

No. 18-____

In the
Supreme Court of the United States

JUSTIN MICHAEL WOLFE,
PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,
RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The States are divided on whether a guilty plea waives a defendant's right to challenge, post-plea, the constitutional authority of the State to prosecute. In this case, in conflict with this Court's recent decision in *Class v. United States*, 138 S. Ct. 798 (2018), the Virginia courts held that petitioner could not raise on appeal his claim of vindictive prosecution because he pled guilty without obtaining consent from both the trial court and prosecutor to make his plea conditional. The question presented is:

Whether, in light of *Class*, a guilty plea in state court waives the right to raise on appeal the constitutional authority of the State to prosecute based on a claim of vindictive prosecution.

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PETITION FOR WRIT OF CERTIORARI

This petition asks the Court to summarily reverse the lower court and to direct it on remand to comply with *Class v. United States*, 138 S. Ct. 798 (2018), by considering the merits of petitioner's claim for vindictive prosecution. In the alternative, this petition urges the Court to grant review to clarify *Class's* scope, to provide guidance to the States, which are split in their approach to these issues, and to protect the integrity of the federal habeas corpus process.

In 2002, a Virginia court sentenced petitioner Justin Wolfe to death for hiring another to commit murder. A decade later, he successfully obtained federal habeas relief on the basis of egregious prosecutorial misconduct. The misconduct included withholding material, exculpatory information and allowing witnesses to present false testimony. *Wolfe v. Clarke*, 819 F. Supp. 2d 538, 571 (E.D. Va. 2011); *see also Wolfe v. Clarke*, 691 F.3d 410 (4th Cir. 2012). Following a decision by the U.S. Court of Appeals for the Fourth Circuit affirming the grant of habeas relief, which resulted in vacating Wolfe's convictions and death sentence, the case returned to the Virginia courts for a new trial. Instead of removing the taint of prosecutorial misconduct that had infected Wolfe's original trial, the Commonwealth engaged in further misconduct. Without conducting a new investigation or obtaining new information, prosecutors immediately filed six additional charges against Wolfe that carried penalties more severe than the penalties accompanying the original charges he had successfully challenged in federal court.

The Virginia trial court refused to dismiss the additional charges and, faced with the possibility of another death sentence, Wolfe entered into a plea agreement. The trial court then sentenced him to 83 years in prison, with 42 years suspended, and ordered him to pay court costs of approximately \$871,000.00. On appeal, Wolfe challenged the validity of his plea in light of the Commonwealth's vindictive prosecution. Concluding that Wolfe voluntarily entered a non-conditional plea, however, the Virginia Court of Appeals refused to consider the merits of his claim. Pet. App. 1–8. The Virginia Supreme Court summarily refused Wolfe's petition for appeal on February 5, 2018, and denied his petition for rehearing on March 23, 2018. Pet. App. 9–10, 11.

In February 2018, this Court decided *Class v. United States*, 138 S. Ct. 798 (2018), which held that “a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.” *Id* at 801 (internal citations omitted). A vindictive prosecution claim meets that requirement, as it implicates “the very power of the State” to prosecute the defendant. *Id* at 803 (citing *Blackledge v. Perry*, 417 U.S. 21, 30 (1974) (involving a vindictive prosecution claim)); see also *id* at 804 (“a guilty plea does not bar a claim on appeal ‘where on the face of the record the court had no power to enter the conviction or impose the sentence’”) (quoting *United States v. Broce*, 488 U.S. 563, 569 (1989)). Wolfe's challenge is a quintessential vindictive prosecution claim—a claim that the Commonwealth lacked the “power to prosecute”—but it was never entertained by the Virginia

appellate courts because he did not preserve the claim with the consent of the prosecutor and trial judge through a conditional guilty plea. As *Class* made clear, however, a guilty plea does not bar a defendant from raising this type of constitutional claim on appeal. That fundamental principle should apply with even greater force in the context of a retrial following a grant of federal habeas relief where prosecutors have been found to have engaged in misconduct. In those circumstances, courts must be vigilant to protect against the prosecutors engaging in vindictive prosecution in response to a successful petition for federal habeas corpus relief.

The Virginia Supreme Court erred in denying Wolfe the opportunity to raise on appeal his vindictive prosecution claim challenging the Commonwealth's power to prosecute. This Court should grant certiorari, vacate the Virginia Supreme Court's decision, and remand with directions for the court to apply *Class* and consider Wolfe's vindictive prosecution claim on its merits. In the alternative, this Court should grant plenary review to clarify *Class's* scope and address the divisions in authority on the important issues raised in this case.

OPINIONS BELOW

The decision of the Virginia Court of Appeals is reproduced at Pet. App. 1–8. The order of the Supreme Court of Virginia summarily refusing Wolfe's petition for appeal is reproduced at Pet. App. 9–10. Its order denying his petition for rehearing is reproduced at Pet. App. 11.

JURISDICTION

The Virginia Court of Appeals issued its decision on May 10, 2017. The Supreme Court of Virginia refused Wolfe’s petition for appeal on February 5, 2018, and denied his petition for rehearing on March 23, 2018. On June 8, 2018, the Chief Justice extended the time for filing a petition for writ of certiorari to August 20, 2018. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part: “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

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

The relevant provision of the Virginia Code addressing the entry of plea agreements, Va. Code. § 19.2-254, is reproduced at Pet. App. 49.

Rule 11 of the Federal Rules of Criminal Procedure is reproduced at Pet. App. 50–56.

STATEMENT

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

2. In 2005, following an unsuccessful state habeas petition, Wolfe sought federal habeas relief in the United States District Court for the Eastern District of Virginia. Wolfe raised his actual innocence as a reason for the district court to consider his otherwise procedurally barred constitutional claims. He argued that his trial had been infected by repeated instances of prosecutorial misconduct, including that the Commonwealth had violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing material evidence favorable to the defense. *See Wolfe v. Johnson*, 565 F.3d 140 (4th Cir. 2009). During the course of the federal habeas proceedings, Barber recanted his trial testimony against Wolfe and later testified that Wolfe had nothing to do with Petrole’s murder.

After considering extensive evidentiary submissions by both sides, the district court concluded that Barber's recantation was credible and corroborated by other evidence. The district court also detailed how "the Commonwealth stifled a vigorous truth-seeking process," *Wolfe*, 819 F. Supp. 2d at 571, when it withheld material, exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and permitted its witnesses to present perjured testimony in violation of *Giglio v. United States*, 405 U.S. 150 (1972). The extensive exculpatory information withheld from the defense included (1) a police report showing that it was a Commonwealth detective who first suggested to Barber that he accuse Wolfe or else face execution; (2) information that Barber had confessed to his roommate that he acted alone in the murder; and (3) evidence suggesting alternate theories of the crime. The police report was particularly significant because it would have substantially undermined Barber's credibility at trial. It showed that, within days of Petrole's murder, the Commonwealth fixated on the theory that Barber had acted at Wolfe's behest. Even though the police had no direct evidence of Wolfe's involvement in the crime, and before asking Barber for his version of events, the investigating detective presented this theory to Barber and suggested that corroborating this theory would be Barber's only way to escape his own execution. Barber took the deal offered by the Commonwealth and agreed to testify that Wolfe had hired him to commit the murder. In exchange, the Commonwealth reduced Barber's charge from capital to first-degree murder, and supported Barber's

sentence of imprisonment for 60 years, with 22 years suspended. *Wolfe*, 565 F.3d at 144 n.1.

The Commonwealth knew the implications of its failure to disclose exculpatory evidence and its deliberate submission of false testimony. As the district court noted, the Commonwealth prosecutors could not “claim that they were unaware of the falsities in Barber’s testimony in light of the exculpatory information in [the Commonwealth’s] possession at the time of the trial” and, therefore, had “notice that Barber’s trial testimony implicating Wolfe was false.” *Wolfe*, 819 F. Supp. 2d at 571. Moreover, the prosecutor’s alarming testimony “that he employs a practice of withholding information from counsel and defendants with the intent of preventing them from establishing a defense” demonstrated “the Commonwealth’s intent in withholding exculpatory information as well as its knowledge about the consequences of suppressing and failing to pursue such evidence.” *Id.* Without the false testimony, the Commonwealth’s case against Wolfe was, as the court explained, “circumstantial” and “best [] described as tenuous.” *Id.* at 564.

Almost immediately after the release of the district court’s opinion, the Commonwealth moved Wolfe to segregation under circumstances the district court found to be very suspicious. The court rejected the prison director’s purported reasons for transferring Wolfe to segregation “given the inconsistent rationales and the uncontroverted evidence of the transfer[’]s effects on Wolfe.” *Wolfe v. Clarke*, 819 F. Supp. 2d 574, 588 (E.D. Va. 2011). Noting the

transfer's "punitive" effect, the court "deem[ed] questionable the fact that the Director transferred Wolfe to segregation within days of this Court's judgment vacating all of Wolfe's convictions and sentences." *Id.* The court ordered that Wolfe be transferred out of segregation and back to death row. *Id.*

3. In 2012, the Fourth Circuit affirmed the district court's grant of habeas relief, reiterating the district court's conclusion that the Commonwealth's conduct in obtaining Wolfe's convictions had been "not only unconstitutional in regards to due process, but abhorrent to the judicial process." *Wolfe v. Clarke*, 691 F.3d 410, 424 (4th Cir. 2012) (quoting *Wolfe*, 819 F. Supp. at 566 n.24). The Fourth Circuit reprimanded the Commonwealth for "tenaciously conceal[ing]" exculpatory evidence "that the prosecution obviously should have disclosed prior to Wolfe's capital murder trial." *Id.* at 422. The Fourth Circuit felt "compelled to acknowledge that the Commonwealth's suppression of the [police] report, as well as other apparent *Brady* materials, was entirely intentional." *Id.* at 423. Describing the prosecutor's rationale for withholding information—that he purposefully avoided providing information that could be used "to fabricate a defense"—as a "flabbergasting explanation," the court of appeals noted that the district court had "rightly lambasted" the Commonwealth. *Id.* The court pointed out that, in an earlier case arising out of Prince William County, it had similarly "refuse[d] to condone the suppression of evidence by the [same] prosecutors, and advised them to 'err on the side of disclosure, especially when a defendant is facing the specter of

execution.” *Id.* at 424 (quoting *Muhammad v. Kelly*, 575 F.3d 359, 370 (4th Cir. 2009)). “We sincerely hope,” the court concluded, “that the Commonwealth’s Attorney and his assistants have finally taken heed of those rebukes.” *Id.*

4. That hope did not last. Only four days after the Fourth Circuit’s mandate issued, the prosecutors paid a special visit to Barber in prison and secretly recorded their conversation. Although Barber maintained that his testimony exculpating Wolfe was true, the prosecutors “proceeded to interrogate, intimidate, and threaten Barber for over an hour.” *Wolfe v. Clarke*, 718 F.3d 277, 296 (4th Cir. 2013). They informed him that his exculpatory testimony had breached his plea agreement, that his case and Wolfe’s were back to square one, and that Barber could now face the death penalty. *Id.* at 296–97. Even under this extreme pressure, Barber held firm that Wolfe was not involved. *Id.* at 296.

Two days later, the prosecutors filed an ex parte motion to recuse themselves and requested that, instead of randomly assigning a new prosecutor, the state trial court appoint a special prosecutor that the original prosecutors had personally selected. The state trial court judge immediately granted the motion, without notice to or a response from Wolfe. The next day, the new prosecutor confirmed in court that he had only reviewed materials from the discredited original trial, and he made no mention of any additional investigation by the Commonwealth. Nonetheless, he told the court that he had already concluded that Wolfe “was absolutely involved in this murder and planned it and caused it to occur and he

did it out of greed Justin Wolfe is many things but innocent is not one of them.” Pet. App. 33, 45.

On October 1, 2012, without having conducted any further investigation, the prosecutor presented new charges against Wolfe to the grand jury, which returned six more indictments in addition to the original three. Two of the new indictments alleged that Wolfe was one of several principal administrators or leaders of a continuing criminal enterprise that distributed marijuana. The Commonwealth further alleged that Wolfe was guilty of capital murder by direction or order of one who is engaged in a continuing criminal enterprise as well as two continuing enterprise charges. In total, in addition to the three original 2001 indictments, the prosecutor charged Wolfe with:

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

Pet. App. 41.

Although Wolfe had never faced a felony murder charge or been charged with use or display of a

firearm in the commission of or attempt to commit a robbery, Wolfe in 2012 faced three separate and different counts of murder and three separate and different firearms charges. All of the October 1, 2012 indictments were based on the same events for which the Commonwealth originally indicted Wolfe in 2001, without having conducted any further investigation.

5. On November 28, 2012, Wolfe filed a motion to dismiss the indictments, arguing that the newly charged October 1, 2012 indictments were vindictive in violation of his constitutional due process rights. The trial court denied that motion. Finding it inappropriate to “analyze the strength of the Commonwealth’s case at this level,” suggesting that the Commonwealth brought “additional charges, not enhanced charges,” and rejecting any notion that *Blackledge* governed Wolfe’s claim, the court found no “presumption” of vindictiveness from the six new indictments. Pet. App. 47–48.

Faced with the possibility of another death sentence, and concluding that the Commonwealth was determined to deny him a fair trial, Wolfe decided to enter into a plea agreement, pleading guilty to use of a firearm in the commission of a felony, conspiracy to distribute marijuana, and murder. The plea conceded that Wolfe had committed these crimes, but it made no mention of Wolfe’s vindictive prosecution claim, nor did it concede in any way the Commonwealth’s power to prosecute Wolfe on these new charges. Pet. App. 12–16. At the plea colloquy, the trial court confirmed that Wolfe understood that he waived his right to appeal “any decision that I [the judge] make”. Pet.

App. 22. Wolfe was ultimately sentenced to 83 years in prison, with 42 years suspended, and ordered to pay court costs of approximately \$871,000.

On appeal, Wolfe argued that the trial court erred in accepting his guilty plea because he was the target of a vindictive prosecution after he successfully obtained habeas relief in federal court. Rejecting these arguments, the Virginia Court of Appeals concluded that, because Wolfe's guilty plea was not conditional, he had waived his ability to raise his vindictive prosecution claim on appeal. Pet. App. 1–8. The Supreme Court of Virginia summarily refused Wolfe's petition for appeal on February 5, 2018, and denied his petition for rehearing on March 23, 2018. Pet. App. 9–10, 11.

REASONS FOR GRANTING THE PETITION

In *Class v. United States*, 138 S. Ct. 798 (2018), this Court held that a defendant who pleads guilty to criminal charges is not barred from raising on appeal whether the government had the constitutional authority to prosecute the charges against him. As *Class* recognized, a vindictive prosecution claim falls within the category of constitutional claims that concern the government's power to prosecute. *Id.* at 805. Because Wolfe's non-conditional guilty plea does not constitute a waiver of the right to raise his vindictive prosecution claim on appeal, the Virginia appellate courts erred in refusing to consider the merits of Wolfe's vindictive prosecution claim. This Court should reverse and remand to the Virginia Supreme Court with instructions to consider Wolfe's vindictive prosecution claim in light of *Class*. In the

alternative, the Court should grant review to clarify *Class*'s scope and protect the integrity of the federal habeas corpus process.

I. The Court Should Summarily Reverse Because The Decision Below Is Contrary To *Class*.

Class held that a defendant who pleads guilty may, nonetheless, challenge on appeal whether the government had constitutional authority to hale him into court to answer the charges. *Class* involved a written plea agreement that waived some of the defendant's constitutional rights but did not address whether the defendant could challenge the constitutionality of the statute under which he had been convicted. 138 S. Ct. at 806. After his guilty plea and sentencing, the defendant appealed the district court's decision rejecting his pretrial claim challenging the statute's constitutionality. *Id.* at 802. The court of appeals held that the defendant could not pursue this constitutional claim because his guilty plea had waived his right to raise it on appeal. *Id.* at 802–03.

This Court reversed. The Court held that the defendant's constitutional challenge to the statute of conviction fit within a category of claims—including double jeopardy and vindictive prosecution—that go to “the very power of the State’ to prosecute the defendant.” *Id.* at 803. For that category of claims, a successful appeal does not result in a retrial; it extinguishes the government's right to constitutionally prosecute the defendant. *Id.* at 804–05. These claims are, therefore, not waived by a guilty plea.

In concluding that a guilty plea does not waive the right to raise on appeal the government's authority to hale a defendant into court, the Court drew on two earlier cases—*Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975)—involving vindictive prosecution and double jeopardy claims, respectively. *Id.* at 803–05. In *Blackledge*, the State of North Carolina re-indicted the defendant with a more severe felony charge after he exercised a statutory right to an appeal. *Blackledge*, 417 U.S. at 23–24. The defendant pled guilty to the felony charge and pursued federal habeas relief “on the grounds that the reindictment amounted to an unconstitutional vindictive prosecution” in violation of the Fourteenth Amendment. *Class*, 138 S. Ct. at 803 (citing *Blackledge*, 417 U.S. 21). Rejecting the State's argument to the contrary, this Court held that the defendant's guilty plea did not bar his vindictive prosecution challenge.

Blackledge expressed concern that allowing harsher charges after a successful appeal or collateral attack would mean that only “the most hardy defendants” would “brave the hazards” of an appeal of, or collateral attack on, a conviction. *Blackledge*, 417 U.S. at 28, 29. A defendant must be allowed to pursue his right to review without apprehension that the State will retaliate with more serious charges. *Id.* at 30. As *Class* explained, citing to *Blackledge*, although “a guilty plea bars appeal of many claims, including some ‘antecedent constitutional violations,’” a vindictive prosecution claim “implicates the ‘very power of the State’ to prosecute the defendant.” 138 S. Ct. at 803.

Accordingly, because the defendant in *Blackledge* alleged that the “very initiation of the proceedings” against him “operated to deprive him due process of law,” he was allowed to seek post-plea review of the state’s authority to prosecute. *Id.* (citing *Blackledge*, 417 U.S. at 30–31).

Class also referenced *Menna v. New York*, a case involving a claim of double jeopardy, to further explain why the defendant could challenge the State’s authority to prosecute him. In *Menna*, the state court would not consider on appeal a defendant’s request to review whether, because of a claim of double jeopardy, the State had constitutional authority to prosecute him. The state appellate court held that the defendant’s guilty plea prevented him from raising that issue on appeal, but this Court reversed. *Menna*, 423 U.S. at 62. Citing *Blackledge*, the Court held that, because the defendant’s claims “that ‘the State may not convict’ him ‘no matter how validly his factual guilt is established,’ [the] ‘guilty plea . . . [did] not bar the claim.’” *Class*, 138 S. Ct. at 804 (quoting *Menna*, 423 U.S. at 63) (internal citation omitted) (second alteration in original); see also *Menna*, 423 U.S. at 63 & n.2. (“where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty”) (citing *Blackledge*, 417 U.S. at 30).

Class thus acknowledged that a defendant’s guilty plea may waive challenges to case-related government conduct, such as the admissibility of

evidence, the validity of the indicting grand jury, whether evidence was unconstitutionally seized, and other incidents related to guilt or innocence. *Id.* at 805. Claims of this type would be “irrelevant to the constitutional validity of the conviction.” *Class*, 138 S. Ct. at 805 (internal quotation marks omitted). But a defendant’s guilty plea “does not make irrelevant” a constitutional claim challenging the very power of the State to prosecute. *Id.*

Class ultimately held that the plea of guilty, the plea agreement (which did not expressly refer to a waiver of the right to appeal the issue in question), and Federal Rule of Criminal Procedure 11(a)(2) did not expressly or implicitly waive *Class*’s right to raise on appeal his claim that he could not be constitutionally prosecuted. *Id.* That issue could be decided on the existing record and fit within that category of cases—such as an indictment’s failure to state an offense, a claim of vindictive prosecution, or a violation of double jeopardy—that, if successful, would preclude the state from forcing the accused to face the charge, regardless of the evidence at trial. *Id.* at 806, 809–10. In other words, when the government would have no authority to prosecute, a guilty plea does not waive the right to raise that issue on appeal.

Class’s holding applies with equal force in the federal and state context. Indeed, *Blackledge* and *Menna*, which spawned the “*Menna-Blackledge* doctrine” that *Class* endorsed, were state court cases in which this Court applied constitutional protections to the states under the Due Process Clause of the Fourteenth Amendment. This Court’s holding in

Class “flow[ed] directly from [the] Court’s prior decisions” in *Blackledge* and *Menna*, “reflect[ing] an understanding of the nature of guilty pleas which . . . stretches back nearly 150 years.” *Class*, 138 S. Ct. at 803-04. Moreover, in reaching its decision in *Class*, this Court examined how “federal *and state* courts throughout the 19th and 20th centuries” viewed “the nature of a guilty plea” in order to ascertain whether the entry of a guilty plea waived a claim regarding the government’s constitutional authority to prosecute. *Id.* at 804 (emphasis added) (citing *Carper v. State*, 27 Ohio St. 572, 575 (1875)). The assessment of both federal and state court treatment of guilty pleas made clear, as this Court said, “that a defendant’s guilty plea [did] not make irrelevant the kind of constitutional claim *Class* [sought] to make.” *Class*, 138 S. Ct. at 805.

As in *Class*, *Blackledge*, and *Menna*, this case involves a claim that challenges the very power of the State to “constitutionally prosecute” Wolfe on the new charges brought in response to his successful federal habeas petition. *Class*, 138 S. Ct. at 803–04 (citing *Blackledge*, 417 U.S. at 30; *Menna*, 423 U.S. at 63). Like the defendant in *Blackledge*, Wolfe raised a vindictive prosecution claim after the Commonwealth brought six new and more severe charges following Wolfe’s successful habeas action. Moreover, as in *Class*, Wolfe’s plea agreement makes no mention of his vindictive prosecution claim, nor does the Virginia statute governing guilty pleas prescribe that Wolfe may only raise his vindictive prosecution claim if he explicitly preserves it in his guilty plea. Pet. App. 12–16, 49. In light of *Class*, the Virginia appellate courts erred when they denied Wolfe the

opportunity to raise his vindictive prosecution claim on appeal.

II. In The Alternative, The Court Should Grant Review To Clarify *Class*'s Scope And Address Divisions Over When A Guilty Plea Waives A Defendant's Right To Challenge The State's Power To Prosecute.

If the Court does not summarily reverse the lower court, it should grant review to clarify *Class*'s scope and address the split in authority within the States. Vindictive prosecution that occurs in response to a successful federal habeas petition raises especially significant concerns that warrant this Court's intervention.

The Due Process Clause protects defendants by prohibiting a State from "upping the ante" by bringing a defendant into court to face additional or more severe charges after the defendant has successfully pursued an appeal or collateral remedy. *Blackledge*, 417 U.S. at 27–28; *see also Class*, 138 S. Ct. at 803–04. This Court has held that due process requires that a defendant be free of the apprehension of retaliation from the prosecutor following a successful appeal or collateral attack, because "fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction." *Blackledge*, 417 U.S. at 28 (citing *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), *overruled in part by Alabama v. Smith*, 490 U.S. 794 (1989)). These due process protections are especially applicable in cases, like this one, where a State raises the ante after the defendant successfully pursued collateral or

appellate review—including through the federal habeas process—because of constitutional transgressions by the State.

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

Despite this Court’s decisions, several States prohibit defendants from raising certain claims concerning the State’s power to constitutionally prosecute on direct appeal following a guilty plea. For example, six years after *Menna* and seven years after *Blackledge*, the New York Court of Appeals determined that a “defendant’s claim of selective and vindictive prosecution was forfeited by his plea of guilty.” *People v. Rodriguez*, 55 N.Y.2d 776, 777 (1981); *see also People v. Rodriguez*, 433 N.Y.S.2d 584 (1980) (“[U]nlike an assertion of double jeopardy, the [vindictive prosecution] claim was waived by the plea” (citation omitted)). At least two other states,

Arizona and Mississippi, prohibit vindictive prosecution claims on direct appeal following a guilty plea. *See State v. Webb*, 681 P.2d 473 (Ariz. App. 2d Div. 1984); *Smith v. State*, 77 So. 3d 526 (Miss. App. 2011). And states such as Delaware and Missouri view a guilty plea as an absolute waiver of all non-jurisdictional claims. *See Smith v. State*, 841 A.2d 308 (Del. 2004); *State v. Thomas*, 96 S.W.3d 834 (Mo. App. W. Dist. 2002). Three states, Montana, Utah and Virginia, view a guilty plea as a waiver of a vindictive prosecution claim on direct appeal and allow preservation of the claim only through the entry of a conditional guilty plea similar to the conditional guilty plea permitted under Federal Rule of Criminal Procedure 11(a)(2). *See Taylor v. State*, 2014 MT 60N (2014); Mont. Code § 46-12-204(3); *State v. Norris*, 57 P.3d 238 (Utah App. 2002); Utah R. Crim. P. Rule 11(j); *see also* Pet. App. 1–8, 9–10, 11; Va. Code § 19.2-254, Pet. App. 49. In these states, preserving a vindictive prosecution claim by utilizing the conditional guilty plea rules requires the consent of the prosecutor who brought the additional or more severe charges and the judge who allowed the charges to proceed.

This case provides an excellent vehicle for this Court to provide clarity to the States regarding the scope of *Class* and the *Menna-Blackledge* doctrine. It involves a quintessential vindictive prosecution claim denied by a state appellate court after a guilty plea. Guilty pleas are not uncommon in state courts. More than “ninety-four percent of state convictions are the result of guilty pleas.” *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (citing Dep’t of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D.

Farole, *Felony Sentences in State Courts*, 2006-Statistical Tables at 1 (NCJ226846, rev. Nov. 2010), available at <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf>.)

This case also showcases especially egregious behavior on the part of the Commonwealth—repeated constitutional violations during trial, more misconduct while he pursued federal habeas relief, and then a vindictive prosecution after he obtained federal habeas relief, punishing Wolfe for exercising his constitutional rights. A defendant in state court, no less than a defendant in federal court, should be entitled to the same due process protections to ensure that the State has the constitutional authority to prosecute. This Court plays a critical role in ensuring that state courts do not undermine *Class*, the *Menna-Blackledge* doctrine, and the federal habeas process by barring guilty-pleading defendants from challenging the power of the State to hale them into court—as the Virginia appellate courts did here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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