NO. 13-____

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

PETITION FOR WRIT OF CERTIORARI

MICHELE J. BRACE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, VA 22903
Telephone: (434) 817-2970

DANIEL J. KING
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, GA 30309
Telephone: (404) 572-3397

ASHLEY C. PARRISH
Counsel of Record
ETHAN P. DAVIS
KAREN F. GROHMAN
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
Telephone: (202) 626-2627
Facsimile: (202) 626-3737
aparrish@kslaw.com

Counsel for Petitioner

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QUESTION PRESENTED

Finding that prosecutors intentionally suppressed critical exculpatory evidence, the district court in this capital case granted habeas relief and directed the Commonwealth of Virginia either to retry petitioner within 120 days or to release him unconditionally. The Fourth Circuit affirmed, but the Commonwealth did not comply with the habeas judgment. Not only did the Commonwealth violate the 120-day deadline, but its prosecutors deliberately engaged in further misconduct, threatening a key witness with the death penalty if he did not revert to trial testimony the witness had fully recanted during the habeas proceedings. That threat impelled the witness to invoke his Fifth Amendment privilege, depriving petitioner of the ability to use at any retrial the witness's truthful exculpatory testimony and the suppressed evidence that had been the basis for the initial grant of habeas relief. In light of the Commonwealth's violation of the habeas order and its egregious misconduct, which has eliminated petitioner's ability to secure a fair trial, the district court barred re-prosecution. The Fourth Circuit agreed that the Commonwealth had violated the habeas judgment but held that federal district courts generally lack power to bar re-prosecution.

The question presented is:

Whether a federal court has authority in extraordinary circumstances to bar a state from re-prosecuting a defendant when state officials violate a federal habeas order and engage in continuing misconduct that substantially prejudices the defendant's ability to secure a fair retrial.

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This case presents a fundamental question of federal habeas law: does a federal court have authority to bar re-prosecution when state prosecutors violate a conditional writ of habeas corpus, continue to engage in the same extraordinary misconduct that provided the basis for the original grant of habeas relief, and deliberately take steps to deny the petitioner a fair trial? That question divides the circuits. In the Sixth Circuit's view, a district court may bar a state from re-prosecuting when the prosecutors' conduct and failure to comply with the writ has effectively eliminated the petitioner's ability to secure a fair retrial. In the decision below, the Fourth Circuit expressly disagreed with the Sixth Circuit, setting forth a new rule that, no matter how serious a prosecutor's misconduct, a district court lacks power to bar retrial. Given the importance of the issues involved, the grave concerns raised by the prosecutors' remarkable conduct in this case, and the risks that the Fourth Circuit's decision will undermine the habeas process and the respect owed to federal courts, the Court should grant review to resolve this disagreement between the courts of appeals.

OPINIONS BELOW

The Fourth Circuit's opinion is published at 718 F.3d 277 and reproduced at Pet. App. 1a. The opinion of the United States District Court for the Eastern District of Virginia is reproduced at Pet. App. 51a. The Fourth Circuit's earlier decision affirming the habeas judgment is published at 691 F.3d 410 and reproduced at Pet. App. 90a. The

district court's decision granting habeas relief is published at 819 F. Supp. 2d 538 and reproduced at Pet. App. 124a.

JURISDICTION

The court of appeals had jurisdiction under 28 U.S.C. § 1291 and § 2253. The court of appeals issued its opinion on May 22, 2013, *see* Pet. App. 1a, and denied rehearing on June 18, 2013, *see* Pet. App. 194a. On August 21, 2013, Chief Justice Roberts extended the time for filing a petition to October 31, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2243 of Title 28 of the United States Code is reproduced at Pet. App. 261a.

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

The Sixth Amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

STATEMENT OF THE CASE

This petition concerns a dispute among the lower courts about the scope of a federal court's power to protect and effectuate a habeas judgment when state officials engage in continuing misconduct for the purpose of undermining the judgment and preventing the petitioner from securing a fair trial.

Petitioner Justin Michael Wolfe was wrongly convicted of murder-for-hire and sentenced to death at a trial plagued by serious prosecutorial misconduct and repeated violations of *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecution's case rested on the testimony of a single key witness, Owen Barber, who admitted that he shot and killed the victim but told the jury that he had done so at petitioner's behest. It was later discovered that prosecutors intentionally withheld exculpatory evidence that could have been used to impeach that testimony and prove petitioner's innocence. Indeed, one of the prosecutors later admitted that he routinely declines to turn over exculpatory material because defendants can use it "to fabricate a defense." Pet. App. 38a.

In federal habeas proceedings, Barber fully recanted his trial testimony and the district court found that petitioner is actually innocent under *Schlup v. Delo*, 513 U.S. 298 (1995). It based that determination on an affidavit Barber had executed, swearing that petitioner had nothing to do with the murder; corroborating declarations from other witnesses to whom Barber had admitted his perjury at various times; and other significant evidence. *See*

Wolfe v. Johnson, __ F. Supp. 2d __, 2010 WL 9459117 (E.D. Va. Feb. 4, 2010). The district court then allowed limited discovery, which revealed that the Commonwealth, among other things, had suppressed substantial exculpatory evidence at trial, including a police report showing that before Barber said anything to the police about the crime, Commonwealth officials threatened Barber with the death penalty if he did not testify that petitioner had hired him to commit the murder. Pet. App. 147a. The district court then held an evidentiary hearing at which Barber made clear that he testified falsely at trial because of the prosecutors' threats. He also testified that petitioner had no involvement in the murder.

At the end of this evidentiary hearing, the district court concluded that prosecutors had repeatedly violated their *Brady* obligations, and made findings that prosecutors knew or should have known that Barber's trial testimony was false. The district court granted habeas relief and gave the Commonwealth an opportunity to re-try petitioner within 120 days or to release him unconditionally from custody. Pet. App. 34a–35a, 52a. The court of appeals affirmed. Pet. App. 92a.

Instead of affording petitioner a new trial curing the original constitutional violations, however, the very same prosecutors took immediate steps to make those violations incurable. They ignored the habeas decree and failed to provide petitioner with a new trial within the 120-day deadline. They also pressured Barber, under threat of the death penalty, to revert to his original, admittedly perjured

testimony. In response, Barber invoked his Fifth Amendment privilege and became unavailable to testify on petitioner's behalf. As a result, the prosecutors have prejudiced petitioner's defense and prevented him from using in any retrial the exculpatory evidence they previously suppressed.

The district court concluded that the Commonwealth had violated its habeas decree. Moreover, because the prosecutors' extraordinary, continuing misconduct "permanently crystalized" the errors in the earlier trial, the district court barred the Commonwealth from re-prosecuting petitioner. A divided panel of the Fourth Circuit affirmed the district court's holding that the Commonwealth had violated the habeas order but reversed the order barring re-prosecution.

A. Petitioner's Unlawful Convictions

In 2001, Barber killed Daniel Petrole after following him in his car through several suburban Northern Virginia neighborhoods. *Wolfe v. Johnson*, 565 F.3d 140, 145 (4th Cir. 2009). When Petrole parked in front of his house, Barber jumped out of his own vehicle, "approached Petrole, and rapidly fired ten rounds through the passenger-side window from a distance of about five or six feet, emptying the ammunition clip." *Id.*

Before conducting a thorough investigation, Commonwealth officials leaped to the conclusion that petitioner—whom they believed to be a low-level marijuana dealer who owed Petrole money—had hired Barber to murder Petrole. During a cross-country flight, immediately after Barber's arrest and

before he was even asked to recount his version of the events, "Prince William County Detective Newsome advised Barber that he could avoid the death penalty by implicating" petitioner. Pet. App. 7a n.4, 77a, 100a. Detective Newsome documented this conversation in a written report:

> I told Barber that we knew he had killed Petrole and had a very strong case against him. But that as far as we knew he had no personal problem with Daniel Petrole but that he had killed him for someone else and we believed that person was [petitioner] Justin Wolfe. I explained to him that we needed the information that he had in order to arrest [petitioner]. I explained again that we had a very strong case against him (Barber) and that we could stop there but that would not be right since we knew it was someone else [sic] idea. I told him that he was potentially facing a capitol [sic] murder charge in this case and that he needed to help himself. He asked me, "What do I get out of it if I tell you who the other person, the higher up, is." I told him I could not make any promises to him, but that the Commonwealth might entertain the idea of not charging him with Capitol [sic] Murder, or that they may be willing to make a recommendation as to his sentence.

Pet. App. 78a, 100a–101a. The report thus showed that Newsome, not Barber, first suggested that petitioner was involved in the murder, and that Newsome planted the idea that Barber could avoid

the death penalty by pointing a finger at petitioner. This police report was in the possession of Commonwealth prosecutors, but they intentionally suppressed it. Pet. App. 36a, 38a, 133a.

Commonwealth officials also intentionally suppressed other crucial evidence that contradicted their theory of the crime. For example, the prosecutors "withheld evidence of Barber's personal dealings with the victim, including a claim that Barber owed Petrole money, a claim that Petrole had a hit out on Barber, and a claim that Barber and Petrole had recently associated with each other socially." Pet. App. 135a. They also failed to disclose that Barber's roommate, Jason Coleman, had told the prosecutors "that Barber said he acted alone." Pet. App. 134a–135a n.9.

Not wanting to face the death penalty, Barber ultimately agreed to testify against petitioner. At the 2002 trial, Barber was the only witness "to provide any direct evidence regarding" petitioner's involvement in the murder. *Wolfe*, 565 F.3d at 144. Barber testified that he and petitioner "agreed that [he] would follow Petrole home from the apartment and kill him." *Id.* at 145. Because prosecutors withheld critical evidence that could have been used to impeach Barber, his testimony was devastating to the defense. Indeed, the Commonwealth has conceded that without Barber's testimony petitioner probably would not have been prosecuted. Pet. App. 83a, 117a, 139a n.11.

Petitioner was convicted of capital murder and conspiracy to distribute marijuana, and sentenced to death.

B. The Grant of Habeas Relief

The state habeas court dismissed petitioner's *Brady* claim on procedural grounds. During federal habeas proceedings, the district court directed both parties to present their arguments and evidence on the issue of petitioner's actual innocence under *Schlup*. The court was persuaded by an unexpected affidavit from Barber confessing that he had committed perjury at petitioner's trial and that petitioner had nothing to do with Petrole's murder. The court found no evidence that Barber's affidavit was the product of coercion, bribery, or misdealing, and it noted that the affidavit's substance was confirmed by at least four other witnesses to whom Barber had confessed the truth at varying points in time. *See Wolfe*, 2010 WL 9459117, at *4–*5. The court found, after "weighing the evidence, it is more likely than not that no reasonable juror would have found Wolfe guilty beyond a reasonable doubt." *Id.* at *6.

The district court then permitted limited discovery, which the Commonwealth resisted but was ultimately required to produce. Discovery revealed that Commonwealth officials had suppressed extensive exculpatory evidence at petitioner's 2002 trial. The district court then held an evidentiary hearing. At the hearing, Barber testified and admitted that he had committed perjury at petitioner's trial because of threats from the prosecution that were never disclosed to petitioner's trial attorney: "[T]hey 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." Pet.

App. 80a, 103a, 118a n.8. Under close questioning from both the district judge and the Commonwealth's counsel, Barber confirmed that petitioner had no involvement in the murder. The district court found that Barber's "demeanor and candor" were "persuasive" and that his testimony was "credible." Pet. App. 41a–42a, 103a, 107a, 184a.

The lead prosecutor, Paul Ebert, also testified. In a remarkable exchange, Ebert confessed that he has made it a practice to withhold exculpatory evidence, based on his own credibility and relevancy determinations, to ensure that defendants cannot "fabricate" a defense. Pet. App. 38a, 82a, 115a, 175a n.24. Ebert also acknowledged that the prosecutors had "choreographed and coordinated witness testimony through a series of joint meetings" between Barber and other key witnesses to resolve inconsistencies in the witnesses' stories. Pet. App. 38a, 131a–132a. The suppression of critical exculpatory evidence at petitioner's trial was thus "entirely intentional." Pet. App. 38a, 84a, 115a.

After completing the evidentiary hearing, and receiving extensive briefing from both sides, the district court granted habeas relief. It ruled, among other things, that "the prosecution had withheld eight items or groups of favorable and material evidence, falling into three broader categories: (1) evidence tending to impeach triggerman Barber; (2) evidence tending to impeach other prosecution witnesses who corroborated Barber's testimony; and (3) evidence suggesting an alternate theory of the Petrole murder." Pet App. 97a. It also concluded that the prosecutors had presented evidence at trial

that they knew or should have known was false. In particular, the district court found that the prosecutors could not claim to be unaware that Barber testified untruthfully at the 2002 trial. Pet. App. 184a–185a. The prosecutors were in possession of "multiple sources of information" that cast doubt on the truthfulness of Barber's testimony, but instead of "addressing the information in [their] possession," they suppressed it. *Id.*

The district court vacated all of petitioner's convictions. Its amended judgment included the following decree:

> The Commonwealth of Virginia shall, within 120 days of the date of this Order, provide Petitioner with a new trial, or release him unconditionally from custody.

Pet. App. 34a–35a, 52a.

Although the Commonwealth argued that the district court had "repeatedly and fatally erred," Pet. App. 92a, the Fourth Circuit rejected the Commonwealth's arguments root-and-branch, "readily conclud[ing]" that the habeas judgment "was not marred by any error." *Id.* It found that a "single, plainly momentous item of suppressed" evidence—the Newsome report—provided a sufficient basis for granting habeas relief because it showed that the Commonwealth had "fed Barber the crux of his testimony, *i.e.*, that [Barber] was hired by [petitioner] to murder Petrole." Pet. App. 77a, 100a; *see also* Pet. App. 114a. The Fourth Circuit also concluded that the district court had "rightly lambasted" the Commonwealth for conduct that was "abhorrent to

the judicial process." Pet. App. 115a–116a (quoting Pet. App. 176a n.24). The Court noted that it had previously admonished these same prosecutors for their suppression of evidence. Pet. App. 116a (citing *Muhammad v. Kelly*, 575 F.3d 359, 370 (4th Cir. 2009)). And it emphasized the Commonwealth Attorney's "flabbergasting" assertion that he routinely declines to turn over *Brady* material because of the possibility that a defendant could use the material to "fabricate a defense." Pet. App. 115a. The Commonwealth did not seek further review.

C. The Commonwealth's Continued Misconduct

Despite having been chastised by two federal courts, the Commonwealth neither released petitioner from custody nor even attempted to retry him within the required 120 days. Instead, the prosecutors devised a strategy that was deliberately calculated to deprive petitioner of a fair retrial. Recognizing that they could not prevail at retrial without Barber's testimony implicating petitioner and if petitioner could use the previously withheld exculpatory evidence, the Commonwealth's original prosecutors, joined by Detective Newsome (who came out of retirement for the sole purpose of participating in petitioner's re-prosecution), arranged to visit Barber at Augusta Correctional Center just days after the Fourth Circuit issued its mandate. Pet. App. 8a, 74a. Over the course of an hour-long interrogation, which the Commonwealth secretly recorded, the prosecutors pressured Barber to revert to the same perjured trial testimony that the federal court determined had been "fed" to Barber by

Detective Newsome. Pet. App. 8a, 41a; *cf. Wolfe v. Clarke*, 691 F.3d 410, 423 (4th Cir. 2009).

Significantly, at "no point did Barber relent"—instead, he continued to insist that petitioner had no involvement in Petrole's murder. Pet. App. 42a (Thacker, J., dissenting). Barber thus told the prosecutors that his testimony at any retrial would be the truth, just as he had told the truth in federal court—that petitioner was not involved in Petrole's murder. Pet. App. 47a.

In response, the prosecutors made the same threats they had made in 2002. In particular, they showed Barber a highlighted copy of *Ricketts v. Adamson*, 483 U.S. 1 (1987), which they had brought with them, and told Barber that under *Ricketts* his previous plea deal could be undone if he did not cooperate. They made clear to Barber that if he did not revert to his original trial testimony, he could face new capital murder charges. Pet. App. 8a, 74a–75a. The prosecutors also made repeated references to Barber's "prison privileges and responsibilities in a manner that create[d] the impression that they were either under threat or could be subject to enhancement if Barber testified in a manner favorable to the Commonwealth." Pet. App. 75a–76a (Thacker, J., dissenting). These threats were designed either to force Barber to revert to his perjured testimony or to put him in the position of having no choice but to invoke his Fifth Amendment right, thus making him "unavailable" for any second trial. The prosecutors knew that under Virginia's rules of evidence, a witness's former testimony can be read to the jury if that witness is unavailable.

As a result of that meeting, Barber obtained counsel and, according to the testimony of his attorney, Barber has invoked his Fifth Amendment privilege and will continue to do so. Pet. App. 40a, 86a–87a. The Commonwealth has thus deprived petitioner of powerful exculpatory evidence—the actual killer's testimony that petitioner was not involved in the murder.

Two days after threatening Barber, the original prosecutors filed an ex parte motion recusing themselves and asking the state court to appoint a close colleague as a special prosecutor. Pet. App. 8a–9a. Since then, the Commonwealth has made clear that it intends to provide petitioner with the same constitutionally deficient trial he had before, relying on literally the same tainted evidence that caused his first conviction to be vacated. For instance, even though the Commonwealth has made Barber unavailable to testify, the special prosecutor has said that he intends to read to the jury a transcript of the perjured testimony Barber presented at the 2002 trial—the same testimony that petitioner was unable to cross-examine and impeach effectively in 2002 because the prosecutors withheld exculpatory evidence. Pet. App. 151a–152a. Even though the withheld evidence has now been disclosed, petitioner cannot use it because he cannot cross-examine a cold transcript.

D. The District Court's Order Enforcing Its Judgment

A month after the 120-day deadline for a new trial had expired, petitioner moved the district court to enforce its habeas judgment, arguing that the

Commonwealth had violated the conditional writ by failing to release him unconditionally or provide him with a new trial. Pet. App. 52a–55a. Petitioner also argued that, by maneuvering Barber into either reverting to the false testimony he gave at petitioner's original trial or making himself unavailable by invoking the Fifth Amendment, the prosecutors were continuing to violate his rights. In short, instead of complying with the federal habeas decree, the prosecutors were deliberately undermining it.

In light of the "serious nature" of the prosecutors' continuing misconduct, the district court directed the Commonwealth to show cause why their conduct did "not constitute extraordinary circumstances warranting the Court to order petitioner's immediate release and bar current and future prosecutions of [petitioner] on all charges related to the death of Danny Petrole." Pet. App. 11a–12a. On its own motion, the court ordered a hearing and directed that Barber be brought to court. After hearing argument from the parties as well as testimony from Barber's attorney, the district court found that the Commonwealth had violated the federal judgment's unambiguous terms because it had not provided petitioner with a new trial within 120 days or unconditionally released him. Pet. App. 56a–71a.

The district court also concluded that barring re-prosecution was necessary because the Commonwealth's conduct had "incurably frustrated the entire purpose of the" conditional writ. Pet. App. 86a. Instead of attempting to cure the constitutional errors that had infected petitioner's original trial, the

Commonwealth "permanently crystalized" them and prevented petitioner from obtaining a fair trial. *Id.* In particular, by threatening Barber and driving him to invoke his Fifth Amendment rights, the Commonwealth intentionally deprived petitioner of "a credible direct and rebuttal witness to defend himself from the charges he faces." Pet. App. 86a–87a. The prosecutors' conduct has thus effectively prevented petitioner from using the exculpatory evidence that was suppressed at his original trial and was the basis for the grant of habeas relief. *Id.*

The district court directed the Commonwealth to unconditionally release petitioner from custody and barred re-prosecution on any charges "stemming from the death of Danny Petrole which requires the testimony of Owen Barber in any form." Pet. App. 88a.

E. The Fourth Circuit's Opinion

On appeal, a divided panel of the Fourth Circuit affirmed in part and reversed in part. It unanimously affirmed the district court's finding that the Commonwealth had violated the terms of the habeas decree. Pet. App. 14a–23a. Nonetheless, despite the Commonwealth's clear violation of the federal decree and its continuing misconduct, the panel majority held that the district court lacked authority to bar re-prosecution. Pet. App. 23a. Instead, the court of appeals announced a new rule, holding that "preventing the retrial of a state criminal case" is appropriate only "where a recognized constitutional error cannot be remedied by a new trial," such as a speedy trial or double jeopardy violation. Pet. App. 23a–26a.

The majority recognized that the Sixth and Tenth Circuits apply a different approach, approving bars on retrial for a state's failure to comply with a conditional writ even though the constitutional errors could theoretically be remedied in a new trial (but in a practical sense would not be). Pet. App. 24a-28a (citing *Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 (6th Cir. 2006); *Capps v. Sullivan*, 13 F.3d 350, 352–53 (10th Cir. 1993)). The Fourth Circuit nonetheless decided to break from these precedents. In the majority's view, the district court did not have the power to remedy the obvious prejudice to petitioner's ability to secure a fair trial caused by the prosecutor's continuing misconduct.

Judge Thacker dissented, embracing the principles recognized in *Capps* and *Satterlee*. Pet. App. 30a. She explained that other "courts have relied on circumstances that demand equitable relief, even if those circumstances present constitutional violations that could be remedied upon retrial." Pet. App. 33a. She also noted that "[w]hether circumstances are 'extraordinary' enough to bar re-prosecution is a fact-based determination, left to the sound discretion of the district court." Pet. App. 34a. In light of the district court's findings, Judge Thacker concluded that "[t]he Commonwealth's misconduct has continued far too long, and the cumulative misconduct permeating this case has tainted it in such a way that it is doubtful [petitioner] will receive a fair and just trial." Pet. App. 30a–31a. In short, "the circumstances at hand are extraordinary enough to demand equitable relief in the form of a bar on re-prosecution." Pet. App. 34a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari for three reasons. *First,* the decision below conflicts with the views of other courts of appeals on the important question whether a federal court has discretion to prohibit re-prosecution when state prosecutors disobey a habeas judgment and engage in continuing misconduct calculated to deny the habeas petitioner a fair trial. *Second*, the Fourth Circuit's new categorical rule denying courts this authority in nearly all circumstances conflicts with the plain text of the habeas statute and with this Court's precedents. *Third*, this case raises important, unresolved questions about the power of federal courts to protect and effectuate their judgments, and the proper response when state prosecutors willfully perpetuate constitutional violations that infected a successful habeas petitioner's original trial.

I. The Courts of Appeals Disagree Over When A Federal Court May Properly Bar Re-Prosecution.

As the Fourth Circuit expressly recognized below, the courts of appeals are divided over the extent of a federal court's authority to enjoin the retrial of a habeas petitioner when a state prosecutor deliberately violates a federal court order, engages in continuing misconduct, and substantially prejudices the petitioner's ability to secure a fair retrial. The Sixth Circuit has concluded that in extraordinary circumstances a bar on re-prosecution is an appropriate remedy within the sound discretion of the district court. In sharp contrast, the court below expressly declined "to embrace the principles"

adopted by the Sixth Circuit. Pet. App. 28a. Instead, it concluded that a federal court may bar re-prosecution only when it is literally impossible for the state court to remedy the constitutional defect. These sharply divergent approaches guarantee that, in the Sixth Circuit, habeas petitioners will be able to secure freedom from custody (the substance of the habeas corpus guarantee) in circumstances where similarly situated petitioners in the Fourth Circuit will face many more years in prison while the state conducts another unfair trial—and perhaps another one after that.

A. There Is A Clear Division In Authority Over When A Federal Court May Bar Re-Prosecution.

In *D'Ambrosio v. Bagley*, 656 F.3d 379 (6th Cir. 2011), the Sixth Circuit concluded that where the state's conduct in post-conviction proceedings deprives a habeas petitioner of the ability to mount an effective defense at trial, a federal court may bar re-prosecution. The facts in *D'Ambrosio* are similar to, although far less egregious than, the facts in this case.

In *D'Ambrosio*, the district court on habeas "concluded that the prosecution had failed to disclose exculpatory evidence" in violation of *Brady*, "and granted a conditional writ, requiring the state either to set aside [petitioner's] convictions and sentences or to conduct another trial" within 180 days. 656 F.3d at 381. After the state failed to comply with the conditional writ, the district court issued an unconditional writ. *Id.* at 382. It found that "the State did not respond to multiple discovery requests;

produced material, relevant items of discovery on the eve of trial; and then sought to interfere with the orderly progress of the trial through gamesmanship." *Id.* At that juncture, the district court declined to bar re-prosecution, concluding that the State's conduct did not warrant the sanction. *Id.* But the day before the court issued the unconditional writ, "Espinoza, the prosecution's key witness, died." *Id.* "The prosecution learned of Espinoza's death four days later, but did not inform the state trial court of this development until July." *Id.* The district court presumably "did not know of Espinoza's death until" nearly four months later, when D'Ambrosio moved "to bar his re-prosecution in light of Espinoza's death." *Id.*

In response to that motion, the district court barred D'Ambrosio's re-prosecution. It noted that the State had held D'Ambrosio "on death row, despite wrongfully withholding evidence that would have substantially increased a reasonable juror's doubt of D'Ambrosio's guilt." *Id.* at 383. The court further observed that "[b]ecause the state failed to retry D'Ambrosio within 180 days . . . the critical State's witness—the man around whom the entire theory of the State's case revolved—is no longer available for trial, a fact the State knew but withheld from D'Ambrosio, the state court, and this Court." *Id.* Accordingly, "[t]o fail to bar retrial in such extraordinary circumstances surely would fail to serve the ends of justice." *Id.*

On appeal, although the State argued that the court lacked jurisdiction to bar re-prosecution, the Sixth Circuit affirmed. A procedurally fair retrial

was not literally impossible, but the court held that D'Ambrosio's claim "is the sort of argument envisioned by the 'extraordinary circumstances' standard, which permits barring re-prosecution if the state's delay is likely to prejudice the petitioner's ability to mount a defense at trial." *Id.* at 389. Because "the loss of a key witness was a collateral consequence of the state's noncompliance with the original writ," the district court "had jurisdiction to" bar re-prosecution. *Id.*

In reaching that conclusion, *D'Ambrosio* reaffirmed two earlier decisions. In *Satterlee v. Wolfenbarger*, 453 F.3d 362 (6th Cir. 2006), the Sixth Circuit had held that "in 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 re-prosecution." 656 F.3d at 383–84 (internal quotation marks and emphasis omitted). Similarly, in *Girts v. Yanai*, 600 F.3d 576 (6th Cir. 2010), the Sixth Circuit quoted *Satterlee* with approval in the course of holding that the State's actions did "not rise to the level of 'extraordinary circumstances' contemplated in *Satterlee*." *Id.* at 583, 586; *see also Capps*, 13 F.3d at 352–53 (explaining that, to justify barring re-prosecution, "the constitutional violation must be such that it cannot be remedied by another trial, *or other exceptional circumstances exist such that the holding of a new trial would be unjust*." (emphasis added)).

In the decision below, the Fourth Circuit expressly rejected the Sixth Circuit's approach. Although it suggested that "in [] extremely rare and unique circumstance[s]," a federal district court "might proscribe a state court retrial," it was "unwilling to embrace the principles of *Capps* or *Satterlee*." Pet. App 28a. Instead, in the view of the court below, "any scenario presenting circumstances sufficiently extraordinary to warrant federal interference with a State's re-prosecution of a successful § 2254 petitioner will be extremely rare, and will ordinarily be limited to situations where a recognized constitutional error cannot be remedied by a new trial." Pet. App. 26a. By way of example, the Fourth Circuit cited cases involving vindictive prosecution, the Sixth Amendment speedy trial guarantee, and double jeopardy violations. Pet. App. 26a–27a. The upshot is that even if egregious prosecutorial misconduct substantially prejudices a petitioner's ability to secure a fair retrial, the Fourth Circuit prohibits granting immediate relief.

These differences among the courts of appeals are mirrored in the majority and dissenting opinions below. In rejecting the majority's analysis, Judge Thacker relied on *Capps* and *Satterlee*. She pointed out that "[t]hese courts have relied on circumstances that demand equitable relief, even if those circumstances present constitutional violations that could be remedied upon retrial." Pet. App. 33a. After cataloguing the numerous instances of prosecutorial misconduct in this case, Judge Thacker concluded that the Commonwealth's continuing "misconduct" has "tainted this case to the extent that [petitioner's] due process rights are all but obliterated." Pet. App.

48a. Accordingly, "the district court was not arbitrary or irrational, did not ignore constraints on its discretion, and did not commit factual or legal error in stopping this loathsome spectacle once and for all." Pet. App. 48a–49a.

B. This Case Presents An Ideal Vehicle To Resolve The Disagreement Between The Courts Of Appeals.

The extraordinary facts of this case make it an ideal vehicle to resolve this conflict. It is difficult to imagine a case involving more astonishing, willful, and unrepentant prosecutorial behavior than this one. *See, e.g.*, Pet. App. 195a–260a. The Commonwealth's conduct cannot and should not be tolerated.

As the district court recognized, this case is extraordinary in several respects. *First*, in its initial prosecution, the Commonwealth's Attorney intentionally withheld crucial exculpatory evidence and, when pressed to explain his nondisclosures, made the "flabbergasting" assertion that he routinely declines to turn over *Brady* material because of the possibility that a defendant could use the evidence to "fabricate a defense." Pet. App. 115a; *see also* Pet. App. 38a, 84a. *Second*, the Commonwealth engaged in continuing misconduct designed, as the district court put it, to replicate and "permanently crystalize[]" the same constitutional errors it intentionally committed in the original trial. Pet. App. 86a. By threatening Barber and goading him into invoking his Fifth Amendment privilege, the Commonwealth has, in one blow, incurably deprived petitioner of any meaningful ability to use the

exculpatory evidence deliberately withheld at the original trial. *Third*, after considering the exculpatory testimony that the Commonwealth has prevented petitioner from using in any retrial, the district court found under *Schlup* that petitioner is more likely than not innocent of the crimes for which he has been charged. *See* Pet. App. 95a. *Fourth*, the federal court retained jurisdiction, since the Commonwealth deliberately failed to comply with the conditional writ by failing to release petitioner unconditionally from custody or retrying him within 120 days.

In these circumstances, there can be no doubt that the outcome of this case depended entirely on geography. Had petitioner been prosecuted in Kentucky, Michigan, Ohio, Tennessee, Colorado, Kansas, New Mexico, Oklahoma, Utah, or Wyoming, the district court's order ensuring his freedom from custody would have been affirmed. Because petitioner resides in Virginia, however, he faces many more years in custody, another trial, and another possible death sentence.

The extraordinary facts of this case also underscore that the Fourth Circuit's new rule is a categorical one that effectively strips district courts of any authority to remedy violations of habeas writs when state prosecutors engage in extraordinary misconduct. As Judge Thacker recognized in her dissent, if this case does not justify a bar on re-prosecution, there are virtually no circumstances where that remedy may be awarded, no matter how egregiously state officials flout federal court authority and deny habeas petitioners a fair trial.

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

The Court should also grant review because the decision below is inconsistent with basic notions of a federal court's authority to fashion a remedy when a party violates its orders. A conditional writ "delay[s] the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). Because the writ is conditional, it necessarily follows that the district court retains jurisdiction to determine whether the state has complied with the conditions imposed; "[t]hat jurisdiction [is] encompassed in the same power that would have enabled the court to release" the petitioner in the first instance. *Phifer v. Warden*, 53 F.3d 859, 865 (7th Cir. 1995); *see also Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring) ("Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release.").

Here, because the Commonwealth did not comply with the conditional writ, this case at bottom is about federal courts' authority to enforce their judgments and the duty on the part of state officials to comply. *Cf.* 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except . . . to protect or effectuate its judgments."). The Commonwealth flagrantly violated the district court's order. Instead of releasing petitioner unconditionally or retrying him within 120 days, the prosecutors engaged in

continuing misconduct and "permanently "crystalized" the constitutional violations in the earlier trial by ensuring that petitioner would be unable to present the most powerful exculpatory evidence in his favor. Pet. App. 86a.

The Fourth Circuit nonetheless denied the district court any discretion to issue the only kind of order that could meaningfully respond to this extraordinary misconduct. In doing so, the Fourth Circuit profoundly misunderstood the import and the posture of this case. It is not about the deference to the state that would be owed if state officials *had complied* with the federal judgment. Instead, it is about respect for the *federal courts*, and the scope of the discretion a federal court enjoys to fashion an appropriate remedy when state officials deliberately violate a federal judgment. *See Commodities Export Co. v. Detroit Int'l Bridge Co.*, 695 F.3d 518, 527 (6th Cir. 2012) ("comity is a two-way street"). By viewing this case solely through the prism of deference to the state, the court below misunderstood the aspect of federalism that is actually implicated here.

This case also presents an opportunity for this Court to clarify that habeas review, at some point, must end. The Fourth Circuit's formalistic holding sabotages habeas law's quest for finality. *Cf. Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (emphasizing, among other things, the importance of "finality" in habeas proceedings). It creates a world where a determined, disobedient prosecutor can conduct successive unfair trials of the same defendant, each separated from the other by an intervening grant of habeas relief. By turning a blind eye to the reality of

years of extraordinary prosecutorial misconduct in favor of a mechanical test, the court of appeals' view ignores practical reality. Where, as here, the prosecution's intent to continue its misconduct is crystal clear, habeas proceedings are at risk of becoming an endless game of "judicial ping-pong between the state and federal courts." *Cf. Harris v. Reed*, 489 U.S. 255, 269–70 (1989) (O'Connor, J., concurring).

The possibility of never-ending habeas proceedings illustrates why, if federal courts could never bar re-prosecution, the writ of habeas corpus could never adequately vindicate constitutional rights. Nor could the writ accomplish what it is designed to do: secure the release from custody of a petitioner who is being held in violation of the Constitution. A state could try and convict a defendant using blatantly unconstitutional procedures, and when a federal court subsequently granted habeas relief, the state could keep the defendant in custody and conduct the same trial, to the same result, on and on indefinitely. A defendant could serve an effective sentence of life imprisonment on unconstitutional grounds, with no federal redress available. Habeas is not so toothless nor so circular. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (the Constitution "'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections").

Finally, the Fourth Circuit's inflexible view cannot be reconciled with the federal habeas statute, which broadly authorizes a district court to "dispose of [a habeas] matter as law and justice require." 28

U.S.C. § 2243. Nor can it be squared with this Court's cases, which have held that a district court has "broad discretion . . . in fashioning the judgment granting relief to a habeas petitioner." *Hilton*, 481 U.S. at 775. As this Court has recognized, "'equitable principles' have traditionally 'governed' the substantive law of habeas corpus." *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (citing *Munaf v. Geren*, 553 U.S. 674, 693 (2008)); *see also id.* at 2561 ("habeas corpus . . . pertains to an area of the law where equity finds a comfortable home"). The Court has thus "made clear that often the 'exercise of a court's equity powers . . . must be made on a case-by-case basis,'" *id.* at 2563 (citing *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964)), and not by reference to any rigid formula or categorical rule.

In the analogous context of determining whether "extraordinary circumstances" exist to justify tolling § 2244(d)'s statute of limitations, this Court has rejected "too rigid" and "per se" legal standards. *Holland*, 130 S. Ct. at 2563. In *Holland*, the court of appeals had ruled that "even attorney conduct that is grossly negligent can never warrant tolling absent bad faith, dishonesty, divided loyalty, mental impairment, or so forth on the lawyer's part." *Id.* This Court reversed, "emphasizing the need for 'flexibility'" and "for avoiding 'mechanical rules.'" *Id.* (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)). As the Court explained, its precedents embrace "a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.'" *Id.* (citing

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248 (1944)). Instead, "[t]he flexibility inherent in equitable procedure enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices." *Id.* at 2563 (internal quotation marks and alteration omitted). The Fourth Circuit's decision disregards these principles.

III. The Question Presented Raises Important Issues About Federalism, Habeas, And Prosecutorial Misconduct.

The Court should also grant review because of the importance of the issues involved. This case raises foundational questions about the deference that state officials owe to the federal courts. It is about whether the federal courts have the power to enforce judgments protecting constitutional rights against state officials determined to disobey.

This case is also about whether habeas, in the end, can do what it is supposed to do: secure "the release of persons held in actual, physical custody." *Jones v. Cunningham*, 371 U.S. 236, 238 (1963). The Fourth Circuit's categorical rule leaves no room for a federal court to grant an effective remedy when a defendant is beset by a defiant prosecutor, who openly commits to depriving the defendant of a fair trial. When confronted with extraordinary circumstances such as these, a habeas court must be able to grant the only remedy that can actually secure the petitioner's release from confinement.

Finally, this case poses fundamental issues regarding extraordinary prosecutorial misconduct

and the right of the people to be free from arbitrary prosecutions. "Prosecutors have a special duty to seek justice, not merely to convict." *Connick v. Thompson*, 131 S. Ct. 1350, 1362 (2011). "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935). "Among prosecutors' unique ethical obligations is the duty to produce *Brady* evidence to the defense." *Connick*, 131 S. Ct. at 1362. These obligations are fundamental to our legal system. And they are squarely implicated here, where the Commonwealth, despite years of misconduct that has made it all but impossible for petitioner to secure a fair retrial, has succeeded in keeping petitioner behind bars for more than a decade.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ASHLEY C. PARRISH
Counsel of Record
ETHAN P. DAVIS
KAREN F. GROHMAN
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
Telephone: (202) 626-2627
aparrish@kslaw.com

MICHELE J. BRACE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, VA 22903
Telephone: (434) 817-2970

DANIEL J. KING
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, GA 30309
Telephone: (404) 572-3397

Counsel for Petitioner

October 31, 2013

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-7

JUSTIN MICHAEL WOLFE,

Petitioner-Appellee,

v.

HAROLD W. CLARKE, Director, Virginia Department of Corrections,

Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk,
D.C. No. 2:05-cv-00432-RAJ-DEM
Raymond A. Jackson, District Judge

OPINION

Before: KING, DUNCAN, and THACKER, Circuit Judges.

Argued: January 28, 2013 Decided: May 22, 2013

OPINION

KING, Circuit Judge:

These habeas corpus proceedings on behalf of Justin Michael Wolfe are before us for the third time, and they arrive saddled with a protracted and eventful history. Most recently, in 2012, we affirmed the judgment entered in the Eastern District of Virginia vacating Wolfe's 2002 state court convictions for capital murder and other crimes, and we remanded for further proceedings, leaving in place the district court's remedial edict that Wolfe be retried or released.

In this appeal, respondent Harold W. Clarke, as Director of the Virginia Department of Corrections (hereinafter the "Commonwealth"), seeks relief from the district court's "Order Enforcing Judgment." Wolfe v. Clarke, No. 2:05-cv-00432 (E.D. Va. Dec. 26, 2012).[1] The court entered the challenged order upon ascertaining that the Commonwealth had not complied with the operative retry-or-release directive. As a consequence of the Commonwealth's noncompliance, it was instructed to "release [Wolfe] unconditionally, free of all criminal proceedings on the charge of murder for hire of Danny Petrole and the drug charges that were previously tried in state court by the Commonwealth, within ten (10) days of the entry of this order." Id. at 25.

Beyond mere release, however, the district court further proscribed the Commonwealth "from

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[1] The Order Enforcing Judgment is found at J.A. 510-35. (Citations herein to "J.A. ____" refer to the contents of the Joint Appendix filed by the parties in this appeal.)

reprosecuting [Wolfe] on the charges originally tried herein in state court or any other charges stemming from [the] death of Danny Petrole which requires the testimony of Owen Barber in any form." Order Enforcing Judgment 25-26. In support of its chosen remedy, the court concluded that the Commonwealth's prosecutors had, on remand, improperly conducted themselves with respect to their key witness, Owen Barber. As a result, the prosecutors had "permanently crystalized" constitutional violations previously found to have tainted Wolfe's trial, id. at 24, which in turn constituted extraordinary circumstances justifying a federal bar to his proposed retrial.

On January 3, 2013, we stayed, pending resolution of this appeal, the district court's order. As explained below, the court accurately determined that the Commonwealth neglected to timely observe the retry-or-release directive. Though the court was correct to order Wolfe's immediate release, it fashioned an overbroad remedy and thereby abused its discretion by precluding the Commonwealth from retrying Wolfe in a new proceeding. We therefore vacate the Order Enforcing Judgment and remand for the district court to enter a substitute order directing that Wolfe simply be released from the custody imposed as the result of his 2002 convictions.

I.

As described in our earlier decisions, a jury in Prince William County, Virginia, found Wolfe guilty in 2002 of the capital murder of Danny Petrole, of using a firearm in the commission of a felony, and of conspiring to distribute marijuana. See Wolfe v.

Johnson, 565 F.3d 140 (4th Cir. 2009) ("Wolfe I"); Wolfe v. Clarke, 691 F.3d 410 (4th Cir. 2012) ("Wolfe II"). The theory of the prosecution was that, as a nineteen-year-old marijuana dealer, Wolfe hired his friend and fellow drug dealer, Owen Barber, to murder Petrole, who was a drug supplier. Barber, the admitted triggerman, was the only witness to testify concerning the "for hire" element of the murder-for-hire scheme. In exchange for Barber's testimony, the Commonwealth dismissed its capital murder charge against him. Barber thus pleaded guilty and was sentenced to sixty years on a non-capital murder conviction, of which twenty-two years were suspended. On the basis of his murder conviction, Wolfe was sentenced to death. For his firearm and drug convictions, Wolfe received consecutive prison terms of three and thirty years, respectively.

A.

1.

In November 2005, after failing to obtain relief on direct appeal and in state post-conviction proceedings, Wolfe filed his 28 U.S.C. § 2254 petition in the Eastern District of Virginia. The district court promptly referred Wolfe's petition to a magistrate judge for a report and recommendation. On December 14, 2005, while Wolfe's petition was pending, Barber executed an affidavit repudiating his trial testimony and exculpating Wolfe from the murder-for-hire scheme. Barber's affidavit prompted Wolfe to file an amended § 2254 petition, which is the operative "petition" in these proceedings. The petition maintained, inter alia, that the prosecution had curtailed Wolfe's entitlement to due process by

concealing material exculpatory evidence that should have been disclosed to his defense attorneys. The petition also alleged that Barber's affidavit had sufficiently demonstrated Wolfe's actual innocence to excuse any procedural default of his constitutional claims.

In April 2006, five months after executing the repudiatory affidavit, Barber sought to recant the statements he had made therein. In an unsworn handwritten letter, Barber insisted that he had testified truthfully in the 2002 trial, and that he had falsified his 2005 affidavit. In August 2007, the magistrate judge issued his report recommending dismissal of Wolfe's § 2254 petition, in that the claims alleged therein were meritless and had been procedurally defaulted. On February 11, 2008, over Wolfe's objections, the district court adopted the magistrate judge's recommendation and dismissed the petition. Wolfe timely appealed that dismissal, and, by our decision of May 11, 2009, see Wolfe I, we vacated in part and remanded for further proceedings.

2.

On remand, the district court determined at the outset that Wolfe was entitled to an evidentiary hearing, and that, pursuant to Schlup v. Delo, 513 U.S. 298 (1995), he had made a sufficient showing of actual innocence to bypass any procedural defenses that might be interposed to foreclose substantive consideration of his constitutional claims. During the evidentiary hearing conducted in November 2010, Barber testified, exculpated Wolfe, and his evidence was credited by the court. On July 26, 2011, the court

ruled that the prosecutors in Wolfe's trial had contravened his Fourteenth Amendment due process rights by (1) failing to disclose favorable and material evidence, contrary to Brady v. Maryland, 373 U.S. 83 (1963); (2) allowing Barber to testify, despite having information indicating that his testimony was false, in violation of Napue v. Illinois, 360 U.S. 264 (1959); and (3) striking a qualified venireman, as proscribed by Supreme Court precedent. The court therefore granted habeas corpus relief to Wolfe and specified that Wolfe's "conviction and sentence" were vacated. Wolfe v. Clarke, 819 F. Supp. 2d 538, 574 (E.D. Va. 2011). On August 4, 2011, the Commonwealth filed a timely notice of appeal.

Thereafter, Wolfe moved the district court, pursuant to Rule 59 of the Federal Rules of Civil Procedure, to clarify whether the relief granted on his capital murder conviction also encompassed his firearm and drug convictions. On August 30, 2011, the court granted Wolfe's clarification motion and entered one of the orders relevant to this appeal. See Wolfe v. Clarke, No. 2:05-cv-00432 (E.D. Va. Aug. 30, 2011) (the "Relief Order").[2] The Relief Order explained that Wolfe was entitled to a new trial on all of the original charges, and it accorded the Commonwealth the option of either "provid[ing] [Wolfe] with a new trial, or releas[ing] him unconditionally from custody" within 120 days. Id. at 2. On September 2, 2011, the Commonwealth filed a

[2] On August 30, 2011, the district court also entered an Amended Judgment containing substantially identical disposition terms as the Relief Order. These documents are found at J.A. 91-93.

second notice of appeal, from the Relief Order and the Amended Judgment. Eleven days later, the Commonwealth moved the district court for a stay pending appeal, which the court granted on November 22, 2011. See Wolfe v. Clarke, 819 F. Supp. 2d 574 (E.D. Va. 2011) (the "Stay Order").[3] Wolfe cross-appealed, asserting that the district court erred in denying him relief on an additional, unadjudicated claim. By our Wolfe II decision, we affirmed the judgment of the district court.[4]

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[3] A brief comment is warranted concerning the two notices of appeal filed by the Commonwealth in Wolfe II. Generally speaking, a duly filed notice of appeal deprives a district court of jurisdiction over all issues relating to the subject matter thereof. See In re Grand Jury Proceedings Under Seal, 947 F.2d 1188, 1190 (4th Cir. 1991). An exception to that general proposition is recognized when a district court elects "to proceed as to matters in aid of the appeal." Id. A court may render such aid, for example, by resolving a motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the judgment being appealed, see Fed. R. App. P. 4(a)(4)(A)(iv) (providing in addition that filing of Rule 59(e) motion resets time allotted all parties to submit notices of appeal), or by addressing in the first instance a motion for stay pending appeal, see Fed. R. App. P. 8(a)(1)(A). Both of those events occurred in Wolfe II, culminating in, respectively, the Relief Order with accompanying Amended Judgment, and the Stay Order.

[4] Our affirmance in Wolfe II of the Relief Order and Amended Judgment was predicated on one sub-part of Wolfe's Brady claim, that is, the Commonwealth's failure to disclose the written police report of Prince William County Detective Sam Newsome, documenting that Newsome had advised Barber that he could avoid the death penalty by implicating Wolfe. Because Wolfe was entitled to relief under § 2254 on that sub-claim, we (Continued)

B.

1.

Our mandate in Wolfe II issued on September 7, 2012. That same day, Wolfe was transferred from the Sussex State Prison to the Prince William County Adult Detention Center, for a status hearing to be conducted in the state circuit court on September 10, 2012. At that hearing, two of Wolfe's federal habeas lawyers were appointed to represent him on the original state charges, and a bond hearing was set for September 14, 2012.[5] The next day, the Commonwealth's Attorney and his assistant, along with one of the primary investigating officers, Detective Sam Newsome, interviewed Barber at the Augusta Correctional Center. During the interview, which was recorded without Barber's knowledge, those three officials sought to ascertain how Barber would testify at Wolfe's retrial. They suggested to Barber that, because his testimony in the federal habeas proceedings was inconsistent with his trial testimony, he had breached his plea agreement with the Commonwealth. The prosecutors then advised Barber that he could face prosecution for perjury,

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had no reason to review the Commonwealth's assignments of error regarding the other grounds for relief, or to consider Wolfe's cross-appeal. See Wolfe II, 691 F.3d at 416-17.

[5] When it became clear that the Commonwealth intended to proceed with a retrial of Wolfe, his habeas counsel successfully moved to withdraw from their representation of him on the original state charges. They were replaced by the Regional Capital Defender, who presently represents Wolfe in the state criminal proceedings.

plus reinstatement of his original capital murder charge, which potentially carried the death penalty.

Not long thereafter, the Commonwealth's Attorney and his assistant recused themselves from Wolfe's retrial and requested the appointment of Raymond Morrogh, the Commonwealth's Attorney for Fairfax County, as Special Prosecutor. Morrogh was appointed, and he represented the Commonwealth at the September 14, 2012 hearing, where Wolfe was denied bond. On that occasion, the defense lawyers asserted that only thirty-six days remained for the Commonwealth to retry Wolfe. The Commonwealth agreed to a retrial beginning on October 15, 2012. On the heels of the bond hearing, Wolfe requested the circuit court to disqualify the Special Prosecutor.

In the meantime, on October 1, 2012, a Prince William County grand jury returned new indictments against Wolfe, charging him with six additional offenses arising from the events underlying Wolfe's original charges. The retrial, then, was to encompass the original charges plus the following:

- capital murder by order of a person engaged in a continuing criminal enterprise ("CCE");
- use of a firearm in the commission of a murder;
- leading a CCE to distribute between $100,000 and $250,000 worth of marijuana in a twelve-month period;

- leading a CCE to distribute more than $250,000 of marijuana in a twelve-month period;
- first degree felony murder of Danny Petrole during commission of a robbery or attempted robbery; and
- use of a firearm in the commission of a robbery or attempted robbery.

See J.A. 229-30. On that same date, the Commonwealth moved in state court for a continuance of the October 15 retrial, asserting that the 120-day period had not begun to run until our mandate issued on September 7, 2012, and, thus, that the 120 days would not expire until January 5, 2013. Consistent with that view, the Commonwealth requested that the retrial commence the first week of January 2013. The continuance motion was granted on October 3, 2012, but a retrial date was not set.

On October 31, 2012, the circuit court conducted a hearing on, inter alia, Wolfe's motion to disqualify the Special Prosecutor. Barber was called to testify at that hearing, and he invoked his Fifth Amendment privilege against self-incrimination. The court accepted Barber's assertion of the privilege and did not seek to compel his testimony. Thereafter, the court scheduled Wolfe's retrial for January 2, 2013.[6]

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[6] On this record, it is not clear when and how Wolfe's lawyers learned of the Barber interview. At least as early as the October 31, 2012 hearing, however, they were aware of Barber's apparent intention to invoke the Fifth Amendment in connection with Wolfe's retrial, and they knew that such invocation was related to Barber's interview by the prosecutors.

Meanwhile, beginning in November 2012, proceedings commenced in federal court that overlapped to some extent with the pretrial litigation in the circuit court. Specifically, on November 16, 2012, Wolfe filed a motion to enforce judgment, asserting that the Commonwealth had neither released him unconditionally nor provided him with a new trial within 120 days of the Relief Order. The Commonwealth opposed the motion, contending that Wolfe had already been released unconditionally, and that, by conducting the bond hearing on September 14, 2012, the Commonwealth had effectively commenced his retrial within the 120-day period. That period, the Commonwealth maintained, had in any event been reset to 120 days by the November 22, 2011 Stay Order, and had not begun to elapse until September 7, 2012, upon issuance of our mandate.

2.

On December 4, 2012, based primarily on the Barber interview, Wolfe filed a motion to dismiss in the circuit court, contending that, by threatening Barber with the death penalty, the prosecutors had engaged in "gross prosecutorial misconduct" sufficiently severe and violative of due process to fatally undermine all the state criminal charges lodged against Wolfe.[7] See J.A. 405-20. Two days

[7] At the oral argument of this appeal, the Commonwealth's lawyer represented that the circuit court elected to defer ruling on Wolfe's motion to dismiss the indictments on the basis of, inter alia, the Barber interview. According to the Commonwealth, the circuit court was of the view that the (Continued)

later, Wolfe brought the Barber interview to the district court's attention, by way of his written reply on the motion to enforce judgment. Wolfe also offered to provide a transcript of the Barber interview "to the Court at its request." Id. at 285. The following day, the district court directed Wolfe's counsel to file "any additional information or transcripts concerning the meeting between the original prosecutors in this case and Mr. Barber on September 11, 2012." Id. at 290. Acting on its own initiative, the court also ordered the Commonwealth to show cause why the Barber interview "does not constitute extraordinary circumstances warranting the Court to order [Wolfe'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." Id. at 289-90. The Commonwealth responded to the show cause order on December 12, 2012, asserting that the district court possessed no authority to prohibit any current or future state prosecutions of Wolfe, and that, even were the situation otherwise, nothing had occurred in the Barber interview to justify any such action.

The district court conducted an evidentiary hearing on December 13, 2012, concerning the show cause order. On that occasion, Barber's lawyer advised that Barber would not testify in Wolfe's retrial, instead relying on his Fifth Amendment privilege. The court itself called Barber as a witness at the hearing, for the purpose of establishing that

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motion was premature because Barber has not yet invoked the Fifth Amendment and declined to testify in Wolfe's retrial. The motion to dismiss thus remains pending in the circuit court.

the September 11, 2012 interview had been recorded without his knowledge. Barber responded to the court's questions, confirming that he had been unaware that the encounter was recorded.

3.

On December 26, 2012, the district court entered its Order Enforcing Judgment, concluding that the Commonwealth had not satisfied either compliance option specified in the Relief Order, that is, Wolfe had not been released unconditionally, and he had not been retried within 120 days of the Relief Order. In discussing the appropriate remedy for the violation, the court surmised that "had the content of [Wolfe's] Motion to Enforce Judgment been strictly limited to the Commonwealth's violation of the deadline set in this case, . . . [t]he Court would order Wolfe's release, but he would be subject to rearrest and reprosecution by the Commonwealth." Order Enforcing Judgment 16. Moving on to the matter of the Barber interview, the court determined that "extraordinary circumstances" had been shown warranting a bar to Wolfe's retrial. More specifically, the court found that the Barber interview "incurably frustrated the entire purpose" of the federal habeas corpus proceedings, and "permanently crystalized" the constitutional violations infecting Wolfe's trial, causing Barber to be legally unavailable to testify in a retrial. Id. at 24.

Consequently, the district court ordered Wolfe's release within ten days and barred the Commonwealth from reprosecuting Wolfe on the original charges "or any other charges stemming from [the] death of Danny Petrole which requires the

testimony of Owen Barber in any form." Order Enforcing Judgment 25-26. The Commonwealth immediately appealed, moving to stay the Order Enforcing Judgment. On January 3, 2013, the district court denied the Commonwealth's request for a stay pending appeal. Later that same day, however, on the Commonwealth's motion, we entered our own stay and expedited this appeal. We possess jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a).[8]

II.

We potentially face two rather significant issues. First, we must assess whether the Commonwealth complied with the Relief Order. If the Commonwealth failed to do so, we must then decide whether the district court abused its discretion in barring Wolfe's retrial.

On the first issue, we review a district court's interpretation of its own orders for abuse of discretion. Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 131 (4th Cir. 1992). In that regard, "we are obliged to accord substantial deference to a district court's interpretation of its own judgment." ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co., 472 F.3d 99, 113 (4th Cir. 2006). Indeed, "to sustain appellate review, district courts need only adopt a reasonable construction of the terms contained in

[8] In connection with the entry of our January 3, 2013 stay pending appeal, we directed the parties to file regular reports on the status of the related state court proceedings. The most recent status report indicates that a trial date remains unscheduled.

their orders." JTH Tax, Inc. v. H & R Block E. Tax Serv., Inc., 359 F.3d 699, 706 (4th Cir. 2004).

If the Commonwealth falls short on the compliance issue, our review of the district court's bar to Wolfe's retrial is also for abuse of discretion. D'Ambrosio v. Bagley, 656 F.3d 379, 390 (6th Cir. 2011). Where applicable, Congress has directed the courts to dispose of habeas corpus petitions "as law and justice require." 28 U.S.C. § 2243.[9] Congress's directive constitutes, in a proper case, "an authorization to adjust the scope of the writ in accordance with equitable and prudential considerations." Danforth v. Minnesota, 552 U.S. 264, 278 (2008). Because "habeas corpus is, at its core, an equitable remedy," a district court is vested with substantial discretion to appropriately redress any violation of an order granting habeas corpus relief. Schlup v. Delo, 513 U.S. 298, 319 (1995).

III.

A.

In view of the foregoing recitation, we turn first to the Commonwealth's assertion that it complied with the district court's Relief Order, which required

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[9] More fully, a court considering an application for habeas corpus relief "shall summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243. Notably, the § 2243 standard only applies when deference to a state court's adjudication of the merits of a habeas corpus claim is not mandated by the Antiterrorism and Effective Death Penalty Act. See Johnson v. Thurmer, 624 F.3d 786, 791 (7th Cir. 2010). Because this appeal does not implicate the merits of a habeas claim, there is no state court adjudication to which we would defer.

that Wolfe be retried or released within 120 days. Those contentions — that Wolfe was both released and retried — were considered and rejected in the Order Enforcing Judgment. The court's rulings were predicated primarily on its explanation of its intentions with respect to the Relief Order and the Stay Order. As explained below, the district court did not abuse its discretion in ruling that the Commonwealth neglected to satisfy either compliance option.

1.

At the threshold, the Commonwealth's position — that Wolfe has been both released and retried — fails to pass muster. By specifying the compliance options in the disjunctive, the district court presented the Commonwealth with a choice: it could either provide Wolfe with a new trial or unconditionally release him from custody. The Commonwealth asserts on appeal, rather counterintuitively, that it has satisfied both options.

First, the Commonwealth maintains that, at least since Wolfe's September 14, 2012 bond hearing, his status is that of a pretrial defendant who has been denied bond. The Commonwealth thus posits that Wolfe was unconditionally released. The Commonwealth's theory fails to take into account the purpose of a new-trial contingency in the habeas setting, which is to delay actual release of the successful petitioner, thus permitting the state authorities to remedy the constitutional defects and retain the petitioner in confinement. See Hilton v. Braunskill, 481 U.S. 770, 775 (1987) ("[T]his Court has repeatedly stated that federal courts may delay

the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court.").

By its Relief Order, the district court did not direct Wolfe's immediate release. It instead accorded the Commonwealth the options of retrying Wolfe within 120 days or unconditionally releasing him. An evaluation of whether the Commonwealth has complied with either directive requires an interpretation of the court's prior orders, the best source for which is the court itself. As it explained,

> [i]n presenting the option of releasing the Petitioner "unconditionally" from custody, the Court used the word "unconditionally" in its traditional and widely underst[ood] context: "Not limited by a condition; not depending on an uncertain event or contingency; absolute." Black's Law Dictionary (9th ed. 2009). Under this meaning of the word "unconditional," it is self-evident that releasing Petitioner from the custody of the Virginia Department of Corrections to Prince William County for the purposes of retrial did not constitute releasing Petitioner "unconditionally from custody."

Order Enforcing Judgment 8.

The foregoing explanation is not an unreasonable one, and we are unable to disturb it. A commonsense reading of the Relief Order is that it obliged the Commonwealth to either release or retry Wolfe within 120 days. Because Wolfe has not been unconditionally released, we turn to the second

compliance option and gauge whether Wolfe has been retried.[10]

2.

The Commonwealth's other option for compliance with the Relief Order was to provide Wolfe with a new trial "within one-hundred and twenty (120) days of the date of [the Order]." Relief Order 2. The Commonwealth insists that it was not obliged to actually complete a retrial within 120 days. That is, it was not necessary for a verdict to be returned in the state court, or even that a jury be selected, so long as proceedings leading to a retrial had commenced in the circuit court. In this regard, the Commonwealth emphasizes that the circuit court had conducted a bond hearing on September 14, 2012, and that other pretrial proceedings (such as motions to dismiss the indictments and disqualify the prosecutor) were ongoing until the Order Enforcing Judgment was entered. The Commonwealth thus

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[10] The Commonwealth also makes a related, though necessarily distinct, assertion that the vacatur of Wolfe's convictions deprived the district court of jurisdiction. Upon reviewing this issue de novo, see United States v. Poole, 531 F.3d 263, 270 (4th Cir. 2008), we conclude that the court possessed jurisdiction to enforce its judgment. Because Wolfe was in custody when the original petition was filed, the jurisdictional contention is really a mootness argument that is foreclosed by Carafas v. LaVallee, 391 U.S. 234 (1968) (challenge to conviction not rendered moot by habeas petitioner's unconditional release, because petitioner suffers from "collateral consequences," including disenfranchisement, ineligibility for jury duty, and disqualification from elected office). See also Maleng v. Cook, 490 U.S. 488 (1989) (Carafas rested "on the fact that the petitioner had been in physical custody under the challenged conviction at the time the petition was filed").

maintains that its obligation to "provide [Wolfe] with a new trial" was thereby satisfied. In the alternative, the Commonwealth suggests that the 120-day retrial period did not begin to run until the issuance of our mandate in Wolfe II, on September 7, 2012.

Each of the foregoing contentions were considered and rejected by the district court, predicated on its interpretations of the orders on appeal. With regard to whether the 120-day retrial period ran from the issuance of our mandate, the court explained that

> the stay [entered on November 22, 2011] pending the Commonwealth's appeal of the Court's Amended Judgment paused or halted the 120-day deadline imposed by the Court to provide Wolfe a new trial. When that stay was lifted [on September 7, 2012], the deadline clock resumed where it left off when the stay was granted and there were 36 days remaining. On Saturday, October 13, 2012, the 120 days given to the Commonwealth to provide Wolfe with a new trial expired. Because the deadline fell on a weekend, the deadline for retrial moved to Monday, October 15, 2012.

Order Enforcing Judgment 11.[11] In response to the second contention, that the obligation to provide

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[11] It is apparent that the Commonwealth was aware, as early as September 13, 2011, that the district court could deem the 120-day retrial period to have run concurrently with the appeal in Wolfe II. In a memorandum filed that day in support of its motion for a stay pending appeal, the Commonwealth assumed (Continued)

Wolfe with a new trial was satisfied by the commencement and conduct of pretrial proceedings in the circuit court, the Order Enforcing Judgment specified that the retrial had to be completed — and not merely commenced — within the prescribed period. More precisely, the court explained that

> it was certainly the objective of the Court in issuing [the Relief Order] that [Wolfe] would be either promptly retried or relieved of the strictures imposed by his constitutionally flawed conviction and it was certainly the intention of the Court that in providing [Wolfe] a new trial within 120 days, said trial actually occur within that period of time.

Id. at 14 (quotation marks and alterations omitted).

The Commonwealth complains that, evaluated together, the district court's interpretation of its prior directives left the prosecution, after the Wolfe II mandate, with only thirty-six days to complete a capital murder trial. According to the

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that the 120-day period had already begun, opining that

> [i]n the absence of a stay, the Order would take effect and the Commonwealth would be either burdened with a new capital trial or required to set Wolfe free without a trial. In either instance, the Director would be prevented from exercising his right of appeal.

J.A. 113. The subsequent Stay Order seems to have been based upon the same assumption, see Wolfe v. Clarke, 819 F. Supp. 2d at 583 (noting that, without a stay, the 120-day period would expire before the Commonwealth's reply brief was due to this Court in Wolfe II). The Commonwealth was therefore cognizant of the 120-day issue during the pendency of the Wolfe II appeal, yet failed to bring it to our attention.

Commonwealth, the Order Enforcing Judgment was a "prejudicial, revisionist rewording of [the] judgment." Br. of Appellant 24. That characterization fails to recognize that, in the referenced order, the district court explained the meaning of its earlier orders as intended upon entry, without regard for post-judgment events. It was the Commonwealth that sought (and now seeks from this Court) a recasting of the district court's rulings on the basis of subsequent procedural developments. See Capps v. Sullivan, 13 F.3d 350, 353 (10th Cir. 1993) (remanding for district court "to give effect to its original understanding of the order granting [habeas relief]" (emphasis added)).

Notwithstanding the foregoing, the Commonwealth may well be correct that completing a retrial of a complex death penalty case within thirty-six days was a practical impossibility. Indeed, that fact alone may have been sufficient to justify an extension of the retrial period. The Commonwealth did not, however, return to court seeking either a clarification or an extension.

We also recognize that the district court's explanation of its 120-day period was a highly restrictive one, and that, in the absence of a thorough explanation, the court's construction of that directive could be viewed as erroneous. By way of example, the court counted against the Commonwealth an aggregate of eighty-four days during the pendency of the Wolfe II appeal. That is, the period from the August 30, 2011 Relief Order through the November 22, 2011 Stay Order was counted against the 120-day retrial period, notwithstanding the Commonwealth's

timely filing, on September 2, 2011, of its second notice of appeal. Furthermore, the district court did not consider that the circuit court, subsequent to the Wolfe II mandate, spent a substantial period of time addressing motions interposed by Wolfe. Even the federal Speedy Trial Act, which the district court administers on a regular basis, excludes such periods of time. See 18 U.S.C. § 3161(h) (excluding from speedy trial calculations, inter alia, "delay resulting from any pretrial motion").

Additionally, before concluding that the Commonwealth had failed to comply with the Relief Order, the district court acknowledged that there is a "lack of clear controlling case law on a number of issues." Order Enforcing Judgment 7. In these circumstances, we are obliged to provide a modicum of clarity: When a district court awards habeas relief, it is preferable that its order include language ensuring that the respondent will suffer no prejudice by exercising its right of appeal. See, e.g., Tice v. Johnson, 3:08-cv-00069 (E.D. Va. Nov. 19, 2009) ("The writ of habeas corpus will be GRANTED if the Commonwealth of Virginia does not commence the retrial . . . within 120 days of the date of entry of this judgment should appeal not be taken, or within 120 days after the final resolution of any appeal (including a petition for a writ of certiorari) if an appeal is taken.").

At this stage of these proceedings, however, with the Commonwealth having foregone any opportunity to obtain clarification from this Court or the district

court, it can hardly claim surprise.[12] Furthermore, the district court has explained its intentions with respect to the Relief Order and the Stay Order, and we are inclined to credit those explanations. Because the Commonwealth failed to either retry or release Wolfe within 120 days, we turn to the remedy for that transgression.

B.

The Commonwealth contends that the district court abused its discretion in barring Wolfe's retrial. Though we reiterate that a federal habeas court possesses substantial discretion in fashioning an appropriate remedy, preventing the retrial of a state criminal case is the strongest of medicine. And it is a measure that should be utilized with the utmost restraint, only in the most extraordinary of circumstances. See Gilliam v. Foster, 75 F.3d 881, 905 (4th Cir. 1996) (en banc) ("Equitable federal court interference with ongoing state criminal proceedings should be undertaken in only the most limited, narrow, and circumscribed situations."). Such limited and narrow circumstances are simply not present here. We are therefore constrained to conclude, as explained below, that the district court abused its discretion in barring Wolfe's retrial.

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[12] In Williams v. Netherland, a decision relied on by the Commonwealth, an issue similar to that presented here was avoided when the Commonwealth's Attorney in that case did what should have been done here: He returned to the habeas court, in advance of the court-ordered deadline, and requested an extension of time. See No. 3:96-cv-00529 (E.D. Va. Nov. 14, 2002).

1.

In support of its chosen remedy, the district court correctly recognized that the award of an unconditional writ does not, in and of itself, preclude the authorities from rearresting and retrying a successful habeas petitioner. As the court acknowledged,

> [i]t is generally recognized that a violation of a court's directive to retry a habeas petitioner within a certain amount of time would permit the court to order the prisoner's release, however, "the granting of an unconditional writ in this circumstance will not, itself, generally preclude the government from rearresting and retrying the prisoner."

Order Enforcing Judgment 15 (quoting Federal Habeas Manual § 13:10 (May 2010)). The court, however, identified an exception to the general rule, namely, that "in extraordinary circumstances . . . a habeas court may forbid reprosecution." Id. (citing Satterlee v. Wolfenbarger, 453 F.3d 362, 370 (6th Cir. 2006)).

In detecting the presence of extraordinary circumstances here, the district court explained that the conduct of the prosecutors — in particular, their conduct during the September 11, 2012 Barber interview — "sp[oke] to a continuing pattern of violating [Wolfe's] right to use Brady and Giglio evidence, which the court attempted to remedy through its habeas decree." Order Enforcing Judgment 19. At the core of the 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 Amendment right to avoid self-incrimination." Id. at 24.

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.[13] 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. 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.

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[13] The district court apparently believed it "unlikely that the Commonwealth would grant immunity to Barber so that he could provide testimony to exonerate [Wolfe]." Order Enforcing Judgment 25 n.6. Nevertheless, the Commonwealth asserts that it has offered Barber immunity for his truthful testimony at trial. Br. of Appellant 35.

The district court also speculated that the Barber interview served to deprive Wolfe's defense of a credible trial witness, and thereby abridged Wolfe's due process rights. See Order Enforcing Judgment 24 (citing United States v. Saunders, 943 F.2d 388, 392 (4th Cir. 1991) ("Improper intimidation of a witness may violate a defendant's due process right to present his defense witnesses freely if the intimidation amounts to substantial government interference with a defense witness' free and unhampered choice to testify." (internal quotation marks omitted))). 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. See Pitchess v. Davis, 421 U.S. 482 (1975) (alleged post-habeas Brady violation subject to state court exhaustion). Indeed, Wolfe has already raised that precise issue before the circuit court in his yet-unresolved post-Wolfe II motion to dismiss the indictments. By barring Wolfe's retrial, the district court has deprived the circuit court of the opportunity to address that motion. Notably, in the event Wolfe is acquitted, any such issues would be moot. And, should Wolfe be again convicted, the state court system might vindicate him on appeal. Failing that, Wolfe's due process claim with respect to the Barber interview could, at the proper time, constitute a separate ground for federal habeas corpus relief.

At the end of the day, any scenario presenting circumstances sufficiently extraordinary to warrant federal interference with a State's reprosecution of a successful § 2254 petitioner will be extremely rare, and will ordinarily be limited to situations where a

recognized constitutional error cannot be remedied by a new trial. See, e.g., Blackledge v. Perry, 417 U.S. 21, 31 (1974) (holding that vindictive prosecution could contravene due process and justify bar to retrial); Barker v. Wingo, 407 U.S. 514, 522 (1972) (concluding that dismissal may be appropriate remedy for Sixth Amendment speedy trial violation); Gilliam, 75 F.3d at 881 (barring state retrial on double jeopardy grounds).[14]

Put succinctly, the constitutional claims for which Wolfe was awarded habeas corpus relief are readily capable of being remedied in a new trial. Our resolution of the Wolfe II appeal never contemplated the possibility of a retrial bar, and we expected a trial — if that option were pursued — to occur within a reasonable time. The resolution of criminal proceedings on their merits, before the public eye, is of critical importance to our system of justice. And it has long been settled that "[a]n indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge[s] on the[ir] merits." Costello v. United States, 350 U.S. 359, 363 (1956) (footnote omitted). We emphasize, however, that Wolfe, like any accused — as well as the Commonwealth — is entitled to a fair trial. That very proposition is what the Wolfe II decision is all about. As has been emphasized, "[a]

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[14] There are limited situations where a state criminal retrial could properly be barred by a habeas court on the basis of a constitutional deprivation. See generally 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 33.2 (identifying decisions involving, inter alia, double jeopardy, insufficient evidence, ex post facto violation, and unconstitutional statute).

murder trial — indeed any criminal proceeding — is not a sporting event." Giles v. Maryland, 386 U.S. 66, 102 (1967) (Fortas, J., concurring).

The district court, in its Order Enforcing Judgment, relied on decisions where a bar to retrial was approved even though the constitutional errors could have been thereby remedied. See Satterlee, 453 F.3d at 370 (barring retrial deemed appropriate "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" (internal quotation marks omitted)); Capps, 13 F.3d at 350 (barring retrial appropriate where state neither retried petitioner nor sought stay of habeas writ). Although we do 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, we are unwilling to embrace the principles of Capps or Satterlee. 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.[15]

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[15] The Commonwealth alternatively contends that the retrial bar was foreclosed by Younger v. Harris, 401 U.S. 37 (1971), and the Anti-Injunction Act, 28 U.S.C. § 2283. Pursuant to Younger, a federal court "may intervene in state criminal proceedings, either by way of declaratory relief or by injunction, only when there has been a 'showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief.'" Gilliam, 75 F.3d at 903 (quoting Younger, 401 U.S. at 54). The Anti-Injunction Act provides, in pertinent part, that

IV.

Here, of course, the district court was correct to order Wolfe's "release" on the original charges, though such action did not actually free him from custody. As we have explained, Wolfe is facing multiple indictments in Prince William County, and he has been rearrested and denied bail. All that remains to effect Wolfe's release in compliance with the alternatives contemplated by our Wolfe II decision (and by the district court in its grant of relief) is for the Commonwealth to expunge Wolfe's 2002 criminal convictions and to take any and all additional steps necessary to nullify any material adverse legal consequences attendant to those convictions. Subsequent to or contemporaneously therewith, the Commonwealth may retry Wolfe on the original charges together with the new charges, in accordance with such plan and schedule that the state circuit court may devise.

Pursuant to the foregoing, we vacate the district court's Order Enforcing Judgment and remand with instructions that the court enter a substitute order directing that Wolfe be released from the custody imposed as the result of his 2002 convictions, and,

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> [a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283. Because the district court abused its discretion in barring Wolfe from being retried in state court, we need not reach or address the Commonwealth's contentions regarding the principles of Younger and the Anti-Injunction Act.

further, that those convictions be expunged and their legal effects nullified consistently with Wolfe II and this opinion. 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.

VACATED AND REMANDED

THACKER, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's conclusion that the Commonwealth failed to satisfy the terms of the district court's conditional writ in this case, as set forth in Part III.A. of the majority opinion. I cannot, however, agree with its conclusion that the district court abused its discretion in barring re-prosecution of Justin Wolfe -- an appropriate remedy in my view, in light of the Commonwealth's continued misconduct and resulting threat to Justin Wolfe's constitutional right to a fair trial.

The 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. Ante at 31-32 (emphasis added). I am willing to do so; in fact, for the reasons that follow, the extremely rare and unique circumstances of this case command a bar on re-prosecution. The Commonwealth's misconduct has continued far too long, and the cumulative misconduct permeating this case has tainted it in

such a way that it is doubtful Wolfe will receive a fair and just trial. Enough is enough.

Accordingly, and for the reasons set forth herein, I dissent as to Part III.B.

I.

The Supreme Court of the United States has stated, simply and repeatedly, "[t]he role of a prosecutor is to see that justice is done." Connick v. Thompson, 131 S. Ct. 1350, 1365 (2011). "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935).

Mindful of this court's admonishment, "federal court equitable interference with state criminal proceedings should not be undertaken except in the most narrow and extraordinary of circumstances," Gilliam v. Foster, 75 F.3d 881, 903 (4th Cir. 1996) (en banc) (citing Younger v. Harris, 401 U.S. 37 (1971)), I nonetheless cannot ignore the ways in which the Commonwealth's misconduct has hindered rather than fostered justice throughout the course of this case. Although the "extraordinary circumstances" exception is narrow, this case -- wherein the Commonwealth's conduct has been appalling -- fits squarely into that narrow space.

A.

1.

I begin with the elementary propositions that habeas corpus is, "at its core, an equitable remedy," Schlup v. Delo, 513 U.S. 298, 319 (1995), and a district court has broad discretion to "dispose of habeas corpus matters 'as law and justice require,'" Hilton v. Braunskill, 481 U.S. 770, 775 (1987) (quoting 28 U.S.C. § 2243). See also Irvin v. Dowd, 366 U.S. 717, 728-29 (1961). For these reasons, our review of a district court's decision to bar re-prosecution is circumscribed. See D'Ambrosio v. Bagley, 656 F.3d 379, 390 (6th Cir. 2011) (stating that a district court's decision to bar re-prosecution would be reviewed for abuse of discretion).

Under an abuse of discretion review, we should not disrupt the court's remedy unless we believe it "act[ed] arbitrarily or irrationally, fail[ed] to consider recognized factors constraining its exercise of discretion, relie[d] on erroneous factual or legal premises, or commit[ted] an error of law." United States v. Wilson, 624 F.3d 640, 649 (4th Cir. 2010) (internal quotation marks omitted).

2.

As the majority notes, see ante at 30, the extraordinary circumstances exception has traditionally surfaced in cases in which a constitutional violation cannot be remedied by a new trial. See, e.g., Gilliam, 75 F.3d at 903 (re-prosecution would contravene the Double Jeopardy Clause); Solem v. Bartlett, 465 U.S. 463, 481 (1984) (state court lacked jurisdiction over the prosecution); Smith v. Goguen, 415 U.S. 566 (1974) (petitioner was convicted under an unconstitutional statute); Strunk v. United States, 412 U.S. 434, 439-40 (1973) (re-

prosecution would violate petitioner's right to a speedy trial).

But some courts have also found the remedy appropriate in cases in which "other exceptional circumstances exist such that the holding of a new trial would be unjust." Capps v. Sullivan, 13 F.3d 350, 352-53 (10th Cir. 1993). These courts have relied on circumstances that demand equitable relief, even if those circumstances present constitutional violations that could be remedied upon retrial. For example, in Satterlee v. Wolfenbarger, the Sixth Circuit held that a district court "may forbid reprosecution" where "the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period," or "the state's delay is likely to prejudice the petitioner's ability to mount a defense at trial." 453 F.3d 362, 370 (6th Cir. 2006) (internal quotation marks and alterations omitted). See also Wiggins v. Estelle, 681 F.2d 266, 268 n.l (5th Cir. 1982) (suggesting petitioner should "forever be set free" if pre-indictment delay denied petitioner due process), rev'd on other grounds, McKaskle v. Wiggins, 465 U.S. 168 (1984); United States ex rel. Schuster v. Vincent, 524 F.2d 153, 154, 158, 162 (2d Cir. 1975) (ordering a habeas petitioner's immediate release and absolute discharge where he had been confined in a state hospital for over 30 years without the opportunity for a commitment hearing and had been in prison for a total of 44 years); Garcia v. Portuondo, 459 F. Supp. 2d 267, 294 (S.D.N.Y. 2006) (A court may bar retrial, even if the constitutional violation is capable of correction, "where the petitioner has served an extended and potentially unjustifiable period of incarceration before the writ

was granted." (internal quotation marks and alterations omitted)); Morales v. Portuondo, 165 F. Supp. 2d 601, 609 (S.D.N.Y. 2001) (barring retrial where "the evidence strongly suggests that [the petitioners] are innocent," their "ability to defend against the charges in any new trial has been hampered" by unavailability of witnesses because of the state's delay, and they have "served extended and potentially unjustified periods of incarceration" (internal quotation marks omitted)).

Whether circumstances are "extraordinary" enough to bar re-prosecution is a fact-based determination, left to the sound discretion of the district court. See Foster v. Lockhart, 9 F.3d 722, 727 (8th Cir. 1993) ("A district court has authority to preclude a state from retrying a successful habeas petitioner when the court deems that remedy appropriate."). In this case, I do not agree that the district court abused that discretion: I am not as confident as the majority that the Commonwealth's Brady and Giglio violations and subsequent misconduct can be remedied in a new trial. But even assuming they can be, the circumstances at hand are extraordinary enough to demand equitable relief in the form of a bar on re-prosecution.

B.

The district court's remedy was set forth in the Order Enforcing Judgment as follows:

> The Commonwealth, having violated the Court's conditional writ of habeas corpus by failing to "within one-hundred and twenty (120) days of the date of this Order, provide

> Petitioner with a new trial, or release him unconditionally from custody," it is ORDERED that the Commonwealth of Virginia release Petitioner unconditionally, free of all criminal proceedings on the charge of murder for hire of Danny Petrole and the drug charges that were previously tried in state court by the Commonwealth, within ten (10) days of the entry of this order.
>
> It is FURTHER ORDERED that the Commonwealth of Virginia is hereby BARRED from reprosecuting the Petitioner on the charges originally tried herein in state court or any other charges stemming from death of Danny Petrole which requires the testimony of Owen Barber in any form.

J.A. 534-35. The district court explained,

> As a starting point, the Court fully concedes that had the content of the Petitioner's Motion to Enforce Judgment been strictly limited to the Commonwealth's violation of the deadline set in this case, the question of the appropriate remedy would be an easy one. The Court would order Wolfe's release, but he would be subject to rearrest and reprosecution by the Commonwealth. However, the reality of this case is very different than that of the ordinary case which constrains the Court to extraordinary remedies.

Id. at 525. The court proceeded to discuss two aspects of Wolfe's case that warranted a bar to re-

prosecution: the Commonwealth's continuing pattern of misconduct, including flagrant and ubiquitous violations of Brady and Giglio; and the Commonwealth's jail visit to Owen Barber on September 11, 2012.

1.

First, I am compelled to set forth a sampling (though certainly not all) of the previous instances of misconduct perpetrated by the Commonwealth:

- The Commonwealth withheld the report composed by Detective Sam Newsome (the "Newsome Report"), which specifically stated, "I told [Barber] that he was potentially facing a capitol [sic] murder charge in this case and that he needed to help himself. . . . I told him I could not make any promises to him, but that the Commonwealth might entertain the idea of not charging him with Capitol [sic] Murder[.]" Wolfe v. Clarke, 691 F.3d 410, 417 (4th Cir. 2012) ("Wolfe II"). The Newsome Report also showed that the first mention that Wolfe had anything to do with Petrole's murder was raised by Detective Newsome, not by Barber himself;
- The Commonwealth withheld evidence that Barber possessed potential motives for murdering Petrole, see Wolfe v. Clarke, 819 F. Supp. 2d 538, 565 (E.D. Va. 2011);
- The Commonwealth withheld evidence that Barber's roommate, Jason Coleman,

informed the prosecution that Barber had confessed to acting alone, see id.;

- The Commonwealth withheld evidence suggesting that Barber knew Petrole before the murder, that Barber owed Petrole money, that Petrole "had a hit out" on Barber, and that Barber had a close relationship with Petrole's roommate, id. at 548-49, 552;
- The Commonwealth withheld impeachment evidence, including information relating to a deal the Commonwealth made with its witness J.R. Martin in exchange for his cooperation, see id. at 549;
- The Commonwealth withheld a recorded statement made by its witness Chad Hough that conflicted with his trial testimony, see id. at 549;
- The Commonwealth withheld evidence which could have allowed Wolfe to present an alternate theory of the Petrole murder: various reports and witness statements relating to a parallel drug investigation that indicated conflict in Petrole's drug business unrelated to Wolfe's purported motive for having Petrole murdered; evidence that Petrole was rumored to be a government informant, constituting yet another possible motive for his murder; and the statements of three witnesses that they saw a second car at the crime scene shortly

after the Petrole murder, see id. at 566, 558-59;

- When questioned why his office does not have an "open-file policy," a Commonwealth prosecutor offered "the flabbergasting explanation that he has '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.'" Wolfe II, 691 F.3d at 423. Thus, in Wolfe II, we found that the suppression of the Newsome Report "as well as other apparent Brady materials, was entirely intentional," id.;
- The district court found, "[t]he prosecutors choreographed and coordinated witness testimony through a series of joint meetings with Owen Barber and J.R. Martin, Owen Barber and Jennifer Pascquierllo and Jason Coleman and Chad Hough." Wolfe, 819 F. Supp. 2d at 547. Further, the prosecutors did not provide any reference to or information regarding the joint meetings with witnesses in their written Brady disclosure, see id.;
- "Sergeant Pass, lead officer of the drug investigation relating to Wolfe and Petrole, submitted reports outlining the investigation of Petrole and others' drug activities to both the prosecutors and homicide investigators. Conway did not review all of the reports dealing with the

drug investigation and he did not provide them to Petitioner," id. (citation omitted);

- The Commonwealth used Owen Barber's trial testimony "despite being on notice that it contained falsities," id. at 571 (emphasis supplied);
- In attempting to circumvent the district court's mandate that the retrial occur within 120 days or Wolfe be released unconditionally, the Commonwealth assured the state court that the "federal court expressly allows the Commonwealth 120 days from September 7, 2012, in which to institute retrial proceedings," J.A. 260; see also ante at 12.

The gravity of this list is startling, but the pattern of misconduct does not end there: it reached its pinnacle on September 11, 2012, when Detective Newsome and Prince William County prosecutors Richard Conway and Paul Ebert (the "Original Prosecuting Team") visited Barber in jail (the "September 11 jail visit") and attempted to coerce Barber to repeat his 2002 trial testimony upon retrial -- the same testimony that the district court found "contained falsities." Wolfe, 819 F. Supp. 2d at 571 ("Not only was the Commonwealth in possession of information that would have revealed falsities in Barber's testimony at the time of the trial, it also knew that suppressing that information would result in denying Petitioner an opportunity to craft a defense based on the information.").

This time, however, Barber had enough. The district court explained,

> As Mr. Barber's counsel's testimony indicated during this Court's December 13, 2012 hearing, Mr. Barber, under advice of counsel and in consideration of the Original Prosecuting Team's [Sept. 11, 2012] conversation, has now invoked his Fifth Amendment privilege, which the Prince William County Circuit Judge authorized. As indicated by Barber's counsel, Barber intends to continue to invoke his Fifth Amendment privilege at Wolfe's retrial, absent the granting of immunity.

J.A. 527 (citations omitted). Thus, by threatening and intimidating Barber -- whose most recent and credited testimony was that Wolfe had nothing to do with Petrole's murder -- into invoking the Fifth Amendment, the Commonwealth has once again deprived Wolfe of potentially exculpatory evidence. This is a circumstance that, even if (somehow) the constitutional violations can be remedied upon retrial, is extraordinary enough "such that the holding of a new trial would be unjust." Capps, 13 F.3d at 353.

2.

In fashioning its remedy to bar re-prosecution, the district court relied heavily upon the actions of the Original Prosecuting Team during the September 11 jail visit, so it is important to put the visit in context. This court's Wolfe II opinion was published on August 16, 2012, and the mandate issued on Friday, September 7, 2012. Our Wolfe II opinion

roundly chastised the Original Prosecuting Team for its failure to disclose exculpatory evidence and for "taint[ing]" evidence by its "prosecutorial misconduct." Wolfe II, 691 F.3d at 426 n.9. At that point, the Commonwealth was well on notice that a change in the prosecution team would be necessary to avoid any continued improprieties.

Yet, the day before a meeting with Wolfe's counsel (scheduled for Wednesday, September 12), the Original Prosecuting Team traveled to the Augusta Correctional Center and met with Barber, who was unassisted by counsel. The encounter was recorded without Barber's knowledge. The Commonwealth states that the Original Prosecuting Team visited Barber "in preparation for the retrial," and maintains, "Mr. Ebert was permitted, even required, to talk to Barber to see which of his many stories he intended to tell at the retrial." Resp't's Br. 6, 28.

Ebert received his answer within the first five minutes of the interview: "EBERT: What might be your testimony if we were to call you this time [upon retrial]? BARBER: I guess it'd have to be what was in the Federal Court." J.A. 298. Barber was referring to the testimony he gave at the district court evidentiary hearing in November 2010, where he reconfirmed that Wolfe was not "involved in the murder of Danny Petrole," did not "hire [Barber] to kill Danny Petrole" and did not "have anything . . . to do with the murder of Danny Petrole." Wolfe v. Johnson, No. 2:05-cv-432, Docket No. 186 at 117-18 (Tr. Nov. 2, 2010); see also Wolfe, 819 F. Supp. 2d at 548 & n.9. Crucially, the district court found

"Barber's demeanor and candor persuasive" at the federal evidentiary hearing. Wolfe, 819 F. Supp. 2d at 570.

Nonetheless, the questioning did not stop there. Instead, because this was not the answer the Commonwealth wanted, they proceeded to interrogate, intimidate, and threaten Barber for over an hour, but at no point did Barber relent.

I am compelled to repeat some of the tactics used by the Commonwealth and statements made to Barber at the September 11 jail visit:

- Conway paraphrased the holding in the Supreme Court case Ricketts v. Adamson, 483 U.S. 1 (1987), explaining that a government witness who breached a plea agreement by failing to testify truthfully against other parties "was convicted of first degree murder and sentenced to death." Conway asked, "Nobody, none of these people [i.e., Wolfe's attorneys] ever told you that by breaching the plea agreement you could be tried again also . . . for the murder[?] . . . I had thought it was pretty deceptive really for these people to be coming here and talking to you as if perjury was the only thing you had to worry about." J.A. 310-14.
- DETECTIVE NEWSOME: "You know, . . . sometimes you may feel like well, if I'm going down, there's no need to take [Wolfe] with me. So I'll just tell this lie to make it easier on him. And I'm saying this may

come from the heart in an effort to do good, to try and do good, and say well even though you may know he's guilty, I'm just going to say this because it will make his life easier. Why should somebody else suffer also? I will take the brunt of this. **But justice doesn't work like that. And nor does God work like that. We are held accountable for our actions. Scripture tells us to obey the laws of the land. We have an obligation to do that. And our obligation before anything else is to be righteous and truthful in our practices and in what we do. And we're told in scripture also that those with authority over us are put there by holy mandate. So we have an obligation to respect the Courts, to respect the process and to do what's right.** And we do not have the moral ability to arbitrarily protect those who are guilty, who are held accountable." Id. at 331 (emphasis supplied).

- CONWAY: "It doesn't matter what the victim's family thinks about now because we've gotten somebody off of death row so it's a victory and the Lord will forgive us for that. But let me tell you something, I don't know -- I don't know if the Lord's all that forgiving or not." Id. at 354.
- CONWAY: "I'm not trying to trick you or anything, but do you remember what you answered [when you were asked why you

killed Petrole]?" BARBER: "No. What did I say?" CONWAY: "Do you know why you don't remember? Because it wasn't the truth." Id. at 361.

- DETECTIVE NEWSOME: "You know, what Mr. Conway said about do you think if you told the truth that you could convince somebody that it's the truth. . . . But this is something that you and you alone can have an impact on and it has to come from in there. And that is a plausible and truthful explanation for those multitude of changes. A plausible and truthful explanation of why you told the truth in the initial trial, you told the truth in letters, but in these affidavits, why you changed. It has to be truthful and plausible[.]" Id. at 367-68.
- CONWAY: "You know what the truth is, Owen. It's something that we should have ingrained in you more, I guess, back then. We thought we had." Id. at 369.
- CONWAY: "So you need to really search your sole [sic] and if we're full of shit and Justin Wolfe didn't have anything to do with all this, you should tell us that right this minute and tell us to get out because you did it all on your own and he never had a thing to do with it. But if you want -- if you believe in yourself and you believe in the truth and that you believe that from now on nothing but the truth will ever

escape your lips, then I think that's different." Id. at 370-71.

- EBERT: "One more thing I want you to think about, what do you think your mother would want you to do?" Id. at 375. (Barber's mother died of cancer a year before Barber killed Petrole, and the Original Prosecuting Team knew this fact because they read aloud a previous statement of Barber's, which said, "I had just lost my mother the year before [Petrole's death] after cancer [was] slowly eating her away," id. at 302).

The very next day, on September 12, 2012, Conway and Ebert filed an ex parte motion to recuse themselves and were replaced on September 13 by a Fairfax County Commonwealth prosecutor. The timing of this action is highly suspect, as it suggests that, rather than working diligently to comply with the district court's mandate that Wolfe be released or retried within 120 days, the Original Prosecuting Team made a last-ditch effort to intimidate Barber into implicating Wolfe once and for all, and then, when their plans failed, the prosecutors immediately filed a motion to recuse themselves.[1]

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[1] The district court asked the Commonwealth, "Did the [prosecutors'] recusal on September the 12th have anything to do with the visit on September 11th of Mr. Barber?" The Commonwealth, represented by the Attorney General's Office, responded, "I can only speak to the record, your Honor. There's nothing I see in the transcript or in my listening to the recording of the visit that would have created the basis for them (Continued)

Considering this cumulative evidence of misconduct, culminating in the Commonwealth urging Barber to reiterate testimony that "contained falsities," and his resulting intention to invoke his Fifth Amendment privilege, I simply cannot join the majority's independent finding that this is not an "extremely rare" situation worthy of a bar on re-prosecution. Ante at 30. Woe is the state of justice in the Commonwealth if this behavior is not extremely rare.

3.

The majority makes the point that Barber may very well not end up invoking his Fifth Amendment privilege, and if he does testify, his testimony could benefit either side. See ante at 28. However, in my opinion, this misses the point. The September 11 jail visit, resulting in Barber's threat of silence, was not an anomaly; it "permanently crystalized" the misconduct of the Original Prosecuting Team, J.A. 533, as the district court explained,

> In the absence of the discovery violations in the state trial, the Original Prosecuting Team's actions on September 11, 2012 might appear to be benign. However, in context, they speak to a continuing pattern of violating Petitioner [sic] right to use Brady and Giglio

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to recuse themselves." J.A. 456. The Commonwealth continued, "[T]he history of the case to that point and the criticism that had been leveled at them would be a distraction in continuing the prosecution of the case, and a special prosecutor would be able to focus on the case itself," to which the court responded, "It took the Commonwealth until September the 12th to figure that out?" Id. at 457.

> evidence, which the Court attempted to remedy through its habeas decree.

Id. at 528.

As it stands, the only witness directly linking Wolfe to the death of Petrole -- Barber -- has now recanted and, as a result, has been sought out and harassed by the Commonwealth attorneys to the extent he is now chilled from testifying. In fact, in December 2012, Barber's attorney testified in district court that, upon his advice, Barber has already invoked his Fifth Amendment privilege in state court, and "based on the contents of th[e] tape [from the September 11 jail visit], my advice will not change about whether [Barber] should testify [at trial] unless there's a new development[.]" J.A. 471-72.

But even if Barber decides to forego the privilege, his testimony will be forever shadowed by the manipulative actions of the Original Prosecuting Team: the Commonwealth threatened Barber with being charged with capital murder for breaching his plea agreement and raised the specters of God and Barber's deceased mother in attempt to coerce him into testifying to "the truth," a.k.a., the Commonwealth's moniker for its version of the facts. See J.A. 310-14, 331, 369, 375. It is the Commonwealth alone that now holds the fate of the crucial Barber testimony (and thus, Wolfe's fate) in its grip. They alone can grant immunity (or not) in order to compel Barber's testimony.[2] Yet, it is clear

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[2] I am not satisfied by the suggestion that a state court grant of (Continued)

from the actions and statements of the Commonwealth prosecutors that the only testimony they are interested in compelling is that which would implicate Wolfe.

The misconduct of the Original Prosecuting Team has tainted this case to the extent that Wolfe's due process rights are all but obliterated. In this case, with its "protracted and eventful history," ante at 3, not only do we have inexcusable delay as set forth in Satterlee, Garcia, and Morales -- caused by the Commonwealth's withholding of Brady and Giglio evidence and its non-compliance with the district court's 120-day deadline -- but we also have the grievous instances of prosecutorial misconduct to boot. Wolfe has been in prison for twelve years, despite the fact that the evidence linking him to Petrole's murder is weak, and he will now likely be deprived of live testimony from the only direct witness to the crime for which he is sitting on death row -- testimony that may very well exculpate him. Thus, the district court was not arbitrary or

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immunity would result in Barber offering testimony. See Gosling v. Commonwealth, 415 S.E.2d 870, 874 (Va. Ct. App. 1992) ("When a witness 'declares his belief that the answer to the question would [in]criminate, or tend to [in]criminate him, the court cannot compel him to answer, unless it is perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer cannot possibly have such tendency.'" (quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881)); see also Byrd v. Commonwealth, No. 2550-02-1, 2003 WL 23021981 (Va. Ct. App. Dec. 30, 2003) ("Even had the trial court granted Spain use immunity, however, it could not compel him to testify if he decided to assert his Fifth Amendment privilege." (citing Gosling, 415 S.E.2d at 873; Va. Code Ann. § 19.2-270)).

irrational, did not ignore constraints on its discretion, and did not commit factual or legal error in stopping this loathsome spectacle once and for all. See United States v. Wilson, 624 F.3d 640, 649 (4th Cir. 2010).[3]

II.

In sum, the district court -- possessing jurisdiction to remedy the constitutional violations that occurred over the past twelve years and armed with the authority to "enforc[e] its conditional grant of a writ of habeas corpus," Gentry v. Deuth, 456 F.3d 687, 692 (6th Cir. 2006) -- disposed of this matter "as law and justice require[d]," 28 U.S.C. § 2243, and did not abuse its discretion in barring re-prosecution of Justin Wolfe. I would affirm the

[3] The majority maintains, "contentions relating to Barber's alleged intimidation by the prosecutors are yet to be exhausted in the state court system." Ante at 29 (citing Pitchess v. Davis, 421 U.S. 482 (1975)). However, Pitchess is inapposite. As noted in Part III.A. of the majority opinion, the Commonwealth did not comply with the conditional writ in this case. In such a situation, jurisdiction remains in the district court so that it may "enforce its conditional grant of a writ of habeas corpus." Gentry v. Deuth, 456 F.3d 687, 692 (6th Cir. 2006); see also D'Ambrosio v. Bagley, 656 F.3d 379, 385 (6th Cir. 2011) ("[T]he state never complied with the conditional writ, and the district court's jurisdiction remained intact[.]"). In Pitchess, the state complied with the district court's writ, thereby depriving the district court of jurisdiction over further proceedings and rendering exhaustion of the utmost importance. In contrast, because the September 11 jail visit occurred while the Commonwealth was under the thumb of the district court's writ, Pitchess's exhaustion requirement does not preclude the district court's consideration of the September 11 jail visit in deciding how best to fashion a remedy for failure to satisfy its own writ.

district court's remedy and thus, respectfully dissent as to Part III.B. of the majority opinion.

I repeat the words of our Supreme Court, "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935). Even Detective Newsome recognized that the Commonwealth "ha[s] an obligation to respect the Courts, to respect the process and to do what's right." J.A. 331. If only the Commonwealth had practiced what it preached.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JUSTIN MICHAEL WOLFE,

Petitioner,

v. **CIVIL ACTION NO. 2:05cv432**

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

Respondent.

Order Enforcing Judgment

Filed December 26, 2012

Before the Court is Petitioner's Motion to Enforce Judgment (ECF. No. 257) of the Court rendered in previous proceedings that directed the Commonwealth of Virginia to "within one hundred and twenty (120) days of the date of this Order, provide Petitioner with a new trial, or release him unconditionally from custody." The Petitioner argues that because the Commonwealth has failed to complete a retrial of Petitioner within the 120 days given by the Court for said purpose, he should be released unconditionally now. The Commonwealth, however, argues that based on its view of how 120 days should be calculated in this case, its time to try the Petitioner has not yet expired. Furthermore, even if the Petitioner's assertions regarding the timing in this case are correct, the Commonwealth believes that it has complied with this Court's order by initiating proceedings to retry the Petitioner. Having considered the memoranda and conducted a hearing, this matter is ripe for decision.

I. FACTUAL AND PROCEDURAL HISTORY

On January 7, 2002, a Prince William County jury convicted Petitioner, Justin Wolfe, of capital murder (murder-for-hire), use of a firearm in the commission of a felony, and conspiracy to distribute marijuana. As a result of his convictions, Wolfe was sentenced to death on the murder-for-hire charge and prison terms of thirty years and three years, respectively, on the conspiracy and firearm charges. Wolfe filed an appeal in the Supreme Court of Virginia on the capital murder conviction and filed an appeal in the Virginia Court of Appeals on the firearm and drug convictions. The non-death penalty

cases were certified to the Supreme Court of Virginia and consolidated. The Supreme Court of Virginia dismissed the petition on March 10, 2005, and the United States Supreme Court denied Wolfe's petition for writ of certiorari on July 8, 2005. On November 7, 2005, Petitioner filed his federal habeas petition under the authority of 28 U.S.C. § 2254 ("§ 2254 claim"). On August 7, 2007, the Magistrate Judge issued a Report and Recommendation declining to conduct an evidentiary hearing and recommending that his petition be dismissed. On February 11, 2008, this Court adopted the Report and Recommendation and dismissed Wolfe's petition. Wolfe then filed a motion to alter or amend the judgment, which this Court denied on May 15, 2008.

On June 18, 2008, Wolfe filed his notice of appeal. On September 12, 2008, the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") granted Wolfe a certificate of appealability on his extraneous influence, venireman, *Brady*, and *Giglio* claims. On May 11, 2009, the Fourth Circuit affirmed the district court's rulings on the extraneous influence claim and the venireman-counsel subpart, and vacated this Court's ruling on the *Brady*, *Giglio*, and venireman-court subpart claims. *Wolfe v. Johnson*, 565 F.3d 140 (4th Cir. 2009). Additionally, the Fourth Circuit remanded the case for a determination under *Schlup v. Delo*, 513 U.S. 298 (1995), and to decide whether an evidentiary hearing was appropriate. *Id.* On February 4, 2010, this Court issued a Memorandum Opinion and Order finding that Wolfe had satisfied the *Schlup v. Delo* standard to pursue his § 2254 claim. Furthermore, the Court granted Petitioner's Motion for an Evidentiary

Hearing on his *Brady* and *Giglio* claims and reserved its ruling on Petitioner's venireman-court claim. This Court conducted a four-day evidentiary hearing on Petitioner's *Brady* and *Giglio* claims beginning on November 2, 2010.

On July 12, 2011, this Court issued a Memorandum Opinion and Order granting Petitioner's habeas petition on three grounds. First, this Court found that Petitioner was deprived of his right to due process pursuant to the Fourteenth Amendment, as interpreted in *Brady v. Maryland*, to be apprised of all material, exculpatory information within the hands of the prosecution. Second, this Court found that the Commonwealth's use of witness Owen Barber's false testimony was grounds for habeas relief under both *Stockton v. Virginia* and *Giglio v. United States*. Third, this Court found that Petitioner was denied his Sixth Amendment right to an impartial jury. Accordingly, the Clerk entered judgment for Petitioner on July 12, 2011. On July 26, 2011, this Court issued an Amended Memorandum Opinion and Order, which made only technical changes to its Order of July 12, 2011 but did not alter any of the Court's rulings. On August 4, 2011, the Commonwealth filed a notice of appeal. On Petitioner's motion, this Court amended its judgment ("Amended Judgment") of July 12, 2011 on August 30, 2011 to further clarify that it granted habeas relief as to Petitioner's convictions on all charges, since the denial of Wolfe's right to due process permeated his entire state criminal trial. The Amended Judgment directed that "[t]he Commonwealth of Virginia shall, within 120 days of

the date of this Order, provide Petitioner with a new trial, or release him unconditionally from custody."

On September 2, 2011, the Commonwealth then filed a notice of appeal of this Court's Amended Judgment. The Commonwealth filed a Motion for a Temporary Stay Pending Appeal on September 13, 2011. On November 22, 2011, the Court stayed its Amended Judgment "during the pendency of the Director's appeal to the Court of Appeals for the Fourth Circuit." On August 16, 2012, the Fourth Circuit affirmed this Court's habeas decree in a written opinion. On September 7, 2012, the Fourth Circuit issued its mandate, ending the Commonwealth's appeal of the Court's habeas decree, and thus lifting the stay issued by the Court. On November 16, 2012, Petitioner filed his "Motion to Enforce Judgment" before the Court ("Motion to Enforce"). On November 30, 2012, the Commonwealth filed its opposition to the motion with the Court ("Opposition Brief"). On December 6, 2012, Petitioner filed its rebuttal ("Reply Brief"). On December 13, 2012, the Court held a hearing on the motion as well as directed the Commonwealth to show cause as to why extraordinary circumstances do not exist in this case to warrant barring current and further prosecutions of Petitioner for all charges related to both drug conspiracy and the death of Danny Petrole.

II. DISCUSSION

Petitioner's motion raise three questions. First, is whether the Commonwealth has complied with the Court's order that "[t]he Commonwealth of Virginia shall, within 120 days of the date of this Order,

provide Petitioner with a new trial, or release him unconditionally from custody." If the Commonwealth has complied with the order, no further analysis is necessary. Second, if the Commonwealth has failed to comply with the conditional writ, the Court must determine the appropriate remedy for the violation. Third, if there are extraordinary circumstances which allow for the barring of further reprosecution of the Petitioner, what should be the scope of any bar to reprosecution?

A. Whether the Commonwealth Complied with the Court's Writ

According to Petitioner, the Commonwealth has failed to provide him with a new trial within 120 days and thus should be released unconditionally. Wolfe's version of the relevant chronology is as follows:

- On August 30, 2011, the Amended Judgment is entered, starting the 120-day period to provide a trial;
- 84 days pass;
- On November 22, 2011, the Court entered a stay for the pendency of the Commonwealth's appeal to the Fourth Circuit;
- On August 16, 2012, the Fourth Circuit issued its opinion affirming the Court's habeas decree;
- On September 7, 2012, the Fourth Circuit issued its mandate, formally ending the Commonwealth's appeals and lifting the

stay issued by the Court, thus restarting the 120-day period;

- 36 days pass;
- On Saturday, October 13, 2012, the 120-day period to provide Wolfe a new trial expired. Because the deadline fell on a weekend, it moved to the next business day, Monday, October 15, 2012.

Under the Petitioner's timeline of events and view of the Court's order, his trial should have been completed by Monday, October 15, 2012 or the Commonwealth should have sought additional time from the Court to complete the trial, which is currently scheduled for January 2013.

The Commonwealth rejects all of Petitioner's arguments on the question of timing. The Commonwealth argues that the lifting of the Court's stay pending the Commonwealth's appeal to the Fourth Circuit had the effect of *resetting*, rather than *restarting* the 120 days the Court gave the Commonwealth to provide Petitioner with a new trial. Under this view, the Commonwealth believes it had 120 days from the issuance of the mandate to try Wolfe and thus its time has not yet expired. Citing the Court's order concerning the Commonwealth's request for a stay pending its appeal to the Fourth Circuit, the Commonwealth argues that:

> This Court thereby made clear what it intended: the stay did not merely suspended the time period allowed for retrial or *toll* the running of its order; rather, it wholly set aside the judgment granting relief. This Court expressly ordered

> that Wolfe's convictions and sentences would remain in full force and effect upon the entry of the stay.

Resp't's Br Opp. 2-3, Nov. 30, 2012, ECF. No. 258 (emphasis in the original). The Commonwealth goes on to assert that:

> During the pendency of the appeal, therefore, the final judgments in Wolfe's criminal trials were undisturbed. Had this Court merely toiled, or extended, the 120-day period within which to retry Wolfe, the convictions and sentences would have remained vacated during the period of tolling. But the Court expressly removed its judgment altogether during the appeal, and expressly reconstituted the validity of the criminal judgments of convictions and sentences, as if no judgment of vacation had occurred.

Id.

In the alternative, the Commonwealth argues that even if the 120-day period has expired, it has complied with the Court's order because it re-indicted Petitioner for the original charges and also for new charges in the Circuit Court for Prince William County and is now currently moving through pre-trial proceedings:

> On the very day the mandate issued, the Director released Wolfe from his custody, and surrendered him to the custody of the Prince William County authorities, in whose custody he remains. Wolfe is in custody, not on the vacated convictions and sentences, but rather as a

> pretrial, untried defendant whose bail has been denied.

Resp't's Br Opp. 4. As a corollary of this argument, the Commonwealth contends that the Court no longer has jurisdiction in this case as the Petitioner is not being held as a result of his unconstitutional conviction, but rather for the reinstituted and newly charged crimes, for which he was denied pre-trial release:

> Wolfe fails to acknowledge that the Commonwealth reinstituted retrial proceedings at the bond hearing held only one week after the Fourth Circuit issued its mandate, thereby fulfilling this Court's judgment that the Commonwealth provide him with a new trial within 120 days of its judgment. The state trial court certainly must be able to manage the retrial, including continuances as it deems necessary. This Court has no continuing or supervisor role over the state court. Cf *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.").

Resp't's Br Opp. 8.

Understanding the arguments of both parties and the lack of clear, controlling case law on a number of issues, the Court turns to its findings and conclusions regarding whether a violation of the Court's order occurred in this case. The Court notes

that both parties, but particularly the Commonwealth given its responsibilities under the Court's Amended Judgment, should have sought clarification if there was any ambiguity in the Court's Amended Judgment. Instead, it appears the Commonwealth sought clarification of the Court's Amended Judgment from the Prince William County Circuit Court Judge assigned to this case. The law, however, dictates that "district courts are in the best position to interpret their own orders." *JTH Tax, Inc. v. H&R Block E. Tax Servs.*, 359 F.3d 699, 705 (4th Cir. 2004) ("When a district court's decision is based on an interpretation of its own order, our review is even more deferential because district courts are in the best position to interpret their own orders.") (citations omitted).

Furthermore, the Fourth Circuit has clearly held that "to sustain appellate review, district courts need only adopt a reasonable construction of the terms contained in their orders." (citations omitted). In construing terms contained in an order, the Fourth Circuit recognizes that "[w]hile dictionaries are undoubtedly useful tools of construction, there is no requirement that district courts adopt the definitions contained therein when construing the terms of their own orders." *Id.* at 706. The Court does recognize, however, that "[i]nsofar as the district court's determination was based upon interpretations of law, however, we review those conclusions de novo." *United States v. Under Seal (In re Grand Jury Subpoena)*, 597 F.3d 189, 195 (4th Cir. 2010).

In the instant case, the Court's Amended Judgment was unambiguous. The Commonwealth

had two clear choices, to either: (1) provide Petitioner with a new trial within 120 days; or (2) release him unconditionally from custody, putting an end to this whole bungled prosecution. The Commonwealth has maintained, both on paper and at the December 13, 2012 hearing, that it complied with the Court's Amended Judgment by releasing the Petitioner from the bonds of his unconstitutional state convictions and that he is now being held on pre-trial detention for the reasserted and new charges.

The Commonwealth's contentions are wrong as they conflated the options presented to it in the Court's Amended Judgment. In presenting the option of releasing the Petitioner "unconditionally" from custody, the Court used the word "unconditionally" in its traditional and widely understand context: "Not limited by a condition; not depending on an uncertain even tor contingency; absolute." *Black's Law Dictionary* (9th ed. 2009). Under this meaning of the word "unconditional," it is self-evident that releasing Petitioner from the custody of the Virginia Department of Corrections to Prince William County for the purposes of retrial did not constitute releasing Petitioner" unconditionally from custody."

Instead, the Commonwealth availed itself of the option to provide the Petitioner with a new trial. In doing so, the Commonwealth subjected itself to the continued jurisdiction by the Court to ensure that it complied with the conditions of retrial, i.e. that a new trial be provided within 120 days. The continued jurisdiction of this Court to ensure its writ is complied with is well recognized, as the Sixth Circuit

noted in *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006):

> [District courts retain jurisdiction to execute a lawful judgment when it becomes necessary. If the state complies with its order, the petitioner will not be released; if the state fails to comply with its order, release will occur. Ordinarily, the only task that remains for the district court is the execution of judgment. A federal district court retains jurisdiction to determine whether a party has complied with the terms of a conditional order in a habeas case. A state's failure to timely cure the error identified by a federal district court in its conditional habeas order justifies the release of the petitioner. On the other hand, when a state meets the terms of the habeas court's condition, thereby avoiding the writ's actual issuance, the habeas court does not retain any further jurisdiction over the matter.

Id. (internal quotations and citations omitted). Taken together, the Commonwealth did not release Wolfe unconditionally within the meaning of the Court's Amended Judgment and instead took the option of providing him with a new trial.[1]

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[1] In *D'Ambrosio v. Bagley*, 656 F.3d 379, 381 n.1 (6th Cir. 2011), a habeas case similar to the instant case supports the Court's conclusion. In *D'Ambrosio*, the district court directed the state to "(1) set aside [Petitioner's] convictions and sentences as to all counts of the indictment, including the sentence of death; or (2) conduct another trial... within 180 days from the effective date

(Continued)

Given that the Commonwealth did not comply with the Court's order to release Petitioner unconditionally, the next question is whether the Commonwealth violated the Court's 120 day deadline for retrial. As outlined above, the Commonwealth argues that it did not violate the deadline for two reasons. First, it argues that the lifting of the stay entered during the pendency of the Commonwealth's appeal to the Fourth Circuit operated to reset, rather than restart the 120 clock. The Commonwealth cites two cases in support of its position, *Michael Williams v. Netherland*, No. 3:96-cv-529 (E.D. Va.) and *Fisher v. Rose*, 757 F.2d 789 (6th Cir. 1985). The reliance on both of these cases is wholly misplaced. Reading the Commonwealth's view of *Williams*, it is not clear how

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of this Order." As the Commonwealth does in this case, the State of Ohio argued that it complied with the order by vacating the conviction and sentences of Petitioner, which Ohio believed deprived the district court of jurisdiction. The Sixth Circuit rejected this argument, finding that:

> The state also failed to satisfy the other alternative for compliance with the conditional writ as it did not set aside D'Ambrosio's conviction and sentences. Indeed, the warden did not even contend, until oral argument at least, that the state had complied with that alternative. Here, the state clearly chose to conduct a new trial, even though it failed to do so, and there is no indication that the state at any point in time decided instead to exercise the setting-aside alternative. Therefore, the state never complied with the conditional writ in D'Ambrosio's case, and the district court retained jurisdiction over it. See Gentry, 456 F.3d at 692. The warden even conceded as much when seeking from the district court an enlargement of time to retry D'Ambrosio.

D'Ambrosio, 656 F.3d at 386.

it supports its argument. Not only does the court in that case not make any pronouncement or rule regarding the operation of a stay or the lifting of one but indeed the state in that case sought an extension of the time given by the court to conduct a retrial because circumstances in the case prevented the set deadline from being met. *Michael Williams v. Netherland*, No. 3:96-cv-529, ECF No. 223 (E.D. Va., Nov. 14, 2002). As the Court will expound upon below, this is precisely what the Commonwealth should have done in this case.

The second case the Commonwealth cites is *Fisher v. Rose*, 757 F.2d 789 (6th Cir. 1985). In that case, the habeas petitioner sought release after arguing the state prosecutor in that case failed to retry him within the prescribed set by the district court. *Fisher*, 757 F.2d at 791. The Sixth Circuit rejected this argument, stating that "[l]ess than sixty days after this court issued the mandate affirming the district court's granting of the writ..." proceedings were on-going to retry the defendant. *Id.* The Commonwealth argues that this statement indicates that the Court of Appeals reset, rather, than simply restarted the clock toward reprosecution or release. Again, it is not clear how the *Fisher* case is applicable. The Sixth Circuit did not make any pronouncement or rule regarding the operation of a stay or the lifting of one. While the Court did refer to using the mandate as a starting point for its calculation of whether the District Court's writ was violated, the Commonwealth fails to note that the district court originally gave a 90 day stay to give the state time to comply with its writ but the Sixth Circuit's calculation is based on whether the state

acted with 60 days of the mandate being issued. This acknowledges the fact that some time already ticked off the 90 day clock and that the Sixth Circuit's mandate did not reset the clock. Thus, the Sixth Circuit did not actually reset the clock, but restarted it where it stopped when the action was stayed. This is precisely how a stay operates.

The Court rejects the Commonwealth's unusual view of what a stay does. It will adopt the conventional understanding of the effect of a stay and the lifting of one. Black's Law Dictionary defines a "stay" as "1. The postponement or halting of a proceeding, judgment, or the like. 2. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding. — Also termed stay of execution; suspension of judgment." *Black's Law Dictionary* (9th ed. 2009). *See also United States v. Martin*, 378 F.3d 353, 358-359 (4th Cir. 2004) (""To 'stay' an order or decree means to hold it in abeyance, or refrain from enforcing it." *Black's Law Dictionary* 1413 (6th ed. 1990). Once a defendant requests a trial de novo in North Carolina superior court, the state district court judgment is held in abeyance - it is not executed, nor is it technically vacated.").

The Petitioner also provides a number of immigration cases to support the conventional view of a stay. See *Garcia v. Ashcroft*, 368 F.3d 1157, 1159 (9th Cir. 2004) ("A stay simply stops the clock, rather than adding time to that clock."). The Commonwealth, however, believes they are inapplicable due to their specific context. Even without these cases, however, it is clear that the stay

pending the Commonwealth's appeal of the Court's Amended Judgment paused or halted the 120-day deadline imposed by the Court to provide Wolfe a new trial. When that stay was lifted, the deadline clock resumed where it left off when the stay was granted and there were 36 days remaining. On Saturday, October 13, 2012, the 120 days given to the Commonwealth to provide Wolfe with a new trial expired. Because the deadline fell on a weekend, the deadline for retrial moved to Monday, October 15, 2012. The Commonwealth had more than adequate time to seek clarification from this Court on its order or, as what happened in the *Williams* case, to seek more time to reprosecute the Petitioner. It chose not to exercise either option.

Having rejected the Commonwealth argument regarding the effect of the stay, the Court turns to its argument that it has not violated the Court's order. The Commonwealth claims that by instituting pre-trial procedures, it has complied with the Court's option to "within one hundred and twenty (120) days of the date of this Order, provide Petitioner with a new trial." The Commonwealth relies on *Fisher v. Rose* to defend its position and the Court finds its argument unavailing. In *Fisher*, the district court issued a writ and directed that "issuance of the writ will be stayed for ninety(90) days pending appeal by respondent or, within which time, the State may on its own motion vacate petitioner's conviction and grant him a new trial." *Fisher*, 757 F.2d at 790. Based on the language of the district court's order in *Fisher*, the Sixth Circuit on review found that:

> Less than sixty days after this court issued the mandate affirming the district court's granting of the writ, the state had appointed counsel for Fisher, set bond, and set a trial date. If Fisher had been able to meet the requirements of his bond, he would have been released from detention. These facts indicate that at the time of the July 7, 1984 hearing, Fisher was no longer in custody pursuant to the constitutionally defective judgment of conviction, but was being held pursuant to the indictment.

757 F.2d at 791. The Commonwealth believes this supports their contention that pre-trial proceedings are adequate to meeting the requirements of a conditional writ in a habeas case. It does not. The district court's order in *Fisher* and the Court's order in this case are wholly different. In *Fisher*, the district court did not direct the state to retry the petitioner within a certain period of time. In the instant case, the Court did direct the Commonwealth to provide Petitioner with a trial within a specific amount of time, 120 days. Instead, the Court finds a more recent case from the Sixth Circuit and a case from the United States District Court for the Eastern District of New York to be more convincing. In *D'Ambrosio v. Bagley*, 656 F.3d 379, 385-386 (6th Cir. 2011), the state argued, as the Commonwealth does here, that by instituting pre-trial proceedings, it complied with the district court's writ. However, the Sixth Circuit rejected this argument:

> Initially, the warden claimed that the state complied with the conditional writ when it commenced proceedings against D'Ambrosio,

> such that the district court's jurisdiction had expired. However, the warden appears to have abandoned this argument in her reply brief. Moreover, this argument lacks merit because the district court's mandate required that D'Ambrosio's retrial be conducted[2] (i.e., completed) within 180 days, not merely that he be granted a new trial within that time period. The warden cites Davis to support her argument for the state's compliance, but that case involved a conditional writ that hinged on granting a new trial, not conducting a new trial like the conditional writ in D'Ambrosio's case. It is clear that the state never conducted a new trial for D'Ambrosio, thus failing to comply with this portion of the writ.

The Sixth Circuit further expounded on its view in a footnote:

> Many of the cases that hinge on the granting of a new trial also involve periods of ninety days or less in which to comply, which is obviously less than the 180-day period in this case. This makes sense considering that the district court wanted the state to conduct a new trial against D'Ambrosio within this time and not merely grant him one. In *Patterson v. Haskins*, 316 F.3d 596, 611 (6th Cir. 2003), this court granted the defendant "a conditional writ of habeas corpus

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[2] The district court in *D'Ambrosio* ordered that either the state ""(1) set aside D'Ambrosio's convictions and sentences as to all counts of the indictment, including the sentence of death; or (2) conduct another trial... within 180 days from the effective date of this Order."" *D'Ambrosio*, 656 F.3d at 381 n.l.

> that [would] result in his release from prison unless the state of Ohio commence[d] a new trial against him within 180 days from the date of [that] opinion." The state began proceedings against the defendant, but they ended in a mistrial, prompting the state to commence a third trial against him. *Patterson v. Haskins*, 470 F.3d 645, 650 (6th Cir. 2006). The defendant moved the district court for an unconditional writ, arguing that the state had failed to comply with the conditional writ by not completing a new trial against him within 180 days. *Id.* However, this court held that the state had complied with a "fair reading" of its initial opinion, which required only commencement and not completion of proceedings. *Id.* at 668-69. A fair reading of the writ at issue in D'Ambrosio's case requires more than the mere grant of a new trial for compliance.

D'Ambrosio, 656 F.3d at 386 n.5 (alterations in the original).

In *Latzer v. Abrams*, 615 F. Supp. 1226, 1227 (E.D.N.Y. 1985), faced with the same question of whether pre-trial proceedings constituted compliance with the district court's directive that the habeas petitioner in the case be "afford[ed]" a new trial, the court found that it had not:

> With these considerations in mind, I conditioned the issuance of the writ in the present case on the event that petitioner was not "afforded" a new trial within sixty days. Respondent now argues that the arraignment of petitioner on the sixtieth day was sufficient to "afford" petitioner a

> new trial within the prescribed period. While the order may not have been the epitome of clarity, respondent's interpretation flies in the face of the order's intent to insure that petitioner was either promptly retried or relieved of the strictures imposed by his constitutionally flawed conviction. The order was intended to mean that petitioner should be brought to trial within sixty days, and will be so applied by the Court.

The *Latzer* Court further notes, as this Court has in this Order, that:

> If respondent had any doubts as to the meaning of the order, he could have sought clarification from the Court, or avoided any potential problems by bringing petitioner to trial before the expiration of the sixty day period. Alternatively, respondent could have applied for an extension of the time for re-trial. Instead, respondent chose to file a notice of appeal, withdraw the appeal, and then seek the indictment of petitioner on five new counts, as well as re-indictment on the count in question. In light of the failure to bring petitioner to trial within the prescribed period and respondent's election not to pursue the options discussed above, I am constrained to conclude that the final writ of habeas corpus must be granted.

Latzer, 615 F. Supp. at 1227-1228. The Court finds the reasoning in both the *Latzer* and *D'Ambrosio* cases highly persuasive in resolving the question of whether pre-trial proceedings in this case constitute providing Petitioner with a new trial. Just as it was the case in *Latzer*, it was certainly the objective of

the Court in issuing its Amended Judgment that the "petitioner [would be] either promptly retried or relieved of the strictures imposed by his constitutionally flawed conviction" and it was certainly the intention of the Court that in "providing]" Petitioner a new trial within 120 days, said trial actually occur within that period of time. Furthermore, just as *D'Ambrosio* notes, the Court gave more than the ordinarily prescribed 90 days or less to provide such a trial, further indicating that the Court intended and expected that the actual re-trial of Petitioner take place within 120 days of the issuance of the Amended Judgment. Finally, as in both cases cited here, if there was any doubt as to the meaning of the Court's order, the Commonwealth could have, and should have sought clarification, which it did not. Taken together, the Court finds that the Commonwealth failed to comply with its Amended Judgment because it failed to "within one-hundred and twenty (120) days of the date of this Order, provide Petitioner with a new trial, or release him unconditionally from custody."

B. The Appropriate Remedy for the Commonwealth's Violation

Given the Commonwealth's violation, the Court must determine the proper remedy for this violation. It is generally recognized that a violation of a court's directive to retry a habeas petitioner within a certain amount of time would permit the court to order the prisoner's release, however, "the granting of an unconditional writ in this circumstance will not, itself, generally preclude the government from rearresting and retrying the prisoner." Fed. Habeas

Manual, § 13:10 (May 2010). However, the case law also reflects that in extraordinary circumstances, a federal district court is permitted to bar reprosecution. *See Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 (6th Cir. 2006) ("[H]owever, in 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.") (internal quotations and citations omitted). Furthermore, additional federal courts of appeals have recognized further grounds for baring reprosecution. The most relevant ground to bar reprosecution in this case is best articulated by the U.S. Courts of Appeals for the Eighth and Tenth Circuits. The Tenth Circuit has found that:

> For a federal court to exercise its habeas corpus power to stop a state criminal proceeding "special circumstances" must exist. In general, the constitutional violation must be such that it cannot be remedied by another trial, or other exceptional circumstances exist such that the holding of a new trial would be unjust.

Capps v. Sullivan, 13 F.3d 350, 352-353 (10th Cir. 1993) (citations omitted). The Eighth Circuit has held the same:

> A district court has authority to preclude a state from retrying a successful habeas petitioner when the court deems that remedy appropriate. *Burton v. Johnson*, 975 F.2d 690, 693 (10th Cir. 1992), cert, denied, 123 L. Ed. 2d 497, 113 S. Ct. 1879 (1993). Nevertheless, this is an

> extraordinary remedy that is suitable only in certain situations, such as when a retrial itself would violate the petitioner's constitutional rights.

Foster v. Lockhart, 9 F.3d 722, 727 (8th Cir. 1993) (citation omitted). Courts have recognized a variety of constitutional violations justifying barring of reprosecution. *See Solem v. Bartlett*, 465 U.S. 463, 466(1984) (barring reprosecution because state court lacked jurisdiction); *Smith v. Goguen*, 415 U.S. 566 (1974) (barring reprosecution because petitioner convicted under unconstitutional statute); *Vogel v. Com. of Pa.*, 790 F.2d 368, 380 (3d Cir. 1986) (barring reprosecution due to the Double Jeopardy Clause); *Wiggins v. Estelle*, 681 F.2d 266, 268 n.l (5th Cir. 1982) (barring reprosecution when pre-indictment delay denies petitioner due process); *Strunk v. U.S.*, 412 U.S. 434 (1973) (barring reprosecution due to violation of Speedy Trial rights).

As a starting point, the Court fully concedes that had the content of the Petitioner's Motion to Enforce Judgment been strictly limited to the Commonwealth's violation of the deadline set in this case, the question of the appropriate remedy would be an easy one. The Court would order Wolfe's release, but he would be subject to rearrest and reprosecution by the Commonwealth. However, the reality of this case is very different than that of the ordinary case which constrains the Court to extraordinary remedies.

Specifically, the record reflects that on September 11, 2012, the Original Prosecuting Team, Prince William County Commonwealth's Attorney

Paul Ebert, Assistant Commonwealth's Attorney Richard Conway, and Detective Sam Newsom, again effectively deprived Petitioner of the opportunity to use *Brady* and *Giglio* evidence, just as they did in the original state proceedings. On September 13, 2012, Ebert and Conway recused themselves from the case as prosecutors. Petitioner states that on September 11, 2012 at Augusta Correctional Center, a meeting occurred in which the Original Prosecuting Team intimidated Owen Barber.[3] At trial, the Commonwealth had offered Barber as the key witness in support of the murder for hire charge against Petitioner. Barber subsequently recanted his original testimony before this Court in habeas proceedings and testified that he was told to falsely testify by the Original Prosecuting Team, and stated that Petitioner was not involved in the murder of Danny Petrole.

The transcript reflects the Original Prosecuting Team's efforts to get Barber to re-implicate Petitioner in the murder of Danny Petrole, despite Barber's testimony before this Court in habeas proceedings. Detective Newsome urges Barber to come up with a "plausible and truthful explanation" that reconciles the two different versions of the testimony given by Barber in state court and before this Court, and why his state court testimony was the truth. *See* Sept. 11 Mgt. Tr., 73:6-21. The Original Prosecuting Team

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[3] On December 10, the Court received a copy of the transcript, as well as a recording, of the September 11, 2012 meeting, and other materials. The Court notes that the Commonwealth conceded that the September 11, 2012 meeting was recorded without Mr. Barber's knowledge. This calls into question the conduct of the Commonwealth.

also advised Barber that he would now be subject to the invalidation of his plea agreement with the Commonwealth of Virginia and could be charged with capital murder since he admittedly lied during the original Wolfe trial in state court.[4] *Id.* at 16-23. The Original Prosecuting Team implied to Barber that counsel for Wolfe acted improper and asked whether they made offers of incentives to Barber to get him to change his testimony. *Id.* at 27-33 (Conway: "Someone must have gotten to you." Barber: "Maybe. I have No Idea").[5] The Original Prosecuting Team appealed to Barber's family, his religion, thoughts of Petrole, and a variety of other topics in service of getting Barber to recommit to his original testimony that Wolfe hired him to kill Petrole. The Original Prosecuting Team made repeated references to Barber having to make "important decisions pretty soon" and argued that unless Barber reevaluated his testimony, Wolfe would be allowed to "skip" responsibility for Petrole's

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[4] The Original Prosecuting Team provided a number of Supreme Court opinions to Barber during the meeting and offered him legal advice. It goes without saying that the line between "friendly" legal advice and witness intimidation is laser thin.

[5] Although initially Barber answers that Wolfe's counsel made no offer of incentives, Detective Newsome made a follow up question that was unintelligible, which resulted in a response from Barber regarding his father and leukemia. The Court is unable to determine the full extent of the context of this portion of the conversations between the Original Prosecuting Team and Barber but finds it unsettling. The Court also notes that at numerous other times, responses to particular questions by Barber, or the question themselves, were unintelligible by audio interference.

death while Barber sat in prison. *Id.* at 46-48. As noted during the December 13, 2012 hearing, the Original Prosecuting Team made a number of references to Barber's prison privileges and responsibilities in a manner that creates the impression that they were either under threat or could be subject to enhancement if Barber testified in a manner favorable to the Commonwealth. *Id.* at 50-53.

Perhaps tellingly, when presented with all of these arguments, Barber did not substantially vacillate from his testimony and on a number of occasions suggested that any reprosecution of Wolfe simply focus on drug changes, rather than Petrole's murder:

> MR. CONWAY: Well, no, I'm not saying that. We can make it happen. What I'm telling you is, you know if you find that - - I'd like for you to be informed before (unintelligible) start shaking down. And we really need to know where we all are at.
>
> MR. BARBER: I would say forget the murder and go for the drugs.
>
> MR. CONWAY: Well I told you we can't do that. We can't do that. Right now you're- from where we sit and look at the facts, Owen, we got two people who took part, both people took part in the taking of another human life. And we've got one who's convictions, because of what you've done, (unintelligible) and we've got to start all over again. And we've got you who breached a

> plea agreement and that's back to square one too.

Id. at 76. As Mr. Barber's counsel's testimony indicated during this Court's December 13, 2012 hearing, Mr. Barber, under advice of counsel and in consideration of the Original Prosecuting Team's conversation, has now invoked his Fifth Amendment privilege, which the Prince William County Circuit Judge authorized. Hr'g Tr. 39-42, Dec. 13, 2012. As indicated by Barber's counsel, Barber intends to continue to invoke his Fifth Amendment privilege at Wolfe's retrial, absent the granting of immunity. Hr'g Tr. 42-43

In the absence of the discovery violations in the state trial, the Original Prosecuting Team's actions on September 11, 2012 might appear to be benign. However, in context, they speak to a continuing pattern of violating Petitioner right to use *Brady* and *Giglio* evidence, which the Court attempted to remedy through its habeas decree. To provide context, it is important to note how members of the Original Prosecuting Team originally violated Wolfe's constitutional rights in the first place. As the Fourth Circuit notes in its decision affirming the Court's habeas decree:

> The single, plainly momentous item of suppressed Barber impeachment evidence on which we rest today's decision is a written police report reflecting that — before Barber ever asserted that Wolfe hired him to murder Petrole — Prince William County Detective Newsome advised Barber that he could avoid the death penalty by implicating Wolfe. *See* J.A. 4825-27

> (the "Newsome report"). The Newsome report documents Newsome's and fellow Detective Walburn's conversations with Barber during an April 14, 2001 cross-country flight, returning Barber to Virginia upon his arrest in California three weeks after the Petrole murder.

Wolfe v. Clarke, 691 F.3d 410, 417 (4th Cir. 2012). The Fourth Circuit further expanded on its view by citing the relevant portions of the Newsome report:

> I told Barber that we knew he had killed Petrole and had a very strong case against him. But that as far as we knew he had no personal problem with Daniel Petrole but that he had killed him for someone else and we believed that person was Justin Wolfe. I explained to him that we needed the information that he had in order to arrest Wolfe. I explained again that we had a very strong case against him (Barber) and that we could stop there but that would not be right since we knew it was someone else [sic] idea. I told him that he was potentially facing a capitol [sic] murder charge in this case and that he needed to help himself. He asked me, "What do I get out of it if I tell you who the other person, the higher up, is". I told him I could not make any promises to him, but that the Commonwealth might entertain the idea of not charging him with Capitol [sic] Murder, or that they may be willing to make a recommendation as to his sentence.
>
> Again Barber asked about discovery and I again explained it to him. He then said, What do I get out it [sic] if I name the "higher up". I told him

> that was one of his problems; that his case was so tight he really had very little to offer us. I told him it could simply be the difference between Capitol [sic] murder or First Degree, execution or life in prison, or that the Commonwealth may be willing to make a recommendation in sentencing after speaking to his attorney. I told him again that the Commonwealth's Attorney would make these decisions and that I could not promise him anything. I pointed out that at this point he would do more good than harm for himself by cooperating with us.

Id. (citations omitted) (alterations in the original). The Fourth Circuit also explains in its opinion that:

> Barber also engaged in the following exchange with the Commonwealth's lawyer during cross-examination:
>
> > Q. You related that several times they had said if you don't tell us what we want, you will get capital murder?
> >
> > A. Yeah.
> >
> > Q. Who is they?
> >
> > A. [Commonwealth's Attorney] Ebert, [Assistant Commonwealth's Attorney] Conway, [Barber's attorney] Pickett, [Detective] Newsome, [and Detective] Walburn.
> >
> > Q. But if my notes are correct, they never told you exactly what to say. They didn't give you a script for the events of that night, did they?
> >
> > A. A specific script for the events, no.

> Q. They in fact told you what they wanted was the truth, didn't they?
>
> A. They said that they know Justin [Wolfe] is involved and that we know that he hired you to kill Danny [Petrole].
>
> Q. Well, what they told you they wanted you to tell them was the truth. Wasn't that their statement?
>
> * * *
>
> Wasn't that their statement to you, that they wanted the truth?
>
> A. Yeah. I mean, 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.

Id. at 417-18 (citations omitted) (alteration in original).

The Fourth Circuit also noted in its opinion a significant body of additional constitutional violations discovered by this Court that did not serve as the basis of the court's opinion but which it did not condone or overrule:

> In its Brady Order, the district court also assessed the cumulative materiality of the Newsome report and the seven other items or groups of suppressed evidence that it found favorable to Wolfe. The first category of that evidence — evidence tending to impeach Barber —encompasses the Newsome report, plus evidence that Barber possessed other motives to murder Petrole (the "Barber-Petrole relationship

evidence") and that Barber's roommate, Jason Coleman, informed the prosecution that Barber had confessed to acting alone (the "Coleman evidence"). The Barber-Petrole relationship evidence includes statements made by confidential informants and Barber's fellow inmates indicating that Barber knew Petrole before the murder, that Barber owed Petrole money, that Petrole "had a hit out" on Barber, and that Barber had a close relationship with Petrole's roommate. The Coleman evidence revealed that Coleman "had a conversation with Barber after the murder where Barber admitted to [Coleman] that he murdered Petrole and acted alone," and that Coleman reported that conversation to the prosecution, including the Commonwealth's Attorney.

The second category of suppressed evidence — evidence tending to impeach other prosecution witnesses who corroborated Barber's testimony — includes information relating to a deal the Commonwealth made with its witness J.R. Martin in exchange for his cooperation (the "Martin evidence"), as well as a recorded statement made by the Commonwealth's witness Jason Hough in conflict with his subsequent trial testimony regarding his pre-Petrole-murder conversation with Wolfe and Coleman about robbing drug dealers (the "Hough evidence"). Finally, the third category of withheld evidence — evidence suggesting an alternate theory of the Petrole murder—consists of the following: various reports and witness statements relating to a parallel drug investigation that indicated

> conflict in Petrole's drug business unrelated to Wolfe's purported motive for having Petrole murdered (the "drug investigation evidence"); evidence that Petrole was rumored to be a government informant, constituting yet another possible motive for his murder (the "informant evidence"); and the statements of three witnesses that they saw a second car at the crime scene shortly after the Petrole murder (the "second car evidence").
>
> Having assessed the materiality of the foregoing — the Newsome report, the Barber-Petrole relationship evidence, the Coleman evidence, the Martin evidence, the Hough evidence, the drug investigation evidence, the informant evidence, and the second car evidence — the district court concluded that the evidence's suppression by the prosecution was, by category and cumulatively, patently prejudicial. While we look no further than the Newsome report today, we do not condone the prosecution's apparent suppression of other Brady material and the pattern of conduct that it reveals.

Wolfe, 691 F.3d at 418 n.7 (citations omitted) (alteration in the original). As this Court noted in its *Brady* Order,

> In effect, Ebert admits here that his contempt of defendants who "fabricate a defense" guides his perspective on disclosing information. This is particularly troubling in the case at bar where the record is replete with statements from Ebert and Conway regarding the scrutiny and credibility determinations that they made (as

> opposed to the jury) regarding the relevance of any potential exculpatory evidence. Essentially, in an effort to ensure that no defense would be "fabricated," Ebert and Conway's actions served to deprive Wolfe of any substantive defense in a case where his life would rest on the jury's verdict. The Court finds these actions not only unconstitutional in regards to due process, but abhorrent to the judicial process.

Wolfe, 691 F.3d at 423-424 (quoting *Wolfe v. Clarke*, 819 F. Supp. 2d 538, 567 n.24 (E.D. Va. 2011)). The centrality of Barber testimony to Petitioner's case has also been expounded upon by the Fourth Circuit. It commented that:

> The Commonwealth's argument is belied by the Brady Order, which carefully outlined the trial evidence and came to the inevitable conclusion that "Owen Barber's testimony was the only evidence that the Prosecution presented to prove that [Wolfe] hired Barber to kill Petrole." Upon our own review of the trial record in the Wolfe I appeal, we also grasped that "Barber was the prosecution's key witness in Wolfe's capital trial and the only witness to provide any direct evidence regarding the 'for hire' element of the murder offense and the involvement of Wolfe therein." And, the Commonwealth itself conceded at Barber's sentencing hearing on his non-capital murder conviction — where he received a sentence of just sixty years in prison, with twenty-two years suspended — that "but for [Barber's] testimony Mr. Wolf[e] probably would not have been prosecuted." In these

> circumstances, where "the jury had to believe that Barber was credible and that his version of events was in fact truthful and accurate in order to support [Wolfe's] conviction," the materiality of the Newsome report is manifest.

Id. at 424 (citations omitted).

Finally, the Fourth Circuit indicated that it felt "compelled to acknowledge that the Commonwealth's suppression of the Newsome report, as well as other apparent Brady materials, was entirely intentional." *Id.* at 423. As the Fourth Circuit explains:

> During Wolfe's evidentiary hearing in the district court, the Commonwealth's Attorney explained that his office does not have an "open-file policy," providing criminal defense counsel access to entire case files. Asked to elaborate, he offered the flabbergasting explanation that he has "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." Additionally, the Assistant Commonwealth's Attorney admitted that he does not produce evidence to a criminal defendant unless he first deems it to be "material[]" and "credib[le]."

Id. (citations omitted) (alterations in the original). The Fourth Circuit reminded the Prince William County prosecutors of their previous *Brady* violations in another recent case and hoped that "the Commonwealth's Attorney and his assistants have finally taken heed of those rebukes." *Id.* at 424. As the Court will outline below, it is quite clear that the

Original Prosecuting Team did not heed the Fourth Circuit's warning.

At the heart of this Court's habeas relief was a desire to correct the pervasive *Brady* and *Giglio* violations this Court identified, which were affirmed on appeal. As the Court previously recognized:

> The Supreme Court has held that both the withholding of exculpatory evidence from a criminal defendant by a prosecutor and the knowing use of false testimony violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *Brady v. Maryland*, 373 U.S. 83, 86, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 153-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. "Evidence is 'exculpatory' and 'favorable' if it 'may make the difference between conviction and acquittal' had it been 'disclosed and used effectively.'" *United States v. Wilson*, 624 F.3d 640, 661 (4th Cir. 2010) (citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). For a court to find a Brady violation, it must determine that the evidence was 1) favorable to the accused, 2) suppressed by the prosecution (either willfully or inadvertently), and 3) material. *Banks v. Dretke*, 540 U.S. 668, 691, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004).

> Evidence that is favorable to the accused includes both exculpatory (whether requested by defendant or not) and impeachment evidence. Id.; see United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (holding that the Brady rule includes impeachment evidence).

Wolfe v. Clarke, 819 F. Supp. 2d 538, 545 (E.D. Va. 2011).

It was the Court's objective through its habeas decree to remedy any constitutional violations by giving the Commonwealth the option of providing a new trial to the Petitioner. However, the Commonwealth has done the exact opposite and as a result, has incurably frustrated the entire purpose of the Court's writ. Instead of curing the constitutional defects in Petitioner's original convictions, the Original Prosecuting Team permanently crystalized them. Though Petitioner is now aware of the *Brady* and *Giglio* evidence helpful to exonerate him, he cannot use it because the Original Prosecuting Team has scared Barber into invoking his Fifth Amendment right to avoid self-incrimination.

On September 11, 2012, the same Original Prosecuting Team returned to Barber. Using the same subtle but unmistakable coercion, the Original Prosecuting Team attempted to get Barber to recant the testimony he gave before this Court and develop a "plausible and truthful explanation" for doing so. And as before, the weapon the Original Prosecuting Team used to persuade Barber was the death penalty. Because of the Original Prosecuting Team's conduct, Barber has invoked his Fifth Amendment

privilege against self-incrimination, and in doing so, has denied Petitioner a credible direct and rebuttal witness to defend himself from the charges he faces. The Original Prosecuting Team's intimidation on September 11, 2012 appears to be consistent with a violation of due process. *See United States v. Saunders*, 943 F.2d 388, 392 (4th Cir. 1991) ("Improper intimidation of a witness may violate a defendant's due process right to present his defense witnesses freely if the intimidation amounts to substantial government interference with a defense witness' free and unhampered choice to testify.") (citations and quotations omitted).

What is clear is that through the actions of the Original Prosecuting Team, Petitioner has been denied the very remedy that would have repaired the numerous constitutional violations this Court found: the ability to call Owen Barber in Petitioner's defense and to use him to rebut other testimony the Commonwealth will put forward. Given the actions of the Original Prosecuting Team, the Brady and Giglio violations the Court found are essentially permanent.[6] As such, the Court finds extraordinary circumstances exist that warrant barring reprosecution of the Petitioner. It is clear that any retrial under the present circumstances would result in incurable violations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the rights afforded to all defendants under *Brady v. Maryland*, 373 U.S. 83, 86, 83 S. Ct.

[6] The Court considers it unlikely that the Commonwealth would grant immunity to Barber so that he could provide testimony to exonerate Petitioner.

1194, 10 L. Ed. 2d 215 (1963) and *Giglio v. United States*, 405 U.S. 150, 153-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) and well as the Petitioner's Sixth Amendment Right to a fair trial.[7]

III. CONCLUSION

The Commonwealth, having violated the Court's conditional writ of habeas corpus by failing to "within one-hundred and twenty (120) days of the date of this Order, provide Petitioner with a new trial, or release him unconditionally from custody," it is **ORDERED** that the Commonwealth of Virginia release Petitioner unconditionally, free of all criminal proceedings on the charge of murder for hire of Danny Petrole and the drug charges that were previously tried in state court by the Commonwealth, within ten (10) days of the entry of this order.

It is **FURTHER ORDERED** that the Commonwealth of Virginia is hereby **BARRED** from reprosecuting the Petitioner on the charges originally tried herein in state court or any other charges stemming from death of Danny Petrole which requires the testimony of Owen Barber in any form.

The Clerk is **DIRECTED** to send copies of this Order to all counsel of record.

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[7] The Commonwealth has argued that any bar to reprosecution of the Petitioner would be a violation of *Younger v. Harris*. The Court has considered the argument and finds it inapplicable.

IS IT SO ORDERED

/s/
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
December 24, 2012

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 11-6, 11-7

JUSTIN MICHAEL WOLFE,

Petitioner-Appellee/Petitioner-Appellant,

v.

HAROLD W. CLARKE, Director, Virginia Department of Corrections,

Respondent-Appellant/Respondent-Appellee.

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Raymond A. Jackson, District Judge.
(2:05-cv-00432-RAJ-DEM)

OPINION

Before: KING, DUNCAN, and THACKER, Circuit Judges.

Argued: May 17, 2012

Decided: August 16, 2012

OPINION

KING, Circuit Judge:

This matter was previously before us on appeal by 28 U.S.C. § 2254 petitioner Justin Michael Wolfe, a Virginia prisoner who was convicted of capital murder and sentenced to death by the Commonwealth in 2002. By our decision of May 11, 2009, *see Wolfe v. Johnson*, 565 F.3d 140 (4th Cir. 2009) ("*Wolfe I*"), we remanded for further proceedings. Specifically, *Wolfe I* instructed the district court to determine whether Wolfe was entitled to an evidentiary hearing and other discovery; to decide in the first instance whether, under *Schlup v. Delo*, 513 U.S. 298 (1995), Wolfe had made a sufficient showing of actual innocence to clear any procedural bars to his constitutional claims (the "*Schlup* issue"); and to assess anew Wolfe's claim, among others, that the prosecution had contravened his Fourteenth Amendment due process rights, as recognized in *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing favorable and material evidence (the "*Brady* claim").

On remand, the district court heeded our *Wolfe I* mandate, authorized appropriate discovery and conducted an evidentiary hearing, and ruled in Wolfe's favor on the *Schlup* issue and his *Brady* and two additional claims. By its judgment of August 30, 2011, the court vacated Wolfe's capital murder and other convictions, and ordered the Commonwealth to either retry him within 120 days or release him unconditionally from custody. The judgment was stayed pending this appeal by the Commonwealth, which was initiated on its behalf by respondent

Harold W. Clarke, Director of the Virginia Department of Corrections.[1] The Commonwealth challenges the remand proceedings from start to finish, contending that the district court repeatedly and fatally erred in its procedural and substantive rulings. Because we readily conclude, however, that the court's award of habeas corpus relief on Wolfe's *Brady* claim was not marred by any error, we affirm the judgment.

I.

A.

As more fully detailed in our *Wolfe I* decision, a Prince William County jury found Wolfe guilty in 2002 of capital murder, using a firearm in the commission of a felony, and conspiring to distribute marijuana. *See Wolfe I*, 565 F.3d at 149. The trial court sentenced Wolfe to death for the murder, plus consecutive terms of three years for the firearm offense and thirty years for the drug conspiracy. *Id.* The murder conviction was premised on evidence that Wolfe, then a nineteen year- old marijuana dealer in northern Virginia, hired his close friend and fellow drug dealer Owen Barber IV to murder drug supplier Daniel Petrole in March 2001. *Id.* at 144-45 & n.2 (explaining that "Virginia defines 'capital murder,' in pertinent part, as '[t]he willful, deliberate, and premeditated killing of any person by another for hire'" (quoting Va. Code Ann. § 18.2-31(2))). Significantly, "Barber was the prosecution's

[1] Clarke has served as Director of the Virginia Department of Corrections since 2010, when he replaced former respondent Gene M. Johnson.

key witness," in that he was "the only witness to provide any direct evidence regarding the 'for hire' element of the murder offense and the involvement of Wolfe therein." *Id.* at 144. In exchange for Barber's testimony that he was Wolfe's hired triggerman, the Commonwealth dismissed its capital murder charge against Barber, and he pleaded guilty to non-capital murder. Barber was sentenced to sixty years in prison, of which twenty-two years were suspended. *Id.* at 144 n.1.

In November 2005, after failing to obtain relief from his convictions on direct appeal and in state habeas corpus proceedings, Wolfe filed his initial 28 U.S.C. § 2254 petition in the district court. *See Wolfe I*, 565 F.3d at 149-51. It was only thereafter, on December 14, 2005, that Barber executed an affidavit repudiating his trial testimony and exculpating Wolfe from the murder-for-hire scheme. *Id.* at 144, 151. Within a single day, Wolfe filed an amended § 2254 petition, along with an appendix of supporting materials, including additional affidavits corroborating the Barber affidavit and suggesting that the prosecution had suppressed evidence that should have been disclosed to the defense. *Id.* at 151. The amended petition raised, inter alia, the *Schlup* actual innocence issue, thereby asserting a second ground to excuse any procedural default of Wolfe's constitutional claims — the previously asserted first ground having been the separate "cause and prejudice" standard. *Id.* at 154, 158 & n.27. In April 2006, while the amended petition and related procedural issues were pending before the magistrate judge, Wolfe notified the court that Barber sought to repudiate the statements in his 2005 affidavit

exculpating Wolfe. *Id.* at 155-56. In conjunction with that notice, Wolfe's lawyers requested an evidentiary hearing to resolve credibility issues, plus discovery into the prosecution's compliance with its *Brady* obligations. *Id.* at 156.

In August 2007, the magistrate judge issued his report, rejecting Wolfe's request for an evidentiary hearing, deeming the Barber and other affidavits to lack credibility, and recommending the dismissal of Wolfe's amended petition on the ground that the claims asserted therein were meritless, had been procedurally defaulted, or both. *See Wolfe I*, 565 F.3d at 156 & n.25. Although Wolfe spelled out a lengthy series of objections to the magistrate judge's report, the district court, by its decision of February 11, 2008, adopted the report as its own and dismissed Wolfe's petition. *Id.* at 158-59 (explaining, inter alia, that the court did not address the *Schlup* issue, but "considered (and rejected) Wolfe's contention that his procedural defaults were excused under the cause and prejudice standard" (internal quotation marks omitted)). After the court declined to alter or amend its decision, we granted Wolfe a 28 U.S.C. § 2253(c) certificate of appealability on his *Brady* and three other claims. *Id.* at 159. And, as explained above, we ultimately remanded with instructions for the court to determine Wolfe's entitlement to an evidentiary hearing and other discovery, to decide the *Schlup* issue in the first instance, and to freshly assess the *Brady* and two additional claims. *Id.* at 171. We also advised the court that it was free to revisit its cause and prejudice ruling. *Id.* at 165 n.35.

B.

Without explicitly reconsidering its prior cause and prejudice ruling, the district court decided the procedural *Schlup* issue early in the remand proceedings, by its opinion and order of February 4, 2010. *See Wolfe v. Clarke*, No. 2:05-cv-00432 (E.D. Va. Feb. 4, 2010) (the "*Schlup* Order").[2] The court therein determined, largely on the existing *Wolfe I* record, that Owen Barber's (subsequently disavowed) recantation of his trial testimony was sufficiently corroborated to "raise doubt in a reasonable juror's mind about the circumstances of the night of the [Daniel Petrole] murder." *Schlup* Order 10. Indeed — weighing the "two stories of what occurred on the night of the murder, both with hearsay corroboration[,] and almost no other evidence that would support one version over another" — the court concluded that it was "more likely than not that no reasonable juror would have found Wolfe guilty beyond a reasonable doubt." *Id.* (applying *Schlup*, 513 U.S. at 327 (requiring petitioner to "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence")). Accordingly, the court announced that Wolfe had "met the *Schlup* standard," thus justifying review of the merits of his procedurally defaulted constitutional claims. *Id.* The court also granted Wolfe's request for an evidentiary hearing, as well as discovery. *Id.* at 13.

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[2] The *Schlup* Order is found at J.A. 3266-78. (Citations herein to "J.A.__" refer to the contents of the Joint Appendix filed by the parties in these appellate proceedings.)

During the contentious course of the discovery proceedings, Wolfe had to move to compel the Commonwealth to meet its discovery obligations. A June 4, 2010 hearing on Wolfe's motion revealed, inter alia, that the Commonwealth had provided only unsworn responses to the interrogatories it had answered, had wholly failed to respond to other interrogatories, and was refusing to produce approximately 916 documents that it unilaterally deemed irrelevant. By its order of June 7, 2010, the district court directed the Commonwealth to provide sworn responses to Wolfe's interrogatories, including those previously unanswered, and to allow Wolfe to examine the hundreds of theretofore undisclosed documents, subject to an agreed protective order. *See Wolfe v. Clarke*, No. 2:05-cv-00432 (E.D. Va. June 7, 2010) (the "Discovery Order").[3] To give Wolfe an opportunity to assess the evidence that would be forthcoming under the Discovery Order, the court was constrained to postpone the impending evidentiary hearing.

The evidentiary hearing finally ensued late that autumn, when it was conducted over the four days of November 2-3 and 16-17, 2010. On the second day of the hearing, in response to the Commonwealth's objection to Wolfe's use of newly disclosed evidence in support of his existing *Brady* and other claims, Wolfe filed a motion to amend his 28 U.S.C. § 2254 petition. *See* J.A. 4026-27 (arguing that the Commonwealth "has tenaciously fought to deny Wolfe access to any facts that would have enabled him to plead additional *Brady*. . . sub-claims," and thus "should

[3] The Discovery Order is found at J.A. 3517.

not be rewarded for playing hide-the-ball" and "should not be allowed to blame Wolfe for lacking the clairvoyance to include these proposed amendments to his 2005 federal habeas petition without the benefit of the withheld documents"). By its mid-hearing order of November 12, 2010, the district court granted Wolfe's motion to amend "out of an abundance of caution," but found that "even in the absence of the [motion], the issues [Wolfe] raises fall squarely within the [existing *Brady* claim]." *See Wolfe v. Clarke*, No. 2:05-cv-00432 (E.D. Va. Nov. 12, 2010) (the "Amendment Order").[4]

Thereafter, by its opinion and order of July 26, 2011, the court determined that Wolfe was entitled to habeas corpus relief premised on, inter alia, the Commonwealth's manifold violations of his *Brady* rights. *See Wolfe v. Clarke*, No. 2:05- cv-00432 (E.D. Va. July 26, 2011) (the "*Brady* Order").[5] Specifically, the court ruled in the *Brady* Order that the prosecution had withheld eight items or groups of favorable and material evidence, falling into three broader categories: (1) evidence tending to impeach triggerman Barber; (2) evidence tending to impeach other prosecution witnesses who corroborated Barber's testimony; and (3) evidence suggesting an alternate theory of the Petrole murder. The court also deemed Wolfe to be entitled to relief on his claim that the prosecution knowingly presented false

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[4] The Amendment Order is found at J.A. 4059-60.

[5] The Brady Order, which amended an earlier decision of July 12, 2011, is found at J.A. 5203-59 and published at 819 F. Supp. 2d 538 (E.D. Va. 2011).

testimony by Barber, in contravention of Wolfe's Fourteenth Amendment due process rights under *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972) (the "*Giglio* claim"), as well as his claim that the state trial court deprived him of his rights under the Sixth and Fourteenth Amendments to an impartial jury by striking a qualified venireman for cause (the "venireman claim"). Notably, the court closed its *Brady* Order by specifying that Wolfe's "conviction and sentence" — both in the singular — were vacated. *See Brady* Order 57.

Wolfe timely filed a Federal Rule of Civil Procedure 59(e) motion to alter or amend the judgment, seeking the district court's clarification that the awarded relief encompassed vacatur of not only his murder conviction and death sentence, but also his convictions and sentences for using a firearm in the commission of a felony and conspiring to distribute marijuana. The court granted Wolfe's motion by its order of August 30, 2011. *See Wolfe v. Clarke*, No. 2:05-cv-00432 (E.D. Va. Aug. 30, 2011) (the "Relief Order"). The court clarified therein that, "[i]n light of [its] finding that [Wolfe] was denied the right to due process during his state criminal trial, [he] is entitled to a new trial on all charges previously considered by the state court." Relief Order 1-2. That same day, the judgment was amended to direct the Commonwealth to retry Wolfe within 120 days or release him unconditionally. *See Wolfe v. Clarke*, No. 2:05-cv-00432 (E.D. Va. Aug. 30, 2011) (the "Judgment"). The Judgment was subsequently stayed pending this appeal by the

Commonwealth. *See Wolfe v. Clarke*, No. 2:05-cv-00432 (E.D. Va. Nov. 22, 2011) (the "Stay Order").[6]

We possess jurisdiction over the Commonwealth's appeal pursuant to 28 U.S.C. § 1291. Further, because we granted Wolfe a certificate of appealability for a cross-appeal, we have 28 U.S.C. §§ 1291 and 2253(c) jurisdiction to consider his contention that the district court should have granted him relief on an additional, unadjudicated claim: that "[e]ven if the prosecutors had no knowledge of Barber's perjury at the time of trial, they do now," and thus his continuing detention by the Commonwealth "'constitute[s] a due process violation.'" *See* Br. of Appellee 62-63 (quoting *Sanders v. Sullivan*, 863 F.2d 218, 224 (2d Cir. 1988)) (the "*Sanders* claim"); *see also Brady* Order 52 (ruling in favor of Wolfe on his *Giglio*, rather than *Sanders*, claim, premised on the finding that the Commonwealth "presented Barber's trial testimony despite having information in its possession indicating that the testimony was false").

As explained below, we need look no further than one item of the first category of evidence withheld from Wolfe's defense by the prosecution — the evidence tending to impeach Barber — to agree with the district court that Wolfe deserves habeas corpus relief on his *Brady* claim and affirm the Judgment. *See Brady* Order 42 (observing "that the suppressed habeas evidence relating to Barber alone is enough to warrant habeas relief under *Brady*"). Consequently,

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[6] The Relief Order is found at J.A. 5293-94, the Judgment at J.A. 5295, and the Stay Order at J.A. 5407-29. The Stay Order is published at 819 F. Supp. 2d 574 (E.D. Va. 2011).

we need not review any issues of substance or procedure related solely to the other withheld evidence underlying Wolfe's *Brady* claim, or to his *Giglio*, *Sanders*, and venireman claims.

II.

A.

The single, plainly momentous item of suppressed Barber impeachment evidence on which we rest today's decision is a written police report reflecting that — before Barber ever asserted that Wolfe hired him to murder Petrole — Prince William County Detective Newsome advised Barber that he could avoid the death penalty by implicating Wolfe. *See* J.A. 4825-27 (the "Newsome report"). The Newsome report documents Newsome's and fellow Detective Walburn's conversations with Barber during an April 14, 2001 cross-country flight, returning Barber to Virginia upon his arrest in California three weeks after the Petrole murder. In pertinent part, the Newsome report reveals the following:

> I told Barber that we knew he had killed Petrole and had a very strong case against him. But that as far as we knew he had no personal problem with Daniel Petrole but that he had killed him for someone else and we believed that person was Justin Wolfe. I explained to him that we needed the information that he had in order to arrest Wolfe. I explained again that we had a very strong case against him (Barber) and that we could stop there but that would not be right since we knew it was someone else [sic] idea. I

> told him that he was potentially facing a capitol [sic] murder charge in this case and that he needed to help himself. He asked me, "What do I get out of it if I tell you who the other person, the higher up, is". I told him I could not make any promises to him, but that the Commonwealth might entertain the idea of not charging him with Capitol [sic] Murder, or that they may be willing to make a recommendation as to his sentence.
>
> Again Barber asked about discovery and I again explained it to him. He then said, What do I get out it [sic] if I name the "higher up". I told him that was one of his problems; that his case was so tight he really had very little to offer us. I told him it could simply be the difference between Capitol [sic] murder or First Degree, execution or life in prison, or that the Commonwealth may be willing to make a recommendation in sentencing after speaking to his attorney. I told him again that the Commonwealth's Attorney would make these decisions and that I could not promise him anything. I pointed out that at this point he would do more good than harm for himself by cooperating with us.

J.A. 4826-27.

The Commonwealth inexplicably withheld the Newsome report from Wolfe until these 28 U.S.C. § 2254 proceedings in 2010, after Wolfe's first appeal and during the contentious discovery proceedings conducted in the *Wolfe I* remand. Thus, the Newsome report was among the newly disclosed evidence that

the Commonwealth argued was outside the legitimate purview of Wolfe's *Brady* claim — a contention that was roundly rejected by the district court in its mid-evidentiary hearing Amendment Order of November 12, 2010. During the evidentiary hearing, as recounted in the court's subsequent *Brady* Order, "Barber recanted his trial testimony while under oath." *Brady* Order 50. Barber also engaged in the following exchange with the Commonwealth's lawyer during cross-examination:

> Q You related that several times they had said if you don't tell us what we want, you will get capital murder?
>
> A. Yeah.
>
> Q. Who is they?
>
> A. [Commonwealth's Attorney] Ebert, [Assistant Commonwealth's Attorney] Conway, [Barber's attorney] Pickett, [Detective] Newsome, [and Detective] Walburn.
>
> Q. But if my notes are correct, they never told you exactly what to say. They didn't give you a script for the events of that night, did they?
>
> A. A specific script for the events, no.
>
> Q. They in fact told you what they wanted was the truth, didn't they?
>
> A. They said that they know Justin [Wolfe] is involved and that we know that he hired you to kill Danny [Petrole].

> Q. Well, what they told you they wanted you to tell them was the truth. Wasn't that their statement?
>
> * * *
>
> Wasn't that their statement to you, that they wanted the truth?
>
> A. Yeah. I mean, 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.

J.A. 3751-52. By its *Brady* Order, the district court found the foregoing testimony by Barber to be "consistent with the suppressed [Newsome] report." *See Brady* Order 9 n.9. The court also deemed Barber's recantation to be "credible" and generally found his "demeanor and candor" to be "persuasive." *Id.* at 50.

Among the enumerated findings of fact in the district court's *Brady* Order is the finding (No. 6) that "[t]he prosecution failed to disclose Detective Newsome's report outlining his initial interview with Owen Barber on April 14, 2001, during which he [Newsome] implicated Wolfe as being involved in the murder before Barber mentioned his [Wolfe's] involvement." *Brady* Order 8. The court also spelled out the controlling legal standard for assessing Wolfe's *Brady* claim, observing that, "to find a *Brady* violation, it must determine that the evidence was 1) favorable to the accused, 2) suppressed by the prosecution (either willfully or inadvertently), and 3) material." *Id.* at 4 (citing *Banks v. Dretke*, 540 U.S. 668, 691 (2004)). In concluding that the emergence of

the Newsome report entitled Wolfe to habeas corpus relief, the court explained:

> This information is favorable to Wolfe because it documents the fact that detectives first mentioned Wolfe in connection to the murder and presented Barber with the option of execution or life imprisonment in exchange for implicating someone else, well before Barber began cooperating with the Commonwealth or implicating Wolfe in the murder. Prosecutors do not dispute the fact that the report was not provided to [Wolfe]. Furthermore, the report is material because it reflects that Barber had a motive to misrepresent the facts regarding Petrole's death.

Id. at 20.[7]

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[7] In its *Brady* Order, the district court also assessed the cumulative materiality of the Newsome report and the seven other items or groups of suppressed evidence that it found favorable to Wolfe. *See Brady* Order 37-44. The first category of that evidence — evidence tending to impeach Barber — encompasses the Newsome report, plus evidence that Barber possessed other motives to murder Petrole (the "Barber-Petrole relationship evidence") and that Barber's roommate, Jason Coleman, informed the prosecution that Barber had confessed to acting alone (the "Coleman evidence"). *See id.* at 15-22. The Barber-Petrole relationship evidence includes statements made by confidential informants and Barber's fellow inmates indicating that Barber knew Petrole before the murder, that Barber owed Petrole money, that Petrole "had a hit out" on Barber, and that Barber had a close relationship with Petrole's roommate. *See id.* at 15-19. The Coleman evidence revealed that Coleman "had a conversation with Barber after the murder (Continued)

According to the Commonwealth, we should not reach or address the merits of the Newsome report aspect of Wolfe's *Brady* claim, because the Newsome

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where Barber admitted to [Coleman] that he murdered Petrole and acted alone," and that Coleman reported that conversation to the prosecution, including the Commonwealth's Attorney. *Id.* at 20.

The second category of suppressed evidence — evidence tending to impeach other prosecution witnesses who corroborated Barber's testimony — includes information relating to a deal the Commonwealth made with its witness J.R. Martin in exchange for his cooperation (the "Martin evidence"), as well as a recorded statement made by the Commonwealth's witness Jason Hough in conflict with his subsequent trial testimony regarding his pre-Petrole-murder conversation with Wolfe and Coleman about robbing drug dealers (the "Hough evidence"). *See Brady* Order 22- 28. Finally, the third category of withheld evidence — evidence suggesting an alternate theory of the Petrole murder — consists of the following: various reports and witness statements relating to a parallel drug investigation that indicated conflict in Petrole's drug business unrelated to Wolfe's purported motive for having Petrole murdered (the "drug investigation evidence"); evidence that Petrole was rumored to be a government informant, constituting yet another possible motive for his murder (the "informant evidence"); and the statements of three witnesses that they saw a second car at the crime scene shortly after the Petrole murder (the "second car evidence"). *See id.* at 28-36.

Having assessed the materiality of the foregoing — the Newsome report, the Barber-Petrole relationship evidence, the Coleman evidence, the Martin evidence, the Hough evidence, the drug investigation evidence, the informant evidence, and the second car evidence — the district court concluded that the evidence's suppression by the prosecution was, by category and cumulatively, patently prejudicial. While we look no further than the Newsome report today, we do not condone the prosecution's apparent suppression of other *Brady* material and the pattern of conduct that it reveals.

report would never have surfaced or been made available to Wolfe but for the flawed procedural rulings made by the district court in the *Wolfe I* remand proceedings. In that regard, the Commonwealth asserts that the court erred in three respects: by generally excusing Wolfe's procedural defaults under the *Schlup* actual innocence standard; by authorizing discovery and conducting the evidentiary hearing; and by allowing Wolfe to amend his 28 U.S.C. § 2254 petition to broaden his *Brady* claim to include the Newsome report and other newly disclosed evidence. We examine those assertions in turn.

1.

Attacking the *Schlup* Order, the Commonwealth argues that the district court erred by ruling early in the remand proceedings that Wolfe satisfied the *Schlup* actual innocence standard on the basis of the *Wolfe I* record, including the 2005 affidavit in which Barber recanted his trial testimony and denied Wolfe's involvement in the Petrole murder. The Commonwealth emphasizes that the court, in looking at that same record, had already decided that the Barber affidavit lacked credibility. *See* Br. of Appellant 47 ("The court never explained its about face and the record certainly did not justify any finding of 'innocence' under *Schlup* . . . ."). Wolfe, of course, defends the *Schlup* Order, asserting that "the correctness of the district court's findings was confirmed when Barber recanted his trial testimony while under oath at the [post-*Schlup* Order] evidentiary hearing." *See* Br. of Appellee 19-20 (internal quotation marks omitted); *see also Brady*

Order 50 (finding Barber's evidentiary hearing recantation "credible" and his "demeanor and candor persuasive").

In any event, we need not reach or assess the parties' competing contentions on the validity of the *Schlup* Order. Put simply, any procedural default of Wolfe's *Brady* claim — particularly as it relates to the Newsome report — was otherwise excused under the separate "cause and prejudice" standard. As we explained in *Wolfe I*,

> [a] procedural default is excusable under the cause and prejudice standard when the petitioner demonstrates (1) "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule," *Murray v. Carrier*, 477 U.S. 478, 488 (1986), and (2) that "errors at his trial . . . worked to his *actual* and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions," *United States v. Frady*, 456 U.S. 152, 170 (1982).

Wolfe I, 565 F.3d at 158 n.27 (alteration in original). On remand, after having decided the *Schlup* issue in Wolfe's favor, the district court understandably declined our *Wolfe I* invitation to revisit its prior cause and prejudice ruling. *See id.* at 165 n.35. Nevertheless, pursuant to Supreme Court precedent, the district court necessarily found cause and prejudice for the *Brady* claim's default when it determined that claim to be meritorious. *See Banks*, 540 U.S. at 691 (recognizing that "'[c]ause and prejudice' . . . 'parallel two of the three components of

the alleged *Brady* violation itself'" (quoting *Strickler v. Greene*, 527 U.S. 263, 282 (1999))).

To illustrate, as recognized by the district court, "the three components or essential elements of a *Brady* prosecutorial misconduct claim" are the following: '"The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" *Banks*, 540 U.S. at 691 (quoting *Strickler*, 527 U.S. at 281-82). By satisfying "the second *Brady* component (evidence suppressed by the State), a petitioner shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence." *Id.* Additionally, "coincident with the third *Brady* component (prejudice), prejudice within the compass of the 'cause and prejudice' requirement exists when the suppressed evidence is 'material' for *Brady* purposes." *Id.*

Thus, by "succeed[ing] in establishing the elements of his [*Brady*] claim" — which we today affirm that he did — Wolfe concurrently "succeed[ed] in demonstrating 'cause and prejudice' [for his procedural default of that claim]." *See Banks*, 540 U.S. at 691. By these circumstances, the Commonwealth's challenge to the *Schlup* Order is rendered moot.

2.

Next, the Commonwealth asserts the district court erred in the remand proceedings by authorizing

discovery and conducting the evidentiary hearing. In rejecting the Commonwealth's position, we emphasize that the court faithfully followed our *Wolfe I* directions to "re-examine whether Wolfe has shown that he is entitled to [an evidentiary hearing]," and then, "[i]f such a hearing is warranted," to "resolve any factual disputes bearing on the procedural *Schlup* issue and the substantive *Brady* and *Giglio* claims." *See Wolfe I*, 565 F.3d at 170-71. We also observe that *Wolfe I* pragmatically anticipated that discovery would be conducted in conjunction with any evidentiary hearing. *See id.* at 171 n.44 (advising that, "[i]f the court determines that *Schlup* is satisfied on the existing record, *any evidentiary hearing and discovery proceedings* may relate primarily to the merits of Wolfe's substantive claims" (emphasis added)). We therefore conclude that, in authorizing discovery and conducting the evidentiary hearing, the district court acted well within its discretion. *See Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (recognizing that "the decision to grant an evidentiary hearing [in a 28 U.S.C. § 2254 case is] generally left to the sound discretion of the district courts"); *see also Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir. 2006) (relating that district court's decision on whether to conduct evidentiary hearing or authorize discovery proceedings is reviewed for abuse of discretion).

Briefly, as we more thoroughly explained in *Wolfe I*, 565 F.3d at 166-71, if a § 2254 petitioner "has failed to develop the factual basis of a claim in State court proceedings," § 2254(e)(2) bars a district court from conducting an evidentiary hearing on the claim unless the petitioner can satisfy one of two

statutory exceptions. Importantly, however, "'a failure to develop the factual basis of a claim is not established unless there is *lack of diligence*, or some greater fault, attributable to the prisoner or the prisoner's counsel.'" *Wolfe I*, 565 F.3d at 167 (quoting *Williams (Michael) v. Taylor*, 529 U.S. 420, 432 (2000)); *see also Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) (recently affirming that § 2254(e)(2) "continues to have force," in that it "still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court" (citing *Michael Williams*, 529 U.S. at 427-29)).

Applying the controlling standard on remand, the district court determined that § 2254(e)(2) did "not bar [Wolfe] from an evidentiary hearing." *See Schlup* Order 11. In so ruling, the court observed that Wolfe had made diligent efforts in the state court proceedings to develop his *Brady* claim by "request[ing] a hearing," "fil[ing] requests under the Virginia Freedom of Information Act," and "mov[ing] for discovery on multiple occasions." *Id.* at 10. Moreover, with respect to the exculpatory 2005 Barber affidavit on which Wolfe's federal habeas petition largely relied, the court found that "[t]here [was] no indication that Barber would have been willing to give his affidavit at an earlier time, particularly as [Wolfe's] lawyers had repeatedly attempted to get Barber to make a statement and he had refused." *Id.* at 11. The court thus concluded that Barber's prior reticence was "precisely the type of external cause that . . . excuses a failure to fully develop facts in state court." *Id.* (citing *Conaway*, 453 F.3d at 589 (explaining that, because petitioner had

"been reasonably diligent in pursuing his claim, and his failure to fully develop the facts related to [his] claim in state court is attributable to external causes, § 2254(e)(2) does not preclude him from being accorded an evidentiary hearing in federal court")).

Having decided that Wolfe was eligible to be accorded an evidentiary hearing, the district court then turned to the question of whether he was entitled to one. That inquiry required the court to determine "'if the facts alleged would entitle [Wolfe] to relief, and if he satisfie[d] one of the six factors enumerated by the Supreme Court in *Townsend v. Sain*, 372 U.S. 293, 313 (1963).'" *See Wolfe I*, 565 F.3d at 169 (quoting *Conaway*, 453 F.3d at 582). Properly "evaluat[ing Wolfe's petition] pursuant to the principles of Federal Rule of Civil Procedure 12(b)(6)," *see id.*, the court concluded that Wolfe set forth sufficient facts to state meritorious *Brady* and *Giglio* claims. *See Schlup* Order 12 (observing that Wolfe "alleged serious violations of his rights," and that those "allegations [were] made even without the benefit of discovery that could lead to considerable additional exculpatory material"). The court also ruled that Wolfe "met at least three of the six [*Townsend*] factors," in that "'the merits of the factual dispute were not resolved in the state hearing'" (factor 1); "'there is a substantial allegation of newly discovered evidence'" (factor 4); and "'the material facts were not adequately developed at the state-court hearing'" (factor 5). *Id.* at 12 (quoting *Townsend*, 372 U.S. at 313); *see also Wolfe I*, 565 F.3d at 313 (observing that factors 1, 4, and 5 "appear to be applicable here"). Accordingly, the court granted

Wolfe's request for an evidentiary hearing, as well as his motion for predicate discovery.

Far from abusing its discretion, the district court engaged in a sound assessment of the evidentiary hearing issue. Premised on that analysis, the court also appropriately (if not explicitly) found that Wolfe had demonstrated "good cause" for discovery. *See Quesinberry v. Taylor*, 162 F.3d 273, 279 (4th Cir. 1998) ("Good cause is shown if the petitioner makes a specific allegation that shows reason to believe that the petitioner may be able to demonstrate that he is entitled to relief."). As a result of the foregoing, Wolfe properly obtained new and relevant evidence, including the Newsome report, in the remand proceedings.

3.

The Commonwealth nevertheless persists in its efforts to thwart Wolfe's reliance on the Newsome report and other newly disclosed evidence, asserting on appeal that Wolfe was erroneously allowed to amend the *Brady* claim alleged in his 2005 federal habeas petition. *See* Br. of Appellant 43 (accusing the district court of "an abuse of judicial power"). The Commonwealth's weak — though strident — contentions in that respect do not long detain us. First of all, we agree with the district court that an amendment of Wolfe's § 2254 petition was not necessary, because his new evidence-related issues "fall squarely within the [existing *Brady* claim]." Amendment Order 2 (specifying that Wolfe's motion to amend was granted "merely out of an abundance of caution"); *see also* J.A. 2854 (Wolfe's 2005 federal habeas petition, broadly alleging that the

Commonwealth violated his *Brady* rights by suppressing, inter alia, "[e]xculpatory and impeachment evidence related to the Commonwealth's key witness, Owen Barber").

Furthermore, we reject the Commonwealth's unfounded depiction of "last-minute amendments far beyond the scope of remand [in violation of] the 'mandate rule.'" *See* Br. Of Appellant 43. To the contrary, our *Wolfe I* mandate explicitly authorized the district court to conduct "such other and further proceedings as may be appropriate." *See* 565 F.3d at 171. In any event, it 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.

C.

With Wolfe's procedural hurdles behind us, we proceed to consider the substance of his *Brady* claim. Because we focus on an aspect of that claim — the long-concealed Newsome report — that was not adjudicated in the state court proceedings, we owe no 28 U.S.C. § 2254(d) deference to any state decision. *See Monroe v. Angelone*, 323 F.3d 286, 297 (4th Cir. 2003) ("[Section 2254(d)'s] deference requirement does not apply when a claim made on federal habeas review is premised on *Brady* material that has surfaced for the first time during federal proceedings."); *see also Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012). Rather, we review the district

court's "legal conclusions de novo and findings of fact for clear error." *Monroe*, 323 F.3d at 299.

1.

As previously explained, to succeed on his *Brady* claim, Wolfe is first required to show that the Newsome report is "favorable to [him], either because it is exculpatory, or because it is impeaching." *See Banks v. Dretke*, 540 U.S. 668, 691 (2004) (internal quotation marks omitted). The Newsome report is indubitably impeaching, in that it establishes a motive not only for Barber to implicate someone else, but to point the finger specifically at Wolfe. Indeed, it cannot be trivialized that — as Detective Newsome's own report demonstrates — Newsome fed Barber the crux of his testimony, i.e., that he was hired by Wolfe to murder Petrole. Put simply, the Newsome report is crucial, impeaching evidence that was "unquestionably subject to disclosure under *Brady*." *See Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 556 (4th Cir. 1999).

2.

Wolfe next must establish that the Newsome report was "suppressed by the State, either willfully or inadvertently." *See Banks*, 540 U.S. at 691 (internal quotation marks omitted). The Commonwealth did not contest the suppression issue in the district court proceedings, and does not do so in this appeal. Because the Commonwealth concedes that it withheld the Newsome report, and because the willfulness or inadvertence of its transgression is inconsequential to our *Brady* analysis, we could say no more on the issue. Nevertheless, we feel compelled

to acknowledge that the Commonwealth's suppression of the Newsome report, as well as other apparent *Brady* materials, was entirely intentional.

During Wolfe's evidentiary hearing in the district court, the Commonwealth's Attorney explained that his office does not have an "open-file policy," providing criminal defense counsel access to entire case files. *See* J.A. 3690. Asked to elaborate, he offered the flabbergasting explanation that he has "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." *Id.* Additionally, the Assistant Commonwealth's Attorney admitted that he does not produce evidence to a criminal defendant unless he first deems it to be "material[ ]" and "credib[le]." *Id.* at 3782. The district court rightly lambasted that conduct in its *Brady* Order:

> In effect, Ebert admits here that his contempt of defendants who "fabricate a defense" guides his perspective on disclosing information. This is particularly troubling in the case at bar where the record is replete with statements from Ebert and Conway regarding the scrutiny and credibility determinations that they made (as opposed to the jury) regarding the relevance of any potential exculpatory evidence. Essentially, in an effort to ensure that no defense would be "fabricated," Ebert and Conway's actions served to deprive Wolfe of any substantive defense in a case where his life would rest on the jury's verdict. The Court finds these actions not only

> unconstitutional in regards to due process, but abhorrent to the judicial process.

Brady Order 43 n.24; *see also Muhammad v. Kelly*, 575 F.3d 359, 370 (4th Cir. 2009) (refusing to condone the suppression of evidence by the Prince William County prosecutors, and advising them to "err on the side of disclosure, especially when a defendant is facing the specter of execution"). We sincerely hope that the Commonwealth's Attorney and his assistants have finally taken heed of those rebukes.

3.

Of course, Wolfe is yet ineligible for § 2254 relief on his *Brady* claim unless he makes a third showing — that "prejudice . . . ensued" from the Commonwealth's suppression of the Newsome report. *See Banks*, 540 U.S. at 691 (internal quotation marks omitted). The prejudice inquiry requires us to determine if the Newsome report is "material" to Wolfe's guilt, i.e., whether "there is a reasonable probability that, had the [Newsome report] been disclosed, the result of the [trial] would have been different." *See Cone v. Bell*, 556 U.S. 449, 469-70 (2009). Importantly, a reasonable probability does not mean that Wolfe "would more likely than not have received a different verdict with the [Newsome report]," only that the likelihood of a different result is great enough to "undermine[ ] confidence in the outcome of the trial." *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (internal quotation marks omitted).

The Commonwealth principally contends that the Newsome report and other Barber impeachment evidence were immaterial, because even without

Barber's testimony that Wolfe hired him to murder Petrole, there was overwhelming trial evidence of Wolfe's guilt. Concomitantly, the Commonwealth asserts that the district court ignored important pieces of non-Barber evidence, and thus improperly failed to weigh them in the *Brady* Order materiality analysis. The Commonwealth's argument is belied by the *Brady* Order, which carefully outlined the trial evidence and came to the inevitable conclusion that "Owen Barber's testimony was the only evidence that the Prosecution presented to prove that [Wolfe hired Barber to kill Petrole." *Brady* Order 41. Upon our own review of the trial record in the *Wolfe I* appeal, we also grasped that "Barber was the prosecution's key witness in Wolfe's capital trial and the only witness to provide any direct evidence regarding the 'for hire' element of the murder offense and the involvement of Wolfe therein." *Wolfe I*, 565 F.3d at 144. And, the Commonwealth itself conceded at Barber's sentencing hearing on his non-capital murder conviction — where he received a sentence of just sixty years in prison, with twenty-two years suspended — that "but for [Barber's] testimony Mr. Wolf[e] probably would not have been prosecuted." J.A. 5144.

In these circumstances, where "the jury had to believe that Barber was credible and that his version of events was in fact truthful and accurate in order to support [Wolfe's] conviction," *Brady* Order 41, the materiality of the Newsome report is manifest. *See Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (holding that, where an eyewitness's "testimony was the only evidence linking [the defendant] to the crime," the eyewitness's undisclosed prior inconsistent

statements "were plainly material"); *Harris v. Lafler*, 553 F.3d 1028, 1034 (6th Cir. 2009) ("Considerable authority from the Supreme Court and our court indicates that a defendant suffers prejudice from the withholding of favorable impeachment evidence when the prosecution's case hinges on the testimony of one witness."); *Monroe*, 323 F.3d at 315-16 (explaining that, because a witness's testimony was "crucial" to proving premeditation, there was "a reasonable probability that [the defendant] would not have been convicted of first-degree murder" if evidence tending to impeach the witness had been properly disclosed). Wolfe therefore satisfies the third and final element of his *Brady* claim.[8]

D.

Having confirmed that Wolfe is entitled to 28 U.S.C. § 2254 relief, the only remaining issue before us is whether the district court properly vacated all three of Wolfe's convictions, including his conviction for conspiring to distribute marijuana, for which he

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[8] We are not convinced otherwise by the Commonwealth's attempt to portray the Newsome report as immaterial because "the jury knew the far more impeaching fact that Barber had … avoided the death penalty in return for his testimony." *See* Br. of Appellant 22. Evidence that Barber got a deal for implicating Wolfe is hardly "more impeaching" than the Newsome report evidence that Detective Newsome specified Wolfe as the deal-garnering perpetrator. Moreover, contrary to the Commonwealth's suggestion that Barber denied being influenced by prosecutors and police to name Wolfe, *see id.*, Barber testified in the district court's evidentiary hearing that "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," J.A. 3752.

received the statutory maximum sentence of thirty years. *See* Relief Order 1 (deeming full vacatur appropriate because the Commonwealth's "*Brady* and *Giglio* violations . . . permeated the fairness of [Wolfe's] trial on all charges"). In contesting the court's vacatur decision, the Commonwealth criticizes the court's reliance on Federal Rule of Civil Procedure 59(e) to amend the Judgment. Unfortunately for the Commonwealth, the court acted well within its discretion. *See Robinson v. Wix Filtration Corp. LLC*, 599 F.3d 403, 407 (4th Cir. 2010) (explaining that "a court may alter or amend the judgment if the movant shows[, inter alia,] that there has been a clear error of law or a manifest injustice," subject to review "under the deferential abuse of discretion standard").

The Commonwealth further asserts that the district court improperly vacated Wolfe's drug conspiracy conviction because it was unaffected by the suppression of any *Brady* material. Significantly, it is the Commonwealth's position that the drug conviction and attendant thirty-year sentence were secured on the basis of Wolfe's trial testimony, wherein he "not only admitted to drug dealing, but bragged about dealing on a massive scale." *See* Br. of Appellant 57 (contending that, in light of Wolfe's self-incriminating testimony, "[t]here was no likelihood, much less a reasonable one, that Wolfe would not have been convicted of conspiracy to distribute marijuana had the allegedly withheld evidence about Wolfe's part in the murder been disclosed"). The Commonwealth emphasizes that "Wolfe's unrepentant braggadocio was the focus of the Commonwealth's closing arguments" and "justified

the Commonwealth's call for the maximum sentence." *Id.* Indeed, although the Commonwealth refers in its opening brief to "overwhelming evidence of a far-reaching drug conspiracy," *id.* at 58, the only evidence discussed therein with any specificity is Wolfe's own damning testimony.

In response, Wolfe maintains that, in the absence of the Newsome report and other wrongfully suppressed Barber impeachment evidence, "his only option was to take the stand and stake his word against Barber's — an unattractive option, for as the Commonwealth acknowledges[,] it required Wolfe to admit to committing a felony and risk thirty years' imprisonment." Br. of Appellee 72. According to Wolfe,

> [his] lawyer would have had little reason to put [Wolfe] on the stand if he could have put forth another, more credible defense theory. Instead, Wolfe's admission of guilt became his defense: In closing, Wolfe's counsel called the jury's attention to Wolfe's admission of guilt on the drug charges to contrast it with his protestations of innocence of murder. The Commonwealth's drug prosecution thus benefited enormously from its systematic suppression of Brady evidence.

Id. at 72-73 (citations, alteration, and internal quotation marks omitted).

We are entirely convinced by Wolfe's contentions. Because the Commonwealth concedes that Wolfe's trial testimony was central to his drug conspiracy conviction and sentence, and because the Commonwealth cannot prove that Wolfe would have

testified if the Newsome report had not been suppressed, we agree with the district court that Wolfe is entitled to vacatur of all three of his state convictions. *Cf. United States v. Pelullo*, 105 F.3d 117, 125 (3d Cir. 1997) (concluding that, where the government committed *Brady* violations that allegedly adduced the defendant's trial testimony, that testimony could not be used against the defendant at a subsequent trial unless the government could prove that "the defendant would have testified anyway even if there had been no constitutional violation" (citing *Harrison v. United States*, 392 U.S. 219, 225 (1968) ("Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony."))). Of course, as the district court's Judgment reflects, the Commonwealth is free to retry Wolfe on the murder, firearm, and drug conspiracy charges.[9]

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[9] We are unwilling to mine the trial record, as our distinguished colleague urges, to identify evidence, aside from Wolfe's testimony, that might sustain his drug conspiracy conviction. The Commonwealth itself has abstained from any such endeavor. *See post* at 30 (acknowledging that "the Commonwealth did not, in its argument, greatly aid in our analysis"). Moreover, whatever evidence exists is inevitably tainted by the prosecutorial misconduct in this case. By depriving Wolfe of the Newsome report, for example, the Commonwealth not only induced Wolfe to take the witness stand to gainsay Barber's trial story, but compelled the defense to abandon its challenge to the alleged drug conspiracy in order to defend against the death penalty offense of murder-for-hire. With the Newsome report in hand, Wolfe could readily have (Continued)

III.

Pursuant to the foregoing, we affirm the Judgment of the district court.

AFFIRMED

DUNCAN, Circuit Judge, dissenting in part:

I write with regard and appreciation for the majority's disposition of Wolfe's murder-for-hire and firearm convictions. I must, however, respectfully and narrowly dissent from its granting of habeas relief on the drug conspiracy conviction. The record, and, significantly, the majority does not directly refute it, contains ample evidence from sources other than Wolfe's testimony to support the drug conviction. The district court's Relief Order does not address the merits of the drug conspiracy issue at all, and the case on which it purports to rely is inapposite as to that charge. *See Wolfe v. Clarke*, No. 1:05-cv-00432 (E.D. Va. Aug. 30, 2011) (citing *Monroe v. Angelone*, 323 F.3d 286, 293 n.5 (4th Cir. 2003)).*

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impeached Barber — as well as, by extension, the evidence corroborating Barber's murder-for-hire story and implicating Wolfe in drug dealing — with compelling evidence that the murder-for-hire story had been planted with Barber by Detective Newsome. As such, the conduct of the prosecution in concealing the Newsome report undermines confidence in the fairness and propriety of the entire trial, including the drug conspiracy conviction, rendering that misconduct a sufficient independent basis for vacating each of Wolfe's convictions and for ordering his unconditional release or retrial.

* In *Monroe*, we granted habeas relief to a petitioner charged, as Wolfe is here, with murder and the use of a firearm in the (Continued)

I fully recognize and appreciate the focus of the district court and the majority on the more serious charges. And, indeed, the Commonwealth did not, in its argument, greatly aid our analysis. The Commonwealth's behavior here is far from exemplary. But the Newsome report cannot carry the weight the majority would assign to it. Because of the amount of evidence as to the drug conspiracy untainted by the *Brady* violation, I would at the very least remand that conviction to the district court for *its* specific consideration.

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commission of a felony because we agreed with the district court's determination that the Commonwealth of Virginia had committed *Brady* violations. Unlike in *Monroe*, however, Wolfe is also charged with a drug conspiracy, and nothing in *Monroe* suggests habeas relief is also appropriate for a free standing charge supported by considerable evidence free of any Constitutional infirmity.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JUSTIN MICHAEL WOLFE,

Petitioner,

v. **CIVIL ACTION NO. 2:05cv432**

HAROLD W. CLARKE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,[1]

Respondent.

AMENDED MEMORANDUM OPINION AND ORDER

Filed July 26, 2011

[1] Substituted for Gene M, Johnson, pursuant to notice dated January 18, 2011.

This matter is before the Court on Petitioner Justin Michael Wolfe's ("Wolfe" or "Petitioner") petition for habeas relief under 28 U.S.C. § 2254, Petitioner alleges that he has been imprisoned in violation of his due process lights under *Brady v. Maryland* and *Giglio v. United States*. Petitioner further alleges that the trial court contravened the Sixth and Fourteenth Amendments by striking venireman Mock from the jury panel despite the fact that he was "plainly able and qualified to serve as a juror." *Wolfe v. Johnson*, 565 F.3d 140, 148 (4th Cir. 2010). For the reasons stated herein, Petitioner's request for habeas relief is **GRANTED**.

I. FACTUAL AND PROCEDURAL HISTORY[2]

On January 7, 2002, a Prince William County jury convicted Petitioner of capital murder (murder-for-hire), use of a firearm in the commission of a felony, and conspiracy to distribute marijuana. As a result of his convictions, Petitioner was sentenced to death on the murder-for hire charge and prison terms of thirty years and three years, respectively, on the conspiracy and firearm charges. Petitioner filed an appeal in the Supreme Court of Virginia on the

[2] The factual and procedural history of this case has been well documented by the United States Court of Appeals for the Fourth Circuit in its opinion remanding these issues to this Court as well as this Court in its previous decisions. *See Wolfe v. Johnson*, 565 F.3d 140 (4th Cir. 2010); *Wolfe v. Johnson*, No. 2:05-cv-432, 2008 WL 37117 (E.D. Va. Feb. 8, 2008). This Court will rely primarily on these recitations for the detailed factual and procedural history. However, for the sake of clarity, the Court has provided a brief summary herein.

capital murder conviction[3] and filed an appeal in the Virginia Court of Appeals on the firearm and drug convictions. The non-death penalty cases were certified to the Supreme Court of Virginia and consolidated. The Supreme Court of Virginia dismissed the petition on March 10, 2005 and the United States Supreme Court denied Wolfe's petition for writ of certiorari on July 8, 2005.

On November 7, 2005, Petitioner filed his federal habeas petition under authority of 28 U.S.C. §2254 ("§2254 claim"). On August 7, 2007, the Magistrate Judge issued a Report and Recommendation declining to conduct an evidentiary hearing and recommending that his petition be dismissed. On February 11, 2008, this Court adopted the Report and Recommendation and dismissed Wolfe's petition Petitioner then filed a motion to alter or amend the judgment which this Court denied on May 20, 2008. On June 18, 2008, Petitioner filed his notice of appeal. On September 12, 2008, the United States Court of Appeals for the Fourth Circuit granted Petitioner a certificate of appealability on his extraneous influence, venireman, *Brady*, and *Giglio* claims. On May 11, 2009, the United States Court of Appeals for the Fourth Circuit affirmed the district court's rulings on the extraneous influence claim and the venireman-counsel subpart, and vacated this Court's ruling on the *Brady*, *Giglio*, and venireman-

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[3] In its opinion, the Unites States Court of Appeals for the Fourth Circuit refers to the murder-for-hire charge/conviction as capital murder. For the purpose of these proceedings, these terms may be used interchangeably. *See Wolfe v. Johnson*, 565 F.3d 140 (4th Cir. 2010).

court subpart claims. *Wolfe v. Johnson*, 565 F.3d 140 (4th Cir. 2009). Additionally, the United States Court of Appeals for the Fourth Circuit remanded the case for a determination under *Schlup v. Delo*, 513 U.S. 298 (1995) and to decide whether an evidentiary hearing was appropriate. *Id.* On February 4, 2010, this Court issued a Memorandum Opinion and Order finding that Petitioner had satisfied the *Schlup v. Delo* standard to pursue his §2254 claim. Furthermore, the Court granted Petitioner's Motion for an Evidentiary Hearing on his *Brady* and *Giglio* claims and reserved its ruling on Petitioner's venireman-court claim. The Court conducted an evidentiary hearing on Petitioner's *Brady* and *Giglio* claims on November 2, 2010[4] At the conclusion of the hearing, the Court ordered both parties to submit proposed findings of fact and conclusions of law. Both parties submitted proposed findings of fact and conclusions of law on January 18, 2011.

On April 22, 2011, Petitioner also filed a Motion for Leave to Amend Petition for Habeas Corpus to include a new legal argument regarding key government witness, Owen Barber's, false testimony at trial. The Director filed a response in opposition to the motion on May 4, 2011; and Petitioner filed a reply in support on May 5, 2011. Having been fully briefed, these matters are now ripe for judicial determination.

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[4] The Court conducted a four-day evidentiary hearing, beginning November 2-3, 2010 and continuing on November 16-17, 2010.

II. LEGAL STANDARD

Title 28 U.S.C. §2254 states that "the Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

A. Legal Standard under *Brady v. Maryland* and *Giglio v. United States*

The Supreme Court has held that both the withholding of exculpatory evidence from a criminal defendant by a prosecutor and the knowing use of false testimony violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Brady v. Maryland*, 373 U.S. 83, 86 (1963); *Giglio v. United States*, 405 U.S. 150, 153-55 (1972). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "Evidence is 'exculpatory' and 'favorable' if it 'may make the difference between conviction and acquittal' had it been 'disclosed and used effectively.'" *United States v. Wilson*, 624 F.3d 640, 661 (4th Cir. 2010) (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)). For a court to find a *Brady* violation, it must determine that the evidence was 1) favorable to the accused, 2) suppressed by the prosecution (either willfully or inadvertently), and 3) material. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Evidence that is favorable to the accused includes both exculpatory

(whether requested by defendant or not) and impeachment evidence. *Id.*; *see United States v. Bagley*, 473 U.S. 667, 676 (1985) (holding that the *Brady* rule includes impeachment evidence).

In analyzing materiality, courts must determine whether there is a "reasonable probability" that the result of the proceeding would have been different if the evidence had been disclosed. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). This showing "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985). Rather, a petitioner can fulfill the materiality standard by showing that the cumulative effect of the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."'[5] *Id.* at 435-437. This cumulative effect analysis emphasizes the fact that when making a materiality finding, courts should consider the suppressed evidence collectively, rather than judging the materiality of each item of suppressed evidence. *Id.* at 436; *see id.* at 437, n.10 ("We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for the purposes of materiality separately and at the end of the discussion.).

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[5] These materiality considerations place a responsibility on the prosecutor "to learn of any favorable evidence known to others acting on the government's behalf, including the police, and to gauge the likely net effect of all such [favorable] evidence" and make disclosure when the point of reasonable probability is reached. *Kyles*, 514 U.S. at 437.

B. False Testimony as Grounds for Habeas Relief

Knowing use of false testimony violates due process. *Giglio v. United States*, 405 U.S. 150, 153 (1972). This rule applies regardless of whether the false testimony is solicited, or merely allowed to stand uncorrected after it appears. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Non-disclosure of evidence affecting credibility also falls within this rule "when the 'reliability of a given witness may well be determinative of guilt or innocence.'" *Giglio*, 405 U.S. at 154 (quoting *Napue v. Illinois*). As with an alleged *Brady* violation, a finding of materiality is required to show that "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" in order for a petitioner to receive habeas relief. *Id.*; *see Napue*, 360 U.S. at 271. Courts have similarly concluded that petitioners may receive habeas relief based on the use of false testimony when a petitioner shows that government officers knew about the falsities in the testimony at the time of the trial; and, when there is evidence, such as a credible recantation, indicating that the testimony was in fact false. *Stockton v. Virginia*, 852 F.2d 740, 749 (4th Cir. 1988).

C. Dismissal of a qualified venireman for cause under *Witherspoon v. Illinois*

Capital defendants have a right to a fair and impartial jury under the Sixth and Fourteenth Amendments. *Gray v. Mississippi*, 481 U.S. 648, 658 (1987). In ensuring this right, courts have held that a death sentence cannot stand when a trial court "excludes from a capital jury a prospective juror who

in fact is qualified to serve." *Id.* at 650-651. This rule includes veniremen who are dismissed for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968); *see also Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (holding that a venireman may be excused for caused based on his or her views on capital punishment if such views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"). When such violations occur, the court does not engage in an inquiry regarding the harm imposed by such error, but rather its findings immediately render the sentence imposed invalid. *Gray*, 481 U.S. at 668 ("because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury…and because the impartiality of the adjudicator goes to the very integrity of the legal system" harmless-error analysis cannot apply); *see Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam) ("[u]nless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings,' he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.").

III. FACTUAL FINDINGS

1. The prosecutors choreographed and coordinated witness testimony through a series of joint meetings with Owen Barber and

J.R. Martin, Owen Barber and Jennifer Pascquierllo and Jason Coleman and Chad Hough[6] Tr. 315; Am. Interr. Ans. at 3, 5; *see* Tr. 142 (providing Barber's testimony that Ebert wanted to ensure that the testimonies matched); *see also* Tr. 294 (providing Conway's testimony that the joint meeting between Barber and Martin was necessary to resolve a conflict in testimony and admitting that Barber conformed with Martin's recollection on at least one instance); Tr. 762 (providing Conway's testimony that he conducted a joint meeting with Coleman and Hough to discuss Hough's testimony regarding conversations with Wolfe).

2. At the time of the trial, the Commonwealth's Attorney' s Office had a policy of putting exculpatory (i.e., *Brady*) disclosures in writing. Tr. 75-76.[7]

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[6] The term "prosecutors" primarily refers to Commonwealth's Attorney Paul Ebert ("Ebert") and Assistant Commonwealth's Attorney Richard Conway ("Conway"). Ebert delegated most of the day to day prosecution of the case, to Conway. Conway also prepared the one formal *Brady* disclosure provided to Petitioner at trial.

[7] During the habeas evidentiary hearing, Conway testified that he had discussions with Petitioner's trial counsel regarding other exculpatory information not disclosed in the written Brady disclosure. Tr. 292. The Court notes Conway's statements that he disclosed some exculpatory information to defense counsel in informal discussions. However, having observed Conway's live testimony and having reviewed the parties' filings and defense counsel's arguments at trial, the Court considers (Continued)

3. The prosecutors did not provide any reference to or information regarding the joint meetings with witnesses in their written *Brady* disclosure. *See* Tr. 702-03; *see also* Resp. Ex. 1.

4. Sergeant Pass, lead officer of the drug investigation relating to Wolfe and Petrole, submitted reports outlining the investigation of Petrole and others' drug activities to both the prosecutors and homicide investigators. Tr. 184, 186. Conway did not review all of the reports dealing with the drug investigation and he did not provide them to Petitioner. Tr. 191-192.

5. Reports from the federal government (Department of Justice and Drug Enforcement Agency) regarding the parallel narcotics investigation were provided to the prosecutors in preparation for the trial. Pet'r's Ex. 30; Tr. 45 (confirming that the reports would have been part of the Commonwealth's' file "as a matter of practice"). Prosecutors reviewed these reports, but failed to include them in the *Brady* disclosure. Tr. 53 and 192.

6. The Prosecution failed to disclose Detective Newsome's report outlining his initial interview with Owen Barber on April 4, 2001,

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Conway's testimony with extreme skepticism. The Court finds it not only self-serving to make a blanket and non-specific statement that he made some disclosures in verbal conversations with defense counsel, but considering the proliferation of suppressed evidence in this case, the Court only consider's Conway's testimony reliable to the extent that it finds evidence proving disclosure in the trial transcripts.

during which he implicated Wolfe as being involved in the murder before Barber mentioned his involvement. Pet'r's Ex. 70 at 30-31 (report); Resp't Ex. 1 (Answer); Tr. 137.[8]

7. On November 2, 2010, while under oath before this Court, Owen Barber made a credible recantation of his trial testimony and indicated that Petitioner Justin Michael Wolfe was not involved in the murder of Daniel Petrole. Tr. 117.[9]

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[8] On May 4, 2001, Newsome submitted a narrative information report during which he describes his interactions with Barber during his initial arrest and transportation of Barber back to Prince William County. In the report, Newsome writes: "I told Barber that we knew he had killed Petrole ... but that he had killed him for someone else and we believed that person was Justin Wolfe." Pet'r's Ex 70 at Prosecution 30. He then describes Barber's reaction: "He asked me, 'what do I get out of it if I tell you who the other person, the higher up, is?'" To which Newsome states, "I told him it could simply be the difference between Capitol [sic) murder or First Degree, execution or life in prison ... " *Id.* at Prosecution 30-31.

[9] The Court notes that Barber's testimony on November 2, 2010, is consistent with another written recantation by affidavit which he executed on December 14, 2005 as well as his trial testimony describing how he shot Petrole after "he reached across for the glove box real quick ... " J.A. 1630; *see also* Tr. 160-61 (stating that the reason he shot Petrole was because "he reached for his glove box fast"). The Court also notes that his testimony is consistent with other exculpatory evidence withheld by the Prosecution in contravention of *Brady*. *See e.g.*, Pet'r's Ex. 70 at 30-31 (Newsome's report suggesting Wolfe as the "higher up" in the murder and indicating that implicating Wolfe could be the difference between "execution or life in prison"); Tr. 457-58, 460 (containing testimony from Jason (Continued)

8. The Prosecution failed to disclose the tapes of multiple recorded meetings with key witnesses or the existence of such recordings to the Petitioner during trial. *See* Tr. 192; *see also* Tr. 554-55; Pet'r's Ex. 24.[10]

9. Prosecutors withheld evidence of Barber's personal dealings with the victim, including a claim that Barber owed Petrole money, a claim that Petrole had a hit out on Barber and a claim that Barber and Petrole had recently associated with each other socially. Pet'r's Ex. 41 (containing notes from an interview

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Coleman indicating that he told Ebert that Barber said he acted alone). In his habeas testimony, Barber also described that he lied about Wolfe's involvement because he wanted to avoid a capital murder charge. Tr. 13 8-40, 171. Specifically, he testified that Ebert, Conway, Mr. Pickett (Barber's attorney), Det. Newsome and Det. Walburn all indicated that he would face capital murder, and consequently the death penalty, if he did not cooperate and disclose the other participants. *See id.* This testimony is consistent with the suppressed report from Det. Newsome regarding his statements to Barber (during his transportation from California to Virginia) about Wolfe being involved in the murder and the importance of Barber's cooperation in avoiding the death penalty during Barber's transportation.

[10] Aside from failing to disclose recorded interviews of key witnesses such as Owen Barber and Jennifer Pascquierllo, the prosecutors also withheld particularly relevant interviews of Walter Gunning (the victim's roommate and drug associate) from March 16, 2001, where he discussed drug associates and other potential persons that could have been responsible for the murder; and March 23, 2001, where he discussed the plan to cut another drug associate, Patterson, out of future drug transactions and the extent to which Patterson was aware of the plan.

between a confidential informant and Detective Walburn stating: "Owen [Barber J owed Petrole money;" "Petrole had a hit out on Owen;" and that Petrole confronted Barber about the money owed and Barber refused to pay); Tr. 352 (stating that Jesse James knew both Petrole and Barber because they hung out at the same household as him in Chantilly, Virginia); Pet'r's Ex. 61 (indicating Randall Ketcham's statement that he had done ecstasy with Petrole and Barber).

10. The Prosecution withheld information indicating that Petrole was rumored to be an informant. Pet'r's Ex. 57; Tr. 687 (stating that Conway was aware of the rumor but failed to share the information because he did not have anything to substantiate it).

11. The Prosecution failed to disclose evidence that Mr. Petrole (the victim's father) was aware of the victim's drug activities and allowed Mr. Petrole's testimony to the contrary to remain uncorrected.

12. The Prosecution failed to disclose that their witness, Regina Zenner, was a confidential informant. Tr. 765:13-24.

13. The Prosecution withheld evidence of prior inconsistent statements made by its own witnesses. Pet'r's Ex. 27 at Police-1175 (revealing Chad Hough's statement that he did not know who made the "do whatever you have to do" comment about robbing a drug dealer).

14. The Prosecution did not disclose its off the record agreement not to prosecute witness J.R. Martin for his participation in the murder based on his cooperation with the Commonwealth. Tr. 414.

IV. DISCUSSION

Petitioner Justin Michael Wolfe seeks relief under 28 U.S.C. §2254. In doing so, Petitioner asserts that the Commonwealth of Virginia ("Commonwealth") violated his due process rights under *Brady v. Maryland* and *Giglio v. United States*. Specifically, Petitioner asserts, *inter alia*, that the Commonwealth withheld potential impeachment evidence, evidence related to alternate theories of the crime, and other government reports and notes containing exculpatory information from him during the state court criminal trial proceedings. Petitioner also alleges that the Commonwealth knowingly provided false testimony or allowed false testimony to go uncorrected in violation of *Giglio* and *Napue v. Illinois*. Petitioner also asserts that the trial court violated his rights under the Sixth and Fourteenth Amendments by erroneously dismissing a qualified juror for cause. The Court will consider each of these assertions in turn.

A. Brady and Giglio Claims

1. The Prosecution's Case

In order to assess the implications of Petitioner's assertions and the Court's factual findings, the Court must first consider the Prosecution's theory of the case as presented at trial. The evidence presented at trial indicates that Petitioner, Justin Michael Wolfe,

was a drug dealer in Northern Virginia. Petitioner dealt mostly with a high-grade marijuana, commonly known as "chronic," which the victim, Daniel Petrole supplied to him. Petitioner was close friends with another local drug dealer named Owen Barber. The Prosecution presented evidence that Petitioner arranged for Barber to rob/kill victim Petrole, who was Petitioner's drug supplier. More specifically, the Prosecution introduced testimony from Barber stating that he spoke with Wolfe about murdering his drug supplier and that he met with Wolfe on the day before the murder to discuss the plan. On March 15, 2001, Owen Barber waited outside Regina Zenner's apartment in Centreville, Virginia while the victim, Petrole, conducted a drug transaction with the Petitioner. Barber knew that Petrole was Wolfe's drug supplier and was aware of the transaction taking place after speaking with Wolfe on the phone. J.A. 1602. Barber then followed Petrole to his townhouse near Bristol, Virginia and fired ten rounds of ammunition through the passenger side of Petrole's vehicle, killing him. J.A. 563.

At trial, the Prosecution presented evidence, in the form of witness testimony, that Barber acted under a murder-for-hire scheme with Petitioner. J.A. 1687. Specifically, Barber testified that he agreed to kill Petrole for Wolfe in exchange for a half-pound of chronic marijuana, four pounds of lower grade marijuana ("schwag"), forgiveness of a $3,000 debt and $10,000 in cash. J.A. 1645. In an effort to link Petitioner to Barber, the Prosecution presented phone records from the Petitioner and Barber to show that they were in contact around the time of the murder. Ember's testimony provided the context for

these phone calls as he described calling Wolfe while he was following Petrole to keep him abreast of the status of the pursuit. J.A. 1651-53. Petitioner presented a contrasting version of the events explaining that the phone calls and any other conversations were either in the normal context of their friendship (e.g., meeting up socially) or related to a drug transaction. *See* J.A. 2094-97. Motive then emerged as the critical factor on which the Prosecution based its theory of the case. The Prosecution argued that Barber would have no reason to kill Petrole, other than his agreement with Wolfe. The Prosecution further argued that Wolfe had motive to kill Petrole because: 1) he owed Petrole $60,000 and did not like paying his debts (J.A. 2175, 1463-64); 2) he wanted to make more money by increasing the amount of chronic dealers (J.A. 577); and 3) Petrole was upset with him (Wolfe) for not paying down his debt (J.A. 2178).

The Commonwealth established their theory of the case through the testimony of several witnesses, primarily Owen Barber, Chad Hough, Jennifer Pascquierllo, Ian Wiffen and J.R. Martin. J.A. 2247 (identifying these witnesses as the individuals whose testimonies cast the most doubt on Wolfe's testimony that he had no involvement in the murder). Owen Barber provided the only evidence directly connecting Wolfe to the murder.[11] Despite the fact that the

[11] The Prosecution has admitted that without Barber's testimony, Wolfe probably would not have been prosecuted on the murder charge. *See e.g.*, Resp't Ex. 18 at 32 ("but for his [Barber's] testimony, Mr. Wolfe probably would not have been prosecuted").

Commonwealth Attorneys, Mr. Paul Ebert ("Ebert") and Mr. Richard Conway ("Conway"), unapologetically employed an unusual practice of coordinating and choreographing the testimony of four of the five key witnesses,[12] the other testimonies primarily served to corroborate Barber's story, albeit often through rank speculation and double hearsay testimony. *See e.g.*, J.A. 1758 (presenting speculation testimony from J.R. Martin that Barber did not tell him why he killed Petrole but that it was "obvious" to him); J.A. 1874, 1877-79 (presenting double hearsay testimony from Jennifer Pascquierllo describing what Barber told her that Wolfe told him and other general hearsay testimony about what Barber told her); J.A. 1399 (presenting testimony from Hough stating that he did not know that Wolfe was involved in the murder and then speculating that "maybe it could be linked to somebody"); J.A. 1399-1400 (indicating that Hough was not sure about a connection and that he did not speak to his attorney until he spoke with Jason Coleman who stated that "he [Coleman] thought it could be linked").

The Prosecution also used circumstantial evidence such as phone records, private conversations between Barber and Wolfe, and facts indicating that Wolfe gave individuals such as J.R. Martin (person whose car was used for the murder) and Jennifer Pascquierllo (Barber's girlfriend) money

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[12] The Court notes credible testimony from the evidentiary hearing that Ebert and Conway also held these joint meetings on occasion without the presence of witness' counsel. Tr. 416, 717 (disclosing an interview with Barber without his attorney); Tr. 761 (disclosing joint interviews including Coleman and Hough outside the presence of their known counsel).

during the aftermath of the murder to string together its theory of the case. While the Petitioner admitted many of these circumstantial facts in his own trial testimony (e.g., admitted to speaking with Barber on the phone throughout the night of the murder, admitted to being in debt to Danny Petrole, admitted to giving Pascquierllo money and posting her bond, admitted to giving Martin a discount on marijuana after he indicated that he knew what Wolfe had done), he has maintained his testimony that all of these acts occurred in the context of his drug conspiracy and not in relation to a murder-for-hire scheme. After hearing all of the evidence, a jury found Wolfe guilty on all three charges and recommended a sentence of death for the capital murder conviction.

2. Prosecution's suppression of impeachment evidence

a. Evidence regarding Owen Barber's Relationship with Petrole

Most of the Prosecution's direct evidence came from the testimony of Owen Barber. J.A. 2530. During the course of Barber's direct examination, the Prosecution established the development and execution of the murder-for-hire agreement between Barber and Wolfe and its claim that but for Wolfe's request, Barber would not have killed Petrole. J.A. 1601-02. Notably, Barber testified that he did not know the victim,[13] thus allowing the Prosecution to

[13] Barber testified that he knew of Petrole from grade school, but that he had no relationship with Petrole in recent years or leading up to the time of his death.

establish its theory that Barber only killed the victim at the direction of Wolfe. *See id.* On cross-examination, Wolfe's counsel attempted to impeach Barber's testimony that he had no relationship with the victim, and therefore no other reason to kill him. J.A. 1691-93. Ultimately, Wolfe's counsel was unsuccessful in impeaching Barber's testimony and the jury convicted Wolfe of capital murder with Barber's testimony standing as the primary source of direct evidence.

The post-conviction evidentiary hearing uncovered the fact that the Prosecution withheld exculpatory evidence from the Petitioner that could have assisted the trial counsel in impeaching Barber's testimony. First, this Court finds that the Commonwealth withheld information regarding the relationship between Barber and Petrole in violation of *Brady*. As indicated in the factual findings, Prosecutors were in possession of various forms of evidence indicating that Barber had a personal relationship with the victim prior to his death. This evidence included statements from a confidential informant that Barber owed Petrole money, that Petrole had a hit out on Barber and notes from Detective Walburn (lead homicide detective) indicating that Barber was "tight" with the victim's roommate, Paul Gunning. Pet'r's Exs. 39, 41. The evidence also included a statement from Jesse James indicating that he, Petrole and Barber hung out at the same household (Tr. 352) and a statement from Randall Ketcham indicating that he had done drugs with Petrole and Barber (Pet'r's Ex. 61).

In finding that the Commonwealth failed to disclose evidence indicating that Barber had a relationship with Petrole, the Court considers the three factor *Brady* analysis. *See Banks v. Dretke*, 540 U.S. 668, 691 (2004). In this case, the evidence was favorable to Wolfe in that it would have impeached the key witness' testimony and possibly established an alternative motive for the crime. It was withheld from the Petitioner during trial as established by the fact that it was only submitted to Wolfe in the discovery ordered by this Court in its habeas inquiry as well testimony at the evidentiary hearing. Finally, as discussed in more detail below, the evidence was material because when combined with the circumstantial nature of the case and the importance of weighing Barber's credibility as the primary source of direct evidence, it reasonably undermines confidence in the verdict by contradicting a central aspect of the Prosecution's theory of the case (i.e., the idea that Barber did not know Petrole and would have no other reason to kill him). *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Confidential Informant's Statements about Barber and Petrole relationship

Respondent ("Director") characterizes the confidential informant's statements (as contained in Detective Walburn's notes) as rumor and speculation and asserts that the Prosecution's failure to disclose this evidence is not material because there was no evidence to corroborate the statements. Director's Proposed Findings of Fact and Conclusions of Law at 19- 21. In *United States v. Moussaoui*, the United States Court of Appeals for the Fourth Circuit

addressed a similar assertion, albeit outside of the *Brady* context. In *Moussaoui*, the court considered whether a defendant asserting his Sixth Amendment right to depose enemy combatant witnesses could rely on obviously inadmissible statements to show that the testimony of certain witnesses was material. The Government asserted that petitioners could rely *only* on admissible evidence to establish the materiality of witness testimony. *United States v. Moussaoui*, 382 F.3d 453, 472 (4th Cir. 2004) (emphasis added). The United States Court of Appeals for the Fourth Circuit agreed that petitioners should not be allowed to rely on obviously inadmissible statements (e.g., statements of belief rather than personal knowledge); however, it expressly stated that "many rulings on admissibility ... can only be made in the context of a trial" and therefore cannot be meaningfully assessed outside of that context. *Id.* (also noting that statements that may not have been admissible during the guilt phase, may nonetheless be admissible during the penalty phase) (emphasis added). The court cited the Supreme Court's decision in *Wood v. Bartholomew* which held that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure under *Brady*. *Id.*; *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995).

This Court emphasizes the Supreme Court's consideration of whether certain materials are likely to lead to the discovery of admissible exculpatory evidence in making its materiality findings. In discussing the confidential informant statements, Detective Walburn indicated that the statement that

Petrole owed Barber money and the statement that Petrole had a hit on Barber were both pieces of information that the confidential informant said he had heard. Tr. 571-572. While the Director asserts that this type of testimony would not have been admissible at trial, this Court cannot state that such third party statements would be obviously inadmissible given the proliferation of other hearsay evidence that the Prosecution presented (and the trial court allowed) during Petitioner's criminal proceedings. *See Moussaoui*, 382 F.3d at 472. More important, had the statements been disclosed, the Petitioner would have had the opportunity to use the information to investigate alternate theories and discover other exculpatory evidence. Therefore, the Court finds that the confidential informant's statements should have been disclosed to the Petitioner under *Brady* because they are not obviously inadmissible given the context of the trial and because they would have likely led to other admissible exculpatory evidence had the Petitioner been afforded an opportunity to investigate the truthfulness of the statements.

James and Ketcham's Statements about Barber and Petrole relationship

However, even if the Court assumes that the confidential informant's statements would not be admissible at trial, the Commonwealth's suppression of both Jesse James' and Randall Ketcham's statements undoubtedly constitute a *Brady* violation. The Director again asserts that the Prosecution's failure to disclose the James and Ketcham statements is not material because the statements

were speculative and lacked corroborating evidence. Director's Proposed Findings of Fact and Conclusions of Law at 19-21. However, both James and Ketcham made statements to the police based on their own experiences and knowledge. The Court also notes that the Prosecution's actions stifled any efforts Petitioner could have made to corroborate the statements. Furthermore, the Court finds no legal authority that indicates exculpatory statements must be corroborated before they can be considered as *Brady* evidence. To the contrary, the Court finds case law that indicates exculpatory evidence, particularly that which would be admissible at trial, should be provided to the defendant under *Brady*. *See Wood*, 516 U.S. at 6. Had the Commonwealth not suppressed this evidence, Petitioner would have been able to impeach the Government's key witness by calling both individuals as witnesses to directly refute Barber's testimony. The jury would have been allowed to weigh an admitted murderer's testimony (corroborated only by Martin, who provided him with a car on the night of the murder) against two other individuals that were wholly unrelated to the murder. The Commonwealth's suppression, therefore, undermines confidence in the verdict because it allowed Barber's testimony to stand unrefuted as opposed to providing not one, but two additional witnesses to challenge Barber's credibility. *See Monroe v. Angelone*, 323 F.3d 286, 315 (4th Cir. 2003) ("A live witness directly contradicting [key witness'] testimony…would have given the jury strong reason to doubt [key witness') veracity. Significantly, the jury, had it been shown that a major prosecution witness was testifying falsely, is

likely to have been more sympathetic to [defendant's] entire case"). Furthermore, if provided during trial, James and Ketcham's testimonies would have undermined the Prosecution's theory of the case because they would have challenged the notion that Barber did not have a personal relationship with Petrole and therefore had no other reason to kill him. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995). For these reasons, the Court finds that the Commonwealth's failure to disclose this evidence meets the three factor test that the Supreme Court articulated in *Banks v. Dretke*. Hence, the Prosecution unconstitutionally withheld exculpatory evidence regarding Barber's potential relationship with the victim in violation of *Brady v. Maryland*.

b. Newsome's Interview with Barber

Prosecutors also failed to disclose a report from Detective Newsome which contained Newsome's initial interview with Barber. Newsome told Barber the police knew that Wolfe was involved in killing Petrole. He also told Barber that implicating the "higher up" (i.e., Wolfe) could mean the difference between execution or life in prison. Pet'r's Ex. 70 at 30-31. This information is favorable to Wolfe because it documents the fact that detectives first mentioned Wolfe in connection to the murder and presented Barber with the option of execution or life imprisonment in exchange for implicating someone else, well before Barber began cooperating with the Commonwealth or implicating Wolfe in the murder. Prosecutors do not dispute the fact that the report was not provided to the Petitioner. Furthermore, the report is material because it reflects that Barber had

a motive to misrepresent the facts regarding Petrole's death.

c. Barber's statement that he acted alone

The Prosecution also withheld evidence indicating that Barber told his roommate, Jason Coleman, that he acted alone on the night of Petrole's murder. During the evidentiary hearing, Coleman testified that he had a conversation with Barber after the murder where Barber admitted to him that he murdered Pelrole and acted alone. *See* J.A. 456-61 (recounting the conversation with Barber and Coleman's disclosures to the prosecutors and investigators regarding what Barber had told him). This evidence is favorable to Wolfe because it is a prior statement from the shooter indicating that he [the shooter] did not act in concert with another person, let alone Wolfe. It is material to the case because it is important impeachment evidence. In fact, during the criminal trial, Wolfe's counsel cross-examined Barber regarding his conversation with Coleman on the Sunday after police first questioned him. *See* J.A. 1701-02. In an attempt to uncover more information about Barber's actions and admissions after the murder, Wolfe's trial counsel asked Barber, "what did you say to him [Coleman]" to which Barber responded "I can't recall." J.A. 1703-04. Counsel then followed up with the question "you're about to take off running from the police and you don't remember what you said" and Barber responded, "no." J.A. 1704. Had the Petitioner been in possession of this information, he would have been able to impeach Barber on his allegations regarding Wolfe's involvement or seek to refresh his recollection, based

on a conversation that he admitted having with Coleman.

Although this evidence is both favorable and material, the Director disputes the allegation that the Commonwealth withheld it. Coleman testified that he told Ebert that Wolfe was not involved in the murder during a meeting held the week after the murder. Tr. 463. The Director asserts that Coleman never told prosecutors or police that Barber acted alone. Director's Proposed Findings of Fact and Conclusions of Law at 7. In support of this notion, the Commonwealth notes that both Ebert, Conway and Det. Walburn's testimonies suggest that Coleman did not make the statement. Tr. 790 (containing Ebert's testimony that Coleman did not make that statement, Tr. 550 (containing Det. Walburn's denial that Coleman made that statement), Tr. 693 (containing Conway's denial that Coleman made that statement). During the evidentiary hearing, the Commonwealth attempted to buttress this position by asking Sgt. Pass, Det. Moore and Det. Newsome whether they remembered Coleman making that statement during their own separate interactions with him. Both Sgt. Pass and Det. Newsome indicated that they did not recall Coleman making that statement and Det. Moore indicated that Coleman did not make the statement in front of him (yet conceded that he was not in all of the interviews conducted by Det. Walburn). *See* Tr. 551, 534, 668 (containing Det. Moore, Det. Pass and Det. Newsome's testimonies, respectively, regarding their recollection of Coleman's statement).

During the evidentiary hearing, Coleman testified that he told Ebert that Wolfe was not involved in the murder and he testified that he believed that Sgt. Pass was also in the room.[14] During the evidentiary hearing, Sgt. Pass stated that he did not remember Coleman making the statement that Barber acted alone. Tr. 534. He did not state unequivocally that Coleman did not make the statement. The Court had an opportunity to examine Coleman on the stand and recalls his unequivocal testimony indicating that he told Ebert about Barber's statement and describing the circumstances under which he told him. Tr. 458. The Court finds Coleman's testimony to be credible. In light of Coleman's testimony, the Court concludes that the Commonwealth suppressed exculpatory evidence in violation of *Brady* by not disclosing the fact that Barber told Coleman he acted alone in committing the murder to the Petitioner during the trial phase.

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[14] The Court notes the Director's argument referencing Petitioner's Exhibit 24 and asserting that Coleman must have made the statement to Ebert on March 22, 2001 because that was the only meeting between Ebert and Coleman within the time frame that Coleman stated (as recorded by Det. Walburn). However, during the evidentiary hearing Coleman testified that he had many conversations with Ebert regarding what happened on the night of the murder. Tr. 457. This testimony contradicts the Director's argument that Coleman only met with Ebert two times. Director's Proposed Findings of Fact and Conclusions of Law at 7. Therefore, the Court does not discount the fact that Coleman and Ebert may have spoken outside of the formal meetings noted by Det. Walburn.

d. J.R. Martin

In addition to the suppressed evidence relating to Owen Barber, the Prosecution also withheld exculpatory evidence relating to J.R. Martin, a prosecution corroborating witness. Martin was a close friend of Barber and provided him with a car to use on the night of the murder. After Barber testified, the Prosecution called Martin to corroborate Barber's testimony. Having had his testimony coordinated in a joint meeting with prosecutors, Martin provided testimony very similar to Barber's testimony. Martin admitted to being friends with and getting drugs from both Barber and Wolfe. J.A. 1730, 1733-34. He corroborated Barber's testimony that Barber had private conversations with Wolfe before the murder (at Back Yard) and after the murder (at Bridges), although he could only speculate about the content of the conversations. J.A. 1740-42, 1759. While corroborating other facts relating to Barber's actions, Martin also testified that Wolfe told him not to say anything [about what happened] and that he [Wolfe] commented that he was about to make a lot of money. J.A. 1760.

Wolfe's counsel was unable to effectively impeach Martin's testimony because the Prosecution withheld an off the record agreement not to prosecute J.R. Martin if he cooperated with the Commonwealth. The information was suppressed during the trial phase because the presence of this agreement was only discovered during this Court's habeas hearing. During the evidentiary hearing, Martin's attorney, Robert Horan, testified that months into the investigation, the Prosecution indicated to him that

Martin would not be charged if he cooperated with the Commonwealth. Tr. 414. When the Court explicitly asked him whether he had an off the record "gentleman's agreement" with the prosecutors, Horan initially responded, "no." However, he quickly clarified that response and admitted that while there was no agreement during the initial meetings, one later took form. Tr. 414. The fact that Horan turned over attorney-client privileged information during the course of police interrogations further supports the existence of an oral off the record agreement. Tr. 418-20; Pet'r' s Ex. 29 at Prosecution 466.

The Director alleges that this information was never withheld from the Petitioner during trial because no such agreement existed. Director's Proposed Findings of Fact and Conclusions of Law at 4 (citing testimony from Martin denying that an agreement existed (Tr. 633-35, 655-56) as well as similar testimony from the Prosecutors (Tr. 286, 708, 820)). The hearing testimony confirms that the Prosecution never executed a *written* agreement not to prosecute Martin. However, the Court finds Mr. Horan's testimony regarding an understanding not to prosecute that emerged months after the investigation began and before Martin testified at trial to be credible and persuasive; this is particularly so, considering Horan's willingness to provide attorney client privileged information to the police prior to the trial.

This evidence qualifies as impeachment evidence worthy of *Brady* disclosure because it reveals a potential source of bias of the witness in favor of the Commonwealth's case (i.e., if the witness would not

be prosecuted for his crimes, he had more incentive to cooperate with the Government and provide testimony consistent with their theory of the crime). *See United States v. Shelton*, 200 Fed. Appx. 219, 221 (4th Cir. 2006) (stating that a defendant has the right to cross-examine witnesses about potential sources of bias under the Confrontation Clause); *see also United States v. Bagley*, 473 U.S. 667, 676 (1985) (indicating that evidence used to impeach a Government witness qualifies as favorable for the purpose of *Brady* inquiry).[15] Furthermore, it is

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[15] In *Williams v. Taylor*, the United States Court of Appeals for the Fourth Circuit considered the question of whether the state's suppression of an informal plea agreement constituted a *Brady* violation. In *Williams*, the United States Court of Appeals for the Fourth Circuit held that there was no *Brady* violation because 1) there was evidence that no such agreement existed and 2) defendant could not show materiality. The case at bar warrants a different conclusion than *Williams* because it is distinguishable on several important points. First, in the instant case, Martin's lawyer testified that he had an understanding that his client would not be prosecuted if he cooperated with the Commonwealth. This differs from *Williams* where both the prosecutor and witness' lawyer stated unequivocally that no agreement existed. *Williams v. Taylor*, 189 F.3d 421, 428 (1999) (finding that there was unrefuted evidence indicating that an informal plea agreement did not exist at the time of the witness' testimony). The instant case is also distinguishable from *Williams* on materiality. In *Williams*, the United States Court of Appeals for the Fourth Circuit held that even if an informal agreement existed, defendant could not show materiality because he had already testified that he was at least an accomplice in the rape of one victim and that he shot the other in the head. *Id.* at 429. In the instant case, Wolfe testified at trial that he was in no way involved in Petrole's murder or any murder for hire scheme with Barber. In light of (Continued)

material because it calls into question a key corroborating witness' motive for testifying at trial. Put in the appropriate context, Martin was not simply another corroborating witness. Rather, he was the person who provided the car that Barber used to commit the murder;[16] the first person to see Barber after he committed the murder; the first person to whom Barber confessed committing the murder; and the person who was present to observe the meetings between Barber and Wolfe after the murder. During cross-examination, Wolfe's counsel asked Martin whether he was facing charges; however, without knowledge of the informal agreement, Petitioner's trial counsel could not fully probe the scope of the witness' cooperation and arrangement with the Commonwealth.[17] *See* J.A. 1805. At trial, Martin testified that the only deal he had with the

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Wolfe's testimony at trial, the impeachment of a key corroborating witness would likely have impacted the outcome of the trial when considered with the totality of the suppressed evidence.

[16] At the trial, Martin admitted that he allowed Barber to borrow his car on the night of the murder after Barber pulled out a gun and told him that he was going to shoot someone in the knee-caps. J.A. 1790.

[17] Defense counsel also tried to impeach Martin during cross-examination on the basis that his testimony only became consistent with Barber's on certain points after the Prosecutors conducted a joint meeting at the Commonwealth Attorney's office. J.A. 1789-90; *see also* Tr. 1788-89 (providing Martin's testimony that Barber had a different recollection of whether Martin knew that Barber was going to shoot/kill someone and indicating that the inconsistency was resolved after Mr. Conway interjected with a suggestion on how to harmonize the story).

Prosecution was that they would not use his truthful statements against him. J.A. 1780-81. While the jury had some impeaching testimony available to determine Martin's credibility, the Prosecution deprived the jury of an opportunity to fully assess the Martin's potential bias by failing to disclose its off the record agreement not to prosecute Martin.

In light of the importance of Martin's testimony as corroboration for Barber's account of the events and given the Petitioner's inability to fully cross-examine Martin with all of the impeachment evidence available, this Court finds that the cumulative effect of the Prosecution's suppression of the existence of the informal agreement, combined with the circumstantial nature of the case and the impact of other withheld impeachment evidence, undermines confidence in the verdict. Having considered all of these factors, the Court finds that the Prosecutors unlawfully withheld impeachment evidence from the Petitioner in violation of *Brady*.

e. Chad Hough

Petitioner asserts that the Prosecution also withheld impeachment evidence regarding Chad Hough in violation of *Brady*. During Petitioner's trial, the Prosecution used Hough's testimony to corroborate Barber's account of the murder for hire plot. Hough testified that at various times, he discussed the idea of robbing drug dealers with Jason Coleman and Petitioner Wolfe. More specifically, Hough testified about one particular conversation with Coleman and Wolfe where Wolfe advised him to "do what you have to do" if things went wrong during the course of a robbery. J.A. 1395. On cross-

examination, Petitioner's trial counsel attempted to impeach Hough's testimony with the limited information available to him. He asked about Hough's steroid use with Jason Coleman (J.A. 1408), he inquired about whether Hough took the robbery conversations seriously (J.A. 1412-13) and he inquired about Hough's impending drug charges. However, he was unable to cast doubt on Hough's credibility surrounding the drug robbery statement.

Discovery during this habeas action revealed a prior conversation with the Commonwealth during which Hough made inconsistent statements regarding his exchange with Wolfe and Coleman. During a December 5, 2001 taped interview in the Commonwealth Attorney's office (in the presence of Conway, his attorney and Detective Walburn), Hough stated that he remembered the comment "you [have] to do whatever you [have] to do" and explicitly stated that he did not recall exactly who made the comment. Pel'r's Ex. 27 at Police 1175. However, the Prosecution did not turn over the recording of the interview. *See* Tr. 192, 554, 555. They also failed to disclose this inconsistent statement in the written *Brady* disclosure which summarized information from each witness the Commonwealth interviewed. Resp. Ex. I at Prosecution 330. Rather, at trial, the Prosecution led Hough's testimony by asking what the *Defendant* told him to do and then allowed Hough to attribute the comment to Wolfe despite Assistant Commonwealth Attorney Conway being present in the interview when Hough made the prior inconsistent statement. *See* J.A. 1395.

This information is favorable to Wolfe because it provides a basis upon which to impeach a corroborating witness' testimony that attributes a potentially damaging statement to the Petitioner. Had Wolfe's counsel known about the prior inconsistent statement, he could have challenged Hough's testimony with his own statements. In a case based primarily on circumstantial evidence, impeaching one of the Commonwealth's key corroborating witnesses would have likely impacted the outcome of the trial. When evaluated for cumulative effect, it provides yet another example of the Prosecution withholding valuable impeachment testimony regarding its five key corroborating witnesses. The Commonwealth's *Brady* violations constrained the Petitioner's ability to fully cross-examine at least three of the five key witnesses in this case (including Barber who provided the only direct evidence in the case). In light of these facts, considered cumulatively with other evidence in the case, the Court finds that the Prosecution unconstitutionally failed to disclose Hough's prior inconsistent statement in violation of *Brady*.

3. Prosecution's suppression of evidence undermining its theory of the case

Petitioner further alleges that the Commonwealth withheld evidence of alternate theories of the crime. Pet'r's Proposed Findings of Fact and Conclusions of Law at 11. Specifically, Petitioner alleges that the Prosecution withheld the following exculpatory evidence: 1) drug investigation reports revealing conflicts in Petrole's drug enterprise; 2) statements indicating that Petrole was

rumored to be an informant; and 3) witness statements indicating that a second car was at the crime scene shortly after the murder. The Court will address each alleged suppression in turn.

First, Petitioner alleges that the Commonwealth suppressed the government reports about the parallel drug investigation accompanying the investigation of Petrole's murder. Specifically, Petitioner asserts that prosecutors suppressed a DEA report by TFO S.M. Straka and Sgt. Pass (Pet'r's Ex. 30), an email indicating that one of Petrole's suppliers accrued charges at a local hotel days before the murder (Pet'r's Ex. 40), a report narrating an interview with Jennifer Scott (victim's girlfriend) indicating that one of the victim's drug associates was aware that he was cut out of a deal (Pet'r' s Ex. 54), and a transcript of an interview with Gunning (victim's roommate) outlining the victim's recent drug associations and operational conflicts in detail (Pet'r's Ex. 55). During the habeas evidentiary hearing, Attorney Ebert admitted that the Commonwealth produced the interview with Paul Gunning (victim's drug associate and roommate) particularly for the habeas proceeding. Tr. 44 (referring to Petitioner exhibit 55 containing transcripts from a March 16 police interview with Gunning). At the evidentiary hearing, both of the prosecutors (particularly Conway in his capacity as lead prosecutor on the case) and Sgt. Pass (head of drug investigation), testified that each of these items was part of the Prosecution's file during the state trial phase. *See e.g.*, Tr. 52-53 (containing Ebert's testimony about the DEA report). Conway then acknowledged that the Commonwealth's written

Brady disclosure did not include any of these documents.[18] The Court, therefore, finds that the Commonwealth suppressed these materials during the trial phase.

Despite the fact that Wolfe faced both murder and drug conspiracy charges at trial, Mr. Conway testified he that did not review all of the reports related to the "separate" drug investigation in preparation for Wolfe's criminal trial.[19] Tr. 191-92. However, later in his testimony, Conway admitted that there was communication back and forth between the drug and homicide investigations and further stated, "I understand that we are charged with information that carne through either." Tr. 272. Conway then testified that it was the

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[18] Ebert testified that it was the Commonwealth's Attorney office's pattern and practice to make written *Brady* disclosures. *See* Pet'r's Exs. 42-50. At no point did the Commonwealth assert that this information was provided to the Petitioner outside of the written disclosure.

[19] Conway characterized the investigation of Petrole, Wolfe and others' drug activities as "separate" from the homicide investigation. However, this distinction is precarious in light of the fact that Wolfe faced a drug conspiracy charge and a murder charge in the same trial. While there were in fact individual inquiries, the Commonwealth acknowledges the fact that the two investigations were interconnected and that the drug investigators remained involved in the homicide investigation. Tr. 47 (stating Ebert's testimony that the investigations were interconnected). *See also* Tr. 61 (admitting that Sgt. Pass worked for the Prince William Police Department and was "certainly part of a Jaw enforcement agency"); Pet'r's Ex. 24 (showing that Sgt. Pass was present in 21 witness interviews relating to the murder investigation, often times along with Det. Walburn).

Commonwealth's theory of the case that Petrole's death was a result of his drug activities. Tr. 273. The Court finds the Commonwealth's admissions in and of themselves to be indicative of a *Brady* violation. The Supreme Court has clearly stated that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Conway's evidentiary hearing testimony reveals a failure to uphold his duty as a prosecutor to learn of the favorable evidence known by government actors. Naturally, if a prosecutor fails to uphold the Supreme Court's mandate to simply review his files to learn of any favorable evidence known by government actors, the prosecutor cannot feign surprise when he violates a defendant's due process right by failing to disclose the same evidence that he could not bring himself to review. These facts are particularly troublesome in light of the fact that the Commonwealth's whole theory of the case was that Wolfe hired Barber to kill his drug supplier because he owed him money and wanted to decrease market competition. At the least, Conway's failure to even review all of the files, let alone turn them over, further supports this Court's finding that these materials were suppressed at the trial phase.

The Court further finds that the drug investigation reports and interviews were not only suppressed but were also favorable to the Petitioner. Each of the documents reveals aspects of Petrole's drug operation that call into question the Prosecution's theory that Wolfe was the person who orchestrated Petrole's murder. In addition to casting

doubt on the Prosecution's theory of the case, the suppressed evidence points to other named individuals with motive to kill Petrole. Thus, in the hands of competent defense counsel, the evidence could have been used to either cast reasonable doubt on the Prosecution's theory of the case, establish a defense strategy pointing to other suspects, or impeach witness testimony. For example, the suppressed Drug Enforcement Administration report ("DEA report") summarizes Gunning's description of Petrole's drug operation. It names other drug suppliers, describes Petrole's various trips to purchase drugs, outlines the prices that Petrole charged for his drugs, and specifically discloses intermediaries' commissions for helping Petrole secure his drug supply. Gunning also described a potential conflict in Petrole's drug operation that stemmed from a recent decision to cut one intermediary, Brandon Patterson, out of a deal between Petrole and his major supplier of high-grade marijuana, Bill Hemenway. Pet'r's Ex. 30 at Prosecution 2027, 2029 (stating that Patterson would charge a commission of $500-$600 per pound). In addition to evidence indicating that there was a conflict between Patterson and Petrole, the Government also had information indicating that Patterson (who lived in Washington State) was in the Northern Virginia area just a few days before the murder. Pet'r's Ex. 40 (containing Trish Harman's August 20, 2001 email to Det. Walburn and Sgt. Pass stating that subpoena information of Patterson's bank account indicated that he was in Northern Virginia at the Dulles Hyatt "just days before Petrole's murder"). Petrole's girlfriend, Jennifer

Scott, then confirmed that Patterson became aware that he had been cut out of a recent deal. Pet'r's Ex. 54 at Police 899. She also told the police that Petrole had become worried and was concerned that something bad would happen as a result of cutting Patterson out. *Id.* All of this information is favorable to Wolfe because it shows that there were conflicts in Petrole's drug operation that could have created motive for Petrole's death without Wolfe being involved.

Additionally, the information is material to the case because it undermines the Government's theory that Wolfe was the only person with motive to harm Petrole. Equipped with this information, a competent defense counsel could have impeached witnesses who suggested that Petrole had no enemies; developed a defense strategy that implicated Petrole's other drug associates (e.g., Patterson) in the murder rather than Wolfe; and/or called Gunning to the stand to inquire about the conflicts in the drug operation and then called Jennifer Scott to corroborate Gunning's testimony. The Petitioner also could have called Scott to testify about the fact that Petrole expressed a fear that something bad was going to happen as a result of Patterson being cut out of the deal. Even if Gunning denied his own statements at trial, competent defense counsel could have used the DEA report and other suppressed items to impeach Gunning on the stand, thus calling into question the credibility of another government witness. When considering the cumulative effect of all of the suppressed evidence, the jury would have been able to consider a properly impeached key witness (Barber) combined with direct evidence implicating

an alternative theory of the case (namely conflicts in the drug enterprise wholly unrelated to Wolfe), as well as other evidence impeaching the corroborating witnesses' version of events at trial. The fact that the jury was never presented with this information undermines confidence in the trial verdict. Consequently, the Court finds that the Commonwealth suppressed the drug investigation reports and interviews relating to victim Petrole in violation of *Brady*.

Second, Petitioner alleges that the Prosecution withheld information indicating that Petrole was rumored to be a government informant. *See* Pet'r's Ex. 57. In an interview with Sgt. Pass on August 20, 2001, Jesse James indicated that he believed Barber killed Petrole due to a rumor that Petrole was a police informant. *Id.* This information was memorialized in a narrative information report When asked about the report during the habeas proceeding, Prosecutors indicated that they were aware of the statement but did not disclose the information because it was a "rumor" and had not been substantiated by other evidence. Tr. 687; *see* Tr. 59 (Ebert's testimony that he did not recall turning the report over to Petitioner's counsel). This admission, along with the statement's absence from the written *Brady* disclosure, shows suppression of evidence for the purpose of *Brady* analysis. Furthermore, the evidence is favorable to Wolfe because it creates yet another potential motive for Petrole's death that does not involve Wolfe.

Despite being favorable, the Director asserts that the Commonwealth had no obligation to disclose the

statement or the report because it was merely an uncorroborated rumor. Director's Proposed Findings of Fact and Law at 24-25. In support of this notion, the Director references the Supreme Court's decision in *Moore v. Illinois*. In *Moore*, the police failed to disclose a police report indicating the outcome of a fruitless investigation of another potential suspect. In affirming the defendant's conviction, the Supreme Court held that fail me to disclose an early lead did not violate *Brady* where an eyewitness to the killing and witnesses to defendant's presence at the scene of the crime were later discovered, thus exonerating the other suspect. *Moore v. Illinois*, 498 U.S. 786, 795 (1972). Moore is easily distinguishable from the case at bar because there are neither eyewitnesses to Petrole's murder nor witnesses at the scene of the crime to directly contradict the suppressed evidence or render it clearly immaterial in light of other evidence.

The Director also asserts that the Commonwealth's suppression does not violate *Brady* because James' admission to the police that most of his information was either speculation or from third party sources supports its argument that suppression was acceptable under *Brady*. *See* Pet'r's Ex. 57. Had James' statement about the Petrole rumor been mere fourth-hand speculation as Conway asserts, the Commonwealth may have a stronger argument. However, here, the individual specifically identified the names of the persons from whom he heard the information, thus providing a traceable path to discovering its source. Moreover, as Sgt. Pass testified, the fact that the rumor existed alone, would be enough to "place a target on [the rumored

informant's] back." Tr. 543; *see e.g.*, *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995). Therefore, the report is material because the fact that the rumor existed may have been probative in value itself and would not qualify as hearsay under the Virginia laws of evidence. *See State Farm Fire and Cas. Co. v. Scott*, 236 Va. 116, 122 (1988) (defining hearsay as "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter"). As Sgt. Pass testified, and this Court finds, the value of James' statement that Petrole was rumored to be an informant does not turn on whether the statement is in fact true, but rather the fact that the rumor existed at all would be enough to create an ulterior motive for Petrole's death. Having determined this report/statement to have been suppressed, favorable and material, the Court determines that the Prosecution withheld this information from the Petitioner in violation of *Brady*.

Third, Petitioner alleges that the Prosecution unconstitutionally suppressed witness statements indicating that a second car was at the crime scene shortly after the murder. The habeas inquiry revealed that the Commonwealth was in possession of at least three independent statements from witnesses at the scene of the crime indicating that there was a second car at the crime scene. Both Holly Reid and Peter Shanz stated on the night of the murder that a few minutes after they heard the gunshots, they observed a small dark colored car slowly pass the victim's car and leave the

neighborhood. Pet'r's Exs. 35, 36; Tr. 369, 374. At the evidentiary hearing, Mr. Shanz testified that he spoke with Mr. Conway and related the same statements to him directly. Tr. 376-77. He also testified that he spoke with Conway a few weeks before the trial about testifying, but that Conway never followed up with him. *Id.* Kimberly Miller also made a statement to police on the night of the murder indicating that after the red car left (later found to be J.R. Martin's car), she observed a blue or black vehicle come in, drive to the end of the court, and then leave the area. Pet'r's Ex. 28. During the evidentiary hearing, Ebert admitted that he considered this information in preparing for Petitioner's trial. Yet, none of these statements were included in the written *Brady* disclosures and there is no evidence to suggest that they were provided to Petitioner's counsel. Accordingly, the Court finds that Petitioner only discovered these statements in light of the Court's habeas inquiry.

The statements are favorable to Petitioner because they indicate the possibility that there may have been additional actors involved in Petrole's murder. This notion would not only undermine the Prosecution's theory that Barber acted only at the direction of Wolfe, but it would also refute Barber's trial testimony that only he and Wolfe were involved in the murder for hire scheme. Properly disclosed to competent counsel, this information would have been material when considered alongside other suppressed evidence impeaching Barber's testimony. *See Monroe v. Angelone*, 323 F.3d 286, 300 (4th Cir. 2003) (holding that suppressed evidence of witness identities and statements indicating that they saw a

suspicious vehicle speeding away from the crime scene at the time of victim's death was favorable to the defendant and ultimately concluding that the prosecution's suppressions violated *Brady*).[20] The witness statements and identities could have drastically altered Petitioner's trial strategy. Rather than relying primarily on Wolfe's own testimony denying the allegations, competent counsel would have been able to call three additional witnesses present at the scene of the crime to testify that they observed a suspicious second car minutes after hearing the gunshots. This would have enabled Petitioner to establish reasonable doubt by developing a theory that there were other individuals involved in the murder, rather than Wolfe. Therefore, this Court finds that the Commonwealth unconstitutionally suppressed the witness identities and statements regarding a second car at the crime scene in violation of *Brady*.[21]

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[20] The Court notes that the United States Court of Appeals for the Fourth Circuit focused its materiality analysis primarily on the impact of the suppressed impeachment evidence regarding the government's key witness in Monroe. However, in footnote 60, the court stated that the suppressed witnesses and statements regarding the second car would have further undermined the Commonwealth's case. *Id.* 316, n.60.

[21] The Court notes Petitioner's argument that the Commonwealth suppressed evidence indicating that Jason Coleman owned a blue Ford Escort at the time of the murder. Had this information been provided to defense counsel, Wolfe could have attempted to establish reasonable doubt by directly implicating Coleman as being involved in the murder. Combined with the trial testimony from several individuals (Continued)

4. Materiality/Cumulative Effect Analysis

A finding that certain evidence is exculpatory under Brady does not require that each individual piece of evidence be material itself, nor does it require a finding that the evidence proves a specific fact, rather the inquiry specifically requires only that the evidence itself be favorable to the defendant and that the net effect of all of the favorable evidence reasonably undermine confidence in the verdict. *See Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Kyles v. Whitley*, 514 U.S. 419, 435-37 (1995). In many cases, a court's materiality analysis determines the disposition of the case. The Director asserts that nearly all of Petitioner's *Brady* allegations fail for lack of materiality. Specifically, the Director argues that there is no reasonable probability of a different trial result in light of the physical evidence presented at trial, mainly Pascquierllo's letter asking Wolfe for money and the telephone records indicating phone calls between Wolfe and Barber surrounding the time of the murder. Director's Proposed Findings of Fact and Conclusions of Law at 26. The Director further posits that Wolfe's trial testimony confirming that Petrole was his drug supplier (J.A. 2170-71), that he arranged a deal with him at Zenner's house on the night of the murder (J.A. 2082), and that he owed Petrole money (J.A. 2175) indicates that the habeas evidence is immaterial. Additionally, the Director argues that Wolfe's other testimony confirming that

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indicating that Barber and Coleman were roommates and had a close relationship, this would have provided Petitioner with a specific argument to further undermine the Prosecution's theory of the case.

he gave Pascquierllo money, gave Martin a discount on drugs after the murder, and admitting that he had a one on one conversation with Barber at the night club after the murder further indicate that none of the suppressed habeas evidence is material. The Court rejects these arguments.

First, the physical evidence (i.e., the Pascquierllo letter and the phone records) hardly amount to overwhelming proof that Wolfe and Barber were engaged in a scheme to kill Petrole. *See Kyles v. Whitley*, 514 US. 419, 451 (1995) (concluding that ammunition matching that found in the victim's body, a holster found in the defendant's apartment, and the victim's grocery receipt found on the floorboard of the victim's car with the defendant's fingerprint on it did not qualify as conclusive physical evidence to render the state's evidentiary suppressions as immaterial). Second, all of Wolfe's "admissions" support his testimony that he was acting within the context of the drug conspiracy and had no involvement in Petrole's murder. Therefore, in light of the fact that his testimony supports an alternative theory of the crime and the fact that his admissions were provided within the context of an unequivocal denial of the capital murder scheme, Petitioner's statements do not impede a materiality finding on any of the suppressed evidence. To support the Director's position, this Court would have to make legal findings in contravention of established precedent from both the Supreme Court and the United States Court of Appeals for the Fourth Circuit. Declining to make such findings, this Court concludes that the net effect of the Commonwealth's

suppressions reasonably undermined confidence in the jury's guilty verdict for a variety of reasons.[22]

The Commonwealth's capital murder case against Wolfe can best be described as tenuous. A review of the trial proceedings unveiled witness testimony replete with hearsay and speculation. The physical evidence that did exist, mainly the records disclosing the phone call activity between Barber and Wolfe, was circumstantial. As the Court has repeatedly mentioned, the only direct evidence linking Petitioner to the capital murder was the testimony of Owen Barber. In an effort to buttress its case, the Commonwealth presented a series of corroborating witnesses to offer their own conjecture about Wolfe's involvement based either on their own assumptions or the opinions of third-parties (e.g., Jason Coleman and Owen Barber). Nonetheless, Ebert and Conway presented a cohesive depiction of the Commonwealth's theory of the case. Wolfe's testimony was the only evidence that the defense could present to counter the Prosecution's theory of the case. Wolfe testified that he had nothing to do with Petrole's murder. He explained that the circumstantial evidence, such as his private talks and phone conversations with Barber, drug discounts to J.R. Martin and monetary gifts to Jennifer

[22] Having previously discussed the materiality implications of the individual pieces of suppressed evidence, this analysis provides a broad review of the cumulative effect of the Commonwealth's suppressions for the sake of thorough evaluation.

Pascquierllo, related to his drug conspiracy and personal relationships, not a murder scheme.[23]

Yet despite these facts, the jury accepted the Prosecution's theory of the case and returned a guilty verdict.

The substance and nature of the suppressed evidence ("habeas evidence") reasonably undermines the Court's confidence in this verdict. The key items of habeas evidence consist of the following:

(1) Barber's relationship with Petrole - confidential informant statements, statement from Jesse James and statement from Randall Ketcham all indicating that Barber knew Petrole. This directly contradicts Barber's testimony that he did not know Petrole as well as the Government's theory of the case;

(2) Barber's ulterior motive for testifying-interview where Det. Newsome implicated Wolfe as the "higher up" and told Barber that turning over Wolfe may be the difference between life and the death penalty;

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[23] The trial judge instructed the jury on circumstantial evidence as follows: "when the Commonwealth relies on circumstantial evidence. the circumstances proven must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt. The evidence as a whole exclude[s] every reasonable theory of innocence." J.A. 2520. Under this instruction, Wolfe's explanation of the circumstantial evidence reasonably presented a theory of innocence. Therefore, the circumstantial evidence alone would not meet the standard articulated by the trial court.

(3) Barber's admission to Coleman that he acted alone;

(4) J.R. Martin deal- Commonwealth's off the record agreement not to prosecute Martin if he cooperated;

(5) Hough's inconsistent statement- Hough initially stated that he did not remember who made the "do what you have to do" comment when talking to Wolfe and Coleman about hypothetical drug robberies. This was inconsistent with his trial testimony that Wolfe made the statement;

(6) Drug investigation reports- the reports and witness statements indicating that there was a conflict in Petrole' s drug enterprise;

(7) Rumor that Petrole was an informant- Jesse James' statement that Petrole was rumored to be an informant; and

(8) Second car witnesses- the identity and statements of three witnesses who told police that they saw a second vehicle approach the area of the crime scene at the time of Petrole's death.

The Commonwealth asked the trial jury to convict Wolfe of capital murder. To find Wolfe guilty, the Commonwealth had to prove each of the following three elements beyond a reasonable doubt: 1) that Owen Barber killed Daniel Petrole; 2) that the killing was willful, deliberate and premeditated; and 3) that the Petitioner hired Owen Barber to kill Daniel Petrole. J.A. 2511. Absent proof of all three elements of the crime, Wolfe could not have been convicted.

Owen Barber's testimony was the only evidence that the Prosecution presented to prove that the Petitioner hired Barber to kill Petrole. *Wolfe v. Johnson*, 565 F.3d 140, 144 (4th Cir. 2009). There was no proof of monetary exchange and no physical evidence indicating that the two ever formed a murder-for-hire agreement. Rather, this was a case of one person's word against another. For this reason, the jury had to believe that Barber was credible and that his version of events was in fact truthful and accurate in order to support a conviction. However, the habeas evidence relating to Barber directly undermine not only his credibility but his version of events. Without this evidence, Wolfe could not impeach Barber's credibility as a witness or his version of events. Thus, it deprived Petitioner of any opportunity to counter the one clear piece of direct evidence linking him to the third element of the crime. Had the prosecution complied with its *Brady* obligations, Barber's testimony would have been seriously undermined as it would have established that he had a relationship with the victim, a motive to specifically implicate Wolfe, and that he was inconsistent in his own statements about what happened on the night of the murder.

Applying these principles, courts have awarded habeas relief in situations similar to that presented in this case where the government withheld impeachment evidence on one witness. *See, e.g.*, *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (awarding new trial because of suppression of impeaching evidence on one witness); *Monroe v. Angelone*, 323 F.3d 286, 316 (4th Cir. 2003) (awarding new trial because of suppression of

impeaching evidence on prosecution's key witness); *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 560-61 (4th Cir. 1999) (awarding new trial because of suppression of impeaching evidence on one witness); *Crivens v. Roth*, 172 F.3d at 991, 998-99 (7th Cir. 1999) (same); *United States v. Service Deli Inc.*, 151 F.3d 938, 944 (9th Cir. 1998) (same). Consistent with such precedents, the Court concludes that the suppressed habeas evidence relating to Barber alone is enough to warrant habeas relief under *Brady*.

In addition to the Barber habeas evidence, the Prosecution suppressed other significant impeaching material on the Commonwealth's corroborating witnesses - particularly J.R. Martin and Chad Hough. Having not disclosed the impeaching evidence, the Prosecution was afforded the luxury of presenting corroborating witnesses that were effectively unimpeachable by the Petitioner. Had Martin's agreement not to prosecute and Hough's prior inconsistent statement been disclosed to Wolfe, he would have been able to highlight an important source of bias for Martin and challenge Hough's credibility in front of the jury. Combined with the Barber habeas evidence, this information would have enabled Petitioner to effectively impeach the testimony of three of the Commonwealth's five key witnesses connecting Wolfe to the crime. Considering the importance of impeaching government witnesses, the cumulative impact of these impeachment suppressions reasonably undermines confidence in the jury's verdict.

The habeas evidence also significantly impacted Wolfe's ability to counter the Commonwealth's theory

of the case and present a vigorous defense at trial ("alternate theory habeas evidence"). By suppressing materials relating to the conflicts in Petrole's drug operations and the rumor that Petrole was an informant, the Commonwealth deprived Wolfe of an opportunity to counter the third element of the crime with evidence. Had Wolfe been able to show that other people had potential motives to kill Petrole, this would have allowed the jury in its capacity as fact finder to weigh all of the evidence and information and determine beyond a reasonable doubt, whether Wolfe had hired Petrole. The Commonwealth's suppression of the second car witnesses also deprived Wolfe of an opportunity to challenge Barber's version of events and further undermine the Commonwealth's theory of the case. Instead, the Commonwealth shielded its case from any potential challenges by the defense, thus depriving the jury of critical information regarding potential motives for the crime and depriving Wolfe of an opportunity to present a defense on those grounds.[24] The United States Court of Appeals for

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[24] In describing why the Commonwealth's Attorney's Office does not have an open-file policy, Mr. Ebert stated the following at the habeas evidentiary hearing: **"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."** Tr. 110. In effect, Ebert admits here that his contempt of defendants who "fabricate a defense" guides his perspective on disclosing information. This is particularly troubling in the case at bar where the record is replete with statements from Ebert and Conway regarding the scrutiny and credibility determinations that they made (as opposed to the jury) regarding the relevance (Continued)

the Fourth Circuit has recognized similar suppression efforts as evidence undermining the Prosecution's theory of the case. *See Monroe v. Angelone*, 323 F.3d 286, 296 (4th Cir. 2003). Other courts have also acknowledged such suppression conduct as evidence undermining the prosecution's case or as evidence providing the defendant with an alternative defense strategy. *See e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 447 (1995) (noting that Defendant could have used suppressed evidence to outline a vigorous argument attacking the integrity of the police investigation); *D'Ambriosio v. Bagley*, No. 1:00cv2521, 2006 WL 1169926 at *31-33 (N.D. Ohio Mar. 24, 2006) (acknowledging that certain suppressed evidence could have been used to impeach witness testimony and to alter the entire strategy of

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of any potential exculpatory evidence. Essentially, in an effort to ensure that no defense would be "fabricated," Ebert and Conway's actions served to deprive Wolfe of any substantive defense in a case where his life would rest on the jury's verdict. The Court finds these actions not only unconstitutional in regards to due process, but abhorrent to the judicial process. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995) ("Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result. This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence ... [a]nd it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.").

the defense).[25] Having considered the materials that would have provided an alternate theory for Petrole's death, the Court **FINDS** that this evidence further undermines confidence in the verdict and warrants relief for the Petitioner.

B. Barber's False Testimony as Grounds for Habeas Relief

On April 22, 2011, Petitioner submitted an additional Motion to Amend the Petition for a Writ of Habeas Corpus. In this motion, Petitioner adds a supplemental claim asserting that "Wolfe's right to due process of law is violated by the Commonwealth's maintenance of a conviction that rests on material perjured testimony." Am. Pet. for Habeas Corpus, Apr. 22, 2011 at 1. Petitioner rests this claim on the fact that Barber admitted to committing perjury at Wolfe's trial. Aff. of Owen Barber at 5 and 7, contained in App. II to Am. Pet. for Habeas Corpus, Dec. 15, 2005, Ex. 37; Tr. 117-18, 158. In addition to his own admissions under oath, Barber also admitted his perjury to at least three other inmates at Wallens

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[25] Although not precedential in value, the United States District Court for the Northern District of Ohio provided a more elaborate analysis of this line of *Brady* argument in *D'Ambriosio v. Bagley*. In this case, the district court concluded that the state's suppression of testimony undercutting the state's theory of the murder was inconsistent with its obligations under *Brady*. *D'Ambriosio v. Bagley*, No. 1:00cv2521, 2006 WL 1169926 at *28 (N.D. Ohio Mar. 24, 2006). In its materiality analysis, the district court then indicated that evidence that would impeach the government's key witness, undercut the state's theory of the case or provide the defense with an alternate defense strategy would have a cumulative impact necessary to constitute a Brady violation. *Id.* at *32-33.

Ridge State Prison (Carl Huff, Allan Rother and Kyle Hulbert), Tr. 118, 120, 122.

The Director opposes Petitioner's Motion on the grounds that Petitioner's assertion: 1) does not state a cognizable constitutional violation for a habeas proceeding; 2) has already been dismissed under *Herrera v. Collins*; and 3) is offered in bad faith and would prejudice the Director. Furthermore, the Director suggests that even if the Court grants Petitioner's Motion, the Amendment would be futile because the United States Court of Appeals for the Fourth Circuit's opinion in *Stockton v. Virginia*, 852 F.2d 740 (4th Cir. 1998), requires that the government officer have knowledge that the testimony was false in order to prevail on this type of claim.

In light of the fact that Barber admitted his perjury after the criminal trial and after Wolfe's original habeas petition, Petitioner's motion is more properly considered as a supplemental pleading under Rule 15(d) of the Federal Rules of Civil Procedure, rather than as an amended pleading under Rules 15(a) or (b). Rule l5(d) states, "the court may…permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented .... "Fed. R. Civ. P 15(d). The United States Court of Appeals for the Fourth Circuit has stated that "leave [to file supplemental pleadings] should be freely granted, and should be denied only where 'good reason exists…such as prejudice to the defendants.'" *Franks v. Ross*, 313 F.3d 184, 198 (4th Cir. 2002) (quoting *Walker v. United Parcel Serv.*, 240

F.3d 1268, 1278 (10th Cir. 2001)); *see also Laber v. Harvey*, 438 F.3d 404, 428-29 (4th Cir. 2006) (analyzing bad faith of the movant, prejudice to the opposing party and futility of the proposed amendment as factors to consider when determining whether to grant leave to amend a filing). The Director asserts that Petitioner's proposed amendment would result in prejudice because Petitioner waited until after the conclusion of the evidentiary hearing to move to amend the petition. Director's Resp. in Opp. to Pet'r's Mot. For Leave to Amend, Apr. 22, 2011, at 13. More specifically, Director points to the fact that Petitioner moved to amend the petition years after Barber initially recanted by affidavit and months after the conclusion of the evidentiary hearing as evidence of bad faith and prejudice.

The Court disagrees with the Director's assertions and finds that the Director suffers no prejudice in allowing Petitioner's supplemental filing. First, Petitioner has asserted the factual basis underlying its supplemental pleading at length in both the Amended Petition for a Writ of Habeas Corpus, dated December 15, 2005, and his Proposed Findings of Fact and Conclusions of Law, filed January 18, 2011. *See* Am. Habeas Corpus Pet., Dec. 15, 2005 at 11-13; Pet'r's Proposed Findings of Facts and Conclusions of Law at 25-27. Consequently, the Director has been well aware of the facts underlying Petitioner's supplemental pleading, despite Petitioner's delay in its filing. Second, Petitioner's only novel contribution through the supplemental pleading is the legal theory on which Petitioner requests relief. Rather than basing his request for

habeas relief in a *Herrera v. Collins* innocence claim ("*Herrera* claim") or a *Giglio v. United States* false testimony claim, Petitioner now asserts that Petitioner Wolfe's "right to Due Process of Law under the Fourteenth Amendment to the United States Constitution is violated by maintenance of a conviction for capital murder that, as the Commonwealth now knows, rests on the material perjured testimony of Owen Barber." Am. Habeas Corpus Pet., Apr. 22, 2011. The Director offers several reasons the Court should not substantively consider Petitioner's new legal argument, but it has not provided a meritorious reason the Court should deny Petitioner leave to file its supplemental pleading. Not only is the Director not prejudiced, but there is also no evidence of bad faith by the Petitioner. While Petitioner's motion is admittedly delayed, the delay does not show bad faith, but rather a reluctance to make the legal argument without the aid of Barber's verbal recantation under oath during the habeas evidentiary hearing. Petitioner's proposed supplemental pleading is not futile. In light of the fact that the Court finds that there is no bad faith, futility or prejudice to the Director in granting Petitioner leave to file a supplemental pleading, Petitioner's motion is **GRANTED**.

Having granted Petitioner's Motion, the Court now considers whether to grant habeas relief based on Petitioner's supplemental legal argument. Contrary to the Director's argument, Petitioner's supplemental argument does not simply recast his original *Herrera* claim. Petitioner's *Herrera* claim rested on the notion that it would contravene the

Eighth Amendment of the Constitution for a defendant who is factually innocent of a crime to be executed for such offense. *See Wolfe v. Johnson*, 565 F.3d 140, 163 (4th Cir. 2009). On initial review, this Court denied the *Herrera* claim because Petitioner failed to meet the extraordinarily high standard and present a "truly persuasive demonstration of actual innocence." *Id.*; *see Herrera v. Collins*, 506 U.S. 390, 417 (1993). Here, Petitioner has asserted a markedly different claim. Rather than positing that the death sentence is unconstitutional because of actual innocence, Petitioner argues that the maintenance of a conviction based upon false testimony violates due process. The Director attempts to distinguish this assertion from clearly established law indicating that "deliberate deception of [the] court and jury by the presentation of testimony known to be perjured…is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). However, the facts of this case fail to warrant such distinction. Consequently, the Court finds that Petitioner's supplemental argument is cognizable in a federal habeas action.

Petitioner acknowledges the Supreme Court's prior rulings that a conviction based on the knowing presentation of false testimony is unconstitutional *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *id.* In presenting its supplemental argument, the Petitioner suggests that the maintenance of a conviction based on false testimony similarly offends due process irrespective of whether the prosecutor knew of the perjury at the time of the trial. *See Saunders v. Sullivan*, 863 F.2d 218, 225-26 (2d. Cir. 1998)

(holding that the test for granting a new trial based on perjured testimony requires that the recanted testimony be false and material and a probability that the jury would have acquitted defendant). In opposition, the Director asserts that Petitioner's supplemental argument lacks merit based on established precedent from the United States Court of Appeals for the Fourth Circuit because the prosecutors did not know that Barber's testimony was false at the time of the trial. *Stockton v. Virginia*, 852 F.2d at 749. However, the instant case is distinguishable from Stockton on several grounds.

In *Stockton v. Virginia*, the United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of habeas relief regarding defendant Stockton's murder-for-hire conviction. In that case, Stockton alleged that the district court failed to properly consider new evidence indicating that a key government witness, Randy Bowman, lied in his testimony about the murder-for-hire scheme. During trial, Bowman testified that he was present when Stockton agreed to commit the murder in exchange for $1,500. In the related habeas petition, Stockton alleged that an affidavit of Bowman's cell mate, Frank Cox, stating that Bowman told him (Cox) that he had lied during his trial testimony should have been considered as grounds for habeas relief. *See id.* at 450. The United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of Stockton's habeas petition stating that the mere existence of new evidence was not enough to grant relief, but rather that the evidence must bear upon the constitutionality of the applicant's detention. *Id.* (quoting *Townsend v. Sain*, 372 U.S. 293, 317 (1963)).

In doing so, they articulated a narrow ground for habeas relief based on newly discovered evidence. It ruled:

> When public officers connive at or knowingly acquiesce in the use of perjured evidence, their misconduct denies a defendant due process of law. Recantation of testimony alone, however, is insufficient to set aside a conviction on the ground that the due process clause has been violated. A habeas corpus petitioner must show that the prosecutor or other government officers knew the testimony in question was false in order to prevail.

Id. (citing *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir. 1975). Although narrow in scope, *Stockton* articulates a standard for relief that focuses on public officer misconduct and the denial of due process. This standard is further supported by the fact that United States Court of Appeals for the Fourth Circuit also considered whether Stockton had alleged prosecutorial misconduct with respect to Bowman's testimony;[26] the extent to which the evidence would

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[26] While Petitioner has not made explicit allegations of prosecutorial misconduct in its supplemental pleading, this Court's factual findings and legal conclusions indicate that Ebert and Conway acted in contravention of the 1999 Virginia Code of Professional Responsibility, DR 8-l02(A)(4), available at, http://www.vsb.org/profguides/1999/codeprof.html. DR 8-102(A)(4) states: "A public prosecutor or government lawyer in criminal litigation shall ... make timely disclosures to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the (Continued)

have brought about a different trial result; and, its admissibility at trial in deciding whether to grant habeas relief on that ground.[27] *Id.* It is within this context that the United States Court of Appeals for the Fourth Circuit indicated that a habeas petitioner must show that the government officer had knowledge of the false testimony in order to prevail. Hence, the knowledge requirement stands as a clear example of the "conniving and knowingly acquiesc[ent]" behavior that results in a denial of due process of law.

In this case, the Court is confronted with a credible recantation by the Commonwealth's only witness with direct knowledge of the murder-for-hire scheme. On November 2, 2010, Barber recanted his trial testimony while under oath before this Court. Tr. 117-18 (containing Barber's habeas testimony that Petitioner was not involved in the murder of Daniel Petrole and that Petitioner did not hire Barber to kill Petrole); *see* Tr. 159-60 (containing a verbal exchange between the Court and Barber, where Barber confirms his recantation of the trial testimony). The Court finds Barber's demeanor and candor persuasive. Barber not only recanted in an affidavit submitted by himself, but he provided

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accused, mitigate the degree of the offense, or reduce the punishment." This rule is currently memorialized as Rule 3.8(d) in the Virginia Rules of Professional Conduct.

[27] These additional analytical considerations mirror those that courts must consider in determining a violation of due process under *Brady v. Maryland*. This further supports the Court's conclusion that habeas relief based on perjured testimony turns on the denial of due process for the defendant.

consistent statements recanting his trial testimony under oath in open court.[28] Therefore, unlike the facts presented in *Stockton*, this Court considers direct (and admissible) testimony from the witness that would likely have impacted the outcome of the trial. Also, unlike the public officials in Stockton, the Prosecution cannot clearly 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. As previously discussed, the Prosecution was in possession of multiple sources of information indicating that Barber had a relationship with Petrole. Rather than addressing the information in its possession (some of which included first hand witness statements about Petrole and Barber's interactions), the Commonwealth suppressed it, thereby stifling any effort to determine the truthfulness of Barber's statements. Had the Commonwealth pursued the statements regarding Barber and Petrole's relationship, it would have discovered the falsity in Barber's testimony that he did not know Petrole. Second, the Commonwealth was in possession of information indicating that Barber told Coleman that he acted alone in murdering Petrole. This statement further provided the Commonwealth with notice that Barber's trial testimony implicating Wolfe was false.[29] Finally,

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[28] Not only does Barber's recantation align with other suppressed evidence in this case, but it is also supported by the affidavits of three individuals whom he confided in while imprisoned.

[29] Ebert denies that Coleman told him about Barber's "acted

(Continued)

Commonwealth Attorney Ebert testified at the habeas evidentiary hearing that he employs a practice of withholding information from counsel and defendants with the intent of preventing them from establishing a defense mound what the information provides. *See* Tr. 110. This statement 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. Not only was the Commonwealth in possession of information that would have revealed falsities in Barber's testimony at the time of the trial, it also knew that suppressing that information would result in denying Petitioner an opportunity to craft a defense based on the information. Therefore, this Court concludes that the Prosecution used Barber's testimony despite being on notice that it contained falsities. *See Stockton v. Virginia*, 852 F.2d 740, 749 (4th Cir. 1988).[30]

These facts, combined with the Prosecution's failure to conduct a proper examination into the drug

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alone" statement. However, the Court finds Ebert's denial to lack credibility in light of his various meetings with Coleman and his unconventional approach to discovery proceedings, particularly in regards to impeaching evidence and information which might contradict the Commonwealth's theory of the case.

[30] The Court distinguishes its finding from cases where a prosecutor presents evidence that they personally believe is false or doubt in accuracy, without any basis for finding that the testimony actually was or is false. *See e.g.*, *Hoke v. Netherland*, 92 F.3d 1350, 1360 (4th Cir. 1990) (concluding that the prosecutor's belief that part of a witness' testimony is false absent any evidence or information in the record suggesting the same does not establish that he suborned perjury).

investigation further exhibit the ways in which the Commonwealth stifled a vigorous truth-seeking process in this criminal case. They had prior knowledge of falsities in Barber's testimony, yet never pursued or investigated the information. In light of the Commonwealth's conduct, the Commonwealth cannot be entitled to benefit from their deliberate ignorance of and/or reckless disregard for the falsities in Barber's testimony. Consequently, the Court **FINDS** that the Commonwealth violated Wolfe's due process rights by presenting Barber's trial testimony despite having information in its possession indicating that the testimony was false.

In addition to requesting relief based on Barber's false testimony in its April 22 Amendment to Petition for a Writ of Habeas Corpus, Petitioner also submits Barber's false testimony as a factual basis for a claim of relief under *Giglio v. United States*. Pet'r's Proposed Findings of Facts and Conclusions of Law at 25-26. The Commonwealth was in possession of information indicating that Barber knew Petrole and that Barber stated that he acted alone, yet, it allowed Barber's testimony that he did not know Petrole and that Wolfe hired him to commit the murder to go uncorrected. As the Court has repeatedly indicated, Barber's testimony was critical to Wolfe's criminal trial because it was the only evidence establishing the murder for hire element of the charge. Therefore, knowledge that aspects of Barber's testimony were false is material because it undermines confidence in the jury's guilty verdict. Furthermore, the Supreme Court has articulated that suppression of credibility evidence when the reliability of the witness is

determinative of guilt or innocence falls within the *Giglio* and *Napue v. Illinois* rule for due process violations. *Giglio*, 405 U.S. 150, 154 (1972); *see Napue v. Illinois*, 360 U.S. 264, 269 (1959). At the very least, this Court's factual findings indicate that the Commonwealth withheld credibility evidence relating to Barber. In light of the fact that the Government would not have been able to prove the third element of capital murder in this case without Barber's testimony, the Commonwealth's suppression of the credibility evidence and allowance of Barber's false testimony contravene Wolfe's constitutional rights under *Giglio v. United States* and *Napue v. Illinois*.

C. Venireman Claim under Witherspoon v. Illinois

Petitioner alleges that the trial court deprived him of his right to an impartial jury by striking a qualified venireman for cause based on his views regarding the application of capital punishment. Am. Pet. for Habeas Corpus, Dec. 15, 2005 at 45. During the *voir dire*, both the prosecution and defense counsel questioned venireman, Robert Mock, on his ability to impose the death penalty in certain cases. The relevant excerpts of the colloquy are provided as follows:[31]

> Mr. Ebert:…Could you impose the death penalty on the person who hired the person to do the killing even though the person who did the

[31] Mr. Ebert conducted the *voir dire* questioning for Mr. Mock on behalf of the Commonwealth of Virginia and Mr. Partridge conducted the questioning on behalf of Petitioner.

killing may or may not receive the death penalty?

Mr. Mock: (shaking head.)

Mr. Ebert: You could or could not?

Mr. Mock: Could not.

…

Mr. Ebert: So you absolutely could not impose the death penalty in that certain case?

Mr. Mock: I don't think so

Mr. Ebert: You realize there may be different facts concerning each instance?

Mr. Mock: No, I couldn't.

…

Mr. Partridge: Is there a set of facts that could be presented to you…or would there be circumstances where you could impose it?

Mr. Mock: Yes, there could be circumstances where I could.

Mr. Partridge: Would you follow the law?

Mr. Mock: Sure, Yeah.

Mr. Partridge: And you would weigh the evidence that you hear over the next few days and come to your own determination then?

Mr. Mock: Yeah.

Mr. Partridge:…[I]f you are selected to be a juror, you don't have any preconceived notions about what the facts are?

Mr. Mock: No.

Mr. Partridge: And you'll listen to the facts subjectively?[32]

Mr. Mock: Yes.

J.A. 910-11, 918; *see generally* J.A. 910-933. Later in the *voir dire*, Mr. Partridge moved to strike Mock from the jury panel on the grounds that he indicated that he could not impose the death penalty for the hirer in a murder for hire scheme if the trigger man did not also receive it.[33] J.A. 932. The trial court struck Mock from the jury panel and Petitioner now challenges his dismissal as a violation of his constitutional right to an impartial jury.

An impartial jury consists of jurors who will conscientiously apply the law and find the facts. In a capital case, a venireman may be excused for cause based on his or her views on capital punishment if such views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v.*

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[32] While the Court accurately quotes Mr. Partridge in his use of the word "subjectively," the context of his colloquy with venireman Mock suggests that he mis-spoke in using the word "subjectively" as opposed to "objectively."

[33] Mr. Partridge did not move for exclusion on the basis of bias. Had he done so, Partridge as the adversary seeking exclusion, would have needed to demonstrate that Mock lacked impartiality. *Wainwright*, 469 U.S. 412 at 423 (citing *Reynolds v. United States*, 98 U.S. 145, 157 (1879)). Rather, Mock's dismissal was premised on his views about capital punishment, and there is clear established federal law limiting the state's power to exclude on this basis. *See id.*; *see also Adams v. Texas*, 448 U.S. 38, 47-48 (1980).

Witt, 469 U.S. 412, 424 (1985). It is the trial judge's duty to determine whether a particular venireman may be dismissed for cause due to a lack of impartiality and such determinations are considered factual findings for the purpose of § 2254 review. *Id.* at 423, 429.

While Mock initially made statements indicating that he could not impose the death penalty in a particular situation, irrespective of the facts of the case, the totality of Mock's *voir dire* testimony indicated that he would obey the court's instructions and come to a determination after weighing the evidence presented in the case. Once the defense counsel clarified Mock's *voir dire* testimony by asking specifically about his ability to objectively review the evidence and follow the law, neither the trial judge nor the Prosecution propounded additional questions to Mock about his qualifications. Therefore, no evidence exists to discredit Mock's clear testimony that he would follow the law and make a determination based on the facts of the case. In situations where the totality of a venireman's *voir dire* testimony indicate that the juror would objectively listen to the facts and make a determination on the appropriate sentence based on the evidence presented in the case, that venireman is considered qualified to serve as a juror. *See e.g.*, *Ivey v. Ozmint*, 304 Fed.Appx. 144, 148 (4th Cir. 2008). Under these facts, the Court **FINDS** that the trial court's decision to strike Mock was contrary to clearly established federal law as articulated *Witherspoon v. Illinois* and *Wainwright v. Witt* because Mock's *voir dire* testimony did not unveil a perspective that would prevent or substantially impair the

performance of his duties as a juror in accordance with his instructions and his oath. On these grounds, Petitioner's death penalty sentence cannot stand. *See Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam).

V. CONCLUSION

The Court **FINDS** that Wolfe was denied the right to due process pursuant to the Fourteenth Amendment as interpreted in *Brady v. Maryland*, 373 U.S. 83 (1963), to be apprised of all material, exculpatory information within the hands of the prosecution. Petitioner's motion for leave to amend the habeas petition is **GRANTED**, and the Court **FINDS** that the Commonwealth's use of Barber's false testimony is also grounds for habeas relief under both *Stockton v. Virginia* and *Giglio v. United States*. Finally, Petitioner's habeas petition for relief on the ground that he was denied his Sixth Amendment right to an impartial jury is **GRANTED**.

Accordingly, Wolfe's petition for a writ of habeas corpus is **GRANTED** and his conviction and sentence are **VACATED**. The case is remanded to the Supreme Court of Virginia for further proceedings not inconsistent with this opinion.

The Clerk is **DIRECTED** to send a copy of this Order to the parties and counsel of record.

IT IS SO ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

July 25, 2011

Appendix E

FILED: June 18, 2013

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-7
(2:05-cv-00432-RAJ-DEM)

JUSTIN MICHAEL WOLFE,

Petitioner-Appellee,

v.

HAROLD W. CLARKE, Director, Virginia Department of Corrections,

Respondent-Appellant.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Duncan and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix F

in re: JUSTIN WOLFE

CD OF INTERVIEW BETWEEN

DETECTIVE SAM NEWSOME, RICHARD CONWAY, PAUL EBERT

AND OWEN BARBER

AT AUGUSTA CORRECTIONAL CENTER

TUESDAY, SEPTEMBER 11, 2012

CONTENTS OF CD

DETECTIVE NEWSOME: Owen, how you doing? Do you remember me?

MR. BARBER: Detective Sam Newsome, Prince William. This is Mr. Ebert. What's going on?

DETECTIVE NEWSOME: And Mr. Conway.

MR. CONWAY: You got a hair cut since the last time I saw you.

MR. BARBER: Yeah, you got to have your hair cut.

DETECTIVE NEWSOME: Where do you want to sit there, Paul?

MR. EBERT: Owen, we wanted to talk to you a little bit. You might know Justin's case got sent back for another trial.

MR. BARBER: Yeah.

MR. EBERT: (Unintelligible) retried on another case as well as the (unintelligible). We want to know just what your testimony would be (unintelligible) as a witness.

MR. BARBER: Yeah.

MR. EBERT: What might be your testimony if we were to call you this time?

MR. BARBER: I guess it'd have to be what was in the Federal Court.

MR. EBERT: So you want to say that your testimony would be what you testified to in Federal Court?

MR. BARBER: Yeah.

MR. EBERT: You're telling me (unintelligible) that's the truth?

MR. BARBER: Yeah.

MR. EBERT: You remember talking to me in the past (unintelligible)?

MR. BARBER: Yeah.

MR. EBERT: You remember sitting in my office. I don't remember much about what happened. It's been a long time ago.

Do you remember telling me I wouldn't be here today -- no way I would testify against him if he holds up his end of the deal?

MR. BARBER: Yeah.

MR. EBERT: That was true, wasn't it?

MR. BARBER: Back then?

MR. EBERT: That was the way you felt about it, if he'd -- I mean, you wasn't going to bust your butt if he done what he promised to do to you, you'd protect him but on the other hand, you told me you'd tell the truth and testify; do you remember that?

MR. BARBER: Yeah, I remember that.

MR. EBERT: Was that true? Is that the reason you agreed to testify against him?

MR. BARBER: No.

MR. EBERT: What was the reason?

MR. BARBER: I was trying to get less time.

MR. EBERT: How much time did you think you were going to get?

MR. BARBER: You all told me I'd get the low end.

MR. EBERT: Low end of what?

MR. BARBER: Low end of the sentence.

MR. EBERT: And you plead to first degree murder; right?

MR. BARBER: Yeah.

MR. EBERT: Well you remember what you signed; right?

MR. BARBER: Yeah, but that's not what you all said. You all argued for the max in Court.

MR. EBERT: That was the deal.

MR. BARBER: No.

MR. EBERT: Yeah. Also told the Court that you were fully cooperative, (unintelligible) testified.

Do you remember what you told the probation officer before you were sentenced?

MR. BARBER: What probation officer?

MR. EBERT: The one that made -- about your probation in Court?

MR. BARBER: No.

MR. EBERT: Read that to him.

MR. CONWAY: We just wanted to remind you of what's taken place beforehand, you know. We'll have you escorted back to your cell whenever you want.

But this is -- I was reading back over what you said when (unintelligible). It reminded me of I think the

notes you wrote to the Judge where you talked about that you found religion in jail.

MR. BARBER: Yeah.

MR. CONWAY: And I'll let you see the whole thing if you want but you know, towards the end you said, "I know I'll have to spend a large portion of my life in prison.

My only request is the Court take into consideration my cooperation and all the circumstances and sentence me in such a way some day I'll get out of prison. I'd like to show through my life and actions how sorry I am for what I did and to live alcohol and drug free."

And you'd even talked back then about how sorry you were to the Petrole family and how you hoped that they would some day forgive you.

MR. BARBER: Yeah, because I didn't get a chance to say nothing at sentencing.

MR. CONWAY: Well, I mean, if you look at the transcript, you'd see that the Judge (unintelligible) give you a chance to say.

MR. BARBER: No.

MR. CONWAY: Okay. But you talked about in here the Defendant's version.

Do you remember Mr. Pickett going over this report with you before the sentencing?

MR. BARBER: I remember what the numbers were. That's about it.

MR. CONWAY: Okay. You talked about, "I know what I did was a terrible thing and nothing I could say or do would change it. I know that there's a severe penalty for me and I must pay for what I've done.

I'd like to say to the family and friends of Danny Petrole and everyone else involved I'm extremely sorry. I'll live with what I did for the rest of my life. When Justin Wolfe approached me and asked me to do this crime for him, I mistakenly felt like my own life meant nothing and I had nothing to lose.

I had just lost my mother the year before after cancer slowly eating her away. My father had just sold our home and moved to Illinois. And my girlfriend, Jennifer Pasquariello, who I'd lived with and trusted for five years, had cheated on me and I felt like I lost her too.

After my mother's death I began using drug and alcohol on a daily basis. I was almost always either high or intoxicated and as a result, was not thinking clearly. If I had not been under the influence, I could never have done what I did.

Since my arrest and incarceration on April 14th, 2001, I have spent the last year thinking about the crime I committed and wondering how I could have done such a thing. I've tried to do the right thing and take responsibility and be honest about what happened and cooperate fully with the police and the Commonwealth.

Justin Wolfe tried to avoid responsibility for what he did and I testified truthfully for the Commonwealth.

My body and mind are now free of alcohol and drugs and I've come to realize how precious life is.

My days are now confined with a small block that I can only leave for an hour a day."

Do you remember all that?

MR. BARBER: Yeah, yeah. That was the letter I wrote to the Judge asking for reconsideration of the sentence before I left Prince William.

MR. CONWAY: No, this was actually what you told the probation officer when she came over to the jail to get your version to put in the presentence report that was attached to the guidelines.

MR. BARBER: Yeah, something --

DETECTIVE NEWSOME: And then there was another one that you had wrote to the Judge, I guess after you had done one of the affidavits.

MR. CONWAY: And you know, I guess you gave -- I guess it was some of the attorneys and Bob Lessemun who kept coming to see you?

MR. BARBER: Yeah.

MR. CONWAY: Where were you then?

MR. BARBER: Both places, Wallens Ridge and Sussex. But I don't think Lessemun ever came to Wallens Ridge. I think they came to Sussex.

MR. CONWAY: Who do you think came to Wallens Ridge?

MR. BARBER: Somebody for the like anti-death penalty people in Virginia or something. I don't know.

MR. CONWAY: You mentioned a female in here somewhere.

MR. BARBER: Yeah, it was a woman that came to Wallens Ridge.

MR. CONWAY: Somebody else prior to that.

MR. BARBER: I don't even know. I think she might have came with somebody else maybe once or maybe twice.

MR. CONWAY: I guy or a female; do you remember?

MR. BARBER: I don't even remember.

MR. CONWAY: Okay. I guess this first affidavit that you signed the form and I think I'm pretty sure that's Bob Lessemun's signature here and that's your's; right?

MR. BARBER: Yeah.

MR. CONWAY: Twenty-eighth of October, 2005. And that's when you told them that you gave different statements you think were recorded and after accepting the plea agreement you were re-interviewed by several people and my explanation changed over time and then that you participated in the meeting for J.R. Martin and his attorney and your attorney were all there.

And then you talked about, you know, the time you were able to see Jennifer, I guess, right after her arrest and you were brought back (unintelligible).

MR. BARBER: Yeah.

MR. CONWAY: And some of that is what happened. Some of it did not. But it's obviously then a couple

months later is when they got you to sign this real long affidavit and you know, it's obviously using – I don't know when the last time you saw this was. Do you recognize it?

MR. BARBER: Whenever that date was, I guess.

MR. CONWAY: When you signed it was the last time you saw it?

MR. BARBER: Yeah.

MR. CONWAY: Let me ask you this, these people that were coming to see you and trying to get you to change your story, did they ever talk to you about the consequences it would have on the plea bargain that you had reached with the Commonwealth?

MR. BARBER: No.

MR. CONWAY: I didn't think so. I think it's pretty obvious that they told you -- in fact, after you wrote this one, of course, which was December the 14th of 2005 and I'm pretty sure that's Lessemun's signature, where were you?

MR. BARBER: '05?

MR. CONWAY: Yeah.

MR. BARBER: December. Sussex.

MR. CONWAY: And when you signed this.

MR. BARBER: '05, December, I was in Sussex.

MR. CONWAY: Okay.

MR. EBERT: When you wrote the letter to the Judge before the hearing in Norfolk, where were you housed at that time?

MR. BARBER: Wrote the letter to the Judge before the hearing in Norfolk?

MR. EBERT: Yeah, about two months.

MR. BARBER: I was in here when I went to Norfolk.

MR. EBERT: You were here?

MR. BARBER: When I went to Norfolk, I was here. This letter, I don't know about.

MR. EBERT: You remember writing the letter to Judge. It came to the Judge and the Judge just sent us a copy of it. We didn't know you wrote it.

MR. BARBER: Wrote a letter to which Judge, the Judge in Norfolk?

MR. EBERT: Judge Jackson, yeah.

MR. CONWAY: Yeah, when you got a subpoena.

DETECTIVE NEWSOME: Telling you that you were going to come to Norfolk.

MR. CONWAY: When you got a subpoena, you wrote him a handwritten note saying you didn't want to come, --

MR. BARBER: Oh, then I was here.

MR. CONWAY: -- that what you testified to --

MR. BARBER: Before I went to Norfolk, I was here.

MR. CONWAY: Okay.

MR. EBERT: You were writing that note to the Judge, you sent it to him telling him you didn't want to testify and everything you testified to at the trial was true?

MR. BARBER: Yeah, I might have wrote it.

MR. EBERT: It was notarized I think.

MR. CONWAY: Yeah. And then of course, you know, you gave this in 2006, a couple months after, you signed this long affidavit --

MR. BARBER: Yeah.

MR. CONWAY: -- saying that, "The affidavit I gave on 12-4-05 was false so I gave this affidavit after much thought and this was my thinking.

I thought that by lying, which I know is wrong, but to do it is to save someone's life, Justin, would be a good thing. Later, and I had done it, made the false affidavit, I was unsure if I did the right thing or not. Eventually one morning" –

Does all of this sound familiar? You recognize your handwriting?

MR. BARBER: Yeah.

MR. CONWAY: "Eventually one morning I woke up totally convinced that what I had did was wrong and wrote the letter to Katy Swanson" --

MR. BARBER: Yeah.

MR. CONWAY: -- "to tell her the truth. When I did that, I felt a weight come off my shoulders as soon as I put it in the mailbox." That doesn't sound like something that could be a lie. That sounds like something from the heart. It was, wasn't it?

MR. BARBER: I mean, different times for different stuff, I guess.

MR. CONWAY: Well I know, but (unintelligible) to talk to you about, different versions at different times. But, you know, at some point you've got to confront yourself.

And if you have any religion at all and believe in a higher power, he knows just like you know, what's true and what's not. Now you could just be blowing smoke by saying this but it doesn't sound like it to me.

It sounded a lot more like the first wrote this version of events to the probation officer and to the Judge and to the family and friends of Danny Petrole. That's what it sounded like to me. But anyway, "When I did that, I felt a weight come off my shoulders as soon as I put it in the mailbox.

The affidavit was handwritten by Katy and then typed later. During these conversations, Katy Swanson and Bob Lessemun both agreed that I had nothing to lose by doing this and that facing a perjury charge wasn't a very big deal considering the amount of time I had to do."

And that's obviously true too. I mean, that has a ring of truth also.

MR. BARBER: Yeah.

MR. CONWAY: Because it is true; right?

MR. BARBER: I guess, yeah, whatever that is.

MR. CONWAY: Okay. I'll come back to that but you know, everybody including you and whatever beliefs you have is aware that, you know, you can change your story back and forth.

MR. BARBER: Yeah.

MR. CONWAY: You know what's true.

MR. BARBER: Yeah.

MR. CONWAY: So anyway, "I had nothing to lose by doing this and facing a perjury charge wasn't a very big deal considering the amount I have to do. They also told me that they'd find an attorney for me and he eventually wrote me a letter concerning the perjury charge."

Nobody, none of these people ever told you that by breaching the plea agreement you could be tried again also, did they, for the murder, not the perjury?

MR. BARBER: I guess not directly but I got a murder charge.

MR. CONWAY: But you're saying you did know that you could be tried again also by changing your story?

MR. BARBER: I mean, I'm already guilty of murder. How am I going to get charged again with being guilty of murder?

MR. CONWAY: That's what I thought. They never explained that to you, did they?

MR. BARBER: Nah.

MR. CONWAY: Okay. I could tell because you're talking about what they said to you about a perjury charge. Obviously if they had talked to you about what the truth of the matter is, and I mean we can't, you know, give you stuff, but you might want to think about some United States Supreme Court cases.

This is Ricketts versus Adamson and I've highlighted the important stuff because this was decided all the way back in 1987. It's been the law forever. So you're thinking that hey, I've already been convicted of murder, I can't be tried for capital murder now because I already plead guilty to first degree murder. Is that what --

MR. BARBER: Yeah, how would I be --

MR. CONWAY: Well what you and your attorney agreed to indicated that if you ever testified differently that all your statements could be used against you to prosecute you.

MR. BARBER: Okay.

MR. CONWAY: And I was just curious as to whether you had any discussions with any of these other attorneys.

This case out of the Supreme Court, here's what happened, they call him Respondent. His name was Adamson. He was the Defendant charged in a murder, okay.

MR. BARBER: All right.

MR. CONWAY: "Adamson and the prosecutor reached an agreement where Adamson would plead guilty to second degree murder and testify against the other parties.

The trial court accepted the plea agreement and proposed sentence and the Defendant testified against the other individuals" -- just like you -- "who were convicted of first degree murder but their convictions were reversed.

The errors on the Supreme Court reversed the latter convictions" of the guys that he testified against "and sent it back for retrial" --

MR. BARBER: Uh-huh.

MR. CONWAY: -- like Wolfe has been now. "And the prosecutors sought to get the Defendant, Adamson, further cooperation but was informed that Adamson believed that his obligation to testify under the agreement terminated when he was sentenced.

The State filed a new information", which is like an indictment, "charging him with first degree murder and the trial court denied his motion to quash that information, vacated his second degree murder conviction and reinstated the original charges holding that the plea agreement contemplated availability of his testimony against the other individuals at both trial and retrial" -- even though it didn't specifically say so -- it called for his cooperation and to testify truthfully -- "that he had violated the agreement's terms and that the agreement waived the defense of double jeopardy if it was violated.

The State then declined his offer to testify at the other individuals' retrial and he was convicted of first degree murder and sentenced to death." In other words, because the guy refused to testify at the retrial, he was charged and convicted of first degree murder.

And this is the Supreme Court indicating that, "He was convicted of first degree murder, sentenced to death and that judgment was affirmed on appeal.

And the holding by the U.S. Supreme Court is that Adamson's prosecution for first degree murder did not violate double jeopardy principles since his breach of the plea agreement removed the double jeopardy bar that otherwise would prevail."

And you know, I had thought it was pretty deceptive really for these people to be coming here and talking to you as if perjury was the only thing you had to worry about. And you, yourself, have gone back and forth on it.

MR. BARBER: Uh-huh.

MR. CONWAY: What's perjury, you know, if I've got to serve years or whatever, 38 years, whatever you had to start with.

MR. BARBER: Yeah.

MR. CONWAY: You know, what's the big deal about perjury. That's only 10 more years although they probably didn't even let you know that, that perjury does carry up to 10 years.

But be that as it may, and I know they did talk to you about perjury because we also have a copy of the letter that David (unintelligible) sent to you saying, hey, look, if you get charged with perjury, I'll be happy to represent you.

But he didn't say anything about, you know, if they bring back your original charge.

MR. BARBER: No. No, they never mentioned nothing about no original charge.

MR. CONWAY: I didn't think so. That doesn't seem fair to me.

MR. BARBER: How would it make the jump from first to capital?

MR. CONWAY: Well, you know, we've got --

MR. BARBER: Or even from second to first?

MR. CONWAY: Well just the same way it did for Mr. Adamson. Because he breached the plea agreement --

MR. BARBER: His went from second to first.

MR. CONWAY: Well first degree --

MR. BARBER: But first out there is like capital?

MR. CONWAY: Yeah, yeah. See, we have a distinction. We make it capital murder or first and second, --

MR. BARBER: Yeah, capital, first and second.

MR. CONWAY: -- involuntary and all that.

MR. BARBER: So would make a first into a capital?

MR. CONWAY: A breach of the agreement.

MR. BARBER: But I mean, what has to happen to make it capital though?

MR. EBERT: Well we would bring the charge against you, capital murder.

MR. BARBER: I mean, what's the -- like okay, speeding is --

DETECTIVE NEWSOME: Elements?

MR. BARBER: -- I've got to go faster than the

speed limit. What's going to make the difference between first and capital besides sentence?

MR. CONWAY: Murder in the course of killing for hire. Murder in the course of an attempted robbery. Murder in the course of a drug conspiracy. All of those are capital. And you, your own words, make it a killing for hire.

I mean, you confessed to that. And the agreement was we wouldn't use your words against you in a prosecution unless you breach the agreement. You see, these cases all talk about how plea agreements are subject to the law of contracts.

You enter into agreement. You get something, the other party gets something. In the case of criminal cases, you get something out of it and you did, and the Commonwealth gets something out of it and that's truthful testimony against the person you identify.

And you probably didn't keep a lot of this paperwork but you know, right from the get-go, this letter that Mr. Ebert showed you when you were testifying, and I've got your testimony here also that I can show you where you did that.

This agreement said that, "No statement will be used directly against your client by this office in any civil or criminal case provided one, that the statements are truthful", and you now said they weren't; "two, that he provides truthful testimony at any stage of the prosecution of Justin Wolfe.

In the event your client is a witness at any legal proceeding and either refuses to testify or offers testimony materially different from the testimony, the Commonwealth is free to use such statements in the impeachment or prosecution of your client."

Had you forgotten about that?

MR. BARBER: Yeah, I guess.

MR. CONWAY: And you didn't seek your own counsel, did you? You never tried to make a call to Mr. Pickett or anything and say, hey, look, these people are after me to change my story?

MR. BARBER: No.

MR. CONWAY: And they're suggesting that the only thing I have to worry about is a perjury charge.

MR. BARBER: No.

MR. CONWAY: You didn't talk to any other attorney? You didn't do any of your own legal research? You were just here by yourself --

MR. BARBER: Yeah.

MR. CONWAY: -- and these people kept coming back to you again.

MR. EBERT: How many attorneys do you think you talked to (unintelligible)?

MR. BARBER: Actual attorneys?

MR. EBERT: Yeah, I mean, attorneys or law students or people with some (unintelligible)?

MR. BARBER: Probably two or three, that's it.

MR. EBERT: How about those girls that came, they were actual members of the bar not just some law student?

MR. BARBER: They were from the anti-death penalty thing. They came one time or something.

MR. CONWAY: Innocence project?

MR. BARBER: Somebody. They came like you all came. Just showed up.

MR. EBERT: How many other people showed up like that?

MR. BARBER: I think two, one or two.

MR. EBERT: How many times do you think?

MR. BARBER: Just once.

MR. CONWAY: I believe that when you talked to the State Police investigator at one point you talked about how the people visited you -- I don't know if it's the same people -- maybe we're talking about different people -- but that these people had kept coming back and coming back and talking to you about your case.

MR. BARBER: Yeah, that was at Sussex.

MR. CONWAY: Okay, that was at Sussex. So that was before you actually did get them an affidavit?

MR. BARBER: Yeah.

MR. CONWAY: And we'll try to see if we can't get documents showing, you know, how many times they came and when they came. You never had any legal representation during any of those visits either?

MR. BARBER: No.

MR. CONWAY: Well now, when Mr. Ebert was first -- do you remember when you testified and Mr. Ebert was asking you questions?

MR. BARBER: (No response.)

MR. CONWAY: You remember testifying?

MR. BARBER: Yeah, yeah, yeah.

MR. CONWAY: And the first thing he did was show you the letter. And he asked you, "You and your attorney received a letter concerning your proposed testimony" and you answered, yes.

"And I'll show you a letter dated May the 11th and ask you if you can identify." "Yes." And then it goes on to ask you about the terms, you know, "What charges are pending against you now"? "Murder 1."

"And do you agree to the terms of that letter"? "Yes."

"And do you intend to enter a plea of guilty to the murder 1"? "Yes."

"Have any other promises been made to you in anyway whatsoever as to the disposition of your case other than you will not face capital murder"? "No, sir."

"And you're willing to testify here today on that basis"? "Yes, sir."

I think it's very unfair that you've been treated this way and like you've said, you've gone back and forth and you've said different things at different times.

But you know, that alone, you know, breaches what you agreed to. It's not that we don't understand because you wrote -- I mean, you wrote what looks like a heart-felt letter about why you did it the first time.

And then you wrote the Judge a letter saying pretty much the same thing. Hey, I've already told the truth at the trial. I don't want to come testify.

Did somebody come and see you between the time you wrote that and the time you came to Norfolk to testify?

MR. BARBER: (No response.)

MR. CONWAY: Somebody must have gotten to you.

MR. BARBER: Maybe. I have no idea.

MR. CONWAY: Where were you when you testified in Norfolk?

MR. BARBER: Here.

10 MR. CONWAY: You were here?

MR. BARBER: Yeah.

MR. CONWAY: Okay, well --

MR. BARBER: What was that, winter before

last, I guess.

MR. CONWAY: Yeah, right.

DETECTIVE NEWSOME: Uh-huh.

MR. BARBER: Yeah.

MR. CONWAY: We're going to get that information from the Warden here about when you were visited and by whom because it's obvious that something happened between the time you wrote that letter to the Judge.

I mean, you know, we were disappointed to see the initial affidavit that you filed. You can imagine that.

MR. BARBER: Yeah.

MR. CONWAY: You never suggested anything like that to us. And we knew what the truth was how you

didn't even know Danny Petrole for crying out loud; right?

MR. BARBER: No, not really.

MR. CONWAY: No, you didn't no him?

MR. BARBER: (Silent.)

MR. CONWAY: No, okay. Well --

MR. EBERT: Somebody come to see you in Norfolk when they brought you up there for the trial? Did you talk to counsel for Wolfe while you were in jail, being held there at Norfolk for Court?

MR. BARBER: Yeah.

MR. CONWAY: Do you remember who it was?

MR. BARBER: I don't know. Some guy. I don't know.

MR. CONWAY: Just one guy?

MR. BARBER: Yeah, he was just one guy.

MR. CONWAY: And --

MR. EBERT: Do you remember what you told him?

MR. BARBER: No, not specifically, no.

MR. CONWAY: Well he must have wanted to ask you about the letter you wrote to the Judge because all of us had it then.

It was some kind of conversation you had with him that made you change your position from the time you got the subpoena and wrote to the Judge. And I think you talked in that about, you know, how you have, you know, found a different life for yourself in here.

Were you serious about that or were you just blowing smoke? I don't want to even mention it again if you were just blowing smoke about that.

But I mean, if you really have found some spirituality in here, if you really do have some kind of faith and you were proclaiming that when you wrote your first affidavit to the State Police after the one you signed for them.

Is there any validity to that?

MR. BARBER: Yeah. Yeah, I'd say I changed.

MR. CONWAY: I would assume that if that's true that you still feel bad when you tell a lie?

MR. BARBER: Yeah. Yeah, for sure.

What -- if his death conviction got overturned, how did all the drug stuff get overturned? That got overturned too?

MR. CONWAY: We asked ourselves the same thing.

MR. BARBER: Didn't he take a plea on all that stuff?

MR. CONWAY: He didn't take a plea. He just admitted to everything.

MR. BARBER: Well, isn't -- I mean, -- or he plead, I guess?

MR. CONWAY: Well he plead not guilty to that too.

MR. EBERT: He plead not guilty but he was found guilty because he took the stand and admitted I'm a drug dealer, not a killer. That was his -- the gist of his story.

MR. CONWAY: I mean, he laid it all on you when he testified in the trial. I'm sure you knew that.

MR. BARBER: No, I never knew what he said.

MR. EBERT: You heard from Owen since --

MR. CONWAY: You mean from Wolfe?

MR. EBERT: I mean, Wolfe since you're both incarcerated?

MR. BARBER: No.

MR. CONWAY: Well he think he's (unintelligible).

MR. BARBER: I didn't think there was no way for him to get out of it. I thought he took a plea for the drugs for like 40 years or something.

MR. CONWAY: No. He plead not guilty. The jury sentenced him to 30 years for that --

MR. BARBER: For the drugs?

MR. CONWAY: -- is my recollection. I think 30 was the max.

MR. EBERT: Thirty-three, I believe.

MR. CONWAY: Well the three was for the firearm. I think the 30 was the max for the conspiracy charge that we never brought against you.

MR. BARBER: Yeah.

DETECTIVE NEWSOME: Have you ever received any threats directly or indirectly from Wolfe, friends of Wolfe's or anybody?

MR. BARBER: No.

DETECTIVE NEWSOME: So it's never been anything like that then?

MR. BARBER: No.

DETECTIVE NEWSOME: Okay.

MR. CONWAY: How about any incentives? Did any of these people ever say that they could do something for you or for your family or friends or anything?

MR. BARBER: No.

MR. CONWAY: Well that's good.

DETECTIVE NEWSOME: (Unintelligible.)

MR. BARBER: (Unintelligible) heard from her in a couple months.

DETECTIVE NEWSOME: Right.

MR. BARBER: Unless you all know something I don't know.

DETECTIVE NEWSOME: No.

MR. CONWAY: I apologize. I had heard (unintelligible). I don't remember (unintelligible).

MR. BARBER: Did you hear that? Who said that?

MR. CONWAY: We haven't had any contact from your dad for a while.

DETECTIVE NEWSOME: Well there was a time -- wasn't your dad diagnosed with leukemia or something or other or I know your mom had passed away.

MR. BARBER: He (unintelligible) bullet from the first Gulf War.

DETECTIVE NEWSOME: Oh, okay.

MR. BARBER: (Unintelligible) mild leukemia.

DETECTIVE NEWSOME: But it wasn't anything terminal then --

MR. BARBER: No.

DETECTIVE NEWSOME: -- at that point?

MR. CONWAY: I'm really glad to hear that.

DETECTIVE NEWSOME: Yeah. Yeah.

MR. EBERT: Where is he living now?

MR. BARBER: Illinois.

MR. CONWAY: Still in Illinois as far as you know?

MR. BARBER: Yeah.

DETECTIVE NEWSOME: He retired from the Corps; right -- from the Marine Corps?

MR. BARBER: Yeah, been retired.

MR. CONWAY: Do you all have any contact?

MR. BARBER: Yeah.

MR. CONWAY: Good. Good.

MR. EBERT: As I recall, I may be wrong, he testified at your sentencing.

MR. BARBER: Yeah.

MR. EBERT: He came and talked to me a long time about you.

MR. EBERT: (Unintelligible) he loved you. And he said what you said, (unintelligible) the war started, your mother died, found out your girlfriend was cheating on you, your father sold the house and moved.

MR. CONWAY: You were in a bad way when all of this happened?

MR. EBERT: I remember your father telling me, you know, he's really changed. He remembered (unintelligible). If you have found God as Mr. Conway said, you know, (unintelligible).

MR. BARBER: Yeah.

DETECTIVE NEWSOME: And I'm looking back at what originally happened and stuff. Justin Wolfe used you and he and/or his representatives, it looks like continued to use you.

MR. BARBER: Uh-huh.

DETECTIVE NEWSOME: And when you look at your letters and stuff, the times that you're changing is when you've got somebody in front of you writing stuff down. All we ever wanted you to do was to tell the truth.

MR. BARBER: Uh-huh.

DETECTIVE NEWSOME: And I told you that coming back on the plane?

MR. BARBER: Yeah.

DETECTIVE NEWSOME: And do you remember me telling you, do not lie to your attorney. Tell your attorney the truth because only a fool lies to his attorney. That's all we ever wanted, Owen, was just the truth.

You know, and sometimes you may feel like well, if I'm going down, there's no need to take him with me. So I'll just tell this lie to make it easier on him.

And I'm saying that this may come from the heart in an effort to do good, to try and do good, and say well even though you may know he's guilty, I'm just going to say this because it will make his life easier.

Why should somebody else suffer also? I will take the brunt of this. But justice doesn't work like that. And nor does God work like that. We are held accountable for our actions. Scripture tells us to obey the laws of the land. We have an obligation to do that.

And our obligation before anything else is to be righteous and truthful in our practices and in what we do. And we're told in the scripture also that those in authority over us are put there by holy mandate.

So we have an obligation to respect the Courts, to respect the process and to do what's right. And we do not have the moral ability to arbitrarily protect those who are guilty, who are held accountable. Because when we do that, then we subrogate and do away with justice for the victim, even though he may not be living, and for those, more importantly those that loved the victim and are left behind. Then we do a greater injustice.

And you can just kind of take that for what it's worth --

MR. BARBER: Yeah, I understand.

DETECTIVE NEWSOME: -- but I think that's one of the most important points.

MR. BARBER: I understand. I don't know how he got out of the drug thing.

MR. CONWAY: So you thought that --

MR. BARBER: I thought that he would just be on death row and he'd still have to do 30 some years and --

MR. CONWAY: And that might be an injustice.

MR. BARBER: Yeah.

MR. CONWAY: (Unintelligible.)

MR. BARBER: Yeah, and totally close the book on this thing here.

MR. CONWAY: Well not only were you misinformed about that or uninformed, but you were also not reminded about your plea bargain. And you know, what I just showed you was the United States Supreme Court because they have the final word in double jeopardy.

MR. BARBER: Yeah.

MR. CONWAY: You know, normally when somebody is found guilty or not guilty of a crime, either one, you can't come back and try them for something else. The exception is when a plea bargain is breached.

And this guy -- this guy claimed he didn't even know he would have to testify again because it wasn't spelled out in the plea agreement.

MR. BARBER: Yeah.

MR. CONWAY: But the U.S. Supreme Court said it's implied. And I've got all these cases from Virginia that say the same thing.

In fact, even if you appeal -- if you get a plea bargain, you know, it's governed by contract law and your due process rights which means this, as long as you don't

breach the agreement, we have to do what (unintelligible).

That's why we always put it in writing --

MR. BARBER: Uh-huh.

MR. CONWAY: -- so everybody knows what their obligations are. And then there's one case here where the only thing the Defendant did was appeal the case after he had already plead guilty to the agreed upon crime.

Where is that one? Oh, here it is. Although double jeopardy need not be specifically waived in a plea agreement, the waiver of the constitutional right may be implied.

When the Defendant pleads guilty pursuant to a plea agreement and receives the agreed upon sentence, an implied term of that agreement is that the Defendant will not appeal what he's bargained for and received.

If he does, then he has breached the plea agreement and the Commonwealth is free to reinstate the original charges.

So you know, plea agreements, plea bargains, they're give and take. And double jeopardy does not apply when you breach a plea agreement.

MR. EBERT: You ought to get your own attorney to tell you that. That's what the law is.

MR. CONWAY: That's true.

MR. EBERT: If you got any doubt about it. The only thing I want to mention, how do you think Danny Petrole's mother feels?

MR. BARBER: Yeah, I didn't -- like I said, I'd say the thing I said earlier.

MR. EBERT: He thought he was going to be in there as long as you were and that may or may not happen. He may walk. He's going to be tried again and he may walk this time. But we'll certainly see.

MR. BARBER: Same Court, same jail, same --

MR. EBERT: (Unintelligible) talked to Petrole's father, he said, my wife's devastated. He said he got away with murder. Well he hasn't gotten away yet but it's (unintelligible) likely.

DETECTIVE NEWSOME: And correct me if I'm wrong, if the decision was not made to retry him again, he'd be walking very shortly?

MR. EBERT: Oh, yeah.

MR. CONWAY: There's nothing to hold him unless we try him again.

MR. EBERT: I don't know that it's going to happen. We're going to meet with his attorneys, Wolfe's attorneys tomorrow. That's the same attorneys he had at the (unintelligible).

MR. BARBER: Yeah.

MR. EBERT: That's the firm of King and somebody. I forgot the last name.

MR. BARBER: I just don't understand how he got out of the drug stuff.

MR. CONWAY: Well quite frankly, we don't understand how he got out of any of it because

normally, just the fact that a witness changes his story --

MR. EBERT: His attorney -- I don't know this but they want to come in. They called me, they said we want to talk to you about Wolfe (unintelligible) what we can do with him. So we'll talk to them tomorrow. I don't know if (unintelligible) or not but we'll see.

DETECTIVE NEWSOME: Let me ask you a question here and I'm not trying to put words in your mouth.

MR. BARBER: All right.

DETECTIVE NEWSOME: What we talked about or what you assumed that he was going to spend "x" amount of time anyway, was it your objective or your thinking that at least you could spare his life and was that what your goal was?

MR. BARBER: I'd say partly probably.

MR. CONWAY: What's the other part?

MR. BARBER: I don't know. It's kind of (unintelligible). I'd rather not say anything. It seems like anymore anything's -- any comment like ends up coming back and you know, 17 years later and I've got to like what, I don't even know, maybe this, that.

It's just, I don't know, I figured it'd be over with.

MR. CONWAY: Yeah, I understand that. And like I say, you know, we're not holding you here against your will but we want to just make sure that you, you know, understand what the ramifications of what's happened are because they're immense.

I mean, you know, by doing what you did, you know, you not only tried to make it look like he had nothing

to do with the murder and now he's skating on the drug charge and you devastated the victim's family.

Because you got to understand, you know, when we went through these first trials and then with your plea, they realized that you were the one getting off easier than Wolfe even though you're the one that pulled the trigger so many times that ended Danny's life.

I mean -- you look confused.

Did you not get off much lighter than Wolfe?

MR. BARBER: Yeah, I guess I got off lighter than him.

MR. CONWAY: Well what did you get to serve?

MR. BARBER: Yeah, I mean, he's getting the death penalty and I'm still alive and then yeah, I'm getting off lighter.

MR. CONWAY: And they sat and watched that happen. And you know, you expressed remorse back then and you apparently stuck to your guns for years but eventually it looks like they wore you down and led you to believe that all you had to worry about was a perjury charge --

MR. BARBER: Yeah.

MR. CONWAY: -- and that he would be, you know, serving the 30 some years for the drugs irrespective of what you said about the murder but it didn't work out that way.

MR. BARBER: No, it doesn't look like it.

MR. CONWAY: And you know, I mean we're all back to square one.

MR. BARBER: Yeah, now we're at square one.

DETECTIVE NEWSOME: You're what, 32 now, 31, 32?

MR. BARBER: Yeah.

DETECTIVE NEWSOME: You've actually got a release date; right?

MR. BARBER: Yeah, as of right now.

DETECTIVE NEWSOME: 2034, is that what it was?

MR. BARBER: Yeah, something like that.

MR. CONWAY: Well you know, we can't be coming down here all the time. We've got to make some decisions.

MR. BARBER: Yeah, well that's why -- yeah, I mean, I haven't really been talking to anybody but when I seen that it was you all, I was like well, you all have gone a long way so I might as well sit here for awhile.

MR. CONWAY: I appreciate it.

DETECTIVE NEWSOME: Yeah.

MR. EBERT: We appreciate it.

MR. BARBER: I don't want to be --

MR. EBERT: Do you want to think about what we've told you a little bit.

MR. BARBER: Yeah, yeah. I think that's the whole -- you know, I just got a truck load of something (unintelligible) and you know, I (unintelligible) --

MR. CONWAY: I can imagine. It's a bunch.

MR. BARBER: Yeah.

MR. CONWAY: But see, I mean, (unintelligible) these papers to you (unintelligible) along the way. And I don't know, you know, who you trust to talk to about it.

MR. BARBER: Yeah. Now it's -- yeah.

MR. CONWAY: You know, I don't know how Mr. Pickett would feel about it but --

MR. BARBER: No. I wouldn't want to talk to him.

MR. CONWAY: You wouldn't want to talk to him, okay. Well I haven't talked to him either but, you know, at least he was the one who was in your corner when all this, the plea bargain was arrived at.

And you know, the thing about it is – the reason I brought these things so you could see we're not here just to blow smoke to you either. I mean, this is the facts of life.

MR. BARBER: Yeah.

MR. CONWAY: It's in black and white right here. And I think I can see recognition that you recall a lot of this also.

MR. BARBER: Yeah. Yeah, it's one of those things that it was a long time ago. I remember the basic stuff of it but maybe not super specific stuff.

MR. CONWAY: Right. Right. And I understand that. It just seemed, I don't know how somebody could come here over and over again trying to get you to change your story without at least discussing with

you what some of the ramifications, what some of the results could be, you know.

MR. BARBER: Yeah.

MR. CONWAY: I mean, here you're thinking that you're done. Nobody explaining to you the concept of plea agreements, and double jeopardy --

MR. BARBER: Yeah. No, I figured that --

MR. CONWAY: -- and how it reaches --

MR. BARBER: -- you know, it's done. Yeah, it's finished. It's over with.

MR. CONWAY: Yeah. Because you didn't – you probably didn't remember all these terms. Have you had a copy of this with you?

MR. BARBER: No.

MR. CONWAY: Had you given any of it a second thought?

MR. BARBER: No.

MR. CONWAY: Well it's unfortunate because had you had somebody in your corner, they would have certainly told you, you know, about the potential results of breaching a plea bargain.

Because you know, I mean, double jeopardy is (unintelligible) the only thing that could happen --

MR. BARBER: Yeah.

MR. CONWAY: -- when a breach occurs.

MR. BARBER: Double jeopardy is out the window.

MR. CONWAY: Exactly.

MR. BARBER: So we're square one.

MR. CONWAY: So you know, the long and short of it is, all of us, all of us have to make some pretty important decisions pretty soon.

MR. BARBER: If you try Justin again, couldn't you just go on the drug side of it and do the same thing again with all of the same evidence that he gave?

MR. CONWAY: And just let him skip --

MR. BARBER: If he gets 30 some years again.

MR. CONWAY: Well let me tell you something, if we -- in the first place we wouldn't do that because we know what the truth is and we're not going to let (unintelligible).

Do you understand where I'm coming from there?

The thing is, if that were even suggested, they would plead him and he would get the benefit of the guidelines. He wouldn't have a jury sentencing him.

DETECTIVE NEWSOME: And would he get credit for time served?

MR. CONWAY: Oh, yeah. So that's not a viable option.

MR. BARBER: Wouldn't he still have like 20 some more years to go?

MR. CONWAY: No.

MR. EBERT: He's got to be sentenced. If he gets sentenced to 30 years or 33 years, he'll have the same sentence assuming they throw out the death penalty (unintelligible) all together.

MR. BARBER: Yeah.

MR. EBERT: He could be -- not get the death penalty. He might get life. He might get 20 years. Who knows (unintelligible).

MR. CONWAY: Or he might be willing to plead to something else.

MR. EBERT: He might walk. Who the hell knows. But he's facing -- he's still facing the death penalty. He hadn't (unintelligible) that yet. Your testimony is the subject -- you don't have a hell of a lot of credibility with all the stuff you said in the past.

MR. BARBER: Yeah.

MR. EBERT: You can understand if these guys put you on the stand, you decide to tell us the truth this time again, you'll get hit over the head with all these affidavits.

MR. BARBER: Yeah.

MR. EBERT: And that's certainly -- we may not want to call you because of that and then again we might. Let the jury know the whole damn story and let them sort it.

Jurors seem to have the capability of sorting through things. Everyday sentences, they don't get (unintelligible) like lawyers.

MR. BARBER: Yeah.

MR. EBERT: Did you know -- you never met Petrole's parents?

MR. BARBER: No.

MR. EBERT: Did you know Danny Petrole?

MR. BARBER: Other than hung out with him? No. Other than -- yeah --

MR. EBERT: I think and I may be wrong about this but didn't you go to school with him, grade school or something?

MR. BARBER: I think one grade or something.

MR. EBERT: But you and him weren't buddies?

MR. BARBER: Like hung out all the time or something? No.

MR. EBERT: Did you know whether chronic or something was coming through him?

MR. BARBER: I don't know. (Unintelligible.)

MR. EBERT: Huh? I know you definitely had to know it was coming through him by the time this happened but at some point in time, Wolfe had to tell you where he was getting his stuff.

As I recall, you basically were getting shwag; right?

MR. BARBER: I don't know if he ever told me. I don't know if he ever told me.

MR. CONWAY: Not until you all went to the --

MR. BARBER: Yeah, maybe eventually I found out or something but I don't know. I mean, I haven't thought about any of this in --

MR. CONWAY: Years.

MR. BARBER: -- years. What, 10 years, 12 years.

MR. CONWAY: Yeah.

MR. BARBER: Yeah, I haven't --

MR. CONWAY: Well you're going to need to start.

MR. BARBER: Yeah.

MR. CONWAY: And you know, where does that leave you?

MR. BARBER: Yeah, really. I don't know, you all. Let me think about all this stuff, I guess. I don't --

MR. CONWAY: (Unintelligible.)

MR. BARBER: Let me know what's happening, I guess. I mean, I didn't know that -- I didn't know that he got the death penalty overturned.

Somebody had said that they thought they had seen that but -- and that was just -- you know, that was like in my head, okay, I think he got the death penalty overturned or something. But I didn't see it.

MR. EBERT: Do you watch television here?

MR. BARBER: Yeah, some.

MR. EBERT: I think the fact that he got the death penalty -- the whole thing overturned, I think that was the subject of some news.

DETECTIVE NEWSOME: Did you see anything on the TV about it?

MR. BARBER: No, I didn't see nothing on TV about it. We get like the Harrisonburg news.

MR. CONWAY: I see.

MR. BARBER: And I think it just switched. I think one of the channels is like the D.C. news or something.

DETECTIVE NEWSOME: You don't have like CNN or anything like that?

MR. BARBER: There's CNN but I don't think it was on no CNN or not that I seen it on CNN.

DETECTIVE NEWSOME: Right. Do you work in here? Do you have a job?

MR. BARBER: Yeah.

DETECTIVE NEWSOME: What do you do?

MR. BARBER: Pick up weights. I missed it at 2:00.

DETECTIVE NEWSOME: Pick up weights?

MR. BARBER: Yeah. Good job, you all. I missed that. You got me out of work.

MR. CONWAY: You're welcome.

DETECTIVE NEWSOME: Do you mean like working in the gym?

MR. BARBER: Outside, yeah. They got weights outside.

DETECTIVE NEWSOME: Oh, okay.

MR. CONWAY: Free weights; right?

MR. BARBER: Yeah.

MR. CONWAY: Somebody's got to pick them up.

DETECTIVE NEWSOME: And you have access to --

MR. EBERT: So that's your exercise, picking up somebody else's weight.

MR. BARBER: No. It's exercise when you first start but then afterwards it's nothing.

DETECTIVE NEWSOME: Right.

MR. CONWAY: Those 45 pound plates are not easy to tote around.

MR. BARBER: No, they're all -- all the plates are welded to the bars and there's a bunch of dumb bells.

MR. CONWAY: Oh, I see. So you have to pick up the whole thing?

MR. BARBER: Yeah.

DETECTIVE NEWSOME: You have access to like the law library and stuff like that?

MR. BARBER: Yeah, the law library or whatever.

MR. CONWAY: You just said, you know, keep me informed of what's going on. You know, things are going to start happening pretty quick. You know, and like Mr. Ebert said, we're meeting with his attorneys and we don't know what they're going to suggest but I mean, we got to think about what's fair, you know.

I mean, we got to think about what's fair. And here we are thinking about that (unintelligible).

MR. BARBER: Yeah.

MR. CONWAY: And you know, the first time we went through this 12 years ago when Justin Wolfe came in with his first attorney, Mr. Whitestone, when he first came in to talk to us with Mr. Whitestone, I mean, we just really couldn't believe how arrogant he was, you know.

I mean, it seemed like he thought he just couldn't get caught for any of the stuff he'd done. And you know, when the Marshall Service found that you were out

in California with Jennifer and then when he went and picked you up, and you all had already written that letter, you know, to Wolfe, that was just kind of the icing on the cake.

Because I mean, all these other people had come in with attorneys and talked, you know, Coleman. Coleman was doing what you've done some, you know. He'll say one thing to Wolfe's attorney and something different to us.

But he was steadfast when he talked to us about how you know, you would never have done what you did unless Justin -- that's what Justin wanted you to do. And you know, that was just the truth.

(Unintelligible) on that, the fact and you know, we try to do the right thing. And now you're changing your stories back and forth. It's not only, you know, it hurt you and the victim's family, you know, it's hurt all of us.

I mean, it makes us look like we were trying to get you to say something that wasn't true.

MR. BARBER: Yeah.

MR. CONWAY: And you know, we've never even -- it's never even been suggested that we've ever done that. And Owen, you know, the one thing (unintelligible) about it (unintelligible) -- the one thing you know is we didn't (unintelligible) you either.

MR. BARBER: Yeah.

MR. CONWAY: We never asked you to say anything that wasn't true.

MR. EBERT: Last thing we want to do is convict somebody who's innocent. You know that.

MR. BARBER: Yeah.

MR. EBERT: Is that right? We got too damn many people who break the law (unintelligible).

MR. CONWAY: I mean, we've gone to the wall for people that we have found that they weren't guilty (unintelligible).

(Unintelligible) all the time and that is try to follow the truth, you know, where the facts lead.

MR. BARBER: Yeah.

DETECTIVE NEWSOME: As a police officer, I've got as much obligation to clear an innocent man as I do convict. We all do. And we've all been doing this job for a long time.

MR. BARBER: Yeah.

DETECTIVE NEWSOME: And we all have a good reputation of integrity. It's always disturbing when that's called into question.

MR. BARBER: Yeah.

DETECTIVE NEWSOME: But something I want you to remember and I want you to think about, Owen, is I want you to remember what it was like the day that you called Justin a couple days later and out of the blue he told you he's on his way to Florida.

MR. BARBER: Yeah.

DETECTIVE NEWSOME: Because that must have been a pretty sinking feeling. And then when you got

down to Florida and tried to get in touch with him and couldn't get in touch with him.

And then when you got off that train in New Orleans and you called him and you get a voice mail saying, I've lost my phone and you know good and well he hadn't lost his phone.

He wasn't taking phone calls from nobody because he was getting out of dodge.

MR. BARBER: Yeah.

MR. CONWAY: And you were too hot.

DETECTIVE NEWSOME: And then when you got to California, and Jennifer showed up with only $1,000 and nothing else.

MR. CONWAY: Detective Newsome is absolutely right. I mean, you really got to do some sole searching. You got to -- you got to decide, you know, what's right and what's wrong.

MR. BARBER: Yeah, I agree. I agree.

MR. CONWAY: And you know, you've done wrong because you said (unintelligible) you could say it. But you know, and I'm certain that you didn't anticipate quite the results that have come about.

MR. BARBER: No. No, I did not anticipate this at all.

MR. CONWAY: And be that as it may, we never have in the past and we will never in the future, ask you to say anything that's not true; do you understand that?

MR. BARBER: Yeah.

MR. CONWAY: I mean, have we ever asked you to do that?

MR. BARBER: No.

MR. EBERT: And I know, for lack of a better word, you don't want to throw Wolfe under the bus so-to-speak, (unintelligible), the truth of what you know. And Wolfe, he didn't give a damn about you.

You remember a guy, Wiffen (ph)?

MR. BARBER: Yeah.

MR. EBERT: He testified, and I assume it's true, that Wolfe said, oh, hell, he said that you fucked up. You were only supposed to rob him. That's Wolfe talking to somebody else on the street, another guy that he had a business relationship with.

MR. CONWAY: That came into evidence. But you know, the one person that you can count on to have your own interest at heart is you.

MR. BARBER: Yeah.

MR. CONWAY: And you know, let me tell you something, Owen, you know, there is a very loud, vocal contention of people who hate the death penalty.

MR. BARBER: Uh-huh.

MR. CONWAY: And they feel like the end justifies the means because they don't think anybody deserves the death penalty; do you understand that?

MR. BARBER: Uh-huh.

MR. CONWAY: And people feel that way and there's nothing wrong with people feeling that way. I know people who feel that way and that's fine.

But when you start doing things in such a manner that the end, if I get one person off of death row, it doesn't matter what methods I use to do it. It doesn't matter whose reputations get soiled.

It doesn't matter what the victim's family thinks about now because we've gotten someone off of death row so it's a victory and the Lord will forgive us for that. But let me tell you something, I don't know – I don't know if the Lord's all that forgiving or not.

I imagine he is but (unintelligible). It's been very, very destructive results from what these people finally got you to do. And like Mr. Ebert said, you know, I know one thing they're going to say about us.

They're going to say, let me tell you something, even if Barber were to go back to his original story, who's going to believe him now, --

MR. BARBER: Yeah.

MR. CONWAY: -- you know? And that's why we put it in the agreement (unintelligible) your story ever changes, that's a breach of your agreement.

Because we've counted on you to do what you've promised and what you've promised was to tell the truth. (Unintelligible) and you know in your heart that you did.

But look what this has gotten you. You know, it's unfortunate because 12 years ago you were much more immature. You were much more immature. I'm sure that you've matured a lot having to go through what you've gone through since then and being here.

And I can see you're a man now. You're not, you know, a kid. And you have to remember, it wasn't

easy for you the first time and it should be much easier for you now. It should be much easier for you now because you (unintelligible) done a lot of bad things.

Some of them may -- I'm sure a lot of them still say, you know, I'm innocent. I didn't really do it.

MR. BARBER: Yeah.

MR. CONWAY: You know what you did and you know why you did it and you know what Wolfe did. And you know there's nothing you can do about the truth except speak it, you know.

MR. BARBER: Yeah. Yeah.

MR. CONWAY: And that's all we ever asked of you. And frankly I thought you did a pretty good job at it. I mean, if I thought for a moment that you had made that stuff up, I mean, it would have been you we would have been going after back then.

I mean, you were the instrument of death and you know that. But we felt then that all the evidence showed what the truth was. And we really still feel that way.

But how could you make somebody believe you now do you think?

MR. BARBER: I don't know.

MR. CONWAY: You know, one thing comes to my mind.

You see, when you tell the truth, you don't have to wonder, you know, what did I say last time; you know what I mean?

MR. BARBER: Yeah.

MR. CONWAY: But when you lie, you forget the lie that you told and you find yourself telling another lie.

Can I give you a perfect illustration of that? Okay. You know one thing that's a very telling fact about all of these statements, unless you're telling the truth, you can't come up with a believable reason for doing what you did.

The only time you can do that is when you're telling the truth; have you noticed that?

MR. BARBER: No, not really.

MR. CONWAY: Well let me ask you this, let's talk about this long affidavit that you filled out, okay, back in '05.

Do you remember saying why you did what you did?

MR. BARBER: No, I don't know.

MR. CONWAY: You don't even remember. That's because you didn't. You couldn't come up with a reason why you did what you did.

But let me say this to you, you know that when you were giving information different from what you testified to, what you promised us would be the truth, right?

When you were giving information other than that, you'd put J.R. in the car with you when all this happened; right? How could you do that to J.R.?

I mean, did you feel like he had wronged you? Do you remember saying that?

MR. BARBER: Not really. I don't --

MR. CONWAY: You don't remember saying that J.R. was in the car with you?

MR. BARBER: Whatever's in here, I guess. I don't know.

MR. CONWAY: Okay, well I'm just showing you. You need to look at this, okay, look. "I did not want to use my own car." I don't want you to think I'm showing you something we've doctored up. This is the same thing you signed.

You recognize it; right? And it's -- how many paragraphs is it? And you know anybody who knows you, who's ever talked to you for any length of time can read this and we know that's not how you talk.

But anyway, there's over what, 70 paragraphs here. But let's go up to Paragraph 16. "I did not want to use my own car that night because my car is distinctive. It has projector headlights. It has a loud exhaust, is low and has rims.

I asked J.R. Martin if we could use his red Ford Escort and he agreed. J.R. Martin and I drove to Regina Zeuner's apartment and waited until Petrole left.

When he drove away from the apartment, we followed him. I drove J.R. Martin's car and he rode along."

Now when you talk about following Danny, you followed him to his street and then you pulled the car up next to his, and you got out of the car and started to approach Petrole on the passenger side and you were wearing a hooded sweatshirt.

"I intended to walk up to Danny Petrole's car and engage him in small talk, asking for directions. I was hoping he'd get out of his car. I did not have a chance to exchange even a single word because of what happened next.

When I approached his car, I had my hand in my pocket holding my gun. When I was a few feet away from the car, Danny Petrole lunged across the car to the passenger side. He was driving a Civic. I own a Civic. I know what's in the glove box.

And I assumed he was reaching for a gun." Okay. "And I panicked and by reflex, I pulled my gun out and shot him." Now I say all that to get to this. "I got back into J.R. Martin's car and we turned around in the cul-de-sac beyond his house and drove away.

J.R. Martin drove but I'm not sure at what point he got in the driver's seat while I was out of the car." And then at some point you indicated that, "I threw the gun and the gloves out of the window as we drove away."

Just to refresh your recollection, that's what you -- and this was sworn to also.

Now, do you know what you said in Norfolk?

MR. BARBER: Yeah, pretty much overall.

MR. CONWAY: Do you think you said that?

MR. BARBER: What does it say specifically because I --

MR. CONWAY: Well I'm going to show you because I want you to know these things but just from your

recollection, do you know if you said what you said in this one in Norfolk?

MR. BARBER: Probably pretty close to that, I guess.

MR. CONWAY: Okay. That's what I -- do you remember what I just now said, that when you tell the truth, you can tell it over and over and over.

When you tell a lie, you find yourself forgetting what you said, and you tell another lie. Okay. Let's get to that part here. Let me find it.

DETECTIVE NEWSOME: Is that the Norfolk one?

MR. CONWAY: Yeah. I think it might have been (unintelligible).

DETECTIVE NEWSOME: It would be 204, 205.

MR. CONWAY: 204 and 205?

DETECTIVE NEWSOME: Yeah, that's the pages.

MR. CONWAY: Oh, this doesn't go that far.

DETECTIVE NEWSOME: Of the actual incident?

MR. CONWAY: Yeah.

DETECTIVE NEWSOME: Yeah, 204, 205.

MR. CONWAY: The pages don't go that high.

DETECTIVE NEWSOME: This is the Norfolk one?

MR. CONWAY: Yeah.

DETECTIVE NEWSOME: Oh, wait a minute. Okay. Sorry. I was looking at the old one, the original one.

MR. CONWAY: Do you remember (unintelligible) asking you why you killed Danny Petrole?

MR. BARBER: (Unintelligible.)

MR. CONWAY: Well let me ask you this -- I'm not trying to trick you or anything, but do you remember what you answered?

MR. BARBER: No.

What did I say?

MR. CONWAY: Do you know why you don't remember? Because it wasn't the truth. "I don't see what that's got to do with it."

DETECTIVE NEWSOME: That was what your answer was.

MR. BARBER: Uh-huh.

MR. CONWAY: And so of course it eventually says, "Answer the question.

What was your reason for killing Danny Petrole"? "I don't see where -- I don't got a reason.

What's my reason"? But let me get onto -- here we go -- when you take the pistol out of your pocket.

"Why did you follow him and approach his car"? "I was supposed to talk to him because somebody asked me to talk to him."

"Who"? "I'm throwing people under the bus."

"Who did tell you to go talk to Danny Petrole"? And then you said, "Jason and J.R." Just whatever came to you then. Let's get to after that. "I pulled in front. I was driving." Here we go.

"What did you do after you shot him"? "I got in the car and left."

"How did you leave"? "J.R.'s car."

"But you were driving"? "When I left"?

"Yeah."

"Okay, you got rid of the gun and the gloves (unintelligible)"? I asked you that. "Threw them out the window."

"While you were driving"? "No, the passenger threw them out."

"Who's the passenger? You mean J.R. threw them out"? "Yeah."

You see, here you've got you driving -- you've got J.R. driving and you threw the stuff out. Here you've got you driving, J.R. threw the stuff out. That's what I mean.

And see that's -- it doesn't take a rocket scientist to see the discrepancies here and yet the consistencies in which you testified to.

Do you understand what I'm saying?

MR. BARBER: Yeah, I see what you're saying.

MR. CONWAY: Okay. So anyway, we started out talking about, you know, how could anybody believe you when you do tell the truth? And I'd like your opinion whether you think you could tell the truth (unintelligible).

MR. BARBER: I don't know, man. I really don't know. I mean, honestly, that would be the best answer. Right now, I -- it would just be back and forth and it's from so long ago and all these different

ones and you got this date in here and this date in here.

MR. CONWAY: Who made that happen, Owen?

MR. BARBER: Yeah. I mean, I don't say that I didn't make it happen.

MR. CONWAY: I know. I know. And I understand it too and quite frankly I think that's the only honest answer you could give.

MR. BARBER: Yeah.

MR. CONWAY: I don't know how I could convince somebody the truth now. But you also said it's been so long ago. I don't believe for a moment that you don't remember what happened that night.

I don't believe for a moment that you don't remember what happened that night. And I don't believe for a moment that you probably haven't relived it over and over in your mind.

And you know, it's probably one of those recollections that you would love to not even possess much less recall. But you know, the difference is, you know, when you tell the truth all you got to do is think back.

And yeah, there may be details that you don't recall. There may be, you know, specific conversations you had during some of your phone calls with Wolfe that you don't remember the details about. But you remember what happened and you remember why it happened.

Like Mr. Ebert said, you know, when we meet with Wolfe's attorneys and I, you know, fully expect that

we may hear something about, you know, Wolfe remembers what happened, that he didn't have anything to do with it.

It was all Owen and now Owen has breached his plea agreement and you guys should have been going after the actual shooter.

MR. EBERT: (Unintelligible.)

MR. BARBER: I don't know, not really.

MR. EBERT: You wouldn't have any reason to. We can (unintelligible).

MR. BARBER: Yeah, but what I specifically told him, I have no idea.

MR. CONWAY: Yeah, you know, well that's something that you may well have forgotten. But let me ask you this, I listened to some tape recordings because we've got Jason Coleman, we've got either three or four different interviews on tape recording, and I listened to them again.

And of course, you know, you were the first one to be thrown under the bus with respect to why this may have happened. But he also said, you know, he would have never done it if Wolfe didn't want him to.

But when asked about what you told him, the closest he gets to suggesting that you did it at all, much less that you did it alone, was he said the two of you were walking down by the tennis courts.

Were there tennis courts where you all lived?

MR. BARBER: I think there might have been some in the complex.

MR. CONWAY: Well anyway, you all were outside somewhere walking and he made some comment about, you know, if you're involved, you need to remember how far that gunshot residue can travel.

You're nodding so you remember that; right?

MR. BARBER: Yeah, I think he said something

about that.

MR. CONWAY: Exactly. He said you got to remember that gunshot residue can travel up to a mile.

And according to him, you said, "Are you kidding? Can it really travel that far"? And according to him at that point, he said, "I don't want to hear anymore." He said, "You got to get out of here."

Does any of that sound familiar?

MR. BARBER: It may. I don't know.

MR. CONWAY: Do you remember something about the gunshot residue traveling?

MR. BARBER: Yeah, maybe something about the gunshot traveling.

MR. CONWAY: Okay. But anyway, did you know that he had suggested that you told him about what happened and why it happened or anything?

MR. BARBER: No.

MR. CONWAY: Well there's no need for us to get into that anymore. But you know, I still believe that you could be convincing but only if you really -- only if you really had -- and I don't mean to be derogatory about this at all --

MR. BARBER: Yeah. Yeah, I mean, --

MR. CONWAY: -- but only if you really have a conscience.

MR. BARBER: Yeah, I know what you're saying. I know -- I don't know. (Unintelligible.)

MR. CONWAY: Well understand this, it's not our fault that you didn't know about this.

MR. BARBER: Oh, yeah, I mean, I'm not -- yeah, I'm not (unintelligible).

DETECTIVE NEWSOME: You know, what Mr. Conway said about do you think if you told the truth that you could convince somebody that it's the truth.

And I think the statement, even the truth on its face, no doubt it's going to be questioned because of these things.

MR. BARBER: Yeah.

DETECTIVE NEWSOME: But this is something that you and you alone can have an impact on and it has to come from in there. And that is a plausible and truthful explanation for those multitude of changes.

A plausible and truthful explanation of why you told the truth in the initial trial, you told the truth in letters, but in these affidavits, why you changed.

It has to be a truthful and plausible -- something that someone can listen to who's weighing your statements and say, I can sense that. I can see where that would happen.

MR. CONWAY: But you know, Owen, that the emphasis has got to be on truthful because whether

it's plausible or not is in the pudding. It's got to be truthful, you know.

DETECTIVE NEWSOME: That's right, yeah.

MR. CONWAY: And let me -- we know -- do you think that any of these people who were coming to you trying to get you to do this and change your story, do you think that they care about you?

MR. BARBER: No, probably not.

MR. CONWAY: Probably not. None of them ever suggested to you that changing your story would be a breach of your plea agreement?

MR. BARBER: No.

MR. CONWAY: And it is going to be so important for not only you, Owen, but for the lives of many, many other people, that you not one more time say anything that's not the truth.

MR. BARBER: Yeah, I agree. I agree.

MR. CONWAY: I mean, I'm serious, man. I don't care what somebody might say or promise you or suggest would be a benefit of you not (unintelligible).

You know what the truth is, Owen. It's something that we should have ingrained in you more, I guess, back then. We thought we had. But you know, time changes stuff and you know, you don't think about back then.

You think about what's going on now and what they're saying you could do, accomplish by saying something that's not true. And you know, in my view the truth is always plausible.

But I mean, I can't tell you how devastating it would be to any future (unintelligible), you know. We're taking this now one step at a time.

MR. BARBER: Yeah.

MR. CONWAY: But I can tell you this, if some version other than the truth comes out of you again, I don't see how anybody could believe you because you know what, because you don't believe in yourself.

MR. BARBER: Yeah.

MR. CONWAY: And if you don't believe in yourself, nobody else is going to believe you.

And if nobody could possibly believe you, how can you help yourself?

So you need to really search your sole and if we're full of shit and Justin Wolfe didn't have anything to do with all this, you should tell us that right this minute and tell us to get out because you did it all on your own and he never had a thing to do with it.

But if you want -- if you believe in yourself and you believe in the truth and that you believe that from now on nothing but the truth will ever escape your lips, then I think that's different.

But you know, when you say for us to keep you informed of what's going on, I don't know how we can get in contact with you other than either coming down here or if you find yourself being transported back there --

MR. BARBER: Yeah, I mean, if you can't do it, then don't worry about.

MR. CONWAY: Well, no, I'm not saying that. We can make it happen. What I'm telling you is, you know, if you find that -- I'd like for you to be informed before (unintelligible) start shaking down. And we really need to know where we all are at.

MR. BARBER: I would say forget the murder and go for the drugs.

MR. CONWAY: Well I told you we can't do that. We can't do that. Right now you're -- from where we sit and look at the facts, Owen, we got two people who took part, both people took part in the taking of another human life.

And we've got one who's convictions, because of what you've done, (unintelligible) and we've got to start all over again. And we've got you who breached a plea agreement and that's back to square one too.

MR. EBERT: You know, I don't know if you talk to these other guys here and they don't give you good advice.

MR. BARBER: No.

MR. EBERT: You understand that. I know you had that guy help you on your habeas. You know, he's not a lawyer. You got a hell of a lot of time to stand around here talking but you got something you got to do (unintelligible). One thing about being in prison, you got plenty of time.

You got time to think about this. Believe me, all we want is the truth. (Unintelligible) damn sole in this room who wants somebody that's guilty to be convicted, including you.

There's no doubt in your mind, at least what you said here today, that Wolfe should never -- he should be sitting there because of that dope. That was a hell of a lot of dope. (Unintelligible) of his activity, that's why Danny Petrole's dead.

You would agree with that, wouldn't you?

MR. BARBER: (Unintelligible.)

MR. EBERT: (Unintelligible) let you know what's happening.

MR. CONWAY: The big thing is you've got to assume that you're going to be called to testify again, one way or another, one way or another, and you've got to decide whether or not anything but the truth is ever going to come out of your mouth again.

MR. BARBER: All right.

MR. CONWAY: I would suggest to you, you know, but obviously I hope that you decide the truth, you know, is the only thing that can benefit you. And I'm not just talking about in the legal sense either, Owen. I mean, you're going to have to live with yourself, you know.

MR. BARBER: Yeah, right.

MR. CONWAY: And I would urge you, if you still have contact with your dad, I'm betting that he doesn't know anything about all this. Does he?

MR. BARBER: No.

MR. CONWAY: You haven't mentioned to him about all this stuff, have you? I would urge you to talk to your dad. I mean, I don't know if there's anybody else that you trust.

I would assume you trust your dad completely. He could at least give you good advice.

DETECTIVE NEWSOME: Yeah.

MR. CONWAY: And if you feel that way, I'd -- are you allowed to make phone calls from time to time?

MR. BARBER: (Silent.)

MR. CONWAY: I'd get on the horn to him and I'd tell him, you know, what -- tell him, you know, what's happened, what you've done and you know, how you need to make some decision now and you need somebody you can trust to talk to.

And if he wants to call us, and let us explain to him as best we can, you know, we'll leave our phone number that you can give him.

DETECTIVE NEWSOME: Anytime that you want to get in touch with us, you know, if you want Mr. Conway to come back down, Mr. Ebert, if you want me to come down, I'll sit and talk to you, I'll listen to you.

If you don't want to answer my questions or if you don't want to just answer questions, you just want to bounce things off of me, all you got to do is let them know and they'll get in touch with us.

MR. BARBER: All right. All right.

MR. CONWAY: And if any of us ever come down again, Owen, it's going to be under the same conditions, you're free to leave, you know, be escorted back to your cell any time, just like today.

DETECTIVE NEWSOME: Right.

MR. BARBER: All right. All right, you all. I've --

MR. CONWAY: I know. You've got a lot to think about.

MR. BARBER: Yeah, let me --

MR. CONWAY: Do you want us to leave you a card, Owen?

MR. BARBER: Yeah. Yeah, you can leave me a card.

MR. EBERT: One more thing I want you to think about, what do you think your mother would want you to do? (Unintelligible.)

DETECTIVE NEWSOME: I don't have a card either.

MR. EBERT: Always good to see you.

DETECTIVE NEWSOME: Owen, you look good. I mean, for what it's worth. I was sitting there yesterday and I was looking through files and I was like, Owen's like 32 years old and then I remember, I'm like 54 so time stops for nobody, Buddy.

MR. BARBER: Yeah.

MR. CONWAY: If he wants to talk to us, just tell him to call that number and ask for me or Mr. Ebert.

MR. BARBER: All right.

DETECTIVE NEWSOME: All right, Owen. Take care of yourself, Buddy. Good luck to you.

MR. EBERT: You got anybody else giving you advice you talk to?

MR. BARBER: No, not really.

MR. CONWAY: All right, man.

MR. EBERT: Like I said, you think about that stuff.

MR. BARBER: All right.

MR. EBERT: Good luck to you.

DETECTIVE NEWSOME: Thanks for talking to us, Owen.

MR. BARBER: All right.

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(This concludes the contents of the CD.)

CERTIFICATE OF NOTARY PUBLIC

I, JAYNE R. KIRBY, a Verbatim Reporter, do hereby certify that I have transcribed the CD recording provided by Jay Wright with Irving and Irving to the best of my ability; that the foregoing is a true record of said recording; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto; nor financially or otherwise interested in the outcome of the action.

/s/
JAYNE R. KIRBY
Verbatim Reporter

Appendix G

28 U.S.C. § 2243

Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.