

High court throws out former priest's case

HELENA (AP) — The Montana Supreme Court has thrown out the case of a former Bozeman priest accused of enticing a teenage boy into a homosexual relationship for more than a year.

The unanimous ruling by five of the seven justices upheld a lower-court decision prohibiting the alleged victim from testifying after he refused to submit to an evaluation by a defense psychologist.

Meanwhile, the boy's family has filed a civil lawsuit against the Rev. Kevin Malee and the Roman Catholic Church, accusing the priest of clergy malpractice and contending the church is liable for his misconduct. The suit seeks unspecified damages.

Marty Lambert, a deputy Gallatin County attorney, said Wednesday he may ask the Supreme Court to reconsider.

The case arose in November 1987 when Malee, 37, who most recently lived in San Diego, Calif., was charged with two counts of deviate sexual conduct for engaging in intercourse, oral sex and other sexual activities with the boy identified as B.K.

The relationship allegedly began in March 1985 when the boy was 15 and continued until May 1986. The boy reached 16, the age of consent, during that time.

Court records indicate the boy's family attended Malee's parish.

B.K. underwent three psychological evaluations for the prosecution; but, citing his right to privacy, balked at a defense motion for a similar exam by its psychologist.

When state District Judge Henry Loble of Helena barred the boy from testifying without first agreeing to the defense evaluation, prosecutors were left without their prime witness.

Loble held that Malee's right to due process and to examine all evidence against him dictate that Malee get access to psychological tests of the alleged victim. Such an exam would provide the defendant with his only means to rebut testimony of the prosecution's psychologists, who concluded the boy had been sexually molested.

"Preventing the harassment of a witness and protecting the witness' privacy interests are of great concern to this court," Loble wrote. "However, the court

must also consider the constitutional rights of the accused."

On appeal, Assistant Attorney General John Paulson cited two previous high-court rulings that said a child victim of sexual abuse cannot be forced to undergo psychological tests.

The law requiring the prosecution to turn over to the defense all evidence does not extend to the creation of new evidence, he argued.

He warned that the policy of mandating psychological exams of sexual abuse victims could discourage victims from reporting such crimes.

In siding with Loble, the Supreme Court said, "This is not a case where the complaining witness is a young child that must be protected from the potentially scarring effects of multiple psychological evaluations."

B.K. is 18 years old and already agreed to several exams, the court noted.

"The complaining witness willingly participated in multiple psychological evaluations conducted by the state," wrote Chief Justice Jean Turnage. "An additional examination by the defendant's psychologist should do no further harm to his psyche."

A review of the court records suggest prosecutors opposed testing by the defense psychologist partly because they feared the results would reveal B.K. had a history of homosexuality and strongly disliked Malee.

At one hearing, Lambert said B.K. "was going to be accused of being an aggressive homosexual with a great deal of anger towards this priest."

The lawsuit claims the Roman Catholic diocese in Great Falls should have known of "Malee's dangerous propensities as a child sexual abuse and/or an unfit agent," and failed to provide any warning when Malee was transferred to Bozeman.

Ward Shanahan, a Helena attorney representing the diocese, said Wednesday he had not seen the lawsuit, but indicated the plaintiffs may be on shaky ground if they're alleging the church is responsible.

"If they're alleging that molesting minors is within the employment scope of a priest, they're mistaken," he said.