No. 20-1056

IN THE
SUPREME COURT OF THE UNITED STATES

JUSTIN MICHAEL WOLFE,
PETITIONER,

v.

COMMONWEALTH OF VIRGINIA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

MARK R. HERRING
Attorney General

K. SCOTT MILES
Deputy Attorney General

DONALD E. JEFFREY, III
Senior Assistant Attorney General

MATTHEW P. DULLAGHAN
Senior Assistant Attorney General

TOBY J. HEYTENS
Solicitor General
Counsel of Record

MICHELLE S. KALLEN
JESSICA MERRY SAMUELS
Deputy Solicitors General

KENDALL T. BURCHARD
John Marshall Fellow

OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240
SolicitorGeneral@oag.state.va.us

QUESTION PRESENTED

Whether this Court's holding in *Class* v. *United States*, 138 S. Ct. 798 (2018), that a guilty plea does not bar an appeal challenging the constitutionality of the statute under which a defendant was convicted, prevents state courts from enforcing longstanding claim-presentation rules under which an appellate court will not consider arguments that were not made to the trial court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT 1
ARGUMENT 7
CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Berry v. *Mississippi*,
552 U.S. 1007 (2007) 11

Bethea v. *Commonwealth*,
831 S.E.2d 670 (Va. 2019) 10

Blackledge v. *Perry*,
417 U.S. 21 (1974) 13, 14

Brady v. *Maryland*,
373 U.S. 83 (1963) 2

Class v. *United States*,
138 S. Ct. 798 (2018) .....passim

Menna v. *New York*,
423 U.S. 61 (1975) 13, 14

Singleton v. Wulff,
428 U.S. 106 (1976) 10

Smith v. *Phillips*,
455 U.S. 209 (1982) 12

United States v. *Williams*,
504 U.S. 36 (1992) 10

Wolfe v. *Clarke*,
691 F.3d 410 (4th Cir. 2012) 2

Wolfe v. *Clarke*,
718 F.3d 277 (4th Cir. 2013) 2

Wolfe v. *Johnson*,
565 F.3d 140 (4th Cir. 2009) 2

Wolfe v. *Virginia*,
139 S. Ct. 790 (2019) 6, 11

COURT RULES AND STATUTES

28 U.S.C. § 1257(a) 1

U.S. Sup. Ct. R. 10..... 7

Va. Code Ann. § 19.2-155 3

Va. Sup. Ct. R. 5A:18.....passim

OPINIONS BELOW

The order of the Supreme Court of Virginia denying the petition for appeal (Pet. App. 22–23) is unreported. The orders of the Court of Appeals of Virginia denying the petition for appeal (Pet. App. 1–19, 20–21) are unreported.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on September 3, 2020. By order dated March 19, 2020, this Court extended the time for filing a petition for writ of certiorari to 150 days from the lower court judgment. The petition for a writ of certiorari was filed on January 29, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. In March 2001, Daniel Petrole, Jr. was shot and killed in his car outside his residence. R.11497.[1] Investigation revealed that Petrole had been supplying petitioner with large amounts of marijuana, which petitioner would distribute. R.11498–99. A debt sheet found with Petrole's body showed that petitioner owed Petrole substantial amounts of money. R.11498.

Police tracked a gun found near the body to Owen Barber, who confessed to participating in Petrole's murder. R.11498–501. Barber told police that he and petitioner had discussed murdering Petrole and that

[1] All record cites (R.) refer to the record before the Supreme Court of Virginia.

they had developed a plan to have Barber rob and murder Petrole in exchange for marijuana, $10,000, and forgiveness of Barber's debt to petitioner. R.11500–02. Other evidence corroborated Barber's version of events, including testimony by Barber's girlfriend and cell phone records showing a series of communications between Barber and petitioner the day Petrole was killed. R.11501–03.

2. In 2002, petitioner was convicted of capital murder in connection with the killing of Petrole and sentenced to death. *Wolfe* v. *Johnson*, 565 F.3d 140, 149 (4th Cir. 2009). After several rounds of post-conviction litigation, the federal courts granted habeas relief because they concluded that the original prosecutors had violated their obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by "suppress[ing]" a police report that could have been used to impeach Barber's testimony against petitioner. See *Wolfe* v. *Clarke*, 691 F.3d 410, 417–18, 423 (4th Cir. 2012). The federal courts ultimately ordered that petitioner be retried within 120 days or released. See *Wolfe*, 691 F.3d at 413; see also *Wolfe* v. *Clarke*, 718 F.3d 277, 291 (4th Cir. 2013).

3. Back in state trial court, a special counsel was appointed to handle petitioner's re-trial. As provided by state statute, the original prosecutor submitted the necessary notification of disqualification and the trial court appointed a new prosecutor from another jurisdiction. See R.159 (motion by original prosecutor to appoint "an independent special prosecutor"); R.160

(order); see also Va. Code Ann. § 19.2-155. The trial court specifically noted that the appointment "was the [c]ourt's determination" and that the attorney who had been selected had significant experience—including as a special prosecutor in retrial proceedings in another matter—that made him an "appropriate" choice. R.8914–17. At the time, petitioner agreed that the special prosecutor "will handle the matter fairly and professionally." R.8915; see also R.8916 (counsel for petitioner noting that special prosecutor "selected by the [c]ourt" was "perfectly well qualified" and "we don't object to him at all").

The following month—after the special prosecutor had "redone th[e] investigation"—the grand jury returned "additional indictments" to cover the "provable" criminal conduct in petitioner's case. R.9864–66, 9877, 11607–13. The new indictments included charges that the special prosecutor was prepared to prove at trial "without Owen Barber's prior testimony," who had by that point given several conflicting statements. R.9865–66.[2]

Before his re-trial, however, petitioner pleaded guilty to three charges: first-degree murder; use of a

---

[2] The petition confuses the timing of certain statements by the special prosecutor, citing a transcript from October 2012 for statements made the month before. Pet. 13 (citing Pet. App. 40). In any event, the statements to which the petition refers were made in connection with a motion for pretrial release and based on the "many hours" the special prosecutor had already spent reviewing the file. R.8925, 8932–35.

firearm in the commission of a felony; and conspiracy to distribute marijuana. Pet. App. 7, 26 (listing indictments to which petitioner pleaded guilty); accord R.1–2, 344 (relevant indictments). The state trial court accepted petitioner's guilty pleas, concluding that the pleas were knowing and voluntary and that petitioner was guilty of the charges. See R.11480–11525. As part of his pleas, petitioner admitted on the record—through a signed, handwritten letter admitted as an exhibit and read by his attorney—that he was responsible for Petrole's murder. See R.11514–19, 12011–14. Petitioner's statement at the plea hearing closely tracked Barber's original trial testimony, and petitioner has never recanted that statement, asserted it was untruthful, or argued that it should be disregarded. The state trial court sentenced petitioner to 60 years on the murder charge (with 27 years suspended); 3 years on the firearm charge; and 20 years on the marijuana charge (with 15 years suspended). R.11586–87. The court ordered the sentences to run consecutively for a total of 41 years of active incarceration. *Id.*

4. Petitioner appealed to the Court of Appeals of Virginia, asserting three errors. R.8833–35. The case was referred to a single judge, who denied the petition for appeal in an unsigned and unpublished per curiam decision. See Pet. App. 24–31.[3] As relevant here,

[3] The appendix to the petition for a writ of certiorari mislabels the decision by the Court of Appeals of Virginia denying the petition for review. Although the decision located at pages 24–

petitioner argued that his guilty pleas were involuntary because he "was the target of vindictive prosecution that subjected [him] to increased mandatory minimum sentences after successful post-conviction proceedings." *Id.* at 24–25 (quotation marks omitted). The court of appeals "decline[d] to consider" that argument, however, because petitioner had raised it "[f]or the first time on appeal." *Id.* at 27, 29. The court of appeals thus concluded that the argument petitioner raised on appeal violated Rule 5A:18 of the Rules of the Supreme Court of Virginia, which "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.'" *Id.* at 27.

The Supreme Court of Virginia denied a petition for appeal, Pet. App. 32–33, and likewise denied a petition for rehearing, *id.* at 34.

5. Petitioner sought a writ of certiorari from this Court, arguing that the Virginia courts' decisions were contrary to the Court's decision in *Class* v. *United States*, 138 S. Ct. 798 (2018). The Court granted the petition, vacated the judgment, and remanded to the

---

31 is labeled September 20, 2019, the text is from the per curiam order of the Court of Appeals of Virginia dated May 10, 2017. See Pet. App. 8; cf. Pet. vi & Pet. App. i. (correctly listing "May 10, 2017"). A copy of the decision with the correct date is available in Case No. 18-227 at Pet. App. 1–8.

Supreme Court of Virginia "for further consideration in light of Class v. United States, 583 U.S. ___ (2018)." *Wolfe* v. *Virginia*, 139 S. Ct. 790 (2019) (mem). The Supreme Court of Virginia in turn remanded to the Court of Appeals of Virginia to reconsider its earlier decision. Pet. App. 1.

6. Following supplemental briefing by both parties, the Court of Appeals of Virginia again denied the petition for appeal. Pet. App. 1–19. Consistent with *Class*, the court specifically acknowledged that petitioner "may present his claim" on appeal "notwithstanding his guilty plea." *Id.* at 14. Even so, the court explained that Rule 5A:18 barred consideration of petitioner's claim that his prosecution was vindictive because that claim had never been addressed by the trial court. *Id.* at 12–15.

The court of appeals specifically addressed the difference between these two doctrines. The court reiterated *Class*'s holding that a "guilty plea, standing alone, does not waive [the] right to present a claim of prosecutorial vindictiveness on appeal." Pet. App. 14. But the court explained that "the waiver under Rule 5A:18"—which applies when a defendant fails to obtain a ruling from a trial court—"is more expansive than the waiver occasioned by a defendant's guilty plea." *Id.* at 13–14. And "[a]lthough there are exceptions to Rule 5A:18," the court noted that petitioner "ha[d] not invoked them." *Id.* Accordingly, the court of appeals concluded that "Rule 5A:18 bars our consideration of [petitioner's] prosecutorial

vindictiveness claim." *Id.*[4] The petition was referred to a three-judge panel, which denied the petition for the reasons stated in the per curiam order. *Id.* at 20. The Supreme Court of Virginia again denied a petition for appeal without comment. *Id.* at 22–23.

ARGUMENT

The petition for a writ of certiorari should be denied. This Court lacks jurisdiction because the decision below was based on petitioner's failure to comply with a longstanding state procedural rule. Even if this Court had jurisdiction, review would not be warranted because the petition does not allege any type of split in lower court authority (much less one that would satisfy Rule 10), this case does not present the issue as framed in the petition, and the Court of Appeals of Virginia's unpublished decision is fully consistent with this Court's holding in *Class* v. *United States*, 138 S. Ct. 798 (2018). At most, the petition asserts a narrow question of state law that is limited to the specific facts of this case and not binding or precedential in any event.

1. This Court lacks jurisdiction because the decision below rests on valid state procedural grounds. The basis of the Court of Appeals of Virginia's decision was clear: petitioner's claim on appeal was barred by Rule 5A:18 because it was never addressed by the trial

[4] The Court of Appeals of Virginia also rejected petitioner's second and third assignments of error. Pet. App. 15–18. Those decisions have not been challenged here.

court in the proceedings below. See Pet. App. 14 ("Rule 5A:18 bars our consideration of the claim because the trial court did not rule on the claim appellant presses on appeal."). Although petitioner had moved to dismiss the new indictments as a vindictive prosecution, the argument that he presented to the trial court was based on an increase in the *number* of charges and an alleged increase in the *maximum* sentence he could face if convicted. *Id.* at 3–4. The trial court denied the motion, agreeing with the Commonwealth that the new charges did not increase the maximum possible penalty because petitioner had previously been charged with a capital crime. *Id.*; accord *id.* at 94–95 (trial court explaining that "the Defendant was facing charges punishable by death," which meant the new charges were "not enhanced" by comparison).

On appeal, however, petitioner has pursued an entirely different argument: that vindictiveness may be inferred based on the *minimum* punishment he could face under the new charges rather than the total number of charges or the *maximum* possible sentence (which had formed the basis for his previous argument). See Pet. App. 8 (petitioner's assignment of error asserting vindictive prosecution based on "increased mandatory minimum sentences"). Accordingly, the Court of Appeals of Virginia concluded that petitioner had not complied with Rule 5A:18 by failing to give the trial court a fair opportunity to rule on "the prosecutorial vindictiveness claim arguing that the correct analysis focused on the

greater *minimum* sentence he would face." *Id.* at 14; accord Rule 5A:18 ("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."). Nor had petitioner invoked any of the Rule's exceptions on appeal. See Pet. App. 14 ("This Court does not apply the exceptions to Rule 5A:18 *sua sponte*."). Under Rule 5A:18, then, the court could not consider the issue. *Id.*[5]

The decision by the Court of Appeals of Virginia that petitioner's new vindictive prosecution claim was barred because it had not been properly presented to the trial court was fully consistent with Virginia law. See, *e.g.*, *Bethea* v. *Commonwealth*, 831 S.E.2d 670, 676 (Va. 2019) ("Procedural-default principles require that the argument asserted on appeal be the same as the contemporaneous argument at trial."); cf. Pet. 27–28 (citing cases where claims were adequately

[5] Even now, petitioner does not identify anywhere in the record that his current increase-in-the-minimum argument was adequately raised. The hearing transcript on which the petition relies described the penalty ranges for each offense to argue that the "additional and harsher charges" were "more serious"—not that increased mandatory minimums would apply. Pet. App. 78–79. The petition also points to a motion to reconsider the trial court's ruling on vindictive prosecution, see Pet. 27 (citing Pet. App. 97–108), but petitioner did not seek or obtain a ruling from the trial court on that motion before pleading guilty. Pet. App. 5–7; accord R.10586.

preserved because they were "presented . . . squarely" or "considered . . . and ruled on" by the trial court). And the requirement in Rule 5A:18 that a specific claim must be presented to a lower court to be considered on appeal is hardly "novel," "extreme," or unique to the Commonwealth, Pet. 6, 19–20, 25, 30—indeed, the same is true under federal law. See, *e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Given this similarity, the petition wholly fails to explain how the straightforward application of a longstanding procedural rule in this case "disregard[s] essential constitutional requirements" or "this Court's own decisions." Pet. 30.[6]

In short, the court of appeals did not reject petitioner's vindictive prosecution claim because he pleaded guilty. Instead, the court of appeals never considered that claim on the merits because petitioner failed to preserve it as a matter of Virginia's well settled procedural rules. Regardless of whether the state-law basis for the Court of Appeals of Virginia's ruling had been clear before, it is plainly spelled out in

---

[6] The petition likewise cites no authority for the proposition that Virginia's preservation rules "go[] far beyond any forfeiture requirements under federal law" or "infringe on constitutional rights." Pet. 28; cf. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (noting that "traditional rule . . . precludes a grant of certiorari" where "the question presented was not pressed or passed upon below").

that court's decision on remand. See Pet. App. 11–15. Accordingly, the decision below rests "upon an adequate and independent state ground that deprives th[is] Court of jurisdiction." *Berry* v. *Mississippi*, 552 U.S. 1007, 1007 (2007) (per curiam).

2. Even if this Court had jurisdiction, further review is not warranted because this case does not actually raise the issue described in the petition. Far from "direct[ing]" Virginia's courts "to address the merits of petitioner's claim," Pet. 1, this Court's remand order required only "further consideration in light of *Class*[.]" *Wolfe* v. *Virginia*, 139 S. Ct. 790 (2019) (mem.). On remand, the Court of Appeals of Virginia did exactly that—and ruled in petitioner's favor on that question. Specifically, the court held: (1) "that appellant may present his claim to this Court notwithstanding his guilty plea," and (2) "that appellant's guilty plea, standing alone, does not waive his right to present a claim of prosecutorial vindictiveness on appeal." Pet. App. 14 (citations omitted).

Separate and apart from the guilty plea, however, the Court of Appeals of Virginia concluded that it could not consider petitioner's minimum-based vindictive prosecution argument on the merits for another reason altogether—the claim had not been adequately preserved below. Pet. App. 12–15. The court of appeals specifically addressed this difference, explaining that "here, unlike the defendant in *Class*, appellant presents a claim that the trial court never

addressed." *Id.* at 12. And because "the waiver under Rule 5A:18 is more expansive than the waiver occasioned by a defendant's guilty plea," petitioner's claim was barred by the former but not the latter. *Id.* at 13–14.

Contrary to the allegations in the petition, the court of appeals did not "ignore[]" the decision in *Class* or "refuse[] to do what the Constitution requires." Pet. 30, 32–33. Instead, the court specifically considered that precedent as directed by the remand order from this Court. Nor did the court of appeals "invent[] a different reason" to "avoid" considering the vindictive prosecution claim, Pet. 18, as the decision on remand was consistent with its prior holding that the claim advanced on appeal had not been raised below. See Pet. App. 29 (declining to consider claim presented "for the first time on appeal").

Nothing about the Court of Appeals of Virginia's analysis under state preservation rules—which apply to all types of claims—threatens to cut off "judicial review of vindictive prosecution claims." Pet. 31. So long as those claims have been adequately raised, appellate courts in Virginia remain open to hear them on the merits. In these circumstances, there is no need or basis for this Court to exercise any purported "supervisory authority" here. Pet. 30, 32–33. But see *Smith* v. *Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.").

3. Petitioner also vastly overstates the scope of this Court's holding in *Class* and its relevance to this case. In particular, petitioner is wrong that *Class* announced a broad rule limiting state forfeiture rules across the board. See Pet. 4, 24. Instead, *Class* considered whether a defendant who pleaded guilty may still challenge the conviction by arguing "that the statute of conviction violates the Constitution." 138 S. Ct. at 801–02.

Seeking to extrapolate from there to here, petitioner makes sweeping assertions about the "broader import and rationale" of *Class*—rather than its specific holding—and urges an interpretation that is completely untethered from the Court's actual decision. Pet. 3, 30. To be sure, this Court's opinion in *Class* discussed the rules governing vindictive prosecution claims. But it did so only in the context of explaining the *Blackledge-Menna* doctrine, which generally applies to determine whether a defendant waived a particular claim by pleading guilty. See *Class*, 138 S. Ct. at 803–04; accord *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam); *Blackledge* v. *Perry*, 417 U.S. 21 (1974). The Commonwealth does not dispute that the merits in a case like this one would be addressed under *Blackledge-Menna* line of cases. But *Class* (which, again, was about whether a defendant can challenge the constitutionality of a statute) adds nothing to the analysis in this case where the sole claim would be vindictive prosecution.

4. The specific posture of this case further weighs against certiorari. The per curiam decision by the Court of Appeals of Virginia contains no substantive analysis of the federal due process issue that petitioner claims is presented, see Pet. App. 1–19, nor does the Virginia Supreme Court's one-page decision refusing petitioner's appeal, see *id.* at 22–23. At most, the petition raises of a question of whether Virginia courts applied state procedural rules correctly. See Pet. 27. Answering that question is necessarily a fact-bound inquiry that depends on the interpretation of specific statements in the record. As a result, any resolution would likely be limited to the particular circumstances of this case—especially where the petition does not claim that any split has developed among the lower courts that this Court needs to resolve. And because the court of appeals' decision in this case is unpublished and nonprecedential, it will not bind future courts adjudicating vindictive prosecution claims or deciding whether those claims may be considered on appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MARK R. HERRING
Attorney General

K. SCOTT MILES
Deputy Attorney General

DONALD E. JEFFREY, III
Senior Assistant Attorney General

MATTHEW P. DULLAGHAN
Senior Assistant Attorney General

TOBY J. HEYTENS
Solicitor General
Counsel of Record

MICHELLE S. KALLEN
JESSICA MERRY SAMUELS
Deputy Solicitors General

KENDALL T. BURCHARD
John Marshall Fellow

OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240
SolicitorGeneral@oag.state.va.us

May 18, 2021