimony of Mrs. Brown. Udell felt that her testimony did not help the defense, and the state

was going to try to use it to discredit the defense's alibi argument. (R. Vol. II, p 159) Thus, Udell tried to neutralize the effects of Mrs. Brown's testimony by asking her if she knew whether or not Anthony was living at the residence at the time of the homicide, and she said that she did not know that. (R. Vol. II, p. 160) And since Mrs. Brown could not say one way or the other whether Anthony was there on the 14th, Udell saw no reason to attack her recall. (R. Vol. II, p. 161) Udell clarified the matter for the court by noting that, as Mrs. Brown understood it, Anthony was living in the back house at the time, but she did not know whether or not he was there on the 14th. (R. Vol. II, pp. 161-62) However, when her deposition was read into the record, Mrs. Brown seemed to be saying that Anthony was not living there at all at the time of the homicide. (R. Vol. II, pp. 163-65)

Udell said that Philmore indicated by his testimony that he was not going down alone. (R. Vol. II, p. 166) Udell added that several witnesses corroborated the state's claim that two black males had robbed a bank in Indiantown and another bank near the site of the abduction of Mrs. Perron. (R. Vol. II, p. 166-67) In an effort to refute that testimony, Udell did not object to Spann's custodial statement (that he was at Mrs. Brown's residence in the early afternoon of November 14, 1997) coming into evidence -- a statement that he felt was reinforced to some extent by the testimony of security guard Majorczak to the effect that one of the persons in the car (near the Indiantown Bank robbery scene) was a female. (R.

Vol. II, p. 167) Udell said that he went over all of Philmore's pretrial statements carefully. (R. Vol. II, p. 168) He reiterated that he felt it was best to let these statements come into evidence without comment since Philmore ended up implicating himself more and more each time he changed his story. (R. Vol. II, p 168-72) Udell said he brought out on cross-examination that Philmore was a convicted felon and a drug addict, had committed a bank robbery before killing Mrs. Perron, and had made an earlier statement that he was afraid of Spann, a statement that Udell found inconsistent with their relative sizes. (R. Vol. II, p. 173-75) He tried to fit Philmore's version of the timeline into Spann's version and pointed out that Philmore was facing the death penalty and trying to obtain mitigation by testifying against Spann. (R. Vol. II, pp. 175-76)

With regard to how the penalty phase was handled, Udell said that normally he would bring out absolutely everything in mitigation that he possibly could. (R. Vol. II, p. 176-77) He tried to convince Spann to let him put on a mitigation for him during the penalty phase. (R. Vol. II, p.178) He hired Dr. Petrilla for this purpose, but Spann did not want to proceed in that fashion. (R. Vol. II, pp. 182, 188-89) He was not aware that Spann was on antidepressants, if in fact he was. (R. Vol. II, p. 184) Had Spann told him about this, Udell probably would have referenced it as mitigation. (R. Vol. II, p. 185) Spann told him about a head injury he had sustained in a car accident but apparently it was not serious enough

to warrant treatment. (R. Vol. II, p. 184) He interviewed Spann's family members in Tallahassee and West Palm Beach regarding mental health mitigation. (R. Vol. II, p. 185-86) They obtained Spann's school records in this regard well before trial. (R. Vol. II, p. 186-87) Spann never expressed dissatisfaction with his representation. (R. Vol. II, p. 194) He said that there just was not much mental health mitigation to present to the jury. (R. Vol. II, p. 195) Spann was clearly competent to stand trial and assist him. (R. Vol. II, p. 197)

Udell noticed nothing unusual about the composition of the jury. (R. Vol. II, p. 199)

Udell could not recall why he did not mention that Spann was HIV-positive. (R. Vol. II, p. 179) He discussed with the client whether Spann should testify. Spann himself made the decision not to do so. (R. Vol. II, p. 181)

Leo Spann is the defendant's brother. (R. Vol. III, p. 275) He moved in with Mrs. Brown at 1102 Adams Street in West Palm Beach prior to the homicide. (R. Vol. III, pp. 275-76, 282) Mrs. Brown had a poor memory, and her daily routine consisted of watching television. (R. Vol. III, pp. 275, 283) Leo learned that his brother had been arrested when he saw him on the evening news on November 14, 1997. (R. Vol. III, p. 276) Mrs. Brown saw him on television too, but she did not recognize him. (R. Vol. III, p. 277) Leo met Udell when Udell came down to take pictures of the house, and Udell called Leo on several occasions. (R. Vol. III, p. 278) Udell drove Leo to his deposition but did not discuss the case or Leo's deposition with him. (R. Vol. III, p. 279-80) On another occasion, they discussed the fact that Spann showed up at Leo's residence on November 14, 1997. (R. Vol. III, p. 280) During his deposition, Leo testified that Anthony was at the Brown residence between 2:00 and 3:00 p.m. on the 14th, but at the March 30th hearing, he testified that had misspoken at the deposition because he had not understood the question. He stated that Anthony had actually come earlier between 1:00 and 2:00 p.m. (R. Vol. III, p. 281) It was quite possible that Mrs. Brown would not have seen someone go to the back house because she was watching television, was not focused on her surroundings and had memory problems. (R. Vol. III, p. 283-84)

On the morning of November 14th around 9:00 or 10:00 a.m., Leo saw lights on in the back house behind the residence. (R. Vol. III, p. 285) About 1:00 or 2:00 p.m. the same day, he saw Anthony when Anthony went through the fence and walked past the window towards the back house. (R. Vol. III, pp. 287-88, 302) Later, Anthony came into the front house and used the phone that was located in the kitchen, in the back of the house. (R. Vol. III, pp. 288) Leo told Mr. Udell about this. (R. Vol. III, p. 290) Later that day, Leo saw a car resembling a gold Lexus parked outside. (R. Vol. III, pp. 291, 290) Anthony went out to the car, and Leo heard the car drive away. (R. Vol. III, p. 291) Udell told Leo that he wanted him to testify but never called him to do so. (R. Vol. III, p. 293) Udell later explained that as Anthony's brother, Leo's testimony would not be believed. (R. Vol. III, p. 294) Leo noted that his mother was very sick when he and Anthony were in their teens. (R. Vol. III, p. 295)

On cross-examination, Leo acknowledged that he had previously testified that he saw Anthony on the 14th between 2:00 and 3:00 p.m., and in response to a question from Mr. Udell had added that he was sure about this time frame. (R. Vol. III, p. 298) He saw the gold car on the 14th around 2:00 p.m. (R. Vol. III, pp. 301-02)

Fred Petrilla is a psychologist. (R. Vol. IV, p. 313) In the past, Udell had retained Petrilla to evaluate defendants in death penalty cases. (R. Vol. IV, p. 316) Petrilla was retained to conduct an evaluation of Spann's intelligence, memory skills, and personality dynamics. (R. Vol. IV, p. 316, 325) Petrilla was not able to complete the evaluation in February 2000, so he tried again on March 14 of that year. (R. Vol. IV, pp. 317, 321) However, Spann refused to cooperate. (R. Vol. IV, p. 317) Prior to that day, Dr. Petrilla had met with Udell to review Spann's mental health records. (R. Vol. IV, pp. 318, 334) Those records were later destroyed in a hurricane. (R. Vol. IV, p. 319) Petrilla did his best to get Spann to cooperate, but to no avail. (R. Vol. IV, p. 320) He could not recall the guidelines established by the American Psychological Association or the Florida Psychological Association regarding standard practice when a patient will not cooperate in testing . (R. Vol. IV, p. 324) He was only able to complete a few hours of testing with Spann. (R. Vol. IV, p. 327)

On cross-examination, Dr. Petrilla testified that he had not spoken to Dr. Bill Mosman, the mental health expert who testified for the defense in the post conviction proceedings. (R. Vol. IV, p. 330) He did not think that Spann was so depressed that he could not cooperate with his attorneys at trial. (R. Vol. IV, p. 330-31, 338) Spann appeared to be intelligent and not suffer from any mental illness. (R. Vol. IV, p. 336-37) Nor was he incompetent. (R. Vol. IV, p. 339)

Petrilla reported Spann's uncooperativeness to Udell, and Udell later asked Petrilla to cease his efforts. (R. Vol. IV, p. 332) Petrilla testified that being convicted of murder and sentenced to death row may have caused Spann to suffer adjustment disorder, anxiety, and depression. Under these circumstances, Petrilla was not surprised by Spann's poor mental condition. (R. Vol. IV, p. 339-40)

Yolanda Spann, Anthony Spann's sister, testified that their mother became gravely ill when Anthony was about 11. She was ill for about two years. (R. Vol. IV, p. 361) This made things very difficult for the children since their father had been killed when Anthony was about one. (R. Vol. IV, p. 363) The children had to split up for awhile. (R. Vol. IV, p. 364) Yolanda was living in Tallahassee at the time of the offenses committed in this case. (R. Vol. IV, p. 367) She never met either Udell or Little. Nor did she speak with them. (R. Vol. IV, pp. 367-368, 380) Nor did she speak to their investigator. (R. Vol. IV, pp. 368) Yolanda remembered that someone, possibly from the police station, took a deposition or statement from Mrs. Brown. (R. Vol. IV, p. 369) Yolanda knew that Mrs. Brown had been in an auto accident and could not drive safely. (R. Vol. IV, p. 370-71) Yolanda's mother felt that Mrs. Brown could not take care of herself, so Leo moved into an efficiency behind Ms. Brown's house on Adams Street to care for her. (R. Vol. IV, p. 371) Anthony would sometimes stay with Leo in the back house. (R. Vol. IV, p. 371-72) Yolanda's mother arranged for care services such

as Meals On Wheels to visit and help Mrs. Brown, as she had difficulty taking care of herself. (R. Vol. IV, p. 373) Yolanda's family also had Dr. Scanameo examine Mrs. Brown. Yolanda worked with Dr. Scanameo as a licensed practical nurse. (R. Vol. IV, p. 375)

On cross-examination, the prosecutor attempted to make the point that Yolanda and Leo were brought up under the same conditions as Anthony, yet they had not had trouble with the law. Yolanda acknowledged that she did not have a criminal record, but she was not sure about Leo. (R. Vol. IV, p. 377) She testified that Anthony had an extensive criminal history that began when he was about 14. (R. Vol. IV, p. 378)

Dr. Andrew Scanameo is a medical doctor who specializes in geriatrics. He saw Mrs. Willie Alma Brown as one of his patients. (R. Vol. II, p. 220) Mrs. Brown's medical record was admitted as Defense Ex. 10. She suffered from significant dementia at the time that Dr. Scanameo examined her in August and September, 2000. (R. Vol. II, pp. 221-22) Mrs. Brown's dementia greatly impaired her short term memory. (R. Vol. II, p. 222) Dr. Scanameo's findings in August of 2000 indicated that Mrs. Brown suffered from dementia for some six years and that her dementia was a serious case. (R. Vol. II, p. 223)

On cross examination, Dr. Scanameo acknowledged that his report also indicated that Mrs. Brown was alert and oriented "times three." Additionally, her "recent and remote memory (was) intact." (R. Vol. II, p. 224) However, Dr. Scanameo explained that his "overall impression (of serious dementia) overrules the physical exam . . ." (R. Vol. II, p. 225) He added that Yolanda Spann worked with him as a nurse. (R. Vol. II, p. 226)

Mrs. Willie Alma Brown recalled that the defendant is her nephew. (R. Vol. II, p. 232) She thought that she was living on Adams Street back in 1997. (R. Vol. II, p.232) Anthony would come and visit her back in 1997 at this address. (R. Vol. II, p. 233) He would stay in the back house when he visited. (R. Vol. II, p. 233-34)

Rory Little, Esq., was Spann's co-counsel, responsible for preparation of the penalty phase of the trial. (R. Vol. III, pp. 241-42) He did not participate in researching the ethnic makeup of the jury. (R. Vol. III, p. 244) After he was convicted, Spann told him that he did not want mitigating evidence presented. (R. Vol. III, pp. 244, 271) Udell told him to prepare for the mitigation phase anyway in order to present same to the judge. (R. Vol. III, pp. 245, 272-73) He contacted family members and looked for medical and school records. (R. Vol. III, p. 245) Udell retained Dr. Petrilla out of an abundance of caution since Spann contended

that he had no involvement in the kidnapping and murder. (R. Vol. III, p. 246) He did not consider retaining another mental health expert since Spann would not cooperate with Dr. Petrilla. (R. Vol. III, p. 247) He did not speak to Dr. Petrilla. (R. Vol. III, p. 247-48) He met with Spann. (R. Vol. III, p. 249) He did not know at the time that Spann was HIV-positive. (R. Vol. III, pp. 247-49) He had a discussion with Spann about his prison and jail records, but did not pursue it beyond that since Spann did not want him to and he did not have time to do so. (R. Vol. III, pp. 250-51) His sentencing memorandum did not include Spann's work records or the fact that Spann's father was shot when Spann was very young. (R. Vol. III, p. 251) He did not pursue mental health mitigation after Dr. Petrilla stopped his work. Nor did he give this doctor any of Spann's medical records. (R. Vol. III, p. 254) He did not pursue the fact that Spann's mother was ill although he may have spoken with her. (R. Vol. III, p. 255) He attended a life-over-death seminar when he was employed by the public defender's office. (R. Vol. III, pp. 255-57) He did not recall every speaking to Leo Spann. (258) He did not prevent Dr. Petrilla from looking at Spann's mental health or medical records. (R. Vol. III, p. 260)

On cross-examination, Little said that he interviewed various members of Spann's family in Tallahassee, and West Palm Beach. (R. Vol. III, p. 261) He did not sit down with Spann to learn of his life history. He got that from Udell. (R.

Vol. III, p. 262) He recalls encouraging Spann to let them put on mitigating evidence, but Spann refused. (R. Vol. III, pp. 264-65) He recalled that Spann resisted having a pre-sentence investigation report done. (R. Vol. III, p. 265) Spann did not tell him that he was HIV-positive. (R. Vol. III, p. 266) Spann did not complain about the quality of his legal services. (R. Vol. III, p. 266) He did not indicate that he lacked the ability to communicate with his lawyers or act like he was irrational. (R. Vol. III, p. 267)

Bill E. Mosman, Ph.D., was allowed to testify as an expert in the field of forensic psychology. (R. Vol. IV, p. 387) He attempted many times to secure the records of Dr. Petrilla, who examined Mr. Spann, but in the end was unable to because they were destroyed in a hurricane. (R. Vol. IV, p. 393) Dr. Petrilla did not complete his exam because Mr. Spann would not cooperate with him. (R. Vol. IV, p. 394) Dr. Mosman testified that in researching the file, he realized that Spann's school records were never requested and never procured byDr. Petrilla, which was very important for a complete evaluation. (R. Vol. IV, p. 411) He also found that despite Spann being incarcerated at Martin County Jail for two years, there were no custody/medical/psychiatric reports or records from there because none were requested. (R. Vol. IV, pp. 412, 413) Despite the existence of some juvenile psychological reports, they were not in the file either, nor any reports from the Department of Children and Families, nor any interviews with family members.

(R. Vol. IV, p. 413) There were no documents in the file regarding a crime in Tallahassee with which Mr. Spann was charged, nor any evidence of any correspondence between trial counsel and Dr. Petrilla. (R. Vol. IV, p. 414) The only medical documentation in trial counsel's file as of March 27, 1998 was the autopsy report on the victim and a juvenile criminal history. (R. Vol. IV, pp. 415, 416) There were no psychiatric or psychological evaluations in trial counsel's file from the time Mr. Spann was in county jail (R. Vol. IV, p. 418), but Dr. Mosman was able to get those documents. (R. Vol. IV, p. 419)

As to Spann not communicating his reasons, thoughts and feelings, Dr. Mosman said there was no difficulty on Spann's part. It was just that no one had inquired. (R. Vol. IV, p. 419) Although Spann stated that he did not want to settle for a life sentence, his underlying reason was not investigated. (R. Vol. IV, p. 419) When Spann was asked by the Court, "Are you on any medication?", he replied, "Presently, no." (R. Vol. IV, p. 420) Spann was prescribed psychotropic medication by the jail, but he stopped taking it for a while before this question, which was a part of his downhill deterioration. (R. Vol. IV, p. 420) The jail records were clear that he exhibited withdrawal and hopelessness for a month, coinciding with his refusal to take his psychotropic medication. (R. Vol. IV, pp. 420, 421) Dr. Mosman stated that Spann's reasons for not taking his medication were not out of

disappointment and rage, as the trial judge implicated, but out of a history of depression, as documented by the psychiatrist and the medical personnel. (R. Vol. IV, p. 421)

Within twelve hours of arriving at Florida State Prison, the officials determined that Spann needed psychiatric attention and called in a psychiatrist and within twenty-four hours, Spann was on medication and cooperating. (R. Vol. IV, p. 438)

Being upset or depressed is not the engine[7] that operates decision making, according to Dr. Mosman. In Spann's case, his depression, untreated and in conjunction with the other factors which took place, led to surface decision making without the normal careful weighing of consequences. (R. Vol. IV, pp.440, 441)

One of the statutory mitigating factors, the age of the defendant, was presented as to his physiological age only. (R. Vol. IV, p. 443) Given his history, it would be accurate to say that his emotional age froze at about 12 or 13. That was the level of his ability to trust other people and the level at which he functioned as an adult man. (R. Vol. IV, p. 444) This was Spann's age when his father was shot. His mother was left with two children to care for. She was

[7] Dr. Mosman often employees terms and words indigenous to the field of psychology.

seriously ill with Myasthenia Gravis, a genetic disease which kills thirty percent of the people afflicted with it. (R. Vol. IV, p. 445) She had been hospitalized and had several serious surgeries. Spann was responsible for her care and, according to his sister, was afraid of being the cause of her death. (R. Vol. IV, p. 445) This was when Spann began skipping school and becoming involved with the wrong crowd. (R. Vol. IV, pp. 448, 449) When Spann was fourteen, he ran drugs for others to make money. (R. Vol. IV, p. 449)

The only non-statutory mitigator presented was that Spann was a good person up to a point. (R. Vol. IV, p. 450) The fact that Spann's father was shot to death was an important non-statutory mitigating factor not raised by trial counsel, but discovered by the judge. (R. Vol. IV, p. 442)

Mosman concluded that Spann had ineffective assistance of counsel on the issues of the knowledge prong, and on the fourth prong, the competence to be sentenced. A person facing a death sentence requires more than a few simple tests as administered by Dr. Petrilla in order to reach an accurate mental health evaluation. (R. Vol. IV, pp. 457, 458)

Mosman stated that under Koon, the attorney is obligated to fully investigate the mitigating factors, not just name them for the judge. (R. Vol. IV, p.461)

Mosman argued that the person who can best determine Spann's capacity is the one who knows the most about his mental illness and his medication situation, not someone who knows nothing about mental illness and has taken no trouble to figure it out. (R. Vol. IV, p. 466)

Someone with situational depression associated with being HIV-positive or facing a death sentence is capable of waiving mitigation. (R. Vol. IV, p. 467)

Dr. Mosman said that the judge went beyond the minimum required in asking the defendant about his medication, because counsel did not inform the court that he was supposed to be on medication. (R. Vol. IV, pp. 468-69)

Though Spann did not offer help on the presentence investigation report, the attorneys also did not provide any material which could have helped him. (R. Vol. IV, pp. 469, 470) It was not until the third hearing when the judge asked Mr. Little directly about pertinent records, that Mr. Little admitted, "You Honor, we never got them." (R. Vol. IV, pp. 421, 422)

Dr. Mosman conducted his personal evaluation of Spann in January of 2005. (R. Vol. IV, p. 424) After extensive testing, Dr. Mosman concluded that Spann's functional behavior and decision making were controlled by his depression. (R. Vol. IV, p. 426) The issue of his competency for sentencing was never clinically

assessed. (R. Vol. IV, p. 427) and instead, at the May 25, 2000 hearing, Mr. Udell, answered the judge on the issue of the defendant's competency by stating: "We attorneys decided that ourselves." (R. Vol. IV, p. 428)

In Dr. Mosman's opinion, Spann's waivers were not knowingly given. (R. Vol. IV, p. 429) The Florida Rules of Criminal Procedure gives mental health clinicians six steps or procedures to evaluate a defendant. (R. Vol. IV, p. 429) Under those guidelines, Spann was too impacted by depression to be able to interact with and to express himself to his attorneys. (R. Vol. IV, pp. 429, 430) Spann suffered from two types of depression: situational reactive and a superseding depressive disorder. (R. Vol. IV, p. 430)

Dr. Mosman explained the difference between being able to function/pass the intelligence prong of a psychological exam, but not the knowledge prong. (R. Vol. IV, p. 435) The intelligence prong is met, but the understanding of consequences, the knowledge prong is not. (R. Vol. IV, p. 437) Spann exhibited hopelessness and abject depression causing Dr. Frank at Florida State Prison to write in this regard: "I think I'm concerned this guy is trying to commit suicide with what he's doing in here." (R. Vol. IV, p. 436)

On cross examination, Mosman clarified that the medical records from the Martin County Jail were the documents defense counsel should have tracked down,

because FSP did not have any (R. Vol. IV, p. 472) and it was incumbent on counsel to find out what the psychiatric status of their client was for the past year and a half. (R. Vol. IV, p. 473) He clarified that there are two sets of documents on inmates, custody records and medical records, and policy requires that they be kept separately. (R. Vol. IV, p. 473) The records counsel had from Martin County Jail were the custody records, which did not mention depression issues or prescriptions recommended. (R. Vol. IV, p. 473) Through comparing various records, Mosman believed the defendant was prescribed anti-depressants in December 1997 to January 1998, relating to the news he received confirming that he was HIV positive. (R. Vol. IV, p. 474-476)

Mosman's basic point was that documentation existed, but was not explored nor presented that were necessary to adequately evaluate the issue of competency. (R. Vol. IV, p. 545-546) Secondly, had the defendant been on his medication, he would have been stabilized and his decisions more acceptable. (R. Vol. IV, p. 547) Had he refused his medication, a mental health practitioner/clinician could have conducted interviews with him, and background records could have been secured. (R. Vol. IV, p. 548) Had this been done, a more meaningful presentation could have been made. (R. Vol. IV, p. 548) In a death penalty case, the pursuit of such information should be expected. (R. Vol. IV, p. 550)

SUMMARY OF THE ARGUMENT

The trial court erred in rejecting Spann's claim that he was denied effective assistance of trial counsel by failing to present a strong, viable alibi defense. Leo Spann could have testified that Anthony was with him at Mrs. Willie Alma Brown's residence in West Palm Beach at the time Anthony was supposedly in the process of abducting and causing the death of Mrs. Perron many miles away. Trial counsel compounded the deficient conduct by failing to challenge Mrs. Brown's testimony to the effect that Anthony was most certainly not at her residence on the early afternoon of November 14, 1997. The defendant suffered prejudice as a result of the ineffectiveness because the prosecutor was able to argue that Spann essentially had no alibi defense other than the supposedly self-serving information that he provided law enforcement shortly after his arrest. The jury was also deprived of available evidence (from Yolanda and Leo Spann and from medical professionals) that Mrs. Brown suffered from dementia at the time and did not know for sure whether Anthony was at her residence or not on the date in question.

Defense counsel was also ineffective for failing to vigorously impeach the state's key witness, Lenard Philmore, based upon Philmore's repeated lies and self-serving misstatements made to law enforcement prior to trial. Spann suffered prejudice because the prosecutor was able to argue to the jurors that they should

believe Philmore precisely because his testimony had not been impeached in any material way.

Nor did trial counsel advise the defendant of the quantity and qualify of mitigating circumstances that could have been presented to a penalty phase jury before obtaining Spann's waiver of the right to present it. This was prejudicial to Anthony because, had he known all the facts, he most certainly would not have agreed to waive a full penalty phase proceeding. He suffered prejudice because he lost his rights under Section 921.141, Florida Statutes, in this regard.

Finally, Spann's counsel deprived him of a full and fair penalty phase proceeding by failing to gather the extant evidence of mental health mitigation. Spann suffered prejudice in this regard because, had trial counsel obtained this information and provided it to Dr. Petrilla and other mental health professionals, a very strong case for a life recommendation could have been made. This available mitigating evidence would have outweighed the statutory aggravating circumstances and left the trial court with no other choice but to sentence Spann to life, not death.

ARGUMENT

Point I: The trial court erred in rejecting Spann's claim that he was denied constitutionally effective assistance of counsel during the guilt/innocence phase of the state court trial.

Standard of Appellate Review

This is a post conviction capital case involving mixed questions of fact and law. As such, the final order of the circuit court denying Spann's Florida Rule of Criminal Procedure 3.851 motion for post conviction relief is entitled to plenary, *de novo* review, except that findings of fact by the trial court are entitled to deference so long as there is competent and substantial evidence in the record to support them. *Johnson v. State*, 789 So. 2d. 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996). As this Court stated in *Nixon v. State*, 857 So. 2d 172, 175, f. 7 (Fla. 2003):

> Generally, our standard of review following a denial of a 3.850 claim after holding an evidentiary hearing affords deference to the trial court's factual findings. "As long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *McLin v. State*, 827 So. 2d 948, 954 n. 4 (Fla. 2002) (quoting *Blanco v. State*, 702 So. 2d 1250, 1252 [Fla. 1997]).

In order to sustain a claim of ineffective assistance of counsel in a criminal case, ". . . 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 by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Merits

A. Trial counsel failed to present an available alibi witness, failed to rebute the state's effort to weaken the alibi defense, and failed to object to the prosecutor's bolstering of the testimony of Mrs. Willie Alma Brown. (Claims 4 And 8 Of Spann's Rule 3.851 motion as amended.)

The Ineffectiveness

The failure to present available evidence that the defendant had a solid alibi at the time of the commission of the most serious crime charged in the indictment -- in this case, the abduction and murder of Mrs. Perron beginning at about 1:00 p.m. on November 14, 1997 -- can constitute ineffective assistance of counsel. *Happ v. State,* 922 So. 2d 182 (Fla. 2005); *Nelson v. State,* 875 So. 2d 579 (Fla. 2004*); Peters v. State*, 844 So. 2d 699, 700 (Fla. 4th DCA 2003). Spann had such an alibi. He claimed in a recorded pretrial statement obtained by law enforcement and presented to the jury that on the early afternoon of November 14, 1997, he was at his great aunt Mrs. Willie Alma Brown's residence at 1102 Adams Street in West Palm Beach, Florida, and that he had nothing to do with the Perron abduction and homicide, including the theft of her Lexus automobile. (*See* Spann's

statement, state's Ex. 64 in evidence in the state court trial, OR Vol. XVII, pp. 2816-42.)

Spann's statement, standing alone, was dismissed by the prosecutor as weak and self-serving (the "alibi doesn't hold water," OR. Vol. XXIX, p. 3044). Obviously, like any alibi, it would be much stronger if it could be corroborated.

Leo Spann saw Anthony go into the back house owned by Mrs. Brown on November 14, 1997 at 1102 Adams Street, West Palm Beach, Florida, between the hours of 1:00 and 2:00 p.m. (R. Vol. III. pp. 281-82, 287). This is virtually the exact same time that Anthony was supposed to have been with Philmore many miles away on New Calkins Grove Road west of Indiantown directing him to shoot Mrs. Perron, according to the prosecutor. (OR. Vol. XXIX, pp. 3038-41) The prosecutor, in his closing argument stated in this regard:

> Distance and times according to Philmore, the physical evidence. 8723 Southeast Elizabeth Avenue, Lake Park, Florida . . . There are three points. *There's the abduction at one o'clock. Now look, one o'clock, 12:58, 1:02, in that area.* Give or take minutes. I mean people are not exact . . . One o'clock, abduction; bank robbery, 1:58. What has to happen between the bank robbery and time of the abduction? Okay. You've got to have the time to abduct her. You've got to have the time to drive through Indiantown, west of Indiantown, New Calkins Grove Road. *Order Kazue Perron out of the car, shoot her in the head, throw her body in the ditch, get back in the car, drive back to Indiantown, stop at the little store, scope out the bank, ditch the car, take the Subaru back to commit the bank robbery at 1:58. That gives you 58 minutes. It takes you 33 minutes to get from the site of the abduction to the scene of the murder. Assuming the murder occurs instantaneously; that is, there is no time spent at the murder*

scene, not even a minute . . . It takes seven minutes to get back to New Calkins Grove Road to the pump station where the Subaru is ditched. Assuming no time to transfer cars; that is, you're jumping out, you're moving. I mean, everything is happening in a continuous stream of events. That's 40 minutes. One minute to the bank, that's forty -one minutes. From one o'clock that would be 1:41.

Now, let's add in some times. Let's add in the time it takes to stop on the side of the road. "Take the b_____ to the bank," says Anthony Spann. And they steal the wedding rings, they steal the woman's wedding rings. Drive to New Calkins Grove Road, commit the murder, add those minutes in and you go from 41 minutes to what? *Very close to the 58 minutes as necessary to make the -- commit the abduction, the murder and the bank robbery. Very consistent. Very tight time line. From the First Bank of Indiantown, the pump station, one more minute back. Then from the pump station to Toya's house in Riviera Beach, 31 minutes. So that takes us -- we know that we've got the bank robbery at 1:58.* Let's say they're back to the Famel Street, scene of the Subaru at two o'clock. 31 minutes later they end up where? 31 minutes later, going with the flow of traffic, they end up where? Remember, you're driving down 95, then you're getting off in a residential area. When you're stopped at a stop sign or a stop light you're not traveling approximately 80 miles an hour, you're stopped. So your average speed is going to be less when you're going through a city, obviously. As well as when you're passing cars or stuck behind a slow car.

But where does that put them, according to this time line, at 2:31? Toya's house. Toya's house. And what do we know? We know that Kiki gets a page at what 2:28. Almost exact. In fact, they had to be moving to make it there by 2:28. And that's exactly what Philmore says. He says, "You know, I have thought it was 15, 20 minutes. We were smoking." And they went right to Toya's house.

Philmore says they drive directly to Toya to pick her up. Toya says they arrived somewhere around 2:30, three o'clock. She's right on the low end because we know Kiki gets her page at 2:28, and they're picking KiKi up at 2:36. Philmore says the car case starts at -- we know the car case starts at 3:15. He says that's about 40 minutes, 45

> minutes after we go to Toya's, didn't he? And what's that make it? That makes it at Toya's at 2:30.
>
> Now, so the time line is consistent with Philmore's testimony.

(OR. Vol. XXIX, pp. 3038-41, emphasis added.)

Leo had knowledge of details regarding Spann's alibi. He was aware that there were two structures on Mrs. Brown's property; a front house and a smaller back house. (R. Vol. III, p. 282) Electric power for the back house was supplied by a cord running from the front house. (R. Vol. III, p. 285) Leo had been living at Mrs. Brown's residence in the front house since about 1995 or 1996. (R. Vol. III, p. 275) He did so because her health, especially her memory, was failing and she needed his help paying bills and doing other things for her. (R. Vol. III, p. 276) There was an open door policy at the residence for family members and, among other things, Anthony often got mail sent there. (R. Vol. III, p. 284)

Leo noticed that the lights were on in the back house around 9:00 or 10:00 a.m. on November 14, 1997. (R. Vol. III, p. 285) That meant that someone was there. (R. Vol. III, p. 286) That someone, according to Leo, was Anthony Spann. When Leo saw Anthony come through the fence at between 1:00 and 2:00 p.m., he (Anthony) was walking past a window. (R. Vol. III, pp. 287-88) Anthony did not say anything to Leo. (R. Vol. III, p. 287-88) Leo recalled that Anthony actually

came into the front house to use the telephone that was located in the kitchen. (R. Vol. III, pp. 288-89) Anthony stayed at the Brown residence for about ten to fifteen minutes. (R. Vol. III, p. 290) He then apparently left in a gold Lexus that was parked outside. (R. Vol. III, p. 290-92) Despite having this detailed knowledge at his fingertips, Udell did not call Leo to the witness stand.

Udell's offered no valid reason for not calling Leo as a witness. Leo's testimony was critical to directly contradict the prosecutor's tight time line which had no direct eye witness to the shooting of Mrs. Perron other than a self-interested co-defendant (Philmore) whose credibility was virtually nonexistent. Udell acknowledged that his practice was to use any witness who could help the defendant since "juries don't listen to us (referring to counsel) anyway." (R. Vol. II, p. 124)

It should be noted in this regard that none of the credible state witnesses (that is, the state witnesses other than Philmore, Sophia Hutchins and Keyontra Cooper) identified Spann as participating in the bank robberies or the theft of Mrs. Perron's Lexus. Mr. Perron last saw his wife leave their West Palm Beach home around 12:40 or 12:45 p.m. on the 14th driving her gold Lexus. (OR. Vol. XXII, pp. 2214-19) She was to drive approximately 15-20 minutes to visit a friend who lived at 8273 Southeast Elizabeth Avenue. (OR. Vol. XXII, pp. 2219-21) At

around 1:00 p.m., Martha Solis was returning to her employer's home on Elizabeth Avenue. (OR. Vol. XXII, pp. 2226-27) Solis saw an old blue car, and in it was a black male whose skin was not very dark. (OR. Vol. XXII, pp. 2229-30) She saw a big black man with a big gold chain running from a red house. (OR. Vol. XXII, pp. 2230-31) She also saw a Lexus behind her. (OR. Vol. XXII, p. 2230) Ms. Solis could not identify the driver, but saw that there was a woman in the Lexus which she described as ". . . kind of yellow. And dark hair, and short." (OR. Vol. XXII, p. 2231) At around 2:00 p.m., near the scene of the Indiantown bank robbery, Lyle Linsley encountered a blue Subaru and a Lexus being driven erratically. She could not identify either driver. (OR. Vol. XXII, pp. 2242-49) At 1:58 p.m., Cathy Donnely saw Philmore (but not Spann) commit the bank robbery, then get into the passenger side of a blue car. (OR. Vol. XXII, pp. 2265-70)

Thus, when all was said and done, the jury had to decide whom to believe, either Philmore or Anthony, because only Philmore could put Anthony at the scene of the homicide.[8] Leo could have broken that tie. But there is more that Leo could

[8] Sophia Hutchins and/or Keyontra (Kiki) Cooper implicated Spann in the auto theft and some of the bank robbery/pawn shop activity, but they were hardly credible witnesses. The credible witnesses such as Martha Solis, Michael Buss, Lyle Linsley and Cathy Donnely could not identify Spann as being in the pawn shop, the banks, the Subaru or the Lexus.

have done to assist his brother regarding Anthony's whereabouts in the early afternoon of November 14, 1997.

At trial, the state presented the testimony of Mrs. Willie Alma Brown to attack Anthony's alibi. (OR Vol. XXVIII, pp. 2884-2900) Mrs. Brown, who was at the time eighty-years old, testified by a recorded video deposition. She stated emphatically that Mr. Spann did not stay or visit her at her home on 1102 Adams Street in West Palm Beach, Florida. She asserted in this regard:

> Q. Okay. Back in November of 1997, Ms. Brown, did the Defendant stay with you at your house?
>
> A. No, Tony never stayed there. He never did.
>
> Q. When you say he never stayed there, you mean he never stayed at your house ever?
>
> A. *Never. He never stayed at my house*.

(OR Vol. XXVIII, p. 2889, emphasis added.)[9]

It was critical that Udell vigorously challenge this testimony, but he did not. At the post conviction evidentiary hearing, Udell admitted that he noticed potential memory problems with Mrs. Brown, but he did not do anything to follow up on

[9] In the order denying Spann post conviction relief, the trial court indicated that Udell successfully established the fact that Mrs. Brown did not know for sure whether Anthony was staying in the back house. (R. Vol. XIV, pp.) However, the trial court missed the point that Mrs. Brown was trying to make. When Mr. Udell pressed her, the following was stated: "Q. That's (referring to whether Anthony was living in the back house) what I wanted to ask you about. Tony was living there, wasn't he? A. No, *no, no. He never lived – he never lived in my place*. Q. Well, I know. How about in the room in the back of your house. He wasn't living in that other house? *No, he sure wasn't. If he was back there, I did not know it*." (OR., Vol. XXVIII, p. 2894, emphasis added.) What Mrs. Brown was saying was that Anthony did not live there, and any suggestion to the contrary was news to her.

them. (R. Vol. II, pp. 72-3) This was particularly problematic for the defendant in that the very able prosecutor in his closing argument hammered the point home to the jury that there was no one to verify or substantiate the alibi. (OR, Vol. XXIX, pp. 3007, 3018-19, 3021) In addition, the prosecutor improperly bolstered her testimony, without objection from defense counsel, by comparing her to his late grandmother who never forgot or missed anything, stating:

> Is there anybody that can substantiate where you were other than your Auntie?" "No." And you know what, not even his aunt's could establish where he was. You saw her testimony. "Tony staying with you"? "No." "Tony stay in that back shed"? "No." Is it possible – is it possible? We all know –
>
> I had a Grandma Bakkendahl. 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 the 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.[10]

OR. Vol. XXIX, p. 3022, emphasis added.) If Udell had allowed Leo to testify about Mrs. Brown's memory problems (after all, it was her senility that caused him

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[10] The trial court found that this argument did not constitute the improper bolstering of Mrs. Brown's testimony (*see* the trial court's order denying Spann post conviction relief, R. Vol. XIV, pp. 1993-95), but it clearly did. The prosecutor was using his grandmother, who apparently had a mind and memory like a steel trap, as a person similarly situated to Mrs. Brown when by everyone's admission it is clear that Mrs. Brown had serious problems with memory and cognitive skills as of November 14, 1997.

to be living with her in the first place (R. Vol. III, p. 276), and called Dr. Scanameo to do so, this would have gone a long way to strengthen Spann's alibi and weaken Mrs. Brown seeming refutation of it. This is confirmed by the post conviction hearing testimony of Dr. Scanameo. He stated that Mrs. Brown's memory problems were serious and that she suffered the onset of dementia five to six years prior to him seeing her in 2000. (R. Vol. II, pp. 221-23) Udell had the indicators of her dementia close at hand. (R. Vol. II, p. 134) His failure to bring them to the jury's attention was seriously deficient.[11]

The Prejudice

Not calling Leo as a defense witness to corroborate Anthony's alibi undermined the reliability of Anthony's first-degree murder conviction and death sentence in the context of *Strickland v. Washington*, 466 U.S. 668 (1984). Udell tried to excuse his ineffectiveness by claiming that he already had established an alibi through Anthony's custodial statement (OR. Vol. 27, pp. 2816-42) given to law enforcement shortly after he was arrested. This is lame because the prosecutor was able to argue (albeit incorrectly) that the defendant's exculpatory statement to law enforcement was unsupported by any other witness. (OR., Vol. XXIX, pp. 3007, 3009-12, 3018-19, 3044) Leo's testimony would have

[11] Udell testified during the post conviction evidentiary hearing that Mrs. Brown had always told him prior to trial that Anthony was living at her house. (R. Vol. II, p. 134)

cemented the fact that Philmore was lying at trial -- just as he lied in many of his earlier statements to law enforcement.

With Leo's testimony before the jury, the outcome of the first-degree murder count would most certainly have been different in that the jury could not possibly have based a first-degree murder conviction on the testimony of someone as disreputable as Lenard Philmore.

Notwithstanding the above, the trial court denied Spann's post conviction claim (8) as it relates to the failure to present an available alibi witness. The thrust of the trial court's ruling, found at R. Vol. XIV, pp. 1998-2004, was that Leo's testimony as to exactly when he saw Anthony on November 14, 1997 was not precise and time specific. But this misses the point. At the very least, Leo could establish that Anthony was at Mrs. Brown's residence in West Palm Beach at around 1:00 or 2:00 p.m. on the 14th, and probably had been there for at least an hour before then. It was not for trial counsel to decide whether the jury would believe Leo because that was virtually the only defense Anthony had. Udell had put all his eggs in that basket. Trial counsel took it upon himself to substitute his personal concerns about Leo's testimony for the jury's -- when the jurors themselves should have made that critical decision. The failure to let the jury decide that issue may cost Anthony his life.

B. Trial counsel failed to challenge Lenard Philmore's credibility based upon his conflicting pretrial statements to law enforcement. (Spann's Claim 5 of his post conviction motion.)

The Ineffectiveness

In *Johnson v. State*, 921 So. 2d 490 (Fla. 2005), *Ridenour v. State*, 707 So. 2d 1183 (Fla. 2d DCA 1998) and *Wright v. State*, 446 So. 2d 208, 209 (Fla. 3d DCA 1984),[12] the courts noted that, absent a tactical reason, the failure to properly defend the client regarding issues of impeachment may form a valid basis for a claim of ineffective assistance of counsel. As stated above, the only witness who directly implicated Anthony Spann as being present at and planning and ordering the shooting death of Mrs. Perron, was co-defendant Lenard Philmore. It was therefore critical for defense counsel to impeach Philmore using all lawful means at counsel's disposal in order to weaken his credibility in the eyes of the jury. There is no more fundamental, tried and true way to do this than by presenting the jury with his prior inconsistent statements per the provisions of Section 90.608(1), Florida Statutes. ("Any party may . . . attack the credibility of a witness by . . . introducing statements of the witness *which are inconsistent with the witness' present testimony,*" emphasis added.)

[12] In *Ridenour* and *Wright* the ineffectiveness was counsel's failure to prohibit the prosecutor from impeaching the defendant regarding alleged prior convictions that were in fact not the subject of impeachment. However, it is safe to say that trial counsel are expected to understand all the basic aspects of how to impeach a state witness.

During the course of events leading up to trial, Philmore gave a host of inconsistent statements -- ranging from his original claim that he was in no way involved in abducting and killing Mrs. Perron to finally admitting that he was in fact the trigger man. Some of the inconsistent statements were given on the following dates:

1. 11/18/97 interview with Martin County Sheriff's Office at 1:45 p.m. (The post conviction motion Appendix, Exhibit S; R. Vol. VII, pp. 772- 847) Philmore denies having anything to do with Mrs. Perron's death -- or ever even seeing her for that matter. ("I didn't know nothing about the lady, though, that's what I keep . . . I'm tryin' . . . tryin' to make that . . . ya'll understand that. You know? I do not know nothing about the lady." (R. Vol. VII, p. 824[13]). He add that Spann had the .38 caliber pistol and that he (Philmore) never drove the stolen Lexus. (R. Vol. VII, pp. 778-80, 802, 812-13) He admits, however, that he would testify against Spann if it would benefit him. (R. Vol. VII, p. 815)

2. 11/20/97 11:00 a.m. interview with Martin County Sheriff's Office. (The post conviction motion Appendix, Exhibit T; R. Vol. VII, pp. 851- 911.) Philmore begins by denying that he was driving the Lexus or that he had anything to do with stealing it. (R. Vol. VII, p. 890-95) He also continues to deny knowing

[13] *See* also R. Vol. VII, p. 826 where Philmore claims, "I have no knowledge of the lady, and if I did I would surely tell you, you know what I'm sayin' . . ." These are false statements that the jury should have been made aware of.

where Mrs. Perron's body is located. (R. Vol. VII, p. 894) Then, he says that he was driving the Lexus (R. Vol. VII, p. 895-96) and that he was following Spann who had Mrs. Perron in the Subaru. (R. Vol. VII, p. 897) Philmore claims that Spann drove off with Mrs. Perron and he did not know what might have happened to her after that. (R. Vol. VII, p. 898-99) Philmore asks the officer, "is she dead," as if he did not know that. (R. Vol. VII, p. 899)

3. 11/21/97 5:50 p.m. Interview with Martin County Sheriff's Office. (Post conviction motion Appendix Exhibit U, R. Vol. VIII, pp. 916-78.) Philmore states that he was present when Spann shot Mrs. Perron. But he claims that he had no idea that Spann was going to kill her -- and that he took no part in her abduction, the shooting or the efforts to conceal her body after she was killed. (R. Vol. VIII, pp. 924-28, 943, 945-46, 949-50.)

4. 11/21/97 7:05 p.m. interview with Martin County Sheriff's Office. (Post conviction motion Appendix Exhibit U; R. Vol. VIII, pp. 961-77.) Philmore changes his story by admitting that he helped Spann put Mrs. Perron's body in the water to conceal it. (R. Vol. VIII, pp. 963-65)

5. 11/23/97 10:26 a.m. interview with Martin County Sheriff's Office. (Post conviction Motion Appendix Exhibit V; R. Vol. VIII, pp. 980-1010.) Philmore continues to claim that Spann shot Mrs. Perron, not him.

6. 11/26/97 10:03 a.m. interview with Martin County Sheriff's Office. (Post conviction Motion Appendix Exhibit W; R. Vol. VIII, pp. 1012-47.) Philmore admits that he knew Spann intended to kill Mrs. Perron shortly before she was abducted (R., Vol. VIII, pp. 1022-23), that he was the one who actually forced her into her car while he held a gun on her (R., Vol. VIII, pp. 1024-25), that they were taking Mrs. Perron to a secluded location in order to kill her (R., Vol. VIII, p. 1030), and, most importantly, that he (not Spann) then shot her in the head twice. (R., Vol. VIII, p. 1031) He adds that Spann was surprised when he shot her and claims that he (Spann) wanted to shoot her (R., Vol. VIII, p. 1032). He also states that he (Philmore) alone picked up Mrs. Perron's body and threw it in the ditch. (R., Vol. VIII, pp 1031-33, 1042)

7. 12/16/97 Grand jury testimony. (Post conviction motion, Appendix Exhibit X; R. Vol. VIII, pp. 1049-70.) Philmore blames Spann for planning the robberies and states that he indicated ahead of time that any victim that came under their control would be killed. (R. Vol. XIV, p. 1055) He states that he abducted Mrs. Perron and drove off with her in the Lexus. (1061) He admits shooting Mrs. Perron after Spann indicates that he should do so. (R. Vol. VIII, pp. 1063-64)

8. 03/31/00 Philmore deposition. (Post conviction motion Appendix Exhibit Y, R. Vol. IX, pp. 1071-1128.) Philmore continues to cast Spann as the leader who was instructing him as to what he was to do, especially with regard to

Mrs. Perron. "She (referring to Mrs. Perron) got out of the car first and I got out behind her. *Spann looked at me, shook his head yeah*." (R. Vol. IX, p. 1113, emphasis added).

9. 04/06/00 Video Deposition. (Post conviction motion Appendix Exhibit Z; R. Vol. IX, pp. 1129-77.) Philmore continues to cast Spann as the organizer of the robberies in general and Mrs. Perron's death in particular. (R. Vol. XIV, p. 1148) He indicates for the first time that Spann's reason for coordinating Mrs. Perron's homicide was witness elimination. (R. Vol. XIV, pp. 1150, 1161)

Yet defense counsel did not impeach Philmore on these earlier statements to the effect that he had virtually nothing to do with Mrs. Perron's abduction and murder -- and in fact he had no idea how Mrs. Perron died because he was not even there at the time. This is so despite the tried and true fact that nothing allows a jury to reject the testimony of a witness like being presented with multiple instances where that witness said just the opposite of what he/she testified to at trial.

The Prejudice

Udell testified that he did not impeach Philmore based upon the host of pretrial inconsistent statements because they became increasingly self-incriminating over time. (R. Vol. II. pp. 106-07). However, as Philmore was already implicated in the murder with the blood that was found on his clothing, it

was unreasonable to conclude that he was further implicating himself with his statements. (R. Vol. II, p. 153) Most importantly, the failure to impeach Philmore with his series of blatant lies allowed the skillful prosecutor to argue to the jury that Udell had not impeached Philmore with any prior inconsistent statements during his cross-examination -- and therefore he should be believed. (OR. Vol. XXIX, p. 3047) The defendant suffered the consequences.

C. The trial court erred in not concluding that defense counsel was ineffective for failing to adequately advise Spann of all mitigating evidence prior to his waiver of the right to present mitigation and failing to move to withdraw that waiver. (Spann's Claim 3 in his post conviction motion, as amended.)

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In *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1993), the defendant was convicted of first-degree murder and sentenced to death upon facts that are somewhat similar to those in the case at bar. Deaton and an accomplice abducted and gruesomely murdered the victim (who Deaton strangled with an electrical cord) " . . . in order to obtain the victim's car and money." *Deaton*, supra, 635 So. 2d at 5. The co-defendants then drove the stolen car to Tennessee where they were apprehended. *Id*. In post conviction proceedings, the trial court, while finding that there was no basis to set aside Deaton's conviction for first-degree murder, determined that defense counsel failed to fully present available mitigating evidence during the penalty phase. The trial court therefore set aside the death sentence, holding that the defendant's waiver of his right to testify and to call mitigating witnesses was

not made knowingly and voluntarily, as defense counsel failed to adequately investigate mitigation. This Court affirmed.

The Ineffectiveness

The same situation existed for Mr. Spann. Dr. Mosman, after examining documents that Dr. Petrilla had not considered, found that

> major and significant data in record, medical notes, doctor's treatment prescriptions, etc., as well as observations and records of Mr. Spann's functioning, when viewed, not from a lay position, but from that of a trained mental health professional, points directly to the fact this his mental illness, emotional and psychiatric impairments, interfered with his objective and non emotional decision making abilities and, i.e. the complications, risks balancing and those cognitive processes which are affected by emotional and psychiatric disabilities. *In my opinion, in the context of the entire process, Mr. Spann did not make a knowing waiver*.

(Defense Ex. 14, p. 16, emphasis added.) There was no expert testimony presented that contradicted Dr. Mosman's findings in this regard.

The Prejudice

The prejudice is fundamental. Spann was denied the right to all of the protective provisions afforded him, including an advisory jury, as provided for by the provisions of Section 921.141, Florida Statutes.

Point II: The trial court erred in rejecting Spann's claim that he was denied constitutionally effective assistance of counsel regarding the penalty/sentencing phase of the state court trial. Specifically, the trial court erred in not finding that trial counsel failed to conduct a thorough

investigation of mitigating circumstances sufficient to assist and guide their mental health expert in being prepared to present all of the extant mitigation to the jury and judge. (Spann's Claim 2 in his amended post conviction motion.)

The standard of appellate review in a capital case is the same regarding the penalty phase of a state court trial as it is for the guilt/ innocence phase. The issues related to the penalty phase involve mixed questions of fact and law. As such, the final order of the circuit court is entitled to plenary, *de novo* review, except that findings of fact by the trial court are entitled to deference so long as there is competent and substantial evidence in the record to support them. *Johnson v. State*, 789 So. 2d. 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996).

Merits

The Ineffectiveness

In *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002), this Court found trial counsel constitutionally ineffective for spending too little time and energy preparing for the penalty phase of the defendant's state court trial. In so doing, this Court affirmed the absolutely crucial importance of the penalty phase of a Florida capital case as codified in Section 921.141, Florida Statutes. In many ways, the penalty phase is more important than the guilt/innocence phase since, at that point, the defendant's very life is literally on the line. *See Rose v. State*, 675 So. 2d 567 (Fla. 1996).

(Counsel ineffective for failure to develop and present all available mitigating evidence.) *See* also *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995).

The cases cited above are relevant to the facts and circumstances in Spann's case. Trial counsel made very little effort to amass the extant mitigating evidence for a life recommendation from the jury in the first place. This inaction was apparently based upon counsel's (mis)under-standing that if Spann was going to deny that he committed the crimes charged in the indictment, preparing a case for mitigation, for all practical purposes, became moot. This was dangerous given the fact that the state had already developed a circumstantial case of guilt again their client as of the time of his arrest. Then, once Spann indicated that he did not want to present a case for mitigation, they compounded their mistake by essentially giving up on the idea of presenting mitigation at all. They also made little effort to talk Spann out of his wishes in this regard. The results were predictable and disastrous for the client and could have been avoided.

Dr. Mosman testified that neither Udell nor Little provided Dr. Petrilla with any significant record information with which to conduct a thorough mental health evaluation of the defendant. As of March 2000, when Dr. Petrilla ceased his contact with Spann, no jail records which would have included Mr. Spann's medical records had been obtained by counsel and forwarded to the doctor. This is evident because Little did not know that Spann was HIV positive. (R. Vol. III, p.

187) Furthermore, Dr. Petrilla was unaware that Spann had been on anti-depressants one year prior to being admitted to Florida State Prison on July 17, 2000. (R. Vol. III, pp. 275-89, 414-18) In addition, Little indicated at the post conviction evidentiary hearing that he was not sure that he ever even spoke to Dr. Petrilla. (EH. 185-186)

Defense counsel's memorandum (post conviction appendix, Ex. F) presented to the trial court regarding aggravating and mitigating factors and circumstances reveals precious little in terms preparation and effort. For example, the presentence investigation report provided to the trial court reveals that Spann's father was shot when the defendant was a very young child. A traumatic event of this magnitude is normally a part of even a minimal effort to gain a life recommendation from the jury in a death case. Because trial counsel failed to adequately supply Dr. Petrilla with the necessary records for his review, they could not have possibly advised Spann of all available mitigating evidence that could have presented in an attempt to save his life.

The Prejudice

In *Rivera v. State*, 859 So. 2d 495 (Fla. 2003) this Court explained the test that it uses in evaluating prejudice as it relates to a claim of ineffective assistance of counsel regarding the obligation to investigate and present all available

mitigating circumstances in a capital case, citing language from, *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988) as follows:

> First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If, however, the failure to present the mitigating evidence was an oversight, and not a tactical decision, then a harmlessness review must be made to determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Thus, it must be determined that defendant suffered actual prejudice due to the ineffectiveness of his trial counsel before relief will be granted.

Spann suffered prejudice as a result of his counsels' ineffectiveness in not finding and presenting all the available mitigation. As Dr. Mosman noted in his testimony and mental health status report (Defense Ex. 14 in evidence):

1. Extant records necessary to present an effective penalty phase defense against a death recommendation within the context of Section 921.141(6), Florida Statutes, were not gathered and presented to Dr. Petrilla or any other mental health expert. (Defense Ex. 14, pp. 1, 2, 8-10)

2. These records would have revealed that Spann was not mentally competent to be sentenced, but was sentenced to death notwithstanding his incompetence. (His symptoms included "insomnia, agitation, hopelessness, feeling trapped, withdrawing, mood changes, loss of interest in activities, depression, need for medication, no reason to live . . ." (Defense Ex. 14, pp. 14-5, 5, 18-21)

3. The records would also have revealed that Spann did not make a meaningful waiver of his right to a jury's advisory opinion as to whether he should be put to death or sentenced to life in prison for killing Mrs. Perron. (Defense Ex. 14, p. 5, 6)

4. Thus, according to Dr. Mosman, the trial court was not presented with extant evidence that showed that there were two statutory mitigators that could have been established: (1) the homicide was committed while Spann was under the influence of extreme mental or emotional disturbance and (2) Spann's emotional age was that of a teenager. See Sections 921.141(6)(b) and (g), Florida Statutes, respectively. (Defense Ex. 14, pp. 6, 13)

5. There were also a host of non-statutory mitigators that were not presented to the court. (Defense Ex. 14, p. 6) They included the fact that Spann's mother was born with a serious genetic disease, Myashenia Gravis, which was debiliting and resulted in her inability to care for Spann and his siblings, causing serious emotional problems for the defendant. (Defense Ex. 14, p. 11) They also showed that Spann was HIV-positive. (Defense Ex. 14, p. 12)

6. None of these oversights could be attributed to strategy.

In summary, Spann suffered prejudice because he was denied a full and fair penalty phase trial (or *Spencer* hearing, for that matter) during which relevant

evidence as to whether he should be sentenced to death or life in prison could have been presented.

CONCLUSION

For the reasons set forth above, the court is requested to reverse the July 1, 2005 final order that denied Spann post conviction relief per the provisions of Florida Rule of Criminal Procedure 3.851, remand the cause to the trial court, require the trial court to grant Spann post conviction relief including setting aside his judgments of conviction and sentences, including the death sentence, order that he receive a new guilt/innocence and penalty phase trial and grant him such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

_____
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CERTIFICATE OF SERVICE

I certify that a copy of the amended initial brief of appellant has been furnished this 3d day of July, 2007, by United States mail and/or electronic mail delivery, to:

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CERTIFICATE OF COMPLIANCE

I certify further that this initial brief of appellant was prepared using a Times New Roman font, 14 point, not proportionally spaced, in compliance with the Florida Rules of Appellate Procedure.

_____
Baya Harrison, III