

No. _____

In The

Supreme Court of the United States

JOHN EDWARD BURR,

Petitioner,

v.

DENISE JACKSON,

Warden, Central Prison, Raleigh, North Carolina,

Respondent.

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

**APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A
PETITION FOR A WRIT OF CERTIORARI**

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Pursuant to 28 U.S.C. § 2101 and Rules 22, and 30.2 of this Court, Petitioner JOHN EDWARD BURR respectfully requests a 60-day extension of time, to and including Friday, May 27, 2022 in which to file a Petition for a Writ of Certiorari in this Court. The U.S. Court of Appeals for the Fourth Circuit issued its Opinion and Judgment on November 30, 2021. Petitioner timely petitioned for Rehearing and Rehearing *en banc*. The Petition for Rehearing and Rehearing *en banc* was denied on December 28, 2021. Absent an extension, the Petitioner's time to file a Petition for Certiorari would expire on March 28, 2022. This application is being filed more than 10 days before that date. A copy of the U.S. Court of Appeals for the Fourth Circuit's opinion is attached as Exhibit 1. It may also be found at 19 F.4th 395 (4th Cir. 2021). A copy of the Order denying the Petition for Rehearing and Rehearing *en banc* is attached as Exhibit 2. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Petitioner will be seeking leave to proceed *in forma pauperis*, and was found to be indigent in the District Court and the Court of Appeals. The undersigned counsel was appointed pursuant to the provisions of the Criminal Justice Act of 1964 and 21 U.S.C. §848(q)(4)(B).

Prior Proceedings

The Petitioner is a prisoner of the State of North Carolina under a sentence of death. The proceedings that led to the decision by the Fourth Circuit for which Certiorari will be sought began on March 26, 2020, when the U.S. District Court

denied the unadjudicated claims in the Petitioner's then-pending Petition for Writ of Habeas Corpus, and also denied a Certificate of Appealability. 2020 WL 1472359. The Petitioner timely appealed and sought a Certificate of Appealability. On August 12, 2020, the Fourth Circuit granted a Certificate of Appealability. Following briefing and oral argument, the Fourth Circuit denied this appeal on November 30, 2021, and then denied a timely Petition for Rehearing and Rehearing *en banc* on December 28, 2021.

Issue to Be Presented

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

by *Pinholster*) was not addressed. This remains an open issue, one that has split the circuits. Compare *Jones v. Bagley*, 696 F.3d 475, 486-87 (6th Cir. 2012) (*de novo* review applies to suppressed evidence only, not to evidence before the state court) with *Gonzalez v. Wong*, 667 F.3d 965, 972 (9th Cir. 2011) (review limited to determining whether a “meritorious” case existed and then remand with instructions to stay to permit relitigation in state courts).

Justice Sotomayor’s hypothetical has occurred in this case. There is no dispute that the State of North Carolina withheld the statements of two key witnesses from the Petitioner at his trial and during Petitioner’s first postconviction proceeding in the state courts. But even when ordered to produce its entire file in postconviction litigation in the North Carolina state courts, the State failed to produce a 111-page statement of one of these witnesses. That statement was not produced *until 2015* in this federal habeas litigation, more than 20 years after Petitioner’s conviction and years after the adjudication of his *Brady* claim in the state courts.

In its decision, the Fourth Circuit acknowledged that this record of suppression left a “plethora of unanswered questions.” The court recognized that the suppression of witness statements, and particularly the 111-page statement that was not produced until 2015 and in habeas proceedings, raised significant “questions about how the Supreme Court’s decisions in *Brady* and *Pinholster* intersect.” Slip Op. at 37. It further recognized that the suppression of this statement for more than two decades and well into the habeas proceedings could mean that the State court record was materially incomplete and entitled to no deference. Slip Op. at 38. The court

also acknowledged that a split in circuits had developed about whether *de novo* review was required by these circumstances. Slip Op. at 41-43. To avoid these questions, the Fourth Circuit conducted a *de novo* review only of the suppressed statements, compared them to the evidence at trial (which was conducted without the suppressed statements), explicitly did not consider any additional evidence developed in discovery during the habeas proceedings, and accepted the factual findings made by the state court in postconviction proceedings notwithstanding the materially incomplete record. It then concluded that the suppressed statements were not material within the meaning of *Brady v. Maryland*.

The decision in this case appears establishes a third different approach by the third federal appellate court to address this issue. Petitioner believes that the Fourth Circuit's approach is inadequate by failing to give any effect to the direction of 28 U.S.C. §2254(e)(2) seemingly endorsed by the *Pinholster* majority. Because this case involves an open question concerning the evaluation of cases under Section 2254, and is one that has resulted in a split among the circuits, this is a case of exceptional importance with potentially widespread applicability.

Undersigned counsel is in private practice and has several other pending matters before both state and federal courts which require this extension of time. In particular, undersigned counsel has been engaged in litigation in several states and in both state and federal court, and is acting as lead counsel in a pending manslaughter case in the North Carolina courts. These cases have interfered with counsel's ability to prepare a Petition on this matter and will likely continue to do so

over the next few weeks. While counsel has represented the Petitioner since 2008, the voluminous record in this case, consisting of a 17 volume Joint Appendix, requires significant time to review for the purpose of a Petition to this Court.

Counsel for the Respondent have advised the undersigned that the Respondent has no objection to this extension of time.

WHEREFORE Petitioner respectfully requests that an order be entered extending his time to petition for certiorari to and including May 28, 2022.

Respectfully submitted,

/s/ James P. Cooney

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