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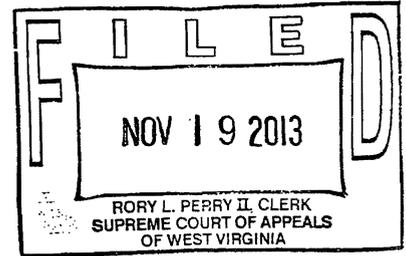
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0910

**ROBERT JUNIOR THOMAS,**  
*Plaintiff below,*  
*Respondent,*

v.

**DAVID BALLARD, Warden,**  
**Mount Olive Correctional Complex,**  
*Defendant below,*  
*Petitioner.*



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**PETITIONER'S BRIEF**

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**PATRICK MORRISEY**  
**ATTORNEY GENERAL**

**CHRISTOPHER S. DODRILL**  
**ASSISTANT ATTORNEY GENERAL**  
812 Quarrier Street, 6th Floor  
Charleston, WV 25301  
Telephone: (304) 558-5830  
State Bar No. 11040  
Email: [csd@wvago.gov](mailto:csd@wvago.gov)  
*Counsel for Petitioner*

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## **ASSIGNMENTS OF ERROR**

1. The Circuit Court committed clear error when it found the jury was not properly instructed to determine whether Robert Thomas, a school bus driver, was (1) in a “position of trust” in relation to his 16-year-old victim, a regular passenger on his bus, and (2) whether she was in his “care, custody or control” at the time they had sexual contact.

2. The Circuit Court erroneously concluded that defense counsel’s trial performance was so deficient and prejudicial that it deprived Thomas of his constitutional right to effective counsel.

## **REQUEST FOR ORAL ARGUMENT**

The State requests oral argument in this case under West Virginia Rule of Appellate Procedure 19. The Circuit Court below granted a writ of habeas corpus based on errors of fact and settled law, and oral argument would significantly aid the decisional process.

## STATEMENT OF THE CASE

Late one July night in 2007, 50-year-old Robert Thomas—a school bus driver in Wyoming County, West Virginia—had sex with 16-year-old L.M.—a summer school student and regular passenger on his bus. Two years later, a jury convicted Thomas of abusing his “position of trust” by having sex with L.M. while she was under his “care, custody or control,” in violation of West Virginia Code § 61-8D-5(a). But in post-conviction proceedings, the Circuit Court of Wyoming County, West Virginia, found that the purported absence of instructions concerning the elements of “position of trust” and “care, custody or control” rendered defense counsel’s performance ineffective and required that Thomas be given a new trial.<sup>1</sup> The pertinent facts of Thomas’s conviction and subsequent habeas relief are detailed below.

### **I. Thomas Was Convicted with Overwhelming Evidence.**

#### **A. Trial Centered on Thomas’s “Position of Trust” and His “Care, Custody or Control” over His Teenage Victim.**

On July 24, 2007, L.M. was a 16-year-old Wyoming County summer school student who had been riding the school bus driving by Robert Thomas for approximately two weeks. (App. 176, 178-79.)<sup>2</sup> Although L.M. had known Thomas for only a fortnight and only as her bus driver, (App. 178, 180), over the course of their two weeks on the bus together, Thomas gave L.M. three personal notes: in one note, Thomas professed his love for L.M. (“the sweetiest most beautiful woman I no [sic]”); and in the other two, he gave her his cell phone number. (App. 448-50).<sup>3</sup>

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<sup>1</sup> The Honorable Robert A. Burnside, Jr. was appointed to preside over this case, during both the trial and habeas corpus proceedings, after the Honorable Warren R. McGraw had recused himself. (See Notice of Intent to Appeal.) To avoid confusion, this brief refers to the Circuit Court as the “trial court” or the “habeas court” when appropriate.

<sup>2</sup> The victim is identified herein by her initials, in accordance with West Virginia Rule of Appellate Procedure 40(e)(1).

<sup>3</sup> In the note confessing his love, Thomas wrote, “Hey baby girl you are the sweetiest most beautiful woman I no wish I could spend the Rest of my life with you I need you and have you need me To baby girl.” (App. 450.)

During the ride home on July 24, Thomas suggested to L.M. that he could help her with her failing schoolwork. L.M. testified, “[H]e told me to meet him, that he was going to help with my grades, that he had seen my grades.” (App. 180; *see also* App. 185.) Thomas suggested to L.M. that they meet later that night: “He told me he was going to drive by my house a couple of times, for me to watch the security system and, whenever he did, for me to come out.” (App. 180.)

L.M. followed Thomas’s instructions. Just before midnight, she left her house, and Thomas picked her up in his white van. (App. 190.) Thomas told L.M. that he was taking her to meet someone that could help with her grades. (*Id.*) Thomas drove L.M. to a nearby campground where L.M. said she was raped. (App. 190-99.) The next day, L.M. was taken to a medical center and examined. (App. 88-90, 214-18.) Seminal fluid matching Thomas’s DNA was found in L.M.’s vagina. (App. 85.) In a statement given with his wife and children present, Thomas admitted to police that he had picked L.M. up, but he did not recall whether they had sex. (App. 102-03).

**B. Thomas Was Convicted of Being a Person in a Position of Trust That Had Sex with a Minor in His Care, Custody or Control.**

On October 6, 2008, Thomas was indicted on one count of violating West Virginia Code § 61-8D-5(a). (App. 5.) That Code provision makes it a felony for a “person in a position of trust to a child” to have sexual contact with the child while she is under his “care, custody or control.” W. Va. Code § 61-8D-5(a). The term “person in a position of trust to a child” is statutorily defined, *see* W. Va. Code § 61-8D-1(12); the phrase “care, custody or control” is not. The victim’s consent and lack of apparent injury are irrelevant and are not a defense to the crime. *Id.*

Thomas’s case went to trial on November 3, 2009. (App. 6.) The core of Thomas’s defense was that he was not guilty because, at the time he had sexual contact with L.M., he was not in a position of trust in relation to her, and she was not in his “care, custody or control” at the

time of their sexual contact. Thomas maintained that a bus driver exercises little power over his passengers, and, in any event, L.M. was not a passenger at the time he had sex with her. Defense counsel raised these issues during his opening statement to the jury, during his examination of witnesses, in his argument for a judgment of acquittal, and in his closing argument. Moreover, the trial court instructed the jury that it had to find that Thomas satisfied these elements before it could render a guilty verdict.

From the outset of the trial, defense counsel vigorously asserted that the elements of “care, custody or control” were the central issue in the case and that they could not be satisfied. In both the second and penultimate sentences of his opening statement, defense counsel denied that the State could carry its burden of proof. He told the jury that “at the time of this alleged event, [Thomas] was in no way controlling or of any custody of this young woman.” (App. 64.) And, he said, “This is a custodial abuse charge, which means that my client, [Thomas], on a certain day in Wyoming County had a sexual encounter with [the victim] while under his duty of control and care and custody, and that’s just not what the evidence is going to show you.” (*Id.*) Defense counsel concluded his opening statement by admonishing the jury, “Do not let the State convince you to assume he’s guilty based on his job title, but that he actually had some custody, control and care over this young woman . . . .” (App. 65.)

Defense counsel continued pressing this issue during his examination of witnesses. Defense counsel challenged L.M. on the amount of authority Thomas, as her bus driver, actually had over her. (App. 251-52, 254.) Defense counsel also called another bus driver and the school’s transportation director and asked them what actual authority a school bus driver has over the students he transports. (App. 307, 309-10, 319-21.)

Likewise, at the close of the State's evidence, defense counsel moved for acquittal and argued that "the State ha[d] failed to meet the element of the crime charged in the indictment of [Thomas] being a custodian, being in care, custody and control of the alleged victim." (App. 274.) The Circuit Court rejected this argument, explaining that the sexual abuse statute should not be read so narrowly, and if the jury believed the State's witnesses, the jury could reasonably return a guilty verdict. (App. 276-77.)

The close of the trial remained focused on the issue of whether L.M. was in Thomas's care, custody, or control at the time of their sexual contact. The trial court instructed the jury that to convict Thomas it had to find that he was in a custodial relationship to L.M. when their sexual contact occurred, and that her consent and lack of injury were not relevant:

Sexual abuse by a parent, guardian or custodian of a child is committed when any parent, guardian or custodian of a child under his or her care, custody or control engages in or attempts to engage in sexual exploitation of or sexual intercourse, sexual intrusion or sexual contact with a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct or the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct.

(App. 369-70.) The court also instructed the jury that a guilty verdict would require that the jury find that the sexual contact occurred while Thomas was in a position of trust in relation to L.M. and that she was in his "care, custody or control" at the time:

Before the Defendant . . . can be convicted of sexual abuse by a parent, guardian or custodian . . . , the State of West Virginia must . . . prove to the satisfaction of the jury beyond a reasonable doubt that the Defendant . . . committed the offense of sexual abuse by a parent, guardian or custodian by willfully and feloniously subjecting [the victim] to sexual exploitation or sexual intercourse, intrusion or contact **when said child was under his care, custody or control; that the Defendant . . . was the parent, guardian, custodian of said child, which child was under his care, custody or control.**

(App. 372-73) (emphasis added).

Following these instructions, both sides—the State and the defense—centered their closing arguments to the jury on this issue. (App. 377, 381, 384 (prosecution argument); 389-91 (defense argument); 391-94, 396 (prosecution rebuttal).) In sum, every participant in the trial—the court, the prosecution, and the defense—told the jury that to convict Thomas, it had to find that he was in a position of trust over L.M. and that she was in his care, custody, or control at the time they had sex.

After hearing the evidence, the lawyers' statements and arguments, and the court's instructions, the jury retired. After less than an hour of deliberation, (App. 407), the jury returned a guilty verdict, (App. 422). Thomas was subsequently sentenced to a term of 10 to 25 years in prison. (App. 451.)

Thomas appealed his conviction to this Court on June 28, 2010, claiming that the evidence was insufficient for the jury to conclude that Thomas was in a position of trust at the time of his sexual contact with his victim. (App. 474.) Thomas's appeal was summarily denied on September 27, 2010. (App. 478.)

## **II. The Circuit Court Granted Thomas Habeas Corpus Relief Based on Errors of Fact and Law.**

Following the denial of his direct appeal, Thomas sought state habeas relief. (App. 481.) The State responded on May 9, 2012. (App. 501.) The court held an omnibus hearing on the petition on September 28, 2012. (App. 509-688.) Just two witnesses testified at the hearing: Thomas's trial counsel and his private investigator. (App. 511.)

On July 26, 2013, the habeas court granted Thomas's writ petition. The court concluded that Thomas's trial counsel had been constitutionally ineffective because he purportedly failed to offer an instruction on whether Thomas was in a position of trust and care, custody, or control over L.M. at the time they had sex. (App. 695.) The habeas court explained that Thomas "could

not have been convicted of the crime unless the prosecution proved to the jury beyond a reasonable doubt that the petitioner's relationship with the victim was that of a person in a position of trust as to the alleged victim and who at the time of the act alleged was in his care, custody, or control." (App. 693.) But the court stated, "Petitioner's trial counsel did not offer an instruction that would guide the jury as to these issues and did not offer at the habeas hearing a strategically related explanation for his failure to do so." (*Id.*) The habeas court concluded that defense counsel's alleged failure constituted deficient performance and was prejudicial under *State v. Miller* and ordered a new trial for Thomas. (App. 696.) The State now appeals that ruling.

## SUMMARY OF ARGUMENT

Thomas manipulated his position of authority to have sex with a teenage girl who rode his school bus. In granting Thomas's habeas petition, the Circuit Court of Wyoming County erred in two ways. Both errors require reversal.

*First*, in declaring defense counsel ineffective for failing to offer sufficient instructions, the habeas court necessarily found that the jury was not properly instructed on the elements of the crime charged. But the record belies this finding. The trial court did instruct the jury that to convict Thomas, it had to find that he was both in a "position of trust" in relation to his victim, and that she was under his "care, custody or control" at the time they had sex. The habeas court's implicit finding to the contrary—and the basis for its ruling—was clear error.

*Second*, the habeas court's ruling that defense counsel was ineffective was nothing more than a second-guessing of objectively valid trial strategy. At the time of trial, the reach of "care, custody or control" remained undefined. A reasonable lawyer, seeking to avoid an adverse ruling, could have chosen not to seek an instruction on the scope of that term. Accordingly, counsel's performance was not objectively deficient. Additionally, given the overwhelming evidence against Thomas, counsel's performance did not prejudice the defense at trial.

For these reasons, Thomas's petition for a writ of habeas corpus should have been denied, and the order granting Thomas a writ of habeas corpus must be reversed.

## ARGUMENT

### I. A Habeas Petitioner Asserting an Ineffective Assistance of Counsel Claim Faces a High Bar.

A circuit court's ruling that trial counsel was constitutionally ineffective presents mixed issues of law and fact. The circuit court's factual findings are reviewed for clear error, but its ultimate ruling on ineffectiveness is reviewed de novo. Syl. pt. 1, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995).

This Court has recognized that “the cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between one another.” *State v. Miller*, 194 W. Va. 3, 16, 459 S.E.2d 114, 127 (1995). To prevail, the petitioner must show both that his counsel's performance was objectively deficient and that his defense was substantially prejudiced as a result.

With regard to the performance prong, courts apply a “strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689. In conducting this inquiry, courts must “refrain[] from engaging in hindsight or second-guessing of trial counsel's strategic decisions” and must instead focus on “whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.” *Miller, supra*, at Syl. pt. 5. “The test of ineffectiveness has little or nothing to do with what the *best* lawyers would have done. Nor is the test even what most good lawyers would have done.” *Id.* at 127, 16. Rather, the test is “whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue” and “whether the adversarial process at the time, in fact, worked adequately.” *Id.*

But even if counsel's performance was objectively deficient, a habeas petitioner must also prove that there is a reasonable probability that, but for his lawyer's performance, the

outcome of his trial would have been different. *Id.* at Syl. pt. 5. Under this prejudice prong, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* That requires a “substantial,” not just “conceivable,” likelihood of a different result. *Harrington v. Richter*, 562 U.S. \_\_\_, \_\_\_, 131 S. Ct. 770, 791 (2011) (applying *Strickland*).

## **II. The Circuit Court Committed Clear Error When It Found that the Jury Was Not Adequately Instructed on the Elements of the Crime Charged.**

For a court to rule that counsel was constitutionally ineffective, it must conclude that there was deficient performance and resulting prejudice. Necessarily, then, when a court concludes that counsel’s performance was deficient because he failed to offer an instruction on a particular element, the court must implicitly find that no such instruction was ultimately given to the jury. Otherwise, there could have been no prejudice because the ultimate instruction would have mooted any failure by counsel. And so here, when the habeas court concluded that defense counsel was ineffective because he allegedly failed to request an instruction on the proper reach of “position of trust” and “care, custody or control,” the habeas court necessarily found that the jury was not properly instructed on those elements by the trial court.

The record, however, shows otherwise. At the close of trial, the jury was instructed that to find Thomas guilty, it had to find that Thomas was in a position of trust in relation to L.M. *and* that L.M. was in Thomas’s care, custody or control at the time he had sex with her:

Sexual abuse by a parent, guardian or custodian of a child is committed when any parent, guardian or custodian of a child *under his or her care, custody or control* engages in or attempts to engage in sexual exploitation of or sexual intercourse, sexual intrusion or sexual contact with a child *under his or her care, custody or control*, notwithstanding the fact that the child may have willingly participated in such conduct or the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct.

(App. 369-70) (emphasis added). The instructions were clear that the State had to temporally connect the control that Thomas exercised by virtue of his position with his sexual contact with L.M.:

Before the Defendant . . . can be convicted of sexual abuse by a parent, guardian or custodian . . . , the State of West Virginia must . . . prove to the satisfaction of the jury beyond a reasonable doubt that the Defendant . . . committed the offense of sexual abuse by a parent, guardian or custodian by willfully and feloniously subjecting [the victim] to sexual exploitation or sexual intercourse, intrusion or contact *when said child was under his care, custody or control; that the Defendant . . . was the parent, guardian, custodian of said child, which child was under his care, custody or control.*

(App. 372-73) (emphasis added).

These instructions substantially tracked the language of the statute and were sufficient. Syl. pt. 8, *State v. Slie*, 158 W. Va. 672, 213 S.E.2d 109 (1975) (“An instruction for a statutory offense is sufficient if it adopts and follows the language of the statute, or uses substantially equivalent language and plainly informs the jury of the particular offense for which the defendant is charged.”). Notably, this Court has tacitly approved similar instructions in other position-of-trust cases. In rejecting the appeal by a defendant convicted of sexually abusing a 12-year-old girl who was staying at his house, this Court approvingly passed on these instructions:

Sexual abuse by a custodian is committed when any parent, guardian or custodian of a child under his or her care, custody or control, engages in, or attempts to engage in, sexual contact with a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct, or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct.

*State v. Collins*, 221 W. Va. 229, 233, 654 S.E.2d 115, 119 (2007) (per curiam).<sup>4</sup>

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<sup>4</sup> In fact, that instruction was even less specific than the instruction offered here, as it lacked the temporal relationship required between the position of trust and the sexual act. Nevertheless, that instruction from *Collins* laid out the essential elements of the offense and was sufficient to convict the defendant under the position-of-trust statute.

The jury instructions here, which recognized the requisite connection between the custodial relationship and the sexual contact, were likewise sufficient to convict Thomas. The habeas court's ruling must therefore be reversed.

**III. Defense Counsel's Performance Did Not Violate Thomas's Sixth Amendment Rights.**

**A. Defense Counsel's Performance Was Not So Deficient that No Reasonable Lawyer Would Have Made the Same Decision.**

Under the well-worn *Strickland/Miller* standard, Thomas is required to show that his lawyer's performance was objectively deficient. Crucially, counsel's deficiencies cannot be uncovered through the clarity of hindsight alone. As this Court has explained, "in retrospect, one always may identify shortcomings, but perfection is not the standard for ineffective assistance of counsel." *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128.

Here, the habeas court's conclusion that trial counsel's decision not to seek particular instructions is the very second-guessing that *Strickland* and *Miller* warn against. Contrary to the court's ruling, a reasonable lawyer could choose, as a matter of strategy, not to seek an instruction on an unsettled legal issue. Defense counsel was certainly aware that the elements of "position of trust" and "care, custody or control" were essential to Thomas's defense. Throughout Thomas's trial, the issue of whether he was in a position of "care, custody or control" of his teenage victim at the time he had sexual contact with her was repeatedly examined. It was mentioned by defense counsel during opening statements, during witness examination, in his motion for a judgment of acquittal at the close of the State's evidence, and during closing argument. Thomas's trial counsel made these elements the focus of trial.

The sufficiency of defense counsel's performance must be reviewed through an objective lens. As the habeas court recognized, Thomas's trial counsel could not explain why he did not seek a jury instruction on the "position of trust" and "care, custody or control" elements during

the omnibus hearing. (App. 595.) But defense counsel's ability to give a subjective rationale for his actions is not relevant; what is relevant is that a reasonable lawyer could certainly choose not to seek such an instruction.

Seeking clarification of statutory terms does not always work to a criminal defendant's advantage in a jury trial. *Cf. Leonard-Bey v. Conroy*, 39 Fed. App'x 805 (4th Cir. 2001) (reversing district court's grant of habeas writ, explaining that trial counsel's decision not to seek more specific instruction on felony murder charge was not ineffective assistance). One reasonable strategy for not seeking additional instructions on the definitions of "care, custody or control" is that the court could have denied any proffered instructions and given an even narrower instruction that would have hurt the defense. In fact, based on the discussion at the close of the State's evidence, Thomas moved for acquittal, arguing that the evidence was insufficient to conclude that Thomas was in a position of "care, custody or control" over L.M. at the time they had sex. (App. 274-75.) Defense counsel maintained that Thomas was "not under any custodial responsibility to this child and, even during working hours, he was merely a mode of transportation, with little or no authority or supervisory obligation to the child." (App. 275.) Counsel continued trying to minimize Thomas's role:

He was a mode of transportation to get her from home to school and at the time of this event, ten hours from when he last saw this young woman, that is when this alleged event had occurred and we would just contend that he was under no duty to care and was not controlling the child by any means.

(App. 275-76.)

The State opposed this motion, arguing that the defense was reading the statute too narrowly and that the defense's interpretation of the statute would create a statutory loophole for offenders like Thomas (*Id.*) The trial court agreed with the State. It denied Thomas's motion,

stating that the statute was not as narrow as defense counsel suggested and that the evidence was sufficient for a guilty verdict:

I believe that the evidence thus far would support the conclusion, if the jury reaches it, that the relationship between a bus driver and a student who rides the bus is a person in the position of trust with respect to that child under his care, custody or control, and the evidence would further support the conclusion, if what has been offered is believed by the jury, that the events that occurred, if believed by the jury, were a continuation of events that began while – while the child was in his care, custody or control, and that the events, if believed by the jury, were an exploitation of that – of that position of trust.

(App. 276.)

So even though defense counsel could have requested an instruction that defined “care, custody or control” in a temporally narrow sense, there was no guarantee that he would have succeeded. In fact, the trial court suggested that it would read the statute broadly, which would have created instructions contrary to Thomas’s interests. A reasonable lawyer could certainly determine, as a matter of trial strategy, that his or her client would be better served by not requesting an instruction requiring that the “care, custody or control” element have a temporal aspect to it.

The jury was made fully aware that to return a guilty verdict, it had to find that Thomas was in a position of “care, custody or control” over his victim at the time he had sex with her. Any other jury instruction—which the habeas court acknowledged would “have been difficult for counsel to draft and for the trial court to analyze and rule upon” (App. 695)—would have simply been repetitive of the instruction the court ultimately gave to the jury. The performance of defense counsel was not deficient, and the habeas court’s ruling must be reversed.

**B. Even if Defense Counsel’s Performance Was Deficient, Thomas’s Suffered No Prejudice by the Alleged Error.**

Even if Thomas is able to show that his trial counsel’s performance was deficient—which the State denies—he must also show that, but for his lawyer’s errors, there is a substantial

probability that the outcome of his trial would have been different. This requires considering all of the evidence that was presented to the jury. *Strickland v. Washington*, 466 U.S. 668, 695 (1984); *see also State ex rel. Wimmer v. Trent*, 199 W. Va. 644, 487 S.E.2d 302 (1997) (finding no prejudice from defense counsel's failure to offer instruction on effect of intoxication); *State ex rel. Boso v. Hedrick*, 182 W. Va. 701, 391 S.E.2d 614 (1990) (finding no prejudice from defense counsel's failure to offer alibi instruction); *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982) (holding that counsel's failure to propose instructions on lesser-included offenses did not prejudice the defendant because self-defense had been the primary argument for the defense throughout trial). Thomas cannot prove that he was prejudiced by the absence of an instruction on the meaning of "care, custody, or control."

There was overwhelming evidence that Thomas violated § 61-8D-5(a) when he had sex with L.M. As a school bus driver, Thomas was undoubtedly in a position of trust in relation to L.M. A person is in a position of trust if he "by virtue of [his] occupation or position is charged with any duty or responsibility for the . . . welfare[] or supervision of the child." W. Va. Code § 61-8D-1(12). Whether a person is in a position of trust is a jury question. *See* Syl. pt. 1, *State v. Stephens*, 206 W. Va. 420, 525 S.E.2d 301 (1999). A school bus driver, by virtue of his or her employment, is charged with seeing to the welfare and supervision of the children he or she transports from home to school and back. Many parents rely on school bus drivers to perform this critical parental function. L.M. testified that, at the time of their sexual contact, she had known Thomas by virtue of his employment as a school bus driver alone; she knew him in no other context. To put it another way, if Thomas had not been L.M.'s bus driver, he would never have had access to her. This evidence was sufficient to satisfy the "position of trust" element of § 61-8D-5(a).

And L.M. was undoubtedly under Thomas's "care, custody or control" at the time of their sexual contact. This Court has explained that those terms should be interpreted in accordance with their normal meaning. *See State v. Edmonds*, 226 W. Va. 464, 469, 702 S.E.2d 408, 413 (2010) ("The word 'care' is defined as '[s]erious attention; heed.' Black's Law Dictionary 240 (9th ed.2009). 'Custody' is defined as '[t]he care and control of a thing or person for inspection, preservation, or security.' *Id.* at 441. 'Control' means '[t]o exercise power or influence over.' *Id.* at 378."). At the time of their sexual contact, L.M. had only known Thomas for two weeks, she only knew him as her school bus driver, and he had given her love notes on the bus. In other words, the 50-year-old Thomas cultivated and manipulated his "power or influence" over L.M. to lure this 16-year-old girl into his van late at night and have sex with her.

What is more, the fact that the sexual contact did not occur on the bus itself or during school hours is irrelevant. Thomas's position of trust over L.M. did not end the moment that she got off the school bus. If that were the case, the statute would have little, if any effect, over people who have access to children during certain windows of time. A person in trust such as a teacher, coach, babysitter, or minister could simply wait to have sexual contact with the minor until they were no longer in school, practice, aftercare, or church and avoid criminal charges. Such a rule would eviscerate the State's ability to prosecute sex predators and undermine the legislative intent behind § 61-8D-5. What is relevant is that Thomas used his position of authority to foster a relationship with L.M., which led to their sexual contact.

The jury knew the State had to prove these elements from the trial court's instructions, as well as defense counsel's questions and arguments, and Thomas was not prejudiced by his lawyer's decision not to offer a more specific instruction. The primary argument for Thomas's defense at trial was that, as a school bus driver, he was not in a position of trust in relation to

L.M., and, in any event, he did not maintain that position of trust when he had sexual contact with her. Therefore, there was no resulting prejudice from this alleged failure by trial counsel.

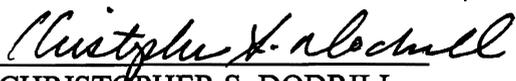
## CONCLUSION

The Circuit Court's order is based on clear errors of fact and mistakes of law. For the reasons stated above, the order of the Circuit Court of Wyoming County, West Virginia, granting Robert Thomas a writ of habeas corpus must be reversed.

Respectfully submitted,

DAVID BALLARD, Warden,  
*Petitioner,*  
By counsel,

PATRICK MORRISEY  
ATTORNEY GENERAL

  
CHRISTOPHER S. DODRILL  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, WV 25301  
Telephone: (304) 558-5830  
State Bar No. 11040  
Email: [csd@wvago.gov](mailto:csd@wvago.gov)  
*Counsel for Petitioner*

**CERTIFICATE OF SERVICE**

I, Christopher S. Dodrill, Assistant Attorney General and counsel for the Petitioner, hereby verify that I have served a true copy of "Petitioner's Brief" upon counsel for the Respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 19th day of November, 2013, addressed as follows:

David Kirkpatrick, Esq.  
Kirkpatrick Law Office  
327 Neville Street  
Beckley, WV 25801

  
CHRISTOPHER S. DODRILL