No. 19-871

In the Supreme Court of the United States

RAHEEM CHABEZZ JOHNSON, PETITIONER,

v.

JEFFREY KISER, WARDEN

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner sought habeas relief in Virginia state court, arguing that his inability to obtain the assistance of a neuropsychologist violated *Ake* v. *Oklahoma*, 470 U.S. 68 (1985). The state court dismissed the petition on state procedural grounds and petitioner has sought review by this Court. Petitioner seeks review of the following question:

Whether an indigent defendant who seeks the appointment of a mental conditions expert to assist in the sentencing phase of his trial is denied due process if the trial court first requires him to satisfy more than the three threshold criteria established by this Court in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), and clarified in *McWilliams* v. *Dunn*, 137 S. Ct. 1790 (2017).

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INTRODUCTION

Petitioner seeks review of a state court decision dismissing a petition for state habeas relief. Petitioner alleges that his conviction for first-degree murder is invalid because he was denied the expert assistance to which he was entitled under *Ake* v. *Oklahoma*, 470 U.S. 68 (1985). Review is unwarranted for two reasons: (1) the decision below rests on adequate and independent state grounds; and (2) petitioner seeks error correction where no error occurred.

The state court concluded that petitioner's *Ake* claim was barred under the state-law procedural rules articulated in *Henry* v. *Warden*, 576 S.E.2d 495 (Va. 2003) (*Henry*), and *Slayton* v. *Parrigan*, 205 S.E.2d 680 (Va. 1974) (*Parrigan*). Although petitioner would have this Court reverse both determinations, this Court has repeatedly explained that it will not review a state court's application of its own law.

Petitioner's arguments lack merit in any event. As the state court concluded, *Henry* bars petitioner's *Ake* claim because it was litigated at trial and on direct appeal and thus "[could] not be considered in a [state] habeas corpus proceeding." *Id.* at 496. Petitioner's contention that the *Henry* rule does not apply because this Court's decision in *McWilliams* v. *Dunn*, 137 S. Ct. 1790 (2017), post-dated his direct appeal to the Virginia Supreme Court is incorrect. *McWilliams* did not change the law in any way relevant to petitioner's claim.

Petitioner is equally wrong that the Virginia court improperly relied on *Parrigan* in finding that, to the extent petitioner raised a "new claim," that claim could not be considered in state habeas proceedings because it could have been (but was not) raised at trial or on direct appeal. Petitioner's contention that the state habeas court was obligated to make a threshold determination that his default was not excused by ineffective assistance of counsel misstates Virginia law. Were such a threshold determination required, *Parrigan* and other Virginia cases would have come out differently.

This Court's review would be unwarranted even if the decision below did not rest on state grounds. Petitioner identifies no split in authority on the issue at the heart of his claim: whether a State may require a showing of particularized need before a defendant is entitled to expert assistance at the government's expense. In fact, petitioner concedes that other courts agree with the Virginia Supreme Court that a showing of need is required and identifies no decision rejecting that standard.

Nor does that standard contravene this Court's precedents. The Virginia Supreme Court derived the analysis it applied to petitioner's claim directly from *Ake* and *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985). And because *McWilliams* did not alter the holding in *Ake*, that decision does not cast doubt on the Virginia Supreme Court's conclusion that petitioner had no due process right to expert assistance.

OPINIONS BELOW

The order of the Supreme Court of Virginia denying petitioner's appeal from the dismissal of his petition for a writ of habeas corpus (Pet. App. 1a) is unreported. The opinion of the Circuit Court for the City of Lynchburg dismissing the petition for a writ of habeas corpus (Pet. App. 2a) is also unreported. The opinion of the Supreme Court of Virginia on petitioner's direct appeal is reported at 793 S.E.2d 326.

JURISDICTION

The Supreme Court of Virginia refused petitioner's petition for appeal on August 16, 2019. On November 7, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 13, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

I. Legal background

In *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), this Court considered "whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question." *Id.* at 70. Applying the balancing test set out in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), the Court held that such government-provided assistance is required in some circumstances but not others.

"[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial," the Court held, "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83.

Later the same Term, the Court rejected a defendant's claim that he was constitutionally entitled to "a criminal investigator, a fingerprint expert, and a ballistics expert." *Caldwell* v. *Mississippi*, 472 U.S. 320, 323 n.1 (1985). Citing *Ake*, the Court "f[ound] no deprivation of due process" "[g]iven that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial." *Id.* (citing *Ake*, 470 U.S. at 82–83).

In 1996, Virginia's highest court considered the rule established in *Ake* and *Caldwell*. "[W]hen read together," the court reasoned, "*Ake* and *Caldwell* . . . require that the Commonwealth . . . provide indigent defendants with the basic tools of an adequate defense, and . . . in certain instances, these basic tools may include the appointment of . . . experts." *Husske* v. *Commonwealth*, 476 S.E.2d 920, 925 (Va. 1996) (internal quotation marks and citation omitted). But "an indigent defendant's constitutional right to the appointment of an expert, at the Commonwealth's expense," the court emphasized, "is not absolute." *Id.* For that reason, "an indigent defendant who seeks the appointment of an expert witness . . . must demonstrate that the subject which necessitates the assistance of the

expert is 'likely to be a significant factor in his defense,' and that he will be prejudiced by the lack of expert assistance." *Id.* (quoting *Ake*, 470 U.S. at 83). "An indigent defendant may satisfy this burden," the court explained, "by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." *Id.* Put differently, "[t]he indigent defendant who seeks the appointment of an expert must show a particularized need" beyond "[m]ere hope or suspicion that favorable evidence is available." *Id.* (quotation marks and citation omitted).

In 2017, this Court revisited its holding in *Ake* in *McWilliams* v. *Dunn*, 137 S. Ct. 1790 (2017). Because *McWilliams* arose out of federal habeas proceedings, the question before the Court was whether "the Alabama Court of Criminal Appeals' determination that McWilliams got all the assistance to which *Ake* entitled him was 'contrary to, or involved an unreasonable application of, clearly established Federal law.'" *Id.* at 1798 (quoting 28 U.S.C. § 2254(d)(1)). The Court declined to reach the "broader question" on which it had granted certiorari: whether a defendant is entitled to the assistance of an expert who is independent from the prosecution. *Id.* at 1799–800. Instead, the Court decided the case on the "narrow" ground that the state court proceedings at issue "did not meet even *Ake*'s most basic requirements." *Id.* at 1800; see also *id.* at 1802 n.2 (Alito, J., dissenting) (describing the Court's decision as "factbound"). The Court emphasized that

"no one" involved in that case "denie[d] that the conditions that trigger application of *Ake* [we]re present"—namely that McWilliams was indigent, that his "'mental condition' was 'relevant to . . . the punishment he might suffer,' [a]nd, that 'mental condition,' *i.e.*, his 'sanity at the time of the offense,' was 'seriously in question.'" *Id.* at 1798–99 (quoting *Ake*, 470 U.S. at 80) (citations omitted; alteration in original). And because the psychiatrist made available to *McWilliams* did not (and could not) "assist in [the] evaluation, preparation, and presentation of the defense," the Court concluded that McWilliams had not been afforded all of the assistance to which he was entitled. *Id.* at 1800.

II. Factual and Procedural background

1. Two months before his 18th birthday, petitioner shot and killed Timothy Irving during a burglary. Pet. App. 69a, 103a. Petitioner was indicted on eight felony charges, including capital murder. *Id.* at 69a. After this Court decided *Miller* v. *Alabama*, 567 U.S. 460 (2012), the Commonwealth reduced the capital murder charge to first-degree murder, thereby ensuring that petitioner would not be subject to a mandatory sentence of life without parole. *Id.* Petitioner was convicted on all eight counts. *Id.*

Before sentencing, petitioner filed a three-page motion asking the trial court to appoint a neuropsychologist to assist him with "preparation for the sentencing hearing." Pet. App. 114a. Petitioner argued that this Court's decision in *Ake* and the Supreme Court of Virginia's decision in *Husske* "hold that upon

a showing of a specific need[,] due process requires an indigent defendant be afforded the same resources as a defendant capable of employing his own experts." *Id.* Examination by a neuropsychologist, petitioner argued, would "provide facts specific to [petitioner] so as 'to fully advise the court' of all matters specific to" him. Pet. App. 52a. The trial court denied the motion, concluding that petitioner had not shown a "particularized need" as required by Virginia law. *Id.* at 122a.

The state trial judge sentenced petitioner to a term of life for first-degree murder and an additional 42 years on the other seven counts. Pet. App. 71a. Before imposing that sentence, the judge commented that "the shooting was unprovoked," the victim was "helpless," and that the murder was "as cruel and callous as anything as [he'd] seen since . . . sitting . . . on the bench." *Id.* at 130a.

2. Petitioner appealed his sentence, arguing both that he was entitled to expert assistance under *Ake* and that his sentence was invalid under *Miller*. Pet. App. 72a.

a. The Virginia court of appeals (the Commonwealth's intermediate appellate court) denied petitioner's petition for appeal with respect to his *Ake* claim but granted it as to his *Miller* claim. Pet. App. 72a. After full briefing, the court of appeals rejected petitioner's *Miller* claim and affirmed petitioner's sentence. *Id.* at 90a–102a.

b. Petitioner then sought review in the Virginia Supreme Court, which granted an appeal on both issues and affirmed petitioner's sentence. Pet. App.

68a–89a. As to petitioner's *Ake* claim, the court explained that "an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is 'likely to be a significant factor in his defense,' and that he will be prejudiced by the lack of expert assistance." *Id.* at 73a–74a (quoting *Ake*, 470 U.S. at 86). And that, in turn, requires a showing that the services of an expert would "materially assist [the defendant] in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." Pet. App. 74a.

The court emphasized that petitioner "admitted that he sought the services of a neuropsychologist because there was no other evidence regarding his physiology or psychology." Pet. App. 74a. "In other words," the court reasoned, "[petitioner] sought the assistance of an expert at the Commonwealth's expense with no idea what evidence might be developed or whether it would assist him in any way" and thus, "[a]t best, [petitioner's] request for a neuropsychologist amounted to a mere hope that favorable evidence would be obtained." *Id*. Because petitioner fell short of the required showing of need, the Virginia Supreme Court concluded that he was not entitled to expert assistance under *Ake*. *Id.*[1]

c. The Supreme Court of Virginia denied petitioner's request for rehearing on March 24, 2017, and

[1] The court also concluded that petitioner's sentencing complied with *Miller*. Pet. App. 76a–78a.

petitioner obtained an extension of time in which to file a petition for a writ of certiorari until August 21, 2017. See Docket entry, No. 17-326 (U.S. June 16, 2017). This Court decided *McWilliams* on June 19, 2017—more than two months before that deadline. Although the petition for a writ of certiorari referenced *McWilliams*, it did not ask this Court to summarily reverse the Virginia Supreme Court's decision based on a freestanding *Ake* violation. See Pet. at 1, 21 (No. 17-326). Instead, petitioner asked this Court to grant certiorari to decide whether his sentence violated *Miller*. See *id.* at i. On January 8, 2018, this Court denied certiorari. *Johnson* v. *Virginia*, 138 S. Ct. 643 (2017) (No. 17-326).

3. Two months later, petitioner sought state habeas relief. Pet. App. 9a–27a. Among other claims, petitioner argued that he was "entitled to a new sentencing proceeding, including the appointment an assistance of a mental health expert, because the decision of the Supreme Court of Virginia is inconsistent with the rule established in *McWilliams*." Pet. App. 12a.

a. The Commonwealth responded that "[petitioner's] claim that he was entitled to the . . . assistance of [a] mental health expert ha[d] already been raised and rejected on direct appeal in the Supreme Court of Virginia and, to the extent he raised it in the United States Supreme Court, in that court as well." Pet. App. 29a. Accordingly, the Commonwealth argued, petitioner's claim was not cognizable in state habeas proceedings under the rule established *Henry* v. *Warden*, 576 S.E.2d 495 (Va. 2003). Insofar as petitioner

"implie[d] that the *Henry* rule should not apply to him in light of . . . *McWilliams*," the Commonwealth urged the court to reject that contention. Pet. App. 30a. The Commonwealth explained that *McWilliams* did not change the law and that petitioner had a full and fair opportunity to litigate his claim because *McWilliams* was issued before he sought certiorari. *Id.* And "[t]o the extent [petitioner] ma[de] new allegations," the Commonwealth explained that any such claim was "defaulted under the rule in *Slayton* v. *Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974), because [petitioner] could have raised it at trial and on appeal." Pet. App. 30a.

b. In response, petitioner insisted that *Henry* did not apply because *McWilliams* "announced a new rule by changing the requirements for courts to provide expert assistance under *Ake*" and was not decided until after petitioner's direct appeal to the Virginia Supreme Court. Pet. App. 37a. Petitioner did not address *Parrigan* at all, nor did he suggest that his failure to raise claims that could have been raised at trial or direct appeal was the result of ineffective assistance of counsel. See *id.*

c. The state habeas court accepted the Commonwealth's arguments and dismissed the petition. Pet. App. 2a–8a. The court explained that petitioner's "claim that he was entitled to the appointment of assistance of a mental health expert [was] . . . raised and rejected on direct appeal in the Supreme Court of Virginia and . . . in the United States Supreme Court." Pet. App. 3a–4a. "Accordingly," the court concluded that

the claim was "not cognizable in a habeas corpus action." Pet. App. 4a (citing *Henry*). The state habeas court also agreed with the Commonwealth that "*McWilliams* did not in fact create any type of change in the law as [petitioner] suggest[ed]." *Id.* "Instead," the *McWilliams* Court "clearly based its ruling on 'what *Ake* requires.'" *Id.* (quoting *McWilliams*, 137 S. Ct. at 1801). For those reasons, the court held that petitioner's claim was "defaulted under the rule in *Henry* to the extent it [was] raised and rejected previously" and "[t]o the extent" it was based on "new allegations, it [was] defaulted under the rule in [*Parrigan*] . . . because [petitioner] could have raised it at trial and on [direct] appeal." *Id.* (citations omitted).

d. The Virginia Supreme Court denied review, finding "no reversible error in the judgment complained of." Pet. App. 1a.

ARGUMENT

Petitioner contends (Pet. 9–22) that this Court should grant certiorari to review his *Ake* claim or vacate the lower courts' decisions and remand for reconsideration in light of *McWilliams*. Further review is unwarranted for two reasons.

For one thing, petitioner seeks review of a claim that the state court whose judgment is under review dismissed as procedurally defaulted under state law. Because the challenged decision rests on adequate and independent state grounds, this Court "may not review [petitioner's] federal claim[]." *Davila* v. *Davis*, 137 S. Ct. 2058, 2064 (2017). Contrary to petitioner's

assertions, the Virginia circuit court properly determined that his *Ake* claim was barred under the state-law *Henry* rule because this Court's decision in *McWilliams* did not change the law in any relevant respect. And to the extent petitioner pressed a new claim that *could have* been (but was not) raised at trial and on direct appeal, the state habeas court correctly determined that it was barred under the state-law *Parrigan* doctrine. Although petitioner challenges those conclusions, this Court has repeatedly indicated that it will not review a state court's application of state law.

Even if the state habeas court's decision did not rest on adequate and independent state grounds, this Court's review would still be unwarranted. Petitioner identifies no split among the lower courts about the showing required to trigger *Ake*, and the Virginia courts' determination that petitioner was not entitled to expert assistance at the Commonwealth's expense is entirely consistent with this Court's precedents.

1. "[A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule." *Davila*, 137 S. Ct. at 2064. "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991).

a. "The question whether a state procedural ruling is adequate is itself a question of federal law," and this Court has "framed the adequacy inquiry by asking whether the state rule in question was firmly

established and regularly followed." *Beard* v. *Kindler*, 558 U.S. 53, 53–54 (2009) (quotation marks omitted). Both grounds relied on by the Virginia habeas court meet that standard. The rule established in *Henry* v. *Warden*, 576 S.E.2d 495 (Va. 2003), that claims adjudicated at trial or on direct appeal are not cognizable in habeas proceedings, has been consistently applied by Virginia courts since it was adopted more than 15 years ago.[2] The same is true of *Slayton* v. *Parrigan*, 205 S.E.2d 680 (Va. 1974).[3] Indeed, this Court previously affirmed a Virginia decision dismissing a petition for habeas corpus based on the rule in *Parrigan*. See *Bustillo* v. *Johnson, Dir., Va. Dep't of Corr.*, 548 U.S. 331,

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[2] See, *e.g.*, *Roberts* v. *Warden of Sussex I State Prison*, No. 080656, 2008 WL 10592954, at *6 (Va. Oct. 15, 2008) (citing *Henry* in finding that "claims . . . are barred because these issues were raised and decided in the trial court and on direct appeal from the criminal conviction, and therefore, they cannot be raised in a habeas corpus petition"); *Muhammad* v. *Warden of Sussex I State Prison*, 646 S.E.2d 182, 192 (Va. 2007) (citing *Henry* in holding that "claim (II) is barred because this issue was raised and decided in the trial court and on direct appeal from the criminal conviction and, therefore, . . . cannot be raised in a habeas corpus petition"); *Winston* v. *Warden of Sussex I State Prison*, No. 052501, 2007 WL 678266, at *2 (Va. Mar. 7, 2007) (same).

[3] See, *e.g.*, *Wright* v. *Woodson*, No. 170163, 2018 WL 5077908, at *6 (Va. Oct. 18, 2018) (citing *Parrigan* in finding that "[the] issue may not be raised for the first time in a petition for a writ of habeas corpus"); *Lawlor* v. *Davis*, 764 S.E.2d 265, 270 (Va. 2014) (citing *Parrigan* in finding that "non-jurisdictional issues [that] could have been raised at trial and on direct appeal . . . are not cognizable in a petition for a writ of habeas corpus"); *Prieto* v. *Warden of Sussex I State Prison*, 748 S.E.2d 94, 105 (Va. 2013); (same); *Morva* v. *Warden of Sussex I State Prison*, 741 S.E.2d 781, 784 (Va. 2013) (same).

358 (2006); see also *Smith v. Murray*, 477 U.S. 527, 533 (1986) (acknowledging application of *Parrigan* bar). And the relevant federal court of appeals has specifically "determined that [*Parrigan*] is an adequate state procedural rule." *Reid* v. *True*, 349 F.3d 788, 805 (4th Cir. 2003).

b. Petitioner does not argue otherwise. Instead, he contends (Pet. 19–20) that the Virginia habeas court simply misapplied Virginia law under the facts and circumstances of his case. There are three problems with that argument. First, this Court has repeatedly rejected the proposition that federal courts should second guess a state court's application of its own laws. See, *e.g.*, *Harris* v. *Reed*, 489 U.S. 255, 264 (1989) ("[I]t would be . . . intrusive for a federal court to second-guess a state court's determination of state law."); *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991) (review of state law "is no part of a federal court's habeas review of a state conviction"). Second, petitioner's claims on this score constitute, at best, a request for factbound error correction. Third (and finally), petitioner's arguments are wrong.

i. Petitioner insists that, insofar as *Henry* precludes a habeas petitioner from raising issues that were litigated at trial or on direct appeal, it cannot properly be applied in his case because his "*McWilliams* claim . . . was [n]ever raised in, or decided by, a state court during [his] trial or on direct appeal." Pet. 19. But petitioner did not then and does not now raise a "*McWilliams* claim" for a basic and fundamental reason: No such claim exists.

As the state habeas court recognized, "*McWilliams* did not in fact create any type of change in the law." Pet. App. 30a. To the contrary, the only question before this Court in *McWilliams* was whether the Alabama Court of Criminal Appeals had contravened already "clearly established law" when it determined that the petitioner received all of the assistance to which he was constitutionally entitled. See *McWilliams*, 137 S. Ct. at 1799. In concluding that the court below had so erred, this Court could not have been clearer that its holding was a "narrow" one based on the rule already set out decades earlier in *Ake*. *Id.*; see also *id.* at 1802 n.2 (Alito, J., dissenting) (describing the Court's decision as "factbound").

Even if petitioner were correct that *McWilliams* "clarified" the holding in *Ake* (see Pet. 10), it did not do so in any respect relevant to petitioner's claim. In *McWilliams*, "no one denie[d] that the conditions that trigger application of *Ake* [we]re present": the only issue the Court decided was whether the psychiatric examination the State provided sufficed to meet the constitutional standard. *McWilliams*, 137 S. Ct. at 1798. Here, in contrast, the question is whether "the conditions that trigger application of *Ake*" (Pet. App. 15a) are present in the first place—an issue about which *McWilliams* did not purport to make any new law.[4] Because petitioner's request for the assistance of

[4] That nuance likely explains why petitioner did not focus on *McWilliams* when he sought certiorari on direct appeal. Petitioner's first petition for certiorari was filed by a (different) major law firm just months after *McWilliams* was decided. See Pet. (No. 17-326). If *McWilliams* established petitioner's entitlement to

a neuro-psychologist was *denied*, his claim has always centered on his *entitlement* to expert assistance, not on whether any assistance provided complied with *Ake*. For that reason, petitioner's claim could not have been affected by *McWilliams* and the state habeas court correctly determined that it was barred under *Henry*.[5]

ii. Petitioner is equally incorrect that the state habeas court misapplied *Parrigan*.

Petitioner insists that, under *Parrigan*, "[b]efore a Virginia court can dismiss a habeas claim on procedural grounds, the court must first consider and resolve any allegation that the default is attributable to, and excused by, the ineffective assistance of trial counsel." Pet. 19–20. "Because the state habeas court never . . . made [that] threshold determination," petitioner argues, "the state's procedural dismissal of the *McWilliams* claim does not rest on adequate and independent state law grounds." *Id.* at 20.

That is simply not the law. Petitioner rests his argument on a single line from *Parrigan* stating that "absent a showing of ineffective assistance of counsel in

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relief as he now claims, his then-counsel presumably would have asked this Court to summarily reverse or vacate the decision below rather than seeking review on the merits based on *Miller* v. *Alabama*, 567 U.S. 460 (2012).

[5] Nor is petitioner correct (at 19) that *Muhammad* v. *Warden of Sussex I State Prison*, 646 S.E.2d 182 (Va. 2007), modified *Henry*. Like the state trial court in this case, the Virginia Supreme Court in *Muhammad* differentiated between claims that were presented at trial or on direct appeal, which are barred by *Henry*, and those that could have been raised but were not, which are barred by *Parrigan*. See *Muhammad*, 646 S.E.2d at 192.

failing to raise [the] question, [a court errs] in permitting inquiry . . . for the first time in the habeas corpus proceeding." 205 S.E.2d at 682. But as the quote makes clear, a habeas petitioner must make a *showing* of ineffective assistance—the court does not engage in a *sua sponte* inquiry at the threshold. Indeed, if petitioner were correct, *Parrigan* itself would have come out differently. In *Parrigan*, the Virginia Supreme Court—*without assessing whether counsel was ineffective*—dismissed the habeas petition because "the issue . . . could have been raised and adjudicated at petitioner's trial and upon his appeal to this court, [and thus] Parrigan had no standing to attack his final judgment of conviction by habeas corpus." *Id.*

The same was true in *Henry*, where the Virginia Supreme Court did not consider ineffective assistance before finding that any "new claim" the petitioner raised was "barred under the holding in *Slayton* v. *Parrigan*." *Henry*, 576 S.E.2d at 497 n.3. And in the common situation where a petitioner raises both substantive claims and ineffective-assistance claims based on the failure to raise those substantive claims at trial or direct appeal, Virginia courts frequently consider the issues separately, without addressing ineffective assistance as a threshold to the *Parrigan* bar.[6]

Because Virginia law does not require a threshold determination of counsel's effectiveness, this Court

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[6] See, *e.g.*, *Winston*, 2007 WL 678266, at *5–7, 13; *Lawlor*, 764 S.E.2d at 270–72; *Bowman* v. *Johnson*, 718 S.E.2d 456, 461 (Va. 2011); *Jackson* v. *Warden of Sussex I State Prison*, 627 S.E.2d 776, 782 (Va. 2006).

would be without jurisdiction to review petitioner's *Ake* claim unless it considered the facts of the case and concluded that counsel's performance was deficient under *Strickland* v. *Washington*, 466 U.S. 668 (1984). And because, as petitioner recognizes (at 20), the state court did not address his ineffective-assistance claim, this Court would have to do so in the first instance. Even before getting there, the Court would have to determine whether petitioner waived that argument by failing to assert that the *Parrigan* bar did not apply given trial counsel's deficiencies. See Pet. App. 37a.[7] That type of fact-bound, case-specific inquiry does not warrant this Court's attention and, insofar as a determination of counsel's ineffectiveness is a necessary predicate to jurisdiction, it renders this case an exceedingly poor vehicle to consider petitioner's *Ake* claim.

iii. Petitioner's case is also not "exceptional." Unlike in *Lee* v. *Kemna*, 534 U.S. 362 (2002), on which petitioner relies (at Pet. 21), here there was nothing unique or "exorbitant" about the Virginia court's

[7] Although petitioner contends (at 20) that he argued to the state habeas court that counsel's failure to raise his "*McWilliams* claim" at trial or on direct appeal constituted ineffective assistance, the record (on the page petitioner cites) shows otherwise. What petitioner actually told the court was: "*[i]f* there was a procedural vehicle (other than habeas corpus) by which Petitioner could have brought a timely action in a Commonwealth court, in order to seek and obtain the benefit of the Supreme Court's decision in *McWilliams*, then Petitioner alleges that trial counsel unreasonably failed to identify and employ that vehicle." Pet. App. 26a (italics added). And when given the opportunity to directly respond to the Commonwealth's argument that *Parrigan* barred his claim, petitioner did not cite counsel's ineffectiveness to excuse his default. See Pet. App. 37a.

application of *Henry* or *Parrigan*. See *supra* pp. 13–14 & nn.2–3; compare *Lee*, 534 U.S. at 382, 387 (finding state procedural bar inadequate where petitioner "substantially complied" with the rule and "no published [state] decision demand[ed] unmodified application of the Rules in the urgent situation . . . presented").

Nor is this case "exceptional" because "Virginia law . . . provided no mechanism for re-opening [petitioner's] trial or direct appeal proceedings in state court after this Court decided *McWilliams*." Pet. 21. As already explained, *McWilliams* did not articulate a new rule (much less one that is applicable to this case). And even if it had, petitioner had the opportunity to benefit from that rule by asking this Court to summarily reverse the Virginia Supreme Court's decision denying his direct appeal. Having failed to obtain that relief (or, for that matter, to even ask for it, see *supra* n.4), petitioner's remedy is habeas corpus, subject to all of its restrictions, including state procedural bars.

2 Certiorari is also unwarranted because petitioner seeks error correction where no error occurred.

a. Petitioner does not allege any split in authority on the showing required to trigger *Ake*'s protections. To the contrary, in the only decisions petitioner cites (at 17), other courts *agreed* with the Virginia Supreme Court that a defendant must show a particularized need to establish an entitlement to expert assistance.[8] Indeed, petitioner cites *no decision* rejecting

[8] Petitioner cites decisions from North Carolina, North Dakota, Ohio, and Tennessee requiring a showing of particularized need

the standard the Virginia Supreme Court applied in this case.

b. "[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari." Stephen M. Shapiro et al, *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013). But even if error correction were a proper basis for certiorari, no error occurred in this case.

In rejecting petitioner's expert-witness claim on direct appeal, the Virginia Supreme Court applied a standard derived straight from this Court's decisions. As the Virginia Supreme Court explained, "*Ake* and *Caldwell*, when read together, require that the Commonwealth . . . provide indigent defendants . . . in certain instances, [with the assistance] of . . . experts."

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before the State will be required to provide a mental-health expert. See Pet. 17 (citing *Page* v. *Lee*, 337 F.3d 411, 415 (4th Cir. 2003) (North Carolina); *State* v. *Sisson*, 567 N.W.2d 839, 842 (N.D. 1997); *State* v. *Moore*, No. 14CA0028, 2016 WL 853277, at *22 (Ohio Mar. 2, 2016); *Young* v. *State*, No. W2011-00982-CCA-R3-PD, 2013 WL 3329051, at *34–35 (Tenn. Crim. App. June 27, 2013). Florida and Texas also require that showing. See, *e.g.*, *Bates* v. *State*, 750 So. 2d 6, 16 (Fla. 1999) ("In evaluating whether there was an abuse of discretion courts have applied a two-part test: (1) whether the defendant made a particularized showing of need; and (2) whether the defendant was prejudiced by the Court's denial of the motion requesting the expert assistance.") (citation and quotation marks omitted); *Matter of T.C.*, No. 02–17–00007–CV, 2018 WL 283785, at *5 (Tex. Ct. App. Jan. 4, 2018) ("Under *Ake*, to be entitled to the appointment of an expert, a defendant must make a threshold showing that he has a particularized need for such an expert to address a significant issue at trial.").

Husske, 476 S.E.2d at 925. But "an indigent defendant's constitutional right to the appointment of an expert, at the Commonwealth's expense, is not absolute." *Id.* Accordingly, "an indigent defendant who seeks the appointment of an expert witness . . . must demonstrate that the subject which necessitates the assistance of the expert is 'likely to be a significant factor in his defense,' and that he will be prejudiced by the lack of expert assistance." Pet. App. 73a–74a (quoting *Ake*, 470 U.S. at 82–83). That is accomplished by showing that "the services of an expert would materially assist [the defendant] in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." *Id.* at 74a.

Although petitioner faults the Virginia Supreme Court for relying on *Caldwell* (Pet. 13), the standard the court applied is necessitated by *Ake* itself. Because *Ake*'s protections are triggered only when the defendant's mental condition is "likely to be a significant factor in his defense," *Ake*, 470 U.S. at 82–83, courts must have a way of evaluating whether a defendant has made the necessary showing. That is all the Virginia Supreme Court did when it required petitioner to show a "particularized need" for expert assistance.

Petitioner's understanding of *Caldwell* is wrong in any event. In *Caldwell*, this Court cited *Ake* for the proposition that a defendant must "offer[] more than undeveloped assertions that the requested assistance would be beneficial" to establish an entitlement to an expert. 472 U.S. at 323 n.1 (citing *Ake*, 470 U.S. at 82–83). If *Ake* could provide the basis for a holding that

the defendant's "underdeveloped assertions" fell short in *Caldwell*, it is clear that the Virginia Supreme Court did not run afoul of *Ake* when it required petitioner to show "more than a mere hope that favorable evidence can be obtained" with expert assistance. Pet. App. 74a.

Petitioner's reliance on *McWilliams* is no more persuasive. As described above, in *McWilliams*, all agreed that "the conditions that trigger[ed] application of *Ake* [we]re present." 137 S. Ct. at 1798. This Court thus had no occasion to consider the showing required to establish those conditions, let alone to conclude that a particularized-need standard is improper. Accordingly, *McWilliams* did not cast doubt on the Virginia Supreme Court's holding that petitioner was not entitled to expert assistance under *Ake*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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April 24, 2020