No. 13-555

In The Supreme Court of the United States

JUSTIN MICHAEL WOLFE,

Petitioner,

v.

HAROLD W. CLARKE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Wolfe was granted habeas relief under 28 U.S.C. § 2254 on his claim that the prosecution did not fully discharge its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. The United States Court of Appeals for the Fourth Circuit found that the district court abused its discretion when it barred the Commonwealth from retrying Wolfe. Where the United States Court of Appeals for the Fourth Circuit's actual holding creates no "split" among the circuits, is certiorari warranted merely to superintend the circuit court's routine exercise of its appellate authority over a case limited to its unique facts?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

On January 22, 2002, a jury convicted Wolfe in the Circuit Court of Prince William County, Virginia, of hiring Owen Barber to murder Daniel Robert Petrole, Jr., the illegal use of a firearm, and conspiracy to distribute marijuana. The jury sentenced Wolfe to death, finding both the future dangerousness and vileness aggravating circumstances. The Supreme Court of Virginia unanimously affirmed. *Wolfe v. Commonwealth*, 576 S.E.2d 471 (Va. 2003). This Court denied certiorari review. *Wolfe v. Virginia*, 540 U.S. 1019 (2003).

The Supreme Court of Virginia dismissed Wolfe's petition for a writ of habeas corpus, *Wolfe v. Warden*, Record No. 040125 (Va. Mar. 10, 2005) (unpub.), and the Circuit Court of Prince William County, Virginia, set an execution date. This Court denied certiorari review and a stay of execution regarding the state habeas judgment. *Wolfe v. True*, 545 U.S. 1153 (2005).

Wolfe obtained a stay of execution from the United States District Court for the Eastern District of Virginia and filed a habeas petition. The district court dismissed all the claims, and the United States Court of Appeals for the Fourth Circuit affirmed in part and vacated in part. *Wolfe v. Johnson*, 565 F.3d 140, 171 (4th Cir. 2009). The Fourth Circuit remanded to determine whether Wolfe's gateway innocence claim under *Schlup v. Delo*, 513 U.S. 298 (1995), excused his defaulted claims, including claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v.*

United States, 405 U.S. 150 (1972). Wolfe primarily relied on Barber's post-trial recantation of his trial testimony, a recantation that Barber subsequently withdrew in affidavits and letters.

On remand, the district court found on the pleadings that Wolfe had satisfied *Schlup* and ordered an evidentiary hearing on the defaulted claims. *Wolfe v. Johnson*, 2010 U.S. Dist. LEXIS 144840 (E.D. Va. Feb. 4, 2010). Prior to the hearing, the district court granted Wolfe extraordinarily broad discovery, ordering that Wolfe be allowed to review and copy the entirety of the police and prosecution files, saving only the prosecutors' own work product. At the hearing, Barber again recanted and the district court credited that last story. The district court ruled the Commonwealth had violated Wolfe's rights under *Brady* and *Giglio*. *Wolfe v. Clarke*, 819 F. Supp. 2d 538 (E.D. Va. 2011).

The Director filed a notice of appeal on August 3, 2011. On August 30, 2011, the district court amended its judgment, vacating all of Wolfe's convictions and ordering the Commonwealth to provide Wolfe a retrial within 120 days, or release him unconditionally.

The Director filed a second notice of appeal on September 2, 2011, and a motion to stay the habeas judgment pending appeal on September 13, 2011. Wolfe filed an opposition and a motion for immediate release. The district court held an evidentiary hearing on the motions. On November 22, 2011, it

granted the Director's motion to stay, and denied Wolfe's motion for release, *Wolfe v. Clarke*, 819 F. Supp. 2d 574 (E.D. Va. 2011), and the appeal proceeded in the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the district court's habeas judgment on August 16, 2012. *Wolfe v. Clarke*, 691 F.3d 410 (4th Cir. 2012). Its mandate issued on September 7, 2012.

On Friday, September 7, 2012, the Director released Wolfe from Sussex I State Prison and the Prince William County, Virginia, authorities took him into custody for retrial on the existing indictments. On Monday, September 10, 2012, the state trial court confirmed that Wolfe had qualified counsel and set Wolfe's bond hearing for that Friday, September 14, 2012. On September 11, 2012, Mr. Ebert, the Commonwealth's Attorney for Prince William County, Mr. Conway, his assistant, and Mr. Newsome, an investigator, interviewed Owen Barber at the Augusta Correctional Center in preparation for the retrial. The investigator made an audio recording of the entire interview, which subsequently was transcribed.

On September 12, 2012, Mr. Ebert asked the trial court to appoint a Special Prosecutor to prosecute the retrial, and to recuse him and his office. On September 13, 2012, the trial court appointed as Special Prosecutor Raymond F. Morrogh, the Commonwealth's Attorney for Fairfax County, Virginia. On September 14, 2012, the trial court held a hearing on Wolfe's motion for bail, and

denied the motion. On Wolfe's request, the trial court set a retrial date of October 15, 2012.

On October 1, 2012, the Grand Jury for the Circuit Court of Prince William County, Virginia, indicted Wolfe on new charges: capital murder of Daniel Petrole by one engaged in a criminal enterprise, felony murder of Daniel Petrole, two related counts of use of a firearm in committing murder, and two counts of leading a criminal enterprise distributing marijuana. On October 3, 2012, the trial court granted the Special Prosecutor's motion to continue the joint trial and retrial. The setting of a new trial date, however, was delayed by Wolfe's pretrial motions to vacate the order appointing the Special Prosecutor and to disqualify the Special Prosecutor. On October 31, 2012, the trial court heard and denied those motions and set the trial for January 2, 2013.

On November 16, 2012, Wolfe filed a motion in the federal district court asking for enforcement of the habeas judgment, arguing that the Commonwealth had not timely provided him a retrial. On December 7, 2012, the district court set a hearing on the motion for December 13, 2012, and, *sua sponte*, entered an order requiring the Director to show cause why one of Wolfe's allegations, if true, did "not constitute extraordinary circumstances warranting the Court to order Petitioner's immediate release and bar current and future prosecutions of Wolfe on all charges related to the death of Danny Petrole and drug conspiracy crimes." The allegation

was that Mr. Ebert, Mr. Conway, and Mr. Newsome threatened Barber with reprosecution and the death penalty, during the September 11, 2012, interview with Barber prior to re-trying Wolfe.

On December 21, 2012, Wolfe moved the state trial court to continue the retrial, and his motion was granted. No new trial date was set, and a status hearing was scheduled for January 16, 2013.

On December 24, 2012, the district court entered its injunction, ordering that, within ten days, the Commonwealth must release Wolfe from all criminal proceedings on the charges it previously had ordered retried, and barring reprosecution of those charges, as well as any future prosecution of Wolfe for "any other charges stemming from [*sic*] death of Danny Petrole which requires [*sic*] the testimony of Owen Barber in any form." The order was filed, and the Director served, on December 26, 2012.

On December 26, 2012, the Director sent by overnight delivery to the district court a notice of appeal of the injunction and a motion for stay of the injunction pending the Director's appeal to the Fourth Circuit, both of which were filed on December 28, 2012.[1] On December 28, 2012, the Director filed in the Fourth Circuit an emergency motion to vacate the district court's injunction.

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[1] The district court considered Wolfe's case a "paper" case and did not permit filing by the ECF system, by fax, or by e-mail.

The Director filed on January 2, 2013, an emergency application to the Chief Justice of the Supreme Court to vacate the district court's injunction. On the same day, the Director filed in the Fourth Circuit an emergency motion for a stay pending appeal.

The state trial court held a hearing on January 2, 2013, on Wolfe's motion for unconditional release, based on the injunction entered by the district court on December 24, 2012. The Special Prosecutor argued against certain terms of the order requested by Wolfe, stating, "I would give Mr. Barber use and derivative use immunity if he testifies for the Defendant in any subsequent trial if he testifies truthfully." Resp. App. 1. The state trial court, out of an abundance of caution, interpreted the injunction broadly as requiring compliance by January 3, 2013, at 5:00 p.m. The trial court ruled that it would enter the order requested by Wolfe at 5:00 p.m. on January 3, 2013, unless the injunction was stayed prior to that time. The Fourth Circuit ultimately stayed the injunction at 3:44 p.m. on January 3, 2013. Following the stay, the trial court declined to enter the order for Wolfe's release.

On May 2, 2013, the Fourth Circuit vacated the district court's order and remanded the case with instructions that the district court enter a substitute order. *Wolfe v. Clarke*, 718 F.3d 277 (4th Cir. 2013), Pet. App. 1a. "The order on remand shall be without prejudice to a retrial of the original charges against Wolfe, and it shall not preclude the conduct of such

other and further proceedings in the state or federal courts as may be appropriate." 718 F.3d at 291, Pet. App. 30a.

The state trial court has continued to hear pre-trial motions by the parties, but no new trial date has been set.

Wolfe filed his certiorari petition on October 31, 2013, and it was placed on the docket on November 4, 2013.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The Decision by the Circuit Court of Appeals, Reviewing the District Court's Order Barring Retrial for Abuse of Discretion, Presents No Compelling Issue of a Circuit Split, Much Less a Compelling Reason to Grant Certiorari.

Wolfe asserts the Fourth Circuit's decision creates a split in the circuits, citing *D'Ambrosio v. Bagley*, 656 F.3d 379 (6th Cir. 2011); *Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 (6th Cir. 2006); and *Capps v. Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993), as approving a bar to retrial as a remedy for a state's failure to comply with a conditional writ. Pet. 16, 18. "[I]n 'extraordinary circumstances,' such as when 'the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period or if the state's delay is likely to prejudice the petitioner's

ability to mount a defense at trial,' a habeas court may 'forbid[ ] reprosecution.'" *Satterlee*, 453 F.3d at 370 (quoting 2 Hertz and Liebman, *Federal Habeas Corpus Practice And Procedure* § 33.3, at 1685-86 (5th ed. 2005)).

The Fourth Circuit was "unwilling to embrace the principles of *Capps* or *Satterlee*" because it was unnecessary to do so to decide the question before it. It correctly characterized those cases, relied on by the district court, as allowing such a remedy only in "extraordinary circumstances." *See Wolfe*, 718 F.3d at 290-91, Pet. App. 28a. "In the absence of extraordinary circumstances, the proper disposition is generally, as the district court recognized, the release of a successful habeas petitioner, subject to rearrest and retrial." *Id.* at 291, Pet. App. 28a. The Fourth Circuit correctly found that the district court improperly relied only on speculation to find such extraordinary circumstances in this case.[2]

> At the core of the [district] court's analysis was its belief that the prosecutors had "incurably frustrated the entire purpose" of habeas corpus and had "permanently crystalized" the constitutional violations by "scar[ing] Barber into invoking his Fifth

[2] Amicus, the Northwestern University School of Law Supreme Court Practicum, asserts that the Fourth Circuit stated no basis for finding an abuse of discretion. (Amicus at 5). As demonstrated here, its assertion is wrong.

> Amendment right to avoid self-incrimination." [Pet. App. 86a.]
>
> The district court's conclusion concerning the availability of Barber's testimony at a retrial, however, is speculative. As an initial matter, Barber could decide on his own to testify, and—based on his track record—such evidence might provide support for either side. And, under a proper grant of immunity, Barber's testimony may well be compelled. *See Kastigar v. United States*, 406 U.S. 441 (1972) (holding that Fifth Amendment privilege may be supplanted and witness compelled to testify by proper grant of immunity). Alternatively, the state trial court, by way of example, could determine that a waiver of Barber's Fifth Amendment privilege has already been made; it could authorize the evidentiary use of Barber's prior statements in one form or another; or it might craft any number of other remedies.

718 F.3d at 289, Pet. App. 25a (footnote omitted). Indeed, the Special Prosecutor already has disproven the district court's speculation that it was "unlikely that the Commonwealth would grant immunity to Barber so that he could provide testimony to exonerate" Wolfe. Pet. App. 25a, 87a. The Special Prosecutor already has committed, on the record, to provide Barber with immunity sufficient under *Kastigar* to compel his testimony. Resp. App. 1.

An order based solely on speculation necessarily is an abuse of discretion. *See, e.g.*, *Baba v. Holder*,

569 F.3d 79, 84 (2d Cir. 2009) ("disbelief based on this gratuitous assumption would be rank unsupported speculation and constitute an abuse of discretion"). This familiar standard is well-established for reviewing, for example, a district court's sentencing decisions:

> We grant sentencing courts discretion to draw conclusions about the testimony given and evidence introduced at sentencing. Yet, this discretion is neither boundless nor is the information upon which a sentencing court may rely beyond due process limitations. To the contrary, we recognize that due process requires that sentencing determinations be based on reliable evidence, not speculation or unfounded allegations.

United States v. England, 555 F.3d 616, 622 (7th Cir. 2009) (citations omitted) (vacating sentence as abuse of discretion where based on speculation), *cert. denied*, 131 S. Ct. 346 (2010).

Compounding his misreading of the Fourth Circuit's narrow opinion, Wolfe asserts it held the district court "lacked authority" to bar retrial and adopted a "new rule." Pet. 15. Wolfe then characterizes the asserted "new rule" as holding that barring retrial "is appropriate only 'where a recognized constitutional error cannot be remedied by a new trial.'" *Id.* As explained below, the Fourth Circuit did not hold the district court was without authority to bar a retrial. To the contrary, it readily concluded the district court possessed jurisdiction

to enforce its judgment. 718 F.3d at 286 n.10, Pet. App. 18a. It held only that the district court had abused its discretion in doing so here. The Fourth Circuit did not ground its decision on the "new rule" Wolfe asserts.[3]

Wolfe argues the dissenting judge in the Fourth Circuit would have embraced *Capps* and *Satterlee*. Pet. 16. Wolfe does not, however, show how such an embrace would have led to the application of any different rule in this case. Wolfe argues only that the dissenter would have held "[w]hether circumstances are 'extraordinary' enough to bar reprosecution is a fact-based determination, left to the sound discretion of the district court." *Id.*; 718 F.3d at 293, Pet. App. 34a. Yet, the dissent did not claim the majority applied any different standard; rather, the dissent disagreed with the majority's *application* of the standard: she concluded she "cannot agree with its conclusion that the district court abused its discretion in barring re-prosecution of Justin Wolfe." 718 F.3d at 291, Pet. App. 30a.

All three of Wolfe's reasons for granting a writ of certiorari depend on the same misstatement of the Fourth Circuit's holding. As a result, none of them demonstrates any compelling reason for this Court to

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[3] Nor would such a rule be "new." *See, e.g.*, *DiSimone v. Phillips*, 518 F.3d 124, 127 (2d Cir. 2008) (retrial bar authorized "only when the grant of habeas corpus is premised on a theory which inevitably precludes further trial").

grant certiorari to superintend the circuit court's decision that the district court abused its discretion.

1. The decision does not create a conflict among the circuit courts of appeals.

Wolfe asserts the Fourth Circuit held "that a federal court may bar reprosecution only when it is literally impossible for the state court to remedy the constitutional defect." Pet. 18. In fact, the Fourth Circuit held only that such a bar "will ordinarily be limited to situations where a recognized constitutional error cannot be remedied by a new trial." 718 F.3d at 290, Pet. App. 26a. It expressly did not exclude "the possibility that a federal habeas court—in an extremely rare and unique circumstance—might proscribe a state court retrial even though the constitutional violation could be thereby remedied." 718 F.3d at 290-91, Pet. App. 26a.

Wolfe argues at length that the Sixth Circuit's decision in *D'Ambrosio* authorized a bar to retrial where the state's actions left the petitioner unable "to mount an effective defense at trial." Pet. 18-20. Wolfe contends *D'Ambrosio* presented "less egregious" facts than his case. *Id.* However, in *D'Ambrosio*, the district court found the State had delayed the retrial until long after its critical witness had died, and that it had concealed his death from D'Ambrosio, the state court, and the district court. 656 F.3d at 383. In addition, the State court had excluded the witness' prior testimony from the retrial. *Id.* The district court

found that the combination of these events meant the State had caused the witness to be completely unavailable to D'Ambrosio in the retrial. *Id.* Given this circumstance, and the State's previous "inequitable" conduct toward D'Ambrosio, barring the retrial served the interests of justice in that case. *Id.* On appeal, the State challenged the district court's jurisdiction to enter such an order on multiple grounds. *See id.* at 383-90. After rejecting all the jurisdictional challenges, the Sixth Circuit stated "the next step in analyzing the propriety of barring D'Ambrosio's reprosecution would be to determine whether the district court abused its discretion in doing so. However, the warden does not challenge the district court's exercise of discretion in her appeal to this court." *Id.* at 390. Thus, even if the Fourth Circuit had followed *D'Ambrosio*, doing so would have been of no aid in resolving the determinative issue in Wolfe's case because the *D'Ambrosio* court never reached that issue.

Wolfe does ultimately acknowledge the Fourth Circuit's holding, that while an order barring retrial after a grant of habeas relief would "ordinarily be limited to situations where a recognized constitutional error cannot be remedied by a new trial," a district court nevertheless "might proscribe a state court retrial" in sufficiently "extraordinary" circumstances. Pet. 21; 718 F.3d at 290-91, Pet. App. 26a. Wolfe nevertheless argues "the outcome of this case depended entirely on geography," asserting if he had been convicted in one of ten other states,

the order barring retrial would have been affirmed. Pet. 23. Wolfe's listing of those states appear to be an oblique reference to the Sixth Circuit (including Kentucky, Michigan, Ohio, and Tennessee) and the Tenth Circuit (including Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming). His assertion is neither relevant nor true. The Fourth Circuit rejected as speculative the district court's finding that Wolfe's case presented "extraordinary circumstances." 718 F.3d at 289, Pet. App. 25a. Absent such circumstances, both those circuits also would have allowed retrial. *Cf. Girts v. Yanai*, 600 F.3d 576 (6th Cir. 2010) ("the failure to proceed during the 180-day conditional grant, even coupled with the multiple instances of prosecutorial misconduct, do not rise to the level of 'extraordinary circumstances' contemplated in *Satterlee*").

The Fourth Circuit's judgment created no conflict among the circuits. Wolfe demonstrates no compelling reason for this Court to grant certiorari to superintend the circuit court's review of the district court's ruling.

2. The decision created no categorical rule, much less one in conflict with the federal habeas statute or this Court's precedent.

Wolfe next argues the Fourth Circuit's decision is "inconsistent with basic notions of a federal court's authority to fashion a remedy when a party violates its orders." Pet. 24. He asserts the decision below

"denied the district court any discretion to issue the only kind of order that could meaningfully respond to this extraordinary misconduct." Pet. 25. Quite the contrary, the Fourth Circuit's holding that the district court abused its discretion necessarily confirms it had discretion to fashion an appropriate remedy. This holding is entirely consistent with this Court's precedent that the district court has "broad discretion . . . in fashioning the judgment granting relief to a habeas petitioner." *Hilton v. Braunskill,* 481 U.S. 770, 775 (1980); *cf.* Pet. 27. Nevertheless, even discretion has limits.

Wolfe further asserts "the prosecution's intent to continue its misconduct is crystal clear" in his case. Pet. 26. The record belies this assertion.[4] The Fourth Circuit held the state courts had yet to decide whether the original prosecutors' post-remand interview

[4] Wolfe goes so far as to cite conduct from his 2002 trial as "proof" that the current prosecutor intends to violate his rights. Wolfe refers at multiple points to Mr. Ebert's explanation for not maintaining an "open-file" discovery policy at the time of Wolfe's trial. *See* Pet. 3, 11, 22. Mr. Ebert testified in the district court, "I have found in the past when you have information that is given to certain counsel and certain defendants, they are able to fabricate a defense around what is provided." *See* Pet. App. 84a, 175a. Wolfe misrepresents the statement to suggest Mr. Ebert had said he routinely withheld *Brady* or other exculpatory material. *See* Pet. 3, 11, 22. Not only are Mr. Ebert's policies from eleven years ago irrelevant to the trial practices of the Special Prosecutor, but Wolfe's willful misrepresentation of Mr. Ebert's explanation for those policies, which did not violate state discovery rules, argues for rejecting all his assertions.

of Barber amounted to misconduct. "Like other constitutional issues that may arise in a post-habeas retrial, however, contentions relating to Barber's alleged intimidation by the prosecutors are yet to be exhausted in the state court system." 718 F.3d at 289, Pet. App. 26a. And Wolfe ignores that the state court appointed an independent Special Prosecutor. There is no evidence of any ill intent by the Special Prosecutor, particularly where he already has committed on the record to ensure Barber will be available to testify for Wolfe. Resp. App. 1.

Amicus argues at some length the Fourth Circuit decided Wolfe's case based only on a desire to protect the state's role in ensuring, in the first instance, that the retrial is conducted under constitutional standards. Amicus at 9. It asserts the Fourth Circuit substituted its own judgment, and its own remedy, for those of the district court.[5] Amicus at 5. The record

[5] Amicus also continues Wolfe's unsupported assertion that the Special Prosecutor will not cure the violations previously found. Amicus at 9. In so arguing, amicus carelessly attributes a statement by the Director at the show cause hearing in the district court to the prosecution. *Id.* While the statement, as transcribed, recalled no "*Brady*" violations with respect to Barber, amicus' argument ignores that the quoted statement went on to deny the prosecutors knowingly used false testimony from Barber, which would instead have constituted a violation under the standards of *Napue v. Illinois*, 360 U.S. 264 (1959), not *Brady*. No such *Napue* violation was at issue in the Fourth Circuit or the retrial. The Director's reference to "*Brady*" was simply a misnomer, and was clearly understood as such by the district court, which did not refer to the Director's statement in its decision. The statement, quoted in isolation, provides

(Continued on following page)

belies this argument. The Fourth Circuit did not "substitute" its own judgment; it simply, and accurately, applied the correct abuse of discretion standard. Neither did it "substitute" a remedy. It left intact the balance of the district court's order, including its requirement that Wolfe be unconditionally released, requiring "that Wolfe be released from the custody imposed as the result of his 2002 convictions, and, further, that those convictions be expunged and their legal effects nullified consistently with *Wolfe II* and this opinion." 718 F.3d at 291, Pet. App. 29a-30a. The court below set aside only the portion of the district court's order which was a clear abuse of discretion because it rested solely on speculation.

Amicus also argues the Fourth Circuit's wariness of "federal interference with a State reprosecution" resulted in undue deference to the State's interests. Amicus at 9. To the contrary, the Fourth Circuit's respect for the competing interests of the State and the petitioner led it to exactly the same abuse of discretion standard Wolfe now urges. Indeed, in the same passage amicus quoted, the Fourth Circuit emphasized "that a federal habeas court possesses substantial discretion in fashioning an appropriate remedy." Amicus at 9, 718 F.3d at 290. At bottom, amicus' argument assumes a false dilemma. The Fourth Circuit was not choosing between a justified

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no support for amicus' mischaracterization of the Special Prosecutor as "intransigent." *Id.*

remedy and the state court's autonomy. Rather, the Fourth Circuit found the remedy unjustified as matter of federal law.

Wolfe's only attempt to argue any conflict between the decision below and the federal habeas statute is his broad assertion that the Fourth Circuit's "inflexible view cannot be reconciled" with the statutory authority "to dispose of the matter as law and justice require." Pet. 26, *citing* 28 U.S.C. § 2243. However, Wolfe's premise is false: the Fourth Circuit's decision involved no "inflexible" rule. Therefore, Wolfe is unable to articulate how the abuse of discretion standard the Fourth Circuit applied limits the proper disposition of a habeas case. Wolfe's claim of a conflict with the statute is baseless.

The judgment below involved no conflict with the statute or this Court's precedent. Wolfe demonstrates no compelling reason for this Court to grant certiorari to superintend the circuit court's review of the district court's exercise of its discretion.

3. The decision raises no question about the authority of a federal court to enforce its judgment.

Finally, Wolfe contends his case "is about whether the federal courts have the power to enforce judgments protecting constitutional rights against state officials who are determined to disobey." Pet. 28. It is not. The Fourth Circuit readily concluded

the district court had authority to enforce its judgment. *Wolfe*, 718 F.3d at 286 n.10. Even the dissenting judge understood "[t]he majority does not 'exclude the possibility that a federal habeas court—in an extremely rare and unique circumstance—might proscribe a state court retrial even though the constitutional violation could be thereby remedied,' but it is 'unwilling to embrace' that principle in this case." *Wolfe*, 718 F.3d at 291-92, quoting *id.* at 290-91. The dissenting judge differed only in finding such "extremely rare and unique circumstances" existed here. 718 F.3d at 292. The Fourth Circuit did not find an extremely rare and unique circumstance here because the district court relied on speculative assumptions concerning what evidence would be available at the retrial. *Id.* at 288-89.

The Fourth Circuit held "the constitutional claims for which Wolfe was awarded habeas corpus relief are readily capable of being remedied in a new trial." *Id*. at 290.

> Put simply, the task of conducting Wolfe's retrial is for the state trial court, and it is not for us to express a view on how that court should manage its affairs. We are confident that the retrial will be properly handled, and, if convictions result, that the appellate courts will perform their duties.

Id. at 289.

Amicus in particular seems confounded by this simple statement, wondering "what else does such a court stand to do" if not manage state courts. Amicus at 8. This Court has already answered this rhetorical question in favor of the state courts. Clear precedent requires the states be allowed to manage their own trials without such intrusive supervision. *See, e.g.*, *Pitchess v. Davis*, 421 U.S. 482, 490 (1975) ("Neither Rule 60(b), 28 U.S.C. § 2254, nor the two read together, permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court.").

Wolfe repeats his assertion that the Fourth Circuit's decision applied a "categorical rule," which he argues "leaves no room for a federal court to grant an effective remedy" to ensure a fair retrial. Pet. 28. In fact, the Fourth Circuit's decision did not rely on any categorical rule. Moreover, these arguments require the federal courts to assume the state trial courts are powerless to ensure a fair trial. Such an assumption is unwarranted. Instead, the Fourth Circuit followed clear precedent in rejecting the district court's multiple, unfounded assumptions about how the state court might mange the retrial.

The Fourth Circuit's judgment involved no question about the authority of a district court to enforce its judgment. Wolfe demonstrates no compelling reason for this Court to grant certiorari to

superintend the circuit court's review of the district court's ruling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

VIRGINIA

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

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

Circuit Courtroom No. 3
Prince William County Courthouse
Manassas, Virginia

Wednesday, January 2, 2013

[By Mr. Morrogh:]

* * *

[6] I will say that in footnote six Judge Jackson opines that in his opinion it is unlikely that the Commonwealth would give immunity of any sort to Mr. Barber and therefore he would be quote, "Unable to exonerate Mr. Wolfe."

Your Honor, I could state quite clearly for the record that I would give Mr. Barber use and derivative [7] use immunity if he testifies for the Defendant in any subsequent trial if he testifies truthfully.

So, Judge Jackson I guess is just simply incorrect on his surmise.

* * *