No. _____

IN THE

Supreme Court of the United States

STEPHEN TODD BOOKER,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE

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Respectfully submitted,

/s/ Linda McDermott
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EXHIBIT 1

Alachua County Circuit Court Order (March 29, 2021)

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

STATE OF FLORIDA,
Plaintiff,

vs.

STEPHEN BOOKER,
Defendant.

CASE NO.: 01-1977-CF-002332-A

DIVISION: III

DEATH PENALTY CASE

ORDER DENYING SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE comes before the Court upon Defendant's "Successive Motion to Vacate Convictions and Sentence of Death," filed November 5, 2020, pursuant to Fla. R. Crim. P. 3.851; and "Notice of Filing Attachment to Successive Rule 3.851 Motion," filed November 5, 2020. Court-appointed counsel subsequently adopted the motion, which was filed by the Federal Public Defender's Office. The State filed a response to the motion on November 20, 2020, with a separate filing for the attachments to its response. On January 21, 2021, a non-evidentiary hearing was held on the motion. Upon consideration of the motion, the State's response, the legal argument of the parties, and the record, this Court finds and concludes as follows:

I. PROCEDURAL HISTORY

The relevant procedural history of the underlying case is as follows:

> On December 2, 1977, the State of Florida charged Booker with first-degree murder, sexual battery, and burglary, all stemming from the November 9, 1977, death of ninety-four-year-old Lorine Demoss Harmon.
>
> The victim, an elderly woman, was found dead in her apartment in Gainesville, Florida. The cause of death was loss of blood due to several knife wounds in the chest area. Two knives, apparently used in the homicide, were embedded in the body of the victim. A pathologist located semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to death. The apartment was found to be in a state of disarray; drawers were pulled out and their contents strewn about the apartment. Fingerprints of the defendant were

> positively identified as being consistent with latent fingerprints lifted from the scene of the homicide. The defendant had a pair of boots which had a print pattern similar to those seen by an officer at the scene of the homicide.
>
> Test results indicated that body hairs found on the clothing of the defendant at the time of his arrest were consistent with hairs taken from the body of the victim.
>
> After being given the appropriate warnings, the defendant made a statement, speaking as an alternative personality named "Aniel." The "Aniel" character made a statement that "Steve had done it."

Booker v. State, 773 So. 2d 1079, 1081–83 (Fla. 2000) (citing *Booker v. State,* 397 So.2d 910, 912 (Fla.), *cert. denied*, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981)). Ultimately, at trial, the jury returned a verdict finding Booker guilty of first-degree murder, sexual battery, and burglary. And, after the penalty phase, the jury recommended death by a nine-to-three vote. The trial court followed the jury's recommendation, sentencing Booker to death. The trial court found no mitigating circumstances and three aggravating circumstances: (1) Previously convicted of a felony involving the use of threat of violence to another; (2) Committed the murder during the commission of a sexual battery and burglary; and, (3) HAC. *Id.* at 1082 n.1 (Fla. 2000). Booker's judgment and sentence of death was affirmed on appeal by the Florida Supreme Court. *Booker v. State*, 397 So. 2d 910 (Fla. 1981). Booker then filed a petition for writ of certiorari in the United States Supreme Court which the Court denied. *Booker v. Florida*, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981). Subsequently, Booker filed numerous proceedings in State and Federal Court. In particular, Booker filed a petition for writ of habeas corpus which the Florida Supreme Court found that any error in light of the U.S. Supreme Court's 1987 decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987) was harmless. The Florida Supreme Court upheld

Booker's sentence. *Booker v. State*,520 So. 2d 246, 247-249 (Fla. 1988). However, the Eleventh Circuit found that the Hitchcock error was not harmless and the case was remanded for resentencing. *Booker v. Dugger*, 922 F.2d 633, 634 (11th Cir. 1991). A new penalty phase hearing was conducted in March 1998. The jury voted eight-to-four for death. The trial court following the jury's recommendation, sentenced Booker to death. The trial court found four aggravating circumstances: (1) committed the felony while he was under sentence of imprisonment; (2) previously convicted of a violent felony; (3) committed the capital felony while engaged in the commission of a sexual battery and burglary; and, (4) HAC. The trial court found two statutory mitigators: (1) the crime was committed while Booker was under the influence of extreme mental or emotional disturbances; and, (2) Booker's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The trial court found nine nonstatutory mitigating circumstances. Booker's sentence of death was affirmed on appeal by the Florida Supreme Court. *Booker v. State*,773 So. 2d 1079, 1086 (Fla. 2000). Booker then filed a petition for writ of certiorari that was denied by the United States Supreme Court on May 14, 2001. *Booker v. Florida*, 532 U.S. 1033 (2001).

II. GROUNDS RAISED

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, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND

EXCULPATORY EVIDENCE IN NATURE WHICH UNDERMINES CONFIDENCE IN THE RELIABILITY OF HIS CONVICTIONS

A. *BRADY*[1] VIOLATION CLAIM

According to Defendant, "the State withheld material, exculpatory evidence concerning the hair analysis that was presented to his capital jury and undermines confidence in the outcome of his convictions." Defendant contends that the State failed "to disclose the exculpatory and material bench notes as they were inconsistent with [FBI Agent Robert] Neil's testimony about the microscopic characteristics of the hairs Neil examined." Further, Defendant argues that "Neil's testimony was false and misleading in that he repeatedly opined that the hairs found at the crime scene originated from [Defendant] and the State relied upon them in proving its case." Defendant submits that he was prejudiced by the State's failure to disclose Agent Neil's bench notes because "had the limitations and inconsistencies been known to trial counsel, a persuasive motion in limine to exclude the hair analysis could have been made." And, that the remaining evidence in the State's case was "entirely circumstantial." Defendant argues that 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 [Defendant's] statement [to law enforcement] to the jury."

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

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

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. *Robinson v. State*, 707 So. 2d 688, 693 (Fla. 1998).

Here, Defendant's *Brady* claim is procedurally barred as untimely raised. A defendant "cannot use a successive 3.851 motion to litigate issues that he could have raised in his initial postconviction motion." *Bogle v. State*, 288 So. 3d 1065, 1068 (Fla. 2019), *reh'g denied*, SC17-2151, 2020 WL 639289 (Fla. Feb. 11, 2020), and *cert. denied sub nom. Bogle v. Florida*, 141 S. Ct. 389 (2020) (citing Fla. R. Crim. P. 3.851(e)(2); *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007)). Defendant has known of the bench notes at issue since the time of his trial in 1978, during which Agent Neil referenced and relied upon the notes during his testimony.[2] *See* State's Attachment at page 116. "If defense counsel wanted to examine the notes he merely had to ask to see them at that time." *Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993). Further, as reflected in Defendant's motion, Defendant has been "well aware of potential deficiencies in [microscopic hair comparison analysis] long before"[3] the 2019 review of this case by the FBI and the 2020 report generated by Microtrace.

Even if the claim were timely raised, it is still without merit. First, the State did not suppress the bench notes. Agent Neil openly relied on the bench notes during his testimony. Thus, Defendant "should have been actually aware of the expert's notes [and] could have

[2] Further, Agent Neil has his bench notes with him during his testimony, which defense counsel could have asked to review.
[3] *Bogle*, 288 So. 3d at 1068.

obtained them at that time." *Way v. State*, 760 So. 2d 903, 912 (Fla. 2000). Second, as previously mentioned, Defendant could have obtained the notes, during or after trial, with due diligence. Finally, Defendant fails to show any prejudice. Although Agent Neil did not explicitly notate every step of his analysis in his bench notes, he did testify in detail as to the basis for his analysis at trial. *See* State's Attachment at 93-119. There is nothing materially inconsistent between Agent Neil's testimony and his bench notes. Thus, even for impeachment purposes, the bench notes would have had little effect on the reliability and credibility of his testimony.

Additionally, there was overwhelming evidence of Defendant's guilt presented at trial. Defendant's prints were found at six different locations in the victim's home. *See* State's Attachments at 70-91. And Defendant's shoeprints were found at the crime scene as well. *Id.* at 165 (lines 12-25) – 166 (lines 1-22). This is significant because Defendant denied having ever been inside the victim's residence. *Id.* at 50 (lines 5-25) – 51 (lines 1-3), 159 (lines 11-25) – 160 (lines 1-14). And beyond the circumstantial evidence, Defendant confessed to the murder, although he did so as a purported demonic entity named "Aniel." *Id.* at 56-69. For these reasons, there is not a reasonable probability that a jury would have acquitted Defendant, even if Agent Neil had been impeached regarding the reliability of microscopic hair analysis comparison. Accordingly, the claim raised is without merit.

B. NEWLY DISCOVERED EVIDENCE

According to Defendant, even if there were not a *Brady* violation, the bench notes and the purported unreliability of Agent Neil's microscopic hair analysis comparison constitute

newly discovered evidence. "To obtain relief based on newly discovered evidence, a petitioner must satisfy two prongs." *Archer v. State*, 934 So. 2d 1187, 1193 (Fla. 2006). "First, the evidence offered must have been unknown by the trial court, by the party, or by counsel at the time of the trial, and it must appear that neither defendant nor his counsel could have known of it by the use of due diligence." *Id.* "Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." *Id.*

The term "fact" under rule 3.851(d)(2)(A) refers to newly discovered evidence that tends to prove or disprove guilt or innocence. *See Lamb v. State*, 212 So. 3d 1108, 1110 (Fla. 5th DCA 2017). "[N]ot all new evidence is the equivalent of newly discovered evidence for the purposes of establishing a postconviction claim." *Henry v. State*, 125 So. 3d 745, 750 (Fla. 2013); *see also Wyatt v. State*, 71 So.3d 86, 100 n. 14 (Fla.2011) (same).

Here, neither the bench notes nor the purported unreliability of Agent Neil's analysis constitutes newly discovered evidence. As previously discussed, Agent Neil referenced and relied upon the bench notes during his testimony. *See* State's Attachment at page 116. "If defense counsel wanted to examine the notes he merely had to ask to see them at that time." *Provenzano*, 616 So. 2d at 430. Defendant "should have been actually aware of the expert's notes [and] could have obtained them at that time." *Way*, 760 So. 2d at 912. Thus, the notes are not newly discovered evidence. Further, Agent Neil's testimony regarding his microscopic hair analysis comparison of the hair found on the victim and Defendant's hair has been available to Defendant since his trial. *See* Attachment B of Defendant's Successive Motion to Vacate

Convictions and Sentence of Death; State's Attachment at 110 (lines 6-25) - 113 (lines 8-13), 114 (lines 13-25) – 117 (line 1). Defendant could have had an independent examiner review this testimony at any point in time after the trial. The fact that Defendant waited until forty years after his trial to do so does not make this evidence newly discovered.

Even if this evidence were considered to "newly discovered evidence," Defendant fails to show prejudice because there is not a reasonable probability that the evidence would produce an acquittal on retrial. Defendant's prints were found at six different locations in the victim's home. *See* State's Attachments at 70-91. And Defendant's shoeprints were found at the crime scene as well. *Id.* at 165 (lines 12-25) – 166 (lines 1-22). This is significant because Defendant denied having ever been inside the victim's residence. *Id.* at 50 (lines 5-25) – 51 (lines 1-3), 159 (lines 11-25) – 160 (lines 1-14). And beyond the circumstantial evidence, Defendant confessed to the murder, although he did so as a purported demonic entity named "Aniel." *Id.* at 56-69. Given the totality of the evidence, there is not a reasonable probability that a jury would acquit Defendant based merely on the impeachment of the microscopic hair analysis comparison. Accordingly, the claim raised is without merit.

Based on the foregoing, it is **ORDERED AND ADJUDGED** that:

Defendant's motion is hereby **DENIED**. Defendant may appeal this decision to the Florida Supreme Court within thirty (30) days of this Order's effective date.

DONE AND ORDERED on Monday, March 29, 2021

01-1977-CF-002332-A 03/29/2021 08:10:41 AM

William E. Davis, Circuit Judge
01-1977-CF-002332-A 03/29/2021 08:10:41 AM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies have been furnished by U.S. Mail or via filing with the Florida Courts E-Filing Portal on Monday, March 29, 2021.

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01-1977-CF-002332-A 03/29/2021 10:05:46 AM

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EXHIBIT 2
Florida Supreme Court Opinion
(Feb. 3, 2022)

336 So.3d 1177
Supreme Court of Florida.

Stephen Todd BOOKER, Appellant,
v.
STATE of Florida, Appellee.

No. SC21-763
|
February 3, 2022

Synopsis

Background: Following affirmance of convictions for first-degree murder, sexual battery, and burglary and death sentence, 397 So.2d 910, vacatur of death sentence on federal habeas review, 922 F.2d 633, subsequent affirmance of death sentence that was imposed during resentencing, 773 So.2d 1079, and denial of prior motions for postconviction relief, movant filed sixth motion for postconviction relief, asserting that FBI agent's handwritten notes and microscopist's report about microscopic-hair-comparison evidence were newly discovered evidence and that state committed *Brady* violation in suppressing agent's notes as well as scientific unreliability of his trial testimony. The Circuit Court, 8th Judicial Circuit, Alachua County, William E. Davis, J., summarily denied motion. Movant appealed.

Holdings: The Supreme Court held that:

[1] State did not suppress agent's notes and thus did not commit *Brady* violation;

[2] agent's notes did not constitute newly discovered evidence; and

[3] microscopist's report did not constitute newly discovered evidence.

Affirmed.

See also 969 So. 2d 186, 684 F.3d 1121, and 252 So. 3d 723

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (12)

[1] **Criminal Law** Necessity for Hearing

A trial court should hold an evidentiary hearing on a motion for postconviction relief where the movant, whose death sentence has been affirmed on direct appeal, makes a facially sufficient claim that requires a factual determination. Fla. R. Crim. P. 3.851.

[2] **Criminal Law** Review De Novo

Supreme Court reviews the summary denial of a postconviction relief motion de novo.

[3] **Criminal Law** Constitutional obligations regarding disclosure

Criminal Law Impeaching evidence

To establish a *Brady* violation, a defendant must show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced.

[4] **Criminal Law** Materiality and probable effect of information in general

Evidence is "material," as required to establish a *Brady* violation, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

[5] **Criminal Law** Materiality and probable effect of information in general

For purposes of establishing that evidence is material, as required to establish *Brady* violation, by showing that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, a "reasonable probability" is

a probability sufficient to undermine confidence in the outcome.

[6] **Criminal Law** Request for disclosure; procedure

Defendant carries the burden to prove each element of his *Brady* claim.

[7] **Criminal Law** Counsel

Trial court may summarily deny a *Brady* claim in a motion that seeks postconviction relief following affirmance of a death sentence on direct appeal where the motion, files, and record conclusively refute any of the three *Brady* prongs. Fla. R. Crim. P. 3.851(f)(5)(B).

[8] **Criminal Law** Diligence on part of accused; availability of information

There is no *Brady* violation where the information is equally accessible to the defense and the prosecution.

[9] **Criminal Law** Test results; demonstrative and documentary evidence

State did not suppress handwritten notes of FBI agent, who was microscopic-hair-comparison analyst, and thus did not commit *Brady* violation in prosecution for first-degree murder, sexual battery, and burglary, where agent expressly used his notes to refresh his recollection during his direct examination, and defense counsel could have examined notes at that time.

[10] **Criminal Law** Newly discovered evidence

Handwritten notes of FBI agent, who was microscopic-hair-comparison analyst, did not constitute "newly discovered evidence" and thus did not warrant granting postconviction relief regarding convictions for first-degree murder, sexual battery, and burglary and death sentence, where movant knew about agent's notes since movant's original trial. Fla. R. Crim. P. 3.851.

[11] **Criminal Law** Newly discovered evidence

To establish that evidence is newly discovered, a movant seeking postconviction relief must establish that (1) the evidence was unknown by trial court, party, or by counsel at time of trial, and it must appear that defendant or his counsel could not have known of it by use of diligence, and that (2) the evidence is of such nature that it would probably produce acquittal on retrial.

[12] **Criminal Law** Newly discovered evidence

Microscopist's report about microscopic-hair-comparison evidence did not constitute "newly discovered evidence" and thus did not warrant granting postconviction relief regarding convictions for first-degree murder, sexual battery, and burglary and death sentence, although report was created many years after movant was convicted, where report stated that it had been recognized since dawn of the field of microscopic-hair-comparison analysis that individualization of hairs was not possible through microscopy alone, and report merely offered new expert opinion on studies that had been available for decades. Fla. R. Crim. P. 3.851.

***1178** An Appeal from the Circuit Court in and for Alachua County, William E. Davis, Judge – Case No. 011977CF002332AXXXXX

Attorneys and Law Firms

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Ashley Moody, Attorney General, and Jason W. Rodriguez, Assistant Attorney General, Tallahassee, Florida, for Appellee

Opinion

PER CURIAM.

Stephen Todd Booker—a prisoner under sentence of death—appeals the trial court's summary denial of his sixth successive motion for postconviction relief, filed ***1179** under Florida Rule of Criminal Procedure 3.851.[1] We affirm.

I. Background

In 1978, Booker broke into ninety-four-year-old Lorine Harmon's home and then raped and murdered her. We summarized the facts surrounding the murder and ensuing investigation as follows:

> The victim, an elderly woman, was found dead in her apartment in Gainesville, Florida. The cause of death was loss of blood due to several knife wounds in the chest area. Two knives, apparently used in the homicide, were embedded in the body of the victim. A pathologist located semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to death. The apartment was found to be in a state of disarray; drawers were pulled out and their contents strewn about the apartment. Fingerprints of [Booker] were positively identified as being consistent with latent fingerprints lifted from the scene of the homicide. [Booker] had a pair of boots which had a print pattern similar to those seen by an officer at the scene of the homicide.
>
> Test results indicated that body hairs found on the clothing of [Booker] at the time of his arrest were consistent with hairs taken from the body of the victim.
>
> After being given the appropriate warnings, [Booker] made a statement, speaking as an alternative personality named "Aniel." The "Aniel" character made a statement that "Steve had done it."

Booker v. State, 397 So. 2d 910, 912 (Fla. 1981).

Following Booker's arrest, the State charged him with first-degree murder, sexual battery, and burglary. Booker pled not guilty, and his case proceeded to trial. In establishing its case against Booker, the State relied on several pieces of forensic evidence. As relevant here, the State called FBI Agent Robert Neil—a microscopic hair comparison analyst. Agent Neil gave testimony on the significance of the hair fragments, which police found on and around the victim. During Agent Neil's direct examination, the State asked him how the hair fragments connected Booker to the crime, resulting in the following exchange:

> [Prosecutor:] Let me know show you State's Exhibit 51 again previously identified as a black hair removed from the vagina of the deceased. Did you attempt to compare that with the known pubic hair samples of the defendant in this case[?]
>
> [Agent Neil:] Excuse me. *I had to review my notes a little bit to refresh my memory.* I found a black head hair fragment in Exhibit 51 which I can identify as being from a person of the black race. However, due to the limited size, I cannot go any further than that with respect to stating whether or not it could have come from a particular individual in this case, Mr. Booker.

(Emphasis added.)

In addition to his testimony, Agent Neil also wrote a report summarizing his findings, which the State provided to Booker in discovery. The State referenced Agent Neil's testimony and his report in its closing argument summarizing the evidence linking Booker to the crimes.

Ultimately, the jury convicted Booker of each charged offense and recommended a sentence of death for Harmon's murder. Accepting that recommendation, the judge sentenced Booker to death.

***1180** On direct appeal, we affirmed Booker's convictions and sentences in all respects. However, the Eleventh Circuit Court of Appeals later vacated Booker's death sentence. *Booker v. Dugger*, 922 F.2d 633, 636 (11th Cir. 1991). After the new penalty phase, a jury again recommended a sentence of death, which the trial court accepted. We affirmed the sentence, which became final in 2001. *Booker v. Florida*, 532 U.S. 1033, 1033, 121 S.Ct. 1989, 149 L.Ed.2d 779 (2001) (denying petition for certiorari review).

Since that time, Booker has sought postconviction relief in both state and federal courts, without success. *See Booker v. State*, 969 So. 2d 186 (Fla. 2007); *Booker v. Fla. Dep't of Corr.*, 684 F.3d 1121 (11th Cir. 2012); *Booker v. State*, 252 So. 3d 723 (Fla. 2018).

This case involves Booker's most recent postconviction challenge which focuses on the microscopic hair comparison evidence presented at his trial. While pursuing this challenge, Booker obtained a 2013 report from the Department of Justice (DOJ), secured Agent Neil's report and handwritten notes, and retained a microscopist. The microscopist, Jason Beckert, reviewed the report and notes, police reports about the crime, as well as scientific studies regarding microscopic hair comparison analysis. He then generated a report, summarizing scientific conclusions regarding the unreliability of microscopic hair comparison analysis, and opining that Agent Neil's handwritten notes conflicted with his trial testimony.

Based on the foregoing investigation, Booker filed a successive postconviction motion raising two claims. He argues that the State suppressed Agent Neil's handwritten notes as well as the scientific unreliability of his trial testimony in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Alternatively, Booker asserts that Agent Neil's notes and Beckert's report constitute newly discovered evidence under *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).

Regarding Booker's *Brady* claim, the trial court found that Agent Neil openly relied on the notes during his testimony, and thus, Booker should have been aware of the notes and could have obtained them at that time.[2] The trial court rejected Booker's newly discovered evidence claim on similar grounds. Having rejected both claims, the court denied the motion.

This appeal follows.

II. Analysis

Booker argues that the trial court erred in summarily denying his successive postconviction motion. We disagree.

[1] **[2]** A trial court should hold an evidentiary hearing on a rule 3.851 motion where "the movant makes a facially sufficient claim that requires a factual determination." *Rogers v. State*, 327 So. 3d 784, 787 (Fla. 2021) (quoting *Pardo v. State*, 108 So. 3d 558, 560 (Fla. 2012)).[3] With this principle in mind, we now assess Booker's claims.

[3] **[4]** **[5]** To establish a *Brady* violation, Booker must show "(1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." *Sweet v. State*, 293 So. 3d 448, 451 (Fla. 2020) (quoting *Dailey v. State*, 283 So. 3d 782, 789 (Fla. 2019)). For *Brady* ***1181** purposes, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Mordenti v. State*, 894 So. 2d 161, 170 (Fla. 2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* at 175 (quoting *Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2003)).

[6] **[7]** As we have held, the defendant carries the burden to prove each element of his *Brady* claim. *See* *Hurst v. State*, 18 So. 3d 975, 988 (Fla. 2009). Thus, the trial court may summarily deny a *Brady* claim where the motion, files, and record conclusively refute any of the three *Brady* prongs. *See* Fla. R. Crim. P. 3.851(f)(5)(B); *Boyd*, 324 So. 3d at 913; *Morris v. State*, 317 So. 3d 1054, 1071 (Fla. 2021); *Jimenez v. State*, 265 So. 3d 462, 474 (Fla. 2018).

[8] As a threshold matter, "[t]here is no *Brady* violation where the information is equally accessible to the defense and the prosecution." *Morris*, 317 So. 3d at 1071 (alteration in original) (quoting *Peede v. State*, 955 So. 2d 480, 497 (Fla. 2007)).

[9] Here, the trial transcript demonstrates that Agent Neil expressly used his handwritten notes to refresh his recollection during his direct examination. Consequently, Booker's counsel could have examined the notes at that time. Therefore, the record conclusively refutes Booker's claim that the State suppressed the notes. *See* *Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993) (finding no suppression where the State's expert referenced his notes at trial and used them while testifying).[4]

[10] **[11]** For similar reasons, Booker's newly discovered evidence claim also fails. Under *Jones*, to establish that

evidence is newly discovered, the movant must establish that "(1) the evidence was unknown by the trial court, party, or by counsel at the time of trial, and it must appear that [the] defendant or his counsel could not have known of it by the use of diligence, and that (2) the evidence is of such a nature that it would probably produce an acquittal on retrial." *Smith v. State*, 46 Fla. L. Weekly S310, S317 (Fla. Oct. 21, 2021) (citing *Jones*, 709 So. 2d at 521). Neither Agent Neil's notes nor Jason Beckert's report satisfies this standard.

Booker has known about Agent Neil's notes since his original trial. Thus, through reasonable diligence—such as asking to review the notes—Booker's counsel could have discovered this evidence over 40 years ago. *See Dailey*, 283 So. 3d at 790 (denying newly discovered evidence claim where the defendant could have discovered the allegedly exculpatory evidence earlier).

[12] Beckert's report does not constitute newly discovered evidence, either. As the report itself states, "[i]t has been recognized since the dawn of the field [of microscopic hair comparison analysis] that individualization of hairs is not possible ***1182** through microscopy alone." Thus, the information Booker asserts is newly discovered has been available at least since the time of his original trial. This fact alone demonstrates that the report is not newly discovered under *Jones*. *See Martin v. State*, 322 So. 3d 25, 38 (Fla. 2021) ("*Jones* claims ... are premised on an allegation that the jury did not hear previously *unavailable* evidence material to guilt or innocence, and that the introduction of such evidence would probably have led to the defendant's acquittal.") (emphasis added)). [5]

In sum, Booker's *Brady* and *Jones* claims lack merit.

III. Conclusion

For the reasons given above, we affirm the trial court's order summarily denying Booker's sixth postconviction motion.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

All Citations

336 So.3d 1177, 47 Fla. L. Weekly S27

Footnotes

1 We have jurisdiction. *See* art. V. § 3(b)(1), Fla. Const.

2 The trial court further found that Agent Neil's handwritten notes did not constitute favorable evidence and that Booker suffered no prejudice from their nondisclosure.

3 We review the summary denial of a postconviction motion de novo. *Boyd v. State*, 324 So. 3d 908, 913 (Fla. 2021) (citing *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008)).

4 The right to examine the items a witness uses to refresh his recollection existed at the time of Booker's original trial. *See Allen v. State*, 243 So. 2d 448, 449-50 (Fla. 1st DCA 1971) (" 'The opposite party in both criminal and civil cases has a right to see and examine the memorandums [sic] used by a witness, so as to be in a position to cross-examine the witness in regard to the testimony given on direct examination'.... [B]asic principles of fair play ... require that the opposite party be permitted to examine the notes ... so that the accuracy of his statements may be verified." (quoting 35 Fla. Jur. *Witnesses* § 180, at 279 (1961))).

5 Additionally, Beckert's report merely offers a new expert opinion on studies that have been available for decades. This Court has found that such new opinions do not constitute newly discovered evidence. *See Asay v. State*, 210 So. 3d 1, 23 (Fla. 2016). ("Merely obtaining a new expert to review the same records

does not create newly discovered evidence."); *see also* *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007) ("[T]his Court has not recognized 'new opinions' or 'new research studies' as newly discovered evidence.").

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EXHIBIT 3

Florida Supreme Court Motion for Rehearing Denial

(April 7, 2022)

2022 WL 1042708
Only the Westlaw citation is currently available.
Supreme Court of Florida.

Stephen Todd **BOOKER**, Appellant(s)
v.
STATE of Florida, Appellee(s)

CASE NO.: SC21-763
|
APRIL 7, 2022

Lower Tribunal No(s).: 011977CF002332AXXXXX

Opinion

***1** Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

All Citations

Not Reported in So. Rptr., 2022 WL 1042708

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EXHIBIT 4

TABLE OF STATE JURISDICTIONS IMPOSING THE DEFENSE-DILIGENCE REQUIREMENT

Table 1: State Jurisdictions Imposing the Defense Diligence Requirement

Alabama
Mashburn v. State, 148 So. 3d 1094, 1120 (Ct. Crim. Ala. 2013) ("Prosecutors have no duty under *Brady v. Maryland* to disclose evidence available to the defense from another source.") (internal citation omitted)

Arkansas
Henington v. State, 556 S.W.3d 518, 522 (Ark. 2018) (no *Brady* violation where the undisclosed report "could have been sought out by the defense")

California
People v. Superior Court (Johnson), 377 P.3d 847, 858-59 (Cal. 2015) (no *Brady* violation where "information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence") (quoting *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980)

District of Columbia
Walker v. United States, 167 A.3d 1191, 1208 (D.C. Ct. App. 2017) ("the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.")

Illinois
People v. Burton, No. 1-14-1796, 2016 WL 7638173, at *12 (Ill. App. Ct. Dec. 30, 2916) ("The State does not offer any explanation why it did not disclose the medical records during discovery. However, defendant offers no explanation as to why he was unable to discover his medical records until 2013 . . . . He avers in the petition that the records were 'readily available by subpoena.' Therefore, this information was not dependent on the State, and there is no evidence that the State knowingly or inadvertently withheld the information from defendant.")

Indiana
Conner v. State, 712 N.E. 2d 1238, 1246 (Ind. 1999) ("the State will not be found to have suppressed material information if that information was available to a defendant through the exercise of reasonable diligence.")

Kansas
State v. Walker, 559 P.2d 381, 384 (Kan. 1977) ("Other states have held the Brady rule does not apply when the defendant or his counsel knew of the exculpatory evidence either before or during trial;" question left open here, but court observes "the rule seems to have support in this jurisdiction."); *see also State v. Belone*, 343 P.3d 128, 150 (Kan. 2015) ("Additionally, a *Brady* violation does not occur when a

defendant or counsel knew about the evidence and could have obtained it prior to or during trial.") (citing to *Walker*)

Louisiana
State v. Green, 225 So. 3d 1033, 1037 (La. 2017) ("However, a defendant shows no entitlement to relief if the information was available to him through other means by the exercise of reasonable diligence.")

Minnesota
Zornes v. State, 903 N.W. 2d 411, 418 (Minn. 2017) (no *Brady* violation where the evidence was "readily available in other documents", so there was no reasonable probability that the result of the trial would have been different); *see also Vera v. State*, No. C1-99-330, 1999 WL 809731, at *2 (Minn. Ct. App. Oct. 12, 1999) ("Evidence is not considered to have been suppressed within the meaning of the *Brady* doctrine if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence.") (internal citation omitted) (alteration in original)

Mississippi
Lofton v. State, 248 So. 3d 798, 810 (Miss. 2018) ("And the State has no obligation to furnish a defendant with exculpatory evidence that is fully available to the defendant or that could be obtained through reasonable diligence.").

Missouri
State v. Moore, 411 S.W.3d 848, 855 (Mo. Ct. App. 2013) ("there can be no *Brady* violation where the defendant knew or should have known of the material or where the information was available to the defendant from another source")

Montana
State v. Weisbarth, 378 P.3d 1195, 1203 (Mont. 2016) (finding *Brady* violation because the defendant exercised due diligence in seeking records and was thwarted by the State)

Nevada
Slaughter v. State, No. 78760, 474 P.3d 332, at *2 (Nev. Oct. 15, 2020) (unpublished table decision) ("And this court has recognized, 'a *Brady* violation does not result if the defendant, exercising reasonable diligence, could have obtained the information.'" (quoting*Rippo v. State*, 946 P.2d 1017, 1028 (Nev. 1997))

New Mexico
State v. Stevenson, No. A-1-CA-36451, 2017 WL 6997257, at *1 (N.M. Ct. App. Dec. 18, 2017) ("Defendant discusses federal law and contends that the United States Supreme Court as well as several federal circuits have rejected a 'duty of due diligence by the defendant with regards to *Brady* violations[.]' Defendant then

acknowledges that several federal circuits do still recognize a due diligence exception to *Brady*. Importantly, Defendant also acknowledges that New Mexico is in line with the latter group of courts recognizing the exception.") (internal citations omitted)

New York
People v. LaValle, 817 N.E.2d 341, 352 (NY Ct. App. 2004) ("Evidence is not suppressed where the defendant 'knew of, or should reasonably have known of, the evidence and its exculpatory nature'") (internal citation omitted)

North Carolina
State v. Allen, 731 S.E.2d 510, 524 (N.C. Ct. App. 2012) (relying on numerous federal court decisions to impose a diligence requirement)

Ohio
State v. McFeeture, No. 108434, 2020 WL 1062137, at *3 (Ohio Ct. App. Mar. 5, 2020) (slip op.) ("Further, the prosecution is not required under *Brady* to furnish a defendant evidence which, with any reasonable diligence, he can obtain for himself.") (internal quotation omitted)

South Dakota
Erickson v. Weber, 748 N.W.2d 739, 745 (S.D. 2008) ("Despite the expansion of the *Brady* doctrine to include cases where the defendant made no request for disclosure, the defendant must still prove that the government, in fact, suppressed the evidence in question....If a defendant knows or should know of the allegedly exculpatory evidence, it cannot be said that the evidence has been suppressed by the prosecution.") (internal citations omitted) (internal quotations omitted)

Tennessee
State v. Marshall, 845 S.W. 228, 233 (Tenn. Crim. App. 1992) ("The prosecution is not required to disclose information that the accused already possesses or is able to obtain")

Texas
Pena v. State, 353 S.W.3d 797, 810 (Tex. Crim. App. 2011) ("Similarly, the State does not have such a duty if the defendant was actually aware of the exculpatory evidence or could have accessed it from other sources.")

Utah
State v. Pinder, 114 P.3d 551, 557 (Utah 2005) ("courts universally refuse to overturn convictions where the evidence at issue is known to the defense prior to or during trial, where the defendant reasonably should have known of the evidence, or where the defense had the opportunity to use the evidence to its advantage during trial but failed to do so") (internal citation omitted)

Vermont
State v. Rooney, 19 A.3d 92, 97 (Vt. 2011) ("A defendant who is aware of essential facts that would allow him to request the exculpatory evidence at issue, yet fails to act on that knowledge, cannot fault the State for failing to produce it.")

Virginia
Porter v. Warden of Sussex I State Prison, 722 S.E.2d 534, 541 (Va. 2012) ("Furthermore, pursuant to *Brady*, there is no obligation to produce information available to the defendant from other sources, including diligent investigation by the defense.")

Washington
State v. Mullen, 259 P.3d 158, 166 (Wash. 2011) ("where 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)

West Virginia
State v. Peterson, 799 S.E.2d 98, 106 (W.Va. 2017) (as part of West Virginia's suppression test, a defendant must show evidence was "not available . . . through the exercise of reasonable diligence")

Wyoming
Chauncey v. State, 2006 WY 18, 24, 25 (Wyo. 2006) (no suppression if "the defendant either knew or should have known of the essential facts permitting him to take advantage of the exculpatory evidence.") (citing *United States v. LeRoy,* 687 F.2d 610, 618 (2d Cir.1982))

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
LINDA MCDERMOTT
Counsel of Record