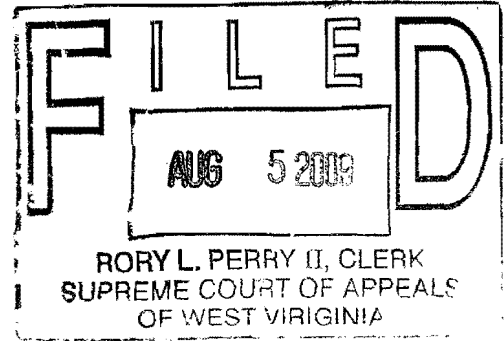


IN THE
SUPREME COURT OF APPEALS

OF
WEST VIRGINIA
CHARLESTON



TOM SCOTT, Administrator,
Southwestern Regional Jail;
WYETTA FREDERICKS, Executive Director,
West Virginia Regional Jail And
Correctional Facility Authority,
Appellants.

v. Civil Action No. 05-C-91M
Underlying Criminal Case 02-F-39

State of West Virginia
ex rel. **STEPHEN P. BOWERS,**
Appellee.

Brief for Appellee

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PROLOGUE

Judge Madden's wording in the final paragraph says it all, ". . . that there would have been a favorable outcome for the petitioner had he received effective representation and the prosecuting attorney had not overreached in his questions and arguments."

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In the Circuit Court of Marshall County:

TOM SCOTT, Administrator, et als,
Appellants.

v.

Civil Action No. 05-C-91M
Underlying Criminal Case 02-F-39

State of West Virginia
ex rel **STEPHEN P. BOWERS**
Appellee.

INTRODUCTION

*“Due process of law is synonymous with fundamental fairness.” State ex rel. Peck v. Gosham*¹. Judge Madden’s statement to the Wheeling News Register (12-31-08) regarding his ruling in this *habeas corpus* proceeding succinctly states the position of the Appellee, “I felt that the defendant had not received the full defense he was entitled to . . . It was over a long period of time of reflection that I came to this decision. I didn’t feel confident with this conviction.” Steve Bowers was not treated in a fundamentally fair manner.

¹ *State ex rel. Peck v. Gosham*, 162 W.Va. 420, 249 S.E. 2d 765 (1978)

**I. KIND OF PROCEEDING
AND
NATURE OF RULINGS BELOW**

Petitioner was indicted (02-F-39) in January of 2002, 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. The jury returned a verdict of guilty on all counts of the indictment. Sexual abuse by a custodian of a child under sixteen years of age is punishable by a sentence of not less than ten years to a maximum of twenty years.

The Trial Court imposed an indeterminate sentence of ten to twenty years for each of the first three counts; one to five years for First Degree Sexual Abuse; and ninety days for the two counts of third degree sexual abuse, and, ordered that several of the sentences be served concurrently. In effect, the sentence was not less than eleven nor more than twenty-five years. Petitioner herein appealed to this Court, but his appeal petition was refused. The Hon. John Madden presided over both the trial and the *habeas corpus* proceeding.

By a Memorandum Order dated December 29, 2008, the Court granted the Writ, with prejudice, and further ordered that Petitioner be released from confinement FORTHWITH.

II. STATEMENT OF FACTS

Steve Bowers was a volunteer youth baseball coach in Glen Dale. He arranged a meeting for his Bronco League team at his home. One purpose of the meeting was uniform fittings. The weather was cold, and most of the boys were wearing bulky clothing, so Steve had them strip to their shirts and underpants. Danny D.² described the process:

[W]hen it was our turn, we would walk up to him in the chair. We would pull down our pants . . . to our ankles and he would measure us. . . . It wasn't strange, but more funny when the coach taped Patrick B.'s mouth shut for talking. It was all a joke; even Patrick was laughing about it.

(R: 73)³

Danny D.'s father, Patrick Joseph D., was a school principal and a former coach. Mr. D. heard rumors about the team meeting and went to Steve's employer, the Ohio County Sheriff, with his concerns. The Sheriff had no jurisdiction but he communicated with Marshall County authorities. On Monday, July 15, 2002, Sgt. David L. Robinson, of the Wellsburg Detachment of the West Virginia State Police, was assigned the task of conducting an investigation (R: 57).

Robinson contacted all of the boys and their families and obtained statements from most (R: 66). The boys remained together during the

² Last names of the young boys have been omitted.

³ "R" represents the official court record, *sans* transcripts; documents are numbered chronologically.

meeting. Only one boy made any comment about any improper touching. Steve Bowers was the only adult present at the team meeting; he was always fully clothed. He had the boys remove their pants but not their shirts. He used a cloth tape measure to measure waists and inseams.

The mother of Michael K. complained about an incident that took place in Petitioner's home. The Respondent's brief contains the allegations from the point of view of Michael K. When Sgt. Robinson asked Steve if he had ever done anything like that before, Steve volunteered that he had a similar session with Donnie G. some years before. Confusion over the year in question led to the indictment alleging that Donnie was eleven years old – although Steve disputes that.

Several families refused to permit their sons to talk with Sgt. Robinson. Clint C.'s parents were less than cooperative; they would not allow him to be examined by the Court's psychologist. They wouldn't return calls to the *guardian ad litem*. In the concluding paragraph of his Memorandum Order, the Court said:

This Court has, in the past, characterized the State's case as weak. Considering the length of time of the jury deliberations, it is clear that there would have been a favorable outcome for Petitioner had he received effective representation and the Prosecuting Attorney had not overreached in his questions and arguments.

III. ASSIGNMENTS OF ERROR

A. The Circuit Court abused its discretion by finding that 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. CROSS-ASSIGNMENT OF ERROR

D. *The Habeas Court erred by failing to rule upon the issue of whether Petitioner was a "parent, guardian or custodian," as defined by West Virginia Code, Chapter 61, Article 8D, Section 5.*

V. STANDARD OF REVIEW

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.” Syl. Pt. 2, *Walker v. West Virginia Ethics Com'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997); Syl. Pt. 2, *State v. Maisey*, 215 W. Va. 582, 600 S.E. 2d 294 (2004).

VI. POINTS AND AUTHORITIES

1. In West Virginia, claims of ineffective assistance of counsel are governed by a two-pronged test: (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. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

2. The standard of proof that the Appellant must overcome in ineffective assistance of counsel claims is that of "preponderance of the evidence." *State ex rel. Bess v. Legursky*, 195 W.Va. 435, 465 S.E.2d 892

(1995).

3. Appellant's right to competent and effective assistance of legal counsel is constitutionally guaranteed. *United States Constitution*, Amendment VI; *West Virginia Constitution*, Article III, §14.

4. The Constitutional guarantee of effective assistance of counsel at trial applies to every criminal prosecution, without regard to whether counsel is retained or appointed. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

5. The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation. *State ex rel. Daniel v. Legursky*, 195 W.Va. 314 at 320, 465 S.E.2d 416 at 422 (1995); *State ex rel. Bess v. Legursky*, *supra*; *State ex rel. Strogan v. Trent*, 196 W.Va. 148, 469 S.E.2d 7 (1996).

6. In assessing reasonableness of attorney's investigation, court must consider not only quantum of evidence already known to counsel, but also whether known evidence would lead reasonable attorney to investigate further. *Wiggins v. Smith*, 123 S.Ct. 2537, 156 L.Ed.2d 471 (2003); *United*

States Constitution, Amendment VI.

7. In making the requisite showing of prejudice an Appellant may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet *Strickland's* test. *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995); See also, *State ex rel. Myers v. Painter*, 213 W.Va. 32, 576 S.E.2d 277 (2002).

8. Since we must presume that the Legislature would not perform a useless act, the statute in effect at the time of the offenses charged in Indictment 02-F-39 must not have properly provided the same penalties for a person in a position of trust. See *Newark Insurance Co. v. Brown*, 218 W.Va. 346, 624 S.E.2d 783 (2005).

9. "If any parent, guardian or custodian of *or other person in a position of trust* in relation to a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care custody or control . . . then such . . . *person in a position of trust* shall be guilty of a felony and, upon conviction thereof, shall be imprisoned in the penitentiary not less than ten nor more than twenty years [.]" *West Virginia Code*, §61-8D-5. (*italics* indicate amendments of 2005).

10. There may exist such extreme abuses on part of state as against constitutional rights of an individual that the only appropriate remedy would be an unconditional discharge coupled with injunction against further prosecution of the underlying criminal action. *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977) Syl. Pt. 1, Citing *West Virginia Code*, §53-4A-1 et seq.

VII. ARGUMENT

A. The Circuit Court properly ruled that 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; Defense counsel knew or should have known that under *West Virginia Code*, §62-12-2(e), if the defendant was convicted of any act of sexual abuse in the first degree or sexual abuse in the third degree, he would only be eligible for probation if the Court was presented with 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.”⁴ While he had employed Mr. Gardner⁵, as a result of his

⁴ See; *State v. Wolfe*, 201 W.Va. 760, 500 S.E.2d 873 (1997)

suspension from the Sheriff's Department, Steve could not afford to pay for a psychiatric/psychological examination or for an anticipated Court appearance by a mental health professional.

Petitioner had been admitted to Hillcrest Behavioral Health Services on July 25, 2002, suffering from "severe depression with suicidal thoughts." He was under the care of Dr. Alber Ghobrial, who reported on August 26, 2002:

Mr. Bowers has had depression for many years but never sought help. His depression has worsened recently and he reports having flashbacks of physical and psychological abuse he experienced as a child. . . . He was started on an anti-depressant and is tolerating the medication but is still feeling anxious and will be receiving behavioral, cognitive and supportive therapy in our outpatient office.

(R: 34)

Defense counsels' failure to investigate Petitioner's mental status left him unable to evaluate whether he should have testified in his own defense. See also *Wiggins v. Smith*⁶, holding, inter alia, that failure to investigate constitutes ineffective assistance of counsel. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, the presumption is simply inappropriate if counsel's

⁵ The Constitutional guarantee of effective assistance of counsel at trial applies to every criminal prosecution, without regard to whether counsel is retained or appointed. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

⁶ *Wiggins v. Smith*, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)

strategic decisions are made after an inadequate investigation. *State ex rel. Daniel v. Legursky*⁷, *State ex rel. Bess v. Legursky, supra*.

In the absence of some compelling reason to believe that the petitioner would certainly be acquitted of these charges, it was imperative that trial counsel request such a “study and diagnosis” and plan. Obtaining this evaluation as early as possible in the process would have served other critical purposes. See *State ex rel Strogan v. Trent*⁸

An evaluation and ongoing relationship between a qualified psychologist or psychiatrist and the defendant would have provided support for dealing with and preparing the defendant for trial. A qualified psychologist or psychiatrist could have provided forensic testimony on both the voluntariness of the defendant’s confession and/or whether it was a confession in fact. A qualified psychologist or psychiatrist was essential in assisting with the decision on whether the defendant should take the witness stand in his own defense and if so in assisting in preparing the defendant to testify. Many of the errors trial counsel made thereafter resulted, directly or indirectly, from the failure to secure the services of a mental health professional. Among counsel’s errors or failures were the following:

⁷ *State ex rel. Daniel v. Legursky*, 195 W.Va. 314 at 320, 465 S.E.2d 416 at 422 (1995); *State ex rel. Bess v. Legursky, supra*.

⁸ *State ex rel. Strogan v. Trent*, 196 W.Va. 148, 469 S.E.2d 7 (1996).

- Defense counsel acted below the standard of care by informing the jury during opening statement that the defendant would testify in his own defense;
- Counsel for the defendant failed to move the Court to strike surplus, misleading and prejudicial language in counts I, III, IV and VI of the indictment;
- Counsel for the defendant also failed to move for a change of venue, based upon pretrial media coverage;
- Counsel for the defendant failed to request that the Court edit or redact prejudicial and irrelevant portions of the videotaped statement before it was published to the jury;
- Counsel for the defendant failed to request that the Court give more detailed and pointed instructions to the jury in its initial charge, as well as at the close of the testimony and activity on the first and second days of trial concerning the reading of newspapers, listening to radio or watching television news accounts of the trial;
- Counsel failed to request the Court to inquire of the jury, on the second day of trial, concerning whether any member of the jury had read newspaper accounts of the trial;

- Counsel for the defendant invited the introduction of inadmissible evidence at trial that there were other unnamed victims, notwithstanding the fact that the Court had limited the prosecution in the introduction of evidence of other ostensible misconduct by the petitioner;
- Counsel invited improper questions from the State by basing his defense upon the “no sexual gratification” theory, and eliciting from him a declaration that he was heterosexual and not sexually attracted to young boys.

Counsel for the defendant failed to object to multiple inappropriate questions by the prosecuting attorney of various witnesses which elicited irrelevant and prejudicial testimony. In making the requisite showing of prejudice an Appellant may demonstrate that the cumulative effect of counsel’s individual acts or omissions was substantial enough to meet *Strickland’s* test. *Williams v. Washington*⁹; See also, *State ex rel. Myers v. Painter*¹⁰.

As Andrew MacQueen noted in his written report:

There is probably no single question or answer to which

⁹ *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995)

¹⁰ *State ex rel. Myers v. Painter*, 213 W.Va. 32, 576 S.E.2d 277 (2002).

there was a failure to object that would stand as independent grounds for a conclusion that counsel for the defendant failed to conduct the trial with the requisite degree of skill. However, the cumulative effect of the failure to object to multiple questions was the equivalent of death by a thousand cuts, and effectively deprived the defendant of a fair and constitutional trial.

Attorney Gardner admitted that he was ineffective by failing to properly investigate the case and to prepare for trial. He also admitted, during his deposition, that he, “insisted on Steve taking the stand . . . he just collapsed on the witness stand.” (10-11-06 transcript p. 22).

Instructions consistent with the defense presented by the defendant and his counsel should have been offered. Defense counsel failed to object to the prosecuting attorney’s comment about that defendant’s exercise of the right to counsel during closing argument.¹¹ Defense counsel failed to object to other prosecutorial misconduct, specifically improper and prejudicial closing arguments.

In short, Trial Counsel’s admitted ineffectiveness was global. He failed to investigate, failed to obtain a psychological examination, failed to object to either surplussage in the indictment or to prejudicial portions of the video-taped statement by Bowers, failed to object to the Prosecutor’s blatant misconduct during closing and failed to offer proper instructions. In addition

11 . *Wiggins v. Smith*, 123 S.Ct. 2537, 156 L.Ed.2d 471 (2003); *United States Constitution*, Amendment VI.

to his sins of omission, he told the jury that Petitioner would testify, despite Bowers' remonstrations that he could not do so, and he placed his client in a situation where he was bound to fail.

Despite all of trial counsel's deficiencies, the State's case was so lacking in substantive evidence that the Court opined in the Habeas Order that the State's case was "weak." The Prosecuting Attorney sought to compensate for weak evidence through invective and inflammatory characterizations of the Defendant.

B. The Circuit Court correctly determined that comments made by the Prosecuting Attorney during trial were improper and warranted a reversal of the defendant's criminal convictions; In Lantz's final argument, he said (without objection from the defense): "When you first heard what he did, did you think to yourself he's a pervert? Did you think to yourself he likes little boys?"

Trial Counsel said he "made a strategic decision not to object" during closing argument. In *State v. Moss*¹², this Court found that the prosecutor's remarks during closing argument were so egregious that they constituted plain error, and you reversed the conviction.

We find that the prosecuting attorney overstepped the permissible bounds of adversary zeal, and that the trial court

¹² *State v. Moss*, 180 W.Va. 363, 376 S.E.2d 569 (1988)

erred by not intervening in order to limit and correct the prosecutor's fundamentally improper remarks. The prosecutor . . . characterized the appellant as a "psychopath" with a "diseased criminal mind."¹³

In his argument, Lantz asked rhetorically:

When you first heard what he did, did you think to yourself 'He's a pervert?'"¹⁴ Has anything changed that? No. You know it. You know it right here beyond a reasonable doubt -- right here that he did it for his sexual desires. *You know it right here, and that's beyond a reasonable doubt.*¹⁵ [italics supplied]

(T2: 277-278)

It is well settled that a prosecutor in a criminal case "has a special obligation to avoid, 'improper suggestions, insinuations, and especially assertions of personal knowledge.'" *United States v. Roberts*, (quoting *Berger v. United States*)¹⁶

Lantz asked: "Why does he need counseling if he's not attracted to boys? They're talking about his sickness, the fact that he likes boys."

(T2: 280)

Without objection from counsel Lantz proceeded to unfairly vilify Steve Bowers:

¹³ *State v. Moss*, 180 W.Va. at 368.

¹⁴ See *Gershman, Prosecutorial Misconduct*, 2nd Ed. §11.3, Thomson-West (1999)

¹⁵ ABA Standards for Criminal Justice §3-5.8(b) (3d Ed., 1983)

¹⁶ *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir.1980); *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)

My son would rather disappoint me than disappoint his coach. If I tell him, “We’re going out of town this weekend, you have to miss practice,” he’s afraid to tell his coach he’s going to miss practice because *these coaches hold something in their hands that we as parents do not.*

(T2: 281)

This was a not so subtle reference to the allegation that Petitioner improperly held Michael K.’s testes in his hand.

Funny how things change after you have a year to think about your answers and you have a year to talk to an attorney, but the one thing he hasn’t been able to come up with, even after all this time, is why did you measure these boys, why were they naked, why would you touch their testicles? He can’t answer that.

Bowers obviously has (and had) a right to counsel. This argument suggests that counsel would suggest that he lie.

He can’t answer that because the answer is, “I like looking at and touching little boys.” Never married, thirty-five years old, and he’s been a baseball coach for eighteen years, no children.

(T2: 285)

Lantz might as well have given a stage wink; he suggests that someone who has the personal background of Steve Bowers must be a pedophile. With regard to his own witnesses, Lantz came very close to vouching for their credibility and he improperly suggested that they deserved to have the jury find Bowers guilty:

Donnie Gilbert’s birthday is today. He turns fifteen. Those boys did their job by coming in here today and testifying – or yesterday and today. They did what was right. It was tough for

them. What better birthday present than a little bit of justice?
It's all we want, a little bit of justice.¹⁷

(T2: 288)

In his closing, Lantz drew a new analogy:

Child pornography. People get turned on just by looking at child pornography. It satisfies their sexual desires and it's against the law. What we have in this case is live child pornography.

(T2: 304)

The Prosecutor is making an almost overt argument for prejudice.

"When you first heard what he did . . ." can only be interpreted as, "When you heard the *charges* against him." Counsel addressed, "You know it right here" in argument to the Court :

Mr. Lantz argued to the jury . . . 'Use your heart¹⁸. Use your heart to determine his guilt or innocence.' Well, Your Honor, we should use the law, and I think that the jury did use their heart and let their feelings and what they *thought* the Defendant's actions were, overrule what . . . the State . . . was able to prove. [Emphasis supplied]

(T3: 6-7)

The *Moss* court was sensitive to the possible risks to a fair trial:

The prosecutor's duty to remain fair and impartial is especially important where the very nature of the crime charged . . . has a tendency to predispose the jury against the defendant. (citation omitted) Likewise, the trial court has a duty to *independently* protect the accused's right to a fair trial free from

17 See *U. S. v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed. 2d 1 (1985)

18 Lantz appears to have been pointing to his chest as he made that argument.

improper remarks by the prosecuting attorney: [Emphasis supplied]

State v. Moss, supra.

Petitioner's counsel, of course, made no objection. Again, we should look to *Moss*:

After carefully reviewing the record in this case, however, we need not decide whether the appellant complied with the contemporaneous objection requirement, since we conclude that the prosecutor's statements were egregious enough to cause this Court to invoke the plain error doctrine. (citations omitted)

By successfully appealing to prejudice, the State denied Petitioner Due Process of Law. Just as in *Moss*, manifest injustice resulted from the prosecutor's remarks insofar as their cumulative effect denied the appellant his fundamental right to a fair trial. "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." *State ex rel. Grob v. Blair*¹⁹. Steve Bowers was entitled to have his case decided on facts and law – not on prejudice and appeals to prejudice. This error cannot be shown to be harmless.

This Court has set out four factors to consider 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

¹⁹ Syl. Pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

*State v. Stephens*²⁰

Lantz also asserted that Bowers had committed an uncharged crime:

Child pornography. People get turned on just by looking at child pornography. It satisfies their sexual desires and it's against the law. *What we have in this case is live child pornography.*

(T2: 304)

Without benefit of an indictment or evidence Lantz maliciously charged Petitioner with a new, heinous crime, probably because he knew the evidence of sexual abuse was too weak to sustain a conviction.

C. The Circuit Court was not required to make a finding that the State had committed extreme abuses of the defendant's constitutional rights as a precondition to granting an unconditional discharge coupled with an injunction against further criminal prosecution; The Court characterized the case of Clint C. as "feeble." The jury obviously had trouble finding sufficient evidence in some of the counts; they deliberated for a time on the last day of trial, then went home for the night. They returned the following day at 9:00 a.m. At 11:38 a.m. on August 13, the jury sent the following note to the Court: "Judge Madden, If we cannot come to an agreement on one or more counts will it affect the other

²⁰ *State v. Stephens*, 206 W.Va. 420, 525 S.E.2d 301 (1999)

counts?” (T4: 316) The jury recessed for lunch at 12:08 p.m., reconvened at 1:15 p.m. and at 1:44 p.m. returned a verdict of guilty on all counts of the indictment. (T4:318-319).

To reiterate from Petitioner’s proposed Findings and Conclusions, as previously filed:

Andrew MacQueen, who testified as an expert on Ineffective Assistance of Counsel, opined that the errors of defense counsel were “important because it appears . . . that this was a case that the jury wrestled with a bit. It wasn’t a case where the jury came back and returned its verdict in a matter of an hour or two[.]”

At the close of the State’s case, Defense Counsel moved for a directed verdict of *not guilty*. The Court, while denying the motion, commented: “I’ll agree with you, Mr. Gardner, that it’s not the . . . type of case that this Court is used to hearing – the kind of case that [is] much more graphic . . . [Clint] admits that the Defendant just touched him with his knuckles.” Given the Court’s own observations on the weakness of the evidence at trial, that misconduct and the cumulative effect of it and other errors was devastating.

In his Order of December 30, 2008, the Habeas Court observed: “This Court has, in the past, characterized the State’s case as weak. Considering the length of time of the jury deliberations, it is clear that there would have been a favorable outcome for Petitioner had he received effective

representation and the Prosecuting Attorney had not overreached in his questions and arguments.”

In *State ex rel Tune v. Thompson*²¹, this Court said that “[W]here the opinion [of the *habeas* Court] was silent as to the question of retrial, they have been retried and convicted and this Court has refused to disturb the subsequent conviction.” The clear implication is, as Judge Madden concluded, that the *habeas* Court has the inherent power to bar a retrial.

In his dissenting opinion, Justice Calhoun opined:

I believe that innumerable prior decisions of this Court firmly establish the principle that, before we are warranted in discharging a prisoner by habeas corpus for some reason based on proceedings leading to his imprisonment, we must adjudge collaterally that something leading to the imprisonment is void. If in habeas corpus we adjudge, for instance, that the indictment is void or that the trial court acted without jurisdiction, it clearly follows that the entire trial proceedings are void and can form no impediment to a second trial. In numerous cases we have held merely that only the sentence was void; and in such cases we have discharged.

The *Habeas* Court concluded that counsel’s assistance satisfied both prongs of *Strickland v. Washington*²², and that cumulatively, the prosecutorial misconduct and the ineffective assistance of counsel “doomed” Petitioner to an unwarranted conviction. The prosecutorial misconduct

21 *State ex rel Tune v. Thompson*, 151 W.Va. 282, 151 S.E.2d 732 (1966), cited in the Order.

22 *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

provides the “extreme abuses” justifying an unconditional discharge and a bar to future prosecution, as set out in *Rhodes v. Leverette*²³. Furthermore, the Court could have directed a verdict of acquittal, and there would have been no retrial. As the Court said, in a footnote to the Order, “[T]his Court must assume some responsibility for the conviction in this case. In granting an unconditional discharge and in joining the State against a further prosecution, the *habeas* Court sought only to partially rectify the prior wrongful conviction. This Court should honor that finding by declaring the conviction to be void.

D. The Habeas Court erred by failing to rule upon the issue of whether Petitioner was a “parent, guardian or custodian,” as defined by West Virginia Code, Chapter 61, Article 8D, Section 5; West Virginia Code §61-8D-5 was amended by H.B. 3098 in 2005, following the indictment and trial of Petitioner. Since the Habeas Court granted the requested Writ “with prejudice,” it had no reason to rule upon this issue. Should this Court determine that the State should be afforded the opportunity for a new trial, however, then it is important that this issue be addressed.

²³ There may exist such extreme abuses on part of state as against constitutional rights of an individual that the only appropriate remedy would be an unconditional discharge coupled with injunction against further prosecution of the underlying criminal action. *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977) Syl. Pt. 1, Citing *West Virginia Code*, §53-4A-1 et seq.

Attached to this brief and identified as “EXHIBIT” is a legislative summary prepared for the Chairman of the House of Delegates Judiciary Committee at the time the bill was pending before it. The operative language is: *or other person in a position of trust*. The legislative changes are directed at the very type of relationship Petitioner had with the children entrusted to his care.

Since we must presume that the Legislature would not perform a useless act, the statute in effect at the time of the offenses charged in Indictment 02-F-39 must not have properly provided the same penalties for a person who is not a parent or guardian who had not been granted custody. In short, the statute attempts to cover someone in a position of trust who is not a baby-sitter. See *Newark Insurance Co. v. Brown*²⁴.

The only previously recognized exception to a strictly construed statute was for babysitters. In *State v. Stephens*²⁵, this Court said that the question of whether a babysitter was a custodian was for the jury’s determination. None of the relationships between Petitioner and the minor children fit the usual definition of babysitter. For one thing, the children were old enough not to be considered *babies*, and for another, the two incidents involving

²⁴ *Newark Insurance Co. v. Brown*, 218 W.Va. 346, 624 S.E.2d 783 (2005).

²⁵ *State v. Stephens*, 206 W.Va. 420, 525 S.E.2d 401 (1999)

individual young boys were very informal. If the legislature intended to cover someone in Petitioner's capacity under Code §61-8D-5, then the language is too vague to pass constitutional muster.

In its response to Petitioner's Motion for Partial Summary Judgment, the State offered no legal authority. In regard to the facts, the State urged that, "The Petitioner was found beyond a reasonable doubt by the jury to be a 'guardian or custodian' as set forth in the statute *in effect at the time* of his offenses and conviction." The legislative history facts are clearly shown by the legislative summary; attached.

In *Southern Erectors, Inc. v. Olga Coal Co.*²⁶, the Court held, "When a court acts with great caution, assuring itself that the parties to be bound by its judgment have had an adequate opportunity to develop all of the probative facts, . . . , the court may grant summary judgment under this rule." Of course, even partial summary judgment is within the sound discretion of the Court and it can be deferred until the Court, sitting without a jury, renders its final verdict.

Steve Bowers was trusted by the parents of the young boys on his Bronco League team. They expected of him what they would have expected of any adult who might have reason to spend time with them in a common

²⁶ *Southern Erectors, Inc. v. Olga Coal Co.*, 159 W.Va. 385, 233 S.E.2d 46 (1976),

pursuit. They did not, however, employ him. They did not authorize him to consent to medical treatment in the event a child should be injured or become ill. They trusted him as much as they would have trusted a bus driver, but his authority was less than that of a public school teacher. He was not acting *in loco parentis*.

CONCLUSION

The Hon. John Madden presided over the trial below, and over the proceedings concerning the petition for a writ of *Habeas Corpus*. Almost every factual allegation in this case is supported by the record: the trial transcripts clearly reveal the egregious arguments by the Prosecuting Attorney. The evidence for the boys who were being measured for uniforms is minimal. The two incidents of the Petitioner with young boys in privacy are somewhat troubling, but they are inconclusive; only the Prosecutor's hyperbole and invective provided the force for a verdict of conviction.

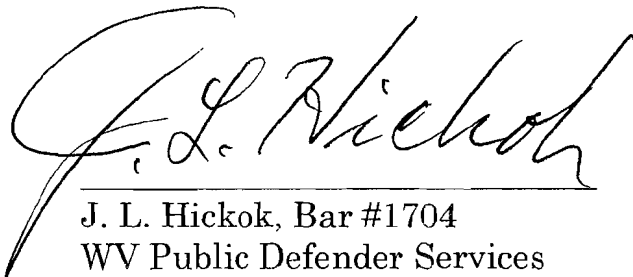
The Trial Court came close to directing a verdict at trial, and as the presiding judicial officer, Judge Madden, was clearly in the best position to evaluate the strength of the State's case. The statute which was the basis for the most serious penalties was amended to clarify its application to situations such as we have in this case.

Finally, Steve Bowers has been incarcerated for six years – more than enough time to punish him for any wrongs he may have committed, even if we assume the testimony of Donnie G. and Michael K. to be completely truthful and accurate. A new trial is unnecessary. Judge Madden’s factual findings are not clearly erroneous and he did not abuse his discretion by dismissing the proceedings with prejudice.

Petitioner Steve Bowers enthusiastically endorses the *Habeas* Court’s final ruling – in particular the provision that “the State is precluded from prosecuting the Defendant for any of the crimes charged in the indictment.”

Respectfully submitted,

Stephen P. Bowers,
By Counsel



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Counsel for Petitioner

SENATE MESSAGE

TO: John Amores/ Richard Staton

FROM: Robert Williams

RE: ENGROSSED H.B. 3098

SHORT TITLE: Expanding the prohibitions and criminal penalties for sexual exploitation or sexual abuse of a child by a parent, or guardian or custodian to include offenses by persons who hold a position of trust in relation to a child

SUGGESTED ACTION: CONCUR WITH SENATE AMENDMENT

PURPOSE OF BILL

This bill would establish enhanced penalties for acts of sexual abuse or sexual exploitation of a child by a person in a position of trust in relation to a child, and impose the same penalties for sexual abuse or sexual exploitation of a child by a person in a position of trust. As defined by the bill, a person in a position of trust includes any person who, by virtue of their occupation or position, is charged with any duty or responsibility for the health, education, welfare or supervision of the child.

WHY TAKE ACTION

The Senate Bill excluded the listed examples of persons in a position of trust in relation to a child that was included in the House Bill, but kept intact the House's basic definition of a "person in a position of trust in relation to a child."

"EXHIBIT"

EFFECTIVE

DATE: **Regular**

TITLE AMENDMENT: None

CERTIFICATE OF SERVICE

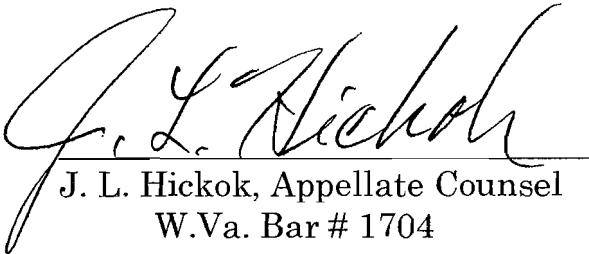
I, J. L. Hickok, counsel of record for Stephen P. Bowers., hereby certify that on the 5th day of August, 2009, I served a copy of the foregoing *Appellee's Brief* upon the following, at their respective addresses and in the manner noted below:

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Via US Mail

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