



U.S. Department of Justice

United States Attorney
Western District of Texas

RECEIVED
AUG 0 / 2005
CORSIANA RESIDENTIAL
TREATMENT CENTER

Bill Baumann
Assistant United States Attorney

601 NW Loop 410 Suite 600
San Antonio, Texas 78216-5512

(210) 384-7100
Major Crimes: 384-7150
FAX: 384-7135

July 28, 2005

Ranger Brian J. Burzynski
2302 W. Dickinson
Ft. Stockton, TX 78235

RE: Declination of Federal Prosecution of Ray Brookins and John Paul Hernandez

Dear Ranger Burzynski:

After a thorough review of witness statements provided by students at West Texas State School, as well as applicable state and federal statutes and relevant case law, our office must reluctantly decline this matter for federal prosecution and refer it to District Attorney Randy Reynolds for his consideration.

As you know, our office initially contemplated prosecuting this matter as a violation of 18 U.S.C. Sections 241 (conspiracy against rights) and 242 (deprivation of rights under color of law). Absent evidence that Brookins and Hernandez conspired with each other to deprive students of their civil rights, we were confined to a prosecution under Section 242 for the substantive violation of students' civil rights. To support a charge based on Section 242, the government must demonstrate that the school administrators willfully deprived inmates at West Texas State School of a right protected by the Constitution while acting under "color of law." The government must also be prepared to counter the defense of consent.

In order to support a *felony* charge under 18 U.S.C. Section 242, it would be necessary for the government to demonstrate that the victims sustained "bodily injury." As you know, our interviews of the victims revealed that none sustained "bodily injury." Federal courts have interpreted this phrase to include physical pain. None of the victims have claimed to have felt physical pain during the course of the sexual assaults which they described.

A felony charge under 18 U.S.C. Section 242 can also be predicated on the commission of "aggravated sexual abuse" or the attempt to commit aggravated sexual abuse. The offense of aggravated sexual abuse is proven with evidence that the perpetrator knowingly caused his victim to engage in a sexual act (which can include contact between the mouth and penis) by using force against the victim or by threatening or placing the victim in fear that the victim (or any other

person) will be subjected to death, serious bodily injury or kidnapping. I do not believe that sufficient evidence exists to support a charge that either Brookins or Hernandez used force to cause victims to engage in a sexual act.

Unfortunately, if we are unable to prove that any of our victims sustained bodily injury or the commission of the offense of aggravated sexual abuse, we would be limited to a misdemeanor charge against Hernandez and Brookins. A misdemeanor conviction in federal court carries a maximum term of imprisonment of one year. Although it is possible that a sentencing judge could "stack" misdemeanor sentences, it is somewhat unlikely in a case involving first time offenders like Hernandez and Brookins. The bottom line is that the facts presented would limit us to a misdemeanor conviction and a likely sentence of not more than one year in jail.

Proving a federal misdemeanor violation of 18 U.S.C. Section 242 would require evidence that Hernandez and Brookins acted under "color of law." Although both men are technically employees of the state as administrators in a Texas Youth Commission facility, I believe that a jury would consider their assaults of these students to be the actions of individuals and not the actions of persons acting "under color of law." Based on my experience, the vast majority of successful federal prosecutions under 18 U.S.C. Section 242 involve uniformed police. I am very concerned that we would not be able to prove beyond a reasonable doubt that the actions of Hernandez and Brookins were committed "under color of law."

A state prosecutor could charge Brookins and Hernandez with violations of either Texas Penal Code Section 39.03 (Official Oppression) or Section 39.04 (Violations of the Civil Rights of Person in Custody; Improper Sexual Activity With Person in Custody). Although Section 39.03 is a Class A misdemeanor, Section 39.04 is a state jail felony if an official or employee of a correctional facility intentionally engages in sexual contact or deviate sexual intercourse with an individual in custody.

As you know, consent is frequently an issue in sexual assault cases. Although none of the victims admit that they consented to the sexual contact, none resisted or voiced any objection to the conduct. Several of the victims suggested that they were simply "getting off" on the school administrator. In order for the government to be successful in a criminal prosecution, it would be essential for us to show that the victim was in fact victimized. Most of the victims were aware of the power that the school principal and assistant superintendent held over them, but none were able to describe retaliative acts committed by either the principal or assistant superintendent. Although it is apparent that many students were retained at West Texas State School long after their initial release date, it would be difficult to prove that either Mr. Brookins or Mr. Hernandez prevented their release.

You have thoroughly investigated the allegations brought to your attention by the Texas Youth Commission. You promptly interviewed all witnesses and victims, gathered appropriate documentation from school officials and executed a

federal search warrant at the residence of Mr. Hernandez at West Texas State School in Pyote. It is my opinion, however, that our office's resources would be better employed investigating and prosecuting cases involving more clearly defined violations of federal criminal law.

Respectfully,

A handwritten signature in black ink, appearing to read 'Bill Baumann', with a long horizontal line extending to the right.

Bill Baumann
Assistant U.S. Attorney
Major Crimes Unit

CC: Tish-Elliott-Wilkns

/yc



U.S. Department of Justice
Civil Rights Division

ANM:dh
DJ 144-76-4864

Criminal Section
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

September 27, 2005

Mr. Lemuel Harrison
Texas Youth Commission
Superintendent
West Texas State School
P.O. Box 415
Pyote, TX 79777

Dear Mr. Harrison:

The Criminal Section of the Civil Rights Division enforces the federal criminal civil rights laws, such as the willful abuse of authority by public officials that deprives individuals of liberties and rights defined in the United States Constitution or federal law. We evaluate allegations of civil rights violations to determine whether the evidence and circumstances of the case warrant a federal criminal prosecution.

We received a complaint that Ray Brookins and John Hernandez of your agency may have been involved in violating the civil rights of [REDACTED]. We recently completed our review of the results of the investigation of that complaint to determine whether a federal criminal prosecution was warranted. After careful consideration, we concluded that the evidence does not establish a prosecutable violation of the federal criminal civil rights statutes. Accordingly, we have closed our investigation. Please be advised that our conclusion in this matter does not preclude other components of the U.S. Department of Justice from taking action, where appropriate, under their separate enforcement authority.

This Division is dedicated to the enforcement of federal criminal civil rights statutes. We appreciate your cooperation in our shared responsibility to ensure the impartial and effective enforcement of our laws.

Sincerely,

Albert N. Moskowitz
Chief
Criminal Section