CASE NO. SC21-763

In the

Supreme Court of Florida

STEPHEN TODD BOOKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT, IN AND FOR ALACHUA COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, Stephen Todd Booker, the movant in the trial court, will be referred to as Booker. Appellee, the State of Florida, will be referred to as the State. The single volume record below will be referred to as "R." and then the PDF page number, i.e., "(R. at 1.)." Booker's initial brief shall be referred to as "I.B." followed by the page number.

STATEMENT OF THE CASE AND FACTS

I. *Statement of the Case.*

A. Brief Procedural History

Petitioner was convicted of first-degree murder, sexual battery, and burglary, and this Court affirmed his direct appeal in 1981. *Booker v. State*, 397 So. 2d 910, 912 (Fla. 1981). After federal habeas courts vacated his capital sentence, Booker returned for resentencing in 1997 and obtained a new capital sentence. *Booker v. State*, 773 So. 2d 1079, 1083–86 (Fla. 2000). This Court affirmed that sentence in 2000, *id.* at 1096, and affirmed the denial of postconviction relief in 2007, *Booker v. State*, 969 So. 2d 186, 201 (Fla. 2007). The Eleventh Circuit affirmed the denial of federal habeas relief in 2012.

Booker v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1121, 1122 (11th Cir. 2012), *cert. denied*, *Booker v. Crews*, 568 U.S. 1236 (2013). This Court denied Booker *Hurst*[1] relief in 2018. *Booker v. Jones*, 235 So. 3d 298, 299 (Fla. 2018).

Booker, through federal counsel, filed his successive motion for postconviction relief in state court on November 5, 2020. (R. at 132–99.) The State filed its response objecting to an evidentiary hearing and requesting summary denial of Booker's claims on November 19, 2020. (R. at 394–413.) The same day, the State filed an appendix with attachments from Booker's trial to demonstrate his claims were conclusively refuted by the record. (R. at 225–393.) The postconviction court held a *Huff*[2] hearing on January 26, 2021, and took the successive motion under advisement. (R. at 453–82.)

The postconviction court summarily denied Booker's claims on March 3, 2021. (R. at 424–32.) The court found that Booker's *Brady*[3] claim was meritless for three alternative reasons: (1) his *Brady* claim

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[1] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

[2] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

was procedurally barred as untimely raised since Booker has known about the alleged *Brady* notes since trial and cannot use a successive motion to litigate a claim that could have been brought in his first postconviction motion; (2) there was no suppression since Booker/his trial counsel could have obtained the notes when they were referenced at trial; and (3) there was no prejudice in light of the minor value of the impeachment evidence and overwhelming evidence of guilt. (R. at 426–29.) The court rejected Booker's newly discovered evidence claim pertaining to the same notes on the grounds that it was untimely and would not probably produce an acquittal on retrial. (R. at 430–31.)

Booker filed a motion for rehearing on April 12, 2021. (R. at 433–42.) The postconviction court denied rehearing on April 27, 2021. (R. at 443–44.) Booker timely appealed to this Court on May 24, 2021. (R. at 447–48.)

II. *Statement of the Facts.*

A. Case Facts

In 1978, Booker was convicted of the first-degree murder of 94-year-old Lorine Harmon, sexual battery, and burglary. This Court recited the facts underlying Booker's crime in 1981. *Booker v. State*,

397 So. 2d 910, 912 (Fla. 1981). On November 9, 1977, the victim was found dead in her ransacked apartment with two knives still embedded in her body. *Id.*; *Booker v. Wainwright*, 675 F.2d 1150 (11th Cir. 1982). A pathologist recovered semen and blood from the victim's vaginal area and determined sexual intercourse occurred prior to death. *Booker*, 397 So. 2d at 912. The evidence at trial singularly pointed to Booker and included: (1) Booker's fingerprints lifted from "the scene of the homicide"; (2) Booker's boots had a similar, unique pattern to the pattern noted by an officer at the homicide scene; (3) test results indicating body hairs found on Booker's clothing were "consistent with" the victim's; and (4) a post-*Miranda* confession by Booker.[4] *Id.* The jury found Booker guilty of first-degree murder, sexual battery, and burglary. *Id.*

Prior to trial, the Federal Bureau of Investigation (FBI) performed analysis of several hairs recovered from the victim and Booker. (R. at 227–32.) The report indicated black pubic hairs of "Negroid origin" were found on the victim's bedspread, pantyhose,

[4] Booker claimed to be speaking as an alternate personality "Aniel" when he stated, "Steve had done it." *Booker*, 397 So. 2d at 912; *Booker v. Wainwright*, 703 F.2d 1251, 1253 (11th Cir. 1983) ("Booker replied, 'He did it, God damn it, he did it.'").

bed area, and pubic region. (R. at 227–32.) According to the report, those hairs either originated from Booker or "from some other individual of the black race whose pubic hairs exhibit the same range of microscopic characteristics." (R. at 230.) The report noted that another black pubic hair found on the victim's bed was "not suitable for microscopic comparison purposes." (R. at 230.) This report was provided to Booker and contained the following disclaimer: "It is to be noted that microscopic hair comparisons do not constitute a positive basis of personal identification." (R. at 227, 231.)

In opening statements, the State mentioned both the FBI hair analyst's testimony and fingerprint evidence. Regarding the fingerprint evidence, the State argued the following:

> And lastly, the State will proceed with a fingerprint expert who will testify as to his ability and his test that he ran in matching the latents that were found in places inside the house, on a jewelry box that was thrown around on the floor, the window sill. And he will testify about the possibility of that being the point of entry. And there are other places, several places in the house where fingerprints were found. And he will testify that he matched those with the prints -- known prints of the defendant to the exclusion of any other person in the world. Those are the defendant's fingerprints.

(R. at 241–42.)

The following relevant evidence was introduced in the State's case in chief. Law enforcement recovered latent prints from: (1) the inside windowsill of the victim's bedroom (three prints later identified as two of Booker's right palm prints and one of his left middle finger); (2) the inside door of the north closet at the victim's address (later identified as two prints of Booker's left index finger); (3) a Christmas box from the victim's bedroom (later identified as Booker's right index finger); (4) the trim of the victim's bedroom door (later identified as Booker's right palm print); (5) a metal box in the victim's bedroom (later identified as Booker's right ring finger); (6) a red jewelry box in the victim's bedroom (later identified as Booker's left middle and ring fingers); and (7) the windowsill of the victim's bedroom (later identified as Booker's right palm print). (R. at 300–17.) An investigator made casts of three shoeprint impressions around the southeast bedroom window. (R. at 243–45, 248, 250–51.)

The next day, an officer encountered Booker around 1:30 to 2:00 p.m. (R. at 246, 261.) The officer's attention was drawn to Booker because of his thick, ankle-height, rubber-soled work shoes.[5]

[5] This officer emphatically testified these were not tennis shoes. (R. at 248, 250–51.) He also later explained that the shoes Booker was

(R. at 247–48.) Booker's shoe pattern was similar to the pattern from the plaster casts. (R. at 248, 250–51.) At law enforcement's request, Booker voluntarily gave his fingerprints despite noting law enforcement already had them. (R. at 254–55, 263.) About six hours later, law enforcement placed Booker under arrest after determining his fingerprints matched those in the victim's apartment. (R. at 265–66.) At the time, the FBI recommended nine points of similarity before declaring a fingerprint match. (R. at 316.) On one example, the fingerprint expert at Booker's trial testified there were "forty-two" points of similarity. (R. at 316.) On two others, there were thirty-eight and twenty-two. (R. at 317.) The fingerprint expert testified with "certainty in [his] mind that this Booker and no other person in the world is the one whose prints were found" in the victim's house. (R. at 317.)

In a post-*Miranda* interview, Booker "flatly denied" being in the victim's apartment or being near her bedroom window. (R. at 276–77.) In response to a question about whether he killed the victim,

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arrested in were not the same ones he observed hours earlier. (R. at 345–46.) The arresting officer did not observe Booker's shoes. (R. at 266.)

Booker replied, "God, damn right. God, damn right he did" and "He did it, God damn, he did it." (R. at 282–83, 287.) Booker was coherent when he made these statements, but called himself "Steve" and claimed to be a demon named Aniel. (R. at 283.) Any time law enforcement tried to seriously question Booker "he would elicit or appear to elicit the Aniel figure." (R. at 290–93.) According to the interviewing officer, the Aniel phenomenon was "controlled on [Booker's] part," and appeared only when Booker was confronted with incriminating evidence. (R. at 290–93.) "His switch from Aniel back to Stephen Todd Booker would depend on what questions you asked." (R. at 294.) Booker appeared highly intelligent to the interviewing officer. (R. at 294.)

An FBI hair analyst also testified at Booker's trial. The analyst testified in part while holding "glass microscope slides" containing hair from the victim's bedspread. (R. at 335.) The slides were "prepared during the course of the examinations" the analyst performed. (R. at 333.) The analyst testified he conducted a "detailed microscopic comparison" of the "individual identifying characteristics" and comparing the sample with a known hair sample. (R. at 336.) This analysis was done by mounting glass

microscope slides with samples onto a microscope and comparing them simultaneously. (R. at 335–37.)

When asked about the precision of his findings, the analyst testified:

> [H]air found on Exhibit 44 falls within a rather narrow range of microscopic characteristics which are exhibited by the known pubic hair samples purported to be from Mr. Booker. And this was found to be true in this case. And based upon this, I can make certain conclusions regarding the *possible* source of the questioned hair.

(R. at 337) (emphasis added). In the analyst's opinion, the hair on the victim's bed "either originated from Mr. Booker or some individual of the black race whose pubic hairs exhibited the same range of microscopic characteristics." (R. at 337.) Hair from the victim's pantyhose exhibited "Negroid characteristics and was exactly the same individual as Exhibit 44." (R. at 338.) When the State pressed the analyst to qualify his findings, the analyst testified: "I can't give you an exact numerical probability or certainty. It is -- I would consider it *possible* that the hair originated from the person represented by the same purported to be" Booker. (R. at 339.) Regarding two hairs by the victim's bed, the analyst testified he performed the same tests and with one hair his findings were the

same as previous: the first hair possibly originated from Booker. (R. at 339–41.) The other hair "could have" originated from Booker, but the analyst was less certain. (R. at 341.) The analyst testified that while hair analysis cannot prove or identify a person, it can exclude with a high degree of certainty. (R. at 341.)

The State moved to the foreign hair recovered from the victim's vagina and asked if the analyst attempted a comparison. The analyst stated: "*Excuse me. I had to review my notes a little bit to refresh my memory*." (R. at 342) (emphasis added). He then testified he could only identify the hair as coming from someone "of the black race." (R. at 342.)

Finally, the analyst addressed a hair found on Booker's socks and identified it as originating from a Caucasian individual. (R. at 343.) This hair was compared with a known sample from the victim. (R. at 344–45.) The analyst determined this hair fell "well within the microscopic range of characteristics exhibited by the known hair sample of the deceased." (R. at 344.)

Booker put on witnesses to bolster his insanity defense. (R. at 346.) The first was the court-appointed psychiatrist, who testified there were records from five years before trial indicating Booker

suffered from paranoid schizophrenia and an organic brain syndrome. (R. at 349–50.) The psychiatrist could not say whether Booker could appreciate the quality of his acts or that his acts were wrong on the date of the victim's murder. (R. at 350–51.) The psychiatrist testified that his review suggested the "Aniel" persona was a "self-serving phenomenon from" Booker. (R. at 359.)

In rebuttal, the State put on a second court-appointed psychiatrist who testified that Booker was legally sane and that the Aniel persona was neither the product of paranoid schizophrenia nor organic brain syndrome. (R. at 364–65.) The State and psychiatrist had the following exchange:

> Q: Coming back to the Aniel thing, is it your opinion or can you state whether this Aniel thing is something that was the product of the defendant's own control condition or whether it is a product he chooses to place himself into? Do you understand my question?
>
> A: I am not sure if at all times -- like I say, from points that I have seen it triggered, it would look as though there was certainly a conscious element in it.
>
> Q: All right. Is it something that -- this Aniel figure --is it something that controls the defendant or something he chooses to be?
>
> A: Again, I am not sure I can say entirely. I think a good part of it is a role playing or an assumption of a role.

> Q: All right. Did you find evidence or signs or suggestions that this Aniel character may have been a self-serving phenomenon on the part of the defendant?
>
> A: There are certainly indications that that is true.

(R. at 365.)

In closing argument, the State argued the hair, the fingerprints, the confession, and the shoeprint evidence as the primary reasons the jury should convict. On the hair, the State argued the following:

> The reason I bring out to you the subject of hair is proof again that intercourse took place. The hair being interesting because the hair was found which was identified later by the FBI expert, a black hair is found which is all the way inside to the back of the vagina. This hair is similar to Negroid origin which matches the defendant's race; and it's embedded in the vagina. The other hair samples are identical to the defendant in every way. This one because of the length he couldn't say whether it was or was not, but it has that same characteristic of being the same race.
>
> . . . .
>
> Now, why do we say he killed her? Why? There are 55 good reasons why on that evidence stand. Look at the hair, the victim's bedspread that was taken by the police and sent to the FBI. There Mr. Neil with his expertise and the rest takes the hair off. And the sample, the known hair sample of the defendant's pubic hair, and he takes the unknown, loose hair from the bedspread and puts them on the microscope; and what does he find. In every way and every respect that hair is his hair. Now, *he can't be as certain to say positive*; it has to be in a certain range. It is

> either this man or one just like him. I said how much range is that. *And he said a limited range*.
>
> The victim's hose, he took the hairs from the victim's hose to match the hairs. What does he find? Matched again. Sweeping from around the floor the police picked up in a vacuum cleaner. It had all kinds of articles, hairs, and fibers. He took a hair out. What does it say? Match. The pubic combings of the deceased.
>
> And so this sounds crude and harsh because here is a lady who has lived 94 years who has lived through peace, depression, wars, things that kill you; and she made it through all of that, almost a century, now is dead. And we talk about things like pubic hair. It is necessary to prove to you this man did what we charge.
>
> Her body was taken to the autopsy suite and these things had to be done to prove this case. Pubic combings were taken from the pubic area and sent to the FBI to match that with the known samples of this defendant. What does it say? Match. Then to prove how good it is, we got the defendant's socks and sent them on a hunch to the FBI. And hairs taken from those compared with the pubic hairs of [the victim]. And what do you get there? You get a match.
>
> Not only have we shown you that the defendant's pubic hairs are found in the property and person of the defendant -- excuse me, of the deceased, but some of her pubic hairs are found in his property, the socks match.

(R. at 375, 383–84) (emphasis added).

The State then addressed the fingerprints as the crux of its case, the "best evidence in the world":

> Then we presented to you this man. *One thing is proof positive beyond every other person in the united world, fingerprints. They don't lie. They are not mistaken. They are not like witnesses. Circumstantial evidence, but the best evidence in the world. Can't be mistaken; no two alike. What do we show*?
>
> First of all you have predicate of the defendant's own admission that he had never been in the house before, never been in the window. The evidence shows that the entrance was through the southeast bedroom window. And there is evidence that this occurred during the burglary; *that's positive because it is important to show you that the fingerprints got there at that time, not another time. He has never been there before. That's the only time he has been there, during the commission of the crime.*
>
> Where do they find them*? Inside the bedroom door closet, match. They get two sets of those inside the bedroom closet door. Prints under a Christmas box, match. Prints on the jewelry box match the defendant. Prints on the victim's bedroom door frame match the defendant's. Four separate prints on the window sills on the bottom and inside where you would crawl in, you know matched the defendant's*.
>
> How well do they match them? Well, you heard George Johnson, the expert, tell you that the FBI usually requires nine before they would be willing to go to Court. *That's to the exclusion of every other man. Just from the three charts that he had prepared and we showed you one of them. That one had 48 points of similarity! Not nine, 48! Somebody ought to put that on a wall, it's like a picture. Thirty-three on one, and 27 on the other. I didn't go further. I thought that was sufficient.*

(R. at 385–86) (emphases added).

Regarding Booker's confession, the State argued:

Well, you know this about the defendant. To everybody that saw him on the day after the crime he appeared sober, rational, and coherent until he got to Mick Price. He did not assume the Aniel role until he was faced with evidence of his guilt. The first time Mr. Price says he ever mentioned Aniel or grinded his teeth was when Mick Price says, "I have got your prints." Now we have got to hear Aniel. Mick Price is probably the best witness to that. He observed it; he was present.

In essence what Mick Price told you was in his opinion this appeared to be a voluntary thing with the defendant. Not a deamon [sic] that comes down and controls him and all of a sudden he goes wacko. This was a voluntary thing on the part of the defendant. It's not the deamon [sic] controlling Mr. Booker. This is Mr. Booker acting like the deamon [sic] because he wants to.

You call it and I call it a different thing. We call it conscience. And your conscience is the moral judiciary, like his Honor, of your soul. It's a rare man that can escape. We often try to hide from them. This man's method of doing that is to assume an escape route called Aniel. He doesn't want to act like Stephen Todd Booker. He wants to talk like somebody else. It's an escape. He does that; it doesn't do it to him. That's important. That's important.

. . . .

Aniel is a self-serving phenomenon of this defendant. Aniel is the escape that he takes from his conscience. Aniel is his runaway. Aniel actually according to the testimony *is the one who confessed in this case*. "God damn right he did. God damn right he did." You know, confession is probably good for the soul they say. One of the largest religions believes that. And you can sit in your own world and think that's not what Stephen Todd Booker was saying as Aniel. "My conscience won't let me live, but I am not

> going to say I did it. My escape mechanism will say. Aniel, you tell them I did it."
>
> Somebody's got to do it. It's the runaway. It's letting the other guy say I did it, not me. That's too much of an admission. I can't take that much.

(R. at 386–87, 390) (emphasis added).

Finally, the State addressed the shoes Mr. Booker was wearing when he was first spotted the day after the murder:

> The other thing is shoes. One of the most alert people in this case was Pete Fancher. This is the police officer on the scene. He saw the shoe prints outside. Remember that he told you that this was unusual. This is right outside the window. He saw the prints on the bottom.
>
> . . . .
>
> [Booker] looked different because he was not hippish or drunkish or whatever the crowd was there. Then when [Fancher] looked at [Booker's] shoes he really got the idea that in his opinion that shoe looked like this.
>
> Mr. Fancher is not Superman. He didn't say that shoe is that print. But what he is telling you is that this is unusual enough that when he looked at the defendant's shoes, he could recall it; not because he has a super memory, but because of the unusualness of the thing. He has seen it like work shoes. And the shoes Booker had on that day were brown and like work shoes. They were not tennis shoes. And you remember I asked him that. "Are these the shoes that he had on?" "No."
>
> Okay. At 1:00 o'clock or 1:30 on the 10th, the day after the killing, Fancher stopped Booker and Booker was wearing those shoes. Booker then knew that the police

> were looking at shoes; and as soon as they dropped him back off at the Flagler Inn on the streets after they were through fingerprinting him, what did Mr. Booker do? Mr. Booker got rid of the shoes. How do I know that? He was picked up at 8:00 o'clock. And from 8:00 o'clock until he was put in jail he didn't go anywhere except with the police. When he got to the jail, they took his shoes off. And those are the shoes that they took off of him.
>
> So I know! You know that between 2:00 and 8:00 that man got rid of incriminating evidence.

(R. at 391–92.)

Booker now appeals the trial court's denial of his successive postconviction motion.

SUMMARY OF THE ARGUMENT

The trial court correctly, summarily denied Booker's untimely, procedurally barred, and meritless *Brady* and newly discovered evidence claims.

Booker's *Brady* claim that the State withheld impeachment evidence of a hair analyst's notes fails for four reasons. First, the expert refreshed his recollection with these notes at trial and Booker could have obtained them at that point. This renders his *Brady* claim untimely. Second, had Booker been diligent and obtained the notes, he could have raised his present *Brady* claim in his initial

postconviction motion. This renders his claim procedurally barred. Third, under this Court's precedent, the State did not suppress the evidence since it was available to Booker once the expert used it to refresh his recollection. Finally, the evidence was not material. The notes are not inconsistent with the hair expert's testimony. At best, the notes show the expert did not notate everything he did and only wrote his conclusions.

Booker's newly discovered evidence claims fair no better. While Booker argues the notes are newly discovered evidence, he has been aware of and had access to them since his trial when the hair analyst used them to refresh his recollection. And even if they were newly discovered, the mere fact that the expert failed to notate all his findings does not demonstrate a jury would "probably" acquit Booker on retrial.

Similarly, the Breckert report is not newly discovered evidence. Booker could have had an analyst perform this same analysis (on the expert's trial testimony and State's arguments) at any point in time over the past forty years. His failure to do so does not make this report newly discovered. Even if it did, a jury would not probably acquit Booker in light of the evidence against him.

Finally, Booker appears to argue the State's overstatements during Booker's trial are themselves newly discovered evidence. But These statements have been available in trial transcripts for about forty years. There is nothing new about them. And even if Booker could pass that hurdle, the evidence against him, weighed against the evidence he now seeks to admit/exclude does not give rise to any likelihood any jury would acquit him on retrial.

This Court should affirm.

ARGUMENT

I. THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED BOOKER'S *BRADY*/NEWLY DISCOVERED EVIDENCE CLAIMS.

Standard of Review

This Court reviews the postconviction court's summary denial of Booker's successive 3.851 motion de novo and will affirm if the record conclusively demonstrates Booker is not entitled to relief. *Rodgers v. State*, 288 So. 3d 1038, 1039 n.2 (Fla. 2019).

Merits

Booker appeals the trial court's summary denial of his successive 3.851 motion and argues the court incorrectly denied him an evidentiary hearing on his claims. The postconviction court correctly determined that Booker's claims are procedurally barred (Booker and his counsel have known/should have known about the evidence undergirding these claims since his 1981 trial) and that they are conclusively meritless even if he could surmount that bar.

At the outset, it is important to recognize that Booker's arguments are unclear and often blended together. Below, Booker failed to clearly, and separately, plead his specific claims below in violation of Florida's rules of criminal procedure. Fla. R. Crim. P.

3.851(e)(1), (2) (requiring each claim *and subclaim* to be separately pled in successive 3.851 motions). On appeal, it appears Booker asserts in error in the summary denial of the following claims: (1) his *Brady* claim regarding the FBI hair analyst's notes; (2) the hair analyst's notes constitute newly discovered evidence; and (3) the Beckert report constitutes newly discovered evidence of overstatements in the State's case (both by the expert and by the State).

This Court should affirm. Booker's arguments are ill taken under Florida procedural law and substantively meritless under *Brady*. The record conclusively demonstrates Booker is entitled to no relief. Booker's *Brady* claim about the FBI hair analyst's notes is untimely, procedurally barred under Florida law, and fails the suppression and prejudice prongs of *Brady*. His newly discovered evidence claims are also meritless and procedurally barred.

A. Booker's *Brady* Claim Is Untimely and Procedurally Barred Under Florida Law, and Fails the Suppression and Prejudice Prongs of *Brady*.

Booker first argues the postconviction court erred in summarily denying his *Brady* claim. As he did below, Booker claims the State

violated *Brady* by failing to disclose the FBI expert's handwritten notes to the defense. The State strongly disagrees.

Booker's *Brady* claim fails at four distinct points conclusively demonstrated by the record. First, his clam is untimely under Florida law. Second, his claim is procedurally barred under Florida law because it could have been raised in his first postconviction motion. Third, the evidence was not suppressed. And fourth, Booker cannot establish prejudice. This Court should affirm the postconviction court's summary denial of Booker's claims based on his failure to surmount any of these obstacles.

i. Booker's Brady Claim Is Time-Barred Under Florida Law.

Florida Rule of Criminal Procedure 3.851(d) governs the timeliness of postconviction motions in capital cases and provides:

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the [one-year] time limitation provided in subdivision (d)(1) 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.

Rule 3.851(d)(2) thus contains an exception that permits capital defendants to file postconviction motions beyond the one-year time limitation if the facts underlying the claim were (1) unknown to counsel/the defendant *and* (2) those facts could not have been ascertained by the use of due diligence. *Dillbeck v. State*, 304 So. 3d 286, 287 (Fla. 2020). "It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim." *Mungin v. State*, No. SC18-635, 2020 WL 728179, at *2 (Fla. Feb. 13, 2020). These rules remain true even when a defendant asserts newly discovered evidence of a *Brady* violation. *E.g., Thomas v. State*, 260 So. 3d 226, 227 (Fla. 2018) (holding a *Brady* claim was procedurally barred as untimely where the "record establishes that the information in his claims could have been discovered at an earlier date through the use of due diligence").

Booker's *Brady* claim that the State withheld the FBI analyst's notes is excessively untimely under Florida law. He has known about the existence of these notes since his 1981 trial when the analyst

explicitly referenced them. (*See* R. at 342 (FBI hair analyst stating: "Excuse me. *I had to review my notes a little bit to refresh my memory*.").) Since "[t]he record establishes that the information in his [*Brady* claim] could have been discovered at an earlier date through the use of due diligence," his claim is procedurally barred as untimely. *See Thomas*, 260 So. 3d at 227. This Court should affirm the summary denial of Booker's *Brady* claim as untimely under Florida law.

Booker raises several flawed arguments to counteract this plain, simple reality. First, Booker argues that the fact that the expert refreshed his recollection with his notes did not make them discoverable. But he is simply wrong. *See Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993) (rejecting a *Brady* claim in an initial postconviction motion where the witness used the alleged *Brady* notes at trial while testifying because "[i]f defense counsel wanted to examine the notes he merely had to ask to see them" at trial); *see also Way v. State*, 760 So. 2d 903, 912 (Fla. 2000) (explaining that in *Provenzano* the Florida Supreme Court found the "notes had not been suppressed because the expert used the notes while testifying at trial, and the defendant could have obtained them at that time"); section

90.613, Fla. Stat. (1989) (requiring disclosure of writings used to refresh the recollection of witnesses). Notably, in the primary case Booker wrongly relies on, this Court held the trial court correctly provided the notes an expert used to refresh his recollection to the defense. *See Geralds v. State*, 601 So. 2d 1157, 1160–61 (Fla. 1992) ("However, after an *in camera* inspection, the court ordered the State to provide the defense with the single page of the notes that the witness had used when responding to the question about the knives.").

In this case, the expert used his notes to refresh his recollection while giving testimony about his hair analysis. Booker could have obtained them at that time. He could then have asserted the "inconsistency"[6] he raises now at trial. He could also have raised this *Brady* claim in his first postconviction motion. But he did neither.

Booker next appears to assert that, even if the notes referenced at trial were discoverable then, it would be too late for counsel to change his strategy. Perhaps this argument would be viable if this were Booker's *initial* 3.851 and he was raising this *Brady* claim. But

[6] There is no inconsistency. At best, the notes show the expert did not notate everything he did.

it isn't. Had counsel been diligent and obtained the notes at trial, Booker could have raised this same *Brady* claim much sooner. But instead Booker has raised it about forty years too late. Booker's claim is untimely under Florida law and should be rejected as such.

As an aside, the State urges this Court to decide this timeliness issue purely as a matter of a state law under rule 3.851(d)(2). There is currently a federal question on whether *Brady* has a diligence prong. *Compare United States v. Vallejo*, 297 F.3d 1154, 1164 (11th Cir. 2002) (holding that a defendant must establish he could not obtain the suppressed evidence through reasonable diligence in order to establish a *Brady* violation), *with Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 117 (2d Cir. 2015) (holding the state violated clearly established law by imposing a diligence requirement in *Brady* and affirming habeas relief). While the court below cited diligence as one of the elements of a valid *Brady* claim, there is simply no reason to wade into this split in this case (or, indeed, in *any* case dealing with timeliness of *Brady* claims in successive postconviction motions). Booker's claims are untimely as a matter of Florida law regardless of the disposition of this academic, federal *Brady* question. *Cf. Savicki v. Att'y Gen., Fla.*, No. 19-11532-J, 2019 WL 10892084, at *3 (11th

Cir. Dec. 26, 2019) (unpublished) (holding the timeliness requirements governing successive 3.850 motions are independent and adequate state law bases precluding federal review).

Therefore, this Court should affirm the lower court's summary denial exclusively on state law grounds. *Cf. Geralds v. Att'y Gen., Fla.*, No. 19-13562, 2021 WL 1914151, at *4 n.4 (11th Cir. May 12, 2021) (rejecting claim that this Court interposed a diligence requirement into *Brady* because this Court did not reject the *Brady* claims on the basis of a federal diligence requirement).

ii. Booker's Brady Claim Is Procedurally Barred Under Florida Law Because He Could Have Litigated this Issue in His First Postconviction Motion.

Florida Rule of Criminal Procedure 3.851(e)(2) governs successive postconviction motions in capital cases and provides that "[a] claim raised in a successive motion *shall be dismissed* . . . if the trial court finds there was no good cause for failing to assert those grounds in a prior motion." (Emphasis added.)

A capital defendant "cannot use a successive 3.851 motion to litigate issues that he could have raised in his initial postconviction motion." *E.g.*, *Bogle v. State*, 288 So. 3d 1065, 1068 (Fla. 2019). When a defendant has an "opportunity to pursue" an issue in an earlier

motion, and fails to do so, he is procedurally barred from doing so later. *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007). This Court has specifically applied this rule in cases involving hair-analysis *Brady* claims. *See Bogle*, 288 So. 3d at 1068.

Booker's *Brady* claim that the State withheld the FBI hair analyst's notes is procedurally barred under this rule. Assuming for the sake of argument that the State did suppress the notes before trial, Booker has been aware of their existence since his 1981 trial when the hair examiner explicitly referenced them while testifying. (*See* R. at 342 (FBI hair analyst stating: "Excuse me. *I had to review my notes a little bit to refresh my memory*.") (emphasis added).) This alerted Booker and trial counsel to the fact that the FBI hair analyst had notes and was actively using them to testify. It also meant Booker could have obtained the notes then.

Had Booker done so, he could have pursued his current *Brady* claim on direct appeal or in his initial postconviction proceedings. But Booker did not object, request to see these notes, or file a *Brady* claim alleging the state suppressed exculpatory evidence in his initial postconviction motion. Since Booker had the opportunity to litigate his claim in his initial postconviction motion, he cannot do so now

forty years after he first became aware (or should have been aware) of the facts undergirding it. Therefore, this Court should affirm the summary denial of Booker's *Brady* claim because the record conclusively demonstrates it is procedurally barred under Florida law. *See Jimenez v. State*, 265 So. 3d 462, 481–82 (Fla. 2018) ("Although [the defendant] claims that he was not aware that the page of handwritten notes existed, he was already aware of the information contained in the page of notes, as none of it is new or previously unknown information inconsistent with [the witnesses] sworn statement or her trial testimony.").

iii. Booker's Brady Claim Fails the Suppression Prong.

Moving to the merits—and demerits—of Booker's *Brady* claim, the second prong of *Brady* requires the defendant to prove the State suppressed favorable evidence. *Conahan v. State*, 118 So. 3d 718, 729 (Fla. 2013). But there is no suppression when an expert uses the alleged *Brady* notes while testifying at trial. *Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993); *see also Way v. State*, 760 So. 2d 903, 912 (Fla. 2000) (explaining that this Court in *Provenzano* held that the "notes had not been suppressed because the expert used the notes while testifying at trial, and the defendant could have obtained

them at that time"). As the analyst explicitly referenced his notes while testifying (R. at 342), Booker "should have been actually aware of the expert's notes." *Way*, 760 So. 2d at 912. This *Brady* claim was correctly denied because it conclusively fails the suppression prong under *Provenzano* and *Way*.

iv. Booker's Brady Claim also Fails the Prejudice/Materiality Prong.

Brady's third prong (prejudice/materiality) requires the defendant to show the favorable, suppressed evidence puts "the whole case in such a different light as to undermine confidence in the verdict." *Sweet v. State*, 293 So. 3d 448, 451 (Fla. 2020) (quoting *State v. Huggins*, 788 So. 2d 238, 243 (Fla. 2001)). Evidence that is "too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards" is not material. *Id.* (citing *Turner v. United States*, 137 S. Ct. 1885, 1894 (2017)). The defendant must show "a reasonable probability that had the suppressed evidence been disclosed the jury would have reached a different verdict" to demonstrate materiality/prejudice. *Pittman v. State*, 90 So. 3d 794, 804 (Fla. 2011).

The evidence of the FBI analyst's notes is too little and too weak to show prejudice in this case. Booker reproduced the notes in one of his attachments along with his expert's conclusion that the notes

> are not notes describing the characteristics of the questioned hairs that were actually observed, but rather only the examiner's conclusions regarding their somatic origin, ancestry and degree of similarity to the known hair standards (and in two instances, his conclusion that two of these hairs were forcibly removed). Also, there are no photomicrographs of any of the hairs.

(R. at 165–66.) In other words, the analyst did not notate every step of his analysis in his notes and only wrote his conclusions. But the analyst testified at trial that he did microscopically examine the hairs. At best, this "impeachment" would have permitted counsel to argue that since the analyst did not notate every step of his analysis the jury should disregard his testimony. The notes are not evidence no microscopic analysis was performed, nor are they inconsistent with the analyst's testimony in any way. They simply indicate he did not notate everything he did. *See Jimenez v. State*, 265 So. 3d 462, 482 (Fla. 2018) (finding notes were not inconsistent when they did "not reveal any facts that" were "inconsistent with the rest of the page of notes or with [a witness's] trial testimony").

This minor "impeachment" evidence becomes even weaker when evaluating the rest of the trial evidence. Eleven of Booker's prints were found in about six different locations in the victim's house. (R. at 300–17.) There were "forty-two" points of similarity on one print, vastly more than the FBI recommended amount. (R. at 316.) And the fingerprint expert testified with "certainty in [his] mind that [Booker] and no other person in the world is the one whose prints were found" in the victim's house. (R. at 317.) As the State argued in closing: "One thing is proof positive beyond every other person in the united world, fingerprints." (R. at 385.) This was the "best evidence in the world" because fingerprints "don't lie. They are not mistaken. They are not like witnesses." (R. at 385.) The State highlighted the importance of the fingerprints because Booker claimed he had never been in the victim's house. (R. at 385.) But his fingerprints proved that was a lie. The State also highlighted Booker 's unique shoeprint as seen by one witness, his confessions, and argued Aniel was a self-serving persona that permitted Booker to unburden his conscious by confessing. (R. at 386–87, 390–92.)

The question before this Court on this prong is rather simple: is there a reasonable probability that a jury would have acquitted

Booker if counsel had cross-examined the analyst and pointed out he failed to notate everything he was testifying to? Considering the analyst's testimony, and Booker's prints, confessions, protestations he had never been in the victim's house, and unique shoeprint, there is no such probability. The lack of this minor impeachment evidence did not prejudice Booker. Therefore, this Court should affirm the summary denial of this *Brady* claim.

Booker's successive 3.851 *Brady* claim fails at almost every conceivable point. It is untimely, procedurally barred, and without merit on both the suppression and materiality prongs. The record conclusively demonstrates these notes were referenced during Booker's trial and there is simply no excuse for raising these claims forty years later. In short:

> There must come a time, even when so irreversible a penalty as that of death has been imposed upon a particular defendant, that the legal issues in the case have been sufficiently litigated and re-litigated so that the law must be allowed to run its course.

Lambrix v. Sec'y, Fla. Dep't of Corr., 851 F.3d 1158, 1173 (11th Cir. 2017) (cleaned up). For Stephen Todd Booker—as evidenced by his present medley of frivolous claims developed after forty years of hindsight—that time has come and gone.

B. Booker's Newly Discovered Evidence Claims Are Untimely and Meritless Under Florida Law.

Below, Booker raised what appear to be three distinct newly discovered evidence claims in his motion below: (1) FBI expert's notes; (2) his own expert's report; and (3) the state overstated the evidence in closing arguments. The arguments pertaining to these claims were all raised under a single "newly discovered evidence" sub-issue in Booker's motion below. This Court should not countenance Booker's failure to separately plead his newly discovered evidence claims. *See Brown v. State*, 304 So. 3d 243, 272 (Fla. 2020) (recognizing Florida's rules require each claim and subclaim in an initial postconviction motion to be separately pled); Fla. R. Crim. P. 3.851(e)(1)–(2) (requiring that successive motions meet "all of the pleading requirements of an initial motion").

In any event, the State addresses each apparent subclaim in turn. Valid claims of newly discovered evidence require a defendant to establish two elements: (1) the claim was filed within one year of the date it became discoverable via due diligence and (2) the evidence is of such magnitude that it would probably produce an acquittal on retrial. *Dillbeck v. State*, 304 So. 3d 286, 288 (Fla. 2020); *Brown v.*

State, 304 So. 3d 243, 273 (Fla. 2020). None of these claims are valid as newly discovered evidence.

i. The FBI Analyst's Notes Do Not Constitute Newly Discovered Evidence Because They Were Explicitly Referenced at Trial.

Booker's newly discovered claim pertaining to the FBI analyst's notes is meritless for two reasons. First, the analyst refreshed his recollection with notes at trial and they were discoverable at that point. (Attachments at 116 ("Excuse me. *I had to review my notes* a little bit to refresh my memory.") (emphasis added)); *Provenzano*, 616 So. 2d at 430; *Way*, 760 So. 2d at 912. Booker has been aware of the existence of these notes for over forty years. Summary denial is appropriate where the record conclusively demonstrates the claim was not timely filed within a year of the time the claim became discoverable through the use of due diligence. *Dailey v. State*, 279 So. 3d 1208, 1215 (Fla. 2019). Booker's newly discovered evidence claim regarding the FBI analyst's notes should be denied on that ground alone.

Second, alternatively, these notes would not probably produce an acquittal. Summary denial is appropriate where the admissible evidence would not probably produce an acquittal on retrial. *Dailey*,

279 So. 3d at 1215. Even if the analyst was impeached with his notes, the State still had overwhelming print evidence, Booker's inculpatory admissions (including his claim he was never in the victim's house), and the shoeprint evidence. No jury would "probably" acquit him on these facts. And even if Booker managed to exclude the hair testimony entirely, the State would still have had Booker's lie, fingerprints, and shoeprint tying him to the crime.[7] *See Duckett v. State*, 148 So. 3d 1163, 1169 (Fla. 2014) (rejecting *Brady* claim about a hair analyst's notes were the fingerprints of the deceased and defendant were found on the defendant's car, the defendant lied about whether the victim had been on his car, the victim was seen with the defendant, and there were tire tracks matching the defendant's car where the victim was found).

Therefore, this Court should affirm the postconviction court's summary denial: the evidence is neither newly discovered (Defendant

[7] While Booker makes conclusory assertions that these notes would have helped him exclude the hair analyst's testimony, he does not explain how. This is particularly striking since he was actually aware, or should have been aware, of everything else he argues now could have been used to exclude the analyst's testimony–including the fact that hair analysis cannot be used for individualization. (*See* R. at 231 ("It is to be noted that microscopic hair comparisons do not constitute a positive basis of personal identification.").)

has been aware of the notes since trial) nor sufficient to "probably" produce an acquittal on retrial.

ii. The Breckert Report Does Not Constitute Newly Discovered Evidence Since the Analyst's Testimony Has Been Available for Forty Years.

In this apparent subclaim, Booker argues the FBI analyst overstated his testimony and the Beckert Report is newly discovered evidence of those overstatements. Specifically, Booker argues the FBI analyst: (1) implied individualization (identification of a specific hair to a specific person) was possible; and (2) overstated the ease with which body area and ancestry can be ascertained through hair.

The postconviction court correctly, summarily denied this claim for two reasons. First, the FBI analyst's report, provided to Booker in discovery, explicitly informed him that "microscopic hair comparisons do not constitute a positive basis of personal identification." (R. at 231.) Booker has been aware since his trial that individualization is not possible. Indeed, he was on notice of that fact well before trial since: "It has been recognized since the dawn of the field that individualization of hairs is not possible through microscopy alone." (R. at 145.) This evidence is not newly discovered under any definition of the phrase. *Cf. Dillbeck v. State*, 304 So. 3d

286, 288 (Fla. 2020) (A "diagnosis . . . could have been discovered by the exercise of due diligence as early as 2013, when ND-PAE became a diagnosable condition.").

Nor is the evidence the analyst overstated the ease with which body area and ancestry can be ascertained through hair newly discovered. Booker has had the analyst's statements in transcripts for around forty years. At any point during this time, he could have had another expert review those transcripts and make findings like these. His failure to do so until now does not make the report or conclusions therein "newly discovered." This Court should therefore deny this claim because it is not based on any newly discovered evidence.

Alternatively, this evidence would not likely produce an acquittal when considered with the evidence admissible on retrial. If a jury heard: (1) the analyst overstated the ease of some of his conclusions (but no one argued against his result); (2) individualization was not possible (when the analyst routinely stated he could only identify Booker as a "possible" hair contributor); and (3) that the FBI analyst failed to notate all of his microscopic analyses, it would not change the outcome. Indeed, even if this

evidence (which Booker has had access to for forty years) permitted Booker to succeed in excluding hair analysis entirely, the jury would still be left with his prints all over the crime scene, his confessions, his protestations he was never at the victim's house, and his unique shoeprint. No jury would probably acquit on this evidence. Therefore, this Court should affirm the postconviction court's summary denial this claim. *Davis v. State*, 26 So. 3d 519, 529 (Fla. 2009) (affirming summary denial of newly discovered evidence claim where the evidence would not probably produce an acquittal on retrial).

iii. The Alleged State Overstatements Do Not Constitute Newly Discovered Evidence Since the State's Closing Arguments Have Been Available to Booker for Around Forty Years.

Booker appears to make a claim that the State overstated the FBI analyst's testimony in closing . . . forty years ago. This claim is neither a *Brady* claim nor a newly discovered evidence claim. Defendant does not explain the basis for it. But no matter what it is, it is entirely untimely. Defendant has been actually aware that individualization in hair analysis was not possible since the FBI analyst's report was disclosed, and on constructive notice since "**the dawn of time**," according to his expert. (R. at 29) (emphasis in

original). He has also been aware of the State's arguments since trial. But he neither objected to the State's closing argument nor raised an ineffective assistance of counsel claim in his first postconviction motion. He cannot do so now. This claim is definitively untimely and should be summarily denied on that basis.

But even if it were timely, it fails to show the jury would probably have acquitted Booker had the state not made these arguments. The jury would have been left with Booker's lie about never being in the victim's house, his confession, his fingerprints all over the crime scene, and his unique shoeprint. Booker's claims do not come close to showing that any reasonable jury would probably have acquitted him.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the summary denial of Booker's successive 3.851 motion.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to all counsel of record via the e-portal.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Bookman Old Style 14-point font.

Respectfully submitted and certified,

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