No. 20-7339

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN ANTONIO WATSON,
PETITIONER,

v.

COMMONWEALTH OF VIRGINIA.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court has jurisdiction to review a state trial court's holding that petitioner could not seek to vacate his decades-old criminal convictions under a particular state statute.

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The order of the Supreme Court of Virginia denying the petition for appeal (Pet. App. A) is unreported. The order of the Circuit Court of the County of Henrico denying petitioner's motion to vacate his conviction (Pet. App. B) is also unreported.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on January 15, 2021 (Pet. App. A). The petition for a writ of certiorari was filed on February 12, 2021. Although the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), the Court lacks jurisdiction under it because the courts below did not consider, let alone resolve, any federal question.

STATEMENT

Following a two-day bench trial in Virginia state court in 1999, petitioner was convicted of numerous crimes, including forcible sodomy, abduction, two counts of attempted robbery, and four counts of use of a firearm. He was sentenced to 98 years in prison, with all but 44 years suspended.

1. During the last two decades, petitioner has filed numerous challenges to his convictions in both state and federal court.

Direct appeal. Petitioner filed a timely petition for appeal to the Court of Appeals of Virginia in June 2000. See *Watson* v. *Angelone*, No. 2:02cv162 (E.D. Va. 2002)

(ECF No. 10 at 2).[1] That court denied petitioner's appeal, and the Supreme Court of Virginia declined review on February 8, 2001. *Id.* at 2–3.

State collateral proceedings. After completing his direct appeals, petitioner filed his first application for state habeas relief in March 2001. *Angelone*, No. 2:02cv162 (ECF No. 10 at 2). The state trial court denied that application, and petitioner's appeal to the Supreme Court of Virginia was dismissed as untimely. *Id.* Petitioner then filed a second state habeas application in August 2002, which was also dismissed. *Watson* v. *Clarke*, No. 2:18-cv-480 (E.D. Va. 2018) (ECF No. 1 at 5).[2]

More than a decade later, petitioner filed a motion to vacate his conviction in the Court of Appeals of Virginia. *Clarke*, No. 2:18-cv-480 (ECF No. 14-2). The court dismissed that motion for lack of jurisdiction in

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[1] Petitioner's original filing in the Virginia Court of Appeals is not available online, but a federal magistrate judge's report and recommendation explaining the reasons for denying petitioner's 2002 federal habeas petition details previous state litigation. The report and recommendation was later adopted by the district court. See *Angelone*, No. 2:02cv162 (ECF No. 13). Although the docket entries from the 2002 federal habeas petition are not available on PACER, a copy of the report and recommendation is attached as an exhibit in petitioner's recent request to file a successive petition. See *In re: Kevin Watson*, No. 19-360 (4th Cir. 2019) (ECF 2, Ex. G).

[2] Petitioner's 2002 state habeas application is not available online. Petitioner references the proceeding in his 2018 federal habeas application.

June 2015, noting that it did "not involve a request for writs of mandamus, prohibition or habeas corpus" or present "a Writ of Actual Innocence" under Virginia law. *Id.*

In 2016, petitioner filed another state habeas petition challenging disciplinary sanctions he received while in the Department of Corrections. The Supreme Court of Virginia denied that petition because it did not challenge the lawfulness of petitioner's custody and detention. *Clarke*, No. 2:18-cv-480 (ECF Nos. 14-2, 14-3, 14-4). Petitioner sought a writ of certiorari from this Court, which was denied in March 2017. *Watson* v. *Virginia*, 137 S. Ct. 1348 (2017) (No. 16–7678). In 2018, petitioner filed another state habeas application, *Clarke*, No. 2:18-cv-480 (ECF No. 14-5), which was dismissed as untimely. *Id.* (ECF No. 14-6).

Federal habeas proceedings. Petitioner has also collaterally attacked his conviction in federal court over the last two decades. After his first state habeas application was denied (but before his second was filed), petitioner sought a writ of habeas corpus in federal court in 2002. See *Angelone*, No. 2:02cv162 (ECF No. 1). In his 2002 application, petitioner argued in part that his confinement violated the Sixth Amendment because counsel "allowed [him] to be convicted of, and receive the maximum sentences on, all four gun charges when they all stemmed from the same incident." *Id.* (ECF No. 10 at 4). A magistrate judge recommended that application be dismissed because petitioner's claims were procedurally defaulted, *id.* at 7–8, and the district

court dismissed it in December 2002, *id.* (ECF Nos. 10, 13).

In 2018–16 years later—petitioner filed a second habeas petition. *Clarke*, No. 2:18-cv-480 (ECF No. 1). In that application, petitioner again claimed that his confinement was unconstitutional because of ineffective assistance of counsel. *Id.* This time, however, petitioner argued his counsel's performance was deficient because of a conflict of interest. *Id.* The district court dismissed that petition in June 2019 as an unauthorized successive petition. *Clarke*, No. 2:18cv480, 2019 WL 2552210, *1 (E.D. Va. June 20, 2019). Petitioner retroactively sought permission from the Fourth Circuit to file his second petition, which was also denied. *In re: Kevin Watson*, No. 19-360 (ECF No. 4).

2. The current proceedings began in June 2019, when petitioner returned to state court and moved to vacate his conviction pursuant to Virginia Code § 8.01-428(D). *Watson* v. *Commonwealth*, Case Nos. CR99-1420, 1422, 1486 through 1491-00 (Mot. to Vacate). In that motion, petitioner argued that counsel had been ineffective for a third reason: because (petitioner claims) counsel fell asleep during trial. *Id.* In support of that claim, petitioner attached a single page from the 1999 trial transcript containing a since-corrected "material error." *Id.* (See Notice of Obj. to Tr.). In petitioner's submission, the court purports to "wake up Mr. [Robert G.] *Cabell*'—petitioner's trial counsel—during the Commonwealth's direct examination of one of its witnesses. Pet. App. C. "The person referenced in

[the court's] exchange," however, was actually Tom *Campbell*—a then-reporter for the *Richmond Times Dispatch*. Notice of Obj. to Tr. at 1. The Commonwealth moved to correct the error on May 9, 2000, *id.*, and the Henrico Circuit Court corrected the transcript the following day. *Watson*, Case Nos. CR99-1420, 1422, 1486 through 1491-00 (May 10, 2000 Or. Correcting Tr.).

It comes as no surprise that after "review[ing] . . . the files and the evidence during the trial and sentencing," the state trial court determined that there was "no basis to grant" petitioner's motion and denied it. Pet. App. B. Petitioner appealed to the Supreme Court of Virginia, which found "no reversible error in the judgment complained of." Pet. App. A.

ARGUMENT

The petition for a writ of certiorari should be denied. Petitioner's failure to satisfy Virginia's statutory criteria for filing his current motion does not implicate federal law and does not confer jurisdiction on this Court. Even if this Court had jurisdiction, moreover, this case lacks the traditional hallmarks for granting a writ of certiorari. The decisions below are unpublished and unreasoned and petitioner's ineffective assistance of counsel claim is predicated on a mistake in the original state court transcript that has since been corrected.

1. This Court lacks jurisdiction because the decisions below do not implicate, let alone resolve, a

question of federal law. Congress has limited this Court's jurisdiction to "[f]inal judgments" issued "by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution." 28 U.S.C. § 1257(a). Consequently, this Court "accept[s] as controlling the decision of the state courts upon questions of local law." *American Ry. Express Co.* v. *Kentucky*, 273 U.S. 269, 272 (1927).

The petition for a writ of certiorari does not accurately describe the lower courts' holdings. The state trial court did not hold, as petitioner claims, "that [p]etitioner's trial counsel sleeping structural error claim ha[d] no merits." Pet. 5. Instead, the state trial court concluded—after "a review of the files and the evidence during the trial and sentencing"—that there was "no basis" to vacate petitioner's stale conviction under a specific state statute, Virginia Code § 8.01-428(D). Pet. App. B; see Mot. to Vacate at 1 (stating that petitioner brought his motion "pursuant to Virginia Code Section 8.01-428(D)").

That conclusion was entirely correct and implicates no question of federal law. Section 8.01-428 of the Code of Virginia "specifies the remedies and procedures available to a party who seeks to have the trial court set aside or correct an error in a judgment." *Charles* v. *Precision Tune, Inc.*, 414 S.E.2d 831, 833 (Va. 1992). Paragraphs A through C permit parties to obtain relief from certain judgments on certain specified grounds.

Paragraph D—the provision under which petitioner brought his motion to vacate—states:

> This section does not limit the power of the court to entertain at any time an independent action to relieve a party from any judgment or proceeding, or to grant relief to a defendant not served with process as provided in § 8.01-322, or to set aside a judgment or decree for fraud upon the court.

Va. Code Ann. § 8.01-428(D).

Consistent with the statutory terms, the Supreme Court of Virginia has specifically rejected the argument that Paragraph D "permits 'a court of equity to relieve a party from *any* judgment.'" *Charles*, 414 S.E.2d at 832 (emphasis added). Instead, Virginia's highest court has held that the provision under which petitioner sought relief empowers state courts to "entertain . . . an independent action" to "relieve a party from any judgment or proceeding" or "set aside a judgment or decree *for fraud*." *Id.* at 832–33 (quoting what was then Va. Code Ann. § 8.01-428(C) and is now Va. Code Ann. § 8.01-428(D)) (emphasis added).[3] To sustain such an "action in equity," a movant must: (i) have been denied the benefit of a "good defense" because of "fraud, accident, or mistake"; and (ii) be without "fault or

[3] When *Charles* was decided, the provision that is now Section 8.01-428(D) was 8.01-428(C). Virginia Code Section 8.01-428 was amended in 1993 to add what is now subsection (C) to address what happens when a party is not notified of the entry of a final order.

negligence" or "any [other] adequate remedy at law." *Charles*, 414 S.E.2d at 833 (citations omitted).

Petitioner's current motion does not satisfy either requirement. Petitioner does not allege that "fraud, accident or mistake" prevented him from reaping the benefit of any defense he may have had, *Charles*, 414 S.E.2d at 833 (citations omitted); rather, he moved to vacate his conviction based solely on allegations of ineffective assistance of counsel. Mot. to Vacate at 1. Nor has petitioner established that he lacked "any adequate remedy at law" for the alleged ineffective assistance of counsel. *Charles*, 414 S.E.2d at 833. Quite the contrary, Virginia law is clear that such claims "can be raised . . . in a habeas corpus proceeding." *Sigmon* v. *Director of Dep't of Corrs.*, 739 S.E.2d 905, 908 (Va. 2013).[4]

Petitioner is far from the first person to seek to vacate a criminal conviction under Section 8.01-428(D) after unsuccessfully seeking habeas relief. To the contrary, as one Virginia court observed, "[t]he first clause of subsection (D) has lately become a favorite of prisoners attacking their convictions after a petition for a writ of habeas corpus has been denied." *Turner* v.

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[4] Indeed, the procedural history recounted above reveals that petitioner has raised (different) ineffective assistance of counsel claims during previous state and federal habeas proceedings. The problem, in short, is not that petitioner lacked any remedy at law for his current claims: it is that petitioner failed to raise them via the procedural mechanism that would have been available to raise such claims.

Commonwealth, No. CL14-9380, 2015 WL 10765165, at *1 (Va. Norfolk Circuit Court 2015). Yet that same court emphasized that it had "never read or heard of any Virginia case in which a court of equity granted an injunction to vacate a criminal conviction and order either a new trial for or the release of a prisoner"—near "conclusive proof . . . that no such jurisdiction in equity exists in Virginia." *Id.* at *3. The state trial court's ruling that petitioner could not use Code § 8.01-428(D) to mount a collateral attack on his long-final convictions is both clearly correct as a matter of state law and implicates no issue giving rise to this Court's jurisdiction.

2. Even if this Court had jurisdiction, moreover, further review would not be warranted because petitioner's claims are without merit and because this case does not satisfy any of the traditional criteria. The decisions of both the state trial court and state supreme court are unpublished and unreasoned and will not bind courts in any future case. For that reason, the challenged orders would be incapable of creating a conflict warranting this Court's review. What is more, petitioner's claims are premised on a long-corrected error in the trial transcript. "[A]t no time" did petitioner's trial counsel "fall asleep during the course of the trial."[5] Notice of Obj. to Tr. at 1. Only a reporter

[5] Even if counsel had fallen asleep, the federal courts of appeal to have considered whether a presumption of prejudice attaches automatically to cases of sleeping counsel have held that it does not. See, *e.g.*, *United States* v. *Ragin*, 820 F.3d 609, 619 (4th Cir.

for a local newspaper did. *Id.* A reporter's actions certainly do not implicate petitioner's Sixth Amendment right to effective assistance of counsel and do not warrant this Court's attention.

Even if petitioner's questions presented were implicated by these facts—and for the reasons discussed above, they are not—there is no indication that petitioner would have prevailed in a different lower court.

CONCLUSION

The petition for a writ of certiorari should be denied.

2016); *Muniz* v. *Smith*, 647 F.3d 619, 625–26 (6th Cir. 2011); *Burdine* v. *Johnson*, 262 F.3d 336, 341 (5th Cir. 2001); *Tippins* v. *Walker*, 77 F.3d 682, 686–87 (2d Cir. 1996); *Javor* v. *United States*, 724 F.2d 831, 834 (9th Cir. 1984). The other decisions cited by petitioner are not to the contrary. Indeed, three of the decisions that petitioner cites—*Hunter* v. *Moore*, 304 F.3d 1066 (11th Cir. 2002), *Norde* v. *Keene*, 294 F.3d 401 (2d Cir. 2002), and *United States* v. *Boone*, 245 F.3d 352 (4th Cir. 2001), see Pet. 5—did not involve sleeping lawyers at all.

Respectfully submitted.

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