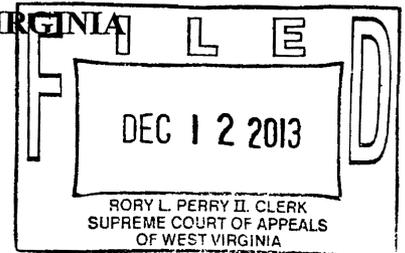


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.**

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**VERIFIED PETITION FOR WRIT OF PROHIBITION**

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**TABLE OF CONTENTS**

**I. QUESTIONS PRESENTED..... 2**

**II. STATEMENT OF THE CASE..... 2**

    A. FACTUAL BACKGROUND..... 2

    B. PROCEDURAL HISTORY ..... 3

**III. SUMMARY OF ARGUMENT..... 6**

**IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION..... 6**

**V. ARGUMENT..... 7**

    A. PROHIBITION IS THE ONLY REMEDY AVAILABLE TO THE PETITIONER TO CORRECT THE  
    CIRCUIT COURT’S LEGAL ERRORS. .... 7

    B. AS A PERSON IN A POSITION OF TRUST BY VIRTUE OF HIS OCCUPATION AS A SCHOOL BUS  
    DRIVER, THE DEFENDANT POSSESSED AUTHORITY INDEPENDENT OF B.F.H’S PARENTS’  
    AUTHORITY. .... 8

    C. THE CIRCUIT COURT ERRED IN FINDING AS A MATTER OF LAW THAT A SCHOOL BUS DRIVER  
    CEASES TO BE A PERSON IN A POSITION OF TRUST IN RELATION TO A CHILD WHEN ACTING  
    OUTSIDE THE SCOPE OF HIS EMPLOYMENT. .... 12

    D. THE CIRCUIT COURT USURPED THE JURY’S ROLE REGARDING THE HIGHLY FACT-INTENSIVE  
    INQUIRY OF WHETHER THE DEFENDANT WAS A PERSON IN A POSITION OF TRUST IN RELATION  
    TO B.F.H..... 15

**VI. CONCLUSION ..... 17**

**CASES**

Cluck v. State, CACR08-1049 (Ark. App. 5/13/2009)..... 9  
Faubion v. State, 2010 WY 79 (Wyo. 2010) ..... 9  
People v. Grocesley, 892 N.E.2d 1225 (Ill. App. 2008)..... 11  
Scadden v. State, 732 P.2d 1036 (Wyo. 1987) ..... 9  
State ex rel. Bowers v. Scott, 226 W. Va. 130, 697 S.E.2d 722 (W. Va. 2010)..... 9, 10  
State ex rel. Hoover v. Berger, 199 W. Va. 12,483 S.E.2d 12 (1996)..... 8  
State v. Buscham, 360 N.J. Super. 346, 823 A.2d 71, 81 (N.J. Super. 2003)..... 14  
State v. Cecil, 221 W.Va. 495, 655 S.E.2d 517 (2007) ..... 16  
State v. Collins, 221 W.Va. 229, 654 S.E.2d 115 (2007) ..... 16  
State v. Cossette, 151 N.H. 355, 361, 856 A.2d 732 (N.H. 2004)..... 14  
State v. Edmonds, 226 W. Va. 464, 702 S.E.2d 408 (2010)..... 5  
State v. Keller, No. 12-0269, (W. Va. 2013) ..... 16  
State v. Lamar, No. 11-1416 (W. Va. 2013)..... 16  
State v. Lewis, 188 W. Va. 85, 422 S.E.2d 807 (1992)..... 7  
State v. Longerbeam, 226 W. Va. 535, 703 S.E.2d 307 (2010)..... 5  
State v. Simons, No. 11-0917 (W. Va. 2012) ..... 5  
State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999) ..... 16  
State v. Tanner, 221 P.3d 901, 2009 UT App 326 (Utah App. 2009) ..... 15  
State v. Thomas, 2007 Ohio 4064 (Ohio App. 8/9/2007)..... 14  
State v. Vaught, Summit App. No. 22846, 2006-Ohio-4727 (2006)..... 14

**STATUTES**

W. Va. Code § 61-8D-5 ..... 2, 4, 11, 14

**RULES**

W. Va. Rev. R.A.P. 16..... 1  
W. Va. Rev. R.A.P. 19..... 7  
W. Va. Rev. R.A.P. 20..... 7

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WEST VIRGINIA,

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

STEVEN R. MALAY, SR., defendant below,

Respondents.

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VERIFIED PETITION FOR WRIT OF PROHIBITION

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On this day comes the State of West Virginia, by and through counsel, Brian D. Parsons and Roger L. Lambert, Assistant Prosecuting Attorneys for the County of Fayette and pursuant to Rule 16 of the Revised Rules of Appellate Procedure submit this Petition seeking a Writ of Prohibition against the Honorable Judge John W. Hatcher, Jr., Circuit Judge of the Twelfth Judicial Circuit, County of Fayette as to that certain Order entered on November 12, 2013 dismissing certain counts of the above styled indictment. (See Appendix Exhibit 1: Order entered November 12, 2013).

## **I. QUESTIONS PRESENTED**

This Court has repeatedly held that the question of whether a person is a custodian or person in a position of trust under W. Va. Code § 61-8D-5 is a question of fact for the jury. In this case, the Circuit Court found, as a matter of law, that the defendant was not a custodian or person in a position of trust when he had sexual intercourse with the alleged victim at the alleged victim's home late at night while her parents were asleep. The Circuit Court also found, as a matter of law, that a school bus driver is only a person in a position of trust when acting in his official capacity. As a result of these rulings, the Circuit Court dismissed seven counts charging the defendant with sexual abuse by a parent, guardian, custodian or person in a position of trust from the Indictment. Did the Circuit Court exceed its legitimate authority by erroneously depriving the State of the right to prosecute those counts?

## **II. STATEMENT OF THE CASE**

### **A. Factual Background**

On December 14, 2012, SGT C. A. Light, of the West Virginia State Police received an anonymous phone call that a minor, B.F.H., was having sexual relations with her older male school bus driver. SGT Light made contact with the mother of B.F.H., who was unaware of any sexual activity between her daughter and the defendant, but promptly cooperated with the investigation and made her daughter available for a forensic interview.

The investigating officer interviewed B.F.H., whose date of birth is December 21, 1997, on December 22, 2012. She informed the officer that she had been talking to the defendant for the past three months. B.F.H. rode the public school bus to and from school and the defendant was her bus driver and had been for a number of years.

When the 2012 school year began, the defendant made comments to B.F.H. that she looked pretty, needed to wear her shirts lower to reveal her breasts and that he enjoyed seeing her by the pool the preceding summer. In September of 2012 the defendant gave her a note with his cell phone number on it and asked her to "call him sometime." She called the defendant and

while they were talking on the phone, the defendant asked her to come to his farm and go up in the woods.<sup>1</sup> B.F.H. met the defendant at his farm and initially he asked only to see her exposed breasts and vagina and kissed her on the mouth. On the subsequent meeting at the defendant's farm, the defendant placed his mouth on her breasts, placed his fingers inside of her vagina and put her hand on his penis. The next time she met the defendant, he indicated that he wanted her to perform oral sex on him. B.F.H., before performing the requested sex act, indicated that she did not know how perform such an act, but the defendant told her that he would teach her how to do it.

B.F.H. told investigators that she had numerous phone conversations with the defendant in November and December 2012.<sup>2</sup> The defendant in these calls engaged in "phone sex" with B.F.H. and expressed a desire to have sexual intercourse with her at her home, due to his home being shared with another woman. The defendant, thereafter, went to her home and engaged in criminal sex acts with B.F.H., in that he placed his fingers in her vagina and performed oral sex on her.

As the relationship escalated, the defendant asked her to purchase condoms for anticipated sexual intercourse. Because of her youth and lack of transportation, B.F.H. told the defendant that she could not do so. The defendant thereafter brought condoms to her house late at night. The defendant performed multiple sex acts with the child including sexual intercourse. The defendant afterwards told her to get on some form of birth control.<sup>3</sup> Both times the defendant had sex with the child in this matter, the child's parents were asleep in the home.

## B. Procedural History

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<sup>1</sup> The home where B.F.H. resides with her mother and step-father is a ten minute walk to the defendant's farm.

<sup>2</sup> Cell phone records obtained from the defendant's cell phone provider corroborate the information provided by B.F.H.

<sup>3</sup> On this occasion, a neighbor photographed the defendant's vehicle in B.F.H.'s driveway.

The defendant was indicted by the September 2013 meeting of the Fayette County Grand Jury. The indictment charged the defendant with sexual abuse by a parent, guardian, custodian or person in position of trust (eight counts), sexual abuse in the third degree (three counts) and sexual assault in the third degree (seven counts). (See Appendix Exhibit 2: Indictment).

On October 9, 2013, the defendant filed a Motion for a Bill of Particulars requesting an explanation of the facts upon which the State based the counts charging sexual abuse by a parent, guardian, custodian or person in position of trust. (See Appendix Exhibit 3: Motion for Bill of Particulars). On October 10, 2013, counsel for the State filed a Response to Defendant's Motion for a Bill of Particulars providing the following factual basis for those counts: "The defendant was the victim's school bus driver employed by the Fayette County Board of Education at the time of the crime. This position of authority and responsibility qualifies as either a custodian or person in a position of trust as defined by W. Va. Code § 61-8D-5." (See Appendix Exhibit 4: Response to Motion for Bill of Particulars).

On October 16, 2013, the defendant filed a Motion to Dismiss. In the Motion, the defendant conceded that he would be considered a custodian or a person in a position of trust while performing his official duties as a school bus driver. However, the defendant argued that because none of the sex acts are alleged to have occurred on the school bus, the counts of the Indictment charging him with sexual abuse by a parent, guardian, custodian or person in a position of trust should be dismissed as a matter of law. (See Appendix Exhibit 5: Motion to Dismiss).

On October 17, 2013 the defendant's Motion to Dismiss was brought on and argued before the trial court. (See Appendix Exhibit 6: Transcript of October 17, 2013 Court Hearing). On October 22, 2013, the Circuit Court delivered its ruling regarding the defendant's Motion to

Dismiss from the bench. The Circuit Court based its ruling on three West Virginia Supreme Court decisions: State v. Edmonds, 226 W. Va. 464, 702 S.E.2d 408 (October 28, 2010)(per curiam); State v. Longerbeam, 226 W. Va. 535, 703 S.E.2d 307 (November 18, 2010)(per curiam); and State v. Simons, No. 11-0917, p.4 (W. Va. Supreme Court April 16, 2012)(memorandum decision). (See Appendix Exhibit 7: Transcript of October 22, 2013 Court Hearing).

The Court noted that Edmonds involved a maintenance worker, tutor and associate youth pastor at a Christian school, who had sexual intercourse with a student at a home that he was remodeling. Longerbeam involved an uncle who was convicted of sexually abusing a niece at her residence. The incident in Longerbeam occurred while the victim's mother was at work and the victim's older sister, who had been left in charge, was asleep. The Court also noted the facts in the more recent Simons memorandum decision, in which the Court stated the appellant, who engaged in sex acts with the victim while the victim was at his residence, was the victim's *de facto* custodian. (See Id. at 3-4).

In an attempt to reconcile these three cases, the Circuit Court ruled the location of the sex acts is the controlling fact. Specifically, the Court held that with respect to the counts of the Indictment wherein the defendant allegedly committed sex acts against B.F.H. at her residence while her parents were sleeping, the parents, like the sleeping sister in Longerbeam, were the sole custodians. Regarding the counts in which the defendant allegedly committed sex acts against B.F.H. at his farm, the Court held the defendant, like the appellant in Simons, was B.F.H.'s *de facto* custodian. Additionally, the Circuit Court ruled that a school bus driver is only a person in a position of trust while performing the official duties of a school bus driver. (See Id. at 12-14).

As a result of the Court's rulings, Counts Seven, Nine, Eleven, Thirteen, Fifteen and Seventeen of the Indictment, charging the defendant with Sexual Abuse by a Parent, Guardian, Custodian or Person in a Position of Trust were dismissed. The resulting Order, for which the State seeks relief, granting in part the defendant's motion, was entered on November 12, 2013. (See Appendix Exhibit 1).

### III. SUMMARY OF ARGUMENT

The State seeks the extraordinary remedy of prohibition because the Circuit Court exceeded its lawful authority by dismissing the aforementioned seven counts of the Indictment and thereby depriving the State of its right to prosecute the same.

Specifically, the Circuit Court erred by finding that B.F.H.'s parents were the only persons exerting control over B.F.H. during the alleged sex acts at B.F.H.'s residence late at night even though they were asleep. In doing so, the Circuit Court failed to recognize the defendant's independent authority over B.F.H. as a person in a position of trust by virtue of his occupation. The Circuit Court also erred by finding that a school bus driver ceases to be a person in a position of trust when not acting within the scope of his employment. Finally, the Circuit Court erred by depriving the State of the opportunity to present its evidence regarding the counts that were dismissed to a jury.

### IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits this case presents issues of fundamental public importance as it relates to the safety of children from sexual predators in positions of authority within society. Moreover, due to inconsistencies between Edmonds and Longerbeam, which were not clearly reconciled by the majority's opinion in Longerbeam, this case involves issues that will likely

create inconsistent rulings by lower tribunals. Thus, this matter would be most appropriate for oral argument under Rule 20 of the West Virginia Revised Rules of Appellate Procedure.

In the alternative, Petitioner submits that this case would be appropriate for oral argument under Rule 19 of the West Virginia Revised Rules of Appellate Procedure.

## V. ARGUMENT

- A. Prohibition is the only remedy available to the Petitioner to correct the Circuit Court's legal errors.

This Court has held that

The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.

Syl. Pt. 5, State v. Lewis, 188 W. Va. 85, 422 S.E.2d 807 (1992).

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Here, it is evident that the State is being erroneously deprived of its right to prosecute the counts of the Indictment that have been dismissed by the Circuit Court, including the right to present the evidence to a jury and to develop a record regarding those counts. Further, the State has no right of appeal from the Circuit Court's order, if it takes the matter to trial.

- B. As a person in a position of trust by virtue of his occupation as a school bus driver, the defendant possessed authority independent of B.F.H's parents' authority.

Contrary to the Circuit Court's attempt to reconcile Edmonds and Longerbeam based on the location of the sex acts, the key distinguishing fact between the two cases is that the appellant in Edmonds occupied a position of trust by virtue of occupation whereas the appellant in Longerbeam had occupied a position of trust by virtue of familial relationship. A careful reading of the two cases shows that the separate analyses employed by the Court in the two opinions hinged on this fact.

In Edmonds, the Court applied a "consistent presence" standard to determine whether the appellant was a person in a position of trust by virtue of his occupation. Specifically, the Court stated that the appellant's consistent presence at the school and church adequately supported the jury's finding that he was a person in a position of trust within the meaning of the law.

In Longerbeam, on the other hand, the Court specifically limited its consideration of whether the defendant was a person in a position of trust to whether the victim's mother or sister, whom the mother had left in charge of the children, had delegated their custodial authority to the appellant. In doing so, the Longerbeam Court implicitly recognized that the authority bestowed on relatives is largely that delegated directly by the child's parent.

Whether the decision is to permit a relative to babysit the child, permit the child to spend the night at a relative's home or permit a relative to take the child to a recreational outing, the decision is based on the parent's personal knowledge of the relative. Further, the parent has full

discretion in the familial context to determine which relatives should be entrusted with the responsibility of child supervision. As such, a relative's authority is derivative of the parent's authority and depends upon the parent's knowledge, acquiescence or express approval.

But when a person is in a position of trust by virtue of occupation, that person does not directly rely upon the parent for his or her authority. Instead, the person's position of authority is independent of the parent's authority. Therefore, unlike in Longerbeam, where the question was who had last been delegated supervisory authority by the victim's mother, the question in Edmonds was whether the appellant was a person in a position of trust by virtue of his occupation. See Faubion v. State, 2010 WY 79, p.17 (Wyo. 2010) ("One in a position of authority is a person who acquires that status by virtue of society and its system of laws granting to him the right of control over another. . . . [T]he teacher or coach is vested with power by a grant from society." (quoting Scadden v. State, 732 P.2d 1036, 1042-43 (Wyo. 1987))).

In Cluck v. State, the appellant, Monica Cluck, was the leader of a church youth group. She was convicted of sexual assault in the first degree based on her relationship as a person in a position of trust to the seventeen-year-old and fifteen-year-old victims who were members of the group. At trial, the mother of the seventeen year old testified for the defense, stating that she did not consider the appellant to be her son's caretaker or in a position of authority over him. The Court of Appeals of Arkansas held that the appellant's independent relationship with the seventeen-year-old was sufficient to support a "temporary caretaker" relationship despite the assertions to the contrary by the victim's mother. CACR08-1049, p.6 (Ark. App. 5/13/2009).

Likewise, this Court recognized the independent authority of persons in a position of trust in State ex rel. Bowers v. Scott, 226 W. Va. 130, 697 S.E.2d 722 (W. Va. 2010). In Bowers, the defendant, a little league baseball coach, engaged in sexual contact on three separate occasions

with boys who were on his team. Although in each instance the parents of the victims had temporarily entrusted the appellant with their children, the Court noted the importance of the fact that the children had also trusted the appellant:

The record shows that M.K. was left alone in the Defendant's care by M.K.'s mother who temporarily entrusted her son into the Defendant's care. D.G.'s father also temporarily entrusted his son into the Defendant's care. C.C. was also left in the Defendant's temporary care when the Defendant ordered that the parents could not attend the team meeting and were to come back later. The Defendant, a deputy sheriff and little league baseball team coach, was trusted by not only the boys' parents, but by the boys—he was “Coach.”

Id. at 729.

The best example of the independent authority of a person in a position of trust by virtue of occupation is in the school context. In some instances, parents may not even be aware of the identity of school faculty or staff members who interact with their children on a daily basis. The parent has no discretion in the hiring, training or supervision of these individuals. Parents must instead trust the school system to employ individuals who will not abuse their positions of authority. Whereas, the parent seemingly has complete discretion in deciding who interacts with their children in the familial context, the parent has little to no discretion in the school context.

Moreover, unlike in the familial context where a relative of a child may never have or seek out any relationship with that child, persons in a position of authority by virtue of their occupation, especially in the school context, will necessarily interact with children in the performance of their job duties and, during this interaction, will exercise the authority granted to them to carry out their job duties. This inherent or independent authority gives such persons the ability to exercise undue influence over the children with which they interact. The fact that such persons have access to significantly larger numbers of children than would be expected in the

familial context further justifies holding those persons to a higher standard than the appellant in Longerbeam.

In People v. Grocesley, the appellant was the assistant coach of a boy's track team for the school district in which the female victim was a student. The appellant in Grocesley, like the defendant in this case, had sexual intercourse with the victim at her home late at night while the victim's parents were sleeping. The appellant argued that he was not a person in a position of trust in relation to the victim because the victim did not know that he was a track coach when the relationship commenced. The Illinois Court of Appeals responded that appellant was a person in a position of trust due to his access to children by virtue of his occupation:

By assuming the position of assistant track coach, the defendant assumed a position of trust that our society imposes upon those who undertake to teach and mentor our children.

In addition, the defendant did not escape criminal conduct under this statute just because he happened to coach the boys' track team, rather than the girls' team. His position presented him with a heightened opportunity to engage in sex with a victim that he knew from the outset was a student at the school, regardless of the victim's knowledge.

892 N.E.2d 1225, 1229 (Ill. App. 2008).

After finding that sufficient evidence existed that the appellant in Edmonds was a person in a position of trust, the Court next addressed the appellant's argument that the child was not under his care, custody or control at the time of the sex acts, which occurred at a house that he was remodeling. This is the temporal element that applies under W. Va. Code § 61-8D-5. The Court held that sufficient evidence existed that the victim was under the care, custody and control of the appellant. Specifically, the Court looked at evidence relating to the relationship between the appellant and the victim to establish the control element.

In this case, the defendant's position of authority was independent from the authority of B.F.H.'s parents. Therefore, it does not matter if B.F.H.'s parents were at B.F.H.'s home asleep

during the sex acts that occurred at B.F.H.'s home. There is also sufficient evidence relating to B.F.H.'s relationship with the defendant to establish the control element. Like the victim in Edmonds, B.F.H. took instruction from the defendant regarding how to perform sex acts. Moreover, the fact that B.F.H. surreptitiously assisted the defendant in accessing her home to have intercourse with her shows that she was acting under his control rather than her sleeping parents'.

- C. The Circuit Court erred in finding as a matter of law that a school bus driver ceases to be a person in a position of trust in relation to a child when acting outside the scope of his employment.

Importantly, neither the defendant nor the Circuit Court have disputed that a reasonable jury may conclude from the facts alleged that the defendant was a person in a position of trust in relation to B.F.H. Instead, the defendant contended and the Circuit Court held that a school bus driver only occupies that position of trust while acting within the scope of his employment. Thus, the Circuit Court concluded that the only time that the defendant was a person in a position of trust in relation to B.F.H. was when she was a passenger on his bus.

Specifically, the Circuit Court compared the position held by the appellant in Edmonds with that of school bus driver in support of his conclusion that a bus driver's authority is confined to the school bus:

In the Edmonds case the defendant tutored the victim outside of school hours though still at the school building premises and maintained his role, as I said, of Associate Youth Pastor. And it says, "Youth Pastor and tutor." Those simply, I believe, apply broader authority than a school bus driver, because a Youth Pastor/tutor would, in all likelihood, interact with persons under his or her charge outside of school hours. Plus, it was almost a family operation, and the family being the defendant's family.

(Appendix Exhibit 7 at 14).

In raising this point, Petitioner is not simply “arguing over semantics.” By making this summary conclusion, the Circuit Court sidestepped the Edmonds Court’s bifurcated analysis of first determining whether sufficient evidence exists that the defendant is a person in a position of trust in relation to the child and then determining whether the defendant exercised control over the child based on the relationship. Instead, the Circuit Court relegated school bus drivers to “quasi-persons in a position of trust,” who only occupy the role of a person in a position of trust when at school or on the school bus.

Apparently, the Circuit Court’s reasoning is based on language in Longerbeam that a person in a position of trust must be “acting in that capacity” at the time of the offense. See 226 W. Va. at 542; 703 S.E.2d at 314. But as discussed above, the only position of authority ever held by the appellant in Longerbeam was that granted by the victim’s mother. And because the sex acts occurred in the victim’s home *by a relative*, this Court required evidence that the victim’s mother or sister, whom the mother had left in charge of the children, had delegated their custodial authority to the appellant.

In this case, as in Edmonds, the defendant’s authority is by virtue of his occupation rather than deriving from parental authority. The Edmonds Court was not so restrictive as to find that the appellant was not a person in a position of trust in relation to a child just because the sex acts occurred at a house that he was remodeling rather than at the school or church where he worked.

Moreover, the Court’s conclusion ignores the reality that most persons in a position of authority only have a limited opportunity to engage in sex acts during the performance of their official duties. Obviously, it would be nearly impossible for the defendant to engage in the sex acts outlined above without detection while performing his duties due to the other students present on the bus who would serve as witnesses.

Courts from several jurisdictions, which have statutes similar to W. Va. Code § 61-8D-5, have recognized that what is most important in cases where the appellant claims to have not been in a position of authority at the time of the unlawful sex acts is that the appellant cultivated a relationship with the victim while acting in a position of authority, and subsequently abused that relationship to obtain sex from the victim. See State v. Cossette, 151 N.H. 355, 361, 856 A.2d 732 (N.H. 2004); State v. Buscham, 360 N.J. Super. 346, 823 A.2d 71, 81 (N.J. Super. 2003).

In State v. Thomas, the appellant was a school security guard convicted of violating an Ohio criminal statute prohibiting a teacher, administrator, coach or “other person in authority” at a school from engaging in sexual conduct with a student. The appellant, who had sex with the victim at a motel, claimed that the State had presented insufficient evidence that he was a person in authority. The Ohio Court of Appeals noted that “[i]t is not a ‘prerequisite’ to the statute ‘that the person actually make or enforce rules,’ rather, ‘[i]t is sufficient for the person acting to be an authority figure, with the ability to exercise an inherent parent-like power over a vulnerable child.’” 2007 Ohio 4064, ¶29 (Ohio App. 8/9/2007)(quoting State v. Vaught, Summit App. No. 22846, 2006-Ohio-4727, ¶12 (emphasis added)). The Court further acknowledged that the relationship the appellant cultivated with the victim while at school was the foundation for the sex acts that later occurred off-campus: “Although T indicated she consented to the sexual encounter, she also indicated that she never would have thought of inviting Thomas to become intimate with her unless he had initiated the relationship by speaking to her at school.” Id. at ¶31.

In State v. Tanner, the appellant was a school bus driver who had sexual intercourse with a female student who was a regular passenger on his bus. 221 P.3d 901, 2009 UT App 326 (Utah App. 2009). Similar to the Circuit Court’s view in this case, the appellant in Tanner argued,

“school bus drivers lack the ‘special authority’ required to be in positions of special trust because they are merely a passive presence in students’ school experience with strictly-limited, task-specific authority.” Id. at ¶17. The Utah Court of Appeals did not find this argument to be persuasive:

The evidence here demonstrates that Defendant used his position as M.S.'s school bus driver to exercise undue influence over her. During the times Defendant was responsible for M.S., he talked to her about her problems at school and singled her out for small gifts, establishing friendship and trust. Defendant then increased the frequency of the time he and M.S. spent together under the guise of giving M.S. responsibility as a bus aide. Defendant would also call M.S. at her house to talk, using the personal information he was entrusted with as her bus driver. Defendant then escalated the intimacy of the time he and M.S. spent together by taking her to the bus depot and driving her home in his own vehicle, causing him to be alone with M.S. Defendant took advantage of these intimate settings he had created by initiating a physical relationship with M.S., beginning with kissing and escalating into sexual touching. Ultimately, it was possible for Defendant to engage in this physical relationship with M.S. due to the undue influence he was able to exercise over her because of his position as her bus driver

Id. at ¶20.

Likewise, the defendant in this case initiated a relationship with B.F.H. in the course of his employment as a school bus driver, gained access to B.F.H. as a result of his position as a school bus driver, and abused his position by exerting undue influence over B.F.H. to have sexual intercourse with her. The defendant should not get a free pass simply because he did not have sexual intercourse with B.F.H. on his school bus.

D. The Circuit Court usurped the jury’s role regarding the highly fact-intensive inquiry of whether the defendant was a person in a position of trust in relation to B.F.H.

This Court has repeatedly found that whether a person falls within one of the four classes of individuals set forth in the provisions of West Virginia Code § 61–8D–5 is a question of fact

for the jury. See Syl. Pt. 1, State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999)(holding that “[a] babysitter may be a custodian under the provisions of *W. Va. Code*, § 61–8D–5 [1998], and whether a babysitter [is] in fact a custodian is a question for the jury”); see also State v. Collins, 221 W.Va. 229, 232–34, 654 S.E.2d 115, 118–20 (2007)(determining that whether an adult who took an eleven-year-old girl four-wheeling on multiple occasions with the implicit permission of the child's mother was a temporary custodian under the provisions of West Virginia Code § 61–8D–5 (2005) was a question for the jury); State v. Cecil, 221 W.Va. 495, 502, 655 S.E.2d 517, 524 (2007)(finding that there was sufficient evidence to support the jury's determination that the defendant was a “custodian” of minor victims so as to uphold conviction of the defendant for sexual abuse by a custodian where the defendant was the father of the victim's friend).

Furthermore, since its holding in Longerbeam, this Court has twice upheld the jury's determination that the defendant was a custodian under W. Va. Code § 61–8D–5 by being the victim's babysitter. See State v. Keller, No. 12-0269, p.3 (W. Va. Supreme Court February 11, 2013)(memorandum decision); State v. Lamar, No. 11-1416, p.2-3 (W. Va. Supreme Court April 12, 2013)(memorandum decision).

Although this Court determined that insufficient evidence existed that the appellant in Longerbeam was a custodian or person in a position of trust, the decision was made after the case had been tried before a jury with the State having a full opportunity to present its evidence and develop a record on the issue. In this case, the State has been deprived of the opportunity to develop the facts relating to whether the defendant was a custodian or person in a position of trust before a jury at trial, despite repeated rulings from this Court that the issue is a question of fact for the jury, not a matter of law for the judge.

## VI. CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant its Verified Petition for Writ of Prohibition and overrule the Order entered by the Circuit Court of Fayette County on November 12, 2013.

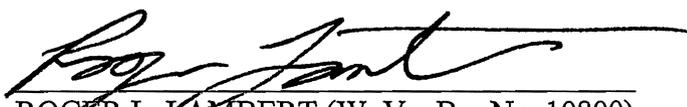
STATE OF WEST VIRGINIA ex rel.  
CARL L. HARRIS, Prosecuting Attorney  
for Fayette County, West Virginia  
*Petitioner*

By Counsel



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*Counsel for Petitioner*

## VERIFICATION

BRIAN D. PARSONS, being by me first duly sworn, upon his oath, deposes and says that he is counsel for the petitioner, State of West Virginia, ex. rel. Carl L. Harris, Prosecuting Attorney for Fayette County, West Virginia, in the foregoing *VERIFIED PETITION FOR WRIT OF PROHIBITION*; that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief; and that insofar as they are therein stated to be upon information and belief, he believes them to be true.

A handwritten signature in black ink, appearing to read 'B. Parsons', is written above a horizontal line.

BRIAN D. PARSONS

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**CERTIFICATE OF SERVICE**

I, BRIAN D. PARSONS, Assistant Prosecuting Attorney for Fayette County and counsel for Petitioner, do hereby certify that service of the foregoing *VERIFIED PETITION FOR WRIT OF PROHIBITION* was made to the following by mailing and/or hand delivering true copies thereof to by United States mail with postage prepaid, if mailed, on this 11<sup>th</sup> day of December, 2013:

The Honorable John W. Hatcher, Jr.  
Judge of the Circuit Court of Fayette County  
P.O. Drawer 90  
Fayetteville, WV 25840

Mr. J. B. Rees  
Attorney At Law  
P. O. Box 432,  
Fayetteville, West Virginia 25840



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BRIAN D. PARSONS