No. 18-265

In the Supreme Court of the United States

MICAH PATTERSON, PETITIONER,

v.

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

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

BRIEF IN OPPOSITION

MARK R. HERRING
Attorney General

VICTORIA N. PEARSON
Deputy Attorney General

TOBY J. HEYTENS
Solicitor General
Counsel of Record

MATTHEW R. MCGUIRE
Principal Deputy Solicitor General

MICHELLE S. KALLEN
Deputy Solicitor General

BRITTANY M. JONES
Attorney

OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240
solicitorgeneral@oag.state.va.us

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether a state court's dismissal of a state-law habeas petition for failure to file the petition in a timely manner violates the Due Process Clause—even where the state court actually addressed the underlying merits of the petition.

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STATEMENT

A jury found petitioner guilty of anally penetrating and murdering the four-month-old infant of his then-girlfriend, S.M.

1. Petitioner and S.M. met online and ultimately developed a romantic relationship. 08/13/13 Tr. 284. At the time, both S.M. and her newborn daughter, A.H., were living with S.M.'s parents. 08/13/13 Tr. 278. As a result, S.M.'s parents had a great deal of contact with A.H., regularly assisting with A.H.'s care and purchasing clothing and many other things for her. 08/13/13 Tr. 278–79.

After several months of dating, petitioner and S.M. decided to move in together. 08/13/13 Tr. 285. Although petitioner had never been alone with A.H., S.M. testified that she had "no reason not to trust" him "[b]ecause [petitioner] had a daughter of his own." 08/13/13 Tr. 286, 290. Leaving a few of A.H.'s belongings with her parents for "babysitting purposes," S.M. and A.H. moved their remaining effects to petitioner's apartment. 08/12/13 Tr. 249.

Two days later (a Sunday), S.M. had an afternoon work shift and arranged for her father to watch A.H. from around 11 a.m. until petitioner got off work. 08/13/13 Tr. 288–89. Petitioner agreed to pick up A.H. and then watch her until the end of S.M.'s shift, around 9:30 p.m. 08/13/13 Tr. 289. This was the first time petitioner had had unsupervised custody of A.H. for any meaningful period of time. 08/13/13 Tr. 288–89.

According to both S.M. and her father, A.H. was in good health when they saw her that day. 08/13/13 Tr. 252–54, 289. But things seemed to change after petitioner picked A.H. up: petitioner texted S.M. during her shift to tell her that A.H. was "sleeping a lot" and refusing to eat much food. 08/13/13 Tr. 291. When S.M. got home, the trend continued. Overnight and into the next morning, A.H. continued acting strangely. She was "barely eating," which was "not like her": As S.M. put it, "something was off." 08/13/13 Tr. 292–93, 296.

S.M. made a doctor's appointment for A.H. for the next day (Monday). 08/13/13 Tr. 296. Although the doctor did not see any bruising or evidence of physical trauma on A.H.'s body, the doctor noticed several white polyps at the back of A.H.'s throat. 08/13/13 Tr. 296–97. Concluding that A.H. had a minor viral infection, the doctor prescribed medication to manage the symptoms. 08/13/13 Tr. 359–60. After picking up the medication, S.M. and A.H. returned to petitioner's apartment where A.H. remained "fussy" and "drowsy" but ultimately took a bottle and went to sleep. 08/13/13 Tr. 297–98.

The next morning (Tuesday), A.H. seemed better, but S.M. noticed two "thumb-size" bruises on A.H.'s waist. 08/13/13 Tr. 299. S.M. asked petitioner if he knew what happened. Petitioner denied involvement but mentioned "something about that his daughter got those—those marks when he used to hold her on her hips." 08/13/13 Tr. 300.

Later that morning, S.M. left the apartment for an appointment. Because of the cold weather, S.M.

decided to leave A.H. at the apartment with petitioner. 08/13/13 Tr. 301. Much like the previous time when petitioner had been alone with A.H., petitioner called S.M. while she was away to say that A.H. "wasn't eating," "had thrown up all over . . . herself," and "was acting lifeless." 08/13/13 Tr. 302–03. Panicked, S.M. called the pediatrician, who recommended that S.M. feed A.H. with a syringe to avoid dehydration. 08/13/13 Tr. 303–04. When S.M. returned to the apartment with the syringe, she found A.H. "[d]rowsy," "[n]ot herself," "[v]ery fussy," and not "acting normal." 08/13/13 Tr. 304.

Despite A.H.'s tenuous state, petitioner pressed S.M. to go with him to the mall so that S.M. could purchase a dress for an upcoming Christmas party. 08/13/13 Tr. 304–05. At the mall, A.H. had an episode of severe diarrhea. 08/13/13 Tr. 307. When S.M. went to change the diaper, she noticed "a little circle bruise above [A.H.'s] belly button that wasn't there when" S.M. had left that morning. 08/13/13 Tr. 307. A.H. also "projectile vomited" in the bathroom while S.M. was attempting to change her diaper. 08/13/13 Tr. 307. The violence of A.H.'s symptoms scared S.M., who insisted that the three return home and attempted to contact the doctor again. 08/13/13 Tr. 307–08.

Once home, S.M. received a return call from a nurse at the pediatrician's office, who advised S.M. to monitor A.H.'s health until the next morning. 08/13/13 Tr. 309–10. "[N]ot quite satisfied with that answer," S.M. called the nurse a second time. 08/13/13 Tr. 309.

During this second call, petitioner began making sexual advances towards S.M. 08/13/13 Tr. 309. S.M. rejected the advances and completed her conversation with the nurse, who recommended using saline drops and a "hospital suctioner" to minimize A.H.'s congestion. 08/13/13 Tr. 311, 320.

After the call ended, petitioner—who had expressed a desire to engage in anal intercourse in the past—attempted to have anal intercourse with S.M. 08/13/13 Tr. 312, 314–19. S.M. again "told him no," but agreed to vaginal intercourse instead. 08/13/13 Tr. 312.

Shortly thereafter, S.M. left the apartment to go to the store for the supplies the nurse had mentioned. 08/13/13 Tr. 313. When she left, petitioner was "[o]n the couch naked playing video games," and A.H. was lying in her crib wearing a purple onesie. 08/13/13 Tr. 309–10, 313.

Around 8 p.m., as S.M. was shopping for the saline solution, she received another phone call from petitioner. 08/13/13 Tr. 321. This time, petitioner said that A.H. had "stopped breathing" and that S.M. "need[ed] to get back to the apartment as quick[ly]" as she could. 08/13/13 Tr. 321.

By that point, petitioner had also called 911. Several officers responded to the call "for an infant in cardiac arrest." 08/13/13 Tr. 371–72. When they arrived, petitioner directed the officers to a changing table in the back bedroom where they found A.H. laying down with "a very bluish grey appearance." 08/13/13 Tr. 389–90. It did not appear that A.H. was breathing, and the first officers on-site could not detect a pulse. 08/13/13

Tr. 390. The officers began performing C.P.R., and a rescue team arrived shortly thereafter to transport A.H. to the hospital. 08/13/13 Tr. 392; 08/14/13 Tr. 511.

Though focused primarily on providing rescue assistance, one officer indicated that he saw "a red area" around A.H.'s sternum. 08/13/13 Tr. 391. Officers also saw a purple onesie lying on the floor in the "middle of the living room by the hallway" with some "fluid or [] spit up next to it." 08/13/13 Tr. 404, 425.

After rescue workers left with A.H., the officers asked petitioner whether he would allow a forensic team to come into the apartment to take evidence. Petitioner agreed, and the officers remained inside to secure any evidence at the scene. 08/13/13 Tr. 375, 383. During this time, petitioner waited in the kitchen with one of the officers. The two spoke largely about their shared military service, though petitioner also volunteered some details about the events of that night. 08/13/13 Tr. 400 ("Q: Are you questioning him or interrogating him about what happened? A: No, ma'am. We mostly talked about . . . the military."). At some point, the police concluded their investigation of the apartment, and petitioner left to meet S.M. at the hospital. See 08/14/13 Tr. 583–84.

When A.H. arrived at the hospital, it became clear that she had suffered extensive injuries. Because A.H. required specialized care, she was transferred to the pediatric intensive care unit at a second hospital, where she was placed on life support. 08/14/13 Tr. 510–11, 513. On arrival, A.H. showed signs of severe brain trauma. She "had no cranial nerve reflexes," meaning

she did not respond, even reflexively, to normal stimuli. 08/14/13 Tr. 522–23. A physical examination also revealed: "two large oval bruises" "at the front of [A.H.'s] pelvis on both sides" that resembled fingerprint marks, 08/14/13 Tr. 524, 528; a series of three circular bruises in a halfmoon shape above A.H.'s bellybutton, 08/14/13 Tr. 529–31; linear bruising around A.H.'s neck (also known as ligature marks), 08/14/13 Tr. 531–33; and an "intense purple coloring of the area around [A.H.'s] anus as well as swelling or distortion of the anal skin folds" and "multiple lacerations or tears in the area around her anal opening," 08/14/13 Tr. 539.

Petitioner remained cooperative with hospital staff, who by this time suspected that A.H. was the victim of abuse. 08/14/13 Tr. 584. But petitioner maintained that A.H. had vomited and started "turning blue" seemingly without cause as he changed her diaper. 08/14/13 Tr. 571. Around 8 a.m. the next morning, while A.H. was still in the hospital, petitioner used his phone to search for the terms: "blood around infant's brain" and "Abusive head trauma (Shaken Baby Syndrome)." 08/13/13 Tr. 488–89, 494.

Though A.H. had remained on life support through the night, a brain scan conducted that afternoon confirmed the worst. A.H.'s brain had suffered such significant trauma and swelling that it had "started to push itself out of the skull," something called a "herniation." 08/14/13 Tr. 514. Because this condition is "incompatible with life," A.H. was taken off of life support and died at 4:45 p.m. on Wednesday, January 11th. 08/14/13 Tr. 514–15.

A post-mortem evaluation of A.H.'s body confirmed the extent of her external and internal injuries. In addition to those already described, the autopsy revealed "blood all over [A.H.'s] brain;" cerebral edema (or brain swelling); retinal hemorrhages; hemorrhage in a "muscle deep underneath the eyelids"; acute bruising in one of the ligaments in A.H.'s neck—typically seen only "in motor vehicle accidents of more than thirty-five miles an hour"; bleeding along the spinal cord; hemorrhage "in the root of the mesentery," an organ that connects the bowel to the inside of the body; as well as several fractured ribs. 08/12/13 Tr. 192–94, 201, 204. Doctors also found iron in A.H.'s heart, lungs, thymus, liver, kidney, and dura (a layer of connective tissue between the brain and the skull), which indicated older trauma. 08/12/13 Tr. 200.

Early the next morning, phone records show that petitioner again took to Google, this time searching: "SBS punishments, V-A," "Shaken Baby Syndrome punishments V-A," "Shaken Baby Syndrome, Virginia," "Harsher punishments for Shaken Baby Syndrome petition," "Increased penalties for Shaken Baby crimes," "Cynthia's Law," "DCJS, Shaken Baby Syndrome punishments," "Shaken Baby Syndrome, Wikipedia," "The National Center on Shaken Baby Syndrome," "Blood around infant's brain," "Brain hemorrhage (bleeding) causes, symptoms, treatments," "Intraventricular hemorrhage," "abusive head trauma," among several other related items. 08/13/13 Tr. 488–89.

A later search of Patterson's phone also uncovered several photos of S.M.'s naked buttocks with a syringe

of anal numbing cream inside. 08/13/13 Tr. 317. On one of these photos, Patterson had written A.H.'s name on S.M.'s buttocks, as well as other words, such as "enter here," and "open all the time." Pet. App. E7.

2. Petitioner was charged with first-degree murder, object sexual penetration, and felony child neglect. Pet. App. E2. At trial, prosecutors called two medical experts, both of whom testified that A.H.'s injuries were consistent with severe shaking. 08/12/13 Tr. 193; 08/14/13 Tr. 550–51. The doctor who conducted A.H.'s autopsy testified that the bulk of A.H.'s injuries, including the anal bruising and ligature marks around her neck, were "fresh," meaning that they had occurred hours, not days beforehand. 08/12/13 Tr. 197; see 08/12/13 Tr. 186, 191, 202, 208, 221. The same doctor also testified that the iron present in certain areas of A.H.'s body also indicated older injury, most likely from "a few days" before. 08/12/13 Tr. 212–13.

The prosecutor's second medical expert—who examined A.H., reviewed the autopsy report, and spoke with petitioner and several of A.H.'s family members—testified that A.H. had "suffered more than one episode of abusive head trauma prior to her death." 08/14/13 Tr. 560. The doctor further opined that the first episode of abuse took place "in the evening or later afternoon" on the first day petitioner was alone with A.H. (Sunday), that a second occurred in the morning of the following Tuesday (when petitioner was again alone with A.H.), and that a third may have occurred later that same day (once again when A.H. was alone with petitioner). 08/14/13 Tr. 560.

Prosecutors also called an inmate who had been housed in the same cellblock as petitioner following petitioner's arrest. 08/13/13 Tr. 456. The inmate testified that petitioner told him that "he was watching his roommate's niece who was four years old and while she slept he fingered her and when she woke up crying he put a pillow over her face until she stopped crying and now she can't cry no more." 08/13/13 Tr. 460.

The jury found petitioner guilty on all counts and petitioner was sentenced to life plus 40 years. Pet. App. E2. Patterson unsuccessfully appealed to the state intermediate appellate court, and the state supreme court later denied his petition for discretionary review on November 20, 2015. Pet. App. E2–E3.

3. A year and two days later, petitioner filed a state habeas petition, claiming that his trial counsel had rendered ineffective assistance. Pet. App. A, E3. The state trial court requested a response, and the government moved to dismiss, arguing that the petition was untimely and meritless. Pet. App. B. Without seeking leave from the court, petitioner filed a second document opposing the Commonwealth's response. See Pet. App. C. As part of that submission, petitioner attached a UPS report indicating that the mailed portion of the petition—which did not include the required signature page—had arrived on November 21, 2016. Pet. App. C23. Patterson did not include any attachments related to the signature page of the petition, which the clerk's office had time-stamped as "received" by hand delivery on November 22, 2016. Pet. App. D4.

The state trial court denied relief. It first held that the petition had not been filed in a timely manner—a failure that independently merited dismissal. Pet. App. E10–E11. But the trial court also rejected petitioner's claim on the merits, concluding that, there too, petitioner's claims fell short. Pet. App. E11–E33.

Petitioner sought discretionary review from the state supreme court. Finding "no reversible error," the Virginia Supreme Court refused a petition for appeal, Pet. App. I1, and denied petitioner's subsequent petition for rehearing, Pet. App. K1.

ARGUMENT

I. The only federal question this Court can reach—whether the Due Process Clause prevents states from enforcing a state statute of limitations for state habeas petitions—is splitless, meritless, and partially hypothetical

Petitioner contends that this petition raises two distinct constitutional questions: (1) whether the trial court's dismissal of his state habeas petition violated the Due Process Clause; and (2) whether his trial attorneys rendered ineffective assistance of counsel.

Not so. The only issue properly before this Court is the due process question because the Sixth Amendment claims are shielded from this Court's review by an adequate and independent state ground—that is, the state trial court's conclusion that petitioner's state habeas petition failed because petitioner did not comply with state-law timing requirements. And the due

process question should be denied because it is splitless, meritless, and intensely factbound.

A. Petitioner's Sixth Amendment claims are unreviewable because the state court's dismissal is supported by adequate and independent state grounds

"[T]his Court has no jurisdiction to review decisions based on adequate, nonfederal grounds." *Republican Nat'l Comm.* v. *Burton*, 455 U.S. 1301, 1302 (1982). This is so even if a state court also identified a separate, federal, basis that would support its judgment. See *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."). The reason is straightforward: "Because this Court has no power to review a state law determination," the "resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id.*

Those principles are controlling here. Virginia law gives state prisoners one year to file a state habeas petition, which runs "from either final disposition of the direct appeal in state court or [when] the time for filing such appeal has expired, whichever is later." Va. Code Ann. § 8.01-654(A)(2). The state supreme court dismissed petitioner's direct appeal on November 20, 2015, which means that his window for filing a state habeas petition closed on November 21, 2016. Because the state trial court concluded that petitioner did not

file a fully compliant petition until November 22, 2016, Pet. App. E10–E11, it found that—as a matter of state law—petitioner's habeas "petition [wa]s untimely and must be dismissed." Pet. App. E11. The state supreme court declined to disturb that ruling, finding "no reversible error" and denying discretionary review. Pet. App. I1.

Under this Court's decision in *Coleman*, that is the end of the matter. In *Coleman*, a Virginia appellate court rejected a prisoner's appeal from a state trial court's denial of habeas relief because it had been filed outside the permissible window for taking such an appeal under state law. 501 U.S. at 727. This Court declined to review the prisoner's subsequently filed federal habeas petition on the merits, concluding that the state courts' denial of relief rested on "an independent state procedural rule" that the Court lacked authority to review. *Id.* at 741, 744.[1]

The same is true here. The application of Virginia's time bar to petitioner's case represents a pure question of Virginia law that independently and adequately justifies the dismissal of petitioner's state habeas petition. This Court thus lacks jurisdiction to

[1] If true on review of a federal habeas petition (as in *Coleman*), this principle is all the more true on direct review of a state habeas petition where the Court evaluates only "the judgment" of the state court. *Coleman*, 501 U.S. at 730 (noting the difference between direct and collateral review and indicating that on direct review "if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do").

reach the merits of petitioner's Sixth Amendment claims.

Petitioner seeks to resist this conclusion by challenging the state trial court's factual findings. But this Court is not one of error correction, and the question of when certain documents got where is about as fact-bound as questions get. More importantly, the *legal* question of whether petitioner's filings were sufficient to comply with state law is, at bottom, wholly a question of state law that this Court lacks jurisdiction to review.[2]

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[2] In any event, petitioner did not, as a factual matter, properly file his petition within the relevant one-year window. Petitioner submitted the required portions of his filing in two separate parts, sending the bulk of the petition by mail, Pet. App. G41, and authorizing an agent to hand-deliver the notarized signature page to the clerk's office, Pet. App. G45. The clerk's office stamped both "received" on November 22, 2016—one day outside the limitations period. Pet. App. D4.

Petitioner is correct that the UPS log for the mailed portion of the petition suggests that it was "received" the day before, on November 21, 2016. But the agent who signed for the UPS package worked for the Virginia Beach City mailroom, not the Virginia Beach Circuit Court Clerk's Office, and the latter is the place where the petition needed to be filed. Pet. App. D4.

The evidence also shows that the signature page arrived a day late. The time-dated "received" stamp on the document shows a filing date of November 22, 2016. In addition, petitioner personally signed the signature page on November 21, 2016, at a time when he was incarcerated at a prison that is approximately 7.5 hours away from the Virginia Beach courthouse. Taken together, those facts amply support the state court's finding that petitioner did not file a fully compliant petition until November 22, 2016—a day too late.

B. Petitioner's due process claim is splitless, meritless, and intensely factbound

As we understand petitioner's due process argument, it appears to be that Virginia cannot apply its generally applicable statute of limitations for state habeas petitions to him because the resulting failure to consider the merits of his petition would "arbitrarily and capriciously" prevent petitioner "from having his day in court." Pet. 17–18.

Petitioner does not establish that the state trial court's decision implicates a split in lower-court authority. A genuine failure to consider *any* arguments made by a party may well violate the Due Process Clause. See, *e.g.*, *Jones* v. *Wood*, 114 F.3d 1002, 1008 (9th Cir. 1997) (reversal required where court did not review the entire record); *Bueno* v. *Pyle*, 24 Fed. Appx. 917, 918 (10th Cir. 2001) (judgment) ("It is also true that a case must be remanded when circumstances indicate that the district court did not review the [magistrate's] report de novo."). But that is not what happened here. Rather, the state trial court simply applied Virginia's generally applicable timing rules and concluded that petitioner's habeas petition failed as untimely.

In any event, petitioner's due process claim is without merit. The Due Process Clause does not guarantee a decision on the merits in all cases, and this Court has repeatedly deferred to state law time limitations, including in capital cases. See, *e.g.*, *Coleman*, 501 U.S. at 729. In addition, this case presents an exceptionally poor vehicle for addressing petitioner's

argument that the state trial court deprived him of "his day in court," Pet. 17–18, in light of the fact the state trial court also addressed *(and rejected)* the merits of petitioner's Sixth Amendment claims, see Pet. App. E11–E33.[3]

II. Petitioner's Sixth Amendment claims would not warrant certiorari even if this Court could review them

As explained above, this Court lacks jurisdiction to review petitioner's Sixth Amendment claims because they are shielded by an adequate and independent state law ground. But even if this were not so, those claims would not merit this Court's review. Petitioner has not shown that the state trial court's fact-bound

[3] At times, petitioner appears to suggest that the state courts' failure to review the substance of his opposition motion with the attached UPS receipt and/or the affidavits attached to his petition for appeal to the Virginia Supreme Court created the constitutional infirmity. See Pet. 7–8, 18. Any such claim is likewise without merit. Virginia law contemplates only two filings in a state habeas proceeding: a petition and a response. See Virginia Supreme Court R. 5:7(a); see also *e.g.*, *Strong* v. *Johnson*, 495 F.3d 135, 139 (4th Cir. 2007) (interpreting Virginia Rule 5:7 to permit only two filings in a habeas case absent permission from the court). The state trial court thus had ample authority under state law to disregard petitioner's additional motion in answer to the state's response as well as the attached UPS report. What is more, petitioner did not even attempt to introduce the affidavits suggesting that his agent had hand-delivered the signature page on November 21 until his appeal to the Virginia Supreme Court. Compare Pet. App. C23 (supplemental filing to state trial court), with Pet. App. G40–G45 (petition for appeal to Virginia Supreme Court). The state trial court cannot be faulted for failing to consider evidence that was never even before it.

and nonprecedential decision implicates any existing split of authority, and its decision also has the additional benefit of being right.

1. Petitioner asks this Court to review (asserted) fact-bound errors that his trial counsel made in this case. But this Court is not one of error correction, and neither the state trial court's decision nor the state supreme court's denial of discretionary review will have precedential effect for future cases. See Pet. 1 (indicating that neither decision was "entered into an official report").

2. Petitioner's Sixth Amendment claim also fails on the merits because his allegations fail both parts of the *Strickland* test. See *Strickland* v. *Washington*, 466 U.S. 668, 687, 694 (1984).

Petitioner argues that his lawyer was constitutionally ineffective in failing to hire an expert to rebut the testimony of one of the prosecution's experts. Pet. 9–16. But the record reveals that petitioner and his trial team made a considered decision to rely on the cross examination of the witnesses presented by the Commonwealth. See 08/12/13 Tr. 6–8. At the close of the prosecution's case-in-chief, petitioner's attorneys again conferred with petitioner and again decided to move forward on the basis of the evidence already presented. 08/14/13 Tr. 605, 607 ("THE COURT: . . . Is the defense going to present any evidence? MR. DEL DUCA: Judge, may we have a moment to discuss that, once again, with our client? . . . MR. DEL DUCA: And, Judge always in discussing the matter with my client at this point . . . we will not be presenting evidence.").

Given that, it is unsurprising that petitioner points to nothing that a competing expert would have added beyond what was addressed on cross examination of the prosecution's two expert witnesses. Even more tellingly, petitioner's state habeas filing did not include an affidavit from any expert who would have even been willing to testify in his case. See *Burger* v. *Kemp*, 483 U.S. 776, 793 (1987) (noting that, "even with the benefit of hindsight [petitioner] has submitted no affidavit . . . establishing that [the absent witness] would have offered substantial mitigating evidence if he had testified"). Absent such evidence, petitioner's efforts to cast aspersion on the strategic choices of his trial counsel fall short. See *Bell* v. *Cone*, 535 U.S. 685, 702 (2002) (stating that "a court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance.").[4]

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[4] Petitioner also gestures obliquely to concerns about the science behind shaken baby syndrome. Pet. 10–11. But the petition nowhere explains how this debate casts doubts on (or even relates to) petitioner's case, and a closer look shows why. The debate to which petitioner alludes involves whether naturally occurring diseases like strokes can produce injuries that mirror the symptoms of shaken baby syndrome. See Pet. 9 (citing Debbie Cenziper, *Prosecutors Build Murder Cases on Disputed Shaken Baby Syndrome Diagnosis*, The Washington Post, March 20, 2015 ("In four other cases, new medical examiners found that their predecessors had made mistakes by diagnosing shaking in babies who likely died from conditions that had nothing to do with violence. One doctor in Tennessee found a 10-week-old diagnosed with shaking appeared to have suffered from a series of strokes while he was in the womb."), https://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/?noredirect=on). But petitioner has no plausible argument that A.H.'s injuries—which included anal bruising consistent with blunt force penetration,

Petitioner also faults trial counsel for failing to procure a character witness to testify about his Navy service, non-violent nature, and demeanor with children (specifically, his own). Pet. 22–25. But this evidence *did* come into the trial through other witnesses. See 08/13/13 Tr. 400 (discussing petitioner's military service); 08/13/13 Tr. 327 (discussing petitioner's "normal" interactions with his daughter); 08/13/13 Tr. 329 (indicating that S.M. had not seen any acts of violence committed by petitioner against A.H.). Here too, counsels' strategic choice to introduce favorable evidence through the Commonwealth's witnesses, rather than through more-biased character witnesses, hardly rises to the level of constitutionally deficient representation.

Petitioner next seeks to cast doubt on counsels' failure to subpoena the recoded phone conversations of the jailhouse informant who testified about petitioner's confession, which (petitioner suggests) may have shown that the informant called other people seeking information about his case. Pet. 25–26. But petitioner has not, even at this point, identified any evidence that any such conversations actually contradict the informant's repeated assertions at trial that he did nothing of the sort, see 08/13/13 Tr. 472, and the informant admitted at trial that he had reviewed accounts of the case from the news. 08/13/13 Tr. 473. Petitioner's trial counsel was not constitutionally ineffective in failing to follow-up on this potential source of minor impeachment evidence.

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ligature marks around the neck, broken ribs, and retinal bleeding—were the result of an organic illness or benign accident.

Petitioner also points to counsels' failure to test the DNA evidence in his case. Pet. 26–27. The biggest problem with this theory is that there was no DNA for his counsel to test: As the forensic analyst repeatedly testified, there was no foreign DNA recovered from the samples taken from A.H.'s body. 08/13/13 Tr. 442, 447–50.

Petitioner next argues that trial counsel should have moved to suppress certain un-Mirandized statements he made to police. Pet. 27–29. But petitioner has failed to establish that he would have had a colorable *Miranda* claim because the record shows that he was neither in custody nor interrogated. See 08/13/13 Tr. 400 ("Q: Are you questioning him or interrogating him about what happened? A: No ma'am."); 08/13/13 Tr. 400–01 ("Q: Now, you said you didn't ask him any questions about what happened. Did he volunteer any information? A: He did, but generic information about—about the child. Q: About what happened before you got there? A: Correct. That was brought up, and the baby had been sick for a few days."). Because both "custody" and an "interrogation" are necessary prerequisites to a *Miranda* violation, see *Dickerson* v. *United States*, 530 U.S. 428, 432 (2000), trial counsel was not constitutionally ineffective in failing to have made such a suppression motion.

Finally, whether viewed individually or cumulatively, none of these alleged errors suffices to demonstrate the prejudice that is an essential component of any ineffective assistance of counsel claim. To the contrary, the extensive evidence in this case refutes any

suggestion that, but for any conceivable errors made by petitioner's trial counsel, the result at trial would have been different.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

MARK R. HERRING
Attorney General

VICTORIA N. PEARSON
Deputy Attorney General

TOBY J. HEYTENS
Solicitor General
Counsel of Record

MATTHEW R. MCGUIRE
Principal Deputy Solicitor General

MICHELLE S. KALLEN
Deputy Solicitor General

BRITTANY M. JONES
Attorney

OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240
solicitorgeneral@oag.state.va.us

Counsel for Respondent