

No. 18-227

In the
Supreme Court of the United States

JUSTIN MICHAEL WOLFE,
PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,
RESPONDENT.

**On Petition for a Writ of Certiorari to
the Supreme Court of Virginia**

**REPLY BRIEF IN SUPPORT
OF PETITION FOR CERTIORARI**

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November 27, 2018

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REPLY BRIEF FOR PETITIONER

Petitioner Justin Wolfe has asked this Court to grant review, summarily reverse, and remand for the Virginia courts to apply *Class v. United States*, 138 S. Ct. 798 (2018), and consider the merits of his vindictive prosecution claim notwithstanding his guilty plea. In opposition, the Commonwealth of Virginia offers no argument that the six additional and more severe indictments brought against Wolfe, in immediate response to the grant of federal habeas relief, were anything other than vindictive. Nor does the Commonwealth dispute that a criminal defendant who pleads guilty is not barred on appeal from challenging his conviction on the ground that the government lacks constitutional authority to prosecute him. The Commonwealth instead advances a theory of forfeiture that is at odds with *Class* and urges the Court to ignore the constitutional violations in this case. The Commonwealth's arguments are meritless, and this Court's intervention is both appropriate and necessary.

Our system of criminal justice cannot work if, after a party obtains federal habeas relief, state prosecutors vindictively bring new charges to pressure the defendant into pleading guilty and, instead of rebuking that misconduct, the state courts summarily refuse to consider the constitutional claims at stake based on the view—rejected in *Class*—that the defendant relinquished them when he pleaded guilty. The principles set forth in *Class* apply here and the Virginia courts should not be allowed to escape their responsibility to consider the

merits of serious claims that call into question the Commonwealth's constitutional authority to prosecute.

ARGUMENT

1. The Commonwealth contends that “[t]his Court lacks jurisdiction because the decision below rests on valid state procedural grounds”—namely, “forfeiture, not waiver.” Opp. 4–5 (emphasis omitted). According to the Commonwealth, the Virginia court of appeals “did not reject petitioner’s vindictive prosecution claim because he pleaded guilty,” but because he “failed to preserve” his claims “as a matter of state law.” *Id.* The Commonwealth is wrong and its recounting of the court of appeals’ decision is misleading. The only basis for refusing to consider Wolfe’s vindictive prosecution claim was the court of appeals’ reliance on the fact that Wolfe entered an unconditional guilty plea.

It is undisputed that Wolfe repeatedly challenged his new, post-habeas remand indictments as the product of a vindictive prosecution and argued that, because of that misconduct, the Commonwealth had no constitutional authority to prosecute. *See* Pet. 11. He moved in the trial court to dismiss his new indictments for vindictive prosecution. *See* App-2. Similarly, in his petition for appeal to the Virginia court of appeals, he argued that his guilty plea was void because it was “obtained without due process of law through a proceeding characterized by vindictive prosecution.” Pet. for Appeal, at 9 (Va. Cir. Ct. Jan. 30, 2017). In his petition to the Virginia Supreme Court, he asserted that the lower court had erred “when it determined that Mr. Wolfe’s guilty pleas

precluded consideration of his claims of vindictive prosecution and prosecutorial misconduct because these are structural due process errors that cannot be waived, even upon a guilty plea, through a failure to contemporaneously object.” Pet. for Appeal, at 2 (Va. S. Ct. June 9, 2017). And in his petition for rehearing before the Virginia Supreme Court, he reiterated that a “guilty plea obtained in violation of due process”—in particular, because of vindictive prosecution—“is void, regardless of whether the defendant objected to the voluntariness of his own plea at the time he made it.” Pet. for Reh’g, at 2–3 (Va. S. Ct. Feb. 19, 2018).

Never in response to any of those pleadings did the Commonwealth raise a standalone argument that Wolfe’s claims were forfeited. The Virginia Supreme Court also did not suggest that any of these arguments were forfeited; instead, it summarily rejected them. Noting that it had reviewed the record and considered the “argument submitted in support of granting of an appeal,” the court refused “the petition for appeal.” App-9; *see also* App-11 (summarily denying petition for rehearing). The court of appeals, for its part, “decline[d] to consider” Wolfe’s argument that the Commonwealth’s vindictive prosecution rendered his guilty plea void and deprived the Commonwealth of any authority to prosecute. App-6. That conclusion rested on the court’s understanding that Wolfe had “entered his guilty pleas, which were not conditional” after the trial court denied his motions for “prosecutorial vindictiveness and prosecutorial misconduct.” App-5.

In arguing that “the court of appeals’ decision was based on *forfeiture*”—a term the Virginia appellate courts never used—the Commonwealth attempts to draw a distinction between “forfeiture” and “waiver” that in this context is empty wordplay. Opp. 5 (emphasis in original). If a defendant’s guilty plea does not *waive* his ability to press certain categories of constitutional claims, it also does not *forfeit* them. *Class* itself recognized as much when it rejected the government’s argument that a federal procedural rule prohibited a guilty-pleading defendant from “challeng[ing] his conviction on appeal on a forfeitable or waivable ground that he either failed to present to the district court or failed to reserve in writing.” 138 S. Ct. at 803. This Court recognized (as did the drafters of that rule) that “certain kinds of constitutional objections may be raised after a plea of guilty,” regardless of whether they were preserved in the form of a conditional plea or presented to the trial court. *Id.* Indeed, if the Commonwealth’s theory were correct, every non-waived claim would be forfeited as a result of the guilty plea and *Class* would be meaningless. No matter what terminology is used—whether waiver, forfeiture, or relinquishment—the point of *Class* is that when a party pleads guilty, he is not required to lodge contemporaneous objections with respect to certain constitutional claims in order to raise them on appeal.

In short, contrary to the Commonwealth’s unsupported assertions, the decision below does not rest on any independent state procedural grounds that bar this Court’s review. The only basis for concluding that Wolfe failed to preserve his due

process challenge to the Commonwealth's authority to prosecute was the court of appeals' observation that he pleaded guilty. That decision cannot be reconciled with *Class*.

2. The Commonwealth asserts that *Class* "adds nothing to the analysis" in a case, like this one, involving vindictive prosecution because *Class*'s holding is purportedly limited to addressing circumstances where a defendant pleads guilty and then challenges the statute of conviction as unconstitutional. Opp. 8. That mischaracterizes *Class* and misunderstands its significance. Although the petitioner in *Class* challenged the constitutionality of the statute of his conviction, this Court considered that challenge as part of a broader universe of "constitutional claim[s]" concerning the "government's power to constitutionally prosecute" that are not relinquished through the entry of a guilty plea. 138 S. Ct. at 803, 805. Indeed, although the dissent questioned the continued vitality of the *Blackledge-Menna* doctrine, the majority in *Class* reaffirmed the doctrine and clarified its scope. *Id.* at 806 ("The applicability of the *Menna-Blackledge* doctrine is at issue in this case."). In particular, the majority made clear that vindictive prosecution claims, like claims challenging the constitutionality of the statute of conviction, are not foreclosed by the entry of a guilty plea. *Id.* at 803. The Commonwealth's attempt to limit *Class* ignores this part of the decision and the significance of the *Blackledge-Menna* doctrine in shaping the Court's holding in *Class*.

The Commonwealth has provided no valid reason this Court should not remand this case for the Virginia courts to consider Wolfe’s vindictive prosecution claim in light of *Class*. To the contrary, the Commonwealth acknowledges that, if a remand is granted, the “merits” of Wolfe’s vindictive prosecution claim “would be addressed under [the] *Blackledge-Menna* line of cases.” Opp. 8. That is nothing less than an admission that *Class*—the latest addition to that “line of cases”—is directly relevant. Because the Commonwealth concedes that the “*Blackledge-Menna* line of cases” applies here, there is no reason the Virginia courts should not be required to apply those cases to address Wolfe’s vindictive prosecution claim on its merits.

3. If the Court does not summarily reverse and remand in light of *Class*, it should grant plenary review to provide clarity on the scope of *Class* and the *Blackledge-Menna* doctrine in state courts. As noted, the Commonwealth does not dispute that this line of cases applies in Virginia state court. Opp. 8. Nonetheless, it argues that there is no conflict that would justify granting review and that Wolfe’s cases are outdated or not from the highest state courts. Opp. 6–7. But the Commonwealth never disputes that state courts are continuing to prohibit defendants from raising vindictive prosecution claims following a guilty plea. State courts, including the Virginia courts here, have failed to comply with the *Blackledge-Menna* line of cases and, contrary to the principles recognized in *Class*, have prohibited guilty-pleading defendants from raising vindictive prosecution claims on appeal. See Pet. 18–20. If this Court is not prepared to summarily reverse and

remand for the Virginia courts to apply *Class*, it should grant review to reaffirm and clarify the circumstances in which vindictive prosecution claims may be raised on appeal notwithstanding any guilty plea.

4. Finally, the Commonwealth suggests that review is not warranted because “[t]here is no decision from Virginia’s highest court” and no significance should be given to “the unpublished, largely unreasoned decision from the state intermediate appellate court.” Opp. 4. But the lack of any reasoned decision only underscores the importance of this case and the need for this Court’s intervention. State courts should not be able to evade resolving serious federal constitutional claims by refusing to address them on their merits and for reasons that are contrary to this Court’s precedent. That is especially true where, as here, the constitutional violations undermine the integrity of the federal habeas process. In these circumstances, it falls to this Court to ensure that the direct appeal and federal habeas processes are meaningful and that federal constitutional claims are given fair consideration.

The prosecutors’ egregious misconduct in obtaining Wolfe’s pre-habeas convictions—including their failure to disclose material exculpatory evidence and their pressuring of witnesses to present perjured testimony—was “abhorrent to the judicial process.” *Wolfe v. Clark*, 691 F.3d 410, 424 (4th Cir. 2012), *see also* Pet. 8–9. When Wolfe successfully obtained habeas relief, he was entitled to a fair trial purged of the constitutional violations that contaminated the

earlier proceedings. Wolfe had consistently maintained his innocence and the prosecution's central witness at his first trial had credibly recanted his testimony, which is one reason the federal courts granted habeas relief. In preparing for retrial, the Commonwealth should have respected the federal courts' decisions and carefully evaluated whether there was any part of their case not irreparably tainted by perjured testimony and unethical prosecutorial misconduct. Instead, the prosecutors rendered the habeas process a meaningless exercise by threatening the recanting witness in an effort to change his testimony and, when that tactic proved unsuccessful, by vindictively adding six new and more severe charges against Wolfe without conducting any further investigation. When the state court refused on retrial to rebuke this obvious misconduct, and facing yet another unfair trial, Wolfe pleaded guilty to avoid the risk of an even longer sentence and another death sentence. *Id.* at 11. This is surely the type of situation where *Class*'s rationale is at its strongest: when a defendant's guilty plea occurs in the face of ongoing prosecutorial misconduct and the state trial court takes no steps to check the conduct of local prosecutors.

Wolfe seeks only modest relief from this Court: he should not be prevented from raising his vindictive prosecution claim on direct appeal merely because he was forced to plead guilty in the face of a vindictive prosecution. A remand would require the Virginia appellate courts to take his claim seriously and, instead of sweeping it away on an untenable theory that cannot be reconciled with *Class*, to address and resolve the claim on its merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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