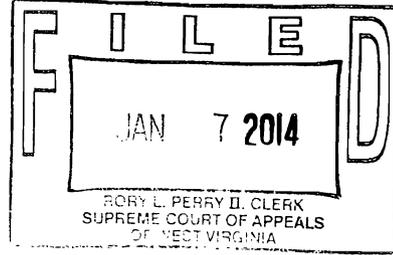


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-1236

STATE OF WEST VIRGINIA EX REL.  
CARL L. HARRIS, PROSECUTING ATTORNEY  
FOR FAYETTE COUNTY, WEST VIRGINIA,

Petitioner,



V.

THE HONORABLE JOHN W. HATCHER, JR.,  
JUDGE OF THE CIRCUIT COURT OF  
FAYETTE COUNTY, WEST VIRGINIA,

and

STEVEN R. MALAY, SR., Defendant below,

Respondents.

**VERIFIED ANSWER TO PETITION**  
**FOR WRIT OF PROHIBITION**

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## CASES

State v. Longerbeam, 226 W. Va. 535, 703 S.E.2d 307 (2010)

State v. Edmonds, 226 W. Va. 464, 702 S.E.2d 408 (2010)

State v. Keller, No. 12-0269, (W. Va. 2013)

State v. Lamar, No. 11-1416 (W. Va. 2013)

## STATUTES

W. Va. Code §61-8D-5

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The Defendant below, Respondent herein, STEVEN R. MALAY, SR., by Counsel, J. B. Rees and Co-Counsel, James W. Keenan, Keenan & Associates, L.C. in answer to the “Verified Petition for Writ of Prohibition” states in response as follows:

**I. QUESTIONS PRESENTED**

The Question presented before the Court is whether or not a person who has been in a custodian and/or a position of trust maintains that status after the time when the person was acting as a guardian or person in a position of trust.

**II. STATEMENT OF THE CASE**

The Defendant was indicted by the September, 2013 Fayette County Grand Jury in an Eighteen Count Indictment alleging various sexual counts of misconduct by the Defendant with a girl who at the time was age fourteen. In eight of those Counts, the State alleged sexual abuse by a parent, guardian, custodian or a person in trust.

Petitioner has gone into great detail of alleged facts that support the various Counts of the Indictment. The Respondent takes exception to many of those allegations including the allegation that the Defendant initiated the relationship with the minor child. However, the allegations made in the Petitioner's Statement of Fact are not relevant to the Question presented before this Court. Both the Petitioner and the Respondent agreed that at all times of the alleged inappropriate sexual conduct by the Defendant with the minor child, he was not acting as a school bus driver nor did any of the alleged activities occur during school hours, on school property or in connection with any school activity.

The Respondent filed a Motion For Bill of Particulars requesting an explanation of the facts on which the State based that the Defendant was a parent, guardian, custodian or a person in trust at the time of the alleged offenses. The Petitioner replied and relied on the fact that the Defendant was the alleged victim's school bus driver and employed by the Fayette County Board of Education during the times of the alleged offenses. The Petitioner relied solely on the Defendant being a school bus driver during the times of the alleged offenses.

The Respondent filed a Motion to Dismiss arguing that at the time of the alleged offenses, the Defendant was not acting in his capacity as a school bus driver. The Defendant moved to dismiss all Counts alleging sexual abuse by a parent, guardian, custodian or a person in trust.

It is alleged that the inappropriate sexual contact by the Defendant with the alleged victim occurred at the alleged victim's home and at a farm close to the alleged victim's home and that of the

Respondent. The Court ruled that at the time of the alleged inappropriate sexual contact by the Defendant with the alleged victim that occurred at the alleged victim's home, the Defendant was not acting as a parent, guardian, custodian or a person in trust. The Court ruled that as to the alleged inappropriate sexual contact by the Defendant with the alleged victim that occurred at a farm in between the home of the alleged victim and the Defendant, the Defendant was acting as a de facto guardian as there was no other responsible adult around. The Respondent maintains that the trial Court was correct in its ruling in dismissing the Counts of alleged inappropriate sexual conduct between the Defendant and the alleged victim at the time the alleged incidents occurred at the alleged victim's home. However, Respondent strongly disagrees with the trial Court's ruling upholding those Counts that occurred between the alleged victim's home and that of the Defendant. Respondent maintains that the Defendant was not acting as a de facto guardian at those times. Respondent also maintains that the Petitioner's response to the Bill of Particulars did not rely upon the allegations that the Defendant was a de facto guardian at those times.

### III. SUMMARY OF ARGUMENT

The argument by the Respondent in this matter is that a person who at times does act in a position of trust as a parent, guardian, custodian or a person in trust does not maintain that status while he is not acting in that capacity and therefore W. Va. Code §61-8D-5 is not applicable.

### IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent defers to the Court if this Court feels that oral argument would aid the Court in this matter.

### V. ARGUMENT

The Petitioner contends that because at certain times the Defendant may have been a

custodian or a person in position of trust, he continued to act in that capacity while away from school and/or activities. The Petitioner further contends that the question of whether or not the Defendant was acting as custodian or a person in position of trust is a question for the jury to decide.

In the case of State v. Longerbeam, 226 W.Va. 535, 703 S.E. 2d 307 (2010), the Court ruled that W. Va. Code §61-8D-5 subparagraph 8 that said statute requires proof that the alleged abuser fell within the specified class of individuals but also the offense requires that the act of abuse must occur with a child under his or her care, custody and control. The times of the alleged offenses the alleged victim was not under the Defendant's care, custody and control by the statute and case law. Further, the Court ruled that a Defendant may have previously have had the status of a custodian or a person of trust is not enough to fall within the purview of the statute. It is quite clear that at the time of the alleged acts, the Defendant was not acting in his capacity as a school bus driver and the actions were not involved on school property and/or any school event.

The State contends that the case of State v. Edmonds, 226 W. Va. 464, 702 S.E. 2d 408 (2010) should control and that the question should be allowed to be presented to a jury. However, in the Edmonds case, the factual situation was different than the case at hand. In that case, the alleged abuser was not only a school maintenance worker but he was also a tutor to the child both on and off school property. In the case at hand, the Defendant had no other responsibility other than a school bus driver and once those responsibilities ended, he no longer was in a position of trust or custodian of a child.

The State also contends that the cases of State v. Keller, No. 12-0269, (W.Va. 2013) and State v. Lamar, No. 11-1416 (W.Va. 2013) confirms their position that the question should be presented to a jury to determine whether a person is in a position of trust or a custodian. Again, the

factual basis in those cases are different than the one at hand. In both State v. Keller and State v. Lamar the Court ruled that the question of whether or not a person was acting as a babysitter should be a question for the jury. The Court has previously held that a babysitter may be a custodian under the provisions of W. Va. Code §61-8D-5 and whether a babysitter is in fact a custodian under this statute is a question for the jury. However, in this matter, it is not alleged nor factually supported that the Defendant was acting as a babysitter at the time of the alleged offenses. The cases of State v. Edmonds, State v. Keller and State v. Lamar are factually distinguishable from the case at hand.

Respondent contends that the trial Court was correct in dismissing the Counts alleging inappropriate sexual conduct at times when the Defendant was not acting in that capacity. However, Respondent does not agree with the trial Court's ruling that at the times the alleged offenses happened on a farm near both the Defendant's and the alleged victim's homes, that at that time the Defendant was acting as a de facto guardian. The position of a de facto guardian was not argued by the Petitioner and the ruling in that regard Respondent also believes that it is erroneous.

#### V. CONCLUSION

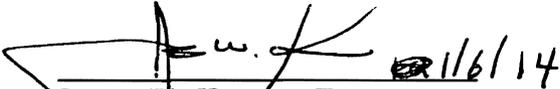
For the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for Writ of Prohibition and uphold the Order entered by the Circuit Court of Fayette County, West Virginia on November 12, 2013.

STEVEN R. MALAY, SR.

By Counsel



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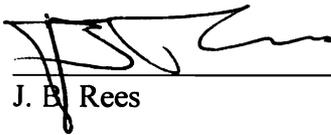
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VERIFICATION OF PLEADING

STATE OF WEST VIRGINIA,

COUNTY OF FAYETTE, to-wit:

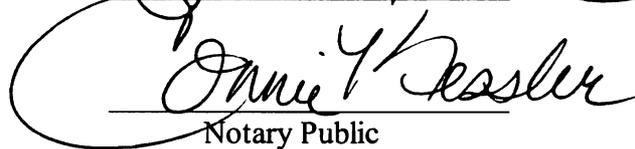
J. B. Rees, individually, after first being duly sworn, does state that he has read the foregoing Verified Answer to Petition for Writ of Prohibition, and knows the contents therein are true except insofar as they are therein stated to be upon information, and so far they are therein stated to be upon information, he believes them to be true.

  
\_\_\_\_\_  
J. B. Rees

Taken, sworn to, and subscribed before me in my said State and County this 10th day of January, 2014.

My commission expires:



August 26, 2022  
  
\_\_\_\_\_  
Notary Public

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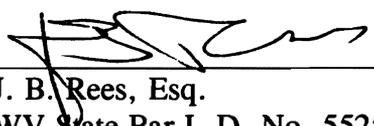
**CERTIFICATE OF SERVICE**

The undersigned attorney does hereby certify that a copy of the foregoing "Verified Answer to Petition for Writ of Prohibition" was served upon Counsel of record by hand delivery and/or United States mail this 7 day of January, 2014 as follows:

The Honorable John W. Hatcher, Jr., Judge  
12<sup>th</sup> Judicial Circuit  
Circuit Court of Fayette County  
P. O. Drawer 90  
Fayetteville, WV 25840

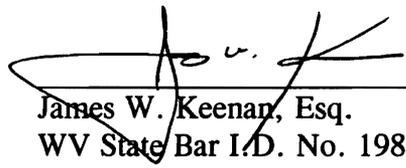
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