

14-0146

IN THE CIRCUIT COURT OF CALHOUN COUNTY, WEST VIRGINIA

RICHARD LEE HUNT, JR.,

Petitioner,

vs.

//

Habeas Corpus Case No. 06-C-22
(Judge Thomas C. Evans, III)

COMMISSIONER, West Virginia Division
Of Corrections, DAVID BALLARD, Warden,
Mt. Olive Correctional Complex,

Respondents.

**JUDGMENT ORDER GRANTING PETITION AND AMENDED PETITION
FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM**

This is a proceeding upon a Petition for Writ of Habeas Corpus filed September 27, 2006, by the Richard Lee Hunt, Jr., *pro se*. His appointed counsel, G. Ernest Skaggs, filed an "Amended Petition For A Writ of Habeas Corpus Ad Subjuciendum" on May 12, 2008. The State filed a Response to the Writ of Habeas Corpus on May 29, 2008, denying that Petitioner was entitled to any relief.

After the appointment of counsel, Mr. Hunt further prepared with the assistance of his attorney and filed an "Checklist of Grounds For Post-Conviction Habeas Corpus Relief" (known as the *Losh* list.) Therein, the Petitioner waived and relinquished all claim for habeas relief contained in the list, except for the following:

- A. Trial Court lacked jurisdiction;
- B. Mental competency at time of crime;
- C. Mental competency at time of trial even if not asserted;
- D. Incapacity to stand trial due to drug use;
- E. Consecutive sentences for same transaction;
- F. Suppression of helpful evidence by prosecutor;

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- G. State's knowing use of perjured testimony;
- H. Ineffective assistance of counsel;
- I. Double jeopardy;
- J. Improper venue;
- K. Refusal of continuance;
- L. Refusal to turn over witness notes after witness has testified;
- M. Claim of incompetence at time of offense, as opposed to trial;
- N. Constitutional errors in evidentiary rulings;
- O. Instructions to the jury;
- P. Claims of prejudicial statements by trial judge;
- Q. Claims of prejudicial statements by prosecutors;
- R. Sufficiency of evidence;
- S. More severe sentence than expected;
- T. Excessive sentence.

The grounds for relief asserted by the petitioner, pro se, in the petition for the writ of habeas corpus are:

- A. The trial court permitted the introduction of opinion testimony that the petitioner had been diagnosed as a pedophile;
- B. The trial court committed error by preventing the admission of evidence relevant to his defense;
- C. The trial court allowed evidence of a prior conviction and denied the petitioner's motion for acquittal;
- D. There was insufficient evidence to sustain a conviction.

The grounds for relief asserted by the petitioner, through his attorney G. Ernest Skaggs, in the Amended Petition for A Writ of Habeas Corpus Ad Subjuendum are as follows:

A. Defendant's trial counsel was ineffective because he failed to obtain a psychiatric and psychological evaluation on the petitioner;

B. The venue for the case was improper and therefore the Circuit Court of Calhoun County lacked jurisdiction;

C. The petitioner received a more severe sentence than he expected;

D. The curative jury instruction given by the Court was insufficient to overcome the prejudice created by the introduction of evidence of the petitioner's prior sexual abuse conviction;

E. The petitioner believes that he was mentally incompetent at the time of the alleged crimes, and that he was mentally incompetent at the time of trial, even though it was not previously asserted;

F. The petitioner further asserts that he was incapable of standing trial due to drug abuse;

G. The petitioner believes that to be charged and convicted of both Sexual Abuse in the First Degree and Sexual Abuse by a Custodian constitutes double jeopardy;

H. The petitioner believes that there were prejudicial statements by both the trial judge and by the prosecution;

I. The petitioner believes that he was refused a continuance until the next term of court and that this refusal prejudiced his case;

J. The petitioner believes that the trial court made Constitutional errors in evidentiary rulings, denying him due process and fair trial;

K. The petitioner believes that there was insufficient evidence to convict him on all counts.

On September 21, 2009, an evidentiary hearing was conducted upon the foregoing, during which the Petitioner and Respondent were afforded the opportunity to present evidence and argument. The petitioner submitted the transcripts of David Karickhoff and Tony Morgan as evidence. Based upon the evidence submitted and a review of the court file, the Court makes the following FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER.

Introduction

The petitioner was indicted by the Calhoun County, W. Va., Grand Jury on May 4, 1999. The indictment charges four counts as follows:

Counts 1 and 2 charge that Richard Lee Hunt, Jr. on or between the 1st day of September, 1998, and the 31st day of December, 1998, in Calhoun County, West Virginia, did commit the offense of Sexual Abuse in the First Degree, in that Richard Lee Hunt, Jr. did unlawfully and feloniously subject another person, namely Andrew Justin King, a male person and not his wife, to sexual contact by intentionally touching the male sex organ of Richard Lee Hunt, Jr. on the buttocks of Andrew Justin King for the purpose of gratifying the sexual desire of Richard Lee Hunt, Jr., without the consent of Andrew Justin King, he, the said Andrew Justin King, being then and there incapable of consent for the reason that he was then and there eleven years old and he, the said Richard Lee Hunt, Jr., was over the age of 14 years, in violation of W.Va. Code Sex.61-8B-7, and against the peace and dignity of the state.

Counts 3 and 4 charge: that Richard Lee Hunt, Jr., on or between the 1st day of September, 1998, and the 31st day of December, 1998, in Calhoun County, West Virginia, did commit the offense of Sexual Abuse by a Custodian, in that Richard Lee Hunt, Jr., did unlawfully, intentionally, and feloniously, while being a custodian of a child under his care, custody or control, namely Andrew Justin King, did engage in sexual contact with Andrew Justin King, an infant, not his wife, under the age of 18 years and at least four years younger than Richard Lee Hunt, Jr., by contact between the buttocks of Andrew Justin King and the male sex organ of Richard Lee Hunt, Jr., for the purpose of gratifying the sexual desire of Richard Lee Hunt, Jr., in violation of WV Code Sec.61-8D-5(a), and against the peace and dignity of the state.

The petitioner, Richard Lee Hunt, Jr. retained attorney David Karickhoff as counsel. The petitioner filed a Motion in Limine, attempting to exclude reference to, comments on, or examination about the petitioner's prior conviction for Sexual Abuse in the First Degree, in which the prior victim was a female child. The Court denied the petitioner's Motion in Limine and found that evidence of the petitioner's prior conviction for sexual abuse was therefore admissible. The petitioner also filed a Motion to Suppress statements that he gave to police. After hearing arguments of counsel, the Court denied the petitioner's Motion to Suppress.

A jury trial was commenced on May 16, 2000, in Calhoun County Circuit Court, at Grantsville, W. Va. The State of West Virginia appeared by counsel, Tony M. Morgan, Prosecuting Attorney of Calhoun County, West Virginia. Richard Lee Hunt, Jr. appeared in person and by counsel, David Karickhoff. The trial lasted three days, and the jury began deliberating on May 18, 2000. After a brief deliberation, lasting around thirty minutes, the jury found the petitioner, Richard Lee Hunt, Jr., guilty of all four counts—two counts of Sexual Abuse in the First Degree, and two counts of Sexual Abuse by a Custodian.

On July 28, 2000, the Court imposed the following sentence on Richard Lee Hunt, Jr.:

[T]hat the defendant be committed to the custody of the Commissioner of the West Virginia Department of Corrections for placement at the West Virginia Penitentiary for an indeterminate period of not less than one (1) nor more than five (5) years for the offense of Sexual Abuse in the First Degree, a felony, as charged in Count One of the Indictment in Criminal Case No. 99-F-5; an indeterminate period of not less than one (1) year nor more than five (5) years for the offense of Sexual Abuse in the First Degree, a felony, as charged in Count Two of the Indictment in Criminal Case No. 99-F-5; and an indeterminate period of not less than ten (10) years nor more than twenty (20) years for the offense of Sexual Abuse by a Custodian, a felony as charged in Count Three of the Indictment in Criminal Case No. 99-F-5. Whereupon, the Court, upon findings from an Information in the within case pursuant to Chapter 61, Article 11, Section 18 of the West Virginia Code, sentenced the defendant to an indeterminate period of not less than ten (10) years nor more than twenty five (25) years for the offense of Sexual Abuse by a Custodian, a felony, as charged in Count Four of the Indictment in Criminal Case No. 99-F-5. Thereupon, the Court ORDERED that each sentence run consecutively with the defendant to receive credit for time served herein...

(July 28, 2000 Order).

Richard Lee Hunt, Jr., filed a Notice of Intent to Appeal the jury verdict on August 28, 2000. The West Virginia Supreme Court of Appeals refused the petition for appeal in an order filed March 29, 2001. Subsequently, Richard Lee Hunt, Jr. filed a Motion for Reduction of Sentence on April 2, 2001. This motion was denied by order entered in the underlying case on or about February 4, 2010.

Findings of Fact and Conclusions of Law

The Court will first address the claims for Habeas Corpus relief that were asserted by the petitioner, Richard Lee Hunt, Jr. in the Amended Petition for A writ of Habeas Corpus Ad Subjucendum, filed by counsel G. Ernest Skaggs.

Ground One

The first ground asserted in the Amended Petition for A Writ of Habeas Corpus Ad Subjucendum is that the Defendant's trial counsel was ineffective, because he failed to obtain a psychiatric and psychological evaluation on the petitioner. The West Virginia Supreme Court of Appeals has stated: "

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Syl. pt. 10, *State v. Chapman*, 210 W.Va. 292, 557 S.E.2d 346.

Further, the court has also stated that:

In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Syl. pt. 11, *Id.*

Applying the standards set out by the West Virginia Supreme Court of Appeals for assessing a claim of ineffective assistance of counsel, this Court cannot find that the Defendant's trial counsel acted outside the range of professionally competent assistance. According to trial counsel's testimony, Mr. Hunt never did anything that would cause counsel to question Mr. Hunt's competency. *Evidentiary Deposition Testimony of David Karickhoff, Esquire*, Sheet 9, Page 33. The petitioner has not produced any evidence that would suggest that Mr. Karickhoff should have reason to question his mental competency. Because there was no evidence that Mr. Hunt's competency might have been at issue, it would be

reasonable for trial counsel to refrain from seeking a psychiatric and psychological evaluation to assess competency to stand trial. Accordingly, the Court DENIES habeas corpus relief on this ground.

Ground Two

The second ground asserted in the Amended Petition for relief is that the venue for the case was improper and therefore the Circuit Court of Calhoun County lacked jurisdiction. However, the petitioner has not presented any evidence that the Court lacked jurisdiction to hear the case. At the petitioner's criminal trial, the victim testified that the abuse occurred on gravel roads. *Trial Transcript*, page 348.

Later in the trial, the state produced Wayne Thompson, a witness, who had worked the identical paper route to the petitioner. Mr. Thompson testified that the secondary, gravel roads, that are part of the paper route, are all located in Calhoun County, West Virginia. *Trial Transcript*, page 472. The Court finds that this was sufficient to establish by a preponderance of the evidence that Calhoun County Circuit Court did have jurisdiction, since the act occurred in Calhoun County, West Virginia. Accordingly, lack of jurisdiction as a ground for habeas corpus relief is DENIED.¹

Ground Three

The next ground asserted for relief is that the petitioner received a more severe sentence than he expected. The petitioner has presented no evidence that he received a more severe sentence than expected. The deposition testimony of trial counsel Karickhoff was that the sentence was within the statutory guidelines and that he had explained, to the

¹ "Venue" for an offense is not an essential element of the charge of crime and, thus, need only be proved by a preponderance of the evidence. *E.g., State v. Sprague*, 214 W.Va. 471, 590 S.E.2d 664 (2003).

petitioner, that there was a possibility that all sentences could be run consecutively. *Evidentiary Deposition Testimony of David Karickhoff, Esq. Sheet 6, Pages 21-2.* The petitioner has presented no evidence that his sentence was more severe than he expected, so relief on this ground is DENIED.

Ground Four

The fourth ground asserted is that the curative jury instruction given by the Court, pursuant to WVRE 404(b), was insufficient to overcome the prejudice created by the introduction of evidence of the petitioner's prior sexual abuse conviction.

The West Virginia Supreme Court has outlined when evidence of collateral acts or crimes may be admitted in sexual abuse cases:

Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition toward children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment...

Syl. pt. 2, *State v. McIntosh*, 207 W.Va. 561, 534 S.E.2d 757 (2000). The West Virginia Supreme Court of Appeals has emphasized the limited use of 404(b) evidence:

When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.

Syl. pt. 3, *Id.* The West Virginia Supreme Court has also stated that when 404(b) evidence is introduced, the defendant is protected from undue prejudice if the following requirements are met:

It is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction.

Syl. pt. 5, *Id.*

The petitioner argues that the curative instruction given to the jury was insufficient.

Following is the text of the curative instruction given to the jury at the time that 404(b) evidence was admitted at the trial:

Members of the jury, you will hear evidence here alleging conduct of other acts of the defendant's which are not charged in the indictment. You're instructed that such evidence is not admitted as proof of the defendant's guilt on the present charge. This evidence is admitted for the limited purpose only is admitted for a limited purpose only [sic] and it may be considered by you only in deciding whether a given issue or element relevant to the present charge has been proven. In this instance, the evidence of sexual abuse may be considered only for the purpose of showing that the defendant had a lustful disposition to children generally or a lustful disposition to specific other children. You may not use this evidence in consideration of whether the state has established a crime of sexual abuse charged in the indictment. In addition, such evidence is not relevant to any other matters such as the character of the defendant or whether the defendant is a bad person. This evidence may not be considered in that regard since the defendant's character is not an issue. In addition, it is not proper for the state to prove a criminal case by evidence that the defendant may have committed other acts or may be a bad person.

The above instruction does tell the jury to limit their consideration of 404(b) evidence in that such evidence was only to be considered toward determining whether the petitioner had a lustful disposition towards children. Because this use of 404(b) evidence is allowed under the law of this State, and because the jury was told that their consideration of the evidence

should be limited as such, the Court finds there was no error with the curative jury instruction. Accordingly, the Court DENIES habeas corpus relief on this ground.

Ground Five

The fifth ground for relief, asserted is that the petitioner believes that he was mentally incompetent at the time of the alleged crimes, and that he was mentally incompetent at the time of trial, even though it was not previously asserted.

The petitioner has presented no evidence that he was either mentally incompetent at the time of the alleged crimes, or that he was mentally incompetent at the time of the trial. The deposition testimony of Attorney Karickhoff was that the petitioner never did anything to cause him to question the petitioner's competency to stand trial or his criminal responsibility in relation to the crimes charged. *Evidentiary Deposition Testimony of David Karickhoff, Esquire, Sheet 2, Pages 5-6.* Because the petitioner has presented no evidence that he was either mentally incompetent at the time of the alleged crimes, or that he was mentally incompetent at the time of the trial, relief on this ground must be DENIED.

Ground Six

The sixth ground asserted is that the petitioner asserts that he was incapable of standing trial due to drug abuse. Mr. Hunt mentions a psychiatric evaluation by Dr. Ralph S. Smith dated July 20, 2000, that gave a diagnosis of Polysubstance Abuse. However, in the deposition testimony of Attorney Karickhoff, he testified that he recalled that Mr. Hunt liked to smoke marijuana, but he never felt that Mr. Hunt was incapable of standing trial due to drug abuse. The Court finds that the petitioner has failed to present any evidence of drug abuse amounting to a deleterious impact on Petitioner's competency to stand trial and hereby DENIES relief on this ground.

Ground Seven

The seventh ground asserted for relief is that the petitioner believes that to be charged and convicted of both Sexual Abuse in the First Degree and Sexual Abuse by a Custodian constitutes double jeopardy. However, *W.Va. Code Sec. 61-8D-5*, in effect on May 4, 1999, when Mr. Hunt was indicted states:

(a) In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection, as follows: If any parent, guardian or custodian of a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct, or the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct, then such parent, guardian or custodian shall be guilty of a felony and, upon conviction thereof, shall be imprisoned in the penitentiary not less than ten nor more than twenty years, or fined not less than five hundred nor more than five thousand dollars and imprisoned in the penitentiary not less than ten years nor more than twenty years.

1998 West Virginia Laws Ch. 117 (S.B. 148).

Since the Code specifically provides that a violation of *W. Va. Code 61-8D-5* constitutes a separate and distinct offense, there was no double jeopardy violation when Mr. Hunt was convicted of both Sexual Abuse in the First Degree, and Sexual Abuse by a Custodian. Accordingly, habeas corpus relief is DENIED on this ground.²

² See *State v. George W.H.*, 439 S.E.2d 423, W.Va., 1993, holding that sentencing of a defendant for incest and for sexual abuse by custodian, both involving sexual abuse of defendant's daughter, did not violate principles of double jeopardy, because the legislature specifically directed that sexual abuse by a custodian be considered separate from other offenses in code

Ground Eight

Petitioner Hunt also contends that he was denied a fair trial and the due process of the law regarding evidentiary rulings made by the trial court. He also alleges that he was denied a fair trial by reason of the prosecutor's inflammatory opening statement to the Jury. More specifically, the petitioner alleges that when the prosecutor referred to him as a pedophile and a predator in his opening statement, it was an unfair, prejudicial statement, and deprived him of a fair trial. The record reveals that in the opening statement, the prosecutor stated:

This defendant, Richard Hunt, is a pedophile [sic]. He is a predator. He has a lustful disposition toward young children... (*Record, at p. 318*)

....

While the defendant was in prison, consistent with being a pedophile, he participated in only the minimum amount of therapy and treatment. (*Id., at 319*)

....

He (victim) had to see a therapist, and he has seen one of the finest: Dr. Mike Carter. He's an expert. He counsels and he treats sexually abused and sexually assaulted children. He's seen A. J. (victim) several times. And he'll tell you A. J. displays those symptoms of a sexually abused child. *He'll tell you in his opinion A. J. has been sexually abused.* (emphasis added)(*Record, at p. 319-321*)

This argument was objected to by Petitioner's trial counsel, who moved for a mistrial which was not granted.

Closely allied with this ground is the contention that the trial court made Constitutional errors in evidentiary rulings, denying Petitioner due process and fair trial. At the trial, the state called an expert witness, Lonnie Kisbaugh, a Division of Corrections counselor and therapist who worked with the Petitioner while he was incarcerated at Denmark Correctional facility. Kisbaugh testified that Mr. Hunt had been previously diagnosed as being a pedophile. *Record, page 462.* This evidence was objected to by

Petitioner's attorney, who argued that that such testimony was inadmissible because it was character evidence prohibited by WVREV 404. *Record*, p. 315. As a further ground, Petitioner's attorney argued that introduction of such testimony was cumulative and prejudicial, because the court had already ruled that evidence of Petitioner's prior sexual abuse conviction was admissible as evidence of a lustful disposition towards children. *Id.*

The state's witness, Kisbaugh, was qualified as an expert "in the field of counseling and treatment of sex offenders, both predators and pedophiles." *Record*, p. 455.

Kisbaugh defined for the Jury the terms *pedophile* and *predator*. He defined pedophile as

"someone who experiences recurrent sexually arousing urges or sexually arousing fantasies of six months duration at least involving sexual activity with a young child, and the person acts on that fantasy or that thought and/or suffers marked distress as a result of those thoughts or urges." (*Record*, pp. 450-451)

When asked about the success of treatment for pedophilia, Kisbaugh testified that "[t]here is no clinical cure for pedophilia." (*Id.*, at 451)

Kisbaugh further defined the term predator as follows:

"A predator is one who is a chronic offender. He seeks and even in the prison setting they seek more victims and we do have some of those in the prison and they can create havoc for you inside a prison; and you can imagine what they can do out in society when there are absolutely no controls on them." (*Id.*, at p. 451)

The prosecutor relied significantly on Kisbaugh's testimony that Division of Corrections records indicated that Petitioner carried a "diagnostic impression" of being a pedophile. He emphasized this evidence in his closing:

"Lonnie Kisbaugh. He wrote - - when this man was released from prison he put on there minimal - - minimal counseling and he told you it was a red flag. He wanted people to know. He was worried. Why was he worried? Because there is a diagnostic impression on file at prison that this man is a pedophile." (*Record*, at p. 764)

Under W. Va. law, evidentiary rulings respecting the admission of evidence are cognizable in habeas corpus only to the extent they violate specific constitutional provisions or are so egregious as to render the entire trial fundamentally unfair and thereby violate due process under the Fourteenth Amendment. *Hatcher v. McBride*, 221 W.Va. 5, 650 S.E.2d 104 (2006).

Regarding the ruling of the trial court that allowed evidence in the State's case in chief that Petitioner carried a diagnostic impression of being a *pedophile*, it was argued that this evidence showed motive and intent and, therefore, was admissible under Rule 404(b). However, this rule relates to the admissibility of "other crimes, wrongs or acts." To be diagnosed as a "pedophile" is not evidence of a prior bad act or crime but evidence of the character (propensity) of the Petitioner to engage in particular conduct.

To be clear, this evidence was offered to show that Petitioner is a pedophile and that he, therefore, in relation to this victim, acted in conformity with the diagnosis.

This evidence is plainly inadmissible by reason of WVREV 404(a), which provides:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion . . . "

While the Supreme Court of Appeals of West Virginia has not decided whether the state may offer that a defendant is a pedophile in a case alleging child molestation, other courts in the United States have. Several states have rejected testimony or evidence showing that a defendant is a pedophile, because it is not evidence of a prior bad act or crime. *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998); *Turtle v. State*, 600 So.2d 1214, 1221 (Fla. Dist. Ct. App. 1992); *Francis v. State*, 512 So.2d 280, 282 (Fla. Dist. Cot.

App. 1987)(error in admitting expert testimony that defendant has a “personality characteristic of being attracted to children”); *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988) (error in admitting expert testimony that defendant had character traits consistent with those of known child abusers); *People v. Bagarozzy*, 132 A.D.2d 225, 522 N.Y.S.2d 848, 853 (1987) (error in admitting evidence seized from defendant’s apartment including NAMBLA newsletters, photographs, and films because “the true purpose behind the introduction of this evidence was to expose defendant’s sexual preferences and attitudes in order to demonstrate a propensity to commit the crimes charged”); *Smith*, 617 N.E.2d at 1160 (error in admitting expert testimony on general pedophile characteristics); *Brewington v. State*, 802 S.W.2d 691, 692 (Tex.Crim.App.1991) (en banc) (reversing conviction because “it is clear from the record that the prosecutor sought to introduce testimony that appellant was a fixated pedophile solely to prove appellant’s propensity to molest children and that he acted in conformity therewith when he committed the charged offense”).

This evidence was also highly prejudicial to the Petitioner and not necessary for the legitimate purposes of the State. The State had already proven Petitioner’s prior conviction for sexual abuse of a child; the fact that Petitioner was imprisoned for the prior offense; and, the State had already proven that the Petitioner was required to register as a sex offender, and was on parole, a condition of which was that he not be in contact with minors absent supervision.

Proving that Petitioner is a pedophile -- on top of the Rule 404(b) evidence of a prior sexual abuse of a child conviction -- is prejudicial, because it highly increases the risk that Petitioner was convicted based not on whether he sexually abused the victim as charged but

because he is a pedophile, a proven child molester and a registered sex offender.³ The error of the trial court in allowing this evidence -- and in allowing prejudicial and inflammatory argument by the prosecutor stating that Petitioner is a pedophile and a predator -- must also be viewed from the perspective that the evidence in the case largely amounted to the uncorroborated testimony of the alleged victim versus the testimony of Petitioner.

The court finds that the rulings of the trial court in this regard were so egregious that Petitioner was denied a fair trial and the due process of the law under the Fourteenth Amendment to the United States Constitution and the Constitution of the State of West Virginia. See *Hatcher v. McBride*, 221 W.Va. 5, 650 S.E.2d 104 (2006). Petitioner is accordingly entitled to a vacation of his convictions and sentence, and he is entitled to a new trial of the Indictment.

Ground Nine

The ninth ground for relief, asserted by the petitioner, is that the petitioner believes that the prosecution, on at least one occasion, failed to turn over witness notes after the witness had testified. In his deposition testimony, Attorney Karickhoff testified that he could not recall any problem with having statements turned over by the prosecution after a witness's testimony. Mr. Karickhoff stated "I was satisfied with discovery. I don't recall

³ The trial court admitted into evidence, over objection, documents offered by the State proving that Petitioner Hunt is required to register as a sex offender pursuant to the Sex Offender Registration Act. (Record, p. 444). In this judge's opinion, this evidence was not admissible. Its purpose was to prove propensity of Petitioner Hunt to reoffend, similar to evidence of the pedophile diagnosis, and it is inadmissible character evidence pursuant to WVREV 404(a).

having a problem with discovery." *Evidentiary Deposition Testimony of David Karickhoff, Esquire Sheet 3, Page 12.*

Because the petitioner has not presented any evidence that the prosecution failed to turn over witness notes after the witness testified, the Court hereby DENIES relief on that ground.

Ground Ten

The tenth ground for relief, asserted by the petitioner is that the petitioner believes that he was refused a continuance until the next term of court and that this refusal prejudiced his case. Petitioner stated "[i]n January of 2000 counsel did request that the case be continued until the next term of court. However, it was determined that the case could not be tried until May, and the trial did not actually begin until May 16, 2000." The petitioner has presented no evidence that he was ever prejudiced in this regard. Accordingly, the Court DENIES habeas corpus relief on this ground.

JUDGMENT ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is therefore ORDERED that the Petition for Writ of Habeas Corpus and Amended Petition For A Writ of Habeas Corpus Ad Subjucendum, be and the same are hereby granted, on the ground that Petitioner was denied his right to a fair trial and due process.

It is further ORDERED that the Petitioner's convictions and sentence in Case No. 99-F-5 of this court are hereby rescinded and vacated.

The ruling of this court is stayed for a period of 45 days to allow the filing of a petition for appeal to the Supreme Court of Appeals of West Virginia.

This is a final order. The Clerk shall dismiss this civil action from the active docket.

The Clerk shall forward attested copies of this order to 1) the Prosecuting Attorney; 2) Ernest Skaggs, Esq., habeas counsel; and, 3) Richard Lee Hunt, Jr., the Petitioner.

All of which is ORDERED, accordingly.

ENTER: Jan. 21, 2014



Thomas C. Evans, III, Circuit Judge
Fifth Judicial Circuit
State of West Virginia

CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for the petitioner, do hereby verify that I have served a true copy of the *NOTICE OF APPEAL* upon counsel for the respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 19th day of February, 2014, addressed as follows:

To: Ernest Skaggs, Esquire
102 3rd Avenue
Fayetteville, WV 25840


LAURA YOUNG