No. _____

In the
Supreme Court of the United States

JUSTIN MICHAEL WOLFE,

APPLICANT,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

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

APPLICATION TO CHIEF JUSTICE JOHN G. ROBERTS, JR. FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

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Counsel for Justin Michael Wolfe

June 1, 2018

TO: THE HONORABLE JOHN G. ROBERTS,
CHIEF JUSTICE OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

Petitioner JUSTIN MICHAEL WOLFE, a Virginia prisoner acting by and through undersigned counsel and pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 13.5, respectfully requests an extension of time of sixty (60) days to prepare and file his Petition for a Writ of Certiorari in this Court. Mr. Wolfe seeks review of the decision of the Supreme Court of Virginia entered on March 23, 2018, denying on rehearing his request to reconsider its judgment of February 5, 2018, refusing his petition to appeal from the Virginia Court of Appeals on a first tier direct appeal from his conviction in the Circuit Court of Prince William County, Virginia. *See* Attachments A, B, & C. Mr. Wolfe invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). His time to file a Petition for a Writ of Certiorari elapses on June 21, 2018. He makes this request more than ten (10) days before the day when his petition would be due without an extension, and this is his first request for an extension of time.

In support of his request, Mr. Wolfe shows the following as good cause:

1. The Virginia state courts' decisions on whether Mr. Wolfe is entitled to relief for unlawful vindictive prosecution appear to present important federal constitutional issues worthy of this Court's attention.

2. Mr. Wolfe previously obtained habeas relief as a result of egregious prosecutorial misconduct, with prosecutors withholding exculpatory information that should have been disclosed in Mr. Wolfe's capital murder trial. *See Wolfe v.*

Clarke, 691 F.3d 410, 424 (4th Cir. 2012). After the federal courts granted habeas relief, vacating Mr. Wolfe's convictions and death sentence, the case returned to the Virginia courts for a new trial. Without conducting any further investigation, the prosecutors then filed six additional charges against Mr. Wolfe seeking to impose convictions and sentences for those new charges that were even more severe than the original charges that Mr. Wolfe had successfully challenged in his federal habeas proceedings.

3. Although Mr. Wolfe was the target of vindictive prosecution and further prosecutorial misconduct, the Virginia trial court refused to dismiss these additional charges and, faced with the possibility of another death sentence, Mr. Wolfe entered into a plea agreement. Mr. Wolfe was ultimately sentenced to 83 years in prison, with 42 years suspended, and ordered to pay court costs of approximately $871,000.

4. On appeal, Mr. Wolfe sought to challenge the trial court's failure to dismiss the new, additional charges for vindictive prosecution and argued that his guilty plea was not voluntary. The Virginia Court of Appeals rejected these arguments and refused to grant relief because Mr. Wolfe's guilty plea was not conditional. The Supreme Court of Virginia refused Mr. Wolfe's petition for appeal on February 5, 2018, and denied his petition for rehearing on March 23, 2018.

5. The undersigned counsel is new to this phase of the case. The attorney appointed to represent Mr. Wolfe for his Appeal from the Virginia state trial court

proceedings is not admitted to this Court. Undersigned counsel is admitted and is undertaking this representation on a *pro bono* basis.

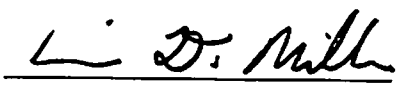
6. Undersigned counsel previously represented Mr. Wolfe in 2002, after he had been convicted and sentenced to death, through judicial sentencing in the trial court, appellate review by the Virginia Supreme Court, and an unsuccessful petition for a writ of certiorari to this Court. *See Wolfe v. Virginia,* No. 03-5945 (denied Nov. 17, 2003; rehearing denied Jan. 12, 2004). Since 2004, however, undersigned counsel has not been involved in representing Mr. Wolfe in his case, and has only recently agreed to represent Mr. Wolfe in preparing a Petition for Writ of Certiorari to this Court. Undersigned counsel did not represent Mr. Wolfe in either the habeas proceedings or the trial court proceedings (and further appeals) that occurred on remand after Mr. Wolfe's original conviction and sentence were vacated.

7. Mr. Wolfe seeks an extension of time to allow his new counsel to be able to adequately review the extensive record and proceedings in the trial court that occurred from 2012 to 2016, as well as the more recent history of litigation before the Virginia Court of Appeals and the Supreme Court of Virginia. Counsel is essentially a solo practitioner with only one associate, a recent law school graduate, and requires the additional time to prepare the Petition for Writ of Certiorari and to ensure that Mr. Wolfe receives a full and fair opportunity to have his case reviewed.

8. Mr. Wolfe remains in custody and there is no harm or prejudice to the Commonwealth of Virginia to allow the requested extension so that new counsel can prepare and present an effective Petition for Certiorari asking this Court to review what appear to be important constitutional questions.

WHEREFORE, Mr. Wolfe respectfully requests that this Court grant him a sixty (60) day extension of time within which to file his Petition for Writ of Certiorari, until and including August 20, 2018.

Respectfully submitted,



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Counsel for Justin Michael Wolfe

June 4, 2018

ATTACHMENT A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 23rd day of March, 2018.

Justin Michael Wolfe, Appellant,

against Record No. 170780
Court of Appeals No. 2081-16-4

Commonwealth of Virginia, Appellee.

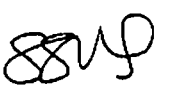
Upon a Petition for Rehearing

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

ATTACHMENT B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 5th day of February, 2018.

Justin Michael Wolfe, Appellant,

against Record No. 170780
Court of Appeals No. 2081-16-4

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

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,

Teste:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

ATTACHMENT C

VIRGINIA:

In the Court of Appeals of Virginia on **Wednesday** *the* **10th** *day of* **May, 2017.**

Justin Michael Wolfe, Appellant,

against Record No. 2081-16-4
Circuit Court Nos. CR05050490-01, CR05050703-01 and CR12003736-00

Commonwealth of Virginia, Appellee.

From the Circuit Court of Prince William County

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 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

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

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 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.

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

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.

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 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

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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.

[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.

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

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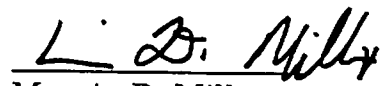
RESPONDENT.

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

CERTIFICATE OF SERVICE

I, Marvin D. Miller, a member of the Supreme Court Bar, hereby certify that three copies of the attached Application to Chief Justice John G. Roberts, Jr. for an Extension of Time to File a Petition for Writ of Certiorari were served on 4 June 2018 by first-class mail, certified, return receipt requested.



Marvin D. Miller