No. _____

IN THE

Supreme Court of the United States

STEPHEN TODD BOOKER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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Capital Case

QUESTIONS PRESENTED

This Court first announced the due process requirement that the State disclose favorable exculpatory or impeachment evidence in *Brady v. Maryland*, 373 U.S. 83 (1963). Forty years later, this Court declined to factor into the *Brady* analysis of the defendant's own action, or lack thereof, in discovering material evidence withheld by the State, noting: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). However, many jurisdictions, including Florida, have imposed a due diligence standard on the defense in determining *Brady* claims.

The question presented is:

1. May courts impose a due diligence requirement for *Brady* claims that focuses on the actions of the defense rather than the government, effectively limiting *Brady*'s reach to evidence that cannot be obtained by means other than government disclosure?

PARTIES TO THE PROCEEDING

Petitioner Stephen Todd Booker, a prisoner serving a death sentence in Florida, was the appellant in Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

STATEMENT OF RELATED PROCEEDINGS

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Trial
Circuit Court of Alachua County, Florida
State of Florida v. Stephen Todd Booker, Case No. 77-2332-CF.
Judgment Entered: October 20, 1978

Direct Appeal
Florida Supreme Court (Case No. SC60-55568)
Booker v. State, 397 So. 2d 910 (Fla. 1981)
Judgment Entered: March 19, 1981

Petition for Writ of Certiorari Denied
Supreme Court of the United States (Case No. 81-5086)
Booker v. Florida., 454 U.S. 957 (1981)
Judgment Entered: October 19, 1981

Resentencing Proceeding
Circuit Court of Alachua County, Florida
State of Florida v. Stephen Todd Booker, Case No. 77-2332-CF.
Judgment Entered: June 25, 1998

Direct Appeal (Resentencing)
Florida Supreme Court, (Case No. SC60-93422)
Booker v. State, 773 So. 2d 1079 (Fla. 2000)
Judgment Entered: October 5, 2000

Petition for Writ of Certiorari Denied
Supreme Court of the United States (Case No. 00-8769)
Booker v. Florida., 532 U.S. 1033 (2001)
Judgment Entered: May 14, 2001

State Collateral Proceedings
Florida Supreme Court (Case No. SC60-61947)
Booker v. State, 413 So. 2d 756 (Fla. 1982)
Judgment Entered: April 19, 1982

Florida Supreme Court (Case No. SC60-64517)
Booker v. State, 441 So. 2d 148 (Fla. 1983)
Judgment Entered: November 17, 1983

Florida Supreme Court (Case No. SC60-68239)
Booker v. State, 503 So. 2d 888 (Fla. 1987)
Judgment Entered: January 5, 1987

Florida Supreme Court (Case No. SC06-121)
Booker v. State, 969 So. 2d 186 (Fla. 2007)
Judgment Entered: August 30, 2007

Florida Supreme Court (Case No. SC18-541)
Booker v. State, 252 So. 3d 723 (Fla. 2018)
Judgment Entered: August 30, 2018

Petition for Writ of Certiorari Denied
Supreme Court of the United States (Case No. SC18-541)
Judgment Entered: January 22, 2019

Florida Supreme Court (Case No. SC21-763)
Booker v. State, 336 So. 3d 1177 (Fla. 2022)
Judgment Entered: February 3, 2022

Federal Habeas Review

United States District Court for the Northern District of Florida (Case No. GCA 83-0130)
Booker v. Wainwright, No. GCA 83-0130 (N.D. Fla. Apr. 17, 1984)
Judgment Entered: April 17, 1984

United States Court of Appeals for the Eleventh Circuit, (Case No. 84-3306)
Booker v. Wainwright, 764 F. 2d 1371 (11th Cir. 1985)
Judgment Entered: June 21, 1985

Petition for Writ of Certiorari Denied
Supreme Court of the United States (Case No. 85-5486)
Booker v. Wainwright, 474 U.S. 975 (1985)
Judgment Entered: November 4, 1985

United States District Court for the Northern District of Florida (Case No. TCA 88-402290-MMP)
Booker v. Dugger, No. TCA 88-402290-MMP (N.D. Fla. Sept. 16, 1988)
Judgment Entered: September 16, 1988

United States Court of Appeals for the Eleventh Circuit (Case No. 88-3751)
Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991)
Judgment Entered: January 14, 1991

Petition for Writ of Certiorari Denied
Supreme Court of the United States (Case No. 90-1778)
Singletary v. Booker, 502 U.S. 900, 112 S. Ct. 277, 116 L. Ed. 2d 228 (1991)
Judgment Entered: October 7, 1991

United States District Court for the Northern District of Florida (Case No. 1:08cv143/RS)
Booker v. McNeil, No. 108CV143, 2010 WL 3942866 (N.D. Fla. Oct. 5, 2010)
Judgment Entered: October 5, 2010

United States Court of Appeals for the Eleventh Circuit (Case No. 10-14966)
Booker v. Sec'y, 684 F.3d 1121 (11th Cir. 2012)
Judgment Entered: June 19, 2012

Petition for Writ of Certiorari Denied
Supreme Court of the United States (Case No. 12-8174)
Booker v. Crews, 568 U.S. 1236, 133 S. Ct. 1595, 185 L. Ed. 2d 590 (2013)
Judgment Entered: March 18, 2013

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OPINION BELOW

The decision of the Florida Supreme Court is reported at *Booker v. State*, 336 So. 3d 1177 (Fla. 2022), *reh'g denied*, No. SC21-763, 2022 WL 1042708 (Fla. Apr. 7, 2022), and reprinted in the Appendix as Exhibit 2 (Florida Supreme Court Opinion).[1]

JURISDICTION

The judgement of the Florida Supreme Court was entered on February 3, 2022. The Florida Supreme Court issued a revised opinion correcting a citation on February 17, 2022. On April 7, 2022, Mr. Booker's motion for rehearing was denied. This Court has jurisdiction under 28 U.S.C § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

[1] The record on appeal from Mr. Booker's initial Rule 3.850 motion is cited as "PCR." The record from his original trial is cited as "R."

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

I. Procedural History

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

Mr. Booker filed several state postconviction motions and petitions, many of which were under a signed death warrant, and all of which were denied. *See Booker v. State*, 413 So. 2d 756 (Fla. 1982); *Booker v. State*, 441 So. 2d 148 (Fla. 1983); *Booker v. State*, 503 So. 2d 888 (Fla. 1987); *Booker v. State*, 520 So. 2d 246 (Fla. 1988).

Mr. 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).

In 1998, a new penalty phase hearing was conducted where the jury recommended a sentence of death by 8-4. The trial court sentenced Mr. Booker to death. The Florida Supreme Court affirmed. *Booker v. State*, 773 So. 2d 1079 (Fla. 2000).

After his resentencing, Mr. Booker's subsequent state petition and postconviction motions were denied. *Booker v. State*, 969 So. 2d 186 (Fla. 2007); *Booker v. State*, 252 So. 3d 723 (Fla. 2018); *Booker v. Jones*, 235 S.3d 298 (Fla. 2018). Likewise, his federal habeas petition was denied. *Booker v. Sec'y*, 684 F.3d 1121 (11th Cir. 2012).

On November 5, 2020, Mr. 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 March 29, 2021, the circuit court summarily denied Mr. Booker's motion for postconviction relief (PC-R2. 424-43). On April 12, 2021, Mr. 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, Mr. Booker filed a notice of appeal as to the circuit court's denial of his motion for postconviction relief (PC-R2. 447-48). The Florida Supreme Court affirmed the denial of relief on February 3, 2022. *Booker v. State*, 336 So. 3d 1177, 1180 (Fla. 2022). On April 7, 2022, Mr. Booker's motion for rehearing was denied. *Booker v. State*, 336 So. 3d 1177, 1180 (Fla. 2022), *reh'g denied*, No. SC21-763, 2022 WL 1042708 (Fla. Apr. 7, 2022).

II. Statement of the Relevant Facts

A. The Trial

At Mr. Booker's capital trial, during opening statement, the State explained how the evidence linked Mr. 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. 445-46) (emphasis added).

Trial counsel informed the jury that the case against Mr. Booker was circumstantial, but he also raised the issue of Mr. 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 Mr. Booker. He indicated that he was drawn to Mr. 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. 581-82). According to Officer Fancher, the sole of Mr. Booker's shoes appeared similar to those that were outside the crime scene (R. 585).[2] Subsequently, Mr. Booker voluntarily traveled to the Gainesville Police Department to provide fingerprints (R. 588-89, 597).

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

FBI Agent Robert Neil testified as an expert in hair comparison (R. 683). Agent Neil obtained hairs from a bedspread and after comparison determined that the hairs "contain[ed] the same characteristics and qualities" as Mr. Booker's pubic hair sample (R. 696-97). 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), Agent 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 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 Mr. Booker's — Agent 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." (R. 699). And, therefore, Agent 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." *Id.*

Likewise, Agent Neil testified that a hair found on the victim's pantyhose also exhibits "Negroid characteristics and **was exactly the same as**" the hair sample

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Though Officer Fancher testified that Mr. 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 Mr. Booker was wearing when he was arrested.

from Mr. Booker (R. 701) (emphasis added). When asked to speak to the certainty or probability that the hairs were the same, Agent 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 vacuumings near the victim's bed, Agent 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). Agent 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).

Agent 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, Agent Neil testified that he found a pubic hair originating from a person of Caucasian or white race on Mr. Booker's socks (R. 705). In comparing the hair to the victim's known pubic hair sample, Agent 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. Mr. Johnson compared Mr. Booker's finger and palmprints to latent prints from the victim's windowsills, 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, 646-58).

Detective Michael Price testified about his interrogation of Mr. Booker. After initially denying that he had been to the victim's residence, Mr. 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, Detective Price described that during the interrogation, Mr. Booker started to describe himself in the third person—Aniel—who was also a demon (R. 624). When speaking as Aniel, Mr. Booker's teeth were clenched until his teeth would crunch; his eyes were glassy and he would whisper (R. 625-6). Before Aniel arrived, Mr. 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 Detective Price that "Steve" killed the victim (R. 623, 628). He then bit at Detective Price and appeared to fall asleep (R. 629). At the jail, Mr. Booker did not recall Aniel, speaking to Detective Price as Aniel or anything about the crime (R. 629). Detective Price believed that Mr. Booker and the individual identified as Aniel were sincere (R. 630).[3]

In his defense, Mr. Booker presented Dr. Frank Carrera, a psychiatrist, who opined that he could not rule out that Mr. Booker was insane at the time of the crime (R. 726-27). However, the State presented the testimony of Dr. George Barnard who testified that Mr. Booker was legally sane at the time of the crime (R. 740).

In closing argument, the State acknowledged that the evidence against Mr. Booker was circumstantial (R. 757). Moreover, the State's closing argument specifically acknowledged the importance of the hair evidence to prove that Mr. Booker committed a sexual battery (R. 754) ("The reason I bring out to the subject of hair is proof again that intercourse took place. . . . [T]he other hair samples are identical to the defendant on every way."). Likewise, the State relied on the hair

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

evidence to put forth its theory of the case: that Mr. Booker, solely, entered the victim's home and killed her. The State argued Mr. 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).

Mr. Booker was convicted as charged.

B. Newly Discovered Evidence

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. One of the areas in which Agent Malone worked was the hair and fiber unit. The scrutiny of Agent Malone's work was discussed in the Office of the Inspector General's

Report: The FBI Laboratory. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (1997). Shortly thereafter, DOJ attempted to identify cases in which Agent 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 Mr. Booker, a second review of Agent 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.
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> ***

> 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, Mr. 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 Mr. 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 Mr. Booker's case had occurred or was being conducted. A few days later, DOJ responded and indicated that Mr. 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 Mr. Booker sent the trial testimony of the hair analyst.

Mr. Booker provided the trial testimony of Agent Neil. Several months later, on April 25, 2019, Norman Wong, on behalf of DOJ, indicated that Agent 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, because DOJ did not identify Mr. Booker's case during the review process, other protocols were overlooked, including the review of Agent Neil's report.

Following receipt of the report and the omission of the Innocence Project's review, Mr. Booker's state court counsel sought to obtain the entire FBI file on his case. Thus, Mr. Booker submitted a FOIA request on October 29, 2019. On February 24, 2020, the FBI, for the first time, provided Mr. Booker with handwritten notes concerning the microscopic hair analysis. Mr. Booker appealed for better copies because the notes were difficult to read due to the faintness of the copies. The FBI conducted another review and determined that the records disclosed to Mr. 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, Mr. Booker retained Jason Beckert, a microscopist at Microtrace, to review the FBI file and Agent 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 Mr. Booker's capital jury (PC-R2. 163-69).

Specifically, as to the handwritten notes, Agent 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 hairs were examined sometime between November 17, 1977, and February 22, 1978, when Agent Neil reported his results. However, the notes do not identify a single microscopic characteristic about the unknown or known hair standards. When Agent 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 Mr. Booker (R. 699), but Agent Neil's notes do not identify a single microscopic characteristic of either the unknown or known hair samples.

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

C. *Brady* Proceedings in State Court

Based on the newly discovered evidence, Mr. Booker filed a *Brady* claim and a newly discovered evidence claim in state court. The basis of Mr. Booker's *Brady* claim was that the State withheld critical impeachment evidence concerning the hair analysis that was conducted in 1977, and that the State presented false, misleading,

and scientifically unreliable evidence related to the comparison of the unidentified hairs obtained from the crime scene and Mr. Booker's sock.

The circuit court denied Mr. Booker's claims without a hearing because it found the claim procedurally barred as untimely raised. The court's decision was premised upon a 4-prong *Brady* analysis, requiring that Mr. Booker establish diligence:

> In order to make a facially sufficient *Brady* claim, the defendant must prove the following: (1) that the State possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant did not possess the evidence nor could he have Additionally, the circuit court held that Mr. Booker had not demonstrated prejudice. obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence, either willfully or inadvertently; and, (4) that had the evidence been disclosed to the defense, a reasonable possibility exists that outcome of the proceeding would have been different.

See Exhibit 1 (Alachua County Circuit Court Order). Additionally, the circuit court held that Mr. Booker had not demonstrated prejudice.

The Florida Supreme Court affirmed the trial court's order. Though the Florida Supreme Court recited the proper three-prong *Brady* standard, the court's analysis functionally folded a defense-diligence requirement into the suppression prong. The Florida Supreme Court denied the *Brady* claim because Mr. Booker's counsel "could have examined the notes" had defense counsel requested them after Agent Neil's reference to them at trial. *Booker v. State*, 336 So. 3d 1177, 1181 (Fla. 2022). For that reason, the court held that Mr. Booker failed to satisfy *Brady*'s suppression prong.

REASONS FOR GRANTING THE PETITION

I. There is a Split among the Federal Circuits and State Courts Regarding whether *Brady* Includes a Due Diligence Requirement Focused on the Actions of the Defense Rather than the Government

Notwithstanding this Court's implicit rejection of a defense-due-diligence requirement in the *Brady* context, some lower courts have read this Court's discussion of materiality in *Kyles v. Whitley*, 514 U.S. 419 (1995), where this Court described "an item of favorable evidence unknown to the defense," to effectively limit *Brady*'s reach to evidence the defense cannot obtain by means other than government disclosure.

Seven federal circuits and a majority of the states now subscribe to this view. Other jurisdictions, however, have remained silent on the issue, declined to decide it, or rejected the suggestion that *Brady* is anything other than a review of the government's improper withholding. Still other jurisdictions have reversed their previous adoption of a defense-due-diligence requirement to dispose of it, or apply the requirement inconsistently across cases.

This Court's intervention is needed to resolve confusion among the lower courts regarding the role defense diligence plays in the *Brady* analysis.

A. Jurisdictions that Expressly Impose a Diligence Requirement

Seven circuits and the majority of states impose a diligence standard on the defense in reviewing *Brady* claims. The Eleventh Circuit, for instance, even identifies a separate diligence prong as a fourth prong of the *Brady* test, a direct departure from this Court's three-part *Strickler v. Greene*, 527 U.S. 263 (1999), test. *See LeCroy v.*

Sec'y, Fla. Dep't of Corr., 421 F.3d 1237, 1268 (11th Cir. 2005) (one prong of the *Brady* test requires the defense to show "the defendant did not possess the evidence and could not have obtained it with reasonable diligence"); *Mitchell v. State*, 307 Ga. 855, 861-62 (Ga. 2020); *State v. Horn*, 857 N.W.2d 77, 81-82 (N.D. 2014).

In most cases, the jurisdictions imposing a defense-diligence standard view it through the lens of suppression: the government cannot suppress evidence the defense has, or should have, anyway. This is the approach of most federal circuits requiring defense diligence. *See, e.g.*, *United States v. Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1998) ("The government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defender, as they were here."); *United States v. Zackson*, 6 F.3d 911, 918 (2d Cir. 1993) ("Evidence is not suppressed if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.") (internal citation omitted); *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) ("In situations such as this, where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine."); *West v. Johnson*, 92 F.3d 1385, 1399 (5th Cir. 1996) ("Evidence is not suppressed if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.") (quoting *United States v. Zackson*, 6 F.3d 911, 918 (2d Cir. 1993)); *United States v. Kimoto*, 588 F.3d 464, 492 (7th Cir. 2009) (evidence is only suppressed where it was "not otherwise available to the defendant through the exercise of reasonable

diligence"); *Ienco v. Angarone*, 429 F.3d 680, 683 (7th Cir. 2005) ("Evidence is 'suppressed' for *Brady* purposes when (1) the prosecution failed to disclose the evidence in time for the defendant to make use of it, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence."); *United States v. Coplen*, 565 F.3d 1094, 1097 (8th Cir. 2009) ("The government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels." (quoting *United States v. Zuazo*, 243 F.3d 428, 431 (8th Cir. 2001))).

This is also the approach of the majority of state jurisdictions imposing a similar rule. *See* Exhibit 4 (Table of State Jurisdictions Imposing the Defense-Diligence Requirement).

Other jurisdictions look to a tipping point, where once prosecutors have disclosed enough information, diligence applies. *See, e.g.*, *State v. Hall*, 419 P.3d 1042, 1129-30 (Idaho 2018) ("When, as here, a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government.") (internal citation omitted); *State v. Davila*, 357 P.3d 636 (Wash. 2015) (finding suppression where the defense had no reason to ask specific questions of a witness given what it knew); *Wright v. State*, 91 A.3d 972, 991-92 (Del. 2014) ("Although Wright's counsel knew that Samuels had entered into a plea agreement, the State did not disclose the details and terms of his cooperation under that agreement—information that would have been useful impeachment evidence for Wright. Moreover, the limited disclosure of Samuels' record was insufficient because

Wright's trial counsel could not adequately use the information or conduct any meaningful investigation given the State's timing of the addition of Samuels as a witness."); *Milke v. Mroz*, 339 P.3d 659, 666 (Ariz. Ct. App. 2014) ("Where a defendant doesn't have enough information to find the *Brady* material with reasonable diligence, the state's failure to produce the evidence is considered suppression.") (internal citation omitted); *Aguilera v. State*, 807 N.W. 2d 249, 252-53 (Iowa 2011) (while evidence is not suppressed "if the defendant knew or should have known the essential facts permitting him to take advantage of the evidence[,] . . . [b]efore we will say that defense counsel lacked diligence or should have known of the exculpatory evidence, defense counsel must be aware of the potentially exculpatory nature of the evidence and its existence.") (internal citations omitted).

Some states, like Tennessee, couch the obligation in terms of whether the exculpatory nature of the evidence is "obvious," at which point there is no diligence requirement. *See State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995) ("The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not."). Similarly, other states rely on a test of "equal access." *See, e.g.*, *Commonwealth v. Bagnall*, 235 A.3d 1075, 1091 (Pa. 2020) (affirming that "no *Brady* violation occurs where the parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence." (quoting

Commonwealth v. Morris, 822 A.2d 684, 696 (Pa. 2003)));[4] *Taylor v. Commonwealth*, 611 S.W.3d 730, 738 (Ky. 2020) (no *Brady* violation for "public information . . . "[that] could have been obtained by the defense.")

B. Jurisdictions that have Rejected the Defense-Diligence Requirement

Other jurisdictions have directly rejected any defense-diligence requirement, largely due to the fact that this Court has never actually announced one. Often, non-diligence jurisdictions find that this Court has itself *discouraged* this requirement. Among the federal circuits, the Third, Sixth, Ninth, Tenth, and D.C. Circuits have rejected the diligence standard.

This Court's opinion in *Banks* especially altered the trajectory of many courts evaluating a purported due diligence requirement. *Banks*' warning against rules permitting prosecutors to hide favorable material and making defense counsel seek it encouraged those courts to shift away from a diligence requirement. The Third Circuit vigorously rejected the defense-diligence requirement in *Dennis v. Sec'y, Pa. Dep't of Corr.* because "the United States Supreme Court has never recognized an affirmative due diligence duty of defense counsel as part of *Brady*, let alone an exception to the mandate of *Brady* as this would clearly be." 834 F.3d 263, 290 (3d Cir. 2016). Relying on this Court's opinion in *Banks*, the Third Circuit explained: "To the contrary, defense counsel is entitled to assume that prosecutors have 'discharged their official duties.'" *Id.* (quoting *Banks*, 540 U.S. at 696). The Third Circuit

[4] Notably, in the time between Pennsylvania announcing this rule in *Morris* and reaffirming it in *Bagnall*, the Third Circuit renounced the diligence requirement after this Court's opinion in *Banks*. *See infra* at 16.

described a prosecutor's *Brady* obligation as "absolute" and observed that "*Brady*'s mandate and its progeny are entirely focused on prosecutorial disclosure, not defense counsel's diligence." *Id.* The court found any reversal of this burden to contradict this Court's *Brady* jurisprudence:

> Construing *Brady* in a manner that encourages disclosure reflects the Court's concern with prosecutorial advantage and prevents shifting the burden onto defense counsel to defend his actions. Requiring an undefined quantum of diligence on the part of defense counsel, however, would enable precisely that result—it would dilute *Brady*'s equalizing impact on prosecutorial advantage by shifting the burden to satisfy the claim onto defense counsel.

Id.

The Third Circuit also noted that in the *Brady* line of cases, this Court often imposes a burden on the government not seen "in the traditional adversarial system." *Id.*; *see also id.* ("'[b]y requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model' because the prosecutor is not tasked simply with winning a case, but ensuring justice." (quoting *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985)); *Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case."). Ultimately, the Third Circuit opined that "[t]he imposition of an affirmative due diligence requirement on defense counsel would erode the prosecutor's obligation under, and the basis for, *Brady* itself." *Dennis*, 834 F.3d at 290. *See also Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 279 (3d Cir. 2021) ("While we had previously suggested that defendants had to search for exculpatory evidence themselves, *Dennis* made clear that a defendant can reasonably expect—and is entitled to presume—that the

government fulfilled its *Brady* obligations because the prosecution's duty to disclose is absolute and in no way hinges on efforts by the defense.").

As the *Dennis* Court was reviewing a *Brady* claim in the context of AEDPA, the Third Circuit went so far as to find that the imposition of any diligence standard on the defense would be tantamount to adding a fourth prong to *Brady*, which would be contrary to clearly established federal law. *But see LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1268 (11th Cir. 2005) (one prong of the *Brady* test requires the defense to show "the defendant did not possess the evidence and could not have obtained it with reasonable diligence").

The Sixth Circuit had a similar reversal after *Banks*. In *United States v. Tavera*, the Sixth Circuit stated: "Prior to *Banks*, some courts, including the Sixth Circuit, . . . were avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due-diligence rule. But the clear holding in *Banks* should have ended that practice." 719 F.3d 705, 712 (6th Cir. 2013). It described the flaws in enforcing a diligence requirement:

> If the prosecution and the dissent are right, we must punish the client who is in jail for his lawyer's failure to carry out a duty no one knew the lawyer had. The *Banks* case makes it clear that the client does not lose the benefit of *Brady* when the lawyer fails to 'detect' the favorable information.

Id. Instead, it found, "[t]he *Brady* rule imposes an independent duty to act on the government, like the duty to notify the defendant of the charges against him." *Id.*

Then in 2014, despite contrary circuit precedent, the Ninth Circuit announced that the prosecution has an "obligation to produce that which *Brady* and *Giglio* require him to produce" and that a "requirement of due diligence would flip that

obligation, and enable a prosecutor to excuse his failure by arguing that defense counsel could have found the information himself." *Amado v. Gonzalez*, 758 F.3d 1119, 1136 (9th Cir. 2014). It continued: "No *Brady* case discusses such a requirement, and none should be imposed." *Id.* at 1137.

The Tenth Circuit has always rejected the defense-diligence requirement. It has acknowledged that "[w]hether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation." *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995). However, this is because the failure to disclose evidence the defense already has would be cumulative and thus not material. *Id.* Ultimately, however, "the prosecutions' obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge", and "[t]he only relevant inquiry is whether the information was 'exculpatory.'" *Id.*

Finally, the D.C. Circuit places great emphasis on the defense reliance on the prosecution's duty and accepts diligence once the defense has made its *Brady* request of the government. *See In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 897 (D.C. Cir. 1999) (quoting *Strickler*, 527 U.S. at 275 n.12). For example, it declined to hold defense counsel at fault for not subpoenaing police officers who had *Brady* information regarding witness deals because "defense counsel was no more required to subpoena the officers to learn of their agreements than she was to subpoena the prosecutor to learn of hers. The appropriate way for the defense counsel

to obtain such information was to make a *Brady* request of the prosecutor, just as she did." *Id.*

A significant number of states have rejected the defense-diligence requirement for similar reasons. *See, e.g.*, *State v. Wayerski*, 922 N.W.2d 468, 478 (Wis. 2019) ("We renounce and reject judicially created limitations on the second *Brady* component that find evidence is suppressed only where: (1) the evidence was in the State's 'exclusive possession and control'; (2) trial counsel could not have obtained the evidence through the exercise of 'reasonable diligence'; or (3) it was an 'intolerable burden' for trial counsel to obtain the evidence."); *State v. Davila*, 357 P.3d 636, 645 (Wash. 2015) (defense's knowledge of a witness did not "waive the defendant's constitutional *Brady* protections); *State v. Taliaferro*, No. A-3056-12T4, 2014 WL 6836150, at *3 (N.J. Super. Ct. Dec. 5, 2014) ("The defendant need not demonstrate that he acted with diligence to discover what the prosecutor should have disclosed and evidence useful to impeach a State's witness is not discounted."); *People v. Bueno*, 409 P.3d 320, 328 (Colo. 2018) ("The Supreme Court has at least rejected arguments similar to the People's assertion that the defense must make reasonable efforts to locate *Brady* materials."); *State v. Durant*, 844 S.E.2d 49, 54 (S.C. 2020) ("However, we believe the better approach is to hold the State responsible for fulfilling its prosecutorial duties, including the duty to disclose under *Brady*.").

Like the Third Circuit, the Supreme Court of Connecticut relied on *Bagley* and its recognition that "an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense

that the evidence does not exist", 473 U.S. at 682, to find that prosecutors had represented the undisclosed information did not exist, so they could not later claim certain documents were public records that the defendant could have discovered through due diligence. *State v. Floyd*, 756 A.2d 799, 824 (Conn. 2000).

The Court of Criminal Appeals in Arizona and the Michigan Supreme Court align with the Third Circuit in holding that courts cannot impose additional prongs outside those announced by this Court in *Strickler*. *See People v. Chenault*, 845 N.W.2d 731, 738-39 (Mich. 2014) ("We hold that the controlling test is that articulated by the Supreme Court in *Strickler*, no less and no more: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material."); *State v. Finck*, No. 2 CA-CR 2012-0186, 2013 WL 6327649, at *7 (Ariz. Ct. App. Dec. 5, 2013) (relying on *Strickler* to explain that the duty to disclose impeachment and exculpatory evidence is "applicable even though there has been no request by the accused").

And, like the Sixth Circuit, the Rhode Island Supreme Court had a similar shift in precedent following *Banks*. As the concurrence in *Tempest v. State*, 141 A.3d 677 (R.I. 2016), explains, the court initially imposed a due diligence requirement in *State v. Clark*, 754 A.2d 73, 78 n.1 (R.I. 2000), but *Banks* undermined that rationale and the Rhode Island Supreme Court has "never articulated" such a requirement since *Clark*. *Tempest*, 141 A.3d at 696 n.12 (Suttell, J., concurring).

C. Jurisdictions that Inconsistently Apply the Defense-Diligence Requirement

Even within jurisdictions, the application of a diligence standard can vary. Given the lack of clarity on this issue, some jurisdictions vacillate between analyzing the defense's diligence and finding it inapplicable, in a way that appears outcome-determinative. Where courts find the government violated *Brady*, the actions of the defense become less relevant to the courts' analyses. Where the courts deny relief, *Brady* claims are easily dismissed by placing blame on the defendant and his counsel. As a result, both the prosecutors and the defense are left without clear guidance as to their constitutional obligations, and repeated violations are foreseeable.

Florida itself, where Mr. Booker's case originates, has relied on conflicting messages about the due diligence requirement. In *Booker*, the Florida Supreme Court found that, "there is no *Brady* violation where the information is equally accessible to the defense and the prosecution." *Booker v. State*, 336 So. 3d 1177, 1181 (Fla. 2022) (citing *Morris v. State*, 317 So. 3d 1054, 1071 (Fla. 2021)). The Florida Supreme Court has made similar findings in other cases. *See e.g.*, *Geralds v. State*, 111 So. 3d 778, 789 (Fla. 2010) (finding no suppression where evidence is "equally available" to both parties); *Way v. State*, 760 So. 2d 903, 911 (Fla. 2000) ("this Court has broadly stated that evidence was not 'suppressed' where it was equally available to the State and the defense."); *Occhicone v. State*, 768 So. 2d 1037, 1041-42 (Fla. 2000) (no *Brady* violation where State failed to disclose favorable witness notes because the defense knew who the witnesses were and could have obtained this information from them directly). In Mr. Booker's case, the Florida Supreme Court found that Mr. Booker's

counsel could have examined Agent Neil's notes when he refreshed his recollection during trial. Therefore, the court concluded the notes were not suppressed and the State did not violate *Brady*. Though the Florida Supreme Court recited the proper 3-prong *Brady* test in its own analysis, it folded a defense-diligence requirement into the suppression prong. Moreover, the Florida Supreme Court did not explicitly correct the lower court's analysis which added diligence as a separate prong of the *Brady* test.

Yet, the Florida Supreme Court had affirmatively denounced the diligence requirement after *Strickler*. *Deren v. State*, 985 So. 2d 1087, 1088 (Fla. 2008) (rejecting the Court of Appeals use of a diligence prong). Consequently, other Florida courts have followed suit. As evidenced in *Booker*, it is entirely unclear to the lower courts and to practitioners in the State whether the due diligence requirement applies. *See, e.g.*, *Ward v. State*, 984 So. 2d 650, 654 (Fla. 1st DCA 2008) (explaining that because "the burden to disclose all duly requested exculpatory information rests solely with the State", the defense has "no duty to exercise due diligence to review *Brady* material until the State disclose[s] its existence."); *Archer v. State*, 934 So. 2d 1187, 1203 (Fla. 2006) ("a defendant is not required to compel production of favorable evidence which is material"); *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003) ("*Brady* does not require that the defendant compel production of exculpatory material, or even that a defendant remind the State of its obligations."); *Hoffman v. State*, 800 So. 2d 174, 179 (Fla. 2001) ("The State argued that the defense should have inquired about the results of the report after learning it existed. The court here says that is

not the case, and the burden was on the State to disclose the results of the report to the defense as it was exculpatory.").

Other jurisdictions have been similarly inconsistent. *Compare State v. Williams*, 896 A.2d 973, 992 (Md. 2006) (relying on *Banks* to find "[a] defendant's duty to investigate simply does not relieve the State of its duty to disclose exculpatory evidence under *Brady*"), *with Yearby v. State*, 997 A.2d 144, 153 (Md. 2010) (explaining that "under *Brady* and its progeny, the defense is not relieved of its 'obligation to investigate the case and prepare for trial'" and thus "'offers a defendant no relief when the defendant knew or should have known facts permitting him or her to take advantage of the evidence in question or when a reasonable defendant would have found the evidence.'") (emphasis deleted) (quoting *Ware v. State*, 702 A.2d 699, 708 (Md. 1997)).

Even the Ninth Circuit, in excoriating the diligence requirement in *Amado*, acknowledged cases where it found otherwise and made a weak attempt at distinguishing those cases because the defendant "ignored" what was given to him. *See Amado*, 758 F.3d at 1137.

Still other courts have not yet made up their minds. In Oregon, the Court of Appeals has noted that this question has not been decided in the state, but that the rule imposing the due diligence requirement is "far from universal or uniform." *Fisher v. Angelozzi*, 398 P.3d 367, 374 (Or. Ct. App. 2017); *see also Eklof v. Steward*, 385 P.3d 1074, 1085 n.9 (Or. 2016) (recognizing "there may be viable arguments in this type of case that failure to disclose information to defense attorneys does not constitute a

Brady violation because the criminal defendant or defense counsel knew the information from other sources."). Similarly, in Maine, the Supreme Judicial Court has cited to federal circuits imposing a diligence requirement but has itself left the question open. *See State v. Nisbet*, 191 A.3d 359, 369 n.7 (Me. 2018) (noting only that there is federal case law imposing a diligence requirement, but not reaching the question in this case or suggesting any state law on the issue).

Throughout these decisions, this nationwide inconsistency leaves both prosecutors and defense counsel uncertain about their constitutional obligations. Defense counsel cannot know whether to continue compelling the release of evidence when they do not even know if it exists, or if they can rely on the State's assertions that it does not and that the State has disclosed all favorable material. And prosecutors cannot accurately determine whether they must disclose evidence or if they are relieved of their duties if their belief is that defense counsel may find it anyway. As the Third Circuit acknowledged in deciding not to impose a defense-diligence requirement, this leads to "subjective speculation" that may be "inaccurate." *See Dennis*, 834 F.3d at 293. This Court should grant certiorari and offer the necessary clarity.

D. This Court Should Take This Opportunity to Affirmatively Rule That There is No Diligence Requirement in the *Brady* Analysis

This Court should take this opportunity to affirmatively rule that there is no diligence requirement in the *Brady* analysis. Importantly, the due diligence requirement does not stem from this Court's *Strickler* test laying out the elements of a *Brady* claim but instead from references in *United States v. Agurs*, 427 U.S. 97

(1976), and *Kyles v. Whitley*, 514 U.S. 419 (1995). In *Agurs*, this Court referred to *Brady* evidence as "information which had been known to the prosecution but unknown to the defense." 427 U.S. at 103. Later, this Court's discussion of materiality in *Kyles* described "an item of favorable evidence unknown to the defense." Based on this reference to evidence "unknown to the defense," the lower courts now imposing the defense-diligence requirement extend *Brady*'s mandate only to that evidence the defense cannot otherwise obtain. *See, e.g.*, *West v. Johnson*, 92 F.3d 1385, 1399 (5th Cir. 1996); *Pena v. State*, 353 S.W.3d 797, 810 (Tex. Crim. App. 2011).

In contrast, the courts that reject the defense-diligence requirement have in turn rejected this interpretation of the *Kyles* language. The Michigan Supreme Court directly addressed this in ruling against a diligence requirement, explaining: "The [*Agurs*] phrase "unknown to the defense" is best understood as a general description of what constitutes *Brady* evidence, instead of the imposition of a new hurdle for defendants. We see no additional meaning to the phrase given its context." *People v. Chenault*, 845 N.W.2d 731, 737 (Mich. 2014). To the contrary, it instead pointed out that if this Court "wanted to articulate a diligence requirement, it would do so more directly. It has not." *Id.* at 738. It instead "[did] not believe the goals of *Brady* counsel in favor of adopting a diligence standard", and that "[t]he *Brady* rule is aimed at defining an important prosecutorial duty; it is not a tool to ensure competent defense counsel." *Id. See also Durant*, 844 S.E.2d at 54 ("This rule is sound, as faulting defense counsel for failing to discover material information about the State's own witnesses 'breathes uncertainty into an area that should be certain and sure' because 'subjective

speculation as to defense counsel's knowledge or access may be inaccurate.'") (quoting *Dennis*, 834 F.3d at 293).

In changing its rule from imposing a diligence standard to rejecting it in *Dennis*, the Third Circuit also relied on this Court's jurisprudence and arrived at the opposite conclusion of the defense-diligence jurisdictions. It explained that the defense must be permitted to rely on the assertions of the prosecutor, stating: "In *Strickler*, [this Court] reasoned that because counsel was entitled to rely on the prosecutor fulfilling its *Brady* obligation, and had no reason for believing it had failed to comply, the failure to raise the issue earlier in habeas proceedings was justified." 834 F.3d at 291; *see also id.* ("Similarly here, the prosecutor's duty is clear. Dennis's counsel was entitled to rely on the prosecutor's duty to turn over exculpatory evidence."). Accordingly, it described an "[assessment] whether [defense counsel] could or should have discovered the receipt" as "beside the point." *Id.*

In affirmatively ruling against the defense-diligence requirement, the *Dennis* court looked to this Court's cases to conclude that "the concept of 'due diligence' plays no role in the *Brady* analysis." *Id.* at 291. It continued: "To the contrary, the focus of the Supreme Court has been, and it must always be, on whether the government has unfairly 'suppressed' the evidence in question in derogation of its duty of disclosure." *Id.* at 291-92.

The Third Circuit had several further concerns regarding a defense-diligence requirement. It held that prosecutors "must disclose all favorable evidence" unless it is completely "aware that defense counsel already has the material in its possession",

and that "[a]ny other rule presents too slippery a slope." *Id.* at 292; *see also Durant*, 844 S.E. 2d at 55 (South Carolina Supreme Court agrees with the Third Circuit that there should be no diligence inquiry into the defense and that "[a]ny other rule presents too slippery a slope." (quoting *Dennis*, 834 F.3d at 292)). It feared that "[s]ubjective speculation as to defense counsel's knowledge or access may be inaccurate, and it breathes uncertainty into an area that should be certain and sure." *Id.* at 293. It also discouraged adding a fourth prong to the *Brady* test "contrary to the Supreme Court's directive that we are not to do so." *Id.* at 293. *See also id.* ("Adding due diligence, whether framed as an affirmative requirement of defense counsel or as an exception from the prosecutor's duty, to the well-established three-pronged *Brady* inquiry would similarly be an unreasonable application of, and contrary to, *Brady* and its progeny.").

Finally, conclusively denying a defense-diligence requirement does not contradict defense counsel's own obligation of providing of effective representation, as some courts have suggested. These are two separate constitutional duties owed to criminal defendants, derived from two separate amendments. Under the Sixth Amendment, counsel must provide effective representation, including the duty to conduct a reasonable investigation. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003). And, under the Fourteenth Amendment due process clause, the State must disclose favorable exculpatory and impeachment evidence. *Brady*, 373 U.S. at 86. Both conditions must be met for a criminal defendant to have a fair trial.

Thus, numerous compelling justifications exist for this Court to reject the defense-diligence requirement in the context of *Brady* analyses. This Court should take this opportunity to do expressly what it has silently done throughout its *Brady* jurisprudence: impose an obligation on prosecutors to disclose favorable evidence without requiring an inquiry into the diligence of the defense.

Mr. Booker's case is an ideal vehicle to make this ruling because it shows the many pitfalls in imposing such a requirement. First, through Agent Neil's testimony, the State put on false and misleading testimony in Mr. 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 Mr. Booker. Though Mr. Booker's case should have been given high priority, the government overlooked it in its review. By the time Mr. Booker's counsel was made aware of the DOJ's mistake, the reviewing panel had been disbanded.

Mr. Booker's counsel provided Agent 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, Mr. Booker's counsel made a FOIA request in 2019 for the FBI file. In 2020, the FBI, for the first time,

provided Mr. Booker with Agent Neil's notes. Due to the violation of the protocol relating to the DOJ review and the recent disclosure of the notes, Mr. Booker retained Mr. Beckert to review the FBI file and Agent Neil's testimony.

Any reason for delay in Mr. 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 Mr. Booker were made to bear the consequences of the State's failures. Mr. Booker's diligence here had no constitutional bearing on the State's obligation to disclose these records. Imposing a diligence standard on defense counsel given these circumstances would reward the State for failing to carry out its *Brady* obligations.

CONCLUSION

For the reasons stated above, this Court should grant the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Jason W. Rodriguez, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399, on this 1st day of July, 2022.

/s/ Linda McDermott
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