

IN THE SUPREME COURT OF THE UNITED STATES

No. A-____

CHADWICK DOTSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
Applicant,

v.

JUSTIN MICHAEL WOLFE,
Respondent.

**APPLICATION TO THE HON. JOHN G. ROBERTS, JR.
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

Pursuant to Rules 13.5 and 30.2 of this Court, Applicant Director of the Virginia Department of Corrections (“the Director”) hereby moves for an extension of time of 60 days, to and including Friday, December 5, 2025, within which to file a petition for a writ of certiorari to review the judgment in this case. The United States Court of Appeals for the Fourth Circuit rendered a decision on July 7, 2025. *Wolfe v. Dotson*, 144 F.4th 218 (4th Cir. 2025) (App., *infra*, 1–38). Unless extended, the deadline to file a petition is Monday, October 6, 2025. This Court has jurisdiction to review the decision under 28 U.S.C. § 1254(1).

In support of his request, the Director states as follows:

1. This case raises important questions about the standard for determining actual innocence under this Court’s decision in *Schlup v. Delo*, 513 U.S. 298 (1995), and its progeny. Respondent Justin Wolfe brought a petition for habeas relief in the

United States District Court for the Eastern District of Virginia, challenging his conviction for murder following his guilty plea. See *Wolfe v. Clarke*, No. 1:22-cv-00700 (E.D. Va.). Wolfe filed his petition after the expiration of the statute of limitations, and his claims were otherwise procedurally defaulted. In an attempt to take advantage of the *Schlup* procedural “gateway” to the merits of his otherwise defaulted claims, he presented a recently signed affidavit from a witness purporting to exculpate him. But this evidence was not new: the witness had testified against Wolfe in an earlier trial, recanted, later acknowledged that his inculpatory testimony was true, recanted again and provided exculpatory testimony in a successful habeas proceeding, and finally invoked his Fifth Amendment rights prior to Wolfe’s guilty plea. The district court dismissed Wolfe’s petition, holding that the affidavit was not new evidence of innocence because its contents were known at the time of Wolfe’s guilty plea. *Wolfe v. Clarke*, No. 1:22-cv-00700, 2024 WL 3732434, at *2 (E.D. Va. Aug. 8, 2024).

2. The Fourth Circuit reversed. See App., *infra*, 1–38. The court acknowledged a circuit split on the question whether “new evidence” under *Schlup* means newly discovered evidence—evidence that was not *available* at trial—or newly presented evidence—evidence that was not *presented* at trial. *Id.* at 29. The court applied the “newly presented” standard, holding that the affidavit was new reliable evidence and that Wolfe had shown that it is more likely than not that any reasonable jury would have reasonable doubt about his guilt. *Id.* at 29–33, 35, 38. The court did not address Wolfe’s handwritten confession that he offered into evidence at his plea

hearing. Having held that Wolfe could take advantage of the *Schlup* gateway to overcome his procedural default and failure to meet the statute of limitations, the court remanded for the district court to address Wolfe’s substantive claims. *Id.* at 38.

3. The Director anticipates filing a petition for a writ of certiorari regarding an issue dividing the courts of appeals: whether the “new” evidence of innocence required under *Schlup* includes only newly discovered evidence that was not available at the time of trial or broadly encompasses all evidence that was not presented to the factfinder during trial. The resolution of this issue is important to clarifying the actual innocence standard under *Schlup*.

4. In the thirty years since this Court decided *Schlup*, the courts of appeals have continued to disagree on how to apply that precedent. There is a well-recognized, entrenched circuit split on the question whether “new evidence” means newly discovered evidence or newly presented evidence. See, e.g., *Green v. Secretary, Dep’t of Corrs.*, 28 F.4th 1089, 1151 n.132 (11th Cir. 2022) (“[S]ome circuits require that the evidence be newly *discovered*, meaning it was not available or discoverable at the time of the trial, while others require that the evidence be merely newly *presented*, meaning its availability or discoverability at the time of trial is irrelevant.”); *Fontenot v. Crow*, 4 F.4th 982, 1032 (10th Cir. 2021) (“The *Schlup* Court did not precisely define what it meant by new reliable evidence that was not presented at trial. As a result, there is a circuit split” (cleaned up)); *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012) (“There is a circuit split about whether the ‘new’ evidence required under *Schlup* includes only newly discovered evidence that was not available at the

time of trial, or broadly encompasses all evidence that was not presented to the factfinder during trial, *i.e.*, newly presented evidence.”). The Fourth Circuit’s decision places that court on the wrong side of the circuit split.

5. The Director’s counsel respectfully requests a 60-day extension of time, to and including December 5, 2025, within which to file a petition for a writ of certiorari. Counsel has significant upcoming briefing and oral argument obligations, including an opening brief due on October 3, 2025, in the Supreme Court of Virginia in *Commonwealth v. Mattocks*, No. 250586; a reply brief due on October 3, 2025, in the Supreme Court of Virginia in *Commonwealth v. Moncrea*, No. 240844; a response brief due on October 7, 2025, in the Supreme Court of Virginia in *Ginevan v. Commonwealth*, No. 250051; oral argument on October 8, 2025, in the Court of Appeals of Virginia in *Mogensen v. County of Rockbridge*, Nos. 1644-24-3 and 1645-24-3; a reply brief due on October 15, 2025, in the Court of Appeals of Virginia in *Virginia State Air Pollution Control Board, et al. v. Association of Energy Conservation Professionals*, No. 0234-25-3; and a response brief due on October 16, 2025, in the Supreme Court of Virginia in *Snyder Nursing Home, Inc., et al. v. Roberts, et al.*, No. 250821—and has numerous other upcoming deadlines in the Fourth Circuit, the Court of Appeals of Virginia, and the Supreme Court of Virginia.

For the foregoing reasons, the Director requests that a 60-day extension of time, to and including Friday, December 5, 2025, be granted within which the Director may file a petition for a writ of certiorari.

Respectfully submitted,

/s/ Kevin M. Gallagher
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September 25, 2025

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