IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0785

BRIAN EMERSON DEMENT,

Petitioner below,
Petitioner,

v.

KAREN PSZCZOLKOWSKI, Superintendent,
Northern Regional Correctional Facility,

Respondent below,
Respondent.

RESPONDENT'S BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

SCOTT E. JOHNSON
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar No. 6335
Office of the Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Tel: (304) 558-5830
Fax: (304) 558-5833
Email: Scott.E.Johnson@wvago.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Other Sources

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*, 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.

Pet'r Br. at 1 (footnote omitted).

STATEMENT OF THE CASE

A. The Petitioner's Guilty Plea.

Brian E. Dement, the Petitioner herein, was indicted in the Circuit Court of Cabell County for the first degree murder of Deanna Louise Crawford[1] and the malicious wounding of Brittany

---

[1]Although the Indictment is not included in the Appendix Record, the circuit court at the Petitioner's guilty plea hearing explained to the Petitioner that

> . . . between the 4th day of August 2002, and the 8th day of August 2002, that you, along with Nathaniel Todd Barnett, Phillip Scott Barnett, and Justin Keith Black, jointly committed the offense of murder by unlawfully and feloniously, willfully and maliciously, and deliberately slaying and killing one Deanna Louise Crawford by strangulation . . . .

Vol. II, A.R. 946.

Mayo Wolfe. *See* Vol. II, A.R. 939, 941. On October 23, 2007, the Petitioner entered a plea of guilty to the second degree murder of Ms. Crawford and also entered an *Alford/Kennedy*[2] plea to the malicious wounding of Ms. Wolfe. Vol. II, A.R. 939.[3] During the plea colloquy, the circuit court judge confirmed the Petitioner was 26 years old, Vol. II, A.R. 949, and was a graduate of Cabell Midland High School, Vol. II, 940, 949, who could read and write. Vol. II, A.R. 949. The circuit court also confirmed the Petitioner understood the charge of first degree murder, Vol. II, A.R. 941, and that he did not have to plead guilty. Vol. II, A.R. 941. The circuit court also established the Petitioner's mental capability:

> Q. Have you ever been treated for any mental illness?
>
> A. Yes, sir.
>
> Q. For what?
>
> A. ADD and bipolar.
>
> Q. Bipolar is a mental illness. Is ADD a mental illness or just a condition that allows doctors to prescribe medicine?
>
> A. Well, it's either a disorder or an illness, sir, however you want to look at it.

---

[2]An *Alford/Kennedy* plea has been explained by this Court:

> Relying on *North Carolina v. Alford*, 400 U.S. 25 (1970), this Court held in syllabus point one of *Kennedy v. Frazier*, 178 W. Va. 10, 357 S.E.2d 43 (1987), that "[a]n accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury could convict him."

State v. Gerald R., No. 18-0814, 2019 WL 5092946, at *1 n.2 (W. Va. Oct. 11, 2019) (memorandum decision). "An *Alford* plea allows a criminal defendant to maintain his or her innocence whilst acknowledging that there is sufficient evidence for a conviction." *Spivey v. Norris*, 731 F. App'x 171, 174 n.1 (4th Cir. 2018).

[3]The Petitioner is not contesting his plea of malicious wounding as to Ms. Wolfe.

Q. Do you feel it affects your decision here today?

A. No, sir.

Q. Are you under any medication of any form or fashion –

A. No, sir.

Q. -- legal or illegal, at this time?

A. No, sir.

Q. Are you under treatment for any mental illness now?

A. No, sir.

Q. Have you had anything to drink in the last 48 hours of an alcoholic nature?

A. Oh, no, sir.

Vol. II, A.R. 950.

During the guilty plea colloquy, the Petitioner stated, under oath, that he was guilty of second degree murder. Vol. II, A.R. 953. The circuit court then engaged in an exchange with the Petitioner about the Petitioner's role in the murder of Ms. Crawford:

Q. Tell me what you did that would make me want to accept your plea of guilty.

A. Well, first, I was out there and I participated in it. I dragged her out of the car.

Q. You were out where?

A. Out at the back side of Hickory Ridge.

Q. And that's here in Cabell County, right?

A. Yes, sir. That's correct.

Q. Now, your voice sort of went down. You said you participated. Tell me exactly what your participation was.

A. Like I said, I was out there. And then I dragged her out of the car like this and dragged her into the woods.

Q. And what did you do then?

A. I hit her in the face one time to shut her up and then I left.

Q. Now, it says – was anyone with you?

A. Yes, sir. That's correct.

Q. Who?

A. Nathaniel Barnett, Phillip Barnett, and Justin Black.

Q. You say you hit her one time; is that correct?

A. That's correct.

Q. No, that didn't kill her, did it?

A. No, mon (sic).

Q. What did she die of?

A. The strangulation.

Q. Who strangled her?

A. Well, I dragged her. But I wouldn't say I strangled her.

Q. Okay. Did you have her by the neck when you dragged her?

A. Yes, mon.

Q. Pardon?

A. Yes, mon. Yes, sir.

. . .

Q. Did you have her by the neck?

A. Yes.

Q. Okay. And you drug her by the neck. Was it in the crook of your arm or with your hand?

A. Right here (indicating).

Q. How far did you drag her?

A. Well, to the road – to the beginning of the woods.

Q. I don't know how far that is. About how much time?

A. About how much time? Maybe a minute, two.

Q. Was she breathing after you dragged her to the edge of the woods?

A. Yes, sir.

Q. So you're saying you really participated in –

A. Yes.

Q. -- the killing, but maybe – did you do anything to her after you dragged her to the edge of the woods?

A. No, sir.

Q. But you pulled her out of the car against her will, is that correct?

A. That's correct.

Q. Why?

A. What?

Q. Why?

MR. BRYSON: [defense counsel]: He said why.

A. Oh, I don't know, mon. I was just going along with the flow.

Vol. II, A.R. 953-956.

The State then proffered the following:

MR. CHILES [Prosecuting Attorney]: Yes, Your Honor. The State would be able to prove at trial based on Mr. Dement's statements to the police, as well as

> statements to others – and other witnesses, that he, the Barnetts – both Barnetts and Justin Black all left a party at Justin Black's house with Deanna Crawford in the car.
>
> That they went to this location on Hickory Ridge. That Justin Black was driving. He pulled over and stopped the car at which time Phillip Barnett who was sitting in the back seat directly behind Ms. Crawford punched her in the left side of the face – leaned forward over the seat and punched her in the left side of the face.
>
> That everyone in the car then started yelling let's get her, things like that. That all the men exited the car, went around to the passenger's side door, and that Mr. Dement pulled Ms. Crawford out the door, drug her down the hill hitting her. That others were hitting her, beating her, kicking her. And that as a result, she ended up being strangled to death down this hill.
>
> We do not necessarily – Mr. Dement does admit dragging her – and admitted to the police dragging her by the neck. But he has always maintained that she was alive. After that, he's also said that he heard her begging, "Please don't kill me," when the other three men were still down there with her. And that she repeatedly said, "Please don't kill me." And then the three others came running up the hill, got in the car and left. He then went down to check on her body and she was dead.
>
> And we feel that he was certainly present aiding and abetting in this manner by dragging her out of the vehicle and hitting her and participating as he admitted.

Vol. II, A.R. 956-958.

The Petitioner agreed the State would have sufficient evidence to show what Mr. Chiles had related. Vol. II. A.R. 958. The Petitioner pled guilty to second degree murder of Ms. Crawford and the malicious wounding of Ms. Wolfe. Vol. II, A.R. 963. The circuit court accepted the petitioner's guilty pleas. Vol. II, A.R. 965. The circuit court also concluded that the Petitioner was not under the influence of any alcohol, drugs, stimulants, or depressants at the time of the plea. Vol. II, A.R. 966.

By Order entered on April 30, 2008, the circuit court sentenced the Petitioner to thirty years of incarceration for the second degree murder and a two to ten year sentence on the malicious wounding, the sentences to run concurrently. Vol. I, A.R. 369.

B. The Co-Defendant's Trials and Appeals.

Consistent with the Petitioner's plea agreement, the Petitioner testified at the trials of Justin Black and the Barnett brothers. *See State v. Black*, 227 W. Va. 297, 303, 708 S.E.2d 491, 497 (2010); *State v. Barnett*, 226 W. Va. 422, 426–27, 701 S.E.2d 460, 464–65 (2010). Black was convicted of second degree murder, *Black*, 227 W. Va. at 301, 708 S.E.2d at 495, a verdict that was affirmed by this Court. *Black*, 227 W. Va. at 315, 708 S.E.2d at 509. The Barnett brothers were both convicted of second degree murder, *Barnett*, 226 W. Va. at 424, 701 S.E.2d at 462, but this Court reversed those convictions. *Id.*, 701 S.E.2d at 462. Subsequently, Philip Barnett entered an *Alford/Kennedy* plea to the offense of voluntary manslaughter, and entered an *Alford/Kennedy* plea to malicious wounding. Vol. II, A.R. 979-980. Nathaniel Barnett entered an *Alford/Kennedy* plea to voluntary manslaughter. Vol. II, A.R. 982-983.

C. The Petitioner's Habeas Petition.

On August 31, 2018, the Petitioner filed a habeas corpus petition with the Circuit Court of Cabell County. Vol. I, A.R. 123. The Petitioner raised three grounds for relief: (1) a newly discovered evidence claim; (2) a freestanding claim of actual innocence; and, (3) a request to withdraw his plea based on manifest injustice. Vol. I, A.R. 126. Specifically, the Petitioner asserted as factual support under his newly discovered evidence claim that:

> Newly Discovered DNA evidence has excluded Mr. Dement and co-Defendants as contributors to a single-source male profile discovered on both semen found on the crotch of the victim's pants and a cigarette but adjascent [sic] to her body at the crime scene. That same profile has also been identified through a CODIS hit to a currently incarcerated felon with a history of pedophillia [sic] and violence against women.

Vol. I, A.R. 126.[4]

[4]The Circuit Court of Cabell County had previously ordered DNA testing at the request of Justin Black, Phillip Barnett and Nathaniel Barnett. Vol. I, A.R. 383. DNA testing was performed by Bode Cellmark Forensics. Vol. I, A.R. 375-378; 379-382. The DNA testing included testing of

Under his claim of freestanding innocence, the Petitioner asserted as factual support:

> Newly obtained DNA evidence fully excludes Mr. Dement and his co-Defendants from probative evidence found at the crime scene. No physical evidence implicated Mr. Dement as having killed the victim. DNA evidence has now linked semen found on probative crime scene evidence to an individiaul [sic] never considered or questioned as a suspect [sic] by law enforcement. The DNA evidence fully undermines Mr. Dement's false confession in which he implicated both himself and the co-Defendants authorities [sic] suspected in the crime.

Vol. I, A.R. 126.

Finally, under his claim that he should be allowed to withdraw his plea based on manifest injustice, the Petitioner asserted as factual support:

> If Mr. Dement had been aware of the DNA evidence that has only been recently obtained and its results, he would not have made any Kennedy/Alford plea, but would have moved forward with the trial unafraid of the possibility of a verdict that was impossibly harsh and unable to be mitigated.

Vol. I, A.R. 126.

D. The Habeas Proceeding of May 1, 2019.

On May 1, 2019, the Circuit Court of Cabell County convened a hearing in the proceeding. Vol. I, A.R. 15. This proceeding addressed the Petitioner's habeas case as well as the pending cases of the Petitioner's co-defendants: Nathaniel Barnett, Philip Barnett, and Justin Black. Vol. I, A.R. 15-16.

---

material located on the victim's (Deanna Crawford's) pants. Vol. I, A.R. 379. Testing of this material excluded the Petitioner and excluded Nathaniel Barnett, Philip Barnett, and Justin Black. Vol. I, A.R. 380. In the proceedings below, the Respondent agreed the DNA on the victim's clothes did match Timothy Smith. Vol. I, A.R. 182-183. Timothy's Smith's DNA was also located on a cigarette found at the crime scene. Vol. I, A.R. 183. In the Appendix Record, the Petitioner has included a statement from Smith's ex-wife Terri Craft wherein Ms. Craft stated that Mr. Smith made statements to Craft about hitting and killing someone. Vol. II, 842-843. Likewise, Smith's other ex-wife, Andrea Ford, gave an interview incriminating Mr. Smith in the death of a prostitute. Vol. II, A.R. 884. *See generally* Pet'r Br. at 14-15.

The circuit court judge explained at the hearing that "[t]his is a complex case. I have had to read parts of the transcripts. I haven't read all of them. The one – the parts that I thought were important I have read." Vol. I, A.R. 26. The circuit court further explained that he was "just telling you a little bit about myself so you know what I am thinking about." Vol. I, A.R. 30. The circuit court continued:

> I always tell the jury I am kind of like a referee and I try to tell them "I am going to be the referee and we've got lawyers over here and I've got lawyers over here and I want to make sure that everybody is – plays by the rules."
>
> And, of Course, during the trial there are objections made and 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?"
>
> You know, to me I try to use a common sense approach.

Vol. I, A.R. 32.

The circuit court then explained further:

> I have spent the last week on this case. I can take you right in that room there and about this high are all the volumes of what has gone on in this case.
>
> Now, I admit to you I didn't read everything in that. I didn't think that I needed to.
>
> But I wanted to try to – I just sat down last night –
>
> There were so many defendants in this case and so many lawyers and so many – there was a motion even filed Monday. A Motion to Prohibit certain evidence and so forth and so on. It was just kind of a daily thing.
>
> And I have got five hundred cases going other times. You know? This is not the only case that I have got.
>
> So the last week I have sat down and taken some time each day to try to figure out what is going on.

Vol. I, A.R. 33-34. As to Justin Black, Phillip Barnett and Nathaniel Barnett, the circuit court granted relief based upon newly discovered evidence. Vol. I, A.R. 41-42.

The circuit court also addressed the Petitioner's case. Vol. I, A.R. 50. The circuit court judge stated that he had done less work on the Petitioner's case than the other cases. Vol. I, A.R. 50. When the circuit court stated that a pro se habeas petition had been filed by the Petitioner, the Petitioner's counsel explained to the circuit court that a counseled petition had been filed on August 31. Vol. I, A.R. 50-51. The circuit court then stated it was going to "wing it then." Vol. I, A.R. 51. The circuit court asked for someone to tell it what the Petitioner's case was about. Vol. I, A.R. 51. The Petitioner's counsel told the circuit court that the Petitioner was relying on the same newly discovered evidence that the other co-defendants were relying on, that "the DNA evidence . . . came back to another individual who has no connection and – no connection to my client in any way, shape, or form." Vol. I, A.R. 51-52. The Petitioner's counsel further argued, "[w]e rely on that evidence, and I believe Mr. Plymale [the Special Prosecuting Attorney] has agreed that we have met all of the burdens of the newly discovered evidence except for No. 4 as to whether or not it ought to have changed the results of trial." Vol. I, A.R. 52. The circuit court confirmed that the Petitioner's only ground for relief was newly discovered evidence. Vol. I, A.R. 52. The circuit court then directed the Petitioner's counsel to address that issue in light of the fact that the Petitioner pled guilty. Vol. I, A.R. 52-53. The Petitioner's counsel asserted that the Petitioner's statements could not be trusted. Vol. I, A.R. 54-55. The Petitioner's counsel then directed the circuit court back to the DNA evidence. Vol. I, A.R. 55. The Petitioner's counsel asserted that the Petitioner was in the "same boat" as his co-defendants. Vol. I, A.R. 56. The circuit court recognized that the Petitioner's "boat is different, though." Vol. I, A.R. 56. Because the Petitioner pled guilty, the circuit court characterized the Petitioner as being on "a row boat or something, and [the co-

defendants] are in a steam liner or something. You know? He is – he doesn't have a – they are not on the same ship." Vol. I, A.R. 56.

The circuit court stated that it did not believe the Petitioner had "a leg to stand on." Vol. I, A.R. 58. The circuit court then ruled that it would allow the Petitioner "to vouch the record on what evidence you want – you would want to put on here today." Vol. I, A.R. 58. *See also* Vol. I, A.R. 58 ("THE COURT: 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. I mean, I don't think he has a claim."). The circuit court permitted the Petitioner to vouch the record, although the circuit court expressed its belief that the Petitioner's testimony made at the co-defendants' trials was damning to the Petitioner's claim. Vol I, A.R. 69 ("THE COURT: If he hadn't gotten on the stand and blown his brains out telling everything that happened, I could go along with what you all are saying.").

After the Petitioner vouched the record, the Special Prosecuting Attorney argued to the circuit court. Vol. I, A.R. 75.

> MR. PLYMALE: About two years after he first stated [sic] talking about it this uncle goes to Tony Cummings, referred there by Jim Schielder, from the Cabell County Sheriff's Department, and provides information.
>
> And if Tony Cummings were to testify he would tell you that he believed it was just another wild goose they were going to have to chase because they had gone through hundreds of suspects, talked to different people. But that what Mr. Bailey provided him with was a piece of information from Mr. Dement that he believed only someone who was out there at the time that this event occurred would know, and that was that circumstance regarding bees.
>
> And what the investigators would tell you is when they went out there to remove the body they had to bring in the fire department to smoke these bees out because they were such a menace, and that that is exactly what Mr. Dement added to this story when he first told it out of police custody.

And then when the police heard that, they believed that this is something that no one would know unless they were there and unless they were there at that time.

Then from that it grew that he made more inculpatory statements on a recording that the State Police had asked Mr. Bailey to do.

Then they brought him in, but they only brought him in because of another incident where they had to place him under arrest for an incident with a girlfriend. And Tony Cummings –

THE COURT: Which he pled guilty to.

MR. PLYMALE: Yes.

THE COURT He pled guilty to it.

That, and he was hiding when the police got there, as I recall.

MR. PLYMALE: And in essence within minutes Mr. Dement is telling him this story. But because they know information that he has not yet told them, they went through a process where they brought in a polygrapher and then challenged his story at certain points. And he gave them a second statement.

Then after he gave the second statement then it was reduced to an audio recording that Sergeant Parde took.

And the length of time that he was in custody was more related to the fact that they had to stretch that story out from its initial – from the initial statements Mr. Dement made at 7:30, 8 o'clock, to get a final recorded statement.

So that he was not under this immense pressure or any type of immense coercion, and all of the officers that took place would tell you that. That he was coherent, that he only spent part of the time in the Interview Room. He was brought out. They brought food to him. He was out in an open area there for lengths of time. So that this is not the type of coercive atmosphere that would produce a statement that would be subject to questioning.

Vol. I, A.R. 75-78. The Special Prosecuting Attorney asserted that the applicable standard for the circuit court to afford the Petitioner relief was not met in this case. Vol. I, A.R. 79-80.

After the Petitioner's rebuttal, the circuit court denied the Petitioner relief:

THE COURT: I wouldn't have had any problem at all if [the Petitioner] 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.

But his case to me, even though what he is saying, is different from the other three because they have always maintained their innocence.

Your client has always maintained his guilt until he filed the Petition.

MR. SWYGERT [Petitioner's counsel]: No, he did retract – he told – as I mentioned before he –

THE COURT: Well –

MR. SWYGERT: -- he had told an investigator for one of the – for one of the co-defendants that he – that it was not true.

He also –

THE COURT: On October 23rd, 2007, in front of the Judge – Judge Cummings – on his Plea Forms he admitted his involvement. I have got it right here.

MR. SWYGERT: Oh, I –

THE COURT: Now, he may have retracted it after that, but he was under oath when he did this. You know?

MR. SWYGERT: Right.

THE COURT: So –

MR. SWYGERT: And, Your Honor, again, other people admitted – although, again, they were Kennedy Pleas – but other people admitted too.

And Mr. Dement –

THE COURT: Well –

MR. SWYGERT: Again –

THE COURT: I understand where you are coming from, but this Court is not going to give him a new trial. I don't think he is entitled to it.

If the Supreme Court grants him a new trial, then so be it. But I don't – I have seen nothing for me to grant him any relief on this Habeas Corpus.

> And so at this point in time I am going to deny the same, and he certainly has a right to appeal that to the Supreme Court. And hopefully if you all really believe what you are saying, you will do that.

Vol. I, A.R. 86-87.

E. The Habeas Order of August 7, 2019.

On August 7, 2019, the circuit court entered a written order denying the Petitioner relief. Vol. I, A.R. 116. The circuit court "upon consideration of the entire record and pleadings introduced and filed herein and upon the arguments and representations of counsel, held that the relief requested by the Petitioner was hereby DENIED." Vol. I, A.R. 116. The order continued:

> The Court held [at the May 1st, 2019 hearing] that the Petitioner was not entitled to have his conviction vacated, nor was he entitled to a new trial or other relief. In addition to the record set forth above, the Court cited Petitioner's confessions, including confessions to family members outside of police custody, sworn testimony by the Petitioner in the trials of co-defendant's [sic], and sworn testimony at the entry of his plea as basis for his decision.

Vol. I, A.R. 116. The Order continued, "[t]he Court held that based on the foregoing considerations, the newly discovered DNA results would not likely provide a different result at a new trial in light of the Petitioner's sworn testimony, guilty plea, and other incriminating statements and upon consideration that such evidence was not the basis of Petitioner's conviction." Vol. I, A.R. 117. The Court:

> also held that Petitioner's conviction is not a "manifest injustice" as contemplated by *State v. Olish*, 164 WV 712, 266 S.E.2nd 712 (W. Va. 1980) and there is no evidence that the multiple confessions of the Petitioner were "false confessions" in light of the fact that Petitioner first confessed to family members outside of police custody and that subsequent custodial and testimonial statements were largely consistent with Petitioner's initial voluntary, non-custodial confession.

Vol. I, A.R. 117. The circuit court's order further provided:

> In the case of *State v. Black*, 227 WV 297, 708 S.E.2nd 491 *W. Va. 2010), the defendant being one of the co-defendant's [sic] in the Petitioner's Indictment, the West Virginia Supreme Court of Appeals held that the refusal by the trial court

> to exclude the testimony of a forensic psychiatrist's expert testimony consisting of general testimony regarding false confessions was proper in that such testimony would be confusing to the jury and such testimony was unreliable. The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court and will not be reversed unless it is clearly wrong.

Vol. I, A.R. 117. The circuit court "declined to rule on Petitioner's Motion in Limine and Motion to Exclude Parole Statements in light of the rulings herein." Vol. I, A.R. 117. The circuit court also "declined Petitioner's Motion to Appoint a Special Prosecutor to investigate another suspect herein, in that it would be the duty of the Cabell County Prosecuting Attorney's Office to undertake and supervise such an investigation." Vol. I, A.R. 118. The circuit court "[a]ccordingly . . . ORDERED that Petitioner's Petition for a Writ of Habeas Corpus Ad Subjiciendum is hereby DENIED; that the Court held in abeyance any ruling on Petitioner's Motion in Limine/Motion to Exclude Parole Hearing Statements; and Petitioner's Motion to Appoint a Special Prosecutor to investigate another suspect is hereby DENIED." Vol. I, A.R. 118. The order was entered *nunc pro tunc* as of May 1, 2019. Vol. I, A.R. 118. It is from this Order that the Petitioner seeks appellate relief from this Court.

SUMMARY OF ARGUMENT

The Petitioner pled guilty to the second degree murder of Deanna Crawford. He did not maintain his innocence in that plea, even though he knew that such a procedure existed having invoked that procedure in the exact same case as to Brittany Wolfe. He testified to his participation in Ms. Crawford's murder under oath in the trial of the Barnett brothers as well as Justin Black.

The Petitioner now contends that he is entitled to relief under the five factor *State v. Frazier* newly discovered evidence test.[5] The Petitioner takes on a significant burden in this regard. *Acord*

[5] This Court reiterated the standard for granting a trial under the newly discovered evidence rule in the sole syllabus point in *State v. Frazier*, 162 W. Va. 935, 253 S.E.2d 534 (1979):

v. Colane Co., 228 W. Va. 291, 304, 719 S.E.2d 761, 774 (2011) (citing, *inter alia*, Syl., *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979)) ("A party seeking to have a judgment set aside based on newly discovered evidence has a significant burden."). This burden is enhanced because the Petitioner pled guilty and "[c]ourts are especially reluctant to overturn a conviction based on new evidence when the conviction stemmed from a guilty plea.'" *LaMarco v. United States*, 336 F. Supp. 3d 152, 172 (E.D.N.Y. 2018) (quoting *Jenkins v. United States*, Nos. 11-CR-0633(WHP), 13-CV-0195(WHP), 2013 WL 6869649, at *3 (S.D.N.Y. Dec. 31, 2013)). Because the Petitioner does not satisfy all five factors of the *Frazier* test, the circuit court did not abuse its discretion in denying the Petitioner relief. As such, the judgment of the circuit court denying the Petitioner habeas relief should be affirmed.

To the extent the Petitioner claims constitutional equal protection and due process violations, his claims are foreclosed by United States Supreme Court precedent. And, further, such claims are substantively meritless because there are distinguishing features between the Petitioner and his co-defendants such that they are not similarly situated.

"A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that 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) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And 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." Syllabus Point 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894).

Finally, to the extent the Petitioner assails the content of the circuit court proceedings and final order, taken together the circuit court reached a decision that survives the abuse of discretion standards that applies to the Petitioner's claims.

For the above reasons, the judgement of the circuit court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary in this case as the facts and legal arguments are adequately presented in the briefs and appendix record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

ARGUMENT

Standard of Review

This appeal arises from the circuit court's denial of the Petitioner's habeas corpus petition. This Court has held that:

> In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review 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 a de novo review. Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *Terry v. Ward*, 240 W. Va. 63, 807 S.E.2d 311 (2017).

Moreover, this Court has stated that "the decision to grant a new trial is within the discretion of the trial court." *State v. Satterfield*, 193 W. Va. 503, 517, 457 S.E.2d 440, 454 (1995).

Finally, the Petitioner wishes to withdraw his guilty plea post-sentencing. In such a circumstance, a withdrawal should only be granted to prevent a "manifest injustice." Syl. Pt. 2, *State v. Olish*, 164 W. Va. 712, 266 S.E.2d 134 (1980) ("Where the guilty plea is sought to be withdrawn by the defendant after sentence is imposed, the withdrawal should be granted only to avoid manifest injustice."). "After sentencing, a defendant who seeks to withdraw a guilty or no-

contest plea has the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct manifest injustice, or that the plea was not entered voluntarily and withdrawal of the plea is necessary to correct manifest injustice." 21 Am. Jur. 2d *Criminal Law* § 671. A decision by the circuit court to refuse a post-sentencing motion to withdraw a guilty plea is also reviewed only for abuse of discretion. *See State v. Byrd*, No. 16-0422, 2017 WL 2229984, at *2 (W. Va. May 22, 2017) (memorandum decision) ("In the case at bar, petitioner seeks to have his guilty plea set aside after sentencing. Based upon the record before this Court, we conclude that there was no abuse of discretion by the sentencing court in refusing to permit the withdrawal.").

"In discussing the application of the abuse of discretion standard, this Court has consistently stated that under such standard, 'we will not disturb a . . . court's decision unless the . . . court makes a clear error of judgment or exceeds the bound of permissible choices in the circumstances.'" *Amanda A. v. Kevin T.*, 232 W. Va. 237, 244–45, 751 S.E.2d 757, 764–65 (2013) (quoting *Wells v. Key Commc'ns, L.L.C.*, 226 W.Va. 547, 551, 703 S.E.2d 518, 522 (2010) (citation omitted)). In other words, "[i]n general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or 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). This is a heavy threshold for the Petitioner to meet. *See United States v. Welsh*, 879 F.3d 530, 536 (4th Cir. 2018) (citation omitted) ("Welsh's burden here is a heavy one, as a district court abuses its discretion only where it 'has acted arbitrarily or irrationally[,] . . . has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises.'"). Moreover, "[t]his Court has also invariably stated that '[u]nder abuse of

discretion review, we do not substitute our judgment for the circuit court's.'" *Amanda A.*, 232 W. Va. at 245, 751 S.E.2d at 765 (quoting *State v. Taylor*, 215 W.Va. 74, 83, 593 S.E.2d 645, 654 (2004) (Davis, J., dissenting) (citing *Burdette v. Maust Coal & Coke Corp.*, 159 W.Va. 335, 342, 222 S.E.2d 293, 297 (1976)).

An abuse of discretion standard is a highly deferential mode of review, *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 106, 459 S.E.2d 374, 383 (1995), and is not, therefore, appellant friendly. *State v. LaRock*, 196 W. Va. 294, 306, 470 S.E.2d 613, 625 (1996). The Petitioner has not demonstrated that the circuit court abused its discretion in denying the Petitioner relief. As such, the judgment of the circuit court denying the Petitioner relief should be affirmed.

A. The circuit court did not abuse its discretion in the manner it handled this case.

The Petitioner contends the circuit court abused its discretion by ignoring unrebutted facts and the law. Pet'r Br. at 18. The Petitioner errs in his contentions.

The Petitioner first contends that the circuit court did not read the Petitioner's habeas corpus petition memorandum of law, or joint supplements. Pet'r Br. at 18. Notwithstanding this omission by the circuit court, it nonetheless directed the Petitioner's counsel to "tell me what it is about then." Vol. I, A.R. 51. The circuit court gave the Petitioner the opportunity to set forth his case before the circuit court.

The Petitioner also contends that the circuit court admitted it failed to review crucial parts of the record. Pet'r Br. at 19. The circuit court did read the portions of the voluminous record that it considered necessary to make a ruling in the case. Vol. I, A.R. 33 ("[THE COURT:] I have spent the last week on this case. I can take you right in that room there and about this high are all the volumes of what has gone on in this case. Now, I admit to you I didn't read everything in that. I didn't think that I needed to."). Indeed, the circuit court was familiar with the Petitioner's petition

having stated that it knew about the pictures of the crime scene in the Petitioner's petition. Vol. I, A.R. 81.

Further, the Petitioner avers "the [circuit] court distinguished Dement from his co-defendants because he pleaded guilty, but the [circuit] court did not read the pleas and ruled differently where two of Dement's co-defendants also took pleas." Pet'r Br. at 19. However, the two codefendants who pled guilty in the Deanna Crawford murder (the Barnett brothers) entered *Alford/Kennedy* pleas. Vol. I, A.R. 36; Vol II, A.R. 979-980, 982-983. The circuit court recognized that the Barnetts always maintained their innocence. Vol. I, A.R. 37. This is in contradistinction to the Petitioner who did not enter an *Alford/Kennedy* plea to the Deanna Crawford murder, but did enter an *Alford/Kennedy* plea in the Brittany Mayo Wolfe case. Vol. II, A.R. 939, 941. The circuit court did not treat the Petitioner similarly to the Barnett brothers for the simple reason the Barnett brothers and the Petitioner were not similarly situated. Likewise, Justin Black never pled guilty. Again, the Petitioner was not similarly situated to Black.

Further, the Petitioner claims that the circuit court was unaware that the Petitioner recanted numerous times, including twice before his codefendants' trials. Pet'r Br. at 19. What the circuit court stated was that the Petitioner had never moved to retract his formal guilty plea (made under oath) after its occurrence on October 23, 2007. Vol. I, A.R. 86.

The Petitioner also claims that the circuit court disregarded unrebutted evidence that the Petitioner desired to introduce at the May 1, 2019 hearing. Pet'r Br. at 19. The circuit court did not disregard that testimony, but 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.

The Petitioner also contends that the circuit court erred in finding that the DNA evidence did not warrant a new trial for the Petitioner, in part, because "'such evidence was not the basis of

[Dement's] conviction.'" Pet'r Br. at 20 (quoting Vol. I, A.R. 2). Petitioner contends that the circuit court's reasoning "would mean that a petitioner could never prevail on a *habeas* petition based on new physical evidence of actual innocence, such as DNA." Pet'r Br. at 20. First, the Petitioner never asked the circuit court at the May 1, 2019 hearing to declare him actually innocent. Vol. I, A.R. 74 ("[MR. SWYGERT:] And, again, I am not asking you to make a decision as to whether or not Mr. Dement is guilty or not What I am asking you to do – [is] to apply the standard as to whether or not this could make a difference at trial and I believe that meets this standard."). Second, the Petitioner cites to *In Re Investigation of West Virginia State Police Crime Lab.*, 190 W. Va. 321, 338, 438 S.E.2d 501, 518 (1993) (*Zain I*). Pet'r Br. at 20. He contends that *Zain I* stands for the proposition that DNA test results are considered newly discovered evidence in habeas proceedings. Pet'r Br. at 20. However, *Zain I* stands for the proposition that "[a]s a general rule, courts have held that where newly discovered evidence indicates that an expert witness committed perjury or gave wilfully false testimony during the trial, a new trial will be awarded only where such evidence would probably produce a different result." *Zain I*, 190 W. Va. at 338, 438 S.E.2d at 518. The newly discovered evidence in *Zain I* was perjured testimony by a State expert witness. Finally, even if the circuit court erred in this ruling, the error was harmless in light of the Petitioner's guilty plea as discussed below.

B. The circuit court did not abuse its discretion in denying the Petitioner habeas relief on the grounds of newly discovered evidence.

The Petitioner in this Court and in the circuit court relied on the theory of newly discovered evidence. Pet'r Br. at 21; Vol. I, A.R. 51-52. This Court reiterated the standard for granting a trial under the newly discovered evidence rule in the sole syllabus point in *State v. Frazier*, 162 W. Va. 935, 253 S.E.2d 534 (1979):

> "A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that 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) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And 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." Syllabus Point 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894).

"A party seeking to have a judgment set aside based on newly discovered evidence has a significant burden." *Acord v. Colane Co.*, 228 W. Va. 291, 304, 719 S.E.2d 761, 774 (2011) (citing, *inter alia*, Syl., *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979)). "If any of the foregoing five essential requirements is not satisfied or complied with, a new trial will not be granted on the ground of newly discovered evidence." *State v. Crouch*, 191 W. Va. 272, 276, 445 S.E.2d 213, 217 (1994). In other words, "[a]ll five factors must be proven before a new trial will be awarded." *Anstey v. Ballard*, 237 W. Va. 411, 422, 787 S.E.2d 864, 875 (2016).

The newly discovered evidence rule imposes a high burden on the Petitioner. "The firmly established rule is that a new trial is rarely granted on the ground of after discovered evidence[.]" *State v. Farley*, 143 W. Va. 445, 456, 104 S.E.2d 265, 270 (1958). *See also State v. Spradley*, 140 W. Va. 314, 325, 84 S.E.2d 156, 162 (1954) ("The rule is well established that a new trial is rarely granted on the ground of after discovered evidence[.]"). "'A new trial on the ground of after-discovered evidence or newly discovered evidence is very seldom granted and the circumstances must be unusual or special.'" 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)).

Furthermore, the Petitioner pled guilty. "[C]ourts are especially reluctant to overturn a conviction based on new evidence when the conviction stemmed from a guilty plea.'" *LaMarco v. United States*, 336 F. Supp. 3d 152, 172 (E.D.N.Y. 2018) (quoting *Jenkins v. United States*, Nos. 11-CR-0633(WHP), 13-CV-0195(WHP), 2013 WL 6869649, at *3 (S.D.N.Y. Dec. 31, 2013)). *See also State v. Archuleta*, 449 P.3d 223, 234 (Utah Ctr. App. 2019) ("other jurisdictions appear reluctant to grant motions for new trial on the basis of newly discovered evidence following the entry of a guilty plea"). The Petitioner pled guilty to the second degree murder of Deanna Crawford.

Below, the Respondent agreed that the Petitioner had met the majority of the *Frazier* factors, but took exception to whether the Petitioner had satisfied factor four—whether the evidence must be such as ought to produce an opposite result at a second trial on the merits. Vol. I, A.R. 180. Regarding factor four, this Court has said, "'[n]ewly discovered evidence satisfies the [fourth] prong of the . . . test if it weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability. If the defendant is seeking to vacate a sentence, the [fourth] prong requires that the newly discovered evidence would probably yield a less severe sentence [or acquittal].'" *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)). Given the nature of guilty pleas, the Petitioner cannot meet this threshold.

"[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Blackledge v. Allison*, 431 U.S. 63, 71(1977). A plea bargain's advantage "can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality." *Id.* Because "courts must be able to rely on the defendant's statements made under oath during a properly

conducted Rule 11 plea colloquy[,]" *United States v. Lemaster*, 403 F.3d 216, 221 (4th Cir. 2005), "statements made at plea allocutions 'carry a strong presumption of verity' and 'constitute a formidable barrier' in any subsequent collateral proceeding." *Montgomery v. Ames*, 241 W. Va. 615, 626, 827 S.E.2d 403, 414 (2019) (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)).

During the guilty plea colloquy, the Petitioner stated, under oath, that he was guilty of second degree murder. Vol. II, A.R. 953. The circuit court then engaged in an exchange with the Petitioner about the Petitioner's role in the murder of Ms. Crawford:

> Q. Tell me what you did that would make me want to accept your plea of guilty.
>
> A. Well, first, I was out there and I participated in it. I dragged her out of the car.
>
> Q. You were out where?
>
> A. Out at the back side of Hickory Ridge.
>
> Q. And that's here in Cabell County, right?
>
> A. Yes, sir. That's correct.
>
> Q. Now, your voice sort of went down. You said you participated. Tell me exactly what your participation was.
>
> A. Like I said, I was out there. And then I dragged her out of the car like this and dragged her into the woods.
>
> Q. And what did you do then?
>
> A. I hit her in the face one time to shut her up and then I left.
>
> Q. Now, it says – was anyone with you?
>
> A. Yes, sir. That's correct.
>
> Q. Who?
>
> A. Nathaniel Barnett, Phillip Barnett, and Justin Black.

Q. You say you hit her one time; is that correct?

A. That's correct.

Q. No, that didn't kill her, did it?

A. No, mon (sic).

Q. What did she die of?

A. The strangulation.

Q. Who strangled her?

A. Well, I dragged her. But I wouldn't say I strangled her.

Q. Okay. Did you have her by the neck when you dragged her?

A. Yes, mon.

Q. Pardon?

A. Yes, mon. Yes, sir.

. . .

Q. Did you have her by the neck?

A. Yes.

Q. Okay. And you drug her by the neck. Was it in the crook of your arm or with your hand?

A. Right here (indicating).

Q. How far did you drag her?

A. Well, to the road – to the beginning of the woods.

Q. I don't know how far that is. About how much time?

A. About how much time? Maybe a minute, two.

Q. Was she breathing after you dragged her to the edge of the woods?

A. Yes, sir.

Q. So you're saying you really participated in –

A. Yes.

Q. -- the killing, but maybe – did you do anything to her after you dragged her to the edge of the woods?

A. No, sir.

Q. But you pulled her out of the car against her will, is that correct?

A. That's correct.

Q. Why?

A. What?

Q. Why?

MR. BRYSON: [defense counsel]: He said why.

A. Oh, I don't know, mon. I was just going along with the flow.

Vol. II, A.R. 953-956.

The State then proffered the following:

MR. CHILES [Prosecuting Attorney]: Yes, Your Honor. The State would be able to prove at trial based on Mr. Dement's statements to the police, as well as statements to others – and other witnesses, that he, the Barnetts – both Barnetts and Justin Black all left a party at Justin Black's house with Deanna Crawford in the car.

That they went to this location on Hickory Ridge. That Justin Black was driving. He pulled over and stopped the car at which time Phillip Barnett who was sitting in the back seat directly behind Ms. Crawford punched her in the left side of the face – leaned forward over the seat and punched her in the left side of the face.

That everyone in the car then started yelling let's get her, things like that. That all the men exited the car, went around to the passenger's side door, and that Mr. Dement pulled Ms. Crawford out the door, drug her down the hill hitting her. That others were hitting her, beating her, kicking her. And that as a result, she ended up being strangled to death down this hill.

> We do not necessarily – Mr. Dement does admit dragging her – and admitted to the police dragging her by the neck. But he has always maintained that she was alive. After that, he's also said that he heard her begging, "Please don't kill me," when the other three men were still down there with her. And that she repeatedly said, "Please don't kill me." And then the three others came running up the hill, got in the car and left. He then went down to check on her body and she was dead.
>
> And we feel that he was certainly present aiding and abetting in this manner by dragging her out of the vehicle and hitting her and participating as he admitted.

Vol. II, A.R. 956-958.

The Petitioner agreed the State would have sufficient evidence to show what Mr. Chiles had related. Vol. II. A.R. 958. The Petitioner pled guilty to second degree murder of Ms. Crawford and the malicious wounding of Ms. Wolfe. Vol. II, A.R. 963. The circuit court accepted the petitioner's guilty pleas. Vol. II, A.R. 965. The circuit court also concluded that the Petitioner was not under the influence of any alcohol, drugs, stimulants, or depressants at the time of the plea. Vol. II, A.R. 966.

Furthermore, while the Petitioner may have made a number of contradictory statements outside of court proceedings, in every statement that the Petitioner made in a criminal proceeding under oath (the trials of the Barnett brothers and Justin Black), the Petitioner implicated himself and the other co-defendants in Deanna Crawford's murder. The strong evidence that the Petitioner provided at his guilty plea and the co-defendant's trials supported the decision of the circuit court that the Petitioner was not entitled to withdraw his guilty plea since no manifest injustice would occur by not allowing the Petitioner to withdraw his guilty plea. Vol. I, A.R. 2. Indeed, the circuit court's judgment is particularly strong as the circuit court was well aware of the dynamics accompanying trials, having been a circuit court judge for forty-two years, Vol. I, A.R. 25, 28, and having tried six hundred jury trials in criminal cases. Vol. I, A.R. 28.

C. There were significant distinctions between the Petitioner and his co-defendants so that the circuit court did not abuse its discretion in ruling against the Petitioner.

The Petitioner contends that the circuit court abused its discretion in treating the Petitioner differently from his co-defendants. Pet'r Br. at 32. The circuit court did not abuse its discretion.

The Petitioner first contends that the State implicitly acknowledged the codefendants deserved relief because it did not appeal the circuit court order granting them relief. Pet'r Br. at 32. This is a non-sequitur because there are many factors other than the chance of success that focus a government decision as to whether to appeal or not. *See, e.g., United States v. Mendoza,* 464 U.S. 154, 161 (1984); *Milton S. Kronheim & Co. v. D.C.*, 91 F.3d 193, 205 (D.C. Cir. 1996) (Silberman, J., concurring).

Furthermore, to the extent the Petitioner is raising some type of constitutional due process or equal protection argument, Pet'r Br. at 36, such arguments should also fail. First, the United States Supreme Court has already foreclosed the Petitioner's argument when it reiterated, "[w]e have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions * * * (or) immunity from judicial error * * *.'" *Beck v. Washington*, 369 U.S. 541, 554–55 (1962) (quoting *Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee*, 252 U.S. 100, 106 (1920)). Second, the Petitioner's equal protection argument is substantively meritless as well. Equal protection prohibits the government from treating similarly situated persons differently. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (holding that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike"). However, "'[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). Thus, "[d]ifferent treatment of dissimilarly situated persons does not violate the Equal Protection Clause." *Boyd v. Browner*, 897

F. Supp. 590, 594 (D.D.C. 1995), *aff'd*, 107 F.3d 922 (D.C. Cir. 1996). Because the Petitioner is dissimilarly situated from his co-defendants because he pled guilty, the circuit court did not tread upon equal protection in denying the Petitioner relief.

Because Equal Protection ""keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike[,]" *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992), where a party claims an equal protection violation, the party complaining of the disparate treatment must show that he or she is in all material respects identical to the allegedly better treated party. *See, e.g., LaBella Winnetka, Inc. v. Village of Winnetka*, 628 F.3d 937, 942 (7th Cir. 2010) ("To be considered 'similarly situated,' a plaintiff and his comparators (those alleged to have been treated more favorably) must be identical or directly comparable in all material respects."). The Petitioner entered a plea of guilty to the second degree murder of Deanna Crawford; the Petitioner did not enter an *Alford/Kennedy* plea in Ms. Crawford's death—a procedure he knew existed because he entered such an *Alford/Kennedy* plea to the malicious wounding of Brittany Wolfe. This distinguishes the Petitioner from his co-defendants as Justin Black never pled guilty to any offense and the Barnett brothers pled guilty under *Alford/Kennedy* pleas (after their convictions had been reversed by this Court), which allowed them to maintain their innocence. Vol. I, A.R. 36-37. Thus, the Petitioner is not similarly situated to his co-defendants and there can be no serious claim of an equal protection violation.[6] Consequently, the judgment of the circuit court denying the Petitioner habeas relief should be affirmed.

---

[6]Because the judgment of the circuit court meets with equal protection standards, *a fortiori* it also meets with due process standards. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n.12 (1981) ("From our conclusion under equal protection, however, it follows a fortiori that the Act does not violate the Fourteenth Amendment's Due Process Clause.").

D. The circuit court's order is sufficient to withstand appellate scrutiny.

The Petitioner complains the circuit court's order is insufficient. Pet'r Br. at 37. While the circuit court's order is sparse, it is sufficient to provide this Court with a basis to enter an appellate order affirming the circuit court's judgment. *See Jeffers v. Terry*, No. 17-0490, 2018 WL 1444292, at *2 (W. Va. Mar. 23, 2018) (memorandum decision).

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Cabell County should be affirmed.

Respectfully submitted,

KAREN PSZCZOLKOWSKI, Superintendent,
Northern Regional Correctional Facility,

Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

SCOTT E. JOHNSON
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar No. 6335
Office of the Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Tel: (304) 558-5830
Fax: (304) 558-5833
Email: Scott.E.Johnson@wvago.gov

CERTIFICATE OF SERVICE

I, Scott E. Johnson, Assistant Attorney General and Counsel for the Respondent, do hereby certify that I served the foregoing Respondent's Brief upon the Petitioner's counsel on this 21st day of January, 2020, by depositing a true and correct copy thereof in the United States Mail, first class postage prepaid, addressed as follows:

Gregory Swygert, Esquire
CENTER ON WRONGFUL CONVICTIONS
Northwestern Pritzker School of Law
375 E. Chicago Ave.
Chicago, IL 60611

SCOTT E. JOHNSON
ASSISTANT ATTORNEY GENERAL