

# State v. Szemple: A Double Whammy: Marital-Communication and the Priest-Penitent Privilege.

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On May 12, 1994, the Supreme Court of New Jersey handed down one of the most interesting decisions of the decade (1). In daring to tread where few have had the courage, the court addressed the confidential relationship between a priest and a penitent and in so doing, has changed the thinking of at least the last 500 years. In addition, an important ruling on the marital-communication privilege was made.

## The Case

In 1975, Craig Szemple killed a 15 year old boy by gun-shot. He was charged with first-degree murder, unlawful possession of a handgun, and murder while armed with the handgun. He was also indicted for murder in two other counties in New Jersey. After the state had rested its case in the first murder trial, it sought permission to reopen to present two admissions of guilt that Mr. Szemple had allegedly made.

The first admission of guilt was contained in a letter written to his wife, Theresa Boyle, that her father had inadvertently discovered and kept without his daughter's permission. Early in 1991, after defendant was arrested, Mrs. Boyle asked her father to help her move. While so doing, he discovered some folded sheets of paper that he identified as a letter from defendant to his wife. Mr. Boyle knew little about the man and thought to himself that reading the letter might shed light on his son-in-law. He was worried that his daughter also knew little about her husband but that he was in jail on charges of murder. Mr. Boyle stuffed the letter in his shirt, carried it to his pick-up truck and placed it in a plastic bag.

He drove back to his home in North Carolina, forgot about the letter but rediscovered it several weeks later. On page eight, he read the following: "My first hit was an act of treachery, the ultimate deceit. 4 bullets in the back, 1 in the neck and a broken promise made at the parting of the oncoming river. I never did tell his mother what happened to him. The second I pulled that trigger, I became larger than the death of all my associates."

Mr. Boyle returned to New Jersey several months later and gave a copy of the letter to his former wife, Theresa Boyle's mother. She communicated with an attorney to inquire whether the letter would be of benefit to the prosecution but was informed that the State already had enough evidence against the defendant and that the letter was not needed.

About a year later Mr. Boyle asked his daughter what had become of the charges against her husband. She told him that they were being dropped. Mr. Boyle then drove from North Carolina to New Jersey and hand-delivered the letter to the prosecutor. Mr. Boyle had never disclosed to his daughter that he had the letter. She became angry with her father and will have nothing to do with him as a result of his actions.

The second admission of guilt was a confession of guilt made to a visiting minister while in jail. While in jail, Mr. Szemple was visited by Mr. Bischoff, a retired fire-fighter who served as a Minister of Visitation with the Trinity Baptist Church. He became a deacon in 1974. The elders of the Church felt that he had the gift to minister and ordained him, signing a "certificate of ordination" recognizing his position. Mr. Bischoff met with Mr. Szemple about nineteen times between April 1991 and January 1992. In October 1991, defendant admitted that he had killed "not one, but three." Mr. Bischoff, who had known defendant family for at least twelve years, reported the admission to defendant sister and brother-in-law. One of the defendant family members related the admission to the prosecutor.

At an evidentiary hearing, the trial court determined that neither the marital-communication privilege nor the priest-penitent privilege protected the admission. The court granted the State's motion to reopen its case to present the two admission, Mr. Szemple moved for a mistrial which was denied. The case was appealed.

On appeal, the Appellate Division reversed the trial court's denial of Mr. Szemple's motion for mistrial and granted leave to appeal to review the trial court's ruling. A majority of the Appellate Division upheld the trial court's evidentiary rulings. One judge dissented. The Supreme Court granted leave to appeal based on the dissent.

#### New Jersey Supreme Court Majority

In a 4-3 decision, the Supreme Court found that the marital communications privilege does not prevent the admission of an inculpatory letter sent by Mr. Szemple to his wife that was then taken by a third person without the wife's permission. Further, the clergy person is the sole holder of the priest-penitent privilege: the decision whether to reveal confidential communication rests with the clergy person.

Under New Jersey Rules of Evidence, the marital-communications privilege provides that no person can disclose any communication made in confidence between that person and his or her spouse unless both consent to the disclosure (2). The privilege is not attached to the communication itself but is personal to the spouses. Involvement of a third person destroys the privilege. There is no reason to distinguish between an oral or written communication. The privilege does not apply to a written communication between spouses that comes into the possession of a third party without the consent of the recipient spouse.

New Jersey also holds that the priest-penitent privilege enables a clergyman or one authorized to perform similar functions to avoid being compelled to disclose a confession or other confidential communication made to him or her as part of his or her professional duties (3). In this case, the minister consented to the disclosure of Mr. Szemple's confession. The court finds that the legislature's intent is that the clergyman alone may waive the privilege and that the penitent need not consent to the waiver prior to the clergyman testifying about a confidential matter, disclosing a confession or a confidential relation.

### The Dissent

Three justices dissented writing that the Legislature did not intend, nor did they even contemplate, that a spiritual advisor should be free to disclose a confidential spiritual conversation. As proof of their dissent, the justices cite that this issue has never even been discussed by the committees on evidence when the Rules of Evidence were drafted (4).

### Comment

The marital-communication privilege has long been recognized as a protector of marital confidences. It stems from the strong public policy of encouraging free and uninhibited communication between spouses and serves to strengthen and protect the sanctity and tranquility of marriage. The New Jersey Legislature amended the marital-communication privilege by Act in 1992. The amendment relaxes the privilege to permit disclosure of marital communication "in a criminal action or proceeding in which either spouse consents to its disclosure" (5). Here we see that communications obtained surreptitiously or otherwise without consent invalidate the privilege.

Under the Code of Canon Law of the Roman Catholic Church for "a confessor in any way to betray a Penitent" was a crime (6). A confessor who directly violates the seal of confession incurs automatic excommunication. The sanctity of the confession was recognized in English law from the Norman Conquest in 1066 until the English Reformation in the sixteenth century. After the Reformation, hostility towards the Catholic Church in England resulted in a refusal to recognize the privilege (6).

Therefore, when the United States was founded, the privilege did not exist at common law. Accordingly, American courts required that the privilege be conferred by statute.

Where no privilege existed, clergypersons were often compelled to testify despite personal, moral and religious objections. The American Lutheran Church has adopted a resolution that the pastor hold inviolate and disclose to no one the confessions and communications made to him as a pastor without the specific consent of the person making the communication. The Presbyterian Church in the U.S., the United Presbyterian Church and the American Baptist Convention have adopted similar policy statements.

The prospect of clergypersons going to jail to defend their religious beliefs resulted in most state legislatures enacting a clergy person privilege by statute. New Jersey first recognized this privilege in 1947. However, nowhere does the statute address just who holds the privilege. There has been debate as to whether the wording of the statute is that of a competency issue or of a privilege. Clearly, the concern was for clergypersons being compelled to testify and to divulge confidences. This was also to protect a clergy person from being manipulated where a communication was made purposely to mislead should it be revealed.

These issues are near and dear to the psychiatric profession. In the Menendez case we saw the further erosion of the psychiatric privilege. Psychiatrists must also be alert to the possibility that statements made, especially in a forensic context, are deliberately fabricated. As a society, we are increasingly relinquishing our non-constitutional right to privacy. This should not be surrendered so easily as the court here has done with the marital privilege.

Justice Clifford in a concurring opinion noted that the concern that the ruling would allow a priest to "natter on at a social gathering about the juicy tidbits in a penitent confession... is a fish of reddish hue. Priests keep the confidences of the confessional not because of any secular law gives the privilege to do so but because their churchly obligation, their religious duty, requires it of them" (1). To paraphrase Hebrew National: "They answer to a higher authority."

#### References

1. State v. Szemple, 135 N.J. 406; 640 A.2d. 817 (1994)
2. New Jersey Rules of Evidence number 509
3. New Jersey Rules of Evidence number 511
4. Personal conversation (and thanks) to Ronald K. Chen, Esquire who submitted the amicus curiae for the American Civil Liberties Union of New Jersey in this case. (06/21/94)
5. Legislature 1992, c. 142 Evid. R. 28, N.J.S.A. 2A:84A-22