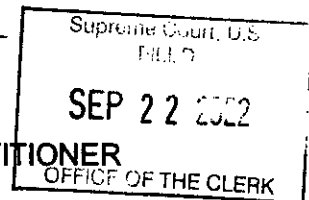


No. 22-5738

IN THE
SUPREME COURT OF THE UNITED STATES

Vernon Jermaine Mills — PETITIONER
(Your Name)



vs.

Commonwealth of Virginia — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Supreme Court of Virginia
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Vernon Jermaine Mills
(Your Name)

Lawrenceville Correctional Center, 1607 Planters Road
(Address)

Lawrenceville, Virginia 23868
(City, State, Zip Code)

N/A
(Phone Number)

Questions Presented

Did the appellate court error in assessing the legal significance of the materiality of the three sworn affidavits tending to exonerate the petitioner, and deny the petitioner his liberty by violating his Fourth Amendment right against illegal restraint, and his Fourteenth Amendment right to due process in concluding that the petitioner failed to satisfy the requirements of Virginia Code § 19.2-327.11(A)(vii)?

Did the appellate court error and deny the petitioner his Sixth Amendment right to a compulsory process for obtaining witnesses in his favor by abusing its discretion in declining to order the trial court to conduct an evidentiary hearing to certify findings of fact pursuant to Virginia Code § 19.2-327.12?

Whether there's plain error violating the petitioners Fourteenth Amendment due process right that seriously affects the fairness, integrity or public reputation of judicial proceedings; where there's a disagreement among the lower courts, when evidence fabricated solely by the prosecutor was a key factor in the appellate court's denial of the petitioners writ of actual innocence after the Supreme Court of Virginia previously agreed with the trial court that, "this alleged misconduct is not of the type that would tamper with judicial machinery or subvert the integrity of the court?"

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Virginia Appeals court appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was May 27, 2022.
A copy of that decision appears at Appendix C.

☒ A timely petition for rehearing was thereafter denied on the following date:
June 29, 2022, and a copy of the order denying rehearing
appears at Appendix D.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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Appendix B: Order from the Court of Appeals of Virginia denying a rehearing for the writ of actual innocence

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Appendix D: Order from the Supreme Court of Virginia denying a rehearing for the appeal of the writ of actual innocence

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LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- Vernon J. Mills v. Commonwealth of Virginia, No. 1107-20-1
Virginia Court of Appeals. Judgment entered October 7, 2021
- Vernon J. Mills v. Commonwealth of Virginia, No. 211113
Supreme Court of Virginia. Judgment entered May 27, 2022

Constitutional And Statutory Provision Involved

The Fourth Amendment to the United States Constitution provides in relevant part: The right of the people to be secure in their person... against illegal restraint.

The Sixth Amendment to the United States Constitution provides in relevant part: The right to have compulsory process for obtaining witnesses in ones favor.

The Fourteenth Amendment to the United States Constitution provides in relevant part: The due process right to a fair trial

Chapter 19.3 of Title 19.2 of the Code of Virginia governing writs of actual innocence based upon nonbiological evidence, § 19.2-327.11(A)(vii) that states, that the previously unknown, unavailable, or untested evidence is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact would have found proof of guilt... beyond a reasonable doubt. And § 19.2-327.12 governing determination by Court of Appeals for finding of facts by the circuit court.

In this petition, unless otherwise indicated, the following references are made: Petitioner Vernon Jermaine Mills as "Mills" and "petitioner", the Court of Appeals of Virginia as "the appellate court" and "the court", Appendix as "(App.)", and Trial Transcript as "Tr."

Statement of the Case

The appellate court stated, "Code § 19.2-327.11(A)(vii) required Mills to prove that Covil^①, Walker^②, and Gatling^③ affidavits are such "that no rational trier of fact would have found proof of guilt... beyond a reasonable doubt" if these affidavits were presented alongside the evidence at trial."

The appellate court held that, "The Walker and Gatling affidavits create a less meaningful conflict in the evidence than the Covil affidavit because neither Walker nor Gatling identified Mills as the shooter." And in a footnote the appellate court held that, "Because we conclude that Mills has failed to show that every rational factfinder would credit Covil's assertions that he perjured himself at trial, we need not remand the case to the trial court to conduct an evidentiary hearing regarding the credibility of Covil's recantation." And likewise stated; "Although a rational factfinder could potentially credit the assertions in the Covil affidavit rather than his trial testimony, our 2017 order listed the numerous reasons why a rational factfinder would not do so." And also; "We conclude that while it is possible that a rational factfinder could potentially disregard Covil's identification of Mills as the shooter at trial and the independent evidence linking Mills to the firearm in favor of the later assertions by Covil, Walker, and Gatling that Mills was not the shooter, Mills has fallen far short of proving that every rational factfinder would so find". Finally, (quoting *Tyler v Commonwealth*, 73 Va. App. 445, 459 (2021)); to support their decision,

① Affidavit from Brionne Covil (App E). ② Affidavit from Johnathan Walker (App F). ③ Affidavit from Kenneth Gatling (App G).

the court ruled, "Because Mills has failed to satisfy the requirements of Code § 19.2-327.11(A)(vii), he is not entitled to relief". (App. A).

Reasons for Granting the Petition

The appellate court incorrectly concluded that the petitioner failed to make the required showing to satisfy Code § 19.2-327.11(A)(vii) based upon the standard of Tyler v. Commonwealth, 73 Va. App. 445, 459 (2021). [According to the opinion of Judges Humphreys, Huff, and Russell of The Court of Appeals of Virginia... Tyler did not meet the burden of proving by the preponderance of the evidence "that every rational trier of fact would have found proof of guilt" standard based on the affidavit of Rogdrick (tending to exonerate), due to the fact that there still was the trial testimony of Rosell J. In the present case the petition proffered affidavits from 100% of the witnesses/victims involved in this case stating that the petitioner was not the assailant that shot them to support his writ of actual innocence based on nonbiological evidence. If presented alongside the evidence at trial these affidavits would leave nothing for a rational trier of fact to find proof of guilt.

Despite the fact that the affidavits from Walker and Gatling are not recantations, the legal significance of the materiality of this evidence should be assessed collectively as to whether they have some logical connection with the consequential facts of the case or the legal issues presented, of probative value. Walker and Gatling's affidavits are

material factual disputes that indicates the petitioner innocence and the appellate court had no basis for finding from the record alone that the petitioner did not prove the truth of the proffered affidavits from Walker and Gatling.

The appellate court erred in assessing the legal significance of the materiality of the affidavits as to whether the petitioner proved that they are such "that no rational trier of fact would have found proof of guilt... beyond a reasonable doubt if these affidavits were presented alongside the evidence at trial"; as was required by Code § 19.2-327.11 (A) (vii) where the appellate court only assessed whether the affidavits from Walker and Gatling create a "less meaningful" or greater meaningful conflict in the evidence than the Covil affidavit. Virginia Code § 19.2-327.11 (A) (vii) governs materiality of evidence. Accordingly, the affidavits "are material," as they could be taken to put the whole case in such a different light that leaves no confidence in the present verdict, Kyles v. Whitley, 514 U.S. 419, 435 (1995); and Blake v. Lambert, 921 F.3d 215, 219 (5th Cir. 2019).

Furthermore, the appellate court erred in assessing the legal significance of the materiality of the evidence regarding the affidavit from Brionne Covil from two (2) aspects: (1) When the court concluded that, "Although a rational factfinder could potentially credit the assertions in the Covil affidavit rather than his trial testimony, our "2017" order listed the numerous reasons why a rational factfinder would not do so"; the court erroneously predicated its ruling upon their "2017" assessment of the evidence that was assessed under the clear and convincing standard. Whereas, by operation of 2020 Va. Acts, c. 994, the burden of proof that a petitioner for a writ of actual innocence based

Upon nonbiological evidence was changed effective on July 1, 2020. This act amended the language of Va. Code § 19.2-327.13 to require a petitioner to prove the elements necessary for a writ of actual innocence by a preponderance of the evidence, and not by clear and convincing evidence. <2> When the element of "materiality" from a factual aspect must be proven, the appellate court lacked the capacity to assess this type of evidence, as the demeanor of live witnesses on the witness stand are to be considered by the factfinder in a factfinding proceeding. Hass v. Commonwealth, 283 Va. 284, 292, 721 S.E.2d 479 (2012); also Davis v. Alaska, 415 U.S. 308, 316 (1974).

The petitioner clearly made a prima facie showing that he is illegally restrained of his liberty, that is supported by the affidavits from the three victims/witnesses tending to exonerate. Therefore, along with his writ, the petitioner requested an evidentiary hearing to certify findings of fact so that the three victims would be witnesses in his favor. Such a prima facie showing entitles the petitioner to a hearing of his complaint. The court is not confined to a consideration of affidavits if an issue of fact arises but is free to receive the evidence of witnesses in open court and to make its determination as in any other controverted case. Davis v. Smyth, 155 F.2d 3 (4th Cir. 1946).

Whether to refer an issue to the Circuit Court to conduct an evidentiary hearing in the first instance, however, is a decision that lies within the Court of Appeals of Virginia's "broad discretion," Hass v. Commonwealth 283 Va. 284, 291, 721 S.E.2d 479 (2012). Under the Statutes governing petitions for writs of actual innocence the Virginia Court of Appeals

act as a court of original jurisdiction, Hass, 283 Va. at 292. As such, it "has the same authority to weigh and evaluate documentary and physical evidence as a trial court would have". Id. Although it has the same authority, as discussed above, appellate courts lack the same capacity to evaluate [this type of] evidence. The Virginia general assembly has recognized that trial courts are best equipped to serve as factfinders; as rigorous cross-examination is the greatest legal engine ever invented for the discovery of truth. Therefore, under Va. Code Ann. § 19.2-327.12 they have provided a mechanism by which the Court of Appeals of Virginia can order the trial court to assist in resolving factual questions raised by a petitioner for a writ of actual innocence based upon nonbiological evidence.

Although the court did not give a ruling on why it declined to order the trial court to conduct an evidentiary hearing regarding the affidavits from Walker and Gatling, that required factual determination, the court did rule, "Because we conclude that Mills has failed to show that every rational factfinder would credit Covil's assertions that he perjured himself at trial, we need not remand the case to the trial court to conduct an evidentiary hearing regarding the credibility of Covil's recantation." Thus, the appellate court erroneously engaged in and conducted a factual evaluation that the trial court was best equipped to conduct. In doing so the appellate court abused its discretion where it inaccurately ascertained the outermost limits of the range of choice by its failure to avail itself of the factfinding mechanism available to it, and deprived the petitioner a compulsory process for obtaining witnesses in his favor, in declining to order the trial court to conduct the evidentiary hearing to certify findings

of facts pursuant to Virginia Code § 19.2-327.12, as appellate courts do not engage in factual evaluation, Lawlor v. Commonwealth, 285 Va. 187, 213, 738 S.E.2d 847 (2013); and Johnson v. Commonwealth, 237 Va. 315 (2007). The petitioner is entitled to an evidentiary hearing because the state did not provide a full and fair hearing at which to develop facts, Hall v. Quarterman, 534 F.3d 365, 367-69 (5th Cir. 2008).

Lastly, the petitioner contends that there is a plain error where the appellate court ruled that, there's independent evidence linking the petitioner to the gun used in the shooting of Walker, Gatling, and Coril in denying the petitioners writ of actual innocence; when that independent evidence is the false testimony of the prosecutor that went uncorrected.

During the pretrial motion in limine regarding the issue of the admissibility of the gun that the appellate court states, linked the petitioner to the shooting, the prosecutor falsely testified that the petitioner was found with the gun pursuant to the execution of a search warrant, (the search warrant was not related to the shooting of Walker, Gatling, and Coril), so that the Commonwealth could present the gun used in the shooting as evidence against the petitioner (see Tr. pg. 8 lines 16-17, App. H), and (Affidavit from Detective Mark Anthony with the Portsmouth Police Department stating that the petitioner was not present for the execution of the search warrant in which the gun was found, App. I).

On May 16, 2021, the petitioner filed a motion to vacate void judgment based on fraud upon the court regarding the prosecutor's false representation of material evidence, in the Circuit Court of Portsmouth Virginia. On May 28, 2021, the Circuit Court of Portsmouth denied the motion, ruling that, "this alleged misconduct is not of the type that would tamper with judicial machinery

or subvert the integrity of the court", (App. J). The Supreme Court of Virginia upheld the Circuit Court's decision, (App. K). On October 7, 2021, in denying the petitioners writ of actual innocence, the appellate court stated, "We conclude that, while it is possible that a rational factfinder could potentially disregard Coxil's identification of Mills as the shooter at trial and the independent evidence linking Mills to the firearm in favor of the later assertions by Coxil, Walker, and Gatling that Mills was not the shooter, Mills has fallen far short of proving that every rational factfinder would so find".

Under the circumstances presented the misconduct of the prosecutor was so prejudicial that it cause a conflict among the lower courts and a miscarriage of justice; to the point that this mistake of fact clearly distracted the trier of fact and led to a less favorable outcome for the petitioner as it tainted the fairness of his writ of actual innocence proceedings.

Appellate court's plain error review is discretionary and should be exercised only if it "seriously affects the fairness, integrity or public reputation of judicial proceedings; U.S. v. Atkinson, 297 U.S. 157, 160 (1936).

Due process bars a prosecutor from making known use of false evidence; U.S. v. Boothe, 994 F.2d 63 (2nd Cir. 1993).

The 11th Circuit held that "As a general matter, we will reverse a conviction on the basis of governmental misconduct only if the misconduct may have prejudiced substantial rights of the accused"; U.S. v. Cross, 928 F.2d 1030 (11th Cir. 1991).

A remand for hearing in this case on the issues presented would promote such courtroom-wide vigilance, not to mention the insistence of fairness

which is a bedrock principle in our system of justice.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted

Vernon J. Mills

Vernon J. Mills