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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

This case involves astounding prosecutorial misconduct. The Commonwealth's prosecutors violated their basic constitutional obligations by deliberately withholding exculpatory evidence before petitioner's original trial. When the federal habeas process unmasked their misconduct and uncovered extensive undisclosed evidence of petitioner's innocence, the prosecutors disregarded the federal court's judgment and took steps to ensure that petitioner would continue to be prejudiced by the constitutional defects that plagued his original trial. In particular, they threatened a critical witness, Owen Barber, to impel him to invoke his Fifth Amendment privilege and deprive Wolfe of testimony that petitioner is innocent, even though the district court found that same testimony credible and corroborated by substantial evidence.

The Commonwealth's opposition refuses to acknowledge that its prosecutors have done anything wrong. But the Commonwealth cannot credibly deny that this case presents an issue of exceptional importance—the scope of a federal court's authority to bar re-prosecution when state officials violate a federal habeas order and engage in continuing misconduct. Nor can it deny that this case presents an ideal vehicle for resolving that issue. Because the Commonwealth has not filed a cross-petition, it is undisputed that the Commonwealth failed to comply with the district court's conditional habeas decree and, as a result, it is undisputed that the district court had jurisdiction.

The Commonwealth nonetheless argues that there is no division in lower court authority warranting this Court's intervention. But that position cannot be reconciled with what the court of appeals said and did. Pet.App. 28a. The Fourth Circuit held that, as a general rule, a district court has no discretion to bar re-prosecution as long as there is some theoretical possibility that constitutional violations might be remedied in a new trial. Pet.App. 26a. That rigid approach opens the door to abuse of the habeas process by unrepentant prosecutors. And it reflects a dramatic departure from the more flexible principles embraced by other courts of appeals, which have held that district courts have discretion to bar re-prosecution when prosecutorial misconduct substantially prejudices a petitioner's ability to secure a fair trial. *See D'Ambrosio v. Bagley*, 656 F.3d 379, 389 (6th Cir. 2011); *Satterlee v. Wolfenbarger*, 453 F.3d 362, 383-84 (6th Cir. 2006); *Capps v. Sullivan*, 13 F.3d 350, 352-53 (10th Cir. 1993).

The Commonwealth also contends that petitioner has not suffered any prejudice because the special prosecutor has offered to grant Barber immunity "if he testifies truthfully." Resp.App. 1. But what the Commonwealth holds out as a palliative is in reality more poison. The offer of immunity is illusory because the Commonwealth has made clear that the only testimony it views as "truthful" is the recanted testimony Barber provided at the original trial, which the Commonwealth procured with the threat that if Barber did not testify against petitioner he would be put to death.

This is not how our criminal justice system is supposed to work. And the Commonwealth's failure to grasp that point confirms the need for this Court's guidance and intervention. The Court should grant the petition.

ARGUMENT

I. The Court Should Grant Review To Resolve The Division In Lower Court Authority.

There is a divide among the lower courts concerning a district court's authority to bar re-prosecution when state officials violate a federal habeas order and substantially prejudice a petitioner's ability to secure a fair trial. *See* Pet. 17-24. The Commonwealth tries to downplay this conflict, arguing that the lower court decisions merely reflect different fact-bound applications of the same abuse-of-discretion standard. Opp. 8. That argument collapses on examination.

The Commonwealth's position cannot be reconciled with how the Fourth Circuit understood its own decision. Both the majority and dissenting opinions recognized that the court was rejecting the approach taken in other circuits. The majority emphasized that the district court had "relied on decisions where a bar to retrial was approved even though the constitutional errors could have been thereby remedied." Pet.App. 28a (citing *Satterlee* and *Capps*). And it pointedly stated that it was "unwilling to embrace the principles" adopted in that out-of-circuit authority. *Id.* Similarly, the dissent noted that other courts had "relied on circumstances that demand equitable relief, even if those

circumstances present constitutional violations that could be remedied upon retrial." Pet.App. 33a. Unlike the majority, the dissent found those cases persuasive, concluding that the district court had discretion to grant "equitable relief in the form of a bar on re-prosecution." Pet.App. 34a.

The Commonwealth contends that the dissent merely disagreed with the majority's "application" of the abuse-of-discretion standard. Opp. 11. But that confuses form with substance. No one disputes that both the majority and the dissent invoked the words "abuse of discretion," but in substance they applied very different standards. *Cf. Horne v. Flores*, 557 U.S. 433, 450, 451 (2009) (recognizing that merely "citing the correct legal standard" does not mean the court actually applied that standard). The majority did not consider the bar on re-prosecution to fall within the district court's sound discretion; instead, it viewed that remedy as foreclosed as a matter of law. *Cf. Koon v. United States*, 518 U.S. 81, 100 (1996) (a "district court . . . abuses its discretion when it makes an error of law"). The majority thus repeatedly emphasized that the district court erred because, in the majority's view, the only lawful basis for barring re-prosecution is when the "recognized constitutional error cannot be remedied by a new trial." Pet.App. 26a-27a. That inflexible rule cannot be reconciled with the Sixth Circuit's more deferential approach—that district courts have discretion to "forbid reprosecution" in extraordinary circumstances when a state's misconduct "is likely to prejudice the petitioner's ability to mount a defense." *Satterlee*, 453 F.3d at 370; *D'Ambrosio*, 656 F.3d at 389 (same); *see also Capps*, 13 F.3d at 352-53; *cf. Brecht v.*

Abrahamson, 507 U.S. 619, 638 n.9 (1993) (suggesting that habeas relief is flexible enough to take into account "a pattern of prosecutorial misconduct").

To be sure, as the Commonwealth stresses, the court below hypothesized "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." Pet.App. 28a. But the court did not explain what those circumstances might be, and the remainder of its opinion suggests that it is a null set. In any event, whatever the scope of the Fourth Circuit's disclaimer, it is clear that the legal standard it applied was dispositive. This case would have been decided differently had the court employed the standard embraced by the Sixth Circuit.

The Commonwealth's continuing misconduct dwarfs the State's actions addressed by the Sixth Circuit in *D'Ambrosio*. *See* Pet.App. 36a-39a (Thacker, J., dissenting) (setting forth "a sampling (though certainly not all)" of the "instances of misconduct perpetrated by the Commonwealth"). To cite a few examples: Unlike in *D'Ambrosio*, the Commonwealth's constitutional violations at petitioner's trial included withholding a mountain of exculpatory evidence and failing to disclose that it had threatened a key witness with the death penalty if he did not testify against petitioner. Pet.App. 100a. Unlike in *D'Ambrosio*, the Commonwealth secured petitioner's original conviction by coordinating witness testimony and withholding exculpatory evidence to prevent petitioner from

"fabricat[ing] a defense." Pet.App. 115a. Unlike in *D'Ambrosio*, where the key witness unexpectedly died, the Commonwealth's prosecutors deliberately violated the federal court's habeas decree so they could again threaten Barber, urging him to testify falsely against petitioner, coercing him into invoking his privilege against self-incrimination, and depriving petitioner of the same crucial exculpatory evidence that the Commonwealth had unlawfully withheld at his first trial.

It follows that if D'Ambrosio's claim was "the sort of argument envisioned by the 'extraordinary circumstances' standard," 656 F.3d at 389, then so too is petitioner's. The only explanation for the different outcomes is the different legal standard applied by the court of appeals. The Fourth Circuit rejected the district court's exercise of discretion not because it believed the district court had erred in its assessment of the facts, but because it held that barring re-prosecution was not permitted as a matter of law.

Finally, the Commonwealth contends that there is no conflict in authority because *D'Ambrosio* merely held that the district court had jurisdiction to enforce its habeas order. Opp. 13. But the Commonwealth misunderstands the nature of the division in lower court authority. It is true that the lower courts agree that a habeas court has *jurisdiction* to enforce its habeas order by barring re-prosecution in "extraordinary circumstances." The disagreement among the circuits is over the question that *follows* the jurisdictional one: whether a federal court has authority to exercise discretion to prohibit re-

prosecution even when the constitutional violation in theory can be remedied by a new trial. The Sixth Circuit has answered that question in the affirmative; the Fourth Circuit has not. It is that legal question that warrants this Court's review.

II. The Fourth Circuit's Decision Conflicts With The Habeas Statute And This Court's Cases.

The Court should also grant review because, as the petition explains, the Fourth Circuit's decision conflicts with basic principles of federal habeas law. *See* Pet. 24-28. In response, the Commonwealth denies any conflict, arguing that because the special prosecutor has represented that he will offer Barber immunity, there is no evidence that the Commonwealth will continue its misconduct or that petitioner will be deprived of a fair trial. Opp. 9-10. Those assertions miss the point and, if anything, only underscore the need for this Court's intervention.

The Commonwealth places heavy emphasis on the special prosecutor's statement that he "would give Mr. Barber use and derivative use immunity if he testifies for the Defendant in any subsequent trial if he testifies truthfully." Opp. 6, 9. The rub is the Commonwealth's careful caveat that it will grant Barber immunity only "if he testifies truthfully." That is the same veiled threat the prosecutors have repeatedly made, telling Barber that the only version of events they will accept as the "truth" is testimony that petitioner hired Barber to kill the victim. *See, e.g.*, Pet.App. 80a, 103a, 118a n.8 ("they said they wanted the truth, but at the same time they said that

this is what you have got to say or you are getting the chair").

The Commonwealth's offer of immunity is illusory: If Barber testifies at any retrial that petitioner had nothing to do with the murder, the prosecutors will simply declare that he was being "untruthful" and dissolve his immunity. The special prosecutor knows that Barber testified at a federal evidentiary hearing that petitioner is innocent and the district court found that testimony to be "credible" and well corroborated. *See* Pet.App. 103a, 107a, 134a, 184a-85a. The special prosecutor also knows that, even while Barber was being threatened in late 2012, he told the original prosecutor that if he was called as a witness at petitioners' retrial, he would provide the same exculpatory testimony he provided in federal court—that petitioner had no involvement in the murder. Pet.App. 47a (Thacker, J., dissenting). If the special prosecutor were willing to accept the truthfulness of that exculpatory testimony, there would be no need to grant Barber immunity. The Commonwealth should not be prosecuting petitioner for a murder he did not commit.

Both the district court and the dissenting judge below saw through this ruse, recognizing that to the Commonwealth "the truth" is just a "moniker for its version of the facts." *Id.* The Commonwealth's argument thus confirms that nothing has changed. Even before this Court, the Commonwealth's principal strategy is to perpetuate the same misconduct that has irreparably tainted petitioner's ability to secure a fair retrial. The Commonwealth

cannot threaten Barber with the death penalty, harassment, and a loss of prison privileges if he does not testify against petitioner and then, after making clear that this is the only version of "the truth" it will accept, demand deference to the special prosecutor's superficial assertion that he "would give Mr. Barber . . . immunity"—but only "if he testifies truthfully." Resp.App. 1.

In any event, the Commonwealth's argument misses the more fundamental point. Although no one knows precisely how the state court proceedings will unfold, there is nothing "speculative" about the severe prejudice that Commonwealth officials have deliberately inflicted on petitioner's ability to secure a fair trial. As the person who shot the victim—and the only witness whose testimony at the original trial provided a direct basis for petitioner's conviction—Barber's testimony that petitioner is innocent is powerful exculpatory evidence. *See* Pet.App. 83a (noting the Commonwealth's concession that "but for [Barber's] testimony [petitioner] probably would not have been prosecuted"). But the Commonwealth's conduct has caused Barber to invoke his Fifth Amendment privilege and he is now unwilling to testify. *See* Pet.App. 86a. The threat of contempt has no teeth to force testimony from a witness who risks a death sentence if he exculpates petitioner. The Commonwealth has thus once again deprived petitioner of the very evidence that it deliberately withheld at petitioner's first trial. *See D'Ambrosio v. Bagley*, 688 F. Supp. 2d 709, 729-31 (N.D. Ohio 2010) (explaining that the absence "of the prosecution's witness can prejudice a defendant"). Worse, the Commonwealth seeks to take advantage of its own

misconduct, arguing that because Barber has invoked his Fifth Amendment privilege, the Commonwealth may rely on Barber's perjured testimony from the first trial, even though the Sixth Amendment's Confrontation Clause forbids the introduction of incriminating out-of-court statements unless the defendant has had a meaningful opportunity to cross-examine the witness. *See Crawford v. Washington*, 541 U.S. 36, 54 (2004).

Contrary to the Commonwealth's assertions, it makes no difference whether the state court tolerates this gambit by letting the jury hear Barber's former testimony. The fundamental point is that, no matter what happens, the Commonwealth's continuing misconduct has irrevocably contaminated the proceedings and made it impossible for petitioner to receive a fair trial. As the dissent emphasized below, "even if Barber decides to forego the privilege, his testimony will be forever shadowed by the manipulative actions of the" Commonwealth prosecutors, Pet.App. 47a, who have "tainted this case to the extent that [petitioner's] due process rights are all but obliterated." Pet.App. 48a. The Fourth Circuit's inflexible approach thus raises the specter of never-ending habeas proceedings, with the Commonwealth acting with impunity to violate the federal court's habeas orders and deny petitioner his constitutional rights.

III. The Court Should Grant Review Because Of The Importance Of The Issue Presented.

If there were ever doubt about the need for this Court's intervention, it should be dispelled by the Commonwealth's brief in opposition. Although the federal courts have reprimanded the Commonwealth for conduct "abhorrent to the judicial process," Pet.App. 115a-16a, the Commonwealth has shown no contrition. Nor has it even acknowledged the seriousness of the actions taken by its prosecutors, including their intentional suppression of exculpatory evidence, their refusal to comply with the federal habeas judgment, and their threats to prevent Barber from testifying at petitioner's retrial.

The Commonwealth has instead continued along a path of massive resistance. Even though the original prosecutors interrogated Barber in September 2012 and threatened him with everything from capital punishment to the withdrawal of certain prison privileges if he told the truth about petitioner's innocence, the Commonwealth continues to suggest that it did nothing wrong. Opp. 16. Even though the prosecutors violated their basic constitutional obligations under *Brady* at petitioner's original trial, the Commonwealth argues that those violations are "irrelevant" because its prosecutors "did not violate state discovery rules." Opp. 15 n.4. And, as noted above, the Commonwealth continues to rely on a deceptive and illusory offer of immunity.

This Court's death penalty cases have often reflected disagreement over the scope of federal courts' authority to grant habeas relief. *See, e.g.*, *Maples v. Thomas*, 132 S. Ct. 912 (2012); *Garcia v.*

Texas, 131 S. Ct. 2866 (2011). But it is beyond question that the criminal justice system cannot work if prosecutors are not held to high standards of integrity. *See*, *e.g.*, *California v. Trombetta*, 467 U.S. 479, 485-86 (1984). "When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law." *United States v. Olsen*, 737 F.3d 625, 632 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of reh'g en banc). And when "such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition." *Id.*

The decision below leaves unattended a significant fault in the foundation of our criminal justice system. If the Court grants review, it can repair this rift, clear up confusion among the lower courts, and reaffirm that habeas is not a never-ending cycle of prosecutorial abuse. The Court can also make clear that, in limited circumstances when state officials have failed to comply with a conditional writ of habeas corpus, a federal district court has discretion to put an end to deliberate prosecutorial misconduct that deprives a petitioner of a fair retrial. The Court can also provide sorely needed guidance to the lower courts about how to balance the need for finality and respect for federal court orders with the deference that should be afforded to state court proceedings.

If the Court declines review, however, the risks are significant. The conflict in circuit authority will remain unresolved. Officials from a State with one of

the highest execution rates in the nation will have succeeded in violating a federal court habeas order with impunity. An innocent man who has remained in prison for more than a decade will face another unfair trial at the hands of state officials determined to secure a conviction and death sentence at whatever cost. And petitioner will be forced to wait for yet another round of habeas proceedings to address the Commonwealth's unlawful efforts to disregard the federal court's habeas judgment and replicate the constitutional errors that infected his original trial. The Court can and should defuse these risks by granting review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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