# APPENDIX

## TABLE OF APPENDICES

*Appendix A*

**COURT OF APPEALS OF VIRGINIA**

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Record No. 2081-16-4

From the Circuit Court of Prince William County,
Nos. CR05050490-01, CR05050703-01
and CR12003736-00

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JUSTIN MICHAEL WOLFE,

*Appellant*,

against

COMMONWEALTH OF VIRGINIA,

*Appellee*.

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September 20, 2019

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**OPINION**

Per Curiam[1]

This case returns to our Court upon remand from the Supreme Court of Virginia following a remand from the Supreme Court of the United States for us to reconsider our earlier decision in light of *Class v. United States*, 138 S. Ct. 798 (2018). We directed the parties to submit supplemental briefing on the effect of *Class* in this case. Upon consideration of the case in light of *Class* and the parties' supplemental briefing, the petition for appeal has been reviewed by a judge of

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[1] The Honorable Mary Grace O'Brien took no part in the consideration of this petition for appeal.

this Court, to whom it was referred pursuant to Code § 17.1-407(c), and is denied.

Appellant originally was indicted for and convicted in 2002 of capital murder for hire, use of a firearm in the commission of murder, and conspiracy to distribute marijuana. *Wolfe v. Commonwealth*, 265 Va. 193, 198 (2003). He was sentenced to death for the murder and thirty-three years' imprisonment for the remaining offenses. *Id.* In 2012, the United States Court of Appeals for the Fourth Circuit affirmed an award of federal habeas corpus relief because the Commonwealth had not met its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and noted that "the Commonwealth [was] free to retry [appellant] on the murder, firearm, and drug conspiracy charges." *Wolfe v. Clarke*, 691 F.3d 410, 426 (4th Cir. 2012).

Following the grant of federal habeas corpus relief, the trial court appointed a special prosecutor,[2] who secured six additional indictments against appellant,[3] charging: capital murder in aid of a continuing criminal enterprise, use of a firearm in the commission of murder, two counts of acting as a principal of a continuing criminal enterprise, felony murder in the course of robbery, and use of a firearm in the commission of robbery. Appellant moved to

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[2] Appellant moved to disqualify the special prosecutor or vacate his appointment. Following a hearing on the record, the trial court denied both motions by orders entered on November 5, 2012.

[3] Appellant argues that the special prosecutor "reindicted" him on the three original charges. However, the record does not support that contention; the record demonstrates that the Commonwealth proceeded on the three original indictments.

dismiss those indictments, arguing that they had been "vindictively brought against [him] in retaliation for the exercise of his constitutional rights to petition for and receive federal habeas corpus relief." Appellant alleged that the 2012 indictments violated his due process rights because they increased the number of charges and the potential quantum of punishment. He argued that he could not be tried on new charges that arose out of the same facts that existed when he originally was indicted.

At the hearing on the motion on December 11, 2012, the Commonwealth argued[4] that the issue before the court was whether there was a presumption of vindictiveness under the circumstances; it asked for a separate evidentiary hearing if the trial court found that the presumption had been satisfied and the burden had shifted to the Commonwealth to show that there was not actual vindictiveness. Appellant's counsel presented testimony that the original indictments against him charged three offenses and that the special prosecutor brought six additional charges. There had been no additional investigation of the case between appellant's 2002 trial and the federal court's remand order. The Commonwealth presented testimony that the special prosecutor had no involvement in the original prosecution.

Appellant argued that considering the posture of the case, bringing the new charges raised the presumption of vindictiveness. Appellant asserted that the federal court rulings meant that it would be

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[4] The record suggests that the Commonwealth filed a written response, but it is not part of the record on appeal.

"difficult, if not impossible" for the Commonwealth to present a successful case on the original charges. Appellant stated that he was not arguing that the special prosecutors "are actually vindictive," only that bringing additional charges with "harsher" punishments implicated a presumption of vindictiveness. He noted that the same sovereign was pursuing the prosecution, so it did not matter that a special prosecutor had been appointed. Appellant asked the trial court to find a presumption of vindictiveness and to rule that "the Commonwealth have the burden of moving forward."

The Commonwealth argued that there was no presumption of vindictiveness in this case. It noted appellant's efforts to have the special prosecutor removed because, appellant had asserted, the special prosecutor would not exercise his independent judgment in prosecuting the case. The Commonwealth argued that the new charges reflected the special prosecutor's exercise of his independent judgment in this case and "that's the only thing the record supports." The Commonwealth also argued that, on their face, the new charges were not "more severe" than the original charges because appellant previously had faced a sentence of death. Thus, there was no additional sentencing exposure.

After considering the evidence and argument, the trial court denied appellant's motion.[5] The trial court noted that *Blackledge v. Perry*, 417 U.S. 21, 30 (1974), and *Barrett v. Commonwealth*, 41 Va. App. 377, 393

[5] The trial court entered an order memorializing its ruling on September 24, 2014.

(2003), were helpful in addressing appellant's claim. Considering all the circumstances, the trial court held that there had not been a *prima facie* showing of prosecutorial vindictiveness. The trial court found that it was not appropriate to analyze the apparent strength of the Commonwealth's case; instead it looked to the charges. The trial court found that although the Commonwealth had brought additional charges, it had not brought enhanced charges. The trial court found that, under the circumstances, appellant had not satisfied "the prosecutorial vindictiveness threshold showing which would require the Commonwealth to rebut that presumption." Appellant then stated that he wished to present evidence to establish actual vindictiveness, and the trial court set the matter for a hearing on that evidence for December 18, 2012. At the December 18, 2012 hearing, however, appellant advised the trial court that he would rest on his brief and would refile the motion if he felt it was appropriate to do so.

In October 2014, appellant filed a motion for reconsideration of his motion to dismiss the 2012 indictments based on prosecutorial vindictiveness. Appellant argued in his motion for reconsideration that he had established a *prima facie* case of vindictive prosecution, which violated his due process rights. He asserted that the Commonwealth was obliged to "articulate a legitimate reason" for bringing the new indictments "after a successful appeal." Appellant asserted that the trial court had not applied the correct legal standard and that, under the circumstances, the burden was on the Commonwealth to justify the new charges. Appellant argued for the first time that the presumption of vindictiveness

applied because the new charges raised the *minimum* quantum of punishment he would face upon conviction.

The Commonwealth filed a written response, arguing that neither the special prosecutor nor his staff "had any involvement in [appellant's] previous trial or appeals." "After independent review of the case, the [s]pecial [p]rosecutor presented the case" to a grand jury, which issued the challenged indictments. The Commonwealth argued that the special prosecutor had "independently formulated his own theories of [appellant's] guilt based on the investigation and evidence." According to the Commonwealth, appellant had not established vindictiveness because any animus on behalf of the original prosecutors could not be imputed to the special prosecutor. The Commonwealth further argued that there was not a presumption of vindictiveness solely based on indictment of additional charges because the new charges did not increase the minimum sentencing exposure that applied for the original charges because the minimum sentence for capital murder is imprisonment for life. *See* Code §§ 18.2-10(a) and 18.2-31.

The motion to reconsider was set for a hearing on December 17, 2014; however, at the hearing, appellant stated that he wished to defer argument on the motion. The trial court granted appellant's request to defer consideration of the motion to reconsider. Although there were several subsequent hearings, appellant never reset the matter for argument.

On March 22, and March 24, 2016, appellant executed written plea agreements with the

Commonwealth. Under the agreements, appellant agreed to plead guilty to: first-degree murder (2012 indictment), use of a firearm in the commission of a felony (2005 indictment), and conspiracy to distribute more than five pounds of marijuana (2005 indictment). Appellant also submitted a four-page written statement outlining his role in the murder. In exchange for appellant's guilty pleas, the Commonwealth agreed to *nolle prosequi* the remaining charges. The parties also agreed that appellant's active sentence would be "not less than 29 years nor more than 41 years for all the charges to which [appellant was] pleading guilty."

The trial court conducted a careful colloquy with appellant and appellant's counsel, and considered the Commonwealth's proffer of evidence. The trial court also separately inquired regarding appellant's waiver of his right to a jury trial. The trial court found that appellant's guilty pleas and jury waiver were "voluntarily and intelligently" made and that appellant understood the nature and consequences of the charges. The trial court then accepted the plea agreements, convicted appellant of the three charges, and granted the Commonwealth's motion to *nolle prosequi* the remaining charges. Appellant entered his guilty pleas without securing a ruling from the trial court on his argument that the presumption of vindictiveness applied because the new charges increased the minimum punishment he faced.

At the subsequent sentencing hearing, consistent with the terms of the written plea agreements, the trial court sentenced appellant to eighty-three years' imprisonment with forty-two years suspended by final

order entered August 4, 2016. As one of the conditions of appellant's suspended sentence, the trial court ordered him to pay court costs of $870,277.11.

Appellant appealed to this Court; he presented three assignments of error:

> I. The circuit court erred when it accepted [appellant's] guilty plea as voluntary where [he] was the target of vindictive prosecution that subjected [him] to increased mandatory minimum sentences after successful post-conviction proceedings.
>
> II. The circuit court erred when it accepted [appellant's] guilty plea as voluntary when [his] guilty plea was the product of prosecutorial misconduct that deprived [him] of exculpatory evidence in the form of Owen Barber's testimony.
>
> III. The circuit court erred when it ordered [appellant] to pay the costs of his prosecution because it was the Commonwealth's actions, and not [appellant's], that necessitated the re-trial of his charges.

By order entered May 10, 2017, this Court denied appellant's petition for appeal. We found that appellant had defaulted his challenges to the voluntariness of his guilty pleas under Rule 5A:18 because the record established that his pleas were knowing and voluntary. *See* Order of May 10, 2017. We rejected appellant's challenge to the assessment of court costs because we determined that the assessment was statutorily authorized. *See id.* The

Supreme Court of Virginia refused appellant's further petition for appeal. *See Wolfe v. Commonwealth*, Record No. 170780 (Feb. 5, 2018).

On February 21, 2018, the Supreme Court of the United States rendered its decision in *Class*. In *Class* the Supreme Court held a guilty plea, standing alone, does not bar a defendant "from challenging the constitutionality of the statute of conviction on direct appeal." 138 S. Ct. at 803. A federal grand jury indicted *Class* "for possessing firearms in his locked jeep, which was parked in a lot on the grounds of the United States Capitol in Washington, D.C. *See* 40 U.S.C. § 5104(e)(1) ('An individual . . . may not carry . . . on the Grounds or in any of the Capitol Buildings a firearm')." *Id.* at 802. Class moved to dismiss the indictment, alleging "that the statute, § 5104(e), violate[d] the Second Amendment" and the Due Process Clause because it did not provide adequate notice of the proscribed conduct. *Id.* The district court denied both motions after a hearing. *Id.* Class subsequently pleaded guilty to "Possession of a Firearm on U.S. Capitol Grounds," in exchange for which the government dropped related charges. *Id.*

Although there was a detailed written plea agreement between Class and the government, the agreement "said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional." *Id.* The district court accepted Class's plea, convicted him of the offense, and sentenced him to twenty-four days' imprisonment and twelve months of supervised release. *Id.* Class then appealed his conviction, again claiming that "the statute violate[d] the Second Amendment and the Due

Process Clause because it fails to give fair notice of which areas fall within the Capitol Grounds where firearms are banned." *Id.* The Court of Appeals for the District of Columbia Circuit "held that Class could not raise his constitutional claims because, by pleading guilty, he had waived them." *Id.* at 802-03. The Supreme Court reversed, holding 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." *Id.* at 803-04 (quoting *Menna v. New York*, 423 U.S. 61, 63 & n.2 (1975)). The Supreme Court explained that "a guilty plea by itself" does not bar claims that: challenge the constitutional validity of the statute of conviction, assert prosecutorial vindictiveness, or allege a double jeopardy violation because those types of claims "call into question the Government's power to 'constitutionally prosecute'" a defendant. *Id.* at 805 (quoting *United States v. Broce*, 488 U.S. 563, 575 (1989)).

After the Supreme Court of Virginia refused appellant's appeal, he sought certiorari in the Supreme Court of the United States. The question appellant presented to the Supreme Court of the United States was: "[w]hether, 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." *Wolfe v. Virginia*, 2018 WL 4035534, at *i (U.S.). On January 7, 2019, the Supreme Court granted appellant's petition for a writ of certiorari. The Supreme Court's order states:

> On petition for writ of certiorari to the Supreme Court of Virginia. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Virginia for further consideration in light of *Class v. United States*, 583 U.S. ___, 138 S. Ct. 798 (2018).

*Wolfe v. Virginia*, 139 S. Ct. 790 (2019). By order of February 15, 2019, the Supreme Court of Virginia remanded the case to this Court "to reconsider its decision of May 10, 2017." As noted above, we directed the parties to provide supplemental briefing. The supplemental briefs address only the vindictive prosecution claim. We turn to that claim now.

I. Appellant argues that the trial court erred in accepting his guilty pleas because he "was the target of vindictive prosecution that subjected [him] to increased mandatory minimum punishments after successful post-conviction proceedings."[6] In his supplemental petition for appeal, appellant argues that the United States Supreme Court's remand requires us to grant his petition and consider his claim on the merits. We disagree.

Citing Supreme Court precedent, we have recognized that imposing "a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy" violates due

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[6] "Only assignments of error assigned in the petition for appeal will be noticed by this Court." Rule 5A:12(c)(1)(i); *see also Maldonado v. Commonwealth*, 70 Va. App. 554 (2019) (applying Rule 5A:12(c)(1)(i) to limit issues considered on appeal). *Cf. Sarafin v. Commonwealth*, 288 Va. 320, 323 (2014) (applying corresponding Rule 5:17(c) to limit issues considered on appeal).

process of law. *Barrett*, 41 Va. App. at 393. And that we must "reverse a conviction that is the result of a vindictive prosecution where the facts show an actual vindictiveness or a sufficient likelihood of vindictiveness to warrant such a presumption." *Id.* at 396 (quoting *United States v. Lanoue*, 137 F.3d 656, 664 (1st Cir. 1998)). But here, unlike the defendant in *Class*, appellant presents a claim that the trial court never addressed: that the presumption of vindictiveness arose because the new charges the special prosecutor brought increased the *minimum* punishment to which he could have been subjected upon conviction.

"No ruling of the 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." Rule 5A:18. "[W]e have repeatedly held that even constitutional claims can be barred by Rule 5A:18." *Le v. Commonwealth*, 65 Va. App. 66, 75 (2015) (rejecting due process challenge to sufficiency of evidence). "The purpose of this contemporaneous objection requirement is to allow the trial court a fair opportunity to resolve the issue at trial, thereby preventing unnecessary appeals and retrials." *Creamer v. Commonwealth*, 64 Va. App. 185, 195 (2015). Virginia's '[p]rocedural-default principles require that the argument asserted on appeal be the same as the contemporaneous argument" presented to the trial court. *Bethea v. Commonwealth*, ___ Va. ___ , ___ (Aug. 28, 2019). "[A]n appellate court may not reverse a judgment of the trial court based upon an alleged error in a decision that was not made or upon

an issue that was not presented." *McDonald v. Commonwealth*, 274 Va. 249, 255 (2007); *see also Floyd v. Commonwealth*, 219 Va. 575, 584 (1978) (holding that appellate courts will not consider an argument that differs from the specific argument presented to the trial court even if it relates to the same general issue).

Consequently, the Supreme Court of Virginia has declined to consider a "claim of facial invalidity of Code § 18.2-361(A)" because the claim was never presented to the trial court. *McDonald*, 274 Va. at 255. Similarly, we have refused to consider a double jeopardy claim because "the trial court was never asked to rule on the issue of double jeopardy." *West v. Commonwealth*, 43 Va. App. 327, 340 (2004). *Cf. Teleguz v. Commonwealth*, 273 Va. 458, 471 (2007) (declining to consider a claim that the trial court in a capital case erred in not granting a continuance to investigate new information because the trial court "never ruled on the continuance request, and Teleguz did not seek a ruling on his motion for a continuance"), *cert. denied*, 552 U.S. 1191 (2008); *Lenz v. Commonwealth*, 261 Va. 451, 463 (holding in a capital case that challenge concerning motion to poll jurors regarding which aggravating factor each had found was waived because defendant failed to request a ruling from the trial court), *cert. denied*, 534 U.S. 1003 (2001); *Hoke v. Commonwealth*, 237 Va. 303, 306 (holding in a capital case that claim challenging denial of motion for a change of venue because defendant did not renew his motion after acquiescing in attempt to seat a jury), *cert. denied*, 491 U.S. 910 (1989). Upon review of these precedents, we conclude that the

waiver under Rule 5A:18 is more expansive than the waiver occasioned by a defendant's guilty plea.

Appellant did not ask the trial court to rule on his motion to reconsider the prosecutorial vindictiveness claim arguing that the correct analysis focused on the greater *minimum* sentence he would face. Under these circumstances, Rule 5A:18 bars our consideration of appellant's prosecutorial vindictiveness claim. Although there are exceptions to Rule 5A:18, appellant has not invoked them, notwithstanding our prior ruling applying Rule 5A:18 and the Commonwealth's express reliance on the Rule in its supplemental briefing.[7] This Court does not apply the exceptions to Rule 5A:18 *sua sponte*. *Edwards v. Commonwealth*, 41 Va. App. 752, 761 (2003) (*en banc*). Accordingly, Rule 5A:18 bars our consideration of this assignment of error on appeal.

In sum, we hold that appellant may present his claim to this Court notwithstanding his guilty plea. *See Garza v. Idaho*, 139 S. Ct. 738 (2019); *Trevathan v. Commonwealth*, ___ Va. ___ (Aug. 23, 2019); *Miles v. Sheriff of Va. Beach City Jail*, 266 Va. 110, 116 (2003). We further hold that appellant's guilty plea, standing alone, does not waive his right to present a claim of prosecutorial vindictiveness on appeal. *Class*, 138 S. Ct. at 804-05. Finally, we hold that although appellant may present his claim, Rule 5A:18 bars our consideration of the claim because the trial court did not rule on the claim appellant presents on appeal. *McDonald*, 274 Va. at 255; *West*, 43 Va. App. at 340.

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[7] We granted appellant leave to file a reply brief. *See* Order of March 7, 2019.

*See also United States v. Rios-Rivera*, 913 F.3d 38, 42 (1st Cir.) (holding that "even after *Class*," appellant's decision not to press arguments challenging the constitutionality of the prosecution before the district court "effects a forfeiture" of the claim), *cert. denied*, 139 S. Ct. 2647 (2019).

II. To the extent the remand order contemplated that we reconsider appellant's second assignment of error, we find that under Class, appellant's guilty plea waived his claim of prosecutorial misconduct.

Following the federal court remand, appellant also moved to dismiss the indictments "for prosecutorial misconduct." He argued that no remedy short of dismissal could cure the constitutional violations that underpinned the habeas corpus relief the federal court had granted and that the original trial prosecutors had tampered with a key witness before recusing themselves. Appellant contended that the witness' (Owen Barber) invocation of his Fifth Amendment privilege prejudiced his defense. The trial court denied the motion in a letter opinion of November 4, 2013. The trial court found that appellant had not met his burden of showing that Barber's invocation of his Fifth Amendment rights was due to prosecutorial misconduct, considering the many varying statements, "many diametrically opposed to each other," he had given and that attorneys and investigators representing both appellant and the Commonwealth had visited Barber while he was incarcerated. The trial court further found that given the many statements, it was "uncertain which testimony" Barber would offer if he did testify. Thus, appellant had not established that

Barber's testimony "would have been favorable to his case."

In his original petition, appellant argued that the (original) prosecutor's asserted misconduct "had an effect on" his decision to plead guilty because "it deprived him of the sole witness who could contradict the government's allegations." *Class*, however, reaffirmed "that a guilty plea bars appeal of many claims, including some '"antecedent constitutional violations'" related to events . . . that had '"occurred prior to the entry of the guilty plea."'" 138 S. Ct. at 803 (quoting *Blackledge*, 417 U.S. at 30). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Thus, a guilty plea renders "case-related constitutional defects," like the one asserted here, "irrelevant" "[b]ecause the defendant has admitted the charges against him." *Class*, 138 S. Ct. at 804-05 (quoting first *Blackledge*, 417 U.S. at 30, and then quoting *Haring v. Prosise*, 462 U.S. 306, 321 (1983)).

Appellant's *Brady* claim was available to him before he entered his guilty pleas and it is within the class of errors that could be cured by a new trial, as the Fourth Circuit recognized in appellant's federal case. "Put succinctly, the constitutional claims for which [appellant] was awarded habeas corpus relief are readily capable of being remedied in a new trial." *Wolfe v. Clarke*, 718 F.3d 277, 290 (4th Cir. 2013). Accordingly, we find that to the extent this claim was

not abandoned in the Supreme Court of the United States, it was waived by appellant's guilty plea. *Tollett*, 411 U.S. at 267.

III. To the extent that the remand order contemplated that we reconsider appellant's third assignment of error, we find no abuse of discretion in the trial court's judgment.

In his original petition for appeal, appellant argued that the trial court "erred when it ordered [him] to pay nearly $900,000 in costs as a special condition of his suspended sentence because [his] re-trial was necessitated by prosecutorial misconduct, the costs were driven up by the Commonwealth's vindictive charging decision . . . , and it is punitive to hang the specter of 43 years in jail over [him] if he cannot pay" the costs within the time the trial court set.

As we found previously, under Code § 19.2-336 "[i]n every criminal case the clerk of the circuit court in which the accused is found guilty . . . shall . . . make up a statement of all the expenses incident to the prosecution, . . . and execution for the amount of such expenses shall be issued and proceeded with." Moreover, "[i]f a defendant is placed on probation, or imposition or execution of sentence is suspended, or both, the court may make payment of any fine, or costs, or fine and costs, either on a certain date or on an installment basis, a condition of probation or suspension of sentence." Code § 19.2-356

"The statutory grant of power to the trial court to order payment of fines, forfeitures, penalties, restitution and costs in deferred payments or installments according to the defendant's ability to

pay implies that the trial judge will act with sound judicial discretion." *Ohree v. Commonwealth*, 26 Va. App. 299, 311 (1998). Additionally, if the defendant later "defaults in payment and is ordered to show cause pursuant to Code § 19.2-358, he or she has the opportunity to present evidence concerning his or her ability to pay and obtain either temporary or permanent relief from the obligation to pay costs." *Id.* In this manner, "Virginia's statutory scheme works to enforce the duty of paying costs 'only against those who actually become able to meet [the responsibility] without hardship.'" *Id.* (alteration in original) (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)).

"Criminal sentencing decisions are among the most difficult judgment calls trial judges face." *Du v. Commonwealth*, 292 Va. 555, 563 (2016). "Because this task is so difficult, it must rest heavily on judges closest to the facts of the case—those hearing and seeing the witnesses, taking into account their verbal and nonverbal communication, and placing all of it in the context of the entire case." *Id.* Upon review of the record in this case, we find no abuse of discretion in the trial court's sentence.

For the reasons stated above, the petition for appeal is denied.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The trial court shall allow Meredith M. Ralls, Esquire, court-appointed counsel for the appellant, the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

This Court's records reflect that Meredith M. Ralls, Esquire, and Marvin D. Miller, Esquire, are counsel of record for appellant in this matter.

Costs due the Commonwealth by appellant in Court of Appeals of Virginia:

Attorney's fee $400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Marty K P. Ring

Deputy Clerk

*Appendix B*

**COURT OF APPEALS OF VIRGINIA**

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Record No. 2081-16-4

From the Circuit Court of Prince William County,
Nos. CR05050490-01, CR05050703-01
and CR12003736-00

---

JUSTIN MICHAEL WOLFE,

*Appellant*,

against

COMMONWEALTH OF VIRGINIA,

*Appellee*.

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December 9, 2019

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**ORDER**

Before Judges Huff, AtLee and Malveaux

For the reasons previously stated in the order entered by this Court on September 20, 2019, the petition for appeal in this case hereby is denied.

It is ordered that the trial court allow court-appointed counsel for the appellant an additional fee of $100 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses. In addition to the costs incurred in this Court's September 20, 2019 order, the Commonwealth shall also recover of the appellant the costs reflected in this order.

This order shall be certified to the trial court.

Additional costs due the Commonwealth by appellant in Court of Appeals of Virginia:

Attorney's fee $100.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

Kristen M. McKenzie

By:

Deputy Clerk

*Appendix C*

**SUPREME COURT OF VIRGINIA**

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Record No. 200205

From the Court of Appeals of Virginia No. 2081-16-4

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JUSTIN WOLFE,

*Appellant*,

against

COMMONWEALTH OF VIRGINIA,

*Appellee*.

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September 3, 2020

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**ORDER**

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of Prince William County shall allow Meredith Madden Ralls, Esquire, the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee $950.00 plus costs and expenses

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: *s/*

Deputy Clerk

*Appendix D*

**COURT OF APPEALS OF VIRGINIA**

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Record No. 2081-16-4

From the Circuit Court of Prince William County,
Nos. CR05050490-01, CR05050703-01
and CR12003736-00

---

JUSTIN MICHAEL WOLFE,

*Appellant*,

against

COMMONWEALTH OF VIRGINIA,

*Appellee*.

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September 20, 2019

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**OPINION**

Per Curiam[1]

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. and II. Appellant argues that the trial court erred when it accepted his guilty pleas as voluntary because appellant "was the target of vindictive prosecution that subjected [him] to increased

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[1] Judge O'Brien took no part in the consideration of this petition for appeal.

mandatory minimum sentences after successful post-conviction proceedings." He also argues that the trial court erred when it accepted his guilty pleas as voluntary because the pleas were "the product of prosecutorial misconduct that deprived [him] of exculpatory evidence in the form of Owen Barber's testimony."

In 2001, a grand jury indicted appellant on charges of capital murder, use of a firearm in the commission of a felony, and conspiracy to distribute marijuana. Appellant was convicted of the charges and sentenced to death. After numerous appeals in the state and federal courts, the United States Court of Appeals for the Fourth Circuit affirmed the district court's opinion vacating appellant's convictions and ordering the Commonwealth to retry him within 120 days or unconditionally release him from custody. *Wolfe v. Clarke*, 691 F.3d 410, 416, 426 (4th Cir. 2012).

Subsequently, the trial court appointed a special prosecutor. On October 1, 2012, the Commonwealth obtained indictments against appellant for six additional charges. The six new charges were capital murder in aid of a continuing criminal enterprise, use of a firearm in the commission of murder, two counts of acting as a principal of a continuing criminal enterprise, felony murder in the course of committing robbery, and use of a firearm in the commission of robbery.

On November 28, 2012, appellant filed a "Motion to Dismiss Indictments Constituting a Vindictive Prosecution." On December 4, 2012, appellant filed a "Motion to Dismiss Indictments for Prosecutorial Misconduct." The trial court denied the motion

alleging prosecutorial misconduct on November 4, 2013, and the motion alleging vindictive prosecution on September 24, 2014.[2]

On March 22 and 24, 2016, appellant entered into written plea agreements with the Commonwealth. He agreed to plead guilty to the following charges: use of a firearm in the commission of a felony, conspiracy to distribute marijuana, and murder. The plea agreements further stated that the parties agreed to a total sentence of active incarceration of "not less than 29 years and no more than 41 years."

On March 29, 2016, appellant appeared before the trial court. The plea agreements were offered to the trial court, and appellant pled guilty to the three charges. Appellant did not enter conditional pleas. The trial court questioned appellant about his guilty pleas and held that appellant "fully understood the nature and effect of the pleas, of the penalties that may be imposed upon conviction, [and] of the waiver of trial by jury and of the right to appeal." The trial court found that appellant's pleas were voluntary. After hearing the proffers of evidence, the trial court found appellant guilty.

On July 20, 2016, appellant appeared before the trial court for sentencing. After hearing the evidence and argument, the trial court sentenced appellant to a total of eighty-three years in prison, with forty-two years suspended. In addition, the trial court ordered appellant to pay the court costs, which appellant

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[2] The trial court denied the motion alleging vindictive prosecution by order. It denied the motion alleging prosecutorial misconduct by letter opinion.

represents totaled $871,247.11. Appellant did not file any motions to withdraw his guilty pleas.

"In a proceeding free of jurisdictional defects, no appeal lies from a punishment fixed by law and imposed upon a defendant who has entered a voluntary and intelligent plea of guilty." *Allen v. Commonwealth*, 27 Va. App. 726, 729, 501 S.E.2d 441, 442 (1998). "A plea of guilty constitutes a 'self-supplied conviction.'" *Id.* at 730, 501 S.E.2d at 443 (quoting *Peyton v. Commonwealth*, 210 Va. 194, 196, 169 S.E.2d 569, 571 (1969)).

For the first time on appeal, appellant argues that the trial court erred in accepting his guilty pleas as voluntary. Rule 5A:18 provides, in pertinent part, that "[n]o ruling of the 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." "The purpose of this contemporaneous objection requirement is to allow the trial court a fair opportunity to resolve the issue at trial, thereby preventing unnecessary appeals and retrials." *Creamer v. Commonwealth*, 64 Va. App. 185, 195, 767 S.E.2d 226, 231 (2015).

> Although Rule 5A:18 allows exceptions for good cause or to meet the ends of justice, appellant does not argue that we should invoke these exceptions. *See e.g., Redman v. Commonwealth*, 25 Va. App. 215, 221, 487 S.E.2d 269, 272 (1997) ("In order to avail oneself of the exception, a *defendant must affirmatively show* that a miscarriage of justice has occurred, not that a miscarriage

> might have occurred." (emphasis added)). We will not consider, *sua sponte*, a "miscarriage of justice" argument under Rule 5A:18.

*Edwards v. Commonwealth*, 41 Va. App. 752, 761, 589 S.E.2d 444, 448 (2003) (*en banc*), *aff'd by unpub'd order*, No. 040019 (Va. Oct. 15, 2004); *see Jones v. Commonwealth*, ___ Va. ___, ___ n.5, 795 S.E.2d 705, 710 n.5 (2017).

Moreover, the record does not reflect any reason to invoke the good cause or ends of justice exceptions to Rule 5A:18. Appellant presented his motions to dismiss the indictments based on alleged prosecutorial vindictiveness and prosecutorial misconduct prior to entry of his guilty pleas. After the trial court denied the motions to dismiss, appellant entered his guilty pleas, which were not conditional.

Rule 3A:8(b)(1) states, "A circuit court shall not accept a plea of guilty . . . to a felony charge without first determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea." *See Allen*, 27 Va. App. at 732-33, 501 S.E.2d at 444. Here, the trial court engaged in a colloquy with appellant and determined that his guilty pleas were voluntary.[3] The record clearly establishes that appellant's pleas were made voluntarily, knowingly, and intelligently.

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[3] The trial court also asked lead counsel for appellant if he was "satisfied that [appellant's] pleas of guilty [were] knowingly, intelligently and understandably made," and counsel replied, "Yes, Your Honor." Counsel also agreed that appellant understood "the nature and consequences" of the pleas.

Accordingly, we decline to consider the first and second assignments of error for the first time on appeal. *See id*.

III. Appellant argues that the trial court erred when it ordered him "to pay the costs of his prosecution because it was the Commonwealth's actions, and not [appellant's], that necessitated the re-trial of his charges." He contends the trial court also erred by ordering him to pay the costs as a special condition of his suspended sentence.

As a part of his sentence, the trial court ordered appellant to be responsible for the court costs. The sentencing order stated, "It is further ordered as [a] special condition of the defendant's supervised probation that the defendant pay the court costs in accordance with a payment plan to be established by the Probation Office, which plan must result in any fines and/or court costs being fully paid during the probationary period." Appellant represents that the clerk's office determined that the court costs totaled $871,247.11.[4]

Appellant filed a motion to reconsider the sentence and, as part of the motion, asked the trial court to remove the special condition that he pay the court costs during his probationary period. The trial court denied the motion.

Code § 19.2-336 states, "In every criminal case the clerk of the circuit court in which the accused is found guilty . . . shall . . . make up a statement of all the

[4] Appellant does not allege that any portion of these costs are associated with his trial upon the first set of indictments, after which his original convictions and death sentence were vacated.

expenses incident to the prosecution, including such as are certified under § 19.2-335, and execution for the amount of such expenses shall be issued and proceeded with." Code § 19.2-356 states, "If a defendant is placed on probation, or imposition or execution of sentence is suspended, or both, the court may make payment of any fine, or costs, or fine and costs, either on a certain date or on an installment basis, a condition of probation or suspension of sentence."

"The statutory grant of power to the trial court to order payment of fines, forfeitures, penalties, restitution and costs in deferred payments or installments according to the defendant's ability to pay implies that the trial judge will act with sound judicial discretion." *Ohree v. Commonwealth*, 26 Va. App. 299, 311, 494 S.E.2d 484, 490 (1998). Additionally, if the defendant later "defaults in payment and is ordered to show cause pursuant to Code § 19.2-358, he or she has the opportunity to present evidence concerning his or her ability to pay and obtain either temporary or permanent relief from the obligation to pay costs." *Id.* In this manner, "Virginia's statutory scheme works to enforce the duty of paying costs 'only against those who actually become able to meet [the responsibility] without hardship.'" *Id.* (alteration in original) (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)).

Consequently, contrary to appellant's arguments, the trial court did not abuse its discretion and acted within its statutory authority to assess the court costs against appellant and make the payment of such costs a condition of his suspended sentence.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The trial court shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

This Court's records reflect that Meredith M. Ralls, Esquire, is counsel of record for appellant in this matter.

Costs due the Commonwealth by appellant in Court of Appeals of Virginia:

Attorney's fee $400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Marty K P. Ring

Deputy Clerk

Deputy Clerk

**SUPREME COURT OF VIRGINIA**

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Record No. 170780

From the Court of Appeals of Virginia No. 2081-16-4

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JUSTIN MICHAEL WOLFE,

*Appellant*,

against

COMMONWEALTH OF VIRGINIA,

*Appellee*.

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February 5, 2018

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**ORDER**

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of Prince William County shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee $400.00 plus costs and expenses

A Copy,

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

**SUPREME COURT OF VIRGINIA**

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Record No. 170780

From the Court of Appeals of Virginia No. 2081-16-4

---

JUSTIN MICHAEL WOLFE,

*Appellant*,

against

COMMONWEALTH OF VIRGINIA,

*Appellee*.

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March 23, 2018

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**ORDER**

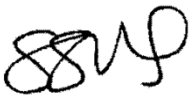
Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 5th day of February, 2018 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

*Appendix E*

**VIRGINIA**

**CIRCUIT COURT OF**
**PRINCE WILLIAM COUNTY**

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Nos.: CR12003732-00–CR12003737-00

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COMMONWEALTH OF VIRGINIA,

vs.

JUSTIN MICHAEL WOLFE,

*Defendant*.

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Filed November 28, 2012
Hon. Mary Grace O'Brien
Hearing: November 20, 2012
JW-2012-31

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**MOTION TO DISMISS INDICTMENTS CONSTITUTING A VINDICTIVE PROSECUTION**

COMES NOW the Defendant, Justin Michael Wolfe, by and through counsel, and moves this Honorable Court to dismiss the indictments brought vindictively against Mr. Wolfe in retaliation for the exercise of his constitutional rights to petition for and receive federal habeas corpus relief. In making this Motion, Mr. Wolfe relies upon his rights to due process of law, to a fair trial, to be free of cruel and unusual punishment, to equal protection, and his fundamental right to seek and receive habeas corpus relief from an

unlawful imprisonment by the Commonwealth. U.S. Const. art. 1; § 9: U.S. Const. amend. V, VI, VIII, XIV; Va. Const. art. I §§ 8, 9, 11.

**PROCEDURAL HISTORY**

Mr. Wolfe expressly adopts and incorporates the procedural history of his case as stated in his *Motion to Exclude Testimony from Prior Trial*, JW-XX, which is filed contemporaneously with this Motion. For the purposes of this Motion, however, the following facts warrant emphasis:

1. Mr. Wolfe has been indicted on purported charges of capital murder and related felonies. If convicted of capital murder plus an aggravator-element, Mr. Wolfe could be sentenced to death. Va. Code §§ 18.2-10(a), 18.2-31, 19.2-264.4.

2. Mr. Wolfe was originally indicted for offenses related to these same events in May and July of 2001. The 2001 indictments alleged conspiracy to dispense marijuana, use or display of a firearm in commission of a felony, and capital murder for hire. The Commonwealth's theory of the case at that time—which has changed dramatically now that Mr. Wolfe has received habeas corpus relief in federal court—was that Mr. Wolfe had hired admitted triggerman Owen Barber to kill Daniel Petrole. On January 7, 2002—after a trial fraught with constitutional violations that included, *Brady* violations, choreographed testimony, and the knowing presentation of false testimony by the Commonwealth—Mr. Wolfe was convicted of all charges.

3. In 2005, Mr. Wolfe petitioned for federal habeas corpus relief in the United States District Court for

the Eastern District of Virginia, raising his actual innocence as a reason to excuse the procedural default of any substantive claims, as recognized in *Schlup v. Delo*, 513 U.S. 298 (1995) (holding that where a "habeas petitioner . . . show[s] that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent,'" that actual innocence serves as a gateway to the consideration of otherwise defaulted substantive claims). Judge Raymond Jackson considered Mr. Wolfe's *Schlup* claim and determined that he had satisfied the actual innocence standard. *Wolfe v. Johnson*, No. 2:05cv432, 2010 U.S. Dist. LEXIS 144840, *20 (E.D. Va. Feb. 4, 2010). This finding was compelled by extensive documentary evidence submitted by Mr. Wolfe. Most significantly, several affidavits attested to the fact that Mr. Barber in fact had committed the murder of Mr. Petrole without Mr. Wolfe's instigation and without his knowledge.

4. Mr. Wolfe's convictions for the 2001 indictments were set aside by the District Court. *Wolfe v. Clarke*, 819 F. Supp. 2d 538, 574 (2011). In vacating Mr. Wolfe's convictions, the District Court made extensive legal holdings and factual findings regarding the injustices perpetrated in this case. In addition to numerous *Brady* violations. the District Court found that the Commonwealth had violated Mr. Wolfe's constitutional rights by knowingly and intentionally presenting false testimony against him in contravention of *Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Furthermore. the District Court found that the prosecution in Mr. Wolfe's case could not "claim that they were unaware of the falsities in Barber's

testimony in light of the exculpatory information in its possession at the time of the trial" and that the Commonwealth "had notice that Barber's trial testimony implicating Wolfe was false." *Id.* at 571. The Court observed that Mr. Ebert himself had testified "that he employs a practice of withholding information from counsel and defendants with the intent of preventing them from establishing a defense" and that this acknowledgment "shows 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.*

5. The District Court found the case against Mr. Wolfe to be "circumstantial" and "best [] described as tenuous." *Id.* at 564. The constitutional violations against Mr. Wolfe were not mere technicalities; as the District Court observed, "[t]he Commonwealth stifled a vigorous truth-seeking process in this criminal case." *Id.* at 571.

6. Almost immediately after the release of the District Court's opinion. Mr. Wolfe was moved from Death Row to segregation under circumstances the District Court considered suspicious. The Court rejected the Director's supposed reasons for transferring Mr. Wolfe to segregation "given the inconsistent rationales and the uncontroverted evidence of the transfer's effects on Wolfe." *Wolfe v. Clarke*, 819 F. Supp. 2d 574, 588 (2011). The Court noted that the transfer had a "punitive" effect, and determined that "[t]he Court deems 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." *Id.* The Court

ordered the alternative relief requested by Mr. Wolfe, which was that he be transferred back to Death Row and that his employment and privileges be restored. *Id.*

7. On August 16, 2012, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's grant of habeas relief, reiterating Judge Jackson's conclusion that the conduct of the Prince William County prosecutors in obtaining Mr. Wolfe's 2002 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 soundly reprimanded the Commonwealth:

> [I]t is difficult to take seriously the Commonwealth's protestations of unfair ambush, when Wolfe had to labor for years from death row to obtain evidence that had been tenaciously concealed by the Commonwealth, and that the prosecution obviously should have disclosed prior to Wolfe's capital murder trial.

*Id.* at 422. Additionally, the Fourth Circuit felt "compelled to acknowledge that the Commonwealth's suppression of the Newsome report, as well as other apparent Brady materials, was entirely intentional." *Id.* The Fourth Circuit described Mr. Ebert's rationale—that he purposefully avoided providing information that could be used "to fabricate a defense"—as a "flabbergasting explanation," and found that the District Court had "rightly lambasted" the Commonwealth's conduct in Mr. Wolfe's case. *Id.*

The Court pointed out that in an earlier case arising out of Prince William County, it had similarly "refus[ed] to condone the suppression of evidence by the Prince William County 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)). The Fourth Circuit concluded, "[w]e sincerely hope that the Commonwealth's Attorney and his assistants have finally taken heed of those rebukes." *Id.*

9. On September 13, 2012, Mr. Ebert and Mr. Conway's *ex parte* motion to recuse themselves and to appoint Mr. Raymond Morrogh as special prosecutor was granted. The very next day, Mr. Morrogh asserted in this Court that he had only reviewed materials from the thoroughly discredited 2002 trial, yet affirmatively stated that "this Defendant 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." 2012-10-31, Hr'g Tr. At 24:15-17, 20-21. Because Mr. Morrogh had only reviewed the 2002 trial, however, he was presumably unaware of the nature and extent of the evidence withheld from Mr. Wolfe, as well as the false testimony offered against him.

10. On October 1, 2012, Mr. Morrogh again presented these cases to a Prince William County Grand Jury, which returned no fewer than six additional charges to append to the original three. Two of the new indictments—CR12003734-00 and CR12003735-00—allege that Mr. Wolfe "was one of several principal administrators, organizers or leaders

of a continuing criminal enterprise" in violation of Virginia Code § 18.2-248(H1), (H2) (Virginia's version of the federal "Drug King Pin Act"). Additionally, the Commonwealth now alleges that Mr. Wolfe is guilty of capital murder "by direction or order of one who is engaged in a continuing criminal enterprise." *See* Indictment C212003732-00. Thus, after wrongfully convicting Mr. Wolfe under a murder-for-hire theory, imprisoning him on death row for a decade, and obstructing his efforts to discover evidence of his innocence and the constitutional violations against him, the Commonwealth now not only purports to change the theory under which it will prosecute Mr. Wolfe, but also seeks convictions and sentences even more severe than those successfully challenged by Mr. Wolfe in federal court.

**ARGUMENT**

The indictments brought against Mr. Wolfe on October 1, 2012, must be dismissed because they constitute a vindictive prosecution in violation of the Due Process Clause of the Fourteenth Amendment. Due process requires that a defendant who has successfully challenged his conviction must not be subjected to harsher charges or penalties as a consequence. *Blackledge v. Perry*, 417 U.S. 21 (1974) (holding that reindicting a defendant on more serious charges after he successfully challenges his conviction on a prior indictment is a due process violation). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

Of course, a prosecutor may not bring charges with a vindictive motive, since "penalizing those who choose to exercise constitutional rights, 'would be patently unconstitutional.'" *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969), *overruled in part by Alabama v. Smith*, 490 U.S. 794 (1989)[1] (quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968)). The constitutional bar on vindictive prosecutions, however, is not limited to cases in which the defendant can prove a vindictive motive. *Blackledge v. Perry*, 417 U.S. 21, 28 (1974); *United States v. Goodwin*, 457 U.S. 368, 381 (1982). Rather, once a defendant demonstrates that the prosecutor increased charges after the defendant exercised a constitutional or statutory right, the court will presume vindictiveness on the part of the prosecutor. *Goodwin*, 457 U.S. at 381 (1982); *United States v. Wilson*, 262 F.3d 305, 319 (4th Cir. 2001) (noting that typical vindictive prosecution claims arise in situations where "the decision was made not to try the defendant on an additional available charge later brought only after the defendant's successful appeal").

This presumption is rooted in the fundamental tenet that the defendant is entitled to pursue his rights "without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly

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[1] In *Smith*, the Court held only "that no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial." 490 U.S. at 795. *Smith* is limited to the plea-bargaining context and leaves un-disturbed the presumption of vindictiveness that arises in the retrial context.

increased potential period of incarceration." *Duck v. Commonwealth*, 8 Va. App. 567, 572 (1989). "For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." *Goodwin*, 457 U.S. at 372. The United States Supreme Court in *Pearce* first articulated the due process rationale barring vindictive prosecutions of this very nature, stating that "the very threat inherent in the existence of such a punitive policy would. with respect to those still in prison, service to 'chill the exercise of basic constitutional rights.'" *Id.* at 724 (citations omitted) (second and third alterations in original). Thus the constitutional bar on vindictive prosecutions arises from "the danger that the State might be retaliating against the accused for lawfully attacking his conviction." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1977).

A presumption of vindictiveness arises from additional or more severe charges brought on retrial because "a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision." *Goodwin*, 457 U.S. at 381. This is a commonsense presumption reflecting the fact that "certainly by the time a conviction has been obtained[.] it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination . . . of the extent to which he should be prosecuted." *Id.* "Thus, if a prosecutor responds to a defendant's successful exercise of his right to appeal by bringing a more serious charge against him, he acts unconstitutionally. Such retaliatory conduct amounts to vindictive prosecution and is unconstitutional."

*United States v. Wilson*, 262 F.3d 305, 314 (4th Cir. 2001).

Where more severe charges are brought on retrial, "the burden shifts to the government to present objective evidence justifying its conduct." *Id.* at 315 (citing *Goodwin*, 457 U.S. at 374, 376 n.8). The burden is on the government because "[m]otives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to 'presume' an improper vindictive motive." *Goodwin*, 457 U.S. at 373. In *Blackledge*, the United States Supreme Court applied this analysis to a prosecutor who sought more severe charges in a trial *de novo*, holding "that the likelihood of vindictiveness justified a presumption that would free defendants of apprehension of . . . a retaliatory motivation on the part of the prosecutor." *Id.* at 376. Because the rule is designed to ensure that defendants are free to exercise their constitutional rights to challenge their convictions, "[t]he Court emphasized in *Blackledge* that it did not matter that no evidence was present that the prosecutor had acted in bad faith or with malice in seeking the felony indictment." *Id.* The presumption of vindictiveness is not only a commonsense rule, but also a burden-shifting device necessary to counteract subconscious institutional biases operating against the previously convicted defendant:

> Both *Pearce* and *Blackledge* involved the defendant's exercise of a procedural right that caused a complete retrial after he had been once tried and convicted. The decisions in

> these cases reflect a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of *stare decisis*, res judicata, the law of the case, and double jeopardy are all based, at least in part, on that deep-seated bias. While none of these doctrines barred the retrials in *Pearce* and *Blackledge*, the same institutional pressure might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain a retrial of a decided question.

*Id.* at 376-77.

The Fourth Circuit has applied these principles in circumstances similar to those in Mr. Wolfe's case. *See, e.g., United States v. Johnson*, 537 F.2d 1170 (4th Cir. 1976). In *Johnson*, the Fourth Circuit vacated a defendant's convictions for two narcotics charges. On retrial, the prosecution re-indicted, retried, and convicted the defendant on additional charges, only one of which had appeared in the initial indictment. The Fourth Circuit vacated the convictions for all but the latter charge, finding that the circumstances gave rise to a presumption of a vindictive prosecution. *Id.* at 1171-74. The Fourth Circuit rejected the contention that the indictments were warranted by new information not known to the prosecution at the time of the offense, acknowledging that "instead of simply assessing the prosecutor's knowledge at the time the original indictment was returned, as the government suggests, we must examine all circumstances of [the

defendant's] situation." *Id.* at 1173.[2] The Court expressly found that there was no evidence of retaliatory motive; however, the presumption applied. Thus, "[a]fter [the defendant] successfully challenged his conviction on the first indictment his prosecution on the increased charges of the superseding indictment denied him due process of law." *Id.* The single overlapping indictment could only be "affirmed because it is *identical* to count one of the first indictment and the court imposed the same punishment." *Id.* at 1173-74.

The presumption of vindictiveness may bar new indictments on retrial that are additional to or more severe than the original indictments brought against a defendant who successfully challenges his convictions. *See, e.g., id.*; *United States v. Hill*, 93 F. App'x 540, 546 (Court? 2004) (observing that "'generally a potentially vindictive superseding indictment must *add additional charges* or substitute more severe charges based on the same conduct'") (quoting *United States v. Suarez*, 263 F.3d 468, 480 (6th Cir. 2001) (emphasis added)): *United States v. Wilson*, 262 F.3d 305, 314 (Court? 2001) (noting that the typical vindictive prosecution case is one in which "at the time the prosecutor initially tried the defendant the decision was made not to try the defendant on an additional available charge later

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[2] The individual prosecutor need not be the same for a vindictive prosecution challenge to lie. Rather, "most successful vindictive prosecution claims involve retaliatory prosecutions by the same sovereign that earlier brought the defendant to trial." *United States v. Woods*, 305 F. App'x 964, 967 (4th Cir. 2009) (citing *Goodwin*, 457 U.S. at 381).

brought only alter the defendant' s successful appeal . . . [i]n that situation . . . an inference may be drawn that the prosecutor's decision making was influenced by the only material fact different the second time around—the defendant's successful appeal of his original conviction"); *United States v. Williams*, 47 F.3d 658, 660 (Court? 1994) ("[A] prosecutor cannot reindict a convicted defendant on more severe charges after the defendant has successfully invoked an appellate remedy."); *United States v. Whitley*, 734 F.2d 994 (Court? 1984) (holding that the imposition of a harsher sentence on retrial after the defendant successfully challenged his conviction for a lesser-included offense was a due process violation); *United States v. Belcher*, 762 F. Supp. 666, 668–670 (W.D. Va. 1991) (barring new indictments for conspiracy and use of a firearm in furtherance of the conspiracy after the defendant successfully challenged his original conviction on one count of manufacturing marijuana, and holding that the defendant could not be tried "for anything more than a single count of manufacturing marijuana"); *Barrett v. Commonwealth*, 268 Va. 170, 177–78 (2004) (noting that the presumption of vindictiveness applies where "the enhanced charge or punishment was directly related to the reversal on appeal of the initial charge," not where a different victim is alleged); *Battle v. Commonwealth*, 12 Va. App. 624, 629 (Va. Ct. App. 1991) (reversing convictions where "the enhanced charges brought against [the defendant] were in direct response to [his] successful suppression motion"); *Duck v. Commonwealth*, 8 Va. App. 567 (Va. Ct. App. 1989) (reversing conviction where harsher charges were brought upon de novo appeal to circuit court); *see also*

*United States v. DeMarco*, 550 F.2d 1224 (9th Cir. 1977) (dismissing new indictment on more severe charges that were based on the same facts underlying the original indictment).

A presumption of vindictiveness thus applies to the new indictments brought against Mr. Wolfe. Each of the new indictments is a more severe charge or an additional charge brought in response to Mr. Wolfe's successful petition for habeas corpus relief. In 2001, Mr. Wolfe was charged with conspiracy to dispense marijuana, capital murder for hire, and use or display of a firearm in the commission of murder. Now, in 2012, he stands charged for the 2001 indictments, plus two new and additional continuing criminal enterprise ("CCE") charges, a new and additional capital murder charge contingent on the CCE charges, a new and additional felony murder charge, a new and additional charge for use or display of a firearm in the commission of or attempt to commit a robbery, and an additional charge for use or display of a firearm in the commission of murder. Each of these is a new and additional charge. Only one charge—use or display of a firearm in the commission of murder—is identical to a charge that Mr. Wolfe previously faced. As discussed in Belcher and Johnson, however, the Commonwealth can only pursue a single charge that replaces an identical prior indictment. A presumption of vindictiveness attaches to this charge due to the fact that the Commonwealth has now indicted Mr. Wolfe on two charges of use or display of a firearm.

Indictments CR12003734-00 and CR12003735-00 are both much harsher indictments based on the same set of circumstances as alleged in the 2001 conspiracy

charge. Having sought and received a maximum penalty of thirty years against Mr. Wolfe for a charge of conspiracy to distribute more than five pounds of marijuana, the Commonwealth now seeks to impermissibly increase the severity of his drug-related charges in retaliation for the exercise of his constitutional rights, hoping to secure a life sentence. Now that Mr. Wolfe has received habeas corpus relief, the Commonwealth alleges that he "was one of several principal administrators, organizers or leaders of a continuing criminal enterprise." Such charges are plainly barred under the vindictive prosecution doctrine, and a presumption of vindictiveness applies to these charges under Blackledge and the other authorities cited herein.

Additionally, because capital murder indictment CR12003732-00 relies on the predicate of a continuing criminal enterprise, it is dependent upon those indictments and a presumption of vindictiveness applies to it. This capital murder charge is not identical to the 2001 capital murder indictment; rather, it is part of an indictment strategy designed to expose Mr. Wolfe to the much harsher penalties faced by an alleged organizer of a continuing criminal enterprise. Finally, the presumption applies because it is an additional indictment, subjecting Mr. Wolfe to two charges of capital murder instead of a single charge. Similarly, indictment CR12003733-00 is an additional indictment for use or display of a firearm in the commission of murder, and thus the presumption of vindictiveness applies to the Commonwealth's attempt to subject Mr. Wolfe to multiple charges based on the same facts for which he previously faced only a single charge.

Indictments CR12003736-00 and CR12003737-00 allege, respectively, a new and additional felony murder charge and a new and additional charge for use or display of a firearm in the commission of or attempt to commit a robbery. These indictments are also plainly barred by the vindictive prosecution doctrine, and a presumption of vindictiveness arises. Mr. Wolfe has never faced a felony murder charge before, yet he is now charged with three separate and different counts of murder. Similarly, he has never been charged with use or display of a firearm in the commission of or attempt to commit a robbery, yet now he is indicted for three separate and different firearms charges. All of the 2012 indictments are based entirely on the events for which the Commonwealth originally indicted Mr. Wolfe in 2001, yet each indictment now presents a harsher charge or an additional charge to which Mr. Wolfe was not previously subject. Because the Commonwealth is seeking additional charges and more severe charges, a presumption of vindictiveness applies to all of the 2012 indictments.

Finally, the Commonwealth cannot rebut the presumption of a vindictive prosecution. As discussed in the procedural history above, Mr. Wolfe was originally indicted for charges related to these events in 2001. He was convicted on all of these charges in a trial fraught with due process violations that deprived him of any opportunity to defend himself. Mr. Wolfe sought and received federal habeas corpus relief, which was granted in a scathing opinion by the District Court and upheld by another scathing opinion by the Fourth Circuit. These opinions note that the Prince William County Commonwealth's Attorneys likely violated ethical rules in Mr. Wolfe's case, that

they were not credible witnesses, that the prosecution's actions were "abhorrent to the judicial process," that their explanations were "flabbergasting," and that it was time for them to finally heed the Fourth Circuit's rebukes and cease their pattern of constitutional violations.

After the Fourth Circuit issued its mandate on September 7, 2012, on September 11, 2012. Mr. Ebert, Mr. Conway, and Mr. Newsome visited Owen Barber in prison. Although Mr. Barber maintained that his testimony exculpating Mr. Wolfe was true, the prosecutors continued to push Mr. Barber. They informed him that his case and Mr. Wolfe's were back at "square one" and that he could face increased penalties. Tellingly, the prosecutors informed Mr. Barber that he could face substantially the same charges on which Mr. Morrogh later indicted Mr. Wolfe. Perhaps most importantly, however, the Commonwealth discussed with Mr. Barber the fact that the reversal of Mr. Wolfe's case has had personal repercussions for them, and the fact that their reputations have been harmed.

Only after that meeting, on September 13, 2012, did Mr. Ebert and Mr. Conway file an *ex parte* motion to recuse themselves and to appoint Mr. Raymond Morrogh as special prosecutor, acknowledging their disqualification. The motion was granted and Mr. Morrogh was appointed. The very next day, Mr. Morrogh asserted in this Court that he had only reviewed the transcript from the thoroughly discredited 2002 trial, yet affirmatively stated that "this Defendant 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." 2012-10-31, Hr'g Tr. at 24:15-17, 20-21. Mr. Morrogh never disclosed, nor even mentioned, additional investigatory efforts on the part of the Commonwealth. Having no time to conduct an additional investigation, it is plain that the current prosecution decided to bring additional and more severe charges against Mr. Wolfe based solely on evidence from Mr. Wolfe's first tainted trial. Under these circumstances, the Commonwealth could not possibly rebut the presumption of vindictiveness that attaches to the new indictments.

**CONCLUSION**

WHEREFORE, for the foregoing reasons, this Court should dismiss the October 1, 2012 indictments brought against Mr. Wolfe.

Respectfully submitted.

JUSTIN MICHAEL WOLFE

By Counsel

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* * *

*Appendix F*

*Excerpt of Transcript*

**VIRGINIA**

**CIRCUIT COURT OF**
**PRINCE WILLIAM COUNTY**

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Criminal Case Nos.: CR05050489, CR05050490,
CR05050703, CR12003732, CR12003733,
CR12003734, CR12003735, CR12003736

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COMMONWEALTH OF VIRGINIA,

-vs-

JUSTIN MICHAEL WOLFE,

*Defendant.*

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December 11, 2012
Filed January 2, 2013
Circuit Courtroom 3
Prince William County Courthouse
Manassas, Virginia

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The above-entitled matter came on to be heard before THE HONORABLE MARY GRACE O'BRIEN, Judge, in and for the Circuit Court of Prince William County, in the Courthouse, Manassas, Virginia, beginning at 10:06 o'clock a.m.

* * *

[3] * * * THE COURT: Good morning, folks. We are on the record in the case of the Commonwealth versus Justin Wolfe. Mr. Wolfe is present in person

with counsel, Mr. MacMahon, Ms. McGarrity and Ms. Irving. And Mr. Morrogh and Mr. Lingan are here for the Commonwealth.

I have five motions before me, folks. Motion to exclude testimony from a prior trial, motion to exclude expert testimony, motion to dismiss indictments constituting a vindictive prosecution, motion for issuance of witness subpoenas for Paul Ebert and Richard Conway to testify at Mr. Wolfe's trial and motion for issuance of witness subpoenas for Paul Ebert and Richard Conway to testify at a pretrial hearing next Tuesday.

Am I missing anything?

MS. IRVING: No, Your Honor.

THE COURT: All right. That's good. And thank you all. I did get the opportunity to get the motions, the briefs, the oppositions and review all of them as well as hopefully review all of the attached exhibits.

* * *

[143] So it's fair for us to treat it as if it doesn't exist. Finally, Your Honor, the Commonwealth really hasn't responded at all to the point that even without the reports, setting that issue aside, the content of what remains in their notice does not include the actual opinions of these experts and the basis and reasons for them. Thank you, Your Honor.

THE COURT: Thank you. The last motion that you all have is the last motion for today. It is the motion to dismiss the indictments as constituting a vindictive prosecution.

MS. IRVING: Your Honor, I want to let the Court know that I will be calling to the stand, Detective Newsome in this case.

And I'm not sure if the Commonwealth intends to call him but I would ask for a rule on witnesses in case they decide there's an evidentiary burden that they need to meet.

THE COURT: Okay.

Mr. Lingan, Mr. Morrogh, do you folks plan to call any witnesses?

MR. LINGAN: No, Your Honor.

THE COURT: Okay.

[144] MR. LINGAN: I think there is a dispute over how far this motion goes and if the Court views it as going to a certain extent, I think we would ask for a separate evidentiary hearing.

That being, if the Court feels that there's a presumption raised, we would ask for a separate evidentiary hearing but obviously we feel that that is not the issue.

So I think that is the first hurtle and in that realm, we do not anticipate calling witnesses, Your Honor, at least none beyond Detective Newsome that are present.

THE COURT: Okay. I understand your position. Okay. Ms. Irving, go ahead, ma'am.

MS. IRVING: Your Honor, I call Detective Newsome to the stand.

THE COURT: Detective Newsome, come on up to the witness stand then.

Whereupon

SAMSON NEWSOME

a witness, was called for examination by counsel on behalf of the Defendant, and after having been duly sworn by the Clerk of the Court, was examined and testified, as [145] follows:

DIRECT EXAMINATION

BY MS. IRVING:

Q Please introduce yourself for the Court, sir.

A Samson C. Newsome.

Q Detective Newsome, are you employed?

A Yes, ma'am, I am.

Q For how long have you been employed?

A Currently?

Q Yes, sir.

A Since September.

Q Of this year?

A I'm sorry, ma'am.

Q Of this year?

A Yes, ma'am.

Q What date did you -- or where are you employed right now?

A Prince William County Police Department.

Q And when did you start your current tour, if you were.

A I don't recall the exact day. It as the first week of September.

Q You were previously employed by the Prince [146] William County Police Department?

A Yes, ma'am.

Q In what capacity?

A Prior to retiring, I was employed as a police officer. I retired as a Master Detective.

Q For what years were you employed there?

A From 1980 to 2010 but 2008 is when I first retired.

Q And did you have an opportunity to work on the case that we're here now, the original charges back in 2001?

A Yes, ma'am, I did.

Q And what was your role in the case at that time?

A I was a Detective assigned to the case. I was not the case agent. I was just one of the Detectives.

MS. IRVING: Your Honor, may I approach?

THE COURT: Sure.

BY MS. IRVING:

Q Detective Newsome, I'm handing you three pages.

Can you look at them and tell the Court what those are?

[147] A Yes, ma'am.

These appear to be Grand Jury indictments.

Q Okay.

And who are they against?

A Are three of these are against Justin Wolfe.

Q Is this a fair and accurate depiction of the indictments as they stood in the charges for 2001?

A I don't think I have seen these indictments specifically before.

Q Do you know what he was charged with in 2001?

A Yes, ma'am.

Q And what was he charged with?

A They are representative of what he was charged with.

Q Okay.

And how many are there?

A There are three of them.

Q Okay.

Can you tell this Court, for the record, what is the maximum punishment for capital murder?

A I'm sorry. I can't hear well.

Q What is the maximum punishment for capital murder?

[148] A One more time, please.

Q What is the maximum punishment for capital murder?

A Execution.

Q What about use of a firearm in the commission of a felony?

A I believe it's 20 years.

Q How about conspiracy to dispense marijuana as it's written in the third indictment?

A That one I don't know.

Q Do you do a lot of drug cases?

A I don't do many drug cases at all, ma'am.

MS. IRVING: Your Honor, I'd ask the Court to receive these as Defense 1.

THE COURT: Any objection?

MR. LINGAN: No, ma'am.

THE COURT: Okay. Thank you. They'll be

introduced as Defense 1 for this motion.

MS. IRVING: Thank you, Your Honor.

(The documents referred to above were marked as Defendant's Exhibit No. 1 for identification [149] and admitted into evidence.)

BY MS. IRVING:

Q Detective Newsome, have you followed this case as it has gone through the Federal level courts?

A Only to the extent of my involvement, ma'am.

Q Are you aware at all of what happened in the Federal Courts?

A Yes, ma'am.

Q Okay.

Are you aware of what the end results of the hearings in Federal Court were?

A Yes, ma'am.

Q And what is that?

A That they were sent back -- the convictions were overturned and it was sent back to State Court.

MS. IRVING: Your Honor, Courts indulgence. I've handed something to the Commonwealth.

MR. LINGAN: No objection, Your Honor.

MS. IRVING: Okay.

Your Honor, if I may, I don't know if the Detective will have any knowledge of this but I'd ask the Court to receive this as Defense 2. That's the order from the Federal Courts.

[150] THE COURT: Obviously 2011 order from Judge Jackson.

MS. IRVING: Yes, Your Honor.

THE COURT: That will be Defendant's 2.

(The document referred to above was marked as Defendant's Exhibit No. 2 for identification and admitted into evidence.)

BY MS. IRVING:

Q It's fair to say shortly after that order you were rehired with the Police Department; is that correct?

A When you say shortly after the order, I'm not sure when the order was, ma'am.

Q The order we just handed up was August of 2011, I believe actually, so the next year you were rehired?

A In September of 2012.

Q 2012?

A Yes, ma'am.

Q Okay.

At the time that you were rehired, did you start reinvestigating this case again?

[151] A Yes, ma'am.

Q And when you started investigating the case, who were the prosecutors on the case?

A Mr. Ebert and Mr. Conway.

Q And can you describe for the Court what you all did on September 11th of this year?

A Yes, ma'am. We traveled to Augusta Correctional Center or the Augusta Center, it's under Virginia Department of Corrections, to interview Mr. Owen Barber.

Q Okay.

And did you have that interview?

A Yes, ma'am, we did.

Q Okay.

And were you present for the entire interview?

A Yes, ma'am, I was.

Q And who was in the room with you, sir?

A It was myself, Mr. Conway --

MR. LINGAN: Your Honor, I would object at this point to relevance. It's already been established in prior hearings through this witness that Mr. Morrogh was not even involved and myself was not involved in this meeting.

[152] This is a case of prosecutorial vindictiveness on the new charges which were brought by Mr. Morrogh as a special prosecutor.

THE COURT: Ms. Irving.

MS. IRVING: Your Honor, I believe that some of the statements, and I will tell the Court, I only intend to ask about three questions regarding that meeting, that Detective Newsome was there.

But I do believe that it is relevant testimony to the prosecution as it stands. I can certainly bring it up on rebuttal if I need to, if Your Honor doesn't want to hear it now.

THE COURT: I don't think it's relevant at this point unless there's some question elicited on cross examination that would require you to bring it up as rebuttal.

I would certainly allow you to do that but at this point on this motion with regard to these charges, I'm going to sustain the Commonwealth's objection.

MS. IRVING: May we approach so I can make a proffer of what I was going to ask the Detective in the next question, Your Honor.

THE COURT: If you were going to make a [153] proffer, then you ask him, he answers and it's on the record. That's the way you'd have to proceed. But I would disregard the answer.

MS. IRVING: May I do that?

THE COURT: Certainly.

BY MS. IRVING:

Q In the course of this meeting do you recall Owen Barber asking Mr. Conway how could you charge me again for murder?

A Yes, ma'am, I do.

Q Do you recall Mr. Conway answering that question?

A Yes, ma'am, I do.

Q Do you recall him answering the question saying that he could charge him for murder in the course of a killing for hire, murder in the course of an attempted robbery, murder in the course of a drug conspiracy?

A Can I refer to the transcript you provided?

Q If Your Honor will --

THE COURT: Well just answer to the best of your recollection because I have excluded as evidence but counsel is making a record.

[154] THE WITNESS: To the best of my recollection, he laid out some of the elements in which one could be charged for capital murder.

BY MS. IRVING:

Q And so he laid out new charges that Mr. Barber could face, new theories of the case?

MR. LINGAN: Your Honor, I object. That's all -- one, that would be leading; two, it's not relevant; and three, it's not what is on the tape.

THE COURT: Well I am going to sustain the objection. The proffer was you had two or three

questions. I sustain the objection. So none of this evidence is being considered by the Court for this motion.

You had a proffer that you had two or three questions which would be relevant to this motion and you have asked a couple of questions and I think the ruling stands. The objection on the last question is sustained based on the leading.

I'm going to ask you to move on with regard to the admissible evidence.

MR. LINGAN: Your Honor, if I could also ask, we object to that proffer as well, Your Honor. As Mr. Morrogh stated in the past, we've -- the case law says if [155] you don't object to the proffer, then it still becomes part of the case.

THE COURT: I understand.

MR. LINGAN: For appellate purposes, we believe the tape speaks for itself, that this would be improper on its foundation as well to ask Detective Newsome his recollection when we have the tape and it can be authenticated through him and submitted for the Court to hear.

And so that's why we would further object to the proffer.

THE COURT: I sustain the objection. I've accepted the proffer. I note the objection to the proffer. So I'll ask you to go on.

BY MS. IRVING:

Q Detective Newsome, have you continued to work on this case?

A Yes, ma'am, I so.

Q And are you aware of what happened on October 1st of this year?

A Could you --

Q Are you aware of what happened in the Grand Jury on October 1st of this year?

[156] A That Mr. Wolfe was indicted.

MS. IRVING: May I approach, Your Honor.

THE COURT: Sure.

BY MS. IRVING:

Q I ask you to look at those six pieces of paper and tell me if you recognize them.

(Whereupon, Ms. Irving handed documents to the witness for his examination.)

A Yes, they are indictments, Grand Jury indictments.

Q And are those indictments the indictments that were brought down against Mr. Wolfe in this case?

A Yes, ma'am, they are.

Q And how many of them are there?

A There are six of them.

Q If I can take you through, the first indictment is for capital murder; is that correct?

THE COURT: It will say it up on the right-hand side.

THE WITNESS: I'm sorry, ma'am.

THE COURT: It will say it up on the right-hand side.

THE WITNESS: Yes, ma'am.

[157] THE COURT: Okay.

BY MS. IRVING:

Q And you already stated the punishment, maximum punishment for that is execution?

A Yes, ma'am.

Q The second indictment is for use or display of a firearm in the commission of a felony.

Do you know what the maximum punishment for that is?

A Yes, ma'am, I believe it's 20 years.

Q The third indictment, what do you see that indictment to be?

A Drug distribution, continuing criminal enterprise.

Q Are you aware at all what the possible punishment for that would be?

A No, ma'am.

Q Are you aware as to whether or not it would be a higher punishment than just conspiracy to distribute marijuana?

A My logical assumption is that it would be a higher penalty.

Q What is the next indictment?

[158] A Drug distribution, continuing criminal enterprise.

Q Okay.

And is that brought under a second section under the Code of Virginia? Do you see on the bottom?

A Under a separate code section, is that the question?

Q Yes.

A What I'm seeing here is 18.2-248 and that's the same one that I'm seeing on the second one 18.2-248.

Q Is the first one under H1 and the second one under H2?

A Hl and H2, yes, ma'am.

Q Are you aware what the maximum punishment for somebody convicted under that 18.2-248(H2) code is?

A No, ma'am.

Q Would it surprise you if it was a maximum of life?

A No, ma'am.

Q Would it surprise you if it was a minimum of life?

A No, ma'am.

Q And the next indictment is another murder [159] indictment; is that correct?

A Yes, ma'am.

Q And are you aware of what the maximum punishment for this count is?

A During the commission of or attempted of robbery is capital.

Q Are you aware of the following charge, the last charge?

A Use of a firearm in the commission of a felony, yes, ma'am.

Q Okay.

And that use of a firearm would also be the same punishment you previously testified to?

A I'm sorry.

Q The use of a firearm, it would be the same punishment as you previously said; is that correct?

A Yes, ma'am.

Q Detective Newsome, if I could draw your attention to the indictment ending in 36, you indicated that that was another murder charge, you indicated that was a capital murder charge.

A The final charge?

Q Yes.

[160] A Yes, ma'am.

Q Okay. I'll leave that alone.

MS. IRVING: Your Honor, may I --

THE COURT: Sure.

MS. IRVING: I'd ask that the Court receive these as Defense 3.

THE COURT: Any objection from the Commonwealth?

MR. LINGAN: Your Honor, I would just ask for the record, the last one to be read to the Court.

THE COURT: It's felony murder, I believe.

MS. IRVING: Yes, Your Honor.

THE COURT: Just on the record, yes.

MS. IRVING: I was going to fix that.

THE COURT: They've been introduced. I'll accept them to be introduced and note for the record that the last indictment is a charge of felony murder.

MR. LINGAN: Thank you, Your Honor.

(The document referred to above was marked as Defendant's Exhibit No. 3 for identification and admitted into evidence.)

[161] BY MS. IRVING:

Q Detective Newsome, you were originally involved in this case in 2001 and 2002 and then you indicated that you retired in 2010; is that correct?

A Yes, ma'am.

Q In the course of that time after the conviction of Mr. Wolfe in 2002, did you do any new investigation of Mr. Wolfe?

A Between then and now?

Q Between then and when you retired.

A Could you ask me that question again, please?

Q Sure.

There was a trial in 2002 for these charges; is that correct?

A Yes, ma'am.

Q And you were part of that trial; correct?

A Yes, ma'am.

Q Okay.

At the close of that trial up until the time you retired, what if any investigation did you do into Justin Wolfe and the Danny Petrole murder?

A There was no other investigation that I'm aware of. I didn't participate.

[162] Q Okay.

At the time that you were hired again in 2012, from the time you had retired, had you done any sort of independent investigation into this case?

A No, ma'am. I testified in Federal Court but I didn't do any investigation. I reviewed my reports, my notes, things of that nature.

Q But everything that you testified to at Federal Court was regarding information that you had back in your original investigation; is that correct?

A Yes, ma'am.

Q And is it fair to say that up until the time you got back here and these cases came back to Prince William County in September of 2012, there was no further investigation into the charges that you know of?

A That I was a part of, no, ma'am.

MS. IRVING: Your Honor, at this point, I have no more questions for Detective Newsome though I may later on in the hearing.

THE COURT: Mr. Lingan.

MR. LINGAN: Thank you, Your Honor.

[163] CROSS EXAMINATION

BY MR. LINGAN:

Q Detective Newsome, fair to say you've never gone to law school?

A No, sir.

Q And you're not a lawyer?

A No, sir.

Q And you would defer to a lawyer's understanding of what the maximum punishment is for certain crimes as opposed to your own? If a lawyer told you it was something different, you would defer to the lawyer; right?

A Yes, sir.

Q Okay.

And that goes with respect to use of a firearm in the commission of a felony as well?

A Yes, sir.

Q Okay.

So you'd actually defer to Ms. Irving's knowledge as opposed to your own?

A Yes, sir.

Q Okay.

And the Judge's knowledge as well?

[164] A Yes, sir.

MR. LINGAN: If I could approach with Defense Exhibit 1 and Defense Exhibit 2 real quick.

May I, Your Honor?

THE COURT: Sure.

Do you have those, Ms. Irving?

MS. IRVING: Your Honor, I gave the Commonwealth their own copies.

MR. LINGAN: For the record, I'm referring to -- just so I'm not wrong, Defense Exhibit 1 is the indictments from the original indictments and Defense Exhibit 2 is the subsequent indictments.

MS. IRVING: I think the subsequent indictments should be Exhibit 3.

MR. LINGAN: Exhibit 3, okay.

THE COURT: Yes, Exhibit 3. Exhibit 2 is the order from District Court.

MR. LINGAN: Oh, I'm sorry, Your Honor.

THE COURT: That's okay.

MR. LINGAN: That's why I always ask.

THE COURT: That's all right. Exhibits 1 and 3.

BY MR. LINGAN:

[165] Q So Defense 1, if you could look down, is it signed by somebody? Do you recognize who that's signed by?

A My Detective Walburn.

Q I'm sorry.

A I'm sorry, by Paul Ebert.

Q Okay.

And there's a signature at the bottom of Defense 3, who is that signed by?

A Mr. Ray Morrogh.

Q Okay.

And back when these charges were originally charged, was Mr. Morrogh involved in the prosecution of that case?

A In 2001, sir?

Q 2001.

A No, sir, he was not to my knowledge.

Q Was I involved in the prosecution of that case?

A No, sir.

Q And in fact, you're aware Mr. Morrogh has been appointed recently in September 13 as a special prosecutor?

[166] A Yes, sir.

Q And to be clear, you said that you testified in the Federal habeas petition during the Federal habeas hearing you testified; is that right?

A Yes, sir, I did.

Q Now additionally there were drug charges that were taken up federally, separate drug charges for other individuals after? What was the timing of that; do you recall?

A I'm sorry.

MS. IRVING: Objection, Your Honor. I don't understand the question.

BY MR. LINGAN:

Q There were Federal drug charges taken up by the Federal Courts; is that correct?

A Subsequent to 2001?

Q Yes.

A From my understanding, there was. I was not involved in it.

Q You were involved just in the investigation of this murder and surrounding that?

A Yes, sir.

Q And you did not continue on with those [167] investigations?

A No, sir.

MR. LINGAN: Thank you, Your Honor. I don't have any further questions.

THE COURT: Anything further on redirect?

MS. IRVING: Not at this time, Your Honor.

THE COURT: Okay. Folks, I'm going to -- thank you, Detective. You may have a seat back in case one of the attorneys wishes to call you back.

THE WITNESS: Thank you, Your Honor.

(The witness stood aside.)

THE COURT: I'm going to need to ask you for 10 minutes because it's three o'clock and I just need to -- I'm hopeful we'll be able to conclude the hearing today.

This was the last motion; is that right?

MS. IRVING: This was the last motion.

THE COURT: Okay. Give me 10 minutes, I'll come back and we'll proceed then. Thank you.

then.

(Recess.)

THE COURT: Okay. We're back on the record then.

Ms. Irving, do you have any argument or how [168] would you like to proceed?

MS. IRVING: Your Honor, in speaking with Mr. Lingan and reading both of our pleadings, the defense pleading comes up to the position that this bringing new charges and the posture of the case as it is, gives rise to a presumption of vindictiveness.

Obviously the Commonwealth's motion opposes that presumption and then goes on to argue that there

is no actual vindictiveness either. If the Court would allow us to bifurcate the argument because I think --

THE COURT: Sure. That makes sense.

MS. IRVING: Thank you, Your Honor.

Your Honor, the procedural history of this case is simple. Mr. Wolfe was charged, tried, convicted, went through his appellate remedies, ran the gamut of them and on a habeas case the Court found enough violations in the first trial to warrant an overruling of those convictions.

They were vacated, it was reversed, remanded back in Court. The Commonwealth of Virginia is the party in both of these proceedings. The Commonwealth in Virginia prosecuted him the first time. The Commonwealth of Virginia is prosecuting him again.

[169] The Commonwealth of Virginia saw fit at the time that he was successful in his appellate remedies to bring more charges and to bring harsher penalties. Now there is some argument within the pleadings as to whether or not there can be harsher penalties for Mr. Wolfe given that he was sentenced to execution in the first place.

And I would suggest to Your Honor that there has never been a case that I've ever seen where there is a constitutional right that is protected for everybody except the person who is charged with capital murder.

And that is actually what the Commonwealth would like to see happen here. They say that because he had this maximum penalty of execution, that the presumption of vindictiveness doesn't apply and I would suggest to the Court that that is an exception

that is one, not justified; two, there's no jurisprudence to suggest that that would be fair.

There's no history to say that that makes any sense within the way that the Courts have enacted and worked hard to protect the rights of the people that are having charges brought against them that seek to end their life.

And I would suggest that it ignores really the [170] procedural posture that we're at here. It's impossible to look at this case without looking at what happened in the District Court and in the Court of Appeals.

And I know you've heard a lot about this but it is highly relevant here to recognize that there are enough rulings that were made in those Courts that one could see the initial charges as being difficult, if not impossible, to gain convictions on.

The Courts have found Giglio violations, Nape violations, Brady violations. They found the Commonwealth's investigation of the case to be lacking. They found the Commonwealth's disclosure of what they found in the investigation to be wholly unsatisfactory under the confines of Brady.

The Federal Courts found that Mr. Wolfe proved a level of actual innocence that allowed him to continue on the process to determine whether or not these violations warranted a remand.

That remand was brought back and it was given an incredibly short time period to do so. And there is argument that still continues in the Federal Circuits as to whether or not those initial three charges can ever be tried.

[171] So to suggest because he had the specter of death the first time, it doesn't count this time ignores the fact that there's the solid chance that those cases either can't be tried or can't be tried in such a way as to guarantee a conviction or to give a reasonable likelihood of a conviction.

So what happens after that is that more charges are brought and the more charges that are brought are not just in number, there's this murder aspect of Danny Petrole that is at issue and there's this drug aspect that is also at issue.

And the Courts have in the earlier proceedings, to some extent, separated them in that there was a dissenting opinion that maybe originally thought maybe the drug charge should stand and not the murder charges.

There's definitely an investigation into the drugs that was separate from the investigation into the murder. It is talked about in the Federal hearings that there was drug files that were never looked at in the Federal orders that came down from Judge Jackson.

As well as the Fourth Circuit Court of Appeals talks about how the Commonwealth hadn't even looked into [172] everything that had been done with regards to the drugs. So you've got these two opposing sides that are moving forward today.

And what happens when this comes back in light of a scathing opinion is that the Commonwealth brings more charges. I have a client. He's charged with three things, granted one of them seeks the specter of death, the other two do not.

The marijuana charge, the Court can take judicial notice I believe was a five to thirty offense. And the new charges that come about, while yes, there's a new capital murder in a whole new theory, and there's a second my client on a felony murder theory.

None of these charges were charged initially. There's no evidence that there was any new investigation that brought forth this new monument of evidence that would overcome some presumption.

And then you have the drug charges that come up when these drug charges are not drug charges for which there's a new investigation. They're absolutely more drug charges than there. They're absolutely punished at a higher level than the conspiracy to distribute marijuana was.

[173] The conspiracy to distribute marijuana is five to thirty and the 18.2-248(H1) is twenty to life. The H2 is a life charge unless you cooperate with the police in which case the Court, in its discretion, can reduce the sentence down to forty years.

There's not anything that can be clearer. The motion as written and filed is not saying that the prosecutors sitting to my left here are actually vindictiveness. And I think that's an important aspect.

The motion that's filed is saying that the posture of the case gives rise to this presumption of vindictiveness. Blackleg is the leading case. It's a 1974 case. And the case bears some mention here.

It's a North Carolina case where a prison inmate had an altercation with another prisoner. He was charged with a misdemeanor. He's convicted of a misdemeanor in District Court. He appealed.

The prosecutor brought a felony indictment. The Defendant ended up pleading guilty to the felony indictment and then brought this vindictive prosecution claim.

So the issue that the Court argued, that the Court said was what they needed to rule on was that does [174] the brining of additional harsher charges when a Defendant exercises his Constitutional rights to appeal violate the due process clause of the Fourteenth Amendment. And it's very simple.

If you bring additional and harsher charges does it violate? And the whole thing is that it does. It wasn't Constitutional permissible for the State to respond to his invocation of his statutory right to appeal to bring a more serious charge against him prior to the trial de novo.

The Courts, the Supreme Court of the United States have previously addressed this sort of vindictive prosecution motion but they had done it with reference to Judges. They had done it with reference to harsher sentencing that was happening if somebody had appealed a case and then was re-sentenced.

Court's indulgence. And the descent [sic] in Blackleg went on to say that what they would have done in that case was to order a re-sentencing of the Defendant, not to do a dismissal charge based on the due process clause.

And the footnote talks in Blackleg and it says that this were a case involving simple an increased [175] sentence violative of the Pearce rule. A remand of the sentencing would be in order.

The holding today, however, is not that Perry was denied due process by the length of the sentence imposed by the Superior Court but rather by the very institution of the felony indictments against him.

And that's what's at issue here, Your Honor. This is not about what happens from here. This is not about what they can charge.

It is about whether in our form in the United States of America, if somebody goes ahead and exercises their Constitutional rights to appeal, should they be then subject or scared or somehow hindered in doing that because the Commonwealth or any state thereof, any agency, Government agency that charges will then go and drop the house on them, throw the book at them, increase the charges, increase the punishment such that it makes people, at that point, not want to go forward with this sort of appellate process for fear of what the retribution is going to be.

And the United States Supreme Court has held very clearly that this is the standard that they're at is that it's not an individual case by case basis. This is a [176] flat out, if you're charged and you win on appeal, and new charges are brought, it is presumed to be vindictiveness.

Now I'm not saying that it can't be overcome but the very nature, the very institution of new felony indictments against him, this is what happened, you had new felony indictments against Pearce. That in and of itself was enough to be found to be a due process violation.

This law has since been reiterated in a number of cases, not many cases where it's happened that it's exactly like Blackleg. I would suggest to Your Honor

that what we have here is a very similar case to the Blackleg case.

In fact, when Virginia first reached this case, I believe it was a case of first impression the Virginia Courts had in the Barrett case. And I think that was the first time that our State Courts addressed this issue and in addressing this issue, they did not find vindictive prosecution, they did not find that there was a presumption of vindictive prosecution in that case but the facts where wholly different.

In that case, there was a drowning of a child and charges were brought for a manslaughter case and some [177] felony child neglect cases for the victim who had been drowned. And the manslaughter case, I believe if I'm remembering correctly, was found not guilty at the trial itself, everything else was convicted and went up on appeal and ultimately the Defendant was successful in appeal.

The charges were dismissed and then subsequently she was re-charged. But the difference was it was a new victim. The parent was not re-charged for new charges with regards to the same person, the same victim that had died. It was with regard to the sibling that was left there watching the child in the bathtub.

And the Court held that that was different because you had a new victim. And that way, the presumption didn't come about. It wasn't the same. So the Commonwealth goes ahead and they list out a number of cases where vindictive prosecution was not found.

However, Your Honor, these cases are not analogous. In fact, the vast majority of cases that they cite are cases that have to do with pleaing.

And the Courts have held that plea negotiations, it's perfectly within the Commonwealth's right to say, listen, I have five charges against you, [178] plead to two or I'm going to bring the next ten that I've just found out about or the next ten that I could have charged in the first place.

Any of that is permissible and the charges in Goodwin is a plea bargaining case. So that actually went up to the United States Supreme Court and that was held that within the context of plea bargaining, this presumption doesn't arise.

There are a number of cases -- the Hill case was also a plea bargaining case. The Barrett case was for different victims. So in those scenarios, there is no presumption. Blackleg is the case. Blackleg is the case that says, if you're successful on appeal, that's the rule.

The rule is, it gives rise to a presumption. And I think that, Your Honor, there is some good language in the Duck case because the Commonwealth makes note, as you heard them ask Detective Newsome, whose name is on the direct indictments.

And in the first set, obviously it was Mr. Ebert and in the second set, it was Mr. Morrogh's name, insinuating as they say in their papers that there's no actual vindictiveness here because Mr. Morrogh was not the [179] prosecutor at the time.

And I would suggest, Your Honor, that that is wholly irrelevant. The Duck Court makes mention --

and actually I'm having trouble finding it right here but I will before this argument's over -- that it doesn't matter if it is a different prosecutor.

It may make a difference if it's a different sovereign and there's been cases where a State case was not found to be a vindictive prosecution when it went up to a Federal case. However, there's been times where a State case has been found to be a vindictive prosecution when it went up to a Federal case, a time when you have similar parties talking.

I think that comes more on an actual vindictiveness case. The fact of the matter is, Mr. Ebert and Mr. Morrogh both represent the Commonwealth of Virginia, frankly, as does Mr. Lingan.

If the Court were to carve out a rule that with different prosecutors there can be no presumption of vindictiveness, it goes against the Supreme Court's rationale that this is -- many of the cases say it has to be held across for everybody.

The rule is the same for everybody. Now [180] normally that is the quote when somebody tries to bring a vindictive prosecution charge and there's been -- it hasn't been more charges or new charges or harsher charges and they say, it doesn't fit. It's got to be exactly like this for the presumption to arise.

We can't just presume. The general presumption is, prosecutors have a wide berth of discretion. However, this is a Constitutional right. Mr. Wolfe had a Constitutional right to appeal his charges. He had a Constitutional right to go up to the State Courts, to the Federal Courts to get his habeas relief that he was granted.

And then when he got back down here, what happened was he got new charges. That's enough to put it within Blackleg and it is irrelevant as to who did it. We're still within the same sovereign. It is still the Commonwealth of Virginia versus Justin Wolfe.

The fact that Mr. Morrogh generally practices out of Fairfax is irrelevant. Mr. Morrogh was actually appointed to be a prosecutor in Prince William County. Even if this Court were to find that because it's different people, the Court would have to acknowledge that prosecutors are substituted out all the time.

[181] We certainly couldn't have a case where one prosecutor handles a case in District Court and another prosecutor handles it in Circuit Court and brings the additional charges and says well, you know, that was Ms. Sylvester's case so there's no vindictiveness here.

I didn't handle it down there. The Courts have found that that's not appropriate. The way the posture of this case stands right now, Mr. Morrogh is assigned to be a special prosecutor for Prince William County.

The Commonwealth of Virginia is the same statewide. Mr. Wolfe exercised his Constitutional rights and the scenario we find ourselves falls directly under Blackleg. And it doesn't have to simply be a higher punishment.

And I think it's important to note, it can also be a cumulative effect. It can also be the fact that there's a lot more charges here, although I would suggest, Your Honor, that -- I would suggest, Your Honor, that all six charges come are deserving to be dismissed if they

cannot rebut the presumption that is laid out on the posture of the case.

But if the Court were not inclined to do that, [182] I would suggest that if nothing else, the drug charges should go because this conspiracy to commit -- be involved in this criminal enterprise, the Commonwealth said earlier, it all stems from the same conduct.

And they said it in their last motion that was done with Mr. MacMahon that all of these things -- on Page 4 of their brief, all these charges stems from that same conduct that was initially charged.

This isn't new stuff. That's what they said. That's in their briefing. It's not new. In fact, I think Mr. Lingan argued that in the last motion when he was talking about why the testimony should be admitted for all of the charges.

Well it's all the same conduct. Well they can't have it both ways. If it's all the same conduct there, it's all the same conduct here. And it wasn't charged first. It was charged after appeal.

And it's the same sovereignty, it's the same County, it's the same prosecutors, the same Commonwealth of Virginia and he was granted Constitutional relief.

I would ask Your Honor to find that based on these facts and this motion, the presumption of vindictiveness arises and I would ask Your Honor to have [183] the Commonwealth have the burden of moving forward.

THE COURT: Thank you, Ms. Irving.

Mr. Lingan.

MR. LINGAN: Well Your Honor, I'm going back to the prior, not too far back from today, but it sounds like we can agree that these all are resulting from the same conduct and thus, counsel's prior argument and the motion to exclude prior testimony, that it's not covered in turn for cross examination, it appears they conceded because that's -- the Commonwealth has --

MS. IRVING: Clearly I would object to that, Your Honor.

THE COURT: I understand. This is argument and I acknowledge they don't agree with the concession.

MR. LINGAN: I would just point out that we're being accused of arguing both ways and in fact, we've been consistent throughout. I would submit that that argument flies in the face of argument that was presented to the Court about three hours ago.

But what I would suggest to the Court is, and I don't have much beyond the pleadings, Your Honor, is that there is no presumption in this case.

I think the Court cannot be -- I think in the [184] Duck case, as I re-read it, and certainly was cited in both pleadings so I'm sure the Court is aware, but I think that's a situation where it was appealed on a DUOS from the General District Court and I think that Commonwealth's office may not be in General District Court proceedings and thus the argument was because the Commonwealth wasn't involved below in the General District Court this trial de novo, which again, Blackleg and all these other cases talk about appeal de novo and trial de novo after a prior proceeding.

So I think that was the argument that Ms. Irving was looking for in terms of a different Commonwealth. But in that case, it's the same office.

In this case, I think it cannot be ignored the procedural history of this case and the argument the Court has already heard and ruled upon in making certain rulings in this case.

If you recall, and I know it can't be easily forgotten, there was a tedious long drawn out motion to get Mr. Morrogh and myself kicked off the case, to have our appointment rescinded and to have the Court appoint a new prosecutor's office.

Through that, I would submit, and I know prior [185] counsel -- it was largely on prior counsel's motion but through that motion, it was suggested that Mr. Morrogh and I guess our office and myself were not acting independently and we were not sufficient, I guess, or that we were somehow tied to the Prince William office.

And the Court found otherwise. The Court found that we were sufficiently independent and we had exercised our independent assessment of the case. As the Court will recall, there was a lot of mention about the bond motion and about the statements presumably made by Mr. Morrogh about the Defendant's guilt and the Court found that it was on Mr. Morrogh's own assessment.

And that's what this is. This is a different posture than the case appealed de novo where a Commonwealth Attorney is coming in for the first time. This is a case where the Commonwealth, as a special prosecutor, has been appointed to prosecutor

the case as he sees fit and to continue the prosecution how he sees fit.

And that's what was done in this case and that's the only thing the record supports. Mr. Morrogh and myself didn't have any involvement in the prior trial at all. The first involvement was after the Court's [186] appointment and the Court has found and there's been no evidence to suggest otherwise.

Additionally, on the face of these charges, Your Honor, they're not more severe than the charges he faced on the original charges. He faced the death penalty on the original charges. And I would be remiss if I didn't point out in these cases, defense counsel always point out the significance of what death entails.

Death is the most severe punishment. Death is different. We hear that over and over again until there's a motion for prosecutorial vindictiveness in which there's a suggestion that somehow these other additional charges increase the potential for exposure. That's just not the case.

The penalty is the same. And in fact, one of the indicted charges is felon first degree murder in the commission of a robbery which is actually a lesser penalty than the death penalty or exposure.

And I would submit to the Court that this was nothing more, and the record supports it, that this was nothing more than an independent evaluation of these cases and the facts as this special prosecutor saw fit and that this is not vindictiveness in anyway and there is no [187] presumption.

There is no exposure to which he was not exposed before. Any other sentences would be cumulative to the harshest sentence that is allowed for under these new charges and the old charges which is death.

So I submit to the Court that the standard is not -- it's just not been met that would give rise to a presumption of vindictiveness. Beyond that, Your Honor, I would submit on the pleadings.

Again, nothing has been presented to carry the burden to create a presumption in this case that there's vindictiveness in these new charges. I submit to the Court that this motion should be denied on its face.

THE COURT: Thank you, Mr. Lingan.

Ms. Irving.

MS. IRVING: Well Your Honor, as promised I found what I was looking for in Duck if I may. Under the first paragraph under Roman numeral three, the court states, "The Commonwealth argues that in the case before us since the Commonwealth Attorney didn't participate in the General District Court trial, no evidence of vindictiveness was induced in the Circuit Court trial.

Blackleg does not bar amendment of the warrant [188] in the Circuit Court. We disagree." It's the same kind of argument. We had nothing to do with it downstairs so now we're coming in and there's no real analogy to Blackleg.

And I would suggest to the Court that the concept that this prosecutor's office is somehow shielded from any claim of vindictive prosecution is taken care of in this.

Not only does the Court say in Duck that they disagree with that assertion but it makes sense that that's not the way this goes which would mean that anytime somebody appeals a case, is granted relief on appeal, the Commonwealth can come bring in new charges, just get a special prosecutor.

Find a reason you cant' [sic] do it, get a special prosecutor from a new jurisdiction and then hammer them. That's not the way this goes. That's not -- there's no Court that thinks that's going to be appropriate and I would suggest, Your Honor, that that argument is wholly without merit.

The argument that because this is a capital case and there is no greater harsher punishment is also without merit although it takes a little bit more thinking [189] through.

The reason it's without merit and the reason that this Court needs to hold that the rule as stated, is that there's a presumption when you win -- when you are convicted, you win on appeal and you come back and there's more charges and some with harsher penalties.

The reason there's that black line shift of presumption is because of this. In the initial charging case where my client was convicted, you had one person, one person, Owen Barber, say that he was the one who hired him.

Everything else was circumstantial and Paul Ebert says in Owen Barber's sentencing that without Owen Barber, Justin Wolfe likely would not have been prosecuted.

The case takes its toll up through the Appellate Courts. The habeas, the Federal Courts hear evidence.

There's a huge evidentiary hearing in which Owen Barber says that that is not true.

I said it because that's what you all wanted to hear. I said that because I wanted a break on my own charges. I said it because frankly I didn't want to be the one facing death.

[190] That's the testimony that's there. Now that's completely inconsistent with what he said in the first trial clearly. And there are a couple of different times in the course of this investigation where Mr. Barber has (unintelligible) testimony.

But the fact is the person that says Justin Wolfe did this is Owen Barber who is, at this point, either an unavailable witness or a wholly incredible witness and being able to go forward on these charges per the Commonwealth's own admission at Owen Barber's sentencing, without him is really, really going to be tough if not impossible.

And I would suggest to the Court that everybody who's been reading these cases, certainly all of the lawyers involved, know that there is not another eyewitness who says Justin Wolfe did this.

There's not going to be somebody else who puts him there. I've got a list of people to interview and I don't have a single person but Owen Barber who has ever said that he had something to do with the murder.

But Owen Barber now becomes either unavailable or incredible making a prosecution on this murder unlikely. So what we really have here is if you separate [191] that out and you assume there's a

chance that they lose this capital murder or the murder case, you've got this drug conspiracy going on.

Well if this case were charged simply with the conspiracy to distribute marijuana, we would be looking at a five to thirty offense. And I would say the Federal Courts, and I think it's appropriate, at the time that you dismiss and separate out the murder conviction and the firearms charges go as well.

They are completely and totally related. There's nobody who says Mr. Wolfe had a firearm. There's no -- I've never seen any evidence of that. I'm not through all 17,000 pages and 56 CDs but my investigation doesn't show any of that.

So what we're left with are drug charges. And by the Commonwealth's argument, they can charge everything they want on the drugs because you know, he could get executed for the murder so there's no greater punishment. Well that's not true because we all know there's the solid chance he doesn't -- the murder charge goes nowhere. I don't think they have an eyewitness. I don't think they have an evidence to it.

I don't think they have anything supporting [192] it. And I think that at the end of this, that's going to be the result.

So what do we have? Conspiracy to distribute marijuana from twelve years ago or continuing criminal enterprise which has a life sentence. And what they've done is they've charged him with something that, if convicted on, he stays exactly where he is for the rest of his natural born life and that satisfies them.

Nobody else is charged with this and I would suggest that probably goes more towards whether or not there's actual vindictiveness and not whether or not the presumption exists.

But in talking through whether or not the Court should find a presumption exists, to say we can just charge a capital murder charge and if there's no evidence there, we're going to add on all of these drug charges because if we don't get him over here, we can get him over there, but there's no presumption against vindictiveness because he was facing the full specter of punishment to begin with and he is now, is to completely ignore the rationale in the Federal courts is to ignore the rationale that the Supreme Court has said that that squelches somebody's right to avail themselves of all their possible [193] remedies.

Clearly we're not going to punish people in the United States of America for exercising a right that they are Constitutionally permissible to exercise.

It seems to be incredulous to me that the idea that because he was charged with capital murder and he's still facing capital murder charges, there can now be no presumption of prosecutorial vindictiveness when what we have here is obviously a scenario that if they lose on the murder, they go forward on the drugs.

And if they win on the drugs, they're still at life because the charges they brought on the drugs, which are rising from the same conduct according to the prosecutors that they had back 12 years ago, was not brought then, it's brought only now and it's brought after a successful appeal.

That, Your Honor, is what the Courts have said is not permitted. That gives rise to prosecutorial

vindictiveness and that puts the burden on them to show why these charges should be permitted to go forward and I'd ask Your Honor to require them to do that.

THE COURT: Thank you, Ms. Irving.

(Pause.)

[194] THE COURT: Counsel is correct, it's a two part analysis in this case and the question is whether the indictments should be dismissed based on prosecutorial vindictiveness with the subset question being has there been a prima facie case shown of prosecutorial vindictiveness and I do not find there has been.

I agree with the defense that it's immaterial for the analysis that it is a different prosecutor however, I do find the cases to be helpful in this issue, particularly Blackleg and Barrett.

I don't think it's appropriate for the Court to analyze the strength of the Commonwealth's case at this level. These are charges. I look at the charges on their face and the Defendant was facing charges punishable by death.

The Commonwealth brought additional charges, not enhanced charges. And the prohibition is against enhanced charges. For example, if the Defendant had been convicted of first degree murder and the Commonwealth brought indictments for capital murder, that in my view, would meet the presumption.

But under the charges which were brought before and the charges which have been brought now, I do [195] not find the prosecutorial vindictiveness

threshold showing which would require the Commonwealth to rebut that presumption.

Now there are two other motions that are before me. I'm going to ask you all for five minutes and I'll be happy to come back and give you a ruling on those two motions.

MS. IRVING: Your Honor, may I ask that the Court -- finding that there's presumption, we would move into an actual vindictiveness analysis and I'm happy to do that on another day.

THE COURT: No, I found that -- oh, on an actual vindictiveness --

MS. IRVING: Yes, Your Honor.

THE COURT: Oh, I see. You want to show the actual vindictiveness.

MS. IRVING: Yes, Your Honor.

THE COURT: Yes. We can keep going now for awhile if you want.

What's your preference?

MS. IRVING: I have -- given the Commonwealth wants to play snippets of video, I have multiple multiple videos that are relevant. I'm wondering if it wouldn't be [196] wise to go ahead and do this on the 18th. We've already got that day set.

I don't think that what we have planned for that -- and part of that is one of the videos that we would play has to do with that same video that would be played for the September 11th, for the continuing prosecutorial misconduct.

THE COURT: That makes -- yes, I'm sorry. I had drawn a blank. You did have that motion. I had it in my head that that was going to be on the 18th as well.

But Mr. Lingan, Mr. Morrogh, any view on that?

MR. LINGAN: That's fine, Your Honor. * * *

[203] THE COURT: I'm not ready -- I'm not ready to advise you on rulings on things that haven't been filed or argued. So I'll give you the rulings on the matters that I've heard today but I think in fairness to both sides, and really to me, you need to file specific motions asking for evidentiary rulings.

MS. IRVING: Okay. Yes, Your Honor.

MR. MACMAHON: Your Honor, note our exceptions to the adverse rulings. We'll get it on the order as well.

THE COURT: Sure. Sure.

And I presume the Commonwealth as well?

MR. MORROGH: Yes, Your Honor.

THE COURT: Okay.

MR. LINGAN: Though our exceptions usually don't matter.

THE COURT: Okay. * * *

*Appendix G*

**VIRGINIA**

**CIRCUIT COURT OF**
**PRINCE WILLIAM COUNTY**

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Nos.: CR12003732-00 through CR12003737-00,
CR05050489-01, CR05050490-01 & CR05050703-01

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COMMONWEALTH OF VIRGINIA,

vs.

JUSTIN MICHAEL WOLFE,

*Defendant*.

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Filed October 23, 2014
Hon. Mary Grace O'Brien
Hearing: November 5, 2014
JW-106

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**MOTION TO RECONSIDER JW-2012-31 TO DISMISS INDICTMENTS CONSTITUTING A VINDICTIVE PROSECUTION**

COMES NOW the Defendant. Justin Michael Wolfe, by counsel Kimberly A. Irving, Edward B. MacMahon, Jr., and Michael D. Lasher and hereby respectfully gives notice that on the November 5, 2014, or as soon thereafter as counsel may be heard, he will move this Court to reconsider JW-2012-31 to Dismiss Indictments Constituting a Vindictive Prosecution. In making this Motion, Mr. Wolfe relies upon his rights to be free from cruel and unusual punishment, to due

process, to a fair trial, to effective assistance of counsel, to investigate, to present a defense, a call witnesses on his own behalf, to confront witnesses against him, to a reliable sentencing determination, and to equal protection pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, § 8, 9, 10, and 11 of the Virginia Constitution; Va. Code §§ 19.2-164, 19.2-166, 19.2-332, 19.2-164; and other authorities cited herein.

Introduction

The Commonwealth must articulate a legitimate reason why the indictments brought against Justin Wolfe on October 1, 2012 must not be dismissed because Mr. Wolfe has established a *prima facie* case of vindictive prosecution in violation of the Due Process Clause of the Fourteenth Amendment. Due process requires that a defendant who has successfully challenged his conviction must not be subjected to harsher charges or penalties as a consequence. *Blackledge v. Perry*, 417 U.S. 21 (1974). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenhicker v. Hayes*, 434 U.S. 357, 363 (1978). Yet after a successful appeal which excoriated the Commonwealth Attorneys[1], Mr. Wolfe was indicted for the first time, eleven years after the alleged crimes, with six charges that include the possibility of a mandatory life-sentence: (1) Virginia Code section 18.2-31 (10) (capital murder under the theory of premeditated killing as part of a Continuing Criminal Enterprise; CR 12003732-00); (2) Virginia

[1] *Wolfe v. Clarke*, 819 F.Supp.2d 538, 574 (E.D. Va. 2011).

Code section 18.2-248 (H1) (marijuana distribution as part of a Continuing Criminal Enterprise CR 12003734-00); (3) Virginia Code section 18.2-248 (H2) (marijuana distribution as part of a Continuing Criminal Enterprise, which carries a life term; CR 12003735-00); (4) Virginia Code section 18.2-32 (felony murder); and (5) two counts of Virginia Code section 18.2-53.1 (use or display of a firearm in the commission of a felony (robbery)).

Under federal and Virginia jurisprudence, these facts alone are enough to indicate a *prima facie* case of vindictiveness, requiring the Commonwealth to articulate a legitimate reason for why the new indictments were brought after a successful appeal.

JW-2012-31 was argued on December 10, 2012. However, none of the parties, including this Court, considered the clear language of binding Virginia precedent. Despite being cited in both parties' pleadings and oral arguments, nobody referred to critical language in *Duck v. Commonwealth*, 8 Va.App. 567, 572-573 (1989), which directly contradicts this Court's ruling. Specifically, this Court ruled that because Mr. Wolfe faced a death sentence both in 2001 and 2012, the six recently filed indictments did not increase his sentence and thus no *prima facie* case of vindictiveness had been shown. Yet as *Duck* makes clear, the new charges must also not expose a successful appellant to an increased ***minimum*** sentence. *Duck v. Commonwealth*, 8 Va.App. 567, 572-573 (1989). In other words, *Duck*, like the jurisprudence in many other state and federal courts, makes clear that the totality of the circumstances must be assessed in determining whether a defendant

has made a prima facie showing of vindictiveness, which would require the proseuction [sic] to provide legitimate reasons why the additional charges were brought for the first time after a successful appeal.

Legal Argument

During argument on JW-2012-31, the Commonwealth erroneously claimed that the state does not "up the ante" on an indictment if the additional charges do not raise the potential maximum sentence. "There is no exposure to which [Wolfe] was not exposed before. Any other sentence would be cumulative to the harshest sentences that is allowed under these new charges and the old charges which is death. So I submit to the Court that the standard is not—it's just not been met that would give rise to a presumption of vindictiveness." Tr:187.2-8. Dec. 10, 2012.

This Court accepted this argument: "The Commonwealth brought additional charges, not enhanced charges. And the prohibition is against enhanced charges. For example, if the Defendant had been convicted of first degree murder and the Commonwealth brought indictments for capital murder, that in my view, would meet the presumption. But under the charges which were brought, before and the charges which have been brought now, I do not find the prosecutorial vindictiveness threshold showing which would require the Commonwealth to rebut the presumption." Tr: 194.17-195.3. Yet this rationale is directly contrary to the clear holdings of *Blackledge* and *Duck*.

The Supreme Court in *Blackledge v. Perry*, 417 U.S. 21 (1974) described the rough framework to

assess whether the addition of additional charges after a successful appeal amounted to a vindictive prosecution. Because a defendant must be free from the fear of an increased sentence merely for exercising his constitutional right to appeal a conviction, the Court held that any attempt to "up the ante" on a potential new sentence was enough to create a *prima facie* case that the prosecutor was acting vindictively after a successful appeal. *Id.* at 27-28 citing *Pearce*, 395 U.S. at 725. "'Prosecutorial vindictiveness' is a term of art with a precise and limited meaning. The term refers to a situation in which the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights. See *United States v. Goodwin*, 457 U.S. 368, 372, 73 L.Ed. 74, 102 S.Ct. 2485 (1982). In other words, a prosecutorial action is "vindictive" only if designed to penalize a defendant for invoking legally protected rights." (*US. v. Meyer*, 810 F.2d 1242, 1246 (D.C. Cir. 1987).) Thus, where a defendant can show a "realistic likelihood of vindictiveness," a defendant has created a *prima facie* case that his Due Process rights were violated. The burden then shifts to the prosecution to come forward with objective evidence justifying the filing of additional charges after a successful appeal. *Id.* at 27. Such objective evidence of a good faith reason might include that additional charges were levied to cure a valid oversight; that more serious charges could not have been brought at the outset because, say, the assault victim died after the appeal; or to reflect the common understanding of the parties. In sum, "'To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.' ... For while an individual

certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." *Goodwin*, *supra*, 457 U.S. at 372.

Interpreting *Blackledge*'s "upping the ante" analysis, the Virginia courts have unequivocally stated that a new sentence need not be greater than the harshest sentence for an indictment to be vindictive, a rule that directly contradicts this Court's rationale during the prior hearing. As clearly explicated in *Duck v. Commonwealth*, an increase in the maximum possible sentence is not the only determining factor as to whether a prosecutor has "upped the ante." 8 Va. App. 567 (1989). In *Duck*, a defendant's first DUI misdemeanor conviction was overturned on appeal, and at his second trial an additional felony indictment for DUI was added. The court held that, although the addition of the felony did not increase the maximum sentence Duck faced, the increased maximum sentence was not the only factor to be considered in weighing the likelihood of vindictiveness. *Id.* at 572. *Duck* stated:

> ***An increased minimum potential period of incarceration can have the same chilling effect on a defendant's exercise of his statutory right to appeal as an increased maximum potential period.*** In either case, the defendant is exposed to an increased penalty range because he has exercised his right to appeal. Under the facts presented here, since Duck faced a minimum jail sentence of one month under the amended charge, but was not required to receive a

> minimum jail sentence on the original charge in the general district court, we find that he faced "a more serious charge" in the circuit court as a direct result of exercising his statutory right to a trial *de novo*. For this reason, his due process rights were violated and his conviction must be reversed. *Id.* at 573 (emphasis added).

In other words, because the new charges exposed Duck to an increased minimum sentence, a *prima facie* case of a "realistic likelihood of vindictiveness" was established, requiring the prosecution to state a legitimate reason for the filing of the new charges. *Id.* Thus, contrary to this Court's ruling, *Duck* made clear that the maximum sentence which a defendant may receive is not the only factor in finding that a *prima facie* case of vindictiveness has been established. In sum, *Duck* stands for the proposition that the totality of the circumstances must be assessed in determining whether a defendant has made a *prima facie* showing of vindictiveness.

Consistent with the broad due process principle of fairness, other jurisdictions also make clear that a *prima facie* case of vindictiveness can be established by looking at factors other than merely whether the maximum sentence is increased as a result of additional charges. *US. v. Meyer*, 810 F.2d 1242, 1246 (D.C. Cir. 1987) involved a group of protesters who were arrested outside the White House demonstrating without a permit and who had an additional charge leveled in retaliation for a trial demand. *Id.* at 1243. Despite not facing a greater maximum sentence due to the new charges, the court, using a totality of the

circumstances assessment, found that the actions of the prosecution raised a realistic likelihood of vindictiveness. *Id.* Although the additional charge did not "up the ante" by exposing the defendants to a greater sentence, the court looked to other factors in determining whether a *prima facie* case of vindictiveness was established. *Id.* at 1246. These other factors included, among others, whether there is proof of disparate treatment of other defendants in the case and the state's "motivation to act vindictively." *Id.* at 1246-48. Though taken separately, these circumstances alone might not raise a likelihood of vindictiveness, but taken together, these considerations were suggestive of vindictiveness. *Id.* at 1246.

Relying on *Meyer*, *US. v. Doran*, 882 F.2d 1511, 1520 (10th Cir. 1989) held that to "provide a well-grounded assessment of the 'realistic likelihood of vindictiveness'," a court must examine "'the totality of the circumstances surrounding the prosecutorial decision at issue.' *United States v. Griffin*, 617 F.2d 1342, 1347 (9th Cir. 1980)." Also relying on *Meyer, State v. Tsosie*, 171 Ariz. 683, 687 (App.1992), also adopted a totality of the circumstances test:

> Courts of other jurisdictions, including the Arizona Supreme Court, have adopted this 'totality of the circumstances' test. *See State v. Noriega*, 142 Ariz. 474, 486, 690 P.2d 775, 787 (1984) (presumption of prosecutorial vindictiveness applies if there is a realistic likelihood of vindictiveness in the decision to reindict a criminal defendant); *United States v. Heldt*, 745 F.2d 1275, 1280 (9th Cir. 1984)

> (mere appearance of vindictiveness gives rise to a presumption of vindictive motive); *United States v. Krezdorn*, 718 F .2d 1360, 1364-65 (5th Cir. 1983 ), cert. denied, 465 U.S. 1066, 104 S.Ct. 1416, 79 L.Ed.2d 742 (1984) (in measuring cases alleging vindictiveness, proper solution is not to be found by classifying prosecutorial decisions as being made pre- or post-trial); *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1982) (to establish a claim of vindictive prosecution, the defendant must make an initial showing that charges of increased severity were filed because the accused exercised a statutory, procedural, or constitutional right in circumstances that give rise to an appearance of vindictiveness). We agree with the *Meyer* court that the critical question in a pretrial setting is whether the defendant has shown 'that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness and therefore give rise to a presumption'.

As the court stated in *United States v. Wilson*, 262 F.3d 305, 314 (4th Cir. 2001): "If the defendant is unable to prove an improper motive with direct evidence, he may still present evidence of circumstances from which an improper vindictive motive may be presumed" "Thus, a change in the charging decision made *after* an initial trial is completed is much more likely to be improperly motivated than a pretrial decision." *Id.* at 315 (quoting *United States v. Goodwin*, 457 U.S. 368,381 (1993)). "Moreover, like *Goodwin*, the facts surrounding the

charging decision are different from those in the typical case in which a presumption of vindictiveness arises. Typically, in that type of case, at the time the prosecutor initially tried the defendant the decision was made not to try the defendant on an additional available charge later brought only after the defendant's successful appeal. In that situation, unlike in *Goodwin* or here, an inference may be drawn that the prosecutor's decisionmaking was influenced by the only material fact different the second time around—the defendant's successful appeal of his original conviction." *Id.* at 319.

Consistent with broad due process principles. other courts do not woodenly look only at the maximum exposure that additional charges bring. The fact of additional charges themselves may be enough to trigger a presumption of vindictiveness. "[G]enerally, a potentially vindictive superseding indictment must add additional charges or substitute more severe charges based on the same conduct charged less heavily in the first indictment." *United States v. Hill*, 93 F. App'x 540, 546 (4th Cir. 2004) (quoting *United States v. Suarez*, 263 F .3d 468, 480 (6th Cir. 2001) (citation omitted)). "*Blackledge* unequivocally assures a prisoner of his right to appeal without fear that the prosecutor will retaliate with a more serious charge if the original conviction is reversed. Therefore, instead of simply assessing the prosecutor's knowledge at the time the original indictment was returned, as the government suggests, we must examine *all circumstances* of Johnson's situation." *United States v. Johnson*, 537 F.2d 1170, 1173 (4th Cir. 1976) (emphasis added).

In this case, there is clearly a "realistic likelihood of vindictiveness" given the totality of the circumstances. As in *Meyer*, in this case Mr. Wolfe has been singled out for disparate treatment. No other defendant alleged to be in the Continuing Criminal Enterprise has faced a life term. In fact, Mr. Petrole's roommate, in whose house was found one half a million dollars in cash and narcotics, has already served his entire sentence. As in *Meyer*, in this case the additional charges are likely motivated by the federal court opinions which were extremely critical of the Commonwealth. (*Wolfe*, *supra*, 819 F. Supp. 2d 538,574 (E.D. Va. 2011).) In fact, on September 11, 2012, Mr. Ebert and Mr. Conway told Owen Barber that the reversal had damaged their reputations and resulted in personal repercussions, clearly raising the specter of vindictiveness. Finally, the Commonwealth has "upped the ante" in terms of the sheer volume of additional witnesses it plans to present at this trial. Unlike the 2002 trial, in this trial the Commonwealth plans to present the testimony of the 62 people it alleges participated in the Continuing Criminal Enterprise, despite that the Commonwealth could have called all of these witnesses in the first trial but did not. (See Commonwealth's Answer to the Court Ordered Bill of Particulars Pursuant to Virginia Code section 19.2-230, dated December 4, 2012.) As well, in the first trial, the Commonwealth called only one witness (Mrs. Valatka) to testify to aggravating evidence. In this trial, the Commonwealth has filed a notice of 12 separate instances, some with multiple sub-parts, of Unadjudicated Criminal Conduct. (See Commonwealth's Notice of Intent to Present Evidence of Unadjudicated Criminal Conduct Pursuant to

Virginia Code section 19.2-264.3:2.) In these circumstances, Mr. Wolfe has clearly established a *prima facie* case of a reasonable likelihood of vindictiveness. Thus, this Court must order the Commonwealth to provide a legitimate explanation for why the additional indictments were filed.

CONCLUSION

WHEREFORE, the Defendant, Justin Michael Wolfe, moves this Court to require the Commonwealth to provide a legitimate explanation for why the six additional charges were filed 11 years after the alleged crimes and after Mr. Wolfe was successful in his appeals.

Respectfully submitted,

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*Appendix H*

12-3736 [handwritten]

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Filed March 29, 2016

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**PLEA OF GUILTY TO A FELONY**

1. My name is **Justin Michael Wolfe** and my age is 35 years.

2. I am represented by Counsel whose names are **Joseph Flood, Daniel Lopez, and Bernadette Donovan** and I am satisfied with their services as an attorney.

3. I have received a copy of the indictments before being called upon to plead and have read and discussed them with my attorneys and believe that I understand the charges against me in this case. I am the person named in the indictments. I have told my attorneys all the facts and circumstances, as known to me, concerning the case against me. My attorneys have discussed with me the nature and elements of the offenses and has advised me as to any possible defenses I might have in this case. I have had ample time to discuss the case and all possible defenses with my attorneys.

4. My attorney has advised me that the punishment which the law provides is as follows: **A maximum of Life imprisonment and a minimum of 20 years imprisonment, and a fine of not more than $100,000.00, or both**, also that probation may or may not be granted; and that if I plead guilty to more than one offense, the Court may order the

sentences to be served consecutively, that is, one after another.

4a. I understand that if the Court sentences me to a term of incarceration, it may impose an additional term of not less than six months nor more than three years, all of which shall be suspended, conditioned upon successful completion of a period of post release supervision.

5. I understand that I may, if I so choose, plead "Not Guilty" to any charge against me, and that if I do plead "Not Guilty", the constitution guarantees me (a) the right to a speedy and public trial by jury; (b) the process of the Court to compel the production of any evidence and attendance of witnesses in my behalf; (c) the right to have the assistance of a lawyer at all stages of the proceedings; (d) the right against self-incrimination; and (e) the right to confront and cross-examine all witnesses against me.

6. I understand that by pleading guilty I waive my right to an appeal and that I am admitting that I committed the offense as charged. I further understand and agree that upon my plea of guilty, I will be found guilty and that the only issue to be decided by the Court is punishment.

7. The following plea agreement is submitted:

**a. Defendant will be found guilty and will be sentenced to a total term of active incarceration of not less than 29 years and no more than 41 years for all charges to which he is pleading guilty (CR05050703-0l, CR05050490-01, CR12003736-00); and**

**b. All other terms and conditions of the sentence, including suspended incarceration and probation, shall be determined by the court; and**

**c. Defendant will receive full credit for time served, as calculated by the Virginia Dep't of Corrections. It is the parties intention that Mr. Wolfe receive credit in this case for all time he has served in any jail, penitentiary or other facility in the Commonwealth of Virginia pursuant to charges CR05050703-0l, CR05050490-0l, CR05050489-0l, CR05050702-00 (previously nolle prosseuied on January 7, 2002); and**

**d. Defendant will submit to the Court a written explanation signed by Defendant as to the nature of his involvement in the murder of Daniel Petrole and will be questioned under oath by the Court as to the authenticity and accuracy of the written statement; and**

**e. The Commonwealth will not prosecute Defendant for any other offenses arising out of Defendant's written statement referenced above including perjury related to Defendant's testimony at the original trial of this matter; and its investigation and court proceedings, including any allegation of perjury, and**

**f. The Commonwealth will nolle prosequi CR05050489-0l, CR12003732-00, CR12003733-00, CR12003734-00, CR12003735-**

**00, CR12003737-00 once the plea is accepted by the Court.**

8. I understand that the Court may accept or reject the agreement. I understand that this plea agreement is not binding upon the Court and should the Court not accept this agreement, the parties may withdraw from this agreement and/ or the plea of guilty.

9. I declare that no officer or employee of the State or County or Commonwealth's Attorney's Office, or anyone else, has made any promises to me that I would receive a lighter sentence or probation if I would plead guilty. In addition, no one has threatened me and thereby caused or influenced me to plead guilty.

10. I understand that if I am not a United States citizen, I may be subject to deportation/removal pursuant to the laws and regulations governing the United States Immigration and Customs Enforcement.

11. After having discussed the matter with my attorney, I do freely and voluntarily plead guilty to the offense of **First Degree Murder, VA Code § 18.2-32, CR12003736-00**, and waive my right to a trial by jury and request the Court to hear all matters of law and fact.

Signed by me in the presence of my attorney this 22nd day of March, 2016.

*s/Justin Wolfe*
Defendant

**CERTIFICATE OF DEFENDANT'S COUNSEL**

The undersigned attorney for the above-named Defendant, after having made a thorough

investigation of the facts relating to this case, do certify that I have explained to the Defendant the charges in this case and that the Defendant's plea of guilty is voluntarily and understandingly made.

*s/Bernadette Donovan*
Attorney for Defendant

**CERTIFICATE OF COMMONWEALTH'S ATTORNEY**

The above accords with my understanding of the facts in this case.

*s/Raymond F. Morrogh*
Attorney for the Commonwealth

The Court being of the opinion that the plea of guilty and waiver of jury are voluntarily made, understanding the nature of the charges and the consequences of said plea of guilty and waiver, doth accept same and concur.

Filed and made a part of the record this 29 day of March, 2016.

*s/Carroll A. Weimer, Jr.*
Judge

*Appendix I*

RULES OF SUPREME COURT OF VIRGINIA
Part Five A
The Court of Appeals
F. Procedure Following Perfection of Appeal

**Rule 5A:18. Preservation of Issues for Appellate Review.**

No ruling of the trial court or the Virginia Workers' Compensation Commission 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. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.

*Promulgated by Order dated Friday, April 30, 2010; effective July 1, 2010.*