No.

In The

Supreme Court of the United States

JOHN EDWARD BURR,

Petitioner,

v.

DENISE JACKSON,
Warden, Central Prison, Raleigh, North Carolina,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

James P. Cooney III
WOMBLE BOND DICKINSON (US) LLP
301 South College Street, Ste 3500
Charlotte, North Carolina 28202
Jim.cooney@wbd-us.com
Telephone: (704) 331-4900

Ernest Lee Conner, Jr.
321 Evans Street, Suite 200
Greenville, North Carolina 27858-7384
ernestconner@earthlink.net
Telephone: 252-757-3535

Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

Where the State withholds the statement of a critical witness from the state court during the postconviction adjudication of a claim under *Brady v. Maryland*, and does not produce the statement until years later during federal habeas proceedings under 28 U.S.C. §2254, should the federal court be required to conduct a *de novo* review of the *Brady* claim, giving no deference to the state court's findings related to this issue, and including relevant evidence developed during federal habeas proceedings?

PARTIES TO PROCEEDINGS

All parties appear in the caption of the case on the cover page.

DIRECTLY RELATED PROCEEDINGS

U.S. Court of Appeals for the Fourth Circuit (No. 20-5) *John Edward Burr v. Denise Jackson, Warden* November 30, 2021

U.S. District Court for the Middle District of North Carolina (1:01CV393) *John Edward Burr v. Denise Jackson*, *Warden* March 26, 2020

Supreme Court of the United States (No. 13-5213) *John Edward Burr v. Kenneth E. Lassiter, Warden* October 7, 2013

U.S. Court of Appeals for the Fourth Circuit (No. 12-4) *John Edward Burr v. Kenneth E. Lassiter, Warden* March 11, 2013

U.S. District Court for the Middle District of North Carolina (1:01CV393) *John Edward Burr v. Gerald J. Branker, Warden* May 30, 2012

Supreme Court of North Carolina (179A93-4), *State of North Carolina v. John Edward Burr,* October 9, 2000

Superior Court Division of the General Court of Justice for County of Alamance (91 CrS 21905-06, 91 CrS 21908-09) *State of North Carolina v. John Edward Burr,* June 15, 2000

Supreme Court of North Carolina (179A93-3), *State of North Carolina v. John Edward Burr,* July 29, 1998

Superior Court Division of the General Court of Justice for County of Alamance (91 CrS 21905-06, 91 CrS 21908-09), *State of North Carolina v. John Edward Burr,* October 3, 1997

Supreme Court of North Carolina (179A93), *State of North Carolina v. John Edward Burr,* September 28, 1995

Superior Court Division of the General Court of Justice for County of Alamance (91 CrS 21905-06, 91 CrS 21908-09) *State of North Carolina v. John Edward Burr,* April 21, 1993

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PETITION FOR WRIT OF CERTORARI

Petitioner John Edward Burr ("Petitioner" or "Burr"), respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND ORDER BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is published and can be found at 19 F.4th 395 (4th Cir. 2021). It is attached to this Petition as Appendix B. (App. 2-47)

JURISDICTION

The Petitioner's timely Petition for Writ of Habeas Corpus under 28 U.S.C. §2254 was denied by the U.S. District Court for the Middle District of North Carolina on March 26, 2020. (App. 49-137). Petitioner filed a Notice of Appeal on April 17, 2020 and sought a Certificate of Appealability. The Certificate was granted by the U.S. Court of Appeals on August 12, 2020. (App. 48). The opinion of the U.S. Court of Appeals for the Fourth Circuit was entered on November 30, 2021. Petitioner's timely petition for rehearing and rehearing *en banc* was denied on December 28, 2021. (App. 1). The Petitioner applied for and on March 3, 2022, was granted an extension of time by the Chief Justice of the United States within which to file this Petition to and including May 27, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect

to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other

reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by Section 3006A of Title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

INTRODUCTION

This case presents an issue first raised by Justice Sotomayor in her dissent in *Cullen v. Pinholster*, 563 U.S. 170 (2011), one which has split the circuits. In *Pinholster,* Justice Sotomayor posited a scenario in which the State withholds statements in postconviction proceedings in the face of a pending *Brady* claim, and the state court (without the withheld statements) denies the *Brady* claim on its merits. The statements are later produced in federal habeas proceedings. Justice Sotomayor noted that, strictly applied, *Pinholster* would bar consideration of the suppressed *Brady* statements in federal court (and the suppressed statements would likely be barred from consideration in a successive petition in the state courts). 563 U.S. at 214-15. In response, the majority in *Pinholster* suggested that 28 U.S.C. §2254(e)(2) could apply to allow consideration of this evidence.

But how this evidence is to be reviewed, and against what other evidence (including any relevant evidence developed in federal habeas proceedings that would otherwise be barred by *Pinholster*) remains an open issue, one that has split the

circuits. *Compare Jones v. Bagley,* 696 F.3d 475, 486-87 (6th Cir. 2012) (*de novo* review applies to suppressed evidence only, not to evidence before the state court) *with Gonzalez v. Wong,* 667 F.3d 965, 972 (9th Cir. 2011) (review limited to determining whether a "meritorious" case existed and then remand with instructions to stay to permit relitigation in state courts).

Justice Sotomayor's hypothetical has occurred in this case. There is no dispute that the State of North Carolina withheld the statements of two key witnesses from the Petitioner at his trial and continued to do so during postconviction proceedings in the state courts. But even after ordered to produce its entire file in state postconviction litigation, the State withheld a 111-page tape-recorded statement of one of these witnesses (after certifying that it had produced all such statements). That statement was not produced ***until 2015*** in this federal habeas litigation, more than 20 years after Petitioner's conviction and years after the adjudication of his *Brady* claim in the state courts.

In its decision, the Fourth Circuit acknowledged that this record of suppression left a "plethora of unanswered questions." The court recognized that the suppression of witness statements, and particularly the 111-page statement that was not produced until 2015, raised significant "fascinating questions about how the Supreme Court's decisions in *Brady* and *Pinholster* intersect." (App. 38). It further recognized that this also could mean that the State court record was materially incomplete and entitled to no deference. (App. 39). And the court recognized that a split in circuits had developed about whether *de novo* review was required by these circumstances.

(App. 43-44). To avoid these questions, the Fourth Circuit conducted a hybrid *de novo* review, evaluating the suppressed statements *de novo* but making a determination concerning materiality by accepting the factual findings made by the State post-conviction court. In addition, the Court explicitly did not consider any additional evidence relevant to materiality developed in discovery during the federal habeas proceedings. It then concluded that all of the suppressed statements, "old and new" were not material within the meaning of *Brady v. Maryland*.

The Fourth Circuit's decision establishes the third different approach by the third federal appellate court to address this issue. Petitioner believes that the Fourth Circuit's approach is inadequate because it fails to evaluate Petitioner's *Brady* claim against all of the evidence presented by Petitioner in both state and federal court on a fully *de novo* basis. Rather, the Fourth Circuit both gave deference to relevant state court findings and explicitly ignored relevant evidence developed in federal habeas proceedings as it considered the critical *Brady* question of materiality. Because this case involves an open question concerning the evaluation of cases under Section 2254, and is one that has resulted in a split among the circuits, it is of exceptional importance with potentially widespread applicability. It is of critical importance to John Burr, who has always denied that he committed this crime and took the witness stand in his own defense to maintain his innocence. Had his counsel, who was forced to try his case when they averred they were not ready, been provided with these statements, they would have had evidence that corroborates Burr's denial and would have been able to forcefully challenge the State's case.

STATEMENT

The Trial and Conviction of John Burr

Early on August 25, 1991, Lisa Bridges was frantically trying to get her four-month-old baby, Tarissa ("Susie"), to the hospital.[1] Susie was bruised and nonresponsive. (JA 2046).[2] Bridges was concerned that her child needed emergency medical treatment. (JA 2049-52). She and her boyfriend, Johnny Burr, were so frantic to leave that Burr forgot his shoes and was barefoot as they drove to the hospital. (JA 2201-02, 3092, 3102). But before she left with her dying child to seek emergency medical help, Bridges took the time to turn to her three other children and warn them:

> I told the boys that as bad as their sister looked that if anybody came by and asked them did I abuse them or beat on them, you tell them that I whip you in the right way.

(JA 2054). At twenty-six, Bridges and her four children (ages four months to eight years) had already been the subject of two Social Services investigations. (JA 3686). For the prior few months, Bridges had been in a relationship with Burr.

Burr and Bridges arrived at the emergency room at 2:55 a.m. (JA 2172). Two things immediately became clear: Susie was in critical condition and her physicians believed she had been abused. The attending physician confronted Bridges and

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[1] During the course of the investigation, Lisa Bridges was sometimes referred to as "Lisa O'Daniel."

[2] All references to the Joint Appendix before the U.S. Court of Appeals for the Fourth Circuit are labeled a "JA."

demanded to know who had beaten Susie.[3] (JA 2057, 2817-18). When confronted about beating Susie, Bridges denied abusing her. Instead, she blamed the injuries on a fall that Susie had experienced the prior evening at approximately 6:00 p.m., (JA 2811), when her 8-year-old son Scott was carrying Susie and tripped over a drop cord that fed electricity into her trailer. *See* JA 1231 ("She reports that her 8 yo son . . . . tripped, dropped the baby & fell on her.").

Physicians and investigators immediately rejected a fall as the cause of all of Susie's injuries because X-rays showed that Susie was suffering from healing factures of her legs and arms. (JA 2263, 2731-32). Thus, while the head injury that threatened Susie's life occurred within hours to a day of her arrival at the hospital, (JA 2752, 2864-65), the injuries to her arms were approximately five days old (JA 2732) and the injuries to her legs were between seven and 10 days old. (JA 1008, 2731). But Bridges, her children, and her relatives, insisted that Susie was uninjured before being left alone for roughly 20 minutes with Burr on August 25. (*See, e.g.,* JA 2211, 2221-22, 2293-94, 2234, 2632, 2659, 2039-41, 2298). A social worker noted that "[n]o one has been able to explain any injuries Tarissa has suffered." (JA 1218).

Despite the fact that family witnesses initially stated they had never seen Burr abuse any child, (JA 2642, 2663, 2669, 2674), and no one claimed to see Burr hit or injure Susie on August 25, investigators charged Burr. They did so on the theory that early in the morning of August 25, 1991, while Burr was alone with Susie for roughly

[3] This did not come as a surprise to Bridges; she testified that she knew there would be child abuse charges when she left for the Hospital - which is why she stopped to warn her children. (JA 2054, 2166-67).

15 to 20 minutes, Burr took her by the legs, threw her against a wall, and then hit her with a closed fist, "push[ing]" her skull into her brain. (JA 4144). Burr always denied that he ever struck or harmed Susie O'Daniel in any way. He told this to investigators, to social workers, to the police, and, in a rare occurrence in a capital case, took the witness stand to say this under oath to his jury. (JA 3098-99, 3107-09, 311, 3113). Indeed, Burr was an unlikely suspect as Susie's chronic abuser for, as Bridges, said, "he wasn't hardly there," (JA 2329, 3418), and had "little to do" with her children. (JA 3782-83). Burr worked every day from the middle of the afternoon until late at night, went to school in the mornings, and spent many nights with his ex-wife (with whom he had two children). (JA 3313-14, 3316, 3354-62).

Burr's denials were consistent with the fall that Scott had taken with Susie hours earlier, one that left Susie crying and shaking for more than an hour. The time frame given by the experts for when Susie's brain injury occurred included the time at which the fall took place. The State's lead prosecutor recognized that the fall could be used to explain the brain injury, and sought from the start of the case to eliminate it as a cause. (JA 1001) ("I was certainly aware that the defendant in his statements to law enforcement officers contended that Tarissa's injuries must have come from her brother dropping and falling upon her.") He did so in two ways, first through expert testimony that the fall could not have caused a skull fracture in which her skull was "pushed" into her brain, and second, by having Susie's brother and her mother both minimize that fall and suggest that Burr was Susie's chronic abuser.

Burr was represented by counsel who were given less than 3 months to prepare for his capital murder trial and whose requests for more time were opposed by the State and denied by the court. (JA 953-57, 959-61, 1139-46, 1153).[4] Arrayed against him was a panoply of expert witnesses, all of whom testified that Susie died from a brain injury caused by a depressed skull fracture from a hard, concentrated blow to the head. (JA 2730, 2859, 2726-27, 2712-13, 2840-41, 2849, 2869). In addition, Susie's family, led by Bridges and her son Scott, accused Burr of having been Susie's chronic abuser despite the fact that no one had ever seen him strike her at any time. But, and despite the medical evidence that Susie had been chronically abused to the point that she had suffered fractures of her arms and legs that were days to weeks old, Bridges, her children, and her relatives, insisted that Susie was uninjured before being left with Burr on August 25. (*See, e.g.,* JA 2211, 2221-22, 2293-94, 2234, 2632, 2659, 2039-41, 2298). To meet this testimony, defense counsel was provided with a single, 4-page statement made by Scott in 1991, (App. 928-932) and a single, 21-page statement made by Bridges in 1991. (App. 906-927).

Bridges and Scott also provided the factual basis for the State's experts to testify that Scott's fall with Susie could not have caused her brain injuries. This was so, according to the State's experts, because the fall as described at trial was not severe enough to cause a brain injury and did not account for a skull fracture, let

[4] During Jury selection, Burr's counsel petitioned the Supreme Court of North Carolina to direct a continuance of the trial. They did so averring that they had not had time to adequately "evaluate the need for and apply *ex parte* for medical witnesses," and had not had "adequate time to evaluate the medical evidence." (JA 1140). The State opposed the petition, claiming that it was a "ploy" and that two months was more than adequate time "in order to review the entire State's investigation and prepare to defend its case." (JA 1150).

alone one in which the skull had been pushed into the brain. Indeed, at trial the State contended that the "fall" was not actually a fall, and that Scott simply tripped and then "cradled" his sister, falling to one knee. Thus, Bridges testified that Scott fell only to his "knees and arms" all the while holding Susie. (JA 2013). And when Scott was asked to "demonstrate" the fall, he showed the jury how he "cradled" Susie to keep her off of the ground. (JA 2758-59).

The State focused on the fall not only in its evidence, but in its closing argument. The prosecutor ridiculed any suggestion that Susie could have been injured by a fall, telling the Jury that evidence about the fall was a "rabbit" based on the "ingenuity of counsel" since "one of the first things" that "all the doctors had said, absolutely no way in the world that the fall caused the injuries that caused her death. Absolutely no way." (JA 3994). This was so because Susie had, according to these experts, a depressed skull fracture, which was the best evidence that Burr struck Susie because, according to the prosecutor, when Burr hit her with a closed fist, that was how her "head gets pushed in." (JA 4144).

After approximately three hours of deliberation, Burr was convicted of first-degree murder. After a sentencing hearing of less than one day, the jury sentenced Burr to death. The Supreme Court of North Carolina affirmed Burr's convictions and his sentence of death. 341 N.C. 263, 461 S.E.2d 602 (1995).

State Post-Conviction Proceedings

First Motion for Appropriate Relief

Burr filed a Motion for Appropriate Relief ("MAR") on September 27, 1996, challenging his convictions and sentence of death, and requesting an evidentiary hearing. In a 103-page Motion accompanied by 161 pages of medical articles and affidavits, Burr raised several issues. (JA 697-975). Foremost among these was whether the fall caused Susie's lethal brain injury. The MAR discussed at length the medical literature on accidental falls from short distances that cause devastating brain injuries in children, (JA 743-45) and presented the affidavit of Dr. John Plunkett, a forensic pathologist who was an expert in falls leading to death in children. (JA 744-45). Dr. Plunkett's affidavit indicated that, based on the initial descriptions of Scott's fall, Susie's "injuries are absolutely consistent with those which may be caused if she was dropped onto a gravel surface by an older sibling, who then fell on top of her." (JA 746, 943-44). Burr also sought discovery of the State's files under a recently-enacted statute that required the State to produce "the complete files of all law enforcement and prosecutorial agencies" in post-conviction proceedings where the defendant was sentenced to death. *See* N.C.G.S. §15A-1415(f).

The State filed a response March 4, 1997, seeking summary denial. (976-1362). The State's Response attached a proposed 114-page Order (plus appendices). (JA 4535-4684). The State urged the Superior Court not to hold an evidentiary hearing because it "would be a waste of the Court's time, the State's time, and taxpayer money." (JA 981). The State further claimed that it had engaged in "open file" discovery and that the statute requiring the production of all prosecutorial files either did not apply to Burr's case or exempted "work product."

On October 3, 1997, the Superior Court denied the request for an evidentiary hearing and dismissed the MAR. (App. 543-694). It adopted the State's proposed Order with no apparent corrections or changes; the only additions appear on the first page of the Order and the last three pages of the Order related to additional claims asserted a month earlier by amendment. (App. 543 ¶5, App. 656-658 ¶¶83-91). In adopting the factual findings proposed by the State, the Superior Court ruled that the evidence showed that Susie only fell "while [being] cradl[ed]" in Scott's arms, that Scott "unequivocally testified that he did not drop Susie," and that "Susie had a depressed skull fracture." (App. 594 1419 ¶c, 1422 ¶I, 1425 ¶(14), 611). The Superior Court denied discovery to Burr and further noted in two separate findings that the State had given its "open files" to counsel for review and thus that defense counsel had access to all information. (App 617, 610).

Second Motion for Appropriate Relief

Burr filed a Petition for Writ of Certiorari to the Supreme Court of North Carolina. The Petition was granted on July 29, 1998, for the limited purpose of remanding his request for discovery for reconsideration in light of *State v. Bates*, 348 N.C. 695, 511 S.E.2d 652 (1998) (App. 542). *Bates* had held that the discovery provisions of §15A-1415(f) applied to cases that were pending on the day of its enactment (like Burr's) and did not exempt the State's "work product" from discovery.

Under the remand Order, and notwithstanding its earlier representations of "open file" discovery, in 1998 the State produced the transcripts (but not the tapes) of two tape-recorded statements of Bridges and her son Scott that were made in 1993 in

the weeks before trial, statements which were never produced to the defense. These newly disclosed statements were substantially longer and more detailed than the statements given to Burr's counsel before trial. For example, the statement that trial counsel was given from Scott was 4 pages; the newly disclosed statement was 29 pages (App. 928-32, 877-905). The statement given to trial counsel made by Bridges was 21 pages; the newly disclosed statement was 31 pages. (App. 906-927, 845-876).

The Suppressed Bridges Statement

Bridges' interview took place less than two weeks before the trial was scheduled, and began with prosecutors attempting to work with her to correct her recollection about when events occurred, and in particular whether there was any evidence Burr was allegedly abusing Susie before August 25. (App. 845-849). When she indicated that there was none, the prosecutors, frustrated, confronted her, telling her that "you aren't going to come out looking real good" (App. 849):

> [Prosecutor] Dr. Wilcox sees at [sic] child 255 AM August 25. He notices at that time that. Well you say you never saw him [Burr] hurt her.
>
> [Bridges] Cause I never did. Not her.
>
> . . . .
>
> [Prosecutors] Didn't you ever suspect it that maybe he was being a little rough with Susie?
>
> [Bridges] He did not act like he would hurt her.

(App. 850).

> You've got to understand that when it looks like you are covering for [Burr], or when it looks like you are covering for yourself, it takes attention off him and puts it on you.

(App. 851).

The prosecutors further, and repeatedly, told Bridges that they did not believe her testimony that Susie was uninjured and was a normal, happy and healthy baby before August 25:

> Lisa, I want to believe you. I just don't, I just would like to understand how this child had the injuries that she had and nobody even her own mother noticed it. . . . You screwed up. I mean there is no two ways about it - - you screwed up.

(JA 862). The prosecutors also confronted Bridges about asking her family to lie for her, telling her that "this is what we, he ask[ed] you yesterday. You know when you go to your sister and other saying - - you can't go telling them that shit. That she doing a lot of crying. You get me in trouble." Bridges only reply was that "But see, it was still messed up." (App. 851). Bridges then admitted that she asked her family to lie for her because otherwise "[t]hat'll make me look bad." (App. 866). The prosecutors repeatedly confronted Bridges, telling her that her family's claims that Susie was a happy child who was uninjured before August 25 were not believable. (App. 851, 860, 862). As one said:

> [I]t's going to be a tough case for us to prove but you'll are making it even tougher. I mean, it was like, it was almost like, you'll, I'm not saying you'll did this - - but it was almost like you and your family all got together and they said that we [sic] not going to tell the DA that this baby was crying and it showed any broken legs, or it showed any bruises, or it showed any swelling, or it cried any time you touched it in one way. I mean, everybody come in, I swear it sounded like you got a sheet of paper and your [sic] memorized the script. . . .

(App. 865-66). He then said that while Bridges "might not have said I want you to lie," "what in effect you did was have her [Bridges' sister] lie, or wanting her to lie." (App. 866).

Yet, and despite disbelieving her version of events, prosecutors told Bridges that they would not charge her with Susie's abuse and death or for any other criminal acts that she may have committed:

> We are not going to use this against you - - to bring charges against you. I mean if charges were going to be brought again (sic) you they would have been brought against you a long time ago. And there is going to be people on the jury, that's going to say they should have brought them against you.

(App. 865). At trial, Bridges testified that no one had promised her anything for her testimony.

Prosecutors also provided a description of what they believed a believable story could be: "I was so in love with this guy that I didn't want my sister to know, or say anything to him if she saw them getting spanked. . . . I had a good idea that he was abusing the kids . . . . I was love blind or something . . . . Or whatever it was. If you don't come across the jury and explain to them - - them you are going to come across as a lier [sic], a cover-up artist, either covering up for yourself or covering up for him." (App. 865).

The Suppressed Scott Statement

The newly disclosed statement by Scott showed, as alleged in post-conviction, a child "who could not remember anything about the details of the day" that Susie was injured. (App. 410). Scott repeatedly told prosecutors that he did not know if he

could remember the night that Susie was hurt except that "I did fall with her but they said it wouldn't – cause any damage." (App. 878). In response, the prosecutors then told Scott "You didn't hurt your sister, Okay. . . . no matter what anybody says – you did not hurt your sister." (App. 878-879). Scott then changed his description of the fall and said that he tripped, fell to his knees and never dropped Susie. (App. 881-882). But as his story evolved in the statement, he inadvertently admitted that "the onliest time she [Susie] cried is when I fell with her and she didn't - - she was in shock then and she didn't cry but - - I heard her cried and it was like she just stopped." (App. 886). On hearing this, prosecutors interrupted him, and redirected him to say Susie was crying after Burr give her a "beating." (App. 886). During the interview, Scott said that "Johnny Burr probably" was the one who bruised Susie because "I don't think my mama would do it" and because "[h]e was mean and he was the only one there to do. I ain't never liked him." (App. 879). Throughout the interview, Scott repeatedly said that he could not remember facts or events, changed his recollection, or could not understand the questions he was being asked, and admitted at one point, "I get mixed up a lot." (App. 896).

In evaluating this tape during the course of habeas proceedings, the Magistrate-Judge wrote that "[i]t is unclear how long this interview lasted, but it is almost painful to read the transcript. Scott often appears confused and overly willing to please." (App. 203). He continued:

> Scott was a very young child at the time of Susie's death and was still only ten years old when he testified. . . . It is clear from the transcript of his meeting with the prosecutors (and even his trial testimony) that he was confused, scared and easily susceptible to

> suggestion. . . . There is, of course, an inherent risk in a strong cross-examination of a young child. However, at some point, the inconsistencies in Scott's story reach a magnitude that goes to the reliability of the witness. . . .

(App. 205).

The Brady *Claim*

On March 5, 1999, and now in possession of these statements, post-conviction counsel amended Burr's MAR and alleged that these two statements "revealed a cache of evidence which could have been used to impeach the State's main witnesses against the Defendant. Not only does this material substantially and materially impeach Lisa O'Daniel and Scott Ingle and shows they are not worthy of belief, but also this new evidence discloses what post-conviction counsel have alleged all along: the prosecution developed the testimony to fit its theory of the case." (App. 400). Based on the undisclosed statements, the amended MAR raised claims for violations of the Fifth and Fourteenth Amendments under *Brady v. Maryland*, 373 U.S. 83 (1963) for the failure to disclose exculpatory evidence (App. 440), and under *Napue v. Illinois,* 360 U.S. 264 (1959) for the presentation of evidence that created a materially false impression. (App. 399).

The State responded and moved to dismiss the amended MAR, again urging the Superior Court not to conduct a hearing, in the process certifying that it had complied with all of its discovery obligations. (App. 390-391). On June 15, 2000, the Superior Court again denied the MAR without a hearing. (App. 321-388). In doing so, it again largely adopted the findings proposed by the State in a proposed Order

that the State attached to its Answer. (App. 361-377 (order), JA 1745-61) (proposed order)).

In its Order, the Superior Court found that the "State agrees that neither the tapes nor the transcriptions made from them were disclosed to trial counsel either before or during trial, and that the tapes and transcriptions were not disclosed to postconviction counsel until after the Supreme Court of North Carolina remanded this case to this Court." (App. 346). Nonetheless, the Court found that the prosecutors proceeded in good faith. (App. 349-350). No mention was made of the State's earlier representation that it had engaged in "open file" discovery. The Superior Court found that the State fully certified that it had now complied with all discovery obligations under the remand order. (App. 323 ¶2, 379-80 ¶11.a)..

The principal findings made by the Superior Court on the *Brady* claim were: (1) the content of the tape-recorded statements "demonstrates that the prosecutors were merely trying to determine the true facts and to prepare the witnesses to provide truthful testimony," (2) the prosecutors "did not attempt to get either . . . to present false testimony," (3) the prosecutors "urged the two witnesses to provide truthful information," (4) the prosecutors "never attempted to get a witness to commit perjury or present false testimony," (5) the witnesses "understood that the prosecutors wanted them to provide only truthful testimony," (6) the "actions of the prosecutors did not deprive defendant of due process of law," (7) any "inconsistencies between the trial testimony . . . and pretrial comments to the prosecutors are of *de minimus* significance," (8) "the failure to disclose . . . the prosecutors' undisclosed discussions .

. . does not establish a reasonable probability that had the evidence been disclosed the result of the trial would have been different," and (9) "all matters . . . demonstrate that the prosecutors' failure to disclose the contents of the pre-trial discussions . . . was neither a violation of *Brady*, nor a denial of due process of law." (App. 361-362). Critical to the Superior Court's assessment that these statements were not material under *Brady* was a finding that Scott's fall with Susie could not have caused her death, in large part because the expert witnesses at trial thought it was "highly unlikely" that a "cradled" fall could have caused her depressed skull fracture. (App. 371-372, JA 1425 (finding adopted as part of Order)).

Burr's Petition to the Supreme of North Carolina was denied on October 5, 2000. (App. 320).

Federal Postconviction Proceedings

Burr timely filed this Petition for Writ of Habeas Corpus on April 12, 2001. (App. 220-319). He raised numerous claims, including ineffective assistance of counsel and the *Brady* and *Napue* claims arising from the withheld statements.

The First Habeas Decisions: Ineffective Assistance of Counsel and the State's Request for Discovery

On December 14, 2004, the Magistrate-Judge recommended that the Writ be granted based upon ineffective assistance of counsel. (JA 306). Rather than object, the State moved to expand the record. Burr moved for leave to conduct discovery and the Magistrate-Judge stayed the recommendation and entered a discovery schedule. (JA 442). Depositions of experts called by the State were then conducted.

The depositions of the State's experts revealed that Susie did not suffer a skull fracture, let alone a skull fracture that "pushed her head in like a ping pong ball." Dr. Chancellor, the State's expert pathologist at trial, testified in federal habeas that she conducted the autopsy and specifically inspected Susie's skull for a fracture. There was no fracture which meant that Susie did not die from a skull fracture, but from brain swelling caused by a closed-head injury. (JA 1010, 5065-67).

Dr. Mertens, the State's expert radiologist at trial, conceded that at least one set of X-rays he reviewed did not show a skull fracture, (JA 4970-71) and that, if there was no skull fracture found on autopsy, then he made an error stating that Susie had a depressed skull fracture. (JA 4993). Dr. Mertens further made clear that his opinion had also been based on his assumption that Scott's fall was a "cradled" fall in which Susie never touched the ground (JA 4999-5000). Another of the State's experts at trial, Dr. Azizkhan, also conceded that his testimony at trial that a skull fracture was present on autopsy was incorrect. (JA 1010, 5070-74).

On May 6, 2009, the Magistrate-Judge again recommended that the writ be granted. (App. 167-219). This recommendation was based largely trial counsel's ineffectiveness in being prepared to offer evidence that the fall was the cause of Susie's death. In particular, the Magistrate-Judge noted that the evidence presented at trial concerning the fall was "materially different" from Bridges' and Scott's pretrial statements. Competent counsel should have investigated the fall through an independent medical expert and, had they done so, would have been in a position to

"have presented evidence that the actual mechanism of her death was an accidental fall." (App. 181-182).

The State objected. After supplemental briefing and a hearing, the District Court, on May 30, 2012, adopted the first recommendation in full and the second recommendation in part. (App. 160-166). Because *Pinholster* had been decided during the course of the litigation (App. 160-162), the District Court explicitly did not consider the additional evidence generated during the habeas proceedings, despite the fact that the State had requested the expansion of the record. (App. 161-162). The District Court ruled that "trial counsel did not conduct a reasonable investigation of the medical opinions regarding the cause of [Susie's] injuries, particularly the brain injury that led to her death." This failure, according to the District Court, left Burr without an effective defense at his trial. The District Court concluded that the Superior Court's decision to the contrary was unreasonable and contrary to established federal law. The Magistrate-Judge and the District Court did not address the *Brady* or *Napue* claims arising out of the suppressed statements, holding them in abeyance.

The State appealed to the Fourth Circuit. On March 11, 2013, that Court reversed the District Court. (App. 144-159). In an unpublished *per curiam* opinion, the Fourth Circuit held that the District Court's decision was "contrary to the deference that federal courts must afford state court decisions adjudicating the merits of such constitutional claims." The Fourth Circuit held that the record revealed a reasonable defense strategy to create doubt that Burr was Susie's abuser "either prior

to or on the night in question," a strategy that did not require the consultation with physicians or presentation of medical evidence but which, instead, reasonably relied upon the cross-examination of the State's experts and Burr's own testimony.

This Court denied certiorari on October 7, 2013. (App. 143).

The Second Habeas Decision: The State Discloses An Additional Taped-Recorded Statement by Bridges

On March 25, 2015, the District Court conducted a telephonic conference with counsel. As a result of that conference, the State undertook an additional search for any tape-recordings that were made of Bridges and Scott before trial. (JA 5274). The State then produced a tape-recording of Bridges from 1993.[5] (JA 5400).

The New Bridges' Tape-Recording

The previously undisclosed tape located by the State initially appeared to be the original tape of Bridges' 1993 pretrial interview with prosecutors and investigators - - a complete transcript of which was allegedly produced in 1998 in state postconviction proceedings. When transcribed, however, the newly-disclosed tape revealed that the transcript provided to Burr in 1998, and relied upon by the Superior Court in making its findings, was substantially different from the actual tape-recording (assuming that this was the original tape-recording). For example, the transcript provided by the State in 1998 to Burr and the Superior Court was 47 pages long; the transcript of the tape-recording produced by the State in 2015 was

[5] The Petitioner wants to make clear that the Attorney-General's counsel on this appeal and before the District Court on this issue were not involved in the suppression of the tape-recording during the state court proceedings. To the contrary, their efforts were instrumental in discovering this recording.

111 pages. The transcript produced by the State in 1998 to Burr and the Superior Court contained 20 pages of dialogue that was ***not*** on the newly-discovered tape. In turn, the newly-discovered tape-recording contained 71 pages of dialogue that is ***not*** in the transcript provided by the State to Burr and the Superior Court in 1998.

In the newly-disclosed statement, recorded just days before Burr's trial, both Bridges and the prosecutors repeatedly refer to Scott as having "dropped" Susie, s*ee* App. 776, and to Scott having "fallen" with Susie, *see* App. 779, rather than the "cradled" fall description they used at trial. Bridges is also asked about a previously undisclosed accusation of abuse towards Susie in which "Susie was in the baby seat, the car baby seat, and was knocked across the floor" - - which she minimized. (App. 807-808). This episode both painted a very different picture of the Bridges than the State presented at trial, and appears to corroborate the testimony at trial of a defense witness, Colene Flores, who testified to an instance in which she had seen Bridges "smack" Susie off of a couch while telling everyone in the room that her baby was "driving me crazy." (JA 3840).

The newly-disclosed tape further revealed that the prosecutors spent considerable time with Bridges showing her autopsy pictures and instructing her on which bruises were caused by medical treatment and which bruises the prosecutors wanted to claim were caused by abuse. (App. 815-16). The interviewers further questioned Bridges about how she could not notice that her daughter's arms and legs had been broken for some time. The prosecutors indicated that their medical experts had told them that "with injuries like that, is not consistent with Susie being able to

stand up or - - I mean, she would have been in a lot of pain." (App. 812). Bridges again denied that her daughter was in any pain from any injuries and said simply that "[s]he didn't act that way."

Burr moved under Rule 7 of the Rules Governing Section 2254 Cases to expand the record to include the newly-produced tape-recording. (App. 139-42). The State consented and the District Court granted the Motion on January 7, 2016. (App. 138). On March 26, 2020, the District Court issued its Memorandum Opinion, denying the remainder of Burr's claims. (App. 49-137). With regard to the *Brady* and *Napue* claims, the District Court reviewed the materials that were before the Superior Court when it denied these claims in 2000 and the factual findings made by the Superior Court. It held that Burr had failed to provide "clear and convincing evidence that the state court's factual findings are incorrect," and found on a review of the transcripts that it could "find no evidence to undermine the MAR court's factual conclusions."

The Fourth Circuit's Decision

Burr appealed. After granting a Certificate of Appealability. (App. 48), and holding oral argument, the Fourth Circuit affirmed the U.S. District Court in a written, published opinion issued on November 30, 2021. (App. 2-47). In its decision, the Fourth Circuit acknowledged that the record of suppression in this case left a "plethora of unanswered questions." The court recognized that the suppression of witness statements, and particularly the 111-page statement that was not produced until 2015, raised significant "questions about how the Supreme Court's decisions in *Brady* and *Pinholster* intersect." (App. 38). It further recognized that the suppression

of this statement for more than two decades and into the habeas proceedings could mean that the State court record was materially incomplete and entitled to no deference. (App. 39). The court also acknowledged that a split in circuits had developed about whether *de novo* review was required by these circumstances. (App. 42-44). To avoid this "plethora of unanswered questions," the Fourth Circuit conducted a *de novo* of the suppressed statements, but limited that review only to an evaluation of the statements themselves, deferred to related factual findings by state postconviction court, and explicitly excluded any evidence developed in discovery during the habeas proceedings. It then concluded that the suppressed statements were not material within the meaning of *Brady v. Maryland.*

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit, in Adopting the Third Different Approach by a Federal Appellate Court to the Production of *Brady* Material in Federal Habeas Proceedings, Erred By Not Fully Evaluating Burr's Entire *Brady* Claim, Relevant Federal Habeas Evidence, and Related State Court Findings on a *De Novo* Basis.

Burr is "a petitioner who diligently attempted in state court to develop the factual basis of a claim that prosecutors withheld exculpatory witness statements in violation of *Brady v. Maryland*," *Pinholster,* 563 U.S. at 214 (Sotomayor, J. dissenting), but was unable to do so because the State withheld *Brady* material in the face of court orders and a statutory obligation to the contrary. Indeed, the State appears to have falsely certified before the Superior Court that it had produced "the complete files of all law enforcement and prosecutorial agencies" as required by North Carolina law.

The issue of how to deal with late-produced *Brady* evidence in federal habeas proceedings has vexed the appellate courts since this Court's decision in *Pinholster*. *Pinholster* commands that evidence that was not before the state postconviction court cannot be used in federal court to challenge state court rulings. But, where the late-produced evidence was withheld by the State despite an obligation to produce it, "to ignore the materials that did not emerge until the federal habeas proceedings would be to reward the prosecutor for withholding them." *Gonzalez v. Wong,* 667 F.3d at 980. Each appellate court that has addressed this issue has developed a different approach to its resolution.

In *Gonzalez,* the Ninth Circuit addressed this issue shortly after *Pinholster*. It elected to conduct a facial analysis of the late-produced statement to determine whether there was a "colorable or potentially meritorious" claim under *Brady*. *Id.* If the new statement established a colorable *Brady* claim, then remand to the state courts was appropriate as, under the AEDPA, the state courts are the courts of first choice to address issues arising out of their proceedings. The court then found that the newly produced statement established a colorable *Brady* violation and remanded to state court.

This issue was next addressed by the Sixth Circuit in *Jones v. Bagley*, 696 F.3d 475 (6th Cir. 2012). There the court noted that because "an actual *Brady* violation is itself sufficient to show cause and prejudice" to excuse a state court default, statements that were never considered by the state court were to be reviewed under a "pre-ADA standard - - that is, we apply de novo review." 696 F.3d at 487. It then

conducted a full *Brady* inquiry of only the new statement in federal court, eventually concluding that while the withheld evidence was favorable, its absence was not prejudicial.

Here, the Fourth Circuit recognized that the record of suppression in this case left a "plethora of unanswered questions." The court recognized that this record of suppression raised significant "questions about how the Supreme Court's decisions in *Brady* and *Pinholster* intersect." (App. 38). To avoid these questions and the split in circuits on how to approach this evidence, the panel indicated that it had conducted a *de novo* review, one that did "not alter our calculation." (App. 46-47). Rather, "considering all the suppressed evidence, old and new, *de novo*, we conclude that Burr cannot satisfy *Brady*."

The Fourth Circuit's approach not only differed from the approaches of the Sixth and Ninth Circuits (thus creating a third analytical framework), but was not a full *de novo* review. To be sure, the court indicated that it conducted a review of the "suppressed evidence, old and new" without deference to the state postconviction court order. But while the panel reviewed the suppressed statements under this standard, it excluded from its review the medical evidence introduced during federal habeas proceedings notwithstanding its relevance to the *Brady* claim, (App. 20 n.9), finding that *Pinholster* "squarely precludes our consideration of this evidence." The panel further did not review the medical literature presented to the state postconviction court regarding the significance of falls in children and, instead, accepted the state postconviction court's findings that Susie suffered from and was

killed by a skull fracture (which was not correct) and that her injuries were not caused by a fall. Thus, in concluding that the suppressed evidence did not undermine confidence in the outcome of this case, *Kyles v. Whitley,* 514 U.S. 419, 434 (1995), the panel's *de novo* review was neither *de novo* nor considered all of the evidence "old and new." Indeed, its materiality conclusion was heavily influenced by the state court findings to which it deferred and was insulated from the actual medical facts that were developed in federal habeas proceedings.

The rule in *Pinholster* was premised on the directive of §2254(d) that claims adjudicated "on the merits in State court proceedings" were to be deferentially reviewed "in light of the evidence presented in the State court proceeding." This rests on the basic structure of federal habeas jurisdiction, one that is "designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter,* 562 U.S. 86, 103 (2011). But courts have long recognized that where the State withholds the necessary evidence from the state court to permit it to conduct a proper review of the merits of a claim, the result is necessarily a "materially incomplete record," one that should not be given deference. *See Valentino v. Clarke,* 972 F.3d 560, 577 (4th Cir. 2020) (this court "has "adopted a more nuanced interpretation of a 'claim' 'adjudicated on the merits' reasoning that a state court could not have ***properly*** adjudicated a claim it if decided on a 'materially incomplete record.'" (quoting *Winston v. Pearson (Winston II)*, 683 F.3d 489, 496 (4th Cir. 2012)). And where the State has engaged in conduct which has prevented evidence from being considered in state postconviction proceedings, "the gloves come

off: The federal habeas inquiry is more penetrating, and - - if consistent with statute and the Rules Governing §2254 Cases - - we may hear evidence that would otherwise be immaterial under §2254(d)'s limited review." *Valentino v. Clarke,* 972 F.3d 560, 576 (4th Cir. 2020). Not doing so both rewards the State for withholding evidence and threatens the essence of due process under our constitutional system, for "[a] rule thus declaring 'prosecutor my hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendant's due process." *Banks v. Dretke,* 540 U.S. 668, 696 (2004). *See Kyles,* 514 U.S. at 440 ("The prudence of the careful prosecutor should not . . . be discouraged.").

Indeed, this precise point was made by the majority in *Pinholster,* when it suggested that notwithstanding its ruling, where evidence is produced by the State after a state postconviction proceeding, and thus not considered by the state courts, then "Section 2254(e)(2) continues to have force where §2254(d)(1) does not bar habeas relief." *See, e.g., Lopez v. Miller,* 906 F. Supp.2d 42, 52 (E.D.N.Y. 2014) ("*Pinholster* was careful to stress, however, that its holding did not entirely preclude district courts from holding evidentiary hearings on §2254 claims . . . . The Court expressly declined to reach the issue of 'whether a district court may ever choose to hold an evidentiary hearing before it determines that §2254(d) has satisfied."). Thus, where, as here, the State takes actions that prevent the state postconviction court from reviewing all of the evidence before a final adjudication of a *Brady* claim, such a claim cannot be said to have been "adjudicated on the merits in State court proceedings." Otherwise the State will be rewarded.

The Fourth Circuit's error in this case stemmed not from its realization that only *de novo* review was appropriate, but rather from its failure to actually conduct a full *de novo* review. Such a review under *Brady* necessarily includes both the withheld statements and the evidence against which the statements are measured for materiality.

The crux of the Fourth Circuit's decision on materiality rested on its assessment that the fall that occurred a few hours before Susie was brought to the hospital was not a central issue at trial, and, in particular, that whether a skull fracture existed or not was beside the point, as all of the evidence indicated that Susie suffered and died from a global brain injury. Thus, in the court's assessment, testimony concerning the fall that was withheld in these suppressed statements was not material, and the credibility of Scott and his mother was not an issue at trial.

The lead prosecutor, however, believed something very different. In an affidavit presented to the State postconviction court, the lead prosecutor wrote that he "was certainly aware" that Susie had suffered a fall and, "[c]onsequently, it was important to know (1) whether such a drop could have caused Tarissa's injuries." (JA 1001). This was so because both falls and blows can cause closed-head injuries that result in the type of global brain damage seen in this case. In fact, peer-reviewed medical literature presented to the State postconviction court described such global brain damage in small children in falls from less than 3 feet and advocated against the "preconceived mindset that head injuries in children cannot occur from short

distant falls." (JA936-38, 939).[6] That is why the heart of the State's case, as noted by the lead prosecutor, was to show that the injuries in this case were not caused by a fall.

To do this, the State principally relied on three expert witnesses who told the jury that Susie had a "depressed" skull fracture in which a piece of her skull was broken loose by a direct blow and pushed into her brain, causing the global brain damage. It was the presence of a depressed skull fracture that indicated to these experts that she had suffered a blow to her head that was not caused by a fall. For this testimony they relied on the at-trial description of the fall as a "cradled fall" and their evaluation of the medical evidence, with one expert claiming that the autopsy confirmed that Susie suffered a skull fracture which looked like "a pushed in ping-pong ball." (JA 4124).

None of this was correct. There was no depressed skull fracture found at autopsy. The pathologist at autopsy found no portion of Susie's skull displaced and pushed into her brain. And the autopsy nowhere found that Susie's head had been "pushed in" like a "ping-pong ball." Indeed, the autopsy found no skull fractures whatsoever, let alone the fractures described by these experts. Moreover, as acknowledged by the prosecutor, the fall, and in particular the mechanism of the fall, was a critical issue for trial. And the evidence for the State on how that fall actually occurred relied nearly exclusively on the credibility of Lisa Bridges and her son, Scott, both of whom changed their descriptions of the fall for trial. Both were also critical

[6] This literature further noted that a period of "lucidity" can follow such injuries, one in which the infant or child appears to be uninjured before the onset of brain swelling.

to the second piece of the State's case - - an implication that Burr not only killed Susie on this night by striking her, but had chronically abused her over a period of weeks beforehand. Indeed, even setting aside the fall, testimony that implied Burr was the abuser of this 4-month old child was critical to securing a conviction and death sentence.

Had the Fourth Circuit performed a complete *de novo* review of all of the evidence before it, including the relevant evidence developed during the course of federal habeas proceedings which showed there was no skull fracture, it could not have reached the conclusions that the fall was immaterial to this case, that Susie suffered a skull fracture, or that the credibility of Lisa Bridges and her son was immaterial to this case. This is precisely the review that would have occurred before the state court had the State properly produced the withheld statements. Because the State failed in its obligation to produce these materials, there is nothing in a full *de novo* review of these statements and the related evidence as it now exists that runs contrary to the policies expressed in Section 2254.

II. These Statements in the Context of the Known Facts Were Material.

The case against Burr was wholly circumstantial and depended on the prosecution both ruling out Scott's fall with Susie as the cause of her injuries and creating the implication that Burr was the killer because he was also Susie's chronic abuser. No one saw Burr strike or shake Susie on the night of her fatal injuries. And in order to weave this circumstantial web, the State was completely dependent on the credibility of Bridges and her son, Scott. Their testimony was critical to whether the

fall was a cause of Susie's head injury, their testimony was critical as to whether it was Burr or someone else who was Susie's chronic abuser, and their testimony was crucial to whether Burr's denials would be believed.

Burr's counsel was appointed a mere 72 days before trial. Despite repeated attempts to continue the case, counsel was forced into a trial for which they averred they were not prepared. But forcing trial counsel into a capital murder trial 72 days after appointment was not enough for the prosecutors; they withheld critical conflicting testimony from defense counsel.

What the State provided to Burr's counsel in order to confront Scott - - perhaps the critical witness in the case - - was a roughly 4-page statement taken during an interview on September 5, 1991, and in the presence of his mother (despite the fact that she was allegedly also under investigation). During the course of this short interview, investigators asked a number of leading questions in an effort to elicit damaging testimony to Burr. But at that time Scott had little information about what happened to Susie, though he appears to have a considerable amount of information about Burr's alleged abuse to his mother, most of it hearsay provided to him by his mother.

What was withheld was a 28-page statement made by Scott on February 26, 1993. This was the same day that Burr's trial counsel filed a Motion to Continue because they were not prepared to try Burr's case. (JA 953-57). This was also 3 days before the start of Burr's trial, on March 1. The State conceded before the Fourth Circuit that this statement contained "conflicting" testimony. (Appellee's Brief at pp.

13, 23, 27, ECF Doc. # 17). As noted by the Magistrate-Judge in his evaluation during habeas proceedings, "[i]t is unclear how long this interview lasted, but it is almost painful to read the transcript." (App. 203). What a reading of the transcript reveals is that Scott had little memory about the details of the day that Susie was injured, other than that "I did fall with her but they said it wouldn't - - cause any damage." (App. 878). Scott revealed not only that he had been repeatedly told his fall could not have caused Susie's injuries, but that he believed Burr did it because "I don't think my mamma would do it" and because Burr "was mean and he was the only one there to do it. I ain't never liked him." (App. 879). The withheld transcript reveals, as the Magistrate-Judge noted, a child that "was confused, scared and easily susceptible to suggestion." (App. 205). Indeed, the "inconsistencies in Scott's story reach a magnitude that goes to the reliability of the witness." (App. 205).

Thus, the State, while forcing Burr's counsel to go to a trial for which they were not prepared, was simultaneously withholding a recording made done just days before that trial started which significantly undermined the credibility of Scott and his story. Moreover, and significantly, in noting that Scott testified to a "diametrically different" story about the fall and the events at trial that was materially different from his first statement, the Magistrate-Judge quoted at length ***from the suppressed statements***. (App. 204, 206). *See, e.g.,* App. 196 - 199 (*comparing* Scott Ingle's Interview of September 15, 1991 and Scott Ingle's Interview of February 25, 1993); (App. 199-201) (*quoting* Scott Ingle's Interview of February 25, 1993).

Counsel was handicapped in a similar fashion from confronting Bridges at trial. Her first undisclosed tape reveals that prosecutors repeatedly confronted Bridges' about the credibility of her story that Susie was happy, healthy, and uninjured before August 25. They accused her of organizing her family to say the same thing: "this is what we, he ask [sic] yesterday. You know when you go to your sister and other saying - - you can't go telling them that shit. That she doing a lot of crying. You get me in trouble." (App. 851). Bridges admitted to asking her family to lie because otherwise "[t]hat'll make me look bad." (App. 866). At one point, the prosecutors told Bridges what while they wanted to "believe" her story, "I just don't, I just would like to understand how this child had the injuries that she had and nobody even her own mother noticed it." (App. 862).[7] Her second suppressed statement revealed that she and the prosecutors, shortly before the trial, discussed the fact that Scott fell with or "dropped" Susie, not the "cradled" trip that presented at trial. It also shows prosecutors coaching Bridges, instructing her on what bruises on her child were caused by medical treatment so that she could describe the others as having been present on August 25. And it revealed that prosecutors continued to press Bridges on her claim that Susie was uninjured before August 25, repeatedly pressing her on how she could not notice that her child had broken arms and legs.

[7] Bridges was dissembling about Susie's injuries because she (or another member of her family) was the perpetrator of Susie's chronic abuse. This is so because Burr, according to Bridges, "wasn't hardly there," (JA 2329, 3418), and had "little to do" with the children.

The materiality of these statements goes beyond their value as impeachment or showing that Bridges and her son were mischaracterizing his fall with Susie. Their materiality is also shown in the context of whether Susie died from a penetrating skull fracture. The existence of a depressed skull fracture was crucial to the State at trial. Because a depressed skull fracture can only be caused by a concentrated blow to the head, it cannot be caused simply by a fall. The existence of this type of skull fracture was thus not only consistent with the State's theory that Burr struck Susie, but also ruled out the fall as the cause of her death. But the evidence now before the federal courts is that Susie did not have a depressed skull fracture (or for that matter any type of skull fracture). The fact that there was no skull fracture meant that Susie's fatal brain swelling was caused by a closed-head injury. Thus, the absence of a skull fracture undermines the medical basis for claiming that the fatal injury could only have been inflicted by Burr; moreover, its absence also means that there is no medical evidence to rule out the fall as the cause of Susie's death. As such the fall, and the credibility of Scott and his mother, are central to this circumstantial case. And these statements could not be more material on these issues.

CONCLUSION

Throughout the 1980s and 1990s, the application of *Brady* in North Carolina was a miserable failure. Court after court in postconviction proceedings found that prosecutors withheld *Brady* material at trial, notwithstanding representations by the State that "open file" discovery occurred. This failure culminated in *State v. Gell,* 95 CrS 1884, 1939, 1940, 2322 (Superior Court Bertie County), in which it was

discovered that the State withheld the statements of 17 witnesses who saw the victim alive after the defendant had been jailed (and thus could not have been the victim's killer). Alan Gell was acquitted by a jury on retrial after spending nearly a decade on death row once the withheld evidence was provided to him. *See* Mosteller, *"Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery,"* 15 Geo.Mason L.Rev. 257, 258-59, 260, 263-65 ("the investigative files . . . contained extraordinary exculpatory evidence - - indeed, evidence that appeared to show Gell was an innocent man who had spent nine years in prison and half of that on death row."). In reaction, in 2004, the General Assembly of North Carolina enacted the country's most stringent "open file" discovery law, one that requires the pretrial production of all law enforcement files without exception. N.C. Gen. Stat. §15A-903 (a)(1) ("Upon motion of the defendant, the court must order: (1) The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' office involved in the investigation of the crimes committed or the prosecution of the defendant.").

That law came too late for Johnny Burr. But he does have recourse to the federal courts under the provisions of Section 2254. Mr. Burr respectfully requests that this Court grant its Writ of Certiorari to determine the proper standard and method for assessing *Brady* claims when the State has withheld statements from the postconviction court.

Respectfully submitted this 26TH day of May, 2022.

/s/ James P. Cooney III
James P. Cooney III
N.C. State Bar #12140
WOMBLE BOND DICKINSON (US) LLP
301 South College Street, Suite 3500
Charlotte, NC 28202-6037
Telephone: (704) 331-4980
Jim.Cooney@wbd-us.com

Ernest Lee Conner, Jr.
N.C. State Bar #14179
321 Evans Street, Suite 200
Greenville, NC 27858
Telephone: (252) 757-3535
ernest@gnclawfirm.com

Attorneys for Petitioner-Appellant