APPENDIX A

FILED: December 28, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-5
(1:01-cv-00393-WO-JEP)

JOHN EDWARD BURR

Petitioner - Appellant

v.

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

Respondent - Appellee

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Wynn, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-5

JOHN EDWARD BURR,

Petitioner - Appellant,

v.

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

Respondent - Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. William L. Osteen, Jr., District Judge. (1:01-cv-00393-WO-JEP)

Argued: September 24, 2021 Decided: November 30, 2021

Before WILKINSON, WYNN, and HARRIS, Circuit Judges.

Affirmed by published opinion. Judge Wynn wrote the opinion, in which Judge Wilkinson and Judge Harris joined.

ARGUED: James P. Cooney, III, WOMBLE BOND DICKINSON (US) LLP, Charlotte, North Carolina, for Appellant. Kimberly Nicole Callahan, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Ernest Lee Conner, Jr., Greenville, North Carolina, for Appellant. Joshua H. Stein, Attorney General, L. Michael Dodd, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee.

WYNN, Circuit Judge:

Petitioner John Edward Burr was convicted after a 1993 trial for the 1991 murder of infant Tarissa Sue O'Daniel, known to her family as "Susie." He was sentenced to death. In the decades since, Burr has pursued habeas remedies before the state and federal courts, including this Court. But this appeal concerns a narrow question: whether the district court erred in declining to grant habeas relief on the basis of claims under *Brady v. Maryland* and *Napue v. Illinois* related to transcripts of interviews with two witnesses, Susie's mother and brother.

Our standard of review is highly deferential to the conclusions of the state post-conviction relief court. Under that standard of review, we agree with the district court that Burr is not entitled to habeas relief. Accordingly, we affirm.

I.

Several courts, including this one, have previously laid out the relevant facts and procedural history of this case in some detail.[1] We do not repeat that full history here, but instead report only those facts relevant to the issues before us.

A.

Susie was born to Lisa Bridges and her then-husband on April 1, 1991. Shortly thereafter, Bridges began having an affair with Burr. In late June, Bridges and her children

[1] *E.g.*, *Burr v. Jackson*, No. 1:01CV393, 2020 WL 1472359, at *1–6 (M.D.N.C. Mar. 26, 2020); *Burr v. Lassiter*, 513 F. App'x 327, 329–39 (4th Cir. 2013) (per curiam) (unpublished but orally argued); *State v. Burr*, 461 S.E.2d 602, 606–11 (N.C. 1995).

moved with Burr into a trailer next door to another trailer owned by Bridges's stepbrother. Burr quickly became physically abusive toward Bridges.

Around 6:00 P.M. on August 24, 1991, Bridges's eight-year-old son, Scott, tripped over a cord while carrying Susie and fell on a gravel-covered driveway. Bridges and Burr examined Susie after the fall and found her to be uninjured. But early reports about the mechanics of the fall were inconsistent. Bridges and Scott both reported in the weeks afterward that Scott fell on Susie, dropped her, or both. However, at other times during those same early weeks, Bridges and Scott each reported that Scott did *not* let go of Susie and instead cradled her gently as he fell. One of Scott's early reports was made to a social worker on August 27, who "assured him that nothing he had done hurt [Susie]." J.A. 1226.[2]

Late on the night of August 24 or in the early hours of the next morning, Bridges went next door to wash dishes at her stepbrother's home. She left Susie in her crib in Bridges's bedroom. Scott and his younger brother Tony were asleep in another bedroom. Burr also remained at Bridges's trailer.

When Bridges returned forty-five minutes later, she found Susie in her swing in the living room. Burr claimed he had moved Susie from her baby bed to the swing after she woke up. It rapidly became clear that Susie was badly injured—she was covered in bruises; her eyes were unblinking and rolling; and she was unresponsive. Bridges and Burr brought Susie to the county hospital, where they arrived just before 3:00 A.M. on August 25.

[2] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

The emergency room physician found Susie to be unconscious, with a weak pulse and wandering eyes; "intermittently seizing or having seizures"; and presenting with a bulging fontanel, "indicat[ing] some swelling inside the head." J.A. 2812. In addition to the bruising all over her body, X-rays revealed that both of her arms and both of her thigh bones were broken. She also appeared to be suffering from a "closed head injury," though X-rays did not show a skull fracture. J.A. 2819. The physician immediately formed a "high suspicion of abuse," which he asked Bridges about. J.A. 2818. He also contacted the sheriff's department and social services.

Due to the severity of her injuries, Susie was transferred to North Carolina Memorial Hospital at the University of North Carolina at Chapel Hill. There, she was examined by a trauma team that included the chief of pediatric surgery. The chief of pediatric radiology reviewed Susie's X-rays and CT scan and concluded that Susie had a "depressed skull fracture" that was mere hours old. J.A. 2713. By contrast, the fractures in both of Susie's thigh bones showed evidence of early healing. The radiologist estimated those fractures were eight to nine days old, with a range of three days on either side of the estimate. Susie's arm fractures did not show signs of healing, and the radiologist testified that they could have happened at the same time as the head injury or up to five days previously.

A pediatric neurologist also reviewed Susie's CT scan and agreed that she had a "depressed skull fracture." J.A. 2840. He noted that there was no external wound on the scalp. And he found that Susie exhibited symptoms, such as bilateral retinal hemorrhages, that were indicative of "shaken baby syndrome," "a specific kind of injury where the baby has a whiplash kind of injury from being shaken back and forth." *Id.*

Susie died from her injuries on August 27, 1991. The medical examiner concluded that Susie's cause of death was a closed head injury, and that the manner of death was homicide. Burr was arrested the next day.

B.

Burr was tried before a jury in a guilt phase that took place over the course of twelve trial days between March 29 and April 16, 1993. The trial evidence was extensive and included testimony from Burr, Bridges, Scott, other relatives, investigating officers, examining doctors, a social worker, and the pathologist who performed Susie's autopsy.

Scott testified at trial that he cradled Susie in his arms as he fell with her on August 24, such that she never hit the ground. Bridges and another witness who saw the fall, an eleven-year-old relative named Jonas, confirmed Scott's rendition. And Burr himself testified that Scott held onto Susie when they fell. That said, the trial evidence also included Burr's testimony that he saw Scott "laying on top of Susie." J.A. 3063. And it included testimony that, in the early hours of August 25, Bridges told a deputy sheriff that Scott "fell on" Susie, and that she similarly told a social worker on August 25 that Scott had "dropped" Susie and "fell on her." J.A. 3617, 3779. This contradicted her trial testimony that Scott "didn't drop his sister," nor did he "fall on [her]." J.A. 2013. In other words, the jury had before it competing testimony regarding the fall. In any event, Bridges, Burr, and several other witnesses testified that they examined Susie after the fall and that she was not injured at that time.

Five doctors testified at trial: the emergency room physician at the county hospital who saw Susie around 3:00 A.M. on August 25; the chief of pediatric surgery at North

Carolina Memorial Hospital, who was part of the trauma team that evaluated Susie when she arrived there around 6:00 A.M. on August 25; the chief of pediatric radiology at the second hospital, who reviewed Susie's X-rays on August 25; the pediatric neurologist at the second hospital who examined Susie in the pediatric intensive care unit on August 25 and reviewed her CT scan; and the pathologist who performed Susie's autopsy on August 28. Each doctor was qualified as an expert witness in their field of medical practice.

The five testifying doctors unanimously agreed that the fall with Scott around 6:00 P.M. on August 24 could not have caused Susie's lethal injuries. They confirmed that Susie had no cuts, scratches, or other abrasions on her, such as one might expect if she fell with any force on gravel. And they made clear that her head injury—whether or not her skull was actually fractured—would have required a concentrated blow from a blunt object that would almost certainly not have resulted from a fall, even if Susie's head had struck the gravel surface. For example, the pediatric surgeon testified that he had "seen situations where somebody lands on top of a child . . . and they can end up with bruising of the liver or even [a] ruptured liver," but Susie's injuries "don't occur with that type of fall." J.A. 2915. The pediatric radiologist testified that the skull fracture was "a very unusual fracture in a very unusual place" that would "take a relatively confined direct blow to that area" with "a great deal of force" to produce, because where the fracture occurred was "in a portion of the skull" that is "somewhat protected because it's a little depressed in," so "the rest of the skull would hit first." J.A. 2726–27, 2738. The pediatric neurologist testified that Susie had a "depressed skull fracture" caused by significant force from a blunt object, akin to Susie having been "thrown against something" in a car accident, not from "a simple

bump or fall." J.A. 2840, 2847–48. He further testified that a fall from a height of roughly three feet would not create "this kind of depressed skull fracture" where the "whole thing [is] caved in." J.A. 2849. The creation of such an injury, he explained, instead required striking by a smaller, blunt object. Accordingly, he concluded that her injuries were not accidental.

The pediatric neurologist also testified that retinal hemorrhages, such as those seen in the back of both of Susie's eyes, would not be caused by a fall, but rather "would require really very violent shaking." J.A. 2876. He further testified that, while Susie's condition might have worsened in the hours following her injury, she would have been "significantly ill, and obviously in trouble from the very beginning." J.A. 2851. That is, "whatever the injury was[,] from that point on the child should have been obviously not right," even to a layperson, with loss of consciousness occurring "within minutes to an hour or so." J.A. 2851, 2854. Other doctors agreed. Finally, the pathologist testified that Susie was covered with bruises across her body that were consistent with strikes from a blunt object, and that she had bruising on her neck that was "consistent with marks that could be caused by a handprint." J.A. 2964.

In the face of this evidence, defense counsel's trial strategy was not to suggest that Scott's fall with Susie had been the cause of her injuries. In fact, counsel explicitly and vigorously disclaimed that view in both their opening and closing statements, and elicited agreement from Burr that the fall was "highly unlikely" to be the cause of the injuries Susie received. J.A. 3111. Instead, counsel sought to suggest that someone else—most notably Bridges—could have caused Susie's injuries. This included arguing that Bridges's

testimony that she did not know Susie had fractured limbs lacked credibility; noting that Bridges had much more access to Susie than Burr did in the weeks leading up to her death; and introducing testimony from a witness who claimed to have once seen Bridges slap Susie so hard that she fell off a couch.

For its part, the State relied on the timeline of events; testimony from Scott, who at the time of trial was ten years old; testimony to undermine that of Burr's witness regarding the couch-slapping incident; and character evidence showing Burr's physically abusive side, including testimony that he could be rough with his own toddler son.

In his testimony, Scott told the jury that, after his mother left to go wash the dishes on the night of August 24, he was awoken by "hammer noises." J.A. 2769. He then heard Susie crying and Burr "mumbling" before Susie's crying ceased. *Id.* Scott testified that he "[j]ust went back to bed" after this incident because he was "scared" to go check on Susie. J.A. 2770. Scott also testified that he had seen Burr surreptitiously "shaking" Susie on multiple occasions.

The jury convicted Burr of first-degree murder, felonious child abuse, and assault on a female (for abuse of Bridges). The court sentenced him to death at the jury's recommendation. The Supreme Court of North Carolina affirmed on direct appeal, and the U.S. Supreme Court denied certiorari. *See State v. Burr*, 461 S.E.2d 602, 631 (N.C. 1995); *Burr v. North Carolina*, 517 U.S. 1123, 1123 (1996).

C.

Burr filed a motion for appropriate relief ("MAR") in state court in 1996. He included with his MAR several affidavits from non-treating doctors who claimed that Susie's injuries could have resulted from the fall with Scott.[3]

The MAR was denied the following year. But in July 1998, the Supreme Court of North Carolina remanded the case for reconsideration in light of a new statutory requirement that the State produce "the complete files of all law enforcement and prosecutorial agencies involved" in investigations leading to death sentences. N.C. Gen. Stat. § 15A-1415(f) (1996); *see State v. Burr*, 511 S.E.2d 652, 652 (N.C. 1998) (citing *State v. McHone*, 499 S.E.2d 761 (N.C. 1998); *State v. Bates*, 497 S.E.2d 276 (N.C. 1998)).

Under the remand order, the State produced tape recordings of interviews with Scott and Bridges that had been conducted in February 1993, shortly before trial, but were never given to defense counsel. Burr filed an amended MAR, alleging that the interviews represented exculpatory evidence that should have been turned over pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and that they showed that the State relied on testimony it knew would leave the jury with a materially false impression, in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). The state court rejected the amended MAR in 2000. The Supreme Court of North Carolina denied certiorari.

Burr then turned to the federal courts, filing a habeas petition in the Middle District of North Carolina in 2001. The parties conducted extensive discovery, including

[3] The medical license of one of the doctors who provided Burr with a supporting affidavit has since been revoked. *See Burr*, 513 F. App'x at 339 n.4.

introducing new medical evidence. In 2009, the magistrate judge recommended that the district court grant habeas relief because competent counsel would have secured an independent medical expert and "presented evidence that the actual mechanism of [Susie]'s death was an accidental fall." *Burr v. Branker*, No. 1:01CV393, 2009 WL 1298116, at *7 (M.D.N.C. May 6, 2009).

The district court did not file its order addressing the magistrate judge's recommendation until 2012, at which point the Supreme Court had issued its decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011). *Pinholster* held that federal review pursuant to 28 U.S.C. § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 180. The district court obliged, confining its review to the record that was before the MAR court and disregarding the parties' discovery from the federal proceedings. *Burr v. Branker*, No. 1:01CV393, 2012 WL 1950444, at *1 (M.D.N.C. May 30, 2012).

Nevertheless, the district court agreed with the magistrate judge and granted habeas relief on the basis of ineffective assistance of counsel. *Id.* at *9. But, applying our highly deferential standard of review under 28 U.S.C. § 2254, this Court reversed. *Burr v. Lassiter*, 513 F. App'x 327, 329 (4th Cir. 2013) (per curiam) (unpublished but orally argued). The case returned to the district court for evaluation of Burr's remaining claims.

In 2015, the State uncovered and disclosed an *additional* recording of a conversation between Bridges and investigators in December 1992, a few months before trial. Only some, but not all, of the 1992 recording had previously been disclosed to Burr. Burr moved to amend the record under Rule 7 of the Rules Governing Section 2254 Cases to include

the new transcript of the 1992 conversation.[4] The State did not object, and the district court agreed.

The district court held argument on the grounds remaining in Burr's petition, after which it denied the petition and declined to issue a certificate of appealability. *Burr v. Jackson*, No. 1:01CV393, 2020 WL 1472359, at *29 (M.D.N.C. Mar. 26, 2020). Burr appealed only as to his *Brady* and *Napue* claims, and we granted a certificate of appealability.

II.

We review the district court's decision de novo. *Valentino v. Clarke*, 972 F.3d 560, 579 (4th Cir. 2020). But our review of the state MAR court's decision is highly deferential.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") empowers federal courts to "entertain" applications for writs of habeas corpus filed by convicted state prisoners "on the ground that [they are] in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "But the manner in which the federal courts may entertain such an application depends considerably on how the state court treats a petitioner's claims" and, in particular, whether its decision qualifies as an "adjudication on the merits." *Valentino*, 972 F.3d at 574; *see* 28 U.S.C. § 2254(d). If it does, then our review is severely circumscribed: we may only disturb the state court's ruling if it (1) "resulted in a decision that was contrary to, or involved an unreasonable application of,

[4] Rule 7 provides that "the judge may direct the parties to expand the record by submitting additional materials relating to the petition," such as "letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge," as well as affidavits. 28 U.S.C. § 2254 Rule 7(a), (b).

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." 28 U.S.C. § 2254(d).

A state court decision involves an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal rule" but "unreasonably applies it to the facts." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). For such an "unreasonable application" to exist, the state court's decision must have been "so lacking in justification that there was an error well understood and comprehended in existing law *beyond any possibility for fairminded disagreement*." *White v. Woodall*, 572 U.S. 415, 420 (2014) (emphasis added) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

Similarly, a state court decision is "based on an unreasonable determination of the facts" only where the "factual determination [is] 'sufficiently against the weight of the evidence that it is objectively unreasonable,'" which means "'it must be more than merely incorrect or erroneous.'" *Williams v. Stirling*, 914 F.3d 302, 312 (4th Cir. 2019), *as amended* (Feb. 5, 2019) (quoting *Winston v. Kelly* (*Winston I*), 592 F.3d 535, 554 (4th Cir. 2010)). Further, the state court's determination of factual issues is "presumed to be correct" and may only be overturned by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Accordingly, the § 2254(d) standard results in "a formidable barrier to federal habeas relief." *Burt v. Titlow*, 571 U.S. 12, 19 (2013). However, one aspect of the case at bar gives us pause. Burr contends that the state MAR court's 1997 and 2000 orders "adopted verbatim the findings proposed by the State in [its] proposed Order[s]." Opening Br. at 21 (discussing 2000 order); *see also id.* at 15 (same regarding 1997 order). And in

some cases, the verbatim adoption of a proposed order can heighten the standard of review, loosening the amount of deference the reviewing court gives to the order under review.[5] *See Jefferson v. Upton*, 560 U.S. 284, 294 (2010) (per curiam). So the question before us is whether we should afford § 2254 deference to state court orders in a capital habeas proceeding where the orders largely track proposed orders filed by the State. We need not determine whether such deference is *always* applicable in such cases, however, because we conclude that, here, § 2254 deference applies.

The Supreme Court stated in *Anderson v. City of Bessemer City*, an employment-discrimination case, that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985). *Anderson* reversed a decision from this Court in which we applied a heightened level of scrutiny to the record where the district court "directed [the] plaintiff's counsel to submit proposed findings of fact, conclusions of law, and an appropriate judgment"; allowed the defendant to respond; and adopted "[t]he substance of [the] plaintiff's submission . . . as the final opinion in the case." *Anderson v. City of Bessemer City*, 717 F.2d 149, 152 (4th Cir. 1983), *rev'd*, 470 U.S. 564; *see id.* at

[5] To be sure, Burr does not argue that the verbatim adoption of the State's proposed orders changes our standard of review. And normally, "[a] party waives an argument by failing to present it in its opening brief or by failing to develop its argument—even if its brief takes a passing shot at the issue." *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (internal quotation marks and alterations omitted). Nevertheless, "[o]ur case law is clear that 'parties cannot waive the proper standard of review by failing to argue it,'" including in habeas cases. *Richardson v. Kornegay*, 3 F.4th 687, 701 n.9 (4th Cir. 2021) (quoting *United States v. Venable*, 943 F.3d 187, 192 (4th Cir. 2019)). Rather, we "must independently assure ourselves" of the appropriate standard of review. *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018).

156. The Supreme Court held that the district court did "not appear to have uncritically accepted findings prepared without judicial guidance by the prevailing party," as it had issued a "preliminary memorandum" before soliciting the proposed opinion and "the findings it ultimately issued . . . var[ied] considerably in organization and content from those submitted by [the plaintiff]'s counsel." *Anderson*, 470 U.S. at 572–73.

After *Anderson*, "we have taken a more lenient approach to district court opinions that closely mirror a party's submissions." *Alig v. Quicken Loans Inc.*, 990 F.3d 782, 790 n.8 (4th Cir. 2021). However, we and other courts have continued to look to the facts of each case to determine whether *Anderson* applies.[6] For example, applying pre-AEDPA federal habeas law, the Supreme Court suggested in *Jefferson v. Upton* that verbatim adoption of proposed findings in habeas cases might be problematic in some circumstances. *Jefferson*, 560 U.S. at 294 (vacating and remanding "for the lower courts to determine . . . whether the state court's factual findings warrant a presumption of correctness").

But *Jefferson* involved a particularly extreme example in which the petitioner alleged that the state court asked the State in an ex parte conversation "to draft the opinion

[6] *See Alig*, 990 F.3d at 790 n.8 (applying *Anderson* where "[t]he district court engaged extensively with the issues over several years" and where its opinion "included substantial sections the court wrote itself—as well as language adopted from [*the appellants'*] briefs"); *Aiken Cnty. v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 676–77 (4th Cir. 1989) (applying *Anderson* despite the court's near-verbatim adoption of an ex parte proposed order where the opposing party had the opportunity to air its views fully and the court appeared to have exercised independent judgment); *Bright v. Westmoreland Cnty.*, 380 F.3d 729, 732 (3d Cir. 2004) (reversing and remanding a § 1983 case for further consideration where the issue was not merely "*findings of fact*" but instead "a District Court *opinion* that is essentially a verbatim copy of the appellees' proposed opinion").

of the court." *Id.* at 287. And some of our sister circuits have applied *Anderson*—and therefore have not altered their deferential standards of review—in less extreme post-AEDPA habeas cases, including after *Jefferson*. *See Barksdale v. Att'y Gen. Ala.*, No. 20-10993-P, 2020 WL 9256555, at *18 (11th Cir. June 29, 2020) (unpublished) ("We have held that a state court's verbatim adoption of the prosecution's proposed order is entitled to AEDPA deference as long as (1) both parties 'had the opportunity to present the state habeas court with their version of the facts' and (2) the adopted findings of fact are not 'clearly erroneous.'" (quoting *Rhode v. Hall*, 582 F.3d 1273, 1282 (11th Cir. 2009) (per curiam))); *Green v. Thaler*, 699 F.3d 404, 415 (5th Cir. 2012) (applying *Anderson* in a capital habeas case even though "the state court requested [the proposed order] *ex parte*, and signed [it] verbatim," where "the state court had already rendered a judgment from the bench" and the petitioner "apparently had an opportunity to object to the findings in a motion to strike he filed in the state court"); *see also Nichols v. Scott*, 69 F.3d 1255, 1276 (5th Cir. 1995) (applying *Anderson* in a capital habeas case where the state court "adopted verbatim the [S]tate's proposed findings of fact and conclusions of law").

We need not lay down any blanket perimeters for how *Anderson* applies in capital habeas cases generally, and we decline to do so where the parties have not briefed this issue. Under the circumstances of this case, we conclude that *Anderson* applies, and therefore the MAR court's opinions are entitled to full § 2254 deference.

Burr filed his initial MAR in 1996, after which the State filed a combined response to and motion for summary denial of the MAR in March 1997. The State attached a proposed 114-page order to that response. The record does not indicate that Burr filed a

response to the motion for summary denial, or a reply related to the MAR.[7] Instead, six months later, Burr filed an amended MAR. The state court denied the MAR in October 1997 in a 116-page order. The state court's filed order copied the State's proposal nearly verbatim, with the exception of a handful of minor modifications and the addition of a three-page section at the end to address the amended MAR.

Following the Supreme Court of North Carolina's 1998 remand of the case, Burr filed his second amended MAR in February 1999. The State again filed a combined response to and motion for summary dismissal of the second amended MAR in May 1999, to which it attached a 43-page proposed order and memorandum opinion. Burr apparently did not reply, instead filing a third amended MAR in October 1999, to which the State filed a response in November. The state MAR court ultimately denied the MAR in June 2000. At 68 pages long, its filed order was largely based on the proposed order but included substantial additions by the court as well.

---

[7] State law may have required Burr to seek permission from the court to file a reply. *See State v. Riley*, 528 S.E.2d 590, 593 (N.C. Ct. App. 2000); N.C. Gen. Stat. § 15A-1420(b1) (specifically noting, in both its 1997 and current versions, that the judge could direct the State to file a response to the defendant's MAR, but not mentioning an opportunity for the defendant to reply); *cf. State v. Vinh Nguyen*, 821 S.E.2d 665 (N.C. Ct. App. 2018) (unpublished table decision) (noting that the State moved to strike the defendant's reply as improper, though dismissing the motion as moot). *But see State v. Howard*, 783 S.E.2d 786, 792 (N.C. Ct. App. 2016) (noting that the defendant filed a reply without noting that he first sought permission to do so); *State v. Chekanow*, No. 14 CRS 50306 & 50307, 2019 N.C. Super. LEXIS 478, at *1 (May 7, 2019) (same); *State v. Lynch*, No. 08CRS58929, 58934, 2014 N.C. Super. LEXIS 237, at *1 (June 11, 2014) (same); *cf. State v. Lane*, No. 14 CRS 50314-15, 2019 N.C. Super. LEXIS 450, at *7 (Jan. 9, 2019) (noting that the defendant filed a response in opposition to the State's motion to dismiss his MAR without noting that he first sought permission to do so). Regardless, even if Burr was required to seek such permission, the record does not show that he did so. Nor did he attach his own proposed order to his amended MAR.

The MAR court's 2000 order is primarily at issue in this appeal, as it contains the *Brady* and *Napue* analyses. But the 1997 order is also relevant because of its discussion of the cause of Susie's death, and the 2000 order "reconsider[s]" and then incorporates the 1997 order. J.A. 1786. Accordingly, the question is whether *Anderson* applies to the 1997 and 2000 orders.

We conclude that it does. We have carefully compared both filed orders with the proposed orders and are convinced that the filed orders represent the state court's own work. Certainly, the 1997 filed order includes only minor changes from the proposed order. But the 2000 order, which "reconsidered" the 1997 one, shows more input from the court. *Id.* The 2000 order still adopted nearly all of the State's proposed order, but Burr is incorrect to state unequivocally that the adoption was "verbatim." Opening Br. at 21. The court made both major and minor changes throughout, including adding substantial sections of text. For example, in discussing ineffective assistance of counsel, the court's order expands a one-sentence paragraph into a section spanning several pages. *Compare* J.A. 1726, *with* J.A. 1792–98. As another example, and of relevance to the *Brady* and *Napue* claims, the MAR court noted that "[Burr]'s transcriptions of the prosecutors' discussion with [Bridges] demonstrate that the prosecutors were most concerned about assuring that she testified truthfully." J.A. 1830. That statement is absent from the equivalent point in the State's proposed order.

To summarize, in this case, Burr had an opportunity to contest the proposed orders. They were not filed ex parte. Nor did the state court simply rubber-stamp the proposed orders—a comparison of the proposed and final 2000 orders reveals that the court carefully

considered the issues and made modifications where appropriate, and the 2000 order makes clear that the court had also reconsidered the closer-to-verbatim 1997 order. Those factors combined convince us that the MAR court's orders represent its own work and are thus entitled to our deference.

The preparation of proposed orders by parties in capital habeas cases appears to persist as a practice in North Carolina. *E.g.*, *State v. Allen*, 861 S.E.2d 273, 280 (N.C. 2021) ("[T]he MAR court sent the parties a Memorandum of Ruling asking the parties to draft proposed orders disposing of [the petitioner's] MAR . . . claims."); *cf. N.C. State Bar v. Sutton*, 791 S.E.2d 881, 896 (N.C. Ct. App. 2016) (noting, in an attorney discipline case, that "[i]t is the accepted practice in North Carolina for the prevailing party to draft and submit a proposed order that the decision-making body may then issue as its own—with or without amendments"). To be clear, though we are sympathetic about the substantial caseloads facing state trial judges, there are serious problems with this practice, as we and other courts have noted previously. *E.g.*, *Aiken Cnty. v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 677 (4th Cir. 1989) (labeling the "near-verbatim adoption" of proposed findings of fact and conclusions of law "less than ideal"); *Anderson*, 470 U.S. at 572 (noting that the Court had "criticized" the "verbatim adoption of findings of fact prepared by prevailing parties"); *Jefferson*, 560 U.S. at 293–94 (same).[8] Those concerns are particularly

[8] *See also, e.g.*, *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1268 (11th Cir. 2021) (noting the Eleventh Circuit's "sharp[] critique[s]" of this practice); *Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 829–30 (10th Cir. 2005) (stating that the near-verbatim adoption of proposed findings of fact and conclusions of law is "[r]egrettabl[e]" and that it "provides little aid on appellate review"); *Basso v. Stephens*,

pronounced when the state court adopts the State's proposed order in a capital case, where the need for an adversarial process and a neutral arbiter is at its zenith.

But, in light of evidence that Burr was on notice of the proposed order and that the state court judge exercised judicial discretion in adopting the State's proposed order, we conclude that it is appropriate to apply *Anderson* under these circumstances even as we continue to "strongly criticize" the practice of verbatim (or close-to-verbatim) adoption of proposed opinions. *Hamm v. Comm'r, Ala. Dep't of Corr.*, 620 F. App'x 752, 756 n.3 (11th Cir. 2015) (per curiam). Accordingly, we apply § 2254 deference to Burr's claims in this appeal.

III.

Turning to the merits, we begin with the unreasonable determination of fact Burr alleges pursuant to § 2254(d)(2). We then evaluate the MAR court's discussion of his *Brady* and *Napue* claims under § 2254(d)(1). We close by analyzing whether we can consider the suppressed transcript that was not turned over until 2015, and if so, whether it makes a difference to Burr's claims.[9] We hold that the district court correctly rejected Burr's habeas petition.

555 F. App'x 335, 342 (5th Cir. 2014) (noting the practice is "troubling"); *Philbrook v. Ansonia Bd. of Educ.*, 925 F.2d 47, 53 (2d Cir. 1991) (collecting cases on this point).

[9] In addition to this transcript, Burr also seeks to rely on appeal on medical evidence first introduced during the federal proceedings. *Pinholster* squarely precludes our consideration of this evidence. *Pinholster*, 563 U.S. at 180–81.

A.

Burr only alleges one factual error on appeal: he claims that the MAR court erred in concluding "that Susie died of a depressed skull fracture." Opening Br. at 30. To satisfy § 2254, he would have to show that "the state [MAR] court based its decision[] 'on an objectively unreasonable factual determination in view of the evidence before it, bearing in mind that factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary.'" *Elmore v. Ozmint*, 661 F.3d 783, 850 (4th Cir. 2011) (quoting *Baum v. Rushton*, 572 F.3d 198, 210 (4th Cir. 2009)) (citing § 2254(e)(1), (d)(2)). An "unreasonable determination of the facts," as the phrase is used in § 2254(d)(2), "is not merely an incorrect determination, but one 'sufficiently against the weight of the evidence that it is *objectively unreasonable*.'" *Gray v. Zook*, 806 F.3d 783, 790 (4th Cir. 2015) (emphasis added) (quoting *Winston I*, 592 F.3d at 554).

Burr cannot satisfy this hefty burden. As an initial matter, the MAR court did not find that Susie *died* of a depressed skull fracture; rather, it is clear the court was persuaded by the medical testimony at trial that Susie's cause of death was a brain injury resulting from child abuse. However, the court did find that she *had* a depressed skull fracture. We will assume that is the factual finding Burr takes issue with. In light of the conflicting testimony on that point, the MAR court's finding was not "objectively unreasonable." *Id.*

At trial, the chief of pediatric radiology and a pediatric neurologist each testified that Susie had a skull fracture. The radiologist took the jury through the CT scans and showed them where he saw "a fracture to the skull." J.A. 2712. He explained that there was "a notch, as if something had hit the skull and pushed this portion of the skull into the inner

table of the skull itself," creating a "little v-shaped depression in the skull." J.A. 2713–14. The neurologist reviewed the same CT scan and testified that "the skull was caved in in that area." J.A. 2847. Perhaps for that reason, Burr's counsel referred to a "skull fracture" in argument to the court. J.A. 4219.

Certainly, other experts who viewed the skull using other methods did not see a fracture. The initial treating physicians in the emergency room performed an X-ray that "revealed no obvious [skull] fracture," J.A. 2829, and the autopsy report indicates "SKULL: No fractures," J.A. 1012. The chief of pediatric surgery testified that Susie "had one area that *looked like* a fracture on the [X]-ray and the CT scan," but that an area of the skull can be pushed in like a dent on a ping-pong ball, without the bone actually breaking. J.A. 2906 (emphasis added). The pathologist who performed the autopsy agreed, testifying that this is particularly possible for infants, because their bones "are not completely calcified, so they are more likely to be deformed [meaning dented in or depressed] by an injury rather than broken." J.A. 2979.

In other words, the disagreement was *not* between, say, some experts saying Susie had a "linear skull fracture[] or crack in the skull" and others saying she had a *depressed* injury, J.A. 2859, or between some experts saying her skull was fractured in one spot and others saying it was dented in a different spot, or between some experts saying she had a head injury and others disputing that point altogether. The experts agreed that Susie's skull had an indentation on the left side with associated brain injuries. They disagreed only as to whether the bone was actually fractured at the site.

Given the competing medical expert testimony on the latter fact, it was not "sufficiently against the weight of the evidence" so as to be "objectively unreasonable" for the MAR court to conclude that the chief of pediatric radiology and pediatric neurologist correctly interpreted the CT scan as demonstrating a fracture of the skull. *Winston I*, 592 F.3d at 554. "To the extent multiple interpretations of the facts may exist, the . . . state court's determination of the facts . . . is not [objectively] unreasonable." *Duke v. Allen*, 641 F.3d 1289, 1294 (11th Cir. 2011). After all, "[i]f reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination." *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (internal quotation marks and alterations omitted); *cf. Wainwright v. Goode*, 464 U.S. 78, 85 (1983) (holding, under pre-AEDPA law, that the lower court "erred in substituting its view of the facts for that of the [state court]" where "the record [was] ambiguous" and therefore both views "[found] fair support in the record").

We further note that, *even if* Burr is correct that the MAR court's finding that there was a skull fracture was erroneous, "we are at a loss to see much critical significance" regarding "the existence or nonexistence of an actual fracture to the skull itself." *Burr*, 513 F. App'x at 344 n.6. As we noted the last time this case was before us, "[a]ll of the treating physicians and the medical examiner agreed that the cause of Susie's death was blunt force head trauma, and its resulting swelling and pressure in the brain, and that significant force was necessary to cause this trauma. Burr presented no evidence to the state MAR court that the treating physicians would have changed their opinions regarding child abuse vis-à-vis accident based upon the difference in the radiographic evidence and the autopsy report."

Id. It is hard to see how the MAR court's decision could have been "*based on*" a fact that, in the context of all the other evidence in this case, represented a minor discrepancy. 28 U.S.C. § 2254(d)(2) (emphasis added); *cf. DelValle v. Armstrong*, 306 F.3d 1197, 1201 (2d Cir. 2002) (rejecting a § 2254(d)(2) claim where the state supreme court's misstatement of fact was "irrelevant"); *Green v. Travis*, 414 F.3d 288, 298 (2d Cir. 2005) (Sotomayor, J.) (distinguishing *DelValle* because, in *Green*, the precise facts "were not tangential" to the claim, "but central to it," which "distinguishe[d] [*Green*] from those situations[, like *DelValle*,] in which a state court's misunderstanding of the facts of a case had little bearing on the state court's ultimate resolution of the claim"). So, we conclude that Burr has not demonstrated that the MAR court's decision was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

B.

Burr's § 2254(d)(1) claims fare no better. He contends that the MAR court's decision "involved an unreasonable application of" *Brady*, *Napue*, and their progeny. *Id.* § 2254(d)(1). We cannot agree.

i.

We begin with the applicable legal principles. In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "To establish a *Brady* violation, the accused must demonstrate that the evidence was" (1) "suppressed by the prosecution;" (2) "favorable to the defendant, either because it [was]

exculpatory or impeaching;" and (3) "material." *Horner v. Nines*, 995 F.3d 185, 204 (4th Cir. 2021). There is no dispute that the evidence here was suppressed, but the parties disagree on the other two prongs. Because the parties and the MAR court focused chiefly on materiality, and because we can affirm the district court's denial of the petition on that basis, we train our analysis primarily on that prong.

"Favorable 'evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.'" *Id.* at 206 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Thus, "*Brady* does not 'automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.'" *Id.* (quoting *Bagley*, 473 U.S. at 677).

"[U]nder [the Supreme Court's decision in] *Napue* [*v. Illinois*], the government 'may not knowingly use false evidence, including false testimony, to obtain a tainted conviction' or 'allow[] it to go uncorrected when it appears.'" *United States v. Chavez*, 894 F.3d 593, 599 (4th Cir. 2018) (quoting *Napue*, 360 U.S. at 269). False testimony includes both perjury and evidence that, "though not itself factually inaccurate, . . . creates a false impression of facts which are known not to be true." *Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir. 1967). Convictions "obtained by the knowing use of perjured testimony [are] fundamentally unfair, and must be set aside if there is any reasonable likelihood that the

false testimony could have affected the judgment of the jury." *Chavez*, 894 F.3d at 601 (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)).

ii.

Burr makes several interpretive moves to position Bridges and Scott's testimony as vital and therefore his *Brady* and *Napue* claims based on their testimony as viable. Pointing to medical evidence introduced before the MAR court and the conflicting testimony regarding whether Susie had a skull fracture, Burr argues that Susie died from a closed head injury but did not have a fractured skull. If Susie did not have a fractured skull, Burr contends, it is possible that her head trauma resulted from being dropped—such as in the fall with Scott—rather than from a concentrated blow. Therefore, he argues, by the time of the MAR proceedings, "the only basis for the State's theory that the fall [with Scott] did not cause the fatal injury, was the description of that fall at trial by" Bridges and Scott. Opening Br. at 34. Thus, Burr posits that Bridges and Scott's credibility was absolutely essential to the case, because "[e]vidence about whether the fall could have caused the injury . . . was literally the entire case." *Id.* at 32. And therefore, Burr's theory goes, he can satisfy the materiality element of the *Brady* and *Napue* claims because anything that undermines the credibility of such key witnesses necessarily calls into question the validity of the jury's verdict.

The central problem with Burr's argument is that the State's case was not so entirely reliant on Bridges and Scott, or on their descriptions of the fall, as he suggests. We have already noted "the overwhelming medical evidence that Susie was a victim of child abuse." *Burr*, 513 F. App'x at 345. While we made that comment in the different context of

analyzing the effectiveness of the assistance of counsel, the record evidence remains the same. The conclusion that abuse, rather than the fall with Scott, caused Susie's death was supported by: (1) significant medical testimony from treating physicians and the pathologist, including regarding the type of head injury, the limb fractures, the retinal hemorrhages, and the bruising all over Susie's body—such as a handprint-shaped bruise on her neck—all of which was consistent with abuse rather than an accidental fall; (2) eyewitness testimony, albeit somewhat mixed, from those who saw the fall, which included Jonas in addition to Bridges and Scott; (3) testimony from several individuals, including Burr, who examined Susie after the fall and found her, in their lay opinions, to be uninjured; and (4) medical expert testimony that Susie would have been so clearly unwell immediately after sustaining the head injury that ultimately killed her that even a layperson would have recognized she was in danger, such that the head injury must have occurred later than the time of the fall (around 6:00 P.M.) if Susie did not show symptoms until after midnight.

With this background and our deferential standard of review in mind, we can easily dispense with Burr's *Brady* and *Napue* claims.

iii.

Burr argues that the MAR court unreasonably applied *Brady* when it concluded that "any inconsistencies between the trial testimony of [Bridges and Scott] and their pre-trial comments to the prosecutors are of *de minimis* significance." J.A. 1827. He contends that the undisclosed tapes would have enabled trial counsel to materially undermine Bridges and Scott's testimony on crucial points related to Scott's fall with Susie and the incidents when Scott had previously seen Burr shake Susie. Therefore, he argues, the tapes are

material because it is reasonably likely that "had the [tapes] been disclosed to the defense, the result of the [trial] would have been different." *Horner*, 995 F.3d at 206. We disagree as to Bridges, Scott, and the evidence considered in the aggregate.

We begin with Burr's arguments related to the suppressed 1993 interview of Bridges. Burr cherry-picks statements from that interview in an attempt to demonstrate that the interview provides new, damning information. Much of what he picks out is made up of questions from the prosecutors about how Bridges could not have known that Susie had at least some fractured limbs for days before she sustained her head injury. But Bridges's credibility as to Susie's demeanor before the night in question was thoroughly aired at trial. It had to have been apparent to the jury that any testimony that Susie was happy and did not cry too much before August 24, 1991, was questionable given that she had at least some fractured limbs for days beforehand. But that dubious testimony did not only come from Bridges's family; Burr also testified that Susie seemed "fine" earlier in the evening of August 24. J.A. 3190–91. Moreover, the evidence about Susie's demeanor was inconsistent, as Bridges and her family *also* testified that Susie had been crying a lot over the preceding weeks, which they chalked up to her throat infection, a result of oral thrush. Bridges explained that Susie "cried constantly" because of the pain in her throat and contended that she assumed this was related to oral thrush rather than realizing that Susie had broken bones. J.A. 2209. Accordingly, the conversation between Bridges and prosecutors about whether and to what degree Susie was in pain before the night of August 24 is cumulative evidence to that provided at trial. Such cumulative evidence "is generally

not considered material for *Brady* purposes." *Juniper v. Zook*, 876 F.3d 551, 571 (4th Cir. 2017) (quoting *Johnson v. Folino*, 705 F.3d 117, 129 (3d Cir. 2013)).

Burr points to another statement in the transcript that was also aired at trial. In the suppressed transcript, Bridges said that Burr "did not act like he would hurt [Susie]." J.A. 1571. Burr contends that this contradicts Bridges's trial testimony, which "listed a litany of Burr's abusive behavior suggesting he could hurt a child." Opening Br. at 17. But at trial, Bridges was also asked why it had not occurred to her immediately that Burr could have caused Susie's injuries. She explained this was because she does not hurt children, "and you can't see it in someone else. . . . [P]eople hurt people, but they don't hurt a child." J.A. 2076; *see also* J.A. 2183–84 (showing Bridges being challenged at trial with statements she made to a social worker soon after Susie was injured, in which she said she could not identify who hurt Susie).

Burr further contends that Bridges "admit[ted]" in the transcript "that she asked her family to lie for her." Opening Br. at 40. He overstates the limited nature of Bridges's concession, in which she acknowledged that she had sought to prevent one of her sisters from saying "that the baby cried all the time" because she was worried about "look[ing] bad." J.A. 1587. Still, this statement could certainly have undermined Bridges's credibility had the defense known about it and been able to impeach Bridges's testimony with it. But again, substantial contradictory evidence at trial allowed the jury to weigh whether Bridges and her family were being truthful regarding Susie's condition. The MAR court's conclusion that this undisclosed statement would not have changed the outcome of the trial was not unreasonable.

Finally, Burr argues that the prosecutors coached Bridges to provide a believable story about why she did not realize that Burr was abusing Susie. For example, the prosecutor suggested that Bridges's rationale could have been, "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 was love blind or something." Opening Br. at 40–41 (quoting J.A. 1586). But the prosecutor went on to add, "[o]r whatever it was." *Id.* at 41 (quoting J.A. 1586). That is, the prosecution asked Bridges to provide whatever story was the accurate one. Further, the MAR court concluded that "the prosecutors were most concerned about assuring that [Bridges] testified truthfully." J.A. 1830. That was not an objectively unreasonable conclusion. The transcript reveals that prosecutors repeatedly urged Bridges to tell "[e]very little [shred] of" the truth, "no matter how bad it ma[de] [her] look." J.A. 1585. So, in our view, Burr's "coaching" argument cannot provide the requisite showing of materiality.

Burr's arguments regarding the suppressed interview with Scott are equally unpersuasive. To be sure, Scott comes across in the interview transcript as, in the magistrate judge's words, "confused, scared[,] and easily susceptible to suggestion." *Burr*, 2009 WL 1298116, at *18. So, Burr contends, "[i]n the hands of competent counsel, Scott's repeated contradictions, his embellishments, and his mistakes could have been used to prove to the [j]ury that his memory of [the fall and the shaking incidents] was not trustworthy." Opening Br. at 45. But the jury could assess for themselves how much weight to give Scott's testimony. At the time of trial, Scott was only ten years old and was testifying about traumatic events that occurred when he was eight. His testimony at trial was also littered

with "I don't remember" statements. *E.g.*, J.A. 2774–89. So even without the suppressed interview transcript, it is apparent from the trial evidence alone that Scott was an imperfect witness, a point that defense counsel could and did drive home to the jury. *E.g.*, J.A. 4054–55 (defense counsel pointing in closing to how Scott's story regarding the fall had changed over time). The interview transcript would have been cumulative evidence on that point.

Moreover, Scott's trial testimony that he "cradled" Susie during his fall such that she never hit the ground was echoed by testimony from Bridges and Jonas and was supported by the lack of abrasions on Susie's skin, "[e]ven over the area on the left part of the skull" where her head was most badly injured. J.A. 2916. And, to the extent Scott's description of the fall can be disputed by statements he made in the suppressed transcript, it was already able to be disputed by similar evidence provided to Burr before trial. As noted, in the weeks following Susie's death, both Scott and Bridges at times described the fall as Scott "dropp[ing]" Susie or "fall[ing] on top of her." J.A. 2262, 3398; *see also* J.A. 3415, 3425–26, 3779. Finally, Burr contends that prosecutors planted in Scott's mind the idea that he did not hurt Susie, and that this led him to change his description of the fall. But Scott's descriptions had shifted over time even before that point, and a social worker was the first person in the record to urge him that he had not hurt Susie—just days after she sustained her fatal head injury.

Burr also argues that the suppressed interview is revealing regarding Scott's description of the incidents in which he saw Burr "shake" Susie. Specifically, he alleges that the transcript demonstrates that Scott's story about those incidents shifted in response to leading questions. But this argument fails for at least three reasons.

First, Burr does not directly explain why the MAR court's reading of the record—which rejected Burr's view of the transcript—was objectively unreasonable.

Second, he fails to explain how the transcript would have allowed him to impeach Scott's testimony. The MAR court found that any inconsistencies in Scott's testimony were "of *de minimis* significance." J.A. 1842. This was not unreasonable, particularly because Burr had an opportunity to cross-examine Scott at trial on the question of whether prosecutors had planted the idea of Burr shaking Susie in Scott's mind. At the time of trial, Burr was aware of Scott's September 5, 1991, statement that he had never seen Burr "do anything" to Susie, such as whipping her—a statement that contradicted his trial testimony that he had seen Burr shake Susie multiple times. J.A. 1655. Defense counsel questioned Scott about that statement at trial. Additionally, Scott conceded at trial that he did not mention the shaking incidents to anyone else before he told the prosecutors about them. He explained that this was because he was scared of Burr and thought that, if he told Bridges about Burr shaking Susie, Burr might kill Bridges. Burr has not clarified how having access to the suppressed transcript would have assisted his trial strategy rather than just being cumulative to the evidence he was already aware of.

Third and finally, Burr cannot sustain his burden to show as objectively unreasonable the MAR court's conclusion that, had Burr had the opportunity to impeach Scott's testimony using this transcript, the result of the trial would not have been different. There is no way to know if the jury believed Scott's story about the shaking incidents based on the evidence before them. It is possible they did not, as he was a child whose credibility could be questioned given that he was frightened of Burr and believed Burr had killed his

baby sister. But even if the jury believed Scott was being truthful about Burr shaking Susie, and even if the impeachment value of the suppressed transcripts would have been the evidence to tip them against finding Scott credible on *that* point, there was plenty of other evidence from which they could nevertheless infer that Burr was Susie's assailant in the assault that led to her death.

For example, as the MAR court noted, the evidence "demonstrate[d] that [Burr] abused Susie on [an]other occasion[]": Bridges testified to a prior incident in the weeks before Susie's death in which Bridges had awoken around 4:00 A.M. to the sound of Susie screaming loudly and found Burr in another room holding her. J.A. 1426. The MAR court further found that the jury "had the opportunity to carefully evaluate [Burr]'s [own] extended testimony and demeanor on the witness stand" and "obviously conclud[ed] that [Burr] was not being truthful with them" about the events of the night in question. J.A. 1832. To name just some of the other circumstantial evidence from which the jury could have inferred guilt, there was testimony that Burr was abusive toward Bridges and his own toddler son; numerous witnesses testified that Susie was fine before she was left alone with Burr on the night in question; Bridges's niece testified that she went to Bridges's trailer during the forty-five-minute window in which Bridges was washing dishes next door, and that at that time she leaned over to kiss Susie and saw no bruises or markings on her; medical experts testified that Susie's seizure-like symptoms, which she exhibited when Bridges returned to her trailer, would have occurred very soon after the head injury; and medical experts testified that the retinal hemorrhages Susie displayed "would require really

very violent shaking," J.A. 2876, and that her head injury would require a "great deal of force," J.A. 2739, 2847.

Our view of the suppressed transcripts of conversations with Bridges and Scott does not change when we consider its possible impeachment value in the aggregate. For the reasons described above, many of the aspects of the transcripts Burr points to are cumulative to testimony that was presented, or impeachment opportunities that already existed, at trial. When the cumulative evidence is put aside, what remains is too insignificant to pose a realistic possibility of altering the trial outcome had Burr's counsel been aware of it before trial. *See* J.A. 1827 (MAR court finding that "any inconsistencies between the trial testimony of [Bridges and Scott] and their pre-trial comments to the prosecutors are of *de minimis* significance"). The MAR court concluded that, "[a]t the bottom line," Burr "ha[d] not presented anything that undermine[d] the Court's confidence in the outcome of the trial proceeding." J.A. 1842. We cannot say that this was objectively unreasonable.

In short, the MAR court's conclusion that Burr had not shown "a reasonable probability that[,] had [the tapes] been disclosed[,] the result of the trial would have been different," J.A. 1827, did not amount to an "unreasonable application" of *Brady*, 28 U.S.C. § 2254(d)(1).[10]

[10] Burr also briefly argues that the MAR court "diminish[ed] the value of impeachment for *Brady* purposes" and that this led it to "engage[] in an interpretation that [was] contrary to *Brady* and established law." Opening Br. at 39; *see* 28 U.S.C. § 2254(d)(1) (relief may be granted where the state court's decision was "contrary to . . . clearly established Federal law"). He does not explain how the MAR court "diminished the

iv.

We reach the same conclusion regarding Burr's *Napue* claim. As noted, *Napue* requires courts to set aside a conviction as violative of due process if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Chavez*, 894 F.3d at 601. Further, "[t]he government does not have to solicit the false evidence; it is enough if the government allows the evidence to go uncorrected when it surfaces." *United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987).

Burr's *Napue* claim rests on the same undisclosed evidence that forms the basis of his *Brady* claim. He does not contend that the State knowingly relied on perjured testimony, but he does allege that the State denied him due process by creating false impressions of critical facts at trial. He points to three key ways in which he claims the State did this. But we are not persuaded.

First, Burr contends that the prosecutors allowed Bridges and Scott to present a "sanitized" rendition of Scott's fall with Susie that was "simply not true." Opening Br. at 49. Specifically, the suppressed 1993 interview tape with Bridges "show[s] that as late as several weeks before trial, Bridges and the State continued to refer to Scott dropping Susie, or falling with her." *Id.* at 48–49. Thus, the theory goes, the trial testimony that Scott

---

value of impeachment for *Brady* purposes," and our review of the MAR court's order reveals that the MAR court explicitly recognized that evidence can be favorable for *Brady* purposes "either because it is exculpatory, or because it is impeaching." J.A. 1822 (quoting *Strickler v. Greene*, 527 U.S. 263, 282 (1999)). The MAR court applied the correct standard; it simply found the evidence to be immaterial.

"cradled" Susie "created a false impression of the fall—a 'sanitized' version which [prosecutors] knew to be sanitized." *Id.* at 49.

This argument fails for at least three reasons. One, "[m]ere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony." *Griley*, 814 F.2d at 971 (citing *Overton v. United States*, 450 F.2d 919, 920 (5th Cir. 1971) (per curiam)). Two, the trial evidence included the contradictory descriptions of the fall that Scott and Bridges had provided over time, such as testimony that Bridges told a deputy sheriff that Scott "fell on" Susie and told a social worker that Scott had "dropped" Susie. J.A. 3617, 3779. So the evidence presented at trial was not a clean, "sanitized" version of events; it included competing statements, including contradictory statements from the same witnesses. Three, and relatedly, even without access to Bridges's suppressed 1993 statement, Burr had plenty of evidence from which he could have impeached Scott and Bridges's "sanitized" accounts of the fall, namely, their inconsistent statements about it. And he did indeed use these discrepancies to undermine their credibility. *See* J.A. 4021 (defense counsel noting in closing that the defense had questioned witnesses about the fall and stating that those questions "[went] to the credibility of the witnesses").

Burr's second argument in favor of his *Napue* claim is similar. He alleges that the State "did not believe Bridges[] and her family when they said that Susie was uninjured before the evening of August 24." Opening Br. at 49. In the suppressed 1993 interview, prosecutors accused Bridges of having coordinated her children's and relatives' stories to give the impression that Susie was a "normal" and "[h]appy" baby who rarely cried, saying

that her family's testimony had been "like a script." J.A. 1593. And Bridges indicated that she had tried to prevent one of her sisters from saying "that the baby cried all the time" out of concern that she would "look bad." J.A. 1587. Yet, according to Burr, she presented the same "script" on the witness stand without a word from the prosecution.

In that same transcript, however, one of the prosecutors specifically stated that he was "playing a devil's advocate"—that he was pressing Bridges's story for weak points because he was "looking at [how] the defense attorneys are going to jump on you." J.A. 1579. So, it is not clear that the prosecutors actually disbelieved Bridges; they may have simply been preparing her for the hard questions they knew would be coming at trial. Indeed, the MAR court found that the prosecutor's "devil's advocate" statement "reveal[ed] [their] motive." J.A. 1829.

Further, the question of how Susie behaved before the night of August 24 was thoroughly aired at trial. The jury heard *both* evidence that Susie was a happy baby who did not cry much, *and* evidence that she had been crying quite a bit in the weeks leading up to the night of August 24 due to pain in her throat. So, again, the jury was not left with a "sanitized" version of events—they were given competing testimony that they had to weigh. The jury could judge for themselves how the family's "script" accorded with the medical facts and, if it did not, factor that into their credibility determinations.

Third and finally, Burr alleges that prosecutors were wrong to rely so heavily on Scott's testimony when they knew he had trouble remembering facts and was prone to embellish. But, again, the jury could make its own determination of how much weight to give the statements of a young child who repeatedly stated that he could not remember key

details. Burr has not pointed to any "false impression" about Scott's testimony that prosecutors should have been aware of and flagged but that the jury would not also have been aware of after listening to Scott's testimony. So, again, the MAR court did not err by rejecting this claim.

In sum, we cannot say that the MAR court's determination that the *Napue* claim was without merit was unreasonable "beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

v.

That leaves us with one final question. We have concluded that the MAR court did not base its opinion on unreasonable determinations of fact or unreasonably apply clearly established federal law based on the record the court had before it in 2000. But what are we to make of the suppressed transcript of a 1992 conversation with Bridges that was not fully turned over to Burr until *2015*—decades after trial and fifteen years after the proceedings before the MAR court wrapped up? May we consider this transcript, even though it was not part of the record before the MAR court?

Burr urges us to do so. And this request raises numerous fascinating questions about how the Supreme Court's decisions in *Brady* and *Pinholster* intersect. We ultimately conclude, however, that we need not resolve these questions because, even if we consider the transcript, it does not alter our analysis.

Some background will help explain why this is a difficult question. Section 2254(d) prevents federal courts from granting habeas relief on "any claim that was *adjudicated on the merits* in State court proceedings" unless the state court's decision "was contrary to, or

involved an unreasonable application of, clearly established Federal law" (§ 2254(d)(1)) or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" (§ 2254(d)(2)). 28 U.S.C. § 2254(d) (emphasis added). Section § 2254(d)(2), on its face, restricts the federal court's evaluation of claims that were adjudicated on the merits by the state court to the evidence that was before the state court. *Pinholster*, 563 U.S. at 185 n.7. And the Supreme Court has instructed that federal habeas review under § 2254(d)(1) of claims adjudicated on the merits in state court is similarly restricted to the record before the state post-conviction relief court. *Id.* at 180–81.

But "[u]nderpinning the Supreme Court's discussion in *Pinholster* is the terse acknowledgment that the habeas petitioner's claims [in that case] *had been* adjudicated on the merits in state-court proceedings." *Winston v. Pearson* (*Winston II*), 683 F.3d 489, 501 (4th Cir. 2012) (emphasis added). And we have held, even after *Pinholster*, that a claim was *not* "adjudicat[ed] on the merits for purposes of § 2254(d)" when the state court made its decision "on a materially incomplete record." *Id.* at 496 (quoting *Winston I*, 592 F.3d at 555–56). "In this rare scenario, 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*, 972 F.3d at 576. In these circumstances, § 2254(d) deference does not apply, and federal courts instead review the claim de novo, applying deference only to any factual findings the state court actually made pursuant to § 2254(e)(1). *Winston II*, 683 F.3d at 496, 500–01; *see also Valentino*, 972 F.3d at 576.

Winston and related cases provide a narrow exception to *Pinholster* that we have held arises where the "state court shuns its primary responsibility for righting wrongful convictions and refuses to consider claims of error." *Valentino*, 972 F.3d at 576. Thus, we have applied the exception in scenarios where a state court "unreasonably refuse[d] to permit further development of the facts of a claim." *Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015) (quoting *Winston II*, 683 F.3d at 496) (internal quotation marks omitted); *cf. Hurst v. Joyner*, 757 F.3d 389, 399 (4th Cir. 2014) (petitioner could develop claim under § 2254(e)(2) where "the state MAR court unreasonably denied [his] motion for further evidentiary development"). "In this circumstance, we do not offend the principles of 'comity, finality, and federalism' that animate AEDPA deference because the state court has 'passed on the opportunity to adjudicate [the] claim on a complete record.'" *Gordon*, 780 F.3d at 202 (quoting *Winston I*, 592 F.3d at 555, 557). Put another way, "[w]hen a state court forecloses further development of the factual record, it passes up the opportunity that exhaustion ensures." *Winston II*, 683 F.3d at 496 (quoting *Winston I*, 592 F.3d at 555). But that raises the question: What if the state court made its decision on a materially incomplete record, not through the fault of the *state court* itself, but instead because the *State* suppressed evidence, in potential violation of *Brady*?

That is the situation we face regarding the tape recording of the 1992 interview of Bridges. The Supreme Court of North Carolina remanded the MAR court's initial denial of Burr's petition in order for the State to comply with N.C. Gen. Stat. § 15A-1415(f). At the time, that statute required the State, "to the extent allowed by law, [to] make available to [a] capital defendant's counsel the complete files of all law enforcement and

prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant."[11] N.C. Gen. Stat. § 15A-1415(f) (1996). So, here, the *state courts* did not prohibit Burr from obtaining the tape recording in question. Rather, it was the *State* that failed to comply by turning over all relevant documents.[12]

The U.S. Supreme Court has contemplated a similar scenario in dicta—dicta that we partially relied on in *Winston II*. *Pinholster* held that, for claims adjudicated on the merits in state court, the petitioner "must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Pinholster*, 563 U.S. at 185. In dissent, Justice Sotomayor criticized that interpretation as precluding relief for some petitioners with *Brady* claims. She contemplated the following scenario, which is not unlike the situation before us now: A petitioner "diligently attempt[s] in state court to develop the factual basis of a claim that prosecutors withheld exculpatory witness statements in violation of *Brady*," but "[t]he state court denie[s] relief on the ground that the withheld evidence then known d[oes] not rise to the level of materiality required under *Brady*." *Id.* at 214 (Sotomayor, J., dissenting). However, before the deadline for filing a federal habeas petition passes, "a state court orders the State to disclose additional documents the petitioner had timely requested under the State's public records Act. The disclosed documents reveal that the State withheld other exculpatory witness statements, but state law would not permit the petitioner to present the new evidence in a successive petition." *Id.* at 214–15. Justice

[11] The same statutory requirement exists today, but it is no longer restricted to capital defendants.

[12] Whether that failure was intentional or accidental is irrelevant for *Brady* purposes. *Brady*, 373 U.S. at 87.

Sotomayor noted that "it is unclear how [such a] petitioner can obtain federal habeas relief after" *Pinholster*. *Id.* at 215.

In a responsive footnote, the *Pinholster* majority "suggested . . . that the prohibition on new evidence might not always apply." *Hanna v. Ishee*, 694 F.3d 596, 606 (6th Cir. 2012). The Court stated that, while it "d[id] not decide where to draw the line between new claims and claims adjudicated on the merits," the facts of Justice Sotomayor's hypothetical "may well present a *new claim*." *Pinholster*, 563 U.S. at 186 n.10 (majority opinion) (emphasis added). The majority made this assertion even though, in the stated hypothetical, "the new evidence merely *bolster[ed]* a *Brady* claim that was adjudicated on the merits in state court." *Id.* at 215 (Sotomayor, J., dissenting) (emphasis added). And our decision in *Winston II* relied in part on *Pinholster*'s "tacit acknowledgment that [a] hypothetical petitioner [presenting a *Brady* claim] would be free to present new, material evidence." *Winston II*, 683 F.3d at 501.

We are left, however, with a plethora of unanswered questions. Most notably for present purposes, even if we can consider new *Brady* evidence—as *Pinholster* suggests and as we noted in *Winston II*—what does that mean for our standard of review?[13] Our

[13] Another question posed by this case, but which we need not answer here, is whether it matters that the State did not object below to the inclusion of the 2015 transcript in the record, that the district court opted to include it in the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases, that the State has not appealed that ruling, or that the State continues to take the position that we can review the 2015 transcript. Our sister circuits have suggested the answer is no. *See Frazier v. Bouchard*, 661 F.3d 519, 528 (11th Cir. 2011) (holding that *Pinholster* precluded the court from considering "the expanded record[] presented to the district court" under Rule 7); *Moore v. Mitchell*, 708 F.3d 760, 780, 782 (6th Cir. 2013) (applying *Pinholster*'s prohibition on new evidence even "when

Winston line of cases considers the *entire claim*, not just the new evidence, de novo, albeit with the appropriate deference to the state court for factual findings it could actually make based on the evidence before it. *See id.* at 492–93, 496–97, 500–01 (affirming a grant of habeas relief after having remanded to the district court to reconsider the entire claim de novo—with deference to "relevant factual findings made by the state court" under § 2254(e)(1)—where the petitioner alleged his trial attorneys were ineffective for failing to raise a claim that "his mental retardation categorically barred imposition of a death sentence" and where new evidence did not fundamentally alter the claim so as to render it unexhausted); *Valentino*, 972 F.3d at 576 (noting that if the claim was not adjudicated on the merits by the state court, "we must remand to the district court for *de novo* review and a possible evidentiary hearing"). Arguably, the same rule should apply for *Brady* claims: although individual pieces of evidence could be analyzed either de novo or with § 2254(d) deference, depending on whether or not they were before the state court, *Brady* also asks us to consider evidence in the aggregate. *Juniper*, 876 F.3d at 568. An aggregate review is more easily performed if all of the evidence is to be reviewed under the same standard.

That said, our sister circuits considering *Brady* claims post-*Pinholster* have taken approaches that differ both from each other and from our *Winston* approach. The Sixth Circuit has evaluated the previously disclosed evidence that was before the state court

---

the parties jointly move to expand the record," reasoning that "by agreeing to look at evidence beyond the state record[,] we would be permitting the parties to declare their own standard of review"); *Champ v. Zavaras*, 431 F. App'x 641, 655 (10th Cir. 2011) ("Although [*Pinholster*] dealt with new evidence that the district court admitted in the context of an evidentiary hearing, this newly articulated rule applies with equal force to any expansion of the record under Habeas Rule 7.").

under the § 2254 standard, while evaluating evidence discovered during the federal habeas proceedings de novo to determine whether it supported a *Brady* claim. *Jones v. Bagley*, 696 F.3d 475, 486–87 (6th Cir. 2012); *see also Hanna*, 694 F.3d at 610 (reviewing new evidence de novo). By contrast, the Ninth Circuit has evaluated the new materials only to determine if, combined with the old materials, they presented a "potentially meritorious" *Brady* claim, at which point the court remanded the case to the district court with instructions to stay federal proceedings so the petitioner could present his claim "in the first instance to [the] state court." *Gonzalez v. Wong*, 667 F.3d 965, 972 (9th Cir. 2011).

We need not, and do not, resolve this question today. Even assuming, purely for the sake of argument, that we may consider the entirety of Burr's *Brady* claim de novo, we would still affirm the denial of Burr's petition. *See Stokley v. Ryan*, 659 F.3d 802, 809 (9th Cir. 2011) (analyzing a claim assuming that *Pinholster* did and, alternatively, did not apply, and holding that "[e]ven considering the new evidence, we conclude that [the petitioner] has not presented a colorable claim of ineffective assistance of counsel"); *Hanna*, 694 F.3d at 610 (opting to deny a *Brady* claim related to newly discovered evidence on the merits, notwithstanding a failure to exhaust).

We need not dwell long on the evidence that was before the state MAR court. For the reasons discussed at length above, Burr has not shown that the suppressed transcripts, individually or in combination, were material for *Brady* purposes—that there "is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Horner*, 995 F.3d at 206 (quoting *Bagley*, 473 U.S. at 682). Although our analysis above paid due deference to the state MAR court, it

would not change if we were to consider the evidence de novo. Burr has not come close to establishing that the jury would not have found him guilty had the defense been aware of the suppressed transcripts, which would have provided at most cumulative or tangential impeachment opportunities.

That analysis does not change when we consider the 1992 transcript first fully revealed in 2015, which was not before the state MAR court. Burr's counsel conceded below that this "new" evidence was largely duplicative of evidence already in the record. And several details he focuses on before this Court were actually included in evidence he had access to during the trial or MAR proceedings.[14]

The only truly new evidence Burr points to is that the full transcript "reveals that the prosecutors spent considerable time with Bridges showing her autopsy pictures and attempting to distinguish between the bruising caused by medical treatment and the bruises caused by the abuse." Opening Br. at 26. Burr contends that "the prosecutors described the

[14] Burr cites Bridges's description of Scott's fall, but that or a materially indistinguishable description was included in a version of the transcript that Burr concedes was formerly provided to him. Another detail, which Burr describes as "a previously undisclosed accusation of abuse towards Susie," was in fact discussed at trial. Opening Br. at 26 (citing J.A. 5528–29 (describing an incident in which Bridges's niece accidentally tripped over Susie's car seat)); *see, e.g.*, J.A. 2349–51 (trial testimony about this incident). Similarly, Burr argues that the transcript shows that "interviewers further questioned Bridges about whether she beat Susie and how she could not notice that her daughter's arms and legs had been broken for some time." Opening Br. at 26. But that, too, was discussed at length at trial. Finally, there is *no* evidence in the newly disclosed transcript (or anywhere else in the record) regarding "an incident when Bridges slapped her infant out of a car seat with such force that she flew across the floor," as Burr claims. *Id.* at 29; *see also id.* at 43.

bruises they believed were caused by medical care [to Bridges] so that her testimony could be confined to bruises that existed before Susie went to the hospital." *Id.*

But, at trial, the sources of the bruising were exhaustively covered by the pathologist. In front of the jury, the pathologist drew circles on photographs of Susie's body to note which bruises were caused by medical interventions such as the insertion of intravenous lines. Bridges's trial testimony regarding which bruises were present on Susie before her trip to the hospital was cumulative to that of a medical expert aware of the types of bruising that would be caused by medical intervention, so evidence that would have impeached Bridges's testimony on that point is of limited value. *Cf. Juniper*, 876 F.3d at 571 ("Suppressed evidence that would be cumulative of other evidence . . . is generally not considered material for *Brady* purposes." (quoting *Johnson*, 705 F.3d at 129)).

Further, the transcript does not directly undermine Bridges's testimony. At most, the suppressed transcript would have provided the defense an opportunity to impeach Bridges's cumulative testimony on this point by questioning her about alleged coaching by the prosecution related to the bruises. We conclude that this evidence is not enough to support a *Brady* claim. Burr "has not convinced us that there is a reasonable probability that the jury would have returned a different verdict if [Bridges's] testimony [about Susie's bruises] had been . . . impeached" in this manner. *Strickler v. Greene*, 527 U.S. 263, 296 (1999).

Finally, in the circumstances of this case, where the new material is of the same kind as, and largely cumulative of, the old material, and relates only to a tangential issue, we readily conclude that considering the transcript finally revealed in 2015 would not alter our

calculation above regarding the "aggregate effect" of the evidence. *Cf. Jones*, 696 F.3d at 489 (concluding that the new evidence did not tip the scales of the "cumulative effect" because there was "otherwise strong circumstantial evidence of [the petitioner's] guilt").

Accordingly, we leave the questions surrounding the *Brady* exception to *Pinholster* for another day when the issue has been more squarely presented and more thoroughly briefed. Even considering all the suppressed evidence, old and new, de novo, we conclude that Burr cannot satisfy *Brady*.

IV.

This is a deeply serious case, both because of the nature of the crime and because of the punishment. But our standard of review renders the analysis of the only claims before us straightforward. Under § 2254(d), the state court's judgment stands unless it is contrary to or involves an unreasonable application of clearly established federal law, or unless it is based on an unreasonable determination of the facts. And here, the MAR court did not base its decision on an unreasonable determination of the facts, nor did it unreasonably apply the principles the Supreme Court laid out in *Brady* and *Napue*. Even if we consider the suppressed transcript that was not before the state court, moreover, our analysis does not change. We affirm the district court's decision to deny the petition for habeas relief.

AFFIRMED

APPENDIX C

FILED: August 12, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-5
(1:01-cv-00393-WO-JEP)

JOHN EDWARD BURR

Petitioner - Appellant

v.

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

Respondent - Appellee

O R D E R

Upon consideration of the appellant's preliminary brief filed pursuant to this court's Local Rule 22(a), the court grants appellant a certificate of appealability.

A copy of this order shall be sent to the clerk of the district court.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOHN EDWARD BURR,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:01CV393
	)	
DENISE JACKSON,[1]	)	
Warden, Central Prison	)	
Raleigh, North Carolina,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

OSTEEN, JR., District Judge

Petitioner John Edward Burr, a prisoner of the State of North Carolina, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C § 2254, (Doc. 2), on April 12, 2001, which this court granted, (Docs. 139, 140), on May 30, 2012. The United States Court of Appeals for the Fourth Circuit reversed the judgment, (Doc. 149), on March 11, 2013, and remanded Petitioner's case to this court for further proceedings. After additional briefing and argument, the court finds that Petitioner is not entitled to relief and therefore denies the Petition.

[1] Denise Jackson succeeded Mr. Carlton Joyner as Warden at Central Prison. The case caption is hereby amended to accurately reflect Ms. Jackson as the Respondent.

I. BACKGROUND

On April 21, 1993, a jury in the Superior Court of Alamance County convicted Petitioner of first-degree murder, felonious child abuse, and assault on a female for the August 25, 1991 killing of four-month old Tarissa Sue O'Daniel (Susie).[2] The jury recommended a death sentence for the murder conviction, and the judge imposed that recommendation. (Recommendation (Doc. 28) at 1.) The state supreme court affirmed the conviction and sentence on September 8, 1995, State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (1995), and the Supreme Court of the United States denied a petition for certiorari, Burr v. North Carolina, 517 U.S. 1123 (1996). (Recommendation (Doc. 28) at 2)

Petitioner then filed a Motion for Appropriate Relief (MAR) in the Alamance County Superior Court on September 27, 1996. (Id. at 2.) The court granted the State's motion for summary denial on October 3, 1997. (Id.) The North Carolina Supreme Court remanded the case for reconsideration on July 29, 1998. (Id.); State v. Burr, 348 N.C. 695, 511 S.E.2d 652 (1998). The superior court again denied the MAR on June 15, 2000. (Recommendation (Doc. 28) at 2.) The state supreme court

[2] The court has drawn the factual history of the case, except where otherwise cited, from the Magistrate Judge's original Order and Recommendation of December 14, 2004, (Doc. 28).

affirmed the denial on October 9, 2000. State v. Burr, 352 N.C. 677. 545 S.E.2d 439 (2000).

Petitioner filed his habeas petition in this court on April 12, 2001. (Recommendation (Doc. 28) at 3.) In his petition, Petitioner alleged twenty-four grounds for relief, including two claims for ineffective assistance of counsel ("IAC"), arguing that (1) trial counsel were constitutionally ineffective because they failed to develop exculpatory evidence of accidental death, and (2) trial counsel were not adequately prepared. (Id.) Petitioner also included a claim that the trial court had committed constitutional error by failing to grant Petitioner a continuance for further trial preparation. (Id.) In his original analysis of Petitioner's claims, the Magistrate Judge determined that these three contained Petitioner's "primary contentions," which alleged that Petitioner's trial counsel were not able to and did not develop a theory of the case that the cause of Susie's death was an accidental fall she suffered on the day before her death. (Id. at 5-6.)

According to the evidence presented at trial, Petitioner, while he was estranged from his wife, began dating Lisa Porter Bridges, Susie's mother, when Susie was a few weeks old. (Id. at 7.) Upon discovery of this affair, John O'Daniel, Bridges' husband, demanded a divorce, and Bridges and her four children

moved into a trailer located behind a trailer owned by Bridges' step-brother, Donald Wade. (Id.) Near the end of June 1991, Petitioner moved into the trailer with Bridges and her children. (Id.) The trailer was not connected to a power grid, so to get electricity, Bridges and Petitioner had run extension cords into the trailer from a nearby pole with an outlet. (Trial Tr. (Vol. 17) at 49-50, 53, Mar. 29, 1993.)[3]

Bridges testified that the relationship with Petitioner began well, but that after he moved into the trailer, he became physically and verbally abusive toward her. (Recommendation (Doc. 28) at 7.) Bridges and Petitioner also began to argue a great deal. (Trial Tr. (Vol. 17) at 88-89, 93, 107-10.) On August 24, 1991, Bridges and Petitioner spent most of the day arguing because Petitioner had spent the previous night at his wife's apartment. (Recommendation (Doc. 28) at 7.) While Bridges tended the baby and her older children played around the yard between the two trailers, Petitioner did general maintenance work in and around the trailer. (Trial Tr. (Vol. 17) at 119-20.)

Eventually, Bridges grew tired of arguing and decided to spend some time in her brother's trailer. (Id. at 121-22.) She asked her seven-year-old son, Scott Ingle, to carry Susie up the

[3] Transcript citations refer to the Jury Trial Transcript filed manually with the Respondent's motion to dismiss. (See Doc. 8; Docket Entry 05/11/2011.)

small hill to the trailer. (Recommendation (Doc. 28) at 7; Trial Tr. (Vol. 17) at 121.) On the way up, Scott tripped over the extension cord on the path and fell to the ground with Susie. (Id.; Trial Tr. (Vol. 17) at 122.) Importantly, Scott testified that Susie never actually hit the ground, but that he cradled her in his arms as he fell to his knees. (Trial Tr. (Vol. 20) at 866-68, Apr. 1, 1993.) After the fall, Bridges and Petitioner checked Susie for injuries and, finding only redness on her arm, soothed her from the shock and continued about their day. (Recommendation (Doc. 28) at 7; Trial Tr. (Vol. 17) at 123-26.)

Petitioner spent the rest of the evening mowing the lawn, while Bridges cared for her children. (Id.; Trial Tr. (Vol. 17) at 127.) At some point during the evening, after more bickering, Bridges started to walk up to her brother's trailer, and Petitioner struck her in the back. (Id.; Trial Tr. (Vol. 17) at 133.) They both went into the brother's trailer and argued. (Id.) When they returned to Bridges' trailer, they were still arguing as Bridges placed Susie in an infant swing in the front room. (Id.) Petitioner then pushed Bridges onto the couch, narrowly missing the swing. (Id.) Petitioner held Bridges down on the couch and attempted to prevent her from leaving the room. (Id. at 8.)

Eventually, Bridges went into the bedroom. (Id.) Petitioner followed her and pushed her down onto the waterbed, causing the base to break. (Id.) The couple started to repair the base of the waterbed, when Susie began to cry. (Id.) Bridges retrieved Susie, calmed her, and placed her on the waterbed. (Id.) She then helped her sons Scott and Tony prepare for bed. (Id.) After she got Susie to fall asleep, she placed her in her baby bed in the bedroom and went back to her brother's trailer so that she could wash dishes. (Id.) She testified that when she left the trailer, Petitioner was working on a plug in the living room, and Susie had no marks on her. (Id.)

Scott testified that while his mother was away, he awoke to "hammer noises" and heard Susie crying. (Id.) He also heard Petitioner mumbling. (Id.) Then Susie stopped crying. (Id.)

Bridges returned to her trailer after forty-five minutes to find Susie in the infant swing in the living room. (Id.) She also found the Petitioner pacing; he told her to look at Susie. (Id.) Petitioner explained that he had moved Susie to the swing when she awoke crying and that he had seen bruises and grease spots on her when he moved her. (Id.) When Bridges attempted to clean off the grease, she discovered that the spots were instead bruises in Susie's ears, under her neck, and on her arms and

legs. Id. She also noticed that Susie's eyes did not "look right" and that the child was unresponsive. (Id.)

Bridges was worried and suggested that they take Susie to the hospital, but Petitioner refused. (Id. at 8-9.) Bridges instead called a hospital from her brother's trailer and was advised to bring Susie in for an examination. (Id. at 9.) Bridges then convinced Petitioner to drive them to the hospital by threatening to call an ambulance. (Id.) On the way to the hospital, while Susie was "jerking," Petitioner stopped to get gas in his truck. (Id.)

At 2:55 a.m. on August 25, 1991, Susie was admitted to the Alamance County Hospital, where she was examined and treated by Dr. Will Willcockson. (Id.) Dr. Willcockson observed that Susie was unconscious, with wandering eyes, and that she appeared lethargic but suffered from occasional seizures that caused twitching. (Id.) He noted that she had multiple bruises and swelling over her head, ears, face, neck, arms, and torso. (Id.) Upon having X-rays taken, the doctor discovered that both legs, both arms, and some ribs were broken. He also observed that the soft spot on her head was bulging, which indicated that her brain was swelling. (Id.) Although Bridges told Dr. Willcockson about Scott's falling with Susie the previous day, Dr. Willcockson did not believe that a fall could have produced

Susie's injuries. (Id.) He suspected that Susie had been abused and called the Alamance County sheriff's department and social services. (Id.)

Less than two and a half hours after Susie was admitted to Alamance County Hospital, doctors had her transferred by ambulance to the intensive-care unit at Memorial Hospital in Chapel Hill, where she was examined by Dr. Michael Azizkhan, chief of pediatric surgery and associate professor of surgery at the University of North Carolina. (Id. at 10.) Dr. Azizkhan observed significant bruising on Susie's neck, particularly on the left side and in a two-by-two-centimeter section under the mastoid and mandible. (Id.) He noted that the bruising on the right side of Susie's face extended onto her ear. (Id.) She also was bruised around her right arm and on her back. (Id.) Dr. Azizkhan testified that Susie had lost "half of her blood volume" and that her bones could only have broken with significant force. (Id.) He opined that her injuries were purposely inflicted. (Id.)

Professor of pediatric radiology Dr. David Merten testified regarding his analysis of Susie's X-rays. (Id.) Dr. Merten opined that the fractures in Susie's thigh bones may have been eight-to-nine days old and had to have been "produced simply by bending the knee[s] with violence, significan[t] force, forward,

and hyperextending [the knees.]" (Id.) He also discussed the fractures in Susie's shoulders, dating them as more recent than the thigh fractures and describing the bending motion it would have taken to break the arms in those places. (Id.) He testified that Susie also had a depressed skull fracture in an unusual place with brain swelling and injury; he opined that this injury took place within hours before Susie's admission to the hospital. (Id. at 10-11.)

Child neurologist Dr. Michael Tennison testified regarding Susie's depressed skull fracture, which he observed after analyzing a CT scan of Susie's head. (Id. at 11.) Noting that Susie had "multifocal intercranial injuries," as well as bleeding behind both eyes, he opined that the skull fracture was caused by "quite a force . . . by some blunt object" to the side of the head. (Id.)

The doctors could not reduce the swelling in Susie's brain, and she died at approximately 6:30 p.m. on August 27, 1991. Dr. Tennison concluded that the cause of death was brain swelling, herniation, and death caused by multiple trauma to the head. (Id.) Pathologist Dr. Karen Chancellor, who performed an autopsy, testified that Susie had multiple bruises on her neck consistent with marks caused by a hand and bruises on her cheek

consistent with marks caused by fingers. Bruises on her back and head were caused by a blunt object. (Id.)

Petitioner's evidence about the events of August 24 was nominally consistent with the State's account of the day's activities but denied any abuse of Bridges or Susie. (Id.) In describing the most crucial events of the night, Petitioner testified that he continued to repair the waterbed when Bridges went to her brother's trailer to wash dishes. (Id. at 12.) Susie was in her crib at that time, and when he looked to seek if he had awakened her with drilling noises, he noticed her eyes were open. (Id.) He then picked her up and put her in the swing in the living room, with her bottle and blanket. (Id.) Petitioner testified that when Bridges returned to the trailer, they both repaired the waterbed, then Petitioner retrieved Susie from the swing and noticed her diaper was wet. (Id.) He stated that when he picked up Susie's legs, her eyes started rolling, and he told Bridges that she was having a seizure. (Id.) Petitioner then claimed that Bridges gently shook Suzie to stop the seizure. (Id.) When they took her out of the bedroom, they noticed bruises. (Id. at 13.

Petitioner denied that he beat Susie and that he initially refused to take her to the hospital. (Id.) His defense team attempted to shift the blame to Bridges, with testimony that she

had been accused of neglect of her other children and that one witness saw her once smack Susie, causing her to fall off a couch. (Id.) Petitioner's trial counsel also suggested that a stranger may have come into the trailer and hurt Susie. (Doc. 123 at 42 (citing Trial Tr. (Vol. 27) at 2172-73, Apr. 15, 1993).) The jury did not believe Petitioner's version of the case and convicted him of Susie's murder, recommending that he be sentenced to death.

In his original Order and Recommendation, filed on December 14, 2004, the magistrate judge recommended that the court grant habeas relief on Petitioner's claim that he was deprived of his Sixth Amendment right to effective assistance of counsel during the guilt phase of his trial. (Recommendation (Doc. 28) at 16.) The magistrate judge concluded that trial counsel had "an inadvisably short period of time to prepare for a capital murder trial," particularly for a complex one with "crucial expert medical testimony," and other obstacles preventing their ability to prepare a defense. (Id. at 20-21.) The magistrate judge further concluded that trial counsel "made no significant investigation into the medical evidence regarding Susie's death," nor did they hire a medical expert to examine that evidence. (Id. at 24.) In considering the prejudice prong of the IAC analysis, the magistrate judge noted that Petitioner

had proffered expert medical opinions that Susie's death was the result of her accidental fall, aggravated by the medical condition osteogenesis imperfecta (OI), which causes a child's bones to be unusually brittle and prone to breaking. (Id. at 27.) Because trial counsel failed to investigate other medical reasons for Susie's death and thus failed to present a potentially viable defense, the magistrate judge concluded that the state MAR court's application of Strickland v. Washington, 466 U.S. 668 (1984), was unreasonable and recommended Petitioner's habeas petition be granted on the basis of IAC. (Recommendation (Doc. 28) at 30-31, 38, 44.

In response to objections and motions for discovery, the magistrate judged entered an order staying the recommendation and permitting expansion of the record on February 1, 2006. (Doc. 68). The court allowed this supplementation of the record because it found that information regarding the revocation of the medical license of one of Petitioner's experts "would cause the Court, at the very least, to afford his opinion considerably less weight than previously assigned in the Recommendation." (Doc. 123 at 2.) After both parties submitted other expert testimony, conducted additional discovery, and filed supplemental briefs, the magistrate judge filed an Order and Supplemental Recommendation on May 6, 2009. (Doc. 123.)

In the supplemental recommendation, the magistrate judge re-entered and incorporated his original recommendation, except as to his discussion of the evidence presented by the Petitioner's expert. (Suppl. Recommendation (Doc. 123) at 3.) The magistrate judge then supplemented his opinion with a discussion of the new evidence added to the record. The new evidence factored into the court's analysis of the prejudice prong of Strickland and did not change the court's original conclusion about Petitioner's having received constitutionally ineffective assistance of counsel.

After timely objections and responses and a de novo review, on May 30, 2012, this court adopted the Original Report in full and the Supplemental Report in part, (Doc. 139), ordering that the writ of habeas corpus be granted because Petitioner received constitutionally ineffective assistance of counsel. The court based its findings only on the record that was before the State MAR court, in compliance with Cullen v. Pinholster, 563 U.S. 170 (2011). The court made clear that its analysis was consistent with the "double deference" standard that should be applied to habeas corpus review of IAC claims, as highlighted in Harrington v. Richter, 562 U.S. 86 (2011).

In an unpublished, per curiam opinion, the United States Court of Appeals for the Fourth Circuit reversed the grant of

habeas corpus on March 11, 2013. Burr v. Lassiter, 513 F. App'x 327 (Mar. 11, 2013). (Doc. 149.) The Fourth Circuit ruled that "the district court's decision granting Burr relief is contrary to the deference that federal courts must afford state court decisions adjudicating the merits of such constitutional claims." Id. at 329. The court found that the State MAR court's decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103. It concluded that the State court's finding of no deficient performance under Strickland was not unreasonable and that the State court did not rule unreasonably when it rejected Petitioner's proffered evidence on OI and the fall with Scott under the Strickland prejudice prong. Burr, 513 F. App'x at 345. Concluding that the State MAR court's rejection of Petitioner's IAC claims was not unreasonable, the Fourth Circuit reversed the ruling of this court.

Following the Fourth Circuit's ruling, this court held telephone conferences with counsel, (see Minute Entry 03/25/2015 and 04/24/2015), to determine the appropriate process. An order was entered providing for additional briefing. (Doc. 156.) In January, 2016, oral argument was held and the remaining claims are ripe for resolution.

Because this court originally granted the petition on the basis of Petitioner's IAC claims alone, on remand, the court must consider Petitioner's remaining grounds for relief. Those claims include:

- Ground Four: The State knowingly presented false evidence and created a materially false impression regarding the facts of the case and the credibility of the witnesses, in violation of Napue v. Illinois, 360 U.S. 264 (1959). (**Brady/Napue Claims**)
- Ground Five: The State failed to reveal exculpatory evidence of other explanations for the injuries to Susie in violation of Brady v. Maryland, 373 U.S. 85 (1963). (**Brady/Napue Claims**)
- Ground Six: The State affirmatively presented the case against Petitioner in a false light. (**Brady/Napue Claims**)
- Ground Seven: Newly discovered evidence warrants a new trial.
- Ground Eight: The trial court denied Petitioner the right to counsel by ruling that defense counsel could not attempt to rehabilitate any venire-person who had been challenged by the prosecution based on that person's ability to vote for a death sentence. (**Jury-Selection Claims**)

- Ground Nine: The trial court erroneously dismissed a juror who may have been able to vote for a death sentence. (**Jury-Selection Claims**)
- Ground Ten: The trial court erroneously excluded evidence regarding Lisa Bridges.
- Ground Eleven: The trial court erroneously overruled an objection to prosecutorial misconduct. (**Prosecutorial Misconduct**)
- Ground Twelve: The trial court erroneously denied a motion to order that Lisa Bridges' medical records be made available to defense counsel.
- Ground Thirteen: The trial court erroneously allowed the prosecutor to argue beyond the facts of the case during the penalty phase of the trial. (**Prosecutorial Misconduct**)
- Ground Fourteen: The trial court erroneously overruled an objection to improper argument the prosecutor made during the penalty phase of the trial. (**Prosecutorial Misconduct**)
- Ground Fifteen: The trial court failed to give a jury instruction that adequately limited the unconstitutionally vague aggravating factor that the murder was "especially heinous, atrocious, or cruel." (**Jury-Instruction Claims**)
- Ground Sixteen: The trial court erroneously failed to prevent the prosecutor from misstating the law regarding

the aggravating circumstance found in the case. (**Prosecutorial Misconduct**)

- Ground Seventeen: The trial court erroneously failed to instruct the jury regarding the mitigating factor that Petitioner had the ability to adjust to prison life. (**Jury-Instruction Claims**)
- Ground Eighteen: The trial court erroneously instructed jurors to decide whether non-statutory mitigating circumstances have mitigating value. (**Jury-Instruction Claims**)
- Ground Nineteen: The trial court erroneously instructed the jury regarding the weighing of aggravating and mitigating circumstances. (**Jury-Instruction Claims**)
- Ground Twenty: North Carolina's death penalty procedure is unconstitutional, and Petitioner's death sentence was imposed in an arbitrary and capricious manner, and constructive denial of counsel made his conviction and sentence constitutionally unreliable. (**IAC**)
- Ground Twenty-One: Trial counsel were constitutionally ineffective in their pre-trial practice. (**IAC**)
- Ground Twenty-Two: The jury was improperly death-qualified. (**Jury-Selection Claims**)

- Ground Twenty-Three: Trial counsel were constitutionally ineffective because they failed to develop mitigation evidence. (**IAC**)
- Ground Twenty-Four: The indictment did not include all of the essential elements of first-degree murder and did not allege the aggravating factors necessary to make Petitioner eligible for a death sentence.

The court has organized Petitioner's grounds for relief according to what the court has determined is each claim's argument. Both Petitioner and Respondent briefed the remaining issues originally and have also submitted additional briefs since the Fourth Circuit's ruling. After consideration of all of the remaining issues and arguments, the court denies the petition.

II. DISCUSSION

When a habeas corpus claim has been "adjudicated on the merits in state court proceedings," a federal district court may not grant relief unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.

§ 2254(d); see also Williams v. Taylor, 529 U.S. 362, 412 (2000). "Clearly established Federal law" includes only "the holdings, as opposed to the dicta," of the Supreme Court of the United States. Williams, 529 U.S. at 412. A state court decision is "contrary to"-Supreme Court precedent if the state court decision either "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different" from the Court. Id. at 405-06.

A state court decision involves an "unreasonable application" of Supreme Court case law "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." Id. at 407. "Unreasonable" does not mean merely "incorrect" or "erroneous." Id. at 410-11. "[E]ven 'clear error' will not suffice." White v. Woodall, 572 U.S. 415, 419 (2014) (quoting Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003)). "[A]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any

possibility for fairminded disagreement." Harrington, 562 U.S. at 103.[4]

Section 2254 provides that the state court's determination of factual issues is "presumed to be correct" and may only be overturned by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); Lenz v. Washington, 444 F.3d 295, 300 (4th Cir. 2006). Additionally, a federal court "will not overturn the [trial] court's credibility judgments unless its error is 'stark and clear.'" Elmore v. Ozmint, 661 F.3d 783, 850 (4th Cir. 2011) (quoting Cagle v. Branker, 520 F.3d 320, 324 (4th Cir. 2008)).

A. Cronic Standard

Petitioner asserts in many of his grounds that the events leading to his trial and the decisions of the trial court constructively deprived him of his Sixth Amendment right to the assistance of counsel. He relies on United States v. Cronic, 466 U.S. 648 (1984), to support the argument that when a prisoner is denied counsel entirely, prejudice is presumed. In Cronic, the Supreme Court ruled that there are some situations in which "the surrounding circumstances ma[k]e it so unlikely that any lawyer

[4] "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington, 562 U.S. at 102.

could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial." Id. at 661. Cronic describes some of those circumstances, including a complete denial of counsel at "a critical stage of [the] trial," a failure "to subject the prosecution's case to meaningful adversarial testing," and a denial of "the right of effective cross-examination." Id. at 659. Specifically, the Court cited Powell v. Alabama, 287 U.S. 45 (1932), in which the trial court appointed, on the first day of a highly publicized trial, counsel from out of state who had not prepared the case or familiarized himself with local procedure. Id. at 660. The Court then determined that petitioner Cronic did not meet these demanding standards, even though his counsel was a young real-estate lawyer who was trying his first jury case and who only had twenty-five days to prepare a defense in a check-kiting case that involved thousands of documents. Id. at 649-50, 666. Cronic sets forth a very difficult standard to achieve.

Petitioner points to the following facts to support his Cronic claims: (1) his first appointed trial attorneys did virtually "no investigation or trial preparation," logging only fifty-one hours of preparation, in the sixteen months before they were replaced a month before trial; (2) his second set of

attorneys, who represented him at trial, only had two months to prepare to try the case; and (3) the court refused to grant a continuance to his attorneys when they asserted a need for further time to prepare the case. (Doc. 12 at 9-11.)[5]

Respondent argues that Petitioner did not fairly present his Cronic claims to the State courts and therefore has not exhausted them. (Doc. 11 at 5.) For a federal habeas court to have jurisdiction to consider a petitioner's claim, the petitioner must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). The Supreme Court has emphasized the importance of exhaustion to habeas cases:

> Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.

O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). A petitioner satisfies the exhaustion requirement by "'fairly present[ing]' his claim in each appropriate state court . . . thereby alerting

[5] All citations in this Memorandum Opinion and Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

that court to the federal nature of the claim." Baldwin v. Reese, 541 U.S. 27, 29 (2004) (quoting Duncan v. Henry, 513 U.S. 364, 365-66 (1995)). To present the claim fairly, the petitioner must allege "both the operative facts and the controlling legal principles" before the state court. Jones v. Sussex I State Prison, 591 F.3d 707, 713 (4th Cir. 2010). Failure to exhaust claims by allowing the state court an opportunity to rule on the claim requires a federal court to dismiss those claims as procedurally defaulted. See O'Sullivan, 526 U.S. at 848 (citing Coleman v. Thompson, 501 U.S. 727, 731-32 (1991)).

To the extent that any of Petitioner's grounds for relief rely on the Cronic standard of presumed ineffective assistance of counsel, this court finds that Petitioner did not present them as such to any state court. Petitioner relies on Cronic and the effective denial of counsel in Grounds Twenty through Twenty-Three. Petitioner presented the last three of those claims as standard Strickland claims to the state MAR court, which denied them on their merits. Ground Twenty is an overall Cronic claim that Petitioner never presented to any state court. Because Petitioner did not "give the state courts one full opportunity to resolve any" of his Cronic claims, they are not exhausted and have been procedurally defaulted by the Petitioner.

B. IAC Claims Decided by the Fourth Circuit

The Fourth Circuit reversed this court's ruling on Petitioner's claims that his trial counsel provided constitutionally ineffective assistance. Burr, 513 F. App'x at 329. Those claims encompassed Grounds One, Two, and Three. Consequently, the court denies Grounds One, Two, and Three.

C. Brady/Napue Claims

Petitioner makes a series of interconnected claims regarding the prosecutor's alleged withholding of evidence and subsequent manipulation of evidence that implicate the principles elucidated in Brady v. Maryland, 373 U.S. 83 (1963), and Napue v. Illinois, 360 U.S. 264 (1959). In Brady, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Brady, 373 U.S. at 87. Favorable evidence includes evidence that could be used to impeach a witness's credibility. Giglio v. United States, 405 U.S. 150, 154 (1972). Evidence is "material" under the Brady standard "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Cone v. Bell, 556 U.S. 449, 469-70 (2009). Evidence must be disclosed when it "could reasonably be taken to put the whole case in such a

different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435 (1995).

Napue stands for the proposition that a conviction cannot be obtained by false evidence, where the prosecutor knew a witness testified falsely and did nothing to correct the testimony. Napue, 360 U.S. at 269. The case involved a murder conviction obtained in part through the testimony of one of the defendant's accomplices. Id. at 265. When asked if he had received any promise of consideration in exchange for his testimony, the witness responded that he had not. Id. The prosecutor had indeed promised that he would recommend a reduction in the accomplice's sentence, but he did not correct the witness's testimony to the contrary. Id. at 265-66. The Court ruled that "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears," due process requires the conviction to be reversed, if that conviction was obtained using that false evidence. Id. at 269.

1. Ground Four

In Ground Four, Petitioner claims that the prosecutors withheld recordings of pretrial interviews the police and prosecutors conducted with Scott Ingle and Lisa Bridges. (Doc. 2 at 14.) Petitioner argues these recordings reveal material impeaching evidence not included at trial and demonstrate that

the prosecutors manipulated the testimony of Scott and Bridges to fit their theory of the case, in violation of Napue. (Id. at 15.) Petitioner also alleges that Bridges was promised immunity and then lied about that promise on the witness stand. The State MAR court should have thus granted relief under Giglio, 405 U.S. at 155 (reversing conviction because the prosecution failed to disclose a promise of immunity to a witness, which was relevant to that witness's credibility).

According to Petitioner, prosecutors interviewed Bridges on February 24, 1993. (Doc. 10 at 43.) During that interview, he asserts that prosecutors attempted to manipulate Bridges' testimony regarding Susie's poor health before her death, Petitioner's good relationship with Susie, and Bridges' attempts to get her family members to lie about Susie's condition. (Id. at 44-45.) Petitioner also claims that the prosecutors offered Bridges immunity in exchange for her testimony, a deal she denied existed during cross-examination. (Id. at 44.) Petitioner argues that the statements Bridges made to the prosecutors in the 1993 interview contradicted statements she had given to the police in 1991, shortly after Susie's death. (Id. at 45.) Before cross-examining Bridges, Petitioner claims that his counsel moved, consistent with N.C. Gen. Stat. § 15A-903(f), for

Bridges' prior statements, but did not receive the 1993 recording. (Id.)

Petitioner also argues that the State withheld recorded statements by Scott Ingle to prosecutors, made on February 25 and 26, 1993. (Id. at 46.) Scott was eight years old when Susie died and had turned ten by the time of this interview. (Id.) Petitioner claims that the transcript of the interview reveals that Scott did not remember what happened in 1991 and that his account of his fall with Susie differed from the testimony he gave at trial. (Id.) He argues that the prosecutors coached Scott in his testimony and manipulated him to testify to facts that best fit their theory of the case. (Id. at 46-47.) Petitioner argues that the withheld statements were material to the matters of both guilt and the credibility of Bridges and Scott. (Id. at 48.)

Respondent asserts that the State MAR court did not unreasonably apply Brady in this claim because:

> (a) trial counsel never obtained a court order directing disclosure of these items, (b) the prosecutors did not believe that either the tapes or the typed version of the comments therein contained Brady material, and (c) the prosecutors believed that the tapes and typed version of the comments therein were "work-product" nor required to be disclosed to trial counsel under state law.

(Doc. 7 at 11.) Respondent also argues that the statements from Bridges and Scott do not qualify as material or as impeachment

evidence under the Brady standard. (Doc. 11 at 22-23.) The prosecutors, they argue, were simply preparing each witness for trial and encouraging them to tell the truth. (Id.) Respondent asserts that any differences in these statements and the trial testimony were de minimus and do not undermine the testimony the jury heard. (Id. at 23.) Respondent also makes it clear that the prosecutors never promised Bridges immunity in exchange for any type of testimony. (Id. at 27.) Respondent concludes with an argument that Petitioner cannot demonstrate that he was prejudiced by not receiving transcripts of the statements, especially given the overwhelming expert evidence regarding the cause of Susie's death and the fact that he also testified. (Id. at 28.)

The state MAR court denied this claim on the merits. The court acknowledged that the prosecution did not turn over the recordings or the transcripts of these interviews before or during trial. State v. Burr, Order and Memorandum Opinion, Nos. 91-CRS-21905, -06, -08, -09, 26 (Superior Court of Alamance County June 15, 2000) [hereinafter Second MAR Order (Doc. 162-4) at 118-85]. In response to the Napue claim, the court concluded that the transcripts of the interviews showed that the prosecutors were appropriately preparing their witnesses to testify and encouraging them to tell the truth. (Id. at 158.)

Furthermore, any inconsistencies between the statements given to the prosecutors and the trial testimony were not material: the prosecutors did not encourage perjury, nor did they fail to correct perjury, because no perjury was committed. (Id. at 159.) With regard to the Brady claim, the state court concluded that the information in the undisclosed statements was not material, in that disclosure would not have resulted in a reasonably probability that the outcome of the trial would have been different. (Id.) The Petitioner, according to the court, did not suffer a violation of his due process rights because of the prosecution's treatment of this evidence. (Id.)

The Antiterrorism and Effective Death Penalty Act ("AEDPA") demands a federal court sitting in habeas-corpus review of a state conviction to presume that the factual findings made by the state review are correct unless proven otherwise by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). In regards to this claim, the state MAR court reviewed the transcripts offered as impeaching Brady material and made several factual findings, including that: Bridges did not state in her pre-trial statements or trial testimony that she ever saw Petitioner hurt Susie, (Second MAR Order (Doc. 162-4) at 160); Susie's pre-injury health conditions were the subject of extensive trial testimony, (id.); when preparing the witnesses for trial, the

prosecutors did a thorough job of challenging them, but repeatedly emphasized the importance of telling the truth, (id.) at 161-62; Bridges was not offered immunity in exchange for her testimony, (id. at 163); the prosecutors did not encourage Bridges to give false testimony, (id. at 164); Bridges was thoroughly cross-examined on any inconsistencies in her testimony, not requiring the prosecutors to correct any false testimony, (id. at 164-65); inconsistencies in Scott's testimony and pre-trial statements were explained by Scott during testimony and on cross-examination, (id. at 165-66); prosecutors repeatedly encouraged Scott to tell the truth to the court, (id. at 166-67); prosecutors did not lead Scott through his testimony so that he would implicate Petitioner, (id. at 169-71); and a medical expert testified that there was medical evidence of a shaking injury beyond a shake impact, (id. at 174.)

Petitioner has not provided clear and convincing evidence that the state court's factual findings are incorrect. This court has reviewed the trial testimony and cross-examination of Lisa Bridges and Scott Ingle, as well as the transcripts of the interviews of these witnesses conducted in both 1991 and 1993, and can find no evidence to undermine the MAR court's factual conclusions. The prosecutors were insistent in their attempts to determine the truth about Susie's health and Bridges'

relationship with Petitioner; nonetheless, they repeatedly encouraged Bridges to tell the truth on the witness stand, no matter how bad that truth made her look as a parent. (See Doc. 159-1 at 5, 8, 20-21.) The unreleased interview of Ingle likewise contains no evidence that belies the state court's determinations. The state court's conclusions that the undisclosed evidence was neither material under Brady nor violative of Napue, therefore, are not unreasonable determinations or fact or clearly established federal law. Ground Four is denied.

2. Ground Five

Petitioner asserts that the prosecution violated Brady by withholding eleven research articles regarding child abuse, accidental injury, and OI. (Doc. 2 at 15.) Petitioner claims that these articles were material because they would have provided his trial counsel with a more effective strategy to combat the State's case: namely, that the cause of Susie's death was the result of an accidental fall, not child abuse. (Id. at 15.) Petitioner further claims that the State violated Brady by choosing not to call Nita Todd, a social worker who interviewed Petitioner on August 24, 1991. (Id. at 16.) In the brief supporting his petition, however, Petitioner claims that the State violated Brady by withholding recordings of interviews

conducted by the prosecutors of Scott Ingle and Lisa Bridges. (Doc. 10 at 41.)[6]

Respondent replies simply that the State MAR court was not unreasonable when it determined that the journal articles and information provided by Todd were not Brady material. (Doc. 7 at 13.) Respondent also disputes Petitioner's claim that he specifically requested all of the prior statements of Bridges prior to cross-examination, instead pointing out that Petitioner's trial counsel only requested the tape recording of an August 26, 1991 interview conducted by the police. (Doc. 11 at 22.)

The State MAR court denied this claim on the merits. State v. Burr, Order, Nos. 91-CRS-21905, -06, -08, -09, 114 (Superior Court of Alamance County Oct. 3, 1997) (included as an exhibit at Doc. 162-4) [hereinafter First MAR Order (Doc. 162-4) at 2-117]. The court ruled that the eleven articles from medical journals "were not evidence, were materials within the public domain available to anyone researching the field[,] and the State was under no obligation to provide defendant's counsel

[6] Because Ground Four asserts the Brady claim regarding the withheld interview recordings, this court will treat the addition of the interview claim to this ground as a clerical error and will not address it here. The court has considered any additional argument Petitioner makes about this claim under the Ground Five subheading as argument relating to Ground Four.

copies of the medical journal articles while preparing for trial." (Id. at 115.) The court concluded that the articles were not Brady material because, as part of the public domain, they could have been discovered with due diligence by trial counsel. (Id.) Similarly, the court ruled that the information provided by Todd was not Brady material because defense counsel had access to Todd before the trial. (Id.) Finally, the court held that the information contained in the articles and given by Todd was not material to the outcome of the case. (Id. at 115-16.)

The state court did not apply Brady unreasonably in its resolution of this claim. Petitioner has provided no evidence that shows that he was not able to access research articles available to everyone prior to trial, nor does he prove that he was denied access to Todd before the trial. The prosecution had no duty to disclose evidence that was not exclusively in its possession. "'[T]he Brady rule does not apply if the evidence in question is available to the defendant from other sources.'" United States v. Wilson, 901 F.2d 378, 380 (4th Cir. 1990) (quoting United States v. Davis, 787 F.2d 1501, 1505 (11th Cir.), cert. denied, 479 U.S. 852 (1986)). For this reason, Ground Five is denied.

3. Ground Six

In Ground Six, Petitioner avers that by withholding the articles and witness mentioned in Ground Five, the prosecution presented its case in a materially false light. (Doc. 2 at 16; Doc. 10 at 53.) The State MAR court denied this claim on its merits. (First MAR Order (Doc. 162-4) at 115.) The court concluded that, in light of the overwhelming evidence presented by medical experts of the cause of Susie's death, "the prosecutors could not be rationally argued to have made a misrepresentation as to the nature and cause of the injuries to the infant victim." (Id. at 116-17.)

In his brief supporting his Petition, Petitioner refers the court to his arguments in Grounds Four and Five but offers no explanation of how Ground Six is, itself, a separate ground for relief. Because the court has denied Grounds Four and Five, and Ground Six does not appear to be distinct from either of those grounds, Ground Six is denied.

D. Ground Seven: Newly Discovered Evidence

Ground Seven alleges that all of Petitioner's evidence concerning OI and accidental short-fall death that he collected post-conviction amounts to newly discovered evidence that justifies giving Petitioner a new trial. (Doc. 2 at 17.) He claims that Townsend v. Sain, 372 U.S. 293 (1963), supports this

ground for relief because his claim of actual innocence based on this newly discovered evidence is accompanied by an independent constitutional violation in his trial. (Doc. 10 at 53 (citing Townsend, 372 U.S. at 317).) The underlying constitutional violation he claims is his constructive denial of counsel as understood by Cronic, which prevented his trial counsel from discovering this evidence. (Id.) Petitioner claims that the state MAR court's denial of this claim without an evidentiary hearing was unreasonable. (Id.) Further, Petitioner argues that because the state court did not recognize the underlying Sixth Amendment claim, it did not adjudicate this claim on the merits, and this court's review should be de novo. (Id. at 54.)

Respondent asserts that the North Carolina Supreme Court has established a seven-part test to determine whether evidence qualifies as newly discovered evidence, and Petitioner's proffered evidence does not pass that test. (Doc. 11 at 38.) Additionally, Respondent points out that federal habeas courts generally do not rule on state courts' determinations regarding the admissibility of evidence. (Id.)

The State MAR court denied this claim on the merits. (First MAR Order (Doc. 162-4) at 114.) After providing a thorough review of North Carolina law regarding whether newly discovered evidence should warrant a new trial and an even more thorough

review of the medical evidence presented at trial and the newly proffered evidence (including a review of other state cases that dealt with similar medical evidence), the court evaluated Petitioner's proffer of new evidence according to the standards set forth by the North Carolina Supreme Court. (See id. at 15-52.) Ultimately, the court did not believe the evidence proffered by the Petitioner that Susie had OI and that her cause of death was an accidental fall compounded by the OI. (Id. at 62.) The court concluded that Petitioner had not proven that (1) the State's experts never considered OI in evaluating Susie's injuries and cause of death, (2) Susie had any of the symptoms common among children with OI, (3) Susie had any family history of OI, and (4) Susie's brain injury could have been caused by the fall with Scott as described to the jury.[7] (Id. at 55-62.)

The court used a four-part test to determine that Petitioner was not entitled to a new trial: namely, (1) whether the proffered evidence was "probably true," (2) whether the defendant, exercising due diligence, could have discovered the evidence at the time of the trial, (3) whether the evidence would not tend only to contradict or impeach the witnesses who testified at trial, and (4) whether the evidence was of such a

[7] The court determined that the injury would have caused her to lose consciousness fairly soon after its cause.

nature to demonstrate that a different result would probably have been reached at trial. (Id. at 62.) The court concluded that Petitioner's proffer failed all four parts of the test. It thus rejected the new evidence claim. (Id.)

Petitioner appears to be arguing that this court should look at this ground for relief with fresh eyes because the state MAR court somehow did not recognize the underlying constitutional error – embodied in a Cronic claim that he never presented to that court – that would allow him to bring this claim regarding his actual innocence in a federal habeas court. To the extent that Petitioner's claim regarding his new evidence relies on the Cronic claim as a vehicle to earn federal habeas review via Townsend, that ground for relief is unexhausted and, as such, has been procedurally defaulted. Without the underlying constitutional claim, Petitioner has asserted a claim that this court cannot review. See Herrera v. Collins, 506 U.S 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."). Finally, if Petitioner is attempting to use his actual innocence claim as the gateway to assert his Cronic claim, he would have to "show that it is more likely than not that no reasonable

juror would have convicted him in light of the new evidence." Schlup v. Delo, 513 U.S. 298, 327 (1995). The Fourth Circuit's rejection of the prejudice prong of Petitioner's Strickland claim that his trial counsel were ineffective for failing to discover and present the evidence at issue in this ground for relief to the jury precludes a Schlup determination in Petitioner's favor. Burr, 513 F. App'x at 345. Ground Seven, therefore, is denied.

E. Jury Selection Claims

1. Ground Eight

In Ground Eight, Petitioner claims that the trial court prevented him from having a fair and impartial jury and from receiving the effective assistance of counsel by prohibiting defense counsel from rehabilitating those potential jurors who were excused for cause because they expressed an inability to vote for the death penalty. (Doc. 2 at 17.) Petitioner argues that this failure to question these venire members adequately about their ability to follow the law violated Witherspoon v. Illinois, 391 U.S. 510 (1968), and Adams v. Texas, 448 U.S. 38 (1980). (Doc. 10 at 55.)

The State MAR court rejected this claim on the merits and as procedurally defaulted. (First MAR Order (Doc. 162-4) at 102.) The court reviewed the voir dire transcript of each

potential juror Petitioner cites as improperly excused and concluded that the trial court itself conducted an appropriate questioning of each juror's ability to follow the law versus his or her opposition to the death penalty. (Id. at 103-04.) The court similarly reviewed the extensive voir dire of those jurypersons accepted and determined that the trial court's review of potential jurors did not violate Witherspoon or Adams. (Id. at 103-06.)

In Witherspoon, the Supreme Court held that a trial court violated a defendant's due process rights when it excused for cause potential jurors who "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon, 391 U.S. at 522. Instead of "exclud[ing] only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death," the court put together "a jury uncommonly willing to condemn a man to die" by not allowing further questioning of those venire members who showed some hesitancy toward the death penalty. Id. at 520-21. Witherspoon thus stands for the principle that a court must make the effort to discover whether a potential juror who expresses opposition to the death penalty can nonetheless follow the law and the juror's oath. Id. at 519. Adams made Witherspoon applicable to bifurcated

capital proceedings and re-emphasized that a "State may bar from jury service [only] those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths." Adams, 448 U.S. at 45, 50.

Based on a review of the transcript of voir dire, this court cannot conclude that the state MAR court unreasonably applied Witherspoon or Adams. Petitioner first complains that the trial court acted in contravention of Witherspoon by denying his motion for individual voir dire of those potential jurors who were excused for cause because of their views on the death penalty. Although the court denied that motion, it granted Petitioner's motion for more general individual voir dire. (Jury Selection Tr., 102 (Mar. 1, 1993).) The court denied the more specific motion in light of North Carolina law that prohibited rehabilitation of jurors who "state[] unequivocally . . . that [their] ability to serve on the case would substantially be impaired by [their] views on the death penalty." (Id. at 88.) Standing by itself, the decision of the trial court to abide by state law does not contradict either Witherspoon or Adams' instructions that a court may only exclude for cause those potential jurors whose opinions about the death penalty would prevent them from following the law or obeying their oaths as jurors. An unequivocal statement from a venireperson that he or

she could do neither is an appropriate ground to be excused for cause. Read in context of the entire jury selection voir dire, the denial of the motion did not hinder the court's ability to determine who would make appropriate jurors in light of Witherspoon and Adams.

Furthermore, this court's review of the lengthy jury selection process reveals that the trial court exercised considerable care to abide by both Witherspoon and Adams and to ensure that a fair jury was seated. Jury selection in Petitioner's case took around four weeks. (See Jury Selection Tr. at 1-3251.)[8] The parties and the court reviewed just under one hundred potential jurors, as reflected in the 3,251-page voir dire transcript. (Id.) From the juror pool, the court excused fifty-three potential jurors for cause, twenty-five of whom expressed an inability to follow the law regarding the death penalty and do their duty as jurors. (Id.) A total of thirty-eight potential jurors expressed either ambivalence about or opposition to the death penalty. (Id.) Of those concerned about the death penalty, fifteen expressed unequivocal opposition to capital punishment and stated that their beliefs

[8] Transcript citations refer to the Jury Selection Transcript filed manually with the Respondent's motion to dismiss. (See Doc. 8; Docket Entry 05/11/2011.)

would substantially impair their ability to follow the law and their duty as jurors.[9]

A review of the individual voir dire of the potential jurors who expressed ambivalence about the death penalty shows that either the prosecutor or the court, both with and without the prompting of defense counsel, took care to explain the death penalty process to those potential jurors and to probe their thoughts and feelings about the death penalty more closely than they did to those jurors who expressed a fixed opinion about capital punishment. (See, e.g., Jury Selection Tr. at 2731-40.)

Three of the ambivalent venire members were seated on the jury after further questioning. Adam Fuller was the first potential juror to express some ambivalence about his ability to impose a death sentence. (Id. at 286.) Mr. Fuller initially stated that he would follow the law as explained by the judge and expressed a belief in and willingness to impose the death penalty. (Id. at 285, 317.) As questioning advanced, however, he asked to return to a discussion of punishments: "About the death

[9] The State prosecutors, in conducting voir dire, were following state law guidelines, inspired by Wainwright v. Witt, 469 U.S. 412 (1985), that allowed removal of jurors for cause if they expressed that their opinions regarding capital punishment "would prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions of [their] oath." Wainwright, 469 U.S. at 424 (quoting Adams, 448 U.S. at 45).

penalty, could I go back to that a minute?" (Id. at 323.) Mr. Fuller then explained his position as a deacon in his church and his belief in the fifth commandment, expressing significant hesitation about his ability to impose the death penalty:

> Now I believe in – that we shouldn't kill, but–and then I think about the – the law of the land, that when we do wrong we shall be punished for it, so it's kind of, you know, got me tied up there in between two, so I – what I'm saying if I believe – I believe that if you do wrong you shall be punished, but as far as the death penalty, I really restrict that, I–I don't believe – I don't think we should kill. I don't think that I have a right to kill, you know, anybody.

(Id. at 323-24.) After this admission, the prosecutor continued to question Mr. Fuller about his ability to vote for a death sentence and elicited a couple of conflicting responses. (Id. at 324-26.) The prosecutor then moved to have Mr. Fuller excused for cause. (Id. at 327.) The court took over questioning, and Mr. Fuller made it clear that he would be able to vote for a death or a life sentence and to follow the law, so the court denied the motion. (Id. at 327-29.) Ultimately, he was seated on the jury. (Id. at 345.)

Similarly, Janet Bunch expressed discomfort with the death penalty and did not believe that it was a necessary law. (Id. at 1404.) Ms. Bunch's first responses to questioning about the death penalty were confusing: she first stated that she was not opposed to the punishment but did not believe it to be "a

necessary law" and did not favor it. (Id. at 1465.) She stated, however, that her beliefs regarding the death penalty would not substantially impair her performance as a juror. (Id.) After several personal questions, the prosecutor established that Ms. Bunch was having difficulty with the fact that the case involved the murder of a child. (Id. at 1411-14.) Then he returned to the death penalty and carefully explained the sentencing process. (Id. at 1440-47.) Ms. Bunch mentioned that she did not "want to really be responsible" for the decision to sentence someone to death, but she agreed that she could follow the law. (Id. at 1447-48.) Although she explained that she was "not particularly fond of a life for a life," Ms. Bunch stated that she would not automatically vote against the death penalty. (Id. at 1449-50.) She also confirmed that her views on the death penalty would not substantially impair her performance as a juror. (Id. at 1452.) The prosecutor asked her again if she could do her duty and follow the law, and she agreed repeatedly that she could. (Id. at 1455-56.) She was seated on the jury. (Id. at 1476.)

Throughout voir dire, attorneys for both sides and the court questioned the jurors about their views on the death penalty and their ability to follow the law. By confirming that jurors could apply the law and that their individual beliefs

regarding the death penalty would not substantially impair their ability to serve as jurors, the court complied with the requirements of both Witherspoon and Adams. The MAR court did not unreasonably apply these federal laws when it denied this juror-selection claim. Ground Eight is denied.

2. Ground Nine

Petitioner argues that the trial court erred by excusing a prospective juror for cause when she asserted that she could follow the law and consider a death sentence during the death-qualifying portion of voir dire. (Doc. 2 at 18.) According to Petitioner, excluding this juror violated the principles articulated in Witherspoon and Adams. (Doc. 10 at 55.) Petitioner does not name this juror in his initial Petition or supporting brief, but in his additional, post-Fourth Circuit brief outlining as-yet unbriefed issues, he identifies her as Mary Ervin. (Doc. 163 at 6.) After a searching review of the voluminous jury-selection transcript, the court has identified additional potential jurors to whom Petitioner could have been referring. The exclusion of all of these jurors, however, was consistent with both Witherspoon and Adams.

Ms. Ervin stated that she was opposed to the death penalty, but immediately followed with the assurance, "I'd abide by the law." (Jury Selection Tr., 1963-64.) She explained that she had

changed her position on the death penalty, but that she would not be substantially impaired as a juror, and in some cases, she could vote for a death sentence. (Id. at 1965-66.) After some questioning on other subjects, the prosecutor resumed asking Ms. Ervin how her views on the death penalty might affect her as a juror. (Id. at 1978, et seq.) She indicated throughout his explanation of the sentencing process that she could follow the law. (Id. at 1980-81.) Ultimately, however, she stated that she could not vote for a death sentence. (Id. at 1982.) Then, after further questioning, she changed her mind and said she could vote for the death penalty and would not automatically vote against it. (Id. at 1983.) She averred that she could follow the law. (Id. at 1986.) The prosecutor continued to question her; again she changed her mind to confirm that she would automatically vote for a life sentence. (Id. at 1987.)

Ms. Ervin became very confused during the prosecutor's questioning. She agreed that she would automatically vote against the death penalty, but then stated that her beliefs would not impair her ability to follow the law. (Id.) When the prosecutor asked for clarification, she stated, "I would vote for the death penalty, yes." (Id. at 1988.) After a recess, the prosecutor attempted to get a definitive answer on Ms. Ervin's ability to serve impartially by asking, "Are your views on the

death penalty such that they will impair substantially, make it very difficult for you to serve on this case?" (Id. at 1989.) Ms. Ervin responded in the affirmative. (Id.) She next agreed that her beliefs "would make it very difficult for [her] to follow the law if it required that [she] come to the point where [she would] vote to impose the death penalty." (Id.) Finally, she admitted that she would automatically vote for a life sentence. (Id. at 1990.)

After the prosecution moved to excuse Ms. Ervin for cause, the trial court heard the defense's argument supporting the objection. (Id.) The defense correctly pointed out that, despite Ms. Ervin's reluctance to participate in the capital sentencing process, she repeatedly stated that she could follow both the law and the judge's instructions. (Id. at 1991.) The court, noting its observation of Ms. Ervin's demeanor and her answers to the many questions posed, ruled in its discretion to remove her for cause, consistent with Wainwright and Adams. (Id. at 1994.)

This court sees no abuse of discretion by the trial court in this situation. The judge was in a better position to judge Ms. Ervin's demeanor and to evaluate her true feelings in light of her inconsistent answers to the prosecutor's many questions. See Skilling v. United States, 561 U.S. 358, 386 (2010)

("Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty."). The MAR court did not apply federal law unreasonably when it deemed this decision to be valid.

Venire member Lynda Harden initially expressed opposition to the death penalty, but she insisted that she could follow the law and perform her duty as a juror to impose a death sentence if the law required it. (Jury Selection Tr. at 695, 699, 707.) She then expressed ambivalence toward the punishment, saying that she had recently changed her position regarding it. (Id. at 699-700.) The court excused Ms. Harden for cause, but the reason was not her views on the death penalty; she had expressed a concern that her performance as a juror might be affected because she would have to cancel a long-planned vacation to see her family if she were selected. (Id. at 718.)

Petitioner's counsel objected to her removal and argued that she had stated earlier in voir dire that having to cancel her trip would not affect her performance as a juror. (Id. at 718-19.) The defense asserted that her answers suggested that

she might be prone to vote for a life sentence and that the prosecutors were giving her an "easy out" with the vacation excuse. (Id. at 720.) Although the court initially gave credit to the defense's argument, it upheld the challenge because of the juror's demeanor and obvious anxiety about her vacation plans: "it's obvious to the Court that [her vacation] is paramount in her mind, and in observing her demeanor, and in the exercise of my discretion, I'm going to excuse her for cause over the objection of the defendant." (Id. at 722.) The defense moved for a mistrial. (Id.)

With each potential juror, the prosecution asked his or her beliefs regarding the death penalty and then meticulously explained the sentencing procedure. Having set out the process in detail, the prosecutor then asked whether the potential juror could follow the law. The prosecutor even encountered a prospective juror, Dawyer Gross, who had a strong opposition to the death penalty but repeatedly insisted that he would follow the law. (See id. at 2127-57.) Recognizing that the juror fit within the federal and state law juror standards, the prosecution used a peremptory strike to remove him instead of moving for cause. (Id.) When a juror seemed unclear on the process, the court clarified and made sure questioning proceeded under Witherspoon and Adams standards. (See, e.g., id. at 1732-

58 (in which court denies motion for cause after asking clarifying questions of a venire member who was unsure of his ability to vote for a death sentence).)

The Petitioner has not proven that the state court applied federal law unreasonably when it denied his juror-selection claims. A court may exclude any potential juror for cause when it determines that the venire member cannot serve fairly and impartially for any reason. See Turner v. Louisiana, 379 U.S. 466, 471 (1965) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." (citations omitted)). Petitioner has presented insufficient evidence that the trial court violated either Witherspoon or Adams in excusing any juror for cause and has certainly not shown that the state court applied either of these cases unreasonably. Ground Nine, therefore, is denied.

3. Ground Twenty-Two

Petitioner argues in Ground Twenty-Two that his trial counsel were constitutionally ineffective for failing to question jurors regarding their opinions on the death penalty in violation of Morgan v. Illinois, 504 U.S. 719 (1992), and failing to assert appropriate challenges to strikes under Batson v. Kentucky, 476 U.S. 79 (1986). (Doc. 2 at 24.) He again alleges that the trial court constructively denied him counsel,

which prevented his counsel from presenting all of the arguments they should have as effective counsel. (Doc. 10 at 63.)

In Morgan, the Supreme Court reversed an Illinois Supreme Court decision that held that a trial court may refuse to ask prospective jurors whether they would automatically vote for a death sentence. Morgan, 504 U.S. at 729. The Court ruled that, to sustain a defendant's right to an impartial jury, a court must ensure "an adequate voir dire to identify unqualified jurors." Id. Following the rulings of Witherspoon, Wainwright, and Adams, a court must take care to see that a jury is "life-qualified," as well as "death-qualified": "Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death after conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so." Id. at 732-34. It follows that the trial court has the responsibility either to question the venire itself or to allow defense questioning to prevent the empaneling of a biased or partial jury.

Batson seeks to prevent racial discrimination in jury selection. If an attorney uses peremptory strikes in what seems to be a racially-discriminatory manner, opposing counsel may

object on the basis of Batson. Batson, 476 U.S. at 96. The defendant must make a prima facie showing that the circumstances surrounding the strike raise an inference that the prosecution struck the prospective juror because of his or her race. Id. The burden then shifts to the prosecutor to present a non-discriminatory reason for the strike. Id. The defendant may present evidence that the reason is merely pretext for racial discrimination. Id. at 98. Ultimately, the burden rests on the defendant to prove by a preponderance of the evidence that the prosecution struck the venire member with discriminatory intent. Id.

As discussed in the analysis of Grounds Eight and Nine, the State MAR court extensively reviewed the transcripts of jury selection to address each of the juror-selection claims. In addressing the juror Petitioner identified as "the best example of a missed Batson claim," the state court quoted the portions of the transcript where potential juror Gross stated that he had always been a strong opponent of the death penalty and that he would be "very reluctant" to vote for a death sentence. (First MAR Order (Doc. 162-4) at 107.) The court determined that Petitioner did not meet the prejudice requirement of Strickland in challenging his counsel's effectiveness for not making a Batson challenge to the strike. (Id. at 111.) The court found

any notion that a Batson challenge could be sustained to be "completely groundless," given the number of race-neutral reasons the prosecution could have used for striking Gross. (Id.) The court pointed to his age (81), the fact that he held a Ph.D. in religion, and his position as a Baptist minister who had always held strong beliefs in opposition to the death penalty. (Id.)

Petitioner cannot show that the State court unreasonably applied Strickland because he cannot demonstrate prejudice, or a reasonable likelihood that had counsel properly questioned jurors or objected to challenges made by the prosecution, the result of his trial would have been different. The State court found no Morgan or Batson violations. The jury selection transcripts reveal that defense counsel questioned prospective jurors on their death-penalty opinions to the extent the trial court allowed them following extensive questioning on the same by both the prosecutor and the court. When the trial court did not allow questions from defense counsel, it questioned the jurors to ensure that any potential juror who would automatically vote for the death penalty was excused for cause.

Although the defense made no Batson objections, Petitioner suffered no prejudice because he cannot prove that the prosecution violated Batson with any of its peremptory strikes.

The prosecution used thirteen peremptory strikes to remove prospective jurors. Of these strikes, seven were venire members who either opposed or were ambivalent toward the death penalty. Of the remaining six, the prosecution had legitimate, non-discriminatory reasons to excuse them all. A race-neutral reason need not be "persuasive, or even plausible," Purkett v. Elem, 514 U.S. 765, 768 (1995), as long as it is "clear, sufficiently specific and related to the particular case to be tried." Kandies v. Polk, 385 F.3d 457, 473 (2004), vacated on other grounds by Kandies v. Polk, 545 U.S. 1137 (2005). Facing no Batson objections, the prosecution was not required to articulate race-neutral reasons for its strikes. This court, however, can easily find such reasons.[10] In addition to the potential juror struck presumably because of their tepid support for the death penalty, Juror Cooke had previously employed defense counsel to represent her son, (Jury Selection Tr. at 416); Juror King was connected to Lisa Bridges through his father's dating of her son's father's girlfriend, and multiple family members had been convicted of drug charges in Alamance and surrounding counties, (id. at 617, 626-28); Juror Giffis

[10] Neither the Petitioner nor the Respondent has provided the court with a racial breakdown of the venire, so the court will proceed as if every strike by the State required an explanation under Batson.

expressed confusion about the concepts of circumstantial evidence and the burden of proof and stated that he could not convict anyone on circumstantial evidence alone, (id. at 725); Juror Riley was very nervous about what a lengthy trial might do to his job status, (id. at 1549); Juror Belton was very combative with the prosecution, knew some members of Bridges' family, and had already formed an opinion about the case, (id. at 2698); and Juror Nachborn had recently served on a criminal jury and admitted to a fellow venire member that he had read about the case in the newspaper, (id. at 2825). Although each of these prospective jurors stated that they did not believe that their individual experiences and opinions would impact their performance as jurors, their voir dire answers would have provided multiple legitimate non-discriminatory reasons for the prosecution to excuse them. With no prejudice resulting from any alleged error by trial counsel, Petitioner has not proven IAC or that the state court unreasonably applied any clearly established federal law.

Because Petitioner did not present the Cronic claim embedded in Ground Twenty-Two to the state court, it is not exhausted. The court therefore denies this Cronic claim as procedurally defaulted. With no merit as a Batson or a Cronic claim, Ground Twenty-Two is denied.

F. Ground Ten: Excluded Social Services Records

In Ground Ten, Petitioner asserts that the trial court erroneously and prejudicially excluded evidence regarding supervision of Bridges and her family by Social Services following Susie's death. Petitioner claims that the exclusion of the evidence violated his constitutional rights to confrontation and to present a defense. (Doc. 2 at 18.) He insists that, had his counsel not been ineffective, he could have used these records to build a defense surrounding Bridges' inability to parent her children and assert an alternative cause for Susie's death. (Doc. 10 at 56.) He claims that Pennsylvania v. Ritchie, 480 U.S. 39 (1987), supports this argument. (Doc. 10 at 56.) Respondent distinguishes Ritchie by pointing out that in that case, the records at issue had not been examined by the trial court. (Doc. 11 at 43.) In Petitioner's case, both trial counsel and the court reviewed the Social Services file before the court excluded it as evidence. (Id.)

The state supreme court rejected this claim. Burr, 341 N.C. at 293, 461 S.E.2d at 618. The court considered that the records at issue were not relevant because they contained no evidence of abuse by Bridges and thus did not point directly to her guilt. Id. Furthermore, the Department of Social Services closed the file on Bridges after a year of supervision, and, during trial,

Petitioner had access to similar records with which he could impeach Bridges and impugn her parenting ability. Id. at 293-94, 461 S.E.2d at 618. The state MAR court concluded, in the context of Petitioner's IAC claim, that Petitioner's counsel had sought and received similar evidence prior to trial and thus did not perform ineffectively. (First MAR Order (Doc. 162-4) at 81-82.)

A federal habeas court will not review a state court's ruling on the admissibility of evidence unless that evidence violates specific constitutional provisions or renders the trial a denial of due process. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Petitioner has not proven that his lack of access to these materials prejudiced him to the extent that it violated his right to confrontation or to present a defense. The state supreme court was not unreasonable when it concluded that the records would have merely been cumulative of the evidence Petitioner had presented to impeach Bridges and point suspicion at her at trial. The excluded records included information that Bridges had some trouble managing her schedule, keeping appointments, and maintaining a clean home. Burr, 341 N.C. at 293, 461 S.E.2d at 618. None of these facts would have assisted Petitioner in pointing the finger at Bridges, and their impeachment value was low given the similar evidence presented

at trial. Petitioner has pointed to no additional evidence in the records to assist his argument.

Ritchie does not help Petitioner. That case holds that due process requires a trial court to review in camera social services files to determine whether they might be material to the determination of guilt. Ritchie, 480 U.S. at 41. The court, not the defendant, holds the responsibility with regard to this type of material: "A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search the State's files and make the determination as to the materiality of the information." Id. Petitioner's trial court made such an in camera review and determined the records to be immaterial. Petitioner has given this court no reason to second-guess that determination. Ground Ten is denied.

G. Prosecutorial Misconduct

Petitioner makes several claims that the prosecutor in his case made improper arguments to the jury that so infected his trial with unfairness as to deprive him of due process. Grounds Eleven, Thirteen, Fourteen, and Sixteen are all subject to the standards set forth in Darden v. Wainwright, 477 U.S. 168 (1986), and Donnelly v. DeChristoforo, 416 U.S. 637 (1974), regarding argument and the guarantee of due process under the Fifth and Fourteenth Amendments.

Although "prosecutors enjoy considerable latitude in presenting arguments to a jury," prosecutorial misconduct may implicate a defendant's due-process right to a reliable sentence. Bates v. Lee, 308 F.3d 411, 422 (4th Cir. 2002). Donnelly sets forth the basic principle for evaluating the impropriety of a prosecutor's actions: the conduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. Darden created a two-pronged method for a reviewing court to use to determine whether (1) the prosecutor's conduct was improper, and (2) it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden, 477 U.S. at 181 (quoting Donnelly, 416 U.S. at 643). Darden concluded that a court may consider, for example, whether the prosecutor's argument manipulates or misstates the evidence or whether it implicates other specific rights of the accused. Id. at 182. The Fourth Circuit recommends a comprehensive look at the trial to determine whether a prosecutor's argument has rendered the trial constitutionally infirm: "In making this determination, we must look at 'the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated.'" Bennett v. Angelone, 92 F.3d 1336, 1345-

46 (4th Cir. 1996) (quoting Lawson v. Dixon, 3 F.3d 743, 755 (4th Cir. 1993)).

1. Ground Eleven

Petitioner argues in Ground Eleven that the trial court erred by overruling Petitioner's objection to the prosecutor's improper suggestion that defense counsel were inferior lawyers because they failed to secure a specific witness to testify. (Doc. 2 at 19.) He asserts that the prosecutor's comments infected the trial with unfairness as prohibited by Darden and Donnelly.

In its rejection of this claim on direct appeal, the North Carolina Supreme Court quoted the portion of the prosecution's argument to which Petitioner vaguely refers in his Petition and supporting briefs. Nita Todd, a social worker at the hospital that initially received Susie, was unable to testify on the day the defense intended for her to take the stand. Burr, 341 N.C. at 297-98, 461 S.E.2d at 620-21. Instead, defense counsel read her report into evidence. Id. In his closing argument, the prosecutor referred pointedly to her absence:

> By gum, ladies and gentlemen, I hope that I don't try a case, particularly one as serious as murder, that I don't talk to my witnesses and you, if any of you ever become victims to crime, which I hope you don't, but if any of you ever do, I think that you would hope that I or some other prosecuting attorney would talk to you and to your witnesses before taking your case

> into the courtroom, because to do anything less would be working an injustice to the victims. You've got to make arrangements to have your witnesses in the court room sometimes. Now, I'll contrast that, if you will, please, to the testimony of Nita Todd, excuse me, not testimony, to the record of Nita Todd which was read to you.

(Trial Tr. (Vol. 27) at 2217.) The trial court overruled the defense's objection to this oblique attack on their efforts in court. (Id. at 2218.) The state supreme court, after reviewing the entire closing argument, determined that the prosecutor was not taking a shot at defense counsel, but was instead attempting "to minimize the effect of the evidence contained in the social worker's report, which evidence may have contradicted the testimony by the State's witnesses." Burr, 341 N.C. at 298, 461 S.E.2d at 621. Acknowledging the latitude generally allowed in argument and considering the statement in the context of the entire closing statement, the court concluded that, error or not, the prosecutor's words did not "infect[] the trial with unfairness" and therefore deny Petitioner due process. Id. at 299, 461 S.E.2d at 621.

Despite its generosity toward the prosecution's seeming attack on defense counsel, the state court's determination was not an unreasonable application of Darden or Donnelly. When read in the context of the entire argument, the statement regarding uncalled witnesses may have thrown shade at defense counsel, but

fair-minded jurists could disagree as to whether the undermining of Petitioner's attorneys was improper and so egregious as to infect the trial with unfairness or whether, as the state court found, it was intended simply to undermine the testimony read into the record. See Parker v. Matthews, 567 U.S. 37, 46-47 (2012) (reversing grant of habeas corpus after considering in the entire context of the argument prosecutor's suggestion that defendant colluded with counsel to manufacture affirmative defense to murder charge); Harrington, 562 U.S. at 102. Considering the evidence of Petitioner's guilt, the fact that opposing counsel called several witnesses and had Todd's testimony available to the jury, and the relative mildness of the remarks, this court cannot conclude that this portion of the prosecution's argument rendered Petitioner's entire trial unfair.

Petitioner has not proven that the prosecutor's statement concerning the defense's failure to secure Nita Todd's appearance in court denied him due process, and he certainly has not proven that the North Carolina Supreme Court's rejection of this claim was an unreasonable application of clearly established federal law. Ground Eleven, therefore, is denied.

2. Ground Thirteen

In Ground Thirteen, Petitioner claims that the trial court erred by allowing the prosecutor to argue outside of the record during the sentencing phase. Petitioner claims that the prosecutor committed misconduct when he used the facts of prior cases to guide the jury in determining whether Petitioner's crime was heinous, atrocious, or cruel, as required by the aggravating circumstance presented to the jury. (Doc. 2 at 20); see N.C. Gen Stat. § 15A-2000(e)(9) (making a defendant death-eligible if "[t]he capital felony was especially heinous, atrocious, or cruel"). To flesh out the (e)(9) aggravator, the prosecutor described to the jury some of the facts of previous cases in which jurors had found the aggravating factor. See Burr, 341 N.C. at 305, 461 S.E.2d at 625 (describing the alleged prosecutorial misconduct). The prosecutor referred to another case in which the defendant had killed an infant, State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), and one in which the defendant bludgeoned a woman with a cast-iron skillet, State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984). Id. In his closing argument, defense counsel also used the Huff case to distinguish that defendant's actions from Petitioner's. Id. at 308-09, 561 S.E.2d at 627.

Petitioner argued to the state supreme court that the prosecutor's use of these cases violated a state law prohibiting counsel from "read[ing] the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client." State v. Gardner, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986). The supreme court rejected this claim, suggesting that the prosecution did not violate this rule and concluding nevertheless that such a violation would not have resulted in prejudice, given the "overwhelming evidence" that Petitioner's murder of Susie rose to the level of the (e)(9) aggravator. Burr, 341 N.C. at 307-08, 461 S.E.2d at 626-27.

In rejecting the claim that the prosecution's behavior was "grossly improper," the state court did not apply any clearly established federal law unreasonably.[11] It is not this court's place to rule on questions of state law. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). To the extent that Ground Thirteen implicates federal due-process protection, the state court's conclusion that the prosecution presented overwhelming evidence to satisfy

[11] Because defense counsel did not object to this argument during sentencing, the state court reviewed under its "grossly improper" standard. Burr, 341 N.C. at 305, 461 S.E.2d at 625.

the (e)(9) aggravator is informative. Susie suffered two broken arms and two broken legs, she had bruising on her jaw in the shape of a hand, and she died because of swelling in her brain caused by a depressed skull fracture. Burr, 341 N.C. at 308, 461 S.E.2d at 626-27. A hard strike with a blunt object caused the skull fracture, meaning Petitioner either hit Susie in the head with great force or smashed her head against something. Id. Susie was a months-old baby toward whom Petitioner had at least some parental duties. Id. The evidence in the case was sufficient for the jury to conclude that the murder was "especially heinous, atrocious, or cruel." N.C. Gen. Stat. § 15A-2000(e)(9). The prosecution's reference to the facts of other (e)(9) cases in an effort to clarify the definition of the aggravator did not rise to a level that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. The state court made no error in rejecting this claim. Ground Thirteen is denied.

3. Ground Fourteen

Petitioner argues in Ground Fourteen that the trial court violated his constitutional rights to a fair and reliable sentencing hearing when it overruled Petitioner's objection to the prosecutor's argument regarding the injuries inflicted on Susie. (Doc. 2 at 20.) Petitioner claims that the prosecutor

misstated the order in which Susie received the injuries leading to her death. The prosecutor said in argument, "I don't know when that was done, [the injuries to [Susie]'s ears], but I would submit to you [the injuries were] probably done prior to the time before the final blow that struck to [sic] her head." Burr, 341 N.C. at 309, 461 S.E.2d at 627. Petitioner insists that this error amplified the evidence for the (e)(9) aggravator and thus "so infected the trial with unfairness as to make the resulting decision a denial of due process," in violation of Darden and Donnelly. (Doc. 10 at 59.) The state supreme rejected this claim as harmless error because of the overwhelming evidence that Susie's murder was especially heinous, atrocious, or cruel. Burr, 341 N.C. at 309, 461 S.E.2d at 627.

The state court's ruling was not contrary to or an unreasonable application of Donnelly and Darden. The extent of Susie's injuries justified the jury's conclusion that her murder was especially heinous, atrocious, or cruel. Whether her ears were bruised before or after her skull fracture matters little in the face of evidence of her multiple bruises, broken bones, and the loss of the majority of her blood volume. Furthermore, Susie lived for nearly a full twenty-four hours after the doctors discovered the bruises on her ears. If the prosecutor misstated the facts about the order in which Susie suffered her

myriad injuries, the trial court's failure to sustain the defendant's objection was indeed harmless. Removing that statement from the jury's consideration would have had little effect on their decision about the (e)(9) aggravator. Ground Fourteen, therefore, is denied.

4. Ground Sixteen

In Ground Sixteen, Petitioner alleges that the trial court erred by failing to prevent the prosecutor from misstating the law regarding the aggravating factor that the crime was "especially heinous, atrocious, or cruel" in his closing argument. (Doc. 2 at 21.) In his post-Fourth-Circuit brief, Petitioner attempts to clarify this argument, stating that the court failed to account for the possibility that, under North Carolina law, non-unanimity on aggravating factors and whether they outweigh mitigating circumstances can result in a life sentence as the verdict. (Doc. 163 at 14-15.) Petitioner may or may not have presented this interpretation of Ground Sixteen to the state court. Nonetheless, Petitioner claims that the prosecutor's argument so infected his trial as to deny him due process. (Doc. 10 at 60.) The state supreme court concluded that Petitioner could not have shown prejudice even if the prosecutor had misstated the law based on its reasoning in rejecting the

claim Petitioner made in Ground Thirteen. Burr, 341 N.C. at 310, 461 S.E.2d at 628.

No matter the precise thrust of Ground Sixteen, Petitioner has not proven that the state court applied federal law unreasonably or even erred when it ruled that Petitioner's claim that the prosecution misstated the law regarding the (e)(9) aggravator failed for a lack of prejudice. The court ruled that the prosecution had proven the aggravating factor with copious evidence, and this court finds no fault with that ruling, as explained in the Ground Fourteen subsection. Furthermore, Petitioner concedes that the Supreme Court of the United States has rejected his argument about the weighing of aggravators and mitigators and unanimity of the verdict. (Doc. 163 at 15, citing Kansas v. Marsh, 548 U.S. 163, 173 (2006).)[12] Ground Sixteen is denied.

H. Ground Twelve: Bridges Medical Records

Ground Twelve asserts that the trial court erred by failing to order that medical and psychiatric records concerning Bridges be admitted into evidence. (Doc. 2 at 19.) Petitioner's trial counsel did not subpoena these medical records, so the North Carolina Supreme Court was unable to review them on appeal and

[12] It is debatable whether Petitioner has exhausted this claim, but the Supreme Court's rejection of it nonetheless guarantees its failure.

rule on the claim. Burr, 341 N.C. at 302, 461 S.E.2d at 623; (Doc. 10 at 57). Petitioner does not argue what these records would have proven had they been obtained and admitted. (Doc. 10 at 57-58.) Respondent claims that this ground is procedurally defaulted pursuant to the state procedural rule that required Petitioner to submit the records to the North Carolina State Court for appellate review. (Doc. 11 at 45.)

"A federal habeas court may not review a claim when a state court has declined to consider its merits on the basis of an independent and adequate state procedural rule." Bacon v. Lee, 225 F.3d 470, 476 (4th Cir. 2000); see Coleman, 501 U.S. at 750 (defining the federal habeas court's rule vis-à-vis claims that have been procedurally barred in state courts). An independent and adequate state procedural rule must not "depend[ ] on a federal constitutional ruling," Ake v. Oklahoma, 470 U.S. 68, 75 (1985), and must be "firmly established and regularly followed." James v. Kentucky, 466 U.S. 341, 348 (1984). A federal habeas court may only determine whether the state law is independent and adequate, not "whether the state court correctly applied its own law." Williams v. French, 146 F.3d 203, 209 (4th Cir. 1998). A federal habeas court may only review a procedurally barred claim if the petitioner shows legitimate cause for the default and actual prejudice resulting from it. Maples v. Thomas, 565

U.S 266, 280-81 (2012); McCarver v. Lee, 221 F.3d 583, 591-92 (4th Cir. 2000).

Petitioner has procedurally defaulted Ground Twelve. North Carolina's rule regarding the competition of a record for appeal is a fundamental rule that allows the reviewing state court to have an adequate basis on which to rule. N.C. Rule App. P. 9, 10(a). As state rules governing appellate procedure, Rules 9 and 10 do not rely on any federal law or constitutional ruling, making them independent under Coleman. A review of North Carolina cases reveals that the North Carolina Supreme and Appellate Courts rely on this rule regularly, dismissing claims and cases in both civil and criminal court where appellants have not included the necessary documents in their record of appeal. See State v. Alston, 307 N.C. 321, 341, 298 S.E.2d 631, 644–45 (1983) ("It is the appellant's duty and responsibility to see that the record is in proper form and complete. . . . Since the motion is not before this Court, the defendant's assignment of error amounts to a request that this Court assume or speculate that the trial judge committed prejudicial error in his ruling."); State v. Williams, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968) ("An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court."); State v. Dobbs, 234 N.C.

560, 67 S.E.2d 751 (1951) (holding that when a necessary part of the record has been omitted, the appeal will be dismissed); State v. Martin, ____ N.C. App. ____, 836 S.E.2d 789, 2020 WL 70711, at *2 (2020) ("Nothing in the record shows the trial court ever docketed Defendant's monetary obligations or court costs as a civil judgment, and without that necessary part of the record we must dismiss Defendant's appeal as it relates to this issue."); State v. Moss, ____ N.C. App. ____, 824 S.E.2d 925, 2019 WL 1283815, at *12 (2019) ("This Court is precluded from addressing alleged error in the prosecutor's argument unless a defendant provides a transcript of the argument in question."); State v. Harvell, 45 N.C. App. 243, 246, 262 S.E.2d 850, 852 (1980) ("When a necessary part of the record has been omitted, the appeal will be dismissed."). In particular, a court will not review a claim regarding excluded evidence if the appellant does not include the evidence in the appellate record:

> [I]t is well established that
>
> > [t]he exclusion of evidence will not be reviewed on appeal unless the record sufficiently shows what the evidence would have been. In order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record.

Discover Bank v. Rogers, No. COA19-217, 2019 WL 6876711, at *3 (N.C. Ct. App. Dec. 17, 2019) (citations omitted).

Petitioner offers no argument that the state courts do not regularly apply this rule or that it depends on federal law. He has not also shown cause for his failure to present the Bridges' records to the court on direct appeal. Ground Twelve, therefore, is denied.

I. Jury Instruction Claims

1. Ground Fifteen

Petitioner asserts that the trial court's jury instruction on the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel," N.C. Gen. Stat. § 15A-2000(e)(9), failed to limit the application of the aggravating circumstance, which Petitioner claims is unconstitutionally vague on its face. (Doc. 2 at 21.) The instruction, he claims, violated the limitations on death sentencing set by Godfrey v. Georgia, 446 U.S. 420 (1980). (Doc. 10 at 59.) According to Petitioner, it "fails to sufficiently define and narrow this circumstance," creating a "vague and arbitrary standard." (Doc. 163 at 11.)

The North Carolina Supreme Court reviewed this claim for plain error because Petitioner did not object to the instruction at trial. Burr, 341 N.C. at 310, 461 S.E.2d at 627. Regardless of the standard of review, the court saw no reason to reexamine

its holding in State v. Syriani, 333 N.C. 350, 391-92, 428 S.E.2d 118, 140-41, which upheld as constitutional an identical instruction given defining the (e)(9) aggravator. Id.

A state must ensure that its capital-sentencing scheme prevents the imposition of the death penalty in an arbitrary and capricious manner. Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring); Fisher v. Lee, 215 F.3d 438, 457 (4th Cir. 2000). Aggravating circumstances must narrow the category of defendants made eligible for a death sentence to "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." Godfrey, 446 U.S. at 428 (footnotes, citations and quotation marks omitted). "A statutory circumstance that is alone too vague to provide meaningful guidance to the sentencer may be accompanied by a limiting instruction which does provide sufficient guidance." White v. Lee, No. 00-3, 2000 WL 1803290, at *5 (4th Cir. Dec. 8, 2000). The North Carolina Supreme Court has ruled that the (e)(9) aggravator plus the pattern jury instruction given in Petitioner's case provide to the jury constitutionally sufficient guidance to narrow the category of defendants subjected to the penalty. Syriani, 333 N.C. at 391-92, 428 S.E.2d at 141.

Petitioner's argument does not convince this court that the state court's reliance on its rulings in Syriani and subsequent cases unreasonably applies clearly established federal law. Petitioner insists that the only way to make the (e)(9) aggravating circumstance constitutionally tailored would be a jury instruction that "incorporate[s] all of the narrowing factors necessary to cure the inherent vagueness" of the circumstance and cites several cases that have used different narrowing instructions. (Doc. 163 at 12-13.) The Constitution, however, does not require that an instruction present every type of narrowing option; it must simply provide "clear and objective standards" and "specific and detailed guidance" to the jury. Godfrey, 446 U.S. at 428. The narrowing portion of North Carolina's pattern jury instruction states: "For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim." N.C.P.I. Crim. 150.10 at 18-19 (1992). Combined with the definition the instructions provides — "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree a pain with utter indifference to, or even

enjoyment of, the suffering of others," id. — the instruction certainly narrows the class of murder-committing defendants eligible for the death penalty. In addition, the instruction is further limited by a requirement of "unnecessarily torturous to the victim." Petitioner has not convinced this court that the state court's approval of the instruction has unreasonably applied any federal law considering the constitutionality of aggravating circumstances and their accompanying jury instructions. Ground Fifteen is denied.

2. Ground Seventeen

Ground Seventeen alleges that the trial court erred by failing to instruct the jury properly on the inherent mitigating value of the mitigating factor regarding Petitioner's ability to adjust to life in prison, in violation of the Eighth and Fourteenth Amendments. (Doc. 10 at 60.) Petitioner claims that the court improperly stated that the jury could reject this mitigating circumstance and that the state supreme court's rejection of the claim was an unreasonable application of Skipper v. South Carolina, 476 U.S. 1, 7 (1986). (Id.)

The state supreme court ruled that it had recently decided against an identical claim in State v. Basden, 339 N.C. 288, 451 S.E.2d 238 (1994). Burr, 341 N.C. at 311, 461 S.E.2d at 628. The state court interpreted Skipper to mean that a court may not

prevent a defendant from presenting to the jury evidence of his or her good behavior in jail as a mitigating circumstance. Id. The court concluded that the trial court fulfilled its duty under Skipper by allowing Petitioner to present the evidence; the question of whether the jury deemed that evidence to have mitigating value did not implicate the right protected by Skipper. Id.

In Skipper, the Supreme Court relied on its decisions in Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), that a defendant facing a death sentence must be allowed to place "relevant mitigating evidence" before the sentence. Skipper, 476 U.S. at 4. Eddings state that "'the sentencer [should] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings, 455 U.S. at 110 (quoting Lockett, 438 U.S. at 604). Based on this principle, the Court concluded that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." Skipper, 476 U.S. at 5. A trial court, therefore, may not exclude good jail-behavior evidence from a jury. Id.

The North Carolina Supreme Court's ruling was not an unreasonable application of Skipper. Skipper requires a trial court to allow a defendant to present relevant potentially mitigating evidence to the jury. Skipper says nothing about requiring the jury to award such evidence mitigating value. The North Carolina legislature has chosen to empower some mitigating circumstances with mitigating value if the defendant has evidence to support them. N.C. Gen Stat. § 15A-2000(f)(1)-(8). These "statutory mitigating circumstances" are different from the non-statutory catch-all circumstances (grouped under subsection (f)(9)), for which the jury must decide whether they have value or not. This legislative scheme does not run afoul of Skipper. Ground Seventeen is denied.

3. Ground Eighteen

In Ground Eighteen, Petitioner claims that the "trial court improperly instructed the jury that each juror could reject non-statutory mitigating circumstances on the basis that they did not find the circumstances mitigating." (Doc. 2 at 22.) He argues that this instruction violated his Eighth and Fourteenth Amendment rights and that the state supreme court's rejection of the claim was an unreasonable application of Eddings v. Oklahoma, 455 U.S. 104 (1982). (Doc. 10 at 61.) The North Carolina Supreme Court relied on its previous rulings in

summarily rejecting this claim. Burr, 341 N.C. at 311-12, 461 S.E.2d at 628-29.

As stated in the above discussion of Ground Eighteen, Eddings requires that a defendant must be allowed to present any relevant mitigating evidence to the sentence. Eddings, 455 U.S. at 110. Eddings does not require the sentence to give value to any mitigating circumstance; it guarantees that evidence supporting the circumstance not be withheld from the sentencer. Id. The state court's rejection of this claim was not unreasonable. The court denies Ground Eighteen.

4. Ground Nineteen

In Ground Nineteen, Petitioner asserts that the trial court improperly instructed jurors regarding the method for weighing mitigating circumstances for each crime for which he was charged. (Doc. 2 at 23.) Petitioner claims that the use of the word may in jury instructions allowed jurors to use their own discretion in determining whether to give proven mitigating circumstances mitigating value, in violation of Boyde v. California, 494 U.S. 370 (1990). (Doc. 10 at 61-62.) Petitioner argues that this instruction may have "prevented consideration of constitutionally relevant evidence." (Id. at 62.) The state supreme court's rejection of this claim, according to Petitioner, violated the Fifth, Six, and Fourteenth Amendments

and was an unreasonable application of Boyde and McKoy v. North Carolina, 494 U.S. 433 (1990). (Id.) The North Carolina Supreme Court summarily rejected this claim as identical to others decided in its previous rulings. Burr, 341 N.C. at 311, 461 S.E.2d at 628.

Neither Boyde nor McKoy help the Petitioner. Boyde reminds courts that "[t]he Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner," which means that a court may not "restrict impermissibly a jury's consideration of relevant evidence." Boyde, 494 U.S. at 377-78. To evaluate whether an instruction has done so, the Court has determined that "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Id. at 380. A court must not "engage in a technical parsing" of an instruction, but rather must evaluate it "with a commonsense understanding of the instructions in the light of all that has taken place at the trial." Johnson v. Texas, 509 U.S. 350, 368 (1993) (quotation marks omitted). The court had instructed the jurors that they were required to weigh any mitigating circumstance they found to exist against the aggravating circumstances. A commonsense interpretation of the

entire instruction makes it highly unlikely that the use of the word may in a subsequent sentence undermined the jury's understanding that they were required to give the mitigating circumstances they found proper consideration. The Fourth Circuit, in an unpublished opinion, has found that the North Carolina Supreme Court's acceptance of these instructions was not an unreasonable interpretation of clearly established federal law. Carter v. Lee, No. 99-10, 1999 WL 1267353, *8 (4th Cir. Dec. 29, 1999) ("That the trial court used the word 'may' instead of the word 'must' — as Carter would have preferred — does not create a reasonable likelihood that the jury misunderstood its task."). This court agrees. Ground Nineteen is denied.

J. Ineffective Assistance of Counsel Claims

To prove IAC, a petitioner must establish both that trial counsel's performance fell below a reasonable standard for defense attorneys and that performance prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668 (1984) (adopted in North Carolina by State v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985)). The petitioner bears the burden of affirmatively showing deficient performance. Spencer v. Murray, 18 F.3d 229, 233 (4th Cir. 1994). An analysis of counsel's performance begins with the assumption that counsel "rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. To overcome that presumption and establish deficient performance, a petitioner must show "that counsel failed to act 'reasonabl[y] considering all the circumstances.'" Cullen, 563 U.S. at 189 (quoting Strickland, 466 U.S. at 688). To establish prejudice, the petitioner must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A court is not required to "address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697.

1. Ground Twenty

Petitioner states in his petition that North Carolina's death penalty procedure is cruel and unusual and that the death penalty statute is both vague and overbroad. (Doc. 2 at 23.) He further asserts that the jury imposed the death sentence in his case in an arbitrary and capricious manner based on sex, race, and poverty. (Id.) In the brief supporting his petition, however, Petitioner claims that his constructive denial of counsel made his conviction and sentence unreliable. (Doc. 10 at 62.) He relies on Cronic to support this claim.

The state supreme court rejected this claim when Petitioner presented it on direct appeal as simply an attack on the constitutionality of North Carolina's death penalty statute. Standing on its previous rulings on the same claim in other cases, the state court upheld its prior rulings and denied the claim. Burr, 341 N.C. at 312, 461 S.E.2d at 629. In these prior cases, the state court evaluated the statute under the standards set forth by Gregg v. Georgia, 428 U.S 153 (1976). For a death-penalty statute to accord with the standards of the Eighth Amendment, it must not be excessive and not be grossly out of proportion to the severity of the crime. Gregg, 428 U.S. at 173; Coker v. Georgia, 433 U.S. 584, 592 (1977). Furthermore, a death penalty statute must "narrow the class of murderers subject to capital punishment," Gregg, 428 U.S. at 196, by providing "specific and detailed guidance to the sentencer," Proffitt v. Florida, 428 U.S. 242, 253 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). The North Carolina Supreme Court has held its statute up to these standards multiple times and has found it to be constitutional.

To the extent that this claim relies on a Cronic claim of constructive denial of counsel, Petitioner has not presented this ground to the state courts. It is therefore not exhausted and procedurally defaulted. Without the underlying Cronic claim,

the state court's decision was not an unreasonable application of clearly established federal law. If a person has been convicted of first-degree, premeditated and deliberate murder in North Carolina, that person may only be eligible for the death penalty if a jury finds beyond a reasonable doubt that the murder was committed in the context of one of eleven specified aggravating circumstances. N.C. Gen. Stat. § 15A-2000. A jury must then consider multiple statutory and non-statutory mitigating circumstances, which may be found by a preponderance of the evidence, and weigh them against the aggravating circumstances. Id. Only if the jury finds beyond a reasonable doubt that the mitigating circumstances do not outweigh the aggravating circumstances, may the jury then recommend a death sentence. Id. The Supreme Court has not held this scheme to be unconstitutional. The trial court in Petitioner's case followed the statutory requirements to arrive at his sentence. The state court, therefore, was not unreasonable when it ruled that the capital sentencing scheme in North Carolina did not violate the United States Constitution. The court denies Ground Twenty.

2. Ground Twenty-One

In Ground Twenty-One, Petitioner claims that his trial counsel were ineffective for failing to submit various pre-trial motions to allow them access to experts who might interpret the

medical evidence in Petitioner's case. (Doc. 2 at 24.) He insists that he was constructively denied the assistance of counsel by the trial court's decisions and relies again on Cronic. (Doc. 10 at 63.)

The State MAR court denied this claim on its merits. The court first pointed out that counsel is not automatically considered deficient under Strickland for failing to acquire the assistance of a medical expert. (First MAR Order (Doc. 162-4) at 77-78.) The court then detailed its conclusions that trial counsel prepared adequately for the trial and had considerable experience in defending against serious charges and in matters relating to child abuse. (Id. at 79.) The court determined that Petitioner did not show either deficient performance or prejudice, given its rejection of Petitioner's proffered evidence from his post-conviction medical experts. (Id.) The court similarly rejected all of Petitioner's other claims based on counsel's alleged pretrial failures. (Id. at 79-84.)

To the extent that Petitioner relies on the constructive denial of counsel as the basis of this claim, Ground Twenty-One has not been exhausted and is procedurally defaulted. Likewise, his claim of ineffective assistance of counsel under Strickland fails because the Fourth Circuit has already decided that his counsel did not perform deficiently in their preparation for

trial, and Petitioner did not suffer prejudice as a result of their performance. Burr, 513 F. App'x at 342, 344, 345. Petitioner's Strickland claim in this ground for relief is that his counsel were not prepared for trial and failed to do the things in preparation that reasonable counsel would have done. This argument is essentially the same argument Petitioner originally pursued in Grounds One, Two, and Three – his counsel were not prepared for trial and failed to develop exculpatory evidence with the help of a medical expert, and the trial court failed to allow them to prepare for trial – which the Fourth Circuit ruled against, finding that the state MAR court's rejection of them was not an unreasonable application of clearly established federal law. For these reasons, Ground Twenty-One is denied.

3. Ground Twenty-Three

In Ground Twenty-Three, Petitioner argues that defense counsel's failure to hire a medical expert was constitutionally ineffective because counsel was thus prevented from developing an alternative explanation for Susie's death, which would have been strong mitigating evidence. (Doc. 2 at 25.) The constructive denial of counsel by the trial court prevented Petitioner's counsel from presenting the mitigation case it

should have. (Doc. 10 at 64.) The State MAR court denied this claim on the merits. (First MAR Order (Doc. 162-4) at 113.)

Ground Twenty-Three, to the extent that it relies on the Cronic claim of constructive denial of counsel, has not been exhausted and is procedurally defaulted. Presented as a Strickland ineffective assistance of counsel claim, this ground did not survive the Fourth Circuit's scrutiny. Burr, 513 F. App'x at 342-45. Petitioner argued in Ground One that "trial counsel were constitutionally ineffective [for] failing to develop exculpatory evidence of accidental death." (Doc. 10 at 21). Developing this evidence, according to Petitioner, would have required hiring a medical expert. Ground Twenty-Three, therefore, asserts a portion of the claim that Ground One asserts and is denied as res judicata.

K. Ground Twenty-Four: Short-Form Indictment

Ground Twenty-Four asserts that the indictment the State used failed to allege all of the elements of the crime of first-degree murder, as well as the aggravating circumstance upon which the State planned to seek the death penalty. (Doc. 2 at 25.) Failure to include all of the elements of first-degree murder in the indictment violates a rule emphasized in Jones v. United States, 526 U.S. 227 (1999). (Doc. 10 at 66.) According to Petitioner, failure to include in the indictment all of the

essential elements of the crime plus anything that may increase the penalty to a death sentence, such as an aggravating circumstance, violates the due process clause of the United States Constitution. Apprendi v. New Jersey, 530 U.S. 466 (2000); (Doc. 10 at 67.)

The state MAR court denied this claim on the merits. (Second MAR Order (Doc. 162-4) at 175.) It noted a recent ruling by the North Carolina Supreme Court that rejected the same claim Petitioner made regarding the short-form indictment. (Id.) In State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000), the court pointed out that the Supreme Court of the United States had never ruled that the Fourteenth Amendment required states to charge every element of the crime in the indictment. Wallace, 351 N.C. at 508, 538 S.E.2d at 343. It further held that the Court had "specifically declined to apply the Fifth Amendment requirement of indictment by grand jury to the states via the Fourteenth Amendment." Id. The state court concluded in Wallace that Jones therefore did not apply to state courts. Bound by Wallace, the state MAR court rejected this claim. (Second MAR Order (Doc. 162-4) at 176.)

Prisoners in North Carolina have been challenging the short-form indictment since the Court ruled in Apprendi. Unfortunately, their reliance on Apprendi does not aid their

efforts. Jones, which ruled that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," was a federal criminal case. Jones, 526 U.S. at 243 n.6. In Apprendi, the Court did not extend the indictment rule to the states. Instead, Apprendi held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. The Court conspicuously left out the Jones rule regarding indictments, and Petitioner may not rely on Apprendi to support his argument that North Carolina's short-form indictment is constitutionally flawed. The North Carolina Supreme Court has repeatedly found the short-form indictment to be constitutionally sufficient. See, e.g., State v. Braxton, 352 N.C. 158, 531 S.E.2d 428 (2000), cert. denied, 531 U.S. 1130 (2001); State v. Davis, 353 N.C.1, 539 S.E.2d. 243 (2000), cert. denied, 534 U.S. 839 (2001). Furthermore, Apprendi does not apply retroactively to habeas-corpus cases. United States v. Sanders, 247 F.3d 139 (4th Cir. 2001). The state court's rejection of this claim was therefore not contrary to or an unreasonable application of clearly established federal law. Ground Twenty-Four is denied.

III. CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that the Petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, (Doc. 2), is **DENIED** and that this action is dismissed with prejudice. A judgment dismissing this action will be entered contemporaneously with this Memorandum Opinion and Order. Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural ruling, a certificate of appealability is not issued.

This the 26th day of March, 2020.

William L. Osteen, Jr.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOHN EDWARD BURR,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:01CV393
	)	
CARLTON B. JOYNER, Warden, Central Prison, Raleigh, North Carolina,	)	
	)	
Respondent.	)	

ORDER

This matter comes before the court on Petitioner's Motion to Expand Record (Doc. 160). Having considered the motion, with Respondent's consent, and for good cause shown,

IT IS HEREBY ORDERED that Petitioner's motion (Doc. 160) is **GRANTED** and that the record in this matter is expanded to include the transcripts attached to Petitioner's motion as Exhibit 1 and Exhibit 2.

This the 7th day of January, 2016.

_____
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION
CIVIL NO. 1:01CV00393

JOHN EDWARD BURR,	)
	)
Petitioner,	)
	)
vs.	)
	)
CARLTON B. JOYNER,	)
Warden, Central Prison,	)
Raleigh, North Carolina,	)
	)
Respondent.	)

****

PETITIONER'S MOTION TO EXPAND RECORD

****

NOW COMES the Petitioner and moves this Court to Order an expansion of the record in this matter pursuant to Rule 7 of the Rules Governing Section 2254 Proceedings to include the transcript of a tape-recording recently located by the State of North Carolina. The grounds for this Motion are that this tape-recording consists of a pretrial statement by Lisa Bridges (who testified for the State at trial and was the mother of the deceased infant, Susie), that the Petitioner contends that this statement contains exculpatory information within the meaning of *Brady v. Maryland* and indicates that a false impression of material fact was presented to the Jury under *Napue v. Illinois*, and that an accurate transcript of this statement was not available during the state court proceedings. Specifically, what was alleged to be a transcript of this tape-recording was

provided to the Petitioner in 1998. A copy of this transcript is attached as **Exhibit 1.** Pursuant to this Court's direction, the parties searched for the tape-recording and counsel for Respondent recently located the recording. The recording was converted from analog to digital and counsel for the Petitioner retained a court reporter to transcribe the tape. A copy of this transcript is attached to this Motion as **Exhibit 2**. There are substantial differences between these transcripts (as described in Petitioner's Memorandum). Thus, in the interests of justice, both transcripts should be considered in connection with the determination of the Petitioner's claims under *Brady* and *Napue* which are presently before this Court. Since these materials do not change the claims made by the Petitioner under either *Brady* or *Napue*, consideration of these materials is permitted under 28 U.S.C. §2254.

The Petitioner has conferred with counsel for the Respondent and counsel for the Respondent has advised that the Respondent does not object to an expansion of the record to include these materials.

WHEREFORE, the Petitioner prays that the record in this matter be expanded to include the transcripts attached to this Motion as Exhibit 1 and Exhibit 2.

Respectfully submitted this 19th day of October 2015.

/s/ James P. Cooney III
James P. Cooney III
N.C. State Bar #12140
One Wells Fargo Center, Suite 3500
301 South College Street
Charlotte, NC 28202-6037
Telephone: 704.331.4980
Attorney for Petitioner-Appellee

Ernest Lee Conner, Jr.
N.C. State Bar # 14179
321 Evans Street, Suite 200
Greenville, NC 27858
Telephone: 252.757-3535
Attorney for Petitioner-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this the 19th day of October, 2015, the foregoing **Petitioner's Motion to Expand** was filed with the Clerk of Court using the CM/ECF system, which will automatically send notification of such filing and serve counsel for all parties:

L. Michael Dodd
Special Deputy Attorney General
9001 Mail Service Center
Post Office Box 629
Raleigh, NC 27602-0629
Email: mdodd@ncdoj.gov

Attorney for Respondent Carlton B. Joyner

/s/James P. Cooney III
James P. Cooney

APPENDIX G

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 7, 2013

Mr. James P. Cooney
Womble Carlyle Sandridge & Rice, PLLC
One Wachovia Center, Suite 3500
301 South College Street
Charlotte, NC 28202-6037

Re: John Edward Burr
v. Kenneth E. Lassiter, Warden
No. 13-5213

Dear Mr. Cooney:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

APPENDIX H

Analysis
As of: Jun 13, 2013

JOHN EDWARD BURR, Petitioner - Appellee, v. KENNETH E. LASSITER, Warden, Central Prison, Raleigh, North Carolina, Respondent - Appellant.

No. 12-4

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2013 U.S. App. LEXIS 4946

December 4, 2012, Argued
March 11, 2013, Decided

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. (1:01-cv-00393-WO-JEP). William L. Osteen, Jr., District Judge.

Burr v. Branker, 2012 U.S. Dist. LEXIS 74315 (M.D.N.C., May 30, 2012)

DISPOSITION: REVERSED.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner inmate was convicted of the first-degree murder and felony child abuse of a four-month-old infant, and of assault. The inmate petitioned for habeas relief under *28 U.S.C.S. § 2254*, alleging that his trial attorneys rendered ineffective assistance of counsel under Strickland and the *Sixth Amendment*. The United States District Court for the Middle District of North Carolina, at Greensboro, granted relief. Respondent warden appealed.

OVERVIEW: The heart of the inmate's claim was that trial counsel were ineffective because they failed to obtain and present expert testimony to refute the medical opinions of the infant's treating physicians. The court found that competent trial counsel reasonably concluded that they were foreclosed from credibly arguing to the jury that the infant died as a result of the accidental fall with her 8-year-old brother because the medical opinions regarding the existence of child abuse and the non-accidental nature of the cause of death were unanimous, consistent with the physical evidence and factual investigation, and overwhelming. There was a reasonable argument that trial counsel satisfied Strickland's deferential standard by reviewing the medical evidence, consulting with an expert, and pursuing an alternative-perpetrator, reasonable-doubt defense that was consistent with the factual investigation and the overwhelming medical evidence that the infant was a victim of child abuse. The district court's decision granting the inmate relief was contrary to the deference that federal courts had to afford state court decisions adjudicating the merits of such constitutional claims.

OUTCOME: The judgment of the district court was reversed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance

Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > Contrary & Unreasonable Standard > General Overview
Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > Deference
[HN1] Under *28 U.S.C.S. § 2254(d)*, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, a federal court's review of a state court's decision rejecting a petitioner's ineffective assistance of counsel claim is highly deferential. Where a federal habeas petitioner's constitutional claim has been adjudicated on the merits in state court proceedings, the federal court may not grant relief unless the state court's adjudication 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 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. *28 U.S.C.S. § 2254(d)*.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance
[HN2] Strickland sets forth the two-prong standard for evaluating *Sixth Amendment* claims of ineffective assistance of counsel. To establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance
[HN3] To demonstrate inadequate or deficient performance under Strickland, the defendant must show that counsel's representation fell below an objective standard of reasonableness measured by prevailing professional norms. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. To demonstrate prejudice under Strickland, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, i.e., that he would have been found not guilty. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance
Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > Deference
[HN4] Where the issue is whether a state court has unreasonably applied Strickland standards to an ineffective assistance of counsel claim, double deference is required--deference to the state court judgment granting deference to trial counsel's performance. Surmounting Strickland's high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance
Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > Deference
[HN5] Establishing that a state court's application of Strickland was unreasonable under *28 U.S.C.S. § 2254(d)* is all the more difficult. The standards created by Strickland and *§ 2254(d)* are both highly deferential, and when the two apply in tandem, review is doubly so. The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonable-

ness under Strickland with unreasonableness under *§ 2254(d)*. When *§ 2254(d)* applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard. If this standard is difficult to meet, that is because it was meant to be. Indeed, even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.

Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > General Overview

[HN6] As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement. *28 U.S.C.S. § 2254(d)* thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance
Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > General Overview

[HN7] To obtain federal habeas relief on a Strickland claim, a habeas petitioner must satisfy a federal court that the state court's rejection of the petitioner's arguments was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement. The question is not whether trial counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance
Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > General Overview

[HN8] Reliance on the harsh light of hindsight to cast doubt on a trial that took place years ago is precisely what Strickland and the Antiterrorism and Effective Death Penalty Act of 1996 seek to prevent. It not a federal habeas court's role to conduct such an intrusive post-trial inquiry into the defense of a crime, or to second-guess the state proceedings that are the central process, not just a preliminary step for a later federal habeas proceeding.

COUNSEL: ARGUED: Leonard Michael Dodd, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellant.

James P. Cooney, III, WOMBLE CARLYLE SANDRIDGE & RICE, PLLC, Charlotte, North Carolina, for Appellee.

ON BRIEF: Roy Cooper, Attorney General of North Carolina, Raleigh, North Carolina, for Appellant. Ernest Lee Conner, Jr., Greenville, North Carolina, for Appellee.

JUDGES: Before TRAXLER, Chief Judge, and WILKINSON and DUNCAN, Circuit Judges.

OPINION

PER CURIAM:

John Edward Burr ("Burr") was convicted by a North Carolina jury of the first-degree murder and felony child abuse of four-month-old Tarissa Sue ("Susie") O'Daniel, and of assault on a female, and sentenced to death plus thirty days imprisonment. The North Carolina Supreme Court affirmed. See *State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (N.C. 1995)*. After unsuccessfully seeking state post-conviction relief, Burr petitioned for habeas relief under *28 U.S.C. § 2254*, alleging that his trial attorneys rendered ineffective assistance of counsel under *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, [*2] because they failed to develop and present evidence that Susie died from accidental injuries she sustained when her 8-year-old brother tripped and fell while carrying her. The district court granted relief. Because the district court's decision granting Burr relief is contrary to the deference that federal courts must afford state court decisions adjudicating the merits of such constitutional claims, we reverse.

I.

A.

On August 25, 1991, at 2:55 a.m., Susie was admitted to the Alamance County Hospital in North Carolina with a closed head injury, fractures of both thighs and both upper arms, and widespread bruises to her head, face, neck, arms, legs, and torso. Shortly thereafter she was transferred by ambulance to North Carolina Memorial Hospital in Chapel Hill. Her head injury proved fatal, and she was pronounced dead on August 27, 1991, at approximately 6:30 p.m.

The state's evidence regarding the events leading up to Susie's hospitalization, including the testimony of Susie's mother, Lisa Bridges, was summarized by the North Carolina Supreme Court as follows:

> [Susie] was born on 1 April 1991 to Lisa Porter Bridges and Bridges' husband at that time, John Wesley O'Daniel. When Susie was [*3] a few weeks old, Bridges began having sexual relations with defendant, who was separated from his wife at the time. When Susie was six weeks old, John O'Daniel discovered his wife was having an affair with defendant and told Bridges that he wanted a divorce.
>
> Subsequently, in June 1991, Bridges and her four children moved into a trailer located next to a trailer owned by Bridges' brother, Donald Wade. Near the end of June, defendant moved into the trailer with Bridges and her four children. Bridges testified that when defendant first moved in with her, "[h]e seemed like a pretty good person," but that after a few weeks, he became physically abusive toward her, bending her hands back in a painful manner, threatening her with a gun, bruising her body, and choking her. Bridges testified that she remained with defendant after this abuse because she "was scared of him."
>
> On 24 August 1991, defendant and Bridges argued most of the day over defendant spending the previous night at his wife's house and his refusing to take Bridges to her parents' house. At approximately 6:00 p.m., Bridges' son Scott tripped over a cord while he was carrying Susie. Bridges testified, however, that she examined [*4] Susie after the fall and did not find any marks on her body except for some redness on her arm, which disappeared. Bridges further testified that later that evening, while she was sitting on the trailer steps with Susie and defendant was mowing the yard, defendant hit Bridges in her lower back with his fist.
>
> After defendant hit her, Bridges went over to her brother's trailer, where defendant eventually joined her. Defendant and Bridges began arguing again, and Bridges left the trailer with the infant child. Bridges testified that defendant followed her and shoved her in the back while she was holding the child. Bridges also told defendant that he was going to make her hurt the child, but Bridges testified that "he just kept running his mouth" and followed her inside her trailer, still arguing.
>
> Once inside the trailer, Bridges placed Susie in her infant swing located in the living room. Bridges testified that while she was still holding onto the swing, defendant pushed her down onto the couch, almost causing her to knock over the swing. When Bridges attempted to get up from the couch, defendant pushed her down again and told her not to leave the couch. Bridges sat on the couch a few minutes [*5] and then stood up and walked down the hallway into her bedroom. Bridges testified that defendant followed her to the bedroom and pushed her onto the waterbed, causing the waterbed to break. Bridges testified that after the waterbed broke, defendant "started talking like everything was fine." Bridges and defendant then began repairing the waterbed.
>
> Bridges testified that as they were repairing the waterbed, Susie began to cry and that defendant told Bridges, "go on up there and get her, that's all in the hell she wants anyway, she is so damned spoiled." Bridges took the child out of her swing and brought her back to the bedroom, where she laid her on the waterbed. After defendant finished fixing the bed, Bridges helped her two sons, Scott and Tony, prepare for bed, while her youngest son, John, Jr., remained at Donald Wade's trailer. Bridges testified that she also "got [Susie] to sleep" and placed her in her "baby bed" located in Bridges' bedroom. Bridges testified that when she placed Susie in her bed, she appeared to be physically fine and that she did not have any marks on her. Bridges then went back to the Wades' trailer to wash the dishes. Bridges testified that when she left her [*6] trailer, Scott and Tony were ready for bed, Susie was asleep in her bed, and defendant was working on a plug in the living room.
>
> Bridges' son Scott testified that after his mother left to go to the Wades' trailer, and after he went to bed, he was awak-

ened by "hammer noises." When Scott awoke, he heard Susie crying. Scott testified that he then heard defendant "mumbling" and that, after he heard defendant mumbling, Susie stopped crying.

After approximately forty-five minutes, Bridges returned to her trailer and found Susie in her swing in the living room. Bridges testified that defendant was pacing the floor at this time and that he told her to look at the bruises on Susie. Defendant told Bridges that he had moved the child to the swing after she woke up and that some of the marks were grease. Bridges attempted to wash these marks off but discovered that they were not grease.

Bridges testified that she observed bruises in the child's ears, under her neck, on her arms, and on her legs. Bridges further testified that her eyes did not "look right," that she did not act right, and that she did not smile or respond to anything.

Burr, 461 S.E.2d at 607-08.

Burr testified in his defense. He confirmed [*7] Bridges' testimony that Scott had tripped and fallen on a gravel roadway while carrying Susie earlier that day. He testified that he also examined Susie after the fall and that she was fine. All of the witnesses confirmed that Susie had no cuts, scrapes, bruises or gravel prints on her skin after the fall. Burr, however, presented a somewhat different version of the events leading up to Susie's hospitalization, as follows:

> Defendant testified that on the evening of 24 August 1991, he mowed the yard at Bridges' trailer until dark. During this time, Bridges was sitting on the back steps with Susie. Defendant denied having a conversation with Bridges or striking Bridges while he was mowing. Defendant testified that when he finished mowing the yard, he joined Bridges and her children and Donald Wades' daughters, Misty and Christy, at the Wades' trailer and watched television for approximately thirty to thirty-five minutes. Defendant and Bridges were arguing at this time about Bridges going to her parents' house. Defendant testified that Bridges finally "got mad enough [and] went out the door" to her trailer, taking Susie with her. Defendant testified that he remained in the Wades' trailer [*8] with Bridges' sons and Wades' daughters.
>
> Defendant testified that after a few minutes passed, he told Scott to tell Bridges that if she wanted to spend the night with her parents, he would take her to their house. Scott left, and, approximately ten minutes later, Bridges returned to the Wades' trailer without Susie. Defendant testified that he told Bridges that he would take her to her parents' house to spend the night. Approximately five minutes later, defendant and Bridges left the Wades' trailer and returned to Bridges' trailer. Defendant testified that he pushed her in a playful manner on the way to her trailer.
>
> Defendant further testified that once they were in Bridges' trailer, he and Bridges went back to the bedroom where the waterbed was located. Defendant testified that at this time, Susie was in her crib in this bedroom. Defendant pushed Bridges onto the waterbed "to have sex," and when he fell on top of her, the bed broke. Defendant and Bridges then attempted to repair the bed. Defendant testified that after they drained the water from the bed and removed the mattress, Bridges went to the Wades' trailer to wash dishes, and he began drilling on the bed. After he started drilling, [*9] defendant looked into Susie's crib to see if he had woken her up, and he noticed that her eyes were open. Defendant testified that he stopped drilling, picked up the child, took her into the living room, and put her in the swing, propping up her bottle with a blanket. Defendant wound the swing and pushed it.
>
> Defendant testified that when Bridges returned to her trailer, she helped him put the remaining parts of the bed together. During this time, defendant walked to the kitchen, and he noticed that the swing had stopped and that Susie was holding the blanket with her head over to the side. Defendant returned to the bedroom. Defendant testified that after he and Bridges finished repairing the bed, he took the child out of the swing and brought her back to her crib. As defendant was putting the child down in the crib, he noticed her

> diaper was wet, and he told Bridges to change the diaper. Defendant testified that when he picked up the child's legs, her eyes started rolling from one side to the other and that Bridges told defendant that the child was having a seizure. Bridges told defendant that one of her sons was born with seizures and that she knew what to do. Defendant testified that [*10] at this time, Bridges shook the child and her eyes stopped rolling. When asked how Bridges shook the child, defendant responded, "[I]t wasn't real hard or nothing." Defendant testified on cross-examination that at this time, he and Bridges took the child into the living room and kitchen where they had a lamp and that he noticed bruises on the child.
>
> Defendant testified that . . . he told [Bridges] that some of the marks on the child could be grease. They wiped the child with a cloth, and some of the marks came off. . . . Defendant denied that the child cried while he was alone with her that night, and he denied that he tried to settle her down or that he beat her.

Id. at 609-10.

Burr drove Bridges and Susie to the Alamance County Hospital. While there is some dispute between them as to the events that had occurred up until this point, there is no dispute about Susie's medical condition upon her arrival at the hospital. It was grave. Bridges told Dr. Willcockson, the examining physician, that her 8-year-old son Scott had accidentally fallen while holding Susie the previous day. But it was apparent to Dr. Willcockson that Susie was a victim of child abuse.

> Dr. Willcockson examined the child [*11] and observed that she was unconscious and "poorly responsive." The child's eyes were wandering but did not "have any particular following," and her right eye deviated to the right. Dr. Willcockson observed that the child made no oral sounds and that her movements appeared lethargic. The child had occasional twitching of the eyes, face, and arms, which appeared to be seizures according to Dr. Willcockson. The child's respiratory rate was fast, and she had multiple bruises and swellings all over her head, scalp, ears, face, neck, arms, legs, and main portion of her trunk. Further, the soft spot on the child's head where the bones were forming was bulging, a symptom which Dr. Willcockson testified indicates swelling in the head. Dr. Willcockson also testified that Susie had a "grating feeling" in both arms and legs which meant the bones were grating upon each other and which indicates bone fractures. The X rays revealed that both of the child's arms were broken, as well as both of her thigh bones. The X rays further showed that the child had suffered some posterior rib fractures.
>
> Dr. Willcockson testified that based on the multiplicity of trauma, Bridges' story of another child falling [*12] with Susie did not account for the injuries, and he immediately asked Bridges if Susie had been abused, to which Bridges responded in the negative. Dr. Willcockson testified that he "felt that there was such a high suspicion of abuse in the matter" that he contacted the sheriff's department and social services. Dr. Willcockson further testified that based on the bruising around the head, the seizures, and the bulging of the soft spot, he formed the opinion that the child had suffered some form of "closed head injury."

Id. at 608.

Due to the severity of her injuries, Susie was transferred to North Carolina Memorial Hospital at 5:15 a.m., where she was examined by Dr. Azizkhan, chief of pediatric surgery and associate professor of surgery at the University of North Carolina Medical School. Dr. Azizkhan also rejected the fall with Scott as a possible cause of Susie's injuries.

> Dr. Azizkhan testified that Susie had bruising of the neck, particularly on the left side of the neck and a two-centimeter-by-two-centimeter area underneath the mastoid and the mandibular portion of her neck. Dr. Azizkhan observed bruising on the right side of the face that extended onto the ear, circumferential bruising [*13] of the right arm, and bruising on the back. Dr. Azizkhan testified that the child's blood pressure "was very low for a baby [her] age" and

> that she had lost "half of her blood volume" from internal bleeding.
>
> Dr. Azizkhan further testified that the bones of a child Susie's age "are quite malleable and soft" and that "when you see fractures that are of this magnitude in a baby, you know that the amount of force that's been delivered is very significant, much, much greater than from a simple fall." Dr. Azizkhan testified that to inflict the injuries to the child's legs "would require either a severe direct blow or some kind of a snapping activity" and that the fractures to the child's arms "could be from intense grabbing of the arm and torquing and pulling the child's arms backwards." In Dr. Azizkhan's opinion, Susie's injuries were "inflicted" instead of "accidental."

Id. at 608-09. Dr. David Merten, professor of radiology in pediatrics at the University of North Carolina School of Medicine and chief of the section of pediatric radiology at Memorial Hospital, studied Susie's X-rays and also testified at trial.

> Dr. Merten testified that these X rays revealed fractures in both thigh bones [*14] with evidence of early healing. In Dr. Merten's opinion, these leg fractures were eight to nine days old. The X rays also revealed fractures on or near both shoulders. These fractures did not show any signs of healing, and, in Dr. Merten's opinion, they occurred five days later than the leg fractures. Dr. Merten testified that the fractures in the legs "were produced simply by bending the knee with violence, significance [sic] force, forward, and hyperextending [the knees]" and that the shoulder fractures were "inflicted and incurred" by "taking the arms and bending them back." Regarding the injuries to the head, Dr. Merten testified that the child had a depressed skull fracture where the skull was actually broken and that the child had suffered injury to the brain underneath this fracture. Dr. Merten testified that this head injury was "a very unusual fracture in a very unusual place" and that "it would take a relatively confined direct blow to that area to produce this type of fracture." Dr. Merten further testified that this head injury occurred within hours before her admission to the hospital in Chapel Hill.

Id. at 609. Dr. Michael Byron Tennison, a child neurologist at Memorial [*15] Hospital, testified at trial regarding Susie's CT scan.

> Dr. Tennison testified that this scan showed not only a depressed skull fracture, but also "multifocal intercranial injuries" and bleeding behind both eyes. Dr. Tennison testified that bleeding behind both eyes is "highly suggestive of a shaken baby syndrome," which he defined as a "specific kind of injury where the baby has a whiplash kind of injury from being shaken back and forth." Dr. Tennison further testified that, based on the nature of the skull fracture, the child suffered "quite a force ... by some blunt object" to the side of the head and that it would have taken a great deal of force to cause this fracture.

Id.

Despite their efforts, the trauma team at Memorial Hospital was unable to reduce the swelling and pressure in Susie's brain. Dr. Tennison testified that Susie died as a result of "multiple trauma to her head that resulted in contusions of the brain and eventually brain swelling and herniation and brain death." Id. (internal quotation marks omitted).

Dr. Karen Chancellor, a pathologist at Memorial Hospital, performed Susie's autopsy.

> Dr. Chancellor observed multiple bruises on the child's neck that were consistent [*16] with marks caused by a hand and bruises on the cheek that were consistent with marks caused by fingers. Dr. Chancellor further observed round bruises on the upper chest area and a round bruise on the back, which bruises, in her opinion, were caused by a blunt object. Dr. Chancellor also observed bruises on the back of the head.

Id. The Report of Autopsy included pathological diagnoses of blunt force trauma to the head, blunt force trauma to the neck and chest with bruising of the neck and chest, and blunt force trauma to all four extremities.

B.

In September 1991, Burr was indicted for Susie's murder and he was appointed trial counsel. In mid-December 1992, with trial rapidly approaching, Burr asked the court to appoint new counsel. The court obliged. The trial was initially set for January 25, 1993, but trial counsel requested and received a continuance to March 1, 1993. Counsel sought an additional one-month continuance on the eve of trial, from both the trial court and the North Carolina Supreme Court, based in part upon their desire to spend additional time evaluating the medical evidence and the need for expert assistance. The requests were denied.

Prior to the start of the guilt [*17] phase, however, trial counsel scheduled an in-person consultation with Dr. Desmond Runyan, a physician at Memorial Hospital and Director of the Child Medical Evaluation Program at the University of North Carolina Children's Hospital in Chapel Hill. Dr. Runyan had been called in to consult on Susie's case at the time of her injuries and death but did not testify at trial. The record reflects that Dr. Runyan provided the following information to the North Carolina Department of Social Services ("DSS"):

> [B]oth [of Susie's] arms were broken cleanly through the bone just below the shoulder. Both legs were broken cleanly through just below the hip. There was no evidence of twisting - no spiral fracture of any bone. To break the bones in the manner they were broken would take a hard blow. There is a fracture of the skull that probably occurred on Saturday night. It is just above the right ear on the right temple.
>
> The fractures in the arms [and] legs probably occurred seven to ten days prior to her hospitalization on Sunday morning. All of the breaks have begun calcification. [T]his begins to occur about seven days after the break. [T]he calcification is in different stages, so they would begin [*18] to heal, and from her own movement or from being picked up, the breaks would be reinjured. [Susie] would have been in extreme pain. She would have been crying, not eating, and not wanting to be held. The family's account of her behavior does not fit.

J.A. 1436. Dr. Runyan also commented on the issue of whether Susie's injuries could have occurred when Scott fell with her:

> [Dr. Runyan] stated that [Susie] would have to be dropped from about 8 feet 6 inches or more to cause the amount of brain damage and injury th[e] child suffered. An 8 [year] old is not strong enough to cause any of these injuries. The fall with Scott probably would have hurt the child if she hit the ground, but it would be minor injuries. For the breaks in the arms and legs, it would take adult strength blows, not a child. [T]here are two occaisions [sic] of injury; 7-10 days prior to hospitalization and Saturday night.

J.A. 1436.

Given the extent and nature of Susie's injuries, counsel was clearly presented with a difficult case. However, there were no eyewitnesses who could explain Susie's prior abuse or her acute injuries. At trial, trial counsel conceded that Susie was a battered child, with preexisting fractures, [*19] and conceded that her fatal injuries were the result of an acute episode of child abuse occurring on August 24. Trial counsel also conceded that Scott's fall with Susie could not have caused the extensive injuries documented by the treating physicians and medical examiner. Trial counsel argued, however, that the state could not prove beyond a reasonable doubt that Burr -- who was only sporadically in the home and not a primary caretaker -- was Susie's abuser either prior to or on the night in question.

In support of this strategy, trial counsel elicited testimony from Dr. Chancellor that one quick, hard blow to Susie's head by a fist could have caused the fatal injury, and presented evidence and argument that there were others with motive and opportunity to inflict the fatal wound. In particular, counsel pointed the finger at Bridges, who had been angry and arguing with Burr all day and who had opportunities to abuse Susie. Counsel pointed out that it was not credible to believe that Bridges, who was Susie's primary caretaker, had failed to realize that Susie had preexisting fractures or see the older, brown bruises that were present from the earlier injuries. Counsel also pointed out [*20] Bridges' admission that, before she and Burr took Susie to the emergency room, Bridges took the time to instruct her three minor children about what they should say if the authorities came to question them. According to Bridges' testimony, she "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." J.A. 2054. When asked why she had taken this step to warn her children, Bridges responded that it was

"[b]ecause Susie looked that bad." J.A. 2054. Counsel also pointed out that, while Bridges initially denied to the authorities that Burr was abusive to her, and Bridges and Burr both related only the fall with Scott as a possible cause of Susie's injuries, Bridges changed her story and began to direct suspicion towards Burr once the treating physicians and authorities unanimously rejected the possibility that Susie's injuries could have occurred from the fall.

Trial counsel also presented the testimony of Colene Faith Flores. Flores claimed that she saw Bridges at a friend's house with a baby in August 1991. Flores testified that after the baby had been crying constantly for [*21] approximately thirty-five minutes, "she . . . observed Bridges walk over to the baby," who had been propped on the couch, "and 'smack' her, stating, 'you're driving me crazy.'" *Burr, 461 S.E.2d at 611.* Flores testified that "the baby fell off the couch." Id.[1] Trial counsel also impeached Bridges "regarding the lack of cleanliness of Bridges' home and her children, the truancy problem with her children, the fact that DSS has received [prior] allegations of neglect against Bridges concerning two of her sons, and a social worker's opinion that Bridges' psychiatric history and relationship with men suggest[ed] instability." *Id. at 618* (alteration and internal quotation marks omitted). There was evidence that Bridges had been hospitalized and received medication and treatment for depression not long before she became pregnant with Susie.

> 1 The state called Flores' ex-boyfriend, James Whitlow, to testify on rebuttal. "Whitlow testified that he was with Flores at her friend's house and that at no time did he observe anyone slap the baby off the couch. Whitlow also testified that he had discovered Flores lying to him previously." *Burr, 461 S.E.2d at 611.*

Despite trial counsel's efforts, the jury [*22] convicted Burr of first degree murder, felony child abuse, and assault on a female. Upon the jury's recommendation, the court sentenced Burr to death for the murder, to thirty days imprisonment for the assault on a female conviction, and arrested judgment on the felony child abuse conviction.

With the assistance of new counsel, Burr filed a direct appeal to the North Carolina Supreme Court. Among other arguments, Burr contended "that the trial court erred by failing to grant his motion for a continuance, thereby violating his constitutional rights to confrontation and to the effective assistance of counsel." *Id. at 619.* In rejecting this claim, the court found as follows:

> [D]efense counsel had access to the medical evidence containing the necessary evidence they required regarding the need for an expert for two months prior to trial, and having observed the evidence and medical testimony at trial, defendant has had ample opportunity to show how his case would have been better prepared with regard to this evidence had the continuance been granted, or to show that he was materially prejudiced. He has failed to do so.

Id. at 620. The Supreme Court denied certiorari. See *Burr v. North Carolina, 517 U.S. 1123, 116 S. Ct. 1359, 134 L. Ed. 2d 526 (1996).*

C.

On [*23] September 27, 1996, Burr's state post-conviction counsel filed a Motion for Appropriate Relief ("MAR") in state court, which was followed by several amendments. Burr claimed, inter alia, that his trial counsel were constitutionally deficient under Strickland because they failed to adequately investigate the medical evidence in the case. More particularly, however, Burr asserted that trial counsel should have developed and presented to the jury expert testimony that Susie may have suffered from an undiagnosed condition of Osteogenesis Imperfecta, or "brittle bone disease," (the "OI" evidence), which could explain her prior fractures, and/or that her fatal injuries occurred when her 8-year-old brother Scott tripped and fell while carrying her that day (the "short-fall" evidence). In support of this theory of accidental injury and death, Burr submitted affidavits from three consulting experts who reviewed the Alamance County Hospital and North Carolina Memorial Hospital records.

The first affidavit was from Dr. Jerry C. Bernstein, a Clinical Professor of Pediatrics at the University of North Carolina Medical School. Although Dr. Bernstein agreed that "consideration of abuse [was] uppermost [*24] in one's diagnosis," he stated that the number and nature of the multiple fractures "should raise a question of osteogenesis imperfecta (brittle bone disease)," and that Susie's injuries could have resulted from an accidental fall compounded by OI. J.A. 968.

After consulting with Dr. Berstein, counsel obtained a second affidavit from Dr. Colin R. Paterson, from the University of Dundee, in Scotland, who was considered to be a leading expert in brittle bone diseases. Dr. Paterson also stated that "[t]he number and distribution of fractures . . . raises the possibility of brittle bone disease (osteogenesis imperfecta)." J.A. 908. He attributed the earlier fractures to "some form of [OI]," and all of Susie's

acute injuries to a "bad fall . . . compounded by this disease." J.A. 909.

Both Dr. Bernstein and Dr. Paterson based their opinions upon an accident whereby Scott dropped Susie to the ground and then fell on top of her -- a version of the accident that appeared in some early medical and investigative reports but which was not supported by the eyewitness testimony at Burr's trial. Both Dr. Berstein and Dr. Paterson also noted that, based upon their review of the medical records, Susie's [*25] treating physicians may not have considered this OI/short fall combination as a possible explanation for Susie's preexisting and fatal injuries.

The final affidavit was from Dr. John J. Plunkett, a forensic pathologist and coroner from the State of Minnesota. Dr. Plunkett stated that Susie's injuries were "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." J.A. 943. Dr. Plunkett did not address the possibility of a brittle bone disease, nor did he address the cause of Susie's prior, healing fractures.

The state offered evidence in opposition, including an affidavit outlining the district attorney's interviews of Susie's treating physicians and their opinions regarding OI and Scott's fall with Susie. The physicians rejected these theories as alternative causes of Susie's extensive injuries and death, and it appears that the state was prepared at trial to refute any such accidental death claim with, at a minimum, these opinions.

In two exhaustive orders, the state MAR court considered and rejected Burr's ineffective assistance of counsel claim.[2] In doing so, the state court made a number of factual [*26] findings and conclusions that we summarize here.[3]

2 On July 29, 1998, the North Carolina Supreme Court granted Burr's Petition for Writ of Certiorari for the limited purpose of reconsideration in light of two state court cases. See *State v. Burr, 348 N.C. 695, 511 S.E.2d 652 (N.C. 1998)*. This led to the second state MAR court's issuance of a second "Order and Memorandum Opinion," dated June 15, 2000, again denying relief. J.A. 1786.

3 Burr additionally argued that he should be granted a new trial under North Carolina law based upon the "newly-discovered" OI/short-fall evidence. While the new-trial claim is not directly relevant here, the state MAR court made findings and conclusions in connection with this claim that are also pertinent to its rejection of the ineffective-assistance-of-counsel claim.

With regard to the expert opinions that Susie may have suffered from OI or some similar degenerative or brittle bone disease that her treating physicians did not recognize or consider, the state court pointed out that the "defendant, the party with the burden of proof . . . ha[d] not presented anything from the experts who testified at trial demonstrating either that they never considered the possibility [*27] that Susie had OI or that they believed that she had OI and that OI contributed to her death." J.A. 1420 (emphasis added). On the contrary, the court observed that "matters of record indicate that the experts who testified found nothing indicative of bone disease when evaluating Susie." J.A. 1420. In particular, the state MAR court noted Dr. Merten's testimony that Susie's "bones [were] perfectly normal other than the injuries," J.A. 1421 (internal quotation marks omitted); Dr. Merten's confirmation to the lead prosecutor "that he had observed nothing in [Susie] to indicate that she suffered from any such disease," J.A. 1421; Dr. Azizkhan's reference in his trial testimony "to the very rare condition of brittle bones in premature babies, evidence indicating that he too was aware of the existence of 'brittle bone' disease," J.A. 1421; and the testimony of the medical examiner, Dr. Chancellor, that "there was no degenerative disease processes" observed, J.A. 1421 (internal quotation marks omitted).

The state court also reviewed numerous articles regarding child abuse and OI that had been provided by Dr. Merten and submitted to the court. The court found the articles to be indicative "of [*28] the knowledge possessed by a reasonably prudent physician concerning the causes and diagnosis of child abuse vis-à-vis accidental injury," J.A. 1391, and noted that four of the articles "included references to children with bone disease or osteogenesis imperfecta," J.A. 1398. The court additionally reviewed the medical records and noted that "the salient features indicating the possible existence of OI" were not present in Susie. J.A. 1422. Finally, the court noted that the consulting expert's opinion regarding Scott's fall was contrary to the evidence at trial regarding the accident, contrary to the unanimous views of the physicians who treated Susie, and did not address OI. Nor, we note, did it explain Susie's preexisting fractures.

Having reviewed all of the medical evidence presented, and taking note of the qualifications, experience, and training of Susie's treating physicians, the state court found no basis upon which to conclude that the eminently qualified physicians who treated Susie "simply failed to give any consideration as to whether Susie had a bone disease that contributed to her death," J.A. 1422, and found that "the far more reasonable inference is that [they] knew [*29] that fractures are sometimes caused by degenerative bone disease, but that nothing indicative of bone disease surfaced while they were evaluating

Susie and the circumstances surrounding her injury and death. Defendant, who has the burden of proof, has not demonstrated otherwise." J.A. 1422.

Turning more specifically to the claim that trial counsel did not adequately prepare for trial, the state court made a number of additional findings, as follows:

> First, matters of record demonstrate that trial counsel worked diligently for a reasonable amount of time. . . . Second, lead trial counsel had considerable experience in the Guardian Ad Litem program that helped him understand the dynamics of a prosecution based on child abuse. Third, trial counsel had an opportunity before trial to review both the medical evidence available and the thorough statements of a number of witnesses and other information in the State's open files. Fourth, trial counsel knew before trial that a host of eminent medical experts had reviewed available information concerning Susie and her cause of death, and that all experts opined that Susie died of child abuse, not an accidental fall. Fifth, even though trial counsel [*30] tried diligently to delay the start of the trial, defendant's well-qualified and experienced lead trial counsel never asserted a particularized necessity for appointment of an expert. Sixth, defendant's pre-trial motions and the transcript demonstrate that trial counsel's actions were driven by a strategy to attempt to shift blame to a third party (e.g., Susie's mother) and the understanding, based on the review of a plethora of information from respected physicians, that Susie's death was not attributed to accidental injury.

J.A. 1807-08 (internal citation omitted). In addition, the state MAR court observed that while "[d]efendant's postconviction counsel have found experts who take issue with the [medical] witnesses at trial[,] [t]he mere fact that they have found such experts does not demonstrate ineffectiveness of counsel." J.A. 1809. The state court observed that "trial counsel's actions [must be evaluated] in light of the circumstances facing trial counsel at and before trial, and not from the vantage point of '20-20 hindsight,'" that counsel's "performance was objectively reasonable" under the circumstances, and that "defendant's proffers of evidence have not shown a reasonable [*31] probability that but for trial counsel's alleged unprofessional errors, the result of the trial would have been different." J.A. 1809. The North Carolina Supreme Court denied Burr's petition for certiorari. J.A. 1864.

D.

On April 12, 2001, Burr filed the instant petition for a writ of habeas corpus under *28 U.S.C. § 2254(d)*. On December 14, 2004, the magistrate judge recommended that habeas relief be granted, but subsequently stayed the matter pending the development of additional evidence, including the identification and discovery of additional experts. Following such discovery and supplemental briefing, the magistrate judge issued a supplemental recommendation that habeas relief be granted.[4]

> 4 The magistrate judge noted the state's additional motion to quash the affidavit of Dr. Paterson, whose medical license had been revoked, and stated that this "would cause the Court, at the very least, to afford his opinion considerably less weight than previously assigned." J.A. 443.

On May 30, 2012, the district court issued its order granting habeas relief. Because the Supreme Court's then-recent decision in *Cullen v. Pinholster, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)*, made it clear that the development of the [*32] evidence in the federal habeas proceedings should not have been allowed, the district court considered only the record that was before the state MAR court when it made its decision. The district court ruled that Burr had made a sufficient showing that his trial counsel were ineffective for failing to conduct additional investigation into the medical evidence, and that the state court's rejection of the claim was unreasonable. This appeal followed.

II.

[HN1] Under *28 U.S.C. § 2254(d)*, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, our review of the state MAR court's decision rejecting Burr's ineffective assistance of counsel claim is highly deferential. Where, as here, a federal habeas petitioner's constitutional claim has been "adjudicated on the merits in State court proceedings," we may not grant relief unless the state court's adjudication "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 "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." [*33] *28 U.S.C. § 2254(d)*. See also *Harrington v. Richter, 131 S. Ct. 770, 785, 178 L. Ed. 2d 624 (2011)*.

The "clearly established" Supreme Court precedent at issue in this appeal is [HN2] Strickland v. Washington,

which sets forth the two-prong standard for evaluating *Sixth Amendment* claims of ineffective assistance of counsel. To establish ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient," and that "the deficient performance prejudiced the defense." *Strickland, 466 U.S. at 687*. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id. at 687*.

[HN3] To demonstrate inadequate or deficient performance under Strickland, the defendant must "show that counsel's representation fell below an objective standard of reasonableness" measured by "prevailing professional norms." *Id, at 688*. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id. at 689*. [*34] "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id.

To demonstrate prejudice under Strickland, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," i.e., that he would have been found not guilty. *Id. at 694*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Harrington, 131 S. Ct. at 787* (citation omitted) (quoting *Strickland, 466 U.S. at 693*). "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id. at 787-88* (quoting *Strickland, 466 U.S. at 687*).

Consequently, [HN4] where the issue is whether the state court has unreasonably applied Strickland standards to an ineffective assistance of counsel claim, "double deference" is required - deference to the state court judgment granting deference to trial counsel's performance.

> "Surmounting Strickland's high bar is never an easy task." [*35] *Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010)*. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland, 466 U.S. at 689-90*. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id. at 689*; see also *Bell v. Cone, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)*; *Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)*. The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland, 466 U.S. at 690*.
>
> [HN5] Establishing that a state court's application of Strickland was [*36] unreasonable under *§ 2254(d)* is all the more difficult. The standards created by Strickland and *§ 2254(d)* are both "highly deferential," *id., at 689*; *Lindh v. Murphy, 521 U.S. 320, 333, n. 7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997)*, and when the two apply in tandem, review is "doubly" so, *Knowles [v. Mirzayance], 556 U.S. 111, 129 S. Ct. [1411], 1420, 173 L. Ed. 2d 251 [2009]*. The Strickland standard is a general one, so the range of reasonable applications is substantial. *129 S. Ct. at 1420*. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under *§ 2254(d)*. When *§ 2254(d)* applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Harrington, 131 S. Ct. at 788.

As the Court succinctly stated, "[i]f this standard is difficult to meet, that is because it was meant to be." *Id. at 786*. Indeed, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Id.

> [HN6] As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court [*37] was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id. at 786-87.* "*Section 2254(d)* thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding.

Id. at 787 (emphasis added).

III.

We begin with Burr's argument that we should review the state MAR court decision de novo instead of under the deferential standards of *§ 2254(d)*. Relying upon our decisions in *Winston v. Kelly, 592 F.3d 535 (4th Cir. 2010)* ("Winston I"), and *Winston v. Pearson, 683 F.3d 489 (4th Cir. 2012)* ("Winston II"), Burr argues that the state court decision was not an adjudication on the merits for purposes of *§ 2254(d)* because the state court denied his request for an evidentiary hearing.

In Winston I, we held that a state court decision might not be deemed an adjudication on the merits for purposes of *§ 2254(d)* if diligent counsel was unable to complete the state court record because the "state court unreasonably refuse[d] [*38] to permit further development of the facts of a claim." *Winston II, 683 F.3d at 496* (internal quotation marks omitted). Here, while the MAR court did not hold an evidentiary hearing, Burr's state post-conviction counsel had an unfettered opportunity to obtain and present expert opinions in support of the new OI/short-fall theory of defense, and the state MAR court accepted the affidavits of these experts at face value. The state court did not deny Burr's state post-conviction counsel an opportunity to develop the evidence that was presented during the federal evidentiary hearing. Indeed there is no reason to believe that state post-conviction counsel could not have developed the exact evidence produced by Burr's counsel in the federal evidentiary hearing. The fact that Burr's state post-conviction counsel requested but was denied an evidentiary hearing simply does not, without more, warrant de novo review of the state court's decision. See *Winston II, 683 F.3d at 497*. Accordingly, like the district court, we review the state court's adjudication of the Strickland claim under the deferential standards of *§ 2254(d)*.

IV.

A.

Burr contends that his trial counsel were constitutionally deficient [*39] because they failed to conduct an adequate investigation into the medical evidence in this case, and failed to make a reasoned decision that further investigation was not required. See *Rompilla v. Beard, 545 U.S. 374, 380, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)*; *Wiggins v. Smith, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*. The heart of Burr's claim, however, is that trial counsel were ineffective because they failed to obtain and present expert testimony to refute the medical opinions of Susie's treating physicians, and failed to present to the jury an argument (1) that Susie had OI which, combined with accidents, explained all of her injuries, or (2) that even if Susie was a battered child, her fatal head injury was from the fall with Scott alone and not from an acute incident of such child abuse.

[HN7] To obtain federal habeas relief on this Strickland claim, however, Burr must satisfy us that the state court's rejection of Burr's arguments "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington, 131 S. Ct. at 786-87.* "[T]he question is not whether [trial] counsel's actions were reasonable. The question is whether there is [*40] any reasonable argument that counsel satisfied Strickland's deferential standard." *Id. at 788.* Burr has failed to overcome this hurdle.

The state MAR court found that trial counsel had experience in child abuse matters, had adequate time to review the medical evidence and witness statements, and worked diligently for a reasonable amount of time investigating the case. Mindful that it must "evaluate trial counsel's actions in light of the circumstances facing trial counsel at and before trial, and not from the vantage point of '20-20 hindsight,'" the state court concluded that trial counsel's "performance was objectively reasonable." J.A. 1809. We cannot say that this was an unreasonable determination of the facts in light of the state court record, or an unreasonable application of *Strickland*'s deferential standards.

There is no question but that Burr's trial counsel were aware of Scott's fall with Susie earlier in the day. However, Susie was observed by both her mother and by Burr to be fine after the fall. All of the witnesses who checked on Susie after the fall related that she had no cuts, scrapes, or gravel marks, which was also consistent with the "cradled fall" description that [*41] was given by the witnesses during the investigation and at trial.

More importantly, however, trial counsel were presented with medical records from independent, eminently qualified treating physicians and pediatric specialists documenting the preexisting and acute non-accidental injuries that Susie had sustained, and unanimously rejecting the notion that Scott's fall with Susie (even as originally reported) was a possible cause of the injuries.

Susie's initial treating physician at Alamance County Hospital immediately recognized that Susie had sustained diffuse, severe injuries, and that the fall with Scott, as Bridges had related it to him, could not account for them, prompting him to alert authorities to the suspected child abuse. The investigating authorities observed and documented the severity of the injuries as well. Susie's treating and evaluating physicians at the UNC Medical Center, all of whom were pediatric and child abuse experts, were also of the unanimous opinion that Susie had been abused, and that Scott's fall could not have caused her injuries.

When Susie was admitted to the hospital, she had sustained an acute, blunt force head injury and was suffering from the effects [*42] of it, including seizures, swelling of the fontanel, and unconsciousness. Even if competent trial counsel would have reasonably entertained the notion that Susie's lethal head injury might have occurred when Scott fell with her earlier in the day (in the face of the evidence that she had no visible marks and seemed fine thereafter), the head injury was just the start of the picture painted by these records.

As noted above, Susie had no visible marks or bruises when she was checked by her mother, Burr and other family members. But when Susie arrived at the hospital six hours later, she had multiple bruises and swelling all over her head, scalp, ears, face, neck, arms, legs, and trunk. Bruises on her neck were consistent with marks caused by a hand. Bruises on her cheek were consistent with marks caused by fingers. Round bruises to the upper chest and back indicated that a blunt object had been utilized to inflict them. There were additional bruises to the back of the head, as well as bleeding behind both of her eyes which was considered to be suggestive of shaken baby syndrome. In addition, both of Susie's upper thighs and both of Susie's upper arms "were broken cleanly through." J.A. [*43] 1436. The nature of the breaks suggested either significant direct blows or gruesome, manual manipulation of the extremities. Susie's leg breaks were consistent with her knees being bent forward with violence and significant force, hyperextending the knees until the leg was broken. Susie's arm breaks were consistent with someone grabbing her arms, torqueing them and pulling them backwards.

To the extent Burr continues to press OI as a possible, contributing cause of Susie's injuries and death, there was likewise nothing in the records that would have raised such a possibility.[5] As the state court found, Burr, "the party with the burden of proof . . . [did] not present[] anything from the [treating physicians] demonstrating either that they never considered the possibility that Susie had OI or that they believed that she had OI and that OI contributed to her death." J.A. 1420 (emphasis added). On the contrary, the "matters of record indicate[d] that the [treating physicians] found nothing indicative of bone disease when evaluating Susie." J.A. 1420. There was simply no basis upon which to conclude that Susie's treating physicians "failed to give any consideration as to whether Susie [*44] had a bone disease that contributed to her death," J.A. 1422, and that "the far more reasonable inference [was] that [they] knew that fractures are sometimes caused by degenerative bone disease, but that nothing indicative of bone disease surfaced while they were evaluating Susie and the circumstances surrounding her injury and death." J.A. 1422.

> 5 The district court properly declined to consider the additional evidence developed during the federal habeas proceedings, but it did observe that the evidence that Susie suffered from OI had weakened. On appeal, Burr's counsel largely abandons the OI portion of the claim, which was the primary focus of the argument presented to the state MAR court. Counsel barely mentions Dr. Bernstein or Dr. Paterson in the history of the case, and confirms the state's introduction of evidence that "Dr. Paterson was [subsequently] charged with providing misleading testimony about another syndrome, Temporary Brittle Bone Disease," Appellee's Brief at 29 n.11, apparently causing him to lose his medical license. Instead, Burr primarily relies instead upon Dr. Plunkett's affidavit and argues that counsel should have developed evidence that Susie's fatal injury [*45] could have resulted from the fall with Scott alone.
>
> While we take note of this evolution of the post-conviction claim as it has progressed over the past 16 years, we do not consider the evidence as it developed in the federal court and need not confront the issue of Dr. Paterson's credibility at this juncture. The state court accepted Dr. Paterson's affidavit at face value. Our review is limited to the question of whether the state court's adjudication of the ineffective assistance of counsel claim, as it was presented to it, was unreasonable.

The record also does not support Burr's contention that trial counsel unreasonably failed to secure the assis-

tance of an expert in light of the factual investigation and medical records. Trial counsel requested an eleventh-hour continuance based in part upon their stated desire to evaluate the need for expert assistance. That request was denied. But, prior to the start of the guilt phase of Burr's trial, counsel did in fact consult with Dr. Runyan, a leading North Carolina child abuse expert. Dr. Runyan confirmed that Susie's death was non-accidental and that Scott's fall could not have been the cause. According to Dr. Runyan, Susie "would have [*46] to be dropped from about 8 feet 6 inches or more to cause the amount of brain damage and injury [she] suffered." J.A. 1436.[6]

> 6 During their treatment of Susie, some of the physicians, based upon x-rays and CT scans, observed that Susie had sustained a skull fracture in addition to the underlying closed head trauma that led to her death. Dr. Chancellor's autopsy report indicated that there was no fracture of the skull, although there was clearly no dispute as to the existence of the blunt force head trauma that caused Susie's death. Burr makes much of the existence or nonexistence of an actual fracture to the skull itself, but we are at a loss to see much critical significance. All of the treating physicians and the medical examiner agreed that the cause of Susie's death was blunt force head trauma, and its resulting swelling and pressure in the brain, and that significant force was necessary to cause this trauma. Burr presented no evidence to the state MAR court that the treating physicians would have changed their opinions regarding child abuse vis-à-vis accident based upon the difference in the radiographic evidence and the autopsy report.

As the state court reasonably observed, "trial [*47] counsel knew before trial that a host of eminent medical experts had reviewed available information concerning Susie and her cause of death, and that all experts opined that Susie died of child abuse, not an accidental fall." J.A. 1807 (emphasis added). These medical opinions were not from consulting experts or state witnesses retained or employed to assist in the collection of evidence on behalf of the prosecutors. They were from the treating physicians who actually examined Susie and attempted to save her life, and from the medical examiner that conducted the autopsy. We have no doubt that competent trial counsel, after consulting with Dr. Runyan, reasonably concluded that further investigation was unnecessary, and that they were foreclosed from credibly arguing to the jury that Susie died as a result of the accidental fall with her 8-year-old brother. The medical opinions regarding the existence of child abuse and the non-accidental nature of the cause of death were unanimous, consistent with the physical evidence and factual investigation, and overwhelming.

Finally, Burr's claim that trial counsel's concession of child abuse and failure to pursue alterative theories of injury and [*48] death left Burr defenseless and the jury with no "rational option" other than to convict is likewise not supported by the record. See *Elmore v. Ozmint, 661 F.3d 783, 855 (4th Cir. 2011)*. As the state MAR court observed, "trial counsel's actions were driven by a strategy to attempt to shift blame to a third party (e.g., Susie's mother) and the understanding, based on the review of a plethora of information from respected physicians, that Susie's death was not attributed to accidental injury." J.A. 1807-08. Our independent review of the record of the trial unquestionably reveals this to be the case. Capitalizing upon Burr's minimal role in the family, as well as evidence of Bridges' actions leading up to and on the night of the fatal abuse, trial counsel pointed the finger at Bridges as an alternative suspect, and persuasively argued reasonable doubt to the jury.

Burr's current post-conviction counsel ignores this clear strategy, and repeatedly represents that trial counsel did no more than concede abuse and argue that Susie might have been attacked by a "deranged stranger" who entered the trailer and inflicted the mortal punch - all to support the claim that trial counsel's strategy [*49] was ridiculous and left the jury with no choice but to convict. See e.g., Appellee's Brief at 19, 29-30; id. at 43 (citing a portion of trial counsel's closing argument and arguing that "by abandoning the fall without adequate investigation, [counsel] were left with no theory at all, other than perhaps a 'deranged stranger' beat Susie."). But this is simply not the case at all.

Trial counsel did reference a "deranged stranger" in closing argument, but the reference was clearly offered to the jury in the context of explaining reasonable doubt. Actually, trial counsel argued to the jury that while such a "deranged stranger" was "a possible explanation," it would likely "fall[] within what the District Attorney's office would call the ingenuity of counsel, a fanciful doubt, not a reasonable doubt." J.A. 4065. Trial counsel then proceeded, in accordance with the planned strategy, to discuss the evidence of the family members that had motive and opportunity to inflict the fatal injuries that night, culminating in the argument that Bridges was the most probable culprit and, at a minimum, enough of a suspect to create such reasonable doubt.

Having considered the record and arguments of counsel, [*50] we simply cannot say that the state court's adjudication of the performance prong of *Strickland* was an unreasonable one. There is certainly a "reasonable argument that [trial] counsel satisfied Strickland's deferential standard" by reviewing the medical

evidence, consulting with Dr. Runyan, and pursuing an alternative-perpetrator, reasonable-doubt defense that was consistent with the factual investigation and the overwhelming medical evidence that Susie was a victim of child abuse. *Harrington, 131 S. Ct. at 788.*

B.

Considering the second prong of *Strickland*, the state court found that Burr's evidence failed to show a reasonable probability that but for trial counsel's alleged unprofessional errors, the result of the trial would have been different. We cannot say that the state court's adjudication of the prejudice prong was unreasonable either.[7]

> 7 On appeal, Burr has argued that the state MAR court applied the wrong prejudice standard, again necessitating de novo review of the claim. In support, however, Burr cites to the state MAR court's initial order that includes, in connection with the prejudice prong of Strickland, the observation that Burr had "proffer[ed] nothing demonstrating [*51] that his trial was fundamentally unfair or that the results are unreliable as a result of trial counsel's performance," J.A. 1443, and cites *Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)*, as the pertinent authority in support. However, in the state MAR court's second decision, issued on remand from the North Carolina Supreme Court, the state MAR court explicitly recognized the clarification that *Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*, provided to the Strickland prejudice prong and the breadth of Lockhart, and reconsidered and reissued its decision in light of the Supreme Court's clarification. Burr's representation that the state court applied the wrong standard of review appears to overlook this second order.

The jury rejected a defense strategy aimed at creating reasonable doubt in their minds that Burr, as opposed to Susie's mother or the other persons with access to Susie, inflicted the mortal wound. Indeed, Burr's post-conviction counsel argued before us that competent trial counsel would have presented this defense, seemingly ignoring the fact that trial counsel did present this defense. In any event, the stakes are high, and it is all too tempting for post-conviction counsel, [*52] with the benefit of hindsight, to second-guess the investigative decisions of trial counsel and to now argue that Burr might have fared better on the reasonable doubt argument if trial counsel had presented the jury with the theory that Susie could have sustained her lethal head injury when Scott tripped and fell while carrying her.

This argument, however, does not take into account the prosecution's plans to refute any claim that Scott's fall with Susie resulted in her condition, nor prosecutorial arguments that might well have weakened the credible, alternative perpetrator defense that trial counsel did advance on Burr's behalf. Indeed, it takes little effort for us to imagine a converse case -- where post-conviction counsel would criticize trial counsel's decision to risk credibility by advancing a speculative osteogenesis imperfecta/accidental death theory that would blame Susie's injuries upon her 8-year-old brother in direct contradiction to the opinions of the physicians, pediatric specialists and child abuse experts who treated and evaluated her. We pass no judgment on the merits of such a hypothetical *Sixth Amendment* claim, of course, but it highlights why such double-deference [*53] is due to state courts that adjudicate Strickland claims. [HN8] "Reliance on the harsh light of hindsight to cast doubt on a trial that took place [20] years ago is precisely what Strickland and AEDPA seek to prevent." *Harrington, 131 S. Ct. at 789* (internal quotation marks omitted). It not our role to conduct such an "intrusive post-trial inquiry" into the defense of this crime, *id. at 788*, or to second-guess the "state proceedings [that] are the central process, not just a preliminary step for a later federal habeas proceeding," *id. at 787*. At a minimum, Burr's ineffective assistance of counsel claim lends itself to "fairminded disagreement" among jurists, *id. at 787*, and the double deference due to the actions of trial counsel and the decisions of the state courts that evaluate them compel denial of federal habeas relief.

V.

For the reasons set forth above, the judgment of the district court is reversed.

REVERSED

APPENDIX I

2012 WL 1950444
Only the Westlaw citation is currently available.
United States District Court,
M.D. North Carolina.

John Edward BURR, Petitioner,
v.
Gerald J. BRANKER, Warden, Central Prison, Raleigh, North Carolina, Respondent.

No. 1:01CV393. | May 30, 2012.

Attorneys and Law Firms

Ernest Lee Conner, Jr., Ernest Lee Conner, Jr., P.A., Greenville, NC, James P. Cooney, III, Womble Carlyle Sandridge & Rice, PLLC, Charlotte, NC, for Petitioner.

L. Michael Dodd, N.C. Department of Justice, Raleigh, NC, for Respondent.

Opinion

ORDER

WILLIAM L. OSTEEN, JR., District Judge.

***1** This matter is before this court for review of the Order and Recommendation of United States Magistrate Judge ("Original Report") (Doc. 28), filed on December 14, 2004, and the Order and Supplemental Recommendation of United States Magistrate Judge ("Supplemental Report") (Doc. 123), filed on May 6, 2009, by the Magistrate Judge in accordance with 28 U.S.C. § 636(b). In both the Original Report and the Supplemental Report, the Magistrate Judge recommends that a writ of habeas corpus be issued and Petitioner's [1] conviction and death sentence for first-degree murder be vacated without prejudice to the State of North Carolina's right to retry Petitioner within a reasonable time. (*See* Original Report (Doc. 28) at 44[2]; Supplemental Report (Doc. 123) at 51.) Respondent[3] filed timely objections (Doc. 32) to this action on January 27, 2005, and filed timely objections (Doc. 125) to the Supplemental Report on May 22, 2009. Petitioner filed a timely response (Doc. 126) to Respondent's objections on June 9, 2009.

This court is required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). This court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge .... or recommit the matter to the magistrate judge with instructions." *Id.* After performing a de novo review of the portions of the Original Report and the Supplemental Report to which objections were made, this court adopts the Original Report in full and the Supplemental Report in part. In compliance with the Supreme Court's holding in *Cullen v. Pinholster*, 563 U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), this court bases its order only on the record that was before the State court during the Motion for Appropriate Relief ("MAR") proceeding. Therefore, while adopting the Original Report in full, this court only adopts the portion of the Supplemental Report that does not incorporate or rely upon facts not before the State court during the MAR proceeding.

In addition to adopting the Reports, this court writes briefly for the following three purposes: 1) to address two recent United States Supreme Court decisions, *Harrington v. Richter*, 562 U.S. ——, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), and *Cullen v. Pinholster*, 563 U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011); 2) to add further analysis supporting this court's holding that the State court's application of *Strickland* was unreasonable; and 3) to clarify that the Reports do not establish a per se rule requiring consultation with an expert as suggested by Respondent. (*See, e.g.,* Resp't's Objections to Magistrate Judge's Supplemental Recommendation [hereinafter "Resp't's Objs. to Supplemental Report"] (Doc. 125) at 79–83.) The findings and analysis of the Magistrate Judge are appropriately extensive, and, because the Original Report is adopted in its entirety, the facts and analysis contained in that Report will not be recited again here.

I. LEGAL STANDARD PURSUANT TO *RICHTER* AND *PINHOLSTER*

***2** When a petitioner's claim has been "adjudicated on the merits in State court proceedings," a federal district court may grant the petitioner's writ of habeas corpus where the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1); *see also Richter*, 131 S.Ct. at 785; *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Petitioner claims that the State court's decision to deny his MAR

constituted an unreasonable application of clearly established federal law, namely the standards for evaluating ineffective assistance of counsel ("IAC") claims set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and its progeny.

To establish that he is entitled to relief under *Strickland*, Petitioner must show "both that his counsel provided deficient assistance and that there was prejudice as a result." *Richter*, 131 S.Ct. at 787. "To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.' " *Id.* (*quoting Strickland*, 466 U.S. at 688). A district court reviewing a *Strickland* claim "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id.* (*quoting Strickland*, 466 U.S. at 689). Petitioner must demonstrate that his counsel's errors were so egregious that he failed to function as the counsel to which Petitioner is entitled under the Sixth Amendment. *Id.* The prejudice prong of a *Strickland* claim is similarly exacting. Petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. As the Supreme Court has stated, "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Richter*, 131 S.Ct. at 787–88 (citation omitted) (*quoting Strickland*, 466 U.S. at 687, 693).

In *Harrington v. Richter*, the Supreme Court articulated a "double deference" standard that applies when, as in this case, a federal district court is reviewing a *Strickland* claim pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA). 131 S.Ct. at 788 (noting that "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so" (citations omitted)). Rather than "asking whether defense counsel's performance fell below *Strickland's* standard," which is the inquiry a court uses to evaluate a *Strickland* claim on direct review of a federal conviction, a district court reviewing a claim under § 2254(d) must instead focus on "whether the state court's application of the *Strickland* standard was unreasonable." *Id.* at 785 (noting that " 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law' ") (*quoting Williams*, 529 U.S. at 410). The Supreme Court explained, "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)." *Id.* at 788. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* at 786. More specifically,

> *3 Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Id. Furthermore, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.*

In *Cullen v. Pinholster*, the Supreme Court "clarified that [the] AEDPA limits federal habeas review 'to the record that was before the state court that adjudicated the claim on the merits.' " *Jackson v. Kelly*, 650 F.3d 477, 492 (4th Cir.) (*quoting Pinholster*, 131 S.Ct. at 1398), *cert. denied*, 132 S.Ct. 64 (2011). "In other words, when a habeas petitioner's claim has been adjudicated on the merits in state court, a federal court is precluded from supplementing the record with facts adduced for the first time at a federal evidentiary hearing." *Id.* This is because "[i]t would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court ." *Pinholster*, 131 S.Ct. at 1399.

Like the Fourth Circuit in *Jackson*, this court recognizes that the Magistrate Judge in this case "did not have the benefit of *Cullen's* guidance" when it granted the State's motion to expand the record and to conduct discovery. *Jackson*, 650 F.3d at 492. Consequently, the Magistrate Judge's "reliance on material developed [before the federal court] was at odds with [the] AEDPA's placement of primary responsibility [for habeas review] with the state courts," albeit unknowingly. *Id.* (internal quotation marks omitted) (*citing Pinholster*, 131 S.Ct. at 1399). Because this court now has the benefit of *Pinholster*, like the Fourth Circuit in *Jackson*, this court is "[m]indful that evidence introduced in a federal court has no

bearing on § 2254(d)(1) review." *Jackson,* 650 F.3d at 492 (internal quotation marks omitted). Consequently, this court "proceed[s] to assess [Burr's] petition on the basis of the facts contained in the state-court record." *Id.*

This court must therefore determine if "fairminded jurists" could disagree over whether the arguments or theories upon which the State court's decision was based are inconsistent with the holding of a prior decision of the Supreme Court. *Richter,* 131 S.Ct. at 786. If so, this court must deny the habeas petition. *Id.* Furthermore, although this court may consider the Magistrate's Original Report in full, based on the holding in *Pinholster,* it may only consider the Supplemental Report in part and may not take into account information that was not in "the record that was before the state court that adjudicated the claim on the merits." *Pinholster,* 131 S.Ct. at 1398. More specifically, this court may only consider, and has only considered, the portions of the Supplemental Report that do not incorporate new facts that were not before the State court.

II. ADDITIONAL ANALYSIS

*4 *Strickland, Wiggins,* and their progeny articulate a duty of counsel to conduct a "reasonable investigation." *See generally Strickland v. Washington,* 466 U.S. 668, 690–91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Wiggins v. Smith,* 539 U.S. 510, 521–23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). The Supreme Court has noted that such a reasonable investigation includes "obtaining the [state's] own readily available file on the prior conviction to learn what the [state] knew about the crime, to discover any mitigating evidence the [state] would downplay, and to anticipate the details of the aggravating evidence the [state] would emphasize." *Rompilla v. Beard,* 545 U.S. 374, 385–86, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). Further, "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to [a particular strategy]. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins,* 539 U.S. at 527; *see also Scanlon v. Harkleroad,* 740 F.Supp.2d 706, 718 (M.D.N.C.2010), *aff'd,* No. 10–7510, 2012 WL 580421 (4th Cir. Feb.23, 2012) (noting that trial counsel's decision not to utilize certain medical records could not have been "strategic because it was based on inadequate investigation").

In this case, Petitioner's trial counsel did not conduct a reasonable investigation of the medical opinions regarding the cause of Tarissa Sue O'Daniel's ("Susie's") injuries, particularly the brain injury that led to her death. Counsel thus did not make a reasoned decision after a reasonable investigation that further investigation was not required. On the contrary, counsel sought a continuance to conduct further investigation. (*See* Original Report (Doc. 28) at 14.) Trial counsel therefore did not make a "strategic" choice not to conduct further investigation into the State's medical opinions. *See Scanlon,* 740 F.Supp.2d at 716–17 (finding petitioner to have met the "performance" prong of the *Strickland* analysis due in part to trial counsel's admission that "he had no strategic reason for failing to use the [alleged victim's medical] Records to rebut the State's" theory of the case).

In *Byram v. Ozmint,* 339 F.3d 203, 209–11 (4th Cir.2003), the Fourth Circuit distinguished *Wiggins* and affirmed a district court's denial of relief premised on ineffective assistance of counsel where counsel had conducted a thorough investigation and had made a strategic decision not to present psychological evidence. Unlike in *Byram,* trial counsel in this case did not make a strategic decision based upon a thorough investigation not to further pursue possible defenses. In that sense, this case is similar to *Scanlon,740* F.Supp.2d 706, in which a court of this district found that trial counsel had not conducted a reasonable investigation that could support his decision not to utilize the alleged victim's medical records at trial. In reaching this holding, the court noted:

> The present case is distinguishable from *Byram v. Ozmint,* 339 F.3d 203 (4th Cir.2003). In *Byram,* the Fourth Circuit observed that the reasonableness of an investigation or decision by counsel that further investigation is not necessary must be considered in light of the scarcity of counsel's time and resources. 339 F.3d at 210. The court found that counsel's decision not to seek the defendant's adoption records was reasonable because counsel had thoroughly investigated the defense that would have utilized them and concluded there was not enough of a factual basis to present that defense. *Id.* Here, Trial Counsel conducted no such thorough investigation into the suicide line of defense. Even in light of the rigors of preparing for a capital trial and the accompanying

> time constraints, it would have been difficult for Trial Counsel to conclude that seeking Harris' psychiatric records would not benefit the defense ...

***5** *Id.* at 719 n. 8. Likewise, in this case, trial counsel "conducted no such thorough investigation" into the medical opinions regarding the cause of Susie's injuries. *See also Wiggins,* 539 U.S. at 533–34.

In *Richter,* the Supreme Court elaborated on counsel's duty to develop expert evidence in preparation for trial. *See Richter,* 131 S.Ct. at 788–90. Although the Court ultimately found that the state court's holding denying the petitioner's IAC claim was not an unreasonable application of *Strickland,* the Court noted that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both ." *Id.* at 788. The Court did maintain, however, that "even that formulation is sufficiently general that state courts would have wide latitude in applying it." *Id.* at 789. Ultimately, "[a]n attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." *Id.* at 789–90.

Further, as more fully discussed by the Magistrate Judge, disagreement with the state court's denial of a petitioner's IAC claim is, standing alone, insufficient to support the issuance of a writ of habeas corpus. (*See* Supplemental Report (Doc. 123) at 45–48; Original Report (Doc. 28) at 15, 38–44.) Because the State court, in its order denying relief, applied applicable precedent such as *Wiggins* and *Strickland,* a writ may be issued only upon a finding that the state court "unreasonably applie[d]" existing precedent to the facts of the petitioner's case. *Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (O'Connor, J., delivering the opinion in part, concurring in part). As explained above, substantial deference is owed to the state court's determination. *See Richter,* 131 S.Ct. at 788; *Pinholster,* 131 S.Ct. at 1398–99.

The State court orders denying Petitioner's IAC claim addressed two motions: 1) Petitioner's motion for a new trial, and 2) Petitioner's MAR. (*See generally* MAR Order I, Oct. 3, 1997; MAR Order II, June 15, 2000.) Both the motion for a new trial and the MAR were based, at least in part, on Petitioner's new evidence related to osteogenesis imperfecta ("OI") and, more significantly, the possible fatal consequences arising from the uncontested fact of Susie's fall shortly before her death.[4] The State court noted in its October 3, 1997 Order that there was overlap between the evidence offered in support of the motion for a new trial and the IAC claims raised in the MAR. (*See* MAR Order I at 13 ("[This claim] is discussed first because of its significance and relationship to other claims discussed below.").)

The State court denied Petitioner's motion for a new trial after considering the same medical testimony upon which Petitioner based his IAC claim in the MAR. (*Id.* at 23–32, 50–61.) The State court held, *inter alia,* that the motion for a new trial should be denied because

> ***6** [D]efendant has not demonstrated by his proffered evidence (i.e., his evidence concerning OI and accidental falls) (a) that the evidence is probably true;[5] (b) *that defendant could not have with due diligence either discovered or made available the evidence at the time of trial* ....

(*Id.* at 61 (emphasis added).) It is undisputed that trial counsel did not actually discover the evidence or information concerning OI or short falls before or during the trial. The State court held that Petitioner failed to show that the OI and short fall evidence provided by Petitioner in the post-trial proceedings could not have been discovered at the time of trial upon the exercise of due diligence. (*Id.*) This conclusion, relevant to the newly discovered evidence standard, is not dispositive of the pertinent inquiry under *Strickland.* However, the conclusion that short fall and OI evidence could have been discovered through the exercise of due diligence is instructive and ultimately weighs in favor of Petitioner's IAC claim. The State court's conclusion that the evidence could have been discovered upon the exercise of due diligence necessarily means that Petitioner's counsel did not exercise such diligence in failing to discover that evidence. As a result, the State court's decision denying relief on the IAC claim appears to unreasonably overlook its own conclusion that the short fall and OI evidence could have been discovered in the exercise of due diligence.

This conclusion is further supported by the findings of the State court in denying the MAR on the continuance issue. The State court held that "it would be mere speculation to conclude that granting the request for a continuance would have diverted trial counsel to the strategy defendant now pursues (i.e., that Susie had OI)." (*Id.* at 75.) This conclusion is in tension with the State court's finding that the evidence

could have been discovered through the exercise of due diligence. If, in fact, the evidence could have been discovered through the exercise of due diligence as held by the State court, then the finding of the State court can only be supported by the assumption that because counsel failed to exercise due diligence in the brief period they were given to prepare for trial, they would have continued to fail to exercise due diligence and discover the evidence if a continuance had been granted. To the contrary, the court must apply an analysis based upon what the objective, diligent counsel would have discovered in the interim, not the Petitioner's actual, deficient counsel. *See Strickland,* 466 U.S. at 694.

This holding by the State court is also somewhat contrary to its findings and rulings on Petitioner's IAC claim. Paradoxically, in regard to that issue, the State court held that "trial counsel worked diligently for a reasonable amount of time." (MAR Order I at 74–75.) The State court further held:

> Defendant's current counsel have found experts who take issue with the State's witnesses at trial. The mere fact that they have found such experts does not demonstrate ineffectiveness of counsel. First, matters of record demonstrate that trial counsel spent a reasonable amount of time investigating circumstances relating to the case. Second, court decisions concerning *Strickland* demonstrate that the first prong of *Strickland* requires the Court to evaluate trial counsel's actions in light of the circumstances facing trial counsel at and before trial.

*7 (*Id.* at 76 (emphasis added).) While there is no dispute that trial counsel worked diligently and spent a reasonable amount of time investigating some issues, trial counsel did not spend a reasonable amount of time investigating the medical opinions about the cause of Susie's death, and thus did not discover the OI or short fall evidence that would have provided a legitimate defense. That evidence, according to the State court's holding, could have been discovered through the exercise of due diligence. (*See* MAR Order I at 61.) The State court unreasonably focused on trial counsel's total time of preparation and allowed its estimation of that time to overshadow the mere ten hours trial counsel spent investigating the medical evidence. *See Wiggins,* 539 U.S. at 527 ("In assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.").

Pinholster and *Richter* hold that "[a] habeas court must determine what arguments or theories ... could have supporte[d] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Pinholster,* 131 S.Ct. at 1402 (omission and second alteration in original) (*quoting Richter,* 131 S.Ct. at 786). Pursuant to that standard, Respondent relies significantly upon the fact that counsel interviewed Dr. Desmond Runyan, a consulting physician to Susie's attending physicians, to support the State court's decision that Petitioner's trial counsel conducted a reasonable investigation. This court, however, agrees with the Magistrate Judge that this investigation was insufficient. (*See, e.g.,* Supplemental Report (Doc. 123) at 12–13.) Dr. Runyan was not interviewed by trial counsel until after jury selection had commenced. (Resp't's Objs. to Magistrate Judge's Original Report (Doc. 32) App. 1 at 44–45; App. 2 at 52–53; Dep. of Dr. Desmond Runyan ("Runyan Dep.") (Doc. 100) at 38–39.) Therefore, in lieu of an independent investigation, it appears that Petitioner's trial counsel conducted an interview with Dr. Runyan simply to confirm the evidence contained in the medical reports and discovery materials, rather than to investigate the subjective components of the medical opinion testimony as to what did or did not cause Susie's death. While an interview of Dr. Runyan certainly would have been an appropriate step in investigating the medical records, it was insufficient, standing alone, to constitute an independent investigation of the medical evidence.

Furthermore, Dr. Runyan was a consulting physician to the team of attending physicians treating Susie. (Runyan Dep. (Doc. 100) at 17; App. 1, Aff. of Dr. Desmond K. Runyan (Doc. 125–1) at 2.) As such, notwithstanding Dr. Runyan's experience, his interview with trial counsel placed him in the position of defending his previously formulated opinion as to the cause of Susie's injuries, rather than in the independent position of articulating or disclosing any medical evidence that might lead to the discovery of exculpatory "evidence the [state] would downplay." *Rompilla v. Beard,* 545 U.S. 374, 385, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (noting that reasonable investigative efforts require some effort to determine the existence of any mitigating or exculpatory evidence). *See also Williams,* 529 U.S. at 392–97 (holding

defendant was denied effective assistance of counsel when his attorneys failed to investigate mitigating evidence related to the sentencing phase); *Gray v. Branker*, 529 F.3d 220 (4th Cir.2008) (recognizing trial counsel's "independent duty to investigate" petitioner's mental health and holding that the MAR court unreasonably applied *Strickland* where it relied on petitioner's one-time refusal to hire an independent psychiatrist to find that petitioner had failed to satisfy *Strickland's* deficient performance component).

*8 As noted above, the time spent by trial counsel preparing for the trial as a whole does not compensate for trial counsels' failure to spend more than ten hours reviewing and investigating the medical evidence in the case, and this court finds that the State court's finding to the contrary is unreasonable. In *Elmore v. Ozmint*, 661 F.3d 783, 856 (4th Cir.2011), the Fourth Circuit found that a petitioner had succeeded in alleging an IAC claim and that "although the state [post-conviction relief] court correctly identified certain *Strickland* principles, the court unreasonably applied those tenets to the facts before it." *Id.* In *Elmore*, the petitioner's trial counsel had failed to make a reasonable investigation into the state's forensic evidence and actually vouched for the veracity of the state's witnesses. The Fourth Circuit noted that trial counsel had

> [C]onceded that he was ill-equipped to challenge the police investigators.... [Counsel] effectively abandoned his client and actually vouched for those investigators, advising the jury: "I think at SLED they are recognized as being one of the best departments or probably as good as the F.B.I. They have a very fine department, and they have very good personnel, and they are experts at everything they do." *Id.* at 913. Not surprisingly, it merely took the jury about two hours to agree on the guilty verdict. After all, as the state [post-conviction relief] court recognized, conviction was the jury's only rational option in view of the State's evidence and Elmore's ineffectual defense.

Id. at 855. Similarly, in this case, trial counsel accepted the State's theory that an accidental fall could not have caused Susie's death:

> Trial Counsel: Do you know how Tarissa Sue O'Daniel was injured?
>
> Petitioner: The only thing I know was the fall.
>
> Trial Counsel: Okay.
>
> Trial Counsel: And you understand now from the medical evidence that has been presented here in Court that it's highly unlikely that that's the cause of the injuries that she received?
>
> Petitioner: Yes, sir, I sho' do.

(Trial Tr. vol. 22, at 1221.) Perhaps more damaging, trial counsel stated in his opening statement to the jury:

> I submit to you that the evidence that will be presented, there will [sic] *no dispute about that fact that Susie O'Daniel was badly abused, there will be no dispute about the fact that Susie O'Daniel died as a result of the injuries she received* late on the night of August 24th or early on the morning of August 25th of 1991.

(Trial Tr. vol. 17, at 35 (emphasis added).) Given that, based upon uncontroverted testimony, Petitioner was alone with Susie in the period leading up to the discovery of her injuries, once Petitioner's trial counsel submitted to the jury that Susie was "badly abused" and that there was "no dispute about the fact that Susie O'Daniel died as a result" of such abuse, conviction was the jury's "only rational option." *Elmore*, 661 F.3d at 855. The fact that trial counsel interviewed Dr. Runyan, a consulting physician and child advocate, during jury selection does not compel a different result or by itself suffice to meet the requirement that trial counsel conduct a reasonable investigation into potentially exculpatory evidence.

III. PER SE RULE ANALYSIS

*9 In its objections, the State has argued that the analysis contained in the Reports would create a rule that counsel must always seek an independent medical expert. This court disagrees. In many cases, the medical testimony may be consistent with other evidence such that reliance on the State's experts is consistent with the standards established by *Strickland* and *Wiggins*. Here, however, it was not clear that the evidence relied upon by the attending and treating physicians was fully consistent and accurate. Most importantly, there was conflicting testimony on the issue of whether Susie did or did not have a skull fracture and whether Susie was dropped or gently cushioned during the short fall that occurred in the arms of her then eight-year-old brother. Recognizing, as the State court held, that OI

and short fall evidence could have been discovered through the exercise of due diligence (*see* MAR I Order at 61), a reasonable investigation or a reasoned decision not to conduct further investigation required some independent investigation and review by trial counsel of the State's medical opinion testimony. "[N]o amount of deference could compel any fair conclusion" to the contrary. *Elmore*, 661 F.3d at 866.

IT IS THEREFORE ORDERED that the Magistrate Judge's Original Report (Doc. 28) is **ADOPTED** and that the Magistrate Judge's Supplemental Report (Doc. 123) is **ADOPTED IN PART** as more fully described herein. For the reasons set forth in the Magistrate Judge's Reports, **IT IS FURTHER ORDERED** that a writ of habeas corpus be issued and that Petitioner's conviction and death sentence for first-degree murder be vacated without prejudice to the State of North Carolina's right to retry Petitioner within a reasonable period of time. A judgment consistent with this opinion will be entered contemporaneously with this Order.

Footnotes

1 "Petitioner" refers to Mr. John Edward Burr. At times throughout this order, however, this court quotes language from the orders issued in the State court proceedings, which refer to Petitioner as "Defendant."

2 The Original Report does not specify that the order be entered without prejudice to the State's right to retry Petitioner. (*See* Original Report (Doc. 28) at 44.) This Order adopts the Supplemental Report's inclusion of this right.

3 "Respondent" refers to Mr. Gerald J. Branker, Warden of North Carolina's Central Prison.

4 Discovery was permitted in this court during the habeas proceedings, and the parties were permitted to supplement the record. (*See* Order of Mag. Judge, Feb. 1, 2006 (Doc. 68) at 3–5.) In keeping with the requirements of *Pinholster,* this court has considered the State court's order based upon the record as it existed before that court. *See Pinholster*, 131 S.Ct. at 1398. Because the OI evidence has significantly changed in character following the habeas discovery, this court's analysis is primarily directed to the State court's order as it related to "short fall" or "accidental fall" medical testimony. More specifically, since the Magistrate Judge issued his Original Report, the evidence that Susie suffered from OI has weakened, while the facts indicating that Susie's death might have been caused by an accidental fall have strengthened. Despite these changes in the record, this court finds that Petitioner's request for habeas relief is not moot because sufficient facts still exist that support an order of habeas relief.

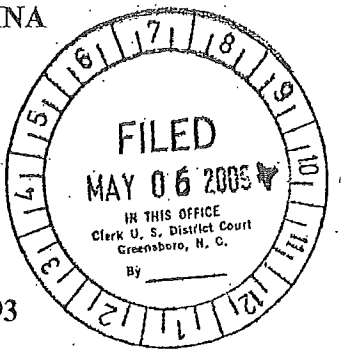
5 The State court's holding that Petitioner failed to show the evidence is "probably true" does not apply to an IAC claim. *Strickland,* 466 U.S. at 694. This is so because the due diligence requirement of the newly discovered evidence standard presupposes *effective* counsel. The Supreme Court in Strickland noted that

> [T]he newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged.

Id. The reliability of Petitioner's evidence is addressed by the Magistrate Judge under the applicable standards set forth by *Strickland* in the context of the ineffective assistance of counsel claim. (*See* Supplemental Report (Doc. 123) at 14; *see also* Original Report (Doc. 28) at 41–44.)

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



JOHN EDWARD BURR,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:01CV393
	)	
GERALD J. BRANKER,[1]	)	
Warden, Central Prison,	)	
Raleigh, North Carolina,	)	
	)	
Respondent.	)	

ORDER AND SUPPLEMENTAL RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

On December 14, 2004, this Court entered a Recommendation (Docket No. 28) that the habeas corpus petition of John Edward Burr, a North Carolina death row inmate, be granted and that Burr's conviction and death sentence for first-degree murder be vacated without prejudice to his being retried by the State. The undersigned Magistrate Judge found that Petitioner's Sixth Amendment right to effective assistance of trial counsel was violated and that the state court's decision to the contrary constituted an unreasonable application of clearly established federal law. *See generally* 28 U.S.C. § 2254(d)(1) and *Williams v. Taylor*, 529 U.S. 362, 411-13 (2000).

---

[1] Gerald J. Branker succeeded Mr. Marvin Polk as Warden at Central Prison. The case caption is hereby amended to accurately reflect Mr. Branker as the Respondent.

Following entry of the Recommendation, Respondent ("the State") filed objections (Docket No. 32) and the parties filed additional motions (Docket Nos. 32-34, 41). The State moved to hold the Recommendation in abeyance, to expand the record, and to quash the affidavit of one of Petitioner's expert witnesses, Dr. Colin R. Paterson. Petitioner Burr moved for leave to conduct discovery.

On February 1, 2006, the undersigned entered an order staying the Recommendation and permitting expansion of the record, including identification and discovery of additional experts. (Docket No. 68.) The Court found that newly-submitted information that the medical license of Dr. Paterson had been revoked would cause the Court, at the very least, to afford his opinion considerably less weight than previously assigned in the Recommendation. The Court gave Petitioner and the State an opportunity to develop other expert testimony, and allowed the parties cross-discovery regarding their medical experts. Finally, the Court ordered that after discovery the parties should file supplemental briefs on Petitioner's habeas corpus petition.[2] This opinion constitutes the Supplemental Recommendation based upon the newly-expanded record.

---

[2] The Court created a schedule for discovery and briefing. That schedule was significantly extended when attorney J. Kirk Osborn, original lead attorney for Petitioner, tragically died of a heart attack. Final briefing on the petition, as supplemented under the February 1, 2006 Order, was completed on August 22, 2007.

Re-entry and Incorporation of Prior Recommendation

The Court hereby re-enters and incorporates its Recommendation of December 14, 2004, except as to its discussion of the affidavit of Dr. Paterson. The Court continues to find and conclude, on the expanded record before it, that Petitioner Burr's Sixth Amendment right to effective assistance of counsel was abridged at trial, and that the state courts unreasonably applied the law of the Supreme Court of the United States in denying Petitioner's challenge to his conviction. The Recommendation of December 14, 2004, is supplemented by this opinion which discusses evidence newly added to the record. The Recommendation of December 14, 2004 is re-entered with this Supplemental Recommendation and is attached hereto as Attachment A.

Deficient Performance by Defense Counsel

The original Recommendation describes in detail the failure of Petitioner Burr's trial counsel to investigate and prepare a defense based upon testimonial and medical evidence tending to show that the fatal head injury incurred by infant Tarissa Sue O'Daniel ("Susie") was caused accidentally and was not the result of intentional child abuse and murder by Petitioner. The Court found, consistent with *Wiggins v. Smith*, 539 U.S. 510 (2003), that Petitioner Burr's counsel had failed in their duty to investigate a significant defense which was available to Petitioner. The Court did not read *Wiggins* to extend or change the law with regard to Sixth Amendment ineffective assistance of counsel as announced in *Strickland v.*

Washington, 466 U.S. 668 (1984); *see also Rompilla v. Beard*, 545 U.S. 374, 380 (2005). Rather, *Wiggins* merely represents a specific application of the *Strickland* standard.[3]

Nothing in the expanded record or supplemental briefing now before the Court alters the Court's assessment that defense counsels' performance was deficient to a constitutional level for failing to investigate the medical and factual evidence in this case in order to develop a defense of accidental death. As noted in the Recommendation, counsel knew that the State would rely upon a complex medical record and expert testimony to attempt to establish that the infant was intentionally murdered. The medical evidence was crucial, as there were no witnesses to any violent action by Petitioner Burr directed toward the infant on the date of her fatal head injury. Nonetheless, defense counsel spent less than 10 hours in preparation on the medical issues.

The expansion of the record and the identification of experts permitted by the Court after entry of the Recommendation produced evidence that is relevant primarily to the prejudice prong of the two-part *Strickland* Sixth Amendment test, not to the performance-of-counsel prong. Nonetheless, one or two additional matters regarding the performance of counsel should be noted at this time.

---

[3] A careful reading of *Wiggins* reveals that the Supreme Court looked to *Strickland* while analyzing whether trial counsel performed an adequate investigation in preparing for the penalty phase of Wiggins' trial. *Wiggins* clearly holds that it is not making "new law" regarding the standard for ineffective assistance of counsel claims. 539 U.S. at 522. Rather, the Supreme Court, in applying *Strickland*, held that it is constitutionally ineffective for counsel not to investigate and introduce mitigating evidence of a defendant's social history and background.

The case against Petitioner Burr was circumstantial; there were no witnesses to any alleged abuse or use of violence by Petitioner against Susie on August 24, 1991. The State relied almost entirely on the testimony of five doctors whose testimony went unchallenged by Petitioner's attorneys. The State may have expected that Petitioner would dispute the cause of the victim's death, but that, in fact, never happened. As noted in the original Recommendation, defense counsel spent less than ten hours reviewing the medical evidence and preparing for cross-examination of the medical experts. Having no other knowledge or expert testimony, defense counsel were left with no choice but to accept as true the State's theory that Susie was the victim of an intentional blow to the head that resulted in her death.

It is well-documented in the medical records and the statements of witnesses that the four-month-old infant victim in this case, Susie O'Daniel, suffered an accidental fall with her eight-year-old brother, Scott Ingle, some six hours before she was taken to the hospital in the nighttime hours of August 24-25, 1991. She died several days later of a closed head injury. There is considerable dispute in the expanded record now before the Court about the *seriousness* of this fall and, in fact, whether it caused, or could have caused, Susie's subsequent death. This issue was the subject of most of the post-recommendation discovery of experts conducted by the parties. What is important for this Court's *Strickland* analysis is that Petitioner's trial counsel failed to recognize the need to develop evidence regarding the nature and consequences of Susie's fall. In fact, defense counsel, in closing argument to the jury, ended up conceding that Susie's fall did not cause her death, an incompetent act by

counsel in view of evidence to the contrary which they could have developed. (*See* Trial Tr. Vol. 27, at 2126.)

The testimony of the State's witnesses, as actually presented at Petitioner's trial, did not describe a particularly significant fall suffered by the infant near the time of her death. But there was *other* evidence regarding the fall that could have been, and should have been, developed by counsel to persuade the jury that Susie O'Daniel in fact suffered a damaging accidental fall, wholly unrelated to Petitioner, on the evening of August 24, 1991. The notes of the investigating police officers, and other contemporaneous notes, reveal that from the time Susie was first transported to the hospital, Lisa O'Daniel, Susie's mother, and Scott Ingle reported that young Scott had fallen to the ground with Susie in his arms only hours before. During the initial course of the investigation, both Ms. O'Daniel and Scott told Captain Dan Qualls and Detective Roney Allen that Susie was injured when Scott dropped her and fell on top of her. Almost all of the medical records, especially the treatment notes, also include a narrative describing a serious fall suffered by Susie. Trial counsel failed to investigate this medical evidence contained in the prosecutor's file and in the records available from the hospitals where Susie was treated.

Descriptions by the State's witnesses of Susie's fall changed materially between August 1991 and the time of trial in early March 1993. On August 25, 1991, Ms. O'Daniel was interviewed by Juanita Todd, a social worker who was called in to investigate Susie's injuries. Ms. O'Daniel's description of the fall in this interview was simply that "[Scott]

tripped, dropped the baby and fell on her." (Record Sheet, The North Carolina Memorial Hospital, "Social Work" entry of August 25, 1991.) She gave a similar account to Detective Allen on August 26, 1991, describing the fall in the following way when asked if she had actually seen the fall: "No, when I turned around, I heard him holler, and when I turned around, he was lying on top of her." (Trial Tr. Vol. 23, at 1525.) To Captain Qualls, she stated on August 26, 1991: "I heard [Scott] fall and when I turned around, he was laying on top of [Susie]," but she stated that the baby did not fall out of Scott's arms. The baby was "crying out real hard." (Trial Tr. Vol. 18, at 389-90.) According to the statement she gave to Captain Qualls, nearly contemporaneous with the events in question, the baby's arm was "red, real red," the baby was "shaking," and the left arm "jerked a whole lot." (*Id.* at 398-400.) The baby cried for "probably about an hour and a half." (*Id.* at 400.) An interview account by Elbert Porter, maternal grandfather to Susie, on August 25, 1991, provided that Porter saw the baby about one hour after her fall with Scott and observed that "the child was not as responsive as normally but he gave it little thought at the time." (Record Sheet, N.C. Mem. Hosp. "Social Work" entry of Aug. 25, 1991.) Clearly, these statements of witnesses all described both a dangerous fall and a serious injury to the child.

By the time of trial, however, Ms. O'Daniel described the fall and its effects on the baby quite differently. She testified that Scott neither dropped Susie nor fell on top of her, and "his arms took most of the fall." (Trial Tr. Vol. 17, at 122.) Ms. O'Daniel testified that she checked the baby and the back of the baby's head after the fall. The baby was "a little

bit red, but it went away." The baby "cried a little while" after the fall, "hard" when she first fell. (*Id.* at 124-25). "It took a few minutes" to settle Susie down. When asked if Susie was doing anything else, Ms. O'Daniel testified that "[s]he was fine." (*Id.* at 125-26.) The central theme of her testimony was that Susie did not suffer a hard fall and showed no signs of significant injury.

There was evidence admitted at trial that during Captain Qualls' interview with Lisa O'Daniel, Ms. O'Daniel stated with regard to the fall that she turned and saw Scott "laying on top of [Susie]." Captain Qualls immediately followed with a leading question: "Was he laying on top of her or was he cradling her in his arms still; and at this falling, holding the child in a, you know, protecting the child from the fall . . . ." (Trial Tr. Vol. 18, at 389.) By the time of trial, the fall came to be routinely described as a "cradled" fall.

Eight-year-old Scott Ingle originally told Detective Allen on September 5, 1991, two weeks after the incident, that Susie "fell out of [his] arms," she hit the ground first, and then he fell on top of her. (Trial Tr. Vol. 23, at 1535-36, 1584.) By the time of trial, however, Scott testified that he only fell to his knees, not all the way to the ground, and Susie did not fall out of his arms. (Trial Tr. Vol. 20, at 868.) Once again, the trial testimony showed only a minimal fall with little-to-no impact upon Susie.

Had counsel recognized the significance of the initial statements of Scott and Ms. O'Daniel, tending to show a serious fall resulting in trauma to Susie's head, a reasonable investigation would have revealed the DSS reports in the medical records containing other

early statements about the fall, and counsel would have recognized that the accounts of the incident by the State's witnesses changed dramatically over time as trial approached. Defense counsel did not develop evidence regarding the seriousness of Scott's fall with Susie because they did not understand its significance. Had counsel developed this evidence, they would have been able to frame a substantial defense based upon Susie's accidental fall and medical testimony concerning the cause of Susie's death.

A determination of the reasonableness of counsel's actions must be made on a "case-by-case" basis. *Williams*, 529 U.S. at 391. "A standard of reasonableness applied as if one stood in counsel's shoes spawns few hard-edged rules," and the merits of counsel's investigative choices may often be "subject to fair debate." *Rompilla*, 545 U.S. at 381. Courts throughout the country, however, have long found defense counsel's performance to be deficient where counsel failed to investigate possible defenses and to interview witnesses who could have supported the only defense available. *See, e.g., United States ex rel Cosey v. Wolff*, 727 F.2d 656, 658 n.3 (7th Cir. 1984), *overruled on other grounds by United States v. Payne*, 741 F.2d 887 (7th Cir. 1984) (finding deficient performance and prejudice where counsel failed to investigate and interview witnesses who could have supported only available defense to charges); *Stewart v. Wolfenbarger*, 468 F.3d 338 (6th Cir. 2006) (finding deficient performance and prejudice where counsel failed to investigate and call additional witnesses who could have corroborated the testimony of the single alibi witness).

Counsel has an obligation to conduct a reasonable investigation or to make a reasonable decision that further investigation is unnecessary. *Strickland*, 466 U.S. at 691. "[W]here counsel fails to investigate and interview promising witnesses, and therefore 'ha[s] no reason to believe they would not be valuable in securing [defendant's] release,' counsel's inaction constitutes negligence, not trial strategy." *Workman v. Tate*, 957 F.2d 1339, 1345-46 (6th Cir. 1992) (citing *Wolff*, 727 F.3d at 658 n.3). Failure to secure expert assistance can also constitute ineffective assistance of counsel. The Fourth Circuit has recognized a right to expert assistance when "'a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance.'" *Smith v. Angelone*, 111 F.3d 1126, 1132 (4th Cir. 1997) (citing *Williams v. Martin*, 618 F.2d 1021, 1026 (4th Cir. 1980)).

The United States Supreme Court and other federal courts have relied upon the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines") which were originally drafted in 1989 and revised in 2003 as "guides to determining what is reasonable" in representing defendants in capital cases. *See Rompilla*, 545 U.S. at 387; *Wiggins*, 539 U.S. at 524. Those Guidelines, at the time of Petitioner's trial, imposed clear obligations for defense counsel:

> A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.
>
> .....

D. Sources of investigative information may include the following:

7. Expert Assistance:

Counsel should secure the assistance of experts where it is necessary or appropriate for

(A) preparation of the defense;

(B) adequate understanding of the prosecution's case;

(C) rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial.

1989 ABA Guidelines § 11.4.1, superseded by ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 4.1 Commentary (rev. ed. 2003). The ABA Guidelines merely reflect the very real difference between death penalty cases and other criminal cases where the sentence is less than death. As explained by the Supreme Court: "The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense . . . [as the pre-1989 ABA Standards] describes the obligation in terms no one could misunderstand in the circumstances of a case like this one." *Rompilla*, 545 U.S. at 387; *but see Yarbrough v. Johnson*, 520 F.3d 329, 339 (4th Cir.), *cert. denied*, ___ U.S. ___, 128 S. Ct. 2993 (2008) ("While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they nevertheless can only be considered as part of the overall calculus of whether counsel's representation falls below an objective standard of reasonableness; they still serve only as guides, not minimum constitutional standards.").

The State maintains that defense counsel met their obligation to investigate possible defenses by reviewing Susie's medical records and meeting with Dr. Desmond Runyan on March 19, 1993. As noted by the State, counsels' fee applications show that the two attorneys spent a total of 5.7 hours reviewing the medical records. It is apparent, however, that five or six hours, in a death penalty case such as this one, involving extensive medical records and complex medical issues, constitutes precious little time for preparation. In many ways, as this Court noted in its first Recommendation, counsels' hands were tied by the extreme lack of time they were given to prepare for trial. However, they met with only one of the State's potential medical witnesses, Dr. Runyan, and that meeting was on the very eve of trial. Dr. Runyan, who was the Director of the Child Medical Evaluation Program (CME), had been called in to consult with Susie's treating physicians. Dr. Runyan's treatment notes at the time indicate that Susie suffered from a depressed left temporal skull fracture, which was in fact apparently contradicted by the autopsy report which showed no skull fracture. Trial counsel appeared to be unaware that Dr. Runyan's conclusion on this point was different from that of Dr. Karen E. Chancellor, who performed the autopsy. Trial counsel had not recognized the evidence of a serious fall by Susie that could account for her head injury. The meeting with Dr. Runyan, therefore, could not have been very productive or beneficial to Petitioner.

This case did not involve a situation where counsels' investigation was hampered by the defendant's failure to provide information to counsel or defendant's direction to forego

investigation. *See Strickland*, 466 U.S. at 691. The information not discovered or followed up on by counsel was beyond the realm of information in the possession of Petitioner. Trial counsel did not meet with any of the other treating physicians or the medical examiner, most of whom were located in Chapel Hill. There was no tactical decision made by counsel to forego an accidental death defense, to not interview witnesses or prepare more thoroughly; they simply did not have the time, the insight, or the experience necessary to do so. Counsel did not secure the services of an expert who could have helped counsel question the State's experts and whose testimony could have raised a reasonable doubt concerning the cause of Susie's death. Petitioner thus was deprived of the opportunity to present an effective defense. As such, counsels' conduct fell far below an objective standard of reasonableness, as defined by *Strickland*, *Wiggins*, and the *1989 Guidelines*, which were the then-prevailing norms of attorney conduct. As found in the original Recommendation, to the extent that the MAR court concluded that counsels' conduct was acceptable, its justifications rested on unreasonable applications of *Strickland*. *See Williams*, 529 U.S. at 387 ("Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law as determined by the Supreme Court of the United States that prevails.") (Internal quotation marks and citations omitted).

Prejudice to Petitioner

Under *Strickland*, of course, deficient performance by counsel is not enough to warrant the grant of a writ of habeas corpus; a petitioner must also show that counsel's deficient performance prejudiced his defense to the extent that a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* "[A]n allegation of inadequate investigation does not warrant habeas relief absent a proffer of what favorable evidence or testimony would have been produced." *Beaver v. Thompson*, 93 F.3d 1186, 1195 (4th Cir. 1996). In addition, the petitioner must show that "the result of the proceeding was fundamentally unfair or unreliable." *Sexton v. French*, 163 F.3d 874, 882 (4th Cir. 1998)(citing *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)).

Petitioner argues that in discovery in this habeas action he developed persuasive medical evidence that Susie's fatal head injury could have been caused by the accidental fall that occurred hours before Susie was taken to the hospital. Petitioner contends that had this evidence been presented at trial, it would have provided a complete defense to the capital murder charge for which he was prosecuted. The state MAR court summarily dealt with the prejudice issue, in a 116-page Order, stating only: "[I]n the Court's opinion, defendant proffers nothing demonstrating that his trial was fundamentally unfair or that the results are unreliable as a result of trial counsel's performance." (MAR Order I at 76.)

All experts for the State and for Petitioner in this habeas proceeding agree that the cause of Susie's death was blunt force head trauma. At trial, the State presented five medical experts who testified about Susie's injuries and her medical treatment. It is clear from their testimony that these doctors, who either treated Susie or examined her, firmly concluded that Susie was the victim of a long-standing pattern of intentional child abuse and that she died from a blow to the head. Importantly, there was unmistakable evidence that Susie had been severely abused *in the weeks before* her head injury. There was evidence that both Susie's arms and legs were broken. These injuries, in combination with the head injury, led Dr. David F. Merten to conclude that Susie was a "battered child." (Trial Tr. Vol. 20, at 845.) Three or four of the fractures, however, *had already begun to heal by the time of the child's death*, leading Dr. Merten to the conclusion that these fractures were eight to nine days old. (*Id.* at 840.) It was the State's contention at trial that Petitioner Burr was the person who abused Susie over the last several weeks of her life and then beat her about the head on August 24, leading to her death from a closed-head injury.

In post-trial discovery, on the other hand, Petitioner Burr developed competent evidence that Susie's head injury was entirely consistent with a fall from a height of two-to-three feet onto a gravel surface, with the backside of her skull hitting the ground. (Docket No. 90, State's Dep. Exs., Ex 9, Dr. John Plunkett report at 2.) Thus, while competent counsel for Petitioner at trial would have conceded that there was a pattern of abuse of Susie that caused severe injuries to her long before her death, they would also have presented

evidence that the actual mechanism of her death was an accidental fall. Further, in briefing to this Court, Petitioner presents argument and evidence tending to show that competent counsel could have effectively impeached the two slender lines of testimony, discussed below, that the State relied on to identify Petitioner Burr as the person who had abused Susie in the weeks before her head injury.

Counsel's failure to obtain or consult an expert witness is prejudicial when expert testimony is so critical to the petitioner's conviction that there is a reasonable likelihood that testimony from a defense expert would have changed the outcome of the case. *See Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993); *see also Dugas v. Coplan*, 428 F.3d 317, 334-41 (1st Cir. 2005) (finding that counsel's failure to consult with an expert may be prejudicial when case against petitioner lacks eyewitness testimony and rests mainly on questionable expert testimony); *Ashker v. Class*, 152 F.3d 863, 876 (8th Cir. 1998) (holding habeas petitioner was not prejudiced by counsel's failure to obtain an expert witness where petitioner made no showing that testimony from an expert would have exculpated him); *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983) (noting "that it should have been obvious to a competent lawyer that the assistance of an accountant [was] necessary" as part of pre-trial defense of complex fraud case).

Because the expert testimony is critical in this case, it is important to examine the basic substance of what the experts for Petitioner and for the State have said. All the experts agree that the cause of Susie's death was head trauma. No expert testified on behalf of

Petitioner at trial. In discovery in this action, however, Petitioner developed the testimony of three experts: Dr. Robert L. West, Dr. John Plunkett, and Dr. Kirk L. Thibault. Dr. West, a pathologist, reviewed Susie's medical records, submitted a report, and later testified in a deposition. He noted that Susie died of traumatic injuries to the head, but opined that "all the recent injuries to the child which are noted by the pathologist at autopsy could have been a result of being dropped by her sibling who then tripped and fell on to her." (Docket No. 90, Ex. 7, Dr. Robert L. West report at 2.) Dr. West went on to state: "It is my further opinion that all the injuries to the child which show evidence of healing could have been caused by someone dropping the child. A bio-mechanical engineer, who can determine the forces involved in such a fall, should review the case and also render an opinion." (*Id.*)

Dr. Plunkett, a board-certified forensic pathologist, also submitted a report and testified by deposition. Dr. Plunkett reviewed the medical records, autopsy report, affidavits of other experts and transcript of an interview that was conducted with Scott Ingle on September 5, 1991. (*Id.*, Ex. 9, Plunkett report at 2). Dr. Plunkett noted that "[a]n impact to the left occipital portion of Susie's scalp and skull caused her death." (*Id*). Dr. Plunkett also noted that the autopsy report did not show a skull fracture.[4] Dr. Plunkett further stated:

> Any head impact in a four-month old infant resulting in inbending of the skull and/or differential acceleration of the brain relative to the scalp and skull is potentially catastrophic. Dropping a 4-month-old infant onto a gravel surface

---

[4] According to Dr. Plunkett, the autopsy is considered "the Gold Standard." (Docket No. 90, Ex. 9, Plunkett report at 2; Docket No. 104, Plunkett Dep. at 42.)

> from a height of three feet, with impact to the left back side of the head, will exceed known thresholds for significant brain injury.
>
> . . . .
>
> In summary, Susie's injuries are consistent with those that may occur if an older child tripped while carrying her, then dropped her 2-3 feet onto a gravel surface, with the backside portion of her skull striking the ground. The injury potential increases if the older child fell on her after dropping her. It is possible, if not likely, that she had a lucid interval following the impact injury. Since her injuries are consistent with the witnessed event involving Scott on August 24, it is unreasonable and scientifically unnecessary to propose a subsequent unwitnessed assault by [Petitioner] as the cause of her injury and death.

(*Id.* at 2-3.) The concept of a lucid interval, that is, a period of time between an injury and the manifestation of symptoms from that injury, was the subject of much discussion by the experts. In his deposition, Dr. Plunkett expounded on his theory: "Tarissa Sue's injury is, in fact, brain swelling. The onset of brain swelling is variable. It is not surprising at all that she would have some period of time in which she appeared to be normal prior to the point where her brainstem center [which] is controlling breathing are damaged or compromised." (Plunkett Dep. at 61.)

Dr. Thibault, a biomechanical engineer who is not a medical doctor, also provided testimony for Petitioner. According to Dr. Thibault,

> The study of the biomechanics of human injury is a widely recognized, well-established branch of science dedicated to elucidating the mechanisms of human injury. This serves two purposes: (1) Determining quantitatively the thresholds at which injury to the human body occurs in order to develop improved strategies for injury control, and (2) to understand the injury at the tissue and cellular level as well as the systemic level in order to develop new approaches for therapeutic intervention. . . .

> While clinicians are trained to examine, diagnose and treat injury, the biomechanical engineer seeks to determine the mechanism of a particular injury through application of formal training in engineering, life sciences, advanced mathematics, and physics.

(Docket No. 90, State's Dep. Exs., Ex. 8, Dr. Kirk L. Thibault report at 2-3.) Dr. Thibault went on to review the evidence in this case to determine whether a fall, as described in some statements by witnesses and taking into account the statistical range of stature and weight for an eight-year-old child, could account for the head trauma suffered by Susie. He concluded:

> In summary, the head injuries sustained by [Susie] are consistent with the given medical history of being carried by a sibling while the sibling fell to the ground and on top of the infant. These injuries are not sensitive to intent, and therefore may be the result of accidental or non-accidental trauma, so long as the loading condition to which the child is exposed is sufficient to exceed the tolerance of the various anatomy to injury. The estimates of head loading are based on the laws of physics and are consistent with experimental testing and published literature regarding impact loads to infants and young children.

(*Id.* at 7.)

The State also put forward the testimony of experts, both at trial and in post-conviction discovery. Most of these expert witnesses were treating physicians who were involved in the medical treatment of Susie: Dr. Richard G. Azizkhan, a pediatric surgeon; Dr. David F. Merten, a pediatric radiologist; Dr. Michael Tennison, a pediatric neurologist; Dr. Karen Chancellor, a medical examiner who performed the autopsy on Susie; and Dr. Barbara Specter, a radiologist. Dr. Desmond Runyan, a pediatrician who evaluated Susie in the hospital and gave a report to the Department of Social Services, did not testify at trial but did testify in a post-trial deposition.

Dr. Azizkhan, who was the chief of pediatric surgery at UNC and treated Susie, testified at trial and in deposition that he had never seen a clearer case of child abuse. (Docket No. 98, Azizkhan Dep. at 85.) He noted that Susie had lost a significant amount of blood, all internally, into the fracture sites in her arms and legs (*id.* at 14), but he stated that the most significant injury to Susie was her traumatic brain injury. It was Dr. Azizkhan's opinion that Susie had a depressed left temporal skull fracture, as seen on a CT scan, though he acknowledged that the autopsy report did not show a skull fracture. (*Id.* at 35.) He also testified that in his opinion, based on the severity of the brain injury, Susie would have lost consciousness soon after the injury, and that the window for a lucid interval would have been fairly short.[5] (*Id.* at 53-54.) Dr. Azizkhan testified that Susie's leg fractures were a result of a direct blow or a snapping of her leg bones, and that such injuries "are generally not accidental." (*Id.* at 59.) In his deposition, Dr. Azizkhan conceded that a fall of 24 inches could cause a depressed skull fracture if "the circumstances are correct and [depending on] the way the child falls and on what the child falls on." (*Id.* at 46-47.) Dr. Azizkhan testified that he was never contacted by Petitioner's trial counsel. (*Id.* at 11.)

Dr. Merten, the pediatric radiologist who read Susie's x-ray films, also testified as an expert witness for the State. At trial, Dr. Merten testified that the fractures and head injury

---

[5] There is in the record an interview by social worker Juanita Todd with Susie's maternal grandfather, who saw Susie one hour after her fall. He told Ms. Todd that Susie was not "normally responsive," although he didn't think much of it at the time. The record also suggests that Susie slept for many of the remaining hours before she was found to be unresponsive around midnight on the night of August 24, 1991.

suffered by Susie could not have occurred in the fall with Scott, *as that fall had been described to him,* although Dr. Merten admittedly did not speak with any witnesses to the fall. Dr. Merten based his opinion on testimony of witnesses and the fact that Susie had "a lucid interval of normal behavior of approximately 6-7 hours from the time of the [fall] and . . . when Susie was found unresponsive with multiple bruises on her head, neck, ears and extremities." (Docket No. 90, State's Dep. Exs., Ex. 1, Dr. David F. Merten Aff. at 2.) Dr. Merten also noted that "[t]here were multiple fresh bruises on the head and neck, torso and extremities not present on 24 August 1991, with the bruises on her cheek suggesting fingerprints and those on her neck consistent with a handprint. There were no signs of cutting, scraping, tearing, or any form of external injury other than the bruises." (*Id.*) Additionally, Dr. Merten stated that the "[f]ractures of the skull, arms and legs" could not have happened in the fall with Scott. (*Id.*) Dr. Merten testified that he concluded that Susie was a victim of child abuse before he ever talked with any law enforcement officers about the case. (Docket No. 101, Merten Dep. at 85.) He also testified that he was never contacted prior to trial by Petitioner's attorneys. (*Id.* at 16-17.)

Dr. Michael Tennison, the treating pediatric neurologist, testified for the State. He stated that at the time he treated Susie, he considered "a wide variety of possible diagnoses." (Docket No. 90, State's Dep. Exs., Ex. 3, Dr. Michael Tennison Aff. at 2.) Dr. Tennison noted that he had "never seen a case that was more clear cut for non-accidental trauma. The diagnosis was absolutely compelling and nothing else including the statistically exceedingly

unlikely combination of delayed brain edema and OI [osteogenesis imperfecta] could possibly account for the child's combination of findings." (*Id.*) Dr. Tennison stated in his affidavit that "there was a fracture present that resulted from an intense force leading to asymmetrical swelling of the brain with very rapid progression to death. The trauma necessary to produce the depressed fracture would have rendered the patient quickly unconscious and there would not have been a completely normal lucid interval." (*Id.* at 3.) In his deposition, however, when Dr. Tennison was informed that Susie's mother had told Detective Allen that it had taken over an hour and a half to calm Susie down after the fall with Scott, Dr. Tennison acknowledged that one and a half hours would be "a long time to calm a child down." (Docket No. 99, Tennison Dep. at 38.) Dr. Tennison conceded that it was "theoretically possible" that Susie could have suffered a depressed skull fracture in a three-foot fall in her brother's arms where the brother fell on top of her. (*Id.* at 69-70.)

Dr. Runyan was the on-call child abuse consultant the night that Susie was brought into the UNC hospital. He examined Susie and in his deposition he testified that, in his opinion, the fall with Scott was inadequate to explain the serious injuries suffered by Susie. (Docket No. 100, Runyan Dep. at 21.) He based this opinion in part on the record and the history given by the family, and the assumption that "Susie did not hit the ground when the purported fall took place." (Docket No. 90, State's Dep. Exs., Ex. 2, Runyan Aff. at 1.) Dr. Runyan noted in Susie's medical record at the time that he viewed Scott as a "scapegoat." (Runyan Dep. at 20, 26-27.) Dr. Runyan also noted that, in his opinion, Susie's leg and

shoulder fractures preceded her head injury by a week. (*Id.* at 21.) In his affidavit, Dr. Runyan summarized his opinion:

> In my medical opinion, there is no reasonable evidence to support the diagnosis of OI or the theory that there is an entity or diagnosis known as Temporary Brittle Bone Disease. This purported condition has never been validated in the medical literature with any clinical, epidemiological, or biochemical evidence and this theory has been raised sufficiently often that there has been plenty of time an[d] opportunity for the scientific community to explore the existence of this entity.
>
> I have carefully reviewed the autopsy and the other materials from the trial and in my medical opinion, there is no alternative explanation for the injuries to Susie other than physical abuse.

(Runyan Aff. at 2.)

Dr. Karen Chancellor, the forensic pathologist who performed the autopsy on Susie, also testified, both at trial and in a post-trial deposition. Dr. Chancellor testified that all of the fractures of Susie's extremities could not have happened in a fall, opining that Susie suffered at least two separate episodes of trauma. (Docket No. 97, Chancellor Dep. at 19-20.) Dr. Chancellor found that Susie did not have a skull fracture. (*Id.* at 30.) In her affidavit, Dr. Chancellor stated her opinion that:

> Susie's death resulted from blunt force injuries to the head. These injuries were evidenced by bruising in the scalp, acute subdural hemorrhage over the left cerebral hemisphere, acute subarachnoid hemorrhage over the left hemisphere, multiple retinal hemorrhages involving right and left eyes, and left optic nerve sheath hemorrhage. The traumatic head injury was the result of either an object(s) impacting the head, or the head impacting blunt object(s). Whether or not shaking contributed to this injury, cannot be determined. The multiplicity of bruises on the head and neck argue strongly against any accidental mechanism of injury.

> Also present were bruises on the neck and chest. The configuration of bruises on the neck and jaw (large bruise on the left side of the neck underneath the jaw and smaller bruises on the right side of the neck and jaw) are extremely suggestive of and consistent with a hand held across the neck and jaw causing these injuries and consequently compressing the neck.
>
> Injuries to the extremities were present and may have contributed to death. There were fractures of both legs (femoral fractures) and both arms (humeral fractures), with some of these fractures indicating evidence of healing by radiography. Other fractures demonstrated no evidence of healing, indicating at least two episodes of traumatic injury to the extremities. The mechanism of these fractures was violent bending, blunt force, violent shaking or some combination thereof.
>
> The constellation of injuries in this child is entirely inconsistent with those injuries being sustained during a simple fall. Indeed, there is nothing to indicate that these fractures were sustained in an accidental manner. A child of this age is unable to sustain serious injuries, such as these, on her own. It is difficult to conceive of an accidental mechanism that could explain these traumatic findings. These injuries are the result of trauma inflicted by other(s).

(Docket No. 90, State's Dep. Exs., Ex. 5, Chancellor Aff. at 2-3.)

Dr. Barbara Specter, a pediatric radiologist, also testified by affidavit and deposition for the State. Dr. Specter reviewed the medical records, reports, x-rays, and the testimony of other witnesses. Although Dr. Specter did not testify at the original trial, she testified in her deposition that in 1991 she had reviewed some of the x-ray films that were performed on Susie. Prior to the 1993 trial, however, she was never contacted by defense attorneys. (Docket No. 96, Specter Dep. at 6-7.)

Dr. Specter testified that Susie had none of the findings, such as decreased bone density, decreased thickness of the bony cortex or presence of multiple Wormian bones, that are typically found in patients with a diagnosis of OI. (Docket No. 90, State's Dep. Exs., Ex.

4A, Specter Aff. at 4.) It was Dr. Specter's opinion, based on her review of the x-rays and CT scans, that Susie was "a victim of non-accidental trauma on repeated occasions." (*Id.* at 8.)

The Court observes that there was clearly a dispute among the State's witnesses as to the presence and relevance of a depressed skull fracture. Drs. Azizkhan, Merten, Specter, and Tennison testified that the CT scan shows a depressed skull fracture. (Azizkhan Dep. at 32; Merten Dep. at 21-22; Specter Dep. at 44-45; Tennison Dep. at 23-24.) Dr. Specter, however, did not notice a depressed skull fracture on the x-ray in 1991 (Specter Dep. at 44-45) and Dr. Chancellor did not find one during the autopsy. (Chancellor Dep. at 65-66.) Dr. Chancellor explained this discrepancy by noting the possibility that Susie had a "ping-pong fracture." (*Id.* at 65.) A ping-pong fracture is "an indentation of the skull . . . where there is no actual breakage of bone, but there is a bending of it." (*Id.*). Such a fracture can go away, though "[i]f there is a breakage of bone, that doesn't go away." (*Id.* at 66.) This description is in accord with a statement made by Dr. Merten in which he stated that the depressed skull fracture was described by Dr. Whaley as a "bending of the low middle cranial fossa." (Merten Dep. at 22.) Dr. Azizkhan stated that the depressed skull fracture actually is "irrelevant" because the issue was the degree of the intracranial injury, . . . not the degree of the skull fracture." (Azizkhan Dep. at 45.)

Prior to her death, Susie had other health issues, as documented in medical records and described by various medical professionals. Susie's mother, Lisa O'Daniel, had taken

Susie to the hospital in July because she was crying and unable to eat. At four months old, Susie's weight was only 10.5 pounds and she was 22.75 inches long, placing her in the bottom fifth percentile for weight and height. (Runyan Dep. at 87.) In an interview with prosecutors in February 1993, Ms. O'Daniel stated that she had been unable to feed Susie for three weeks prior to her death. Clearly, then, Susie was a baby who was not thriving. (Tennison Dep. at 55-58.) Significantly, while she was in the ICU, the doctors determined that Susie suffered from coagulopathy, a condition that compromises the ability of blood to clot, *and which can cause easy bruising of the skin.*[6] (Azizkhan Dep. at 16, 25.)

Had defense counsel for Petitioner Burr adequately prepared for trial and obtained the testimony of expert witnesses, they could have contested critical conclusions of the State's experts and offered to the jury a plausible accidental cause for Susie's fatal injury. The head injury was the fatal injury, and counsel could have argued to the jury at the close of evidence

---

[6] The issue of the bruises found on Susie on August 25, 1991, is complicated. A medical record from the North Carolina Memorial Hospital notes "multiple old and new bruises covering [] body." (Consultation Visit Record.) The Report of Investigation by Medical Examiner in those same medical records includes body diagrams that show bruises all over Susie's body. By the time of these diagrams, some bruises may have been caused by medical intervention. The bruises appear to include an "injury" bruise at the center of the back of Susie's head. And there are "injury" bruises on Susie's neck and chin. The interpretation of the bruising would be a matter for argument to the jury. Competent defense counsel would highlight the fact of Susie's coagulopathy (easy bruising), the evidence of bruising of the neck several weeks earlier when Susie visited her natural father (Record Sheet, N.C. Mem. Hosp. "Social Work" entry of Aug. 25, 1991), and the evidence that Susie suffered a serious fall, with her brother falling on top of her, to rebut an argument that Petitioner must have caused the bruising by grabbing and hitting Susie when he was alone with her.

that competent medical and scientific evidence showed that the head injury was caused by an accidental fall suffered by the child that was well-documented in contemporaneous medical and other records. Lisa O'Daniel and Scott Ingle initially described the fall as being quite serious. According to the original statements of these witnesses, Scott tripped over a cord while carrying Susie. The witnesses originally recounted that Susie fell all the way to the ground, out of Scott's arms, and then Scott fell on top of her. Counsel could have pointed out to the jury that the actual testimony of these witnesses on the stand – to the effect that Scott only fell to his knees and "cradled" the baby – was strongly contradicted by their original statements. Defense counsel could have also directed the jury's attention to the suggestive question put by a law enforcement officer to Ms. O'Daniel during a pretrial interview wherein the officer injected the terminology that perhaps eight-year-old Scott was in fact "cradling" the baby in his arms during the fall and "protecting" her. Counsel could have argued that the baby obviously would not have turned "real red," shaken, jerked a whole lot, cried for an hour and a half, and appeared less than normally responsive, as witnesses first reported, unless there was in fact a serious fall and apparent neurological impact upon the child. In closing argument with regard to the fall, defense counsel could have asked the jury to find that, just hours before her death from a head injury, Susie suffered a damaging fall wherein she was dropped to a gravel road from a height of three feet or so and then her brother landed on top of her, causing trauma to her head.

Further, defense counsel could have argued to the jury that other injuries suffered by Susie, such as broken bones that were already partially healed by the day of her death, clearly influenced the State's experts to find that *all* of Susie's injuries, including her head injury, were part of an extended pattern of intentional abuse suffered by the baby. The prosecutor attributed this pattern of abuse to the hand of Petitioner Burr. Competent defense counsel would have conceded, of course, that Susie *was* a victim of serious abuse over an extended period of time. But very little evidence presented at trial tied Petitioner to any abuse of Susie before the date of her accidental fall and head injury. And the evidence that was introduced on this point was subject to effective impeachment by competent defense counsel. *See* discussion below.

In order to assess the strength of the State's evidence that Petitioner Burr had abused Susie before August 24, 1991, the date of the fall, the Court must consider the wider context of the investigation into the death Susie of O'Daniel. Susie died as a result of a discrete head injury, but she had already been a victim of severe abuse for some time before she suffered that injury. Susie had comminuted fractures of her legs and at least one arm for a week or more before her head injury. *Yet no report to authorities or physicians was made by Lisa O'Daniel or any other family member about Susie's battered and painful condition.* As was ominously reported after the fact by Dr. Runyan, a treating physician for Susie, "[Susie's] family's account of her behavior does not fit [her actual history of injuries]." (*See* Recommendation of Dec. 14, 2004, at 40.)

Further, it is absolutely clear that Lisa O'Daniel understood even before a police investigation began that she, as primary caregiver for Susie, would be the target of suspicion regarding the child's injuries. Indeed, she testified at trial that as she left her trailer to take Susie to the hospital on the night of August 24-25, she told her sons 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." (Trial Tr. Vol. 17, at 163.) Competent defense counsel would have looked for indications that Ms. O'Daniel's interest in protecting herself and her family may have influenced the development of damaging testimony against Petitioner Burr. Of course, the radically sanitized descriptions of the accidental fall suffered by Susie given by Ms. O'Daniel and Scott at trial would have been one major indication of testimony influenced by self-interest, but there were other indications, as well. Defense counsel would have found substantial alterations, all to the detriment of Petitioner, in the statements of Ms. O'Daniel and Scott regarding alleged incidents of abuse of the baby by Petitioner in the weeks before Susie's head injury.

As evidence of Petitioner's prior use of violence, the State relied on the testimony of ten-year-old Scott Ingle.[7] A close examination of Scott's testimony, however, reveals glaring internal inconsistencies, several of which competent trial counsel could have used to impeach Scott.

---

[7] As pointed out by Petitioner, Scott was a much more sympathetic witness than Lisa O'Daniel, Susie's mother.

Significantly, Scott denied any form of abuse of Susie by Petitioner Burr when Detective Allen and Captain Qualls interviewed Scott on September 6, 1991, just two weeks after Susie's death. Detective Allen specifically asked Scott whether he had ever seen Petitioner harm Susie:

DET. ALLEN: Q: Alright, have you ever seen Johnny do anything to your little sister Susie? Whip her or do anything to her?

SCOTT INGLE: A: Nope

(Second Amend. to MAR, Ex. 4, Interview with Scott Ingle at 4.)

The evidentiary record now before this Court shows that, over a year later, two of the state's prosecutors met with Scott shortly before Petitioner's trial. At that meeting, Scott said for the first time that he had seen Petitioner shake Susie on two or three other occasions. The questions and answers for this session are somewhat disjointed, and it is difficult to determine exactly which incidents Scott is describing at which time. In the interview, Scott's answers appear typical of a young child; he often does not answer the question asked and jumps from one topic or description to another. From what may be gleaned from the interview, however, Scott describes at least two incidents where he observed Petitioner shake Susie. The first incident occurred on a day when he and his mother, Lisa O'Daniel, were playing football outside the trailer and Petitioner and Susie were inside the trailer:

Q: So, your mama and Tony and you were outside playing football?

A: Yea, and I went in.

Q: And you went in. Alright, where was Susie?

A: In the house.

Q: Where at

A: He was suppose[d] to be watching her.

Q: Where

A: Cause my mama didn't get to play with us much, so we wanted [her] to play with us that day.

Q: Okay, why did you go inside?

A: To get some drink.

Q: To get something to drink.

A: And I didn't get nothing because he was doing that [unintelligible] and I hide [unintelligible] in case something would happen.

Q: He had what?

A: [unintelligible] I thought something might would have happened.

Q: And where was Susie at when you went inside?

A: She was in the living room in - you know that swing thing.

Q: So she was in the living room in her swing and what was she doing? Was she happy or was she asleep or was she crying or was she not doing anything at all?

A: I went in there and she was laying down and he just - she crying cause she was hungry and he just jerked her up by her arm - and he shook and jerked her up by her arm.

Q: Okay, show me, now you say she was in a swing.

A: Yeah

Q: Was she sitting up

A: When he jerked her up he took her in there and started feeding her.

. . . .

Q: When he shook her what did Susie do?

A: She started crying and he tried to make her stop crying.

Q: How did he try to make her stop crying?

A: Like my mama would - he would do her like that - but she was spoiled by my mama - so she would cry a lot when she wasn't around . . .

Q: Let me ask you something Scott? Was Susie crying before or after Johnny picked her up out of the swing? And you say he grabbed her and shook her.

A: She was happy - but she started crying because she got hungry and she had to use the bathroom. But he thought she was hungry I reckon because he started feeding her.

Q: Okay - so she started crying and then that's when he went over and started shaking her - is that what you are telling me? Or did she start crying after?

A: She started crying because she used the bathroom [unintelligible] or was hungry and I said that he probably thought she was hungry because he started feeding her.

Q: Okay - that's what I'm wanting to ask you. Okay - when she started crying and that when he went over and grabbed her - did he say anything to her when he grabbed her?

A: He said Shhhhhhhhhhhhh.

Q: Okay -

A: He didn't know I was in there because I hid.

Q: Where were you hiding at?

A: I was - it was like - I was hiding in my bedroom and I was kinda peeking out to look.

Q: So you had kinda

A: And when he took her in there - I ran - I crawled behind the couch or the chair I don't remember - it was something like a stereo I was behind or beside the stereo and between the tv - you know - we used to have a little crack and I crawled - I crawled behind that [and] looked - and then when he took her in the kitchen

Q: So you were hiding - peeking out - he didn't know you were there.

A: See, I am sneaky and real quiet.

. . . .

Q: . . . So he kind of did like this shhhhhhh and then grabbed her by the arm and pulled her out. But when he did that did she stop crying and did she start crying harder?

A: She started crying harder and he gave her some milk and started doing like mama and then she stopped crying and that's right when mama came in and I went out . . . .

(Second Amend. to MAR, Ex. 3, Interview at 13-15.)

Scott also told the prosecutors about another time he saw Petitioner shake Susie. He said that he was inside "peeking" through the bedroom door:

A: I came in cause I heard her crying and then I peeked.

Q: What do you mean - were you outside and heard her crying or were you [inside].

A: Yeah - see we had a big yard and they were out in the woods in a - it was a big homemade planet clubhouse

Q: Kind of behind your house

A: It was way on out that way cause we had a great big yard and I was close to the house and then I

Q: What did you hear? You say

A: I heard her crying and I then I ran in and I figured he'd probably be done shaking her again and he was shaking her again.

Q: Where was she at? How loud was she crying?

A: Not loud enough

Q: Not loud enough to hear her up at Rita's

A: No

Q: But loud enough for you to hear outside the trailer

A: Yeah - I was nearest - I was in the backyard cause - cause you see I was - in my mama

Q: Okay - so were in the back near the backdoor

A: And the backdoor is near my mama's room

Q: Right near your room too isn't it?

A: Yeah

Q: Okay

Q: So you were both - when you - You say you [snuck] in did you kind of creep in so he couldn't hear the door open or what did you do?

A: There's a crack about that big and I just peeked. Peeked into the bedroom.

Q: Peeked into the bedroom? Where was Susie at when you looked in?

A: He was shaking her in her bed.

Q: Who was?

A: [Petitioner]

Q: How was he shaking her - you mean she was laying in her bed?

A: Yes - he was the onliest one that shake her - my mama never did shake her - she'd just pick her up and do her like that - but that ain't shaking her -

Q: Kind of rock her

A: No, she did rock her.

. . . .

A: I don't know why he picked her up - he just started - picked her up for no reason - she wasn't even crying.

Q: I thought you said she was crying.

A: Not that - oh yeah, oh yeah, I was thinking of another time. That was the day after that day.

Q: The day after you were playing football

A: Yeah - it was real - no - it was about - you could say three days it was close to when she died.

Q: Okay, so about three days after you played football is when you - when you heard her crying and you were outside the trailer.

A: Yeah and about two - about two or three more days - maybe four he was is when I heard her not crying I just walked in and he just started shaking her.

(*Id.* at 17 -19.)

Scott described a third incident which occurred the day before Susie was taken to the hospital. Scott told the prosecutors that on this day, he saw Petitioner shake Susie and that Petitioner saw Scott watching him. Scott said that he was playing outside with his two brothers (Tony and JJ) and that he walked inside:

A: I walked - when I walked in I - he - he - that's when he just went over there and you know and he - she didn't do nothing that day neither - she was just sitting there and he did that two times.

Q: He did what two times?

A: He shook her two times - remember that time I told you he shook her one time and she wasn't crying - I mean - or anything - just laying in the bed - she was - the day before she died - she - he did that to[o] and she wasn't crying or anything.

Q: Okay - that's what I

A: And I walked in and I saw him walk to the bed and he just.

Q: Was she laying in the bed? Was Susie in the bed when Johnny walked in?

A: Oh, yeah, she was in her bed.

Q: Okay - that's what we want to know - where Susie was [when] you saw Petitioner do that to her.

Q: Show me how he . . . shook her that day.

A: He got her like right here - and he got her right there and she was hitting - her head was kinda let against the pillow but it couldn't - but her head couldn't hurt but I know her - he - her waist was probably hurting because she did cry and she probably was in shock a lot too.

Q: So her head was bouncing on the pillow.

A: Yeah.

(*Id.* at 21-22.)

Later, Scott said that Petitioner was playing with Susie and tickling her belly. He also appeared confused about which incident he was talking about to the prosecutors, but eventually, after much questioning, he agreed that there were three separate incidents. (*Id.* at 26.) In at least one of the incidents, Scott told the prosecutors that he heard Petitioner cursing and yelling at Susie to "shut up." (*Id.* at 22, 28.) It 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. He appears protective of his mother during the interview, speaking of how Lisa "spoiled" Susie and how she never shook Susie.

At trial, Scott testified about two incidents in which he observed Petitioner shake Susie. These two incidents were uncorroborated by any other witnesses. Like Scott's recounting of his fall with Susie on August 24, Scott's stories of these two prior incidents also changed over time. Scott told the prosecutors that on the day he was playing football ("the football incident"), he went inside to get a drink; at trial he testified that he went inside "cause [he] heard [Susie] crying." In another example of the inconsistency of Scott's statements, he testified at trial that Susie was not crying before Petitioner shook her. As noted above, however, in the pre-trial meeting with prosecutors, Scott had said that "Susie was happy - - but she started crying because she got hungry and she had to use the bathroom." In his testimony about the second incident, Scott testified that he was outside

playing with Tony and JJ, and that he heard Susie crying, so he went in and peeked through the door. Scott testified that Susie was in the living room, and that Petitioner took her into the kitchen, where he shook her. In the interview, however, Scott had said that Susie was in her swing and Petitioner grabbed her by the arm and started to feed her. Scott testified that he was scared of Petitioner and that he did not tell anyone of this incident because he was scared that Petitioner would kill his mother.[8] In fact, Scott did not tell police officers about this incident and did not report it to anyone until he told the prosecutors when they were preparing him for trial.

A reasonably competent attorney, recognizing the significance of Scott's testimony and the need for the State to explain the older bruises on Susie's body, could have impeached Scott's trial testimony which was diametrically different from what he told the police in the days after Susie's death. Scott testified that he was scared of Petitioner, and that is why he did not tell the police officers about the prior shaking incidents. However, at the time of his interview with the officers, Petitioner was already in jail.

Moreover, it is clear from Scott's trial testimony, that he blamed himself for Susie's injury, or, at the very least, worried that his fall with his sister caused her injuries. Competent counsel would have pointed out the illogic of this worry, even for a young child, based on the trial testimony he actually gave. Counsel could have argued that it did not make

---

[8] Scott's testimony of these threats by Petitioner is also internally inconsistent. It is unclear from his testimony and statements exactly when his mother told him that Petitioner had threatened to kill her.

sense for Scott to blame himself, if, as he testified at trial, he succeeded in cradling Susie in his arms during his fall and she suffered no impact in the fall, and he had seen Petitioner shake or hit Susie on more than one occasion.

Scott was a very young child at the time of Susie's death and was still only ten years old when he testified at Petitioner's trial. 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. These feelings were understandable under the circumstances, and Scott was undoubtedly a sympathetic witness. 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, and it was incumbent upon trial counsel to show the weakness of Scott's testimony in order to limit its effect. No other witness testified concerning any violence against Susie by Petitioner.[9] The use of a ten-year-old child to do so left that child open to cross-examination. The fact that Scott changed his

---

[9] Lisa O'Daniel testified at trial that "about two weeks before Susie's death," she [Lisa] heard Susie scream at 4:00 a.m. and found Petitioner "holding Susie up in the air." (Trial Tr. Vol. 17, at 195, 198-200.) According to Lisa, "[Susie] was red . . . [i[n the same place he had his hands." (*Id.* at 199.) Notably, and unknown to defense counsel at the time of trial, Lisa had previously placed this incident in time about two days before Susie's death. (Second Amend. to MAR, Ex. 1, Interview with Lisa O'Daniel at 3.) By the time of trial, however, Lisa moved the incident back in time, arguably to account for the week-old fractures that Susie suffered. Lisa's trial testimony about "prior abuse" by Petitioner does not appear strong, since she did not say she saw Petitioner hit or shake Susie. Nonetheless, competent counsel could have impeached even her weak testimony by pointing out that Lisa had previously made an inconsistent statement to the effect that Petitioner had never abused Susie and Lisa did not know who was responsible for harming her daughter. (Record Sheet, N.C. Mem. Hosp. "Social Work" entry of Aug. 25, 1991, "Interview with Mrs. O'Daniel.")

testimony on two key factors of the case, i.e., (a) whether he had ever seen Petitioner abuse Susie, and (b) the severity of his fall with his baby sister, greatly undermined his overall reliability and should have been a focus of counsels' trial strategy.

Consistent with evidence presented at trial, defense counsel could have maintained during closing argument, in complete agreement with the State's experts, that Susie was abused and neglected in the last weeks of her life before the date of her head injury. Harkening back to a report to the Department of Social Services made by Dr. Runyan, counsel could have reminded the jury that "[Susie's] family's account of her behavior does not fit [her actual history of injuries]." Susie's mother and family members must have seen signs of the pattern of abuse, including even multiple, painful bone fractures suffered by the baby, long before the date of her death, but they made no report of abuse. As the physician wrote, the "family's account" did not fit the facts. Counsel could have asked the jury to find that no reliable showed that Petitioner had anything to do with the abuse of Susie, certainly not that which included broken bones, before her death. They could have argued that the negative portrayal of Petitioner as a repeated and continuous abuser, so critical to the prosecutor's case in seeking Petitioner's conviction and death sentence, was without significant or credible foundation in the evidence.

Defense counsel could have argued that the circumstantial evidence that Petitioner was the last person in the child's presence before Petitioner and others began to notice symptoms of a head trauma was not strong evidence against him in view of the real facts

concerning the seriousness of Susie's accidental fall hours earlier. Even State experts recognized that a fall from a height of three feet or so could have caused the head trauma that led to Susie's death. Moreover, there was competent evidence by defense experts that Susie could have appeared normal and lucid for the period of time after her injury from the fall and before the beginning of her symptoms since the onset of brain swelling can be variable.

In a summation, defense counsel could have emphasized to the jury the strong evidence of longstanding child abuse directed toward Susie before the day of her head injury, none of which was shown by credible evidence to involve Petitioner. Counsel could have pointed out that the family's behavior in the last weeks of Susie's life simply "did not fit" the actual history of the baby's injuries according to the treating physician. And counsel could have strongly advocated the agreement of State and defense experts that Susie's head injury could have been caused by an accidental fall of the severity described in the original statements of Lisa O'Daniel and Scott Ingle. On the basis of these lines of argument, defense counsel could have asked the jury to find Petitioner "not guilty" of the murder charge against him.

Instead, lacking a defense bolstered by the testimony of medical experts, counsel was left with no choice but to concede, at the close of the guilt phase of the trial, that Susie's fall with Scott could not have caused her fatal injuries. Almost in passing, counsel offered an alternative "defense," one that was patently unbelievable:

I submit to you that in order to create a reasonable doubt in your mind, you need to make some effort at least to show you that there is an alternative theory as to how this occurred.

Because of the fact that we can't prove – we can't prove Johnny innocent, but we need, I think, to show you and I think the evidence does show you the reasons why you ought to have a reasonable doubt.

And if you'll bear with me a minute, I want to start a little bit at this other end.

Mr. Burr testified that he took Tarissa, Susie, and put her in the baby swing, and went back in the other room, all way back at the end of the trailer, front door is open, the back door is open. Susie is near the front door. Johnny is back in the back room working at the back door.

Some stranger, some deranged stranger might wander by and see the child in the trailer, go on in and hurt her.

Now, ladies and gentlemen, that's possible, but it should raise a reasonable doubt in your mind as to whether or not that's the way this incident occurred.

I suggest to you it probably was not - - it is certainly a possible explanation, but that's probably is falls within what the District Attorney's office would call the ingenuity of counsel, a fanciful doubt, not a reasonable doubt.

(Trial Tr. Vol. 27, at 2172-73.)

In contrast to defense counsel's inept "deranged stranger" explanation for Susie's death, one of the State's attorneys, in the final argument to the jury, stated:

Mr. Burr, for whatever reason, whatever callousness or maliciousness, depravity, took that child and hit her against her babybed or the wall and hit her (hits against the table), banged her, pulled her arms back, grabbed the poor child under the neck, the handspring, grabbed her under there and with her – wherever he had her with a closed fist, hit her.

> And that's how her head got pushed in, without the skin being broken, because if he hit her like that, you'd probably have broken skin.
>
> But there was none, and I submit to you it was done with a fist and that's my theory.
>
> The same man who bends arms, and wrists and fingers, and pushes people, and even though they want to say it's a game, what a game.

(*Id.* at 2251-52). Clearly, had defense counsel performed a meaningful investigation and presented evidence that called into question the State's medical evidence and presented an alternate explanation for Susie's death - one that wholly exculpated Petitioner - the case could have sounded vastly different to the jury.

The cause of Susie's death was an essential element of the State's case, established primarily through expert medical witnesses. In cases where a defendant is indigent, courts often approve the allocation of funds so the defendant can secure the assistance of independent experts. In fact, as the Fourth Circuit has stated, "[there can be no doubt that an effective defense sometimes requires the assistance of an expert witness." *Williams*, 618 F.2d at 1026. The ABA Guidelines clearly acknowledge this fact. In this case, of course, there was no request made by the defendant for funds to consult with an expert.[10] Had an expert been

---

[10] In an affidavit submitted in the MAR proceeding, attorney Thomas F. Loflin, III, a criminal defense attorney, opined that the "failure of Mr. Burr's trial counsel . . . to apply to the trial court for funds to employ the assistance of a medical expert . . . amounts to startingly ineffective assistance of counsel and falls far below the standard required of lawyers practicing criminal law in the courts of the State of North Carolina." (MAR, App. H, Loflin Aff.) The MAR court gave little or no weight to Mr. Loflin's conclusions. (MAR Order I, Oct. 3, 1997 at 69-73.)

consulted, counsel could have, at the least, challenged the notion that Susie had a depressed left temporal skull fracture and that it was caused by the Petitioner hitting Susie with a closed fist. Counsel also would have been able to discredit the medical experts who testified about the presence of the skull fracture, thus potentially preventing the State from arguing that the jury could infer malice, premeditation, and deliberation from the alleged blow to Susie's head. Of course, absent malice, premeditation, and deliberation, the case could have been one of second-degree murder rather than first-degree murder. "Evidence that creates a 'battle of the experts' is precisely the type of evidence that gives rise to reasonable doubt, and thus will typically support a finding of prejudice." *Pinholster v. Ayers*, 525 F.3d 742, 777 (9th Cir. 2008) (Fisher, J., dissenting), *reh'g granted en banc*, 560 F.3d 964 (2009). There is, of course, no evidence that defense counsel, after undertaking a thorough investigation and consulting with experts, concluded that a battle of experts on the medical evidence was not in Petitioner's best interests. Indeed, such a conclusion was impossible in this case precisely because counsel did not consult with experts or even completely review Susie's medical records. Trial counsels' failure to review the medical evidence and consult with medical experts, when viewed in light of the medical testimony developed in this habeas proceeding that would have been exceedingly helpful to Petitioner's defense, creates a reasonable probability that the outcome of his trial and sentencing proceeding would have been different had trial counsel represented Petitioner competently.

This Court concludes that there is a reasonable probability that the jury, or at least one juror, in Petitioner's case would have formed a reasonable doubt as to his guilt on the charge of first-degree murder had they heard the expert medical testimony that should have, and could have, been presented on Petitioner's behalf. The State tried Petitioner for his life. Petitioner was constitutionally entitled to effective assistance of counsel, but counsel failed to investigate the most critical issue in the case, the cause of Susie's death. Counsel incompetently and without a reasonable basis conceded that the baby's accidental fall earlier in the day could not have resulted in her death. Due to defense counsels' deficient performance, Petitioner was deprived of a level playing field with the State, and was convicted in a trial where his only plausible defense, an absolute defense that could have been supported by competent expert testimony, was never even investigated. The expert medical testimony now proffered by Petitioner concerning the immediate cause of Susie's death is sufficient to undermine the Court's confidence in the outcome of Petitioner's trial. As succinctly stated by the Sixth Circuit Court of Appeals, and equally applicable here, "[t]he difference between the case that was and the case that should have been is undeniable." *Stewart*, 468 F.3d at 361.

The Unreasonableness of the Decision of the State MAR Court

Under 28 U.S.C. § 2254(d)(1), a federal district court may not grant habeas relief unless the state court's 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.

28 U.S.C. § 2254(d)(1) and (2); *see also Williams v. Taylor*, 529 U.S. 362 (2000).

With regard to the ineffective assistance of counsel issue, the state MAR court found:

> Defendant's current counsel have found experts who take issue with the State's witnesses at trial. The mere fact that they have found such experts does not demonstrate ineffectiveness of counsel. First, matters of record demonstrate that trial counsel spent a reasonable amount of time investigating circumstances relating to the case. Second, court decisions concerning *Strickland* demonstrate that the first prong of *Strickland* requires the court to evaluate trial counsel's actions in light of the circumstances facing trial counsel at and before trial... Third, in the Court's opinion, defendant proffers nothing demonstrating that his trial was fundamentally unfair or that the results are unreliable as a result of trial counsel's performance.

(MAR Order I at 76.) The MAR court similarly rejected Petitioner's claim that trial counsel were ineffective for failing to move the court for funds to obtain the assistance of an independent expert to conduct an investigation and assist counsel with the medical evidence:

> The Court holds that this claim is without merit for several reasons. First, for reasons discussed above . . . (e.g., trial counsel conducted a diligent investigation, had considerable experience in defending against serious charges, had considerable experience in matters relating to child abuse, and had access to considerable medical evidence prior to trial) the Court concludes that matters of record demonstrate that counsel's decision to not submit a request for expert assistance was not action below the standard established by the first prong of *Strickland*. Second, the Court knows from its own experience that an experienced trial attorney does not always need a physician by his or her side to understand medical evidence relating to child abuse. Stated otherwise, the failure to request expert assistance in such a case does

> not, in the Court's opinion, demonstrate that trial counsel fell below the standard of reasonable competent counsel. . . . Third, for reasons previously stated (e.g., the third reason stated above . . . - - no demonstration of unfair trial or unreliable results), the Court concludes that defendant has not demonstrated that the claimed error caused prejudice, the second prong of *Strickland*.

(MAR Order I at 78.)

This Court, in its initial Recommendation, examined in detail the unreasonableness of the state MAR court's determination that trial counsel did not perform incompetently. Nothing in the expanded record or supplemental briefing changes the Court's conclusion. As noted in the Recommendation, the MAR court reached a result that was significantly at odds with the evidence of record. It is unnecessary to revisit the specific instances of unreasonableness; the Court has re-entered and incorporated the prior Recommendation by reference, *supra*, at 2. Additionally, the Court notes that the MAR court failed to consider relevant ABA Guidelines when evaluating the performance of counsel. The United States Supreme Court has repeatedly held that the ABA guidelines should be considered when assessing whether counsel's performance was deficient. *Strickland*; *Wiggins*; *Rompilla*. Counsel in this case clearly failed to meet the standards of the Guidelines concerning investigation, preparation, and use of expert witnesses. As such, the failure of the MAR court to find deficient performance, and resulting prejudice, was unreasonable and relief should be granted.

This Court's scope of review on habeas corpus is highly constrained and deferential of the state court decision. *Williams*, 529 U.S. at 389-90. The MAR court's disposition of

Petitioner's ineffective assistance of counsel claim, however, cannot withstand scrutiny, even under the deferential review prescribed by AEDPA. *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence."). Where, as here, deprivation of a habeas petitioner's Sixth Amendment right to competent assistance of trial counsel is clearly shown, and the prejudice to Petitioner from being deprived of a potentially viable absolute defense in a capital case is adequately demonstrated, this Court should grant the writ of habeas corpus.

Additional Matters

There are several other matters pending by motion of the parties:

1. The State moved to expand the record to include the affidavit of Dr. Jerry Bernstein (Docket No. 67). This motion is granted.

2. Petitioner moved to expand the record to include reports from Drs. Plunkett, West, and Thibault (Docket No. 86). This motion is granted.

3. The State moved to expand the record to include affidavits of Margaret Costner, Vera Porter, and James Lynch and the report of Dr. James C. Hyland (Docket No. 89). This motion is granted.

4. The State moved to expand the record to include written transcripts of depositions of nine experts; Dr. Runyan's statement dated November 28, 2006; the State's

deposition exhibits; certain State trial exhibits; and certain designated DVD's and videotapes (Docket No. 91). This motion is granted.

5. The State moved to expand the record to include the affidavit of District Attorney Robert F. Johnson with attached exhibits (Docket No. 112). In conjunction with this motion, the State filed a 24-page "Post-Discovery Supplemental Brief" (Docket No. 113). Petitioner moved to strike the State's Post-Discovery Supplemental Brief, Supporting Affidavit and Other Materials (Docket No. 118). For reasons discussed below, the Court will grant the State's motion and deny Petitioner's motion.

In his post-discovery supplemental brief, Petitioner did not discuss a *Brady*[11] claim. His brief solely dealt with the ineffective assistance of counsel claim, the medical evidence and post-trial discovery (Docket No. 87). Accordingly, the State did not discuss any *Brady* issue in its brief (Docket No. 88). In his reply brief, Petitioner included a separate argument asserting a *Brady*/prosecutorial misconduct claim with regard to certain evidence Petitioner claims was wrongfully withheld from him (Docket No. 109). The State then filed a supplemental brief addressing Petitioner's *Brady* claim (Docket No. 113), together with a motion to expand the record and an affidavit from District Attorney Robert F. Johnson, with attachments (Docket No. 112). Petitioner filed a motion to strike this supplemental brief, affidavit and attachments (Docket No. 118).

---

[11] *Brady v. Maryland*, 373 U.S. 87 (1963).

While the Local Rules of this court do not specifically allow surreply briefs, they also do not specifically prohibit such briefs. *See* Local Rule 7.3(h). Generally, courts have permitted surreply briefs when a party seeks to respond to new material that an opposing party has raised for the first time in its reply brief. *See, e.g., Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001) ("The standard for granting a leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply."); *Dunn v. Sandoz Pharms. Corp.*, 275 F. Supp. 2d 672 (M.D.N.C. 2003) (allowing surreply brief); *Khoury v. Meserve*, 268 F. Supp. 2d 600, 605 (D. Md. 2003) ("Surreplies may be permitted when the moving party would be unable to contest matters presented to the court for the first time in the opposing party's reply."). Technically speaking, Petitioner first raised a *Brady* claim in the state post-conviction proceedings and again in his petition for a writ of habeas corpus, filed in this court in 2001. The State responded to the claim in its initial response. However, the emphasis in the proceedings subsequent to this Court's initial Recommendation has clearly been on the medical evidence and Petitioner's claim that he received ineffective assistance of counsel. It is somewhat disingenuous of Petitioner to insert a *Brady* argument into his final brief filed in 2007 and then argue that the State should not be afforded an opportunity to respond. As such, given the lengthy and complicated procedural history of this case, and because the State's supplemental brief responds directly and briefly to the material presented in Petitioner's reply brief to the State's post-conviction brief, the Court will grant the State's

motion to expand the record, and accept the surreply brief and attachments as filed. Petitioner's motion to strike the supplemental brief, accordingly, will be denied.[12]

Conclusion

For reasons set forth above and in the incorporated Recommendation of December 14, 2004, **IT IS RECOMMENDED** that a writ of habeas corpus be issued and the Petitioner's conviction and death sentence for first-degree murder be vacated without prejudice to the State's right to retry Petitioner within a reasonable period of time.

---

[12] Because the Court has found that Petitioner received ineffective assistance of counsel and is recommending that his petition for a writ of habeas corpus be granted, it is unnecessary to reach the *Brady* issue. However, the Court does note that Petitioner has not made a substantial showing of prosecutorial misconduct. As discussed in this supplemental recommendation and the initial recommendation, the failures in this case were with defense counsel, not the district attorney. The district attorney's office maintained an "open-file" policy and, with regard to medical files, x-rays, test results, etc., that were not physically in the possession of the prosecuting attorney's office, defense counsel were informed of the location of these files. The affidavit of District Attorney Johnson details, at length, the compliance of his office with discovery obligations. (Docket No. 112, Motion to Expand Record, Ex. 1.) The fact that some of the material was never examined by defense counsel was, again, a result of the ineffective assistance of counsel, not any prosecutorial misconduct. Petitioner has simply not made an adequate showing under *Brady* and its progeny that the State suppressed any evidence in this case. *See also Banks v. Dretke*, 540 U.S. 668 (2004) (discussing the components of a *Brady* claim). The only evidence that, arguably, was not turned over or disclosed was a videotape of Susie, recorded four to seven weeks before her death which, at some point, was turned over to the State by Susie's aunt and uncle, Donald and Rita Wade. Both of these individuals testified at trial, and there was no mention in their testimony of the videotape. The videotape was not introduced at trial. District Attorney Johnson states in his affidavit that there is no record of when his office received the videotape, but Petitioner's first post-conviction counsel, J. Kirk Osborn, was specifically made aware of its existence in a document dated November 25, 1998, in response to Petitioner's post-conviction discovery motion. In the event Petitioner is retried in this case, of course, his counsel would have all of the evidence that his first trial counsel either overlooked or neglected to obtain.

Further, **IT IS ORDERED** that the Motion to Supplement Motion to Expand the Record (Docket No. 67) and the Motion to Supplement to Expand the Record (Docket No. 86) be **GRANTED. IT IS FURTHER ORDERED** that Respondent's Motions to Expand the Record (Docket No. 89, 91) be **GRANTED.** Finally, **IT IS ORDERED** that Respondent's Motion to Expand the Record (Docket No. 112) be **GRANTED** and that Petitioner's Motion to Strike Respondent's Post-Conviction Supplemental Brief, Supporting Affidavit and Other Materials (Docket No. 118) be **DENIED.**

P. Trevor Sharp, U.S. Magistrate Judge

May 5, 2009

ATTACHMENT A

APPENDIX K

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

dBase

United States District Court	District: Middle District of North Carolina
Name: John Edward Burr	Prisoner No.: 10759-01 Case No.:
Place of Confinement: Central Prison, Raleigh, NC	
Name of Petitioner (include name under which convicted): John Edward Burr	Name of Respondent (authorized person having custody of petitioner): V. R.C. Lee, Warden
The Attorney General of the State of: North Carolina	

FILED IN THIS OFFICE APR 05 2001 CLERK, U.S. DISTRICT COURT GREENSBORO, N.C.

FILED APR 12 2001 IN THIS OFFICE Clerk U.S. District Court By

1:01CV00393

PETITION

1. Name and location of court which entered the judgment of conviction under attack Alamance County Superior Court, Graham, North Carolina

2. Date of judgment of conviction April 21, 1993

3. Length of sentence Death

4. Nature of offense involved (all counts) First degree murder, felonious child abuse, and assault on a female

5. What was your plea? (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

AO 241 (Rev. 5/85)

9. If you did appeal, answer the following:

(a) Name of court North Carolina Supreme Court

(b) Result Conviction and Sentence Affirmed

(c) Date of result and citation, if known September 8, 1995

(d) Grounds raised See attached Exhibit A

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court N/A

(2) Result

(3) Date of result and citation, if known

(4) Grounds raised

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court United States Supreme Court

(2) Result Petition for Certiorari Denied

(3) Date of result and citation, if known April 21, 1996, 517 U.S. 1123 (1996)

(4) Grounds raised See attached Exhibit B

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court North Carolina Superior Court, Alamance County

(2) Nature of proceeding Motion for Appropriate Relief

(3) Grounds raised See attached Exhibit C

AO 241 (Rev. 5/85)

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result MAR Denied

(6) Date of result June 15, 2000

(b) As to any second petition, application or motion give the same information:

(1) Name of court N/A

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result

(6) Date of result

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☒ No ☐
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

AO 241 (Rev. 5/85)

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted you state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(h) Denial of right of appeal.

A. Ground one: See attached Exhibit D

Supporting FACTS (state *briefly* without citing cases or law)

B. Ground two:

Supporting FACTS (state *briefly* without citing cases or law)

AO 241 (Rev. 5/85)

C. Ground three: _____

Supporting FACTS (state *briefly* without citing cases or law) _____

D. Ground four: _____

Supporting FACTS (state *briefly* without citing cases or law) _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:

(a) At preliminary hearing Craig T. Thompson and Robert J. Jacobs

(b) At arraignment and plea Craig T. Thompson & Robert J. Jacobs

AO 241 (Rev. 5/85)

(c) At trial Robert E. Collins & Douglas R. Hoy

(d) At sentencing Robert E. Collins & Douglas R. Hoy

(e) On appeal Janine M. Crawley

(f) In any post-conviction proceeding J. Kirk Osborn & Ernest L. Conner, Jr.

(g) On appeal from any adverse ruling in a post-conviction proceeding J. Kirk Osborn & Ernest L. Conner, Jr.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Ernest L. Conner, Jr. by JKO

Ernest L. Conner, Jr.
N.C. State Bar No. 14179
Post Office Box 8668*

J. Kirk Osborn
Signature of Attorney (if any)
J. Kirk Osborn
N.C. State Bar No. 6316
100 Europa Drive, Suite 130*

I declare under penalty of perjury that the foregoing is true and correct. Executed on

4/5/01
(date)

Signature of Petitioner

*Greenville, NC 27835-8668
(252) 355-8100

(7) Chapel Hill, NC 27514
(919) 929-0987

EXHIBIT A
ISSUES RAISED BY PETITIONER ON DIRECT APPEAL TO
THE NORTH CAROLINA SUPREME COURT

I. Whether the trial court committed prejudicial constitutional error by ruling at the beginning of jury voir dire that defense counsel could not question any venireperson following a death qualification cause challenge by the prosecutor, where, on the facts of this case, that ruling denied the Defendant the right to the assistance of counsel?

II. Whether the trial court committed prejudicial constitutional error in jury selection by excusing a potential juror on the basis of her responses to the State's death qualifying questions where her responses did not show that she could not return a sentence of death?

III. Whether the trial court committed reversible error by allowing the prosecutor to "stake out" a juror during voir dire by obtaining a commitment from the juror that he would overlook evidence that the mother has mistreated the victim?

IV. Whether the trial court reversible constitutional error by limiting defense counsel's questions to prospective jurors regarding their feelings about the death penalty and life imprisonment?

V. Whether the trial court erred by failing to give an instruction to juror Kenneth Stainback in response to his inquiry about the meaning of a life sentence?

VI. Whether the trail court erred by admitting evidence of prior acts of misconduct by Defendant towards against Lisa O'Daniel Bridges where this evidence was irrelevant to the issue of the identity of the perpetrator of the capital offense and its unfair prejudicial effect far outweighed its probative value?

VII. Whether the trial court erred in instructing the jury on the proper uses of evidence of uncharged misconduct by failing to inform the jury that is should not consider such evidence as evidence of Defendant's character?

VIII. Whether the trial court erred by excluding evidence regarding Alamance County Social Services investigation into and supervision of Lisa O'Daniel Bridges' family following Susie O'Daniel's death, where the evidence was relevant and admissible to impeach Lisa Bridges and as substantive evidence of third party guilt?

IX. Whether the trial court committed reversible constitutional error by failing to grant Defendant a necessary continuance?

X. Whether the trial court erred by failing to give Defendant's requested instruction on non-flight where this instruction was supported by the evidence and a correct statement of the law?

XI. Whether the trial court erred by overruling Defendant's objection to the prosecutor's bad faith argument that defense counsel acted unprofessionally by failing to arrange for a witness to be present?

XII. Whether the trial court erred by failing to intervene *ex mero motu* to prevent the prosecutor from misstating the law during closing argument?

XIII. Whether the trial court erred by admitting irrelevant evidence that Lisa Bridges son John, Jr. was afraid of Defendant?

XIV. Whether the trial court erred by denying Defendant's motion to order that Lisa O'Daniel's medical records be made available to the defense?

XV. Whether the trial court erred by failing to conduct an inquiry into an alleged communication between a seated juror and a pastoral counselor during the jury's penalty phase deliberations?

XVI. Whether the trial court erred by permitting the prosecutor to travel outside the record and comparatively argue facts of other cases to the jury as a means of persuading the jury of the existence of the aggravating circumstance submitted in the instant case?

XVII. Whether the trial court erred by overruling Defendant's objection to the prosecutor's improper closing argument concerning the order of the injuries inflicted on the victim?

XVIII. Whether the trial court committed reversible error by refusing to instruct the jurors that the burden of proof applicable to mitigating circumstances, preponderance of the evidence, means proof showing that it is more likely than not that a mitigating circumstance exists?

XIX. Whether the trial court erred by giving an instruction on the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel" which failed to adequately limit the application of this facially vague factor?

XX. Whether the trial court erred by failing to prevent the prosecutor from misstating the law on the aggravating circumstance that the capital felony was especially heinous, atrocious or cruel, and on issue three of our capital sentencing procedure?

XXI. Whether the trial court committed reversible constitutional error by failing to

instruct that if any juror found by a preponderance of the evidence that Defendant had the ability to adjust to prison life, the juror must give that circumstance mitigating value?

XXII. Whether the Defendant's death sentence is excessive and disproportionate and the Defendant's sentence should be reduced from death to life in prison?

XXIII. Whether the trial court committed reversible constitutional error by denying Defendant's motion to prohibit the state from death qualifying the jury?

XXIV. Whether the trial court committed reversible constitutional error from failing to prevent the prosecutor from arguing during the sentencing phase that (a) the jury was the conscience of Alamance County and that (b) Defendant was unconstrained in his ability to submit nonstatutory mitigating circumstances?

XXV. Whether the trial court committed reversible constitutional error by instructing jurors to decide whether nonstatutory mitigating circumstances have mitigating value?

XXVI. Whether the trial court committed reversible constitutional error by instructing that at issues three and four each juror may rather than must consider any mitigating circumstance found by the juror in issue two?

XXVII. Whether the trial court committed reversible constitutional error by instructing the jury that it should answer issue three yes if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance?

XXVIII. Whether North Carolina's death penalty procedure is unconstitutional and the death sentence in this case was imposed in an arbitrary and capricious manner?

EXHIBIT B
ISSUES RAISED BY PETITIONER ON DIRECT APPEAL TO THE UNITED STATES SUPREME COURT

I. Defendant's constitutional rights to due process and to an impartial adjudicator were denied when prospective jurors were struck from Defendant's jury under *Witherspoon v. Illinois* and *Wainwright v. Witt*, without adequate determination that those jurors were disqualified to serve.

II. In sentencing Petitioner to death, jurors were unconstitutionally permitted to disregard mitigating evidence regarding Petitioner's good conduct during pretrial incarceration and his ability to adjust to life in prison.

III. Petitioner's jury found that the murder was "especially heinous, atrocious, or cruel" bases upon instructions which failed to constitutionally limit the jury's discretion in violation of *Godfrey v. Georgia* and *Maynard v. Cartwright.*

EXHIBIT C
ISSUES RAISED BY PETITIONER IN
MOTION FOR APPROPRIATE RELIEF

I. Mr. Burr was denied ineffective assistance of counsel when his appointed counsel were not adequately prepared.

II. Mr. Burr's constitutional and other rights were violated by the absence of relief on meritorious pre-trial motions and other pre-trial omissions.

III. The guilt phase of the trial witnessed repeated violations of Mr. Burr's rights attributable to the ineffectiveness of counsel.

VI. The jury in Mr. Burr's case was improperly death-qualified.

V. Improper statements by the prosecutor in his closing arguments during the guilt/innocence phase of the trial constituted prejudicial error.

VI. Failure to develop mitigation evidence to present during penalty phase of the trial.

VII. The imposition of the death penalty in this case is not warranted, especially in light of new evidence concerning aggravating and mitigating factors.

VIII. Newly discovered evidence warrants a new trial for Mr. Burr.

IX. The State affirmatively presented the case against Mr. Burr in a false light.

X. The State failed to reveal exculpatory evidence of other explanations for the injuries to Tarissa Sue O'Daniel.

XI. The State knowingly presented false evidence which created a materially false impression regarding the facts of the case and the credibility of witnesses.

XIII. The State withheld favorable evidence from the Petitioner in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution.

XIV. The State violated N.C. Gen. Stat. § 15A-903(f) by not producing Lisa O'Daniel's statement to the prosecutors made on or about February 24, 1993.

XV. The indictment of this Petitioner did not include all of the essential elements to allege the crime of first degree murder and did not allege the factors necessary

to increase the punishment to death in violation of the due process clause of the Fifth and Fourteenth Amendments the indictment clause of the Fifth Amendment and the right of jury trial of the Sixth Amendment of the United States Constitution, and in violation of Article I, Sections 1, 19, 22, 23, 24, 35 and 36 of the North Carolina Constitution, and the judgment in this case should be vacated and the Petitioner should be awarded a new trial on the charge of second degree murder as currently alleged.

EXHIBIT D
GROUNDS FOR RELIEF IN PETITION FOR WRIT OF HABEAS CORPUS

12.A. **GROUND ONE**

TRIAL COUNSEL WERE CONSTITUTIONALLY INEFFECTIVE, FAILING TO DEVELOP EXCULPATORY EVIDENCE OF ACCIDENTAL DEATH

Mr. Burr was charged with first-degree capital murder on August 28, 1991. From the date of his arrest, Mr. Burr always maintained his innocence. The case against Mr. Burr was entirely circumstantial. No one saw Mr. Burr injure the alleged victim, a four-month-old developmentally deficient child with substantial medical problems. The State's case involved very complicated medical evidence as to the cause of death of the child. Mr. Burr's initial court-appointed counsel did not investigate his case or obtain any expert assistance during the seventeen months following his being charged. On the eve of trial, the trial court judge removed his initial trial attorneys for failing to investigate Mr. Burr's claim of innocence. Two new attorneys were appointed to represent Mr. Burr. His new counsel were required to try Mr. Burr's capital case with two months to prepare, no medical experts, and no investigative staff. In contrast, the State had nineteen months to prepare, five medical experts, and substantial investigative staff. Trial counsel were ineffective by failing to obtain the assistance of any medical experts, failing to review fully the medical records, and failing to interview the State's experts before trial. Their eve-of-trial motion to continue was denied. They filed an affidavit alleging they were unprepared and set forth all the work they had been unable to complete. They further alleged that if they had to try the case, they would render ineffective assistance of counsel. The case was tried and Mr. Burr was sentenced to death. Shortly thereafter, trial counsel filed another affidavit alleging that they rendered ineffective assistance of counsel to Mr. Burr. During post-conviction investigation, Mr. Burr was able to obtain the assistance of world renowned medical experts who gave an alternative explanation as to the cause of death of the alleged

victim. Consistent with Mr. Burr's claim of innocence, these defense experts asserted that the injuries which caused the child's death resulted from either a fall which occurred earlier on the day of the onset of her injuries, brittle bone disease, or both. Despite this substantial sworn, uncontradicted evidence supporting Mr. Burr's claim of innocence, the post-conviction court denied Mr. Burr an evidentiary hearing. There is more than a reasonable probability that had this alternative explanation as to the cause of death been presented to the jury, Mr. Burr would have been acquitted.

12.B. GROUND TWO

MR. BURR WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS APPOINTED COUNSEL WERE NOT ADEQUATELY PREPARED

See summary under Ground One.

12.C. GROUND THREE

THE TRIAL COURT COMMITTED REVERSIBLE CONSTITUTIONAL ERROR BY FAILING TO GRANT DEFENDANT A NECESSARY CONTINUANCE

See summary under Ground One.

12.D. GROUND FOUR

THE STATE KNOWINGLY PRESENTED FALSE EVIDENCE WHICH CREATED A MATERIALLY FALSE IMPRESSION REGARDING THE FACTS OF THE CASE AND THE CREDIBILITY OF WITNESSES.

During post-conviction, the State, under order from the North Carolina Supreme Court, disclosed for the first time to Mr. Burr pretrial recorded interviews of the mother and brother of the deceased child, Lisa Bridges and Scott Ingle, respectively. The pretrial recorded interviews revealed substantial and material impeaching evidence. These interviews revealed that the prosecutors manipulated their testimony to fit the State's theory of prosecution. The following are some examples from Lisa Bridges' statements: prior health problems of the deceased child;

prosecutors coaching her to disparage, not cover up, for Mr. Burr; prosecutors assuring her she was immune from prosecution; prosecutor confronting her with her instructing her family to lie to the prosecutors and say her baby was not having problems; the prosecutor's disbelief of witnesses later offered by the State at trial; and prosecutors instructing her as to what she ought to say when she testified. The pretrial recorded interview of Scott Ingle reveal prosecutors coaching and instructing this ten-year-old boy how to testify. These pretrial statements offered material impeachment evidence which could have been used at trial to impeach both Lisa Bridges and Scott Ingle, two of the State's most important witnesses. The State's failure to provide Mr. Burr with these pretrial statements denied Mr. Burr due process under the Fifth and Fourteen Amendments to the United States Constitution.

12.E. GROUND FIVE

THE STATE FAILED TO REVEAL EXCULPATORY EVIDENCE OF OTHER EXPLANATIONS FOR THE INJURIES TO TARISSA SUE O'DANIEL.

The State had available before trial eleven research articles documenting the problems with diagnosing child abuse as opposed to accidental injury or injury resulting from osteogenesis imperfecta, or brittle bone disease. In this case, these articles were particularly relevant because the State's case was based entirely upon circumstantial evidence. As an example one of these articles explained that the type of fracture the child victim had was typical of an accidental fall. The child victim had been injured in a fall shortly before she went into a coma. The State did not provide the defense with this exculpatory evidence, nor did the trial court allow Mr. Burr's new attorneys time to conduct any medical research. During post-conviction Mr. Burr secured the assistance Dr. Colin Paterson, one the world's foremost experts on this bone disease. Dr. Paterson noted that the medical records revealed no attempt to rule out osteogenesis imperfecta. Further, he expressed the opinion

that the alleged victim suffered from osteogenesis imperfecta, and this condition caused her death. These articles in the possession of the State were material exculpatory evidence and should have been provided to Mr. Burr, especially given the limited time allowed Mr. Burr's attorney to prepare for trial.

Additionally, the State informed Ms. Nita Todd, a social worker who interviewed Mr. Burr on the day of the alleged child-victim's onset of injury that she would not be needed for trial, because she thought Mr. Burr was very appropriate in his interview and not hostile or overly defensive. The prosecutors told her that they would not need her at trial after interviewing her for a second time. She was out-of-state and unavailable during trial. There is a reasonable probability that had the articles and testimony of Ms. Todd been available to the defense, the result of the trial would have been different. The State's failure to provide Mr. Burr with these articles denied Mr. Burr due process under the Fifth and Fourteen Amendments to the United States Constitution.

12.F. GROUND SIX

THE STATE AFFIRMATIVELY PRESENTED THE CASE AGAINST MR. BURR IN A FALSE LIGHT.

For the factual basis of this claim see Ground Five. The State's coaching and promising immunity to its witnesses, and withholding these witnesses' prior recorded statements, and withholding opposing medical literature crossed the line from trial preparation to presenting the case in a false light, to the point of manipulating testimony. Had this withheld information been presented, there is a reasonable probability it could have affected the judgment of the jury.

12.G. GROUND SEVEN

NEWLY DISCOVERED EVIDENCE WARRANTS A NEW TRIAL FOR MR. BURR.

During post-conviction investigation, Mr. Burr discovered another explanation for the death of the alleged victim which was consistent with his claim of innocence. Her death was the result of an accident, brittle bone disease, or a combination of both. This exclamation was supported by a world renowned expert in brittle bone disease, a medical examiner, and a pediatrician. This evidence was unknown and unavailable to Mr. Burr before trial, could not have been discovered by the Defendant through due diligence, was material to the cause of death in this case, was not merely cumulative or impeaching, and would have produced a different result had it been presented to the jury. This claim is all the more pressing given how the trial judge refused to heed the pleas of Mr. Burr's newly appointed attorneys for additional time to adequately prepare for trial.

12.H. GROUND EIGHT

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY RULING AT THE BEGINNING OF JURY VOIR DIRE THAT DEFENSE COUNSEL COULD NOT QUESTION ANY VENIREPERSON FOLLOWING A DEATH QUALIFICATION CAUSE CHALLENGE BY THE PROSECUTOR, WHERE, ON THE FACTS OF THIS CASE, THAT RULING DENIED THE DEFENDANT THE RIGHT TO THE ASSISTANCE OF COUNSEL

The trial court erred by issuing a blanket ruling prohibiting the Petitioner from questioning jurors prior to excusing those jurors for cause on the basis of their answers to the State's death-qualifying questions. At least three jurors who were excused for cause were genuinely equivocal and may well have given different answers if questioned by the defense. The trial court's excusal of these jurors denied the Petitioner the effective assistance of counsel and denied him a fair and impartial jury. Accordingly, the Petitioner must be resentenced.

12.I. **GROUND NINE**

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR IN JURY SELECTION BY EXCUSING A POTENTIAL JUROR ON THE BASIS OF HER RESPONSES TO THE STATE'S DEATH QUALIFYING QUESTIONS WHERE HER RESPONSES DID NOT SHOW THAT SHE COULD NOT RETURN A SENTENCE OF DEATH

The trial court excused a prospective juror for cause on the basis of her responses to the prosecutor's death qualifying questions. The juror asserted that she could follow the law and consider the death sentence. The trial court's actions violated the Petitioner's constitutional rights to a fair and impartial jury and a reliable sentencing hearing under the Fifth, Sixth and Eighth Amendments to the United States Constitution.

12.J. **GROUND TEN**

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY EXCLUDING EVIDENCE REGARDING ALAMANCE COUNTY SOCIAL SERVICES INVESTIGATION INTO, AND SUPERVISION OF LISA O'DANIEL BRIDGES' FAMILY FOLLOWING SUSIE O'DANIEL'S DEATH, WHERE THE EVIDENCE WAS RELEVANT AND ADMISSIBLE TO IMPEACH LISA BRIDGES AND AS SUBSTANTIVE EVIDENCE OF THIRD PARTY GUILT

The trial court excluded evidence regarding Alamance County Department of Social Services supervision of Lisa Bridges' family following the death of her child. The trial court reasoned that the events which occurred after the infant's death were irrelevant. On the contrary, evidence concerning Lisa Bridges' treatment of her surviving children after her daughter's death was highly relevant both to impeach Ms. Bridges' testimony that she was a competent and caring parent and as substantive evidence of third party guilt consistent with Mr. Burr's claim of innocence. The trial court's exclusion of this evidence infringed upon the Petitioner's constitutional rights to confrontation and to present a defense under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

12.K. GROUND ELEVEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY OVERRULING DEFENDANT'S OBJECTION TO THE PROSECUTOR'S BAD FAITH ARGUMENT THAT DEFENSE COUNSEL ACTED UNPROFESSIONALLY BY FAILING TO ARRANGE FOR A WITNESS TO BE PRESENT

In closing argument the prosecutor improperly suggested that defense counsel had acted unprofessionally in failing to secure Ms. Nita Todd's presence in the courtroom. The prosecutor was well aware that defense counsel had made diligent efforts to arrange for Ms. Todd to be present to testify. Indeed, during post-conviction investigation, Mr. Burr's counsel learned that the State had told her they would not be needing her for the trial. The prosecutor's bad faith argument that defense counsel had acted incompetently in failing to prepare for trial, infringed upon the Petitioner's Sixth Amendment right to counsel and was especially egregious when the prosecutor knew he had told Ms. Todd she would not be needed for trial. This argument had a substantial and injurious effect and influence in determining the jury's verdict.

12.L. GROUND TWELVE

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY DENYING DEFENDANT'S MOTION TO ORDER THAT LISA O'DANIEL'S MEDICAL RECORDS BE MADE AVAILABLE TO THE DEFENSE

Information contained in medical records admitted into evidence revealed that Lisa Bridges reported to a social worker that she had previously been hospitalized for depression and had been treated with anti-depressant medication until approximately one year before the victim's death. The Petitioner moved the trial court to order that the Petitioner be allowed to obtain, inspect and copy all information concerning the psychiatric treatment of Lisa Bridges. The trial court's denial of this motion infringed upon the Petitioner's constitutional rights to due process and confrontation

under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

12.M. GROUND THIRTEEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY PERMITTING THE PROSECUTOR TO TRAVEL OUTSIDE THE RECORD AND COMPARATIVELY ARGUE FACTS OF OTHER CASES TO THE JURY AS A MEANS OF PERSUADING THE JURY OF THE EXISTENCE OF THE AGGRAVATING CIRCUMSTANCE SUBMITTED IN THE INSTANT CASE

During the penalty phase, the prosecutor erroneously argued the facts of decided cases to the jury and invited the jury to compare the facts of prior cases to the facts in the instant case in determining that this capital offense was heinous, atrocious and cruel. The prosecutor's argument was plainly improper and the trial court infringed upon the Petitioner's constitutional rights to a fair and reliable sentencing hearing under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

12.N. GROUND FOURTEEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY OVERRULING DEFENDANT'S OBJECTION TO THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT CONCERNING THE ORDER OF THE INJURIES INFLICTED ON THE VICTIM

The trial court overruled the Petitioner's objection to the prosecutor's traveling outside the record to postulate on the order in which certain injuries were inflicted upon the victim. The prosecutor's improper argument prejudiced the jury by inflaming the jury toward finding that the infant experienced pain and consequently that the killing was heinous, atrocious and cruel. The trial court's action violated the Petitioner's constitutional right to a fair and reliable sentencing hearing under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

12.O. **GROUND FIFTEEN**

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY GIVING AN INSTRUCTION ON THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" WHICH FAILED TO ADEQUATELY LIMIT THE APPLICATION OF THIS FACIALLY VAGUE FACTOR

The only aggravating factor submitted to the jury in the instant case was N.C. Gen. Stat. § 15A-2000(e)(9), that the murder was "especially heinous, atrocious or cruel." This aggravating circumstance was unconstitutionally vague as applied. In particular, the trial court's instructions were so broad that they permitted the jury to find the heinous, atrocious, or cruel circumstance based on the single underlying fact that the victim was an infant. A death sentence based on such a finding is arbitrary and capricious in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. Accordingly, the Petitioner must be resentenced.

12.P. **GROUND SIXTEEN**

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY FAILING TO PREVENT THE PROSECUTOR FROM MISSTATING THE LAW ON THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL, AND ON ISSUE THREE OF OUR CAPITAL SENTENCING PROCEDURE

The trial court committed reversible constitutional error by failing to intervene *ex mero motu* to prevent the prosecutor from misstating the law on numerous occasions in his closing argument. The combined effect of the prosecutor's improper arguments created a strong possibility that the jury returned a verdict of death based on a misunderstanding of the applicable law, and thus, violated the Petitioner's constitutional right to a reliable sentencing hearing. Accordingly, the Petitioner must be resentenced.

12.Q. **GROUND SEVENTEEN**

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY FAILING TO INSTRUCT THAT IF ANY JUROR FOUND BY A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANT HAD THE ABILITY TO ADJUST TO PRISON LIFE, THE JUROR MUST GIVE THAT CIRCUMSTANCE MITIGATING VALUE

The trial court instructed that jurors could reject the mitigating circumstances pertaining to the Petitioner's adjustment to incarceration on the grounds that these circumstances had no mitigating value. Under *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986), this evidence is inherently mitigation. The trial court's erroneous instruction violated the Petitioner's right under the Eighth and Fourteenth Amendments to the United States Constitution to a proper consideration of the Petitioner's mitigating evidence. Accordingly, the Petitioner must be resentenced.

12.R. **GROUND EIGHTEEN**

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY INSTRUCTING JURORS TO DECIDE WHETHER NON-STATUTORY MITIGATING CIRCUMSTANCES HAVE MITIGATING VALUE

The trial court improperly instructed the jury that each juror could reject non-statutory mitigating circumstances on the basis that they did not find the circumstances mitigating. The erroneous instruction prevented jurors from fully and properly considering the Petitioner's mitigating evidence. Moreover, because the instruction did not explicitly inform jurors that they were required to give statutory mitigating circumstances mitigating value, jurors may have interpreted the instruction to allow them to reject even statutory mitigating circumstances which they did not find mitigating. The trial court's error violated the Petitioner's rights to due process, his right to effective assistance of counsel and his right to be free from cruel and unusual punishment. Accordingly, the Petitioner must be resentenced.

12.S. GROUND NINETEEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY INSTRUCTING THAT AT ISSUES THREE AND FOUR EACH JUROR MAY RATHER THAN MUST CONSIDER ANY MITIGATING CIRCUMSTANCE FOUND BY THE JUROR IN ISSUE TWO

By instructing the jury that it must weigh the aggravating circumstances found in Issue One, but that the jurors may (or may not) consider any mitigating circumstances found in Issue Two, the trial court erroneously invited jurors to reject mitigating circumstances which they believed were supported by the evidence and had mitigating value at the weighing stage. By giving an analogous instruction at Issue Four, the trial court similarly invited jurors to reject mitigating circumstances at that stage. The erroneous instruction violated the Petitioner's rights to due process, and his right to be free from cruel and unusual punishment. Accordingly, the Petitioner must be resentenced.

12.T. GROUND TWENTY

NORTH CAROLINA'S DEATH PENALTY PROCEDURE IS UNCONSTITUTIONAL AND THE DEATH SENTENCE IN THIS CASE WAS IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER

The death penalty is inherently cruel and unusual and the North Carolina death penalty statute is vague and over broad. The statute also permits juries to make excessively subjective sentencing decisions and the statute is applied arbitrarily and pursuant to a pattern of discrimination on the basis of race and sex of defendants and victims and on the basis of defendant's poverty.

12.U. GROUND TWENTY-ONE

MR. BURR'S CONSTITUTIONAL AND OTHER RIGHTS WERE VIOLATED BY THE ABSENCE OF RELIEF ON MERITORIOUS PRE-TRIAL MOTIONS AND OTHER PRE-TRIAL OMISSIONS

Among other motions Mr. Burr's trial counsel failed to submit to the trial court, they failed to move for the payment of fees and costs for expert witnesses. This case involved extremely complex medical issues. The State's case was entirely circumstantial. Yet defense counsel never sought the assistance of medical experts to interpret the medical records and x-rays and explain the rampant inconsistences contained therein. As a consequence, defense counsel never discovered the other more reasonable cause of the child's death. These failures amounted to ineffective assistance of counsel under the Sixth Amendment to the United States Constitution.

12.V. GROUND TWENTY-TWO

THE JURY IN MR. BURR'S CASE WAS IMPROPERLY DEATH-QUALIFIED

Mr. Burr's trial counsel failed to question jurors with respect to their opinions regarding the imposition of the death penalty upon all persons convicted of premeditated and deliberate murder. Without asserting Mr. Burr's rights as set forth in *Morgan v. Illinois*, the Petitioner was saddled with a jury strongly in favor of the death penalty. Moreover, the Petitioner's trial counsel failed to exercise the Petitioner's rights under *Batson v. Kentucky* and the State therefore peremptorily challenged four African-American jurors. As a consequence, Mr. Burr was denied his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Mr. Burr is entitled to a new trial.

12.W. GROUND TWENTY-THREE

MR. BURR WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR THEIR FAILURE TO DEVELOP MITIGATION EVIDENCE TO PRESENT DURING PENALTY PHASE OF THE TRIAL.

Defense counsel failed to obtain the assistance of a medical expert. Such an expert would have discovered an alternative and more reasonable explanation for the child's death. If this alternative evidence had been presented to the jury and Mr. Burr was nonetheless convicted, such evidence would have provided valuable mitigating evidence at the sentencing phase. Failure to develop such mitigating evidence infringed upon the Petitioner's right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. The Petitioner is entitled to a new sentencing hearing.

12.Y. GROUND TWENTY-FOUR

THE INDICTMENT OF THIS PETITIONER DID NOT INCLUDE ALL OF THE ESSENTIAL ELEMENTS TO ALLEGE THE CRIME OF FIRST DEGREE MURDER AND DID NOT ALLEGE THE FACTORS NECESSARY TO INCREASE THE PUNISHMENT TO DEATH IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS THE INDICTMENT CLAUSE OF THE FIFTH AMENDMENT AND THE RIGHT OF JURY TRIAL OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE JUDGMENT IN THIS CASE SHOULD BE VACATED AND THE PETITIONER SHOULD BE AWARDED A NEW TRIAL ON THE CHARGE OF SECOND DEGREE MURDER AS CURRENTLY CHARGED.

The indictment in this case did not include all the essential elements of first degree murder and did not alleged the aggravating factor submitted to the jury to increase the maximum punishment to death. The indictment did not allege the murder was premeditated and deliberate. Nor did the indictment allege that the Petitioner acted with specific intent to kill. Finally, the indictment failed to allege that the murder was especially heinous, atrocious and cruel. Prosecuting the Petitioner under this indictment for first degree capital murder infringed on his rights to due

process under the Fifth and Fourteenth Amendments, and the right of jury trial under the Sixth Amendment of the United States Constitution. The Petitioner must be awarded a new trial on the charge of second degree murder.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOHN EDWARD BURR,	)	
	)	
Petitioner,	)	
	)	
VS,	)	No. 1:01CV00393
	)	
R. C. LEE, Warden,	)	
Central Prison, Raleigh, N.C.,	)	
	)	
Respondent.	)	

****

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

****

June 11, 2001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Constitutional Provisions

Other Authorities

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOHN EDWARD BURR,	)	
	)	
Petitioner,	)	
	)	
VS.	)	**No. 1:01CV00393**
	)	
R. C. LEE, Warden,	)	
Central Prison, Raleigh, N.C.,	)	
	)	
Respondent.	)	

****

PETITIONER'S BRIEF IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS

****

NOW COMES the Petitioner, JOHN EDWARD BURR, by and through his undersigned counsel, pursuant to the Order of this Honorable Court entered on April 12, 2001, and hereby submits the following Brief in support of his Petition for a Writ of Habeas Corpus regarding his conviction for first degree murder and sentence of death, Alamance County File Nos. 91 CrS 21905-06, 08-09.

STATEMENT OF THE FACTS

Mr. Burr was charged with capital murder on August 28, 1991, for allegedly causing the death of Tarissa Sue O'Daniel, the four-month-old daughter of Lisa O'Daniel. On August 27, 1991, the child died of head injuries allegedly inflicted by the Petitioner when he was alone with her for forty-five minutes during the late evening of August 24, 1991. (Tpp. 134-152, 187-194) The State's case was entirely circumstantial and involved complicated medical issues. The State relied on five medical experts; the Petitioner had no expert assistance whatsoever.

Two attorneys were appointed to represent the Petitioner in his capital proceedings. For the

next seventeen months, these attorneys did nothing to prepare for Mr. Burr's capital trial and sentencing proceeding. The most crucial mistake made by these counsel was that they made no effort to understand the medical evidence that was a critical component of the State's case. On the eve of trial, on or about December 18, 1993, the trial court replaced Mr. Burr's original trial counsel with two sole practitioners, one who had prior capital experience and another with no capital experience. They were given approximately sixty days to prepare for the trial and sentencing phases. (MAR, MAR Exhibit F)

The case involved extremely complicated medical evidence. Trial counsel did not review the medical records completely and did not interview any of the five doctors who testified for the State. Nor did they seek to hire medical experts to assist them. According to counsel, failure to hire medical experts was not a strategic decision; they did not have time or sufficient information to make a request for such assistance.

Shortly before trial, counsel filed a motion to continue, supported by lead counsel's affidavit, setting forth these and other shortcomings and asking for more time to prepare. Despite counsel's assurance that Mr. Burr would be denied effective assistance of counsel, the trial court denied their motion. (MAR Exhibit F; Affidavit of Robert E. Collins dated May 8, 1997).

The trial began on March 1, 1993. The State presented evidence that Mr. Burr and Ms. O'Daniel, both separated from their respective spouses, started dating each other shortly before the alleged victim was born on April 1, 1991. (Tpp. 70-88) On August 24, 1991, at 6:00 P.M., Ms. O'Daniel's eight year old son, Scott Ingle, tripped over a drop cord and fell while carrying Tarissa. (Tpp. 118-130, 660) O'Daniel checked Tarissa for signs of injury and found none. At trial O'Daniel described this fall as Scott just dropping to his knees while holding the baby. The baby did not touch

the ground. (Tp. 122)

Late that same evening while Tarissa was sleeping in her crib in the bedroom, O'Daniel went to her brother's trailer to wash dishes and left the Petitioner at her trailer with Tarissa. This evidence proved especially troubling to post-conviction counsel. O'Daniel claimed that the Petitioner assaulted her three times that evening and was afraid of the Petitioner. Her baby was very sick. During post-conviction discovery Petitioner obtained tape-recorded interviews of O'Daniel, theretofore not revealed to the defense, admitting that she had been unable to get Tarissa to eat anything for nearly three weeks (July 31, 1991 through August 22, 1991). During that three-week period, Bridges never sought medical assistance for her baby. It strains credulity to believe that a mother with a terribly sick baby and afraid of the Petitioner would leave that baby with him. This fact is especially true when, according to O'Daniel, the Petitioner had just assaulted her and showed no concern for Tarissa not two hours earlier when he shoved O'Daniel while she was carrying Tarissa.

When she returned to her trailer forty-five minutes later, she found Tarissa in her swing. Both Mr. Burr and Ms. O'Daniel noticed bruising on the child. The child was unresponsive. (Tpp. 150-160)

They took her to Alamance County Hospital where the doctor examined her. Suspecting child abuse, the doctor notified the Alamance County Sheriff's Department and Department of Social Services. Tarissa was moved to UNC Memorial Hospital. An examination revealed fractures in both arms and legs. Some of the fractures were at least ten days old. During ensuing interviews with law enforcement and social workers, Mr. Burr and Ms. O'Daniel denied abusing the child and attributed Tarissa's injuries to the Scott Ingle's fall while carrying her. (Tpp. 849-857; 912-930)

At trial, the State presented five medical experts to describe Tarissa's injuries. One expert, Dr. Merten, hypothesized that fractures of both arms and legs were highly unusual, caused by hyper-extending the arms and legs, and too bizarre to be accidental. During post-conviction proceedings, Mr. Burr, with the assistance of medical experts, learned that the placement and symmetry of the fractures was a marker against non-accidental injury. Dr. Merten added that the alleged victim fit the profile of a "battered child." (Tpp. 799-847) Although Dr. Merten claimed that a CAT scan showed a fracture of the skull, this claim was not supported at autopsy. (Tpp. 799-847; 1160-1108; Affidavit of Dr. Colin R. Paterson, MAR Exhibit C)

Another expert, Dr. Azizkhan, expressed the opinion that the injuries were too severe to have been caused by the fall. Dr. Azizkhan ruled out accident, because the fractures to the arms were in an unusual place and would have required twisting motion. He also acknowledged his examination of the x-rays regarding signs of healing fractures differed from other examining doctors. (Tpp. 996-1049)

The three other experts, Drs. Tennison, Willcockson, and Chancellor, supported the conclusions of Drs. Merten and Azizkhan. Pathologist Dr. Chandler opined that shaking could have been the cause of the head and arm injuries. (Tpp. 912-930; 944-995; 1060-1108).

Counsel, who had not reviewed the medical evidence completely, were unprepared and without necessary resources to contest the experts' conclusions. The trial court denied their motion for additional time to review medical evidence in order to get expert assistance. Lacking sufficient preparation to challenge the State's experts and medical expert testimony for his defense, Mr. Burr was forced to accept the State's theory of child abuse and blame it on a stranger wandering by or other family members. (Tpp. 2172-76; Affidavit of Robert E. Collins, dated May 8, 1997). The jury

rejected Mr. Burr's evidence and arguments, finding him guilty. After a sentencing hearing, the jury sentenced him to death. (Tpp. 2307; 2629)

The undersigned counsel were appointed to represent the Petitioner in post-conviction and filed a Motion for Appropriate Relief on September 27, 1996. The witnesses' testimony had changed between the time of the dropping of the baby by Scott Ingle and trial. (MAR, p. 13) Counsel requested discovery from the State. The State refused to comply with the discovery requirements of the state post-conviction statute until ordered to do so by the North Carolina Supreme Court, despite maintaining throughout pre-trial and trial proceedings that it maintained an open file discovery policy. *State v. Burr*, 348 N.C. 695, 511 S.E.2d 652 (1998). Pursuant to this order, the State provided post-conviction counsel with tape-recorded pretrial interviews of Lisa Bridges and Scott Ingle. These interviews were never divulged to trial counsel.

The interviews were significant because they revealed the evolution of the changes in the witnesses' statements over time, the pressure and influence imposed by the prosecutors to create these changes and promises by the prosecutors to avoid prosecuting Ms. O'Daniel. During the interviews, Lisa Bridges description of Scott's fall changes from Scott tripping, dropping the baby and falling on top of her to Scott tripping and dropping the baby on the ground to Scott tripping and the baby never touching the ground. (Second Amendment to MAR, Exhibit 1)

During post-conviction, counsel obtained funds to retain a pediatrician, Dr. Jerry C. Bernstein. Dr. Bernstein informed counsel that the child may have suffered from osteogenesis imperfecta or brittle bone disease. In turn, counsel contacted Dr. Colin C. Paterson, one of the world's most widely published doctors on childhood brittle bone disease, who volunteered to review the medical evidence in this case. Dr. Paterson opined that the most likely cause of the earlier

fractures was some form of *osteogenesis imperfecta*, that all injuries sustained on August 24, 1991 resulted from the bad fall, and that the adverse effects of this fall – intracranial bleeding, failure to breathe and brain damage – were compounded by this disease. (MAR Exhibit C, Affidavit of Dr. Paterson) In direct contradiction of the trial testimony of Drs. Merten and Azizkhan, Dr. Paterson noted that the symmetry of the fractures was a pointer against non-accidental injury as their cause.

In addition, counsel contacted Dr. John Plunkett, a coroner for Minnesota and an expert regarding injuries and potential injuries incurred by children in short distance falls, who volunteered to review the medical records. After reviewing all of the medical records and autopsy materials, Dr. Plunkett expressed the opinion that all of Tarissa's injuries were 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. (MAR Exhibit E, Affidavit of Dr. Plunkett)

All of the evidence obtained by post-conviction counsel was entirely consistent with the Petitioner's original and persistent claim of innocence.

PREFATORY STATEMENT

The state court's orders in this matter are convoluted, full of extraneous material, and virtually impossible to decipher concerning what findings of fact and conclusion of law the state court made. *See* State Court Order, dated October 3, 1997, 116 pages long not counting exhibits; State Court Order dated June 15, 2000, 68 pages long and incorporating by reference the State Court's October 3, 1997 Order. Both orders were drafted by Respondent's counsel and signed by the state court without any material changes.

PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING

The Petitioner is entitled to an evidentiary hearing in this Court. He is not subject to the

requirements of 28 U.S.C. § 2254(e)(2) because he searched for and produced during post-conviction proceedings substantial evidence proving constitutional violations during his capital trial. *Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). The post-conviction court rejected Petitioner requests for an evidentiary hearing. Moreover, the post-conviction court found facts against the Petitioner when it was required to assume all of Petitioner's alleged facts were true if it ruled against the Petitioner without a hearing. Mr. Burr hereby respectfully requests a hearing in this Court.

STANDARD OF REVIEW

The standard of review of Claims One, Two, Three, Twenty, Twenty-One, Twenty-Two, Twenty-Three is *de novo*. The deferential "contrary to" and "unreasonable application" clauses of 28 U.S.C. § 2254(d) only apply to claims adjudicated on the merits in state court proceedings. *Weeks v.* Angelone, 176 F.3d 249, 258 (4th Cir. 1999) ("When a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits, however, our review of questions of law and mixed questions of fact and law is de novo."); *Fisher v. Texas*, 169 F.2d 295, 300 (5th Cir. 1999) (declining to apply § 2254(d)'s deferential standards because the Texas state courts had dismissed petitioner's claim on procedural grounds rather than on its merits). The state court did not adjudicate on the merits the Petitioner's claims of constructive denial of counsel. *See Appel v. Horn*, 200[redacted] U.S. App. LEXIS 8050, at *18-27 (3rd Cir. May 3, 2001) (approving *de novo* review under *Cronic* when the state post-conviction court never mentioned *Cronic* its decision and finding constructive denial of counsel in violation of the Sixth Amendment when stand-by counsel did not assist petitioner during his hearing on competency before trial).

In *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389, 430

(2000), the United State's Supreme Court announced the standard of review of a state court decision during federal habeas corpus proceedings:

> Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied — the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decision but unreasonably applies that principle to the facts of the prisoner's case.

A state court decision is "contrary" to established Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases. *Id.* at 405-06, 120 S.Ct. at 1519-20, 146 L.Ed.2d at 425. A rule contradicts governing law when it is "diametrically different," "opposite in character or nature," or "mutually opposed" to clearly established precedent. *Id.* A state court decision is also contrary to the Supreme Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. *Id.* Relief is available when the state court applies the wrong legal standard. *Id.*

A state court decision involves an "unreasonable application" of United States Supreme Court precedent if it identifies the correct governing legal rule from Supreme Court cases but unreasonably applies it to the facts of a state prisoner's case. *Id.* at 408, 120 S.Ct. at 1520-21, 146 L.Ed.2d at 427. A state court decision can be disregarded under the "unreasonable application" clause of § 2254(d) if the state court decision lacks objective reasonableness; i.e., something beyond erroneous in the view

of the federal court, but less than so erroneous that all rational judges would decide it differently. *Id.* at 410-11, 120 S.Ct. at 1522-23, 146 L.Ed.2d at 428-29. A state court decision is objectively reasonable when it resulted in a "satisfactory" outcome. *Id.*

In conducting a harmless error analysis for constitutional violations in habeas corpus proceedings, "structural" error is prejudicial *per se*. *Brecht v. Abrahamson*, 507 U.S. 619, 629-30, 638, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (quoting *Arizona v. Fulminante*, 499 U.S. at 307-08, 309 and discussing *Kotteakos v. United States*, 328 U.S. 750 (1946)). In conducting a harmless-error analysis for constitutional "trial" error, the standard of review for a Petition for a Writ of Habeas Corpus is whether viewing the record as a whole, the error, "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 638.

GROUNDS FOR FEDERAL RELIEF

GROUND ONE

TRIAL COUNSEL WERE CONSTITUTIONALLY INEFFECTIVE, FAILING TO DEVELOP EXCULPATORY EVIDENCE OF ACCIDENTAL DEATH

A. State Court Disposition of this Claim

The Petitioner raised this issue in post-conviction. The state court denied it and the North Carolina Supreme Court denied certiorari. This claim is ripe for federal review.

B. Summary of Argument

Mr. Burr was denied effective assistance of counsel. Original trial counsel did nothing in preparation of his case during the seventeen months of their appointment (August 28, 1991 through December 18, 1993). They conducted no investigation, pressured Mr. Burr to take a plea to second-degree murder, and ignored Mr. Burr's protestations of innocence.

The trial court discharged these lawyers less than one month before Mr. Burr's capital trial was to begin. Newly appointed counsel were both sole practitioners. They were given only two months to prepare for both the guilt/innocence and penalty phases. This case involved incredibly complicated medical evidence, yet trial counsel failed to seek the assistance of one single medical expert. On the eve of trial, trial counsel requested more time to prepare. Lead counsel supported his request with an affidavit stating that if he were required to proceed to trial he would render constitutionally ineffective assistance of counsel.

With expert medical assistance at trial, Mr. Burr could have proved to the jury that the most reasonable explanation for the death of the alleged victim was accident or other medical complications.

The State possessed no direct evidence against Mr. Burr, so the opinion of experts was material to any defense. The failure of trial counsel to understand the medical evidence and obtain the assistance of medical experts deprived Mr. Burr of his Sixth Amendment right to present a defense, substantially prejudiced him and significantly undermined any confidence in the verdict and sentence of death. In addition and in combination with these facts, Mr. Burr's trial attorneys rendered constitutionally deficient assistance to him throughout their representation, and the lead counsel so affirmed this fact in his affidavit filed after trial.

C. Facts Supporting this Claim

On August 24, 1991, the day of Tarissa's injuries, she suffered from a fall while being carried by her half-brother, Scott Ingle. On September 5, 1991, Scott Ingle described the fall as "tripping, dropping Tarissa, and falling on top of her." *See* Exhibit 4 to Petitioner's Second Amendment to MAR.

This account was identical to the account Scott's mother, Lisa Bridges, gave to Nita Todd, the Social Worker who was called in to investigate the suspected child abuse on August 25, 1991. Ms. Todd's recorded interviews with Lisa Bridges contained the following description of the fall by Scott Ingle when he was carrying Tarissa: "[Scott] tripped, dropped the baby and fell on her."

Moreover, Lisa O'Daniel corroborated this account in her statement to Detective Roney Allen on August 26, 1991. She described the fall by stating, "... when I turned around I heard him holler and when I turned around he was laying on top of her." *See* Recorded interview of Lisa Bridges by Roney Allen, p. 4, and Exhibit 2 to Petitioner's Second Amendment to MAR.

Even when prosecutors interviewed Lisa O'Daniel shortly before the first scheduled trial date of January 4, 1993, she explained "[Scott] fell, tripped over the drop cord with her, and Susie fell out of his arms." *See* Second Amendment to MAR, Exhibit 1, p. 30. By the time Lisa Bridges and Scott Ingle got to trial, however, their testimony had changed to Scott just falling to his knees and the child never touched the ground. Pretrial interviews of both Lisa Bridges and Scott Ingle were not furnished to the defense but demonstrated how their testimony was clearly manipulated by the prosecution.

The medical evidence in this case showed that Tarissa Sue O'Daniel was suffering from *osteogenesis imperfecta* or a similar brittle bone disease, a condition often confused with child abuse. *See* Attachments C, E, and G to MAR, Affidavits of Dr. Colin R. Paterson, Dr. John Plunkett, and Dr. Jerry C. Bernstein, respectively. Children afflicted with *osteogenesis imperfecta* or its variant forms have specific symptoms. Some symptoms are remarkably documented in the medical records of Tarissa Sue O'Daniel. These symptoms, never factually disputed by the State in its post-conviction responses, include the following: growth retardation, excessive bruising,

unexplained healing fractures, anemia, vomiting, and diarrhea.

Growth retardation: Tarissa Sue O'Daniel's birth weight was five pounds and eleven ounces, 2580 grams (< 10 percentile). Her weight on July 26, 1991 was 4300 grams (< 5 percentile) when Ms. O'Daniel brought her to the emergency room 5:10 A.M. in the morning. At the time of autopsy, Tarissa Sue O'Daniel's body weighed 10.5 pounds, 4763 grams (< 5 percentile) and measured 22.75 inches, 57.79 centimeters (< 5 percentile) in length. Thus, 95 percent of all babies four-and-one-half months old were heavier and longer.[1] Tarissa was not a thriving baby as evidenced by her decline to the lower reaches of body size in the last month of her life. Significantly, the State possessed significant undisclosed exculpatory evidence furnishing a reason for this decline, but failed to disclose it. Lisa Bridges told the prosecutors on February 24, 1993, that she had been unable to feed Tarissa for more than three weeks prior to her death (from July 31, 1991 through August 21 or 22, 1991).[2]

Excessive bruising: At the time of autopsy, the body of Tarissa Sue O'Daniel showed a significant number of bruises, many of which were induced by medical intervention. Indeed, the medical records of Tarissa Sue O'Daniel noted "mult[iple] old and new bruises covering [the] body."[3]

Unexplained healing fractures: The medical records of the deceased indicate that there

---

[1]Percentiles are taken from a chart produced from the following research: P. V. V. Hamill et al., *Physical Growth: National Center for Health Statistics Percentiles,* 32 Am. J. Clin. Nutr. 607 (1979). *See* Appendix B. Dr. Karen Chancellor, the medical examiner in this matter, testified that ten and one-half pounds is normal weight for a four-and-one-half month old child! (Tp. 1095)

[2]This interview of Lisa Bridges was only obtained after the North Carolina Supreme Court ordered discovery and remanded this case back to the Superior Court for reconsideration of its decision denying Petitioner's MAR.

[3]p. 36, Medical Records (State's Exhibit No. 17).

were many unexplained healing fractures on the body of Tarissa Sue O'Daniel. Both humeri (long bone of the upper part of the arm) with the left humerus showing signs of healing,[4] both femurs (the long leg bone between the pelvis and the knee) with both femurs showing signs of healing,[5] the left clavicle (the collar bone)[6] and ribs[7] were all noted as showing evidence of fractures, old and new.

Anemia: The medical records indicate that at the time of her admission to UNC Hospitals, Tarissa O'Daniel was anemic. Her hemoglobin was 8.6 grams per deciliter, well below the normal range of 12.3 to 15.7 grams per deciliter.

Vomiting: Ms. Bridges brought Tarissa O'Daniel to UNC Hospitals on May 3, 1991. At that time, she reported that the child was vomiting two times per day. Ms. Bridges is quoted in the medical records as describing her daughter's vomiting as "like a water fountain."

Diarrhea: Again, the medical records indicated that on the May 3, 1991 visit to UNC Hospitals, Ms. Bridges reported that her daughter had a significant problem with "watery diarrhea," occurring three times per week.

---

[4]p. 6, Medical Records (State's Exhibit No. 17). Although it is noted in the medical records that there was evidence of healing of the arm fractures by Dr. Specter, at trial Dr. Merten testified that he saw no such evidence. (Tp. 816)

[5]p. 6, Medical Records (State's Exhibit No. 17). The State's experts could not agree on whether one or both femurs showed evidence of healing. (*Compare* Tp. 1046 *with* Tp. 813)

[6]p. 24, Medical Records (State's Exhibit No. 17). A doctor's note from UNC Physicians and Associates Consultation Visit Record dated August 25, 1991 states: "Tarissa Sue O'Daniel has "old clavicle fracture."

[7]p. 24, Medical Records (State's Exhibit No. 17). Dr. Merten states in his radiologist report dated August 25, 1991 that there are no rib fractures noted. Dr. Willcockson of Alamance County Hospital testified that he did a chest x-ray which appeared to show some posterior rib fractures. (Tp. 924)

Classical symptoms of persons suffering from brittle bone disease -- blue sclera, wormian bones, osteopenia, family history -- are not necessary for making the diagnosis. This fact makes diagnosis of *osteogenesis imperfecta* rather than child abuse particularly difficult.

> [T]he diagnosis [of *osteogenesis imperfecta* (OI)] was extremely difficult at the time of the first fracture because none of the classical manifestations of OI were present. In the worst case, a child was in the care of the local authority for three and one half years and was very nearly adopted before continued fracturing made the diagnosis obvious. At the time of the first two fractures the bone density was normal, the teeth were normal, the sclerae were normal, there was no family history and the only possible abnormality was a modest excess of Wormian bones.

Colin R. Patterson, et al., *Osteogenesis Imperfecta: The Distinction from Child Abuse and the Recognition of a Variant Form*, 45 Am. J. of Med. Genet. 187 (1993).

"It is well known that children with *osteogenesis imperfecta* can sustain fractures with minimal trauma." Gahagan and Rimsza, *Child Abuse or Osteogenesis Imperfecta: How Can We Tell?*, 88 Pediatrics 987, 991. All of the medical experts who testified at trial agreed that Tarissa suffered from a fracture or fractures that were at least one week old. Nevertheless, the State called witnesses who testified that Tarissa was happy and smiling during the evening of August 24, 1991, shortly before her half-brother, Scott Ingle, dropped her on the rocky driveway.

Neither the medical records for Tarissa Sue O'Daniel nor the autopsy report ruled out *osteogenesis imperfecta* as the cause of her fractures. None of the State's doctors involved in this matter considered this bone disease as a possible explanation for the series of events which led to her death.

When Tarissa was brought to UNC Hospitals from Alamance Hospital, the doctors suspected child abuse. Mr. Burr was questioned by a social worker, Nita Todd. He acted appropriately during the interview and told Ms. Todd that he did not know of any abuse occurring to the child. *See* Affidavit of Juanita Todd, CCSW.

Trial counsel for Mr. Burr did not interview any of the treating physicians who testified at trial and did not seek assistance from the trial court to hire an expert pediatrician.

Dr. Colin R. Paterson, the most widely published author in the world regarding brittle bone disease in children executed an affidavit stating his opinion that the "most likely cause of the earlier fractures was some form of *osteogenesis imperfecta*, that all the injuries sustained on August 24, 1991 resulted from the bad fall, and the adverse effects of this fall-- leading to intracranial bleeding, failure to breathe and brain damage – were compounded by this disease." *See* Appendix C to MAR.

John Plunkett, M.D., a board certified forensic pathologist and coroner for the State of Minnesota, is an expert in fatalities in children resulting from falls. According to Dr. Plunkett, Scott Ingle's fall while carrying Tarissa could have easily caused her death. The forces necessary to inflict a skull fracture were present, the lucidity Tarissa experienced after the fall is a common feature of such a fall by children, and the retinal hemorrhaging is a consequence of the subdural bleeding over time. *See* Appendix E to MAR, Affidavit of John Plunkett, M.D.

Both Dr. Paterson and Dr. Plunkett noted the symmetry of the breaks in both the arms and legs. This symmetry was suggestive of accidential injury rather than intentionally inflicted injury.

The State's medical experts expressed the opinion that Tarissa's head injury could not have been caused by Scott Ingle dropping her to the ground and falling on top of her. (Tpp. 836, 926, 956, 1015) These opinions went unchallenged by counsel for Mr. Burr. Yet, the study performed by the

Cook County Medical Examiner's Office and Dr. Plunkett's opinion are directly contradictory. Dr. Plunkett's opinion is supported by research published in a forensic journal:

> Weber[8] and Chaussier[9] have demonstrated that free falls from 18 inches (6.7 mph) to 33 inches (approx. 9 mph) impacting on the head can and probably will result in skull fractures in infants. In these studies, the conditions were held constant to insure that impact was to the head.

I. Root, *Head Injuries from Short Distance Falls*, 13 American Journal of Forensic Medicine and Pathology 85 (1992).

The State's doctors who addressed the retinal hemorrhaging problem linked it to shaking the baby. (Tpp. 949, 958-59) The same forces involved in shaking a baby are involved in dropping a baby. Cardiac-Pulmonary Resuscitation (CPR), bleeding in the brain, and dropping the baby could have caused this retinal hemorrhaging. *See* Appendix D to MAR for journal articles. Like the State's doctor's, Mr. Burr's attorneys, never investigated other possibilities for Tarissa's rentinal hemorrhaging.

Dr. Plunkett concluded that Tarissa easily could have died as a result of the fall she took when Scott Ingle carried her. This opinion from an expert forensic pathologist such as Dr. Plunkett surely would have provided a defense against the State's narrowly contrived case using manipulated testimony.

The failure to present this evidence and defense to the Jury was ineffective assistance of counsel. *See Helton v. Singletary*, 85 F.Supp.2d 1323, 1334 (S.D.Fla. 1999) (holding that trial counsel constitutionally ineffective for failure to investigate another cause of death as a defense

---

[8]Weber W., *Biomedical Fragility of Skull Fractures in Infants*, 94 Z. Rechtsmed 93 (1985).

[9]Taylor A.S., *Medical Jurisprudence*, Philadelphia: Blanchard Y Lea, 1856:368.

strategy in circumstantial evidence case). Counsel's lack of preparation and expert resources left them unable to disclose the inadequate evaluation by the State's doctors, as well as their faulty conclusions. Unprepared counsel without adequate resources is equivalent to no counsel at all.

D. Review of the State Court Decision

The post-conviction court first found that the Petitioner's medical experts would testify according to what they stated in their affidavits. *See* Order and Memorandum Opinion, p. 16. The post-conviction court ruled against the Petitioner without a hearing and, therefore, had to assume that these expert's affidavits were true. Nevertheless, the post-conviction court then found that the allegations contained in the Affidavits are probably not true. *See* Order and Memorandum Opinion, p. 17. By making this finding, the post-conviction court resolved disputed factual issues against the Petitioner without a hearing.

The state court found as a fact that Mr. Collins experience as an attorney for the Alamance County Department of Social Services provided him with considerable experience relating to the investigation of child abuse. This finding of fact is not supported by a single fact submitted to the state court. In fact, such a finding is impeached by Mr. Collins' affidavit, which the state court had to assume was true in denying Petitioner's claim without a hearing. (Collins Affidavit, dated May 8, 1997)

In addition to the above errors, the state court's decision is contrary to clearly established United States Supreme Court law. The Supreme Court held that there are circumstances where the conduct of trial counsel so effects the reliability of the trial process that a Sixth Amendment violation occurs and prejudice to the accused is presumed. *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657, 667 (1984). Examples cited in *Cronic* where prejudice is

presumed include the following: (1) obtaining a conviction when the jury determined both the voluntariness and truthfulness of a confession, *Jackson v. Denno*, 378 U.S. 368, 389-91, 84 S.Ct. 1774, 1787-88, 12 L.Ed.2d 908, 923-24 (1964); (2) obtaining a conviction where prejudicial publicity is pervasive both before and during trial, *Sheppard v. Maxwell*, 384 U.S. 333, 351-352 (1966); (3) obtaining a conviction with a coerced confession, *Payne v. Arkansas*, 356 U.S. 560, 567-68, 78 S.Ct. 844, 849-50, 2 L.Ed.2d 975, 980-81 (1978); and (4) obtaining a conviction where the confession of a non-testifying co-defendant implicating the defendant is used to convict the defendant in a joint trial, *Bruton v. United States*, 391 U.S. 123, 136-37, 88 S.Ct. 1620, 1628, 20 L.Ed.2d 476, 485 (1968). *Cronic* at 658 n.24, 104 S.Ct. at 2046 n.24, 80 L.Ed.2d at 667 n.24.

The Court's analysis in *Bruton* is particularly instructive. The Court held that even if the jury is instructed that an accomplice's testimony is inherently unreliable and therefore less susceptible of being believed by the jury, denying the defendant the right to cross-examine the co-defendant regarding his statement was prejudicial per se. *Bruton* at 135-37, 88 S.Ct. at 1627-28, 20 L.Ed.2d at 485-86. In the instant case, counsel failed to retain its own expert and failed to discover the medical explanation that all of the injuries to Tarissa were accidental. In consequence, the Petitioner had to accept the State's medical explanation of Tarissa's death, just as Bruton had to accept the co-defendant's version of the killing, without meaningful adversarial testing. Mr. Burr did not even have Bruton's added benefit of the jury instruction that the unchallenged co-defendant's statement was inherently unreliable. Mr. Burr faced unchallenged testimony from five medical experts. If Bruton was prejudiced per se, Petitioner was more so. *See Appel v. Horn*, No. 99-9003, 2001 U.S.App.LEXIS 8050, at *24-37 (3rd Cir. May 3, 2001) (upholding the grant of a writ of habeas corpus for *Cronic* violation because standby counsel failed to investigate or prepare for petitioner's

competency determination so as to subject the state's evidence of competency to meaningful adversarial testing).

The post-conviction court's determination was also an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Williams v. Taylor*, 529 U.S. 362, 398-99, 120 S.Ct. 1495, 1516, 146 L.Ed.2d 389 (2000), the United States Supreme Court found that trial counsel rendered ineffective assistance of counsel under *Strickland* for failing to discover and present mitigating evidence in the defendant's capital trial. Trial counsel in that case failed to introduce the following available evidence: (1) Williams' nightmarish childhood, (2) his borderline mental retardation, (3) prison records indicating Williams had helped crack a prison drug ring and had returned a guard's missing wallet, (4) testimony from prison officials who described the defendant as among the inmates "least likely to act in a violent, dangerous or provocative way;" and (5) testimony from a professional who frequently visited Williams as part of a prison ministry program that Williams seemed to thrive in a more regimented and structured environment. *Id.* at 396, 120 S.Ct. at 1414. Trial counsel did present evidence that Williams turned himself in, alerting the police to a crime they otherwise would never have discovered; that he expressed his remorse for his actions; and that he cooperated with police after that. *Id.* at 398, 120 S.Ct. at 1515. The Supreme Court reasoned that while the presented evidence "coupled with the prison records and guard testimony may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, **or** the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* (emphasis added)

In the instant case, counsel's failure to review the medical records, failure to hire an expert

and failure develop the medical explanation for the accidental death was unreasonable. Furthermore, there was a reasonable likelihood that had Petitioner presented an alternative accidental explanation of death together with the ability to cross-examine the State's experts, the result of the trial would have been different. This evidence and expertise "might will have influenced the jury's appraisal" the Petitioner's guilt. *Id.*

How different the trial would have been had the Petitioner been represented by attorneys who obtained the assistance of experts? He would have had the assistance of experts; there certainly were grounds for counsel to seek funds to hire one. He would have discovered the alternative cause of death due to accident. He could have challenged through cross-examination the State's so-called "A-team" of experts. The State's medical testimony was inconsistent and conflicting. He could have presented a defense, instead of accepting the State's theory of the case.

Add to this expert assistance the withheld *Brady* evidence obtained through discovery and the Petitioner would have had a defense required under the Sixth Amendment. The *Brady* material provided a vast resource of information regarding the evolution of the testimony of Lisa O'Daniel and Scott Ingle. O'Daniel could have been challenged for not taking her sickly daughter to the doctor during the three weeks she could not get her to eat, for instructing her family to lie, for lying to the jury that she was not told what to say, for being promised immunity, for the sorry way she treated her child declining in health. It could be demonstrated how Scott Ingle, through suggestive interview techniques, was convinced that he did not injure Tarissa. There is a reasonable probability that had trial counsel been adequately prepared the result of the trial would have been different.

GROUND TWO

MR. BURR WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS APPOINTED COUNSEL WERE NOT ADEQUATELY PREPARED

A. State Court Disposition of this Claim

Mr. Burr raised this issue in post-conviction. The state court denied this claim and the North Carolina Supreme Court denied certiorari. This claim is ripe for federal review.

B. Summary of Argument

In this claim, Mr. Burr alleged that his trial counsel were ineffective because court action prevented them from preparing adequately. They were hobbled by the initial counsel's lack of due diligence, further impaired by the prosecutor's control of the calendaring of cases, and disabled by the trial court's unsympathetic response to their request for more time to prepare. Consequently, the Petitioner entered the trial as an "unarmed prisoner" and was sacrificed to the State "gladiators." *United States v. Cronic*, 466 U.S. 648, 657, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657, 667 (1984).

C. Facts Supporting this Claim

Mr. Burr was appointed Mr. Craig Thompson as his counsel on August 30, 1991. Because of the capital status of the case, on September 5, 1991, Mr. Thompson moved the Court and obtained an order appointing Mr. Jacobs as assistant counsel. From August and September, 1991, until December 17, 1992, counsel spent a combined seventy-four hours in preparation for trial. Mr. Thompson allocated thirty-seven and nine-tenths hours (37.9 hrs) and Mr. Jacobs sacrifice thirty-six and one-tenth hours (36.1 hrs) to out-of-court preparation for the trial of this capital case. Trial was set to begin January 4, 1993.

From the outset of their appointment, initial-appointed counsels' strategy was to obtain a plea

bargain for the Petitioner, despite the Petitioner's adamant position that he would not take a plea bargain for a crime he did not commit. Messrs. Thompson and Jacobs spent virtually no time investigating Mr. Burr's case prior to its scheduled trial date of January 4, 1993.

On the eve of trial, December 17, 1992, Mr. Burr expressed his displeasure at his trial counsel's failure to prepare and requested the trial court to appoint him new counsel. On December 18, 1992, the Honorable Gregory A. Weeks appointed Robert E. Collins, Esq. and Douglas R. Hoy, Esq. Both attorneys were sole-practitioners in Alamance County. Mr. Hoy had no prior capital litigation experience and a substantial portion of his practice was dedicated to real estate law. (Tp. 33) On December 18, 1992, after the appointment of new counsel for Mr. Burr, the State announced in court its intention to call this matter for trial on January 25, 1993.

Mr. Burr's trial counsel began preparing immediately upon their appointment on December 18, 1992. They were scheduled to try Mr. Burr's case on January 25, 1993. Faced with a monumental job of preparing a capital case for trial in a month's time, they filed a Motion to Continue on December 22, 1992, four days after they were appointed.

The District Attorney for Alamance County further hampered Mr. Burr's defense by giving notice to Mr. Collins that he intended to call another capital case before Mr. Burr's. On December 29, 1992, the District Attorney informed Mr. Collins that he intended to try Danny Pegram for his life on January 25, 1993, instead of Mr. Burr. Mr. Collins was assistant counsel for Mr. Pegram. Lead counsel was Mr. Craig Thompson. Mr. Thompson and Mr. Collins were the only attorneys on the capital list in Alamance County. On information and belief, at that time each attorney had six pending capital cases. Note that because the Petitioner's case was set for January 25, 1993, Mr. Collins had two capital case set within three weeks of each other.

Because of the deliberate act of the prosecutor, Mr. Collins had to abandon his trial preparation of Mr. Burr's case and commenced preparing to try *State v. Danny Pegram*. The Pegram matter was resolved on January 8, 1993, when Mr. Pegram pleaded guilty to second degree murder.

Mr. Burr's Motion to Continue his trial date from January 25, 1993 was heard on the same day Mr. Pegram pleaded guilty. The trial court continued Mr. Burr's trial date to March 1, 1993.

Mr. Collins and Mr. Hoy were appointed on December 18, 1992. Mr. Collins had from December 18 through December 29, 1992 and from January 9 through February 28, 1993 to prepare: 64 days. Over this period of time, Mr. Collins had to prepare for this capital case; keep in tact his practice of law as a sole-practitioner; and school his assistance counsel, also a sole-practitioner, on the rigors and demands of preparing for a capital case. It was an impossible job for even the most experienced of attorneys in capital litigation, much less a sole-practitioner with many other cases and obligations to address.

Mr. Hoy had from December 18, 1992 until March 1, 1993 to prepare for his first capital trial: 71 days. Shortly after Mr. Hoy was appointed, he approached Judge Weeks to request that he be relieved of the appointment because he had no experience in trying capital cases. Judge Weeks assured Mr. Hoy that he could handle the matter -- an undaunting task for the most capable and thoroughly experienced trial lawyer – despite Mr. Hoy's protestations otherwise.

According to his time sheets, Mr. Hoy spent 56.8 hours preparing for trial. He was responsible for rebutting the State's expert medical testimony without the assistance of an expert of his own. Although his time records are unclear, a fair estimate of the time he allocated to prepare for this task was approximately 10 hours.

Prior to trial, defense counsel were unable to review or analyze medical evidence which

included Tarissa's medical records, x-rays, charts and other material and failed to interview the nine (9) doctors and residents at the two different hospitals where Tarissa was treated. As a result, they could not establish a basis for moving for the assistance of an expert witness. They were unable to locate and interview all of the nearly thirty (30) witnesses identified by Mr. Burr. Sixteen months had passed during which Mr. Burr's initial trial counsel did nothing to contact these witnesses. Counsel lacked time to review and investigate Department of Social Service records provided to the defense on February 22, 1993, the week before trial. Finally counsel were unable to review and investigate new discovery provided by the State on the Wednesday before trial, February 24, 1993, in the form of statements of Mr. Burr. Mr. Burr's alleged statements were not identified as to whom or on what date they were made. (Tpp. 33-40)

On December 29, 1992, the District Attorney, Steve A. Balog, informed Mr. Collins that the capital case of *State v. Danny Pegram*, Alamance County File No. 91 CRS 24734, would be called for trial on January 25, 1993 instead of Mr. Burr's capital case. Mr. Collins along with Mr. Burr's former counsel, Craig T. Thompson represented Mr. Pegram. As a consequence, Mr. Collins was unable to devote any time toward Mr. Burr's case from December 29, 1992 until January 8, 1993, when Mr. Pegram entered a guilty plea to second-degree murder. *See* Appendix F to MAR, Affidavit of Robert E. Collins.

On Friday, February 26, 1993, trial counsel for Mr. Burr filed a Motion to Continue the trial, alleging the above inadequacies in counsels' preparation for trial. Furthermore, counsel for Mr. Burr alleged *inter alia* that starting the trial on March 1, 1993 would deprive Mr. Burr of effective assistance of counsel under the Sixth Amendment to the United States Constitution.

On Monday, March 1, 1993, counsel for Mr. Burr filed a sealed Affidavit outlining specific

matters which counsel needed to accomplish in order to adequately prepare to render effective assistance of counsel for Mr. Burr. (*See* Appendix F to MAR, Affidavits of Mr. Collins) (Tp. 40) These matters included the review of medical records, interviewing witness and obtaining the assistance of expert medical witnesses.

Nevertheless, the trial court denied the request for a continuance. Trial counsels' obvious lack of knowledge and understanding of the medical evidence in this matter was pervasive and resulted in the complete lack of development of a defense for Mr. Burr.

The failure of the trial court to grant a continuance coupled with trial counsel's failure to adequately prepare led to a complete breakdown in Mr. Burr's defense. The facts demonstrating that Tarissa died from accidental injury aggravated by a brittle bone disease or accidental injury resulting from her being dropped by her half-brother or both were never presented to the jury. Whether failure to present this evidence resulted from trial counsel's insufficient time to prepare or from failure to prepare within a sufficient pre-trial period, the conclusion is the same. Mr. Burr received ineffective assistance of counsel.

D. Review of the State Court Decision

The post-conviction court denied this claim without a hearing. The post-conviction court found the following facts against Mr. Burr on this issue when either (1) there was no factual support in the record or (2) the facts stated in Mr. Burr's supporting affidavits were diametrically opposite those found by the post-conviction court: (post-conviction court had to assume Petitioner's affidavits were true before ruling without an evidentiary hearing) (1) that lead trial counsel's considerable experience in the Guardian Ad Litem program helped him understand the dynamics of a prosecution based on child abuse (no evidence in the record to substantiate this finding; Affidavit of

Collins dated May 8, 1997, contradicts this finding); (2) that trial counsel had an opportunity to review both the medical evidence available (Affidavit of Collins states exactly the opposite, Appendix F to MAR, Affidavit of Robert E. Collins, dated March 1, 1993); (3) that trial counsel knew before trial that a host of eminent medical experts had reviewed available information concerning Susie and her cause of death and that all experts opined that Susie died of child abuse, not an accidental fall (no evidence in the record – in fact, Mr. Collins stated defense counsel had not even talked to the doctors who testified, Appendix F to MAR, Affidavit of Robert E. Collins, dated March 1, 1993); (4) that defendant's well-qualified and experienced lead trial counsel never asserted a particularized necessity for appointment of an expert (trial counsel did not have time to review the medical records, Appendix F to MAR, Affidavit of Robert E. Collins, dated March 1, 1993); and (5) that trial counsel's actions were driven by a strategy to shift blame to a third party (Mr. Collins stated that their attempt to shift blame was not a strategic decision based upon a reasonable and thorough investigation, Attachment 3 to Petition for Writ of Certiorari). *See* Order and Memorandum Opinion, p. 23.

The post-conviction court concluded that trial counsel spent a reasonable amount of time investigating circumstances relating to the case and their performance was objectively reasonable. The North Carolina Supreme Court recently held that 34 days was insufficient time to prepare for a capital trial. *State v. Rogers*, 352 N.C. 119, 126, 529 S.E.2d 671, 676 (2000). In light of the complexity of the medical evidence in this case, an additional 30 days would not be sufficient.

The post-conviction court noted that trial counsel's performance must be viewed not from a vantage point of "20-20 hindsight." Trial counsel filed an affidavit the day trial started stating the conditions under which they labored in having to go to trial and hence provided a "20-20 foresight"

vantage point to judge trial counsel's performance. The post-conviction court had to assume their statements were true but nevertheless ignored them. Finally, the post-conviction court concluded that Mr. Burr's proffers of evidence did not show a reasonable probability that but for counsel's performance the result of the trial would have been different. The post-conviction court made this conclusion after finding that the facts in Petitioner's affidavits were not true. The post-conviction court could not so find these facts without a hearing. *See* Order and Memorandum Opinion, p. 24. The court used the wrong standard of review. No prejudiced was required to be shown. *United States v. Cronic, supra.* Using the wrong standard of review is contrary to clearly established Supreme Court law. *Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389, 425-26 (2000).

GROUND THREE

THE TRIAL COURT COMMITTED REVERSIBLE CONSTITUTIONAL ERROR BY FAILING TO GRANT DEFENDANT A NECESSARY CONTINUANCE

A. State Court Disposition of this Claim

On direct appeal to the North Carolina Supreme Court, the Petitioner raised the issue that the trial court's denial of the Petitioner's motion to continue denied Petitioner his constitutional rights to confrontation and effective assistance of counsel. The North Carolina Supreme Court found no error. *State v. Burr*, 341 N.C. 263, 297, 461 S.E.2d 602, 620 (1995). This claim is ripe for federal review.

B. Summary of Argument

It is impossible to conceive of any circumstances where two sole practitioners, one without capital experience, could be prepared for both the guilt and sentencing phases of a capital trial

involving extremely complicated medical evidence in twelve months, much less sixty days. Add to the time difficulty the fact that lead counsel had another capital case scheduled trial during that sixty day period, and the trial court's denial of a continuance was a perfect recipe for disaster. That was exactly what happened in this case. Failure to grant a continuance in these circumstances was so likely to prejudice the Petitioner (and in hindsight did substantially prejudice him) that the trial was not reliable. The North Carolina Supreme Court's upholding the trial court's denial of a continuance resulted in a violation of the Sixth Amendment. The ruling was contrary to, and was an unreasonable application of, Supreme Court law. *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657, 667 (1984).

GROUND FOUR

THE STATE KNOWINGLY PRESENTED FALSE EVIDENCE WHICH CREATED A MATERIALLY FALSE IMPRESSION REGARDING THE FACTS OF THE CASE AND THE CREDIBILITY OF WITNESSES

A. State Court Disposition of this Claim

The Petitioner raised this issue in post-conviction. The state court denied this claim and the North Carolina Supreme Court denied certiorari. This claim is ripe for federal review.

B. Summary of Argument

By withhold exculpatory and impeaching evidence, the State created a materially false impression regarding the facts of the case and the credibility of the witnesses. *See* Ground VI. This materially false impression "may have had an effect on the outcome of the trial[,]" and therefore reversal is required. *Napue v. Illinois*, 360 U.S. 264, 272, 79 S.Ct. 1173, 1179, 3 L.Ed.2d 1217, 1223 (1959). The post-conviction court's conclusion that this claim is without merit is contrary to and an unreasonable application of *Napue*.

Furthermore, the State's chief lay witness, Lisa O'Daniel, was promised immunity. She denied it on the witness stand. In light of this false statement, the post-conviction court's decision to deny any relief was an unreasonable application of United States Supreme Court precedent. *See Giglio v. United States*, 405 U.S. 150, 155, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 107 (1972) (reversing defendant's conviction because government failed to disclose promise of immunity to defendant's co-conspirator and "evidence of any understanding or agreement as to future prosecution would be relevant to his credibility and the jury was entitled to know it.").

GROUND FIVE

THE STATE FAILED TO REVEAL EXCULPATORY EVIDENCE OF OTHER EXPLANATIONS FOR THE INJURIES TO TARISSA SUE O'DANIEL

A. State Court Disposition of this Claim

The state court found that the prosecutors withheld from trial counsel the tapes of the prosecutors' discussions with Lisa O'Daniel and her son, Scott Ingle, concluding in part that the defendant waived disclosure of statements made by O'Daniel. Order and Memorandum Opinion, pp. 28-27. The state court went on to hold that Mr. Burr's *Brady* claims were without merit. Without providing Mr. Burr a hearing on any of his claims including his claim of innocence the state court stated in the *Order*:

"More specifically, the Court finds and concludes:

(1) That the content of the prosecutors' taped pretrial discussions with Lisa O'Daniel and Scott Ingle demonstrates that the prosecutors were merely trying to determine the true facts and to prepare the witnesses to provide truthful testimony.

(2) That the prosecutors did not attempt to get either Lisa O'Daniel or Scott Ingle to present false testimony.

(3) That the prosecutors urged the two witnesses to provide truthful information to the prosecutors and jury.

(4) That the prosecutors never attempted to get a witness to commit perjury or present false testimony.

(5) That the witnesses understood that the prosecutors wanted them to provide only truthful testimony.

(6) That the action of the prosecutors did not deprive defendant of due process of law.

(7) That any inconsistencies between the trial testimony of the two witnesses and their pre-trial comments to the prosecutors are of *de minimis* significance.

(8) That the failure to disclose to trial counsel the content of the prosecutors' undisclosed discussions with Lisa O'Daniel and Scott Ingle does not establish a reasonable probability that had the evidence been disclosed the result of the trial would have been different (i.e., the failure to disclose the content of the discussions does not undermine the Court's confidence in the reliability of the verdict, and does not demonstrate a violation of due process of law).

(9) That, in summary, all matters before the Court demonstrate that the prosecutors' failure to disclose the content of the pretrial discussions mentioned on the tapes and in the transcripts referred to above was neither a violation of nor a denial of due process of law."

This ruling is plainly erroneous and directly contrary to clearly established Supreme Court law. The state court's ruling is contrary to the United States Supreme Court's established precedent as it applies a rule that contradicts and is diametrically opposed the governing law set forth in United States Supreme Court cases. *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

B. Summary of Argument

The prosecution failed to divulge pretrial interviews of its two main lay witnesses, Lisa O'Daniel and Scott Ingle. These interviews could have been used to challenged their trial testimony as to the facts surrounding Tarissa's death. Moreover, these statements could have been used to

impeach these witnesses' credibility. The interviews were material and failure to provide the Petitioner with them deprived him of due process of law. His conviction was thereby rendered unworthy of confidence.

C. Facts and Argument Supporting this Claim

The trial testimony of Lisa O'Daniel and Scott Ingle presented a materially false impression to the jury. Not having the tapes prevented Petitioner from showing the jury the evolution of, and explanation for Ms. O'Daniel and Scott Ingle's testimony.

Pursuant to orders of the North Carolina Supreme Court, the State provided the Petitioner with discovery that the State had previously withheld. This previously undisclosed material impeached the State's main witnesses against the Petitioner. Not only did this new material substantially and materially impeach Lisa O'Daniel and Scott Ingle, it showed that they were not worthy of belief. Additionally, this new evidence disclosed that the prosecution coached and manipulated their testimony to fit its theory of the case. This improperly withheld material included prior statements of Lisa O'Daniel and Scott Ingle which, in violation of Federal law, were not turned over to Petitioner's counsel, despite trial counsels' timely request pursuant to N.C. Gen. Stat. § 15A-903(f), and the prosecutor's constitutional obligation to turn over to the defense exculpatory evidence which could be used to impeach a State's witness. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The following are illustrative examples of these violation that the state court ignored.

1. Lisa O'Daniel's statement of February 24, 1993.

On February 24, 1993, Ms. O'Daniel told prosecutors that Mr. Burr did not act like he would hurt Tarissa. The prosecutors instructed Ms. O'Daniel not to say anything good about Mr. Burr

because it would not aid the prosecution. Tp. 7.

Ms. O'Daniel described how much difficulty she was having with Tarissa and her throat problem. According to Ms. O'Daniel she had been unable to get Tarissa to eat anything from July 31, 1991 through August 21 or 22, 1991, almost one month. Tp. 16-18. This evidence was substantiated by Tarissa's substantial growth decline.

The prosecutors expressed disbelief in Lisa O'Daniel's denials that she saw nothing wrong with her daughter despite her daughter allegedly having broken legs for at least ten days prior to August 24, 1991. They gave Ms. Lisa O'Daniel a promise of immunity for her testifying in this matter. Tp. 21. However, during her trial testimony, Ms. O'Daniel denied any type of arrangement with the prosecutor's office when questioned by Mr. Collins. (Vol. 18, p. 219)

O'Daniel instructed her family to lie to the prosecutors about Tarissa's problems. Her family had maintained to investigators that there was nothing wrong with Tarissa's prior to August 24, 1991. Tp. 7. The prosecutor found out and accused Ms. O'Daniel of counseling her sister to lie. Ms. O'Daniel admitted the attempted deceit. Tp. 22. Later in the interview, the prosecutor again noted how Ms. O'Daniel's family conspired to make it look like there was nothing wrong with Tarissa before August 24, 1991. Tp. 28.

The prosecutors expressed disbelief in statements made to them by Rita, Christy and Misty Wade. Tp. 17.

The prosecutors continually instructed Ms. O'Daniel how she ought to testify. Tpp. 7,21. Despite these repeated instructions, during redirect examination by those same prosecutors, Ms. O'Daniel denied that anyone told her what she ought to say on the witness stand or what her testimony ought to be. (Vol. 18, p. 334) The prosecutor's failed to correct her misstatements.

Trial counsel for Mr. Burr moved pursuant to N.C. Gen. Stat. § 15A-903(f) for prior statements of Ms. O'Daniel prior to the beginning of her cross-examination. (Vol. 17, p. 207) The prosecutors failed to provide trial counsel with the tape recording or the transcription of Ms. O'Daniel's statement given on February 24, 1993. Failure to produce this statement after a request from trial counsel was a violation of the statutory law of North Carolina. N.C. Gen. Stat. § 15A-903.

The state court found that trial counsel made no requests for Ms. O'Daniel's statements and waived entitlement under N.C. Gen. Stat. § 15A-903(f). *See Order and Memorandum Opinion*, p. 28. However, the State operated under an "open file" policy and trial counsel, relying on this policy, had no way of knowing these recorded interviews existed. Moreover, these statements were exculpatory evidence and trial counsel could not waive entitlement to them – the prosecutor was constitutionally required to turn them over. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963). The state court ruling to the contrary directly ignores and violates clearly established United States Supreme Court precedent.

Lisa O'Daniel's statement to the prosecutors on February 24, 1993 directly contradicted earlier statements she had given law enforcement. For example, but not limitation, on August 26, 1991, Ms. O'Daniel stated that on August 21, 1991, when Lisa was awaken at four o'clock in the morning and discovered Johnny Burr holding Susie who was crying loudly like she was when Scott fell on her. Yet, when Lisa O'Daniel was interviewed on February 24, 1993, she claimed that this incident occurred on August 14, 1991, one week earlier. This time frame would support an inference that Mr. Burr inflicted serious injury on the baby on August 14, 1991, coinciding with some of the medical doctors testimony that Tarissa O'Daniel had some fractures that were at least ten days old.

2. Scott Ingle's Statement on February 25, 1993.

Scott Ingle's tape recorded statement on or about February 25, 1993 revealed a young man who could not remember anything about the details of the day of Tarissa's medical problems that ultimately lead to her death. Failure of the prosecutors to produce this statement to trial counsel for John Burr violated his due process rights under both the state and federal constitutions. The coaching and instruction the prosecutors in taking Scott Ingle's statements were even more egregious than those evident in Lisa O'Daniel's recorded statements. Like Ms. O'Daniel's statements, these statements were withheld from the defense until the State was ordered to provide them by the North Carolina Supreme Court.

The tapes reveal that prosecutors prepared false and misleading testimony. Before being interviewed, coached and manipulated by the prosecutors, Scott Ingle maintained that he tripped while carrying Tarissa, and fell on top of her. (See portion of Recorded interview of Scott Ingle by Det. Roney Allen at p. 20 of Petitioner's MAR; Exhibit 4, Second Amendment to MAR). Furthermore, he told Detective Roney Allen that he had never seen Johnny Burr hurt Tarissa. (Recorded interview of Scott Ingle by Det. Roney Allen, p. 4)

During the prosecutors' interview, Scott Ingle stated that he could not remember much of the events surrounding his fall with Tarissa. The prosecutors seized his lack of recollection as their first order of business and told ten-year-old Scott Ingle that he did not cause any injuries to Tarissa. Tpp. 2-3. They, of course, had no way of knowing such facts.

After this colloquy, Scott Ingle changed his initial statement and testified that he tripped, fell to his knees and never dropped Tarissa. These facts were crucial to the prosecution's theory of the case and the prosecution developed them through the coaching of a 10-year-old and highly

suggestive child.

Scott Ingle's statement and testimony show that the prosecutors met with him again, preparing him to testify, and taking him to the courthouse in preparation for his testimony. (See pp. 2 and 28 of the transcript of Scott Ingle's February 26, 1993 interview). The defense was not provided with any notes, transcripts, or tape recordings of his statements during this additional coaching session.

Throughout their interview with Scott Ingle, the prosecutors would lead him, and insure that he did not say anything that could be seen as positive for Johnny Burr. Tpp. 3, 4-5, 6-7, 13-15. This helpful piece of impeachment information was never known to defense attorneys and was completely glossed over by the prosecutors. Scott's answer shows how susceptible he was to the prosecutors' tactics. When Scott Ingle's statements about the time line did not fit into the prosecution's theory of the case the prosecutors led Scott Ingle to see that night or "dark" was what the prosecutors were seeking. Tpp. 7, 9. When Scott Ingle could not remember something crucial to the State's case, the prosecutors were quick to lead Scott and provide him with additional information harmful to Mr. Burr. Tpp. 9-11.

It was also crucial to the prosecution's theory of the case that Mr. Burr had abused Tarissa before August 24, 1991, since she had some bruises and broken bones that were days, and possibly a week or more old. Scott Ingle did not report this information in his early interviews with the detectives. (See Exhibit 4 to Second Amendment to MAR). The prosecution sought to have a 10-year-old child to prove this (possibly because he would be more credible than Lisa O'Daniel). In order to get this evidence from Scott Ingle, they had to plant the information. One statement detailed the development of Scott Ingle's testimony and makes references to the prosecutors' earlier meeting

with Scott, the notes, transcripts or tapes of which the defense has still not been provided. Tpp. 11-12, 22, 25-26.

During trial and after another preparatory meeting with the prosecutors, Scott testified extensively about an issue crucial to the prosecution's case, which did not exist until after the State spent a significant amount of time manipulating and coaching this highly suggestive witness.

Further in the questioning before trial, Scott made a couple of points helpful to the defense, and the prosecution sought to correct him, putting additional words in Scott's statement. Tpp. 14-19.

A comparison of the statement of Scott Ingle given to the prosecutors on February 25, 1993 with his trial testimony regarding the two incidents where he claimed he saw Johnny Burr hurt Tarissa showed the glaring inconsistencies. *See* Vol. 20, Tpp. 869, 870, 871, and Tpp. 11, 13, 14 and 15. *See also,* Vol. 20, Tpp. 872-74 and Tpp. 16-27.

This evidence, discounted by the state court, was material to the issue of guilt in that there was a reasonable probability (sufficient to undermine confidence in the outcome) that had the evidence been disclosed, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481, 494 (1985). In this case there was no direct evidence of harm done to the child by Mr. Burr. The entire case depended upon circumstantial evidence. Most of this circumstantial evidence came through Lisa O'Daniel and Scott Ingle, both of whom had reasons to lie in order to cover for their own misconduct – Lisa O'Daniel for the sorry way she raised her kids and Scott Ingle for dropping the child and falling on top of her. The evidence hidden by the prosecution shows that their testimony was manipulated in order to obtain a conviction. Furthermore, Lisa O'Daniel lied to the jury on two occasions -- denying any

deal and denying that anyone told her what she ought to say on the witness stand. The use of their pretrial statement to impeach them would have raised serious and material doubts as to their truthfulness. It would have also affected the credibility of the prosecutors in the jurors' eyes. There is more than a reasonable probability that had these statements been produced, the result of the trial would have been different.

In resolving this claim against the Petitioner, the state court ignored the impeachment value of these statements. *See, e.g Opinion and Memoradum Opinion*, p. 44, wherein the state court ignores the evidence in the statements in which the prosecutor counsels Ms. O'Daniel how to testify, and quotes that the prosecutor told her to tell the truth. The state court parsed out of the statements of both Ms. O'Daniel and Scott Ingle those portions that supported their trial testimony, all of which were obtained after coaching and manipulation, and ignored the critical impeachment value or these undisclosed statements. The impeachment value of these statements along with the Petitioner's medical evidence raises a reasonable probability that had Petitioner been provided this evidence the result of the trial would have been different.

In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963), the United States Supreme Court held that due process requires that the prosecution disclose evidence favorable to a defendant. The state's obligation to disclose favorable evidence under *Brady* covers not only exculpatory evidence but also information that could be used to impeach the state's witnesses. *Giglio v. United States*, 405 U.S. 150, 155, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 107 (1972). The post conviction court committed constitutional error to summarily deny this claim of Petitioner's.

The State admits that it did not provide Ms. O'Daniel's February 24, 1993 statement to the Petitioner when he made a request for her statement after her direct testimony at trial. The state court erroneously found that Mr. Burr had waived this issue because he did not asked for these statements. This finding is beyond erroneous for a number of reasons.

First, defense counsel had no reason to ask for them. The State represented to Mr. Burr's counsel that it was maintaining an open file policy. The prosecutor now claims this open file policy did not include taped interviews of Lisa O'Daniel because they were "work product." The interviews of witnesses who testify to material facts are not work product, when the interviews are inconsistent with trial testimony.

Second, the interviews were full of statements inconsistent with their trial testimony. Prosecutors had an affirmative obligation to correct misstatements. It was error for the post conviction court to summarily dismiss this claim without a hearing on the merits of Petitioner's claim, and the merits of the State's assertion. Furthermore, *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963), held suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material, either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution.

In the case at bar, the State failed to comply with *Brady* and its progeny. The prosecutors manipulated evidence and testimony in order to have the evidence conform to the State's theory of the case. The prosecutors intentionally withheld evidence, required under *Brady* from Mr. Burr. By doing this, the state prohibited Mr. Burr from impeaching the witnesses, and was thereby able to obtain a conviction against Mr. Burr, who has always maintained his innocence. In addition, by

withholding favorable evidence and manipulating testimony, the State was able to obtain an unconstitutional death sentence against Mr. Burr.

The United States Supreme Court in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), held that evidence was material for *Brady* purposes if there was a "reasonable probability" that had the evidence been disclosed to the defense the result of the proceeding would have been different. A review of the withheld evidence which was detailed in Petitioner's Motion for Appropriate Relief and Petition for Writ of Certiorari before the state courts, and which is incorporated herein by reference, revealed that such disclosure not only would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense, but would have also substantially reduced or destroyed the value of the State's two main witnesses. The state court's ruling to the contrary directly violates *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Scott Ingle's undisclosed coaching sessions with the prosecutors show that the prosecutors were attempting to bolster and manipulate Scott's testimony. The prosecution was doing this in violation of the rules of ethics for the State of North Carolina and, more importantly, in violation of the constitutional protections afforded Mr. Burr.

Defense lawyers would have found it helpful to see and hear how the prosecution was influencing and changing Scott's testimony from his original statements. The tapes reveal how Scott's changed testimony benefited the prosecution. Disclosure of the interviews at the hands of the prosecutors would have provided counsel with ammunition necessary to explain that these changes in Scott's testimony were not the result of memory loss over time but rather the result of improper

intrusive and suggestive questioning by the prosecution.

Lisa O'Daniel's was given assurances that she would not be prosecuted for her possible crimes. Her testimony was bolstered and manipulated by the prosecution, who was attempting to make her testimony against Mr. Burr appear worse and minimize, upon threat of possible prosecution, anything positive in regard to Mr. Burr. A jury would have been troubled by the adjustments to Lisa and Scott's original stories, especially after viewing and hearing how the prosecution had manipulated and influenced the testimony.

Mr. Burr's situation is on point with the case of *Kyles v. Whitley*, where Mr. Kyles was convicted of first degree murder by a Louisiana jury and sentenced to death. Following the affirmance of his conviction and sentence on direct appeal, it was revealed on state collateral review that the state had never disclosed certain evidence favorable to him. That evidence include *inter alia* (1) statements by eyewitnesses taken by the police; (2) statements made to the police by an informant; and (3) a computer printout of license numbers of cars parked at the crime scene on the night of the murder, which did not include the license plate number of Kyles' car.

Despite this failure to disclose, the trial court, denied relief and the State Supreme Court affirmed the trial court's denial of relief. Kyles sought relief in federal habeas grounds, claiming a violation of *Brady*. The Federal District Court denied relief and the Fifth Circuit affirmed this denial. This denial of relief was overturned by the United States Supreme Court because the net effect of the State's suppressed evidence favoring Kyles raised a reasonable probability that his disclosure would have produced a different result at trial.

The net effect of not providing Mr. Burr these statements was (1) it prevented him from

effectively cross-examining the State's main witnesses; (2) further debilitated an already constructive denial of counsel; and (3) prevented the jury from assessing Lisa O'Daniel's credibility for truthfulness by catching her lying to the jury and by a promise of immunity.

GROUND SIX

THE STATE AFFIRMATIVELY PRESENTED THE CASE AGAINST MR. BURR IN A FALSE LIGHT

See argument under Grounds Four and Five.

GROUND SEVEN

NEWLY DISCOVERED EVIDENCE WARRANTS A NEW TRIAL FOR MR. BURR

A claim of actual innocence based on newly discovered evidence states a ground for federal habeas relief when there is an independent constitutional violation occurring in the course of the underlying state criminal proceedings. *Townsend v. Sain*, 372 U.S. 293, 317, 83 S.Ct. 745, 759, 9 L.Ed.2d 770, 788 (1963). As stated repeatedly throughout this Brief, Mr. Burr was constructively denied counsel in violation of the Sixth Amendment. This denial caused the failure to discover and develop the newly discovered evidence. The state court found Mr. Burr's new discovered medical evidence not true without a hearing. Such fact-finding was improper without a hearing. The state court failed to recognize the constructive denial of counsel for Mr. Burr.

The United States Supreme Court in *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), considered whether a habeas petitioner could assert a claim of innocence based upon newly discovered evidence. *Id.* at 399-400, 113 S.Ct. at 860, 122 L.Ed.2d at 216-217. The petitioner had been through direct review and post-conviction before he asserted his claim of innocence. *Id.* The time for filing a motion in state court for a new trial based upon newly

discovered evidence had expired. *Id.* The Court held that Herrera was not entitled to federal habeas corpus relief unless the he supplemented a constitutional claim with his colorable claim of innocence based upon newly discovered evidence. The Court noted:

> Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionally of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not ground for relief on federal habeas corpus.

Id. at 400, 113 S.Ct. at 860, 122 L.Ed.2d at 216 (quoting *Townsend v. Sain*, 372 U.S. 293, 317, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). As noted above, Mr. Burr's new evidence bears upon his detention and it is coupled with, and caused by, his unconstitutional constructive denial of counsel.

The issue was squarely presented to the state court but not adjudicated on the merits because the state court failed to recognized a Sixth Amendment violation and resolved evidentiary matters without a hearing. This courts review is *de novo*. More likely than not, Mr. Burr would have been acquitted had he been able to present his medical evidence. The Writ should issue, or alternatively, Mr. Burr should be granted an evidentiary hearing.

GROUND EIGHT

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY RULING AT THE BEGINNING OF JURY VOIR DIRE THAT DEFENSE COUNSEL COULD NOT QUESTION ANY VENIREPERSON FOLLOWING A DEATH QUALIFICATION CAUSE CHALLENGE BY THE PROSECUTOR, WHERE, ON THE FACTS OF THIS CASE, THAT RULING DENIED THE DEFENDANT THE RIGHT TO THE ASSISTANCE OF COUNSEL

The North Carolina Supreme Court considered and rejected this argument. *Burr* at 282, 461 S.E.2d at 611. Its rejection was contrary to and an unreasonable application of United States Supreme Court precedent. The trial court permitted cause challenges by the prosecutor when each of the juror's views on capital punishment would not clearly prevent or substantially impair the juror in the performance of his or her duties in accordance with his or her oath. The removal of these jurors for cause based solely on unsubstantiated alleged conscientious scruples against capital punishment, violated of the principles announced in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and *Adams v. Texas*, 448 U.S. 38 (1980).

GROUND NINE

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR IN JURY SELECTION BY EXCUSING A POTENTIAL JUROR ON THE BASIS OF HER RESPONSES TO THE STATE'S DEATH QUALIFYING QUESTIONS WHERE HER RESPONSES DID NOT SHOW THAT SHE COULD NOT RETURN A SENTENCE OF DEATH

The North Carolina Supreme Court considered and rejected this argument. *Burr* at 282, 461 S.E.2d at 611. Its rejection was contrary to and an unreasonable application of United States Supreme Court precedent. The trial court removed the above-named juror for cause based solely on alleged conscientious scruples against capital punishment, in violation of the principles announced in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and

Adams v. Texas, 448 U.S. 38 (1980).

GROUND TEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY EXCLUDING EVIDENCE REGARDING ALAMANCE COUNTY SOCIAL SERVICES INVESTIGATION INTO, AND SUPERVISION OF LISA O'DANIEL BRIDGES' FAMILY FOLLOWING SUSIE O'DANIEL'S DEATH, WHERE THE EVIDENCE WAS RELEVANT AND ADMISSIBLE TO IMPEACH LISA BRIDGES AND AS SUBSTANTIVE EVIDENCE OF THIRD PARTY GUILT

The North Carolina Supreme Court held that these records did not contain any evidence of third party guilty. *Burr* at 294, 461 S.E.2d at 618. Interestingly, the Court did note that the DSS records contained information that O'Daniel had difficulty keeping medical appointments for her children, helping her children at home, bathing her children, and being home when her children returned from school. *Id.* All of this material would have been relevant to Mr. Burr's defense had he not been constructively denied counsel and built a defense such as that by post-conviction counsel. He would have had a right to use these records in his defense. *Pennsylvania v. Richie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

GROUND ELEVEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY OVERRULING DEFENDANT'S OBJECTION TO THE PROSECUTOR'S BAD FAITH ARGUMENT THAT DEFENSE COUNSEL ACTED UNPROFESSIONALLY BY FAILING TO ARRANGE FOR A WITNESS TO BE PRESENT

The North Carolina Supreme Court found no error when the prosecutor argued in bad faith that defense counsel acted unprofessionally by failing to arrange for Nita Todd to be present. *Burr* at 298, 461 S.E.2d at 621. The prosecutor's arguments so infected the trial with unfairness as to make the resulting decision a denial of due process. The North Carolina Supreme Court's decision on this

issued amounted to an unreasonable application of *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144, 157 (1986) and *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

The defense was not only unprepared but this constructive denial of counsel was exploited by the prosecution. It compounded the unconstitutional denial of counsel.

GROUND TWELVE

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY DENYING DEFENDANT'S MOTION TO ORDER THAT LISA O'DANIEL'S MEDICAL RECORDS BE MADE AVAILABLE TO THE DEFENSE

The North Carolina Supreme Court held that trial counsel failed to subpoena the medical records of Lisa O'Daniel. *Burr* at 302, 461 S.E.2d at 623. Because the medical records were not made part of the record or appeal, it could not review this assignment of error. *Id.* The Court also noted that it reviewed the DSS records that were made available to the Court and found no evidence that Lisa O'Daniel was abusive towards her children. *Id.* at 303, 461 S.E.2d at 624.

Mr. Burr was entitled to have these records reviewed by the trial court *in camera* under *Pennsylvania v. Richie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). An order by the trial court would have guaranteed that defense counsel would have been successful in subpoenaing these records the court. Most medical facilities in North Carolina require a court order (or subpoena signed by the court) before the facility will provide records to the court pursuant to a subpoena *ducus tecum*. Review is *de novo* because the state court was presented this issue and did not decide it on the merits. It was prejudicial constitutional error for the trial court to refuse to order the records into court for an *in camera* review.

If counsel was required to subpoena the records to the court, then their failure to do so is another example of the constructive denial of counsel. The North Carolina Supreme Court decision stated that its review of the DSS records did not reveal any evidence of third party guilty or abusive treatment by Lisa O'Daniel of her children. This limited review by the Court shows how trapped Mr. Burr was by his constructive denial of counsel. The North Carolina Supreme Court did not even think to review the records for signs of medical problems or inadequate health care and concern.

GROUND THIRTEEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY PERMITTING THE PROSECUTOR TO TRAVEL OUTSIDE THE RECORD AND COMPARATIVELY ARGUE FACTS OF OTHER CASES TO THE JURY AS A MEANS OF PERSUADING THE JURY OF THE EXISTENCE OF THE AGGRAVATING CIRCUMSTANCE SUBMITTED IN THE INSTANT CASE

The North Carolina Supreme Court found no error when the prosecutor improperly argued the law with respect to the aggravating circumstance that the capital felony was especially heinous, atrocious and cruel and on Issue Three of the sentencing procedure. *Burr* at 309, 461 S.E.2d at 627. The prosecutor's arguments so infected the trial with unfairness as to make the resulting decision a denial of due process. The North Carolina Supreme Court's decision on this issue amounted to an unreasonable application of *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144, 157 (1986) and *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

GROUND FOURTEEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY OVERRULING DEFENDANT'S OBJECTION TO THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT CONCERNING THE ORDER OF THE INJURIES INFLICTED ON THE VICTIM

The North Carolina Supreme Court overruled the Petitioner's objections that the prosecutor

improperly argued the order of the injuries inflicted on the victim. *Burr* at 309, 461 S.E.2d at 627. The prosecutor's arguments so infected the trial with unfairness as to make the resulting decision a denial of due process. The North Carolina Supreme Court's decision on this issue amounted to an unreasonable application of *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144, 157 (1986) and *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

GROUND FIFTEEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY GIVING AN INSTRUCTION ON THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" WHICH FAILED TO ADEQUATELY LIMIT THE APPLICATION OF THIS FACIALLY VAGUE FACTOR

The trial court's instruction on the especially heinous, atrocious or cruel aggravating circumstance was unconstitutionally vague. The North Carolina Supreme Court affirmed Mr. Burr's death sentence despite this unconstitutional instruction. *Burr* at 309, 461 S.E.2d at 628-29. This ruling was contrary to and an unreasonable application of *Godfrey v. Georgia*, 446 U.S. 420, 428-29, 100 S.Ct. 759, 1759, 1765, 64 L.Ed.2d 398 (1980); *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); and *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). Therefore, this Court should grant Mr. Burr's Petition for Writ of Habeas Corpus and order that Mr. Burr's death sentence be vacated.

GROUND SIXTEEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY FAILING TO PREVENT THE PROSECUTOR FROM MISSTATING THE LAW ON THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL, AND ON ISSUE THREE OR OUR CAPITAL SENTENCING PROCEDURE

The North Carolina Supreme Court overruled the Petitioner's objections that the prosecutor improperly argued the law with respect to the aggravating circumstance that the capital felony was especially heinous, atrocious and cruel and on Issue Three of the sentencing procedure. *Burr* at 310, 461 S.E.2d at 628. The prosecutor's arguments so infected the trial with unfairness as to make the resulting decision a denial of due process. The North Carolina Supreme Court's decision on this issue amounted to an unreasonable application of *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144, 157 (1986) and *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

GROUND SEVENTEEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY FAILING TO INSTRUCT THAT IF ANY JUROR FOUND BY A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANT HAD THE ABILITY TO ADJUST TO PRISON LIFE, THE JUROR MUST GIVE THAT CIRCUMSTANCE MITIGATING VALUE

The trial court improperly instructed the jury that it could reject the mitigating circumstance that the Petitioner had the ability to adjust to prison life. Such an instruction violated Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution. The North Carolina Supreme Court found no error. *Burr* at 311, 461 S.E.2d at 628. The North Carolina Supreme Court's decision was an unreasonable application of *Skipper v. South Carolina*, 476 U.S. 1,

106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *McKoy v. North Carolina*, 494 U.S. 433, 441, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990); and *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

GROUND EIGHTEEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY INSTRUCTING JURORS TO DECIDE WHETHER NON-STATUTORY MITIGATING CIRCUMSTANCES HAVE MITIGATING VALUE

The trial court improperly instructed the jury that it could reject certain mitigating circumstances if the jury determined those circumstances were not mitigating. Such an instruction violated Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution. The North Carolina Supreme Court found no error. *Burr* at 311, 461 S.E.2d at 629. The North Carolina Supreme Court's decision was an unreasonable application of *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *McKoy v. North Carolina*, 494 U.S. 433, 441, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

GROUND NINETEEN

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY INSTRUCTING THAT AT ISSUES THREE AND FOUR EACH JUROR MAY RATHER THAN MUST CONSIDER ANY MITIGATING CIRCUMSTANCE FOUND BY THE JUROR IN ISSUE TWO

The trial court's use of the term "may" in jury sentencing instructions on issues three and four made consideration of proven mitigation discretionary with the sentencing jurors. The North

Carolina Supreme Court found no error in this case and must have relied on its opinion in *State v. Lee*, 335 N.C. 244, 286-87, 439 S.E.2d 547, 569-570 (1994). There is a reasonable likelihood the jury applied this instruction in a way that prevented consideration of constitutionally relevant evidence. *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316, 329 (1990). In upholding this instruction, the North Carolina Supreme Court's decision resulted in a violation of the Fifth, Sixth, and Fourteenth Amendments, and involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. *McKoy v. North Carolina*, 494 U.S. 433, 441, 110 S.Ct. 1227, 1232, 108 L.Ed.2d 369, 379-80 (1990); *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). The Petitioner is entitled to a new sentencing hearing.

GROUND TWENTY

NORTH CAROLINA'S DEATH PENALTY PROCEDURE IS UNCONSTITUTIONAL AND THE DEATH SENTENCE IN THIS CASE WAS IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER

The constructive denial of counsel for Mr. Burr was pervasive throughout the trial and lead to a complete break down of the adversarial process at every stage of the trial rendering the verdict and death sentence unreliable. The Petitioner is entitled to the grant of the Writ of Habeas Corpus under the constitutional principles in *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657, 667 (1984). Moreover, the state court's denial of the claim was unreasonable. There was a reasonable probability that the result would have been different had Petitioner be provided with counsel meeting the Sixth Amendment standards. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984).

GROUND TWENTY-ONE

MR. BURR'S CONSTITUTIONAL AND OTHER RIGHTS WERE VIOLATED BY THE ABSENCE OF RELIEF ON MERITORIOUS PRE-TRIAL MOTIONS AND OTHER PRE-TRIAL OMISSIONS

The constructive denial of counsel for Mr. Burr was pervasive throughout the trial and lead to a complete break down of the adversarial process at every stage of pretrial motions practice. The Petitioner is entitled to the grant of the Writ of Habeas Corpus under the constitutional principles in *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657, 667 (1984). Moreover, the state court's denial of the claim was unreasonable. There was a reasonable probability that the result would have been different had Petitioner be provided with counsel meeting the Sixth Amendment standards. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984).

GROUND TWENTY-TWO

THE JURY IN MR. BURR'S CASE WAS IMPROPERLY DEATH-QUALIFIED

The constructive denial of counsel for Mr. Burr was pervasive throughout the trial and lead to a complete break down of the adversarial process at every stage including jury selection. The Petitioner is entitled to the grant of the Writ of Habeas Corpus under the constitutional principles in *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657, 667 (1984). Moreover, the state court's denial of the claim was unreasonable. There was a reasonable probability that the result would have been different had Petitioner be provided with counsel meeting the Sixth Amendment standards. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984).

GROUND TWENTY-THREE

MR. BURR WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR THEIR FAILURE TO DEVELOP MITIGATION EVIDENCE TO PRESENT DURING PENALTY PHASE OF THE TRIAL

The constructive denial of counsel for Mr. Burr was pervasive throughout the trial and lead to a complete break down of the adversarial process at every stage including the sentencing phase. The Petitioner is entitled to the grant of the Writ of Habeas Corpus under the constitutional principles in *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657, 667 (1984). Moreover, the state court's denial of the claim was unreasonable. There was a reasonable probability that the result would have been different had Petitioner be provided with counsel meeting the Sixth Amendment standards. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984).

GROUND TWENTY-FOUR

THE INDICTMENT OF THIS PETITIONER DID NOT INCLUDE ALL OF THE ESSENTIAL ELEMENTS TO ALLEGE THE CRIME OF FIRST DEGREE MURDER AND DID NOT ALLEGE THE FACTORS NECESSARY TO INCREASE THE PUNISHMENT TO DEATH IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS THE INDICTMENT CLAUSE OF THE FIFTH AMENDMENT AND THE RIGHT OF JURY TRIAL OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE JUDGMENT IN THIS CASE SHOULD BE VACATED AND THE PETITIONER SHOULD BE AWARDED A NEW TRIAL ON THE CHARGE OF SECOND DEGREE MURDER AS CURRENTLY CHARGED

A. The State Court Disposition of this Claim

Petitioner presented this claim in his Third Amendment to Motion for Appropriate Relief. The post-conviction court denied the Petitioner's claim on the merits.

B. Summary of Argument

The short-form indictment used in North Carolina violates the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, because any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. The indictment in the instant case fails to charge that the killing was done with specific intent to kill, with premeditation or with deliberation, three essential elements for first degree murder. Furthermore the indictment does not allege the aggravating circumstances relied upon by the State to increase the punishment from life imprisonment to the death penalty.

C. Factual and Legal Basis Supporting this Claim

Relief from his imprisonment and execution is mandatory if Mr. Burr is being held in prison pursuant to a judgment entered by a court that did not have jurisdiction to enter the judgment. *State v. Edwards*, 192 N.C. 321, 324-25, 135 S.E. 37, 38 (1926). "It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981). A trial judge does not have the jurisdiction to enter a judgment against a defendant that is different from and not a lesser included offense of the offense for which the defendant was indicted. *State v. Hare*, 243 N.C. 262, 90 S.E.2d 550 (1955).

The indictment in this case was insufficient to charge the offense of first-degree murder because the indictment failed to allege all the essential elements of first-degree murder. Additionally, the indictment in this case was insufficient to charge the offense of capital first-degree

murder because the indictment failed to allege any of the statutory aggravating circumstances set out in N.C. Gen. Stat. § 15A-2000(e) that elevate a non-capital first-degree murder, punishable by life in prison, to a capital murder, punishable by death.

These deficiencies in the Indictment left the trial court without jurisdiction to adjudicate the Petitioner guilty of first-degree murder and, additionally, without jurisdiction to impose a death sentence. The Petitioner is adjudged to be executed pursuant to the Judgment of guilty of first-degree murder and the Judgment of death imposed by the trial court.

The Petitioner was purportedly indicted for first-degree murder on September 16, 1991. The Indictment alleged that he "unlawfully, willfully and feloniously and of malice aforethought did kill and murder Tarissa Sue O'Daniel."

This Bill of Indictment complies with N.C. Gen. Stat. § 15-144, which purports to establish a "short form" indictment for first-degree murder. Further, the Supreme Court of North Carolina has held an essentially identical indictment sufficient to support a death sentence. *State v. Williams*, 304 N.C. 394, 420-22, 284 S.E.2d 437, 453-54 (1981). The issue appeared to be settled until now.

Recently, the Supreme Court of the United States held that "elements [of the offense] **must** be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232, 119 S.Ct. 1215, 1218-19, 143 L.Ed.2d 311, 319 (1999) (emphasis added). This holding by the Court in *Jones* was clearly grounded in the Federal Constitution. Justice Souter, wrote for the Court:

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt.

Jones, 526 U.S. at 243 n.6, 119 S.Ct. at 1223 n.6, 143 L.Ed.2d at 326 n.6. Of course, these constitutional protections apply to citizens prosecuted by the several states as well as those brought before federal courts.

The Due Process Clause of the Fourteenth Amendment applies these constitutional protections to the states, just as the Due Process Clause of the Fifth Amendment and the notice requirement of the Sixth Amendment apply these protections to the federal courts. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 2355, 147 L.Ed.2d 435 (2000); *Hodgson v. Vermont*, 168 U.S. 262, 268-69, 18 S.Ct. 80, 81-82, 42 L.Ed. 461 (1897); *United States v. Davis*, 184 F.3d 366 n.4 (4th Cir. 1999).

The *Jones* Court took care to point out that the constitutional requirement that every essential element of the offense must be charged in the indictment is not new. Other decisions of the Supreme Court of the United States going back more than a century also state that an indictment must allege every element of a charged offense. *See, e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 228, 118 S.Ct. 1219, 1223, 140 L.Ed.2d 350 (1998); *United States v. Carll*, 105 U.S. 611, 612, 26 L.Ed. 1135 (1882). In *United States v. Davis, supra*, the Fourth Circuit observed that it had "consistently held for over sixty years that "[i]t is elementary that every ingredient of crime must be charged in the bill, a general reference to the provisions of the statute being insufficient." 184 F.3d at 372, n. 5 (citations omitted). This constitutional requirement existed at the time that Mr. Burr was indicted in 1991.

The indictment in this case does not comply with the constitutional requirements set out in *Jones* and *Apprendi*. The indictment does not allege the essential elements of first-degree murder

that the defendant acted with specific intent to kill formed after premeditation and deliberation. Nor does the indictment allege any aggravating circumstance.

The Petitioner acknowledges that this bill of indictment complies with N.C. Gen. Stat. § 15-144, which purports to establish a "short-form" indictment for first-degree murder. The applicant also acknowledges that the North Carolina Supreme Court has held that short-form murder indictments, which allege only the elements of second-degree murder, are sufficient to charge both first-degree capital murder and second-degree murder. *State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343 (2000); *State v. Lawrence*, 352 N.C. 1, 10-11, 530 S.E.2d 807, 814 (2000).

The decisions of the United States Supreme Court in *Jones* and *Apprendi* are binding on North Carolina on the issue of what the Fifth, Sixth, and Fourteenth Amendments require for a valid indictment. The United States Supreme Court has held that a state court judgment imposed by a court without jurisdiction violates the Fourteenth Amendment. *Burnham v. Superior Court of California*, 495 U.S. 604, 608, 110 S.Ct. 2105, 2109, 109 L.Ed.2d 631 (1990). Therefore, under United States Supreme Court precedent, the indictment is insufficient to support a conviction and sentence for first-degree capital murder and, under *Burnham*, the Petitioner is entitled to have the resulting void convictions for first-degree murder arrested, and the Petitioner should be sentenced for second-degree murder.

The North Carolina statute authorizing use of short-form indictments to charge first-degree murder also violates the Equal Protection Clause of the Fourteenth Amendment. A defendant's right to notice of all elements of the charge against him is a fundamental right under the United States Constitution. *Herring v. United States*, 422 U.S. 853, 856-57 & n.7, 95 S.Ct. 2550, 2552 & n.7, 45 L.Ed.2d 593, 597 & n.7 (1975); *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed.2d

644, 647 (1948). Consequently, N.C. Gen. Stat. § 15-144, which singles out a designated class of defendants and impinges on that fundamental right of such defendants to notice of all elements, is subject to strict scrutiny under Equal Protection Clause analysis. *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942).

This statute violates the Equal Protection Clause unless the State can prove that it is necessary to achieve a compelling state interest. *Romer v. Evans*, 517 U.S. 620, 635, 116 S.Ct. 1620, 1629, 134 L.Ed.2d 855 (1996). The State cannot carry its burden. The State cannot even satisfy the most deferential standard of review by showing that the statute has a rational relationship to a legitimate end. *Id.* It is arbitrary and capricious to eliminate fundamental constitutional protections for a small minority of felony defendants in North Carolina. It is even more irrational to eliminate those protections for defendants accused of the most serious charge of first-degree murder.

Since N.C. Gen. Stat. § 15-144 violates the Equal Protection Clause of the Fourteenth Amendment by authorizing the use of short-form indictments to charge first-degree murder, the portion of that statute giving such authority must be struck down and declared void. Consequently, that statute cannot give a trial court jurisdiction to try a defendant for first-degree murder, and it did not give the trial court in this case jurisdiction to try the applicant for first-degree murder.

In summary, the Petitioner recognizes that for over a century, North Carolina grand juries and prosecutors have followed a traditional state law practice, authorized by state statute and upheld by our state courts, of using short-form murder indictments purportedly to charge the offense of first-degree murder, even though such indictments allege only the elements of second-degree murder. However, the Petitioner respectfully submits that under a solid line of precedent beginning as early as *United States v. Carll, supra*, in 1882, and culminating in *Jones* in 1999 and *Apprendi* in 2000,

this tradition must yield to the clear requirements of the Fifth, Sixth, and Fourteenth Amendments that an indictment must allege all elements of an offense in order to give a trial court jurisdiction to try, convict, and sentence a defendant for that offense.

The trial court lacked jurisdiction to try, convict, or sentence the Petitioner for first-degree murder. The Petitioner was validly indicted for second-degree murder in this case. The jury having found Mr. Burr guilty of first-degree murder, necessarily found him guilty of the lesser offense of second-degree murder. The Double Jeopardy Clause forbids a State from retrying a defendant for a greater offense after a jury has found him guilty of a lesser. The judgment for first-degree murder is void, and that judgment must be arrested, and the Petitioner should be sentenced for second-degree murder.

D. Review of the State Court Decision

The state court's decision denying this claim is both contrary to and an unreasonable application of United States Supreme Court precedent under 28 U.S.C. § 2254(d). The claim is clearly governed by *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The state court flatly rejected Petitioner's claim that the "short-form" indictments for murder violate *Jones* and *Apprendi* in that the indictments contain neither all of the elements of the offense of murder nor any of the aggravating circumstances upon which the state intended to use in seeking sentences of death against Petitioner. *Apprendi*, applying the rationale of *Jones*, clearly holds that all of the elements of an offense and any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests this Court to Grant the Writ of Habeas Corpus. Alternatively, the Petitioner requests that the Court hold an evidentiary hearing wherein Petitioner can present to the Court his experts and other evidence to demonstrate that he was constructively denied counsel and, additionally, was denied effective assistance of counsel, all in violation of the Sixth Amendment. Furthermore such hearing would allow the Petitioner to demonstrate his *Brady* and *Napue* claims.

RESPECTFULLY SUBMITTED this the 11th day of June, 2001.

J. Kirk Osborn
J. KIRK OSBORN
N.C. State Bar # 6316
100 Europa Drive, Suite 130
Chapel Hill, NC 27514
(919) 929-0987

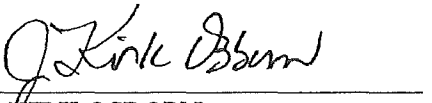
Ernest L Conner, Jr. by JKO
ERNEST L. CONNER, JR.
N.C. State Bar # 14179
Post Office Drawer 8668
Greenville, NC 27835-8668
(252) 355-8100

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS has been duly served upon the following person by depositing a copy of the same with the U.S. Postal Service, first-class postage prepaid and addressed as follows:

Edwin W. Welch, Esq.
Assistant Attorney General
Post Office Box 629
Raleigh, NC 27602-0629

This the 11th day of June, 2001.



J. KIRK OSBORN
ATTORNEY FOR THE PETITIONER
Osborn & Tyndall, PLLC
100 Europa Drive, Suite 130
Chapel Hill, NC 27514
(919) 929-0987

manipulated and enhanced through pretrial interviewing. This Court should again remand this case for an evidentiary hearing.

ATTACHMENTS

1. Petitioner's Motion for Appropriate Relief;
2. Petitioner's Motion for an Evidentiary Hearing;
3. Affidavit – Robert E. Collins, Esq. – Lead Trial Counsel;
4. Affidavit of Juanita Todd, C.C.S.W., B.C.D. Emeritus;
5. Petitioner's Amendment to his Motion for Appropriate Relief;
6. Order denying Petitioner's Motion for Appropriate Relief dated October 3, 1997;
7. Petitioner's Second Amendment to his Motion for Appropriate Relief;
8. Petitioner's Reply to State's Proposed Order and Second Motion for an Evidentiary Hearing;
9. Affidavit of Ronald H. Uscinske, M..D.
10. Petitioner's Submission of Materials Received in Discovery Which Support the Claims in Petitioner's Motion for Appropriate Relief, as amended;
11. Petitioner's Third Amendment to his Motion for Appropriate Relief;
12. Petitioner's Motion for Discovery of X-Rays and CT Scans;
13. State's Response to MAR and renewed Motion for Summary Judgment and proposed Order;
14. Letter from Ernest L. Conner, Jr. to Judge Spencer dated June 20, 2000;
15. Order denying Petitioner's Motion for Appropriate Relief, as Amended, dated June 15, 2000.

Please Note: Petitioner's Memo in Support of Federal Habeas Petition Attachments Omitted

APPENDIX L

352 N.C. 677
Supreme Court of North Carolina.

STATE of North Carolina
v.
John Edward BURR.

No. 179A93-4. | Oct. 9, 2000.

Attorneys and Law Firms

J. Kirk Osborn, Chapel Hill, Ernest L. Conner, Jr., Greenville, for Burr.

Edwin W. Welch, Assistant Attorney General, Robert F. Johnson, District Attorney, for State.

Opinion

ORDER

Upon consideration of the petition filed by Defendant in this matter for a writ of certiorari to review the order of the Superior Court, the following order was entered and is hereby certified to the Superior Court of that county:

> "Denied by order of the Court in conference, this the 5th day of October 2000."

Parallel Citations

545 S.E.2d 439 (Mem)

APPENDIX M

STATE OF NORTH CAROLINA

COUNTY OF ALAMANCE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 91-CRS-21905-06
91-CRS-21908-09

STATE OF NORTH CAROLINA)
)
v.)
)
JOHN EDWARD BURR)

ORDER AND MEMORANDUM OPINION

PROCEDURAL HISTORY

As directed by the 29 July 1998 Order of the Supreme Court of North Carolina allowing defendant's Petition for Writ of Certiorari for the limited purpose of reconsideration in light of State v. Bates, 348 N.C. 29, 497 S.E.2d 276 (1998), and State v. McHone, 348 N.C. 254, 499 S.E.2d 761 (1998) [herein "Bates" and "McHone"], and as further authorized by the 12 August 1998 Administrative Order of The Honorable Judge J. B. Allen, Jr., Senior Resident Superior Court Judge, designating this Court as the Superior Court Judge who should proceed in accordance with the 29 July 1998 Order of the Supreme Court of North Carolina and take action deemed necessary to properly dispose of the matter, this Court has reconsidered its 3 October 1997 decisions denying defendant's 27 September 1996 Motion for Appropriate Relief [herein "MAR"], as amended 2 September 1997. The Court has also considered other matter submitted to the Court after the Supreme

Court of North Carolina remanded the case to this Court. In particular, the Court has considered the following additional new matters:

a. Defendant's requests for discovery and an evidentiary hearing.

b. Defendant's Second Amendment to Motion for Appropriate Relief filed 24 February 1999 (with new page 42 added on 5 March 1999) [herein "Second AMAR"], which was filed after the Supreme Court of North Carolina remanded the case and after the State made additional disclosures of information to defendant. The Second AMAR is based on information not previously provided to either postconviction counsel or trial counsel (i.e., audio tapes made during discussions between the prosecutors and two witnesses, Ms. Lisa O'Daniel, the victim's mother, and Scott Ingle, the victim's brother who was 10-years old when he testified, and transcriptions of the tapes). The Second AMAR asserts three new claims of error stated below in ¶ 8.

c. Defendant's Third Amended Motion for Appropriate Relief filed 21 October 1999 [herein "Third AMAR"], which alleges constitutional error based on alleged deficiencies in the indictment charging defendant with first-degree murder, a claim discussed below in ¶ 10.

d. Defendant's Motion for Discovery (X-rays and CT Scans) dated 13 May 1999.

e. All matters submitted to the Court by defendant and the State relating to the aforementioned motions (e.g., materials submitted by defendant on 24 September 1999 that were received in discovery, the 26 May 1999 affidavit of Dr. Ronald H. Uscinski concerning x-rays and CT scans, and cases submitted by defendant).

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND COMMENTARY

Based on all matters before the Court, the Court's relevant findings of fact, conclusions of law, and comments are as follows:

1. Postconviction counsel have been provided an opportunity to examine all prosecutorial and investigative files not previously disclosed to postconviction counsel, including "work product." See Appendices 1, 2, 3, and 4 of this Order and Memorandum Opinion and Second AMAR, and defendant's Motion for Discovery (X-rays and CT Scans) dated 13 May 1999.

2. The State's voluntary disclosure of all prosecutorial and investigative files concerning defendant's case moots any issues concerning defendant's entitlement under Bates to inspect the State's prosecutorial and investigative files.

3. In defendant's 7 December 1998 Response to State's Letter of December 1, 1998, defendant argued that defendant is entitled to

all medical records of Tarissa Sue O'Daniel, including her birth records. Concerning this argument, the Court concludes:

3.a. The argument is without merit;

3.b. The State fulfilled its obligation under N.C.G.S. § 15A-1415(f) by providing defendant the opportunity to review the complete files of all law enforcement and prosecutorial agencies involved in the case at bar, including Tarissa Sue O'Daniel's medical records possessed by law enforcement and prosecutorial agencies; and

3.c. Under N.C.G.S. § 15A-1415(f), the State has no obligation to obtain or create files not already possessed by law enforcement and prosecutorial agencies involved in the case at bar (e.g., the State has no obligation to obtain Tarissa Sue O'Daniel's alleged "birth records" not already located in law enforcement or prosecutorial files).

4. The Court has carefully evaluated McHone, 348 N.C. at 257-58, 499 S.E.2d at 762-63, concluding that McHone must be read in pari materia with the provisions of N.C.G.S. § 15A-1420(b)(1), which states:

> A motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.

(Emphasis added). "Documentary evidence" means "records, papers,

documents, or tangible things in a criminal proceeding," not unsworn statements. N.C.G.S. §§§ 15A-802; 1-A, Rule 45(C); 8-61. See State v. Robinson, 336 N.C. 78, 125-26, 443 S.E.2d 306, 330 (1994); State v. Bush, 307 N.C. 152, 168, 297 S.E.2d 563, 574 (1982); State v. Ware, 125 N.C.App. 695, 697, 482 S.E.2d 14, 16 (1997).

5. "Dispositive facts" are "[j]ural facts, or those acts or events that create, modify or extinguish jural relations." BLACK'S LAW DICTIONARY 423 (5th ed. 1979)[1].

6. The Court concludes that McHone, read in pari materia with N.C.G.S. § 15A-1420(b)(1), and Robinson, Payne, and Bush, means that a postconviction evidentiary hearing is not required unless (a) the defendant first satisfies the support requirements of N.C.G.S. § 15A-1420(b)(1), and (b) an evidentiary hearing is needed to resolve a dispute about a "dispositive fact" reasonably raised by a defendant's assertion of facts that are supported by admissible evidence proffered in the defendant's affidavits and supporting documentation. Furthermore, the Court concludes (a) that in determining whether an evidentiary hearing is needed to

[1] "Jural" is defined at length in BLACK'S LAW DICTIONARY (e.g., "Pertaining to . . . the doctrines of rights and obligations; as 'jural relations.' Of or pertaining to jurisprudence; juristic; juridical." BLACK'S LAW DICTIONARY 764 (5th ed. 1979)).

resolve a dispute about a dispositive fact, the Superior Court may consider all information of record before the Court (e.g., all testimony and documentary evidence introduced at trial, the decision of the Supreme Court of North Carolina on direct appeal, proffered evidence in affidavits, and information within the knowledge of the Superior Court); and, (b) that in determining whether an evidentiary hearing is required, the Superior Court may properly assume arguendo that defendant's proffered witnesses' testimony would be as stated in their affidavits, and then properly conclude that an evidentiary hearing is not required because the proffered factual testimony, when considered with all other evidence and information before the Court, does not demonstrate entitlement to the relief sought as a matter of law.

7. Upon reconsideration and a careful review of Bates, McHone, and all information before the Court, the Court affirms its decisions and orders of 3 October 1997, except as to (a) the decision to deny discovery of "work product," and (b) matters noted below in the Court's discussion of court decisions issued after 3 October 1997 (e.g., see ¶¶ 7.c, 7.d, and 9.f(5) below). The Court's decision is based upon all matters mentioned in the Court's orders dated 3 October 1997, except as noted and modified below (i.e., the Court has considered new case law, e.g., the

Supreme Court of the United State's clarification of the second prong of the Strickland test). In particular, the Court affirms, inter alia, the following conclusions stated in the longer 3 October 1997 order:

7.a. That an evidentiary hearing is not required to resolve any dispositive question of fact.

7.b. That dispositive issues raised by defendant's MAR and AMAR may be resolved based on applicable law, matters of record, proffers of evidence by defendant, and matters within the Court's knowledge.

7.c. That defendant's proffers of evidence, applicable law and matters of record do not support a colorable claim that his two trial counsel, Mr. Robert E. Collins and Mr. Douglas R. Hoy, provided representation that fell below the requirements of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In reaching this conclusion of law while reconsidering its earlier decision, the Court has relied upon the following new authority:

(1) Williams v. Taylor, 529 U.S. ___ (2000), 2000 U.S. LEXIS 2837, reiterating that allegations of ineffective assistance of counsel must be resolved under the two component test stated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 80 L.Ed.2d 674 (1984):

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687.
>
> To establish ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." Id., at 688. To establish prejudice he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

529 U.S. at ___, 2000 U.S. LEXIS at 50-51. Most importantly, Williams also clarified its prior holding in Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)[2], stating:

---

[2] The clarification by the Supreme Court of the United States regarding the meaning of Lockhart v. Fretwell is significant because this Court cited Lockhart v. Fretwell and its progeny in its 3 October 1997 long order (at pages 6-9) when discussing the second prong of Strickland. Williams clearly indicates that the "unreliable or . . . fundamentally unfair" verbiage in Lockhart v. Fretwell is dispositive in only a limited number of cases. Accordingly, in reconsidering its prior decision regarding each ineffective assistance of counsel claim, this Court has disregarded all references in the 3 October 1997 long order to Lockhart v. Fretwell, and adjudicated defendant's claims under the pure Strickland test emphasized in Williams. Upon reconsideration under the more demanding pure Strickland standard, the Court concludes as a matter of law that defendant was not deprived of his Sixth Amendment right to effective assistance of counsel at either phase of his trial.

The Virginia Supreme Court erred in holding that our decision in Lockhart v. Fretwell, 506 U.S. 364, 122 L. Ed. 2d 180, 113 S. Ct. 838 (1993), modified or in some way supplanted the rule set down in Strickland. It is true that while the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as Strickland itself explained, there are a few situations in which prejudice may be presumed. 466 U.S. at 692. And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate "prejudice." Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. Nix v. Whiteside, 475 U.S. 157, 175-176, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986).

Similarly, in Lockhart, we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by our opinion in Strickland. The death sentence that Arkansas had imposed on Bobby Ray Fretwell was based on an aggravating circumstance (murder committed for pecuniary gain) that duplicated an element of the underlying felony (murder in the course of a robbery). Shortly before the trial, the United States Court of Appeals for the Eighth Circuit had held that such "double counting" was impermissible, see Collins v. Lockhart, 754 F.2d 258, 265 (1985), but Fretwell's lawyer (presumably because he was unaware of the Collins decision) failed to object to the use of the pecuniary gain aggravator. Before Fretwell's claim for federal habeas corpus relief reached this Court, the Collins case was overruled. [n 16, stated below]. Accordingly, even though the Arkansas trial judge probably would have sustained a timely objection to the double counting,

> it had become clear that the State had a right to rely on the disputed aggravating circumstance. Because the ineffectiveness of Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him, we held that his claim did not satisfy the "prejudice" component of the Strickland test. [n 17, stated below].

529 U.S. at ___, 2000 U.S. LEXIS 2837 at *51-*54. The footnotes mentioned above are as follows:

> n16 In Lowenfield v. Phelps, 484 U.S. 231, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1988), we held that an aggravating circumstance may duplicate an element of the capital offense if the class of death-eligible defendants is sufficiently narrowed by the definition of the offense itself. In Perry v. Lockhart, 871 F.2d 1384 (1989), the Eighth Circuit correctly decided that our decision in Lowenfield required it to overrule Collins.
>
> n17 "But the 'prejudice' component of the Strickland test does not implicate these concerns. It focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. [466 U.S. at 687]; see Kimmelman, 477 U.S. at 393 (Powell, J., concurring). Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him. As we have noted, it was the premise of our grant in this case that Perry was correctly decided, i.e., that respondent was not entitled to an objection based on 'double counting.' Respondent therefore suffered no prejudice from his counsel's deficient performance." Lockhart v. Fretwell, 506 U.S. 364, 372, 122 L. Ed. 2d 180, 113 S. Ct. 838 (1993).

529 U.S. at ___, 2000 U.S. LEXIS at *54. Williams adds the following important distinction:

> Cases such as Nix v. Whiteside, 475 U.S. 157, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986), and Lockhart v. Fretwell, 506 U.S. 364, 122 L. Ed. 2d 180, 113 S. Ct. 838 (1993), do not justify a departure from a straightforward application of Strickland when the ineffectiveness of counsel does deprive the defendant of a substantive or procedural right to which the law entitles him. [footnote omitted]. In the instant case, it is undisputed that Williams had a right -- indeed, a constitutionally protected right -- to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer.

529 U.S. at ___, 2000 U.S. LEXIS at *55. See also State v. Morganherring, 350 N.C. 701, 719, 517 S.E.2d 622, 632 (1999) (North Carolina's test of ineffectiveness of counsel is identical to the test under the federal constitution).

(2) Roe v. Flores-Ortega, ___ U.S. ___ , 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), 2000 U.S. LEXIS 1539 (when evaluating trial counsel performance under the first prong of Strickland "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." 2000 U.S. LEXIS 1539 *21).

(3) The following decisions indicating that some claims of ineffective assistance of counsel [herein "IAC"] may be appropriately resolved by reviewing courts based on matters of record (i.e., they supplement the cases cited in the Court's 3 October 1997 long order): State v. McGraw, 2000 N.C. App. LEXIS 503

(2 May 2000) (not IAC for failing to object to Officer's testimony as it was valid evidence and not objectionable, therefore first prong of Strickland not met); State v. Jones, 2000 N.C. App. LEXIS 313 (4 April 2000) (not IAC because even assuming that the defendant's attorney erred in not objecting to the admission of the phone calls, this one deficiency of performance was slight and did not result in prejudice to the defendant); State v. Lesane, 2000 N.C. App. LEXIS 323 (4 April 2000) (not IAC because the decision whether or not to develop a particular defense is a tactical decision that is part of trial strategy and generally are not second-guessed by the courts); State v. Lancaster, 2000 N.C. App. LEXIS 266 (21 March 2000) ("Our review of the record reveals that both decisions made by trial counsel were strategic decisions and that neither approach the levels required by Braswell. Defendant is unable to establish that either decision deprived defendant of a fair trial and thus defendant's contentions are without merit."); State v. Perez, ___ N.C. App. ___, 522 S.E.2d 102 (1999) (not IAC to attempt defense of imperfect self-defense when "[a] perfect self-defense claim was clearly untenable in this case"); State v. Williams, 350 N.C. 1, 19, 510 S.E.2d 626, 638 (1999) (not IAC to fail to object to prosecution obtaining copy of psychiatrist's report to which State was entitled); State v. Lee,

348 N.C. 474, 491-92, 501 S.E.2d 334, 345-56 (1998) (not IAC when counsel failed to object to allegedly inadmissible evidence); State v. Sanderson, 346 N.C. 669, 684-85, 488 S.E.2d 133, 141 (1997) (not IAC when counsel failed to object to instruction regarding consideration of mitigating circumstances); State v. Strickland, 346 N.C. 443, 454-55, 488 S.E.2d 194, 201 (1997) (not IAC by making certain comments in opening statement because comments were a reasonable tactical decision); State v. McNeill, 346 N.C. 233, 237-38, 485 S.E.2d 284, 286-87 (1997) (not IAC based on matters reflected in the transcript, i.e., trial counsel's argument conceding guilt to second-degree murder was not ineffective assistance of counsel because defendant's stipulation admitted all elements of the offense).

7.d. Regarding defendant's claim of "newly discovered evidence" warranting a new trial, the Court's comments on pages 13-61 of the longer 3 October 1997 order accurately evaluate the claim. In addition to considering authorities concerning newly discovered evidence cited in pages 14-23 of the 3 October 1997 longer order, the Court has also considered State v. Gardner, ___ N.C. App. ___, 523 S.E.2d 689 (1999), cert. denied, 2000 N.C. LEXIS 340 (6 April 2000), stating, inter alia:

> Third, defendant argues that he has obtained since the first motion hearing newly discovered evidence in the

form of two affidavits from experts in eyewitness identification and forensic psychiatry who will testify on behalf of defendant. The testimony of these two witnesses would rebut the expert testimony of Nicole Wolfe regarding DeLoach's confession and recantation.

. . . .

[T]he present motion are not procedurally barred. However, the defendant's three contentions of newly discovered evidence are still subject to the Britt requirements that (1) the witness will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the newly discovered evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness, and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. Britt, 320 N.C. at 712-13, 360 S.E.2d at 664.

Wright's affidavit merely serves to contradict, impeach or discredit the testimony of Riddick, Woodard and Wise. Furthermore, Wright's affidavit establishes that defendant was aware prior to the first motion hearing that Wright knew of Riddick's plan to commit perjury. However, defendant did not ask the trial court to declare Wright unavailable and consider his affidavit instead.

With regard to the affidavit of Detective Best, we fail to see how the evidence proffered is material or relevant. Additionally, defendant makes no showing that this evidence was not available at trial or at the first motion hearing. Also, Detective Best was called by the defendant and testified at the first motion hearing. Finally, the evidence proffered by the Wright and Best affidavits when applied to the requirements of Britt is not of such a nature that a different result will probably be reached at a new trial.

> Defendant fails to establish how the experts' opinions constitute newly discovered evidence. Additionally, defendant states in his motion that the testimony of one expert "would rebut the State's expert testimony" and that "the jury would likely (and properly) lose confidence in the accuracy of Ms. Wise and Mr. Woodard." As defendant argues, the testimony would tend to contradict, impeach and discredit the testimony of former witnesses. Again, applying the Britt requirements the defendant has failed to prove that this evidence warrants a new trial. Therefore, defendant's motion, with respect to his contentions based on newly discovered evidence, is denied.

___ N.C. App. at ___, 523 S.E.2d at 702-03, 1199 N.C.App. LEXIS * 38-41 (emphasis added). The Court's significant findings and conclusions regarding the claim of entitlement to a new trial based on newly discovered evidence include the following:

(1) Dr. Paterson's affidavit demonstrates that his opinions are based in part on (a) a report that Susie was dropped by Scott; (b) a report of a fracture of the left temporal bone of the skull that was described in a summary but not supported by either the radiological reports or the autopsy; (c) a report of a fracture of the left clavicle that was mentioned in one emergency room record but not alluded to either in the x-ray reports or at autopsy; and, (d) a conclusion that no attempt was made to either identify evidence of osteogenesis imperfecta [herein "OI"] or to elicit a family history. Dr. Paterson, obviously, was not present when Susie was evaluated by the physicians who testified. Furthermore, he appears not to have been privy to either the testimony relating

to Scott's fall, the report of defendant shaking Susie on two prior occasions, or Lisa O'Daniel's report of Susie screaming exceptionally loud while in defendant's hands.

(2) Dr. Plunkett's affidavit demonstrates that his opinion is based on the belief that Susie was dropped on a gravel surface. Furthermore, the last paragraph of his affidavit indicates a basic disagreement with some opinions of the experts who testified. His opinions relate solely to the reported fall and Susie's head injuries, not to OI.

(3) Dr. Bernstein's affidavit states his belief that none of the experts who testified at trial entertained any consideration of whether Susie suffered from OI and his opinion that Susie's demise attributed to child abuse is not sustainable. His belief about the lack of knowledge of the State's experts is not supported by anything submitted by the defense and is countered by information discussed in ¶ 36.h, pages 53-55, of the 3 October 1997 longer order. Furthermore, Dr. Bernstein's opinion concerning child abuse is simply another opinion that is contrary to that of the many experts who testified at trial, not "new evidence." See ¶ 7.d above (discussion of State v. Gardner).

(4) For purposes of evaluating the motions before the Court, the Court presumes that Doctors Paterson, Plunkett and Bernstein would testify at an evidentiary hearing in the manner stated in their affidavits.

(5) Based on the aforementioned information and law, the Court concludes that defendant has not proffered evidence demonstrating entitlement to a new trial under the provisions of N.C.G.S. § 15A-1415(c). More specifically, the Court concludes that defendant's proffered evidence (i.e., his evidence concerning OI and accidental falls presented by affidavits of Doctors Paterson, Plunkett and Bernstein) is similar to that presented by affidavits of the expert in forensic psychiatry mentioned in Garner that was offered to rebut the testimony of Dr. Nicole Wolfe, a psychiatrist, and the evidence in cases cited in the 3 October 1997 longer order on pages 18-23. At the bottom line, the Court concludes that defendant's affidavits present (a) evidence that is probably not true, (b) evidence that could have been discovered before trial by the exercise of due diligence, (c) evidence that is offered merely to contradict, impeach or discredit the testimony of the imminently qualified experts who testified at trial concerning the cause of Susie O'Daniel's death, and (d) evidence of such a nature that a different result would probably not be reached at a re-trial if it were considered by the jury.

7.e. Regarding defendant's claims of ineffective assistance of counsel, the Court's significant findings and conclusions regarding this claim include the following:

(1) The Court understands the responsibilities of an attorney appointed as either a guardian ad litem for a child

alleged to be the subject of child abuse, or an attorney appointed to assure that an abused child's legal rights are protected. Thus, in the Court's opinion, Mr. Collins' extensive experience as an attorney for the Alamance County Guardian Ad Litem Program indubitably provided him considerable experience relating to the investigation of child abuse.

(2) The Court has considered the affidavit of Attorney Thomas F. Loften, III, MAR Appendix H, which includes his opinion that the "failure of Mr. Burr's trial counsel . . . to apply to the trial court for funds to employ the assistance of a medical expert . . . amounts to startlingly ineffective assistance of counsel and falls far below the standard required of lawyers practicing criminal law in the courts of the State of North Carolina." The Court has also considered the affidavit of Mr. Collins, in which he asserts that he provided ineffective assistance of counsel at trial. In the exercise of its discretionary authority, the Court concludes that it will not consider Mr. Loften's affidavit. Furthermore, the Court concludes as a matter of law that it is not bound to accept Mr. Collins' legal conclusion asserting that he was ineffective at trial. In the Court's opinion, Mr. Loften and Mr. Collins are not in as good a position as the Court to determine whether trial counsel were ineffective, and the decision to be made is one for the Court to make. Stated otherwise, as a matter of law, the Court concludes that it is not bound to find

ineffective assistance of counsel based on the legal conclusions contained in affidavits of attorneys Loften and Collins. Additionally, assuming arguendo that the Court must consider the affidavits of these two attorneys, considering all matters before the Court, the Court does not agree with the legal conclusions expressed in their affidavits. The Court also observes that, in the case at bar, trial counsel's pretrial assertion (i.e., that they would be "ineffective" at trial if a continuance was denied) was rejected on direct appeal by the Supreme Court of North Carolina. In reevaluating the efficacy of affidavits of Mr. Loften and Mr. Collins and reaching the aforementioned conclusions of law, the Court has considered the following new authority cited by the State: Noland v. French, 134 F.3d 208 (4th Cir.), cert. denied, 525 U.S. 851, 119 S.Ct. 125, 142 L.Ed.2d 101 (1998), stating:

> Initially, Noland contends that he was not afforded a fair and adequate hearing in state post-conviction because the state court refused to allow an attorney to testify as an expert as to what constitutes the objective standard of reasonable competence for a lawyer trying a death penalty case. We agree with the district court that when an expert witness is not in a better position than the fact finder to render an opinion on a matter, it is not error to exclude that witness' testimony. See J.A. at 1353-54. Under North Carolina law, the trial court is the finder of fact in a motion for appropriate relief. See N.C. Gen.Stat. § 15A-1413 (1997). Noland's expert was in no better position than the trial court judge, who had tried a number of capital cases, J.A. at 390, to explain the general standard of practice and to assess the adequacy of Noland's trial counsel. Noland was therefore not prejudiced in his state court hearing,

> and is not entitled to remand for further factual development by the district court.

134 F.3d at 217. See also Beaver v. Thompson, 93 F.3d 1186, 1191 (4th Cir.) (no abuse of discretion when state court would not permit expert in legal ethics to testify that in his opinion employment of an individual as a part-time Commonwealth's attorney would have been a breach of legal ethics because the court did not need the assistance of the expert in determining the issue before the court), cert. denied, 519 U.S. 1021, 117 S.Ct. 553, 136 L.Ed.2d 124 (1996); Walls v. Bowersox, 151 F.3d 827, 836 (8th Cir. 1998) (ineffectiveness is a question for the court; counsel saying he is ineffective does not prove ineffectiveness), cert. denied, 526 U.S. 1071, 119 S.Ct. 1468, 143 L.Ed.2d 552 (1999); LaGrand v. Stewart, 133 F.3d 1253, 1270 n.8 (9th Cir.) (no requirement that expert testimony of outside attorneys be used to determine appropriate standard of care when evaluating ineffective assistance of counsel claims), cert. denied, 525 U.S. 971, 119 S.Ct. 422, 142 L.Ed.2d 343 (1998) (see 526 U.S. 115, 119 S.Ct. 1018 (1999) for subsequent history (injunctive order delaying execution vacated)); Middleton v. Evatt, No. 94-4015 (4th Cir., 14 February 1996), slip op. at 15 (unpub.) (Trial counsel's affidavit claiming ineffectiveness appears to be "nothing but a post hoc

rationalization intended to defeat imposition of the death penalty. See Atkins v. Singletary, 965 F.2d 952, 959-60 (11th Cir. 1992) [(affidavit of trial counsel tending to demonstrate ineffectiveness of counsel given no substantial weight because ineffectiveness of counsel is a question to be decided by the court)].”); Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995) (matters of law are for court's determination and inappropriate for expert opinion), cert. denied, 516 U.S. 1051, 116 S.Ct. 718, 133 L.Ed.2d 671, reh'g denied, 516 U.S. 1142, 116 S.Ct. 977, 133 L.Ed.2d 897 (1996); State v. Mancuso, 321 N.C. 464, 468-69, 364 S.E.2d 359, 362-63 (1988) (trial court did not abuse discretion by refusing to admit testimony of an assistant attorney general concerning involuntarily commitment procedures at mental health facilities); Smith v. Childs, 112 N.C. App. 672, 679-80, 437 S.E.2d 500, 506 (1993) (reversible error when trial court permitted an attorney to testify as to legal conclusions; attorney not allowed to either interpret the law or to testify as to the legal effect of particular facts).

7.f. Regarding other claims before the Court, but not the claims raised in the Second and Third AMAR's, the Court notes:

(1) For a number of reasons, the Court concludes that defendant has not proffered evidence demonstrating that the denial of defendant's request for a continuance caused counsel to make

specific errors that undermine confidence in the outcome of the trial. First, matters of record demonstrate that trial counsel worked diligently for a reasonable amount of time when preparing the case. Second, lead trial counsel had considerable experience in the Guardian Ad Litem program that helped him understand the dynamics of a prosecution based on child abuse. Third, trial counsel had an opportunity before trial to review both the medical evidence available and the thorough statements of a number of witnesses and other information in the State's open files. Fourth, trial counsel knew before trial that a host of eminent medical experts had reviewed available information concerning Susie and her cause of death, and that all experts opined that Susie died of child abuse, not an accidental fall. Fifth, even though trial counsel tried diligently to delay the start of the trial, defendant's well-qualified and experienced lead trial counsel never asserted a particularized necessity for appointment of an expert. See State v. Ballard, 333 N.C. 515, 518, 428 S.E.2d 178, 181, cert. denied, 510 U.S. 984, 126 L.Ed.2d 438 (1992) (defendant required to make threshold showing of necessity for appointment of medical expert). Sixth, defendant's pre-trial motions and the transcript demonstrate that trial counsel's actions were driven by a strategy to attempt to shift blame to a third party (e.g.,

Susie's mother) and the understanding, based on the review of a plethora of information from respected physicians, that Susie's death was not attributed to accidental injury. Stated otherwise, it would be mere speculation to conclude that granting the request for a continuance would have diverted trial counsel to the strategy defendant now pursues (i.e., that Susie had OI). Seventh, based on all matters mentioned above concerning defendant's claim of "newly discovered evidence," the Court concludes that defendant has failed to proffer evidence of specific errors attributable to trial counsel's alleged lack of time to adequately prepare for trial which undermine the Court's confidence in the outcome of the trial. See United States v. Lawrence, 161 F.3d 250, 254 (4th Cir. 1998)(absent a presumption of prejudice, trial court's denial of request for continuance does not constitute reversible error unless defendant shows specific errors undermining reviewing court's confidence in verdict rendered), cert. denied, 526 U.S. 1031, 119 S.Ct. 1279, 143 L.Ed.2d 372 (1999). Accord United States v. Myers, 66 F.3d 1364, 1370 (4th Cir. 1995). Stated otherwise, the Court concludes as a matter of law that defendant has not proffered evidence demonstrating either an abuse of discretion by the trial court in denying trial counsel's request for a continuance, or prejudice to defendant

attributable to the denial of his request for a continuance. See United States v. Speed, 53 F.3d 643, 645 (4th Cir. 1995).

(2) Defendant's postconviction counsel have found experts who take issue with the State's witnesses at trial. The mere fact that they have found such experts does not demonstrate ineffectiveness of counsel. First, matters of record demonstrate that trial counsel spent a reasonable amount of time investigating circumstances relating to the case, and that their performance was objectively reasonable. Second, court decisions concerning Strickland demonstrate that the first prong of Strickland requires the Court to evaluate trial counsel's actions in light of the circumstances facing trial counsel at and before trial, and not from the vantage point of "20-20 hindsight." Third, considering the second prong of Strickland, in the Court's opinion, defendant's proffers of evidence have not shown a reasonable probability that but for trial counsel's alleged unprofessional errors, the result of the trial would have been different.

(3) Concerning the allegation of ineffective assistance of counsel by failing to make a "lingering doubt" argument (discussed in ¶ 81 of the 3 October 1997 longer order of the Court), the Court in affirming its prior decision rejecting defendant's claim,

relies on State v. Roseboro, ___ N.C. ___, ___ S.E.2d ___ (2000)(No. 156A94-2, 5 May 2000)(2000 N.C. LEXIS 352), stating, inter alia:

> We have held that once a jury has found a defendant guilty of first-degree murder at trial, it is inappropriate for the sentencing jury to focus on anything other than the defendant's character or record and any circumstance of the offense. See State v. Walls, 342 N.C. 1, 52-53, 463 S.E.2d 738, 765 (1995), cert. denied, 517 U.S. 1197, 134 L. Ed. 2d 794, 116 S. Ct. 1694 (1996). We have recognized that the defendant's character or record and the circumstances of the offense do not encompass "[l]ingering or residual doubt" of defendant's guilt. State v. Hill, 331 N.C. 387, 415, 417 S.E.2d 765, 779 (1992), cert. denied, 507 U.S. 924, 122 L. Ed. 2d 684, 113 S. Ct. 1293, (1993). "Therefore, residual doubt is not a relevant circumstance to be submitted in a capital sentencing proceeding." Id.

2000 N.C. LEXIS *20-21 (emphasis added). Accordingly, the Court concludes as a matter of law that trial counsel were not ineffective for failing to make a "lingering doubt" or "residual doubt" argument to the jury because "lingering doubt" and "residual doubt" are not relevant circumstances to be submitted in a capital sentencing proceeding. Simply stated, failing to make such an argument did not render trial counsel's performance either objectively unreasonable or the source of prejudice under the second prong of Strickland.

8. Defendant's Second AMAR states the following new claims:

I. THE STATE KNOWINGLY PRESENTED FALSE EVIDENCE WHICH CREATED A MATERIALLY FALSE IMPRESSION REGARDING THE FACTS OF THE CASE AND THE CREDIBILITY OF WITNESSES.

II. THE STATE WITHHELD FAVORABLE EVIDENCE FROM DEFENDANT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 19 & 23 OF THE NORTH CAROLINA CONSTITUTION.

III. THE STATE VIOLATED N.C.G.S. § 15-A-903 (F) BY NOT PRODUCING LISA O'DANIEL'S STATEMENT TO THE PROSECUTORS MADE ON OR ABOUT 14 FEBRUARY 1993.

9. Concerning the three claims stated above in ¶ 8, the Court makes the following findings of fact and conclusions of law:

9.a. The prosecutors had discussions with Lisa O'Daniel on or about 24 February 1993, and her son, Scott Ingle, on or about 25 February 1993. The discussions were recorded on audio tapes. The tapes were then transcribed. The transcriptions are attached to the second AMAR. Additionally, on 24 September 1999, defendant submitted to the Court his transcriptions of tape recorded interviews with Lisa O'Daniel, which have been reviewed by the Court. The State agrees that neither the tapes nor the transcriptions made from them were disclosed to trial counsel either before or during the 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.

9.b. An evidentiary hearing is not required to properly adjudicate these claims because (a) the dispositive facts are not in dispute and are readily apparent to the Court, and (b) the issues presented by the dispositive facts merely require the Court to evaluate the facts under applicable law known to the Court.

9.c. The prosecutors did not provide trial counsel the information stated in the above-mentioned tapes because the prosecutors believed the tapes were "work-product." The Court need not now determine whether all or part of the tapes were in fact "work-product" because (a) the tapes and transcription thereof have now been disclosed to defendant, (b) the characterization of all or part of the information withheld by the prosecutors as "work-product" is of little significance when resolving the issues raised by Claims I, II, and III in ¶ 8 above, and (c) as indicated below, the two key issues before the Court are whether the prosecutors presented false or perjurious testimony, and whether the prosecutors withheld information that they were required to disclose under Brady and its progeny (i.e., Claims I and II in ¶ 8 above). Before discussing these two key issues, the Court addresses in the following subparagraph the less-critical issue raised by Claim III in ¶ 8 above (i.e., whether the prosecutors violated the provisions of N.C.G.S. § 15A-903 (f) by not disclosing the existence of Lisa O'Daniel's comments made to the prosecutors on 24 February 1993).

9.d. Concerning Claim III in ¶ 8 above, the transcript (T, Vol 17, pp 207-09) demonstrates that trial counsel Collins, after the direct examination of Lisa O'Daniel, made a motion for disclosure of her prior statement, citing N.C.G.S. § 15A-903(f). However, Mr. Collins immediately thereafter told the trial court that he was requesting the Court's permission to listen to the tape recording of the interview of Ms. O'Daniel conducted by Officers Qualls and Allen. The Court directed that trial counsel be permitted to listen to the tapes. Trial counsel made no other requests for Ms. O'Daniel's statements and requested no other rulings from the trial court. E.g., trial counsel did not inquire of the witness whether she had made other statements and did not ask for disclosure of all statements of the witness in possession of the State. Under these circumstances, the Court concludes that defendant waived his entitlement under N.C.G.S. § 15A-903 to disclosure of any additional statements made by Ms. O'Daniel. See State v. Payne, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994) ("[T]he motion did not indicate that a request was made for a copy of defendant's criminal record. Failure to make such a request constitutes a waiver by defendant of his right to discovery of his record under N.C.G.S. § 15A-903(c)."). See also State v. Williams, ___ N.C. ___, 526 S.E.2d 655 (2000)(No. 264A90-5, 7 April 2000)(2000 N.C. LEXIS 242)(holding that a capital defendant must

file a written motion to be entitled to postconviction discovery under N.C.G.S. § 15A-1415(f) because "the requirement of a written motion is consistent with the custom and practice in our trial courts. Further, a written motion provides a logical means of notice that a capital defendant is exercising his or her discovery rights under the statute and will promote more accurate and uniform application of subsection (f)." 2000 N.C. LEXIS *6-7); State v. Abbott, 320 N.C. 475, 482, 358 S.E.2d 365, 370 (1987)(defendant not entitled to discovery of materials in possession of State unless he makes motion to compel discovery); State v. Jones, 295 N.C. 345, 347-60, 245 S.E.2d 711, 719 (1978) (statutory right to have trial court order prosecutor to permit discovery waived by not arguing or making any other showing in support of discovery motion at hearing before trial); State v. Moore, 335 N.C. 567, 600, 440 S.E.2d 797, 816 (1994)(trial court under no obligation to ex mero motu examine prosecutor's investigative files for discovery compliance).

9.e. Concerning Claims I and II in ¶ 8 above, the Court concludes that a prosecutor's good faith belief that his discussions with a witness in preparation for trial constitute "work-product" does not ipso facto mean that all statements of the witness to the prosecutor are privileged. See State v. Hardy,

293 N.C. 105, 126, 235 S.E.2d 828, 840-41 (1977) ("Only roughly and broadly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all."). In any event, the good faith of the prosecutors in the case at bar and the legitimacy of their questioning of the witnesses in preparation for trial is demonstrated by the nature of their questioning (e.g., the discussion of their thought processes with Ms. O'Daniel, their challenges to both Ms. O'Daniel and Scott Ingle, and their efforts to have both Ms. O'Daniel and Scott tell them and the jury only the truth).

9.f. The principles of law relied on by the Court when adjudicating Claims I and II in ¶ 8 above are as follows:

(1) As stated in State v. McCormick, 298 N.C. 788, 259 S.E.2d 880 (1979):

> It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer, See, e. g., A. Morrill, Trial Diplomacy, Ch. 3, Part 8 (1973), and is to be commended because it promotes a more efficient administration of justice and saves court time.
>
> Even though a witness has been prepared in this manner, his testimony at trial is still his voluntary

> testimony. Nothing improper has occurred so long as the attorney is preparing the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth and not false or perjured testimony.

298 N.C. at 791-92, 259 S.E.2d at 882-83. Accord United States v. Magana, 118 F.3d 1173, 1193 (7th Cir. 1997) (rejecting allegations that prosecutors' "coaching" of witnesses was subordination of perjury, noting that defendants had not proved that perjury was committed, much less that the government knew or should have known of it, that witnesses each testified that they had been told to tell the truth at all times, and that inconsistencies in testimony were "simply too minor to have borne directly on the issue of Defendant's guilt").

(2) The Napue principles, as stated in Boyd v. French, 147 F.3d 319 (4th Cir. 1998), cert. denied, 525 U.S. 1150, 119 S.Ct. 1057 (1999):

> A conviction acquired through the knowing use of perjured testimony by the prosecution violates due process. See Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). This is true regardless of whether the prosecution solicited testimony it knew to be false or simply allowed such testimony to pass uncorrected. See Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Napue, 360 U.S. at 269, 79 S.Ct. 1173.
>
> . . . .

> The knowing use of perjured testimony constitutes a due process violation when "'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Kyles v. Whitley, 514 U.S. 419, 433 n. 7, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)); see United States v. Ellis, 121 F.3d 908, 915 n. 5 (4th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 738, 139 L.Ed.2d 674, 675 (1998); United States v. Kelly, 35 F.3d 929, 933 (4th Cir. 1994).

147 F.3d at 329-30. Accord State v. Rowsey, 343 N.C. 603, 616-17, 472 S.E.2d 903, 909-10 (1996) (quoting State v. Williams, 341 N.C. 1, 16, 459 S.E.2d 208, 217 (1995) (emphasis added); UnitedStates v. Martin, 59 F.3d 767 (8th Cir.1995), stating:

> To prove prosecutorial use of false testimony, Martin must show that: (1) the prosecution used perjured testimony; (2) the prosecution knew or should have known of the perjury; and (3) there is a "reasonable likelihood" that the perjured testimony could have affected the jury's judgment. United States v. Nelson, 970 F.2d 439, 443 (8th Cir.1992), cert. denied, ___ U.S. ___, 113 S.Ct. 293, 121 L.Ed.2d 217 (1992).
>
> . . . .
>
> Even assuming Hunter perjured himself, Martin has failed to prove that the prosecution knew or should have known that the testimony was false or that, without the testimony, the jury might have come to a different decision. See United States v. Runge, 593 F.2d 66, 73-74 (8th Cir.), cert. denied, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). In short, Martin has not shown any prosecutorial misconduct affecting his due process rights.

59 F.3d at 770-71 (emphasis added); Spence v. Johnson, 80 F.3d 989,

1005 (5th Cir. 1996) ("But even if Snelson and Ivy testified falsely at trial, and even if the district court incorrectly employed an outcome-determinative approach to the materiality of their testimony, no constitutional error occurred. Under the proper materiality standard, it is not reasonably likely that Snelson's and Ivy's false testimony would have affected the jury's judgment. Napue, 360 U.S. at 271, 79 S.Ct. at 1178. This standard, conceitedly less onerous than the Brady materiality standard, Kirkpatrick v. Whitley, 992 F.2d 491, 497 (5th Cir.1993), is not met here." (emphasis added)); United States v. Bueno-Sierra, 99 F.3d 375, 380 (11th Cir. 1995)("Although the record is unclear regarding whether the government indeed violated Napue, [footnote citation omitted], we hold that reversal is inappropriate on these facts. Reversible error occurs only if a failure to correct results in material prejudice such that there is any reasonable likelihood that the false testimony would affect the jury's judgment. (citation omitted).").

(3) "An unintentional misstatement of the facts is not perjurious." State v. Phillips, 297 N.C. 600, 605, 256 S.E.2d 212, 215 (1979). "[P]erjury is 'a false statement under oath, knowingly, wilfully and designedly made, in a proceeding in a court of competent jurisdiction . . . as to some matter material to the

issue or point in question.' (Citation omitted)." Id.

(4) Discrepancies in testimony discovered postconviction are immaterial if "there was not a reasonable likelihood that the false testimony could have affected the judgment of the jury. (citation omitted)." Pope v. Netherland, 113 F.3d 1364, 1371 (4th Cir.), cert. denied, 521 U.S. 1140, 118 S.Ct. 16, 138 L.Ed.2d 1048 (1997)). Accord United States v. Ellis, 121 F.3d 908, 927 (4th Cir. 1997); United States v. Adcox, 19 F.3d 290, 295 (7th Cir. 1994)(mere inconsistencies in testimony do not establish perjury); United States v. Griley, 814 F.2d 967, 971 (4th Cir.1987) (mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony); United States v. Verser, 916 F.2d 1268, 1270-71 (7th Cir. 1990)("[N]ot every testimonial inconsistency that goes uncorrected by the government establishes a constitutional violation. . . . Here Huff was a young witness subjected to extensive cross-examination spanning two days of trial. The inconsistent statements related to events that occurred more than a year before his trial testimony and nine months before his testimony at the plea hearing. It is not at all clear that his inconsistent testimony amounted to perjury. . . .").

(5) The principles of Brady as summarized in State v. West, 339 N.C. 622, 457 S.E.2d 276 (1995), stating:

> We conclude that the trial court did not err in denying defendant's motion for access to the SBI report or for an in camera inspection. N.C.G.S. § 15A-903(d) requires the disclosure to the defendant of all documents and tangible objects "which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belonged to the defendant." However, the next section of the statute, N.C.G.S. § 15A-904, limits the application of N.C.G.S. § 15A-903 and is dispositive of the issue of prosecution witnesses' statements. N.C.G.S. § 15A-904(a) provides as follows:
>
> > Except as provided in G.S. 15A-903(a), (b), (c) and (e), this Article does not require the production ... of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State.
>
> N.C.G.S. § 15A-904(a) (1988); see State v. Hardy, 293 N.C. 105, 124, 235 S.E.2d 828, 839 (1977). Therefore, the investigative files of the district attorney, law enforcement agencies, and others helping to prepare the case are not open to discovery. State v. Alston, 307 N.C. 321, 336, 298 S.E.2d 631, 642 (1983). The trial court did not err in refusing to order the State to disclose the SBI report to defendant. In addition, notably lacking from the list of subsections that are excluded from the scope of N.C.G.S. § 15A-904(a) is subsection (f) of N.C.G.S. § 15A-903.
>
> . . . .
>
> Defendant claims that the information sought was discoverable under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. The United States Supreme Court has held that due process does not require the State to make complete disclosure to defendant of all

> of the investigative work on a case. Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706, reh'g denied, 409 U.S. 897, 93 S.Ct. 87, 34 L.Ed.2d 155 (1972). "[N]o statutory provision or constitutional principle requires the trial court to order the State to make available to a defendant all of its investigative files relating to his case...." State v. McLaughlin, 323 N.C. 68, 85, 372 S.E.2d 49, 61 (1988), sentence vacated on other grounds, 494 U.S. 1021, 110 S.Ct. 1463, 108 L.Ed.2d 601 (1990), on remand, 330 N.C. 66, 408 S.E.2d 732 (1991). Brady only requires the disclosure, upon request, of evidence favorable to the accused and not a disclosure of all evidence. Moreover, in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Supreme Court clarified Brady and held that the prosecutor is constitutionally required to disclose only any evidence that is favorable and material to the defense. In determining whether the suppression of certain information was violative of a defendant's right to due process, the focus should be on the effect of the nondisclosure on the outcome of the trial, not on the impact of the undisclosed evidence on the defendant's ability to prepare for trial. Id. at 109, 96 S.Ct. at 2400, 49 L.Ed.2d at 353. Because the evidence withheld must be material, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Id. Defendant in the case at bar has failed to establish that any evidence not disclosed from the SBI report was "material" and what effect, if any, the nondisclosure would have had on the outcome of the trial. This Court finds no constitutional principle under Brady that would require the trial court to order the State to make available to defendant the SBI report or to conduct an in camera inspection of the SBI report.

339 N.C. at 656-57, 457 S.E.2d at 295-97 (emphasis added). Accord Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), stating:

The first question that our order granting certiorari directed the parties to address is whether the State violated the Brady rule. We begin our analysis by identifying the essential components of a Brady violation.

. . . .

This special status [of the prosecutor] explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term "Brady violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence [footnote omitted]--that is, to any suppression of so-called "Brady material"--although, strictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

. . . . [discussion of documents withheld omitted]

Moreover, with respect to at least five of those documents, there is no dispute about the fact that they were known to the State but not disclosed to trial counsel. It is the third component--whether petitioner has established the prejudice necessary to satisfy the "materiality" inquiry--that is the most difficult element of the claimed Brady violation in this case.

Unlike the Fourth Circuit, we do not believe that "the Stolzfus [sic] materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial." App. 425. Without a doubt, Stoltzfus' testimony was prejudicial in the sense that it made petitioner's conviction more likely than if she

had not testified, and discrediting her testimony might have changed the outcome of the trial. That, however, is not the standard that petitioner must satisfy in order to obtain relief. He must convince us that "there is a reasonable probability" that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. As we stressed in Kyles: "[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S., at 434, 115 S.Ct. 1555.

. . . .

The record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached.

. . . .

Notwithstanding the obvious significance of Stoltzfus' testimony, petitioner has not convinced us that there is a reasonable probability that the jury would have returned a different verdict if her testimony had been either severely impeached or excluded entirely.

. . . .

Petitioner has satisfied two of the three components of a constitutional violation under Brady: exculpatory evidence and nondisclosure of this evidence by the prosecution. . . . However, petitioner has not shown that there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed. He therefore cannot show materiality under Brady . . . .

527 U.S. at 280-96, 119 S.Ct. at 1948-55 (emphasis added). See also State v. Lyons, 430 N.C. 246, 669-70, 459 S.E.2d 770, 783 (1995);

State v. Johnson, 128 N.C. App. 361, 367, 496 S.E.2d 805, 809 (1998); Johnson v. Gibson, 169 F.3d 1239, 1255 (10th Cir. 1999) (Brady does not require the prosecution to make a complete and detailed accounting to the defense of all police investigatory work on a case); United States v. Hamilton, 107 F.3d 499, 510 (7th Cir. 1997) ("Again, a Brady violation does not arise due to nothing more than a possibility that the undisclosed item might have helped the defense. Augurs, 427 U.S. at 109-10, 96 S.Ct. at 2400-01."); Smith v. Secretary of New Mexico Dept. of Corrections, 50 F.3d 801, 823 (10th Cir.), cert denied, 516 U.S. 905, 116 S.Ct. 272, 133 L.Ed.2d 193 (1995) (Brady does not require the prosecutor to divulge every possible shred of evidence that could conceivably benefit the defendant); United States v. Willis, 89 F.3d 1371, 1381 (8th Cir.) (undisclosed pretrial statement of witness not material evidence requiring Brady disclosure in part because contents of sealed statement not likely to have altered result), cert. denied, 519 U.S. 909, 117 S.Ct. 273, 136 L.Ed.2d 196 (1996); United States v. Marshall, 56 F.3d 1210, 1212 (9th Cir. 1995) (undisclosed tape recording of defendant's telephone conversation with witness not material evidence requiring Brady disclosure because no reasonable probability of different result when witness's account corroborated by other evidence and witness subject to cross-examination), cert.

denied, 517 U.S. 1211, 116 S.Ct. 1830, 134 L.Ed.2d 935 (1996); United States v. Hernandez, 94 F.3d 606, 610 (10th Cir. 1996) (undisclosed exculpatory evidence which arguably supported defendant's case not Brady material because insufficient to create reasonable probability of acquittal).

(6) Concerning Brady claims based on allegations of prosecutorial misconduct, Brown v. French, 147 F.3d 307 (4th Cir.), cert. denied, 525 U.S. 1025, 119 S.Ct. 559, 142 L.Ed.2d 465 (1998), states the following bottom line position:

> [H]owever reprehensible we may find the actions of the prosecutor, the focus of a Brady claim is not on him, but rather on the character of the evidence that he has withheld. The Supreme Court made this point clear in United States v. Agurs:
>
> > Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor.... If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.
>
> United States v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (footnote omitted).

147 F.3d at 312-13 (emphasis added).

(7) "Evidence is 'material' for Brady purposes if its cumulative effect would be to undermine confidence in the verdict. Kyles v. Whitley, 514 U.S. 419, ___, 115 S.Ct. 1555, 1566, 131

L.Ed.2d 490 (1995)." United States v. Van Brocklin, 115 F.3d 587, 594 (8th Cir. 1997). Accord United States v. Amlani, 111 F.3d 705, 714 (9th Cir. 1997)("Amlani focuses on evidence that is not inconsistent with the government's case. Thus, we find that Amlani failed to demonstrate the required prejudice to justify vacating his conviction.").

(8) When alleging a Brady violation, "[t}he defendant has the burden of showing that the evidence not disclosed was material and affected the outcome of the trial." State v. Lyons, 340 N.C. 646, 670, 459 S.E.2d 770, 783 (1995).

9.g. Based on principles of law stated above in ¶ 9.f and all facts and other information before the Court, the Court concludes that Claims I and II, stated in ¶ 8 above, are without merit. More specifically, the Court finds and concludes:

(1) That the content of the prosecutors' taped pretrial discussions with Lisa O'Daniel and Scott Ingle demonstrates that the prosecutors were merely trying to determine the true facts and to prepare the witnesses to provide truthful testimony.

(2) That the prosecutors did not attempt to get either Lisa O'Daniel or Scott Ingle to present false testimony.

(3) That the prosecutors urged the two witnesses to provide truthful information to the prosecutors and jury.

(4) That the prosecutors never attempted to get a witness to commit perjury or present false testimony.

(5) That the witnesses understood that the prosecutors wanted them to provide only truthful testimony.

(6) That the action of the prosecutors did not deprive defendant of due process of law.

(7) That any inconsistencies between the trial testimony of the two witnesses and their pre-trial comments to the prosecutors are of de minimis significance.

(8) That the failure to disclose to trial counsel the content of the prosecutors' undisclosed discussions with Lisa O'Daniel and Scott Ingle does not establish a reasonable probability that had the evidence been disclosed the result of the trial would have been different (i.e., the failure to disclose the content of the discussions does not undermine the Court's confidence in the reliability of the verdict, and does not demonstrate a violation of due process of law).

(9) That, in summary, all matters before the Court demonstrate that the prosecutors' failure to disclose the content of the pre-trial discussions mentioned on the tapes and in the transcripts referred to above was neither a violation of Brady, nor a denial of due process of law.

9.h. In making the findings and conclusions stated above concerning Claims I and II in ¶ 8 above, the Court has considered all factual matters before the Court, including, but not limited to the following matters:

(1) Lisa O'Daniel did not state in either trial testimony or pre-trial statements that she saw defendant hurt Susie in any way that would have caused the injury Susie suffered. Her trial testimony established that she did not suspect that defendant caused Susie's injuries until she was at Chapel Hill with Susie, who was then receiving emergency medical treatment. For example, when asked at trial "[w]hat changed your mind, what made you begin to believe that it was him?", she replied "[b]ecause there was too many injuries that a child couldn't have done it." (T, Vol 17, p 172). Additionally, she testified: "I didn't see him hurt her. . . . [I did not think he would hurt Susie] [b]ecause people hurt people, but they don't hurt a child." (T, Vol 17, p 185).

(2) Susie's health problems were the subject of extensive testimony at trial. For example, Lisa testified that Susie had thrush throat during the summer of 1991, that she had ulcers down her throat, and that Lisa could not get Susie to eat. (T., Vol 17, pp 93-105). Lisa's testimony was confirmed by Dr. Willcockson, who testified that Susie had some decreased appetite and a condition he

described as oral thrush, a yeast infection.

(3) The trial transcript and the reports of pre-trial discussions with Lisa O'Daniel demonstrate that the prosecutors were trying to assure that Lisa was being completely candid with them and that she would offer truthful testimony at trial. First, for example, the transcript demonstrates that trial counsel had an unlimited opportunity to cross-examine Lisa at trial. Second, trial counsel questioned Lisa about her discussions with the prosecutors, and she stated that she was questioned on several occasions by the prosecutors, and that the prosecutors had "continued to communicate with her." (T, Vol 18, p 18). Third, when asked by one prosecutor, "[w]hat, if anything, have you been told about your testimony?" Lisa answered, "[t]o get up here and tell the truth the way the things were." (T, Vol 18, pp 334-35). She testified that she had "done that to the best of her ability." (T, Vol 18, p 335). Fourth, Attachment 1 of the Second AMAR reveals the prosecutors' motive.

> **I'm just, I'm just kinda playing a devil's advocate** - I'm looking at [what] the defense attorneys are going to jump on you and how a juror is going to sit over there. And the bottom line Lisa is how could, how could you not [have] seen what was going on with your children and your boyfriend[?].

Second AMAR, Attachment 1, p 14 (emphasis added). Soon after this statement was made, one prosecutor made the following illuminating statement to Lisa O'Daniel:

> But you know you can't change what has happened - you can only go forward with it. And I mean, you know if we go to the jury and you know you bear your soul to them cause that [is] **the only way you're going to have any credibility with the jury is to tell as much of the truth no matter how bad it makes you look.** No matter how bad it makes you look. . . .
>
> **The best, the best guarantee, the absolute best thing to do justice in this case is for everyone to shoot out the truth. Every little shred of it.** And if it makes you look like a bad mama -- so be it. Because you did. You screwed up.

Second AMAR, Attachment 1, p 20 (emphasis added). Fifth, defendant's transcriptions of the prosecutors' discussion with Lisa demonstrate that the prosecutors were most concerned about assuring that she testified truthfully. E.g., Mr. Johnson's comments at the end of the discussion included the following:

> I'm going to tell you one other thing, Lisa, and this is real important. I don't care what the answer is as long as it's the truth. And when it comes to trying this case in the courtroom, I want you to tell the truth. I want you to answer every question just absolutely honestly. Whether you think it makes you look good or whether you think it makes you look bad. I want every question answered the absolute gospel truth.

Transcription of interview submitted to the Court by defendant on 24 September 1999 (page 8 of last interview).

(4) A reasonable interpretation of the colloquy between Lisa O'Daniel and the prosecutor does not support defendant's assertion that Lisa was promised immunity in exchange for her testimony. The Court finds that the quotation in Second AMAR, ¶9, p 6 (i.e., "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."), when read in context with the entire discussion, does not demonstrate that Lisa was either promised immunity in exchange for her testimony or that she entered into some other beneficial arrangement in exchange for her testimony. Significantly absent from her reported comments are any statements demonstrating that she thought that she would avoid prosecution by providing testimony against defendant. The prosecutor's comment was brief and merely conveyed the obvious position that the prosecutors were convinced that defendant, not Lisa, was responsible for Susie's death, that they did not at any time have an intent to prosecute Lisa, and that they only wanted to get to the truth. Additionally, defendant has not presented anything demonstrating that Lisa was arrested or charged with any offense alleging that she killed her daughter. Fifth, defendant has not demonstrated how the prosecutor's brief comment prejudiced defendant, and matters of record demonstrate a lack of prejudice

(e.g., Lisa was subjected to extensive cross-examination at trial, many other witnesses testified, much of the most damaging evidence against defendant came from the lips of medical experts, and the jury had the opportunity to carefully evaluate defendant's extended testimony and demeanor on the witness stand, obviously concluding that defendant was not being truthful with them).

(5) Defendant has failed to point to anything in the transcript of trial testimony reasonably demonstrating that the prosecutors got Lisa to give false testimony. On the other hand, the matters offered by defendant and Lisa's testimony at trial demonstrate that the prosecutors urged Lisa to tell the truth.

(6) Matters of record demonstrate that trial counsel knew about the alleged inconsistencies in some of Lisa's prior statements about seeing defendant holding Susie at four o'clock in the morning, and that Lisa was thoroughly cross-examined about the inconsistencies in a manner that permitted the jury to properly evaluate the evidence presented. For example, Lisa's cross-examination included the following:

> Q. Now, you indicated yesterday in your testimony that some time, I believe you stated approximately two weeks prior to Susie's injury on the 24th or the morning of the 25th, that you had woken up at four in the morning and had found Johnny with Susie in the living room.
>
> A. Yes, sir, I did.

> Q. Do you remember telling Mr. Allen and Mr. Qualls in your tape recorded statement [provided to trial counsel] that that was on Wednesday or Thursday of the same week?
>
> A. Yes, I did.
>
> Q. That Susie was injured?
>
> A. Like I said, you can't focus when your daughter is in that shape, you can't regulate (sic) everyday. When you have time and your mind is clear, yes, you can regulate most of it.
>
> Q. So, as of now, again, you are sure it was two weeks before and not two days before?
>
> A. It was two weeks, it was a week before my daughter died.

(T, Vol 18, pp 300-01) (emphasis added). Later, the prosecutor asked Lisa:

> Now when you're telling us about finding Johnny holding Susie out at four in the morning, have you tried to make that fit with what the doctors said or are you telling it the way you remember it?

(T, Vol 18, p 353). Lisa responded: "I'm telling it the way I remember it. (T, Vol 18, p 353).

(7) Defendant's allegations that the prosecutors coached and prepared Scott Ingle to give false and misleading testimony are unsupported by matters before the Court. Scott did answer in the negative when Detective Allen asked him if he had ever seen defendant do anything to Susie. However, the transcript demonstrates that Scott told the jurors why he did not tell the

police officers about defendant shaking Susie and why he later provided information to the prosecutors about observing defendant shaking Susie (i.e., he told the jurors that he did not report the shaking because he was scared, thereafter stating that he was not scared after defendant was in jail. T, Vol 20, p 889). Scott also explained why he did not tell his mother when he first saw defendant shaking Susie: "Q: When did you tell your mother, Scott?" A: I didn't. I was scared he would kill her." (T, Vol 20, p 894). Scott's first report of observing defendant shaking Susie was made to the prosecutors, Mr. Allen and Mr. Johnson. (T, Vol 20, pp 894-95).

(8) Matters of record demonstrate that the prosecutors frequently emphasized to Scott the importance of telling the truth to them and to the jury, and that the prosecutors did not tell Scott what to say. For example, the transcript includes the following:

Q. Did we [the prosecutors] ever tell you what to say?

A. No.

Q. What did we tell you about testifying in court?

A. To not tell lies.

Q. To tell the truth?

A. Yes.

Q. Are you telling the truth to the best of your

memory?

A. Yes.

Q. And when you tell the jury about him [defendant] shaking her [Susie] on those occasions and about hearing the banging noise or the hammering noise, are you telling the truth?

A. Yes.

(T, Vol 20, p 902). The same information is stated earlier in the transcript, during direct examination (i.e., "Q: And is that why -- when you saw him shaking Susie you didn't tell your mama because you thought he would kill you or kill her? A: Yeah, kill her." (T, Vol 20, pp 875-76). Furthermore, the first page and a half of the typed version of the 26 February 1993 interview (Second AMAR, Appendix 3, pp 1-2) is devoted exclusively to impressing Scott with the need to tell the prosecutors the truth (e.g., The prosecutors asked Scott what it means to tell a lie, and he responded. Then they asked Scott if he understood what it means when he puts his hand on the Bible and swears to tell the truth, and he replied that if he lied, he would "probably get in deep trouble." "Q: So, do you think God wants you to tell the truth or tell lies." A: The truth.").

(9) Defendant's attempt to assign sinister motives and effects to the prosecutor's statements telling Scott that he did

not hurt his sister are not supported by a reasonable interpretation of the facts. First, it is clear to the Court that the comments were intended to put Scott at ease and to get him to tell the prosecutors everything he remembered about the night Susie got hurt. Second, evidence at trial demonstrates that when the prosecutors provided Scott assurance that he did not hurt his sister, they were conveying their honest opinion that he was not responsible for Susie's death. Their opinion was based on considerable medical evidence of child abuse that started being developed when Susie was observed by Dr. Willcockson at 2:55 a.m., 25 August 1991. Third, the medical evidence at trial supports the position conveyed by the prosecutors (i.e., that Scott did not injure his sister). Fourth, testimony of witnesses present when Scott fell with Susie in his arms confirms that Scott did not hurt Susie when he tripped and fell (E.g., Captain Dan Qualls, Alamance County Sheriff's Office, read into evidence Lisa's responses to questions asked during an interview. In describing Scott's fall with Susie, Lisa stated that she did not watch Scott as he fell, but that she heard him fall and that "when I turned around, he was laying on top of her." (T, Vol. 18 p 389). Scott "was holding her the whole time he fell . . . [he did not literally drop her] and he didn't let go of her." (T, Vol. 18 p 390). "He didn't really drop the child, he cradled it but fell

with the child in his arms." (T, Vol. 18 p 397). Additionally, Jonas Kimrey testified that he saw Scott fall with Susie in his arms. "Scott was coming out and holding Susie when he stumbled over a cord and dropped her to the ground, with her in his arms. [When I say "dropped," I do not mean he actually dropped her out of his arms.] . . . I mean he fell with her in his arms. . . . He was holding her like this right here (stands up and demonstrates), sort of cradling her. . . . He landed on his knees, and then he fell to the ground on his elbows on the ground, with his arms touching the ground." (T, Vol. 19 p 601). Jonas testified that Scott did not actually drop Susie out of his arms, that he just went down to his knees and cradled her down. Fifth, at trial, trial counsel and defendant agreed that "from the medical evidence . . . presented . . . it's highly unlikely that [Scott's fall with Susie in his arms was] the cause of the injuries that she received." (T, Vol 22, p 1221).

(10) In the Court's opinion, defendant's allegations that "prosecutors would lead [Scott Ingle], and insure that he did not say anything that could be seen as positive for Johnny Burr," is not supported by a reasonable reading of typed version of the discussion with Scott. First, for example, the Court notes that questioning quoted on Second AMAR, page 16, follows non-leading general exploratory questions (E.g., "[P]retend that this box is

Susie and I want you to show me how he did it," followed by "He shook her and shook her - I'll have to show you how he jerked [her] up by one of these arms - I can't do it with this - . . . Yeah, he went like this." (Second AMAR, Appendix 3, p 14). Second, the questioning is in general, not leading, because it does not suggest an answer. The questions that defendant apparently contends are leading are generally either foundation questions (e.g., "did he say anything to her when he grabbed her?" -- a foundation question, normally followed by something like "what did he say?"; "Do you know how Susie got those bruises on her?", also a foundational question), or an open-ended request for an explanation in narrative form (e.g., "Why?" "Why do you think Johnny Burr probably did it?" Fourth, many of the questions offer as an answer alternative choices (e.g., the last five lines on Second AMAR, page 18); furthermore, the prosecutor's question "[w]as it light outside or dark outside?" is certainly not leading. Fifth, the nature of Scott's responses to the prosecutors' questions and comments demonstrates that he is a youngster who listens to questions and responds in an intelligent manner (e.g., "I think he did it when it was dark but I'm not sure." And, when asked the foundational, non-leading question "do you remember anything about the bed -- your mama' bed . . . what do you

remember?", Scott replied "[w]hat do you mean?"). Sixth, some questions that follow non-leading questions are in fact leading and asked like they would be asked on cross-examination. E.g., After "Was it light outside or was it dark?", appears the question "[w]as it dark outside then?" The Court is not troubled by the relatively few leading questions because (a) the asking of such questions is not improper when preparing a witness to testify because the rules of evidence are not then applicable, and (b) the Court knows that such questions are frequently necessary to determine with clarity exactly what a witness knows or does not know.

(11) Concerning comments in Second AMAR, ¶ 26, pages 21-24, in the Court's opinion, these comments demonstrate that the prosecutors were trying to get Scott to provide an accurate and truthful description of the events he states he observed. The intent of the prosecutor appears with clarity in the quotation in Second AMAR, Appendix 3, page 10, reporting a question of the prosecutor:

> She was crying and there was beating and beating and she just stopped. **Is that what you are telling me? - Okay - now do you remember what we were talking about a while ago about telling the truth and all that. Is that the truth?**

(Emphasis added).

(12) In the Court's opinion, defendant's allegation that the prosecutors "plant[ed] the information" necessary to get a conviction is not supported by the facts before the Court and is contrary to the evidence of record. First, the transcript demonstrates the reason for Scott not reporting the shakings to the police -- he was afraid for himself and his mother. The reasons for these fears are apparent from testimony in the transcript (e.g., the evidence of defendant's abusive treatment of Scott's mother, and the testimony of physicians pointing to the conclusion that Susie, a defenseless baby, was maltreated to the extreme). Second, in the Court's opinion, information relied on by defendant (see Second AMAR, pp. 24-28) simply does not convey the message that defendant assigns to it. Furthermore, information in Second AMAR, Appendix 3, pages 11-27, conveys a different message than that expressed by defendant; in these 16 pages, Scotty discusses at great length his observations of defendant shaking Susie. His responses are not "yes" and "no" answers. He provides spontaneous answers and narrative commentary that have the ring of truth. E.g., "There's a crack about that big and I just peeked in [and Johnny] was shaking her in bed." (Second AMAR, Appendix 3, p 18). Furthermore, Scott's "no" when asked if he remembered when he saw defendant shake Susie was a precise answer at the time; he did not remember the exact time

initially, however, he almost immediately responded in a descriptive manner, as many people would do when asked such a question, by stating that "[i]t was another day [not the day Susie got hurt] . . . Tony and my mama was playing football . . . but he did it about two or three times." (Second AMAR, Appendix 3, p 26). Third, as previously noted, the prosecutors went to great length to impress upon Scott the importance of telling the truth. Their concern for obtaining only truthful information demonstrates that they were not trying to present false evidence (i.e., if they had wanted to plant seeds of deception, they surely would not have began their discussion with Scott with a prolonged discussion of the Bible, Jesus, the necessity for being truthful, and the consequences of lying, as was done). Fourth, considerable expert medical testimony at trial demonstrated that Susie was in fact shaken. E.g., testimony of Dr. Tennison, a child neurologist, stating, inter alia, that some of the hemorrhaging in Susie's brain could certainly have occurred from shaking, that he would not expect to find retinal hemorrhages from such a fall as described to him, that such hemorrhages come from the repeated shaking type action, and that, in his opinion the multiple trauma Susie suffered was attributable to a combination of the blunt force to the head and the element of shaking. (T, Vol 21 p 978). Additionally, Dr.

Azizkan, a professor of pediatric surgery, testified, inter alia, that there was evidence in this case of shaking over and beyond shake impact, such as shaking and hitting the head against something, and that the multiple severe retinal hemorrhages on both sides almost certainly means with as high a confidence as you can have, the child had suffered a severe whiplash, from a shake injury. Dr. Azizkan ascertained that there was a shaking type injury based on a combination of what we saw on the CT scan plus the retinal hemorrhaging. (T, Vol 21 pp 985-87; T, Vol. 22 pp 1083-95). Sixth, defendant offers nothing but speculation to support his claim that the prosecutors convicted him on evidence known to be false. Seventh, concerning the summary position stated in Second AMAR pages 39-41, in the Court's opinion, there are no material differences noted, and the inconsistencies presented are only apparent after the closest of examinations (e.g., page 39: Scott testified at trial that he went inside from playing football because he heard Susie crying, but he told the prosecutors prior to trial that he went in to get water). In the Court's opinion, the inconsistencies, if any, are those that inevitably arise whenever a witness, especially a 10-year-old, is questioned on more than one occasion, and are of de minimis significance. At the bottom line, under the law discussed above in ¶ 9.f, defendant has not presented anything that undermines the Court's confidence in the outcome of the trial proceeding.

10. Defendant's Third AMAR states the following claim, identified as Claim XVI:

> THE INDICTMENT OF THIS DEFENDANT DID NOT INCLUDE ALL THE ESSENTIAL ELEMENTS TO ALLEGE THE CRIME OF FIRST DEGREE MURDER AND DID NOT ALLEGE THE FACTORS NECESSARY TO INCREASE THE PUNISHMENT TO DEATH IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS THE INDICTMENT CLAUSE OF THE FIFTH AMENDMENTS AND THE RIGHT OF JURY TRIAL OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND IN VIOLATION OF ARTICLE I, SECTIONS 1, 19, 22, 23, 24, 35 AND 36 OF THE NORTH CAROLINA CONSTITUTION, AND THE JUDGMENT IN THIS CASE SHOULD BE VACATED AND THE DEFENDANT SHOULD BE AWARDED A NEW TRIAL ON THE CHARGE OF SECOND DEGREE MURDER AS CURRENTLY ALLEGED.

10.a. The claim stated above is based on defendant's claim that the short form indictment charging first degree murder is unconstitutional under Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). For reasons stated below in ¶ 10.b, the Court concludes as a matter of law that this claim is without merit.

10.b. Defendant's "Jones claim" was recently squarely address and rejected by the Supreme Court of North Carolina in State v. Wallace, __ N.C. __, __ S.E.2d __ (2000), 2000 N.C. LEXIS 350. After discussing Mr. Wallace's contentions similar to those raised by Mr. Burr, Wallace states:

> Defendant has not cited, and we have not discovered, any United States Supreme Court case which has applied the Due Process Clause of the Fourteenth Amendment in a

> manner which requires that a state indictment for a state offense must contain each element and fact which might increase the maximum punishment for the crime charged. Furthermore, it is informative to note the United States Supreme Court has specifically declined to apply the Fifth Amendment requirement of indictment by grand jury to the states via the Fourteenth Amendment. See Hurtado v. California, 110 U.S. 516, 28 L. Ed. 232, 4 S. Ct. 111 (1884). The Court's refusal to incorporate the grand jury indictment requirement into the Fourteenth Amendment along with the lack of precedent on this issue convinces us that the Fourteenth Amendment does not require the listing in an indictment of all the elements or facts which might increase the maximum punishment for a crime. Indeed, the Supreme Court specifically stated that its decision in Jones "announced [no] new principle of constitutional law, but merely interpreted a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century." Jones, 526 U.S. at 251-52 n.11, 143 L. Ed. 2d at 331 n.11. In light of our overwhelming case law approving the use of short-form indictments and the lack of a federal mandate to change that determination, we decline to do so. Defendant's arguments in objection to his indictments for first-degree murder, first-degree rape, and first-degree sexual offense are without merit and are overruled.

2000 N.C. LEXIS 350, *46-*47. This Court must follow Wallace.

11. The Court now turns to defendant's Motion for Discovery (X-rays and CT Scans) dated 13 May 1999, making and entering the following findings of fact, conclusions of law, and comments:

11.a. By his CERTIFICATE OF DISCOVERY filed with the Court on 22 June 1999 (Appendix 4 of this Order and Memorandum Opinion), District Attorney Robert F. Johnson certified to the Court, under

oath, that he had met with defendant's postconviction counsel at the Sheriff's office in Alamance County on 28 May 1999, allowed them to peruse the Sheriff's investigative files, and thereafter, on 22 June 1999, provided postconviction counsel copies of all items identified in the CERTIFICATE OF DISCOVERY. The CERTIFICATE OF DISCOVERY also adds:

> I have fully complied with the defendant's discovery motion. Furthermore, defendant's counsel have been allowed to view the entirety of the State's case, both the prosecution files and the sheriff's investigation files. The State has furnished to defendant's counsel copies of all exhibits, documents, reports, notes, prosecution summaries, recordings, and photographs for counsel's review.

11.b. Defendant's motion for discovery asserts, inter alia:

(1) "It has just been recently discovered by counsel for the Defendant that this set [i.e., the set of x-rays and CT scans introduced into evidence and in the possession of the Supreme Court of North Carolina] is not a complete set of x-rays and CT scans made by Alamance County Hospital (through Alamance Health Services, Inc.) and UNC Hospitals"; and,

(2) "Both Alamance Memorial Hospital and UNC Hospitals assisted in the prosecution of this case and therefore their records are subject to discovery under Bates."

11.c. Based on matters of record, the Court finds as a fact that defendant has known of the existence and location of the victim's medical records for years (i.e., at least as early as 30 December 1992). This finding is based on State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (1995), stating, inter alia:

> By letter dated 30 December 1992, the district attorney informed Mr. Collins and Mr. Hoy that the file containing the complete investigative and medical report was available to them, as it had been made available to Mr. Thompson and Mr. Jacobs. Among other things, this file included the investigative report by the sheriff's department laying out the investigation and the witnesses who were interviewed, the names and addresses of the doctors involved at Alamance County Hospital and Memorial Hospital, and the victim's medical records from both hospitals. The district attorney also informed Mr. Collins and Mr. Hoy about X-rays taken at both hospitals and about whom to contact in order to observe these X-rays. Additionally, in this letter, the district attorney informed Mr. Collins and Mr. Hoy about photographs that were taken by the medical examiner and advised them that he had requested doctors to locate and bring to the court drawings, charts, and models of relevant portions of the body in which injuries were found to illustrate their testimony. Thus, defense counsel had access to the medical evidence containing the necessary evidence they required regarding the need for an expert for two months prior to trial, and having observed the evidence and medical testimony at trial, defendant has had ample opportunity to show how his case would have been better prepared with regard to this evidence had the continuance been granted, or to show that he was materially prejudiced. He has failed to do so.
>
> Further, the DSS report on Bridges was referenced in the investigative report by the sheriff's department as well as in the medical records from Memorial Hospital,

> both of which were contained in the file made available to defense counsel prior to January 1993. Counsel for the defense could have requested the full report from DSS at this time. In any event, as we held previously, the file did not contain evidence relevant to third-party guilt. Thus, defendant has also failed to show his case would have been better prepared with regard to this evidence had the continuance been granted or that he was materially prejudiced. Defendant's ninth assignment of error is overruled.

341 N.C. at 296-97, 461 S.E.2d 619-461 S.E.2d 620 (emphasis added).

11.d. The Court concludes as a matter of law that

(1) Neither N.C.G.S. § 15A-1415(f) nor State v. Bates, 348 N.C. 29, 497 S.E.2d 276 (1998), imposes an obligation on the State to make available to postconviction counsel in capital cases medical records not contained in either law enforcement or prosecutorial agency files. See Bates, stating, inter alia:

> [W]e read this phrase as allowing the State to exclude from its "complete files" only specific types of information which the State is elsewhere prohibited by law from disclosing. For example, N.C.G.S. § 7A-675 prohibits the disclosure without court order of confidential juvenile court records.

348 N.C. at 35, 497 S.E.2d 279-80.

(2) Neither Alamance Memorial Hospital (a private incorporated hospital) nor UNC Hospital (a state agency) are law enforcement or prosecutorial agencies. Medical records maintained by these hospitals are not public documents. Disclosure of medical records of these hospitals must be in accordance with the law that

protects confidential records. Thus, just as Bates does not mandate disclosure of juvenile court records without a court order, Bates does not mandate disclosure of confidential hospital records without a court order. The aforementioned hospitals do not become prosecutors or investigators whenever a member of the respective hospital staffs is either called as a witness at a trial or discusses the cause of a baby's death with either the district attorney or a law enforcement investigator.

(3) Disclosure of private medical information is strictly limited by statute. See Adams v. Lovette, 105 N.C.App. 23, 411 S.E.2d 620 (1992), stating, inter alia, that N.C.G.S. § 8-53 provides in pertinent part as follows:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon. . . . Any resident or presiding judge in the district, either at the trial or prior thereto, . . . may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.

105 N.C.App. at 29, 411 S.E.2d at 623-24. "[T]he physician-patient privilege has no common law predecessor and is entirely a creature of statute. (citation omitted). N.C.G.S. § 8-53 sets forth the procedure to compel disclosure of information which ordinarily is

protected by the doctor-patient privilege. Such information may be disclosed by order of the court if in the opinion of the trial judge disclosure is necessary to the proper administration of justice. This decision is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully challenge the ruling. (Citation omitted)." State v. Drdak, 330 N.C. 587, 591-92, 411 S.E.2d 604, 330 N.C. 587, 607 (1992). "The law allows the trial court discretion to require disclosure of privileged communications so long as the disclosure is `necessary to a proper administration of justice.' (Citations omitted)." State v. McAbee, 120 N.C.App. 674, 684, 463 S.E.2d 281, 286-87 (1995). Accord State v. Adams, 103 N.C.App. 158, 404 S.E.2d 708, 710 (1991) (Medical records for treatment purposes are privileged and the contents of such records may be disclosed only if, in the opinion of the trial court, disclosure is necessary to a proper administration of justice. N.C.G.S. § 8-53 (1986)).

11.e. Defendant has not moved for discovery under the Court's inherent power to order discovery. He relies solely on N.C.G.S. § 15A-1415(f), and Bates, authorities that do not mandate postconviction discovery of files held by hospitals.

(1) Assuming arguendo that defendant's motion is also a motion for the Court to exercise its inherent authority to order

discovery, in the exercise of its discretion, the Court denies the request for an order directing disclosure of additional medical records.

(2) Assuming arguendo that defendant's motion is also a motion for the Court to exercise its inherent authority to order discovery, the Court exercises its discretion by denying the request for reasons that include the following: (a) defendant had the opportunity to seek such discovery prior to trial and at trial, and did not do so; (b) defendant has waived entitlement to discovery not mandated by N.C.G.S. § 15A-1415(f), and Bates, by not making a timely discovery motion at trial; (c) such a motion is now procedurally barred because it was not raised at trial; (d) the entertaining and granting of such a motion expands the perimeters of the limited remand order of the Supreme Court of North Carolina; and, (e) the granting of such a motion is not in the interest of justice because defendant has always had access to a proverbial mountain of medical evidence in this case, and the State is entitled to reach a point of finality in litigation. See authority cited above in ¶ 9.d (cases discussing the principle of law that a defendant waives entitlement to discovery by failing to make a timely motion for discovery at trial).

ORDER

Upon reconsideration in light of Bates and McHone pursuant to the limited remand of the Supreme Court of North Carolina, and further consideration of motions and material submitted by defendant and the State after the limited remand, the Court MAKES AND ENTERS THE AFOREMENTIONED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND COMMENTS. Furthermore, the Court MAKES AND ENTERS THE FOLLOWING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS:

a. That neither Bates nor McHone requires the Court to reverse in whole or in part the Court's orders of 3 October 1997, except for the decision denying defendant discovery of "work product" and the Court's previous reliance on Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), and its progeny;

b. That the State's voluntary disclosure of all investigative and prosecutorial files, including "work product" and medical records of the victim in the possession of State law enforcement and prosecutorial agencies, moots any issue concerning discovery pursuant to Bates, and demonstrates that the State has complied with the requirements of N.C.G.S. § 15A-1415(f);

c. That defendant's Motion for Hearing on Defendant's Discovery Motion dated 23 October 1998 is DENIED as moot;

d. That defendant's Motion for Discovery (X-rays and CT Scans) dated 13 May 1999 is DENIED;

e. That, considering all the circumstances before the Court, the Court's prior decision to deny defendant's request for an evidentiary hearing comports with McHone;

f. That defendant is not entitled to an evidentiary hearing;

g. That the Court AFFIRMS THE COURT'S DECISIONS AND ORDERS ISSUED ON 3 OCTOBER 1997, EXCEPT FOR THE DECISION DENYING DEFENDANT DISCOVERY OF "WORK PRODUCT" AND THE COURT'S STATED RELIANCE ON LEGAL AUTHORITY THE EFFICACY OF WHICH HAS BEEN CHANGED BY COURT DECISIONS PUBLISHED AFTER 3 OCTOBER 1997 (e.g., as indicated above in ¶ 7.c, the Court has not relied on Lockhart v. Fretwell);

h. That the State's Motion for Summary Denial of Defendant's Motion for Appropriate Relief (as amended) is ALLOWED;

i. That defendant's Motion for Evidentiary Hearing is DENIED;

j. That defendant's Motion for Appropriate Relief, with all amendments, is DENIED; and,

k. That the Clerk of Court is ORDERED to mail a certified copy of this Order and Memorandum Opinion to the Supreme Court of North Carolina, the District Attorney for Judicial District 15A, postconviction counsel for defendant, and the Special Deputy

Attorney General representing the State.

SO ORDERED, this 15th day of June 2000.

James C. Spencer, Jr.
Resident Superior Court Judge
Judicial District 15A

APPENDICES

1. Copy of affidavit of 25 November 1998 of District Attorney Robert F. Johnson and Chief Assistant District Attorney Bradley R. Allen.

2. Copy of affidavit of 25 November 1998 of Sheriff Richard L. Frye.

3. Copy of affidavit of 5 May 1999 of District Attorney Robert F. Johnson.

4. Copy of Certificate of Discovery of 21 June 1999 executed by District Attorney Robert F. Johnson.

A TRUE COPY OF THE ORIGINAL
This 15-08
C.S.C

APPENDIX N

1

STATE OF NORTH CAROLINA COUNTY OF ALAMANCE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 91 CRS 21905; 21906; 21908; 21909
STATE OF NORTH CAROLINA)) vs.)) JOHN EDWARD BURR,) DEFENDANT)	STATE'S AFFIDAVIT REFERENCE DEFENDANT'S POST CONVICTION DISCOVERY MOTION

The undersigned affiants do hereby depose and say:

1. Robert F. Johnson is the District Attorney for Judicial District Fifteen A, Alamance County, and Bradley R. Allen is the Chief Assistant District Attorney for the same district.

2. Together we have reviewed the files of the Alamance County Sheriff's Department with reference to the above cases. The murder of Tarrisa Sue O'Daniel was investigated entirely by the Alamance County Sheriff's Department, and no other law enforcement agency participated in the same. Specifically, there was no investigation by the North Carolina State Bureau of Investigation, nor was there any information submitted to the North Carolina State Bureau of Investigation Laboratory.

3. Together we have reviewed the investigative files of the Alamance County Sheriff's Department, and we have compared the same to the files maintained in the District Attorney's office here in Alamance County.

4. Previously, we have made complete discovery to the Defendant's Motion For Appropriate Relief counsel, Mr. J. Kirk Osborn, of everything in the District Attorney's files, save and except work product.

5. By comparing the Sheriff's files to the District Attorney's files, we find that in the Sheriff's files are handwritten notes which were transcribed into typed interviews. Those typed interviews are retained in the Sheriff's files, and verbatim copies were furnished by the Sheriff to the District Attorney's office in Alamance County. Those verbatim copies were made available to the Defendant's trial counsel and were also made available for inspection by Defendant's post conviction counsel. Copies of the original handwritten notes made by Sheriff's investigators were not furnished to the District Attorney's office. Only the typed report was placed in the District Attorney's files.

(a) Furthermore, within the Alamance County Sheriff's Department files there were six audio tapes containing dictation of statements made by Misti Wade, Christi Wade, Rita Wade, Scott O'Daniel, Donald Wade, Valeria Michaels, Deborah Michaels and miscellaneous dictation, all of which had been reduced to transcribed reports which are contained in the files of the District Attorney, and which have been provided on discovery to Defendant's trial counsel, and made available for inspection by Defendant's post conviction counsel. The audio tapes themselves were not in the District Attorney's files, but remain in the files of the Alamance County Sheriff.

(b) Within the files of the Alamance County Sheriff's Department are a number of photographs and one video tape, which were provided for inspection by Defendant's trial counsel, but which were not introduced into evidence at the trial by either party. The photographs are both Polaroids and 35 MM shots of the victim Tarrisa Sue O'Daniel taken at the University of North Carolina Memorial Hospital, and the video tape is a video made of the victim also in the hospital. These photographs, and the video tape, portray the victim lying in a hospital bed connected to various medical apparatus.

(c) Within the Alamance County Sheriff's Department files are a number of x-ray photographs taken at Alamance County Hospital, and North Carolina Memorial Hospital, which were not marked as exhibits or introduced into evidence. These x-ray photographs were made available for discovery to Defendant's trial counsel, but have not been retained in the District Attorney's files but in the Sheriff's files.

(d) Inspection of the Sheriff's files reveals miscellaneous individual notes recorded on scraps of paper or notebook paper, criminal record checks, a polygraph report, a rough diagram, a warden's office report, a letter dated September 3, 1991, from Ricky W. Champion, Assistant District Attorney, to Capt. Dan Qualls reference the DSS (Department of Social Services) report alleging physical abuse following the victim's death, a list of names, and three poems written by Lisa O'Daniel about Susie.

6. Also available is a video tape made by Donald and Rita Wade of the victim Susie O'Daniel some weeks prior to her death.

7. We have further examined the files of the District Attorney, the files of the Sheriff, and the records retained by the Alamance County Clerk of Court's office to determine what, if any, exhibits may be duplicated in such files. In the course of that inspection it appears that a number of exhibits were furnished by the Clerk of Court to the Honorable Christie Cameron, Clerk of the North Carolina Supreme Court, and are retained on file by the Clerk of the North Carolina Supreme Court. These include medical records, x-rays, photographs, and audio tapes which were introduced into evidence at the Defendant's trial.

8. The undersigned District Attorney and Assistant District Attorney desire to moot any issues with reference to post conviction discovery under the *Bates* decision, and will make available to Defendant's post conviction counsel any and all the above for his inspection, including District Attorney work product.

This the 25th day of November 1998.

Robert F. Johnson, District Attorney
Affiant

Bradley R. Allen, Assistant District Attorney
Affiant

On this the 25th day of November 1998, the foregoing affiants Robert F. Johnson and Bradley R. Allen personally appeared before me, a Notary Public, and being first duly sworn, attested to the truth and veracity of those things contained in the foregoing Affidavit.

PATRICIA OWEN NOTARY PUBLIC CUMBERLAND COUNTY, N.C.

Patricia Owen

Patricia Owen, Notary Public
My Commission Expires 02/05/2000

A TRUE COPY OF THE ORIGINAL
This the 25th day of Nov. 1998
C.S.C.

2

STATE OF NORTH CAROLINA
COUNTY OF ALAMANCE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91 CRS 21905; 21906; 21908; 21909

STATE OF NORTH CAROLINA	)	SHERIFF'S AFFIDAVIT
	)	
vs.	)	REFERENCE DEFENDANT'S
	)	
JOHN EDWARD BURR,	)	POST CONVICTION DISCOVERY MOTION
DEFENDANT	)	

I, Sheriff Richard L. Frye, being first duly sworn, do depose and say:

1. I am the duly elected Sheriff of Alamance County, and I held this office on August 25, 1991, the date of Tarrisa Sue O'Daniel's death.

2. Detective Captain Dan Qualls and Detective Roney Allen of the Alamance County Sheriff's Department conducted the entire investigation into the death of Tarrisa Sue O'Daniel.

3. I have provided to the Alamance County District Attorney's office for inspection copies of all my files retained in the foregoing styled cases. This includes rough notes, photographs, x-rays, a video tape, audio tapes, and transcribed interviews and notes, and hospital records from Alamance County Hospital and North Carolina Memorial Hospital in Chapel Hill.

This the 25th day of November 1998.

Richard L. Frye, Sheriff of Alamance County
Affiant

On this the 25th day of November 1998, the foregoing affiant Richard L. Frye personally appeared before me, a Notary Public, and being first duly sworn, attested to the truth and veracity of those things contained in the foregoing Affidavit.

Patricia Owen
Patricia Owen, Notary Public
My Commission Expires 02/05/2000

A TRUE COPY OF THE ORIGINAL
USCA

3

STATE OF NORTH CAROLINA	)	IN THE GENERAL COURT OF JUSTICE
	)	SUPERIOR COURT DIVISION
ALAMANCE COUNTY	)	91 CRS 21905-06, 21908, 21909
STATE OF NORTH CAROLINA	)	
	)	
VS.	)	AFFIDAVIT
	)	
JOHN EDWARD BURR,	)	
Defendant	)	

THE UNDERSIGNED, BEING FIRST DULY SWORN, DEPOSES AND SAYS:

I, Robert F. Johnson, am the duly elected District Attorney of Alamance County, North Carolina. I was the lead prosecutor in 1993 during the trial of John Edward Burr, Defendant, for the charge of First Degree Murder.

I.

I have reviewed the entire file in the above-styled case, and have made it available to defendant's counsel for inspection, which they have done. Requested by defendant's counsel were the original tape recordings made during interviews conducted by myself and State's co-counsel, Mr. Bradley R. Allen. Copies of transcribed notes of those taped interviews which were a part of my work file have previously been furnished to defendant's counsel. I have personally conducted a search of all materials contained within the John Burr file. The original taped interviews were not in the file. However, I did locate four cassette tapes which contain the original recordings of those meetings between witnesses, Mr. Allen, and me. I have had copies of those tapes reproduced, and furnished those copies to defendant's counsel as of Friday, April 30th, 1999. These reproduced tapes were mailed by my secretary to Mr. Kirk Osborn, lead counsel for defendant. I have also offered both Mr. Osborn and Mr. Conner the opportunity, should they desire, to come listen to the original tapes in my office.

II.

I have further inquired of the Alamance County Sheriff's department whether or not they possess any other taped materials. By letter from Sheriff Richard L. Frye to me, I am informed that the only interview tapes that are in the case file are as follows:

Misty Wade
Christy Wade
Scott O'Daniel
Donald Wade
Valerie Michaels
Deborah Michaels.

A TRUE COPY OF THE ORIGINAL

Copies of those taped interviews were in the original sheriff's investigative report. They were made available to trial counsel, appellate counsel, and post-conviction counsel.

III.

I did not turn over to defendant's trial counsel copies of interviews conducted by Mr. Allen and me with the state's witnesses because I did not believe it to contain any material required to disclosed pursuant to *Brady*. Furthermore, I also considered these interviews to be a part of my work product pursuant to 15A-903. These interviews were taped in an informal format during conversations with some witnesses and the victim's mother. In turn, I had my secretary to type transcripts in rough draft fashion. The transcripts are a reasonable facsimile of the material contained on the audiotape. These interviews were used to help me prepare for trial. I had come to Alamance County on or about October 22nd, 1992. This case was assigned to me in November of that year, and I was asked to have it ready to go to trial in December. We actually began trial on March 8th, 1993.

Both Mr. Allen and I at all times urged witnesses to provide us truthful information.

IV.

I did provide to defendant's four previous trial counsel all discoverable materials including all investigative reports of law enforcement agencies, and medical reports. Defendant asked the court to remove his first two appointed lawyers. Judge Gregory Weeks allowed defendant's motion in December, 1992. At that time he appointed two more attorneys to represent defendant, and continued defendant's case into 1993. Prior to the removal of defendant's first two attorneys, I had gone to UNC-Chapel Hill North Carolina Memorial Hospital and obtained copies of all the victim's medical records. I placed these into a file folder which I furnished to defendant's first attorneys, allowing them to take them to their offices to reproduce the same.

After defendant's first two lawyers were removed at defendant's request, I again allowed his substitute counsel the same opportunity to copy the medical file. To my knowledge, this was in fact done. I also allowed defendant's new counsel the opportunity to review all law enforcement investigative reports. I did not provide them with copies of Mr. Allen's and my interviews with witnesses because, again, I viewed it both as work product, and non-*Brady* material.

V.

There were no grants of immunity given to any witnesses. Specifically, the victim's mother Lisa O'Daniel was not a suspect in the murder of her daughter. The investigation and evidence at hand did not in any way point to her as having had anything

to do with her daughter's death. There was no evidence connecting Lisa O'Daniel to the murder of Susie O'Daniel.

This the 5th day of May, 1999.

ROBERT F. JOHNSON, AFFIANT

STATE OF NORTH CAROLINA
COUNTY OF WAKE

Sworn and subscribed to me, a Notary Public,

this 5th day of May, 1999.

My Commission expires: 12/28/99.

A TRUE COPY OF THE ORIGINAL
This

4

FILED
1999 JUN 22 AM 9:22
ALAMANCE COUNTY, C.S.C.
BY

COPY

STATE OF NORTH CAROLINA) IN THE GENERAL COURT OF JUSTICE
) SUPERIOR COURT DIVISION
ALAMANCE COUNTY) 91 CRS 21905-06, 21908, 21909
)
STATE OF NORTH CAROLINA)
)
VS.) CERTIFICATE OF DISCOVERY
)
JOHN EDWARD BURR,)
Defendant)

NOW COMES ROBERT F. JOHNSON, DULY ELECTED DISTRICT ATTORNEY FOR ALAMANCE COUNTY, PROSECUTORIAL DISTRICT 15-A, and shows unto the Court that on May 13th, 1999 I was served by Defendant's counsel with a document entitled "Motion for Discovery (X-Rays and CT Scans)". Accordingly, I have complied fully with Defendant's Discovery requests and now hereby certify as follows:

I.

On Friday, May 28th, 1999 I met with defendant's attorneys Messrs. J. Kirk Osborn and Ernest L. Conner, Jr. Together we went to the office of the Alamance County Sheriff where the Sheriff's investigative file was presented to defendant's attorneys in my presence. They were allowed to peruse the file and request copies of any documents or exhibits contained therein. This they did, after which they provided me with a list of the documents, exhibits, and tape recordings which they desired to be reproduced.

II.

I herewith am serving upon defendant's counsel all those items requested by them to be duplicated. They are listed as follows:

1. Copy of mini-cassette taped interview with Misty Wade and Christy Wade by Roney N. Allen and Dan Qualls of the Alamance County Sheriff's Department, dated 9/5/91;

2. Copy of mini-cassette taped interview with Christy Wade and Rita Wade by Roney N. Allen and Dan Qualls of the Alamance County Sheriff's Department, dated 9/5/91;

3. Copy of mini-cassette taped interview with Scott O'Daniel and Donald Wade by Roney N. Allen and Dan Qualls of the Alamance County Sheriff's Department, dated 9/5/91;

4. Copy of mini-cassette taped interview with Valerie Michaels and Deborah Michaels by Roney N. Allen and Dan Qualls of the Alamance County Sheriff's Department;

5. Supplement by Roney Allen dated 9/20/91, mini-cassette tapes 1 & 2;

6. Handwritten notes dated 8/25/91 re Tarissa Sue O'Daniel;

7. Handwritten notes numbered consecutively "1" through "27" (note: there is no page "23", apparently an error made in numbering);

8. Handwritten note dated 8/26/91 re Margett (sic) Costner;

9. Handwritten note dated 8/27/91 re Dr. Robert K. Kanter;

10. Copy of white legal pad with handwritten notes;

11. Copy of Alamance County Hospital Consent for Release of Medical Information;

12. Copy of Clinic Note re "well child care";

13. Handwritten note by Don Lloyd 9/17/91;

14. Copies of four loose notes contained within white legal pad;

14. Copies of X-rays and CT scans of Tarissa Sue O'Daniel in custody of Sheriff of Alamance County totaling 14 films. Pursuant to defendant's counsel's request, three sets of copies of each film have been reproduced;

15. Copy of taped interview with Lisa O'Daniel conducted by Robert F. Johnson and Bradley R. Allen (This is a new copy of the copies of tapes previously furnished to defendant's counsel, which, I am advised, did not reproduce the first time.).

16. Copy of bill for reproducing X-rays and CT scans in the sum of $210.00 total.

III.

I have fully complied with the defendant's discovery motion. Furthermore, defendant's counsel have been allowed to view the entirety of the State's case, both the prosecution files and the sheriff's investigation files. The State has furnished to

defendant's counsel copies of all exhibits, documents, reports, notes, prosecution summaries, recordings, and photographs for counsel's review.

This the 21st day of June, 1999.

ROBERT F. JOHNSON
DISTRICT ATTORNEY
Prosecutorial District 15-A
Alamance County

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Discovery Certificate has been duly served upon the defendant by providing to his attorneys of record a copy thereof by the following method:

___X___ hand delivery to: Mr. J. Kirk Osborn or to a person duly authorized to accept service for him Shawn Ferguson served 6/21/99

___X___ by depositing a copy of the same with the U. S. Postal Service, first-class postage prepaid, addressed to:

Mr. Ernest L. Conner, Jr.
Attorney at Law
P. O. Box 8668
Greenville, N. C. 28735

This the 22 day of June, 1999.

ROBERT F. JOHNSON, DISTRICT ATTORNEY

Copy also provided to Mr. Edwin W. Welch, Assoc. Attorney General, P. O. Box 629, Raleigh, North Carolina.

A TRUE COPY OF THE ORIGINAL
This

APPENDIX O

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
ALAMANCE COUNTY	FILE NOS. 91 CRS 21905-06, 08-09
STATE OF NORTH CAROLINA)) VS.)) JOHN EDWARD BURR,) DEFENDANT.)	SECOND AMENDMENT TO MOTION FOR APPROPRIATE RELIEF

FILED
99 FEB 24 PM 1:50
ALAMANCE CO., N.C.
BY

TO: THE HONORABLE PRESIDING JUDGE OF THE SUPERIOR COURT OF ALAMANCE COUNTY

NOW COMES the Defendant, JOHN EDWARD BURR, by and through his undersigned counsel, pursuant the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, 21, 23, 24, 27, 35 and 36 of the North Carolina Constitution and the provisions of N. C. Gen. Stat. § 15A-1411 *et seq.*, and hereby amends his Motion for Appropriate Relief filed on September 27, 1996 and first amended on September 2, 1997, as hereinafter set forth and again requests that this Honorable Court grant his Motion for Appropriate Relief, as amended. John Burr is an innocent man and stands convicted because the State through its prosecutors manipulated and developed false testimony in order to obtain a conviction.

I. THE STATE KNOWINGLY PRESENTED FALSE EVIDENCE WHICH CREATED A MATERIALLY FALSE IMPRESSION REGARDING THE FACTS OF THE CASE AND THE CREDIBILITY OF WITNESSES.

1. The testimony of Lisa O'Daniel and Scott Ingle presented a materially false impression to the jury. "[T]here is a reasonable likelihood that this false testimony could have affected the judgement of the jury." *United States v. Agurs*, 427 U.S. 97,

103 (1976); *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 1935 (1935); *Routly v. Singletary*, 33 F.3d 1279 (1994); *Campbell v. Reed*, 594 F.2d 441 (4th Cir. 1979); *Boone v. Patrick*, 541 F.2d 441 (4th Cir. 1976).

2. Pursuant to the directive of the North Carolina Supreme Court, the State provided the Defendant with some of the work product discovery which the State had previously withheld. The material reviewed by post-conviction counsel for the Defendant has revealed a cache of evidence which could have been used to impeach the State's main witnesses against the Defendant. Not only does this new material substantially and materially impeach Lisa O'Daniel and Scott Ingle and shows that 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. The following are some examples from statements of Lisa O'Daniel which could have been used to impeach her had these statements been provided to the Defendant as required by the United States and North Carolina Constitutions. These examples are listed by way of illustration and not by way of limitation.

A. Lisa O'Daniel's statement of February 24, 1993.

3. On February 24, 1993, the prosecutors interviewed Ms. Lisa O'Daniel at their office and tape recorded the interview. Although this interview transcription is incomplete and names of persons speaking are not designated, in most instances from the

context it is possible to determine who is talking.[1]

4. **Johnny Did Not Act Like He Would Hurt Susie.** The prosecutors confronted Lisa O'Daniel with the fact that somebody caring for Tarissa should have noticed that someone, specifically Johnny Burr, was abusing the baby. Ms. O'Daniel then stated that Johnny did not act like he would hurt Tarissa.

> PROSECUTOR: The fact is, that if you talked to folks long enough they will ask the question. I don't have to ask it. Somebody should have known. Somebody should have know (sic) this child was being abused. And the reason for that is because, we can't get around this. Dr. Wilcox (sic) sees child at 2:55 A.M. August 25. He noticed at that time. Well you say you never saw him hurt her. . . . Didn't you ever suspect it that maybe he was being a little rough with Susie?
>
> LISA O'DANIEL: He did not act like he would hurt her.

Tp. 6

5. Yet during her trial testimony, Lisa listed a litany of acts by John Burr which suggested that he would hurt Tarissa. These "acts" were encouraged, prepared and developed by the prosecution. For example, the prosecution instructed Lisa O'Daniel not to say anything good about Johnny Burr. *See* section (c),

---

[1]The undersigned counsel have written Mr. Johnson requesting the actual tapes of these interviews so complete transcriptions can be made. That request was made on January 20, 1999. Mr. Johnson has not responded to this request.

infra.

6. **Health problems of Tarissa.** During this interview, Ms. O'Daniel described how much difficulty she was having with Tarissa and her throat problem. According to Ms. O'Daniel she had been unable to get Tarissa to eat anything from July 31, 1991 through August 21 or 22, 1991, almost one month.

> All I can say is when her throat messed up Susie didn't have much activity to her. She just laid her head over my arm and let the saliva run out because she couldn't even swallow.

Tp. 16

> [I took Susie to the County Hospital and then took her to Chapel Hill Hospital on] the 26th [of July, 1991] and it is around the 27th [of July, 1991] or something when I called them back. Cause I not (sic) get her to eat any and it might have been that following Monday [July 31, 1991]. But I called them back, cause I could not get her to eat. . . It took me till about two or three days before I could be her to eat before that Saturday [August 24, 1991] when he hit that.

Tp. 17

> Because when [Susie's] throat was messed up she didn't play.

Tp. 18

7. **Ms. O'Daniel Instructed to Disparage Defendant.** The prosecutors instructed Ms. O'Daniel not to say anything good about Johnny because it would not aid the prosecution.

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

it on you.

Tp. 7

8. **Immunity from Prosecution.** During the interview on February 24, 1993, the prosecutors expressed disbelief in Lisa O'Daniel's denials that she saw nothing wrong with her daughter despite her daughter allegedly having broken legs for at least ten days. Nevertheless, the prosecutors gave Ms. Lisa O'Daniel a promise of immunity for her testifying in this matter:

> And I am going to tell you, what's going to make you look the best in front of the jury, you are going to look bad, but what's going to give you credibility and what's going to give you believability is if you come out and you know, I don't know, if you say, look, yeah, I saw this going on but I was in love with [Johnny Burr].

Tp. 7

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

Tp. 7

> And there are going to be people on [the jury] who very well may say why isn't she charged? That are going to say why, what is the sheriff protecting? What is the DA protecting? But the important thing is that what are you protecting? And why keep saying we can determine DSS that they have investigated this they ain't took your kids yet. He might come up with something at the trial, I don't know what, it could be the truth or it could be a lie. And they are going to say hold it we want to reopen this case. We can't control that. And I'm going to tell you, what's going to make you look the best in front of the jury, you are going to look bad, but what's going to give you credibility and what's going

to give you believableness is if you come out and you know, I don't know, if you say, look, yeah I saw this going on but I was in love with [Johnny Burr].

Tp. 7

[Y]ou were the person that the jury -- the women and the men -- and anybody that has kids and don't have kids it (sic) going to say should have known.

Tp. 8

The bottom line Lisa is how could, how could you not see what was going on with your children and your boyfriend?

Tp. 14

What I am trying to figure out, were you trying to protect him?

Tp. 15

How could you miss broken bones?

Tp. 16

Lisa, I want to believe you. I just don't, I just would like to understand how this child had the injuries she had and nobody even her own mother noticed it.

Tp. 18

You screwed up. I mean there is no two ways about it -- you screwed up.

9. After the prosecutors expressed their disbelief in Ms. O'Daniel's story, they offered her immunity.

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.

Tp. 21

10. Later in the interview, the prosecutors again note Lisa O'Daniel's curious lack of interest in her daughter when her daughter is getting ready to go to the operating room.

> It is curious twist that here your daughter is getting ready to be operated on and rather than being up on, in the waiting room, you down in the motel room with your boyfriend [Johnny Burr]. I mean, that, it it looks funny.

Tp. 23

11. During her trial testimony, Ms. O'Daniel denied any type of arrangement with the prosector's office:

> MR. COLLINS: Have you any arrangements with the District Attorney's office or law enforcement officers concerning your testimony and any potential charges against you or possible plea to charges that might be brought against you?
>
> MS. O'DANIEL: No, sir.

Vol. 18, p. 219

12. **Lisa O'Daniel Instructed Her Family to Lie.** The prosecutors even confronted Lisa about her instructions to her family to lie to the prosecutors about her baby's problems:

> I mean, you see this is what we, he asked you yesterday [February 23, 1993]. You know when you go to your sister and others saying, "You can't go telling them that shit. That [Susie] is doing a lot of crying. You get me in trouble."

Tp. 7

> When Teresa [Lisa O'Daniel's sister] tells us [the prosecutors] yeah, she [Lisa O'Daniel] told us to tell the Court and to tell whoever,

> don't tell that bunch of junk -- that'll make me [Lisa O'Daniel] look bad.

Tp. 21

> [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 every time you touched 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. And that's why we've been beating our month (sic) -- even before when we were getting it ready the first time. How in the world can you have two broken legs and broken arm and nobody know anything about it? How in the world did the baby not cry? And the only one that's come in here and told up front that the baby cried was your sister. And she's the same one, of course she didn't tell us everything -- she didn't tell us that you told her to lie to us. I mean that you might not have said I want you to lie. But what in effect you did was have her lie, or wanting her to lie.

Tp. 22

13. When the prosecutor directly accused Ms. O'Daniel of counseling her sister to lie, Ms. O'Daniel admitted to doing it.

> PROSECUTOR: But you wanted her to say don't tell them that the baby cried all the time. That'll make me look bad.
>
> MS. O'DANIEL: Yeah, I did.

Tp. 22

14. Then, later in the interview, the prosecutor again notes how Ms. O'Daniel's family conspired to make it look like there was nothing wrong with Tarissa before August 24, 1991.

> It was like a script that everybody came in here and said. She was a normal baby. She's normal. Happy baby. Happy. Cries a little Not much at all.

Tp. 28

15. **Prosecutor's disbelief of Rita, Christy and Misty Wade.**

The prosecutors expressed disbelief in statements made to them by Rita, Christy and Misty Wade.

> We talked with them, is what I want to know, is I've talked to them, we talked to them, Christy, Misty, Rita. Nothing is wrong with [Susie]. She didn't cry. She was a normal baby.

Tp. 17

> They didn't say that the doggone child was crying or nothing was wrong with it.

Tp. 18

> And, if you've got any juror that up there that's ever had a broken leg or broken bone, and here Rita is going to say this baby seven to ten days after breaking its legs -- both legs -- was standing on her lap pushing down. And I'm not saying that it didn't happen -- I'm just saying does it sound believable to you?

16. **The prosecutors told Lisa O'Daniel what she ought to say when she testified.** The prosecutors continually reminded Ms. O'Daniel how she ought to testify.

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

Tp. 7

> And I'm going to tell you, what's going to make you look the best in front of the jury, you are going to look bad, but what's going to give you credibility and what's going to give you believableness is if you come out and you know, I don't know, if you say, look, yeah I saw this going on but I was in love with [Johnny Burr].

Tp. 7

> You are going to look bad -- but you are going to be believable to the jury if you get up there and say members o of the jury, only you don't say it like this, but in effect you say, I messed up. I was stupid. I was scared of him. I was afraid of him. I loved him. Or whatever it is.

Tp. 21

> And one of your answers, you may, I don't know, maybe the explanation is that you were just blind -- in love -- scared of him -- didn't want to lose him -- didn't think that he would hurt the kid -- or just -- I'm not saying that you were stupid -- but maybe at that point in your life you were just to stupid and didn't pay attention. I don't know. Maybe its a whole combination of all those things.

17. Even though prosecutors gave Ms. O'Daniel's instruction on how she ought to testify, at trial during redirect of Lisa O'Daniel by those same prosecutors Ms. O'Daniel responded as follows:

> PROSECUTOR: Has anybody told you what you ought to say here on the witness stand?
>
> MS. O'DANIEL: No, sir.
>
> PROSECUTOR: Has anyone told you what your testimony should be?
>
> MS. O'DANIEL: No, sir.

Vol. 18, p. 334

18. Trial counsel for Mr. Burr moved pursuant to N.C. Gen. Stat. § 15A-903(f) for prior statements of Ms. O'Daniel prior to the beginning of her cross-examination. (Vol. 17, p. 207) The prosecutors failed to provide trial counsel with the tape recording or the transcription of Ms. O'Daniel's statement given on February 24, 1993. Failure to produce this statement after it was requested by trial counsel was a violation of the statutory law of North Carolina. N.C. Gen. Stat § 15A-903(f); *see also Goldberg v. United States*, 425 U.S. 94 (1976) (holding that when a defendant moves for production of material under the Jencks Act [the act upon which N.C. Gen. Stat. § 15A-903(f) is based], production must include statements of testifying witness obtained by the prosecutor during pretrial preparation). Also, the deliberate concealment of this statement was a violation of the "law of the land" clause of the North Carolina Constitution and the due process clause of the United States Constitution. *Alcorta v. Texas*, 355 U.S. 28 (1957) (holding that a due process violation occurred where prosecutor offered testimony of a witness, which when taken as a whole, gave the jury a false impression squarely refuting the defendant's defense; and which, if the true facts were known by the defense, they could have been used to impeach the government's main witness); *Mooney v. Holohan*, 294 U.S. 103 (1935) (finding a due process violation when prosecutor learned during trial that witness committed perjury but failed to inform defense counsel).

19. The statement of Lisa O'Daniel to the prosecutors on

February 24, 1993, contained statements by Lisa O'Daniel which contradicted earlier statements she had given law enforcement. For example, on August 26, 1991 she stated that she had noticed Susie crying loudly like she cried when Scott Ingle fell with her on August 24, 1991 on August 21, 1991, when Lisa was awaken at four o'clock in the morning and discovered Johnny Burr holding Susie. Yet, when Lisa O'Daniel was interviewed on February 24, 1993, she claimed that this incident occurred on August 14, 1991, one week earlier. This time frame would support an inference that Mr. Burr inflicted serious injury on the baby at that time and would coincide with some of the medical doctors testimony that Tarissa O'Daniel had some fractures which were at least ten days old.

B. Scott Ingle's Statement on February 25, 1993.

20. Scott Ingle's statement tape recorded on or about February 25, 1993 reveals a young man who could not remember anything about the details of the day of Tarissa's medical problems which ultimately lead to her death. Failure of the prosecutors to produce this statement to trial counsel for John Burr violated his due process rights under both the state and federal constitutions. The coaching and instruction done by the prosecutors in taking Scott Ingle's statements are even more egregious than those that evident in Lisa O'Daniel's statement. And like Ms. O'Daniel's statements, the defense was not provided these statements at any time until the State was ordered to provide such statements by the North Carolina Supreme Court.

21. **Preparation of false and misleading testimony.** Before being interviewed, coached and prepared by the assistant district attorneys prosecuting Johnny Burr, Scott Ingle stated that he fell and dropped Tarissa, and then fell on top of her. (*See* portion of Recorded interview of Scott Ingle by Det. Roney Allen on page p. 20 of Defendant's MAR). Furthermore, he told Detective Roney Allen that he had never seen Johnny Burr hurt Tarissa.

> DET. ALLEN: Have you ever seen Johnny do anything to your little sister Susie? Whip her or do anything to her?
>
> SCOTT INGLE: Nope.

(Recorded interview of Scott Ingle by Det. Roney Allen, p. 4)

22. During the prosecutors' interview, Scott Ingle states that he cannot remember much of the events surrounding his fall with Tarissa. The prosecutors seize on his lack of recollection as their first order of business and tell ten-year-old Scott Ingle that he did not cause any injuries to Tarissa.

PROSECUTOR: I want to talk to you some Scott about Johnny and about Susie. Some of the things we were talking about the other day.[2] But I thought it would be better if the three of us could just talk by ourselves so we could talk without having little brothers putting in their two cents worth - that kind of thing. Sometimes it is just easier to talk one at a time. Okay.

PROSECUTOR: I want you to tell me everything that you remember about the night that Susie got hurt.

SCOTT INGLE: Well I was in bed. You mean what I heard and all that.

PROSECUTOR: Just everything that you remember about it - you just tell me everything that you remember about it.

SCOTT INGLE: **I don't know if I can remember** -- I know he shook her and all that -- he shook her and he shook her and he would slam my mama against the wall and all that junk and we heard Susie hollowing and we saw -- she -- he would jerk her a lot -- and you -- **I did fall with her but they said it wouldn't -cause of any damage.**

PROSECUTOR: **You didn't hurt your sister. Okay.**

---

[2]Mr. Burr still has not been provided with a copy of any statement made by Scott on this earlier date, nor has the Defendant been provided with any notes from the prosecutors regarding this earlier statement.

SCOTT INGLE: I know.

PROSECUTOR: Alright.

PROSECUTOR: You need to put that our (sic) of your mind **no matter what anybody says - you did not hurt your sister.**

SCOTT INGLE: Okay.

PROSECUTOR: That was an accident.

SCOTT INGLE: I know cause I tripped over the cord.

PROSECUTOR: Okay - you couldn't help that could you?

Tpp. 2-3 (emphasis added)

23. After this colloquy, Scott Ingle changes his initial statement and testifies[3] that he tripped, fell to his knees and never dropped Tarissa. These facts were crucial to the prosecution's theory of the case and they were developed by the prosecution through the coaching of a 10-year-old and highly suggestive child.

24. Throughout their interview with Scott Ingle, the prosecutors would lead him, and insure that he did not say anything that could be seen as positive for Johnny Burr. For example,

---

[3]It is clear from Scott Ingle's statement and testimony that the prosecutors met with him again, preparing him to testify, and taking him to the courthouse in preparation for his testimony. *See* pp. 2 and 28 of the transcript of Scott Ingle's February 26, 1993 interview. The defense has not been provided with any notes, transcripts, or tape recordings of his statements during this additional coaching session.

SCOTT INGLE: She was happy -- but she started crying because she got hungry and she had to use the bathroom. But he thought she was hungry I reckon because he started feeding her.

PROSECUTOR: Okay -- so she started crying and then that's when he went over and starting shaking her - is that what you are telling me? Or did she start crying after?

SCOTT INGLE: She started crying because she used the bathroom _____ or was hungry and I said that he probably thought she was hungry because he started feeding her.

PROSECUTOR: Okay - that's what I'm wanting to ask you. Okay - when she started crying and that when he went over and grabbed her - did he say anything to her when he grabbed her?

SCOTT INGLE: He said Shhhhhhhhhhhh.

PROSECUTOR: Okay

Tpp. 14-15

PROSECUTOR: Do you know how Susie got those bruises on her?

SCOTT INGLE: No, but I think Johnny - I know Johnny Burr probably did it.

PROSECUTOR: Why?

SCOTT INGLE: I don't think my mama would do it.

PROSECUTOR: Okay. Why do you think Johnny Burr probably did it?

SCOTT INGLE: He was mean and he was the only one there to do. I ain't never liked him.

PROSECUTOR: Now you said he would hit your brother with a switch. Which brothers (sic) did he hit with the switch?

SCOTT INGLE: JJ and _____ and he hit both of us with a belt.

PROSECUTOR: Yeah, and he hit you with a belt.

SCOTT INGLE: Yeah, and mama - my other brother Tony he wouldn't whip him. He wouldn't whip - my mama - mama wouldn't

PROSECUTOR: Alright, now he would - you said that he would slam you (sic) mama against the wall and he would choke her.

SCOTT INGLE: Yeah.

Tp. 3

PROSECUTOR: Well, did he do any of that to your mama the night that Susie got hurt?

SCOTT INGLE: In the daytime he did. He choked her.

PROSECUTOR: He did. Where was she when he choked her?

SCOTT INGLE: Close to my room - you know when you went in and you saw them bunk beds -it was right down where that window was.

PROSECUTOR: I see.

SCOTT INGLE: I mean where - close - right beside the door.

PROSECUTOR: How did he choke her? Can you show me?

SCOTT INGLE: No, but her feet would be off the floor.

PROSECUTOR: . . .

SCOTT INGLE: . . .

PROSECUTOR: Can I ask - Scott did - are you saying that this occurred before the night that Susie got hurt or during -

SCOTT INGLE: It was the day she got hurt and he'd do it almost everyday - he did it almost everyday - I can't think of one day he probably didn't. He always used to do - he choked her the night that Susie died too.

PROSECUTOR: Are you saying - do you know - was it still light outside when he choked her?

SCOTT INGLE: Yeah.[4]

PROSECUTOR: Or was it dark?

SCOTT INGLE: Well, I don't remember - I think he did it when it was dark but I'm not sure.

---

[4]This helpful piece of impeachment information was never known to defense attorneys, and was completely glossed over by the prosecutors as the next question reveals. Scott's answer shows how susceptible was to the prosecutors' tactics.

PROSECUTOR: Let me ask you a couple of things - let's try to put things in order. Sometimes it help (sic) if we kind - if we kind of think about things in the order in which they happened. So lets start - lets start with that Saturday evening - now you were holding Susie - is that right? And where - why were you holding Susie - this is before you tripped over the cord. Why were you holding Susie?

Tpp. 4-5

SCOTT INGLE: Oh, well I was out there playing and we stayed till night and my mama had Susie and I was up there with mama but I was playing around near mama cause I wanted to watch out for Susie cause you know cause she didn't get hurt - And Johnny Burr was mowing the yard and went in and that's when my mama left.[5]

PROSECUTOR: Okay - now do you remember - do you remember anything about the bed - your mama's bed.

SCOTT INGLE: The water bed or _____ bed.

PROSECUTOR: The water bed, yes. Do you know something about that? What do you remember about that.

---

[5]Nothing here was harmful to Johnny Burr, but notice the prosecutor's next few questions and how it suggest to Scott Ingle that something harmful must be added. Scott Ingle never mentioned the negative aspect of the bed being "busted." This evidence was planted in Scott Ingle by the prosecutors.

SCOTT INGLE: What do you mean?

PROSECUTOR: Did something happen with it?

SCOTT INGLE: Oh, I don't think so - might have got - I'll check with them -I think it did cause -

PROSECUTOR: Do you remember how that happened? Were you inside or were you outside when it got busted?

Tpp. 6-7

25. When Scott Ingle's statements about the time line do not fit into the prosecution's theory of the case the prosecutors lead Scott Ingle to see that night or "dark" is what the prosecutors are seeking.

PROSECUTOR: Was it light outside or was it dark?

SCOTT INGLE: I don't remember - I think it was light.

PROSECUTOR: Okay - how about do you remember going to bed sometime that night.

SCOTT INGLE: Yea, but I don't remember what time it was - it was close to about nine o'clock or maybe - probably about in the middle of nine and ten.

PROSECUTOR: Was it dark outside then?

SCOTT INGLE: Yes

Tp. 7

PROSECUTOR: Now - I understand that the waterbed had been broken before your mother left and she and Johnny had tried to fix it. Did it sound like he was fixing the waterbed or did it sound like something else?

SCOTT INGLE: I was in there where they were gonna fix it. See I walked in there but it was already busted I think - it was already busted - but I saw them put it together - see they had to get this waterhose and stick it in and patch the waterbed - I think they patched it.

PROSECUTOR: Was the waterbed fixed by the time your mama went up to Aunt Rita's to wash the dishes?

SCOTT INGLE: Yeeee - yea

PROSECUTOR: Did Johnny ever go back in there to work on it some more? Do you know?

SCOTT INGLE: No

Tp. 9

26. When Scott Ingle could not remember something crucial to the State's case, the prosecutors are quick to lead Scott and provide him with additional information. In the following exchange, Scott Ingle tells the prosecutors how he thought Tarissa was in shock from his fall, and that was the only time he heard her cry. The prosecutors wanted and developed more damaging testimony.

PROSECUTOR: Now Susie - have you heard Susie crying?

SCOTT INGLE: When?

PROSECUTOR: Either before of after you heard these beats.

SCOTT INGLE: When we was in the bed that's the only time I heard her crying cause she was asleep - the onliest time she 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.

PROSECUTOR: Was that before or after you heard the beat that she stopped.

SCOTT INGLE: I heard the beat and she was crying for _____ and she keep on crying and she kept on crying and _____ and beating and beating and she just stopped.

PROSECUTOR: She was crying and there was beating and beating and she just stopped. Is that what you are telling me? - Okay - now do you remember what we were talking about a while ago about telling the truth and all that. Is that the truth? (nothing auditble) (sic) Did you hear any other noises coming out from the room after that?

SCOTT INGLE: No - I heard some foot prints - yeah.

PROSECUTOR: Okay - when you (sic) mama came back - do you remember when you mama came back?

SCOTT INGLE: No - cause after them beating I just went to bed but I know - I know I didn't hear my mama - it was a mans. (sic)

PROSECUTOR:[6] Now, when you (sic) mama got back Susie was out in the living room sitting in her swing. That's where your mama found her when your mama got back.

SCOTT INGLE: But I was still in bed.

PROSECUTOR: Okay - do you know how Susie got from her bed to out to that swing?

SCOTT INGLE: I don't know.

PROSECUTOR: You just don't know about that - is that what you are saying Scott? You don't remember anything about that?

SCOTT INGLE: _____ they said she has bruises on her - and she did when I went to the hospital too. And it was in daylight when they took her out of the crib I think. No it was still dark.

PROSECUTOR: And was it dark when you hear Susie cry and you heard the banging - was it dark them? (sic)

SCOTT INGLE:[7] Yea - my mama got back close to - see we went to bed at ten something or nine something and my mama got back from Aunt Rita and that's when she told me.

PROSECUTOR: Do you think maybe your mama got back later than that?

---

[6]Now the prosecutor provides Scott Ingle with more information harmful to Johnny.

[7]Now Scott, the naive, trusting witness starts to repeat what he was told, and changes his story from not knowing when his mother came home to one in which he does know.

SCOTT INGLE: Cause I ask the others to make sure and I - you know to see what time she got back - because I would need to know - cause I used to - see I ask a lot of questions about doing it - I say what time did she get back because I was real worried and all that and they said _____ (IT SOUNDS LIKE HE SAID ELEVEN)(sic)

Tpp. 9-11

27. It was also crucial to the prosection's theory of the case that Johnny had abused Tarissa before August 24, 1991, since she had some bruises and broken bones that were days, and possibly a week or more old. The prosecution sought to have a 10-year-old child to prove this (possibly because he would be more credible than Lisa O'Daniel). In order to get this evidence from Scott Ingle, they had to plant the information. Scott Ingle did not report this information in his early interviews with the detectives. *See* Exhibit 4. The follow exchange details the development of this testimony, including making reference to the prosecutors' earlier meeting with Scott, the notes, transcripts or tapes of which the defense has still not been provided.

PROSECUTOR: Now, Scott do you remember two days ago when Mr. Allen and I came out to your trailer and got the bunny rabbit - whose bunny rabbit was that?

SCOTT INGLE: Mine - I got that after Susie done died.

PROSECUTORS: And we were asking - did we ask you to show us something with that rabbit or did we ask Tony.

SCOTT INGLE: Me

PROSECUTOR: Alright, do you remember what you showed us.

SCOTT INGLE: Yes

PROSECUTOR: What did you show us.

SCOTT INGLE: How I fell with her.

PROSECUTOR: Okay - did you show us anything else with that rabbit?

SCOTT INGLE: _____ and how it had torn up my arm.

PROSECUTOR: And did you show us that?

SCOTT INGLE: Yes

PROSECUTOR:[8] Did you see him shake her?

SCOTT INGLE: Yes

PROSECUTOR: Do you remember when you saw him shake her?

SCOTT INGLE:[9] No

PROSECUTOR: Was it the same?

SCOTT INGLE:[10] Do you mean it dark or daylight or you know what day?

---

[8]Finally, they just come out and tell Scott Ingle what they want to hear.

[9]Here Scott Ingle gives an honest answer, but it is not the answer the prosecutor wants, so the prosecutor tells Scott Ingle more of what to say, as follows.

[10]Trying hard to give them what they want.

PROSECUTOR: What day?

SCOTT INGLE: No

PROSECUTOR: Was it the same day that Susie got hurt or was it some other day?

SCOTT INGLE: It was another day and then he did it - on me and my mamas - well me - Tony and my mama was playing football - I went in there and he did that then and then it was - not that day - but he did it about two or three times.

PROSECUTOR: Okay - what would Susie do when he would shake her?

SCOTT INGLE: Cry - when he - she - she'd - he'd hit her - and we was in the backyard and he hit her in the kitchen - cause - I mean - he took her out of her baby carries (sic) for _____ and took her and bring her to the kitchen and she just sat in the chair and then I walked out - started playing football with Tony and my mama.

PROSECUTOR: When he was sitting in chair, when did he shake her? Was it - Where was he when you saw him shaking her?

SCOTT INGLE: Where - she's - he was in - what happened was when my mama was at Aunt Rita's me and Tony saw that and it was - where - it was in her baby crib.

PROSECUTOR: Was that a different day?

SCOTT INGLE: He wouldn't never do nothing if he sees my mama was around.

PROSECUTOR: Was that on the same day or was that on a different day than.

SCOTT INGLE: Different day.

PROSECUTOR: A different day as in another time when your mama was up at Aunt Rita's and you saw him shake her - is that what you are telling me?

SCOTT INGLE: He wouldn't never do anything like that around my mama.

PROSECUTOR: How many times did you see him shake her?

SCOTT INGLE: About two or three.

PROSECUTOR: Can you remember another time and tell us about that? Other than the that your mom was up at Aunt Rita's and you say you and Tony.

SCOTT INGLE: She was always gone when _____ did it.(sic)

PROSECUTOR: Okay - you said there were two or three times that he did this?

SCOTT INGLE: Yeah

PROSECUTOR: Okay - you just told us about that one time.

SCOTT INGLE: He shook her about two or three times - is that what you mean how he took her and shook her. Yeah

PROSECUTOR: Show us again - I think you were just showing us - but show us - I don't have a bunny rabbit - but why don't you use that klennex box.

Tpp. 11-12

SCOTT INGLE: He got her like right her (sic) - and he got her right there and she was hitting - her head was kinda let against the pillow but it couldn't - but her head couldn't hurt but I know her - he - her waist was probably was hurting because she did cry and she probably was in shock a lot too.

PROSECUTOR: So her head was bouncing on the pillow.

SCOTT INGLE: Yeah.

PROSECUTOR: Okay and you say he had her by her waist. Well, let me ask you something -what did he do after he shook her?

SCOTT INGLE: He -

PROSECUTOR: Was Johnny saying anything when he was shaking her?

SCOTT INGLE: He - he did say shut up for a minute.

PROSECUTOR: Shut up for a minute - is that on this day - the day before you talk about - the day before Susie died or was hurt real bad.

SCOTT INGLE: No, she wouldn't hurt real bad - it was the day before.

PROSECUTOR: Okay.

PROSECUTOR: So she started crying and he said shut up for a minute.

SCOTT INGLE: Yeah

PROSECUTOR: I don't understand something - when you said he said shut up for a minute. Is that the words he said shut up for a minute or are you saying he shut up and he said that for a minute or so - which did you mean?

SCOTT INGLE: He said shut for a minute.

PROSECUTOR: He said shut up for a minute - that's what he said? Okay

SCOTT INGLE: But he did have curse words in it.

PROSECUTOR: He did have curse words in it.

SCOTT INGLE: He said shut up you GD for a minute.

PROSECUTOR: And thats when he was shaking her. She was - and where was she when he was shaking her?

Tp. 22

PROSECUTOR: No you just told me about that. I want to talk about - you said it was two times that you peeked in and saw him

SCOTT INGLE: No, I got it mixed up. The day I told - before she died was when I saw -is when he saw me - before the day she died - you know a few days before that three - is when he didn't see me and I was peeking in and he just shook her.

PROSECUTOR: Okay thats the day after you all were playing football.

SCOTT INGLE: Yeah.

PROSECUTOR: Okay - are you saying that you saw him shaking her three times.

SCOTT INGLE: Yeah, three times - he shook her three times.

SCOTT INGLE: I mean - I'm - I'm - No - maybe I'm

PROSECUTOR: Oh, you mean three times

PROSECUTOR: That's okay. That's okay. Can you think of any other times that you saw him do something to Susie - other than what we're already talked about.

SCOTT INGLE: About shaking her and all that?

PROSECUTOR: Or whatever.

SCOTT INGLE: I didn't see him do anything else but shake her.

PROSECUTOR: And he only - you saw him doing this to her but he only saw you on that one time.

SCOTT INGLE: Okay.

Tpp. 25-26

28. The end result of all this coaching was that during trial, after another preparatory meeting with the prosecutors, Scott testifies extensively about an issue crucial to the prosecution's case which did not exist until after the state spent a significant amount of time quizzing, preparing and coaching this highly suggestive witness. Further on in the questioning, Scott makes a couple of points helpful to the defense, and the prosecution seeks to correct him, and puts additional words in

Scott's statement.

PROSECUTOR: How did he try to make her stop crying.

SCOTT INGLE: Like my mama would - he would do her like that - but she was spoiled by my mama - so she would cry a lot when she wasn't around - and I know she would start crying over that and she take her in and she didn't cry around _____.

PROSECUTOR: Let me ask you something Scott? Was Susie crying before or after Johnny picked her up out of the swing? And you say he grabbed her and shook her.

SCOTT INGLE: She was happy - but she started crying because she got hungry and she had to use the bathroom. But he thought she was hungry I reckon because he started feeding her.

PROSECUTOR: Okay - so she started crying and then that's when he went over and starting shaking her - is that what you are telling me? Or did she start crying after?

SCOTT INGLE: She started crying because she used the bathroom _____ or was hungry and I said that he probably thought she was hungry because he started feeding her.

PROSECUTOR: Okay - that's what I'm wanting to ask you. Okay - when she started crying and that when he went over and grabbed her - did he say anything to her when he grabbed her?

SCOTT INGLE: He said Shhhhhhhhhhh.

PROSECUTOR: Okay -

. . .

Tpp. 14-15

PROSECUTOR: After he grabbed her - when he grabbed her - did he grab her first or did he say shhhhhhh first, or

SCOTT INGLE: He started _____ saying shhhhh.

PROSECUTOR: You just, you said, he said shhhhh and you raised your hand up? Did he raise his hand up?

SCOTT INGLE: No, he pulled her up.

PROSECUTOR: Oh, okay, I see what you're saying. So he kind of did like this shhhhhhhh and then grabbed her by the arm and pulled her out. But when he did that did she stop crying and did she started crying harder.

SCOTT INGLE: She started crying harder and he gave her some milk and started doing like mama and then she stopped crying and that's right when mama came in and I went out and I told mama would you give me some drink because you know I didn't get none and when she came in she would just stopped crying.

Tpp. 15-16

PROSECUTOR: Do you know how many days before - the night Susie got hurt - do you know how may days it was before when you'll were playing football and you saw Johnny shake - do you know how many days it was before that? If you do -that's fine.

SCOTT INGLE: What do you mean?

PROSECUTOR: Like was it - do you know if it was a couple of days or a week or more or if you don't know - you don't know its fine - I'm just wanting to - I'm just wondering

SCOTT INGLE: What do you mean? Ask me that question.

PROSECUTOR: Do you remember the night that Susie got hurt. Do you remember that night?

SCOTT INGLE: What do you mean?

PROSECUTOR: The night they had to take her to the hospital.

SCOTT INGLE: Oh yeah.

PROSECUTOR: When you'll were playing football and the next day you said you kind of snook and saw him shaking her - did that happen the day before or two days before

SCOTT INGLE: She died?

PROSECUTOR: Yeah

SCOTT INGLE: I don't know. I don't know. A few days. You know - I don't know.

PROSECUTOR: If you're not sure Scott

PROSECUTOR: You just think it was a few days?

SCOTT INGLE: It could have been about a week or a few days - I don't really know.

Tp. 17

29. Another example of Scott's testimony preparation, and the prosecutors suggestive questions consist of the following:

PROSECUTOR: Where was she at? How loud was she crying?

SCOTT INGLE: Not loud enough

PROSECUTOR: Not loud enough to hear her up at Rita's

SCOTT INGLE: No

PROSECUTOR: But loud enough for you to hear her outside the trailer

SCOTT INGLE: Yeah - I was nearest - I was in the backyard cause - cause you see I was in my mama

PROSECUTOR: Okay - so you were in the back near the backdoor

SCOTT INGLE: And the backdoor is near my mama's room.

PROSECUTOR: Right near your room too isn't it?

SCOTT INGLE: Yeah.

PROSECUTOR: Okay

. . .

PROSECUTOR: He was shaking her in her bed.

SCOTT INGLE: Who was?

PROSECUTOR: Johnny

PROSECUTOR: How was he shaking her - you mean she was laying in her bed?

SCOTT INGLE: Yes - he was the onliest one that shake her - my mama never did shake her - she'd just pick her up and do her like that - but that ain't shaking her -

PROSECUTOR: Kind of rock her.

SCOTT INGLE: No, she did rock her

Tpp. 17-19

30. Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and the North Carolina and United States constitutions, the transcript of Scott Ingle's statement should have been turned over to the defense as it also contained significant impeachment material, and information which would have been extremely beneficial to the defense as the following illustrates:

PROSECUTOR: I thought you said she was crying.

SCOTT INGLE: Not that t - oh yeah, oh yeah, I was thinking of another time. That was the day after that day.

PROSECUTOR: The day after you were playing football.

SCOTT INGLE: Yeah - it was real - no - it was about - you could say three days it was close to when he (sic) died.

PROSECUTOR: Okay, so about three days after you played football is when you - when you heard her crying and you were outside the trailer.

SCOTT INGLE: Yeah and about two - about two or three more days - maybe four he was is when I heard her not crying I just walked in and he just started shaking her or whatever.

PROSECUTOR: Okay

SCOTT INGLE: That time he just pulled her arm.

PROSECUTOR: Okay we'll get to that in one minute. Okay. Let me - I want to talk about the day - the day that you played football

SCOTT INGLE: Yeah

PROSECUTOR: Okay - how many days after you - you know the day that you saw her shaking - how many days was it that you heard her crying and you were playing out back by the back steps - and you snook in and looked in through the cracked door.

PROSECUTOR: Was it - I'm saying

SCOTT INGLE: Oh - I don't remember - Ask me that again.

SCOTT INGLE: Okay - I get mixed up a lot.

PROSECUTOR: That's okay.

SCOTT INGLE: Cause I was around her a lot - I was around most of the times when he shook her and I get mixed up about all the times he shook her and all that.

PROSECUTOR: Okay - you told me you'll were out playing football and you saw her shaking and then you told me it was the next day that you were outside playing and hear her crying.

SCOTT INGLE: Yeah

PROSECUTOR: Was it the next day or was it another day - some - several days later.

SCOTT INGLE: The next day.

PROSECUTOR: Okay - that's what I want to ask you about right now. That next day - if you stand up and show me how you saw him when you peeked into the bedroom door - what did you see him doing - was she still crying when you walked in?

SCOTT INGLE: Yes

PROSECUTOR: Okay - stand up and show me what you saw him do.

SCOTT INGLE: He shook - he shaked her lots of times and he kept on and kept

PROSECUTOR: Did she keep crying?

SCOTT INGLE: Yes

PROSECUTOR: Okay - how was she crying?

SCOTT INGLE: Loud - well not real real loud

Tpp. 19-20

31. At trial Scott testified that Johnny was mumbling. (Vol. 20, p. 878) In his interview, Scott refers to the mumbling several times,[11] including the following.

PROSECUTOR: Okay. Well, Scott let me ask you - when Johnny - did he pick her up after he shook her and shut up a GD minute - did he pick her up then?

SCOTT: Yeah

PROSECUTOR: Was she crying?

[11]See pages 8, 9, and 23 of Scott Ingle's February 26, 1993 interview.

SCOTT: By the arm

PROSECUTOR: How do you pick - he grabbed her by the arm and picked her up?

SCOTT: Yeah, he started playing with her and you know (mumbling)- you know how they'd play with you - you know tickling your belly and all that - he did that to make her stop crying cause he never did want my mama to find out I reckon.

Tp. 23

PROSECUTOR: Well, let me ask you one question, if I may. When he would shake her in the bed would it make a sound?

SCOTT: No, my mama fixed it so it would be real soft you know everything but the bars and he would - she'd hit the pillow you know but he made her cry.

Tp. 26

32. Comparing the statement of Scott Ingle given to the prosecutors on February 25, 1993 with his trial testimony regarding the two incidents where he claims he saw Johnny Burr hurt Tarissa shows the glaring inconsistencies. The following itemization show how different Scott Ingle's versions were and could have been used to impeach him.

THE FOOTBALL INCIDENT:

Scott Ingle's Trial Testimony:

They were "playing football and I went in and [Johnny] was shaking her." p. 869
Went in "'cause I heard her crying."
He was playing football with his mama, Tony and J. was at Aunt Rita's. p. 870
He went in the back door.
Susie was in "my mama's room. . . . No, she was in the living room."
[Susie] was in the living room and he carried her into the kitchen."
She was not crying before he shook her. p. 871
"She was crying, and then when I went in there she had done stopped, but then he started shaking her.'

Scott Ingle's Statement to the Prosecutors:

Tony and my mama was playing football. p. 11
He went inside to get something to drink p. 13
Susie was in the living room in her swing when he went in. p. 14
He jerked her up by her arm -- and he shook and jerked her up by her arm. p. 14
Susie was happy -- but she started crying because she got hungry and she had to use the bathroom. But he thought she was hungry I reckon because he started feeding her. p. 14
I was hiding in my bedroom and I was kinda peeking out to look. p. 15
When he took her in there (kitchen) -- I ran -- I crawled behind the couch or the chair, I don't remember. p. 15

SECOND DESCRIBED INCIDENT:

Scott Ingle's Trial Testimony:[12]

"Tony and J. was like in the woods and I was in -- near the back door and I heard her crying and I went in and peeked through the door." p. 872
Went in the back door. p. 873
My mom was at Aunt Rita's
Susie and [Johnny] were in the back bedroom.
He was shaking her. p. 874
She was in her crib.
I saw him shaking her "hard."
He had her "up out of her crib."
He made her cry. "she kept on crying, [I] went back out, because she had stopped crying later." p. 875

Scott Ingle's Statement to the Prosecutors:

The next day after the football incident I saw Johnny shake her foot. pp. 16, 20
I could have been a week or a few days before [Susie died]. p. 17
I peeked in and saw him shaking her. p. 17
Mama was at Aunt Rita's and Tony and J were playing some games. p. 17
I came in because I heard her cry. p. 17
He was shaking her in her bed. p. 18
She was laying in her bed. p. 18

THIRD INCIDENT THE DAY BEFORE SUSIE DIED:

Scott Ingle's Statement to the Prosecutor's:

The day before that she died he shook her and that's when I -- that's when he saw me looking. p. 21
Me and Tony and J was outside playing and I walked in and he was me(sic) watching him. p. 21
I walked in the back door. p. 21
Susie didn't do nothing, she was just sitting there and he

[12]Page references to trial transcript are taken from Vol. 20 containing Scott Ingle's testimony.

shook her two times. p. 21
Her head was against the pillow but it couldn't -- but her head couldn't hurt but I know her waist was probably was hurting because she did cry and she probably was in shock a lot too. p. 22
He said shut up for a minute. p. 22
He said shut up for a GD minute. p. 22
He was shaking her in the crib. p. 23
He grabbed her by the arm and picked her up. p. 23
He started playing with her . . . tickling your belly p. 23
I ran out and started crying. p. 24
This happened a few days after I was peeking in he shook her. p. 25

Scott Ingle also claimed that he and Tony went in and Johnny was shaking Susie. p. 26
Susie wasn't crying, she was going hee hee. p. 27
He was just bouncing her in bed. p. 27

32. This evidence was material to the issue of guilt in that there was a reasonable probability (sufficient to undermine confidence in the outcome) that had the evidence been disclosed, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). In this case there was no direct evidence of harm done to the child by Mr. Burr. The entire case depended upon circumstantial evidence. Most of this circumstantial evidence came through both Lisa O'Daniel and Scott Ingle, both of whom had reasons to lie in order to cover for their own misconduct -- Lisa O'Daniel for the sorry way she raised her kids and Scott Ingle for dropping the child and falling on top of her. The evidence hidden by the prosecution shows that their testimony was manipulated in order to obtain a conviction. Furthermore, Lisa O'Daniel lies to the jury on two occasions --

denying any deal and denying that anyone told her what she ought to say on the witness stand. The use of both these statements to impeach both witnesses would have raised serious and material doubts as to their truthfulness. There is a reasonable probability that had these statements been produced, the result of the trial would have been different.

II. THE STATE WITHHELD FAVORABLE EVIDENCE FROM THE DEFENDANT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 19 AND 23 OF THE NORTH CAROLINA CONSTITUTION.

33. The allegations contained in Paragraphs 1 through 32 of this Amendment to his Motion for Appropriate Relief are realleged and incorporated by reference as if fully set forth herein.

34. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963) the United States Supreme Court held that due process requires that the prosecution disclose evidence favorable to a defendant. The state's obligation to disclose favorable evidence under *Brady* covers not only exculpatory evidence but also information that could be used to impeach the state's witnesses. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

III. THE STATE VIOLATED N.C. GEN. STAT. § 15A-903(f) BY NOT PRODUCING LISA O'DANIEL'S STATEMENT TO THE PROSECUTORS MADE ON OR ABOUT FEBRUARY 24, 1993.

10. The allegations contained in Paragraphs 1 through 34 of this Amendment to his Motion for Appropriate Relief are realleged and incorporated by reference as if fully set forth herein.

WHEREFORE, the Defendant prays the Court consider these additional issues in ruling on his Motion for Appropriate Relief, as amended, and grant relief as to all issues set forth in his Motion for Appropriate Relief, as amended.

RESPECTFULLY SUBMITTED, this the 24th day of February, 1999.

J. KIRK OSBORN
ATTORNEY FOR THE DEFENDANT

Suite 421, The Europa Center
100 Europa Drive
Chapel Hill, NC 27514
(919) 929-0987

ERNEST L. CONNER, JR.
ATTORNEY FOR THE DEFENDANT

110 Arlington Drive
P. O. Drawer 8668
Greenville, NC 27835
(919) 355-8100

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing Amendment to Motion for Appropriate Relief was served on the following person by depositing a copy of the same with the U. S. Postal Service, first-class postage prepaid and addressed as follows:

Edwin W. Welch, Esq.
Associate Attorney General
P.O. Box 629
Raleigh, NC 27602-629

and by hand-delivery to the following persons by handing a copy of the same to them or someone duly authorized to accept service for them.

The Honorable James C. Spencer, Jr.
245 Criminal Courts Building
212 West Elm Street
Graham, NC 27253

Robert Johnson, Esq.
District Attorney
Fifteen-A Judicial District
Alamance County Courthouse
Graham, NC 27253

This the 24th day of February, 1999.

J. KIRK OSBORN
ATTORNEY FOR THE DEFENDANT

Suite 421, The Europa Center
100 Europa Drive
Chapel Hill, NC 27514
(919) 929-0987

VERIFICATIONS

J. KIRK OSBORN, being first duly sworn, deposes and says that he is the Attorney for the Defendant in the above-captioned matter; that he has read the foregoing Second Amendment to Motion for Appropriate Relief and that the same is true of his own knowledge, except as to those matters and things therein stated upon information and belief, and as to those, he believes them to be true.

This the 24th day of February, 1999.

J. KIRK OSBORN

Sworn to and subscribed to before me this the 24th day of February, 1999.

SHAWN FERGUSON NOTARY PUBLIC CHATHAM COUNTY, N.C.

NOTARY PUBLIC

My Commission Expires: 4/26/2003

ERNEST L. CONNER, JR., being first duly sworn, deposes and says that he is the Attorney for the Defendant in the above-captioned matter; that he has read the foregoing Second Amendment to Motion for Appropriate Relief and that the same is true of his own knowledge, except as to those matters and things therein stated upon information and belief, and as to those, he believes them to be true.

This the ___ day of _____, 1999.

ERNEST L. CONNER, JR.

Sworn to and subscribed to before me this the ___ day of _____, 1999.

NOTARY PUBLIC

My Commission Expires: _____

1

#1

Lisa O'Daniel talking

His problem was his wife would not let him see his children when he was with me and I told I cared about him, but if he wanted to be with his children, then back with his wife and be with his children. That you know he didn't have to obligated to stay with us and he said that he loved me and he did not love his wife and he didn't want to go back on that you know just because of that. That he would take his children and run before he went back with her.

This is the calender that you and Mrs. Bryant, the social worker, were trying to put together to try to reconstruct these things. Do you remember doing that.

Yeah, I remember doing that. Been a while back.

Do you see these entries in here - John in school - Dana and John in school with Dana - do you know what that means?

Yeah. Alright. This is when Johnny said he was in school.

What kind of school?

Some about they were promoting him to supervisor and he said that he went to school and it was nighttime and let me see - it seems like I told her that I didn't think he was in school - that was when he was with Dana. Anyway he came in at four o'clock, so it could have been possible that he was at school cause a lot of times he came in at four o'clock.

In the morning or in the afternoon.

In the morning.

Now, then down here on Sunday, the 18th, it says John in mountains. Here John in the mountains John in the mountains.

Yeah, he went one week-end to the mountains.

Who did he go with?

He took Misty and Christy with him.

He did.

Uh-huh

Because, alright, I can tell you something about that. When he took Misty and Christy to the mountains.

Who all went?

It was Johnny, Misty and Christy.

Just the three of them?

ust the three of them.

Okay, go ahead

And he went to his aunt's house or something. And, let me see, Christy said that when they were up at the mountains said that - that was either the mountains or South Carolina - anyway she said that he told her to told her something about to come over there and lay down on the couch with him and she told him no and he told her he wouldn't touch her in anyway and she said something about he insinuated or tried to mess with her or something I don't really know. Christy could tell you the way that went.

Is that the time he is suppose to have stuck his hand up her shirt - up the back of her shirt not the front.

Not-huh

No, that time we was at my house and Christy was sitting on his lap, she had a bad habit of going up hugging on you and stuff. And she was sitting on his lap and I noticed she came up off his lap real fast and she said I've got to go home. And I started walking with her out the door and I said what's wrong and she said Johnny stuck his hand up her shirt and I went back in and ask Johnny about it and he said that - first he said he said he didn't stick his hand up her shirt and then he said she had an undershirt underneath.

Then the next thing on here is the 19th says John worked until four A.M. with Dana.

All right she's saying John, I think Johnny said this part and I said this part. If I'm not misunderstanding.

And then there is an arrow from this block up into this block. Do you know what that might mean?

I don't know.

And see right here John in school and then Dana again with an arrow point up.

No not really unless I was saying trying to say he was in school and I was saying he was Dana on those occasions. I don't know.

Why is the arrow pointing from this block to this block here and here. do you know?

This is a Monday - seems like he did go to school on Mondays. So, he might have been at school that day and then he might have told her with Dana. Because there were several occasions he tried to say he was with Dana and I told her no because of the occasions he was not with Dana he was with me.

ut you don't know why the arrow may be from one to the 19th to the 12th.

The only thing I can figure is that Monday night's school. That's all I an figure.

Why would an arrow mean Monday night school

That he was at school both those days. I don't know.

All right, then she here Donald babysat Susie for Lisa.

You know, he did, he babysit her I think I went to the grocery store and maybe get (wick - wicker)? something like that.

All right

He baby-sitter her a lot when I had to go do things.

But in sitting down with Mrs. Bryant a year and a half ago you felt that was on the 21st is that what you are telling me?

Yea.

Now, here on the 22nd, again John worked until four AM on the 22nd and then beneath it says John had Susie up at four o'clock AM, changed diaper

Now that's when I - wait that being on a Wednesday - wait a minute - What does that say? I can't read that.

John had Tarissa up at four o'clock AM to change diaper. Baby cried a lot. Then no [redacted]. See that sounds like the time you are telling us about Johnny got her up and said he was going to change her diaper.

Yeah

And

And that's when I was talking to her to you know

If this date is accurate then here is the night that Scott fell with her and it was this morning that you come back and find her all battered and bruised. Then I guess my question is is your recollection correct here?

No mine - I'm pretty sure it is correct here and the 14th because let me see

What do you think?

Right here is Donald kept her that evening. And then I had her that night. You know and so if I was mistaken and it was a possibility he wouldn't with Dana then still the same at four o'clock he would have been coming up and but I still say right here he saying in school or maybe I say I don't know which is which. But this is when he came in at four o'clock. This is when he said he had to work till three o'clock. But he got off of work.

Are you saying this was the morning that you woke up to hear Susie crying

)r was it this the day he went to work and he came in and this was the orning that you woke up. In other words, midnight starts the end of one day and the beginning of the next.

Oh, well the Thursday would have been the morning I woke up at four.

Then it would have been Thursday morning.

Yeah.

He went to work, didn't get home until four o'clock this morning and you think that's when you heard her crying. But, nonetheless, when you talked with Mrs. Bryant you had picked this date down here. I guess we've got to deal with.

Cause you see, close to about the about the same time I Dan and them to same thing that's was there. I told them a Wednesday and her a Thursday. That's my bad mistake.

And you pretty much told them that it was somewhere in this period of time.

Yeah.

But see

The week of and not the week before.

.eah.

And then, I guess I'll have to fight that the best I can in court.

Well,

Because that was my mistake, a bad mistake.

Why do you think you made that mistake?

I was just so upset and I was trying to put everything together and I had her on my mind and them asking me all them questions too that I was trying to get everything organized and I really didn't have that much time to situate everything out.

Have you counted backwards from the date that she was found to try to fit it into what the doctor's say it would have had to been?

Have I counted back?

No, not really.

Well, I mean, that's going to be the obvious implication the defense is going to push on here, is that is that since this didn't fit what the doctor's report said then this would that's now why you are now picking his day instead of this one. You understand what I'm saying?

Yeah.

That's what they're going to imply.

That going to imply.

Well, what about when they talked to Darlene, she can verify that she came that Thursday and picked them up at school.

Darlene told me that it was that Thursday.

Well, that ain't what she told me on the phone. She told me it was on, she said it was a week or two weeks before. That's what she told me. She said I told them two week before.

I don't think I was making notes, did you hear it Brad?

Yeah, I made the notes.

She said you were writing them down. She said I told him two week before, a week to two weeks before. And I told her, I said.

I'll be happy to call her back and talk to her. But I specifically remember, and the reason I was, what I was thinking was well maybe if she was injured on the 14th the morning of the 15th, then maybe something caused her to wake up and be crying all night on the 21st or the morning of the 22nd. The same is, if she was injured right here and you went over, if it was a week before, that you went over to Terassa or Tissia's and you spent the night Thursday, Friday night and then on Friday night Tissia gets up and walks the floor with her for two hours. I means that goes to show that there were injuries whether you'll put two and two together that her legs were broke or that she was injured pretty badly - whatever. It certainly goes to show that she was showing signs of injuries.

I guess, it barely hit on me, when you don't see bruises on nothing. Now if I'd seen bruises I would have took her and had it checked. More than glad too. I wouldn't have waited until she was dead.

Let me just lay all this on the line for you. Now, I'm not just going to beat around the bush. I think I have mentioned to you before, in the course, in the trial of this case, you're not going to come out looking to good. Do you under that?

I'm not worried about me.

Any way we go about it you aren't going to come out looking real good. This is going to look like, for some reason or another, that at some point in your life at that time in your life, at that time in your life, that if at no other time, that you were not putting your children first. That you were putting your boyfriend first. That's how it is going to look. You need to understand that. Up front, you need to understand that. And, neither Mr. Allen or myself are going to sit here and tell you we think you killed your baby. And the reason we are not going to tell you that is because we think Johnny killed your baby. However, in presenting this case

we have got to lay the case out for the jury in a way that they can nderstand it and for most things there is indeed an explanation for most things. Sometimes getting that explanation is the hard part. Sometimes that what we really have to search and search and search for. And as I have indicated to you and to Teressa and to you mom and your dad and several other people that we've talked to, cause we've talked to a pile of people, the question always comes up. The fact is, that if you talked to folks long enough they will ask the question. I don't have to ask it. Somebody should have known. Somebody should have know this child was being abused. And the reason for that is because, we can't get around this.

Dr. Wilcox sees at child 2:55 AM August 25. He noticed at that time that. Well you say you never saw him hurt her.

Cause I never did. Not her.

Not her. What did you see him do?

He hit Scott.

How?

In the back with his fist.

When?

don't know. Probably about three weeks. I didn't see him. Scotty told me.

Didn't you ever suspect it that maybe he was being a little rough with Susie?

He did not act like he would hurt her.

Yea, but didn't you ever see something on her that kinda made you think what's going here? I think the morning you went our there and found him out, you came right out and ask him. You said what's going on here? You came right out and put it to him. What's going on here?

Cause of the way she was screaming. It scared me.

Didn't you start noticing some things with her? Didn't you notice that a little redness and bruising here and there and _____ on that child?

Not at that time. She was red under here a little bit but I didn't know at the time he hurt her. She just kept screaming.

Didn't she start doing a lot of crying, after that. right on up to the time she died?

On up to about three days before he did her Saturday. It was two or three days.

Do a lot of crying wasn't she? I mean, you see this is what we. he ask you

vesterday. You know when you go to your sister and other saying - you an't go telling them that shit. That she doing a lot of crying. You get me in trouble.

But see, it was still messed up.

But, I don't care if it was messed up.

After that time she did cry no more when he picked her up. But I didn't think he hurt her that bad. I didn't think he had done anything like that.

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

See, Lisa, let me just tell you something. That are going to be women on that jury that are going to think are the worse person in the world and that ain't nothing we can do about it. See, Mr. Johnson didn't tell you we can't control what Johnny Burr says. We can't control what he put on. He might get up there and ain't no telling what he going to come up with. And there going to be people on there who may very well say why isn't she charged? That are going to say why, what is the sheriff protecting? What is the DA protecting? But the important thing is that what are you protecting? And why keep saying we can determine DSS they have investigated this they ain't took your kids yet. He might come up with something at the trial, I don't know what, it could be the truth or it could be a lie. And they are going to say hold it we want to reopen this case. We can't control that. And I'm going to tell you, what's going to make you look the best in front of the jury, you are going to look bad, but what's going to give you creditability and what's going to give you believableness is if you come out and you know, I don't know, if you say, look, yeah I saw this going on but I was in love with this guy. I didn't want to, you told you mom, now didn't you tell you mom when Tissie said I want to see my nephews and bring them by that you told her you come back to her and said, well Johnny correcting the kids now and if we come over there I don't want you saying anything to him if he corrects them.

Yeah. Cause I told her how he corrected them, he was

Did you think that he might be correcting him a little bit to tough?

He might have been.

Well I mean, you said that, that's why I'm asking. What was the basis of your saying that. You know that Tissie might jump in his face. She's your older sister.

Yeah. She was _____(666) after the kids.

She was also, if you would have let on that he was hurting your hand the night that he bent it back, would she have jumped in his face them.

e were up there one night when he did it.

Yeah, I remember you didn't let on that it was hurting you. But it hurt ou hand didn't it? The reason you didn't let on, is that because you knew that she wouldn't approve of that?

No, because he'd get his satisfaction out of hurting.

Out of hurting you. Letting you know. Let me ask you something. You didn't let you daddy know that he hurt you. Cause your daddy would have jumped in his stuff. Wouldn't he? That's what I saying, you were hiding this from your family, weren't you? I mean, you were hiding the abuse from your family. Didn't you get mad at Tissie when she, didn't you say you told mama and daddy about that bruise on my thigh.

Yeah.

You didn't want her to tell them did you? Your daddy ask you about it.

Yeah, I denied it.

You denied it. Did he look, did he see a bruise?

It was gone.

Okay. That's what I'm saying. You were hiding it from your parents. You were hiding it from all your relatives weren't you?

xcept Tissie, I showed her the bruises.

I understand. The thing that, you know, you will probably one of the most. the - I mean, you were the person that the jury - the women and the men - and anybody that has kids and don't have kids it going to say should have known. Whether you did anything about it or not. You know it is kind of apparent you didn't do much about it. I mean he was grabbing your breast, grabbing your thighs

Cause I figured it would me and I didn't know it would be her.

Well, Scott, he told you he hit him in the back with his fist.

Yeah, he wasn't crying. He said I had walked up to Rita and said Johnny hit him in the back.

I mean

See Scott didn't tell me until after Susie.

Till after.

After Susie. I didn't know none of this before.

Alright, why are they keeping this from you?

e said that he Johnny told him that if he told me that he would whip him.

Lisa in talking with not only your family, but with people who knew you, hat is, a picture develops at the time. For some reason or another there had been a change in your life that summer. That you have kind of changed in a way that you dealt with your family and your children and things like that. Maybe

I didn't worry about my family that much.

Well, I guess that's part of the change because I think prior to that you had been closer to them. Haven't you?

Yeah

What, what developed there. Why was it that you and John O'Daniel. What lead you'll to split up?

To get together.

No, you and John O'Daniel, John Wesley O'Daniel.

Oh

You'll got that _____ and split up. What happened?

He just, John was real jealous type person. Over anything. I wouldn't even allowed to walk out my front door. And then I if I walked up to my arents he would accuse me of seeing somebody. And then Rita came to the house because I told you, me and her both had an affair with Johnny. And she came to the house when I was pregnant with Susie then. And I told her I seeing anybody when I was pregnant. You know, with John's baby. And she said, well just meet him, cause that was somebody she was seeing. So on different occasions I met Johnny but nothing between me and him, it was her and him.

Why were you meeting Johnny before Susie was born?

She just said she want me to met the guy that she was seeing.

Was she still living with Donald at the time?

Uh-huh

She was seeing Johnny on the side. Did you know that she was having sex with him?

Yeah.

How did you know that?

Cause sometime I was with her when she did - I wouldn't in the room with her but I was with her. Then she told me that they had had an affair for four years. Off and on.

Well, then after Susie was born is that when you started seeing

hen she was about three weeks old.

And after that you started having sexual relations with him.

Yeah, I think I did about two or three times.

Why were you cheating on your husband at that time?

We just weren't getting along. Then I moreorless just listened to Rita. You know, he could be like that and I didn't need him and stuff like that. He didn't want me to have friends he didn't want me to have anybody.

Let me ask you something? Do you know what's meant by the words menage a trois? Have you ever heard that phrase? Two on one. Two women one man, two men one woman. You ever had a situation like that where you and Rita were having sex with Johnny at the same time

Not-huh

or in the same room?

You're sure.

I'm positive.

id Rita know you were having sex relations with Johnny?

Yeah

How did she know?

Cause she's the one that it all started.

I thought you told me before you called me back after we first interview and then you told me you'll had had sex together. You told me that

No, not me, Rita and him. But Rita would be there and she would be in one room and we went into the other. Cause on one occasion it was at Rita' house.

I was going to ask you where it happened?

And then on another occasion it was at Johnny's house.

You'll two were over at Johnny's, John's

Lisa have you ever done anything like that before? Now you've have sexual relations with other men because you fathered children by other men. I mean, you mothered children by other fathers. But have you had anything going on like that - where you are having sex in one room and somebody was in another room?

Not-huh

hy the change in your lifestyle? What was going on with you?

I don't know.

Well, I also learned that you started dressing different during that time, little things like going without a bra, wearing real short shorts, that kind of thing.

No, I didn't wear real short shorts.

But I went without a bra married to John.

John tell me that one of the reasons that you argued about.

Yeah, it is.

The matter of the fact is you'll had a fuss over at Rita and Donald's where you didn't have one on and you reached over and picked something up and that was about the time that he told you that maybe you'll ought to go your separate ways.

Yeah. He took JJ up to the store and he called back and said I think we need to get a divorce and I said well John that can be done.

Is that the time that you were already having an affair with Johnny?

hat was when I'd seen him. And I'd slept with him but about twice. Two or three times.

John knew thought, didn't he? John O'Daniel.

He had a feeling.

Had he talked to you about it? Had he accused you?

Oh, yeah.

Had he specifically named Johnny Burr?

Yeah.

Was there an occasion when he, you'll were at a lake somewhere and John was afraid of water he was on the bank and Johnny swam out into the middle of the lake where you were at and talked to you.

Lisa O'Daniel talking

He came out there where the boardwalk, it was me, Donald, Rita and them.

Where was the lake?

At Hidden Lake.

Hidden Lake down here on 54.

What I'm saying though it John didn't even come out on the boardwalk.

He came out

out in the water

Yeah, he came out as far as that thing. Said he wanted to talk to me.

John or Johnny?

John O'Daniels. And then Johnny he came out there to the thing where Donald and Rita and all the rest was diving off Misty and Christy. He was there specifically out there with just me.

I understand, what, as far as John was concerned he wouldn't out there but Johnny was and he was suspecting you of having an affair with him at that ime.

And that was out where the water was over this head.

Yeah.

Where he really couldn't get to you.

He called me up there. He sent Christy out there and I went up to see what he wanted and then he started accusing me of Johnny and

Out there at the lake together?

Yeah, and so, Rita came up and she said what's going on? And I said John is accusing me of Johnny saying that I out here just talking to him when Johnny out here talking to everybody. Well Johnny said if I'm causing problems, then fine, I'll go over to the other side and he went to the diving board.

Well, in any event you've got tied up with Johnny Burr. And it wouldn't too long after you got tied up with him that he starts bending your hands and squeezing on you and doing that kind of mess with you.

I guess so.

Lisa why is it when all that mess started why didn't, what was it that kept ou from cutting off with him right then and there?

I was scared of Johnny.

Why?

Cause Johnny don't play.

Well being scared of him, I mean, it seems like to me you have two choices - and that's either to kick his butt out of the house or

I tried.

?

When I tell him to get out. That's when he'd end up hurting me or something. They saying he tied the trailer down, put a bomb under it and blow me and the kids up.

Why did you, why did you let him discipline your children?

Cause I didn't really see him beat on them.

You knew he was capable to hurting you.

Yeah, but I didn't he was capable of hurting on them, cause it ain't in me to hurt a child. And I didn't think it would be into anybody else. You know I've seen a lot of guys beat women but he does not beat their kids.

Well you knew JJ was scared of him?

Yeah

Well you had to know that, JJ would run up to Donald and Rita's and run away whenever he came around. What did you think was going on? I think, who was it,

(Brad) Tissie

Somebody said something to you about

You know it was Tissie you told me yesterday.

Yeah, opening your eyes about what was going on with you.

She didn't say opening your eyes, she said what's going on with JJ. Said just as soon as Johnny pulls up, said JJ came running up to Rita's saying Johnny's home. Said I ask why did Johnny come home and she said JJ said - no said - well what are you doing up here? And he said, something about, I'm scared or something. And she said, what did he mean by that? I said a lot of times Rita and them would tell him Johnny coming and if you don't sit down I'm going to get him - he's going to get you. I said, and he just - I guess scared JJ was Johnny. I said too, you know he want's his daddy back he don't want Johnny in the family.

_____ expression, but not hers but it

is the same thing.

Did you ever hear JJ say that he use to whip him real fast?

That was after Susie, he said Johnny whipped me and he'd say Johnny whipped me fast.

Yeah, that's what I'm saying.

When did you know that? When were you told that?

He might have said it before Susie, I don't know. Cause we ask him

Before? Well, you knew he had taken a switch and beat him pretty hard. Did you know that?

He didn't leave any stripes - I mean nothing like blood or nothing come out of.

Did he take a switch and beat him?

Not at that time.

When did you know that?

Seem like JJ came in crying and I ask him what was wrong and he said Johnny whipped me with a stick. I said what do you mean a stick? And Scotty said with a switch.

So you knew about that on that day. Whenever it was that he whipped him with a switch.

Yeah

Did you not confront Johnny with it? Say what in the heck are you doing whipping my kids with a switch?

Well I told him he shouldn't whipped him with a switch he should whip them with his hand.

What did Johnny say?

They were going to listen to him.

In other words, I going to whip them how I want to.

I guess you could say it that way.

I'm just. I'm just, I'm kinda playing a devil's advocate - I'm looking at the defense attorneys are going to jump on you and how a juror is going to sit over there. And

he bottom line Lisa is how could, how could you not seen what was going on with your children and your boyfriend.

ause a lot of times they said they would either be down at the trailer and _____(71). Rita would have been closer to seeing whipping JJ out of the wrong way up there. Cause that was just like Rita don't tell me till after Susie dies that she told JJ to get her cigarettes. And he went to get them and said when JJ started toward her said, said I couldn't see Johnny's face I'm sitting behind. Donald is sitting at the other end of the couch. All I know is that when he started out he acted like he was laughing at JJ. Rita said when he got in front of her that he acted like he was going to hurt JJ and she knew he would hurt JJ. She don't say nothing until that happens to Susie.

Is she protected, was she protecting Johnny cause she didn't want to ruin her marriage with Donald?

She could have - you know I don't know.

What I'm trying to figure out, were you trying to protect him? I mean when he says this to you and I mean that this is not even his kid. This is just some - this boy that you fell in love with and he moves in and he starts hurting you and he hurts your little kid and beats him with a switch or whips him with a switch. Maybe not beating him, hitting him with a switch and you complain about it; and he says, well, they are going to mind me. Kinda of like you don't need to be beating them with a switch. You don't need to spank them with a switch you need to use you hand. Well they're going to mind me. And then couple that with you telling you mother that Johnny corrects them and I don't want you saying anything. Are you saying this, are you doing this, are you don't want to piss him off. Do you not want to make him upset so he leaving? Are you not doing this cause you don't want him to run away from you.

No, because this is when he, he didn't, he started whipping them a lot with his hand.

Well, I mean why do you tell you mother to tell Tessie, you know don't say anything to him. Do you think he going to leave you? Are you that much in love with him that you would want him to - you don't want your sister to jump on him if he does something to them?

Could have been that she'd seen him do a lot - that would be up to her.

What do you make the comment at all that she can come over and see him but I don't want her saying anything? If Johnny disciplines the kids?

It gives the impression that you knew he was doing something out of way. He was doing something - are you saying he is correcting them and I don't want you saying anything? You are giving the impression that you knew that he was doing something wrong.

Because she (spoken over the above questions)_____ or something like that. And Tissie got a mouth and a half. She don't think you should make them go to their room and stuff or ground them for a week. So don't think you should touch my boys at all. And if he didn't beat them with a switch. I've spanked them with a switch but I didn't beat them. I spanked them

with my hand. I didn't leave bruises or I'm not going to leave whelps all p and down my children.

When you went over, after you carried Susie over here to County Hospital that night - that Sunday night - I think you had her wrapped up in something didn't you - blanket or something?

Seems like I did.

Remember walking into the hospital?

I remember walking in.

Do you remember what you did?

I went to a window over here at the side.

Remember going to a desk and talking with the girl filling out the form?

Like, like, the nurse?

Yeah, I went in there and I was sitting there and she was going to take blood pressure or something and I told her to look at Susie's eyes. I said her eyes don't look right. Then she looked at her eyes and then she said I'm going and get a doctor. Then she went and got a doctor. Then the doctor came in and he said, they had me lay Susie down and he said who beat his baby? And I said, I didn't, my son fell with her, cause that was all I saw was my son fall with her. At that point in time all she had was bruises I didn't know of no broken bones.

How could you miss something like that?

I guess cause her throat was so messed up - I assumed it was her throat.

Yeah, but broken bones?

She wasn't swollen or nothing. All I can say is when her throat messed up Susie didn't have much activity to her. She just laid her head over my arm and let the slava run out because she couldn't even swallow it. I told the doctors that. They saw it.

She had loss so much blood, _____ broken bones, that she had lost about one and a half of her circulatory blood - internal bleeding. It like taking half of your blood in your body and draining it off which is not according _____.
How can you miss these things?

Cause Susie didn't respond to no broken bones. That's all I can tell you. They came and sit back and expect me to see a baby with that bad of a throat and all of a sudden say she gotten broken bones. Something bad is wrong with her. I don't know that. The only thing I went by was her throat. It looked that bad - I had to work with her - day and night - I could not get her to eat - and then when Johnny picked her up and she was screaming out. I'd been up with her that night till about twelve o'clock,

myself, twelve or twelve thirty. Just got her in the bed asleep and then I ayed down. Then Johnny had up in the living room. And then it took me till that following two or three days before that Saturday that I had just got that baby to eating again. They said she had dehydrated. I said, that's probably because when I called them I ask them that night, I said, that day, I said she can't eat. I said, can't you put an IV in her? And if they didn't give you that statements that's their problem. Cause I plainly told them, and Rita was standing there, can't you put an IV or something in her? Cause I'm not getting any fluids in her and she said, well, if she getting an ounce of juice in her or that Petrolite said that better than nothing. I said she ain't getting that much in her.

Are you talking about the last time you took her to the doctor, before

That was when I took her to County, then I took her to Chapel Hill the same night, and then I turned around and I called them.

That the 26th of July?

That was the 26th and it is around the 27th or something when I called them back. Cause I not get her to eat any and it might have been that following Monday. But I called them back. cause I could not get her to eat.

How long did it take you to get her before she could eat?

It took me till about two or three days before I could get her to eat. efore that Saturday when he did that.

We're talking about the 26th it is up here. And you've got, or over here 26th, let's say about Thursday, 27th, 28th, 29th, 30th, 31. So you are saying right in here this Thursday, this is when you carried her to Chapel Hill or County - County and then Chapel Hill. And then you called here right in here? Say about the 29th? Cause there are 31 days in July. You're telling me from right here until right here you couldn't get to hardly eat anything?

Not-huh

And this baby was, why

Cause when they showed me her throat it looked that bad. They said continue to give her the Tylenol. Instead, I went farther with the pink medicine, Wilcox give her, and plus I went with the Tylenol.

(Tape turned over)

If she was staying with them, is what I want to know, is I've talked to them, we talked to them, Christy, Misty, Rita. Nothing is wrong with her. She didn't cry. She was a normal baby.

She was normal till her throat messed up. And her throat got that bad.

That's what I getting at. That's what I getting at. This whole lump here,

when they're interviewed and when they come in here and talk to us, they idn't say that the doggone child was crying or nothing was wrong with it.

Now that's a lie because they helped me walk the floor with her.

That's what I getting at. That's exactly what I'm getting at.

Why, why can't, why

I just can't make it specific with them. I would have them right back in here and make them tell you the truth.

That's why we've blown our minds because

If they said Susie did not cry within that month, they're lying because Susie continues through on through the 26th. And then I finally got her straightened out and they're just telling me this. I finally got her straightened out two to three days before that Saturday. Before he even did that to her. And they said they told you that. They said they told you that Susie was doing fine on up until her throat messed up and if they other than that they're lying. Cause I'm not going to sit here and say Susie was a happy _____ younguns with a sore throat. Any doctor would know, any human being would know that when you've got a sore throat you don't go around jumping up and down and playing. Now Susie did not play with a sore thoat. I had a hard time with her throat. I just hope you'll believe me. I'm sitting here telling the truth.

Lisa, I want to believe you. I just don't, I just would like to understand how this child had the injuries she had and nobody even her own mother noticed it.

Because when her throat was messed up Susie didn't play. Susie, Susie was

How about the times we talked about how she been bounded in your lap and she giggled

Now that was only when her throat started feeling better, that was on that Friday. Before Rita and them left to go

That's on the 23rd.

That was when Rita and them went to go there because I had just gotten her to eat around this time right here and that's how I can remember all this. And that how I can remember Johnny saying he was working over because that's when I got my baby to eating again. I'm coming up with everything that I can to help the case. Well if Rita and them is not going in help me too I can't do it by myself. Now that's, that's how I can remember everything because I got her to finally eating. Cause I said we went up to Rita's and Rita was feeding her and I think gravy and potatoes. In a jar. She put a little bit on her mouth with those cream potatoes and that's what Susie liked. Or either she would like baby foods like in the baby food. Because on up until that time Susie was sick until I got her to eating.

Rita and Donald _____ the call on August 23. Rita

was playing with Susie. Rita would hold her fingers out, Susie would grab old of her fingers and Rita would have her hands raised about chest level while she was sitting in a chair. Susie would be holding onto Rita fingers as she stood in Rita's lap. And on that Rita made faces and made funny noises. That was also a note indicating that Susie would reach out and grab Rita by the hair and which Rita would respond ouch and that too would make Susie laugh.

Yeah, that was along the time Susie was starting to get better.

Can I just step in on - I'm not saying that they're lying and but I'm going to tell you - you sit back and put yourself out - not even in this case - and you imagine yourself as a juror - or imagine yourself as just any ole person - and you have a doctor come in without a doubt he's going to say on July 25, Saturday - late Saturday night when they x-rayed that baby on Sunday

August 25th

August 25th, excuse me. They had, that baby had two broken legs, that were seven to ten days old. I've never broke a leg myself, I've never broke a bone - but from what I understand it's painful.

It hurts like hell. I've done it.

And, if you've got any juror that up there that's ever had a broken leg or roken bone, and here Rita is going to say this baby seven to ten days after breaking its legs - both legs - was standing on her lap pushing down. And I'm not saying that it didn't happen - I'm just saying does it sound believable to you?

Not really - my son's have had broken - not broken legs - but a broken foot and Tony has had a broken arm.

And was he ever standing on? On his broken foot?

No, not until they put a cast on it.

As a matter of fact I believe they broke their bones the Spring after Susie died.

Yeah

Because they were asking, you were being asked questions about why these boys had been having breaks that close together.

No, she really didn't say anything. I told her, I said, it may look funny, but you can ask my boys what happened. As a matter of fact, Mike's kids were out there when Scotty fell from the tree and broke his arm. I was with John when Scott broke his foot. And then Tony came running down and if he'd look where my turtle was sitting, Tony could have run him down through the driveway, slid down onto the porch and broke his hand. His arm r something.

You were with out when that happened?

I was with Mike when Scott broke his arm and Tony broke his other but I with John O'Daniels when Scott broke his foot.

Okay. John O'Daniels

I keep forgetting one is John and one is Johnny. That's the way you just told me, you might think

I'll, I'm not saying that they are lying - I'm just saying it really don't sound believable. And that the whole thing is what I'm saying about the sore throat - I understand maybe the sore throat and the baby being fussing and the baby crying and things like that - but when we interviewed you - you now remember your telling me that you remember about your sister walking the floor with the baby at four in the morning. But you hadn't told us anything about that. That's the kind of things that you noticed - you should have noticed - and maybe you just didn't put two and two together. But it is things like that we can go to jury and say she noticed this, she noticed that, maybe she was just blind about it. Maybe she, in deep down in her soul she knew that Johnny was a sorry no good SOB. And maybe she feels guilt. Maybe she feels like she let down her responsibility to Susie and to her other children because she didn't get them out of that situation. But you know you can't change what has happened - you can only go forward with it. And I mean, you know if we go the jury and you know you bear your soul to them cause that the only way you're going to have any creditability with the jury is to tell as much of the truth no matter how bad it makes you look. No matter how bad it makes you look. That

Do it for Susie. Do it for your other children.

If it makes it so it looks like you are trying to protect yourself are you trying, no matter if it looks like you are trying to protect Johnny or yourself, the jury is going to say she trying to protect somebody and the defendant is going to get up there and rant and rave and it's a good possibility that they will come back and will competely miss the whole point of the trial which is who killed Susie. They are going to say its competely ridiculou - she's up there - she's trying to protect somebody - she trying to protect herself - trying to protect Rita - I mean they are going to throw blame everywhere they can and it's possible they are going to come back not guilty.

See we can't guaranteed you a conviction on this case. But we can guaranteed you is that we've going to do everything in our power to get him convicted but we can guarantee you what that jury is going to do. The best, the best guarantee, the absolute best thing to do justice in this case is for everyone _____ to shoot out the truth. Every little shread of it. And if it makes you look like a bad mama - so be it. Because you did. You schrewed up. I mean there is no two ways about it - you schewed up. And, and unfortunately a terrible tragedy happened to draw that to light. But we don't want him to have that opportunity to do with nother child and another mama. And I just as soon you not have to carry that around inside you buried for the rest of your life. Better off to go

n and get it off your chest and get on with it. At least s. Better off o go on and get it off your chest and get on with it. At least Susie would not have died for nothing. Do you understand what I saying? You know, you, you've been to church from time to time - you ever heard the preacher talk about repent before you can be forgiven. Well, that's what I talking about here. You really have to. I hope you understand where we're coming from. We're not trying to hurt you. We're just trying to get to the very bottom of this thing.

We not going to use this against you - to bring charges against you. I mean if charges were going to be brought again 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.

Oh yeah, they're going - why wouldn't the mama charged? I mean

I've heard it before.

Sure you have.

But, we're just wanting you to open up to us because - well, you just need to opoen up to us and when you bring in the fact that when Teressa tells us yeah, she told us to tell the Court and to tell whoever, don't tell that bunch of junk - that'll make me look bad. You know, and I don't want to be laboring the same point over and over, Johnny going to make you look bad. You're, his lawyers are going to do everything they can to point the finger t you. You are going to look bad - but you are going to be beliveable to the jury if you get up there and say members of the jury, only you don't say it like this, but in effect you say, I messed up. I was stupid. I was scared of him. I was afraid of him. I loved him. Or whatever it is.

Maybe a combination of all of it.

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 didn't want my mama and daddy to know that he was abusing me. I had a good idea that he was abusing the kids - I knew that he was spanking them with a switch and I told him not to and he said they were going to mind him - kinda like - well, the heck with what you say, if I want to spank them with a switch then I will spank them with a switch. That I knew all these things and I maybe obvious didn't open my eyes up. I was love blind or something. I was, you know I didn't want to lose this guy. I was free. I was enjoying life. I was enjoying running around with this guy. Or whatever it was. If you don't come across the jury and explain to them - them you are going to come across as being a lier, a cover-up artist, either covering up for yourself or covering up for him. And that just gives his lawyers something to argue and it gives the jury to go in the back room and they can say well maybe she did do some of this or maybe the judge is going to tell us that maybe it not all the evidence we have heard but maybe evidence that we haven't heard - And we can use that to find him not guilty. We can use that to have a reasonable doubt. And they will. This is a very serious case and they are going to have a serious time - it's going to be a tough ase 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 ot 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 everytime you touched it one way. I mean, everybody come in, I swear it sounded like you got a sheet of paper and your memorized the script. And that's why we've been beating our month - even before when we were getting it ready the first time. How in the world can you have two broken legs and broken arm and nobody know anything about it? How in the world did the baby not cry? And the only one that's came in here and told up front that the baby cried was your sister. And she's the same one, of course she didn't tell us everything - she didn't tell us that you told her to lie to us. I mean that you might not have said I want you to lie. But what in effect you did was have her lie, or wanting her to lie.

Withhold.

Withold.

What I meant to tell the truth but I meant

No you didn't

to say was when she was around Susie her throat was messed up. _____ of time she wasn't with Susie.

I know. But you wanted her to say don't tell them that the baby cried all he time. That'll make me look bad.

Yeah, I did.

So, Lisa that makes it look like you were more concerned about yourself than you were about Susie. Just like when you'll went down to the hospital at Chapel Hill and Susie was not going to _____ and going in there going to bed with him, and him doing a little

That was on a Sunday

To relieve that pressure - you went over to the motel room with Johnny and into bed you go.

I didn't do anything with Johnny

I don't care

cause that was the same night that Johnny

_____ it was the same night it was.

That Johnny said well if Susie dies, don't worry about it we can always have another one.

How did that make you feel?

Mad. I told him it was almost as if he didn't care about her.

idn't he want you to have sex with him?

He did, I didn't.

I know, but wouldn't he after you to have sex with him? Hu?

Yeah

What did you tell him?

I told him no, I didn't want to have sex with my baby in the hospital. I didn't want to do anything with him.

It is a curious twist that here you daughter is getting ready to be operated on and rather than being up on, in the waiting room, you down in a motel room with you boyfriend. I mean, that, it it looks funny.

See

And then I think it was the next morning, that you didn't even go over to the ward until sometime after noon, after mid-day.

Cause Rita and all of them was talking to me and stuff. Everybody was what happened - what happened. I'm trying to answer everybody.

think, hadn't you and Johnny gone off together and gotten, smoked some cigarettes and gotten a drink or something like that. I mean you are still hanging tight with Johnny there. But, Sunday and on into Monday - what's going on? Why are you doing that?

Won't nothing going on.

You're with him.

I just, I didn't see him hurt her so I didn't point fingers at him.

Who else could have have him - her?

The onlyest thing I based it on was it was Scotty fault. And then when they said that it won't possible for him to fall like that I didn't know to do - I didn't know what to say.

You mean to tell me, honestly tell me, that you couldn't put two and two together when you saw the way your baby daughter was bruises, and battered, and that you couldn't put two and two together and realize that something bad wrong had happened and nothing to do with Scotty. You mean you saw

Eventually I did.

But when you see those marks under here and something on her cheek you knew that Scotty had done that to her.

_____ then, when they said she looked like she had been chocked. Cause

that's when I ask them couldn't they run fingerprints on Susie. I didn't now no difference - I ain't never been in trouble.

Couldn't, but, when you saw Susie bruised and Johnny saying all is is grease, its grease. Let's take this baby to the doctor. Oh, put the baby to bed the baby will be alright. Couldn't you start figuring out then that too, wait a minute, something bad wrong here - my child is in bad shape and she's got these marks all over her and here my boyfriend has been the only one with her - only adult with her - while I'm up here washing dishes - something ain't right here - I mean you even tell him if you don't take me and the baby to the hospital I'll call the ambulance - I'll call the rescue - You tell him that - you have to argue with him - then the son of a bitch doesn't want to wear a shirt that you picked for him - he wants to argue over the shirt.

Then he warms up the truck.

Well I kept wondering why all the delays. Why did he want to delay it?

Why couldn't you figure out what was doing on with him? Lisa, what kept you right then and there from figuring out what that man had done to your child? Why is it, why has it taken another day and a half for all of this to start coming through to you? Answer me that.

I guess I might have been a thought.

Then there might have been a thought? Was there one?

In a way. From what they said, Scott didn't do it.

So why are you in bed with him for at Chapel Hill?

Cause I wasn't going to say he did it. I didn't see him. They was saying a lot of things but they can't see it they can't say it. And all I wanted my baby here with me, not there. And I still want her here with me not in that damn grave yard - and it ain't doing me no good to sit back and pay for something he did and it damn sure ain't helping me get my baby back. And I want him dead - I don't care if you'll do it or if I have to do it - I want him dead. Because it ain't fair what that baby had to go through for that sorry basard. Why didn't he kill his self? Why did he have to go as far as to touch a baby? A baby that can't get up off the bed and take care of herself. No, he had to go to somebody who can't even talk to me to tell me what he did. I have to go and find out through all these doctors what's going on with my own child - because maybe I was so god damn stupid I didn't see it.

That possibility exist?

What?

That you were so god damn stupid that you didn't see it?

could have been.

Ts that

Maybe I just kept sit back thinking well maybe he's going to hurt me and he'll end up killing me - it ain't going to go of my kids - may the whole time it was going to my kids - and I was just to blind to know it. Maybe I am a god damn son of a mulking fucking mama but I didn't intend for my only baby daughter to be gone. If I had a choice I'd stand there and let him kill me - I'd stand there - no damn problem - take my life but don't you touch my daugther or my sons. But I didn't have that choice - when I come back she was hurt. Now I've done lost her and there ain't nothing I can do to bring her back. Not even taking his life. But, yes, I would take his life because she didn't have one and he don't need one. I don't want him to have one. I hate that boy with a passion for what he did to her. I am sorry I'm sitting here fussing but I'm mad at him. I hate him.

I'd rather you fuss right now - I'd far rather here you get it off your chest

I tired of holding all my babies in and going to my family. Well, this is how I feel. I think he's horrible for what he did to my baby. I tired of taking them to them, I'm tired of crying to my husband at nighttime and I tired of him sitting in that jail not shedding a tear. They don't care what he done - he never cared the night we took her to the hospital - that sorry bastard never shedded a tear - but I did - I sit there and begged that doctor not to make my baby stay there overnight after she died. I sit there rocking my baby in my arms after they unhooked her and she was dead.) 'm the one who stayed there all night with my baby the night she died. But, no, did he? No, the sorry bastard he don't care what he did to her. He never will care what he did to her and then if he gets off the hook he going to turn around and he going to kill another baby and then that one baby will be able _____ cause she's going to be like me and there're going to be another dead baby in this word. Now he's going to get off the hook with it again if they don't do something to him and do it now. And I tired of my baby having to pay the price and tired of my baby being out there in that grave and the only thing I can do is I can walk over there near her grave give her flowers every Sunday and cry and say Susie I'm sorry because I didn't know he was hurting you. If I'd knew I'd have killed him. That's all I can say in my mind.

Do you go over there every Sunday?

I go mostly every Sunday.

Where is she buried?

Alamance Memorial Park. Babyland. I'm the one who had to walk up to that casket and want to pick her up so bad and take her home and put her back in her baby bed. I didn't want her staying at the hospital - I wanted her home with me where she belonged. I just hate that I was slow - as Johnny would say I'm slow.

Well, thinking about it, thinking back on it - you didn't realize this was something was going on before you carried her over to County Hospital. Come on Lisa.

o I didn't. That's what I saying, if I did, it would not have been her it would have been Johnny - Cause I'd killed him over my kids. _____ and it seemed like I was getting Susie a little bit better than then he picked up and maybe she got worse after that - I don't know I can prove it. I'll take God as my word, but as it looks like they're going to believe Johnny, he's going to walk scot free for what he did to her cause maybe he's a smarter damn lier, maybe he good at lying - I don't know what is problem is - I'm sitting here telling the truth when I ought to just lie it out and get it over with and maybe he'd pay the price. I sit here and tried to tell the truth the best I know how and it seems like the truth ain't getting me nowhere. He's sitting up there lying out his ass and it's going to make him walk. He's going to get out of this - he's going scot free and my babys not going to be doing anything but laying in that grave and he's going to be walking around baby killing. Then again he may use some damn sense and not away and hurt someone else kid because he sees what he's been so far. I just hope that if he does walk free that I get to kill him. I'd don't mind going to prison for taking his life. Cause he sure didn't mind taking my babies and I hate him bad enough to that I could kill nobody but Johnny Burr standing in front of me and I'll kill him. And if they ask me that I'll kill him. That was my daughter. I might couldn't defended her them but by god I can defend her now and if they stand him out in front of my I'm going to kill him. I'm sorry but that's the way I feel. I'm not a hateful person but that's the way I feel. I made a mistake, I got over that sorry thing, and it cost me my daughter's life. And I don't want to live without her. I often think of taking my)ife and I wish I could but I've got three more kids that need me more. And that's the only thing that keeps me here. And I have to go away and I don't care who know it, I take those drugs you buy over the counter - is 357 magniums - I take them every day to keep me going. It ain't nothing but caffine pills but I take them. I take them when I get up every morning - I take me two more every evening and if that looks bad then that's just tough because I have to have something to keep me going. And if I could find something stronger I would take it. Anything to keep me out of jail.

To keep you out of jail?

Yeah

What do you mean?

Like I ain't going to do cocaine or something and get put in prison for cocaine.

I see what you are saying.

Or pot or something like that. I'd just as soon take something over the counter to keep me on my feet.

Why are you going to do that?

Cause. I stayed depressed with Susie all the time. I can't live without er being gone. I want my baby so bad and I can't get her back. I talke to her at night before I to to sleep, I talk to her all day. I look at

her pictures and I cry and I've done that every since my baby been gone and hey don't know what its like to have that damn kind of pain on them. He's got his kids. I don't have mine. _____ he sure ain't bringing her back. I turn to my three children and I turn to my three step-children and that's about all I have to keep me going. Maybe if something was to happen to them, they'd just take my baby I'm gone. _____ everything I know concerning I did not see him mistreat Susie. The only thing I know of was her sore throat and then he picks her up at four o'clock in then morning. That's all that I can answer. If I'd seen him hurting her that night I'd have killed Johnny that night over my baby. Cause I ain't going to see nobody hurting my youngun. I can't ever see to see a animal get killed much less a human being. And that ain't in me so I didn't think it would be in anybody else. I don't see how it could be in anybody else. I'm sorry. Getting this upset. I'm just hurt and I'm mad and it seems like I'm not getting no where with it.

Get it out. Just get it out. Cause it ain't going to be any easier when you get into the courtroom and you testify. And don't fake it, you're a human being and you're going to have come across as one in the courtroom. You said something a minute ago though which you're going to have to be willing to admit. That you made a mistake.

I did make a mistake. I got with that sorry thing.

And you probably, Mr. Johnson when he questions you, he's going to ask you

) 'm going to ask you a lot of hard questions. A lot of hard questions.

And one of your answers, you may, I don't know, maybe the explanations is that you were just to blind - in love with him - scared of him - didn't want to lose him - didn't think that he would hurt the kids - or just - I'm not saying that you were stupid - but maybe at that point in your life you were just to stupid and didn't pay attention. I don't know. Maybe its a whole combination of all those things.

After she died all I know is the boys said that he mistreated them and they would not tell me so because they didn't want to see me get hurt but they knew I would jump Johnny.

Lisa there are things like - I try to reconcile different things - I learned that both before and after this happened - that your children - that you were inside and your children were outside playing out side until late, late, late at night. LATE at night. What's going on?

When they were outside playing?

Uh-huh

Late into the night. Eleven - midnight - one in the morning.

My kids never played until one in the morning.

hat's not what your neighbors are telling us.

They didn't play till one in the morning.

I mean even the night that this happened, you don't go up there to wash dishes until sometime midnight - one o'clock in the morning.

Cause they was working on that trailer.

And the kids? JJ was up at Donald and Rita's

So was Scott and them

And they don't go to bed until you have to wash the dishes. That's pretty late for little boys.

They were watching a movie.

You knew enough of something was bad wrong when you saw Susie that when you left you said to your boys if they come around asking questions, and they ask you if we spank, you tell them we do it the right way.

Yeah

And that was when you were leaving to go to the hospital.

_____ cause my baby was bruised up bad.

But you knew enough then to realize, that that's what it looked like. Which goes to show that you are not stupid. See.

I just hate I didn't know at that time he did it.

Well, you, like I say if you put two and two together it's going to come up four. And you didn't do it. You knew somebody had to. You didn't think somebody had broken into your trailer and done that I dont't think. Did you?

Scott and Tony were in bed.

You didn't think that your boys would do that would you.

My boys wouldn't hurt their sister for nothing. I know he did it. I just don't know how to prove it.

Well you let us worry about proving it. You just tell us anything and everything that you can think of and don't hold anyting back. If you hold back - It was like a script that everybody came in here and said.

She was a normal baby.

She's normal.

Happy baby.

Happy. Cries - a little. Not much at all.

usie cried a lot when her throat was messed up.

It seems to me, just looking at _____ record that your last, her last month and a half was a tough month and a half.

It was.

Cause she doesn't seen even, my lord, on well, on April 18, April 19, you even took her to Alamance Hospital, she was 18 days old at the time. She was irritable, gas, and that kind of thing. And, that the first time Wilcox saw her. Change formula to Infamile. Try more Petelite or sugar - water if not hungry - two minocycline two drops full every four hours if further gas or irritability. Letrimine AF cream for rash. That's was back on April 19. And here we come up to July 17 and you take her to the emergency room at that would have been Memorial Hospital I suppose and yeah. Alamance Memorial Hospital. Redness, tenderness, I swear these doctor's write where you can't read. But that's when he told you to give her tylenol for fever.

Seems like she was running a fever.

And something, proxomide in each ear. That was I reckon it was Dr. Richard Lowyer. And then, then _____ July 17, the fact is the complaint was mother stated that child is pulling at her ears. She is fussy all day. Nurse wrote that. I could read it. Medication - current medication ylenol - looks like the ever prescribed some noxicyline. Suspension a ittle syrup - I guess a half teaspoon - they gave her a half teasoon then they gave her a half teaspoon to carry with you. Remember that?

Yeah

And that was on the 17th of July and then a week later you are back in the 26th of July. Mother states that child is weezing and has a sore throat. Is taking medication for an ear infection. Current medication is noxicyline perscribed July 19, 91. Mylecocine drops. The medications they gave you looks like mysotane, oral suspension to go. You weren't satisfied with that so you'll went to Chapel Hill. Lets see here. Chapel Hill on - one month - not quite that long - no you had her up to Chapel Hill one time before that didn't you? One white female vomiting twice - had vomited twice - _____. Watery diarrea. That was back in March. Then July 26, you had up to Chapel Hill after you had left the hospital locally because you weren't satisfied. You and Rita were up there because it looks like she was admitted. Let me see if I can find the time. 6 AM. Three and a half month old girl who presents a one to two day history of difficulty feeding, screaming, and a rattle air chest. Patient sleeping in mother's arms, noisy breathing, lots of upper airway sounds. Prenatual care been uneventful. She's presently medications were noxicyline to the ears and she was started on that on July 19. She presents irritability and patient on intake has noisy breathing for several days. No B/D. I'm trying to remember what that meant. Fever, calls for other syptoms being treated for om with noxicyline since 7/19. Irritable ut consolible. Head, ear, eye and nose, throat for both sides and this is with a good I just can't read this thing. Ulcerations of the postura up in

here or _____. _____ one thing I notice too is that hey were reporting her weight was a little low for her age. That she was a little small for her age. Impression vile illness. Probably coxisacking which I told you meant thresh mouth or something they call thresh mouth. Tylenol for pain. Feeds soon. Patient's dose. Returned to medical center if the syptoms percise or if they worsen. Dignosis vile syptrome. Discharge instructions tylenol every four to six hours for pain, feed small frequent amounts, return to pediatric clinic if no improvement with one to two days. That was your last visit to Chapel Hill prior to carrying, the ambulance carrying her up there on the 25th. What I'm saying here is it looks like a baby girl whose really had a tough time of it. Particular her last month - she's had a tough time of it. I would expect her to cry a lot. I think anybody else would. Isn't that was she was doing?

Hu?

Crying a lot with various and sundry things? I'm not saying that she didn't never say she didn't stop crying but that she did cry a lot I would think.

When she would get sick she cried. When she was irritable. We used them to do her better.

Tell you what. What do you mean getting them to do her better?

Getting her to do them better. Giving

WORD/RFJ/BURRO-D2.DOC

Lisa O'Daniel still talking

And Johnny had - tell me one time when we was outside me and Rita and them. Do you remember when them people, two old couple down on, I don't know if it was Jimmy Bowled Road or what road it was, it was right down below us, I can't think of what their name is, their grandson killed them - that was right before Susie - that happened to Susie - and I remember me and Rita was outside and we was talking about how bad that and I said that was close to where we lived at - and he made the statement he said, Yeah something like that could be happened right up under your roof and you not even know about it. It was something else I was going to tell you.

Let me ask you something as far as that statement goes. Who all was present when that statement was made.

Me, and Rita, I don't know if the children were or not but Me and Rita. We we all standing out in the - Rita's and them's yard - when he made that statement.

When in relation to the 24th of August was that made?

I don't know exactly when it was. I just can remember that was on after that happened to that couple.

You are talking about the Mr. and Mrs. - what was their name -

Crotts' case.

That lived close to us.

Now they are the people who were killed - Crotts

That was, what was their people's name?

Isn't that a shame that you remember who did it but not the victims?

Yeah, it is.

Gilliam's? Was that them?

Gilliam's

That's what it is.

How much time do you have any idea approximately?

Maybe just a few weeks, I would say that happened to Susie.

Yeah, cause that was not to terrible far - that would have made sense.

And that happened - seems like that happened before this happened to Susie. It was close.

And your comment was you said "Isn't it a shame."

said that was close - that's terrible. And then he made the comment back he said, yeah that could be happening under your own roof and you not even know anything about it.

And then my mama told me to tell you something.

Well I've been meaning to get in touch with your mama, it's just

She said she called and left a message.

Yeah

What that was she said that she made a mistake, she said that she told you'll Rita was the one that told her that Johnny was accusing Misty and them of doing it. You remember what I'm talking about?

Uh-huh

Okay. She said that was her mistake. Johnny was the one told her that.

Johnny told your mother.

Yes, he was the one who said that. That's who she heard that statement from was Johnny.

) hat what did she hear from Johnny.

That he was accusing Christy and Misty - he said he wouldn't doubt it if Misty and Christy wouldn't doing something to hurt Susie - that's the way it was.

That's about all I can really think about now. But I did, have to think about that statement about it could be under your own roof. I thought I'm come in and tell you while I have everything on my mind.

That's the way to do - appreciate it.

Okay.

2

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO:	4. OCA FILE NO.
Alamance Cty Sheriff's Dept.	0010000 NC	☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	1-100-8-91

5. NARRATIVE

This will be an interview with Lisa Porter O'Daniel, this is in reference to the Tricia Sue O'Daniel case. Today's date is 8/26/91.

Q. Ok, Lisa you have been advised of your constitutional rights, is that correct?
A. Yes.
Q. Do you fully understand those rights?
A. Yes.
Q. And do you agree to have conversation with us?
A. Yes.
Ok.
Q. Give us your, give us your full name, your date of birth and your address?
A. Lisa Porter O'Daniel, December 31, '64...
Q. And your address?
A. 4147, Lot 1G Bowles Road
Q. And what's the name of that mobile home park?
A. Country Living.
Q. Do you have a phone?
A. Huh-uh, I use my stepbrother's.
Q. If you will, speak up a little bit louder, will you do that for us, you know so this recorder will pick it up. You just talk a little louder. What we're talking about, what we want to discuss about is your daughter and her name is Susie?
A. We call her Susie, it's Terisa.
Q. Terisa O'Daniel, and she's a 4½ month old infant?
A. Yeah.
Q. Speak up. And this child was seriously injured Saturday night or Sunday morning, is that right?
Yes.
Alright, that's what we want to talk about. That child is now where?
A. At the hospital.
Q. Which one?
A. Chapel Hill.
Q. What has the doctor, and what does your understanding of the condition of the child?
A. She could die.
Q. The doctor has told you and us that the child could die at any moment, isn't that right?
A. Yes.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 1 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

0015999

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. Tell us about what happened Saturday before you had to take your child to the hospital and we'll call her, you want to call her Susie? Is that what we're going to refer to?
A. Yeah.
Q. What happened at you home Saturday, Saturday all day and Saturday night and Sunday morning? Tell us what happened and who was with you and where you were at and what you did.
A. Tell him about when Christy kept her or just from the part where Scott fell?
Q. I want to know what happened Saturday all day. Just start when you got up. (Pause) What time did you get up?
A. Probably about ten or eleven.
Q. Was your children up already or did they just get up late like you?
A. Well sometimes they sleep late, sometimes they go up to Rita's and thems with their youngins.
Q. And Rita is what?
A. My stepbrother's wife.
Q. And they live beside of you or right up above you?
A. Right up above me.
Q. And that is your stepbrother and his name is what?
A. Donald Wade.
Q. Donald Wade, and that's where they would go sometimes. Were they up there Saturday morning when you got up?
A. Yeah.
Q. Ok, and are you married?
A. Separated.
Q. Have you got a boyfriend?
A. Yes.
Q. What is his name?
A. John Burr.
Q. John Burr? Was he at your trailer Friday night and Saturday morning?
A. Not Friday, but Saturday after twelve.
Q. He came to your trailer after you had gotten up Saturday at about 12:00 o'clock or so is when he got there, is that what you said?
A. Yes, and I was up at my....Naw, I got up before then.
Q. Alright, what time did he get at the trailer?
A. A little after twelve.
Q. Did ya'll start fussing about anything?
A. About where he'd been.
Q. Well, what happened, what was said?
A. He said he worked real late and then he went and took care of his little boys for his wife to

001600

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 2 OF 22

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

go to work, his ex-wife or whatever.
Q. He's still married?
A. They're separated.
Q. Are they actually separated or does he stay with you some and stay with her some?
A. Well she's got papers from her lawyer.
Q. Well doesn't he stay over there some overnight?
A. Yeah.
Q. You know that don't you?
A. Yes.
Q. Alright, and don't ya'll fuss about that occasionally? Alright, so you fussed about that aturday after he got back and your other children were up at your stepbrother's home, at the Wade home. Where was Susie?
A. With me.
Q. Had she already been changed and dressed?
A. Yes, and then I took her up there, he said we was going do some more work on the trailer. We was putting in some windows.
Q. Putting in windows?
A. Yes, and a panel box so I took her up there to Christy Wade.
Q. Christy Wade?
Q. How was the, how was Susie at that time? How was she acting, was she a normal kid or was she still, or did she have some problems still? Was she still nervous from the days before or weeks before that or was the child ok?
A. She was acting ok.
Q. She wasn't nervous?
A. And then I took her up there and and then Christy kept her for a little while and said that she couldn't do nothing with her so she brought her back to me.
Q. hy couldn't she do anything with her, what was wrong with her? Did she say?
A. ne just said she started crying and got ill.
Q. And so she brought her back to you, and what did you do with the child?
A. I held her and then put her in her swing.
Q. Did she calm down for you?
A. Yeah.
Q. How long did it take her to calm down?
A. It didn't really take long.
Q. Ok, and then you put her in the swing and she set there and swung, right? Inside the trailer or outside?
A. Inside.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 3 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. Alright, and then what happened later on that day?
A. We went out there to hook some wiring up on a pole....
Q. Like a meter pole?
A. Yeah,
Q. Uh-huh.
A. And then ah, I took her out there with me and then I called my little boy and asked him would he hold her for me.
Q. Alright, and which little boy did you call and ask to hold.....
A. Scott.
Q. And how old is Scott?
A. He's 8½.
Q. And was this....do you remember about what time this was?
A. Probably about 6:00 o'clock or maybe a little after.
Q. And he came over and was carrying the baby for you, or holding the baby?
A. Uh-huh.
Q. Did you tell him to go do anything with the baby or take the baby anywhere?
A. No, I started to walk up to Christy's and he was going follow me.
Q. Alright, so you was, you was in front of him walking toward Christy's and your son, Scott,....
A. Was going to follow me.
Q. Carrying the child?
A. Yes.
Q. And what happened?
A. I told him to turn around and go back down in the grass with her and when he went to turn he fell with her.
Q. Did you see the fall, did you watch him as he fell?
A. No, when I turned around I heard him holler and when I turned around he was laying on top of her.
Was he laying on top of her or was he cradling her in his arms still and had just fallen holding the child in a, you know to protect the child from a fall or was, did the child literally fall and had he had laid on top of her? Which was it if you remember?
A. Well her was holding her the whole time he'd fell.
Q. He continued to hold her, he didn't literally drop her?
A. No, and he didn't let her go.
Q. He didn't let her go, he still had his arms around this child and you went down there to them and what happened? Did the baby cry out and scream out or just cry out?
A. She was crying out real hard.
Q. And was it ah, I mean have you heard her cry out louder or harder than that before? Have you heard the baby scream or cry or holler any louder than that before?

001602

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 4 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

th Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

lot of times when she was, when I heard her crying with Johnny like that night I went in there.

Q. You had heard her the child scream louder when she was with Johnny?
A. When she was with Johnny.
Q. And that's your boyfriend?
A. Yes.
Q. Well tell us about that.
A. That was at the time I went in there and he said that he going to.....
Q. Tell us about going in there and how long before Saturday was this. I don't, we'll have to get back in just a minute to the fall, but go ahead and tell us about you hearing this child scream and cry louder than she was Saturday.
A. That was on a Wednesday or Thursday when he come in.
Q. Of this same week?
A. And he said that, you know, that when he come in from work she was laying there looking at him, she was wet and he was going to change her. But I heard her scream and sound like far away and when I went to the living room, that's where they were at.
Q. And this was about what time in the morning?
A. It was 4:00 o'clock in the morning when he.....
Q. And you was in the room with the child or she was in the room with you?
A. She was in the bedroom with me, he took her out of there and took in there.
Q. Did you hear him come in?
A. No.
Q. And the child wasn't crying was she when he came in cause you would have heard the child wouldn't you?
A. Yes.
Q. Any time the child cries, do you wake up? And so the child did not cry out?
A. No.
Q. But then you did hear the child crying, you heard a scream from the child different from what a normal cry is, is that what you're saying?
A. Yes, and I went in there.
Q. And when you went in there, what did you see?
A. He was holding her up in front of him and said he was just getting ready to lay her down and change her.
Q. He was holding her up in front of him like, if you will rather than just holding your hand, try to describe that.
A. He had his hands up under her arms and ah, sides, on her sides, up under her arms.
Q. Up under her arms and up under her, on her sides. Was he holding her up to him or was he holding

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 5 OF 22
		/ /		

DCI - IR 202

Rev. 1/79

North Caro. Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

her out from him?
A. Sort-of.
Q. And was that, was that child still crying and screaming?
A. Yes.
Q. And he said that the reason he got the child out of the bed was what reason?
A. She was wet and he was going change her. She was laying there looking at him.
Q. Had he ever changed the child up until that point before?
A. No.
Q. Never?
A. No.
Was the child in fact wet when you checked her?
A. The pamper was wet.
Q. That would make sense at 4:00 o'clock in the morning. Did you change the child or did he change the child?
A. I changed her. I took her from him and changed her.
Q. And did the child act right the rest of that morning or the rest of that day?
A. Well it took me an hour or so to calm her and she went back to bed.
Q. And is that a habit the child has of getting up in the middle of the night and taking an hour or two to get her back to bed?
A. No, no.
Q. And it took you how long to get her back to sleep and back in bed that morning?
A. I got her to bed around 5:30 or 6:00 o'clock.
Q. So what you're saying is another hour, hour and a half or more?
A. Yeah.
Q. Before the baby quit crying and calmed back down?
A. And went back to sleep.
And what did Johnny do?
A. He didn't do nothing, he just sit there.
Q. Did he go to bed, did he just sit there and watch you rock her and...
A. He just set there and watched me rock her.
Q. You were rocking her?
A. Yes.
Q. Did he say anything?
A. No, just talked about work.
Q. Did you think that was strange that had occurred with him and that baby and that the baby was continually crying?
A. Yes.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 6 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

001604

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. Did you ask him if he'd hurt the child?
A. I just asked him what was wrong with her.
Q. And did you see any, did the child have any bruises or marks on it?
A. Maybe his fingerprints right there.
Q. Did it, or did you just think so or did you actually see some fingerprints?
A. I seen some but I figured it was where he was holding her up.
Q. How long did those fingerprints and thumb prints last on that child? How long did they remain on the child when you seen it?
A. I think they were still on her when I put her to bed.
Q. His fingerprints?
A. I think so, I'm not for sure.
Q. Well, as honestly as you know, you think they were still on there or were there on there. You're the mother of the child, you should know. And why did you know they were fingerprints or thumb prints? Is it because ah, you changed the baby and seen them?
A. Yes, when I was holding her and rocking her, that's when I noticed them.
Q. Did, does she, did the child not have on anything but a pamper?
A. That's all she had on.
Q. It was hot wasn't it?
A. Yes.
Q. And so even when you put the child to bed it was still wasn't wearing anything but a pamper?
A. Yes.
Q. It wouldn't have on night clothes, right? It did not have on....
A. No, just her pamper.
Q. And you, you're of the opinion that the child still had finger and thumb prints on it's side and back even ...
A. While he was changing her..
Q. After an hour-and-a-half or two hours later?
A. If I can remember right, they was lightening up but they were there.
Q. Ok, now, and the child did she seemingly do alright the following day or did she have problems with any limbs or her ability to, to focus her eyes or did she seem to be normal?
A. She could focus her eyes.
Q. She could?
A. Yes.
Q. Did she seem to be normal as far as taking her bottle? Was everything normal?
A. Yes, she would take her bottle.
Q. Did she act like she was crying more than normal?
A. Mother was going to take her from me she wouldn't.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 7 OF 22

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. That day, if someone else would hold her other than you she cried more than normal?
A. Yes.

(We'll change sides.....turned tape over)

Q. Ok. Alright, now let's go back to this past Saturday night and Sunday morning about 6:00 o'clock we're talking....you said your son Scott dropped your child. He didn't really drop the child, he cradled it but fell with the child in his arms?
A. Yes.
Q. And you, and you turned around and seen that, that the child had not left his arms?
Yes.
Q. You went to him and what happened?
A. I got the baby and ah,
Q. What did the baby look like? How was the child?
A. She was just red, but she was crying real hard and shaking.
Q. Ok, and that's whenever, but you're saying and that's what led us back to the previous Wednesday was whenever you said the child was crying loudly.
A. Yeah.
Q. But you had heard her cry and scream louder than that, right?
A. Yes.
Q. Ok. Now did the child have any marks on her?
A. When Scott fell with her?
Q. Yes.
A. It was red, real red.
Q. Where was the child red at?
A. On her arm.
On which arm?
A. This one over here.
Q. Your referring to her right arm?
A. Yes.
Q. And he had the child cradled with the child's face toward him and the child's back toward the ground, is that right?
A. It would have to be just like this, he was standing this way with her.
Q. So it was on her left arm?
A. Yes, her left arm and her back.
Q. And like I said, the child's back was toward the ground.
A. Yes.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 8 OF 22

001606

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. And the face toward your son, Scott.
A. Yes.
Q. Alright, and so you took the child from him, the child was crying and how long did it take you to settle her down?
A. Probably about an hour-and-a-half.
Q. And how did the child act after you'd gotten the child quitened down and she'd settled back down. Did she take her bottle?
A. Yes and she would play.
Q. She would play, move her arms, move her legs, I'm talking about the normal fashion.
A. Yes, this arm over here jerked a whole lot.
Q. Her left arm?
A. Yes.
Q. Was it jerking right after the fall some?
A. Yes.
Q. And .....
A. And it was real red.
Q. And, but the child was....
A. She was moving her arm and everything.
Q. And she was taking her bottle right?
A. Yes.
Q. And her eyes was normal?
A. Yes.
Q. And did, did your boyfriend, Johnny, what is that Murr?
A. Burr.
Q. Burr, did he tell you not to let the child go to bed or go to sleep or did you do that or did you know not to let the child go to sleep or what?
A. He said not to.
Q. Alright, and then what happened?
A. He went to mow the yard and then she, well I put her to bed. She got sleepy but it would, had-a-been a while.
Q. How long was it, what time was it you put her to bed?
A. Probably about eight or nine.
Q. Eight or nine o'clock, so it had been a couple or three hours since the fall?
A. Yeah.
Q. Since....when you put her to bed. Were you and your boyfriend Johnny still fussing and arguing off and on?
A. Yeah, cause he wouldn't take me to my mamma's.

001607

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 9 OF 22

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. He wouldn't take you to your mother?
A. Yeah, after he said he would.
Q. Had he hit you?
A. He hit me in my back.
Q. Had he.....and what did he use to hit you in the back?
A. His fist.
Q. What time of day did he do that?
A. Well it was around.....right after I put her to bed I think or maybe right before.
Q. Alright, had he hit you any other time during the day?
A. Yeah, he pushed me in my back.
Q When did he push you in the back? (Pause) When did that happen?
A. That was on up in the evening.
Q. That was like that had happened earlier than the fall, before the fall with the child? That had happened earlier as you wasleaving your step.....
A. No that was, wait a minute, that was after she fell, he fell with her.....
Q. So he pushed you.....
A. That he pushed me in my back.
Q. But you didn't fall to the ground or any.....?
A. No.
Q. Why did he push you in the back?
A. Cause he said I was running my mouth.
Q. Ok.
A. He was tired of hearing my mouth.
Q. So he just pushed you and you was holding the baby.
A. Yes.
Q. But it didn't hurt the baby?
A. No.
Q nd so, is that when you were going back to the trailer?
A. Yes.
Q. Alright, and so then you put the baby to bed about 9:00 o'clock or so, is that right?
A. Yeah, maybe a little earlier.
Q. And how was the baby then?
A. She was real calm.
Q. No problem?
A. She went to sleep, she went to sleep while I was holding her.
Q. And she seemed to be natural and normal?
A. Yeah.

001608

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 10 OF 22
		/ /		

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO:	4. OCA FILE NO.
	NC	☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	

5. NARRATIVE

Q. And you fed the child?
A. Yes.
Q. She took her bottle, did she take it all?
A. Yes, she took most of it.
Q. Like normal?
A. Yes.
Q. And did she have any bruises on her at time point and time on her face, neck....
A. No.
Q. Arms?
A. No.
Legs?
A. No.
Q. Ears?
A. No.
Q. Was she red? Was she still red from the fall or had she already started getting over the redness?
A. I think she was still a little red.
Q. On the left arm?
A. Yes.
Q. Ok, so you put the child to bed, right? And then what did you do?
A. I went up to my niece's to wash dishes.
Q. Were your children, your boys, were they there at that time? Your sons?
A. Yes they were in the bed.
Q. And what time was this now?
A. Might have been something after twelve, right at one or something like that.
Q. What did you do, and what did you and he do between ah, 8:30 – 9:00 o'clock when you put the child to bed until you went up to your step-brother's to wash dishes about twelve. What did ya'll do in that three hour period?
A. Trying to get the water bed, putting the water out of the water bed to get it set back up.
Q. Why did you have to set the water bed back up?
A. Cause he pushed me on it and it fell.
Q. And broke?
A. Yes.
Q. Did the water bust out of it?
A. No.
Q. Just the frame?
A. Yeah the frame.

TIMES IS WRONG

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 11 OF 22

DCI - IR 202

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. Why did he push you or knock you on the bed? Did he push you or knock you?
A. He pushed me.
Q. And why did he push you on the water bed?
A. He said he was picking when he done it.
Q. Was he? Weren't ya'll, weren't ya'll having words?
A. Yes.
Q. So what did it, why did he push you for? Because what had you said to him? What were ya'll discussing? What about going to your mother's or something .....
A. Yeah, my mamma's house.
Q. Ya'll still fussing and arguing about going to your mother's and he wouldn't take you?
A. Yes.
Q. So he pushed you on the water bed and broke it and ya'll had been trying to repair that?
A. Yes.
Q. Had ya'll made up to some degree or were you still mad at each other and still saying things to each other in a mad and a ill way?
A. No, we wasn't then.
Q. And your sons had come back down to the house from up at your step-brother's house, your three sons?
A. Yes.
Q. And you had put them to bed?
A. Yes.
Q. And what did you do then?
A. I went to wash the dishes.
Q. And....where was the baby Susie?
A. In her baby bed.
Q. In her baby bed. And you checked her, did she just have a diaper on again?
A. Yes.
Q. No night clothes, just a diaper?
A. Just a diaper.
Q. And you checked her and everything was still ok, no bruises?
A. No.
Q. Nothing.
A. No.
Q. And where was Johnny when you left to go up to your step-brother's?
A. He was in there working on that bed.
Q. Still working on it? And let's get this clear now. Your step-brother only lives a 100 or 200 hundred feet from you, isn't that right?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 12 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

A. Yes.
Q. A couple hundred fee away in a different trailer?
A. Yes.
Q. And how long was you up at your step-brother's home before you went back down to you home?
A. Only about 45 minutes.
Q. What did you do, go up there and wash.....
A. I washed the dishes, set down and smoked a cigarette and then come back home.
Q. So you couldn't have been gone over 45 minutes?
A. No, I don't think so.
Q. And when you got home what did you see and what did you hear?
A. The baby was all bruised up and she wasn't reacting to nothing.
Q. And where was the baby?
A. She was in a swing and then he took her out and was showing me the bruises.
Q. And you had only been gone 45 minutes and when you left no bruises were on that child, is that right?
A. Yes.
Q. And when you got back 45 minutes later the baby was not in it's bed?
A. No.
Q. Why did he get that baby out of that bed, did he tell you?
A. He said he woke her up drilling on the bed.
Q. Using an electric drill?
A. Yes.
Q. And he woke her and had to do what with her?
A. He said she just woke up so he said then he got her and put her in the swing.
Q. How was the baby whenever you got back there and it was in it's swing?
A. She was bruised.
Q. Where was she bruised at?
A. Under her neck, her arm....
Q. How about her ears?
A. Her ears (mother is crying).
Q. And what did you say or do to him, Johnny? Did you ask what was going on?
A. I asked him what happened and he said that was as far as he knew from where Scott fell with her.
Q. And didn't he tell you or did he say anything to what that was on her face or neck or ears?
A. He said it was grease.
Q. And you did what?
A. I washed her up and it wasn't grease.
Q. Was the baby, how did the baby act whenever you got her out of the swing?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 13 OF 22
		/ /		

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

001611

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

A. She didn't act right.
Q. Was she awake?
A. She was awake but she just didn't look right.
Q. What was she....how....why and other than the bruises, how did she look?
A. She wouldn't blink.
Q. Did her eyes look right?
A. No.
Q. Did her arms and legs look right?
A. No.
Q. What were they doing?
A. She just kept shaking.
Q. Shaking? Was she shaking in the, in the swing before you picked her up? Did you realize that when she was sitting in the swing or did you pick her up out of the swing before you realized how bad.....
A. He walked over there and picked her up out of the swing to show me the bruises.
Q. He did?
A. And brought her to the light. He said that was grease on her arm and stuff but it wasn't.
Q. He was trying to get you to believe that it was grease from him working on that water bed that he had gotten on the child when he picked the child up?
A. Yes.
Q. But you cleaned the child up and knew something seriously was wrong with the child didn't you?
A. Yes.
Q. You immediately made a call right away, did you go back up to your brother's?
A. Yes.
Q. And made a call to where?
A. To Memorial Hospital.
Q. And what did they tell you?
A. Things didn't sound normal for her.
Q. And to bring the child in?
A. To bring her over there.
Q. And you went back down....did you have the child with you when you made that call?
A. No.
Q. You had left the child there?
A. Yes.
Q. With Johnny?
A. Yes, he was holding her while I made the emergency call.
Q. Was your boys still in the bed?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 14 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

A. Yes.
Q. Did you go back down there after making the call and then did you clean the child up or try to or change her diaper or do anything or what did you do?
A. He changed her diaper right before we brought her to the hospital.
Q. Johnny did?
A. Yeah.
Q. Is that the first and only time he's ever changed the child?
A. Yes.
Q. Did you ask him to?
A. No.
Q. Did you have to wake your children up to get them to go with you or to take them somewhere else or what did you do with them, your boys?
A. We got them to go up to Christy's and so I could get her to the hospital.
Q. And Christy is your niece?
A. Yes.
Q. That's your brother's daughter? And that's what you did do?
A. Yes.
Q. And as you left did you tell your sons what to say to us or did you and Johnny tell your sons what to say to us in law enforcement or Department of Social Services if we asked whether or not anybody ever whipped, beat or mis....ah, mistreated them? Did you say anything to them about what to say to us?
A. I just told them to tell the truth.
Q. And what did you tell them the truth was?
A. That I didn't beat on them that I whipped them in a normal way.
Q. And how about Johnny, did he say the same thing?
A. I don't know because then I went on out to the truck with her. Christy was in there with them.
Q. Did you tell your children or did anyone tell the children to say that Johnny did not correct them or spank them in any way or in any particular way?
A. I didn't.
Q. And you don't know if he did or not?
A. I don't know if he did or not.

(I'm going to change the tape)

Q. Ok, continue on, this is a continuation.
Q. So you don't know whether or not he said anything to your children about what to say to law enforcement or anything about whipping them, right?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 15 OF 22

DCI - IR 202

001613

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO:	4. OCA FILE NO.
	NC	☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	

5. NARRATIVE

A. No I don't.
Q. Now, let's go back a second, didn't or when did you realize that Johnny had done something to your child?
A. When I come back from washing the dishes.
Q. Did you realize then that he had hurt your child?
A. I knew she was hurt bad.
Q. And you knew she wasn't hurt before you went to do the dishes, is that right?
A. Yes.
Q. Are you confident of that?
A. Yes, I swear to it.
Q. And he had told you he had to get that baby out of the bed and put it in the swing after you had gone washing dishes because he woke that child up with a drill?
A. Yes.
Q. Did he say he made the, the child cry and had to take her in there or how did he put that?
A. He just said he woke her up drilling and took her in there.
Q. Did he continue to work after putting the child in the swing or did he stay with her until you came back?
A. I don't know, all I know is she was in the swing and then he got her to show me the bruises.
Q. He, why didn't he, if he realized something was wrong with that child, and seen all those bruises that he was showing you after coming back from washing dishes, why didn't he come and get you when he first got the child out of the bed if he woke it up with a drill? Why wouldn't he have come and gotten you if he realized something was wrong with that child?
A. I don't know. He kept trying to tell me wasn't nothing wrong, she was just bruised from the fall.
Q. And the child was semi-unconscious or unconscious and didn't cry and wasn't making noises or doing anything other than that....
A. She was there and that was it.
Q. And you knew the child was seriously ill?
A. Yes and I told him then to either take me to the hospital or I'd call an ambulance.
Q. And he was, in other words, he wasn't going to take you? He kept telling you he wasn't going take you, the child was ok?
A. Yes.
Q. And so you had to threaten him with calling.....
A. The ambulance......
Q. Rescue? Did you feel like, are you, do you feel confident that Johnny hurt your child while you was washing dishes?
A. I think he did.

Finney Ford

001614

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 16 OF 22
		/ /		

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. If he didn't someone else had too, is that what you're saying?
A. He was the onlyest one there.
Q. That's what I'm saying to you, and it had to have happened while you were gone washing dishes that 45 minutes, right?
A. Yes.
Q. Has he ever threatened your life?
A. Yes.
Q. Can you tell me how or why he threatened your life and in what manner?
A. He just said that if I ever run around on him he would shoot me and showed me a bullet.
Q. Did he show you the gun the bullet would go into?
A. Yes.
Q. And is it a long barrel or a short barrel gun? Is it a pistol or long barrel gun?
A. It's a long gun.
Q. And he told you he would use that on you and kill you?
A. Yes.
Q. If he caught you running around on him.
A. Yes.
Q. Did you believe him?
A. Yes.
Q. How many times has he ever assaulted you over and above this past Saturday, those two times that you told us about there. Matter of fact, three times you told us about on Saturday. One whenever you were out in the backyard mowing, he hit you with his fist in the back, is that correct?
A. Yes.
Q. He ah, the second time hit you in the back as you was leaving your brother's trailer, as you was going back to your trailer...
Yes.
Q. And a third time when he pushed you and shoved you into the bed and broke it, all in one day. Is that right?
A. Yeah, and then he put his finger up at my mouth and knocked me on the couch.
Q. Saturday?
A. Yes.
Q. In your trailer?
A. Yes.
Q. Why did he do that?
A. Cause I was fussing with him.
Q. It was a bad, ill day with you people Saturday, wasn't it?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 17 OF 22

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

A. Yes.
Q. How many times has he ever assaulted or done anything to you prior to and before Saturday? How often would he assault you?
A. I don't know, just once in a while he'd push me or hit me or something like that.
Q. And that's normal?
Q. Normal for him?
A. I reckon for him.
Q. And you will allow it? He did it didn't he?
A. Yes.
Q. And how hard would he whip or correct your children?
. Well he whooped Tony one time with a belt and Tony had a bruise on his leg.
Q. How often would he whip your children?
A. Not too often, cause he wasn't hardly there.
Q. But when he was there would he, is, is he a man that would loose his temper quickly? Has he got a fast hot temper?
A. Yeah.
Q. Gets mad quickly and when he gets mad does he lose control of himself and do things that he doesn't do when he's not mad, like hit you?
A. Yeah.
Q. Have you ever seen him do anything with the child before last Wednesday or Thursday that was odd or different?
A. Not just sometimes I would come in and she would be crying.
Q. And then she would stop crying when you'd take the child?
A. Yes, when I would take her.
Q. Do you know whether or not anyone hurt your child Saturday night or Sunday morning? Did you know, do you know that first hand? Do you know what happened to your child, absolutely?
No.
. Did you have anything to do with your child being hurt?
A. No.
Q. Did you shake your child?
A. No.
Q. Did you hit your child?
A. No, I've never hit her?
Q. Do you ever hit any of your children?
A. In the right way.
Q. What is the right way?
A. With my hand on their butt or with a switch.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 18 OF 22

DCI - IR 202

Rev. 1/79

001616

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. But you've never lost control and slapped them in the mouth or in the jaw?
A. No, no.
Q. And have you ever tried to do anything to make this child, this infant child of yours, Susie, to stop crying?
A. I rock her and take up time with her.
Q. But you've never had, you've never tried to pat her or slap her hands or anything to make her hush?
A. No, I pat her pamper, but that's not, I pat it to get her to go to sleep. But I didn't.....
Q. But not like as ah, ah, whip?
A No.
(Just a light pat?
A. Yes.
Q. Ok, do you have any questions you want to ask us?
A. No, I just want to get who done it.
Q. And who done it? As you say you want to get who did it, who do you think did do this? Who are you convinced did this?
A. Evidently he did, he had her when I came back?
Q. Who is he?
A. Johnny.
Q. Ok. And what you're telling us is the truth?
A. Yes.
Q. Absolute?
A. Yes.
Q. You'll testify in a court of law what you're saying?
A. Yes.
Q. Will you take a polygraph test for me?
Yes.
Q. Have you ah, have you ever seen Johnny hit any children in a violent way?
A. His little boy.
Q. And what did he do?
A. He put both his fists together and hit him in the chest.
Q. Did he hit him hard?
A. Yes.
Q. He put his fists together and that's both of his fists together?
A. Yes.
Q. Making it as one?
A. Yeah.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR -	9. SUPERVISOR SIGNATURE	10. PAGE 19 OF 22

DCI - IR 202

Rev. 1/79

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. And did he hit him violently?
A. Yeah, he hit him real hard in the chest and knocked him back.
Q. Did the kid act like he lost his breath or anything?
A. He wanted to cry.
Q. And what happened?
A. Johnny told him he didn't want to hear it.
Q. What did he tell him he would do if he did?
A. Evidently the little boy knew because he wouldn't cry. That was up at Rita and them's house.
Q. Is ah, up at who?
A. Rita and them's.
Q. Rita Nimms?
A. Rita and Donald's, they was in there.....
Q. Oh, that's your step-brother?
A. Yes.
Q. Ok, I'm sorry. And Johnny's just a violent person isn't he, in you opinion?
A. Yes.
Q. Has he ever, has he ever done anything with you like checking your body because he was distrustful as to whether or not you was being faithful to him sexually?
A. He would grab me, trying to make me tell the truth.
Q. Grab you where?
A. My breasts.
Q. And do what?
A. Mash it.
Q. Trying to get, hurt you to tell you that, get you to tell the truth about whether or not you'd been seeing someone?
A. Yes.
Q. Did he grab you anywhere else?
A. Down in my.....
Q. In your crotch, your vagina?
A. Yes.
Q. And what would he do and say doing that?
A. Just mashing it, trying to make me tell him if I had done anything with my step-brother or not.
Q. Why, did he think you'd had some sort of relationship with your step-brother?
A. Evidently, I don't know.
Q. Is that referring to ah....
A. Donald
Q. Donald Wade? Well let me ask you, have you?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 20 OF 22
		/ /		

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

A. No.
Q. Why would he think you had?
A. I don't know, he's just jealous.
Q. Ok. Anything else? Anything else you want to say or add to your statement?
A. Huh-uh.
Q. Have you ever had any problems with Social Services and Protective Services as mistreating your children?
A. No.
Q. Neglecting them?
A. No.
. Has Johnny ever been charged or do you know if he's ever been charged with any crime? Have you ever asked him about it or talked to him....
A. I think he'd been in prison one time, but I don't know.
Q. What for?
A. I think it was drugs.
Q. Now, let me ask you one other thing. (Pause) Ok.
Q. Now I said I had a question and that question I thought of it is: Have you seen any separation papers filed by Johnny's ex-wife toward him?
A. Yes.
Q. What did the complainant in the civil matter consist of, if you remember?
A. Where he beat her.
Q. What did it say about it?
A. It said that one time he hit her in her back and then another time he was repeatedly kicking her and she run to get in her car and when she went to leave he pulled the truck in front of her and pulled her out and twisted her arm and threatened to take the children.
Q. Like take the children and run?
Yes.
Q. Did it say anything in there about molesting anybody or, or abusing anybody?
A. It had molest in there?
Q. Do you know what it was referring to in there in the paper where it said molest someone?
A. Evidently his children, I don't know.
Q. Was it molest or abuse or .....
A. It was molest.
Q. Did it say anything in there about mistreating his children?
A. She said he was ah, had a violent temper, he was real quick tempered.
Q. Toward her and her children?
A. That's the way I understood it.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10.
				PAGE 21 OF 22

DCI - IR 202

001619

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. What, anything other things about.....
A. He put them out in the cold, shut and locked the door.
Q. And left them out in the cold.
A. Yes, she had to go to her mother's house.
Q. Anything else you remember about those papers? Where are they now?
A. They're at my house.
Q. They're in your custody? The papers are in your home?
A. Yes.
Q. Do you have any problems with us looking at them?
A. No.
Q. Do you have anything you want to add to your statement or ask us? Any questions?
A. No.
Q. And we've discussed everything you can think of in reference to Johnny, you and the injury of your child?
A. Yes.

Ok, this concludes the interview with Lisa Porter O'Daniel, today's date is 8/26/91. Also inside the room is Captain Dan Qualls.

ns/8/27/91

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 22 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

001620

3

V

Scott Ingle
OB: February 26, 1983
4th Grade
Reidsville Immediate School

Now we talking about what it is to tell the truth and you said it means to not tell a lie. What does it mean to tell a lie?

To not to tell the truth. It like when your mama ask you did you push your brother and you say - you did - and you say no.

That's telling a lie isn't it? Okay, so if I said something like - like that's a coffee cup would that be the truth or a would that be a lie?

Truth

Alright, and if I said that's an airplane -

That would be a lie.

If I said that book over there was green

It would be a lie

If I said this was tan

't would be the truth - its brown or black

Yea, you know what it means. Okay. Do you know what the Bible is?

Yeah, I've got one at home.

What's the Bible

It tells about God.

Alright, do you know what it means to take your hand and put it on the Bible and swear to tell the truth?

Yes

What does that mean.

Cause they do it in court.

Yeah, what does it mean when you do that?

Means you can't lie for whatever you say.

And what happens if you tell a lie when your sworn to tell the truth? Do you know?

f you -

What does it mean to you - what do you think would happen - if you tell a ie after you've promised to tell the truth when you have sworn on the Bible? What do you think would happen?

I probably get in deep trouble. Like if I was big and if I didn't understand it might be different.

Do you ever go to church and sunday school?

Yeah, I go to _____

And do you learn about Jesus and about God. And what do you learn about them? About telling the truth.

Well, we did something about that yesterday. But I don't know what his name is but he lied to God. I think that's what it was.

And did God think that was good or did God think that was bad.

Bad.

Okay

So, do you think God wants you to tell the truth or tell lies.

The truth.

Well, let me ask you some other questions. We've talkked about that enough.

I want to talk to you some Scott about Johnny and about Susie. Some of the things we were talking about the other day. But I thought it would be better if the three of us could just talk by ourselves so we could talk without having little brothers putting in their two cents worth - that kind of thing. Sometimes it is just easier to talk one at a time. Okay.

I want you to tell me everything that you remember about the night that Susie got hurt.

Well I was in bed. You mean what I heard and all that.

Just everything that you remember about it - you just tell me everything that you remember about it.

I don't know if I can remember - I know he shook her and all that - he shook her and he he shook her and he would slam my mama against the wall and all that junk and we heard Susie hollowing and we saw - she - he would jerk her a lot - and you - I did fall with her but they said it wouldn't - cause of any damage.

You didn't hurt your sister. Okay.

know.

Alright.

You need to put that our of your mind no matter what anybody says - you did not hurt your sister.

Okay.

That was an accident.

I know cause I tripped over the cord.

Okay - you couldn't help that could you?

And he would whip my brother hard with a switch - and us hard with a belt.

That was JJ that got whipped with a switch?

I did forget to tell you'll something. When I was at the hospital she had a lot of bruises.

Who was that?

Susie - cause Johnny Burr was at the hospital too.

Do you know how Susie got those bruises on her?

No, but I think Johnny - I know Johnny Burr probably did it.

Why?

I don't think my mama would do it.

Okay. Why do you think Johnny Burr probably did it?

He was mean and he was the only one there to do. I ain't never liked him.

Now you said he would hit your brother with a switch. Which brothers did he hit with the switch?

JJ and _____ and he hit both of us with a belt.

Yeah, and he hit you with a belt.

Yeah, and mama - my other brother Tony he wouldn't whip him. He wouldn't whip - my mama - mama wouldn't

Alright, now he would - you said that he would slam you mama against the wall and he would choke her.

Yeah.

Did you ever see him do that to her?

Yes, I was the one who was always there when he - Tony was there sometimes

- but I was there most of the time.

Okay - when he would do that to your mama - what would you do?

I was going to hit him with my ball bat.

What did he say to you?

Nothing - he didn't know - I hid it - hid it and he never did know I even had a ball bat.

Oh, he didn't.

No - _____ mama - cause I didn't like him - _____ tell him either - unless I had to and I didn't have to tell him I had a ball bat.

Well, did he do any of that to your mama the night that Susie got hurt?

In the daytime he did. He choked her.

He did. Where was she when he choked her?

Close to my room - you know when you went in and you saw them bunk beds - it was right down where that window was.

I see.

- mean where - close - right beside the door.

How did he choke her? Can you show me?

No, but her feet would be off the floor.

Feet would be off the floor? Can you show me with your hands how she was holding her?

He did it with two hands and pick her up.

Two hands and pick her up.

By her neck.

Can I ask - Scott did - are you saying that this occured before the night that Susie got hurt or during -

It was the day she got hurt and he'd do it almost everyday - he did it almost everyday - I can't think of one day he probably didn't. He always used to do - he choked her the night that Susie died too.

Are you saying - do you know - was it still light outside when he choked her?

eah.

Coleman -

- Came in shortly after Conf started.

Or was it dark?

Well, I don't remember - I think he did it when it was dark but I'm not sure.

Let me ask you a couple of things - let's try to put things in order. Sometimes it help if we kind - if we kind of think about things in the order in which they happened. So lets start - lets start with that Saturday evening - now you were holding Susie - is that right? And where - why were you holding Susie - this is before you tripped over the cord. Why were you holding Susie?

Because my mama went to Aunt Rita's and I was getting ready to sit down and then I tripped over

Okay, and what was Johnny doing when that happened?

I don't quite remember - I think he was probably fixing on this gray thing - box on the telephone pole.

Okay, now tell me about the cord that you tripped over? Where was the cord coming from and where was it going?

From his truck - I mean - from that gray thing.

And where - it was coming from the gray thing?

Yeah, from our house - I don't know - you know we could've been using it - either one of them places.

And do you remember where the cord was going - do you remember which way it was going?

It was across (that way??) so it probably went to the house from the gray thing.

Could it have been going up to Aunt Rita's?

Yea, part of it was up there.

Okay. Now,

Cause - oh yea, he was running from there to somewhere at our house trying to do something.

And when you tripped over the card - you showed me the other day how you fell.

Yes

And Susie - did Susie ever fall out of your arms?

When I tripped over the cord?

Uh-huh

She was in my arms - she didn't even hit the ground.

And what did you say when that happened - what did you do?

I just ran - mama ran back - and I just started - trying to do something - you know - and me and my mama was with her

Was Susie crying?

She'd talk to her - you know - do something - to make her quit - I was there - she did something - _____ all that

And did that scare you too

Yea

Now, after that did you mama get Susie to stop crying sometime later on?

Yes

And where did you go?

I was there.

Do you remember - Mr. Elbert Porter and I think Chrisy who came out and visited for little while. Do you remember them coming?

Yes

Okay - And do you remeber that sometime after they left - do you remember that?

I don't remember what time ____.

Was is getting dark or was it still light?

It was in the middle - about 6:30 or 6:35.

Now, what did you do later on that night - where did you go and what kind of things did you do - do you remember?

What do you mean - that day?

That night.

Oh, well I was out there playing and we stayed till night and my mama had Susie and I was up there with mama but I was playing around near mama cause I wanted to watch out for Susie cause you know cause she didn't get hurt - And Johnny Burr was mowing the yard and went in and that's when my mama left.

Okay - now do you remember - do you remember anything about the bed - your

mama's bed.

The water bed or _____ bed.

The water bed, yes. Do you know something about that? What do you remember about that.

What do you mean?

Did something happen with it?

Oh, I don't think so - might have got - I'll check with them -I think it did cause -

Do you remember how that happened? Were you inside or were you outside when it got busted?

I think I was getting ready to come in or I was in my bed _____ cause I was _____ I was

Was it light outside or was it dark?

I don't remember - I think it was light.

Okay - how about do you remember going to bed sometime that night.

Yea, but I don't remember what time it was - it was close to about nine o'clock or maybe - probably about in the middle of nine and ten.

Was it dark outside them?

Yes

Who else was in the bedroom with you?

When I had to go to bed?

Uh-huh

Tony and I don't remember I think - oh J was at Aunt Rita's - yea - and no wonder I don't remember where he was.

Where was Susie?

In her baby crib in mama's room.

And where was your mama?

At Aunt Rita's washing dishes.

Did you know she had gone up there to wash dishes?

'ause I - cause I - she told him to watch her leave because she was scared of dark and carried a flashlight and watched her leave.

'here was Johnny Burr when your mama left to go to Aunt Rita's? Where was your mama?

When I went to go to bed he went down the hall and went into her room.

He went down

That way

Which way - toward the living room or the bedroom?

The bedroom where Susie is.

What's the next thing you remember after that? What happened after that?

I hear - like - kind of heard him kinda mumbling you know I could't hear what he was saying and I thought we'd be in trouble cause we would if we got up and I didn't want to get up and get in trouble but I did want to get up to see what was wrong with her. And it just stopped all of a sudden.

Did you hear any other noises?

All I's heard is a little bit - no I didn't hear nothing else. I didn't hear her crying no more and oh I did hear that beating when she was crying.

You did hear that what?

He hit against something?

He hit against something? Can you tell me what that something sounded like?

Something like when you hit something with a hammer.

Now, which room were you in?

My bedroom - when I went to bed.

Now, is that the same bedroom that I saw the other day - that had all the bunk beds in it.

Yeah - but it didn't have these bunk beds - so he - the closet used to be over there but he - Mike moved it over there to put the bunk beds up. We used to just have one bed right there.

Just a flat bed.

Yeah. And our bedroom - we probably - and it - it sounded loud because our bedroom was right there - and it was the bathroom and them the bedroom and they ain't to far apart neither.

'kay - could you - where did it sound like that noise was coming from - that noise that says like you hear when something is hit with a hammer?

Where did it sound like that noise was coming from?

Towards the bedroom.

Your mama's bedroom.

Yep - where Susie was.

How many noises did you hear like that?

And right when we went to go to bed and my mama wouldn't back and he was the onliest one in there.

Okay -

And I didn't - and it was - I just went to bed and then is when I hear it.

Okay - How many noises like like did you hear? That bang.

About _____ a few.

Was it more than one?

Yea

Now - I understand that the waterbed had been broken before your mother left and she and Johnny had tried to fix it. Did it sound like he was fixing the waterbed or did it sound like something else?

I was in there where they were gonna fix it. See I walked in there but it was already busted I think - it was already busted - but I saw them put it together - see they had to get this waterhose and stick it in and patch the waterbed - I think they patched it.

Was the waterbed fixed by the time your mama went up to Aunt Rita's to wash the dishes?

Yeeee - yea

Did Johnny ever go back in there to work on it some more? Do you know?

No

Okay - now when your mama was at Aunt Rita's and you're telling us about you heard Johnny mumbling and you heard - you didn't want to go out because you might get in trouble and you said you heard this nosie - did it sound like Johnny was working on the waterbed or did it sound differnt?

It sounded different - it didn't make no like water noise - it made beats.

Now Susie - have you heard Susie crying?

Then?

Either before or after you heard these beats.

When we was in the bed that's the only time I heard her crying cause she was asleep - the onliest time she 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.

Was that before or after you heard the beat that she stopped.

I heard the beat and she was crying for _____ and she keep on crying and she kept on crying and _____ and beating and beating and she just stopped.

She was crying and there was beating and beating and she just stopped. Is that what you are telling me? - Okay - now do you remember what we were talking about a while ago about telling the truth and all that. Is that the truth? (nothing auditable) Did you hear any other noises coming out from the room after that?

No - I heard some foot prints - yeah.

Okay - when you mama came back - do you remember when you mama came back?

No - cause after them beating I just went to bed but I know - I know I didn't hear my mama - it was a mans.

Now, when you mama got back Susie was out in the lving room sitting in her swing. That's where your mama found her when your mama got back.

But I was still in bed.

Okay - do you know how Susie got from her bed to out to that swing?

I don't know.

You just don't know about that - is that what you are saying Scott? You don't remember anything about that?

_____ they said she has bruises on her - and she did when I went to the hospital too. And it was in daylight when they took her out of the crib I think. No it was still dark.

And was it dark when you hear Susie cry and you heard the banging - was it dark them?

Yea - my mama got back close to - see we went to bed at ten something or nine something and my mama got back from Aunt Rita and that's when she told me.

Do you think maybe your mama got back later than that?

Cause I ask the others to make sure and I - you know to see what time she ot back - because I would need to know - cause I used to - see I ask a lot of questions about doing it - I say what time did she get back because I

was real worried and all that and they said _____ *(IT SOUNDS LIKE HE SAID ELEVEN.)*

Now, Scott do you remember two days ago when Mr. Allen and I came out to your trailer and got the bunny rabbit - whose bunny rabbit was that?

Mine - I got that after Susie done died.

And we were asking - did we ask you to show us something with that rabbit or did we ask Tony.

Me

Alright, do you remember what you showed us.

Yes

What did you show us.

How I fell with her.

Okay - did you show us anything else with that rabbit?

_____and how it had torn up my arm.

And did you show us that?

Yes

Did you see him shake her?

Yes

Do you remember when you saw him shake her?

No

Was it the same

Do you mean it dark or daylight or you know what day?

What day?

No

Was it the same day that Susie got hurt or was it some other day?

It was another day and then he did it - on me and my mamas - well me - Tony and my mama was playing football - I went in there and he did that then and then it was - not that day - but he did it about two or three times.

Okay - what would Susie do when he would shake her?

:ry - when he - she - she'd - he'd hit her - and we was in the backyard and he hit her in the kitchen - cause - I mean - he took her out of her baby

carries for _____ and took her and bring her to the kitchen and she just sat in the chair and then I walked out - started playing football with Tony and my mama.

When he was sitting in chair, when did he shake her? Was it - Where was he when you saw him shaking her?

Where - she's - he was in - what happened was when my mama was at Aunt Rita's me and Tony saw that and it was - where - it was in her baby crib.

Was that a different day?

He wouldn't never do nothing if he sees my mama was around.

Was that on the same day or was that on a different day than.

Different day.

A different day as in another time when your mama was up at Aunt Rita's and you saw him shake her - is that what you are telling me?

He wouldn't never do anything like that around my mama.

How many times did you see him shake her?

About two or three.

Can you remember another time and tell us about that? Other than the time that your mom was up at Aunt Rita's and you say you and Tony.

She was always gone when _____ did it.

Okay - you said there were two or three times that he did this?

Yeah

Okay - you just told us about that one time.

He shook her about two or three times - is that what you mean how he took her and shook her. Yeah

Show us again - I think you were just showing us - but show us - I don't have a bunny rabbit - but why don't you use that klennex box.

I can use this.

You can use that?

I can use my two fingers.

Well it would be better it you used

How he shook her?

Yea

He would take her and do her like that.

Then what would he do?

He would just pick her up like under her arms and then he carried her in there - and put her in baby crib _____ by her arm like that and then he went to feed cause she stopped crying but he knew I was around that time but that time I told you I didn't - I didn't - he didn't know I was around because

Which time was that? When your mama was at Rita's or were they out playing football.

Well, why don't you tell me about the time that you were out - who all was outside playing football?

Just my mama and Tony and I was but then I went in and that's when I saw

So, your mama and Tony and you were outside playing football.

Yea, and I went in.

And you went in.

Alright, where was Susie?

In the house.

Where at

He was suppose to be watching her.

Where

Cause my mama didn't get to play with us much, so we wanted to play with us that day.

Okay, why did you go inside?

To get some drink.

To get something to drink.

And I didn't get nothing because he was doing that _____ and I hide _____ in case something would happen.

He had what?

_____ I thought something might would have happened.

And where was Susie at when you went inside?

She was in the living room in - you know that swing thing.

So she was in the living room in her swing and what was she doing? Was she happy or was she asleep or was she crying or was she not doing nothing at all?

I went in there and she was laying down and he just - she crying cause she was hungry and he just jerked her up by her arm - and he shook and jerked her up by her arm.

Okay, show me, now you say she was in a swing.

Yeah

Was she sitting up

When he jerked her up he took her in there and started feeding her.

Why don't you, if you would, put down your little thing, and pretend that this box is Susie and I want you to show me how he did.

He shook her and shook her - I'll have to show you how he jerked up by one of these arms - I can't do it with this -

But show me first

He shook her like that and then when to pull her - and pull it like this and you know.

And when he put up here - put you box up show me how he did it with the box.

Yeah, he went like this.

When he shook her what did Susie do?

She started crying and he tried to make her stop crying.

How did he try to make her stop crying.

Like my mama would - he would do her like that - but she was spoiled by my mama - so she would cry a lot when she wasn't around - and I know she would start crying over that and she take her in and she didn't cry around _____.

Let me ask you something Scott? Was Susie crying before or after Johnny picked her up out of the swing? And you say he grabbed her and shook her.

She was happy - but she started crying because she got hungry and she had to use the bathroom. But he thought she was hungry I reckon because he started feeding her.

kay - so she started crying and then that's when he went over and starting shaking her - is that what you are telling me? Or did she start crying

after?

She started crying because she used the bathroom _____ or was hungry and I said that he probably thought she was hungry because he started feeding her.

Okay - that's what I'm wanting to ask you. Okay - when she started crying and that when he went over and grabbed her - did he say anything to her when he grabbed her?

He said Shhhhhhhhhhh.

Okay -

He didn't know I was in there because I hid.

Where were you hiding at?

I was - it was like - I was hiding in my bedroom and I was kinda peeking out to look.

So you had kinda

And when he took her in there - I ran - I crawled behind the the couch or the chair I don't remember - it was something like a stereo I was behind or beside the stereo and between the tv - you know - we used to have a little crack and I crawled - I crawled behind that looked - and then when he took her in the kitchen

So, you were hiding - peeking out - he didn't know you were there.

See, I am sneaky and real quiet.

Kinda like an army man.

Like that ninja there.

After he grabbed her - when he grabbed her - did he grab her first or did he say shhhhhhh first, or

He started _____, saying shhhhh.

You just, you said, he said shhhhh and you raised your hand up? Did he raise his hand up?

No, he pulled her up.

Oh, okay, I see what you're saying. So he kind of did like this shhhhhhhh and then grabbed her by the arm and pulled her out. But when he did that did she stop crying and did she started crying harder.

She started crying harder and he gave her some milk and started doing like mama and then she stopped crying and that's right when mama came in and I went out and I told mama would you give me some drink because you know I

didn't get none and when she came in she would just stopped crying.

Scott, why were you hiding when he was doing this? You said you were

I thought he might have did something - see I never did like him - I told my mama that after they broke up you know.

I understand. But, when you went in and your mama was outside playing football with Tony, I think you said, and you went inside and he was doing this - why did you feel like you had to hide from him.

Cause you know I was thought he was mad and he really was.

Alright. I didn't mean to interrupt you Brad.

So when you mom - did you follow - you went outside and then followed your mom back inside to get something to drink?

And one day I saw him - and he was shaking her foot I forget that time. He shook her one time when I saw him. I walked in _____, I kind of peeked in too cause I

What were you doing then - do you know when - was this before or after the time you'll were playing football.

This was the next day.

he next day.

Do you know how many days before - the night Susie got hurt - do you know how may days it was before when you'll were playing football and you saw Johnny shake - do you know how many days it was before that? If you do - that's fine.

What do you mean?

Like was it - do you know if it was a couple of days or a week or more or if you don't know - you don't know its fine - I'm just wanting to - I'm just wondering

What do you mean? Ask me that question.

Do you remember the night that s shake - do you know how many days it was before that? If you do - that's fine.

What do you mean?

Like was it - do you know if it was a couple of days or a week or more or if you don't know - you don't know its fine - I'm just wanting to - I'm just wondering

What do you mean? Ask me that question.

Do you remember the night that Susie got hurt. Do you remember that night?

What do you mean?

The night they had to take her to the hospital.

Oh yeah.

When you'll were playing football and the next day you said you kind of snook and saw him shaking her - did that happen the day before or two days before

She died?

Yeah

I don't know. I don't know. A few days. You know - I don't know.

If you're not sure Scott

You just think it was a few days?

It could have been about a week or a few days - I don't really know.

Well, let me ask you about that next day. You said - what were you doing outside - or were you outside?

I was inside - remember I saw him - I was peeking

Hu?

I peeked and I saw him choke - I mean not choking her but shaking her.

Where were you at? Where were you at inside?

He was in the bedroom and _____ see the door was cracked a little so I just peeked in.

Okay - where was your mama?

She was at Aunt Rita's, Tony was outside with JJ and playing some game I don't know what they played.

Tony was outside with JJ and where were you at? What were you doing inside? Were you playing with the ninja men or were you playing

No, I just got the ninja man yesterday.

Okay - what were you playing - what were you doing inside - do you remember?

I was - I watches - I came in cause I heard her crying and then I peeked.

What do you mean you - were you outside and heard her crying or were you

Yeah - See we had a big yard and they were out in the woods in a - it was a ig homemade planet clubhouse

Kind of behind your house

It was way on out that way cause we had a great big yard and I was close to the house and then I

What did you hear? You say

I heard her crying and I then I ran in and I figured he'd probably be done shaking her again and he was shaking her again.

Where was she at? How loud was she crying?

Not loud enough

Not loud enough to hear her up at Rita's

No

But loud enough for you to hear her outside the trailer

Yeah - I was nearest - I was in the backyard cause - cause you see I was in my mama

Okay - so you were in the back near the backdoor

And the backdoor is near my mama's room.

Right near your room too isn't it?

Yeah.

Okay

So you were both - When you - You say you snook in did you kind of creep in so he couldn't hear the door open or what did you do?

There's a crack about that big and I just peeked.

Peeked into the bedroom.

Peeded into the bedroom? Where was Susie at when you looked in?

He was shaking her in her bed.

Who was?

Johnny

How was he shaking her - you mean she was laying in her bed?

Yes - he was the onliest one that shake her - my mama never did shake her -

she'd just pick her up and do her like that - but that ain't shaking her - Kind of rock her.

No, she did rock her

Why don't you use that box and show me how Susie

(NEW TAPE)

Scott, you were telling me that Johnny was shaking Susie - now was he leaning over the - how was he leaning or how was he standing at the bed?

She was - you ask me how he laying down - she was like - this is like a pillow and she was laying down like that.

Okay, why don't you stand up and show me

I don't know why he picked her up - he just started - picked her up for no reason - she wasn't even crying.

I thought you said she was crying.

Not that t - oh yeah, oh yeah, I was thinking of another time. That was the day after that day.

The day after you were playing football.

Yeah - it was real - no - it was about - you could say three days it was close to when he died.

Okay, so about three days after you played football is when you - when you heard her crying and you were outside the trailer.

Yeah and about two - about two or three more days - maybe four he was is when I heard her not crying I just walked in and he just started shaking her or whatever.

Okay

That time he just pulled her arm.

Okay we'll get to that in one minute. Okay. Let me - I want to talk about the day - the day that you played football

Yeah

Okay - how many days after you - you know the day that you saw her shaking - how many days was it that you heard her crying and you were playing out back by the back steps - and you snook in and looked in throught the cracked door.

I don't know.

'as it - I'm saying

Oh - I don't remember - Ask me that again.

Okay - I get mixed up a lot.

That's okay.

Cause I was around her a lot - I was around most of the times when he shook her and I get mixed up about all the times he shook her and all that.

Okay - you told me you'll were out playing football and you saw her shaking and then you told me it was the next day that you were outside playing and hear her crying.

Yeah

Was it the next day or was it another day - some - several days later.

The next day.

Okay - that's what I want to ask you about right now. That next day - if you stand up and show me how you saw him when you peeked into the bedroom door - what did you see him doing - was she still crying when you wallked in?

'es

Okay - stand up and show me what you saw him do.

He shook - he shaked her lots of times and he kept on and kept

Did she keep crying?

Yes

Okay - how was she crying?

Loud - well not real real loud

Okay

About you know the size of this beat.

Well let me ask you something - when you saw him shaking her did he know you were out there watching him?

Not-huh

Okay she keep crying.

'he day before

or did she stop crying?

She stopped crying. The day before that she died he shook her and that's when I - that's when he saw me looking.

Tell us about that.

It was - mama was gone to Aunt Rita's cause Aunt Rita was not there - I think she was to - yeah, she was gone to the mountains - she left sometime that day and them Misty and Christy was there and she had washed the dishes and a lot of _____ you know they do a lot of house stuff when her mama was gone and she had liked sweeped the floors and all that my mama would and when - and me, Tony, and J was outside playing and I walked in and he was me watching him.

What - when you walked in where was Susie at and where was he at?

He was in the bedroom and Tony and J was up - well I - near that big hallway - was right beside me - because see they played in that big hall a lot.

Okay - what I want to ask you is when you walked in the house which door did you walk in?

The back - cause I played in the backyard a lot.

Okay - is that the door that is right there by the bed - the bedrooms?

Yeah and you get - closer if you go throught that door you can walk right into the bathroom.

Okay

If you want to go to my mama bedroom just walk in there like that and if you want to go to my bedroom you go like that and

Okay - well let me ask you - when you walked in the back bedroom - the backdoor what did you hear?

I walked - when I walked in I - he - he - that's when he just went over there and you know and he - she didn't do nothing that day neither - she was just sitting there and he did that two times.

He did what two times?

He shook her two times - remember that time I told you he shook her one time and she wasn't crying - I mean - or anything - just laying in the bed - she was - the day before she died - she - he did that to and she wasn't crying or anything.

Okay - thats what I

nd I walked in and I saw him walk to the bed and he just

Was she laying in the bed? Was Susie in the bed when Johnny walked in?

Oh, yeah, she was in her bed.

Okay - that's what we want to know - where Susie was you saw Johnny do that to her.

Show me how he she - he shook her that day.

He got her like right her - and he got her right there and she was hitting - her head was kinda let against the pillow but it couldn't - but her head couldn't hurt but I know her - he - her waist was probably was hurting because she did cry and she probably was in shock a lot too.

So her head was bouncing on the pillow.

Yeah.

Okay and you say he had her by her waist. Well, let me ask you something - what did he do after he shook her?

He -

Was Johnny saying anything when he was shaking her?

He - he did say shut up for a minute.

Shut up for a minute - is that on this day - the day before you talk about - the day before Susie died or was hurt real bad.

No, she wouldn't hurt real bad - it was the day before.

Okay.

So she started crying and he said shut up for a minute.

Yeah

I don't understand something - when you said he said shut up for a minute. Is that the words he said shut up for a minute or are you saying he shut up and he said that for a minute or so - which did you mean?

He said shut for a minute.

He said shut up for a minute - that's what he said? Okay

But he did have curse words in it.

He did have curse words in it.

He said shut up you GD for a minute.

nd thats when he was shaking her. She was - and where was she when he was shaking her?

n the baby crib.

In the baby crib.

She wasn't on her bed that time - she was in the baby crib.

And the baby crib was where?

He had - just - well - he started - I mean - he went over there and started doing that and I walked in and thats when he saw me.

And where was the baby crib?

What part of the house?

It was in my mama's room - you know when you walk in you saw that - have you been in my mama's room - and you know where that shelf is with all that stuff on it - right beside the dresser with the pink underwear that's Susie - that's where the baby crib used to be - that big shelf used to be in the back.

Okay. So when you went in that backdoor - if you went in the backdoor - let's say we walk in the backdoor here - that would have been right that way -

Yeah - I would go that way, that way and then her baby crib would be right here.

Okay. Well, Scott let me ask you - when Johnny - did he pick her up after he shook her and shut up a GD minute - did he pick her up then?

Yeah

Was she crying?

By the arm

How do you pick - he grabbed her by the arm and picked her up?

Yeah, he started playing with her and you know (mumbling) - you know how they'd play with you - you know tickling your belly and all that - he did that to make her stop crying cause he never did want my mama to find out I reckon.

What did he say to when he - did he say anything to you when he turned around and saw you seeing this?

No

What did you think when you saw him do this?

I reckon he was going to - I know he was trying to hurt probably cause it didn't make sense - you know the way he was shaking her and all that all

the time.

Well let me ask you something Scott. Did - what did you do when - when you saw him and he turned around and saw you. Did you say anything to him?

No - I never did tell anybody either.

Okay - why didn't you tell anybody?

He would have hurt us probably.

Did you stay in the house or what did you do - after - when you saw him shaking her on

I just ran outside and started crying. Cause I was scared he'd probably _____ cause he threatened my mama he said - he said if you break up with me you know and leave me he'd kill her.

When did - did you hear him say that?

That's when we were at his house so I thought if I told my mama she'd better break up with him and he would have killed her.

Did you hear him say that?

I was in a room and all I heard is he said I'll kill you. She told me - I said - all I heard was I'll kill you Lisa and she told me the rest of the part that went with it. I asked her why did he say that - and then she told the part that went with it - she said that he said

Oh, you asked you mama why did Johnny say he was going to kill you?

Yeah, cause that's the only part I heard - part - all I heard him say was I'll kill you Lisa and ask him why he said that and she told me that wasn't all he said he had that was not the only thing he said that it you break up with me I'll kill you.

Okay - can you - do you remember you told me there were two times - or do you have any other questions Rob. Scott there were two times that you told me that Susie wasn't doing anything at all.

Yeah

She wasn't crying or nothing. Okay. Can you tell me about that other time - when she wasn't - besides this time - the day before she got hurt real bad - can you tell me about the other time that you say you saw Johnny shaking her

No, I don't know what day that was.

Okay, can you just tell me about.

ow he did it?

Were you - what you were doing - where you mom was

He didn't see me then and my mom was at Aunt Rita's.

Okay - where was Susie at? Okay - what were you doing? Were you outside playing or were you playing inside.

That's when I was peeking through the - I was peeking through the - you know the door again.

You peeked through the door two times.

Yeah, I peeked through the door a lot so he wouldn't - cause he would do that much to her

In which room?

My mama's - he wouldn't do that much no where else but he did do in the living room one time.

Well let me ask you - the other time - not the time we just talked about - but the other time that you say Susie was not crying or doing anything.

The day before she died?

No you just told me about that. I want to talk about - you said it was two times that you peeked in and saw him

No, I got it mixed up. The day I told - before she died was when I saw - is when he saw me - before the day she died - you know a few days before that three - is when he didn't see me and I was peeking in and he just shook her.

Okay thats the day after you all were playing football.

Yeah.

Okay - are you saying that you saw him shaking her three times.

Yeah, three times - he shook her three times.

I mean - I'm - I'm - No - maybe I'm

Oh, you mean three times

That's okay. That's okay. Can you think of any other times that you saw him do something to Susie - other than what we're already talked about.

About shaking her and all that?

Or whatever.

didn't see him do anything else but shake her.

And he only - you saw him doing this to her but he only saw you on that one ime.

Okay.

Well, let me ask you one question, if I may. When he would shake her in the bed would it make a sound?

No, my mama fixed it so it would be real soft you know everything but the bars and he would - she'd hit the pillow you know but he made her cry.

Did you ever hear the bed making a sound when he would shake her in the bed - you know where the bars

You know how waterbeds got that noise when you like - jump on it.

How about her baby bed?

Her baby bed?

Did you ever - when he - you saw him shake her in the bed

It would make a big of a noise - nope - cause the reason I noticed cause he would like hit her head against the pillow.

The night that he hurt Susie - you know the night that you and Tony had)one to bed and mama had gone up to wash dishes at Rita's trailer.

Yeah.

Do you remember hearing a noise coming out of the baby bed that nigth.

Yes.

What did it sound like?

It's like of - a - a loud loud hammer head.

Okay

But not loud enough for mama to hear it - but see he would always try no to let my mama hear anything _____.

But you don't remember hearing the baby bed

Or my brothers - he let - Tony heard it one day me and him went in.

Tony heard what?

Me and him heard him - her crying - and then we went in and he was shaking her. Did he tell you about that?

'hy don't you tell us about it.

He was - we just walked in and saw it - and he said that she - when we alked in and saw him - he was shaking her - and we - well Tony - we both didn't really - we both really heard him say I'll kill you Lisa. Did he tell you about that?

Not-huh

We was in his house playing the _____ and then - and you know was in there and we heard him say - we never did you know tell anything cause we were scared.

That's when you heard him say I'll kill you Lisa and that's talking to you mama.

Yeah - but when we saw him shake her - when we both were looking - that's why we didn't tell or anything. Cause they would say something. My mama would try to break up with him and he probably would kill her.

When you both saw him - When you and Tony both saw him shaking Susie where was mama?

Mama was - when we both saw it - I think she was outside getting J and cause

Now when you and Tony both saw him shaking her

T said it was past that whole week - and done pass that whole.

Okay - but when you and Tony both saw it was this at your house or was it at Johnny house or whose house was it at?

My mamas.

Your mama's house - there at the trailer park.

Yeah, cause we didn't really play on his yard - we never did - cause he had a little bitty ole yard - you know - with lots of baby toys you know.

Well, the time that you and Tony both saw him shaking Susie was Susie crying then? Either before or after he shook her?

No, because she - that's when my mama put like - put it on the bars and everything it was real fluffy but he - he was trying to make - but she was just like - she thought he was playing with her then - she was going hee hee.

Was he shaking her real hard then or

He wouldn't really make her pick off the bed he would just you know.

Just kind of bouncing her in bed.

eah.

When he - he did say - I don't know what he said - but I can remember him aying something.

Okay. Can you think of anything else you think maybe you need to tell us about him - about it.

I remember - I think I remember anything else - but I do want to tell you.

Alright, we need to make - carry him up to the courthouse. Do you think of anything else Brad.

Well, actually, on the night that Susie got hurt Scott, do you recall hearing anything?

Yeah, the night that she died.

Yeah. Did you recall hearing any voices?

I heard a man's voice - it sounded like Johnny Burr's - but I couldn't hear what he was saying.

You couldn't hear what he said.

Not-huh - I heard him mumbling.

Okay, that's what I was wanting to ask you.

When you heard him mumbling - you couldn't tell what he was saying - is that right?

Yeah, but _____ sister she said that you'll said we had to talk to Johnny Burr.

Hu?

My sister said that you said that we had to talk to Johnny Burr.

No we're not going to talk to Johnny Burr in here. Don't worry.

I was going to ask him a question.

What were you going to ask him?

Why did he kill my sister? I wanted to ask him that.

Could you - did you ever - were you able - ever that night that she got hurt real bad - were you able to make out any words that you heard him say?

He - I can remember just one word.

What word did you remember?

GD - He said GD - shut up.

o you remember him saying that?

Yeah, but that's the onliest words I heard.

You heard him saying GD - he said the word.

Yeah - and that all I heard cause he said that - you know - loud enough for me to hear it. When - I just - she just stopped crying.

What about the shut up? Did you hear him saying shut up.

Cause I - and then I heard - I heard this calming down - well, I think he killed her. He was the only one there.

Okay.

When are we going to court? Are we going to court?

word/rfj/burrkid3

4

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO:	4. OCA FILE NO.
Alamance Cty Sheriff's Dept.	NC 0010000	☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	1-160-8-91

5. NARRATIVE

This is Roney Allen, I'm an investigator with the Alamance County Sheriffs Department. This will be an interview with Scott Ingle, white male, date of birth is 2-26-83, address is 4177 Jimmy Bowles Road, Elon College. Scott is the son of Lisa O'Daniel. This interview is in reference to case #1-160-8-91, Tarissa Sue O'Daniel case. Present inside the room is Captain Dan Qualls.

Q. Okay Scott, we want to talk to you son about what took place and what happened at your home on Saturday. I know you probably don't remember dates, but it would have been August the 24th and that's the day that you little sister was hurt. That day and that night, okay. And we want you to if you will speak up and talk loud, will you? Will you do that? Answer me will you? I can't, you're are going to have to answer me. Will you speak up and talk loud for me?

A. Ah, yeah.

Q. Okay. Now you remember that day we're talking about? That Saturday that your little sister was hurt or injured. Do you remember that day we're talking about? What do you remember about that day?

A. Well, I had to show you where her, I fell with her at.

Q. Okay if you would sit up in the chair, sit up toward the front of the chair there. That's a boy. Alright, now you're saying that you showed us where you had falling while you were holding your little sister Susie?

A. Yeah.

Q. Is that what you're saying?

A. Yeah.

Q. You showed us that didn't you when we was out at your house?

A. Yeah.

Q. Okay, tell us what happened that day. How did you come about having the child and fall with her? Tell me how that happened.

A. I tripped over a cord that was tied onto Johnny's truck.

Q. Alright you tripped, you're saying you tripped over a drop cord?

A. Yeah.

Q. And you was holding your little sister Susie? Huh?

A. Yeah.

Q. And when you tripped over and fell you were holding her, did you fall to the ground?

A. Yeah.

Q. Did you continue to hold Susie or did you drop her? When you were holding her in your arms and you tripped over and fell, did she fall out of your arms or did you just fall while you were still holding her?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 1 OF 5

DCI - IR 202

ORIGINAL COPY

Rev. 1/79

001652

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		1-160-8-91

5. NARRATIVE

A. She fell out of my arms.
Q. As you hit the ground or before you hit the ground?
A. Before I hit the ground.
Q. Did you fall on top of her?
A. Yeah.
Q. Did you fall on her hard or did you fall on her or trying to keep from falling all of your weight on her? Did you keep, did you try to keep from putting all of your weight on her when you fell?
A. Yeah.
. And did you grab her and cradle her up back in your arms and stand back up with her yourself?
... Yeah, I picked her up and handed her to momma cause she was standing, she ran back down there.
Q. Alright, your mother ran back down to you when she realized that you had fallen, but you had already picked your little sister back up and gave her to your mother? Alright, now did you see anything wrong with your sister? Did she...
A. Yeah.
Q. Huh?
A. Yeah.
Q. I'm talking about after you dropped her?
A. Oh, no. Um, later....
Q. I'm talking about....
A. After momma....
Q. Son I'm talking about whenever you first dropped her and you picked her back up and gave her to your mother and she was crying of course, right? Huh?
A. Was she crying?
Q. Yeah, was she crying?
A. Yeah, when I dropped her I started telling she was, that's all she did is cry.
. That's what I'm saying, she was crying. Alright son, now after you gave her back to your mother, did she seem like she got okay? Did she stop crying a short time later?
A. After I gave her to my momma?
Q. Uh huh?
A. Yeah, she stopped crying.
Q. Did you see ~~anything wrong with her then~~ or did she look okay?
A. She looked okay.
Q. Alright, it wouldn't no, was any bruises or marks on her at that time? Huh?
A. No.
Q. Okay. Now did you see her later that night after you had gone to bed and got up?
A. Yeah and then I had to go to bed when momma washed the dishes.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 2 OF 5

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		1-160-8-91

5. NARRATIVE

Q. Alright, now let me ask you something. Did you see your little sister just before you went to bed? Did you see your sister Susie just before you went to bed?
A. Yeah and she was just a little bit red. Momma told us she would be okay.
Q. Alright, where was she red at son? On her arm here?
A. Right here.
Q. Okay. Now when did you see the child next?
A. I didn't, that's when I was going to bed.
Q. Okay, did your mother get you up and you see the baby after they woke you back up and took you up to Misty and Christy's house, did you see the child then, in the middle of the night?
A. Ah....
Q. When they took the child to the hospital son.
A. Yeah, I looked at her, she had ah, a little bruises.
Q. Where were those bruises at?
A. On her face a little bit.
Q. On her face, how about her ear, did you see anything wrong with her ear?
A. Huh uh, I didn't look at that, I just looked at her face.
Q. And she had bruises on her face? Huh? Answer.
A. Yeah.
Q. Okay and they weren't there whenever you had gone to bed were they?
A. Huh?
Q. Those bruises were not on your sister when you went to bed or when you seen her last, is that what you're saying?
A. No.
Q. Okay. Now, let me ask you this. Has your mother ever mistreated you?
A. Ah, no.
Q. Has she ever whipped you?
A. No, Johnny did all the whooping.
Q. Has your mother whipped you some though?
A. No, she just says be good.
Q. Does she ever spank your bottom or get you on your butt with her open hand?
A. Uh huh.
Q. Does Johnny whip you?
A. Yeah.
Q. Does he whip you hard?
A. Yeah.
Q. And what does he whip you with?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 3 OF 5

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO:	4. OCA FILE NO.
	NC	☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	1-160-8-91

5. NARRATIVE

A. Some, most of the times with a switch.
Q. Does he ever whip you with a belt?
A. Some...times.
Q. Does he ever whip you with his hands?
A. Sometimes.
Q. And did it hurt you?
A. Yeah.
Q. Would your mother tell him not to do that?
A. Yeah.
Q. And he'd do it anyway? Do you think that he was mean to you or do you think he was just trying to correct you?
A. Correct me is all, I thought.
Q. Alright, you just thought he was trying to correct you. And he wouldn't really hurting you to much?
A. Sort of.
Q. Sort of. And he whipped you and your brothers? Huh?
A. Yeah.
Q. Alright, have you ever seen Johnny do anything to your little sister Susie? Whip her or do anything to her?
A. Nope.
Q. Have you ever seen Johnny do anything to your mother by the way of hurting her?
A. Yeah.
Q. Well have you seen just....
A. He's choked her if she didn't, she couldn't breath.
Q. He choked her and she couldn't breath? Why did he do that, do you know?
A. No.
Q. Okay, have you ever seen him do anything else other than choke her?
A. Yeah.
Q. What?
A. He bends back her arms, sometimes he kicks her.
Q. Sometimes he kicks her and then he bends back her arms. You mean bend them back behind her back or what?
A. Bend them, just bend her arms.
Q. Oh, you're talking about bending her hand at the wrist?
A. Yeah.
Q. And he would kick her? Have you ever seen or heard him threaten to do anything to your mother,

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 4 OF 5

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		1-160-8-91

5. NARRATIVE

like, have you ever heard him say he'd kill her or anything?
A. Yeah, no momma told me he said it.
Q. When did you mother tell you he said that?
A. I don't remember.
Q. Has it been since Susie was hurt or was it before Susie had gotten hurt?
A. Before.
Q. She told you that Johnny Burr had said that he would kill her, is that what she told you, son? What did she tell you?
A. She said he'd kill her, he broke up with her.
Q. That's what you mother told you he said? Okay. Anything else that you know that occurred on Saturday or Sunday, the days that your little sister was hurt and injured. Anything else you know about that you should tell us?
A. No.
Q. We've talked and you've told everything you know about it hadn't you son?
A. Yeah.
Q. Okay, thank you.

This concludes the interview with Scott Ingle. Today's date is 9-5-91, the time is 10:55 a.m.

ja/9-6-91

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 5 OF 5

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

5

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
ALAMANCE COUNTY	FILE NOS. 91 CRS 21905-06
	91 CRS 21908-09

STATE OF NORTH CAROLINA	)	
	)	
	)	SECOND AFFIDAVIT--ROBERT E.
VS.	)	COLLINS, ESQ., LEAD TRIAL COUNSEL
	)	FOR MR. BURR
JOHN EDWARD BURR,	)	
DEFENDANT.	)	

NOW COMES the undersigned, ROBERT E. COLLINS, after being duly sworn, and deposes and says as follows:

1. I am an attorney duly licensed to practice law in the State of North Carolina and was the court-appointed lead counsel for John Edward Burr in the above-captioned matter.

2. Throughout my representation of Mr. Burr, I believed in his innocence. I still remain convinced that he is innocent of these charges.

3. Post-conviction counsel for Mr. Burr gave me copy of the transcription of the statement of Lisa O'Daniel taken by the prosecutors on or about February 24, 1993 and the transcription of the statement of Scott Ingle taken by the prosecutors on or about February 25, 1993.

4. Neither of these statements were provided to me or my co-counsel either before, during or after the trial of Mr. Burr. The first time I had seen these statements was when I received them from Mr. Osborn in January and February, 1999.

FURTHER YOUR AFFIANT SAYETH NOT.

This the 24th day of February, 1999.

Robert E. Collins
ROBERT E. COLLINS

Sworn to and subscribed to
this the 24th day of February,
1999.

Carol Gradke Deputy Clerk
~~NOTARY PUBLIC~~

My Commission Expires: _____

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
ALAMANCE COUNTY	FILE NOS. 91 CRS 21905-06, 08-09
STATE OF NORTH CAROLINA)	
)	
VS.)	**REPLACEMENT OF PAGE 42**
)	**OF SECOND AMENDMENT TO**
JOHN EDWARD BURR,)	**MOTION FOR APPROPRIATE RELIEF**
DEFENDANT.)	

TO: THE HONORABLE PRESIDING JUDGE OF THE SUPERIOR COURT OF ALAMANCE COUNTY

NOW COMES the Defendant, JOHN EDWARD BURR, by and through his undersigned counsel, and respectfully requests, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, 21, 23, 24, 27, 35 and 36 of the North Carolina Constitution and the provisions of N. C. Gen. Stat. § 15A-1411 *et seq.*, that this Honorable Court replace page 42 of the Defendant's Second Amendment to Motion for Appropriate Relief with the attached page 42.

RESPECTFULLY SUBMITTED, this the 5th day of March, 1999.

J. KIRK OSBORN
ATTORNEY FOR THE DEFENDANT

Suite 421, The Europa Center
100 Europa Drive
Chapel Hill, NC 27514
(919) 929-0987

ERNEST L. CONNER, JR.
ATTORNEY FOR THE DEFENDANT

110 Arlington Drive
P. O. Drawer 8668
Greenville, NC 27835
(919) 355-8100

denying any deal and denying that anyone told her what she ought to say on the witness stand. The use of both these statements to impeach both witnesses would have raised serious and material doubts as to their truthfulness. There is a reasonable likelihood that during jury deliberations, the jurors could have considered the false evidence. *Kyles v. Whitley*, 514 U.S. 419, 433 n.7 (1995).

II. THE STATE WITHHELD FAVORABLE EVIDENCE FROM THE DEFENDANT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 19 AND 23 OF THE NORTH CAROLINA CONSTITUTION.

33. The allegations contained in Paragraphs 1 through 32 of this Amendment to his Motion for Appropriate Relief are realleged and incorporated by reference as if fully set forth herein.

34. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963) the United States Supreme Court held that due process requires that the prosecution disclose evidence favorable to a defendant. The state's obligation to disclose favorable evidence under *Brady* covers not only exculpatory evidence but also information that could be used to impeach the state's witnesses. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

III. THE STATE VIOLATED N.C. GEN. STAT. § 15A-903(f) BY NOT PRODUCING LISA O'DANIEL'S STATEMENT TO THE PROSECUTORS MADE ON OR ABOUT FEBRUARY 24, 1993.

35. The allegations contained in Paragraphs 1 through 34 of this Amendment to his Motion for Appropriate Relief are realleged and incorporated by reference as if fully set forth herein.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing Replacement of Page 42 of Second Amendment to Motion for Appropriate Relief was served on the following person by depositing a copy of the same with the U. S. Postal Service, first-class postage prepaid and addressed as follows:

The Honorable James C. Spencer, Jr.
245 Criminal Courts Building
212 West Elm Street
Graham, NC 27253

Edwin W. Welch, Esq.
Associate Attorney General
P.O. Box 629
Raleigh, NC 27602-629

Robert Johnson, Esq.
District Attorney
Fifteen-A Judicial District
Alamance County Courthouse
Graham, NC 27253

This the 5th day of March, 1999.

J. KIRK OSBORN
ATTORNEY FOR THE DEFENDANT

Suite 421, The Europa Center
100 Europa Drive
Chapel Hill, NC 27514
(919) 929-0987

APPENDIX P

348 N.C. 695
Supreme Court of North Carolina.

STATE of North Carolina
v.
John Edward BURR.

No. 179A93-3. | July 29, 1998.

Attorneys and Law Firms

Ernest L. Conner, Jr., Greenville, J. Kirk Osborn, Chapel Hill, for Burr.

Edwin W. Welch, Associate Attorney General, Robert F. Johnson, District Attorney, for State.

Prior report: 341 N.C. 263, 461 S.E.2d 602.

Opinion

ORDER

Defendant's Petition for Writ of Certiorari is allowed for the limited purpose of remanding this case to the Superior Court, Alamance County, for reconsideration of defendant's Motion for Appropriate Relief in light of this Court's opinion in *State v. McHone,* 348 N.C. 254, 499 S.E.2d 761 (1998) and *State v. Bates,* 348 N.C. 29, 497 S.E.2d 276 (1998).

By order of the Court in Conference, this 29th day of July, 1998.

Parallel Citations

511 S.E.2d 652 (Mem)

End of Document

APPENDIX Q

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF ALAMANCE	FILE NOS: 91-CRS-21905, -21906 91-CRS-21908, -21909
STATE OF NORTH CAROLINA)) v.)) JOHN EDWARD BURR)	ORDER

THIS CAUSE came before the undersigned Resident Superior Court Judge, in chambers, who finds the following:

I. Procedural History

1. On 16 April 1993, defendant was convicted at the March 1, 1993 Regular Session of Superior Court for Alamane County of first degree murder, felonious child abuse, and assault on a female.

2. On 21 April 1993, pursuant to the jury's recommendation, The Honorable A. Leon Stanback, Jr., sentenced defendant to death for the murder and thirty days imprisonment for the assault on a female conviction. He arrested judgment on the felony child abuse conviction.

3. On 11 May 1993, the North Carolina Supreme Court issued an order staying defendant's execution.

4. On 8 September 1995, the North Carolina Supreme Court affirmed defendant's conviction and sentence of death. State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (1995), cert. denied, ___ U.S. ___, 134 L. Ed. 2d 526 (1996) [hereinafter "Burr"].

5. On 27 September 1996, defendant submitted a motion for appropriate relief [herein "MAR"], with an amendment thereto being submitted on September 2, 1997.

II. Summary of Court's Conclusions

6. Based on a careful review of all matters before the Court, the Court concludes:

a. That an evidentiary hearing is not required to resolve any dispositive question of fact.

b. That dispositive issues raised by defendant's MAR may be resolved based on applicable law, matters of record, proffers of evidence by defendant, and matters within the Court's knowledge.

c. That defendant's MAR, as amended, is without merit and should be denied.

d. That all of defendant's claims are without merit.

e. That some of defendant's claims are procedurally barred under provisions of N.C.G.S. 15A-1419.

f. That nothing submitted by defendant demonstrates that claims procedurally barred by provisions of N.C.G.S. 15A-1419(a) must be considered under the "good cause" and "fundamental miscarriage of justice" provisions of N.C.G.S. 15A-1419(b).

g. That defendant's proffers of evidence, applicable law and matters of record do not support a colorable claim that his two trial counsel, Mr. Robert E. Collins and Mr. Douglas R. Hoy, provided representation that fell below the requirements of Strickland v. Washington, 446 U.S. 668, 80 L. Ed. 2d 674 (1984).

III. Applicable General Principles of Law

Procedural Bar

7. Concerning procedural bar, N.C.G.S. 15A-1419 (21 June 1996) provides as follows:

(a) The following are grounds for the denial of a motion for appropriate relief, including motions filed in capital cases:

(1) Upon a previous motion made pursuant to this article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment or the previous motion was made during the pendency of the direct appeal.

(2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

(3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

(4) The defendant failed to file a timely motion for appropriate relief as required by G.S. 15A-1415(a).

(b) The court shall deny the motion under any of the circumstances specified in this section, unless the defendant can demonstrate:

(1) Good cause for excusing the grounds for denial listed in subsection (a) of this section and can demonstrate actual prejudice resulting from the defendant's claim; or

(2) That failure to consider the defendant's claim will result in a fundamental miscarriage of justice.

(c) For the purposes of subsection (b) of this section, good cause may only be shown if the defendant establishes by a preponderance of the evidence that his failure to raise the claim or file a timely motion was:

(1) The result of State action in violation of the United States Constitution or the North Carolina Constitution including ineffective assistance of trial or appellate counsel;

(2) The result of the recognition of a new federal or State right which is retroactively applicable; or

> (3) Based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review.
>
> A trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim may not constitute good cause, nor may a claim of ineffective assistance of prior postconviction counsel constitute good cause.
>
> (d) For the purposes of subsection (b) of this section, actual prejudice may only be shown if the defendant establishes by a preponderance of the evidence that an error during the trial or sentencing worked to the defendant's actual and substantial disadvantage, raising a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error.
>
> (e) For the purposes of subsection (b) of this section, a fundamental miscarriage of justice only results if:
>
> > (1) The defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense; or
> >
> > (2) The defendant establishes by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty.
>
> A defendant raising a claim of newly discovered evidence of factual innocence or ineligibility for the death penalty, otherwise barred by the provisions of subsection (a) of this section or G.S. 15A-1415(c), may only show a fundamental miscarriage of justice by proving by clear and convincing evidence that, in light of the new evidence, if credible, no reasonable juror would have found the defendant guilty beyond a reasonable doubt or eligible for the death penalty.

8. Even before the 21 June 1996 change in the law (e.g., the change adding the phrase "[t]he court shall deny the motion . . . unless . . . " N.C.G.S. § 15A-1419(b)), case law established that the procedural bar provisions of N.C.G.S. § 15A-1419(a) were

mandatory provisions. See Smith v. Dixon, 14 F.3d 956, 965 (4th Cir. 1994).

Ineffective Assistance of Counsel

9. While evaluating defendant's claims of ineffective assistance of counsel, the Court has considered principles of law mentioned below.

a. Under Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984), for a defendant to prevail on an ineffective assistance of counsel claim, the defendant must satisfy a dual test. First, the performance of counsel must be so deficient that counsel was not functioning as counsel guaranteed by the Sixth Amendment for a defendant. Second, the defendant must show that the deficient performance prejudiced the defense. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690, 80 L. Ed. 2d at 695. The Strickland test is the test for ineffective assistance of counsel under the North Carolina Constitution. State v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985). Accord Luchenburg v. Smith, 79 F.3d 388 (4th Cir. 1996).

b. Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995), states the following concerning the first prong of the Strickland test:

> The test for ineffectiveness is not whether counsel could have done more; perfection is not required. E.g., Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992) ("Trial counsel did enough. A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance."). Nor is the test whether the best criminal defense


> attorneys might have done more. Instead, the test is whether some reasonable attorney could have acted, in the circumstances, as [trial counsel] did--whether what [he] did was within the "wide range of reasonable professional assistance," Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984); White v. Singletary, 972 F.2d 1218, 1220 (11th Cir. 1992).

46 F.3d at 1518. See also State v. Mason, 337 N.C. 165, 446 S.E. 2d 58 (1994); Turner v. Williams, 35 F.3d 872 (4th Cir. 1994), stating:

> "Particularly when evaluating decisions not to investigate further, we must regard counsel's choices with an eye for 'reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments.'" (Citations omitted)).
>
> . . . .
>
> In sum, although [trial counsel] "could have perhaps investigated the facts of the case more thoroughly and with more diligence," Williams v. Dixon, 961 F.2d 448, 451 (4th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 510, 121 L. Ed. 2d 445 (1992), and perhaps could have prepared more thoroughly for the resentencing proceeding, [defendant] has not shown that [trial counsel's] performance fell below an objective standard of reasonableness.

35 F.3d at 896-97; Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir. 1991), cert. denied, 505 U.S. 1230, 120 L. Ed. 2d 922, reh'g denied, ___ U.S. ___, 120 L. Ed. 2d 947 (1992) ("It is becoming all too commonplace to charge even diligent counsel in the midst of difficult circumstances with the adverse outcome in a capital case.").

c. The second prong of Strickland is discussed in Lockhart v. Fretwell, 506 U.S. 364, 122 L. Ed. 2d 180 (1993). Lockhart v. Fretwell held that there was no prejudice under the second prong of Strickland when counsel failed to make an objection during a death-

penalty phase that then would have been supported by a decision that was subsequently overruled

> [b]ecause the result . . . was rendered neither unreliable nor fundamentally unfair as a result of counsel's failure to make the objection. . . . To hold otherwise would grant criminal defendants a windfall to which they are not entitled.

506 U.S. at 366, 122 L. Ed. 2d at 187. Explaining the holding, the Court stated:

> "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." United States v. Cronic, [466 U.S. 648,] at 658, 80 L. Ed. 2d 657, 104 S. Ct. 2039 [(1984)].
>
> . . . .
>
> Thus, an analysis focussing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective (footnote omitted). To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him. See Cronic, at 658 (citation omitted).
>
> . . . .
>
> [T]he "prejudice" component of the Strickland test . . . focusses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. [Strickland] at 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052; see Kimmelman [v. Morrison], 477 U.S., at 393, [106 S. Ct. 2574, 91 L. Ed. 2d 305] (Powell, J., concurring).

506 U.S. at 369-70, 372, 122 L. Ed. 2d at 188-91 (1993). Accord Wesley v. Johnson, 83 F.3d 714 (5th Cir. 1996); Armstead v. Scott, 37 F.3d 202, 206-07 (5th Cir. 1994), cert. denied, ___ U.S. ___, 131 L. Ed. 2d 570 (1995).

d. State v. Mason, 337 N.C. 165, 446 S.E.2d 58 (1994), (quoting Strickland, "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance").

e. Stewart v. Gramley, 74 F.3d 132 (7th Cir. 1996), states:

> The question how extensive an investigation into the existence of potential mitigating factors a capital defendant's lawyers must conduct in order to discharge their duty of rendering professionally competent assistance is a difficult one. Mitigation is a vaguer concept than guilt. When the issue is guilt, defense counsel's duty of investigation is fairly well defined; . . . (Citations omitted). What exactly counsel must do to determine the presence of factors mitigating the gravity of the defendant's conduct is less clear. The standard is clear enough--is in fact the same standard as that of effective assistance in the guilt phase of the proceeding. (Citations omitted) The lawyer must make a "significant effort, based on reasonable investigation and logical argument," to mitigate his client's punishment. Kubart v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989). But what does this mean in practice? Presumably the lawyer is not required to investigate the defendant's past with the thoroughness of a biographer. The resources of defense lawyers are limited and they have only a short time to prepare for the sentencing hearing. Sometimes it will be apparent from the evidence concerning the circumstances of the crime, from conversation with the defendant, or from other sources of information not requiring fresh investigation, that the defendant has some mental or other condition that will repay further investigation, and then the failure to investigate will be ineffective assistance. Brewer v. Aiken, 935 F.2d 850, 857-58 (7th Cir. 1991); Antwine v. Delo, 54 F.3d 1357, 1365-68 (8th Cir. 1995). In other cases, where these indications are lacking, counsel may "reasonably surmise from his conversations with [the defendant] that character and psychological evidence would be of little help." (Citations omitted) If a "decision not to mount an all-out investigation . . . [is] supported by reasonable professional judgment," it is not ineffective assistance. (Citations omitted)

> But we need not try to fix the outer bounds of the duty to investigate in preparation for a death-penalty hearing. The failure to conduct a fuller investigation in this case was not prejudicial; it is highly unlikely to have made the difference between a sentence of death and a lesser sentence. (Citations omitted)
>
> . . . .
>
> [S]ince it obviously is not the theory of capital punishment that murderers are compelled to murder by their past and therefore should not be punished, it cannot be right that anything brought out at a death-penalty hearing is certain or even likely to help the defendant to save his life. What is brought out that will help him is what goes to show he is not as "bad" a person as one might have thought from the evidence in the guilt phase of the proceeding. What is brought out that will hurt him is what goes to show that he is, indeed, as bad a person, or worse, than one might have thought from just the evidence concerning the crime.

74 F.3d at 135-36.

f. North Carolina appellate courts have demonstrated on numerous occasions that ineffective assistance of counsel claims may be properly resolved based on matters of record (i.e., without an evidentiary hearing) (e.g., when the reviewing court can conclude based on matters of record either that counsel's performance was within the range of reasonably competent counsel, or that the alleged error of counsel need not be confronted because the defendant failed to demonstrate the prejudice required by the second prong of the Strickland test). See State v. Mason, 337 N.C. 165, 446 S.E.2d 58 (1994) (counsel not ineffective for failing to make objections to evidence because testimony in the trial transcript, cited dispositive law, and overwhelming evidence of guilt demonstrated that defendant was not prejudiced by alleged errors of counsel); State v. Braswell, 312 N.C. 553, 324 S.E.2d

241 (1985) (counsel not ineffective because "[b]ased on our review of the record, we hold that defendant has received a fair trial free from prejudicial error." 312 N.C. at 566, 324 S.E.2d at 250; "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." 312 N.C. at 563, 324 S.E.2d at 249); State v. Tunstall, 334 N.C. 320, 332, 432 S.E.2d 331, 339 (1993) (no ineffective assistance of counsel based on alleged inadequate time for defendant to consult with counsel prior to trial because "[t]he record before us on appeal indicates that the defendant's trial counsel provided him with a thorough and skillful defense throughout the trial."); State v. Fisher, 318 N.C. 512, 534, 350 S.E.2d 334, 347 (1986) (no ineffective assistance of counsel based on alleged Harbison violation because the transcript demonstrated that trial counsel did not admit that defendant was guilty of murder, and because "[a]fter a careful review of the record we find that even if defense counsel's conduct is held to be professionally deficient, these errors did not result in prejudice sufficient to satisfy the reasonable probability standard that absent the errors a different verdict would have been handed down."); State v. Lewis, 321 N.C. 42, 361 S.E.2d 728 (1987) (the record demonstrated that counsel's inadvertent error in opening statement was not so serious as to constitute ineffective assistance of counsel); State v. Robinson, 330 N.C. 1, 11, 409 S.E.2d 288, 293 (1991) (record

demonstrates no ineffective assistance of counsel at trial; findings affirmed, but sentence vacated for McKoy error); State v. Howie, 116 N.C. App. 609, 614, 448 S.E.2d 867, 870 (1994) ("We find it unnecessary to address the details of defendant's contentions, because there is no possibility that the jury would have reached a different verdict but for his counsel's alleged errors."); State v. Jones, 97 N.C. App. 189, 203, 388 S.E.2d 213, 221 (1990) (no ineffective assistance of counsel because "[o]ur review of the record reveals that counsel vigorously opposed the admission of evidence damaging to his client's defense and he could do little else in view of the strength of that evidence. There are no grounds for a new trial when the record and the defendant's arguments on appeal fail to indicate that trial counsel could have taken any legitimate action that would have produced a different result."); State v. Cogdell, 74 N.C. App. 647, 329 S.E.2d 675 (1985) (Court summarily rejected claims of ineffective assistance of counsel because content of doctor's report and instruction at issue, along with cited law, demonstrated prudence of counsel entering into stipulation); State v. Cole, 343 N.C. 399, 411, 471 S.E.2d 362, 367 (1996) (no ineffective assistance of counsel because "[o]ur review of the transcript and record reveals that defense counsel zealously represented their client and that any disputes between counsel and defendant were resolved before trial."); Smith v. Dixon, 996 F.2d 667 (4th Cir. 1993) (no ineffective assistance on appeal because defendant clearly has not met the second requirement of Strickland; there was not a

reasonable probability that the result in defendant's case would have been different had his attorney raised these claims); State v. Bruton, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (no ineffective assistance of counsel when both defendants were represented by same lawyer at trial).

g. Federal courts have also recognized that claims of ineffective assistance of counsel may be procedurally barred under state law. See Steward v. Lane, 60 F.3d 296, 303 (7th Cir. 1995) ("With regard to the ineffective assistance of trial counsel claims, the Illinois Supreme Court and the district court properly concluded that they were unreviewable for reasons of waiver and res judicata."); Oxford v. Delo, 59 F.3d 741 (8th Cir. 1995) (held that district court properly concluded that claim of ineffective assistance of counsel was procedurally barred).

Support Requirements for Motion for Appropriate Relief

10. Concerning the need for affidavits or other documentary evidence to support a Motion for Appropriate Relief, N.C.G.S. § 15A-1420(b) states:

> (1) A motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.
>
> (2) The opposing party may file affidavits or other documentary evidence.

Evidentiary Hearings

11. Concerning the lack of a requirement for an evidentiary hearing merely because a Motion for Appropriate Relief has been filed, State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), states:

> When a motion for appropriate relief is filed pursuant to N.C.G.S. § 15A-1414, an evidentiary hearing is not required, "but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact." N.C.G.S. § 15A-1420(c)(2) (1988). In addition, "[t]he court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law." N.C.G.S. § 15A-1420(c)(3) (1988). In this case, the trial court correctly determined that the juror affidavits supporting the motion were inadmissible. . . . The trial court properly determined that, as a matter of law, defendant was not entitled to relief. No evidentiary hearing was required.

336 N.C. at 125-26, 443 S.E.2d at 330. See also N.C.G.S. § 15A-1420(b)(1) and State v. Payne, 312 N.C. 647, 668-69, 325 S.E.2d 205, 219 (1985) (defendant must file affidavits or other documents to support a motion for appropriate relief when information therein is not otherwise available for the judge's review).

IV. Evaluation Of Specific Claims

Claim of Newly Discovered Evidence: Evidence of osteogenesis imperfecta and/or accidental injury warrants a new trial (Claim X, MAR ¶¶ 193-219)

12. This claim is without merit. It is discussed first because of its significance and relationship to other claims discussed below. Considerations leading the Court to this conclusion are discussed in the following paragraphs.

13. In 1996, the North Carolina General Assembly enacted An Act to Expedite the Postconviction Process in North Carolina [hereinafter "Act"]. The relevant part of the Act is N.C.G.S. § 15A-1415(c) (21 June 1996), stating:

> Notwithstanding the time limitations herein, a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence. A motion based upon such newly discovered evidence must be filed with a reasonable time of its discovery.

(Emphasis added). In State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987), then Justice Mitchell stated the following regarding the then existing statutory language, which now has been modified, albeit only slightly (i.e., the only substantive addition to the new statute is the addition of the phrases "including recanted testimony" and direct and material bearing upon "the defendant's eligibility for the death penalty"):

> As his last assignment of error, the defendant contends that the trial court erred in denying his motion under N.C.G.S. § 15A-1415(b)(6) for a new trial based on newly discovered evidence. The statute provides that a defendant by motion may seek appropriate relief when:
>
> > [e]vidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.
>
> N.C.G.S. § 15A-1415(b)(6) (1983).

In order for a new trial to be granted on the ground of such newly discovered evidence under the statute, the following must be shown: (1) the witness or witnesses will give newly discovered evidence; (2) such newly discovered evidence is probably true; (3) the new evidence is competent, material and relevant; (4) due diligence was used and proper means were employed to procure the testimony at the trial; (5) the newly discovered evidence is not merely cumulative; (6) it does not tend only to contradict a former witness or to impeach or discredit him; (7) it is of such a nature as to show that a different result would probably be reached at a new trial. See State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980); State v. Parson, 298 N.C. 765, 259 S.E.2d 867 (1979). Such a motion is addressed to the sound discretion of the trial judge and in the absence of abuse of discretion is not reviewable on appeal. Id.; State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

Through an affidavit of the defendant's attorney and testimony at the hearing on the motion, evidence was introduced tending to show that in December, 1985, the defendant's attorney sent him to the Cliffdale Clinic to be examined by Dr. Robert G. Crummie, a psychiatrist and the Medical Director of the Clinic. As a result of his evaluation of the defendant, Dr. Crummie prepared a report in which he stated that he felt that the defendant is generally a gentle person, except when he is drinking, at which times he is probably very dangerous. He stated that the defendant drinks excessively, but otherwise did not mention in his report any emotional disturbance that might have existed at the time of the murder. Dr. Crummie did, however, state in his report that the defendant spent one year in Vietnam which was "relatively stressful" for him.

After the verdict, the defendant's attorney contacted the Cliffdale Clinic in an effort to get Dr. Crummie to testify, for purposes of sentencing, concerning the defendant's possible rehabilitation. Because Dr. Crummie was unable to appear, he suggested that the defendant's attorney contact Rick Ryckman or Ron Friar, psychotherapists at the clinic who had talked with the defendant in conjunction with Dr. Crummie's evaluation. Upon discussion with Mr. Ryckman, the defendant's attorney learned for the first time that Mr. Ryckman and Dr. Friar had discussed the possibility that the defendant suffered from Post Traumatic Stress Disorder.

Mr. Ryckman testified that in his position at the clinic, he is required to be supervised by a licensed

practicing psychologist or psychiatrist, and that Dr. Crummie is his supervisor. He further testified that he administered two psychological tests to the defendant and then interviewed him for approximately fifteen minutes. Mr. Ryckman prepared a report which he submitted to Dr. Crummie. In this report, he stated that "there appears to be some possible mitigating factors with regard to [the defendant's] . . . recent behavior. These could be associated with Vietnam War Syndrome (Post Traumatic Stress Disorder, Chronic, delayed.)" He discussed this with Dr. Crummie. Mr. Ryckman testified, explaining that he is of the opinion that:

> [T]here was significant impairment in Larry Gappins at the time of the commission of the alleged offense. . . . The post-traumatic stress disorder is a contributing factor and is exacerbated by the use of alcohol. Specifically, when Mr. Gappins drinks, his judgment becomes extremely poor and he becomes violent, often incurring flashbacks to the Vietnam War experiences.

Dr. Friar testified that while interviewing the defendant, Mr. Ryckman called him in to listen to the defendant recount some of his Vietnam experiences. Based upon one such experience related by the defendant, Dr. Friar concluded that the defendant "may well have post-traumatic stress disorder." However, he suggested that further testing would be required and that his conclusion could prove to be wrong in later diagnosis.

The defendant argues that the trial court abused its discretion in failing to find that this evidence is probably true, that it is not merely cumulative, and that it is of such a nature that a different result would probably be reached in the guilt determination phase at a new trial. We do not agree. The opinions of the two witnesses were related to their supervisor Dr. Crummie after their interview with the defendant. Dr. Crummie apparently ruled them out in making his evaluation of the defendant's mental health, because he did not adopt them or incorporate them in his report in which he specifically noted the defendant's tour in Vietnam and assessed it as "relatively stressful." We therefore conclude that the trial court did not err. This assignment of error is overruled.

320 N.C. at 74-76, 357 S.E.2d at 661-62 (emphasis added). See also C.A. Wright, Federal Practice and Procedure: Criminal 2d § 557 (1982 & Supp. 1996), stating in part:

> [M]otions on [grounds of newly discovered evidence] are not favored by the courts and are viewed with great caution. (Footnote omitted). No court wishes a defendant to remain in jail if he has discovered evidence showing that he is not guilty, but after a man has had his day in court, and has been fairly tried, there is a proper reluctance to give him a second trial.
>
> Accordingly, rather exacting standards have been developed by the courts for motions of this kind. A motion based on newly discovered evidence must disclose (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant. (Footnote omitted). This test is commonly known as the "Berry rule," from the name of the state case from which it was derived. (Footnote omitted).

Id. at 315.

14. Neither the State nor defendant's counsel have cited the Court to a dispositive case (e.g., a case "on all fours" from either a North Carolina state appellate court or a federal court within the Fourth Circuit). Cases cited by defendant (e.g., in MAR ¶¶ 76, 77, and 219), do not address the factual situation presented (i.e., a request for a new trial based on testimony of physicians concerning the cause of death that would contradict the testimony of physicians who testified at trial). The State cites a number of cases from other jurisdictions concerning factually related situations that are instructive, but not dispositive. These cases include the following:

a. Matter of Martin, 423 N.W.2d 327 (Mich. App. 1988), in which the Court directed a new hearing after concluding that the probate court had abused its discretion in continuing Ashley Martin's placement in foster case. The decision was based on a number of factors, including "[v]ery persuasive evidence from Dr. [Colin] Paterson [who has submitted an affidavit in the case at bar] and Dr. Parfitt show (sic) that the cause [of fractures] was copper deficiency or some similar metabolic disorder." 423 N.W.2d at 335 (emphasis added).

b. Misskelley v. State, 915 S.W.2d 702 (Ark. 1996), a first degree murder case holding that the trial court properly denied defendant's motion for a new trial based in part on proffered evidence that the medical examiner, Dr. Frank Peretti, if called as a witness, would give new testimony concerning the use of a knife that had been disclosed during Dr. Peretti's cross-examination at the trial of two other men. The reasons for the holding were (a) "The appellant has not shown that, prior to his conviction, he could not have discovered such evidence. . . ." [and (b)] "The question regarding Dr. Peretti's opinion is whether it would have impacted the outcome of the trial. We think it would not have." Id., at 717 (emphasis added).

c. Taylor v. State, 834 P.2d 1325 (Kan. 1992), a first degree murder case holding in part that certain entomology evidence was not "newly discovered" and that certain pathology evidence concerning the date of death was not "newly discovered." The reasoning of the Court included:

(1) "The district court specifically found the identification of maggot growth on a body as an investigative tool in ascertaining the interval between death is not a recent or novel development. It held information necessary to perform the test was known in 1982 when appellant was tried for the murder of his wife. Was the maggot test discoverable with due diligence? The burden is on the defendant to prove that it was not. . . . [T]he district court did not abuse its discretion in denying a new trial based on newly discovered evidence." 834 P.2d at 1337 (emphasis added).

(2) Forensic pathologist Dr. William Eckert's testimony concerning the decomposition of the victim's heart was not "newly discovered evidence" partly because "he was available to be asked his opinion during the trial. The court determined the evidence was not newly discovered." 834 P.2d at 1338 (emphasis added).

d. Summerville v. Warden, State Prison, 641 A.2d 1356 (Conn. 1994), a state habeas corpus proceeding in which the defendant sought relief based in part on the testimony of a Dr. Taff, a pathologist, containing the following comment:

> Taff's testimony . . . amounted to nothing more than a fourth expert opinion derived from an interpretation of the underlying autopsy data that Katsnelson, Gross and Sturner had already interpreted. That is not the kind of evidence that renders prior expert opinions as to the cause of death scientifically impossible or improbably. Indeed, if it were, "[t]he ultimate result would be a never-ending battle of [pathologists] appointed [or retained] as experts for the sole purpose of discrediting a prior [pathologist's] diagnosis." Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir. 1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991). (Footnote omitted).

641 A.2d at 1376 (emphasis added).

e. Isom v. State, 497 So. 2d 208 (Ala. Crim. App. 1986), a manslaughter case holding that the defendant was not entitled to a new trial based on newly discovered evidence concerning cause of death, and stating in part:

> [T]he newly discovered evidence is a coroner's testimony that would refute the testimony of the coroner who stated at trial that the victim's death could not have been a result of her chronic alcoholism. However, a new trial should not be granted on the basis of newly discovered evidence that merely serves to impeach the coroner's testimony as to the cause of death, (citation omitted), and it is clear that the appellant is not alleging perjury. (Citation omitted).

497 So. 2d at 212 (emphasis added).

f. People v. Burrington, 242 N.E.2d 433 (Ill. App. 2 Dist. 1968), a murder-of-a-child case, holding that defendant was not entitled to a new trial based on an affidavit of two physicians who had testified at trial. Their affidavit stated:

> "That since their testimony . . ., they have developed through research, an opinion different from that which they had at the time of their testimony, and do now state that a rupture of a severely distended stomach could occur by reason of minimal trauma, so that a severe blow such as by a fist or other blunt object would not necessarily be required to cause such a rupture."

242 N.E.2d at 434. The Court stated:

> As far as we can see, the motion [for a new trial based on newly discovered evidence] has never been allowed or even made in regard to expert testimony. It is clear, however, that the new evidence is not of such conclusive character that it would probably change the result on a retrial. (Citations omitted). The uncontradicted evidence is that Duane Gerloff was a normal, healthy child on November 28, immediately prior to his confinement in the bathroom with the defendant. Five minutes later, his stomach was enlarged and extended to five times its normal capacity, he was unconscious,

> his head was 'bobbing' and he was suffering from severe brain damage, a ruptured stomach and a lacerated liver.
>
> In view of the expressed hostility of the defendant for this child, the circumstantial evidence that death was caused by his criminal act is overwhelming. That the stomach could have been ruptured by a minimal trauma is pertinent but hardly conclusive. Under the circumstances, it is highly improbable that the jury would return any other verdict than that returned.

242 N.E.2d at 435 (emphasis added).

g. United States v. Smith, 179 F. Supp. 684 (D.C., 1959), a first degree murder case finding that affidavits of five eminent neurosurgeons concerning the cause of death, which contradicted the medical opinion of the medical examiner who testified at trial, were not "strictly speaking newly discovered" because each was "evidence that was available and could have been obtained for use at the trial. . . . The rule has always been that newly discovered evidence must be evidence that could not have been discovered by the exercise of due diligence for use at the trial." 179 F. Supp. at 685-86. The opinion contains an extensive discussion of the reasons for denial of motions for new trials (e.g., a quotation from Justice Cardozo: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." 179 F. Supp. at 686). Thereafter, the Court "in the interest of justice," examined the evidence proffered including the affidavit of the medical examiner that stated in part:

> 'I must emphasize that I actually saw the injuries on the head . . . they were not caused by the decedent falling down. The other doctors, of course, never saw those wounds and therefore their opinions are

> entitled to little weight. In medicine[,] opinions frequently vary but any competent medical practitioner, irrespective of his specialty, will agree that a doctor who actually sees a patient or performs an autopsy on a body is in a much better position to give a valid opinion than one who merely answers a hypothetical question.'

179 F. Supp. at 688 (emphasis added). The Court then concluded that "medical testimony cannot be weighed alone, but must be taken together with the circumstantial evidence in this case which all points inexorably in the direction of the defendant's guilt. . . . [F]urther, even if this additional medical testimony were adduced, [it] is not likely to change the result." Id. (Emphasis added). Smith was affirmed on review based on the Court's conclusion that "the views of the affiants [i.e., five neurosurgeons] have little or no bearing on any material issue in the case." Smith v. United States, 283 F.2d 607, 609 (D.C. Cir. 1960). However, the concurring opinion of two judges opined that

> [r]ealistically speaking, we think the evidence of the five neuro-surgeons was 'newly discovered' as to appellant. . . . [because] it is 'too much to require' that under the circumstances counsel should have anticipated, at the trial, the evidence of the neuro-surgeons. We must keep in mind that appellant is a pauper. His court-appointed trial counsel, as is often the case, was without the investigative or consultative facilities necessary to properly and fully present the defense. . . . An interpretation of 'newly discovered' which places the poor at a disadvantage (footnote omitted) is inconsistent with the philosophy of Rule 33 which authorizes new trials where 'required in the interest of justice.'

283 F.2d at 611-12.

h. People v. Maringer, 251 P.2d 999 (Cal. Ct. App., 4 Dist. 1953), affirming denial of defendant's motion for a new trial based on newly discovered evidence, and stating in part:

> The defendant's claim of newly discovered evidence consists of an attack upon portions of the testimony of the doctor who testified for the People at the trial. The only new evidence referred to is the claim that defendant has found statements made by some medical writers which disagree with some of the incidental opinions expressed by this doctor. Aside from other considerations there is nothing to indicate that this doctor testified falsely, knowingly or otherwise. The supposed new evidence, if received, would not throw any doubt on the essential part of this doctor's evidence, his opinion as to the cause of the victim's death, and the presence or absence of such evidence could not have affected the verdict.

251 P.2d at 1000-001.

15. The Court has considered all evidence presented and proffered. Burr summarizes the evidence. Appendix 1 of this order focuses attention on testimony and exhibits that indubitably led the jury to conclude that defendant murdered Tarissa Sue O'Daniel [hereinafter "Susie"]. Bold print in Appendix 1 emphasizes the evidence the Court considers most probative of defendant's guilt.

16. The Court has also considered Appendix 1 of the State's Response, an affidavit of Mr. Robert F. Johnson, the lead prosecutor in this case. Attached to the affidavit are copies of Susie's death certificate, the report of investigation by the medical examiner, the report of autopsy, the neuropathology consultation report, body diagrams, and a number of articles provided to Mr. Johnson by Dr. David Merten[1]. The articles

[1] The Court has disregarded comments and questions on various papers that appear to be notes of the prosecutor.

provided by Dr. Merten are considered significant because they represent some -- but surely not all -- of the ideas, studies, research, and other information relied on by Dr. Merten in evaluating information relating to Susie's injuries. Furthermore, in the Court's opinion, the articles are some indication of the knowledge possessed by a reasonably prudent physician concerning the causes and diagnosis of child abuse vis-a-vis accidental injury. The articles include the following information:

a. J. Michael Cupoli, M.D., Piecing together the pattern of child abuse, 4 Contemporary Pediatrics, at 12-28 (Dec. 1987):

(1) "Child abuse leaves recognizable clues. This article tells you what patterns of injury are characteristic, when the history doesn't make sense, and what tests you need to back up your suspicions."

(2) "The shape of the bruises can often tell you what happened. . . . Grabbing a child . . . leaves fingerpad-shaped bruises ranging from the imprint of a single finger to a full outline of all of the fingertips." (Emphasis added).

(3) "Children with multiple fractures, at multiple sites, and in various stages of healing, should be presumed to be victims of inflicted injury." (Emphasis added).

(4) "Any fracture in a child under 2 years of age without a clear history of severe trauma -- as severe as an automobile accident -- must be viewed with suspicion. The malleable bones of infants and toddlers are very resistant to fracture. They tend to bend rather than break." (Emphasis added).


(5) "Skull fractures in a child under 1 year of age, and probably under 2 years of age, is abuse until proven otherwise. The skull of a child this age, with the open fontanelle, is quite pliable and difficult to fracture. The history of a simple fall to the floor is highly suspect." (Emphasis added)

(6) "Unexplained rib injury without roentgenographic or metabolic evidence of other bone disease is specific for child abuse." (Emphasis added).

(7) "Because the consequences [of intracranial injury is] so serious, any child in whom abuse is suspected should be evaluated for head injury (footnote omitted). The most likely victims . . . are children under 1 year of age. These children often have no bruising or other external evidence of abuse. . . . The characteristic findings of the 'shaken child syndrome' are retinal hemorrhage . . . and changes in sensorium. . . . I have recently seen a child with no retinal hemorrhage who had subdural, subarachnoid, and parenchymal bleeding. To make the diagnosis even more difficult, children between 6 weeks and 6 months of age may at first present with only apnea, then return weeks later with severe CNS [central nervous system] findings and retinal hemorrhage. This pattern indicates recurrent shaking episodes that have led to severe intracranial hemorrhage (footnote omitted)." (Emphasis added).

(8) "Most victims of the shaken child syndrome are infants less than 6 months of age . . . ." (Emphasis added).

(9) "Many . . . [child abusers] are people under chronic stress, exacerbated in times of economic downturn, who take out their frustration on their children. One must be careful, however, not to equate the stresses of poverty with a potential for [child abuse]." (Emphasis added).

b. David F. Merten, M.D., and Dennis R.S. Osborne, M.D., Craniocerebral Trauma in the Child Abuse Syndrome, 12 Pediatric Annals, at 882-87 (1983) (i.e., an article by the Dr. Merten who testified at defendant's trial and provided advice and information to the lead prosecutor prior to trial), includes the following:

(1) "The principal mechanical factors involved in the dynamics of craniocerebral injury are translational and rotational forces (footnote omitted). . . . Translational forces are generated by a direct blow or impact to the head . . . Both impact injuries resulting from 'battering' and non-impact injuries resulting from 'shaking' may generate rotational forces which are most commonly responsible for the cerebral and extracerebral injuries in childhood, and more specifically in cases due to abuse (footnote omitted)."

(2) "Skull fractures serve primarily as evidence that a direct impact injury has been dealt to the head." (Emphasis added).

(3) "Extracerebral fluid collections, both acute and chronic, are the most common intracranial sequelae of child abuse (footnote omitted). Subdural hemorrhage is the most common acute intracranial lesion and results from rupture of one or more of the

delicate bridging veins running from the cerebral cortex to the venous sinuses. . . . In some cases both acute and chronic subdural fluid collections may be encountered. In such cases concurrent skeletal injury lends evidence to abuse as the basis for the intracranial lesions." (Emphasis added).

c. Prasit Nimityongskul, M.D., and Lewis D. Anderson, M.D., The Likelihood of Injuries When Children Fall Out of Bed, 7 Journal of Pediatric Orthopedics, at 184-86 (1987), stating in part: "Our data indicate that severe head, neck, spine, and extremity injuries are extremely rare when children fall out of hospital beds. Child abuse should be suspected and ruled out when a child is seen with severe injury from a reported 'fall at home.'" (Emphasis added). Table 2 in this article notes that one of the children evaluated in the study was an osteogenesis imperfecta patient.

d. M. Elaine Billmire, M.D., and Patricia A. Myers, M.S.W., Serious Head Injury in Infants: Accident or Abuse? 75 Pediatrics at 340-42 (Feb. 1985), stating in part:

(1) "Certain clinical features such as complex, depressed, or diastatic fractures, retinal hemorrhages, and associated findings such as metaphyseal fractures and failure to thrive make the diagnosis of abuse more likely (footnotes omitted)." (Emphasis added).

(2) "Our findings concur with those of Helfer and Hobbs (footnotes omitted) that accidental trauma rarely, if ever, causes intracranial injury in infants. Sixty-four percent of all head injuries, excluding uncomplicated skull fractures, and 95% of

serious or life-threatening head injuries were the result of child abuse. No infant sustained an injury worse than a concussion with brief loss of consciousness as a result of a fall from a bed or couch, and only motor vehicle accidents accounted for injuries comparable to those seen in battered children. We found no instances of disease processes mimicking the intracranial abnormalities seen in battered children." (Emphasis added).

e. Charles Q. McClelland, M.D., and Kingsbury G. Heiple, M.D., Fractures in the First Year of Life: A Diagnostic Dilemma?, 136 Am. J. Dis. Child, at 26-29 (Jan. 1982), stating in part:

(1) "In preparation for a prospective study of fractures in prewalking infants and older children, a review of fractures occurring in the first year of life was made. This study sought to answer three specific questions: . . . (3) What is the influence of age, cause, and other host factors (presence of constitutional medical illnesses that may predispose to skeletal fractures) on the site and type of fractures in such infants?"

(2) "Constitutional/Host Abnormalities. Table 4 presents data on eight patients with constitutional/host abnormalities in the fracture group. These abnormalities include one patient with osteogenesis imperfecta, . . . These patients are at increased risk for fractures when compared with the general population of normal infants. This increased risk results from either genetically or metabolically derived abnormalities resulting in increased friability of the skeletal system (osteogenesis imperfecta, osteopenia, etc.) . . . ." (Emphasis added).

(3) "Two studies have examined the incidence of fractures in small infants resulting from falls. In the study of Kravitz et al. on 436 infants . . . 101 children (30%) were noted to fall, but only two skull fractures and no extremity fractures occurred in this group (footnote omitted). In a retrospective review of 81 children less than 5 years of age reported to have fallen from hospital beds or carts approximately 90 cm in height, Helfer et al. reported only one skull fracture."

f. Susan A. Thomas et. al., Long-Bone Fractures in Young Children: Distinguishing Accidental Injuries From Child Abuse, 88 Pediatrics, at 471-76 (Sept. 1991), stating in part:

(1) "Akbarnia et al. found that humerus fractures were the second most frequent fracture in 74 abused children, O'Neill found the humerus to be the most common bone broken in 28 abused children, and Galleno and Oppenheim found it to be the third most frequent (after femur and tibia fractures) in 36 abused children. . . . In our series, we found that all nonsupracondylar humerus fractures were from abuse." (Footnotes omitted).

(2) "Femur fractures in children younger that 1 year of age [are likely to be] due to abuse." (Emphasis added).

g. Peter Worlock et. al., Patterns of fractures in accidental and non-accidental injury in children: a comparative study, 293 British Medical Journal, at 100-02 (12 July 1986), stating in part: "Child abuse cannot be diagnosed from the patterns of fractures alone."

h. Richard H. Gross and Mary Stranger, Causative Factors Responsible for Femoral Fractures in Infants and Young Children, 3 Journal of Pediatric Orthopedics, at 341-43 (1983), stating in part:

(1) "Almost one-half of the [femoral] fractures (34/74) were sustained as a result of suspected or confirmed abuse; most (17/26) of the fractures in infants less than 1 year of age were a result of abuse." (Emphasis added).

(2) "Abuse is most common in young infants, especially when parents are under stress, often economic stress."

i. William A. Anderson, The Significance of Femoral Fractures in Children, 11 Annals of Emergency Medicine, at 174-77 (April 1982), stating in part: "The major portion (79%) of children less than 2 years of age sustained [femur] fracture as a result of abuse. . . . The physician faced with a fractured femur in a pediatric patient must be highly suspicious of abuse if the child is 2 years of age or younger, unless there is a clear history of an accidental major trauma." (Emphasis added).

j. Rodney K. Beals and Emily Tufts, Fractured Femur in Infancy: The Role of Child Abuse, 3 Journal of Pediatric Orthopedics, at 583-86 (1983), stating in part:

(1) "The data in this study reinforce the known association of child abuse and fracture of the femur. . . . This study suggests that as many as 30% of femoral fractures in this age group [i.e., under 4 years of age] are due to child abuse." (Emphasis added).

(2) The criteria for child abuse in this study included: unreasonable history of cause of fracture; inappropriate delay in seeking care; physical evidence of trauma; previous known abuse; admission of abuse, radiologic evidence of fractures at varying stages of healing, and multiple acute fractures "without evidence of bone disease." (Emphasis added).

(3) Ten of the patients in the study had "pathologic" fracture, including 3 who had osteogenesis imperfecta, 3 who had myelomeningocele, 2 who hard arthrogryposis, and 1 who had bone sepsis.

k. John King et. al., Analysis of 429 Fractures in 189 Battered Children, 8 Journal of Pediatric Orthopaedics, at 585-89 (1988), stating in part: "CONCLUSION[.] Single and multiple fractures are common among battered children. The most commonly observed fractured bone was the humerus. The most common type was the transverse fracture and not the spiral or corner variety."

17. The Court notes that four of the articles provided to Mr. Johnson by Dr. Merten included references to children with bone disease or osteogenesis imperfecta (i.e., page 16 of the article by Cupoli, page 186 of the article by Nimityongskul and Anderson, Table 4 in the article by McClelland and Heiple, and page 583 of the article by Beals and Tufts). Furthermore, as the last page of Mr. Johnson's affidavit indicates, Dr. Merten indicated to Mr. Johnson that he had observed nothing in Susie indicating that she suffered from such a disease.

18. The Court has also considered medical journal articles presented by defendant (MAR Appendices A and D), the cases provided by the State (Appendix 2, State's Response), and the affidavits of defendant's medical experts (MAR Appendices C, E, and G).

19. The Court has considered the following comments of various court regarding osteogenesis imperfecta [hereinafter "OI"]:

a. Matter of Mathew D., 641 N.Y.S. 526 (Family Court, Queens County, 14 March 1996) (Appendix 2, State's Response), stating in part:

> Osteogenesis imperfecta is described by the three physicians who testified at trial as an extremely rare condition, observed in approximately one birth per 250,000. The bones of a newborn afflicted with the most severe form of OI will fracture during the birth process and also during routine handling. Such a baby is unlikely to survive infancy. Milder forms of OI result in repeated fractures which may be reduced by careful training for the caretakers.
>
> Diagnosis of OI is based on several factors, including genetic history (parents and siblings); the type of fractures (typically, the long bones are fractured in more than one site); presence of "Wormian bones" in the skull (irregularities in the frontal sutures, visible in x-rays); blue or blue-ish sclerae; and a triangular shape to the face. In addition to clinical observations, OI can also be confirmed by various blood tests for the child and parents. The most sophisticated test, performed only rarely, requires a biopsy from which unusual levels of collagen can be detected. That test ("the Seattle biopsy") was requested by the parents soon after the petitions were filed, and payment for it was ultimately authorized at public expense. The Seattle biopsy is recognized as conclusive in 85% of cases, meaning that 15% of such test results will be negative despite the patient actually having OI.

641 N.Y.S. at 527.

b. In the Interest of D.L., 401 N.W.2d 201 (Iowa Ct. App. 1986), stating in part:

> We agree . . . that Dr. Smith's testimony is more convincing. Smith testified that the radiological tests performed upon D.L. disclosed no evidence of osteogenesis imperfecta. Although he noted that in one to five percent of the cases where the disease is found to exist it is not detectable by radiological examinations, he further testified that in those cases there is generally a family history of the disease. There is no evidence of a history of osteogenesis imperfecta in the instant case. Moreover, the fact that D.L. suffered skull fractures and subdural hematomas in addition to his rib fractures further negates the possibility of osteogenesis imperfecta; Dr. Smith testified that subdural hematomas and skull fractures are not caused by osteogenesis imperfecta. On the basis of this evidence, we have no difficulty in concluding that D.L.'s injuries were caused by abuse . . . .

401 N.W.2d at 205. (Emphasis added, Appendix 2, State's Response).

c. Lamberton v. State, 1995 WL 599022 (Tex. App.-Houston (1 Dist.)) (unpublished), stating in part: "Dr. Lupski testified . . . that Nicholas did not have osteogenesis imperfecta. Nicholas did not have gray sclera that is characteristic of osteogenesis imperfecta patients. More importantly, the collagen testing from Nicholas's skin biopsy, which is the best test for diagnosing osteogenesis imperfecta, was normal." Id. at 3. Furthermore, "Dr. Lupski also testified that, in any case, there is no connection between osteogenesis imperfecta and edema, or swelling of the brain, which was the cause of Nicholas' death." (Emphasis added, Appendix 2, State's Response).

d. In re Jeffrey R.L., 435 S.E.2d 162, 165-66 (W. Va. 1993), noting that experts ruled out osteogenesis imperfecta and diagnosed Jeffrey as suffering from battered child syndrome, adding that "[t]he ophthalmologist was consulted because a symptom of osteogenesis imperfecta . . . is a thin cornea. Jeffrey R.L.'s

cornea, however, showed normal thickness." (Emphasis added, Appendix 2, State's Response).

e. Hart v. State, 818 S.W.2d 430 (Tex. App.-Corpus Christi 1991), on the facts, a case closely related to defendant's. The child victim had her skull fractured, an enlargement of the fluid-holding chambers within the brain and an abnormal increase of fluid in the subdural area. Osteogenesis imperfecta was ruled out by a physician. E.H.'s subdural head injuries indicated that the head was hit against a blunt object or hard surface. The multiple fractures indicated that E.H.'s head received more than one such blow. X-rays revealed a "healing" fracture, a callous formation on the bone of the left femur. Dr. Fred Perez, Jr., an orthopedic surgeon at Driscoll Children's Hospital stated that

> [the] healing fractures on a child who has not been treated by a physician for that fracture causes the physician to suspect child abuse because such an injury is extremely painful and the child would respond by constantly crying. He revealed that a fractured femur is very unusual because it is the strongest bone in the human body. When confronted with a broken femur in a child, a doctor suspects three possible causes, brittle bone disease, accidental trauma, or non-accidental trauma, better known as child abuse.

818 S.W.2d at 441 (emphasis added). Dr. Tom McNeil, a pediatrician at Driscoll Children's Hospital,

> testified that he examined E.H. . . . and diagnosed multiple fractures to the skull, a large amount of subdural hematomas, bleeding in the brain on both sides of the head, a broken left femur and evidence of previous fractures of both tibias. In his experience as a pediatrician, McNeil had opportunities to observe suspected child abuse victims. In his opinion, E.H.'s condition and the fact that the patient's history was not consistent with her injuries supported a diagnosis of child abuse. . . . Based upon his medical experience, McNeil believed that appellant's explanation of the

> child's injuries was unrealistic. The skull fractures E.H. sustained could not occur merely by shaking the infant; rather, to obtain the fractures and the large amount of bleeding in the brain which E.H. had "would take a significant amount of force" such as falling off a balcony, a car wreck, or possibly swinging an infant by the legs, causing the head to contact a hard surface. Despite the fact that breaking a femur required a significant amount of force, it was possible to break a femur by forcefully swinging an infant back and forth by the ankles and dashing the head against a wall.

818 S.W.2d at 442-43. (Emphasis added. Appendix 2, State's Response).

20. Appendix 2 to this order, a table, identifies the classifications of OI, the clinical features of each type of OI, the inheritance characteristic of each type of OI, and the birth frequency of each type of OI.

21. Although the Court has considered the information in all medical journal articles provided by defendant, this Court notes in particular the following specific information in a thorough article provided by defendant (Ablin, Greenspan, Reinhart and Grix, Differentiation of Child Abuse from Osteogenesis Imperfecta, AJR: 154: at 1035-1046, May 1990):

a. The "incidence of OI is estimated to be between 1/15,000 and 1/60,000 births." (Emphasis added).

b. Table 3 (Summary of the Salient Features of Osteogenesis Imperfecta), Table 4 (Features in Clinical History and Physical Examination Helpful to the Radiologist in Diagnosing Child Abuse), and Table 5 (Radiologic Features of Child Abuse). (See Appendix 3 to this order, which sets forth the tables that appear on pages 1041 and 1042 of the aforementioned article).


c. "The effects of the disorder can be seen in the bones, ligaments, skin, sclerae, and dentin. . . . In general, four major features characterize OI: (1) abnormal bone fragility with osteoporosis, (2) blue sclerae, (3) defective dentition (dentinogenesis imperfecta), and (4) presenile onset of hearing impairment. . . . In approximately 80% of patients, OI is autosomal dominant and the patients have blue sclerae (OI type I). Only the rarer types III and IV may be confused with child abuse." (Emphasis added).

d. "Type I OI is the most common form of the disorder . . . . Wormian bones are present. . . . Fractures present at birth have been observed in 8-10% of patients with OI type I. . . ." (Emphasis added).

e. "Type II OI is the fetal or perinatal lethal form of the disorder. . . . The very severe nature of generalized osteoporosis, bone fragility, and severe intrauterine growth retardation result in death in the fetal or early perinatal period. Of those who survive, 80-90% die by 4 weeks of age. Of these survivors, all have radiologic features typical of OI. Sclerae are blue/black. Faces have a triangular shape, caused by soft craniofacial bones, and a beaked nose. . . ." (Emphasis added).

f. "Type III OI is a progressive severe form . . . which is rare. . . . Sclerae are normal, pale blue, or gray at birth, but the color changes through infancy and early childhood until it is normal by adolescence or adulthood. The calvarium is large, thin,

and poorly ossified, and wormian bones are present." (Emphasis added).

g. "Type IV OI is a rare type of osteogenesis imperfecta. . . . [and] only a few families with the disorder have been documented. . . . Paterson's[2] studies are flawed and incomplete because only a small percentage of radiographs of patients with OI type IV and subtype IVA were reviewed. Also, only sporadic comments were made on associated radiologic and clinical features of individual patients. Radiologic documentation to support his findings is lacking. Further detailed information about these cases of OI type IV is needed to make an accurate assessment and conclusion. The validity of Paterson's work has been questioned before. Paterson and colleagues did not explain how they diagnose OI subtype IVA with neither radiologic confirmation nor progressive deformity (except fractures), without family history, with normal sclera and teeth, and without fracture recurrence in protective environment. It would indeed be difficult to diagnose OI without at least some other definite feature of OI. The rarity of sporadic (without family history) type IV OI can be appreciated from understanding that the probability of encountering a child with this type of OI in a large city (population 500,000) is estimated by Taitz to be between 1/1,000,000 and 1/3,000,000 births; thus, one case might occur every 100 to 300 years." (Emphasis added).

---

[2] The Dr. Paterson who has submitted an affidavit in this case.

h. "The keys to distinguishing OI from abuse are the presence of blue sclerae or abnormal teeth; investigation of clinical and family history; physical examination; and radiologic examination for detection of wormian bones, osteoporosis, metaphyseal corner fractures and bucket-handle fractures or other fractures typical of abuse. Metaphyseal corner fractures and bucket-handle fractures are virtually pathognomonic and highly specific features of child abuse." (Emphasis added).

i. "Types I and II of OI easily are distinguished from child abuse simply by the presence of blue sclerae. Of 392 OI patients in a pedigree of 60 families, 370 had blue sclerae. In addition to the child, the parents of OI type I patients should be examined for the presence of blue sclerae. Furthermore, most children with OI type II are stillborn or die in the perinatal period and are easily recognized by the severe radiologic-skeletal deformities and osteopenia. Most cases of OI type III with normal sclerae cannot be confused with child abuse because of the severe nature of skeletal deformities, marked dwarfism, and the presence of osteoporosis. However, a mild case of type III with normal sclerae initially may cause problems in diagnosis if the skeletal manifestations are correlated with clinical history, family history, and physical examination. Family history and medical records of family members should always be reviewed for features of OI." (Emphasis added).

j. "[W]ormian bones [are defined] as 'sultural bones which are 6 mm by 4 mm (in diameter) or larger, in excess of 10 in

number, with a tendency to arrangement in a mosaic pattern.': The presence of significant wormian bones on skull radiographs . . . is a strong indicator of OI or other abnormal conditions . . . . In the study of Cremin et al. 88% of 81 patients with proved OI had significant wormian bones. The absence of this feature is strong evidence against osteogenesis imperfecta, although Paterson and McAllion state that the absence of wormian bones does not exclude OI. The neonatal period may present some difficulties because the skull may be insufficiently ossified or too small to evaluate for wormian bones. Cremin et al. found that essentially all patients with OI except some neonates and adults with technically poor radiographs had wormian bones. Thus, good-quality skull radiographs (lateral, frontal, and Towne views) later in infancy may be helpful for further evaluation for wormian bones." (Emphasis added).

k. "The most difficulty in distinguishing OI from child abuse might occur in patients with mild cases of OI type III or OI type IV, especially in patients with OI subtype IVA and normal teeth. In both instances, patients and parents may have normal sclerae, and with autosomal dominant new mutation there may be no family history; moreover, radiographs may be evaluated without the benefit of pertinent clinical history. Yet, in mild OI type III and severe type IV osteoporosis and/or wormian bones should be present, as should at least some other associated features of OI. The patient's physical examination and clinical history also must

be correlated with regard to features of OI for proper diagnosis." (Emphasis added).

l. "Mild OI type IV, on the other hand, might present more difficulty if mild osteoporosis is not observed carefully, or osteoporosis is minimal or absent at the time of the first fracture. Family history may be absent in rare autosomal dominant new mutation. In sporadic cases of the rare form of mild OI type IV, theoretically a patient could present with normal sclerae, one or more fractures or no fracture, minimal or no osteoporosis, no family history, no hearing impairment, normal teeth (if subtype IVA), and no fracture recurrence after removal from home (fracture-free period). The combination of these events together, however, would be very rare . . . . [t]hus, only the sporadic case representing an uncommon mild form of OI type IV might create difficulty in being distinguished from child abuse. However, if clinical and historical features are scrutinized along with the radiographs, this should not create a significant problem in the majority of patients. Sporadic occurrence of OI type IV is rare, . . . whereas child abuse is common. In otherwise normal bones and in the absence of features typically associated with OI, unexplained fractures are much more likely to represent child abuse than this rare form of OI." (Emphasis added).

m. "On the other hand, Acland speculates that approximately 1% of parents of children with bone disease (15 cases a year) may be convicted unjustly of abuse of children when injuries actually were due to bone disease. There have been sporadic reports in the

literature of children diagnosed as victims of abuse and kept in protective care who later were found to have OI type IV. Unfortunately, several publications pertaining to osteogenesis imperfecta and child abuse have been written by Paterson[3] and colleagues. Paterson is active in the field of abuse . . . . Paterson's work, as detailed earlier under type IV OI, had a weak scientific basis. His work, although partially based on radiologic assessments, lacks strong radiologic support. Taitz reports that a court was not convinced by Paterson's evidence that an abused child had OI, a judge rejected Paterson's testimony in a wardship case, and another court case rejected his evidence. Despite this fact, writings of Paterson et al. provide potential ammunition for aggressive lawyers seeking to undermine clear-cut cases of child abuse." (Emphasis added).

n. "If, after a complete clinical history and family history have been obtained and a careful physical examination and proper skeletal survey have been performed, confusion remains as to the proper diagnosis of OI vs child abuse, a punch biopsy of the skin for collagen analysis may be helpful. . . ." (Emphasis added).

o. "When entertaining the possibility of OI in a case of suspected child abuse, the pediatrician, orthopedist, geneticist, and radiologist must work together in a coordinated effort to arrive at the proper diagnosis. Thus, in the presence of unexplained fractures or fractures typical for child abuse, the

[3] The Dr. Paterson who has submitted an affidavit in this case.

possibility of OI is unlikely without the presence of some other associated clinical features of OI: blue sclerae, osteoporosis, dentinogenesis imperfecta, hearing loss or impairment, joint laxity or hypermobility, wormian bones, short stature, excessive sweating, easy bruising and nosebleeds, or family history of hearing impairment, dentinogenesis imperfecta, OI, or fractures (see Table 3, Appendix 3 to this order). The key to the distinction is the correlation of clinical history, physical examination, family history, and radiologic findings." (Emphasis added).

22. The Court has also considered (a) Dr. Paterson and Dr. McAllion's response to the aforementioned article by Ablin et al., and (b) Ablin et al.'s response to Dr. Paterson and Dr. McAllion, both published as letters in 155 AJR (December 1990). The latter response notes that "[t]wo of the papers cited by Paterson[4] and McAllion were published after the submission of our revised manuscript to AJR. One of these described 15 (2%) of 802 children with OI who were subjects of formal case conferences and care proceedings. However, only two of these patients lacked blue sclerae, wormian bones, or a family history that would have caused confusion in distinguishing type IV OI from child abuse. In 13 of these patients with OI, protective care proceedings could have been avoided if radiologic findings, clinical history, physical examination, and family history had been correlated." (Emphasis added).

[4] The Dr. Paterson who has submitted an affidavit in this case.

23. "The diagnosis of severe forms of osteogenesis imperfecta is indisputable by a radiologist or clinician. Milder forms of the disease can be difficult to diagnose and often a diagnosis can only be made with time. Most children with mild osteogenesis imperfecta do not present with fractures early in life but tend to fracture between toddling and adolescence." H Carty, Brittle or battered, 63 Archives of Disease In Childhood at 350-52, 351 (1988).

24. "The results of this study do not support the view that a particular fracture pattern renders a diagnosis of OI unlikely. Clinicians should be aware of the danger of diagnosing a child with OI as a case of NAI based on the radiographic appearances alone." John A. Dent and Colin Paterson, Fractures in Early Childhood: Osteogenesis Imperfecta or Child Abuse? 11 Journal of Pediatric Orthopaedics, at 184-86, 186 (1991).

25. "Type I is the most common type, accounting for 80% of all cases of OI. . . . This type is associated with distinctly blue sclerae throughout life . . . . [and] occurs in about 1 per 30,000 live births. [OI] type II . . . is characterized by extreme bone fragility leading to intrauterine or early infant death and thus is unlikely to be confused with child abuse. . . . [OI] type III is also a rare form of the disease. . . . Like OI type II, this disorder presents with early and progressive clinical involvement. The sclerae, however, may or may not be blue. Deafness is common with this type and these patients may have dentinogenesis imperfecta. . . . [OI] type IV is also quite rare. This form is characterized by osteopenia leading to bone fragility of variable

severity. In these patients the sclerae are normal or faintly blue, becoming progressively less blue by adulthood. The presence of dentinogenesis imperfecta is variable. . . . Because of the severe bone fragility of OI types II and III, these forms are unlikely to be mistaken for child abuse. These children often have multiple fractures at birth and obvious bony deformities. [OI] types I and IV, however, have been misdiagnosed as child abuse." Sheila Gahagan and Mary Ellen Rimsza, Child Abuse or Osteogenesis Imperfecta: How Can We Tell?, 88 Pediatrics at 987-92 (Nov. 1991). "The more severe forms of OI can be diagnosed clinically if physicians maintain an unbiased attitude toward families who have underlying social problems. Milder forms of OI will be definitively diagnosed only by biochemical studies. . . [W]e would recommend biochemical studies of skin fibroblasts in children who present with fractures suggestive of abuse if (1) there are no other signs of abuse such as bruises or head injuries; (2) the fracture site is consistent with the history, but the mode of injury seems too minor to have caused a fracture; or (3) the child has had fractures in different environments. It is important to remember that the child with OI may have a normal physical examination, no radiographic abnormalities, and a negative family history!" Id. at 991. (Emphasis added).

26. "New radiologic methods to measure bone density, which is markedly decreased in osteogenesis imperfecta, and biochemical methods to measure plasma osteocalcin, a bone protein elevated in osteogenesis imperfecta, allow physicians to make a relatively

certain diagnosis [of OI]." Arlene Hurwitz and Salvador Castells, Misdiagnosed Child Abuse and Metabolic Diseases, 13 Pediatric Nursing, at 33-36 (Jan-Feb 1987). (Emphasis added).

27. "One characteristic feature of [OI] . . . is that fractures may occur with little or no trauma and fractures may well not be accompanied by the physical signs of bruising, swelling or contusions that would otherwise be expected. Generally bruises are much more common than fractures in genuine cases of non-accidental injury. In [OI] however, although bruising is a feature of the disorder, there may paradoxically be little bruising at the site of the trauma." C.R. Paterson, Osteogenesis imperfecta and other bone disorders in the differential diagnosis of unexplained fractures, 83 Journal of the Royal Society of Medicine, at 72-76, 73 (Feb. 1990).

28. "The presence or absence of other physical signs of [OI] needs to be assessed with some caution. Blue or grey sclerae are present in two-thirds of all patients with [OI] but mild variants of the disease with normal sclerae are well recognized. . . ." (Footnotes omitted). Id. at 73.

29. "Since the disorder reflects abnormalities of collagen formation it is not surprising that bone may appear normal radiologically, particularly at the time of the first fracture . . . . The classical radiological abnormalities described in textbooks reflect the effects of the fractures and their immobilization rather than the fundamental disorder. Even in adults normal figures for cortical thickness and bone density may

be found (footnote omitted). The presence of excessive numbers of wormian bones may be a helpful diagnostic pointer but their absence does not exclude osteogenesis imperfecta." Id. at 74. (Emphasis added). Accord Colin R. Paterson, James Burns, and Susan J. McAllion, Osteogenesis Imperfecta: The Distinction From Child Abuse and the Recognition of a Variant Form, 45 American Journal Of Medical Genetics at 187-92, 188 (1993) ("most patients with OI type I and OI type IV have apparently normal bone density (as far as can be assessed by ordinary radiography. . . . Wormian bones, if present in excess, are valuable for diagnosis but an excess of Wormian bones is not universal in OI; in OI type I and OI type IV it is present only in a few cases. Most patients with OI type III do have an excess of Wormian bones"). (Emphasis added).

30. This Court has also considered Roger Smith, Osteogenesis imperfecta, non-accidental injury, and temporary brittle bone disease, 72 Archives of Diseases in Childhood, at 169-76 (1995), and the accompanying two commentaries and author's response which recently reported the debate among physicians concerning some of the arcane aspects of OI. Doctors Wynne and Hobbs' commentary includes:

> Dr. Smith concludes by acknowledging that osteogenesis imperfecta is rare. He might have added that osteogenesis imperfecta with no family history of fractures, joint laxity, early onset deafness, blue sclerae, and dentinogenesis is very rare. In addition the probability that an individual infant with no relevant family history has osteogenesis imperfecta where the skeleton is normal, there are no wormian bones, there is no or trivial history of trauma, the infant is not weight bearing yet has a fractured skull, ribs, or metaphyseal fractures is in the Taitz range of probabilities, that is, millions.

Id. at 172 (emphasis added). Dr. Carty's commentary includes:

> Skull fractures in children with osteogenesis imperfecta occur as the result of trauma. Intracranial trauma is rare. There are only two references identified during a literature search as to its occurrence. Therefore, the finding of incracranial (sic) injury in a child with bone injury must raise the question of NAI. (Footnotes omitted).

Id. at 173 (emphasis added).

31. The Court has considered MAR Appendix B, a chart indicating that Susie's length and weight were below average for a child of her age.

32. The Court has carefully considered the affidavit of Dr. Colin R. Paterson, MAR Appendix C, noting, among other things that the affidavit includes the following:

a. "I understand that during the evening of August 24, 1991 . . . [Tarissa's brother] . . . dropped Tarissa . . . ." (Emphasis added).

b. "[T]he fresh fractures could have occurred at the time of the known accident. This applies particularly to the bilateral fractures of the upper humeri. Their position was consistent with the accident as described. The symmetry of these fractures is a pointer against their causation by non-accidental injury. However, the fractures in both femora were reported to have shown evidence of healing and were thought radiologically to have been seven to ten days old when first seen on August 25. The apparent symmetry of these fractures is also a pointer against non-accidental injury as their cause." (Emphasis added).

c. "The number and distribution of fractures in this case raises the possibility of brittle bone disease (osteogenesis imperfecta). My reading of the medical records indicates that no attempt was made to identify evidence of this condition - in recording the signs of this or in eliciting a family history."

d. "It is important to recognize that in known cases of osteogenesis imperfecta, intracranial bleeding can occur and can be fatal without know[n] trauma. In addition, in a recently published survey of the causes of death in osteogenesis imperfecta we have described children who died with intracranial bleeding after minor trauma that would not ordinarily have caused difficulties. In two of these children there was a lucid interval before the intracranial bleeding was identified; in one the patient was seen at a hospital and sent home." (Emphasis added).

e. "The most likely cause of the earlier fractures was some form of osteogenesis imperfecta, that all the injuries sustained on August 24, 1991 resulted from the bad fall, and . . . intracranial bleeding, failure to breathe and brain damage - were compounded by this disease." (Emphasis added).

33. The Court has considered MAR Appendix D, two medical journal articles concerning falls by children, noting in part the following:

a. Hall, et al., The Mortality of Childhood Falls, 29 The Journal of Trauma, at 1273-75 (1989) includes the following:

(1) This 4-year study considered 18 children who suffered "minor" falls sustained while running or falls from furniture (less

than 3 feet). "These children all died from head injuries without any associated injury." (Emphasis added).

(2) "While some of the 'minor' falls may have been secondary to abuse despite negative investigations (all of these had intense police investigation to rule out abuse) . . . ."

(3) "'Minor falls' can be lethal, especially in a toddler, and must be evaluated. . . . Additionally, we have found, as have other authors (footnote omitted), that it is extremely rare to have visceral, thoracic, or non-skull fracture injuries in children who fall from less than 3 floors. It is, in fact, possible to suggest that if these injuries are found in a child with a fall from less than 3 stories, one should suspect abuse as the etiology of the injury."

b. Irving Root, Head Injuries From Short Distance Falls, 12(1) The American Journal of Forensic Medicine and Pathology at 85-87 (1992) includes the following:

(1) "The problem of evaluating injury in childhood as to causation . . . is compounded by conflicting literature."

(2) "So we should not be surprised by the inadequacy of the evaluation of the injuries in the Helfer paper."

(3) "[I]n considering the effect of a fall, we must consider a number of questions: What part of the anatomy hit? Was all the force taken up at once? Did the body roll and dissipate the force? . . . Do we know the actual distance? . . . ." (Emphasis added).

(4) "One can conclude that most children who fall do not sustain injuries or, if so, only minor ones. . . . One can also

conclude that Helfer demonstrated that skull fractures can occur from falls from short distances."

34. The Court has considered MAR Appendix E, an affidavit of Dr. John J. Plunkett, a forensic pathologist, stating in part:

a. "Tarissa'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. In fact, since her injuries are absolutely consistent with that witnessed event/trauma, it is unreasonable and scientifically unnecessary to propose a second, unwitnessed assault by Mr. Burr as the cause of her death." (Emphasis added).

b. "Further, and this does not seem to be clearly understood by those either performing the autopsy or taking care of Tarissa while she was in the hospital, her head injuries are associated with a skull/scalp impact, and once an impact injury has occurred, it is impossible, scientifically, to differentiate between a rotational fall with an impact as the cause of the injuries (accident), and/or a shaking with a subsequent impact (homicide, whether intentional or not). In fact, the physics of both phenomena are identical." (Emphasis added).

35. The Court has considered MAR Appendix G, the affidavit of Dr. Jerry C. Bernstein, a pediatrician, which states in part:

a. Susie's "birth weight of five pounds eleven ounces makes her small for gestational age. When seen weighing nine pounds even and one-half ounces at three months of age she was below average

for her age. She was seen for gastrointestinal complaints." (Emphasis added).

b. "The symmetry of the fractures in the upper and lower extremities is most uncommon in non-accidental injury." (Emphasis added).

c. "The retinal hemorrhages are consistent with a subdural bleed with the history of a fall onto the gravel roadbed." (Emphasis added).

d. "The consideration of abuse is uppermost in one's diagnosis. However, the number of fractures, their bilateral, as well as symmetrical, nature in (sic) most unusual and should raise a question of osteogenesis imperfecta (brittle bone disease). The child's small size, failure to thrive, and development of multiple fractures as well as easy bleeding with minimal trauma should alert physicians to the possibility of this disorder being a cause of this child's tragic picture." (Emphasis added).

e. "This case represents a strong picture of a child with osteogenesis imperfecta suffering a fatal injury. I see no indication that this diagnosis was ever entertained and her demise being attributed to child abuse is not sustainable in my opinion." (Emphasis added).

36. Considering all matters presented, the Court's bottom line relevant conclusions, opinions, considerations, and observations are as follows:

a. The credentials, training, and experience of all the physicians who testified at defendant's trial are truly impressive,

as are the credentials, training, and experience of the physicians who have presented affidavits on defendant's behalf. Furthermore, it is clear that the views of the physicians who testified at trial were shared by colleagues who were not called as witnesses.

b. The medical experts at trial who rendered opinions concerning the cause of Susie's death all agreed that Susie's death was not caused by accidental injury. When they testified, they were aware of the nature and circumstances of Scott Ingles fall with Susie on Saturday, 24 August 1991. Numerous exhibits were presented to the jury during the testimony of the experts (e.g., x-rays, CAT scans, and medical records).

c. The jury heard Susie's brother, Scott, describe the fall he took on Saturday, 24 August 1991. The jury also saw Scott demonstrate how he fell while cradling Susie in his arms. Scott unequivocally testified that he did not drop Susie. Scott's testimony was confirmed by two eye-witnesses to the event. One witness, Jonas Kimrey, who actually witnessed the fall, confirmed Scott's account of the fall and demonstrated for the jury how Scott fell. The second witness, Lisa O'Daniel, did not see the actual trip, but did see Scott fall. She too described and demonstrated for the jury exactly what she saw Scott do when he fell.

d. The jury heard considerable testimony from witnesses describing Susie's condition both before and after Scott fell with her in his arms, and before and after her mother left her with defendant at the end of the day on 24 August 1991.

e. The jury heard Scott Ingle describe and demonstrate what he observed on two occasions when he saw defendant shaking Susie.

f. The jury heard considerable testimony about defendant inflicting pain and injury on Lisa Porter (a.k.a. Lisa O'Daniel) by squeezing parts of her body and bending her arm and hand, about defendant's threats, about defendant hitting his son in the chest, about defendant's quick temper, about defendant being alone with Susie at the end of the day on 24 August 1991 for approximately 45 minutes, and about defendant's reluctance to take Susie to the hospital as requested by Lisa Porter.

g. The jury heard defendant testify and observed his demeanor.

h. Defendant's current counsel contend that Susie suffered from OI and that her death was caused by that condition and her being dropped by Scott when he fell with her in his arms. They contend that the experts who testified at trial never considered the possibility that Susie had OI, and that defendant is entitled to an evidentiary hearing and subsequent new trial based on their proffered evidence. However, defendant, the party with the burden of proof in this proceeding, has not presented anything from the experts who testified at trial demonstrating either that they never considered the possibility that Susie had OI or that they believed that she had OI and that OI contributed to her death. On the other hand, matters of record indicate that the experts who testified found nothing indicative of bone disease when evaluating Susie. First, Dr. Merten was asked at trial whether he found in examining

the x-rays any indication that there was anything wrong with Susie's bone structure, and he replied that "[h]er bones are perfectly normal other than the injuries," albeit he did not specifically refer to OI. Second, Dr. Azizkhan, in testimony, referred to the very rare condition of brittle bones in premature babies, evidence indicating that he too was aware of the existence of "brittle bone" disease, albeit he did not specifically use the term "osteogenesis imperfecta." Third, Dr. Chancellor, in response to a specific question asking whether there appeared to be any signs of bone disorder or degenerative disease processes, replied, "No, there was no degenerative disease processes." Fourth, the State has presented an affidavit from Mr. Johnson, the lead prosecutor in this case, that demonstrates the nature of his pretrial conversations with the State's experts. His affidavit also attaches articles provided by Dr. Merten, summarized above in ¶ 16, which specifically refer to "pathologic" fractures and, more specifically, osteogenesis imperfecta, and states that "Dr. Merten described to me that he had observed nothing in Tarissa to indicate that she suffered from any such disease . . . ." See ¶ 17 above for reference to articles provided by Dr. Merten that referred to bone disease as an alternative to injury by abuse. Fifth, as will be discussed below in more detail, matters of record do not demonstrate the existence of major salient feature of OI. Thus, based on these factors and what the Court now knows about the qualifications, experience, and training of the State's expert witnesses, the circumstances surrounding Susie's death, the report

of autopsy, and all the information presented concerning child abuse and OI, the Court cannot conclude that the State's experts simply failed to give any consideration as to whether Susie had a bone disease that contributed to her death. Under these circumstances, the far more reasonable inference is that the State's experts knew that fractures are sometimes caused by degenerative bone disease, but that nothing indicative of bone disease surfaced while they were evaluating Susie and the circumstances surrounding her injury and death. Defendant, who has the burden of proof, has not demonstrated otherwise.

i. Susie had a depressed skull fracture, multifocal intercranial injuries, and bilateral retinal hemorrhages, and the fractures and bruises described in detail in Appendix 1 and 4 of the State's Response.

j. The rarity of OI, and particularly the rarity of OI types III and IV, the characteristics of OI, the salient features indicating the possible existence of OI, and the most reliable test for OI are discussed above. In considering these matters vis-a-vis information relating to the case at bar, the Court notes the following:

(1) Defendant presents nothing indicating that Susie had either blue or gray sclerae. Her eyes were examined by medical experts before and after death, and no one has reported the existence of either blue or gray sclerae.

(2) The evidence established that Susie had retinal hemorrhages.

(3) Defendant presents nothing indicating that Susie had Wormian bones. Her x-rays and CAT scans were examined by a number of experts, including Dr. Merten, a board certified radiologist, professor, and specialist in pediatric radiology. No one has reported the existence of Wormian bones.

(4) Defendant's observation in his MAR that no one considered whether there was a family history indicative of OI, or words to that effect, is not exactly true. The records of the Alamance County Department of Social Services demonstrate that representatives of that department conducted an extensive investigation into the circumstances relating to Susie's death. That investigation included interviews with Susie's mother and father (John O'Daniel), Susie's paternal grandmother (Ms. Margaret Costner), Susie's maternal grandparents (Vera Lipscomb and Elbert Porter) and physical examinations, including x-rays, of Susie's siblings, Tony R. Dawson, Johnathan W. O'Daniel, and Scott Ingle. No evidence of child abuse was discovered (e.g., no latent previously broken bone). The social worker reported on 30 October 1991 that all children were healthy. Furthermore, the transcript demonstrates that Susie's father, Ms. Costner, Ms. Lipscomb, and Elbert Porter were all in court when defendant was tried. Stated otherwise, there is considerable evidence presented demonstrating that many of Susie's family members were involved in one way or another with Susie's death, the investigation that followed, and defendant's trial. All were concerned about her death; all were asked questions about her death; and, all had knowledge about Scott

Ingle's fall and Susie's broken bones and skull fracture. Nevertheless, nothing now before the Court presents the slightest suggestion that any family member knew of the existence of any family history of any bone disorder (e.g., OI). Under these circumstances, the reasonable inference is that there was no family history of OI in Susie's family. Defendant proffers nothing demonstrating otherwise.

(5) The evidence demonstrates that Susie had multiple bruises on her body, including fingerprint bruises on her neck.

(6) The evidence demonstrates that neither the pathologist who testified, the pediatric radiologist who testified, the child neurologist who testified, nor the pediatric surgeon who testified saw signs of bone disorder or degenerative bone disease. Defendant proffers nothing demonstrating otherwise.

(7) The evidence demonstrates that Susie's legs -- or at least one of her legs -- contained a callus formation (i.e., an indicator of a previous break in the bone).

(8) Neither defendant nor the information presented indicates that Susie was deaf or had hearing impairment.

(9) Neither defendant nor the information presented indicates that there was dentinogenesis imperfecta or bone deformity in Susie's family, or in Susie, albeit she was only 4 1/2 months old at time of death.

(10) Neither defendant nor the information presented indicates that Susie had fragile skin. There is evidence, however, that she

suffered no scratches, cuts, or scraps when Scott fell with her in his arms.

(11) There is evidence that defendant delayed in seeking appropriate medical treatment for Susie on the night of 24 August 1991.

(12) The evidence at trial demonstrates that Susie's head injuries were not compatible with being cradled in Scott's arms when he fell on 24 August 1991.

(13) Susie was small for a child of her age. However, Susie's weight loss could be attributable to the fact that she had oral thrush, which caused her to not eat and retain an abundance of food, as well as the fact that she lived in a hot, unairconditioned trailer in North Carolina during the summer. Furthermore, Susie's injuries approximately seven to ten days before her fatal injury would have caused her to "have been crying [and] not eating." See ¶ 47 below.

(14) In discussing the time between Susie's brain injury and her reaction to it, Dr. Tennison, a child neurologist, concluded that Susie's skull fracture did not fit the expected description of a fracture from a fall, and that she would have loss of consciousness likely within minutes to an hour or so after her brain injury was inflicted. Dr. Azizkhan concluded that with the kind of injury she received, Susie would have lost consciousness fairly soon after the injury she received, i.e., literally minutes or less than an hour. This evidence counters any suggestion that Susie died as a result of a brain injury received around 6:00 to

6:30 p.m. on 24 August 1991 and demonstrates that Susie received brain injury during the time she was alone with defendant at the end of the day of 24 August 1991.

(15) Evidence before the Court demonstrates that defendant abused Susie on other occasions (i.e., (a) Susie's mother testified that at about 4:00 a.m. about two weeks before Susie's death Susie, while being held by defendant in the living room with no one else present in the living room, Susie was screaming real loud like she had never screamed before, and (b) Scott Ingle testified that he saw defendant shaking Susie on two occasions).

(16) There is no evidence before the Court of any skin biopsy and biochemical analysis of collagen demonstrating that Susie had OI.

(17) As Burr observed, the unusual injuries inflicted on Susie were particularly similar to those inflicted by defendant on Susie's mother, and were admissible for the purpose of showing identity of the perpetrator of the murder. See ¶ 64c below.

k. The Court observes that Dr. Paterson's affidavit clearly indicates that his opinions are based in part on information (a) that Susie was dropped by Scott; (b) a report of a fracture of the left temporal bone of the skull that was described in a summary but not supported by either the radiological reports or the autopsy; (c) a report of a fracture of the left clavicle that was mentioned in one emergency room record but not alluded to either in the x-ray reports or at autopsy; and, (d) that no attempt was made to either identify evidence of OI or to elicit a family history. Dr.

Paterson, obviously, was not present when Susie was evaluated by the physicians who testified. Furthermore, he appears not to have been privy to the testimony relating to Scott's fall, report of defendant shaking Susie on two prior occasions, or Lisa O'Daniel's report of Susie screaming exceptionally loud while in defendant's hands.

l. The Court observes that Dr. Plunkett's affidavit clearly indicates that his opinion is based on the belief that Susie was dropped on a gravel surface. Furthermore, the last paragraph of his affidavit indicates a basic disagreement with some opinions of the experts who testified. His opinions relate solely to the reported fall and Susie's head injuries, not to OI.

m. The Court observes that Dr. Bernstein's affidavit indicates his belief that none of the experts who testified at trial entertained any consideration of whether Susie suffered from OI and his opinion that Susie's demise attributed to child abuse is not sustainable. His belief about the lack of knowledge of the State's experts is not supported by anything submitted by the defense and is countered by information discussed above in ¶ 36h. Furthermore, Dr. Bernstein's opinion concerning child abuse is simply another opinion that is contrary to that of the many experts who testified at trial, not "new evidence." See ¶¶ 13 and 14 above.

37. For purposes of evaluating the motions before the Court, the Court presumes that Doctors Paterson, Plunkett and Bernstein

would testify at an evidentiary hearing in the manner stated in their affidavits.

38. Based on the aforementioned information and law, the Court concludes that defendant has not proffered evidence demonstrating entitlement to a new trial under the provisions of N.C.G.S. § 15A-1415(c). More specifically, the Court concludes that defendant has not demonstrated by his proffered evidence (i.e., his evidence concerning OI and accidental falls) (a) that the evidence is probably true; (b) that defendant could not have with due diligence either discovered or made available the evidence at the time of trial; (c) that the evidence would not tend only to contradict or impeach the witnesses who testified; and, (d) that the evidence is of such a nature as to show that a different result would probably be reached in a new trial.

Claim of ineffective assistance of counsel based on lack of adequate preparation for trial (Claim III, MAR ¶¶ 98-119)

39. This claim is without merit. Considerations leading the Court to this conclusion are discussed below.

40. This claim is based primarily on defendant's assertions that the trial court's denial of his request for a continuance violated his right to assistance of counsel, that the State manipulated the trial calendar to defendant's detriment, that trial counsel had inadequate time to prepare, and that the denial of the continuance request coupled with trial counsel's failure to adequately prepare led to a complete breakdown in the trial of defendant.

41. Post-trial, on 26 April 1993, Mr. Robert E. Collins, defendant's lead trial counsel, executed an affidavit (part of Appendix F of the MAR) that states in part:

a. That he has practiced law since August 1976.

b. That his experience includes: research, drafting legislation, teaching for the North Carolina Department of Crime Control and Public Safety and the North Carolina Justice Academy; service in 1980 as an assistant district attorney; private practice from 1981 to present with significant emphasis in trial practice; 5-7 years of increasingly focused work in criminal law which currently comprises approximately 70% to 80% of his practice; the trial of many cases in Superior Court to juries, including felony assaults, robbery with a dangerous weapon, first degree rape, first degree sex offense, and first degree murder; and, criminal appellate practice before the North Carolina Court of Appeals and the North Carolina Supreme Court.

c. That after 8 January 1993, he made a good faith effort to properly represent defendant, including many hours of work at night and on weekends.

d. That he was forced to devote virtually all of his available time to the trial and continuing preparation of this matter, declining new employment and in some instances, referring ongoing cases to other counsel.

e. That since early to mid-February 1993, he devoted seven days a week to this matter, except two or three days when counsel was too ill to work.

f. That his efforts to provide defendant proper representation have caused him severe financial strain.

g. That despite his training, experience and best efforts, he is of the opinion that he provided defendant ineffective assistance of counsel.

h. That his efforts to provide defendant proper representation have had extraordinary adverse impact on his personal life, family life and personal health, which effects counsel declines to detail other than to assert that they have considerably exceeded any prior experiences of counsel in other capital litigation.

i. That he has expended in excess of 560 hours working on defendant's case in less than four months, and that he should be reimbursed for his efforts at $75.00 an hour (i.e., $42,000).

j. That the hours he expended in this matter constituted an extraordinary effort and sincere dedication by counsel.

42. On 26 February 1993, in support of their request for a continuance, Mr. Robert E. Collins and Mr. Douglas R. Hoy, defendant's trial counsel, executed an affidavit (part of Appendix F of the MAR) that states in part:

a. That from 18 December 1992 to 29 December 1992, Mr. Collins expended 28 hours beginning investigation and preparation for the trial of this matter, but that Mr. Collins was unable to devote any time to defendant's representation from 29 December 1992 until 8 January 1993.

b. That on 29 December 1992, Mr. Collins reviewed discovery matters with the district attorney.

c. That Mr. Collins is the attorney advocate for the Alamance County Guardian Ad Litem program and devotes approximately one day per week to representation of that program.

d. That there are extensive medical records from two hospitals and six or more doctors concerning injuries to Susie which have required enormous time by counsel to review, evaluate, research, and understand.

e. That various x-rays, charts, drawings or models have been made available to counsel by the State, however, these items are at the University of North Carolina Memorial Hospital.

f. That on 22 February 1993, one week prior to the trial setting of 1 March 1993, the district attorney provided counsel extensive discovery of records of the Department of Social Services containing statements from defendant and numerous witnesses.

43. On 1 March 1993, Mr. Robert E. Collins, executed an affidavit (part of Appendix F of the MAR) that states in part:

a. That counsel received information on or about 4 February 1993 that Coleen Faye Flores and James Allen Whitlow witnessed Susie's mother, Lisa O'Daniel, violently strike Susie one or two weeks prior to Susie's death, a matter of significance because medical evidence will show that the child had serious injuries 7 to 14 days prior to the abuse which caused her death. After searching for each individual for several weeks, counsel was able to interview and subpoena Coleen Faye Flores on 23 February 1993.

b. That Coleen Faye Flores confirmed the story that Mr. Whitlow was present at the time and witnessed the event (i.e., Susie being violently struck by her mother).

c. After searching court records and interviewing other persons, counsel believe that Mr. Whitlow is still in Alamance County and had several leads on how to find him. His potential testimony is extremely important, both to describe the acts of Lisa O'Daniel and to corroborate the testimony of Ms. Flores.

d. Counsel has previously represented a brother of the father of Susie. After searching for several weeks for members of the father's family to interview, on 17 February 1993, counsel spoke with his former client and was given information about the father of the child, John W. O'Daniel, Sr., and his mother Margaret Costner (also previously known by counsel).

e. On 18 February 1993, counsel spoke by phone with Margaret Costner and was told that she and John W. O'Daniel, Sr., were reluctant to talk with counsel as "detectives" had told them not to do so. Counsel was able to arrange an appointment with Margaret Costner on Sunday, 21 February 1993 at 2:00 p.m., and an agreement that Ms. Costner would attempt to get John O'Daniel to attend. Counsel went to Ms. Costner's home at the agreed time and she was not present. Counsel located Ms. Costner about 30 minutes later at her mother's residence. She refused to speak with counsel, saying "everyone had told her that her big mouth" would get her in trouble or help the man who killed her grandchild.

f. That on 26 February 1993, counsel's representative attempted to interview Ms. Costner. She again refused to cooperate but did make a brief reference to Robin Clark who allegedly witnessed Lisa O'Daniel make a reference to the possible death of Susie.

g. Counsel has been active in juvenile justice for more than 14 years and has been attorney advocate for the Alamance County Guardian Ad Litem Program for 2 1/2 years. Counsel was well aware that the Department of Social Services [hereinafter "DSS"] must have investigated this incident. On 18 February 1993, counsel obtained an order from the Honorable A. Leon Stanback, Jr., for disclosure of all DSS records relating to this family.

h. On 22 February 1993, counsel was provided approximately 50-60 pages of DSS material. Upon review, counsel noticed several glaring omissions that counsel knows to be standard DSS documentation. On 27 February 1993, counsel discovered a previously unnoticed reference in the medical records to prior DSS contacts with Lisa O'Daniel concerning suspected abuse and neglect. Counsel subpoenaed the DSS records and requested an in camera review by the court or compliance with the order entered 18 February 1993.

i. Counsel has noted references to the fact that Lisa O'Daniel has a history of depression. DSS records contain a reference to the fact that Lisa O'Daniel had a history of depression and residential commitment for depression. Counsel for defendant filed a Motion to obtain access to said records. On

information and belief, the State's evidence will show that Lisa O'Daniel could be the perpetrator of the abuse to the minor child and these records could be very valuable to the defendant's defense.

j. The medical records and evidence in this matter are extensive and confusing, the product of two hospitals, some nine doctors and a hospital social worker.

k. Counsel has identified numerous legal issues that require extensive research. Counsel has expended numerous hours researching these issues since they were identified from investigation but is in need of additional research to be adequately prepared.

l. Upon opportunity to properly review available medical discovery, the defendant, upon information and belief, may need to secure expert witnesses to aid in the defense.

m. That Lisa O'Daniel, alleged by the defendant to be the possible perpetrator of the abuse resulting in the death of the child, has given numerous statements to individuals named in the affidavit.

44. Defendant's MAR ¶ 117 asserts that Mr. Hoy had 71 days to prepare for trial and that Mr. Hoy's time sheets state that Mr. Hoy spent 56.8 hours preparing for trial.

45. The Court has reviewed defendant's petitions to the North Carolina Supreme Court for a writ of supersedeas and a writ of certiorari, the State's reply thereto, and the North Carolina Supreme Court's denial of defendant's petitions (Record at 76-91,

see Appendix 3, State's Response). In particular, the Court has noted the content of Mr. Robert F. Johnson's affidavit of 4 March 1993 and Mr. Johnson's letter of 30 December 1992 because these documents reveal that, prior to trial, defendant's counsel were provided a wealth of information concerning the case against defendant (e.g., the district attorney's open files, photographic evidence, x-rays, and the entire Department of Social Services investigative report). Furthermore, trial counsel were advised of the availability of other information concerning the case located at two hospitals (e.g., x-rays, photographs). See Burr, 341 N.C. at 293-97, 461 S.E. 2d at 618-20 for a summary of this evidence.

46. The Court understands the responsibilities of an attorney appointed as either a guardian ad litem for a child alleged to be the subject of child abuse, or an attorney appointed to assure that an abused child's legal rights are protected. See N.C.G.S. § 7A-586 (e.g., when a petition alleges that a juvenile is abused or neglected, the judge shall appoint a guardian ad litem to represent the juvenile. The duties of the guardian ad litem shall be to make an investigation to determine the facts, etc.). Thus, in the Court's opinion, Mr. Collins' extensive experience as an attorney for the Alamance County Guardian Ad Litem Program indubitably provided him considerable experience relating to the investigation of child abuse. See also North Carolina Administrative Office of the Courts, Juvenile Justice Procedures (1991).

47. As defendant acknowledges in MAR ¶ 122, his trial counsel met prior to trial with Dr. Desmond Runyon, who did not testify at

trial, and "Dr. Runyon led trial counsel to believe that Tarissa Sue O'Daniel suffered from battered child syndrome." Dr. Runyon was a physician at UNC-Chapel Hill Memorial Hospital who evaluated and treated Susie at the hospital. Dr. Runyon provided the following information to DSS on 27 August 1991:

> That both arms were broken cleanly through the bone just below the shoulder. Both legs were broken cleanly through just below the hip. There was no evidence of twisting -- no spiral fracture of any bone. To break the bones in the manner they were broken would take a hard blow. There is a fracture of the skull that probably occurred on Saturday night. It is just above the right ear on the right temple.
>
> The fractures in the arms & legs probably occurred seven to ten days prior to her hospitalization on Sunday morning. All of the breaks have begun calcification. [T]his begins to occur about seven days after the break. [T]he calcification is in different stages, so they would begin to heal, and from her own movement or from being picked up, the breaks would be reinjured. Tarissa would have been in extreme pain. She would have been crying, not eating, and not wanting to be held. The family's account of her behavior does not fit.
>
> [Regarding whether Scott could have done the damage by falling on Susie or dropping her], [h]e stated that she would have to be dropped from about 8 feet 6 inches or more to cause the amount of brain damage and injury this child suffered. An 8 yr. old is not strong enough to cause any of these injuries. The fall with Scott probably would have hurt the child if she hit the ground, but it would be minor injuries. For the breaks in the arms and legs, it would take adult strength blows, <u>not</u> a child. [T]here are two occaisions (sic) of injury; 7-10 days prior to hospitalization and Saturday night. Child is basically Brain Dead today. Doctors are conducting tests to determine when child reaches Brain Dead.

Appendix 4, State's Response.

48. The Court has considered the affidavit of Attorney Thomas F. Loften, III, MAR Appendix H, which includes his opinion that the "failure of Mr. Burr's trial counsel . . . to apply to the trial

court for funds to employ the assistance of a medical expert . . . amounts to startlingly ineffective assistance of counsel and falls far below the standard required of lawyers practicing criminal law in the courts of the State of North Carolina." However, for several reasons, the Court is not bound by Mr. Loften's conclusions, and, for reasons stated elsewhere in this opinion, does not agree with Mr. Loften's conclusions. First, the Court is not bound to accept any attorney's conclusion that the attorney or another attorney rendered ineffective assistance of counsel. If the Court were required to accept such conclusions, reversal would be automatically required whenever such an assertion is raised, an illogical and unpersuasive result. Indeed, in the case at bar, trial counsel's pretrial assertions that they would be "ineffective" at trial if a continuance was denied was rejected by the North Carolina Supreme Court. Furthermore, Mr. Collins' asserted post-trial that he was ineffective. See ¶ 41g above. The Court is not bound by Mr. Collins' assertion of ineffectiveness. See People v. Sanchez, 662 N.E.2d 1199, 1209 (Ill. 1996) ("Counsel's own admission of ineffectiveness is not binding on us or determinative of the issues raised here. (Citation omitted)"). Second, in the Court's opinion, the Court is capable of deciding whether trial counsel was ineffective without having to defer to Mr. Loften's opinion. See State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990), holding that Superior Court did not err in denying defendant's motion for funds to employ a legal expert on North Carolina appellate practice to testify in support of his

claim of ineffective assistance of counsel on his direct appeal, and stating in part:

> [W]e doubt that an expert witness would be of any real help to the Superior Court or this Court in deciding whether ineffectiveness of counsel on the direct appeal of these cases led this Court into either factual or legal error. This being so, we simply cannot conclude either that the defendant will be deprived of a fair hearing and ruling on his motion for appropriate relief without the assistance of the expert requested, or that there is a reasonable likelihood that such an expert would materially assist him in the preparation or presentation of his claim of ineffective assistance of counsel during the direct appeal.

327 N.C. at 157, 393 S.E.2d at 807-08. Compare State v. Nauslar, 1994 WL 25919 (Neb. App.) at 9 (quoting State v. Joubert, 455 N.W.2d 117, 126 (Neb. 1990)), cert. denied, 499 U.S. 931, 113 L. Ed. 2d 269 (1991) (Appendix 2, State's Response) and finding no error when trial court would not allow an Omaha attorney to give expert testimony concerning whether defendant had been denied effective assistance of counsel) ("[T]he question of whether a defendant is denied effective assistance of counsel 'is a legal matter concerning which judges are required to be their own experts.'"). Third, HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991) (expert improperly permitted to testify that a fiduciary relationship existed and that defendants breached their fiduciary duty because such testimony constituted a legal conclusion), states that testimony of an expert in law should be excluded if it "suggests whether legal conclusions should be drawn or whether legal standards are satisfied." 328 N.C. at 587, 403 S.E.2d at 489. Two reasons support the holding in HAJMM Co. v. House of Raeford Farms, Inc.: The court is responsible for

explaining the legal standard, and an expert should not "usurp the function of the judge," Id., and "[u]nder the . . . rules of evidence, an expert may not testify that a particular legal conclusion or standard has or has not been met . . . ." 328 N.C. at 586, 403 S.E.2d at 309. See also Peterson v. City of Plymouth, 60 F.3d 469 (8th Cir. 1995) (trial court abused discretion by letting expert testify that police officers' conduct comported with "standards under the Fourth Amendment," a legal conclusion).

49. Reasonableness of investigation is evaluated by examination of the totality of the circumstances facing trial counsel at the time. Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991), cert. denied, 505 U.S. 1230, 120 L. Ed. 2d 922, reh'g denied, ___ U.S. ___, 120 L. Ed. 2d 947 (1992); William v. Dixon, 961 F.2d 448, 451 (4th Cir.), cert. denied, 506 U.S. 991, 121 L. Ed. 2d 445 (1992) (trial counsel could have investigated more and discovered mental health experts. However, Court finds it unreasonable to second-guess trial counsel's decision and refuses to do so).

50. United States v. LaRouche, 896 F.2d 815 (4th Cir. 1990) states:

> In order to prove an abridgement of the sixth amendment right to effective assistance of counsel based on an allegedly wrongful denial of a continuance, a defendant must first demonstrate that the district court "abused its discretion" in denying the motion. Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 1616-17, 75 L. Ed. 2d 610 (1983); (citations omitted). Second, the defendant must show that the denial "specifically prejudiced" the defendant's case. (Citations omitted). That is, in the absence of circumstances giving rise to a presumption that the defendant's case was prejudiced, the defendant must point to specific errors made by

> defense counsel that undermine confidence in the outcome of the trial. United States v. Cronic, 466 U.S. 648, 660-61, 104 S. Ct. 2039, 2047-48, 80 L. Ed. 2d 657 (1984) (when court refuses to postpone trial, only "inherently unfair" circumstances give rise to presumption of prejudice, such as actual or constructive denial of counsel's assistance); Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984); see also Slappy, 461 U.S. at 27, 103 S. Ct. at 1624 (Brennan, J., concurring) (requiring showing of prejudice is appropriate for "ineffective assistance" claims because attorney's performance can be assessed, as opposed to situations in which denial of continuance results in attorney absence). The due process analysis, in this context, merges into the sixth amendment analysis; if the district court's wrongful denial of a continuance did not prejudice the defense's ability to prepare, it cannot otherwise be said here that the court deprived the defendants of a fair trial.

896 F.2d at 823 (emphasis added). Accord United States v. Bakker, 925 F.2d 728, 735-36 (4th Cir. 1991) (no ineffective assistance of counsel by denial of continuance; defendant must show prejudice by denial of request).

51. The Court has reviewed Burr, paying particular attention to the North Carolina Supreme Court's disagreement with defendant's contention on direct appeal that "the trial court erred by failing to grant his motion for a continuance, thereby violating his constitutional rights to confrontation and to the effective assistance of counsel." 341 N.C. at 294, 461 S.E.2d at 618. For reasons stated in Burr, this Court agrees with the North Carolina Supreme Court's determination that the trial court did not err by failing to grant defendant's motion for a continuance. Furthermore, this Court is obligated to follow the rulings of the North Carolina Supreme Court. In the Court's opinion, Burr resolved the issue underlying defendant's assertion that his trial

counsel had inadequate time to prepare. They had adequate time to prepare. Thus, the Court holds that defendant's claim that he had inadequate time to prepare for trial is both without merit and procedurally barred by N.C.G.S. § 15A-1419(a)(2) (i.e., because the issue underlying this claim was previously determine to be without merit on direct appeal).

52. On direct appeal, defendant alleged ineffective assistance of counsel as part of his assertion that the trial court improperly denied his motion for a continuance. In the Court's opinion, the North Carolina Supreme Court's holding that it was not error to deny the motion for a continuance does not procedurally bar defendant from now asserting, based on evidence outside the record, that he was denied his right to effective assistance of counsel by the trial court's action. Under these circumstances, the Court must evaluate defendant's current claim under the standard stated above in LaRoach. See ¶ 50 above.

53. Burr's determination that the trial court did not abuse its discretion in denying the motion for a continuance resolved the issue raised by the first half of the LaRoach test. Thus, the dispositive question for the Court is raised by the second half of the LaRoach test. For a number of reasons, the Court concludes that defendant has not proffered evidence demonstrating that the denial of defendant's request for a continuance caused counsel to make specific errors that undermine confidence in the outcome of the trial. First, matters of record demonstrate that, while preparing the case, trial counsel worked diligently for a

reasonable amount of time. Second, lead trial counsel had considerable experience in the Guardian Ad Litem program that helped him understand the dynamics of a prosecution based on child abuse. Third, trial counsel had an opportunity before trial to review both the medical evidence available and the thorough statements of a number of witnesses and other information in the State's open files. Fourth, trial counsel knew before trial that a host of eminent medical experts had reviewed available information concerning Susie and her cause of death, and that all experts opined that Susie died of child abuse, not an accidental fall. Fifth, even though trial counsel tried diligently to delay the start of the trial, defendant's well-qualified and experienced lead trial counsel never asserted a particularized necessity for appointment of an expert. See State v. Ballard, 333 N.C. 515, 518, 428 S.E.2d 178, 181, cert. denied, 510 U.S. 984, 126 L. Ed. 2d 438 (1992) (defendant required to make threshold showing of necessity for appointment of medical expert). Sixth, defendant's pretrial motions and the transcript demonstrate that trial counsel's actions were driven by a strategy to attempt to shift blame to a third party (e.g., Susie's mother) and the understanding, based on the review of a plethora of information from respected physicians, that Susie's death was not attributed to accidental injury. Stated otherwise, it would be mere speculation to conclude that granting the request for a continuance would have diverted trial counsel to the strategy defendant now pursues (i.e., that Susie had OI). Seventh, based on all matters mentioned above concerning

defendant's claim of "newly discovered evidence," the Court concludes that defendant has failed to proffer evidence demonstrating that the verdict was unreliable because trial counsel did not have time to adequately prepare for trial.

54. Defendant's current counsel have found experts who take issue with the State's witnesses at trial. The mere fact that they have found such experts does not demonstrate ineffectiveness of counsel. First, matters of record demonstrate that trial counsel spent a reasonable amount of time investigating circumstances relating to the case. Second, court decisions concerning Strickland demonstrate that the first prong of Strickland requires the Court to evaluate trial counsel's actions in light of the circumstances facing trial counsel at and before trial. See ¶ 9 above. Third, in the Court's opinion, defendant proffers nothing demonstrating that his trial was fundamentally unfair or that the results are unreliable as a result of trial counsel's performance. See ¶ 9 above.

Claim: Defendant's constitutional and other rights were violated by the absence of relief on meritorious pre-trial motions and pre-trial omissions (Claim IV, MAR ¶¶ 120-30)

55. This claim is without merit. Considerations leading the Court to this conclusion are discussed below.

56. An allegation that counsel were ineffective by failing to move the court for funds for an independent expert to conduct an investigation and assist counsel does not raise an Ake claim that defendant's rights to due process of law were violated because the

trial court failed to supply the defense with an independent expert. Such an allegation is to be evaluated under Strickland. Waldrop v. Thigpen, 857 F. Supp. 872 (N.D. Ala., 1994), affirmed Waldrop v. Jones, 77 F.3d 1308 (11th Cir. 1996) (citing Atkins v. Singletary, 956 F.2d 952 (11th Cir. 1992).

57. James v. Gomez, 1995 WL 302443 (N.D. Cal.) (Appendix 2, State's Response) rejected a claim of ineffective assistance of counsel based on petitioner's assertion that counsel failed to consult with and/or call an expert witness to rebut the State's medical expert, thereby leaving the jury left with the false impression that petitioner's guilt had been scientifically proven, stating:

> Although petitioner's trial counsel probably could have conducted a more effective cross-examination if he had increased his knowledge of the relevant scientific techniques and principles by consulting an expert, we cannot, in light of the existing record, hold that counsel's representation was constitutionally inadequate. It bears emphasizing that an ineffective assistance claim is not established simply by showing that trial counsel could have done more or could have done a better job. "A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance." Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992).
>
> Moreover, we need not discuss whether counsel fell below professional standards because we find that no prejudice resulted. Strickland, 466 U.S. at 697. The victim . . . testified at trial. The jury found her testimony credible, as indicated by their verdict.

1995 WL 302443 at 1-2 (emphasis added).

58. Defendant asserts that his rights were violated by trial counsel's failure to move for payment of fees and costs for expert witnesses, or otherwise take advantage of the procedures available

for obtaining expert assistance and advice. See MAR ¶¶ 120-24. The Court holds that this claim is without merit for several reasons. First, for reasons discussed above in ¶ 53 (e.g., trial counsel conducted a diligent investigation, had considerable experience in defending against serious charges, had considerable experience in matters relating to child abuse, and had access to considerable medical evidence prior to trial) the Court concludes that matters of record demonstrate that counsel's decision to not submit a request for expert assistance was not action below the standard established by the first prong of Strickland. Second, the Court knows from its own experience that an experienced trial attorney does not always need a physician by his or her side to understand medical evidence relating to child abuse. Stated otherwise, the failure to request expert assistance in such a case does not, in the Court's opinion, demonstrate that trial counsel fell below the standard of reasonable competent counsel. See James v. Gomez, ¶ 57 and ¶ 9 above. Third, for reasons previously stated (e.g., the third reason stated above in ¶ 54 -- no demonstration of unfair trial or unreliable results), the Court concludes that defendant has not demonstrated that the claimed error caused prejudice, the second prong of Strickland.

59. Defendant asserts that trial counsel never had defendant examined by a psychiatrist and never made effective use of Michael Hughes, a private investigator hired for the defense. See MAR ¶ 125. Defendant's assertions do not demonstrate grounds for the requested relief. First, they are not supported by a proffer of

evidence demonstrating the existence of either prong of Strickland (e.g., a report of psychiatric evaluation offering important evidence, or a disclosure of the "vital information" the investigator could have provided). See Clanton v. Bair, 826 F.2d 1354 (4th Cir. 1987), cert. denied, 484 U.S. 1036, 98 L. Ed. 2d 779 (1988) (failure to insist upon psychiatric examination was not ineffective assistance); Springer v. Collins, 586 F.2d 329 (4th Cir. 1978), cert. denied, 440 U.S. 923, 59 L. Ed. 2d 477 (1979) (failure to investigate for possible insanity defense was not unreasonable); Hooper v. Garraghty, 845 F.2d 471 (4th Cir.), cert. denied, 488 U.S. 843, 102 L. Ed. 2d 91 (1988) (failure to obtain psychiatric evaluation prior to entry of guilty plea was incompetent but not prejudicial). Second, the United States Court of Appeals for the Fourth Circuit has refused to "institute a rule that psychiatric testimony should always be offered in the sentencing phase." Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991), cert. denied, 505 U.S. 1230 , 120 L. Ed. 2d 922, reh'g denied, ___ U.S. ___, 120 L. Ed. 2d 947 (1992) (quoted in Stout v. Netherland, No. 95-4007 and 95-4008, slip op. at 14 (4th Cir., 3 September 1996) (unpublished). In brief, defendant's assertions appear to be nothing more than speculation.

60. Defendant asserts that trial counsel failed to filed a Brady motion or a motion for voluntary discovery under N.C.G.S. § 15A-901. Defendant acknowledges that certain statements of defendant and certain DSS records were provided one week before trial. Furthermore, defendant asserts that trial counsel failed to

move for an order prohibiting the State from introducing the evidence not disclosed, or for dismissal. For several reasons, these assertions do not demonstrate grounds for the requested relief. First, on 25 June 1992, Attorney Craig Thompson made a motion for disclosure of written statements, citing N.C.G.S. § 15A-903(f). See Record at 33; Appendix 5, State's Response. Second, on 8 March 1993, Mr. Collins made a motion for an order directing the State to divulge all oral statements made by defendant, citing N.C.G.S. § 15A-903(a). See Record at 38-39; Appendix 5, State's Response. Third, on 26 February 1993, Mr. Collins and Mr. Hoy made a motion for production of law enforcement interview reports or notes with individuals who will not be called as witnesses. Fourth, on 1 March 1993, Mr. Collins and Mr. Hoy made a motion to be allowed to obtain and copy numerous records in the possession of named agencies relating to Lisa Dawn Porter (a.k.a. Lisa O'Daniel). See Record at 46-47; Appendix 5, State's Response. Fifth, on 25 February 1993, Mr. Collins made a motion for an order of court requiring the Alamance County Department of Social Services to present records subpoenaed by defendant for an in camera inspection. See Record at 50-53; Appendix 5, State's Response. Sixth, Burr discloses that defendant possessed prior to trial a proverbial mountain of information. See 341 N.C. at 293-97, 461 S.E.2d at 618-20. Seventh, there can be no due process violation as long as Brady material is disclosed in time for effective use at trial. United States v. Smith Grading & Paving, Inc., 760 F.2d 527 (4th Cir.), cert. denied, 474 U.S. 1005, 88 L. Ed. 2d 457 (1985)

(exculpatory information put before jury during cross-examination of first trial witness); State v. Abernathy, 295 N.C. 147, 157, 244 S.E.2d 373, 380 (1978) (no Brady violation when defense received Brady material during trial). Eighth, the information in this case was supplied to trial counsel in time for use at trial. Thus, there appears to be no reasonable probability that the result of the proceeding would have been different had evidence been disclosed earlier. Defendant, who has the burden of proof, has not demonstrated otherwise. Thus, defendant does not allege suppression of "material" exculpatory evidence. See Hoke v. Netherlands, 92 F.3d 1350, 1356 (4th Cir. 1996) (evidence is material only if there is a "reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different."). Ninth, trial counsel is under no obligation to raise every conceivable motion at the risk of being found "ineffective" (e.g., a motion to suppress evidence based on the fact that a disclosure was made one week before trial). Stated otherwise, "it is appropriate for counsel to refrain from raising weak . . . arguments. See Lowery v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). An unmeritorious motion may cost a defendant's attorney some credibility with the judge on other issues later in the case. Id." James v. Gomez, 1995 WL 302443 (N.D. Cal.) (Appendix 2, State's Response). In brief, defendant's assertions do not demonstrate the existence of either prong of the Strickland test.

61. Defendant's assertion that trial counsel failed to move for an order to provide funds for essential witnesses at the trial demonstrates no grounds for the requested relief. For several reasons, this assertion does not demonstrate grounds for the relief requested. First, defendant has not proffered evidence demonstrating who the alleged essential witnesses were or what their testimony would establish. See Bassette v. Thompson, 915 F.2d 932, 940-41 (4th Cir. 1990), cert. denied, 499 U.S. 982, 113 L. Ed. 2d 734 (1991) (no relief warranted absent proffer of what favorable testimony witness would have given). Second, evidence of record demonstrates that trial counsel made an objectively reasonable effort to present evidence of defendant's good character. See Appendix 4 to this Order, a summary of sentencing evidence presented at trial as summarized in pages 35-36 of defendant's brief on direct appeal; Turner v. Williams, 35 F.2d 872, 896 (4th Cir. 1994) (not ineffective assistance to fail to contact more people familiar with defendant's background. When evaluating decisions not to investigate further, court must regard counsel's choices with an eye for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgment). Third, defendant "has not demonstrated that he was prejudiced by [trial counsel's] failure to contact other individuals." Id. Fourth, the jury's affirmative answers to 16 questions concerning mitigating circumstances demonstrates that the jury understood that defendant had displayed in the past evidence of good character. See Record at 159-161; Appendix 6, State's

Response. In brief, defendant's assertions do not demonstrate the existence of either prong of the Strickland test.

62. Defendant asserts in MAR ¶ 130 that counsel's failure to make the motions noted in prior paragraphs was prejudicial and sufficient evidence of ineffective assistance of counsel. The Court disagrees. To prevail, defendant

> must do more than show that counsel's errors might have had an effect on the proceedings. (citation omitted). A mere 'conceivable effect' is not enough to 'undermine [] the reliability of the result of the proceeding.' (citation omitted). In order to establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991), cert. denied, 505 U.S. 1230 , 120 L. Ed. 2d 922, reh'g denied, ___ U.S. ___, 120 L. Ed. 2d 947 (1992) (quoted in Stout v. Netherland, No. 95-4007 and 95-4008, slip op. at 12 (4th Cir., 3 September 1996) (unpublished). Considering all circumstances presented and discussed in this order, the Court concludes that defendant's assertions do not demonstrate the existence of either prong of the Strickland test.

Claim: The guilt phase of the trial witnessed repeated violations of defendant's rights, with most of the violations attributable to the ineffectiveness of counsel (Claim V, MAR ¶¶ 131-67)

63. This claim is without merit. Furthermore, parts of the claim are procedurally barred.

64. Defendant asserts that trial counsel failed to object to the State's joinder of the assault on a female charge with the murder and felonious child abuse charges, that this caused

defendant to not receive a fair hearing regarding the murder and child abuse charges, and that defendant failed to protect defendant's right to a fair trial by making a pretrial motion for severance. MAR ¶¶ 133-39. Defendant's assertions demonstrate no ground for the requested relief and are without merit. Considerations leading the Court to this conclusion include the following:

a. On 17 December 1992, the trial court allowed the State's motion for joinder which was based on the State's assertion that the several offenses charged were: (a) part of a common scheme or plan; (b) part of the same act or transaction; and, (c) so closely connected in time, place and occasion that it would be difficult to separate one charge from proof of the other. Record at 71; Appendix 7, State's Response. The standard of review of such a decision has been stated as follows: "If the consolidated charges have a transactional connection, the decision to consolidate the charges is left to the 'sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion.' (Citation omitted)." State v. Weathers, 339 N.C. 441, 447, 451 S.E.2d 266, 269 (1994).

b. Defendant asserts in MAR ¶ 134 that "[t]rial counsel failed to object to the State's joinder of the assault on a female charges with the murder and felonious child abuse charges." However, defendant's Assignment of Error 1 on direct appeal to the North Carolina Supreme Court was:

> The trial court's overruling defendant's objection to the state's motion to join the two misdemeanor charges

> of assault on a female with the charges of felony child abuse and first-degree murder, on the grounds that the court's action was in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, §§ 18, 19, 23, 24, 26, 27 and 35 of the North Carolina Constitution, and was otherwise contrary to North Carolina law. Dec. 14 Mot. Tp. 7, lines 10-11; Rp. 71.

Record at 181; Appendix 8, State's Response. See also Appendix 9, State's Response (MT[5] pp 4-7). However, defendant did not mention anything about Assignment of Error 1 in his appellate brief submitted to the North Carolina Supreme Court. Thus, defendant abandoned this assignment of error on direct appeal. See N.C.R. App. P. 28(b)(5) and State v. Bonney, 329 N.C. 61, 82, 405 S.E.2d 145, 157 (1991) (assignment of error deemed abandoned "because the defendant has cited no reasonable authority in its support").

c. Defendant's assertions are without merit for a number of reasons. First, even if there has been an improper joinder of alleged offenses, the misjoinder will not prejudice a defendant if the evidence of the offense improperly joined is admissible as evidence to prove the other offense. See State v. Weathers, 339 N.C. 441, 448, 451 S.E.2d 266, 269 (1994). Second, Burr, in addressing issues raised in Assignment of Error VI (i.e., alleged error based on the admission of evidence of uncharged misconduct by defendant against Lisa O'Daniel (also referred to as "Bridges")) concluded: (a) that the unusual injuries inflicted on the victim were particularly similar to those inflicted by defendant upon Bridges; (b) that the unusual acts which would have caused the

[5] "MT" refers to transcript of hearing on motion to join offenses held on January 4, 1993.

victim's injuries were particularly similar to those defendant committed against Bridges; (c) that similarities between defendant's assaults against Bridges and the assault against the victim are highly probative on the issue of identity; (d) that the identity of the perpetrator in this case was the critical issue at trial; (e) that the probative value of defendant's prior misconduct toward Bridges outweighs any potential for unfair prejudice against defendant; (f) assuming arguendo that the admission of the other testimony concerning defendant's threats to kill Bridges for infidelity and defendant placing a gun in Bridge's face was error, any such error was not prejudicial; (g) that both the evidence discussed in Assignment of Error VI, and the other evidence regarding defendant's prior acts held admissible to show identity, was competent to support a finding that defendant was the perpetrator of the murder; (h) that defendant has failed to show a reasonable possibility that but for the admission of the evidence of defendant's threats to kill Bridges and his pointing a gun at her, the jury would have reached a different verdict; and, (i) that any error regarding admission of defendant's threats to kill Bridges and his pointing the gun at her was not prejudicial. 341 N.C. at 288-92, 461 S.E.2d at 615-17. Third, assuming arguendo that there was a misjoinder of charges at trial, the aforementioned discussion of Burr demonstrates that defendant was not prejudiced by the misjoinder because the evidence of the offense allegedly improperly joined (i.e., offenses against Lisa O'Daniel) was admissible as evidence to prove the other offense (i.e., murder of

Susie). Fourth, considering everything before the Court, the Court concludes that defendant has not proffered anything demonstrating that the trial court abused his discretion by granting the motion for consolidation. Stated otherwise, defendant was not deprived of his right to a fair trial by the trial court's decision.

d. This claim is also procedurally barred by N.C.G.S. §§ 15A-1419(a)(2) and (3). First, this claim could have been easily resolved on direct appeal because all relevant information is a matter of record. It was raised by assignment of error, but it was abandoned. Second, the issue underlying this claim (i.e., unfair prejudice based on consideration of other acts of misconduct involving Lisa O'Daniel as the victim) was resolved by the North Carolina Supreme Court in Burr contrary to defendant's position.

65. Defendant asserts that trial counsel's failure to challenge the competency of the children testifying in this matter (i.e., Christy Wade, Misty Wade, Jonas Kimrey, and Scott Ingle) amounted to ineffective assistance of counsel. This claim is without merit. Considerations leading the Court to this conclusion include the following:

a. The ages of the children when they testified were as follows: Christy, 14; Misty, 16; Jonas, 13; and, Scott, 10. The testimony of each child is summarized in Appendix 1 of this order (e.g., the youngest, Scott, testified that he knew what it meant to tell the truth, that it means to not lie, and that he would get in trouble if he did not tell the truth; he was articulate on both direct and cross-examination).

b. Under N.C.G.S. § 8C-1, Rule 601, the general rule is that every person is competent, with certain exceptions not applicable to the case at bar, and that a person is disqualified only if the court determines either (a) that the witness is incapable of expressing himself or herself, or (b) that the witness is incapable of understanding the duty to tell the truth. See Kenneth S. Broun, Brandis on North Carolina Evidence, Third Edition (1992 Cumulative Supp) § 55, citing: State v. Kivett, 321 N.C. 404, 364 S.E.2d 404 (1988) (trial court properly permitted 4-year-old to testify where "he knew what it meant to tell the truth" and "he was going to tell the truth"); and, State v. Rael, 321 N.C. 528, 364 S.E.2d 125 (1988) (court properly exercised discretion in permitting 4-year-old to testify; no need for formal findings); State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991) (9-year-old properly held competent to testify despite absence of a specific finding that she was capable of expressing herself).

c. The quotation from the transcript cited by defendant demonstrates merely that Scott Ingle did not remember much about the statement he gave to police eight days after Susie died; it does not counter the fact that the content of his entire testimony demonstrates beyond cavil that he was a competent witness.

d. Trial counsel is under no obligation to raise every conceivable motion at the risk of being found "ineffective." Any objection to the testimony of these children on grounds of lack of competency would have been groundless, and "it is appropriate for counsel to refrain from raising weak . . . arguments." See Lowery

v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). An unmeritorious motion may cost a defendant's attorney some credibility with the judge on other issues later in the case." Id. James v. Gomez, 1995 WL 302443 (N.D. Cal.) (Appendix 2, State's Response). In brief, defendant's assertions do not demonstrate the existence of either prong of the Strickland test.

e. This claim is also procedurally barred by N.C.G.S. § 15A-1419(a)(3) because it could have been raised on direct appeal, as all relevant information is a matter of record, and was not.

66. Defendant asserts in MAR ¶ 146 that trial counsel were ineffective because they failed to produce a witness, Nita Todd, the investigative social worker for Alamance County DSS, and thereafter obtained a stipulation from the State which permitted defense counsel to read into the record Ms. Todd's investigative report. This assertion fails to demonstrate a basis for the relief requested. Considerations leading the Court to this conclusion include the following:

a. First, Appendix 5 to this order contains pages 107-10 of defendant's brief on direct appeal, which summarizes the discussion at trial concerning Ms. Todd (e.g., that Ms. Todd had been subpoenaed by both the State and defense counsel, that Ms. Todd thought that the defense did not need her present at trial, that Ms. Todd was out of town because of an apparent miscommunication, that defense counsel asked the trial court for an order allowing funds to fly Ms. Todd back to North Carolina from Ohio, and that, as an alternative to personal appearance, the trial counsel be

permitted to read Ms. Todd's report in lieu of delaying the trial until Ms. Todd's return to North Carolina). The scenario presented does not, in the Court's opinion, demonstrate that trial counsel's actions fell below the requirements of the first prong of Strickland. Second, on direct appeal, defendant stated that "defense counsel had made diligent efforts to arrange for Ms. Todd to be present to testify" (i.e., defendant now asserts a position contrary to that stated to the North Carolina Supreme Court, when he argued the reasonableness of trial counsel's efforts to have Ms. Todd present in court). Third, trial counsel objected to the prosecutor's argument cited in MAR ¶ 146. Fourth, Burr held that the prosecutor's argument was not error. "[And added that:] Certainly any error in allowing this argument does not rise to the level of prejudicial error that would require a new trial." 341 N.C. at 299, 461 S.E.2d at 621. Fifth, jury was informed of the content of Ms. Todd's report. Considering all circumstances presented, the Court concludes that defendant's assertions do not demonstrate the existence of either prong of the Strickland test.

b. This claim is also procedurally barred by N.C.G.S. § 15A-1419(a)(3) because it could have been raised on direct appeal, as all relevant information is a matter of record, and was not.

67. Defendant asserts in MAR ¶¶ 148-53 that trial counsel made three cited admissions to the jury, without the consent of defendant, that were ineffective assistance of counsel. The assertions are without merit and procedurally barred.

Considerations leading the Court to this conclusion include the following:

a. Defendant was asked on direct examination, "[a]nd you understand now from the medical evidence that has been presented here in Court that it's highly unlikely that that's [i.e., Scott Ingle's fall with Susie in his arms] the cause of the injuries that she received?" and he responded, "Yes, sir, I sho' do." (T Vol. 22 p. 1221; State's Response, Appendix 10). Thus, the record demonstrates that trial counsel's closing argument was a fair comment on both evidence personally introduced by defendant and evidence introduced by the State. Stated otherwise, this evidence renders irrelevant defendant's contention that error was committed because defendant "did not consent to this admission" because it expressed defendant's agreement with the view that medical evidence indicated that it was highly unlikely that Susie was killed by Scott's fall.

b. Defendant has not demonstrated a violation of the Harbison rule. More precisely, he has not demonstrated that trial counsel admitted that defendant was guilty. Furthermore, the transcript demonstrates that counsel's comments did not concede guilt. See State v. Harvell, 334 N.C. 356, 432 S.E.2d 125 (1993), stating in part:

> In State v. Harbison, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), cert. denied, 476 U.S. 1123, 90 L. Ed. 2d 672, (1986), we held that a defendant has been denied effective assistance of counsel if his counsel admits his guilt to the jury without his consent. . . . In the present case, the defendant's counsel never conceded that the defendant was guilty of any crime. He merely noted that if the evidence tended to establish the

> commission of any crime, that crime was voluntary manslaughter. This was not the equivalent of admitting that the defendant was guilty of any crime. Accordingly, this assignment of error is without merit.

334 N.C. at 361, 432 S.E.2d at 128 (emphasis added). Accord State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986) (no Harbison violation when counsel's argument did not admit that defendant was guilty of murder, even though counsel did state that malice was present, or words to that effect. Harbison distinguished because "[a]lthough counsel stated there was malice, he did not admit guilt, as he told the jury that they could find the defendant not guilty." 318 N.C. at 533, 350 S.E.2d at 346). See also State v. Basden, 339 N.C. 288, 451 S.E.2d 238 (1994), cert. denied, ___ U.S. ___, 132 L. Ed. 2d 845 (1995) (no Harbison error when prior to closing arguments defendant consented on the record to his attorney's decision to concede guilt to second-degree murder or voluntary manslaughter; defendant's consent prior to the closing arguments amounted to ratification of defense counsel's earlier statement and cured any possible error); State v. Greene, 332 N.C. 565, 572, 422 S.E.2d 730, 734 (1992) ("The clear and unequivocal argument was that the defendant was innocent of all charges.").

c. Concerning trial counsel's comment quoted in MAR ¶ 150, the transcript demonstrates that the statement lifted out of context by defendant was a mere prefatory comment to counsel's effort to raise reasonable doubt by suggesting alternative possible sources of the injury (e.g., "Christy and Misty could have injured the child." (T Vol. 27 p 2174; Appendix 11, State's Response)).

d. Concerning trial counsel's comment quoted in MAR ¶ 152, trial counsel's statement was a candid statement acknowledging the fact that they had no medical evidence to disprove the State's assertions.

e. Concerning all of counsel's comments, the following observation in Roger v. Zant, 13 F.3d 384 (11th Cir.), cert. denied, ___ U.S. ___, 130 L. Ed. 2d 175 (1994) is apropos:

> To avoid being branded ineffective, defense lawyers need not assert every nonfrivolous defense. We have accepted in earlier cases that stacking different defenses can undercut with the jury the defense team's credibility, which is essential to a likelihood of success. (Citations omitted). And, as the Supreme Court has stressed, we know good advocacy requires the winnowing out of some arguments in favor of stressing others: multiplicity of arguments or defenses hints at the lack of confidence in any one. (Citation omitted).

13 F.3d at 388. Furthermore, defendant's statement in MAR ¶ 151 that "[i]t was the duty of Mr. Burr's defense counsel to raise reasonable doubts through cross-examination of the State's witnesses and the presentation of witnesses for Mr. Burr" is not an accurate statement of a defense counsel's duty; if it were, every defense counsel losing a case would be found ineffective under the Strickland standard. Stated otherwise, matters of record demonstrate that counsel was being candid with the jury, obviously with the hope of maintaining credibility and creating reasonable doubt. Considering all circumstances presented, the Court concludes that defendant's assertions do not demonstrate the existence of either prong of the Strickland test.

f. This claim is also procedurally barred by N.C.G.S. § 15A-1419(a)(3) because it could have been raised on direct appeal, as

all relevant information is a matter of record, and was not. See ¶¶ 7-9 above, particularly ¶ 9f.

68. Defendant claims in MAR ¶ 154 that trial counsel, because of their lack of preparation, were unable to cross-examine the medical experts in this matter. For reasons stated elsewhere in this order (e.g., ¶¶ 53, 54, and 58), the Court concludes that this claim is without merit.

69. In MAR ¶¶ 155-58, defendant states several assertions that allege, basically, that evidence of many out-of-court statements of many witnesses were offered to corroborate the testimony of other witnesses, that the statements were introduced not merely for corroborative purposes, but to prove the truth of the matter asserted therein, and that the trial court failed to adequately instruct the jury regarding the limited purpose for which such testimony may be considered. Defendant cites the Court to pages in the transcript where such evidence was admitted: e.g., "Tpp. 500, 562, and 564." (Appendix 12, State's Response). The testimony on page 500 is Christy Wade's testimony that Lisa O'Daniel told her that defendant, before Lisa mentioned calling an ambulance, had told her that he "wasn't going to take Lisa and Susie to the hospital," and that Lisa said that defendant had said, in regard to bruises on Susie, that "it was all grease." The testimony on page 562 is Misty Wade's testimony about several things that Lisa told her (e.g., that defendant pushed Lisa on the water bed, that defendant thereafter was fixing the waterbed). The testimony on page 564 is Misty's testimony about what Lisa told her

about Susie's condition (e.g., "Susie doesn't look right. Susie's eyes just don't look right, she looks like she had a seizure . . .). Based on considerations mentioned below, these assertions are without merit.

a. "A prior statement by a witness is corroborative if it tends to add weight or credibility to his or her trial testimony." State v. Coffey, 326 N.C. 268, 293, 389 S.E.2d 48, 63 (1990). "[N]ew information contained in a witness's prior statement but not referred to in his or her trial testimony may be admitted as corroborative evidence if it tends to add weight or credibility to that testimony." Id. Corroborative evidence can add new facts. State v. Jennings, 333 N.C. 579, 602, 430 S.E.2d 188, 199 (1993). When portions of a statement corroborate and portions do not, defendant must specifically object to incompetent portions. State v. Williamson, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992) ("[P]rior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony."; State v. Benson, 331 N.C. 537, 548, 417 S.E.2d 756, 763 (1992); State v. Harrison, 328 N.C. 678, 682, 403 S.E.2d 301, 304 (1991).

b. The trial court gave the standard limiting instruction to the jury concerning the limited purpose for which such statements may be used. (T Vol. 28 p 2279; Record at 106; Appendix 13, State's Response). Additionally, when requested to give a limiting instruction at the time that such corroborating evidence was

offered, the trial court gave the instruction. (T Vol. 23 p 1562).

c. Defendant has simply failed to demonstrate, based on the law stated above, how prejudicial error occurred (e.g., he has not shown that counsel made any objection to such evidence that was improperly over-ruled, that the evidence was not corroborative, that the evidence was solely substantive evidence, that the judge's instructions were in error, or that he was prejudiced by the improper admission of the statements). Furthermore, in the Court's opinion, the testimony cited by defendant (from pages 500, 562, and 564 of the transcript, Appendix 12, State's Response) was testimony properly admitted as corroborative testimony under the principles in cases cited above in subparagraph 69a.

d. Furthermore, these claims are procedurally barred. On direct appeal, defendant raised one -- and only one -- assignment of error (Assignment of Error 54) based on a claim that an out-of-court statement was improperly admitted because it failed to corroborate testimony (i.e., Misty Wade's testimony). (Record at 189, Appendix 14, State's Response). However, in his appellate brief on direct appeal, he made no mention of either Assignment of Error 54 or anything such as he now asserts. Thus, defendant abandoned Assignment of Error 54 and failed to complain to the Supreme Court about other alleged inappropriately admitted "corroborating statements." Under these circumstances, the Court concludes that defendant's claims in MAR ¶¶ 155-58 are procedurally barred by N.C.G.S. § 15A-1419(3) because defendant was in a

position to raise the claims on direct appeal and did not do so. See ¶¶ 7-9 above.

70. In MAR ¶¶ 159-165, defendant claims error based on the admission into evidence, over defendant's objection, of a number of "grim" photographs. Defendant's Assignment of Error 36 alleged that "[t]he trial court's admitting into evidence of State's Exhibits #3, #5, #6, #7, #8, #9, and #10, on the grounds that these exhibits [i.e., photographs of the baby] were inflammatory and unfairly prejudicial . . ." (Record at 186; Appendix 15, State's Response). The trial court instructed the jury that the photographs introduced into evidence "may only be considered by you as evidence of facts that they illustrate or show." (T Vol. 28, p 2276; Record at 103; Appendix 15, State's Response). Based on considerations mentioned below, defendant's claims are both without merit and procedurally barred.

a. When a trial court admits photographic evidence after determining that the evidence is more probative than unfairly prejudicial under N.C.G.S. § 8C-1 Rule of Evidence 403, the standard of appellate review is abuse of discretion by the trial judge. As stated in State v. Hennis, 323 N.C. 279, 284, 372 S.E.2d 523, 527 (1988), "[P]hotographs of the body of a homicide victim may be introduced into evidence under instructions limiting their use to the purpose of illustrating the witness' testimony." Photographs of a victim may be used "to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree, (citation omitted)." Id.

b. The transcript contains considerable testimony concerning Susie's physical condition. See Appendix 1 to this order. The testimony was highly relevant to issues relating to cause of death and the responsibility for Susie's death. The photographs were indubitably helpful to the jury, and the jury was properly instructed concerning their use. Based on the authority cited above and matters of record, the Court concludes that defendant has not demonstrated that the trial court abused his discretion by permitting the jury to consider the photographs for illustrative purposes. Additionally, matters of record demonstrate the absence of error.

c. Furthermore, under the circumstances presented, the Court concludes that defendant's claims in MAR ¶¶ 159-65 are procedurally barred by N.C.G.S. § 15A-1419(3) because defendant was in a position to raise the claims on direct appeal and did not do so.

71. In MAR ¶¶ 166-67, defendant asserts that errors in the evidentiary portion of the guilt phase were compounded by the acquiescence of trial counsel. By way of example, defendant cites to the comparison between testimony on page 490 of the transcript (i.e., when the trial court sustained trial counsel's objection that prevented Christy Wade from testifying to what "they," meaning, apparently, Lisa or Misty, told her as a reason why they did not want her to return to Lisa's trailer) and page 562 (i.e., the corroborative testimony summarized above in ¶ 69), where defense counsel made no objection. (Appendix 16, State's Response). Defendant also cites to the comparison between page 206

of the transcript (i.e., where trial counsel made no objection to testimony from Lisa O'Daniel in response to the prosecutor's question, "[d]id he [J.J.] do anything to indicate that he was scared of [defendant]?" and Lisa responded that he "[w]hen Johnny would come up he would go to Rita and Donald's" and only return if Johnny left) and page 557 (when the trial court sustained an objection to the prosecutor's question "when Johnny came around, what would J.J. do or where would he go?" and added "I think we're going a little far in this direction."). (Appendix 17, State's Response). Based on considerations that follow, the Court concludes that defendant's assertions are meritless.

a. When evaluating alleged tactical errors or errors based on trial counsel's failure to object, a Strickland error does not occur unless defendant demonstrates that counsel's error was both incompetent and prejudicial. See Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991), cert. denied, 70 U.S.L.W. 3580 (U.S. 1992) (tactical decision was neither incompetent nor prejudicial); Williams v. Kelly, 816 F.2d 939 (4th Cir. 1987) (counsel's failure to move to strike prosecution's case not ineffective); Inge v. Sielaff, 758 F.2d 1010 (4th Cir.), cert. denied, 474 U.S. 833, 88 L. Ed. 2d 85 (1985) (failure to object to exhibition of shotguns, whether deliberate or inadvertent, was not ineffective).

b. Concerning objections to corroborating evidence, the Court concludes that the evidence of corroborating statements was properly admitted. Thus, defendant's failure to object to

corroborating testimony was not prejudicial error. See ¶ 69. above.

c. Concerning objections to evidence demonstrating that J.J. was scared of defendant, the Court has reviewed the discussion in Burr of defendant's thirteenth assignment of error on direct appeal. In concluding that defendant failed to show plain error by trial counsel's failure to except to the State's offering of such evidence, the North Carolina Supreme Court concluded that the evidence "was relevant and admissible to demonstrate the state of the familial relationship in the brief period preceding the murder in which defendant resided in the home." 341 N.C. at 301, 461 S.E.2d at 623. Thus, trial counsel's failure to note an exception to the admissibility of evidence demonstrating that J.J. was scared of defendant was not prejudicial error.

d. Defendant's general assertions in MAR ¶ 167 do not demonstrate prejudicial error. Trial counsel's failure to introduce evidence that he did not know about (e.g., evidence relating to osteogenesis imperfecta) has been discussed elsewhere in this order.

e. Furthermore, under the circumstances presented, the Court concludes that defendant's claims in MAR ¶¶ 166-67 are procedurally barred by N.C.G.S. § 15A-1419(3) because defendant was in a position to raise the claims on direct appeal and did not do so. Additionally, with regard to any claimed prejudicial error based on trial counsel's "acquiescence" to the evidence being admitted that tended to show that J.J. was scared of defendant, the Court

concludes that any such claim is procedurally barred by N.C.G.S. § 15A-1419(a)(2) because the underlying ground or issue was determined on direct appeal to be without merit.

Claim: The jury was improperly death-qualified (Claim VI, MAR ¶¶ 168-85)

72. In MAR ¶¶ 168-85 defendant asserts a number of claims focused on jury selection (e.g., that jurors were seated in violation of Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed. 2d 776 (1968), and Adams v. Texas, 448 U.S. 38, 65 L. Ed. 2d 581 (1980), that counsel failed to question jurors regarding their opinions about imposition of the death penalty upon all persons convicted of murder that was premeditated (citing Morgan v. Illinois, 504 U.S. 719, 119 L. Ed. 2d 492 (1992)), that the State's use of peremptory challenges was racially motivated (citing Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69 (1986)), and that trial counsel's failure to raise issues now cited by defendant constituted ineffective assistance of counsel). The Court concludes that these claims are both without merit and procedurally barred. Considerations leading the Court to this conclusion are discussed below.

a. On direct appeal to the North Carolina Supreme Court, defendant submitted 20 assignments of error concerning jury selection (i.e., Assignments of Error [hereinafter "AOE"] 12-32). (Record at 182-85; Appendix 18, State's Response). Without restating all the claimed errors, the Court notes that they raised issues like those now raised in defendant's MAR and cite to certain

pages in the transcript cited by defendant (e.g., AOE 16 alleges that an inadequate inquiry was conducted, etc., and cites to a string of pages in the transcript, including pages 892, 899, and 1094 of the voir dire transcript, pages cited by defendant in MAR ¶ 169). Many of the AOE's were abandoned on direct appeal; others were argued and resolved in Burr at 341 N.C. 279-88, 461 S.E.2d at 610-615 (i.e., jury selection issues).

b. Page 892 of the voir dire transcript, cited by defendant, presents an example of the proceedings which defendant contends is in error. When trial counsel objected to a Witherspoon challenge, the trial court asked juror Burnette, "are you saying that under no circumstances could you vote to sentence to (sic) somebody to death. Is that the way I -- what you're saying?" and the juror replied, "[y]es." Page 899 reflects a similar colloquy with juror Hurdle (her affirmative response to a question demonstrating that "under no set of circumstances could [she] ever vote for a sentence of death because of [her] views"), as does page 1094 concerning juror Warren's responses (his affirmative response to questions asking him if his "feelings about the death penalty [made] it impossible for [him] to return a verdict . . . that the defendant be put to death). (Appendix 19, State's Response).

c. In MAR ¶ 176, defendant quotes part of the voir dire of juror Sutton. In MAR ¶ 177, defendant alleges that trial counsel "commenced only the most cursory examination of Ms. Sutton regarding her beliefs in the death penalty, or for that matter life imprisonment." The voir dire of Ms. Sutton covers 48 pages of the

transcript (i.e., pages 774-822). She was accepted by both trial counsel after they conferred. Before reaching that decision, counsel heard her responses to many questions by the prosecutor demonstrating that she "understood that death is not automatic," (page 803), that she would not "automatically impose the death sentence," (page 803-04), that she "could engage in the weighing process [the prosecutor] went through," (page 804), that she would "follow the judge's instructions on the law," (page 804), that her decision would be determined "[b]y the evidence," (page 805), that she would be fair and impartial, and follow the law (pages 806-07). Furthermore, trial counsel asked her questions that demonstrated that she would make her decision "based on the law as Judge Stanback instructs [her] . . . [a]nd set aside [any religious beliefs that might conflict with the law]," (page 819), that she "could consider life imprisonment if there were a conviction of first degree murder," (pages 819-20), that she was "not predisposed as to the death penalty or life imprisonment as a punishment [because] . . . it's the facts of the case," (page 820), and, after the process of the weighing of aggravating and mitigating circumstances was explained to her, that she would "be able to apply each of those parts [of the weighing process] in making [her] decision" (pages 821-22). (Appendix 20, State's Response).

d. In MAR ¶ 178, defendant complains because his jury included Mr. Ambrosio and Mr. King, citing their responses to questions at pages 2064 and 1355, respectively. The transcript demonstrates that trial counsel affirmatively accepted these men as

jurors after a relatively extensive voir dire that included questioning about their views on the death penalty. Mr. Ambrosio's responses to questions indicated that he "can follow the law and say he shouldn't get the death penalty, he should get life imprisonment, but [he] might not necessarily agree with that," (page 2065), that he would not "automatically vote for the imposition of the death penalty in the case of first degree murder" and that he would "go alone with what ya'll said the law was," (page 2065), and that he would give fair consideration to whether or not the aggravating factors were so substantial that they outweighed the mitigating factors, that he would not be more inclined to vote automatically for the death penalty, and that he would "have to weigh both sides to it." (Page 2068). Mr. King's responses to questions included: "when I say I'm a believer in the death penalty, I'm a believer in it to the respect if it is warranted, and there are certain . . . crimes that . . . I believe that life imprisonment is . . . adequate [punishment]," (page 1355), and that he could follow the fairly complicated sentencing scheme that the prosecutor told him about in reaching his determination concerning a vote for life or death (page 1355), (Appendix 21, State's Response).

e. In MAR ¶ 184, defendant claims, inter alia, about trial counsel's failure to "inquire appropriately" as to their particular beliefs of jurors Loyd and Deaton with respect to people convicted of premeditated murder.

(1) The transcript of voir dire demonstrates that Ms. Loyd was questioned extensively by the lead prosecutor and lead trial counsel before lead trial counsel advised the trial court that he was "content" with her as a juror. After stating that she was a strong believer in the death penalty and being advised of the basic nature of the sentencing phase, she then told counsel that she would "[n]ot automatically" vote for the death sentence regardless of the facts and circumstances (page 1014), that she would not automatically vote for life imprisonment no matter what the facts are (page 1015), that her vote on such an issue "would be depending on the circumstance" (page 1015), that she could "vote either for death or life based upon how the evidence [was] presented to [her] and his Honor's instructions," (page 1015), and that she would "evaluate mitigating circumstances [herself] and determine which [she] found to have been proven," (page 1017). (Appendix 22, State's Response).

(2) The transcript of voir dire demonstrates that Ms. Deaton was questioned extensively by the lead prosecutor and lead trial counsel before the lead trial counsel advised the trial court that he was "content" with her as a juror. After stating that she was pro death penalty and being advised of the basic nature of the sentencing phase, and she stated that she "would hope" that she would not automatically impose the death sentence, (page 1512), and that she "would hope that I could be impartial enough to weigh, . . . everything on both sides," (page 1513). Thereafter, she told trial counsel that she "would hope" that she would be able to

render a fair and impartial verdict at the sentencing phase, (Page 1536), and that she would have "no difficulty" in following the judge's instructions to return a life sentence if she were not satisfied beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors, (page 1537). (Appendix 22, State's Response).

f. In MAR ¶ 185, defendant claims that the "best example of a missed Batson claim was Juror Gross. (T pp 2122-57). The pages cited demonstrate that questioning of prospective juror Dr. Gross revealed the following: that when asked his feelings about the death penalty, he replied, "I'm opposed to the death penalty . . . [and have been for] [a]s far as I can remember. . . I suppose [I am a strong opponent of the death penalty because] to me it has always seemed that society sends the wrong message to its children and young people by applying the death penalty," (page 2127); that he would be "very reluctant to . . . decide for the death penalty," (page 2127); that he has a Ph.D. in religion from New York University; that he was a Baptist minister for eleven years; that he was an ECU professor of religion and director of religious activities for 17 years before he retired (page 2134); that he has several grandchildren; that his wife has a master's degree in mathematics and is a retired ECU professor; that he has served as a pastor on a number of occasions; that he served about a year as an interim chaplain in two state prisons (page 2135); that his wife's brother was shot in the back and killed, and his murderer was convicted, and nothing about the process left a bad taste in

his mouth; and, that he is 81 years of age (page 2138). (Appendix 23, State's Response).

g. Burr, 341 N.C. at 282, 461 S.E.2d at 612, states, "the standard for determining whether a prospective juror may be properly excused for cause" because of his or her views on capital punishment (i.e., whether his or her views would "'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath." (Citations omitted)). Because a juror's bias is not always provable with unmistakable clarity in some cases, "reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially. (Citations omitted)." Id. See also State v. Hill, 331 N.C. 387, 403, 417 S.E.2d 765, 772 (1992), cert. denied, 507 U.S. 924, 122 L. Ed. 2d 684, reh'g denied, 507 U.S. 1046, 123 L. Ed. 2d 503 (1993) (capital case) (defendant did not show that further questioning by defendant would likely have produced different answers).

h. A defendant in a capital case "is not entitled to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court." State v. Cummings, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990).

i. "The Batson requirement that the objecting defendant and the excused prospective juror be of the same race was eliminated by the United States Supreme Court in Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)." Clark v. Newport News

Shipbuilding and Dry Dock, 937 F.2d 934, 939 n. 5 (4th Cir. 1991) [hereinafter "Newport News"].

j. "Neither Batson nor its progeny suggests that it is the duty of the court to act sua sponte to prevent discriminatory exclusion of jurors. Rather, even in criminal cases, the objection is deemed waived if not timely raised. (Citations omitted)." Newport News, 937 F.2d at 939. Newport News held that appellant's assertion of plain error based on Batson "cannot be supported and he is foreclosed from raising the issue here because of his failure to timely object." 937 F.2d at 940. Accord State v. Alston, 341 N.C. 198, ___, 461 S.E.2d 687, 700 (1995), cert. denied, ___ U.S. ___, 116 S. Ct. 1021, ___ L. Ed. 2d. ___ (1996) ("Defendant's failure to object to the prosecutor's challenges precludes him from raising the issue on appeal. (Citation omitted). We must assume that defendant, through counsel, was familiar with Batson but elected not to raise the issue at trial, because he did not in fact believe the State was exercising its peremptory challenges in a discriminatory manner."); Andrews v. Collins, 21 F.3d 612, 621 (5th Cir. 1994) ("[Defendant's] failure to timely object at trial to the prosecutor's use of his peremptory challenges is a constitutional bar to his Batson challenge." (Citations omitted). Factual disputes relating to Batson challenges are best resolved at the trial court level at the time of trial. When this occurs, the trial court can -- and should -- make findings concerning each step of the Batson analysis. See United States v. Allen, 814 F.2d 977 (4th Cir. 1987), cert. denied, 488 U.S. 944, 102 L. Ed. 2d 360

(1988); United States v. Joe, 928 F.2d 99 (4th Cir.), cert. denied, 502 U.S. 816, 116 L. Ed. 2d 45 (1991); State v. Barnes, 479 S.E.2d 236 (N.C. App. 1997) (No. 146A94, 10 February 1997), slip op. at 19.

k. To establish a claim of ineffective assistance of trial counsel based on counsel's failure to investigate and raise a Batson claim, defendant must carry the usual burden under Strickland of demonstrating both deficiency of counsel and prejudice. Nickerson v. Lee, 971 F.2d 1125, 1135-37 (4th Cir. 1992). Accord Batiste v. State, 888 S.W.2d 9, 15 (Tex. Cr. App. 1994) (en banc) ("[W]e hold that the likelihood that failure of counsel to ensure that racial discrimination did not take place in jury selection will render trial unfair is not so great as to justify exempting ineffective counsel claims for lack of a Batson objection from Strickland's 'prejudice' requirement."); Fortenberry v. State, 659 So. 2d 194, 196-97 (Ala. Crim. App. 1994), cert. denied by Ala. S. Ct. (3 Mar 1995), cert. denied, ___ U.S. ___, 116 S. Ct. 137, ___ L. Ed. 2d ___ (1995). In Heard v. State, 887 S.W.2d 94 (Tex. Ct. App., Texarkana, 1994), discretionary review denied, (22 Feb 1995), the white defendant contended that his trial counsel was ineffective by failing to request a Batson hearing after the State used its peremptory challenges to strike four black venirepersons. Rejecting this contention, after noting that a fair assessment of an attorney's performance requires that every effort be make to eliminate the wisdom gained from hindsight, the Court stated:

> Heard is white, and the victim was also white. While the defendant does not have to be of the same race or ethnicity as the struck veniremembers to challenge the State's use of its peremptory strikes, defense counsel's failure to challenge the State's strikes could be sound trial strategy and a reasonable decision under the circumstances of this case. (Citations omitted).

887 S.W.2d at 102.

73. The Court concludes, based on matters discussed above, that defendant has not demonstrated that prejudicial error occurred during voir dire based on any grounds summarized above in ¶ 72 (i.e., Witherspoon, Morgan, or Batson errors). Matters of record demonstrate otherwise. In particular, defendant's assertion of Batson errors are completely groundless. The summary of juror Gross' voir dire -- defendant's "best example of a missed Batson claim" -- in ¶ 72f above, demonstrates a number of race-neutral grounds for a prosecutor to properly use a peremptory challenge against this 81-year-old holder of a Ph.D. in religion, who is also a Baptist minister who has done prison ministry and has always been a strong opponent of the death penalty. Furthermore, because defendant is white, trial counsel's failure to raise a Batson challenge does not, in the Court's opinion, demonstrate ineffective assistance of counsel. See ¶ 72k above. At the bottom line, defendant has not demonstrated the existence of either prong of the Strickland test.

74. On his direct appeal to the North Carolina Supreme Court, defendant was in a position to adequately raise the grounds or issues underlying this claim, but he did not do so. Thus, this

claim is procedurally barred by N.C.G.S. § 15A-1419(a)(3). See ¶¶ 7-9 above, particularly ¶ 9f.

Claim: Improper statements by prosecutor in closing arguments during guilt/innocence phase constituted prejudicial error (Claim VII, MAR ¶ 186-87)

75. This claim is without merit and procedurally barred under N.C.G.S. §§ 15A-1419(1)(2) and (3). Considerations leading the Court to this conclusion are discussed below.

76. In MAR ¶ 186, defendant states that his counsel failed to object to the prosecutor misstating the law on two separate occasions: (1) "that the jury could infer the defendant's identity from his alleged malicious acts towards Lisa Bridges," and (2) a misstatement of the degree of provocation necessary to reduce first to second degree murder. He argues that because trial counsel did not object, appellate review was under the higher "plain error" standard. In MAR ¶ 187, defendant argues that trial counsel's failure to object constituted ineffective assistance of counsel.

77. This claim is based on matters raised on direct appeal by defendant's twelfth assignment of error. See Burr, 341 N.C. at 299-300, 461 S.E.2d at 621-22. Concerning the first alleged misstatement of the law by the prosecutor, Burr stated in part that "[b]ased on our holding in section VI of this opinion, the jury could properly consider evidence of defendant's prior acts on the issue of identity . . . ." 341 N.C. at 299, 461 S.E.2d at 621. Section VI of Burr discussed at length the issue defendant now raises; it also concludes that defendant was not unfairly prejudiced by the admission of such evidence, and that if such

evidence was erroneously admitted, it was "not prejudicial." 341 N.C. at 291-92, 461 S.E.2d at 617. Concerning the second alleged misstatement of the law by the prosecutor, Burr evaluated defendant's contention and stated in part "[w]e disagree." 341 N.C. at 300, 461 S.E.2d at 622. See also ¶¶ 7-9 above, particularly ¶ 9f.

78. At the bottom line, this claim is without merit for reasons stated in Burr (i.e., Burr found no error in the prosecutor's argument that is the subject of this claim). Stated otherwise, defendant has not demonstrated the existence of either prong of the Strickland test. Furthermore, the issues underlying this claim were resolved against defendant in Burr, and any claim of ineffective assistance of counsel on this basis could have been raised on direct appeal because all evidence relevant to the claim is in the transcript, but was not.

Claim: Failure to develop mitigation evidence to present during penalty phase (Claim VIII, MAR ¶ 188).

79. In MAR ¶ 188, defendant claims his trial counsel were ineffective because they failed to obtain a medical expert to testify about OI. The Court concludes that this claim is without merit for reasons discussed above concerning related claims (i.e., defendant's claims III, IV, and X). See ¶¶ 53, 54 and 58.

Claim: The imposition of the death penalty in this case is not warranted, especially in light of new evidence concerning aggravating and mitigating circumstances (Claim XI, MAR ¶189-92).

80. This claim is without merit. Considerations leading the Court to this conclusion are discussed below.

81. In MAR ¶ 190, defendant asserts that trial counsel failed to make an obvious argument based on "lingering doubt." This argument is without merit because it is contrary to State v. Goode, 341 N.C. 513, 548-49, 461 S.E.2d 631, 652 (1995) (refusal to admit the nonstatutory mitigating circumstance of "lingering doubt" no error because the "United States Supreme Court has held that trial courts are not required to submit lingering doubt of guilt as a mitigating circumstance." (Citation omitted).

82. In MAR ¶ 192, defendant asserts that "in light of the abundance of mitigating medical evidence available to defense counsel, the failure of counsel to present such evidence at Mr. Burr's sentencing hearing was an unconstitutionally deficient performance." For reasons stated in the Court's discussion of Claim X (i.e., the claim of newly discovered evidence), the Court is not convinced that defendant has proffered evidence demonstrating that Susie's death was due to her having either OI or an accidental injury. Additionally, for reasons stated in the Court's discussion of Claim III (i.e., ineffective assistance of counsel based on lack of adequate preparation for trial), the Court is not convinced that defendant has proffered evidence demonstrating ineffective assistance of counsel based on a failure to present evidence concerning either OI or accidental injury.

Furthermore, the North Carolina Supreme Court, in Burr, determined that, as a matter of law, defendant's death sentence was not disproportionate or excessive. 341 N.C. at 315, 461 S.E.2d at 631.

Claim: The State affirmatively presented the case against Mr. Burr in a false light (Claim I, Amendment to MAR).

83. This claim is without merit. Considerations leading the Court to this conclusion are discussed below.

84. In the Amendment to MAR, the defendant asserts that "(t)he State had at least eleven articles from medical journals which documented the problems with diagnosing child abuse as opposed to accidental injury resulting from osteogenesis imperfecta." The articles referred to in the Amendment to MAR were not evidence, were materials within the public domain available to anyone researching the field and the State was under no obligation to provide defendant's counsel copies of the medical journal articles while preparing for trial.

85. The assertion that the State's failure to present evidence from Juanita Todd constituted a presentation of the case in a false light is also without merit. The record clearly demonstrates that trial counsel knew of Ms. Todd's involvement in the case, that Ms. Todd had interviewed defendant and that trial counsel had planned to call Ms. Todd as a witness. See State v, Burr, 341 N.C. 263, 297, 461 S.E.2d 602, 620 (1995), page 108 of defendant's brief on direct appeal and volume 25, page 1864 of the trial transcript.

86. The trial transcript also demonstrates that in the light of unequivocal testimony from eminently qualified medical

experts that the infant victim's death was not caused accidentally, the prosecutors could not be rationally argued to have made a misrepresentation as to the nature and cause of the injuries to the infant victim.

Claim: The State failed to reveal exculpatory evidence of other explanations for the injuries to Tarissa Sue O'Daniel (claim II, Amendment to MAR).

87. This claim is without merit. Consideration leading the Court to this conclusion are discussed below.

88. The medical journal articles possesed by the prosecution were not Brady material. Those journal articles as before indicated, were articles available to the defendant, being in the public domain which could have been obtained by due diligence as a consequence of which the State cannot be said to have suppressed the information.

89. The information obtained from Ms. Juanita Todd was not Brady material. As before indicated, defendant's trial counsel knew of Ms. Todd and of her involvement in the case. Such information was available to defendant through inquiry of Ms. Todd, who in fact was stated by defendant's trial counsel to be a potential defense witness. See reference in paragraph 85.

90. Additionally, it does not appear to the Court that the disclosure of medical journal articles documenting problems with diagnosing child abuse as opposed to accidental injury or injury resulting from osteogenesis imperfecta, in light of the evidence adduced at trial from the medical expert witnesses, would have affected the outcome of the trial, there being no

reasonable probability that, had the articles been disclosed, the result of the proceeding would have been different.

91. Nor does it appear to the Court that testimony by Juanita Todd to the effect that Mr. Burr "... was very appropriate in his interview with her and was not hostile or overly defensive." (p. 2 of Amendment to MAR), would have been such as to change the outcome, there being no reasonable probability (sufficient to undermine the outcome) that had this information been disclosed, the result would have been different.

IT IS THEREFORE ORDERED that the State's Motion for Summary Denial of Defendant's Motion for Appropriate Relief be and it is hereby ALLOWED;

IT IS FURTHER ORDERED that the Defendant's Motion for Evidentiary hearing be and it is hereby DENIED and that Defendant's Motion for Appropriate Relief be and it is hereby DENIED;

IT IS FURTHER ORDERED that a copy of this ORDER be mailed to the defendant, to the defendant's attorney, to the Attorney General of North Carolina and to the District Attorney for Judicial District 15A.

This the 3rd day of October, 1997.

James C. Spencer, Jr.
Resident Superior Court Judge
Judicial District 15A

A TRUE COPY OF THE ORIGINAL
This 10-21-97
C.S.C

APPENDIX

KEY TESTIMONY OF IMPORTANT STATE'S WITNESSES
(paraphrased, quoted, and emphasized)

1. Mrs. Lisa Porter Bridges, Susie's mother:

a. **Susie was "born [1 April 1991] in all respects, a healthy and normal child."** (T Vol 17, p 44). I took her to the doctor one time in April for an ear infection. There was also a rattling in her chest. The doctor gave me medication for her.

b. **Defendant moved in with me about the end of June 1991.** I believe defendant loved me. About three weeks later, that changed. He would "would bend my hand underneath to make me do what he wanted me to do." (T Vol 17 p 88). "[O]n one occasion and [he] put a gun up to my face, and told me that if he caught me running around that he would take and make me stand there and watch him -- watch him take and kill the guy I was with and then after he made me do that, he would tie me to a tree and then he'd kill me." (T Vol. 17 p 91). He showed me a bullet and said "something about the bullet would go in small but when it came out it would be awfully big." (T Vol. 17 p 92). **Susie had thrush mouth during the summer of 1991. She had ulcers all the way down her throat.** She also had a rash. **There was no air conditioning in the trailer.** On 17 July 1991, I took Susie to Alamance Memorial Hospital and saw Dr. Willcockson. I got some medicine for her. I took her back to the hospital on 26 July 1991 and again saw Dr. Willcockson. She had thrush mouth and rattling in her chest. I was given drops to numb her throat because I could not get her to eat. I then took Susie to UNC-Chapel Hill Hospital, where I was given Tylenol for her. **I gave her the medications and tried to get her to eat.** I administered the medications up until her death. She cried alot.

c. **Defendant "continued to bend my wrist down** and he would take my fingers and push them underneath . . . real hard . . . but it hurts the bones in your fingers." (T Vol. 17 p 107). Defendant "accused me of my stepbrother . . . . He kept trying to make me say that I had something going with my brother . . . . **When I kept saying, no, he grabbed my breast and mashed them till he bruised them and then my privates. . . . He grabbed both** [breasts] . . . . I had bruises." (T Vol. 17 p 108). "**[H]e has bruised my legs before.**" (T Vol. 17 p 109). "One time he took and he bent my wrist trying to make me kiss my stepbrother's feet." (T Vol. 17 p 110). "One time he threatened that if I left him, he would blow my trailer up; put a bomb underneath my trailer, and blow it up." (T Vol. 17 p 116).

d. On **Saturday, 24 August 1991,** I asked Scotty to hold Susie and I went to Rita's and got some tea. "**Scotty went to come up behind me and tripped over the cord.** And he fell but he didn't drop his sister or he didn't fall on his sister . . . as I turned, he was falling. . . . **He was holding her in his arms like that (demonstrates with both arms)." (T Vol. 17 p 122). Scott did not drop Susie. "He first went down on his knees and then he was holding his sister like I said, and then he didn't fall on her but**

his arms took most of the fall, and his knees, his knees hit first and then he kind of went down on his arms." (T Vol. 17 p 122). "I went and got Susie and checked her. . . . I checked the back of her head and the back part of her, anything where I thought might could have hit." (T Vol. 17 p 123). I saw no marks on her body. There was a little redness on her right arm, but the redness did not remain for long. (T Vol. 17 p 124-25). She cried a little while after that. She was fine afterwards. (T Vol. 17 p 126). I laid her down in her bed. She was asleep. Johnny and I talked about going to my parent's. He said he was not going to take me over there because I cussed at him. Anytime I cussed him, he wouldn't do nothing for me. (T Vol. 17 p 132). When I was on the back steps with Christy and Susie, Johnny left the lawnmower and came up the steps "and he hit me in the lower part of my back with his fist. . . . it did [hurt]." (T Vol. 17 p 133).

e. Later, on 24 August 1991, Johnny and I had an argument after I asked him if he was going to take me to mama's and he said no. He said, "I'd better shut my mouth and there was a lot of cussing involved." (T Vol. 17 p 136). Then I started walking down toward the yard, and he came running back down there and pushed me with Susie in my arms. "I stumbled with her but I didn't fall." (T Vol. 17 p 137). "I went on down there to my trailer, and Johnny was still behind me. And we were arguing all the way to the trailer, and then I took little Susie and put her in the swing." (T Vol. 17 p 138). **Johnny pushed me down on the couch with his hands.** I told him he better not make me hurt Susie. When I went to get up, "he just pushed me down again and told me I had better not get up off the couch, and then he done that about twice so I just sat there a few minutes and then I started to get up and go down the hallway. And when I went down the hallway, that's when he came back there again and he pushed me across the waterbed and it broke." (T Vol. 17 p 139). Susie was still in the swing. **The time was ten, ten thirty, or about eleven at night.**

f. I was angry with Johnny. He acted like everything was fine. We then had to drain some water out of the waterbed by using a water hose. Then Johnny had to fix the corners of the bed by putting bigger bolts and screws on it. He used an electric drill. While we repaired the bed, Susie was in the swing at first. Then she started crying. Johnny said, "go on up there and get her, that's all in the hell she wants anyway, she is so damned spoiled." (T Vol. 17 p 145). I laid her on the waterbed and played with her . . . to keep her calmed down, so that he could finish putting the bolts and screws in the bed. After we finished with the waterbed, I took Susie and got her to bed. **I put Susie in her baby bed. She was asleep when I left. "She was fine."** (T Vol. 17 p 149). Susie did not have any marks or bruises on her at that time. (T Vol. 17 p 150). I then went up to Rita and Donald's to do the dishes.

g. **When I came back to the trailer after doing the dishes, about 45 minutes later, Susie was in her swing in the living room.** (T Vol. 17 p 153). **When I walked into the trailer, Johnny was "next to the door, pacing the floor." (T Vol. 17 p 154).** "When I

first come in, he told me, look at Susie's bruises, but some of that was grease." (T Vol. 17 p 154). Johnny told me "he had moved her [Susie] from the baby bed to the swing." (T Vol. 17 p 154). He said he had moved her because she had woke up. "[S]he wasn't the baby I left, she was bruised, her eyes didn't look right . . . . She just didn't act right, she didn't smile, she didn't respond to nothing. . . . She had some [bruises] in her ears . . . around in here (indicates neck). . . She had bruises in her ears, right up under her neck . . . , her arms, and her legs." (T Vol. 17 p 155). "I just know she didn't have them [bruises] until I came back." (T Vol. 17 p 156). I have seen bruises like that before -- on my breasts when Johnny did me the way he did me. I took her to the sink and tried to wash of what Johnny said was grease. It was not grease. Scott and Tony were in their rooms at the time. I asked Johnny to take Susie to the hospital. He "said no because all they was going to do is send her back home and say nothing was wrong. And so that's when I went and called the hospital. . . . He said that all-- that Susie was just sleepy." (T Vol. 17 p 158). She did not look sleepy to me. Her eyes were open. "She didn't have no response." (T Vol. 17 p 159). Johnny finally agreed to take me to the hospital with Susie. I did not discuss the bruises with him. I just wanted to get help for her. "He said that when Scott had fell with Susie, that she could have just started bruising and showing signs of where he fell." (T Vol. 17 p 162). When I threatened to call an ambulance, he agreed to take me to the hospital.

h. State's Exhibits 3, 5, 6, 8, 9, and 10 are photographs of Susie depicting bruises and marks on various parts of her body (e.g., left ear, cheek, and arms). None of those marks were on my daughter when I left her in her baby bed and went to wash dishes next door.

i. There had been something unusual that drew my attention to my daughter and Johnny. "It was about two weeks before Susie's death, before she got beat Saturday, I was in the bed, it was about four o'clock in the morning, and I heard Susie screaming real loud, and I had never heard her scream like that before." (T Vol. 17 p 195). A blower was going, which is louder than a fan. I heard her scream. I went up the hallway and Johnny had her in the living room. Susie had been in her bed when I went to sleep. I have never heard her scream that way before. Johnny was holding Susie in the air (demonstrates with doll). Johnny "said that Susie had woke up and she was laying in the bed looking at him and he thought maybe she needed to be changed." (T Vol. 17 pp 198-200). Johnny had never changed Susie before. He did not change her then. He didn't even have a Pamper in there. I got the Pamper from the bedroom. I noticed that Susie was red in the same place he had his hands, where your fingers go, where your thumb goes. It took over an hour and a half, maybe a little more, to calm Susie down. She stayed real irritable and I thought it was her throat. After that,

she didn't want him to hold her, if he held her some, she'd cry. (T Vol. 17 p 202).

j. After Susie was in the hospital, Johnny said he bet he knew who had done it. He said it was probably Rita or Misty or Christy. He also "tried to say Scotty's fall could have done it." (T Vol. 17 p 203). I did not tell Johnny to leave because I was scared for me and my children. (T Vol. 17 p 206).

k. Johnny "was quick tempered." (T Vol. 18 p 258). Susie was sleeping in her baby bed when I went to wash the dishes. (T Vol. 18 p 265). It was somewhere around 12:30 a.m. when I went to wash dishes. (T Vol. 18 p 266). "He did not want to take my daughter to the hospital. He was trying to stand back and say, she's a normal baby." (T Vol. 18 p 282). Johnny was not still working on the bed when I got back from washing the dishes. (T Vol. 18 p 282). I did at first tell Mr. Qualls and Mr. Allen that Johnny was working on the water bed in the same room with the baby when I left, but then I remembered that he was working on the plug in. (T Vol. 18 p 297). To my knowledge, prior to the morning of 25 August 1991, Johnny had never at any time changed Susie's diapers. (T Vol. 18 p 302). Susie had thrush mouth and she cried constantly. I thought she was crying because of the thrush mouth; I was surprised when I heard she had broken arms and legs seven to ten days prior to 24 August 1991. (T Vol. 18 p 318).

2. Captain Dan Qualls, a 24-year veteran of the Alamance County Sheriff's Office:

a. Officer Qualls identified photographs of the Wade and O'Daniel trailers and the areas where they were located. He identified the area in a photograph indicating where the drop cord ran. (T Vol. 18 p 366). He also identified Susie's grandmother, Ms. Costner, who was in court sitting beside Susie's father. (T Vol. 18 p 370).

b. When we first talked to Susie's mother, she related that her son, Scott, about eight years old, about 6 p.m. the day before, had taken Susie from her and was in a graveled driveway and had dropped the child. (T Vol. 18 p 371). At that time, we had had a conversation with the doctors and they informed us that they had taken x-rays and that the child had two broken legs, two broken arms along with the bruises about the ear and the neck, and the cheek, and these broken bones were seven to ten days old. (T Vol. 18 p 372). I looked at the child in the hospital. In my opinion, "those bruises and those marks about the neck had the appearance of possible hands. . . . [Looking at State's exhibit 5, a photograph of the child], on this side of the neck and the lower jaw area would be an impression and the look of fingers and on this side it would give the impression of a thumb, which would be this way (demonstrates with hand)." (T Vol. 18 pp 374-75). I also noticed

bruises about her ears, which showed up on State's Exhibit 9, another photograph of the child. (T Vol. 18 p 375).

c. We took a recorded statement from Lisa, the child's mother. The statement was transcribed. We also took statements from other witnesses, including defendant. The statements and tapes were made available to defendant and his counsel. "[A]ll the transcribed statements have been made available to them and they've listened to both this statement and the defendant's statement to us, they've heard them both." (T Vol. 18, pp 381-82). Captain Qualls read into evidence Lisa's responses to questions asked during an interview. In describing Scott's fall with Susie, Lisa stated that she did not watch Scott as he fell, but that she heard him fall and that "when I turned around, he was laying on top of her." (T Vol. 18 p 389). **Scott "was holding her the whole time he fell . . . [he did not literally drop her] and he didn't let go of her." (T Vol. 18 p 390). "He didn't really drop the child, he cradled it but fell with the child in his arms."** (T Vol. 18 p 397). Lisa said she had seen fingerprints on the child and figured it was from where Scott had held her. She said she still observed the finger and thumbprints on the child's side and back when she was changing her about an hour and half or two hours later, although she said they were lightening up. She said the child was real red on her right arm and that Scott cradled the child with the child's face towards him and the child's back towards the ground. She demonstrated for us how Scott held the child ("just like this"). When I asked her if the child could focus its eyes and moved its limbs in a normal fashion, her answer was yes. (T Vol. 18 pp 395-99). **She said that defendant told her he woke Susie up drilling on the bed and that he then put her in the swing.** (T Vol. 18 p 409). She also said **defendant would lose his temper quickly and do things that he doesn't do when he's not mad.** (T Vol. 18 p 440).

3. Christy Wade, age 14:

a. I was 12-years-old in August 1991. I saw Johnny take Lisa by the arm and try and make her kiss my daddy's feet. "He would take it like that and then he would put in behind her back and he would push it up (demonstrates). . . . It hurt, she had tears in her eyes. . . . he was . . . laughing about it." (T Vol. 19 462). **I saw Johnny bend Lisa's arm or wrist behind her back "a lot," I saw the bullet that Johnny said he was going to use to shoot Lisa, and I heard Lisa tell me that Johnny said that's the bullet that he's going to use to shoot at her if she cheated on him, and I heard her say that he said he'd put a bomb underneath her trailer."** (T Vol. 19 pp 464-65). **I saw bruises on Lisa's neck that "looked like a thumb, it was a thumb and three fingers." (T Vol. 19 p 465). I saw Johnny choking Lisa "like this (demonstration)."** (T Vol. 19 p 471). I saw Johnny do something to his son, J.J.; "Johnny took his hands like this (demonstrating) and rammed it in John-John's chest . . . [J.J.] had tears in his eyes

and he was sniffling like he wanted to cry. John said, you'd better not cry." (T Vol. 19 pp 473-74).

b. I've seen Johnny whipping Lisa's boys with a switch. He used to "hit them real hard and they'd cry and they'd yell . . . ." (T Vol. 19 p 475).

c. **After I heard Scott fell with Susie, I looked at her back and "I didn't see nothing, no bruises or nothing."** (T Vol. 19 p 479). Later, when Lisa came up to wash the dishes, I went down to ask Johnny for a bandaid for my sister Misty's cut foot. I don't know what time it was, but it was dark, around midnight. I went back to the back bedroom. Johnny was fixing the bed. Susie was in her baby bed. Johnny was drilling on the bottom of the waterbed. (T Vol. 19 p 481-83). Johnny made me mad. He would not get a bandaid for me. When I talked, he would drill a hole and the "drill went over what I was saying." I leaned over to kiss Susie before going home, but Johnny would not let me. He told me to leave her alone or else I would wake her up. **When I leaned over her, I did not see any bruises or marks or scratches or anything, except that rash.** There were no bruises in her ears. "It was no bruises or nothing from what I saw her earlier, and when I saw her again later." I left. (T Vol. 19 pp 486-90).

d. When I returned later to Lisa's trailer, Johnny was holding Susie. Her eyes wouldn't react. **I saw bruises** on her arms, on her back, and underneath her neck (demonstrating on State's Exhibit 2, a toy doll). (T Vol. 19 pp 493-94). I noticed bruises on the crown of her head and in her ear. The bruises in her ear were "dark purple." (T Vol. 19 p 496). I noticed dark purple bruises on her legs, I think both legs. Johnny was acting hateful and mean. (T Vol. 19 pp 497-98). It was thirty-five to forty minutes from the time I leaned over to kiss Susie until I returned to see Susie in that condition. (T Vol. 19 p 501).

4. Misty Wade, 16-years-old:

a. I was 14 in August 1991.

b. **I saw Johnny choke Lisa one time and bend her arm back behind her back (demonstrates).** (T Vol. 19 p 547). I have seen Johnny whip Lisa's boys, Scott and Tony, pretty hard with a switch. The boys were screaming and crying. I have also seen Johnny "take his fist and hit his little boy in the chest . . . [and say] don't cry, take it like a man . . . ." (T Vol. 19 pp 551-52).

c. **I looked at Susie after Scott fell with her and Lisa brought her to the house. There wasn't anything wrong with her. I looked at her head first because mama used to say a baby's head is soft and if anything happened, look around the soft spot.** I looked around her head (indicating on the doll's head). I did not see any marks, bruises, or scratches; I saw only the rash on her

neck. I looked at her legs and up her back and I saw nothing wrong with her. (T Vol. 19 pp 558-60).

d. Later, when Susie looked like she was about to have a seizure, Lisa said to me, referring to Johnny, "that that asshole wouldn't let me call -- didn't want me to call the hospital." (T Vol. 19 p 565). I recall Susie's bruises. Pointing to the doll, the bruises were on the back of the head in two places, on her left ear, her forearm, on the back of the elbow, and under her chin. (T Vol. 19 p 567).

5. Jonas Kimrey, 13-years-old:

a. Misty and Christy Wade are my cousins. I visited them on Saturday, 24 August 1991. On that day, **I saw Scott fall with Susie in his arms. "Scott was coming out and holding Susie when he stumbled over a cord and dropped her to the ground, with her in his arms. [When I say "dropped," I do not mean he actually dropped her out of his arms.] . . . I mean he fell with her in his arms. . . . He was holding her like this right here (stands up and demonstrates), sort of cradling her. . . . He landed on his knees, and then he fell to the ground on his elbows on the ground, with his arms touching the ground." (T Vol. 19 p 601). He did not actually drop Susie out of his arms. He just went down to his knees and cradled her down.**

b. Later, I saw Susie and noticed that she had bruises on the back of her head and around the neck, and her ears were purple and blue and red. I then "said she wasn't bruised like that before" after Scott fell with her. Johnny said, "if you were dropped, wouldn't you be bruised, too?" like he was angry. (T Vol. 19 pp 605-06).

c. Jonas again stepped down in front of the jury and demonstrated for the jury how Scott fell with Susie. Scott "hit the ground like this and he was holding her like this (demonstrating)." He did not crush Susie with his body. Scott's chest may have touched her but it didn't fall on her very hard. (T Vol. 19 p 625).

6. Mr. Elbert Porter, Lisa Porter O'Daniel's father:

a. **Lisa's mother is Vera Lipscomb, the lady sitting behind me in the purple shirt.** (T Vol. 19 p 627). Christy Jenkins is Vera's youngest daughter.

b. On Saturday, 24 August 1991, **I looked at Susie after Lisa said Scott fell with her.** All I noticed was the rash around her neck. If I had noticed something else, I would have remembered it. (T Vol. 19 p 630).

7. Christy Jenkins, 21-years-old: Lisa is my sister. On Saturday, 24 August 1991, I went to see Lisa. Lisa said that earlier Scott had fallen down with Susie. I checked Susie's arms, legs, and back very closely. I did not see any marks or bruises. She was fine, except for a real bad heat rash. (T Vol. 19 p 649). It was very hot inside the trailer. (T Vol. 19 p 657).

8. Cardella Porter: I am married to Lisa's father, Elbert Porter.

9. Vera Lipscomb: I am Lisa's mother. I was married to Elbert Porter years ago. He is Lisa's daddy. (T Vol. 19 p 669). I talked to two social workers after talking with Lisa in the bathroom at the hospital. (T Vol. 20 p 721).

10. Mr. Donald Wade:

a. Lisa is my stepsister. Susie was my niece. I would see Susie everyday. She was a happy baby, but she had a rash and my wife and Lisa took her to the hospital for the throat problems and she was a little irritable. (T Vol. 20 p 731).

b. I saw Johnny grab Lisa's arm and bent it back like this (demonstration). He told her to kiss my feet. He had her down on her knees and she was pulling backwards. "You could tell she was in pain. . . . he was laughing." (T Vol. 20 p 740).

c. After Susie was in the hospital, I heard Lisa tell Rita that "the only time she could remember Susie ever crying out loud, was that one particular night when she got up, and saw Johnny with the baby . . . in the living room and [he] told her he was going to change her diaper." (T Vol. 20 pp 740-41).

11. Mrs. Rita Wade:

a. I went with Lisa on her second visit to Alamance County Hospital with Susie. (T Vol. 20 p 760). When Lisa was taking a bath and I had to use the bathroom, I saw the dark bruises on her breasts and heard her tell me about Johnny pulling her genital hair. (T Vol. 20 p 761). When I asked her why she didn't turn him out, she said she was scared of him and that he had threatened her with a gun and a bullet. (T Vol. 20 p 763).

b. I saw Johnny hit his little boy in the chest with his fist like that (demonstration). The little boy stumbled back and started to cry, and Johnny told him he had better not cry and he knew what was going to happen to him if he cried. (T Vol. 20 p 765).

c. "Lisa was a good mama." (T Vol. 20 p 771). I have seen Johnny and Lisa argue. "He would just talk some ole stupid stuff that didn't make no sense about nothing . . . and when she wouldn't

do what he told her to do, like he told her to kiss my husband's feet, and all, he'd take her hand and bend it up like this here, and mash it and pull it behind her back, way up behind her back (demonstrates). She'd be screaming in pain and he wouldn't let go, he don't care, he know [sic] it hurt." (T Vol. 20 p 778).

12. Eliana Owens: I am employed as the assistant director of medical records at UNC Hospital. State's Exhibit 17 is a certified copy of all of Tarissa Sue O'Daniel's medical records at the hospital. (T Vol. 20 pp 797-98).

13. Dr. David F. Merten:

a. I received my M.D. degree in 1954. I am on the **medical faculty** at UNC at Chapel Hill. I did my residency at the Children's Hospital in Cincinnati, Ohio, in the field of pediatrics and subsequently did a radiology residency at the University of California, San Francisco. I practiced pediatrics for seven years, then took additional training in **pediatric radiology** following my diagnostic radiology at the University of California, San Francisco. That training was at Texas Children's Hospital in Houston. Then I practiced radiology for two years at Beaumont Hospital in Michigan. **I was on the faculty at University of California at Davis for three years. I was at Duke University for ten years, and I've been at UNC-Chapel Hill for the past five years.** Pediatric radiology refers to the use of x-rays and other imaging methods for the diagnosis of diseases in children. I taught pediatric radiology at Davis. At Duke, I was associate professor in pediatrics and radiology and specialized in pediatric radiology. At UNC, I'm **professor of radiology in pediatrics and chief of the section of pediatric radiology.** (T Vol. 20 pp 800-02).

b. Susie was x-rayed on 25 August 1991. My comments on the x-rays, all State's Exhibits, include the following: Exhibit 18, and x-ray of the chest area: **she has fractures of her arms, just below the shoulders on both sides.** That upper bone in the arm is known as the humerus. (Pointing) the fracture is completely through that portion of the bone of the arm. There is a very similar fracture in approximately the same place on the other arm. Both are complete fractures. Exhibit 19 is her pelvis: there are fractures through the ends of both of the bones, the femurs. In addition, there are fragments or splinters of bone that are seen here and we can also see **evidence of early healing.** The fractures occurred in the area above the knee, the metaphysis. (T Vol. 20 pp 804-10). Exhibit 20: this is her **right leg (femur). You can see some whiteness here which is the early healing of this fracture. Exhibit 21: this is her left leg. The fracture there is very similar to the fracture on the other side. Additionally, on this side there are some little slivers of bone or fragments of bone and in addition, there is early healing evident very much as it was on the previous film of the other side.** Here is the fluffy,

early healing of calcium and the blood clot around this fracture. Exhibits 22 and 23 are x-rays taken 26 August 1991. (T Vol. 20 pp 811-14). We do not see any evidence of healing of these shoulder fractures. (T Vol. 20 p 817).

c. Exhibits 24 A, B, and C are CT (computed tomography) scans of Susie. Exhibit 24 C: There is a depressed skull fracture on the left side in an area slightly higher than the temple. The piece of bone from the surface is gone; it's pushed into the inner portion of the skull. It is just a notch, as if something had hit the skull and pushed this portion of the skull into the inner table of the skull itself. There is soft tissue swelling with the fracture underneath. Exhibit 24 B: In this region on the left side, where we saw the skull fracture, there is some fresh blood that shows up in a very white material in this area, so that's evidence that there was a blow or focal damage, impact damage, to the skull and some injury to the underlying brain itself. There is white material, which is blood, in the subdural space, which is the space surrounding the brain; this means that there was some bleeding in that area. What we see in sum here is evidence that there has been direct injury to the brain in this region of the fracture and there has been more extensive injury to the brain here, these dark areas are areas of swelling of the brain. (T Vol. 20 pp 819-25).

d. Exhibit 25: is a CT of Susie's head taken later in the day on 25 August 1991. This shows that Susie's brain continued to swell and was herniating downward. The left side of the brain is now much larger than the right side. It is difficult to assess the significance of one side swelling before the other. Sometimes we see in shaking children, both sides will be involved equally. When we have a blow to one side of the head, we may have injury to the other side but more commonly we have injury to the side that receives the blow first. Within the field of child abuse, there have been injuries inflicted on small infants when the infant is picked up and simply shaken and the head moves rapidly back and forth. During the course of the shaking, the little fine blood vessels that go from the skull down to the brain just get sheered off and that's what causes the bleeding outside of the brain. In addition, you create these forces that sheer through the brain so that you get sheering injuries right through the brain and the brain matter itself just due to the shaking and the sheering force. That is the shaking theory of head injuries in children. (T Vol. 20 pp 830-35).

e. In my opinion, the fracture of her skull and at least the first evidence of direct injury to her brain occurred from a blow to the left side of her head. This is a very unusual fracture in a very unusual place. And it would take a relatively confined direct blow to that area to produce this type of fracture. It would require a great deal of force. I understand that there has been evidence that on the evening of 24 August 1991, Susie was

being carried by her brother who fell with her. I believe that that fracture would not be inflicted by just simply an accidental fall. If the infant was cradled in her brother's arms, presumably the only way possible for a fracture like that to have occurred would have been for the baby's head to have hit the ground with sufficient force upon a relatively blunt local object that could have produced that blow and fracture to her head. (T Vol. 20 pp 835-36).

f. The injuries to the leg and arm are very unusual injuries and in my experience I have never encountered this sort of fracture before in an infant of this age. The fractures of her knees were produced simply by bending the knee forward in what we call hyperextending the knee. Both fractures of the knees were produced simply by bending the knee with violence, significant force, forward, and hyperextending them (demonstrates with doll). The shoulder fractures, were simply inflicted and incurred by bending the shoulder like that (demonstrating) and both of these fractures were produced, I think, by simply bending them back like that (demonstrates with doll). "Q: When you examined . . . x-rays of Susie, did you find any indication that there was anything wrong with her bone structure? A: Her bones are perfectly normal other than the injuries." The bones of infants and young children tend to be more elastic or plastic than ours do. If you bend one of our bones like that, they simply fracture -- they are more brittle in point of fact than an infant's bones which tend to bend before they break. In addition, there's the growing portions of the bone, but I don't think that that pertains to what we are talking about here. The relative force required to produce these fractures is much greater than would be from a simple accidental fall in an adult. "Q: Dr. Merten, in your opinion could the series of injuries which you have observed, the head, the arms and the legs, resulted from a little boy who was carrying his sister and he falls and goes down, cradling his sister (demonstrates with doll)? A: There is no way that the fractures and the head injuries that I found in this child could have been incurred in that fashion. Q: And in your opinion, Dr. Merten, is there anything at all in these fractures which would indicate an accidental breaking of the bone? A: None whatsoever." (T Vol. 20 pp 837-39).

g. The evidence of healing was in the fractures just above her knees. We begin to see healing of bones anywhere from seven to fourteen days after the injury. The younger the baby, the earlier it begins to heal. I can't be absolutely precise, but I think we can be relatively precise in a child of this age that I would suspect these injuries were somewhere around eight to nine days of age. The evidence of healing is referred to as callus; that's what I found in her leg. In the arms, there was no evidence of callus or healing. The first x-rays that we had of her chest, which included her shoulders and upper arms, did not show any callus. We were not satisfied with that fact, so we took additional x-rays the following day. Again, on the additional x-rays, we could see no

evidence of callus formation or healing. I requested a follow-up in the event that Susie survived. If that had occurred, I would have been able to tell more about the recency of the injuries. The fractures of her shoulders occurred at a different time than the fractures of her legs. We cannot be precise, but I would suggest that the fractures of her arms occurred "at least five days at a different time than the fractures to the legs." **It is possible that the fractures to her arms occurred at the same time as the fracture to the skull.** It takes about five to seven days before we ever begin to see evidence of healing of these fractures, so I can't be precise. It could have occurred at the same time as the head injury or it could have occurred within five days. (T Vol. 20, pp 840-42).

h. **Based on what I have seen on the x-rays, I am satisfied that we are looking at child abuse. These are non-accidental injuries inflicted on this child. I have published on a number of subjects, but perhaps the greatest number of articles have dealt with the subject of child abuse. I have published on the subject of craniocerebral trauma in the child abuse syndrome.** There were several articles. One was in the Pediatric Annals and the other was in Pediatric Radiology, which is a journal for pediatric radiologists. Before and after Susie's death, I consulted with other doctors at Chapel Hill. **I reviewed the CT of her head with our neuroradiologist and I reviewed her x-rays daily with the doctors in the pediatric intensive care unit.** I consulted with Dr. Michael Tennison, a pediatric neurologist, and Dr. Richard Azizkhan, a pediatric surgeon who was the head of the pediatric surgery section at UNC Hospital, the surgeon who attended Susie. (T Vol. 20 pp 842-45).

i. Today, when we use the term "battered child," we limit that to children who have had skeletal and other injuries inflicted upon them by other than shaking. Basically, a battered child is one who is battered up against an object, who is struck, where limbs are bent. **In my opinion, Susie's x-rays are those of a battered child. That fracture to Susie's skull would have necessarily requires that that portion of her skull strike some hard object. I understand that there has been testimony that the little boy fell on a graveled driveway. If the child's head had struck a piece of gravel in the driveway, I do not believe it could have resulted in such an injury because gravel is a relatively soft rock and it gives. "This fracture which occurred right here is in a portion of the skull, the head, that normally would not strike. In fact, it's somewhat protected because it's a little depressed in. And the rest of the skull would hit first. That would be injured long before this area would be injured." "Q: So you would expect to find some other injuries to the skull if it had been from gravel? A: I wouldn't expect a skull fracture from the accident that you've described, under any circumstances. . . [because] there is evidence that if you take a -- with head injuries, that it takes a fall at least three or more feet directly to a hard surface such**

as a concrete floor or linoleum or something very hard, wood floor, where there is no give. With gravel there would be some give. As I also pointed out just a minute ago, the type of skull fracture, of this had been a skull fracture from just hitting the ground, I would have expected a fracture to be out here on the top or upper portion of the skull, rather than down here. Q: I'll ask -- if an individual were to have held a child in a manner such as this, and struck that child with a closed fist in a manner such as this, (demonstrates), would that result in an injury such as you observed? A: Yes. If we would assume that perhaps one of the knuckles would be the leading point of impact, it would deal a local blow that would result in a fracture like this. . . . [That would have been a blow requiring a] great deal of force." (T Vol. 20 pp 845-48).

j. The original descriptions of the battered child syndrome inferred that it was the result of repeated injuries by a mother. However, that concept is no longer valid and is no longer accepted by anyone. In fact, more recent surveys of this subject would indicate that the assailant in the battered child syndrome is more commonly a male who is not a legal member of the family. (T Vol. 20 pp 850-51). The skull fracture was produced by a direct impact. There may have been shaking involved, but we can directly state that there was a direct blow to the head. I had access to the x-rays, but I did not review the medical records. We discussed Susie during daily rounds with the doctors who were caring for her. Dr. Whaley is a member of the radiology department specializing in neuroradiology. He reviewed the x-rays. Dr. Mauro, a specialist in CT, reviewed her CT. Dr. Barbara Specter, my associate in pediatric radiology, also evaluated those x-rays. I am now aware that Dr. Spector observed callus formation. I would only state that the observations of two people with expertise may vary on minor points. I have reviewed the x-rays repeatedly over the last weeks and I am unable with any degree of certainty to see evidence of healing in those fractures despite what she may have interpreted. My diagnosis would be consistent with the injury occurring in the five day period. Some of the hemorrhaging in the brain could certainly have occurred from shaking. One of the things that I think has become confusing to many in this field is the dependence upon the term "shaken baby." There is a large contingent of experts who have dealt with child abuse, and more specifically head injury. . . , and there is a difference of opinion as to whether shaking per se can produce the force that's necessary. There has been a debate in the medical literature. I personally believe that most injuries to the head in babies who are shaken are what we refer to as shake impact injuries where the baby may be shaken and then during the course of shaking, the back of the head may be brought up against a table or something like that, a wall or whatever it might be, a firm surface. We know that when a rapidly moving head hits a static object, it can produce the sheering forces in great amount sufficient to produce all the injuries that we see in the head. So this debate goes on. I do

not concur that this injury could have occurred by the shake impact. This fracture of her skull did not occur from shaking. The fractures we see in the shake impact are almost invariably either at the back of the head or the front of the head, because they don't shake the baby from side to side and this is on the side of the head. The injuries to Susie's brain that lead to her death would have had to have happened within hours before her admission to Chapel Hill. (T Vol. 20 pp 854-61).

14. Scott Ingle, 10-years-old:

a. In August 1991, I lived on Jimmy Bowles' Road with my mom, Susie, Tony, and defendant Johnny Burr. I know what it means to tell the truth. It means to not lie. I know what the Bible is. I know that if I do not tell the truth I get in trouble. In August 1991, Rita, Donald, Christy, and Misty Wade were living in the second trailer up the hill from where we lived. I remember falling with Susie in my arms. I was holding Susie like this (turning toward the jury). I tripped on a cord and fell like this (demonstrates). I hit one knee and hurt the knee. And my elbow. (Demonstrates again). I did not go all the way to the ground. Susie did not come out of my arms. (T Vol. 20 pp 862-68).

b. I remember one time before Susie got hurt when I was outside playing football with my mom and Tony. I went in and Johnny was shaking Susie. I heard her crying. I went into the back door. Susie was in the living room and Johnny carried her into the kitchen. She was not crying before Johnny shook her. She was crying, and then when I went in there she had done stopped, but then he started shaking her. I can show the jury how he was shaking her. Johnny had her and shook her like that (demonstrates). When he shook her, she cried harder. Johnny did not see me because I was hiding. I didn't want him to see me. I was scared of him. I have seen Johnny shake Susie on other occasions. Tony and J. was like in the woods and I was near the back door and I heard her crying and I went in through the back door and peeked through the door. The door that was cracked was in mom's bedroom. Mama was at Aunt Rita's. Johnny and Susie were in there. I looked through the crack in the door. Susie was in her crib. Johnny was shaking Susie hard (demonstrates). Susie cried when he shook her. She kept on crying. I did not tell anybody because I was scared that he would kill my mama. I had heard him say that. I just heard him say I'll kill you, but then my mama had told me the rest of what he said. He said that if you leave me, I'll kill you. I am telling the truth. I don't remember seeing him shake her at other times. On these two occasions, I don't remember if he said anything to her. (T Vol. 20 pp 868-76).

c. I remember the night after I fell with Susie and the night Susie got hurt real bad and had to go to the hospital. Before I went to bed that night, Johnny, Susie, me, and Tony were in the trailer. Mama was at Aunt Rita's washing dishes. Johnny

told me to go to bed. I went to sleep. I woke up that night. I heard hammer noises. It woke me up and Susie started crying. I also heard a little bit of mumbling. The mumbling sounded like a man's voice. It sounded like was defendant's voice. I could not make out what he was saying. Susie was crying when I heard the mumbling sound. Then her crying stopped. I just went back to bed. I did not go out and check on her or anything because I was scared of what was happening. I did not tell those two officers right there when they talked to me about this because I was too scared to. The sounds were coming from either the bathroom or my mama's room. I know what curse words are and I don't remember if I heard Johnny say any curse words to Susie. I heard Susie stop crying. That is when I went back to sleep. I heard no other noise or anyone else in the trailer when this was going on. Tony was in the bedroom, too. I don't know if he was awake or asleep. (T Vol. 20 pp 876-83).

d. I think I made a recorded statement to the two police officers. (T Vol. 20 p 885). I got over being scared when Johnny was in jail. (T Vol. 20 p 889). I don't remember if the shaking of Susie by Johnny was a week or two before they took Susie to the hospital. The first time I saw the shaking was when my mother was playing football during daylight. It was not after supper. It was before supper. I did not tell my mother because I was afraid he would kill her. I first told Mr. Allen (one of the prosecutors) about this. I think it was after Christmas when I told them. (T Vol. 20 pp 893-95). One time when I saw Johnny shaking Susie was when mom was at Aunt Rita's; the other time was when we were playing football. Johnny would shake her and then when he would try to get her to stop crying by giving her a bottle or something. I remember telling the officers that Johnny would whip me hard and that I saw Johnny choking my mother. I did hear Johnny say to my mama "I'll kill you, Lisa." I am telling the jury the truth about him shaking her on those occasions and about hearing the banging noise or the hammering noise. (T Vol. 20 pp 899-902).

15. Dr. William S. Willcockson:

a. I'm a physician at the emergency rooms of Alamance County Hospital and Alamance Memorial Hospital. I received my medical degree in 1985 from the University of Texas Medical Branch in Galveston and I have had postgraduate training in internal medicine and have had neurology training at UNC-Chapel Hill. I also have a Ph.D. in pharmacology and toxicology, which I received in 1981. (T Vol. 21 pp 912-13).

b. I've reviewed Susie O'Daniel's medical records. She was seen in the emergency room on 17 July 1991 by Dr. Rick Waller. It appears that the child was pulling at her ears for a day or so, had some decreased appetite, had no fever, and had slightly red ear drums, indicating a likely infection. An antibiotic, amoxicillin, was prescribed. She was seen again on 26 July 1991, this time by

me. She had normal vital signs, pulse and breathing and temperature. She had what we call oral thrush, a yeast infection of the throat and this is a common occurrence after giving antibiotics. It could have resulted from the amoxicillin given the week earlier. I found no other abnormalities and the ears looked fine. (T Vol. 21 pp 915-17).

c. I saw Susie on 25 August 1991. She arrived at 2:55 a.m. She was unconscious and poorly responsive. The child had multiple bruises and swellings all over the head, in the scalp, both ears, the face, the neck, the arms, the legs, the main portion of the trunk. She had bulging fontanel, the soft spot, indicating some swelling inside the head. She had what we call crepitus in the extremities which means that when you touch the extremities or move them a little bit you can feel a grating type of feeling; this was noted in both arms and both legs in what we call the proximal aspect or the areas of the limbs that are closest to the trunk. It was feeling typical of fracture of the bones. When I saw the extent of the injuries, I asked the mother point-blank if the child had been abused. (T Vol. 21 pp 920-22).

16. Dr. Michael B. Tennison:

a. I am a child neurologist in the Department of Neurology at UNC-Chapel Hill. I received my medical degree at Harvard in 1975. I then trained for three years at UCLA in pediatrics. I then took three additional years of training in neurology with emphasis in child neurology. I've published articles. I am certified with the American Board of Pediatrics in Pediatrics. I'm certified by the American Board of Psychiatry and Neurology in neurology with special competence in child neurology. I'm certified by the American Board of clinical Neurophysiology. (T Vol. 21 pp 944-49)

b. I first saw Susie on 25 August 1991. It seemed clear that the child had suffered multiple trauma. There were bruises and we had a CT scan which showed a depressed skull fracture and multifocal intercranial injuries and bilateral retinal hemorrhages. Bilateral retinal hemorrhages means that there is bleeding in the back of both eyes. It is highly suggestive of a shaken baby syndrome: of a specific kind of injury where the baby has a whiplash kind of injury from being shaken back and forth. "Shaken baby syndrome" is a mechanism of injury. If a child is shaken vigorously back and forth, that will tend to cause a lot of pressure in the back of the eye and produce bleeding. It would also typically produce multiple injuries to the brain, contusions to the brain or bruising of the brain; I found evidence of this in Susie's case. We felt that a shake was an element of the injury she received. She probably had received different kinds of injuries or multiple injuries. We knew there was a depressed skull fracture in the left temporal area, and that would indicate that there had been quite a force delivered by some blunt object to that

side of the head. There was no wound on the scalp, so it had to be more of a blunt kind of object, as opposed to a bullet or a knife. There was no broken skin and no external bleeding. The retinal hemorrhages were detected by using an ophthalmoscope to look through the pupil into the back of the eye. (T Vol. 21 pp 949-51).

c. The CAT scan disclosed a depression in the skull, indicating that in addition to some kind of whiplash type injury, there was also some kind of severe force applied to that side of the head. The force required to cause the injury to the left side of the child's skull was a great deal of force; it wouldn't be just a simple bump or fall. A hard blow with a closed fist would be the kind of force that would be required, or the skull moving at a very fast speed then running into something that was solid or stationary, like in an automobile accident. I'm aware of the story about the child's eight-year-old brother falling with her (prosecutor demonstrating). It would be very unlikely for such an injury to occur during such a fall. We know that people that fall from a height of three feet or so usually do not provide enough force to produce even a skull fracture, and certainly not this kind of depressed skull fracture. At the most it might produce a crack in the skull like if you drop an egg and it cracks on the outside. But to produce the actual whole thing being caved in would require a great deal of force. It would have had to have been a pretty violent fall. I would not expect to find retinal hemorrhages from such a fall; they come from the repeated shaking type action. It seemed impossible to me that a single injury or single fall or a single blow could have produced everything we saw. We also found damage to the right side of the brain. I did not think one single blow could have done that. (T Vol. 21 pp 955-59).

d. Following the infliction of these injuries, you'd expect the child to have symptoms almost from the very beginning and certainly the child might worsen over the course of hours, but she'd be significantly ill, and obviously in trouble from the very beginning. Whatever the injury was, from that point on the child should have been obviously not right. If the child had fallen around six to six thirty on the evening of Saturday 24 August 1991, it would not be very likely that the symptoms would not have been seen until one or two in the morning. "Q: I mean if the child appeared to be otherwise fine from six thirty on up through the rest of the evening, up until the following morning sometime, it appeared to be otherwise normal, playful, happy, lucid in some manner, would you expect to see that, can you explain that to us? A: I can't in this case. We do know that children can have delayed deterioration after a head injury, and it's thought to be due to brain swelling, or excessive amounts of blood accumulating within the skull, within the brain, and those children, typically recover okay, although occasionally they don't and they go on to have this malignant brain swelling problem and die, after an injury that didn't render them completely unconscious initially or only transiently unconscious and then they recovered and they later they

get worse again. That's something that happens uniquely in children. But that doesn't explain the sequence of events that we see in this child's brain, with the bilateral hemorrhages in the eyes, the multiple injuries in the brain, that would not be the -- in my opinion, reasonable to believe that a single injury could have produced all of that, the child would have been fine and then later deteriorated. Q: Have you ever seen a child who sustained a single injury to exhibit the symptoms that Susie did? A: No, actually delayed deterioration after a, . . . moderate injury, is a fairly uncommon event . . . ." Considering the multiple injuries and the retinal hemorrhages, it just doesn't add up at all to delayed deterioration. (T Vol. 21 pp 960-62).

e. Given the multiplicity and type of injuries Susie sustained, I would expect that the course of time from infliction of the injuries to time of death would be 48 to 72 hours. I know Susie died on Tuesday, 27 August 1991. On the 26th, we felt she had no evidence of brain or hemispheric or brain stem function, so we felt she was basically clinically brain dead by the next day. After receiving the injuries, loss of consciousness would have likely have occurred within minutes to an hour or so. Prior to losing consciousness, she would have felt pain. The symptoms of the injury would have been obvious, outward signs of injury and that anybody paying attention to a baby would have been very alarmed by how a baby must look after an injury like that. The outward signs I would expect would be that she wouldn't make visual contact with you properly, maybe poorly arousable, in a sleep-lie state, and certainly wouldn't be responding normally, and wouldn't eat. There very well could be a seizure. Either the child's eyes would be closed and in unarousable state, in a coma state, or if her eyes were open, they would be very glassy and not making that eye to eye contact with you. "Doll's eye" is used to describe a situation in which if you are in a comatose state and if you move your head back and forth, the eyes will move in the orbit, and that indicates that the brain is no longer suppressing or controlling that response. We saw on 25 August 1991 that Susie had a positive "doll's eyes" response. Anything that injures both hemispheres of the brain, both halves to the top of the brain, will allow that reflect to be apparent, anything that renders you in a comatose state essentially. (T Vol. 21 pp 962-66).

f. The combination of the multiple injuries contributes to my opinion concerning the time between infliction of the injuries and the onset of observable symptoms as being nearly immediate. You know it was a severe injury, given the depressed skull fracture and the retinal hemorrhages, it all adds up to a very massive and ultimately lethal injury. So that you would expect symptoms to have their onset very quickly. In my opinion, Susie's injuries could not have been the result of an accident. From the way I understand the fall by her brother, I can't see how that fall could have produced this child's symptom complex of all the different injuries that were seen, and specifically the brain injuries. The

vast majority of children that fall from that kind of height, even if they were just let go and dropped straight down, do fine, and at the very worst, they have what we call a linear skull fracture or crack in the skull, where they heal and have no problems. They do not get a depressed kind of caved-in kind of appearance of a fracture. Less than probably one percent of the patients are going to have any kind of serious problem from that. It seems very unlikely that that kind of fall could have produced this kind of serious injury. Susie's fracture does not fit the expected description of a fracture from a fall. Her fracture was the type you would expect to see from a blunt force trauma. (T Vol. 21 pp 967-69).

g. When Susie was first admitted, she appeared to have some blood flow to the brain. The degree of swelling was not as pronounced then as it was when she expired, a fact shown by CT scans. That would be consistent with the recent infliction of these head injuries. Infliction of the head injuries could not have been very long prior to our seeing the child. It could have been hours to a day. (T Vol. 21 pp 973-74). At 6:30 p.m., 27 August 1991, there was no evidence of any electrical activity in her brain. She was brain dead. (T Vol. 21 p 975) We felt on the 26th, one day earlier, that in all likelihood the child was brain dead, but we had a number of criteria to apply. (T Vol. 21 p 976). In my opinion, the cause of death was multiple trauma to her head that resulted in contusions of the brain and eventually brain swelling and herniation and brain death. The multiple trauma was a combination of the blunt force to the head and the element of shaking. (T Vol. 21 p 978). In treating a child injured such as this, we use the team approach. We have a bunch of people in different fields looking at different aspects of the case (e.g., pediatric surgeons, pediatric neurosurgeons, neurologists, pediatric intensive care specialists and a whole variety of specialists who might be necessary to care for the child. (T Vol. 21 p 984).

h. There is evidence in this case of shaking over and beyond shake impact, such as shaking and hitting the head against something. The multiple severe retinal hemorrhages on both sides almost certainly means with as high a confidence as you can have, the child had suffered a severe whiplash, from a shake injury. This is sort of a pathognomonic sign of that. It was not just like shaking someone to wake them up. It would require really very violent shaking and I don't know exactly how much it takes. The usual sort of shaking that might be done if a child had a seizure or some other medical illness would not do it. It doesn't take very long to produce this type of injury. "Q: And would you likely start to see the symptoms very shortly thereafter? A: The child would physically be ill, yes, right away. Q: Right away. When you combine shaking with a blunt trauma, again, does that reinforce that you're going to see these symptoms almost right away? A: I would certainly expect it, yes." The child would

display symptoms such as not making visual contact, would be very lethargic, maybe even comatose, maybe even have seizures or twitching movements of the arms or legs or face, and would not want to eat. I ascertained the shaking type injury based on a combination of what we saw on the CT scan plus the retinal hemorrhaging. (T Vol. 21 pp 985-87). The broken arms and broken legs were not the cause of death. (T Vol. 21 pp 994-95).

17. Dr. Richard G. Azizkhan:

a. I am a pediatric surgeon at State University in New York, Buffalo Children's Hospital. I'm chief of the children's hospital and a professor of surgery. In August 1991, I was the chief of pediatric surgery and associate professor of surgery at UNC-Chapel Hill. I received my medical training at Penn State where I graduated in 1975. I had surgical training at the University of Virginia. I completed my general surgery training and had pediatrics surgery training at both Boston Children's Hospital and Johns Hopkins. At UNC, I also taught medical students, residents, and interns. I was chief of pediatric surgery at UNC for eight years. I am a diplomate of the American College of Surgeons, and also a fellow of that organization. I am board certified in general surgery, pediatric surgery, and critical care surgery. I have published about 90 articles in a variety of scientific journals and I've published one book and several book chapters. Several of my publications have dealt with pediatric trauma and management and trauma systems development. (T Vol. 21 pp 996-999).

b. I saw Tarissa Sue O'Daniel about 6:00 a.m. on 25 August 1991. My trauma team was assembled awaiting her arrival. Dr. Arno Zuritski was associate professor of pediatrics, the chief of the pediatric intensive care unit. He is now at King's Daughter Hospital in Norfolk, Virigina; he specializes in children's diseases and trauma at that children's hospital. I observed the following external injuries on the child: bruising of the neck, particularly on the left side, we had about a two by two centimeter area that's little less than an inch that was sitting underneath the mastoid and the mandibular portion of her neck (indicates on neck). She also had bruising on this part of her face on the right side, and it extended on her ears. She had circumferential bruising of the right mid arm, upper arm. She had one bruise on her back and other bruises that were sort of scattered throughout her surface. By touching the arms and legs, there was obvious fractures that were present in both upper arms and both femur areas. You could angulate the legs abnormally, in other words, you could flex them in a position that would not be natural. There was bruising of the ears. (T Vol. 21 pp 1001-003).

c. We saw no evidence of external bleeding, no scraps, or cuts. It was all internal. What disturbed me when I looked at her, was the two centimeter bruise that was underneath the edge of her mandible. That's very a very unusual location for a bruise,

except when someone is grabbed very tightly. State's Exhibit 5 portrays the bruising I observed. I saw the large bruise under the chin and the small bruises that go up onto the face and under this part on the chin. That could easily be from the child being grabbed like this very forcibly (demonstrates on doll). It's just an unusual location for a bruise without some kind of direct manipulation. I've seen this a few times in situations where children have been abused or physically injured by somebody they know. (T Vol. 21 pp 1006-007). I observed some redness to the left pinna or the left ear flap. (T Vol. 21 p 1012).

d. The head CAT scan demonstrated significant diffuse injury to the brain, but it was worse on the left side of the brain. She had one area that looked like a fracture and it almost had the characteristic of a pushed in ping pong ball; where the bone actually wasn't broken into but the skull was soft enough that the cortex of the bone was pushed in slightly. The bones in a baby of Susie's age are quite malleable and soft. They have a paramount of resilience and it's not unusual to have children who say, fall and the bone breaks incompletely. An adult might be injured and have a clean break, a snap, but a child's bones are soft and malleable so it tends to break like a green stick where only part of the bone breaks. When you see fractures that are of this magnitude in a baby, you know that the amount of force that's been delivered is very significant, much, much greater than from a simple fall. (T Vol. 21 pp 1014-15). Even though she had this depression on the left side, the effect of the injury extended throughout the entire brain. (T Vol. 21 p 1018).

e. I have been working with children in my medical practice for more than 15 years. I treat two or three thousand children a year. I have never seen bruises, fractures or lesions on children that have been received in normal play or normal activities that are like Susie's. Her injuries fall into the category of inflicted injury. These bruises would not have been obtained in normal activity. (T Vol. 21 pp 1020-21).

f. I received information about Susie's older brother falling with her in his arms. (Prosecutor demonstrates how he went down with the doll). "Q: Now, Dr. Azizkhan, first of all, in your opinion were Susie's injuries as you observed them incurred by accidental means? A: I do not believe in the remotest chance that they are. Q: Why is that? A: Well, the mechanism of injury that would sustain those kinds of injures has to be extreme force, and the description of Susie being carried by her brother and falling with her, is just not compatible with having four extremity fractures. You can understand perhaps a broken arm, as an isolated injury or even cuts and bruises. . . . but these kinds of fractures don't occur with that type of fall. They would have to be from tremendous height, and/or I think the analogy would be having a child ejected through a windshield at sixty miles an hour hitting a tree, I think it's that kind of force. Q: Now, more to the

point, in your opinion, could Susie's injuries have been sustained by a fall onto a graveled driveway? A: No, I don't believe so. And I think the telltale clue to that is that she had no scrapes or cuts or anything that would have implied that she actually hit the graveled driveway with enough force to cause those kinds of injuries." (T Vol. 21 pp 1024-25).

g. I saw no signs of inflammation, which told me that the injuries were relatively new within a few hours or a few days. (T Vol. 21 p 1032). The injuries I saw on Susie's legs were certainly consistent with snapping. The fractures on the arms are a little different. I believe one of those fractures was not displayed and that could be from intense grabbing of the arm and torquing and pulling the child's arms backwards. In my professional opinion, the time from the infliction of Susie's head injuries to the first visible symptoms would be almost immediately. With that kind of injury the baby would lose consciousness fairly soon after the injury. Considering the degree of the injury and the swelling in the brain, even if the child was conscious for a short time, the child would become unconscious within literally minutes or less -- less than an hour. The most common symptoms of such an injury that you could see could be something as simple as lethargy, vomiting, seizures, and then total loss of motor activities. (T Vol. 21 pp 1037-38).

h. Over a period of time, the pain associated with a fracture dissipates and the child could become more comfortable and tolerant. We see that occasionally with infants that are in the newborn nursery that have very brittle bones and they end up with fractures when they are placed on IV boards. And even though the doctor and nurse are very careful with trying to pad those arms and legs, just the slightest distraction to try to get an IV could cause a fracture. And this is a very rare circumstance that occurs in premature babies who have essentially minimal calcium deposits in their bones. I have reviewed Susie's medical records and the autopsy report. I found in the autopsy report a callus formation on one leg; all the other sites had no evidence of callus formation. That would indicate that perhaps one fracture was several days old whereas the other fractures were very recent. I believe that's the case. That would be more consistent with the loss of blood pressure that I saw exhibited in Susie. The loss of blood caused by the multiple fractures could have contributed to her ultimate death. In my opinion, the cause of death was clearly the terminal effect of the brain swelling and the brain death related to her head injury, but I'm convinced that having severe hypotension or low blood pressure, non-profusing the brain for a substantial period of time, clearly contributed to her death. (T Vol. 21 pp 1039-41).

i. I cannot tell from reading the autopsy report how it was determined that their was callus with respect to one leg. There are some histological features that pathologists can address and

that is what they are looking for. They take a piece of tissue adjacent to the bone and examine it. There is a layer of tissue called periosteum that covers the outside of the bone. That area initiates the healing process, and callus is where there is some deposition of new bone matrix and calcium and there is a characteristic appearance that one sees under histology. My understanding is that the medical examiner looks for callus formation in the site of the fracture by physically examining the deceased. I have examined Dr. Merten's reports. He is clearly an expert in pediatric radiology and I greatly respect him professionally and personally. I am aware of the fact that he found both legs had callus formation. You can have a difference of opinion over something like that. It's often very difficult to be absolutely one hundred percent sure unless you see absolute obvious callus formation. And less than five days, you may not see any or you might see a very small amount of reaction around the bone that might make you think that there is some early callus formation. I think histological examination of the tissues is the most reliable way of determining whether there was ongoing healing or not. Generally, healing should be seen eight to ten days after the injury, but there may be exceptions and the exceptions would be somebody who is on steroids and the healing process is impaired. (T Vol. 21 pp 1043-46).

j. **I am aware that Dr. Specter found callus formation on one of the arms as well. I could not see the callus formation in the arms myself.** I did read the x-rays. In the right femur, you could see the periosteum reaction. I wasn't convinced that the left femur had evidence of callus formation. My focus was on trying to save her life. (T Vol. 21 pp 1046-47).

k. Based on her blood pressure and her hematocrit, **I estimate that Susie had lost about one half of her blood volume.** If a child weighed ten pounds, the blood volume would be about 400 to 450 cc's which when translated to ounces (i.e., 30 cc's per ounce), you're talking about 12 ounces. I read Dr. Specter's findings, but I was unable to find callus in the arms. That was at my reading at the time, but I haven't seen the x-rays since the time of death. It is very difficult to determine the order in which the injuries were inflicted. I can conjecture, but not be absolutely certain. I would presume that the child was irritable or crying and that a variety of actions were taken by the perpetrator to try to get her to stop crying, by either twisting or holding her arms and potentially slapping or hitting the child in the left side of the head. The fractures of the arms could have occurred by pulling the arms back like this (demonstrates with doll) and merely using the thumbs to forcibly hold the child and that puts a real significant torque on the bone and that would be enough to fracture the bone. The legs could have been basically snapped forward. You would have had to put the leg in an abnormal position (demonstrates with doll). **The fractures of both the upper arms and the lower legs are very unusual types of fractures. In fifteen years, I haven't seen**

four extremity fractures in a child like this, and I've seen a lot of abused children. Concerning the bruising under the neck, you could grab a child under the neck like this (demonstrating). (T Vol. 21 pp 1049-56).

18. Dr. Karen E. Chancellor:

a. I am a pathologist at UNC-Hospitals. I graduated from Duke University Medical School in 1985. I pursued postgraduate specialty training in pathology at the University of Kentucky. In 1990, I came to UNC-Chapel Hill where I continued my study. In July 1991, I became assistance chief medical examiner for the State and worked in the medical examiner's office as a forensic pathologist from July 1991 to the end of June 1992. I am now a fellow in neuropathology and instructor in biochemistry at UNC. I'm still employed part-time by the office of the chief medical examiner as a forensic pathologist. (T Vol. 22 pp 1060-61).

b. Susie's body was 22 and 3/4 inches in length. She weighed ten and a half pounds. (T Vol. 22 p 1066). I noted bruises not attributed to medical intervention. There were two bruises on the back of the head, a bruise on the left side of the face and several bruises on the right jaw area. (T Vol. 22 pp 1069). State's Exhibit 6 shows the child's head and upper chest area. None of the bruises or any portion of the skin shown therein show any signs of cutting, scraping, tearing, or any form of external injury other than the bruise itself. Looking at the bruises on the neck, one is larger than the other. These bruises are consistent with marks caused by a handprint. Concerning the bruises on the cheek shown in State's Exhibit 6, the bruises are consistent with marks made by fingers. Concerning the bruises on the chest shown in State's Exhibit 5, the bruises are punctate or round bruises. In my opinion, these bruises were caused by a blunt object. Concerning the bruises on the back shown in State's Exhibit 4, that bruise is a round or punctate type bruise. It was caused by blunt force. Concerning State's Exhibit 8, showing bruises to the baby's right arm and chest area, there are small round bruises on the chest area as well as a larger area of the brown bruising of the arm. The ones on the chest are round or punctate bruises; the one on the upper arm is more diffuse. My opinion is that the bruises on the chest were caused by blunt force injury to the child's body. The diffuse bruise on the upper arm is due to trauma. It could be associated with a fracture. Concerning State's Exhibit 9, there is a bruise on the upper part of the left shoulder. It is a round, small bruise caused by blunt force to the body. Concerning State's Exhibit 10, my opinion is that the brown bruising shown there is associated with a fracture of the left arm. State's Exhibit 3 is a frontal photo of the baby demonstrating bruising. Small bluish bruises appear on the upper part of the right shoulder and the midpart of the upper chest, and also on the upper parts of each leg, which show brown areas of bruising. The brown areas are not punctate, they are not round and small; they

are diffuse. In my opinion these brown areas of bruising are associated with underlying fractures of the upper legs. There is a very small bruise on the forehead area, but there was no breaking of the skin. (T Vol. 22 pp 1070-82).

c. When I opened the head to examine the brain, I noticed that there was bruising in the scalp tissue. When I reflected the scalp tissue (i.e., pulled it forward and backward) from the skull, this bruising was located on the left side of the back of the head in the approximate location of the bruises I demonstrated on the back of the head. When I opened the skull, there was blood over the left side of the brain in what is known as the subdural space. The eyes were removed during the examination and sent to the neuropathologist, who found retinal hemorrhages in both eyes. I reviewed the x-rays findings with Dr. Merten. There were four broken bones, both arm bones and both upper leg bones. There were complete fractures of the bone; they were not just splintered fractures (i.e., they were all the way through). In my autopsy report, I used the word "comminuted," which means that the bone is broken into pieces. That was seen on the x-ray. I found no evidence of injury to internal organs other than to the brain and to the eyes. "Q: Did there appear to be any signs of any type of bone disorder or degenerative diseases in the bones of this child? A: No, there was no degenerative disease processes." The bones of an infant are not completely calcified, so they are more likely to be deformed by an injury rather than broken. They can be deformed (i.e., dented in or depressed) without an actual fracture. An infant can receive an injury that is significant without the bone being broken. My opinion is that these were not accidental injuries because there is evidence of significant trauma to the head; this type of injury cannot be incurred during a fall or any sort of accident. The trauma is the bruising on the scalp and on the back of the head and also the subdural hemorrhage as well as the subarachnoid hemorrhage on the brain as well as the hemorrhages in the eyes. I am referring to the same injury to the upper left side of the head as Dr. Merten found on the x-ray. The injuries were throughout the brain, however, they were much more marked on the left side. The fractures to the upper arms and lower legs would have resulted in internal bleeding. My opinion is that death was the result of head trauma that was inflicted on the child's head due to blunt trauma. A significant degree of force would be required to inflict this type of trauma. In my opinion, it would not be possible for such a significant force to have been the result of an accidental fall whereby Susie was being held in the arms of her younger brother as he fell to the ground cradling her in his arms; infants that fall from a height of three feet or less do not sustain these types of injuries. These injuries, including both the head injury and the fractures of the extremities, are not consistent with a fall. My opinion is that the injuries to the head and the fractures of the arms could have resulted in part from shaking. If an infant is shaken by holding either the arms or the legs, I think you can see a shaking injury that could cause

fractures of these extremities. Also, if an infant is shaken like this, because an infant's neck is very flexible, the head is relatively heavy in relation to the body, and babies don't have much control of the head, it's very easy to cause head trauma by shaking a child. The bruises on her back and head could not have been caused by shaking alone. There would have had to have been a blow to the head or an impact of some foreign object to have caused those bruises. During shaking, the baby could have hit against a blunt object, such as a bedrail or bedpost or a hand -- anything that was hard. A closed human hand could have caused the impact injury to the baby's head. All these injuries together rule out an accidental occurrence. Regarding the small round bruises on the chest, arms, and shoulders, they are consistent with a small blunt object, such as the end of a broken stick, a hand, particularly the fingers, or a knuckle. I believe ten and a half pounds is a normal weight for a four and a half month old child. (T Vol. 22 pp 1083-95).

d. The fractures could have been caused by shaking. The injury to the head could have been caused by shake impact. The injury to the head could have been caused by a fist. When a bruise is inflicted, it is usually bluish purple in color. The usual sequence would be from blue-purple to green to yellow color. The time sequence over which this color change occurs is extremely variable (i.e., a bruise inflicted a week after another bruise may look pretty much the same color). There is no correlation with time sequence and the color of the bruise. (T Vol. 22 pp 1101-02).

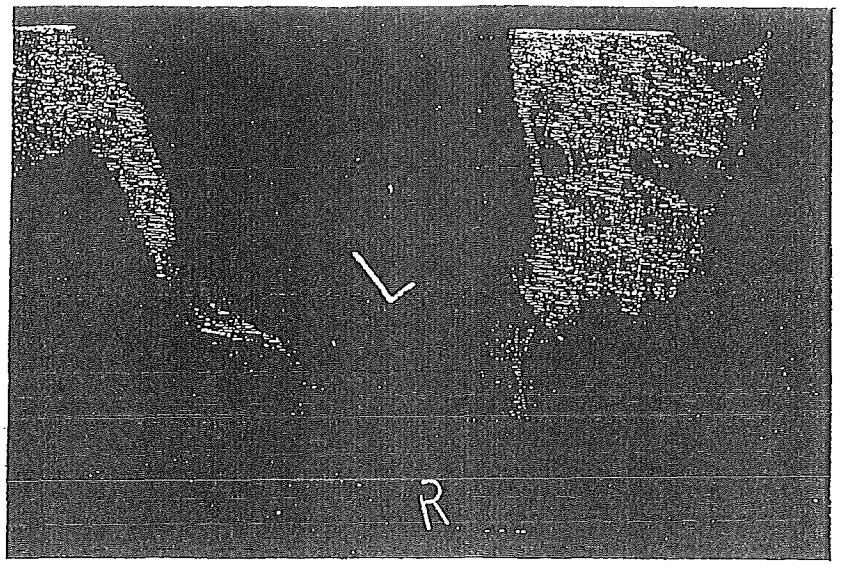


Fig. 3. Radiographs of the left extremity (left) and bilateral femurs and proximal legs (right), showing severe curvature, osteopenia and fractures. Incomplete formation of each joint is visible.

Table 1
Classification of osteogenesis imperfecta [15]

Sillence type	Clinical features	Inheritance	Birth frequency
I[a]	Mild to moderate severity; little impairment of growth; blue sclerae at all ages	Autosomal dominant; new mutation occurs frequently	1/30 000
II	Very severe disease causing stillbirth or early neonatal death	Not known in most cases; autosomal recessive in some; new dominant mutation in others	1/40 000 – 60 000
III	Severe disease with antenatal fractures in most cases; progressive deformity common; severe impairment of growth; blue sclerae in some but not all cases	Autosomal recessive in most cases	Rarer than Type II
IV[a]	Mild to moderate severity; impairment of growth may occur; white sclerae in older children and adults; pale blue sclerae in early childhood	Autosomal dominant; new mutation occurs frequently	Quite rare

[a]Subdivided into A (without dental abnormality) and B (with dentinogenesis imperfecta).

TABLE 2: Clinical Features of Osteogenesis Imperfecta Subtype IVA*

Feature	Frequency (%)
Height	
<2 SD	68
<4 SD	41
Fractures	
Ribs	40
Skull	28
Sclerae	
White	56
White but earlier pale blue	30
Pale blue	13
Teeth	
No or few fillings	88
Crumbling and/or more than average decay	12
Nosebleeds	30
Easy bruising	32
Deafness	13
Hernia	10
Excessive sweating	60
Dislocated joints	27
Double jointedness	51

* Modified after Paterson et al. [23]

description of radiographs (including skulls) was given. Also, systematic description of associated abnormalities was not detailed, and all data were obtained from questionnaires filled out by patients and/or parents.

From the total of 78 patients with OI subtype IVA, Paterson et al. [23] investigated only 17 sets of radiographs (22%), which included only 11 skull radiographs (14%). Of these, 9% had significant (>10) wormian bones, 45.5% had one to 10 wormian bones, and 45.5% had no wormian bones. No comment was made on association of wormian bones with osteoporosis. Metaphyseal fractures were shown in 24% (4/17) of examined radiographs, normal bones at the time of first fracture were shown in 59% (10/17), but in 18% (3/17) osteoporosis developed later. No comment was made regarding the remaining patients. As in his earlier work [20], no further detailed data were given. No radiographs of patients with OI subtype IVA are presented in his paper to verify his radiologic findings [23]. In this study, the prevalence of skull fractures was unusually high (28%). The reason for this was questioned by Carty and Shaw [59], who raised the possibility of misdiagnosis of OI for actual child abuse.

Obviously, Paterson's studies are flawed and incomplete because only a small percentage of radiographs of patients with OI type IV [20] and subtype IVA [23] were reviewed. Also, only sporadic comments were made on associated radiologic and clinical features of individual patients [23, 59]. Radiologic documentation to support his findings is lacking. Further detailed information about these cases of OI type IV is needed to make an accurate assessment and conclusion. The validity of Paterson's work has been questioned before [59]. Paterson and colleagues did not explain how they diagnose OI subtype IVA with neither radiologic confirmation nor progressive deformity (except fractures), without family history, with normal sclera and teeth, and without fracture recurrence in protective environment [14, 59–62]. It would indeed be difficult to diagnose OI without at least some oti definite feature of OI. The rarity of sporadic (without fam history) type IV OI can be appreciated from understandi that the probability of encountering a child with this type OI in a large city (population 500,000) is estimated by Ta to be between 1/1,000,000 and 1/3,000,000 births [14]; thi one case might occur every 100 to 300 years. These numbe are based on a study by Silence et al. [13] in which nine 180 patients with OI had OI type IV; only one of the instances was a sporadic case with no family history. Pat son and coworkers' studies [20, 23] of OI type IV are al sources of these estimates.

Distinguishing Osteogenesis Imperfecta from Child Abuse

Patient and family history, physical examination, diagnos imaging, and the clinical course all contribute to the distincti of OI from child abuse. The major features of OI are discuss in the preceding sections and are summarized in Table 3. T features in clinical history and physical examination that a helpful to the radiologist in diagnosing child abuse [63–6 are listed in Table 4, and the salient radiologic features child abuse [33, 64–68] are summarized in Table 5. The ke to distinguishing OI from abuse are the presence of bl sclera or abnormal teeth; investigation of clinical and fam

TABLE 3: Summary of the Salient Features of Osteogenesis Imperfecta

1. Bone fragility, fractures, osteoporosis
2. Blue sclerae
3. Deafness or hearing impairment
4. Dentinogenesis imperfecta
5. Wormian bones
6. Positive family history of hearing impairment, dentinogenes imperfecta, osteogenesis imperfecta, and/or history of fractur or bone deformity
7. Ligamentous laxity and hypermobility of joints
8. Abnormal temperature regulation (heat intolerance, excessi sweating)
9. Easy bruising
10. Fragile skin
11. Short stature, growth retardation
12. Progressive scoliosis
13. Fractures continue in protected environment

TABLE 4: Features in Clinical History and Physical Examinatio Helpful to the Radiologist in Diagnosing Child Abuse

1. Injury with cause or extent not compatible with a given history
2. Inconsistent or conflicting history
3. Lack of history of significant trauma in patient with fractures
4. Lack of or delay in seeking appropriate medical attention for a injury
5. Retinal hemorrhages
6. Specific bruises (e.g., palmprints, fingerprints, strap marks bruises in unusual places (perineum), human bites, and cigaret burns
7. Lack of blue sclera
8. Lack of clinical features or family history of osteogenesis impe fecta (see Table 3)

TABLE 5: Radiologic Features of Child Abuse*

1. Bucket-handle and metaphyseal corner fractures
2. Multiple rib fractures, especially posterior rib fractures
3. Multiple fractures and/or multiple fractures showing different stages of healing
4. Scapular, acromial, or sternal fractures
5. Transverse, oblique, or spiral fractures of long bones in nonambulatory infants in the absence of significant accidental trauma or fracture inconsistent with given history
6. Fracture separations of distal humeral epiphysis or distal femoral epiphysis (suggestive but nondiagnostic of abuse)
7. Unsuspected fractures found in patient without history of trauma
8. Unexplained fractures associated with normal bone mineralization
9. Lack of repeated fractures in a protective environment
10. Visceral injuries such as duodenal or jejunal hematomas
11. Head injuries not compatible with mechanism of injury or unexplained, such as subdural hematoma, subarachnoid hemorrhage, diffuse cerebral edema, intracerebral hematoma, and skull fracture; although head injuries can be the result of child abuse, they are not distinctive and look like abnormalities of other cause

* Adapted from Silverman [33], Kleinman [64], Hilton [65], Kleinman et al. [66], Radkowski et al. [67], and Kirks [68].

history; physical examination; and radiologic examination for detection of wormian bones, osteoporosis, metaphyseal corner fractures and bucket-handle fractures or other fractures typical of abuse. Metaphyseal corner fractures and bucket-handle fractures (Fig. 9A) are virtually pathognomonic and highly specific features of child abuse [64–66]. They both result from the same pathologic injury and are simply variations in appearance due to different radiographic projections [64, 66]. These types of fractures occur in relatively young infants, usually less than 1 year old, and are highly specific for abuse. The pattern of injury is different from more extensive metaphyseal fractures that may involve the growth plate in older children or metaphyseal fractures in OI, which correspond to type II fractures of the Salter classification. These fractures should be clearly distinguished from abuse-specific metaphyseal lesions in young infants. It must be stressed that the presence of multiple rib fractures (Fig. 9B), especially posterior rib fractures [64, 65, 69] near or at the costovertebral junction (Fig. 10); multiple fractures and/or multiple fractures showing different stages of healing (Fig. 11, see also Fig. 9); and sternal or scapular fractures, especially acromial (see Figs. 11B and 11C), are highly specific of child abuse [64–66]. Transverse, oblique, or spiral fracture of a long bone with normal mineralization (see Fig. 9C) in the absence of significant accidental trauma or fracture inconsistent with given history, especially in a nonambulatory infant, are also highly suggestive of child abuse [64–67].

Blue Sclerae and Osteoporosis

Types I and II of OI easily are distinguished from child abuse simply by the presence of blue sclerae. Of 392 OI patients in a pedigree of 60 families, 370 had blue sclerae [14, 70]. In addition to the child, the parents of OI type I patients should be examined for the presence of blue sclerae. Furthermore, most children with OI type II are stillborn or die in the perinatal period and are easily recognized by the severe radiolc skeletal deformities and osteopenia [1, 13, 14, 20, (Fig. 3).

Most cases of OI type III with normal sclerae cannot confused with child abuse because of the severe nature skeletal deformities [1, 14], marked dwarfism, and the pr ence of osteoporosis (Figs. 4–6). However, a mild case type III with normal sclerae initially may cause problems diagnosis if the skeletal manifestations are not correlated w clinical history, family history, and physical examination. Fa ily history and medical records of family members sho always be reviewed for features of OI.

Wormian Bones

Cremin et al. [71] defined significant wormian bones, opposed to normal developmental variants, as "sutural bon which are 6 mm by 4 mm (in diameter) or larger, in excess 10 in number, with a tendency to arrangement in a mos pattern." The presence of significant wormian bones on sk radiographs (see Figs. 6B and 6C), a feature absent in norm skulls [71], is a strong indicator of OI [63] or other abnorm conditions as listed below. In the study of Cremin et al. [7 88% of 81 patients with proved OI had significant wormi bones. The absence of this feature is strong evidence agai osteogenesis imperfecta [14, 63], although Paterson a McAllion [23, 60] state that the absence of wormian bon does not exclude OI. The neonatal period may present sor difficulties because the skull may be insufficiently ossified too small to evaluate for wormian bones [71]. Cremin et [71] found that essentially all patients with OI except sor neonates (6/81) and adults (4/81) with technically poor rad graphs had wormian bones. Thus, good-quality skull rad graphs (lateral, frontal, and Towne views) later in infancy m be helpful for further evaluation for wormian bones. Cons tent significant wormian bones are not unique to OI; they m also be seen in cleidocranial dysostosis, cretinism, pachyd moperiostosis, Jansen-type metaphyseal dysplasia, Menk syndrome, acroosteolysis, Prader-Willi syndrome, and trisor F translocation. Inconsistent significant wormian bones m be seen in pyknodysostosis, sclerosteosis, hydrocephal osteopetrosis, aminopterin-induced syndrome, Down sy drome, Hallerman-Strieff syndrome, otopalatodigital sy drome, rickets, hypophosphatasia, and progeria [68, 71, 7

Metaphyseal Corner Fractures

Metaphyseal corner fractures and bucket-handle fractun (see Figs. 9A, 11B, 11C, and 11D) are virtually pathognomor and highly specific for child abuse [33, 63, 64, 66, 68]. In C this feature is extremely rare and fractures are seen primar in the diaphyses of long bones [63]. Metaphyseal corn fractures have been reported by Astley [73] in 17% of patien with OI and by Paterson et al. [23] in 23% of patients with (subtype IVA. In all of Astley's patients [73], metaphyse corner fractures invariably were seen together with gener ized bone disease, including osteoporosis, abnormal bor modeling, deformities or fractures, and wormian bones in tl

seen defendant with his children and described him as a good father who had a strong, and loving relationship with his sons. (Tpp. 2337-2345)

Defendant's cousin Billy Chandler testified that defendant lived with Billy and his family for two years in Hartsville, South Carolina. Defendant and Billy worked together driving trucks. Billy described defendant as a good, hard worker who was skilled at carpentry and welding. Defendant was always helpful; he would repair Billy's trucks without charge and on one occasion, helped cut firewood for a needy neighbor. Defendant babysat Billy's stepson during a visit in either late July or early August, 1991. Billy trusted defendant with the child and said that children liked him. (Tpp. 2407-2414)

Jail minister Marvin Strickland testified that he regularly visited defendant in jail, that defendant participated in jail prayer services and had asked Strickland to provide him with Christian materials to read and study. Strickland said that defendant was generous to other inmates; he shared money with them and often acted as a counselor. (Tpp. 2346-2358)

Alamance County Jailors James Alan and Deloris Hortin both testified that defendant had adjusted well to incarceration and caused no problems in the jail. Defendant had been involved in only one minor altercation, with someone whom the jailors described as a well known troublemaker. No punishment was imposed. (Tpp. 2368-2377)

2. State's Rebuttal.

Alamance County jailors Gary Carpenter and Tim Britt testified that the jail had intercepted a Polaroid picture containing a marijuana cigarette concealed in a slit in the picture in an envelope addressed to defendant. Defendant claimed that the picture was

often worked overtime, and in addition he was attending supervisor training school two mornings a week in Greensboro. Birdsall described defendant as thoroughly dependable, conscientious employee who worked hard and advanced. (Tpp. 1461-1474)

Numerous friends and relatives all testified that defendant liked children and was good with them. Defendant was close to his own kids and would play with his son John by extending his fist; John would run onto the fist and fall down laughing. Defendant was not violent, but it was in his character to roughhouse and pick. (Tpp. 1479-1502, 1643-1694)

B. Sentencing Evidence.

The state did not introduce any new evidence at sentencing.

1. Defendant's Sentencing Evidence.

Dana Burr testified at sentencing that defendant was a good father. Defendant called from jail every night to talk to his children and often asked Dana to bring them for visits. She refused because she thought a non-contact visit would be emotionally difficult for the kids. She emphasized that defendant had supported his family even during their separation, and had given her his entire paycheck on August 23, 1991. The couple fought primarily over defendant's long working hours. (Tpp. 2380-2387)

Jeff Chandler testified that defendant was his cousin. Defendant worked for Jeff in Chandler's plumbing business in 1989-90. Jeff described defendant as a good trustworthy employee, who was able to handle difficult situations without frustration. Defendant had also worked as a driver for Chandler's mother, who owned a concession truck. Most of defendant's concession customers were children and defendant treated them well. Jeff had

insinuating that the witness was motivated by pay and arguing "you can get a doctor to say just about anything these days." The Court of Appeals wrote, [s]uch argument not only attacked the integrity of [the expert witness] but also that of defense counsel. We vigorously disapprove of this improper argument." *Id.* at 156, 412 S.E.2d at 162-163.

The prosecutor's argument in the instant case was very similar to the argument disapproved in *Vines*. In bad faith, knowing that defense counsel had done everything in their power to arrange for Ms. Todd to testify, the prosecutor improperly attacked the integrity and professionalism of defense counsel. Failing to sustain defendant's objection to this argument was error.

The prosecutor's erroneous argument prejudiced defendant by calling into question his attorneys' professionalism and thus infringing upon defendant's constitutional right to counsel. *See* Balske, *Prosecutorial Misconduct During Closing Argument*, 37 Mercer L. Rev. 1033, 1055 (1986) (any time the prosecutor unfairly attacks defense counsel, defendant's sixth amendment right to counsel comes into play). Thus, the state carries the burden of showing that the error was harmless beyond a reasonable doubt. Challenging the competence and professionalism of defense counsel and disfavorably comparing defense counsel's integrity to the prosecutor's own, just prior to defense counsel's argument and the jury's deliberations cannot be harmless error. *See State v. Sanderson*, 336 N.C. at 11, 442 S.E.2d at 39-40 (argument which diminishes defendant's counsel in the eyes of the jury requires reversal).

In sum, the trial court erred by overruling defendant's objection to the prosecutor's improper argument which attacked defense counsel's competence and professionalism. Accordingly, defendant must be awarded a new trial.

DEFENSE COUNSEL: Objection.

COURT: Overruled.

(Tpp. 2217-2218). The prosecutor was well aware that defense counsel had made diligent efforts to arrange for Ms. Todd to be present to testify. The prosecutor's bad faith argument that defense counsel had acted incompetently in failing to prepare for trial was completely improper.

Counsel may not argue incompetent and prejudicial matters to the jury. *See e.g.*, *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990). In particular, counsel may not improperly discredit witnesses, *State v. Rossier*, 322 N.C. 826, 370 S.E.2d 359 (1988) (error to imply that professional witness had been paid, where there was no evidence that the witness had received compensation), or personally attack opposing counsel. *State v. Sanderson*, 336 N.C. 1, 11, 442 S.E.2d 33, 39-40 (1994) (error to diminish defendant's counsel in the eyes of the jury); *State v. Payne*, 312 N.C. 647, 325 S.E.2d 205 (1985) (disapproving generally of counsel using argument to "personalize the case" and inviting the jury to consider issues other than the guilt or innocence of the defendant); *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990) (prosecutor's closing argument that defendant objected to certain evidence because he was trying to "pull the wool over the jury's eyes" improper). Numerous other jurisdictions have found reversible error where the prosecutor unfairly attacks defense counsel during closing argument. *See e.g.*, *Spencer v. State*, 466 S.W.2d 749, 754 (Tex. Cr. App. 1971) (error to argue that defense counsel "does not want to see justice done"); *Commonwealth v. Collins*, 462 Pa. 495, 341 A.2d 492 (1975) (error to argue that defense counsel was a creator of smokescreens).

In *State v. Vines*, 105 N.C. App. 147, 412 S.E.2d 156 (1992), the Court of Appeals found plain error where the prosecutor discredited defendant's expert witness by

On Tuesday, April 13, 1993, at the end of defendant's presentation of his case, defense counsel informed the trial court that one of defendant's witnesses, UNC Social Worker Juanita Todd, was not available to testify. Defendant had subpoenaed the witness. Todd informed defense counsel that she would be out of the state until Monday, April 12, 1993. When defense counsel attempted to contact Todd on Monday evening, they were informed that Todd would not be returning to North Carolina until Thursday, April 15th. Defense counsel then contacted Todd in Ohio and found that the witness was recalcitrant; Todd told defense counsel that she believed that since the State had not called her as a witness, the defense would not need her. Defendant asked the judge for an order allowing funds to fly Todd back to North Carolina, or in the alternative, for the trial court to allow defense counsel to read Todd's report into evidence in lieu of calling her as a witness. The trial court agreed to the latter. (Tpp. 1863-1881)

During closing argument, the prosecutor improperly suggested that defense counsel had acted unprofessionally in failing to secure Ms. Todd's presence in the courtroom:

> PROSECUTOR: By gum, ladies and gentlemen, I hope that I don't try a case, particularly one as serious as murder, that I don't talk to my witnesses and if you, any of you ever become the victims of crime, which I hope you don't, but if any of you ever do, I think you would hope that I or some other prosecuting attorney would talk to you and to your witnesses before taking your case into the courtroom, because to do anything less would be working an injustice to the victims.
>
> You've got to make arrangements to have your witness in the courtroom sometimes.
>
> Now, I'll contrast that, if you will, please, to the testimony of Nita Todd, excuse me, not testimony to the record of Nita Todd that was read to you.

but rather detoured to a gas station close to his place of work. (Tpp. 163, 1394, 1407, 1994-1996, 2224-2228).

The defense's requested instruction on non-flight would have allowed the jury to focus on evidence which rebutted the state's claim of callousness. The state's case against defendant was not strong; every circumstantial inference counted. Had defendant's requested instruction been given, there is a reasonable possibility that the outcome in the case would have been different.

In sum, the trial court erred by failing to give defendant's requested instruction on non-flight. Defendant was prejudiced by the trial court's error because this instruction would have assisted defendant in rebutting the state's claim that he lacked concern for the victim. Accordingly, defendant must be awarded a new trial.

XI. THE TRIAL COURT ERRED BY OVERRULING DEFENDANT'S OBJECTION TO THE PROSECUTOR'S BAD FAITH ARGUMENT THAT DEFENSE COUNSEL ACTED UNPROFESSIONALLY BY FAILING TO ARRANGE FOR A WITNESS TO BE PRESENT.

Assignment of Error No. 74, Rp. 192.

The trial court erred by overruling defendant's objection to an unfair attack upon defense counsel during closing argument. The prosecutor's argument infringed upon defendant's constitutional right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 19, 23 and 24 of the North Carolina Constitution. Discrediting defense counsel cannot be harmless error. Accordingly, defendant must be awarded a new trial.

APPENDIX R

Burr v. North Carolina, 517 U.S. 1123 (1996)
116 S.Ct. 1359, 134 L.Ed.2d 526, 64 USLW 3657

116 S.Ct. 1359
Supreme Court of the United States

John Edward BURR, petitioner,
v.
NORTH CAROLINA.

No. 95-7709. | April 1, 1996.

Case below, 341 N.C. 263, 461 S.E.2d 602.

Opinion

Petition for writ of certiorari to the Supreme Court of North Carolina denied.

Parallel Citations

116 S.Ct. 1359 (Mem), 134 L.Ed.2d 526, 64 USLW 3657

End of Document

APPENDIX S

State v. Burr, 341 N.C. 263 (1995)
461 S.E.2d 602

341 N.C. 263
Supreme Court of North Carolina.

STATE of North Carolina
v.
John Edward BURR.

No. 179A93. | Sept. 8, 1995.

Defendant was convicted of capital murder in the Superior Court, Alamance County, A. Leon Stanback, Jr., J. Appeal was taken as of right. The Supreme Court, Orr, J., held that: (1) trial court was not required to allow defendant to rehabilitate prospective jurors dismissed for cause because of their express opposition to imposing death penalty; (2) evidence that defendant had beaten mother of four-month-old victim was admissible to show that pattern of mother's beating was similar to that inflicted upon victim; (3) trial court was not required to conduct an inquiry of jury panel about alleged communication between seated juror and pastoral counsellor during jury's penalty deliberation; (4) prosecutor could argue to jury, during sentencing phase, that jury was conscience of county; and (5) death penalty was not disproportionate, given sentences in other murder cases.

Affirmed.

Whichard, J., concurred in result in part and filed opinion.

**606 *273 Appeal as of right pursuant to N.C.G.S. § 7A–27(a) from a judgment imposing a sentence of death entered by Stanback, J., at the 1 March 1993 Criminal Session of Superior Court, Alamance County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to the additional judgment imposed for assault on a female and conviction for felony child abuse was allowed 13 July 1994. Heard in the Supreme Court 16 February 1995.

Attorneys and Law Firms

Michael F. Easley, Attorney General by Ellen B. Scouten, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender by Janine M. Crawley, Assistant Appellate Defender, for defendant-appellant.

Opinion

ORR, Justice.

On 16 September 1991, defendant was indicted for the first-degree murder of Tarissa Sue O'Daniel, who, at the time of her death, was four months old, and in addition was indicted for one count of felony child abuse. These charges were joined for trial with defendant's appeal from a consolidated judgment finding defendant guilty of two counts of assault on a female entered 6 November 1991 in District Court, Alamance County. Following the presentation of the State's case, the trial court granted defendant's motion to dismiss one charge of assault on a female.

On 16 April 1993, the jury returned a verdict finding defendant guilty of the three remaining charges. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. The judge sentenced defendant in accordance *274 with the jury's recommendation regarding the murder conviction and sentenced him to a term of thirty days' imprisonment for the assault on a female conviction. The judge arrested judgment on the conviction for felony child abuse. From **607 these judgments and conviction, defendant appeals.

The State's evidence tended to show the following: Tarissa Sue O'Daniel ("Susie") was born on 1 April 1991 to Lisa Porter Bridges and Bridges' husband at that time, John Wesley O'Daniel. When Susie was a few weeks old, Bridges began having sexual relations with defendant, who was separated from his wife at the time. When Susie was six weeks old, John O'Daniel discovered his wife was having an affair with defendant and told Bridges that he wanted a divorce.

Subsequently, in June 1991, Bridges and her four children moved into a trailer located next to a trailer owned by Bridges' brother, Donald Wade. Near the end of June, defendant moved into the trailer with Bridges and her four children. Bridges testified that when defendant first moved in with her, "[h]e seemed like a pretty good person," but that after a few weeks, he became physically abusive toward her, bending her hands back in a painful manner, threatening her with a gun, bruising her body, and choking her. Bridges testified that she remained with defendant after this abuse because she "was scared of him."

On 24 August 1991, defendant and Bridges argued most of the day over defendant spending the previous night at his

wife's house and his refusing to take Bridges to her parents' house. At approximately 6:00 p.m., Bridges' son Scott tripped over a cord while he was carrying Susie. Bridges testified, however, that she examined Susie after the fall and did not find any marks on her body except for some redness on her arm, which disappeared. Bridges further testified that later that evening, while she was sitting on the trailer steps with Susie and defendant was mowing the yard, defendant hit Bridges in her lower back with his fist.

After defendant hit her, Bridges went over to her brother's trailer, where defendant eventually joined her. Defendant and Bridges began arguing again, and Bridges left the trailer with the infant child. Bridges testified that defendant followed her and shoved her in the back while she was holding the child. Bridges also told defendant that he was going to make her hurt the child, but Bridges testified that "he just kept running his mouth" and followed her inside her trailer, still arguing.

*275 Once inside the trailer, Bridges placed Susie in her infant swing located in the living room. Bridges testified that while she was still holding onto the swing, defendant pushed her down onto the couch, almost causing her to knock over the swing. When Bridges attempted to get up from the couch, defendant pushed her down again and told her not to leave the couch. Bridges sat on the couch a few minutes and then stood up and walked down the hallway into her bedroom. Bridges testified that defendant followed her to the bedroom and pushed her onto the waterbed, causing the waterbed to break. Bridges testified that after the waterbed broke, defendant "started talking like everything was fine." Bridges and defendant then began repairing the waterbed.

Bridges testified that as they were repairing the waterbed, Susie began to cry and that defendant told Bridges, "go on up there and get her, that's all in the hell she wants anyway, she is so damned spoiled." Bridges took the child out of her swing and brought her back to the bedroom, where she laid her on the waterbed. After defendant finished fixing the bed, Bridges helped her two sons, Scott and Tony, prepare for bed, while her youngest son, John, Jr., remained at Donald Wade's trailer. Bridges testified that she also "got [Susie] to sleep" and placed her in her "baby bed" located in Bridges' bedroom. Bridges testified that when she placed Susie in her bed, she appeared to be physically fine and that she did not have any marks on her. Bridges then went back to the Wades' trailer to wash the dishes. Bridges testified that when she left her trailer, Scott and Tony were ready for bed, Susie was asleep in her bed, and defendant was working on a plug in the living room.

Bridges' son Scott testified that after his mother left to go to the Wades' trailer, and after he went to bed, he was awakened by "hammer noises." When Scott awoke, he heard Susie crying. Scott testified that he then heard defendant "mumbling" and that, **608 after he heard defendant mumbling, Susie stopped crying.

After approximately forty-five minutes, Bridges returned to her trailer and found Susie in her swing in the living room. Bridges testified that defendant was pacing the floor at this time and that he told her to look at the bruises on Susie. Defendant told Bridges that he had moved the child to the swing after she woke up and that some of the marks were grease. Bridges attempted to wash these marks off but discovered that they were not grease.

*276 Bridges testified that she observed bruises in the child's ears, under her neck, on her arms, and on her legs. Bridges further testified that her eyes did not "look right," that she did not act right, and that she did not smile or respond to anything. According to Bridges, defendant refused to take the child to the hospital, so Bridges called North Carolina Memorial Hospital in Chapel Hill from the Wades' trailer.

After Bridges talked to a person at the hospital, who instructed her to bring the child in to be examined, she told defendant that she would call an ambulance if he did not take her to the hospital, and defendant finally agreed to take Susie to the hospital. Bridges testified that at this time, Susie was "jerking." Bridges also testified that she did not know how to get to Memorial Hospital and that they ended up at Alamance County Hospital. On the way to the hospital, defendant stopped at a gas station for gas.

Susie was admitted to the Alamance County Hospital at 2:55 a.m. on 25 August 1991. Bridges told the examining doctor, Dr. Willcockson, that her son had fallen while holding the child the day before. Dr. Willcockson examined the child and observed that she was unconscious and "poorly responsive." The child's eyes were wandering but did not "have any particular following," and her right eye deviated to the right. Dr. Willcockson observed that the child made no oral sounds and that her movements appeared lethargic. The child had occasional twitching of the eyes, face, and arms, which appeared to be seizures according to Dr. Willcockson. The child's respiratory rate was fast, and she had multiple bruises and swellings all over her head, scalp, ears, face, neck, arms, legs, and main portion of her trunk. Further, the soft

spot on the child's head where the bones were forming was bulging, a symptom which Dr. Willcockson testified indicates swelling in the head. Dr. Willcockson also testified that Susie had a "grating feeling" in both arms and legs which meant the bones were grating upon each other and which indicates bone fractures. The X rays revealed that both of the child's arms were broken, as well as both of her thigh bones. The X rays further showed that the child had suffered some posterior rib fractures.

Dr. Willcockson testified that based on the multiplicity of trauma, Bridges' story of another child falling with Susie did not account for the injuries, and he immediately asked Bridges if Susie had been abused, to which Bridges responded in the negative. Dr. Willcockson testified that he "felt that there was such a high suspicion of abuse in *277 the matter" that he contacted the sheriff's department and social services. Dr. Willcockson further testified that based on the bruising around the head, the seizures, and the bulging of the soft spot, he formed the opinion that the child had suffered some form of "closed head injury."

At 5:15 a.m., the child was transferred by ambulance to the intensive care unit at Memorial Hospital in Chapel Hill. Dr. Azizkhan, who was the chief of pediatric surgery and associate professor of surgery at UNC Medical School at this time, testified that he examined Susie at 6:00 a.m. Dr. Azizkhan testified that Susie had bruising of the neck, particularly on the left side of the neck and a two-centimeter-by-two-centimeter area underneath the mastoid and the mandibular portion of her neck. Dr. Azizkhan observed bruising on the right side of the face that extended onto the ear, circumferential bruising of the right arm, and bruising on the back. Dr. Azizkhan testified that the child's blood pressure "was very low for a baby [her] age" and that she had lost "half of her blood volume" from internal bleeding.

Dr. Azizkhan further testified that the bones of a child Susie's age "are quite malleable and soft" and that "when you see fractures **609 that are of this magnitude in a baby, you know that the amount of force that's been delivered is very significant, much, much greater than from a simple fall." Dr. Azizkhan testified that to inflict the injuries to the child's legs "would require either a severe direct blow or some kind of a snapping activity" and that the fractures to the child's arms "could be from intense grabbing of the arm and torquing and pulling the child's arms backwards." In Dr. Azizkhan's opinion, Susie's injuries were "inflicted" instead of "accidental."

Dr. David Merten, a professor of radiology in pediatrics at UNC Medical School and chief of the section of pediatric radiology at Memorial Hospital, studied the child's X rays and testified at trial. Dr. Merten testified that these X rays revealed fractures in both thigh bones with evidence of early healing. In Dr. Merten's opinion, these leg fractures were eight to nine days old. The X rays also revealed fractures on or near both shoulders. These fractures did not show any signs of healing, and, in Dr. Merten's opinion, they occurred five days later than the leg fractures. Dr. Merten testified that the fractures in the legs "were produced simply by bending the knee with violence, significance [sic] force, forward, and hyperextending [the knees]" and that the shoulder fractures were "inflicted and incurred" by "taking the arms and bending them back." Regarding the injuries to the head, *278 Dr. Merten testified that the child had a depressed skull fracture where the skull was actually broken and that the child had suffered injury to the brain underneath this fracture. Dr. Merten testified that this head injury was "a very unusual fracture in a very unusual place" and that "it would take a relatively confined direct blow to that area to produce this type of fracture." Dr. Merten further testified that this head injury occurred within hours before her admission to the hospital in Chapel Hill.

Dr. Michael Byron Tennison, a child neurologist at Memorial Hospital, testified regarding a CT scan done on Susie. Dr. Tennison testified that this scan showed not only a depressed skull fracture, but also "multifocal intercranial injuries" and bleeding behind both eyes. Dr. Tennison testified that bleeding behind both eyes is "highly suggestive of a shaken baby syndrome," which he defined as a "specific kind of injury where the baby has a whiplash kind of injury from being shaken back and forth." Dr. Tennison further testified that, based on the nature of the skull fracture, the child suffered "quite a force ... by some blunt object" to the side of the head and that it would have taken a great deal of force to cause this fracture.

The trauma team at Memorial Hospital attempted to reduce the swelling of the child's brain, but they could not obtain a consistent response, and, after twenty-four hours, they could not reduce the pressure in the brain. The child was pronounced dead at approximately 6:30 p.m. on 27 August 1991. Dr. Tennison testified that the child died as a result of "multiple trauma to her head that resulted in contusions of the brain and eventually brain swelling and herniation and brain death."

Dr. Karen Chancellor, a pathologist at Memorial Hospital, performed an autopsy of the child. Dr. Chancellor observed multiple bruises on the child's neck that were consistent with marks caused by a hand and bruises on the cheek that were consistent with marks caused by fingers. Dr. Chancellor further observed round bruises on the upper chest area and a round bruise on the back, which bruises, in her opinion, were caused by a blunt object. Dr. Chancellor also observed bruises on the back of the head.

Defendant presented evidence that tended to show the following: Defendant testified that on the evening of 24 August 1991, he mowed the yard at Bridges' trailer until dark. During this time, Bridges was sitting on the back steps with Susie. Defendant denied having a conversation with Bridges or striking Bridges while he was mowing. ***279** Defendant testified that when he finished mowing the yard, he joined Bridges and her children and Donald Wades' daughters, Misty and Christy, at the Wades' trailer and watched television for approximately thirty to thirty-five minutes. Defendant and Bridges were arguing at this time about Bridges going to her parents' house. Defendant testified that Bridges finally "got mad enough [and] went out the door" to her trailer, ****610** taking Susie with her. Defendant testified that he remained in the Wades' trailer with Bridges' sons and Wades' daughters.

Defendant testified that after a few minutes passed, he told Scott to tell Bridges that if she wanted to spend the night with her parents, he would take her to their house. Scott left, and, approximately ten minutes later, Bridges returned to the Wades' trailer without Susie. Defendant testified that he told Bridges that he would take her to her parents' house to spend the night. Approximately five minutes later, defendant and Bridges left the Wades' trailer and returned to Bridges' trailer. Defendant testified that he pushed her in a playful manner on the way to her trailer.

Defendant further testified that once they were in Bridges' trailer, he and Bridges went back to the bedroom where the waterbed was located. Defendant testified that at this time, Susie was in her crib in this bedroom. Defendant pushed Bridges onto the waterbed "to have sex," and when he fell on top of her, the bed broke. Defendant and Bridges then attempted to repair the bed. Defendant testified that after they drained the water from the bed and removed the mattress, Bridges went to the Wades' trailer to wash dishes, and he began drilling on the bed. After he started drilling, defendant looked into Susie's crib to see if he had woken her up, and he noticed that her eyes were open. Defendant testified that he stopped drilling, picked up the child, took her into the living room, and put her in the swing, propping up her bottle with a blanket. Defendant wound the swing and pushed it.

Defendant testified that when Bridges returned to her trailer, she helped him put the remaining parts of the bed together. During this time, defendant walked to the kitchen, and he noticed that the swing had stopped and that Susie was holding the blanket with her head over to the side. Defendant returned to the bedroom. Defendant testified that after he and Bridges finished repairing the bed, he took the child out of the swing and brought her back to her crib. As defendant ***280** was putting the child down in the crib, he noticed her diaper was wet, and he told Bridges to change the diaper. Defendant testified that when he picked up the child's legs, her eyes started rolling from one side to the other and that Bridges told defendant that the child was having a seizure. Bridges told defendant that one of her sons was born with seizures and that she knew what to do. Defendant testified that at this time, Bridges shook the child and her eyes stopped rolling. When asked how Bridges shook the child, defendant responded, "[I]t wasn't real hard or nothing." Defendant testified on cross-examination that at this time, he and Bridges took the child into the living room and kitchen where they had a lamp and that he noticed bruises on the child.

Defendant testified that when Susie did not respond to Bridges, Bridges left to call the hospital. Defendant further testified that Bridges returned five minutes later and that he told her that some of the marks on the child could be grease. They wiped the child with a cloth, and some of the marks came off. Defendant testified that he and Bridges then took the child to the hospital, stopping for gas on the way. Defendant denied that the child cried while he was alone with her that night, and he denied that he tried to settle her down or that he beat her.

Defendant also presented evidence, through the testimony of a social worker, that the Alamance County Department of Social Services ("DSS") had received allegations of neglect against Bridges regarding her son Scott on 18 November 1988 and regarding her son Tony on 19 February 1990. On cross-examination, the social worker testified that DSS found the report of neglect regarding Scott to be unsubstantiated, and the social worker testified on redirect that "unsubstantiated" meant that there were "no risk factors to the children in the house." The social worker also testified on cross-examination that in Tony's case, insufficient evidence existed regarding the allegation to open a file.

Colene Faith Flores testified that in August 1991, she went to her friend's house where she observed Bridges with "a little bitty baby." Flores testified that the baby was propped on the couch when she arrived and cried constantly for approximately thirty-five minutes. Flores testified that she **611 then observed Bridges walk over to the baby and "smack" her, stating, "you're driving me crazy." Flores further testified that the baby fell off the couch.

*281 On rebuttal, the State called Flores' ex-boyfriend, James Whitlow, to testify. Whitlow testified that he was with Flores at her friend's house and that at no time did he observe anyone slap the baby off the couch. Whitlow also testified that he had discovered Flores lying to him previously.

JURY SELECTION ISSUES

I.

[1] In his first assignment of error, defendant contends that the trial court erred in denying his pretrial motion to examine prospective jurors challenged for cause, thereby "issuing a blanket ruling prohibiting rehabilitation." Essentially, defendant argues that instead of exercising his discretion, the trial judge erroneously relied upon this blanket ruling to deny his request to rehabilitate prospective jurors Barbee, Watkins, and Torain after they were challenged for cause. We disagree.

> We have noted that while defendants can be given the opportunity to rehabilitate a juror, this is not an entitlement; judges are not required to allow a defendant to attempt to rehabilitate jurors challenged for cause. A trial court in its sound discretion may refuse a defendant's request to attempt to rehabilitate certain jurors challenged for cause by the State.

State v. Skipper, 337 N.C. 1, 18, 446 S.E.2d 252, 261 (1994), *cert. denied,* 513 U.S. 1134, 115 S.Ct. 953, 130 L.Ed.2d 895 (1995).

[2] In the present case, the trial judge did not enter a general ruling that, as a matter of law, defendant would not be allowed to attempt to rehabilitate a juror challenged for cause. Instead, the record shows that Judge Stanback exercised his discretion in denying defendant's *general* pretrial motion seeking to be allowed to attempt to rehabilitate *every* prospective juror challenged for cause by the State. Judge Stanback then exercised his discretion in ruling on defendant's specific requests to be allowed to attempt to rehabilitate individual jurors as these requests were made. Judge Stanback based his specific rulings on the individual juror's answers and demeanor.

Judge Stanback specifically acknowledged that the question of whether to allow defendant to attempt to rehabilitate a prospective juror was within the presiding judge's discretion, and, in at least one instance, he allowed defendant to attempt to rehabilitate a prospective juror. Thus, we conclude that Judge Stanback properly exercised *282 his discretion in denying defendant's specific requests to rehabilitate jurors Barbee, Watkins, and Torain after the State challenged them for cause based on their unequivocal opposition to the death penalty.

"The defendant is not allowed to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court." *State v. Cummings,* 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). In the present case, all three prospective jurors at issue unequivocally expressed an inability to sentence someone to death. Specifically, when asked whether he would vote against a sentence of death, regardless of the evidence, prospective juror Barbee without reservation stated that he would; when asked whether she could vote to return the death sentence, under any set of circumstances, regardless of the judge's instructions on the law, prospective juror Watkins unequivocally answered that she could not; and when asked whether there was any set of circumstances under which he could impose the death penalty, prospective juror Torain answered, "No," regardless of the judge's instructions on the law. Thus, the trial judge did not abuse his discretion in denying defendant's request to attempt to rehabilitate these prospective jurors by further questioning. *See id.; accord State v. Green,* 336 N.C. 142, 159–60, 443 S.E.2d 14, 25, *cert. denied,* 513 U.S. 1046, 115 S.Ct. 642, 130 L.Ed.2d 547 (1994). Accordingly, defendant's first assignment of error is overruled.

II.

[3] Next, defendant contends that the trial court erred in excusing prospective juror **612 Mary Ervin for cause based on her opposition to the death penalty. We disagree.

"The standard for determining whether a prospective juror may be properly excused for cause for his views on capital punishment is whether those views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *State v. Syriani,* 333 N.C. 350, 369, 428 S.E.2d 118, 128 (quoting *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841, 851–52 (1985)), *cert. denied,* 510 U.S. 948, 114 S.Ct. 392, 126 L.Ed.2d 341 (1993), *reh'g denied,* 510 U.S. 1066, 114 S.Ct. 745, 126 L.Ed.2d 707 (1994). However, "a prospective juror's bias may not always be 'provable with unmistakable clarity [and,] [i]n such cases, reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially.' " *Id.* at 370, 428 S.E.2d at 128 (quoting *State v. Davis,* 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert.* *283 *denied,* 496 U.S. 905, 110 S.Ct. 2587, 110 L.Ed.2d 268 (1990)) (alteration in original); *accord Wainwright,* 469 U.S. at 424–25, 105 S.Ct. at 852, 83 L.Ed.2d at 852.

The transcript reveals that at the outset, when asked whether she had any feelings about the death penalty that would influence her as a juror, prospective juror Ervin responded, "Yes, sir." When asked whether she was opposed to the death penalty, she again responded, "Yes, sir." Then, when asked whether her feelings about the death penalty were so strong that she could not vote for the death penalty under any set of circumstances, Ervin responded, "I couldn't." Thereafter, Ervin stated that she could abide by the law and that her feelings would not prevent her from following the law. In response to the question of whether she could vote for the death penalty under some circumstances, she stated, "It depends. Yes, in some."

After asking questions regarding other aspects of the trial, the prosecutor then explained the sentencing procedure to prospective juror Ervin and again asked her questions concerning her feelings about the death penalty. The prosecutor asked Ervin if she could recommend defendant be put to death if she were on the jury and the jury determined that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty. Ervin responded, "I couldn't, no."

Prospective juror Ervin later stated, however, that she "could vote for [the death penalty]," and, when asked whether she would automatically vote against the death penalty, she responded, "No." Thereafter, when asked whether she would automatically vote for death or life, Ervin responded, "Automatic vote for life." When told that this response implied that she would automatically vote against the death penalty, Ervin was asked, "Is that your honest answer, that you would automatically vote for life and against the death penalty because of your views?" Ervin responded, "Yes." However, Ervin then responded in the negative to the question of whether her views on the death penalty would "substantially impair [her] in performing [her] duties as a juror in accordance with the judge's instructions and [her] oath as a juror." The prosecutor then stated:

> Well, you've lost me there. [Y]ou say that you could vote for death, but then you tell me you would automatically vote for life and then you say that your views would not impair you in ... reaching that. I—it can't be all three ways. I need to know where *284 you stand on this thing. The [c]ourt needs to know. Where do you stand on this?

Prospective juror Ervin responded, "I would vote for the death penalty, yes." The court then called a fifteen-minute recess.

After the court reconvened, the following transpired:

> [PROSECUTOR]: All right, Ms. Ervin, again ... I want to emphasize something here. It's not that there's any right answers or wrong answers. I want you to just be as honest with yourself and with the [c]ourt as you can be, and before we broke I was asking you about your feelings that you had on your views on the death penalty and my question is this: [I]t's very simply this: Are your views on the death penalty such that they will impair substantially, **613 make it very difficult for you to serve on this case?
>
> MS. ERVIN: Yes, it would be.
>
> [PROSECUTOR]: Okay. [A] little while ago you told me you would automatically vote for life and then you've come back and said well, you think you could vote for death. What I'm asking you [is,] are your views on the death penalty such that it would make it very difficult for you to follow the law if it required that you come to that point where you vote to impose the death penalty?

MS. ERVIN: Yes, it would be.

[PROSECUTOR]: And along those lines, are you saying that for that reason you believe that you would tend to automatically vote for a life sentence as opposed to a death sentence?

MS. ERVIN: Yes.

[PROSECUTOR]: Even if you were otherwise satisfied? Is that—

MS. ERVIN: Yes.

The prosecutor then moved to excuse prospective juror Ervin for cause. Following a discussion outside the presence of the prospective juror, the court ruled:

> The [c]ourt has observed the demeanor of the witness in addition to her inconsistent answers to the questions that have been posed to her and in its discretion will allow the challenge for cause for this witness.

***285** Ms. Ervin's equivocal yet conflicting responses exemplify the situation anticipated by the United States Supreme Court in *Wainwright,* where the Court recognized that, in some instances, a prospective juror's bias may not be provable with unmistakable clarity. *Wainwright,* 469 U.S. at 424, 105 S.Ct. at 852, 83 L.Ed.2d at 852. Thus, we defer to the trial court's judgment concerning whether prospective juror Ervin would have been able to follow the law impartially. *See Davis,* 325 N.C. at 624, 386 S.E.2d at 426. Some of Ms. Ervin's responses reveal that she was opposed to the death penalty and that her views on the death penalty would cause her to automatically vote for a life sentence, regardless of the circumstances. Further, those responses show that she thought her views on the death penalty would make it difficult for her to follow the law and thus carry out her duties as a juror. Although there were conflicting responses, we conclude that the trial court did not err in excusing prospective juror Ervin for cause. *See Syriani,* 333 N.C. at 371, 428 S.E.2d at 129.

III.

[4] Defendant also contends that the trial court erred in allowing the prosecutor to question prospective juror Fuller about his ability to overlook certain facts in the case based on the argument that these questions improperly "staked out" the juror. We disagree.

> Counsel may not pose hypothetical questions which are designed to elicit from prospective jurors what their decision might be under a given state of facts. Such questions are improper because they tend to "stake out" a juror and cause him to pledge himself to a decision in advance of the evidence to be presented.

State v. Jones, 339 N.C. 114, 134, 451 S.E.2d 826, 835 (1994) (citing *State v. Vinson,* 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated,* 428 U.S. 902, 96 S.Ct. 3204, 49 L.Ed.2d 1206 (1976)), *reconsideration denied,* 339 N.C. 618, 453 S.E.2d 188, *cert. denied,* —— U.S. ——, 115 S.Ct. 2634, 132 L.Ed.2d 873 (1995). "The nature and extent of the inquiry made of prospective jurors on *voir dire* ordinarily rests within the sound discretion of the trial court." *State v. Hill,* 331 N.C. 387, 404, 417 S.E.2d 765, 772 (1992), *cert. denied,* 507 U.S. 924, 113 S.Ct. 1293, 122 L.Ed.2d 684, *reh'g denied,* 507 U.S. 1046, 113 S.Ct. 1886, 123 L.Ed.2d 503 (1993). Thus, "[i]n order for the defendant to show reversible error, he must show that the trial court abused its discretion and that he was prejudiced thereby." *Jones,* 339 N.C. at 134, 451 S.E.2d at 835.

***286** **[5]** In the present case, the prosecutor informed prospective juror Fuller that the evidence may tend to show that the child died from abuse, that she had been subjected to some form of abuse prior to her death, and that the child was not living in "the best of ****614** family environment." The prosecutor then asked Fuller if he could

> look beyond the issue of what kind of environment this child was living in, look beyond the issue of the mother and how she may have been caring for her children at the time, and concentrate on what, if anything, this defendant, Mr. Burr, did, concentrate on whether or not he is guilty of killing this child?

Defendant objected, and the court asked the prosecutor to repeat the question. The prosecutor restated the question as follows:

> Notwithstanding the environment, the evidence—how the evidence may tend to show the environment the child was living in or whether or not her mother was fulfilling all of her motherly duties, can you focus, can you view, on whether or not this defendant, Mr. Burr, is guilty or not guilty of killing the child?

Thereafter, the court overruled defendant's objection, and Fuller responded, "Yes, sir."

We do not agree with defendant's assertion that the prosecutor's rephrased question was an impermissible attempt to stake out prospective juror Fuller. The rephrased question did not contain incorrect or inadequate statements of law. Further, the prosecutor's inquiry into whether the prospective juror could impartially focus on the issue of defendant's guilt or innocence, regardless of the child's living conditions and lack of motherly care, was not an impermissible attempt to ascertain how this prospective juror would vote upon a given state of facts. Instead, this question was properly allowed in the exercise of the prosecutor's right to secure an unbiased jury. *See State v. Williams,* 41 N.C.App. 287, 254 S.E.2d 649 (upholding the State's questioning prospective jurors as to whether they could be fair and impartial in a case involving a proposed sale of marijuana), *disc. rev. denied,* 297 N.C. 699, 259 S.E.2d 297 (1979). Defendant's third assignment of error is overruled.

IV.

[6] In his next assignment of error, defendant contends that the trial court erred by not allowing him to ask one prospective juror, "Do you have a preference for the death penalty as opposed to life imprisonment?" ***287** In support of his contention, defendant cites to the holding in *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

In *Morgan,* "the United States Supreme Court held that a defendant must be allowed to ask a potential juror whether he would automatically or always vote for the death penalty following a defendant's conviction of a capital offense." *State v. Miller,* 339 N.C. 663, 681, 455 S.E.2d 137, 147, *reh'g denied,* 340 N.C. 118, 458 S.E.2d 183 (1995), *petition for cert. filed,* —— U.S.L.W. —— (No. 95–5388, 21 July 1995); *accord State v. Robinson,* 336 N.C. 78, 100, 443 S.E.2d 306, 315–16 (1994), *cert. denied,* 513 U.S. 1089, 115 S.Ct. 750, 130 L.Ed.2d 650 (1995). As stated by the Supreme Court, a defendant is "entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case-in-chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Morgan,* 504 U.S. at 736, 112 S.Ct. at 2233, 119 L.Ed.2d at 507.

In the present case, the trial court sustained the State's objection to defendant's question as to *form.* Defendant was not barred from asking the question in any form, but instead was told that he "may rephrase" the question, indicating that if properly put, it would be permissible. *See Skipper,* 337 N.C. at 23, 446 S.E.2d at 263. Defendant, however, chose not to rephrase the question. Thus, defendant was not precluded from inquiry into whether this prospective juror would automatically vote for the death penalty in violation of the holding in *Morgan.* In addition, defendant was allowed to ask the prospective juror if she would be able to give life imprisonment the same consideration as the death penalty. Accordingly, we find no error, and defendant's fourth assignment of error is overruled.

V.

[7] Defendant also contends that the trial court erred in failing to instruct prospective juror Stainback on the meaning of a life sentence. We disagree.

****615** Counsel for the defense asked Stainback if he would be able to consider life imprisonment as an appropriate penalty for first-degree murder, and Stainback replied, "Is that without privilege of parole?" Counsel for the defense then stated:

> The judge will have to instruct you with regards [sic] to the life imprisonment or the possibility of life imprisonment. Whether or not he mentioned that or not, would you be able to follow the judge's instructions as they ... apply to this case?

***288** Prospective juror Stainback answered, "Yes, sir." After asking a few more questions, counsel for the defense accepted Stainback as a juror. Counsel for the defense did not ask the trial court to instruct Stainback or the jury panel on the meaning of life imprisonment. On appeal, defendant argues,

however, that the court erred in failing to instruct Stainback, and the jury panel, on the meaning of life imprisonment based on Stainback's response.

"A defendant's eligibility for parole is not a proper matter for consideration by a jury." *State v. Campbell,* 340 N.C. 612, 632, 460 S.E.2d 144, 154 (1995). Further, although we have approved the inclusion of the language "life means life" in instructions to the jury in response to inquiries by the jurors about the meaning of a life sentence during their sentencing deliberations, we have not required it. *See id.* Accordingly, we find no error with the trial court's failure to instruct the jury on the meaning of a life sentence on the facts in the present case. Defendant's fifth assignment of error is overruled.

GUILT/INNOCENCE PROCEEDING

VI.

Next, defendant contends that the trial court erred in admitting testimony by Lisa Bridges; Donald Wade's wife, Rita Wade; the Wades' daughters, Misty and Christy Wade; and Bridges' son Scott regarding defendant's prior misconduct toward Lisa Bridges. The testimony given by these witnesses tended to show that on numerous occasions, defendant would bend Bridges' hands behind her back to make her say and do whatever he wanted; that on one occasion, defendant bent Bridges' wrist behind her back in an attempt to make her kiss her brother's feet and told her that he "could make that bone pop through the skin"; that on another occasion, defendant threw Bridges up against the wall and choked her, leaving bruises on her neck in the shape of a hand and fingerprints; and that defendant put a gun in Bridges' face and threatened to kill her and any man involved if she were unfaithful to him.

The testimony also included statements that defendant "grabbed [Bridges'] breast[s] and mashed them till he bruised them"; that he bruised her legs; that these bruises were in the shape of thumb and fingerprints; that defendant would grab Bridges' vagina, leaving bruises; and that defendant would tease Bridges and hit her. Scott testified that defendant told Bridges that if she left him, he would kill her.

***289** Defendant also argues that it was error for the trial court to admit testimony by Officer Dan Qualls, Bridges' mother, and Bridges' step-sister corroborating Bridges' testimony regarding defendant's misbehavior by repeating descriptions Bridges had given to them. Defendant contends that all of the testimony regarding defendant's prior misconduct was inadmissible under N.C.G.S. § 8C–1, Rule 404(b). We disagree.

[8] Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey,* 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990).

> Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried."

State v. Bagley, 321 N.C. 201, 206–07, 362 S.E.2d 244, 247 (1987) (quoting ****616** *State v. Morgan,* 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986)), *cert. denied,* 485 U.S. 1036, 108 S.Ct. 1598, 99 L.Ed.2d 912 (1988).

[9] **[10]** The State contends that the evidence of defendant's prior misconduct was admissible under Rule 404(b) to prove identity. In order for evidence of defendant's prior crimes or bad acts to be admissible to show identity of the perpetrator in the crime charged under Rule 404(b), there must be " 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both.' " *State v. Riddick,* 316 N.C. 127, 133, 340 S.E.2d 422, 426 (1986) (quoting *State v. Moore,* 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)). "However, it is not necessary that the similarities between the two situations 'rise to the level of the unique and bizarre.' " *State v. Stager,* 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991) (quoting *State v. Green,* 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied,* 488 U.S. 900, 109 S.Ct. 247, 102 L.Ed.2d 235 (1988)). "Rather, the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts." *Id.*

[11] In the present case, defendant was charged with the first-degree murder of Susie O'Daniel, and the State was required to prove the ***290** identity of the perpetrator. At the time of her death, the victim was covered with bruises similar to those inflicted upon Bridges by defendant, including bruises in the shape of fingerprints on the body and handprints on the neck. Specifically, Dr. Chancellor testified that she observed multiple bruises on the neck that were consistent

with marks caused by a hand and bruises on the cheek that were consistent with marks caused by fingers.

In addition, the evidence tended to show that the victim's injuries were caused by acts similar to those acts defendant committed against Bridges. Dr. Azizkhan testified regarding the unusual two-centimeter-by-two-centimeter bruise on the child's neck as follows:

> What disturbed me when I looked at her, the two centimeter bruise that was underneath the edge of her mandible, that's a very unusual location for a bruise, except when someone is grabbed very tightly.
>
> And that also would match the bruising on the other side. It could also account for the child being grabbed around the head and the neck.

Dr. Azizkhan further testified that to inflict the injuries to the child's legs "would require either a severe direct blow or some kind of a snapping activity" and that the fractures to the child's arms "could be from intense grabbing of the arm and torquing and pulling the child's arms backwards." Similarly, Dr. Merten testified that the fractures in the child's legs were produced by bending the knees forward and that the shoulder fractures were inflicted by "taking the arms and bending them back."

Because we conclude that the unusual injuries inflicted on the victim were particularly similar to those inflicted by defendant upon Bridges and because we conclude that the unusual acts which would have caused the victim's injuries were particularly similar to those acts defendant committed against Bridges, we conclude that the evidence of defendant's prior misconduct toward Bridges regarding his choking her, bruising her with his hands and fingers, and bending her arms behind her back was relevant and admissible to show identity under Rule 404(b). *See State v. Carter,* 338 N.C. 569, 587–88, 451 S.E.2d 157, 167 (1994) (evidence that defendant assaulted an elderly man above his right eye with a piece of cinder block was admissible to show identity in the first-degree murder of a woman occurring eight years later where one cause of the victim's death was blunt ***291** trauma to the head caused by a brick and the primary wound was above the right eye), *cert. denied,* 515 U.S. 1107, 115 S.Ct. 2256, 132 L.Ed.2d 263 (1995); *see also State v. Phillips,* 328 N.C. 1, 14, 399 S.E.2d 293, 299 (evidence defendants had previously chained the victim to a pole in their basement in Chicago was admissible to show identity in the felony child abuse of this victim in North Carolina, as "[t]hese circumstances were similar to the evidence that [the victim] was tied with a dog chain in North Carolina and explained the medical evidence that the serious injury to [the victim's] ankles ****617** was caused by their being tightly bound"), *cert. denied,* 501 U.S. 1208, 111 S.Ct. 2804, 115 L.Ed.2d 977 (1991). We also conclude that the trial court properly allowed testimony corroborating Bridges' testimony concerning these prior assaults. *See State v. Marlow,* 334 N.C. 273, 285–86, 432 S.E.2d 275, 282 (1993).

Further, the similarities between defendant's assaults against Bridges and the assault against the victim are highly probative on the issue of identity. Defendant was clearly identified as the one who committed these prior assaults, especially in light of defendant's own testimony regarding the fact that he "would grab [Bridges'] arm and bend it back" and that he bent her wrist back on one occasion and "she got on her knees like she was going to kiss [her brother's] feet." The identity of the perpetrator in this case was the critical issue at trial. Thus, we are satisfied that the probative value of defendant's prior misconduct toward Bridges regarding his choking her, bruising her with his hands and fingers, and bending her arms behind her back outweighs any potential for unfair prejudice against defendant. *See Carter,* 338 N.C. at 589, 451 S.E.2d at 168.

[12] Further, assuming *arguendo* that the admission of the other testimony, concerning defendant's threats to kill Bridges for infidelity and defendant placing a gun in Bridges' face, was error, we conclude that any such error was not prejudicial. "Defendant has the burden under N.C.G.S. § 15A–1443 of demonstrating that but for the erroneous admission of this evidence, there is a 'reasonable possibility' that the jury would have reached a verdict of not guilty." *State v. Gibson,* 333 N.C. 29, 44, 424 S.E.2d 95, 104 (1992), *overruled on other grounds by State v. Lynch,* 334 N.C. 402, 432 S.E.2d 349 (1993). The State's evidence tended to show that the night of the murder, defendant was left alone with the victim and two of Bridges' young sons for forty-five minutes; that before Bridges left, the child appeared to be physically fine, with no marks on her body; that while defendant was with the child, Bridges' eight-year-old son, Scott, was awakened by hammering ***292** and the victim crying; that Scott heard defendant "mumbling" and then the victim stopped crying; that after Bridges returned to the trailer, the victim was covered in bruises and had suffered a blow to the head; and that the child died from these injuries.

This evidence, in addition to the evidence regarding defendant's prior acts that was admissible to show identity, was competent to support a finding that defendant was the perpetrator of the murder, and defendant has failed to show a reasonable possibility that but for the admission of the evidence of defendant's threats to kill Bridges and his pointing a gun at her, the jury would have reached a different verdict. Accordingly, any error regarding the admission of defendant's threats to kill Bridges and his pointing a gun at her was not prejudicial. *See id.* Defendant's sixth assignment of error is overruled.

VII.

[13] Defendant's seventh assignment of error concerns the court's instruction with regard to the evidence of defendant's prior misconduct toward Bridges. Defendant requested an instruction "similar in form to North Carolina Pattern Instruction—Criminal 104.15, to inform the [jurors] that they are not to consider such evidence as evidence of the [d]efendant's character and limiting the purposes for which the jury may properly consider it." The trial court followed the pattern instruction and properly instructed the jurors that the evidence of defendant's prior misconduct towards Bridges was admitted "solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed," and that they "may consider it, only for the limited purpose for which it was received." *See* N.C.P.I. —Crim. 104.15 (1984). The trial court declined to include the extra sentence that the jury was not to consider the evidence as evidence of defendant's bad character.

We conclude that the trial court properly limited the jury's consideration of this evidence to the issue of identity and therefore that the trial court's instruction was in substantial conformity with defendant's request. Defendant's seventh assignment of error is ****618** overruled. *See State v. Brown,* 335 N.C. 477, 490, 439 S.E.2d 589, 597 (1994) ("[T]his Court has consistently held that a trial court is not required to repeat verbatim a requested, specific instruction that is correct and supported by the evidence, but that it is sufficient if the court gives the instruction in substantial conformity with the request.").

*293 VIII.

[14] Next, defendant contends that the trial court erred in excluding evidence contained in records from the Alamance County Department of Social Services concerning the Department's one-year supervision and investigation of Lisa Bridges' family following the child's death. Defendant contends that these records "contained much information which incriminated Lisa" and was relevant and admissible to show third-party guilt, as well as to impeach Bridges' testimony that she had done nothing wrong to her other children. We disagree.

> [W]here the evidence is proffered to show that someone other than the defendant committed the crime charged, admission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt.

State v. McNeill, 326 N.C. 712, 721, 392 S.E.2d 78, 83 (1990).

> "Evidence which tends to show nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded."

State v. Brewer, 325 N.C. 550, 564, 386 S.E.2d 569, 576 (1989) (quoting *State v. Britt,* 42 N.C.App. 637, 641, 257 S.E.2d 468, 471 (1979)), *cert. denied,* 495 U.S. 951, 110 S.Ct. 2215, 109 L.Ed.2d 541 (1990).

[15] In the present case, the DSS opened a case file on Lisa Bridges following the death of Susie as required under N.C.G.S. § 7A–544. The records reveal Bridges showed difficulty in keeping counseling appointments for herself and the children, taking her children to the dentist, helping her children at home with school-related work, bathing her children, and being home when her children returned from school; the records contain no evidence, however, that Bridges physically abused or acted violently toward these children. Following the year of supervision, the social worker for the case concluded that the children were "having their

minimal needs met" and recommended closing the case. After a thorough review of the DSS records, we find no evidence pointing to the guilt of Lisa Bridges in the murder of the child.

*294 Further, defendant was allowed to impeach Bridges with evidence similar to the evidence contained in the excluded DSS records regarding the lack of cleanliness of Bridges' home and her children, the truancy problem with her children, the fact that DSS had received allegations of neglect against Bridges concerning two of her sons, and a social worker's opinion that Bridges' psychiatric history and relationship with men "suggest[ ] instability." Thus, the evidence contained in the DSS record would have, for the most part, been merely cumulative, and any probative value for impeachment purposes was substantially outweighed by the danger of confusion and undue delay. N.C.G.S. § 8C–1, Rule 403 (1992). Defendant's eighth assignment of error is overruled.

IX.

Defendant also contends that the trial court erred by failing to grant his motion for a continuance, thereby violating his constitutional rights to confrontation and to the effective assistance of counsel. We disagree.

> Traditionally, the decision to grant or deny a continuance rests within the discretion of the trial court. *Ungar v. Sarafite,* 376 U.S. 575, 589 [84 S.Ct. 841, 849], 11 L.Ed.2d 921, 931[, *reh'g denied,* 377 U.S. 925, 84 S.Ct. 1218, 12 L.Ed.2d 217] (1964); *State v. Roper,* 328 N.C. 337, 348, 402 S.E.2d 600, 606, *cert. denied,* [502] U.S. [902] [112 S.Ct. 280], 116 L.Ed.2d 232 (1991). However, that discretion does not extend to the point of permitting the denial **619 of a continuance that results in a violation of a defendant's right to due process. *See Roper,* 328 N.C. at 349, 402 S.E.2d at 606. This Court has long held that when a motion for a continuance is based on a constitutional right, the issue presented is an issue of law and the trial court's conclusions of law are fully reviewable on appeal.
>
> *State v. Tunstall,* 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993).

[16] "The defendant's rights to the assistance of counsel and to confront witnesses are guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and by sections 19 and 23 of Article I of the Constitution of North Carolina." *Id.* "It is implicit in these guarantees that an accused have a reasonable time to investigate, prepare and present his defense." *State v. Harris,* 290 N.C. 681, 687, 228 S.E.2d 437, 440 (1976). Every defendant must " 'be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he *295 stands charged and to confront his accusers with other testimony.' " *State v. Thomas,* 294 N.C. 105, 113, 240 S.E.2d 426, 433 (1978) (quoting *State v. Baldwin,* 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970)).

[17] "However, no set length of time for investigation, preparation and presentation is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case." *Harris,* 290 N.C. at 687, 228 S.E.2d at 440. "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *Tunstall,* 334 N.C. at 329, 432 S.E.2d at 337. In order to demonstrate that the time allowed was inadequate, defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *State v. Covington,* 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986).

[18] In the present case, Craig Thompson, an attorney licensed in this State since 1977, was appointed as defendant's trial counsel on 30 August 1991, and attorney Robert Jacobs was appointed to assist Mr. Thompson on 5 September 1991. Mr. Thompson represented defendant at a preliminary hearing on 6 November 1991; received and copied the district attorney's investigative files, including statements from the State's witnesses and the victim's medical records from Alamance County Hospital and Memorial Hospital; and filed eighteen motions in the action.

On 14 December 1992, Judge Weeks held a hearing on defendant's pretrial motions, and, at the end of this hearing, defendant asked the court to remove his court-appointed counsel based on his allegation that they had not

communicated with him and that they had not contacted witnesses whom he considered essential to his case. At this time, the trial was scheduled for 4 January 1993, and Judge Weeks took defendant's request under advisement.

The next day, after interviewing defendant again, Judge Weeks removed Mr. Thompson and Mr. Jacobs as defendant's counsel based on irreconcilable differences and appointed Robert Collins and Douglas Hoy to represent defendant. The district attorney then informed Mr. Collins that the case would be called for trial on 25 January 1993. Mr. Collins moved that the trial be continued, and on 4 January 1993, Judge Stanback heard this motion and continued the case until 1 March 1993. On 26 February 1993, Mr. Collins and Mr. Hoy ***296** filed another motion to continue the trial for thirty days, which motion Judge Stanback denied on 1 March 1993.

On appeal, defendant argues that various "unanswered medical questions strongly imply that defendant required a medical expert to assist defendant in the preparation of his defense" and that "he sought a continuance in part to evaluate his need for an expert, to identify a suitable expert, and to file the motions necessary to obtain funds." Defendant also argues that because he did not receive the DSS records regarding Lisa Bridges in a timely manner, he did not have adequate time to interview witnesses contained in these records in order to investigate the issue of third-party guilt. Based on ****620** these arguments, defendant contends the trial court erred in failing to grant his motion for a continuance. We disagree.

By letter dated 30 December 1992, the district attorney informed Mr. Collins and Mr. Hoy that the file containing the complete investigative and medical report was available to them, as it had been made available to Mr. Thompson and Mr. Jacobs. Among other things, this file included the investigative report by the sheriff's department laying out the investigation and the witnesses who were interviewed, the names and addresses of the doctors involved at Alamance County Hospital and Memorial Hospital, and the victim's medical records from both hospitals. The district attorney also informed Mr. Collins and Mr. Hoy about X rays taken at both hospitals and about whom to contact in order to observe these X rays. Additionally, in this letter, the district attorney informed Mr. Collins and Mr. Hoy about photographs that were taken by the medical examiner and advised them that he had requested doctors to locate and bring to the court drawings, charts, and models of relevant portions of the body in which injuries were found to illustrate their testimony. Thus, defense counsel had access to the medical evidence containing the necessary evidence they required regarding the need for an expert for two months prior to trial, and having observed the evidence and medical testimony at trial, defendant has had ample opportunity to show how his case would have been better prepared with regard to this evidence had the continuance been granted, or to show that he was materially prejudiced. He has failed to do so.

Further, the DSS report on Bridges was referenced in the investigative report by the sheriff's department as well as in the medical records from Memorial Hospital, both of which were contained in the file made available to defense counsel prior to January 1993. Counsel ***297** for the defense could have requested the full report from DSS at this time. In any event, as we held previously, the file did not contain evidence relevant to third-party guilt. Thus, defendant has also failed to show his case would have been better prepared with regard to this evidence had the continuance been granted or that he was materially prejudiced. Defendant's ninth assignment of error is overruled.

X.

[19] Next, defendant contends that the trial court erred in failing to instruct the jury that defendant did not attempt to flee the scene and that evidence of nonflight may be considered in determining whether the combined circumstances indicate innocence or a showing of nonguilt. We disagree.

> "The general rule is that the defendant in a criminal case is not, for the purpose of showing his innocence, allowed to prove that he refused to take to flight before his arrest or to escape from jail after his arrest, even though offered the opportunity to do so, at least in the absence of any testimony that he had attempted to flee or escape." 29 Am.Jur.2d, 334, Evidence § 287. Refusal to flee or escape; voluntary surrender.

State v. Thomas, 34 N.C.App. 594, 596, 239 S.E.2d 288, 290 (1977), *cert. denied,* 294 N.C. 445, 241 S.E.2d 846, *cert. denied,* 439 U.S. 926, 99 S.Ct. 308, 58 L.Ed.2d 318 (1978). Admitting evidence of defendant's refusal to flee to prove his innocence " 'would be permitting prisoners to make evidence for themselves by their subsequent acts.' " *State v. Wilcox,* 132 N.C. 1120, 1136, 44 S.E. 625, 630 (1903) (quoting *State v. Taylor,* 61 N.C. (Phil.Law) 508, 513 (1868)). Thus, we conclude that the trial court did not err in failing to instruct

the jury on evidence of nonflight. Accordingly, defendant's tenth assignment of error is overruled.

XI.

Defendant next contends that the trial court erred by overruling his objection to the prosecutor's closing argument concerning the failure of Nita Todd, a social worker with Memorial Hospital, to testify. Defense counsel had intended to have Ms. Todd testify for the defense regarding her investigation of the child's death, including her interviews with Bridges and defendant. Because of an apparent miscommunication, however, Ms. Todd was out of town the day she was to testify. Upon defendant's motion, the trial ****621** court allowed the ***298** defense to read Ms. Todd's report into evidence. Thereafter, in his closing argument, the prosecutor stated:

> By gum, ladies and gentlemen, I hope that I don't try a case, particularly one as serious as murder, that I don't talk to my witnesses and if you, any of you ever become the victims of crime, which I hope you don't, but if any of you ever do, I think you would hope that I or some other prosecuting attorney would talk to you and to your witnesses before taking your case into the courtroom, because to do anything less would be working an injustice to the victims.
>
> You've got to make arrangements to have your witness in the courtroom sometimes.
>
> Now, I'll contrast that, if you will, please, to the testimony of Nita Todd, excuse me, not testimony, to the record of Nita Todd which was read to you.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

Defendant argues that because "[t]he prosecutor was well aware that defense counsel had made diligent efforts to arrange for Ms. Todd to be present to testify," the prosecutor's argument was a bad-faith attack on defense counsel's competence and professionalism. Our review of the prosecutor's argument in its entirety shows, however, that this statement was not an attack on defense counsel, but rather an attempt to minimize the effect of the evidence contained in the social worker's report, which evidence may have contradicted the testimony by the State's witnesses.

[20] **[21]** Trial counsel are allowed wide latitude in jury arguments and are permitted to argue the facts based on the evidence presented as well as reasonable inferences to be drawn therefrom. *State v. Morston,* 336 N.C. 381, 405, 445 S.E.2d 1, 14 (1994). Further, " 'prosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred.' " *State v. Abraham,* 338 N.C. 315, 358, 451 S.E.2d 131, 154 (1994) (quoting *State v. Pinch,* 306 N.C. 1, 24, 292 S.E.2d 203, 221, *cert. denied,* 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982), *reh'g denied,* 459 U.S. 1189, 103 S.Ct. 839, 74 L.Ed.2d 1031 (1983), *overruled on other grounds by* ***299** *State v. Benson,* 323 N.C. 318, 372 S.E.2d 517 (1988), *and by State v. Robinson,* 336 N.C. 78, 443 S.E.2d 306 (1994)).

[22] Viewed in context, we cannot say that the argument complained of in the present case was error. Certainly any error in allowing this argument does not rise to the level of prejudicial error that would require a new trial. *See Green,* 336 N.C. at 186, 443 S.E.2d at 40 (for an inappropriate prosecutorial comment to justify a new trial, the comment must have " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process' ") (quoting *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144, 157, *reh'g denied,* 478 U.S. 1036, 107 S.Ct. 24, 92 L.Ed.2d 774 (1986)). Defendant's eleventh assignment of error is overruled.

XII.

[23] By his twelfth assignment of error, defendant contends that the trial court erred by failing to intervene *ex mero motu* to prevent the prosecutor from misstating the law on two occasions during his closing argument. The first occasion occurred when the prosecutor stated, "Now, who acts with malice, who bends arms, who hits, who chokes, who acts with malice? There he sits." Defendant contends that by this statement, the prosecutor erroneously argued to the jurors that they could infer defendant's identity as the perpetrator of the murder from his malicious character. We conclude, however, that under the facts of this case, the prosecutor's argument was referring to the jury considering evidence of defendant's prior acts to show his identity as the perpetrator of the murder. Based on our holding in section VI of this opinion, the jury could properly consider evidence of defendant's prior acts on the issue of identity, and the trial court did not, therefore, err

in failing to intervene *ex mero motu* to prevent the prosecutor from making this argument.

**622 [24] The second occasion occurred when the prosecutor stated:

> Considering premeditation and deliberation, you may consider one, provocation on the part of the deceased. Susie O'Daniel was a baby, she could not have provoked the defendant unless maybe she was crying and he didn't like it, but that's not adequate provocation.
>
> ....
>
> Cool state of blood does not mean an absence of passion. What is referred to is the lack of an adequate provocation. For *300 instance, I'll give you an example. I go over there and I smack Ms. Rodriquez, the clerk of court. She pulls out a six shooter and plugs me.
>
> Well, my smacking her is not adequate provocation for her to kill me. Although well she may want to, well she might ought to, but ladies and gentlemen it's not under the law, adequate provocation.
>
> But what it does, it reduces the crime from first degree murder to second degree murder because her killing me is in the heat of the passion aroused by sudden and adequate provocation. My smacking her is adequate to reduce it from first to second degree murder. We don't have that situation in this case.

Defendant argues that because "adequate provocation" reduces murder to manslaughter, the prosecutor's statement that defendant needed to show "adequate provocation" in order to negate deliberation was an incorrect statement of the law which prevented the jury from properly considering the verdict of second-degree murder. We disagree.

> There are two kinds of provocation relating to the law of homicide: One is that level of provocation which negates malice and reduces murder to voluntary manslaughter. Mere words, however abusive or insulting are not sufficient provocation to negate malice and reduce the homicide to manslaughter. Rather, this level of provocation must ordinarily amount to an assault or threatened assault by the victim against the perpetrator.
>
> The other kind of provocation is that which, while insufficient to reduce murder to manslaughter, is sufficient to incite defendant to act suddenly and without deliberation. Thus, words or conduct not amounting to an assault or threatened assault, may be enough to arouse a sudden and sufficient passion in the perpetrator to negate deliberation and reduce a homicide to murder in the second degree.

State v. Watson, 338 N.C. 168, 176–77, 449 S.E.2d 694, 699–700 (citations omitted), *reconsideration denied,* 338 N.C. 523, 457 S.E.2d 302 (1994), *cert. denied,* 514 U.S. 1071, 115 S.Ct. 1708, 131 L.Ed.2d 569 (1995). Based on the foregoing, we conclude that defendant's argument is without merit and that the trial court did not err in failing to intervene *ex mero motu* to prohibit the prosecutor's argument. Defendant's twelfth assignment of error is overruled.

***301 XIII.**

Defendant's thirteenth assignment of error concerns the admission of testimony that Bridges' son John, Jr. ("J.J.") was scared of defendant. Defendant filed a motion *in limine* to exclude this evidence, and the trial court denied defendant's motion, reserving the right to address defendant's specific objections when, and if, the State offered such evidence. Defendant did not except to the trial court's ruling.

[25] At trial, the State asked Lisa Bridges, "Did you notice how your children behaved around [defendant]?" Bridges responded, "Well, the other ones, they wouldn't really say nothing about him, but J.J., he was scared of [defendant]." Defendant neither objected to this testimony nor moved to strike Bridges' answer. Defendant has failed, therefore, to preserve his right to appellate review of this issue. Thus, this assignment of error is reviewable only under the plain error rule. *State v. Rush,* 340 N.C. 174, 179–80, 456 S.E.2d 819, 822–23 (1995). "In order to prevail under plain error analysis, defendant must first establish that the trial court committed error and then show that 'absent the error, the jury probably would have reached a different result.' " *Id.* at 180, 456 S.E.2d at 823 (quoting *State v. Jordan,* 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)).

**623 [26] [27] Defendant has failed to show that the admission of this testimony constituted plain error, as it was relevant and admissible to demonstrate the state of the familial relationship in the brief period preceding the murder in which defendant resided in the home. *See State v. Lynch,* 337 N.C. 415, 424, 445 S.E.2d 581, 585 (1994). Defendant also argues, however, that the testimony by Misty

Wade and social worker Brownlee Cable that J.J. was scared of defendant was also inadmissible. Misty Wade did not, however, testify that J.J. was scared of defendant. Instead, the State asked Misty what she had observed about the behavior of Bridges' children when defendant was around, and Misty testified, over objection, "Their behavior, they had —they didn't act like kids when [defendant] was around." This opinion testimony was rationally based on the witness' perception and was helpful to show the relationship defendant had with Bridges' children, one of whom was the murder victim. Admission of this testimony was, therefore, not error. *See State v. Baker,* 338 N.C. 526, 555, 451 S.E.2d 574, 591 (1994) (opinion testimony by lay witness admissible as an inference rationally based on the perception of the witness and helpful to the determination of a fact in issue). Defendant failed to object ***302** to the remaining testimony by Misty that was admitted regarding the behavior of Bridges' children, and defendant has failed to show that the admission of this testimony amounts to plain error.

[28] Finally, defendant called social worker Brownlee Cable to testify about her investigation of the murder, including her interviews with Bridges and defendant. On cross-examination, the State asked Cable if Bridges told her during her interview "that the kids were frightened of [defendant]." Over objection, Cable responded, "At that time she told me that J.J. was scared of [defendant]." This evidence was admissible to corroborate the prior testimony of Bridges. *See Marlow,* 334 N.C. at 285–86, 432 S.E.2d at 282. Defendant's thirteenth assignment of error is overruled.

XIV.

[29] Next, defendant contends that the trial court erred in denying his motion to order that Lisa Bridges' medical records be made available to the defense. Defendant has failed, however, to make these documents part of the record on appeal. It is incumbent on defendant to provide a complete record for appellate review. Because defendant failed to include these documents in the record, we cannot review this assignment of error.

"[T]here is no statute that grants a defendant in a criminal trial access as of right to any documents unless they are 'within the possession, custody, or control of the State.' " *State v. Newell,* 82 N.C.App. 707, 708, 348 S.E.2d 158, 160 (1986) (quoting N.C.G.S. § 15A–903(d)). In the present case, the documents at issue were not in the possession, custody, or control of the State. Thus, a proper method for obtaining these records would have been through the use of a subpoena *duces tecum. See State v. Love,* 100 N.C.App. 226, 395 S.E.2d 429 (1990), *dismissal allowed and disc. rev. denied,* 328 N.C. 95, 402 S.E.2d 423 (1991).

> The subpoena *duces tecum* is the process by which a court requires that particular documents or other items which are material to the inquiry be brought into court. It is issued by the clerk of court, and can be issued to any person who can be a witness. G.S. 7A–103(1); *Vaughan v. Broadfoot,* 267 N.C. 691, 149 S.E.2d 37 (1966).
>
> The purpose of the subpoena *duces tecum* is to require the production of specific items patently material to the inquiry. *Id.* ***303** Therefore, it must specify with as much precision as fair and feasible the particular items desired. *Id.*

Newell, 82 N.C.App. at 708, 348 S.E.2d at 160.

Defendant in the present case did not subpoena the records at issue. Instead, he made a general motion for the court to order five specified entities and "any and all physicians, psychologists, health care providers and any other person providing medical or psychological care to Lisa [Bridges to] make all such records available to the [d]efendant for inspection and/or copying." Defendant's argument that he was entitled to all of Bridges' medical and psychological records ****624** because the DSS files revealed that she suffered from depression and therefore her medical and psychological files might reveal that she became abusive toward her children is unpersuasive. As we held in section VIII of this opinion, the DSS records contain no evidence that Bridges physically abused or acted violently toward her children. Thus, defendant's general request for all of Bridges' medical and psychological records could amount to nothing more than a fishing expedition. Accordingly, defendant's fourteenth assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

XV.

Regarding the sentencing proceeding, defendant first contends that the trial court erred in failing to conduct an inquiry of the jury panel about an alleged communication between a seated juror and a pastoral counselor during the

jury's penalty proceeding deliberations. Based on the specific facts of this case, we disagree.

[30] "In the event of some contact with a juror it is the duty of the trial judge to determine whether such contact resulted in substantial and irreparable prejudice to the defendant. It is within the discretion of the trial judge as to what inquiry to make." *State v. Willis,* 332 N.C. 151, 173, 420 S.E.2d 158, 168 (1992).

[31] In the present case, the trial court conducted an *in camera* hearing with a local attorney, Mr. Hemrick, regarding the alleged juror communication. Mr. Hemrick informed the court that during the penalty proceeding deliberation of this case, he received a call from an organization known as Pastoral Care and that he had spoken to a person who apparently was a psychologist there. Mr. Hemrick told the court that this alleged psychologist told him that he wanted to ask ***304** him a "hypothetical question about a trial situation." The question was "may a juror who has assented to a verdict who is still a juror in the case ... change their [sic] verdict after they've [sic] rendered a verdict." Mr. Hemrick informed the caller that the only thing he knew about the law in North Carolina was "that a verdict cannot be assailed after it[']s a verdict." Mr. Hemrick also informed the caller, however, that if the question were not hypothetical, if he had a client who was sitting on a panel who had changed his or her mind, then

> that person should address their questions to the trial bench, should have a written question addressed to the trial bench, should inform the foreman, first of all, that the juror wants to have a conference or a written communication with the trial judge.

Mr. Hemrick further informed the court that the caller did not indicate in what state or city this "hypothetical" trial was located, if in fact the trial was not hypothetical.

We conclude that the trial court did not abuse its discretion in failing to conduct an inquiry of the jury regarding this communication. The trial court properly conducted an interview with Mr. Hemrick, and nothing in this interview revealed any juror misconduct. The caller presented the scenario in the hypothetical and did not indicate where the trial was being held, if indeed it was not a hypothetical, nor did the caller indicate the name of the particular juror. Further, Mr. Hemrick properly informed the caller of the law in North Carolina that "a juror may not impeach the verdict of the jury after it has been rendered and received in open court," *State v. Martin,* 315 N.C. 667, 685, 340 S.E.2d 326, 336 (1986), and instructed him to tell the juror to address his questions to the trial judge, if the scenario was real. Under these circumstances, we cannot say that this anonymous phone call and hypothetical scenario evinced juror contact in the present case which resulted in substantial and irreparable prejudice to defendant so as to require the court to conduct an inquiry of the jury panel. Accordingly, defendant's fifteenth assignment of error is overruled.

XVI.

[32] By his next assignment of error, defendant contends that he is entitled to a new sentencing proceeding because the prosecutor improperly referred to this Court's decisions in *State v. Huff,* 325 N.C. 1, 381 S.E.2d 635 (1989), *sentence vacated on other* ****625** *grounds,* ***305** 497 U.S. 1021, 110 S.Ct. 3266, 111 L.Ed.2d 777 (1990), *on remand,* 328 N.C. 532, 402 S.E.2d 577 (1991), and *State v. Huffstetler,* 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied,* 471 U.S. 1009, 105 S.Ct. 1877, 85 L.Ed.2d 169 (1985), to bolster his argument that the jury should find that the murder was especially heinous, atrocious, or cruel. Because defendant failed to object during the closing arguments, "he must demonstrate that the prosecutor's closing arguments amounted to gross impropriety." *State v. Rouse,* 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *reconsideration denied,* 339 N.C. 619, 453 S.E.2d 188 (1995), *cert. denied,* 516 U.S. 832, 116 S.Ct. 107, 133 L.Ed.2d 60 (1995).

Defendant refers to the following statements by the prosecutor:

> 1989 case, *State v. Huff,* and this is a case involving the killing of an infant. The North Carolina Supreme Court wrote, "a finding that this aggravating circumstance, especially heinous, atrocious and cruel, exists and only is permissible if the level of brutality involved exceeds that normally found in first degree murder or when the first degree murder in question is conscienceless, pitiless or unnecessarily torturous to the victim."
>
> The Court went on to write, the killing of the infant was conscienceless, pitiless, and unnecessarily torturous to the victim when the facts tend to establish that the killing or when the facts tend to establish the killing was both conscienceless and pitiless.

And then finally, another case by the North Carolina Supreme Court and this is [a] 1984 case, *State v. Hufstettler* [sic], the Court writes, "we decline to limit the definition of especially heinous, atrocious or cruel murder to include only those which involve physical injury or torture prior to death."

....

What the Court is saying in its opinion is that we decline to limit the definition of especially heinous, atrocious or cruel murder to include only those which involve physical injury or torture prior to death. In other words, the Court is saying you don't have to decide which injury was first, in determining whether this was especially heinous, atrocious or cruel killing. That is not the issue.

The Court goes on to write, we have upheld the submission of this aggravating circumstance even though the evidence did not ***306** establish at what point during a brutal attack[ ] the victim's death or unconsciousness occurred.

So the North Carolina Supreme Court has answered that question for you. It doesn't matter if the first injury, the middle injury or the last injury was the one which caused her to lose consciousness, that is not an issue in deciding if the circumstance exists.

The Court went on to say, we hold the evidence presented by the State in present cases for submission would permit the jury to consider whether the murder of the victim, whose name was Edna Powell, was especially heinous, atrocious or cruel.

"Edna Powell died as a result of being battered to death by what could only have been a prolonged series of blows, blows from a cast iron skillet, so severe as to fracture her skull, neck, jaws and collarbone.["]

> "And it caused her skull to be pushed into her brain. The severity and the brutality of the numerous wounds inflicted amply justified the submission of this aggravating circumstance to the jury."

Ladies and gentlemen, that's an important case. It's an important case in the context of the one that is before you. Why do I say that?

Let's think about it. In determining the appropriate sentence the Judge will tell you you may rely not only [on] the evidence that you heard in this sentencing hearing, the witnesses that were called yesterday, but you may rely on all the evidence which you have previously heard. And as you may recall at yesterday's sentencing hearing I announced at the outset that we would rely upon the previous presentation of evidence.

Both cases, the one dealing with Mr. Huff, the infant who died, and ... the ****626** present case involved the death of infants. Both cases involved the killings which demonstrated a lack of conscience, a pitiless crime. Likewise that last case that I just read to you for [sic] *Huffstetler* case, demonstrates lack of pity, lack of conscience.

In all those cases and in the present case we're dealing with multiple injuries. Susie certainly had multiple injuries....

***307** **[33]** **[34]** Defendant argues that by these statements, the prosecutor encouraged the jury to find the especially heinous, atrocious, or cruel aggravating circumstance based on the fact that other juries had found this circumstance in factually similar cases and because this Court reviewed those decisions favorably. In so doing, defendant contends that the prosecutor violated the prohibition enunciated in *State v. Gardner,* 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986), that "counsel may not read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client."

It is, however, "permissible for counsel in argument to state his view of the law applicable to the case on trial, to read published decisions of this Court in support thereof, and to recount some of the facts on which those other decisions were based." *State v. Laws,* 325 N.C. 81, 115–16, 381 S.E.2d 609, 630 (1989) (citing *Wilcox v. Glover Motors, Inc.,* 269 N.C. 473, 479, 153 S.E.2d 76, 81 (1967)), *sentence vacated on other grounds,* 494 U.S. 1022, 110 S.Ct. 1465, 108 L.Ed.2d 603 (1990), *on remand,* 328 N.C. 550, 402 S.E.2d 573, *cert. denied,* 502 U.S. 876, 112 S.Ct. 216, 116 L.Ed.2d 174, *reh'g denied,* 502 U.S. 1001, 112 S.Ct. 627, 116 L.Ed.2d 648 (1991). Assuming *arguendo* that the prosecutor's unobjected-to reading from *Huffstetler* and *Huff* and argument in this regard were so grossly improper as to require the trial court to intervene *ex mero motu,* we nevertheless conclude that defendant has failed to show any resulting prejudice in light of the overwhelming evidence of this aggravating circumstance

introduced at trial. *See Laws,* 325 N.C. at 116, 381 S.E.2d at 630.

"A murder is [especially] 'heinous, atrocious, or cruel' when it is a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' " *Rouse,* 339 N.C. at 97, 451 S.E.2d at 564 (quoting *State v. Goodman,* 298 N.C. 1, 25, 257 S.E.2d 569, 585 (1979)). Evidence of a "prolonged brutal attack inflicting injuries beyond what would be necessary to kill the victim" may be considered in determining the existence of this aggravating circumstance, *Laws,* 325 N.C. at 114, 381 S.E.2d at 628, as well as the victim's age and the existence of a parental relationship between the victim and defendant, *see Huff,* 325 N.C. at 56, 381 S.E.2d at 667.

In the present case, the murder victim was a defenseless four-month-old baby who was left in the care of defendant at the time of the murder. Defendant had been living in the child's home for approximately half of the child's life in a relationship with the child's mother, ***308** and testimony by Bridges that she had given defendant permission to discipline her children tends to show that he had taken on a parental role in the family. Thus, defendant's murder of this defenseless child was not only pitiless, but it also betrayed the special role which defendant had been given in the family.

The evidence also supports a finding that the injuries inflicted upon the child were numerous, going beyond what would be necessary to kill the victim, and brutal. The medical evidence and testimony showed that the child suffered bruises all over her body, including bruises on her neck, which indicated she had been grabbed "very tightly" around the neck, and bruises on her arms, ears, torso, and legs. Both of the child's arms and legs were broken, which injuries would have required a great amount of force to inflict. The breaks in her arms could have been caused by "intense grabbing of the arm and torquing and pulling the child's arms backwards," and the breaks in her legs were produced by hyperextending the knees "with violence [and] significan[t] force."

Further, the child suffered from a fracture to the skull, which indicated that "quite a force [was] delivered by some blunt object to [the] side of the head," as well as multifocal intercranial injuries and bleeding behind both eyes, which would have been caused by repeated shaking of the child, and which ****627** resulted in the child's "brain [being] slosh[ed] essentially inside of the skull" and "pounded against the bones of the skull." The evidence also showed that the child suffered injuries over a prolonged period of time, as the breaks in her legs were eight to nine days old, and that she would have been conscious from "minutes to an hour or so" following the infliction of injuries, during which time she would have experienced severe pain. In light of this overwhelming evidence that the killing was especially heinous, atrocious, or cruel, we conclude that defendant has failed to show any prejudice resulting from any error by the trial court in failing to intervene *ex mero motu* to prevent the prosecutor's argument.

Furthermore, the trial court subsequently instructed the jurors that it was their duty to decide from all the evidence presented that the aggravating circumstance existed, and in his closing argument, defense counsel was also allowed to argue the facts in *Huff* to defendant's advantage. Defense counsel argued:

> Finally, [the prosecutor] talked to you about the case *State v. Huff* and mentions a child, and read to you parts about the pitiless, conscienceless nature of what Mr. Huff did to the child.
>
> ***309** He neglected to mention to you what Mr. Huff did do to this child was to take his nine-month-old baby out into the woods and dig a hole about two feet deep and put the baby in the hole and slowly covered her up while she was alive. Again, that was a very cold-blooded, conscienceless, hideous act. I submit to you that's not an act that we have in this situation.

Defendant's sixteenth assignment of error is overruled.

XVII.

[35] In his next assignment of error with regard to the prosecutor's sentencing argument, defendant contends that the trial court erred in allowing the prosecutor, over defendant's objection, to state, "I don't know when that was done, [the injuries to the victim's ears,] but I would submit to you [the injuries were] probably done prior to the time before the final blow that struck to [sic] her head." Defendant contends that by this statement, the prosecutor was allowed to improperly travel outside the record and postulate on the order in which certain injuries were inflicted upon the victim. Defendant argues that this error prejudiced him by increasing the likelihood that the jury would find the especially heinous, atrocious, or cruel aggravating circumstance. Based on the overwhelming amount of evidence that the killing was especially heinous, atrocious, or cruel, assuming *arguendo* the admission of this statement was error, any such error was

necessarily harmless beyond a reasonable doubt. Defendant's seventeenth assignment of error is overruled.

XVIII.

In his next assignment of error, defendant contends that the trial court's instruction on the burden of proof for finding mitigating circumstances, to which defendant failed to object, constituted plain error. However, the instruction given in this case is the same instruction we held did not constitute plain error in *State v. Payne,* 337 N.C. 505, 531–32, 448 S.E.2d 93, 108–09 (1994), *cert. denied,* 514 U.S. 1038, 115 S.Ct. 1405, 131 L.Ed.2d 292 (1995). Further, defendant's arguments in support of his assignment of error are the same arguments we rejected in *Payne.* Defendant's eighteenth assignment of error is overruled.

XIX.

[36] Next, defendant contends that the trial court's instruction with regard to the aggravating circumstance, especially heinous, atrocious, or cruel, was unconstitutionally vague. Because defendant ***310** failed to object to this instruction, he is entitled to relief only if plain error occurred. *Id.* at 530, 448 S.E.2d at 107.

Except for a sentence requested by defendant, that "[t]his aggravating circumstance is limited to acts done during the commission of the murder," the instruction given by the trial court in the present case is identical to the instruction we upheld as providing "constitutionally sufficient guidance to the jury" in ****628** *Syriani,* 333 N.C. at 391–92, 428 S.E.2d at 140–41, and defendant has presented this Court no reason to reexamine our holding. Accordingly, defendant's nineteenth assignment of error is overruled.

XX.

In his twentieth assignment of error, defendant contends that the trial court erred by failing to prevent the prosecutor from misstating the law on two occasions during his closing argument. Defendant first refers to the prosecutor's argument set out in section XVI of this opinion. Based on our holding in that section, we conclude any error was not prejudicial.

The second argument to which defendant refers occurred during the prosecutor's explanation of Issue Three of the capital sentencing procedure. The prosecutor argued:

> The third issue, is—are the mitigating circumstances insufficient to outweigh the aggravating circumstances?
>
> ....
>
> You must make a determination whether or not these mitigating circumstances beyond a reasonable doubt, are insufficient to outweigh this aggravating circumstance. Again, your finding as to this, if you find that the mitigating are sufficient to outweigh the aggravating, your finding must be unanimous, all twelve of you must agree to it.

Defendant argues that the prosecutor misstated the law when he informed the jury that it had to be unanimous in determining that the mitigating circumstances outweighed the aggravating circumstances before it could answer "No" to Issue Three. What the prosecutor argued, in essence, is that if the mitigators did not outweigh the aggravators, then a "Yes" answer required unanimity. On the other hand, if the mitigators *did* outweigh the aggravators, then a "No" answer by the jury to Issue Three required unanimity.

***311** For the reasons set forth in *State v. McCarver,* 341 N.C. 364, 462 S.E.2d 25 (1995), and *State v. McLaughlin,* 341 N.C. 426, 462 S.E.2d 1 (1995), we conclude that the prosecutor did not misstate the law, and this assignment of error is overruled.

XXI.

[37] Relying on *Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), defendant next contends that the trial court erred in instructing the jury that it could refuse to consider the nonstatutory mitigating circumstances pertaining to defendant's good conduct in jail if it deemed the evidence had no mitigating value. We recently decided this issue against defendant's position in *State v. Basden,* 339 N.C. 288, 451 S.E.2d 238 (1994), *cert. denied,* 515 U.S. 1152, 115 S.Ct. 2599, 132 L.Ed.2d 845 (1995).

In *Basden,* we concluded that "*Skipper* does not require this Court to overrule its precedents holding that jurors are allowed to reject any nonstatutory mitigating circumstance which they do not deem to have mitigating value." *Basden,* 339 N.C. at 304, 451 S.E.2d at 247. Instead, the issue

in *Skipper* was whether the exclusion from the sentencing hearing of defendant's evidence regarding his good behavior in jail deprived him of his right to place before the sentencer relevant evidence in mitigation of punishment. Here, defendant was allowed to place such evidence before the jury. Accordingly, we conclude that the trial court did not err in its instruction on the nonstatutory mitigating circumstances pertaining to defendant's good conduct in jail. *See Basden,* 339 N.C. at 304, 451 S.E.2d at 247.

PRESERVATION ISSUES

Defendant raises four additional issues which he concedes have recently been decided against defendant's position by this Court: (1) the trial court erred in denying defendant's motion to prohibit the State from death-qualifying the jury; (2) the trial court erred in instructing the jurors they must consider whether the nonstatutory mitigating circumstances have mitigating value; (3) the trial court erred in instructing the jury that at Issues Three and Four, each juror "may" rather than "must" consider any mitigating circumstance found by the juror in Issue Two; and (4) the trial court erred in instructing ****629** the jury that it should answer Issue Three "yes" if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance.

***312** We have considered defendant's arguments on these issues, and we find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

[38] Defendant also asserts two other assignments of error in the preservation portion of his brief. First, defendant asserts that the trial court erred in failing to prevent the prosecutor from arguing during the penalty proceeding that the jury was the conscience of Alamance County. The prosecutor merely reminded the jury that it was the voice and conscience of the community. Based on our holding in *State v. Artis,* 325 N.C. 278, 330, 384 S.E.2d 470, 499–500 (1989), *sentence vacated on other grounds,* 494 U.S. 1023, 110 S.Ct. 1466, 108 L.Ed.2d 604 (1990), *on remand,* 329 N.C. 679, 406 S.E.2d 827 (1991), that "it is not improper to remind the jury ... that its voice is the conscience of the community," we find no error.

[39] Defendant also asserts under this assignment of error that the trial court erred in failing to prevent the prosecutor from arguing during the penalty proceeding that "[t]here is no limit to the number of ... nonstatutory mitigating circumstances that could be submitted." In *State v. Harris,* 338 N.C. 129, 148–49, 449 S.E.2d 371, 379 (1994), *cert. denied,* 514 U.S. 1100, 115 S.Ct. 1833, 131 L.Ed.2d 752 (1995), we held that the prosecutor's argument "that he was limited in the circumstances which he could submit justifying the imposition of the death penalty, while there was no limit except that of their own imagination as to what the defendant's attorney[s] could submit in mitigation of his punishment ... was not so grossly improper that the conviction was a denial of due process." Based on our holding in *Harris,* we overrule defendant's assignment of error.

Finally, defendant contends the North Carolina death penalty procedure is unconstitutional. We continue to uphold our prior rulings on this issue and overrule this assignment of error. *Payne,* 337 N.C. at 535, 448 S.E.2d at 111; *see State v. Barfield,* 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied,* 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137, *reh'g denied,* 448 U.S. 918, 101 S.Ct. 41, 65 L.Ed.2d 1181 (1980).

PROPORTIONALITY REVIEW

Having concluded that defendant's trial and separate capital sentencing proceeding were free from prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A–2000(d)(2) exclusively for this Court in capital cases. We have thoroughly examined the record, transcripts, and briefs in the present case and conclude that the record ***313** fully supports the aggravating circumstance found by the jury, that the killing was especially heinous, atrocious, or cruel, N.C.G.S. § 15A–2000(e)(9) (Supp.1994). Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must then turn to our final statutory duty of proportionality review.

[40] "Proportionality review is designed to 'eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *Miller,* 339 N.C. at 692, 455 S.E.2d at 153 (quoting *State v. Holden,* 321 N.C. 125, 164–65, 362 S.E.2d 513, 537 (1987), *cert. denied,* 486 U.S. 1061, 108 S.Ct. 2835, 100 L.Ed.2d 935 (1988)). In conducting proportionality review, we determine whether "the sentence of death in the present case is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Williams,* 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied,* 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 177, *reh'g denied,* 464 U.S. 1004, 104 S.Ct. 518, 78

L.Ed.2d 704 (1983); *accord* N.C.G.S. § 15A–2000(d)(2). We cannot conclude based on the record that the imposition of the death penalty in this case is aberrant or capricious.

[41] This case is distinguishable from those cases in which this Court has found the death penalty disproportionate. In three of those cases, *Benson,* 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes,* 319 N.C. 1, 352 S.E.2d 653 (1987); and **630 *State v. Jackson,* 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant either pled guilty or was convicted by the jury solely under the theory of felony murder. Here, defendant was convicted on the theory of premeditation and deliberation. We have said that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *Artis,* 325 N.C. at 341, 384 S.E.2d at 506.

In *State v. Rogers,* 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver,* 321 N.C. 570, 364 S.E.2d 373 (1988), defendant shot the victim while trying to shoot a different person with whom he had argued. The only aggravating circumstance found in *Rogers* was that it was part of a course of conduct which included the commission of other violent crimes. In the present case, an infant was cruelly and violently murdered by being shaken and beaten to death. Defendant, being the mother's boyfriend, violated a position of trust, as the infant was helpless and defenseless to resist this senseless crime. The facts of the case are clearly distinguishable from *Rogers* and involve a much more brutal killing.

*314 In *State v. Young,* 312 N.C. 669, 325 S.E.2d 181 (1985), the two aggravating circumstances found were pecuniary gain and committed in the commission of a robbery. In finding the death sentence disproportionate, this Court focused on the fact that there was no finding that defendant was engaged in a course of conduct including other violent crimes or that it was especially heinous, atrocious, or cruel. The present case is distinguishable from *Young* because, among other things, in this case the jury found the aggravating circumstance that it was especially heinous, atrocious, or cruel.

In *State v. Hill,* 311 N.C. 465, 319 S.E.2d 163 (1984), a police officer was shot with his own gun while he and defendant struggled on the ground. The only aggravating circumstance found by the jury was that the offense was committed against a law enforcement officer engaged in the performance of his official duties. In the present case, the jury found that the murder was especially heinous, atrocious, or cruel, and once again, the facts in this case are clearly distinguishable from *Hill.*

In *State v. Bondurant,* 309 N.C. 674, 309 S.E.2d 170 (1983), several friends were riding in a car when defendant began taunting the victim by telling him that he would shoot him. Defendant eventually shot the victim and then immediately drove to the emergency room of the local hospital. While the jury found both that the murder was especially heinous, atrocious, or cruel and that it was part of a course of conduct including other violent crimes, this Court focused on defendant's attempt to obtain medical assistance in finding the death sentence disproportionate. Here, defendant refused to take the infant to the hospital until the infant's mother threatened to call an ambulance. Then, instead of rushing the infant to the hospital, defendant stopped for gas. Thus, the facts of this case are clearly distinguishable from the facts in *Bondurant.*

We recognize that juries have imposed sentences of life imprisonment in certain cases involving the death of an infant. However, "the fact that in one or more cases factually similar to the one under review a jury or juries have recommended life imprisonment is not determinative, standing alone, on the issue of whether the death penalty is disproportionate in the case under review." *Green,* 336 N.C. at 198, 443 S.E.2d at 46.

Defendant in the present case refers us to two cases, other than the ones we have already discussed, in which juries following capital sentencing proceedings recommended life sentences. These cases are *315 clearly distinguishable from the present case on their facts. In *State v. Huff,* 328 N.C. 532, 402 S.E.2d 577 (1991), this Court found sufficient evidence from which a reasonable juror examining defendant's behavior and mental problems could conclude that defendant's capacity to appreciate the criminality of his conduct was impaired. Such was not the case here. Further, in *Phillips,* 328 N.C. 1, 399 S.E.2d 293, defendants were sixty-eight and fifty-seven years old, and premeditation and deliberation were not elements of the offense as charged. Here, defendant was thirty-two years old, and he was convicted of **631 the premeditated and deliberated murder of a four-month-old child.

Further, we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have *consistently* returned recommendations of life imprisonment. *E.g., State v. Spruill,* 338 N.C. 612, 452 S.E.2d 279 (1994)

(murder of an acquaintance in which the jury found as the only aggravating circumstance that the murder was especially heinous, atrocious, or cruel—death sentence proportionate), *petition for cert. filed,* —— U.S.L.W. —— (No. 94–9410, 19 May 1995); *Syriani,* 333 N.C. 350, 428 S.E.2d 118 (murder in which the jury found as the only aggravating circumstance that the murder was especially heinous, atrocious, or cruel and in which defendant was convicted solely under the theory of premeditation and deliberation—death sentence proportionate); *Huffstetler,* 312 N.C. 92, 322 S.E.2d 110 (murder of elderly female in which the jury found the only aggravating circumstance to be that the murder was especially heinous, atrocious, or cruel—death sentence proportionate).

After comparing this case carefully with all others in the pool used for proportionality review, we conclude that it falls within the class of first-degree murders in which we have previously upheld the death penalty. For the foregoing reasons, we conclude that the sentence of death entered in the present case is not disproportionate.

Having considered and rejected all of defendant's assignments of error, we hold that defendant received a fair trial and sentencing proceeding, free from prejudicial error. Comparing this case to similar cases in which the death penalty was imposed and considering both the crime and defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive. Therefore, the sentence ***316** of death entered against defendant must be and is left undisturbed.

NO ERROR.

WHICHARD, Justice, concurring in the result in part.

On issue XX, I do not agree that the prosecutor did not misstate the law in his explanation of Issue Three of the capital sentencing proceeding. For the reasons stated in Justice Frye's dissenting opinions in *McCarver* and *McLaughlin,* both filed simultaneously herewith, I believe the prosecutor's statement that the jury must be unanimous to answer Issue Three in the negative was incorrect.

In this case, however, unlike in *McCarver* and *McLaughlin,* the misstatement was by the prosecutor, not the judge. Further, there was no objection to the statement at trial, so the standard of review is whether the error was so egregious as to require the trial court to intervene *ex mero motu.* I do not believe the misstatement rose to that level, nor do I believe that, in the total context presented, there is any serious possibility the statement had an effect on the jury's decision. I therefore concur in the result reached on this issue in the opinion for the Court, though disagreeing with the reasoning.

FRYE, J., joins in this concurring opinion.

Parallel Citations

461 S.E.2d 602

APPENDIX T

STATE OF NORTH CAROLINA. IN THE GENERAL COURT OF JUSTICE.
SUPERIOR COURT DIVISION.
COUNTY OF ALAMANCE. FILE NO.:91-CRS-21905

STATE OF NORTH CAROLINA,

-v- V E R D I C T

JOHN EDWARD BURR,

Defendant.

We, the jury, unanimously find the defendant, John Edward Burr, to be:

✓ Guilty of first degree murder,
or;
____ Guilty of second degree murder,
or;
____ Not guilty.

This the 16th day of April, 1993.

Deborah L. Deaton
SIGNATURE OF FOREMAN

DEBORAH L. DEATON
PRINTED NAME OF FOREMAN

STATE OF NORTH CAROLINA.

COUNTY OF ALAMANCE.

IN THE GENERAL COURT OF JUSTICE.
SUPERIOR COURT DIVISION.
FILE NO.: 91-CRS-21906

STATE OF NORTH CAROLINA,

-v-

JOHN EDWARD BURR,

Defendant.

V E R D I C T

We, the jury, unanimously find the defendant, John Edward Burr, to be:

✓ Guilty of felonious child abuse,

or;

_____ Not guilty.

This the 16th day of April, 1993.

Deborah L. Deaton
SIGNATURE OF FOREMAN

DEBORAH L. DEATON
PRINTED NAME OF FOREMAN

STATE OF NORTH CAROLINA. IN THE GENERAL COURT OF JUSTICE.
SUPERIOR COURT DIVISION.
COUNTY OF ALAMANCE. FILE NO.: 91-CRS-21909

STATE OF NORTH CAROLINA,

-v- V E R D I C T

JOHN EDWARD BURR,

Defendant.

We, the jury, unanimously find the defendant, John Edward Burr, to be:

✓ Guilty of assault on a female,

or;

____ Not guilty.

This the 16th day of April, 1993.

Deborah L. Deaton
SIGNATURE OF FOREMAN

DEBORAH L. DEATON
PRINTED NAME OF FOREMAN

STATE OF NORTH CAROLINA. IN THE GENERAL COURT OF JUSTICE.
SUPERIOR COURT DIVISION.
COUNTY OF ALAMANCE. FILE NO. 91-CRS-21905.

STATE OF NORTH CAROLINA,
-V-
JOHN EDWARD BURR,
Defendant.

ISSUES AND RECOMMENDATION

AS TO PUNISHMENT

ISSUE 1:

Do you unanimously find from the evidence beyond a reasonable doubt the existence of the following aggravating circumstance?

ANSWER YES

BEFORE YOU ANSWER ISSUE ONE, CONSIDER THE FOLLOWING AGGRAVATING CIRCUMSTANCE. IN THE SPACE AFTER THE AGGRAVATING CIRCUMSTANCE WRITE "YES" IF YOU UNANIMOUSLY FIND THE AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE "NO" IF YOU DO NOT UNANIMOUSLY FIND THE AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE "YES" IN THE SPACE AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCE, WRITE "YES" IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE "NO" IN THE SPACE AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCE, WRITE "NO" IN THE SPACE AFTER ISSUE ONE.

Was this murder especially heinous, atrocious and cruel?

ANSWER YES

IF YOU ANSWERED ISSUE ONE "NO" SKIP ISSUES TWO, THREE AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE "YES" PROCEED TO ISSUE TWO.

ISSUE 2:

Do you find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER YES

BEFORE YOU ANSWER ISSUE II, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, WRITE "YES" IF ONE OR MORE OF YOU FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE. WRITE "NO" IF NONE OF YOU FIND THAT MITIGATING CIRCUMSTANCE.

IF YOU WRITE "YES" IN ONE OR MORE OF THE SPACES, WRITE "YES" IN THE SPACE AFTER ISSUE II AS WELL. IF YOU WRITE "NO" IN ALL OF THE SPACES, WRITE "NO" IN THE SPACE AFTER ISSUE II.

1. The Defendant has no significant history of prior criminal activity?

ANSWER YES one or more of us finds this mitigating circumstance to exist.

2. The capital felony was committed while the Defendant was under the influence of mental or emotional distrubance.

ANSWER YES one or more of us finds this mitigating circumstance to exist.

3. That the Defendant has been a person of good character or has a good reputation in the community in which he lives.

ANSWER YES one or more of us finds this circumstance to exist and deem it to have mitigating value.

4. That the conduct of the Defendant was inconsistent with his history and background.

ANSWER YES one or more of us finds this circumstance to exist and deem it to have mitigating value.

5. That the Defendant has a prior history of working appropriately and productively while caring for minor children.

ANSWER YES one or more of us finds this circumstance to exist and deem it to have mitigating value.

6. That the Defendant has been a loving and supportive father to his own children.

ANSWER YES one or more of us finds this circumstance to exist and deem it to have mitigating value.

7. That the Defendant has been a hard-working and productive citizen.

ANSWER YES one or more of us finds this circumstance to exist and deem it to have mitigating value.

8. That the Defendant is skilled in areas of mechanical ability, construction and maintenance and can be a productive individual.

ANSWER YES one or more of us finds this circumstance to exist and deem it to have mitigating value.

9. That the Defendant has maintained good conduct while incarcerated following his arrest and has the ability to adjust to prison life.

ANSWER YES one or more of us finds this circumstance to exist and deem it have mitigating value.

10. That the Defendant offered no resistance upon arrest.

ANSWER YES one or more of us finds this circumstance to exist and deem it to have mitigating value.

11. That the Defendant obtained his G.E.D. after dropping out of high school.

ANSWER YES one or more of us finds this circumstance to exist and deem it to have mitigating value.

12. That during his incarceration since this incident, the Defendant has demonstrated an ability to function as a positive citizen while incarcerated.

ANSWER YES one or more of us finds this circumstance to exist and deem it to have mitigating value.

13. That the Defendant has always strived to help others.

ANSWER YES one or more of us finds this circumstance to exist and deem it to have mitigating value.

14. That the act by the Defendant was conducted while he was under a great deal of stress and emotional conflict.

ANSWER YES one or more of us finds this circumstance to exist and deem it to have mitigating value.

15. That the Defendant exhibited religious beliefs and practices since incarceration.

ANSWER Yes one or more of us finds this circumstance to exist and deem it to have mitigating value.

16. Any other circumstance or circumstances arising from the evidence which one or more of you deems to have mitigating value.

ANSWER Yes one or more of us finds the circumstance to exist.

ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO "YES". IF YOU ANSWERED TWO "NO", SKIP ISSUE THREE AND ASWER ISSUE FOUR.

ISSUE 3:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance found?

ANSWER YES

IF YOU ANSWERED ISSUE THREE "NO", INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT". IF YOU ANSWERED ISSUE THREE "YES" PROCEED TO ISSUE FOUR.

ISSUE 4:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance you found is sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?

ANSWER YES

IF YOU ANSWERED ISSUE FOUR "YES", INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT". IF YOU ANSWERED ISSUE FOUR "NO", INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONMENT" OR "DEATH" IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, John Edward Burr, be sentenced to DEATH.

This the 21st day of April, 1993.

SIGNATURE OF JURY FOREPERSON

4/20/93
11:35 AM
JDR ACSC

JOHN EDWARD BURR

DEFENDANT'S PRIOR CONVICTIONS

1. That during December, 1976, in Anson County, North Carolina Superior Court the Defendant was convicted of Felonious Breaking and Entering.

2. That during October, 1979, in Anson County, North Carolina Superior Court the Defendant was convicted of Felonious Obtaining Property by False Pretense.

3. That during December, 1983, in Lynchburg, Virginia the Defendant was convicted of Misdemeanor Larceny.

4. That during December, 1983, in Lynchburg, Virginia the Defendant was convicted of Trespassing.

5. That during May, 1990, in Alamance County, North Carolina District Court the Defendant was convicted of Assault on a Female.

6. That during June, 1990, in Alamance County, North Carolina District Court, the Defendant was convicted of Driving While Impaired.

WORD/RPJ/JEB-PC

STATE OF NORTH CAROLINA. IN THE GENERAL COURT OF JUSTICE.
SUPERIOR COURT DIVISION.
COUNTY OF ALAMANCE. FILE NO. 91-CRS-21905

4/21/93
5:30 pm
JDR, ACSC

STATE OF NORTH CAROLINA,

-v-

JOHN EDWARD BURR,

Defendant.

O R D E R

The prisoner, John Edward Burr, having been convicted of murder in the first degree by unanimous verdict of the Jury duly returned at the term of the Superior Court of Alamance County, North Carolina, and the Jury having unanimously recommended the punishment of death.

IT IS THEREFORE, ORDERED AND ADJUDGED that the same, John Edward Burr be, and he is hereby sentenced to death and the Sheriff of Alamance County, North Carolina, in whose custody the said defendant now is, shall forthwith deliver said prisoner, John Edward Burr, to the Warden of the State's Penitentiary at Raleigh, North Carolina, who the said Warden, on the 25th day of June, 1993, shall cause the said prisoner, John Edward Burr, to be put to death as by law provided.

May God have mercy on his soul.

This the 21st day of April, 1993.

A. LEON STANBACK, JR.
Judge presiding

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION
CIVIL NO. 1:01CV00393

JOHN EDWARD BURR,)
)
Petitioner,)
)
vs.)
)
CARLTON B. JOYNER, Warden,)
Central Prison, Raleigh,)
North Carolina,)
)
Respondent.)
)

INTERVIEW

OF

LISA BRIDGES

INTERVIEWER: Lisa, what that is -- that's a Dictaphone. It's a transcribing machine and I'd like -- if you don't mind, I'm going to use that.

MS. BRIDGES: That's fine.

INTERVIEWER: Okay. First of all, let me get your married name now.

MS. BRIDGES: It's Bridges, Lisa Bridges.

INTERVIEWER: Bridges. And, Lisa, what's your date of birth?

MS. BRIDGES: It's 12, the 31st.

INTERVIEWER: 12/31/64. All right. And what is your present mailing address?

MS. BRIDGES: It's 580 Guilrock Lane.

INTERVIEWER: Guilrock Lane?

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: Guilrock Lane. What town is that?

MS. BRIDGES: That will be in Browns Summit.

INTERVIEWER: Browns Summit?

MS. BRIDGES: Uh-huh (yes.)

INTERVIEWER: What is that ZIP code out there? 215?

MS. BRIDGES: Or 141, I have to.

MR. ALLEN: That's not the same as Burlington, is it?

MS. BRIDGES: No. It's in Rockingham County.

MR. ALLEN: That would be 27214.

MS. BRIDGES: 04, Okay. I'm sorry.

INTERVIEWER: 27214.
MR. ALLEN: Burlington is 215.
MS. BRIDGES: Yeah.
INTERVIEWER: What is your telephone number, Lisa?
MS. BRIDGES: It's 342 --
INTERVIEWER: 342.
MS. BRIDGES: -- 00 --
INTERVIEWER: 00.
MS. BRIDGES: -- 77.
INTERVIEWER: 77. All right. And what's your husband's name?
MS. BRIDGES: Michael Dell Bridges.
INTERVIEWER: Michael Dale, D-a-l-e?
MS. BRIDGES: D-e-l-l.
INTERVIEWER: D-e-l-l. Dell Bridges. And how old are you now?
MS. BRIDGES: I'm 27. I'll be 28 the end of this month.
INTERVIEWER: And your husband is how old?
MS. BRIDGES: He's 29.
INTERVIEWER: Twenty-nine. Are you working anywhere at this time?
MS. BRIDGES: No.
INTERVIEWER: Okay. How about your husband? Where does he work?
MS. BRIDGES: Olympic Narrow.

INTERVIEWER: What?
MS. BRIDGES: Narrow.
INTERVIEWER: I'm not sure what that is.
MS. BRIDGES: N-a-r-r-o-w.
INTERVIEWER: N-a-r-r -- what type of work does he do?
MS. BRIDGES: He's a fixer.
INTERVIEWER: Okay. Is that a textile mill?
MS. BRIDGES: Yeah, I guess.
INTERVIEWER: Okay. Lisa, how many children do you have?
MS. BRIDGES: Well, I got three my own right now.
INTERVIEWER: Okay. Let's start with oldest child. What's his name?
MS. BRIDGES: Scott Ingle.
INTERVIEWER: Scott Ingle, I-n-g-l-e?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: And how old is he?
MS. BRIDGES: He's 10.
INTERVIEWER: And when was he born?
MS. BRIDGES: February.
INTERVIEWER: The 26th?
MS. BRIDGES: Yeah.
INTERVIEWER: Of what year?
MS. BRIDGES: '83.
INTERVIEWER: All right. And what's the next child in

age?

MS. BRIDGES: Tony Dawson.

INTERVIEWER: Tony Dawson, D-a-w-s-o-n?

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: And how old is Tony?

MS. BRIDGES: He's seven.

INTERVIEWER: What's his date of birth?

MS. BRIDGES: February the 10th.

INTERVIEWER: February the 10th of?

MS. BRIDGES: Of '85.

INTERVIEWER: '85. And then the next child?

MS. BRIDGES: John Wesley.

INTERVIEWER: John Wesley?

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: Is that his last name, Wesley?

MS. BRIDGES: O'Daniel, Jr.

INTERVIEWER: O'Daniel, Jr.

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: Age?

MS. BRIDGES: He's four now.

INTERVIEWER: And date of birth?

MS. BRIDGES: February the 8th.

INTERVIEWER: February 8th?

MS. BRIDGES: Of '88.

INTERVIEWER: February is a busy month for you.

MS. BRIDGES: Yeah.
INTERVIEWER: I guess you hit with birthdays real bad in February. Okay. These are your three children?
MS. BRIDGES: Yeah.
INTERVIEWER: And then you have some step-children?
MS. BRIDGES: Yeah. I'm raising my step-children, too.
INTERVIEWER: And they are the children of Michael; is that correct?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: All right. So we have a complete family profile here. Let's see. Step-children are of Michael, and what are their ages -- or, excuse me, their names? I'm sorry.
MS. BRIDGES: All right. The oldest one is Lisa Bridges.
INTERVIEWER: Lisa Bridges?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: Same name as you.
MS. BRIDGES: Yeah.
INTERVIEWER: Okay. How old is Lisa?
MS. BRIDGES: She's 10.
INTERVIEWER: Okay. And the next child?
MS. BRIDGES: Angela Bridges.
INTERVIEWER: Angela Bridges. Age?
MS. BRIDGES: She's seven.

INTERVIEWER: Seven. Any others?
MS. BRIDGES: Yeah. Jeffrey.
INTERVIEWER: Is that the little boy out in the waiting room?
MS. BRIDGES: Yeah.
INTERVIEWER: And how old is Jeffrey?
MS. BRIDGES: He's four.
INTERVIEWER: Okay.
INTERVIEWER: So if we need to get up with you, we can get up with you through this number at 342-0077?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: How about your husband's work telephone? Do you know what that number is?
MS. BRIDGES: No. It's in the phone book.
INTERVIEWER: Look under Olympic Narrow; is that correct?
MS. BRIDGES: Yeah.
INTERVIEWER: Okay. Lisa, the reason we that we need to talk to you, obviously, we talking about Burr. And this case is set to go to trial on the 4th of January. That's when it will start. I can't tell you when it will end. Cases like this sometimes take a couple of weeks or so to try. So when we get started, we're going to start on the 4th of January and we will go until it's concluded. If

that's a week or if it's two weeks, if it's three weeks. Whatever it takes, that's what we've got to do. In order to try the case, we need to -- we're trying to talk with everybody, every potential witness. Mr. Allen and I are both Assistant District Attorneys in this office. Mr. Balog is the District Attorney. I think you've met him, I believe.

MS. BRIDGES: Yeah.

INTERVIEWER: Okay. Mr. Allen and I work for Mr. Balog. We -- that's what we do. We are what's commonly referred to as prosecuting attorneys or the State's attorneys. We are the lawyers who put on the evidence to the Court and to the jury to try to demonstrate to the jury why they ought to find Mr. Burr guilty of the murder of your baby.

In the process of trying put this together, we need to ask a lot of questions. We need to get as much information from you and from others as we can concerning what has happened, a complete history. And we're not trying to embarrass you or anything, but some of the questions we ask could be personal or they could be embarrassing. I want you to understand that we're not trying to pick up you, but we're just trying to get to the bottom of this

thing --
MS. BRIDGES: I want to.
INTERVIEWER: -- to develop the truth. You've already talked with the deputy sheriff, so you know a little bit about what we're talking about.
MS. BRIDGES: Yeah.
INTERVIEWER: Also, I'm sure that it's probably not something that you really relish talking about, but it's important.
MS. BRIDGES: Well, it's important for me to make him pay.
INTERVIEWER: Okay, great. Tarissa was born?
MS. BRIDGES: Tarissa.
INTERVIEWER: Tarissa?
MS. BRIDGES: Yeah.
INTERVIEWER: Spell that name, please.
MS. BRIDGES: T-a-r-i-s-s-a.
INTERVIEWER: Okay. Tarissa --
MS. BRIDGES: Sue.
INTERVIEWER: Sue, S-u-e?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: Okay. O'Daniel?
MR. BRIDGES: Uh-huh (yes).
INTERVIEWER: Tarissa Sue was born?
MS. BRIDGES: April the 1st of '91.

INTERVIEWER: That's 1991. All right. You were married at the time?

MS. BRIDGES: I was separated.

INTERVIEWER: Separated. Okay.

MS. BRIDGES: Not legally, but we weren't living together.

INTERVIEWER: Okay. Is this marriage to Michael Bridges, is this your second marriage?

MS. BRIDGES: No. This is my third.

INTERVIEWER: Your third marriage. All right. When were you first married?

MS. BRIDGES: I was first married when I was --

INTERVIEWER: What was that husband's name?

MS. BRIDGES: Daniel Ingle.

INTERVIEWER: Daniel Ingle?

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: All right. Now, that would be Scott's daddy; is that correct?

MS. BRIDGES: Yeah.

INTERVIEWER: How long did you and Daniel remain married?

MS. BRIDGES: We weren't married long. About four months.

INTERVIEWER: All right. Now, when were you next married?

MS. BRIDGES: I was married to John.
INTERVIEWER: Your marriage was to John O'Daniel?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: What was John's middle name?
MS. BRIDGES: Wesley.
INTERVIEWER: John Wesley.
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: Okay. That would be the father of John Junior?
MS. BRIDGES: Yeah.
INTERVIEWER: Okay. When were you married to John O'Daniel?
MS. BRIDGES: We were married about six years.
INTERVIEWER: Do you know when you got married?
MS. BRIDGES: September the --
INTERVIEWER: September 14th?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: Of what year?
MS. BRIDGES: Of --
INTERVIEWER: (Recording inaudible.)
MS. BRIDGES: I'm pretty sure that. I don't know. It was six years ago. Just you might have to count back.
INTERVIEWER: Okay. And he's the father of John Jr.?
MS. BRIDGES: John Jr., Yeah.

INTERVIEWER: Okay. Now, the middle child.
MS. BRIDGES: I wasn't married to his father.
INTERVIEWER: Okay. Tony was conceived and born between your marriages?
MS. BRIDGES: Yeah.
INTERVIEWER: Okay. Who is Tony's father?
MS. BRIDGES: Dewey Reed Dawson.
INTERVIEWER: Dewey Reed Dawson. Okay. Is he a local person?
MS. BRIDGES: He lives in Hampstead, North Carolina.
INTERVIEWER: Hampstead? Down on the coast?
MS. BRIDGES: Yeah.
INTERVIEWER: Have you ever lived down in Hampstead?
MS. BRIDGES: I did for a little while. Not long.
INTERVIEWER: I'll be darned. I lived -- until recently, I lived down on the coast. I lived in a little place called Swan Quarter, which is on the north side of Pamlico Sound. But I know where Hampstead is. I've been through there a few times. Small place.
MS. BRIDGES: Yeah.
INTERVIEWER: Okay. Now, when did you and John separate?
MS. BRIDGES: Just last year.
INTERVIEWER: Do you recall about when you separated

last year?
MR. BRIDGES: It was about the middle of June, or something like that.
INTERVIEWER: Of June?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: Do you mind my asking why you separated?
MS. BRIDGES: We just really couldn't along. That's our main problem.
INTERVIEWER: Okay. How about Mr. Burr, John Edward Burr, how did you get to know John Burr?
MS. BRIDGES: Through my sister-in-law.
INTERVIEWER: How did you first meet him?
MS. BRIDGES: We all went swimming, I think it was.
INTERVIEWER: It was through your sister-in-law?
MS. BRIDGES: Yeah.
INTERVIEWER: What's her name?
MS. BRIDGES: Rita Wade.
INTERVIEWER: Rita Wade. And she's the lady who still lives here in Alamance County, I believe.
MS. BRIDGES: Yes, she lives up there on Jimmy Bowles Road.
INTERVIEWER: Okay. She lives in a trailer right up the road from where you were at the time?
MS. BRIDGES: Yeah.
INTERVIEWER: Okay. All right. So you met John through

Rita.

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: And that was by going swimming?

MS. BRIDGES: Swimming and then we had a cookout at her house and stuff like that.

INTERVIEWER: Do you remember about when that was?

MS. BRIDGES: Me and my husband, John, we were still together at that time, at the swimming. And he accused me and Johnny, and then things just led into a bigger problem.

INTERVIEWER: Uh-huh (yes).

MS. BRIDGES: So, you know --

INTERVIEWER: Okay. So you and -- we've got so many Johns here. You and John O'Daniel were still together --

MS. BRIDGES: Yeah, we were still together.

INTERVIEWER: -- when your sister-in-law introduced you to John Burr?

MS. BRIDGES: Yeah.

INTERVIEWER: I take it, when she introduced you to John Burr, that that was not in any -- that wasn't to set you up on a date or something, that was just --

MS BRIDGES: No, not intentionally.

INTERVIEWER: Okay. That is a -- Brad, do you need a Kleenex?

MR. ALLEN: If you have one.
INTERVIEWER: We've got a trash can, too.
MR. ALLEN: I'm fine. Thanks.
INTERVIEWER: Okay. So you and John were still together when you first met John Edward Burr?
MS. BRIDGES: Yeah.
INTERVIEWER: All right. Now, when did you start seeing John Edward in a social setting?
MS. BRIDGES: Probably about the end of June because right after that me and John --
INTERVIEWER: When was it that you and your husband -- that your husband accused you of seeing John Edward?
MS. BRIDGES: That was at the swimming and stuff. He was a real jealous type husband and, if you talked to a guy, well, you know, you're doing something. And that's just the way he was.
INTERVIEWER: Okay.
MS. BRIDGES: So then from there on, he decided, you know, a divorce would be better. So that's what we did.
INTERVIEWER: So you separated toward the end of June, sometime after meeting John Edward? Or did you then?
MS. BRIDGES: We separated about the middle of June and

then I got with Johnny around the end of June is when we really become together.

INTERVIEWER: Close?

MS. BRIDGES: Yeah.

INTERVIEWER: All right. Now, toward the end of June of '91, what was your relationship with Johnny?

MS. BRIDGE: Well, we were living together.

INTERVIEWER: And where were you living at the time when you were living together?

MS. BRIDGES: Down at Jimmy Bowles Road.

INTERVIEWER: What type of dwelling were you living in?

MS. BRIDGES: I was in my mobile home.

INTERVIEWER: Mobile Home?

MS. BRIDGES: Uh-huh (yes). But that wasn't right at the end of June when me and him started staying together because I stayed with my brother, my step-brother, Donald, and his wife. And see, like when they put it down in the paper, they put it as I had the kids down there, you know, at the home. But the way we were doing it was, during the daytime, we stayed at Rita and them's.

INTERVIEWER: Okay.

MS. BRIDGES: Then at night time, we stayed down there.

INTERVIEWER: Well, let me say this to you, what was in the newspaper is really of absolutely no interest

or concern to either of us because the newspaper gets things wrong all the time.

MS. BRIDGES: They did plenty of times.

INTERVIEWER: Yeah, well, I've tried cases that the news has covered and I read it in the paper and I start thinking I wonder what case they're talking about because it doesn't sound like the one that I was in, and I was trying it. Well, where were you and your husband, John O'Daniel, where were you all living?

MS. BRIDGES: We were living on Morehead Street.

INTERVIEWER: In Burlington?

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: So after you split up -- so after you and John split up, where did you -- did you move out of the house, or did he move out of the house, or did both of you move out of the house?

MS. BRIDGES: I moved out of the house and then he moved his girlfriend in, and his cousin, and then later on, they all lost the house. That's the way it went.

INTERVIEWER: You mean at the time that John O'Daniel was accusing you of seeing John --

MS. BRIDGES: Yeah, right after I moved out.

INTERVIEWER: -- he also had a girlfriend?

MS. BRIDGES: I guess. You know, I don't know. All I know is just right after I moved out, it was like a few days later -- maybe about two days later or three, he moved them in.

INTERVIEWER: Okay. Well, where did you move to from the Morehead Street?

MS. BRIDGES: In with Rita and them until I got my trailer pulled down there.

INTERVIEWER: What was the name of that trailer park where you and Rita were living? Where you were living over at the home park, Country Living Mobile Home Park?

MS. BRIDGES: Number 2.

INTERVIEWER: When you moved down with Rita and her -- was it her husband and her children?

MS. BRIDGES: Yeah.

INTERVIEWER: When you moved in with them, how long did you stay with them?

MS. BRIDGES: It was several weeks.

INTERVIEWER: All right. So after you stayed several weeks with Rita and her family, then what happened?

MS. BRIDGES: That's when I got my trailer pulled down out of the -- I didn't have any power. I was running a drop cord from theirs to mine.

INTERVIEWER: Where did you get your trailer from?

MS. BRIDGES: I bought it from a my step-brother's cousin. It was LaFay Ferguson

INTERVIEWER: Were you working anywhere at the time?

MS. BRIDGES: Huh-uh (no).

INTERVIEWER: You were not? But, nonetheless, you bought this trailer and you had it moved out to the Country Living Trailer Park?

MS. BRIDGES: Yeah. There were, like, working with me, letting me pay them like $50 a month, or whatever.

INTERVIEWER: I understand. But it was the same trailer park that Rita and her husband were in?

MS. BRIDGES: Yeah, same one.

INTERVIEWER: Okay. And they are family?

MS. BRIDGE: Yeah. He's my step-brother. Well, was through marriage. Daddy was married to his momma.

INTERVIEWER: I see. All right. Now, you said you had no electric power?

MS. BRIDGES: Huh-uh (no). Other than the drop cord.

INTERVIEWER: No electric power, other than -- what was that?

MS. BRIDGES: A drop cord running from their trailer to mine.

INTERVIEWER: From Rita's trailer?

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: How far would you say Rita's trailer was

away from yours?
MS. BRIDGES: Well, she was one and I was four. But the way the -- it wasn't like straight in a row. It was like hers was here, then another one behind her, and then mine. It was like a little ways over. You know what I'm saying?
INTERVIEWER: Now, this drop cord, did it come across your front yard, your backyard, or what?
MS. BRIDGES: It went across my front.
INTERVIEWER: And what did it hook up to?
MS. BRIDGES: Well, it was like a four-way box, and I had like a tv, or you know, a fan or something like that. I had a light.
INTERVIEWER: Did it come through a window, or through a door?
MS. BRIDGES: It just went in my front door.
INTERVIEWER: It comes through the front door and it has the four-way box on it?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: And you can plug whatever you needed to into it; is that right?
MS. BRIDGES: Yeah.
INTERVIEWER: Was there any running water inside your trailer?
MS. BRIDGES: In a way, I really can't remember.

INTERVIEWER: Okay. The reason I'm asking you this, I get the impression from reading the officer's notes that you were still in the process of setting up housekeeping.

MS. BRIDGES: Yeah, we were.

INTERVIEWER: Okay. That's what I'm trying to get a picture of.

MS. BRIDGES: Yeah. That's why we, you know, had the drop cord and stuff because it -- you know, at night time, I would stay with the children down there. Then every morning we would go up to Rita's. So we really wasn't living there. We were just staying there at night time.

INTERVIEWER: Well, Rita and her family, I reckon they were in a mobile home too. They probably didn't have a whole lot of room for you and the children.

MS. BRIDGES: No, they didn't.

INTERVIEWER: Did you have some furniture in your trailer?

MS. BRIDGES: Yeah. I was furnished.

INTERVIEWER: It was furnished?

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: Okay. So you had a bed and each child had a bed?

MS. BRIDGES: Yeah.

INTERVIEWER: And how many bedrooms did you have in the trailer?

MS. BRIDGES: Well, it didn't have but two bedrooms. I had one, and the boys -- I had Suzie's baby bed in my room.

INTERVIEWER: Okay. That was my next question.

MS. BRIDGES: I call her Suzie.

INTERVIEWER: I know that the nurses at Chapel Hill called her Little Suzie.

MS. BRIDGES: Yeah.

INTERVIEWER: It must be where it came from. What kind of bed did Suzie have?

MS. BRIDGES: A baby bed. It was on like a bassinet bed or something.

INTERVIEWER: A bassinet?

MS. BRIDGES: Yeah, a bassinet bed, but it's really just like a baby bed.

INTERVIEWER: All right. Now, I want to be sure I'm clear on this. Are you talking about one of those little wicker type baskets that's got --

MS. BRIDGES: No.

INTERVIEWER: Just the bed that's got the posts in it?

MS. BRIDGES: Yeah. Her's had the little rails and everything like a baby bed.

INTERVIEWER: Kind of like a Jenny Lind bed? That type

of thing? Do you know what a Jenny Lind bed is?
MS. BRIDGES: huh-uh (no).
INTERVIEWER: Do you know -- the baby beds you see at the furniture stores?
MS. BRIDGES: Yeah, it's like that.
INTERVIEWER: It's got the little rails in it all around. All around all four sides.
MS. BRIDGES: Yeah.
INTERVIEWER: Okay.
MS. BRIDGES: Huh-uh (no). Wait a minute. Not on all four sides, just -- it had the rails on this side, and then the rails on other side, and then it had like a whole wood piece.
INTERVIEWER: A headboard?
MS. BRIDGES: Yeah. And a --
INTERVIEWER: And a footboard.
MS. BRIDGES: Yeah.
INTERVIEWER: Okay. And are we talking about the kind of beds where the rails come up high like this, keep the baby from crawling out?
MS. BRIDGES: Yeah. And you can let them up, or you can put them down.
INTERVIEWER: Got you. You can raise and lower one side of it.
MS. BRIDGES: Yeah.

INTERVIEWER: Okay. Now, Suzie would sleep in there in your room?
MS. BRIDGES: Yeah.
INTERVIEWER: And the boys were in the other room?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: What about Johnny? How often did Johnny stay with you?
MS. BRIDGES: He stayed -- say he was working over, but then there were times I found he was back with his wife. He was supposed to say no.
INTERVIEWER: Okay. I'm going to -- this thing keeps clicking over and it's a nuisance. I'm going to turn it where it can pick up your voice just a little bit more. Maybe it won't shut it off so much. It probably will anyway. When we talk, that's when it comes on. When we quit talking, after a few seconds, it cuts off and that's why it keeps clacking.

Lisa, when you first moved to that mobile home, or had you moved (recording malfunctions).
MS. BRIDGES: -- so that could be like --
INTERVIEWER: He didn't come out at first, but maybe a few days later, he moved in with you?
MS. BRIDGES: Yeah.
INTERVIEWER: All right. Now, you said something about

that he didn't stay with you all the time?
MS. BRIDGES: Yeah. He was there most of the time.
INTERVIEWER: Where was he working?
MS. BRIDGES: Alamance Foods.
INTERVIEWER: Thing is still doing funny.
What time would he get off of work on second shift, 12:00 or 12:30?
MS. BRIDGES: Yeah. That's when he would get to the trailer.
INTERVIEWER: What time would he go to work?
MS. BRIDGES: It was in the evening.
INTERVIEWER: Okay. See if that thing will do any better.
All right. He'd leave at what time?
MS. BRIDGES: I think it was around 2:00 or something like that.
INTERVIEWER: In the afternoon?
MS. BRIDGES: Yeah.
INTERVIEWER: And he'd get home around 12:00 or 12:30 in the morning?
MS. BRIDGES: Yeah. Some times later, or different times.
INTERVIEWER: Usually worked about eight hours?
MS. BRIDGES: Yeah.
INTERVIEWER: All right. Now, you said that he was

going back to his wife some.
MS. BRIDGES: Yeah. That's what I found out later on, after he had done done that to my little girl.
INTERVIEWER: You didn't know it before?
MS. BRIDGES: No. I wasn't really familiar to it. And I do know of the Saturday that he done that to Suzie, that he did because that's what we were fighting over.
INTERVIEWER: Okay. Well, that's what I was getting toward. Did you have words about his going back and forth between you and his wife?
MS. BRIDGES: Huh-uh (no).
INTERVIEWER: You didn't?
MS. BRIDGES: No. I knew that he went to his children's birthday party, which, you know, that seemed natural to me because I would mine.
INTERVIEWER: How would you describe your relationship with Johnny up until the 25th of August?
MS. BRIDGES: At first, it was okay. And then he just -- he got -- I don't know. He just -- he changed. He changed a lot.
INTERVIEWER: He changed how?
MS. BRIDGES: Well, I know he's like -- he tells you what to do and you're supposed to do it. You know, you don't -- you know, he's like a bossy type

person. He tries to be your daddy in other words. And then, like if we would argue or something, he'd either twist my arm or bend my fingers or something like that.

INTERVIEWER: Can you show me how he'd bend your fingers? I don't want you to hurt yourself, but just show me.

MS. BRIDGES: He'd twist my arm, or either he would just take -- and it was somehow he could get my fingers and push them underneath, and they would hurt real bad. It felt like --

INTERVIEWER: Like that?

MS. BRIDGES: I could show you. Like, turn your hand around. It was something like that and he'd push your fingers up, and it felt like those bones were going to break.

INTERVIEWER: Squeeze that little finger like that?

MS. BRIDGES: Yeah, and it felt like them bones were going to break or something. Or either he'd take my wrist and he would just push it back real far.

INTERVIEWER: Okay. Now, do you remember when this change started showing up?

MS. BRIDGES: He got real bad right before he killed Suzie.

INTERVIEWER: All right. Now, timing gets to be kind of

important. I don't have a '91 calendar, I don't think.

MS. BRIDGES: I remember we got into it one time and he said that, if I left him -- he pulled a gun out and said he'd kill me.

INTERVIEWER: I don't have a '91.

MR. ALLEN: I've got one maybe in my office. Do you want to me see if I can get it?

INTERVIEWER: See if you've got a '91 in your office.

MR. ALLEN: Lisa, do you want a soft drink or a cup of water, or anything?

MS. BRIDGES: No, I'm fine.

INTERVIEWER: We've got plenty of it.

MR. ALLEN: You sure?

MS. BRIDGES: Yeah, I'm sure. Thank you

MR. ALLEN: Do you want anything? I might get me a Pepsi or something.

INTERVIEWER: I wouldn't mind -- I don't know whether I have change or not. Is there -- that think has a dollar changer, doesn't it.

MR. ALLEN: No, I don't think so. I've got some change. You don't want any?

MS. BRIDGES: Uh-huh (yes). Thank you.

MR. ALLEN: You sure?

MS. BRIDGES: Yeah.

INTERVIEWER: Get a diet drink
MR. ALLEN: Diet?
INTERVIEWER: Yeah, diet something.
MR. ALLEN: Pepsi?
INTERVIEWER: Will be fine.
MS. BRIDGES: Do y'all ever hear anything on him?
INTERVIEWER: He -- well, see, we don't -- we don't talk directly to him. He is represented by two lawyers. And any communication that we have has to go through those lawyers or with his lawyers. It wouldn't be ethical for me to go over and talk to him directly. The fact is, if I did that, it could cause real problems with the trial of the case. So we don't do that kind of thing.

That doesn't have a '91 on it either. I thought maybe my checkbook would.

But, of course, he's been in jail now since August of a year ago.

And we, at one time, thought, well, maybe we could get this case ready to try the end of November, but there was just no way. Just absolutely no way to do it, so I had it set for the 4th of January. That's why we're trying to talk to everybody and pull it together.

MS. BRIDGES: Yeah.

INTERVIEWER: And I came up here -- I'm originally from Burlington, but I have not lived in Burlington for a number of years and I came here back the end of October. The last 12 years I have worked as a district attorney down in eastern North Carolina. I had five counties down there that I worked in.

You sure you don't want one of these?

MS. BRIDGES: Yeah, I'm positive.

MR. ALLEN: I found one (recording inaudible).

INTERVIEWER: Good.

Okay. Looking at the calendar here, June of '91. So somewhere in here is when you and your husband separated and can you -- just looking at the calendar, can you kind of narrow it down some do you think?

MS. BRIDGES: I'd say around the 14th.

INTERVIEWER: Somewhere around in here?

MS. BRIDGES: Yeah.

INTERVIEWER: All right. After that, can you look on there and figure out when you and Johnny started living together?

MS. BRIDGES: Do you have to have the exact date?

INTERVIEWER: No. I'm just trying to kind of pin it down, you know, within a range of a few days, Lisa.

MS. BRIDGES: All right. I'd say around maybe the 24th.

INTERVIEWER: Some where in here?
MS. BRIDGES: Yeah.
INTERVIEWER: All right. Now --
UNKNOWN PERSON: Can I ask you a question? Can I?
INTERVIEWER: Sure.
UNKNOWN PERSON: Approximately when, after the 14th -- that's when you say you moved in with Rita.
MS. BRIDGES: Yeah.
UNKNOWN PERSON: And when approximately did you get the trailer moved down there?
MS. BRIDGES: It took me about a week. So let me see, that would be, yeah, around the 21st.
INTERVIEWER: Okay. So the 14th moved in with Rita, the 21st, approximately, with the trailer, the 24th sometime Johnny comes in?
MS. BRIDGES: Yeah.
INTERVIEWER: All right. Now, let's look down here through July and August. All right, here's the 25th. That's the morning that y'all took Suzie to the doctor, over here at Alamance County Hospital. So what we want to try to do is reconstruct this period of time from here to here the best we can as to how Johnny was acting, what he was doing to you, when his -- somewhere in there about when do you recall him first started to becoming bossy and

hurting you?

MS. BRIDGES: I would say probably about maybe three to four weeks before he killed Suzie.

INTERVIEWER: All right. So looking at that calendar, that would be around when, Lisa?

MS. BRIDGES: It would have to be in July, somewhere in July. I'd say about July the 16th or 17th.

INTERVIEWER: Okay. Now, did he start accusing you of other men? Was that one of the things that he would say?

MS. BRIDGES: He accused me of my brother, my step-brother.

INTERVIEWER: And this would have been Rita's husband. What's his name?

MS. BRIDGES: Donald Wade.

INTERVIEWER: And he was accusing you of having a relationship with Donald?

MS. BRIDGES: Yeah. I think he would just do something just so I would argue with him, and then that way, you know, he could hurt me. It was like sometimes, if you sit and think about it now, at the time you couldn't realize, you know, why he'd do the things he did. But now, if you kind of think about it -- it's like he kind thrived on hurting women or something, I don't know.

INTERVIEWER: Did he -- did y'all argue a lot?
MS. BRIDGES: Not really. His main thing was he would say I held Suzie too much. And that she wasn't going to do nothing but be spoiled. And let me see. You know, it was just different things. A lot of times you didn't even have to argue with Johnny. He'd just -- he'd act like he was playing but the whole time he'd be hurting you. And you'd let him know he was hurting you, but it didn't stop him.
INTERVIEWER: What was your relationship with Suzie?
MS. BRIDGES: Oh, my gosh. She was everything to me.
INTERVIEWER: She's the only daughter you had?
MS. BRIDGES: Yeah.
INTERVIEWER: Okay. Was she a particularly clingy child?
MS. BRIDGES: (No audible response.)
INTERVIEWER: Did you, in fact, hold her a lot?
MS. BRIDGES: (No audible response.)
INTERVIEWER: Was Johnny jealous of Suzie?
MS. BRIDGES: I think so.
INTERVIEWER: Did he ever tell you or fuss with you about spending too much time with her?
MS. BRIDGES: He just said I held her too much.
INTERVIEWER: How did he treat your boys?

MS. BRIDGES: He was all right. If they done wrong, he would correct them. But --
INTERVIEWER: How would he correct them?
MS. BRIDGES: He spanked them before but he never beat them. Not that I know of.
INTERVIEWER: Lisa, did he have your permission to spank the children?
MS. BRIDGES: No, not really. If they just done something, he would spank them. But then when he killed Suzie, Scott said he hit him in the back.
INTERVIEWER: How did you feel about Johnny correcting your children?
MS. BRIDGES: I mean, if he done it in a right way, I didn't mind, you know, if it was right. But, you know, if I had seen him do it outside, that would have been different. He would have had to leave because they came first.
INTERVIEWER: Now, what do you mean, if you had seen him do it outside? I don't understand.
MS. BRIDGES: You know, if I had seen him, you know, maybe hit them like Scott told me after he done that her, with his fist or in the back. Any kind of way that ain't no right way, you know, other than a spanking. If he had knocked them around or something, I wouldn't have stayed.

INTERVIEWER: Did you ever discipline your children by spanking?
MS. BRIDGES: Yeah.
INTERVIEWER: When you would spank them, how would you spank them?
MS. BRIDGES: I whipped them with a switch or maybe with my hand. And sometimes send them to their room.
INTERVIEWER: What did you use for a switch?
MS. BRIDGES: One of those you go pick off a tree and looks like a flimsy little switch.
INTERVIEWER: All right. Did you ever see Johnny use the switch on any of the kids, boys or Suzie?
MS. BRIDGES: No. But I know my baby was real scared of Johnny, John Jr.
INTERVIEWER: John Jr. was scared of Johnny Edward?
MS. BRIDGES: Yeah.
INTERVIEWER: Okay.
MS. BRIDGES: But you'd ask him, you know, had he ever hurt him and he would say no. We just assumed maybe it was he didn't want him taking his daddy's place, you know, or something.
INTERVIEWER: Okay. Lisa, when Johnny moved in with you, you had your boys with you and you had Suzie. All right, Suzie then would have been about -- April, May, June -- about three months old? Be

about right? Born in April, April 1st I think you said. Johnny moved in about the 24th. That's almost three months, not quite.

MS. BRIDGES: Yeah. Not quite, yeah.

INTERVIEWER: How big was Suzie?

MS. BRIDGES: Suzie was -- she was little.

INTERVIEWER: Was she always a little girl? I mean, always small?

MS. BRIDGES: Yeah.

INTERVIEWER: I noticed that the doctors weighed her and she was 10-and-a-half pounds.

MS. BRIDGES: Yeah. That's -- she's always been a little tight person, you know.

INTERVIEWER: How much did she weigh when she was born?

MS. BRIDGES: She weighed, I think it was five pounds something.

INTERVIEWER: Was she born premature?

MS. BRIDGES: Huh-uh (no).

INTERVIEWER: She was a full-term baby?

MS. BRIDGES: Yeah.

INTERVIEWER: Five pounds is a small baby.

MS. BRIDGES: Yeah. Or maybe a little more. I've got a birth certificate at home.

INTERVIEWER: How about when you get home this evening, if you would, take a look at that and see how much

she weighed.
MS. BRIDGES: I know that from what -- you know, I saw that it was like a big difference between night and day when you leave her. You know, she's small. And then I noticed, like when we got her to the hospital and we really got to looking at her and stuff, she looked just swollen. She didn't look small like she normally did.
INTERVIEWER: You took her in for well baby visits when she was a little girl, didn't you?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: Where were you taking her?
MS. BRIDGES: She would either go to Chapel Hill or down here.
INTERVIEWER: Where was she born?
MS. BRIDGES: She was born down here at Alamance Memorial.
INTERVIEWER: Now, Alamance Memorial, is that what we used to call t
MR. ALLEN: Huh-uh (no). Turrentine.
INTERVIEWER: Turrentine. Okay. Is that where you took her before she was taken to Chapel Hill? It was Memorial?
MS. BRIDGES: That was County.
INTERVIEWER: It was the County?
MS. BRIDGES: Yeah. I called Memorial and ended up at

County. You know, I didn't know one hospital from the other. I just wanted to get her there.

INTERVIEWER: Well, that's why I wanted to be sure because I had see statements that I had seen with the County, and I knew that the records we had were from County.

Who was -- did she have a regular pediatrician, or who did you use for well baby visits?

MS. BRIDGES: Well, she would go to Pringle. I think that was his name.

INTERVIEWER: Who was that?

MS. BRIDGES: Pringle.

INTERVIEWER: Pringle? Where is Dr. Pringle?

MS. BRIDGES: He's over there across from the hospital.

INTERVIEWER: Across from Memorial?

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: Lisa, would you be willing to give us a medical release so that Dr. Pringle could give us his medical records concerning Suzie?

MS. BRIDGES: Yeah.

INTERVIEWER: I have medical records from County Hospital. I have them from Chapel Hill. I think it would probably useful for us to obtain all of her well baby records. I think what we need to do is --

MS. BRIDGES: Now, you might -- if not from Pringle, she went to the health department because she was on WIC now. You would come closer to getting more out them.

INTERVIEWER: The public health department?

MS. BRIDGES: Yeah.

INTERVIEWER: All right. Where was the public health office that you went to:

MS. BRIDGES: This side of where you get your WIC and all that.

MR. ALLEN: It's over there across from (recording inaudible) AT&T.

MS. BRIDGES: Yeah.

INTERVIEWER: The same place it's always been? The old -- I think that's the old --

MR. ALLEN: Mental health is right over there on --

INTERVIEWER: Yeah. That's the old sanitarium, if I recall correctl Let's go ahead and do that before we forget about it. Let me get, I guess Glenda's got the medical release forms, doesn't she?

MR. ALLEN: Yeah, I imagine so. We'll need to get a few of them, won't we? Because you also took your baby to Chapel Hill.

MS. BRIDGES: Yeah.

INTERVIEWER: We've got that.

MR. ALLEN: Well, visits from Chapel Hill?
INTERVIEWER: I think we've got them.
MS. BRIDGES: When I took her was when her throat was messed up and we took her over here to, I think it was Memorial, and I wasn't satisfied with Dr. Wilcox's decision because he had this little light and he kind of flashed it, and then she went -- I took her straight to Chapel Hills the same day. And, if they give you them records, you can compare it and see that we took her to the same -- two different hospitals the same day and got a second opinion on her throat because she couldn't eat. She couldn't swallow.
INTERVIEWER: This was when?
MS. BRIDGES: That was about a month, I think it was, before Johnny got a hold of her.
MR. ALLEN: Glenda doesn't pick up.
INTERVIEWER: Call Patricia.
MR. ALLEN: Okay. Hers is busy.
INTERVIEWER: Or Brenda in the copy room. I think we've got --
(WHEREUPON, recording labeled Burr 01 ends.)
INTERVIEWER: Now, did Suzie have any teeth?
MS. BRIDGES: Huh-uh (no). No.

INTERVIEWER: All right. So when you say her tongue -- it looked like she bit her tongue, what do you mean?

MS. BRIDGES: It looked like her gums went down on the very tip of her tongue. It wasn't really a bad place. It might not even have been from the fall. But, you know, it was just a fine place on her tongue.

INTERVIEWER: Was it bleeding?

MS. BRIDGES: I don't think so.

INTERVIEWER: Okay. And you said a little redness?

MS. BRIDGES: Yeah, a little redness.

INTERVIEWER: And you indicate right at the chin.

MS. BRIDGES: Yes.

INTERVIEWER: How about all up under her neck or on her cheeks?

MS. BRIDGES: No. She had a rash right here and that was it.

INTERVIEWER: I want you tell us what that rash looked like.

MS. BRIDGES: It looked like where you sweat and it kind of like you were fat, kind of chubby, and you got that wrinkle and it looked like she had sweated a lot in it and the wrinkle had caused it to, you know, chap and turned into a rash from the heat.

INTERVIEWER: How long had she had that type of a rash?
MS. BRIDGES: Oh, goodness. She kept it a lot where it was so hot. And I put ointment on it and then I put like a Desitin on it and stuff to keep it from being so irritating. But I never could seem to get that rash to completely go away.
INTERVIEWER: All right. Well, how often would you put that ointment or Desitin up there on her rash?
MS. BRIDGES: I think I applied it about maybe five times a day, four to five times a day.
INTERVIEWER: Every day?
MS. BRIDGES: Yeah.
INTERVIEWER: Now, the rash that you're indicating is up here in the neck area?
MS. BRIDGES: Yeah. Right down here.
INTERVIEWER: So when you put the ointment on you got to look at her neck?
MS. BRIDGES: Yeah.
INTERVIEWER: And I would assume that you, better than anybody else, would know what her neck looked like. Ever have any bruising on her neck?
MS. BRIDGES: No.
INTERVIEWER: All right. So after Scott had fallen with her, a moment ago you said that you went over -- you were angry. Who were you angry with?

MS. BRIDGES: Well, I was more or less angry with myself, you know.
INTERVIEWER: Tell me why.
MS. BRIDGES: Because I blame myself for letting him hold her outside in the rocks. And then he fell over the cord. So I wasn't really mad at Scott. It wasn't his fault, it was my fault for getting him to hold her.
INTERVIEWER: Did you scold him?
MS. BRIDGES: No. I don't really think I did. I just more or less got Suzie and checked her out.
INTERVIEWER: How about Scott? How was he acting at the time?
MS. BRIDGES: He was scared, you know. He was scared maybe he hurt her bad. All he could say was, you know, Mama, I didn't let her hit the ground. I held her, you know. And that was the main thing Scott would say, was he held her.
INTERVIEWER: Was he afraid he was going to get punished? Do you know?
MS. BRIDGES: No. They just -- they loved their sister to death.
INTERVIEWER: All right. So tell me again what you did after that? You checked her?
MS. BRIDGES: Yeah. I checked her.

INTERVIEWER: By the way, did you see any bruises to her back?
MS. BRIDGES: No.
INTERVIEWER: Did you see any bruises on her chest?
MS. BRIDGES: Huh-uh (no).
INTERVIEWER: How about her ears?
MS. BRIDGES: No.
INTERVIEWER: Did you look at her --
MS. BRIDGES: I can tell you for a fact on that day she didn't have any bruise on her ears that evening, because my niece, in the process -- when they had them when we were down there working --
INTERVIEWER: Uh-huh (yes).
MS. BRIDGES: -- she asked me could she give Suzie a bath. And I told her just run a little bit of water and that's it. So she washed Suzie more or less with a little bit of water and washed her face and stuff. And there wasn't no bruises, because I checked her after she brought Suzie home from giving her a bath.
INTERVIEWER: Which niece was that?
MS. BRIDGES: That was Christie Wade.
INTERVIEWER: Why did you check her after she brought her home?
MS. BRIDGES: Just to make sure, you know, (recording

inaudible) and then to check her little rash and stuff.

INTERVIEWER: Okay. Did you, after she -- after Scott fell, did you see any bruises on the back of her head?

MS. BRIDGES: Huh-uh (no). She didn't have any.

INTERVIEWER: Okay. So you said something then that you did what? What was it you did after you checked her out?

MS. BRIDGES: With my niece giving her a bath?

INTERVIEWER: No, no, no. After she was dropped.

MS. BRIDGES: Oh, when Scott dropped her?

INTERVIEWER: Uh-huh (yes).

MS. BRIDGES: I just checked her and everything to make sure she was okay. And then eventually, you know, she stopped crying. And then it wasn't long after that my Daddy then come about 7:00 o'clock.

INTERVIEWER: Now, you say eventually she stopped crying. How long would you say that would have been all together before she stopped crying?

MS. BRIDGES: It wasn't really long because I held her, you know, and I was talking to her and stuff and telling her it was going to all right. And just, you know, no longer than a young'un will fall and get her, and then they cry a little bit, and that's

it. And that's all she did.
INTERVIEWER: Now, your parents -- your parents came over?
MS. BRIDGES: My Daddy and my baby sister.
INTERVIEWER: All right. What's your daddy's name?
MS. BRIDGES: Lewie Albert Porter.
INTERVIEWER: Louis? L-o-u-i-s?
MS. BRIDGES: L-e-w-i-e, Lewie.
INTERVIEWER: L-e-w-i-e, Lewie.
MS. BRIDGES: Elbert.
INTERVIEWER: E-l-b-e-r-t?
MS. BRIDGES: E-l-b-e-r-t.
INTERVIEWER: Porter.
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: How old is your daddy?
MS. BRIDGES: My daddy, he's 53 or 54.
INTERVIEWER: Okay. And where does he live?
MS. BRIDGES: In Landy Mobile Home Park.
INTERVIEWER: I'm sorry. I don't understand.
MS. BRIDGES: Landy Mobile Home Park.
INTERVIEWER: Landy Mobile Home Park. What town is that in?
MS. BRIDGES: What town?
INTERVIEWER: Uh-huh (yes).
MS. BRIDGES: It's around in Burlington.

INTERVIEWER: Burlington. And what's his phone number?
MS. BRIDGES: 227 --
INTERVIEWER: 227.
MS. BRIDGES: -- 93 --
INTERVIEWER: 93.
MS. BRIDGES: -- 47.
INTERVIEWER: 47. Is that the same place he was living back in the summer a year ago? I mean, is that --
MS. BRIDGES: Yeah, that's the same place.
INTERVIEWER: That's where you wanted Johnny to take you over to and Johnny wouldn't take you to; is that right?
MS. BRIDGES: Yeah. My parents.
INTERVIEWER: All right. So you daddy and who comes over?
MS. BRIDGES: My baby sister, Christie Jenkins.
INTERVIEWER: Is that the same Christie who gave Lisa the bath?
MS. BRIDGES: No. That was my niece, Christie. This is my sister, Christie.
INTERVIEWER: Okay. I get confused sometimes, but I'm trying to get all the people --
MS. BRIDGES: Yeah. This is Christie Jenkins.
INTERVIEWER: Christie Jenkins and that's your baby sister?

MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: And when you say baby sister, how old is she?
MS. BRIDGES: She's 20.
INTERVIEWER: Okay. Baby sister, but baby no more.
MS. BRIDGES: That's it.
INTERVIEWER: (Recording inaudible.) Okay. Does she have any children?
MS. BRIDGES: She's got one son.
INTERVIEWER: So Christie and your daddy come over. And this is about what time?
MS. BRIDGES: Seven o'clock.
INTERVIEWER: What was the purpose of their visit, if any?
MS. BRIDGES: Just came down to see how we were doing and stuff.
INTERVIEWER: All right. So when they came over, where was -- where was Suzie?
MS. BRIDGES: I was holding Suzie.
INTERVIEWER: Okay. So by this time Suzie had -- Scott had fallen with Suzie, and you had been comforting Suzie. Had Suzie settled down by the time your daddy and Christie got over?
MS. BRIDGES: Yeah.
INTERVIEWER: So did you tell them anything about --

MS. BRIDGES: I told my Daddy. You know, that's just they way we were. I told him, I said Dad, you wouldn't believe it. I said, Scott fell with Suzie today. And he said, "Well, is she all right?" You know, I told him yeah. And he's looking at her and stuff. And so -- and then he played with her and everything. He didn't really hold her, he just -- you know, he could see her good. She was in a pamper and nothing else on. And you know, Daddy will tell you today wasn't nothing wrong with her.

INTERVIEWER: How long did -- how long did your daddy and Christie stay over there? Do you recall?

MS. BRIDGES: Probably about 25, 30 minutes. They didn't stay very long.

INTERVIEWER: Where was Johnny Burr at the time?

MS. BRIDGES: Mowing the yard.

INTERVIEWER: Did he ever come over to talk to you, to your family?

MS. BRIDGES: No.

INTERVIEWER: Okay. Were you holding Suzie -- were you holding Suzie the whole time your daddy was there?

MS. BRIDGES: Not the whole time. I was holding her a few minutes while Daddy was there. And then she went to sleep a little after 7:00. Maybe about 10 minutes after. You know, I kept her up for a whole

hour and that's probably how I can remember 6:00 o'clock so good too because I did keep her up a whole hour.

INTERVIEWER: Uh-huh (yes). And when she went to sleep, where did you put her?

MS. BRIDGES: In her baby bed.

INTERVIEWER: Now, during any of that time, did you put her on her swing, any of that hour, or did you have her the whole time?

MS. BRIDGES: Yeah.

INTERVIEWER: You had her?

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: Okay. All right. So when you put her to bed, that was in her baby bed --

MS. BRIDGES: The baby bed.

INTERVIEWER: -- in your bedroom.

MS. BRIDGES: In my room.

INTERVIEWER: Do you remember about what time that would have been that you put her down?

MS. BRIDGES: Probably about -- when she went to sleep in my arms, my little sister wanted to see my trailer because she's hadn't seen the inside. And she was walking behind me and she said, "Suzie done went to sleep." So that was a little after 7:00. Probably about -- that's when I put Suzie in her

bed.

INTERVIEWER: About 10 or 15 after 7:00?

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: All right. At that time of summer was it light or was it dark outside when you put her down to bed?

MS. BRIDGES: It was still light. Seemed like it was still light.

INTERVIEWER: Okay. What did you do after you put her down?

MS. BRIDGES: I put her in her bed and then I went on to show my little sister my trailer and everything. And then we walked outside, down to the back of the trailer, and I stand there talking to Daddy and them and everything.

INTERVIEWER: And what happened after that?

MS. BRIDGES: They left.

INTERVIEWER: All right. Where was Johnny then?

MS. BRIDGES: He was still mowing the yard.

INTERVIEWER: Okay. What did you do next now? We've got your daddy and Christie have left. Johnny is still mowing the grass, and Suzie's in the bed. What' the next thing that happens, as best you recall?

MS. BRIDGES: Christie Wade came down there.

INTERVIEWER: That's your niece?
MS. BRIDGES: Yeah, Christie Wade.
INTERVIEWER: And she's how old?
MS. BRIDGES: She's 13, I think.
INTERVIEWER: Okay.
MS. BRIDGES: And she came down there and then we were sitting out on the back porch watching Johnny mow the yard and everything. And then Suzie didn't really sleep very long and she woke back up. And then we got her and we took her outside with us.
INTERVIEWER: All right. So Christie's down there and y'all are watching Johnny mow grass, and you say Suzie wakes up.
MS. BRIDGES: Yeah. She didn't sleep very long.
INTERVIEWER: How did you know she was awake?
MS. BRIDGES: Because I was sitting at my back door, on my steps, watching him mow the back yard.
INTERVIEWER: How far is your back door from where Suzie's in the bed?
MS. BRIDGES: Right at my bedroom.
INTERVIEWER: How did you know she was awake though?
MS. BRIDGES: She started crying.
INTERVIEWER: Did you go get her out of the bed at that time?
MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: Did you check her diaper or anything when she woke up?
MS. BRIDGES: I changed her diaper.
INTERVIEWER: You changed her at that time?
MS. BRIDGES: (No audible response.)
INTERVIEWER: Did you usually check Suzie to see if she was wet when she'd get up or when she'd wake up?
MS. BRIDGES: Yeah. I would just stick my finger through her diaper and see. And if it wasn't wet, you know, I didn't change her.
INTERVIEWER: Okay. All right. So you get Suzie. Where do you take her now?
MS. BRIDGES: Back on the back steps with me and Christie watching him mow the yard.
INTERVIEWER: Do you have an opinion as about what time of evening this would have been?
MS. BRIDGES: It was getting dark outside.
INTERVIEWER: Where were your boys by then?
MS. BRIDGES: They were up at Rita and them's house playing, because they go up through there and play a lot of basket ball at my landlord's court.
INTERCOM ON PHONE: Rob?
INTERVIEWER: Yes.
INTERCOM ON PHONE: Do you have someone with you?
INTERVIEWER: Yes.

INTERCOM ON PHONE: I'm sorry.
INTERVIEWER: That's all right. What do you need?
All right. Let's see. Okay, we were talking about when you got Lisa up, she had waken again --
MS. BRIDGES: Suzie.
INTERVIEWER: I'm sorry. I apologize. When you got Suzie up, about what time of evening was this now, Lisa? You said it was beginning to get dark.
MS. BRIDGES: Yeah. It was about 8:00 o'clock because she didn't sleep very long. She just slept a few minutes.
INTERVIEWER: Okay. What as Johnny doing at that time?
MS. BRIDGES: At the time I got her up?
INTERVIEWER: Uh-huh (yes).
MS. BRIDGES: He was still mowing the yard.
INTERVIEWER: Still mowing?
MS. BRIDGES: (No audible response.)
INTERVIEWER: Was he using a power mower or a hand mower?
MS. BRIDGES: A push mower.
INTERVIEWER: What it a motorized push mower? Is what I'm getting -- was it one of these old fashioned ones?
MS. BRIDGES: Yeah.
INTERVIEWER: That has no motor on it at all?

EXHIBIT 2

(Part 2 of 2 – pages 55-112)

"Verbatim Interview" of Lisa Bridges

MS. BRIDGES: Oh, it has a motor, it's just, you know --
INTERVIEWER: All right. Because I wouldn't think this would be very big yard. It's in a mobile home park.
MS. BRIDGES: It's a pretty good sized yard.
INTERVIEWER: Was it?
MS. BRIDGES: Yeah.
INTERVIEWER: Okay. When you get Suzie up, what do you do now?
MS. BRIDGES: Well, we went outside and sit on the steps in the back.
INTERVIEWER: And this is you and --
MS. BRIDGES: Suzie and Christie.
INTERVIEWER: And Christie. All right, any idea how long you did that?
MS. BRIDGES: It was a -- it was a while because then is when my niece was running to help -- because then was when I was picking with Johnny with the baby bottle, and he hit me on my back.
INTERVIEWER: Okay. You're picking at Johnny with the baby bottle. When you're doing that, where is Suzie?
MS. BRIDGES: My niece was holding her.
INTERVIEWER: This is Christie who is holding Suzie. What made you start picking at Johnny with the baby

bottle?

MS. BRIDGES: He had come by and he'd say something and then I'd squeezed the bottle at him.

INTERVIEWER: What kind of thing was he saying, Lisa?

MS. BRIDGES: He'd just come by and he'd be picking. He'd say, "Ah, shut up. You don't know what you're talking about." Because we were sitting out there talking and stuff. And that's what he would do.

INTERVIEWER: All right. Now, at this point in time, had there been any words exchanged between you and Johnny? Any argument or anything up to this point in time? I mean, you say you're picking, but had there been some -- had there been any argument that had led up to it or what?

MS. BRIDGES: No, because right after that is when she came to tell me the fall, and then after that --

(WHEREUPON, the interview was interrupted by someone at the door.)

INTERVIEWER: I'm sorry.

MS. BRIDGES: That was when I got a phone call and Misty come running down there to let me know.

INTERVIEWER: Uh-huh (yes).

MS. BRIDGES: And she hurt her foot somehow on the rocks. And right after that was when me and him really started fussing, when I asked him about

taking me to my parents.
INTERVIEWER: Do you remember who the phone call was from?
MS. BRIDGES: Yeah. It was from my sister's boyfriend. He was calling from work.
INTERVIEWER: What is his name?
MS. BRIDGES: Tom Blackstock.
INTERVIEWER: What was -- why was he calling you?
MS. BRIDGES: He called and was asking me was I going to come down by there any that day, that he would let T.C. know --
INTERVIEWER: Come down by where?
MS. BRIDGES: You know, if I was going to come to T.C.'s house.
INTERVIEWER: T.C. is your sister?
MS. BRIDGES: My other sister. She's my oldest sister.
INTERVIEWER: Okay. Were they expecting you?
MS. BRIDGES: That evening?
INTERVIEWER: Uh-huh (yes).
(WHEREUPON, the interview was interrupted by a phone call.)
MS. BRIDGES: No, it was the next day. Was I going to come to her house the next day and he would let her know that night when he got off of work.
MR. ALLEN: Did you say Misty or Christie that come

down?
MS. BRIDGES: Misty.
MR. ALLEN: Okay. Christie and Misty --
MS. BRIDGES: They're sisters.
MR. ALLEN: They're two different people?
MS. BRIDGES: Yeah.
MR. ALLEN: Okay.
MS. BRIDGES: Misty. She's older than Christie.
INTERVIEWER: Okay. They are sisters, aren't they, Misty and Christie?
MS. BRIDGES: Yeah.
INTERVIEWER: You see, that's the confusion that I've had part of the time we got a sister, Christie; we've got a nice, Christie; we've got another niece who is Misty. The niece, Christie, is about 13?
MS. BRIDGES: Yeah.
INTERVIEWER: And niece, Misty, is about?
MS. BRIDGES: Fifteen.
INTERVIEWER: Okay. And they are the children of Rita?
MS. BRIDGES: And Donald.
INTERVIEWER: And Donald. Donald is your step-brother?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: And Rita is his wife, and they live right up the hill from where you were?
MS. BRIDGES: Yeah.

INTERVIEWER: I'm beginning to get it. So she comes down and tells you you've got this phone call. And you go to take the call. Now, you said that you had been picking at Johnny with the baby bottle. Is that when Johnny hit you in the back?

MS. BRIDGES: Yeah. Right before she came down there is when he hit me in the back.

INTERVIEWER: Had he -- did he hit you hard?

MS. BRIDGES: Yeah. He hit me hard.

INTERVIEWER: Until then, had any ill words been spoken between the two of you at all?

MS. BRIDGES: No, because I went on up to get the phone.

INTERVIEWER: I guess what I'm getting at, Lisa, is did he have any reason or any cause to be mad at you at that point in time? Had you said anything or done anything, or had you tried to provoke him?

MS. BRIDGES: Huh-uh (no.)

INTERVIEWER: Okay. But you were just flipping the baby bottle at him?

MS. BRIDGES: Yeah.

INTERVIEWER: And what was in the baby bottle?

MS. BRIDGES: It was juice, I think.

INTERVIEWER: So when you would flip it, would some of the juice fly over on him?

MS. BRIDGES: It wasn't getting on him. It would go,

you know, the opposite way.
INTERVIEWER: Okay. Had you been feeding Suzie from the baby bottle?
MS. BRIDGES: Giving her some of her juice, yeah.
INTERVIEWER: And this was after she had waken and you'd gotten her up again?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: Was she taking the juice?
MS. BRIDGES: Yeah, she was taking it.
INTERVIEWER: Any problems at all?
MS. BRIDGES: Huh-uh (no).
INTERVIEWER: Any bruising showing up on her by then from being tumbled or the fall?
MS. BRIDGES: No.
INTERVIEWER: Okay. So you go up to take the phone call. Tell me what happens now.
MS. BRIDGES: Then when I went up to take the phone, that was when Johnny quit mowing and come up to Rita and them's house. And he said he was going to check on Misty's foot. And then when he went to check her foot, that's when I asked him was he going to take me to Mama and them's, because he told me, when Daddy was there, he would. Then, when Daddy left, he said he wouldn't. So then I made the remark that he could ride his ex-wife

around in the car but he couldn't take me like he promised me. And I told him I didn't have to ride in his truck. And so that was when we really started fussing.

INTERVIEWER: All right. So somehow or another by then you obviously knew that he had been seeing his ex-wife?

MS. BRIDGES: Yeah. Because that was -- when he came that evening, he had stayed at her house.

INTERVIEWER: How did you find that out?

MS. BRIDGES: I called a neighbor.

INTERVIEWER: Whose neighbor?

MS. BRIDGES: Johnny's. To see, you know, if they'd seen him or maybe if he'd stopped by to see his kids or something or what. And they said he'd been there that whole night.

INTERVIEWER: I see. Did you tell Johnny -- until that comment was made up at Misty and Christie over at Rita's trailer, until then had you said anything at all to Johnny about knowing that he'd spent the previous night at his ex-wife's? I mean, had you led him know --

MS. BRIDGES: I asked him where was he at. And he said that he went over there at 5:00 o'clock in the morning and was watching the young'uns, for her to

go to work. But the neighbors say it different, but I just didn't let it go into no arguing.

INTERVIEWER: Okay. All right. So you tell him then that you don't have to ride in his truck. Tell me what happens after that.

MS. BRIDGES: He got mad and he said, well, I wasn't, you know, going to ever ride in his truck again. I told him I didn't care, that I wished the thing would blow up. You know, that's just madness and stuff. And I told him, as far as I was concerned, he could move out of my trailer. And then I went to go down to my trailer, and I had Suzie. And he said I wouldn't go, and I told him he didn't tell me what to do.

INTERVIEWER: All right. Now, how did Suzie get up the trailer, to Rita's trailer? Who brought her up there?

MS. BRIDGES: That was when me and Christie went up there to get the phone.

INTERVIEWER: You and Christie went together?

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: Who carried Suzie?

MS. BRIDGES: Christie carried her up there.

INTERVIEWER: All right. How long were you up at Rita's trailer?

MS. BRIDGES: It wasn't very long because started to fuss probably 30 minutes. And we started fussing.
INTERVIEWER: All right. So you leave and go back down the hill carrying Suzie? Where is Christie and Misty?
MS. BRIDGES: They stayed at home.
INTERVIEWER: Where are your boys?
MS. BRIDGES: They was with Christie and them out in the yard playing ball.
INTERVIEWER: All right. About what time of night are we talking about?
MS. BRIDGES: It was dark though, it was real dark.
INTERVIEWER: Okay. Now, you say the boys are out in the yard playing ball?
MS. BRIDGES: Yeah.
INTERVIEWER: How are they playing ball in the dark?
MS. BRIDGES: It's a street light. They got a street light out there, and then he's got like a porch light to his driveway, and he'd turn it on an let them play.
INTERVIEWER: Okay. Now, you're going back down the drive, you're carrying Suzie. And Johnny and Christie stays at her trailer. Where is Johnny?
MS. BRIDGES: He's coming behind me running his mouth.
INTERVIEWER: What's he saying?

MS. BRIDGES: When I told him that he couldn't ride me but he could take his ex-wife around in the truck, then he said I was talking about his children, which I hadn't even mentioned his children. I told him I didn't care that he wasn't seeing his children, but he didn't have to stay with me and then go see her, you know. And so anyway, he said you'd better shut up and started cussing. I told him he'd better shut up. Then when I was walking down, just turned around and kept on walking, trying to ignore him, you know how you can hear somebody running up behind you? And he kept running up behind me and got right up on me, and just made a dead stop and pushed me on my back with Suzie.

INTERVIEWER: What happened when he pushed you?

MS. BRIDGES: I fumbled, but I didn't fall with her.

INTERVIEWER: All right. So what did you do then?

MS. BRIDGES: I just kept on walking.

INTERVIEWER: Did you say anything to him?

MS. BRIDGES: Yeah. I asked him, I said -- I made a remark, it takes a real man to beat a woman or something like that.

INTERVIEWER: Now, a while ago, you told me that earlier, a few weeks earlier, his behavior had

changed and he started hurting your hand and your fingers. And you said something about he would twist your arm.

MS. BRIDGES: Un-huh (yes).

INTERVIEWER: I want you to show me how he did that.

MS. BRIDGES: He would -- do you remember what I said about he'd do it like that, and push my hand underneath, and it would feel like that bone was going to pop out.

INTERVIEWER: Would he used both of his hands to do that? I mean, when he'd twist you, would he grab you with both of them or just with one of them?

MS. BRIDGES: He'd kind of take -- he'd do it like this. He'd grab it like that and push it underneath like that. You'd be trying to get it and you can't get it, and you'd be trying to get his hands off of that one because it hurt so bad. And that's the way he would do.

INTERVIEWER: Okay. Did he do anything like that to you after he pushed you?

MS. BRIDGES: Huh-uh (no). Because I went on down in the trailer with Suzie.

INTERVIEWER: But you told him it took a real man to beat on a woman?

MS. BRIDGES: Yeah.

INTERVIEWER: What was his reaction to that?
MS. BRIDGES: He got mad.
INTERVIEWER: What did he say or do then?
MS. BRIDGES: He said I'd better shut up or he'd choke me like he did before.
INTERVIEWER: What did he mean, he'd choke you like he did before?
MS. BRIDGES: See, he choked me one time before in front of my oldest boy, Scott. Scott was standing right beside of me and we got into an argument and he just grabbed me and shoved me up against the wall and kind of had me on my tip toes and was choking me.
INTERVIEWER: Do you remember when that was with relationship to the 25th of August?
MS. BRIDGES: It wasn't too far from when he done that to her.
INTERVIEWER: Take a look at the calendar again. Brad, where was that calendar?
MR. ALLEN: (Recording inaudible.)
INTERVIEWER: Take a look at that calendar again and see if you can find that date that would have been approximately the amount of time.
MS. BRIDGES: Probably somewhere around in here, between the 17th or the 14th or something like that.

INTERVIEWER: Somewhere between the 14th to the 17th of August?
MS. BRIDGES: Yeah.
INTERVIEWER: And when he grabbed you, he grabbed you with how many hands?
MS. BRIDGES: He just -- he grabbed me like that right there and --
INTERVIEWER: One hand?
MS. BRIDGES: -- and had his hand up. Yeah.
INTERVIEWER: Did he use his right hand or his left hand?
MS. BRIDGES: Seems like he used his right hand.
INTERVIEWER: Is he right-handed or left-handed, do you know?
MS. BRIDGES: I think he's right-handed.
INTERVIEWER: Okay. When he did that to you, did it hurt?
MS. BRIDGES: Yeah.
INTERVIEWER: Did it leave any?
MS. BRIDGES: He left some bruises, a little bit.
INTERVIEWER: On your neck?
MS. BRIDGES: Yeah.
INTERVIEWER: Was Johnny particularly strong?
MS. BRIDGES: Very strong.
INTERVIEWER: Okay. So he told you you'd better shut up

or else he'd choke you again like he did before?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: What next?
MS. BRIDGES: Then is when I went on to put Suzie in her swing, and when I put her in there, he put his finger up in my face and kept running his mouth because he thought it was cute because he'd choked me before.
INTERVIEWER: Where was the swing?
MS. BRIDGES: It was sitting by -- the couch was up against the wall this way, and then Suzie's swing was right down here.
INTERVIEWER: All right. Now, earlier in the day the swing had been outside.
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: You had carried in back inside by then?
MS. BRIDGES: Yeah. I carried it back in, or one of the kids did one.
INTERVIEWER: Okay. So you put her in the swing. Did you wind the swing up?
MS. BRIDGES: He didn't give me time to wind it up.
INTERVIEWER: Was Suzie awake or asleep now?
MS. BRIDGES: She was awake.
INTERVIEWER: Was she crying or was she quiet?
MS. BRIDGES: She was quiet.

INTERVIEWER: All right. So you've got his finger in your face. What's he saying to you?

(WHEREUPON, the interview was interrupted by a phone call and recording labeled Burr 02 ends.)

INTERVIEWER: Lisa, if you would, just repeat -- I asked, when you first walked in there, what did you say to Johnny and what did he say to you about what was going on with the baby?

MS. BRIDGES: When I heard her scream, when I got up there. I asked him what was he doing, and what was wrong with Suzie. And he said that it wasn't nothing, but where he was going to change her pampers and she got fussy, and he was in the process of picking her up when I came up the hall. And that was why he holding her that way.

INTERVIEWER: Okay. And you were explaining that his explanation didn't make sense, or what were you saying?

MS. BRIDGES: It didn't make sense. You know, why not go on and lay a baby down and finish changing them because they're going to fuss anyway.

INTERVIEWER: Well, what was your response to all of this? I mean, what, if anything, did you say to him?

MS. BRIDGES: Well, I asked him why was she screaming that bad? And he said she was just fussy because he was laying her down on the -- he was laying her down on the floor.

INTERVIEWER: On the floor?

MS. BRIDGES: Yeah. That's what he said. He was going to lay her down on the floor to change her.

INTERVIEWER: Had he ever changed her before?

MS. BRIDGES: No.

INTERVIEWER: He usually didn't change the baby?

MS. BRIDGES: No. I always changed her, or my sister-in-law and them or something. He never did.

MR. ALLEN: Well, let me ask you: Was he ever there in a situation where it would have been just easy for him to change the child, and he'd say, "Hey Lisa, Suzie needs changing," or something along those lines?

MS. BRIDGES: He never really held Suzie that much. That's why I don't understand why he picked her up at 4:00 o'clock in the morning, you know. Stuff -- why he even bothered to move her from her bed to her swing because he never held her that much.

MR. ALLEN: Well, did he ever -- was he ever there and she woke up in the middle of the night and he told you, "Hey, go tend to your baby," or something like

that, or "She's upset," or -- I mean, you understand what I'm asking?

MS. BRIDGES: Yeah. She didn't really wake up in the middle of the night, but -- seems like maybe one time she woke up about 6:00 o'clock in the morning. He didn't get with her then. I did.

MR. ALLEN: Did he even -- I mean, was there anything, had he woke up or did you just hear the baby wake up, not even -- was he even -- did he even get woke up by it?

MS. BRIDGES: I woke up, but he got woke up too.

INTERVIEWER: Did you notice any change in Suzie after that?

MS. BRIDGES: She didn't want him to hold her no more. If he would act like, if you would act like you were going to give her to him, she would cry.

INTERVIEWER: How about -- how long did it take you to get her settled down?

MS. BRIDGES: Probably about an hour to an hour and a half.

INTERVIEWER: What was she wearing?

MS. BRIDGES: It was like that night I had her pamper on, and a little shirt-type thing because, you know --

INTERVIEWER: Did you notice anything about her -- her

appearance after you found Johnny in there with her?

MS. BRIDGES: She just cried for the longest time.

INTERVIEWER: Yeah. But did you notice anything about her body?

MS. BRIDGES: I just held her to me and stuff.

INTERVIEWER: But you didn't notice any redness or any bruises or anything like that? If you did, you need to tell us; if you didn't, you need to tell us, to the best of your recollection.

MS. BRIDGES: I don't think I did.

INTERVIEWER: All right. Tell me something, Lisa, you have several times today used an expression "before Johnny killed Suzie." Do you believe Johnny killed Suzie?

MS. BRIDGES: Yes, I do.

INTERVIEWER: What makes you think that Johnny killed Suzie?

MS. BRIDGES: Because he was the one that was in there with her.

INTERVIEWER: Other than the boys?

MS. BRIDGES: Other than the boys.

INTERVIEWER: Well, what would you say if Johnny said you killed Suzie?

MS. BRIDGES: I would argue his point.

INTERVIEWER: Huh?
MS. BRIDGES: I would argue his point.
INTERVIEWER: Why?
MS. BRIDGES: Because he's lying. He's really lying.
INTERVIEWER: Now, when you say you would argue his point, what do you mean?
MS. BRIDGES: Whatever lie he brought up. I'm like this, you tell you a lie, you're going to get caught in it, so he's going to get caught in his lies.
INTERVIEWER: Well, suppose he were to say something like that the bruises that Suzie had were bruises that you put there before you left to go to wash the dishes. What do you have to say about that?
MS. BRIDGES: He would be lying.
INTERVIEWER: All right. I want you to --
MS. BRIDGES: Because my niece even went down -- it was during the time I was doing the dishes, she went to ask him would he go to the store and get some Band-Aids, and she says Suzie was in her bed then.
INTERVIEWER: Now, which niece was that?
MS. BRIDGES: That was Christie.
INTERVIEWER: That's the 13-year-old?
MS. BRIDGES: Yeah.
INTERVIEWER: Christie went to ask him and said that

Suzie was --
MS. BRIDGES: And he got smart with Christie.
INTERVIEWER: What do you mean "He got smart with Christie"?
MS. BRIDGES: She just said that he told her -- well, she calls it being smart -- he told her he wasn't going to get no Band-Aids for nobody. And so she said that she got mad and came on up to the house.
INTERVIEWER: Did Johnny drink?
MS. BRIDGES: Yeah.
INTERVIEWER: What did he drink?
MS. BRIDGES: I don't know. I don't know. He never drank with me. I know, like when he went to South Carolina one time and he came back, he was drunk.
INTERVIEWER: I see. Well, had he had anything to drink that night, Saturday night or early that Sunday morning?
MS. BRIDGES: Not that I could tell.
INTERVIEWER: Do you drink?
MS. BRIDGES: No.
INTERVIEWER: I mean, do you ever drink a beer or a glass of wine or anything like that?
MS. BRIDGES: I did probably about a while before that happened to her.
INTERVIEWER: Now, what do you mean a while? After she

was born or before she was born?
MS. BRIDGES: Oh, it was after she was born, but it really wasn't nothing to get you real drunk or nothing.
INTERVIEWER: Had you ever had too much to drink?
MS. BRIDGES: Huh-uh (no).
INTERVIEWER: I mean, if -- is it likely that Johnny is going to point his finger at you and say that you had a drinking problem, or anything like that?
MS. BRIDGES: Oh, no. I just did it that one time.
INTERVIEWER: Did you get intoxicated?
MS. BRIDGES: I was buzzy like, but I wasn't really what you'd call falling over.
INTERVIEWER: Where were you when you did this?
MS. BRIDGES: I was at my trailer.
INTERVIEWER: This was after you and your husband had split up?
MS. BRIDGES: Yeah.
INTERVIEWER: Was anybody else there?
MS. BRIDGES: My kids were in the bed.
INTERVIEWER: Was there a time when Suzie was in the baby seat, the car baby seat, and was knocked across the floor or anything like that?
MS. BRIDGES: The baby seat -- yeah, I know what you're talking about. She wasn't knocked across the

floor.

INTERVIEWER: Tell me about that. When and where and what?

MS. BRIDGES: Christie kind of -- we were up at Rita's and Donald's playing cards, and Christie was walking, and I had the seat sitting down beside my chair, and she went and kind of fumbled over the seat and it kind slid across the floor, but it didn't turn over or nothing.

INTERVIEWER: Did Christie fall on the seat?

MS. BRIDGES: Huh-uh (no).

INTERVIEWER: Did she fall on Suzie?

MS. BRIDGES: Huh-uh (no).

INTERVIEWER: Did Suzie fall out of the seat?

MS. BRIDGES: No.

INTERVIEWER: Do you remember when that was with relationship to the night that Suzie was injured?

MS. BRIDGES: Probably about three weeks or -- it was a while before she even got hurt.

INTERVIEWER: Oh, really. Okay. Well, Lisa, I need to ask you to do something and it ain't going to be very pleasant. I need you to look at a picture because I need to ask you about some bruises. Can you do that?

MS. BRIDGES: If I have to.

MR. ALLEN: Ron, while you're doing that, can I ask a few more questions about this prior time?
INTERVIEWER: Yes, sir.
MR. ALLEN: That prior time when he was working and you were woke up by you say the baby screaming. Had you ever heard Suzie scream in that manner prior to that?
MS. BRIDGES: Huh-uh (no).
MR. ALLEN: Was he living there at the trailer at that time?
MS. BRIDGES: Uh-huh (yes).
MR. ALLEN: What time would he usually get home at night?
MS. BRIDGES: It was different times. A lot of times it was around 12:30, maybe 1:30. But that time he came home at --
MR. ALLEN: So -- I mean, would you wake up when he would come home or --
MS. BRIDGES: Oh, yeah.
MR. ALLEN: So you would always wake up when he would come home?
MS. BRIDGES: (No audible response.)
MR. ALLEN: And he had come home on this particular night and apparently come in the bedroom, got Suzie out of the bed and was in the livingroom, and yet

you had not woke up?
MS. BRIDGES: Huh-uh (no).
MR. ALLEN: And would he wake you up if you hadn't already woke up when he come in at night?
MS. BRIDGES: Yeah.
MR. ALLEN: How would he do that, by shaking your leg or --
MS. BRIDGES: Yeah. Something like that.
UNKNOWN PERSON: -- saying something to you or --
MS. BRIDGES: Yeah. He'd usually shake my leg, or something like that. Anything to wake me up.
INTERVIEWER: Why would he wake you up?
MS. BRIDGES: Just to let me know he was there.
MR. ALLEN: Okay. Well, how was he acting -- I mean, when you walked in there, how was he acting, you know, when you were questioning him about what he was doing with Suzie or anything, if you recall?
MS. BRIDGES: He just looked at me. You know, like you don't believe I'd hurt her, you know, or something like that. That was the look I got from him, like I was accusing him of hurting her when, at the time, I really wasn't. I was just wanting to know why he had her in there, and if she wasn't crying, why take her out of the baby bed and, you know, why was she screaming out that loud? That's all I

wanted to know.

MR. ALLEN: Had he been drinking on that occasion?

MS. BRIDGES: Not from what I could tell. Now, I know that he had said that I can't say he did, because I didn't see him, but I know that he said that he smoked pot with some of his friends sometimes. Now, if he did it that night, I don't know.

INTERVIEWER: Before we go on, do you need to call anybody and let them know where you are? And it's taking a while. Do you need to do that?

MS. BRIDGES: No. My husband will wait until I call.

INTERVIEWER: Well, I mean, I don't want him worrying about you.

MS. BRIDGES: He'll wait until I call.

INTERVIEWER: Okay. You're going to have to see these sooner or later. So we might as well go ahead and look at some of these. In court you're going to probably see some of them again. But anyway, this picture, Lisa, this is Suzie and that shows some bruises on her.

MS. BRIDGES: (Recording inaudible.)

INTERVIEWER: Huh? Do you see anything in that picture that you saw that night?

MS. BRIDGES: She was bruised in here and her ears. She was bruised.

INTERVIEWER: Okay. Now, I want to explain something to you. This one right here, is not from -- this is where they put the IVs.

MS. BRIDGES: Yeah.

INTERVIEWER: But this one's not. And this one's not, these. Do you remember seeing those?

MS. BRIDGES: This is (recording inaudible).

INTERVIEWER: Now, you said you'd remembered seeing some bruises on her arm. And, again, I ask you about the arms -- and I'm not trying to put words in your mouth, but it's kind of important that you try to remember the arms that you saw.

MR. ALLEN: Rob, I'm going to double check and make sure that we're not locked out.

INTERVIEWER: Okay. I've got a key to it.

MR. ALLEN: Well, that's fine.

INTERVIEWER: Are you all right? Can you look at another one? If you need to stop now, you tell me. We'll stop. All right. I want you to look at that one.

MS. BRIDGES: That's the bruise.

INTERVIEWER: All right. Now, that's her left arm.

MS. BRIDGES: Yeah. That's the one.

INTERVIEWER: Do you remember that one?

MS. BRIDGES: (No audible response.)

INTERVIEWER: Okay. Now, while we're looking at arms, there's another one. Now, this -- again, this is where they were trying to treat her. This is where they had the cuffs that held the ventilator tube in place. That is not -- that's because she is being treated at the hospital. But you see this right here?

MS. BRIDGES: That was there.

INTERVIEWER: It was? That's her right arm. Now, that's a bruise on both her right arm and her left arm. Do you remember those?

MS. BRIDGES: Yeah.

INTERVIEWER: You're sure? See that bruise on her back? Did you ever see that one?

MS. BRIDGES: I don't think so.

INTERVIEWER: Okay. Now, these red marks and things on here, that's -- did you see anything like that, or do you remember?

MS. BRIDGES: I don't remember.

INTERVIEWER: Okay. The doctor tells me that all of this redness comes from when she was lying in the hospital on a ventilator and when she passed away. But that bruise was there. And it's -- you can see it in this picture but you can't see it very well. But I need to ask you about these, Lisa. I hate to

do this, but you need to -- I need to ask you about them. You see that on the back of her head? And that one right there?

MS. BRIDGES: That wasn't there (recording inaudible).

INTERVIEWER: Pardon?

MS. BRIDGES: And wasn't there when I left her.

INTERVIEWER: Did you look good?

MS. BRIDGES: Yes, I did.

INTERVIEWER: Are you sure that those bruises there were not her? I mean, if she was wearing just a pamper, are you sure that she didn't have those when she fell?

MS. BRIDGES: I would have seen them when Scotty fell. What happened to her head?

INTERVIEWER: All right. This is not a bruise. You remember the doctors telling you that she had -- they were trying to relieve the pressure in her head because she had some brain damage? They use what's called a shunt. It's a device to try to release the pressure. In other words, you get too much pressure inside, and that's why she passed away. And they've got to get the pressure off. And that's why they use a shunt to try to drain that pressure. And that's all that was. It's a ventilator. That's where they were trying to help

her, but that is not something that was on there when she went in the hospital. But these were.

MS. BRIDGES: Let me see her neck. That rash I was telling you about. It was right in here of the bending.

INTERVIEWER: That little redness in there?

MS. BRIDGES: Uh-huh (yes).

INTERVIEWER: Okay. You said something about her ears. Do you see her ear, where her ear is hurt?

MS. BRIDGES: I see right down in there.

INTERVIEWER: Does that look like it? Let me show you one of her other ears. I think I've got her other ear. Here's her right ear. Do you remember anything like that?

MS. BRIDGES: Yeah. It's right there.

INTERVIEWER: Had you ever seen anything like that before?

MS. BRIDGES: (No audible response.)

INTERVIEWER: Okay. Now, Lisa, I need you to understand something. I know it's painful to look at. If anybody shows you these in the courtroom and asks you about them, do you see that one right there? That was not -- this was where she was being treated. You know they had to use IVs and they had to use catheters to try to treat her. And when

they did that, it left some marks because she was injured at the time and her heart wasn't pumping real good. This one is where they put a cuff on her, and that's where they put a cuff on her to hold the ventilator tubes, okay. This one here is where they had some other medical apparatus. They were having to give her blood infusions and this is where they did it, right there. They had to make an incision so they could put the line in and get it into a main artery to give her the blood. So these things here are not -- these injuries are from medical treatment. They're not from where she was hurt. The same with this one down on her foot. But the ones that we're concerned with are here and here. And they don't show up real good in these photographs, but they're up here and up here.

MS. BRIDGES: (Recording inaudible.)

INTERVIEWER: Uh-huh (yes).

MR. ALLEN: What about this? Rob, I'm --

INTERVIEWER: While we're at it.

(WHEREUPON, recording labeled Burr 03a ends.)

MS. BRIDGES: That was there.

INTERVIEWER: This one was there? Are you sure?

MR. ALLEN: Was that there prior to you going to wash

dishes or after you got home from washing dishes?
MS. BRIDGES: When I came back, she looked that. She had all that under her chin, her ears, and her little arms.
INTERVIEWER: How about her head? Did you notice anything unusual about her head anywhere when you saw her there and picked up out of her swing and tried to wash her off? Did you notice anything at all? Other than the bruises to the ears, did you notice anything else about her head?
MS. BRIDGES: Well, I remember thinking she was all bruised up.
INTERVIEWER: Did you see any swelling or anything like that?
MS. BRIDGES: Yeah. She looked big.
INTERVIEWER: Where? That's kind of important. Can you show me where she looked bigger?
MS. BRIDGES: Her head had just looked swollen.
INTERVIEWER: Which part of her head looked swollen, Lisa?
MS. BRIDGES: It seemed like it was just over in here.
INTERVIEWER: Over in this area here?
MS. BRIDGES: (No audible response.)
INTERVIEWER: Okay.
MR. ALLEN: Point to your part of your head that you're

talking about you're seeing as looking bigger.

MS. BRIDGES: Like over here.

INTERVIEWER: And you're sure about that?

MS. BRIDGES: (No audible response.)

INTERVIEWER: Okay. That's not inconsistent. That's consistent with what the doctors found, what you just told us. But I want -- it's important that it comes from you.

Lisa, I know the doctors told somebody in your family this. In addition to those bruises, she had both arms were broken and both legs were broken. You knew that, didn't you?

MS. BRIDGES: Yeah.

INTERVIEWER: The doctors had told you and I think Mr. Allen and Ms. Qualls have asked you about it. I've talked to the doctors. I've been to see them and I've looked at the x-rays. At least three of those breaks were not new. I mean, there's just absolutely no question about it. You can tell from x-rays something about the age of a fracture. It has to do with the healing process in the bone. And that's fairly well established medically. The doctors can do that or some doctors can because it's in their field of knowledge. I've talked with a radiologist who read the ex-rays and there were

three of those who did that. I've talked with the medical examiner who did the autopsy on Suzie. I've talked with the chief attending pediatric surgeon, and I've talked with a couple of nurses. And they all -- and then when I talked with them they were all separate. They weren't together, but they all agree and they can all point to different things that show that there were some old breaks.

MS. BRIDGES: Why wouldn't we have known?

INTERVIEWER: I don't know, and that's what I need to know from you.

MS. BRIDGES: She just didn't react to it.

INTERVIEWER: What the doctors will say and testify to, and there's no way around this. I want to talk about that the x-ray views of the right and the left shoulder identifies what they call proximal humeral fractures. What that means is up here, near the trunk of the body, one over here, and one over here. It says on the right side, this one over here, there's no definite callus formation. And what that indicates is that that one was probably a fairly recent injury. Recent in terms of time that she was admitted to the hospital and x-rayed. But it says -- it goes on and it says on the left, however, there does appear to be callused

both superiority and inferiorly noted around proximal humeral fracture. And what that means is that there was new bone growth in the front and in the back of this fracture that was up here. And when I looked at those pictures, both the x-rays and what they call CTs, the computerized tomography scans, they show up very clearly. They show up in the upper end of the bones, the larger ends of the bones. And this one over here definitely shows a healing process. It says the findings suggest a possibility of the fractures being different ages, that we would recommend to follow it up to observe the formation of the healing process in this bone. Of course, they didn't have that opportunity because Suzie passed away and healing stops.

It talks about the knees and the legs. It notes the fractures of what she calls the distal femurs. Again, noted with lateral displacement of fracture fragments bilaterally. It also notes the healing process around those. Now, what she's talking about -- she's talking about -- and this shows up very, very clearly on x-rays. Right down in here, here, here and here, on both of Suzie's legs, the bones were broken. And I don't mean broken a little bit, I mean they were broken.

Lisa, from what I understand from the doctors, it would have taken an awful lot of force to inflict those injuries. And this would have caused some problems with Suzie. And I'm going to ask you again, does this -- Mr. Allen and I need to know this, and we need to know it before we ever get in the courtroom. Do you know anything at all about that? Can you help us at all with that?

MS. BRIDGES: Huh-uh (no).

INTERVIEWER: From what I understand, with injuries like that, is not consistent with Suzie being able to stand up or -- I mean, she would have been in a lot of pain.

MS. BRIDGES: She didn't act that way.

INTERVIEWER: Are you very, very sure?

MS. BRIDGES: I'm positive.

INTERVIEWER: See, if I were the defense attorney, not the State's attorney, but if I were the defense attorney, that would tell me that somebody has beaten that child before. And if I were the defense attorney, I would probably be pointing at you, not at Johnny, because after all, Johnny wasn't always there, and you were. And I'll come back to what I said a while ago, what if that's what they do? Point at you and say, Lisa, you have

been beating your baby.
MS. BRIDGES: They'd be lying.
INTERVIEWER: Do you have any reason to hold back that Johnny had been beating your baby, hit her?
MS. BRIDGES: Huh-uh (no).
INTERVIEWER: Any reason at all? I mean, a minute ago, you said you hate him. Do you?
MS. BRIDGES: I hate him for killing my baby, yes.
INTERVIEWER: Do you have any reason at all to try to cover for him?
MS. BRIDGES: No. I wouldn't cover for him.
INTERVIEWER: Anybody else in your family?
MS. BRIDGES: (No audible response.)
INTERVIEWER: You're absolutely positive about that?
MS. BRIDGES: I'm positive.
INTERVIEWER: Well, it's a problem that we've got to deal with.
MS. BRIDGES: Well, why don't they just talk to Rita then?
INTERVIEWER: Talk to what?
MS. BRIDGES: Rita and them was with her every day too.
INTERVIEWER: Rita?
MS. BRIDGES: Rita and Donald. People in the trailer park seen her. She wasn't bruised. Nothing wrong with her then. That Friday before he beat her that

Saturday, Rita was standing her up on her legs. She was pulling Rita's hair.

INTERVIEWER: How was she acting?

MS. BRIDGES: She was playing. The Sunday before that, we went over to Mama's house and Mama was playing with her.

INTERVIEWER: Have you had any communication with Johnny Burr since he was arrested?

MS. BRIDGES: No.

INTERVIEWER: Have you written him a letter or he written you a letter?

MS. BRIDGES: I don't care to hear from that boy.

INTERVIEWER: Well, I understand that, but people do unusual things sometimes. Has he written to you or tried to call you?

MS. BRIDGES: (No audible response.)

INTERVIEWER: Have you ever known him to -- other than yourself, has he ever beat on anybody else, to your knowledge?

MS. BRIDGES: He beat his ex-wife.

INTERVIEWER: How do you know that?

MS. BRIDGES: Because he had a separation paper at the house and it's indicated in it.

INTERVIEWER: Have you ever talked to his ex-wife?

MS. BRIDGES: No.

INTERVIEWER: Okay. But your information, that comes from the paper that he had in the house?
MS. BRIDGES: Separation.
INTERVIEWER: Okay. That's where she sued him, I think, for divorce from bed and board.
MS. BRIDGES: Yeah. And then she said that she wanted him supervised -- under supervised something, when he's got the kids because of his temper.
INTERVIEWER: Other than bending your arm and your fingers, and that kind of thing, did he ever do anything else to you? Cruel type things?
MS. BRIDGES: Like what?
INTERVIEWER: Anything.
MS. BRIDGES: Well, it's embarrassing to say.
INTERVIEWER: Well, now's the time to hear it and before we get in the courtroom.
MS. BRIDGES: When he accused me and my brother, he mashed my baby real hard and then pulled down.
INTERVIEWER: Between your legs?
MS. BRIDGES: Uh-huh (yes).
INTERVIEWER: Did he leave marks?
MS. BRIDGES: He bruised it a little bit.
INTERVIEWER: Has he done that more than one time?
MS. BRIDGES: Huh-uh (no). He just done it then.
INTERVIEWER: Was anybody around when he did that?

MS. BRIDGES: Huh-uh (no).
INTERVIEWER: Tell me about the incident about the gun and the bullet.
MS. BRIDGES: He had a gun. And I don't know, I guess he just wanted me to know that he had the gun. And he said that if I left him or I dated anybody else, he would kill me and my boyfriend, and to look at that gun good.
INTERVIEWER: When did he tell you that?
MS. BRIDGES: He told me that -- let me see, it was right when he started doing my hand like he did any everything.
MR. ALLEN: What about the other incident where he grabbed your chest and bruised you and stuff? When was that?
MS. BRIDGES: It wasn't too long before he did that to her.
MR. ALLEN: What do you mean by "too long"?
MS. BRIDGES: Just a few days before that because he was accusing me and my brother.
MR. ALLEN: Of your brother-in-law?
MS. BRIDGES: Stepbrother.
MR. ALLEN: Stepbrother. That was a few days before the 25th?
MS. BRIDGES: 24th.

MR. ALLEN: 24th was when he was accusing you and did that to you?
MS. BRIDGES: No, that was probably that day (recording inaudible). Just right around when he started doing all that other things to my hand and stuff, and he pulled the gun out.
INTERVIEWER: Lisa, what do you think happened?
MS. BRIDGES: To Suzie?
INTERVIEWER: Uh-huh (yes).
MS. BRIDGES: I don't know, but I think he beat the shit out of her.
INTERVIEWER: Why would he do that?
MS. BRIDGES: I think jealously.
INTERVIEWER: Jealous of whom?
MS. BRIDGES: Of Suzie.
INTERVIEWER: Why would he be jealous of Suzie?
MS. BRIDGES: Because he'd always want me to put her down and everything, and I wouldn't.
INTERVIEWER: When did it first occur to you that perhaps it was Johnny who had inflicted these wounds on Suzie?
MS. BRIDGES: When we got her down to Chapel Hill and they diagnosed it as Suzie had been beat. And I knew then he was the only one there.
INTERVIEWER: Was there anything else about it, other

than the fact that he was the only one there? Was there anything else at all that made you think that Johnny had done this?

MS. BRIDGES: He just didn't act upset. He didn't act like it bothered him that she was like that.

INTERVIEWER: Did he go back down to the hospital with you to visit Suzie when she was in intensive care?

MS. BRIDGES: It seems like he did but he just stood there.

INTERVIEWER: When did you first learn that your daughter might not survive?

MS. BRIDGES: I think it was that Sunday when we took her to Chapel Hill or maybe that Monday.

INTERVIEWER: They told you then?

MS. BRIDGES: They said at Chapel Hill they -- we was waiting on everything. They had done moved her to her room and they come out and told us that chances are Suzie might not make it, but if she did, she wouldn't ever be the same.

INTERVIEWER: How did you respond to that?

MS. BRIDGES: It hurt.

INTERVIEWER: How did he respond to it?

MS. BRIDGES: He didn't.

INTERVIEWER: Did he talk to you about it at all either going to the hospital or coming home from the

hospital or at home at night?
MS. BRIDGES: Huh-uh (no).
INTERVIEWER: Did he continue to stay with you while she was in the hospital?
MS. BRIDGES: It seemed like he stayed that first night when she was in there. And then after that he came, and then it just got to the point of where when he kept coming up there, he didn't hurt for her and stuff like somebody who would care for a baby. And then -- I don't know. I just dodged him. I went to my room.
INTERVIEWER: Even after the night that you found him in the livingroom about 10 days beforehand, are you saying you didn't notice any change in Suzie?
MS. BRIDGES: She didn't really act different.
INTERVIEWER: Didn't notice any change in her activities at all?
MS. BRIDGES: No.
INTERVIEWER: No. Okay.
MR. ALLEN: What about her personality?
MS. BRIDGES: She just didn't -- if you would act like you were going to take her next Johnny, she would cry.
MR. ALLEN: You say he never -- did you ever ask him later, like after you all went to the hospital here

in the county and then in Chapel Hill, did you ever ask him what happened or anything like that?

MS. BRIDGES: He just said that when he got her up, she was just bruised. That's all he said. He said he didn't know what happened.

(WHEREUPON, recording labeled Burr 03b ends.)

INTERVIEWER: So you just said she was bruised. Now, you've seen all the bruises in the pictures. Does that look like the bruises you saw, I mean, the same color, shape, that type of thing?

MS. BRIDGES: Yeah.

INTERVIEWER: But you're sure that Lisa didn't act -- Lisa, excuse me, you're sure that Suzie didn't act any differently after you found him 10 days before, other than not wanting to be around him?

MS. BRIDGES: Huh-huh (no).

INTERVIEWER: No difference, even in the first day or two?

MS. BRIDGES: Before then or after?

INTERVIEWER: After. I'm talking about -- you find him in the livingroom with her, after you heard her cry out.

MS. BRIDGES: Well, see that was in the same time Suzie did cry a lot, but that was in the same time her

throat?
INTERVIEWER: Well, her throat, you talking about the thing they called the thrush mouth?
MS. BRIDGES: That thing, that stuff in her throat.
INTERVIEWER: All right. And that was July 26th.
MS. BRIDGES: No, this was August when I took her Chapel Hill.
INTERVIEWER: Well, let me see what we got here.
MS. BRIDGES: They should have one in there for the month of August because her throat went on, I know, for three weeks. And it was just like we were just getting her back to herself when that happened. Now, her legs could have been broke prior to that. I know she cried all the time with that. But I assumed it was that.
INTERVIEWER: I've got July 26th, three-and-a-half month old baby girl who presents with one to two-day history of difficulty feeding, screaming, and rattle in chest. Patient sleeping in mother's arms, noisy breathing, lots of upper airway sounds.
MS. BRIDGES: Because when we took her then, that was when she was so bad off with her throat.
INTERVIEWER: All right. And that's when they gave her Tylenol drops; is that right?
INTERCOM: Rob?

INTERVIEWER: Yes.
INTERCOM: I just wanted to remind you that Lisa's ride is out here in the lobby.
INTERVIEWER: Okay, thank you.
INTERCOM: Thank you.
MS. BRIDGES: That's the last time Suzie acted normal.
INTERVIEWER: All right. But now, the hospital record shows that was July 26th.
MS. BRIDGES: Well, Suzie went on for three weeks like that.
INTERVIEWER: She did?
MS. BRIDGES: Because I called around. I called the hospital back.
INTERVIEWER: Which hospital?
MS. BRIDGES: That was Chapel Hill. And I told them that Suzie still was not eating, Suzie couldn't swallow, and was there something they could do, whether it be an IV or something. And they told me that, if Suzie got an ounce in her, that was fine.
INTERVIEWER: If she got what?
MS. BRIDGES: An ounce.
INTERVIEWER: An ounce of milk?
MS. BRIDGES: Fluid or something in her.
INTERVIEWER: Okay. Did you take her back after they gave her the Tylenol drops?

MS. BRIDGES: No. We just kept working with her at home.
INTERVIEWER: Okay. So you say for the next several weeks though she was crying a lot?
MS. BRIDGES: For three weeks.
INTERVIEWER: What do you mean, a lot? Days, nights, all day, all night?
MS. BRIDGES: And I thought it was her throat.
INTERVIEWER: Okay. And part of it may have been, or it may have all been. I don't know. Was that before you found Johnny with her in the livingroom, or was it during that same of time you found Johnny with her in the livingroom?
MS. BRIDGES: I think it was -- I don't know. It might have been before. I ain't for sure.
INTERVIEWER: Tell me something.
MS. BRIDGES: I just know she cried a lot with her throat.
INTERVIEWER: Okay. I want to ask you a few more questions and they're going to be kind of personal, but I think it could become important. You and Johnny were living together. Now, y'all weren't married but y'all were living together. We're all adults, and I assume you were having a sexual relations with him. Was that a frequent thing?

MS. BRIDGES: What? Sexual?
INTERVIEWER: Uh-huh (yes). Every night?
MS. BRIDGES: Not every night.
INTERVIEWER: Did any of that change after Suzie started having problems with her throat?
MS. BRIDGES: Once she got real sick, it had to change.
INTERVIEWER: What do you mean it had to change?
MS. BRIDGES: Because I had to take care of her. She come first.
INTERVIEWER: Did you and Johnny quit having sex?
MS. BRIDGES: It did for me to take care of her.
INTERVIEWER: Did Johnny ever talk to you about that? When Johnny would come in from work early in the morning, you said he'd wake you up. Did he want sex when he got home?
MS. BRIDGES: No, because a lot of times I was up with Suzie anyway.
INTERVIEWER: Okay. I want you -- I want you to give some thought to this, because it might not be something that comes to mind right away, but did she ever get over her throat?
MS. BRIDGES: It seemed like I had her eating a little better.
INTERVIEWER: How long was she doing better before these injuries?

MS. BRIDGES: It wasn't long.
INTERVIEWER: Meaning what?
MS. BRIDGES: I had just got her to eating.
INTERVIEWER: Days or weeks or what?
MS. BRIDGES: What, before that happened?
INTERVIEWER: Uh-huh (yes).
MS. BRIDGES: It was probably just days. She really still wasn't eating good when that happened.
INTERVIEWER: Okay. All right. It's late, it's almost 7:00 o'clock and we've been talking for four hours. Anything at all comes to your mind, anything, I want to know about it, or I want Mr. Allen to know about it. Anything. If you wake up in the middle of the night and some thought comes to your mind that you hadn't told us, or that you think is important, what I want you to do is I want you to take a -- do you got a pad of paper at home, or do you want me to give you one?
MS. BRIDGES: I got one.
INTERVIEWER: I want you to put it by your bed. You working anywhere now?
MS. BRIDGES: Huh-uh (no).
INTERVIEWER: I want you to put it by your bed. I want you to keep one close by you. Any thought at all occurs to you, I want you to write it down. I

mean, you might wake up in the middle of the night and something comes up and you say, I remember something. I didn't tell him that. I don't know if it's important or not. I don't want you to decide whether it's important or unimportant. I just want you to write it down. I want you to keep a record of your thoughts.

Brad, you got some business cards with you or are they in the office?

MR. ALLEN: I got one more on me.

INTERVIEWER: Okay. Mine haven't come in yet.

MR. ALLEN: I have to change a number on it.

INTERVIEWER: Okay. The same telephone number comes in for Mr. Alan as it does for me. If you need to talk to either one of us, call us. If we're not in our office, leave a message and we'll call you back.

MS. BRIDGES: Okay.

INTERVIEWER: We may be calling on you again for some reason or another. We may need to talk some more, probably will. But anything, anything at all, write it down. Do you understand how important that is?

MS. BRIDGES: Okay.

MR. ALLEN: Glenda is a witness coordinator. That's Rob,

and there's my card. Okay?

MS. BRIDGES: All right.

INTERVIEWER: Okay. Some times it's the littlest details that become important. Do you have any questions that you want to ask us this evening before we call it a night?

MS. BRIDGES: Do you think it's possible her legs were broken, that's why she cried, other than her throat?

INTERVIEWER: I think anything is possible.

MS. BRIDGES: So all those times she cried?

INTERVIEWER: I'm satisfied, however, that her legs were broken before that night. Absolutely satisfied. The doctors have no reason to make it up. And not only that, that was one of the things the doctors wanted them to check out on the autopsy, and they did. And the forensic pathologist -- and what a pathologist does is they go through and they examine for wounds and injuries and causes of death or other unusual noted things. The pathologist was absolutely positive, convinced, because of the state of healing.

MS. BRIDGES: You don't think he thought when her throat messed up and then he done that thinking it was her throat?

INTERVIEWER: I don't know. All I'm saying is anything is possible. I know one thing. It takes someone with an awful mean spirit to hurt a baby. But I also know one other thing. Sometimes people hurt babies because they lose their temper. Just like that and they don't plan on doing it, it just happens. Just like that.

MS. BRIDGES: It's not fair.

INTERVIEWER: No, it's not.

MS. BRIDGES: He don't have to walk down to her grave and cry for his baby. The holidays coming and he don't have to sit back and grieve over his baby. It's me. She should be here, not him. If he felt like she had to die, why didn't he kill himself? This is not fair. It's not fair to her. It's not fair to my kids. I want that boy to pay.

INTERVIEWER: Is there anything at all that could -- any surprises anybody may come out with. Is there anybody that's going to come in and say that you were not a good mother, or that you didn't look after your children, or that you --

MS. BRIDGES: No.

INTERVIEWER: -- slapped your children around?

MS. BRIDGES: Huh-uh (no).

INTERVIEWER: Well, I'm going ask you about one other

thing. I might as well go ahead and ask it. I understand that, at some point in time, you had some problems with depression.

MS. BRIDGES: Oh, that was a long time ago.

INTERVIEWER: How long ago?

MS. BRIDGES: I had been off my pills for probably about two years.

INTERVIEWER: What kind of pills?

MS. BRIDGES: Depression pills. Amitriptyline.

INTERVIEWER: Who was prescribing those for you?

MS. BRIDGES: Pete Scott.

INTERVIEWER: Had you ever been in any kind of inpatient hospital care for depression or any other mental problem?

MS. BRIDGES: They put me in Wesley Home one time.

INTERVIEWER: How long ago was that, Lisa?

MS. BRIDGES: That was when Tony was little. That was -- they said that the depression come from a lot of miscarriages.

INTERVIEWER: Okay. You had a number of miscarriages?

MS. BRIDGES: Yeah.

INTERVIEWER: Were you ever on any kind of medication during the time that you had Suzie?

MS. BRIDGES: No. I went off the depression pills.

INTERVIEWER: Okay. Did you ever use any kind of

controlled substances at all, like marijuana or cocaine or pills or anything at all? Did you ever do that?

MS. BRIDGES: I think I took one toke off of a joint when I was with Johnny. That's it.

INTERVIEWER: That summer you were with Johnny?

MS. BRIDGES: Yeah. That was it.

INTERVIEWER: Was that at your trailer house?

MS. BRIDGES: Yeah.

INTERVIEWER: Did he keep marijuana in the house?

MS. BRIDGES: No.

INTERVIEWER: Okay.

MS. BRIDGES: He says one of his friends he rode with would give him after taking him home.

INTERVIEWER: All right. Now, I'm not trying to embarrass you, and I'm not trying to look for ways to make trouble for you, but I want to find out now in here and I don't want to hear about it for the first in a courtroom with a jury in the box when the defense attorney is sitting up there trying to accuse you, or make you look like you didn't care about your child. That's why I'm asking you now.

And I'm going to tell you one other thing, Lisa. And this is real important. I don't care what the answer is as long as it's the truth. I

don't want to hear something that's not the truth. I want the whole truth. And when it comes to trying this case in the courtroom, I want you to tell the truth. I want you to answer every question just absolutely honestly, whether you think it makes you good, or whether you think it makes you look bad. I want every question answered the absolute gospel truth. It's up to us to present the case to the jury to demonstrate, to the jury's satisfaction, that Johnny killed Suzie. But we can't do that if any of the evidence is either withheld or is changed or is fabricated, or if you're not telling the whole thing. Because if you're not, sooner or later you're going to get caught in a trap on it. Or any other witness will.

I would rather go in there and maybe you aren't proud of the fact that you took a toke off of marijuana. Maybe you used more than that one time. If you did, now is the time to find out --

MS. BRIDGES: No. It was one time.

INTERVIEWER: -- because if that's what the evidence is, then so be it. But I don't want to hear something that's not the truth and then it comes out different in the courtroom --

MS. BRIDGES: Not (recording inaudible).

INTERVIEWER: -- and we're standing there saying, well, what do we do now? It makes our witness look like she's not telling the truth. Because if that happens, I can tell you, that reduces the chances of bringing Johnny to justice. Do you understand what I'm saying?

MS. BRIDGES: Yes.

INTERVIEWER: Do you understand the import of it?

MR. ALLEN: It only takes one lie. Get caught in one lie, you're credibility is down to zero. And in this particular case --

INTERVIEWER: Credibility is everything. And we have what's called the burden of proof. We've got to prove him guilty to the jury's satisfaction beyond a reasonable doubt. And that means all 12 of them have to be satisfied beyond a reasonable doubt. All it takes is, like Mr. Allen says, one lie. One thing that's not quite so. And the jury -- some one juror might say, uh-oh, I'm not sure about this. And if they start doing that, we've got problems. So let's get the truth out early. Good, bad, or indifferent. Let's get it all out, okay?

So, again, keep that pad by your bed, keep a pencil and pen handy. During the day, have another pad, or the same one, or whatever, available to

you. Any thought at all goes through you mind -- I don't care how good or how bad, or how ugly -- you put it down.

MS. BRIDGES: Okay.

INTERVIEWER: And keep in touch with us, okay?

MR. ALLEN: And let us worry about whether's it's important or not.

INTERVIEWER: That's right.

MR. ALLEN: You might it's -- well, it's not important, but it may be very important.

INTERVIEWER: It might be one of those little details that makes all the difference in the world. And I'm sorry that we had to ask you some of the things that we did, and I'm sorry we had to show you some pictures, but we needed to go ahead and do it. It's important to put this case together right. Other than that -- other than that, we're not accomplishing anything. Do you understand?

MS. BRIDGES: Yeah.

INTERVIEWER: Anything else? Any other questions?

MS. BRIDGES: No. I'll just do whatever I can to help you.

INTERVIEWER: That's what I want you to do. I appreciate you coming in. And I want you to -- I want you to understand that we're going to do

everything we can to try to do the right thing.

* * * * *

STATE OF NORTH CAROLINA C E R T I F I C A T E

COUNTY OF MECKLENBURG

I, THOMAS M. WESTMORELAND, JR., CVR, Certified Verbatim Reporter and Notary Public, do hereby certify that said Interview of Lisa Bridges was transcribed under my supervision; and that the foregoing 111 pages are a true and accurate transcription.

I further certify that I am not related to, of counsel for or in the employment of any of the parties to this action.

IN WITNESS WHEREOF, I have hereunto subscribed my name, this the 5th day of October 2015.

Thomas M. Westmoreland, Jr.
Certified Verbatim Reporter
Notary Public No. 19953190044

APPENDIX V

#1

Lisa O'Daniel talking

His problem was his wife would not let him see his children when he was with me and I told I cared about him, but if he wanted to be with his children, then back with his wife and be with his children. That you know he didn't have to obligated to stay with us and he said that he loved me and he did not love his wife and he didn't want to go back on that you know just because of that. That he would take his children and run before he went back with her.

This is the calender that you and Mrs. Bryant, the social worker, were trying to put together to try to reconstruct these things. Do you remember doing that.

Yeah, I remember doing that. Been a while back.

Do you see these entries in here - John in school - Dana and John in school with Dana - do you know what that means?

Yeah. Alright. This is when Johnny said he was in school.

What kind of school?

Some about they were promoting him to supervisor and he said that he went to school and it was nighttime and let me see - it seems like I told her that I didn't think he was in school - that was when he was with Dana. Anyway he came in at four o'clock, so it could have been possible that he was at school cause a lot of times he came in at four o'clock.

In the morning or in the afternoon.

In the morning.

Now, then down here on Sunday, the 18th, it says John in mountains. Here John in the mountains John in the mountains.

Yeah, he went one week-end to the mountains.

Who did he go with?

He took Misty and Christy with him.

He did.

Uh-huh

Because, alright, I can tell you something about that. When he took Misty and Christy to the mountains.

Who all went?

It was Johnny, Misty and Christy.

Just the three of them?

ust the three of them.

Okay, go ahead

And he went to his aunt's house or something. And, let me see, Christy said that when they were up at the mountains said that - that was either the mountains or South Carolina - anyway she said that he told her to told her something about to come over there and lay down on the couch with him and she told him no and he told her he wouldn't touch her in anyway and she said something about he insinuated or tried to mess with her or something I don't really know. Christy could tell you the way that went.

Is that the time he is suppose to have stuck his hand up her shirt - up the back of her shirt not the front.

Not-huh

No, that time we was at my house and Christy was sitting on his lap, she had a bad habit of going up hugging on you and stuff. And she was sitting on his lap and I noticed she came up off his lap real fast and she said I've got to go home. And I started walking with her out the door and I said what's wrong and she said Johnny stuck his hand up her shirt and I went back in and ask Johnny about it and he said that - first he said he said he didn't stick his hand up her shirt and then he said she had an undershirt underneath.

Then the next thing on here is the 19th says John worked until four A.M. with Dana.

All right she's saying John, I think Johnny said this part and I said this part. If I'm not misunderstanding.

And then there is an arrow from this block up into this block. Do you know what that might mean?

I don't know.

And see right here John in school and then Dana again with an arrow point up.

No not really unless I was saying trying to say he was in school and I was saying he was Dana on those occasions. I don't know.

Why is the arrow pointing from this block to this block here and here. do you know?

This is a Monday - seems like he did go to school on Mondays. So, he might have been at school that day and then he might have told her with Dana. Because there were several occasions he tried to say he was with Dana and I told her no because of the occasions he was not with Dana he was with me.

ut you don't know why the arrow may be from one to the 19th to the 12th.

The only thing I can figure is that Monday night's school. That's all I an figure.

Why would an arrow mean Monday night school

That he was at school both those days. I don't know.

All right, then she here Donald babysat Susie for Lisa.

You know, he did, he babysit her I think I went to the grocery store and maybe get (wick - wicker)? something like that.

All right

He baby-sitter her a lot when I had to go do things.

But in sitting down with Mrs. Bryant a year and a half ago you felt that was on the 21st is that what you are telling me?

Yea.

Now, here on the 22nd, again John worked until four AM on the 22nd and then beneath it says John had Susie up at four o'clock AM, changed diaper

Now that's when I - wait that being on a Wednesday - wait a minute - What does that say? I can't read that.

John had Tarissa up at four o'clock AM to change diaper. Baby cried a lot. Then no [illegible]. See that sounds like the time you are telling us about Johnny got her up and said he was going to change her diaper.

Yeah

And

And that's when I was talking to her to you know

If this date is accurate then here is the night that Scott fell with her and it was this morning that you come back and find her all battered and bruised. Then I guess my question is is your recollection correct here?

No mine - I'm pretty sure it is correct here and the 14th because let me see

What do you think?

Right here is Donald kept her that evening. And then I had her that night. You know and so if I was mistaken and it was a possibility he wouldn't with Dana then still the same at four o'clock he would have been coming up and but I still say right here he saying in school or maybe I say I don't know which is which. But this is when he came in at four o'clock. This is when he said he had to work till three o'clock. But he got off of work.

Are you saying this was the morning that you woke up to hear Susie crying

)r was it this the day he went to work and he came in and this was the orning that you woke up. In other words, midnight starts the end of one day and the beginning of the next.

Oh, well the Thursday would have been the morning I woke up at four.

Then it would have been Thursday morning.

Yeah.

He went to work, didn't get home until four o'clock this morning and you think that's when you heard her crying. But, nonetheless, when you talked with Mrs. Bryant you had picked this date down here. I guess we've got to deal with.

Cause you see, close to about the about the same time I Dan and them to same thing that's was there. I told them a Wednesday and her a Thursday. That's my bad mistake.

And you pretty much told them that it was somewhere in this period of time.

Yeah.

But see

The week of and not the week before.

.eah.

And then, I guess I'll have to fight that the best I can in court.

Well,

Because that was my mistake, a bad mistake.

Why do you think you made that mistake?

I was just so upset and I was trying to put everything together and I had her on my mind and them asking me all them questions too that I was trying to get everything organized and I really didn't have that much time to situate everything out.

Have you counted backwards from the date that she was found to try to fit it into what the doctor's say it would have had to been?

Have I counted back?

No, not really.

Well, I mean, that's going to be the obvious implication the defense is going to push on here, is that is that since this didn't fit what the doctor's report said then this would that's now why you are now picking his day instead of this one. You understand what I'm saying?

Yeah.

That's what they're going to imply.

That going to imply.

Well, what about when they talked to Darlene, she can verify that she came that Thursday and picked them up at school.

Darlene told me that it was that Thursday.

Well, that ain't what she told me on the phone. She told me it was on, she said it was a week or two weeks before. That's what she told me. She said I told them two week before.

I don't think I was making notes, did you hear it Brad?

Yeah, I made the notes.

She said you were writing them down. She said I told him two week before, a week to two weeks before. And I told her, I said.

I'll be happy to call her back and talk to her. But I specifically remember, and the reason I was, what I was thinking was well maybe if she was injured on the 14th the morning of the 15th, then maybe something caused her to wake up and be crying all night on the 21st or the morning of the 22nd. The same is, if she was injured right here and you went over, if it was a week before, that you went over to Terassa or Tissia's and you spent the night Thursday, Friday night and then on Friday night Tissia gets up and walks the floor with her for two hours. I means that goes to show that there were injuries whether you'll put two and two together that her legs were broke or that she was injured pretty badly - whatever. It certainly goes to show that she was showing signs of injuries.

I guess, it barely hit on me, when you don't see bruises on nothing. Now if I'd seen bruises I would have took her and had it checked. More than glad too. I wouldn't have waited until she was dead.

Let me just lay all this on the line for you. Now, I'm not just going to beat around the bush. I think I have mentioned to you before, in the course, in the trial of this case, you're not going to come out looking to good. Do you under that?

I'm not worried about me.

Any way we go about it you aren't going to come out looking real good. This is going to look like, for some reason or another, that at some point in your life at that time in your life, at that time in your life, that if at no other time, that you were not putting your children first. That you were putting your boyfriend first. That's how it is going to look. You need to understand that. Up front, you need to understand that. And, neither Mr. Allen or myself are going to sit here and tell you we think you killed your baby. And the reason we are not going to tell you that is because we think Johnny killed your baby. However, in presenting this case

we have got to lay the case out for the jury in a way that they can nderstand it and for most things there is indeed an explanation for most things. Sometimes getting that explanation is the hard part. Sometimes that what we really have to search and search and search for. And as I have indicated to you and to Teressa and to you mom and your dad and several other people that we've talked to, cause we've talked to a pile of people, the question always comes up. The fact is, that if you talked to folks long enough they will ask the question. I don't have to ask it. Somebody should have known. Somebody should have know this child was being abused. And the reason for that is because, we can't get around this.

Dr. Wilcox sees at child 2:55 AM August 25. He noticed at that time that. Well you say you never saw him hurt her.

Cause I never did. Not her.

Not her. What did you see him do?

He hit Scott.

How?

In the back with his fist.

When?

don't know. Probably about three weeks. I didn't see him. Scotty told me.

Didn't you ever suspect it that maybe he was being a little rough with Susie?

He did not act like he would hurt her.

Yea, but didn't you ever see something on her that kinda made you think what's going here? I think the morning you went our there and found him out, you came right out and ask him. You said what's going on here? You came right out and put it to him. What's going on here?

Cause of the way she was screaming. It scared me.

Didn't you start noticing some things with her? Didn't you notice that a little redness and bruising here and there and _____ on that child?

Not at that time. She was red under here a little bit but I didn't know at the time he hurt her. She just kept screaming.

Didn't she start doing a lot of crying, after that, right on up to the time she died?

On up to about three days before he did her Saturday. It was two or three days.

Do a lot of crying wasn't she? I mean, you see this is what we, he ask you

yesterday. You know when you go to your sister and other saying - you an't go telling them that shit. That she doing a lot of crying. You get me in trouble.

But see, it was still messed up.

But, I don't care if it was messed up.

After that time she did cry no more when he picked her up. But I didn't think he hurt her that bad. I didn't think he had done anything like that.

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

See, Lisa, let me just tell you something. That are going to be women on that jury that are going to think are the worse person in the world and that ain't nothing we can do about it. See, Mr. Johnson didn't tell you we can't control what Johnny Burr says. We can't control what he put on. He might get up there and ain't no telling what he going to come up with. And there going to be people on there who may very well say why isn't she charged? That are going to say why, what is the sheriff protecting? What is the DA protecting? But the important thing is that what are you protecting? And why keep saying we can determine DSS they have investigated this they ain't took your kids yet. He might come up with something at the trial, I don't know what, it could be the truth or it could be a lie. And they are going to say hold it we want to reopen this case. We can't control that. And I'm going to tell you, what's going to make you look the best in front of the jury, you are going to look bad, but what's going to give you creditability and what's going to give you believableness is if you come out and you know, I don't know, if you say, look, yeah I saw this going on but I was in love with this guy. I didn't want to, you told you mom, now didn't you tell you mom when Tissie said I want to see my nephews and bring them by that you told her you come back to her and said, well Johnny correcting the kids now and if we come over there I don't want you saying anything to him if he corrects them.

Yeah. Cause I told her how he corrected them, he was

Did you think that he might be correcting him a little bit to tough?

He might have been.

Well I mean, you said that, that's why I'm asking. What was the basis of your saying that. You know that Tissie might jump in his face. She's your older sister.

Yeah. She was _____(666) after the kids.

She was also, if you would have let on that he was hurting your hand the night that he bent it back, would she have jumped in his face them.

e were up there one night when he did it.

Yeah, I remember you didn't let on that it was hurting you. But it hurt ou hand didn't it? The reason you didn't let on, is that because you knew that she wouldn't approve of that?

No, because he'd get his satisfaction out of hurting.

Out of hurting you. Letting you know. Let me ask you something. You didn't let you daddy know that he hurt you. Cause your daddy would have jumped in his stuff. Wouldn't he? That's what I saying, you were hiding this from your family, weren't you? I mean, you were hiding the abuse from your family. Didn't you get mad at Tissie when she, didn't you say you told mama and daddy about that bruise on my thigh.

Yeah.

You didn't want her to tell them did you? Your daddy ask you about it.

Yeah, I denied it.

You denied it. Did he look, did he see a bruise?

It was gone.

Okay. That's what I'm saying. You were hiding it from your parents. You were hiding it from all your relatives weren't you?

xcept Tissie, I showed her the bruises.

I understand. The thing that, you know, you will probably one of the most. the - I mean, you were the person that the jury - the women and the men - and anybody that has kids and don't have kids it going to say should have known. Whether you did anything about it or not. You know it is kind of apparent you didn't do much about it. I mean he was grabbing your breast, grabbing your thighs

Cause I figured it would me and I didn't know it would be her.

Well, Scott, he told you he hit him in the back with his fist.

Yeah, he wasn't crying. He said I had walked up to Rita and said Johnny hit him in the back.

I mean

See Scott didn't tell me until after Susie.

Till after.

After Susie. I didn't know none of this before.

Alright, why are they keeping this from you?

e said that he Johnny told him that if he told me that he would whip him.

Lisa in talking with not only your family, but with people who knew you, hat is, a picture develops at the time. For some reason or another there had been a change in your life that summer. That you have kind of changed in a way that you dealt with your family and your children and things like that. Maybe

I didn't worry about my family that much.

Well, I guess that's part of the change because I think prior to that you had been closer to them. Haven't you?

Yeah

What, what developed there. Why was it that you and John O'Daniel. What lead you'll to split up?

To get together.

No, you and John O'Daniel, John Wesley O'Daniel.

Oh

You'll got that _____ and split up. What happened?

He just, John was real jealous type person. Over anything. I wouldn't even allowed to walk out my front door. And then I if I walked up to my arents he would accuse me of seeing somebody. And then Rita came to the house because I told you, me and her both had an affair with Johnny. And she came to the house when I was pregnant with Susie then. And I told her I seeing anybody when I was pregnant. You know, with John's baby. And she said, well just meet him, cause that was somebody she was seeing. So on different occasions I met Johnny but nothing between me and him, it was her and him.

Why were you meeting Johnny before Susie was born?

She just said she want me to met the guy that she was seeing.

Was she still living with Donald at the time?

Uh-huh

She was seeing Johnny on the side. Did you know that she was having sex with him?

Yeah.

How did you know that?

Cause sometime I was with her when she did - I wouldn't in the room with her but I was with her. Then she told me that they had had an affair for four years. Off and on.

Well, then after Susie was born is that when you started seeing

hen she was about three weeks old.

And after that you started having sexual relations with him.

Yeah, I think I did about two or three times.

Why were you cheating on your husband at that time?

We just weren't getting along. Then I moreorless just listened to Rita. You know, he could be like that and I didn't need him and stuff like that. He didn't want me to have friends he didn't want me to have anybody.

Let me ask you something? Do you know what's meant by the words menage a trois? Have you ever heard that phrase? Two on one. Two women one man, two men one woman. You ever had a situation like that where you and Rita were having sex with Johnny at the same time

Not-huh

or in the same room?

You're sure.

I'm positive.

id Rita know you were having sex relations with Johnny?

Yeah

How did she know?

Cause she's the one that it all started.

I thought you told me before you called me back after we first interview and then you told me you'll had had sex together. You told me that

No, not me, Rita and him. But Rita would be there and she would be in one room and we went into the other. Cause on one occasion it was at Rita' house.

I was going to ask you where it happened?

And then on another occasion it was at Johnny's house.

You'll two were over at Johnny's, John's

Lisa have you ever done anything like that before? Now you've have sexual relations with other men because you fathered children by other men. I mean, you mothered children by other fathers. But have you had anything going on like that - where you are having sex in one room and somebody was in another room?

Not-huh

hy the change in your lifestyle? What was going on with you?

I don't know.

Well, I also learned that you started dressing different during that time, little things like going without a bra, wearing real short shorts, that kind of thing.

No, I didn't wear real short shorts.

But I went without a bra married to John.

John tell me that one of the reasons that you argued about.

Yeah, it is.

The matter of the fact is you'll had a fuss over at Rita and Donald's where you didn't have one on and you reached over and picked something up and that was about the time that he told you that maybe you'll ought to go your separate ways.

Yeah. He took JJ up to the store and he called back and said I think we need to get a divorce and I said well John that can be done.

Is that the time that you were already having an affair with Johnny?

hat was when I'd seen him. And I'd slept with him but about twice. Two or three times.

John knew thought, didn't he? John O'Daniel.

He had a feeling.

Had he talked to you about it? Had he accused you?

Oh, yeah.

Had he specifically named Johnny Burr?

Yeah.

Was there an occasion when he, you'll were at a lake somewhere and John was afraid of water he was on the bank and Johnny swam out into the middle of the lake where you were at and talked to you.

Lisa O'Daniel talking

He came out there where the boardwalk, it was me, Donald, Rita and them.

Where was the lake?

At Hidden Lake.

Hidden Lake down here on 54.

What I'm saying though it John didn't even come out on the boardwalk.

He came out

out in the water

Yeah, he came out as far as that thing. Said he wanted to talk to me.

John or Johnny?

John O'Daniels. And then Johnny he came out there to the thing where Donald and Rita and all the rest was diving off Misty and Christy. He was there specifically out there with just me.

I understand, what, as far as John was concerned he wouldn't out there but Johnny was and he was suspecting you of having an affair with him at that ime.

And that was out where the water was over this head.

Yeah.

Where he really couldn't get to you.

He called me up there. He sent Christy out there and I went up to see what he wanted and then he started accusing me of Johnny and

Out there at the lake together?

Yeah, and so, Rita came up and she said what's going on? And I said John is accusing me of Johnny saying that I out here just talking to him when Johnny out here talking to everybody. Well Johnny said if I'm causing problems, then fine, I'll go over to the other side and he went to the diving board.

Well, in any event you've got tied up with Johnny Burr. And it wouldn't too long after you got tied up with him that he starts bending your hands and squeezing on you and doing that kind of mess with you.

I guess so.

Lisa why is it when all that mess started why didn't, what was it that kept ou from cutting off with him right then and there?

I was scared of Johnny.

Why?

Cause Johnny don't play.

Well being scared of him, I mean, it seems like to me you have two choices - and that's either to kick his butt out of the house or

I tried.

?

When I tell him to get out. That's when he'd end up hurting me or something. They saying he tied the trailer down, put a bomb under it and blow me and the kids up.

Why did you, why did you let him discipline your children?

Cause I didn't really see him beat on them.

You knew he was capable to hurting you.

Yeah, but I didn't he was capable of hurting on them, cause it ain't in me to hurt a child. And I didn't think it would be into anybody else. You know I've seen a lot of guys beat women but he does not beat their kids.

Well you knew JJ was scared of him?

Yeah

Well you had to know that, JJ would run up to Donald and Rita's and run away whenever he came around. What did you think was going on? I think, who was it,

(Brad) Tissie

Somebody said something to you about

You know it was Tissie you told me yesterday.

Yeah, opening your eyes about what was going on with you.

She didn't say opening your eyes, she said what's going on with JJ. Said just as soon as Johnny pulls up, said JJ came running up to Rita's saying Johnny's home. Said I ask why did Johnny come home and she said JJ said - no said - well what are you doing up here? And he said, something about, I'm scared or something. And she said, what did he mean by that? I said a lot of times Rita and them would tell him Johnny coming and if you don't sit down I'm going to get him - he's going to get you. I said, and he just - I guess scared JJ was Johnny. I said too, you know he want's his daddy back he don't want Johnny in the family.

_____ expression, but not hers but it

is the same thing.

Did you ever hear JJ say that he use to whip him real fast?

That was after Susie, he said Johnny whipped me and he'd say Johnny whipped me fast.

Yeah, that's what I'm saying.

When did you know that? When were you told that?

He might have said it before Susie, I don't know. Cause we ask him

Before? Well, you knew he had taken a switch and beat him pretty hard. Did you know that?

He didn't leave any stripes - I mean nothing like blood or nothing come out of.

Did he take a switch and beat him?

Not at that time.

When did you know that?

Seem like JJ came in crying and I ask him what was wrong and he said Johnny whipped me with a stick. I said what do you mean a stick? And Scotty said with a switch.

So you knew about that on that day. Whenever it was that he whipped him with a switch.

Yeah

Did you not confront Johnny with it? Say what in the heck are you doing whipping my kids with a switch?

Well I told him he shouldn't whipped him with a switch he should whip them with his hand.

What did Johnny say?

They were going to listen to him.

In other words, I going to whip them how I want to.

I guess you could say it that way.

I'm just. I'm just, I'm kinda playing a devil's advocate - I'm looking at the defense attorneys are going to jump on you and how a juror is going to sit over there. And

he bottom line Lisa is how could, how could you not seen what was going on with your children and your boyfriend.

ause a lot of times they said they would either be down at the trailer and _____(71). Rita would have been closer to seeing whipping JJ out of the wrong way up there. Cause that was just like Rita don't tell me till after Susie dies that she told JJ to get her cigarettes. And he went to get them and said when JJ started toward her said, said I couldn't see Johnny's face I'm sitting behind. Donald is sitting at the other end of the couch. All I know is that when he started out he acted like he was laughing at JJ. Rita said when he got in front of her that he acted like he was going to hurt JJ and she knew he would hurt JJ. She don't say nothing until that happens to Susie.

Is she protected, was she protecting Johnny cause she didn't want to ruin her marriage with Donald?

She could have - you know I don't know.

What I'm trying to figure out, were you trying to protect him? I mean when he says this to you and I mean that this is not even his kid. This is just some - this boy that you fell in love with and he moves in and he starts hurting you and he hurts your little kid and beats him with a switch or whips him with a switch. Maybe not beating him, hitting him with a switch and you complain about it; and he says, well, they are going to mind me. Kinda of like you don't need to be beating them with a switch. You don't need to spank them with a switch you need to use you hand. Well they're going to mind me. And then couple that with you telling you mother that Johnny corrects them and I don't want you saying anything. Are you saying this, are you doing this, are you don't want to piss him off. Do you not want to make him upset so he leaving? Are you not doing this cause you don't want him to run away from you.

No, because this is when he, he didn't, he started whipping them a lot with his hand.

Well, I mean why do you tell you mother to tell Tessie, you know don't say anything to him. Do you think he going to leave you? Are you that much in love with him that you would want him to - you don't want your sister to jump on him if he does something to them?

Could have been that she'd seen him do a lot - that would be up to her.

What do you make the comment at all that she can come over and see him but I don't want her saying anything? If Johnny disciplines the kids?

It gives the impression that you knew he was doing something out of way. He was doing something - are you saying he is correcting them and I don't want you saying anything? You are giving the impression that you knew that he was doing something wrong.

Because she (spoken over the above questions)_____ or something like that. And Tissie got a mouth and a half. She don't think you should make them go to their room and stuff or ground them for a week. So don't think you should touch my boys at all. And if he didn't beat them with a switch. I've spanked them with a switch but I didn't beat them. I spanked them

with my hand. I didn't leave bruises or I'm not going to leave whelps all p and down my children.

When you went over, after you carried Susie over here to County Hospital that night - that Sunday night - I think you had her wrapped up in something didn't you - blanket or something?

Seems like I did.

Remember walking into the hospital?

I remember walking in.

Do you remember what you did?

I went to a window over here at the side.

Remember going to a desk and talking with the girl filling out the form?

Like, like, the nurse?

Yeah, I went in there and I was sitting there and she was going to take blood pressure or something and I told her to look at Susie's eyes. I said her eyes don't look right. Then she looked at her eyes and then she said I'm going and get a doctor. Then she went and got a doctor. Then the doctor came in and he said, they had me lay Susie down and he said who beat his baby? And I said, I didn't, my son fell with her, cause that was all I saw was my son fall with her. At that point in time all she had was bruises I didn't know of no broken bones.

How could you miss something like that?

I guess cause her throat was so messed up - I assumed it was her throat.

Yeah, but broken bones?

She wasn't swollen or nothing. All I can say is when her throat messed up Susie didn't have much activity to her. She just laid her head over my arm and let the slava run out because she couldn't even swallow it. I told the doctors that. They saw it.

She had loss so much blood, _____ broken bones, that she had lost about one and a half of her circulatory blood - internal bleeding. It like taking half of your blood in your body and draining it off which is not according _____.
How can you miss these things?

Cause Susie didn't respond to no broken bones. That's all I can tell you. They came and sit back and expect me to see a baby with that bad of a throat and all of a sudden say she gotten broken bones. Something bad is wrong with her. I don't know that. The only thing I went by was her throat. It looked that bad - I had to work with her - day and night - I could not get her to eat - and then when Johnny picked her up and she was screaming out. I'd been up with her that night till about twelve o'clock,

myself, twelve or twelve thirty. Just got her in the bed asleep and then I ayed down. Then Johnny had up in the living room. And then it took me till that following two or three days before that Saturday that I had just got that baby to eating again. They said she had dehydrated. I said, that's probably because when I called them I ask them that night, I said, that day, I said she can't eat. I said, can't you put an IV in her? And if they didn't give you that statements that's their problem. Cause I plainly told them, and Rita was standing there, can't you put an IV or something in her? Cause I'm not getting any fluids in her and she said, well, if she getting an ounce of juice in her or that Petrolite said that better than nothing. I said she ain't getting that much in her.

Are you talking about the last time you took her to the doctor, before

That was when I took her to County, then I took her to Chapel Hill the same night, and then I turned around and I called them.

That the 26th of July?

That was the 26th and it is around the 27th or something when I called them back. Cause I not get her to eat any and it might have been that following Monday. But I called them back. cause I could not get her to eat.

How long did it take you to get her before she could eat?

It took me till about two or three days before I could get her to eat. efore that Saturday when he did that.

We're talking about the 26th it is up here. And you've got, or over here 26th, let's say about Thursday, 27th, 28th, 29th, 30th, 31. So you are saying right in here this Thursday, this is when you carried her to Chapel Hill or County - County and then Chapel Hill. And then you called here right in here? Say about the 29th? Cause there are 31 days in July. You're telling me from right here until right here you couldn't get to hardly eat anything?

Not-huh

And this baby was, why

Cause when they showed me her throat it looked that bad. They said continue to give her the Tylenol. Instead, I went farther with the pink medicine, Wilcox give her, and plus I went with the Tylenol.

(Tape turned over)

If she was staying with them, is what I want to know, is I've talked to them, we talked to them, Christy, Misty, Rita. Nothing is wrong with her. She didn't cry. She was a normal baby.

She was normal till her throat messed up. And her throat got that bad.

That's what I getting at. That's what I getting at. This whole lump here,

when they're interviewed and when they come in here and talk to us, they idn't say that the doggone child was crying or nothing was wrong with it.

Now that's a lie because they helped me walk the floor with her.

That's what I getting at. That's exactly what I'm getting at.

Why, why can't, why

I just can't make it specific with them. I would have them right back in here and make them tell you the truth.

That's why we've blown our minds because

If they said Susie did not cry within that month, they're lying because Susie continues through on through the 26th. And then I finally got her straightened out and they're just telling me this. I finally got her straightened out two to three days before that Saturday. Before he even did that to her. And they said they told you that. They said they told you that Susie was doing fine on up until her throat messed up and if they other than that they're lying. Cause I'm not going to sit here and say Susie was a happy _____ younguns with a sore throat. Any doctor would know, any human being would know that when you've got a sore throat you don't go around jumping up and down and playing. Now Susie did not play with a sore thoat. I had a hard time with her throat. I just hope you'll believe me. I'm sitting here telling the truth.

Lisa, I want to believe you. I just don't, I just would like to understand how this child had the injuries she had and nobody even her own mother noticed it.

Because when her throat was messed up Susie didn't play. Susie, Susie was

How about the times we talked about how she been bounded in your lap and she giggled

Now that was only when her throat started feeling better, that was on that Friday. Before Rita and them left to go

That's on the 23rd.

That was when Rita and them went to go there because I had just gotten her to eat around this time right here and that's how I can remember all this. And that how I can remember Johnny saying he was working over because that's when I got my baby to eating again. I'm coming up with everything that I can to help the case. Well if Rita and them is not going in help me too I can't do it by myself. Now that's, that's how I can remember everything because I got her to finally eating. Cause I said we went up to Rita's and Rita was feeding her and I think gravy and potatoes. In a jar. She put a little bit on her mouth with those cream potatoes and that's what Susie liked. Or either she would like baby foods like in the baby food. Because on up until that time Susie was sick until I got her to eating.

Rita and Donald _____ the call on August 23. Rita

was playing with Susie. Rita would hold her fingers out, Susie would grab old of her fingers and Rita would have her hands raised about chest level while she was sitting in a chair. Susie would be holding onto Rita fingers as she stood in Rita's lap. And on that Rita made faces and made funny noises. That was also a note indicating that Susie would reach out and grab Rita by the hair and which Rita would respond ouch and that too would make Susie laugh.

Yeah, that was along the time Susie was starting to get better.

Can I just step in on - I'm not saying that they're lying and but I'm going to tell you - you sit back and put yourself out - not even in this case - and you imagine yourself as a juror - or imagine yourself as just any ole person - and you have a doctor come in without a doubt he's going to say on July 25, Saturday - late Saturday night when they x-rayed that baby on Sunday

August 25th

August 25th, excuse me. They had, that baby had two broken legs, that were seven to ten days old. I've never broke a leg myself, I've never broke a bone - but from what I understand it's painful.

It hurts like hell. I've done it.

And, if you've got any juror that up there that's ever had a broken leg or roken bone, and here Rita is going to say this baby seven to ten days after breaking its legs - both legs - was standing on her lap pushing down. And I'm not saying that it didn't happen - I'm just saying does it sound believable to you?

Not really - my son's have had broken - not broken legs - but a broken foot and Tony has had a broken arm.

And was he ever standing on? On his broken foot?

No, not until they put a cast on it.

As a matter of fact I believe they broke their bones the Spring after Susie died.

Yeah

Because they were asking, you were being asked questions about why these boys had been having breaks that close together.

No, she really didn't say anything. I told her, I said, it may look funny, but you can ask my boys what happened. As a matter of fact, Mike's kids were out there when Scotty fell from the tree and broke his arm. I was with John when Scott broke his foot. And then Tony came running down and if he'd look where my turtle was sitting, Tony could have run him down through the driveway, slid down onto the porch and broke his hand. His arm r something.

You were with out when that happened?

I was with Mike when Scott broke his arm and Tony broke his other but I with John O'Daniels when Scott broke his foot.

Okay. John O'Daniels

I keep forgetting one is John and one is Johnny. That's the way you just told me, you might think

I'll, I'm not saying that they are lying - I'm just saying it really don't sound believable. And that the whole thing is what I'm saying about the sore throat - I understand maybe the sore throat and the baby being fussing and the baby crying and things like that - but when we interviewed you - you now remember your telling me that you remember about your sister walking the floor with the baby at four in the morning. But you hadn't told us anything about that. That's the kind of things that you noticed - you should have noticed - and maybe you just didn't put two and two together. But it is things like that we can go to jury and say she noticed this, she noticed that, maybe she was just blind about it. Maybe she, in deep down in her soul she knew that Johnny was a sorry no good SOB. And maybe she feels guilt. Maybe she feels like she let down her responsibility to Susie and to her other children because she didn't get them out of that situation. But you know you can't change what has happened - you can only go forward with it. And I mean, you know if we go the jury and you know you bear your soul to them cause that the only way you're going to have any creditability with the jury is to tell as much of the truth no matter how bad it makes you look. No matter how bad it makes you look. That

Do it for Susie. Do it for your other children.

If it makes it so it looks like you are trying to protect yourself are you trying, no matter if it looks like you are trying to protect Johnny or yourself, the jury is going to say she trying to protect somebody and the defendant is going to get up there and rant and rave and it's a good possibility that they will come back and will competely miss the whole point of the trial which is who killed Susie. They are going to say its competely ridiculou - she's up there - she's trying to protect somebody - she trying to protect herself - trying to protect Rita - I mean they are going to throw blame everywhere they can and it's possible they are going to come back not guilty.

See we can't guaranteed you a conviction on this case. But we can guaranteed you is that we've going to do everything in our power to get him convicted but we can guarantee you what that jury is going to do. The best, the best guarantee, the absolute best thing to do justice in this case is for everyone _____ to shoot out the truth. Every little shread of it. And if it makes you look like a bad mama - so be it. Because you did. You schrewed up. I mean there is no two ways about it - you schewed up. And, and unfortunately a terrible tragedy happened to draw that to light. But we don't want him to have that opportunity to do with nother child and another mama. And I just as soon you not have to carry that around inside you buried for the rest of your life. Better off to go

on and get it off your chest and get on with it. At least s. Better off o go on and get it off your chest and get on with it. At least Susie would not have died for nothing. Do you understand what I saying? You know, you, you've been to church from time to time - you ever heard the preacher talk about repent before you can be forgiven. Well, that's what I talking about here. You really have to. I hope you understand where we're coming from. We're not trying to hurt you. We're just trying to get to the very bottom of this thing.

We not going to use this against you - to bring charges against you. I mean if charges were going to be brought again 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.

Oh yeah, they're going - why wouldn't the mama charged? I mean

I've heard it before.

Sure you have.

But, we're just wanting you to open up to us because - well, you just need to opoen up to us and when you bring in the fact that when Teressa tells us yeah, she told us to tell the Court and to tell whoever, don't tell that bunch of junk - that'll make me look bad. You know, and I don't want to be laboring the same point over and over, Johnny going to make you look bad. You're, his lawyers are going to do everything they can to point the finger t you. You are going to look bad - but you are going to be beliveable to the jury if you get up there and say members of the jury, only you don't say it like this, but in effect you say, I messed up. I was stupid. I was scared of him. I was afraid of him. I loved him. Or whatever it is.

Maybe a combination of all of it.

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 didn't want my mama and daddy to know that he was abusing me. I had a good idea that he was abusing the kids - I knew that he was spanking them with a switch and I told him not to and he said they were going to mind him - kinda like - well, the heck with what you say, if I want to spank them with a switch then I will spank them with a switch. That I knew all these things and I maybe obvious didn't open my eyes up. I was love blind or something. I was, you know I didn't want to lose this guy. I was free. I was enjoying life. I was enjoying running around with this guy. Or whatever it was. If you don't come across the jury and explain to them - them you are going to come across as being a lier, a cover-up artist, either covering up for yourself or covering up for him. And that just gives his lawyers something to argue and it gives the jury to go in the back room and they can say well maybe she did do some of this or maybe the judge is going to tell us that maybe it not all the evidence we have heard but maybe evidence that we haven't heard - And we can use that to find him not guilty. We can use that to have a reasonable doubt. And they will. This is a very serious case and they are going to have a serious time - it's going to be a tough ase 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 ot 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 everytime you touched it one way. I mean, everybody come in, I swear it sounded like you got a sheet of paper and your memorized the script. And that's why we've been beating our month - even before when we were getting it ready the first time. How in the world can you have two broken legs and broken arm and nobody know anything about it? How in the world did the baby not cry? And the only one that's came in here and told up front that the baby cried was your sister. And she's the same one, of course she didn't tell us everything - she didn't tell us that you told her to lie to us. I mean that you might not have said I want you to lie. But what in effect you did was have her lie, or wanting her to lie.

Withhold.

Withold.

What I meant to tell the truth but I meant

No you didn't

to say was when she was around Susie her throat was messed up. _____ of time she wasn't with Susie.

I know. But you wanted her to say don't tell them that the baby cried all he time. That'll make me look bad.

Yeah, I did.

So, Lisa that makes it look like you were more concerned about yourself than you were about Susie. Just like when you'll went down to the hospital at Chapel Hill and Susie was not going to _____ and going in there going to bed with him, and him doing a little

That was on a Sunday

To relieve that pressure - you went over to the motel room with Johnny and into bed you go.

I didn't do anything with Johnny

I don't care

cause that was the same night that Johnny

_____ it was the same night it was.

That Johnny said well if Susie dies, don't worry about it we can always have another one.

How did that make you feel?

Mad. I told him it was almost as if he didn't care about her.

idn't he want you to have sex with him?

He did, I didn't.

I know, but wouldn't he after you to have sex with him? Hu?

Yeah

What did you tell him?

I told him no, I didn't want to have sex with my baby in the hospital. I didn't want to do anything with him.

It is a curious twist that here you daughter is getting ready to be operated on and rather than being up on, in the waiting room, you down in a motel room with you boyfriend. I mean, that, it it looks funny.

See

And then I think it was the next morning, that you didn't even go over to the ward until sometime after noon, after mid-day.

Cause Rita and all of them was talking to me and stuff. Everybody was what happened - what happened. I'm trying to answer everybody.

think, hadn't you and Johnny gone off together and gotten, smoked some cigarettes and gotten a drink or something like that. I mean you are still hanging tight with Johnny there. But, Sunday and on into Monday - what's going on? Why are you doing that?

Won't nothing going on.

You're with him.

I just, I didn't see him hurt her so I didn't point fingers at him.

Who else could have have him - her?

The onlyest thing I based it on was it was Scotty fault. And then when they said that it won't possible for him to fall like that I didn't know to do - I didn't know what to say.

You mean to tell me, honestly tell me, that you couldn't put two and two together when you saw the way your baby daughter was bruises, and battered, and that you couldn't put two and two together and realize that something bad wrong had happened and nothing to do with Scotty. You mean you saw

Eventually I did.

But when you see those marks under here and something on her cheek you knew that Scotty had done that to her.

_____ then, when they said she looked like she had been chocked. Cause

that's when I ask them couldn't they run fingerprints on Susie. I didn't now no difference - I ain't never been in trouble.

Couldn't, but, when you saw Susie bruised and Johnny saying all is is grease, its grease. Let's take this baby to the doctor. Oh, put the baby to bed the baby will be alright. Couldn't you start figuring out then that too, wait a minute, something bad wrong here - my child is in bad shape and she's got these marks all over her and here my boyfriend has been the only one with her - only adult with her - while I'm up here washing dishes - something ain't right here - I mean you even tell him if you don't take me and the baby to the hospital I'll call the ambulance - I'll call the rescue - You tell him that - you have to argue with him - then the son of a bitch doesn't want to wear a shirt that you picked for him - he wants to argue over the shirt.

Then he warms up the truck.

Well I kept wondering why all the delays. Why did he want to delay it?

Why couldn't you figure out what was doing on with him? Lisa, what kept you right then and there from figuring out what that man had done to your child? Why is it, why has it taken another day and a half for all of this to start coming through to you? Answer me that.

I guess I might have been a thought.

Then there might have been a thought? Was there one?

In a way. From what they said, Scott didn't do it.

So why are you in bed with him for at Chapel Hill?

Cause I wasn't going to say he did it. I didn't see him. They was saying a lot of things but they can't see it they can't say it. And all I wanted my baby here with me, not there. And I still want her here with me not in that damn grave yard - and it ain't doing me no good to sit back and pay for something he did and it damn sure ain't helping me get my baby back. And I want him dead - I don't care if you'll do it or if I have to do it - I want him dead. Because it ain't fair what that baby had to go through for that sorry basard. Why didn't he kill his self? Why did he have to go as far as to touch a baby? A baby that can't get up off the bed and take care of herself. No, he had to go to somebody who can't even talk to me to tell me what he did. I have to go and find out through all these doctors what's going on with my own child - because maybe I was so god damn stupid I didn't see it.

That possibility exist?

What?

That you were so god damn stupid that you didn't see it?

could have been.

Ts that

Maybe I just kept sit back thinking well maybe he's going to hurt me and he'll end up killing me - it ain't going to go of my kids - may the whole time it was going to my kids - and I was just to blind to know it. Maybe I am a god damn son of a mulking fucking mama but I didn't intend for my only baby daughter to be gone. If I had a choice I'd stand there and let him kill me - I'd stand there - no damn problem - take my life but don't you touch my daugther or my sons. But I didn't have that choice - when I come back she was hurt. Now I've done lost her and there ain't nothing I can do to bring her back. Not even taking his life. But, yes, I would take his life because she didn't have one and he don't need one. I don't want him to have one. I hate that boy with a passion for what he did to her. I am sorry I'm sitting here fussing but I'm mad at him. I hate him.

I'd rather you fuss right now - I'd far rather here you get it off your chest

I tired of holding all my babies in and going to my family. Well, this is how I feel. I think he's horrible for what he did to my baby. I tired of taking them to them, I'm tired of crying to my husband at nighttime and I tired of him sitting in that jail not shedding a tear. They don't care what he done - he never cared the night we took her to the hospital - that sorry bastard never shedded a tear - but I did - I sit there and begged that doctor not to make my baby stay there overnight after she died. I sit there rocking my baby in my arms after they unhooked her and she was dead.) 'm the one who stayed there all night with my baby the night she died. But, no, did he? No, the sorry bastard he don't care what he did to her. He never will care what he did to her and then if he gets off the hook he going to turn around and he going to kill another baby and then that one baby will be able _____ cause she's going to be like me and there're going to be another dead baby in this word. Now he's going to get off the hook with it again if they don't do something to him and do it now. And I tired of my baby having to pay the price and tired of my baby being out there in that grave and the only thing I can do is I can walk over there near her grave give her flowers every Sunday and cry and say Susie I'm sorry because I didn't know he was hurting you. If I'd knew I'd have killed him. That's all I can say in my mind.

Do you go over there every Sunday?

I go mostly every Sunday.

Where is she buried?

Alamance Memorial Park. Babyland. I'm the one who had to walk up to that casket and want to pick her up so bad and take her home and put her back in her baby bed. I didn't want her staying at the hospital - I wanted her home with me where she belonged. I just hate that I was slow - as Johnny would say I'm slow.

Well, thinking about it, thinking back on it - you didn't realize this was something was going on before you carried her over to County Hospital. Come on Lisa.

o I didn't. That's what I saying, if I did, it would not have been her it would have been Johnny - Cause I'd killed him over my kids. _____ and it seemed like I was getting Susie a little bit better than then he picked up and maybe she got worse after that - I don't know I can prove it. I'll take God as my word, but as it looks like they're going to believe Johnny, he's going to walk scot free for what he did to her cause maybe he's a smarter damn lier, maybe he good at lying - I don't know what is problem is - I'm sitting here telling the truth when I ought to just lie it out and get it over with and maybe he'd pay the price. I sit here and tried to tell the truth the best I know how and it seems like the truth ain't getting me nowhere. He's sitting up there lying out his ass and it's going to make him walk. He's going to get out of this - he's going scot free and my babys not going to be doing anything but laying in that grave and he's going to be walking around baby killing. Then again he may use some damn sense and not away and hurt someone else kid because he sees what he's been so far. I just hope that if he does walk free that I get to kill him. I'd don't mind going to prison for taking his life. Cause he sure didn't mind taking my babies and I hate him bad enough to that I could kill nobody but Johnny Burr standing in front of me and I'll kill him. And if they ask me that I'll kill him. That was my daughter. I might couldn't defended her them but by god I can defend her now and if they stand him out in front of my I'm going to kill him. I'm sorry but that's the way I feel. I'm not a hateful person but that's the way I feel. I made a mistake, I got over that sorry thing, and it cost me my daughter's life. And I don't want to live without her. I often think of taking my)ife and I wish I could but I've got three more kids that need me more. And that's the only thing that keeps me here. And I have to go away and I don't care who know it, I take those drugs you buy over the counter - is 357 magniums - I take them every day to keep me going. It ain't nothing but caffine pills but I take them. I take them when I get up every morning - I take me two more every evening and if that looks bad then that's just tough because I have to have something to keep me going. And if I could find something stronger I would take it. Anything to keep me out of jail.

To keep you out of jail?

Yeah

What do you mean?

Like I ain't going to do cocaine or something and get put in prison for cocaine.

I see what you are saying.

Or pot or something like that. I'd just as soon take something over the counter to keep me on my feet.

Why are you going to do that?

Cause. I stayed depressed with Susie all the time. I can't live without er being gone. I want my baby so bad and I can't get her back. I talke to her at night before I to to sleep, I talk to her all day. I look at

her pictures and I cry and I've done that every since my baby been gone and hey don't know what its like to have that damn kind of pain on them. He's got his kids. I don't have mine. _____ he sure ain't bringing her back. I turn to my three children and I turn to my three step-children and that's about all I have to keep me going. Maybe if something was to happen to them, they'd just take my baby I'm gone. _____ everything I know concerning I did not see him mistreat Susie. The only thing I know of was her sore throat and then he picks her up at four o'clock in then morning. That's all that I can answer. If I'd seen him hurting her that night I'd have killed Johnny that night over my baby. Cause I ain't going to see nobody hurting my youngun. I can't ever see to see a animal get killed much less a human being. And that ain't in me so I didn't think it would be in anybody else. I don't see how it could be in anybody else. I'm sorry. Getting this upset. I'm just hurt and I'm mad and it seems like I'm not getting no where with it.

Get it out. Just get it out. Cause it ain't going to be any easier when you get into the courtroom and you testify. And don't fake it, you're a human being and you're going to have come across as one in the courtroom. You said something a minute ago though which you're going to have to be willing to admit. That you made a mistake.

I did make a mistake. I got with that sorry thing.

And you probably, Mr. Johnson when he questions you, he's going to ask you

) 'm going to ask you a lot of hard questions. A lot of hard questions.

And one of your answers, you may, I don't know, maybe the explanations is that you were just to blind - in love with him - scared of him - didn't want to lose him - didn't think that he would hurt the kids - or just - I'm not saying that you were stupid - but maybe at that point in your life you were just to stupid and didn't pay attention. I don't know. Maybe its a whole combination of all those things.

After she died all I know is the boys said that he mistreated them and they would not tell me so because they didn't want to see me get hurt but they knew I would jump Johnny.

Lisa there are things like - I try to reconcile different things - I learned that both before and after this happened - that your children - that you were inside and your children were outside playing out side until late, late, late at night. LATE at night. What's going on?

When they were outside playing?

Uh-huh

Late into the night. Eleven - midnight - one in the morning.

My kids never played until one in the morning.

hat's not what your neighbors are telling us.

They didn't play till one in the morning.

I mean even the night that this happened, you don't go up there to wash dishes until sometime midnight - one o'clock in the morning.

Cause they was working on that trailer.

And the kids? JJ was up at Donald and Rita's

So was Scott and them

And they don't go to bed until you have to wash the dishes. That's pretty late for little boys.

They were watching a movie.

You knew enough of something was bad wrong when you saw Susie that when you left you said to your boys if they come around asking questions, and they ask you if we spank, you tell them we do it the right way.

Yeah

And that was when you were leaving to go to the hospital.

_____ cause my baby was bruised up bad.

But you knew enough then to realize, that that's what it looked like. Which goes to show that you are not stupid. See.

I just hate I didn't know at that time he did it.

Well, you, like I say if you put two and two together it's going to come up four. And you didn't do it. You knew somebody had to. You didn't think somebody had broken into your trailer and done that I dont't think. Did you?

Scott and Tony were in bed.

You didn't think that your boys would do that would you.

My boys wouldn't hurt their sister for nothing. I know he did it. I just don't know how to prove it.

Well you let us worry about proving it. You just tell us anything and everything that you can think of and don't hold anyting back. If you hold back - It was like a script that everybody came in here and said.

She was a normal baby.

She's normal.

Happy baby.

Happy. Cries - a little. Not much at all.

usie cried a lot when her throat was messed up.

It seems to me, just looking at _____ record that your last, her last month and a half was a tough month and a half.

It was.

Cause she doesn't seen even, my lord, on well, on April 18, April 19, you even took her to Alamance Hospital, she was 18 days old at the time. She was irritable, gas, and that kind of thing. And, that the first time Wilcox saw her. Change formula to Infamile. Try more Petelite or sugar - water if not hungry - two minocycline two drops full every four hours if further gas or irritability. Letrimine AF cream for rash. That's was back on April 19. And here we come up to July 17 and you take her to the emergency room at that would have been Memorial Hospital I suppose and yeah. Alamance Memorial Hospital. Redness, tenderness, I swear these doctor's write where you can't read. But that's when he told you to give her tylenol for fever.

Seems like she was running a fever.

And something, proxomide in each ear. That was I reckon it was Dr. Richard Lowyer. And then, then _____ July 17, the fact is the complaint was mother stated that child is pulling at her ears. She is fussy all day. Nurse wrote that. I could read it. Medication - current medication ylenol - looks like the ever prescribed some noxicyline. Suspension a ittle syrup - I guess a half teaspoon - they gave her a half teasoon then they gave her a half teaspoon to carry with you. Remember that?

Yeah

And that was on the 17th of July and then a week later you are back in the 26th of July. Mother states that child is weezing and has a sore throat. Is taking medication for an ear infection. Current medication is noxicyline perscribed July 19, 91. Mylecocine drops. The medications they gave you looks like mysotane, oral suspension to go. You weren't satisfied with that so you'll went to Chapel Hill. Lets see here. Chapel Hill on - one month - not quite that long - no you had her up to Chapel Hill one time before that didn't you? One white female vomiting twice - had vomited twice - _____. Watery diarrea. That was back in March. Then July 26, you had up to Chapel Hill after you had left the hospital locally because you weren't satisfied. You and Rita were up there because it looks like she was admitted. Let me see if I can find the time. 6 AM. Three and a half month old girl who presents a one to two day history of difficulty feeding, screaming, and a rattle air chest. Patient sleeping in mother's arms, noisy breathing, lots of upper airway sounds. Prenatual care been uneventful. She's presently medications were noxicyline to the ears and she was started on that on July 19. She presents irritability and patient on intake has noisy breathing for several days. No B/D. I'm trying to remember what that meant. Fever, calls for other syptoms being treated for om with noxicyline since 7/19. Irritable ut consolible. Head, ear, eye and nose, throat for both sides and this is with a good I just can't read this thing. Ulcerations of the postura up in

here or _____. _____ one thing I notice too is that hey were reporting her weight was a little low for her age. That she was a little small for her age. Impression vile illness. Probably coxisacking which I told you meant thresh mouth or something they call thresh mouth. Tylenol for pain. Feeds soon. Patient's dose. Returned to medical center if the syptoms percise or if they worsen. Dignosis vile syptrome. Discharge instructions tylenol every four to six hours for pain, feed small frequent amounts, return to pediatric clinic if no improvement with one to two days. That was your last visit to Chapel Hill prior to carrying, the ambulance carrying her up there on the 25th. What I'm saying here is it looks like a baby girl whose really had a tough time of it. Particular her last month - she's had a tough time of it. I would expect her to cry a lot. I think anybody else would. Isn't that was she was doing?

Hu?

Crying a lot with various and sundry things? I'm not saying that she didn't never say she didn't stop crying but that she did cry a lot I would think.

When she would get sick she cried. When she was irritable. We used them to do her better.

Tell you what. What do you mean getting them to do her better?

Getting her to do them better. Giving

WORD/RFJ/BURRO-D2.DOC

Lisa O'Daniel still talking

And Johnny had - tell me one time when we was outside me and Rita and them. Do you remember when them people, two old couple down on, I don't know if it was Jimmy Bowled Road or what road it was, it was right down below us, I can't think of what their name is, their grandson killed them - that was right before Susie - that happened to Susie - and I remember me and Rita was outside and we was talking about how bad that and I said that was close to where we lived at - and he made the statement he said, Yeah something like that could be happened right up under your roof and you not even know about it. It was something else I was going to tell you.

Let me ask you something as far as that statement goes. Who all was present when that statement was made.

Me, and Rita, I don't know if the children were or not but Me and Rita. We we all standing out in the - Rita's and them's yard - when he made that statement.

When in relation to the 24th of August was that made?

I don't know exactly when it was. I just can remember that was on after that happened to that couple.

You are talking about the Mr. and Mrs. - what was their name -

Crotts' case.

That lived close to us.

Now they are the people who were killed - Crotts

That was, what was their people's name?

Isn't that a shame that you remember who did it but not the victims?

Yeah, it is.

Gilliam's? Was that them?

Gilliam's

That's what it is.

How much time do you have any idea approximately?

Maybe just a few weeks, I would say that happened to Susie.

Yeah, cause that was not to terrible far - that would have made sense.

And that happened - seems like that happened before this happened to Susie. It was close.

And your comment was you said "Isn't it a shame."

said that was close - that's terrible. And then he made the comment back he said, yeah that could be happening under your own roof and you not even know anything about it.

And then my mama told me to tell you something.

Well I've been meaning to get in touch with your mama, it's just

She said she called and left a message.

Yeah

What that was she said that she made a mistake, she said that she told you'll Rita was the one that told her that Johnny was accusing Misty and them of doing it. You remember what I'm talking about?

Uh-huh

Okay. She said that was her mistake. Johnny was the one told her that.

Johnny told your mother.

Yes, he was the one who said that. That's who she heard that statement from was Johnny.

) hat what did she hear from Johnny.

That he was accusing Christy and Misty - he said he wouldn't doubt it if Misty and Christy wouldn't doing something to hurt Susie - that's the way it was.

That's about all I can really think about now. But I did, have to think about that statement about it could be under your own roof. I thought I'm come in and tell you while I have everything on my mind.

That's the way to do - appreciate it.

Okay.

APPENDIX W

Scott Ingle
OB: February 26, 1983
4th Grade
Reidsville Immediate School

Now we talking about what it is to tell the truth and you said it means to not tell a lie. What does it mean to tell a lie?

To not to tell the truth. It like when your mama ask you did you push your brother and you say - you did - and you say no.

That's telling a lie isn't it? Okay, so if I said something like - like that's a coffee cup would that be the truth or a would that be a lie?

Truth

Alright, and if I said that's an airplane -

That would be a lie.

If I said that book over there was green

It would be a lie

If I said this was tan

'T would be the truth - its brown or black

Yea, you know what it means. Okay. Do you know what the Bible is?

Yeah, I've got one at home.

What's the Bible

It tells about God.

Alright, do you know what it means to take your hand and put it on the Bible and swear to tell the truth?

Yes

What does that mean.

Cause they do it in court.

Yeah, what does it mean when you do that?

Means you can't lie for whatever you say.

And what happens if you tell a lie when your sworn to tell the truth? Do you know?

f you -

What does it mean to you - what do you think would happen - if you tell a ie after you've promised to tell the truth when you have sworn on the Bible? What do you think would happen?

I probably get in deep trouble. Like if I was big and if I didn't understand it might be different.

Do you ever go to church and sunday school?

Yeah, I go to _____

And do you learn about Jesus and about God. And what do you learn about them? About telling the truth.

Well, we did something about that yesterday. But I don't know what his name is but he lied to God. I think that's what it was.

And did God think that was good or did God think that was bad.

Bad.

Okay

So, do you think God wants you to tell the truth or tell lies.

The truth.

Well, let me ask you some other questions. We've talkked about that enough.

I want to talk to you some Scott about Johnny and about Susie. Some of the things we were talking about the other day. But I thought it would be better if the three of us could just talk by ourselves so we could talk without having little brothers putting in their two cents worth - that kind of thing. Sometimes it is just easier to talk one at a time. Okay.

I want you to tell me everything that you remember about the night that Susie got hurt.

Well I was in bed. You mean what I heard and all that.

Just everything that you remember about it - you just tell me everything that you remember about it.

I don't know if I can remember - I know he shook her and all that - he shook her and he he shook her and he would slam my mama against the wall and all that junk and we heard Susie hollowing and we saw - she - he would jerk her a lot - and you - I did fall with her but they said it wouldn't - cause of any damage.

You didn't hurt your sister. Okay.

know.

Alright.

You need to put that our of your mind no matter what anybody says - you did not hurt your sister.

Okay.

That was an accident.

I know cause I tripped over the cord.

Okay - you couldn't help that could you?

And he would whip my brother hard with a switch - and us hard with a belt.

That was JJ that got whipped with a switch?

I did forget to tell you'll something. When I was at the hospital she had a lot of bruises.

Who was that?

Susie - cause Johnny Burr was at the hospital too.

Do you know how Susie got those bruises on her?

No, but I think Johnny - I know Johnny Burr probably did it.

Why?

I don't think my mama would do it.

Okay. Why do you think Johnny Burr probably did it?

He was mean and he was the only one there to do. I ain't never liked him.

Now you said he would hit your brother with a switch. Which brothers did he hit with the switch?

JJ and _____ and he hit both of us with a belt.

Yeah, and he hit you with a belt.

Yeah, and mama - my other brother Tony he wouldn't whip him. He wouldn't whip - my mama - mama wouldn't

Alright, now he would - you said that he would slam you mama against the wall and he would choke her.

Yeah.

Did you ever see him do that to her?

Yes, I was the one who was always there when he - Tony was there sometimes

- but I was there most of the time.

Okay - when he would do that to your mama - what would you do?

I was going to hit him with my ball bat.

What did he say to you?

Nothing - he didn't know - I hid it - hid it and he never did know I even had a ball bat.

Oh, he didn't.

No - _____ mama - cause I didn't like him - _____ tell him either - unless I had to and I didn't have to tell him I had a ball bat.

Well, did he do any of that to your mama the night that Susie got hurt?

In the daytime he did. He choked her.

He did. Where was she when he choked her?

Close to my room - you know when you went in and you saw them bunk beds - it was right down where that window was.

I see.

- mean where - close - right beside the door.

How did he choke her? Can you show me?

No, but her feet would be off the floor.

Feet would be off the floor? Can you show me with your hands how she was holding her?

He did it with two hands and pick her up.

Two hands and pick her up.

By her neck.

Can I ask - Scott did - are you saying that this occured before the night that Susie got hurt or during -

It was the day she got hurt and he'd do it almost everyday - he did it almost everyday - I can't think of one day he probably didn't. He always used to do - he choked her the night that Susie died too.

Are you saying - do you know - was it still light outside when he choked her?

eah.

Coleman -

- Came in shortly after Conf started.

Or was it dark?

Well, I don't remember - I think he did it when it was dark but I'm not sure.

Let me ask you a couple of things - let's try to put things in order. Sometimes it help if we kind - if we kind of think about things in the order in which they happened. So lets start - lets start with that Saturday evening - now you were holding Susie - is that right? And where - why were you holding Susie - this is before you tripped over the cord. Why were you holding Susie?

Because my mama went to Aunt Rita's and I was getting ready to sit down and then I tripped over

Okay, and what was Johnny doing when that happened?

I don't quite remember - I think he was probably fixing on this gray thing - box on the telephone pole.

Okay, now tell me about the cord that you tripped over? Where was the cord coming from and where was it going?

From his truck - I mean - from that gray thing.

And where - it was coming from the gray thing?

Yeah, from our house - I don't know - you know we could've been using it - either one of them places.

And do you remember where the cord was going - do you remember which way it was going?

It was across (that way??) so it probably went to the house from the gray thing.

Could it have been going up to Aunt Rita's?

Yea, part of it was up there.

Okay. Now,

Cause - oh yea, he was running from there to somewhere at our house trying to do something.

And when you tripped over the card - you showed me the other day how you fell.

Yes

And Susie - did Susie ever fall out of your arms?

When I tripped over the cord?

Uh-huh

She was in my arms - she didn't even hit the ground.

And what did you say when that happened - what did you do?

I just ran - mama ran back - and I just started - trying to do something - you know - and me and my mama was with her

Was Susie crying?

She'd talk to her - you know - do something - to make her quit - I was there - she did something - _____ all that

And did that scare you too

Yea

Now, after that did you mama get Susie to stop crying sometime later on?

Yes

And where did you go?

I was there.

Do you remember - Mr. Elbert Porter and I think Chrisy who came out and visited for little while. Do you remember them coming?

Yes

Okay - And do you remeber that sometime after they left - do you remember that?

I don't remember what time ____.

Was is getting dark or was it still light?

It was in the middle - about 6:30 or 6:35.

Now, what did you do later on that night - where did you go and what kind of things did you do - do you remember?

What do you mean - that day?

That night.

Oh, well I was out there playing and we stayed till night and my mama had Susie and I was up there with mama but I was playing around near mama cause I wanted to watch out for Susie cause you know cause she didn't get hurt - And Johnny Burr was mowing the yard and went in and that's when my mama left.

Okay - now do you remember - do you remember anything about the bed - your

mama's bed.

The water bed or _____ bed.

The water bed, yes. Do you know something about that? What do you remember about that.

What do you mean?

Did something happen with it?

Oh, I don't think so - might have got - I'll check with them -I think it did cause -

Do you remember how that happened? Were you inside or were you outside when it got busted?

I think I was getting ready to come in or I was in my bed _____ cause I was _____ I was

Was it light outside or was it dark?

I don't remember - I think it was light.

Okay - how about do you remember going to bed sometime that night.

Yea, but I don't remember what time it was - it was close to about nine o'clock or maybe - probably about in the middle of nine and ten.

Was it dark outside them?

Yes

Who else was in the bedroom with you?

When I had to go to bed?

Uh-huh

Tony and I don't remember I think - oh J was at Aunt Rita's - yea - and no wonder I don't remember where he was.

Where was Susie?

In her baby crib in mama's room.

And where was your mama?

At Aunt Rita's washing dishes.

Did you know she had gone up there to wash dishes?

'ause I - cause I - she told him to watch her leave because she was scared of dark and carried a flashlight and watched her leave.

'here was Johnny Burr when your mama left to go to Aunt Rita's? Where was your mama?

When I went to go to bed he went down the hall and went into her room.

He went down

That way

Which way - toward the living room or the bedroom?

The bedroom where Susie is.

What's the next thing you remember after that? What happened after that?

I hear - like - kind of heard him kinda mumbling you know I could't hear what he was saying and I thought we'd be in trouble cause we would if we got up and I didn't want to get up and get in trouble but I did want to get up to see what was wrong with her. And it just stopped all of a sudden.

Did you hear any other noises?

All I's heard is a little bit - no I didn't hear nothing else. I didn't hear her crying no more and oh I did hear that beating when she was crying.

You did hear that what?

He hit against something?

He hit against something? Can you tell me what that something sounded like?

Something like when you hit something with a hammer.

Now, which room were you in?

My bedroom - when I went to bed.

Now, is that the same bedroom that I saw the other day - that had all the bunk beds in it.

Yeah - but it didn't have these bunk beds - so he - the closet used to be over there but he - Mike moved it over there to put the bunk beds up. We used to just have one bed right there.

Just a flat bed.

Yeah. And our bedroom - we probably - and it - it sounded loud because our bedroom was right there - and it was the bathroom and them the bedroom and they ain't to far apart neither.

'kay - could you - where did it sound like that noise was coming from - that noise that says like you hear when something is hit with a hammer?

Where did it sound like that noise was coming from?

Towards the bedroom.

Your mama's bedroom.

Yep - where Susie was.

How many noises did you hear like that?

And right when we went to go to bed and my mama wouldn't back and he was the onliest one in there.

Okay -

And I didn't - and it was - I just went to bed and then is when I hear it.

Okay - How many noises like like did you hear? That bang.

About _____ a few.

Was it more than one?

Yea

Now - I understand that the waterbed had been broken before your mother left and she and Johnny had tried to fix it. Did it sound like he was fixing the waterbed or did it sound like something else?

I was in there where they were gonna fix it. See I walked in there but it was already busted I think - it was already busted - but I saw them put it together - see they had to get this waterhose and stick it in and patch the waterbed - I think they patched it.

Was the waterbed fixed by the time your mama went up to Aunt Rita's to wash the dishes?

Yeeee - yea

Did Johnny ever go back in there to work on it some more? Do you know?

No

Okay - now when your mama was at Aunt Rita's and you're telling us about you heard Johnny mumbling and you heard - you didn't want to go out because you might get in trouble and you said you heard this nosie - did it sound like Johnny was working on the waterbed or did it sound differnt?

It sounded different - it didn't make no like water noise - it made beats.

Now Susie - have you heard Susie crying?

hen?

Either before or after you heard these beats.

When we was in the bed that's the only time I heard her crying cause she was asleep - the onliest time she 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.

Was that before or after you heard the beat that she stopped.

I heard the beat and she was crying for _____ and she keep on crying and she kept on crying and _____ and beating and beating and she just stopped.

She was crying and there was beating and beating and she just stopped. Is that what you are telling me? - Okay - now do you remember what we were talking about a while ago about telling the truth and all that. Is that the truth? (nothing auditable) Did you hear any other noises coming out from the room after that?

No - I heard some foot prints - yeah.

Okay - when you mama came back - do you remember when you mama came back?

No - cause after them beating I just went to bed but I know - I know I didn't hear my mama - it was a mans.

Now, when you mama got back Susie was out in the lving room sitting in her swing. That's where your mama found her when your mama got back.

But I was still in bed.

Okay - do you know how Susie got from her bed to out to that swing?

I don't know.

You just don't know about that - is that what you are saying Scott? You don't remember anything about that?

_____ they said she has bruises on her - and she did when I went to the hospital too. And it was in daylight when they took her out of the crib I think. No it was still dark.

And was it dark when you hear Susie cry and you heard the banging - was it dark them?

Yea - my mama got back close to - see we went to bed at ten something or nine something and my mama got back from Aunt Rita and that's when she told me.

Do you think maybe your mama got back later than that?

Cause I ask the others to make sure and I - you know to see what time she ot back - because I would need to know - cause I used to - see I ask a lot of questions about doing it - I say what time did she get back because I

was real worried and all that and they said _____ *(IT SOUNDS LIKE HE SAID ELEVEN.)*

Now, Scott do you remember two days ago when Mr. Allen and I came out to your trailer and got the bunny rabbit - whose bunny rabbit was that?

Mine - I got that after Susie done died.

And we were asking - did we ask you to show us something with that rabbit or did we ask Tony.

Me

Alright, do you remember what you showed us.

Yes

What did you show us.

How I fell with her.

Okay - did you show us anything else with that rabbit?

_____and how it had torn up my arm.

And did you show us that?

Yes

Did you see him shake her?

Yes

Do you remember when you saw him shake her?

No

Was it the same

Do you mean it dark or daylight or you know what day?

What day?

No

Was it the same day that Susie got hurt or was it some other day?

It was another day and then he did it - on me and my mamas - well me - Tony and my mama was playing football - I went in there and he did that then and then it was - not that day - but he did it about two or three times.

Okay - what would Susie do when he would shake her?

:ry - when he - she - she'd - he'd hit her - and we was in the backyard and he hit her in the kitchen - cause - I mean - he took her out of her baby

carries for _____ and took her and bring her to the kitchen and she just sat in the chair and then I walked out - started playing football with Tony and my mama.

When he was sitting in chair, when did he shake her? Was it - Where was he when you saw him shaking her?

Where - she's - he was in - what happened was when my mama was at Aunt Rita's me and Tony saw that and it was - where - it was in her baby crib.

Was that a different day?

He wouldn't never do nothing if he sees my mama was around.

Was that on the same day or was that on a different day than.

Different day.

A different day as in another time when your mama was up at Aunt Rita's and you saw him shake her - is that what you are telling me?

He wouldn't never do anything like that around my mama.

How many times did you see him shake her?

About two or three.

Can you remember another time and tell us about that? Other than the time that your mom was up at Aunt Rita's and you say you and Tony.

She was always gone when _____ did it.

Okay - you said there were two or three times that he did this?

Yeah

Okay - you just told us about that one time.

He shook her about two or three times - is that what you mean how he took her and shook her. Yeah

Show us again - I think you were just showing us - but show us - I don't have a bunny rabbit - but why don't you use that klennex box.

I can use this.

You can use that?

I can use my two fingers.

Well it would be better it you used

How he shook her?

Yea

He would take her and do her like that.

Then what would he do?

He would just pick her up like under her arms and then he carried her in there - and put her in baby crib _____ by her arm like that and then he went to feed cause she stopped crying but he knew I was around that time but that time I told you I didn't - I didn't - he didn't know I was around because

Which time was that? When your mama was at Rita's or were they out playing football.

Well, why don't you tell me about the time that you were out - who all was outside playing football?

Just my mama and Tony and I was but then I went in and that's when I saw

So, your mama and Tony and you were outside playing football.

Yea, and I went in.

And you went in.

Alright, where was Susie?

In the house.

Where at

He was suppose to be watching her.

Where

Cause my mama didn't get to play with us much, so we wanted to play with us that day.

Okay, why did you go inside?

To get some drink.

To get something to drink.

And I didn't get nothing because he was doing that _____ and I hide _____ in case something would happen.

He had what?

_____ I thought something might would have happened.

And where was Susie at when you went inside?

She was in the living room in - you know that swing thing.

So she was in the living room in her swing and what was she doing? Was she happy or was she asleep or was she crying or was she not doing nothing at all?

I went in there and she was laying down and he just - she crying cause she was hungry and he just jerked her up by her arm - and he shook and jerked her up by her arm.

Okay, show me, now you say she was in a swing.

Yeah

Was she sitting up

When he jerked her up he took her in there and started feeding her.

Why don't you, if you would, put down your little thing, and pretend that this box is Susie and I want you to show me how he did.

He shook her and shook her - I'll have to show you how he jerked up by one of these arms - I can't do it with this -

But show me first

He shook her like that and then when to pull her - and pull it like this and you know.

And when he put up here - put you box up show me how he did it with the box.

Yeah, he went like this.

When he shook her what did Susie do?

She started crying and he tried to make her stop crying.

How did he try to make her stop crying.

Like my mama would - he would do her like that - but she was spoiled by my mama - so she would cry a lot when she wasn't around - and I know she would start crying over that and she take her in and she didn't cry around _____.

Let me ask you something Scott? Was Susie crying before or after Johnny picked her up out of the swing? And you say he grabbed her and shook her.

She was happy - but she started crying because she got hungry and she had to use the bathroom. But he thought she was hungry I reckon because he started feeding her.

kay - so she started crying and then that's when he went over and starting shaking her - is that what you are telling me? Or did she start crying

after?

She started crying because she used the bathroom _____ or was hungry and I said that he probably thought she was hungry because he started feeding her.

Okay - that's what I'm wanting to ask you. Okay - when she started crying and that when he went over and grabbed her - did he say anything to her when he grabbed her?

He said Shhhhhhhhhhh.

Okay -

He didn't know I was in there because I hid.

Where were you hiding at?

I was - it was like - I was hiding in my bedroom and I was kinda peeking out to look.

So you had kinda

And when he took her in there - I ran - I crawled behind the the couch or the chair I don't remember - it was something like a stereo I was behind or beside the stereo and between the tv - you know - we used to have a little crack and I crawled - I crawled behind that looked - and then when he took her in the kitchen

So, you were hiding - peeking out - he didn't know you were there.

See, I am sneaky and real quiet.

Kinda like an army man.

Like that ninja there.

After he grabbed her - when he grabbed her - did he grab her first or did he say shhhhhhh first, or

He started _____, saying shhhhh.

You just, you said, he said shhhhh and you raised your hand up? Did he raise his hand up?

No, he pulled her up.

Oh, okay, I see what you're saying. So he kind of did like this shhhhhhhh and then grabbed her by the arm and pulled her out. But when he did that did she stop crying and did she started crying harder.

She started crying harder and he gave her some milk and started doing like mama and then she stopped crying and that's right when mama came in and I went out and I told mama would you give me some drink because you know I

didn't get none and when she came in she would just stopped crying.

Scott, why were you hiding when he was doing this? You said you were

I thought he might have did something - see I never did like him - I told my mama that after they broke up you know.

I understand. But, when you went in and your mama was outside playing football with Tony, I think you said, and you went inside and he was doing this - why did you feel like you had to hide from him.

Cause you know I was thought he was mad and he really was.

Alright. I didn't mean to interrupt you Brad.

So when you mom - did you follow - you went outside and then followed your mom back inside to get something to drink?

And one day I saw him - and he was shaking her foot I forget that time. He shook her one time when I saw him. I walked in _____, I kind of peeked in too cause I

What were you doing then - do you know when - was this before or after the time you'll were playing football.

This was the next day.

he next day.

Do you know how many days before - the night Susie got hurt - do you know how may days it was before when you'll were playing football and you saw Johnny shake - do you know how many days it was before that? If you do - that's fine.

What do you mean?

Like was it - do you know if it was a couple of days or a week or more or if you don't know - you don't know its fine - I'm just wanting to - I'm just wondering

What do you mean? Ask me that question.

Do you remember the night that s shake - do you know how many days it was before that? If you do - that's fine.

What do you mean?

Like was it - do you know if it was a couple of days or a week or more or if you don't know - you don't know its fine - I'm just wanting to - I'm just wondering

What do you mean? Ask me that question.

Do you remember the night that Susie got hurt. Do you remember that night?

What do you mean?

The night they had to take her to the hospital.

Oh yeah.

When you'll were playing football and the next day you said you kind of snook and saw him shaking her - did that happen the day before or two days before

She died?

Yeah

I don't know. I don't know. A few days. You know - I don't know.

If you're not sure Scott

You just think it was a few days?

It could have been about a week or a few days - I don't really know.

Well, let me ask you about that next day. You said - what were you doing outside - or were you outside?

I was inside - remember I saw him - I was peeking

Hu?

I peeked and I saw him choke - I mean not choking her but shaking her.

Where were you at? Where were you at inside?

He was in the bedroom and _____ see the door was cracked a little so I just peeked in.

Okay - where was your mama?

She was at Aunt Rita's, Tony was outside with JJ and playing some game I don't know what they played.

Tony was outside with JJ and where were you at? What were you doing inside? Were you playing with the ninja men or were you playing

No, I just got the ninja man yesterday.

Okay - what were you playing - what were you doing inside - do you remember?

I was - I watches - I came in cause I heard her crying and then I peeked.

What do you mean you - were you outside and heard her crying or were you

Yeah - See we had a big yard and they were out in the woods in a - it was a ig homemade planet clubhouse

Kind of behind your house

It was way on out that way cause we had a great big yard and I was close to the house and then I

What did you hear? You say

I heard her crying and I then I ran in and I figured he'd probably be done shaking her again and he was shaking her again.

Where was she at? How loud was she crying?

Not loud enough

Not loud enough to hear her up at Rita's

No

But loud enough for you to hear her outside the trailer

Yeah - I was nearest - I was in the backyard cause - cause you see I was in my mama

Okay - so you were in the back near the backdoor

And the backdoor is near my mama's room.

Right near your room too isn't it?

Yeah.

Okay

So you were both - When you - You say you snook in did you kind of creep in so he couldn't hear the door open or what did you do?

There's a crack about that big and I just peeked.

Peeked into the bedroom.

Peeded into the bedroom? Where was Susie at when you looked in?

He was shaking her in her bed.

Who was?

Johnny

How was he shaking her - you mean she was laying in her bed?

Yes - he was the onliest one that shake her - my mama never did shake her -

she'd just pick her up and do her like that - but that ain't shaking her -

Kind of rock her.

No, she did rock her

Why don't you use that box and show me how Susie

(NEW TAPE)

Scott, you were telling me that Johnny was shaking Susie - now was he leaning over the - how was he leaning or how was he standing at the bed?

She was - you ask me how he laying down - she was like - this is like a pillow and she was laying down like that.

Okay, why don't you stand up and show me

I don't know why he picked her up - he just started - picked her up for no reason - she wasn't even crying.

I thought you said she was crying.

Not that t - oh yeah, oh yeah, I was thinking of another time. That was the day after that day.

The day after you were playing football.

Yeah - it was real - no - it was about - you could say three days it was close to when he died.

Okay, so about three days after you played football is when you - when you heard her crying and you were outside the trailer.

Yeah and about two - about two or three more days - maybe four he was is when I heard her not crying I just walked in and he just started shaking her or whatever.

Okay

That time he just pulled her arm.

Okay we'll get to that in one minute. Okay. Let me - I want to talk about the day - the day that you played football

Yeah

Okay - how many days after you - you know the day that you saw her shaking - how many days was it that you heard her crying and you were playing out back by the back steps - and you snook in and looked in throught the cracked door.

I don't know.

'as it - I'm saying

Oh - I don't remember - Ask me that again.

Okay - I get mixed up a lot.

That's okay.

Cause I was around her a lot - I was around most of the times when he shook her and I get mixed up about all the times he shook her and all that.

Okay - you told me you'll were out playing football and you saw her shaking and then you told me it was the next day that you were outside playing and hear her crying.

Yeah

Was it the next day or was it another day - some - several days later.

The next day.

Okay - that's what I want to ask you about right now. That next day - if you stand up and show me how you saw him when you peeked into the bedroom door - what did you see him doing - was she still crying when you wallked in?

'es

Okay - stand up and show me what you saw him do.

He shook - he shaked her lots of times and he kept on and kept

Did she keep crying?

Yes

Okay - how was she crying?

Loud - well not real real loud

Okay

About you know the size of this beat.

Well let me ask you something - when you saw him shaking her did he know you were out there watching him?

Not-huh

Okay she keep crying.

'he day before

or did she stop crying?

She stopped crying. The day before that she died he shook her and that's when I - that's when he saw me looking.

Tell us about that.

It was - mama was gone to Aunt Rita's cause Aunt Rita was not there - I think she was to - yeah, she was gone to the mountains - she left sometime that day and them Misty and Christy was there and she had washed the dishes and a lot of _____ you know they do a lot of house stuff when her mama was gone and she had liked sweeped the floors and all that my mama would and when - and me, Tony, and J was outside playing and I walked in and he was me watching him.

What - when you walked in where was Susie at and where was he at?

He was in the bedroom and Tony and J was up - well I - near that big hallway - was right beside me - because see they played in that big hall a lot.

Okay - what I want to ask you is when you walked in the house which door did you walk in?

The back - cause I played in the backyard a lot.

Okay - is that the door that is right there by the bed - the bedrooms?

Yeah and you get - closer if you go throught that door you can walk right into the bathroom.

Okay

If you want to go to my mama bedroom just walk in there like that and if you want to go to my bedroom you go like that and

Okay - well let me ask you - when you walked in the back bedroom - the backdoor what did you hear?

I walked - when I walked in I - he - he - that's when he just went over there and you know and he - she didn't do nothing that day neither - she was just sitting there and he did that two times.

He did what two times?

He shook her two times - remember that time I told you he shook her one time and she wasn't crying - I mean - or anything - just laying in the bed - she was - the day before she died - she - he did that to and she wasn't crying or anything.

Okay - thats what I

nd I walked in and I saw him walk to the bed and he just

Was she laying in the bed? Was Susie in the bed when Johnny walked in?

Oh, yeah, she was in her bed.

Okay - that's what we want to know - where Susie was you saw Johnny do that to her.

Show me how he she - he shook her that day.

He got her like right her - and he got her right there and she was hitting - her head was kinda let against the pillow but it couldn't - but her head couldn't hurt but I know her - he - her waist was probably was hurting because she did cry and she probably was in shock a lot too.

So her head was bouncing on the pillow.

Yeah.

Okay and you say he had her by her waist. Well, let me ask you something - what did he do after he shook her?

He -

Was Johnny saying anything when he was shaking her?

He - he did say shut up for a minute.

Shut up for a minute - is that on this day - the day before you talk about - the day before Susie died or was hurt real bad.

No, she wouldn't hurt real bad - it was the day before.

Okay.

So she started crying and he said shut up for a minute.

Yeah

I don't understand something - when you said he said shut up for a minute. Is that the words he said shut up for a minute or are you saying he shut up and he said that for a minute or so - which did you mean?

He said shut for a minute.

He said shut up for a minute - that's what he said? Okay

But he did have curse words in it.

He did have curse words in it.

He said shut up you GD for a minute.

nd thats when he was shaking her. She was - and where was she when he was shaking her?

n the baby crib.

In the baby crib.

She wasn't on her bed that time - she was in the baby crib.

And the baby crib was where?

He had - just - well - he started - I mean - he went over there and started doing that and I walked in and thats when he saw me.

And where was the baby crib?

What part of the house?

It was in my mama's room - you know when you walk in you saw that - have you been in my mama's room - and you know where that shelf is with all that stuff on it - right beside the dresser with the pink underwear that's Susie - that's where the baby crib used to be - that big shelf used to be in the back.

Okay. So when you went in that backdoor - if you went in the backdoor - let's say we walk in the backdoor here - that would have been right that way -

Yeah - I would go that way, that way and then her baby crib would be right here.

Okay. Well, Scott let me ask you - when Johnny - did he pick her up after he shook her and shut up a GD minute - did he pick her up then?

Yeah

Was she crying?

By the arm

How do you pick - he grabbed her by the arm and picked her up?

Yeah, he started playing with her and you know (mumbling) - you know how they'd play with you - you know tickling your belly and all that - he did that to make her stop crying cause he never did want my mama to find out I reckon.

What did he say to when he - did he say anything to you when he turned around and saw you seeing this?

No

What did you think when you saw him do this?

I reckon he was going to - I know he was trying to hurt probably cause it didn't make sense - you know the way he was shaking her and all that all

the time.

Well let me ask you something Scott. Did - what did you do when - when you saw him and he turned around and saw you. Did you say anything to him?

No - I never did tell anybody either.

Okay - why didn't you tell anybody?

He would have hurt us probably.

Did you stay in the house or what did you do - after - when you saw him shaking her on

I just ran outside and started crying. Cause I was scared he'd probably _____ cause he threatened my mama he said - he said if you break up with me you know and leave me he'd kill her.

When did - did you hear him say that?

That's when we were at his house so I thought if I told my mama she'd better break up with him and he would have killed her.

Did you hear him say that?

I was in a room and all I heard is he said I'll kill you. She told me - I said - all I heard was I'll kill you Lisa and she told me the rest of the part that went with it. I asked her why did he say that - and then she told the part that went with it - she said that he said

Oh, you asked you mama why did Johnny say he was going to kill you?

Yeah, cause that's the only part I heard - part - all I heard him say was I'll kill you Lisa and ask him why he said that and she told me that wasn't all he said he had that was not the only thing he said that it you break up with me I'll kill you.

Okay - can you - do you remember you told me there were two times - or do you have any other questions Rob. Scott there were two times that you told me that Susie wasn't doing anything at all.

Yeah

She wasn't crying or nothing. Okay. Can you tell me about that other time - when she wasn't - besides this time - the day before she got hurt real bad - can you tell me about the other time that you say you saw Johnny shaking her

No, I don't know what day that was.

Okay, can you just tell me about.

ow he did it?

Were you - what you were doing - where you mom was

He didn't see me then and my mom was at Aunt Rita's.

Okay - where was Susie at? Okay - what were you doing? Were you outside playing or were you playing inside.

That's when I was peeking through the - I was peeking through the - you know the door again.

You peeked through the door two times.

Yeah, I peeked through the door a lot so he wouldn't - cause he would do that much to her

In which room?

My mama's - he wouldn't do that much no where else but he did do in the living room one time.

Well let me ask you - the other time - not the time we just talked about - but the other time that you say Susie was not crying or doing anything.

The day before she died?

No you just told me about that. I want to talk about - you said it was two times that you peeked in and saw him

No, I got it mixed up. The day I told - before she died was when I saw - is when he saw me - before the day she died - you know a few days before that three - is when he didn't see me and I was peeking in and he just shook her.

Okay thats the day after you all were playing football.

Yeah.

Okay - are you saying that you saw him shaking her three times.

Yeah, three times - he shook her three times.

I mean - I'm - I'm - No - maybe I'm

Oh, you mean three times

That's okay. That's okay. Can you think of any other times that you saw him do something to Susie - other than what we're already talked about.

About shaking her and all that?

Or whatever.

didn't see him do anything else but shake her.

And he only - you saw him doing this to her but he only saw you on that one ime.

Okay.

Well, let me ask you one question, if I may. When he would shake her in the bed would it make a sound?

No, my mama fixed it so it would be real soft you know everything but the bars and he would - she'd hit the pillow you know but he made her cry.

Did you ever hear the bed making a sound when he would shake her in the bed - you know where the bars

You know how waterbeds got that noise when you like - jump on it.

How about her baby bed?

Her baby bed?

Did you ever - when he - you saw him shake her in the bed

It would make a big of a noise - nope - cause the reason I noticed cause he would like hit her head against the pillow.

The night that he hurt Susie - you know the night that you and Tony had)one to bed and mama had gone up to wash dishes at Rita's trailer.

Yeah.

Do you remember hearing a noise coming out of the baby bed that nigth.

Yes.

What did it sound like?

It's like of - a - a loud loud hammer head.

Okay

But not loud enough for mama to hear it - but see he would always try no to let my mama hear anything _____.

But you don't remember hearing the baby bed

Or my brothers - he let - Tony heard it one day me and him went in.

Tony heard what?

Me and him heard him - her crying - and then we went in and he was shaking her. Did he tell you about that?

'hy don't you tell us about it.

He was - we just walked in and saw it - and he said that she - when we alked in and saw him - he was shaking her - and we - well Tony - we both didn't really - we both really heard him say I'll kill you Lisa. Did he tell you about that?

Not-huh

We was in his house playing the _____ and then - and you know was in there and we heard him say - we never did you know tell anything cause we were scared.

That's when you heard him say I'll kill you Lisa and that's talking to you mama.

Yeah - but when we saw him shake her - when we both were looking - that's why we didn't tell or anything. Cause they would say something. My mama would try to break up with him and he probably would kill her.

When you both saw him - When you and Tony both saw him shaking Susie where was mama?

Mama was - when we both saw it - I think she was outside getting J and cause

Now when you and Tony both saw him shaking her

T said it was past that whole week - and done pass that whole.

Okay - but when you and Tony both saw it was this at your house or was it at Johnny house or whose house was it at?

My mamas.

Your mama's house - there at the trailer park.

Yeah, cause we didn't really play on his yard - we never did - cause he had a little bitty ole yard - you know - with lots of baby toys you know.

Well, the time that you and Tony both saw him shaking Susie was Susie crying then? Either before or after he shook her?

No, because she - that's when my mama put like - put it on the bars and everything it was real fluffy but he - he was trying to make - but she was just like - she thought he was playing with her then - she was going hee hee.

Was he shaking her real hard then or

He wouldn't really make her pick off the bed he would just you know.

Just kind of bouncing her in bed.

eah.

When he - he did say - I don't know what he said - but I can remember him aying something.

Okay. Can you think of anything else you think maybe you need to tell us about him - about it.

I remember - I think I remember anything else - but I do want to tell you.

Alright, we need to make - carry him up to the courthouse. Do you think of anything else Brad.

Well, actually, on the night that Susie got hurt Scott, do you recall hearing anything?

Yeah, the night that she died.

Yeah. Did you recall hearing any voices?

I heard a man's voice - it sounded like Johnny Burr's - but I couldn't hear what he was saying.

You couldn't hear what he said.

Not-huh - I heard him mumbling.

Okay, that's what I was wanting to ask you.

When you heard him mumbling - you couldn't tell what he was saying - is that right?

Yeah, but _____ sister she said that you'll said we had to talk to Johnny Burr.

Hu?

My sister said that you said that we had to talk to Johnny Burr.

No we're not going to talk to Johnny Burr in here. Don't worry.

I was going to ask him a question.

What were you going to ask him?

Why did he kill my sister? I wanted to ask him that.

Could you - did you ever - were you able - ever that night that she got hurt real bad - were you able to make out any words that you heard him say?

He - I can remember just one word.

What word did you remember?

GD - He said GD - shut up.

o you remember him saying that?

Yeah, but that's the onliest words I heard.

You heard him saying GD - he said the word.

Yeah - and that all I heard cause he said that - you know - loud enough for me to hear it. When - I just - she just stopped crying.

What about the shut up? Did you hear him saying shut up.

Cause I - and then I heard - I heard this calming down - well, I think he killed her. He was the only one there.

Okay.

When are we going to court? Are we going to court?

word/rfj/burrkid3

APPENDIX X

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO:	4. OCA FILE NO.
Alamance Cty Sheriff's Dept.	0010000 NC	☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	1-100-8-91

5. NARRATIVE

This will be an interview with Lisa Porter O'Daniel, this is in reference to the Tricia Sue O'Daniel case. Today's date is 8/26/91.

Q. Ok, Lisa you have been advised of your constitutional rights, is that correct?
A. Yes.
Q. Do you fully understand those rights?
A. Yes.
Q. And do you agree to have conversation with us?
A. Yes.
Ok.
Q. Give us your, give us your full name, your date of birth and your address?
A. Lisa Porter O'Daniel, December 31, '64...
Q. And your address?
A. 4147, Lot 1G Bowles Road
Q. And what's the name of that mobile home park?
A. Country Living.
Q. Do you have a phone?
A. Huh-uh, I use my stepbrother's.
Q. If you will, speak up a little bit louder, will you do that for us, you know so this recorder will pick it up. You just talk a little louder. What we're talking about, what we want to discuss about is your daughter and her name is Susie?
A. We call her Susie, it's Terisa.
Q. Terisa O'Daniel, and she's a 4½ month old infant?
A. Yeah.
Q. Speak up. And this child was seriously injured Saturday night or Sunday morning, is that right?
Yes.
Alright, that's what we want to talk about. That child is now where?
A. At the hospital.
Q. Which one?
A. Chapel Hill.
Q. What has the doctor, and what does your understanding of the condition of the child?
A. She could die.
Q. The doctor has told you and us that the child could die at any moment, isn't that right?
A. Yes.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 1 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

0015999

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. Tell us about what happened Saturday before you had to take your child to the hospital and we'll call her, you want to call her Susie? Is that what we're going to refer to?
A. Yeah.
Q. What happened at you home Saturday, Saturday all day and Saturday night and Sunday morning? Tell us what happened and who was with you and where you were at and what you did.
A. Tell him about when Christy kept her or just from the part where Scott fell?
Q. I want to know what happened Saturday all day. Just start when you got up. (Pause) What time did you get up?
A. Probably about ten or eleven.
Q. Was your children up already or did they just get up late like you?
A. Well sometimes they sleep late, sometimes they go up to Rita's and thems with their youngins.
Q. And Rita is what?
A. My stepbrother's wife.
Q. And they live beside of you or right up above you?
A. Right up above me.
Q. And that is your stepbrother and his name is what?
A. Donald Wade.
Q. Donald Wade, and that's where they would go sometimes. Were they up there Saturday morning when you got up?
A. Yeah.
Q. Ok, and are you married?
A. Separated.
Q. Have you got a boyfriend?
A. Yes.
Q. What is his name?
A. John Burr.
Q. John Burr? Was he at your trailer Friday night and Saturday morning?
A. Not Friday, but Saturday after twelve.
Q. He came to your trailer after you had gotten up Saturday at about 12:00 o'clock or so is when he got there, is that what you said?
A. Yes, and I was up at my....Naw, I got up before then.
Q. Alright, what time did he get at the trailer?
A. A little after twelve.
Q. Did ya'll start fussing about anything?
A. About where he'd been.
Q. Well, what happened, what was said?
A. He said he worked real late and then he went and took care of his little boys for his wife to

001600

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 2 OF 22

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

go to work, his ex-wife or whatever.
Q. He's still married?
A. They're separated.
Q. Are they actually separated or does he stay with you some and stay with her some?
A. Well she's got papers from her lawyer.
Q. Well doesn't he stay over there some overnight?
A. Yeah.
Q. You know that don't you?
A. Yes.
Q. Alright, and don't ya'll fuss about that occasionally? Alright, so you fussed about that aturday after he got back and your other children were up at your stepbrother's home, at the Wade home. Where was Susie?
A. With me.
Q. Had she already been changed and dressed?
A. Yes, and then I took her up there, he said we was going do some more work on the trailer. We was putting in some windows.
Q. Putting in windows?
A. Yes, and a panel box so I took her up there to Christy Wade.
Q. Christy Wade?
Q. How was the, how was Susie at that time? How was she acting, was she a normal kid or was she still, or did she have some problems still? Was she still nervous from the days before or weeks before that or was the child ok?
A. She was acting ok.
Q. She wasn't nervous?
A. And then I took her up there and and then Christy kept her for a little while and said that she couldn't do nothing with her so she brought her back to me.
Q. hy couldn't she do anything with her, what was wrong with her? Did she say?
A. ne just said she started crying and got ill.
Q. And so she brought her back to you, and what did you do with the child?
A. I held her and then put her in her swing.
Q. Did she calm down for you?
A. Yeah.
Q. How long did it take her to calm down?
A. It didn't really take long.
Q. Ok, and then you put her in the swing and she set there and swung, right? Inside the trailer or outside?
A. Inside.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 3 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. Alright, and then what happened later on that day?
A. We went out there to hook some wiring up on a pole....
Q. Like a meter pole?
A. Yeah,
Q. Uh-huh.
A. And then ah, I took her out there with me and then I called my little boy and asked him would he hold her for me.
Q. Alright, and which little boy did you call and ask to hold.....
A. Scott.
Q. And how old is Scott?
A. He's 8½.
Q. And was this....do you remember about what time this was?
A. Probably about 6:00 o'clock or maybe a little after.
Q. And he came over and was carrying the baby for you, or holding the baby?
A. Uh-huh.
Q. Did you tell him to go do anything with the baby or take the baby anywhere?
A. No, I started to walk up to Christy's and he was going follow me.
Q. Alright, so you was, you was in front of him walking toward Christy's and your son, Scott,....
A. Was going to follow me.
Q. Carrying the child?
A. Yes.
Q. And what happened?
A. I told him to turn around and go back down in the grass with her and when he went to turn he fell with her.
Q. Did you see the fall, did you watch him as he fell?
A. No, when I turned around I heard him holler and when I turned around he was laying on top of her.
Q. Was he laying on top of her or was he cradling her in his arms still and had just fallen holding the child in a, you know to protect the child from a fall or was, did the child literally fall and had he had laid on top of her? Which was it if you remember?
A. Well her was holding her the whole time he'd fell.
Q. He continued to hold her, he didn't literally drop her?
A. No, and he didn't let her go.
Q. He didn't let her go, he still had his arms around this child and you went down there to them and what happened? Did the baby cry out and scream out or just cry out?
A. She was crying out real hard.
Q. And was it ah, I mean have you heard her cry out louder or harder than that before? Have you heard the baby scream or cry or holler any louder than that before?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 4 OF 22

th Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

A lot of times when she was, when I heard her crying with Johnny like that night I went in there.
Q. You had heard her the child scream louder when she was with Johnny?
A. When she was with Johnny.
Q. And that's your boyfriend?
A. Yes.
Q. Well tell us about that.
A. That was at the time I went in there and he said that he going to.....
Q. Tell us about going in there and how long before Saturday was this. I don't, we'll have to get back in just a minute to the fall, but go ahead and tell us about you hearing this child scream and cry louder than she was Saturday.
A. That was on a Wednesday or Thursday when he come in.
Q. Of this same week?
A. And he said that, you know, that when he come in from work she was laying there looking at him, she was wet and he was going to change her. But I heard her scream and sound like far away and when I went to the living room, that's where they were at.
Q. And this was about what time in the morning?
A. It was 4:00 o'clock in the morning when he.....
Q. And you was in the room with the child or she was in the room with you?
A. She was in the bedroom with me, he took her out of there and took in there.
Q. Did you hear him come in?
A. No.
Q. And the child wasn't crying was she when he came in cause you would have heard the child wouldn't you?
A. Yes.
Q. Any time the child cries, do you wake up? And so the child did not cry out?
A. No.
Q. But then you did hear the child crying, you heard a scream from the child different from what a normal cry is, is that what you're saying?
A. Yes, and I went in there.
Q. And when you went in there, what did you see?
A. He was holding her up in front of him and said he was just getting ready to lay her down and change her.
Q. He was holding her up in front of him like, if you will rather than just holding your hand, try to describe that.
A. He had his hands up under her arms and ah, sides, on her sides, up under her arms.
Q. Up under her arms and up under her, on her sides. Was he holding her up to him or was he holding

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 5 OF 22

DCI - IR 202

Rev. 1/79

North Caro. Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

her out from him?
A. Sort-of.
Q. And was that, was that child still crying and screaming?
A. Yes.
Q. And he said that the reason he got the child out of the bed was what reason?
A. She was wet and he was going change her. She was laying there looking at him.
Q. Had he ever changed the child up until that point before?
A. No.
Q. Never?
A. No.
Was the child in fact wet when you checked her?
A. The pamper was wet.
Q. That would make sense at 4:00 o'clock in the morning. Did you change the child or did he change the child?
A. I changed her. I took her from him and changed her.
Q. And did the child act right the rest of that morning or the rest of that day?
A. Well it took me an hour or so to calm her and she went back to bed.
Q. And is that a habit the child has of getting up in the middle of the night and taking an hour or two to get her back to bed?
A. No, no.
Q. And it took you how long to get her back to sleep and back in bed that morning?
A. I got her to bed around 5:30 or 6:00 o'clock.
Q. So what you're saying is another hour, hour and a half or more?
A. Yeah.
Q. Before the baby quit crying and calmed back down?
A. And went back to sleep.
And what did Johnny do?
A. He didn't do nothing, he just sit there.
Q. Did he go to bed, did he just sit there and watch you rock her and...
A. He just set there and watched me rock her.
Q. You were rocking her?
A. Yes.
Q. Did he say anything?
A. No, just talked about work.
Q. Did you think that was strange that had occurred with him and that baby and that the baby was continually crying?
A. Yes.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 6 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. Did you ask him if he'd hurt the child?
A. I just asked him what was wrong with her.
Q. And did you see any, did the child have any bruises or marks on it?
A. Maybe his fingerprints right there.
Q. Did it, or did you just think so or did you actually see some fingerprints?
A. I seen some but I figured it was where he was holding her up.
Q. How long did those fingerprints and thumb prints last on that child? How long did they remain on the child when you seen it?
A. I think they were still on her when I put her to bed.
Q. His fingerprints?
A. I think so, I'm not for sure.
Q. Well, as honestly as you know, you think they were still on there or were there on there. You're the mother of the child, you should know. And why did you know they were fingerprints or thumb prints? Is it because ah, you changed the baby and seen them?
A. Yes, when I was holding her and rocking her, that's when I noticed them.
Q. Did, does she, did the child not have on anything but a pamper?
A. That's all she had on.
Q. It was hot wasn't it?
A. Yes.
Q. And so even when you put the child to bed it was still wasn't wearing anything but a pamper?
A. Yes.
Q. It wouldn't have on night clothes, right? It did not have on....
A. No, just her pamper.
Q. And you, you're of the opinion that the child still had finger and thumb prints on it's side and back even ...
A. While he was changing her..
Q. After an hour-and-a-half or two hours later?
A. If I can remember right, they was lightening up but they were there.
Q. Ok, now, and the child did she seemingly do alright the following day or did she have problems with any limbs or her ability to, to focus her eyes or did she seem to be normal?
A. She could focus her eyes.
Q. She could?
A. Yes.
Q. Did she seem to be normal as far as taking her bottle? Was everything normal?
A. Yes, she would take her bottle.
Q. Did she act like she was crying more than normal?
A. Mother was going to take her from me she wouldn't.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 7 OF 22

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. That day, if someone else would hold her other than you she cried more than normal?
A. Yes.

(We'll change sides.....turned tape over)

Q. Ok. Alright, now let's go back to this past Saturday night and Sunday morning about 6:00 o'clock we're talking....you said your son Scott dropped your child. He didn't really drop the child, he cradled it but fell with the child in his arms?
A. Yes.
Q. And you, and you turned around and seen that, that the child had not left his arms?
Yes.
Q. You went to him and what happened?
A. I got the baby and ah,
Q. What did the baby look like? How was the child?
A. She was just red, but she was crying real hard and shaking.
Q. Ok, and that's whenever, but you're saying and that's what led us back to the previous Wednesday was whenever you said the child was crying loudly.
A. Yeah.
Q. But you had heard her cry and scream louder than that, right?
A. Yes.
Q. Ok. Now did the child have any marks on her?
A. When Scott fell with her?
Q. Yes.
A. It was red, real red.
Q. Where was the child red at?
A. On her arm.
On which arm?
A. This one over here.
Q. Your referring to her right arm?
A. Yes.
Q. And he had the child cradled with the child's face toward him and the child's back toward the ground, is that right?
A. It would have to be just like this, he was standing this way with her.
Q. So it was on her left arm?
A. Yes, her left arm and her back.
Q. And like I said, the child's back was toward the ground.
A. Yes.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 8 OF 22

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. And the face toward your son, Scott.
A. Yes.
Q. Alright, and so you took the child from him, the child was crying and how long did it take you to settle her down?
A. Probably about an hour-and-a-half.
Q. And how did the child act after you'd gotten the child quitened down and she'd settled back down. Did she take her bottle?
A. Yes and she would play.
Q. She would play, move her arms, move her legs, I'm talking about the normal fashion.
A. Yes, this arm over here jerked a whole lot.
Q. Her left arm?
A. Yes.
Q. Was it jerking right after the fall some?
A. Yes.
Q. And .....
A. And it was real red.
Q. And, but the child was....
A. She was moving her arm and everything.
Q. And she was taking her bottle right?
A. Yes.
Q. And her eyes was normal?
A. Yes.
Q. And did, did your boyfriend, Johnny, what is that Murr?
A. Burr.
Q. Burr, did he tell you not to let the child go to bed or go to sleep or did you do that or did you know not to let the child go to sleep or what?
A. He said not to.
Q. Alright, and then what happened?
A. He went to mow the yard and then she, well I put her to bed. She got sleepy but it would, had-a-been a while.
Q. How long was it, what time was it you put her to bed?
A. Probably about eight or nine.
Q. Eight or nine o'clock, so it had been a couple or three hours since the fall?
A. Yeah.
Q. Since....when you put her to bed. Were you and your boyfriend Johnny still fussing and arguing off and on?
A. Yeah, cause he wouldn't take me to my mamma's.

001607

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 9 OF 22

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. He wouldn't take you to your mother?
A. Yeah, after he said he would.
Q. Had he hit you?
A. He hit me in my back.
Q. Had he.....and what did he use to hit you in the back?
A. His fist.
Q. What time of day did he do that?
A. Well it was around.....right after I put her to bed I think or maybe right before.
Q. Alright, had he hit you any other time during the day?
A. Yeah, he pushed me in my back.
Q When did he push you in the back? (Pause) When did that happen?
A. That was on up in the evening.
Q. That was like that had happened earlier than the fall, before the fall with the child? That had happened earlier as you wasleaving your step.....
A. No that was, wait a minute, that was after she fell, he fell with her.....
Q. So he pushed you.....
A. That he pushed me in my back.
Q. But you didn't fall to the ground or any.....?
A. No.
Q. Why did he push you in the back?
A. Cause he said I was running my mouth.
Q. Ok.
A. He was tired of hearing my mouth.
Q. So he just pushed you and you was holding the baby.
A. Yes.
Q. But it didn't hurt the baby?
A. No.
Q nd so, is that when you were going back to the trailer?
A. Yes.
Q. Alright, and so then you put the baby to bed about 9:00 o'clock or so, is that right?
A. Yeah, maybe a little earlier.
Q. And how was the baby then?
A. She was real calm.
Q. No problem?
A. She went to sleep, she went to sleep while I was holding her.
Q. And she seemed to be natural and normal?
A. Yeah.

001608

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 10 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. And you fed the child?
A. Yes.
Q. She took her bottle, did she take it all?
A. Yes, she took most of it.
Q. Like normal?
A. Yes.
Q. And did she have any bruises on her at time point and time on her face, neck....
A. No.
Q. Arms?
A. No.
Legs?
A. No.
Q. Ears?
A. No.
Q. Was she red? Was she still red from the fall or had she already started getting over the redness?
A. I think she was still a little red.
Q. On the left arm?
A. Yes.
Q. Ok, so you put the child to bed, right? And then what did you do?
A. I went up to my niece's to wash dishes.
Q. Were your children, your boys, were they there at that time? Your sons?
A. Yes they were in the bed.
Q. And what time was this now?
A. Might have been something after twelve, right at one or something like that.
Q. What did you do, and what did you and he do between ah, 8:30 – 9:00 o'clock when you put the child to bed until you went up to your step-brother's to wash dishes about twelve. What did ya'll do in that three hour period?
A. Trying to get the water bed, putting the water out of the water bed to get it set back up.
Q. Why did you have to set the water bed back up?
A. Cause he pushed me on it and it fell.
Q. And broke?
A. Yes.
Q. Did the water bust out of it?
A. No.
Q. Just the frame?
A. Yeah the frame.

TIMES IS WRONG

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 11 OF 22

DCI - IR 202

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. Why did he push you or knock you on the bed? Did he push you or knock you?
A. He pushed me.
Q. And why did he push you on the water bed?
A. He said he was picking when he done it.
Q. Was he? Weren't ya'll, weren't ya'll having words?
A. Yes.
Q. So what did it, why did he push you for? Because what had you said to him? What were ya'll discussing? What about going to your mother's or something .....
A. Yeah, my mamma's house.
Q. Ya'll still fussing and arguing about going to your mother's and he wouldn't take you?
A. Yes.
Q. So he pushed you on the water bed and broke it and ya'll had been trying to repair that?
A. Yes.
Q. Had ya'll made up to some degree or were you still mad at each other and still saying things to each other in a mad and a ill way?
A. No, we wasn't then.
Q. And your sons had come back down to the house from up at your step-brother's house, your three sons?
A. Yes.
Q. And you had put them to bed?
A. Yes.
Q. And what did you do then?
A. I went to wash the dishes.
Q. And....where was the baby Susie?
A. In her baby bed.
Q. In her baby bed. And you checked her, did she just have a diaper on again?
A. Yes.
Q. No night clothes, just a diaper?
A. Just a diaper.
Q. And you checked her and everything was still ok, no bruises?
A. No.
Q. Nothing.
A. No.
Q. And where was Johnny when you left to go up to your step-brother's?
A. He was in there working on that bed.
Q. Still working on it? And let's get this clear now. Your step-brother only lives a 100 or 200 hundred feet from you, isn't that right?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 12 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

A. Yes.
Q. A couple hundred fee away in a different trailer?
A. Yes.
Q. And how long was you up at your step-brother's home before you went back down to you home?
A. Only about 45 minutes.
Q. What did you do, go up there and wash.....
A. I washed the dishes, set down and smoked a cigarette and then come back home.
Q. So you couldn't have been gone over 45 minutes?
A. No, I don't think so.
Q. And when you got home what did you see and what did you hear?
A. The baby was all bruised up and she wasn't reacting to nothing.
Q. And where was the baby?
A. She was in a swing and then he took her out and was showing me the bruises.
Q. And you had only been gone 45 minutes and when you left no bruises were on that child, is that right?
A. Yes.
Q. And when you got back 45 minutes later the baby was not in it's bed?
A. No.
Q. Why did he get that baby out of that bed, did he tell you?
A. He said he woke her up drilling on the bed.
Q. Using an electric drill?
A. Yes.
Q. And he woke her and had to do what with her?
A. He said she just woke up so he said then he got her and put her in the swing.
Q. How was the baby whenever you got back there and it was in it's swing?
A. She was bruised.
Q. Where was she bruised at?
A. Under her neck, her arm....
Q. How about her ears?
A. Her ears (mother is crying).
Q. And what did you say or do to him, Johnny? Did you ask what was going on?
A. I asked him what happened and he said that was as far as he knew from where Scott fell with her.
Q. And didn't he tell you or did he say anything to what that was on her face or neck or ears?
A. He said it was grease.
Q. And you did what?
A. I washed her up and it wasn't grease.
Q. Was the baby, how did the baby act whenever you got her out of the swing?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 13 OF 22
		/ /		

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

001611

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

A. She didn't act right.
Q. Was she awake?
A. She was awake but she just didn't look right.
Q. What was she....how....why and other than the bruises, how did she look?
A. She wouldn't blink.
Q. Did her eyes look right?
A. No.
Q. Did her arms and legs look right?
A. No.
Q. What were they doing?
A. She just kept shaking.
Q. Shaking? Was she shaking in the, in the swing before you picked her up? Did you realize that when she was sitting in the swing or did you pick her up out of the swing before you realized how bad.....
A. He walked over there and picked her up out of the swing to show me the bruises.
Q. He did?
A. And brought her to the light. He said that was grease on her arm and stuff but it wasn't.
Q. He was trying to get you to believe that it was grease from him working on that water bed that he had gotten on the child when he picked the child up?
A. Yes.
Q. But you cleaned the child up and knew something seriously was wrong with the child didn't you?
A. Yes.
Q. You immediately made a call right away, did you go back up to your brother's?
A. Yes.
Q. And made a call to where?
A. To Memorial Hospital.
Q. And what did they tell you?
A. Things didn't sound normal for her.
Q. And to bring the child in?
A. To bring her over there.
Q. And you went back down....did you have the child with you when you made that call?
A. No.
Q. You had left the child there?
A. Yes.
Q. With Johnny?
A. Yes, he was holding her while I made the emergency call.
Q. Was your boys still in the bed?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 14 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

A. Yes.
Q. Did you go back down there after making the call and then did you clean the child up or try to or change her diaper or do anything or what did you do?
A. He changed her diaper right before we brought her to the hospital.
Q. Johnny did?
A. Yeah.
Q. Is that the first and only time he's ever changed the child?
A. Yes.
Q. Did you ask him to?
A. No.
Q. Did you have to wake your children up to get them to go with you or to take them somewhere else or what did you do with them, your boys?
A. We got them to go up to Christy's and so I could get her to the hospital.
Q. And Christy is your niece?
A. Yes.
Q. That's your brother's daughter? And that's what you did do?
A. Yes.
Q. And as you left did you tell your sons what to say to us or did you and Johnny tell your sons what to say to us in law enforcement or Department of Social Services if we asked whether or not anybody ever whipped, beat or mis....ah, mistreated them? Did you say anything to them about what to say to us?
A. I just told them to tell the truth.
Q. And what did you tell them the truth was?
A. That I didn't beat on them that I whipped them in a normal way.
Q. And how about Johnny, did he say the same thing?
A. I don't know because then I went on out to the truck with her. Christy was in there with them.
Q. Did you tell your children or did anyone tell the children to say that Johnny did not correct them or spank them in any way or in any particular way?
A. I didn't.
Q. And you don't know if he did or not?
A. I don't know if he did or not.

(I'm going to change the tape)

Q. Ok, continue on, this is a continuation.
Q. So you don't know whether or not he said anything to your children about what to say to law enforcement or anything about whipping them, right?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 15 OF 22

DCI - IR 202

001613

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO:	4. OCA FILE NO.
	NC	☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	

5. NARRATIVE

A. No, I don't.
Q. Now, let's go back a second, didn't or when did you realize that Johnny had done something to your child?
A. When I come back from washing the dishes.
Q. Did you realize then that he had hurt your child?
A. I knew she was hurt bad.
Q. And you knew she wasn't hurt before you went to do the dishes, is that right?
A. Yes.
Q. Are you confident of that?
A. Yes, I swear to it.
Q. And he had told you he had to get that baby out of the bed and put it in the swing after you had gone washing dishes because he woke that child up with a drill?
A. Yes.
Q. Did he say he made the, the child cry and had to take her in there or how did he put that?
A. He just said he woke her up drilling and took her in there.
Q. Did he continue to work after putting the child in the swing or did he stay with her until you came back?
A. I don't know, all I know is she was in the swing and then he got her to show me the bruises.
Q. He, why didn't he, if he realized something was wrong with that child, and seen all those bruises that he was showing you after coming back from washing dishes, why didn't he come and get you when he first got the child out of the bed if he woke it up with a drill? Why wouldn't he have come and gotten you if he realized something was wrong with that child?
A. I don't know. He kept trying to tell me wasn't nothing wrong, she was just bruised from the fall.
Q. And the child was semi-unconscious or unconscious and didn't cry and wasn't making noises or doing anything other than that....
A. She was there and that was it.
Q. And you knew the child was seriously ill?
A. Yes and I told him then to either take me to the hospital or I'd call an ambulance.
Q. And he was, in other words, he wasn't going to take you? He kept telling you he wasn't going take you, the child was ok?
A. Yes.
Q. And so you had to threaten him with calling.....
A. The ambulance......
Q. Rescue? Did you feel like, are you, do you feel confident that Johnny hurt your child while you was washing dishes?
A. I think he did.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10.
		/ /		PAGE 16 OF 22

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. If he didn't someone else had too, is that what you're saying?
A. He was the onlyest one there.
Q. That's what I'm saying to you, and it had to have happened while you were gone washing dishes that 45 minutes, right?
A. Yes.
Q. Has he ever threatened your life?
A. Yes.
Q. Can you tell me how or why he threatened your life and in what manner?
A. He just said that if I ever run around on him he would shoot me and showed me a bullet.
Q. Did he show you the gun the bullet would go into?
A. Yes.
Q. And is it a long barrel or a short barrel gun? Is it a pistol or long barrel gun?
A. It's a long gun.
Q. And he told you he would use that on you and kill you?
A. Yes.
Q. If he caught you running around on him.
A. Yes.
Q. Did you believe him?
A. Yes.
Q. How many times has he ever assaulted you over and above this past Saturday, those two times that you told us about there. Matter of fact, three times you told us about on Saturday. One whenever you were out in the backyard mowing, he hit you with his fist in the back, is that correct?
A. Yes.
Q. He ah, the second time hit you in the back as you was leaving your brother's trailer, as you was going back to your trailer...
Yes.
Q. And a third time when he pushed you and shoved you into the bed and broke it, all in one day. Is that right?
A. Yeah, and then he put his finger up at my mouth and knocked me on the couch.
Q. Saturday?
A. Yes.
Q. In your trailer?
A. Yes.
Q. Why did he do that?
A. Cause I was fussing with him.
Q. It was a bad, ill day with you people Saturday, wasn't it?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 17 OF 22

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

A. Yes.
Q. How many times has he ever assaulted or done anything to you prior to and before Saturday? How often would he assault you?
A. I don't know, just once in a while he'd push me or hit me or something like that.
Q. And that's normal?
Q. Normal for him?
A. I reckon for him.
Q. And you will allow it? He did it didn't he?
A. Yes.
Q. And how hard would he whip or correct your children?
. Well he whooped Tony one time with a belt and Tony had a bruise on his leg.
Q. How often would he whip your children?
A. Not too often, cause he wasn't hardly there.
Q. But when he was there would he, is, is he a man that would loose his temper quickly? Has he got a fast hot temper?
A. Yeah.
Q. Gets mad quickly and when he gets mad does he lose control of himself and do things that he doesn't do when he's not mad, like hit you?
A. Yeah.
Q. Have you ever seen him do anything with the child before last Wednesday or Thursday that was odd or different?
A. Not just sometimes I would come in and she would be crying.
Q. And then she would stop crying when you'd take the child?
A. Yes, when I would take her.
Q. Do you know whether or not anyone hurt your child Saturday night or Sunday morning? Did you know, do you know that first hand? Do you know what happened to your child, absolutely?
No.
. Did you have anything to do with your child being hurt?
A. No.
Q. Did you shake your child?
A. No.
Q. Did you hit your child?
A. No, I've never hit her?
Q. Do you ever hit any of your children?
A. In the right way.
Q. What is the right way?
A. With my hand on their butt or with a switch.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 18 OF 22

DCI - IR 202

Rev. 1/79

001616

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. But you've never lost control and slapped them in the mouth or in the jaw?
A. No, no.
Q. And have you ever tried to do anything to make this child, this infant child of yours, Susie, to stop crying?
A. I rock her and take up time with her.
Q. But you've never had, you've never tried to pat her or slap her hands or anything to make her hush?
A. No, I pat her pamper, but that's not, I pat it to get her to go to sleep. But I didn't.....
Q. But not like as ah, ah, whip?
A No.
(Just a light pat?
A. Yes.
Q. Ok, do you have any questions you want to ask us?
A. No, I just want to get who done it.
Q. And who done it? As you say you want to get who did it, who do you think did do this? Who are you convinced did this?
A. Evidently he did, he had her when I came back?
Q. Who is he?
A. Johnny.
Q. Ok. And what you're telling us is the truth?
A. Yes.
Q. Absolute?
A. Yes.
Q. You'll testify in a court of law what you're saying?
A. Yes.
Q. Will you take a polygraph test for me?
Yes.
Q. Have you ah, have you ever seen Johnny hit any children in a violent way?
A. His little boy.
Q. And what did he do?
A. He put both his fists together and hit him in the chest.
Q. Did he hit him hard?
A. Yes.
Q. He put his fists together and that's both of his fists together?
A. Yes.
Q. Making it as one?
A. Yeah.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR -	9. SUPERVISOR SIGNATURE	10. PAGE 19 OF 22

DCI - IR 202

Rev. 1/79

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. And did he hit him violently?
A. Yeah, he hit him real hard in the chest and knocked him back.
Q. Did the kid act like he lost his breath or anything?
A. He wanted to cry.
Q. And what happened?
A. Johnny told him he didn't want to hear it.
Q. What did he tell him he would do if he did?
A. Evidently the little boy knew because he wouldn't cry. That was up at Rita and them's house.
Q. Is ah, up at who?
A. Rita and them's.
Q. Rita Nimms?
A. Rita and Donald's, they was in there.....
Q. Oh, that's your step-brother?
A. Yes.
Q. Ok, I'm sorry. And Johnny's just a violent person isn't he, in you opinion?
A. Yes.
Q. Has he ever, has he ever done anything with you like checking your body because he was distrustful as to whether or not you was being faithful to him sexually?
A. He would grab me, trying to make me tell the truth.
Q. Grab you where?
A. My breasts.
Q. And do what?
A. Mash it.
Q. Trying to get, hurt you to tell you that, get you to tell the truth about whether or not you'd been seeing someone?
A. Yes.
Q. Did he grab you anywhere else?
A. Down in my.....
Q. In your crotch, your vagina?
A. Yes.
Q. And what would he do and say doing that?
A. Just mashing it, trying to make me tell him if I had done anything with my step-brother or not.
Q. Why, did he think you'd had some sort of relationship with your step-brother?
A. Evidently, I don't know.
Q. Is that referring to ah....
A. Donald
Q. Donald Wade? Well let me ask you, have you?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 20 OF 22
		/ /		

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

A. No.
Q. Why would he think you had?
A. I don't know, he's just jealous.
Q. Ok. Anything else? Anything else you want to say or add to your statement?
A. Huh-uh.
Q. Have you ever had any problems with Social Services and Protective Services as mistreating your children?
A. No.
Q. Neglecting them?
A. No.
. Has Johnny ever been charged or do you know if he's ever been charged with any crime? Have you ever asked him about it or talked to him....
A. I think he'd been in prison one time, but I don't know.
Q. What for?
A. I think it was drugs.
Q. Now, let me ask you one other thing. (Pause) Ok.
Q. Now I said I had a question and that question I thought of it is: Have you seen any separation papers filed by Johnny's ex-wife toward him?
A. Yes.
Q. What did the complainant in the civil matter consist of, if you remember?
A. Where he beat her.
Q. What did it say about it?
A. It said that one time he hit her in her back and then another time he was repeatedly kicking her and she run to get in her car and when she went to leave he pulled the truck in front of her and pulled her out and twisted her arm and threatened to take the children.
Q. Like take the children and run?
Yes.
Q. Did it say anything in there about molesting anybody or, or abusing anybody?
A. It had molest in there?
Q. Do you know what it was referring to in there in the paper where it said molest someone?
A. Evidently his children, I don't know.
Q. Was it molest or abuse or .....
A. It was molest.
Q. Did it say anything in there about mistreating his children?
A. She said he was ah, had a violent temper, he was real quick tempered.
Q. Toward her and her children?
A. That's the way I understood it.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10.
		/ /		PAGE 21 OF 22

DCI - IR 202

001619

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		

5. NARRATIVE

Q. What, anything other things about.....
A. He put them out in the cold, shut and locked the door.
Q. And left them out in the cold.
A. Yes, she had to go to her mother's house.
Q. Anything else you remember about those papers? Where are they now?
A. They're at my house.
Q. They're in your custody? The papers are in your home?
A. Yes.
Q. Do you have any problems with us looking at them?
A. No.
Q. Do you have anything you want to add to your statement or ask us? Any questions?
A. No.
Q. And we've discussed everything you can think of in reference to Johnny, you and the injury of your child?
A. Yes.

Ok, this concludes the interview with Lisa Porter O'Daniel, today's date is 8/26/91. Also inside the room is Captain Dan Qualls.

ns/8/27/91

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 22 OF 22

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

001620

APPENDIX Y

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO:	4. OCA FILE NO.
Alamance Cty Sheriff's Dept.	NC 0010000	☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	1-160-8-91

5. NARRATIVE

This is Roney Allen, I'm an investigator with the Alamance County Sheriffs Department. This will be an interview with Scott Ingle, white male, date of birth is 2-26-83, address is 4177 Jimmy Bowles Road, Elon College. Scott is the son of Lisa O'Daniel. This interview is in reference to case #1-160-8-91, Tarissa Sue O'Daniel case. Present inside the room is Captain Dan Qualls.

Q. Okay Scott, we want to talk to you son about what took place and what happened at your home on Saturday. I know you probably don't remember dates, but it would have been August the 24th and that's the day that you little sister was hurt. That day and that night, okay. And we want you to if you will speak up and talk loud, will you? Will you do that? Answer me will you? I can't, you're are going to have to answer me. Will you speak up and talk loud for me?

A. Ah, yeah.

Q. Okay. Now you remember that day we're talking about? That Saturday that your little sister was hurt or injured. Do you remember that day we're talking about? What do you remember about that day?

A. Well, I had to show you where her, I fell with her at.

Q. Okay if you would sit up in the chair, sit up toward the front of the chair there. That's a boy. Alright, now you're saying that you showed us where you had falling while you were holding your little sister Susie?

A. Yeah.

Q. Is that what you're saying?

A. Yeah.

Q. You showed us that didn't you when we was out at your house?

A. Yeah.

Q. Okay, tell us what happened that day. How did you come about having the child and fall with her? Tell me how that happened.

A. I tripped over a cord that was tied onto Johnny's truck.

Q. Alright you tripped, you're saying you tripped over a drop cord?

A. Yeah.

Q. And you was holding your little sister Susie? Huh?

A. Yeah.

Q. And when you tripped over and fell you were holding her, did you fall to the ground?

A. Yeah.

Q. Did you continue to hold Susie or did you drop her? When you were holding her in your arms and you tripped over and fell, did she fall out of your arms or did you just fall while you were still holding her?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 1 OF 5

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO:	4. OCA FILE NO.
	NC	☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	1-160-8-91

5. NARRATIVE

A. She fell out of my arms.
Q. As you hit the ground or before you hit the ground?
A. Before I hit the ground.
Q. Did you fall on top of her?
A. Yeah.
Q. Did you fall on her hard or did you fall on her or trying to keep from falling all of your weight on her? Did you keep, did you try to keep from putting all of your weight on her when you fell?
A. Yeah.
. And did you grab her and cradle her up back in your arms and stand back up with her yourself?
... Yeah, I picked her up and handed her to momma cause she was standing, she ran back down there.
Q. Alright, your mother ran back down to you when she realized that you had fallen, but you had already picked your little sister back up and gave her to your mother? Alright, now did you see anything wrong with your sister? Did she...
A. Yeah.
Q. Huh?
A. Yeah.
Q. I'm talking about after you dropped her?
A. Oh, no. Um, later....
Q. I'm talking about....
A. After momma....
Q. Son I'm talking about whenever you first dropped her and you picked her back up and gave her to your mother and she was crying of course, right? Huh?
A. Was she crying?
Q. Yeah, was she crying?
A. Yeah, when I dropped her I started telling she was, that's all she did is cry.
. That's what I'm saying, she was crying. Alright son, now after you gave her back to your mother, did she seem like she got okay? Did she stop crying a short time later?
A. After I gave her to my momma?
Q. Uh huh?
A. Yeah, she stopped crying.
Q. Did you see ~~anything wrong with her then~~ or did she look okay?
A. She looked okay.
Q. Alright, it wouldn't no, was any bruises or marks on her at that time? Huh?
A. No.
Q. Okay. Now did you see her later that night after you had gone to bed and got up?
A. Yeah and then I had to go to bed when momma washed the dishes.

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 2 OF 5

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		1-160-8-91

5. NARRATIVE

Q. Alright, now let me ask you something. Did you see your little sister just before you went to bed? Did you see your sister Susie just before you went to bed?
A. Yeah and she was just a little bit red. Momma told us she would be okay.
Q. Alright, where was she red at son? On her arm here?
A. Right here.
Q. Okay. Now when did you see the child next?
A. I didn't, that's when I was going to bed.
Q. Okay, did your mother get you up and you see the baby after they woke you back up and took you up to Misty and Christy's house, did you see the child then, in the middle of the night?
Ah....
Q. When they took the child to the hospital son.
A. Yeah, I looked at her, she had ah, a little bruises.
Q. Where were those bruises at?
A. On her face a little bit.
Q. On her face, how about her ear, did you see anything wrong with her ear?
A. Huh uh, I didn't look at that, I just looked at her face.
Q. And she had bruises on her face? Huh? Answer.
A. Yeah.
Q. Okay and they weren't there whenever you had gone to bed were they?
A. Huh?
Q. Those bruises were not on your sister when you went to bed or when you seen her last, is that what you're saying?
A. No.
Q. Okay. Now, let me ask you this. Has your mother ever mistreated you?
A. Ah, no.
Q. Has she ever whipped you?
. No, Johnny did all the whooping.
Q. Has your mother whipped you some though?
A. No, she just says be good.
Q. Does she ever spank your bottom or get you on your butt with her open hand?
A. Uh huh.
Q. Does Johnny whip you?
A. Yeah.
Q. Does he whip you hard?
A. Yeah.
Q. And what does he whip you with?

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 3 OF 5

DCI - IR 202

Rev. 1/79

ORIGINAL COPY

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO:	4. OCA FILE NO.
	NC	☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	1-160-8-91

5. NARRATIVE

A. Some, most of the times with a switch.
Q. Does he ever whip you with a belt?
A. Some...times.
Q. Does he ever whip you with his hands?
A. Sometimes.
Q. And did it hurt you?
A. Yeah.
Q. Would your mother tell him not to do that?
A. Yeah.
Q. And he'd do it anyway? Do you think that he was mean to you or do you think he was just trying to correct you?
A. Correct me is all, I thought.
Q. Alright, you just thought he was trying to correct you. And he wouldn't really hurting you to much?
A. Sort of.
Q. Sort of. And he whipped you and your brothers? Huh?
A. Yeah.
Q. Alright, have you ever seen Johnny do anything to your little sister Susie? Whip her or do anything to her?
A. Nope.
Q. Have you ever seen Johnny do anything to your mother by the way of hurting her?
A. Yeah.
Q. Well have you seen just....
A. He's choked her if she didn't, she couldn't breath.
Q. He choked her and she couldn't breath? Why did he do that, do you know?
A. No.
Q. Okay, have you ever seen him do anything else other than choke her?
A. Yeah.
Q. What?
A. He bends back her arms, sometimes he kicks her.
Q. Sometimes he kicks her and then he bends back her arms. You mean bend them back behind her back or what?
A. Bend them, just bend her arms.
Q. Oh, you're talking about bending her hand at the wrist?
A. Yeah.
Q. And he would kick her? Have you ever seen or heard him threaten to do anything to your mother,

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 4 OF 5

North Carolina Internal Records

CONTINUATION PAGE

1. AGENCY	2. IDENTIFIER - ORI	3. CONTINUATION TO: ☐ INVESTIGATION ☐ SUPPLEMENTARY INV.	4. OCA FILE NO.
	NC		1-160-8-91

5. NARRATIVE

like, have you ever heard him say he'd kill her or anything?
A. Yeah, no momma told me he said it.
Q. When did you mother tell you he said that?
A. I don't remember.
Q. Has it been since Susie was hurt or was it before Susie had gotten hurt?
A. Before.
Q. She told you that Johnny Burr had said that he would kill her, is that what she told you, son? What did she tell you?
A. She said he'd kill her, he broke up with her.
Q. That's what you mother told you he said? Okay. Anything else that you know that occurred on Saturday or Sunday, the days that your little sister was hurt and injured. Anything else you know about that you should tell us?
A. No.
Q. We've talked and you've told everything you know about it hadn't you son?
A. Yeah.
Q. Okay, thank you.

This concludes the interview with Scott Ingle. Today's date is 9-5-91, the time is 10:55 a.m.

ja/9-6-91

6. OFFICER'S NAME	7. OFFICER'S SIGNATURE	8. DATE SUBMITTED MO / DAY / YR	9. SUPERVISOR SIGNATURE	10. PAGE 5 OF 5

DCI - IR 202

Rev. 1/79

ORIGINAL COPY