IN THE SUPREME COURT OF FLORIDA

CASE NO. SC21-763
LOWER COURT CASE NO. 1977CF002332

STEPHEN BOOKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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REQUEST FOR ORAL ARGUMENT

Booker has been sentenced to death. The resolution of the issues in this action will determine whether Booker lives or dies. This Court has not hesitated to allow oral argument in other capital cases in similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Booker, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE[1]

In 1977, Booker was indicted and charged with first degree murder and related offenses. After a jury trial, he was convicted and sentenced to death. This Court affirmed. *Booker v. State*, 397 So. 2d 910 (Fla. 1981).

Booker filed a motion for postconviction relief which was summarily denied. On appeal, this Court affirmed. *Booker v. State*,

[1] References to the record on appeal are designated as "R. ." References to the initial postconviction record on appeal are designated as "PC-R. ." References to the successive postconviction record on appeal are designated as "PC-R2. ." All other references are self-explanatory or otherwise explained herewith.

413 So. 2d 756 (Fla. 1982). Booker filed a petition for writ of habeas corpus with the federal district court which denied all relief. The Eleventh Circuit Court of Appeals affirmed. *Booker v. Wainwright*, 703 F. 2d 1252 (11th Cir.1983).

After his execution was scheduled, Booker filed another motion for postconviction relief. The circuit court denied the motion and Booker appealed. This Court affirmed and denied Booker's petition for writ of habeas corpus and a stay of execution. *Booker v. State*, 441 So. 2d 148 (Fla. 1983). Booker filed another petition for writ of habeas corpus with the federal district court which dismissed the petition. The Eleventh Circuit Court of Appeals affirmed. *Booker v. Wainwright*, 764 F. 2d 1371 (11th Cir. 1985).

Booker filed another motion for postconviction relief which was denied. On appeal, this Court affirmed. *Booker v. State*, 503 So. 2d 888 (Fla. 1987). Booker again unsuccessfully sought relief from the federal courts. *Booker v. Dugger*, 825 F.2d 281 (Fla. 1987).

Booker filed a petition for writ of habeas corpus with this Court based upon *Hitchcock v. Dugger*, 481 U.S. 393 (1987). On January 14, 1988, the petition was denied. *Booker v. Dugger*, 520 So. 2d 246 (Fla. 1988). Booker sought federal review and on January 14, 1991,

the Eleventh Circuit reversed the federal district court and granted him a resentencing proceeding. *Booker v. Dugger*, 922 F.2d 633 (11th Cir. 1991).

Booker's resentencing occurred in March, 1998. The jury recommended a sentence of death by 8-4. The trial court sentenced Booker to death. This Court affirmed. *Booker v. State*, 773 So. 2d 1079 (Fla. 2000).

In 2004, Booker filed a motion for postconviction relief which was denied. This Court affirmed. *Booker v. State*, 969 So. 2d 186 (Fla. 2007). Booker filed a petition for writ of habeas corpus with the federal district court which denied the petition. The Eleventh Circuit Court of Appeals affirmed. *Booker v. Sec'y*, 684 F.3d 1121 (11th Cir. 2012).

In 2016, Booker filed a motion for postconviction relief based upon *Hurst v. Florida*, 136 S.Ct. 616 (2016). The motion was denied and this Court affirmed. *Booker v. State*, 252 So. 3d 723 (Fla. 2018). Booker's petition for writ of habeas corpus based upon similar issues was also denied. *Booker v. Jones*, 235 S. 3d 298 (Fla. 2018).

On November 5, 2020, Booker filed a motion for postconviction relief based on a claim of newly discovered evidence related to

exculpatory evidence that had been withheld and the recent recognition by the Department of Justice and Federal Bureau of Investigation of the scientific limitations to microscopic hair analysis (PC-R2. 132-99). On January 21, 2021, the circuit court held a case management conference (PC-R2. 453-82).

On March 29, 2021, the circuit court summarily denied Booker's motion for postconviction relief (PC-R2. 424-43). On April 12, 2021, Booker filed a motion for rehearing (PC-R2. 433-42). On April 27, 2021, the circuit court denied the motion (PC-R2. 443-44).

On May 24, 2021, Booker filed a notice of appeal as to the circuit court's denial of his motion for postconviction relief (PC-R2. 447-48). This appeal follows.

STATEMENT OF THE FACTS

At Booker's capital trial, during opening statement, the State explained how the evidence linked Booker to the killing of Lorine Harmon on November 9, 1977:

> [T]he State will present a person by the name of McNeil (sic) who is an FBI hair comparison expert whose testimony will show certain hair samples were taken from the body and transferred with loose hair samples in places in the house and combings from the victim's pubic area to match with the known samples from the defendant. He will testify about several samples taken from different areas in

> the house which he compared with the defendant's hair samples. **And the result of those tests I think will be most beneficial in proving the State's case**.
>
> 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 person in the world. Those are the defendant's fingerprints.

(R. 445-6)(emphasis added).

Trial counsel informed the jury that the case against Booker was circumstantial, but he also raised the issue of Booker's sanity as a defense to the charges (R. 446).

During the State's case, Officer Pete Fancher testified that the day after being dispatched to the victim's home, he came into contact with Booker. He indicated that he was drawn to Booker because he was wearing thick rubber shoes, the kind which he believed would make shoeprints similar to those he had observed outside of a window at the victim's house (R. 581-2). According to Fancher, the sole of Booker's shoes appeared similar to those that were outside

the crime scene (R. 585).[2] Subsequently, Booker voluntarily traveled to the Gainesville Police Department to provide fingerprints (R. 588-9, 597).

FBI Agent Robert Neil testified as an expert in hair comparison (R. 683). Neil obtained hairs from a bedspread and after comparison determined that the hairs "contain[ed] the same characteristics and qualities" as Booker's pubic hair sample (R. 696-7). When the State asked: "How is it that you conduct a test to determine whether or not [a questioned hair] is the same or similar to the known pubic hairs" (R. 698), Neil explained:

> [T]he procedure involves in this case the identification of the hair as to body area and as to race which can be done without any great difficulty, after which a detailed microscopic comparison is conducted of the

[2] When Booker was arrested he provided the blue sneakers he was wearing to law enforcement. However, Fancher testified that the shoes Booker provided upon arrest were not the same as the shoes that he was wearing when he first spoke to Booker. The issue of Booker's shoes was problematic due to the inconsistencies in their description: in his report relating to his contact with Booker the day after the crimes, Fancher described Booker's shoes as tan, rubber soled shoes. Yet, shortly thereafter on that same day, a BOLO was issued for Booker that indicated he was wearing blue sneakers. When Booker was arrested the following day he wore blue sneakers. Though Fancher testified that Booker was wearing different shoes when he first encountered him, he did not explain the inconsistency with the information contained in the BOLO or how that description matched the shoes Booker was wearing when he was arrested.

> individual identifying characteristics of a questioned hair . . . for comparison with a known hair sample.
>
> This is done by mounting the hairs on the glass microscope slides . . .

(R. 698). When asked how definite he was about the identity of the two hairs - the one from the bedspread and Booker's – Neil testified that the hair from the bedspread "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, therefore, Neil concluded the: "hair found on Exhibit 44, the bedspread, based upon this comparison in my opinion either originated from Mr. Booker or some individual of the black race whose pubic hairs exhibited the same range of microscopic characteristics." (R. 699).

Likewise, Neil testified that a hair found on the victim's pantyhose also exhibits "Negroid characteristics and **was exactly the same as**" the hair sample from Booker (R. 701)(emphasis added). When asked to speak to the certainty or probability that the hairs were the same, Neil initially commented that he could not provide "an exact numerical probability, but "I would consider it possible that the hair originated from . . . Mr. Booker." (R. 701).

As to the hairs collected from the vaccumings near the victim's bed, Neil stated:

> I found two black pubic hairs, both of which exhibited Negroid characteristics. One of these hairs the conclusion would be **exactly the same** in that it exhibited microscopic characteristics falling well within the range of those characteristics exhibited by the known pubic hair sample purported to be from Mr. Booker.
>
> The other hair exhibited closely similar with respect to this microscopic characteristic when compared with the known pubic hair sample. The conclusion in the latter case would have to be modified slightly to the extent that I wouldn't consider – well, let me put it this way. **In my opinion, that second hair could have originated from Mr. Booker. The first hair I think there is a possibility that it did originate from Mr. Booker**.
>
> ***
>
> I am saying that [the second hair] exhibits very similar microscopic characteristics from those hairs purporting to be from Mr. Booker, but it is not identical. **The other hair, the first hair found in the Exhibit 47, falls very precisely in the range of characteristics exhibits in Mr. Booker's hairs**.

(R. 702-3)(emphasis added). Neil continued:

> **One, the first one, falls precisely within the range of microscopic characteristics exhibited by the known hairs of Mr. Booker**. The second doesn't quite come up to this particular standard. In other words, it exhibits a similarity, a very close similarity as a matter of fact, with the known hairs from the defendant, Mr. Booker. But it doesn't quite come up to the standard which I require **in order to come to a positive conclusion regarding the source of hairs**.

(R. 704)(emphasis added).

Neil also testified about a "black hair removed from the vagina" of the victim, telling the jury that it was a black head hair fragment from "a person of the black race", but he could say nothing further due to the limited size of the hair (R. 704).

Finally, Neil testified that he found a pubic hair originating from a person of Caucasian or white race on Booker's socks (R. 705). In comparing the hair to the victim's known pubic hair sample, Neil found that **the hair fell "well within the microscopic range of characteristics exhibited by the known hair sample of the deceased**." (R. 706)(emphasis added).

The State also presented the testimony of fingerprint examiner George Johnson. Johnson compared Booker's finger and palmprints to latent prints from the victim's window sills, the door to the victim's bedroom and a Christmas box, a metal box, a jewelry box in the victim's bedroom and found that the prints on those items matched those of Booker (R. 643, 646-658).

Detective Michael Price testified about his interrogation of Booker. After initially denying that he had been to the victim's

residence, Booker admitted that he had trimmed the shrubbery once, but had not been inside (R. 617). On cross-examination and introduced by trial counsel only to support an insanity defense, Price described that during the interrogation, Booker started to describe himself in the third person –Aniel-- who was also a demon (R. 624). When speaking as Aniel, Booker's teeth were clenched until his teeth would crunch; his eyes were glassy and he would whisper (R. 625-6). Before Aniel arrived, Booker "worked himself into a frenzy" and was chanting (R. 626). Then, after Aniel began speaking, he burst into tears and cried, quickly vacillating between laughing and back to calm and crying again (R. 627). On the drive to the jail, Aniel told Price that "Steve" killed the victim (R. 623, 628). He then bit at Price and appeared to fall asleep (R. 629). At the jail, Booker did not recall Aniel, speaking to Price as Aniel or anything about the crime (R. 629). Price believed that Booker and the individual identified as Aniel were sincere (R. 630).[3]

[3] It is important that the State did not refer to in opening statement or elicit any testimony about Booker's statement to law enforcement, other than the information concerning whether Booker had been to or inside the victim's home. Booker's inculpatory statement, including his bizarre, "Steve did it" comment were presented when trial counsel, who in assessing the evidence against Booker, and

In his defense, Booker presented Dr. Frank Carrera, a psychiatrist, who opined that he could not rule out that Booker was insane at the time of the crime (R. 726-7). However, the State presented the testimony of Dr. George Barnard who testified that Booker was legally sane at the time of the crime (R. 740).

In closing argument, the State acknowledged that the evidence against Booker was circumstantial (R. 757). Thus, throughout the State's closing argument, the prosecutor relied on the hair analysis as evidence to support the charges (R. 754) ("The other hair samples are identical to the defendant in every way."). Specifically, the State maintained that the hair collected from the crime scene: **"[i]n every way and every respect that hair is his hair** ... It is either this man or one just like him." (R. 762)(emphasis added); *see also* R. 763 ("Matched again"; "Match"; "You get a match.").

Booker was convicted as charged.

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being unaware of the impeachment evidence relating to the microscopic hair analysis and its unreliability, decided to present an insanity defense. Thus, the thrust of Booker's statement was simply not a part of the State's case against him at trial and is not relevant to this Court's evaluation of his claims.

SUMMARY OF ARGUMENT

Recently discovered evidence demonstrates that Booker's capital conviction is constitutionally unreliable in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The evidence establishes that Booker's right to due process under the Fourteenth Amendment to the United States Constitution and his rights under the Fifth and, Sixth Amendments were violated, because the State withheld evidence which was material and exculpatory in nature.

The conflux of errors in Booker's case severely prejudiced him. This Court is required to analyze the prejudice of the errors not only individually, but also cumulatively. *See Parker v. State*, 89 So. 3d 844, 867 (Fla. 2011); *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996).

The lower court erroneously failed to grant an evidentiary hearing despite allegations regarding the substance of the new evidence, the constitutional claims based upon the new evidence, and Booker's diligence in attempting to unearth the new evidence. This Court should order an evidentiary hearing.

STANDARD OF REVIEW

The lower court summarily denied Booker's motion without conducting an evidentiary hearing. Booker's factual allegations presented in his motion and in this appeal must be taken as true and the circuit court's decision must be reviewed *de novo* by this Court. *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999).

ARGUMENT

ARGUMENT I

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT BOOKER WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY IN NATURE WHICH UNDERMINES CONFIDENCE IN THE RELIABILITY OF HIS CONVICTIONS.

A. INTRODUCTION

In his 3.851 motion, Booker presented a newly discovered evidence claim under *Jones v. State*, 591 So. 2d 911 (Fla. 1991) and/or *Brady v. Maryland*, 373 U.S. 83 (1963). Booker sought an evidentiary hearing on these claims, but the circuit court summarily denied the claims.

The law attendant to the granting of an evidentiary hearing in a postconviction proceeding is often stated and well settled: "[u]nder rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). *Accord Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Arbelaez v. State*, 775 So. 2d 909, 914-15 (Fla. 2000). The rule is the same for a successive postconviction motion, where allegations of previous unavailability of new facts, as well as diligence of the movant, warrant evidentiary development if disputed or if a procedural bar does not "appear[] on the face of the pleadings." *Card v. State*, 652 So. 2d 344, 346 (Fla. 1995). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

As will be demonstrated herein, the circuit court erroneously failed to grant Booker an evidentiary hearing despite allegations regarding the diligence in attempting to unearth the new evidence,

the constitutional claims based upon the new evidence, and the substance of the new evidence.

B. BOOKER'S CASE

Booker pleads his claim in the alternative. Booker submits that the State withheld material, exculpatory evidence concerning the hair analysis that was presented to his capital jury and undermines confidence in the outcome of his convictions. However, should this Court determine that the State did not withhold the evidence, then it is newly discovered evidence that, had it been presented to his jury, would have probably resulted in an acquittal. *See Jones v. State*, 591 So.2d 911, 916 (Fla.1991).

1. DILIGENCE

Hair analysis and the import of an examiner's conclusions has come under fire over the past two decades, yet, even today, the Federal Bureau of Investigation (FBI) and Department of Justice (DOJ) refuse to completely repudiate the evidence. In the late 1990s, the DOJ undertook an independent review of FBI Agent Michael Malone, who worked at the FBI. One of the areas in which Malone worked was the hair and fiber unit. The scrutiny of Malone's work was discussed in the Office of the Inspector General's Report: The

FBI Laboratory, April 1997. Shortly thereafter, DOJ attempted to identify cases in which Malone testified and contacted the prosecuting agency in those particular cases to determine whether the case should be independently reviewed.

In the wake of the litigation that followed, criticism about the scope of the initial review followed. Unbeknownst to Booker, a second review of Malone and the reliability of testimony concerning microscopic hair analysis was undertaken in 2013. On September 15, 2015, United States Assistant Attorney General Peter J. Kadzik, on behalf of the Department of Justice, informed the United States Senator Richard Blumenthal about the review:

> As you are aware, the Department of Justice (the Department) and the FBI are engaged in a review of historical cases involving testimony and laboratory reports regarding microscopic hair comparison analysis. The Department and FBI have developed a process to systematically identify and review all cases that resulted in a conviction in which microscopic hair comparison analysis was conducted, a positive association between evidentiary hair and a known sample was identified, and the hair was not submitted for mitochondrial DNA analysis. We have given the highest priority to reviewing capital cases.
>
> ***
>
> The FBI's methodology for processing identified cases was carefully constructed in coordination with the

Innocence Project (IP), the National Association of Criminal Defense Lawyers (NACDL), and the Department. A coordinated effort with multiple parties throughout the country is being implemented to obtain information to conduct reviews. This process requires multiple attempts to obtain pertinent case file materials via telephone and letter if no response is received, assistance is sought from the applicable States Attorney General, the IP, the NACDL, and the Department.

***

The FBI anticipates completing reviews of all identified cases by the end of the calendar year 2015. This means the identified case files will be reviewed to determine if further action is required. This review process, however, is dependent on the responses and cooperation the FBI receives from contributors of the evidence, prosecutors offices, and others.

***

Since the United States is not a party to the underlying state court criminal proceedings it does not have jurisdiction to intervene in post-conviction proceedings. **However, in our notification letters to state prosecutors and defense counsel, we are informing them that in federal post-conviction proceedings, in the interest of justice, the government is waiving reliance on the statute of limitations for collateral attack on the convictions and any procedural default defenses in order to permit a resolution on the merits of any legal claims arising from erroneous statements in laboratory reports or testimony period specifically, the government will not dispute that the erroneous statement should be treated as false evidence and that knowledge of the falsity should be imputed to the prosecution. This will allow the parties to litigate the effect of the false**

> **evidence on the conviction in light of the remaining evidence in the case**.

(PC-R2. 155-56)(emphasis added).

While, according to DOJ protocol, Booker's case fell within the high priority of cases to review, DOJ apparently failed to identify his case for review. On December 14, 2018, when Booker's federal court counsel learned of the review due to litigation in other cases, they contacted DOJ and inquired as to whether review of Booker's case had occurred or was being conducted. A few days later, DOJ responded and indicated that Booker's case had not been reviewed yet. When pressed, DOJ indicated that, though the panel conducting the review had been disbanded, some form of a review could occur if Booker sent the trial testimony of the hair analyst.

Booker provided the trial testimony of Neil. Several months later, on April 25, 2019, Norman Wong, on behalf of DOJ, indicated that Neil's testimony regarding microscopic hair comparison analysis "met accepted scientific standards" (PC-R2. 158). However, in a breach of DOJ's protocol, the Innocence Project did not sign off on the review. Further, due to the fact that DOJ did not identify Booker's

case during the review process, other protocols were overlooked, including the review of Neil's report.

Following receipt of the report and the glaring omission of the Innocence Project's review, Booker's state court counsel sought to obtain the entire FBI file on his case. Thus, a FOIA request was made on October 29, 2019. On February 24, 2020, the FBI, for the first time provided Booker with handwritten notes concerning the microscopic hair analysis. The notes were difficult to read due to the faintness of the copies and an appeal was made for better copies. The FBI conducted another review and determined that the records disclosed to Booker were the best copies available.

Due to the violation of the protocol relating to the DOJ review and the recent disclosure of the handwritten notes, Booker retained Jason Beckert, a microscopist at Microtrace, to review the FBI file and Neil's testimony. On September 25, 2020, Mr. Beckert issued a report identifying several areas of concern relating to the hair analysis and testimony that was presented to Booker's capital jury (PC-R2. 163-69).

Beckert's case specific report outlining the unreliable overstatements in Neil's testimony about the certainty of the hair

analysis and origination of unknown hair samples along with the handwritten notes qualify as newly discovered evidence. *See Henry v. State*, 125 So. 3d 745, 751 (Fla. 2013); *Wyatt v. State*, 71 So. 3d 86, 99 (Fla. 2011). Both the notes and the information in the Beckert Report were "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 it] by the use of diligence". *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).

2. *BRADY V. MARYLAND*

Specifically, as to the handwritten notes, it is clear that Neil only notated the generic color of the hair (macroscopic characteristic) and the "somatic origin, ancestory and degree of similarity to the known hair standards"; **"[t]hese are not notes describing the characteristics of the questioned hairs that were actually observed."** (PC-R2. 165)(emphasis added). The notes clearly constitute impeachment of Neil. The hairs were examined sometime between November 17, 1977, and February 22, 1978, when Neil reported his results. However, the notes do not identify a single microscopic characteristic about the unknown or known hair standards. When Neil testified months later, on June 19, 1978, he

repeatedly testified that the unknown hair samples "fell within the narrow range of microscopic characteristics" exhibited by the known hair samples from Booker (R. 699), but Neil's notes do not identify a single microscopic characteristic of either the unknown or known hair samples. Had trial counsel been provided with the notes, he could have questioned Neil about this inconsistency. The jury would have been left with the fact that there was nothing noted during the microscopic examination to support Neil's testimony. *See* R. 696-9, 601-3, 705-6.

Furthermore, as to Neil's testimony, he made several overstatements, either directly or impliedly, about hair analysis. In his report, Beckert details Neil's numerous overstatements:

> During his testimony, the examiner makes numerous over statements regarding the hair evidence in this case. For example, when discussing the basic principles of her examinations, he states:
>
> > "Well, the procedure involves in this case the identification of the hair as to body area and as to race which can be done without any great difficulty, after which a detailed microscopic[al] comparison is conducted of the individual identifying characteristics of a questioned hair from a - in this case exhibit 44 - for a comparison within known hair sample."

> There are two issues with this passage of testimony. First he overstates the ease with which somatic origin (*i.e.*, body area) and ancestry (referred to at the time this testimony was given as racial origin) can be determined from individual questioned hairs. It is possible to reach opinions regarding these questions, but it is not always a straightforward task and quite often there are significant limitations with respect to the conclusions that can be reached depending on the hairs themselves.
>
> Secondly, it is unclear what is meant by the phrase (individual identifying characteristics) but its use is confusing and potentially misleading in that it implies individualization (*i.e.*, that microscopic characteristics are unique to the individual). It has been recognized since the dawn of the field that individualization of hairs is not possible through microscopy alone.
>
> Later in his testimony, when discussing the questioned hair recovered from the hose/stockings from the scene (Q12- Q13), the examiner states:
>
> > "The procedure, the examinations that was used in this hair which consists of a single black pubic hair exhibiting Negroid characteristics and was exactly the same individual as Exhibit 44 [Q1 – the hair recovered from the bedspread at the scene]."
>
> It is an overstatement of the science to declare that these 2 questioned hairs originated from the same individual.

(PC-R2. 166-67)(footnotes omitted). Beckert details other overstatements and misleading statements that are not scientifically supportable: "Our review of the trial testimony has identified several problematic areas of testimony in which the examiner either

overstated the significance of the science or inaccurately described the underlying principles of science." (PC-R2. 169).

The State went even further than Neil when, in closing argument, told the jury that the unknown hairs found at the crime scene identified and matched Booker's hair and that the victim's hair matched the hair removed from Booker's socks the day after the crime. *See* R. 754, 762-3. Beckert's report demonstrates that Neil's testimony and the State's closing argument violated Booker's right to due process.

In order to insure a constitutionally adequate adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon the prosecuting attorney. He is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" *United States v. Bagley*, 473 U.S. 667, 674 (1985), *quoting Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See Kyles v. Whitley*, 514 U.S. 419, 438 (1995) ("the prosecutor's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable"). The prosecutor has a "duty to learn of any favorable evidence known to the others acting

on the government's behalf in the case, including the police". *Kyles*, 514 U.S. at 437; *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

In Booker's case, the State had an obligation to disclose the exculpatory and material bench notes as they were inconsistent with Neil's testimony about the microscopic characteristics of the hairs Neil examined. Further, as Beckert's report makes clear, Neil's testimony was false and misleading in that he repeatedly opined that the hairs found at the crime scene originated from Booker and the State relied upon them in proving its case. However, as Beckert stated in his report: **"It has been recognized since the dawn of time that individualization of hairs is not possible through microscopy alone."** (PC-R2. 166)(emphasis added). Indeed, research conducted in the early 1970's demonstrated error rates as high as 67%:

> The weakness of the field is well established. For instance, hairs pulled from the same head might not match one another. The hair examiners cannot agree on a criteria for comparisons. Some people have "featureless" hair that is hard to distinguish. With all the uncertainty about matching criteria, no one has been able to set up data banks for hairs, like the ones for fingerprints. That's also why no one can plausibly claim to know if the characteristics of a particular hair are rare, common, or somewhere in between.

> In the early 1970's, the U.S. Law Enforcement Assistance Administration (LEAA) sponsored a proficiency testing program for 240 laboratories that provided evidence in criminal cases. The labs botched many kinds of tests: paint, glass, rubber, fibers. But, by far, the worst results came from hair analysis.
>
> Out of ninety responses for the hair survey, the proportion of labs submitting "unacceptable" responses on a given sample – either by failing to make a match, or making a false match – range from 27.6 to 67.8 percent.
>
> On five different samples, the error rates were 50.0 percent, 27.6 percent, 54.4 percent, 67.8 percent, and 55.6 percent. **In short, there was little difference between flipping a coin and getting a hair analyst to provide reliable results**.

Actual Innocence, Barry Scheck, Peter Neufeld and Jim Dwyer, Doubleday, 2000, pp 162-3 [relying on *Oklahoma v. Durham*, CF 91-4922; *Out of the Blue*, Mark Hansen, ABA Journal, February 1996, "*The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*," Paul Gianelli, Virginia Journal of Social Policy and Law 4:439 (1997)] (emphasis added). Thus, Neil was aware of the limitations of hair comparison, but he ignored them. It was the State's obligation to disclose Neil's bench notes and evidence that undermined his testimony. Moreover, it was imperative that the

State not rely on the false and misleading testimony in closing argument.[4]

As to the issue of prejudice, the United States Supreme Court has explained:

> [T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution.

Kyles, 514 U.S. at 453.

Booker was prejudiced as a result of the State's failure to disclose. First, Booker submits that had the limitations and inconsistencies been known to trial counsel, a persuasive motion in limine to exclude the hair analysis could have been made. Neil's testimony regarding the microscopic hair analysis performed in Booker's case simply does not meet the standard for admissibility. *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) ("while the court will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from

[4] As the Department of Justice indicated, claims like Booker's "should be treated as false evidence [claims] and the knowledge of the falsity should be imputed to the prosecution." (PC-R2. 156).

which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.").[5] *See also Ramirez v. State*, 810 So. 2d 836, 853 (Fla. 2001)("Any doubt as to admissibility under *Frye* should be resolved in a manner that minimizes the chance of a wrongful conviction, especially in a capital case.").

Second, Neil's false testimony was especially insidious because of his status as an expert. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 578, 595 (1993) (citation and internal quotation marks omitted). Jurors can judge the credibility of a lay witness for the prosecution, but not the credibility of an expert. The jurors at Booker's capital trial could never have expected that a Special Agent of the FBI, a man with 15 years of experience in the Crime Laboratory, would be telling them something

[5] While *Frye* is no longer the law in Florida, *In re Amendments to Fla. Evidence Code*, 278 So.3d 551 (Fla. 2019), because it was the law at the time of Booker's trial, he references it here in conjunction with the *Brady* analysis. However, in any strictly newly discovered evidence analysis, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 578 (1993), provides the framework for the issue of whether the hair analysis would be admissible at a future trial.

that was not true. The jurors were utterly unequipped to suspect that Neil's testimony, so seemingly scientific, was in fact unreliable and unsupportable.

Third, as the State recognized, the case against Booker was entirely circumstantial. Without the hair evidence, the jury was left with the finger and palm print evidence and Booker's statement that he had never been inside of the victim's home. However, without the hair evidence, Booker could have vigorously challenged the sexual battery and murder counts, i.e., left with the finger and palm print evidence alone, many other reasonable explanations could have been advanced to show reasonable doubt. Such was the ruling in another case Neil[6] had testified in: *United States v. Ausby*, 916 F.3d 1089, 1095 (D.C. Cir. 2019).

In the prosecution of Ausby, the FBI had flagged Neil's testimony as false and misleading in its microscopic hair analysis review. The D.C. Circuit Court of Appeals ruled that Neil's testimony had been the primary evidence that contradicted the defense's theory. *Id.* at 1095. Without the hair evidence, the defense could have

[6] Although Agent Robert Neil's name is spelled as "Neil" in Booker's case, his name is notated as "Neill" in Ausby's case.

explained that Ausby had been in the victim's apartment at a time other than the day of the rape and murder, despite the discovery of Ausby's fingerprints and signature vials of oil in the apartment, as well as sightings of Ausby near the victim's apartment. *Id.* Thus, like in Ausby's case, trial counsel could have presented a defense that while Booker may have entered the victim's apartment, he did not commit the sexual battery or murder.

Furthermore, in Booker's case, the finger and palm print evidence presented by the prosecution was not without reproach. Johnson's report indicated that "[a] more complete set of prints are needed on [Booker] for a complete comparison." However, Johnson later noted that he never received a complete set, which included the sides and fingertips of Booker's known prints. Thus, Johnson's comparison by his admission were incomplete. In addition, in his deposition, Johnson testified that numerous finger and palm prints were obtained from the crime scene that did not match Booker or the victim. The perpetrator had clearly accessed the areas of the crime scene that the unidentified fingerprints were found in. Despite this, Johnson did not make any effort to match the unidentified prints to anyone else.

Moreover, though the State did not rely on Booker's statement to law enforcement, other than his denial that he had been inside the victim's home, it bears mentioning that trial counsel, based on his assessment of the evidence, presented more of Booker's statement in order to establish an insanity defense. Had trial counsel been armed with the compelling exculpatory evidence relating to the microscopic hair analysis, he surely would not have presented an insanity defense or presented Booker's statement to the jury. Thus, while Booker's statement was not a part of the prosecution's case, he submits that it also prejudiced him because it was totally unreliable.

During his interrogation, Booker experienced dissociation. Dr. David Lisak recently evaluated Booker and explained that due to the severe trauma Booker experienced as a child, he developed a defense of dissociation so that he could survive (PC-R2. 195-99). Lisak notes: "Dissociation helps a child to survive an overwhelming experience by separating some aspect of their experience from consciousness." (PC-R2. 195). Lisak cites numerous examples and references to Booker's experiencing dissociation throughout his life, including Dr. Barnard's opinion in 1997 that, at the time of the crime, Booker was suffering from a Dissociative Disorder (PC-R2. 196-98).

One of the most pertinent aspects of dissociation is that individuals may not remember what he or she did or said while dissociating and becomes suggestible to individuals who fill in the gaps for them. Booker submits that this is what occurred during his interrogation. As reported by Price, Booker exhibited a genuine dissociation and decompensated when being interrogated and assuming the role of Aniel. After speaking to Price as Aniel, Price described that after crying and making statements, Booker "seemed not to know that he had done or told these things" (PC-R2. 197). Indeed, the next day, Booker contacted Price and asked him "whether Price thought that Stephen had really committed the crime" (PC-R2. 197). The danger of Booker's dissociation resulted in the unreliability of his statements and whether he was simply supplying information based upon what he had been told by law enforcement during their questioning or whether he provided even a single reliable statement to them. Certainly, the defense's use of the statement was made in light of the prosecution's evidence and must be assessed as such in the prejudice analysis.

Finally, the State's closing argument specifically acknowledged the importance of the hair evidence to prove that Booker committed

a sexual battery (R. 754) ("The reason I bring out to the subject of hair is proof again that intercourse took place." and "the other hair samples are identical to the defendant on every way."). Likewise, the State relied on the hair evidence to put forth its theory of the case: that Booker, solely, entered the victim's home and killed her. The State argued Booker:

> entered the bedroom of the deceased through the southeast bedroom window while she was not home. The evidence then indicates that he began a ransacking process in the living room and the bedroom looking for money. Now, he missed some money in this process that he was throwing things around. I don't know. There are two conclusions to me, and one is that he was either in a rush to find what he wanted to and the money was not contained in an obvious place but in a box in an envelope shut so you have to open the envelope to see the money. He missed it.
>
> I don't know whether it was because of his rush or whether he got surprised by the return of the deceased in the home. He missed the money, and apparently from the evidence as it's shown here I believe that he heard her come in that rear door, the one where the key is found, and he heard her rattling the door. That door is near the kitchen area. She is fooling with the key and unlocks the door, and before she has a chance to take the key out he grabs her.
>
> Being in the kitchen area, he then has access to the knives. This is a picture of that area where the drawers are pulled open in the kitchen, and you can see that's where the knives are stored. He has access to the knives right there in the kitchen area.

(R. 756).

C. THE CIRCUIT COURT ERRONEOUSLY SUMMARILY DENIED BOOKER'S CLAIM

1. *BRADY V. MARYLAND*

In denying Booker's claim, the circuit court found it procedurally barred because it was untimely (PC-R2. 428). The court's decision is premised upon an incorrect legal standard, albeit one that the State encouraged the circuit court to apply. Specifically, the circuit court applied a 4-prong analysis to Booker's claim, requiring that he establish diligence (PC-R2. 427-29). However, in *Banks v. Dretke*, the United States Supreme Court addressed the notion of diligence head-on:

> Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred." 527 U.S. 263 at 286-287, 144 L. Ed. 2d 286, 119 S. Ct. 1936.

540 U.S. 668, 695-6 (2004). Indeed, after the United States Supreme Court announced the three *Brady* prongs in *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), this Court announced that it had "abandoned the four-prong test" to adopt the *Strickler* standard and, in doing so, got rid of the diligence prong. *Deren v. State*, 985 So. 2d

1087, 1088 (Fla. 2008); *see also Way v. State*, 760 So. 2d 903, 910 (Fla. 2000) (citing the three elements of a *Brady* claim). The United States Supreme Court also stated:

> The State here nevertheless urges, in effect, that 'the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected . . . **A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process**.

540 U.S. at 696 (emphasis added).

Furthermore, in *Hoffman v. State*, 800 So. 2d 174, 179 (Fla. 2001), during postconviction, Hoffman obtained the FDLE agent's bench notes, similar to those at issue here. Hoffman presented the court with a *Brady* claim premised upon undisclosed "results of an exculpatory hair analysis …" Just like it has argued here, the State argued in *Hoffman* that the defense was aware of the analysis and that in and of itself "should have placed Hoffman's attorney on notice of any other evidence flowing therefrom." *Id*. This Court rejected the State's argument and granted a new trial. This Court held:

> The information solicited, however, was merely the fact that hairs were gathered at the scene. The State asserts this testimony sufficiently apprised the defense of the existence of this evidence. This argument is flawed in light

> of *Strickler* and *Kyles*, which squarely place **the burden on the State to disclose to the defendant all information in its possession that is exculpatory**. In failing to do so, the State committed a Brady violation when it did not disclose the results of the hair analysis pertaining to the defendant.

Id. (emphasis added). *See Smith v. Sec'y Dep't of Corrs.*, 572 F.3d 1327 (11th Cir. 2009). The circuit court misapprehended the clear law concerning the elements of a *Brady* claim.

The circuit court also overlooked that Neil's reference to his notes did not make them discoverable (PC-R2. 428). In *Geralds v. State*, this Court explained that the forensic analyst was not required to disclose the field or bench notes under any rule or statute:

> Geralds next argues that the trial court erred and denying defense counsel access to field notes used by a State witness to refresh her memory during trial testimony. The record established that Laura Rouseau, a Florida Department of Law Enforcement crime laboratory analyst and the crime scene coordinator assigned to the case, refreshed her memory during direct examination from handwritten notes in response to a question about whether she had documented the brand of knives located in the kitchen. Defense counsel objected that these notes were not provided pursuant to Florida discovery rules and also requested access to the notes for use on cross-examination. The trial judge ruled that there had been no discovery violation because defense counsel had received the witness's formal report. 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.

Geralds argues that he was entitled to *all* of the witness's notes either under Florida Rule of Criminal Procedure 3.220 (b)(1)(x), or pursuant to section 90.613, Florida Statues (1989)

Rule 3.220 (b)(1)(x) provides for disclosure of "[r]eports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons." Geralds contends that because rule 3.220 (b)(1)(ii) specifically excludes police notes from the definition of "statements" as used in *that* paragraph, the legislature therefore intended to *include* the notes of other experts within the definition of "statements" in paragraph (b)(1)(x).

***

The plain language [of Rule 3.220(b)(1)(ii)] dictates that police and investigative reports are discoverable but that "*notes from which such reports are compiled*" are not discoverable. Here, the witness in question was a police officer testifying to what she found at the crime scene of the crime. Geralds therefore cannot argue for disclosure of that witness's field notes under paragraph (b)(1)(x) when such notes are specifically exempted from disclosure under paragraph (b)(1)(ii).

Gerald's second contention is that defense counsel was entitled to all of the witness's field notes pursuant to section 90.613, Florida Statutes (1989), which provides:

> When a witness uses a writing or other item to refresh his memory while testifying, an adverse party is entitled to have such writing or other item produced at the hearing, to inspect it, to cross examine the witness there on, and to introduce it, or, in the case of a writing, to introduce those portions which relate to the testimony of the witness, in

> evidence. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, an order delivery of the remainder to the party entitled there to any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a rating or other item is not produced or delivered pursuant to order under this section, the testimony of the witness concerning those matters shall be stricken.
>
> Geralds argues that all of the field notes were "related to the subject matter" of the witnesses testimony (i.e., the witness's examination of the crime scene) and therefore the trial court erred in only providing that page of the witness's notes relating to the knives. In fact, the record reveals that the trial judge followed the exact letter of the rule by holding an *in camera* inspection and then excising those portions of the notes that in his view were not related to the precise subject matter of the witness's testimony. Although the trial court's interpretation of the rule may have been somewhat restrictive, we do not find an abuse of discretion.

601 So. 2d 1157, 1159-61 (Fla. 1992) (emphasis in original) (citations and footnotes omitted).

In Booker's case, he was provided with a report from Neil. Booker could not have obtained the bench notes even if he had requested them in discovery. Further, he had no reason to believe that the notes were inconsistent with Neil's testimony. The obligation to disclose the notes fell squarely to the prosecution. *See Mordenti v.*

State, 894 So. 2d 161, 170 (Fla. 2004) ("To comply with *Brady,* the individual prosecutor has a duty to learn of any favorable evidence and to disclose that evidence to the defense."); *see also Kyles v. Whitley,* 514 U.S. 419, 437 (1995). And, this obligation continues in postconviction proceedings. *Johnson v. Butterworth*, 713 So. 2d 985, 987 (Fla. 1998) ("As stated earlier, the State is under a continuing obligation to disclose any exculpatory evidence.").

Even when the State maintains an "open-file policy", the State must disclose favorable evidence. *Strickler v. Greene*, 527 U.S. 263, 283-86 (1999). In fact, in *Strickler*, the United States Supreme Court clearly stated:

> Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review. **Nor, in our opinion, should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support**. Proper respect for state procedures counsels against a requirement that all possible claims be raised in state collateral proceedings, even when no known facts support them. **The presumption, well established by "'tradition and experience,'" that prosecutors have fully "'discharged their official duties,'" is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.**

Id. at 286-87 (emphasis added). The circuit court's conclusion that Booker was under some obligation to obtain the bench notes and that he was not timely in doing so ignores the clear and consistent law: it was the State's obligation to disclose the exculpatory evidence.

Not only is it the State's duty to disclose exculpatory evidence, the Eleventh Circuit has ruled that it is the State's obligation to disclose *Brady* evidence in a timely manner so that the defense could effectively utilize the evidence. *United States v. Beale*, 921 F.2d 1412, 1426 (11th Cir. 1991)("A *Brady* violation can also occur if the prosecution delays in transmitting evidence during a trial, but only if the defendant can show prejudice, *e.g.,* the material came so late that it could not be effectively used.") In Booker's case, the evidence was revealed too late for trial counsel to reformulate his strategy and effectively utilize the notes. Neil mentioned his notes when he was testifying on the witness stand. By the time Neil testified, the defense had already laid the foundation to his insanity defense by eliciting Booker's statement through Price's testimony. It was the State's duty to timely disclose the exculpatory material so that Booker could effectively utilize the exculpatory material.

Likewise, the circuit court's determination that Booker was well aware of the potential deficiencies in hair analysis prior to 2019 or 2020 again ignores the fact that it was the State's obligation to correct the false and misleading testimony that was presented to Booker's jury. The State shirked its responsibility when it failed to submit Booker's case for review to the Department of Justice (DOJ) or even alert Booker or his postconviction counsel to the review that DOJ was conducting when his case fell within the parameters of the review.

In *Wyatt v. State*, 71 So. 3d 86 (Fla. 2011), this Court reviewed the timeliness of Wyatt's claim that the comparative bullet lead analysis (CBLA) relied upon by the State at his trial was false and misleading. Though CBLA was publicly criticized and refuted several years prior to Wyatt's filing his claim, this Court held that his claim was timely:

> Wyatt first contends that the postconviction court erred in its two-fold ruling that the FBI letter in this case did not constitute newly discovered evidence and that a claim relating to the letter's subject matter was procedurally time-barred because it should have been raised within a year from the date the 2004 NRC report was issued. On appeal, the State subscribes to the same position as the postconviction court's ruling.
>
> As an initial matter, the State contends that Wyatt's claim is procedurally time-barred because a motion for postconviction relief in a capital case must be filed within

> one year from the date the new facts become known. **According to the State, Wyatt should have raised this claim within one year from the date the NRC issued its February 10, 2004, report, which undermined the scientific reliability of the testimony that Agent Riley gave at trial, or one year from September 1, 2005, the date the FBI issued a press release announcing it was discontinuing its usage of CBLA. We reject the State's position**.
>
> The record reflects that unlike the NRC report or the FBI press release, the 2008 letter was based on the FBI's own review of Agent Riley's 1991 testimony in this case. Although the letter did not invalidate all of Agent Riley's testimony, the agency clearly determined that his statement or implications "that the evidentiary specimen(s) could be associated to a single box of ammunition ... exceed[ed] the limits of science and [could not] be supported by the FBI." **In contrast, neither the 2004 NRC report nor the 2005 press release involved a concession that the testimony the FBI offered in past cases was unreliable and were only prospective in nature**. Thus, we hold that a newly discovered evidence claim predicated upon a case-specific letter from the FBI discrediting the CBLA testimony offered at trial is not procedurally barred if timely raised. In the present case, upon receipt of the FBI's 2008 letter, Wyatt timely filed a supplemental motion for postconviction relief, alleging that the letter constituted newly discovered evidence warranting a new trial, and, therefore, this claim is not time-barred.

Id. at 99-100 (emphasis added). Here, DOJ did not notify Booker or his defense that a review of his case was warranted. DOJ notified the State and requested the State to submit the cases that fit within the parameters of the review. The State failed to submit Booker's case.

Thus, even if Booker knew the limitations of microscopic hair analysis prior to obtaining the report from Microtrace, until DOJ and the FBI acknowledged the unreliability of testimony like Booker's, any claim would have been futile, and Booker would have been reasonable to rely on the State's silence as an assertion that the State had either properly submitted his case for review or that his case did not fall within the DOJ's parameters. To place the obligation on Booker rather than the State is contrary to the State's obligation as the prosecutor in Booker's case:

> These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

Strickler, 527 U.S. at 281. Thus, the circuit court erred in applying the law and facts of Booker's case in denying his claim.

Finally, the circuit court held that Booker has not demonstrated prejudice because Neil's testimony is not materially inconsistent with

his bench notes and due to the "overwhelming evidence of [Mr. Booker's] guilt" (PC-R2. 429). In so holding, the circuit court ignored the fact that Neil's entire testimony was based upon the premise that the unidentified hairs from the crime scene and Booker's sock exhibited specific characteristics that matched or were similar to the characteristics of the known hairs. However, the bench notes show that this was not the case. Neil mentioned no specific characteristics of the hairs in his notes. The failure to disclose the notes deprived trial counsel from showing that Neil's testimony was unreliable because he did not identify a single specific characteristic about the hairs that linked them. Additionally, the circuit court overlooked the fact that Neil's testimony was false and misleading. Thus, the evidence asserted by Booker entirely affects the reliability and credibility of Neil and his testimony.

And, as to the "overwhelming evidence", the circuit court relied on evidence that has been shown to be flawed. For example, Booker's shoe prints were not found at the crime scene as the circuit court held (PC-R2. 429). Rather, a shoeprint was seen outside of the victim's home that appeared to be from a work boot or heavy rubber soled boot. According to Fancher, one of the reasons he spoke to

Booker was due to the fact that he was wearing work boots and Fancher asked Booker to show him the sole of the boot. However, according to Hill, Fancher described Booker as wearing blue sneakers when he asked Hill to come and speak with Booker. Indeed, a BOLO was issued for Booker and it indicated that Booker was wearing blue sneakers. Booker was arrested in his blue sneakers. Thus, Fancher's testimony is unsupported by the evidence. And, there is no explanation as to how Booker would have known what kind and color of shoes to be wearing when he was arrested, i.e. what was contained in the BOLO and Hill's report, if he had somehow decided to change his shoes from the time he was questioned to his arrest.

Likewise, the fingerprint evidence was impeachable and weak. There were numerous other unidentified prints in the victim's home and in areas of her home that the perpetrator was known to have been, like the kitchen. The fingerprints did not tie Booker to the homicide or sexual battery. His prints were not identified in the kitchen where drawers had been opened and the knife was obtained. Booker could have entered the home before the victim arrived or after she had been killed by someone else and rifled through some of the items that appeared to have valuables.

Finally, the circuit court failed to acknowledge the fact that Booker's statement, other than the denial that he had ever been in the victim's home, was introduced by the defense in support of the insanity defense. Thus, it was improper for the circuit court to rely on it. The evidence against Booker is far from overwhelming. Indeed, the correct standard, which the circuit court failed to apply, is whether the evidence undermined confidence in the outcome. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The circuit court did not address how this evidence could have impacted the entire defense strategy. Here, the undisclosed evidence provided the defense the possibility of asserting innocence, or at a minimum reasonable doubt, in a weak, circumstantial case. Booker submits that the circuit court erred in its analysis of the law and facts as to the prejudice analysis.

Based upon the newly disclosed exculpatory evidence impeaching Neil's testimony and demonstrating the unreliability of microscopic hair comparison, Booker is entitled to an evidentiary hearing after which the circuit court should grant relief.

2. NEWLY DISCOVERED EVIDENCE

The circuit court also denied Booker relief as to his claim that the evidence concerning the faulty microscopic hair analysis would probably produce an acquittal upon retrial (PC-R2. 430-31). The circuit court reiterated its previous ruling, determining that the bench notes were not newly discovered because Booker could have obtained them at trial and could have had an expert review Neil's testimony at any time over the past forty years (PC-R2. 430-31).

As to the whether Booker was not diligent in seeking an independent review, the circuit court ignored the fact that for the past forty years, the State has neither indicated nor acknowledged that microscopic hair comparison is unreliable generally or specifically in Booker's case They certainly have not done so in the litigation of Booker's successive Rule 3.851 motion even when the DOJ has urged the State to forego any procedural defenses and allow defendants like Booker to proceed on a claim of a due process violation/false evidence claim. In *Florida Bar v. Feinberg*, 760 So. 2d 933, 939 (Fla. 2000), this Court stated: "Truth is critical in the operation of our judicial system." In determining that Booker was not diligent, the circuit court ignores the fact that Booker must not be held to a higher

standard than that the State is held. Thus, if the State has not violated its ethical and legal obligations in failing to submit Booker's case for an independent review, a conclusion that Booker was not diligent is clearly erroneous.

Furthermore, at the time of trial, the notes did not come to light until Neil was testifying on the witness stand. Not only could the notes have been used to impeach Neil's testimony, timely knowledge of the notes would have significantly changed Booker's defense strategy. Because the State had not disclosed the material, by the time Neil testified, it was too late for the defense to effectively utilize the notes.

And, as to whether there is a reasonable probability of an acquittal, Booker again submits that the hair evidence was critical in the analysis of whether he was guilty of homicide or sexual battery. To ascertain whether the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial, the court must "evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial.'" *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998)(internal citations omitted). In Booker's

case, the hair evidence functioned as the linchpin that held the prosecution's circumstantial case together.

Moreover, each piece of evidence that made up the circumstantial case was unsound. Booker's shoe prints were not found at the crime scene. A shoeprint that appeared to be from a work boot or a heavy rubber soled boot had been found outside of the victim's home. Though Fancher claimed that he had spoken to Booker because Booker was wearing work boots, Hill stated that Fancher had described Booker's shoes as blue sneakers. This is buttressed by the fact that the BOLO that was issued for Booker indicated that Booker was wearing blue sneakers. Booker was wearing his blue sneakers when he was arrested. The finding that Booker's shoeprint was found at the scene was not supported by the evidence.

Nor did the fingerprints show that Booker committed the homicide or sexual battery. Though Booker's fingerprints were found on items such as the victim's jewelry box, his prints were not identified in the kitchen where the knife had been procured. Rather, other prints that were never identified were found in the kitchen. Booker could have left his prints in the apartment while rummaging

for valuables either before the victim arrived or after she had been killed by someone else. Accordingly, the fingerprint evidence did not tie Booker to the homicide or sexual battery.

Finally, excluding Booker's denial of ever having been in the victim's home, it was trial counsel, not the State, that had introduced Booker's statement to the jury. Defense counsel had introduced the statement as part of his strategy to present an insanity defense. Had defense counsel been privy to the evidence concerning the faulty microscopic hair analysis, he could have avoided eliciting the testimony concerning Booker's statement. Thus, not only was the hair evidence crucial to the State's case, it shaped trial counsel's defense strategy. Without Neil's microscopic hair analysis testimony, the State would not have had the evidence to tie together the weak circumstantial case against Booker and trial counsel would not have had to present Booker's statement to the jury. Booker submits that without Neil's microscopic hair analysis testimony, there is a reasonable probability that Booker would be acquitted upon retrial.

CONCLUSION

The FBI's review of cases involving erroneous microscopic hair comparison analysis evidence that amounted to false evidence was

contingent on the cooperation received from contributors of the evidence, prosecutor's offices, and others. Though Booker's case meets the profile of the cases flagged for review, and though the expert witness' testimony has been recognized as false testimony in another case, Booker's case was never reported by either the contributor of evidence or the prosecutor's office. In light of the State's failure to submit Booker's case for review, Booker diligently pursued an independent review of the microscopic hair comparison analysis evidence presented in his case.

The ensuing review revealed newly discovered exculpatory evidence that had been withheld by the State. Not only would this evidence have undermined the microscopic hair evidence, which played a key role in the State's circumstantial case, but it would have also restructured the defense's strategy. This evidence undermines confidence in Booker's conviction.

In light of the foregoing arguments, Booker requests this Court reverse the lower court, and remand the cause for an evidentiary hearing on the claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 1st day of July, 2021.

CERTIFICATION OF TYPE SIZE AND STYLE

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/s/. Linda McDermott
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