ARIZONA COURT OF APPEALS

DIVISION ONE

MARIO RODRIGUEZ-RAMIREZ, Petitioner, v. THE HONORABLE KRISTIN CULBERTSON, in her official capacity as Judge of the Superior Court of the State of Arizona in and for Maricopa County, Respondent, and STATE OF ARIZONA, Real Party in Interest.	No. 1 CA-SA 23-0182 Maricopa County Superior Court No. CR2021-101028-001

BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF MARIO RODRIGUEZ-RAMIREZ

FILED WITH WRITTEN CONSENT OF THE PARTIES

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Introduction

This Court requested supplemental briefing on the procedural and substantive requirements when a criminal defendant claims that certain communications are inadmissible under the clergy-penitent privilege. [Order for Supp'l Br. at 2] Arizona Attorneys for Criminal Justice ("AACJ") submits this amicus brief to answer this Court's questions.

Procedurally, under issues (1) and (3), when a criminal defendant asserts that the clergy-penitent privilege renders certain evidence inadmissible, the State must prove that the privilege does not apply by a preponderance of the evidence. Substantively, under issues (2), (4), and (5), the State must establish—as relevant here—that the defendant lacked a subjectively reasonable belief that he spoke to the clergyman in his "professional character." This Court should remand for the Superior Court to apply this legal standard with this burden of proof to this record.

Interests of Amicus Curiae

AACJ, the Arizona affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and the attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense

lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature; promoting excellence in the practice of criminal law through education, training, and mutual assistance; and fostering public awareness of citizens' rights, the criminal justice system, and the defense lawyer's role.

Argument

I. The State must prove that the clergy-penitent privilege does not apply by a preponderance of the evidence.

This Court requested briefing on procedural issues under questions (1) and (3). [Order for Supp'l Br. at 2] We answer those questions below.

A. Rodriguez-Ramirez need not make a prima facie showing that the privilege applies.

"The burden of establishing admissibility lies with the proponent of the testimony—in this case, the State." *State v. Haskie*, 242 Ariz. 582, 586 ¶ 16 (2017); *accord, e.g.*, *Brown v. Dembow*, 248 Ariz. 374, 376 ¶ 6 (App. 2020). Requiring a criminal defendant to make a prima facie showing that the evidence that the State seeks to introduce is inadmissible under any evidentiary privilege would violate this principle.

This Court's order focuses on "admissibility," not discoverability. [Order for Supp'l Br. at 1] In the discoverability context, the party asserting a privilege must make a prima facie showing that the privilege

applies. *See, e.g.*, *State ex rel. Adel v. Adleman*, 252 Ariz. 356, 360 ¶¶ 13-15 (2022); *McGlothlin v. Astrowsky*, 255 Ariz. 449, 457 ¶¶ 21-22 (App. 2023). This burden makes sense in the discoverability context because the party asserting the privilege is the only party that possesses the allegedly privileged evidence. But it has no business in the admissibility context because all the parties already possess the evidence. The evidence's proponent must establish that the evidence is admissible.

There's one exception to this admissibility rule, but it does not apply here. When a defendant moves to suppress confession evidence under Rule 16.2(b)(2), the defendant must make "a prima facie case supporting the suppression of the evidence." But Rule 16.2(a) defines "suppress" to refer only to "the exclusion of evidence that was unlawfully obtained due to a constitutional violation." The question here is whether the evidence is privileged, not whether it was unconstitutionally obtained. That means this is a preclusion issue—not a suppression issue. *See, e.g.*, *State v. Bejarano*, 219 Ariz. 518, 520 ¶¶ 3-4 (App. 2008); *State v. Roper*, 225 Ariz. 273, 274 ¶¶ 6-8 (App. 2010). So the general admissibility rules apply. The State—as the evidence's proponent—must prove that the evidence is

admissible. A criminal defendant need not make a prima facie showing that the evidence is inadmissible under the clergy-penitent privilege.

B. The State must prove by a preponderance of the evidence that the privilege does not apply.

As the evidence's proponent, the State must prove that the evidence is admissible—*i.e.*, the privilege does not apply—by "a preponderance of the evidence." *State v. Salazar-Mercado*, 234 Ariz. 590, 594 ¶ 13 (2014).

For its part, the State tries to chart a new path, arguing (Supp'l Br. at 4-5) that a criminal defendant must prove that the evidence is inadmissible under the clergy-penitent privilege by clear-and-convincing evidence. Wrong. The State cites Arizona cases only in the discoverability context—not the admissibility context. This Court recognizes in the admissibility context that the State must "overcome [a defendant's] claim of privilege." *State v. Bogan*, 183 Ariz. 506, 508 (App. 1995). *Bogan* dooms the State's effort to place any burden—much less a clear-and-convincing burden—on a criminal defendant to establish the privilege's elements.

II. The State must establish that Rodriguez-Ramirez lacked a subjectively reasonable belief that he spoke to Pastor Padron in his "professional character."

For the State to establish that the clergy-penitent privilege does not apply to certain communications, it must prove—as relevant here—that

a defendant lacked a subjectively reasonable belief that he spoke to a clergyman in his "professional character." This Court invited briefing on these issues under questions (2), (4), and (5). [Order for Supp'l Br. at 2]

The clergy-penitent privilege under A.R.S. § 13-4062(3) applies to "any confession made to [a] clergyman or priest in his professional character in the course of discipline enjoined by the church to which the clergyman or priest belongs." We focus here only on the "professional character" element. That element requires a communication "to be directed to a clergyman in his or her capacity as a spiritual leader within his or her religious denomination." *State v. Archibeque*, 223 Ariz. 231, 235 ¶ 11 (App. 2009) (citation omitted). Said otherwise, "the congregant must speak to the cleric as part of the cleric's 'job' as a cleric"—not in the cleric's role as "a relative, friend, or employer." *People v. Bragg*, 824 N.W.2d 170, 185 (Mich. Ct. App. 2012); *see also Scott v. Hammock*, 870 P.2d 947, 955 (Utah 1994) ("[S]tatements made to a cleric in a social context are not privileged because the statements are not made to the cleric in the course of his or her professional responsibilities or in a religious context.").

A congregant must subjectively believe that he's communicating with a clergyman in his "professional character" for the privilege to apply.

After all, the "privilege afforded by the statute belongs to the communicant." *Waters v. O'Connor*, 209 Ariz. 380, 383 ¶ 12 (App. 2004). If a congregant does not subjectively believe that he's communicating with a clergyman in his "professional character," then there's no good reason why the congregant should hold a privilege over the conversation.

This tracks how Arizona courts analyze the attorney-client privilege under A.R.S. § 13-4062(2). "The test for determining whether a communication is protected by the attorney-client privilege is a subjective one; it focuses primarily on the state of mind of the client." *State v. Fodor*, 179 Ariz. 442, 448 (App. 1994). A court must decide—based on "the circumstances under which the communication was made"—whether the client subjectively believed that she communicated with and sought legal advice from an "attorney in a professional capacity." *Id.*; *accord, e.g.*, *Clements v. Bernini*, 249 Ariz. 434, 440 ¶ 9 (2020). The same standard should apply under A.R.S. § 13-4062(3).

So what are the circumstances that determine whether a congregant holds a subjectively reasonable belief that he's communicating with a clergyman in his "professional character?" This question usually arises when—as here—a congregant has a longstanding

multi-faceted relationship with a cleric. "[T]here is nothing inconsistent with being both a cleric and a friend to a person." Wright & Miller, 26 Fed. Prac. & Proc. Evid. § 5618 (2023). Yet the "professional character" requirement still applies. In this scenario, the "common thread" underlying clergy-penitent privilege cases is that "the privilege may not be invoked to enshroud conversations with wholly secular purposes solely because one of the parties to the conversation happened to be a religious minister." *People v. Carmona*, 627 N.E.2d 959, 965 (N.Y. 1993). In short: No matter what a congregant subjectively believes, when a conversation with a cleric is "wholly secular," it is not privileged. Otherwise, it is.[1]

Applying these principles, courts have not hesitated to hold that the clergy-penitent privilege renders certain communications inadmissible when a congregant held a subjectively reasonable belief that he communicated with a cleric in the cleric's "professional character." *See State v. Jackson*, 336 S.E.2d 437, 438 (N.C. Ct. App. 1985) (a defendant's

[1] This Court requested briefing only on the "professional character" element. The privilege, of course, has two more elements—both of which further cabin its reach. The State may prove that evidence is admissible by showing that the evidence fails any of the elements. *See Archibeque*, 223 Ariz. at 234 ¶ 7 (the privilege applies only when "all three inquiries is affirmative"). We focus here on the "professional character" element.

communications with a minister—who was also the defendant's aunt—were inadmissible because it was "impossible to determine to what extent [the] defendant confided in [her] as a relative and to what extent as a minister," but she was clearly "acting at least in part in her professional capacity" given that the conversation was not entirely secular); *accord, e.g.*, *State v. Boling*, 806 S.W.2d 202, 204 (Tenn. Ct. App. 1990).

This is true even when a cleric testifies that the cleric subjectively believed that the congregant was *not* speaking to her in her "professional character." *See, e.g.*, *Tankersley v. State*, 724 So.2d 557, 560-61 (Ala. Crim. App. 1998) (disregarding a pastor's testimony that she did not believe that the defendant called her because she's a pastor but because he "knew that I loved him" when the record showed that the defendant—during part of the conversation—sought "spiritual guidance" from her).

This interpretation also reinforces the values that the clergy-penitent privilege serves. The privilege recognizes "the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." *Trammel v. United States*, 445 U.S.

40, 51 (1980). "Wholly secular" conversations are untethered from these values. Other conversations, though, further the privilege's purposes.

Consider the consequences were this Court to adopt a different rule. How is a congregant supposed to exercise his constitutional right to confidentially disclose his "flawed acts or thoughts" to a cleric when the State could later argue in a criminal prosecution that the cleric changed capacities throughout the conversation with no notice to the congregant and the cleric's chameleon approach allows the State to admit the congregant's confession against him? As the Superior Court put it: "This business about I put my pastor hat on and off when it suits me[] doesn't really hold water." [Resp. to Pet. for Special Action at 198] Exactly. When a conversation is "wholly secular," these constitutional considerations don't come into play. But when a conversation is even partly spiritual, "the constitutional right to the free exercise of religion strongly suggests that the privilege should be recognized when clergy perform the functions required of them." *Scott*, 870 P.2d at 954. To steer clear of these constitutional guardrails, all reasonable inferences must thus favor the privilege. *See, e.g.*, *id.* The "wholly secular" test honors this principle.

To sum up, for the clergy-penitent privilege to apply, a congregant must subjectively believe that he's communicating with a clergyman in his "professional character." The congregant's subjective belief must be reasonable. A congregant lacks a subjectively reasonable belief that he's communicating with a clergyman in his "professional character" when the congregant's conversation with the clergyman is "wholly secular."

Conclusion

As the evidence's proponent, the State must prove that the clergy-penitent privilege does not apply by a preponderance of the evidence. To meet its burden, the State must establish that the defendant lacked a subjectively reasonable belief that he spoke to the clergyman in his "professional character." This Court should remand for the Superior Court to apply this legal standard with this burden of proof to this record.

RESPECTFULLY SUBMITTED this 27th day of October, 2023.

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