ON REHEARING EN BANC

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6980

RONNIE WALLACE LONG,

Petitioner – Appellant,

v.

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

Respondent – Appellee.

THOMAS ALBRIGHT, Professor and Director, Vision Center Laboratory, Conrad T. Prebys Chair in Vision Research, Salk Institute for Biological Studies; VALENA ELIZABETH BEETY, Professor of Law, West Virginia University School of Law; BARBARA E. BIERER, MD, Professor of Medicine, Harvard Medical School; DR. C. MICHAEL BOWERS, Clinical Associate Professor, Herman Ostrow School of Dentistry, University of Southern California; ARTURO CASADEVALL, MD, PhD, Chair, Molecular Microbiology & Immunology, Alfred & Jill Sommer Professor and Chair, Bloomberg Distinguished Professor, Johns Hopkins University; JESSICA GABEL CINO, Associate Professor of Law, Associate Dean for Academic Affairs, Georgia State University School of Law; SIMON A. COLE, Professor, Department of Criminology, Law & Society, University of California, Irvine; M. BONNER DENTON, Galileo Professor of Chemistry, Professor of Geosciences, The University of Arizona; SHARI SEIDMAN

DIAMOND, Howard J. Trienens Professor of Law, Northwestern University Pritzker School of Law; DR. RACHEL DIOSO-VILLA, Senior Lecturer, School of Criminology & Criminal Justice, Griffith University; JULES EPSTEIN, Professor of Law, Director of Advocacy Programs, Temple University Beasley School of Law; DAVID L. FAIGMAN, Chancellor and Dean, John F.Digardi Distinguished Professor of Law, University of California Hastings College of the Law; LISA S. FAIGMAN, Professor, University of California Hastings College of the Law; NITA A. FARAHANY, Professor of Law & Philosophy, Duke University School of Law; BRANDON L. GARRETT, L. Neil Williams Professor of Law, Duke University School of Law; BRUCE GREEN, Louis Stein Chair of Law, Director, Stein Center for Law and Ethics, Fordham University School of Law; LISA KERN GRIFFIN, Carroll-Simon Professor of Law, Duke University School of Law; EDWARD J. IMWINKELRIED, Edward L. Barrett, Jr. Professor of Law Emeritus, UC Davis School of Law; INNOCENCE PROJECT, INC.; EISHA JAIN, Assistant Professor of Law, University of North Carolina School of Law; DR. DAVID KORN, Professor of Pathology, Harvard Medical School; JASON KREAG, Associate Professor of Law, University of Arizona James E. Rogers College of Law; DANIEL S. MEDWED, University Distinguished Professor of Law and Criminal Justice, Northeastern University; JENNIFER L. MNOOKIN, Dean, David G. Price & Dallas P. Price Professor of Law, UCLA School of Law; JOHN MONAHAN, PhD, Shannon Distinguished Professor of Law, Professor of Psychology, Professor of Psychiatry and Neurobehavioral Sciences, University of Virginia School of Law; ALAN MORRISON, Lerner Family Associate Dean for Public Interest & Public Service, George Washington University Law School; ROBERT P. MOSTELLER, J. Dickson Phillips Distinguished Professor of Law, University of North Carolina School of Law; ERIN MURPHY, Professor of Law, NYU School of Law; D. MICHAEL RISINGER, John J. Gibbons Professor of Law Emeritus, Seton Hall University School of Law; MICHAEL SAKS, Regents' Professor, Sandra Day O'Connor College of Law, Department of Psychology, Arizona State University; NICHOLAS SCURICH, PhD, Associate Professor, Department of Psychological Science, Department of Criminology, Law & Society, University of California, Irvine; GEORGE SENSABAUGH, Professor of the Graduate School, Professor Emeritus of Forensic and Biomedical Sciences, School of Public Health, University of California, Berkeley; DAN SIMON, Richard L. and Maria B. Crutcher Professor of Law & Psychology, Gould School of Law, Department of Psychology, University of Southern California; J.H. PATE SKENE, JD, PhD, Associate Research Professor of Neurobiology, Duke University Medical Center; CLIFFORD SPIEGELMAN, Distinguished Professor of Statistics and University Distinguished Professor, Department of Statistics, Texas A&M University; COLIN STARGER, Associate Professor, University of Baltimore School of Law; HAL STERN, Chancellor's Professor, Department of Statistics, Donald Bren School of Information and Computer Sciences, University of California, Irvine; WILLIAM A. TOBIN, Principal, Forensic Engineering International; JAMES L. WAYMAN, PhD, FIEEE, FIET, Office of Research, San Jose State University; ELLEN YAROSHEFSKY, Howard Lichtenstein Professor of Legal Ethics, Director, Monroe Freedman Institute for the Study of Legal Ethics, Maurice A. Deane School of Law, Hofstra University; SANDY ZABELL, Director

of Undergraduate Studies, Professor of Statistics and Mathematics, Northwestern University,

Amici Supporting Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Catherine C. Eagles, District Judge. (1:16-cv-00539-CCE-LPA)

Argued: May 7, 2020 Decided: August 24, 2020

Amended: August 26, 2020

Before GREGORY, Chief Judge, and WILKINSON, NIEMEYER, MOTZ, KING, AGEE, KEENAN, WYNN, DIAZ, FLOYD, THACKER, HARRIS, RICHARDSON, QUATTLEBAUM, and RUSHING, Circuit Judges.

Vacated and remanded with instructions by published opinion. Judge Thacker wrote the opinion, in which Chief Judge Gregory and Judges Motz, King, Keenan, Wynn, Diaz, Floyd, and Harris joined. Judge Wynn wrote a concurring opinion, in which Judges Thacker and Harris joined. Judge Richardson wrote a dissenting opinion, in which Judges Wilkinson, Niemeyer, Agee, Quattlebaum, and Rushing joined.

ARGUED: Jamie Theodore Lau, DUKE UNIVERSITY SCHOOL OF LAW, Durham, North Carolina, for Petitioner. Phillip Anthony Rubin, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Respondent. **ON BRIEF:** Theresa A. Newman, DUKE UNIVERSITY SCHOOL OF LAW, Durham, North Carolina; G. Christopher Olson, Raleigh, North Carolina, for Appellant. Joshua H. Stein, Attorney General, Clarence Joe DelForge, III, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. Karen A. Newirth, THE INNOCENCE PROJECT, INC., New York, New York; Breon S. Peace, Matthew Aglialoro, Willam Segal, CLEARY GOTTLIEB STEEN & HAMILTON LLP, New York, New York, for Amicus The Innocence Project, Inc. Brandon L. Garrett, L. Neil Williams Professor of Law, DUKE UNIVERSITY SCHOOL OF LAW, Durham,

North Carolina; Mark D. Harris, Adam W. Deitch, PROSKAUER ROSE LLP, New York, New York, for Amici Curiae.

WYNN, Circuit Judge, with whom Judges THACKER and HARRIS join, concurring:

Without a doubt, no reasonable jury could find Mr. Long guilty based on the undeniable facts before us today: suppressed physical evidence failing to link Mr. Long to the crime scene, the perjured testimony of investigating officers, missing key biological evidence, and an eyewitness identification obtained through means now illegal in North Carolina. So, while I am in full accord with the majority that Mr. Long would be entitled to additional discovery if it were necessary, I believe there to be no need for it. Rather, justice demands that we immediately grant Mr. Long the relief he has pursued for forty-four years.

This case exemplifies how our current habeas precedent incentivizes and rewards bad faith on the part of police and prosecutors. Our habeas precedent rewards state actors guilty of *Brady* violations for committing *additional* constitutional violations in order to subject the *Brady* claim to a higher standard of review. But keeping an innocent man in prison should not be considered a "reward."

Such a result is of no benefit to the principles of law and order: for every innocent man behind bars due to mistaken identity, a guilty one remains free. Not just free from prison—free to commit additional heinous crimes.[1] Meanwhile, public confidence in the judicial system falters, making it more difficult for law enforcement to do their jobs—and weakening our democracy.

[1] *E.g.*, *DNA Exonerations in the United States*, Innocence Project, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited August 17, 2020) (noting dozens of murders and rapes committed by the actual perpetrators of initial crimes after innocent defendants falsely confessed to those initial crimes).

The violent racial history of this country necessarily informs the background of this case: a Black man accused of raping a white woman is tried in 1976 by an all-white jury in a county with strong ties to the woman's family, because defense counsel feared that any attempt to relocate the case would land them instead in a county with significant controlling influence by the *Klan*. Those historical facts lend gripping context to the egregious constitutional violations at the heart of this case.

At the end of the day, this record shows compellingly that we should give justice to Mr. Long now.

I.

A.

From the outset, though I, like the majority, employ the shorthand "actual innocence" to refer to the standard presented in § 2244(b)(2)(B), it is important to emphasize that habeas petitioners need not come forward with irrefutable evidence pointing to a different perpetrator or establishing an unassailable alibi. Rather, the question is whether, "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii); *see also McQuiggin v. Perkins*, 569 U.S. 383, 395 (2013) (noting a similar standard for petitioners seeking an exception to the filing deadline of § 2244(d)(1), namely, they must present "new evidence show[ing] it is more likely than not that no reasonable juror would have convicted" them (internal quotation marks omitted)). For a reasonable factfinder to find the applicant guilty, of course, the factfinder would have to "f[i]nd him guilty beyond a reasonable doubt." *McLeod v. Peguese*, 337 F. App'x 316, 324 (4th Cir. 2009)

(unpublished but orally argued); *see also, e.g.*, *In re Bolin*, 811 F.3d 403, 408 (11th Cir. 2016) (referring to the reasonable-doubt standard).

Thus, an actual-innocence analysis must take into consideration "the evidence as a whole." § 2244(b)(2)(B)(ii). This means the Court looks at all evidence, "old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under [trial evidentiary rules]." *United States v. MacDonald*, 641 F.3d 596, 612 (4th Cir. 2011) (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)).[2] So, the Court must consider "all the evidence, including that alleged to have been illegally admitted [and that] tenably claimed to have been wrongly excluded or to have become available only after the trial." *Id.* (alteration in original) (quoting *Schlup v. Delo*, 513 U.S. 298, 328 (1995)).[3]

[2] New evidence can, of course, include advances in scientific knowledge that cast old evidence in a new light. *Cf. Gimenez v. Ochoa*, 821 F.3d 1136, 1143 (9th Cir. 2016). A defendant convicted before the existence of DNA testing, for example, could certainly be exonerated by a later DNA analysis. So, too, may we consider advances in our understanding of the psychology of memory formation, eyewitness identification, and implicit bias. *See* Brian R. Means, *Federal Habeas Manual* § 11:30 (2020 ed.) (collecting cases emphasizing the breadth of the "evidence as a whole," including this Court's decision in *MacDonald*).

[3] Notably absent from this list is evidence that the prosecution was unable to introduce at trial. Rather, the evidence to be considered is (1) all trial evidence, even if arguably illegally admitted; (2) all evidence the defense alleges to have been wrongly excluded at trial; and (3) all evidence that became available after trial. Even if evidence properly excluded at trial can be considered in this Circuit, *cf. Hyman v. Brown*, 927 F.3d 639, 659 (2d Cir. 2019), its reliability must be questioned in light of the principles of evidence, and the Court must analyze only what a properly instructed, reasonable jury would make of it. Thus, my dissenting colleague's insinuative references to an unsolved rape case in Washington, D.C., are unavailing. *See* Dissenting Op. at 97. While the prosecution was aware of that case, they did not bring it up at trial. And for good reason: neither the victim nor a witness identified Mr. Long from a photo lineup, and no charges were ever filed. Thus, that case is entitled to no weight in our analysis here.

B.

As discussed by the majority, the trial evidence against Mr. Long came down to: (1) Ms. Bost's eyewitness identification; (2) the alleged corroboration of that identification by the physical evidence, including the footprint, the "matches of [a] similar nature," and the discovery of the toboggan and gloves in Mr. Long's car; and (3) the honesty of the police. J.A. 378; *see* Majority Op. at 17. Lacking countervailing affirmative evidence, the defense team was left to mount challenges to each of these points by: (1) pointing to the weaknesses of eyewitness identification, especially cross-racial identification by a white woman who admitted to having little interaction with African Americans; (2) noting the discrepancies between Ms. Bost's initial description of her attacker and Mr. Long; (3) asking the jury to look at the leather jacket for evidence (or lack thereof) of paint transfer; (4) pointing the jury to a light hair in the toboggan (and noting that Mr. Long's hair was black), but without any supporting forensic tests regarding the origin of the hair; and (5) implying that the police planted the toboggan. As affirmative evidence, the defense could present only Mr. Long's alibi. With the weight of evidence slanting firmly toward the prosecution, it is no surprise the jury returned a verdict of guilty.

But we now know better. The mountain of evidence once concealed by the State has slowly been revealed. This new evidence directly contradicts the State's second and third arguments: significant evidence did *not* implicate Mr. Long, and the police did *not* act honestly. Moreover, today we know much more about the pitfalls of eyewitness identification, especially across racial lines, and especially where the identification procedures lacked protections against influence (conscious or otherwise) by investigating

officers. This new evidence, in turn, necessarily casts the trial evidence in a new light. Faced with these realities, no reasonable juror could conclude that the State met its burden to prove beyond a reasonable doubt that Mr. Long committed this crime.

C.

1.

A Black man broke into a white woman's North Carolina home. Putting a knife to her throat, he raped her. Though terrified, she tried to remain clear-headed: she memorized his face. She told herself that if she survived, she would make sure he would pay for his terrible crime. She believed she would never forget his face.

The same day, she reported the crime and described her attacker to the police. Shortly thereafter, she identified him in person. Physical evidence also appeared to tie him to the crime. He was arrested, tried, and sentenced to life in prison by an all-white jury. She was elated, knowing the person who harmed her could never hurt anyone else.

While the foregoing could easily be a summary of the attack on Ms. Bost and her identification of Mr. Long, it isn't. Instead it describes the identification of Ronald Cotton by Jennifer Thompson in another unfortunate case with similar facts.[4] She picked him from

[4] *See* Jennifer Thompson, *I Was Certain, But I Was Wrong*, N.Y. Times (June 18, 2000), https://www.nytimes.com/2000/06/18/opinion/i-was-certain-but-i-was-wrong.html; Jennifer Thompson-Cannino, Ronald Cotton & Erin Torneo, *Picking Cotton: Our Memoir of Injustice and Redemption* 124 (2009); *see also* Innocence Project Amicus Br. at 9–10. For another similar case, see Nat'l Registry of Exonerations, *Perry Mitchell*, U. Mich. L. Sch. (June 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3479 (discussing the case of Perry Mitchell, a Black man convicted of raping a seventeen-year-old white girl at knife-point after she confidently identified him from the third photo array she was shown, who was later exonerated by DNA evidence).

a photo lineup, and then again in a physical lineup. She was absolutely positive. And after another man, Bobby Poole, bragged about committing the crime, she testified that she had never seen Poole before.

Moreover, Ms. Thompson's confidence was bolstered by the physical and other purported evidence against Mr. Cotton. "There was [a] piece of rubber [the police] found at [Ms. Thompson's] apartment, which was found to be consistent with the shoes [the police] took from Ronald Cotton's apartment[.]" Jennifer Thompson-Cannino, Ronald Cotton & Erin Torneo, *Picking Cotton: Our Memoir of Injustice and Redemption* 67 (2009) [hereinafter *Picking Cotton*]. Mr. Cotton's boss tipped off the police after seeing Ms. Thompson's composite sketch of her attacker, which Mr. Cotton's boss thought resembled him. *Id.* at 44. A witness had seen Mr. Cotton riding his bicycle in Ms. Thompson's neighborhood early in the morning, wearing a shirt and gloves matching Ms. Thompson's description. *Id.* at 18, 44, 67. He had previous convictions for breaking and entering—including having pleaded guilty at age sixteen to breaking and entering with intent to commit rape against a teenage girl. *Id.* at 44, 82–84. He gave conflicting alibi accounts, and the alibi he ultimately provided was merely testimony from his family saying he was at home asleep on the couch. *Id.* at 66, 86. He had a utility knife on him when he came to the police station, and he owned a flashlight matching one stolen from a second rape victim's home. *Id.* at 77, 82. And a cellmate told police he had heard Mr. Cotton talking in his sleep about the rape. *Id.* at 88–89. Ms. Thompson was sure this could not all be coincidence. *Id.* at 67–68.

But in 1995, after Mr. Cotton had served eleven years in prison, DNA evidence exonerated him—*and implicated Mr. Poole*. Ms. Thompson had been certain that Mr. Cotton was her attacker, and that she had never seen Mr. Poole. She had it exactly backwards.[5]

Mr. Cotton's case emphasizes three details that reappear in this case. First, that Ms. Bost sincerely believed her identification to be correct. Second, that the brutal, terrifying crime occurred exactly as she said it did, with the exception of one important detail: the identity of her attacker. And third, that it is not farfetched that someone who endures a violent crime, does everything in her power to memorize her attacker's face, immediately reports the attack, and then identifies the culprit, does so erroneously.

In short, it has happened before, and it can happen again. To say so suggests no ill will on the part of the victim; nor does it cast any doubt on the fact of the attack itself. Rather, it simply points to a deficit in human cognition: difficulty forming memories of faces we do not know, especially in a traumatic situation, and especially across racial lines.

[5] Years later, Ms. Thompson and Mr. Cotton wrote a book together which described these events, explained the failings of eyewitness identifications, and emphasized their eventual friendship, founded on grace and forgiveness. *See generally Picking Cotton*. Their book makes apparent how lucky Mr. Cotton was to have ever been exonerated. He happened to come across Mr. Poole early on in his time in prison—after Mr. Poole was convicted of additional attacks on women—and thought Mr. Poole resembled Ms. Thompson's composite sketch. *Id.* at 99–100. He persisted in seeking help from counsel, and ultimately was blessed with pro bono counsel who pursued the state version of habeas relief. *Id.* at 163–66. Ultimately, they were able to obtain DNA testing—giving Mr. Cotton another stroke of luck that the samples still existed and were in good shape. *Id.* at 212. Mr. Poole only confessed when confronted with the DNA evidence. *Id.* at 213. And it was in the nick of time—Mr. Poole died of cancer a few years after Mr. Cotton's exoneration. *Id.* at 252, 265. Mr. Cotton's narrow path to exoneration raises the question of how many other innocent people have not been so lucky and remain behind bars.

Recently, the Third Circuit confronted this issue by convening a task force consisting of "a diverse group of judges, lawyers, professors, and law enforcement agents . . . to study the issue of eyewitness identification." Third Circuit Task Force, *2019 Report of the United States Court of Appeals for the Third Circuit Task Force on Eyewitness Identifications*, 92 Temp. L. Rev. 1, 6 (2019) [hereinafter Task Force Report]. The Task Force noted that "[e]yewitness misidentification is the single greatest source of wrongful convictions in the United States." *Id.* at 10 (internal quotation marks omitted). And it cataloged modern understandings of the psychology surrounding eyewitness identification, noting that over the past several decades, "a burgeoning body of research has shed light on how human perception and memory function. We now understand that the brain does not work like a video camera." *Id.* at 12; *see also Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 314 (3d Cir. 2016) (en banc) (McKee, C.J., concurring) ("In the last thirty years, over 2,000 studies have examined human memory and cognition and their relationship to the reliability of eyewitness identifications. This impressive body of scholarship and research has revealed that eyewitness accounts can be entirely untrustworthy. As the International Association of Chiefs of Police has concluded, '[o]f all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification.'" (alteration in original) (footnote omitted)).

The Task Force Report noted that Ms. Thompson's identification of Mr. Cotton "was the result of a suggestive eyewitness process that unintentionally resulted in a wrongful conviction." Task Force Report at 10. Thus, even though "[l]aw enforcement employed identification procedures considered standard, including a composite sketch, a

photo array with a subsequent lineup, and finally an in-court identification," those guardrails were not enough to prevent the police from "suggestively reinforcing the accuracy of her identification of Cotton"—even if they did not intend that result. *Id.* at 9–10. Mr. Cotton's case was not an anomaly: erroneous eyewitness identification played a role in *ninety-three percent* of wrongful rape convictions later overturned by DNA evidence. *See* Innocence Project Amicus Br. at 10.

To prevent the recurrence of tragedies like Mr. Cotton's, the Task Force Report provides several suggested best practices, including: (1) double-blind administration of eyewitness identification procedures;[6] (2) selecting fillers (i.e., lineup members who are not suspected of committing the crime) using "all the features included in the witness's description of the perpetrator," since "[i]t is obviously crucial that the suspect not stand out"; (3) avoiding the use of show-ups,[7] which are "inherently suggestive," but if necessary to the investigation, conducting any show-ups "no later than *two hours* after the eyewitness observed the perpetrator"; and (4) giving a witness "only one opportunity to make an identification of the same suspect." Task Force Report at 13–14, 16, 42–43 (emphasis added).

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[6] "Double-blind administration . . . occurs when the officer administering the procedure does not know which person in the display is the suspect." Task Force Report at 13. This is crucial "so as to avoid 'conscious or unconscious verbal or behavioral cues that could influence the eyewitness'[s] identification.'" Innocence Project Amicus Br. at 25 (quoting *Identifying the Culprit: Assessing Eyewitness Identification*, Nat'l Res. Council Nat'l Acads. 91–92 (2014)).

[7] "A show-up or field identification is a procedure wherein only one person—the suspect—is presented to a witness for the purpose of identification. Show-ups typically occur live and relatively soon after the crime has been reported in the same vicinity." Task Force Report at 41 (footnote omitted).

These best practices are so well-established today that *the State of North Carolina itself has recognized their importance by requiring, by statute, that officers employ nearly all of them*. North Carolina's Eyewitness Identification Reform Act requires that officers conducting live lineups or photo arrays use double-blind identification procedures or approved alternatives "that achieve neutral administration." N.C. Gen. Stat. § 15A-284.52(c)(3); *see id.* § 15A-284.52(a)(3), (b)(1). Moreover, officers must use fillers who "generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers." *Id.* § 15A-284.52(b)(5). And show-ups are *only* permissible "when a suspect matching the description of the perpetrator is located in close proximity in time and place to the crime, or there is reasonable belief that the perpetrator has changed his or her appearance in close time to the crime, and only if there are circumstances that require the immediate display of a suspect to an eyewitness." *Id.* § 15A-284.52(c1)(1).

No such best practices were observed here. If, as noted by the Task Force Report, the procedures used in Ms. Thompson's identification of Mr. Cotton were subpar and almost certainly contributed to her errant identification, those employed in Ms. Bost's identification of Mr. Long were absolutely dismal. The police settled on Mr. Long as a possible suspect by May 5, 1976. Yet, despite having a photograph of him, they did not perform a photo lineup. Instead, on May 5, Detectives David Taylor and Van Isenhour visited Ms. Bost at her home and asked her to accompany officers to court on May 10, as Mr. Long was to present that day on an unrelated minor charge. Detectives Taylor and Isenhour suggested to Ms. Bost that her attacker might be present in the courtroom and

instructed her to wear a disguise "so that if the suspect was there he would[ ]not recognize her." J.A. 1432. Ms. Bost testified that she thought this procedure "was strange" and that she "was so afraid," "was nervous," and was "scared to death." J.A. 149, 153. While the police did not tell her that the suspect would *definitely* be in the courtroom, common sense suggests she would have assumed there was a reason the police were putting her through this ordeal.[8] Yet she also testified that there were no other men who "even closely resembled" Mr. Long in the courtroom on May 10. J.A. 172.

Thus, instead of using a photo lineup, the police opted to put the victim through an extremely stressful, in-court identification procedure that was not double-blind,[9] lacked even a single appropriate filler, was inherently suggestive, and was followed immediately by a second identification opportunity—a photo lineup in which the fillers again did not match Ms. Bost's description of the suspect.[10] In other words, the police did not undertake the procedures "considered standard" at the time of Ms. Thompson's identification of Mr. Cotton less than a decade later ("a composite sketch, a photo array with a subsequent lineup, and finally an in-court identification"). Task Force Report at 9. And they certainly

[8] Ms. Thompson has explained that, while the police told her that "[t]he suspect may or may not be included in" the photo array, she "assumed they must have had a suspect. Why would they want me to drive all this way if they didn't? All I had to do was pick him out. And if I failed to do that, would he go free? Would he find me?" *Picking Cotton* at 32–33.

[9] Ms. Bost and Detective Taylor could see each other from their positions in the courtroom.

[10] According to Ms. Bost, one of the fillers "looked like it might have been a woman," and only Mr. Long's photograph depicted a person wearing a leather jacket. J.A. 160. Additionally, the fillers sported a variety of types of facial hair (or had no facial hair at all).

did not abide by the best practices we know today—and which North Carolina now *requires* its officers to use.[11] Intentionally or not, there can be no doubt that the officers' suggestive tactics influenced the identification, such as by inflating Ms. Bost's confidence in her identification of Mr. Long. *Id.* at 53; *see also Picking Cotton* at 271 (Ms. Thompson noting that after the photo and physical lineups, "by the time I went into court, everything added up for me: I was defiantly confident that Ronald Cotton was the one").

The fact that eyewitness identification is deeply flawed is something we all, lay people and experts alike, understand much better today than in the 1970s. Indeed, the concept was novel to the public even in the 1990s, but has received significant attention since then, through news reports and the efforts of organizations like the Innocence Project (founded in 1992). In their book, for example, Mr. Cotton and Ms. Thompson describe participating in an interview with Larry King in which the prosecutor and defense counsel from their case "talked a lot about DNA, how DNA was even better than eyewitness identification because people can make mistakes." *Picking Cotton* at 224. Of course, everyone today understands that DNA is significantly more trustworthy than eyewitness identification; it goes without saying. The pair also participated in a PBS *Frontline* story in 1996 "about how eyewitnesses can make mistakes." *Id.* at 236. What was newsworthy in the 1990s is now common sense.

[11] Incredibly, the State continues to argue that this eyewitness identification procedure was appropriate and even ahead of its time. Oral Arg. at 41:50–42:10, available at https://www.ca4.uscourts.gov/OAarchive/mp3/18-6980-20200507.mp3; *see* Response Br. at 16 ("[T]his was a very strong eye-witness identification.").

In sum, "[t]he voluminous studies conducted on the subjects of memory and eyewitness identifications make it painfully clear that many of the identification procedures used in this case were inconsistent with the fundamental concept of neutral inquiry. As a result, [Ms. Bost's] identification[] lack[s] many of the basic indicia of reliability. Yet, the jury that convicted [Mr. Long] was completely unaware of these problems." *Dennis*, 834 F.3d at 315–16 (McKee, C.J., concurring). A reasonable juror today would know more about these matters and, therefore, necessarily question the strength of the identification.

2.

Putting aside the specific faults of the police identification procedures in this case, today we know more about general shortcomings in eyewitness identification—shortcomings that cast doubt on the prosecution's case. For example, although Ms. Bost confidently identified Mr. Long at trial, we now know that "[t]here is no scientific basis for correlating time-of-trial confidence with accuracy." Task Force Report at 57 (citing studies from the past three years); *see also United States v. Greene*, 704 F.3d 298, 309 n.4 (4th Cir. 2013) (citing "considerable research showing that an eyewitness's confidence and accuracy have little correlation"). Armed with modern science, we can see several factors at play in Ms. Bost's identification of Mr. Long that tend to cripple eyewitness identifications.

First, we know that stress, especially that induced by weapons, can inhibit accurate memory formation and retention, rendering identifications less reliable. *See* Task Force Report at 77–81. For example, a 2008 study "found that correct identification rates dropped to 18 percent [in high-stress scenarios] compared with 75 percent for identifications

following low-anxiety scenarios." Innocence Project Amicus Br. at 18. Similarly, "[t]he visible presence of a weapon during a witnessed event"—such as the knife brandished in this case (and in Ms. Thompson's)—"can influence eyewitness accuracy by directing attention towards the weapon and away from the perpetrator." Task Force Report at 19. This Court has previously recognized that an identification may be unreliable where a victim's "degree of attention to the [perpetrator] at the time of the offense was greatly diminished due to her reasonable fear and the distraction of having a weapon pointed at her." *Greene*, 704 F.3d at 308.

Moreover, today, the difficulties with cross-racial identification are clear. For instance, a 2001 meta-analysis demonstrated that study participants were more than fifty percent more likely "to falsely identify a novel other-race face" than an own-race face. Innocence Project Amicus Br. at 20 (quoting Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol. Pub. Pol'y & L. 3, 15 (2001)). The impact appears to be generally greater where, as here, the eyewitness has not "had regular interactions and involvement with persons of the same ethnic group as the perpetrator." Task Force Report at 19.

Next, Ms. Bost's identification of Mr. Long did not occur until more than two weeks after the attack. Delays in time can, unsurprisingly, frustrate a witness's ability to identify a suspect. *E.g.*, Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. Experimental Psychol.: Applied 139, 147 (2008) ("[C]onservative advice to a trier of fact would be that the typical eyewitness viewing a perpetrator's face that was not highly distinctive would

be expected to have no more than a 50% chance of being correct in his or her lineup identification (six-person lineup) at a *1-week* delay." (emphasis added)).

Additionally, Ms. Bost testified that her attacker wore a toboggan that was pulled "down over his ears, and down his neck." J.A. 201. Research has found "that wearing a disguise as simple as a hat reduce[s] identification accuracy." Task Force Report at 89; *see also Young v. Conway*, 698 F.3d 69, 80 (2d Cir. 2012).

Finally, today we understand that witnesses may incorporate details about an individual they have identified into their memory of the suspect. *E.g.*, Nancy K. Steblay, *Scientific Advances in Eyewitness Identification Evidence*, 41 Wm. Mitchell L. Rev. 1090, 1108 (2015) ("[E]yewitness veracity is dually cursed by the likelihood that original memory of the crime event will be tainted by new external information and that the witness will be unable to effectively parse information into what she knows now, versus what she knew at the time of the crime . . . . An eyewitness may replace (or confuse) a perpetrator's face with another image—of an innocent lineup member, a police composite, or a face seen in a mug-shot or other post-event context." (footnotes omitted)). We see this phenomenon at work here.

On the night of the attack, the police recorded Ms. Bost's description of her rapist. The description does not mention facial hair and describes both the leather jacket and the toboggan merely as "dark," without specifying color. J.A. 1428. Yet she later testified that her attacker *did* have facial hair—as did Mr. Long at the time—and that the jacket and toboggan introduced into evidence (which were black and green, respectively) were those worn by her attacker. She positively identified the clothing even though she could not even

describe the *color* of the items *on the night of the attack*—let alone be able to testify, months later, to further details, such as the number of pockets on the jacket.

To summarize, even before considering the suppressed evidence in this case, a modern jury would have a much improved understanding of cognition and memory—and the lessons learned from other cases, like the 1995 exoneration of Mr. Cotton, which occurred many years after Mr. Long was sentenced—than the original jury did. They would also have much more guidance on the flaws in the identification procedures used and why those defects mattered. No reasonable juror could have found, on the basis of Ms. Bost's identification alone, that Mr. Long was guilty beyond a reasonable doubt. Yet after considering the suppressed evidence—which overwhelmingly controverts the other trial evidence—the entirety of the State's remaining case dangles on that single thread.

D.

Turning now to the rest of the State's case, first, the evidence that the prosecution suppressed would have seriously undermined the physical evidence tying Mr. Long to the crime—and pointed to a different assailant. The police deliberately hid test after test that did *not* link Mr. Long to the crime scene. *See* Majority Op. at 22–23. This forensic evidence would necessarily give a jury pause—and it casts the remaining evidence in a far different light. *See* Professors Amicus Br. at 8 ("[J]urors use a coherence-based reasoning method, in which they integrate the whole of the evidence that they receive. . . . [A] piece of strong inculpatory evidence can make the entire evidence set appear inculpating. By the same token, including an *exculpating* item can push the evidence towards a conclusion of innocence." (citations and internal quotation marks omitted)).

At trial, the only concrete evidence for the defense was Mr. Long's alibi testimony. In contrast, the prosecution had Ms. Bost's identification, the items of clothing that seemed to match those worn by her attacker, the shoeprint that *could* have been made by Mr. Long's shoes, and the matches "of [a] similar nature." J.A. 378. The prosecution could thus argue that Ms. Bost's "testimony is not only accurate, but totally consistent with every piece of physical evidence existent." J.A. 536. Given the balance of evidence, the jury understandably interpreted the forensic evidence as supporting Mr. Long's guilt—even though each piece of forensic evidence was, at best, ambiguous.

But the suppressed evidence entirely shifts this balance—meaning that a reasonable jury, in search of proof of guilt beyond a reasonable doubt, would recalibrate its analysis of the ambiguous trial evidence supposedly incriminating Mr. Long.

We now know that lab tests could not conclude that the matches found in Mr. Long's car were any more "similar" to the matches found at the crime scene than any other matches in the world. A hair located at the scene, which forensic testing revealed could have come from a Black individual—and therefore, given Ms. Bost's admitted lack of general social interaction with African Americans, may well have come from her attacker—*did not match Mr. Long*. In fact, *none* of his hair was located at the scene or on her clothing.[12] And the forensic report on the hair that *was* retrieved from the scene noted that it was "reddish" in color—which aligns with Ms. Bost's description of her attacker as a light-skinned Black man. J.A. 1471. By contrast, Mr. Long is a dark-skinned Black man with black hair that

[12] In fairness, *no* suspect hair was located on her clothing.

took on "a brownish gray color" under the microscope. Further, no paint or fibers from the scene were discovered on Mr. Long's jacket or gloves, or on the toboggan supposedly found in his car. No fingerprints from Mr. Long were found at Ms. Bost's house.[13] And while Mr. Long's shoes "could have made" a print found at the scene, the analyst could not "effect any identification." J.A. 1464 (emphasis omitted).

While the absence of evidence is not evidence of absence, Dissenting Op. at 116, in our criminal justice system, evidence is required to convict. That simply means that in the absence of evidence, the State has not met its burden to prove guilt beyond a reasonable doubt.

E.

1.

Next, there is the matter of the police officers' purported "perfect honesty," as the State put it during closing arguments. J.A. 576. Our criminal justice system indeed rests on the honesty of those who investigate crimes: absent their forthrightness, the system becomes one of corruption, cronyism, and conviction without evidence. In short, their honesty is necessary to our constitutional order.

I do not take lightly, therefore, the conclusion that officers or other investigators, such as lab analysts, discharged their duties dishonestly. But nor can I ignore such a

[13] While Ms. Bost testified at trial that her attacker was wearing gloves, the police reports of her description on the night of the attack were less clear. The first report mentions gloves, but the more complete description recorded at the hospital shortly thereafter states only that the suspect "*could possibly* [have] been wearing gloves." J.A. 1428 (emphasis added).

conclusion when the evidence is clear; in fact, all who seek to uphold the rule of law *must* acknowledge when it has been flouted. Officers have a duty to investigate truthfully; as noted, our system of justice depends upon it.

Unfortunately, we well know that some officers sometimes lie. *E.g.*, *United States v. Slager*, 912 F.3d 224, 234 (4th Cir.) (noting that several of the defendant police officer's statements concerning his killing of Walter Scott were directly contradicted by a witness's video evidence—including the particularly significant lie that Scott grabbed the officer's taser, supposedly justifying the use of deadly force), *cert. denied*, 139 S. Ct. 2679 (2019). Wishing otherwise does not make it so.

The majority opinion has already recounted several ways in which the officers responsible for investigating this case acted dishonestly, but I will summarize those points again here. At trial, Detective Isenhour—a key witness for the prosecution, who was himself later convicted for a crime of dishonesty, that is, possession of a stolen U.S. Treasury check—perjured himself on the stand. That is, he lied. When asked during trial what items he brought with him to the lab at the State Bureau of Investigation ("SBI") for forensic testing a mere four months earlier, Detective Isenhour purported to list them: a "pair of shoes" from Mr. Long, "two inked [shoe] impressions," "*and* . . . the latent lift" of a shoeprint from the banister. J.A. 411 (emphasis added). There was no hedging, and his meaning is unmistakable: he had taken those items, and only those items, to the SBI. That was false. In fact, he had brought more than a dozen items to the lab—but the test reports

on the others had failed to provide results even remotely helpful to the prosecution's case. So they were, conveniently, "forgotten."[14]

And not just forgotten on the stand at trial: the reports, which the SBI recorded were sent to Detective Isenhour, vanished from the police's files. They were uncovered, decades later, only in the SBI's records. The clear inference is that someone removed the reports from the police's case file.

Detective Isenhour also lied at trial about whether the items had remained in his possession and control since he first received them. He testified that they had so remained. Again, that was not true. In fact, he had left the items he discussed at trial—as well as those he decided not to mention—with the SBI for several days. Perhaps he feared that inquiries into the time the items spent at the lab would lead to discovery of the test reports whose existence he wanted to conceal.

Moreover, Detective Isenhour covered his tracks in writing. On May 12, 1976, he prepared a summary report listing all the items of evidence he had brought to the SBI the previous day. He later prepared a second, undated report, which claimed to be "intended to show what type [of] work was done and on which dates evidence was collected and processed." J.A. 1484. The second report describes receiving "oral and written results" that "the shoes worn by [Mr.] Long could have made the latent impression recovered" from the scene. J.A. 1484.[15] But the second report does not mention any other forensic test results.

[14] The State concedes that Detective Isenhour's testimony was "at least incorrect." Oral Arg. at 46:30–46:42.

[15] That suggests the report was created on May 19 or later, as that was the date of the written shoeprint report.

Additionally, the report states only that Mr. Long's clothing had been "collected . . . and held for investigative uses"; there is no mention that the clothing had been brought to the lab. *Id.* Neither report was disclosed to the defense. The rational inference is that Detective Isenhour created the second report to support his trial testimony, whether or not he ultimately used it that way.

Detective Isenhour was not the only officer who acted deceitfully. Detective Taylor testified, outside the presence of the jury, that "[t]o [his] knowledge, [the matches found in Mr. Long's vehicle] were not matched [to those found at the crime scene]." J.A. 335. When pressed by the presiding judge, who asked whether he "ha[d] any information that they didn't match," Detective Taylor stated, "No, sir, they didn't match." *Id.* Such an affirmative statement suggests knowledge of the underlying SBI report analyzing this issue. Yet Detective Taylor did not disclose the existence of that report. And before the jury, he stated only that the two sets of matches were "of [a] similar nature." J.A. 378. He failed to mention that a lab report did not support his testimony.[16]

[16] The majority notes the discrepancy between Detective Taylor's testimony before the jury and his testimony outside the jury's presence. *See* Majority Op. at 12–13. But this point bears repeating because the State argued to the MAR Court that Detective Taylor's testimony given *outside the presence of the jury* was in fact *heard* by the jury—and argued that this meant "the jury was left" with an impression even more favorable to Mr. Long than the actual matchbook report. J.A. 1004. The MAR Court perpetuated this error, relying on this supposed fact twice in its opinion. *See* J.A. 1352 (stating that at trial, defense counsel "elicited testimony that the [burned] matches did not match [the matchbook found in Mr. Long's car, which] . . . . was inaccurate, but to the benefit of [Mr. Long]"); J.A. 1358 ("[T]he jury was misled to believe that the matches did not match which was to [Mr. Long]'s benefit.").

Disclosure of the reports would have undermined the State's case regarding physical evidence; the State could no longer argue that Ms. Bost's identification was "totally consistent with every piece of physical evidence existent." J.A. 536. But it also would have damaged the credibility, and allowed for the impeachment, of Detectives Isenhour and Taylor—the two officers who approached Ms. Bost with their unorthodox (and highly suspect) plan for the in-court identification of Mr. Long. It would have raised the question of why, if this evidence was *not* meaningful, the officers chose to hide it. *E.g.*, *Carrillo v. County of Los Angeles*, 798 F.3d 1210, 1227 (9th Cir. 2015) (noting that an officer's suppression of exculpatory evidence, combined with that officer's affirmative statements contradicting the suppressed evidence, "implicitly recognizes that [the suppressed] evidence . . . would have been very helpful to the defense"). And it would have cast the case in an entirely different light, where implications about planted evidence—such as the toboggan supposedly found in Mr. Long's car—no longer seemed so farfetched.[17] *Cf. Killian v. Poole*, 282 F.3d 1204, 1209 (9th Cir. 2002) ("[T]he finders of fact were deprived of the fundamental inference that if [a witness] lied about X, Y and Z, it is quite likely that he lied about Q, R and S.").

I would be remiss if I did not also mention the missing semen sample—which police collected from the hospital, with the victim's consent, a few hours after the rape. The semen

[17] I note that Mr. Long's claim of actual innocence does not rest on the inference that the police planted the toboggan, however fair an inference that may be. The police claimed to locate the toboggan under the seat of Mr. Long's car. But the car was a family car in which friends also sometimes rode, including in the days before his arrest. It is not hard to imagine that someone else—days, weeks, even years earlier—could have forgotten their hat under the seat of the car.

sample was released along with the victim's pubic hair combings. The former simply vanished into the ether, while the latter were tested (though those test results, too, disappeared for several decades). Yet Mr. Long's trial counsel was "reasonably certain" he had asked the prosecution whether a rape kit was taken and was "not told that any such thing existed." J.A. 1036. And it appears that the prosecutors believed that to be true. In fact, even the police no longer have a record of the semen sample; the only reason Mr. Long knows about it is because the *hospital* still had a record of its release to the police. Again, key evidence was somehow lost from the police file.

The semen sample held significant exculpatory power.[18] But moreover, the officer who collected the sample from the hospital, Sergeant Marshall Lee, testified at trial on an unrelated matter. Yet defense counsel, knowing nothing of the semen sample's existence, had no reason to cross-examine Sergeant Lee.[19]

Finally, the officers' motives must be questioned when one considers their chosen method of identification. Despite having a photograph of Mr. Long, they subjected Ms. Bost to a terrifying in-court ordeal, complete with a disguise in case her attacker was

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[18] Although DNA testing was not available in 1976, there were other forensic tests that could be performed on a semen sample. *See Hilliard v. Spalding*, 719 F.2d 1443, 1445 (9th Cir. 1983) (discussing the technology available in 1975, such as "test[ing] a sample of seminal fluid taken from the victim and compar[ing] it with samples of a defendant's saliva and blood," which in some circumstances could "conclusively exculpate an individual").

[19] The district court found that the examining doctor's testimony that he had confirmed the presence of sperm provided Mr. Long with the opportunity "to argue that the state failed to make any meaningful use of the biological evidence, such as connecting it to [him]." J.A. 1691. But the court failed to note that Mr. Long did not know that *the police had collected a test tube containing a sperm sample and then (at best) lost it*—a fact tending to show either police incompetence or dishonesty, both of which are distinct points from the one the court found Mr. Long could have elicited based on the trial testimony.

present and recognized her. And, although they had purportedly identified a key suspect who they believed had committed a heinous, brutal crime, they chose to wait *at least five days* before having the victim identify him. Five days during which the alleged rapist could have attacked more women, fled the state, or returned to harm Ms. Bost.

The officers in this case plainly did not act with "perfect honesty." In fact, some of them acted with deliberate deceit—at the time of the investigation, on the stand at trial, and in the ensuing decades, when they never revealed the existence of the suppressed evidence. The impact on Mr. Long's case was profound. The impact on his life was disastrous.

2.

Nevertheless, the State has continued to hinder Mr. Long's attempts to obtain the evidence that should have been disclosed more than forty years ago. In June 2005, an officer testified that the only evidence he had found related to the investigation was the master case file, and the SBI reported it had no additional records. But after the court permitted Mr. Long's counsel to review the master case file—at which point counsel discovered Detective Isenhour's May 12 report—the SBI located the missing test reports. The SBI finally provided those reports in January 2006—thirty years after Mr. Long's arrest, trial, and conviction.

And then, in 2015, yet more evidence was uncovered—three envelopes containing 43 latent fingerprints from the crime scene, which did not match Mr. Long's. The fact that the physical prints still existed was not disclosed after the court order in 2005, despite the State's representations that there remained no additional evidence to reveal.

Indeed, Mr. Long only learned of the prints due to an investigation by the North Carolina Innocence Inquiry Commission ("Commission").[20] The Commission apparently ran the prints against "several alternate suspects," in addition to Mr. Long. J.A. 1584. But when Mr. Long sought more information from the Commission about those other suspects, the State again stood in the way, refusing to consent to disclosure of the Commission's files.

3.

The exculpatory evidence that has come to light thus far is voluminous and weighty. But there also exists a very real possibility of other evidentiary problems of which we may never learn. Unconstitutional behavior in investigations is not limited to investigating officers. In recent years, the practices of North Carolina's forensic lab, the SBI, have come under scrutiny—particularly after the high-profile 2010 exoneration of Gregory Taylor, whose conviction was based in part on an errant SBI report.[21]

After Mr. Taylor's exoneration, the state Attorney General commissioned an independent review of the policies and procedures of certain subsections of the SBI. Chris Swecker & Michael Wolf, *An Independent Review of the SBI Forensic Laboratory*, N.C.

[20] When no DNA evidence was located and the fingerprints provided no match, the Commission closed its investigation without coming to a decision as to guilt or innocence.

[21] *See* Nat'l Registry of Exonerations, *Gregory Taylor*, U. Mich. L. Sch. (Oct. 16, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3677. Specifically, an SBI report indicated that there was a "chemical indication for the presence of blood" on Mr. Taylor's truck. *Id.* Absent from the final report were the results of a subsequent test showing that, in fact, no blood was present.

Dig. Collections 2 (2010).[22] The reviewers located *hundreds* of North Carolina cases "contain[ing] lab reports that mention positive presumptive test results but omit the results [of] other more sensitive tests." *Id.* at 3. More troubling still, "[i]t was determined that during the relevant time periods"—1987 through 2003—"lab files were not routinely produced to an accused defendant." *Id.* at 4. In fact, it was "the sanctioned *practice* of some NC SBI Laboratory Analysts at the time to omit the results of certain negative or inconclusive confirmatory tests in final lab reports under certain circumstances, *and this practice later became written SBI policy in 1997*." *Id.* at 12 (second emphasis added); *see also id.* at 18–22.

Bad faith is not a prerequisite to the production of such abysmal results. In fact, the SBI reviewers noted that they found no evidence "that laboratory files or reports were concealed or evidence deliberately suppressed." *Id.* at 28. Rather, they attributed the issues they uncovered to flawed policies, training, and management, and to a mindset "that the lab's customer was law enforcement and reported results should be tailored primarily for law enforcement's consumption." *Id.*

The SBI review involved blood and DNA analyses between 1987 and 2003; neither the type of analysis, nor the time frame, is directly relevant to this case. But the report is worth considering because it demonstrates how even elements further removed from direct suppression of evidence or perjured testimony can greatly impact a case. North Carolina's SBI has had a lengthy history of, for one reason or another, failing to disclose key

[22] Available at https://digital.ncdcr.gov/digital/collection/p249901coll22/id/498661/.

information that we now know would have prevented convictions of the innocent. And we may well question whether the SBI's history means that the results of the lab tests in Mr. Long's case were designed to be as friendly to the prosecution as they could possibly be, notwithstanding the fact that they did not support the State's case—or that other tests were performed whose existence remains suppressed, and which may never be uncovered.

F.

Finally, in light of all of the above, a jury would surely view Mr. Long's alibi with a much more open mind today.

Mr. Long's alibi evidence showed a young man enjoying a normal weekend evening: attending a class reunion meeting; socializing with friends; then returning home where he went upstairs to his room, talked to his girlfriend and young son on the phone, and listened to music, all the while excitedly waiting for his father to return home with the car so he could borrow it to make the half-hour drive to Charlotte for a party. Both the attendees of the meeting (which occurred before the attack on Ms. Bost) and the partygoers who saw Mr. Long later in the evening (after the attack) reported he was wearing khaki pants—not blue jeans, as Ms. Bost's attacker wore. And at the party, he wore a black leather hat—not a green toboggan. Moreover, those at the party testified that Mr. Long acted normally and did not display any cuts or scratches. Nor is there anything in the record to suggest that there were scratches on his leather jacket.

Is it possible that between talking to his son and checking on whether his father had brought the car home yet, Mr. Long changed his pants, sneaked out of his upstairs bedroom, walked to Ms. Bost's home, broke in, raped her in such a brutal fashion that her fingernails

were bent backward from her attempts to scratch and fight off her attacker (but without getting *any* scratches on himself or his jacket), returned home, slipped back into his bedroom unseen, changed back into the pants he was wearing earlier, and then went about his normal evening? Many things are *possible*. Is such a sequence of events probable, or even plausible, such as to support a conviction beyond a reasonable doubt? I do not believe any reasonable juror would find so—particularly in light of the many other items of exculpatory evidence of which we are now aware.

G.

Considering "all the evidence put before the court" today, *MacDonald*, 641 F.3d at 610, Mr. Long has established by "clear and convincing evidence" that, but for the *Brady* violations, no reasonable juror would have found him guilty of this crime beyond a reasonable doubt, § 2244(b)(2)(B)(ii). The various pieces of evidence cast each other in a new light. The new forensic evidence would undermine the only physical evidence presented at trial. The officers' dishonesty would undermine the integrity of the investigation. Both the new forensic evidence and the evidence of the officers' dishonesty would strengthen the alibi evidence. And all of that would leave only the eyewitness identification—an identification conducted using highly suggestive procedures, whose validity therefore must be doubted. Mr. Long has satisfied the § 2244(b)(2)(B) gateway, and since he has also succeeded on the merits in his § 2254 petition, he is entitled to habeas relief.

II.

Before closing, I add my voice and vote in this en banc proceeding to overturn our decision in *Evans v. Smith*, which held that *Brady* claims may be subjected to the strictures of "second or successive" petitions. 220 F.3d 306, 309 (4th Cir. 2000).[23] In my view it is an extraordinary fact that Mr. Long is subjected to the § 2244(b)(2) gateway at all.[24] That statute requires a habeas petitioner filing "a second or successive habeas corpus application" to meet the exacting standards of this gateway. 28 U.S.C. § 2244(b)(2). Mr. Long has not squarely challenged the applicability of this rule to his petition in this appeal.[25]

On en banc review, however, we may reconsider our circuit precedent, and we ought to do so here. After all, "[t]he [Supreme] Court has declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time."

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[23] Notably, this Court's reasoning in *Evans* has been undermined by the Supreme Court's more recent holding in *Panetti v. Quarterman*, 551 U.S. 930 (2007). For example, *Evans* emphasized that unlike the earlier Supreme Court holding in *Stewart v. Martinez-Villareal*, "Evans' *Brady* claim was not part of th[e] first petition." *Evans*, 220 F.3d at 325 (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998)). *Panetti*, however, involved a claim that was *not* raised in the initial petition. 551 U.S. at 942. Whether *Evans* remains good law in this Circuit after *Panetti* is an open question. We have cited *Evans* only once since *Panetti*, in an unpublished decision released *the day after Panetti*, which cited *Evans* for an unrelated point. *See United States v. Richardson*, 239 F. App'x 792, 793 (4th Cir. 2007) (per curiam).

[24] Mr. Long must satisfy some actual-innocence standard regardless of the successiveness of his petition, since it was filed out of time. Majority Op. at 25. As the majority opinion notes, however, the showing of actual innocence is less stringent for a tardy petition than for a successive one. *See id.* at 50 n.13. *Compare* 28 U.S.C. § 2244(b)(2)(B)(ii), *with McQuiggin*, 569 U.S. at 395. I believe Mr. Long satisfies both standards, but I also believe it worth considering whether he *need* do so.

[25] At oral argument, however, Mr. Long's counsel did note that AEDPA was not intended to prevent cases like Mr. Long's from going forward. Oral Arg. at 12:50–13:30.

Panetti v. Quarterman, 551 U.S. 930, 944 (2007) (collecting cases). Rather, there are "exceptions." *Id.* at 947.

Panetti elaborated on one such exception (related to mental competency for execution), but left the door open to others. Notably, the Court held that § 2244 should not be interpreted in a manner "that would 'produce troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress'[s] intent.'" *Id.* at 946 (quoting *Castro v. United States*, 540 U.S. 375, 380–81 (2003)). And, noting that AEDPA's purposes were to promote "comity, finality, and federalism," the Court held that "[t]hese purposes, and the practical effects of [the Court's] holdings, should be considered when interpreting AEDPA," "particularly . . . when petitioners run the risk under the proposed interpretation of forever losing their opportunity for any federal review of their unexhausted claims." *Id.* at 945–46 (internal quotation marks omitted); *cf. McQuiggin*, 569 U.S. at 393 (collecting post-AEDPA decisions that "*see[k] to balance* the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case" (alteration in original) (emphasis added) (quoting *Schlup*, 513 U.S. at 324)).

Brady claims, as a category, represent a good candidate for exclusion from the "second or successive" requirements. After all, such claims relate to *suppression of material, favorable evidence by the state*. In other words, to subject *Brady* claims to the heightened standard of § 2244(b)(2) is to reward investigators or prosecutors who engage in the unconstitutional suppression of evidence with a "win"—that is, the continued

incarceration of a person whose trial was fundamentally unfair (and unconstitutional). For that reason, some courts have hesitated to sanction a rule as broad as the one we adopted in *Evans*. *E.g.*, *Brown v. Muniz*, 889 F.3d 661, 668 n.5 (9th Cir. 2018) ("[S]hould exculpatory evidence be discovered by the State *after* the first habeas petition is filed, and is thereafter suppressed by the State over the course of post-conviction proceedings, [the second-or-successive rules would not apply because] . . . . the new claim would not have been ripe at the time of the initial filing."), *cert. denied sub nom. Brown v. Hatton*, 139 S. Ct. 841 (2019); *Crawford v. Minnesota*, 698 F.3d 1086, 1090 (8th Cir. 2012) (concluding that "at least nonmaterial *Brady* claims in second habeas petitions" are subject to the second-or-successive rules, but noting that the question of whether "all *Brady* claims in second habeas petitions are second or successive regardless of their materiality" was "not presented" in the case); *Douglas v. Workman*, 560 F.3d 1156, 1193 (10th Cir. 2009) (declining to apply the § 2244(b)(2) requirements where a prosecutor acted affirmatively to conceal the facts underlying the petitioner's *Brady* claim until after he filed his first habeas petition, since to do so "would be to allow the government to profit from its own egregious conduct," and "[c]ertainly that could not have been Congress's intent when it enacted AEDPA").

Moreover, some of our colleagues in other circuits have expressed serious reservations about imposing § 2244(b)(2)(B)'s limitations on *Brady* claims at all. *E.g.*, *Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015) (noting that the petitioner's "argument for exempting his *Brady* claim from the § 2244(b)(2) requirements has some merit," though the Court was bound to follow circuit precedent in concluding otherwise).

Notably, an Eleventh Circuit panel recently followed its circuit precedent requiring a petitioner raising *Brady* claims to satisfy the § 2244(b)(2)(B) standard—which, as a three-judge panel, it was required to do—but nevertheless explicitly, and at length, noted the panel's unanimous disagreement with that precedent and called for en banc review of the matter. *Scott v. United States*, 890 F.3d 1239, 1243–44 (11th Cir. 2018) (citing *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257 (11th Cir. 2009)). The panel explained that the circuit's precedent "eliminates the sole fair opportunity for these petitioners to obtain relief" and that, in the panel's view, "Supreme Court precedent, the nature of the right at stake here (the right to a fundamentally fair trial), and the Suspension Clause . . . do not allow this. Instead, they require the conclusion that a second-in-time collateral claim based on a newly revealed actionable *Brady* violation is not second-or-successive for purposes of AEDPA." *Id.* at 1243. The panel reached this conclusion even absent any of the evidence of bad faith or conscious suppression on the part of law enforcement that exists in this case. *See id.* at 1246.

The Eleventh Circuit's opinion in *Scott* warrants careful consideration. After all, Congress's intention in enacting AEDPA was "to curb the abuse of the statutory writ of habeas corpus." H.R. Rep. No. 104-518, at 111 (1996) (Conf. Rep.); *see also Panetti*, 551 U.S. at 945 (noting the legislative purpose of promoting "finality"). In many cases, the rules governing second or successive petitions advance that goal: defendants are discouraged from filing frivolous habeas petitions because, if they do, any later petitions will be subject to strict limitations.

But *Brady* claims almost necessarily will not be included in an initial petition, *no matter how meritorious the initial petition*. That is because, in most cases, the petitioner will have no way of knowing he has a *Brady* claim to raise until it is too late; the initial petition, after all, must generally be filed within one year of the conclusion of direct review. § 2244(d)(1). So, unless the petitioner becomes aware of the suppressed evidence shortly after trial, his claim will be subjected to higher standards—through no fault of his own.

Consider, for example, a Black defendant tried by an all-white jury who raises a plausible *Batson* claim in his initial habeas petition.[26] It would be reasonable for him to do so; otherwise, he will have forfeited the claim forever. Yet if, ten or twenty or thirty years later, it comes to light that the state failed to disclose material favorable evidence, the defendant will now have to establish not only the merits of a *Brady* claim, but also that he can satisfy the stringent rules applicable to second or successive petitions. (This is no mere hypothetical; *Evans* presented this Court with a *Brady* challenge subsequent to an initial *Batson*-based petition. 220 F.3d at 312, 322–23.)[27]

Worse still, this situation creates incentives for any state actors withholding material evidence to violate the petitioner's other constitutional rights, if subtly. After all, if they succeed in prompting the petitioner to file an initial habeas petition, they position

[26] *Batson* claims are brought pursuant to the Supreme Court's holding that "a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234 (2019) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

[27] Indeed, one wonders whether, in light of such situations, § 2244 as interpreted in *Evans* does not violate the Equal Protection Clause, to the extent that petitioners of some races are more likely to have cause to raise *Batson* challenges in initial habeas petitions than petitioners of other races.

themselves to better defend against any later habeas claims in the event the suppressed evidence is ever uncovered. Such an incentive structure promotes neither the interests of justice nor finality.

Similarly, the current situation disproportionately impacts petitioners in Mr. Long's precise boat: that is, those who were convicted and raised habeas claims before AEDPA's enactment in 1996—but who became aware of suppressed material evidence only after 1996. This is because the standards for successive petitions were much less strict prior to 1996. *See* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 28.3[a] (7th ed. 2019). Had the State disclosed the evidence it had withheld from Mr. Long for so long before 1996, he would have been in a much better position to raise his *Brady* challenge than he was when they *actually* disclosed it years later. And of course, yet another standard would have applied had the State disclosed the evidence before 1989, when Mr. Long filed his first federal habeas petition. Mr. Long had no control over when the State finally started to disclose the evidence. Surely Congress did not intend such a perverse result.

Yet, under the precedent of this and other circuits, this is precisely how § 2244 currently works. Our Court, and others, should reconsider this precedent. And of course, Congress could choose to resolve the issue definitively by explicitly excluding *Brady* claims from the second-or-successive rules.

III.

I conclude by noting that it is imperative we not lose sight of the context in which this case was investigated and prosecuted.

Mr. Long, a Black man, was tried in "small town" 1970s North Carolina by an all-white jury for the rape of the white widow of a prominent local business executive. J.A. 703.[28] Concord and the surrounding county "had a reputation of being run by" the company Ms. Bost's husband had worked for. *Id.* And *four* members of the jury were either employees of that company or married to an employee. Moreover, the community, inside and outside the courtroom, was "racially polarized." J.A. 677. Despite all these drawbacks, Mr. Long's counsel decided against moving for a change in venue for fear of being transferred to an area with heavy Klan activity—which would have been "getting out of the frying pan into the fire." J.A. 680.

Mr. Long thus faced a steep uphill battle to persuade the jury of his innocence before he ever set foot in the courtroom. And that uphill climb became an impossibly steep—perhaps even vertical—one when one considers the particular crime in this case: an interracial rape.

The history of policing sexual contact between Black men and white women—including using accusations of inappropriate or violent conduct, from wolf whistles to rapes, to imprison or lynch Black men—is a long and troubling one in this country, particularly in the South. These dynamics took on particular ferocity in the aftermath of the Civil War. *See* Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* 189 (2003). White supremacists argued that "the abolition of slavery and the awarding of civil rights to blacks had led to a sharp increase in sexual crimes against white

[28] The population of the City of Concord at the time was around 18,000.

women." *Id.* Ambassador Claude Bowers wrote that rape was "the foul daughter of Reconstruction." *Id.* (quoting Claude G. Bowers, *The Tragic Era: The Revolution After Lincoln* 308 (1929)). And academics "concocted theories to legitimate the claim that black men were dangerous subhumans predisposed to rape." *Lynching in America: Confronting the Legacy of Racial Terror*, Equal Just. Initiative 49 (3d ed. 2017), https://eji.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf [hereinafter Lynching Report]; *cf.* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 21–22 (2010) (arguing that the mass incarceration of Black men today plays a similar role in enforcing racial hierarchy as slavery and Jim Crow laws did for previous generations).

Not surprisingly, therefore, "[o]f the several defenses that apologists offered for lynching, one of the most popular was the claim that black men's lust for white women was irrepressible or so intense that nothing short of mob violence could control it." Kennedy, *supra*, at 192; *see also* Lynching Report at 15 ("Charges of rape, while common, were 'routinely fabricated' and often extrapolated from minor violations of the social code, such as 'paying a compliment' to a white woman, expressing romantic interest in a white woman, or cohabitating interracially."). Indeed, in 1951 in North Carolina, a Black man was prosecuted for assault with intent to rape for allegedly looking at a seventeen-year-old white girl inappropriately (from a distance of seventy feet, no less). Kennedy, *supra*, at 196. And "[m]ore than half of the lynching victims [the Equal Justice Initiative has] documented were killed under accusation of committing murder or rape." Lynching Report at 32.

Even as lynchings became less common, American society continued to frown upon interracial contact. We cannot forget, for example, that at the time of Mr. Long's trial, interracial marriage—with its implications for *fully consensual* sexual contact across racial lines—had only been legal across the country for less than a decade. *See Loving v. Virginia*, 388 U.S. 1 (1967). Nor can we forget that despite that legal victory, the vast majority of white Americans in the 1970s continued to disapprove of such marriages.[29] Officers and jurors who disapproved of interracial *marriage* were sure to be highly skeptical of a man accused of interracial *rape*.

There is no doubt that Ms. Bost was brutally raped. This was not a case of a fabricated claim or of retaliation for mere flirtation. But that does not mean we can ignore the history and context that no doubt implicitly biased both the officers during the investigation and the jury when faced with the decision of whether to convict *Mr. Long*, specifically, of the crime. *Cf. Picking Cotton* at 76, 84–85 (Mr. Cotton discussing how the cards were stacked against him as a Black man accused of raping a white woman in small-town North Carolina in the 1980s); *id.* at 121 ("If it was so important to the community

[29] According to Gallup polls, in 1958, only 4% of respondents approved of Black-white marriages, while 94% disapproved. Joseph Carroll, *Most Americans Approve of Interracial Marriages*, Gallup (Aug. 16, 2007), https://news.gallup.com/poll/28417/most-americans-approve-interracial-marriages.aspx. In 1972 and 1978, the disapproval figures had fallen somewhat, but remained steep: 60% and 54%, respectively. *Id.* White respondents in the 1970s were particularly disapproving, with the percentage approving ranging between a mere 25% and 33%. *Id.* Such numbers may be hard for younger Americans to fathom today—in 2013, the percentage approving had risen to 87%, including 84% of white respondents—but they cannot be forgotten when contemplating the historical context in which this case was investigated and tried. Frank Newport, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, Gallup (July 25, 2013), https://news.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx.

that a black man be punished for these crimes, I guess any one would do, so they pinned it on me.").

Nor can we ignore the devastating fact that the officers suppressed evidence they knew tended to show Mr. Long's innocence—even though Mr. Long was charged with first-degree rape at a time when that crime carried *a mandatory death sentence* in North Carolina. *Woodson v. North Carolina*, 428 U.S. 280, 287 n.6 (1976) (plurality opinion) (citing N.C. Gen. Stat. § 14-21 (1975)).[30] That is, the officers hid evidence despite knowing that doing so could lead directly to Mr. Long's death. Such an action is repugnant in any context. But it takes on a particularly sinister meaning here, given our country's historical treatment of Black men accused of raping white women.

IV.

Mr. Long has spent forty-four years in prison. He has maintained his innocence all along. And the State has maintained his guilt—even while concealing evidence showing otherwise.

[30] The U.S. Supreme Court found North Carolina's statute unconstitutional between the time of Mr. Long's arrest and his trial. *See Woodson*, 428 U.S. at 305. That decision converted the mandatory sentence to life in prison. *State v. Mathis*, 239 S.E.2d 245, 250 (N.C. 1977). Today, however, Mr. Long's sentence for first-degree rape would have been far less than life in prison. *See* N.C. Gen. Stat. §§ 14-27.21, 15A-1340.14, 15A-1340.16–.17 (labeling first-degree forcible rape as a Class B1 felony, for which the penalty *cannot* be life imprisonment *unless* (1) the defendant has multiple prior felonies (or at least fourteen prior misdemeanors) *and* (2) the jury finds aggravating factors warranting an increased sentence). Under the State's current sentencing structure, Mr. Long may well have already served far more than the maximum permissible sentence for rape. And while he was also convicted of first-degree burglary, life imprisonment is no longer permitted for that crime. *See* N.C. Gen. Stat. § 14-52.

That evidence has now trickled out, revealing the truth that Mr. Long has declared for decades: he should not have been found guilty.

Today, the Court remands to give the State yet another opportunity to disclose the evidence it should have disclosed nearly half a century ago. Based on the record in this case over the last fifteen years, I would not be surprised if more evidence does turn up. But since the evidence is sufficient today to grant Mr. Long the relief he has so long pursued, I would not wait for further proceedings on remand.

Forty-four years is an unconscionably long period to wait for justice. It is time.