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Contact: Barry Massey, public information officer

bmassey@nmcourts.gov

505-470-3436

Supreme Court reinstates spousal communications privilege and orders rules committee study of the issue

SANTA FE – The state Supreme Court reinstated a prohibition against court testimony about private conversations between a husband and wife, and ordered a study of the evidentiary issue through its rule-making process.

The Court had abolished the spousal communications privilege in a decision issued on Aug. 30, 2019, which upheld the murder conviction of a Clovis man. The defendant, David Gutierrez II, asked for a rehearing in the case and a divided Court partly granted the motion on June 26, 2020. The sole issue on rehearing was whether the opinions of attorneys, judges, other experts in the law and civil litigants should be considered before eliminating the protections for private marital conversations.

In an order issued Thursday, the Court reinstated the privilege for all cases pending or filed as of June 26, and directed its Rules of Evidence Committee to study and make recommendations on the spousal privilege in [Rule 11-505 NMRA](#). The Court has standing committees, which are made up of attorneys, judges and others, to consider changes to rules governing court procedures.

“We determine that whether the spousal communications privilege contained in Rule 11-505 should be modified or abolished in New Mexico should be the subject of comprehensive study and robust public discussion,” Chief Justice Michael Vigil wrote for the Court’s majority.

Justice Judith K. Nakamura dissented from the order.

“I am saddened by the Court’s restatement of the spousal privilege, an evidentiary rule whose legacy is the silencing of women and the hindrance of truth seeking,” Justice Nakamura wrote in her dissent.

She noted that the Court’s majority in 2019 rejected having the privilege considered through the rule-making process. Two justices who joined in the majority decision to abolish the privilege no longer serve on the Court — Retired Justices Petra Jimenez Maes and Gary L. Clingman.

A rule governing Supreme Court rehearings allows any sitting justice to vote on a motion for rehearing even if the justice was not a member of the panel that originally decided the case.

“I fear that granting rehearing through this process incentivizes litigants to seek rehearing whenever the Court’s decision is split and a change in the members of the Court is imminent,” Justice Nakamura wrote.

Justices Nakamura and Barbara J. Vigil are the only current members of the Court who participated in the 2019 decision. Justice Nakamura wrote the majority opinion last year. Justice Barbara Vigil dissented from the majority’s decision to abolish the privilege. Justice Charles Daniels, who died last year, wrote a separate opinion critical of the spousal privilege but he agreed with Justice Vigil that any change in the evidentiary rule should be considered through the judicial rule-making process.

Under the rehearing order, Gutierrez’s murder conviction stands along with portions of the 2019 opinion that applied the spousal communications privilege to his case. The Court in 2019 unanimously affirmed his conviction.

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To read the order on rehearing and dissent and the original opinion in *State v. Gutierrez*, No. S-1-SC-36394, please visit the New Mexico Compilation Commission's website using the following links:

[State v. Gutierrez, No. S-1-SC-36394 \(Order on Rehearing and Dissent Filed November 5, 2020\)](#)

[State v. Gutierrez, No. S-1-SC-36394 \(Original Opinion Filed August 30, 2019\)](#)