Administrative Office of the Courts

FOR IMMEDIATE RELEASE

Sept. 2, 2019

Contact: Barry Massey, communications officer
bmassey@nmcourts.gov
505-827-4805
505-470-3436

Supreme Court abolishes prohibition against court testimony about private conversations between a husband and wife

SANTA FE – The state Supreme Court has abolished a prohibition against spouses testifying in court cases about what their husband or wife told them in private conversations during their marriage.

The Court issued the ruling Friday in upholding the first-degree murder conviction of a Clovis man, David Gutierrez II, for a 2002 killing. During his trial, Gutierrez unsuccessfully tried to block the testimony of his ex-wife, with whom he was married at the time of the murder, and a second wife.

A divided Court abolished the spousal communication privilege in future criminal and civil cases — those filed on or after Aug. 30, 2019, the date of the ruling. The Court unanimously affirmed Gutierrez's conviction for the shotgun slaying of Jose Valverde. The privilege remained in effect for his case.

"This Court has a constitutional duty to ensure that the pursuit of truth is not unduly undermined by a procedural rule that has outlived its justification," the Court's majority said in an opinion written by Chief Justice Judith K. Nakamura. "Having carefully examined the spousal communication privilege, we cannot accept that it meaningfully encourages marital confidences, promotes marital harmony, or produces any substantial public benefit that justifies its continued recognition. Rather, we believe that the privilege is a vestige of a vastly different society than the one we live in today and has been retained in New Mexico simply through inertia."

Retired Justices Petra Jimenez and Gary L. Clingman joined in the majority decision to abolish the spousal communication privilege.

In a dissenting opinion, Justice Barbara J. Vigil wrote: "The sacred bond of marriage forms the foundation for personal happiness and is the bedrock of our civilized society. The spousal

communications privilege protects that bond. Given the historical significance of marriage and the indecency of forcing one spouse to reveal the confidences of the other, I am not convinced that the privilege must be abolished in toto."

Justice Vigil said it was not necessary to eliminate the privilege in deciding the murder case and the issue should have been handled through the Judiciary's rulemaking process. The Court has standing committees, which are made up of attorneys, judges and others, to consider changes to rules governing court procedures, such as the rules of evidence. New Mexico becomes the only state in the nation without a legal protection for confidential marital communications, she said.

Justice Charles W. Daniels, who died Sunday, wrote a separate opinion agreeing with the elimination of the privilege but saying it should have been considered through the rules process.

"I share the views of the majority, views that I have held for a long time as a courtroom lawyer, as an evidence professor, and as a jurist, with regard to considering abolition or severe evisceration of the husband-wife communication privilege," wrote Justice Daniels. "That privilege obstructs the truth-seeking mission of our courts in order to protect criminals and other law-evaders and tort-feasors from being held responsible for their unlawful actions. And all this to hold sacred the marriage of Bonnie and Clyde?"

The Court said the privilege did not prohibit the ex-wife from testifying about her "observations and experiences" when she went with Gutierrez to the crime scene after the killing to look for spent shotgun shell casings. The Court's majority said the trial court should not have allowed the ex-wife to testify about Gutierrez's statements related to the murder, but that it was "harmless error" that did not affect the jury's verdict because her permissible testimony was more significant evidence.

The Court said the spousal communication privilege did not apply to the second wife because Gutierrez apparently told her about the murder before their marriage.

"Gutierrez's decision to talk about the murder with his wives was not premised on any legal guarantee of confidentiality; to the contrary, he not only told his wives about the killing but also bragged about the murder to third parties who were not covered by the privilege," the Chief Justice wrote in the majority opinion. "Gutierrez's case also illustrates that abolishment of the privilege is unlikely to chill candor between spouses, one of the putative reasons for recognizing the privilege."

Gutierrez's appeal came before the Court while all five justices were members, and the retired members were designated to continue participating in the case after their retirement while written opinions were finalized.

###

To read the decision in *State v. Gutierrez*, No. S-1-SC-36394, please visit the New Mexico Compilation Commission's website using the following link:

https://nmonesource.com/nmos/nmsc/en/item/420927/index.do