IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1033

PAUL ANTOHNY BROWN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

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[1] A portion of the issues in this argument are repeated in Argument III.

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PRELIMINARY STATEMENT ON PROCEDURAL BAR

The successive motion is time-barred.

Brown's conviction and sentence were final on May 3, 1999, when the United States Supreme Court denied certiorari review. Brown's prior postconviction motion was filed November 3, 2000, and its denial affirmed by this Court in 2003. Brown's successive postconviction motion was filed February 7, 2008.

Rule 3.851(d)(2) provides:

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1)[one year] unless it alleges:
>
> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Brown's alleged basis for filing a successive motion was that the State's "chief witness" deceived the court as to his true identity. (V4, R746). This was the same claim raised in the prior Motion for Postconviction relief which was denied by this Court in *Brown v. State*, 846 So. 2d 1114, 1126 (Fla. 2003).

STANDARD OF REVIEW

This is a successive motion for postconviction relief. This Court recently set forth the standard of review for successive motions:

> Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Because a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review. *See State v. Coney*, 845 So. 2d 120, 137 (Fla.2003) (holding that "pure questions of law" that are discernable from the record "are subject to de novo review"). In reviewing a trial court's summary denial of postconviction relief, this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. *Rutherford v. State*, 926 So. 2d 1100, 1108 (Fla.2006) (citing *Hodges v. State*, 885 So. 2d 338, 355 (Fla.2004)). The summary denial of a newly discovered evidence claim will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record. *McLin v. State*, 827 So. 2d 948, 954 (Fla.2002) (citing *Foster v. State*, 810 So. 2d 910, 914 (Fla. 2002).

Hunter v. State, 33 Fla. L. Weekly S72 (Fla. Sept. 25, 2008).

PROCEDURAL HISTORY

This Court summarized the factual and procedural history in *Brown v. State/Crosby*, 846 So. 2d 1114, 1118 -1120 (Fla. 2003), when this Court denied postconviction relief:

> Brown was found guilty of first-degree murder and sentenced to death based on the following facts:
>
> > On November 6, 1992, Roger Hensley ("Hensley") was found dead on the bedroom floor of an apartment in Ormond Beach,

Florida. He had been stabbed multiple times and his throat had been slashed. The police found two steak knives on the floor in the living room, one of which was covered in blood. Investigators documented blood spatter in several areas of the victim's bedroom and bathroom, as well as fingerprints and bloody shoe prints inside the apartment. Investigators also discovered several empty beer bottles and a bag of a substance presumed to be marijuana. Missing were the victim's white Nissan pick-up truck and keys thereto.

In October of 1992, Brown traveled from Tennessee to Daytona Beach where he met Scott Jason McGuire ("McGuire"). McGuire moved into Brown's motel room and the two spent the next two weeks consuming alcoholic beverages and smoking crack cocaine. At some point Brown decided to return to Tennessee. According to McGuire, Brown offered him $1000 to drive Brown to Tennessee but McGuire's vehicle did not work.

Thereafter, on November 5, Brown and McGuire approached Roger Hensley outside of a bar and, with Hensley driving, accompanied him to his apartment. McGuire testified that during the drive, Brown held a gun behind Hensley's seat. McGuire also claimed that during before [sic] entering Hensley's apartment, Brown whispered, "How would you like to do it?," to which McGuire made no response. Inside, the three men each drank a bottle of beer, shared half of a marijuana cigarette, and talked about various things, including employment possibilities. Hensley invited Brown and McGuire to spend the night. However, before retiring to his bedroom, Hensley dropped a few dollars on the table and stated, "I don't know what you guys' game is. If you've come here to rob me, this is all the money I have. You can take it." McGuire assured Hensley that they were not there to rob him and Hensley went to bed.

After Hensley left the room, Brown told McGuire he was going to shoot Hensley and steal his truck. McGuire objected to the use of the gun because of the noise. Appearing angry at McGuire's response, Brown walked to the kitchen and got two steak knives, handing one to McGuire. McGuire threw the

knife to the ground and denounced any intention of taking part in murder. Brown said he would take care of it himself and, in a symbolic gesture, dragged his hand across his throat.

Brown told McGuire to stand by the door to block Hensley's escape and he entered the bedroom where Hensley was lying on the bed. McGuire then heard what he thought were stabbing sounds and heard the victim say “no.” Upon hearing something hit the floor, McGuire approached the bedroom where he noticed Hensley lying on the floor covered in blood and “making sounds” as if he was “struggling to breathe.” Brown was rummaging through the victim's bedroom looking for car keys. He found the victim's wallet and removed a twenty-dollar bill. Brown, who had blood on his hands, arms, and pants, then tried to wash it off. McGuire did not have any blood on him, but attempted to wipe his fingerprints from everything in the apartment that he had touched.

Ten or fifteen minutes later, the two left the victim's apartment in Hensley's truck, stopped at their motel room to collect their belongings, and drove to Tennessee. There, Brown burned his bloody pants in a stove and McGuire departed on foot a day or two later. Brown was arrested on November 8 at a farmhouse in Tennessee by agents from the Federal Bureau of Investigation (F.B.I.) on unrelated charges.

While in the custody of the F.B.I., Brown stated, “I'm a murderer, not only a bank robber”, and declared that he and another man named “Scott” killed “a white male” in Daytona Beach and stole his truck. Brown explained how the two met the victim and went back to the victim's “motel room”, where they smoked “crack” cocaine and then stabbed and killed the victim. Brown claimed that it was McGuire's suggestion that they find someone who owned a car, steal the car, and kill the owner. He also claimed that he stabbed the victim several times in the chest and once in the back but that McGuire slit the victim's throat. Brown's statements to the FBI were admitted in evidence at trial.

Brown also testified at trial and denied any involvement in the homicide, claiming instead that McGuire killed Hensley while

> Brown was asleep as a result of smoking marijuana. Brown testified that he awoke to find Hensley standing over him with a bloodied knife. He claimed that McGuire had stabbed Hensley once in the back and was attempting to slit his throat. Brown also claimed that after they left the apartment, McGuire threatened to frame him for the murder if Brown told anyone about it.

Brown v. State, 721 So. 2d 274, 275-76 (Fla. 1998) (footnotes omitted).

Brown was charged with first-degree murder and first-degree felony murder, and was convicted by a jury. *Id*. at 276. Following the penalty phase proceeding, the jury voted twelve to zero to recommend the death penalty. *Id*. at 277. On a finding of four aggravating circumstances FN1 and two nonstatutory mitigating circumstances, FN2 the trial court accepted the jury's unanimous recommendation and sentenced Brown to death. *Id.* We affirmed Brown's conviction and sentence on direct appeal. *Id*. at 275.

> FN1. The court found the following aggravating circumstances: (1) defendant was previously convicted of a felony involving the use or threat of violence to some person (assault with intent to commit armed robbery); (2) the murder was committed while engaged in the commission of a felony (robbery and burglary) and the murder was committed for financial gain, merged; (3) the murder was heinous, atrocious or cruel (HAC); and (4) the murder was cold, calculated and premeditated (CCP).
>
> FN2. The court found the following nonstatutory mitigating circumstances: (1) Brown's family background and (2) Brown's alcohol and drug use prior to the commission of the crime.

Brown filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 on November 3, 2000. He filed an amended 3.850 motion on February 12, 2001, and a second amended motion on April 26, 2001, raising twenty-one claims.FN3 The trial court granted an evidentiary hearing, which was held on April 26-27, 2001. Subsequent to the hearing, the trial court entered a

comprehensive order denying Brown all relief. Brown appeals that denial to this Court and also petitions this Court for a writ of habeas corpus.

> FN3. The issues presented to the trial court in the second amended motion were: **(1) newly discovered evidence;** (2) change in the law that would be retroactive under *Delgado v. State*, 776 So.2d 233 (Fla.2000); (3) ineffective assistance of counsel in cross-examination of Scott McGuire; (4) ineffective assistance of counsel in failing to object and preserve for appellate review improper comments and argument made by the State in opening and closing; (5) ineffective assistance of counsel resulting from prejudicial statements made by trial counsel in opening statement; (6) ineffective assistance of counsel through conflict of interest; (7) ineffective assistance of counsel in failing to object and preserve for appellate review improper comments, statements, and opinion or belief of the prosecutor in closing argument; (8) ineffective assistance of counsel in counsel's omissions or failures to make argument in closing argument; (9) ineffective assistance of counsel in rebuttal argument; (10) ineffective assistance of counsel in cross-examination of Robert Childs; (11) ineffective assistance of counsel in failing to take the pretrial deposition of Robert Childs; (12) ineffective assistance of counsel in failing to object and preserve for appellate review inadmissible hearsay testimony of Scott Jason McGuire; (13) ineffective assistance of counsel in failing to object and preserve for appellate review admission into evidence of defendant's confession before the *corpus delicti* was proved; (14) ineffective assistance of counsel in failing to object and preserve for appellate review the State's use of leading questions in direct examination; (15) ineffective assistance of counsel in failing to object and preserve for appellate review the State's arguments in closing concerning burglary as an underlying felony; (16) ineffective assistance of counsel in failing to request the appointment of associate counsel; (17) ineffective assistance of counsel in failing to object and preserve for

> appellate review irrelevant testimony of Edward Schlaupitz; (18) ineffective assistance of counsel in cross-examination of State's witnesses; (19) per se ineffective assistance of counsel; (20) ineffective assistance of counsel in making a statement during closing that was highly prejudicial to the defendant; and (21) ineffective assistance of counsel during the direct examination of Scott Jason McGuire by failing to object and preserve for appellate review inadmissible testimony.
>
> 3.850 APPEAL
>
> Brown raises three claims in his 3.850 appeal: (1) that trial counsel rendered ineffective assistance of counsel, **(2) that he is entitled to a new trial based on newly discovered evidence,** and (3) that the cumulative effect of the errors resulted in an unfair proceeding.

Brown v. State/Crosby, 846 So. 2d 1114, 1118 -1120 (Fla. 2003) (Emphasis supplied.

Regarding the second issue on appeal – newly discovered evidence – the Florida Supreme Court held:

> Newly Discovered Evidence
> Brown's second argument on appeal is based on newly discovered evidence. Following trial, Brown became aware of Scott McGuire's use of an alias, as well as a conviction McGuire received for aggravated burglary in Ohio and his subsequent escape from a correctional institution there. Brown asserts that his newly discovered evidence justifies the granting of a new trial because it would have shown that McGuire, not Brown, killed Roger Hensley to avoid detection, and this information, had it been available at trial, would have sufficiently impeached McGuire's testimony so as to make him wholly incredible.
>
> In order to obtain a new trial on the basis of newly found evidence, Brown was required to show that the evidence was "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 the

> evidence] by the use of due diligence." *Hallman v. State*, 371 So. 2d 482, 485 (Fla.1979). Additionally, the evidence must be of such a nature that it would probably produce an acquittal on retrial. *Jones v. State*, 591 So. 2d 911, 916 (Fla.1991).
>
> On review, we find that Brown's claim of newly discovered evidence does not warrant a new trial under the strict test set out in *Jones*. The probability that this evidence would have resulted in Brown's acquittal at trial is extremely remote, at best, in light of the other evidence presented to the jury. Therefore, we find no error in the trial court's determination that Brown is not entitled to relief on the basis of newly found evidence.

Brown v. State, 846 So. 2d 1114, 1126 (Fla. 2003). Mandate issued on May 27, 2003.

STATEMENT OF THE CASE AND FACTS

On July 1, 2003, Walker's postconviction counsel filed a motion to withdraw and requested that Mary Bonner be appointed for the writ of certiorari and federal habeas corpus petitions. (V1, R77-98).[2] Pursuant to a stipulation, on July 15, 2003, Ms. Bonner was appointed to represent Mr. Brown and a Notice of Appearance was filed that same day. (V1, R101, 104).[3]

On February 13, 2004, Brown filed a Demand for Discovery pursuant to *Florida Rule Criminal Procedure* 3.852 (i) which sought documents from various

[2] Bonner did not file either a petition for writ of certiorari with the United States Supreme Court or federal petition for writ of habeas corpus.

[3] Cites to the record on appeal are as follows: Volume number "V" followed by "R" and the page number for the cite.

Florida agencies and the Ohio Department of Rehabilitation and Corrections (Mansfield Correctional Institution) in Mansfield, Ohio. (V1, R105-23). On February, 19, 2004, the State filed its response and moved to strike Brown's demand for discovery and, in the alternative, motion for summary denial of Brown's request for post-production request for additional public records. (V1, R125-28). On April 29, 2004, the trial court held a hearing, and, on May 10, 2004, denied the State's motion to strike, granted Brown's demand for discovery, and ordered an *in camera* review of the documents. (V1, T9-29; R135-37). On May 18, 2004, the trial court issued an Order releasing the documents and requested its "Sister Court, the Common Pleas Court of Hickaway County, Ohio, to enter its Order consistent with this Court's Order" in which the warden of Mansfield Correctional Institution would release the documents requested on Brown's discovery motion. (V1, R138-39). The State filed a notice of prior compliance and motion for reconsideration which the trial court denied on June 14, 2004. (V1, R142-174; 175).

On June 28, 2004, the State filed a Petition for Extraordinary Relief with this Court, which was dismissed on May 19, 2005, as untimely filed. (*See* Case No. SC04-1063). The trial court issued a corrected order on release of records on April 3, 2006. (V2, R348-49). On December 18, 2006, the State submitted confidential documents from the Ohio Department of Rehabilitation and Correction ("DRC") to

the trial court for an *in camera* inspection. The remainder of the documents previously requested by Brown were submitted to Brown. (V2, R350-54). On February 21, 2007, the trial court issued an order releasing all but three documents which were confidential medical history. (V3, R355-56). On February 4, 2008, Brown filed a Successive Rule 3.851 postconviction motion and Memorandum of Law. (V4, R745-51, V5, R752-864). On February 21, 2008, the State filed a Motion for Summary Denial/Response to Successive Motion for Postconviction. (V5, R865-949).

On April 30, 2008, the trial court held a case management conference ("CMC"). (V1, T39-76). During the CMC, postconviction counsel admitted that John Bonacoccorsy, Brown's attorney in the prior postconviction proceedings, knew McGuire used the alias of Keenum. (V1, R51).

The trial judge granted the State's motion for summary denial, holding:

> (1) The issues are procedurally barred, having been litigated previously and affirmed on appeal. *Brown v. State*, 846 So. 2d 1114 (Fla. 2003); *and*
>
> (2) The facts alleged in this successive Rule 3.8561 motion do not constitute newly-discovered evidence. *Jones v. State*, 591 So. 2d 911 (Fla. 1991). The evidence is not material and would not change the outcome of either the trial or penalty phase.

(V6, R962-63). This appeal follows.

SUMMARY OF THE ARGUMENT

Arguments I and III: This is a successive postconviction motion and every issue raised herein has been, or could have been, raised in the prior postconviction proceedings. *Brown v. State/Crosby*, 846 So. 2d 1114 (Fla. 2003). Brown points to no allegedly "newly discovered" evidence which was previously before this Court. The issues are time-barred, procedurally barred, and as this Court found in *Brown,* have no merit.

Arguments II, IV and V: Prosecutorial misconduct was not raised at the trial level or on appeal from the previous postconviction proceedings. Brown's argument on this issue is not clear; however, all allegations of misconduct reference either pre-trial discovery rules or the 2001 evidentiary hearing. As such, this issue is time barred and procedurally barred. The trial judge did allow current postconviction counsel to acquire Ohio records; however, Brown never requested depositions or further discovery until the case management conference. The trial judge did not abuse his discretion in denying the untimely, generalized, requests for further discovery. Discovery in postconviction proceedings is discretionary. No issue in this section has merit.

Argument III: The issue of disparate treatment of the co-defendant was raised on direct appeal and rejected by this Court. The further impeachment evidence now proferred by Brown was known during the 2001 postconviction

proceedings. This issue is time barred, procedurally barred, and, as this Court previously held, has no merit.

ARGUMENTS I and III (partial)[4]

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE FACTS ALLEGED IN THE SUCCCESSIVE POST-CONVICTION MOTION DO NOT CONSTITUTE NEWLY DISCOVERED EVIDENCE; THE ISSUES RAISED ARE PROCEDURALLY BARRED AND HAVE NO MERIT.

The facts alleged as "newly discovered evidence" were litigated in the first postconviction proceeding and decided in *Brown v. State/Crosby*, 846 So. 2d 1114 (Fla. 2003); Case No. SC01-1275. The trial judge correctly ruled that this issue was litigated previously and that the facts alleged in the successive Rule 3.851 motion do not constitute newly discovered evidence. The trial judge further ruled that the evidence was not material and would not change the outcome of either the trial or penalty phase. (V6, R962-63).

To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements:

> (1) the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence;

[4] A portion of the issues in this argument were repeated in Argument III. The State's arguments are considered in one point to avoid repetition.

> (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

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

When this case was before this Court in 2001-2003, the trial judge held an evidentiary hearing. During that 2001 hearing, Mr. Bonaccorsy, Brown's previous postconviction attorney, elicited testimony that McGuire had several aliases, was arrested under different names, and hid his identity from the State because he was an escaped felon. In the appeal of the postconviction denial, this Court had before it the judgment and sentence from Ohio showing McGuire was convicted as Scott Keenum. (V5, R891). Case No. SC01-1275. Also admitted at the 2001 evidentiary hearing and in this Court's record was the Department of Corrections ("DOC") website print-out showing McGuire used the aliases of Daniel Scott Davidson, Scott Jason McGuire, and Scott Steven Michaels. (V5, R892). The DOC record also showed there was a Mansfield, Ohio, detainer placed on McGuire in February 2000. (V6, R893). Thus, it has been clear since the evidentiary hearing in 2001 and on appeal to this Court that McGuire was Keenum was Davidson was Michaels. *See Brown v. State/Crosby*, 846 So. 2d 1114 (Fla. 2003); Case No. SC01-1275.

Brown concedes that McGuire misrepresented his true identity to law enforcement, to the State's Attorney, to this Court, and to Mr. Bonaccorsy. (Initial

brief at 17, 19). He fails to explain, then, how this evidence could be *Brady* evidence. In fact, McGuire was such a good liar, he managed to escape detection from Ohio law enforcement, the FBI, and the entire Florida Department of Corrections until 2000 when Ohio discovered McGuire was incarcerated in Florida. (V5, R893). Mr. Bonaccorsy stated at the 2001 hearing that there was no allegation that the State possessed information regarding McGuire's additional aliases. (V5, R925). In fact, McGuire even told Bonaccorsy the State never knew about his Ohio conviction. (V5, R929). The trial judge recognized that McGuire's pre-sentence investigation did not show an Ohio burglary conviction. (V5, R929). The PSI showed the aliases of Davidson and Michaels, gave a birthdate of 8-10-64 and a place of birth of Chicago. (V5, R940). The PSI listed seven convictions. (V5, R943). According to the PSI, McGuire's parents were Robert and Dorothy McGuire who died in a car accident, after which McGuire was raised in foster homes. (V5, R945). When McGuire testified at the evidentiary hearing in 2001, he was asked whether:

- He was convicted of aggravated battery in Cuyahoga County in 1986;
- He escapted from Mansfield Correctional institution on Febuary 15, 1989;

- He went by the name of Scott "Kenan";[5]
- He used the name Daniel Scott Davidson;
- He used the name Scott Steven Michaels;
- He used any other names.

(V5, R814-15). McGuire denied using any other alias and "took the Fifth" when asked the other questions. McGuire also admitted he had three felonies, not two, that he had a felony heroin conviction from Jacksonville, and was arrested for cocaine in Daytona Beach. (V5, R816).

Mr. Bonaccorsy argued that the newly discovered evidence he had in 2001 was:

- McGuire escaped from a correctional institution in Mansfield, Ohio, on February 15, 1989 (V5, R932);
- McGuire was convicted of a burglary in Cuyahoga County, Ohio, on December 12, 1986 (V5, 932)

Mr. Bonnacorsy argued this evidence could have been used to impeach McGuire and show he had a motive to frame Brown. Further, the new evidence was the reason McGuire wiped his fingerprints from the scene and testified against Brown.

[5] Although this name was transcribed as "Kenan," Mr. Bonaccorsy clarified in his Initial Brief in Case No. SC01-1275 that the name was "Keenum." (Case No. SC01-1275, Initial Brief at 7). Judicial notice of the record on appeal of Brown's case is automatic. *See In re Amendments to Florida Rules of Appellate Procedure*, 34 Fla. L. Weekly S574 (Fla. Oct. 15, 2009).

(V5, R932). Current postconviction counsel argues that the newly discovered evidence which is "powerful impeachment" is:

- That McGuire testified under a false name;
- That McGuire had a conviction in Ohio; and
- That McGuire was an escapee from an Ohio institution.

(Initial Brief at 20). The precise issue raised in this successive postconviction motion and appeal was raised as Argument II in Case No. SC01-1275. The present appeal is a repeat of the 2001 appeal, and Brown can point to no "newly discovered" evidence other than that which was apparent from the 2001 proceedings.

In its 2003 decision, this Court held:

> Newly Discovered Evidence
> Brown's second argument on appeal is based on newly discovered evidence. Following trial, Brown became aware of Scott McGuire's use of an alias, as well as a conviction McGuire received for aggravated burglary in Ohio and his subsequent escape from a correctional institution there. Brown asserts that his newly discovered evidence justifies the granting of a new trial because it would have shown that McGuire, not Brown, killed Roger Hensley to avoid detection, and this information, had it been available at trial, would have sufficiently impeached McGuire's testimony so as to make him wholly incredible.
>
> In order to obtain a new trial on the basis of newly found evidence, Brown was required to show that the evidence was "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 the evidence] by the use of due diligence." *Hallman v. State*, 371 So. 2d 482, 485 (Fla.1979). Additionally, the evidence must be of such a

> nature that it would probably produce an acquittal on retrial. *Jones v. State*, 591 So. 2d 911, 916 (Fla.1991).
>
> On review, we find that Brown's claim of newly discovered evidence does not warrant a new trial under the strict test set out in *Jones*. The probability that this evidence would have resulted in Brown's acquittal at trial is extremely remote, at best, in light of the other evidence presented to the jury. Therefore, we find no error in the trial court's determination that Brown is not entitled to relief on the basis of newly found evidence.

Brown v. State, 846 So. 2d 1114, 1126 (Fla. 2003).

On page 16, Brown's initial brief addresses the allegations in the successive motion regarding *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). He concedes on page 17 that there is no evidence of either and this issue was insufficiently pled. In fact, it was not even argued at the case management conference, the trial judge did not rule on the issue, and as appellate counsel recognizes, was not adequately pled. This issue, if raised at all, was abandoned and is procedurally barred. *See Aguirre-Jarquin v. State,* 9 So. 3d 593, 602 (Fla. 2009); *Kelley v. State*, 974 So. 2d 1047, 1051 (Fla. 2007).

Brown later admits that the documents the State allegedly withheld were explored in the 2001 evidentiary hearing. Brown also states that at the 2001 evidentiary hearing it was alleged "the State may have known of Keenum's false names." (Initial Brief, pages 19). In other words, all these issues were apparent in 2001 and are now procedurally barred. In any case, Brown has pointed to no

material *Brady* or *Giglio* evidence that would have (*Brady)*[6] or might have (*Giglio)*[7] affected the outcome.

Every reference Brown makes to the "evidentiary hearing" is a reference to the hearing in 2001 and could have been raised on appeal from that proceeding. (Initial Brief, pages 17-18). The fact that Brown continuously refers to the 2001 evidentiary hearing illustrates that this is simply a re-argument of those issues. (Initial Brief, pages 17-18).

Brown concedes there is "overlap" between the prior proceeding and the present proceeding, but argues there was no knowledge of the Keenum alias.

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[6] To establish a *Brady* violation, the defendant must demonstrate (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) the defendant was prejudiced. *See Way v. State*, 760 So. 2d 903, 910 (Fla. 2000). To meet the materiality prong, the defendant must demonstrate "a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." *Smith v. State*, 931 So. 2d 790, 796 (Fla.2006). With regard to Brady's second prong, this Court has explained that "[t]here is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." *Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993).

[7] To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Ventura v. State*, 794 So. 2d 553, 562 (Fla. 2001). Under *Giglio*, a statement is material if "there is a reasonable probability that the false evidence may have affected the judgment of the jury." *Ventura v. State*, 794 So. 2d at 563.

(Initial Brief, page 19). This allegation is refuted by the record of the 2001 evidentiary hearing, and the briefs in Case No. SC01-1275. This issue is procedurally barred.

Not only are these issues procedurally barred, they have no merit. As previously discussed, the evidence is not "newly discovered" under *Jones* because it was all known, or could have been known with due diligence, at the 2001 evidentiary hearing. As to materiality, the strength of the State's case was Brown's detailed confession, the physical evidence which corroborated that confession, and the fact Brown was arrested in possession of the victim's truck.

Last, to the extent Brown attempts, not only in this point but in successive points herein, to incorporate arguments from other pleadings, this procedure is not appropriate. (Initial Brief at 21, 24, 27, 29, 33). *See Coolen v. State*, 696 So. 2d 738, 742 n. 2 (Fla.1997); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990).

ARGUMENTS II and IV, and V

BROWN DID NOT RAISE A COGNIZABLE CLAIM OF PROSECUTORIAL MISCONDUCT AT THE TRIAL LEVEL; THIS ISSUE IS PROCEDURALLY BARRED AND HAS NO MERIT. THE FRAUD-ON-THE-COURT ISSUE IS PROCEDURALLY BARRED AND HAS NO MERIT.

Brown did not raise an issue of prosecutorial misconduct at the trial level or in the 2001 postconviction proceedings. This issue is procedurally and time

barred. Insofar as arguments in the issue relate to the 2001 evidentiary hearing, they could have been raised on appeal from the prior postconviction proceedings, and are procedurally barred.

Brown refers to the prosecutor's duty to list a witness by his/her proper name. (Initial Brief at 23). Prior postconviction counsel knew of the various aliases of McGuire, never raised this procedural issue, and this issue is procedurally barred. Further, this issue has no merit. The record of the 2001 evidentiary hearing shows that Mr. Bonaccorsy was provided all documents in the State's possession and that the state obtained those documents only after Brown filed his amended 3.850 motion. (V5, R303-304). Mr. Bonaccorsy confirmed that the documents were dated January 30, 2001, (after the first postconviction motion was filed) and that he was not alleging a *Brady* violation. (V5, R304). Mr. Daly stated that he obtained the documents in 2001, after he received Brown's motion for postconviction relief. (V5, R304). This statement is corroborated by Brown's Composite Exhibit C to Brown's successive motion which is Mr. Daly's letter, dated January 2001, *after* Brown filed his allegations about McGuire being Keenum. (V5, 831).

Argument IV raises a variation of this claim: a fraud-on-the-court claim. Argument IV repeats the nondisclosure argument in this claim. This argument is procedurally barred, refuted by the record, and has no merit.

Brown seems to refer to the trial court denying discovery in the present case.[8] The trial judge allowed Brown to obtain Ohio records of the co-defendant, a process which required *en camera* inspections and orders to courts in Ohio. Insofar as the matters raised in this appeal, Brown filed no written motion requesting discovery. The first mention of discovery was at the case management conference ("CMC") when postconviction counsel suddenly wanted to start deposing witnesses. However, in the five (5) years she had been appointed, collateral counsel never requested additional discovery. A request for discovery at the CMC is hardly timely. Discovery in postconviction proceedings is discretionary with the judge. *State v. Lewis*, 656 So. 2d 1248, 1249 (Fla. 1994). *Lewis* does not suggest that parties have an unqualified entitlement to engage in prehearing discovery relating to a postconviction motion. Rather, the availability of discovery in a postconviction case is a matter firmly within the trial court's discretion. *See id*. at 1250; *Marshall v. State*, 976 So. 2d 1071, 1079 (Fla. 2007).

Argument V repeats the discovery issue in Arguments II and IV.

ARGUMENT III (partial)

THE ISSUE OF DISPARATE TREATMENT OF CO-DEFENDANT SCOTT McGUIRE IS PROCEDURALLY BARRED AND HAS NO MERIT.

[8] Although this argument does not relate to the argument that the prosecutor allowed false testimony, the State will attempt to address the discovery issue.

This claim repeats the arguments regarding "newly discovered" impeachment in Argument I and should be denied accordingly. To the extent that the issue is re-argued, the State has combined that portion of Argument III with Argument I.

To the extent Brown argues further impeachment evidence would show that McGuire was the more culpable co-defendant (Initial Brief at 25), this issue could have been raised in the first postconviction motion since all the facts presently proferred were known by prior postconviction counsel. Further, this very issue was raised on direct appeal, and this Court held:

> Brown also asks this Court to consider the State's disparate treatment of McGuire. Where the circumstances indicate that the defendant is more culpable than a codefendant, disparate treatment is not impermissible despite the fact the codefendant received a lighter sentence for his participation in the same crime. *See Howell v. State*, 707 So. 2d 674, 682 (Fla.), *cert. denied*, 524 U.S. 958, 118 S.Ct. 2381, 141 L.Ed.2d 747 (1998); *Raleigh v. State*, 705 So. 2d 1324, 1331 (Fla.1997), *cert. denied*, 525 U.S. 841, 119 S.Ct. 105, 142 L.Ed.2d 84 (1998); *Sliney v. State*, 699 So. 2d 662, 672 (Fla. 1997), *cert. denied*, 522 U.S. 1129, 118 S.Ct. 1079, 140 L.Ed.2d 137 (1998); *Heath v. State*, 648 So. 2d 660, 665-66 (Fla. 1994). As noted above, McGuire pled guilty to second-degree murder punishable by forty years in prison in exchange for his promise to testify against Brown.
>
> Further, there was evidence submitted at trial indicating that Brown was the more culpable defendant. Brown's fingerprint matched a latent print found on one of the beer bottles and bloody shoeprints found at the scene of the crime positively matched tennis shoes worn by Brown. Further, Brown initially confessed to stabbing the victim multiple times in the chest and in the back. Although Brown also stated McGuire slit the victim's throat, such evidence ignores

> McGuire's testimony and does not exonerate Brown as the more culpable offender because the medical examiner testified that the neck wounds were nonfatal injuries, despite the substantial blood loss. The wounds to the chest and lower back, however, were fatal. Thus, the trial court acted within its discretion in rejecting as mitigating factors Brown's claim that he was the minor participant in the homicide and McGuire's lighter sentence. Accordingly, we find no error.

Brown v. State, 721 So. 2d 274, 282 (Fla. 1998).

This issue is procedurally barred and has no merit.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Christopher J. Anderson, Esquire, 645 Mayport Road, Suite 4-G, Atlantic Beach, Florida 32233 on this ___ day of November, 2009.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

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