



in Liminie #3) and he had a second, separate meeting with Eloina Hernandez (the subject of Motion in Liminie #5). As discussed below, both of these meetings were conducted within the parameters of the Jehovah's Witnesses confessional process. Accordingly, these two meetings remain confidential pursuant to the penitent-clergy privilege found at 735 ILCS 5/8-803.

Moreover, as these two meetings are confidential pursuant to 8-803, they are also protected by and exempt from reporting by the Illinois mandated reporting law the defendant is alleged to have violated. Publication and disclosure of these two meetings should not occur. Prior to trial Mr. Penkava requests this Honorable Court exclude from trial any testimony regarding these two confidential meetings.

As persuasive authority to this Court, Judge Michael E. Coppedge on October 22, 2019 was confronted with a legal and fact pattern identical to the matter raised in this Motion in Liminie #3 and ruled <sup>1</sup> the conversation between Mr. Penkava and Arturo Hernandez-Pedraza in July of 2006 was confidential pursuant to the Illinois clergy-penitent privilege.

As persuasive authority to this Court, Judge Thomas A. Meyer on February 24, 2020 ruled <sup>2</sup> on matters relevant to Motion in Liminie #5. Further argument as to what was argued before Judge Meyer will require closing the courtroom to honor Judge Meyer's February 24, 2020 and January 28, 2021 Orders. The State has provided this

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<sup>1</sup> People of the State of Illinois vs. Arturo Hernandez-Pedraza, 18 CF 1057.

<sup>2</sup> In Re the Matter of Subpoena Duces Tecum Grand Jury 19 GJ 244 Directed to the Kingdom Hall of Jehovah's Witnesses, 19 MR 1149, a sealed and impounded file, unsealed by Court Order of January 28, 2021 by Judge Thomas A. Meyer including a Protective Order the transcript of February 24, 2020 and any documents that may be produced may only be viewed by Mr. Prossnitz, Mr. Ekl, their respective clients, Michael Penkava and Colin Scott, Mr. Youash, and Judge Gerhardt and that they may not be published to the public.

Court with a copy of Judge Meyer's February 24, 2020 sealed ruling for *in camera* use to which Mr. Penkava has no objection. As the defense will refer this Court to pages and lines in that protected transcript, that transcript of Judge Meyer's February 24, 2020 ruling is incorporated by reference thereto as Exhibit A of these motions.

In sum, the meetings addressed in Motion in Liminie #3 and #5 involved conversations that were part of the Jehovah Witness's confessional process; those conversations were and remain confidential under the Code of Civil Procedure's clergy-penitent privilege, they are also exempt from reporting under the Abused and Neglected Child Reporting Act, and they should be excluded from trial.

#### Applicable Law

1. Code of Civil Procedure (735 ILCS 5/8-803).

Clergy. A clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs, shall not be compelled to disclose in any court, or to any administrative board or agency, or to any public officer, a confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline **enjoined by the rules or practices of such religious body or of the religion which he or she professes**, nor be compelled to divulge any information which has been obtained by him or her in such professional character or as such spiritual advisor. (Emphasis ours.)

2. The clergy-penitent privilege belongs both to the person making the statement and to the clergyman.

**The Second District Court of Appeals has made it clear that the clergy-penitent privilege belongs both to the person making the statement and the clergyman.** In People v. Burnidge, 664 N.E.2d 656, 279 Ill.App.3d 127 (Ill. App. 1996) a jury convicted Burnidge of two counts of aggravated criminal sexual abuse. Two subpoenaed witnesses, the Reverend Carleton Payne, pastor of St. Matthew's Lutheran Church, and Todd Martin, a deacon at the church, brought a motion to exercise the clergy privilege requesting that they not be compelled to violate their oaths as clergyman by being required to testify about conversations they had had with the defendant. Rev. Payne testified that he learned of the incident involving the defendant

and victim and he spoke with the defendant about it. Rev. Payne stated that he attended a joint meeting with the defendant, the victim, and the victim's parents and the defendant admitted that he apologized to the victim at the meeting with the victim's parents. Thereafter, Payne referred the defendant to Rev. Golisch for counseling.

The trial court granted the motion of the two pastors to be excused from testifying against the defendant about conversations they had had with him. On appeal the defendant argued the State improperly compelled Rev. Golisch to file a report with the DCFS in violation of the clergy privilege (735 ILCS 5/8-803 (West 1994) to which the State responded the clergy privilege did not apply in this case. The Second District Court of Appeals ruled:

"Section 8-803 of the Code allows the privilege to be raised when disclosure by the minister is " 'enjoined by the rules or practices of such religious body or of the religion which he or she professes.' " *People v. Bole*, 223 Ill.App.3d 247, 262, 165 Ill.Dec. 739, 585 N.E.2d 135 (1991); 735 ILCS 5/8-803 (West 1994). The clergyman cannot be " 'compelled to divulge any information which has been obtained by him or her in such professional character or as such spiritual advisor.' " *Bole*, 223 Ill.App.3d at 262, 165 Ill.Dec. 739, 585 N.E.2d 135; 735 ILCS 5/8-803 (West 1994). The privilege belongs both to the person making the statement and the clergyman. See *Bole*, 223 Ill.App.3d at 262-63, 165 Ill.Dec. 739, 585 N.E.2d 135; *People v. Diercks*, 88 Ill.App.3d 1073, 1077, 44 Ill.Dec. 191, 411 N.E.2d 97 (1980) (when the clergyman does not object to testifying the burden is on the person asserting the privilege to show that disclosure is enjoined by the rules or practices of the relevant religion).

Applying the above-mentioned principles to the instant case, we find that the defendant's conversations with Rev. Golisch were privileged." [*People v. Burnidge*, 664 N.E.2d 656, 659; 279 Ill.App.3d 127 (Ill. App. 1996)]. [ A courtesy copy of *Burnidge*, *supra*, is attached hereto as Exhibit C]. (Emphasis ours.)

*People vs. Burnidge*, *supra*, was referenced in another Second District Court of Appeals *People v. Thodos*, 2014 IL App (2d) 121001, 18 N.E.3d 577, 385 Ill.Dec. 316 (Ill. App. 2014). Though not a sex abuse case, *Thodos*, *supra*, reaffirmed:

"Before evidence is excluded as privileged, the party asserting the privilege must establish all of the privilege's constituent elements. [People v. Diercks](#), 88 Ill.App.3d 1073 1077, 44 Ill.Dec. 191, 411 N.E.2d 97 (1980). Section 8–803 of the Code allows the clergy-penitent privilege to be raised when disclosure by the clergyman is " enjoined by the rules or practices of such religious body or of the religion which he or she professes." 735 ILCS 5/8–803 (West 2012) ; see [People v. Burnidge](#), 279 Ill.App.3d 127, 131, 216 Ill.Dec. 19, 664 N.E.2d 656 (1996) ; [People v. Bole](#), 223 Ill.App.3d 247, 262, 165 Ill.Dec. 739, 585 N.E.2d 135 (1991). The clergyman cannot be "compelled to divulge any information which has been obtained by him or

her in such professional character or as such spiritual advisor." 735 ILCS 5/8–803 (West 2012) ; see *Burnidge*, 279 Ill.App.3d at 131, [216 Ill.Dec. 19](#), [664 N.E.2d 656](#) ; *Bole*, 223 Ill.App.3d at 262, [165 Ill.Dec. 739](#), [585 N.E.2d 135](#). **The privilege belongs both to the person making the statement and to the clergyman.** *Burnidge*, 279 Ill.App.3d at 131, [216 Ill.Dec. 19](#), [664 N.E.2d 656](#) ; *Bole*, 223 Ill.App.3d at 262–63, [165 Ill.Dec. 739](#), [585 N.E.2d 135](#). When the clergyman does not object to testifying, the burden shifts to the person asserting the privilege to show that disclosure is enjoined by the rules or practices of the relevant religion. *Diercks*, 88 Ill.App.3d at 1077, [44 Ill.Dec. 191](#), [411 N.E.2d 97](#)." [*People v. Thomas*, 2014 IL App (2d) 121001, 18 N.E.3d 577, 597, 385 Ill.Dec. 316, 336 (Ill. App. 2014)]. [ A courtesy copy of *Thodos*, *supra*, is attached hereto as Exhibit D]. (Emphasis ours.)

### 3. Abused and Neglected Child Reporting Act (325 ILCS 5/4).

Sec. 4. Persons required to report; privileged communications; transmitting false report.

(a) The following persons are required to immediately report to the Department when they have reasonable cause to believe that a child known to them in their professional or official capacities may be an abused child or a neglected child: ...

(g) The privileged quality of communication between any professional person required to report and his patient or client shall not apply to situations involving abused or neglected children and shall not constitute grounds for failure to report as required by this Act or constitute grounds for failure to share information or documents with the Department during the course of a child abuse or neglect investigation. If requested by the professional, the Department shall confirm in writing that the information or documents disclosed by the professional were gathered in the course of a child abuse or neglect investigation.

The reporting requirements of this Act shall not apply to the contents of a privileged communication between an attorney and his or her client or to confidential information within the meaning of Rule 1.6 of the Illinois Rules of Professional Conduct relating to the legal representation of an individual client.

**A member of the clergy may claim the privilege under Section 8-803 of the Code of Civil Procedure.** (Emphasis ours.)

### Motion in Limine # 3

On or about July 27, 2006, Jehovah's Witness Elder Chairman Alfonso Mahecha (now deceased), Elder/Defendant Michael Penkava and Elder/Defendant

Colin Scott met with Arturo Hernandez-Pedraza. For a description of the confessional process the Court is directed to Page 34, line 8 to Page 44, line 12 of the February 24, 2020 transcript, Exhibit A. The July 27, 2006 meeting between the three Elders and Arturo Hernandez-Pedraza was part of the confessional process pursuant to the rules and practices of the Jehovah's Witness faith. This was the one and only meeting between the Elders and Arturo Hernandez-Pedraza. Judge Coppedge was required to rule on the admissibility of the July 27, 2006 meeting between the three Elders and Arturo Hernandez-Pedraza at Hernandez-Pedraza's trial in October of 2019. A copy of an excerpt of the People of the State of Illinois vs. Arturo Hernandez-Pedraza, trial, 18 CF 1057, is attached hereto and incorporated by reference thereto as Exhibit B. Judge Coppedge ruled:

"It seems to the Court that based upon the testimony of Mr. Penkava, what takes place within the confines of the preliminary meeting for the public reproof or a censure, which he says are the same, is within the purview of Section 8-803; that is to say, it's the Elders providing spiritual guidance to a member of the congregation." (Exhibit B, Page 56, lines 12-18).

Judge Coppedge went on to rule:

"Relative to the discussions that pertain to the Defendant in the preliminary public reproof meeting, the Court does find that the [*sic*] is a proper invocation of the testimonial privilege afforded to Mr. Penkava, and will not compel Mr. Penkava to testify about that." (Exhibit B, Page 58, lines 5-9).

Mr. Penkava requests this Court enter a similar ruling finding the July 27, 2006 meeting between Arturo Hernandez-Pedraza and Mr. Penkava was protected by the penitent-clergy privilege under 735 ILCS 5/8-803. The privilege would have to be waived by both the clergyman and the person making the statement. Mr. Penkava does not waive the privilege. Moreover, as the crime allegedly occurred in July of 2006,

the State would have to present a waiver from all parties of the penitent-clergy privilege from July of 2006. (A copy of the Complaint against Mr. Penkava is attached hereto and incorporated by reference thereto as Exhibit C).

#### Motion in Liminie #4

A corollary of a ruling granting Motion in Liminie #3 pursuant to 735 ILCS 5/8-803 is a finding that any information Mr. Penkava may have received on or about July 27, 2006 in a confessional with Arturo Hernandez-Pedraza is by law exempt from mandated reporting pursuant to the Abused and Neglected Child Reporting Act 325 ILCS 5/4 (g) which specifically incorporates 735 ILCS 5/8-803.

#### Motion in Liminie #5

Once again, for a discussion of the confessional process of the Jehovah's Witnesses, the Court is directed to Page 34, line 8 to Page 44, line 12 of the February 24, 2020 transcript, Exhibit A. For purposes of the confessional process as it relates to a meeting between Mr. Penkava and Eloina Hernandez in late July of 2006, this Court is directed to Judge Meyer's ruling Page 44, line 17 to 23 of the February 24, 2020 transcript, Exhibit A.

Based upon an interview of Eloina Hernandez that took place on March 19, 2021, Mr. Penkava believes Eloina Hernandez will testify that three Jehovah's Witnesses Elders summoned her for a face-to-face meeting in July of 2006 following their meeting with Arturo Hernandez-Pedraza. Unrebutted testimony was provided by

Mr. Penkava at the trial of Arturo Hernandez-Pedraza as to the Jehovah's Witnesses confessional process. (Exhibit B, Page 31 to Page 47).

Judge Coppedge summarized Mr. Penkava's testimony when he stated,

"How does that distinguish Mr. Penkava's prior answer that there were two sessions, that there was a discussion with Mr. Hernandez, and then they provided spiritual guidance to Mrs. Hernandez in what Mr. Penkava had said was a separate discussion?" (Exhibit B, Page 43, lines 8 to12).

The confessional process of the Jehovah's Witnesses covers the meeting between Mr. Penkava and Eloina Hernandez; therefore Motion in Liminie #5 should be granted pursuant to 735 ILCS 5/8-803.

#### Motion in Liminie #6

Again, a corollary of a ruling granting Motion in Liminie #5 pursuant to 735 ILCS 5/8-803, as the meeting was part of the Jehovah's Witnesses confessional process, is a finding that any information Mr. Penkava may have received on or about July 27, 2006 in a meeting with Eloina Hernandez is by law exempt from mandated reporting pursuant to the Abused and Neglected Child Reporting Act 325 ILCS 5/4 (g) which specifically incorporates 735 ILCS 5/8-803.

#### Conclusion

For the reasons stated herein, the defendant prays for an Order granting this Motion in Liminie #3, #4, #5 and #6 and for such other relief as this Court deems just and appropriate.

Respectfully Submitted,

By: Philip A. Prossnitz

/Philip A. Prossnitz, ARDC # 6185116

/Philip A. Prossnitz

CERTIFICATE OF SERVICE BY EMAIL

I Philip A. Prossnitz, an attorney, hereby verify that I served this Defendant Penkava's Motions in Liminie #3, #4, #5 and #6 by emailing a copy to Ashur Youash, A.S.A., at [AYYouash@mchenrycountyil.gov](mailto:AYYouash@mchenrycountyil.gov) and Mr. Terry Ekl at [tekl@eklwilliams.com](mailto:tekl@eklwilliams.com) on and before 3:30 PM on March 24, 2021.

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