NO. 20-1056

In the
Supreme Court of the United States

JUSTIN MICHAEL WOLFE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The Commonwealth of Virginia's opposition brief only confirms that this Court should grant review, summarily reverse, and remand for the Virginia courts to comply with this Court's earlier remand order. Our system of justice cannot work if a state court can evade this Court's remand order by applying a novel and excessively stringent forfeiture requirement in a way that is contrary to this Court's precedent, contrary to basic due process requirements, and contrary to existing state law applied in other cases. Having recognized that this Court's decision in *Class v. United States,* 138 S. Ct. 798 (2018), applies to this case, the court below was duty bound to address the merits of petitioner Justin Wolfe's vindictive prosecution claim. Its continued refusal to take that obligation seriously should not be allowed to stand. Nothing in the Commonwealth's opposition should prevent this Court from enforcing its earlier order and directing the lower courts to resolve the serious questions of vindictive prosecution that call into question the Commonwealth's constitutional authority to prosecute, convict, and sentence Wolfe.

ARGUMENT

The Commonwealth does not deny that this Court previously granted certiorari, summarily reversed, and remanded this case to the Virginia courts for "further consideration in light of *Class v. United States*." *Wolfe v. Virginia*, 139 S. Ct. 790, 790 (2019) (mem.). Nor does it deny that on remand, the Virginia courts correctly recognized that *Class* applies and that, in light of *Class*, Wolfe was entitled to raise his vindictive prosecution claim despite his guilty plea.

App. 14. That should have resulted in the Virginia courts addressing Wolfe's vindictive prosecution claim on its merits. Instead, the lower courts circumvented this Court's remand order and violated both *Class* and federal due process requirements by relying on a novel, excessively stringent application of a procedural forfeiture rule.

1. The Commonwealth offers no serious defense of the Virginia courts' refusal to comply with their remand obligations. As Wolfe's petition explains, under *Class* a guilty plea does not waive a defendant's appellate rights with respect to a narrow category of claims that challenge a court's constitutional authority to hale a defendant into court and convict and impose sentence; as a result, a procedural forfeiture rule also cannot extinguish a defendant's appellate rights with respect to such claims. With no response to that essential logic, the Commonwealth asserts that a forfeiture under Virginia's Rule 5A:18 is "more expansive than the waiver" occasioned by a guilty plea. Opp. 11–12 (quoting App. 14). But it cites no support for that counterintuitive conclusion, except for a statement made by the court below. *Id.* In any event, the question is not whether forfeiture requirements might be characterized as more or less expansive than a waiver. The question is whether any difference between forfeiture and waiver is relevant under *Class* and the constitutional principles it applies.

The answer is plainly no. This Court has described a guilty plea as "a grave and solemn act," *Brady v. United States*, 397 U.S. 742, 748 (1970), and "more than an admission of conduct; it is a conviction."

Boykin v. Alabama, 395 U.S. 238, 242 (1969). It waives most constitutional rights, so it must be knowing and voluntary. *Brady*, 397 U.S. at 749; *see Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Under *Class* and the *Menna-Blackledge* doctrine, however, even a "grave and solemn" guilty plea, made knowingly and voluntarily, does not bar a defendant from raising on appeal a narrow category of claims, including vindictive prosecution, that challenge the state's constitutional authority to prosecute. *Blackledge v. Perry*, 417 U.S. 21, 31 (1974); *Menna v. New York*, 423 U.S. 61, 62 (1975) (per curiam); *Class*, 138 S. Ct. at 805. As this Court has explained, a guilty plea does not extinguish such a claim because it raises important structural, jurisdictional-related concerns that go beyond the interests of the parties to the case. *See Blackledge*, 417 U.S. at 28–29. These concerns are so important they can be raised on appeal even if they have not been preserved when a defendant pleads guilty. *See Class*, 138 S. Ct. at 805.

The Commonwealth's suggestion that a forfeiture should be treated differently under *Class* than a waiver occasioned by a guilty plea cannot be taken seriously. Its position is contrary to this Court's decision in *Blackledge*. In that case, the defendant pleaded guilty and never even attempted to "present[] his [vindictive prosecution] claim to the North Carolina state courts." *Perry v. Blackledge*, 453 F.2d 856, 856 (4th Cir. 1971). As a result, the claim was never considered or addressed by the state courts. Nonetheless, this Court granted certiorari and held that the vindictive prosecution claim was properly raised in federal habeas proceedings because the defendant was asserting his "right not to be haled into

court at all upon" a charge that the State had no constitutional authority to prosecute. *Blackledge*, 417 U.S. at 30. Whether the state has constitutional authority to prosecute is too fundamental to be blocked by procedural rules designed to apply to appeals challenging the ordinary events of trial.

Because *Blackledge* and *Class* teach that a court cannot avoid deciding a vindictive prosecution challenge on grounds that a defendant has entered into a knowing and voluntary guilty plea, it also necessarily means that a court cannot avoid addressing a vindictive prosecution challenge by applying a procedural rule governing the forfeiture of claims not raised and preserved in the trial court. Indeed, *Class* expressly rejected the government's argument that Rule 11(a)(2) of the Federal Rules of Criminal Procedure prohibits "a defendant who pleads guilty" from challenging "his conviction on appeal on *a forfeitable or waivable ground* that he either failed to present to the district court or failed to reserve in writing." 138 S. Ct. at 806 (emphasis added) (quotation marks omitted). As *Class* explained, the procedural rule could not override the significant constitutional principles recognized in this Court's *Blackledge* and *Menna* line of cases. There is no reason a different conclusion should apply to a state rule of procedure, such as Virginia Rule 5A:18, designed to give a trial court the ability to rule on objections relating to the incidents of trial before they are considered on appeal.

In fact, this Court has already considered the issue. When the Commonwealth opposed Wolfe's petition for certiorari in 2018, the Commonwealth

raised the same forfeiture argument. *See* Br. in Opp. at 5, *Wolfe v. Virginia*, 139 S. Ct. 790 (2019) (No. 18-227), 2018 WL 6012696. That issue was briefed by both parties, and the Commonwealth argued that the state court's decision rested on an independent valid state procedural ground. If that argument had merit, the Court presumably would not have granted certiorari and remanded for the Virginia courts to consider *Class*. *Cf. United States v. Williams*, 504 U.S. 36, 40 (1992) (rejecting argument in brief in opposition that was "necessarily considered and rejected" when the Court granted review).

2. Even if it were appropriate under *Class* to treat forfeiture differently from waiver, the application of any state forfeiture rule would still need to comply with minimum requirements of federal due process. Due process concerns are paramount when a defendant has made a prima facie showing of vindictive prosecution. In those circumstances, it is important for federal law to protect against a vindictive application of a procedural forfeiture rule that insulates a vindictive prosecution from judicial review, allowing a trial court with no constitutional authority to prosecute, convict, and sentence a defendant to do all three.

That concern applies with particular force here. There can be no dispute that Wolfe properly raised his vindictive prosecution claim and that the claim was considered and addressed by the state trial court. The record is clear that (1) Wolfe raised and briefed his claim of vindictive prosecution before the trial court; (2) the trial court announced on the record that it had carefully considered the briefing; (3) the trial court

held an evidentiary hearing and heard argument from both the Commonwealth and Wolfe; (4) the trial court issued a bench ruling and Wolfe immediately objected; (5) Wolfe filed a motion for reconsideration before entering a guilty plea; and (6) after pleading guilty, Wolfe raised the question of vindictive prosecution in his first appeal. *See* App. 54 (raised and briefed); App. 54 (court reviewed briefing); App. 56–93 (hearing and argument); App. 94–95 (bench ruling and objection); App. 97–108 (motion to reconsider); App. 8 (describing contents of first appeal).

The Commonwealth also cannot dispute that Wolfe argued that the prosecutor's unexplained decision to add six new charges with more serious and harsher penalties was vindictive and gives rise to a prima facie case of vindictiveness. *See Blackledge,* 417 U.S. at 27–28; *Duck v. Commonwealth*, 383 S.E.2d 746, 749 (Va. Ct. App. 1989); *see also* App. 70 (conceding that the Commonwealth's detective did not complete any new investigation to justify the new charges). Instead, the Commonwealth's only argument is that Wolfe purportedly did not adequately articulate that one of the reasons the charges are more serious is that they increase the *minimum* range of the sentence to which Wolfe was exposed.

The Commonwealth identifies no basis for concluding that a claim can be forfeited consistent with the requirements of due process merely because an argument in support has not been articulated in the form preferred by the Commonwealth. As this Court has explained, the "traditional rule" is that "[o]nce a federal claim is properly presented, a party

can make *any argument* in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (emphasis added) (quotation marks omitted). The issue of vindictive prosecution was clearly presented and passed upon by the Virginia trial court. *Cf. Garnett v. Remedi Seniorcare of Va., LLC*, 892 F.3d 140, 142–43 (4th Cir. 2018) (holding that issue was preserved for appeal when the "the issue was taken up at some length at oral argument" even though it was never raised in briefing). It is therefore properly preserved under any traditional understanding of ordinary forfeiture rules.

Because federal preservation rules presumptively comply with due process, they provide an important baseline for evaluating whether a state court is applying state procedures in violation of due process and in a way that abrogates constitutional rights. That baseline is relevant here because nothing in Virginia law suggests that the state has adopted onerous forfeiture requirements that depart from the federal baseline. To the contrary, Virginia case law is clear that defendants are not forced to invoke magic words to preserve objections. *See Scialdone v. Commonwealth*, 689 S.E.2d 716, 726 (Va. 2010) ("however imprecise the vehicle by which the defendants raised their objections, their motions to stay presented their arguments squarely to the circuit court"); *George v. Commonwealth*, 667 S.E.2d 779, 782 (Va. 2008) (though he did not use term "fatal variance" in his objection to trial, the objection was clearly to inconsistency between indictment and jury instruction). Rule 5A:18 requires only that parties "make timely and specific objections" so that the trial

court has "an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals.'" *West v. Commonwealth*, 597 S.E.2d 274, 278 (Va. Ct. App. 2004).

3. There can be no dispute that the trial court had an opportunity to rule intelligently on the issues raised by Wolfe's vindictive prosecution claim. The Commonwealth's suggestion that he did not adequately explain that the new charges were more severe because they increased his minimum sentence is contradicted by the record. The evidence taken by the trial court at the hearing discussed the increase in minimum sentences. *E.g.,* App. 67 (asking Virginia detective "Would it surprise you if [the new charge's sentence] was a minimum of life? A. No, ma'am."). In addition, when the trial court heard argument, the minimum sentence for the new charges was also discussed. Wolfe's counsel specifically argued that the new charges were:

> absolutely punished at a higher level than the [original 2001] conspiracy to distribute marijuana was. … The [original] conspiracy to distribute marijuana is five to thirty and the [shortest of the new charges] is twenty to life.

App. 78. His counsel also argued that the more severe charges meant that the prosecutor had ensured that Wolfe would remain in prison for life:

> So what do we have? Conspiracy to distribute marijuana from twelve years ago [with a five to thirty-year sentence] 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.

App. 92. In addition, Wolfe's briefing addressed the issue, citing and discussing the leading Virginia case, *Duck v. Commonwealth*, which holds that *Blackledge* applies even though the defendant "was exposed to a greater minimum, rather than maximum, period of incarceration as a result of the amended charge." 383 S.E.2d at 749; App. 99–103.

Nor can there be any dispute that the trial court understood these arguments. The trial court's ruling was premised on the erroneous conclusion that there is a death penalty exception for vindictive prosecution. According to the trial court, when a defendant is subject to a capital charge in his first case, there can never be a prima facie showing of vindictive prosecution on re-trial because no penalty can be "enhanced" beyond a sentence punishable by death. App. 94 (concluding that because Wolfe "was facing charges punishable by death," the six additional charges were not "enhanced" charges). In reaching that surprising conclusion, the trial court accepted the prosecutor's assertion that the new charges are "not more severe than the charges [Wolfe] faced on the original charges" because he "faced the death penalty on the original charges" and, as a result, there "is no exposure to which he was not exposed before." App. 88–89 (arguing that "[a]ny other sentences would be cumulative to the harshest sentence that is allowed for under these new charges and the old charges which is death").

4. The Commonwealth contends that there is no reason to grant review because there is no split in federal authority and, in any event, the decisions in this case are "unpublished and nonprecedential." Opp. 14. That underscores the problem with the Commonwealth's procedural gambit and the refusal of the Virginia courts to take this case seriously. As Wolfe's petition explains, the reason the Court should grant certiorari is to enforce its earlier order and make clear that state courts cannot evade this Court's direction by hiding behind clever procedural rulings that expand state requirements beyond the bounds of federal due process.

While the Commonwealth seeks to sweep everything under the rug, it is important to emphasize how outrageous the Commonwealth has behaved in these proceedings. Wolfe has been in prison for 20 years, but he has never received a fair trial free from prosecutorial misconduct, despite obtaining federal habeas relief. In his original trial, prosecutors "inexplicably" withheld exculpatory evidence, coached witnesses, and engaged in egregious misconduct. *Wolfe v. Clarke*, 691 F.3d 410, 417, 418, 422–24 (4th Cir. 2012). As the federal courts recognized in this case, the prosecutos' "flabbergasting" misconduct was "'abhorrent to the judicial process.'" *Id.* at 423–25 (quoting *Wolfe v. Clarke*, 819 F. Supp. 2d 538, 566 n.24 (E.D. Va. 2011)). After Wolfe obtained federal habeas relief, Virginia prosecutors threatened a witness in a blatant attempt to prejudice Wolfe's ability to have a fair retrial. *Wolfe v. Clarke*, 718 F.3d 277, 296 (4th Cir. 2013) (Thacker, C.J., concurring in part). Only then, after that misconduct had come to light and the

Commonwealth's original case was in tatters, did the prosecutors file the six new charges.

At a minimum, the Commonwealth should be required to come forward with objective evidence to try to explain why the new charges were not a vindictive response to Wolfe's successful federal habeas petition and the Fourth Circuit's public "rebukes." *Wolfe*, 691 F.3d at 424. But the Virginia courts repeatedly refused even to consider Wolfe's vindictive prosecution claim on its merits, first, because the trial court reached the baseless conclusion that vindictive prosecution can never occur in a capital case and, second, because the appellate courts concluded that Wolfe's guilty plea waived his right to raise the claim. Because that refusal was directly contrary to *Class,* this Court granted certiorari and remanded for the Virginia courts to reconsider in light of *Class.* On remand, the Virginia courts acknowledged that *Class* applies and yet they have still refused to consider the merits of Wolfe's vindictive prosecution, summarily dismissing the claim based on what can only be viewed as the vindictive and improper application of state forfeiture rules.

The behavior of the Commonwealth and the Virginia courts in this case undermines the integrity of the criminal justice system. They have shown little respect for either the federal habeas process or this Court's earlier remand order. More fundamentally, if it is not corrected, the Virginia courts' response to this Court's remand order will cast doubt on whether our legal system serves the ends of justice or has become a procedural game to be played by manipulating lawyers.

There is no reason this effort to dodge federal law should be tolerated. Nor is there any reason not to enforce the Court's earlier order and reject the Commonwealth's improper procedural maneuvers to avoid applying *Class*. The relief that Wolfe seeks remains modest. All he requests is the same relief he sought in his 2018 petition—to have the Virginia courts fairly consider the merits of his federal due process claim arising from the Commonwealth's vindictive prosecution. The Court should grant review and summarily reverse the judgment below.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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