

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

Katherine M. Keefe
Clerk of the Circuit Court
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06/29/2021
McHenry County, Illinois
22nd Judicial Circuit

PEOPLE OF THE STATE OF ILLINOIS)
)
)
 VS.) 20 CM 1338
)
)
 MICHAEL PENKAVA)

DEFENDANT'S RESPONSES TO STATE'S MOTIONS IN LIMINIE #1 & #2

Now comes the defendant, Michael Penkava, by and through his attorney, Philip

A. Prossnitz, and in response states:

Response to State's Motion in Liminie #1

Defendant adopts and incorporates by reference thereto the Response filed by Defendant Scott.

Response to State's Motion in Liminie #2

The State's Motion in Liminie #2 is nothing more than a rehash of the lengthy courtroom briefs and arguments surrounding Defendant Penkava's Motions in Liminie #3, #4, #5 and #6 which sought a pre-trial ruling to protect the Defendant's and Jehovah's Witness's confessional process, statutory clergy-penitent privilege and associated First Amendment rights.

The defense is unaware of any evidence that the State will seek to introduce other than testimony emanating from the protected and confidential Jehovah's Witness's confessional process between Arturo Hernandez-Pedraza, Jehovah's Witness Elders and indispensable parties.

A waiver of the clergy-penitent privilege requires a waiver both from the penitent as well as from the clergy member. The State argues, without supporting caselaw, that by seeking the advice of counsel, Mr. Penkava waived his clergy-penitent privilege. Mr. Penkava scrupulously raised the privilege before Judge Coppedge during the criminal trial of Arturo Hernandez-Pedraza; Mr. Penkava never has and never will waive his privilege.

The defendant anticipates that this court will once again rule that it must receive evidence before making a ruling. The State in its prayer for relief requests the matter be set for an evidentiary hearing to explore communications prior to ruling on the applicability of the clergy-penitent privilege. The defense joins in that request.

If such an evidentiary hearing is to be held, there must be no confusion or misleading statements as to the applicable law.

There can be no quarrel that the Code of Civil Procedure (735 ILCS 5/8-803) protects a communication which is an admission or confession made for the purpose of receiving spiritual counsel or consolation made to a clergy member whose religion requires him to receive admissions or confessions for the purpose of providing spiritual counsel or consolation is a privileged communication. This is the clear statement of law in People vs. Campobello, 348 Ill.App.3d 619, 635; 810 N.E.2d 307, 321; 2004 Ill.App. LEXIS 583, 284 Ill.Dec. 654, 668 (2nd Dist., 2004). The government cannot intrude into and dictate the parameters of a religion's confessional process without violating the Establishment Clause of the First Amendment.

Disclosure to third-parties does not automatically result in a waiver of the clergy-penitent privilege by both clergy and penitent. That was the holding of People v.

Thodos, 2014 IL App (2d) 121001, 18 N.E.3d 577, 385 Ill.Dec. 316 (Ill. App. 2014). The Fifth District 1980 decision cited by the State ¹ which has “Caution As of June 21, 2021 9:47 PM Z” for the proposition that the priest-penitent privilege, as with the attorney-client privilege, only attaches when the communication is made in confidence, has been roundly rejected by the more modern views of Thodos *infra*, (2015) and Campobello *supra*, (2004).

As was previously argued by Penkava in his Motions in Limine #3 - #6, the clergy member in Thodos was a mere bible study leader who revealed what the defendant told him to eight other people! The court in Thodos never concluded that the privilege was waived because admissions were revealed to other people nor did it accept the argument that that was the holding of Cox v. Miller, 296 F.3d 89 (2d Cir.2002). To the contrary the court’s words were:

¶ 26 Here, the undisputed evidence revealed that, although Sutter relayed what defendant told him to eight other people, he did so only so that he could obtain advice on how to disciple defendant. We note that courts have found that “a showing of indispensability [of the third person] is necessary before a privilege is extended to nonprofessional representatives.” (Emphasis added.) *Id.*; see also Campobello, 348 Ill.App.3d at 636, 284 Ill.Dec. 654, 810 N.E.2d 307. However, [49 N.E.3d 69] we also note some disagreement on that point. See Robert W. Webb, Priest–Panitent [sic] Privilege, 46 Chi.–Kent L.Rev. at 52 (noting that the presence of third parties when a confession is given to a clergyman for the purpose of spiritual advice should not waive the privilege because, among other things, the statute requires simply that the confession be given for the purpose of obtaining spiritual advice, and the presence of third parties should not affect the clergyman's capacity to do so).

¶ 27 In any event, even if we were to conclude that Sutter waived the privilege when he relayed defendant's admission to other people, defendant did not do likewise. Because “[t]he privilege belongs both to the person making the statement and to the clergyman [or practitioner]” (Thomas, 2014 IL App (2d) 121001, ¶ 94, 385 Ill.Dec. 316, 18 N.E.3d 577), the privilege would still apply here, as nothing indicates that defendant, who joined Sutter in invoking the privilege, ever shared his admission with anyone other than Sutter.

¹ People vs. Diercks, 88 Ill.App.3d 1073, 411 N.E.2d 97, 1980 Ill.App. LEXIS 3693, 44 Ill.Dec. 191 (5th Dist., 1980)

¶ 28 Relying on Cox v. Miller, 296 F.3d 89 (2d Cir.2002), the State claims that, because defendant's admission was shared with others, the admission was not confidential, and, thus, the privilege does not apply. We disagree. [People v. Thodos, 49 N.E.3d 62 (Ill. App. 2015)].

The suggestion that Thodos held that a disclosure to a third party automatically results in a waiver is false.

Conclusion

For the reasons stated herein, the defendant prays for an Order denying State's Motion in Liminie #1 and granting an evidentiary hearing as requested in State's Motion in Liminie #2, 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 Response 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 June 29, 2021.

Law Office of Philip A. Prossnitz

By: Philip A. Prossnitz

/Philip A. Prossnitz, ARDC # 6185116

/Philip A. Prossnitz

Philip A. Prossnitz
Attorney-at-Law
454 W. Jackson St
Woodstock, IL 60098
Attorney ID number 06185116
815-206-2969 (phone)
paprossnitz@aol.com