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NO. A05-1782

State of Minnesota
In Supreme Court

State of Minnesota,

Petitioner-Plaintiff

v.

John Joseph Bussmann,

Appellant-Defendant.

APPELLANT'S ANSWER TO PETITION FOR REHEARING

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TO: THE SUPREME COURT OF THE STATE OF MINNESOTA.

This is Appellant John J. Bussmann's ("Appellant") response to the Petitioner State of Minnesota's ("Petitioner") Petition for Rehearing to this Court.

FACTS

As stated in the State's Petition for Rehearing, the facts of this case are both laborious and detailed, and in the interests of judicial economy, Appellant will only refer to facts relevant to the Petition.

On December 12, 2006, this Court granted Appellant's Petition for Review on the issue as to the whether Minn.Stat. § 609.344, subd. 1(l)(ii) was constitutional. The matter was briefed to this Court and oral argument was heard on April 10, 2007. On November 1, 2007, this Court issued its Order.

This Court held (1) Minn.Stat. § 609.344, subd. 1(l)(ii) is not unconstitutionally vague; (2) affirmed the holding of our Court of Appeals (by a 3-3 vote) that Minn.Stat. § 609.344, subd. 1(l)(ii) does not violate the Establishment Clause of the First Amendment on its face; but (3) because certain evidence and testimony presented at trial violated the Establishment Clause of the First Amendment, Appellant was entitled to a new trial. State v. Bussmann, A05-1782 (Minn. 2007).

On November 13, 2007, Petitioner filed a Petition for Rehearing in this Court pursuant to Minn.R.Civ.App.P., Rule 140.01.

ARGUMENT

I. PETITIONER'S REQUEST FOR A REHEARING SHOULD BE DENIED.

Petitioner argues that this Court erred in its decision ordering a new trial because the evidentiary issues were not within the scope of review granted by this Court, and because Appellant failed to object to this evidence at trial. [State's Petition for Rehearing dated November 13, 2007, previously file with this Court]. Additionally, Petitioner makes several arguments that are absolutely irrelevant to this case.

As will be more fully stated below, Petitioner's arguments are without merit, and the Petition should be denied.

A. Unconstitutional "As Applied To."

The scope of this Court's review was whether or not Minn.Stat. § 609.344, subd. 1(l)(ii) was unconstitutional. This Court did not find that the statute was unconstitutional on its face, however, this Court did find that the statute was unconstitutional "as applied to" Appellant because the evidence and testimony presented at trial violated the Establishment Clause of the First Amendment, by excessively entangling religious doctrine into the trial. Bussmann, A05-1782 at p. 25-29. Thus, since Appellant's trial and ultimate convictions were tainted by a clear violation of the Establishment Clause of the First Amendment, Appellant is entitled to a new trial.

Contrary to Petitioner's assertions, and contrary to the dissent, this determination was well within the scope of this Court's grant of review. An "as applied to" challenge is a challenge to the constitutionality of the statute. Just because this Court was split as to

whether or not Minn.Stat. § 609.344, subd. 1(l)(ii) is constitutional on its face by no means ended the constitutional inquiry.

Contrary to Petitioner's argument, this Court did hear from the State on these issues, as they were fully discussed in Petitioner's brief to this Court. In fact, Petitioner argued in more than three (3) pages of its brief that the testimony of Fr. Kevin McDonough, Phyllis Willerscheidt, and the evidence presented at trial did not excessively entangle religion with the elements of the statute at issue. [Respondent's Brief dated February 6, 2007 at p. 30-33].

Additionally, at oral argument, a representative of the Hennepin County Attorney's Office was questioned repeatedly on how this evidence could have been constitutionally permissible. The questions were raised by Justices Hanson, Page and Meyer. However, the State declined provide an adequate (or indeed any) response.

Appellant's "as applied to" challenge was well within the parameters of this Court's review and these issues were given a chance to be briefed and argued to this Court. Given the State's refusal to answer these questions at oral argument, its argument that it was not heard on these issues is disingenuous.

B. Appellant's Objections at Trial.

Admittedly, Petitioner is correct that our Court of Appeals decision noted that Appellant did not object to the admission of religious testimony at trial. State v. Bussmann, 2006 WL 2673294 (Minn.Ct.App.). However, until this time, Appellant has

never been able to address this holding which went against the clear weight of the record of this case.

With regard to the testimony of Fr. Kevin McDonough, Appellant, through counsel, objected on numerous occasions throughout that testimony. [Trial Transcript volume VI at p. 707-08, 710-12, 714, 716, 718-27, 732, 733, 736-44, 749, 751, 752, 759; Trial Transcript volume X at p. 1423-25, 1427, 1429 (Westrick)].

Specifically, Fr. McDonough was allowed to testify, over Appellant's counsel's objection, to the nature what "pastoral care:"

> Q: Father McDonough, we just discussed some patterns of pastoring and some of the training that you do with the priests from the Archdiocese. And I want to ask you, what is "pastoral care"?
>
> Mr. Westrick: Objection, irrelevant. Invades the province of the jury.
>
> The Court: Oh, he can answer that.
>
> The Witness: Pastoral care broadly speaking is what we do. It's the work of the clergy. Narrowly speaking, it is sometimes distinguished from sacramental leadership, preaching and administration. So worship and governess, and then the - - and teaching, those are more formal. And then pastoral care is the remainder of the work that we do.
>
> ****
>
> Q: Okay. Does that include counseling parishoners?
>
> A: It does.

[T VI at p. 723 (McDonough)].

Additionally, Petitioner was allowed to introduce as evidence a Decree from the Archdiocese of St. Paul and Minneapolis stating that "[Appellant] has engaged in

behavior violative of his priest authority and of his priestly celibacy." [Decree, Exhibit 2; App's Appdx. at A-19]. Nearly two (2) pages of the trial transcript is devoted to Appellant's counsel making a record objecting to the introduction of this evidence. [T VI at p. 742-43 (Westrick)].

Regarding the testimony of Ms. Phyllis Willerscheidt, Appellant's counsel objected consistently throughout her testimony as well. [T VI at p. 775, 777-86, 790, 794, 795, 797-805, 811, 812]. Specifically Ms. Willerscheidt, over objection, was allowed to testify as to what pastoral "grooming" and control was.

> Q: Ms. Willerscheidt, what does the term "grooming" mean in relationship to these types of cases?
>
> A: Okay. It's a process of which over time a victim is singled out to be a special person and starts with maybe just talking - - calling them a special name and moving on to something more and more and more until finally gets to the point where they're feeling like they are the only one that's special to an individual. With gifts, with any number of things.
>
> Q: And when your talking about grooming, who is the person in a relationship like this who is doing the grooming?
>
> Mr. Westrick: [Relevance, foundation] objection, Your Honor.
>
> The Court: She may answer.
>
> The Witness. The offender.

[T VI at p. 796 (Willerscheidt)].

This Court has held previously that the introduction of evidence of this nature is error. Odenthal v. Minn. Conference of Seventh-Day Adventists, 649 N.W.2d 426, 436

(Minn. 2002).

Although Appellant may not have objected to the entire testimony presented by Fr. McDonough and/or Ms. Willerscheidt, or to each and every question that was asked of these witnesses, Appellant's counsel objected on numerous occasions throughout their testimony, as well as having objected to the introduction of internal religious documents.[1] These objections throughout the trial certainly preserved these issues for an appeal.

How our Court of Appeals determined that Appellant did not object to the introduction of this evidence remains a mystery to Appellant.

1. Plain-Error.

Assuming (without conceding) the point that this Court determines Appellant did not object to the introduction of the religious evidence and testimony presented at trial, review can still legitimately ensure under the plain-error doctrine. Minn.R.Crim.P., Rule 31.02.

In determining whether there was plain-error below, this Court applies a three (3) pronged test, "there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." State v. Anderson, 733 N.W.2d 128, 134 (Minn. 2007).

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[1] Prior to trial, Appellant's counsel brought a motion in limine seeking to preclude expert testimony by the State. [T V at p. 632 (Westrick)]. Although this motion focused more on the potential testimony of Dr. Gary Schoener, it certainly put the State and the Court on notice that Appellant had an overall objection to the introduction of expert testimony at trial. And, this Court specifically found that the testimony of Fr. McDonough and Ms. Willerscheidt was "religious expert testimony." Bussmann, A05-1782 at p. 25.

a. Error.

This Court held that the district court's admission of this testimony and evidence at trial "allowed the religious doctrine of the Catholic Church to become entangled with the criteria set out in the clergy sexual conduct statute for determining the criminality of [Appellant's] conduct. The jury's verdict was based on this evidence, and was unavoidably entangled with the religious doctrine introduced by the State." Bussmann, A05-1782 at p. 29.

As stated above, this Court has held previously that the introduction of evidence of this nature is error. Odenthal, 649 N.W.2d at 436. Thus, the first prong is satisfied.

b. Error Must be Plain.

An error is "plain" if it is clear and obvious. State v. Reed, 737 N.W.2d 572, 583 (Minn. 2007). In its decision, this Court specifically found that the district court allowed the introduction of "extensive evidence regarding the Catholic Church's doctrine on religious power of priests over parishioners; the Church's official policy on counseling and pastoral care; the Church's concerns about priest sexual misconduct; and the Church's official investigation and findings regarding [Appellant's] behavior." Bussmann, A05-1782 at p. 28-29.

Additionally, this evidence and testimony "lacked foundation to connect it to any secular standard, was irrelevant to any secular standard, was inadmissible hearsay evidence, and was highly prejudicial." Bussmann, A05-1782 at p. 27. Further, "[the

evidence] suggested to the jury that a conviction would be important to assist the Catholic Church in solving problems of offending priests." Bussmann, A05-1782 at p. 27.

Thus, the second prong is satisfied.

c. Substantial Rights.

The third prong is satisfied if the error was prejudicial. State v. Griller, 583 N.W.2d 736, 741 (Minn. 1998). This Court specifically held that this evidence was "highly prejudicial," Bussmann, A05-1782 at p. 27, was "not harmless" and the jury's verdict was "unavoidably entangled" with the religious doctrine introduced by the State. Bussmann, A05-1782 at p. 29. These findings by this Court show that Appellant's substantial rights were affected.

Certainly, these determinations agreed to by five (5) justices of this Court represent a finding of plain error, and a new trial must have been ordered.

C. Irrelevant Arguments.

Finally, Petitioner makes numerous arguments throughout its Petition that have absolutely no relevance to this case. The temerity of these complaints (which could be read as a lecture to this Court) underscores the enormous dissatisfaction that the Hennepin County Attorney's Office has with the direction of and recent decisions of this Court.

Although Appellant's counsel (who has only worked on 136 individual appellate matters in his 17 years at the bar) cannot compete with the collective experience of the Hennepin County Attorney's appellate practice group, the undersigned does understand

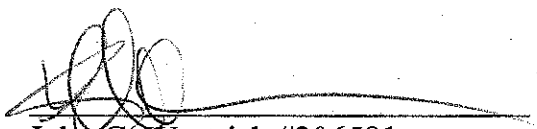
that a Petition for Rehearing is not the proper forum to raise these issues. The undersigned will not allow this case to be the vehicle with which to enter into a debate with the Hennepin County Attorney's Office on its apparent dissatisfaction with this Court's decisions.

After all, it is this Court, no the Petitioner's counsel who administers Justice and sees that it is done.

CONCLUSION

For the reasons stated above, Appellant respectfully requests this Court deny the Petition for Rehearing. However, should this Court grant the Petition, Appellant would respectfully request this Court grant rehearing on all of the issues previously requested.

Dated: November 20, 2007 **WESTRICK & MCDOWALL-NIX, PLLP**



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