NO. 20-_____

In the
Supreme Court of the United States

JUSTIN MICHAEL WOLFE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After petitioner Justin Wolfe obtained federal habeas relief because of "abhorrent" prosecutorial misconduct, the Commonwealth of Virginia vindictively brought six new charges with more severe penalties against Wolfe. Instead of requiring the Commonwealth to justify the new charges, the trial court rejected the vindictive prosecution claim on grounds that are manifestly wrong. With no chance of a fair trial, Wolfe entered a plea and then, on appeal, argued that the trial court had no authority to convict or sentence him because of the vindictive prosecution. Instead of addressing the federal constitutional issues raised by that claim, the Virginia courts concluded that Wolfe's guilty plea waived his right to appeal. This Court granted certiorari, vacated the judgment, and directed the Virginia courts to consider *Class v. United States*, 138 S. Ct. 798 (2018). On remand, the Virginia courts recognized that Wolfe's guilty plea does not bar his appeal. But they invented another reason not to address Wolfe's vindictive prosecution claim, holding that Wolfe forfeited his appellate rights because he purportedly did not preserve an argument in favor of his position. As a result, nearly 20 years after his original indictment, Wolfe remains in prison without ever having received a fair trial. The question presented is:

Whether a state court can avoid the federal constitutional issues raised by a vindictive prosecution claim, which challenges the State's constitutional authority to convict and impose sentence, by applying a forfeiture rule that itself does not comply with constitutional due process.

RELATED PROCEEDINGS

This case arises from the following proceedings in This case arises from the following proceedings in the Virginia state courts, Circuit Court of Prince William County, Va., the Court of Appeals of Virginia, and the Supreme Court of Virginia; the United States District Court for the Eastern District of Virginia; the United States Court of Appeals for the Fourth Circuit; and the U.S. Supreme Court, listed here in reverse chronological order:

- *Wolfe v. Virginia*, No. 200205 (Va. Sept. 3, 2020), included as Appendix C;
- *Wolfe v. Virginia*, No. 2081-16-14 (Va. Ct. App. Dec. 9, 2019), included as Appendix B;
- *Wolfe v. Virginia*, No. 18-227 (U.S. Jan. 7, 2019), reported at 139 S. Ct. 790;
- *Wolfe v. Virginia*, No. 170780 (Va. Mar. 23, 2018);
- *Commonwealth of Virginia v. Wolfe*, Nos. CR12003732–37, CR05050489–90, CR05050703, (Va. Cir. Ct. Prince William Cty., March 29, 2016);
- *Wolfe v. Virginia*, No. 13-555 (U.S. Feb. 24, 2014), reported at 571 U.S. 1197;
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- *Wolfe v. Clarke*, No. 2:05cv432 (E.D. Va. Nov. 12, 2011), reported at 819 F. Supp. 2d 574;
- *Wolfe v. Clarke*, No. 2:05cv432 (E.D. Va. July 26, 2011), reported at 819 F. Supp. 2d 538;
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- *Wolfe v. Johnson*, No. 08-8 (4th Cir. May 11, 2009), reported at 565 F.3d 140;
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- *Wolfe v. Commonwealth of Virginia*, Nos. 021872, 022193 (Va. Feb. 28, 2003), reported at 576 S.E.2d 471;

- *Commonwealth of Virginia v. Wolfe*, Nos. 50489, 50490, 50702, 50703 (Va. Cir. Ct. Prince William Cty. Jan. 7, 2002).

To the best of our knowledge, there are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

This petition asks this Court to again reverse the Virginia courts and, consistent with its earlier order in this case, direct them to address the merits of petitioner's claim that the Commonwealth's vindictive prosecution violates his federal due process rights. Because that claim goes to the very constitutional power of the State to prosecute, it is not subject to ordinary waiver or forfeiture. *See Class v. United States*, 138 S. Ct. 798 (2018). The Court should grant review to enforce its earlier remand order, to ensure that the lower court addresses the important federal constitutional issues that Wolfe has properly raised, and to protect the integrity of the federal habeas corpus process.

In 2002, a Virginia court sentenced petitioner Justin Wolfe to death for purportedly hiring another to commit murder—a crime that he has consistently maintained he did not commit. A decade later, Wolfe obtained federal habeas relief because his trial was blighted with egregious prosecutorial misconduct, which included intentionally withholding material, exculpatory information and knowingly allowing witnesses to present false testimony. *Wolfe v. Clarke*, 819 F. Supp. 2d 538, 571 (E.D. Va. 2011); *see also Wolfe v. Clarke*, 691 F.3d 410, 423–24 (4th Cir. 2012). Following a decision by the U.S. Court of Appeals for the Fourth Circuit affirming the grant of habeas relief and vacating Wolfe's convictions and death sentence, the case returned to the Virginia courts for a new trial. Instead of removing the taint caused by the prosecutors' constitutional violations, the Commonwealth engaged in even more misconduct.

Without conducting a new investigation or obtaining new information, prosecutors immediately filed six additional charges against Wolfe that carried penalties more severe than those accompanying the original charges he had successfully challenged in federal court. Under this Court's precedent, the Commonwealth's actions give rise to a presumption of vindictiveness that can only be overcome with objective evidence that the new charges were justified. *See Blackledge v. Perry*, 417 U.S. 21, 27–28 (1974) (explaining that there is a "realistic likelihood of 'vindictiveness'" in violation of federal due process when a state prosecutor substitutes a more serious charge for the original one after an appeal); *see also United States v. Goodwin*, 457 U.S. 368, 374–75 (1982).

Despite the obvious concerns of vindictive prosecution, the Virginia trial court refused to dismiss the additional charges or even require the Commonwealth to explain its reasons for bringing the new charges. With little hope of receiving a fair trial and facing another death sentence, Wolfe entered a guilty plea. The trial court then sentenced Wolfe to 83 years in prison, with 42 years suspended, and ordered him to pay court costs of approximately $871,000.

On appeal, Wolfe challenged the validity of his plea because of the Commonwealth's vindictive prosecution, arguing that the trial court had no authority to convict and sentence him under the new charges. But the Virginia Court of Appeals refused even to consider the claim. App. 11–15. In its view, Wolfe had waived his appellate rights by voluntarily entering a non-conditional guilty plea. The Virginia

Supreme Court summarily refused Wolfe's petition for appeal and also denied his petition for rehearing. App. 22–23.

Wolfe petitioned this Court for certiorari in 2018. Granting that request, the Court vacated the judgment and remanded for the Virginia courts to consider *Class v. United States*, 138 S. Ct. 798 (2018). *See Wolfe v. Virginia*, 139 S. Ct. 790 (2019) (mem.). *Class* held that "'a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.'" 138 S. Ct. at 801 (quotation marks omitted). A vindictive prosecution claim meets that requirement because it implicates "the very power of the State" to prosecute the defendant. *Id.* at 803 (citing *Blackledge*, 417 U.S. at 30); *see also id.* at 804 ("a guilty plea does not bar a claim on appeal 'where on the face of the record the court had no power to enter the conviction or impose the sentence'") (quoting *United States v. Broce*, 488 U.S. 563, 569 (1989)).

On remand, the Virginia Court of Appeals conceded that, in light of *Class*, Wolfe's guilty plea does not bar him from raising his vindictive prosecution claim on appeal. App. 14. But while it purported to apply *Class*, it overlooked *Class*'s essential reasoning. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (noting that both the result and the essential reasoning of this Court's decisions are binding). Disregarding the federal due process principles that *Class* embraced, the court instead concluded that it would not entertain the appeal for a new and different reason—because Wolfe

had purportedly failed to preserve a supporting argument in favor of his position.

The Virginia court's refusal to consider Wolfe's vindictive prosecution claim is invalid as a matter of federal law. A state court cannot apply forfeiture rules to avoid the merits of a claim that goes to the constitutional power of the state court to convict. *See Class*, 138 S. Ct. at 803 (discussing *Blackledge*, 417 U.S. at 30). Under this Court's precedents, there are a few, very limited types of constitutional claims—of which vindictive prosecution is one—that raise serious concerns that even the initiation of proceedings violates due process of law. *Id.* Accordingly, because a vindictive prosecution claim raises a structural challenge to the government's power to "constitutionally prosecute," and involves more than just a personal right, it is not subject to ordinary waiver or forfeiture. *Id.* at 805 (quotation marks omitted).

At a minimum, if a state court seeks to avoid adjudicating this kind of claim by applying a forfeiture requirement, its ruling must be subject to a federal due process analysis, lest the state court be allowed to unconstitutionally (and even vindictively) block any inquiry into the vindictive prosecution. In undertaking that analysis, this Court should recognize that a state court forfeiture ruling presumptively fails to comply with due process if it imposes requirements that go beyond settled federal preservation rules. Because federal preservation rules presumptively comply with federal due process, they establish a useful baseline for evaluating whether state courts are improperly wielding state

procedures in violation of due process to abrogate constitutional rights. Against that baseline, it is clear that Wolfe more than adequately preserved his claim.

The record shows that Wolfe presented his vindictive prosecution claim to the trial court, which held an evidentiary hearing with argument before it ruled on the issue. At that hearing, Wolfe's counsel argued that the new charges established a prima facie case of vindictive prosecution because they were more severe than his original charges that were vacated by the Fourth Circuit. App. 75–94. The record further shows that, in arguing that the new charges were vindictive, his counsel compared the minimum sentence for the original marijuana-distribution charge in 2001, which was 5 to 30 years, with the minimum sentence for the new charges of distributing marijuana as part of a continuing criminal enterprise, which were 20 years to life or 40 years to life. *See* App. 78. Under well-settled law, the evidence and arguments that Wolfe presented establish a presumption of vindictiveness and a requirement that the Commonwealth come forward with a valid justification for bringing the new charges. *See United States v. Hill*, 93 F. App'x 540, 549, 551 (4th Cir. 2004) (increased severity of charges after conviction was vacated results in a presumption of vindictiveness, and government must then rebut that presumption).

Because Wolfe pressed his vindictive prosecution claim to the trial court, and because the trial court ruled on that claim, Wolfe is entitled to have the claim resolved on its merits on appeal. *Cf. United States v. Williams*, 504 U.S. 36, 41 (1992) (explaining "traditional rule" that grant of certiorari is precluded

only when "question presented was not pressed or passed upon below") (quotation marks omitted). Instead, the Virginia Court of Appeals threw Wolfe out of court, concluding that he had not adequately preserved his argument that the new charges "increased the *minimum* punishment to which he could have been subjected upon conviction." App. 12 (emphasis in original). In support of that puzzling conclusion, it invoked Virginia Supreme Court Rule 5A:18, which provides that "no ruling of [a] trial court … will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice." App. 12. Although this extreme application of Rule 5A:18 is contrary to *Class* and the precedent on which it relies, the Virginia Supreme Court summarily denied Wolfe's petition. *See* App. 22.

In refusing to consider Wolfe's vindictive prosecution claim, the Virginia Supreme Court and the Virginia Court of Appeals violated Wolfe's due process rights, ignored the reasoning in *Class*, and compounded the significant constitutional concerns raised by the Commonwealth's vindictive prosecution. Rules of procedure cannot be deployed to abrogate constitutional rights. And federal law does not permit a state court to turn a blind eye to vindictive prosecution undertaken in response to a successful federal habeas petition. Because the Virginia courts failed to understand the full import of *Class* and the precedent on which it relies, this Court should grant certiorari to ensure that the Virginia courts properly comply with its earlier remand order and that Wolfe's

federal claims are given the fair hearing that the Constitution requires.

More broadly, because the remedy Wolfe seeks is only a remand for his claim to be considered on its merits, this case is an ideal vehicle for the Court to provide guidance to the lower courts. In particular, this case presents an opportunity for the Court to reaffirm to the legal community and the public at large that judicial proceedings are not mere procedural games to be played by prosecutors, lawyers, and judges. They are instead designed to protect the rule of law by ensuring that the ends of justice are served.

OPINIONS BELOW

The decision of the Virginia Court of Appeals is reproduced at App. 1–19. The order of the Supreme Court of Virginia summarily refusing Wolfe's petition for appeal is reproduced at App. 22–23.

JURISDICTION

The Virginia Court of Appeals issued its decision on September 20, 2019. The Supreme Court of Virginia refused Wolfe's petition for appeal on September 3, 2020. Under this Court's March 19, 2020 order, the Court extended the time for filing a petition for writ of certiorari to 150 days from the judgment, or February 1, 2021. The Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part: "No person

shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

The relevant rule of the Supreme Court of Virginia, Rule 5A:18, which governs the preservation of issues for appellate review is reproduced at App. 114.

STATEMENT OF THE CASE

1. In 2001, a grand jury indicted nineteen-year-old Justin Wolfe on three charges—(1) conspiracy to distribute marijuana, (2) use or display of a firearm in the commission of a felony, and (3) capital murder for hire—on the Commonwealth's theory that Wolfe had hired his friend and fellow marijuana-dealer, Owen Barber, to kill a supplier named Daniel Petrole. In a trial marred by extraordinary prosecutorial misconduct, including numerous *Brady* violations and false testimony by state witnesses, the only direct evidence against Wolfe was Barber's testimony that Wolfe had hired him to kill Petrole. The jury found Wolfe guilty of all charges and, at the prosecutor's request, sentenced him to death.

2. In 2005, following an unsuccessful state habeas petition, Wolfe sought federal habeas relief in the United States District Court for the Eastern District of Virginia. Wolfe raised his actual innocence as a reason for the district court to consider his otherwise procedurally barred constitutional claims. He argued that his trial had been infected by repeated

instances of prosecutorial misconduct, including that the Commonwealth had violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing material evidence favorable to the defense. *See Wolfe v. Johnson*, 565 F.3d 140 (4th Cir. 2009). During the course of the federal habeas proceedings, Barber recanted his trial testimony against Wolfe and later testified that Wolfe had nothing to do with Petrole's murder.

After considering extensive evidentiary submissions by both sides, the district court concluded that Barber's recantation was credible and corroborated by other evidence. The district court also detailed how "the Commonwealth stifled a vigorous truth-seeking process," *Wolfe*, 819 F. Supp. 2d at 571, when it withheld material, exculpatory information in violation of *Brady*, and permitted its witnesses to present perjured testimony in violation of *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959). The extensive exculpatory information withheld from the defense included (1) a police report showing that it was a Commonwealth detective who first suggested to Barber that he accuse Wolfe or else face execution; (2) information that Barber had confessed to his roommate that he acted alone in the murder; and (3) evidence suggesting alternate theories of the crime.

The police report was particularly significant because it would have substantially undermined Barber's credibility at trial. It showed that, within days of Petrole's murder, the Commonwealth fixated on the theory that Barber had acted at Wolfe's behest.

Even though the police had no direct evidence of Wolfe's involvement in the crime, and before asking Barber for his version of events, the investigating detective presented this theory to Barber and suggested that corroborating it would be Barber's only way to escape execution. Barber took the deal offered by the Commonwealth and agreed to testify that Wolfe had hired him to commit the murder. In exchange, the Commonwealth reduced Barber's charge from capital to first-degree murder, and supported Barber's sentence of imprisonment for 60 years, with 22 years suspended. *Wolfe*, 565 F.3d at 144 n.1.

The district court concluded that the Commonwealth knew the implications of its failure to disclose exculpatory evidence and its deliberate submission of false testimony. The court noted the Commonwealth prosecutors could not "claim that they were unaware of the falsities in Barber's testimony in light of the exculpatory information in [the Commonwealth's] possession at the time of the trial" and, therefore, had "notice that Barber's trial testimony implicating Wolfe was false." *Wolfe*, 819 F. Supp. 2d at 571. Moreover, the prosecutor's extraordinary and alarming testimony admitting "that he employs a *practice* of withholding information from counsel and defendants with the intent of preventing them from establishing a defense" demonstrated "the Commonwealth's intent in withholding exculpatory information as well as its knowledge about the consequences of suppressing and failing to pursue such evidence." *Id.* (emphasis added). Without the false testimony, the Commonwealth's case against Wolfe was, as the court

explained, "circumstantial" and "best [ ] described as tenuous." *Id.* at 564.

Almost immediately after the release of the district court's opinion, the Commonwealth moved Wolfe to segregation under circumstances the district court found to be very suspicious. Noting the transfer's "punitive" effect, the court "deem[ed] questionable the fact that the Director transferred Wolfe to segregation within days of this Court's judgment vacating all of Wolfe's convictions and sentences." *Wolfe v. Clarke*, 819 F. Supp. 2d 574, 588 (E.D. Va. 2011). The court rejected the prison director's purported reasons for transferring Wolfe to segregation "given the inconsistent rationales and the uncontroverted evidence of the transfer[']s effects on Wolfe." *Id.* The court ordered that Wolfe be transferred out of segregation and back to death row. *Id.* At that point, Wolfe had been incarcerated continuously since 2001, and most of that had been in isolation.

3. In 2012, the Fourth Circuit affirmed the district court's grant of habeas relief, reiterating the district court's conclusion that the Commonwealth's conduct in obtaining Wolfe's convictions had been "not only unconstitutional in regards to due process, but abhorrent to the judicial process." *Wolfe v. Clarke*, 691 F.3d 410, 424 (4th Cir. 2012) (quoting *Wolfe*, 819 F. Supp. at 566 n.24). The Fourth Circuit reprimanded the Commonwealth for "tenaciously conceal[ing]" exculpatory evidence "that the prosecution obviously should have disclosed prior to Wolfe's capital murder trial." *Id* at 422. The Fourth Circuit felt "compelled to acknowledge that the Commonwealth's suppression

of the [police] report, as well as other apparent *Brady* materials, was entirely intentional." *Id.* at 423. Describing the prosecutor's rationale for withholding information—that he purposefully avoided providing information that could be used "to fabricate a defense"—as a "flabbergasting explanation," the court of appeals noted that the district court had "rightly lambasted" the Commonwealth. *Id.* The court pointed out that, in an earlier case arising out of Prince William County, it had similarly "refuse[d] to condone the suppression of evidence by the [same] prosecutors, and advised them to 'err on the side of disclosure, especially when a defendant is facing the specter of execution.'" *Id.* at 424 (quoting *Muhammad v. Kelly*, 575 F.3d 359, 370 (4th Cir. 2009)). "We sincerely hope," the court concluded, "that the Commonwealth's Attorney and his assistants have finally taken heed of those rebukes." *Id.*

4. That hope was ill-placed. Only four days after the Fourth Circuit's mandate issued, the prosecutors visited Barber in prison. Although Barber maintained that his testimony exculpating Wolfe was true, the prosecutors "proceeded to interrogate, intimidate, and threaten Barber for over an hour." *Wolfe v. Clarke*, 718 F.3d 277, 296 (4th Cir. 2013) (Thacker, C.J., concurring in part). They informed him that his exculpatory testimony had breached his plea agreement, that his case and Wolfe's were back to square one, and that Barber could now face the death penalty. *Id* at 296–97. Even under that extreme pressure, Barber held firm that Wolfe was not involved. *Id.* at 296.

Two days later, the original prosecutors filed an ex parte motion to recuse themselves. The motion requested that, instead of assigning a new prosecutor through a random process, the state trial court appoint a special prosecutor personally selected by the same original prosecutors that had intentionally withheld exculpatory information and been lambasted for it by the district court and by the Fourth Circuit. The state trial court judge immediately granted the motion, without notice to or a response from Wolfe.

The next day, the new prosecutor told the court that he had already concluded that Wolfe "was absolutely involved in this murder and planned it and caused it to occur and he did it out of greed . . . . Justin Wolfe is many things but innocent is not one of them." App. 40. At the same hearing, the prosecutor confirmed that he had only reviewed materials from the discredited original trial, and he made no mention of any additional investigation by the Commonwealth. *Id.* On October 1, 2012, without having conducted any further investigation of the events that had led to indicting Wolfe 11 years earlier, the prosecutor presented new charges against Wolfe to the grand jury, which returned six more indictments in addition to the original three. Two of the new indictments alleged that Wolfe was one of several principal administrators or leaders of a continuing criminal enterprise that distributed marijuana. The Commonwealth further alleged that Wolfe was guilty of capital murder by direction or order of one who is engaged in a continuing criminal enterprise.

In total, in addition to the three original 2001 indictments, the prosecutor charged Wolfe with:

- Two new and additional drug distribution as part of a continuing criminal enterprise charges;
- One new and additional capital murder charge contingent on the continuing criminal enterprise charges;
- One new and additional felony murder charge;
- One new and additional charge for use of a firearm in the commission of or attempt to commit a robbery; and
- One new and additional charge for use of a firearm in the commission of a murder.

App. 48; *see also* App. 65–69.

Although Wolfe had never before faced a felony murder charge or been charged with the use or display of a firearm in the commission of or attempt to commit a robbery, he now faced three separate and different counts of murder and three separate and different firearms charges. All of the 2012 indictments were based on the same events for which the Commonwealth originally indicted Wolfe in 2001, without having conducted any further investigation.

5. In November 2012, Wolfe filed a motion to dismiss the indictments, arguing that the newly charged indictments were vindictive in violation of his constitutional due process rights. The only plausible explanation for the new, additional charges was because Wolfe had obtained federal habeas relief. The

trial court held a hearing in December 2012, at which the judge noted that she had considered the motion, the supporting brief, and the exhibits. App. 54.

At the hearing, the trial court heard testimony from Detective Newsome, who had investigated the case in 2001 and whose exculpatory report formed the basis for one of the Commonwealth's *Brady* violations. App. 56–74; *Wolfe*, 691 F.3d at 417. Wolfe's counsel questioned Detective Newsome about (1) the penalties for the current indictments as compared to the original indictments; (2) his conversation with Owen Barber after Wolfe's convictions had been overturned, during which Newsome and prosecutors threatened Barber with capital punishment if he did not disavow his recantation of his testimony from 2001; and (3) whether any new investigation had been conducted since Wolfe's original conviction in 2001. The Commonwealth briefly cross-examined Detective Newsome.

Wolfe's counsel then argued that the circumstances were sufficient to give rise to a presumption of prosecutorial vindictiveness under *Blackledge* and binding Virginia caselaw. *See Duck v. Commonwealth*, 383 S.E.2d 746 (Va. Ct. App. 1989); *see also* App. 84 (arguing that the "cumulative effect" of the new charges should be considered). That presumption would shift the burden to the Commonwealth to offer a valid basis for bringing the new charges. With no explanation to offer, and even though the special prosecutor was selected by the original prosecutors, the Commonwealth argued that because the person serving as special prosecutor was not involved in the original prosecution,

vindictiveness was impossible. App. 86–89. It also took the position that because death was a possible penalty in the first case, there could never be a greater punishment on re-trial, even if many new and more serious charges were added. *See* App. 89 (arguing that "[a]ny other sentences would be cumulative to the harshest sentence that is allowed for under these new charges and the old charges which is death"); *but see Duck*, 383 S.E.2d at 572–73 (holding that when a defendant is "exposed to an increased penalty range," there is a realistic likelihood of vindictiveness). In essence, the Commonwealth argued that there can never be a presumption of vindictive prosecution in a capital case.

After hearing testimony and argument, the trial court denied Wolfe's motion, reaching the conclusion that the evidence was not sufficient to establish even a prima facie case of vindictiveness. The trial court held that the Commonwealth brought "additional charges, not enhanced charges." App. 94. It thus accepted the Commonwealth's suggestion that because the original charges sought the death penalty for capital murder, the six additional charges could not be more severe, even though Wolfe was exposed to a significant increase in penalty range. Based on this spurious reasoning, the court found no "presumption" of vindictiveness. App. 94–95. Wolfe's counsel asked the trial court to hold a hearing on actual vindictiveness, which was postponed. App. 95–96. Wolfe's counsel also noted their exceptions to the court's rulings. App. 96. Wolfe's counsel later filed a motion to reconsider the ruling on the motion to dismiss indictments constituting a vindictive prosecution. App. 97–108.

Concluding that he had no hope of a fair trial, Wolfe pled guilty to use of a firearm in the commission of a felony, conspiracy to distribute marijuana, and murder. The plea conceded that Wolfe had committed these crimes, but it made no mention of Wolfe's vindictive prosecution claim, nor did it concede in any way the Commonwealth's power to prosecute Wolfe on the new charges. App. 109–113. The trial court ultimately sentenced Wolfe to 83 years in prison, with 42 years suspended, and ordered him to pay court costs of approximately $871,000.

On appeal, Wolfe argued that the trial court erred in accepting his guilty plea because he was the target of vindictive prosecution after he had successfully obtained habeas relief in federal court. The Virginia Court of Appeals refused to consider these arguments. Ducking the serious issues raised by the prosecutors' new charges, it instead concluded that, because Wolfe's guilty plea was not conditional, he had waived his ability to raise his vindictive prosecution claim on appeal. App. 26–29. The Supreme Court of Virginia summarily refused Wolfe's petition for appeal and later denied his petition for rehearing. App. 32–34.

6. Wolfe filed a petition for certiorari with this Court in August 2018. His petition urged the Court to summarily reverse and presented a single question: "whether, in light of *Class*, a guilty plea in state court waives the right to raise on appeal the constitutional authority of the State to prosecute based on a claim of vindictive prosecution." In opposing the petition, the Commonwealth argued that this Court lacked jurisdiction to consider the petition because "the court of appeals' decision was based on *forfeiture*, not

waiver, and it involved *the timing* and *the forum* in which petitioner first raised his claim rather than the nature of his guilty plea." Brief in Opp., *Wolfe v. Virginia*, No. 18-227, 2018 WL 6012696, at *5 (U.S. Nov. 13, 2018). Citing Virginia Rule 5A:18, the Commonwealth asserted that the Virginia courts' decision rested "upon an adequate and independent state ground that deprives this Court of jurisdiction." *Id.* (quoting *Berry v. Mississippi*, 552 U.S. 1007, 1007 (2007) (per curiam)).

In January 2019, rejecting the Commonwealth's jurisdictional arguments, this Court granted certiorari and summarily reversed. It vacated the judgment and remanded the case to Virginia "for further consideration in light of *Class v. United States*." *Wolfe v. Virginia*, 139 S. Ct. 790, 790 (2019) (mem.).

7. On remand, the Virginia Court of Appeals directed the parties to provide supplemental briefing on the vindictive prosecution claim. In a per curiam opinion, it once again refused to consider the merits of Wolfe's vindictive prosecution claim and rejected Wolfe's appeal. The court held that in light of *Class*, Wolfe *could* raise the vindictive prosecution claim despite his guilty plea. App. 14. But it then invented a different reason to avoid addressing Wolfe's claim that he was denied due process as a result of vindictive prosecution: it concluded that Wolfe's claim was forfeited. *Id.*

Invoking Rule 5A:18, which limits an appellate court's authority to consider claims that are not presented in the first instance to the trial court, App. 12, the Virginia Court of Appeals concluded that

the claim "present[ed] on appeal" was *not* that the new charges constituted vindictive prosecution, but the more specific argument that "the new charges the special prosecutor brought increased the *minimum* punishment to which [Wolfe] could have been subjected on conviction." App. 12 (emphasis in original). Because that argument was purportedly not presented to the trial court, the Virginia court concluded that Wolfe had forfeited his ability to appeal. According to the Virginia court, "the waiver under Rule 5A:18 is more expansive than the waiver occasioned by a defendant's guilty plea." App. 13–14.

In applying its novel forfeiture theory, the Virginia Court of Appeals overlooked the record evidence showing that Wolfe's counsel did argue the minimum punishment issue to the trial court. In fact, Wolfe's counsel specifically argued that the new charges were more severe because they would impose an increased penalty range and overall greater sentence:

> The [2001] conspiracy to distribute marijuana is five to thirty and the [2012] 18.2-248(H1) is twenty to life. The H2 is a life charge unless you cooperate with police in which the Court, in its discretion, can reduce the sentence down to forty years. There's not anything that can be clearer. … The motion that's filed is saying the posture of the case gives rise to this presumption of vindictiveness.

App. 78; *see also id.* at 91–94 (arguing that because Barber had recanted his testimony, it was important to consider the length of sentence imposed by the additional charges); *see also id.* at 92–93 (arguing that

added charges were more severe because they would result in an effective life sentence). The trial court understood Wolfe's objection and had every opportunity to "rule intelligently on the issue," which is all that Virginia law requires. *Scialdone v. Commonwealth*, 689 S.E.2d 716, 725 (Va. 2010).

The Virginia Supreme Court denied Wolfe's petition for appeal without reasoning on September 3, 2020. App. 22. It ordered the appellant to pay the Commonwealth for all costs incurred in the appeal. *Id.*

REASONS FOR GRANTING THE PETITION

The Court should grant review to reaffirm that a party cannot ordinarily waive, much less forfeit, a claim that his due process rights have been violated because of vindictive prosecution. When asked to adjudicate this important question of federal law—one of a narrow category of claims that go to the constitutional power of the state court to convict and impose sentence—a state court cannot avoid resolving the underlying federal law question through a novel forfeiture ruling. The issue of the preservation vel non of a federal due process objection to a vindictive prosecution in state court must itself be subject to federal due process analysis—lest a state court be allowed to vindictively and unconstitutionally ignore a defendant's protests against a vindictive state prosecution by improperly claiming forfeiture. Applying federal constitutional analysis to the grounds of decision below, Wolfe more than adequately preserved his federal claim and is entitled to have that claim addressed on appeal.

I. Claims of Vindictive Prosecution Are Not Susceptible to Ordinary Waiver or Forfeiture.

This Court has long recognized—and recently reaffirmed in *Class*—that claims for vindictive prosecution fall within a narrow category of claims that ordinarily cannot be waived or forfeited because they raise a fundamental jurisdictional question that goes to "'the very power of the State' to prosecute the defendant." 138 S. Ct. at 803 (quoting *Blackledge*, 417 U.S. at 30). With respect to these categories of claims, a successful appeal extinguishes the government's right to constitutionally prosecute the defendant and denies the court jurisdiction to impose sentence. *Id* at 804–05.

In concluding that even a knowing guilty plea does not waive a defendant's right on appeal to challenge the government's authority to hale a defendant into court, *Class* drew on two earlier cases—*Blackledge*, 417 U.S. 21, and *Menna v. New York*, 423 U.S. 61 (1975)—involving vindictive prosecution and double jeopardy claims, respectively. 138 S. Ct. at 803–05. In *Blackledge*, the State of North Carolina re-indicted the defendant on a more severe felony charge after he exercised a statutory right to an appeal. *Blackledge*, 417 U.S. at 23–24. The defendant pled guilty to the felony charge and pursued federal habeas relief "on the grounds that the reindictment amounted to an unconstitutional vindictive prosecution" in violation of the Fourteenth Amendment. *Class*, 138 S. Ct. at 803 (citing *Blackledge*, 417 U.S. 21). Rejecting the State's argument to the contrary, this Court held that the

defendant did not waive his vindictive prosecution challenge by pleading guilty.

Blackledge expressed concern that a defendant must be allowed to pursue his right to appeal without apprehension that the State will retaliate with more serious charges. *Blackledge*, 417 U.S. at 30. Citing *Blackledge, Class* explained that although "a guilty plea bars appeal of many claims, including some 'antecedent constitutional violations,'" a vindictive prosecution claim "implicates 'the very power of the State' to prosecute the defendant." 138 S. Ct. at 803 (quoting 417 U.S. at 30). Accordingly, because the defendant in *Blackledge* alleged that the "very initiation of the proceedings" against him "operated to deprive him due process of law," he was allowed to seek post-plea review of the State's authority to prosecute. *Id.* (citing *Blackledge*, 417 U.S. at 30–31).

Class also referenced *Menna v. New York*, a case involving a claim of double jeopardy, to further explain why the defendant could challenge the State's authority to prosecute him. Citing *Blackledge*, the Court held that, because the defendant claimed "that 'the State may not convict' him 'no matter how validly his factual guilt is established,' [the] 'guilty plea . . . [did] not bar the claim.'" *Class*, 138 S. Ct. at 804 (quoting *Menna*, 423 U.S. at 62 n.2). In short, when "the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Menna*, 423 U.S. at 62 & n.2 (citing *Blackledge*, 417 U.S. at 30).

Class, Blackledge, and *Menna* establish a category of claims for which even a knowing guilty plea does not waive a constitutional claim challenging the power of the State to prosecute. *Class*, 138 S. Ct. at 803–04; *compare Tollett v. Henderson*, 411 U.S. 258, 266–67 (1973) (recognizing that unconditional guilty pleas do extinguish other claims of antecedent constitutional error). Claims falling with that narrow category raise important structural concerns that require indulging every presumption against waiver and resolving the claims on their merits. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights") (quotation marks omitted).

Because these principles are grounded in federal due process, they apply with equal force in both the federal and state contexts. *Blackledge* and *Menna*, which spawned the "*Menna-Blackledge* doctrine" that *Class* endorsed, were state court cases in which this Court applied constitutional protections to the states under the Due Process Clause of the Fourteenth Amendment. This Court's holding in *Class* "flow[ed] directly from [the] Court's prior decisions" in *Blackledge* and *Menna*, "reflect[ing] an understanding of the nature of guilty pleas which . . . stretches back nearly 150 years." *Class*, 138 S. Ct. at 803-04.

Moreover, in reaching its decision in *Class*, this Court examined how "federal *and state* courts throughout the 19th and 20th centuries" viewed "the nature of a guilty plea" in order to ascertain whether the entry of a guilty plea waived a claim regarding the government's constitutional authority to prosecute.

Id. at 804 (emphasis added) (citing *Carper v. State*, 27 Ohio St. 572, 575 (1875)). The Court's assessment of these federal and state cases in *Class* confirmed that a knowing guilty plea does not waive a claim that challenges a court's constitutional authority to convict and sentence. *See id.* at 805.

Under *Class*'s rationale, an involuntary forfeiture cannot bar claims falling within the narrow category addressed in *Blackledge* and *Menna*. *See Seminole Tribe*, 517 U.S. at 67 (explaining that both the holding and essential reasoning of a decision is binding). As both the majority and dissent in *Class* acknowledged, because "a rule of procedure cannot abrogate a constitutional right," 138 S. Ct. at 809 (Alito, J., dissenting), the *Blackledge-Menna* doctrine imposes an important due process exception to the requirements of Rule 11(a)(2) of the Federal Rules of Criminal Procedure, which ordinarily prevents a guilty-pleading defendant from challenging his conviction on a forfeitable or waivable ground. *Id.* at 806.

If federal due process necessitates an exception to the federal rules of criminal procedure, it also must constrain state courts in a similar fashion. When a party brings a vindictive prosecution claim that calls into question the state court's authority to convict and impose sentence, the claim goes to the constitutional power of the State. Because that claim raises not only a personal right, but is also important to protecting constitutional structural guarantees, the claim is not subject to forfeiture.

II. When a State Invokes a Forfeiture Rule to Avoid Addressing a Vindictive Prosecution Claim, Its Decision Must Comply With the Requirements of Due Process.

As in *Class* and *Blackledge*, this case involves a claim that challenges the very power of the State to "constitutionally prosecute." Wolfe contends that the state court lacked any jurisdiction to convict or sentence him because the six new and more serious charges brought by a prosecutor handpicked by those whose intentional and knowing misconduct led to his prior convictions were vindictive in violation of his due process rights. *Class*, 138 S. Ct. at 803–04 (citing *Blackledge*, 417 U.S. at 30; *Menna*, 423 U.S. at 63). Indeed, the new charges were brought in response to and immediately following his successful federal habeas petition. They had the sole purpose of forcing Wolfe into an untenable position—plead guilty or else defend against six new charges with harsher penalties. The Commonwealth has never offered any credible explanation that could justify bringing the new charges, especially because it admitted that it brought the charges eleven years after the first without any additional investigation.

In these circumstances, if the federal due process guarantees recognized in *Class* and *Blackledge* are to count for anything, they must mean that the state courts are duty bound to consider Wolfe's vindictive prosecution claim on its merits. By the same logic, the state courts cannot avoid addressing the important federal constitutional issues that Wolfe's claim raises through novel application of forfeiture rules. Indeed, if a party cannot *waive* a vindictive prosecution claim

by voluntarily entering a knowing guilty plea, the claims also cannot be thrown out of court on the theory that an argument presented to and considered by the trial court was unknowingly *forfeited*. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (distinguishing between "waiver," the "'intentional relinquishment'" of a right, and "forfeiture," the failure to timely assert a right) (quoting *Johnson*, 304 U.S. at 464). Under both circumstances, the state court's obligation is to resolve the vindictive prosecution claim and to ensure that the trial court had constitutional authority to convict and sentence the defendant.

It has long been recognized that jurisdictional-type defects are not subject to ordinary rules of waiver and forfeiture. As this Court has recognized in other contexts, "[n]o party can waive [a jurisdictional] defect" or even "consent to jurisdiction." *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998). Similarly, "[n]o court can ignore the defect; rather, a court, noticing the defect, must raise the matter on its own." *Id.* In short, "[i]n contrast to the ordinary operation of our adversarial system, courts are obliged to notice jurisdictional issues and raise them on their own initiative." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017). That principle should apply with particular force where the claim stems from vindictive prosecution, because resolving the constitutional issues is important to the integrity of the judicial system. When a defendant has successfully obtained relief, either on appeal or through federal habeas proceedings, and prosecutors bring new and more serious charges, it is important

for the judicial system to ensure that the prosecutors have a compelling and valid justification for doing so.

The record in this case is clear that Wolfe properly preserved his claim that the Commonwealth engaged in vindictive prosecution because the six new charges were more serious than the charges on which he was originally indicted before he sought and obtained federal habeas relief. *See* App. 75–96, 97–108. The record is also clear that the trial court considered and ruled on these issues. App. 54, 94–96. Wolfe did not consent to the vindictive prosecution or the bringing of those new, more severe charges. *Cf. Currier v. Virginia*, 138 S. Ct. 2144 (2018) (finding that defendant lost on merits of double jeopardy claim because he consented to two trials).

In refusing to entertain Wolfe's appeal, the Virginia court concluded that Wolfe had not adequately argued to the trial court that "the new charges the special prosecutor brought increased the *minimum* punishment to which he could have been subjected upon conviction." App. 12. That hair-splitting imposition of Virginia's forfeiture rule is not consistent with the record in this case. *See* App. 78 (arguing that the differences in punishment established vindictive prosecution); *see also* App. 92–93 (arguing that it was important to consider the length of sentence available under the additional charges). It may not even be consistent with Virginia law. *See Scialdone*, 689 S.E.2d at 726 (even though defendants "imprecise[ly]" objected at the trial court, claim preserved on appeal because they had "presented their arguments squarely to the [trial] court"); *Eure v. Norfolk Shipbuilding & Drydock*

Corp., 561 S.E.2d 663, 667 (2002) (even though the party did not object precisely, issue was preserved on appeal because the trial court had considered issue and ruled on it).

But whether the state court's rigid forfeiture ruling is or is not consistent with Virginia law does not matter. Whatever Virginia law may require, the ruling still must satisfy minimum federal due process requirements. A state court necessarily violates due process if it refuses to address the structural constitutional questions raised by a vindictive prosecution claim. *See Blackledge*, 417 U.S. 21 at 31.

As this Court has long recognized, "[a] rigid and undeviating" practice of declining to consider questions that had "not previously been specifically urged would be out of harmony with … the rules of fundamental justice." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("Orderly rules of procedure do not require sacrifice of the rules of fundamental justice"). The Commonwealth's forfeiture ruling is itself presumptively vindictive and contrary to due process because it goes far beyond any forfeiture requirements under federal law, which presumptively reflect the bounds of due process. If a State seeks to impose stricter requirements, it must do so in a way that does not infringe on constitutional rights. The Constitution "nullifies sophisticated as well as simple-minded modes" of infringing on constitution rights, *see U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)), and the Commonwealth's courts cannot insulate its prosecutors' misconduct and abrogate

constitutional rights through the clever use of forfeiture rules.

Nothing in the Virginia Court of Appeals' decision is sufficient to overcome the presumption that by imposing excessively stringent forfeiture requirements, the Commonwealth has violated Wolfe's federal due process rights. The cases cited by the Virginia court—with one exception—do not involve a federal constitutional claim going to the constitutional power of the Commonwealth to prosecute, convict, and sentence a defendant. The cases instead address motions for a new venue, *see Hoke v. Commonwealth*, 377 S.E.2d 595 (Va. 1989), motions relating to evidentiary issues at trial, *see Teleguz v. Commonwealth*, 643 S.E.2d 708 (Va. 2007), *Le v. Commonwealth*, 774 S.E.2d 475 (Va. Ct. App. 2015), claims relating to the facial invalidity of a Virginia statute, *McDonald v. Commonwealth*, 645 S.E.2d 918 (Va. 2007), and claims challenging the failure to poll jurors, *Lenz v. Commonwealth*, 544 S.E.2d 299 (Va. 2001). These are all circumstances where forfeiture is routinely applied. The one exception involves a case where the defendant sought to raise a claim of double jeopardy that was never presented to the trial court at the time of ruling. *See West v. Commonwealth*, 597 S.E.2d 274 (Va. Ct. App. 2004). But that case was decided before this Court's decision in *Class* and there is no evidence that any party raised an objection under *Blackledge*.

In short, while the Virginia Court of Appeals purported to take this Court's previous remand seriously, in reality it didn't, once again circumventing its obligation to review the Commonwealth's

prosecutors' continuing misconduct and to ensure that the trial court had the constitutional power to convict and impose sentence. By imposing an extreme forfeiture requirement, the Virginia court ignored *Class*'s broader import and rationale. In doing so, it defied the Court's remand order and further violated Wolfe's due process rights.

III. The Question Presented Is Exceptionally Important.

This case presents an exceptionally important, simply presented, and unusually elegant opportunity to enforce this Court's earlier remand order and to affirm to the broader public that the ends of justice are justice, and not procedural games played by lawyers. *Hormel*, 312 U.S. at 557. If this Court does not grant certiorari and reverse, it will send an unfortunate signal that state courts are free to disregard essential constitutional requirements (and this Court's own decisions) in response to a grant of federal habeas relief, as long as they hide behind clever procedural rulings that expand state rules beyond the bounds of federal due process. When the lower courts have refused to do what the Constitution requires, this Court's supervisory authority is especially vital to protecting the integrity of the criminal justice system.

The Due Process Clause protects defendants by prohibiting a State from "upping the ante" by bringing a defendant into court to face additional or more severe charges after the defendant has successfully pursued an appeal or collateral remedy. *Blackledge*, 417 U.S. at 27–28; *see also Class*, 138 S. Ct. at 803–04. This Court has held that due process requires that a defendant be free of the apprehension of retaliation

from the prosecutor following a successful appeal or collateral attack, because "fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction." *Blackledge*, 417 U.S. at 28 (citing *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), *overruled in part by Alabama v. Smith*, 490 U.S. 794 (1989)). These due process protections are especially important in cases, like this one, where a State ups the ante after the defendant successfully challenges his convictions in the federal habeas process because of severe and shameful constitutional transgressions by the State.

Preserving judicial review of vindictive prosecution claims is especially important in this context because "penalizing those who choose to exercise constitutional rights" is "patently unconstitutional" and can serve to "chill the exercise of basic constitutional rights." *Pearce*, 395 U.S. at 724 (citing *United States v. Jackson*, 390 U.S. 570, 582 (1968) (quotation marks omitted)). Furthermore, allowing prosecutors to penalize defendants who successfully obtain relief undermines the integrity and protection of the federal habeas corpus process and can "impede open and equal access to the courts," *id*. at 724–25 (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)), by allowing the State to "insure that only the most hardy defendants will brave the hazards of a *de novo* trial." *Blackledge*, 417 U.S. at 27–28.

These concerns are presented in spades in this case. Wolfe has been in prison for nearly 20 years, but he has never received a fair trial free from prosecutorial misconduct. His original trial was

marred by repeated *Brady* and *Giglio* violations, he faced additional misconduct when he pursued federal habeas relief, and, after obtaining relief, he was again denied a fair trial because of vindictive prosecution. The Commonwealth's courts have an obligation to address these abuses. They cannot just look the other way, creatively deploying forfeiture rules in legally and factually unsupported ways to avoid addressing the merits of Wolfe's federal constitutional claims. Those claims raise fundamental questions about the state trial court's authority to convict and impose sentence.

All that Wolfe seeks is to have the Virginia courts fairly evaluate the merits of his vindictive prosecution claim. That means recognizing that the Commonwealth's decision to bring six new charges with more severe penalties establishes a prima facie case of vindictive prosecution. *See Blackledge,* 417 U.S. at 27–28; *Duck*, 383 S.E.2d at 749. The burden is therefore on the Commonwealth to come forward with objective evidence and a credible reason to justify the additional charges that does not depend on the fact that it simply disagrees with the federal courts' determination that Wolfe was entitled to habeas relief. *See Goodwin*, 457 U.S. at 376 n.8 (objective evidence can overcome presumption of vindictiveness). The Commonwealth has never even attempted to provide that explanation because it can't.

* * * *

Two years ago, this Court granted review for the Virginia courts to consider *Class* in evaluating Wolfe's vindictive prosecution claim. If the Virginia courts had expressly refused that mandate, this Court would

have surely stepped in to enforce its order and protect the important federal constitutional interests at stake. But that is no different from what has in fact happened. Wolfe's constitutional rights are of "little value" because they have been "indirectly denied" by the Virginia court's imposition of improper forfeiture rules, which is itself a violation of Wolfe's due process rights. *U.S. Term Limits,* 514 U.S. at 829 (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)).

This Court plays an important role in not only enforcing federal constitutional rights, but also in protecting the integrity of the judicial system as a whole. That role is essential to preventing the public from becoming disillusioned that the legal system has become too procedurally complex—a game for lawyers that no longer serves the ends of justice and that insulates deliberate misconduct by prosecutors. This case is an ideal vehicle to reassert the constitutional values that are essential to maintaining the rule of law. Wolfe's federal due process claim arising from the Commonwealth's vindictive prosecution is entitled to be considered on its merits on appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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