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

REPLY BRIEF FOR PETITIONER

THIS IS A CAPITAL CASE

LINDA McDERMOTT
Counsel of Record
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
(850) 942-8818
linda_mcdermott@fd.org

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ARGUMENT

This Court should grant certiorari. In his initial brief, Mr. Booker showed the importance of granting certiorari to resolve the issues permeating the lower state and federal courts regarding whether *Brady v. Maryland*, 373 U.S. 83 (1963), requires the defense to act diligently. Interestingly, in Respondent's second paragraph addressing why this Court should deny certiorari, Respondent concedes that both the state and federal courts are split on this issue. Respondent's Brief in Opposition ("BIO") at 13. Nonetheless, Respondent advances several reasons for why, despite the circuit split, this Court should still deny relief. Mr. Booker addresses each main reason.[1]

I. Respondent inaccurately asserts that state law precludes relief.

A. Under state law, Mr. Booker's claim is not untimely.

State law does not preclude relief. Pursuant to Florida Rule of Criminal Procedure 3.851(d), a petitioner must file a motion for postconviction relief within one year of the sentence becoming final, unless:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2).

[1] Mr. Booker will not substantively address Respondent's contention that Florida agrees with the circuits imposing defense diligence simply because Respondent acknowledges this is better argued at the merits, rather than the certiorari, stage. BIO at 21.

Respondent, homing in on subsection (A), contends that state law bars Mr. Booker from ever obtaining relief because "Booker could have obtained the expert's alleged *Brady* notes over forty years ago and did not . . . ." BIO at 17. First, Respondent's argument simply assigns a diligence requirement to Mr. Booker and alleviates all of the responsibility from the State to disclose favorable evidence. This is the very issue before the Court.

Moreover, Respondent ignores that the Florida Supreme Court has at times not taken such a stringent position. For instance, in *Wyatt v. State*, the Florida Supreme Court addressed a similar procedural argument in the context of a newly discovered evidence claim:

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

> constituted newly discovered evidence warranting a new trial, and, therefore, this claim is not time-barred.

71 So. 3d 86, 98–99 (Fla. 2011). The fact that the FBI refused to acknowledge the problem with microscopic analysis cannot defeat Mr. Booker's claim. Mr. Booker had no indication that he should request the notes or challenge the analysis until the FBI conceded that its examiners often exceeded the bound of science.

In Mr. Booker's case, despite the fact that his case should have been reviewed, it was not. Upon learning of the DOJ review, Mr. Booker took steps to obtain the relevant materials in his case and have a comprehensive review conducted. Certainly, the notion that the fault lies with Mr. Booker when it was clearly the responsibility of the state prosecutors to refer his case for review is simply an effort to erect another barrier to his claim — one that is characterized as diligence.

B. Even if Mr. Booker's claim is untimely under state law, this Court should nonetheless grant certiorari because the state law is not an adequate and independent state ground.

Under the unique facts that Mr. Booker presents, Rule 3.851 does not constitute an adequate and independent state ground divorced from federal law. Thus, this Court can and should grant certiorari.

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision.'" *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). A state procedural ground is not independent of federal law if resolution of the petitioner's state law claim depends on resolution of a federal claim

that was properly presented and addressed by the state court. *Nitro-Lift Techs, L.L.C. v. Howard*, 568 U.S. 17, 19–20 (2012) (noting that the Ohio Supreme Court's claim that its decision rested on independent and adequate state grounds was flawed "because the court's reliance on Oklahoma law was not 'independent'—it necessarily depended upon a rejection of the federal claim, which was both 'properly presented' and 'addressed by' the state court." (quoting *Howell v. Mississippi*, 543 U.S. 440, 443 (2005))). And "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Hathorn v. Lovorn*, 457 U.S. 255, 262–63 (1982) (citing *Barr v. City of Columbia*, 378 U. S. 146, 149 (1964)). In other words, "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Id.* at 263.

Rule 3.851 is not independent of federal law. Respondent's hypothetical scenario that on remand the Florida Supreme Court would reject Mr. Booker's *Brady* claim by relying on Rule 3.851 does not prevent relief because Mr. Booker already clearly and conspicuously presented his *Brady* claim to the state courts. *See Booker v. State*, 336 So. 3d 1177 (Fla. 2022), *reh'g denied*, No. SC21-763, 2022 WL 1042708 (Fla. Apr. 7, 2022).[2]

And Rule 3.851 is not adequate because the Florida Supreme Court has in several other cases considered a successive postconviction claim on the merits where facts and information surfaced after the initial postconviction proceedings. *See e.g.*,

[2] Cutting further against Respondent's position is the fact that the Florida Supreme Court already had an opportunity to deny Mr. Booker's *Brady* claim based on Rule 3.851 and did not do so, instead disposing of the claim due to lack of suppression. *Booker*, 336 So. 3d at 1181.

Wyatt, supra; *Johnson v. State*, 44 So. 3d 51 (Fla. 2010); *State v. Mills*, 788 So. 2d 249 (Fla. 2001).

II. Retroactivity does not present a bar to certiorari and relief because holding that *Brady* does not require defense diligence does not create new law.

A holding that *Brady* does not require defense diligence applies to Mr. Booker, and thus this Court can and should grant relief. Respondent contends this Court should find another vehicle to address the contours of *Brady* because Mr. Booker failed to address three questions she posits: "(1) when did Booker's conviction become final?[3] (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?"[4] BIO at 17. The answers counsel in favor of granting certiorari.

Granting certiorari does not require this Court to create new law, but rather involves explaining the contours of existing law. "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion) (citation omitted). "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became

[3] The only date that matters is that Mr. Booker's conviction became final decades after this Court decided *Brady*.

[4] Respondent takes this opportunity to give this Court public policy reasons to avoid certiorari, including that retroactivity bars protect the State's interest in finality by not forcing the State to continuously marshal its resources. BIO at 20. If granting certiorari runs afoul of the State's interest in finality, this is squarely on the State and not on Mr. Booker because all the State had to do to avoid this issue was not suppress the *Brady* material.

final." *Id.* (citation omitted). The *Teague* plurality illustrated how those standards applied to petitioner's claim that fairness in jury selection required proportional race representation: "[g]iven the strong language in *Taylor* and our statement in *Akins v. Texas* . . . that '[f]airness in [jury] selection has never been held to require proportional representation of races upon a jury,' application of the fair cross section requirement to the petit jury would be a new rule." *Id.*

Unlike petitioner's claim in *Teague*, Mr. Booker's claim does not break new ground or impose a new obligation on the states. Any new obligations to the states instead stem from those states, such as Florida, refusing to consistently abide by this Court's guidance. This Court has never signaled that *Brady* requires the defense to act diligently. Indeed, in *Brady* itself the petitioner Brady knew of the contents of the suppressed statements — that his companion Boblit had committed the murder. *Brady*, 373 U.S. at 84.

Brady represents a departure from the pure adversarial model that governs trials in the United States. In this limited circumstance, this Court has found it prudent to require the State to assist the defense, and this assistance does not depend on the defense's actions:

> By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done."

United States v. Bagley, 473 U.S. 667, 675 n.6 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Respondent makes too much of the fact that in *Strickler v. Greene*, 527 U.S. 263, 288 n.33 (1999), this Court said that it did "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." *See* BIO at 19 ("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*."). Respondent's position fails for two reasons.

First, the fact that this Court in *Strickler* did not address the precise question of diligence does not mean that addressing the question here would create new law. Reference to *Brady*'s progeny and a second constitutional right illustrate this point. Nowhere in *Bagley* or *Strickler* did this Court state that its explanations of the duties that *Brady* imposes on the State qualify as new law. But perhaps most instructive is *Kyles v. Whitley*, 514 U.S. 419 (1995). In *Kyles*, this Court stated that:

> The prosecution's *affirmative duty* to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland* . . . In *United States v. Agurs*, 427 U.S. 97 (1976), however, it became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation.
>
> ***
>
> In the third prominent case on the way to current *Brady* law, *United States v. Bagley*, 473 U.S. 667 (1985), the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, i.e., the "specific-request" and "general- or no-

request" situations.

Kyles, 514 U.S. at 432–33 (emphasis added). Under Respondent's construction of *Brady* jurisprudence, *Bagley* and *Agurs* would also constitute a break from *Brady* simply because they defined the contours of the State's duties to affirmatively disclose favorable evidence in a different way than *Brady* itself did. Such construction is inconsistent with this Court's language. Moreover, in addressing another constitutional right — ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) — this Court has never stated that defining the contours of what constitutes deficient performance involves the creation of new law. *See Rompilla v. Beard*, 545 U.S. 374, 381–82 (2005) (defense counsel has a duty to conduct an investigation into mitigation even if defendant is uncooperative); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (defense counsel has an "obligation to conduct a thorough investigation of the defendant's background").

Second, while the *Strickler* Court did not go as far as to explicitly say *Brady* does not require defense diligence, the language it used cuts against Respondent's position. The *Strickler* Court was clear in articulating that "[t]he presumption, well established by 'tradition and experience,' that prosecutors have fully 'discharged their official duties,' is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred." *Strickler*, 527 U.S. at 286–87 (quoting *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995)). Just like the presumption that prosecutors will fully discharge their official duties is

inconsistent with compelling defense counsel to assert prosecutorial error just based on mere suspicion, so is a rule that says that prosecutors violate *Brady* only if defense counsel is diligent.

A square holding that *Brady* does not require defense diligence does not create new law, and thus there are no retroactivity problems.

III. Agent Neil's notes are material.

Contrary to Respondent's suggestion, the notes are material. *See* BIO at 14–16. Materiality in the *Brady* context does not mean sufficiency of the evidence. *Kyles*, 514 U.S. at 434. Rather, all *Brady* requires is a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

Here, Mr. Booker can show that Agent Neil's notes, when viewed in the context of the whole trial, undermine confidence in the verdict. Respondent reframes the importance of the notes by claiming the only issue is that Agent Neil "did not notate every step of his analysis . . . and only wrote his conclusions." BIO at 15. Doing so allows Respondent to then claim that the notes would only serve as "minor 'impeachment' evidence." BIO at 15. Not so. As an initial matter, in the 1999 DOJ review of Agent Michael Malone, lack of documentation was a core critique of his reports. *Bogle v. State*, 288 So. 3d 1065, 1068 (Fla. 2019) ("That 1999 review found that the lab reports of Malone's work were not sufficiently documented to determine whether the work had been done in a scientifically reliable manner."). Despite the fact the federal government has deemed rectifying such errors so crucial to justice so

as to conduct nationwide case reviews, the State continues to dismiss these claims as "minor impeachment evidence."

Second, the State's theory at trial was that the hair evidence was extremely important. Contrary to Respondent's suggestion that there was substantial evidence against Mr. Booker, at trial the State conceded that the evidence against him was circumstantial (R. 757) and homed in on hair analysis. 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 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. 756–57 (emphasis added). Third, Mr. Beckert's report highlights the severe problems with Agent Neil's testimony, testimony that Mr. Booker could not meaningfully challenge because the State suppressed the notes.

The notes are material. Thus, granting certiorari would resolve more than a purely academic exercise.

Respectfully submitted,

/s/ Linda McDermott
LINDA MCDERMOTT
Counsel of Record
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
linda_mcdermott@fd.org

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 30th day of August, 2022.

/s/ Linda McDermott
LINDA MCDERMOTT
Counsel of Record