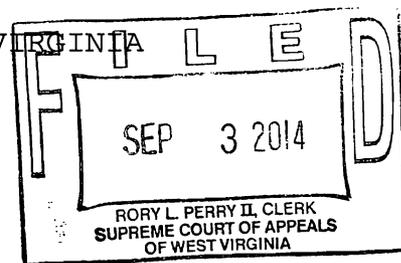


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0146



STATE OF WEST VIRGINIA, ex rel  
RICHARD LEE HUNT, JR.,  
Petitioner,

V.

COMMISSIONER, West Virginia Division of  
Corrections; and Warden, Mt. Olive  
Correctional Complex,  
Respondents

**RESPONSE OF RESPONDENT RICHARD LEE HUNT, JR.**

TO THE HONORABLE JUSTICES OF THE SUPREME COURT  
OF APPEALS OF WEST VIRGINIA:

INTRODUCTION

The respondent, Richard Lee Hunt, Jr., states as his  
response to the Petitioner's Brief as follows:

STATEMENT OF THE CASE

The Respondent, Richard Lee Hunt, Jr., adopts the  
Statement of the Case of the Petitioner.

STATEMENT OF FACTS

The Respondent, Richard Lee Hunt, Jr., adopts the  
Statement of Facts of the Petitioner except the allegation  
in Paragraph 1 that "there is substantial and overwhelming  
evidence of Respondent's guilt" and the allegation in the

last paragraph that "Respondent was not unfairly prejudiced in violation of his constitutional rights as found by the Circuit Court in his habeas proceedings."

#### SUMMARY OF THE ARGUMENT

The lower court did not err in granting the writ of habeas corpus of the respondent. The respondent contends that the use of the word "pedophile" by the prosecuting attorney and the testimony of the State's witness Kisbaugh, who was qualified as an expert in the counseling and treatment of sex offenders, both pedophiles and predators, unfairly prejudiced the defendant. Further it was so egregious as to render the entire trial fundamentally unfair. It was therefore a violation of the due process guaranteed to the defendant under the Fourteenth Amendment of the Constitution of the United States and the Constitution of the State of West Virginia.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Although this case is appropriate for Rule 19 oral argument, the Respondent does not wish to have an oral argument. He requests that the Court rule based upon the briefs and record submitted by the parties.

## ARGUMENT

The respondent contends that the use of the words "pedophile" and "predator" by the prosecuting attorney and the testimony of Lonnie Kisbaugh unfairly prejudiced him and denied him due process of law under the Fourteenth Amendment of the Constitution of the United States and the Constitution of the State of West Virginia. This was a constitutional error, and the lower court did not err in granting the respondent his writ of habeas corpus.

The first use of the word "pedophile" was made in the opening statement of the State. The prosecutor stated as follows:

"I submit to you there has never been a more important criminal case tried in this courtroom than this trial today. These reasons will become obvious. This defendant, Richard Hunt, is a **pedophile**. He is a **predator**. He has a lustful disposition toward young children, and indeed in 1995 he sexually assaulted a young girl in Jackson County..." (Appendix, Page 73)

Later in the opening statement the prosecuting attorney stated, "While the defendant was in prison, consistent with being a **pedophile**, he participated in only the minimum amount of therapy and treatment." (Appendix, Page 74)

Although the opening statement is not law, the seed of branding the respondent as a pedophile and a predator was

planted in the minds of the jurors.

Although the Appendix does not contain the closing argument of the State and counsel does not have a copy of it, a reference is made to the prosecuting attorney's statements in the lower court's Judgment Order Granting Petition and Amended Petition for a Writ of Habeas Corpus Ad Subjiciendum.

The prosecuting attorney stated as follows:

"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 the man is a **pedophile**." (Appendix, Page 538)

The testimony of Lonnie Kisbaugh, who was a counselor at Denmar Correctional Center, was highly prejudicial. He was qualified as an expert in "the counseling and treatment of sex offenders, both pedophiles and predators," in spite of the fact that he was six hours short of his Master's Degree in psychology. (Appendix, Page 210) He defined for the jury "pedophilia" and "predator." (Appendix, Page 205-06)

The respondent had been at Denmar after his previous conviction, and Mr. Kisbaugh testified about his conduct

during his incarceration there. The respondent contends that all of the testimony of Mr. Kisbaugh is prejudicial. However, the following statement was probably the most damaging and denied him a fair trial. Mr. Kisbaugh in response to the prosecuting attorney's question as to whether there is a diagnostic impression that the respondent is a pedophile, replied "Yes." This was allowed by the lower court over the objection of defense counsel. (Appendix, Page 217-28.) Further this diagnosis was emphasized in the State's closing.

In its brief the State cites several cases, none of which are on point with the instant case. None of these cases appear to deal with the use of the word "pedophile" in trial. Even Hamm v. State, 365 Arkansas 647, 653, 232 S.W. 3d 463, 469 (Ark. 2006), an Arkansas case about the implementation of a "pedophile exception" is nothing more than the exception in Rule 404 (b). The lower court had already ruled that the evidence of the previous conviction was admissible. Therefore, that case and others cited by the State are irrelevant.

In granting the respondent's writ of habeas corpus, the lower court found that a diagnosis of a pedophile is character evidence clearly inadmissible under West Virginia

Rules of Evidence 404(a) which states as follows: "Evidence of a person's character or a trait of character is not admissible for purpose of proving he or she acted in conformity therewith on a particular occasion..." Moreover, the Court found that it does not fall under Rule 404(b) because a diagnosis of a pedophile "is not evidence of a prior bad act or crime but is evidence of character (propensity) of the Petitioner to engage in particular conduct," and is therefore not admissible. (Appendix 539).

Counsel could find no West Virginia cases which dealt with the use of the word "pedophile." However, the lower court cites several cases, among them People v. Bagarozzy, 132 A.D. 2d 225, 522 N.Y.S. 2d 848, 853 (1987) where evidence of NAMBLA newsletters, photographs and films were not admissible because this was character evidence in that "'the true purpose behind this introduction of this evidence was to expose defendant's sexual preferences and attitudes in order to demonstrate a propensity to commit the crimes charged.'" The lower court also cites State v. Nelson, 331 S.C. 1, 501 S.E. 2d 716 (1998). In this case an expert testified that the defendant "'has a personality characteristic of being attracted to children.'" This evidence was inadmissible under 304 (a) (Appendix 539-540.)

The respondent agrees with the lower court's use of these cases to support granting the respondent a writ of habeas corpus.

These errors in the instant case are constitutional errors which were highly prejudicial and deprived the respondent of a fair and impartial trial and further denied him due process of law under the Fourteenth Amendment of the Constitution of the United States and the Constitution of the State of West Virginia. This prejudicial evidence is even more egregious because the evidence of the prior conviction was admitted into evidence.

CONCLUSION

The respondent contends that this appeal should be denied, and the case should be remanded to the lower court for further proceedings.

RICHARD LEE HUNT, JR.  
By Counsel

SKAGGS & SKAGGS



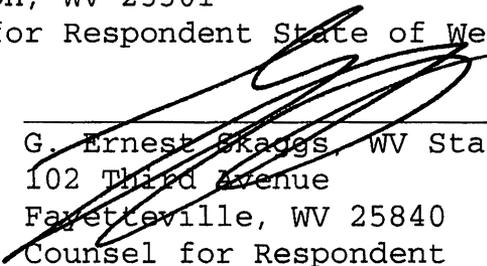
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CERTIFICATE OF SERVICE

I, G. Ernest Skaggs, Counsel for the Respondent herein, do hereby certify that I have served this RESPONSE OF RESPONDENT RICHARD LEE HUNT, JR. by first class United States mail, postage prepaid, true copies hereof, to the following designated party, on this the 2nd day of September, 2014:

Shannon Frederick Kiser  
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Counsel for Respondent State of West Virginia

  
\_\_\_\_\_  
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