

13-1236

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VS:

INDICTMENT NO. 13-F-246  
JOHN W. HATCHER, JR., JUDGE

STEVEN R. MALAY, SR.  
DOB: 07-30-1958

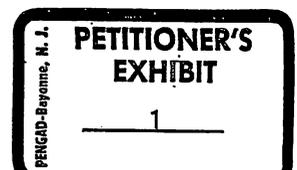
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ORDER

On the 22<sup>nd</sup> day of October, 2013, came the State of West Virginia by Brian D. Parsons, and Roger L. Lambert, Assistant Prosecuting Attorneys, and the defendant, Steven R. Malay, Sr., appearing in person and by counsel, James W. Keenan and J. B. Rees, for the purpose of a hearing for the Court to announce its ruling on the defendant's Motion to Dismiss as previously argued by the parties on October 17, 2013.

Regarding the issue at hand of whether or not the defendant was a custodian or a person in position of trust of the victim in this matter, the Court makes the following findings:

1. The cases argued in this matter are State v. Edmonds, 226 W. Va. 464 (2010), State v. Longerbeam, 226 W. Va. 535 (2010) and State v. Simmons, (2012), an as of yet unpublished opinion. Both Longerbeam and Edmonds are *per curiam* cases. Simmons was a memorandum decision.
2. The facts in the case of Edmonds reveal the defendant was a school janitor, tutor and youth pastor for a church sponsored school. The church and school were operated by the defendant's wife. The Court said the defendant was a custodian of the victim



because he was the only adult present at the time of the criminal sex acts and the minor victim followed all instructions concerning the sex acts. The Court found that the question of the defendant's custodial status was a question of fact for a jury;

3. In Longerbeam, the Court held as a matter of law that the victim's uncle was not a custodian or person of trust at the time of the criminal sex act. The Court said that a custodian or person in position of trust acting in that role in the past does not make a defendant a custodian or person in position of trust at all subsequent times. The Court further held that the custodian at the time of the act was a sixteen (16) year old sibling, whom the mother had put in charge of supervising the victim despite her being asleep at the time of the sex act;
4. In Simmons, the sixteen (16) year old male victim was in the home of the defendant to perform odd jobs to earn money. The defendant engaged in sex acts with the victim at his home. The Supreme Court upheld the defendant's conviction based on the defendant being the only adult present, thus making him a *de facto* custodian of the child;
5. In the present case, the defendant was a school bus driver employed by the Fayette County Board of Education in Fayette County, West Virginia. The victim, age fourteen (14), rode on the defendant's bus to and from school;
6. No sex acts occurred on the bus, at school, during school hours or on school property. The criminal sex acts that allegedly occurred in this matter took place at the victim's home with her parents in the residence but asleep and at the defendant's farm a short distance from the victim's home.

Based thereon, the Court finds that consistent with the Supreme Court's rulings in the above-referenced cases, the alleged criminal sex acts that took place at the defendant's farm were, if proven, done while the defendant was acting as a custodian or person in a position of trust. The sex acts which occurred in the victim's home, while the victim's sleeping parents were in the home, were done, if proven, while the defendant was not acting as a custodian or person in position of trust. Accordingly, the defendant's Motion to Dismiss the crimes of sexual abuse by a parent, guardian, custodian or person in position of trust as it relates to alleged criminal sex acts that occurred at the victim's home are **GRANTED**. As to the alleged sex acts which the evidence shows occurred at the defendant's farm, the Motion to Dismiss is **DENIED**.

The Court encourages the State to seek a Writ of Prohibition due to the conflicts existing in the law urging the West Virginia Supreme Court to make a definitive statement in an authored opinion as to whether the issue raised in this case is a question of law for the Court or a question of fact within the province of the jury.

The Court further directs the State to obtain a transcript of today's proceeding for the West Virginia Supreme Court to review in rendering its opinion.

Thereupon, the State orally moved the Court to continue this matter generally while the State seeks a Writ of Prohibition in this matter. There being no objection by the defendant, the Court **GRANTS** the motion to continue. Accordingly, it is **ORDERED** that the trial in this matter is continued generally within this criminal term of court.

Pending further proceedings in this matter, the defendant is released upon his bond previously posted in this matter.

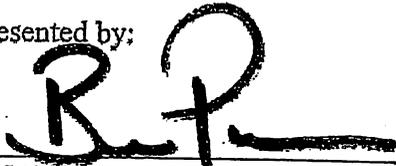
The Clerk of this Court is directed to forward attested copies of this Order to Brian D. Parsons, Assistant Prosecuting Attorney, 108 East Maple Avenue, Fayetteville, West Virginia 25840; James W. Keenan, counsel for defendant, P. O. Box 614, Fayetteville, West Virginia 25840; and J. B. Rees, counsel for the defendant, P. O. Box 432, Fayetteville, West Virginia 25840.

ENTERED this 12th day of November, 2013.

JOHN W. HATCHER, JR.  
JUDGE

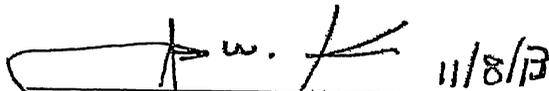
JOHN W. HATCHER, JR., JUDGE

Presented by:



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A TRUE COPY of an order entered  
November 12, 2013  
Teste: D. W. [Signature]  
Circuit Clerk Fayette County, WV