**IN THE SUPREME COURT OF FLORIDA**

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

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**STEPHEN BOOKER,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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

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# REPLY BRIEF OF APPELLANT

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### 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.

The State argues that Booker's *Brady* claim is procedurally barred and meritless and that Booker's newly discovered evidence claim fails, because of his alleged lack of diligence. This mischaracterizes the nature of Booker's claims which are predicated on the State's failures. Through this distortion of the law and facts, the State attempts to foist the consequences of the State's own failures onto Booker.

### A. Brady

#### i. Booker Exercised Due Diligence and Timely Filed His *Brady* Claim

The State urges the Court to deny relief arguing that Booker was untimely under Florida Rule of Criminal Procedure 3.851(d) and states that had "counsel been diligent and obtained the notes at trial, Booker could have raised this same *Brady* claim much sooner." (AB

at 26). However, the State ignores the fact that analyzing due diligence involves a highly fact-and context-specific inquiry, one that depends on the characteristics and reasonable expectations of someone in the defendant's shoes. *Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 278–79 (3d Cir. 2021). Multiple federal circuits have held that the nature of a *Brady* claim informs what reasonable diligence is expected of a petitioner under § 2244(d)(1)(D)'s "due diligence" standard.

The logic extends here to *Brady* claims brought under Rule 3.851(d)(2)(A)'s due diligence standard. Not only under § 2244(d)(1)(D), but in the law generally, "due diligence" is "a relative term; it is '[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.'" *Id.* at 286 (quoting *Diligence*, Black's Law Dictionary (6th ed. 1990). The nature of the claim factors into the diligence inquiry and shapes the reasonable expectations of

the defendant.[1] Here, the nature of a *Brady* claim shapes the due diligence expected of Booker.

In the typical *Brady* case, it is unreasonable to expect the defendant to "harbor suspicions that the government is defying its obligations because such an expectation would be 'fundamentally at odds with *Brady* itself.'" *Id.* at 293 (internal citations omitted). Booker is entitled to "presume that public officials have properly discharged their official duties." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). The United States Supreme Court stated that it is "appropriate for [a defendant] to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." *Id.* at 694. This presumption means that, "[w]ithout a specific 'basis for believing [the prosecution] had failed to comply with *Brady*'…a petitioner need not independently search for *Brady* material." *Bracey*, 986 F.3d at 292 (citing *Jefferson v.*

[1] The diligence requirement in the federal habeas equitable tolling context is also informative. There, the diligence requirement demands "reasonable diligence, not maximum feasible diligence." *Holland v. Florida*, 560 U.S. 631, 653 (2010)).

*United States*, 730 F.3d 537, 545 (6th Cir. 2013))(quoting *Strickler v. Greene*, 527 U.S. 263, 287 (1999)).

In addition, the State oversimplifies *Provenzano v. State*, 616 So. 2d 428 (Fla. 1993) and *Way v. State*, 760 So. 2d 903 (Fla. 2000) to the premise that notes are not suppressed when an expert relies on them at trial. But this distorts the opinions and directly contravenes the United States Supreme Court's articulation that "[o]ur 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." *Banks*, 540 U.S. at 695.

In *Provenzano*, the notes did not contain impeachment or exculpatory material that was inconsistent with the expert's testimony. In fact, the expert's notes corroborated the expert's trial testimony: "The most relevant item cited by Provenzano as contained in these notes is Dr. Wilder's comment that Provenzano was afforded 'the privacy that security would permit.' **as Wilder explained at trial.**" *Provenzano*, 616 So. 2d at 430 (emphasis added). In contrast, this Court found that *Brady* material in *Way* had been suppressed. The trial court had found that the photographs had been disclosed because the expert had "brought the photographs to the deposition

and his report that stated that 'photographs were also taken by Mr. Regalado, some of which are included in this report, with the remainder being on file.'" *Way*, 760 So. 2d at 911. The trial counsel had even used the report during the expert's deposition. *Id.* This Court held that, notwithstanding the report that had disclosed the existence of the photographs, because the expert did not refer to the disputed photographs in his testimonies and because at a pretrial hearing, the prosecutor had assured the defense that all photographs of the crime scene had been produced, the photographs had been suppressed. *Id.* When addressing the issue of whether trial counsel should have been aware of the photographs this Court held:

> Thus, while the discovery rules impose an obligation upon defendants to obtain exculpatory materials through the exercise of due diligence, the "ultimate test" in determining if a *Brady* violation occurred is whether "confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different."

*Id.* at 912 (quoting *Young v. State,* 739 So.2d 553 (Fla.1999)). These cases, when viewed holistically, follow the principle that "[w]ithout a specific 'basis for believing [the prosecution] had failed to comply with

*Brady*'…a petitioner need not independently search for *Brady* material." *Bracey*, 986 F.3d at 292 (internal citations omitted).

In sum, if a defendant is not aware that *Brady* material exists, he is entitled to presume that it is non-existent. Even if he could have uncovered the existence of the *Brady* claim through the exercise of greater diligence, it is "incumbent on the State to set the record straight." *Douglas v. Workman*, 560 F.3d 1156, 1181 (10th Cir. 2009)(quoting *Banks*, 540 U.S. 668 at 675–76). Consequently, the defendant has not failed to exercise due diligence. *Id.* To hold otherwise would "subvert the expectation on which *Brady* is built, namely that it is 'incumbent on the State to set the record straight.'" *Bracey*, 986 F.3d at 291 (internal citations omitted). Moreover, "unless and until there are reasons to think otherwise, that reasonable expectation continues past trial, into postconviction proceedings and beyond." *Id.* at 293 (citing *Banks*, 540 U.S. at 693; *Strickler*, 527 U.S. at 286–87).

In Booker's case, Agent Neil 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). However, Neil's notes do not identify a single microscopic

characteristic of either the unknown or known hair samples. Though Neil referenced his notes during his testimony, it was with regards to a hair fragment that was too limited in size to identify beyond race (R. 704). As in *Way*, Booker did not have a specific basis to suspect that the government had not complied with *Brady*. It was "incumbent on the State to set the record straight" and until such a disclosure, Booker was reasonable in presuming that "his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." *Banks*, 540 U.S. at 693. Accordingly, because the onus was on the State to divulge *Brady* material, Booker did not fail to exercise due diligence.

Despite the State's failure to comply with *Brady*, the State goes so far to urge the Court to decide the timeliness issue as a matter of state law rather than a *Brady* issue. This attempt to avoid accountability has been repudiated by the Eleventh Circuit *in Scott v. United States*, 890 F.3d 1239, 1252 (11th Cir. 2018):

> Yet the government alone holds the key to ensuring a *Brady* violation does not occur. So the government cannot be heard to complain of trial prejudice from a new trial necessitated by its own late disclosure of a *Brady* violation, since it is solely responsible for inflicting any such prejudice on itself in such circumstances. Whatever finality interest Congress

> intended for AEDPA to promote, surely it did not aim to encourage prosecutors to withhold constitutionally required evidentiary disclosures long enough that verdicts obtained as a result of government misconduct would be insulated from correction.
>
> Finality interests then are not served by saying a prisoner has not timely brought his *Brady* claim where the government's failures affirmatively and entirely prevented him from doing so.

ii. Booker's *Brady* Claim Is Not Procedurally Barred

The State argues that because Booker had known Neil's notes existed since his 1981 trial, he is procedurally barred from raising the issue in a successive 3.851 motion. (AB at 28). However, as explained above, though Booker may have been aware of the notes, he was not aware of the *Brady* material and had no reason to without the State's disclosure. *Bogle v. State*, 288 So. 3d 1065, 1068 (Fla. 2019) is certainly distinguishable since Bogle had actual knowledge of the deficiencies in Malone's testimony, long before the 2013 review, as a result of the 1999 review of Malone's work. *Id.* The State additionally cites *Jimenez v. State*, 265 So. 3d 462, 481–82 (Fla. 2018) for the proposition that "[a]lthough [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." Again, Booker is distinguishable because though he was aware of the notes, the contents were previously unknown information, inconsistent with Neil's testimony.

iii. The State Suppressed Neil's Notes

The State erroneously injects a diligence requirement into the suppression prong of Brady. This Court has rejected this requirement:

> The State argues that inherent in the suppression prong of *Brady* is a requirement that the defendant could not have obtained the evidence through due diligence. It argues that it did not suppress the results of the hair analysis because Allen knew that the State had performed such an analysis. A defendant's knowledge that the State submitted evidence for testing, however, does not create a duty to inquire further. *See Hoffman v. State*, 800 So.2d 174, 179 (Fla. 2001) (noting that the State has the burden "to disclose to the defendant all information in its possession that is exculpatory"). The defendant's duty to exercise due diligence in reviewing *Brady* material applies only after the State discloses it.

*Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003). A diligence requirement advances a system where a "prosecutor may hide, defendant must seek." *Banks*, 540 U.S. at 696. Such a system has been disavowed by the Supreme Court. *Id.*

The State relies on *Provenzano* and *Way* to support the conclusion that Neil's notes were not suppressed. However, as explained above, the cases show instead that Neil's notes were in fact suppressed. Unlike *Provenzano*, Neil's undisclosed notes contained significant impeachment material. Furthermore, Provenzano's counsel was aware of the contents of the expert's notes because the content was consistent with the expert's trial testimony. However, as in *Way*, Neil's testimony did not reference or mention the inconsistent portion of his notes. As in *Way*, Booker did not have a specific basis to suspect that the government had suppressed *Brady* material. It was "incumbent on the State to set the record straight." *Banks*, 540 U.S. at 693. Though the State may argue that trial counsel should have been aware of the notes because the expert referenced them at trial, the Court should recognize, that:

> while the discovery rules impose an obligation upon defendants to obtain exculpatory materials through the exercise of due diligence, the "ultimate test" in determining if a *Brady* violation occurred is whether "confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different.

*Way*, 760 So. 2d at 912. Since the State failed to disclose Neil's inconsistent notes, the notes were suppressed.

iv. Neil's Notes Undermine Confidence In The Outcome Of Trial

The State sets forth an incorrect standard of materiality. "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?" (AB at 32-33). The United States Supreme Court has repeatedly and explicitly rejected this formulation of the materiality standard:

> a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal…*Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

*Kyles v. Whitley*, 514 U.S. 419, 434 (1995)(citing *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

Moreover, the State characterizes Neil's lack of details as "simply" indicating that he did not notate everything he did. (AB at 31). In doing so, the State reduces the lack of notes to "minor 'impeachment' evidence." (AB at 32). This is a gross minimization of the evidence. Since the 1999 DOJ review of Agent Michael Malone and subsequent reviews, lack of documentation has been a core critique of the experts' reports. *Bogle v. State*, 288 So. 3d 1065, 1068 (Fla. 2019)("That 1999 review found that the lab reports of Malone's work were not sufficiently documented to determine whether the work had been done in a scientifically reliable manner."); *Duckett v. State*, 231 So. 3d 393, 396 (Fla. 2017) ("Malone's laboratory reports were not adequately documented in the laboratory bench notes, as there was no abbreviation key, small portions of notes were illegible, and some notes were undated. Finally, Malone's testimony at trial was not consistent with the laboratory reports, the bench notes, or Malone's area of expertise."). Despite the fact that the federal government has deemed rectifying such errors so crucial to justice so as to conduct nationwide case reviews, the State continues to dismiss these claims as "minor impeachment evidence."

Moreover, the State's factual recitation misrepresents the evidence presented in Booker's case. The State states that "[t]he evidence at trial **singularly** pointed to Booker…" (AB at 4)(emphasis added). This is simply untrue. For example, 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 in which the unidentified fingerprints were found. Despite this, no effort was made to match the unidentified prints to anyone other than Booker. Furthermore, the print expert, Johnson, indicated in his report 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.

As the State recognized, the case against Booker was entirely circumstantial. 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.

The remainder of the "overwhelming evidence" has been shown to be similarly flawed. 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 Officer Pete 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 Officer 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.

Additionally, the State improperly relies on Booker's statement which, 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. 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.

Significantly, 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."). 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.

He takes her with the threat of force or use of the knives and went into the bedroom where the attack takes place and the rape as I have referred to it. I would suspect that the blows to her nose and to her ribs were accompanied by a part of that rape because there is no indication that the body was moved anywhere. There is no indication of scuffling anywhere else in the house. That appears to be the place where both actions as far as contact between these two people in the way of a struggle, fight, and rape occurred. Whether it is because she wouldn't reveal the location of the money after he had finished raping her or whether it is because he didn't want a witness left to his deeds or whether killing is something he felt like doing, I don't know. But he ends his escapade by taking the life of Mrs. Harmon.

***

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. 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 Mrs. Harmon. 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. 756-64) (emphasis added).

A government agent, whether a prosecutor or an FBI expert, cannot present evidence willy-nilly, without taking any care to ensure that the evidence is true. Whether false evidence is presented as "a result of negligence or design, it is the responsibility of the prosecutor." *Giglio v. United States*, 405 U.S. 150, 154 (1972). 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 that was not true. The jurors were utterly unequipped to suspect that Neil's testimony, so seemingly scientific, was in fact unreliable and unsupportable.

Per the correct standard, whether the evidence undermined confidence in the outcome, the undisclosed evidence provided the defense the possibility of asserting innocence, or at a minimum reasonable doubt, in a weak, circumstantial case.

**B. Newly Discovered Evidence**

i. Booker Exercised Due Diligence In Light Of The State's Failures

The State's disingenuous framing of Booker's newly discovered evidence claim once again erroneously buries the State's numerous

failings in Booker's case. In light of the State's obstructions, Booker has met the diligence standard of newly discovered evidence.

First, through Neil's testimony, the State put on false and misleading testimony in Booker's case. The DOJ and FBI, in recognizing their critically damaging role in disseminating false testimony, attempted to rectify this by conducting a nationwide review of cases involving such testimony. The DOJ further acknowledged the severity of this error by waiving reliance on statute of limitations and procedural default defenses in subsequent litigation. This review and the resultant litigation marked a concession from the nation's premier law enforcement agency of widespread error.

Although the DOJ had moved to correct the error, the State once again failed Booker. Though Booker's case should have been given high priority, the government overlooked it. By the time Booker's counsel was made aware of the DOJ's mistake, the reviewing panel had been disbanded.

Booker's counsel provided Neil's testimony to the DOJ so that some form of review could still occur. The DOJ conducted a review in 2019 but the review breached several of DOJ's protocols. After this

botched review, Booker's counsel made a FOIA request in 2019 for the FBI file. In 2020, the FBI, for the first time, provided Booker with Neil's notes. Due to the violation of the protocol relating to the DOJ review and the recent disclosure of the notes, Booker retained Beckert to review the FBI file and Neil's testimony.

The State asserts that Booker could have utilized an independent analyst and brought this claim any time in the past forty years. (AB at 38). It seems that the State misunderstands what is considered as newly discovered evidence. This Court has ruled that an independent expert's affidavit "cannot be considered newly discovered evidence in the same way as the case-specific letter from the FBI in *Wyatt*. Tobin is not a law enforcement agent seeking to correct his agency's prior testimony." *Asay v. State*, 210 So. 3d 1, 23 (Fla. 2016). Prior to the FBI's concession, Booker would not have had a cognizable claim. But this court *has* determined that case specific letters issued by the 2014 FBI review constitutes newly discovered evidence. *Wyatt v. State*, 71 So. 3d 86, 99 (Fla. 2011); *Gordon v. State*, 2016 WL 6462391, at *1 (Fla. Nov. 1, 2016); *State v. Murray*, 262 So. 3d 26, 38 (Fla. 2018). This focus on concession rather than

knowledge is paralleled in this Court's treatment of recanted testimony:

> the State's only argument to dispute due diligence was that defense counsel had "years" to find the witness. *See id.* Regardless of the time span from the time of trial to the discovery of the new testimony, recanted testimony cannot be "discovered" until the witness *chooses* to recant. *See Burns v. State,* 858 So.2d 1229, 1230 (Fla. 1st DCA 2003) ("Even though the appellant knew at trial that the codefendant was lying, the appellant could not have gotten the codefendant to admit that he was lying earlier, and thus the recantation is newly discovered evidence that could not have been obtained earlier with due diligence.").

*Davis v. State*, 26 So. 3d 519, 528 (Fla. 2009). Any reason for delay in Booker's case should be imputed upon the State as the State has impeded access at every juncture and still continues to do so. It would be an egregious miscarriage of justice if Booker were made to bear the consequences of the State's failures.

ii. There Is A Reasonable Probability Of An Acquittal Without The Hair Evidence

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). As enumerated above, the hair evidence functioned as the linchpin that held the prosecution's circumstantial case of unsound shoe print and fingerprint evidence together. Further, without the hair evidence, Booker's counsel could have completely avoided eliciting the testimony concerning Booker's statement.

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

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 *Berger v. United States*, 295 U.S. 78, 88 (1935), the United States Supreme Court stated that the prosecutor's "interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." The State has failed to heed this calling in Booker's case instead adhering to its adversarial position in the face of injustice caused by its own failures. The circuit court erred by summarily denying Booker's postconviction motion. In light of the State's failures, Booker has diligently pursued and timely raised his constitutional claims supported by a comprehensive evidentiary proffer. These claims

necessitate factual determinations by the circuit court. *See Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999).

For the reasons explained herein and in Booker's initial brief, Booker respectfully requests that this Court vacate the decision below and remand for an evidentiary hearing.

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 10th day of August, 2021.

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/s/. Linda McDermott
LINDA McDERMOTT