IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0785

BRIAN EMERSON DEMENT, Petitioner,	)	
	)	Appeal from a final order of
v.	)	the Circuit Court of Cabell
	)	County (Case No. 18-C-411)
KAREN PSZCZOLKOWSKI, WARDEN NORTHERN REGIONAL CORRECTIONAL FACILITY, Respondent.	)	Indictment No. (07-F-144)

Petitioner's Brief

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ASSIGNMENTS OF ERROR

1. The circuit court abused its discretion when it ignored both undisputed facts and the applicable law in denying Brian Dement's *habeas corpus* petition. This stands in contrast to its decision in Dement's codefendants' cases, where the court granted them relief after properly applying the appropriate law to the same facts.
2. The circuit court abused its discretion by making a serious mistake in weighing the factors when it applied *State v. Frazier*[1] and determined that new DNA and accompanying evidence would not likely provide a different outcome at a new trial. This is evidenced by the fact that Dement's three codefendants, who were convicted on identical evidence, were granted *habeas corpus* and *coram nobis* relief under *Frazier*.
3. The circuit court abused its discretion by relying on an improper factor when it foreclosed Dement's newly discovered evidence argument, in part, on the basis of his guilty plea.
4. The circuit court abused its discretion by denying Mr. Dement the opportunity to present new exculpatory evidence at a hearing and by failing to produce a sufficient written order under the West Virginia Code and the Rules Governing Post-Conviction *Habeas Corpus* Proceedings.

[1] Throughout this brief, Petitioner refers to a claim of newly discovered evidence that requires a conviction to be vacated elucidated by *State v. Frazier,* 162. W. Va. 935, 253 S.E.2d 534 (1979), as the *Frazier* test or individual components of that test as *Frazier* factors. The foundation for *Frazier* derives from *Halstead v. Horton*, 38 W. Va. 727, 18 S.E. 953 (1894).

SUMMARY OF ARGUMENT

The circuit court abused its discretion by denying Brian Dement ("Dement") *habeas corpus* relief based on newly discovered exculpatory DNA and accompanying evidence identifying a viable alternative suspect. The court made this mistake for five separate reasons.

First, the circuit court failed to carefully consider Dement's evidence both by not reading essential components of the record, including the *habeas corpus* application and supporting memorandum of law, the guilty pleas, and Dement's three documented recantations, and by ignoring the well settled law in its rush to judgment.

Second, the circuit court made a serious mistake in weighing the *Frazier* factors. Dement's codefendants were convicted solely on the basis of Dement's statements, which, at the time, constituted the only serious evidence of anyone's involvement. However, newly discovered DNA evidence connected the victim and the crime scene to a suspect whose criminal and personal history is consistent with this crime. Based on the evidence, the circuit court vacated the convictions of Justin Black and Philip and Nathaniel Barnett ("the Barnetts"), finding that the evidence met all five *Frazier* factors and constituted a manifest injustice. The circuit court differentiated Dement on the basis that he testified, took a plea, and made other incriminating statements. However, these distinctions are fictional. For instance, Dement testified in the circuit court as to his participation in the crime; each of his codefendants did the same to the Parole Board. Dement acquiesced to a plea deal; the Barnetts pleaded as well. The circuit court did not accept the alternative suspect as viable because Dement made incriminating statements to family members. The alternate suspect did as well, but unlike Dement, physical evidence connects the suspect to both the victim and the crime scene. These false distinctions amount to a "serious mistake" in weighing the *Frazier* factors and reflect a quintessential abuse of discretion.

Third, the circuit court relied on an improper factor when denying Dement's *habeas corpus* petition. The circuit court denied Dement relief, in part, because he pleaded guilty. Under the *Frazier* test, a guilty plea is not a factor in determining whether a petitioner is granted a new trial. The Barnetts also took a plea, but the same court properly determined that the new evidence met the *Frazier* test and constituted a manifest injustice requiring that their pleas be withdrawn.

Fourth, these errors came about in part because the court failed to grant an evidentiary hearing which would have exemplified the fact that the distinctions between Dement and his codefendants were illusory.

Finally, the court's cursory order was statutorily insufficient and evidences the above.

Because the circuit court abused its discretion, the material facts are undisputed, and the factual record is precise, Dement asks this Court to rule on the existing record without requiring remand for additional fact finding. If this Court decides to remand, it should instruct the circuit court to hold an evidentiary hearing and, at the conclusion, issue an order that is statutorily sufficient.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria in Rule 18(a). W. Va. R. App. P. 18(a). Oral argument should be set for a Rule 19 argument, as this case involves both assignments of error in the application of settled law and claims of unsustainable exercise of discretion where the law governing that discretion is settled. W. Va. R. App. P. 19(a). This case is not appropriate for a memorandum decision.

STATEMENT OF THE CASE

The Crime and Initial Investigation

At 1:00 p.m. on August 8, 2002, a logging crew working in the remote Hickory Ridge area of Cabell County, West Virginia, discovered a young woman's body on an abandoned farm underneath a dilapidated storage shed. (Vol. III at 298, 301-302; App. 0417).[2] She was on her back with her arms and legs straight out and her hands above her head. (Vol. III at 96, 273, 286-87); (*see also* App. 0926 (CAUTION GRAPHIC)).[3] The victim's body was naked from the waist down, her shirt was pulled up underneath her armpits and her feet were bare. (Vol. III at 94; App. 0926). Her leopard pants were strewn adjacent to her body. (App. 0927). Her body was decomposed, and she could not be visually identified. (App. 0926).

Using fingerprints taken at the autopsy, a search identified the victim as 21-year-old Deanna Crawford ("Ms. Crawford"), who police knew as a prostitute. (Vol. III at 97, 138; App. 0439). The medical examiner found that, at the time her body was discovered, Ms. Crawford had been dead between three to five days. (App. 0599; Vol. III at 147-48). Irregular abrasions measuring up to two inches were found on Ms. Crawford's heel and on the bottoms of her feet, indicating she had been dragged along her back. (App. 0596; Vol. III at 141). Her "right hyoid bone was fractured with extensive laceration of the right hyoid cartilage," which was "strongly indicative of manual strangulation." (App. 0596; *see also* Vol. III at 142-43). Contusions and abrasions covered Ms. Crawford's lower extremities. (App. 0596, 0598-99). The bruises on her body and feet were determined to be "fresh," meaning they were inflicted shortly before death. (Vol. III at 150-51, 156, 158-59). Due to decomposition, the medical examiner could not tell if

[2] Because Dement took a plea, many of the facts concerning the investigation rely on transcript from the Barnetts' original trial.

[3] A few pictures of the crime scene are located in the Appendix, pages 0926-0930. Pictures and videos of the crime scene from the present day are located in the Media Appendix, attached on a USB drive.

the victim had been sexually assaulted. (Vol. III at 146). No semen was detected on the pants, and based on that finding, the sex crimes kit was left untested until recently. (App. 0426).

The West Virginia State Police ("WVSP") investigated by speaking to nearly 100 family members, friends, and acquaintances. (Vol. III at 97-98). Although the WVSP proceeded to develop suspects, they were all eventually "excluded." (Vol. III at 116). After six months, the leads grew cold, and the investigation went dormant. (Vol. III at 99). The WVSP, however, never closed the case.

Cold Case Revived

Five years later, Greg Bailey, a man known to law enforcement, approached the WVSP alleging that his nephew, Dement, had confessed to Ms. Crawford's murder. (App. 0439). Bailey told WVSP that Dement "said they pulled her fingernails, eyebrows, pubic hairs and tortured her... He said he kicked her in the head and that's what killed her." (App. 0996). These injuries are not indicated in the autopsy report. (App. 0599). At the request of the WVSP, Bailey surreptitiously recorded two conversations with his nephew, one on January 22, 2008, and the other hours before Dement's arrest, on January 28, 2007. (App. 0444-45). As a result, Dement was brought in for questioning. (App. 0448-51).

In the recordings, Bailey asked Dement about a murder and the alleged codefendants on multiple occasions. (App. 0989). Dement provided vague "mum hum" answers. (*Id.*). Bailey asked Dement about two or three murders, and when Dement denied involvement, Bailey asked him if he was involved in just "the one." Dement again replied with "umm hum." (*Id.*).

In these recordings, Dement stated that the victim was not a prostitute, instead claiming he knew her from school. (App. 0990). Hours later, during the police interrogation, Dement stated that he did not know that Ms. Crawford was a prostitute until the codefendants informed

him of this. (App. 0482). He also stated that he did not talk to the codefendants about the crime after the fact. (App. 0484).

At the time of the WVSP interview, Dement was addicted to opiates and Xanax. (App. 0589). He acknowledged becoming a drug addict after his mother's death (following an accident and paralysis). (App. 0536; Vol. III at 477). His father also died when he was young. (App. 0536). During the second recording, Bailey found Dement "passed out on his bed" and later reported to police that Dement was "all out of it and was high on Zanax." (App. 0594). Hours later, Bailey told police that Dement "has a few [Xanax] on him now." (*Id.*). Later that day, Dement was arrested and interrogated. Police testified that they did not notice that Dement appeared intoxicated or under the influence. (App.0297).

The WVSP interrogation took place on January 28, 2007 and, during its course, Dement provided three versions of what he said happened after an August 2002 party took place at Vetina Baylous' home. Baylous is the mother of Justin Black. (Vol. III at 122-23).

The First Custodial Statement (January 28, 2007 at 8:22 p.m.)

According to the first signed, written statement, "in the summertime a few years [earlier]," Nathaniel Barnett asked Dement to go to a party at Baylous' home. (App.0462). The pair walked to the house and, upon arrival, Dement saw twenty people there. (*Id.*). Dement drank a "couple of beers" and started playing video games; Philip Barnett soon joined him. (App. 0463). An hour later, Black came into the room and asked Dement and Philip if they wanted "to go for a ride." (*Id.*). They walked outside, and Black told them to get into a "blue or black" car that was parked down the driveway. (*Id.*). Black, the Barnetts, and "the girl" were "talking on the porch." (*Id.*). Dement said that he was in the car when Philip entered with "the girl." (*Id.*). Black

got into the driver's seat, "the girl" sat in the passenger seat, Dement sat behind Black, and the Barnetts were also in the backseat. (*Id.*).

Black drove for "about 3-5 minutes" and pulled to the side of the road on Hickory Ridge. (*Id.*). Philip, without provocation, "lean[ed] up" and "punche[d] the girl up front really hard right in the head around her cheek and temple." (*Id.*). Black and the Barnetts exited the car and went to the passenger door; Philip "ended up grabbing the girl by the neck and hair and pulled her out of the car." (App. 0464). Dement said he "was in shock and just sat there." (App. 0463). The others "started dragging the girl down the path and her feet were dragging," and they disappeared "off into the darkness" for 10-15 minutes. (App. 0462). When they came back, "the girl" was not with them. (*Id.*). Dement claimed to hear Philip and Black discussing "the girl's neck snapping." (*Id.*). Everyone entered the car, and Black sped back to his house. (*Id.*). Once there, Dement "took off running down the road" and walked to Route 10, where he called a cab from a grocery store. (*Id.*).[4] The cab allegedly picked him up between 2:00-3:00 a.m. and took him to his uncle Jimmy's home. (*Id.*). The cab company that Dement referenced did not service that area. (App. 0211). At no point did Dement state that he saw Black or the Barnetts rape or kill Ms. Crawford.

The Second Custodial Statement (January 29, 2007 3:33 a.m.)

In the early morning of the next day, Trooper Losh took another statement from Dement. Once again, Dement was unable to provide an actual date of the murder, though at trial Dement remembered that the party was a "day in early August." (Vol. III at 373). According to this statement, Dement went to a party "in the summertime" at Baylous' home. (App. 0465). He drank a few beers and played video games. (*Id.*).

[4] For a sense of the distance between the crime scene and the grocery store as well as the remoteness of the location, see Video Segment 4 in the Media Appendix.

This time, Nathaniel, not Black, came into the room and asked him and Philip to take a ride. (*Id.*). Dement and Philip "made [their] way towards the front porch," where Dement noticed the Barnetts and Black talking to "this girl." (*Id.*). In this version, Black told Dement to get into the car, but "everyone else stayed on the porch" for ten minutes. (App. 0465-66). Everyone eventually entered the car. (*Id.*) The seating arrangement was the same. (*Id.*) Black again drove 3-5 minutes, until he suddenly stopped the car at a "little gravel spot off of Hickory Ridge," and "Philip immediately punche[d] the girl up front in the face." (*Id.*).

This time, Dement "went to the passenger side" where he "grabbed her out of the car by her neck," and "drug her down the hill about 20-30 yards by her neck." (*Id.*). When she began screaming, Dement "punched her in the face to shut her up." (*Id.*). While she was on the ground, Philip "started punching her real hard in the head and kicking her," as Black and Nathaniel egged him on. (*Id.*). Then, Dement said: "guys I'm out of here," and he "hid in the bushes beside the car." (App. 0467). Black and the Barnetts were alone with the girl for 10-15 minutes. (*Id.*). Unlike the original version, Dement claimed that, when the screams stopped, he "went back up to see the girl." (*Id.*). He found her "kind of curled up." (*Id.*). He checked her neck for a pulse. (*Id.*) Knowing she was dead, Dement "ran over the hill and walked to Route 10…all the way to Huntington to [his] Uncle Jimmy's house" which took him a "couple hours." (*Id.*). At the Barnetts' trial, Dement estimated that the distance from that location on Hickory Ridge Road to his uncle's home in Huntington was 16 miles. (Vol. III at 443). The actual distance is 17.2 miles, and it would take an estimated 5 hours and 50 minutes to walk. (App. 0925). When confronted with the inconsistencies between the statements, all Dement could say was that his time estimate was "incorrect" "because it would take way longer than that and that ain't going to happen."

(Vol. III at 443). Again, Dement did not say he witnessed Black or the Barnetts kill or rape Ms. Crawford.

The Third Custodial Statement (January 29, 2008 at 4:52 a.m.)

Over an hour after the second confession, Dement made yet another statement— his third, and only recorded, confession. (App. 0468). Like the other two, it included new details and new inconsistencies. Nathaniel allegedly came to get Dement at his home around 9:00 p.m. (App. 0469). Dement was still unable to remember the day of the week and whether it was a weekday or the weekend. (*Id.*). In this version, Aaron Midkiff, the Barnetts, and Black were at the party when he arrived, but he "didn't remember" any others. (App. 0471).

When police asked who "the girl" was, Dement responded "I can't remember the name you all told me." (*Id.*). Upon mentioning Ms. Crawford's name, a trooper asked if Dement "remembered her name or just because we've told you that?" to which he answered "[b]ecause you told me that." (*Id.*). When asked to describe Ms. Crawford, Dement said "she was white… she was medium build, you know not fat, not real, real skinny, a… and that's about all I can remember." (*Id.*). Dement could not describe the color or length of her hair. (*Id.*). He could not describe what she was wearing, how she got to the party, or who she was with. (App. 0471-72). Dement again said Ms. Crawford was left "on her back curled up," though she was found on her back with her hands over her head. (App. 0479). Dement said Ms. Crawford's clothes were on when he left her, but she was only partially clothed, and her pants were strewn next to her body. (App. 0479, 0417). Dement again stated that he walked to his Uncle Jimmy's house. (App. 0479). Once again, he refused to say that he saw Ms. Crawford raped or killed by his codefendants, and he stated that he never spoke to them about the crime after it took place. (App. 0485).

Justin Black's Statements to Authorities

Black also made a statement during a police interrogation which occurred only hours after Dement's final custodial statements. (App. 0210; App. 0452-53). These statements are described by this court in *State v. Black*, 227 W. Va. 297, 308, 708 S.E.2d 491, 502 (2010): "Mr. Black gave both an oral and a written statement, wherein he stated that he drove a car containing the victim and three other individuals to an abandoned farm. He further stated that he stayed by the car while the other passengers went down a path." (App. 0210).

April 5, 2007 Psychological Assessment and Dement's First Recantation

Nearly three months later, Dement was given a psychological assessment. He admitted having "a problem with Xanax, cannabis, and opiates." (App. 0589). His abuse of alcohol, sedatives, amphetamines, and hallucinogens led to a heart attack at age 24 in 2005. (App. 0589-90). The assessment also noted that Dement had also been diagnosed with Bipolar and Attention Deficit Disorders and experienced depression and anxiety throughout his life. (App. 0591; Vol. III at 408). He also denied involvement in Ms. Crawford's murder. (App. 0589).

The Initial DNA Testing

About a month earlier, the WVSP Forensic Laboratory issued a report on DNA testing conducted on various items. (App. 0431). The Barnetts and Dement were excluded as donors to the cigarettes and the drinking glass found at the scene and produced comparable DNA profiles; Black's DNA was later compared, and he was also excluded. (App. 0432). Although there was no physical evidence linking them to the crime, Dement's statements led to the indictments of the Barnetts, Black, and Dement for Ms. Crawford's murder.

October 23, 2007 Plea

With the prospect of a life sentence, Dement pleaded guilty to the second-degree murder of Ms. Crawford and took an *Alford/Kennedy* plea to an unrelated malicious wounding charge. (App. 0966-67). He was sentenced in 2008 to thirty years for second-degree murder and two to ten years for malicious wounding, with both sentences running concurrently. (App. 0369). As part of the plea agreement, Dement was required to testify against the Barnetts and Black. (App. 0189).

Dement's Second Recantation

Two days after his plea, Dement told Black's investigator in a recorded interview that he lied to police, stating "we all are innocent" and that he wanted to "go against [his] statement," but his lawyers and the court would not allow him to do so. (App. 0492; 0501; App. 0189).

2008 Codefendants' Trials

After an initial mistrial, Black's second trial began on April 15, 2008. (App. 0205). Black introduced Dement's two recantations. (*Id.*). Based on Dement's trial testimony, in which he disavowed his recantations, Black was convicted of second-degree murder and sentenced to forty years imprisonment, which was affirmed on appeal. (App. 0205; 0217).

The Barnetts' joint trial began in August of 2008. Dement again disavowed his recantations. (App. 0191). The Barnetts were subsequently convicted of second-degree murder. (*Id.*). Nathaniel was sentenced to 40 years and Philip to 36 years. (*Id.*). In 2010, this Court held that the trial court abused its discretion when it excluded Dement's prior inconsistent statements; it reversed the Barnett's convictions and remanded for a new trial. (App. 0196). The Barnetts subsequently accepted *Alford/Kennedy* pleas to voluntary manslaughter; Philip also pleaded guilty to malicious wounding. (App. 0979-80; 0982-83).

At parole hearings, each of Dement's three codefendants admitted their involvement to the Parole Board. (App. 0181).

Post-Conviction DNA Testing

In 2015, the Exoneration Project ("EP"), representing Black, filed a post-conviction motion for DNA testing. (App. 0388). The West Virginia Innocence Project ("WVIP"), representing Nathaniel, and the Innocence Project ("IP"), representing Philip, joined the motion in June 2016. The projects secured DNA testing on several items of crime scene evidence, including Ms. Crawford's leopard print pants, her fingernail scrapings, hair recovered from her hands and shirts, the sexual assault kit, cigarettes, as well as a beer and a snuff can. (*Id.*).[5] The motion was granted in September of 2016. (App. 0383-85). An amended order was later entered in April of 2017. (App. 0386).

The evidence was sent to Bode Cellmark Forensics ("Bode") laboratory for advanced forensic DNA testing, using technologies not in existence at the time of the original testing. Bode issued a report on August 22, 2017, finding the victim's vaginal, rectal, and oral swabs, as well as her pubic hair combings, were inconclusive for male DNA. (App. 0380). Bode issued another report in October, which provided the results of DNA testing on the crotch of the victim's pants. (App. 0375). The result revealed a single-source, CODIS-eligible STR DNA profile derived from both semen and epithelial (skin) cells. (*Id.*). That single-source profile excluded Dement, Black, and the Barnetts as donors. (App. 0373) The same profile also matched a Basic cigarette butt recovered from the remote crime scene. (*Id.*). The profile was uploaded into the CODIS system to determine whether a "match" could be found. On December 18, 2017, Cabell County

[5] The location of this evidence can be seen in the Crime Scene Report and photos. Approximations as to where the evidence was found at the present-day location can be viewed in videos and photos in the Media Appendix.

Prosecuting Attorney Sean Hammers informed the petitioners that a positive "hit" to the profile had been found.

Viable Alternative Suspect

The single source of the semen on the crotch of the victim's pants (as well as the epithelial fraction) belongs to a convicted and recently incarcerated felon named Timothy Smith. (App. 0373). This suspect's criminal history includes a 2011 conviction for unlawful sexual activity with a 13-year old girl. (App. 0823-24). This suspect is also allegedly a regular domestic violence abuser, an admitted frequenter of prostitutes, and a drug addict. (App. 0841-42; 0851).

In February 2018, the WVSP and a defense investigator separately interviewed Smith at Chillicothe Correctional Facility in Ohio. (App. 0630-32). Smith is considerably older than the defendants, at 48 years old. (App. 0675) Smith stated that he "never 'hung out' with younger boys during that time," and he declared that he did not know any of the defendants. (App. 0631-32). Despite his semen on the crotch of her pants, Smith denied knowing Ms. Crawford, claimed he did not recognize a picture of her, stated that he had never had a sexual relationship with her, said he had no memory of seeing her in person, and claimed he was not aware that she was murdered. (App. 0631). Smith denied knowing the location of Hickory Ridge but acknowledged that he had been to nearby Salt Rock and had family there. (*Id.*). He also was a delivery driver in the area and according to his brother went to Elementary School in Salt Rock. (App. 0899; 0922). His brother also told police that Smith was always a liar. (App. 0922). Smith denied ever hiring prostitutes to the defense investigator, but previously told police that he did "from time to time." (App. 0634; 0631). Smith admitted to having been addicted to drugs. (App. 0630). When WVSP informed him that his DNA was found at the crime scene, he denied involvement in the

crime. (App. 0631). Smith also told police that "he never harmed anyone and that no one in his past would say he was a violent person." (App. 0632).

Both the police and the investigator then interviewed two of Smith's five ex-wives, Terri Craft ("Craft") and Andrea Ford ("Ford"), and both of them described Smith in a different light. (Exs. 47, 51). Craft was married to Smith during the summer of 2002, when Ms. Crawford was found dead. (App. 0858). At the age of sixteen, Craft was warned by her sister—also the suspect's ex-wife— that he was physically abusive. (*Id.*) Unfortunately, she soon experienced it. Craft said that Smith was "extremely violent" with her. (App. 0859). Per Craft's account, Smith once knocked her down and began "stomping on [her] throat." (App. 0842). Another time, he grabbed her neck and pressed so hard she had visible red marks on both sides of her neck. (App. 0859). On another occasion, Smith hit her with a two-by-four and broke her hand so that she could get a prescription for the pain pills to which he was addicted. (App. 0852). Ford recounted similar abuse. She stated that Smith broke her thumbs several times so she could get pain pills. (App. 0898). Ford also told police that Smith "threatened to kill her many times during the marriage." (App. 0884).

Both ex-wives described Smith's sexual abuse of children. They accused him of raping at least two of his step-daughters, one of whom he allegedly raped dozens of times from when she was three until she was fifteen. (App. 0851; 0884).

Aside from his general penchant for violence and sexual deviancy, Smith confessed to his involvement in a murder to both Craft and Ford. Craft said that less than a week before she saw TV news reports of Ms. Crawford's death, Smith came home with blood on his hands and in possession of blood-soaked money. (App. 0842). When Craft asked about it, Smith mentioned "something about hitting someone and killing them." Craft did not take him seriously and

thought he was "just being stupid." (App. 0842-43). Weeks later, during a fight with a friend, the friend told Smith that he was "going to go to the cops… to tell them what you did to that girl." (*Id.*). Apparently scared, Smith, who had gone out most nights prior to this interaction, stopped doing so for "almost a month." (App. 0843).

When police contacted Ford to see if she had information that would assist their investigation, she responded "would a confession from him help?" (App. 0884). She recalled an incident where he threatened to kill her "like he had killed a prostitute." (*Id.*) Smith told her that "he had hit Crawford over the head and that [his cousin] Jerry Lee Perry strangled the victim." (*Id.*) They then "hid her body in the hills." (App. 0897). At Smith's suggestion, Ford confirmed this with Jerry Lee Perry. (App. 0885; 0897). Smith told her this occurred "a couple of years before they were married." (App. 0885.) They married in 2004, two years after Ms. Crawford's death. (App. 0884). After the conversation, the cousin asked the suspect "what if she… tells," to which Smith responded that Ford would not tell anyone. (App. 0885). Ford, like Craft, thought Smith and his cousin "were making it up at the time." (*Id.*).[6]

Dement's Third Recantation

On March 12, 2018, Dement recanted again; this time, during an interview with his codefendants' private investigator. (App. 0525). The investigator informed Dement about the new DNA results, and Dement responded that he was not surprised. (App. 0524). The investigator asked: "Why is that not surprising?" and Dement responded: "…the – statements I did was I under the influence, as you know, and I was there for hours and hours, and just pretty much gave them a false statement as it indicates. And I tried to take it back, but they wouldn't let

[6] The Media Appendix includes numerous interviews and clips of these interviews with Smith, Ford, Craft, and others who knew Smith that Petitioner planned to use at the hearing. Though denied the hearing, he was allowed to enter them into the record.

me." (*Id.*). Dement stated that he told police interrogators: "'I'm high on Xanaxes right now.'" (App. 0529). When the investigator asked Dement about the confessions to Bailey, Dement stated "I remember hearing tapes that I got from the discovery – the tapes, and it was all blurred out. I mean, I didn't make no sense at all, because I was just – I was strung out on drugs..." (App. 0525). On numerous occasions, Dement spoke about how he tried to take back his false admissions. (App. 0524; 0526; 0535). Dement said that the prosecutor told him that they were all going to be convicted because the statements were written, and Dement would face a longer sentence if he refused to cooperate. (App. 0526).

Timothy Smith's Deposition

In April, 2019, Smith was deposed. He now admitted to regularly paying prostitutes for sex with pills while his wife was at work. (App. 0700-01). He admitted to smoking Basic brand cigarettes, (App. 0691), but suggested that Ms. Crawford must have been at his house at some point, stole a used cigarette, and took it to the crime scene. (App. 0721). He also explained his semen by offering that at some point Ms. Crawford must have performed oral sex on him in exchange for pills, and she likely spat his ejaculate onto the inside of her pants. (App. 0722). He again claimed to have never harmed anyone in his life and did not take any responsibility for his prior convictions. (App. 0729; 0732). He also agreed to testify at the May 1 hearing, but the day before the hearing, he refused to come. (App. 0779; 0061-62).

PROCEDURAL HISTORY

On October 23, 2007, Dement pleaded guilty, (App. 0965-66), and he was later sentenced to thirty years for second-degree murder. (App. 0369). He did not appeal.

Upon the discovery of the new DNA evidence, Dement and his codefendants sought *habeas corpus* and/or *coram nobis* relief in Cabell County, arguing that the DNA and

surrounding evidence satisfied the *Frazier* standard for newly discovered evidence and entitled them to new trials. An omnibus hearing was scheduled for May 1 and 2, 2019, where all four defendants were prepared to present this new evidence. (App. 0120). However, on the day of the hearing, the circuit court abruptly declined to hold it. The court instead vacated Dement's three codefendants' convictions, finding that the evidence was newly discovered and entitled them to new trials. (App. 0041).

The circuit court then turned its attention to Dement but admitted that it had not read the briefs submitted by Dement's attorneys and would be "wing[ing] it." (App. 0051). The court denied Dement *habeas corpus* relief. (App. 0058). Despite the fact that all four convictions were based on the same evidence and all four defendants presented the same new evidence, the court held that "the newly discovered DNA results would not likely provide a different result at a new trial in light of [Dement's] sworn testimony, guilty plea, and other incriminating statements and upon consideration that such evidence was not the basis of Petitioner's conviction." (App. 0002). A written order was not entered until August 7, 2019. (App. 0003) Dement filed objections to the order on August 22, and on September 4, Dement timely filed a notice of appeal. (App. 0008).

STANDARD OF REVIEW

In reviewing challenges to the findings and conclusions of the circuit court in a *habeas corpus* action, this Court applies a three-pronged standard of review. This Court reviews the final order and the ultimate disposition under an abuse of discretion standard, the underlying factual findings under a clearly erroneous standard, and questions of law are subject to *de novo* review. *Mathena v. Haines,* 219 W. Va. 417, 421, 633 S.E.2d 771, 775 (2006). "[A]n abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon… when all proper and no improper factors are assessed but the

circuit court makes a serious mistake in weighing them," *Gentry v. Mangum*, 195 W. Va. 512, 520 n. 6, 466 S.E.2d 171, 179 n. 6 (1995), or when the circuit court's rulings are "so arbitrary and unreasonable as to shock [this Court's] sense of justice and to indicate a lack of careful consideration." *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W. Va. 463, 465, 475 S.E.2d 555, 557 (1996). When reviewing *habeas corpus* petitions, if the record is sufficient, this Court rules directly on the contentions, rather than remanding the matter. *See State v. VanHoose*, 227 W. Va. 37, 50 n. 39, 705 S.E.2d 544, 557 n. 39 (2010) (holding that the Supreme Court of Appeals need not remand back the matter if the record is "adequately developed," even if the circuit's court order sets forth mere legal conclusions without citing to any supporting facts.).

ARGUMENT

I. The circuit court abused its discretion by ignoring the unrebutted facts and the law, which are two material factors deserving significant weight.

A. The circuit court erred by consciously ignoring the evidence.

The circuit court abused its discretion by failing to consider the relevant facts. First, the circuit court did not read Dement's *habeas corpus* application, memorandum of law, and joint supplements. (App. 0051). At the May 1, 2019 hearing, the court was not aware that Dement had filed a counseled petition, instead believing that only a *pro se* petition existed. The court stated: "So, now, in this case I have probably done less work on this one than any of the other ones, but the only thing I saw in the file was a *Pro Se* Petition that [Dement] had filed." (App. 0050). Dement has never filed *pro se habeas corpus* petition. (App. 0051). The circuit court did not read the counseled petition upon realizing that it existed. Instead the court disregarded the petition, declaring: "Well, I will – okay we are going to wing it then. Okay? I have already talked about winging it. So we are going to do that here because I want to try to resolve all of this this morning. So – well you are going to have to tell me what it is about then." (*Id.*).

Second, the circuit court admitted that it failed to review crucial parts of the record, including parts that it relied upon in denying relief. (App. 0026). The court only read the portions that it assumed to be important, concluding: "Now I admit to you I didn't read everything in [the record]. I didn't think I needed to." (App. 0033-34). However, it is not apparent how much of the evidence was deemed important. Unfortunately, the final order failed to contain a complete finding of facts and conclusions of law. *See* Argument V below. For example, the court distinguished Dement from his codefendants because he pleaded guilty, but the court did not read the pleas and ruled differently where two of Dement's codefendants also took pleas. (App. 0074; 0057). ("He has already made that decision as far as I am concerned. . . He pled guilty."; "I didn't go back and read his plea."). Additionally, the court was unaware that Dement recanted numerous times, including twice before his codefendants' trials, claiming: "Your client has always maintained his guilt until he filed the petition." (App. 0086).

The circuit court also disregarded unrebutted evidence that Dement wished to enter at the hearing. This evidence included Smith's sworn testimony and interviews with his ex-wives who heard him confess to a killing, *inter alia.* (App. 0067-68). Rather than reviewing the evidence that Dement would rely upon at the cancelled hearing, the court denied the petition, stating: "So I am going to let you vouch the record with whatever witness you had here and what you feel like they would testify to, and then I am going to throw you out of court." (App. 0058). Dement's counsel proceeded to outline the evidence and arguments to the court for over twenty-five pages of transcript and proffered to the court hundreds of pages of documents as well as many audio and video recordings. (App. 0058-87; *see* Media Appendix).

B. The circuit court erred by ignoring the law.

Furthermore, even if the circuit court had adequately familiarized itself with record, it still abused its discretion by disregarding the appropriate legal standards as it raced to deny Dement relief. At the abbreviated hearing, the circuit court explained its process for applying the law: "I am not the type of Judge that is going to say, 'Oh, we are going to take a break and I am going to go in and I am going to research this' and I am going to do that. I rule from the hip. I try to think 'what should the law be'. . . And I let in – I let in hearsay sometimes, which is not supposed to come in." (App. 0032).

The circuit court's order illustrates its fundamental misunderstanding of *habeas corpus* relief for newly discovered evidence of innocence. In denying the petition, the circuit court reasoned that the newly discovered DNA evidence and identity of an alternate suspect would not lead to a different outcome, in part, because "such evidence was not the basis of [Dement's] conviction." (App. 0002). This demonstrates that the circuit court applied an impossible standard: Dement would have to produce evidence that was both discovered after his conviction, and upon which his conviction was based. This reasoning would mean that a petitioner could never prevail on a *habeas* petition based on new physical evidence of actual innocence, such as DNA. Not only is this logically inconsistent, but it also conflicts with this Court's precedent that DNA results are considered newly discovered evidence in *habeas* proceedings. *See Matter of Investigation of W. Virginia State Police Crime Lab., Serology Div.*, 190 W. Va. 321, 338, 438 S.E.2d 501, 518 (1993) (*Zain I*).

The circuit court entered its final order months after the rushed hearing, giving it time to correct any legal errors that it initially committed in dismissing this matter. (App. 0003). The

cursory legal analysis in the order suggests that it did not use the time to do so. Dement filed objections, one of which was to correct the deficient order. (App. 0009).

In sum, the circuit court abused its discretion by not carefully considering this matter in its rush to deny relief. The court ignored significant material evidence, ruled based on its gut, and ignored the appropriate legal standards.

II. The circuit court abused its discretion by making a serious mistake in weighing the evidence when applying the factors set forth in *State v. Frazier.*

The standard that should have been applied is the one outlined in *State v. Frazier*. 162 W. Va. 935, 253 S.E.2d 534 (1979). Under *Frazier*, a petitioner's conviction will be vacated under a newly-discovered evidence claim when the following five prongs are met: (1) the evidence appears "to have been discovered since the trial"; (2) the plaintiff was diligent in "ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict"; (3) the evidence is new and material, rather than cumulative, meaning "additional evidence of the same kind to the same point"; (4) "[t]he evidence must be such as ought to produce an opposite result at a second trial on the merits"; (5) "[a]nd the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side." (*Id.* at 941).

There is no dispute that the new evidence here meets *Frazier* factors one, two, three, and five. The State agreed, and the circuit court did not dispute this in its order. (App. 0180; 0002).[7]

[7] The DNA evidence and supporting evidence is new because it was discovered in 2017, years after Dement's conviction. *Frazier*, 162 W. Va. at 941, 253 S.E.2d at 537. The parties stipulated that the DNA technology "available and utilized during the initial investigation was not able to obtain the results that were subsequently obtained," thereby meeting the diligence requirement. (App. 0372-73); *Frazier*, 162 W. Va. at 941, 253 S.E.2d at 537 ("ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict."). The new DNA evidence is also material and not cumulative because there is now physical evidence – two DNA profiles found at the crime scene – linking the crime to Smith, who was not previously known to Dement or law enforcement. Finally, the "sole object of the new evidence" is not to discredit or impeach a witness; rather, the sole object is to identify an alternate suspect and establish a new, more likely theory of the case.

The circuit court based its decision on its doubt that Dement's case met factor four. (App. 0180). The circuit court concluded, both at the hearing and in its order, that the DNA evidence "would not likely provide a different result at a new trial in light of [Dement's] sworn testimony, guilty plea, and other incriminating statements and upon consideration that such evidence was not the basis of [Dement's] conviction." (*Id.*). This Court has stated that "[n]ewly discovered evidence satisfies the [fourth] prong of the… test if it weakens the case against [the defendant] so much as to give rise to a reasonable doubt as to his culpability." *State ex rel. Smith v. McBride*, 224 W. Va. 196, 207, 681 S.E.2d 81, 92 (2009) (quoting *Riechmann v. State*, 966 So.2d 298, 316 (Fla. 2007) (internal quotations and citations omitted).

Had the court weighed the *Frazier* factors properly, it would have determined that, like his three codefendants, Dement meets the fourth factor because the new evidence both points to a viable alternative suspect and highlights the unreliability of Dement's confessions. The circuit court's decision to treat Dement differently than his three codefendants demonstrates that it made a serious mistake in weighing the *Frazier* factors, therefore abusing its discretion.

A. The evidence of Smith as a viable alternative suspect would likely produce an opposite result at trial.

The availability of an alternative suspect can create a reasonable probability that the outcome of a defendant's trial would be different, especially when the initial conviction was based solely on circumstantial evidence. *See Ballard v. Ferguson*, 232 W. Va. 196, 207, 751 S.E.2d 716, 727 (2013). Here, the physical evidence – DNA evidence – overwhelmingly points to Smith as a viable, and probable, alternative suspect. In addition, witness testimony also implicates him; the nature of the crime is consistent with his criminal record and reputation; and he has been deceitful when questioned on the matter. This evidence leads one to conclude that

Smith not only had sex with the victim, but that he was also at the crime scene. It therefore offers a compelling alternative suspect.

i. Physical Evidence Implicated Smith

At the time of Ms. Crawford's death and Dement's conviction, there was no testable DNA that could be used to identify a suspect. Because of advances in technology, now there is and it points to a likely suspect – Smith. His semen was found on the crotch of the victim's pants. (App. 0373). His saliva was found on a cigarette butt at the remote crime scene. (*Id.*). He admits to smoking the same brand of cigarettes as the one recovered from the crime scene. (App. 0691). With no viable explanation for how his semen was found on her pants and his DNA was found on a cigarette butt at the remote scene, the most likely conclusion is that Smith both had sex with the victim around the time of her death and was at this secluded location.[8]

Smith denies knowledge of Hickory Ridge, and he claims he has never been there. (App. 0714). However, he admits that he has been to nearby Salt Rock because family members lived there and according to his brother went to school for some time in Salt Rock. (App. 0631; 922). Witnesses also dispute Smith's assertions about Hickory Ridge, claiming that Smith was familiar with the area, as he was delivery driver. (App. 0899).

Smith's justifications for how his DNA could have ended up at the crime scene are absurd. He claimed that at some point he must have – without remembering – had oral sex with Ms. Crawford and that she must have spat his semen onto the inside of her leggings. (App. 0722). He initially claimed that the cigarette butt must have fallen out of a car while he was driving and ended up at the extremely remote crime scene by chance. (App. 0634). He later changed his explanation, suggesting that Ms. Crawford must have taken the used cigarette from a

[8] The videos in the Media Appendix may provide this Court with an understanding of the location's remoteness.

can at his house and brought it with her to Hickory Ridge. (App. 0724). The circuit court acknowledge how "far-fetched" Smith's explanations were. (App. 0064).

ii. Smith's Violent Background

Smith's criminal background and personal history also make him a more likely perpetrator than Dement and his codefendants. Smith is a serial sexual abuser. In 2011, he, at age forty, was convicted of having unlawful sexual activity with a thirteen-year-old girl. (App. 0823-26). His previous partners also list a multitude of occasions where he sexually and physically abused children. He is accused of raping at least two of his step-daughters, one of whom he allegedly raped dozens of times from when she was three until she was fifteen. (App. 0851; 0884).

He has a long history of domestic violence. Two ex-wives report that he was extremely violent. This abuse included stomping on his wife's throat, choking his wife to the point that marks appeared on her neck, and purposefully breaking her wrist and thumbs with a two-by-four so that she would be prescribed with Smith's choice of narcotics. (App. 0852). He also frequented prostitutes, and the police knew the victim to be a prostitute. (App. 0841; 0439).

iii. Smith's Confessions to Family Members

Besides his general violent tendencies, the evidence against Smith is further corroborated by two ex-wives who claim that he bragged about a crime fitting the description of Ms. Crawford's murder. These confessions are both consistent with the timeline of Ms. Crawford's murder and her manner of death. His first confession came in 2002. His then-wife Terri Craft said that less than a week before the discovery of Ms. Crawford's body made the news, Smith came home with a wad of bloody money and told her that he had killed someone. (App. 0842). Years later, he confessed to the murder again, this time to his then-wife Andrea Ford. (App.

0885). He described killing a prostitute in West Virginia around 2004 with his cousin. (*Id.*) Smith admitted to hitting Ms. Crawford over the head while an accomplice strangled her. (App. 0884).

In both accounts of his confessions, Smith was concerned about the story spreading. After his first confession, he became home-bound for a month after a friend threatened to tell police "what [Smith] did to that girl". (App. 0843). After the second, he had to reassure his cousin that he need not worry about his wife telling anyone about the murder he just described. (App. 0885).

iv. Smith's Deception to Investigators

Lastly, Smith's behavior and explanations about his DNA since being confronted about the evidence points to his guilt. He has been deceitful to everyone, which fits with how his own brother described him as a liar. (App. 0922). Despite his long criminal record, he claims that he has never been violent. (App. 0726). Despite his semen on Ms. Crawford's crotch, he claims to have never met her. (App. 0682). When confronted with the DNA evidence, Smith contradicted his earlier statement, admitting to frequenting prostitutes in West Virginia, suggesting that he may have had oral sex with Ms. Crawford at his house and that she may have spat his semen onto the inside of her pants. (App. 0686-87; 0690-91; 0722-23).

In short, Smith is a compelling alternative suspect, and the circuit court abused its discretion when ruling that the new evidence would not satisfy the fourth prong of *Frazier*. If this evidence had been available at the time of trial, it would have cast significant doubt over Dement's unreliable confessions. (*See* Argument II.B below). If Smith's DNA and the supporting evidence was found in 2002 prior to Dement's statements, there is no doubt Smith would have been arrested and prosecuted for Ms. Crawford's death.

B. The new DNA evidence satisfies *Frazier's* fourth prong, particularly when viewed in light of the unreliability surrounding Dement's confessions.

In deciding whether the new evidence satisfies *Frazier's* fourth prong, this Court must evaluate the new evidence in light of the entire record. *State v. Stewart*, 161 W. Va. 127, 137, 239 S.E.2d 777, 783 (1977). Physical evidence never connected Dement or his codefendants to the crime. The fact that the DNA evidence now links the crime scene and Ms. Crawford to Smith helps snap a bewildering story into focus. In hindsight, Dement's "confessions" – which served as the only evidence driving Dement and his codefendants' convictions – were questionable at best. Concededly, at the time that Dement was charged and convicted, this evidence was the only evidence available for solving the crime. Dement understood this, and it explains why he pleaded guilty, *i.e.*, to mitigate the consequences of his false confessions. But the newly discovered evidence provides the answers needed, and when examined in conjunction with the unreliability of Dement's confessions, gives rise to a reasonable doubt as to his culpability. *McBride*, 224 W. Va. at 207, 681 S.E.2d at 92 (quoting *Riechmann*, 966 So.2d at 316 (Fla. 2007)).

i. Dement's initial confessions to his uncle are unreliable.

Dement was not a suspect until five years after the crime. At that time, Bailey went to police with news of his nephew's confessions. (App. 0444). The police provided Bailey with recording equipment, and he secretly recorded Dement on January 22 and January 28 in 2007. (App. 0444; 0446). These recordings led to Dement's charges, arrest, and interrogation. (App. 0446; 0448). They illustrate Dement's severe drug addiction and questionable character during that time period. But they do not tell the story of Ms. Crawford's death.

Prior to the recordings, Bailey contacted the police and was interviewed at his home on January 1, 2007. (App. 0990). In that interview, Bailey spoke about Dement's confessions to him telling police that Dement "said [he and his codefendants] pulled her fingernails, eyebrows,

pubic hairs and tortured her... He said he kicked her in the head and that's what killed her." (App. 0996). There is nothing in the autopsy report to suggest that any of these facts are accurate. (App. 0596-0599).

In the recordings, Bailey asked Dement a series of leading questions. Dement never provided unprompted information about the crime, and many of his "confessions" to Bailey were in the form of "um hum." The main substance of Dement's confessions to Bailey are as follows: Bailey talked about two or three murders, and Dement denied involvement. Bailey asked if he was just involved in "the one," and Dement replied "um hum." (App. 0980).

In the wire recording, Bailey asked Dement whether the victim was a prostitute. (App. 0981). Dement said that she was not a prostitute, and he and his codefendants knew her from school. (*Id.*). However, in Dement's recorded confession to the police later that day, the police ask Dement about whether the codefendants were expecting sex from Ms. Crawford. (App. 0482). Dement replied that he "was not," and stated: "I didn't know she was a prostitute until they told me." (*Id.*). He also stated that he did not talk to the codefendants about the crime after the fact. (App. 0484). This suggests that he should have known about her status as a prostitute during his conversation with Bailey, but curiously, he did not.

ii. Dement's confessions to police are unreliable.

The police took Dement to the station for questioning on January 28, 2007. He proceeded to give three confessions, which in hindsight appear unreliable for a number of reasons. First, Dement was intoxicated during these interrogations. Second, the confessions are inconsistent with the crime scene and with one another. Third, the alleged narratives are illogical.

When the codefendants' investigator interviewed Dement in 2018, Dement spoke several times about his intoxicated state during his confessions. He claimed that he confessed because he

was "under the influence…high on Xanaxes, and [the police] knew [he'd] been drinking and stuff." (App. 0524-25). Bailey confirmed Dement's state of intoxication in both his written statement to police and the tape recording. At 2:22 p.m. on the day that Dement was arrested, Bailey told WVSP T.F.C. Blankenship that he had to wake Dement up earlier because he was passed out and "all out of it and was high on Zanax." (App. 0594). Bailey also told him that Dement "has a few [Xanax] on him now." (*Id.*). Curiously, no other police report discusses Dement's intoxication or Bailey's statement concerning Dement's intoxicated state. When Sergeant Cummings was asked whether Dement, at the time of the initial interrogation, "[did] or [said] anything to give the appearance of being intoxicated or under the influence of anything or anything which would limit his ability to understand his rights and voluntarily give them up…" (App. 0297). Cummings responded "No, sir, not at all." (*Id.*).

In addition to intoxication, another way to assess the reliability of a confession is by looking at the consistency between the statement and the crime. One clear inconsistency has only recently been uncovered. Despite naming several other alleged co-perpetrators, Dement does not mention Smith at any time during his "confessions" to Bailey or police, or at any point during later proceedings, despite Smith's semen on the victim's pants and DNA on a cigarette found at the remote crime scene.

This key gap in Dement's narrative is compounded by other crucial details that are incorrect or missing from his confessions. During the third confession, when asked whether Ms. Crawford had clothes on, Dement replied "[t]hey was on, I believe, yes." (App. 0479). However, the Crime Scene Report states that Ms. Crawford was "partially clothed," the crime scene photo shows Ms. Crawford with her shirt pulled up without clothes on her lower body, and the leopard pants – where Smith's DNA was found – were strewn adjacent to Ms. Crawford's corpse. (App.

0926). Dement also said that Ms. Crawford was on her back curled up, that she was not lying flat, and that he did not move her. (App. 0479; 0484; 0464). In reality, crime scene photos show her lying flat on her back, not curled up. (*See e.g.,* App. 0926).[9]

Further, neither of Dement's exit strategies are probable. In his first confession, he claimed that he traveled with the codefendants to Black's house, walked to a convenience store miles away, and called a cab to his Uncle Jimmy's house. (App. 0464). The cab company that he purportedly called did not service that area. (App. 0211). In the next two confessions, Dement alleged that he stayed at the crime scene after the codefendants left and walked to his Uncle Jimmy's house. (App. 0467; 0479). That walk totals 17.2 miles, amounting to an estimated 5 hours and 50 minutes in travel time. (App. 0925).

The confessions are also inconsistent with one another. Dement gives two different explanations for: his involvement in Ms. Crawford's attack (sitting in the car versus actively beating and dragging Ms. Crawford); his exiting the crime scene (driving away with the codefendants versus walking the nearly six-hour journey to his uncle's house); his location during the crime scene (sitting in the car versus hiding in the bushes); and the post-attack events (leaving with the codefendants versus checking on Ms. Crawford and feeling her pulse). (App. 0462-0464; 0465-0467; 0468-0489). These are not insignificant inconsistencies.

In addition to not knowing the condition of the crime scene, Dement had surprisingly little knowledge about Ms. Crawford. Notably, the police provided Ms. Crawford's name to Dement. When police asked who "the girl" was, Dement replied "I can't remember the name you all told me." (App. 0471). When he finally answered: "Deanna," the police responded: "[o]kay, do you know that from… do you remember her name or just because we've told you that?"

[9] The Crime Scene Report incorrectly states she was found lying face down. (App. 0417).

Dement replied: "Because you told me that." (*Id.*). Dement did not know the color of her hair, what she was wearing, or how she arrived to the party.

The story becomes more dubious when conjuring a motive. Dement did not know Ms. Crawford. In several of confessions, he explained that he entered the car expecting to drive somewhere to "smoke," but without warning, someone in the car decided to attack her. (App. 0463; 0489). When the drive turned violent, he, along with his friends, ended up spontaneously dragging, punching, and killing Ms. Crawford. (App. 0466; 0474). He never described discussing the plan of events with any of the codefendants, either before, during, or after the crime.

Finally, Dement did not provide any facts about the crime not already known by police and there is no physical evidence linking the crime to any of the four codefendants. In 2007 and again in 2017, the DNA testing excluded all four codefendants (App. 0432; 0376). Aside from Dement's confessions, nothing links the four men to the crime.

iii. False confessions are a proven phenomenon, and many of the risk factors were present during Dement's interrogations.

The idea of confessing to a crime one did not commit is so counterintuitive, so against one's self-interest— particularly in heinous crimes like the one here— that fact finders cannot imagine a sane adult doing so. *See* Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 396 (2015). But false confessions happen frequently. Out of 2,366 exonerations in the National Registry of Exonerations, false confessions led to 289 (12 percent) of the convictions. (App. 0553). Similarly, false confessions contributed to 25 percent of the 362 DNA-based exonerations obtained by the Innocence Project at the Cardozo School of Law. (*Id.*).

In terms of what leads someone to falsely confess, researchers have identified several risk factors. Out of the total Innocence Project false confession exonerations, 35 percent of the false confessions were performed by youth or mentally-impaired individuals. (App. 0561). Individuals

with developmental disabilities and mental illness are more likely to falsely confess. (*Id.).* Other factors, such as fatigue, intoxication, physical and social isolation, excessive interrogation length, leading questions, and threats, can lead to false confessions. (App. 0562-63).

Many of these factors were present during Dement's interrogation. Dement was diagnosed with a myriad of mental impairments, including Attention Deficit Disorder, cognitive impairments, and intellectual disabilities. (App. 0575). He received accommodations for learning disabilities while in school. (*Id.*). At the time of the confession, he was receiving Social Security Disability payments for his mental health – having been diagnosed with Bipolar II, Depression, and Anxiety. (*Id.*).

Aside from the many diagnoses, Dement lived a tragic life; one that would cause most individuals to lose touch with reality. Dement's father died when he was young. (App. 0536). His mother was in a car accident and became paralyzed; eventually, she died as well. (*Id.*). Once his mother passed away, Dement began abusing substances. (App. 0525). At the time he was arrested, he developed a habit of abusing opiates, sedatives, amphetamines, cannabis, hallucinogens, and was "all high" on Xanaxes immediately before his interrogation. (App. 0576).

Lastly, other factors that lead to false confessions were present. He was asked leading questions. (*Id.*). The officers used false evidence ploys – claiming that the other men had confessed. (*Id.*). And he was kept in isolation from family and questioned for over eight hours. (App. 0577).

C. DNA evidence connecting the murder to Smith would likely provide a different outcome at trial because Smith is a viable alternate suspect and Dement's confessions have reliability issues.

Prior to 2017, Dement's confessions were the only and best evidence of someone's culpability for the death of Ms. Crawford. However, even then, the killing made no sense. Why

would a murderer have an inaccurate account of the details of the crime and the victim? Why didn't the exit strategies make any sense? Where was the motive or plan? Why didn't any of the DNA or physical evidence point to Dement or any of his codefendants? All of these doubts were compounded by Dement's unreliability – his clear intoxication, mental disabilities, and history of tragedy and drug addiction.

Then, in 2017, the DNA provided an alternative narrative, and the story finally snapped into focus and began to make sense. Dement, in his vulnerable state, bragged about a crime he did not commit; a crime he knew nothing about. Meanwhile, the real perpetrator, a seasoned criminal, had skated underneath the investigators' radars. But technology caught up to him and Smith's DNA now placed him both at the remote crime scene and inside of the victim.

Dement is not a perfect man; he is guilty of lying, betraying three friends, and other crimes. But he did not commit this murder; Smith most likely did, though that need not be decided here, and it is not the standard that Dement must meet.

D. The circuit court abused its discretion because the same newly discovered evidence led to relief for Dement's codefendants, despite the lack of significant differences among the men.

The circuit court abused its discretion when it made a "serious mistake" in weighing the *Frazier* factors. The lack of evidence surrounding Dement's confession, coupled with the new DNA evidence pointing to a probable perpetrator, led the court to grant relief to Dement's three codefendants. (App. 0012). Notably, the State implicitly acknowledged that the codefendants were deserving of relief, as the State did not appeal the decision.

However, despite identical evidence among the four codefendants, the circuit court rejected Dement's petition under the "different outcome" factor of *Frazier*. (App. 0002). In its final order, the circuit court concluded that Dement did not meet this factor in light of "his sworn

testimony, guilty plea, and other incriminating statements and upon consideration that such evidence was not the basis of the petitioner's conviction." (*Id.).*

The circuit court's unique holding for Dement based on the few specified factors suggests a "serious mistake" in weighing the *Frazier* factors. The circuit court's factors do not go to the heart of whether there would be a different outcome at trial. If Dement or any of his codefendants were retried, the only evidence against any of them would be Dement's statements, or in the case of Black, both his and Dement's statements to police. Thus, if his codefendants were likely to get a different result at trial because of the new evidence, then Dement would as well because he is in the exact same position.

Further, the circuit court focused on these specific components to differentiate Dement from his codefendants. But all of the factors that supposedly differentiate Dement were present in his codefendants' cases or the future case against Smith. The circuit court referenced Dement's "testimony" in finding that Dement did not meet the "different outcome" factor. (*Id.*). However, Dement and all three of his codefendants have testified to their involvement in Ms. Crawford's murder. While Dement testified to this at his codefendants' trials, each codefendant has since made inculpatory statements to the Parole Board. (App. 0181). The circuit court mentioned Dement's guilty plea in holding that Dement did not meet the "different outcome" factor. (App. 0002). However, the Barnetts' convictions were also obtained via pleas. (App. 0979-0981; 0985-0988). The circuit court claimed that Dement did not meet the "different outcome" factor based, in part, on the fact that Dement made "other incriminating statements." (App. 0002). Yet, Black also incriminated himself to police during his interrogation, which, like Dement, he also later recanted prior to trial. (App. 0208). With respect to Dement's confessions to family members, Smith confessed to at least two of his ex-wives. (App. 0858-0860; 0884).

But unlike Dement, Smith left his DNA in two different places at the crime scene: in the form of his semen on Ms. Crawford's pants strewn next to her; and on a cigarette butt of the brand he smoked, steps away from her body, and in a remote area that the circuit court described as "out between a couple of hollows [sic- hollers]." (App. 0056). The circuit court was correct when it posed its first question: "how did this Smith guy know to be out there in those… in that particular area?" (*Id.*).

In sum, when a court applies the same law differently between indistinguishable defendants by weighing identical facts differently, it makes a serious mistake in weighing the evidence – amounting to the quintessential abuse of discretion.

III. The circuit court abused its discretion because it relied on an improper factor when it based its decision, in part, on Dement's guilty plea.

The circuit court also abused its discretion by adding an additional requirement to its *Frazier* analysis – the absence of a guilty plea. Dement's guilty plea served, in part, as the court's basis for finding that the new evidence would not lead to a different outcome at trial and its distinction between Dement and his codefendants. (App. 0002). Aside from the aforementioned fact that this did not distinguish Dement from the Barnetts, the court imposed this additional factor in its *Frazier* analysis, holding that a guilty plea, even if recanted, defeats a newly discovered evidence claim. (App. 0086; 0053). ("I wouldn't have had any problem at all if he would have pled not guilty and gone to trial and been convicted and then you find this DNA. He would have had a new trial. Just like the other defendants.") The circuit court necessarily abuses its discretion when imposes or relies on an improper factor. *Gentry*, 195 W. Va. at 520 n. 6, 466 S.E.2d at 179 n. 6.

It is clear that this is not part of the *Frazier* analysis not only because *Frazier* and its progeny does not identify it as a factor, but also because guilty pleas can be withdrawn and

convictions vacated to "avoid manifest injustice." *State v. Olish*, 164 W. Va. 712, 715, 266 S.E.2d 134, 136 (1980). In deciding this question, the court looks to "all the circumstances surrounding the plea and the evidence of the defendant's involvement in the crime. *Zain I*, 190 W.Va. at 327, 438 S.E.2d at 507. In fact, the circuit court used the proper *Frazier* and manifest injustice standards when it determined that *Frazier* was satisfied and that it would be a manifest injustice if the Barnetts' convictions were to stand. This finding permitted the Barnetts to have their pleas withdrawn and convictions vacated. (App. 0038). ("There has been a manifest injustice to these Defendants, and they should be allowed to withdraw their guilty pleas.")

Here, the unreliability of the confession, the overwhelming evidence that someone else committed this crime, and the arbitrary distinction between Dement and his codefendants require that Dement's guilty plea be withdrawn because there has been a manifest injustice. As described in detail in section II.B above, Dement's guilty plea is the result of a series of contradictory, unreliable confessions given while Dement was intoxicated. These confessions were the only evidence against him. But, facing the possibility of a lifetime in prison, and with no alternative suspects to offer at trial, he decided he had no alternative but to plead guilty. His codefendants faced a similar situation when they admitted their involvement to the Parole Board. (App. 0181). Recognizing that they would not be released without accepting responsibility for the crime, and in hopes of finding freedom sooner, each defendant told the Board that they were involved in the crime.

The new evidence significantly changes our understanding of Dement's involvement in this crime. As such, the conviction should be set aside and Dement should be given the opportunity to argue his innocence in front of a jury of his peers. After all, the overriding purpose of the West Virginia Habeas Statute is "remedying defects in the proceeding which

constitute a fundamental miscarriage of justice or which result in the imprisonment of an innocent man." *Pethel v. McBride*, 219 W. Va. 578, 594, 638 S.E.2d 727, 743 (2006). Allowing Dement's conviction to stand in light of his codefendants' convictions being vacated would constitute a manifest injustice. "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). If anything, manifest injustice must encompass ruling arbitrarily and singling-out particular defendants. The fact that Dement's conviction stands alone amongst the four, seemingly based on the whims of the circuit court, surely cannot stand.

IV. This Court should grant Dement's petition without remanding this matter back to the circuit court.

Based on the arguments above, this Court need not remand this matter back to the circuit court because it can rule on the merits without the need for additional fact finding. The record is adequately developed for appellate review. All of the material facts are undisputed or have been stipulated to, and "where facts are stipulated, they are deemed established as full as if determined by the trier of facts." *Matter of Starcher*, 202 W. Va. 55, 61, 501 S.E.2d 772, 778 (1998) (quoting *Blair v. Fairchilds*, 25 N.C.App. 416, 419, 213 S.E.2d 428, 430–31 (1975)). *Cf. Elmore v. State Farm Mut. Auto. Ins. Co.,* 202 W. Va. 430, 431, 504 S.E.2d 893, 894 (1998) (appellate review appropriate where facts are "sufficiently precise and undisputed."); *State v. VanHoose*, 227 W. Va. 37, 50 n. 39, 705 S.E.2d 544, 557 n. 39 (2010) (holding that this Court need not remand the matter if the record is "adequately developed," even if the circuit's court order sets forth mere legal conclusions without citing to any supporting facts.). Therefore, this Court should

rule on this matter based on the existing record, without requiring a remand for additional fact finding.

V. Alternatively, if this Court requires additional fact finding, it should instruct the circuit court to consider all the evidence and fully explain its reasoning behind its decision.

If this Court believes that additional fact finding is needed to decide this matter, it should first instruct the circuit court to hold an evidentiary hearing in order to allow Dement to present his evidence. In a *habeas corpus* proceeding, the petitioner is due a "full and fair hearing" . . . "with respect to the contentions raised in his petition" *State ex rel. Farmer v. Trent*, 206 W. Va. 231, 235, 523 S.E.2d 547, 551(1999) (citing *Gibson v. Dale*, 173 W. Va. 681, 689, 319 S.E.2d 806, 814 (1984)); W. Va. R. Habeas P. 9(a). While the circuit court is given wide latitude in how it chooses to have the evidence presented, it abused this discretion by ruling based solely off briefs – that it did not read – before even hearing what evidence Dement wished to present.

Furthermore, the circuit court failed to produce a comprehensive order making "specific findings of fact and conclusions of law relating to each contention," and "the grounds upon which the matter was determined." W. Va. Code Ann. § 53-4A-7(c). Here, the judge lumped all the contentions into a blanket declaration that it would not produce a different result at trial. Notably, the circuit court entirely neglected to make any findings of fact based on the new evidence, imposed a new legal standard without any explanation, and did not provide an adequate explanation for why Dement's result should be different than that of his codefendants. This surely cannot be considered "comprehensive" under § 53-4A-7(c). At the very least, this matter should be remanded for the judge to elaborate on these points.

CONCLUSION

For the foregoing reasons, Brian Dement asks this Court to reverse the circuit court's order denying his *habeas corpus* application, to vacate his conviction, and to remand the case for a new trial. Alternatively, Dement asks this Court to remand this matter to the circuit court with instructions to hold an evidentiary hearing and at its conclusion issue a comprehensive order detailing its ruling.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2019, true and accurate copies of the foregoing **Petitioner's Brief** and **Appendix** were hand delivered to counsel for all other parties to this appeal as follows:

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