RECORD NO. 18-6980

In The
United States Court of Appeals
For The Fourth Circuit

RONNIE WALLACE LONG,

Petitioner – Appellant,

v.

ERIK A. HOOKS, Secretary, NC Dep't of Public Safety,

Respondent – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

BRIEF OF APPELLANT

Jaime T. Lau
Theresa A. Newman
DUKE UNIVERSITY SCHOOL OF LAW
210 Science Drive
Post Office Box 90360
Durham, North Carolina 27708
(919) 613-7764

Counsel for Appellant

G. Christopher Olson
ATTORNEY AT LAW
917 West Johnson Street
Raleigh, North Carolina 27605
(919) 624-3718

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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Signature: /s/ Jamie T. Lau Date: 08/17/2018

Counsel for: Ronnie Wallace Long

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Petitioner-Appellant, Ronnie Wallace Long, files this Opening Brief, pursuant to this Court's Order of August 8, 2018.

STATEMENT OF JURISDICTION

This is an appeal of a final judgment of the United States District Court for the Middle District of North Carolina, entered on July 9, 2018, granting Appellee-Respondent's Motion for Summary Judgment. The District Court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. Long filed a timely Notice of Appeal on August 7, 2018.

The District Court granted a Certificate of Appealability pursuant to Rule 11 of the Rules Governing Section 2254 Cases in United States District Courts. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF THE ISSUE

Whether the state court unreasonably applied Supreme Court precedent in concluding that the suppressed, exculpatory evidence, considered cumulatively, did not qualify as material.

STATEMENT OF THE CASE

Petitioner Ronnie Wallace Long has been incarcerated for more than 42 years for a rape he did not commit. Although many proceedings have been held in Long's case during his four-decade effort to prove his innocence, all of the proceedings have been tainted by the State's persistent suppression of favorable evidence. It is now established that the State withheld evidence from Long beginning when he was first arrested and charged in May 1976 until recent state court proceedings commenced in 2005.[1] In 2008, Long filed a Motion for Appropriate Relief ("MAR") in state court alleging that the evidence discovered after 2005 was withheld from him at trial in violation of his established constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963). J.A. 773. The 2008 MAR was based on a new disclosure, during the state court proceedings commencing in 2005, that certain State Bureau of Investigation ("SBI") forensic reports had been suppressed for nearly 29 years. The suppressed reports indicated the following: (1) Long was excluded as the source of hair found at the crime scene; (2) Long's hair was not present on the victim's clothes; (3) Long's clothing contained no traces of paint or fibers from the crime scene; and (4) partially burned

[1] The first hearing in the state court leading to the 2008 MAR filing and the state court order being reviewed in these habeas proceedings was a hearing related to Long's Motion for Discovery that was filed on April 20, 2005. J.A. 766.

matches recovered from the crime scene were different from matches found in the Long family car. J.A. 1454-74.

Long also learned that, because these SBI forensic reports failed to link him to the crime, a Concord Police Department ("CPD") investigator created a second summary report of evidence collected in the case. That report excluded information about testing the evidence listed above, with the evident goal of concealing that the items were transported to the SBI Lab and tested. *Compare* J.A. 1480-83, *with* 1484-85. Long was therefore prevented from using the earlier, favorable reports in his defense at trial. Finally, Long learned that the CPD had custody of biological evidence in the case, but in 2005 the CPD asserted that it could not find that evidence and had no record of what happened to it after it was received by a CPD sergeant in 1976. *See*, *e.g.*, J.A. 95-104 (showing CPD spent 25 man hours searching for sexual assault kit but did not find a kit or records related to its destruction).

The impact this suppressed evidence would have had on Long's trial is profound. It shows that a CPD investigator believed certain evidence collected at the scene and from Long himself was potentially significant in identifying the perpetrator, therefore the investigator collected it, transported it to the SBI in Raleigh, and had it tested. But when the tests either excluded Long as the source of the evidence or otherwise failed to link him to the crime, the CPD investigator

falsified a new report to conceal the collection and testing of the evidence and the results of the tests that were favorable to Long.

In its 2009 MAR Order, the state court unreasonably applied clearly established Supreme Court *Brady* precedent by concluding that Long had not established that the evidence had been suppressed, that it was favorable, or that it was material. J.A. 1347-61. On May 22, 2018, the Magistrate Judge agreed with Long that the 2009 MAR Order unreasonably applied clearly established Supreme Court precedent in concluding that the evidence was not suppressed or favorable to Long. J.A. 1670, 1678. Despite this conclusion, the Magistrate Judge found that the state court reasonably concluded that the suppressed, favorable evidence was immaterial and recommended granting Respondent's Motion for Summary Judgment. J.A. 1693-94 & 1702.

Pursuant to 28 U.S.C. § 636(b)(1)(C), on June 4, 2018, Long filed objections to the Magistrate Judge's finding that the 2009 MAR Order reasonably concluded that the suppressed, favorable evidence was immaterial and to his recommendation to grant Respondent's Motion for Summary Judgment. J.A. 1703. On July 9, 2018, the District Court adopted the Magistrate Judge's Recommendation and granted summary judgment to Respondent. J.A. 1724-25. Without elaboration, the District Court agreed that the evidence was suppressed and favorable, but it also deemed the state court's finding on materiality reasonable. *Id.* The District

Court granted a Certificate of Appealability pursuant to Rule 11 of the Rules Governing Section 2254 Proceedings for the United States District Courts. *Id.* On August 7, 2018, Long timely filed a Notice of Appeal. J.A. 1726.

STATEMENT OF FACTS

A. Long's Arrest and the CPD Investigation

On May 10, 1976, CPD investigators arrested Long alleging he committed first-degree sexual assault and burglary following an identification of Long by the victim fifteen days after she was assaulted. On May 11, 1976, CPD Detective Van Isenhour drove fifteen items of evidence to the SBI Crime Lab for forensic testing, including known standards of Long's hairs, clothes taken from Long, the victim's clothes, and samples collected from the crime scene.[2] J.A. 1451 at ¶ 6. Det. Isenhour asked that the evidence be tested to determine whether (1) Long's hair matched suspect hair found at the crime scene, (2) Long's hairs could be located on the victim's clothes, (3) trace evidence from the crime scene could be found on Long's black leather jacket or black gloves, (4) matches found at the crime scene

[2] The fifteen items examined by the SBI were (1) a green toboggan, (2) black gloves, (3) black leather jacket, (4) head hair from Long, (5) pubic hair from Long, (6) carpet fibers from den area of crime scene, (7) carpet fibers from hallway area of crime scene, (8) paint from crime scene, (9) hair found at crime scene, (10), pubic hair of victim, (11) matchbooks, (12) partially burned matches from crime scene, (13) clothes of victim worn at time of rape, (14) latent show print from crime scene, and (15) known shoe impressions from Long.

were the same as matches taken from the Long family car, and (5) a latent shoe print from the scene could be matched to Long's shoes. *See* J.A. 1456-58, 1465 (Request for Examination Forms). Det. Isenhour left the items at the SBI Lab and was notified on or about May 17, 1976, that the examinations were complete.[3] The examinations failed to connect Long to the crime scene, and the only result not harmful to the prosecution of Long was the conclusion that Long's shoes "could have made" the latent print collected at the scene but that there were "an insufficient number of distinct characteristics" to make any identification. J.A. 1464.

On May 12, 1976, Det. Isenhour detailed the work he had done in the case, including the items he submitted to the SBI Lab in a written summary report. J.A. 1480-83. The report included a list of all fifteen items transported to the Lab and the type of examinations requested. *Id.* At some later point, Det. Isenhour created a second summary report that is undated. J.A. 1484-85. In that report, he asserted that he only transported the latent shoe print and prints from Long's shoes to the SBI Lab. J.A. 1484. He described the other items of evidence collected during the investigation but did not note that he also took these items to the SBI Lab. *Id.* He

[3] The forensic examinations were completed by May 17, 1976, and two undated entries in the SBI Records request that Det. Isenhour be notified that results were complete and the evidence ready for pick up. J.A. 1457, 1468.

explicitly stated that he collected Long's clothes, but held them in his possession without mentioning that he had taken Long's clothes to the Lab earlier. *Id.*

The conclusions from SBI reports related to the items Det. Isenhour transported to the SBI Lab for examination but excluded from his undated summary report were as follows:

(1) Microscopic Hair Comparison ("SBI Hair Report"). A report prepared by SBI agent Glesne ("Glesne"), who conducted a microscopic comparison of sample head and pubic hair from Long with a suspect hair collected at the crime scene, concluded that the compared hairs were different. J.A. 1466. Glesne also reported that no hairs resembling those of Ronnie Long were found on the victim's clothing. *Id.*

(2) Trace Evidence Examination ("SBI Trace Report"). A report prepared by SBI agent Cone ("Cone") concluded that none of the clothing submitted for analysis (leather jacket, black gloves, and green toboggan) had any paint or fibers from the crime scene on them. J.A. 1454-55. Also, none of the partially burned matches found at the scene had "sufficient identifying characteristics" to indicate they came from the matchbooks recovered from Long's father's vehicle. *Id.* Cone's notes reveal that five matchbooks

> from the Long family car were compared with the matches from the crime scene. J.A. 1463. Four matchbooks were eliminated as possible origins for the burned matches because of a difference in color, and, although the fifth matchbook could not be excluded on that basis, Cone concluded the burned matches from the scene "*probably did not* originate from this matchbook." *Id.* (emphasis added).

A third SBI report concluded, as described above, that Long's shoes "could have made" the latent print collected at the scene but that there were "an insufficient number of distinct characteristics" to make any positive identification.[4] J.A. 1464.

A sexual assault evidence kit, which included a test tube containing vaginal swabs and secretions taken from the victim shortly after the rape, was turned over to CPD Sergeant Marshall Lee following the hospital examination. J.A. 1479. This sexual assault kit was not listed in either of Det. Isenhour's summary reports, and there is no record of what happened to it after it was received by the CPD, including whether any examination was conducted on evidence from the kit, or when it was destroyed or went missing. *See*, *e.g.*, J.A. 22 n. 7 (summary of representations made by State at 2005 discovery hearing) & 95-104 (transcript).

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[4] This brief refers to the three reports collectively as the "SBI Reports."

B. Defense Counsel Was Not Told the Evidence Had Been Taken to the SBI for Testing and that the CPD Received Biological Samples

Det. Isenhour's summary reports listing what items were taken to the SBI, the SBI Hair Report, and the SBI Trace Report were never disclosed to Long's trial counsel. J.A. 971-74, 1024-25, 1097, 1099, & 1126-27. His trial counsel was also never informed that the CPD had obtained a full sexual assault kit from the hospital, J.A. 968-69, 1035-36, 1101, 1103-04, and he (trial counsel) has testified that the State affirmatively denied that a sexual assault kit had been taken, J.A. 1036.

Assistant District Attorney ("ADA") Ronald Bowers, who prosecuted Long, testified at the 2008 MAR hearing that he did not recall seeing Det. Isenhour's summary reports or the suppressed SBI Reports before trial, and he believed they were not disclosed to the defense. J.A. 1145-46 & 1154-55. He further testified that, if he had known about them, the full SBI Reports would have been disclosed to the defense and he would not have permitted Det. Isenhour to testify falsely at trial as described below. JA 1145-46 & 1154-55. He also testified that he did not know about the fluid samples or pubic hair combings taken from the victim at the hospital, and, if he had known about them, he would have requested further testing. J.A. 1145, 1149 & 1152-53.

C. The State's Case at Trial

The State's case against Long relied almost entirely on the victim's testimony. The other State witnesses, including Det. Isenhour, painted a picture of a very limited forensic investigation, when in fact the forensic investigation was extensive. It is now known that Det. Isenhour's testimony about the forensics was patently false. There is no innocent or honest explanation for the actions taken by State actors. The only explanation is that they intended to mislead Long's counsel, as well as the judge and jury in his criminal trial.

The victim described a terrifying attack. She testified that her assailant threatened her with a knife, then beat and raped her. J.A. 134-35 & 141-44. She struggled, fought for her life, and scratched her assailant, J.A. 197, 239-40 & 245, and her assailant yelled, "Don't look at my face" and "kept pushing . . . [her] face to the side, holding . . . [her] face with his hand," J.A. 204. She also testified she was very frightened, so frightened that she "had no idea . . . [she]'d ever get out alive," J.A. 138-37 & 242, and, as soon as her assailant fled the scene, she ran to a neighbor's house and reported the rape, J.A. 145. The victim identified Long at trial, J.A. 146, and the defense attempted to attack her identification based on the fact that Long's appearance differed significantly from her pre-identification descriptions of the assailant, J.A. 248, 262-64, 368-75 & 549-50.

Dr. Lance Monroe, who examined the victim on the night of the attack, opined that the victim's injuries had been caused by "some sort of traumatic intercourse." J.A. 298-99. He also described a slide he had made containing semen and sperm he had collected during a pelvic examination of the victim. J.A. 296-97. He did not reveal that this slide and at least four other samples of bodily fluid collected from the victim were transferred to CPD custody. *See generally* J.A. 293-99. Dr. Monroe also testified that the victim's fingernails had been traumatized and "nearly bent backwards." J.A. 295.

Det. Isenhour testified that the only thing he brought to the SBI Lab was a latent shoe print and prints from Long's shoes for comparison, and that he remained with an SBI examiner while the examiner reviewed the latent shoe print. Those representations were categorically and demonstrably untrue.

Det. Isenhour testified as follows:

> Q. What did you then do for the remainder of the day of the 11th of May sir?
> A. I went to Raleigh, North Carolina, to the State Bureau of Investigation Lab. I had previously contacted a Special Agent that I would be enroute (sic) there.
> Q. Officer Isenhour, did you take any items with you when you went?
> A. I did.
> Q. What did you take?
> A. I took the pair of shoes which I received from Long in Kannapolis. I took two inked impressions, one of the left shoe and one of the right shoe which I had made on May

the tenth, and I took the latent lift, which I had lifted from the top of the banister column at [the victim's home].

. . .

A. I asked Mr. Mooney if he would make an examination of the latent lift, which I had lifted and compare it to known inked impressions of a pair of shoes which I had in my possession.
Q. What happened?
A. *He did examine the items in my presence at the State Bureau of Investigation Lab*.
Q. What then happened?
A. The items were further examined by another Special Agent in the Lab.
Q. Then what happened?
A. Then we talked about the findings of their examination, and I was told that I would receive a written report later as to what they had told me orally, and *I took the items with me and came back to Concord*.

J.A. 411-14 (emphasis added).

Det. Isenhour also testified that the clothes taken from Long never left his custody:

Q. What did you receive?
A. I received a black leather-type coat from Sgt. David Taylor. I received a green cloth toboggan from Sgt. Taylor, I received a pair of black gloves from Sgt. Taylor. I received a quantity of matchbooks from Sgt. Taylor.
Q. I hand you, now, sir, a leather jacket marked for identification as State's Exhibit Number Seven, and ask you if you can identify that sir?
A. I can.
Q. What is that?
A. It's the black jacket that I received from Sgt. David Taylor.
Q. Where has it been since you received it?
A. It's been in my custody and control.

J.A. 415.

Det. Isenhour did not mention the other items he submitted to the SBI, including Long's clothes that left his custody at the time they were transferred. The State also introduced as evidence the black leather jacket Long was wearing the day he was arrested, and a pair of black leather gloves and a green toboggan that were recovered from the car he drove to the police station the day he was arrested. J.A. 364-66 & 427-28. The State did not disclose that the SBI's examination of those items had failed to provide any link between Long and the victim or the crime scene.

Detective David Taylor testified that, contrary to the SBI Trace Report, the matches he took from the Long family car were of similar nature to burned matches found in the victim's home. J.A. 378. SBI agent Cone had concluded, however, that four of the five matchbooks collected were eliminated as possible origins for the burned matches in the victim's home because of a difference in color, and, although the fifth matchbook could not be excluded on that basis, the burned matches from the scene "*probably did not* originate from this matchbook." J.A. 1463 (emphasis added).

At closing, the State made the following arguments, relying on the victim's testimony and emphasizing the thoroughness of the forensic investigation:

- "Every word [the victim] uttered is fully and entirely corroborated by the evidence as was seen by the officers in her home . . . and the latent evidence found by the officers." J.A. 526-27.

- "[T]he man that made that footprint is the man that broke into her home." J.A. 532.

- The victim's "testimony is not only accurate, but totally consistent with every piece of physical evidence existent. Everything she says happened that is capable of being corroborated by physical evidence, corroboration, is so corroborated . . . . *Every piece of physical evidence* points unerringly to the fact that [the victim] told you exactly what happened that night unerringly." J.A. 536 (emphasis added).

D. The Defense Case at Trial

Long's trial counsel presented an alibi defense, calling several witnesses who testified that Long spent the afternoon and early evening planning a high school reunion party, J.A. 437-38, 442-43, 448-49, 455 & 504, and spent the later evening at home talking to his girlfriend and young son on the telephone, J.A. 464-69 & 475-79, and waiting for his father to return home with the family car, J.A. 474. Then, around 10:25 p.m., he and a friend drove to a party in Charlotte. J.A. 489 & 504. According to the victim's testimony and the CPD's response to her call, the crime occurred around 9:30 to 9:45 p.m., which is when Long's witnesses testified he was at home. J.A. 131, 166-67, 464-69 & 473-79.

Defense witnesses, including a witness who was intimate with Long after the party, also testified that they did not observe any scratches or injuries on Long or scratches on Long's leather jacket. J.A. 451 & 456. A witness also said that Long's black leather jacket, which the State presented as evidence against Long,

was popular attire for African American men at the time because of the movie *Shaft*. J.A. 458.

On both cross-examination and in their summations, Long's trial counsel challenged the accuracy of the victim's identification of Long. Among other things, they demonstrated the following: (1) the victim had little or no interaction with African Americans, J.A. 256-59 & 543-44; (2) she described the perpetrator as a "light skinned" or "yellow" black man, J.A. 248, but Long is black and dark skinned, *see* J.A. 117; (3) she said the toboggan concealed the assailant's face, J.A. 263 & 570; and (4) she said she recognized Long, in part, because he was wearing a leather jacket similar to the one she recalled the assailant wearing, J.A. 553-54. Finally, counsel established that, despite being in the courtroom with only a dozen black people, J.A. 154, the victim took more than an hour to identify Long, and identified him only when he was called to the bench by name, J.A. 253-55.

Finally, in closing argument, Long's trial counsel asked the jury to give no weight to the State's introduction of Long's black leather jacket or the black gloves and toboggan. Counsel argued that evidence should be disregarded because there was no link between it and the crime scene. Specifically, counsel argued that a visual inspection of Long's jacket and gloves revealed there was no white paint although the assailant allegedly shimmied up a white-painted surface to reach the second floor window. J.A. 539. Counsel also argued that the hair that could be

seen in the toboggan was light in color rather than black like Long's hair, J.A. 540, and that no blood was found on Long's clothing, J.A. 568. Asking the jury to make these inferences from its own inspection of the evidence was all Long's counsel could do without the withheld SBI Reports that demonstrated in stark and unequivocal terms that there was no connection between Long or his clothing and the victim or the crime scene.

E. Evidence from State Post-Conviction Proceedings

At the 2008 MAR hearing, Long's counsel presented the evidence discovered for the first time following Long's Motion for Discovery in 2005, nearly 30 years after Long was charged and convicted. This evidence included Det. Isenhour's summary reports, J.A. 1480-85, the SBI Hair and Trace Evidence Reports and their associated notes, J.A. 1454-74, and the victim's medical records, J.A. 1475-79.

At the hearing, several witnesses testified about the withheld evidence, including two SBI agents, an outside forensic expert, and Long's trial attorneys. Jennifer Remy, a senior hair analyst with the SBI, summarized Glesne's 1976 report, discovered in 2006, concerning the known samples of the victim's hair and pubic hair combings, a hair found at the crime scene, the suspect's pubic hair, and clothes worn by the victim at the time of the rape. J.A. 1179-87, 1193-97, 1201-02 (all cited pages are Remy's testimony) & 1540-43 (SBI letter on discovery of

reports). She testified that Glesne's analyses concluded that the hair "was different from the suspect's hair." J.A. 1195.

Retired SBI agent Rick Cone testified that an examination of Long's clothing failed to reveal the presence of any fibers or paint similar to items collected from the crime scene, and conceded that, in a violent rape such as the one in this case, "there was probably some transfer of material." J.A. 1250.

Jeffrey Hollifield, the owner and operator of a private forensic laboratory, testified that the absence of any hair, fiber, and paint on any possession of Long's was significant and probative. J.A. 1307 & 1328. He stated that, in a violent crime such as the instant one, it would be unlikely to find no trace evidence on any of the items submitted for analysis. J.A. 1281 & 1286. He also testified that, given there was white paint on the pole the assailant climbed to break into the house, one would expect to find traces of white paint on the assailant's clothing. J.A. 1304.

Long's trial counsel, James Fuller, testified that the undisclosed SBI Hair and Trace Reports would have been critical to the defense at the time of trial. J.A. 1035-36 & 1099-1100. He stated that the SBI Report showing no trace of fibers or paint from the crime scene on Long's clothes would have been "the most critical piece of evidence" for the defense:

> I think the test results on the jacket would have been absolute dynamite for a trial attorney who knew what he or she was doing back in 1976. And in fact it probably, it could well have been the most

> critical piece of evidence in the case, because without the test we tried to argue, and it's hard to argue when you don't have the test result.
>
> But here's the point. And again, you need to go back to a situation where the stress and the frustration you could cut with a butter knife. There is a real war going on down here, albeit in my view with two very good lawyers, there's a jury, and you get up there and you can say, the assailant, this other person, climbed up, it was either a banister or a drain pipe that was covered with whitewash in a black leather jacket and the lab tests show that there are no particles. Now, you can brush it off. You can run a vacuum cleaner over it. But the SBI lab would have found any particles of white paint and those would have pointed inextricably to Ronnie Long and they're not there and therefore they point even louder that it wasn't Ronnie Long.
>
> . . .
>
> Well, Ma'am, my question, and maybe I just didn't say it well, is my coming up with an argument is not nearly as important as my being able to say I'm in partnership with the SBI who tested this jacket and they couldn't find one iota of paint, and the reason is, not because I say so, but because they say so. It wasn't there. And if it wasn't there, he wasn't there.

J.A. 1111-12. He then explained the cumulative effect of the undisclosed SBI reports:

> Well, I would have pursued the reports we could get in hopes that they would tend to show his innocence that he maintained all along, and again, equally important, the studies, the tests that didn't show, those have both an individual and a cumulative effect. And I'm not talking in the aftermath of CSI. I'm talking about in the 70's. I got one test here that does not implicate you. Okay. I've got a second test that does not implicate you. And now the jury is paying attention. And now I've got a third test and a fourth test, and pretty soon it creates a snowball effect that you're not the defendant. And that's why I believe every one of those tests was critical.

J.A. 1099-1100.

Long's other trial counsel, Karl Adkins, testified that it would have been "critically important to have forensic evidence in a case where your prosecution is relying primarily, and almost exclusively in this case on eyewitness testimony, which at the time we knew was unreliable, but the scientific body of work confirming that theory, that legal theory of ours, had not been done." J.A 1027.

SUMMARY OF ARGUMENT

"There are three fundamental components to a *Brady* claim: (1) 'the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching'; (2) the 'evidence must have been suppressed by the State'; and (3) the evidence must be material to the defense . . . ." *Walker v. Kelly*, 589 F.3d 127, 137 (4th Cir. 2009) (quoting *Strickler v. Green*, 527 U.S. 263, 281-82 (1999)).

The Recommendation adopted by the District Court concluded that favorable evidence had been suppressed by the State, and that the state court's findings to the contrary were unreasonable in light of clearly established Supreme Court precedent. J.A. 1670 & 1678. Respondent did not object to the Recommendation's findings on suppression or favorability.

The Recommendation then concluded that the 2009 MAR Order "reasonably applied the Supreme Court's *Brady* jurisprudence in concluding that the evidence in question, considered cumulatively, did not qualify as material" and recommended that the District Court grant summary judgment to Respondent. J.A.

1693-94 & 1702. The District Court, in a two-page order without additional substantive analysis, adopted the Recommendation and granted summary judgment for Respondent. J.A. 1724. The grant of summary judgment is erroneous and contrary to law, as the state court decision clearly ignores established Supreme Court precedent. The District Court should be reversed and a writ issued for the following reasons:

1. Applying the Incorrect Materiality Standard. The 2009 MAR Order fails to follow clearly established Supreme Court precedent on assessing materiality in at least three ways. First, given the state court's unreasonable findings that the evidence was not suppressed or favorable, as a matter of logic, it could not have reasonably applied the third prong of the Supreme Court's *Brady* precedent, which requires a reasonable understanding of the evidence's value in order to assess its materiality. Second, the state court applied the incorrect materiality standard, as it required Long to show "that the result likely would have been different with the claimed evidence," J.A. 1359 ¶ 17, when the clearly established standard is "*not whether the defendant would more likely than not have received a different verdict with the evidence*, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (emphasis added). Third, the state court failed to consider the cumulative effect of *all* of the suppressed

evidence as required, including the impact that false testimony by law enforcement officers would have on the proceedings and the impact that the concealed forensic reports would have had on the state's case presented at trial. *See Kyles*, 514 U.S. at 454 (evaluating materiality requires cumulative assessment of the suppressed evidence and all the possible findings precluded by the failure to disclose the evidence).

2. Constitutionally Required *Brady* Materiality Assessment. Applying the correct *Brady* materiality standard, which includes the consideration of the ways in which the withheld evidence cumulatively affected the trial, undeniably demonstrates the evidence's materiality. First, the CPD's withholding of the reports not only prevented the jury from knowing that the forensic tests failed to connect Long to the crime, it also prevented the jury from knowing that the testimony of the law enforcement officers about the suppressed evidence was untrue. It's an entirely different case if the jury knew that law enforcement officers proffered intentionally false testimony. The evidence would have undermined the quality of the investigation and the integrity of the investigation and the officers involved. Second, the withheld reports excluding Long cast doubt on the victim's identification, and, if the reports had been disclosed, jurors could have reasonably questioned the reliability of the identification given the involved officers' extensive efforts to connect Long to the scene and to conceal the efforts when they

proved futile. If there was no risk to disclosing the reports, why did investigators conceal them and then testify falsely at Long's trial? And, if the withheld evidence is not material, why did the prosecutor emphasize the strong corroborative effect of the physical evidence in the case, an argument now known to be false and misleading. Third, the state's case against Long was weak. It relied entirely on the victim's identification, which, even in the best of circumstances, can be unreliable, and, here, included nearly every factor known to diminish an identification's reliability.

When these three factors are considered together, it is without question that the CPD's withholding of evidence in Long's case undermined the fairness of his trial and resulted in a verdict unworthy of confidence.

3. The Recommendation's Erroneous Assessment. The Recommendation's own assessment of materiality also falls far short of what is required by Supreme Court precedent, as it conducts an explicitly rejected sufficiency of evidence test rather than the required cumulative assessment. It also fails to consider the full effect of the suppressed evidence on Long's case.

ARGUMENT

I. THE STATE COURT UNREASONABLY APPLIED CLEARLY ESTABLISHED SUPREME COURT PRECEDENT IN CONCLUDING THAT THE SUPPRESSED, FAVORABLE EVIDENCE WAS IMMATERIAL.

Suppressed, favorable evidence is material where there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). A "'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id*. In evaluating materiality, the court should consider the cumulative effect of all of the suppressed evidence, *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995), not only upon the jury, but also upon defense counsel's preparation or presentation of the defense's case, *Bagley*, 473 U.S. at 683. While it is the defendant's burden to establish a "reasonable probability" of a different outcome, the proof required is less than a preponderance of evidence. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

A. Standard of Review

This Court reviews *de novo* the District Court's conclusion that the state MAR court reasonably applied clearly established Supreme Court precedent when

it deemed the suppressed, favorable evidence immaterial. *See Barnes v. Joyner*, 751 F.3d 229, 237-38 (4th Cir. 2014) ("We review de novo the district court's application of the standards of 28 U.S.C. § 2254(d) to the findings and conclusions of the MAR court.") (quoting *McNeill v. Polk*, 476 F.3d 206, 210 (4th Cir. 2007)). Under 28 U.S.C. § 2254(d)(1), a writ can be granted where the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law. A state court decision is contrary to, or involves an unreasonable application of federal law, if it applies a rule that contradicts the governing law established by Supreme Court precedent or if it "identifies the correct governing legal rule . . . but unreasonably applies it to the facts." *Williams v. Taylor*, 529 U.S. 362, 405-07 (2000). A habeas petitioner clears AEDPA's hurdle in § 2254(d) if the state court's application of federal law was "objectively unreasonable." *Id*. at 409; *accord Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

B. Given the State Court's Finding That the Evidence Was Not Favorable or Suppressed, the Court Could Not Have Reasonably Applied Established Supreme Court Precedent in Assessing the Evidence's Materiality.

The assessment of materiality is inextricably linked to an accurate understanding of the suppressed evidence's value. It requires a court to consider the totality of the evidence and all the ways the suppressed evidence, considered cumulatively, could have affected the jury and defense counsel's preparation or presentation of the defense's case. *Bagley*, 473 U.S. at 683.

The record here shows that the materiality assessment required by established precedent did not take place. The state court unreasonably concluded that the SBI Reports and biological evidence from the sexual assault kit were neither suppressed nor favorable, which indicates that it had no understanding of the value of the evidence and therefore deemed it immaterial. *See* J.A. 1670 & 1678 (Recommendation finding that state court unreasonably determined the evidence was neither suppressed nor favorable). The state court also failed to consider the impeachment value of the suppressed evidence. J.A. 1669-70; *see Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (nondisclosure of evidence affecting credibility falls within *Brady*).

The Recommendation excused the state court's unreasonable application of Supreme Court precedent on suppression and favorability by concluding that the materiality assessment was reasonable because it found "no chance of a different outcome existed." J.A. 1680 (emphasis in original). The state court's conclusion was the necessary result of the court's misunderstanding of the evidence's value, however, not a reasonable application of clearly established *Brady* law. When a court unreasonably concludes that suppressed evidence has no value, and fails to even consider its impeachment value, it cannot then reasonably apply Supreme Court precedent regarding materiality, as the court is blind to the effects of the suppressed evidence on the trial. Moreover, as described further below, the state

court's conclusion on materiality is not only severely flawed by its accompanying unreasonable determinations on suppression and favorability, but is also undercut by the court's use of the incorrect standard for materiality under clearly established law.

C. The State Court Applied the Incorrect Standard in Assessing the Materiality of the Suppressed, Favorable Evidence in Contravention of Clearly Established Supreme Court Precedent.

The state court ruled that Long failed to prove "by a preponderance of evidence that the claimed evidence was withheld by the state, that it was exculpatory, or that the result likely would have been different with the claimed evidence." J.A. 1359 ¶ 17. It repeatedly articulated this erroneous "result would have been different" standard throughout the decision. *See* J.A. 1357 ¶ 7-9 & 1358 ¶¶ 10, 11 & 13. The District Court correctly concluded that the state court unreasonably applied established Supreme Court precedent in its determination of suppression and favorability. Yet, despite the state court's incorrect articulation of the standard, the District Court concluded that the state court's materiality assessment was reasonable.

The *Williams* Court directly addressed a similar misunderstanding of the applicable legal standard in an ineffective assistance of counsel case. There, the Court explained that,

> if a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not

> established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different."

529 U.S. at 406-07 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Similarly, in *Brady* cases, the Supreme Court has ruled that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434. "The questions is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* Thus, the state court explicitly applied the very standard rejected by *Kyles*. That decision, therefore, is objectively unreasonable because it is "diametrically different" from the Supreme Court's clearly established precedent. *Williams*, 529 U.S. at 406.

Additionally, as described above, the error caused by the application of a clearly incorrect standard was compounded by the state court's failure to consider the numerous ways that the suppressed evidence undermined the fairness of trial, as the court erroneously construed the value of the suppressed evidence and ignored the value of impeachment evidence. When applying the correct standard,

and fully considering the effect the evidence would have had on the jury and the defense's preparation and defense at trial, under the clearly established Supreme Court precedent, the verdict in Long's case is unworthy of confidence.

D. The State Court Unreasonably Failed To Consider All of the Ways the Suppressed, Favorable Evidence Would Have Affected the Trial and Preparation, and Presentation of a Defense.

The state court's misunderstanding of the suppressed, favorable evidence's value led it to ignore numerous ways that the evidence would have impacted Long's trial and his defense generally. In assessing materiality, a court must consider whether the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. Here, the whole case would have been placed in a different light if the suppressed SBI Hair and Trace Reports, Detective Isenhour's summary reports, and the record of biological evidence turned over to the CPD had been disclosed. As explained in detail in Part II below, had that evidence been disclosed, the jury would have been entitled to make the following findings:

(1) Detective Isenhour falsely testified about the physical evidence he brought to the lab for forensic testing;

(2) Detective Isenhour created a second report to comport with his testimony and conceal the fact that his testimony was false;

(3) Detective Taylor misrepresented the physical evidence when he testified that the matches found in Long's car were similar to matches found in the victim's home;

(4) the SBI Hair and Trace Reports were concealed to deny Long an opportunity to attack his identification on the ground that the physical evidence did not connect him to the crime;

(5) the law enforcement officers' false or misleading testimony and other actions called into question their entire investigation and raised doubts about the veracity of their testimony about the identification process, including the facts from the victim's prior descriptions that were not included in their written reports;

(6) the eyewitness was likely mistaken in her identification; and

(7) the investigation was not sufficiently probing, was not conducted in good faith, and was unreliable.[5]

Moreover, if the evidence had been disclosed, the prosecutor would not have been able to argue that "everything [the victim] says happened that is capable of being corroborated by physical evidence, corroboration, is so corroborated . . . Every piece of physical evidence points unerringly to the fact that [the victim] told you exactly what happened that night unerringly." J.A. 536.

[5] This is likely an incomplete list, but it is sufficient to demonstrate, as the *Kyles* Court did after its construction of a similar list, that the suppressed evidence resulted in a verdict unworthy of confidence.

II. WHEN APPLYING THE CORRECT *BRADY* MATERIALITY STANDARD AND FULLY CONSIDERING THE WAYS THE SUPPRESSED, FAVORABLE EVIDENCE IMPACTED LONG'S TRIAL, IT IS CLEAR THAT THE VERDICT IS NOT WORTHY OF CONFIDENCE AND LONG'S PETITION FOR A WRIT SHOULD BE GRANTED.

In evaluating materiality, a court must consider the cumulative effect of all of the suppressed evidence, *Kyles*, 514 U.S. at 436-37, not only upon the jury, but also upon defense counsel's preparation or presentation of the defense's case, *Bagley*, 473 U.S. at 683. Considering the suppressed evidence cumulatively means "adding up the force of it all and weighing it against the totality of evidence that was introduced at trial." *Smith v. Sec'y, Dept. of Corr.*, 572 F.3d 1327, 1334 (11th Cir. 2009). While it is the defendant's burden to establish a "reasonable probability" of a different outcome, the proof required is less than a preponderance: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

A. The Suppressed, Favorable Evidence Considered Cumulatively Would Have Profoundly Affected the Prosecution's Case at Trial and Is Therefore Material.

As described in Part I(D), the state court failed to consider the numerous ways the suppressed, favorable evidence would have impacted Long's trial, trial preparations, and defense, as required by established Supreme Court precedent.

Had the state court done so, it would have determined 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." *Kyles*, 514 U.S. at 435.

1. The suppressed evidence shows that the investigators falsely testified to conceal evidence from Long.

The suppressed evidence shows that Det. Isenhour testified falsely to conceal evidence from Long. The suppressed SBI Reports reveal that Det. Isenhour took a total of fifteen items to the SBI Lab, along with a request for trace evidence comparisons of hair, carpet, and paint samples, and a request for the latent examination of a shoe print impression. J.A. 1451 ¶ 6. These fifteen items were submitted to the SBI on May 11, 1976, where they were tested and analyzed, and then returned to the CPD sometime after May 17, 1976.[6] At trial, however, Det. Isenhour testified that the only thing he brought to the SBI Lab was a latent shoe print and known prints from Long's shoes for comparison, and that he remained with an SBI examiner while the examiner reviewed the latent shoe print. J.A. 411-14. He also testified that the remaining items collected in the

[6] The last documented transfer of the evidence was on May 17, 1976, from Agent Glense to Agent Cone, and there was a note in the SBI file to contact Det. Isenhour to inform him that testing was complete and the evidence was available to be picked up. J.A. 1467-68. It is clear that someone from the CPD picked up the evidence and reports because items of evidence transferred to the SBI for testing were introduced at Long's trial.

investigation, including Long's clothes, never left his custody after they were collected. J.A. 415.

Det. Isenhour's testimony was false and concealed the true facts surrounding the evidence brought to the SBI Lab. As now shown by the SBI Reports, Det. Isenhour took evidence to the lab, relinquished control of the evidence, and asked that it be tested for the purpose of establishing Long's presence at the crime scene.[7] When the testing failed to connect Long to the scene, Det. Isenhour took steps to conceal the results from Long, the jury, and the state court through false testimony and the creation of a second, undated forensic evidence summary report – a report that omitted the fact that Det. Isenhour had additional items tested – to comport with the false testimony he planned to and did proffer.[8] The Magistrate Judge below specifically singled out the state court's failure

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[7] The purpose of the forensic testing is clear from the request submitted by Det. Isenhour. He asked that Long's clothes be examined for the presence of trace evidence from the crime scene, that his hair samples be compared to "suspect hair found at the crime scene" for "possible identification," that the victim's clothes be examined for the presence of Long's hair, and that the match books from the Long family car be compared to matches collected at the crime scene. *See* J.A. 1456-57 (Request for Examination Form). As with the SBI reports and Detective Isenhour's two versions of his summary, Long did not learn about the Lab Request form until after the state court entered a discovery order in 2005.

[8] In addition to creating the second summary report, it appears from the record that Det. Isenhour and investigators also concealed or destroyed the reports received from the SBI. During the state court proceedings, Long's post-conviction counsel was provided a copy of the CPD file in the case, which did not include the

> to account for the impeaching value of the two different versions of the summary report, i.e., one which harmonized with Detective Isenhour's testimony that he delivered only the shoeprint evidence to the SBI, and one that listed the numerous additional items of evidence Detective Isenhour delivered to the SBI about which he did not testify.

J.A. 1669-70.

The false testimony and concealment of this evidence by Det. Isenhour speaks to its materiality, as there was a clear effort to gain an unfair advantage at trial through the concealment of the SBI Hair and Trace Reports. *See Carillo v. County of Los Angeles*, 798 F.3d 1210, 1227 (9th Cir. 2015) (finding that the conscious effort by law enforcement to suppress evidence implicitly recognizes the evidence would have been helpful to defendant).

Det. Isenhour was not the only officer testifying in a false or misleading fashion. Det. Taylor testified to the jury that matches taken from the Long family car were "of similar nature" to those found in the victim's home, J.A. 378, which allowed the jury to believe that the matches could have been the same as those found in the victim's home. Yet the suppressed SBI Trace Report regarding these matches concludes that "[a]ll but one of the match books [found in the Long family

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SBI Reports. J.A. 788. These reports were provided to Long directly by the SBI Lab. J.A. 1541-43. The CPD retrieved the evidence from the SBI Lab sometime after May 17, 1976, and presumably, at the same time, the SBI Reports from the Lab. It is unknown why these received SBI Reports were not incorporated into the CPD file, but a reasonable inference from the false testimony and the second, false summary report is that they were intentionally excluded or destroyed.

car were] eliminated by color" as sources of the matches found in the victim's home, and the matches in the victim's home "probably did not originate from [the last] match book." J.A. 1463. Thus, had the Trace Report been disclosed, the jury would have known about the lack of connection between the matches in the Long family car and the matches in the victim's home, and would have likely entirely rejected the matches as evidence of guilt.

Kyles is very clear that evidence undermining the thoroughness and good faith of the law enforcement investigation is material. 514 U.S. at 445-49. Here, there is ample reason to question the thoroughness and the integrity of the investigation. A fundamental inference that can be drawn from the false and misleading testimony of investigators is that if investigators are willing to lie about forensic tests, conceal the test results, and imply probative value to evidence contrary to the concealed results, it is also likely that they are willing to lie about other aspects of the case as well. *See Maxwell v. Roe*, 628 F.3d 486, 512 (9th Cir. 2010) ("[T]he finders of fact were deprived of the fundamental inference that if [a witness] lied about X, Y, and Z, it is quite likely that he lied about Q, R, and S.") (quoting *Killian v. Poole*, 282 F.3d 1204, 1209 (9th Cir. 2002)); *see also Curran v. Delaware*, 259 F.2d 707, 712 (3d Cir. 1958) ("The jury may well have applied the equivalent of the maxim *falsus in uno*, *falsus in omnibus* [*i.e.*, false in one thing, false in everything].").

In Long's case, this fundamental inference has powerful significance. The defense tried to undermine the eyewitness identification by pointing to the differences between the victim's pre-identification descriptions of her assailant and Long. These differences included her description of the assailant as light-skinned or "yellow" when Long is dark skinned; her failure to describe her assailant as having facial hair, which Long had on the date of the assault; and her uncertainty about whether the assailant wore gloves. Investigators, whose contemporaneous notes included these detailed differences and uncertainties, testified that the differences were not in fact what they seemed. Det. Taylor testified that, at the hospital shortly after the assault, the victim initially told him that her assailant had facial hair and wore gloves, though these facts were not in his official report. J.A. 305. In fact, before trial, there is no report from any investigator, including Det. Taylor, that notes the victim described her assailant as having facial hair, and the reports differ on whether the assailant was wearing gloves. *See, e.g.,* J.A. 1428-35 (documenting victim's pre-trial descriptions of assailant).

Det. Taylor also showed the victim photos of possible suspects following her interview at the hospital, and the photos were of men with and without facial hair. *See* J.A. 1595 ¶¶ 6-7 (Affidavit of Rachel Smith) (attesting that of the 19 photos shown to the victim in two lineups – 13 at the hospital and another 6 after Long was identified in the procedure described above – 8 had a moustache and beard, 6

had no facial hair, 4 had a moustache and no beard, and 1 had a beard and no moustache). By closing argument, the shift to the suspect having facial hair was complete, with the prosecutor arguing that the CPD "brought in thirteen photographs of thirteen black males with moustaches and beards, and handed them to her, and said: Mrs. Bost, see if you can pick out your assailant." J.A. 583. Given that there was not a single pre-identification report noting that the victim said her assailant had facial hair, and that photos of black males without facial hair were shown to the victim, if the jury had known of the other false testimony by law enforcement, including other misleading testimony from Det. Taylor, the jury could have reasonably inferred that investigators were also testifying falsely about facial hair being included in the pre-identification descriptions.[9]

2. The SBI Hair and Trace Reports would have carried significant weight with the jury and are material.

The SBI Hair and Trace Reports were concealed from Long so that he could not benefit from the numerous forensic exclusions at trial. The investigators would not have lied and manufactured a summary report to conceal the lies if the withheld forensic reports were insignificant. The numerous forensic exclusions also would have affected the jury's deliberations, given the high likelihood of some

[9] A likely argument against this proposition is that the victim herself testified that she recalled the perpetrator having facial hair. As explained below, however, victims often incorporate features in their descriptions of the individual they identify after making the identification.

transfer of trace evidence in a violent sexual assault case. *See* J.A. 1286 (noting that although there may not be a transfer of evidence when looking at one item, it is very unlikely that some sort of trace evidence would not be found when looking collectively at multiple items).

This was understood by James Fuller, one of Long's attorneys at trial, who testified at the 2008 state court evidentiary hearing as follows:

> [T]he tests that didn't [implicate Long], those have both an individual and a cumulative effect. And I'm not talking in the aftermath of CSI. I'm talking about in the 70's. I got one test here that does not implicate you. Okay. I've got a second test that does not implicate you. And now the jury is paying attention. And now I've got a third test and a fourth test, and pretty soon it creates a snowball effect that you're not the defendant. And that's why I believe every one of those tests was critical.

J.A. 1099-1100. Yet, the state court never considered the impact of these reports on the trial and erroneously concluded that any value of the paint/fiber SBI Report is negated by counsel's closing argument that no white paint can be seen on the black leather jacket or black gloves. *See* J.A. 539 (James Fuller closing). Of course, arguments of counsel are not evidence, and Long was affirmatively denied admissible evidence that would have bolstered and supported the arguments his counsel made. Additionally, the court's summary of evidence at the end of trial, which was the last word on the evidence heard by jurors, contained nothing about

the absence of transfer because the evidence never made it into the record due to the state's suppression. *See*, *e.g.*, J.A. 587-628 (Judge's Charge).

Studies confirm the common sense notion that jurors are influenced by negative forensic evidence, *i.e.*, evidence that a test fails to connect a suspect to a crime when a positive result is probative of the suspect's involvement. Thus, the higher the probability of a particular forensic test to "detect" the assailant (*i.e.*, identify), the less likely jurors are to convict if the test is negative. C. Thompson, et al., *Evaluating Negative Forensic Evidence: When Do Jurors Treat Absence of Evidence as Evidence of Absence?*, 14 J. Empirical Legal Stud. 569-91 (2017). For example, if a test is 100% accurate in detecting an individual's participation in a crime, a negative test result carries significant weight and would likely result in an acquittal. If a test has a near-zero chance of detecting participation, then a negative result is essentially meaningless to a jury. In Long's case, law enforcement pursued routine tests they believed would detect the assailant, and the probability of detection naturally rose with each forensic test, so a jury would have been less likely to convict with each successive negative result. This is a fact the CPD understood, which is why it went through great lengths to suppress the negative results.

3. The suppressed biological evidence could have conclusively established Long's innocence, and its unexplained disappearance further undermines the thoroughness and integrity of the CPD investigation.

Long's trial counsel were explicitly told that a sexual assault kit was not collected. J.A. 1036. That was false. A kit, which included a test tube containing vaginal swabs and secretions taken from the victim shortly after the rape, was turned over to CPD Sergeant Marshall Lee following the hospital examination. J.A. 1479. This sexual assault kit was not listed in either of Det. Isenhour's summary reports. There is no record of what happened to this kit after it was received by the CPD; whether any examination was conducted on biological evidence from the kit; or when it was destroyed or went missing. J.A. 793.

The record showing this evidence's collection comes from the Cabarrus County Hospital, where the victim was treated, J.A. 1479, which again raises the question of how such important evidence could be collected by CPD investigators without documentation. Additionally, using the biological samples, contemporary serological testing techniques could have determined whether the assailant was a secretor, which could have inculpated or exonerated Long.[10] That this evidence

[10] The Recommendation discounts the significance of this evidence, as it erroneously states that the biological evidence could merely categorize the perpetrator as a secretor (80% of the population) or a non-secretor (20% of the population). It failed to account for the fact that, if the perpetrator was a secretor, blood typing would further narrow the population who could be responsible for the

was concealed makes it likely that investigators feared testing would exculpate Long,[11] an understandable fear given the weakness of the case against him. Long, however, had a constitutional right to favorable evidence while preparing his defense. *Bagley*, 473 U.S. at 676. And Long's trial counsel had asked about the collection of this evidence specifically because they understood that it was a standard practice at the time and relevant to their preparations. J.A. 1036. Failure to disclose its collection and disappearance undermined the fairness of Long's trial and is material.

B. The Case Against Long Was Weak, as It Relied Almost Entirely on an Unreliable Eyewitness Identification.

The reviewing court must assess the possibility that suppressed evidence affected the trial or the defendant's preparation for trial in light of the totality of circumstances. *Bagley*, 473 U.S. at 683. This review necessarily considers the strength of the prosecution's case at trial. If the verdict rests on evidence of

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assault, and that this procedure was well known and standard practice at the time of Long's trial. J.A. 1149-51.

[11] It is possible that serological testing was conducted and exculpated Long, but that investigators concealed the evidence, just as it did with the SBI Hair and Trace Reports. At each step, evidence has been disclosed only after repeated denials of its existence or of its favorability. That additional favorable evidence exists is not mere speculation, as explained in Long's motion for discovery in the District Court; it is now known that latent fingerprints exist in the CPD file, despite sworn testimony during the state MAR proceedings that the CPD no longer had physical evidence in its custody. J.A. 98 (Testimony of Sgt. Robert Ledwell); *compare* J.A.1583-85 (showing CPD had latent prints).

questionable validity, then "evidence of relatively minor importance" may be material. *United States v. Agurs*, 427 U.S. 97, 113 (1976).

1. The unreliability of eyewitness identifications.

The general reliability of eyewitness identifications has long been questioned. More than 50 years ago, the Supreme Court warned that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). The Court's warning has been confirmed by the large number of DNA exonerations following erroneous eyewitness identifications. A recent study found that, of 250 individuals exonerated by DNA evidence, 76% of the cases involved eyewitness misidentifications. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48 (Harvard 2011). Against this backdrop, a starting point for this Court's analysis should be that an eyewitness identification, standing alone, is far from strong evidence of guilt. *See Moore v. Hardy*, 723 F.3d 488, 497 (4th Cir. 2013) (recognizing the fallibility of eyewitness identifications); *see also Smith v. Cain*, 565 U.S. 73, 76 (2012) (when the identification is the only evidence of guilt, undisclosed evidence contradicting it is plainly material); *United States v. Hodges*, 515 F.2d 650, 653 (7th Cir. 1975) ("There is no question that identification testimony is notably fallible, and the result of it can be, and sometimes has been, 'the greatest single injustice that can

arise out of our system of criminal law,' namely the conviction of the wrong man through a mistake in identity.") (quoting *Gregory v. United States*, 369 F.2d 185, 190 (D.C. Cir. 1966) (citation omitted)).

2. The identification of Long was suspect and unreliable.

Here, there are numerous reasons why the victim's identification of Long should be viewed skeptically. Most telling, it was not supported by her pre-identification descriptions of her assailant. In the pre-identification descriptions, she described him as light-skinned or "yellow," did not describe her assailant as having facial hair, and was not sure whether he wore gloves.

Additionally, the process used to display Long to the victim was bizarre and highly likely to result in a misidentification. On May 10, 1976, CPD officers escorted the victim, who was wearing a disguise, to a courtroom where Long was appearing on a trespassing charge. J.A. 307-09. She was told that the man who raped her might be in the courthouse. The decision to undergo this in-court identification procedure is particularly questionable given that a standard photo lineup could have been arranged days before, allowing the victim to avoid the trauma of sitting in court in disguise, searching for the man who raped her. The CPD had a photo of Long, which could have been used, along with photos of other men – fillers – fitting the assailant's general description. That procedure could have been carried out earlier without subjecting the victim to the anxiety of sitting

in a courtroom with her possible attacker, exposing Long to the risk of being wrongly identified, and exposing the public to five additional days of insecurity from the possible perpetrator remaining at large. The CPD's failure to use the more common identification procedure raises questions about the investigators' purpose in showcasing Long at the courthouse. Given that mistaken identifications occur frequently even under ideal circumstances, Avraham M. Levi, *Are Defendants Guilty if They Were Chosen in a Lineup*, 22 L. & Human Behav. 389, 400 (1998) (assuming a fair, single-suspect lineup, the probability of an innocent defendant being chosen is approximately 25%), little weight should be given to an identification arrived at under such a highly unorthodox and suggestive procedure.

The victim herself was understandably fearful and anxious during the procedure. She wore a red wig and glasses to disguise herself and was forced to sit in the gallery for about an hour or an hour and a half before ending the experience by identifying Long.[12] She testified she was "constantly just looking" around until Long's case was called, and she identified him as he began walking to the front of the courtroom. J.A. 155-56, 174-75, 222-25 & 253. Testimony at Long's trial suggested that investigators did not tell the victim that Long was their prime

[12] This anxiety of the victim likely made her more vulnerable to any advertent or inadvertent suggestion by investigators, as making an identification would end her uncomfortable experience.

suspect beforehand, but it is clear that investigators had singled him out from the moment they entered the courtroom, as they reported immediately observing him sitting in the middle of the courtroom with his father. J.A. 310. Although Long was sitting in the courtroom, it was more than an hour before he was identified despite there only being 12 black males present and no other black male with an appearance similar to Long. J.A. 154, 172 & 253-55. At trial, and as described above, the investigators attempted to reconcile the disparities between the victim's pre-identification description of the perpetrator and her ultimate identification of Long, but those attempts should now be questioned, given that it is known that the investigators were willing to testify falsely to secure Long's conviction.

Although the victim testified she was certain that her assailant was Long, research shows that the physical appearance of the person identified, whether the identification is correct or not, can distort the witness's memory of the perpetrator. *See* Gary L. Wells & Elizabeth F. Loftus, *Eyewitness Memory for People and Events*, *in* HANDBOOK OF PSYCHOLOGY PART THREE 149-60 (2003) (misleading post-event information can alter a person's recollection in powerful ways, including people recalling a clean-shaven man as having a moustache). That is, once a witness identifies someone, the witness tends to incorporate the identified person's features and other characteristics into their recall of the assailant, which

likely explains why, at trial, the victim in this case claimed to be certain of the assailant's facial hair despite its absence in her initial descriptions. J.A. 158.

It is also now known that the victim's identification involved nearly every factor researchers have found contribute to misidentifications, including the following:

- Cross-racial identification. The victim was white and admitted unfamiliarity with Blacks. J.A. 257. It is a well-established phenomenon that individuals have more difficulty identifying members of other races. This cross-racial effect ("CRE") has gained general acceptance and has been found to occur across a range of races, ethnicities, and ages. *See* Nat'l Research Council of the Nat'l Acads., *Identifying the Culprit: Assessing Eyewitness Identification* 96 (Nat'l Acad. 2014). A 2001 meta-analysis of CRE studies highlights the concern caused by convictions resting solely on cross-race identifications, as it shows that the likelihood of a mistaken identification is significantly more likely in other-race than in same-race conditions. Christian A. Meissner & John Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol. Pub. Pol'y & L. 3, 15 (2001).

- Impermanence of memory. The victim's identification took place 15 days after the attack. It is well established that memory decays with time, and that, as the period between the time of the incident and the identification increases, the accuracy of the identification decreases. *See, e.g.*, Kenneth. A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*. 14.2 J. Exp. Psychol.: Applied 139, 147 (2008). A corollary and confounding effect is that witnesses are more likely to make an identification as time passes, indicating that pressure to make an identification increases as the crime remains unsolved. *Id.*

- Weapon and stress effects. The victim's assailant had a knife, and she testified she was terrified that she would not survive the encounter. It is well established that when a weapon is present during a crime, the victim's attention is drawn away from the perpetrator's characteristics to the weapon itself, decreasing the victim's ability to accurately describe and identify the perpetrator and thereby creating a greater potential for mistakes in identification. *See, e.g.*, Jonathan M. Fawcett et al., *Of Guns and Geese: A Meta-Analytic Review of the "Weapon Focus" Literature*, 19 Psychol., Crime & L. 35 (2013). It is also well established that extreme stress negatively impacts identification accuracy. *See, e.g.*, Kenneth. A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & Hum. Behav. 687, 699 (2004).

These factors are independently sufficient to raise questions about a possible mistaken identification, but collectively raise significant concern about the reliability of the victim's identification of Long.

C. The Recommendation's Assertion that the 1977 North Carolina Supreme Court's Decision on Direct Appeal Supports a Finding that the Identification Was Strong Is Misplaced.

The Recommendation found the victim's identification was strong evidence of guilt based on the North Carolina Supreme Court's 1977 decision on direct appeal. J.A. 1684. The direct appeal decision focused on the constitutional admissibility of the identification, not on its weight in light of the evidence presented at trial, and certainly not on its weight in light of all of the suppressed evidence known today. *See State v. Long*, 237 S.E.2d 728, 730; 293 N.C. 286, 289 (1977) (determining whether the pretrial identification procedures were so impermissibly suggestive that the in-court identification violated due process of

law). Constitutional admissibility is a threshold inquiry, conducted before evidence is considered by a jury and vetted through the adversarial process, including cross-examination and the introduction of evidence casting doubt on its reliability. *See Perry v. New Hampshire*, 565 U.S. 228, 233 (2012) (after determining no improper law enforcement activity was involved in a questioned eyewitness identification, "it suffices to test reliability through the rights and opportunities generally designed for that purpose[, including] vigorous cross-examination, protective rules of evidence, and jury instructions"); *see also Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) (juries must weigh identification evidence absent "a very substantial likelihood of irreparable misidentification"); *Sales v. Harris*, 675 F.2d 532, 539 (2nd Cir. 1982) (identification evidence meeting a minimum threshold level of reliability is weighed by the jury). Here, while the identification may have met the threshold admissibility inquiry of constitutionality, the victim's identification must still be assessed in the context of the evidence the jury heard and the favorable evidence that was suppressed. *See Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 560–61 (4th Cir. 1999) (holding materiality assessment must examine both). When the proper materiality assessment is done, the identification is underwhelming and unreliable.

D. When Weighing the Impact of the Suppressed Evidence Against the Weak Evidence that Resulted in Long's Conviction, the Suppressed Evidence Was Material.

Considering the suppressed evidence cumulatively means "adding up the force of it all and weighing it against the totality of evidence that was introduced at trial." *Smith v. Sec'y, Dep't. of Corr.*, 572 F.3d 1327, 1334 (11th Cir. 2009). Here, the force of the suppressed evidence overwhelmingly shows the evidence's materiality when weighed against the weak eyewitness identification, which, as described, is well understood to be weak evidence without corroboration and is the only evidence inculpating Long in this case.

False testimony by law enforcement officers is particularly odious to conceptions of due process and fundamental fairness. Officers are viewed as highly credible witnesses, so their false testimony is more damaging to constitutional rights than testimony from lay witnesses. *See Briscoe v. LaHue*, 460 U.S. 325, 365 (1983) ("[A police officer's] official status gives him credibility and creates a far greater potential for harm than exists when the average citizen testifies.") (Marshall, J., dissenting); *United States v. Young*, 17 F.3d 1201, 1205 (9th Cir. 1994) (finding that testimony from law enforcement officers is "highly credible"); *Curran*, 259 F.2d at 712 ("The testimony of police officers usually is given credence by members of the jury.").

The year after the Supreme Court's decision in *Brady*, this Court recognized the magnitude of the problem when evidence is suppressed by the police:

> [I]f [the prosecuting attorney] is the victim of police suppression of the material information, the state's failure is not on that account excused. We cannot condone the attempt to connect the defendant with the crime by questionable inferences which might be refuted by undisclosed and unproduced documents then in the hands of the police . . . . [T]his procedure passes beyond the line of tolerable imperfection and falls into the field of fundamental unfairness.

Barbee v. Warden, Md. Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964) (internal quotations omitted).

Here, the false testimony from officers and the officers' suppression and concealment of the SBI Hair and Trace Reports and biological evidence fell below tolerable imperfection and into the field of fundamental unfairness. If Long had the SBI Hair and Trace Reports, he could have attacked the State's introduction of his jacket and the gloves and toboggan taken from his family's car as probative of guilt, as well as used the results to establish his innocence. Additionally, he could have attacked the credibility of the officers who conducted the investigation and the investigation itself. As the Supreme Court has noted, these credibility issues are often the difference between guilt or innocence and life or liberty. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying

falsely that a defendant's life or liberty may depend."). That Long was denied an opportunity to challenge the State's evidence in these ways renders his trial unfair and the verdict unworthy of confidence.

III. THE RECOMMENDATION'S MATERIALITY ASSESSMENT OF THE SUPPRESSED, FAVORABLE EVIDENCE ALSO FAILED TO FOLLOW THE CLEARLY ESTABLISHED SUPREME COURT PRECEDENT.

The Recommendation undertook a separate materiality assessment, despite finding that the 2009 MAR Order reasonably applied Supreme Court precedent. It is unclear why the Recommendation undertook this step, given its findings, as a reasonable state court decision under established federal law is not subject to federal review. 28 U.S.C. § 2254(d)(1). The likely answer is that the Magistrate Judge realized the erroneous approach of the state MAR court's analysis and sought to establish what could have supported the state court's decision. This "gap-filling" is inappropriate when the state court enters a reasoned, albeit flawed, decision as it did here. *See Dennis v. Sec'y, Penn. Dep't. of Corr.*, 834 F.3d 263, 283 (3rd Cir. 2016) ("[F]ederal courts may not speculate as to theories that 'could have supported' the state court decision when the state court enters a clear, reasoned opinion.") (*citing Wetzel v. Lambert*, 565 U.S. 520, 524 (2012)). Additionally, even if it was appropriate to determine what could have supported the state court's decision, the Recommendation's analysis is erroneous because it also failed to follow clearly established Supreme Court precedent.

The Recommendation's materiality assessment amounts to an impermissible sufficiency of the evidence test, as it finds that the suppressed, favorable evidence is not material because it did not directly undermine the State's lone inculpatory evidence, the victim's identification. *Kyles*, 514 U.S. at 434-35 ("A defendant need not demonstrate that after discounting inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict."); *see also Dennis*, 834 F.3d at 303-04 (tying *Brady* materiality of an undisclosed report undermining the testimony of one of three eyewitnesses to the strength of identifications from the remaining two was an improper sufficiency of evidence test "in direct contravention of how the Supreme Court has defined materiality").

The Recommendation's assessment fails to consider the full impact of the undisclosed evidence on the State's case, including that the jury would have been entitled to discount the victim's eyewitness identification if it had known that the suppressed forensic testing failed to connect Long to the physical evidence at the crime scene and that law enforcement officers had falsely testified and falsified reports to ensure that the test results remained concealed.

CONCLUSION

For the foregoing reasons, Appellant-Petitioner requests that the Court reverse the District Court and remand for it to enter an order granting the writ and

ordering Respondent-Appellees to release Long or retry him within 30 days of the mandate from this Court.

REQUEST FOR ORAL ARGUMENT

Given the complexity and significance of the issues presented in this appeal, as well as the substantial factual record and procedural history involved, Petitioner respectfully requests that this Court allow oral argument.

Respectfully submitted,

/s/ Jamie T. Lau
Jamie T. Lau
N.C. State Bar No. 39842
Wrongful Convictions Clinic
Duke University School of Law
Box 90360
Durham, North Carolina 27708
Telephone: (919) 613-7764
Fax: (919) 613-7262
E-mail: jamie.lau@law.duke.edu

/s/ G. Christopher Olson
G. Christopher Olson
N.C. State Bar No. 21223
917 W. Johnson St.
Raleigh, NC 27605
Telephone: (919) 624-3718
E-mail: gchrisolson15@gmail.com

/s/ Theresa A. Newman
Theresa A. Newman
N.C. State Bar No. 15865
Wrongful Convictions Clinic
Duke University School of Law
Box 90360
Durham, North Carolina 27708
Telephone: (919) 613-7133
Fax: (919) 613-7262
E-mail: newman@law.duke.edu

Counsel for Petitioner-Appellant

Dated: September 24, 2018

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Dated: September 24, 2018

/s/ Jaime T. Lau
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 24th day of September, 2018, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Clarence J. DelForge, III
NORTH CAROLINA
DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, North Carolina 27602
(919) 716-6571

Counsel for Appellee

I further certify that on this 24th day of September, 2018, I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court.

/s/ Jamie T. Lau
Counsel for Appellant