

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6277

RONNIE WALLACE LONG,

Petitioner - Appellant,

v.

FRANK L. PERRY, Secretary, N.C. Dep't of Public Safety,

Respondent - Appellee.

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)

Submitted: September 29, 2017

Decided: October 25, 2017

Before GREGORY, Chief Judge, and NIEMEYER and HARRIS, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

Jamie Theodore Lau, DUKE UNIVERSITY SCHOOL OF LAW, Durham, North Carolina, for Appellant. Clarence Joe DelForge, III, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ronnie Wallace Long seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing without prejudice his 28 U.S.C. § 2254 (2012) petition on the ground that the petition contained an unexhausted, but not procedurally defaulted, *Brady*¹ claim. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When, as here, the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000).

We conclude that Long has made the requisite showing, and we therefore grant a certificate of appealability. Although the district court determined that Long was attempting to assert a new, unexhausted *Brady* claim, Long unequivocally disclaimed, both before this court and the district court, any independent claim based upon newly discovered latent fingerprint evidence. Thus, Long did not present the district court with a mixed petition that required dismissal.²

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

² We do not address whether the newly discovered fingerprint evidence may be considered when examining Long's exhausted *Brady* claim or whether that evidence so fundamentally alters Long's exhausted *Brady* claim that it may not be considered when addressing the merits of Long's petition. *Winston v. Kelly*, 592 F.3d 535, 549 (4th Cir. 2010). We leave any such determination to the district court in the first instance.

We vacate the district court's judgment and remand for further proceedings. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

VACATED AND REMANDED