IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA
ex rel. STEPHEN P. BOWERS,

PETITIONER,

VS. **// CIVIL ACTION NO. 05-C-91M**

TOM SCOTT, ADMINISTRATOR,
SOUTHWESTERN REGIONAL JAIL;
WYETTA FREDERICKS, EXECUTIVE
DIRECTOR, WEST VIRGINIA REGIONAL
JAIL AND CORRECTIONAL FACILITY
AUTHORITY,

RESPONDENTS.

FILED
2008 DEC 29 PM 4:05
DAVID R. EALY

MEMORANDUM ORDER

BACKGROUND

PROCEDURAL BACKGROUND: Petitioner, Stephen P. Bowers, was convicted of 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 **Criminal Case 05-C-91M**, Marshall County, West Virginia, on August 13, 2003.

His Petition for Appeal was refused by the West Virginia Supreme Court of Appeals.

Following a Petition for a Writ of *Certiorari* to the United States Supreme

Court (also refused), he filed a *pro se* Petition for a Writ of *Habeas Corpus*. An amended petition was filed with this Court on July 1, 2005.

Later, the Court appointed David L. Zehnder, Esq. and J. L. Hickok, Esq., to prosecute the Petitioner's Writ.

The following Findings of Fact are drawn from the hearings before this Court, with reference to Trial Transcripts[1] when appropriate:

FINDINGS OF FACT

1. Petitioner's trial was significantly impacted by the following events or facts which one could argue constituted, ineffective assistance of counsel and/or prosecutorial misconduct or comment.

   a. Counsel failed to obtain a detailed psychological evaluation and consultation concerning Petitioner early in the course of preparation for trial (H: 8-9, 37, 39, 41, 58-59); ***MacQueen Opinion***, 3-20-08, pp. 4-5);

   b. Counsel failed to request that the Court edit or redact prejudicial and irrelevant portions of his videotaped statement before it was published to the jury *e.g.* the allegations involving strip searches of

[1] Parenthetical references to transcript pages include (T:__), signifying the trial transcript and (H:__) signifying the hearing in the *Habeas Corpus* proceeding on April 9, 2008. ("R") refers to the trial court record.

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young male subjects and the accusatory statements of Sgt. Robinson, his interrogator (H: 19-20, 22-23);

c. Counsel invited the introduction of otherwise inadmissible evidence that there were other unnamed victims (***MacQueen Opinion***, 3-20-08, p. 6);

d. Counsel failed to object to multiple inappropriate questions by the prosecuting attorney of various witnesses which elicited irrelevant and prejudicial testimony (H: 13-15; T1: 114-115, 121, 139 and 149);

e. Counsel inappropriately told the jury, in his opening statement, that Petitioner would take the witness stand in his own defense and then had him testify without proper preparation (H: 10-12, 39-41, 43);

f. Counsel failed to object to multiple improper an d prejudicial questions during cross-examination of Defendant/Petitioner (T2: 218-219, 222-235, 279);

g. Counsel failed to offer an instruction on the definition of *custodian* (H: 26-27, 53, 56, 64);

h. Counsel failed to object to the prosecuting attorney's improper comment about Petitioner's exercise of the right to counsel during

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closing argument (T2: 285);

i. Counsel failed to object to other prosecutorial misconduct during closing arguments (T: 277-278, 280, 285, 288, 304; H: 28-29).

CONCLUSIONS OF LAW

Ineffective Assistance (Generally)

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

2. The standard of proof required by the Appellant in ineffective assistance of counsel claims is that of "preponderance of the evidence". **State ex rel. Bess v. Legursky, 195 W. Va. 435, 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 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 . 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); State v. Foster, 221 W. Va. 629, 656 S.E.2d 74 (Nov. 19, 2007).**

7. If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then the Defendant's Sixth Amendment rights have been denied and the adversarial process is presumptively unreliable. **U.S. v. Cronic,**

466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Specific Conclusions Regarding

Ineffective Assistance

8. Counsel not only neglected to request a competency evaluation, but also told the jury in opening statement that Petitioner would testify despite Petitioner's revelations to counsel prior to trial that he was in emotional distress. **State ex rel Bess v. Legursky, 195 W. Va. 435 at 440-441; 465 S.E.2d 892 at 897-898 (1995)**; and **Strickland v. Washington, supra**.

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).

9. Defense counsel's failure to investigate Petitioner's mental status left him unable to evaluate whether the defendant should have testified in his own defense. **Wiggins v. Smith, 123 S.Ct. 2527; 156 L.Ed.2d 471 (2003).** In

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his testimony on May 29, 2008, Mr. Gardner acknowledged that the decision to have Petitioner testify completely changed his entire case. Witness Andrew MacQueen observed that the "most important area" of ineffective assistance was, "not know how his client was going to do if he went on the witness stand." (H: 10) See **Wiggins v. Smith, supra**, 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 strategic decisions are made after an inadequate investigation. **State ex rel. Daniel Legursky, 195 W. Va. 314 at 320, 465 S.E.2d 416 at 422 (1995); State ex rel Bess v. Legursky, supra**. While the Court observed, 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, such a motion should have been made. There was authority for it under **West Virginia Code 62-12-2(e)** and, as witness Andrew MacQueen pointed out, it is not uncommon for a criminal defendant to become indigent during trial.

10. Counsel failed to object to the Prosecutor's improper and prejudicial remarks which were made to the jury throughout the trial, particularly during closing argument. In the Prosecutor's final argument, he said (without

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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?" In **State v. Moss, 180 W. Va. 363, 376 S.E.2d 569 (1988)**, our Supreme Court of Appeals found that the prosecutor's remarks during closing argument were so egregious that they constituted plain error, and reversed the conviction.

> We find that the prosecuting attorney overstepped the permissible bounds of adversary zeal, and that the trial court 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 "dis-eased criminal mind."

State v. Moss, 180 W. Va. *supra*, at 368.

Continuing, Lantz asked rhetorically: "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*. (Emphasis supplied) (T2: 277-278). He continued:

> You can't rub lotion all over a young boy's body on his butt. A parent couldn't even do that. They would take your child from you. Right here is where the answer is, Ladies and Gentlemen, right inside of you. (T2: 287).

The Prosecutor repeatedly, and without objection from counsel, interjected his personal opinions into his final argument. "One thing is for sure . . . he likes to look at little boys, and he likes to touch little boys." (T2: 274) "Count One? Guilty, beyond a reasonable doubt. Beyond all doubt" (T2: 279).

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He also violated Rule 3.4 of the **West Virginia Rules of Professional Conduct**, which provides that during a trial a lawyer shall not state his personal opinion as to the justness of the cause or to the credibility of a witness: "Michael Kusza did not lie." (T2: 282). The Prosecutor did not merely make an improper comment or two - many of the objectionable statements were made repeatedly, such as, "Because he likes to look at and touch young boys."

10. Counsel was ineffective in cross examination of State witnesses. If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then the Defendant's Sixth Amendment rights have been denied and the adversarial process is presumptively unreliable. **U.S. v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)**.

Cumulative error

11. 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)**; State v. Foster, **221 W. Va. 629, 656 S.E.2d 74 (2007)**. In this case, many of the grounds are egregious enough to constitute ineffective assistance when standing alone. However, the

sheer number of defects removes any doubt.

Prosecutorial Misconduct

Prior to the jury trial, Petitioner requested a bench trial. Mr. Lantz opposed it. Under West Virginia Law, the prosecution must consent to a Defense request for a bench trial before it can take place. In light of the weakness of the state's evidence and the Prosecutor's resort to prejudicial remarks to the jury and questions on cross examination, one must question whether the Prosecutor relied upon his ability to inflame the jury in order to secure a conviction.

12. The Prosecutor's remarks in closing argument inflamed and prejudiced the jury. Among his improper remarks, he vouched for the credibility of his witnesses, characterized Petitioner's actions as "live child pornography" and asked, rhetorically; "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?'" Furthermore, the Prosecutor strongly implied that Petitioner was not only a pedophile, but that he was homosexual:

> [T]he 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.

> 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).

West Virginia has long recognized that accusations of homosexuality are among the most harmful and prejudicial words that can be uttered. Not only are such allegations slanderous, but the law views them as slander *per se*. **Sprouse v. Clay Communication, Inc., 158 W. Va. 427, 211 S.E.2d 674 (1975)**. In other words, the very accusation is so prejudicial that it is civilly actionable without a showing of further injury.

Our criminal law has viewed allegations of homosexuality in the same light. In **State v. Adkins, 170 W. Va. 46, 55, 289 S.E.2d 720, 729 (1982)**, the Supreme Court of Appeals wrote that "evidence regarding sexual predilections or conduct is not admissible at trial unless it is *clearly* relevant." (Emphasis added). Here, there was no evidence other than the alleged touching of the boys; the allegations concerning Petitioner's marital state were accusatory and insinuations of homosexuality. It doesn't matter whether the accusations are true or false; accusations and insinuations of homosexuality are so incendiary that they constitute prejudicial and reversible error regardless of whether they are correct. **State v. Adkins, supra, 170 W. Va. at 55, 289**

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S.E.2d at 729.[2]

Cumulative Error

13. Cumulatively, the ineffective assistance by Trial Counsel, and the misconduct by the prosecuting attorney are of such a magnitude that the outcome would have been different had the two factors not meshed as they did in this case.

This Court observed during trial that the case against Petitioner was weak. 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[.]" (H: 7).

I thought perhaps with [Clint Cunningham] it might have been the weakest of the three cases, so I had his testimony transcribed . . . . 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". (T3: 10-12). Not only

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[2]The public attitude toward homosexuality was most recently reflected nationally when California, a state known for extreme liberality of its citizens, granted in favor of proposition 8., which made it unlawful for persons of the same sex to marry.

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were counsel's efforts ineffective, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." **Strickland v. Washington**, *supra*.[3]

Summary

By his own admission, Mr. Gardner's representation of Petitioner was ineffective. While he was employed by Petitioner, his client became indigent during the course of legal proceedings. Counsel's theory of the case was that neither Petitioner nor any of his *victims* experienced any sexual gratification – that any apparent improper touching was either unintentional or motivated by legitimate concerns. Counsel acknowledged that his strategy necessitated that Petitioner testify, and Counsel inappropriately told the jury (in his opening statement) that Petitioner would testify. Even if Counsel thought that having the Defendant testify was part of his trial strategy, there was no reason for him to make that remark in his opening statement. The filmed confession alone should have alerted defense counsel that his client could not stand up to pressure.

Counsel was forewarned that his client was suffering from emotional

[3]It is important to note that this Court must assume some of the responsibility for the conviction in this case. This Court had a duty, at some point in the trial, to become involved in regulating the improper comments and questions of the Prosecutor.

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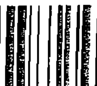
distress but he made no effort to obtain a detailed psychological evaluation (including whether his client could testify effectively) or therapy to help him withstand the emotional rigors of a criminal trial. Without a psychological "investigation", the trial strategy was seriously flawed.

As mentioned before, counsel did not object to the Prosecuting Attorney's numerous, egregiously improper and highly prejudicial remarks during cross-examination and argument to the jury. Given the tone of the cross-examination, a motion in limine seeking to prohibit such an argument to the jury would have been a proper remedy, but no such motion was made. While many of Counsel's errors and omissions are individually sufficient to establish ineffective assistance, their combined effect was to doom Petitioner to a felony conviction, when combined with prosecutorial overreach.

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.

The Writ ~~is~~ **GRANTED** with prejudice.[4]



[4]In other words, the State is precluded from prosecuting the Defendant for any of the crimes charged in the indictment. This provision is placed in this Order, not because of a Syllabus point, but rather by the language of the Court in **State ex rel Tune v. Thompson,**

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The Petitioner shall be released from confinement FORTHWITH.

It is so ORDERED.

Objections and Exceptions are saved.

The Clerk shall transmit a copy of this order to the Prosecuting Attorney of Marshall County, West Virginia; David L. Zehnder, Esq., Marshall County Public Defender Corporation, 607 Court Avenue, Moundsville, West Virginia, 26041; J. L. Hickok, Esq., West Virginia Public Defender Services, Building 3, Room 330, 1900 Kanawha Boulevard, E., Charleston, West Virginia, 25305; Evelyn Seifert, Warden, Northern Regional Jail and Correctional Facility, R. D. #2, Box 1, Moundsville, West Virginia, 26041, and to Steven P. Bowers, Petitioner, at the Northern Regional Jail and Correctional Facility, Moundsville, West Virginia.

Dated this 29th day of December, 2008.

JOHN T. MADDEN, JUDGE

151 W. Va. 282, 151 S.E.2d 732 (1966) wherein our Court stated in part in the opinion that "this Court, in original proceedings in habeas corpus, has discharged many prisoners from custody, in some instances specifically stating that such action was without prejudice to the right of the State to further proceed against the petitioner therein and other cases being silent upon that question. However, where the opinion was silent as to the question of retrial, they have been retried and convicted and this Court has refused to disturb the subsequent conviction." From this language, this Court is of the opinion that it has the inherent power to discharge the Petitioner with prejudice to the State to try the Petitioner again.

Entered 12-29, 2008 and Recorded in Civil Order Book BOOK No. 162, at Page 619

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