Case No. 22-5037

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

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Counsel of Record

Jason William Rodriguez
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT

Capital Case

QUESTION PRESENTED

I. Does a State violate *Brady v. Maryland* by failing to disclose evidence that is equally available to the defendant and could have been easily discovered through due diligence?

Stephen Todd Booker was sentenced to death for the first-degree murder of 94-year-old Lorine Harmon in 1978. The evidence tying him to the crime included conclusive evidence that Booker's fingerprints were in the victim's home, Booker's guilty-conscious denial he had ever been in the victim's home, Booker's eventual confession, a unique shoeprint, and hair analysis.

Over forty years after murdering the victim, Booker argued that the State violated *Brady*[1] by failing to disclose an expert's hair-analysis notes. These notes were openly used during Booker's trial and do not conflict with the expert's testimony in any way. The sole, minor impeachment value of these notes is that the expert did not notate everything he testified to at trial. The state postconviction court denied Booker's motion without an evidentiary hearing. The Florida Supreme Court also summarily rejected Booker's claim.

Booker now seeks certiorari review to resolve a federal question that is purely academic in his case in light of the evidence against him and a likely retroactivity bar. This Court should accordingly decline to exercise certiorari jurisdiction over the aforementioned question.

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

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The Florida Supreme Court's decision petitioned for review appears as *Booker v. State*, 336 So. 3d 1177, 1178 (Fla. 2022), *reh'g denied*, No. SC21-763, 2022 WL 1042708 (Fla. Apr. 7, 2022).

JURISDICTION

This Court has jurisdiction over the Florida Supreme Court's determination that the federal due process clause is not violated where the State fails to disclose evidence equally available to the defense. *See* 28 U.S.C. § 1257(a); 28 U.S.C. § 2101 (d).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution, section one:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This certiorari petition arises from the Florida Supreme Court's decision to summarily reject Booker's *Brady* claim that the State unconstitutionally failed to disclose a hair expert's notes over forty years ago. The expert explicitly relied on his notes while testifying at Booker's trial over forty years ago.

Facts

The underlying facts are set forth in the opinion below. *Booker v. State*, 336 So. 3d 1177, 1179 (Fla. 2022). On November 9, 1977, the victim was found dead in her

ransacked apartment with two knives still embedded in her body. *Id.*; *Booker v. Wainwright*, 675 F.2d 1150, 1151 (11th Cir. 1982). A pathologist recovered semen and blood from the victim's vaginal area and determined sexual intercourse occurred prior to the victim's death. *Booker v. State*, 397 So. 2d 910, 912 (Fla. 1981).

The evidence at trial singularly pointed to Booker and included: (1) Booker's fingerprints lifted from "the scene of the homicide"; (2) Booker's boots had a similar, unique pattern to the footprint pattern noted by an officer at the homicide scene; (3) test results indicating body hairs found on Booker's clothing were "consistent with" the victim's; and (4) a post-*Miranda*[2] confession by Booker.[3] *Id.* The jury found Booker guilty of first-degree murder, sexual battery, and burglary. *Id.* Booker's sole trial defense was insanity. *Booker v. State*, 441 So. 2d 148, 151–52 (Fla. 1983) (noting Booker's counsel identified an "insanity/lack of premeditation" defense "early" on as the sole defense to these charges"; holding this focused strategy was reasonable "in light of the overwhelming evidence against" Booker).

Prior to trial, the Federal Bureau of Investigation (FBI) performed analysis of several hairs recovered from the victim and Booker. (R.[4] at 227–32.) The report indicated black pubic hairs of "Negroid origin" were found on the victim's bedspread, pantyhose, bed area, and pubic region. (R. at 227–32.) According to the report, those

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[2] *Miranda v. Arizona*, 384 U.S. 52 (1966).

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

[4] The State will cite the Florida Supreme Court record on appeal as "R. at [page number]." This record is available on the Florida Supreme Court's online docket: https://efactssc-public.flcourts.org/casedocuments/2021/763/2021-763_record_140896_record.pdf.

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

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

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

(R. at 241–42.)

The following relevant evidence was introduced in the State's case in chief. Law enforcement recovered latent prints from: (1) the inside windowsill of the victim's bedroom (three prints later identified as two of Booker's right palm prints and one of his left middle finger); (2) the inside door of the north closet at the victim's address (later identified as two prints of Booker's left index finger); (3) a Christmas box from the victim's bedroom (later identified as Booker's right index finger); (4) the

trim of the victim's bedroom door (later identified as Booker's right palm print); (5) a metal box in the victim's bedroom (later identified as Booker's right ring finger); (6) a red jewelry box in the victim's bedroom (later identified as Booker's left middle and ring fingers); and (7) the windowsill of the victim's bedroom (later identified as Booker's right palm print). (R. at 300–17.) An investigator made casts of three shoeprint impressions around the southeast bedroom window. (R. at 243–45, 248, 250–51.)

The next day, an officer encountered Booker around 1:30 to 2:00 p.m. (R. at 246, 261.) The officer's attention was drawn to Booker because of his thick, ankle-height, rubber-soled work shoes.[5] (R. at 247–48.) Booker's shoe pattern was similar to the pattern from the plaster casts. (R. at 248, 250–51.) At law enforcement's request, Booker voluntarily gave his fingerprints despite noting law enforcement already had them. (R. at 254–55, 263.) About six hours later, law enforcement placed Booker under arrest after determining his fingerprints matched those in the victim's apartment. (R. at 265–66.)

At the time, the FBI recommended nine points of similarity before declaring a fingerprint match. (R. at 316.) On one example, the fingerprint expert at Booker's trial testified there were "forty-two" points of similarity. (R. at 316.) On two others, there were thirty-eight and twenty-two. (R. at 317.) The fingerprint expert testified with "certainty in [his] mind that this Booker and no other person in the world is the

[5] This officer emphatically testified these were not tennis shoes. (R. at 248, 250–51.) He also later explained that the shoes Booker was arrested in were not the same ones he observed hours earlier. (R. at 345–46.) The arresting officer did not observe Booker's shoes. (R. at 266.)

one whose prints were found" in the victim's house. (R. at 317.)

In a post-*Miranda* interview, Booker "flatly denied" being in the victim's apartment or being near her bedroom window. (R. at 276–77.) In response to a question about whether he killed the victim, Booker replied, "God, damn right. God, damn right he did" and "He did it, God damn, he did it." (R. at 282–83, 287.) Booker was coherent when he made these statements but called himself "Steve" and claimed to be a demon named Aniel. (R. at 283.) Any time law enforcement tried to seriously question Booker "he would elicit or appear to elicit the Aniel figure." (R. at 290–93.) According to the interviewing officer, the Aniel phenomenon was "controlled on" Booker's "part," and appeared only when Booker was confronted with incriminating evidence. (R. at 290–93.) "His switch from Aniel back to Stephen Todd Booker would depend on what questions you asked." (R. at 294.) Booker appeared highly intelligent to the interviewing officer. (R. at 294.)

An FBI hair expert also testified at Booker's trial. The expert testified in part while holding "glass microscope slides" containing hair from the victim's bedspread. (R. at 335.) The slides were "prepared during the course of the examinations" the expert performed. (R. at 333.) The expert testified he conducted a "detailed microscopic comparison" of the "individual identifying characteristics" and compared the sample with a known hair sample. (R. at 336.) This analysis was done by mounting glass microscope slides with samples onto a microscope and comparing them simultaneously. (R. at 335–37.)

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

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

(R. at 337) (emphasis added).

In the expert's opinion, the hair on the victim's bed "either originated from Mr. Booker or some individual of the black race whose pubic hairs exhibited the same range of microscopic characteristics." (R. at 337.) Hair from the victim's pantyhose exhibited "Negroid characteristics and was exactly the same individual as Exhibit 44." (R. at 338.) When the State pressed the expert to quantify his findings, the expert testified: "I can't give you an exact numerical probability or certainty. It is -- I would consider it *possible* that the hair originated from the person represented by the same purported to be" Booker. (R. at 339) (emphasis added). Regarding two hairs by the victim's bed, the expert testified he performed the same tests and with one hair his findings were the same as previous: the first hair possibly originated from Booker. (R. at 339–41.) The other hair "could have" originated from Booker, but the expert was less certain. (R. at 341.) The expert testified that while hair analysis cannot positively identify a person, it can exclude with a high degree of certainty. (R. at 341.)

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

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

Booker put on witnesses to bolster his insanity defense. (R. at 346.) The first was the court-appointed psychiatrist, who testified there were records from five years before trial indicating Booker suffered from paranoid schizophrenia and an organic brain syndrome. (R. at 349–50.) The psychiatrist could not say whether Booker could "appreciate the quality of his acts or that his acts were wrong" on the date of the victim's murder. (R. at 350–51.) The psychiatrist testified that his review suggested the "Aniel" persona was a "self-serving phenomenon from" Booker. (R. at 359.)

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

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

A: Again, I am not sure I can say entirely. I think a good part of it is a role playing or an assumption of a role.

Q: All right. Did you find evidence or signs or suggestions that this Aniel character may have been a self-serving phenomenon on the part of the defendant?

A: There are certainly indications that that is true.

(R. at 365.)

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

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

Match. The pubic combings of the deceased.

And so this sounds crude and harsh because here is a lady who has lived 94 years who has lived through peace, depression, wars, things that kill you; and she made it through all of that, almost a century, now is dead. And we talk about things like pubic hair. It is necessary to prove to you this man did what we charge.

Her body was taken to the autopsy suite and these things had to be done to prove this case. Pubic combings were taken from the pubic area and sent to the FBI to match that with the known samples of this defendant. What does it say? Match. Then to prove how good it is, we got the defendant's socks and sent them on a hunch to the FBI. And hairs taken from those compared with the pubic hairs of [the victim]. And what do you get there? You get a match.

Not only have we shown you that the defendant's pubic hairs are found in the property and person of the defendant -- excuse me, of the deceased, but some of her pubic hairs are found in his property, the socks match.

(R. at 375, 383–84) (emphasis added).

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

Then we presented to you this man. *One thing is proof positive beyond every other person in the united world, fingerprints. They don't lie. They are not mistaken. They are not like witnesses. Circumstantial evidence, but the best evidence in the world. Can't be mistaken; no two alike. What do we show*?

First of all you have predicate of the defendant's own admission that he had never been in the house before, never been in the window. The evidence shows that the entrance was through the southeast bedroom window. And there is evidence that this occurred during the burglary; *that's positive because it is important to show you that the fingerprints got there at that time, not another time. He has never been there before. That's the only time he has been there, during the commission of the crime.*

Where do they find them? *Inside the bedroom door closet, match. They get two sets of those inside the bedroom closet door. Prints under a*

Christmas box, match. Prints on the jewelry box match the defendant. Prints on the victim's bedroom door frame match the defendant's. Four separate prints on the window sills on the bottom and inside where you would crawl in, you know matched the defendant's.

How well do they match them? Well, you heard George Johnson, the expert, tell you that the FBI usually requires nine before they would be willing to go to Court. *That's to the exclusion of every other man. Just from the three charts that he had prepared and we showed you one of them. That one had 48 points of similarity! Not nine, 48! Somebody ought to put that on a wall, it's like a picture. Thirty-three on one, and 27 on the other. I didn't go further. I thought that was sufficient.*

(R. at 385–86) (emphases added).

Regarding Booker's confession, the State argued:

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

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

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

. . . .

Aniel is a self-serving phenomenon of this defendant. Aniel is the escape that he takes from his conscience. Aniel is his runaway. Aniel

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

Somebody's got to do it. It's the runaway. It's letting the other guy say I did it, not me. That's too much of an admission. I can't take that much.

(R. at 386–87, 390) (emphasis added).

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

The other thing is shoes. One of the most alert people in this case was Pete Fancher. This is the police officer on the scene. He saw the shoe prints outside. Remember that he told you that this was unusual. This is right outside the window. He saw the prints on the bottom.

. . . .

[Booker] looked different because he was not hippish or drunkish or whatever the crowd was there. Then when [Fancher] looked at [Booker's] shoes he really got the idea that in his opinion that shoe looked like this.

Mr. Fancher is not Superman. He didn't say that shoe is that print. But what he is telling you is that this is unusual enough that when he looked at the defendant's shoes, he could recall it; not because he has a super memory, but because of the unusualness of the thing. He has seen it like work shoes. And the shoes Booker had on that day were brown and like work shoes. They were not tennis shoes. And you remember I asked him that. "Are these the shoes that he had on?" "No."

Okay. At 1:00 o'clock or 1:30 on the 10th, the day after the killing, Fancher stopped Booker and Booker was wearing those shoes. Booker then knew that the police were looking at shoes; and as soon as they dropped him back off at the Flagler Inn on the streets after they were through fingerprinting him, what did Mr. Booker do? Mr. Booker got rid of the shoes. How do I know that? He was picked up at 8:00 o'clock. And

> from 8:00 o'clock until he was put in jail he didn't go anywhere except with the police. When he got to the jail, they took his shoes off. And those are the shoes that they took off of him.
>
> So I know! You know that between 2:00 and 8:00 that man got rid of incriminating evidence.

(R. at 391–92.)

Decades later, as part of the postconviction challenge below:

> 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.

Booker v. State, 336 So. 3d 1177, 1180 (Fla. 2022). Booker filed a successive postconviction motion arguing the State violated *Brady* by failing to turn the hair expert's notes over to the defense. *Id.*

Decision Below

The postconviction court rejected Booker's claim. The court "found that" the hair expert "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." *Id.* The court also found that the notes were not favorable to Booker and he suffered no prejudice from any failure to disclose them. *Id.* at 1180 n.2.

The Florida Supreme Court affirmed the postconviction court's decision to deny Booker's *Brady* claim without an evidentiary hearing. It explained:

> As a threshold matter, there is no *Brady* violation where the information is equally accessible to the defense and the prosecution."

> 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).

Id. at 1801. Further, as a matter of Florida law, the "right to examine the items a witness uses to refresh his recollection existed at the time of Booker's original trial." *Id.* at 1801 n.4.

Booker timely filed his petition for certiorari seeking review of the Florida Supreme Court's decision on July 1, 2022.

This is the State's Brief in Opposition.

REASONS FOR DENYING THE WRIT

Stephen Todd Booker seeks certiorari review of the Florida Supreme Court's decision rejecting his successive postconviction claim that the State violated due process under this Court's decision in *Brady*. He asks this Court to decide whether a lack of diligence and equal access defeat a *Brady* claim.

Thought it is true that state courts and circuit courts are split on that issue, this forty-year-old murder case is a very poor vehicle to address the split for two reasons. First, Booker's claim conclusively fails *Brady*'s materiality prong regardless of diligence, and Florida law imposes an independent diligence requirement for successive claims raised as late as Booker's. Questions about whether diligence defeats a *Brady* claim are therefore purely academic in this case and should be deferred for a more appropriate vehicle. *See Rice v. Sioux City Mem'l Park Cemetery*,

349 U.S. 70, 74 (1955) (certiorari should not be granted when the "intellectually interesting and solid problem" is only "academic"). Second, Booker has entirely failed to address whether the answer to his academic *Brady* question would apply to his case, and the answer is probably no. Although more a merits' argument, the State of Florida briefly also notes its agreement with the courts that have held a lack of diligence can defeat a *Brady* claim.

A. The Hair Expert's Notes Were Not Material and Florida Law Imposes an Independent Diligence Requirement for Successive Postconviction Claims Like Booker's.

This Court should deny review because, whatever the academic answer to Booker's question, he will not obtain relief. The hair expert's notes were not material under any definition of the phrase and Booker's sixth successive motion was untimely under independent/adequate Florida law.

Brady's third prong (prejudice/materiality) requires the defendant to show "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Turner v. United States*, 137 S. Ct. 1885, 1893, (2017). The critical inquiry is whether the suppressed evidence undermines confidence in the trial's outcome. *Id.* Evidence that is "too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards" is not material. *Id.* at 1894. Failure to show materiality defeats a *Brady* claim regardless of the favorable evidence and suppression prongs. *Id.* at 1893 (holding the defendant was entitled to a new trial only if he established materiality).

Booker's *Brady* claim conclusively fails the materiality prong. Evidence of the

FBI expert's notes is simply too little, too weak, and too distant from the main evidentiary points to show prejudice in this case. Booker reproduced the notes in one of his attachments along with his expert's conclusion that the notes:

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

(R. at 165–66.)

In other words, the expert did not notate every step of his analysis in his notes and only wrote his conclusions. But the expert testified at trial that he did microscopically examine the hairs. At best, this "impeachment" would have permitted counsel to argue that since the expert did not notate every step of his analysis the jury should disregard his testimony. The notes are not evidence that no microscopic analysis was performed, nor are they inconsistent with the expert's testimony in any way. They simply indicate he did not notate everything he did.

This minor "impeachment" evidence becomes even weaker when evaluating the rest of the trial evidence. Eleven of Booker's prints were found in about six different locations in the victim's house. (R. at 300–17.) There were "forty-two" points of similarity on one print, vastly more than the FBI recommended amount. (R. at 316.) And the fingerprint expert testified with "certainty in [his] mind that [Booker] and no other person in the world is the one whose prints were found" in the victim's house. (R. at 317.) As the State argued in closing: "One thing is proof positive beyond every other person in the united world, fingerprints." (R. at 385.) This was the "best

evidence in the world" because fingerprints "don't lie. They are not mistaken. They are not like witnesses." (R. at 385.) The State highlighted the importance of the fingerprints because Booker claimed he had never been in the victim's house. (R. at 385.) But his fingerprints proved that was a lie. The State also highlighted Booker's unique shoeprint as seen by one witness, his confessions, and argued Aniel was a self-serving persona that permitted Booker to unburden his conscious by confessing. (R. at 386–87, 390–92.)

The question before this Court on this prong is rather simple: is there a reasonable probability that a jury would have acquitted Booker if counsel had cross-examined the expert and pointed out he failed to notate everything he was testifying to? Considering the expert's testimony, Booker's prints in the victim's home, Booker's protestations that he had never been in the victim's house, later confessions, and unique shoeprint, there is no such probability. There is no reasonable argument that the lack of this minor impeachment evidence prejudiced Booker in view of the overwhelming evidence against him. Since, inarguably, Booker was not prejudiced, this Court should defer answering questions about the interplay between *Brady* and diligence to another case where it will actually make a difference. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari should not be granted when the "intellectually interesting and solid problem" is only "academic").

A holding that diligence is irrelevant to *Brady* will not aid Booker for another reason: his claim is untimely as a matter of *Florida* law independent from federal law. *See Hunter v. State*, 29 So. 3d 256, 267 (Fla. 2008) ("Rule 3.851 requires motions

filed beyond the time limitations to specifically allege that the facts on which the claim is predicated were unknown or could not have been ascertained by the exercise of due diligence. Fla. R. Crim. P. 3.851(d)(2)(A).") Obviously, as the Florida Supreme Court recognized for its federal law analysis, Booker could have obtained the expert's alleged *Brady* notes forty years ago and did not, meaning his successive *Brady* claim is clearly and excessively untimely under Florida law. Even if this Court grants certiorari, finds diligence is irrelevant to *Brady*, and remands, the Florida Supreme Court will almost certainly still affirm as a matter of state law.

Since Booker will obtain no relief due to a lack of materiality and clear state law barring his claim, this Court should not grant certiorari to resolve questions about the interplay between *Brady* and diligence in this case.

B. Booker has Failed to Address the Retroactivity of Any Ruling on *Brady* and Diligence to His Case.

Although Booker has raised an academically interesting question, he has failed to address whether the answer would even apply to him under this Court's retroactivity precedents. This failure, along with the fact that any holding would not likely apply to Booker, counsels against granting certiorari in his case.

Whether a ruling from this Court answering the question presented applies to Booker's case requires this Court to determine retroactivity by analyzing three questions: (1) when did Booker's conviction become final? (2) Is the rule this Court announces actually new when viewed from the legal landscape existing when the conviction became final? And (3) does the new rule fall within a nonretroactivity exception? *See Beard v. Banks*, 542 U.S. 406, 411 (2004).

Booker has failed to discuss any of these questions, and that is reason enough to pick another case to decide the question he presents. *See N.C.P. Mktg. Grp., Inc. v. BG Star Prods., Inc.*, 556 U.S. 1145, (2009) (Kennedy, J., respecting denial of writ of cert.) (explaining that certiorari was properly denied because answering the question presented would have required the Court to answer "antecedent questions under state law and trademark-protection principles"); *McDonough v. Smith*, 139 S. Ct. 2149, 2161-62 (2019) (Thomas, J., dissenting) (arguing that the Court should have dismissed the writ of certiorari as improvidently granted because it assumed away key antecedent questions); *see also Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must" determine retroactivity "before considering the merits of the claim."); *Graham v. Collins*, 506 U.S. 461, 477 (1993) (refusing to reach the merits when the petitioner asked for a new rule to be applied to his case on habeas review because any decision would not have been retroactive).

Additionally, the answers to these questions are either not straightforward or cut against retroactivity. Normally, determining the date a state conviction is "final poses no difficulties." *Beard*, 542 U.S. at 411. State convictions are normally final, for retroactivity purposes, when a state direct appeal is over and a petition for certiorari has either been decided or the time to file has elapsed. *Id.*

Unfortunately, in Booker's case, that normally easy analysis is complicated. This Court denied Booker's post-direct-appeal certiorari petition in 1981. *Booker v. Florida*, 454 U.S. 957 (1981). But later, the Eleventh Circuit vacated Booker's

sentence while leaving his conviction intact. *Booker v. Dugger*, 922 F.2d 633, 636 (11th Cir. 1991). Booker's sentence became final in 2001. *Booker v. Florida*, 532 U.S. 1033, 1033 (2001) (denying petition for certiorari review). Since Booker's *Brady* claim challenges guilt-phase evidence, and deals with the State's *Brady* obligation back in the late 1970s, an argument could be made that the appropriate date for a retroactivity analysis is either 1981 or 2001.

This difference may matter when analyzing the second retroactivity question. In 1999, this Court stated it was an open question whether diligence matters for *Brady*. *Strickler v. Greene*, 527 U.S. 263, 288 n.33 (1999) ("We do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them."). At least as of 1999, the answer to the second question is clearly that settled law did not compel any answer to the question of whether diligence is relevant to *Brady*.[6] Since (calculating finality by the 2001 date) *Greene* appears to be this Court's last word on diligence and *Brady* before Booker's conviction and sentence became final, the answer to this second retroactivity question seems to cut against Booker. A rule that diligence is irrelevant to *Brady* is indeed new for Booker.

The final retroactivity question also indicates that any future holding that diligence is irrelevant to *Brady* would not apply to Booker. The only nonretroactivity

[6] *Banks v. Dretke* is, therefore, irrelevant to a retroactivity analysis since that case was decided in 2004. 540 U.S. 668, 696 (2004).

exception[7] applicable to Booker's question applies if this Court's new answer forbids punishment of certain conduct or prohibits a category of punishment on a class of defendants. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1555–62 & n.3 (2021) (eliminating the watershed procedural rule exception to retroactivity and recognizing substantive rules are automatically retroactive). A holding that diligence is irrelevant to *Brady* does neither. Therefore, most likely, the answer to Booker's question presented will not apply to him.

Retroactivity bars are designed to protect the State's interest in finality. *See Beard*, 542 U.S. at 413. Such bars are designed to ensure the State is not continually forced to marshal its resources to keep in prison defendants whose proceedings were constitutionally acceptable under the standards existing at the time. *Id.* These interests are particularly acute in a case like this one, where the State has been marshaling resources for over forty years. *Id.* Retrial may not be available due to "lost evidence, faulty memory, or missing witnesses." *Edwards*, 141 S. Ct. at 1554 (cleaned up). In short, respect for the State's resources and decades of finality also counsel against taking this case in light of the retroactivity question here.

This Court should deny certiorari and forgo consideration of the question presented for a more appropriate case. Booker has assumed away an important antecedent question regarding retroactivity and the likely answer means he will obtain no relief regardless of this Court's resolution on his question presented.

[7] This Court has recognized that this is not really an exception, but a substantive rule that does not need to go through a retroactivity analysis. *Beard*, 542 U.S. at 411 n.3.

Perhaps more importantly, this Court will not be short of better vehicles if/when it decides to wrestle with the relevance of a defendant's diligence to *Brady*. *See, e.g.*, *United States v. Edwards*, 34 F.4th 570, 587 (7th Cir. 2022) (rejecting a *Brady* claim because a defendant failed to exercise reasonable diligence despite agreeing with the defendant that the report should have been turned over); *United States v. Blankenship*, 19 F.4th 685, 694 (4th Cir. 2021) (When "assessing the defendant's role in preparing his defense, he should not be allowed to turn a willfully blind eye to available evidence and thus set up a *Brady* claim for a new trial."), *petition for certiorari docketed, Blankenship v. United States*, No. 21-1428 (May 9, 2022).[8] This Court could also avoid retroactivity issues entirely by granting review on a direct review *Brady* claim. *Cf. United States v. Sedaghaty*, 728 F.3d 885, 897–903 (9th Cir. 2013) (granting relief on a direct-appeal *Brady* claim raised in a motion for new trial); *Lugo v. State*, 845 So. 2d 74, 84, 92, 104–106 (Fla. 2003) (rejecting two direct-appeal *Brady* claims). For all these reasons, this Court should deny certiorari in this over forty-year-old case.

C. A Defendant's Lack of Diligence May Defeat a *Brady* Claim.

Although this is a Brief in Opposition to Certiorari rather than a merits brief,

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[8] The question presented by Blankenship is:

> Whether, to establish a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a defendant must show that he could not have obtained the suppressed, exculpatory evidence through his own independent efforts of "self-help" or "due diligence" as the Fourth Circuit and five other circuits have held, or whether the defendant's failure to uncover the evidence independently is irrelevant, as the remaining six courts of appeals have held.

The United States' Brief in Opposition to Certiorari is due August 8, 2022.

the State of Florida notes its agreement with the six circuits that have held a defendant's lack of diligence or failure to use self-help may defeat a *Brady* claim. *See United States v. Therrien*, 847 F.3d 9, 16 (1st Cir. 2017) ("[E]vidence is not suppressed if the defendant either knew, or should have known of the essential facts permitting him to take advantage of" the evidence.); *United States v. Blankenship*, 19 F.4th 685, 694 (4th Cir. 2021) (When "assessing the defendant's role in preparing his defense, he should not be allowed to turn a willfully blind eye to available evidence and thus set up a *Brady* claim for a new trial."); *Guidry v. Lumpkin*, 2 F.4th 472, 487–88 (5th Cir. 2021) (holding a *Brady* claim failed because the underlying evidence was discoverable through reasonable diligence), *cert. denied*, 142 S. Ct. 1212 (2022); *Camm v. Faith*, 937 F.3d 1096, 1108 (7th Cir. 2019) (Evidence is suppressed only if it "was not otherwise available to the defendant through the exercise of reasonable diligence."); *United States v. Anwar*, 880 F.3d 958, 969 (8th Cir. 2018) ("[T]he government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels"); *United States v. Stein*, 846 F.3d 1135, 1146 (11th Cir. 2017) ("[T]he government is not obliged under *Brady* to furnish a defendant with information which . . . with any reasonable diligence, he can obtain himself.").

This rule is dispositive of Booker's *Brady* claim. The hair expert stated out loud during Booker's trial that he was using his notes to refresh his recollection. (R. at 342) ("*Excuse me. I had to review my notes a little bit to refresh my memory.*") (Emphasis added.) At that point, under Florida law existing at the time of Booker's

trial, he could have obtained them. *Booker v. State*, 336 So. 3d 1177, 1181 & n.4 (Fla. 2022). Booker and his counsel were actually aware of the notes during his trial and have failed to pursue this issue for over forty years. Booker's failure to exercise the most basic self-help available to him should be considered in determining whether the State "suppressed" evidence that Booker was actually aware of and could have obtained. *Blankenship*, 19 F.4th at 694 (When "assessing the defendant's role in preparing his defense, he should not be allowed to turn a willfully blind eye to available evidence and thus set up a *Brady* claim for a new trial."). The Florida Supreme Court correctly decided Booker's sixth successive challenge to his over-forty-year-old conviction. This Court should decline to review this case.[9]

[9] This Court has repeatedly recognized the importance of finality in criminal cases and capital cases in particular. Imposing a reasonable diligence requirement would promote finality and prevent the defense from engaging in gamesmanship. *Bucklew v.Precythe*, 139 S.Ct. 1112, 1134 (2019) (stating that federal courts can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion).

CONCLUSION

The Florida Supreme Court's decision below does not present any conflict with any decision of this Court. And while an unsettled, important question of federal law is involved, this case is a poor vehicle to answer it. Therefore, the Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Florida Bar No. 158541
Counsel of Record

Jason William Rodriguez
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT