No.

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IN THE SUPREME COURT OF THE UNITED STATES

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DARNELL BERNARD BLAGMON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Virginia law provides for filing of a Petition for Writ of Actual Innocence (Va. Code Ann. § 19.2-327.10 (West)) in Virginia state court. Petitioner filed for this relief on ground that the main witness against him at trial, Angel Berdecia, recanted his testimony and has affirmed that petitioner was not involved in the crimes. The state courts denied the Petition without an evidentiary hearing, however, ruling that the Affirmation of the witness Berdecia was "not shown to be true."

Did the state court violate petitioner's federal constitutional right to due process by making this ruling without having held an evidentiary hearing?

List of Parties

All parties appear in the caption of the case on the cover page.

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Petition for Writ of Certiorari

Petitioner Darnell Bernard Blagmon respectfully petitions for a writ of certiorari to review the Order of the Supreme Court of Virginia refusing review (petition for appeal) of the Virginia Court of Appeals' decision that denied petitioner's Petition for a Writ of Actual Innocence without an evidentiary hearing.

Opinions Below

The November 15, 2017 Opinion of the Virginia Court of Appeals is attached at Appendix B at A2-9 and is unpublished.

Jurisdiction

The Order of the Virginia Supreme Court denying petition for appeal was entered on July 23, 2018. A1. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257 (West).

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides, "No person shall ... be deprived of life, liberty, or property, without due process of law…"

Section One of the Fourteenth Amendment to the United States Constitution provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law…"

Statement of the Case

On April 2, 2007, petitioner was found guilty in the Circuit Court of the City of Virginia Beach of felony murder and robbery arising from the death of Keith Sears. (Appendix B at A2-9). Petitioner's direct state court appeal was affirmed; the Supreme Court of Virginia refused the petition for appeal. (Appendix B at A2-9). In March 2009, Blagmon filed a *habeas corpus* petition in the City of Virginia Beach Circuit Court, but the Circuit Court denied the petition on June 11, 2009. (Appendix B at A2-9).

This proceeding flows from petitioner's filing of a Petition for Writ of Actual Innocence filed on October 6, 2017 with the Virginia Court of Appeals. Blagmon contended that his Petition should be granted because the main prosecution witness at trial, Angel Berdecia, had recanted his testimony that had led to Blagmon's convictions. (Appendix B at A2-9).

Petitioner explained why his Petition for Writ of Actual Innocence should be granted. According to the prosecution's trial testimony, the victim Sears, Blagmon, and Angel Berdecia, were walking together from Berdecia's residence. During the walk, Sears was shot and killed. The bullet removed from his brain was a .380 caliber bullet and was fired from a distance of less than six inches. The gun

that fired the bullet was found by Berdecia's mother in a trash can on her porch about three weeks later (on January 5, 2006). (Appendix B at A2-9).

The prosecution claimed at trial that Blagmon had conspired with Berdecia to rob Sears that night. Berdecia rifled through the victim's pockets after he was shot. (Appendix B at A2-9).

Berdecia agreed to testify for the Commonwealth against Blagmon (in exchange for helping himself with his own charges). At Blagmon's trial, Berdecia said it was Blagmon who initiated the idea of robbing Sears, and it was Blagmon who fired the gunshot. (Court of Appeals Opinion, at 1-6).

The jury, however, acquitted Blagmon of use of a firearm in the commission of a felony, indicating it did not believe that Blagmon was the one who shot the victim. The jury had questions about the law governing principals and accomplices as well. During deliberations, the jury inquired about the "exact definition of first and second principal, murder in the first degree." The trial judge referred the jurors to the instructions provided to them on principals in the first and second degree in the commission of a felony or robbery. Following further deliberations, the jury then convicted Blagmon of robbery and felony murder for the killing of Sears during the robbery's commission. (Appendix B at A2-9).

In the recanted statement from Angel Berdecia, he affirmed that it was he who committed the crimes against Sears, and that Mr. Blagmon was not involved. Berdecia affirmed as follows:

> On or about December 14, 2005, I Angel Berdecia was in a heated conversation wi[th] Mr. Kieth [sic] Sears that resulted to [sic] a physical altercation. Which ultimately ended with the death of Mr. Kieth [sic] Sears. There was never any arguement [sic] or altercation between Mr. D. Blagmon and Mr. Kieth [sic] Sears. I just want to bring forth the truth which is Mr. D. Blagmon never willingly aided or abetted, nor as [l]isted in the death or robbery of Mr. Kieth [sic] Sears. My reason for righting this wrong is, because Mr. D. Blagmon . . . was erroneously charged and convicted for crimes he is not responsible for committing. Mr. D. Blagmon is erroneously convicted of the afore-mentioned crimes; because of my coecive [sic] and falsified statement and testimony, Mr. D. Blagmon['s] . . . convictions must be reversed/ overturned because he is not guilty of, and never has willingly aided or abetted in the afore-mentioned crimes which are murder and robbery.

Petitioner contended that Berdecia's statement contradicted his trial testimony, showed that he lied at trial, and showed that Blagmon was not, in fact, involved in the robbery or death of the victim Sears. For instance, at trial, Berdecia testified that Sears owed a debt to Blagmon of $65. (Tr. pps. 125-126). Berdecia testified that around 11 p.m. on the night in question, Blagmon came onto the porch stating that he needed to rob somebody that night. (Tr. p. 127). Berdecia claimed that Blagmon wanted to rob Sears, who was present that night, because Sears owed Blagmon money. (Tr. p. 127). Berdecia claimed that he tried to talk

Blagmon out of the robbery plan. (Tr. pps. 127-128). Berdecia claimed that Blagmon carried out this plan anyway. As the three men (Berdecia, Sears, and Blagmon) walked towards Margate, Blagmon shot Sears from behind, Berdecia told the jury at trial. (Tr. p. 132). Berdecia claimed that Blagmon ordered him to help move Sears' body or Blagmon would shoot Berdecia, too. (Tr. p 133).

Berdecia's current statement completely contradicts that version of events the prosecution presented at trial. Berdecia now confirms it was he, not Blagmon, who was in the "heated conversation with Mr. Keith Sears that resulted to a physical altercation which ultimately ended with the death of Mr. Keith Sears." Berdecia affirms, "There was never any argument or altercation between Mr. D. Blagmon and Mr. Keith Sears. … Mr. D. Blagmon never willingly aided or abetted, nor assisted in the death or robbery of Mr. Keith Sears."

Berdecia's current affirmation is shown to be true, further, by other holes in the prosecution's version of events presented at trial. Berdecia ultimately admitted at trial that there was no agreement or plan for him and Blagmon to rob Sears. (Tr. pps. 142-143). Berdecia told Detective Hall on December 17, 2005 that the last time he saw Sears was a day before the incident. (Tr. pps. 145-146). Berdecia said that the only time he left his house on December 15 (the day of the killing) was between 5:00 and 5:30 p.m. to go to the Getty Mart for blunts. (Tr. p. 146).

Berdecia told Detective Hall that the last time he saw Sears, Sears was walking by himself. (Tr. p. 147, 152). Berdecia told the Detective that he didn't know anything about Sears' murder. (Tr. pps. 151-152). Berdecia admitted lying to the police by stating that he had walked with Sears to the corner and then returned home. (Tr. p. 153). Berdecia admitted lying to the police that Sears left his house between 11:30 p.m. and 1:30 a.m., and that Berdecia shook Sears' hand as he left. (Tr. p. 154). Berdecia admitted lying to the police by stating that he had watched Sears walk from the porch until he was out of sight, and that Berdecia then went upstairs and passed out. (Tr. p. 155). Berdecia admitted telling the police that he did not see Blagmon with a gun on the night that Sears was shot – contrary to Berdecia's claim at trial that it was Blagmon who shot the victim. (Tr. p. 161).

The Stipulation entered into evidence at Blagmon's trial further discredits Berdecia's trial testimony and shows that his current Affirmation is true, Mr. Blagmon contended in his Virginia Petition filed in the state court below. The Stipulation confirmed that there was tension between Berdecia and Sears, not Blagmon and Sears (Sears was Blagmon's friend), and that Berdecia owed Sears money. Sears had been staying with Berdecia for 1½ months prior to the shooting. Within a week of the shooting, Berdecia was seen with a small caliber handgun. On the day that Sears' body was found, Berdecia had a nonchalant attitude. Within

a week of the shooting, Berdecia pulled out a .380 caliber handgun from his right pocket in the alley off East Hastings Arch. (Tr. pps. 301 - 303).

Berdecia's affirmation is shown true, also, by some of the trial testimony of Commonwealth witness John Rivera, who testified that there was some sort of scuffle between Berdecia and Sears, not Blagmon and Sears -- consistent with the Commonwealth's agreement, via the Stipulation, that there was animosity between Berdecia and Sears, not Blagmon and Sears. It was Berdecia, not Blagmon, who was seen with the .380 caliber handgun, near the location of the shooting, that was alleged to be the murder weapon.

Petitioner argued that an evidentiary hearing was at least warranted on his Petition for Writ of Actual Innocence before ruling by the state court. The Commonwealth's case rested entirely on Berdecia's word against Blagmon. There was no forensic or objective evidence showing that Blagmon was the perpetrator of the robbery. Had Mr. Berdecia testified consistent with his current Affirmation rather than his prior trial testimony, no rational trier of fact would or could have found Mr. Blagmon guilty of robbery and felony murder beyond a reasonable doubt.

Despite those submissions, Virginia's Court of Appeals denied Blagmon's Petition without an evidentiary hearing, ruling that Berdecia's current Affirmation

was not shown to be true, and that Blagmon failed to prove that Berdecia's statement, "'when considered with all the other evidence in the current record,' is such that 'no rational trier of fact [w]ould have found [Blagmon] guilty of" the robbery and felony murder crimes. (Appendix B at A2-9). Petitioner sought review from Virginia's Supreme Court, arguing that the lower court had erred in ruling that "Blagmon's petition fails to prove that Berdecia's new statement is true" without the benefit of an evidentiary hearing, which was required to be held. Petitioner contended that without an evidentiary hearing followed by proper findings of fact on the truth or falsity of the witness Berdecia's statement, the Court of Appeals could not properly determine whether Berdecia's current statement is "true" as the Court of Appeals purported to do in its decision (on page 6, Appendix B at A8). The Virginia Supreme Court nonetheless denied review by Order of July 23, 2018. (A1).

Reason for Granting the Petition

The Court should grant Certiorari to address the due process flaw in the post-conviction procedure employed by the Virginia courts to resolve petitioner's Petition for Writ of Actual Innocence.

States are not required to provide post-conviction procedures, but, if they do, the procedures they use must "compor[t] with fundamental fairness." Pennsylvania v. Finley, 481 U.S. 551, 556, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). A state's freedom to choose its own procedures provides no license to dispense with due process or to "transgress[] any recognized principle of fundamental fairness in operation." Medina v. California, 505 U.S. 437, 448, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992).

Virginia has provided the Actual Innocence Petition remedy. Va. Code Ann. § 19.2-327.10 confers original jurisdiction upon the Court of Appeals of Virginia to consider the Petition based on newly-discovered, non-biological evidence filed by any individual "convicted of a felony upon a plea of not guilty." Turner v. Com., 282 Va. 227, 239, 717 S.E.2d 111 (2011). To obtain the writ, the petitioner must prove that the newly-discovered evidence (1) "was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court;" Va. Code Ann. § 19.2-327.11(A)(iv) (West); (2)

"is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction by the court;" Va. Code Ann. § 19.2-327.11(A)(vi); (3) "is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact would[1] have found proof of guilt beyond a reasonable doubt;" Va. Code Ann. § 19.2-327.11(A)(vii); and (4) "is not merely cumulative, corroborative or collateral." Va. Code Ann. § 19.2-327.11(A)(viii). The petitioner bears the burden of proving these elements by clear and convincing evidence. Va. Code Ann. § 19.2-327.13; Moore v. Com., 53 Va. App. 334, 343–44, 671 S.E.2d 429, 434 (2009) (quoting Carpitcher v. Com., 273 Va. 335, 343–44, 641 S.E.2d 486, 491 (2007)); Montgomery v. Com., 62 Va. App. 656, 671–73, 751 S.E.2d 692 (2013). In cases involving recanted testimony, courts have said that the recantation evidence must be found to be true. Carpitcher, 273 Va. at 345; Haas v. Com., 283 Va. 284, 295, 721 S.E.2d 479, 484 (2012).

We submit that failing to hold an evidentiary hearing on petitioner's actual innocence claim is not "in accord with the dictates of the Constitution -- and, in

[1] Effective July 1, 2013, Va. Code Ann. § 19.2-327.13 and 19.2-327.11(A)(vii) (West) was amended to read no rational trier of fact "would" have found proof of guilt beyond a reasonable doubt instead of the prior no rational trier of fact "could" have found proof of guilt beyond a reasonable doubt. Altizer v. Com., 63 Va. App. 317, 322, 757 S.E.2d 565 (2014).

particular, in accord with the Due Process Clause." Evitts v. Lucey, 469 U.S. 387, 401, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Without hearing the witness and making findings of fact, the Court of Appeals could not properly determine whether Angel Berdecia's current statement is "true" as the Court of Appeals purported to do. This Court has emphasized the importance of proper state-court fact findings on disputed evidentiary issues. Cullen v. Pinholster, 563 U.S. 170, 182, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). Failing to hold an evidentiary hearing on Actual Innocence claims such as Petitioner Blagmon's conflicts with this Court's statement that "the evidentiary basis" for constitutional claims "often turns on evidence outside the trial record" and that proceedings "without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim." Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 1317–18, 182 L. Ed. 2d 272 (2012).

The Virginia court's resolution of disputed facts on the basis of looking at the paper affidavit of a witness – as the Virginia court did in this case below – contradicts with what due process requires. Cf. Honda Motor Co. v. Oberg, 512 U.S. 415, 430, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994) (finding Oregon's abrogation of well-established common law procedures "raises a presumption that its procedures violate the Due Process Clause"). Proper adjudication has always

required the application of legal rules to the factfinder's findings of facts. "Trial on affidavits" is not permitted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "When evidentiary facts are in dispute, when the credibility of witnesses may be an issue, when conflicting evidence must be weighed, a full trial is clearly necessary regardless of whether it is a bench or jury trial." *Federal Judicial Ctr., The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure* 39 (1991). The Virginia state court's declaration of the truth or falsity of the witness Berdecia's Affirmation – which the state court then hinged its denial of Mr. Blagmon's Petition for Writ of Actual Innocence – contravenes these established due process principles. The Court should grant Certiorari to clarify this area of due process law that affects thousands of criminal habeas defendants in Virginia and in similar states providing writs of innocence.

CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ Michael Confusione

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Dated: October 16, 2018

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 23rd day of July, 2018.

Darnell Bernard Blagmon, Appellant,

against Record No. 171651
Court of Appeals No. 1639-17-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on **Wednesday** *the* **15th** *day of* **November, 2017**.

Darnell Bernard Blagmon, Appellant,

against Record No. 1639-17-1

Commonwealth of Virginia, Appellee.

Upon a Petition for a Writ of Actual Innocence

Before Judges Decker, Malveaux and Senior Judge Annunziata

Darnell Bernard Blagmon petitions this Court for a Writ of Actual Innocence pursuant to Chapter 19.3 of Title 19.2 of the Code of Virginia. He contends he is innocent of felony murder and robbery, of which he was convicted in the Circuit Court of the City of Virginia Beach on April 2, 2007.

BACKGROUND

A. Blagmon's Convictions

Blagmon was tried and convicted for the felony murder and robbery of Keith Sears on December 13, 2005.

During the trial, the parties stipulated to the following facts: In the early morning hours of Wednesday, December 14, 2005, Sears, a/k/a "Flames," Blagmon, and Angel Berdecia walked together from Berdecia's residence. During the walk, Sears was shot in the head and killed. The bullet later removed from his brain was identified as a .380 caliber bullet and was fired from a distance of less than six inches. The gun that fired the bullet was found by Berdecia's mother in a trash can on her porch[1] on January 5, 2006. It was wrapped in a brown paper bag.

In addition to the stipulated facts, several witnesses testified at trial regarding statements Blagmon made concerning the offenses. Detective Janine Hall testified that she interviewed Blagmon on December 20,

[1] The evidence at trial proved that Berdecia lived with his mother.

2005, and that Blagmon told Hall that the idea to rob Sears originated with Berdecia, Blagmon's co-defendant. After initially denying any conversation with Berdecia prior to the robbery and murder, Blagmon eventually admitted that he and Berdecia discussed robbing Sears shortly before the robbery and shooting occurred. Berdecia told Blagmon that Berdecia was "tired of Sears staying at his house and eating up his food" without reimbursing Berdecia and that Berdecia was going to rob Sears.

Upon Hall relating that Berdecia had told the police that the robbery idea originated with Blagmon, Blagmon disputed that claim; however, he did admit stating to Berdecia in the context of the robbery conversation that "it was Christmastime and he [Blagmon] needed to get some money." Blagmon told Hall that, after the two men discussed robbing Sears, Blagmon did not believe that Berdecia would follow through with the robbery. When Blagmon and Berdecia walked with Sears from Berdecia's house on the evening of December 14, 2005, Blagmon told Hall that Berdecia shot Sears without warning. Blagmon admitted to Hall that he helped Berdecia move Sears's body into an alley and then acted as a "lookout" while Berdecia went through Sears's pockets. When Berdecia and Blagmon met back at Berdecia's house that evening, Berdecia gave Blagmon $25.00 and kept a larger amount for himself. Blagmon told Hall he could not see exactly how much money Berdecia had, but Blagmon estimated it was around $150.00. Blagmon confirmed that Berdecia had no money prior to the robbery.

During his interview with Hall, Blagmon admitted that, "two and a half to three weeks prior" to December 20, 2005, he had borrowed a loaded .380 caliber gun from a friend named "Wallace" and that the gun was at Berdecia's house.

John Rivera was incarcerated with Blagmon prior to trial and testified to statements made by Blagmon to him during their incarceration. Blagmon told Rivera that Blagmon knew that Sears had money on him on the night of the robbery and murder because Blagmon knew Sears intended to purchase drugs. Blagmon stated that he instructed Berdecia to get his gun before Blagmon and Berdecia left Berdecia's house with Sears. Blagmon told Rivera that Blagmon produced the gun during the outing with Berdecia and Sears, and Sears began "tussling" with Berdecia. Blagmon shot Sears during the fight with Berdecia and instructed

Berdecia to go through Sears's pockets. Blagmon stated that Berdecia passed the money to him, but did not state how much money he received.

Rivera also testified that he, Rivera, eventually moved to a different cell block and that, shortly prior to the move, Blagmon expressed anger because he "felt like the neighborhood [had] really turned its back on him . . . ." Blagmon told Rivera, "I will kill you like I killed that nigger Flames."

In addition to the statements to the police and Rivera, Blagmon discussed the murder and robbery with Berdecia's sister-in-law, Raquel Ramoutar. Ramoutar, a member of the United States Navy, testified that Blagmon called her shortly after he was taken into custody in December 2005 and asked her where Berdecia was and for information about the case. When Ramoutar answered she did not know where Berdecia was, Blagmon told her that Berdecia "better shut his mouth, not say nothing because the police ain't got nothing on us." Ramoutar replied that he and Berdecia should cooperate with the police if they were innocent. Blagmon told her, "Oh, don't worry about it. I got everything taken care of. Snitches will get snitches."

Berdecia, who was also charged in connection with Sears's robbery and murder, testified that Blagmon was visiting Berdecia at the latter's home on the evening of Sears's murder. Sears, as well as Berdecia's mother and sister, were in the home that evening. At approximately 11:00 p.m. Berdecia and Blagmon walked outside to the porch and began talking. Berdecia testified that Blagmon told him that Blagmon wanted to rob Sears because Sears owed Blagmon money. Berdecia stated that he tried to talk Blagmon out of the plan to rob Sears.

Shortly thereafter, Sears came outside. When Blagmon announced he wanted to go for a walk, Sears and Berdecia agreed to accompany him. Although Berdecia knew that Blagmon was carrying a gun, Berdecia testified that he did not believe Blagmon was going to "do anything with it" and that Blagmon was "most likely" going to "scare" Sears when he confronted Sears about the debt owed Blagmon.

As the men walked, Sears led the way, followed by Blagmon and then Berdecia. Without warning, Berdecia heard a gunshot, followed by Sears lying on the ground. Berdecia exclaimed to Blagmon, "What did you do? Why did you do that for? What's going on?" Berdecia testified that Blagmon ordered Berdecia

to help Blagmon conceal Sears's body behind some bushes, threatening to shoot Berdecia if he refused. After helping Blagmon move Sears, Berdecia fled from the scene.

Later that night, however, the two men met again. Blagmon told Berdecia, "We take this to our graves. We don't tell nobody." After giving Berdecia $10.00, Blagmon instructed Berdecia to hide Blagmon's gun in Berdecia's house.

At the conclusion of the evidence, the trial court instructed the jury on the law governing principals in the second degree and, during deliberations, the jury specifically inquired about the "exact definition of first and second principal, murder in the first degree." The trial judge referred the jurors to the instructions provided to them on principals in the first and second degree in the commission of a felony or robbery.

Following deliberations, the jury convicted Blagmon of first-degree murder and robbery, but acquitted him of use of a firearm in the commission of a felony. Blagmon noted his appeal to this Court on his convictions.

B. Post-Trial Proceedings

On November 2, 2007, this Court issued an order denying Blagmon's petition for appeal and finding that the evidence was sufficient to convict him of first-degree murder and robbery. See Blagmon v. Commonwealth, Record No. 0911-07-1 (Va. Ct. App. Nov. 2, 2007). Blagmon appealed to the Supreme Court of Virginia, which refused the petition. See Blagmon v. Commonwealth, Record No. 072320 (Va. Mar. 19, 2008).

In March 2009, Blagmon filed a *habeas corpus* petition in the City of Virginia Beach Circuit Court. Following a response from the Attorney's General Office, the circuit court denied the petition on June 11, 2009.

C. Blagmon's Petition for Writ of Actual Innocence

On October 6, 2017, Blagmon filed a petition for writ of actual innocence. In support of his petition, he provided a statement from Berdecia maintaining Blagmon's innocence. While Berdecia did not specifically recant his trial testimony, he stated in pertinent part as follows:

On or about December 14, 2005, I Angel Berdecia was in a heated conversation wi[th] Mr. Kieth [sic] Sears that resulted to [sic] a physical altercation. Which ultimately ended with the death of Mr. Kieth [sic] Sears. There was never any arguement [sic] or altercation between Mr. D. Blagmon and Mr. Kieth [sic] Sears. I just want to bring forth the truth which is Mr. D. Blagmon never willingly aided or abetted, nor as[s]isted in the death or robbery of Mr. Kieth [sic] Sears. My reason for righting this wrong is, because Mr. D. Blagmon . . . was erroneously charged and convicted for crimes he is not responsible for committing. Mr. D. Blagmon is erroneously convicted of the afore-mentioned crimes; because of my coecive [sic] and falsified statement and testimony, Mr. D. Blagmon['s] . . . convictions must be reversed/overturned because he is not guilty of, and never has willingly aided or abetted in the afore-mentioned crimes which are murder and robbery.

ANALYSIS

To obtain a writ of actual innocence under the provisions of Code §§ 19.2-327.10 through -327.14, a petitioner must allege and prove, among other things, that the newly-discovered evidence

> (1) "was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court;" Code § 19.2-327.11(A)(iv);
>
> (2) "is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction by the court;" Code § 19.2-327.11(A)(vi);
>
> (3) "is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact [w]ould have found proof of guilt beyond a reasonable doubt;" Code § 19.2-327.11(A)(vii);[2] and
>
> (4) "is not merely cumulative, corroborative or collateral." Code § 19.2-327.11(A)(viii).

The petitioner bears the burden of proving these four elements by clear and convincing evidence. Code § 19.2-327.13.

Carpitcher v. Commonwealth, 273 Va. 335, 343-44, 641 S.E.2d 486, 491 (2007).

[2] In 2013, the General Assembly amended the language of Code § 19.2-327.11(A)(vii) by replacing "could have found" with "would have found." 2013 Va. Acts 180. The amendment does not affect our analysis. See Altizer v. Commonwealth, 63 Va. App. 317, 757 S.E.2d 565 (2014) ("[T]he amendment did not alter our Supreme Court's holding in Carpitcher that any newly-discovered evidence must be material to a factual conclusion regarding the elements of the offense(s) for which the petitioner was convicted, rather than merely the credibility of the witnesses.").

In short, to be entitled to a writ of actual innocence pursuant to Chapter 19.3 of Title 19.2, the petitioner must assert the existence of evidence, previously unknown or unavailable to him, that proves "no rational trier of fact would have found proof of guilt . . . beyond a reasonable doubt[.]" Code § 19.2-327.11(A).

The legislative intent behind Code §§ 19.2-327.10 through -327.14 is

> to provide relief only to those individuals who can establish that they did not, *as a matter of fact*, commit the crimes for which they were convicted. The statutes governing writs of actual innocence based on non-biological evidence considered as a whole, and Code § 19.2-327.11 in particular, *were not intended to provide relief to individuals who merely produce evidence contrary to the evidence presented at their criminal trial*.

Carpitcher, 273 Va. at 345-46, 641 S.E.2d at 492 (emphasis added).

Thus, "to be 'material,' within the meaning of Code § 19.2-327.11(A)(vii), evidence supporting a petition for a writ of actual innocence based on non-biological evidence must be true." Id. at 345, 641 S.E.2d at 492. In the context of recanted testimony, the Supreme Court has construed the pre-July 1, 2013 version of Code § 19.2-327.11(A)(vii) to require proof "that the recantation evidence [is] true and that, when considered with all the other evidence in the current record, no rational trier of fact could have found him guilty of the crimes." Carpitcher, 273 Va. at 347, 641 S.E.2d at 493. Because Carpitcher could not prove the recantation testimony was true, he failed to meet his burden of proof.

Here, Blagmon's petition fails to prove that Berdecia's new statement is true. First of all, the new statement simply disavows Berdecia's prior statements and testimony in a general manner without citing any specific evidence. While Berdecia's new statement asserts generally that Blagmon "never willingly aided or abetted, nor as[s]isted in the death or robbery" of Sears, it lacks a specific denial that Berdecia discussed the robbery with Blagmon prior to the offenses. Likewise, the statement omits any claim that Berdecia coerced Blagmon's participation in the offenses. Nothing in the new statement or in the petition cites evidence corroborating Berdecia's allegation that Blagmon was an unwilling participant. Thus, while this Court "is vested with broad discretion in determining whether the facts require further development" in a petition filed

under Code §§ 19.2-327.10 through -327.14, Haas v. Commonwealth, 283 Va. 284, 291, 721 S.E.2d 479, 481 (2012), even if Berdecia provided more detailed testimony denying Blagmon's willing participation in further proceedings and recanted his original testimony, we conclude that nothing in his new testimony or in the petition proves that the new recantation evidence is, in fact, true. Thus, because Blagmon has failed to prove that the recantation evidence is true, he has failed to establish that it is "material." Carpitcher, 273 Va. at 345, 641 S.E.2d at 492.

Not only has Blagmon failed to prove that the new evidence is true, he has also failed to prove that the new evidence, "when considered with all the other evidence in the current record," is such that "no rational trier of fact [w]ould have found him guilty of the crimes." Id. at 347, 641 S.E.2d at 493. Based upon Blagmon's statements to the police and other witnesses, Blagmon admitted he knew that Berdecia wanted to rob Sears on the night of December 13, 2005, provided the gun to Berdecia that was used to commit the robbery and murder, knew that Berdecia was armed when the three of them left Berdecia's house together, assisted Berdecia in moving Sears's body from view after Sears was shot, acted as a lookout while Berdecia went through Sears's pockets, and shared in the robbery proceeds.

Regardless of whether Blagmon or Berdecia was the gunman, such evidence was sufficient for a rational fact finder to conclude that Blagmon acted as a principal in the second degree. "It is a well-settled rule that a defendant is guilty as a principal in the second degree if he is guilty of some overt act done knowingly in furtherance of the commission of the crime, or if he shared in the criminal intent of the principal committing the crime." McMorris v. Commonwealth, 276 Va. 500, 505, 666 S.E.2d 348, 351 (2008). See Code § 18.2-18 (in felony cases, except most capital murders, principal in second degree may be indicted, tried, convicted and punished in all respects as if principal in first degree). Based upon the jury's question about principals in the second degree and its acquittal of Blagmon on the firearm charge, the jury convicted Blagmon of murder and robbery despite concluding that Blagmon was not the gunman.

As Blagmon has failed to establish the truth of Berdecia's new statement by clear and convincing evidence, he has not offered newly-discovered evidence that is "material" within the meaning of Code

§§ 19.2-327.10 through -327.14. He has also failed to allege evidence that, "when considered with all of the other evidence in the current record, will prove that no rational trier of fact [w]ould have found proof of guilt beyond a reasonable doubt." Carpitcher, 273 Va. at 347, 641 S.E.2d at 493. In short, he has "failed to offer any evidence that he is factually innocent." Altizer, 63 Va. App. at 328, 757 S.E.2d at 570.

CONCLUSION

Accordingly, as Blagmon has failed to meet his burden of proof under Code § 19.2-327.13, we summarily dismiss the petition for a writ of actual innocence.

This Court's records reflect that Beth V. McMahon, Esquire, is counsel of record for petitioner in this matter.

A Copy,

Teste: Cynthia L. McCoy
Clerk