

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**STATE OF WEST VIRGINIA**

**STATE OF WEST VIRGINIA,**

**Plaintiff Below/Appellee,**

**vs:**

**No. 33300**

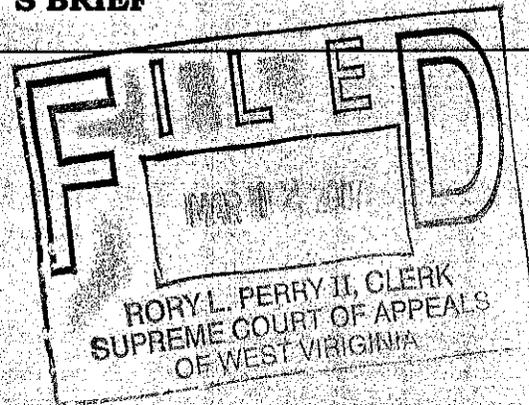
**KENNETH RAY COLLINS,**

**Defendant Below/Appellant.**

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**APPELLANT'S BRIEF**

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**Counsel for Defendant/Appellant**

**THE KIND OF PROCEEDING AND  
NATURE OF RULING IN THE CIRCUIT COURT**

NOW COMES your Petitioner, Kenneth Ray Collins, who at all times hereinafter mentioned shall be referred to as "Appellant", by Counsel, Mark Hobbs, and submits the following Appellant's Brief concerning his Petition for Appeal of a Sentencing Order entered in said proceeding in the Circuit Court of Mingo County, West Virginia, on February 16, 2005, regarding a sentencing hearing held on February 14, 2005. Furthermore, a reconsideration hearing was held in this matter on November 21, 2005, and an Order Denying Motion For Reconsideration was entered on December 30, 2005. It is to the denial for the Reconsideration to which this Petition for Appeal is taken.

The sentences hereinafter described were a result of a jury verdict rendered in this matter on January 12, 2005. Your Appellant was sentenced by the Honorable Michael Thornsbury to a state correctional facility to be kept and confined as follows: SEXUAL ABUSE BY A PARENT, GUARDIAN OR CUSTODIAN (West Virginia Code 61-8D-5) - not less than ten (10) nor more than twenty (20) years in the State Penitentiary; SEXUAL ABUSE IN THE THIRD DEGREE (West Virginia Code 61-8B-9) - ninety (90) days in the Southwestern Regional Jail. The sentences were to run concurrently. The Appellant was also assessed costs, fines and restitution in the amount of \$240.00 plus the jury

costs, the cost for HIV testing and the costs for any pre-trial drug screening.

Your Appellant was indicted by the September 2004 term of the Mingo County Grand Jury in a four (4) count indictment. Count I charged that the Appellant in August of 2000 committed the offense of Sexual Assault in the First Degree; Count II alleged that in August of 2000 the Appellant committed the crime of Sexual Abuse by a Custodian; Count III alleged that between July 2001 and September 2001, the Appellant committed the crime of Sexual Assault in the Second Degree; and Count IV of said indictment charged that the Appellant between July 2001 and September 2001 committed the crime of Sexual Abuse by a Custodian.

A jury trial commenced in this matter with jury selection occurring on January 11, 2005, and trial held on January 12, 2005. On January 12, 2005, the State and the Appellant gave opening statements to the jury. Upon the conclusion of the presentation of evidence on the same day, the jury retired for deliberations and ultimately returned a verdict of Guilty to Count I of Sexual Abuse in the Third Degree, a misdemeanor, as a lesser included offense to Sexual Assault in the First Degree; and Count II, Sexual Abuse by a Parent,

Guardian or Custodian; Not Guilty to Count III and Not Guilty to Count IV. (Vol. II, Tr. pp. 155 & 156).

**STATEMENT OF FACTS**

NOW COMES THE Appellant, Kenneth Ray Collins, and represents to this Honorable Court that the following facts are applicable in this matter:

1. The alleged victim involving all four counts of the indictment is an individual by the name of Samantha Owens. For purposes of the Statement of Facts, the victim is referred to in all paragraphs simply as Samantha Owens.
2. According to the testimony of Samantha Owens during the trial on January 12, 2005, sometime in August 2000, she and the Appellant took a four-wheeler ride up in the hills near the residence of the Appellant's parents. (Vol. I, Tr. pp. 216 & 217).
3. According to the testimony of Samantha Owens, Samantha was born on October 5, 1988. At the time of trial on January 12, 2005, she was sixteen (16) years old. (Vol. I, Tr. p. 214). Accordingly, at the time of the allegations involved in Count I and Count II of the Indictment, Samantha Owens was 11 years old and Samantha Owens was 12 years old at the time of the allegations contained in Counts III and IV of the Indictment.
4. According to the testimony of Samantha Owens, Samantha and her mother were living with the parents of the Appellant at Taylorville, Mingo County, West Virginia, in August of 2000. (Vol. I, Tr. p. 215).
5. According to the testimony of Samantha Owens, during the four-wheeler ride up in the hills, Appellant stopped the four-wheeler and asked Samantha to give him oral sex. According to Samantha Owens, she complied with the

Appellant's request as the Appellant had stated "we will stay there until you do it". (Vol. I, Tr. pp. 217 & 218)

6. In August of 2002, Corporal Mark E. Muncy contacted the Appellant, Kenneth Ray Collins, and Kenneth Ray Collins agreed to be interviewed. Kenneth Ray Collins traveled to the State Police Barracks in Williamson, West Virginia, wherein a written statement was obtained. It is undisputed that the Appellant, Kenneth Ray Collins, does not read English but does understand the English language. (Vol. I, Tr. p. 132).
7. According to the statement offered by Corporal Mark E. Muncy, the Appellant stated, "About two years ago me and Samantha were four wheeler riding. She kept begging me to take her for a ride. I told her no three to four times. I finally gave in and we went for a ride thru Kenny Smith's bottom and Samantha kept on feeling of my penis so I stopped the four wheeler and I told her to quit or I was going to take her home. She said there was no way before I done this. She jerked my pants down and grabbed my penis with her hand and started playing with it. She then put her mouth on it and took her tongue around it and she then took it out of her mouth and said this is nasty. I pulled my pants back up and took her back to my dad's. About a year ago maybe more Samantha was at my house. My girlfriend Missy went to the neighbor, Tonya Prater's house. Samantha was in the bathroom and went into the bedroom and started hollering for me. I went to the doorway and she grabbed a hold of me and started kissing me and she started grabbing me by the penis. I shoved her down on the bed. She got up and started jumping on the bed and pulled her shirt off. Missy came thru the door and she ran into the bathroom. Missy came in and asked what was going on and I told her nothing." (Vol. I, Tr. pp. 138 & 139).
8. According to the testimony of the Appellant, Kenneth Ray Collins, Mr. Collins denied that he had ever taken the alleged victim four-wheeler riding and further denied any sexual misconduct with the alleged victim. (Vol. II, Tr. pp. 26 & 27).

9. The Appellant, Kenneth Ray Collins, further denied sexual misconduct with Samantha Owens at his house sometime in July of 2001. (Vol. II, Tr. p. 30).

### **ASSIGNMENT OF ERROR**

**THE TRIAL COURT ERRED WHEN IT FAILED TO DIRECT A VERDICT OF ACQUITTAL ON THE CHARGE OF SEXUAL ABUSE BY A CUSTODIAN AT THE CLOSE OF THE STATE'S CASE IN CHIEF, AND ERRED IN SUBMITTING TO THE JURY ANY INSTRUCTIONS ON THAT CHARGE.**

### **POINTS AND AUTHORITIES**

#### **CONSTITUTIONAL AUTHORITY:**

1. Amendment V to the United States Constitution.
2. Amendment VI to the United States Constitution.
3. Article III, Section 10 of the Constitution of West Virginia.
4. Article III, Section 14 of the Constitution of West Virginia.

#### **STATUTORY LAW:**

1. West Virginia Code Section 61-8B-9.
2. West Virginia Code Section 61-8D-1
3. West Virginia Code Section 61-8D-5

#### **CASE LAW:**

1. State v. Stephens, 206 W.Va. 420, 525 S.E. 2d 301 (1999).
2. Mathews v. United States, 485 U.S. 58, 108 S. Ct. 883, 887, 99 L.Ed.2d 54, 61 (1988).
3. State of W.Va. v. Danny L. Cecil, Case No. 062615.

## DISCUSSION OF LAW

### **THE TRIAL COURT ERRED WHEN IT FAILED TO DIRECT A VERDICT OF ACQUITTAL ON THE CHARGE OF SEXUAL ABUSE BY A CUSTODIAN AT THE CLOSE OF THE STATE'S CASE IN CHIEF, AND ERRED IN SUBMITTING TO THE JURY ANY INSTRUCTIONS ON THAT CHARGE.**

The most important issue to remember in the trial of Appellant is that Appellant was indicted and convicted under the statute which was in effect at the time of the alleged offense. More specifically, the indictment alleges conduct that occurred in August of 2000 and July and September of 2001. Consequently, the Appellant was tried under the statute which was in effect as of 1998. W.Va. Code 61-8D-5(a)

(1998) states:

*(a) In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection, as follows: If any parent, guardian or custodian of a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in 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, then such parent, guardian or custodian shall be guilty of a felony and, upon conviction thereof, shall be imprisoned in the penitentiary not less than ten years nor more than twenty years, or fined not less than five hundred nor more than five thousand dollars and imprisoned in the penitentiary not less than ten years nor more than twenty years.*

*Appellant does not believe that subsections (b), (c) or (d) are applicable to his case.*

In 2005 the Legislature amended Chapter 61-8D-5(a) which subsection presently provides:

*In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection, as follows: If any parent, guardian or custodian of or other person in a position of trust in relation to a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in 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, then such parent, guardian, custodian or person in a position of trust shall be guilty of a felony and, upon conviction thereof, shall be imprisoned in the penitentiary not less than ten nor more than twenty years, or fined not less than five hundred nor more than five thousand dollars and imprisoned in the penitentiary not less than ten years nor more than twenty years.*

*Appellant does not believe that subsections (b), (c) or (d) are applicable to his case.*

It is apparent that the Legislature extended the definition of custodian to include "or other person in a position of trust in relation to" a child. It is undisputed that the Appellant's argument would not apply under the present definition of custodian. However, Appellant asks this Court: Why would the Legislature add the term "or other person in a position of trust in relation to" a child if the Legislature was not attempting to extend the definition to include situations such as the facts of Appellant's case?

The charge to the jury in this matter concerning the definition of custodian (Vol. II, Tr. pp. 119 & 120) used the 1998 definition which defined custodian as:

*“Custodian” means any person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement, or legal proceeding.*

The Legislature in 2005 extended the definition of the crime of sexual abuse by a parent, guardian or custodian to include sexual abuse by a parent, guardian custodian or person in a position of trust to a child. More specifically, the present definition of custodian as contained in 61-8D-1 provides:

*(12) A “person in a position of trust in relation to a child” refers to 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.*

The Appellant in this matter argues to this Court that since the Legislature changed the definition of custodian in 2005 to include persons in a position of trust, it is logical to conclude that definition was not in effect and did not apply to the Appellant in his trial as Appellant was tried under the 1998 statutes. Consequently, if the Legislature chose to add the definition of a person in a position of trust

to a child, this would effectively apply to Appellant if the crime occurred today.

It should be remembered at trial that the Appellant denied any type of sexual contact with the alleged victim. However, it appears the jury tended to believe the statement offered by Corporal Mark E. Muncy. Consequently, it must be assumed that the jury believed that the Appellant took the alleged victim for a ride on a four-wheeler and then engaged in an act of oral intercourse. However, the issue becomes not whether a sexual act occurred but whether the Appellant was a custodian of the alleged victim pursuant to the 1998 statute.

How does taking an alleged victim for a four-wheeler ride make that person the custodian? Remember, custodian is defined in part as “who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis”. **Appellant submits that this definition is designed to include parents, step-parents, guardians, etc. and is not intended to include any individual who is otherwise in the presence of the child. Otherwise, why would the Legislature find it necessary to change the definition of 61-8D-5 and extend the definition of custodian in the 2005 statute?**

State v. Stephens, 206 W.Va. 420, 525 S.E. 2d 301 (1999) is remarkably similar to the issues of custodian and the argument of the

Appellant in this Appellant's Brief. In Stephens the Court considered the issue of whether a babysitter was a custodian for purposes of the 1998 statute. The Court ultimately found that whether a babysitter is a custodian is a question for jury determination. Consequently, Stephens appears to support the Appellant's conviction in this case. However, this Appellant argues to the Court that Stephens was overturned on other grounds and despite the ruling in Stephens, the Legislature found it necessary to extend the definition of custodian by the enactments of 2005.

It should be remembered that Stephens involved the factual basis wherein a babysitter was entrusted with the care of three (3) small children for about a half an hour while the children's mother took her father-in-law and the Appellant's mother to visit a doctor. In the case at hand, we have an allegation by the alleged victim that the Appellant engaged in oral sex with the alleged victim during a four-wheeler trip into the woods. (Vol. I, Tr. pp. 217 & 218). Furthermore, the alleged victim alleges an event sometime in July or September of 2001 wherein she and the Appellant allegedly engaged in sexual contact at the Appellant's home. (Vol. I, Tr. pp. 224 & 225).

In the case at hand, there was simply not enough evidence presented at trial to allow the jury to consider the charge of sexual

abuse by a parent, guardian or custodian. Furthermore, any instruction concerning Count II and Count IV of the Indictment which charged the Appellant with sexual abuse by a custodian was not supported by a factual basis. Before an instruction may be offered, the instruction must be clearly supported by the evidence, not an abstract discussion. Mathews v. United States, 485 U.S. 58, 108 S. Ct. 883, 887, 99 L.Ed.2d 54, 61 (1988). Further, the jury was allowed to hear the instruction on said counts. (Vol. II, Tr. pp. 113, 118, 119 & 120).

The State of West Virginia may argue that Appellant's trial Counsel did not properly object to the introduction of instructions. However, for purposes of this Appeal, Appellant's trial Counsel properly preserved the assignment of error contained in the Appeal as he properly made a Motion for Judgment of Acquittal at the conclusion of the State's case in chief. (Vol. I, Tr. pp. 267 & 268).

The jury in this matter found the Appellant guilty of the lesser included offense of Sexual Abuse in the Third Degree which was a misdemeanor crime that involved a maximum sentence of ninety (90) days. It is inconceivable that the jury would have found the Appellant guilty of Sexual Abuse by a Parent, Guardian or Custodian if the jury would have known that the crime carried a minimum of ten (10) years in

prison. This Counsel is well aware that the jury is not to be concerned with penalties. However, this Counsel propounds to this Court: How logical is it for a Defendant to be convicted of a crime that involves a maximum of ninety (90) days in jail and then receive a ten (10) year minimum sentence for allegedly being the custodian of the victim?

Appellant directs this Court's attention to the fact that during this same term of Court, the issue of the definition of custodian for purposes of the 1998 Statute under which Appellant was convicted is presently pending in State v. Danny L. Cecil, Case No. 062615. This Appellant hopes that this Court considers reversing both cases on the issue of the definition of custodian for purposes of this criminal statute.

### **CONCLUSION**

Based upon the above, the Appellant, Kenneth Ray Collins, hereby submits to this Court that sufficient grounds have been established to reverse the jury verdict rendered in this matter on January 12, 2005, and vacate or modify the Sentencing Order entered in the Circuit Court of Mingo County, West Virginia, on February 16, 2005; that the Appellant be granted a new trial; and to remand the matter to the Circuit Court for further proceedings that are consistent with the Court's decision.

Kenneth Ray Collins

By Counsel

A handwritten signature in cursive script that reads "Mark Hobbs". The signature is written in black ink and is positioned above a horizontal line.

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**CERTIFICATE OF SERVICE**

I, Mark Hobbs, Counsel for Appellant, do hereby certify that a true and accurate copy of the foregoing Appellant's Brief was sent by United States Mail, postage prepaid, to Dawn E. Warfield, Esquire, Attorney General's Office, 1900 Kanawha Boulevard, East, Room E-26, Charleston, West Virginia 25305-0220, on this the 12th day of March, 2007.

  
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Mark Hobbs