No. 21-8016

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN EDWARD BURR,

Petitioner,

v.

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

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

JOSHUA H. STEIN
ATTORNEY GENERAL

Kimberly N. Callahan
Special Deputy Attorney General
Counsel of Record

North Carolina
Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 716-6500
kcallahan@ncdoj.gov

CAPITAL CASE

QUESTION PRESENTED

Is this case the proper vehicle to determine whether a federal court is required to conduct *de novo* review of a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), during a federal habeas proceeding pursuant to 28 U.S.C.S. § 2254(d)(1), when new evidence that purportedly supports that claim was not discovered by the State until after the state postconviction court adjudicated the claim on the merits, where the Fourth Circuit explicitly declined to resolve this legal question and instead assumed for argument's sake that it was proper to consider both the old and new evidence, and rejected Petitioner's *Brady* claim on the merits because he failed to meet his burden of demonstrating materiality?

TABLE OF CONTENTS

QUESTION PRESENTED ii

TABLE OF CASES AND AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASON FOR DENYING THE PETITION 12

THIS CASE IS AN EXCEPTIONALLY POOR VEHICLE TO CONSIDER THE QUESTION PRESENTED 12

A. The question presented was neither pressed by Petitioner nor passed upon by the Fourth Circuit 12

B. Resolution of the question presented is not outcome determinative 14

CONCLUSION 17

TABLE OF CASES AND AUTHORITIES

CASES

Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) 12

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

Burr v. Jackson, 19 F.4th 395 (U.S. 4th Cir. 2021) 2, 4

Burr v. Jackson, 2020 U.S. Dist. LEXIS 52580 (M.D.N.C. Mar. 26, 2020) 4

Burr v. Lassiter, 513 F. App'x 327 (4th Cir. 2013) 4

Cullen v. Pinholster, 563 U.S. 170 (2011) 2, 16

Cutter v. Wilkinson, 544 U.S. 709 (2005) 12

Duignan v. United States, 274 U.S. 195 (1927) 12

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) 14

State v. Bates, 497 S.E.2d 276 (N.C. 1998) 7

State v. Burr, 461 S.E.2d 602 (N.C. 1995) 4, 7

State v. McHone, 499 S.E.2d 761 (N.C. 1998) 7

United States v. Wells, 519 U.S. 482 (1997) 12

STATUTES

28 U.S.C.S. § 2254(d) .... ii, 1, 11, 16

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INTRODUCTION

Petitioner presents the question of how federal courts should consider a *Brady* claim during habeas review pursuant to 28 U.S.C.S. § 2254(d)(1) where additional evidence that was not previously disclosed was discovered after the state postconviction court adjudicated the claim on the merits. This case is an exceptionally poor vehicle to address the question presented for several reasons. First, Petitioner did not argue to the Fourth Circuit that the appropriate standard of review in this procedural posture was for the court to consider both the old and newly alleged *Brady*

evidence *de novo* without any deference to the state MAR court's findings. Instead, he proceeded on a different argument below, asserting only that the state postconviction court's findings were unreasonable in light of the record evidence and that the court unreasonably applied the holding of *Brady* to the facts of this case. Petitioner failed to press the question he now presents below.

Second, the Fourth Circuit posed the question of whether it could consider a transcript of a witness's statement discovered by the State in 2015 during federal habeas proceedings when it was not part of the record before the state postconviction court which adjudicated the *Brady* claim on the merits, notwithstanding the rule established in *Cullen v. Pinholster*, 563 U.S. 170 (2011). The Court also *sua sponte* raised the question of how considering this newly alleged *Brady* evidence would affect the appropriate standard of review during federal habeas proceedings.

However, the Fourth Circuit expressly declined to resolve these legal issues. While the Fourth Circuit noted this case raised "numerous fascinating questions" about how this Court's decisions in *Brady* and *Pinholster* intersect, it ultimately concluded: "we need not resolve these questions because, even if we consider the transcript, it does not alter our analysis." *Burr v. Jackson*, 19 F.4th 395, 416 (U.S. 4th Cir. 2021). Accordingly, this case is not worthy of certiorari review because the question presented was not passed upon below and this Court would have to adjudicate the novel issue of whether there is a *Brady* exception to the rule established in *Pinholster* in the first instance.

Finally, the question presented is not outcome determinative. Even if this Court granted certiorari review and agreed with Petitioner concerning the appropriate standard of review to apply to his *Brady* claim, he would still not be entitled to habeas relief. The Fourth Circuit assumed for argument's sake that it could properly consider the entirety of the evidence cited to support Petitioner's *Brady* claim and then correctly held, even under *de novo* review, he failed to meet his burden of showing any of the statements at issue were material to his defense. The Fourth Circuit's straightforward application of *Brady* to the particular facts of Burr's case does not warrant this Court's review.

The State of North Carolina respectfully requests this Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

I. The Murder of Four-Month-Old Susie O'Daniel

Tarissa Sue O'Daniel ("Susie") was four months old when she was murdered in an especially heinous and cruel manner. (USCA4 Joint Appendix "JA" 1003) She died from head injuries that resulted from a combination of violent shaking and blunt force trauma so great it was analogized to being ejected through a windshield as a vehicle going sixty miles an hour hit a tree. (JA 2842, 2876, 2916, 2982-83) Both of Susie's arms and thighs were broken "completely through" and in different stages of healing; there were bruises on her neck and face that resembled a handprint; and other bruising covered her body. (JA 1229, 2696-97, 2812, 2964) Medical experts and

her treating physicians unanimously agreed Susie's injuries were non-accidental and inflicted as a pattern of child abuse. (JA 2819, 2915, 2980, 2985)

The facts surrounding the murder of Susie have been thoroughly detailed by multiple state and federal courts. *See Burr v. Jackson*,19 F.4th 395 398-400 (4th Cir. 2021); *Burr v. Jackson*, No. 1:01CV393, 2020 U.S. Dist. LEXIS 52580, at *3-11 (M.D.N.C. Mar. 26, 2020); *Burr v. Lassiter*, 513 F. App'x 327, 329-39 (4th Cir. 2013) (per curiam); *State v. Burr*, 461 S.E.2d 602, 606-11 (N.C. 1995). In addition, the transcript of Petitioner's 1993 jury trial was included in the Joint Appendix in the United States Court of Appeals for the Fourth Circuit. (JA 1892-4534) The evidence relevant to the issue brought forward here can be succinctly summarized as follows.

On April 1, 1991, Susie was born to Lisa Bridges and her then-husband John Wesley O'Daniel. (JA 1931, 1934) Several weeks later, Bridges began having an affair and engaging in a sexual relationship with Petitioner. (JA 1972-73) Petitioner moved into Bridges' trailer at the end of June 1991. (JA 1975) Petitioner quickly became physically abusive towards her. (JA 1980, 1982)

At approximately 6:00 p.m. on Saturday, August 24, 1991, Susie's eight-year-old brother, Scott Ingle, tripped over an extension cord while he was carrying her and fell on a gravel driveway. (JA 2013) Bridges checked Susie for any injuries and found only slight redness on her arm where Scott was holding her when he fell. (JA 2014-15) Several other witnesses also observed Susie just after the fall and opined that she was uninjured, including Petitioner himself. (JA 2370, 2449-50, 2521, 2539, 3190-91)

Later that evening, Bridges walked next door to her sister-in-law's residence to help wash dishes. (JA 2041) Susie was asleep in her baby bed, and Bridges' sons, Scott and Tony, were asleep in their bedroom. (JA 2039-40, 2768) Scott subsequently awoke to "hammer noises" and heard Susie crying. (JA 2769) Scott was scared and did not leave his bedroom. (JA 2770) After forty-five minutes, Bridges returned home and found Susie in her swing in the living room. (JA 2044) Petitioner was standing next to the door, pacing the floor. (JA 2045) Susie was non-responsive and her eyes did not "look right." (JA 2046) She had bruises on her ears, arms, legs, and neck. (JA 2046) Those bruises were not present when Bridges left the home less than an hour earlier. (JA 2047) Petitioner insisted that some of the bruising was merely grease. (JA 2045) It was not. (JA 2048)

Bridges asked Petitioner to take her to the hospital and he refused, saying nothing was wrong with Susie. (JA 2049) He finally relented after Bridges threatened to call an ambulance. (JA 2052-53) They arrived at the county hospital around 3:00 a.m. the next morning and Susie was immediately admitted into the emergency room. (JA 2811) Susie was unconscious, shaking, and her eyes were rolling back into her head. (JA 2811-12) She appeared to be having intermittent seizures. (JA 2812) Swelling and bruising covered her entire body. (JA 2812) Susie presented with a bulging fontanel which indicated swelling inside of her head. (JA 2812) Susie's arms and legs also appeared to be fractured. (JA 2813) When the emergency room doctor observed the extent of Susie's injuries, he asked Bridges pointblank "has this child

been abused" and she responded in the negative. (JA 2813) Nevertheless, the doctor had such a high suspicion of abuse that the Alamance County Sheriff's Department and Social Services were contacted immediately. (JA 2818)

Susie was transported to the pediatric intensive care unit in Memorial Hospital at the University of North Carolina in Chapel Hill. (JA 2816) A CT scan showed that Susie had a depressed skull fracture, multifocal intercranial injuries, and bilateral retinal hemorrhages. (JA 2840) Despite medical intervention, Susie's brain continued to swell and she ultimately became brain dead on the evening of August 27, 1991. (JA 2863, 2866) Susie's manner of death was listed as homicide. (JA 1004-05)

II. State Court Proceedings

Petitioner was arrested for Susie's murder and tried by a jury. (JA 1892) Overwhelming medical evidence demonstrated that Susie's injuries and death were caused by physical abuse so much so that defense counsel for Petitioner acknowledged that she was a battered child and was unlawfully killed. (JA 4029, 4021, 4044) During closing argument, defense counsel repeatedly conceded that Susie did not die from the accidental fall with her brother Scott earlier that evening. (JA 4018, 4020, 4042, 4054) The central issue for the jury to determine was who inflicted Susie's fatal injuries and defense counsel strenuously attempted to shift the blame towards Bridges. (JA 4022-23, 4028, 4059-60) The jury found Petitioner guilty of first-degree murder in addition to other crimes and he was sentenced to death. (JA 4200-01, 4529)

Petitioner's convictions and death sentence were upheld on direct appeal to the North Carolina Supreme Court. *Burr*, 461 S.E.2d at 631. This Court denied Petitioner's petition for writ of certiorari. *Burr v. North Carolina*, 517 U.S. 1123 (1996). Petitioner subsequently filed a 100+ page motion for appropriate relief (MAR) in the Superior Court of Alamance County, alleging numerous grounds for relief. (JA 697-975) The state postconviction court entered an order summarily denying Petitioner's MAR. (App. 543-694; JA 1368-1483) Petitioner filed a petition for writ of certiorari to the North Carolina Supreme Court and it was allowed for the limited purpose of remanding the case to superior court for reconsideration of his MAR in light of the decisions in *State v. Bates*, 497 S.E.2d 276 (N.C. 1998), and *State v. McHone*, 499 S.E.2d 761 (N.C. 1998), cases which governed the interpretation of the newly-enacted postconviction discovery statute and whether a criminal defendant was entitled to an evidentiary hearing on his MAR, respectively. (App. 542)

During postconviction discovery pursuant to section 15A-1415(f) of the North Carolina General Statutes, the State turned over audio tapes and two transcribed statements of Lisa Bridges and Scott Ingle taken in February 1993 just before the trial commenced, neither of which were previously disclosed to Petitioner. (App. 845-905) The District Attorney averred that he did not believe these interviews contained any *Brady* material and he also considered the interviews to be work product. (App. 394) Petitioner filed an amendment to his MAR and alleged his due process rights were violated under *Brady v. Maryland*, 373 U.S. 83 (1963), based on the State's

failure to disclose these statements. (App. 399-440) The state postconviction court again filed an order summarily denying Petitioner's amended MAR. (App. 321-388) With regard to the denial of Petitioner's *Brady* claim, the state postconviction court found, among other things, that (1) any inconsistencies between the trial testimony of the two witnesses and their pre-trial comments to the prosecutors were of "*de minimis* significance;" and (2) there was no reasonable probability that had the 1993 interviews been disclosed the result of the trial would have been different. (App. 362) Petitioner's petition for writ of certiorari was denied by the North Carolina Supreme Court. (App. 320)

III. Federal Court Proceedings Below

On April 12, 2001, Petitioner filed an application for writ of habeas corpus pursuant to 28 U.S.C.S. § 2254 in the United States District Court for the Middle District of North Carolina, alleging twenty-four grounds for relief. (App. 220-319) For the next decade, the parties conducted extensive discovery and litigated Petitioner's ineffective assistance of counsel claim through all levels of federal court. (App. 143-219) In 2013, the Fourth Circuit ultimately decided that his IAC claim did not merit issuance of the writ of habeas corpus and this Court denied Petitioner's petition for writ of certiorari. (App. 143, 219) The case was returned to the district court for determination of Petitioner's remaining claims, including his argument that the State violated *Brady* based on the undisclosed 1993 statements of Bridges and Ingle. (App. 11)

In 2015, the State discovered an additional recording of a conversation between Bridges and law enforcement officers which occurred in December 1992. (App. 11) Petitioner moved to expand the record before the district court pursuant to Rule 7 of the Rules Governing Section 2254 Proceedings to include a copy of this transcript and the State indicated it had no objection. (App. 139-40) The district court granted expansion of the record. (App. 138) On March 26, 2020, the district court issued its Memorandum Opinion, denying the remainder of Petitioner's grounds for relief, including his *Brady* claim. (App. 49-137).

After reviewing the trial testimony and cross-examination of Bridges and Ingle, as well as the transcripts of their 1993 interviews, the district court found no evidence to undermine the state postconviction court's factual conclusions. (App. 78) The district court held (1) Petitioner had not provided clear and convincing evidence that the state postconviction court's findings were incorrect; and (2) the state court's conclusion that the undisclosed evidence was not material under *Brady* was not an unreasonable determination of fact or clearly established federal law. (App. 78-79) Petitioner appealed, and the Fourth Circuit granted a certificate of appealability. (App. 48)

On November 30, 2021, the Fourth Circuit affirmed the district court's decision to deny the petition for habeas relief. (App. 4-46) The Court first rejected Petitioner's argument that state postconviction court factually erred in concluding Susie had a depressed skull fracture. (App. 21) The Court noted that all the experts agreed that

Susie's skull had an indentation on the left side associated with brain injuries and that there was only disagreement concerning whether the bone was actually fractured at the site. (App. 22) The Court held that there was no evidence that this minor discrepancy would have changed the opinions of the medical experts that Susie was a victim of child abuse. (App. 23)

The Fourth Circuit next rejected Petitioner's argument that the state postconviction court's decision involved an unreasonable application of *Brady*. (App 24) Petitioner contended that Bridges and Ingle's credibility was absolutely essential to the case because "evidence about whether the fall could have caused the injury . . . was literally the entire case." (App. 26) The Court rebuked such an assertion based on "overwhelming" medical evidence that Susie was a victim of child abuse and that she died from that abuse based on the extent of her injuries; eyewitness testimony who observed the fall and examined Susie after; and medical testimony that Susie would have immediately been unwell after sustaining the head injury that ultimately killed her. (App. 27) The Court reviewed the statements in the 1993 interviews which Petitioner cited as material to his defense; it held that those statements mostly amounted to cumulative evidence to that provided at trial and what remained was too insignificant to pose a realistic possibility of altering the outcome of the proceeding. (App. 27-34)

After rejecting the arguments briefed by Petitioner, the Fourth Circuit posed 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?

(App. 38) The Court explained why these questions were difficult in light of 28 U.S.C.S. § 2254(d) and the decision in *Pinholster*. (App. 38-42) The Court then posited that it was left was a "plethora of unanswered questions," one of which was if it could properly consider new *Brady* evidence, "what would that mean for [the] standard of review?" (App. 42) The Court concluded that it did not need to resolve these questions because, even if the 2015 transcript was considered, it did not alter the analysis. (App. 38, 44)

Although the Fourth Circuit noted that earlier in its decision it paid due deference to the state postconviction court, it explicitly stated that its analysis would not change if it were to consider the evidence *de novo*. (App. 44-45) The Fourth Circuit ultimately held that "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." (App. 45) The Court also noted that Petitioner's counsel conceded below that the "new" *Brady* evidence (or the 1992 transcript discovered in 2015) was largely duplicative of evidence already in the record. (App. 45)

The Fourth Circuit denied rehearing *en banc* with no judge requesting a poll under Fed. R. App. P. 35. (App. 1)

REASON FOR DENYING THE PETITION

This Case is an Exceptionally Poor Vehicle to Consider the Question Presented.

A. The question presented was neither pressed by Petitioner nor passed upon by the Fourth Circuit.

This Court's traditional rule is that it will not grant certiorari to review a question presented which was "not pressed [in] or passed on" by the court below. *United States v. Wells*, 519 U.S. 482, 488 (1997) (quoting *United States v. Williams*, 504 U.S. 36, 42 (1992)). This is so because this Court sits as a court of review, "not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *see also Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("[T]his is a court of final review and not first view"). Of course, this Court has discretion to make exceptions to this traditional rule; however, it generally does so only in exceptional cases. *Duignan v. United States*, 274 U.S. 195, 200 (1927). This is not one of them.

Petitioner did not argue to the Fourth Circuit that it was required to consider his *Brady* claim *de novo* without any deference to the state MAR court's findings because new evidence which purportedly supported this claim was discovered during federal habeas proceedings and was not considered by the state postconviction court. Instead, Petitioner asserted only that "the state postconviction court's conclusion that there was no *Brady* violation was a decision based on an unreasonable determination

of facts and contrary to established law as set forth in *Brady*." (USCA4 No. 20-5, DE 10 pp 39-40) In arguing such, Petitioner simply presupposed that the statement discovered in 2015 could be considered in this analysis, notwithstanding the rule established in *Pinholster,* because the district court expanded the record to include it. (USCA4 No. 20-5, DE 10 p 47 n.10) Petitioner did not advocate for the Fourth Circuit to conduct a *de novo* review of his *Brady* claim. Accordingly, Petitioner did not press the question he now presents in his petition below in the Court of Appeals.

In addition, the Fourth Circuit did not pass upon this question and instead expressly declined to resolve it. While the Fourth Circuit *sua sponte* posed the issue of whether it could properly consider Bridges' 1992 statement (which was discovered in 2015) in its analysis and, if so, how that would affect the standard of review, the Court ultimately concluded: "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." (App. 44) In closing, the Fourth Circuit stated that it was leaving "the questions surrounding the *Brady* exception to *Pinholster* for another day when the issue has been more squarely presented and more thoroughly briefed." (App. 47)

Because the Fourth Circuit did not resolve the question presented, this Court should not entertain it in the first instance. That the question presented was neither pressed in nor passed upon below is, by itself, a sufficient basis to deny certiorari.

B. Resolution of the question presented is not outcome determinative.

Certiorari review should also be denied because resolution of the question presented makes no difference to the outcome of the case. See Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 4.4(f) (11th ed. 2019) (if resolution of a question "is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied."); *cf. Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192 (1997) (declining to resolve a question where it would not affect the case's outcome). The question presented here relates only to how federal courts should review a *Brady* claim in a very specific procedural posture, not whether Petitioner has met his burden of demonstrating he is entitled to habeas relief. Indeed, the Fourth Circuit correctly held that even considering the entirety of the evidence, both old and new, under a *de novo* standard of review, Petitioner could not satisfy *Brady* because he did not even "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." (App. 45, 47)

Petitioner argued to the Fourth Circuit and now to this Court that the State's case against him rested "entirely" on proving that Susie's fall with her brother Scott earlier that evening could not have caused her fatal head injury and that the only basis supporting that theory were the descriptions of the fall at trial by both Bridges and Ingle. (USCA4 No. 20-5 DE 10 p 37; Pet. 33-34) Petitioner contended that the

information in the undisclosed statements materially undermined that testimony and therefore those statements were material to his defense under *Brady*. (USCA4 No. 20-5 DE 10 p 39; Pet. 34-36) Petitioner's primary contention was that the undisclosed statements demonstrated that Bridges and Ingle "mischaracterized" his fall with Susie. (App. 27; Pet. 37) To be sure, there were some inconsistencies in the evidence concerning whether Scott dropped Susie on the gravel driveway, fell on top of her, or cradled Susie so she did not touch the ground. Yet, defense counsel was aware of these inconsistencies and they were also known to the jury. (JA 2012-13, 2176, 2262, 2758-59, 2811, 3063, 3398, 3415, 3425-26, 3617, 3779; App. 909, 928-29) This is apparent not only from the evidence presented at trial, but also a portion of defense counsel's closing argument:

> Scott told the officers, told Brownlee Bryant, I didn't drop the baby, and a bit later was interviewed by Sheriff's Department by the officer and said, I did drop the baby, he's in [the courtroom] now and he shows he very carefully fell and didn't drop the baby.
>
> Again, it doesn't matter whether he dropped the baby or not . . . the injury that killed her did not come from that fall.

(JA 4054) Therefore, the new statement from Bridges that was discovered in 2015 in which she stated that Scott "dropped" Susie, and that Scott had "fallen" with her was merely cumulative of the evidence presented at trial. (App. 776, 779-80)

Furthermore, as the Fourth Circuit observed: "The problem with Burr's [*Brady*] 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." (App. 26) Indeed, there was

"overwhelming medical evidence" that Susie was a victim of child abuse; the evidence of the types of injuries she suffered—her head injury, fractures of the limbs, retinal hemorrhages, and hand-shaped bruise on her neck—were all consistent with abuse rather than an accidental fall; there was testimony from several individuals that after the fall with Scott, Susie appeared to be uninjured; and there was medical testimony that Susie would have clearly been in distress after sustaining the head injury that killed her. (App. 27) In light of this evidence, the Fourth Circuit correctly held that Petitioner failed to satisfy *Brady* or, in other words, he failed to show that there was a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

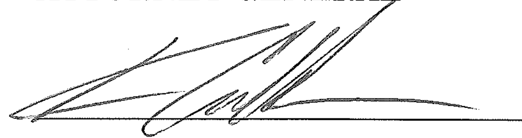
As a final note, Petitioner criticizes the Fourth Circuit's analysis, asserting that it did not actually conduct a full *de novo* review. (Pet. 31) Petitioner insists that the Court failed to consider relevant medical evidence developed during the course of federal habeas proceedings which showed there was not a fracture in Susie's skull. (Pet. 31) However, that evidence was developed in discovery in conjunction with Petitioner's ineffective assistance of counsel claim prior to the issuance of this Court's decision in *Pinholster*. (App. 183-91) This evidence was not made part of Petitioner's *Brady* claim and the Fourth Circuit correctly held that "*Pinholster* squarely precludes our consideration of this evidence." (App. 20 n.9) *See Pinholster*, 563 U.S. at 180-81 (holding habeas review under 28 U.S.C.S. § 2254(d)(1) is "limited to the record that was before the state court that adjudicated the claim on the merits.").

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted, this the 1st day of July, 2022.

JOSHUA H. STEIN
ATTORNEY GENERAL



Kimberly N. Callahan
Special Deputy Attorney General
**Counsel of Record*

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6500
kcallahan@ncdoj.gov