IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
No. __:____ HC _____

RONNIE WALLACE LONG, Petitioner, v. FRANK LEE PERRY, Secretary, N.C. Dep't of Public Safety, et al., Respondents.	))))))))))	**PETITION FOR WRIT OF HABEAS CORPUS 28 U.S.C. § 2254**

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NOW COMES Petitioner Ronnie Wallace Long, pursuant to 28 U.S.C. § 2254, and through undersigned counsel, respectfully moves this Court for a writ of habeas corpus requiring Respondents to release him from confinement or try him anew within a reasonable time, showing the Court as grounds therefore the following:

INTRODUCTORY STATEMENT

Ronnie Wallace Long was convicted on October 1, 1976 for burglary and the rape of a prominent local widow in Concord, NC. Long was a twenty-one-year-old black cement mason and the father of a two-year-old son.

Long was convicted and sentenced to two concurrent life sentences despite a complete absence of physical evidence linking him to the crime. Physical evidence was collected and tested, but his counsel did not know of the tests or their negative results. Additionally, as described below, the victim's identification of Long ten days after the crime was highly suggestive and inherently unreliable. Finally, the circumstances of the trial further undermine confidence in the verdict. An all-white jury, which was drawn from a pool of prospective jurors hand-screened by the County Sheriff, included four jurors with employment connections to the victim's spouse, and a racially polarized atmosphere existed.

* * *

Long was arrested on May 10, 1976, after being asked to accompany two local police officers to the Concord, North Carolina, police station to resolve a trespassing warrant for a charge that had been dismissed earlier that same day. Upon his arrival, Long was instead arrested for burglary and rape and has remained incarcerated for the 40 years since. Long has steadfastly maintained his innocence, from his first contact with Concord police in 1976 until now. His claim of innocence is persuasively reinforced by newly discovered exculpatory evidence, which has been trickled out piecemeal to the defense in 2005, 2006, and 2015. None of the new evidence was available to Long at the time of his 1976 trial or prior to his 1989 habeas petition. See Petition for Writ of Habeas Corpus, Long v. Dixon, No. C-89-278-S (M.D.N.C. May 3, 1990).

Most of the new evidence was first discovered after a court order in 2005 ("Discovery Order"). App. 100-04. Even after the court's order, the evidence was belatedly turned over following several requests and the affirmative denial of its existence by the State Bureau of investigation ("SBI") and the Concord Police Department ("CPD"). The latent lifts discussed below were not produced at the time of Long's trial or after the Discovery Order, and first came to the defense's attention in 2015 after the North Carolina Innocence Inquiry Commission ("NCIIC") notified Long's counsel that the lifts were discovered and queried

through a database.[1] See CPD Evidence Processing Report, attached as Exhibit 1. The evidence withheld from defense counsel at trial includes:

- The test tube containing vaginal swabs and secretions taken shortly after the rape, which, according to the police report, were signed for by Sergeant Lee;
- An SBI analyst report on Long's jacket and gloves, which contained no trace of the paint or fibers from the crime scene;
- An SBI analyst report regarding a suspect hair found at the scene of the crime, which concluded that the compared hairs were different;
- An SBI analyst report on the victim's clothing, finding no hairs resembling Long's;
- An SBI report for matchbooks recovered from the crime scene compared with matches in Long's car that found no sufficiently identifying characteristics to link them to Long;
- And latent fingerprints discovered in 2015.

To this day, the sexual assault evidence kit or results from tests on this kit, if it was tested, have not been made available to the defense. Considering the way in which this evidence has been disclosed – first being denied, then found, then explained away – there is no way to know what additional evidence may be or at one time was in the State's possession.

[1] The North Carolina Innocence Inquiry Commission is a state agency with statutory authority to investigate claims of innocence made by North Carolina inmates. As described below, the CPD's report raises more questions than answers because the report provides no information about which database was queried. See infra, pp. 35-36.

The fact that Long was not previously provided this evidence was clearly established at an evidentiary hearing held in November and December 2008 following his Motion for Appropriate Relief ("MAR").[2] Long's trial counsel testified at the MAR hearing that he did not know that evidence was brought by police investigators to the SBI Crime Lab for forensic testing in 1976 and that these test results were favorable to Long. The Assistant District Attorney ("ADA") who prosecuted Long testified that Long's trial counsel was not provided with details about the forensic examinations and results. At the 2008 MAR hearing, the ADA testified that the only forensic evidence he was aware of before trial was a latent shoeprint taken by Detective Van Isenhour to the SBI Crime Laboratory. 2d MAR T Vol. I pp. 313-314.[3]

The Cabarrus County Superior Court's ("the MAR Court") subsequent denial of relief in 2009 was based on an unreasonable determination of the facts in

[2] Long had earlier filed a pro se Petition for Post-Conviction Relief in 1986. The trial court denied his pro se Petition after appointing counsel and holding an evidentiary hearing. A second MAR, with the assistance of counsel, was filed on August 27, 2008. References to the MAR proceedings and evidentiary hearing relate to the 2008 MAR filed on Long's behalf by counsel. The MAR will be referred to as either "2008 MAR" or "2d MAR."

[3] Throughout this Petition, the following conventions will be used: "T p. ___" for Vol. II of the trial transcript; "T Argument p. ___" for the transcript of closing arguments at trial; "MAR p. ___" for the transcript of the evidentiary hearing related to the 1986 MAR; "2d MAR T Vol. I p. ___" and "2d MAR T Vol. II p. ___" for the transcript of the evidentiary hearing related to the 2008 MAR; and "App. ___" for the appendix to Long's brief to the Supreme Court of North Carolina after the denial of his 2d MAR. (Since Long's case came before the Supreme Court of North Carolina on certiorari, there was no settled record on appeal.) It is undersigned counsel's understanding that all of the above-referenced documents will be made available for this Court's review by the State under Habeas Rule 5. Petitioner will provide copies of any of the items upon request.

light of the evidence presented at the 2008 MAR hearing and the repeated misapplication of clearly established federal law about the burden of proof applicable to claims under Brady v. Maryland, 373 U.S. 83, 87 (1963).[4] Long's claims were exhausted in state court after the North Carolina Supreme Court split three-to-three, with one Justice abstaining, on the merits of his claims. State v. Long, 365 N.C. 5, 705 S.E.2d 735 (2011). This even split resulted in the procedural affirmation of the MAR Court's decision.

Although this petition is being filed outside of the one-year statute of limitations, Long's persuasive claim of innocence creates a gateway to federal habeas review under Schlup v. Delo, 513 U.S. 298, 314 (1995). A review of all the evidence in this case makes clear that a fundamental miscarriage of justice would result by failure to review the merits of Long's claims. The withholding of exculpatory evidence, the unreliable eyewitness identification, and the racially biased jury-selection process deprived Long of a fair trial and a verdict worthy of

[4] Although the burden under Brady is well–established as "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), the MAR Court incorrectly applied the much more rigorous standard "that the result likely would have been different with the claimed evidence." App. 229 ¶17. While there exists compelling evidence to support Long's claim of factual innocence, that was not his burden before the MAR Court. Rather, Long was simply required to demonstrate that he did not receive a fair trial. The trial court clearly erred in subjecting Long's Motion to the incorrect legal standard.

confidence and wholly support's Long's innocence. The totality of these circumstances begs for this Court's review.

PROCEDURAL BACKGROUND

A. Trial and Appeal

Ronnie Long was indicted on May 17, 1976 in what was then the Nineteenth Judicial District of North Carolina on charges of burglary and rape. App. 1-2. A trial was held before Judge William Z. Woods during the September 27, 1976 Criminal Session of the Cabarrus County Superior Court. The jury returned verdicts of guilty on both charges and the trial court entered judgments imposing concurrent life sentences for the two convictions.[5] App. 3-4. Long filed an appeal of right to the North Carolina Supreme Court,[6] which affirmed his convictions. State v. Long, 293 N.C. 286, 237 S.E.2d 728 (1977).

B. First MAR (1986) and Habeas Petition (1989)

On August 1, 1986, Long filed a pro se MAR in Cabarrus County Superior Court, arguing ineffective assistance of counsel. App. 219 ¶ 5; MAR T Vol. I p. 3.

[5] At trial, Long was represented by the law firm of Chambers, Ferguson, Stein and Wallace (the "Chambers Firm"). His lead trial attorneys were James Fuller and Karl Adkins, and their lead investigator in this case was Les Burns.

[6] At the time of indictment, rape and burglary carried a mandatory death sentence. On July 2, 1976, the United States Supreme Court ruled North Carolina's capital punishment statute unconstitutional and the possible sentence became life in prison. Woodson v. North Carolina, 428 U.S. 280 (1976).

The Superior Court appointed counsel to represent Long for the MAR proceedings, and the court ultimately denied Long's MAR. Id. The North Carolina Supreme Court denied certiorari on January 4, 1989. State v. Long, 377 S.E.2d 228 (Mem.) (N.C. 1989).

On April 24, 1989, Long filed a pro se habeas petition with the United States District Court for the Middle District of North Carolina, arguing ineffective assistance of counsel on the basis of, among other things, his trial counsel's failure to adequately challenge the jury selection process. That petition was dismissed on May 3, 1990. Long v. Dixon, No. C-89-278-S (M.D.N.C. May 3, 1990).

C. Discovery Order (2005), Second MAR (2008), and Appeal (2011)

Long later applied to the UNC Innocence Project to investigate his case, and the Project recruited a volunteer attorney to litigate Long's case. 2d MAR T Vol. I pp. 97-99. On April 20, 2005, that pro bono counsel filed a Motion for Location and Preservation of Evidence in Cabarrus County Superior Court. On May 23, 2005, the Superior Court issued an Order directing the District Attorney's Office, the Concord City Police Department ("CPD"), and the North Carolina SBI to locate and preserve all physical evidence and records in the case and to provide defense counsel with copies of all test results and reports prepared in connection with the case. App. 100-04. The Court also ordered Northeast Medical Center,

formerly Cabarrus Memorial Hospital, to locate, preserve, and provide to the court all biological evidence relating to this case. App. 105-06.

In response to the Discovery Order, the SBI reported that it had no evidence related to Long's case. App. 112. The CPD also reported that it did not locate any physical evidence but did find a file on the case which included a May 12, 1976 summary, prepared by Det. Isenhour, who was also the evidence custodian. See 2005 Discovery Hearing Transcript, attached as Exhibit 2.[7] That file included a list of items Det. Isenhour had taken to the SBI for examination. App. 146-49. Prompted by the discovery of that list, the SBI then found a file containing results of examinations on the evidence from 1976 submitted by the CPD. The SBI produced these results on January 13, 2006. App. 117-37.

Finally, the Northeast Medical Center provided the Cabarrus County Superior Court with 26 pages of medical records pertaining to Long's case. App.

[7] At an evidentiary hearing in 2005, the State prosecutor stated that "we requested that the Concord Police Department do a thorough search of all of their evidence and the inventory they have. . . . [I] know that based on the work that he's done, there have been at least 25 man hours spent searching for any of the items outlined in the Court's order . . . anything that may not have been introduced into court at the actual trial and they have found nothing." Exhibit 2 at 4. The officer who testified at the hearing, Sergeant Robert Ledwell, affirmatively denied the existence of any physical evidence: "Really, the only thing I was able to locate was the case file." Exhibit 2 at 7. Sgt. Ledwell answered affirmatively when asked whether the master file was "just paperwork." Ledwell further testified, "No, sir, no physical [evidence] . . . No, sir, no evidence sheets." Id. When detailing the amount of time spent searching the evidence room in response to the Discovery Order, Sgt. Ledwell testified that he and an assistant spent "easily 12 to 14 hours manually going through what we had, the older evidence that we had and physical searches." Exhibit 2 at 9.

138. After in camera review, the Superior Court turned 11 pages over to Long's counsel. Id.

After exhausting investigative leads, counsel for Long filed a second MAR in Cabarrus County Superior Court on August 27, 2008. 2008 Motion for Appropriate Relief, attached as Exhibit 3. Among other things, the 2008 MAR raised Brady claims related to the State's failure to disclose the favorable SBI reports and test results to the defense. An evidentiary hearing was held on November 20-21 and December 2, 2008. 2d MAR T Vol. I p.1; 2d MAR Vol. II p.1. On February 25, 2009, the Court denied Long's Brady claims but granted sentencing relief on other grounds. App. 218-31. The State appealed the MAR Court's Order granting sentencing relief and obtained a temporary stay from the North Carolina Supreme Court, but the stay was eventually dissolved. State v. Long, 689 S.E.2d 137 (Mem.) (N.C. 2009). The sentencing relief granted was directly tied to other state court litigation, see, e.g., State v. Bowden, 367 N.C. 329, 755 S.E.2d 53 (2014), which was resolved unfavorably for Long.

Long appealed the Court's denial of his Brady claims and the North Carolina Supreme Court granted full certiorari review. State v. Long, 365 N.C. 5, 705 S.E.2d 735 (2011). In a February 4, 2011 per curiam decision, the North Carolina

Supreme Court – by a three-to-three vote with one Justice abstaining – affirmed the MAR Court's Order denying the Brady claims. Id.

D. Second Habeas Petition (2012)

Long's 2008 MAR counsel then enlisted North Carolina Prisoner Legal Services ("NCPLS") to file a habeas petition on the basis of the Brady claims. On February 3, 2012, NCPLS filed a habeas petition in the Middle District of North Carolina, but, apparently unaware of the pro se habeas petition filed by Long in 1989, did not first obtain the permission of the United States Court of Appeals for the Fourth Circuit to file a successive habeas petition. 28 U.S.C. § 2244 (2015).

After the habeas petition was filed, the federal magistrate judge assigned to the case advised NCPLS of the 1989 petition, but it maintained that the 2012 habeas petition was not "second or successive" because the MAR Court's holding that Long "is entitled to have his sentence considered as a term of eighty years" constituted a "new judgment intervening between the two habeas petitions." See Magwood v. Patterson, 561 U.S. 320, 341-42 (2010) (holding petition is not "second or successive" under the Anti-Terrorism Effective Death Penalty Act ("AEDPA") if there is a "new judgment intervening between the two habeas petitions"). The District Court disagreed and dismissed Long's petition for lack of

jurisdiction. Petitioner has sought permission from the Fourth Circuit to file this petition.

STATEMENT OF THE FACTS

A. The Crime

Around 10:00 p.m. on April 25, 1976, in Concord, North Carolina, the 54-year-old widow of a Cannon Mills executive was raped by a man who broke into her home by climbing up a paint-covered outside banister and entered through an upstairs window. App. 59, 138-51; T pp. 108-09, 273-74; MAR T Vol. I p. 46. The victim sustained injuries requiring hospital admission, App. 138-51, including that her "fingernails were all sore" and some "had been bent backward," which she believed occurred when she fought and scratched her assailant, who was wearing a leather jacket and a toboggan (a knit cap), App. 141. Hospital staff collected numerous items of biological evidence from the victim, including pubic hair combings and five samples of bodily fluid suspected of containing the sperm of the perpetrator, which were taken "according to the rape protocol." Id.

B. The Victim's Identification of Long

About two hours later, at approximately 12:05 a.m. on April 26, 1976, CPD Sgt. David J. Taylor talked with the victim at Cabarrus Memorial Hospital. T pp. 174-75. She described her attacker as follows:

> [a] black male, height, five foot five to five foot nine, slender build, slim hips. Subject was plain spoken, used correct English and at times spoke very softly. No speech defect, accent, or noticeable brogue evident. Subject was wearing a dark waist length leather jacket, blue jeans with a dark toboggan pulled over his head. Could possibly have been wearing gloves.

T pp. 243-44. Although a police photograph taken of Long four days after the assault revealed that he wore a moustache and a "scruffy beard," her description did not mention any facial hair. T pp. 167 & 247; App. 59. Long still had a moustache and beard when arrested on May 10, 1976. T p. 247; State's Exs. 10 & 11.

The victim's description of Long was also inconsistent with other significant aspects of Long's appearance. She described him as a "light-skinned . . . yellow black man," T p.122, but Mr. Long is a dark-skinned African-American. See Photo of Ronnie Long, attached as Exhibit 4.

On May 5, 1976, ten days after the crime, Sgt. Taylor and Lt. George Vogler of the CPD, who had earlier shown the victim a photographic lineup including another suspect, T p. 180, apparently decided against a photographic lineup including Long, and asked her to accompany them to district court on the morning of May 10, 1976. The officers, knowing Long would be in court that morning for a

misdemeanor trespassing charge,[8] suggested to the victim that her rapist may be present and hoped she would identify him. T pp. 21, 45-46, 181 & 184.

On the morning of May 10, Sgt. Taylor and Lt. Vogler took the victim, wearing a red wig and glasses to disguise herself, and her neighbor to the courtroom. T pp. 24-25 & 182-83. The victim reported that officers told her to "sit there [in the gallery] and to look around and see if [she] saw anybody that [she] knew, or the man that raped [her]." T p. 27. The officers watched from the jury box. T p. 30. There were 35 to 50 people in the courtroom and "there were some blacks in there, like maybe a dozen." T pp. 27-28. Long was seated in the middle of the gallery for the full time. T p. 184.

The victim was "constantly just looking" around for about an hour or an hour and a half, but did not identify Long as her assailant until the judge called him to come forward for the trespassing charge. T pp. 28-30, 48-49, & 127.

About 15 to 20 minutes later, the officers took the victim to the police station and showed her six to eight photographs, including one of Long in a black leather jacket and one that "looked like it might have been a woman." T pp. 33-35 & 49-50. When asked whether there was "anything distinctive about the dress of

[8] The CPD could have used the photograph of Long taken on April 30, 1976, in connection with his alleged trespass in Caldwell Park. The park was located behind and adjacent to his parents' home, where Long lived at the time. The trespass was dismissed on May 10, the day the officers took the victim to court.

any of those individuals . . . that drew [her] attention to them," she said, "[It] was the jacket . . . if it wasn't the jacket, it was the identical, one identical to it. It was a leather jacket." T pp. 34-35. She further admitted that Long was the only one in the photographs wearing a leather jacket and, on a question from the judge, that the officers "could have" explicitly asked her to pick Long from the photo array. T p. 53.

C. Long's Arrest

On the evening of May 10, 1976, Sgt. Taylor and Sgt. Marshall Lee went to Long's home and told him to come to the station to "straighten out" the trespassing warrant, which had been dismissed that morning. T pp. 215-16. Upon his arrival, Long was arrested on the rape and burglary charges. Id. By October 1, 1976, less than five months after his arrest, Long was tried, convicted, and sentenced to life in prison.

D. The Investigation, Including the Evidence Collected and Driven to the SBI Lab for Analysis

Police, responding to the victim's call to the CPD, arrived at the crime scene just after 10 p.m. on Sunday, April 25, 1976. Sgt. Taylor arrived at approximately 10:30 p.m. with tracking dogs and searched the area for approximately 30 minutes. T pp. 174-75. Shortly after midnight, Sgt. Taylor met with the victim at the

hospital and acquired the suspect description described above. Det. Isenhour processed the crime scene and later testified that he only lifted a partial latent shoe print from the scene. T p. 291. He did not reveal that he had also collected latent fingerprints, carpet samples, suspect hair, and paint samples from the crime scene, as well as the victim's clothing and partially burned matches from the suspected point of entry to the victim's home. App. 117-21, 127-28 & 146-49. About three hours after the rape, around 12:35 a.m. on April 26, 1976, Sgt. Lee took custody of two specimens collected at the hospital: (1) a plastic bag containing combings of the pubic hair of the victim, and (2) a test tube containing vaginal swabs and secretions. App. 145.

At the time of his arrest, Long's leather jacket, which he wore to the police station on May 10, was also collected, as were gloves and matchbooks from his father's vehicle, which Long drove to the police station that evening. Police reported finding a green toboggan[9] in Long's car and Det. Isenhour took inked impressions of the shoes Long wore to the station.

On May 11, 1976, Det. Isenhour drove 15 items of evidence to the SBI laboratory in Raleigh for examination, including the toboggan, Long's gloves and

[9] Long has steadfastly maintained that the toboggan was not his and that he had never seen it before his arrest. T p. 218 (suppression hearing).

jacket, the victim's head hair samples and pubic hair combings, carpet samples, suspect hair, matchbooks from Long's father's car and the partially burned matches from the scene, the victim's clothing, paint samples, latent shoe print impressions, and inked impressions of Long's shoes. App. 117-21, 127-28 & 148. Det. Isenhour delivered 13 of the 15 items to SBI Special Agent Rick Cone ("S/A Cone) and the remaining two items to SBI Special Agent Dennis Mooney ("S/A Mooney"). App. 117-21 & 127-28.

The sexual assault evidence kit – a test tube containing vaginal swabs and secretions taken shortly after the rape, and signed for by Sgt. Lee for pickup from Cabarrus County Hospital – was not listed in Det. Isenhour's report of evidence submitted to the SBI and is not mentioned in any SBI document thus far discovered in the case.

E. Forensic Analysis Conducted by the SBI Did Not Connect Long to the Crime

The items delivered to the SBI by Det. Isenhour were examined by three separate analysts, and each analyst produced his own report. App. 117, 127 & 129. None of the forensic examinations connect Long to the crime.

The first report, prepared by SBI Special Agent Glen Glesne ("S/A 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. App. 129. S/A Glesne also reported that he examined the victim's clothing, including a pair of sandals, a blue house coat, panties and panty hose, and found no hairs resembling Long's. App. 129-37.

The second report, prepared by S/A Cone, concluded that none of the clothing submitted for analysis (a leather jacket, a pair of black gloves, and a green toboggan) had the presence of any paint or fibers from the crime scene, and none of the partially burned matches found at the scene had "sufficient identifying characteristics" to determine if they came from the matchbooks recovered from Long's father's vehicle. App. 117-26. Five matchbooks were compared with the matches from the crime scene. App. 126. 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, S/A Cone concluded the burned matches from the scene "probably did not originate from this matchbook." Id.

The third report, prepared by S/A Mooney, compared two inked shoe impressions taken from Long on the day of his arrest with the partial latent shoe print impression taken from the crime scene. App. 127. While S/A Mooney reported that Long's shoes "could have made the shoe track impression" from the

crime scene, "there were an insufficient number of distinct characteristics noted by which to effect any identification." Id. (emphasis in original).

The MAR Court found that the SBI concluded in its report that the shoes seized from the defendant "matched the tread design of the print left at the scene." App. 220 ¶ 12. The SBI analyst report states that no identification could be made: "There was an insufficient number of distinct characteristics noted by which to effect any identification." App. 127. The examiner also testified at the trial he could not state there was a match:

> Q. [Prosecutor] Did you then . . . do you have an opinion satisfactory to yourself, sir, as to whether or not State's Exhibit Thirteen was made by either specific object, namely State's Exhibit Fifteen-A or Fifteen-B?
>
> A. No, sir, I do not.
>
> . . .
>
> Q. [Defense] Now, is it your testimony that if I found a pair of red shoes in this courtroom, similar to the ones that were used to make the inked impressions, that those shoes could also have made an impression similar to what you have there?
>
> A. Yes, sir, that is correct.
>
> Q. So in other word, you are not telling this jury that your opinion is such that the impressions you examined that were brought to you by an officer from the Concord Police were made by any type that you could identify?
>
> A. That is correct.

T pp. 298-99.

When Det. Isenhour was asked at trial what evidence he had taken to the SBI for analysis, he stated that he took only the latent shoe impression, the inked impressions from Long's shoes, and Long's shoes. T p. 285. He further testified that he remained with these items during the forensic analysis, thus never relinquishing custody and control, T p. 265, but, the SBI reports show that, on May 11, 1976, Det. Isenhour released to the SBI the of evidence detailed above and picked them up nearly a week later, on May 17, 1976, App. 117-21, 127-28.

F. Defense Counsel Was Not Told that the Evidence Above Had Been Taken to the SBI and that the Hospital Had Retained the Biological Samples and Turned Them Over to the CPD

At trial, Long's principal defense counsel were James Fuller and Karl Adkins. App. 3-4. Les Burns, an investigator, assisted the defense. 2d MAR Vol. I T pp. 174-77. The State was represented by Assistant District Attorney ("ADA") Ronald Bowers. App. 3-4.

ADA Bowers testified at the MAR hearing that District Attorney ("DA") James Roberts handled discovery and that his office had an open-file discovery policy. 2d MAR T Vol. I pp. 177-78, 252 & 297-99. Long's trial counsel specifically recalled a meeting at which DA Roberts handed over a packet of documents relating to the case, which was the only documentary discovery the

defense received from Roberts.[10] 2d MAR T Vol. I pp. 113-15, 252-58. Fuller and Burns recalled a second pretrial meeting with DA Roberts at which the defense had the opportunity to inspect a jacket, toboggan, and gloves. 2d MAR T Vol. I pp. 118-19 & 257-58. Long's trial counsel did not have another opportunity to inspect any other physical evidence.

Det. Isenhour's investigation summaries listing what items were taken to the SBI and the SBI analysts' reports were never disclosed to Long's trial counsel. 2d MAR T Vol. I pp. 130-33, 183-84, 256, 258 & 286-87. The defense team was also never informed that the CPD had obtained a full sexual assault evidence kit from the hospital. 2d MAR T Vol. I pp. 127-28, 194-95, 260, 262-63. Long's trial counsel recalled the State affirmatively denying that a rape kit had been taken. 2d MAR T Vol. I p. 195.

ADA Bowers testified at the 2008 MAR hearing that he did not recall seeing Det. Isenhour's investigation summaries or the SBI reports before trial, and he believed they were not turned over to the defense. 2d MAR T Vol. I pp. 133, 184 & 258. He further testified that, if he had had them, the SBI reports would have been disclosed to the defense, and that he did not know about the fluid

[10] The packet of materials from DA Roberts was admitted as Defendant's Ex. 2 at the MAR hearing in 2008. 2d MAR p. 125. An identical set of discovery materials was kept in the courthouse file; it was admitted as Defendant's Ex. 3. 2d MAR pp. 125-26; App. 85-86.

samples or pubic hair combings taken from the victim at the hospital, and if he had, he would have requested further testing of them. 2d MAR T Vol. I pp. 304, 308 & 311-12.

Long's trial counsel testified that, based on previous dealings with DA Roberts, they trusted and relied on him to provide all the discovery pursuant to his office's open file discovery policy. 2d MAR T Vol. I pp. 177-78 & 252. Fuller stated that he would have followed up with DA Roberts if there had been a suggestion from anyone in the CPD or DA's office that additional discovery materials existed or that evidence had been sent for testing. 2d MAR T Vol. I pp. 284-85.

G. Long's Arrest and Trial Stirred Racial Unrest in Concord

Long's arrest polarized the community. Marches and demonstrations were held throughout the summer. App. 47-50; MAR T Vol. I p. 54. The atmosphere at the 1976 trial was tense and racially polarized: "white folks were on the prosecutor's side and the black folks with a few, sort of a salt and pepper sprinkling of whites" on the defense side. MAR T Vol. I p. 19. The jurors were all white. MAR p. 82. When the verdicts were announced, spectators were cleared from the courtroom by police. MAR T Vol. I pp. 54-55 & 61.

The victim was the widow of a well-known Cannon Mills executive, and, in Cabarrus County at the time, there was a "real or perceived feeling that Cannon Mills ran" the county, and, as Adkins testified, it would have been "difficult to keep those kinds of feelings out of . . . [the] courtroom." MAR T Vol. I p. 46. Three of the jurors worked for Cannon Mills, and a fourth was married to a Cannon Mills employee. App. 45-46 (newspaper article referred to at MAR pp. 82-83).

The all-white jurors were selected from a jury pool that was personally vetted by the Cabarrus County Sheriff before anyone on the list was issued a summons for service. The county's Jury Commission Chairman explained the process during voir dire:

> [He] takes the [jury] roll lists to the Sheriff's department and sometimes the sheriff comes to our office on Church Street, and go over name by name and he knows most of them personally, but sometimes he also brings a couple of deputies with him; and they in turn help him check the names off of the ones who are supposed to be disqualified, or the same thing is done in the CPD . . . and that's the way we disqualify these people who are not eligible to be on the jury.

T Jury p. 20. The Chairman further explained that he "give[s] [the sheriff] a red pencil and he marks that red through that particular name." T Jury pp. 20-21. No record was maintained of the reason for any disqualifications. Id.

H. The State's Case at Trial

The State's case relied almost entirely on the victim's testimony. She testified that her assailant threatened her with a knife, and beat and raped her. T pp. 8-9 & 15-18. She testified that she struggled and fought for her life, T pp. 71, 113, 119, and that her assailant yelled, "Don't look at my face," T p. 78, and "kept pushing . . . [her] face to the side, holding . . . [her] face with his hand," id. The victim also testified that she was very frightened, so frightened that she "had no idea . . . [she]'d ever get out alive." T pp. 12-13 & 116. As soon as her assailant fled the scene, the victim ran to a neighbor's house and reported the rape. T p. 19. The victim identified Long at trial. T pp. 20.

Dr. Lance Monroe testified that he examined the victim on the night of the attack and that, in his opinion, the injuries he observed on her had been caused by "some sort of traumatic intercourse." T pp. 172-73. He also described a slide he had made containing semen and sperm he had collected during a pelvic examination of the victim. T pp. 170-71. Dr. Monroe did not mention that numerous items of biological evidence, including pubic combings and five samples of bodily fluid, were collected from the victim and picked up from the hospital by the CPD.

Detective Isenhour testified that he asked S/A Mooney to conduct the shoe print examination and comparisons; S/A Mooney testified that he could not say the shoeprint was made by either of Long's shoes. T pp. 288 & 298-99. Det. Isenhour did not mention the other 13 items he submitted to the SBI. At closing, the State made the following arguments:

- "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*." T Argument pp. 103-04 (emphasis added).

- "The man that made that footprint is the man that broke into her home." T Argument p. 109.

- 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*." T Argument p. 113 (emphasis added).

The State also introduced as evidence the black leather jacket Long was wearing the day he was arrested, 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. T pp. 238-40 & 301-02. The State did not disclose the examination

of these items that failed to provide any link between Long and the victim or the crime scene.

I. The Defense Case

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, T pp. 311-12, 316-17, 322-23, 329 & 377, and spent the later evening at home talking to his girlfriend and young son on the telephone, T pp. 338-43 & 349-53, waiting for his father to return home with the family car, T p. 348, and listening to music in his room, T p. 352. Then, around 10:25 p.m., he and a friend drove to a party in Charlotte. T pp. 362 & 377. The victim testified that the crime occurred around 9:30 to 9:45 p.m., which is when Long's witnesses testified that he was at home. T pp. 5, 40-41, 338-43 & 347-53.

Witnesses also testified that they did not observe any scratches or injuries on Long, including a witness who was intimate with Long after the party, or any scratches on his leather jacket. T pp. 325 & 330.

On both cross-examination and in their summations, trial counsel attempted to challenge the accuracy of the victim's identification by demonstrating that she had little or no interaction with African Americans. T pp. 130-33; T Argument pp. 120-21. Among other things, she described the perpetrator as a "light skinned" or

"yellow" black man, T p. 122, but Long is black and dark skinned. See Exhibit 4. The victim also admitted to recognizing Long because he was wearing a leather jacket similar to the one she recalled the assailant wearing. T pp. 140-41. Finally, despite being in the courtroom with only a dozen black people, it took the victim more than an hour to identify Long, and then only when he was called to the bench by name. T pp. 127-29.

Long's trial counsel also challenged the accuracy of the identification by highlighting the victim's state of mind during the attack. She was terribly frightened and extremely emotionally upset, and the assailant held a knife to her throat during the attack. T pp. 113, 116, 120 & 129; T Argument p. 139. Counsel also pointed to the fact that the victim testified that the toboggan concealed the assailant's face. T p. 137; T Argument p. 147.

Finally, Long's trial counsel pointed to the lack of physical evidence connecting Long to the crime: S/A Mooney admitted that he could not say the latent shoe print was made by Long's shoes, T p. 299; there was no paint on the leather jacket or gloves, although the assailant likely shimmied up a white painted surface to reach the second floor window, T Argument p. 116; there were no scratches on Long, although the victim vividly described how she fought her assailant, T Argument pp. 145-46; the hair that could be seen in the toboggan was

light in color rather than Long's black hair, T p. 310; and no blood was found on Long's clothing, T Argument p. 145. Trial counsel did not have the medical records of the victim and, as described above, were unaware of the existence of the other favorable evidence.

J. Evidence From State Post-Conviction Proceedings

At the 2008 MAR hearing, Long's counsel presented newly discovered evidence, including Det. Isenhour's summary reports, App. 146-51; the three SBI analysts' reports and their associated notes, App. 117-137; and the victim's medical records, App. 139-145. 2d MAR T Vol. 1 pp. 131-32, 133-37, 321 (Defendant's Exhibits 4A, 4B, 5 and 7, respectively). The summary reports presented included the May 12, 1976, summary report discussed above, which lists the 15 items of evidence taken to the SBI, and a second report prepared by Det. Isenhour excluding the information related to the evidence taken to the SBI other than the latent shoe print evidence.[11]

At the hearing, a number of witnesses testified about the withheld evidence. The witnesses included two SBI agents, an outside forensic expert, and Long's trial attorneys. Jennifer Remy, a senior hair analyst with the SBI, summarized S/A

[11] The second report is entitled "Latent Evidence Work and Photography . . . ," but it does not include all of the now-known latent evidence that was collected by the CPD and lacks other information related to the materiality of the latent evidence included in the report.

Glesne's 1976 report 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. 2d MAR vol. II pp. 10-18, 24-28, 32-33. She testified that S/A Glesne's analyses concluded that the hair "was different from the suspect's hair." 2d MAR vol. II p. 26.

S/A Cone also 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 conceding that, in a violent rape such as the one in this case, there probably would have been some transfer of material. 2d MAR vol. II pp. 69 & 81. Among other things, given that there was white paint on the pole up which the assailant climbed to break into the house, one would expect to find traces of white paint on the assailant's clothing. 2d MAR vol. II p. 136.

Jeffrey Hollifield, 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. 2d MAR vol. II pp. 138 & 159. He indicated that, in a violent crime such as the one here, it would be unlikely not to find some sort of trace evidence in any of the items submitted for analysis. 2d MAR vol. II pp. 112 & 117.

Long's trial counsel testified that the undisclosed SBI reports would have been critical to the defense at the time of trial. 2d MAR T Vol. I pp. 194-95 & 258-59. Fuller stated that S/A Cone's SBI report, which found no trace of fibers or paint from the crime scene on Long's clothes, would have been particularly helpful to 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.

2d MAR T Vol. I pp. 270-71. 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.

2d MAR T Vol. I pp. 258-59.

According to Fuller, cross-examination of the victim was made particularly difficult given the competing racial empathies and tensions that simmered in the courtroom during the trial of a young black man accused of raping the white widow of a Cannon Mills executive in 1970s Concord. Fuller testified that the SBI reports would have made his cross-examination of the victim more effective:

> I mean, you just don't act like race isn't a factor. It was a factor. And my point is instead of my being able in effect with nothing in my hands to cross examine this nice lady who sadly had been raped by somebody, but with nothing to show positive or negative, it just made it a darn near insurmountable climb up the mountain. If I'd been able to take test after test and show that this guy who didn't admit it, that there was evidence, both affirmative and non, I guess that didn't point to him, I think in that context, in this kind of case, in this county at that time, it would have made all the difference in the world.

2d MAR T Vol. I pp. 263-64.

Adkins testified that if they had known of the existence of the SBI reports, they would have retained an expert "to examine the reports and the results and give us guidance on interpreting the information. And then we would have done whatever was necessary to follow up." 2d MAR T Vol. I p. 185. That follow-up would have included "independent testing done to confirm or refute whatever might have been in the SBI reports." 2d MAR T Vol. I p. 186. In Adkins' view, 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." Id.

As Long's trial counsel indicates, because of the circumstances of this trial, the disclosure of this evidence would have "made all the difference in the world." 2d MAR T Vol. I pp. 264.

SUMMARY OF ARGUMENT

This Petition should be granted for two reasons. First, in light of the evidence that is now known, coupled with the new understanding of the fallibility

of eyewitness identification (as described below), Long presents a credible claim of actual innocence, permitting this Court to review his constitutional claims. Second, the MAR Order was contrary to, or an unreasonable application of, the Supreme Court's clearly established Brady jurisprudence with respect to each of the three fundamental Brady components: favorability to the accused; suppression of evidence by the State; and materiality. Most of the MAR Court's findings of fact are not relevant to the disposition of his Brady claims. To the extent any of the findings of fact are relevant, they were based on an unreasonable determination of the facts in light of the evidence presented at the MAR hearing.

Long has been incarcerated for almost 40 years, after being convicted almost entirely on the victim's highly questionable eyewitness identification. The only other evidence the State argued implicated Long was the equivocal testimony of the latent shoe print examiner and the similarity in some of Long's and the assailant's clothes. It is now known that the State possessed significant exculpatory evidence, including all of the SBI agents' analyses that failed to implicate Long. The hair did not match his. The prints did not match his. The burned matches did not match the matchbooks in his car. There was no transfer evidence on his clothing, including no white paint on his clothes, which the SBI analyst admitted he would have expected with the assailant shimmying up the

white-painted pole to access the victim's house. In short, there was no evidence that Long was ever in the victim's home, other than her identification.

GROUNDS FOR RELIEF

I. LONG'S CREDIBLE CLAIM OF ACTUAL INNOCENCE CREATES A "GATEWAY" TO FEDERAL HABEAS REVIEW.

A. Actual Innocence Gateway

As discussed above, because this petition is filed outside the one-year statute of limitations under 28 U.S.C § 2244(d)(1), Petitioner seeks federal habeas review by this Court based on the actual innocence gateway under Schlup v. Delo, 513 U.S. 298 (1995). In order for the gateway to open, Petitioner must show that new reliable evidence not presented at trial makes it "more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id. at 327. The United States Court of Appeals for the Fourth Circuit recently elaborated on the proper approach to such claims. First, "the district court must consider '*all* the evidence' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" Teleguz v. Pearson, 689 F.3d 322, 328 (4th Cir. 2012) (citing Schlup, 513 U.S. at 327-28). Next, "the district court must make a holistic determination of how a reasonable juror would perceive all of the evidence in the

record." Teleguz, 689 F.3d at 330. If it is "'more likely than not any reasonable juror would have reasonable doubt' as to petitioner's guilt, then the petitioner has satisfied the Schlup standard." Id. at 328 (quoting House v. Bell, 547 U.S. 518, 538 (2006) (emphasis added)).

Once the Schlup standard is met, the district court must review the merits of Long's substantive claims, id. at 327, and, if Long passes through the gateway, he is entitled to a review of all barred claims on the merits regardless of AEDPA's statute of limitations. McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013).

A consideration of *all* available evidence in this case convincingly demonstrates that there would be a reasonable juror who has reasonable doubt. The conviction was based almost exclusively on an eyewitness identification following an unorthodox and suggestive procedure. Even in the best circumstances, eyewitness identifications are known to be unreliable and a leading cause of wrongful convictions. See, e.g., Perry v. New Hampshire, 132 S. Ct. 716, 738 (2012) (Sotomayor, J., dissenting) ("The empirical evidence demonstrates that eyewitness misidentification is 'the single greatest cause of wrongful convictions in this country.'"); United States v. Hodges, 515 F.2d 650 (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." (internal citation omitted)); State v. Henderson, 27 A.3d 872, 885 (N.J. 2011) ("eyewitness '[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country'") (internal citation omitted). Moreover, as discussed, the newly discovered evidence unequivocally points to Long's innocence.

B. New Evidence Supports Passage through the Innocence Gateway

At the time of trial, the State failed to provide material, exculpatory evidence to the defense, including the evidence that is the subject of this Petition and additional new evidence discovered since the 2008 MAR hearing by NCIIC. The new evidence discovered since the 2008 MAR hearing is particularly important to this Court's consideration of whether an evidentiary hearing is necessary to resolve Long's actual innocence gateway claim. The new evidence, i.e., latent fingerprints collected from the crime scene, may be highly probative of the identity of the perpetrator, as a number of the lifts were repeatedly checked against suspects by the CPD.[12] Isenhour Report dated May 12, 1976, App. 147. This new evidence

[12] The State will likely argue that the latent lifts are immaterial because evidence at trial suggests that the perpetrator wore gloves. This argument should fail for several reasons: (1) the CPD believed that the lifts had probative value and repeatedly compared them to suspects; (2) there was some dispute at trial whether the victim was certain that the perpetrator wore gloves; and (3) evidence at trial showed that burned matches from a matchbook were found just inside of the location where the perpetrator entered the victim's home, and it is unlikely that a gloved person could tear, light, and burn matches from a matchbook in the dark.

should have been provided to Long's counsel before the 2008 MAR hearing pursuant to the Discovery Order discussed above, which directed the State to "locate and preserve all physical evidence gathered in the investigation" leading to Long's arrest and conviction and to "inform defense counsel whether any physical evidence is still in [its] custody." App 100-04.

The CPD responded to the Discovery Order by denying that it had any remaining physical evidence in its possession. App 110. Yet, when the NCIIC reviewed the case in 2014, it obtained the latent prints from the CPD. The latent lifts do not match Long, but the full extent of the value of the lifts remains unknown. The NCIIC asked the CPD to run the lifts through an automated fingerprint identification system ("AFIS"), which compares the lifts to known offenders in a database. The one-page report provided to Long says that "no possible contributors" of the latent lifts were identified,[13] yet no information was provided regarding the specific database queried. See Exhibit 1. Given that there are national, statewide, and local databases, without knowing which database was queried, the scope and related effectiveness of the search cannot be determined. More troubling is the obvious conflict that exists in having the CPD, which had

[13] The language "no possible contributors" is itself problematic with respect to AFIS. Upon information and belief, a query always returns possible contributors, and the analyst must make a subjective judgment whether any of the possible prints match the latent print in question.

earlier denied having physical evidence in its possession, conduct the examination to determine their value.

In an effort to understand the examinations conducted on these latent prints, Long recently asked for the NCIIC file on the case, but the State (DA's Office) objected to the provision of its file and the NCIIC refused to provide any of its file over that objection. The State's objection is consistent with its overall approach in this case since the beginning, which seems to be to make every effort to prevent Long from accessing favorable evidence in the State's possession.

C. The Continued Suppression of Evidence by the State Warrants this Court Holding an Evidentiary Hearing on the Gateway Issue

Ordinarily, 28 U.S.C. § 2254(e)(2) "precludes a district court form conducting an evidentiary hearing on a federal habeas claim if the petitioner 'failed to develop the factual basis of the claim in state court proceedings.'" Wolfe v. Johnson, 565 F.3d 140, 166 (4th Cir. 2009) (quoting 28 U.S.C. § 2254(e)(2)). In the gateway context, however, the Fourth Circuit has clarified that courts may order evidentiary hearings to establish whether the threshold of actual innocence has been met. Teleguz, 689 F.3d at 331. The court reasoned that an evidentiary hearing may be necessary to assess the probative value of new evidence that has not been considered by the state court. Id. at 331-32. Here, of course, the probative value of the latent evidence was never considered by the state court since

it was suppressed by the State. See Affidavit of Donna Bennick, attached as Exhibit 5. There is also reason to believe additional evidence continues to be suppressed, as Long's 2008 MAR counsel was never provided with state records revealing the alternative suspects considered by the NCIIC. Id.

In addition, while the state court's factual findings bearing on the resolution of a gateway issue are presumed to be correct, this presumption may be rebutted by clear and convincing evidence from the Petitioner. Teleguz, 689 F.3d at 311. As will be discussed infra, the 2008 MAR Court's findings of fact are unreasonable in light of the evidence presented at the MAR hearing. Additionally, the new evidence found since the Order denying Long's 2008 MAR further supports the claims Long made at the MAR hearing. Thus, the MAR court's analysis of the evidence was necessarily frustrated by the State's continued suppression of additional evidence favorable to Long. Therefore, any of the state court's factual findings bearing on the gateway issue should not be presumed correct, and this Court should hold a hearing to make its own determinations in light of the newly available evidence.

D. The Evidence Presented at Trial Was Unreliable

Long was convicted based on the victim's identification and his possession of attire similar to that worn by the perpetrator. His possession of similar attire is

hardly noteworthy, as there was no distinctive piece of clothing worn by the perpetrator that would make possession of similar clothing probative. Long wore a black leather jacket, which was common attire in the 1970s. Additionally, as discussed above, the jacket worn by Long had no signs of being scratched or otherwise marked during a struggle, which would have been expected here.

There are numerous reasons why the victim's identification of Long was highly unreliable. Most telling, it was not supported by her pre-identification descriptions of her assailant. In the pre-identification description, 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. Also, according to research, the physical appearance of the person identified, whether the identification is correct or not, can distort the witness's memory of the perpetrator. That is, once a witness identifies someone, they tend to incorporate the features and other characteristics of the person identified into their recall of the assailant, which might explain 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. T p. 32.[14]

[14] See Gary L. Wells, Elizabeth F. Loftus, Eyewitness Memory for People and Events, 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).

Separately, witnesses' statements of certainty or confidence in identification should not be viewed as indicia of the accuracy of the identification. Studies have found that confidence is, at best, only moderately correlated with accuracy,[15] and that this moderate correlation erodes further when the viewing conditions are poor[16] and suggestive identification procedures are used,[17] as these procedures wrongly reinforce the victim's belief in her ability to accurately identify the perpetrator.

The procedures used to identify Long were highly unorthodox and suggestive, and, in light of possible alternative, more conventional, identification procedures, one of which (a photo array) the CPD had used with an earlier suspect, suspicious. As described above, on May 10, 1976, CPD officers escorted the victim to district court, telling her that the man who raped her might be in the courthouse. Understandably fearful and anxious, the victim wore a red wig and glasses to disguise herself, as she sat in the gallery for about an hour or an hour and

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[15] Kevin Krug, The Relationship Between Confidence and Accuracy: Current Thoughts of the Literature and a New Area of Research, APPLIED PSYCHOLOGY IN CRIMINAL JUSTICE 31 (2007).

[16] Nancy K. Steblay, Gary L. Wells & Amy B. Douglass, The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications, 20.1 PSYCHOLOGY, PUBLIC POLICY, AND LAW, Vol. 15 (2014).

[17] Gary L. Wells & Deah S. Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 33.1 LAW AND HUMAN BEHAVIOR, Vol. 12 (2009).

a half. [18] 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. T pp. 29-30, 48-49, 96 & 127. Testimony at Long's trial suggested that investigators did not tell the victim that Long was their prime suspect before her identification, 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. T p. 184.

Even if CPD officers did not intentionally encourage the victim to identify Long, controlled studies show that investigators can inadvertently convey the suspect's identity to witnesses, which increases their likelihood of identifying the suspect.[19] Here, CPD officers remained in the courtroom within the victim's line of sight throughout the process, and, during this time, they were keenly interested in whether the victim would identify Long.

Among other things, this procedure lacked an important safeguard for all identifications – known innocent fillers.[20] These fillers, who are similar in

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[18] 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.

[19] Sarah M. Greathouse & Margaret B. Kovera. Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification. 33 LAW & HUMAN BEHAVIOR at 79 (2009).

[20] G.L. Wells, B.L.. Cutler, & L.E. Hasel, The Duke-Lacrosse Rape Investigation: How Not To Do Eyewitness Identification Procedures in M. L. Siegel, Race to injustice: Lessons learned from the Duke lacrosse rape

appearance to the suspect, ensure that the identification is based on recognition, not based on the fact that a suspect stands out from a group of easily excludable candidates. Fillers also guard against misidentification leading to wrongful convictions, because selection by the witness of a known-innocent filler has no criminal consequence for the individual identified and provides critical feedback to investigators regarding the quality of the witness's memory. Here, all that is known about the other individuals in the courtroom when Long was identified is that there were approximately "12 Black men" in the general age range of the assailant. T p. 185. Given that these men were not selected fillers, all of them could have been easily excludable based on factors such as hair length, height, weight, etc., which would have highlighted Long as the black male investigators believed to be the assailant. Holding the procedure in a courtroom further enhanced the likelihood that the victim would select someone despite his possible innocence, because the courtroom itself conveys a message that the persons present were criminals.

More questionable was the decision to employ this in-court identification procedure, which carried a great deal of anxiety for the victim, rather than the

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case, 313 Carolina Academic Press 2009.

standard photo lineup. The CPD had a photograph 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 five days 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,[21] this Court should give very little weight to the victim's identification of Long under the highly unorthodox and suggestive procedure employed here.

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

- Cross-racial identification. The victim was white and admitted unfamiliarity with Blacks. T p. 131. It is a well-established phenomenon that individuals have more difficulty identifying

[21] Avraham M. Levi, Are Defendants Guilty if They were Chosen in a Lineup, 22 LAW & HUMAN BEHAVIOR, 400 (1998) (noting that assuming a fair, single-suspect lineup, the probability of an innocent defendant being chosen is approximately 25%).

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.[22] 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.[23]

- Impermanence of memory. The victim's identification took place 16 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.[24] 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.[25]

- 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 when a weapon is present during a crime, the victim's attention is drawn away from the perpetrator's characteristics in favor of the weapon itself, decreasing the victim's ability to accurately describe and identify the perpetrator and thereby creating a greater potential

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[22] See National Research Council of the National Academies, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION, 96 (National Academies 2014).

[23] Christian A. Meissner, John C. Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, PSYCHOLOGY, PUBLIC POLICY & LAW, Vol 7.1 at 15.

[24] See e.g. Kenneth. A. Deffenbacher, Brian. H. Bornstein, E. Kiernan. McGorty, Steven D. Penrod, Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation. JOURNAL OF EXPERIMENTAL: APPLIED (2008), Vol. 14.2 at 147.

[25] Id.

> for mistakes in identification.[26] It is also well established that extreme stress negatively impacts identification accuracy.[27]

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 Ronnie Long.

Finally, although the victim selected Long from a photo array approximately twenty minutes after the courtroom identification procedure, T p. 39, that second identification cannot remedy the defects of the courtroom identification because the victim was already primed to select Long and only had to pick the same person she selected just twenty minutes before.

E. Petitioner's All-White Jury Resulted from the Purging of the Juror Rolls by Local Law Enforcement Officials

As noted above, the Cabarrus County Jury Commission Chairman described the following as a matter of common practice in his county at the time:

> [He] takes the [jury] roll lists to the Sheriff's department and sometimes the sheriff comes to our office on Church Street, and go over name by name and he knows most of them personally, but sometimes he also brings a couple of deputies with him; and they in turn help him check the

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[26] See, e.g., Jonathan M. Fawcett, Emily J. Russell, Kristine A. Peace, Joh Christie, Of Guns and Geese: A Meta-Analytic Review of the 'Weapon Focus' Literature, 19 PSYCHOLOGY, CRIME & LAW 35 (2013).

[27] See, e.g., Kenneth. A. Deffenbacher, Brian. H. Bornstein, Steven D. Penrod, E. Kiernan. McGorty, A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 LAW AND HUMAN BEHAVIOR 699 (2004).

> names off of the ones who are supposed to be disqualified, or the same thing is done in the Concord Police Department…and that's the way we disqualify these people who are not eligible to be on the jury. . . . I give him [the sheriff] a red pencil and he marks that red through that particular name.

T Jury pp. 20-21.

The Sheriff testified that he struck through a couple dozen or more names from the list. T Jury p. 31. There was no testimony regarding the number of jurors struck from the jury rolls by other law enforcement officers, including the Concord Police Chief.

The Chairman acknowledged that neither he nor the Commission made an independent inquiry of the names disqualified by law enforcement. T Jury p. 22. At trial, the court asked whether the list of those marked off was available, but the Chairman said he was unable to locate it. T Jury p. 28. Notably, Long's juror pool included just 2 blacks out of 49 potential jurors. T Jury p. 1. An additional 50 jurors were summoned, and the total number of potential black jurors called to the jury box during jury selection was 4 out of 43. MAR T at 28. All four were excused.[28] Given the questionable jury-selection process, this Court should give less weight to the jury's finding of guilt.

[28] The racial composition of a jury has been found to dramatically influence results in criminal cases. Among

F. It Is More Likely Than Not That No Reasonable Juror Would Have Convicted Long

All of the new evidence described above, including the evidence that has been discovered since Petitioner's 2008 MAR hearing, was withheld from the defense at trial and is favorable under Brady, either because it is wholly exculpatory or has significant impeachment value. Considering all of this new evidence together with the scant evidence presented against Long at trial makes plain that it is more likely than not that no reasonable juror would have convicted Long. It would be patently unreasonable to elevate the now-known fallible eyewitness evidence over the numerous examinations of physical evidence in the case that in no way connect Long to the crime.

Long's jury, the composition of which was carefully engineered by law enforcement's improper participation in the construction of the jury rolls, resulting in an all-white jury, was grossly hindered by the very narrow view of the evidence it was provided. Had the State honored its obligations under Brady, even this unrepresentative jury would have had the opportunity to more fairly assess the question of Long's culpability. Given this, this Court should give no deference to

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other things, the greater percentage of Whites on a jury, the more likely it is to convict a Black defendant. Williams, M. R., & Burek, M. W., Justice, juries, and convictions: The relevance of race in jury verdicts, Journal of Crime & Justice, 31, 149-69 (2008). This association persists regardless of crime type or strength of case. See Bradbury, M. D., & Williams, M. R., Diversity and Citizen Participation: The Effect of Race on Juror Decision Making, Admin. & Soc'y, 45, 563-82 (2013).

the jury's determination and instead conduct a wholly independent assessment of the totality of the evidence in this case.

II. THE STATE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER BRADY V. MARYLAND BY FAILING TO DISCLOSE SBI REPORTS AND NOTES, THE VICTIM'S MEDICAL RECORDS, AND DETECTIVE ISENHOUR'S REPORTS.

Because Long's claim of actual innocence is credible and thus opens the gateway to federal habeas review, this Court may review Long's claim that the State failed to disclose exculpatory and impeachment evidence under Brady.

A. Standard of Review

Habeas corpus relief is available when a state court's decision on the merits is contrary to or an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d). Here, given that Long has exhausted his claims in state court, habeas relief should be available because the state court decision is contrary to and an unreasonable application of clearly established federal law, and, its findings of facts, in many respects, are unreasonable in light of the evidence presented.

B. Legal and Constitutional Grounds for Relief

"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, 527 U.S. at 281-82).

The State has an affirmative obligation to disclose favorable evidence to the defense. Suppression of such evidence violates a defendant's rights under the Fifth and Fourteenth Amendments, irrespective of the good or bad faith of the prosecutor, Brady v. Maryland, 373 U.S. 83, 87 (1963), and whether or not the evidence was requested by the defense, Kyles v. Whitley, 514 U.S. 419, 433 (1995). The prosecutor has an affirmative duty to obtain information in the possession of other state agencies and disclose it if it is favorable to the defense. Id. at 432; Love v. Johnson, 57 F.3d 1305, 1314 (4th Cir. 1995). A defendant may reasonably rely upon the State's representation that it is following an "open file" discovery policy as fulfilling its constitutional duty. Strickler v. Greene, 527 U.S. 263, 284 (1999).

A new trial is required where the suppressed evidence is material, that is, where there is a "reasonable probability that, had the evidence been disclosed to

the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). In evaluating materiality, the court should 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. 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.

C. Contrary to the State Court Order, Favorable, Material Evidence Was Suppressed by the State, Resulting in a Verdict Unworthy of Confidence

The 2008 MAR Court denied Petitioner's Brady claim by finding that he had failed to establish any of the three necessary components, concluding:

> The Defendant has failed to prove by a preponderance of 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.

App. 229 ¶ 17.

As will be discussed below, the MAR Court's Order was contrary to, or an unreasonable application of, the Supreme Court's clearly established Brady jurisprudence with respect to each of the three fundamental Brady components. Petitioner contends that most of the MAR Court's findings of fact are not relevant to the disposition of his Brady claims. In the alternative, to the extent any of the findings of fact are relevant, they were based on an unreasonable determination of the facts in light of the evidence presented at the MAR hearing.

1. The Suppressed Evidence is Favorable

The SBI reports and notes, Detective Isenhour's summary reports, and the victim's medical records were all suppressed and are all favorable to the defense.

a. Exculpatory evidence need not affirmatively exonerate the defendant.

With respect to the three SBI reports and the associated notes of the SBI analysts, which showed no connection between Long and the crime scene, the MAR Court noted that "both the expert for the State and the defense testified that the absence of evidence was not evidence of evidence [sic] and the lack of fibers or fragments did not exonerate the defendant." App. 222 ¶ 22. The Order concluded

that S/A Cone's report finding that Long's clothing failed to reveal the presence of any fibers or paint similar to items found at the crime scene "contained no meaningful analysis . . . [and was] not exculpatory." App. 228 ¶ 10.

That narrow view of favorable evidence is contrary to well-established federal law. In Kyles v. Whitley, the State argued that a computer printout of license numbers of cars parked at the crime scene on the night of the crime, which did not list the number of the defendant's car, "was neither impeachment nor exculpatory evidence because Kyles could have moved his car before the list was created and because the list does not purport to be a comprehensive listing of all the cars" at the scene. Kyles, 514 U.S. at 450-51. In rejecting that argument, the Supreme Court ruled that "[s]uch argument . . . confuses the weight of the evidence with its favorable tendency. . . . [H]owever the evidence would have been used, it would have had some weight and its tendency would have been favorable to Kyles." Id. at 451.

Here, although the three SBI reports and accompanying notes in this case, which were withheld from the defense, do not indisputably exonerate Long, they, like the printout in Kyles, contain no evidence connecting him to the crime, where one would expect to find some if he were in fact the perpetrator:

- Hair: "Microscopic examination and comparison of the hair found at the scene in Item #9 showed it to be different from [Long's] hair in Items #4 and #5. No hair or hair fragments similar to [Long's] were found in the victim's clothing in Item #13." App. 129.

- Long's Clothing: "Examination of the clothing in Items #1, #2, and #3 failed to reveal the presence of any fibers or paint similar to those in Items #6, #7, and #8, respectively." App. 117.

- Matches from Long's father's vehicle: "Examination of the matches in Item #12 failed to reveal sufficient identifying characteristics to allow the examiner to give an opinion with regard to their origin relative to the matchbooks in Item #11." Id. Five matchbooks were compared with the matches from the crime scene. App. 126. 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, S/A Cone concluded the burned matches from the scene "probably did not originate from this matchbook." Id.

- Victim's Pubic Hair Combings: Examination of the combings of the victim's pubic hair in Item #10 showed only Caucasian hair. App. 135.

- Shoe Track Impressions: "There were an insufficient number of distinct characteristics noted by which to effect any identification" based on the submitted shoe track impression. App. 127.

These SBI reports and notes are, individually and collectively, exculpatory – particularly in a case built almost exclusively on a victim's eyewitness

identification. As trial counsel testified at the 2008 MAR hearing, the evidence failing to connect Long to the crime scene would have been "absolute dynamite" evidence to challenge the victim's identification of Long as her assailant. 2d MAR T Vol. I pp. 258-59, 263-64 & 270.

b. Evidence that discredits the investigation is Brady material.

The MAR Court unreasonably construed "evidence favorable to the accused." The Court concluded that the semen evidence, collected immediately following the crime and placed in glass test tubes, "would have been suspect" by the time defense counsel obtained the victim's medical records. App. 224 ¶ 27. Yet, even if that were the case, the failure to preserve critical biological evidence could have been used by the defense to impeach the investigation. As courts have long recognized, "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation." See Kyles, 514 U.S. at 446, (quoting Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986)); Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir. 1985). The State's subsequent loss of this biological evidence and the withheld SBI reports and notes further discredit the investigation.

The MAR Court also unreasonably construed the import of the State's failure to preserve the crime scene and conduct a reasonably diligent effort to identify the sources of the hair collected. The Court found that the potential sources of the hair collected at the scene, including the "negroid" hair, could have come from the victim's white nephews, police dogs, and other people at the post office the victim had "walked through" earlier that day, which allowed the Court to disregard the favorable report indicating that the suspect's hair found at the scene did not match Long. App. 221 ¶ 16. The Court ignored the defense's possible uses of the report. For example, the defense could have shown that the hair did not match Long and that the CPD investigation was deeply flawed.

The defense also could have shown S/A Glesne's failure to examine the hairs he believed to be Caucasian found in the victim's underwear and to determine the source of the hairs, especially since victim described her attacker as a "light-skinned" or "yellow-looking" black man. 2d MAR vol. II p. 33; T p. 122. The State's investigators and the MAR Court (see e.g., App. 221 ¶ 18) both apparently presumed that the pubic hair of a person exhibiting both Caucasian and African features would not appear "Caucasian" to a hair analyst. This presumption may well have caused the police to neglect leads on other suspects who may have appeared less "black" relative to Long, who is dark-skinned.

c. Impeachment evidence is Brady material.

A long-established constitutional dictate is that the State has a duty to disclose both impeachment and exculpatory evidence. Bagley, 473 U.S. at 676; Giglio v. United States, 405 U.S. 150, 154 (1972). Yet, in this case, the MAR Court neglected to mention impeachment evidence at all: "In order to demonstrate a Brady violation, the defendant must prove by a preponderance of the evidence that the evidence was exculpatory . . . ." App. 226 ¶ 2. The Court did not discuss the impeachment value of any of the evidence at issue in Long's Brady claims. This fact is especially salient because the State's case rested almost entirely on the credibility of the victim's identification and the integrity of the investigation, and much of the withheld evidence would have impeached both.

For example, the MAR Court failed to recognize any impeachment value in the SBI reports and associated notes, and in Det. Isenhour's report fully describing the items he collected and submitted to the SBI for analysis.[29] The SBI reports, associated notes, and Det. Isenhour's report were all powerful impeachment material.

[29] As discussed above, Det. Isenhour completed a second report, which is undated but is limited to that which he testified to at trial. App. 150-51. This report does not identify or discuss the many other items taken to the SBI for testing and analysis, which were included in the report found years later pursuant to the Discovery Order. App. 146-49.

A comparison of Det. Isenhour's trial testimony to the withheld records shows that Det. Isenhour was untruthful at trial. ADA Bowers twice asked Det. Isenhour if he had ever relinquished possession and control of the latent lift of the shoe track, and the detective twice responded in the negative: "it has not" and "no, sir." T pp. 265, 282.

This testimony is contrary to contemporaneous SBI records. The SBI reports show the latent prints were submitted to the SBI on May 11 and returned to Det. Isenhour on May 16: "DISPOSITION OF EVIDENCE: Items #1 and #2 are herewith enclosed." App. 127. The first time the question was asked during voir dire, Det. Isenhour explained:

> Q. Has (the latent footprint) ever been out of your possession and control since you took it?
>
> A. It has not.
>
> Q. Did you take it anywhere for comparison with any other print of a shoe?
>
> A. I did.
>
> Q. And what date did you take it?
>
> A. May the eleventh.
>
> Q. Where did you take it?
>
> A. To the State Bureau of Investigation laboratory, Latent Evidence Section in Raleigh.

Q. While that comparison was made, did it leave your possession and control?

A. It did not.

Q. And what did you do with it once the comparison was made?

A. It's been under my custody and control.

Q. So that latent lift has never left your custody and control since you took the lift from the porch, is that correct?

A. It has not.

T p. 265 (emphasis added). In front of the jury, Det. Isenhour was even more explicit:

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.

T pp. 285-88 (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.

T p. 289.

Despite being asked open-ended questions – e.g., what did you take with you and who did you see? – Det. Isenhour responded, untruthfully, that he took only the latent shoeprint lift, the shoes, and the inked shoe impressions.

The SBI reports directly contradict Det. Isenhour's testimony. As detailed above, they document that Det. Isenhour took a total of fifteen items to the SBI along with a request for trace evidence comparison of hair, and carpet and paint samples, and a request for the latent examination of a shoe print impression. App. 117 & 127. These fifteen items were submitted to the SBI on May 11, 1976, where they were tested and analyzed, and then returned to Det. Isenhour on May 17, 1976. App. 118, 119, 120, 129, 131.

Det. Isenhour's apparent decision to conceal that the additional thirteen items had been taken to the SBI is evidenced by the two versions of his investigation summary reports. App. 146-51. In the report dated May 12, 1976, he lists all fifteen items of evidence "submitted by hand" to the SBI laboratory in

Raleigh and notes that he expected the items taken to the SBI to be returned to him. App. 148.

The other version of Det. Isenhour's investigation summary report, which is not dated, lists "the impressions of Long's shoe bottoms" and the latent lift as the only items submitted to the SBI laboratory. App. 150. This version of the report states that "certain articles of clothing belonging to Ronnie Long were collected by this Officer," but asserts that they were "held for investigative uses" rather than taken to the SBI. Id. This version of the report also fails to mention the pubic hair combings taken from the victim, the test tube containing swabs or the suspect hair recovered in the hallway. App. 150-51.

2. The State suppressed the SBI reports and associated notes, Detective Isenhour's summary reports, and the victim's medical records.

The MAR Court concluded that Long "failed to prove by a preponderance of evidence that the State failed to disclose the three State Bureau of Investigation lab reports (Lab Report 1: shoeprint analysis, Lab Report 2: hair analysis, Lab Report 3: paint, fiber and matches analysis), Detective Isenhour's Crime Scene Identification Report and the victim's medical records." App. 226 ¶ 4. To the contrary, it is incontrovertible that the reports and notes of Special Agents Glesne (hair) and Cone (paint, fiber and matches) were not disclosed to the defense.

Defense counsel Fuller and Adkins and defense investigator Burns testified adamantly that the first time they had seen the SBI reports, or even knew they existed, was after they had been discovered by the SBI pursuant to the 2005 Discovery Order. 2d MAR T Vol. I pp. 127-28, 133-34, 184-85, 258-62.

Even more telling, ADA Bowers, who questioned Det. Isenhour at trial, testified at the MAR hearing that he believed the SBI reports were not provided in discovery. He testified that he believed he had not seen the reports or known of their existence because if he had, he would not have allowed Det. Isenhour to testify falsely at trial:

> But there's a thing that – in regard to this hair and this stuff, one of the things that you said was that I asked Mr. Isenhour a question about something and he said he only took something down to the lab, the latent print, the show, and that I stopped there. If I had known about the rest of this I wouldn't have stopped there, because I'm not going to make – that's a strategic mistake that's just stupid. If I have the tests, if I have evidence that he's taken it to the lab, I'm not going to sit there and let the defense lawyer be the one to bring that out. If I know about it, it's coming out.

2d MAR T Vol. I p. 313.

It is likewise incontrovertible that the DA's Office had an open file discovery policy at the time. 2d MAR pp. 177-78; 252-53; 297-99. Long's trial

counsel testified that they believed they had been given all discovery in the case, pursuant to the open file policy. 2d MAR T Vol. I pp. 177-78, 252.

Yet, the MAR Court erroneously suggested throughout the MAR Order that the DA maintained an open file policy in name only, and that defense counsel were actually required to seek information about Long's case directly from the police or hospital. See App. 220 ¶ 10, 223 ¶ 24 and ¶ 27, 224 ¶ 27 & 228 ¶ 12. The Court apparently reached this conclusion based on the testimony of ADA Bowers at the 2008 MAR hearing, who stated he did not handle discovery in the Long case and only became involved in the case a few days before trial, 2d MAR T Vol. I pp. 297 & 299, and on Fuller's testimony at the same hearing that the DA set up a meeting for him to discuss the case with some police officers, 2d MAR T Vol. I pp. 279-83; MAR T Vol. I pp. 24-25. Fuller recalled that this discussion with police officers occurred at the second meeting between the defense team and prosecution, where the DA allowed the defense to inspect the physical evidence the State intended to introduce at trial. 2d MAR T Vol. I pp. 282-83. Burns testified that the police investigators "were not cooperative" with the defense team, meaning that "they weren't answering any questions": "If it went beyond the scope of what we were looking at. We'd ask, what is this? They would say, that's the defendant jacket. If

we asked, have you run any tests on it, we either wouldn't get an answer or they would refer us back to Mr. Roberts." 2d MAR T Vol. I p. 154.

The MAR Court's conclusions on this matter are contrary to or an unreasonable application of the Supreme Court's clearly established Brady jurisprudence in at least two respects: First, "if a prosecutor asserts that he complies with Brady through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under Brady." Strickler, 527 U.S. at 283. Second, the prosecutor has an affirmative duty to obtain information in the possession of other state agencies and disclose it if it is favorable to the defense, regardless of whether or not it is requested by the defendant. Kyles, 514 U.S. at 432-33. Therefore, the MAR Court erred in imposing an affirmative obligation on the defense.

3. The MAR Court's Finding that Long's Trial Counsel Was Aware of Detective Isenhour's Report Is Unreasonable in Light of the Evidence Presented.

The MAR Court found that an Identification Report referenced by Taylor at trial was Det. Isenhour's withheld report detailing the collection of items submitted

to the SBI. App. 223 ¶ 26.[30] This finding is an especially egregious misstatement of MAR and trial testimony and is unreasonable in light of the evidence presented.

Despite specifically concluding otherwise at the 2008 MAR Hearing, the MAR Court Order found that Long's trial counsel was aware of Det. Isenhour's report. App. 223 ¶ 26. At the 2008 MAR hearing, the State asked Adkins if he should have been alerted to the fact that he did not have Det. Isenhour's summary report in his discovery when Taylor testified to an investigative report. 2d MAR T Vol. I pp. 206-07. MAR defense counsel objected to the question, pointing out that Taylor was being asked specifically about Defendant's Trial Exhibit Three – an Identification Report, including the victim's initial description of her assailant while in the hospital, which *was* part of the case file. 2d MAR T Vol. I pp. 207-08. Any other reports Taylor may have had in his file on the witness stand were not identified. After reviewing the trial exhibit, the Court ruled it was speculation that Sgt. Taylor had Det. Isenhour's reports with him or that trial counsel should have been alerted to the possibility that Officer Taylor had other reports:

> Now, my conclusion from that is that there were additional reports to which he was referring, but as soon as he began his description of the reports the judge sustained the objection to

[30] The MAR Court also found that defense counsel did not "appear surprised" at trial when Taylor testified to the Identification Report, which, as noted above, the Court mistakenly concluded was the withheld report. App. 223 ¶ 26. Judge Bridges did not preside at trial, which separately draws into question his conclusion about defense counsel's appearance at trial.

> that line of questioning and then the questions returned to the document, Defendant's Exhibit Number 3.
>
> Now, it appears that those were some additional police reports apparently prepared by some officers other than Officer Taylor. But as to exactly what they were, and certainly as to forming any conclusions that they were, the documents are not identified as Defendant's Exhibits 4A and 4B,[31] certainly don't think that can be established through the testimony of this witness at this point.

2d MAR T Vol. I pp. 212-13. Thus, the MAR Court specifically concluded at the MAR hearing that it was speculation that Sgt. Taylor was referring to any specific reports. Yet in its Order denying Long's Brady claims, the MAR Court ignored that conclusion and found instead that he *was* referring to Det. Isenhour's reports. App. 223 ¶ 26.

4. The SBI reports and notes, the victim's medical records, and Detective Isenhour's reports are all "material" under *Brady*.

In assessing Petitioner's Brady claims, the MAR Court applied the incorrect standard for evaluating Brady materiality, thereby reaching a decision contrary to clearly established federal law. Kyles v. Whitley instructs courts that, in determining Brady materiality, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but

[31] At the 2008 MAR, Long introduced Det. Isenhour's summary reports as Exhibits 4A and 4B. App. 146-51.

whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. at 434 (emphasis added).

In denying the Brady claim, the MAR Court repeatedly used the standard of prejudice that was specifically held to be incorrect by Kyles – i.e., that the defendant would have received a different verdict had the evidence been disclosed. App. 227 ¶¶ 7-9; 228 ¶¶ 10, 11 & 13; 229 ¶¶ 14-17. The MAR Court also required Long to show Brady materiality by a preponderance of the evidence – i.e., more likely than not – which was also rejected by Kyles. App p. 227 ¶¶ 7-9; 228 ¶¶ 10-12; 229 ¶¶ 15-17.

As discussed above, the SBI reports and associated notes, the victim's medical records, and Det. Isenhour's reports would have allowed the defense to (1) more credibly attack the victim's identification of Long, (2) impeach Det. Isenhour's testimony concerning which evidence he took to the SBI for analysis and whether it was always in his custody and control, and (3) more generally discredit the police investigation. This evidence is material under Brady because its cumulative effect on the jury would have been significant in a case that relied so heavily upon a questionable eyewitness identification. Kyles, 514 U.S. at 436-37; Bagley, 473 U.S. at 683. The materiality determination is strengthened

further by the additional consideration of the newly discovered latent fingerprint evidence discovered by the defense in 2015.

In making a materiality determination, the court must consider the evidence's cumulative effect on defense counsel's preparation for trial, as well as its effect on the jury. Bagley, 473 U.S. at 683. But the MAR Court here unreasonably applied this clearly established federal law by failing to consider the effect of the suppressed evidence on defense counsel's preparation for Long's trial. Among other things, Adkins testified that, had they had access to the SBI report, defense counsel would have consulted with an expert who could interpret the results and that defense counsel would have followed up in any way they deemed necessary, based on the results and consultation. 2d MAR T Vol. I pp. 185-86. Again, it is important to note that Adkins testified that he was not made aware of the existence of any physical evidence before the trial, despite the DA's open-file policy. 2d MAR T Vol. I pp. 194-96.

The MAR Court concluded that Long's trial attorneys "contradicted one another on several occasions regarding how they may have used some of the information they claim they did not receive, if they would have used it at all. Therefore, the claims the defense alleged at this hearing as to how they may have

used this information at trial if they had known about it carries no weight or merit, is not material and would not have changed the result at trial." App. 228 ¶ 13.

While the MAR Court does not clearly state how defense counsel purportedly contradicted one another, whether they did or not is irrelevant to the disposition of the Brady claims. The Supreme Court's Brady jurisprudence does not require a defendant to show a perfectly coherent defense strategy with respect to the suppressed evidence. It is natural for co-counsel to consider multiple options in developing trial strategy, and settling on the best option as the case develops. Trial counsel both agreed that all of the suppressed evidence was *critical* to the defense. 2d MAR T Vol. I pp. 194-95 & 258-59. To the extent they disagreed about how they could have best used the suppressed evidence, this only increases the significance it would have had on trial preparation and strategy.

Although the MAR Court noted that trial counsel recognized the strategic value of not testing physical or medical evidence that could have inculpated Long, App. 223 ¶ 27, 224 ¶ 30, 225 ¶ 31, 227 ¶ 6, 228 ¶ 12 & 229 ¶ 17, defense counsel Adkins expressly qualified those statements. Adkins acknowledged that, hypothetically, he would not have tested a rape kit not tested first by the State, but he was clear that the State was certain to test any semen evidence prosecutors knew about. 2d MAR T Vol. I pp. 200-01. In fact, ADA Bowers testified that he

certainly would have ordered testing of the biological material collected from the victim if he had known about it. 2d MAR T Vol. I pp. 311-12. Adkins testified unequivocally that the defense would have ordered an independent test of the biological evidence if the State's own test did not clear Long. 2d MAR T Vol. I p. 201.

The MAR Court's Order finds that, as Adkins and Fuller were experienced trial attorneys, they realized "it was to their client's advantage not to have certain items of evidence tested because they ran the risk of the results inculpating their client." App. 224 ¶ 30. Again, the MAR Court's Order fails to note that both attorneys testified that, while it would normally be strategically unwise to have evidence examined that might be inculpatory, that principle did not apply to evidence that had already been examined by the SBI and found to have no connection to the crime. 2d MAR T Vol. I pp. 200-01, 272. The MAR Court then makes a finding based on no testimony at the hearing and contrary to the testimony of the attorneys, that Adkins and Fuller decided not to even ask if SBI analysis had been performed. App. 225 ¶ 31. It is incomprehensible that two well-respected attorneys, both former judges, would fail to perform the unquestioned duty of counsel to investigate all evidence held by the State which might either incriminate or clear their client. See, e.g., Strickland v. Washington, 466 U.S. 668, 691 (1984).

This finding clearly violates established federal law, because "defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under Brady." Strickler, 527 U.S. at 283.

CONCLUSION

Petitioner presents clear and convincing evidence of his actual innocence, which creates a gateway for federal habeas review. Here, a reasonable juror would have reasonable doubt, which allows this Court to hear Petitioner's Constitutional claim on the merits. Moreover, additional latent fingerprints collected from the crime scene and discovered since the 2008 MAR hearing further support Petitioner's claims. This new evidence should have been provided to the defense pursuant to the Discovery Order. This case has been frustrated by a long process of trickling out evidence by the State. An evidentiary hearing must granted to once and for all fully assess all the evidence in the state's possession and how it relates to Long's innocence.

Finally, in denying Petitioner's Brady claims, the MAR Court's decision was contrary to, or an unreasonable application of, the clearly established federal law of Brady and its progeny in the following respects: (1) it fails to acknowledge that exculpatory evidence need not necessarily be exonerating evidence; (2) that evidence which discredits the investigation is Brady material; (3) that

impeachment evidence is Brady material; (4) that the State has an affirmative duty to produce evidence favorable to the defense; and (5) that defense counsel may reasonably rely on a prosecutor's open file discovery policy. Moreover, the MAR Court applied the incorrect standard for evaluating Brady materiality, thereby reaching a decision contrary to clearly established federal law. To the extent any of the MAR Court's findings of fact are relevant to the disposition of Petitioner's Brady claims, the MAR Court's determination of such facts was unreasonable in light of the evidence presented. Therefore, Petitioner's is entitled to habeas relief.

SUPPORTING MATERIALS

Petitioner has electronically filed the following exhibits in support of this Petition:

1. CPD Evidence Processing Report, dated June 4, 2015
2. 2005 Discovery Hearing Transcript
3. Motion for Appropriate Relief, filed August 27, 2008
4. Photo of Ronnie Long
5. Affidavit of Donna Bennick
6. Order Authorizing the District Court to Consider Successive Application for Relief under 28 U.S.C. § 2254, filed May 24, 2016

PRAYER FOR RELIEF

Wherefore, Ronnie Wallace Long respectfully petitions this Honorable Court for the following Relief:

1. An Order pursuant to Habeas Rule 4 directing Respondents to file an Answer;

2. An Order pursuant to Habeas Rule 5 directing the Respondents or, in the alternative, Petitioner, to file copies of the trial transcript, transcripts of post-conviction proceedings, an appellate briefs and opinions;

3. An opportunity to address the Court further through briefing and oral argument;

4. A writ of habeas corpus directing Respondents to free Petitioner or retry him within a reasonable time; and

5. Such other and further relief as seems just and proper to the Court.

Respectfully submitted, this 26th day of May, 2016.

/s/ Jamie Lau
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/s/ Theresa A. Newman
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VERIFICATION

I, Jamie T. Lau, solemnly attest that I am an attorney for Petitioner, Ronnie W. Long, in this matter and that I have read the forgoing Petition for Writ of Habeas Corpus and that the same is true to my knowledge except as to those matters alleged upon information and belief, and as to those matters, I believe them to be true.

This the 26th day of May, 2016.

/s/ Jamie Lau
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing PETITION FOR WRIT OF HABEAS CORPUS upon the Attorney General of North Carolina by depositing a copy thereof, postage prepaid, in the United States mail, addressed as follows:

The Honorable Roy Cooper
Attorney General of North Carolina
Attention: Appellate Section
PO Box 629
Raleigh, NC 27602

This 26th day of May, 2016.

/s/ Jamie Lau
N.C. Bar No. 39842
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