

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

**TOM SCOTT, ADMINISTRATOR,
SOUTHWESTERN REGIONAL JAIL;
WYETTA FREDERICKS, EXECUTIVE
DIRECTOR, WEST VIRGINIA REGIONAL
JAIL AND CORRECTIONAL FACILITY AUTHORITY
RESPONDENT BELOW - APPELLANTS,**

**V. UNDERLYING PROCEEDING CIVIL ACTION NO. 05-C-91M
MARSHALL COUNTY CIRCUIT COURT**

**STATE OF WEST VIRGINIA,
ex rel. STEPHEN P. BOWERS,
PETITIONER BELOW - APPELLEE.**

APPELLANT'S BRIEF

Jeffrey D. Cramer
W.V. State Bar # 7436
Marshall County Prosecuting Attorney
Marshall County Courthouse
600 Seventh Street
Moundsville, West Virginia 26041
(304) 845-3580

Counsel for Appellants

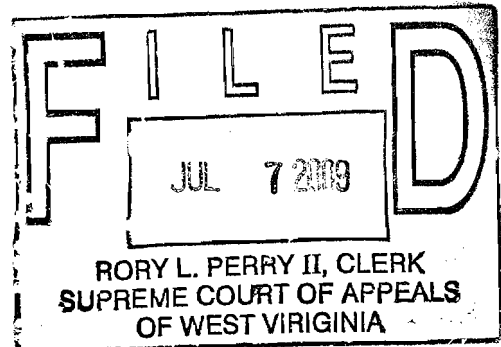


TABLE OF CONTENTS

TABLE OF AUTHORITIES.....4

INTRODUCTION.....6

I. KIND OF PROCEEDINGS AND NATURE OF RULINGS BELOW.....7

II. STATEMENT OF FACTS.....9

III. ASSIGNMENTS OF ERROR.....15

A. The Circuit Court abused its discretion by finding that the defendant below/appellee was ineffectively assisted by counsel in the underlying criminal trial of this matter, and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.

B. The Circuit Court abused its discretion by finding that comments made by the Prosecuting Attorney during trial were improper and warranted a reversal of the defendant’s criminal convictions.

C. The Circuit Court’s failure to make any finding pursuant to *Rhodes v. Leverette* that the State had committed extreme abuses of the defendant’s constitutional rights which warranted the extreme and extraordinary remedy of an unconditional discharge coupled with an injunction against further criminal prosecution is subject to a de novo review and is clearly erroneous.

IV. POINTS AND AUTHORITIES.....16

V. DISCUSSIONS OF LAW.....22

A. The Circuit Court abused its discretion by finding that the defendant below/appellee was ineffectively assisted by counsel in the underlying criminal trial of this matter, and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.....22

B. The Circuit Court abused its discretion by finding that comments made by the Prosecuting Attorney during trial were improper and warranted a reversal of the defendant's criminal convictions.....26

C. The Circuit Court's failure to make any finding pursuant to *Rhodes v. Leverette* that the State had committed extreme abuses of the defendant's constitutional rights which warranted the extreme and extraordinary remedy of an unconditional discharge coupled with an injunction against further criminal prosecution is subject to a de novo review and is clearly erroneous.....34

VI. RELIEF PRAYED FOR.....39

TABLE OF AUTHORITIES

Cases

<i>Mathena v. Haines</i> , 219 W. Va. 417, 633 S.E.2d 771 (2006).....	17
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	17, 22
<i>State v. Miller</i> , 194 W.Va. 3, 459 S.E.2d 114 (1995).....	18, 22
<i>State v. Thomas</i> , 157 W.Va. 640, 203 S.E.2d 445 (1974).....	18
<i>State v. Compton</i> , W. Va. , 277 S.E.2d 724 (1981).....	19,30
<i>State v. Bowman</i> , 155 W. Va. 562, 184 S.E.2d 314 (1971).....	19,30
<i>State v. Brewster</i> , W. Va. , 261 S.E.2d 77 (1979).....	19
<i>State v. Adkins</i> , 170 W.Va. 46, 289 S.E.2d 720 (1982).....	19,27,28,29
<i>State v. Sugg</i> , 193 W. Va. 388, 456 S.E.2d 469 (1995).....	19,20,31,33
<i>State ex rel. Tune v. Thompson</i> , 151 W. Va. 282 (1966).....	20,21,34,36,37,39
<i>State ex rel. Johnson v. McKenzie</i> , 159 W. Va. 795 (1976).....	21,35,38
<i>State ex rel. Titus v. Hayes</i> , 150 W. Va. 151, 144 S. E. 2d 502 (1965).....	21
<i>State ex rel. Powers v. Boles</i> , 149 W. Va. 6, 138 S. E. 2d 159 (1964)...	21,35,39
<i>State ex rel. Boner v. Boles</i> , 148 W. Va. 802, 137 S. E. 2d 418 (1964).	21,35,39
<i>State ex rel. Browning v. Boles</i> , 147 W. Va. 878, 132 S.E.2d 505 (1963).....	35
<i>State ex rel. Nicholson v. Boles</i> , 148 W. Va. 299, 134 S. E. 2d 576(1964).....	21,35,39
<i>State v. Holland</i> , 149 W. Va. 731, 143 S. E. 2d 148 (1965).....	22,37,38
<i>Foran v. Maxwell</i> , 184 N.E. 2d 398 (Ohio, 1962).....	22
<i>Northcott v. Hand</i> , 352 P. 2d 450 (Kan., 1960).....	22

U.S. v. Nash, 264 F. 2d 610 (6th Circuit 1959).....22

U.S. v. Tateo, 377 U.S. 463, 12 L. Ed. 2d 448, 84 S. Ct. 1587 (1964).....22

Rhodes v. Leverette, 160 W. Va. 781, 792-796 (W. Va. 1977).....20,34,35,36

State ex rel. May v. Boles, 149 W. Va. 155, 139 S.E.2d 177 (1964).....35

State ex rel. Stumbo v. Boles, 149 W. Va. 174, 139 S.E.2d 259 (1964).....35

State ex rel. Browning v. Boles, 149 W. Va. 181, 139 S.E.2d 263 (1964).....35

Statutes

W.V. Code §62-12-2(E).....23 ,24

W.V. Code § 53-4A-9.....16

W.V. Code §61-8B-1(6).....18,27

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA**

**TOM SCOTT, ADMINISTRATOR,
SOUTHWESTERN REGIONAL JAIL;
WYETTA FREDERICKS, EXECUTIVE
DIRECTOR, WEST VIRGINIA REGIONAL
JAIL AND CORRECTIONAL FACILITY AUTHORITY
RESPONDENT BELOW - Appellants,**

**V. UNDERLYING PROCEEDING CIVIL ACTION NO. 05-C-91M
MARSHALL COUNTY CIRCUIT COURT**

**STATE OF WEST VIRGINIA,
ex rel. STEPHEN P. BOWERS,
PETITIONER BELOW - APPELLEE.**

APPELLANT'S BRIEF

INTRODUCTION

Stephen P. Bowers was an Ohio County Sheriff's Deputy and a Glen Dale little league baseball coach. The former position bestowed upon him the respect of a community, the latter, it was alleged, provided him opportunities to sexually abuse three young boys.

Bowers was indicted on six counts of sexual crimes against three boys, D.G., M.K. and C.C. He was convicted by a jury and sentenced to the West Virginia Penitentiary for Men for more than a decade. His criminal appeals were denied by the West Virginia and United States Supreme Courts of Appeal, yet today he walks free, no felony conviction, no supervised release, no sex offender registry, nothing stopping him from coaching kids again . . . **and he cannot be re-tried.**

I. KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

On November 12, 2002, Stephen P. Bowers was indicted by the Marshall County Grand Jury on three counts of Sexual abuse by a Custodian, one count of Sexual Abuse in the First Degree, and two counts of Sexual Abuse in the Third Degree in Marshall County Circuit Court. The alleged victims were D.G. (Counts I & IV), M.K. (Counts II & V) and C.C. (Counts III & VI).

A jury trial on all counts of the Indictment commenced August 11, 2003, and continued over the next two days. At the close of the State's case, Bowers' Motion for a judgment of acquittal was denied by the Court. The jury returned it's verdict finding Bowers guilty of all six counts of the Indictment. Bowers renewed motion for a judgment of acquittal was denied at a post-trial hearing on September 4, 2003.

Subsequent to a pre-sentence investigation report being completed by the Court's Probation Officer, a sentencing hearing was held on September 12, 2003. Following testimony and arguments of counsel, the Court imposed a sentence of ten to twenty years for each of the first three counts, one to five years for count IV and ninety days for counts V and VI. The sentences for counts I, II and IV were ordered to be served consecutively, the sentence imposed in count II was suspended and Bowers was to be on three years of supervised probation following his release. The sentences in counts III, V and VI were ordered to run concurrently with the sentences in I, II and IV. The total effective sentence of incarceration was not less than eleven nor more than

twenty-five years.

Bowers' Petition for Appeal was refused by the West Virginia Supreme Court of Appeals as was a subsequent Petition for Writ of Certiorari to the United States Supreme Court. In his subsequent Habeas Corpus Petition, among many assertions of Bowers were two primary claims; that he was ineffectively assisted by his trial counsel, Frederick E. Gardner, Esquire, (hereinafter Gardner), and that then Marshall County Prosecutor, Herman D. Lantz, (hereinafter Lantz) made inappropriate comments during the jury trial, particularly during his closing argument.

The Circuit Court's Memorandum Order dated December 29th, 2008, granted Bowers' Habeas Corpus Petition *with prejudice*. The Court held that Bowers had received ineffective assistance of counsel and further that Prosecutor Lantz had made improper comments regarding Bowers' sexuality during the trial. The Court concluded that the cumulative effect of Gardner's and Lantz' actions (and inactions) precluded Bowers from receiving a fair and impartial trial.¹ During the prosecution of this Habeas Corpus Petition, the testimony of Bowers, the discovery deposition and testimony of Gardner, and the expert testimony of Andrew MacQueen were admitted and considered by the Court.

The Memorandum Order granted the Habeas Corpus Petition, overturned

1

Marshall County Circuit Court Memorandum Order, December 29th, 2008.

the defendant's conviction and discharged the defendant from incarceration. Of great significance, the Court ordered that the Habeas Corpus discharge was granted "*with prejudice*" and precluded further prosecution of the Indictment, ***relief which was above and beyond the prayers of Bowers' Habeas Petitions.***

II. STATEMENT OF FACTS

A complete evaluation of this appeal would be impossible without setting forth herein the facts and testimony as developed at the underlying criminal trial. The Habeas Corpus proceedings greatly centered around the actions (and inactions) of defendant's counsel and the prosecuting attorney. To fully understand the propriety of the strategies and actions of respective counsel, one must be cognizant of the circumstances with which they were respectfully faced.

As stated above, Bowers was charged with six total counts involving the sexual abuse of three young boys, D.G., M.K. and C.C. The facts and evidence developed at trial were as follows, respectively:

D.G. (11 years old)

D.G. was an eleven year old boy.² Bowers was D.G.'s little league baseball coach, he was 34 years old. Bowers himself testified at trial that on

²

State v. Bowers, Marshall County Circuit Court Case #02-F-39, Trial Transcript, page 57, lines 9-10 (D.G.'s Testimony).

the date of the allegations he spoke with D.G.'s father and told him that he was going to show D.G. some stretching exercises that he had learned.³ D.G.'s father told Bowers that he had to leave the house to deejay at a wedding reception, and that D.G. wasn't home, he was at the city park.⁴

Bowers testified that he then went and picked up D.G. at the park and took him back to D.G.'s now vacant home.⁵ At the house, D.G. and Bowers both testified that Bowers then told him to strip naked and take a warm bath.⁶ Bowers entered the bathroom while D.G. was still in the bathtub and watched him get out of the tub and towel off. They then went into the boy's bedroom and Bowers told him to remove the towel the boy had wrapped around his waist.⁷

While D.G. remained nude, Bowers began measuring him with a cloth tape, including measuring from his ankle to his private area, touching his testicles in the process.⁸ Bowers then began posing him into various stretches, bending the boy over at the waist, having him stand facing the wall and

³ Id. at page 202, lines 23-24, page 203, lines 1-7 (Bowers' Testimony).

⁴ Id. at page 203, lines 18-24, page 204, lines 1-17 (Bower's Testimony).

⁵ Id. at page 203, lines 18-24, page 204, lines 5-9 (Bower's Testimony).

⁶ Id. at page 204, lines 18-24, (Bower's Testimony) & page 58, lines 4-9 (D.G.'s Testimony).

⁷ Id. at page 58, lines 4-11 (D.G.'s Testimony).

⁸ Id. at page 59, lines 4-14 (D.G.'s Testimony).

stretching on the floor, all while D.G. remained nude.⁹ D.G. testified that Bowers then touched his testicles again "like a doctor would"¹⁰ and had him lay down, nude, on his bunk bed.¹¹

While laying nude on the bed, D.G. testified that Bowers told him to lay on his stomach, retrieved some skin lotion from a black bag that Bowers had brought with him and began to rub lotion all over his nude backside, from his shoulders to his ankles, including his buttocks.¹² Bowers then told D.G. to roll over onto his back and began rubbing lotion on his front side.¹³ D.G. testified that when Bowers got close to his private area, he told Bowers that he had to use the restroom and got up.¹⁴ D.G. testified that Bowers then told him that he shouldn't be embarrassed about his penis size because Bowers had seen other sizes bigger and smaller.¹⁵ Again, D.G. was eleven years old. Bowers left shortly thereafter when the boy's father returned.¹⁶

⁹ Id. at page 58, lines 14-21 (D.G.'s Testimony).

¹⁰ Id. at page 61, line 24, page 62, lines 1-9 (D.G.'s Testimony).

¹¹ Id. at page 64, lines 9-11 (D.G.'s Testimony).

¹² Id. at page 61, lines 10-18 (D.G.'s Testimony).

¹³ Id. at page 60, lines 1-7, 24 & page 61, lines 1-6 (D.G.'s Testimony).

¹⁴ Id. at page 61, lines 1-6 (D.G.'s Testimony).

¹⁵ Id. at page 60, lines 8-12 (D.G.'s Testimony).

¹⁶ Id. at page 62, lines 15-19 (D.G.'s Testimony).

M.K. (12 years old)

The testimony of twelve year old M.K. was virtually an instant replay of D.G.'s. M.K. testified that he lived across the street from Coach Bowers and one day shortly after his twelfth birthday he asked his mom if he could go over to the Coach's house.¹⁷ Bowers had been telling M.K. and his mom that he knew some stretching exercises that would help the boy's muscles grow and make him a better baseball player, and that the boy could come over anytime Bowers was home to learn them.¹⁸ M.K.'s mother permitted him to go over and told him that she had to leave to get his sister at school and would be right back home.¹⁹

M.K. and Bowers both testified that upon arrival at Bower's house, M.K. was led to the basement bathroom of the residence where he was directed to remove his clothing and get into the bathtub.²⁰ Bowers had already turned on the water. Bowers gave the boy a washcloth and soap and told him to scrub himself clean. As with D.G., Bowers came back into the bathroom to "check"

17

Id. at page 88, lines 13-19 & page 111, lines 2-6 (M.K.'s & M.K.'s Mother's Testimony).

18

Id. at page 107, lines 18-24 & page 108, lines 1-7 (M.K.'s Mother's Testimony).

19

Id. at page 111, lines 1-6 (M.K.'s Mother's Testimony).

20

Id. at page 91, lines 11-23 & page 196, lines 9-13 (M.K.'s. & Bowers' Testimony).

on the bathing boy.²¹ M.K. got out of the bathtub and towed himself off.²² Bowers took the towel off M.K. and proceeded to have the boy perform nude stretching exercises in his basement sitting room. Exercises such as laying prone and arching his back, and while standing up, spreading his legs and touching his toes, all nude and alone with Coach Bowers.²³ M.K. then testified that Bowers measured his height, took his pulse and did "other EMT things" such as grabbed his testicles and held them and grabbed his buttocks from behind and rubbed them.²⁴

At this point, M.K. and Bowers heard a knock at the door upstairs.²⁵ Initially Bowers ignored it, but it grew more persistent. It was M.K.'s mother.²⁶ Bowers told M.K. to "hurry up and get dressed."²⁷ When M.K.'s mother asked Bowers why it took so long to answer the door, Bowers told her that he thought it was someone else.²⁸ It should be noted that when questioned at trial as to why he "measured" D.G. and M.K., Bowers' response was simply "I don't

²¹ Id. at page 92, lines 3-9 (M.K.'s Testimony).

²² Id. at page 93, lines 1-7 (M.K.'s Testimony).

²³ Id. at page 93, lines 8-14 (M.K.'s Testimony).

²⁴ Id. at page 93, lines 19-24 & page 94, lines 3-23 (M.K.'s Testimony).

²⁵ Id. at page 95, lines 7-8 (M.K.'s Testimony).

²⁶ Id. at page 953, lines 12-17 & page 199, lines 20-24 (M.K.'s & Bowers' Testimony).

²⁷ Id. at page 96, lines 13-18 (M.K.'s Testimony).

²⁸ Id. at page 112, lines 1-20 (M.K.'s Mother's Testimony).

know.”²⁹ Bowers also testified that it was in no way necessary that the stretching exercises be performed while nude.³⁰

C.C. (12 years old)

Bowers’ “players only” team meeting held in the basement of his home served as the premise for the counts involving C.C. Bowers advised the team members that there would be two team meetings held at his home, an 11 year old meeting and a 12 year old meeting. The two meetings were held separately.³¹ At the meetings, Bowers told the parents to leave the kids and come back in an hour.³² Then, as the only adult present, he took the boys to the basement and “fitted” the boys for baseball uniform pants by having them strip down to their underwear while he measured their waists and inseams (from ankle to crotch).³³ While conducting such “measurements” during the 12 year old meeting, he touched C.C.’s testicles.³⁴ D.D., another player present at the meeting, testified that when another player told Bowers he didn’t want to strip down to his underwear, he was told that if he didn’t he wouldn’t be playing that year.³⁵ D.D. also testified that Bowers told the boys at the

²⁹ Id. at page 227, lines 17-24 (Bowers’ Testimony).

³⁰ Id. at page 225, lines 1-5 (Bowers’ Testimony).

³¹ Id. at page 187, lines 15-19 (Bowers’ Testimony).

³² Id. at page 223, lines 17-18 (Bowers’ Testimony).

³³ Id. at page 221, lines 2-5 (Bowers’ Testimony).

³⁴ Id. at page 126, lines 4-18 (C.C.’s Testimony).

³⁵ Id. at page 157, lines 17-24 & page 158, lines 1-6 (D.D.’s Testimony).

meeting, "everything that happens here, stays here."³⁶

Bowers took the stand at trial and testified in his own defense. Although he disputed that any touching was for sexual gratification, he disputed very little of the events as testified by the boys. During the Habeas Corpus proceedings Gardner testified that the trial defense was premised not upon arguing that the touching did not occur, but that the touching was not for the sexual gratification of either party (Bowers or the victim), which was an essential element of the alleged crimes to be proven by the State.

III. ASSIGNMENTS OF ERROR AND THE MANNER

IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

- A. The Circuit Court abused its discretion by finding that the defendant below/appellee was ineffectively assisted by counsel in the underlying criminal trial of this matter, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.**
- B. The Circuit Court abused its discretion by finding that comments made by the Prosecuting Attorney during trial were improper and warranted a reversal of the defendant's**

³⁶ Id. at page 159, lines 11-17 (D.D.s' Testimony).

criminal convictions.

- C. The Circuit Court's failure to make any finding pursuant to *Rhodes v. Leverette* that the State had committed extreme abuses of the defendant's constitutional rights which warranted the extreme and extraordinary remedy of an unconditional discharge coupled with an injunction against further criminal prosecution is subject to a de novo review and is clearly erroneous.**

IV. POINTS AND AUTHORITIES RELIED UPON

Right of State to Appeal Final Habeas Corpus Judgment

§ 53-4A-9. Judicial review; disposition of petitioner pending appeal.

(a) A final judgment entered under the provisions of this article by a statutory court may be appealed by the petitioner or the State to the circuit court of the county upon application for an appeal or writ of error in the manner and within the time provided in article four [§§ 58-4-1 et seq.], chapter fifty-eight of this code, as amended. A final judgment entered under the provisions of this article by a circuit court or a final judgment entered by the circuit court after an appeal or writ of error was granted by such circuit court with respect to the judgment of a statutory court entered under the provisions of this article, as well as an order by a circuit court rejecting an appeal from or writ of error to the judgment of a statutory court entered under the provisions of this article,

may be appealed by the petitioner or the State to the Supreme Court of Appeals upon application for an appeal or writ of error in the manner and within the time provided by law for civil appeals generally. When an application for an appeal or writ of error is rejected by the circuit court (and the order of rejection is not appealed to the Supreme Court of Appeals), or the Supreme Court of Appeals, as the case may be, or both, the order sought to be reviewed shall thereby become final to the same extent and with like effect as if said order had been affirmed on appeal.

Standard of Review on Appeal

"In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syllabus point 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

Ineffective Assistance of Counsel

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

Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

"In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." Syl. Pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

"Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. Pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Criminal Law–Sexual Abuse Definition

§ 61-8B-1(6) "Sexual contact" means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.

Criminal Law -- Review -- Admission of Evidence

"An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case." Syl. pt. 1, *State v. Compton*, W. Va. , 277 S.E.2d 724 (1981), *quoting*, Syl. pt. 2, *State v. Bowman*, 155 W. Va. 562, 184 S.E.2d 314 (1971).

Criminal Law--Evidence of Sexuality of Defendant

Evidence regarding sexual predilections or conduct is not admissible at trial unless it is clearly relevant. Syl. pt. 7, *State v. Adkins*, 170 W.Va. 46, 289 S.E.2d 720 (1982).

Criminal Law -- Verdict -- Remarks Made by Prosecuting Attorney

"A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. pt. 2, *State v. Brewster*, W. Va., 261 S.E.2d 77 (1979).

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters. Syl. pt. 6, *State v.*

Sugg, 193 W. Va. 388, 456 S.E.2d 469 (1995).

Habeas Corpus – Effect of Discharge

“Habeas Corpus -- Due Process of Law -- The sole issue presented in a habeas corpus proceeding by a prisoner is whether he is restrained of his liberty by due process of law.” Syl. Pt. 1, *State ex rel. Tune v. Thompson*, 151 W. Va. 282 (W. Va. 1966).

“Criminal Law -- Retrial -- A retrial of a defendant who has obtained his release on collateral attack for failure to afford him due process of law does not constitute double jeopardy.” Syl. Pt. 2, *State ex rel. Tune v. Thompson*, 151 W. Va. 282 (W. Va. 1966).

“Finally, as in all attempts to categorize such a complex subject as the nature of the relief to be awarded on a writ of habeas corpus, we recognize that there may exist such extreme abuses on the part of the State as against the constitutional rights of an individual that the only appropriate remedy would be an unconditional discharge coupled with an injunction against further prosecution of the underlying criminal action.” *Rhodes v. Leverette*, 160 W. Va. 781, 794 (W. Va. 1977).

“We now again affirm the principles of *Tune*, hoping to settle the conflict which is apparent from a review of our prior decisions. A discharge in habeas corpus operates upon the custody of a person illegally or unconstitutionally restrained. It does not operate to discharge forever a person from the legal consequences of an act or to acquit him of a crime. It does not deprive a court

of any jurisdiction it may otherwise have. It merely frees the prisoner from continued restraint unless the State elects to resume the proceedings at the point they had reached prior to the unlawful action on the part of the court." *State ex rel. Johnson v. McKenzie*, 159 W. Va. 795, at 802 (W. Va. 1976).

"This Court has held that if a trial on a felony charge is void, jeopardy did not attach and that 'Especially is this true where the accused himself has set in motion the proceedings which nullified the judgment.'" *State ex rel. Tune v. Thompson*, 151 W. Va. 282, 286, 151 S. E.2d 732, 734. (W.Va. 1966).

A discharge in habeas corpus affects only the imprisonment, that is, the illegal restraint. "The primary object of habeas corpus is to determine the legality of the restraint under which a person is held and the only issue which it presents is whether the prisoner is restrained of his liberty by due process of law." *State ex rel. Titus v. Hayes*, 150 W. Va. 151, 144 S. E. 2d 502 (1965). It does not act upon the penalty nor does it operate as an absolute discharge from the legal consequences, or as an acquittal, of a crime. It does not deprive a court of any jurisdiction it may otherwise have. It merely requires resumption of the proceedings at the point [*286] they had reached prior to the unlawful action on the part of the court. *State ex rel. Powers v. Boles*, 149 W. Va. 6, 138 S. E. 2d 159 (1964); *State ex rel. Boner v. Boles*, 148 W. Va. 802, 137 S. E. 2d 418 (1964); *State ex rel. Nicholson v. Boles*, 148 W. Va. 299, 134 S. E. 2d 576 (1964).

It presents no bar to subsequent proceedings for the reason that the

former proceedings having been held invalid, jeopardy did not attach. *State v. Holland*, 149 W. Va. 731, 143 S. E. 2d 148. Especially is this true where the accused himself has set in motion the proceedings which nullified the judgment. *State v. Holland*, 149 W. Va. 731, 143 S. E. 2d 148; *Foran v. Maxwell* (Ohio, 1962), 184 N.E. 2d 398; *Northcott v. Hand* (Kan., 1960), 352 P. 2d 450; *U.S. v. Nash*, 264 F. 2d 610 (6th Circuit 1959); *U.S. v. Tateo*, 377 U.S. 463, 12 L. Ed. 2d 448, 84 S. Ct. 1587 (1964).

V. DISCUSSIONS OF LAW

A. The Circuit Court abused its discretion by finding that the defendant below/appellee was ineffectively assisted by counsel in the underlying criminal trial of this matter, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

"In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel' unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The evidence adduced by Bowers during the course of the Habeas Corpus litigation regarding his claim of ineffective assistance of counsel primarily focused upon two areas: the failure of Gardner to appreciate how poorly Bowers would stand up to Lantz' cross-examination; and the failure of Gardner to object to alleged improper and prejudicial statements of Lantz.

Regarding the failure of Gardner to appreciate Bowers' inability to be cross-examined, the Circuit Court makes its finding upon several premises. Primarily the Court, relies upon the testimony of Bowers' habeas corpus expert witness, Andrew MacQueen, and finds that Gardner failed to obtain a detailed psychological evaluation of Bowers in the course of preparation for trial.³⁷ MacQueen testified and opined that Gardner should have requested, pre-trial, an evaluation pursuant to W.V. Code §62-12-2(E).³⁸

W.V. Code §62-12-2(E) sets forth requirements which must be met, i.e. a physical, mental and psychiatric study and diagnosis which shall include an on-going treatment plan requiring active participation in sexual abuse counseling at a mental health facility or through some other approved program, before someone **convicted** of certain sexual crimes may be considered for

³⁷

Marshall County Circuit Court Memorandum Order entered December 29th, 2008. Page 2, paragraph 1(a).

³⁸

State ex Rel. Bowers v. Scott, et al., 05-C-91M, April 9, 2008, transcript, Page 7, Lines 20-24, Page 8, Lines 1-9. (MacQueen's Testimony)

probation.³⁹

MacQueen testified that given what Gardner "*was confronted with a - a confession, it was relatively clear that there was a real possibility that his client was going to be convicted.*"⁴⁰ Therefore, in MacQueen's opinion, since Gardner should have known with Bowers' confession admissible he would be convicted, Gardner should have requested the above evaluation to prepare for sentencing. According to MacQueen, said evaluation may have given him insight into "knowing how his client was going to do if he went on the witness stand."⁴¹

What MacQueen does not specify in his opinion is exactly what information Gardner might have gleaned from this probation eligibility evaluation that could have alerted him of Bowers' testimonial difficulties, especially given the fact that this evaluation would be conducted by the evaluator premised upon Bowers being guilty of the alleged crimes. Bowers and Gardner were obviously not ready to make such a concession.

MacQueen opined that Gardner should have requested a *post-trial* psychological probation eligibility evaluation and attempted to glean information from that evaluation to determine *pre-trial* whether Bowers would be able to stand up to cross-examination. MacQueen's opinion regarding the significance

³⁹ W.V. Code §62-12-2(E).

⁴⁰ State ex Rel. Bowers v. Scott, et al., 05-C-91M, April 9, 2008, transcript, Page 7, Lines 20-24 (MacQueen's Testimony)

⁴¹ Id at Page 9, Lines 16-17.

of Gardner's failure to request the evaluation completely disregards Judge Madden's own observation "during the hearing on May 30, that he likely would have denied a Motion for a Court ordered and paid psychological evaluation since Mr. Gardner was employed and not Court appointed."⁴² Not to mention the fact that Bowers had not yet been convicted. In fact, when asked during his cross-examination whether this probation eligibility evaluation could be completed "after trial" MacQueen responded that "... it is often done that way."⁴³

MacQueen also opines that Gardner could have done more to prepare Bowers for testifying at trial. However MacQueen testified that Gardner did attempt to prepare Bowers on several occasions by discussing with Bowers the questions he would face on cross-examination, even if he did not conduct a full blown mock cross-examination and attempt to break Bowers down.⁴⁴ Lantz' actual trial cross-examination questions were, according to Gardner, "same subject, worded differently."⁴⁵ Faced with what MacQueen himself termed "a *real possibility that his client was going to be convicted.*" Gardner encouraged

42

Page 7, Marshall County Circuit Court Memorandum Order entered December 29th, 2008.

43

State ex Rel. Bowers v. Scott, et al., 05-C-91M, April 9, 2008, page 36, lines 1-6 (MacQueen's Testimony).

44

State ex Rel. Bowers v. Scott, et al., 05-C-91M, April 9, 2008, page 38, lines 9-19 (MacQueen's Testimony).

45

Id. at page 38, lines 9-24 (MacQueen's Testimony).

a reluctant Bowers to testify on his own behalf. Bowers himself testified in his habeas corpus proceeding that "I think it was basically implied that, you know - - that I was the only defense witness that there could be."⁴⁶

Assuming arguendo that Gardner was ineffective as determined by the Circuit Court, the Court erred in finding that a reasonable probability that the outcome of the case would have been different existed. Assume for a moment that Bowers does not testify, Gardner requests the above evaluation pre-trial and gleans something from the report that Bowers shouldn't take the stand. Gardner cross-examines the witnesses for the State and argues to the jury that the State did not prove beyond a reasonable doubt that the touching was for the sexual gratification of Bowers. Given the statement/confession that had been ruled admissible and the testimony of the three boys as set forth herein above, the appellants submit that there is no reasonable possibility or probability that Bowers would have been acquitted, and the Circuit Court clearly erred in finding the same.

B. The Circuit Court abused its discretion by finding that comments made by the Prosecuting Attorney during trial were improper and warranted a reversal of the defendant's criminal convictions.

⁴⁶

State ex Rel. Bowers v. Scott, et al., 05-C-91M, February 3, 2006, page 62, lines 5-7. (Bowers' Testimony).

Prosecutor Lantz' comments regarding Bowers' sexuality during the criminal trial were not improper as set forth in the Circuit Court's Memorandum Order. To convict Bowers of the crimes alleged in the Indictment, Lantz was required to prove beyond a reasonable doubt that "sexual contact" as defined in West Virginia Code §61-8B-1(6) occurred. "Sexual contact" is defined as "any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor *and the touching is done for the purpose of gratifying the sexual desire of either party.*"⁴⁷

Lantz' comments regarding Bowers' sexuality were proper and clearly relevant pursuant to *State v. Adkins*.⁴⁸ The West Virginia Supreme Court in *Adkins* held "[e]vidence regarding sexual predilections or conduct is not admissible at trial *unless it is clearly relevant.*"⁴⁹ Bowers' trial defense to the allegations that he had "sexual contact" while touching these boys' testicles was that touching their testicles was **not** for his sexual gratification. Bowers testified upon questioning by his attorney that he was not attracted to young boys sexually, was not a homosexual, was a heterosexual, and had no "sexual

⁴⁷ West Virginia Code §61-8B-1(6) (Emphasis Added)

⁴⁸ *State v. Adkins*, 170 W.Va. 46, 289 S.E.2d 720 (1982)

⁴⁹ Syl. pt. 7, *State v. Adkins*, 170 W.Va. 46, 289 S.E.2d 720 (1982). (Emphasis Added)

contact" with those three boys.⁵⁰

Bowers had been indicted of sexual contact with three young boys. He took the witness stand and proclaimed himself a heterosexual male, ergo he could not have been sexually attracted to boys. The Court's Memorandum Order erroneously held that it was improper for Lantz to then attempt to rebut Bowers' witness stand declaration of heterosexuality and argue to the jury that Bowers was sexually attracted to these three boys and received sexual gratification from the touching, making it "sexual contact".

The Circuit Court Memorandum Order completely fails to make any finding or conduct an evaluation of whether Bowers' sexuality was "clearly relevant" pursuant to *Adkins*. The Order simply concludes that "Here, there was no evidence other than the alleged touching of the boys; the allegations concerning the Petitioner's marital state were accusatory and insinuations of homosexuality. It doesn't matter whether the accusations are true or false; accusations of homosexuality are so incendiary that they constitute prejudicial and reversible error regardless of whether they are correct."⁵¹

The Appellants submit that this finding is not only clearly erroneous but logically ludicrous. Prosecutor Lantz was in no manner attempting to call upon the jury's possible latent bias against homosexuals to convict Bowers on the

⁵⁰ State of W.V. v. Bowers, page 208, lines 4-18. (Bowers' Testimony)

⁵¹

Page 11, Marshall County Circuit Court Memorandum Order entered December 29th, 2008.

sole ground that Bowers was arguably homosexual. Bowers himself had exclaimed his heterosexuality as a quasi-defense to an essential element of the charged criminal acts. It mattered greatly whether the "accusation" of homosexuality was true or false.

Bowers was accused of sexual contact with three young boys. As stated above, Lantz was required to prove beyond a reasonable doubt that the alleged touching of the boys' testicles was for Bowers sexual gratification. Bowers had taken the stand and proclaimed fundamentally that him receiving sexual gratification from the touchings and his heterosexuality were mutually exclusive conclusions for the jury.

Bowers sexuality was not only clearly relevant to the criminal allegations being tried, it was perhaps the lynchpin of the entire case for the defendant and the State. It logically follows that if Bowers could convince the jury that he was a heterosexual man, he would not have had any sexual interest in young boys, and received no sexual gratification from touching their testicles or nude buttocks. Conversely, Prosecutor Lantz had virtually no choice but to argue Bowers was in some way homosexual if there were any chance of successfully meeting the burden of proving that touching the boys was for Bowers' sexual gratification. Further, the defendant himself opened the door for Lantz' line of cross-examination regarding Bowers' sexuality, he discussed the issue during his direct testimony. Was Lantz bound by *State v. Adkins* to simply not cross-examine Bowers regarding this important and clearly relevant issue? Lantz'

avoidance of the issue of Bowers' sexuality, and failure to cross-examine Bowers regarding his testimony may have very easily been interpreted by the jury as a concession by the prosecution that Bowers was indeed a heterosexual man.

As set forth in *State v. Compton*, quoting *State v. Bowman*, "An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case."⁵² In his case in chief during his direct testimony, Bowers made very clear, unambiguous assertions regarding his heterosexuality, and that the touching was not for his sexual gratification because he was not homosexual. Lantz then cross-examined Bowers and made subsequent arguments regarding Bowers' testimony. Bowers' declaration of heterosexuality and Lantz' argument that the touchings were for sexual gratification was clearly a controverted factual issue requiring a determination by the jury, especially given Bowers' quasi-defense that the two were mutually exclusive. Again, the Circuit Court clearly erred in disregarding the black letter law of *Compton* and *Bowman* above, by permitting Bowers to subsequently, collaterally *and successfully* complain of prejudice by Lantz' remarks.

"Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree

⁵²

Syl. pt. 1, *State v. Compton*, W. Va. , 277 S.E.2d 724 (1981), quoting, Syl. pt. 2, *State v. Bowman*, 155 W. Va. 562, 184 S.E.2d 314 (1971).

to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." Syl. pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995). The appellants submit that none of the above four required factors were present during the underlying trial.

First, Lantz' remarks had very little tendency to mislead the jury and prejudice the accused. The accused had declared himself a heterosexual man and that any touching of the three young boys was incidental and not for his sexual gratification. As stated above, Prosecutor Lantz had a burden of proving that Bowers did indeed receive sexual gratification from the respective touching. Lantz' remarks were not intentionally or incidentally misleading to the jury.

Secondly, Lantz' remarks were isolated and not overly extensive. It can't be overstated that Bowers himself had placed his sexuality at issue and testified that he received no sexual gratification from touching young boys, although he had done so on at least three occasions. Lantz' remarks and arguments simply attempted to rebut Bowers' assertions. In fact, Lantz' alleged improper cross-

examination regarding Bowers' sexuality consisted of only five questions.⁵³ During closing arguments, Lantz' comments regarding the issue were simply an attempt to show that Bowers received sexual gratification from looking at, and touching, little boys.⁵⁴ Again, this was not a situation where Lantz was attempting to argue to the jury that they should convict Bowers of a crime simply because he was a homosexual. Bowers had asserted his heterosexuality as a mutually exclusive proposition to the charge that he had received sexual gratification from the touchings.

Further, absent the remarks of Lantz, the strength of competent proof introduced to establish the guilt of Bowers was overwhelming. During the trial, all three young boys testified as set forth above regarding their respective interactions with Bowers. Bowers, during his testimony, disputed very little of their allegations. Testimony of Bowers himself, particularly of damning nature was that he indeed did have D.G. and M.K. take baths, did show them stretching exercises while they remained nude and did rub skin lotion on D.G.'s nude body. Bowers did not dispute that he was the only adult present during

⁵³ State v. Bowers, Trial Transcript, page 235, lines 14-24 (Bowers' Testimony):
Q. Mr. Gardner asked if you were a homosexual. Are you a homosexual?
A. No.
Q. Are you a pedophile?
A. No.
Q. Do you like to look at young boys?
A. No.
Q. Are you married?
A. No.
Q. Have you ever been married?
A. No.

⁵⁴ State v. Bowers, Trial Transcript, page 274, lines 22-24, (Lantz' Closing).

the times of all three boys allegations.

Further, an *in camera* hearing was held pre-trial regarding the admissibility of the defendant's videotaped statement/confession to Sergeant Robinson of the West Virginia State Police, Bowers having moved for its suppression. The Court ruled, both *in limine* and at trial, that the statement was admissible and the taped statement/confession was shown to the jury. The appellants submit that overwhelming competent proof was introduced at trial to establish Bowers' guilt regardless of Lantz' remarks.

Finally, Prosecutor Lantz' remarks were in no manner deliberately placed before the jury to divert attention to extraneous matters. The matter of Bowers' sexuality was in fact placed before the jury by Bowers himself and certainly was not an extraneous matter. Bowers had declared his heterosexuality as a quasi-defense to the charges. To find that Lantz' remarks regarding Bowers' sexuality were deliberately placed before the jury to divert attention to extraneous matters is clearly erroneous. Lantz' remarks were deliberately placed before the jury to **call** attention to a **highly relevant and material** matter. Prosecutor Lantz' remarks fulfill zero of the four required factors set forth in *State v. Sugg*.⁵⁵ Factors which the Circuit Court should have determined in order to find that Lantz' remarks warranted a reversal of the jury's guilty verdicts.

⁵⁵ *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).

C. The Circuit Court failure to make any finding pursuant to *Rhodes v. Leverette* that the State had committed extreme abuses of the defendant's constitutional rights which warranted the extreme and extraordinary remedy of an unconditional discharge coupled with an injunction against further criminal prosecution is subject to a de novo review and is clearly erroneous.

The primary object of habeas corpus is to determine the legality of the restraint under which a person is held and the only issue which it presents is whether the prisoner is restrained of his liberty by due process of law."⁵⁶

In its Memorandum Order, the Marshall County Circuit Court held that pursuant to *State ex rel. Tune v. Thompson*, 151 W.Va. 282, 151 S.E.2d 732 (1966), it had the inherent ability to grant Bower's Habeas Petition *with prejudice* and preclude any further prosecution of the indictments against him. The Circuit Court opined that if it could order a discharge specifically without prejudice, as discussed in *Tune*, it could discharge a defendant in a habeas corpus proceeding with prejudice.⁵⁷ It needed not attempt to interpret the *Tune* holding to make such an assumption. The West Virginia Supreme Court of

⁵⁶

State ex rel. Tune v. Thompson, quoting *State ex rel. Titus v. Hayes*, 150 W. Va. 151, 144 S. E. 2d 502.

⁵⁷

Footnote 4, Page 14-15, Marshall County Circuit Court Memorandum Order entered December 29th, 2008.

Appeals in *Rhodes v. Leverette* clearly discussed this exact issue.⁵⁸

The *Rhodes* Court discusses the nature of habeas corpus relief as follows: "In this State, as pointed out in *State ex rel. Johnson v. McKenzie*, W. Va. , 226 S.E.2d 721 (1976), some confusion existed in our prior decisions as to the appropriate relief to be awarded on the granting of a writ of habeas corpus. It appears that the confusion occurred from the failure to understand two salient principles in regard to habeas corpus relief. ***The first is that even on an unconditional discharge, the State is ordinarily not precluded from retrying the relator***; the second is that relief will be given so as to cure the underlying constitutional error. In those cases where the constitutional error substantially affects the underlying trial, the relief is a discharge of the relator. *State ex rel. Browning v. Boles*, 147 W. Va. 878, 132 S.E.2d 505 (1963) (criminal court lacked jurisdiction to sentence juvenile); *State ex rel. May v. Boles*, 149 W. Va. 155, 139 S.E.2d 177 (1964); *State ex rel. Stumbo v. Boles*, 149 W. Va. 174, 139 S.E.2d 259 (1964); *State ex rel. Browning v. Boles*, 149 W. Va. 181, 139 S.E.2d 263 (1964) (failure to provide counsel at trial). In each instance the fact that the court did not upon discharge of the prisoner add language to the effect that the discharge was subject to the right of the State to retry is of no consequence. This right is implicit because double jeopardy principles are inapplicable."⁵⁹

⁵⁸ *Rhodes v. Leverette*, 160 W. Va. 781, 794 (W. Va. 1977).

⁵⁹ *Rhodes v. Leverette*, 160 W. Va. 781, 787 (W. Va. 1977)(Emphasis Added).

Most applicable and relevant to the present case is the Court's discussion in *Rhodes* regarding the issue of granting habeas corpus relief *with prejudice*. The Court in *Rhodes* concluded "[f]inally, as in all attempts to categorize such a complex subject as the nature of the relief to be awarded on a writ of habeas corpus, we recognize that there may exist such extreme abuses on the part of the State as against the constitutional rights of an individual that the only appropriate remedy would be an unconditional discharge coupled with an injunction against further prosecution of the underlying criminal action."⁶⁰

The Marshall County Circuit Court's Memorandum Order, however, makes no mention of *Rhodes*, and contains no finding that "extreme abuses on the part of the State" existed against the constitutional rights of Bowers. "Extreme abuses" which may have warranted the injunction against further prosecution.

The West Virginia Supreme Court in *Rhodes* was faced, as in *Tune*, with a situation wherein the defendant was not provided with a timely post-conviction appeal. In *Tune*, the Court considered whether a retrial of a defendant, who had obtained his release for failure to afford him appellate due process by withholding a transcript, constituted double jeopardy. In *Rhodes*, the defendant claimed ineffective assistance of appellate counsel had violated his rights of due process. In both cases, the Court determined that while an unconditional discharge from confinement was proper, a subsequent trial was

⁶⁰ *Rhodes v. Leverette*, 160 W. Va. 781, 794 (W. Va. 1977).

not barred by double jeopardy.

In *Tune*, the defendant/appellant had been convicted of armed robbery and sentenced to the West Virginia Supreme Court for Men. The defendant was unable to perfect an appeal of his conviction due to a lengthy delay in obtaining a trial transcript. The Circuit Court in the Habeas proceeding discharged the defendant from confinement for the State's failure to provide the transcript in a timely fashion. The Circuit Court's Opinion and Order in *Tune* discharging the defendant was silent upon the question of whether such action was without prejudice thereby expressly permitting a second trial. The defendant, taken to Kanawha County for a second trial, sought a writ of prohibition against a second trial. The defendant's petition for a writ of prohibition in *Tune* was denied by the West Virginia Supreme Court.

The Court in *Tune* held clearly and unambiguously that "if a trial on a felony charge is void, jeopardy did not attach and that 'Especially is this true where the accused himself has set in motion the proceedings which nullified the judgment.'" The Court further held that "[a] discharge in habeas corpus affects only the imprisonment, that is, the illegal restraint."⁶¹

The Court in *Tune* ratified and reiterated the well established legal principles set forth in *State v. Holland* that a Habeas Corpus discharge "presents no bar to subsequent proceedings for the reason that the former proceedings

61

State ex rel. Tune v. Thompson, 151 W. Va. 282, 286, 151 S. E.2d 732, 734.

having been held invalid, jeopardy did not attach."⁶²

Again, it was not necessary for the Marshall County Circuit Court to interpret *Tune v. Thompson*, for the West Virginia Supreme Court had already authored an opinion regarding the extraordinary remedy of an unconditional discharge coupled with an injunction against further prosecution. In fact, in *State ex rel. Johnson v. McKenzie*, the Court itself interpreted *Tune* by stating that "[a]ccording to *Tune* a writ of habeas corpus merely requires 'resumption of the proceedings at the point they had reached prior to the unlawful action on the part of the court.'"⁶³

The Circuit Court of Marshall County, contrary to the longstanding precedent set forth above, and without any finding of "extreme abuse" on the part of the State, has enjoined the prosecution of Bowers a second time for six counts of alleged sexual abuse of children. The Order not only served to grant the unconditional discharge of Bowers from incarceration, but essentially served as an acquittal of Bowers on all charges. The Court has effectively replaced the jury's verdict of guilt with its own verdict of acquittal.

It is well established in West Virginia that a discharge in Habeas Corpus "does not act upon the penalty nor does it operate as an absolute discharge from the legal consequences, or as an acquittal, of a crime. It does not deprive

⁶² *State v. Holland*, 149 W. Va. 731, 143 S. E. 2d 148.

⁶³ *State ex rel. Johnson v. McKenzie*, 159 W. Va. 795, 800-801 (W. Va. 1976)

a court of any jurisdiction it may otherwise have. It merely requires resumption of the proceedings at the point they had reached prior to the unlawful action on the part of the court."⁶⁴

The Circuit Court's Memorandum Order granting the habeas corpus relief **with prejudice** was clearly erroneous and cannot stand upon a *de novo* review of the same. If Bowers' trial was in some manner unconstitutional, improper or unlawful, West Virginia law required the Circuit Court to order the resumption of the proceedings at the point prior to the unconstitutional, improper or unlawful actions, and if necessary grant the defendant a new trial, not an unconditional discharge of acquittal enjoining further prosecution.

VI. RELIEF PRAYED FOR

For the reasons more fully set forth herein, the appellants respectfully request this Honorable Court reverse the Memorandum Order granting the defendant's Habeas Corpus relief, reinstate the jury trial convictions and remand the defendant back to the West Virginia Penitentiary for Men to complete his previously ordered criminal sentences.

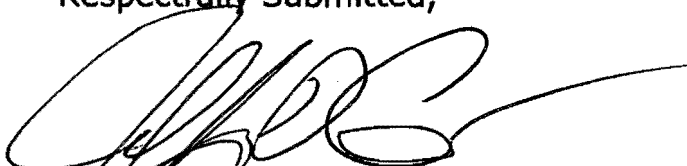
Alternatively, the appellants respectfully request that this Honorable Court

64

State ex rel. Tune v. Thompson, quoting *State ex rel. Powers v. Boles*, 149 W. Va. 6, 138 S. E. 2d 159; *State ex rel. Boner v. Boles*, 148 W. Va. 802, 137 S. E. 2d 418; *State ex rel. Nicholson v. Boles*, 148 W. Va. 299, 134 S. E. 2d 576.

reverse the Marshall County Circuit Court's Memorandum Order regarding the extraordinary habeas corpus remedy of an unconditional discharge coupled with an injunction against further prosecution, return the parties to the point in the proceedings prior to the jury trial and remand the matter for a new jury trial on the merits of the six count criminal Indictment.

Appellant's Brief
Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'J. D. Cramer', with a long horizontal flourish extending to the right.

Jeffrey D. Cramer
Marshall County Prosecuting Attorney
W.V. Bar #7436
Marshall County Courthouse
Moundsville, West Virginia 26041

Counsel for Appellants

CERTIFICATE OF SERVICE

I Jeffrey D. Cramer, Prosecuting Attorney for Marshall County, West Virginia, hereby certify that on the 2nd day of July, 2009, I delivered a copy of the foregoing Petition for Appeal upon respondent's counsel by U.S. Postage Prepaid First Class Mail at:

J.L. Hickok
West Virginia Public Defender Services
Building 3 Room 330
1900 Kanawha Blvd. E.
Charleston, WV 25305-0730

David Zehnder
Chief Public Defender
2nd Judicial Circuit
607 Court Avenue
Moundsville, WV 26041



Jeffrey D. Cramer