

BEFORE THE STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

ROBERT THOMAS

**Petitioner below,
RESPONDENT herein**

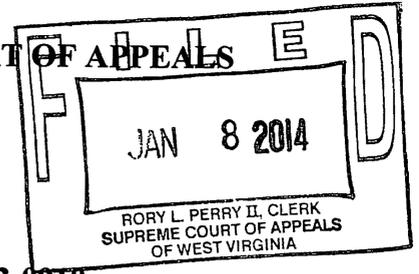
vs.

DAVID BALLARD, Warden

Mount Olive Correctional Complex

**Defendant below,
PETITIONER herein**

NO.: 13-0910



RESPONSE TO APPEAL

ROBERT THOMAS, RESPONDENT

DAVID KIRKPATRICK, WV. State Bar # 7186

KIRKPATRICK LAW OFFICE

327 Neville Street

Beckley, WV 25801

Telephone: (304) 254-2260

Email: dave1kirk@wvdsi.net

Counsel for the Respondent

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II. ASSIGNMENT OF ERROR

- A. **THE TRIAL COURT CORRECTLY CONCLUDED THAT THE JURY WAS NOT PROPERLY INSTRUCTED AS TO THE LAW REGARDING AN ESSENTIAL ELEMENT OF THE OFFENSE WHEN RESPONDENT’S TRIAL COUNSEL FAILED TO OFFER ANY JURY INSTRUCTIONS REGARDING THE TERMS “PERSON IN A POSITION OF TRUST” AND “CARE, CUSTODY, OR CONTROL” AS CONTAINED IN W.Va. § 61-8D-5(a).**

- B. **THE TRIAL COURT CORRECTLY CONCLUDED THAT RESPONDENT’S TRIAL COUNSEL WAS INEFFECTIVE WHEN TRIAL COUNSEL FAILED TO OFFER ANY JURY INSTRUCTIONS IN A CASE THAT INVOLVED A LEGAL DEFENSE AS OPPOSE TO A FACTUAL DEFENSE.**

III. STATEMENT OF CASE

A. FACTUAL SUMMARY

The Trial Court below accepted the following facts upon reviewing the evidence presented at Respondent Robert Thomas’ trial and Omnibus Habeas Petition hearing:

- 1. The Respondent Robert Thomas was a bus driver for the Wyoming County Board of Education.

- 2. The Respondent Robert Thomas engaged in consensual sexual intercourse with a person who was over the age of sixteen years and under the age of eighteen years.

3. The person with whom Respondent Robert Thomas engaged in sexual intercourse was a public school student who was a regular passenger on the bus regularly operated by Respondent Robert Thomas.
4. Respondent Robert Thomas' acquaintance with the child developed at a time when he was operating the school bus on which the child was a passenger.
5. On the date of the offense charged, Respondent Robert Thomas acting in his capacity as school bus driver delivered the person to her home at the ordinary time following the end of the school day.
6. Respondent Robert Thomas and the alleged victim had consensual sexual intercourse at approximately 11:30pm during the nighttime following a school day.

B. PROCEDURAL SUMMARY

Procedurally, the Court took note of the following first six (6) paragraphs and Respondent Robert Thomas adds the last three (3) paragraphs:

1. On October 6, 2008, THE GRAND JURY OF Wyoming County indicted the Respondent Robert Thomas for the offense of "Sexual Abuse by Parent, Guardian, or Custodian" in violation of West Virginia Code § 61-8D-5.
2. On November 4, 2009, Respondent Robert Thomas was convicted by jury trial.
3. On September 22, 2010, the Supreme Court of Appeals refused the Respondent's direct appeal of that conviction.
4. On December 1, 2011, The Respondent Robert Thomas filed his original petition for post-conviction habeas corpus relief. The original time frame order was entered on or about December 7, 2011 and subsequently amended from time to time.

5. On April 23, 2012, Respondent Robert Thomas filed the present amended petition for post-conviction habeas corpus. By order of April 30, 2012, this Court summarily dismissed the petition in part, granted the petition in part, and directed the prosecuting attorney of Wyoming County to file a response to the issues that were not summarily dismissed.
6. On September 28, 2012, an omnibus hearing on Respondent Robert Thomas' post-conviction habeas corpus petition was held.
7. On July 23, 2013 the trial Court entered an Order Granting Respondent Robert Thomas' Petition For Post-Conviction habeas corpus; setting aside the his guilty verdict; and granting Respondent Robert Thomas a new trial.
8. On July 27, 2013 the State of West Virginia filed its Notice of Intent to Appeal.
9. On November 19, 2013 the State of West Virginia perfected and filed its Petition for Appeal to which the Respondent Robert Thomas now responds.

IV. SUMMARY OF ARGUMENT

- A. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE JURY WAS NOT PROPERLY INSTRUCTED AS TO THE LAW REGARDING AN ESSENTIAL ELEMENT OF THE OFFENSE WHEN RESPONDENT'S TRIAL COUNSEL FAILED TO OFFER ANY JURY INSTRUCTIONS REGARDING THE TERMS "PERSON IN A POSITION OF TRUST" AND "CARE, CUSTODY, OR CONTROL" AS CONTAINED IN W.Va. § 61-8D-5(a).**
- B. THE TRIAL COURT CORRECTLY CONCLUDED THAT RESPONDENT'S TRIAL COUNSEL WAS INEFFECTIVE WHEN TRIAL COUNSEL FAILED TO OFFER ANY JURY INSTRUCTIONS IN A CASE THAT INVOLVED A LEGAL DEFENSE AS OPPOSE TO A FACTUAL DEFENSE.**

V. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is sought on this appeal pursuant to Rule 19 of Appellate Procedure as this case involves 1) an assignment of error in the application of settled law; and 2) a narrow issue of law.

VI. ARGUMENTS

A. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE JURY WAS NOT PROPERLY INSTRUCTED AS TO THE LAW REGARDING AN ESSENTIAL ELEMENT OF THE OFFENSE WHEN RESPONDENT'S TRIAL COUNSEL FAILED TO OFFER ANY JURY INSTRUCTIONS REGARDING THE TERMS "PERSON IN A POSITION OF TRUST" AND "CARE, CUSTODY, OR CONTROL" AS CONTAINED IN W.Va. § 61-8D-5(a)

This Court in State v. Davis, 220 W.Va. 590, 648 S.E.2d 357 (2007) held "[t]he trial court **must** instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error." State v. Davis, 220 W.Va. 590, 648 S.E.2d 357 (2007) syl. pt. 2 (citing State v. Miller, 184 W.Va. 367, 400 S.E.2d 611 (1990)) (emphasis added). Accordingly, it would appear axiomatic that defense counsel, who is duty bound to effectively advocate and advance his client's defense(s), has an equal and corresponding obligation to compound and offer jury instructions that may assist the jury as to the law of the case. The source of the instruction of law to guide the jury in its deliberation is immaterial, whether it was offered by the Defense, the State, or compounded by the Court, the jury must be offered sufficient strictures concerning the law to make the necessary factual findings that would result in a guilty or not guilty verdict. To require anything less would merely subject a criminal defendant's conduct to the whims and favor of the community at-large and turn the petit jury to a representative sample thereof.

In the instant case, the trial court in its habeas review was correct in its evaluation of the elements of the crime alleged under W.Va. § Code 61-8D-5(a). The Court stated in its Order granting Respondent Robert Thomas' habeas corpus relief:

As applied to the facts of this case, the special circumstances necessary to the elements of the charge are summarized as the following:

1. That the accused be a
 - a. Parent,
 - b. Guardian,
 - c. Custodian, or
 - d. A person in a position of trust in relation to a child under his or her care, custody or control
2. Who engaged in sexual intercourse, sexual intrusion or sexual contact with sexual intercourse
3. With a child under his care, custody or control

Order Granting Habeas Relief p. 3-4. The trial court also correctly noted that the State conceded that the Respondent Robert Thomas was not within the categories of “parent”, “guardian”, or “custodian”, as defined by statute and as it pertained to the alleged victim and noted that “[i]t was the prosecution’s theory that the [Respondent] qualified as a ‘person in a position of trust as to a child in his care, custody, or control’ in relation to the victim because he was the school bus driver for the bus upon which the victim regularly traveled from public school to her home.” Id. at p. 4. Further, the trial court noted that “[t]he terms ‘position of trust’¹, ‘care’, or ‘control’ are not defined in the statute.” Id.

In its appeal brief, the State argues that the trial court instructed the jury “that a guilty verdict would require the jury find that the sexual contact occurred while [Respondent] Thomas was in a position of trust in relation to [the alleged victim] and that she was in his ‘care, custody or control’ at the time. . . .” State’s Appeal Brief at p. 6 and 11-12. However, the State does not and cannot argue that the jury received any kind of guidance as to what the terms “person in a

¹ Apparently, the trial court missed the 2005 amendment to W.Va. § 61-8D-1(12) that defined “person in a position of trust in relations to a child” as “ any person who is acting in the place of a parent and charged with any of a parent’s rights, duties or responsibilities concerning a child or someone responsible for the general supervision of a child’s welfare, or any person who by virtue of their occupation or position is charged with any duty or responsibility for the health, education, welfare, or supervision of the child.”

position of trust”² and “care, custody, and control” meant because neither the State nor Defense Counsel offered such an instruction for the Court to consider and the Court did not formulate one on its own. Without any parameters as to what “person in a position of trust” and “care, custody, and control” meant these two essential elements of Respondent Robert Thomas’ offense were left to the vagaries of the jury’s moral leanings as opposed to actual prohibitive conduct defined by law. “Failure to afford a criminal defendant the fundamental right to have the jury instructed on *all essential elements of the offense* charged has been recognized as plain error.” State v. Davis, 220 W.Va. 590, 648 S.E.2d 357 (2007) (citing Smith v. United States, 549 A.2d 1119, 1123 (D.C.Ct. App.1988)) (emphasis added).

In regard to the element of the offense, the trial court noted that “the statute’s [W.Va. Code § 61-8D-5(a)] separation of the factors of ‘position of trust’ and ‘in his care, custody and control’ indicates that the existence of a relationship which constitutes a ‘position of trust’ does not require the conclusion that the child is thereby deemed to be always in that person’s ‘care, custody or control.’” Order Granting Habeas Relief p. 5. Further, the trial court stated that “the Longerbeam opinion concluded that [the person in a position of trust] category of relationship requires that [sic] the alleged victim be under the supervision, ‘or to be statutorily-specific [the] ‘care, custody or control,’ of the [Respondent] *when she was subject to the alleged abuse* (emphasis original).” Order Granting Habeas Relief p. 6 (citing State v. Longerbeam, 226 W.Va. 535, 703 S.E.2d 307 (2010)).

² As noted in footnote 1 above, the definition of a “person in position of trust” was readily accessible as it was statutorily defined in a 2005 amendment to W.Va. Code §61-8D-12.

In the absence of adequate instructions on these two offense elements, the trial court's analysis upon reviewing the evidence presented at trial on the issues left the trial court less than confident in the verdict reached by the jury³. The trial court noted:

The State argues that the evidence supports the conclusion that the [Respondent Robert Thomas] exploited his position as a bus driver to entice the victim, in particular, by promising to help her with her grades or her homework. The evidence was not clear, however, as to whether the victim's conduct with the petitioner was directly associated with that enticement. It is even less clear that even if that were [sic] what motivated the child to place herself in the [Respondent's] company, such constitutes care, custody, or control by the [Respondent].

Id. at p. 6. The trial court further noted that:

The question of care, custody or control is further complicated by evidence that on the day in question the victim had gone home from school and later left her home without the knowledge of her parents, and had been in the company of other persons during the evening before she eventually entered the presence of the [Respondent], entered his vehicle, and had sexual intercourse with him.

Id. The trial court concluded that “[t]he trial was fundamentally flawed by the absence of jury instruction on a factual point that was critical not just to the determination of guilt, but to the question whether a crime had been committed at all.” Id. at p. 8.

B. THE TRIAL COURT CORRECTLY CONCLUDED THAT RESPONDENT'S TRIAL COUNSEL WAS INEFFECTIVE WHEN TRIAL COUNSEL FAILED TO OFFER ANY JURY INSTRUCTIONS IN A CASE THAT INVOLVED A LEGAL DEFENSE AS OPPOSED TO A FACTUAL DEFENSE

As state previously, this Court in State v. Davis, 220 W.Va. 590, 648 S.E.2d 357 (2007) held “ [t]he trial court **must** instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his

³ In Syllabus point 7 of *Miller* the Court set out the elements of the plain error doctrine as follows: To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. State v. Davis, 648 S.E.2d 358 (citing Syl. pt. 7, *Miller*. 194 W.Va. 3, 459 S.E.2d 114).

fundamental right to a fair trial, and constitutes reversible error." *State v. Davis*, 220 W.Va. 590, 648 S.E.2d 357 (2007) syl. pt. 2 (citing *State v. Miller*, 184 W.Va. 367, 400 S.E.2d 611 (1990)) (emphasis added). Accordingly, it would appear axiomatic that defense counsel, who is duty bound to effectively advocate and advance his client's defense(s), has an equal and corresponding obligation to compound and offer jury instructions that may assist the jury as to the law of the case. Defense counsel's obligation to compound appropriate jury instructions is especially critical in cases such as this one where the Defendant asserts a legal defense (is conduct did not violate a provision of the law) as opposed to a factual defense (he did not commit the act of which he is accused).

In the case at bar, Respondent Robert Thomas' trial counsel readily admitted that his case evolved from a factual defense (Respondent did not engage in sexual contact with the alleged victim) to more of a legal defense (he engaged in sexual contact with the alleged victim but she was of an appropriate consenting age (16) and not within his care, custody, and control at the time of the incident).⁴ Yet Respondent's trial counsel offered only two (2) jury instructions, and neither of the two instructions dealt with the issues of "person in a position of trust" or "care, custody, or control" and then ultimately withdrew both of those proposed instructions.⁵ Further, as the trial court noted in its Order Granting Habeas Corpus Relief, Respondent's trial counsel did not have any explanation for his failure to compound and offer instructions on these essential elements of Respondent's offense.⁶ Likewise, there were other points of law that Respondent's

⁴ See Appeal Appendix- direct examination of Defense Counsel Thomas Evans p. 591 lines 1 to 12 and p. 603 lines 6-12.

⁵ See Appeal Appendix- direct examination of Defense Counsel Thomas Evans p. 595 line 24 to p. 596 line 17 and p. 647 line 19 to 648 line 19.

⁶ See Appeal Appendix- direct examination of Defense Counsel Thomas Evans p. 595 lines 7-23.

trial counsel brought into issue by presenting evidence at trial, but again totally failed to compound and offer jury instructions thereon.⁷

As the trial court pointed out in its Order Granting Habeas Relief, Respondent's trial counsel's failure did not only substantial impair Respondent's rights at trial but also at the appellate stage:

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.

Such an instruction might have been difficult for counsel to draft and for the trial court to analyze and rule upon. But if the necessary instruction had been drafted and offered, the trial court would have had the duty to rule upon it, and if conviction resulted the Supreme Court of Appeals would have had the opportunity to determine on direct appeal whether the instruction was correct. As it was, however, trial counsel did not offer it and so there was no trial court ruling that allowed the Supreme Court to evaluate whether the jury was instructed correctly.

The court is mindful of syll. Pt. 6, State v. Miller, cited above. Had trial counsel identified a strategic purpose that supported an election not to offer such an instruction, and if that strategic purpose had been within that which would have been employed by counsel acting with the required degree of skill and competence, such would not support a claim of ineffective assistance of counsel. In the present case, however, neither trial counsel nor the state in their resistance to the petition could identify such a strategic purpose.

It is also necessary, as required by syll. Pt 5, State v. Miller, to determine whether "but for counsel's unprofessional errors, the results of the proceedings would have been different." The trial was fundamentally flawed by the absence of jury instructions on a factual point that was critical not just to the determination of guilt, but to the question whether a crime had been committed at all. Under those circumstances there is a reasonable likelihood that a properly instructed jury dealing with this body of evidence might have come to a different conclusion.

Order Granting Habeas Relief p. 7. Accordingly, Respondent's trial counsel prejudiced both Respondent Robert Thomas' trial and appellate rights with his deficient representation.

⁷ See Appeal Appendix- direct examination of Defense Counsel Thomas Evans p. 601 lines 10-24.

VII. CONCLUSION

Based upon the foregoing, the Respondent Robert Thomas prays that this Court sustains the trial court's Order Granting Habeas Corpus Relief and deny the Petitioner's appeal.

ROBERT THOMAS

RESPONDENT BY COUNSEL,

A handwritten signature in black ink, appearing to read "David A. Kirkpatrick", written over a horizontal line.

David A. Kirkpatrick, WV State Bar #7186
KIRKPATRICK LAW OFFICE
327 Neville Street
Beckley, WV 25801
(304) 254-2260 Telephone
(304) 254-2280 Facsimile

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the forgoing **“Response To Appeal”** has been served
by: mailed by United States Mail, First Class Postage Pre-paid to the following:

**Christopher S. Dodrill
Assistant Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301**

on this the 8th day of January, 2014.

Robert Thomas,
By Counsel:



David A. Kirkpatrick, WV State Bar #7186
KIRKPATRICK LAW OFFICES
327 Neville Street
Beckley, WV 25801
(304) 254-2260