IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-1033
Lower Tribunal No.: 92-34756 CFAES

PAUL A. BROWN
Appellant,

v.

STATE OF FLORIDA
Appellee.

(a death-penalty case)

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

INITIAL BRIEF OF APPELLANT

Christopher J. Anderson, Esquire
Florida Bar No.: 0976385
645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233
Ph: (904) 246-4448
Fx: (904) 458-8998
Court-Appointed Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONS

COURT RULES

PRELIMINARY STATEMENT

This is an appeal of a summary denial of a Rule 3.851 (e) (2) successive motion for postconviction relief. The Appellant is referred to variously as "Defendant" and "Appellant." Throughout this brief, this successive motion for postconviction relief is referred to as the "subject" or "second" postconviction motion. This is done to distinguish it from the single, prior postconviction motion. References to the present record on appeal are made with an "R" followed by the record volume number, followed by the record page number(s).

This case has already been through an original direct appeal of the judgment and sentence of death. That direct appeal was assigned Florida Supreme Court Appeal Number 89537. This Court's Opinion affirming Defendant's judgment and sentence of death is published as Brown v. State, 721 So.2d 274 (Fla. 1998). References to its record are made with "DAR" (an acronym for "direct appeal record"), followed by "R" followed by the direct appeal record volume number, followed by the direct appeal record page number(s).

This case has also already been through one prior postconviction relief motion. Throughout this brief, it is referred to as the "first" postconviction motion or the "initial" postconviction motion to distinguish it from the second postconviction motion which is the subject of this appeal. The trial court denied it in full. This

Florida Supreme Court assigned Appeal Number SC01-1275 to the appeal of that denial. This Florida Supreme Court's Opinion affirming that denial is published as Brown v. State, 846 So.2d 1114 (Fla. 2003). References to its record are made with "1st PCR," followed by "R" followed by the direct appeal record volume number, followed by the direct appeal record page number(s).

The defense attorney that drafted the subject postconviction motion is a seasoned death-penalty lawyer. She was forced to discontinue her representation of Defendant due to health problems. That she was experiencing health problems is evident in the subject postconviction motion. It is extremely discursive. Parts of it are difficult to understand and must be read and re-read several times to discern their meaning. The undersigned attorney has done his best to understand and accurately describe all of the allegations in the subject postconviction motion. However, if opposing counsel believes that the undersigned attorney has misunderstood or mischaracterized any of the allegations, the undersigned attorney requests that opposing counsel contact the undersigned and attempt to eliminate the problem amicably with some kind of joint-attorney stipulation or notice to this court.

STATEMENT OF THE CASE AND FACTS

The issues raised in this appeal are narrow and few. They concern the

discovery that Defendant's codefendant, Scott Jeffrey Keenum, testified against the Defendant under the false name of "Scott Jason McGuire" and had other aliases as well.[1] However, the procedural history of this case is long and complex. In an effort to keep this brief as short and as clear as possible, the facts in this Statement of the Case and Facts are presented in reverse order. The recent events which gave rise to this appeal are described first and the older, relevant events are described later.

As mentioned above, this is an appeal of a summary denial of a Rule 3.851 (e) (2) successive (second) motion for postconviction relief. R6, p. 964-967. It is referred to as the "subject" postconviction motion.[2] In it, Defendant alleged that he acquired newly discovered evidence that his co-defendant, Scott Jason McGuire (who testified against Defendant pursuant to a 40-year plea agreement) was actually Scott Jeffrey Keenum. R4, p. 746; R5, p. 752, 753-754, 756. Defendant also alleged that there is evidence suggesting that at the time of Defendant's jury trial, the State may have known –and indeed *would* have known with the exercise of reasonable diligence– that the name "McGuire" was a fiction, a "construct" Keenum created to protect himself from the repercussions of his criminal past. R5, p. 757, 760, 769, 772.

Defendant admitted in his subject postconviction motion that he does not

[1] There were other issues raised in the subject postconviction motion which were unrelated to these multiple-name issues (R4,p. 747). However, Defendant chose not to pursue them below and hence is not pursuing them in this appeal.

[2] Confusingly, Defendant's first postconviction motion, which is *not* the subject of this appeal, was entitled "Second Amended Motion for Post-Conviction Relief."

currently possess any direct evidence that the State *knew* "Scott Jason McGuire" was a false name when the State called "Scott Jason McGuire" to testify against Defendant at the subject, 1996 murder trial. R5, p. 757. However, in his subject postconviction motion, the Defendant described some strange occurrences at the evidentiary hearing on his first postconviction motion which sent up a "red flag" that the State may have known all along that "McGuire" had multiple identities and testified at Defendant's murder trial under a false name. In particular, the Defendant alleged in his subject postconviction motion that, before "McGuire" was called by the defense to testify at the evidentiary hearing on Defendant's initial postconviction motion, the State urged the court to appoint counsel for "McGuire." R5, p. 753, 759, 793-795. Defendant further alleged in his subject postconviction motion that when McGuire took the stand to testify at Defendant's first postconviction motion evidentiary hearing, the State announced "for the record" that it was not immunizing "McGuire" from the consequences of his testimony and that anything "McGuire" said could be used against him. R5, p. 761-762, 810. Defendant further alleged –and appended the supporting, first postconviction motion evidentiary hearing transcript– that "McGuire" did indeed invoke his Fifth Amendment privilege to avoid answering what his true name was. R5, p. 762-763, 810, 814.[3]

R5, p. 871.

[3] Later in the same, first postconviction motion evidentiary hearing, "McGuire" admitted using the names "Daniel Scott Davidson" and "Scott Steven Michaels" but, amazingly, denied using any other names. R5, p. 814-815. The State attorney said

These surprise occurrences gave new significance to previously acquired information about "McGuire's" alternate names and activities. For example, the Defendant alleged in his subject postconviction motion that McGuire/Keenum had escaped from an Ohio prison on February 15, 1989 and remained a fugitive from Ohio justice all the way through Defendant's jury trial and beyond, until January 24, 2000, when an Ohio and FBI task force found Keenum imprisoned in Florida under the pseudonym "McGuire." R5, p. 757.[4] The Defendant also alleged in his subject postconviction motion that, if the State had ordered a National Crime Information Center report ("NCIC report") during the year of Defendant's jury trial using another Keenum alias of "Davidson," that NCIC report would have shown that "Davidson" and "Jason McGuire Scott" were additional names sometimes used by Keenum. R5, p. 758.

The Defendant also alleged that, at the time of the evidentiary hearing on Defendant's initial postconviction motion, his lawyer had been unable to obtain Ohio

---

nothing in response to such patently false denial.

[4] It appears that most, perhaps all, of the information about "McGuire's" other names and Ohio criminal past were known to Defendant prior to the filing of his first postconviction motion. 1st PCR R5, p. 587, 590, 596, 687, 695-697. However, because the State alerted the Court and McGuire/Keenum to the need for McGuire/Keenum to have counsel at the evidentiary hearing for Defendant's first postconviction motion, and because McGuire/Keenum did subsequently assert his right to remain silent and did subsequently refuse to answer what his true name was, such previously known information acquired new significance and, in retrospect, appeared as signs that the State probably knew all along about "McGuire's" alternate names and true identity as "Keenum."

records on Keenum. Defendant further alleged the State had not responded to Defendant's request for NCIC records and reports, even though the State already possessed them. R5, p. 759.

Defendant did acquire some Ohio law enforcement and correctional records pertaining to Keenum. Those records include a federal, NCIC "inquiry" print-out form dated November 5, 1993. It identifies the following "alias names" of Keenum: Scott Keenum, Scott Jeffrey Keenum, Jason McGuire Scott, Scott J. Keenum, Daniel Scott Davidson, Jeffrey Scott. R3, p. 20, 25, 29,32, 33. Those records also include an Ohio arrest warrant and "hold order" dated January 20, 2000 which directs law enforcement officers to arrest escaped convict Scott Keenum a/k/a "Scott Jason McGuire. R3, 175. There is an Ohio prison "Special Incident Report dated December 9, 1992 which identifies the involved inmate as Scott Jeffrey Keenum a/k/a Daniel Scott Davidson." R3, p. 188.[5] As noted above, Defendant admitted in his subject postconviction motion that he does not currently possess any direct evidence that the State knew "McGuire" was a false name at the time the State called "McGuire" to testify against the Defendant at Defendant's jury trial. R5, p. 757. However, in the last few lines of his subject postconviction motion, Defendant requested "discovery in the form of deposition and other discovery tools" to "fill in those gaps." R5, p. 781. Defendant's subject postconviction motion was summarily denied before Defendant

[5] See footnote 4 above.

had an opportunity to acquire the relevant law enforcement and prosecution records, and without an opportunity to depose the relevant law enforcement and prosecution personnel. This denied Defendant the opportunity to obtain proof that the State knew before trial that Keenum had several aliases and would be testifying under the false name of "McGuire." Similarly, this deprived Defendant of the opportunity to prove that the State knew of Keenum's aliases, prior convictions and prison-escapee status prior before the subject trial and yet withheld such information from Defendant.

Keenum, falsely testifying as "McGuire," gave a great deal of jury trial testimony against the Defendant. DAR 8, p. 855-899 (court reporter transcript pages 698-742). It is summarized accurately in Brown v. State, 721 So.2d 274 (Fla. 1998), as follows:

> 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 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.

(Id., at p. 275-276)

This Florida Supreme Court also summarized Defendant's own trial testimony in its same, direct-appeal Opinion as follows:

> 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.

(Id. p. 276)

Defendant alleged in his subject postconviction motion that Keenum's act of testifying as "McGuire" perpetrated a fraud upon the court. R4, p. 746, 750; R5, p.

753, 754. Defendant argued that such fraud is, in itself, so great that Defendant should receive a new trial, even if State did nothing wrong. R5, p. 768.

Defendant also alleged in his subject postconviction motion that the State's act of presenting Keenum as "McGuire" obscured Keenum's criminal past. R5, p. 757. Defendant further alleged that if his own trial counsel had known that "McGuire" was actually Keenum, his own trial counsel would acquired much useful impeachment information and would have used it to undermine McGuire/Keenum's credibility at trial. This useful impeachment evidence included the following:

> (A) Keenum was convicted of an Ohio burglary on December 12, 1986 and was an escapee from the resultant Ohio prison sentence at the time of the subject murder. R5, p. 754.
>
> (B) Although the 40-year plea bargain that Keenum made with the State in connection with the subject murder case required Keenum to testify truthfully, Keenum was actually testifying falsely by identifying himself as "McGuire." R5, p. 753-754.
>
> (C) Defendant has a history –reflected in Ohio correctional records– of alcohol and drug abuse, hallucinations, alcoholic blackouts, and perhaps even psychosis. R5, p. 765-766.

The State responded by filing a written motion for summary denial of the subject postconviction motion. The State listed several reasons why the State believed that the subject motion should be summarily denied. R5, p. 855. With regard to Defendant's allegation that he had "newly discovered evidence" of Scott Jason McGuire's true identity as Scott Jeffrey Keenum, the State quoted the following language from the

second appeal Opinion for this case (the appeal of the trial court's denial of Defendant's first postconviction motion):

> 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.
>
> (excerpt of Brown v. State, 846 So.2d 1114, 1126 [Fla. 2003], as quoted in the State's motion for summary denial of the *subject* postconviction motion, R5, p. 873-874)

In its same motion for summary denial of the subject postconviction motion,

the State further pointed out that the defense discovered that "McGuire" was "Keenum" prior to Defendant's first postconviction motion. The State went on to argue that the issue of Keenum's use of the false name "McGuire" had already raised and litigated in Defendant's first postconviction motion and its ensuing appeal, Brown v. State, 846 So.2d 1114 (Fla. 2003).[6] R5, p. 882. The State further argued in its motion for summary denial of the subject postconviction motion, that the question of whether this multiple-name information constituted "new evidence" of sufficient importance to warrant a new trial had already been litigated and resolved against the Defendant in his first postconviction motion and ensuing appeal, Brown v. State, 846 So.2d 1114, 1126 (Fla. 2003). R5, p. 882-886.

On April 30, 2008, the lower court conducted a hearing on the State's motion for summary denial of the subject postconviction motion. R1, p. 39-75. Defendant's counsel again admitted that she had no evidence that the State had committed a fraud upon the court by knowingly calling Keenum to testify under the false name of "McGuire." R1, p. 50. However, she said that she needed to engage in discovery ". . .to know what they (the State) knew and when they knew it." R1, p. 50.

The court granted the State's motion for summary denial of the subject post-conviction motion. The court stated:

---

[6] Defendant concedes that this is true. *i.e.* Defendant *did* discover that "McGuire" was "Keenum" prior to Defendant's first postconviction motion and Defendant did indeed raise this as an issue in Defendant's *first* postconviction motion and ensuing appeal.

> The Defendant's (subject) Motion . . . is summarily denied for the following reasons:
>
> (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 3.851 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.
>
> (R6, p. 962)

There is one, final, factual matter which requires mention in this brief. It concerns the ages and sentences of the two codefendants. The subject murder occurred on November 5, 1992. DAR 1, p. 4. At the time, Defendant was 25 years old (date of birth 7-31-67). DAR 1, p. 1. His co-defendant, Scott Jeffrey Keenum ("Scot Jason McGuire") was 28 years old (date of birth 8-10-64).

Keenum, a/k/a "McGuire," the older of the two codefendants, received a 40-year sentence pursuant to a negotiated plea agreement. That negotiated plea agreement required Keenum a/k/a "McGuire" to testify truthfully against the present Defendant/Appellant. DAR 8, p. 879 (court reporter transcript page723). Keenum a/k/a "McGuire did indeed receive the 40-year sentence. 1st PCR R5, p. 688. The present, younger Defendant was sentenced to death. R4, p. 745.

SUMMARY OF ARGUMENT

Defendant's codefendant testified against Defendant a trial. In Defendant's first postconviction motion, Defendant alleged –and subsequently presented proof and

argument– that Defendant had newly discovered evidence that his codefendant, who had testified against Defendant as "Scott Jason McGuire" was actually Scott Jeffrey Keenum. Defendant alleged that "McGuire" had other pseudonyms as well. Defendant alleged that this information, if given to Defendant before trial, would have led to yet more impeachment evidence that "McGuire"/Keenum had a Ohio felony conviction and was an escapee from an Ohio prison.

In the middle of the evidentiary hearing on that first postconviction motion, when it was too late to amend and add a new claim, "McGuire"/Keenum and the prosecutor made some statements which suggested the State had known all along that Keenum had multiple pseudonyms and testified under a false name of "McGuire." In other words, it became apparent, in the middle of the evidentiary hearing on the first postconviction motion, that the evidence of Keenum's false names was not only evidence that the Defendant had "newly discovered," himself, it was probably also evidence the State had known of and improperly withheld from the Defendant in violation of Brady v. Maryland, 373 U.S. 83 (1963).

Defendant's subject postconviction motion was summarily denied without the Defendant having a chance to engage in discovery to gather proof that the State did knew of and withheld evidence of Keenum's false names prior to Defendant's trial. This was error.

ARGUMENT FOR EACH ISSUE

Issue 1: The trial court erred in holding that the facts alleged in the subject, second Rule 3.851 motion do not constitute newly-discovered evidence and in holding that the issues raised in the subject postconviction motion are procedurally barred due to having been litigated and previously affirmed on appeal

The trial court must have understood that, although Defendant used the expression "newly discovered evidence" in his subject postconviction motion, he was really referring to the State improperly withholding evidence of Keenum's use of false names in violation of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S.150 (1972). Indeed, Defendant typed the sentence "This claim is based on Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S.150 (1972)." at pages 5 and 6 of his subject postconviction motion. R4, p. 749.

Furthermore, in Defendant's subject postconviction motion, the Defendant repeatedly used the expression "fraud on the court." R4, p. 746, 750; R5, p. 753, 754, 768.

Although Defendant did not use the expression "prosecutorial misconduct" in his subject postconviction motion, the concept of "prosecutorial misconduct" is clearly what the he was alluding to in pages 21-30 of his subject postconviction motion. R5, p. 772-781. Furthermore, the case of Giglio v. United States, 405 U.S.150 (1972), which is cited at pages 5 and 6 of Defendant's subject postconviction motion (R4, p. 749) encompasses the concept of "prosecutorial misconduct."

As mentioned in the Statement of the Case and Facts above, Defendant

admitted in his subject postconviction motion that he does not currently possess any direct evidence that the State *knew* "Scott Jason McGuire" was a false name when it called "Scott Jason McGuire" to testify against Defendant at the subject, 1996 murder trial. R5, p. 757. However, in his subject postconviction motion, the Defendant described some strange occurrences at the evidentiary hearing on his first postconviction motion which sent up a "red flag" that the State may have known all along that "McGuire" had multiple identities and testified against the Defendant under the false name of "McGuire." In particular, the Defendant alleged that just before Defendant's lawyer called "McGuire" to testify at the evidentiary hearing for Defendant's first postconviction motion, the State urged the court to appoint a lawyer for "McGuire." R5, p. 753, 759, 793-795.

Defendant further alleged in his subject postconviction motion that when McGuire had took the stand to testify at Defendant's first postconviction motion evidentiary hearing, the State announced "for the record" that it was not immunizing "McGuire" from the consequences of his testimony and the State announced that anything "McGuire" said could be used against him. R5, p. 761-762, 810. Defendant further alleged –and appended the supporting, first postconviction motion evidentiary hearing transcript– that "McGuire" did indeed invoke his Fifth Amendment privilege to avoid answering what his true name was. R5, p. 762-763, 810, 814.

In cases like the present one, where the lower court summarily denies a postconviction motion without an evidentiary hearing, the reviewing courts accept factual allegations of the motion as true, to the extent that they are not refuted by the record. McLin v. State, 827 So.2d 948 (2002), *rehearing denied* 949 So.2d 1123.[7]

Admittedly, there is some overlap between the "newly discovered evidence" issues in the first postconviction motion and the Brady/Giglio issues raised in the subject postconviction motion. However, at the time Defendant filed his first postconviction motion, there was nothing of record which suggested that the State knew or should have known that "McGuire" was one of Keenum's pseudonyms." Furthermore, the multiple-name issues in Defendant's first postconviction motion were presented as surprise-discovery issues and as "ineffective assistance of counsel" issues rather than as issues of improper withholding of evidence by the State. As indicated elsewhere in this brief, it was not until the middle of the evidentiary hearing on that first postconviction motion that Defendant received signs that the State may have known of Keenum's false names all along. By that time, it was too late to amend and add a new claim to the first postconviction motion.

Standard of review: In reviewing trial court rulings on a Brady v. Maryland,

[7] Defendant is also aware of the decision in Keller v. State, 551 So.2d 1269 (Fla. 1st DCA 1996) which states that relevant records are to be attached to an order summarily denying a Rule 3.850, Fla. R. Crim. P. motion for postconviction relief. Defendant is not raising the non-attachment of papers as an issue in this appeal because the relevant records are obvious and because, as a practical matter, Defendant will not derive benefit from raising an issue of non-attachment of papers.

373 U.S. 83 (1963), claim that the State has improperly withheld evidence, the appellate courts defer to the trial court on questions of fact, but review de novo associated questions of law. Mordenti v. State, 894 So. 2d 161, 169 (Fla. 2004)

Before the State's withholding of evidence will be deemed a Brady violation, the defendant must demonstrate that (1) favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and that (3) because the evidence was material, the defendant was prejudiced. To satisfy the materiality prong, the defendant must demonstrate a reasonable probability that had the suppressed evidence been disclosed, the factfinder would have reached a different verdict or judgment. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Lynch v. State, SC06-2233 (Fla. 1-30-2009).

In the present case, the evidence of Keenum's other names and the evidence that Keenum testified under the false name of "McGuire," and the additional evidence of Keenum's Ohio conviction and prison-escapee status are powerful impeachment evidence. At a minimum, the State's disclosure of such evidence to the defense would have probably netted the Defendant a "life" sentence. As indicated elsewhere in this brief, the Defendant needs an opportunity to engage in discovery to search for proof that the State possessed such evidence at the time of Defendant's trial and wrongfully withheld it from the Defendant.

Constitutional violations: The trial court's summary denial of Defendant's

subject postconviction motion violated Defendant's rights to due process as secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 9 of the Florida Constitution. It also violated Defendant's right to a fair jury trial and right to confront witnesses as secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. It also violated the prohibition of cruel and unusual punishment of the Eighth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 16 of the Florida Constitution.

Defendant also incorporates all of the argument he has made for the other four enumerated Issues of this appeal in support of this Issue .

Issue 2: The trial court erred in failing to find that the matters alleged in Defendant's subject postconviction motion stated a valid claim of prosecutorial misconduct

Standard of Review: A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. United States v. Agurs., 427 U.S. 97 (1976).

Where a prosecutor knowingly allows a witness to give false testimony, the defendant's due process rights are violated. The prosecutor has an affirmative duty to correct false witness testimony at trial. Alcorta v. Texas, 360 U.S. 264 (1959), Giglio v. United States, 405 U.S. 150 (1972).

In Riechmann v. State, 966 So.2d 298 (Fla. 2007) this Florida Supreme Court stated, "A Giglio violation is demonstrated when it is shown (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. Guzman v. State, 941 So.2d 1045, 1050 (Fla. 2006). Once the first two prongs are established, the false evidence is deemed material if there is any reasonable probability that it could have affected the jury's verdict. Id. Under this standard, the State has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt."

It also appears that the prosecution may have also failed to meet its Fla. R. Crim. P. Rule 3.220(b) obligation to correctly identify its witnesses. There is a special *Standard of Review* for appellate review of issues related to State violations of the Florida Rules of Criminal Procedure: The trial court must make a full inquiry into all the circumstances surrounding the breach to determine whether the defendant is prejudiced by the State's noncompliance. The State has the burden of showing to the trial court that there is no prejudice to the defendant. Failure of the trial court to make a full inquiry requires reversal of a conviction. Richardson v. State, 246 So.2d 771 (Fla. 1971), Cumbie v. State, 345 So.2d 1061 (Fla. 1977), Lavigne v. State, 349 So.2d 178 (Fla.App. 1 Dist. 1977).

Rule 3.220 (b), entitled "Prosecutor's Discovery Obligation," requires the

prosecutor to serve a written Discovery Exhibit which lists the *names* of all witnesses. Implicit in this is a duty to learn and list each witnesses true name, not just their pseudonyms or aliases. Defendant's prosecutor breached that duty by not listing "McGuire's" true name of "Keenum."

In the present case, the trial court erred in not allowing Defendant to engage in discovery to follow up on Defendant's reasonable suspicions and seek proof that the State did indeed possess and withhold evidence of Keenum's use of false names. Alternatively, the trial court erred in not allowing Defendant to engage in the discovery to follow up on Defendant's reasonable suspicions and seek evidence that State failed to properly identify and list "Keenum" in its discovery disclosures.

Constitutional violations: The trial court's summary denial of Defendant's subject postconviction motion violated Defendant's rights to due process as secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 9 of the Florida Constitution. It also violated Defendant's right to a fair jury trial and right to confront witnesses as secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. It also violated the prohibition of cruel and unusual punishment of the Eighth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 16 of the Florida Constitution.

Defendant also incorporates all of the argument he has made for the other four

enumerated Issues of this appeal in support of this Issue.

Issue 3: The trial court erred in holding that the evidence of Keenum's use of false names was not material and would not change the outcome of either the trial or penalty phase

In its order summarily denying the subject postconviction motion, the trial court stated, "The evidence is not material and would not change the outcome of either the trial or penalty phase." R6, p. 962.

This Florida Supreme Court summarized what Defendant said about the subject murder to the FBI and what the Defendant said about the subject murder to his own jury in Brown v. State, 721 So.2d 274 (Fla. 1998). *See above*. Admittedly, there are some substantial inconsistencies between the two statements. However, the Defendant was consistent in indicating (A) He and McGuire/Keenum were both present in the victim's hotel room when the murder occurred, and (B) McGuire/Keenum was the mastermind and dominant actor. Brown, supra. If Defendant's jurors believed just this much, they might have spared him the death penalty.

The evidence of Keenum's false names, which Defendant discovered after his jury trial, would have led to yet more useful impeachment evidence to use against "Mcguire"/Keenum at trial. All told, such impeachment evidence included:

1. "McGuire" was convicted of felony burglary in Ohio under the name "Keenum." 1st PCR R5, p. 587. This is admissible evidence of bad character and could have been used to counter his testimony that his only prior convictions were two drug convictions. Id., p. 590. It would have also make the jurors distrust his testimony as "McGuire" in the subject trial. Id. P. 590

2. Before completing his Ohio prison sentence for such burglary, "McGuire" escaped and was a fugitive from Ohio justice at the time of the subject murder. Id., p. 587, 589-590. This suggests a motive for the subject murder: to avoid getting caught and sent back to prison in Ohio.

3. Keenum's Ohio law enforcement and prison records reveal that Keenum was not only an escapee from Ohio prison (Id. P. 757), he also had alcohol and drug abuse problems that were so severe that there were adversely affecting his cognitive abilities. Subject appeal record, R5, p. 765-767.

Defendant's trial counsel would have used all of this evidence to argue to the jury that "McGuire"/Keenum is the more dangerous and deceitful of the two Defendants. Defendant's trial counsel would have used this evidence to depict Keenum as the older, dominant actor who brought the younger Defendant into his world of trouble. This would likely have resulted in a jury recommendation of a life in prison, rather than the death penalty.

In Marek v. State, 492 So.2d 1055, 1058 (Fla. 1986) this Florida Supreme Court addressed a claim that it is cruel and unusual and unequal for one first-degree murder defendant to receive a death sentence while his codefendant gets life in prison. This court held that the different sentences in Marek were justified because the defendant who received the death penalty was the dominant actor in the criminal episode.

The present, death-sentenced Defendant, was 25 years old at the time of the subject murder. Co-Defendant "McGuire,"/Keenum was 28. Both testified at Defendant's trial. Each one characterized the other was the dominant actor. If Defendant's jurors had known "McGuire's" true name, his other aliases, his other

crimes and his prison-escapee status, they may well have considered the present Defendant and his version of the murder to be more believable. In other words, Defendant's jurors may have accepted Defendant's description of "McGuire" as the dominant actor. This may have motivated them to recommend that Defendant be sentenced to life in prison, rather than death. Clearly, the trial Court erred in finding that the false-name evidence is not "material."

Constitutional violations: The trial court's summary denial of Defendant's subject postconviction motion violated Defendant's rights to due process as secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 9 of the Florida Constitution. It also violated Defendant's right to a fair jury trial and right to confront witnesses as secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. It also violated the prohibition of cruel and unusual punishment of the Eighth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 16 of the Florida Constitution.

Defendant also incorporates all of the argument he has made for the other four enumerated Issues of this appeal in support of this Issue.

Issue 4: The trial court erred in not finding that the subject postconviction motion stated a valid claim of fraud on the court

Defendant argued throughout his subject postconviction motion that the State's nondisclosure of information about "Keenum's" multiple, false names was "fraud on

the court." R4, p. 746, 750; R5, p. 753, 754, 768.

Standard of review: The appellate court reviews the evidence supporting an allegation of fraud on the court. If that evidence clearly supports an allegation of fraud on the court, the trial court must conduct a new trial. Robinson v. Weiland, 988 So.2d 1110 (Fla.App. 5 Dist. 2008).

Fraud on the court occurs where ". . . it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." Cox v. Burke, 706 So.2d 43, 46 (Fla. 5th DCA 1998).

The concept of "fraud on the court" also applies in criminal proceedings. In Goene v. State, 577 So.2d 1306 (Fla. 1991), This Florida Supreme Court held that the principle of fraud on the court can be applied to impose a harsher sentence on a criminal defendant who falsely identifies himself at his sentencing hearing. In Goene the court explained why the "fraud on the court" concept *should* be applied to prevent defendant's from falsely identifying themselves in court as follows: "As this Court has previously recognized, orders, judgments or

decrees which are the product of fraud, deceit, or collusion "may be vacated, modified, opened or otherwise acted upon at any time. This is an inherent power of courts of

record, and one essential to insure the true administration of justice and the orderly function of the judicial process." State v. Burton, 314 So.2d 136, 138 (Fla. 1975). As the State correctly points out, to hold otherwise in circumstances such as the one now before this Court would encourage and reward a defendant's use of aliases . . .”

As indicated in the Statement of the Case and Facts above, Keenum’s false testimony as “McGuire” worked a fraud on the court. The trial court should have allowed Defendant to engage in discovery to further develop this issue for an evidentiary hearing. The trial court also erred in entering a summary denial order which did not address this “fraud on the court” issue.

Constitutional violations: The trial court’s summary denial of Defendant’s subject postconviction motion violated Defendant’s rights to due process as secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 9 of the Florida Constitution. It also violated Defendant’s right to a fair jury trial and right to confront witnesses as secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. It also violated the prohibition of cruel and unusual punishment of the Eighth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 16 of the Florida Constitution.

Defendant also incorporates all of the argument he has made for the other four enumerated Issues of this appeal in support of this Issue.

Issue 5: The court erred in denying the subject postconviction motion without allowing the defendant to engage in discovery first

Standard of review: The reviewing court applies an "abuse of discretion" standard of review in appeals of orders denying or limiting discovery in post-conviction proceedings. Spaziano v. State, 879 So.2d 51 (Fla.App. 5 Dist. 2004).

In the last few lines of the subject postconviction motion, Defendant requested "discovery in the form of deposition and other discovery tools" to "fill in those gaps." R5, p. 781. At the hearing on the State's motion for summary denial of the subject postconviction motion, Defendant's counsel informed the Court that there remained an outstanding question of whether the State knew that McGuire was actually Keenum at the time of Defendant's trial. R1, p. 48. Defendant's counsel informed the court that she needed discovery to find out what the State knew about Keenum's multiple identities. R1, p. 50. She indicated that she wanted to depose the involved prosecutors to find out what they knew of the multiple identities. R1, p. 56. She indicated that she wanted to obtain Florida Department of Corrections records to determine what they revealed about Keenum's multiple identities. R1, p. 57. She indicated she wanted to obtain documentary evidence and depose crime-reporting agency personnel (such as FDLE and NCIC personnel) to determine when Defendant's prosecutor's contacted them and when such agencies provided

Defendant's prosecutors with information on "McGuire" / Keenum . R1, p. 59-60.

The attorney who drafted Defendant's subject postconviction motion also informed the lower court that she needed to take Keenum's deposition (presumably to find out when he informed the State of his other names). R1, p. 60-61. Nevertheless, the lower court granted the State's summary dismissal motion without giving the Defendant a chance to engage in such discovery. R1, p. 74-75.

The undersigned attorney for Defendant could not find any cases dealing with the right to engage in discovery in Rule 3.851, Fla. R. Crim. P. postconviction proceedings. However, guidance is provided in the cases dealing with requests for discovery in Rule 3.850, Fla. R. Crim. P. The Florida Supreme Court has held the trial court may allow discovery into matters which are relevant and material. Where the discovery is permitted, the court may place limitations on the sources and scope of the discovery. In deciding whether to allow this limited form of discovery, the lower court shall consider the issues presented, the elapsed time between the conviction and the postconviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts. State v. Lewis, 656 So.2d 1248 (Fla. 1994).

The present case is a death penalty case. The Defendant faces execution. His lack of information about "McGuire's" true identity as Keenum put him at a terrible disadvantage at trial. That disadvantage probably landed him on Death Row. If the

State knew or had reason to know that "McGuire" was Keenum and failed to disclose this to Defendant before trial, an major injustice has occurred. The trial court erred in not allowing Defendant the discovery he needed to prove that (A) the State knew or should of known before Defendant's trial that "McGuire" was actually Keenum, and (B) the State failed to disclose information about "McGuire's" alternate names to the Defendant before Defendant's trial.

Constitutional violations: The trial court's summary denial of Defendant's subject postconviction motion violated Defendant's rights to due process as secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 9 of the Florida Constitution. It also violated Defendant's right to a fair jury trial and right to confront witnesses as secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution. It also violated the prohibition of cruel and unusual punishment of the Eighth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 16 of the Florida Constitution.

Defendant also incorporates all of the argument he has made for the other four enumerated Issues of this appeal in support of this Issue.

CONCLUSION

For all of the reasons given above, the Defendant respectfully requests that this Florida Supreme Court vacate Defendant's judgment and sentence of death and

remand the case to the lower court for a new trial based upon the fraud on the court. Alternatively, Defendant respectfully requests that this Florida Supreme Court enter its Order and Mandate vacating the subject, summary denial order and remanding the case to the lower court with directions to (A) reopen the subject, postconviction proceedings and allow the undersigned defense attorney to redraft the subject postconviction motion in a more readable form, (B) conduct a hearing to determine what limited discovery should be allowed on the limited issues of (1) what actions, if any, the State took to ascertain "McGuire's" true name and other names, (2) the dates the State first learned of "McGuire's" other names and identities, (3) the other names that the State learned of, (4) the types of other-name information that the State disclosed to Defendant, if any, and (4) the dates the State disclosed such other-name information to the Defendant.

Respectfully submitted,

CHRISTOPHER J. ANDERSON, ESQ.
Florida Bar No.: 0976385
645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233
(904) 246-4448
Court-Appointed Counsel for Appellant

CERTIFICATE OF SERVICE

The undersigned, Court-appointed attorney hereby certifies that copies of this brief have been served by U.S. Mail addressed as follows:

A.A.G. Barbara Davis, Esquire
Office of the Attorney General
Criminal Appeals Division
444 Seabreeze Blvd., Suite 500
Daytona Beach, FL 32118

Paul A. Brown, DC# V02093
Union Correctional Institution
7819 North West 228th Street
Raiford, FL 32026-4460

on August 28, 2009.

CHRISTOPHER J. ANDERSON, ESQ.
Florida Bar # 0976385
645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233
(904) 246-4448
Court-Appointed Counsel for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief is submitted in Times New Roman 14-point font and complies with the font requirements of Rule 9.210, Fla. R. App. P.

CHRISTOPHER J. ANDERSON, ESQ.
Florida Bar # 0976385
645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233
(904) 246-4448
Court-Appointed Counsel for Appellant