IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC09-2330

ANTHONY SPANN

Appellant

VS.

STATE OF FLORIDA

Appellee

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Anthony 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. "1-PCR" for the postconviction record;
3. "2PCR" for the successive postconviction record, and
4. "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.

This Court found, on direct appeal, 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.[1] Each was

[1] The seven issues raised by Spann, as rephrased by this Court, to which proportionality review was added, were:

(1) whether the trial court erred in admitting expert testimony as to handwriting identification because the

rejected in this Court's April 3, 2003 opinion. He 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. (1-PCR.6-11 569-1210, 1211-1492). Several amendments were permitted before and after the Case Management Conference and the State responded when ordered. (1-PCR.1 28-53; 1-PCR.12 1493-1559, 1560-1625, 1639-41, 1645-68, 1679-92; 1-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

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> expert testimony does not satisfy the test set forth in *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923); (2) whether the trial court failed to adequately follow the procedures required for granting a 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 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.

Spann v. State, 857 So.2d 845, 850-51 (Fla. 2003).

the death penalty (1-PCR.2-5 63-568) and on July 1, 2005, the trial court denied relief on all of Spann's claims. (1-PCR.14 1973-2007).

In his postconviction appeal, Spann raised two claims: "He contends that (I) trial counsel rendered ineffective assistance during the guilt phase of trial, and (II) trial counsel rendered ineffective assistance during the penalty phase by failing to conduct a thorough investigation of mitigating evidence." Spann v. State, 985 So.2d 1059, 1064 (Fla. 2008). Of import here, this Court rejected the sub-claims of ineffective assistance for: (1) failure to present an alibi defense; and (2) failure to challenge Lenard Philmore's credibility.

Rejecting these claims, this Court reasoned:

> Ineffective Assistance of Counsel During Guilt Phase
> Failure to Present Alibi Witness
>
> Spann contends that counsel was ineffective for failing to present the testimony of Spann's brother, Leo Spann. Spann asserts that Leo would have corroborated Spann's statement to the police that Spann was at the house of his aunt, Mrs. Willie Alma Brown, in West Palm Beach at the time of Kazue Perron's abduction and murder in Indiantown. Spann further argues that he was prejudiced by this failure because the testimony of his codefendant, Leonard Philmore, was the only evidence to show that Spann was involved in the abduction and murder of Perron.
>
> **The trial court denied relief and concluded that Leo's statements concerning Spann's alibi were contradicted by evidence presented at trial and also in conflict with Spann's own statement.** As a result, Spann failed to show prejudice under *Strickland*. We agree. At

trial, the State introduced into evidence a tape of Spann's statement to the police. In his statement, **Spann claimed that on the day of the crime, after he, Philmore, Stevenson, and Cooper left the motel where they spent the night, he and Philmore dropped Stevenson and Cooper at their respective homes, and then went to see Sophia Hutchins. Spann said he left Hutchins' house alone and drove to his aunt's house in his blue Subaru. He indicated that no one saw him while he was at his aunt's house. He was there for about an hour before Philmore came by in a white Lexus between 12 and 1 p.m. to pick him up.**

Leo Spann testified concerning Spann's whereabouts on the day of the crime at his **deposition** and at the evidentiary hearing. In his deposition, Leo stated that he saw Spann come home around 2 to 3 p.m. and never saw Spann leave. However, on cross-examination he said Spann could have come home an hour earlier or an hour later. He also said he did not see Philmore at his aunt's house that day. At the **evidentiary hearing**, Leo testified that he knew Spann was in the small house in the back of the aunt's house sometime between 9 and 10 a.m. because the lights were on in the house. The next time he was aware that Spann was on the property was between 1 and 2 p.m.FN4 Leo said that he heard the gate in front of the house squeak open about ten to fifteen minutes later. Around 2 p.m., he looked outside and noticed that there was a car parked close to the house and it looked like either a gold Lexus or Acura. Leo further testified that he did not see Philmore at the house that day.

> FN4. Leo also testified that the reason he said it was between 2 and 3 p.m. at the deposition was because he did not understand the question.

A comparison of Spann's statement and Leo's testimony demonstrates that the two statements were not consistent with regards to Spann's whereabouts on the day of the crime. Spann admitted he was at a hotel with Philmore and two females on the morning in question, but Leo said Spann was in the house behind the aunt's house during the same time period. While Spann stated that he was home for about an hour before Philmore came to pick him up and that Philmore picked

him up sometime between 12 and 1 p.m., Leo said several times at his deposition that he saw Spann come home between 2 and 3 p.m. Moreover, Leo testified that he never saw Spann leave and never saw Philmore at the house. The presentation of this type of contradictory evidence would have weakened Spann's alibi defense. Counsel cannot be deemed ineffective for not calling an alibi witness who would not have been helpful. See *Happ v. State*, 922 So.2d 182 (Fla.2005) (finding that counsel was not ineffective for failing to call an alibi witness because the witness's deposition revealed that it was in direct conflict with another witness's alibi testimony).

Spann further contends that Leo's alibi testimony was critical because there were no eyewitnesses to the shooting of Perron other than Philmore, who was a self-interested codefendant, and no one identified Spann as participating in the bank robbery. However, a review of the record demonstrates that **Leo's testimony is contradicted by other evidence presented at trial that cumulatively demonstrates that Spann was involved in the abduction and murder of Perron as well as the bank robbery in Indiantown.**

In addition to Philmore's testimony, which included Spann in both the planning and execution of the criminal activities, **there were several witnesses who placed Spann in the area where the victim was kidnapped and placed Spann with Philmore during the time of the robbery and the murder**. Spann himself, Philmore, Cooper, and Stevenson said they spent the night of November 13 at a motel together. Around noon, Spann and Philmore took Cooper and Stevenson home. **There was testimony from persons in the victim's neighborhood who placed an old blue car [Spann had a blue Subaru] FN5 in the vicinity around 1 p.m. The car was also seen leaving the scene of the bank robbery just before 2 p.m. At or near 2:30 p.m., Spann and Philmore picked up Stevenson at her home, and they picked up Cooper shortly thereafter. They were driving the stolen Lexus. Around 3:30 p.m., the four attempted to flee the police, a tire on the Lexus blew out, and the four were eventually arrested after several hours of a police search.**

FN5. The Subaru is a manual shift car that Philmore could not drive.

Because all of Leo's statements are either inconsistent with Spann's alibi, in contradiction with other evidence presented at trial, or simply do not support Spann's alibi that Spann was home during the time period of the crimes, there is not a reasonable probability that the outcome would have been different had counsel presented Leo's alibi testimony. Accordingly, Spann fails to demonstrate that counsel was ineffective under *Strickland*.

. . .

Failure to Challenge Philmore's Credibility

Spann next contends counsel was ineffective for failing to impeach Philmore with his prior inconsistent statements. Spann argues that impeachment was critical because Philmore was the only witness who directly implicated Spann as being present at the scene as well as planning and ordering the shooting death of Perron.

The record undisputedly demonstrates that Philmore made multiple inconsistent statements to the police after he was arrested. In his first statement, Philmore denied any involvement in the abduction and murder of Perron, and only admitted his involvement in the bank robbery. However, **through the next four statements, he slowly began to admit his involvement in the abduction and murder. He first stated that although he was involved, Spann was the one who shot Perron and concealed her body. In his final statement, though, he admitted that he was the shooter and Spann was the mastermind behind the plan**. At trial, during defense counsel's cross-examination of Philmore, Philmore admitted his involvement in the abduction, murder, and bank robbery. Although defense counsel did not question Philmore regarding the inconsistencies in his statements to the police, defense counsel did ask Philmore whether he lied when he was first questioned about his involvement. Philmore admitted that he had lied.

> At the evidentiary hearing, counsel testified that although he was aware of Philmore's inconsistent statements, he did not question Philmore because he believed 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." In denying relief, the trial court found that counsel made a strategic and reasonable decision to not raise the issue of Philmore's multiple inconsistent statements during cross-examination.
>
> Although counsel did not question Philmore specifically about each inconsistent statement, counsel still demonstrated that Philmore's trial testimony and his first statement to the police were inconsistent by having Philmore admit that he lied to the police in his first statement. Moreover, during cross-examination, counsel raised the fact that in Philmore's case, the jury had unanimously recommended a death sentence, and that the judge had not yet sentenced him, to demonstrate that Philmore was testifying against Spann to possibly gain mitigation of his sentence.
>
> Because counsel's decision to not question Philmore about his inconsistent statements was a strategic, reasonable decision, counsel cannot be deemed ineffective. Counsel contemplated alternative courses, but decided it was better to just show that Philmore first lied when questioned by the police, but later admitted his involvement in the crimes. *See Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000) ("[S]trategic 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.").
>
> Accordingly, because Spann fails to satisfy either prong of *Strickland*, we affirm the trial court's denial of relief.

Spann, 985 So.2d at 1065-69 (emphasis supplied). This Court affirmed the denial of relief on these claims as well aa the remaining issues. Id. at 1073.

Following the denial of state postconviction relief, Spann filed a petition for writ of habeas corpus with the federal district court. In it he raised an actual innocence claim based on Philmore's un-dated affidavit attesting that Spann had nothing to do with the crimes for which they were on death row. The State argued that the claim was unexhausted. Spann was permitted to return to state court to litigate this claim.

In state court, he filed a successive postconviction motion. The State agreed to an evidentiary hearing on the matter and such hearing was held on September 1, 2009. Two witnesses were called; Spann presented Lenard Philmore ("Philmore") and the State called Assistant State Attorney Tom Bakkedahl ("Bakkedahl"), the prosecutor of both Spann and Philmore. At the hearing, Philmore repeated his assertion that he was untruthful when testifying at Spann's trial and that Spann had nothing to do with the murder, however, his account conflicted with the known time-line, facts, and Spann's previous alibi. Bakkedahl explained the facts which corroborated Philmore's trial testimony and how the recantation version was not credible. Based on the evidentiary hearing testimony and entire record, the trial court found Philmore's recantation to be newly discovered evidence, but that Philmore was not truthful or credible. Under the newly discovered evidence standard, the court denied relief. This appeal followed.

SUMMARY OF THE ARGUMENT

Issue I – The trial court's credibility and factual findings are supported by the record and the law was applied properly. Philmore's recantation was not believable as it conflicted with the known facts and his demeanor indicated a lack of veracity. With a finding that the recanting witness was not credible, the trial court did not have to conduct further analysis, however, even if such analysis is considered, Spann has not carried his burden of proving he probably would be acquitted or receive a life sentence on retrial. The denial of postconviction relief should be affirmed.

ARGUMENT

ISSUE I

RELIEF WAS DENIED PROPERLY ON SPANN'S CLAIM OF NEWLY DISCOVERED EVIDENCE AFTER THE COURT ASSESSED AND REJECTED THE CREDIBILITY OF LENARD PHILMORE, SPANN'S CO-DEFENTANT AND RECANTING WITNESS. (restated)

Spann asserts that the trial court erred in denying relief based on a finding Philmore was not truthful because it gave too much weight to intangible and subjective factors of Philmore's testimony in making the credibility determination. Contrary to Spann's assertion, the court followed the law by considering the new evidence, assessing the credibility of the witnesses, and resolving factual disputes. The court cited and applied the appropriate law governing instances where a witness attempts to recant his trial testimony, and considered the trial evidence, Spann's confession, Philmore's new version of events, and his demeanor at the evidentiary hearing. In analyzing these factors, the trial court found Philmore's recantation was "not credible, untruthful, and exceedingly unreliable." (2PCR.v3 317, 323). There is substantial, competent evidence supporting this finding and the law supports the court's denial of the newly discovered evidence claim. This Court should affirm.

The standard of review for the denial of a new trial based upon newly discovered evidence is abuse of discretion. Hurst v. State, 18 So.3d 975, 992-93 (Fla. 2009); Consalvo v, State, 937

So.2d 555, 562 (Fla. 2006); Mills v. State, 786 So.2d 547, 549 (Fla. 2001) (finding trial court did not abuse its discretion in denying postconviction relief based on newly discovered evidence); State v. Spaziano, 692 So.2d 174 (Fla. 1997).

In order to prevail on a claim of newly discovered evidence two requirements must be met by the defendant:

> First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." [c.o.]
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. [c.o] To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." [c.o.]

Jones v. State, 709 So.2d 512, 521-22 (Fla. 1998).

This Court has stated:

> In determining whether newly discovered evidence requires a new trial, the trial court must "'consider all newly discovered evidence which would be admissible,' and must 'evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.'" *Heath*, 3 So.3d at 1025 (quoting *Jones v. State*, 591 So.2d 911, 916 (Fla. 1991)). This determination includes consideration of evidence that goes to the merits of the case as well as impeachment evidence. The trial court should also determine whether this evidence is cumulative to other evidence in the case, whether the evidence is material and relevant, and whether there are any inconsistencies in the newly discovered evidence. *Jones*, 709 So.2d at 521. "[A]bsent an abuse of discretion, a trial court's decision on a motion based

> on newly discovered evidence [including a witness's newly recanted testimony] will not be overturned on appeal." *Lowe*, 2 So.3d at 39 (brackets in original) (quoting *Mills v. State*, 786 So.2d 547, 549 (Fla. 2001)). In reviewing the circuit court's decision as to a newly discovered evidence claim following an evidentiary hearing, where the court's findings are supported by competent, substantial evidence, we will not substitute our judgment for that of the trial court on questions of fact, credibility of the witnesses, or the weight to be given to the evidence by the trial court. *Jones*, 709 So.2d at 532.

Hurst, 18 So.3d at 992-93. See also, Archer v. State, 934 So.2d 1187, 1196 (Fla. 2006) (noting "[t]his Court is highly deferential to a trial court's judgment on the issue of credibility"); Lightbourne v. State, 841 So.2d 431, 442 (Fla. 2003) (affirming denial of postconviction relief based on conclusion trial court's finding defendant had "not established a reasonable probability that a life sentence would have been imposed is supported by competent, substantial evidence."); Rogers v. State, 783 So.2d 980, 1003-04 (Fla. 2001) (reiterating "this Court will not substitute its own judgment for that of the trial court on question of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.")

"Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial" Marquard v. State, 850 So.2d 417, 424 (Fla. 2002) (citing

Brown v. State, 381 So.2d 690 (Fla. 1980); Bell v. State, 90 So.2d 704 (Fla. 1956)).

With respect to recantations, this Court has stated:

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. [c.o.] In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. [c.o.] "**Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury**." [c.o.] Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted.

Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994) (emphasis supplied). See Heath v. State, 3 So.3d 1017, 1024 (Fla. 2009)(same); Consalvo v. State, 937 So.2d 555, 561 (Fla. 2006) (same); Stano, v. State, 708 So. 2d 271, 275 (Fla. 1998) (same); Spaziano v. State, 660 So. 2d 1363, 1365 n. 1 (Fla. 1995) (same); Bell v. State, 90 So. 2d 704, 705 (Fla. 1956) (same).

Only where it is determined that the recantation testimony is true must there be an assessment as to whether the new testimony would result in a different verdict on re-trial. See Johnson v. State, 769 So.2d 990, 998 (Fla. 2000) (announcing requirement of dual findings “First, the court must determine whether [the witness’s] recantation is true. If so, the court

then must determine whether [the witness's] new testimony would probably result in a different verdict at a new trial). "Because [assessment of a witness's recantation] entails a determination as to the credibility of the witness, this Court 'will not substitute its judgment for that of the trial court on issues of credibility' so long as the decision is supported by competent, substantial evidence." Marquard, 850 So.2d at 424 (quoting Johnson v. State, 769 So.2d 990, 1000 (Fla. 2000)).

Following the evidentiary hearing, the trial court denied postconviction relief finding the recantation testimony offered by Philmore to be "not credible, untruthful, and exceedingly unreliable." (2PCR.v3 317, 323). The trial court provided its rationale for this conclusion stating:

> Philmore's recantation testimony is inconsistent with the timeline and facts established at trial. In ruling on the initial postconviction motion, this court summarized the sequence of events and timeline for November 14, 1997, the day of the abduction and murder of Perron, and the commission of the bank robbery. The timeline is based on the testimony of other trial witnesses who corroborated Philmore's trial testimony. The court incorporates by reference and adopts the timeline[2] in evaluating the credibility

[2] The trial court's timeline was:

12:00 - 12:30 p.m. - Spann and Philmore deliver girlfriends, Toya Stevenson and Keyontra "Kiki" Cooper to their homes (ROA 2203, 2381)

12:40 - 12:45 p.m. - Perron leaves for 1:00 p.m. appointment in Lake Park, does not arrive and is never heard from again (ROA 2214, 2219-2, 2224)

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

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

of Philmore's recantation testimony.

. . .

The court finds Philmore's recantation testimony in conflict with trial evidence and testimony of other witnesses, and with Spann's alibi, as follows:

Philmore testified that he drove the stick shift Subaru where Cooper and Folia Spann testified Philmore cannot drive a stick shift vehicle (ROA 2199, 2329; 2PCR 31-34)

Philmore testified that before the offenses he dropped off Spann in West Palm Beach and picked up Brooks in Riviera Beach between 7:00 a.m. and noon; this could not have occurred before Philmore and Spann left the motel and delivered their girlfriends to their homes between noon and 12:30 p.m. (ROA 2203, 2381; see timeline [footnote 2])

Philmore testified that he drove the Subaru from Spann's aunt's house to pickup Brooks in Riviera Beach; this conflicted with Spann's alibi that Spann drove the Subaru to Spann's aunt's house, and later Hutchins took the Subaru from Spann's aunt's house. (ROA 2818-20, 2830, 2PCR.v2 24, 58-59).

Philmore testified after the offenses in the 30-minute period between the bank robbery 911 call and the pager

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1:58 p.m. 911 call - Rob bank in Indiantown while driving Subaru (ROA 2287-88)

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

2:28 p.m. pager call - Spann and Philmore pick up Stevenson in Riviera Beach (ROA 2347-52)

2:28 - 3:15 p.m. - Spann and Philmore pick up Cooper (ROA 2382-85) - All go to Burger King - All see police at Sophia Hutchins' house

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

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

(2PCR.v3 318)

> call, that he ditched the Subaru in Indiantown, dropped off Brooks at an unknown location in Riviera Beach, picked up Spann in West Palm Beach, and then drove to Stevenson's house (PCR 72-74); this could not have been accomplished in the 30-minute period where the distance from Indiantown to Stevenson's house alone was clocked at 30.6 miles taking 31 minutes to drive (ROA 2791-95).

(2PCR.v3 317-19).

The trial court also found that there was no corroboration of Philmore's recantation testimony related to: (1) Philmore's claim he lied at trial when he said he could not drive a stick shift; (2) Philmore's idenification of Daryl Brooks as his accomplice; (3) travel routs after the bank robbery; and (4) Philmore having possession of both guns before abandoning the Lexus and being arrested in the orange grove. (2PCR.v3 319). Continuing, the trial court found that there was no evidentiary hearing testimony/evidence which undermined the trial timeline or trial evidence established by: (1) Stevenson and Cooper (the girlfriends) concerning the timeline, the Lexus, and gun possession; (2) the time of the bank robbery and 911 call; (3) the pager call; and (4) the cash found on Spann ($545) and Philmore ($464.12) equivalent to the bank reobbery proceeds.

Additional factors the trial court identified which led to the conclusion Philmore's recantation was untruthful were: (1) Philmore never gave a satisfactory answer for his identification

of Spann at trial;[3] (2) Philmore's demeanor at the evidentiary

[3] The postconviction trial court concluded:

> Explanation for fingering Spann - Multiple times during the hearing Philmore testified that it was the advice of his trial attorneys to point the finger at Spann as the mastermind for the carjacking and killing of Perron. According to Philmore, his attorneys explained that pointing the finger at Spann would shift focus away from him, particularly since Spann was facing an earlier murder charge in Leon County. Philmore's testimony in this regard is not credible for two reasons. First, the court does not find credible his assertion that trial counsel coached him into fabricating a story. Second, his testimony directly conflicts with testimony of the prosecutor Thomas Bakkedahl. Bakkedahl testified that after the jury found Philmore guilty and unanimously recommended the death penalty and while he was pending sentencing, Philmore's attorneys advised the State that Philmore would not be testifying in Spann's upcoming trial. Then shortly before Spann's trial began, Philmore's attorneys advised that State that Philmore would testify against Spann. Philmore had given a confession implicating Spann months before Philmore went to trial. If Philmore implicated Spann in his confession on the advice of counsel as Philmore testified, it is logically inconsistent that his lawyers would initially tell the State after Philmore's trial that he would not be testifying against Spann.

(2PCR.v3 320). Consistent with the collateral court's conclusion, this Court should recall that Philmore gave multiple confessions starting with his complete lack of involvement and Spann accomplishing everything by himself to eventually Philmore and Spann planning and executing the carjacking, kidnapping, killing, and bank robbery together, with Philmore shooting and killing Perron at Spann's direction. Philmore v. State, 820 So.2d 919, 926-29 (Fla. 2002); Philmore v State, 937 So.2d 578, 584-85 (Fla. 2006); Spann, 985 So.2d at 1068-69. In fact, it was Philmore's incremental self-incrimination and incremental lessening of Spann's actions which added credibility to Philmore's final police confession and his trial testimony against Spann.

hearing; Philmore seemed amused at the proceedings, he was evasive, appeared not to take his testimony seriously, and seemed to be sparing with the Stare; (3) Philmore was inconsistent about why he testified at trial and how the development of the plan to carjack and kill a victim was developed;[4] (4) although Philmore claimed he "hanging around a lot" with Spann in the wekks leading up to the murder and that Spann lived at his aunt's home, Philmore "seemed to be unable to describe" where the aunt's home was located, and at trial, the State presented substantial evidence impeaching the defense evidence Spann was at his aunt's home at the time of the crimes; and (5) Philmore was unable or unwilling to provide details concerning Daryl Brooks. (2PCR.v3 320-24).

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[4]Here, the postconviction court reasoned:

Inconsistency about the plan - During cross-examination at trial, Philmore admitted that he testified that the reason he was testifying against Spann was because he felt really bad about what happened (the carjacking and the murder), and he did not want to take all the blame himself because *the whole idea was Spann's* and he simply helped to carry out *Spann's plan*. He further testified that all those statements he made in front of the jury were true, except the part "about Spann's involvement." (2PCR.v2 42). The import of his trial testimony, which Philmore reaffirmed was true at the evidentiary hearing, is that the carjacking and murder of Perron *was somebody else's idea*, presumably Brooks' idea, since Philmore testified at the evidentiary hearing that Brooks was the only person with him at the scene; however, if you examine the description of the events leading up to Perron's death and killing of Perron was his idea and he never once said the plan was Brooks' idea.

(2PCR.v3 322)(emphasis in original)

As recognized by the trial court, under the "newly discovered evidence" standard, Philmore's credibility is the critical factor. How Philmore came to confess to the police, his grand jury testimony, the evidence which corroborates his confession, grand jury and trial testimony, and the inconsistency of Philmore's new version with Spann's police statement/alibi together show that Philmore's recantation is believable. The timeline, as established by witnesses other than Philmore, precludes Philmore's recantation version of events and adds futher support of the postconviction court's determiniation that Philmore was untruthful during his evidentiary hearing testimony.

The record reflects that the abduction took place near 1:00 p.m. in Lake Park, the bank robbery at 1:58 p.m. in Indiantown, and the start of the high speed chase near 3:15 p.m. in West Palm Beach. Keyontra Cooper ("Kiki") testified that Spann drove a blue manual transmission Subaru and that 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. (ROA.22 2203; ROA.24 2381). Claude Perron, the victim's husband, explained that his wife left their home between 12:40 and 12:45 p.m. for a 1:00

p.m. appointment on November 14, 1997 to meet a friend who lived on Southeast Elizabeth Avenue. Kazue Perron ("Perron") was driving her gold Lexus. She never arrived at her friend's home and Claude Perron never heard from her again. (ROA.22 2214, 2219-21, 2224).

Near 1:00 p.m. on November 14th, Martha Solis ("Solis") was driving on Elizabeth Avenue where she saw Spann's blue Subaru[5] driven by a young, slim, light-skinned black male. (ROA.22 2227, 2229-30). Running in the same area was a very dark-skinned black male wearing gold chains around his neck. The blue car pulled in front of her, and a Lexus got behind her. Solis could not see who was driving the Lexus, but a woman with yellow skin and dark short hair was in the vehicle. (ROA.22 2230-31).

Returning from lunch on November 14th near 2:00 p.m., Lysle Linsley. witnessed Spann's Subaru pull to the side of Famel Avenue in Indiantown followed by an erratically driven gold Lexus[6] When approaching the Indiantown bank near 2:00 p.m. on November 14th, Leo Gomez was almost struck by a vehicle carrying two black males and speeding from the area (ROA.23 2282-83).

Between 2:30 and 3:00 p.m. on November 14th, Toya was picked up by Spann who was driving a gold Lexus. She saw magazines addressed to Kazue Perron and there were two guns in

[5] Solis identified State's trial exhibits 1 and 2.

[6] Linsley identified State's trial exhibits 3 and 4.

the center console. Before they could leave West Palm Beach, a police chase ensued. After a period of time driving on Interstate 95, the Lexus blew a tire and Spann and Philmore, taking the guns with them, ran into a nearby orange grove (ROA.23 2347-52).

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 admitting the car was stolen (ROA.24 2382-85). The group proceeded to a Burger King for something to eat and for Kiki to get her check. They then stopped for gasoline before proceeding to Sophia Hutchins' home. When they approached, they saw a van with police officers parked in front of Hutchins's home, 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).

While working undercover in West Palm Beach on November 14th at 3:15 p.m., Officer Willie Thomas saw Spann driving a gold Lexus. Officer Thomas knew there was an outstanding warrant for Spann's arrest, and he signaled to other officers and a high speed chase began (ROA.24 2395-99). Officer Nathanson became involved in the November 14th pursuit of Spann

in a gold Lexus which had started near 3:15 p.m. or 3:16 p.m. Once the Lexus entered the highway, it reached speeds 100 to 130 miles per hour. The Lexus outdistanced the police cruisers, and Officer Nathanson lost sight of the suspects near Palm Beach Gardens. (ROA.24 2400-02. 2404-07, 2412).

Between 3:15 and 3:30 p.m. on November 14th, Edward Merten was nearly run down by a gold Lexus as the car passed him on the left shoulder of Interstate 95 North going at about 130 miles per hour. Merten followed and eventually caught up to the Lexus as it was pulling to the shoulder with a flat, and its occupants were emerging. He watched as they ran into an adjacent orange grove (ROA.24 2414-19). Upon their arrest, Detective John Cummings seized gold jewelry and $464.12 from Philmore and $545.00 from Spann. (ROA.24 2460-65).

In addition to collecting evidence in this case, Detective Bagley also measured certain distances pertinent to the case and the time it took to transverse those distances while traveling with the general flow of traffic. It was her testimony that:

FROM	TO	DISTANCE	TIME
Elizabeth Ave abduction site	New Caulkins Grove Rd murder scene	31.2 miles	33 min
New Caulkins	Famel Rd Pump Station Hide cars	3.8 miles	7 min
Famel Rd Sta.	First Indiantown Bank	0.4 miles	1 min
Bank	Famel Road	0.4 miles	1 min

Famel Rd Sta.	8th St., Riviera Bch Toya's house	30.6 miles	31 min

(ROA.27 2791-95).

Tom Ranew also did time/distance tests and reported:

FROM	TO	DISTANCE	TIME
Famel Station	Third Street; West Palm Sophia Hutchins' house	35.2 miles	43 min
Third Street	Adams Street, West Palm home of Spann's aunt	1.1 miles	4 min
Adams Street	8th St., Riviera Bch Toya's house	3.6 miles	7 min

(ROA.27 2842-49). The total distance from Famel Road Station to Toya's home using the above route would be 39.9 miles and would take 54 minutes to cover. (ROA.27 2849). Ranew found it would not be possible to complete this route, **based on Spann's confession**, within the time frame offered, namely, a 1:58 p.m. bank robbery in Indiantown and a 2:28 p.m. page for Toya's home. (ROA.27 2849-53).

Detective Dennis Fritchie interviewed Spann in connection with this case. (ROA.25 2639). **Spann's taped statement** was played for the jury. Specific to the issue before this Court, Spann confessed to spending the night in a hotel with Kiki and Toya, and dropping the women off at their homes the next day. Philmore and Spann then went to Hutchins's home. **Shortly thereafter, Spann left Philmore with Hutchins, and alone, drove**

his Subaru to his aunt's home on Adams Street. Spann next saw Philmore between 12:00 and 1:00 p.m. when Philmore arrived at the Adams Street residence driving a white Lexus, the same one involved in the chase. From there, Spann and Philmore picked up Toya and Kiki and went to Burger King before heading toward Third Street where they saw the police and the high speed chase began. Spann's explanation for his Subaru being in Indiantown was that he let everyone drive it; he let Hutchins drive it that day. (ROA.27 2816-41).

The foregoing synopsis of trial testimony does not include any testimony from Philmore. Such was also summarized by Tom Bakkedahl ("Bakkedahl") when he testified at the instant evidentiary hearing. (2PCR.v2 95-114, 118-29) As Bakkedahl noted, even if Philmore did not testify against Spann, he would have the mitigator of "cooperation" based on his police confessions and assistance in finding Perron's body. (2PCR.v2 95). Moreover, even without Philmore's testimony the State was prepared to go forward with its prosecution of Spann and was planning on seeking death on the above noted testimony and that the State had no expectation Philmore would become a witness against Spann. While Bakkedahl admitted that Philmore's testimony made the State's case easier, he averred that the evidence, absent Philmore's testimony, was significant and amounted to "strong circumstantial evidence that would have

certainly warranted a guilty verdict in Spann's case." (2PCR.v2 90-91).[7]

Philmore's testimony in Spann's trial was consistent with the eye-witness accounts and the known timeline based on the eye-witnesses, telephone records, and driving times provided by the police. At Spann's trial, Philmore admitted he had seven prior felonies convictions independent of those involving Perron's murder for which he was awaiting sentencing, and upon which he had received a unanimous death recommendation. His motivation for testifying was that he was remorseful, he wanted people to know he did not act alone, but was carrying out

[7] In addition to the eye-witnesses' testimony, the forensic investigation established that the Lexus was processed by Deputy Bruffey and blood stains were found inside. (ROA.24 2473-78). Detective Bagley collected evidence from the area where Perron's body was recovered. He recovered two .380 caliber shell casings, and a portion of the roadway and maiden cane which tested positive for blood. The roadway portion contained a projectile, which was also recovered. During the autopsy, a projectile was extracted from Perron's head. (ROA.24 2480, 2484-98, 2500, 2514-15).

Criminalist, Earl Ritzline, conducted DNA testing and determined Perron's blood was on the maiden cane (near where Perron was found), the dirt roadway, the Lexus, and Philmore's shirt. (ROA.24 2414-23). Michael Kelly, a forensic firearm and tool mark examiner testified he examined the two guns, casings, and projectiles recovered. The casings and projectiles were fired from the .380 caliber gun in evidence. (ROA.25 2594, 2600-05). As a result of Perron's autopsy, the medical examiner, Dr. Hobin, determined that she died from a single gunshot wound to the head. (ROA.25 2606, 2611, 2614, 2617-20; ROA.27 2797-2801). Dr. Williams, a forensic dentist, confirmed through dental records that the body recovered was that of Perron. (ROA.25 2632-35).

Spann's scheme, and Perron deserved justice. Also, while awaiting sentencing, Philmore became aware Spann had been calling him a "big dummy" and saying Philmore would do whatever Spann wanted. This also motivated Philmore. (ROA.26 2653-54, 2699-2702, 2761, 2773, 2783-85).

In November, 1997, Philmore spent time with Spann and Sophia Hutchins. On the morning of November 13th, they discussed robbing a pawn shop. Spann's plan called for Philmore and Hutchins to rob the store and Spann to be the getaway driver. The robbery was spurred in part by Spann and Philmore's need for money to leave Palm Beach. The group drove to the pawn shop in Spann's Subaru which had been purchased a few weeks earlier by Spann's wife, and was Spann's only form of transportation. Spann would not let just anyone drive his manual transmission car; and Philmore did not know how to drive such a car. The robbery netted four firearms and some jewelry. They sold the jewelry and one gun, keeping a gun each for themselves, but Spann was dissatisfied with the proceeds. Philmore identified the murder weapon and the gun kept by Spann. (ROA.26 2655-67, 2704-07, 2711-14, 2717-20, 2722-24, 2785).

During the evening of November 13th, Spann and Philmore spent the night at a motel with Toya Stevenson ("Toya") and Keyontra Cooper ("Kiki"). There, while alone with Philmore, Spann set out his plan for them to commit an armed bank robbery

the next day and to get money and a car to leave town. Spann intended to obtain a car so they would have a getaway vehicle after the robbery and to drive to New York. He explained that they needed to abduct the car's driver and murder her so that there would be no witnesses and they would have time to flee without anyone knowing the car was stolen. (ROA.26 2666-70, 2676, 2725-31).

The next morning/early afternoon of November 14th, before leaving the motel, Philmore was notified he was wanted by the police. Although Kiki and Toya were not privy to the criminal plans, they knew of the plan to leave town. The women were dropped off between noon and 12:30 p.m., with the understanding Spann and Philmore would return that afternoon to take them out of town. After leaving the women, Spann reitereated how they would procure a vehicle. Spann's scheme was to target a woman, who he posited would be easier to overcome than a man. They were to catch her getting out of her car, force her back in, and take her along with the vehicle. The woman was to be killed so she could not identify them and they would have enough time to get away with the car. Philmore agreed with the scheme. In executing this plan, Spann and Philmore visited the Palm Beach Mall without success. They next headed north, targeted a woman, followed her to a plaza, but were not close enough to complete the abduction. Next, they headed for a wealthy area. On the

way there, they spotted a gold Lexus which was in the driveway of a residence. Philmore jumped from the Subaru, ran up the driveway, pointed his gun, and confronted Perron. Philmore told her to move to the passenger seat. He entered the vehicle and drove away, with Spann eventually taking the lead position in his Subaru. (ROA.26 2670-81, 2731-37, 2748-57, 2785-86).

As Philmore drove Perron toward Indiantown, Spann followed in the Subaru. Perron was nervous, crying. She told him she had been carjacked before, and had just returned from her mother's burial in Japan. Perron inquired whether they intended to kill her. On the way to Indiantown, they stopped the car, and Spann ordered Philmore to take Perron to the bank. Perron offered the little money she had, but Philmore refused, instead taking wedding rings, only later to discard them at Spann's direction. (ROA.26 2681-83, 2758-60). Near Indiantown, Spann indicated the road he wished Philmore to take. When they stopped, Perron got out of the car, and Spann gave Philmore a signal, a nod, to follow through on their plan to kill Perron. Philmore, with gun in hand, approached Perron; she said, "no" and Philmore shot her in the forehead with the .380 handgun he stole from the pawn shop. Spann appeared disappointed to Philmore as he too had wanted to use his gun. While Perron lay on the ground, Philmore, nervously fired into the ground. Afterwards, he picked up Perron's body, threw it into the canal,

and in so doing, got blood on his shirt. (ROA.26 2683-87, 2758, 2760-61).

Having dispatched Perron, the pair continued to Indiantown and stopped at a store where Spann identified the bank to be robbed. They parked the Lexus, Philmore removed his bloody T-shirt, and they went to the bank in the Subaru. Philmore was to enter the bank armed, and get money; Spann would be the getaway driver. In the bank, Philmore saw a customer with a large deposit and took it. He ran from the bank, got into the Subaru, and Spann sped off. All was done to Spann's plan. The proceeds of the robbery was $900. Philmore gave Spann $500 and kept the balance for himself. They returned to where the Lexus was hidden, secreted the Subaru, and drove the Lexus directly to Toya's home. (ROA.26 2687-90, 2761-66).

Spann was driving the Lexus quickly and Philmore estimated it took 15 to 20 minutes to return to Toya's home, but later agreed they returned near 2:30 p.m. that day and stayed there for approximately five minutes. Kiki was called from Toya's to alert her; it took just a few minutes to drive from Toya's home to Kiki's home where they remained for another five minutes. After picking up the women, they went to Burger King and a gas station which took about ten minutes. They then headed for Sophia's home, but as they approached in the Lexus, they saw the police, and sped from the scene. Ultimately, they had to stop

when a tire blew. Spann and Philmore ran into an orange grove, each carrying a gun. Eventually, they discarded the guns in the grove. When captured some five or six hours later, they had the proceeds of the bank robbery on their persons. (ROA.26 2691-94, 2766-69, 2771-72).

Also relevant to the credibility of Philmore's recantation is the fact that at trial, Philmore explained that during their incarceration in the Martin County Jail, he and Spann conversed twice and corresponded via letters delivered by trustees. Spann wrote about ten letters to Philmore. The final letter, Philmore retained and it was addressed to what he was to tell the authorities. Spann's letter directed Philmore to deny that Spann had anything to do with the crimes and that Philmore, driving the Lexus, had picked Spann up from "Aunt Willie's house" on Adams Street. Philmore was directed by Spann to concoct a name and say that that person had been with him. (ROA.26 2695-99, 2771-75, 2779, 2781-82, 2786). This is very similar to the "recantation" testimony Philmore offered at the September, 2009 evidentiary hearing.

Moreover, Philmore's multiple confessions indicate from the outset that Spann[8] was involved in these crimes, that Philmore

[8] Philmore's first interview was a complete denial of any involvement in the crimes committed upon Perron and placed all blame on Spann. With counsel present on November 18, 1997, Philmore spoke to the police. In that interview, Philmore

and Spann were complicit in the abduction and murder of Perron, that defense counsel did not advise Philmore to name Spann as his accomplice, and Philmore's recent recantation is unworthy of belief. This Court will recall that in Spann's original postconviction case, at issue were counsel's ineffectiveness in not challenging Philmore on his multiple confessions and for not

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reported that Spann had procured the Lexus while Philmore waited as Kiki's home. Upon Spann's return, they went to the Indiantown bank, robbed it, and drove to the location where Spann had hidden the Lexus. Afterwards, Philmore and Spann returned to West Palm Beach and picked up their girlfriends only to be spotted by the police. A high-speed chase began and they ended up being captured in a Martin County orange grove. (2PCR.v4 339-414; 1PCR 775-77). Over the next few interviews, Philmore amended his version of events to admit to more and more involvement. On November 20th Philmore admitted to being with Spann when the Lexus was taken, that Spann had Perron get into the Subaru, and that Philmore drove the Lexus because he could not drive a stick-shift car. Additionally, Philmore claimed that he waited in the Lexus while Spann left with Perron in the Subaru, and returned without her. (2PCR.v4 415-75). During the third interview, November 21st, Philmore amended his confession, this time admitting he was present at both the abduction and at the killing of Perron by Spann (2PCR.v4 and v5 476-571). Following Philmore's failed November 23rd polygraph (2PCR.v5 572-603), he gave a final statement to the police on November 26th wherein he admitted to Spann's planning of the criminal episode, but the he abducted Perron as Spann watched from his Subaru, that Spann followed in his Subaru as Philmore drove the Lexus with Perron to a site in Indiantown that Spann identified, and that at the remote location, Spann watched as Philmore shot Perron in the head and threw her body into the canal, after which they went to an Indiantown bank where Philmore entered the branch and stole cash while Spann awaited in the Subaru getaway car. Philmore admitted to the timing of picking up their girlfriends, the high speed chase by the police, and eventual capture. (2PCR.v5 604-39) This confession mirrored Philmore's grand jury testimony and the testimony offered at Spann's trial. (2PCR.v5 640-68)

presenting Leo Spann as an alibi witness. There, Spann's trial counsel, Robert Udell ("Udell") explained that he did not cross-examine Philmore on his multiple confessions where he increasingly inculpated himself, because such examination would make Philmore look more credible as he implicated himself more fully with each statement, while reducing Spann's culpability even though in the end, Spann was identified as the mastermind. (1PCR.v14 1995-96). Udell also offered that he did not present Leo Spann as an alibi witness because he did not cover the times needed to present a complete alibi. The trial court found Leo Spann's evidentiary hearing testimony not credible and inconsistent with the facts. (1PCR.v2 113-14, 116-18, 122-25, 158; 1PCR.v14 1993-95, 1998-2004) The denial of these claims of ineffective assistance was affirmed on postconviction appeal. Spann, 985 So.2d at 1059.

In contrast to his prior testimony, which identified Spann as the principal and driving force for these crimes, Philmore's affidavit (2PCR.v6 776) and September 1, 2009 evidentiary hearing testimony, Philmore averred that his testimony at Spann's trial was fabricated and that Spann had nothing to do with any of the crimes for which he was sentenced to death. (2PCR.v2 23-26). Philmore stated that he testified against Spann only because his attorneys at the time told him he should do so to help his case at his upcoming death penalty sentencing

hearing. Also, Philmore claimed he had a different accomplice and route of travel. However, Spann offered nothing to support this new account. In fact, Philmore's 2009 version of events deviated in significant respects to the known facts and on occasion, Philmore either was reluctant, uncooperative, or not forthcoming. The totality of his evidentiary hearing testimony, as found by the trial court, established Philmore was not a credible witness in these proceedings, and that his recantation was untruthful.

Philmore admitted that he and Hutchins were involved in the pawn shop robbery on November 13, 1997, but that it was Darryl Brooks ("Brooks"), Philmore's secret homosexual lover, who drove Spann's Subaru as the getaway vehicle. (2PCR.v2 30-31, 42, 43, 46-48, 50-51). After the robbery, the three drove back to Hutchins' residence, but Spann was not there. (2PCR.v2 48) Later, Philmore and Hutchins pawned the stolen jewelry and sold one of the guns; Hutchins kept one of the guns for herself, and Philmore kept the murder weapon and a Glock .40 pistol. (2PCR.v2 50, 52, 54-55) That evening, Philmore picked up Spann, Toya, and Kiki and stayed at a motel. (2PCR.v2 55)

Although Spann wanted to leave Palm Beach County, Philmore at first denied knowing why, but later admitted that Spann had a warrant for his arrest. However, Philmore denied that he and Spann discussed plans for robbing a bank the following day,

November 14th, for money to leave town. (2PCR.v2 44, 57)

With respect to the events of November 14, 1997, Philmore stated that on that morning, sometime between 7:00 a.m. and noon, Philmore drove Spann in the Suburu to the home of Spann's aunt, Willie Brown, and left him there. This conflicts with Spann's version of events given in his police statement. There, Spann claimed he left Philmore with Hutchins at her home and that he drove to his aunt's home alone, getting there near noon. (ROA.27 2816-41).

Philmore's account of the hunting for and abduction of Perron was essentially the same as his trial testimony, except for his accomplice. While Spann's Subaru was used, it was Brooks with Philmore during the abduction, not Spann. (2PCR.v2 66-67). After Perron's abduction they drove to Indiantown where Philmore murdered Perron and then hid the Lexus to use as a getaway car after the bank robbery. (2PCR.v2 64-65, 70-71). In this most recent account, Brooks drove Philmore to the First Bank of Indiantown, where he waited for Philmore to rob the financial institution. (2PCR.v2 71) Following the robbery, Brooks drove Philmore to the place where he had hidden the Lexus, and they switched cars, leaving the Suburu there. Philmore then drove the Lexus from Indiantown to an unknown person's home in Riviera Beach, where he dropped off Brooks. (2PCR.v2 72-73) From there he drove to West Palm Beach to pick

up Spann at Willie Brown's house. Spann then took over the driving of the Lexus and they went to Toya's Riviera Beach residence, and then Kiki's home before being spotted by the West Palm Beach police near Hutchins' home. (2-PCR 74)

Philmore's recantation testimony, following arrival at Toya's residence again paralleled his trial testimony until he related his flight from the disabled Lexus into an orange grove. At the evidentiary hearing, Philmore claimed that he removed both guns from the Lexus and placed one in his pocket and one in his waistband, claiming Spann had no weapons. He offered that the testimony of witness, John Scarborough, in Spann's trial would support that statement. He denied that Spann ever possessed either of the firearms and stated that witnesses who testified to the contrary were lying. (2PCR.v2 77-78). However, this conflicts with Toya's testimony that Spann and Philmore each had a gun. (ROA.23 2352).

Based on a comparison of the record evidence and Philmore's recantation, it is clear that the trial court's rejection of the claim is supported. Philmore claimed he drove Spann's Subaru and left Spann at Aunt Willie's home on the morning of the murder. However, Spann confessed that he left Philmore at Hutchins' home, and took the Subaru to his aunt's home that morning. (ROA.27 2818-20, 2830; 2-PCR 24, 58-59). Also, the Subaru was a manual transmission, Kiki, along with Spann's wife,

Floria Spann, testified that Philmore could not drive a stick-shift vehicle, thus, Philmore new account is not credible. (ROA.22 2199; ROA.23 2329; 2PCR.v2 31-34). Philmore testified at the evidentiary hearing that he had Spann's Subaru and used it to pick up Brooks. However, this account conflicts with Spann's confession that he drove to his aunt's home alone and later Hutchins took the car. (ROA.27 2818-20; 2PCR.v2 24, 58-59)

Additionally, Philmore claimed that after abducting Perron, killing her in Indiantown, robbing a bank there, abandoning Spann's Subaru in Indiantown,[9] he and Brooks drove to an unknown location/unknown person's home in Riviera Beach. After dropping off Brooks, Philmore claimed he drove to West Palm Beach to pick up Spann, then they drove together to Toya's and Kiki's homes before returning to West Palm Beach and commencing the high-speed chase. The undisputed record evidence reveals that the bank robbery took place at 1:58 p.m., that Philmore and Spann were at Toya's home by 2:28 p.m. based on the page, at Kiki's home by 2:35 p.m., and being chased by the police by 3:15 p.m. The drive from Indiantown to Toya's home, alone, was clocked at 31 miles taking 31 minutes to drive. As such, it is not

[9] It appears unreasonable, and thus incredible, that Philmore would take Spann's Subaru without permission, use it in a crime, and abandon the vehicle, (2PCR.v2 76) without giving Spann some notice of his intent, especially when the pair had planned to leave Florida for New York that day, and allegedly, Spann was not in on the plan to steal another car.

credible that Philmore could drop off Brooks in Riviera Beach, drive to West Palm Beach to get Spann, then back to Riviera Beach and meet Toya by 2:28 p.m. Philmore's new version cannot be completed within the known and un-refutable timeframe.[10]

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[10] Without utilizing Philmore's account, the November 14, 1997 time line based on the testimony of other witnesses reveals:

near 1:00 p.m. - Perron is car-jacked at the Elizabeth Street residence - Martha Solis sees thin black male in Subaru - another larger, darker black male, wearing gold chains and running nearby - and a gold Lexus with oriental female passenger following the Subaru (ROA.22 2214, 2219-21, 2224, 2227, 2229-31)

near 2:00 p.m. - Lysle Linsley witnesses Spann's Subaru being pulled to the side of the road followed by an erratically driven Lexus (distance/time to drive from Elizabeth Street to New Caulkins Grove Road (murder scene) then to Famel Road Pump station (hiding place of Lexus) 35 miles / 40 minutes not including time to commit murder and hide body) (ROA.23 2282-83; ROA.27 2791-95; 2842-49)

1:58 p.m. - police dispatch for Indiantown bank robbery (distance/time from Famel Pump station to bank .04 miles / 1 minute) (ROA.23 2289, 2292-93; ROA.27 2791-95; 2842-49)

near 2:00 p.m. - When approaching the Indiantown bank, Leo Gomez is nearly struck by a vehicle carrying two black males (ROA.23 2282-83)

2:28 p.m. - Kiki receives page from Philmore who said he was at Toya's home (8th Street, Rivera Beach) and would be coming to Kiki's shortly to pick her up (distance/time from bank to Famel Road pump station (hiding place of Lexus/Subaru) to Toya's Rivera Beach home) 31 miles / 31 minutes following general flow of traffic)

2:35 p.m. - Spann, Philmore, and Toya arrive at Kiki's home (ROA.23 2347-52; ROA.24 2382-85)

3:15 p.m. - police spot Spann driving gold Lexus near Third Street, West Palm Beach - high speed chase starts. (ROA.23 2347-52; ROA.24 2385-93, 2395-2407, 2412, 2414-19).

Further support of the trial court's credibility determination comes from Philmore's alleged basis for testifying against Spann. Philmore offered that he believed he would get a lenient sentence given his attorney's suggestion that it would be offered as mitigation even though the State promised him nothing and informed him that it was seeking death regardless of whether or not he testified. (2PCRv2 28-29, 81-83) Conversely, at Spann's trial, Philmore swore that his motivation was prompted by remorse, he believed the victim deserved justice, and he wanted people to know he did not act alone, but that he was working with Spann to carry out Spann's scheme.

Further motivation came from the knowledge Spann was saying Philmore was a "big dummy" who would do whatever Spann desired. (ROA.26 2700-01, 2761, 2773, 2783-85). Tom Bakkedahl recalled that Spann had sent Philmore letters after Philmore's conviction, but before Spann's trial, calling him a "big dummy" for confessing and getting convicted. One of the letters attributed to Spann (although signed by Captain Hook Daddy),[11] demanded Philmore backup Spann's alibi-confession, to report that someone other than Spann committed the crimes, and to name anyone else, even someone who is dead. (2-PCR 114-15).

[11] When the State tried to confirm that the letter was written by Spann, Spann altered his handwriting when giving exemplars. Nonetheless, the letter was conveying Spann's alibi and ordering Philmore to confirm the alibi for the police. (2PCR.v2 115-17) In and of itself, this shows conscientiousness of guilt.

Moreover, as noted by Bakkedahl, the fact that Philmore had confessed fully and led the police to Perron's body qualified for the mitigator of cooperation regardless of whether Philmore testified against Spann. (2PCR.v2 95).

Another support for doubting Philmore's recent account comes from his inexplicable lack of knowledge of basic information about his "lover", Brooks. Philmore did not know Brook's birthday or address (2PCR.v2 50-51, 63, 73-74). Likewise, Philmore failed to give details regarding the routes he took from one location to another and offered the unrealistic assertion that he could speed through West Palm Beach in the middle of the day and avoid traffic lights (2PCR.v2 50-75, 79-81, 84-85). Also, his testimony that he had both guns was refuted by the testimony of Kiki and Toya who reported that each man carried a gun. (R.23 2352)

Philmore's courtroom behavior and comments when asked to give details was telling to the postconviction court. As the court found, when asked to reveal who committed the pawn shop robbery with him, if it were not Spann, Philmore refused to give a name. When the court stated Philmore was required to answer, Philmore continued to refuse. When the State asked that Philmore be compelled, he indicated there was nothing that could be done to him, replying: "Cut me open. I'm not going to answer it because I'm not going to give you the name of a person that

hasn't been charged with a crime." (2PCR.v2 35-36). The court noted that "Obviously contempt and sanctions are a possibility as well as incarceration but I don't know that it's going to be particularly productive to somebody on death row." (2PCR.v2 36) As a result, Spann's counsel was permitted to speak to Philmore alone. Following such discourse, Philmore offered Brooks as his "accomplice" to perform all of the acts originally attributed to Spann. This was but one example of where Philmore was not forthcoming during questioning by the State. On numerous occasions, the State and/or the Court had to remind Philmore that he was required to answer the questions posed to him. (2PCR.v2 29, 32, 34-36, 45, 62).

When judging a witness's credibility, the fact finder may take into consideration whether: (1) the witness seemed to have an accurate memory; (2) the witness was honest and straightforward in answering questions; (3) the witness had an interest in how the case should be decided; (4) the witness' testimony agreed with the other testimony and evidence in the case; (5) the witness at a different time made statements inconsistent with the present testimony; and (6) the witness had prior convictions. See Fla. Std. Jury Inst. 3.9. Moreover, throughout much of Philmore's testimony he appeared to be

"smiling, kind of laughing" (2PCR.v2 85);[12] and although he passed that off as a response to the prosecutor's asking the same questions multiple times, the State offers that Philmore's demeanor has a more nefarious meaning.

From the foregoing, it is clear that Philmore's recantation testimony is not credible based on his inability to report details, but also, it is refuted by the known, and still un-refuted, facts of the case. This Court should find that Philmore is not being truthful in his recantation and that he is not credible when he denies Spann was involved with this case. Where a recanting witness is not being honest, this Court has a duty to deny postconviction relief. Armstrong; Consalvo.

Although the record supports the collateral court's finding Philmore was untruthful in his recantation, and thus, Spann was not entitled to postconviction relief, the following is offered to show that Spann would not be acquitted even with Philmore's recantation. As noted above, the timeline was very tight. Philmore's recantation timeline could not be accomplished under the known facts. Likewise, Spann's exculpatory "confession" was in direct conflict with Philmore's new account and together they would not result in an acquittal on re-trial. Moreover, a

[12] The postconviction court stated that it was observing Philmore's demeanor while he was testifying. (2PCR.v2 86) Such observations were reflected in the order denying collateral relief. (2PCR.v 321)

person fitting Spann's description was seen driving Spann's car at the time of Perron's abduction followed by Philmore driving with Perron in the Lexus. Both the Subaru and Lexus were seen in the vicinity of and near the time of the bank robbery with two black males driving; Philmore admits he robbed the Indiantown bank. Again the timeframe was so close, and corroborated by Kiki and Toya, that it establishes that Spann and Philmore were together in Indiantown committing murder and robbery just before returning to Palm Beach County to collect their girlfriends. The girls confirmed that Spann admitted that "they" had stolen the Lexus and both men were in possession of guns. Also, Perron's blood was found in the Lexus. Such would have been sufficient, competent evidence to find Spann guilty as charged.

Even absent Philmore's testimony that Spann planned this the night before the murder, Spann would not have received a life sentence. The following aggravators were found by the trial court after Spann waived his penalty phase jury and a mitigation presentation: (1) prior violent felony (which included a 1997 manslaughter conviction); (2) felony murder (kidnapping); (3) avoid arrest; (4) pecuniary gain; and (5) cold, calculated and premeditated (CCP). See Spann v. State, 857 So.2d 845 (Fla. 2003). The prior violent felony, felony murder, and pecuniary gain aggravators remain based on the convictions

in this case as well as Spann's prior record. Further, the fact neither assailant hid his identity, Perron offered no resistance, and she was taken to a remote location and killed establishes the avoid arrest aggravator. See Preston v. State, 607 So.2d 404, 408-09 (Fla. 1992) (recognizing avoid arrest aggravator may apply where victim is abducted from crime scene, transported to different location, and killed).

Likewise, the fact Philmore and Spann were armed as they hunted for and killed the unarmed Perron for her car when they could just as easily left her alive at the place of abduction or the remote location where he body was found some 30 miles from West Palm Beach goes to the CCP aggravator. See Alston v. State, 723 So.2d 148, 162 (Fla. 1998) (noting CCP upheld "where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder."); Bell v. State, 699 So.2d 674, 677 (Fla. 1997) (opining CCP "can be indicated by the circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.").

Further, the sentence is proportional, Puiatti v. State, 495 So.2d 128, 129 (Fla. 1986) (concluding that death sentence was proportional with avoid arrest, pecuniary gain, and CCP, no mitigation, and where codefendant kidnapped and robbed victim,

used the victim's car to take her to orange grove where she was shot, and then drove to New Jersey), and would remain so even if the avoid arrest and CCP aggravators not considered. Pope v. State, 679 So.2d 710 (Fla. 1996) (holding sentence proportionate as pecuniary gain and prior violent felony outweighed two statutory mental mitigating circumstances); Clark v. State, 613 So.2d 412 (Fla. 1992) (affirming death sentence based on prior violent felony and pecuniary gain/felony murder) and no mitigation); Freeman v. State, 563 So.2d 73 (Fla. 1990) (finding proportionality for murder committed during burglary based on prior violent felony and felony murder/financial gain and four nonstatutory mitigators). As noted above, Philmore's testimony is untruthful as the trial court found, thus, Spann failed to show entitlement to relief under the newly discovered evidence standard. This Court should affirm.

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, Esq., 310 North Jefferson Street, Monticello, FL 32344 on this 27th day of July, 2010.

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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