No. 18-227

In the Supreme Court of the United States

JUSTIN MICHAEL WOLFE, PETITIONER,

v.

COMMONWEALTH OF VIRGINIA

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a guilty plea in state court constitutes a waiver of a vindictive prosecution claim under *Class* v. *United States*, 138 S. Ct. 798 (2018).

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The opinion of the Supreme Court of Virginia denying the petition for appeal (Pet. App. 9a–10a) and the order denying rehearing (Pet. App. 11a–12a) are unreported. The opinion of the Court of Appeals of Virginia denying the petition for appeal (Pet. App. 1a–8a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on February 5, 2018. A petition for rehearing was denied on March 23, 2018 (Pet. App. 11a). On June 8, 2018, the Chief Justice extended the time to file a petition for a writ of certiorari to and including August 20, 2018, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. In March 2001, Daniel Petrole, Jr. was found dead in his car outside his residence. Va. S. Ct. R. 11497. Investigation revealed that Petrole had been supplying petitioner with large amounts of marijuana, which petitioner would distribute. *Id.* at 11498–99. A debt sheet found with Petrole's body showed that petitioner owed Petrole substantial amounts of money. *Id.* at 11498.

Police tracked a gun found near the body to Owen Barber, who confessed to participating in Petrole's murder. Va. S. Ct. R. 11498–500. Barber told police that he and petitioner had discussed murdering Petrole and

that they had developed a plan to have Barber rob and murder Petrole in exchange for four pounds of marijuana, $10,000, and forgiveness of Barber's debt to petitioner. *Id.* at 11500–01.

2. In 2002, petitioner was convicted of capital murder in connection with Petrole's murder and sentenced to death. *Wolfe* v. *Johnson*, 565 F.3d 140, 149 (4th Cir. 2009). That conviction was later vacated on federal habeas review, and federal courts ultimately ordered that petitioner be retried or released. See *Wolfe* v. *Clarke*, 691 F.3d 410, 413 (4th Cir. 2012).

3. The federal courts granted habeas relief because they concluded that the original prosecutors had violated their obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by "suppress[ing]" a police report that could have been used to impeach Barber's testimony against petitioner. See *Wolfe*, 691 F.3d at 417–18, 422–23; see also *Wolfe* v. *Clarke*, 718 F.3d 277, 296–97 (4th Cir. 2013). As a result, the state trial court appointed a special counsel to handle the second trial before petitioner was retried. Va. S. Ct. R. 159 (motion by original prosecutor to appoint a special prosecutor); *id.* at 160 (order granting motion).

Before his retrial, however, petitioner pleaded guilty to three charges: first-degree murder; use of a firearm in the commission of a felony; and conspiracy to distribute marijuana. Pet. App. 13a (listing indictments to which petitioner pleaded guilty); accord Va. S. Ct. R. 1–2, 344 (relevant indictments). The state trial court accepted petitioner's guilty pleas, concluding that the pleas were knowing and voluntary and that

petitioner was guilty of the charges. See Va. S. Ct. R. 11480–94. Indeed, petitioner admitted on the record—through a letter read by his attorney—that he was responsible for Petrole's murder. See *id.* at 11514–19. The state trial court sentenced petitioner to 60 years on the murder charge (with 27 years suspended); 3 years on the firearm charge; and 20 years on the marijuana charge (with 15 years suspended). Va. S. Ct. R. 11586. The court ordered the sentences to run consecutively for a total of 41 years of active incarceration (33 years on the murder charge, 3 years on the firearms charge, and 5 years on the marijuana charge). *Id.* at 11588.

4. Petitioner appealed to the Court of Appeals of Virginia, asserting three errors. Va. S. Ct. R. 8833–35. The case was referred to a single judge, who denied the petition for appeal in an unsigned and unpublished decision. See Pet. App. 1a–8a.

As relevant here, petitioner argued that his guilty plea was involuntary because he "was the target of vindictive prosecution that subjected [him] to increased mandatory minimum sentences after successful post-conviction proceedings." Pet. App. 1a (internal quotation marks omitted). The court of appeals "[d]ecline[d] to consider" that issue, however, because petitioner had raised it "[f]or the first time on appeal." *Id.* at 4a, 6a. The court of appeals thus concluded that petitioner's argument that the trial court erred in accepting his plea violated Rule 5A:18 of the Rules of the Supreme Court of Virginia, which "provides, in pertinent part, that '[n]o ruling of the trial court . . . will be considered

as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to obtain the ends of justice.'" Pet. App. 4a.[1]

5. The Supreme Court of Virginia denied a petition for appeal without comment, Pet. App. 9a–10a, and likewise denied a petition for rehearing without comment, Pet. App. 9a–11a.

ARGUMENT

The petition for a writ of certiorari should be denied. This Court lacks jurisdiction because the decision below was based on petitioners' failure to comply with a longstanding and perfectly valid state procedural rule rather than rejection of petitioner's federal claim on the merits. There is no decision from Virginia's highest court, and the unpublished, largely unreasoned decision from the state intermediate appellate court does not, and could not, implicate any split in lower court authority. And no split has yet developed about how to apply this Court's less than one-year-old decision in *Class* v. *United States*, 138 S. Ct. 798 (2018).

1. This Court lacks jurisdiction because the decision below rests on valid state procedural grounds. The linchpin of petitioner's argument is that the court of appeals rejected his vindictive prosecution claim on the theory "that, because [petitioner's] guilty plea was

[1] The court of appeals also denied petitioner's third assignment of error, which challenged the order to pay costs associated with the retrial. Pet. App. 6a–7a. That decision has not been challenged here.

not conditional, he had waived his ability to raise a vindictive prosecution claim on appeal." Pet. 12.

But that is not what the Court of Appeals of Virginia said. Rather, the court of appeals' decision was based on *forfeiture*, not waiver, and it involved *the timing* and *the forum* in which petitioner first raised his claim rather than the nature of his guilty plea. See Pet. App. 6a (stating that the court would not "consider the first and second assignments of error" because petitioner had raised them "for the first time on appeal"); see also *id.* at 1a–2a (stating the first two assignments of error as relating to the voluntariness of petitioner's guilty plea and vindictive prosecution); accord S. Ct. Va. R. 5A:18 ("No ruling of the trial court * * * will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice.").

In short, the court of appeals did not reject petitioner's vindictive prosecution claim because he pleaded guilty. Rather, the court of appeals never considered that claim on the merits because petitioner failed to preserve it as a matter of state law. The decision below thus rests "upon an adequate and independent state ground that deprives this Court of jurisdiction." *Berry* v. *Mississippi*, 552 U.S. 1007, 1007 (2007) (per curiam).

2. Even if this Court had jurisdiction, the decision below neither creates nor implicates any split in lower court authority. The court of appeals' unsigned opinion in this case contains no meaningful analysis of the issue petitioner claims is presented, see Pet. App.

1a–8a, nor does the Virginia Supreme Court's one-page decision refusing petitioner's appeal, see *id.* at 9a–10a. And because the Court of Appeals of Virginia's decision in this case is unpublished and nonprecedential, it will not bind future courts in answering the question whether a guilty plea necessarily waives the right to raise a vindictive prosecution claim on appeal.

Petitioner never acknowledges that the decisions in this case are not binding precedent and will not control any future Virginia court. Nor does petitioner identify any other decision by the Supreme Court of Virginia showing that Virginia "view[s] a guilty plea as a waiver of a vindictive prosecution claim on direct appeal." Pet. 20. Any conceivable split of authority on that question simply does not implicate Virginia.

3. In any event, there is currently no "conflict[]" among the "United States court[s] of appeals" or "state court[s] of last resort" over the question raised by petitioner. S. Ct. R. 10(a) & (b).

Petitioner frames his question presented as whether "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." Pet. i. But, other than the Court of Appeals of Virginia's unpublished and nonprecedential decision here, *all eight* of the decisions that petitioner claims comprise that split were decided long before the this Court's decision last Term in *Class*—the opinion that petitioner claims points the way to its proper resolution. See Pet. 19–20 (cases decided between 1980 and 2014).

Moreover, even if decisions that pre-date *Class* could serve as the basis for a circuit split about what *Class* requires, almost none of the decisions cited by petitioner satisfy Rule 10. Half of the decisions on which petitioner relies on are not from the relevant State's highest court, see Pet. 20 (citing decisions from the intermediate appellate courts of Arizona, Mississippi, Missouri, and Utah), and two more are unpublished, see Pet. 20 (citing *Smith* v. *State*, 841 A.2d 308 (Del. 2004) (unpublished op.); and *Taylor* v. *State*, 2014 MT 60N (Mont. 2014) (unpublished op.)). The final two decisions on which petitioner relies—which were both decided more than three-and-a-half decades ago—are from a single State. See Pet. 19 (citing 1980 and 1981 decisions from New York).

4. Petitioner also vastly overstates *Class* and its relevance to this case. In particular, petitioner is wrong that *Class* "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." Pet. 12. Instead, *Class* considered whether a defendant who pleaded guilty can still challenge the conviction by arguing "that *the statute of conviction violates the Constitution*." 138 S. Ct. at 801–02 (emphasis added).

To be sure, this Court's opinion in *Class* discusses the rules governing vindictive prosecution claims. But it does so only in the context of explaining the *Blackledge-Menna* doctrine, which generally applies to determine whether a defendant waived a particular claim by pleading guilty. See *Class*, 138 S. Ct. at 803–04; accord *Menna* v. *New York*, 423 U.S. 61

(1975) (per curiam); *Blackledge* v. *Perry*, 417 U.S. 21 (1974). We do not dispute that the merits in a case like this one would be addressed under *Blackledge-Menna* line of cases. But *Class* (which, again, was about whether a defendant can challenge the constitutionality of a statute) adds nothing to the analysis in a case like this one where the sole claim would be vindictive prosecution. Thus, even if petitioner had properly preserved this argument, see 4-5, *supra*, the petition for a writ of certiorari should be denied because the question presented does not accurately reflect the issue this Court would have to decide.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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