**IN THE SUPREME COURT OF FLORIDA**

ANTHONY SPANN,

Appellant,

vs. CASE NO. SC09-2330
(L. C. Case No. 97-1672-CFB)

STATE OF FLORIDA,

Appellee.
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# INITIAL BRIEF OF APPELLANT

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On Direct Appeal from an Amended Final Order of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida, denying Spann's Successive Motion for Post Conviction Relief from Judgments and Sentences, including a death sentence.

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## PRELIMINARY STATEMENT

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

The record on appeal is in six volumes. Volume 1 contains the master index and progress docket sheets. The pages in this first volume are not numbered.

Volume 2 contains the transcript (pages 1-143) of the September 1, 2009, evidentiary hearing held on Spann's successive motion for post conviction relief. Volume 2 also contains the transcript (pages 144-175) of the *Huff* hearing held on July 8, 2009 regarding the successive motion. This volume will referred to by the letter "R," a volume number, the letters "PCT" (for post conviction transcript) and by a page number located in the upper right hand corner of each page.

Volumes 3-6 contain the pleadings, orders and evidence related to Spann's successive post conviction motion. The clerk of the circuit court has provided a sequential page number (beginning with page 176 in order to coincide with the numbers of the pages referenced in Volume 2) in the bottom right hand corner of each page. Reference to this part of the record

will be by the letter "R" followed by an appropriate volume and page number.

The record on appeal regarding Spann's original state court trial is also a part of this record. It will be referred to as "ROA" followed by an appropriate volume and page number.

All emphasis is added unless indicated otherwise.

## STATEMENT OF THE CASE AND OF THE FACTS

**Nature of the Case:**

This is a direct appeal of an amended final order (R3/312-24) rendered on December 31, 2009, by the Hon. Burton C. Conner, Circuit Judge, that denied Spann's May 4, 2009 successive motion for post conviction relief (R3/176-191) based upon newly discovered evidence and filed per the provisions of Florida Rule of Criminal Procedure 3.851(e)(2).

**Jurisdiction:**

The Supreme Court of Florida has jurisdiction because this is a direct appeal of a final order that denied Spann post conviction relief in a capital case. Art. V, Sec. 3(b)(1), Fla. Const. "We have jurisdiction over all death penalty appeals." *Parker v. State*, 873 So. 2d 270, 275, f. 1 (Fla. 2004). This includes jurisdiction of appeals from final orders denying post conviction relief in capital cases. *Parker v. State*, 542 So. 2d 356-57 (Fla. 1989).

**Course of the Proceedings:**

An accurate, detailed procedural history of the case is set forth on pages 1-8 (R3/192-99) of the state's May 15, 2009, response to the successive motion for post conviction relief filed by the defendant in this cause per the provisions of Florida Rule of Criminal Procedure 3.851(e)(2) based upon the recantation of co-defendant Lenard Philmore. Since the state

does not claim that the successive motion is time barred or filed in bad faith and because the response is accurate in terms of the very detailed procedural history, Spann does not take issue with that history as the state has described it. Only the essential history is set forth here for context.

Spann and co-defendant Lenard Philmore were indicted by a Martin County, Florida grand jury on December 16, 1997, for the November 14, 1997, first-degree murder of Mrs. Kazue Perron and for other felonies[1] related thereto. (R3/192) The trials for the defendants were severed. Philmore was tried and convicted first. Spann's trial commenced on May 15, 2000. (R3/192) Philmore testified against Spann noting that Spann planned and was with him during an armed robbery spree and the kidnapping of Mrs. Perron that followed. Philmore claimed that Spann participated in the abduction of Mrs. Perron. Philmore added that, while he actually shot the victim, before doing so he turned to Spann who gestured in a manner indicating for him to proceed.[2] (R. 3/196) The jury returned verdicts of guilty as charged against Spann on all counts on May 24, 2000.

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[1] Kidnapping, conspiracy to commit robbery with a deadly weapon, carjacking with a deadly weapon, robbery with a deadly weapon and grand theft.

[2] "They drove down an isolated road, and when they stopped, Spann motioned to Philmore, a motion that Philmore understood to mean that he should kill the woman." *Spann v. State*, 985 So. 2d 1059, 1062 (Fla. 2008).

Spann waived the presentation of mitigation and a penalty phase jury per the provisions of Section 921.141(2), Florida Statutes. On June 23, 2000, after a *Spencer* hearing, Spann was sentenced to death. (R. 3/193, 194) The trial court found that five statutory aggravators had been established beyond a reasonable doubt: (a) Conviction of a prior violent felony, (b) felony murder (kidnapping), (c) homicide committed to avoid arrest, (d) homicide committed for pecuniary gain and (e) CCP. No statutory mitigation within the parameters of Section 921.141(6)(a)-(g), Florida Statutes, was proven. (R3/193) Some non-statutory mitigation was found but it was determined to be far outweighed by the aggravating circumstances. (R3/193; *See also Spann v. State*, 857 So. 2d at 858.)

On April 3, 2003, the Florida Supreme Court affirmed Spann's judgments and sentences including the death sentence. *Spann v. State*, 857 So. 2d 845 (Fla. 2003). The mandate was issued on October 31, 2003. No petition for writ of certiorari was filed in the United States Supreme Court. (R3/197)

On August 2, 2004, Spann filed a motion for post conviction[3] relief with appendix in state circuit court per the provisions of Florida Rule of Criminal Procedure 3.851. (R3/197) He was represented by Denise Simpson, Esq.[4] The state responded and included a detailed appendix as well. This Court granted an evidentiary hearing on some of the claims raised therein and denied an evidentiary hearing on others. (R3/197) After the evidentiary hearing, on July 1, 2005, the lower Court denied Spann post conviction relief. (R3/197)

An appeal to this Court ensued wherein the undersigned represented the defendant. Spann presented issues of ineffective assistance of trial counsel for the alleged (a) failure to present an alibi defense, (b) failure to impeach Philmore with his inconsistent and changing pretrial statements to law enforcement and others, (c) failure to attack the state's bolstering of Willie Mae Brown's (Spann's aunt's) testimony and (d) failure to provide Spann's mental health expert with information regarding the extent of

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[3] Spann's post conviction motion was amended three times and included claims of ineffective assistance of trial counsel plus legal arguments directed to the alleged unconstitutionally of Florida's death penalty scheme. None of the claims was similar to the recantation issue raised in the successive post conviction proceeding.

[4] After the post conviction evidentiary hearing, Ms. Simpson took a job with the United States Attorney in Texas and had to withdraw. The undersigned was appointed in her stead.

Spann's emotional problems. This Court affirmed, rejecting all of Spann's post conviction claims. *See Spann v. State*, 985 So. 2d 1059 (Fla. 2008); R. 3/198.

On October 16, 2008, Spann filed a timely petition for writ of habeas corpus per the provisions of Title 28, United States Code, Section 2254, in the United States District Court for the Southern District of Florida, West Palm Beach Division, based upon a claim of actual innocence specifically including the recantation issue referenced above. *See Spann v. McNeil*, Case No. 2:08-cv-14360-JAL; R3/198. In particular, Spann alleged that he had recently received from Philmore a sworn affidavit (R3/189) in which Philmore recanted his trial testimony and claimed that Spann had nothing whatsoever to do with any of the offenses of conviction. ("Spann didn't have anything to do with the crime for which we are on death row for. I'm saying this because it is true and I've made this statement without force." *See* the undated affidavit attached as Exhibit A to the Rule 3.851(e)(2) motion filed in this cause, R3/189.) Quite understandably, the state filed a motion to dismiss the habeas petition, raising a lack of state exhaustion defense. (R3/283) The federal district court judge "denied the petition without prejudice for Spann to file a successive post conviction motion in state court." (R3/283)

Spann then on May 4, 2009, filed the successive motion for post conviction relief (R3/176-191) which is the subject matter of this appeal. On May 20, 2009, the state filed a detailed response. (R3/192-203) After the *Huff* hearing, the cause came on for an evidentiary hearing in Stuart, Florida, on September 1, 2009. (R2/1-413) Spann was present with undersigned counsel. The state was represented by Assistant State Attorney Ryan Butler and Assistant Attorney General Leslie Campbell. The Hon. Burton C. Connor, circuit judge, presided. (R2/1-143)

**Disposition in Lower Tribunal:**

On November 13, 2009, the trial court rendered a final order denying the successive post conviction motion based upon the Philmore affidavit. (R3/282-294) On December 8, 2009, Spann filed a notice of appeal to this Court. (R3/295-309) On December 31, 2009, the trial court rendered an amended order denying the successive motion correcting a minor factual mistake. (R3/312-24) On January 1, 2010, Spann filed an amended notice of appeal. (R3/334-36)

**Statement of the Facts:**

**The Facts as found by the Florida Supreme Court after the Direct Appeal of the Judgments of Conviction and Sentences.**

The Supreme Court of Florida made the following factual findings based in large measure upon the testimony of Lenard Philmore:

On November 13, 1997, Anthony Spann (Spann) drove his blue Subaru as the getaway car for the robbery of a pawnshop. Leonard Philmore (Philmore) and Sophia Hutchins (Hutchins) robbed the pawnshop. 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 the 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 the 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, and 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 that 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 pawnshop. 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.[5]

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[5] It is clear from the Florida Supreme Court's rendition of the facts that most of the material information came from Philmore.

*Spann v. State*, supra, 857 So. 2d at 849-50.

**The Evidence Presented During the 9/1/2009 Hearing**

Philmore was the first and only witness for the defense during the evidentiary hearing on the successive post conviction motion. He said that he executed the affidavit (Defense Ex. 10) earlier in the year 2009 because he "couldn't let a person go down for something he didn't do so I decided to bring the truth out." (R2/PCT21-2) He also indicated that he had "changed his life" and given "his life to Christ and decided that I just can't let an incident (sic) man go down for something he didn't do, therefore I decided it was time to tell the truth." (R2/PCT26) He advised that he was not in communication with Spann before executing the affidavit, but later he sent it to Spann. (R2/PCT22) When asked whether his trial testimony to the effect that Spann gave him the go ahead to shoot the victim right before he did so was true, Philmore answered, "(n)o it was not." (R2/PCT23) He also refuted his trial testimony to the effect that Spann was with him during the bank robbery and the pawnshop robbery committed the day before. (R2/PCT23-4) He said that he had actually dropped Spann off at his aunt's residence on the morning of the homicide. (R2/PCT24) He admitted that he failed two polygraph tests after his arrest. (R2/PCT25) When asked about

the fact that his version of events changed markedly over time, he said that it was because his trial counsel pressured him to do so.[6] (R2/PCT26) Philmore denied being paid for his most recent testimony or being promised anything for doing so. (R2/PCT26-7)

On cross-examination, Philmore said that he hoped to get a more lenient sentence by originally testifying against Spann, but he admitted that the state attorney made no such promise to him. (R2/PCT28-9) He said that Sophia Hutchinson was with him when he robbed the pawnshop on November 13, 1997. (R2/PCT/30) Spann was at the apartment with him after that robbery. (R2/PCT/30) He noted that Spann drove a blue Subaru with stick shift but insisted that he (Philmore) could also drive that car regardless of what some other witness may have said. (R2/PCT31) Four guns were stolen during the pawnshop robbery. (R2/PCT34-5) He denied that Spann was the getaway driver after the pawnshop robbery. (R2/PCT35) Philmore admitted that he testified at trial that one of the reasons for testifying against Spann was that Spann had called him a "dummy" after they were arrested (R2/341) and another reason was that Spann had planned

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[6] By all accounts, Philmore at first put the blame for Mrs. Perron's death all on Spann, claming he had nothing to do with any of the offenses of conviction. Over time he modified his testimony so that at trial he said that he shot the victim in Spann's presence and with Spann's prior approval. (R2/PCT93-4)

the crimes and he (Philmore) felt that Mrs. Perron deserved justice. (R2/PCT42) However, Philmore insisted that all of that testimony was false. (R2/PCT42-4) He acknowledged that Spann needed to get out of town -- but it was because of the pendancy of another serious felony charge in Leon County, Florida. (R2/PCT44-5)

When pressed to name his male accomplice, Philmore said that it was Darryl Brooks who at the time lived in Riviera. (R2/PCT46) Brooks drove the Subaru. (R2/PCT48) Spann was left at the apartment. (R2PCT49) He acknowledged that he (Philmore) had been in a "relationship" with Brooks. (R2/PCT51) He said that when he was " . . . testifying against (Spann) I was trying to make it look like he was the mastermind, and I had sat in that cell and I thought about how I can make everything to look like he planned it, did it, and so I was just coming up with those stories." (R2/PCT54) He insisted that Spann did not get one of the guns he had stolen from the pawnshop. (R2/PCT54) Nor did Spann participate in planning the bank robbery to be carried out the next day. (R2/PCT57-8) That bank robbery and the kidnapping and killing of Mrs. Perron were done with Daryl Brooks, not Spann. (R2/PCT64-8)

Spann was dropped off at his aunt's house on the 14th before the abduction and bank robbery. (R2/58) Philmore did not recall what time he

did that (dropped off Spann at his aunt's house). (R2/PCT58-9) Philmore then took Spann's Subaru and picked up Darryl Brooks. (R2/PCT59-60) He and Brooks had the guns. (R2/PCT60) It was his (Philmore's) idea to rob the bank. (R2/ PCT61) After Mrs. Perron was killed with Brooks present, Philmore dropped Brooks off at his residence and picked up Spann and the girls. (R2/PCT 73-5) They were later arrested. (R2PCT77)

Spann rested.

Thomas Bakkedahl, a chief assistant state attorney, prosecuted Spann at his state court trial. (R2/PCT88-9) He observed that Philmore was tried first and he did not know until thereafter whether Philmore would testify against Spann. (R2/PCT90) Therefore, he was prepared to try Spann without Philmore's testimony since there was "strong circumstantial evidence that would certainly warrant a guilty verdict in Spann's case as well." (R2/PCT90) He was quite familiar with all of Philmore's pretrial statements. (R2/PCT92) He acknowledged that Philmore's testimony changed over time but it always included Spann as the only other person involved with him in the subject crimes. (R2/PCT93-4)

Bakkedahl said that evidence regarding the November 13, 1997, pawnshop robbery was important because two of the guns stolen were seen in Spann's possession. Furthermore, Spann was wanted in Tallahassee so he

needed money to get out of town. (R2/PCT95-6) Philmore could not drive a stick shift and Sophia Hutchins, who participated in the pawnshop robbery, was not driving the Subaru getaway car, so, according to Bakkedahl, Spann had to be the one who drove the Subaru. (R2/PCT97) Spann and his wife had purchased the Subaru about two weeks before the pawnshop robbery and, according to Spann's wife, she and Spann were the only ones who drove it. (R2/PCT98-9) The state had at least three witnesses who testified to the effect that, after the pawnshop robbery, Spann was with Philmore at the Inns of America motel. (R2/PCT100) Kiki Cooper saw Spann in the motel room with a firearm, which Bakkedahl said was one of the weapons stolen from the pawnshop. (R2/PCT101) He felt that Martha Solis and the victim's husband, Jon Perron, helped support the state's version of the time line in the case. (R2/PCT103-04) Bakkedahl added that Philmore admitted that he shot Mrs. Perron and the ballistics expert confirmed that the gun used came from the pawnshop robbery. (R2/PCT104-05) Bakkedhal said that Spann wrote Philmore while they were in jail awaiting trial, called him a "big dummy" and suggested that Philmore back up his alibi to the effect that he was at his Aunt Willie Mae Brown's house when the abduction occurred. (R2/PCT116) Bakkedhal then discussed what he considered to be the importance of time lines he developed in the case that suggested that

Philmore's trial testimony was true and that Spann was involved in all of the offenses of conviction. The timelines were based in part upon the testimony of the two females, Keyontra Cooper and Toya Stevenson, who were with Philmore and Spann on the morning of the 14th. (R2/PCT118-127)

Portions of the original record were placed in evidence by agreement.

**The Trial Court's Findings after the Post Conviction Hearing on the Newly Discovered Evidence Claim**

The trial court, while ruling that "it is uncontested that Philmore's recantation is newly discovered evidence," found his testimony to be "not credible, untruthful, and exceedingly unreliable . . ." (R3/317) In large part, this was due to the finding that the testimony was inconsistent with the previously established sequence of events and timeline for November 14, 1997. (R3/317) The trial court's version of that timeline is set forth on page 7 (R3/318) of its amended final order. The trial court added that Philmore's recantation was also inconsistent with, among other things, (a) the testimony of other witnesses who indicated that he (Philmore) could not drive a stick shift vehicle, (b) the testimony of Keyontra Cooper and Toya Stevenson regarding when (the time) they left the motel on the day of the homicide, (c) Spann's original alibi that he drove the Subaru to his aunt's house, and later that Sophia Hutchins took the Subaru from there, and (d) the time that would be involved in doing all those things Philmore said he did between the bank

robbery and picking up one of the girlfriends at her residence. (R3/319)

The trial court also noted that there was no corroboration of Philmore's recantation testimony and his most recent version of events. (R3/319)

The trial court rejected Philmore's explanation for originally implicating Spann on the alleged advice of counsel, finding that, if that were true, the lawyers would not have told the state after Philmore's trial that he would not be testifying against Spann. (R3/321)

The trial court added that Philmore's demeanor during the hearing was evasive and cavalier to such a degree that he did not appear to take his testimony seriously. According to the trial court, Philmore seemed rather ". . . amused about sparring with the State." (R3/321)

The trial court also noted that during his original trial testimony, Philmore implicated Spann as the person who planned the carjacking and murder and he (Philmore) just went along with him. However, he changed his story during the post conviction, newly discovered evidence hearing by appearing to shift the culpability to Brooks since Brooks presumably was the only other person with him when the crimes occurred. (R3/322) But, according to the trial court, a careful analysis of Philmore's post conviction

testimony revealed that Philmore stated albeit inconsistently that the idea to steal the car and kill Perron was his. (R3/322)

The trial court added that Philmore had grown up with Spann and was with him for some considerable period of time shortly before the homicide. Yet at the post conviction hearing, Philmore seemed unsure where Spann's aunt lived. (R3/322) Finally, the trial court found it not credible that Philmore could not provide any details concerning the identification and whereabouts of Brooks until after the threat that his recantation testimony could be stricken if he did not provide this information. (R3/323)

Accordingly, the trial court concluded:

> The court finds Philmore's recantation testimony not credible, untruthful, and exceedingly unreliable. Consequently, Spann is not entitled to a new guilt phase or penalty phase because this court is not satisfied that the newly discovered evidence of Philmore's confession of perjury is true.

(R3/323)

## SUMMARY OF THE ARGUMENT

In denying Spann's successive motion for post conviction relief based upon the recantation of Lenard Philmore, the trial court did not find it necessary to reach the second prong of resolving a claim like this -- whether the recantation, if credible, would probably have changed the outcome of the jury trial. Instead, the trial court determined that the first prong -- whether Philmore was credible to begin with -- was not met. In the Argument section of this initial brief of appellant, Spann addresses both issues.

Spann urges error because the trial court in denying the successive post conviction motion gave too much weight to intangible, subjective features of Philmore's testimony (such as how seriously he took the hearing proceedings) that are not subject to proof or disproof for that matter, and undervalued how important Philmore's testimony was in Spann's original trial and how it fit logically with the other facts in the case. Spann adds that there was not competent and substantial evidence in the record to support a rejection of this successive collateral claim. Therefore, this Court should reverse the findings of the trial court.

## ARGUMENT

### Standard of Appellate Review

This Court reviews an order of the trial court that denies a post conviction claim of newly discovered evidence in a capital case *de novo* to determine whether the lower tribunal abused its discretion. The newly discovered evidence must have been unknown to the trial court, the defendant and counsel at the time of trial and not susceptible of being known by the exercise of due diligence. The newly discovered evidence must be of such a nature that, had it been presented at trial, it would probably have produced an acquittal. The reviewing court must give deference to the trial court regarding its factual determinations, and those findings will not be disturbed so long as there is competent and substantial evidence in the record to support them. *Fototopolus v. State*, 838 So. 2d 1122 (Fla. 2002). "When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, we review the trial court's findings on questions of fact, the credibility of witnesses and the weight of the evidence for competent, substantial evidence." *Jones v. State*, 709 So. 2d 512, 521, citing *Melendez v. State*, 718 So. 2d 746, 747-48 (Fla. 1998).

## Merits

### Point on Appeal: The trial court erred in determining that Philmore's post conviction testimony was false.

Spann's claim was cognizable in the trial court by virtue of Florida Rule of Criminal Procedure 3.851 and in this Court on appeal of the order denying relief. That rule recognizes two situations where a death-sentenced inmate can collaterally attack his/her judgment of conviction and death sentence. One is by an "initial" motion under Rule 3.851(e)(1) where "no state court has previously ruled on a postconviction motion challenging the same judgment and sentence." Obviously, Spann does not qualify for relief under this rule since his initial motion as amended challenging his judgments of conviction and death sentence has been litigated on the merits and resolved against him. *Spann v. State*, 985 So. 2d 1059 (Fla. 2008). However, Spann was also entitled to challenge his judgments and death sentence based upon "newly discovered evidence" per Florida Rule of Criminal Procedure 3.851(e)(2). As the Florida Supreme Court stated in *Knight v. State*, 784 So. 2d 396, 400 (Fla. 2001), "(i)n order to bring a motion for postconviction relief in a capital case more than one year after the judgment and sentence became final, 'the facts on which the claim is predicated (must be) unknown to the movant or the movant's attorney and (must) not have been (ascertainable) by the exercise of due diligence,' "

citing Florida Rule of Criminal Procedure 3.850(b)(1). In this case, there is no question but that Philmore's recantation is newly discovered evidence because Philmore was a key prosecution witness against Spann at Spann's state court trial and Philmore recanted that testimony in his 2009 affidavit (R3/189; Defense Ex. 10)[7] -- thus, it was impossible for either Spann or his counsel to know about the recantation until then.[8] The trial court specifically found that the Philmore recantation was newly discovered evidence. (R3/317)

The newly discovered evidence involving the recantation of testimony offered by a state witness does not have to be so strong as to conclusively show that it would have affected the guilty verdict in order for Spann to be entitled to relief. Instead, the new evidence (recantation) must be sufficiently believable to "probably" affect that verdict. *Spaziano v. State*, 660 So. 2d 1363, 1365 (Fla. 1995). "Thus, we hold that henceforth, in order to provide relief, the newly discovered evidence must be of such nature that

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[7] The Court reporter identifies this Exhibit as No. 10. It is included in the record at various places including R3/189 and R6/776.

[8] The successive motion could be dismissed if it failed to allege new or different grounds for relief or if the failure to assert the claim in a prior motion constituted an abuse of discretion. Fla. R. Crim. P. 3.850(f); *Knight v. State*, 784 So. 2d at 400. The state did not argue below that the post conviction recantation claim was raised before or that there was an abuse of procedure for the defendant to assert it.

it would *probably* produce an acquittal on retrial." *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991), emphasis added. A defendant can show prejudice if the newly discovered evidence is believable and if it "weakens the case against (the defendant) so as to give rise to a reasonable doubt as to his culpability." *Jones v. State*, 709 So. 2d 512, 526. As far as the sentence of death is concerned, prejudice is shown if the newly discovered evidence would probably yield a less severe sentence. *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991); *Williams v. State*, 961 So. 2d 299 (Fla. 2007).

**The Recantation and Prejudice**

A recantation does not necessarily entitle a defendant to relief. *Brown v. State*, 381 So. 2d 690 (Fla. 1980). In fact, recantations are highly suspect and must be found by the trial court to be true. *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994). In making its determination of the truthfulness of the recantation and whether it would more than likely affect a jury verdict, the trial court is to determine the credibility of the recanting witness as well as the entirety of the evidence presented at the original state court trial. *Jones v. State*, 709 So. 2d 512, 521-22 (Fla. 1998). Stated a little differently, in addition to a finding of truthfulness of the recantation, the trial court had to find that " . . . the newly discovered evidence must be of such a nature

that it would probably produce an acquittal on retrial" in order for Spann to be granted post conviction relief. *Jones v. State*, supra, 709 So. 2d at 522.

In this case, the trial court did not believe Philmore's recantation. (R3/312-24) The state will certainly agree with the trial court that Philmore's recantation lacks credibility. But actions speak louder than words. Mr. Bakkedhal was convinced that, beginning with his pretrial grand jury testimony, Philmore was always truthful thereafter. ("From that day forward, he gave -- testified before a Grand Jury, his testimony was virtually consistent."[9] R2/93)

Mr. Bakkedhal therefore put Philmore on the stand at the original trial and argued for Spann's conviction and for the imposition of the death penalty based largely (admittedly, not totally) upon his testimony. *See Spann v. State*, supra, 857 So. 2d at 849-50 where this Court notes that Philmore testified against Spann at trial and describes some of what he testified to. There was no eyewitness to the homicide except for Philmore. *See* Philmore's grand jury testimony, R5/653-58, where he notes that only he and Spann were present when Mrs. Perron was killed. While Spann's vehicle was observed at the scene of the pawnshop robbery, no one could positively identify Spann as being the getaway man during that event. This

[9] Philmore's grand jury testimony, the state's Ex. 7 in evidence below, is found at R5/640-668.

is because Sophia Hutchins, an alleged accomplice at the pawnshop robbery, did not testify at trial. Only Philmore, who also participated in that robbery, did so. (R6/642-43) Nor did anyone positively identify Spann as being present at the scene of the abduction of Mrs. Perron. Martha Solis identified Spann's blue Subaru driven by a young, slim, light skinned black male near Mrs. Perron's residence and saw what she described as a woman with yellow skin and short hair in a Lexus that was following the Subaru, but she could not identify either driver. (R3/246-47; ROA 22/2227-31) The same is true regarding the bank robbery. Lysle Linsley saw Spann's Subaru near the Indiantown bank at about 2:00 p.m. on November 14, 1997, and Leo Gomez was almost struck by a gold Lexus carrying two black males speeding from the area. But again, neither witness could positively identify Spann. (R3/247; ROA 23/2282-83) Only Philmore testified that Spann participated in that crime. (R6/656-57) Perhaps this is why Mr. Bakkedhal described his supposedly "strong" case against Spann as nevertheless based upon evidence that was "circumstantial." (R2/PCT91)

The point is that by its actions, the state certainly relied upon Philmore's credibility when he served its purpose. Does this government reliance not indicate that he was telling the truth when he recanted, and that the trial court erred in not crediting Philmore's testimony accordingly?

The trial court's finding that Philmore should not be believed because some of his answers to questions indicated a failure to take the proceedings seriously and a general cavalier attitude toward the judicial process (R3/321) was misplaced. First of all, these findings are extremely subjective. More importantly, the findings belie the fact that Philmore's affidavit and hearing testimony was voluntary and unsolicited. There was nothing in it for Philmore himself. His death sentence is not/will not be affected. In addition, Philmore had a reason to lie at trial -- in order to gain favor with the sentencing judge during the *Spencer* hearing that was yet to be held in his case. He had no reason to lie at the September 1, 2009 evidentiary hearing. Spann argues that the trial court overlooked these facts.

Except for his reluctance to give up the name of his actual partner in the bank robbery, the abduction and murder (apparently he was in a romantic relationship with that accomplice), Philmore's post conviction hearing testimony was relatively clear, consistent and low key. Despite the state's skillful cross-examination of Philmore (R3/27-86), the counsel did not significantly undermine Philmore's testimony or bring out any substantial

contradictions[10] in it. This is all the more reason why the trial court erred in not believing Philmore's recantation.

The state's timeline evidence of Spann's guilt, as alluded to by Mr. Bakkedhal and as relied upon so heavily by the trial court (R3/318), is not so strong as to refute Philmore's recantation. In fact, it fits rather closely with Spann's alibi regarding his claim that he was at his aunt's house during the time of the abduction as testified to during the post conviction proceedings by Leo Spann. The appellant suggests that the trial court overlooked the fact that much of the timeline was supplied by Keyontra Cooper and Toya Stevenson, hardly pillars of the community. These women had every reason to testify in a manner that would help convict Spann in order to get themselves out of the fact that they were accessories albeit after the fact to serious criminal offenses.

And even if the jury had found Spann guilty of the crimes charged, without Philmore's testimony (which it probably could not have done), it would have been based upon a felony murder theory. Under these circumstances, there would have been no way for the state to prove that Spann possessed the requisite heightened *mens rea* to expose Spann to the

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[10] For clarity, Philmore's post conviction testimony (R2/19-27) was consistent during direct and cross-examination. Obviously, it was entirely different than his original trial and pretrial testimony (R5/555-668).

death penalty. That is, even according to Philmore's trial testimony, Spann did not shoot the victim, Philmore did. In this regard, Spann became eligible for the death penalty as opposed to a life sentence only when Philmore supposedly got the signal from Spann to fire the gun. This Court found in this regard based upon Philmore's trial testimony:

> They drove down an isolated road, and when they stopped, Spann motioned to Philmore, a motion that 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 pawnshop. Philmore picked up the victim's body and threw it into the canal, and in the process got blood on his shirt.

*Spann v. State*, 985 So. 2d 1059, 1062 (Fla. 2008).

Without that testimony, there was no credible evidence to prove that Spann knew and approved of what Philmore intended to do. In *Enmund v. Arizona*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987), the United States Supreme Court held that a codefendant found guilty of assisting the actual killer on a felony murder theory per the provisions of Section 782.04(1)(a), Florida Statutes, cannot be subjected to the death penalty unless the state can prove beyond a reasonable doubt that the codefendant knew about what the actual killer was going to do and approved of it or aided and abetted the actual killing.

In *Enmund*, the victims were robbed at their farmhouse. When Jeanette Armstrong tried to defend herself and her husband, the assailants shot and killed them. No one could place Enmund at the crime scene. In fact, he was some 200 yards away and drove the getaway car. *Enmund*, supra 458 U.S. at 784. While the trial judge determined that Enmund had participated in the planning of a robbery and actually shot the victims,[11] this Court determined that there was not sufficient evidence to prove that (a) Enmund was anything more than the getaway driver, (b) he shot anyone and that (b) he actually knew that the victims were going to be killed. *Enmund*, supra, 458 U.S. at 786, f. 2. The United States Supreme Court concluded that "(b)ecause the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty . . ." *Enmund*, supra, 458 U.S. at 801. Clearly, the state could not prove this heightened *mens rea* without Philmore's testimony.

In *Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994), this Court addressed a situation where there was newly discovered evidence from

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[11] *Enmund v. State*, 399 So. 2d 1362, 1372 (Fla. 1981).

witnesses (prison inmates) that someone other than the defendant was the actual wrongdoer in a homicide. This Court found in that regard at 110:

> Finally, Johnson submits the affidavits of four persons obtained less than a week ago which state that William "Buddy" Pruitt told them that he had actually killed Moulton during the course of a robbery and that Johnson was innocent. Pruitt is an alleged drug kingpin who recently died of a heart attack in federal prison. William Bonds and his ex-wife, Jean D. Corley, say that they stopped by to see Pruitt in 1984 and that he told them in considerable detail how he killed a Pensacola druggist during the course of robbing him. Pruitt said that there was another person on death row for the crime, but observed that it was "better him than me." Both Bonds and Corley said they did not tell anyone because they believed that Pruitt would kill them if they did. They have only now come forward because of Pruitt's death.
>
> Kenneth L. Wood and Bill Lawley, inmates in the same prison, say that the two of them talked to Pruitt about the Moulton killing a week before Pruitt died. They were discussing Johnson's impending death warrant, and Pruitt said that Johnson was going to be executed for a murder which Pruitt had committed. When asked what he was going to do about it, Pruitt said he would do nothing or "they will fry me." Both of them claim that they knew they would be killed if they said anything as long as Pruitt was alive.
>
> **********
> Johnson alleges that Pruitt met the description of the killer described by Summitt. (Footnote omitted.) Johnson contends that he is entitled to an evidentiary hearing so that these affiants could testify and at which he could demonstrate the corroborating circumstances sufficient to establish the trustworthiness of Pruitt's statements. In view of the impending death warrant and at least a possibility of factual innocence, we are inclined to agree. Thus, we have concluded to remand the case for an evidentiary hearing limited solely to the claims surrounding Pruitt's alleged confessions.

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> *In addition, we have reexamined the transcript of the original trial and find that the State's case was based almost entirely upon the eyewitness testimony of Gary Summitt. While Summitt positively identified Johnson as the killer, there was no other evidence effectively tying him to the crime*.

Emphasis added. This Court granted an evidentiary hearing on this newly discovered evidence.

The *Johnson* case is similar to the case at bar where Philmore was clearly the key state witness in the case, and absent his testimony, it would have been difficult if not impossible to convict Spann and sentence him to death. *See* also *Jones v. State*, 591 So. 2d 911, 916 ( Fla. 1994) where the confession of someone other than the defendant to various inmates qualified as newly discovered evidence which should be considered in post conviction proceedings.

## CONCLUSION

Wherefore, this Court is asked to:

1. Reverse the trial court's amended final order of December 31, 2009 (R3/312-24) that denied the Rule 3.851 successive motion for post conviction relief based upon the Philmore recantation.

2. Vacate and set aside all of Spann's judgments of conviction and sentences, including the death sentence.

3. Grant Spann a new trial.

4. Grant Spann 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 foregoing has been sent by regular United States mail and by electronic mail this 9th day of July, 2010, to counsel referenced below:

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## CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared using a 14 point Times New Roman font in compliance with the Florida Rules of Appellate Procedure.

_____
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