

such professional character or as such spiritual advisor. (Source: P.A. 82-280.)

3. The information sought in Paragraph #8 is information received by a clergyman or practitioner of a religious denomination by way of a confession or admission made to the spiritual advisor in the course of their discipline. The following is an explanation of the confession process in the Jehovah's Witnesses faith relevant to the Illinois clergy-penitent privilege (735 ILCS 5/8-803).

4. 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.

5. The Judicial Committee/Ecclesiastical Process. 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.

6. 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/Ecclesiastical Process described above commences.

7. The Judicial Committee/Ecclesiastical Process 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 (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 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].¹

9. *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

¹ *People v. Burnidge*, affirmed on appeal to the Illinois Supreme Court, 178 Ill. 2d 429; 687 N.E.2d 813; 1997 Ill. LEXIS 408; 227 Ill. Dec. 331.

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].

WHEREFORE, the Respondent prays for an Order from this Court:

- A). Granting this Motion to Quash Paragraph #8 in the two State Subpoena Duces Tecums: #1 Returnable August 25, 2021 and #2 Returnable August 31, 2021;
- B). Alternatively, ordering all materials supplied pursuant to Paragraph #8 be held and viewed *in camera* until such time as the court hears testimony and receives evidence as to the confessional process of the Kingdom Hall of Jehovah’s Witnesses faith so as to determine if the documents are privileged, and,
- C). 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 to Quash by emailing a copy to Ashur Youash, A.S.A., at AYYouash@mchenrycountyil.gov and Mr. Terry Ekl at tekl@ekwilliams.com on and before 12:00 PM on August 3, 2021.

Law Office of Philip A. Prossnitz

By: *Philip A. Prossnitz*
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