APPENDIX

TABLE OF APPENDICES

Appendix A
Filed May 10, 2017

VIRGINIA:

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

Justin Michael Wolfe, Appellant,

against

Commonwealth of Virginia, Appellee.

Record No. 2081-16-4

Circuit Court Nos. CR05050490-01, CR05050703-01 and CR12003736-00

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

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

misconduct that deprived [him] of exculpatory evidence in the form of Owen Barber's testimony."

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

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

On November 28, 2012, appellant filed a "Motion to Dismiss Indictments Constituting a Vindictive Prosecution." On December 4, 2012, appellant filed a "Motion to Dismiss Indictments for Prosecutorial Misconduct." The trial court denied the motion alleging prosecutorial misconduct on November 4, 2013,

and the motion alleging vindictive prosecution on September 24, 2014.[2]

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

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

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

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

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

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

For the first time on appeal, appellant argues that the trial court erred in accepting his guilty pleas as voluntary. Rule 5A:18 provides, in pertinent part, that "[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice." "The purpose of this contemporaneous objection requirement is to allow the trial court a fair opportunity to resolve the issue at trial, thereby preventing unnecessary appeals and retrials." Creamer v. Commonwealth, 64 Va. App. 185, 195, 767 S.E.2d 226, 231 (2015).

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

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

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

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

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

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

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

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

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

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

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

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[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.

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 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.

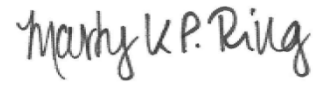
Costs due the Commonwealth by appellant
in Court of Appeals of Virginia:

Attorney's fee $400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: 

Deputy Clerk

Appendix B
Filed February 5, 2018

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

Commonwealth of Virginia, Appellee.

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

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

Appendix C
Filed March 23, 2018

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

Commonwealth of Virginia, Appellee.

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

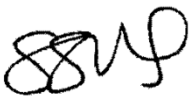
Upon Petition for Rehearing

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

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

Appendix D
Filed March 22, 2016

PLEA OF GUILTY TO A FELONY

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

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

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

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

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

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

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

7. The following plea agreement is submitted:

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

b. All other terms and conditions of the sentence, including suspended

incarceration and probation, shall be determined by the court; and

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

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

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

f. The Commonwealth will nolle prosequi CR05050489-0l, CR12003732-00, CR12003733-00, CR12003734-00, CR12003735-00, CR12003737-00 once the plea is accepted by the Court.

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

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

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

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

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

/s/ Justin Wolfe
Defendant

CERTIFICATE OF DEFENDANT'S COUNSEL

The undersigned attorney for the above-named Defendant, after having made a thorough investigation of the facts relating to this case, do certify that I have explained to the Defendant the charges in this case and that the Defendant's plea of guilty is voluntarily and understandingly made.

/s/ Bernadette Donovan
Attorney for Defendant

CERTIFICATE OF COMMONWEALTH'S ATTORNEY

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

/s/ Raymond F. Morrogh
Attorney for the Commonwealth

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

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

/s/ Carroll A. Weimer, Jr.
Judge

Appendix E
Filed March 29, 2016

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA -vs- JUSTIN MICHAEL WOLFE Defendant.	CRIMINAL CASE NOS: 05050489-01, 05050490-01, 12003732-00, 12003737-00, 05050703-01

Circuit Courtroom 6
Prince William County Courthouse
Manassas, Virginia

Tuesday, March 29, 2016

The above-entitled matter came on to be heard before THE HONORABLE CARROLL A. WEIMER, JR., Judge, in and for the Circuit Court of Prince William County, in the Courthouse, Manassas, Virginia, beginning at 10:05 a.m.

APPEARANCES:

On behalf of the Commonwealth:

RAYMOND F. MORROGH, ESQUIRE
Special Prosecutor

CASEY M. LINGAN, ESQUIRE
Assistant to the Special Prosecutor

ROBERT D. MCCLAIN, ESQUIRE
Assistant to the Special Prosecutor

On Behalf of the Defendant:

JOSEPH T. FLOOD, ESQUIRE

DANIEL T. LOPEZ, ESQUIRE

BERNADETTE M. DONOVAN, ESQUIRE

* * *

[Pages 20–31]

THE COURT: And how old are you, sir?

THE DEFENDANT: Thirty-five.

THE COURT: I'm sorry?

THE DEFENDANT: Thirty-five.

THE COURT: And what is your date of birth?

THE DEFENDANT: 3/17/81.

THE COURT: What's the last grade in school which you completed?

THE DEFENDANT: Twelfth.

THE COURT: Did you have any college or other education since then?

THE DEFENDANT: A little.

THE COURT: Do you read, write and understand the English language?

THE DEFENDANT: Yes.

THE COURT: Are you the person charged in the indictments which were just read to you and to which you entered pleas of guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Do you fully understand the charges against you?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed the charges and their elements with your lawyers?

THE DEFENDANT: Yes, sir.

THE COURT: Do you believe that you understand what the Commonwealth or the prosecutor must prove before you could be found guilty of those charges?

THE DEFENDANT: Yes.

THE COURT: Have you had enough time to discuss with your lawyers any possible defenses which you may have to the charges?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed with your lawyers whether you should plead guilty or not guilty?

THE DEFENDANT: Yes, sir.

THE COURT: After that discussion did you decide for yourself that you should plead guilty?

THE DEFENDANT: Yes.

THE COURT: Are you entering your pleas of guilty freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: This is a decision that you have made and no one is forcing you to make; is that correct?

THE DEFENDANT: That's correct.

THE COURT: Are you entering your pleas of guilty because you are in fact guilty of the crimes charges?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that by pleading guilty you are giving up certain rights?

THE DEFENDANT: Yes.

THE COURT: Do you understand that by pleading guilty you are not entitled to a trial by jury?

THE DEFENDANT: Yes.

THE COURT: Do you understand that by pleading guilty you give up or waive your right against self-incrimination? In other words, you could be asked questions and required to answer them.

THE DEFENDANT: Yes.

THE COURT: Do you understand that by pleading guilty you are giving up your right to confront and cross-examine your accusers?

THE DEFENDANT: Yes.

THE COURT: Do you understand that by pleading guilty in certain respects you are waiving or giving up your right to defend yourself?

THE DEFENDANT: Yes.

THE COURT: Are you on probation or parole for any other offenses?

THE DEFENDANT: No.

THE COURT: Have you discussed with your lawyers whether the defense of accommodation applies in the one drug case, or marijuana case?

(Whereupon, the Defendant conferred with his counsel, off the record.)

THE DEFENDANT: Yes.

THE COURT: Do you understand that if you are not a citizen of the United States that if you plead guilty or are found to be guilty in these cases there may be consequences of deportation, exclusion of admission into the United. States or denial of naturalization pursuant to the laws of the United States?

THE DEFENDANT: Yes.

THE COURT: Has anyone connected with your arrest and prosecution, such as the police or the Commonwealth's attorney or any other person, in any manner threatened you or forced you to enter these pleas of guilty?

THE DEFENDANT: No, sir.

THE COURT: Have there been any promises to you concerning your plea of guilty other than the plea agreement?

THE DEFENDANT: No.

THE COURT: Do you understand what the maximum possible punishment is in this situation?

THE DEFENDANT: Yes.

THE COURT: What is it?

THE DEFENDANT: Forty-one years.

THE COURT: No, sir. Do you understand --

THE DEFENDANT: Death.

THE COURT: No.

MR. FLOOD: Which charge, Your Honor?

THE COURT: Well, the maximum possible punishment is life.

THE DEFENDANT: Oh, life.

THE COURT: And you understand that you could get life plus a maximum of, let's see, you could get life for the murder charge, you could get up to five years for the -- I believe it's five years for the use of a firearm in the commission of a felony, and up to 30 years on the marijuana charge?

THE DEFENDANT: Yes.

THE COURT: All right. And do you understand that those sentences could be ordered to be served consecutively?

THE DEFENDANT: Yes.

THE COURT: And you understand -- and we'll get into the questions about the plea agreement in just a minute.

Are you entirely satisfied with the service of your lawyers in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that by pleading guilty you may waive any right to appeal any decision that I make?

THE DEFENDANT: Yes.

THE COURT: I've been given documents entitled, "Plea of guilty to a felony," three of them. I've got three different ones, they have your name typed at the top and on the second page they appear to have your signature in the line for defendant and they apparently were signed March 22nd.

Well, one of them was signed March 22nd, that is the first degree murder case, the use of a firearm in the commission of a felony was likewise signed on March 22nd, and the other charge, conspiracy charge, was signed on March 24th.

Is that your understanding?

THE DEFENDANT: Yes.

THE COURT: Is that your signature on each of these documents?

THE DEFENDANT: Yes, it is.

THE COURT: Did you read those documents?

THE DEFENDANT: I did.

THE COURT: Did you go over them with your lawyers?

THE DEFENDANT: I did.

THE COURT: Were they able to answer any questions that you might have had about them?

THE DEFENDANT: Yes, they were.

THE COURT: And are all the statements made in those forms true and correct to the best of your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: Do you believe you understand everything that the forms say?

THE DEFENDANT: Yes, sir.

THE COURT: Have you entered into an agreement with the Commonwealth's attorney in this case, in these cases?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I see in these forms that the Commonwealth has agreed to a particular sentence and it is a sentence range in this situation; It says that you will be found guilty and be sentenced to a total term of active incarceration of not less than 29 nor more than 41 years for all charges to which you are pleading guilty.

Is that your understanding of the recommendation?

THE DEFENDANT: It is.

THE COURT: And do these forms contain the full and complete agreement between you and the Commonwealth?

THE DEFENDANT: Yes.

THE COURT: Do you understand that the Court may accept the agreement, reject the agreement or may defer any decision to either accept or reject it until there has been opportunity to consider a pre-sentence report?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that if the Court accepts the agreement that the Court will

include in its judgement [Sic] and sentence order the sentence provided for the agreement?

THE DEFENDANT: Yes.

THE COURT: Now, because this is a range do you understand that it could be anywhere within that range if I accept the agreement?

THE DEFENDANT: Yes.

THE COURT: So it could be 29 years or it could be 41 years.

THE DEFENDANT: Yes.

THE COURT: Do you understand that if the Court rejects the agreement you will not be bound by it and you will be given an opportunity to withdraw your plea of guilty and if you do your trial will be conducted by another judge?

THE DEFENDANT: Yes.

THE COURT: Do you understand that if you still plead guilty after the Court rejects the plea agreement, the sentence in the case may be more severe than the disposition contained in the agreement?

THE DEFENDANT: Yes.

THE COURT: In other words, if I reject the agreement but nevertheless you decide to go forward with a plea of guilty in each of these cases, then I would be free, or the Court would be free, to sentence you to anything up to and including the maximum for each of the charges?

THE DEFENDANT: Right.

THE COURT: Have you gone over with your lawyers the sentencing guidelines in these cases?

THE DEFENDANT: Yes.

THE COURT: And you believe that you know what the guidelines will recommend to me as a sentence; is that correct?

THE DEFENDANT: Yes.

THE COURT: The way this will work is I will refer the matter to the probation office, unless the parties have agreed that they are going to prepare the guidelines and submit them to the Court. But I submit it to the probation office, the probation office prepares the guidelines then they come in on the day of sentencing, and sometimes, not often, but sometimes the probation office has more information available to it than you did when you discussed it with your lawyers, and as a result sometimes the sentencing guidelines calculation that I ultimately accept is different from the one that you and your lawyers arrived at.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And if I accept a different guidelines calculation than what you all came up with, you would not have the opportunity to withdraw your pleas of guilty?

THE DEFENDANT: I understand.

THE COURT: Now, that -- I'm required to ask that question but that may have no bearing whatsoever on this case if I accept the agreement

because the guidelines may come back completely outside of the agreement.

I tend to think not, but it could be that the guidelines will have nothing to do with your case, do you understand that?

THE DEFENDANT: I understand.

THE COURT: Have you understood all the questions that I've asked of you?

THE DEFENDANT: Yes, I did.

THE COURT: Do you have any questions for me? If so, please ask them of your lawyers first.

THE DEFENDANT: No, sir.

THE COURT: Now, do you all have any objection to the Commonwealth proceeding by way of proffer?

Appendix F
Filed November 28, 2012

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA vs. JUSTIN MICHAEL WOLFE, Defendant.	CR12003732-00– CR12003737-00 Motion to Dismiss Indictments Constituting a Vindictive Prosecution Hon. Mary Grace O'Brien Hearing: Nov. 20, 2012

MOTION TO DISMISS INDICTMENTS CONSTITUTING A VINDICTIVE PROSECUTION

COMES NOW the Defendant. Justin Michael Wolfe, by and through counsel, and moves this Honorable Court to dismiss the indictments brought vindictively against Mr. Wolfe in retaliation for the exercise of his constitutional rights to petition for and receive federal habeas corpus relief. In making this Motion. Mr. Wolfe relies upon his rights to due process of law. to a fair trial. to be free of cruel and unusual punishment. to equal protection. and his fundamental right to seek and receive habeas corpus relief from an unlawful imprisonment by the Commonwealth. U.S. CONST. art. l. § 9: U.S. CONST. amend. V. VI. VIII, XIV: VA. CONST. art. I §§ 8, 9, 11.

PROCEDURAL HISTORY

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

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

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

3. In 2005, Mr. Wolfe petitioned for federal habeas corpus relief in the United States District Court for the Eastern District of Virginia, raising his actual innocence as a reason to excuse the procedural

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

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

Commonwealth "had notice that Barber's trial testimony implicating Wolfe was false." *Id.* at 571. The Court observed that Mr. Ebert himself had testified "that he employs a practice of withholding information from counsel and defendants with the intent of preventing them from establishing a defense" and that this acknowledgment "shows the Commonwealth's intent in withholding exculpatory information as well as its knowledge about the consequences of suppressing and failing to pursue such evidence." *Id.*

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

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

Mr. Wolfe, which was that he be transferred back to Death Row and that his employment and privileges be restored. *Id*.

7. On August 16, 2012, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's grant of habeas relief, reiterating Judge Jackson's conclusion that the conduct of the Prince William County prosecutors in obtaining Mr. Wolfe's 2002 convictions had been "not only unconstitutional in regards to due process, but abhorrent to the judicial process." *Wolfe v. Clarke*, 691 F.3d 410, 424 (4th Cir. 2012) (quoting *Wolfe*, 819 F. Supp. at 566 n.24). The Fourth Circuit soundly reprimanded the Commonwealth:

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

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

out of Prince William County, it had similarly "refus[ed] to condone the suppression of evidence by the Prince William County prosecutors, and advised them to 'err on the side of disclosure, especially when a defendant is facing the specter of execution.'" *Id.* at 424 (quoting *Muhammad v. Kelly*, 575 F.3d 359, 370 (4th Cir. 2009)). The Fourth Circuit concluded, "[w]e sincerely hope that the Commonwealth's Attorney and his assistants have finally taken heed of those rebukes." *Id*.

9. On September 13, 2012, Mr. Ebert and Mr. Conway's *ex parte* motion to recuse themselves and to appoint Mr. Raymond Morrogh as special prosecutor was granted. The very next day, Mr. Morrogh asserted in this Court that he had only reviewed materials from the thoroughly discredited 2002 trial, yet affirmatively stated that "this Defendant was absolutely involved in this murder and planned it and caused it to occur and he did it out of greed .... Justin Wolfe is many things but innocent is not one of them." 2012-10-31, Hr'g Tr. At 24:15–17,20–21. Because Mr. Morrogh had only reviewed the 2002 trial, however, he was presumably unaware of the nature and extent of the evidence withheld from Mr. Wolfe, as well as the false testimony offered against him.

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

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

ARGUMENT

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

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

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

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

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

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

tory conduct amounts to vindictive prosecution and is unconstitutional." *United States v. Wilson*, 262 F.3d 305, 314 (4th Cir. 2001).

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

> Both *Pearce* and *Blackledge* involved the defendant's exercise of a procedural right that

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

Id. at 376–77.

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

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

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

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

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

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

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

Indictments CR12003734-00 and CR12003735-00 are both much harsher indictments based on the same set of circumstances as alleged in the 2001 conspiracy charge. Having sought and received a maximum penalty of thirty years against Mr. Wolfe for a charge of conspiracy to distribute more than five pounds of marijuana, the Commonwealth now seeks to impermissibly increase the severity of his drug-related charges in retaliation for the exercise of his constitutional rights. hoping to secure a life sentence. Now that Mr. Wolfe has received habeas corpus relief, the Commonwealth alleges that he "was one of several principal administrators, organizers or leaders of a continuing criminal enterprise." Such charges are plainly barred under the vindictive prosecution doctrine. and a presumption of vindictiveness applies to these charges under *Blackledge* and the other authorities cited herein.

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

vindictiveness applies to the Commonwealth's attempt to subject Mr. Wolfe to multiple charges based on the same facts for which he previously faced only a single charge.

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

Finally, the Commonwealth cannot rebut the presumption of a vindictive prosecution. As discussed in the procedural history above, Mr. Wolfe was originally indicted for charges related to these events in 2001. He was convicted on all of these charges in a trial fraught with due process violations that deprived him of any opportunity to defend himself.

Mr. Wolfe sought and received federal habeas corpus relief, which was granted in a scathing opinion by the District Court and upheld by another scathing opinion by the Fourth Circuit. These opinions note that the Prince William County Commonwealth's Attorneys likely violated ethical rules in Mr. Wolfe's case, that they were not credible witnesses, that the prosecution's actions were "abhorrent to the judicial process," that their explanations were "flabbergasting," and that it was time for them to finally heed the Fourth Circuit's rebukes and cease their pattern of constitutional violations.

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

Only after that meeting, on September 13, 2012, did Mr. Ebert and Mr. Conway file an *ex parte* motion to recuse themselves and to appoint Mr. Raymond Morrogh as special prosecutor, acknowledging their disqualification. The motion was granted and Mr.

Morrogh was appointed. The very next day, Mr. Morrogh asserted in this Court that he had only reviewed the transcript from the thoroughly discredited 2002 trial, yet affirmatively stated that "this Defendant was absolutely involved in this murder and planned it and caused it to occur and he did it out of greed .... Justin Wolfe is many things but innocent is not one of them." 2012-10-31, Hr'g Tr. at 24:15–17, 20–21. Mr. Morrogh never disclosed, nor even mentioned, additional investigatory efforts on the part of the Commonwealth. Having no time to conduct an additional investigation, it is plain that the current prosecution decided to bring additional and more severe charges against Mr. Wolfe based solely on evidence from Mr. Wolfe's first tainted trial. Under these circumstances, the Commonwealth could not possibly rebut the presumption of vindictiveness that attaches to the new indictments.

CONCLUSION

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

Respectfully submitted.

JUSTIN MICHAEL WOLFE
By Counsel

/s/ Kimberly A. Irving
[Signature Block]

/s/ Edward B. Machmahon, Jr.
[Signature Block]

/s/ Teresa E. McGarrity
[Signature Block]

[Certificate of Service Omitted]

Appendix G
Filed December 11, 2012

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA -vs- JUSTIN MICHAEL WOLFE Defendant.	CRIMINAL CASE NOS: CR05050489, CR05050490, CR05050703 CR12003732, CR12003733 CR12003734 CR12003735 CR12003736,

Circuit Courtroom 3
Prince William County Courthouse
Manassas, Virginia

Tuesday, December 11, 2012

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

APPEARANCES:

On behalf of the Commonwealth:

RAYMOND F. MORROGH, ESQUIRE
CASEY M. LINGAN, ESQUIRE
Assistant Commonwealth's Attorney

On Behalf of the Defendant:

KIMBERLY A. IRVING, ESQUIRE

TERESA E. MCGARRITY, ESQUIRE

EDWARD B. MACMAHON, JR., ESQUIRE

* * *

[Pages 194–95]

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

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

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

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

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

showing which would require the Commonwealth to rebut that presumption.

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

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

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

MS. IRVING: Yes, Your Honor.

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

MS. IRVING: Yes, Your Honor.

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

What's your preference?

MS. IRVING: I have -- given the Commonwealth wants to play snippets of video, I have multiple multiple videos that are relevant. I'm wondering if it wouldn't be

Appendix H
VA Code Ann. § 19.2-254
Effective: July 1, 2014

Arraignment shall be conducted in open court. It shall consist of reading to the accused the charge on which he will be tried and calling on him to plead thereto. In a felony case, arraignment is not necessary when waived by the accused. In a misdemeanor case, arraignment is not necessary when waived by the accused or his counsel, or when the accused fails to appear.

An accused may plead not guilty, guilty or nolo contendere. The court may refuse to accept a plea of guilty to any lesser offense included in the charge upon which the accused is arraigned; but, in misdemeanor and felony cases the court shall not refuse to accept a plea of nolo contendere.

With the approval of the court and the consent of the Commonwealth, a defendant may enter a conditional plea of guilty in a misdemeanor or felony case in circuit court, reserving the right, on appeal from the judgment, to a review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

Upon rejecting a plea agreement in any criminal matter, a judge shall immediately recuse himself from any further proceedings on the same matter unless the parties agree otherwise.

Appendix I
Federal Rules of Criminal Procedure, Rule 11

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the

defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for

good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea

agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be

recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.