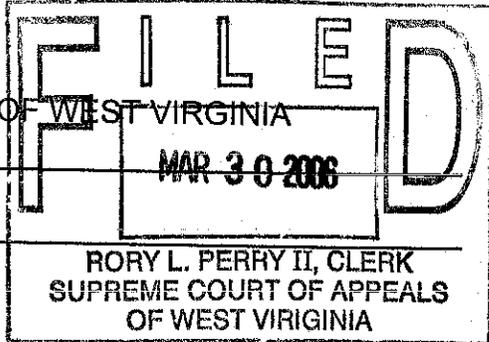


Case Number 32977

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



FREDERICO HATCHER,

Petitioner,

v.

THOMAS MCBRIDE, Acting Warden,
Mount Olive Correctional Complex,

Respondent.

Appeal from the Circuit Court of Cabell County
Honorable Dan O'Hanlon, Judge
Circuit Court Case Number 98-C-1016
(Based upon Cabell County Criminal Case Number 96-F-88)

PETITIONER'S REPLY BRIEF

Susan Breece, Esq.
Attorney for Frederico Hatcher
Counsel for Petitioner
West Virginia Bar #7963

Darrell V. McGraw, Esq.
Attorney General
Counsel for Respondent

Robert D. Goldberg, Esq.
Assistant Attorney General
Counsel for Respondent

Susan Breece PLLC
Law Office
Post Office Box 731
Huntington, WV 25712-0731
Telephone/Fax (304) 522-1242
E-mail slbreece@verizon.net

Office of the Attorney General
State of West Virginia
State Capitol, Room 26-E
Charleston, WV 25305
Telephone (304) 558-2021

March 30, 2006

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2. Judge Ferguson’s testimony during the mercy phase of Mr. Hatcher’s trial violated the Code of Judicial Conduct.	
A. The State’s contention that Judge Ferguson did not testify to areas outside of his expertise goes to show that the State contends that Judge Ferguson testified as an expert witness. The Judge’s testimony denied Mr. Hatcher his United States and state constitutional rights to due process.	
B. Judge Ferguson violated Canon 2 of the Code of Judicial Conduct when he testified.	
(1) The State filed a praecipe of witnesses and subpoenaed Judge Ferguson three (3) hours before the start of the trial and with no notice to the defense violating the state and federal constitutional rights of Mr. Hatcher.	
(2) The Court has already ruled in <u>Kaufman</u> that the court should speak through its orders and should resist testifying.	
C. Judge Ferguson’s testimony created an actual and apparent conflict of interest.	
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MEMORANDUM OF LAW

JURISDICTION

This Court has jurisdiction to issue a writ of habeas corpus pursuant to W. Va. Code Section 53-4A-1. See also Rule 3 of the West Virginia Rules of Appellate Procedure.

STANDARD OF REVIEW

The standard of review is explained in the following passage from Mugnano v. Painter, 212 W. Va. 831, 833, 575 S.E.2d 590, 592 (2002).

In Syllabus Point 1 of *State ex rel. Postelwaite v. Bechtold*, 158 W. Va. 479, 212 S.E.2d 69 (1975), *cert. denied*, 424 U.S. 909, 96 S. Ct. 1103, 47 L. Ed. 2d 312 (1976), this Court held that: "Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong." The Court has also indicated that a circuit court's final order and ultimate disposition are reviewed under the abuse of discretion standard and that conclusions of law are reviewed *de novo*. *State ex rel. Hechler v. Christian Action Network*, 201 W. Va. 71, 491 S.E.2d 618 (1997).

Id.

QUESTION PRESENTED

Should the Court grant Mr. Hatcher relief when Mr. Hatcher's sentencing was unfairly prejudiced by highly prejudicial and opinionated statements made by a Circuit Judge?

BRIEF ANSWER

Yes. The Court should grant relief to Mr. Hatcher. The Circuit Judge's lengthy testimony in front of the jury at Mr. Hatcher's sentencing hearing was clearly prejudicial and violates Mr. Hatcher's state and federal constitutional rights, the Professional Code of Conduct's Judicial Cannons, and the case law. Moreover, Mr. Hatcher's entire case is fraught with injustices and violations of his United States and West Virginia Constitutional rights.

STATEMENT OF THE CASE

On October 22, 1995, Mark Vernatt, died after being shot three times with a .457 Magnum revolver while he was working as an employee of the Convenient Food Mart in Huntington, West Virginia. Ultimately, three individuals, Frederico Hatcher, Shawn Tabor, and Mike Walker were arrested for the murder of Mark Vernatt.

Mark Vernatt's murder was a case that the media followed avidly. Ultimately, the media coverage made it impossible for Frederico Hatcher to have a fair trial in the Sixth Circuit of the State of West Virginia. See Pre-trial Hearing, 4/2/1996, pp. 23-24.

At the time of the murder trial, Mr. Hatcher had completed tenth grade primarily by attending "LD and BD" classes. See Habeas Hearing Transcript, 05/23/2005, p. 74. Mr. Hatcher had been going to Prestera Mental Health Center for treatment from the time he was six (6) years old until he turned eighteen (18) years old. Id. at 75. During his pre-trial incarceration and trial, Mr. Hatcher was using drugs. Id. at 85-86.

The State ended up having a bifurcated murder trial with Frederico Hatcher as the defendant. At Frederico Hatcher's trial, both Shawn Tabor and Mike Walker testified against Frederico Hatcher basically testifying that Frederico Hatcher killed Mark Vernatt by firing the first two of three shots during a robbery of beer from the convenience store. See Trial Transcript, pp. 288-299, 340-341

Interestingly, Mr. Hatcher's co-defendants had given earlier conflicting statements. Indeed, Shawn Tabor's first statement put the entire blame for the murder of Mark Vernatt on Mike Walker, not Frederico Hatcher. Shawn Tabor's first statement is quoted in the following passage.

Question: Nobody said anything?

Answer: I heard a gunshot and the guy moan, and I went to turn around to take off and I had the beer in my hand and then it was, they shot twice, two more times.

Question: Who did?

Answer: Mike.

Question: Did you see Mike actually shoot the gun?

Answer: He shot once, I saw him shoot one round. I didn't see him shoot the first two.

Question: Was [sic] there three bullets all he had then?

Answer: Yes.

Question: Where was Fred standing when Mike did all of this?

Answer: Right there at the door.

Statement of Shawn Tabor, 10/24/1995.

Mike Walker testified that he fired the final shot, because Frederico Hatcher told him to do it, and he was afraid of Frederico Hatcher. Mike Walker testified that he was afraid of Frederico Hatcher, because Frederico Hatcher threatened to harm either Mike Walker or Mike Walker's sister, Kim Walker. See Trial Transcript, pp. 289-290.¹

After the jury returned a verdict of felony murder, the State presented its evidence on the issue of mercy. In an unprecedented move, the State called Judge

¹Despite his fear of Frederico Hatcher, Mike Walker ended up requesting to be Frederico Hatcher's *cellmate* at Mount Olive Correctional Center after the murder trial. Indeed, Mike Walker and Frederico Hatcher were cellmates together living in an efficiency cell as roommates for around two (2) years until Mike Walker was subsequently transferred to Huttonsville Correctional Center. See Habeas Hearing Transcript, 05/23/2005, pp. 76-84.

Alfred E. Ferguson to testify about his opinion of Frederico Hatcher during the second phase of the trial. The State did not list Judge Ferguson as a witness until it filed a praecipe for witnesses little more than three (3) hours before the mercy phase.

Not only did Judge Ferguson testify as to his personal opinion of Frederico Hatcher, but also, Judge Ferguson testified about the contents and nature of Frederico Hatcher's juvenile petitions. See Sentencing Phase Transcript, pp. 28-38. Specifically, Judge Ferguson testified about the contents and nature of Mr. Hatcher's dismissed and adjudicated juvenile petitions. Id. Part of Judge Ferguson's testimony is in the following passage.

Q: Did you feel like there was any hope of rehabilitation?

A: I knew, I knew, I've dealt with thousands of adult criminals also. I knew Frederico was going to be in trouble with the law. I was not surprised when I saw that he was arrested on this charge, and my statements were, when he was arrested, that it was probably him that did the shooting, to be truthful.

Q: ...[D]o you feel that there is a, from what you know of him in the past, do you feel that there is a risk of him committing violence to the persons of others?

A: Well, certainly. Absolutely, unless he totally changes his past conduct. He's not going to get any better in prison. We don't send people to prison to rehabilitate them, we send them there to punish them and to remove them from society, and there's some people that need to be removed from

society. Nobody likes to do, but we have to do it. Yes I'm sorry, to say that also.

Sentencing Phase transcript, pp. 27-39. Throughout his direct examination of Judge Ferguson, the prosecutor repeatedly referred to Judge Ferguson as "Judge" more than twenty (20) times. Id. Judge Egnor, the trial judge, also referred to Judge Ferguson as "Judge", and remarked the following statement in the presence of the jury. "Thank you, Judge. We appreciate your testimony. I know this was difficult." Sentencing Phase Transcript, lines 7-8, page 41. Indeed, the prosecutor started the closing argument by stating, "As Judge Ferguson told you...." Sentencing Phase Transcript, State's Closing Argument.

PROCEDURAL HISTORY

A jury convicted Mr. Hatcher of first-degree murder on June 27, 1996. Through a bifurcated proceeding, Mr. Hatcher received a sentence of life "without mercy." On August 13, 1996, the Court sentenced Mr. Hatcher to life without mercy for first-degree murder and a consecutive sentence of two-hundred-and-twelve (212) years for an unrelated aggravated robbery conviction for theft of a pizza. The Court sentenced Mr. Hatcher for the aggravated robbery and the first-degree murder convictions at the same hearing. At Mr. Hatcher's sentencing Judge Egnor stated the following reasoning for the remarkable sentencing hearing for the aggravated robbery charge.

It is this Court's belief that your action with respect to the commission of the felonious--or the aggravated robbery, warrant what is essentially a life Sentence. It is my belief that at your age the mortality tables would reveal that you have approximately 53 more years to live. Under the sentencing structure of the State of West Virginia in order to ensure that what would constitute essentially a life sentence for you under this sentencing process be done, it would be necessary to sentence your to four times 53 years, in order to ensure that you would not be considered for parole too soon, to ensure that the attention of this Court be carried out.

Final Sentencing Hearing Transcript dated 8/13/1996, lines 9-22, page 9. Mr. Hatcher filed appeals for both the first-degree murder conviction and the

aggravated robbery charge², and the West Virginia Supreme Court of Appeals refused both appeals.

Mr. Hatcher filed a habeas petition for the first-degree murder charge on December 22, 1998. On May 23, 2005, the Circuit Court of Cabell County held a habeas hearing based upon Mr. Hatcher's twice-amended petition. On May 27, 2005, the Court entered an order denying Mr. Hatcher's petition for writ of habeas corpus. Therefore, Mr. Hatcher filed a notice of intent to appeal on June 6, 2005 and filed an appeal with this Court in August 2005.

This case is now in its eighth (8th) calendar year, and ten (10) calendar years have passed since the underlying trial. On January 24, 2006, the Court heard the oral presentation on the motion docket. Subsequently, the Court granted the writ of habeas corpus for appeal exclusively for assignment of error number one (1) in an order dated January 26, 2006. On February 13, 2006, Mr. Hatcher's Petitioner's/Appellant's Brief was filed with the Court. On March 17, 2006, the State's Appellee's/Respondent's Brief was filed with the Court.

²Mr. Hatcher's first habeas petition for the aggravated robbery charge has already been fully adjudicated ending with a final disposition of a refusal for appeal entered by the West Virginia Supreme Court of Appeals on or about October 6, 1999 in case number 992681. However, in February 2006, Mr. Hatcher recently filed, *pro se*, a second habeas petition for the aggravated robbery charge. Since that time, the Circuit Court of Cabell County, West Virginia, appointed this counsel to represent Mr. Hatcher for his pending second habeas petition on the robbery charge.

ASSIGNMENT OF ERROR

Mr. Hatcher's sentencing was unfairly prejudiced by highly prejudicial statements made by a Circuit Judge.

1. The Circuit Judge's testimony violated the Code of Professional Conduct and the Judicial Canons.
 - a. Judges should not testify as character witnesses.
 - b. The Judge's testimony created an actual conflict and an appearance of a conflict.
 - c. The Circuit Judge testified in an area where he had no expertise.
2. The Circuit Judge's testimony created a problem of future dangerousness when the Circuit Judge testified in an area where he had no expertise and when the Circuit Judge revealed his mental thought processes for forming opinions in cases involving Mr. Hatcher.
3. Other jurisdictions, both federal and state, have ruled that testimony from a judge is prejudicial.

ARGUMENT

1. **The Respondent has misstated facts in its brief—especially when it says, *without a source*, that Mr. Hatcher fired two (2) shots at the victim. Mr. Hatcher has always maintained his innocence.**

In its brief, the Respondent erroneously states several facts including the following facts.

- The Respondent erroneously alleges that there Mr. Hatcher shoot an unarmed store clerk twice, at point blank range, in order to shoplift beer. See Respondent's brief dated 3/17/2006, p. 5. ***Mr. Hatcher has always maintained his innocence.*** See Habeas Hearing Transcript dated 5/23/2005, lines 3-10, page 84.
- The Respondent erroneously relies on the testimony of Mr. Hatcher's co-defendants, to cite that Mr. Hatcher used the same gun to shoot at an occupied car three times—especially when the co-defendants each offered conflicting testimony. See Respondent's Brief dated 3/17/2006, p. 8. A more accurate statement of the facts would be to cite that the Respondent's sources were Mr. Hatcher's co-defendants, who had both continuously made inconsistent statements, rather than citing as a solid fact.
- The Respondent erroneously states that the Petitioner does not address constitutional ramifications of the trial court's decision. See Respondent's brief dated 3/17/2006, p. 5. First, the Respondent apparently has failed to read even the *very first paragraph* of Mr. Hatcher's brief that is a quote

from the Constitution of the State of West Virginia. See Petitioner's Brief dated 2/13/2006, p. 8. Second, the Respondent apparently has also failed to read the Petitioner's Points of Authorities citing the State and United States Constitution. Id. at p. ii, iii. Third, the Respondent apparently has failed to read the Petition in which all eight (8) grounds allege both state and federal constitutional violations. Fourth, the Respondent apparently has failed to read the Petitioner's Brief which, in itself, is a strong constitutional argument for Mr. Hatcher's state and United States constitutional rights being violated including due process when the State called a senior judge (with the first praecipe of witnesses notice filed about three hours prior to the trial) to testify about future dangerousness in front of a jury. Fifth, the Respondent has failed to review all the resources cited in the brief interpreting constitutional issues such as due process.

- The Respondent erroneously relies on the testimony of Mr. Hatcher's co-defendants to cite that Mr. Hatcher did not want any witnesses at the robbery. See Respondent's Brief dated 3/17/2006, pp. 8-9. A more accurate statement of the facts would be to cite that the Respondent's source was a convicted felon and co-defendant who received a plea bargain to testify against Mr. Hatcher.
- The Respondent has also misstated the law and failed to consider existing applicable West Virginia law. These points will be addressed later in the brief.

2. Judge Ferguson's testimony during the mercy phase of Mr. Hatcher's trial violated the Code of Judicial Conduct.

A. A judge shall respect and comply with the law, shall avoid impropriety and the appearance of impropriety in all of the judge's activities, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

West Virginia Code of Judicial Conduct, Canon 2 A.

A judge must not testify as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

Commentary, West Virginia Code of Judicial Conduct, Canon 2.

Judge Ferguson was certainly not the only possible source of this information. Moreover, Judge Ferguson testified about his *personal opinion* of Mr. Hatcher. Judge Ferguson gave the following impression of Mr. Hatcher during the hearing, "Frederico, my impression of him is anything you say to him just goes right through him. He's a kid that never shows any emotion. It's like me trying to talk to that wall to try to tell him something." See Sentencing Phase

Transcript, p. 39. Moreover, over the objections of Mr. Hatcher's counsel, Judge Ferguson offered the following testimony.

Q: Did you feel like there was any hope of rehabilitation?

A: I knew, I knew, I've dealt with thousands of adult criminals also. I knew Frederico was going to be in trouble with the law. I was not surprised when I saw that he was arrested on this charge, and my statements were, when he was arrested, that it was probably him that did the shooting, to be truthful.

Q: ...[D]o you feel that there is a, from what you know of him in the past, do you feel that there is a risk of him committing violence to the persons of others?

A: Well, certainly. Absolutely, unless he totally changes his past conduct. He's not going to get any better in prison. We don't send people to prison to rehabilitate them, we send them there to punish them and to remove them from society, and there's some people that need to be removed from society. Nobody likes to do, but we have to do it. Yes I'm sorry, to say that also.

Sentencing Phase Transcript, pp. 27-39.

- a. **The State's contention that Judge Ferguson did not testify to areas outside of his expertise goes to show that the State contends that Judge Ferguson testified as an expert witness. The Judge's testimony denied Mr. Hatcher his United States and state constitutional rights to due process.**

The State is absolutely correct in that Judge Ferguson testified as an expert witness in front of the jury. However, Judge Ferguson testified in an area where he has no expertise. At other times during his testimony, Judge Ferguson testified as to his personal opinions of Mr. Hatcher's character. In fact, Judge Ferguson was the State's star character witness. During Judge Ferguson's direct examination, the prosecutor referred to Judge Ferguson as "Judge" *more than twenty (20) times*. See Sentencing Phase Transcript, pp. 27-39. In the mercy phase of the trial, the State called exactly five (5) witnesses: Judge Ferguson (approximately sixteen (16) transcript pages of testimony), the circuit clerk (approximately 3 transcript pages of testimony), the magistrate clerk (approximately 4 transcript pages of testimony), a police officer (approximately 6 transcript pages of testimony), and a friend of the victim's (approximately 7 transcript pages of testimony). See Sentencing Phase Transcript. Therefore, the length of Judge Ferguson's testimony was easily more than *double* the length of any of the other State witnesses.

In citing the state case from Oregon, the Respondent fails to mention that the Oregon court gave the jury a cautionary instruction when a judge testified to facts. See Sansone v. Garvey, 71 P. 2d 124 (Or. App. 2003). "In the instructions, the trial court reminded the jury that "the judges who testified in this trial appeared before you as witnesses, not as judges. You must evaluate their

testimony as witnesses.” Id. at 217. A cautionary instruction would be in accordance with the view of Justice Cleckley.³

In the case at hand, Circuit Judge Egnor allowed the State to have Circuit Court Judge Ferguson testify without a cautionary instruction to the jury. Instead of issuing a cautionary instruction to the jury, Judge Egnor made the following remarks at the close of Judge Ferguson’s testimony.

Thank you, Judge. We appreciate your testimony. I know this was difficult.

Sentencing Phase Transcript, lines 7-8, page 41.

As Justice Cleckley has opined, a Circuit Judge testifies as a normal person not as an expert witness.⁴ *1-6 Handbook on Evidence for West Virginia Lawyers* § 6-5 (2005).

³ Indeed, the Respondent cited the same passage in its brief that states a cautionary instruction is appropriate. See Respondent’s Brief dated 03/17/2006, page 10.

⁴ Part of Judge Ferguson’s testimony that would make a jury think that he is testifying as to his personal opinion of Mr. Hatcher’s character and also his “expertise” is in the following passage.

Q: Did you feel like there was any hope of rehabilitation?

A: I knew, I knew, I’ve dealt with thousands of adult criminals also. I knew Frederico was going to be in trouble with the law. I was not surprised when I saw that he was arrested on this charge, and my statements were, when he was arrested, that it was probably him that did the shooting, to be truthful.

Q: ...[D]o you feel that there is a, from what you know of him in the past, do you feel that there is a risk of him committing violence to the persons of others?

A: Well, certainly. Absolutely, unless he totally changes his past conduct. He’s not going to get any better in prison. We don’t send people to prison to rehabilitate them, we send them there to punish them and to remove them from society, and there’s some people that need to be removed from society. Nobody likes to do, but we

It should be noted that Rule 605 is limited only to trials in which the judge is presiding. A witness is not disqualified merely because s/he is an active judicial officer. Judges should be called as witnesses with caution, but the court concluded that judges are not *per se* disqualified. In cases where a judge is called, it would be appropriate to give a cautionary instruction advising the jury that a judge's testimony is not entitled greater weight merely because he/she is a judge.

Id.

Judge Ferguson's testimony clearly and blatantly violated Mr. Hatcher's United States and state constitutional rights to due process. First, Mr. Hatcher had no notice of Judge Ferguson's testimony. Second, the Court gave no cautionary instruction regarding Judge Ferguson's testimony. Third, Mr. Hatcher had no idea, when he was before Judge Ferguson in court as a juvenile that his plea negotiations and juvenile record would be used against him as Judge Ferguson revealed his mental thought processes in deciding those juvenile cases.

For example, at the mercy trial, Judge Ferguson testified the following about Mr. Hatcher's plea negotiations as a juvenile.

Normally he would come in and plead not guilty and then he'd change his mind and end up pleading guilty. I have lots of orders where he's pled not guilty and then he changes his mind.

have to do it. Yes I'm sorry, to say that also.
Sentencing Transcript, pp. 27-39.

Sentencing Phase Transcript, lines 12-16, page 37. Of course, Mr. Hatcher pled innocent in the case at hand, and then Judge Ferguson testified that frequently when Mr. Hatcher pled innocent, he was actually guilty.

Sitting judges should absolutely not be in the business of testifying as expert witnesses in cases. Nor should sitting judges be in the business for testifying as character witnesses, *for good or bad character*. The prejudice to Mr. Hatcher is so obvious when on direct examination, the prosecutor repeatedly refers to Judge Ferguson as "Judge" more than twenty (20) times. Moreover, when asking Judge Ferguson introductory questions, the prosecutor made sure to confirm that Judge Ferguson had, at that time, been on the bench for nearly twenty (20) years. See Sentencing Phase Transcript, line 7, page 37.

b. Judge Ferguson violated Canon 2 of the Code of Judicial Conduct when he testified.

i. The State filed a praecipe of witnesses and subpoenaed Judge Ferguson three (3) hours before the start of the trial and with no notice to the defense violating the state and federal constitutional due process rights of Mr. Hatcher.

The State's failure to give adequate notice to Mr. Hatcher that Judge Ferguson would be testifying as a witness at his mercy trial violates Mr. Hatcher's state and federal constitutional right of due process. Additionally, the State's failure to give any notice to Mr. Hatcher that Judge Ferguson would be testifying to the issue of future dangerousness violates Mr. Hatcher's state and federal constitutional right to due process. See Estelle v. Smith, 451 U.S. 454 (1981).

ii. The Court has already ruled in Kaufman that the court should speak through its orders and should resist testifying.

Without even mentioning or addressing the existence of on point West Virginia case law, the Respondent instead refers to state case law from the state of Oregon. See Sansone v. Garvey, 71 P.3d 124, 132, 188 Or. App. 206. (2003). Unfortunately, the Respondent has misstated the law in the Oregon case. See Respondent's Brief dated 03/17/2006, pages 13-14. Indeed, the Respondent attempts to use the Oregon case to make a public policy argument stating that judges, as a class, should not be excluded as witnesses. Id. However, the Respondent fails to mention that, unlike the case at hand, the Judge in Sansone testified only to facts and not to personal views and mental thought processes in judicial decisions. Id. at 227.

Indeed, the Court has already addressed this issue in a similar case. In State ex rel Kaufman, the Court ruled the following. See State ex rel. Kaufman v. Zakaib et al, 207 W. Va. 662, 535 S.E.2d 727 (2000). "Judicial officers may not be compelled to testify concerning their mental processes employed in formulating official judgments or the reasons that motivated them in their official acts." Id. at Syl. Pt. 3.

In fact, other states have cited Kaufman, further holding that the scope of judicial privilege is absolute. The following passage from a recent Illinois case discusses Kaufman.

In the case of State ex rel. Kaufman v. Zakaib, 207 W. Va. 662, 535 S.E.2d 727 (W. Va. 2000) (Kaufman), the West Virginia Supreme Court

held that judicial officers may not be compelled to testify regarding their mental processes used in formulating official judgments or the reasons that motivate them in their official acts. Kaufman, 535 S.E.2d at 735. Although the Kaufman Court did not speak in terms of an absolute or qualified privilege, it noted that the scope of the privilege is limited to communications relating to a judge carrying out his or her official duties. Kaufman, 535 S.E.2d at 735 ("The Court is mindful that this protection from discovery proceedings has its limits, and those limits are that a judge must be acting as a judge, and that it is information regarding his or her role as a judge that is sought"). By addressing the scope of the privilege as opposed to balancing the need for disclosure of the information against the degree of intrusion upon the court's right to confidentiality, we believe that the Kaufman Court was analyzing a privilege it considered to be absolute in nature.

Thomas v. Page, et al., 361 Ill. App. 3d 484, 493-494; 837 N.E.2d 483, 492-493 (2005).

The errors in this case are clearly egregious and wrong⁵, and the Court clearly abused its discretion.⁶ Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

⁵ Even Mr. Hatcher's trial lawyers have testified that Judge Ferguson was expressing his opinion of Mr. Hatcher. First, Mr. Spurlock, a trial lawyer for more than thirty (30) years, testified that Judge Ferguson testified to his opinion of Mr. Hatcher. See Habeas Hearing Transcript dated 05/23/2005, p. 15. Second, when Mr. Oliverio was asked whether Judge Ferguson was expressing his opinion about Mr. Hatcher, Mr. Oliverio responded, "It certainly sounds like it." See Habeas Hearing Transcript dated 05/23/2005.

c. Judge Ferguson's testimony created an actual and apparent conflict of interest.

Judge Ferguson, who has at times served as the Chief Circuit Judge, has the most seniority out of the circuit judges in this county. His seniority creates an actual conflict and an appearance of a conflict when he testifies at a sentencing hearing that is presided by a less tenured judge, such as the trial judge, Judge Egnor. At the very least, this situation conveys apparent authority to the jury and an appearance of impropriety, because the testimony erodes the fundamental principle of judicial independence. Throughout his testimony, Judge Ferguson was not referred to as a lay witness. Rather, the prosecutor repeatedly referred to Judge Ferguson as "Judge" more than twenty (20) times during direct examination.

3. Judge Ferguson's testimony was improper as to Mr. Hatcher's future dangerousness. The Judge's testimony denied Mr. Hatcher of his United States and state constitutional rights of due process.

The State's failure to give any notice to Mr. Hatcher that Judge Ferguson would be testifying to the issue of future dangerousness violates Mr. Hatcher's state and federal constitutional right to due process. See Estelle v. Smith, 451 U.S. 454 (1981). The State interestingly has cited Barefoot v. Estelle, a United States case that has been superceded by statute in several jurisdictions. See

⁶ "Government is instituted for the common benefit, protection and security of the people, nation or community. Of all its various forms that is the best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal."

Barefoot v. Estelle, 463 U.S. 880 (1983). However, this case is still significant in the sense that courts still require advance notice if testimony of future dangerousness is to be given and allow both sides to present evidence of future dangerousness. Id.

In the sense that the Respondent claims to have used Judge Ferguson, a sitting judge, as a surprise witness for future dangerousness, the following United States Supreme Court case is helpful. The United States Supreme Court has cautioned against judges testifying. In the following passage, the Court discusses that adverse testimony from a judge can take away a defendant's right to testify. "It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf. *Hicks v. United States*, 150 U.S. 442, 452; *Allison v. United States*, 160 U.S. 203, 207, 209, 210." Quercia v. U.S., 289 U.S. 466, 470, 53 S. Ct. 698, 699, 77 L. Ed. 1321, 1325 (1993).

Introducing the Petitioner's juvenile record as well as allowing Judge Ferguson to testify about his mental thought processes involving the juvenile records violates Mr. Hatcher's United States and state constitutional rights and is absolutely a cognizable state and federal habeas claim. West Virginia Code Section 49-5-17 is designed to protect the records of juveniles and keep them sealed. That of course, was not what occurred in the case at hand.

The following passage from Judge Ferguson's testimony demonstrates how the Judge revealed his mental thought processes, personal views, and

W. Va. Const. Art. III.

rulings on sealed juvenile cases. Judge Ferguson testified the following about Mr. Hatcher's plea negotiations as a juvenile.

Normally he would come in and plead not guilty and then he'd change his mind and end up pleading guilty. I have lots of orders where he's pled guilty and then he changes his mind.

Sentencing Phase Transcript, lines 12-16, page 37.

The Court erroneously allowed Judge Ferguson to testify about the contents and nature of approximately twenty (20) of his juvenile petitions including sixteen (16) that the Court ultimately dismissed. See Sentencing Phase Transcript, pp. 28-38. Remarkably, Judge Ferguson claimed to be testifying about his experience with Mr. Hatcher since Mr. Hatcher was six years old. The errors in this case are clearly egregious and wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

CONCLUSION

For all the foregoing reasons, Mr. Hatcher requests relief from this Court. The errors in this case are clearly egregious and wrong, and the Court clearly abused its discretion. Mr. Hatcher's state and federal constitutional rights have been violated. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

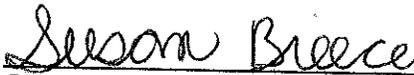
Wherefore, your Appellant, respectfully requests the following relief:

1. A hearing;
2. That the Court reverse the Appellant's conviction for the charges in this petition;
3. That the Court expunge the Appellant's criminal record to show no conviction and no arrest for the charges in this petition;
4. That the Court release the Appellant from his confinement, or in the alternative, set a bond;
5. That the Court grant any further relief that it deems necessary.

RESPECTFULLY SUBMITTED,

FREDERICO HATCHER
PETITIONER/APPELLANT

By Counsel:



Susan Breece, Esq.
West Virginia Bar #7963
Susan Breece PLLC
Law Office
Huntington, WV 25712-0731
Telephone/Fax: (304) 522-1242
E-mail: slbreece@verizon.net

CERTIFICATE OF SERVICE

I, Susan Breece, counsel for the Appellant Fred Hatcher, do hereby certify that I served a true and accurate copy of the foregoing Petitioner's Reply Brief upon Prosecutor Chris Chiles, Cabell County Courthouse, 750 Fifth Avenue, Huntington, WV 25701, and Darrell V. McGraw, Attorney General, State Capitol Complex, Building 1, Room E-26, Charleston, WV 25305, by depositing the same into the USPS first class mail and mailing it to the Prosecutor, Cabell County Courthouse, 750 Fifth Avenue, Huntington, WV 25701, and the Darrell McGraw, Attorney General, and Robert D. Goldberg, Assistant Attorney General, State Capitol Complex, Building 1, Room E-26, 1900 Kanawha Blvd. E., Charleston, WV 25305 on this 30th day of March in the year 2006.


Susan Breece, Esq.
West Virginia Bar #7963