IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6980

RONNIE WALLACE LONG,

Petitioner-Appellant,

v.

ERIK A. HOOKS, Secretary,
North Carolina Department of Public Safety,

Respondent-Appellee.

RESPONSE OPPOSING PETITION FOR REHEARING EN BANC
Fed. R. App. P. 35

From the United States District Court
For the Middle District of North Carolina

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STATEMENT OF THE CASE

The North Carolina Supreme Court (NCSC) summarized the facts from Petitioner's trial in its published opinion. State v. Long, 293 N.C. 286, 288, 237 S.E.2d 728, 729 (1977). In addition, the panel majority opinion also sets forth a statement of the facts. Long v. Hooks, No. 18-6980, 2020 U.S. App. LEXIS 447 (4th Cir. Jan. 8, 2020).

LEGAL ARGUMENT

I. THE PANEL MAJORITY OPINION CORRECTLY UPHELD THE DECISION OF THE STATE POST-CONVICTION MAR COURT UNDER AEDPA, IN COMPLIANCE WITH CONTROLLING SUPREME COURT DECISIONS AND DECISIONS OF THIS COURT, SUCH THAT REHEARING EN BANC SHOULD BE DENIED.

The majority opinion correctly determined that the state post-conviction motion for appropriate relief (MAR) court's decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, i.e., Brady v. Maryland, 373 U.S. 83 (1963). Nor was the state post-conviction MAR court's adjudication based on an unreasonable determination of facts, in light of the evidence presented in the state court proceedings. Therefore, Petitioner's federal habeas petition was properly denied. Long v. Hooks, No. 18-6980, 2020 U.S. App. LEXIS 447 (4th Cir. Jan. 8, 2020).

Furthermore, Petitioner has not shown that the panel majority opinion conflicts with a decision of the Supreme Court or this Court, and requires consideration by the full Court to secure and maintain uniformity of this Court's decisions. Nor has Petitioner shown that this proceeding involves one or more questions of exceptional importance such as conflicts with authoritative decisions of

other circuit courts. Therefore, Long's petition for rehearing en banc should be denied. See Fed. R. App. P. 35(b)(1) (2020).

The district court's decision is reviewed de novo. See Conner v. Polk, 407 F.3d 198, 204 (4th Cir. 2005), cert. denied, 546 U.S. 1216 (2006). The standard for reviewing the state courts' decision under 28 U.S.C. § 2254(d) and (e) is highly deferential. A federal habeas court may grant relief only if the state-court adjudication on the merits, even in a summary or unexplained order, "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of facts, in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). See also Sexton v. Beaudreaux, 138 S. Ct. 2555 (2018) and Harrington v. Richter, 562 U.S. 86, 103 (2011).

Also, a federal habeas court may not consider new evidence in support of a claim when that evidence was not presented in support of the claim in state court. Cullen v. Pinholster, 563 U.S. 170 (2011). Furthermore, "habeas corpus proceedings are a guard against extreme malfunctions in the state criminal justice systems." Harrington, 562 U.S. at 102. The panel majority correctly upheld the 2009 state post-conviction MAR court's determination that no constitutional violations

occurred here, necessarily preventing "extreme malfunctions in the state criminal justice systems." (JA 1347-61)

Moreover, Petitioner's assertion that the majority's decision upholding the state post-conviction MAR court's ruling is unreasonable "beyond any possibility of fairminded disagreement," is incorrect. See Harrington, 562 U.S. at 103. As already demonstrated in this case, four federal judges, i.e., the Magistrate Judge, District Court Judge, and panel majority have already concluded that the state post-conviction MAR court's order is objectively reasonable. Long v. Hooks, 2020 U.S. App. LEXIS 447. Thus, fair-minded judges have disagreed with Petitioner's position. For this reason alone, en banc reconsideration of the panel's well-reasoned decision is not warranted. (JA 1347-61) See Harrington, 562 U.S. at 103.

In addition, Wetzel v. Lambert, 565 U.S. 520 (2012) specifically holds that a federal habeas corpus court may disturb a state court judgment only "if each ground supporting the state court decision is examined and found to be unreasonable." Id. at 525. Here, the majority panel carefully examined the state post-conviction MAR court's determination that the newly discovered evidence considered cumulatively had "no impact" on the verdict and found it to be reasonable. (JA 1358-59) Rehearing en banc "is not favored and ordinarily will not be ordered." Fed. R. App.

P. 35(a) (2020). As explained supra, Petitioner has not met the exacting standards for rehearing en banc in this case.

Petitioner nevertheless contends the en banc review of the panel's decision is required because the state post-conviction motion for appropriate relief (MAR) court applied the wrong standard by also concluding:

> 17. The Defendant has failed to prove by a preponderance of the evidence that his due process rights have been violated under Brady v. Maryland, 373 U.S. 83 (1996), in that he has not shown by a preponderance of the 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. Decisions made by trial counsel for strategic purposes have been weighed as part of this determination.

(JA 1359)

The reference to the "preponderance of the evidence" standard refers to the state statutory standard at a MAR hearing for a constitutional claim, i.e., the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion and that a constitutional violation was committed. N.C.G.S. § 15A-1420(c)(5) (2017). See also State v. Atkins, 349 N.C. 62, 111, 505 S.E.2d 97, 127 (1998), cert. denied, 526 U.S. 1147 (1999). Fairly read in context, the panel correctly held that the above quoted MAR order does not show a lesser standard for determining the mixed issue of whether a Brady violation occurred.

Petitioner must show that the newly discovered evidence was material, i.e., created a reasonable probability of a different result, in order to establish a Brady violation. Petitioner appears to argue that favorability is enough to demonstrate materiality under Brady in this case. That is incorrect. The majority panel held that the state post-conviction MAR court reasonably concluded that Petitioner has not meet the Brady materiality standard.

In addition, Wetzel does not require that each reason for the state court's decision be "isolated from" any other reason the court may give to justify its holding. In Wetzel, the grounds supporting the state court's decision were not isolated. There, the alleged Brady violation concerned a police "activity sheet" that supposedly identified another participant in a robbery. Wetzel, 565 U.S. at 521-22. According to the petitioner, the activity sheet was exculpatory because it would have impeached one of the Commonwealth's significant witnesses. The state court ruled otherwise, holding it would not have been exculpatory or impeaching but was instead "entirely ambiguous." Id. at 524. Moreover, the state court found the contents of the activity sheet would have been cumulative to other impeachment evidence. Id. These holdings were not "isolated from" one another nor separate. Instead, they were simply two descriptive phases used together in order to assess the contents of the

activity sheet. See Commonwealth v. Lambert, 584 Pa. 461, 884 A.2d 848, 855-56 (Pa. 2005).

The Supreme Court found that the Third Circuit erred by granting the writ based on its disagreement with the state court's impeachment analysis of the activity sheet. Wetzel, 565 U.S. at 523-24. The Supreme Court held that because the state court reasonably determined that the activity sheet was "ambiguous," it could not be either exculpatory or impeaching. Id. Whatever else the state court opinion had to say was "beside the point." Id. Here, Wetzel commands that because the "no impact" conclusion alone is sufficient to reasonably reject Petitioner's Brady claim, whatever else the state court had to say about preponderance of the evidence, is irrelevant. Wetzel, 565 U.S. at 524. See also Woodford v. Visciotti, 537 U.S. 19, 23-34 (2002) (reversing court of appeal's grant of habeas petition where state court used imprecise language in applying Strickland prejudice prong).

Also, as noted by the majority panel opinion, when the Supreme Court requires federal habeas courts to conduct such an "adequate and independent" examination of the rationales contained in state court orders, it will say so with unmistakable clarity. See Coleman v. Thompson, 501 U.S. 722, 732-33 (1991). See also Long v. Hooks, 2020 U.S. App. LEXIS 447, at *19. The fact that the MAR court here found the cumulative effect of the newly discovered evidence had "no

impact" on the verdict supports the panel's decision that the MAR court finding of no reasonable probability of a different result under Brady was not unreasonable. Long v. Hooks, 2020 U.S. App. LEXIS 447, at *17.

Furthermore, Petitioner's Brady claim is without merit because the new evidence consisting of SBI reports, Isenhour summaries, and victim's medical records are consistent with and cumulative to the evidence presented at trial, i.e., that the victim's eyewitness identification of Petitioner was not coupled with physical evidence conclusively proving that Petitioner was in the victim's home. As the panel held, the victim's positive eyewitness identification of Petitioner as the man who raped her supports the MAR court's determination that the SBI reports, Isenhour summaries, and victim's medical records were immaterial. Therefore, the decision was not unreasonable. Long v. Hooks, 2020 U.S. App. LEXIS 447, at *29.

Also, the panel correctly held that the MAR court did not unreasonably decide that three SBI reports that did not establish a connection between Petitioner and the crime scene were not material under Brady, because they did not create a reasonable probability of a different result. Furthermore, it was uncontested at trial that there was no physical evidence of any white paint chips, skin, hair, or anything else conclusively connecting Petitioner to the crime. (JA 538-39, 568-69, 1055) Therefore, the panel correctly held that the MAR court did not unreasonably

conclude that the SBI reports were consistent with the trial testimony and cumulative to undisputed facts, and do not establish a Brady violation. Long v. Hooks, 2020 U.S. App. LEXIS 447, at *22.

In addition, the panel correctly held that the MAR court did not unreasonably conclude that the Isenhour summary reports were not material under Brady because they "merely outline[d] the evidence collected and examined" in the lab reports. Long v. Hooks, 2020 U.S. App. LEXIS 447, at *25. Thus, considered cumulatively, the panel correctly held that, under the deferential standards that apply on AEDPA review, the new evidence does not create a reasonable probability of a different result. See Kyles v. Whitley, 514 U.S. 419 (1995) (Brady standard applied in federal habeas context).

Furthermore, Petitioner has not shown that the panel majority opinion conflicts with a decision of the Supreme Court or this Court, and requires consideration by the full Court to secure and maintain uniformity of this Court's decisions. Nor has Petitioner shown that this proceeding involves one or more questions of exceptional importance such as conflicts with authoritative decisions of other circuit courts. Therefore, Long's petition for rehearing en banc should be denied. See Fed. R. App. P. 35(b)(1).

In sum, the petition for rehearing en banc should be denied.

Respectfully submitted, this the 3rd day of February, 2020.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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This the 3rd day of February, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on 3 February 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to the following:

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