IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0785

BRIAN EMERSON DEMENT, Petitioner,	
v.	Appeal from a final order of 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 Reply 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 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 Reply Brief, Petitioner refers to the standard set forth in *State v. Frazier,* 162. W. Va. 935, 253 S.E.2d 534 (1979), which elucidates when a claim of newly discovered evidence requires a conviction to be vacated. This Brief refers this standard as the "*Frazier* test" or individual components of this test as "*Frazier* factors." The foundation for *Frazier* derives from *Halstead v. Horton,* 38 W. Va. 727, 18 S.E. 953 (1894).

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 exercises 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.

ARGUMENT

Respondent's Brief ("Resp. Br.") defending the circuit court's denial of *habeas corpus* ("*habeas*") relief to Brian Dement ("Dement" or "Petitioner") is built on an erroneous application of West Virginia law. Namely, Respondent argues that a guilty plea acts as an effective bar to *habeas* relief. As such, Respondent, like the circuit court, never weighs the *Frazier* factors or argues that they would not lead to a different outcome at a retrial based on the new evidence. Nor does Respondent determine whether a manifest injustice has occurred. Indeed, not once does Respondent acknowledge the mounds of newly discovered evidence that undermines Dement's confession and conviction; namely, physical evidence that places a man with a sexually violent history at the crime scene and who admitted to the murder to two of his ex-wives. This is because, when properly evaluated, the weight of the newly discovered evidence commands a new trial.

I. Petitioner's guilty plea does not categorically bar him from *habeas corpus* relief.

According to Respondent, nearly every issue can be resolved against Dement because of his plea. (Resp. Br. at 17-18, 20-24, 29). Respondent conspicuously fails to mention both the new evidence or analysis of *habeas* relief beyond an unsupported guilty plea threshold. Respondent does not argue that the circuit court properly weighed the factors as outlined in *State v. Frazier*, 162 W. Va. 935, 935, 253 S.E.2d 534 (1979). Instead, Respondent argues that the circuit court properly denied the petition due to Dement's guilty plea, making it effectively a *per se* bar to *habeas* relief. (Resp. Br. at 23) ("Given the nature of guilty pleas, the Petitioner

cannot meet [the *Frazier*] threshold."). However, this reasoning is a misapplication of West Virginia law.[2]

The claim that a guilty plea bars *habeas* relief undermines the West Virginia Post-Conviction Habeas Corpus statute and well-established West Virginia precedents relating to both newly discovered evidence claims and the withdrawal of guilty pleas after a sentence is imposed. W. Va. Code Ann. § 53-4A-1-11 (2011).

First, barring petitions involving a guilty plea would logically undermine the purpose of the Post-Conviction Habeas Corpus statute. The Act guarantees that relief is available to "[a]ny person," and promises "the setting aside of [a] plea" as one of the forms of relief available. W. Va. Code Ann. § 53-4A-1. To adopt Respondent's argument would therefore directly contravene legislative intent.

Second, Respondent's proposed interpretation of the law would also undermine well-established precedents for *habeas* relief in West Virginia. This Court explicitly recognized that raising a "question of actual guilt upon an acceptable guilty plea" is a cognizable basis for *habeas* relief. *Losh v. McKenzie*, 166 W. Va. 762, 769–70, 277 S.E.2d 606, 611 (1981). Further, the withdrawal of a guilty plea is subject to analysis under a "manifest injustice" standard that is separate from the *Frazier* factors evaluating newly discovered evidence claims. *See Matter of Investigation of W. Va. State Police Crime Lab., Serology Div.*, 190 W. Va. 321, 327, 338; 438 S.E.2d 501, 507, 518 (1993) (*Zain I*) (citing, Syl. pt. 2, *State v. Olish*, 164

[2] To the extent that the circuit court applied this *per se* bar as a conclusion of law, Petitioner asks this Court to review the circuit court's conclusion of law under the *de novo* standard. *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006) ("questions of law are subject to a *de novo* review").

W. Va. 712, 266 S.E.2d 134 (1980)). Treating the lack of a guilty plea as a threshold requirement for *Frazier* analysis would render these longstanding approaches superfluous. And this is exactly what Respondent does. Respondent claims Dement's guilty plea categorically bars *habeas* relief under the newly discovered evidence standard, and therefore Respondent fails to engage in the requisite "manifest injustice" analysis, let alone *Frazier* analysis.

This Court laid out the proper approach in *Buffey v. Ballard* which has many parallels to this case. 236 W. Va. 509, 782 S.E.2d 204 (2015). Buffey was charged with robbing and sexually assaulting a homeowner. *Id.* at 512. Despite Buffey being excluded from DNA collected from the scene, he confessed to police. *Id.* at 512-13. Facing a long prison sentence, and unaware of exculpatory DNA evidence, Buffey pled guilty. *Id.* at 513. Years later, Buffey was granted post-conviction DNA testing. *Id.* at 515. Newly developed DNA testing methods produced a profile that again excluded Buffey. The profile was uploaded to CODIS and hit another individual: an inmate who had delivered newspapers to the victim as a teenager and had a history of sexual violence. *Id.* Despite this compelling new evidence, the circuit court denied Buffey's *habeas* petition. *Id.* This Court reversed, holding that *habeas* relief for *Brady* violations extends to the pleading stage, meaning that *habeas* relief is available even after a guilty plea. *Id.* at 526. As a result, and in light of the *Brady* evidence, this Court granted a new trial and ordered the circuit court to allow Buffey to withdraw his guilty plea. *Id.*

While *Buffey* was decided as a *Brady* claim, its logic extends to Petitioner's claim of newly discovered evidence here. Both cases sought *habeas* relief, and both are based on the petitioners' discovery of exonerating evidence after having pleaded guilty. The newly acquired evidence is also identical in both cases: DNA that excludes the petitioner and links to a compelling alternative suspect. Accordingly, the circuit court here abused its discretion in reading in a no guilty plea threshold requirement to *habeas* claims.

Third, Respondent's argument – that a guilty plea effectively bars *habeas* relief – has also been resoundingly rejected in other jurisdictions. According to the National Registry of Exonerations, there have been 507 exonerations involving a defendant who, at one point, pleaded guilty. More specifically, there have been at least thirty-seven exonerations of defendants who falsely confessed to involvement in a murder and pleaded guilty. *The National Registry of Exonerations*, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx. These cases illustrate the fact that at least sixteen states other than West Virginia agree that guilty pleas are not a bar to newly discovered evidence claims in cases involving false confessions. *Id.* These states include: Georgia, Texas, Mississippi, Florida, North Carolina, Nebraska, Nevada, Ohio, Missouri, Virginia, Maryland, Indiana, Pennsylvania, Connecticut, Illinois, and Michigan. *Id.*

Lastly, even the cases cited by Respondent acknowledge that guilty pleas are not a bar to relief. (Resp. Br. at 23). Both cases, each from an out-of-state jurisdiction, merely explain that courts may be more reluctant to grant relief if a

defendant pleads guilty. *Id.*[3] They do not hold that the inquiry ends at a guilty plea, nor is their logic applicable here as is shown by statute, *Buffey*, and *Losh*.

In short, Respondent's entire argument is based on a misapplication of West Virginia law – one that treats a guilty plea as a categorical bar to *habeas* relief. Because the circuit court's decision as endorsed by Respondent's Brief is based on this legal error, it must be reversed.

II. A proper application of West Virginia law concerning newly discovered evidence weighs in favor of Petitioner.

The proper "standard for granting a trial under the newly discovered evidence rule" is described in *Frazier*. Respondent concedes the only *Frazier* factor at issue is factor four, which requires that "the evidence must be such as ought to produce an opposite result at a second trial on the merits." (Resp. Br. at 22) (quoting *Frazier*, 162 W. Va. at 935). But neither the circuit court nor Respondent actually analyze *Frazier's* fourth factor as applied to this case. When the new evidence is properly considered, it is clear that Dement should be granted a new trial and the circuit court's decision to ignore the *Frazier* factors requires reversal.

Instead of analyzing the case through a *Frazier* lens, Respondent points to four cases discussing the proposition that new trials are rarely granted on the basis of newly discovered evidence. (Res. Br. at 22) (citing *State v. Farley*, 143 W. Va. 445, 456, 104 S.E.2d 265, 270 (1958), *State v. Spradley*, 140 W. Va. 314, 325, 84 S.E.2d

[3] Respondent cites the following cases on page 23 of its response: *LaMarco v. United States*, 336 F. Supp. 3d 152, 172 (E.D.N.Y. 2018) (quoting *Jenkins v. United States*, 2013 WL 6869649, at *3 (S.D.N.Y. 2013) ("[Courts] are especially reluctant to overturn a conviction based on new evidence when the conviction stemmed from a guilty plea."); *Utah v. Archuleta*, 449 P.3d 223, 234 (Utah Ctr. App. 2019) ("[O]ther jurisdictions appear reluctant to grant motions for a new trial on the basis of newly discovered evidence following the entry of a guilty plea.").

156, 162 (1954), Syl. Pt. 2, *State v. Helmick*, 201 W. Va. 163, 495 S.E.2d 262 (1997) (quoting Syl. Pt. 9, *State v. Hamric*, 151 W. Va. 1, 151 S.E.2d 252 (1966)). Yet this argument is less persuasive when one takes into consideration the year in which each of these cases was decided: 1958, 1954, 1997, and 1966. Each case was determined before the judicial system began to grapple with the advent of forensic DNA evidence. Unlike cases dealing with witness recantations or other non-scientific evidence, in Dement's case there is scientific evidence that undoubtedly matches an individual to the victim and crime scene while excluding Dement and his codefendants. Timothy Smith's DNA is on both the victim's strewn clothing and a cigarette at the remote crime scene, whereas all four co-defendants are excluded from the same. Surely, this unassailable, scientific new evidence must place it within the rare category where a new trial should be granted.

A. The circuit court failed to apply the *Frazier* factors.

In its defense of the denial of *habeas* relief, Respondent adopts the same legal errors made by the circuit court that prevented it from properly weighing the new evidence against the old as required by *Frazier*. First, the circuit court admitted that it did not read Dement's petition, let alone the record, which is necessary in order to appropriately weigh the new evidence. Respondent defends the circuit court's omission by arguing that this decision was harmless because Dement was provided an opportunity to proffer his evidence at the hearing. (Resp. Br. at 19). However, the court admitted that it had already made its decision to deny the petition, and it was only hearing evidence for the purposes of the appellate record. (App. 0058). Respondent further argues that the circuit court read all the important

parts of the record. (Resp. Br. at 19). But surely the actual *habeas* petition, which the court admitted to not have read, is a crucial part of Dement's petition for relief. (App. 0050-51).

Contrary to Respondent's arguments, these omissions colored the circuit court's decisions and, therefore, were not harmless. For example, despite the fact that Dement repeatedly recanted his confession, the circuit court erroneously cited the fact that Dement never recanted his confession when deciding to deny his petition based on newly discovered evidence. (App. 0086). The Respondent argues that the circuit court was simply saying that Dement never formally retracted his guilty plea, (Resp. Br. at 20), but this is a misleading construction of the judge's reasoning. ("[Dement] has always maintained his guilt until he filed the Petition.") (App.0086).

Second, the circuit court avoided *Frazier's* required evaluation of Dement's new evidence by reasoning that a claim of newly discovered evidence must be based on evidence that was the basis of the conviction. (App. 0002). However, like the circuit court, Respondent does not substantively attempt to justify this position. (Resp. Br. at 20-21). As explained in the opening brief, not only does this position defy logic, but it would also completely undermine the rationale of newly discovered evidence *habeas* cause of action, which requires evidence to be, unsurprisingly, newly discovered.

In sum, the circuit court did not actually engage in a *Frazier* analysis, but rather summarily dismissed the claims based on flawed legal logic and without

considering the evidence. Because the circuit court based its decision on a misapplication of law, its decision must be overturned.

B. The circuit court abused its discretion when it denied a new trial under the *Frazier* analysis.

To the extent that it can be argued that the circuit court attempted to analyze the case under the *Frazier* framework, the circuit court abused its discretion when evaluating *Frazier's* fourth factor and determining that new evidence would not likely provide a different outcome at a new trial.

Respondent argues that this was not an abuse of discretion because Dement does not meet the fourth prong of *Frazier*. In reaching this argument, Respondent does not weigh the substantive facts underlying Dement's *habeas* petition, but instead centers its argument wholly on the guilty plea. Respondent notes that the circuit court "concluded that since the Petitioner had pled guilty, the Petitioner could not satisfy the five-part test for new evidence that the Petitioner had relied upon for relief." (Resp. Br. at 20). A guilty plea is not mentioned within the *Frazier* rule, and there is nothing to suggest, as Respondent concludes, that it is in any way dispositive.

Instead, in considering whether newly discovered evidence ought to produce an opposite result at trial, courts should "evaluate the new evidence in light of the entire record." *State v. Stewart*, 161 W. Va. 127, 137, 239 S.E.2d 777, 183 (1977). When doing so here, it is clear that the plea is outweighed by the new evidence that someone unconnected to Dement committed this crime. Petitioner's Brief presents numerous arguments why the DNA evidence linking an alternate suspect ought to

produce an opposite result at retrial. (Pet. Br. at 22-34). There was no physical evidence behind the original conviction of Dement and his co-defendants, and every DNA test has excluded the four men. (Pet. Br. at 10, 12). The newly discovered DNA evidence points to an alternative suspect, Timothy Smith, in the form of his semen on the crotch of the victim's pants and his saliva on a cigarette at the remote crime scene. (Pet. Br. at 22). Smith has a criminal history rife with sexual and physical violence; according to several witness accounts, he confessed to a murder that matches this crime; and he repeatedly lied to investigators. (Pet. Br. 24-25).

Additionally, the viability of an alternative suspect casts further doubt on the reliability of Dement's dubious confessions. Dement's initial confessions include several details that are inconsistent with the crime scene and victim; he then provided three confessions to the police – all of which are inconsistent with each other and the crime itself. (Pet. Br. 26-30). Not only are the confessions themselves unreliable, but Dement is unreliable. He is diagnosed with Bipolar II, Depression and Anxiety, Attention Deficit Disorder, intellectual disabilities, and cognitive impairments. (Pet. Br. at 31). He spent much of his youth in special education classrooms. *Id.* He was also addicted to drugs and heavily intoxicated throughout his interrogations. (Pet. Br. at 27, 28, 31).

Lastly, and perhaps most importantly, the same newly discovered evidence led to a different result for Dement's identically-situated co-defendants. Petitioner's Brief argued that if the circuit court held that the co-defendants met factor four of *Frazier*, the same logic should apply to Dement. (Pet. Br. 32-34). The four men were

convicted using identical evidence, Dement's words, and the men's post-conviction petitions rely on the exact same newly discovered evidence, DNA and corroborating evidence pointing to an alternate suspect. (Pet. Br. at 33).

Respondent failed to address any of these unrebutted facts, that DNA and other evidence points to an alternative suspect, or any of the arguments regarding the unreliability of Dement's confessions. The circuit court also reached its decision without weighing any of this evidence as is required by *Frazier*, and the result constitutes an abuse of discretion. Had it properly weighed the factors, the circuit court would have to find that the newly discovered evidence requires granting Dement a new trial.

C. Because a *Kennedy/Alford* plea is a guilty plea, there are no meaningful distinctions among the four co-defendants.

Respondent claims that Petitioner raised "some type of constitutional due process or equal protection argument," though those claims are not present within Petitioner's Brief. (Resp. Br. at 28). However, Respondent misunderstands Petitioner's argument that the outcomes within Dement's co-defendants' cases suggest that the identical petitioners all meet *Frazier* factor four.

Accuracy aside, Respondent argues that Dement is distinguished from his co-defendants because he "entered a plea of guilty...and the Barnett brothers pled guilty under *Alford/Kennedy* pleas...which allowed them to maintain their innocence." (Resp. Br. at 29).[4] Respondent's allegation, that *Alford/Kennedy* pleas

[4] It is worth nothing that the prosecutor may not have given Petitioner the choice to enter an *Alford/Kennedy* plea as it is not necessarily a defendant's right to choose that option.

are not guilty pleas and are therefore differentiated, is incorrect. In *Kennedy v. Frazier*, this Court made it clear that *Alford/Kennedy* pleas are guilty pleas, describing the holding in *North Carolina v. Alford* as a form of "guilty plea" and that an accused may "consent to imposition of a prison sentence even though he is unwilling to admit participation in a crime, if he intelligently concludes that his interests require a guilty plea and the record supports that a jury could convict him." *Kennedy v. Frazier* 178 W. Va. 10, 12, 357 S.E.2d 43, 45 (1987), citing *North Carolina v. Alford* 400 U.S. 25, 91 S.Ct. 160 (1970).

Lastly, the circuit court knew that *Alford/Kennedy* pleas are guilty pleas because it explicitly stated this at the hearing. When codefendant's counsel tried to make a distinction between pleading guilty and entering a *Kennedy* plea, the circuit court responded: "Okay but that is a form of a guilty plea ma'am... an *Alford* or *Kennedy* plea is a guilty plea." (App.0037). Respondent only differentiates Dement from his co-defendants on the basis of the pleas, alleging that Dement's guilty plea is different from the co-defendants' *Alford/Kennedy* pleas, and therefore justifying the divergence in outcomes. However, both the circuit court and West Virginia law make it clear that an *Alford/Kennedy* plea is a guilty plea. The circuit court committed an error of law in distinguishing between the co-defendants during, both its misapplication of *Frazier* and its manifest injustice analysis. Therefore, its decision must be overturned

III. Because the factual record is adequately developed, this matter is ripe for appellate review.

Remand is only required when a decision necessitates further fact-finding. However, here, there are no facts in dispute, which is reflected in both Petitioner's and Respondent's Briefs. Therefore, this Court should decide this matter based on the existing and undisputed factual record and vacate Dement's conviction. *See Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 431 (1998) (appellate review appropriate where facts are "sufficiently precise and undisputed.")

Conclusion

For the foregoing reasons, this Court should reverse the circuit court's denial of Dement's *habeas* petition, grant his petition because the material facts are not in dispute, and order a new trial.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2020, true and accurate copies of the foregoing **Petitioner's Reply Brief** were hand delivered to counsel for all other parties to this appeal as follows:

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