

IN THE CIRCUIT COURT OF THE 22nd JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS

VS.

MICHAEL PENKAVA

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20 CM 1338

Katherine M. Keefe
Clerk of the Circuit Court
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McHenry County, Illinois
22nd Judicial Circuit

DEFENDANT PENKAVA’S MOTION TO QUASH
SUBPOENA DUCES TECUM ITEM # 3 -
RETURNABLE APRIL 23, 2021

NOW COMES THE DEFENDANT, Michael Penkava, by and through one of his attorneys, Philip A. Prossnitz and moves for an Order from this Court quashing the State’s *Subpoena Deuces Tecum* Item # 3 in this matter as, *inter alia*, public disclosure is enjoined by the rules or practices of the Jehovah’s Witnesses, protected by the clergy-penitent privilege in Illinois, and in support thereof states as follows:

1. The State has filed a *subpoena duces tecum* returnable April 23, 2021.
2. Request #3 of the *subpoena duces tecum* seeks, “All documents, reports, minutes generated by the Judicial Committee formed for Arturo Hernandez” despite the fact that the Judicial Committee is part of the Jehovah Witness’s confessional process.
3. First, upon information and belief an identical unsuccessful attempt to obtain this information was made by the State’s Attorney and is the subject of the proceedings in 19 MR 1149 in which Judge Meyer on February 24, 2020 denied the State’s request.
4. Secondly, as the State is aware from testimony in other related McHenry County court proceedings as cited in Penkava’s Motions in Liminie #3, #4, #5 and #6, the

commencement of the confessional process in the Jehovah's Witness faith commences with a Judicial Committee. This *subpoena duces tecum* Item #3 seeks to invade the Judicial Committee process, an integral part of the Jehovah Witness confessional process, and grab, "All documents, reports, minutes generated by the Judicial Committee formed for Arturo Hernandez"; these documents generated in the Judicial Committee are protected by the clergy-penitent privilege in Illinois (735 ILCS 5/8-803) (from Ch. 110, par. 8-803).

Sec. 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. (Source: P.A. 82-280.)

5. A party has standing to object to production of documents containing privileged or other protected matter; Penkava acknowledges he does not have standing to raise objections based upon relevancy, undue burden or the alleged broadness of the document request. [See 9A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, § 2459 (1995).] But this *subpoena duces tecum* is enjoined by the rules or practices, more particularly the confessional process, of the Jehovah's Witnesses.

6. The Jehovah's Witness confessional process is clear.

The Investigative Stage. If an allegation of a gross sin such as child abuse arises, two Elders will confront the accused with the allegation. If he confesses, then the matter moves on.

The Judicial Committee. Once there is a confession of the gross sin, a Judicial Committee of three Elders – usually the two who were involved in the investigation and one other – meet with the accused to re-establish his confession and then determine whether he is repentant. This is an entirely internal, ecclesiastical process.

If the Elders believe the law may require a report of the confessed sin to authorities, the Elders will contact the Legal Department to learn their legal obligations under Illinois law. This consultation with the Legal Department and possible call to authorities will occur before the Judicial Committee described above commences.

7. The Judicial Committee is not an “open meeting.” It is an ecclesiastical procedure that adheres to Bible Scriptures that govern how such ecclesiastical investigations and disciplinary determinations are to be conducted. The fact that two Elders are present for the first confession, and that three Elders are present for the second one, should not impact applicability of the clergy-penitent privilege under 735 ILCS 5/8-803.

8. The Second District Court of Appeals has made it clear that the clergy-penitent privilege belongs both to the clergyman (in the instant case that would be Defendant/Elder Penkava) and the person making the statement. [See People v. Burnidge, 664 N.E.2d 656, 279 Ill.App.3d 127 (Ill. App. 1996)].

In Burnidge, *supra*, two subpoenaed witnesses, a pastor and a deacon successfully raised the clergy privilege despite having learned of the sexual abuse from conversations with the defendant and the victim. Moreover, the pastor attended a joint meeting with the defendant, the victim, and the victim's parents and the defendant admitted he apologized to the victim at the meeting with the victim's parents.

The trial court granted the motion of the deacon and pastor to be excused from testifying. The government cannot intrude upon or define the penitent clergy process of a religious denomination; to do so violates the First Amendment.

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)].

WHEREFORE, the Respondent prays for an Order from this Court granting this Motion to Quash Subpoena Duces Tecum Item # 3 - Returnable April 23, 2021 and 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 Motion to Quash Subpoena Duces Tecum Item # 3 - Returnable April 23, 2021 by emailing a copy to Ashur Youash, A.S.A., at AYYouash@mchenrycountyil.gov to Hunter Jones at HPJones@mchenrycountyil.gov and Terry Ekl at tekl@eklwilliams.com on and before 1:00 PM on April 6, 2021.

Law Office of Philip A. Prossnitz

By: Philip A. Prossnitz

/Philip A. Prossnitz, ARDC # 6185116

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