

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 27th day of May, 2022.

Vernon Jermaine Mills, Appellant,

against Record No. 211113
Court of Appeals No. 107-20-1

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.

The Circuit Court of the City of Portsmouth shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee \$950.00 plus costs and expenses

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk



By:

Deputy Clerk

(App. C)

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Wednesday the 29th day of June, 2022.*

Vernon Jermaine Mills, Appellant,

against Record No. 211113
Court of Appeals No. 107-20-1

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein
on May 27, 2022 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By: *Muriel Theresa Pitney*
Deputy Clerk

(App. D)

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 7th day of October, 2021.

Vernon J. Mills,

Petitioner,

against Record No. 1107-20-1

Commonwealth of Virginia,

Respondent.

Upon a Petition for Writ of Actual Innocence

Before Judges Russell, AtLee, and Senior Judge Haley

In an amended petition filed on November 19, 2020, Vernon J. Mills seeks a Writ of Actual Innocence pursuant to Chapter 19.3 of Title 19.2 of the Code of Virginia. A jury convicted Mills of aggravated malicious wounding, malicious wounding, three counts of use of a firearm in the commission of a felony, and unlawfully shooting into an occupied building. By final order entered August 3, 2014, the Circuit Court for the City of Portsmouth (“trial court”) imposed a sentence of forty-five years and six months’ imprisonment.

Mills asserts that he is actually innocent of these offenses and is entitled to relief based on the affidavits of three victims who testified at trial: Brionne Covil, Jonathan Walker, and Kenneth Gatling. The Attorney General filed a response on behalf of the Commonwealth, and Mills, represented by counsel, has filed a reply. The matter is now ripe for adjudication. After considering the parties’ arguments and the entire record, we conclude that Mills is not entitled to a writ of actual innocence.

BACKGROUND

Covil testified that he was at the Dale Homes housing development in Portsmouth on January 17, 2002, visiting his cousin. Covil arrived between 10:00 a.m. and 12:00 p.m. and stayed until the evening, gathered with a group of people outside his cousin’s apartment. Walker and Gatling were both part of the group.

Covil testified that around 9:00 p.m., “[w]e was all out there dancing, and a black male came up” and said “don’t nobody move,” and “everybody ran” but Covil. The man, who Covil did not recognize, wore all black clothing, including a hooded shirt, but the hood was not pulled up over his head. He had a “black machine gun” in his hands and approached to within eight to ten feet of Covil. At trial, Covil identified a black Cobray model PM11 9mm semi-automatic pistol as appearing to be the same gun the man held on January 17, 2002.

People in the crowd began to run away, and Covil turned and started walking toward his cousin’s house. The man then fired multiple shots toward the crowd. Covil was struck by a bullet and knocked to the ground. The bullet entered Covil’s left upper back and exited through his left cheek. He suffered nerve damage and limited mobility in his left arm due to the wound. Covil subsequently identified Mills as the shooter in a police photographic lineup. He also identified Mills at trial as the man who shot him. Covil testified that he got a “good look” at Mills on January 17, 2002 and was “certain” Mills was the person who shot him. Covil testified that he saw Mills at a party a few months after the shooting and someone told him Mills’s name. Covil subsequently saw Mills multiple times at various places in Portsmouth.

Covil admitted on cross-examination that he drank two cans of malt liquor and smoked a marijuana blunt before he arrived at Dale Homes on the day of the shooting but claimed he did not drink any alcohol or consume any drugs while he was there. Covil also admitted that he initially described the shooter to police as a “black male of average height and build,” but later described him to a police detective as a “big, tall, black male, very heavy.” He initially told the police he did not want to prosecute charges against Mills because his grandmother feared for his safety if he testified.

In September 2003, Covil had an encounter with Mills while they were both incarcerated in the same facility. Covil asked why Mills shot him, and Mills responded that he did not do it. Covil told Mills he would not testify against him, and Mills responded that “he got [Covil].” Covil understood that this meant Mills was going to give him money. Covil subsequently received a \$500 payment from Mills to his account

at the Hampton Roads Regional Jail in April 2004. Covil admitted that he was testifying against Mills despite receiving the money and denied attempting to extort Mills in exchange for changing his testimony.

Walker testified that he had been outside with a group of around twenty people for about an hour when the shooting occurred. He was preparing to leave when he heard a male voice say “[d]on’t nobody move.” Walker was shot in the back while running away; the bullet entered one side of his back and exited on the other side of his back. He described the shooter as wearing a black hood covering part of his head and holding a “Tech” gun. Walker stated that he was “about twenty feet” away from the shooter.

Gatling had been with the group of people outside for ten to twenty minutes when the shots began. When the shots began, Gatling ran. He testified he was approximately fifteen to seventeen feet away from the shooter. Gatling was shot once; the bullet entered his left side and exited his right side. He was not able to identify the shooter, testifying “I didn’t see no one.”

Covil’s older brother, Demetrius Covil (“Demetrius”) testified he was also present at Dale Homes on the evening of January 17, 2002. He arrived around 5:00 p.m. and was with the group of people outside listening to music and dancing. Demetrius left briefly and was not present when the shooting occurred. When Demetrius returned, he was told “someone was chasing [his] brother shooting him.” Demetrius saw Covil lying on the ground holding his neck; Covil told Demetrius he had been shot in the neck. Demetrius testified he saw Mills at Dale Homes earlier in the evening, in a black car speaking with someone. He further testified he later overheard a conversation while at the courthouse for proceedings related to this case, wherein Mills offered to pay Covil \$500 if he did not testify and another \$300 if Mills went free after trial.

Dale Homes resident Sylvia Gill was at home watching television in her living room on the evening of January 17, 2002. At 9:15 p.m., Gill heard multiple gunshots outside and heard something hit the awning of her front porch. She also heard a car speed away. When the noise stopped and Gill saw police cars down the street, she went to her porch and found a bullet under a chair.

Portsmouth Police Detectives Timothy McAndrew and Mark Anthony executed a search warrant at 118 Allard Road in Portsmouth on November 21, 2002. Mills was listed as a target of the warrant. Anthony

recovered a Cobray model PM11 9mm semi-automatic handgun with a magazine containing twenty-nine bullets from a laundry basket in a bedroom of that residence. He also recovered a pill bottle bearing the name "Vernon L. Mills," a jewelry store receipt dated August 24, 2002 which bore the name "Vernon Mills," and a Virginia state identification card issued to "Vernon Jermaine Mills" from the residence. McAndrew further testified he encountered Covil after the shooting but before the search warrant was executed; during that interaction, Covil indicated who had shot him.

Felicia Jenkins testified she had known Mills at least seven years and had a daughter with him who was born in 2002.¹ Jenkins lived at 118 Allard Road in November 2002 when the search warrant was executed on that residence. Jenkins testified she purchased the handgun that was recovered during the search for home protection in October 2000. She indicated she normally kept the gun under her mattress, not in the laundry basket. She usually kept twelve to sixteen bullets in the gun. As of November 2002, Mills only came to her residence when she needed something for their child. Jenkins did not recognize the identification card, receipt, or pill bottle bearing Mills's name that were found in her residence during the search. Jenkins did not remember telling a detective that Mills came to her house three or four nights a week in November 2002 and that Mills had once seen her cleaning her gun.

Forensic testing indicated that four bullets, two bullet fragments, and ten shell casings recovered from the scene of the shooting were fired from the handgun recovered from Jenkins's residence. Two other shell casings recovered from the scene did not match that handgun.

Mills testified in his own defense and denied being at Dale Homes on January 17, 2002, or shooting Covil, Gatling, and Walker. According to Mills, he had an "on and off" relationship with Jenkins for nine years and that, as of January 2002, both he and Jenkins were dating other people. He asserted he was not spending nights at Jenkins's residence in January 2002. Mills also claimed he and Jenkins were not "an item" in November 2002. Mills acknowledged the Virginia identification card belonged to him, but asserted it was

¹ Mills disputed the paternity of the child but admitted it was possible he was the father.

an old identification card issued in 1997.² Mills speculated it was among Jenkins's belongings when she moved from a prior address. He further claimed that the pill bottle recovered from Jenkins's residence bore his father's name, rather than his. Mills could not explain how the jewelry store receipt containing his name, which was dated August 24, 2002, came to be at Jenkins's residence.

On cross-examination, the Commonwealth's Attorney asked whether Mills's nephew had been shot shortly prior to January 17, 2002, and had told Mills that Covil was with him when he was shot. The Commonwealth's Attorney asked Mills if he shot Covil because he believed Covil set up his nephew. Although Mills admitted his nephew had been shot, he denied that his nephew implicated Covil as being involved or that he attempted to exact revenge on Covil. On rebuttal, Covil asserted Mills's nephew was shot a couple of days before January 17, 2002, and that Covil was present when Mills's nephew was shot.

Mills claimed that on one occasion when he and Covil were being transported to the courthouse together, Covil admitted that Mills was not the shooter but threatened to testify against him unless Mills paid him \$1,500. Mills further alleged that while he and Covil were both incarcerated at the Hampton Roads Regional Jail, Covil spoke to him again and modified the demand to \$500 immediately and \$1,000 when Mills was released from jail.³ Mills arranged to have a friend deposit \$500 into Covil's jail canteen account. Mills claimed he arranged for the payment to use the receipt as evidence that Covil was attempting to extort him.

After the jury convicted Mills on all counts, Mills appealed his convictions to this Court, which denied his appeal by one-judge order on March 10, 2005, and by three-judge order on May 23, 2005. The Supreme Court of Virginia refused Mills's petition for appeal of the convictions. Mills filed a state *habeas*

² The card expired on October 28, 2002.

³ Mills claimed the modified demand for payment was also communicated through a note from Covil that was delivered to Mills by a correctional officer. Mills's trial counsel attempted to introduce the purported note into evidence at trial. Covil denied writing the note. The Commonwealth's Attorney objected to admission of the note, alleging it was hearsay. The trial court sustained the objection and did not admit the purported note as evidence.

corpus petition that the circuit court denied. See Mills v. Robinson, No. CL06-1869. The Supreme Court of Virginia dismissed his appeal of that decision in April 2007. See Mills v. Robinson, No. 062509. Mills filed a second state *habeas* petition in the Supreme Court of Virginia in December 2010; the Supreme Court dismissed the petition in February 2011. See Mills v. Warden, No. 102265. Mills appears to have filed a third state *habeas* petition in the circuit court that remains pending. See Mills v. Clarke, No. CL20-1429. Mills also filed a federal *habeas* petition that was dismissed by the United States District Court for the Eastern District of Virginia; the United States Court of Appeals for the Fourth Circuit dismissed Mills's appeal of that order and the United States Supreme Court denied *certiorari*. See Mills v. Watson, 294 F. App'x 65, 66 (4th Cir. 2008), cert denied 555 U.S. 1191 (2009).⁴

On May 8, 2017, Mills filed a petition for writ of actual innocence in this Court (“2017 petition”). In support of the 2017 petition, Mills attached an affidavit executed by Covil in December 2016 in which he recanted his identification of Mills as the shooter and alleged that the police coerced him to testify falsely at trial (“the Covil affidavit”). Covil averred that he “falsely testified under oath . . . in cohesion with [Detectives McAndrew and Anthony] after being coerced by . . . McAndrew, and constantly being told by . . . Anthony that . . . Mills was the person who had shot [him].” Covil asserted that he did not know who shot him “until one day in 2003” when “McAndrew stopped him on the street, poured out the bottle of beer that [Covil] was drinking, frisked [him], told [him] [he] was intoxicated, handcuffed [him,] and placed [him] in the back seat of his car.” McAndrew stated: “this is not what I stopped you for,” and asked if Covil knew who had shot him on January 17, 2002. When Covil replied that he did not know, McAndrew showed him a picture of Mills and told him that Mills had shot him. McAndrew also claimed that Mills was responsible for “a number of crimes” committed in the City of Portsmouth. According to McAndrew, all Covil had to do was “pick [Mills] out of a photo line[up],” and if Covil “help[ed] [McAndrew] put Mills away, [he] would be doing everyone a favor.”

⁴ Mills also filed several motions to vacate his convictions in the circuit court, all of which the circuit court denied.

McAndrew then placed the picture of Mills in Covil's lap, drove him to the detectives' office, and "had another detective show [him] a photo lineup that had the same photo of Mills in it . . ." Covil identified Mills in the photo lineup after the other detective told him that Covil "would be doing [himself] a favor" by incriminating Mills because Mills would kill Covil "the first chance he gets[.]"

Covil stated that he knew "for a fact" that Mills was not the shooter and that Mills "was too short and a much smaller build than that of the actual shooter." Covil "said what needed to be said in the court room to help the detectives put Mills away in prison because that is what the detectives told [him] to do."

The Attorney General attached to its response to the 2017 petition the written summary of an interview of Covil conducted by Virginia State Police Special Agent Brian Kennedy on August 18, 2017. Covil affirmed that he wrote the 2016 affidavit and that everything written in the affidavit was true. He stated that he "really did not see anyone shoot [him], and it was the detectives" who identified Mills as the shooter.

When asked why he had waited so many years to write the affidavit recanting his trial testimony, Covil "talked about how corrupt the criminal justice system is." He noted that he had recently received "a sentence of close to twenty years" in a case "that involved a small amount of heroin." He further explained: "if I can make a man free, I will do so." Covil asserted that he would testify under oath that he had perjured himself during Mills's trial and that he would take a polygraph test. On the day Covil was scheduled to take the polygraph, he informed Sergeant Turner of the Department of Corrections that he no longer wished to take the test, telling Turner to "tell the detectives, what is in it for me?"

This Court summarily dismissed the 2017 petition, holding that Mills failed to prove that Covil's recantation was true by clear and convincing evidence, and, therefore, the recantation was not material to Mills's claim of actual innocence. See Mills v. Commonwealth, No. 0712-17-1 (Va. Ct. App. Nov. 2, 2017). The Court noted that the reliability of the recantation was undercut by the fact that it was made approximately twelve years after the trial—while Mills and Covil were housed in the same prison—and by Covil's remarks about the corruption of the criminal justice system. Further, the jury heard Mills's assertions that Covil

threatened to falsely incriminate Mills if Mills did not pay him and that Covil was coerced by the police to testify falsely at trial. The jury “rejected th[ese] claims[s], and it accepted Covil’s identification of Mills.”

We further found that Covil’s assertions about the conduct of McAndrew and Anthony with respect to the photo lineup were inconsistent with his trial testimony. Moreover, there was independent evidence at trial linking Mills to the firearm used in the shooting that was not called into question by Covil’s recantation. Considering all these factors, we concluded that Covil’s recantation “merely create[d] a conflict in the evidence” and that Mills failed to prove by clear and convincing evidence that the recantation was true. The Court therefore held that the Covil affidavit was not material to the issue of actual innocence and Mills was not entitled to relief.⁵

The Supreme Court of Virginia refused Mills’s appeal of this Court’s decision denying the writ of actual innocence. See Mills v. Commonwealth, No. 171616 (Va. July 5, 2018). Mills filed a second petition for writ of actual innocence on March 5, 2020, styled as a “Motion to Reopen Petition for Writ of Actual Innocence Based Upon Newly Discovered Evidence.” We noted that we lacked jurisdiction to reopen Mills’s prior actual innocence petition because there was no statutory authority to do so and because Mills appealed the dismissal of his prior petition to the Virginia Supreme Court; therefore, we construed the “motion” as a new petition for a writ of actual innocence. See Mills v. Commonwealth, No. 0583-20-1 (Va. Ct. App. Apr. 17, 2020). The Court summarily dismissed Mills’s second petition for a writ of actual innocence because at the time it was filed Code § 19.2-327.10 permitted only one writ of actual innocence to be filed by a petitioner.⁶ Id.

⁵ Covil also asserted in the 2017 petition that Covil’s identification of Mills as the shooter was caused by an unduly suggestive identification procedure, the evidence that the firearm was recovered pursuant to a search warrant was unduly prejudicial, McAndrew perjured himself at trial, and the evidence at trial was insufficient to support the convictions. We declined to address these claims, noting that such legal arguments are not cognizable in a petition for a writ of actual innocence.

⁶ It appears that Mills’s “motion to reopen” was based on the same May 31, 2019 affidavit from Jonathan Walker offered in support of his present petition for writ of actual innocence. Because the Court dismissed on statutory grounds, it did not consider the substance of the claims in the motion to reopen.

PETITION FOR A WRIT OF ACTUAL INNOCENCE

In the instant amended petition,⁷ Mills relies on the same Covil affidavit on which he relied in support of his 2017 petition. In addition, he attaches affidavits executed by Walker and Gatling on May 31, 2019 and September 29, 2020, respectively. Mills claims he became aware of the Walker affidavit on September 25, 2019, after it had been delivered to his mother's home on September 15, 2019, and that he became aware of the Gatling affidavit on November 11, 2020, when he received it by mail.

Walker asserted in his affidavit that before the shooting he saw "a black male with dread [sic] holding a gun," but that "the man that [I] saw with the gun is not the same man that has been charged for this crime." Walker further stated that he has been "living with this guilt for 17 years" and "want[ed] to do everything in [his] power to correct this mistake."

Gatling averred that he did not know who the shooter was, but that he knew that Mills was not the shooter because "the shooter was much taller and bigger than Mills." Gatling stated that he told the prosecutor *after* the trial that Mills was not the shooter, but she ignored him, and "that moment has always been replaying in [his] mind." Gatling further stated, "I cannot understand why they found that man guilty of shooting me, because I never told anyone that . . . Mills was the shooter."

Mills claims that Walker's declaration that Mills was not the man he saw holding a gun prior to being shot and Gatling's declaration that the shooter was taller and bigger than Mills constitute "close[] to unequivocal" evidence that he is innocent of the offenses. Mills further argues that the Walker affidavit and Gatling affidavit must be considered in conjunction with the earlier Covil affidavit that was offered in support of his 2017 petition. Finally, as he did in his 2017 petition, Mills argues he was denied a fair trial due to statements made by the Commonwealth's Attorney and Detective McAndrew regarding the search warrant that led to recovery of the gun and the circumstances of Covil's identification of Mills.

⁷ The Court previously granted Mills's unopposed motion to amend his petition.

As directed by this Court, the Attorney General filed a response on behalf of the Commonwealth. As it did with respect to its response to the 2017 petition, the Commonwealth included in the attachments to its response the written summary of the August 18, 2017 interview between Covil and Special Agent Kennedy. The Commonwealth asserts in its response that the Covil, Walker, and Gatling affidavits are not material because Mills has not shown that the affidavits are true. Further, the Commonwealth contends that the evidence upon which Mills relies is insufficient to establish that no rational trier of fact would convict him of the offenses.

In his reply, Mills argues that the Covil, Walker, and Gatling affidavits are material, asserting that “all of the people who were shot[] now state under oath that . . . Mills was not the man who shot them.” He further contends that, considering these affidavits, no reasonable trier of fact would find him guilty beyond a reasonable doubt of the charged offenses.

ANALYSIS

“Code § 19.2-327.10 confers original jurisdiction upon this Court to consider a petition for a writ of actual innocence based on non-biological evidence.” Johnson v. Commonwealth, 72 Va. App. 587, 596 (2020) (quoting Phillips v. Commonwealth, 69 Va. App. 555, 562 (2018)). When we consider a petition for a writ of actual innocence, we sit “as a court of original jurisdiction” and have “the same authority to weigh and evaluate documentary and physical evidence as a trial court would have.” Tyler v. Commonwealth, 73 Va. App. 445, 459 (2021) (quoting Haas v. Commonwealth, 283 Va. 284, 292 (2012)).

In adjudicating a petition for a writ of actual innocence, “we begin with the presumption that [the challenged convictions], the result of a full criminal trial that has been affirmed on direct appeal, [are] correct.” Id. To be entitled to a writ of actual innocence, the petitioner must prove “many things,” including that his petition is based on evidence that was unknown or unavailable to him or his counsel and could not have been discovered in the exercise of diligence before the convictions became final in the trial court⁸ and

⁸ “The noun ‘diligence’ means ‘devoted and painstaking application to accomplish an undertaking.’” Madison v. Commonwealth, 71 Va. App. 678, 702-03 n.14 (2020) (quoting Dennis v. Jones, 240 Va. 12, 19

“that such new evidence, when considered in conjunction with all of the record evidence, established that no rational factfinder would have concluded beyond a reasonable doubt that the petitioner was guilty of the offense[s] of conviction. . . .” Id. at 460. (footnote omitted). The petitioner must also show that the “new evidence was not merely cumulative, corroborative, or collateral. Id.⁹.

In 2020, the General Assembly amended the actual innocence statutes to require a petitioner to establish the necessary facts by a preponderance of the evidence, rather than by clear and convincing evidence. See 2020 Va. Acts chs. 993, 994. “Sometimes referred to as the ‘greater weight of the evidence,’ the preponderance standard is satisfied when the evidence convinces a factfinder that a particular fact in dispute was ‘more probable than not[.]’” Tyler, 73 Va. App. at 461 (quoting Lysable Transp., Inc. v. Patton, 57 Va. App. 408, 419 (2010) (footnote omitted)). Under this standard, unlike under the clear and convincing standard,¹⁰ proof that establishes that a fact is “more likely than not” is “sufficient to carry a petitioner’s burden in a writ of actual innocence proceeding.” Id. at 462. Because the General Assembly has mandated that a petitioner must prove ‘all of the allegations contained in clauses (iv) through (viii) of subsection A of 19.2-327.11,’” Mills’s failure “to establish any one of the required facts requires us to dismiss his petition.” Id. at 463 (quoting Code § 19.2-327.13).

(1990)). The Covil, Walker, and Gatling affidavits did not exist at the time Mills’s convictions became final in the trial court. Given that the Covil affidavit contains a complete recantation of his unequivocal testimony at trial that Mills was the shooter, this evidence was not available in the exercise of diligence before the convictions became final in the trial court. Although the statements in the Walker and Gatling affidavits are not entirely inconsistent with their trial testimony, nothing in the record suggests that the defense was or should have been on notice that Walker or Gatling would aver that they knew that Mills was not the shooter.

⁹ Amendments to Code § 19.2-327.10 in 2020 “removed the limitation that a petitioner may only file one petition seeking a writ of actual innocence challenging a felony conviction.” Johnson, 72 Va. App. 587, 595; see 2020 Va. Acts chs. 993, 994. Accordingly, Mills’s prior petitions do not bar him from filing the instant petition and we have jurisdiction to consider it on the merits. Code § 19.2-327.10; see Johnson, 72 Va. App. at 595-96.

¹⁰ “The ‘clear and convincing evidence’ standard requires a litigant to produce evidence sufficient ‘to render the assertion to be proved ‘highly probable or reasonably certain.’’” Tyler, 73 Va. App. at 462 (quoting In re Brown, 295 Va. 202, 228 (2018)).

Code § 19.2-327.11(A)(vii) requires Mills to prove that the Cole, Walker, and Gatling affidavits are such “that no rational trier of fact would have found proof of guilt . . . beyond a reasonable doubt” if those affidavits were presented alongside the evidence at trial. When conducting this analysis, “[w]e assess the evidence and proffers individually under Code § 19.2-327.11(A) and then consider the totality of the evidence [Mills] has presented in support of his claim of innocence.” Knight v. Commonwealth, 71 Va. App. 492, 509 (2020). Even under the lower burden of proof, satisfying Code § 19.2-327.11(A)(vii) remains a “daunting task.” Tyler, 73 Va. App. at 469. Mills must prove that “*no* rational trier of fact would have found” him guilty if aware of the three affidavits on which he relies. Id. (quoting Code § 19.2-327.11(A)(vii)). “Thus, it is not enough for [Mills] to convince us that some, many, or even most rational factfinders would have acquitted him if presented with” those affidavits “along with the evidence adduced at trial;” instead, “[h]e must prove that *every* rational factfinder would have done so.” Id.

We conclude that Mills has failed to make the required showing. At trial, the jury not only heard Covil’s unequivocal testimony that Mills was the shooter, but also that the firearm used in the shooting belonged to and was found in the residence of the mother of Mills’s child, along with several documents bearing Mills’s name. The jury also heard Mills’s denial that he was shooter and his assertion that Covil knew that Mills was not the shooter but threatened to falsely implicate Mills unless Mills paid him. As we explained in our order dismissing Mills’s 2017 petition, Covil’s assertions in his affidavit that his trial testimony was false and coerced by the police “merely creates a conflict in the evidence.” 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. “[F]actfinders are called upon to resolve [such] conflicting versions of events in trial courts on a near daily basis and the existence of conflicting testimony does not preclude a finding, beyond a reasonable doubt, that a defendant is guilty of the crime charged.” Tyler, 73 Va. App. at 469.

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,

including the length of time that passed between the trial and the recantation, Covil's remarks about the corruption of the justice system, and the fact that the jury had considered and rejected Mills's assertions that Covil attempted to extort Mills and that Covil admitted to Mills that his identification had been coerced by the police. Walker and Gatling's assertions that Mills was not the shooter were even more distant from the trial than Covil's affidavit. Further, a rational factfinder weighing Walker and Gatling's new assertions against their trial testimony that they could not identify the shooter would likely consider the sparse descriptions of the shooter in their affidavits. Walker states only that the shooter was a "black man" with dreadlocks, and Gatling merely described the shooter as being "much bigger and taller than Mills."

Most importantly, none of the three affidavits on which Mills relies in any way undermines the evidence that the firearm used in the shooting belonged to his one-time girlfriend and the mother of his child and was found in her residence along with several documents bearing his name. At trial, Mills told the jury that he and Jenkins were not in a relationship either at the time of the shooting or when the police discovered the firearm, and he attempted to offer some explanation as to how some of the documents bearing his name were found in the residence along with the firearm. The jury did not credit these explanations. Mills has never offered any explanation for how Jenkins's firearm was used in the shooting and found in her residence if he was not the shooter.¹¹ 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 Gatlin that Mills was not the shooter, Mills has fallen far short of proving that every rational factfinder would so find.¹²

Because Mills has failed to satisfy the requirements of Code § 19.2-327.11(A)(vii), he is not entitled to relief. Accordingly, we dismiss his petition.

¹¹ Other than the firearm, there is no other evidence in the record linking Jenkins to the shooting.

¹² 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. See Tyler, 73 Va. App. at 470 n.17.

The Court's records reflect that Dennis J. McLoughlin, Jr., Esquire, is counsel of record in this matter. The Circuit Court of the City of Portsmouth shall allow the said court-appointed counsel the fee set forth below and counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the petitioner the costs in this Court. The Commonwealth shall recover of the petitioner the costs in this Court.

Costs due the Commonwealth

by petitioner in Court of
Appeals of Virginia:

Attorney's fee \$400.00 plus costs and expenses

A Copy,

Teste:

A. John Vollino, Clerk

By:

Anne Callic Forsythe

Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday the 3rd day of November, 2021.

Vernon J. Mills,

Petitioner,

against Record No. 1107-20-1

Commonwealth of Virginia,

Respondent.

Upon a Petition for Rehearing En Banc

Before Judges Humphreys, Petty*, Beales, Huff, O'Brien, Russell, AtLee, Malveaux, Athey,

Fulton, Ortiz, Causey, Friedman, Chaney, Raphael and Lorish

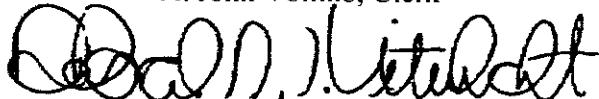
On consideration of the petition of the petitioner to set aside the judgment rendered herein on the 7th day of October, 2021 and grant a rehearing *en banc* thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing *en banc* in this case. Code § 17.1-402(D).

A Copy,

Teste:

A. John Vollino, Clerk

By:



Deputy Clerk

* Judge Petty participated in the decision of this case prior to the effective date of his retirement on November 1, 2021