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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

ARGUMENT IN RESPONSE AND REBUTTAL TO ARGUMENT PRESENTED IN THE ANSWER BRIEF

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

Appellee addressed this issue at page 12 of its Answer Brief, beneath the heading entitled *Arguments I, and III (partial): The trial court did not err in holding that the facts alleged in the successive post-conviction motion do not constitute newly discovered evidence; The issues raised are procedurally barred and have no merit.*

Appellee essentially argues that the fact that Keenum testified falsely as "McGuire" was already discovered and litigated and in Defendant's first postconviction motion and ensuing appeal entitled Brown v. State/Crosby, 846 So.2d 1114 (Fla. 2003). Appellee goes on to argue that the Issue 1 in the present appeal is nothing more than an effort to relitigate this same issue.

Actually, the subject appeal is about *different* new evidence. The *different* "new evidence" is the warning that the State gave to Keenum prior to Keenum testifying during the evidentiary hearing on Defendant's *first* postconviction motion and Keenum's reaction to that warning: invoking his right to remain silent. Such warnings and reaction appear at Volume 5, p. 753, 759, 761-763 793-795, 810, 814 of the record on appeal for this appeal. Until such State warnings and reaction occurred, there was nothing to suggest that the State knew about Keenum's false testimony all along. Such warnings and reaction did not occur until the middle of the evidentiary hearing on Defendant's *first* postconviction motion. At that time, it was too late to add a new, *Giglio* claim to Defendant's *first* postconviction motion.

If the trial court had allowed Defendant his requested postconviction discovery to pursue these signs of State-involved false testimony in the subject, subsequent postconviction motion proceedings, Defendant may have acquired admissible evidence that the State knowingly presenting Keenum's false testimony at Defendant's jury trial. Evidence that the State and Keenum cooperated in presenting Keenum's false testimony against the Defendant –if admissible evidence of such could have been acquired during postconviction discovery– would also be "new" evidence. Such new evidence would constitute much more damaging impeachment evidence against "Keenum" and would engender much more juror doubt against the

State's case as a whole than the mere evidence of Keenum's fake name that came out during the first postconviction motion proceedings. Evidence of *State-induced* false testimony would provide a valid

basis for subsequent postconviction motion pursuant to Giglio v. United States, 405 U.S. 150 (1972).

In all other respects, Appellant will continue to stand on the argument he submitted in his Initial Brief on 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

Appellee addressed this issue at page 19 of its Answer Brief, beneath the heading entitled *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.*

Appellee appears to be arguing that Appellant's "prosecutorial misconduct" and "fraud-on-the-court" arguments are barred because (A) they could have been raised in the *first* postconviction motion proceedings and (B) they were not raised in the *subject* postconviction motion proceedings. However, as Appellant has indicated in his reply to Issue 1 above, the State appeared innocent of wrongdoing until the middle of the evidentiary hearing on Defendant's *first* postconviction motion. That is when the prosecutor admonished Keenum that he could be prosecuted for testifying about his true name and that is when Keenum invoked his right to remain silent. The prosecutor represented the State of Florida, not Keenum. Why would he want to silence Keenum in this fashion? Naturally, the Defendant suspected the State had known about Keenum's multiple identities and false testimony all along and did want such foreknowledge to be exposed.

With regard to Appellee's claim that Appellant failed to raise "prosecutorial misconduct" and "fraud on the court" claims in his *subject* post-conviction motion, Appellant points out that he *did* raise a fraud-on-the-court claim in his subject postconviction motion. R4, p. 746, 750; R5, p. 753, 754. Furthermore, a prosecutor's knowing presentation of false testimony is both prosecutorial misconduct and fraud. With regard to the knowing presentation of false testimony, the expressions "prosecutorial misconduct" and "fraud on the court," may be regarded as

synonymous. *See*, *e.g.* Florida Bar v. Schuab, 619 So.2d 202 (Fla. 1993) and Florida Bar v. Kickliter, 559 So.2d 1123 (Fla. 1990).

Finally, Appellee states that the Appellant did not request discovery until the Case Management Conference, a full five years after the appointment of postconviction counsel. (Answer Brief, p. 21). In reply, Appellant now points out that in its April 16, 2009 Order, this Florida Supreme Court directed the trial court to appoint a different lawyer to represent this Appellant. In such Order, this Florida Supreme Court noted that the previously appointed attorney, Mary Catherine Bonner was unable to proceed "due medical reasons."

The Appellant should not be penalized because his former lawyer had health problems. Appellee argues that attorney Bonner failed to request postconviction discovery until five years after she was first appointed. However, Appellee does not claim that she missed any deadlines. Rule 3.851, Fla. R. Crim. P. does not contain any specific postconviction discovery deadlines.

In all other respects, Appellant will continue to stand on the argument he submitted in his Initial Brief on 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

Appellee Addressed this issue at page 12 of its Answer Brief, beneath the heading entitled *Arguments I, and III (partial): The trial court did not err in holding that the facts alleged in the successive post-conviction motion do not constitute newly discovered evidence; The issues raised are procedurally barred and have no merit.* The Appellee further addressed this issue at page 21 of its Answer Brief, beneath the heading entitled *Argument III (partial): The issue of disparate treatment of Co-Defendant Scott McGuire is procedurally barred and has no merit.*

Appellee again seems to be arguing that even if the defense had been allowed the chance to discover admissible evidence that the State knowingly presented the false testimony of Keenum, such new evidence would not have any effect on sentencing issues. Appellant disagrees. Even if it is assumed –for purposes of argument only– that the trial court acted within its discretion in rejecting Defendant's "minor participant" claim as a mitigating factor (as Appellee argues at page 23 of its Answer Brief) Defendant's *jury* could have reached a different conclusion and could have recommended a sentence of life instead of death. At a minimum, the withholding of the Keenum information denied the Defendant a fair jury sentence recommendation.

Appellee's other arguments on this issue have already been addressed in Appellant's replies for Issues 1 and 2, above.

In all other respects, Appellant will continue to stand on the argument he submitted in his Initial Brief on 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

Appellee addressed this issue at page 19 of its Answer Brief, beneath the heading entitled *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.*

Appellee's arguments on this issue have already been addressed in Appellant's replies for Issues 1 and 2, above.

In all other respects, Appellant will continue to stand on the argument he submitted in his Initial Brief on this issue.

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

Appellee addressed this issue at page 19 of its Answer Brief, beneath the heading entitled *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.*

At page 30 of his Initial Brief, Appellant argued that the trial court erred in denying the subject postconviction motion without first allowing the Appellant his requested discovery.

In response, the Appellee cited State v. Lewis, 656 So.2d 1248, 1249 (Fla. 1994) and Marshall v. State, 976 So.2d 1071, 1079 (Fla. 2007) for the proposition that

" . . . the availability of discovery in a postconviction case is a matter firmly within the trial court's discretion." (Appellee's Answer Brief, p. 21).

However, Appellee did not give examples of how this Florida Supreme Court applies such abuse-of -discretion standard to cases like the present one. Some recent Florida Supreme Court cases are illustrative. First, the Florida Supreme Court reviews the record to determine whether the Defendant demonstrated "good reason" for the requested postconviction discovery. The Florida Supreme Court reviews the record to assure that the Defendant *identified* the information sought and made the "*required allegations*." Kelley v. State, 974 So.2d 1047, 1050 (Fla. 2007). Next, the Florida Supreme Court reviews the record to determine whether the denied discovery sought *relevant* evidence. Overton v. State, 976 So.2d 536, 549, (Fla. 2007) and Blanco v. State, 963 So.2d 173, 177 (Fla. 2007).

Where the record supports the relevance of the requested postconviction discovery, the Florida Supreme Court then searches the record for evidence that the requested *means* of discovery stands a chance of yielding relevant evidence, or whether the Defendant is just engaging in a "fishing expedition," hoping to get lucky and stumble across something useful. This court upholds denials of postconviction discovery that would be nothing more than this sort of "fishing expedition."

Anderson v. State, SC07-648 (Fla. 7-9-2009), Arbelaez v. State, 775 So. 2d 909 (Fla. 2000), Rutherford v. State, 926 So.2d 1100, 1116 (Fla. 2006).

Lastly, this Florida Supreme Court upholds denials of postconviction discovery which are excessively *burdensome*. State v. Lewis, 656 So.2d 1248, 1250 (Fla. 1994), Kelley v. State, 974 So.2d 1047 (Fla. 2007).

The State and the defense learned prior to the evidentiary hearing on Defendant's *first* postconviction motion that State Witness Keenum had testified at Defendant's jury trial using the false name of "McGuire." (Appellant's Initial Brief, p. 13, fn 6; Appellee's Answer Brief, pp. 12-13).

The "new developments" which occurred *during the evidentiary hearing* on Defendant's first postconviction motion –when it was too late to add an additional claim– were [1] the State requested that the trial court appoint a separate lawyer to represent "McGuire," (Keenum) and [2] the State admonished "McGuire" (Keenum) that the State was not immunizing him from the consequences of his testimony and that anything he said could be used against him, and [3] "McGuire" (Keenum) promptly invoked of his Fifth Amendment privilege to not answer

what his true name was. (R5, p. 753, 759, 793-795; R5, p. 761-762, 810; R5, p. 762-763, 810, 814).

The Defendant, quite understandably, saw all this as a sign that the State had not been forthcoming about "McGuires" true identity and had likely known all along that Keenum testified falsely as "McGuire." Defendant filed his second, subject postconviction motion in pursuit of this false-testimony/*Giglio* issue.[1]

Defendant specifically alleged in his subject, subsequent postconviction motion that he learned that the person who testified against Defendant as "McGuire" was actually Scott Jeffrey Keenum. R4, p. 746; R5, p. 752, 753-754, 756. Defendant also specifically identified the above-described "new developments" as signs that the State had likely known all along that Keenum testified falsely against the Defendant as "McGuire." R5, p. 757, 760, 769, 772. Hence, the Defendant made the "allegations" required by Kelley v. State, 974 So.2d 1047, 1050 (Fla. 2007). Defendant also demonstrated the "relevance" required by Overton v. State, 976 So.2d 536, 549 (Fla. 2007)

Attorney Mary Catherine Bonner represented the Defendant on the subject, subsequent postconviction motion. At the April 30, 2008 case management conference (referred to at page 10 of Appellee's Answer Brief) Ms. Bonner informed

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[1]Giglio v. United States, 405 U.S. 150 (1972).

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). Ms. Bonner informed the court that she needed discovery to find out what the State knew about Keenum's multiple identities (R1, p. 50). Accordingly, attorney Bonner identified the relevance of the sought evidence as required by Overton v. State, 976 So.2d 536 (Fla. 2007).

Attorney Bonner also informed the trial court at the same April 30, 2008 case management conference, that she wanted to depose the involved prosecutors to find out what they knew of the multiple identities. R1, p. 56. She said that she wanted to obtain Florida Department of Corrections records to determine what they revealed about Keenum's multiple identities. R1, p. 57. She said that 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. She also informed the lower court that she needed to take Keenum's deposition (obviously, to determine when Keenum/Mcguire told the State about his aliases). R1, p. 60-61. In doing these things, attorney Bonner identified the *means* of discovery that she proposed to use, and what she hoped to get from it. In other words, the defense was not engaged in a mere "fishing expedition" of

the type condemned in Anderson v. State, SC07-648 (Fla. 7-9-2009) and Arbelaez v. State, 775 So.2d 909 (Fla. 2000) and Rutherford v. State, 926 So.2d 1100, 1116. (Fla. 2006).

Finally, attorney Bonner did not request time-consuming or expensive discovery such as juror interrogations or scientific tests. All that attorney Bonner asked for was an opportunity to acquire some records and depose some witnesses. Hence, the discovery she requested cannot be considered "excessively burdensome." State v. Lewis, 656 So.2d 1248, 1250 (Fla. 1994), Kelley v. State, 974 So.2d 1047 (Fla. 2007).

The trial court abused its discretion in denying Defendant the requested discovery. Such requested discovery was reasonably calculated to lead to the discovery of admissible evidence that the State knew " McGuire" was a false name of Keenum's even before Defendant's jury trial and the State wrongfully withheld such information. Such requested discovery was also reasonably calculated to lead to the discovery of admissible impeachment evidence of Keenum's other crimes and prison-escapee status. Such requested discovery was also reasonably calculated to lead to the discovery of admissible evidence that the State knowingly and willingly presented the false testimony of Keenum at Defendant's jury trial.

In all other respects, Appellant will continue to stand on the argument he submitted in his Initial Brief on this issue.

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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.

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