

No. 05-8571

**In the
Supreme Court of the United States**

CLARA JANE SCHWARTZ,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent.

**On Petition for a Writ of Certiorari
to the Supreme Court of Virginia**

**BRIEF IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Given that the Grand Jury Presentment Clause of the Fifth Amendment does not apply to the States and in light of the fact that the defendant was on notice of the exact charges and punishments she faced, did the Constitution require the State to include all elements of the offense in the charging document?

2. Where a criminal defendant was convicted of both the substantive offense of murder and the inchoate offense of conspiracy to commit murder—crimes, which have separate and distinct elements under state law, does the Double Jeopardy Clause of the Fifth Amendment preclude multiple punishments?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE.....	3
1 Background of Schwartz’ Crimes.....	3
2. Trial.....	5
3. The Appeals.....	7
REASONS FOR DENYING THE WRIT	7
I. THE COURT SHOULD DECLINE REVIEW OF THE SPECIFICITY OF THE INDICTMENT CLAIM.....	8
A. Because the Grand Jury Presentment Clause Does not Apply to the States, the Issue is of No Consequence.....	8
B. The Split Among State Courts is Exaggerated.....	11
C. This Case is a Poor Vehicle to Reach the Issue Because Schwartz was Fully Advised that She was Charged with First-Degree Murder and Conspiracy to Commit Murder.....	14
II. THE COURT SHOULD DECLINE REVIEW OF THE DOUBLE JEOPARDY CLAIM....	17
CONCLUSION.....	22

TABLE OF AUTHORITIES

	Page
CASES	
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	1, 2, 9, 10, 11, 12, 13, 14
<i>Blockburger v. United States</i> , 284 U.S. 299 (1932).....	2, 17, 18, 19
<i>Blythe v. Virginia</i> , 284 S.E.2d 796, 798 (Va. 1981)	18
<i>Brown v. Ohio</i> , 432 U.S. 161 (1977).....	18
<i>Campbell v. Louisiana</i> , 523 U.S. 392 (1998).....	8
<i>Cole v. Arkansas</i> , 333 U.S. 196 (1948).....	8
<i>Coleman v. Virginia</i> , 539 S.E.2d 732 (Va. 2001)	18
<i>Gray v. Virginia</i> , 537 S.E.2d 862 (Va. 2000)	18
<i>Hurtado v. California</i> , 110 U.S. 516 (1884).....	8
<i>In re Oliver</i> , 333 U.S. 257 (1948).....	8
<i>Jones v. United States</i> , 526 U.S. 227 (1999).....	10, 11, 12
<i>Mackall v. Virginia</i> , 372 S.E.2d 759 (Va. 1988)	15
<i>Massachusetts v. D'Amour</i> , 704 N.E.2d 1166 (Mass. 1999).....	20, 21
<i>Massachusetts v. Quincy Q.</i> , 753 N.E.2d 781 (Mass. 2001).....	13

TABLE OF AUTHORITIES - Continued

	Page
<i>New Hampshire v. Ouellette</i> , 764 A.2d 914 (N.H. 2000)	11, 12
<i>North Carolina v. Hunt</i> , 582 S.E.2d 593 (N.C.) <i>cert. denied</i> , 539 U. S. 985 (2003).....	9
<i>Oregon v. Early</i> , 43 P.3d 439 (Or. App. 2002)	11, 12
<i>Payne v. Virginia</i> , 468 U.S. 1062 (1984).....	20
<i>Powell v. Virginia</i> , 590 S.E.2d 537 (Va.), <i>cert. denied</i> , 543 U.S. 892 (2004).....	16
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	11
<i>Schwartz v. Virginia</i> , 611 S.E.2d 631 (Va. App. 2005).....	7
<i>Smith v. Alabama</i> , 124 U.S. 465 (1888).....	8
<i>Smith v. Virginia</i> , 261 S.E.2d 550 (Va. 1980)	15
<i>South Carolina v. Simuel</i> , 593 S.E.2d 178 (S.C. App. 2004)	11, 13
<i>Stewart v. Mississippi</i> , 662 So.2d 552 (Miss. 1995).....	20
<i>United States v. Cotton</i> , 535 U.S. 625 (2002).....	11

TABLE OF AUTHORITIES - Continued

	Page
<i>United States v. Dixon</i> , 509 U.S. 688 (1993).....	18, 19, 21
<i>United States v. Terry</i> , 86 F.3d 353 (4 th Cir. 1996)	19, 20
<i>Walshaw v. Virginia</i> , 603 S.E.2d 633 (Va. App. 2004), <i>cert. denied</i> , 126 U.S. 575 (2005).....	2
<i>Washington v. Goodman</i> , 83 P.3d 410 (Wash. 2004)	13, 14
<i>Wolfe v. Virginia</i> , 576 S.E.2d 471 (Va.) <i>cert. denied</i> , 540 U.S. 1019 (2003).....	17
 CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. V (Double Jeopardy Clause).....	2, 6, 7, 17, 19, 20
U.S. Const. amend. V (Grand Jury Presentment Clause)	2, 7, 8
U.S. Const. amend. XIV, § 1 (Due Process Clause).....	8, 10
 STATUTES	
<i>Virginia Code</i> § 18.2-22	1, 16, 18
<i>Virginia Code</i> § 18.2-32	1, 15, 17

TABLE OF AUTHORITIES – Continued

	Page
RULES	
Va. S. Ct. Rule 3A:9	17
OTHER AUTHORITIES	
4 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, <i>Criminal Procedure</i> § 19.1(c) (2 nd ed. 1999 & 2006 supp.).....	9, 11
4 William Blackstone, <i>Commentaries on the Laws of England</i> (1 st ed.).....	8, 9

BRIEF IN OPPOSITION

The Attorney General of the Commonwealth of Virginia, Robert F. McDonnell, pursuant to this Court's Order of February 16, 2006 directing that a response be filed, responds to the Petition for a Writ of Certiorari.¹

INTRODUCTION

Clara Jane Schwartz was charged in an indictment alleging that she did “feloniously, willfully, and deliberately, *and with premeditation kill and murder*” her father, Dr. Robert Schwartz, “in violation of Section 18.2-32 of the Code of Virginia.” (emphasis added). Schwartz also was charged in the indictment with conspiracy, during November 2001 to December 2001, with Kyle Hulbert to commit a felony, in violation of *Virginia Code* § 18.2-22, and with two counts of solicitation to commit a felony. The reference to Virginia's murder statute and its inclusion of the words “willfully and deliberately, and with premeditation, kill and murder” unquestionably notified Schwartz that she was charged with first-degree murder and subject to the penalties available for that offense. Through a bill of particulars, Schwartz was further advised that the solicitation count concerned murder and conspiracy to commit murder. Indeed, during the colloquy at the beginning of trial, Schwartz advised the trial court that she understood all of the charges against her. Tr. 10/7/02 at 10-11.

Nevertheless, Schwartz, relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, contends that the Constitution mandates that a *charging document in a state prosecution* include all the elements of a charged offense, including any fact that may increase

¹On February 22, 2006, this Court extended the time for such filing to and including April 19, 2006.

the potential punishment to be imposed for an offense. Virginia's intermediate appellate court, the Court of Appeals of Virginia, like most state courts to address the issue, rejected this contention. *App.* at 17-27. The lower court, relying on its earlier opinion in *Walshaw v. Virginia*, 603 S.E.2d 633 (Va. App. 2004), *cert. denied*, 126 U.S. 575 (2005), held that *Apprendi* was inapposite. *App.* at 17, 18. In *Walshaw*, the court reasoned *inter alia* that the Grand Jury Presentment Clause of the United States Constitution, applies only to federal prosecutions. Thus, *Apprendi* does not require a state charging document to include all of the elements of the offense. *See Walshaw*, 633 S.E. 2d at 638.

Additionally, Schwartz contends that Virginia was barred by principles of double jeopardy from convicting and punishing her for the murder and the conspiracy. The lower court, relying on this Court's decision in *Blockburger v. United States*, 284 U.S. 299 (1932), examined the offenses charged "in the abstract, without referring to the particular facts of the case under review." *App.* at 30. The court held that the murder charge and the conspiracy charge each required proof of a fact that the other did not. Thus, the *Blockburger* test was satisfied and Schwartz' punishments for both offenses did not constitute double jeopardy. *App.* at 30-32.

Neither of the issues presented by Schwartz warrants review by this Court. The specificity of the indictment issue—while perhaps interesting in the context of a prosecution by the National Government—is of no consequence when a State initiates a prosecution. The double jeopardy issue is nothing more than a straightforward application of this Court's settled precedents.

STATEMENT OF THE CASE

1. Background of Schwartz' Crimes

In its published opinion of April 19, 2005, the Court of Appeals of Virginia recited extensive background facts and noted that they were not in dispute. *App.* at 3. Schwartz was the daughter of the victim, Dr. Robert Schwartz. During her senior year in high school, Schwartz became friends with Katherine Inglis. Schwartz told Inglis that her father was “continually doing stuff to her like try[ing] to poison her.” *App.* at 3. During the summer and fall of 2001, Schwartz told Inglis that her father was poisoning her food, hitting her, and “pulling her under the water in their pool.” *App.* at 3. She also told Inglis that “she wished he was dead” and that “she would inherit a third of a million dollars from her father” when he died. *App.* at 3. Inglis, however, did not observe bruises or other evidence of physical abuse. *App.* at 3. In August 2001, Schwartz began dating Patrick House. She told House about her desire for her father’s death and asked House to kill him. *App.* at 3. She gave House a book about poisoning and told him that she wanted the killing to “look natural” so it could not be “traced back” to her. *App.* at 3.

In September 2001, Schwartz met Kyle Hulbert at a Renaissance Fair in Maryland. Hulbert quickly became close friends with Schwartz, Inglis, and Inglis’ boyfriend, Michael Pfohl. Schwartz told Hulbert that her father had threatened her and poisoned her food. *App.* at 4. She told Hulbert that she and her father were planning a trip to the Virgin Islands over Christmas vacation and that her father “was planning on making sure she did not come back.” *App.* at 4.

In November 2001, Hulbert, Inglis, and Pfohl drove to James Madison University (JMU), where Schwartz was a student, to spend the weekend with her. Following the weekend visit, Schwartz and Hulbert began exchanging instant messages and speaking by telephone almost

every day. In one instant message, Hulbert responded to Schwartz' claim that her father had tried to kill her by saying her father was lucky Hulbert did not know where he lived. *App.* at 4. Schwartz said if Hulbert killed her father, he needed to make sure it could not be traced back to her. *App.* at 4. She then gave Hulbert directions to her father's house, which was located in a rural area of Loudoun County, Virginia. *App.* at 4.

During Thanksgiving weekend, Schwartz arranged for Hulbert to camp in the woods near her father's house. Inglis and Pfohl dropped Hulbert off. The next day, Hulbert went to the house to visit Schwartz. During the visit, he met Schwartz' father and older sister and showed them a sword he had with him. *App.* at 5.

Subsequently, Hulbert asked Schwartz to send him money for gas, for gloves, and a "do-rag" to prevent him from leaving evidence at the scene of the killing. On December 6, 2001, Schwartz sent Hulbert a check for sixty dollars by overnight mail. *App.* at 5. On December 8, 2001, Inglis and Pfohl dropped Hulbert off near Dr. Schwartz' property. Hulbert killed Dr. Schwartz, stabbing him more than thirty times. *App.* at 5. The next day, Hulbert advised Schwartz by telephone that he had killed her father. *App.* at 5.

A neighbor found Dr. Schwartz' body on December 10, 2001. Schwartz initially told investigators she thought Hulbert was only "venting" or "kidding" when he said he was going to kill her father. *App.* at 5. Subsequently, she told Loudoun County Investigator Greg Locke, "I want to go straight. In my heart of hearts, I knew that [Hulbert] was going there to kill [my father]." Schwartz was arrested for the murder of her father. After being taken to jail, Schwartz told a cellmate that the plan was for Hulbert to kill her father "because if anything came up he would take the blame because he had mental issues." *App.* at 5-6.

2. Trial

A preliminary hearing was held in the matter on March 21, 2002 in the Juvenile and Domestic Relations Court of Loudoun County. *App.* at 6. On March 29, 2002, the grand jury returned a four-count indictment charging Schwartz with murder, conspiracy to commit a felony, and two counts of solicitation to commit a felony. *App.* at 6.

Prior to trial, Schwartz filed a motion for a bill of particulars regarding Count II, Count III, and Count IV of the indictment. *App.* at 6. With regard to the conspiracy count, Schwartz sought to have Virginia identify the persons referenced by the phrase “et. al.” included in that count of the indictment, and to disclose “where and when the alleged agreement took place.” *App.* at 6. Concerning Count III and Count IV of the indictment, Schwartz sought to have Virginia provide the date and location of the alleged solicitation. She also sought to have Virginia identify “the person who was the object of the alleged solicitation” and “the felony which was the subject of the alleged solicitation.” *App.* at 7. Regarding the solicitation counts, Virginia’s response identified Hulbert and House, and identified murder and conspiracy to commit murder as the object felonies of those counts. *App.* at 7. The trial court directed Virginia to disclose the identity of the persons referenced in Count II, the conspiracy count, as “et. al.” *App.* at 7. Count II was subsequently amended to recite that the conspiracy was with Kyle Hulbert alone. *App.* at 7.

Schwartz’ trial began on October 7, 2002. *App.* at 9. During trial, the court refused Schwartz’ tendered instruction on manslaughter and rejected her argument that she could be convicted of no higher offense than voluntary manslaughter, because Count I of the indictment did not allege malice. *App.* at 10. With regard to the murder charge, the trial court also instructed the jury that Virginia was required to prove that Schwartz “acted as an accessory before the fact”

or “conspired with Hulbert” in the commission of the killing of Dr. Schwartz, “as those terms are defined in other instructions by the Court.” *App.* at 130.

With regard to the conspiracy alleged in Count II of the indictment, the trial court instructed the jury that Virginia was required to prove that Schwartz entered into an agreement with Hulbert, that the agreement was to commit murder, and that both Hulbert and Schwartz intended to commit murder. *App.* at 10-11, 132. Schwartz argued that Virginia could not use the word murder in the instruction because Count II of the indictment charged only “conspiracy to commit a felony,” without identifying the object felony. *App.* at 11. As the Court of Appeals noted in its opinion, the trial court, in rejecting Schwartz’ argument, “reasoned that no ‘other felony [was] suggested.’” *App.* at 11.

The jury convicted Schwartz of first-degree murder, conspiracy to commit murder, and two counts of solicitation to commit murder. *App.* at 11. The jury fixed Schwartz’ punishment at 30 years for the murder, eight years for the conspiracy, and five years each for the solicitation convictions. *App.* at 11.

Following trial, Schwartz filed a motion to set aside the murder and conspiracy convictions. She argued that the court should not have instructed the jury on first-degree murder because Count I of the indictment had not alleged malice or accomplice liability. *App.* at 97-113. She also argued that the court should not have instructed the jury on conspiracy to commit murder because Count II of the indictment had not alleged the object felony. *App.* at 114-27. Schwartz also argued that the conspiracy conviction should be set aside on double jeopardy grounds because it was a lesser-included offense of the murder conviction. *App.* at 76-95. The trial court rejected Schwartz’ arguments. The court imposed the sentence recommended by the jury.

3. The Appeals

On July 15, 2003, Schwartz, by counsel, filed a petition for appeal in the Court of Appeals of Virginia. By order dated November 17, 2003, a judge of that court granted the appeal as to three of the seven issues raised. A three-judge panel of the court, by order dated January 30, 2004, granted two additional issues raised in the appeal and “restated” one of the issues previously granted. Following briefing and oral argument in the case, the court, in a published opinion issued April 19, 2005, affirmed the trial court’s judgment. *See Schwartz v. Virginia*, 611 S.E.2d 631 (Va. App. 2005), *App.* at 2-43. In doing so, the lower court relied on its opinion in *Walshaw*, which had rejected the argument that the Constitution required a State to include all elements of an offense in its charging document.

Schwartz, by counsel, filed a petition for appeal in the Supreme Court of Virginia on May 2, 2005. By unpublished order entered October 6, 2005, that Court refused the appeal. *App.* at 1. This Petition for Certiorari followed.

REASONS FOR DENYING THE WRIT

Certiorari should be denied for two reasons. First, this Court should decline review of the specificity of the indictment claim. Because the Grand Jury Presentment Clause does not apply to the States, the issue is of no consequence. Moreover, the split among the States on the issue is exaggerated. Furthermore, this Petition is a poor vehicle for resolving the question.

Second, this Court should decline review of the double jeopardy claim. The lower court’s opinion is a straightforward application of this Court’s long-standing precedents and their progeny.

I. THE COURT SHOULD DECLINE REVIEW OF THE SPECIFICITY OF THE INDICTMENT CLAIM.

A. Because the Grand Jury Presentment Clause Does Not Apply to the States, the Issue is of No Consequence.

The Grand Jury Presentment Clause of the United States Constitution provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .” U.S. Const. amend. V. The Grand Jury Presentment Clause is one of the few provisions of the Bill of Rights that does not apply to the States through the Fourteenth Amendment. *See Hurtado v. California*, 110 U.S. 516, 534-35 (1884). *See also Campbell v. Louisiana*, 523 U.S. 392, 398-99 (1998). Rather, the Due Process Clause of the Fourteenth Amendment simply requires that the accused be fairly informed of the accusation brought against him. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *In re Oliver*, 333 U.S. 257, 273 (1948). Consequently, no particular form is required in a State’s charging instrument so long as it informs the accused of the nature of the accusation.

“The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.” *Smith v. Alabama*, 124 U.S. 465, 478 (1888). While the common law is influential in constitutional interpretation, it is not dispositive. Indeed, because of growing discontent with the common law’s pleading rules, States enacted reforms to mitigate their harshness. For example, legislatures enabled prosecutors to amend indictments, a practice unknown at common law. *See* 4 William Blackstone, *Commentaries on the Laws of England* (1st Ed.) at *368-69. Legislatures also enacted short form indictment statutes and permitted notice pleading in civil cases. *See* 4 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal*

Procedure § 19.1(c) (2nd ed. 1999 & 2006 supp.). *See also North Carolina v. Hunt*, 582 S.E.2d 593, 600-02 (N.C.), *cert. denied*, 539 U. S. 985 (2003) (discussing origin of North Carolina short form indictment statute).

These short form indictment statutes permitted fewer facts to be alleged than had been required at common law. For example, a common law indictment for murder was required to specify the time and place of the murder and the depth and length of the wound. *See Blackstone, supra*, at *302. However, these limitations on the factual specificity required in indictments were more than compensated for by other developments in the law such as the advent of discovery rules in criminal cases, the right to seek a bill of particulars, and the right to counsel.

Schwartz argues that *Apprendi* mandates that a charging document in a state prosecution contain all elements of the offense charged. A thorough examination of the decision, however, refutes that contention. The defendant in *Apprendi* fired several bullets into the home of an African-American family that had moved into a previously all-white neighborhood. *See Apprendi*, 530 U.S. at 469. The state charged him with several firearm offenses. A separate statute permitted a trial judge to sentence a defendant to an extended term of incarceration if the judge—not the jury—found by a preponderance of the evidence that the defendant had committed the crime with a racial animus. *See id.*

Pursuant to a plea agreement, the defendant pled guilty to three counts. These charges carried a possible maximum sentence of 20 years in prison. *See id.* at 470. However, in the agreement, the State reserved the right to seek an “enhancement” on the ground that one of the charges was committed with “a biased purpose.” In the event the court agreed with the prosecution, Apprendi faced a maximum sentence of 30 years. *Id.* The court ultimately found by a preponderance of the evidence that the hate crime enhancement applied. *Id.* at 471. The case

implicated two constitutional provisions: the right to a jury trial and the right to compel the State to meet the “beyond a reasonable doubt” standard of proof. *See id.* at 476-77.

Schwartz relies on this Court’s statement that:

“under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt. . . .” The Fourteenth Amendment commands the same answer in this case involving a state statute.

Id. at 476 (emphasis added) (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

This Court noted that its holding in *Apprendi* was “foreshadowed by our opinion in *Jones v. United States.*” *Apprendi*, 530 U.S. at 476. This Court then quoted the portion of the *Jones* opinion recited above. This quote from *Jones*, a federal case, does *not* represent the actual holding of *Apprendi*. Not surprisingly, in *Apprendi*, this Court omitted any mention of a requirement for an indictment and did not direct the States to specify the elements of the offense in an indictment. *Apprendi* simply holds that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490.

In *Jones*, this Court stated that “our decision today does not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter

century.” *Jones*, 526 U.S. at 252.² In *United States v. Cotton*, 535 U.S. 625, 627 (2002), this Court noted that *Apprendi* requires that any fact other than a prior conviction, which increases the penalty for a crime beyond the statutory maximum, “must be submitted to a jury, and proved beyond a reasonable doubt. *In federal prosecutions, such facts must also be charged in the indictment.*” (emphasis added) (citation omitted). *Apprendi* does not stand for the proposition that a state court charging instrument is constitutionally infirm unless it specifies all the elements of an offense.

B. The Split Among State Courts is Exaggerated.

Although the issue has no consequence for state courts, more than a “dozen state courts so far have addressed the question of whether the federal constitution requires a state pleading to allege an *Apprendi*-type element.” LaFave, *supra*, at § 19.3. The “vast majority” of states addressing the question “have directly held that there is no such requirement.” *Id.*³ “Only a few appear to have concluded that there is such a requirement.” *Id.* Indeed, Professor LaFave identifies only three cases—*New Hampshire v. Ouellette*, 764 A.2d 914 (N.H. 2000); *Oregon v. Early*, 43 P.3d 439 (Ore. App. 2002), and *South Carolina v. Simuel*, 593 S.E.2d 178 (S.C. App. 2004)—as mandating such a requirement. However, none of the three is unequivocally based on a holding that the federal Constitution requires that all elements of the offenses be recited in the

² In fact, both *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi* expressly avoided the issue of defective indictments. *Ring*, 536 U.S. at 597 n.4 (“Ring does not contend that his indictment was constitutionally defective.”); *Apprendi*, 530 U.S. at 477 n.3 (*Apprendi* has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment.”).

³ Professor LaFave cites cases from twelve States, other than Virginia, in support of this conclusion. *See id.* at n.12.25.

indictment. One of the cases essentially turned on state law, a second addressed the issue only *in dicta*, and the third addressed the issue only in the context of another defect.

First, in *Ouellette*, the defendant argued that the trial court erred when it sentenced him to prison for more than one year for offenses that were charged by information, not indictment. The New Hampshire Supreme Court agreed that that was error, based on *state* law requiring that misdemeanors that result in imprisonment for more than a year must be charged by indictment. *See Ouellette*, 764 S.2d at 915. The New Hampshire court also found that the defendant's punishment was enhanced because he assaulted a law enforcement officer, and this was a fact other than "recidivism." *Id.* The court determined that its holding was "supported" by *Apprendi*. It found that *Apprendi*'s requirements that such an enhancing factor be submitted to the jury and proved beyond a reasonable doubt were met, but that *Apprendi*'s "indictment requirement" was not satisfied. *See id.* at 915-16. Although the Grand Jury Presentment Clause is not applicable to the States, New Hampshire apparently has adopted such a requirement as a matter of state law for offenses punishable as felonies, and has added *Jones*' requirement, applicable to federal indictments, that indictments must include all of the elements of the offense. Of course, a State *can* provide greater protection to a criminal defendant than the federal Constitution requires. However, New Hampshire's choice to do so does not mean that the federal Constitution requires such a result.

Second, in *Early*, the defendant was charged by indictment with feloniously driving on the public highway when his privilege to drive had been revoked. Early argued unsuccessfully on appeal that the indictment's reference to "feloniously" was insufficient. He contended that the State must plead the specific facts that elevated the suspension to a felony. *See Early*, 43 P.3d at 441. The Oregon appellate court stated that under *Apprendi*, any fact, other than the fact of a

prior conviction, that “elevates an offense from one level to a higher level” must be placed in the charging document and proved to the fact finder. *Id.* at 441-42. The Oregon court concluded that the indictment in Early’s case met that requirement. Thus, the Oregon court unnecessarily reached the issue of whether the federal Constitution requires a state indictment to include such elevating factors. *See id.* at 442.

Third, in *Simuel*, the defendant escaped from custody while serving a sentence for armed robbery. He was re-captured in another state. The fact of the out-of-state capture was an aggravating factor permitting an increased punishment. *See Simuel*, 593 S.E.2d at 179. Simuel challenged his sentence because the enhancement element was not charged in the indictment or submitted to the jury. The South Carolina appellate court reversed, finding that Simuel’s indictment did not contain the enhancement factor *and* that it was not submitted to the jury. *See id.* at 180. Thus, the court concluded that the trial judge erred in enhancing the sentence. Because the failure to include the factor in the indictment and the failure to submit the factor to the jury were discussed in the conjunctive, the court did not separately address the failure of the indictment to include the factor.

Schwartz mistakenly asserts that *Washington v. Goodman*, 83 P.3d 410 (Wash. 2004), imposes such a requirement as a matter of federal constitutional law.⁴ In *Goodman*, the defendant alleged that the amended information against him was defective because it identified the specific

⁴ Schwartz also references *Massachusetts v. Quincy Q.*, 753 N.E.2d 781, 789 (Mass. 2001), for the proposition that *Apprendi* governs indictment of a juvenile. There, the state court simply held that *Apprendi* required submission of the enhancement element to the jury and proof of the factor beyond a reasonable doubt and that, if Massachusetts determined to proceed against a juvenile by indictment, proof must be presented before the grand jury to establish the enhancement factor.

controlled substance involved in his crime as “meth,” rather than methamphetamine. *See Goodman*, 83 P.3d at 415. He argued that the information lacked “essential elements” of the crime. *Id.* The Washington Supreme Court noted that a charging document is constitutionally sufficient, under the Sixth Amendment of the United States Constitution and the Washington state constitution, “only if it includes all ‘essential elements’ of the crime, regardless of whether they are statutory or nonstatutory.” *Id.* The state court continued, “[t]he purpose of the well-established ‘essential elements’ rule is to apprise the defendant of the charges against him or her and properly allow the accused to present a defense.” *Id.*

The Washington court noted that *Apprendi* required that any fact, other than a prior conviction, which increases the penalty for a crime beyond the statutory maximum, “‘must be submitted to a jury, and proved beyond a reasonable doubt.’” *Id.* (quoting *Apprendi*, 530 U.S. at 490). The Washington court then held:

It is clear under *Apprendi* the identity of the controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant. *Axiomatic in Washington law is the requirement that the charging document must “allege facts supporting every element of the offense” in order to be constitutionally sufficient.*

Id. at 415-16 (citations omitted, emphasis added). Clearly, it was as a matter of Washington law that the charging document had to contain all elements of the offense. Thus, the decision in *Goodman*, based on state law, does not contribute to a split in authority.

C. This Case is a Poor Vehicle to Reach the Issue Because Schwartz was Fully Advised that She was Charged with First-Degree Murder and Conspiracy to Commit Murder.

Even if the issue had consequence and if the split among the States was not exaggerated, this case is a poor vehicle to reach the issue presented. The murder count in the indictment

substantially employed the form suggested by Virginia law for a murder indictment and fully satisfied the constitutional requirement that the defendant be informed of the specific charge against her. The conspiracy count, when read with the bill of particulars, fully advised Schwartz of the specific conspiracy charge.

Count I of the indictment in this case recited that Schwartz “did feloniously, *willfully* and *deliberately*, and *with premeditation*, kill and murder Robert Schwartz, against the peace and dignity of the Virginia, in violation of Section 18.2-32 of the Code of Virginia.” (emphasis added). The count fully informed Schwartz that she was charged with first-degree murder. “To premeditate means to adopt a specific intent to kill, and that is what distinguishes first and second degree murder.” *Smith v. Virginia*, 261 S.E.2d 550, 553 (Va. 1980). An explicit use of the term “malice” in the indictment was not required. “Malice is subsumed in proof of willfulness, deliberateness, and premeditation in the commission of a criminal offense.” *Mackall v. Virginia*, 372 S.E.2d 759, 768 (Va. 1988).⁵

Count II of the indictment, as amended, charged that in November through December 2001, Schwartz “did feloniously and unlawfully conspire, confederate or combine

⁵ There cannot be a deliberate and premeditated manslaughter.

with another, to wit: Kyle Hulbert, to commit a felony either within or without this Commonwealth, in violation of Section 18.2-22 of the Code of Virginia.” *App.* at 129. Schwartz filed a request for a bill of particulars. With regard to the conspiracy count, she did not ask for any clarification of the object felony. Rather, she sought only the identity of the co-conspirators and the time and place of the conspiracy. *App.* at 6.⁶

Significantly, with regard to Counts III and IV of the indictment alleging solicitation to commit a felony, Schwartz sought in the bill of particulars, among other things, for Virginia to identify “the felony which was the subject of the alleged solicitation.” *App.* at 7. Equally significant, Virginia identified the object of the solicitations as murder and conspiracy to commit murder. *App.* at 7. While the indictment must charge the offense, “the bill of particulars and the indictment must be read together. The function of the bill of particulars is to supply additional information concerning an accusation.” *Powell v. Virginia*, 590 S.E.2d 537, 552 (Va.) *cert. denied*, 543 U.S. 892 (2004) (citation omitted). Based on the indictment and the bill of particulars, Schwartz was apprised that she faced a charge of conspiracy with Hulbert to commit murder.⁷ *Virginia Code* § 18.2-22 provides for different *punishments* for the conspiracy offense depending upon the nature of the felony the parties conspired to commit. The jury in this case was required to find beyond a reasonable doubt that Schwartz and Hulbert conspired to kill the victim.

⁶ Virginia amended the indictment to allege the killer, Kyle Hulbert, as the only co-conspirator.

⁷ When Schwartz argued during the jury instruction discussion against an instruction for conspiracy to commit murder, the court asked “what other felony” was suggested. *App.* at 66.

All of the charges against Schwartz were brought in a single indictment. The indictment and bill of particulars sufficiently apprised Schwartz of the charges she faced.⁸

II. THE COURT SHOULD DECLINE REVIEW OF THE DOUBLE JEOPARDY CLAIM

Schwartz contends that under Virginia law “and the facts of this case” the conspiracy in Count II of the indictment was “wholly contained” within the murder charge in Count I of the indictment. *Pet.* at 14. Thus, she contends that under *Blockburger*, she could not be convicted and punished for both offenses. Schwartz challenges the analysis of the state appellate courts, which reviewed the elements of the offenses, in the abstract, and determined that the conspiracy was not a lesser included offense of the murder for double jeopardy purposes. Schwartz focuses on the jury instructions given in the case. She argues that a reviewing court must examine the offenses as charged, rather than their abstract statutory elements.

The claim is without merit. The defendant was charged in Count I with first degree murder, in violation of *Virginia Code* § 18.2-32; and in Count II with conspiracy, in violation of

⁸ The Virginia courts did not apply a waiver to this issue. However, it should be noted that at the beginning of trial, the trial court asked Schwartz if she had reviewed the indictment with counsel, and if she understood the elements of the charges against her, “that is, what the Commonwealth must prove beyond a reasonable doubt in order for [her] to be found guilty.” Tr. 10/7/02 at 11. She responded that she understood. Tr. 10/7/02 at 10-11. She waited until the discussion of jury instructions to bring the issue to the trial court’s attention. She also argued extensively about the indictment at the motion to set aside the verdict. A challenge to the form of the indictment, other than a challenge to the court’s jurisdiction or the indictment’s failure to state a charge, must be raised prior to trial. *See Wolfe v. Virginia*, 576 S.E.2d 471, 489 (Va.), *cert. denied*, 540 U.S. 1019 (2003); Rule 3A:9, *Rules of the Supreme Court of Virginia*. The Virginia Supreme Court noted in *Wolfe* that challenges to the *sufficiency* of an indictment must be made before verdict. *See id.* at 489.

Virginia Code § 18.2-22.⁹ Because this appeal involves convictions for murder and conspiracy in a single trial, “the role of the constitutional guarantee is limited to assuring that the court does not exceed the legislative authorization by imposing multiple punishments for the same offense.” *Brown v. Ohio*, 432 U.S. 161, 165 (1977). The test to be applied in determining “whether there are two offenses or only one, is whether each [offense charged] requires proof of a fact which the other does not.” *Blockburger*, 284 U.S. at 304.

In deciding this issue on appeal, the Court of Appeals of Virginia applied the *Blockburger* test to determine if “each [charged offense] *requires* proof of a fact which the other does not.” *App.* at 29. The Court of Appeals noted that such a test “emphasizes the elements of the two crimes.” *App.* at 29. Consistent with longstanding case law, the Court of Appeals held that “[i]n applying the *Blockburger* test, we look at the offenses charged in the abstract, without referring to the particular facts of the case under review.” *App.* at 30 (quoting *Coleman v. Virginia*, 539 S.E.2d 732, 734 (Va. 2001)).¹⁰ *See Blythe v. Virginia*, 284 S.E.2d 796, 798 (Va. 1981). In so doing, the court concluded that the “first-degree murder requires proof of a fact that the charged offense of conspiracy to commit murder does not. The murder offense requires proof that the victim was killed.” *App.* at 30. The court found that conspiracy requires proof of a fact the murder does, not namely proof of an agreement. *App.* at 32.¹¹

⁹ There is no offense in Virginia of murder during conspiracy. *See App.* at 27.

¹⁰ Of course, *Coleman* was decided eight years after this Court’s decision in *United States v. Dixon*, 509 U.S. 688 (1993).

¹¹ A conspiracy is complete when the parties make an agreement to commit the crime and “no overt act in furtherance of the underlying crime [is] necessary.” *Gray v. Virginia*, 537 S.E.2d 862, 865 (Va. 2000).

The Court of Appeals noted that Schwartz had focused on the fact that the finding instruction for murder permitted the jury to find her guilty if Virginia proved that she conspired with Hulbert in the commission of the killing. The court noted that Schwartz ignored the other language in the same prong of the finding instruction which plainly indicated that a conspiracy between Schwartz and Hulbert was “but one of two alternate means” of establishing Schwartz’ guilt with respect to the charged murder.” *App.* at 31. The court held:

Indeed, in view of the finding instruction’s provision that the Commonwealth must prove that appellant either “acted as an accessory before the fact *or* conspired with . . . Hulbert in the commission of the killing” (emphasis added), it is clear that proof of the referenced conspiracy is not the sole basis upon which appellant’s liability as an accomplice to the murder could rest.

App. at 31.

Schwartz’ participation in the murder as an accessory before the fact also would suffice to establish her guilt. Unlike a conspiracy, accessory before the fact culpability does not require proof of an agreement. Thus, the Court of Appeals concluded the charged offenses satisfied the *Blockburger* test and there was no double jeopardy violation.

Schwartz incorrectly asserts that Virginia “stands alone” in reviewing the elements in the abstract when conducting double jeopardy analysis under *Blockburger*, and that this Court’s opinion in *Dixon*, mandates a different review.

For example, in *United States v. Terry*, 86 F.3d 353 (4th Cir. 1996),¹² the defendants were convicted for violating the Assimilated Crimes Act and for using a firearm in connection with a crime of violence. The district court dismissed the latter charge on double jeopardy grounds and

¹² This case was decided three years after this Court’s decision in *Dixon*.

the government appealed. *See Terry*, 86 F.3d at 354. The Fourth Circuit reversed because “[e]ach offense contains one statutorily-mandated element that the other does not, and Congress has not expressed a clear intention that multiple punishments not be imposed.” *Terry*, 86 F.3d at 355. The Fourth Circuit noted that if the “statutory elements” of the two crimes in question “do not overlap, then multiple punishments are presumed to be authorized absent a clear showing of contrary Congressional intent.” *Id.* at 356. The court further stated, “even though in this case” there was overlap of facts, “for purposes of double jeopardy analysis we examine only the statutory elements to determine if the elements of the crimes charged *necessarily* overlap.” *Id.* at 356.

Schwartz relies on *Stewart v. Mississippi*, 662 So.2d 552 (Miss. 1995), and *Massachusetts v. D’Amour*, 704 N.E.2d 1166 (Mass. 1999), in arguing that Virginia created a conflict with the two other States which have addressed the fact scenario in the instant case. This reliance, however, is misplaced.

In *Stewart*, the issue was whether a conviction for murder-for-hire capital murder could co-exist with a conviction for conspiracy to commit capital murder. The court found that the conspiracy to commit murder for hire was completely enveloped by the substantive charge. The court found, “the act of exchanging or offering to exchange money in connection with the murder would not be possible without an underlying agreement.” *Stewart*, 662 So.2d at 561.

In *D’Amour*, the double jeopardy challenge involved successive prosecutions, rather than multiple punishments for the same offense in a single trial.¹³ *See D’Amour*, 704 N.E.2d at 1182.

¹³ Schwartz cites *Payne v. Virginia*, 468 U.S. 1062 (1984). That case involved double jeopardy in the successive prosecutions context, and is inapplicable.

Furthermore, *D'Amour*, too, involved the charges of murder for hire and conspiracy to commit murder. The defendant hired someone to kill her husband. The court found that hiring “presupposes the existence of an agreement.” *D'Amour*, 704 N.E.2d at 1183. The court concluded that the “entire crime of conspiracy is subsumed by the crime of accessory before the fact to murder on a hiring theory.” *Id.*

These cases are distinguishable from the instant case because murder for hire necessarily involves an agreement, just as a conspiracy involves an agreement. The rulings in the cases do not provide a reason for this Court to grant certiorari review in the instant case. Furthermore, nothing in *Dixon* supports a grant of certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be **DENIED**.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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April 19, 2006

CERTIFICATE OF SERVICE

On April 19, 2006, I served one copy of the RESPONDENT'S BRIEF IN OPPOSITION upon all parties required to be served, by United States Postal Service in accordance with Rule 29(3), as follows:

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