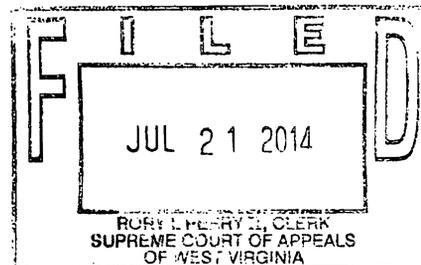

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0146

DAVID BALLARD, Warden,
Mount Olive Correctional Complex, and
JIM RUBENSTEIN, Commissioner,
West Virginia Division of Corrections,
Respondents below,
Petitioners,



v.

RICHARD LEE HUNT,
Petitioner below,
Respondent.

PETITIONERS' BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

SHANNON FREDERICK KISER
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
State Bar No. 12286
Email: Shannon.F.Kiser@wvago.gov
Counsel for Petitioners

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ASSIGNMENT OF ERROR

- A. The State is assigning as its sole error that the Circuit Court of Calhoun County abused its discretion when determining that the prosecutor's statement regarding pedophilia, the expert testimony referencing the same, and the use of the testimony in closing argument were so egregious as to require vacation of Respondent's conviction.

I.

STATEMENT OF THE CASE

On May 4, 1999, the Respondent, Richard Lee Hunt, Jr., was indicted by a grand jury in the Circuit Court of Calhoun County, West Virginia, on four counts including two counts of Sexual Abuse in the First Degree in violation of W. Va. Code § 61-8B-7 and two counts of Sexual Abuse by a Custodian in violation of W. Va. Code § 61-8D-5(a). (Appendix [hereinafter “App.”] at 1-4.) The Indictment alleged that the Respondent sexually abused A.K., a minor child who was eleven (11) years of age at the time of the abuse. (*Id.*) On May 16, 2000, the Circuit Court of Calhoun County, West Virginia, began a jury trial in the matter. Three days later, on May 18, 2000, the jury returned a verdict whereby the Respondent was found guilty on all four counts charged by the indictment. (*Id.* at 529.) The jury reached its decision following an extremely brief deliberation of approximately thirty (30) minutes. (*Id.*)

On July 18, 2000, the Circuit Court of Calhoun County, West Virginia, sentenced the Respondent to the following:

[T]he defendant [shall] 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...

(*Id.* at 530.) Following his conviction, the Respondent filed a Notice of Intent to Appeal the Jury Verdict on August 28, 2000. (*Id.*) The Supreme Court of Appeals of West Virginia refused to entertain the Petition in an Order filed on March 29, 2001. (*Id.*)¹

Respondent, acting *pro se*, filed a petition for writ of habeas corpus on September 27, 2006. (*Id.*) Respondent was subsequently appointed counsel, G. Ernest Skaggs, who filed an amended petition for writ of habeas corpus on May 12, 2008, including the following grounds:

- (a) Defendant's counsel at the trial level was ineffective in that he failed to obtain a psychiatric and psychological evaluation on the petitioner.
- (b) The venue for this case was improper.
- (c) The petitioner received a more severe sentence than he expected.
- (d) The curative jury instruction given by the Court was not sufficient to overcome the prejudice created by the introduction of the 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 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.

¹ The Respondent also moved for a reduction of sentence on April 2, 2001. However, the motion was denied by an order entered in the underlying case on or about February 4, 2010.

- (h) The petitioner believes that there were prejudicial statements by both the trial judge and by the prosecution.
- (i) The petitioner further believes that the prosecution on at least one occasion failed to turn over witness notes after the witness had testified.
- (j) The petitioner believes that he was refused a continuance until the next term of court and that this refusal prejudiced his case.
- (k) The petitioner believes that the court made constitutional errors in evidentiary rulings which denied him due process and a fair trial.
- (l) The petitioner believes that there was insufficient evidence to convict him on all counts.

(*Id.* 488-92.) The State filed a response later that month on May 29, 2008. An omnibus hearing was then held on September 21, 2009.

Following the hearing, on January 21, 2014, the Circuit Court of Calhoun County, West Virginia granted the Respondent's habeas petition solely based upon the allegations contained within Ground Eight (8), reversing Respondent's conviction and entitling him to a new trial of the indictment. (*Id.* at 525) The Petitioners now appeal the Circuit Court's decision on the grounds that the Circuit Court erred in its findings as to application of West Virginia law, or in the very least, in its conclusion that the facts as contained in Ground Eight (8) amounted to anything more than harmless error.²

² In its Order, the Circuit Court references the counts as contained alphabetically in the amended habeas petition as numerical, with Ground Eight (8) specifically referencing that of Paragraph H.

II.

STATEMENT OF FACTS

In this matter, there is substantial and overwhelming evidence of Respondent's guilt. On May 4, 1999, Respondent was indicted by a Grand Jury in Calhoun County, West Virginia, of two counts of Sexual Abuse in the First Degree under W. Va. Code § 61-8B-7, and two counts of Sexual Abuse by a Custodian under W. Va. Code § 61-8B-5(a). (App. at 1-4.) The Indictment charged Respondent for activity occurring between September, 1998, through December 1998, during which time he sexually abused A.K. (name redacted), a minor who was, at that time, eleven (11) years of age. (*Id.*) Specifically, the Indictment specified that Respondent, for purposes of gratifying his own sexual desire, had intentionally rubbed his male sex organ against the buttocks of the victim. (*Id.*) On May 16, 2000, a jury trial commenced on the matter. (App. at 67.)

Prior to opening statements, David Karickhoff, trial counsel for Respondent, objected to the testimony of Lonnie Kishbaugh, a therapist who had previously treated Respondent during Respondent's prior incarceration for an earlier conviction in which Respondent had pled to a charge wherein he sexually abused his stepsister, T.T. (name redacted), a minor child. (App. At 69-72.) The Circuit Court, after hearing a brief argument on the matter, decided to wait until the State was prepared to call Mr. Kishbaugh to rule on the matter. (*Id.*)

During opening statement, Tony Morgan, prosecuting attorney for Calhoun County, stated the following:

Ladies and gentlemen of the jury. I submit to you there has never been a more important criminal case tried in this courtroom than this trial today. Those reasons will become obvious. This defendant, Richard Hunt, is a pedophile. He is a predator. He has a lustful disposition toward children, and indeed in 1995 he sexually assaulted a young girl in Jackson County. He was

arrested, indicted, and he was convicted. And he said why he sexually abused that ten year-old child. And he put it in writing. He said he did it to gratify his sexual desire.³

(*Id.* at 73.) Mr. Morgan then went on to inform the jury that they would be hearing the testimony of the victim in addition to the testimony of the victim's sexual-abuse counselor. (*Id.* at 76). Mr. Morgan also informed the jury that they would hear from Mike K. and Denise K. (names redacted), the victim's parents, who would detail the victim's odd behavior which began during the time of the abuse, such as impulsive bathing and instances wherein the victim would repeatedly gargle and rinse his mouth. (*Id.* at 77.) Further, Mr. Morgan informed that they would hear the testimony of Mike K., wherein he would identify a time that he had picked up a secondary phone line while Respondent was speaking with the victim, and had heard the Respondent specifically ask the victim: "When are we gonna have sex again?" (*Id.*)

Mr. Karickhoff, in his opening statement, advanced theories that Respondent had been wrongfully charged for the crime; that the victim's father, Mike K., had a vendetta against Bill K. (name redacted), who was dating Respondent's mother at that time, and had put the victim up to testifying against Respondent as a form of revenge; that the victim's troubles were the result of physical abuse suffered at the hands of his parents; that the victim was always a troubled youth; and that the vehicle in which the sexual abuse occurred, a Ford Festiva, was too small a vehicle for the sexual abuse to occur in the manner the victim stated it had occurred. (*Id.* at 82-86.) Of these theories, Respondent could ultimately prove none.

The victim, A.K., was the first witness to testify on behalf of the State. (*Id.* at 87.) The victim identified that from September, 1998, through December, 1998, he had begun travelling

³ As recognized by the Circuit Court, Mr. Morgan referenced Respondent's pedophilia a second time ("while the defendant was in prison, consistent with being a pedophile, he participated in only the minimum amount of therapy and treatment"), and stated that Dr. Mike Carter believed that the victim, in his opinion, had been sexually abused. (App. at 74-75.)

with the Respondent during the Respondent's nightly paper route for the Charleston Gazette. (*Id.* at 94.) Respondent had invited the victim to join him on the nightly paper route after befriending the victim and playing video games together. (*Id.* at 95.) The victim stated that occasionally others would join Respondent on the nightly paper route as well. (*Id.* at 96.) During the route, Respondent would drive his Ford Festiva. (*Id.*) After the route, Respondent would invite the victim to stay at Respondent's home and sleep. (*Id.* at 99.)

Then, the victim began recounting that occasionally Respondent would invite him to drive the vehicle. (*Id.*) In order to do this, Respondent would slide over and put the victim on his lap. (*Id.*) While on a back road, the victim stated that Respondent would "squeeze [the victim's] legs, and take his penis and rub it up against [his] butt." (*Id.* at 100.) This happened a total of three times. (*Id.*) The victim recounted how he could feel what was happening, that it bothered him, and that Respondent would remain silent throughout the action. (*Id.* at 101.)

Afterwards, the victim testified that he began having trouble in school as a result of the abuse, that he was embarrassed, and that people in school began calling him a "queer." (*Id.* at 104.) Finally, the victim testified that once he had worked up the courage to stop going on the paper route, Respondent called his home and asked when they were going to "have sex again." (*Id.* at 105.) The victim also verified that his father, Mike K., was listening silently on the other line at the time of the conversation. (*Id.* at 106.)

The victim, by writing a note which was also admitted as evidence at trial, told his father about the abuse. (*Id.* at 106-08.) The note read as follows:

When [Respondent] let me drive, I could feel his dinker. It was feelin' my butt. I thought I said somethin' he would hurt me. He would always ask me if I had sex and stupid questions. And when he let me drive, I could feel him keep scooting up. He would always ask me if I've been getting any pussy.

(*Id.* at 107.) The victim testified how the abuse made him feel dirty and unclean, and specified that he needed professional help in overcoming the emotional trauma. (*Id.* at 108.) As a result, he began seeing Dr. Mike Carter. (*Id.* at 109.) The victim also stated that he required help from teachers, because his grades began slipping and other students would joke about the abuse and call him names. (*Id.*) Ultimately, the victim affirmatively stated that he was sexually abused by Respondent, and that he was afraid of Respondent although he initially thought Respondent to be a friend. (*Id.* at 110.)

During cross-examination, the victim testified that he did not recall Respondent's friends following him on the paper route, and stated that Respondent had never asked him to go to local Speedy Mart to see Joyce Smith, Respondent's girlfriend at the time. (*Id.* at 111.) The victim also denied ever telling Respondent or anyone associated with Respondent that he suffered physical abuse at the hands of his father. (*Id.* at 117-18.) Throughout the cross-examination, trial counsel for Respondent attempted to elicit testimony that victim had physically abused his great-grandmother, that he had asked Respondent and Ms. Smith to adopt him, and that he was generally a troubled youth due to the problems he had with his parents. (*Id.* at 117-28.) Throughout these lines of questioning, the Circuit Court allowed trial counsel for Respondent to ask these questions. (*Id.*) Regardless, the victim specifically denied each and every allegation. (*Id.*) On redirect, the victim specified that the bruises he experienced were the result of the sexual abuse suffered at the hands of Respondent. (*Id.* at 135.)

Next, the State called Dr. Mike Carter as an expert witness in the field of treatment and counseling of sexually abused children. (*Id.* at 137-44.) Dr. Carter stated the victim's parents had requested his assistance in March of 1999, as a result of their suspicions that their son had been molested. (*Id.* at 151-52.) Dr. Carter identified that "[A.K.] exhibited a severe level of

trauma which is consistent with and would suggest that he had been molested.” (*Id.* at 153.) In particular, Dr. Carter identified that drawing assessments, story-based exercises, physical assessments, and the victim’s own destructive thought process were synonymous with sexual abuse. (*Id.* at 156-62.) Dr. Carter asserted this with a reasonable degree of psychological and scientific certainty. (*Id.* at 163.) Further, upon cross-examination, Dr. Carter identified that the victim’s father was just as helpless in the victim’s drawings, firmly suggesting that victim thought of his father as unable to help throughout victim’s molestation, rather than the father being any sort of physical aggressor. (*Id.* at 170.)

Next, State Police Trooper Kenneth Michael Corner, the investigative officer of Respondent’s previous crime, that of sexually abusing his minor stepsister, was called to testify. (*Id.* at 181.) As part of his testimony, Trooper Corner introduced the written statement of the Respondent in his prior plea agreement. (*Id.* at 186.) Under the heading “Describe briefly your participation in the crime,” the Respondent wrote as follows:

In February '94 at my dad's house in Jackson County, West Virginia, . . . I was then 20 years old and was with [T.T.] a girl age under 11, and I had sexual contact with her to gratify my sexual desires.

(*Id.*) Following introduction of Respondent’s prior statement by Trooper Corner, Respondent declined cross-examination. (*Id.* at 187.)

Next, West Virginia State Police Sergeant David Wayne Skeen testified that on January 20, 1999, he was approached by Michael K., the victim’s father, upon suspicions that Respondent had sexually abused the victim. (*Id.* at 189.) Sergeant Skeen testified that Respondent, after his arrest and while being transported to the jail, inquired if the current charges could be reduced. (*Id.* at 193.) Upon Respondent’s denial of committing prior sexual abuse, Sergeant Skeen also detailed that Respondent had, in fact, registered as a sex offender in the

State of West Virginia. (*Id.* at 198.) As part of the registration, Respondent listed the charge against him, which involved exposing himself to his stepsister and on one occasion “had her touch his penis.” (*Id.* at 199.) The Circuit Court then admitted the record of registration. (*Id.*)

Mr. Morgan then called Lonie Kishbaugh, Associate Warden for treatment at the Denmark Correctional Center in Hillsboro, West Virginia, to testify. (*Id.* at 200.) As a case manager, Mr. Kishbaugh counseled many prisoners who were convicted sex offenders. (*Id.* at 202.) Mr. Kishbaugh informed the jury of the definition of pedophilia as defined by the Diagnostic and Statistical Manual in Mental Disorders, Fourth Edition, 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 having those thoughts and urges.” (*Id.* at 205-06.) Mr. Kishbaugh then acknowledged that treatment of pedophilia could be successful if a person is seriously committed to changing their behavior. (*Id.* at 206.) While Mr. Kishbaugh was six hours away from his Master’s Degree in Psychology from Marshall University, the Circuit Court admitted him as an expert due to his extensive experience in counseling sex offenders, his continued training, and his membership in the National Association of Forensic Counselors. (*Id.* at 210.) Mr. Kishbaugh then testified at length as to the general attitude of pedophiles while imprisoned, specifically stating that treatment is difficult because most inmates arrested for pedophilia spend most, if not all, of their incarceration in denial of those crimes. (*Id.* at 211.)

Mr. Kishbaugh then identified the Respondent as being previously incarcerated at Denmark Correctional Center. (*Id.* at 213.) Mr. Kishbaugh recognized that while Respondent was arrested for sexual abuse of a child, he underwent only minor counseling and specified that he “did not wish to enter treatment,” despite displaying the red flags and primary characteristics

of many pedophiles within the jail. (*Id.*) The Circuit Court allowed Mr. Kishbaugh's testimony over the objection of the Respondent, who had challenged the information's relevancy. (*Id.* at 216.) Mr. Kishbaugh then revealed that there is a diagnostic impression on file at Denmark Correctional Center that Respondent was a pedophile. (*Id.* at 217.) Upon questioning by defense counsel, Mr. Kishbaugh revealed that the targeting of both boys and girls by a pedophile is not uncommon. (*Id.* at 219.)

The following day, Mike K., the victim's father, testified. (*Id.* at 231.) Mr. K. explained that the victim became acquainted with Respondent when he began going to Respondent's home to play video games and draw pictures. (*Id.* at 235.) He explained that the victim, who was approximately 5'5" at the time of trial, had grown about a foot since the time of the sexual abuse.⁴ (*Id.* at 239.) Mr. K. further testified that, while at first he didn't have a problem with the victim riding along with Respondent during Respondent's paper route, he eventually became suspicious because of the victim's odd activities and bruises on the victim "like handprints." (*Id.* at 240-41.) This culminated with Mr. K. listening in on a conversation between the victim and Respondent. (*Id.*) After identifying that Respondent was calling the victim through caller ID, Mr. K. picked up a second line within the home and began listening to the conversation quietly. (*Id.*) After inquiring that no one was on the phone besides the victim, Respondent asked the victim about when they would have sex again. (*Id.* at 243.)

Mr. K. also testified that, around the same time, the victim began having problems at school, taking baths "all the time," lashing out at his siblings, and would routinely say things such as "you don't like me, Dad." (*Id.* at 244.) Mr. K. stated that his son spent much of his life around that time "sad and distressed." (*Id.*) Further, the victim began frequently rubbing his

⁴ The victim's size was a factor in the trial, as Respondent contended that the abuse could not possibly have happened due to the size of the victim and the Respondent, and the size of Respondent's Ford Festiva.

mouth, and would often brush his teeth and tongue. (*Id.* at 245.) Mr. K. also verified the note that the victim had written him regarding Respondent's sexual abuse. (*Id.* at 247.) Mr. K. then explained that, after Respondent's abuse had been reported to the police, Respondent and his cousin rode up to the victim's home on four-wheelers and began harassing him. (*Id.* at 254.) The police had to be called to make Respondent leave the premises. (*Id.*)

During cross-examination, trial counsel for Respondent unsuccessfully attempted to further Respondent's defense that prosecution of the sexual abuse by Respondent, and the sexual abuse activity itself, were mere fabrications brought on by Mr. K. as a result of an altercation between Bill K., who was Mr. K.'s uncle and the boyfriend of Respondent's mother. (*Id.* at 262-66.) Respondent did not question Mr. K. about the telephone call, the bruises, or the victim's unusual habits. (*Id.*)

The victim's school counselor, Stephanie Dawn Moore, then testified on behalf of the State. (*Id.* at 267.) She explained that, at the beginning of the school year, the victim was very outgoing and had many friends. (*Id.* at 269.) As the school year progressed, however, the victim began pushing people away and began "doing things to jeopardize his relationship with others so that he wouldn't have to talk to them or associate with them." (*Id.* at 270.) At several points, the victim claimed that he wanted "to kill himself or hurt himself." (*Id.*)

Lastly, the State introduced the victim's mother, Denise K., who corroborated, exactly, the prior testimony of Mike K. and the victim. (*Id.* at 298-303.) Ms. K. also refuted any instances of physical abuse within the family, as it had been asserted by Respondent. (*Id.* at 303-04.) The State then rested its case.

Respondent was the first to testify in his own defense. (*Id.* at 334.) After explaining how he came to live in the area and the responsibilities of his paper route, Respondent stated that his

cousin, Nick Dye, and his girlfriend, Joyce Smith, traveled with him on his paper route “every weekend.” (*Id.* at 348.) Respondent then attempted to assert that the victim suffered physical abuse at the hands of his father, and that the victim came along on the paper route as a measure of escape. (*Id.* at 350.) Respondent stated that he never put the victim on his lap, and that it would have been “virtually impossible” to do so in his Ford Festiva. (*Id.* at 354.)

Upon cross-examination, Respondent denied having sexually abused his stepsister, instead remarking that he pled to the deal, and consequentially wrote a false plea statement, in an effort to avoid serious “exposure into prison.” (*Id.* at 361.) Mr. Morgan, on behalf of the State, then identified that Respondent had broken the rules of his parole by having contact with a minor child, and by being convicted for trespassing on Mike K.’s property when harassing the victim following the report of Respondent’s sexual abuse. (*Id.* at 365.) Respondent then asserted that he never took the victim alone while on the paper route. (*Id.* at 371.) Respondent further claimed that he frequently dropped the victim off at the local Speedy Mart so that the victim could sleep. (*Id.* at 374-74.) While Respondent repeatedly asserted that sexual abuse of the victim could not have occurred in his Ford Festiva, he did not refute any prior testimony regarding his telephone conversation with the victim. Regardless, the Circuit Court permitted defense counsel to publish images of Respondent’s car to show its size. (*Id.* at 386.)

Next, Joyce Smith testified on behalf of Respondent, and asserted that she accompanied Respondent on the paper route “every time [she] wasn’t working.” (*Id.* at 393-95.) Ms. Smith, however, testified that the victim was dropped off at the Speedy Mart only “twice,” a stark contrast from the frequency asserted by Respondent. (*Id.* at 396.) Ms. Smith testified that it was still warm outside both times the victim stayed at the Speedy Mart. (*Id.* at 401.) Ms. Smith also informed the jury that Respondent had admitted his prior sexual abuse conviction and that she

believed he was not guilty of committing such a crime. (*Id.* at 399.) She then stated that the victim had previously asked her, along with Respondent, to adopt him. (*Id.* at 405.) Finally, Ms. Smith stated that, even if she was aware of Respondent's prior diagnostic impression of conforming to pedophilia, she would not have changed her feelings about Respondent being alone with the victim. (*Id.* at 407.)

Respondent next called Nick Dye, Respondent's cousin, to testify. (*Id.* at 408.) Mr. Dye stated that he accompanied Respondent on his paper route "90 percent of the time," or just about every night. (*Id.* at 413.) Despite Respondent's prior testimony, Mr. Dye stated that the victim only accompanied Respondent on the paper route two or three times. (*Id.* at 414.) Then, in what would become a recurring theme in Respondent's witnesses, Mr. Dye stated that Ms. Smith never accompanied Respondent on the paper route, despite Ms. Smith's prior testimony that she accompanied Respondent every night she wasn't working. (*Id.* at 419.) Additionally, Mr. Dye highlighted one occasion in which Respondent rode with another woman, Jamie Howard, and opined that Respondent must have been "pretty slick" to keep Ms. Smith from finding out. (*Id.* at 417.) Additionally, Mr. Dye refuted Respondent's prior testimony that the back of the Ford Festiva was full of "posts" and "sledgehammers." (*Id.* at 419.)

Respondent next called Nancy Pritt, who was also employed by the Charleston Gazette. (*Id.* at 424.) While Ms. Pritt testified Respondent had the victim with him, to her knowledge, on three occasions when picking up the newspapers to deliver, but stated that Mr. Dye was mostly with Respondent on the weekends. (*Id.* at 430-31.) She then affirmatively refuted Mr. Dye's testimony that he was with Respondent 90 percent of the time. (*Id.* at 433.) Ms. Pritt, however, despite saying that Respondent always drove the route, couldn't recall the numerous occasions that Respondent had others fill in for him on pickups and deliveries. (*Id.* at 424-34.)

Following the testimony of Ms. Pritt, Respondent called Breia Cooper to the stand. (*Id.* at 434.) Ms. Cooper testified that of the three times she followed Respondent on the paper route, Mr. Dye accompanied Respondent once. (*Id.* at 437.) Interestingly, she also recalls when Respondent brought the victim alone, something that Respondent’s witnesses up to this point testified had never occurred. (*Id.*)

Lastly, Respondent called his mother, Becky Hunt, to the stand. (*Id.* at 442.) Respondent primarily sought the testimony of his mother to show of the feud between her boyfriend, Bill K., and the victim’s father. (*Id.* at 448-50.) Respondent apparently believed that his prosecution was conceived as a plot for Mike K. to “get even” with Bill K. (*Id.* at 450.) She further testified that Respondent was “never alone” with the victim, despite prior testimony showing the opposite to be true. (*Id.* at 453.) Regardless, Becky Hunt acknowledged that, due to his prior conviction, Respondent was not lawfully permitted to be around children under the age of 18. (*Id.* at 453.)

On the final day of trial, the Circuit Court instructed the jury that “evidence of sexual abuse may be considered only for the purposes of showing that the defendant had a lustful disposition towards the victim. . . . [and] a lustful disposition to children generally.” (*Id.* at 25.) Following the Circuit Court’s thorough reading of jury instructions and closing arguments, the jury returned after deliberating approximately thirty-two minutes and found Respondent guilty on all counts.⁵ (*Id.* at 57-59.)

Petitioners assert that the jury found Respondent guilty of all charges because of the overwhelming, corroborated and meaningful evidence submitted on behalf of the State at trial. In addition, despite the large amount of leniency afforded Respondent by the Circuit Court in exploring his defenses, Respondent could advance no corroborated theories supplying him with

⁵ During the State’s closing argument, Mr. Morgan made no specific reference to Respondent being a pedophile.

any notion of a believable defense, including those that Mike K. fabricated the matter to “get even” with Bill K., or his Ford Festiva being too small to allow the sexual abuse of a small child to occur. As a result, Respondent was not unfairly prejudiced in violation of his constitutional rights as found by the Circuit Court in his habeas proceedings.

III.

SUMMARY OF THE ARGUMENT

The habeas court abused its discretion in granting the respondent’s petition for writ of habeas corpus. As has been held innumerable times, a writ of habeas corpus is not a substitute for an appeal, and only errors of constitutional dimension are cognizable in habeas. The Petitioners assert that the evidence regarding Respondent’s diagnosis of pedophilia, and the brief references by the prosecutor in argument to the respondent as a pedophile were not error at all. However, should the diagnosis and reasoned scientific testimony, and the brief argument using the term pedophile be deemed erroneously admitted, that admission was ordinary trial error, and not constitutional error. If regarded as constitutional error, the error was harmless beyond a reasonable doubt and did not contribute to the conviction.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate to be decided in a memorandum decision as the law regarding habeas corpus is well settled. As the Petitioners are requesting reversal of the circuit court, this matter is appropriate for Rule 19 oral argument.

V.

ARGUMENT

A. Erroneous Admission Of Evidence Regarding Respondent's Prior Sexual Abuse Offense, Specifically that of Conviction, Treatment and Recognition of Respondent's Pedophilia Is Not An Error Of Constitutional Dimension

Under West Virginia law, an error that does not involve constitutional violations is not subject to habeas review. *State ex rel. Farmer v. McBride*, 224 W. Va. 469, 480, 686 S.E.2d 609, 620 (2009). According to this Court, “[a] habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.” Syl. Pt. 4, *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979). “Absent ‘circumstances impugning fundamental fairness or infringing specific constitutional protections,’ admissibility of evidence does not present a state or federal constitutional question.” *Hatcher v. McBride*, 221 W. Va. 5, 11, 650 S.E.2d 104, 110 (2006) (citing *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1997)). Therefore, “State court 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.” *Id.* (citing *Estelle v. McGuire*, 502 U.S. 62 (1991)).

Here, Petitioners assert that no claim, witness, statement or evidence created prejudice to such a level as to become a violation of Respondent's constitutional rights. As there is no explicit right which Respondent can claim, the Circuit Court and Mr. Morgan, as prosecutor, could only have been held to violate Respondent's right to due process under the Fourteenth Amendment. Indeed, that is the finding of the Circuit Court in granting Respondent's habeas petition.

Respondent, however, had the opportunity to challenge Mr. Morgan's statements, but was plainly unable to do as much. Respondent was incarcerated for a prior conviction, and that prior conviction was admissible to show Respondent's lustful disposition towards children at trial. Respondent had the opportunity to cross-examine and challenge Mr. Kishbaugh's finding that Respondent displayed common indicators of pedophilia, as defined by the well-accepted Diagnostic and Statistical Manual of Mental Disorders (DSM IV), but again, was unable to proffer any questioning or theories of defense dismissing Mr. Kishbaugh's claims. Nor did Mr. Kishbaugh inflammatorily label Respondent as a pedophile. Rather, he spoke at length about the psychiatric definition of pedophilia, his experience with prisoners who suffered the same, the typical identifiers of such individuals, such as their social interactions and lifestyles, and then reported that, according to his interactions with Respondent, and in some cases Respondent's own admissions, Respondent conformed to pedophilia as described by the DSM IV and Mr. Kishbaugh's own prior experiences. This includes Respondent's own indication that years ago his grandfather sexually abused him. (May 16, 2000, Transcript at 151.)

At no point did the State's or the Circuit Court's actions become so prejudicial to Respondent as to affect the fairness of the trial and shift the burden to Respondent to prove his own innocence. Rather, the underlying criminal action contained an overabundance of evidence establishing Respondent's guilt and Respondent was unable to proffer a believable or coherent defense.

The Circuit Court, during Respondent's criminal trial, provided substantial leeway in terms of admitting evidence and allowing lines of questioning that benefitted or could benefit Respondent. While Respondent had ample opportunities to absolve himself of his past convictions and his documented recognition as a pedophile, however, he was unable to do so and

the State's evidence cannot be determined to have unconstitutionally and unfairly shifted the outcome of Respondent's criminal trial. Respondent could muster no defense. As such, Respondent should not be awarded a retrial merely because he was completely routed in the first.

B. Even if this Court Deems the Erroneous Admission of Evidence Regarding Respondent's Prior Sexual Abuse Offense, Specifically that of Conviction, Treatment and Recognition of Respondent's Pedophilia, Is an Error of Constitutional Dimension, Such Error, in the Underlying Criminal Case, Is Harmless Due to the Overwhelming Evidence of Guilt.

According to this Court in *State v. Bowling*, 232 W. Va. 529, 753 S.E.2d 27, 40-41 (2013), when an "alleged error involves the infringement of a petitioner's constitutional rights, the burden is on the State to show that the error is harmless beyond a reasonable doubt." The Court continued:

We have stated that the "[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syllabus Point 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975). In accord, Syllabus Point 14, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998). "An error in admitting plainly relevant evidence which possibly influenced the jury [or a trial judge] adversely to a litigant cannot ... be conceived of as harmless." *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." *State v. Jenkins*, 195 W.Va. 620, 629, 466 S.E.2d 471, 480 (1995) (quoting, Syllabus Point 20, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974)). Moreover, once an error of constitutional dimensions is shown, the burden is upon "the beneficiary of a constitutional error"—usually the State—"to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24, 87 S.Ct. 824.

Id. at 41.

Here, Petitioners first assert that Respondent's error did not rise to the level necessary to be considered a constitutional violation. Should this Court agree with the Circuit Court,

however, Petitioners assert that the State and Circuit Court's admission into evidence of Respondent's prior diagnosis of pedophilia and testimony regarding Respondent's prior criminal act of molesting his stepsister, although highly prejudicial, were not *unfairly* prejudicial. Petitioners claim that testimony was necessary to prove Respondent's lustful disposition, and that evidence submitted at trial was necessary to combat Respondent's assertions of denial of both the prior and current acts.

Further, Petitioners highlight the many facts established against Respondent in the underlying criminal trial, some of which Respondent did and could not rebut: A.K.'s sudden changes in character and the strange bruises upon his thighs and buttocks; Respondent's telephone conversation with A.K. wherein he asked the child to have sexual contact; A.K.'s psychological treatment and analysis; Dr. Carter's testimony showing A.K.'s signs and symptoms of sexual abuse, including making those around him seem helpless; A.K.'s note to his father describing Respondent's sexual contact; evidence of Respondent's past conviction for the molestation of his stepsister; corroborated testimony of how A.K. started to compulsively groom himself; Respondent's harassment of A.K. following police investigation; and the testimony of Ms. Moore, who indicated that A.K. began school as a popular and outgoing child, but in the span of one semester, became a boy who pushed away his friends and remarked that he wanted to "kill himself or hurt himself."

In response to this evidence and witness testimony, Respondent could offer only conflicting testimony of related witnesses, claim that the victim's father was merely trying to get even with Respondent's mother's boyfriend, deny that sexual contact with his stepsister ever happened, and claim that his vehicle was just too small in which to maneuver a small child. To make clear the error was harmless, it is necessary to examine all of the inadequacies of

Respondent's defense. Ms. Smith stated that she always accompanied Respondent on the paper route, while Nick Dye stated that she was only there a handful of times. Nick Dye stated he was with Respondent 90 percent of the time, while Ms. Pritt stated that Mr. Dye was only there on the weekends, if at all. Respondent stated he always dropped off A.K. at the Speedy Mart, while Ms. Smith indicated that only occurred two or three times. Breia Cooper indicated that she and a friend had met up with Respondent on a night when he was alone with A.K., yet Respondent, Mr. Dye and Ms. Smith swore that Respondent was never alone with A.K. Mr. Dye couldn't even establish that Respondent's car was as full as it was originally indicated to be.

On top of all of this conflicting evidence, Respondent hinged his defense on that fact that his Ford Festiva was too small a car in which to house the sexual abuse charged against him. The jury, however, heard testimony throughout the trial of the countless newspapers, posts, and sledgehammers that were contained in this tiny car. In addition, the jury heard repeated testimony of how this car could contain all of the above along with two full-grown individuals or more and a small child.

Skepticism aside, the State put forth a very concise, corroborated story that, in and of itself, was significant and overwhelming enough to warrant Respondent's conviction. Put plainly, Respondent could not assert a cohesive, realistic or persuasive defense to overcome the basic facts of this case. Therefore, the evidence of Respondent's aptitude for pedophilia and his prior sexual acts were unnecessary to establish guilt. Thus, any error upon the Circuit Court for admission of that evidence is nothing more than harmless.

C. **While the Circuit Court Relies Solely upon the Ruling and Citations in *State v. Nelson*, Other Courts Have Adopted an Exception to Rule 404 Evidentiary Exclusion Wherein Past Acts and Diagnoses of Pedophilia is Admissible to Show Not Only Intent, but a Defendant's Depraved State of Mind and Motive.**

West Virginia in *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E. 2d 123 (1990) determined that evidence regarding other acts of sexual misconduct involving children are admissible when proffered by the state under the exceptions to Rule 404 (b) to demonstrate an individual's lustful disposition toward children. However, West Virginia has not specifically adopted a "pedophile exception." While West Virginia does not have a rule of evidence specifically advising on the admissibility of evidence relating to past sexual misconduct of pedophila in criminal cases involving a defendant charged with the sexual abuse or assault of a child, including referencing the term and diagnosis of pedophila, many states and federal circuits make exceptions which allow the admission of such testimony and other evidence in the interest of corroborating victim testimony and child protection. The following cases from other jurisdictions reveal that testimony regarding pedophila and its application to the defendant on trial is not universally condemned.

Arkansas has implemented a "pedophile exception" to Rule 404(b), wherein "evidence of other crimes, wrongs, or acts, such as sexual abuse of . . . other children, is admissible to show motive, intent, or plan," when a charge concerns the sexual abuse of a child. *Hamm v. State*, 365 Ark. 647, 653, 232 S.W.3d 463, 469 (Ark. 2006) (wherein the Supreme Court of Arkansas held there was a sufficient degree of similarity between explicit sexual contact and through-the-clothes contact to warrant testimony of the through-the-clothes contact admissible, for which defendant was not on trial). Likewise, the Appellate Court of Connecticut, in *State v. Cancel*, 149 Conn.App. 86, 96, 87 A.3d 618, 625 (Conn. 2014), held that evidence related to a prior conviction is admissible to show that a defendant has "an unusual disposition, that is, a sexual interest in children," could be used to show motive, and could be used to show a "propensity to engage in aberrant and compulsive criminal sexual behavior with children." (Citing *State v.*

DeJesus, 288 Conn. 418, 470, 953 A.2d 45 (Conn. 2008); *State v. Sanseverino*, 291 Conn. 574, 579, 969 A.2d 710 (2009)).

In *Allen v. State*, 624 So.2d 650, 653-54 (Ala. 1993), the Court of Criminal Appeals of Alabama held that evidence of prior sexual abuse could be admitted to show motive, finding that an act of abuse that occurred two-to-four years prior was not too remote to introduce, and that similarities in the abuse warranted admission. Additionally, the court recognized that the two acts do not have to be identical. *Id.* at 653.

In *State v. Arner*, 195 Ariz. 394, 988 P.2d 1120 (Ariz. 1999), the Court of Appeals of Arizona held that it was not necessary that the State quantify evidence of prior abuse by having an expert testify to the defendant's propensity and likelihood of child sexual abuse. Other states have also held that evidence of past uncharged and charged instances of sexual abuse is admissible in a trial involving the sexual abuse of a minor. *See People v. Mullens*, 119 Cal.Rptr.3d 534 (Ca. 2004) (evidence of an uncharged sex crime admitted); *People v. Larson*, 97 P.3d 246 (Colo. 2004) (prior acts of sexual molestation of children permitted to show intent and identity); *Stepho v. State*, 718 S.E.2d 852 (Ga. 2011) (evidence of prior sexual abuse admitted to show course of conduct, lustful disposition, and to corroborate child victim's testimony); *State v. Hawkins*, 633 So.2d 301 (La. 1993) (wherein probative value of past conviction for sexual molestation outweighed the prejudicial effect due to limiting instruction); *State v. Quinn*, 603 S.E.2d 886 (N.C. 2004) (wherein evidence of defendant's use of a computer to download and view sexually explicit images of children was admissible in sexual abuse case to show motive, preparation, and plan); *Blackwell v. State*, 193 S.W.3d 1 (Tex. 2006) (extraneous acts of evidence of sexual misconduct was admissible to rebut defense theory that defendant had been framed or set up).

Such holdings have even occurred and remain good law in Florida, despite the cases referenced by the Circuit Court in granting Respondent's habeas petition. *See McLean v. State*, 934 So.2d 1248 (Fla. 2006) (wherein the Supreme Court of Florida ruled that the probative value of evidence of prior acts of child molestation was not substantially outweighed by the danger of unfair prejudice); *Perry v. State*, 718 So.2d 1258 (Fla. 1998) (wherein testimony of defendant's pedophilia not reversible error because state did not make such an assertion the "feature" of its case).

Federal Courts have also allowed evidence and testimony of prior acts of sexual misconduct in cases involving the sexual abuse or molestation of children. The Sixth Circuit has held that even uncharged prior sexual assaults are admissible in a criminal trial involving the sexual abuse of a minor, even if the other assaults occurred against adult women, and may be highly probative, overcoming the facts' prejudicial nature, based upon (1) closeness in time, (2) similarity and (3) alleged frequency. *U.S. v. Seymour*, 468 F.3d 378, 386 (6th Cir. 2006). The Eighth Circuit, in *U.S. v. Summage*, 575 F.3d 864, 878 (8th Cir. 2009), held evidence of prior sexual acts against children is "highly probative," and could show that a defendant has a sexual interest in children. So long as a trial court gives a limiting instruction, directing the jury to assess guilt based only upon the facts as charged in an indictment, the Eighth Circuit found that such evidence is "not unfair prejudice." *Id.*

A majority of Federal Circuits have interpreted the Federal Rules of Evidence as permitting the admissibility of prior charged and uncharged sexual acts, including testimony on the basis of those acts, and have repeatedly held that such facts' probative value significantly outweighs any danger of unfair prejudice, thereby recognizing that any appeal based upon such testimony does not rise to a constitutional dimension. *See U.S. v. McHorse*, 179 F.3d 889 (10th

Cir. 1999) (evidence relating to defendant's sexual abuse of two other girls was not so prejudicial as to violate due process); *U.S. v. Davis*, 624 F.3d 508 (2d Cir. 2010) (while evidence of past abuse may be *highly* prejudicial, it is not necessarily *unfairly* prejudicial); *U.S. v. Birdsbill*, 97 Fed. Appx. 721 (9th Cir. 2004) (admission of prior acts of sexual misconduct proper); *U.S. v. Sandoval*, 410 F.Supp.2d 1071 (D.N.M. 2005) (admission of testimony of prior uncharged sex abuse proper); *U.S. v. Bunty*, 617 F.Supp.2d 359 (E.D. Penn. 2008) (wherein defendant's conviction overturned due to admission of past sexual acts only because defendant was charged with possession of child pornography, which did not share enough similarities with prior sexual abuse of grandchildren); *U.S. v. Grossman*, 233 Fed.Appx. 963 (11th Cir. 2007) (child's testimony of a prior charged sexual offense admissible).

Courts of federal jurisdiction, in general, are apt to allow such evidence through Fed. R. Evid. Rule 414(a), which states, in part: “[i]n a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation.” This is separate from traditional Fed. R. Evid. Rule 404(b) evidence, and supersedes evidence of adult criminal sexual acts notwithstanding the “rape shield” rule found in Fed. R. Evid. Rule 412 which is comparable to that of the upcoming W. Va. R. Evid. Rule 412.

Here, the Circuit Court has granted habeas relief as the result of one secondary case, *State v. Nelson*, 331 S.C. 1 (1998), and the case sites explicitly contained within that single case. Moreover, the Circuit Court, in its discretion, seems to have confused simple or even substantial prejudice with unfair prejudice. While the Petitioners no doubt concede that evidence of Respondent's past sexual acts and psychologically diagnosed pedophilia are prejudicial, such evidence was not “unfairly prejudicial.”

Here, Respondent claims that his past sexual act never occurred -- that he agreed to false charges to limit exposure to jail time. Respondent claims that the victim is lying, and that he was encourage to implicate Respondent in a sexual abuse scheme by an abusive, conniving father who simply was trying to "get even" with his uncle, who also happened to be the boyfriend of Respondent's mother. Respondent ultimately claims that he has no sexual desires for children.

For this very reason, the state and Federal courts referenced above admit evidence and testimony of prior sexual acts. Such evidence and testimony contains a probative value which may serve to rebut the testimony and/or assertions of a criminal defendant regarding a crime which almost always occurs in private. Further, such evidence goes to prove a continuing desire to commit criminal acts against children who often times have repressed memory of, or are too embarrassed about, an incident to accurately portray the same during trial.

Given the facts of this case and Respondent's continued denial of his lustful disposition toward children, testimony of his prison therapist showing conformity to pedophilia as defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM IV) is astronomically probative. It proves lustful disposition and intent beyond admission of Respondent's prior conviction, which consequently, Respondent said he falsified. It corroborates the victim's testimony and the State's theory of a grooming process of the victim. Perhaps most importantly, all evidence of Respondent's pedophilia was introduced during trial in a manner that was scientific, rather than inflammatory. Such evidence showed Respondent's continued mental state, his continued issues relating to his lustful disposition towards children and his need to gratify his own sexual desire, an element of the crime charged.

Therefore, the evidence of Respondent's previous conviction—a crime involving sexual molestation of a minor to which he pled guilty—was clearly admissible under Rule 404(b) and *Edward Charles L., supra*. The specific testimony regarding pedophilia was equally admissible.

V.

CONCLUSION

Based upon the foregoing recitations of fact and arguments of law, Petitioners respectfully request that this Honorable Court reverse the Circuit Court of Calhoun County which granted the Respondent's writ of habeas corpus and reinstate his convictions and penitentiary sentences for sexual assault and sexual abuse.

Respectfully submitted,

DAVID BALLARD, Warden,
Mount Olive Correctional Complex, and
JIM RUBENSTEIN, Commissioner,
West Virginia Division of Corrections,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



SHANNON FREDERICK KISER
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
State Bar No. 12286
Email: Shannon.F.Kiser@wvago.gov
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Shannon Frederick Kiser, Assistant Attorney General and counsel for the Respondent Warden, hereby verify that I have served a true copy of "*Petitioners' Brief*" upon counsel for the Respondent, Richard Lee Hunt, Jr., by depositing said copy in the United States mail, with first-class postage prepaid, on this 21st day of July, 2014, addressed as follows:

Mr. G. Ernest Skaggs
102 3rd Avenue
Fayetteville, WV 25840
Counsel for the Respondent



SHANNON FREDERICK KISER