RECORD NO. 171599

IN THE
SUPREME COURT OF VIRGINIA

NATHANIEL DENNIS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT

The order dismissing Nathaniel Dennis's petition for a writ of actual innocence credited the Commonwealth's new evidence (unsworn denials from the alleged perpetrator) over Dennis's new evidence (five witnesses reporting confessions and a corroborated getaway driver), without explanation. This Court owes that order no deference. It contains too many errors and leaves too many open questions to stand. And the Commonwealth's attempts to fill the gaps with its own views of the evidence do not address, let alone solve, its problems. Nathaniel Dennis was entitled to have his new evidence acknowledged and to have a chance to challenge the Commonwealth's new evidence before it was accepted as true. This Court should grant the writ or remand so that both sides' evidence can be considered.

I. This Court reviews the written record and legal conclusions in this case de novo because there are no factual findings requiring deference.

This Court owes no deference to the Court of Appeals' factual findings in this case because it made no factual findings—such findings are the province of the circuit court.

This Court explained in *Carpitcher v. Commonwealth* that it owes deference to factual findings made by the circuit court and approved by the Court of Appeals. 273 Va. 335, 343 (2007). But where the Court of Appeals makes conclusions of law or based on mixed questions of law and fact, this Court reviews de novo. *Id.*

Here, the Court of Appeals drew legal conclusions from its view of the proffered evidence. It did not purport to make a factual finding, nor could it. Virginia's statute creating Writs of Actual Innocence provides only for factual development in the circuit court, not the Court of Appeals. Va. Code Ann. § 19.2-327.12. Because factual development never occurred in this case, there are no factual findings requiring deference, so review is de novo.

II. The contemporaneous objection rule does not apply, and no motion for reconsideration was required.

The Commonwealth contends at various points that Dennis has waived arguments by failing to file a motion to reconsider that might have allowed the Court of Appeals to correct any errors. *See* Br. at 20–21, 23 & n.133. That cannot be. This Court has explained that "motions to reconsider are not favored." *Hechler Chevrolet, Inc. v. Gen. Mo-*

tors Corp., 230 Va. 396, 403 (1985).[1] It would make no sense to condition this Court's review on the filing of a motion this Court disfavors. *Cf. Commonwealth v. Amos,* 287 Va. 301, 307 (2014) (a party that was unable to make a contemporaneous objection is not required to move for reconsideration to preserve the objection). Such a rule would guarantee a motion to reconsider after every dismissal of a petition for a Writ of Actual Innocence, needlessly burdening the Court of Appeals.

III. The Court of Appeals did not simply err in its weighing of the evidence. It missed much of the evidence altogether and weighed the rest improperly.

Dennis does not simply "disagree" with the Court of Appeals' weighing of evidence. Br. at 30. Much of the evidence was not weighed, and the rest was weighed using incorrect legal standards. The Commonwealth's brief provides no further illumination than the opinion below on the essential questions of this appeal.

First, why were the statements of Donald Poindexter and Harry Cutchin found not to be true? Neither the Commonwealth nor the opin-

[1] That *Hechler* involved motions to reconsider in trial courts is no basis to distinguish, as the Court of Appeals functions as the court of first instance on a petition for a Writ of Actual Innocence. Va. Code Ann. § 19.2-327.10.

ion below offer an answer. The Commonwealth simply argues for waiver, Br. at 20–21, which, as discussed above, does not apply here. The Commonwealth also faults Dennis for omitting legal authority for the proposition that ignoring a petitioner's evidence is not consistent with Virginia law. Br. at 21. The legal authority is the existence of the law permitting him to present that evidence—it is implied that the evidence will be considered. Va. Code Ann. § 19.2-327.11.

Second, why were the alleged perpetrator's denials and documents accepted as true, outweighing Dennis's evidence?

The Commonwealth answers that the Court of Appeals was entitled to consider inadmissible evidence, and that Dennis's evidence was inadmissible too. Br. at 24. That is not responsive to Dennis's point. The Court of Appeals simply accepted Al-Musawwir's hearsay denials, filtered through Special Agent Boyd's memorandum, as true. And it accepted the purported letters Al-Musawwir had on hand as true too. Why?

The Court of Appeals never said. It did not explain how it could accept as true the purported words of a man who has never said a word

under oath in this case. It did not grapple at all with the reliability of Al-Musawwir's words or purported letters, let alone offer Dennis the opportunity to challenge them at a hearing. It simply accepted Al-Musawwir's alleged statements and purported letters over the words of the woman he tried to kill and five people he served in prison with, again without explanation. That is the error requiring reversal.[2]

Third, how could the Court of Appeals make credibility determinations between new witness statements without the witnesses testifying and being subject to cross-examination? The Commonwealth provides its thoughts as to why it believes Al-Musawwir, Br. at 27, but the Court of Appeals never expressed those thoughts—it simply took Al-Musawwir's denials as true, and that was error.

To the extent this Court wishes to consider the reasons the Commonwealth believes Al-Musawwir, they are meritless. The Commonwealth notes that Al-Mussawir's denial of guilt to a police officer is

[2] Al-Musawwir's confessions would be admissible evidence, either as a statement against interest, Va. R. Evid. 2:804(b)(3)(B), or else as impeachment evidence to rebut the only witness who affirmatively contends Al-Musawwir was not the perpetrator—Al-Musawwir himself, Va. R. Evid. 2:801(d)(1).

"wholly inconsistent" with Al-Musawwir's repeatedly confessing his guilt to fellow inmates. Br. at 27. But jailhouse informants routinely claim to have heard confessions not provided directly to law enforcement, and the Commonwealth readily uses them to prosecute crimes and presumably intends to keep doing so. *See, e.g., Burrows v. Commonwealth*, 17 Va. App. 469, 473 (1993) (describing testimony about defendant's repeated confessions to a fellow inmate who had a "long standing relationship with various Commonwealth's Attorneys").

The Commonwealth also points out that Dennis's affiants are all subject to impeachment as convicted felons. Br. at 29. But felons regularly serve as witnesses, especially for the Commonwealth. *See, e.g., id.* While a felony conviction can affect credibility, corroboration can too. *Furrow v. State Farm Mut. Auto. Ins. Co.*, 237 Va. 77, 81 (1989). Here, Dennis's witnesses' statements corroborate each other with respect to key details. Koneta Walker's statement corroborates them too, and she is not a felon. Meanwhile, Al-Musawwir is a several-times-convicted, comically non-credible (at his trial, he claimed he was trying to shoot

someone else and Walker's head got in the way) violent felon.[3] He also has a personal stake in the outcome of this case.

Finally, the Commonwealth protests that, while it is true that Al-Musawwir has never faced cross-examination, neither have Dennis's proposed witnesses. Br. at 28. Dennis raised this exact point in his opening brief. Dennis Br. at 44. It is the reason an evidentiary hearing is appropriate in the circuit court, so that both sides can test each other's new evidence. *Id.* [4]

Fourth, what did the court mean when it said Dennis's evidence was merely "contrary" to that presented at trial? The Commonwealth suggests this was simply another way of saying Dennis failed to prove that he is "factually innocent of the crime." Br. at 37. The Commonwealth quotes this standard from *Altizer v. Commonwealth*, 63 Va. App.

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[3] J.A. at 82–84, 484, 491; Ct. of App. App'x at A695 (Al-Musawwir Trial Tr. 158:10–22).

[4] The Commonwealth also argues that Dennis had the opportunity in his reply brief below to present evidence undermining Al-Musawwir or questioning the letters, just as he provided Ellen Speller's declaration to support Koneta Walker's testimony. But Dennis *did* present argument and evidence to discredit the letters, *see* Ct. of App. Reply Br. at 15–16 & n.10, and the court did not acknowledge any of it or Speller's declaration. Nor is a reply brief typically seen as a substitute for cross-examining a witness.

317, 328 (2014). But *Altizer* is no longer good law. *Bush v. Commonwealth*, 68 Va. App. 797, 808 n.4 (2018) (recognizing that this holding of *Altizer* was "implicitly overruled" by this Court's decision in *In re Watford*, 295 Va. 114, 123 (2018)).

And again this misses the point. Yes, merely "point[ing] the finger" at a possible alternate suspect is not necessarily enough to grant the writ. Br. at 37. But many fingers point at Al-Musawwir, from the five people to whom Al-Musawwir confessed, to his admitted getaway driver. And Al-Musawwir's guilt fits the facts of this case where Dennis's guilt never did.[5] Further, while the victim-eyewitness may have been confident in his identification (by the time of trial[6]), this does not

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[5] The crime appeared to be a robbery, as the attacker paused for five or ten minutes to search Harrison's office where money was kept, but Dennis was prosecuted as if it were a crime of passion. Dennis Br. at 4–5, 10. A getaway car sped from the scene, yet Dennis was there the whole time and even casually dropped by the security desk right after the robbery, where guards asked him to watch their cameras while they went to investigate a shooting. *Id*. at 8.

[6] The Commonwealth recites the platitude that "memories fade over time. Br. at 32. But the "improved" memory of Lynwood Harrison—who initially said he had never seen his attacker before (J.A. at 380 (Trial Tr. 246:7–13))—was the only evidence used to convict his co-worker and romantic rival Nathaniel Dennis (who had cleaned Harrison's office 15 minutes before the crime, with Harrison there, J.A. at

mean it was accurate, particularly considering the extreme circumstances of the crime, the resemblance between Dennis and Al-Musawwir, and the victim's shaky identification of Dennis.[7]

Fifth, why did the court find a minor error in Koneta Walker's statement to be dispositive, and why did it not acknowledge the corroborating statement of Ellen Speller?

The court below, as well as the Commonwealth, have insisted that Walker's statement proves nothing because it misstates by a few days the date of a crime that occurred more than a decade before her statement. But her statement otherwise matches up with the known facts

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169 (Trial Tr. 33:16–24); J.A. at 303–304 (Trial Tr. 168:1–2, 168:23–169:11) in the first place.

[7] *See, e.g.,* J.A. at 655 ¶ 19 (Det. Darryl Williams: "[T]hey are extremely similar looking, and could be easily mistaken for each other."); J.A. at 640 (George Holley: "Dennis and Al-Musawwir look a lot alike, like brothers, so it made sense that one could be mistaken for the other."); J.A. at 554 ¶ 8 (Andre Terry stated that Al-Musawwir said Dennis had "similar features to his"). *But see* J.A. at 80–81 (Ct. of App. Op. at 9–10) (indicating that the failure of the victim-eyewitness to recant his identification was fatal to the petition); Dennis Br. at 33–34 (explaining that trial-witness recantation is precisely the evidence that this Court has condemned as merely contrary, and is not required to grant the writ); Dennis Br. at 34–36 (discussing the frequency of misidentification and the specific circumstances under which Harrison identified Dennis).

and Al-Musawwir's confessions.[8] She obviously misstated the date, and if there is any doubt about that, an evidentiary hearing is the perfect place to clear it up.

The Commonwealth also suggests Walker's statement that she picked up Al-Musawwir "around midnight" should be taken literally, implying that Walker, during a frantic situation with a violent man, should have remembered years later that it was really closer to 1:00 a.m. Br. at 35. She should not be discredited for failing to distinguish between "around midnight" and 1:00 a.m., to the extent there is a difference.

The Commonwealth criticizes Dennis's response to these petty distractions as "minimizing his own affidavit." Br. at 35. Not at all. Dennis is minimizing the distractions. The substance of Walker's statement is that she picked up a bloody and anxious Al-Musawwir, from the Daily Press, late at night, with a bag of money (including "coins"), and he ad-

[8] She has also confirmed that her witness statement refers to the night that Lynwood Harrison was attacked, even though she may not have known or recalled the exact date. *See* Dennis Br. at 37; J.A. at 749 ¶ 2.

mitted to beating someone up—the essential facts that demonstrate Al-Musawwir committed the attack.

The Commonwealth also seizes on the swapping of synonymous words—"coins" and "money"—between Walker's two statements as an indication of something nefarious, arguing that Walker "conform[ed] the statement to the later-disclosed police report." Br. at 33–34. But the Commonwealth cites no record support regarding the disclosure of a police report to anyone, let alone support for the disclosure having happened between Walker's statements in 2010 and 2015. This Court does not consider facts not in the record, *Greater Richmond Transit Co. v. Wilkerson*, 242 Va. 65, 68 n.2 (1991), and "unilateral assertions of fact by counsel are not considered a part of the record on review," *Packett v. Herbert*, 237 Va. 422, 424 n.1 (1989).[9] Moreover, Dennis's opening brief in this Court explained the reason for obtaining the second statement and affirmed that Walker stands by both versions. Dennis Br. at 40 n.13.

[9] If the Court would find it helpful, Dennis would welcome the opportunity to supplement the record with the same information he has provided the Commonwealth as to the actual timing of the disclosure of the police report.

The Court of Appeals did not mention Ellen Speller in its order at all. But the Commonwealth offers its view that Speller's declaration is "nothing more than twenty-year-old hearsay" that "adds nothing of substance to Walker's affidavits." Br. at 31. Given the Commonwealth's claims about Walker, however, Speller's testimony is both admissible and highly substantive.

A prior consistent out-of-court statement may be admitted when a witness has been impeached by an "express or implied charge that [her] in-court testimony is a recent fabrication." Va. R. Evid. 2:801(d)(2)(B).[10] The Commonwealth has made that charge against Walker, once *its* chief witness against Al-Musawwir[11]—a man it now finds credible while calling Walker a liar.

The Commonwealth argues that (i) Walker's memory has been impaired since Al-Musawwir shot her in the head, (ii) she did not impli-

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[10] The statement must also have been made "before any litigation motive arose for the witness to make a false statement." *Id.* Walker made her statement to Speller in 1997, when there was no indication that Al-Musawwir was even a suspect in the Daily Press attack or that Walker intended to report his crime.

[11] *See* Ct. of App. App'x at A590–97 (Al-Musawwir Trial Tr. 53:2–21; 55:4–12; 59:24–60:6).

cate Al-Musawwir when she spoke with an investigator in 1999, and (iii) her statement is not consistent with her testimony against Al-Musawwir at trial. Br. at 32–35. But Speller has declared that—in 1997, before Walker was shot—Walker told essentially the same story of the Daily Press attack that she tells today. J.A. at 660. This negates claims that Walker has changed her story.

IV. The Court of Appeals abused its discretion by dismissing the petition without an evidentiary hearing.

The Commonwealth suggests that Dennis inappropriately relies on dicta from *Haas v. Commonwealth* in seeking to constrain the Court of Appeals' discretion to decline a hearing. But Dennis has been clear from the outset that the facts of this case do not line up exactly with *Haas*. This case instead justifies a reasonable extension in line with an alternative scenario contemplated by *Haas*. There this Court stated that, when "a new witness has been found, who has not previously testified," a circuit court hearing "might be appropriate." 283 Va. 284, 292 (2012). In *Haas*, this was merely a hypothetical. Here it is reality.

Haas did not define the contours of the Court of Appeals' discretion because it did not need to. The new evidence in *Haas* included re-

cantations from trial witnesses, allegations that child-witnesses were coached, and affidavits from physicians who had not actually examined the victims. The only new *witnesses* were the physicians, but the petitioner had presented medical evidence at his trial, so the proffered evidence was not new and was instead cumulative. *Id*. at 294.

Here, by contrast, the contested evidence on *both* sides is entirely new. Both parties have come forward with new witnesses addressing the potential guilt of a man whose name was unknown at trial: Al-Musawwir. Every one of Dennis's witnesses was unavailable to him at trial. None of Al-Musawwir's alleged confessions occurred before Dennis's trial, so all the prisoner-witnesses were unavailable. The Commonwealth contends "Walker and Speller were not unavailable at trial," *see* Br. at 39, but there is no evidence that anyone associated with Dennis's trial knew or could have had an inkling of what they had to say, *see, e.g.,* J.A. at 652 ¶ 16 (affidavit of Dennis's trial counsel, stating that he had never heard of Walker or Al-Musawwir, and not mentioning Speller).

These new witnesses, along with Al-Musawwir himself, have never testified under oath or been subject to cross-examination. If ever a case called for putting the *Haas* dicta into practice, this is it.

That is not to say that any time a single new and untested witness appears, the Court of Appeals *must* order a hearing. Instead, *Haas* implies that the Court of Appeals indeed has broad, but not infinite, discretion when confronted with one or more new witnesses, and that this Court may review that exercise of discretion. Here, in favoring the Commonwealth's new witness—who, again, has never testified under oath—over Dennis's new witnesses without explanation or an opportunity to cross-examine, the Court of Appeals abused its discretion.

CONCLUSION

The Court of Appeals erred in dismissing Dennis's petition. This Court should reverse that judgment and grant the writ of actual innocence, or in the alternative, remand for further proceedings consistent with this Court's decision.

Respectfully Submitted,

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CERTIFICATE PURSUANT TO RULE 5:26(h)

I certify compliance with Rule 5:26 as follows:

(1) On September 24, 2018, an electronic version of this brief was filed with the Clerk of the Supreme Court using the Virginia Appellate Courts eBriefs System (VACES). Three printed copies have been filed with the Clerk of the Supreme Court by FedEx next-day delivery.

(2) On September 24, 2018, a copy of this brief was served on counsel for the Appellee by electronic mail to the following address:

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(3) Exclusive of the Cover, Table of Contents, Table of Authorities, and Certificate, this Petition does not exceed 15 pages and is produced in Century Schoolbook size 14 font.

Respectfully submitted,

/s/ Andrew George
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