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MORALES V. PORTUONDO: HAS THE SEAL OF THE CONFESSIONAL SPRUNG A LEAK?

Jordan B. Woods*

I. INTRODUCTION

On July 24, 2001 Jose Morales was released from jail by the order of federal district Judge Denny Chin.¹ Morales, as well as his friend Ruben Montalvo, had been convicted in 1989 for the brutal slaying of a young man, Jose Rivera.² Throughout their incarcerations, both men vigorously proclaimed their innocence and appealed their convictions numerous times. Finally, upon a second filing of a habeas corpus petition, Morales was able to convince Judge Chin that his due process rights had been violated and that he deserved to be a free man. Thereafter, Montalvo was also released, and Judge Chin has ordered the Bronx District Attorney not to retry their cases.³

The granting of a habeas petition is in and of itself unusual. Of the 24,945 petitions filed in the federal courts in the year

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¹ See *Morales v. Portuondo*, 154 F. Supp.2d 706, 734 (S.D.N.Y. 2001)[hereinafter *Morales* I].

² See *id.* at 709. See also *People v. Montalvo*, 576 N.Y.S.2d. 868, 869 (1st Dep't 1991).

³ See *Morales v. Portuondo*, 165 F. Supp.2d 601, 615 (S.D.N.Y. 2001). Montalvo's habeas petition was transferred to Judge Chin as well and was likewise granted. The Bronx District Attorney argued however that the two men should be re-tried. Judge Chin flatly rejected such a notion:

The District Attorney's arguments are rejected. For the reasons that follow, and in the interests of justice Morales and Montalvo are hereby granted an unconditional discharge: their convictions are vacated and the Bronx District Attorney's Office is ordered to take whatever steps are necessary to restore Morales and Montalvo to the status they were in prior to their arrest and prosecution in the underlying murder case.

Id. at 602-03.

2000, only a handful were granted.⁴ The Morales case is all the more unusual because of the evidence Morales used to support his petition. His petition was supplemented with an affidavit from a Roman Catholic priest, Father Joseph Towle, who testified that another young man had both confessed to the Rivera murder and admitted that Morales and Montalvo were not even at the scene of the crime. Father Towle had learned this information after he met in private with this man, Jesus Fornes, shortly after Morales and Montalvo were convicted. At the conclusion of this meeting, Father Towle granted Fornes absolution for his sins.⁵

The testimony of Father Towle was pivotal to Morales gaining his freedom from prison. What is so extraordinary is that this information was garnered from what appears to be a confession. Under New York evidentiary rules, this testimony would seemingly be inadmissible.⁶ Of greater import, to this piece particularly, is that the contents of a confession, under Catholic Church Canon Law, cannot be divulged for any reason whatsoever.⁷ A priest who breaks this rigid seal of the

⁴ See *Morales I*, 154 F. Supp.2d at 734.

⁵ See *id.* at 711-12.

⁶ See N.Y. C.P.L.R. LAW § 4505 (McKinney 1992); see generally *People v. Carmona*, 82 N.Y.2d 603 (1993). Commonly known as the Priest-Penitent Privilege, C.P.L.R. § 4505 states: "Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed [sic] disclose a confession or confidence made to him in his professional character as spiritual advisor." *Id.* See also STOKES & PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 555-556 (1975). The first state to institute a priest-penitent statute was New York in 1813. At common law confessions were not considered privileged. The theory behind creating the privilege was that locking up priests for contempt of court if they refused to violate the seal would infringe upon their free exercise of religion. Originally the privilege was only extended to Roman Catholic clergy because other Christian churches did not have canons analogous to the Confessional Seal. Some states allow the clergyman to decide whether or not he wants to testify, while others bar a clergyman outright from divulging secrets of the confessional. Over time the laws of the individual states expanded to encompass more than just Catholic confessions. See *id.*

⁷ See 1983 CODE c.983, §1 (Caparros, Theriault & Thorn translation, 1993). Section 1 states: "The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion." See also 4 THE CATHOLIC UNIVERSITY OF AMERICA, *NEW CATHOLIC ENCYCLOPEDIA* 133 (1967). According to this work, the purpose of the Seal of the Confessional "is to protect the penitent from betrayal by the revelation of his confessional matter and to protect also the sacredness of the Sacrament." *Id.*

confessional intentionally is to be punished by excommunication.⁸ Generally, this piece will attempt to answer how was Father Towle able to testify on this matter without breaking the sacred seal placed on confessions.

Part II will set out the facts of the crime itself, the subsequent trial of Montalvo and Morales, and their appeals. Part III will focus on the applicable Canon Law and Part IV will analyze the facts of the Fornes meeting with respect to the relevant Church Law in order to answer the question of how Father Towle was able to testify about his meeting with Jesus Fornes.

II. FACTS

A. THE MURDER

On September 28, 1987, Jose Rivera was killed in a Bronx park.⁹ At around 11 p.m., Rivera was walking near Kelly Park with his girlfriend and 11 year old son. They were approached by a group of teenagers, and Rivera proceeded to flee. Members of the group chased Rivera, and a brief, violent beating ensued. According to the autopsy report, Rivera's injuries included "multiple lacerations of the right side of the head with brain injury and intracranial hemorrhage, two stab wounds on the back, one piercing the left kidney with abdominal hemorrhage."¹⁰

No arrests were made at the scene of the crime, but three men, Jose Morales, Ruben Montalvo, and Peter Ramirez were all eventually indicted. Ramirez committed suicide before the trial, but Morales and Montalvo were tried and convicted of second degree murder.¹¹ The prosecution case relied heavily on the eyewitness testimony of the victim's girlfriend and son. The

⁸ See 1983 CODE c.1388, § 1 (stating "A confessor who directly violates the sacramental seal incurs a *latae sententiae* excommunication reserved to the Apostolic See; he who does so only indirectly is to be punished according to the gravity of the offence."). A *latae sententiae* excommunication "binds *ipso facto* upon the completion of the forbidden act." 5 THE CATHOLIC UNIVERSITY OF AMERICA, NEW CATHOLIC ENCYCLOPEDIA 707 (1967). Excommunication essentially means an exclusion from the communion of the faithful. One who has been excommunicated may not receive the sacraments, and in some instances may not even be allowed to enter a church. See *id.* at 706.

⁹ See *Morales I*, 154 F. Supp.2d at 710.

¹⁰ See *id.* at 711. The autopsy report was taken from trial transcripts.

¹¹ See *id.*

girlfriend Jennifer Rodriguez testified to seeing Montalvo stab the victim in the back, while Morales and Rivera struck his head with sticks.¹² The defense presented evidence that both Morales and Montalvo were not in the park at the time of the murder.

B. FORNES APPROACHES FATHER TOWLE

Shortly after Morales and Montalvo's conviction, but before their sentencing, a 17 year old Bronx man, Jesus Fornes, requested that Father Joseph Towle come to his house. At this meeting Fornes told Father Towle, that he and two men had murdered Jose Rivera, and that Morales and Montalvo had been wrongly convicted. At a hearing before Judge Chin, Towle explained the contents of the meeting as follows:

It was a heart-to-heart talk where he was feeling very badly that two of his friends had been accused and convicted of something which he had done and it was his desire to do something to make the truth appear and he wanted to make public the fact that he was responsible and they were not.¹³

Fornes asked Father Towle for advice as to what to do, and Towle recommended that "if he had enough courage, he should step forward and accept responsibility for his crime."¹⁴ At the end of the meeting, Towle granted Fornes absolution for his sins.¹⁵ Initially Fornes took the priest's advice. Fornes admitted his complicity as well as Morales' and Montalvo's innocence to Montalvo's mother, Morales' lawyer, and to a legal aid

¹² See *id.* at 715. See also *Morales v. Portuondo*, 165 F. Supp. 2d. 601, 609-10 (S.D.N.Y. 2001). Judge Chin made little effort to hide his dismay at the weakness of the prosecution's case. Judge Chin stated: "The evidence of Morales's and Montalvo's guilt was extremely thin. Only one eyewitness, Rodriguez, placed Morales at the scene, and only two eyewitnesses, Rodriguez and her son, implicated Montalvo." *Id.* at 609. As to Rodriguez's qualifications to testify, Judge Chin did not mention in his first opinion, but does so in this subsequent opinion, that Rodriguez had been drinking at a bodega on the night in question and had a warrant out for her arrest on drug possession. Chin also points out various inconsistencies in her testimony. For instance, at trial Rodriguez stated that she had never seen Montalvo before the night of the attack, but at a pre-trial hearing she had stated that she had seen him two weeks before. *Id.* at 606.

¹³ See *Morales I*, 154 F. Supp.2d. at 711..

¹⁴ See *id.*

¹⁵ See *id.* at 711-12.

attorney.¹⁶ But on the advice of his legal aid attorney, Stanley Cohen, Fornes pled the Fifth Amendment at a hearing to set aside the guilty verdict of Morales and Montalvo. Cohen had explained to Fornes that confessing to the crime would land him in jail, but most likely not gain the two wrongly convicted men their freedom.¹⁷ In light of the Bronx District Attorney's eagerness to retry Morales and Montalvo, Cohen's fears were probably not unfounded.

C. APPEALS AND HABEAS PETITIONS

Morales sought an appeal of his conviction within the New York courts. The Appellate Division, 1st Department affirmed the conviction¹⁸ and the Court of Appeals denied leave to appeal.¹⁹ Eventually in 1997, Morales and Montalvo filed separate habeas corpus petitions in the federal courts, essentially arguing that statements of various witnesses had been improperly excluded from evidence by the trial court. The Morales petition was decided by Judge Chin, and it was denied on procedural grounds.²⁰ Morales appealed, and the Second Circuit remanded the petition to Judge Chin to make findings as to whether the state courts improperly excluded—on hearsay

¹⁶ See *id.* at 712.

¹⁷ See *id.* at 714. Cohen later testified at the habeas petition hearing: I said, look, you are 17, 18 years old, you have your entire life ahead of you. If you feel guilt, you have the priest here, you can feel guilt with the priest. It is not in your best interests to go any further. . . I just said I thought it was – he should not step forward, he should not answer questions and he should invoke the Fifth Amendment.

Id. at 713. Apparently Fornes' lawyer was more persuasive than his priest. Fornes was killed in an unrelated incident in 1997.

¹⁸ See *People v. Montalvo*, 576 N.Y.S.2d 868, 869 (1st Dep't 1991).

¹⁹ See *People v. Montalvo*, 594 N.E.2d 953 (N.Y. 1992).

²⁰ See *Morales I*, 154 F. Supp. 2d. at 717-18. This gives a rough rendering of the rather circuitous route this case has taken. See also *Morales v. Portuondo*, 1997 LEXIS 11094 (S.D.N.Y. 1997)(relying on Second Circuit precedent Judge Chin dismissed the first habeas petition as untimely under 28 U.S.C. §2244(d), the Antiterrorism and Effective Death Penalty Act of 1996). The Second Circuit vacated the judgment when it decided that its previous interpretation of the AEDPA had been dicta. They ruled that the Morales petition was indeed timely under the Act. On remand, Chin denied the petition on the merits, and petitioner Morales appealed once again. Only at this point did the testimony of Father Towle come into play. Second Circuit remanded yet again to Judge Chin. This case is fascinating for its procedural twists and turns alone.

grounds—the statements Fornes had made to others. It was again denied. The petition ultimately landed yet again in front of Judge Chin after he had already dismissed it twice. Apparently, an amended appellate brief persuaded the Second Circuit to remand the case.²¹ The amended brief contained an affidavit from Father Towle stating his discussion with Jesus Fornes. The Towle testimony was equally persuasive to Judge Chin.

Judge Chin's decision went on to ascertain the admissibility of Fornes' statements to various people, and whether the exclusion of these statements violated Morales' due process protections.²² Statements Fornes made to his priest, his lawyer, Montalvo's mother and Morales' lawyer would seemingly be barred by a priest-penitent privilege, the attorney-client privilege, as well as hearsay barriers respectively.²³ Nonetheless, through the deft application of various hearsay exceptions and waiver principles, Judge Chin found such testimony admissible and granted Morales' habeas petition.²⁴

²¹ See *Morales I*, 154 F. Supp. 2d. at 718.

²² See *id.* at 722-32.

²³ See *id.* Statements Fornes made to Towle would presumably be barred by C.P.L.R § 4505, the Priest-Penitent Privilege. See *supra* note 6. Take note however of the rather prominent waiver principle the statute contains. Fornes' discussions with his lawyer would be barred under the attorney-client privilege, and statements to Montalvo's mother and Morales' lawyer would be barred as hearsay. See generally *Chambers v. Mississippi*, 410 U.S. 284 (1973). Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: They are usually not made under oath or other circumstances that

impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury." *Id.* at 298.

²⁴ See *Morales I*, 154 F. Supp.2d at 722-32. Judge Chin found that the Priest-Penitent privilege was waived when Fornes had similar discussions with Montalvo's mother and Morales' lawyer. See *id.* at 728-29. Fornes' discussions with his lawyer would be barred by the attorney-client privilege, but Judge Chin used a residual hearsay exception espoused by the Supreme Court in *Chambers v. Mississippi*, 410 U.S. 284 (1973). "As the Supreme Court held in *Chambers*, even if the evidence would otherwise be inadmissible under the state's rules of evidence, a defendant in a criminal case may nonetheless be entitled to introduce the evidence if its exclusion would render his trial fundamentally unfair." *Morales I*, 154 F. Supp.2d at 730.. Statements Fornes made to Montalvo's mother and Morales' lawyer were deemed admissible under the declarations against penal interest hearsay exception. This exception is based on the premise that statements made by a person which could land him in jail are presumably reliable, since he has no reason to make them up. See *id.* at 723-24..

III. THE SEAL OF THE CONFESSIONAL

A. CATHOLIC CHURCH CANON LAW

Under the Catholic Church Code of Canon Law, a priest may not divulge what is revealed to him in a sacramental confession for any reason at all.²⁵ Not even the death of the penitent lifts this absolute seal.²⁶ The violation of this Church law is one of the highest crimes a Catholic can commit and is punishable by excommunication of the violating priest.²⁷

How was Father Towle able to testify as to the statements Jesus Fornes made to him without running afoul of this rigid proscription? There is no body of Church case law to aid in answering this question, since any documentation of individual cases where the Canon was broken would run afoul of the Canon itself. One must examine the testimony of Father Towle to characterize his meeting with Fornes consisted of. Then one needs to look at what a confession consists of in order to see whether the Fornes meeting met the conditions for a sacramental confession.

B. THE FORNES MEETING

Father Towle has characterized the Fornes meeting as a "heart-to-heart" talk as opposed to a sacramental confession.²⁸ The Archdiocese of New York also gave Father Towle permission to disclose the contents of the Fornes meeting.²⁹ The meeting

²⁵ See *supra* note 7.

²⁶ See 2 JOHN A. ABBO & JEROME D. HANNAN, *THE SACRED CANONS* 17 (1952). Previous to the latest incarnation of the Code of Canon Law compiled in 1983, the relevant section of the Code dealing with the Seal of the Confessional was Canon 889. See *id.*

²⁷ See *supra* note 8. Only a few crimes are punishable by excommunication reserved exclusively to the Holy See. These include laying violent hands upon the Pope, Profanation of the Sacred Species, Priests who attempt to marry, and crimes in the election of the Roman Pontiff. See T. LINCOLN BOUSCAREN ET AL, *CANON LAW: A TEXT AND COMMENTARY* 952 (4th 1966).

²⁸ See *Morales I*, 154 F. Supp.2d at 7-11. See also Jim Dwyer, *In Court, a Priest Reveals a Secret He Carried for 12 Years*, N.Y. TIMES, July 17, 2001 at B4 ("Nevertheless, Father Towle said, he granted Mr. Fornes absolution for his sins at the end of their meeting. 'It was kind of tacked on,' he said.")

²⁹ See *Morales I*, 154 F. Supp.2d at 729. See also Dwyer *supra* note 28 at B4.A spokesman for the archdiocese said last night that Father Towle had in fact cleared his court appearance. Father Towle, given the circumstances as we

was at the request of Fornes and occurred at Fornes' home.³⁰ It can be inferred from Towle's description of the meeting that Fornes seemed more concerned with his friends being wrongly convicted than with the any overbearing guilt at his participation in a murder. In a meeting with his legal aid lawyer, Fornes stated "that he had not come forward earlier because he had been convinced that the other two individuals would be found not guilty—in fact, they had not been involved. He was surprised when the two were convicted."³¹ Anthony Servino, one of Morales' lawyers who Fornes spoke to also testified at the habeas petition hearing.

As Servino testified, Fornes told him that: "it wasn't right that Jose and R[u]ben were in [jail], they didn't do anything, I should be there. Then he kept on repeating, I did the crime, I will do the time. They did nothing. They weren't even there. They weren't even there."³²

Servino sensed that Fornes felt a great deal of guilt for his friends being in jail.³³ These episodes reveal that Fornes' main concern was guilt for his friends being in jail for his crime, and not guilt for the crime itself. This indicates that perhaps the nature of Fornes' meeting was more of a search for advice by a trusted confidant on how to free his friends, other than a confession for the mortal sin of murder.

C. SACRAMENTAL CONFESSION

According to the Council of Trent, the Sacrament of Penance is made up of three acts of the penitent (contrition, confession, and satisfaction), and the spoken absolution of a priest.³⁴ Although it is acknowledged that absolution is the most

understand it, was not violating any church law by testifying,' said Joseph G. Zwilling, the archdiocese's spokesman. 'It was not a sacramental confession, in which confidentiality would be absolute.

Id.

³⁰ See Morales, 154 F. Supp.2d at 711.

³¹ *Id.* at 713.

³² *Id.* at 712.

³³ See *id.*

³⁴ See 11 THE CATHOLIC UNIVERSITY OF AMERICA, NEW CATHOLIC ENCYCLOPEDIA 73 (1967). The Council of Trent was convoked by Pope Paul III in 1542. It lasted 21 years, and was in response to the Protestant reformation. The Council was responsible for numerous Church reforms. See 4 THE CATHOLIC UNIVERSITY OF AMERICA, NEW CATHOLIC ENCYCLOPEDIA 376 (1967).

important factor, the acts of the penitent are vital as well. As the New Catholic Encyclopedia summarizes the doctrinal teachings of the Council of Trent:

“Contrition, confession, and satisfaction are parts of Penance, the quasi matter of the Sacrament; the words of absolution are the form, in which the power of the Sacrament principally resides. All are needed for the integral remission of sins.”³⁵ It is clear that the intentions of a penitent are integral to a full confession. He must be truly sorry for the sins he has committed, confess them to a priest, and then carry out some form of Penance.

On this question of what constitutes a Sacramental Confession, the writings of St. Thomas Aquinas are essential. In his work *The Summa Theologica*, St. Thomas Aquinas responds to a vast series of questions regarding the Christian faith and practice. One of the questions is, “Whether Penance has any parts?”³⁶ To this St. Thomas responds: “The parts of a thing are those out of which the whole is composed. Now the perfection of Penance is composed of several things, viz. contrition, confession, and satisfaction. Therefore Penance has parts.”³⁷ St. Thomas Aquinas goes on further to describe these three parts of the sacrament of Penance. Accordingly the first requisite on the part of the penitent is the will to atone, and this is done by contrition; the second is that he submit to the judgment of the priest standing in God’s place, and this is done in confession; and the third is that he atone according to decision of God’s minister, and this is done in satisfaction: and so contrition, confession, and satisfaction are assigned as parts of Penance.³⁸

Although the absolution may be the pivotal element of the sacrament, the three acts of the penitent are also needed for a sacramental confession.

³⁵ 11 THE CATHOLIC UNIVERSITY OF AMERICA, *supra* note 34, at 77.

³⁶ ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* (Fathers of the English Dominican Province trans.) 2563, Pt. III, Q. 90 (1947).

³⁷ *Id.*

³⁸ *Id.* at 2564.

IV. ANALYSIS AND CONCLUSION

Two factors lead to the conclusion that the meeting Father Towle had with Jesus Fornes was indeed a sacramental confession. First was the granting of absolution at the end of the meeting. Father Towle described this as almost an afterthought.³⁹ The second factor is the length of time it took Father Towle to come forward with his story. For roughly 12 years Father Towle assumed the contents of his meeting were sealed by Canon 983. He states that only after long reflection did he realize that the meeting was not an actual confession.⁴⁰ Nevertheless, for over a decade, Father Towle believed he was bound to keep Fornes' statements secret.

The evidence pointing away from the meeting being a sacramental confession is more persuasive. The intentions of the penitent are of vital importance to a confession, and such, Fornes' statements show that his intention for the meeting was to get his friends out of jail. There appears to be no sign that Fornes was interested in getting the guilt of a murder off his chest. From Fornes' statements to his attorney one can surmise that he never would have come forward if his friends had not been convicted of the crime. His sin was the taking of a human life, not in his friends being in jail. Moreover, Fornes seems to lack any contrition for his role in the murder. Nor is there any sign that Fornes was given some sort of Penance to carry out (the satisfaction). If one could characterize his coming forward to admit guilt as a penance, Fornes did not even fully carry out the task (on the advice of his attorney).

Other evidence pointing away from a confession is the lack of any trappings or ritual surrounding the sacrament, excepting the granting of absolution. There is no evidence of Fornes saying the obligatory "Bless me Father for I have sinned. . .", or an Act of Contrition. Although such formalities are not conclusive, they point away from deeming the meeting a confession.

Another factor to consider is the location of the meeting.

³⁹ See Dwyer, *supra* note 28.

⁴⁰ See *id.* According to the Dwyer article, Father Towle contacted the two incarcerated men in 1997 after Fornes' death. He realized there might have been some way he could help them. "He began to reconsider the nature of his meeting with Mr. Fornes eight years earlier, and he wondered as he went about his life running a small middle school if he might be able to share his secret." *Id.*

Towle went to Fornes' house at the latter's request. As Canon 964 states, "The proper place for hearing sacramental confessions is a church or oratory. . . Except for a just reason, confessions are not to be heard elsewhere than in a confessional."⁴¹ While a deathbed confession certainly would be a just reason to make a confession outside a church, it is questionable whether Fornes' desire to meet in the comfort of his home would qualify as such. It is yet further evidence that the meeting was not a sacramental confession thereby binding Father Towle to Canon 983

The overwhelming weight of evidence supports the contention that the actions of the Archdiocese of New York and Father Towle were entirely proper under Church Canon Law. While skeptics may note the only accounts of the Fornes meeting come from Father Towle himself, his veracity must be assumed not only because of his vocation, but also because he had nothing to gain personally by his testimony. The granting of a habeas petition is a needle in a haystack.⁴² Towle could not have placed much hope in the habeas petition since it had already been denied by the same judge in two previous instances. The meeting as described lacked several crucial elements of a sacramental confession, including contrition for the murder, satisfaction in the form of a penance, and the proper location as set out in Canon 964. Therefore the admissions of Jesus Fornes were not sealed as a result of the Confessional Seal.

⁴¹ 1983 CODE c.964 (Caparros, Theriault & Thorn translation, 1993).

⁴² See *Morales I*, 154 F. Supp.2d at 734.

