IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC94226
	)	
BRENDA A. CHURCHILL,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF MONROE COUNTY
TENTH JUDICIALCIRCUIT
THE HONORABLE RACHEL BRINGER SHEPHERD, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Brenda adopts and incorporates by reference the jurisdictional statement from her opening brief.

STATEMENT OF FACTS

Brenda adopts and incorporates by reference the Statement of Facts from her opening brief.

POINTS RELIED ON[1]

I.

The trial court erred in admitting, over objection at trial, Brenda's statements made during the juvenile hearing, about the non-existence of the child, because this ruling violated Brenda's statutory and constitutional right to counsel, her privilege against self-incrimination and her right to due process of law, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 18(a) of the Missouri Constitution Section 211.211 & Rules 115.01(a) and 123.05(d), in that Brenda was entitled to counsel during the juvenile hearing and the trial court's refusal to continue the hearing "under any circumstances," and threatening her with contempt and criminal charges without advising her that it was her privilege not to testify, resulted in Brenda being compelled to testify against herself, thus depriving herself of her liberty, or to commit perjury and her resulting statements must be suppressed.

State v. Caperton, 207 S.W.795 (Mo. 1918);

Brown v. United States, 245 F.2d 549 (8th Cir. 1957);

In re M.A.J., 998 S.W.2d 177 (Mo. App. W.D. 1999); and

Maness v. Meyers, 419 U.S. 449 (1975).

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[1] Appellant replies to the issue presented in Point I, and relies on her opening brief as to the issue presented in Point II.

ARGUMENT

I.

The trial court erred in admitting, over objection at trial, Brenda's statements made during the juvenile hearing, about the non-existence of the child, because this ruling violated Brenda's statutory and constitutional right to counsel, her privilege against self-incrimination and her right to due process of law, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 18(a) of the Missouri Constitution Section 211.211 & Rules 115.01(a) and 123.05(d), in that Brenda was entitled to counsel during the juvenile hearing and the trial court's refusal to continue the hearing "under any circumstances," and threatening her with contempt and criminal charges without advising her that it was her privilege not to testify, resulted in Brenda being compelled to testify against herself, thus depriving herself of her liberty, or to commit perjury and her resulting statements must be suppressed.

Brenda's Due Process Right to Counsel under the 14th Amendment

Respondent devotes five pages of its brief to explaining why Brenda was not entitled to counsel pursuant to the Fifth and Sixth Amendments at the protective custody hearing (Resp. BR 20-24). However, Brenda asserted in her opening brief that her right to counsel at the civil proceeding emanated from the Due Process Clause of the Fourteenth Amendment and exists to safeguard her

fundamental liberty interest in raising her child. (See App. BR 17-19). "It is fundamental that restrictions upon parental rights must be in accordance with due process of law." *In re N.H.*, 41 S.W.3d 607, 612 (Mo. App. W.D. 2001). The liberty interest of parents and guardians includes the right "to direct the upbringing and education of children under their control." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Indeed, the United States Supreme Court recognizes a due process right to counsel at civil proceedings that impinge upon parental rights, noting that the application of the right must be decided on a case-by-case basis. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 28 (1981). And Missouri has also recognized that, as an aspect of due process, the right to counsel turns not on whether a proceeding may be characterized as "criminal" or "civil," but on whether the proceeding may result in a deprivation of liberty. *State ex rel. Family Support Division v. Lane*, 313 S.W.3d 182, 186 (Mo. App. W.D. 2010).

Respondent brief makes no effort to challenge Brenda's assertion that she was entitled to counsel under the Due Process Clause. Indeed, the circumstances of this case perfectly illustrate why counsel is necessary for a parent in Brenda's situation. The juvenile court judge would later testify at the suppression hearing that, "whether she was entitled to an attorney or not, I wasn't going to continue this case" (TR 107). And this judge was the same person who, in his previous role as prosecutor, had represented the state in terminating Brenda's parental rights to her other children (TR 78). With the mighty power of the State marshalled against her, intent on severing her liberty interest in parenting her child, Brenda

desperately needed the guiding hand of counsel. Indeed, she emphatically and repeatedly requested that the court allow her this right.

In describing the importance of counsel in both civil and criminal cases, the United States Supreme Court has said that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id*.

The right to counsel is one of the most pervasive rights "as it affects the defendant's ability to assert any other rights he may have." *In re D.J.M.*, 259 S.W.3d 533, 535 (Mo. banc 2008) (*citing State v. Dixon*, 916 S.W.2d 834, 837 (Mo. App., W.D. 1995). "Because of the importance of the right to counsel to the fairness of the proceedings, there must be strict and literal compliance with the statutes affecting this right[.]" *In re C.W.*, 211 S.W.3d 93, 97-98 (Mo. banc 2007). In Brenda's case, there was no intent on the part of the juvenile court judge to ensure "strict and literal compliance" with *Section 211.211*, *Rule 115.01(a)* or *Rule 123.05(d)*. Indeed, he testified that he would not have stopped the proceedings whether Brenda was entitled to counsel under these provisions or not (TR 107).

Also, even if a parent's right to counsel in a juvenile proceeding was only a state-created right, as suggested by Respondent (see Resp. BR 25), the Constitution still guaranteed Brenda a procedural due process right to counsel in this case. This is because, the right to counsel in juvenile cases implicates a liberty interest, and such state-created right cannot be arbitrarily abrogated. *See Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (once the State has created a right that implicates a real interest sufficiently embraced within the Fourteenth Amendment "liberty," a party is entitled to minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated). Here, the juvenile court judge arbitrarily abrogated this statutory right to counsel by stating that he would not allow Brenda to have counsel during the hearing, even if she was entitled to it.

Respondent acknowledges that Missouri, by statute and rule, provides that parties to a juvenile proceeding have the right to be represented by counsel, and that an alleged parent is a party under the law (Resp. BR 25). However, Respondent goes on to state that "nothing prevents those proceedings from occurring if a party appears without counsel." (Resp. BR 25). Not surprisingly, Respondent cites no authority that would delegate the right to counsel to a "technicality" in juvenile cases. On the contrary, numerous Missouri cases emphasize the right to counsel guaranteed under Section 211.211.1 and Rule 115.01(a), stating that "because of the importance of the right to counsel to the fairness of the proceedings, there must be strict and literal compliance with the

statutes affecting this right and failure to strictly comply results in reversible error. *See In re M.M.*, 320 S.W.3d 191, 195 (Mo. App. E.D. 2010); *In re D.J.M.*, 259 S.W.3d 533, 535 (Mo. banc 2008).

In *In re M.A.J.*, 998 S.W.2d 177 (Mo. App. W.D. 1999), a juvenile officer filed petitions alleging that a father had neglected his children and that they were in need of care and treatment under the supervision of the court. *Id.* at 182. The father appeared before the court without counsel, and he requested the presence of counsel. *Id.* He did not waive his right to counsel. *Id.* The appellate court reversed, finding that the juvenile court did not comply with the requirements of the statutes or rules regarding counsel. *Id.*

In reversing, it noted the distinction between termination of parental rights cases where the right to counsel is governed by *§ 211.462*, not *§ 211.211*. Under *§ 211.462*, the summons served upon the parents includes notice of the statutory right to have counsel appointed to represent the parents "if they request counsel." Because parents in termination cases receive this notice that they have a right to be represented by counsel and that they must request counsel, it is not unreasonable to require that the request be made before the beginning of the scheduled hearing. *Id.* By contrast, in a juvenile proceeding on a petition which alleges that a child is a need of care and treatment due to neglect or abuse, the parents do not receive written notice of their right to counsel, nor are the parents informed of the need to request appointment of counsel, prior to appearing in court. Here, Brenda requested the presence of counsel at the earliest possible time – when she appeared

for the hearing. Her repeated requests not to proceed without counsel were ignored. The juvenile court judge acted in contravention of its affirmative duty to respect and preserve Brenda's right to counsel, and certainly did not ensure strict and literal compliance with the statutes affecting such right. *In re C.W.*, 211 S.W.3d at 97-98. Her right to counsel and to due process of law was violated.

The Fifth Amendment Privilege

Preservation

Respondent claims that the issue regarding the violation of Brenda's Fifth Amendment privilege was not preserved for appeal (Resp. BR 32). This is false. In a pre-trial motion to suppress, Brenda's trial attorney asserted that Brenda was denied her right to counsel at the juvenile hearing, that she was unable to effectively examine other witnesses, and that she was not advised of her rights, nor the consequences and ramifications of any statement made in court under oath and on the record (LF 27). Further, counsel asserted that the criminal charges, arising from her uncounseled statements made at the juvenile hearing, were "directly attributable and are a collateral consequence, to her inability to retain counsel." (LF 27). Counsel also asserted that the potential "deprivation of liberty" that Brenda faced from statements made at the juvenile hearing showed that counsel was constitutionally required under the due process clause (LF 28-29).

The prosecutor's response to Brenda's motion to suppress focused almost entirely on the theory that Brenda's Fifth Amendment rights were not violated because she did not assert the privilege, nor was she compelled to be a witness

against herself (LF 32-34). The day before the bench trial, the trial court held a suppression hearing where these issues were fully discussed (TR 62-130). The trial court ruled on the suppression motion, finding that Brenda was denied her right to counsel at the juvenile court proceeding, but that her perjured statements following such violation were not constitutionally protected through the remedy of suppression (LF 53-55). Counsel objected when Brenda's statements at the juvenile hearing were introduced at trial, and a continuing objection was permitted and overruled (TR 144). As this was a bench trial, the filing of a motion for new trial was not required. *Rule 29.11(e).*

Therefore, both as a direct constitutional violation and as the prejudice stemming from the violation of Brenda's right to counsel, the issue regarding the Fifth Amendment privilege was fully litigated by both parties and ruled on by the trial court. The issue is preserved for appeal, despite Respondent's protestations to the contrary.

<u>While depriving her of counsel, the Court failed to warn Brenda of her privilege</u>

The State asserts that the juvenile court was not required to warn Brenda of her privilege not to testify or incriminate herself, that she failed to invoke the privilege on her own, and that the privilege did not even apply in this situation because: a) the hearing was not to investigate or prosecute her, but to determine if she was the parent of a child in need of protection; and b) her statement constituted a crime.

First, the privilege applied to Brenda at the juvenile hearing. The State had filed a petition, alleging that a child of Brenda's was abused or neglected and in need of protection. It is easy to see how these allegations could subject her to any number of criminal charges (child abuse, assault, endangering the welfare of a child, among others). The Supreme Court has always broadly construed the protection of the Fifth Amendment privilege to assure that an individual is not compelled to produce evidence which later may be used against her as an accused in a criminal action. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). The protection does not merely encompass evidence which may lead to a criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used her in a criminal prosecution. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Evidence establishing that there was a child and Brenda's parentage of that child would have been basic elements to be proved in any criminal case involving her responsibility as a parent to protect the child from harm – it was clearly a link in the chain of evidence that could lead to prosecution, and she would have been entitled to invoke the privilege upon being asked these questions.

Respondent cites several federal circuit court cases for the proposition that, when a statement itself is a crime, and not inculpatory with respect to a previous crime, the privilege does not apply (Resp. BR 30-31). All of these cases are inapposite and do not provide any basis for admitting Brenda's statement here. In

both Ninth Circuit cases cited by Respondent, it is clear that both defendants' statements (amounting to prospective, anticipatory threats to kill the President) were not made in response to questioning, neither defendant had made an unequivocal request for counsel, and there was no evidence in either record that the defendants uttered their statements as the result of "mistake, duress or coercion." *See United States v. Mitchell*, 812 F.2d 1250, 1252-1255 (9th Cir. 1987); *United States v. Gordon*, 974 F.2d 1110, 1115 (9th Cir. 1992). Likewise, in *United States v. Melancon*, 662 F.3d 708, 712 (5th Cir. 2011), the defendant was directly advised that he did not have to answer the officer's questions before he made the statement.

Here, Brenda's statements[2] were made in response to direct questioning, over repeated and unequivocal requests for counsel that were ignored, without the advisement of her privilege not to incriminate herself, in an inherently coercive and intimidating environment, where the State was attempting to take her child, throw her in jail and charge her with contempt. Her unwarned, uncounseled statement made under such duress was the product of coercion.

[2] Respondent's reliance on *Baltimore City Dep't of Social Services v. Bouknight*, 493 U.S. 549, 555 (1990), is similarly unavailing, as the State did not seek to admit evidence of her *act* in failing to produce a child; rather, the State relied upon her *statement* that she was not the child's parent, in bringing the perjury charge.

Respondent also cites *United States v. Owuor*, 397 Fed Appx. 572, 575 (11th Cir. 2010) for support, but this case perfectly illustrates the distinction between a statement which is "confessional in nature" and one which is "not confessional in nature but in and of itself constitutes the crime charged." *Id.* at 575 (*citing United States v. Kirk*, 528 F.2d 1057, 1062 (5th Cir. 1976). The Fifth Amendment privilege applies to the former statement, but not to the latter. Here, Brenda's statement was "confessional in nature" because it related to the allegations in the petition which were under investigation at the hearing. In other words, the statement was evidence of a potential prior offense, and was not a crime in and of itself. For example, in criminal cases, the State routinely admits at trial evidence of statements made by the defendant – even if the statement is believed by the State to be a false denial of innocence – as long as Fifth Amendment protections have been followed (i.e., in the custodial interrogation setting, if the *Miranda* warnings regarding silence and counsel have been administered and waived). However, if Respondent's analysis were applied, that same false denial of guilt, if made under oath, would subject the defendant to perjury charges, if she was found guilty. An even more outrageous example of Respondent's theory is that a false *confession* made under oath similarly could be charged as a perjured statement, because it would not be protected by the privilege. Brenda's situation is not at all what the federal cases contemplate or encompass. Rather, Brenda's statement was a statement "confessional in nature"

that related to the charge at issue at the hearing, and did not, in itself, constitute evidence of another crime, and the Fifth Amendment analysis should apply.

Likewise, the cases of *United States v. Mandujano*, 425 U.S. 564 (1976) and *United States v. Wong*, 431 U.S. 174 (1977), are inapposite because in both cases, the witnesses appearing before the grand jury were advised of their Fifth Amendment privilege, and neither witness was explicitly denied an opportunity to consult with counsel. In fact, *Mandujano* was explicitly granted the opportunity to consult with counsel outside of the grand jury room, and he waived that right. The plurality opinion hinged on the fact that no compulsion to answer self-incriminating questions was applied, *Id.* at 574, and that the warnings administered, including the opportunity to consult with counsel if he desired, were more than sufficient to inform the defendant of his privilege and his responsibilities and particularly of the consequences of perjury. *Id.* at 580-581. The Supreme Court also noted that there could be cases involving abuse of process which would require the voiding of a subsequent perjury charge. *Id.* 426 U.S. at 582-583 (*citing Brown v. United States*, 245 F.2d 549 (8th Cir. 1957). Indeed, as "abuse of process" was not involved in *Mandujano*, the Court had "no occasion to address the correctness of the results reached by the courts in these inapposite instances." But, as discussed earlier, "abuse of process" clearly occurred in Brenda's case, as she was intentionally deprived of her right to counsel under the Due Process Clause and state statutory provisions. As requested in Brenda's opening brief, this Court should more properly follow the Missouri precedent of

State v. Caperton, 207 S.W.795 (Mo. 1918), where this Court reversed the defendant's perjury conviction because his statements made before the grand jury were made without advisement that "it is his privilege not to testify unless he wants to do so, and that anything he may say may be used against him." *Id.* at 796. The Court presumed that the perjured statements were thereby made involuntarily and the motion should have been sustained. *Id.*

Additionally, "the assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion." *Maness v. Meyers*, 419 U.S. 449, 466 (1975). Indeed, had the juvenile court judge followed the law, Brenda would have had the assistance of counsel at the hearing, who could have fully explained her privilege to her. Her repeated request for counsel was a clear indication that she needed legal advice and counsel. Denying her that basic right, it should have been incumbent upon the trial court to advise her of the privilege when she was called to the stand to testify.

Respondent cites *Minnesota v. Murphy*, 465 U.S. 420, 440 (1984) and *Brogan v. United States*, 522 U.S. 398, 399 (1998), for the proposition that Brenda had waived the privilege because she did not assert it on her own, that the questioning authorities were not required to advise her of it, and that the Fifth

Amendment does not confer a privilege to lie (Resp. BR 33-34). Yet, the Court in *Murphy* acknowledged that this conclusion was appropriate because the totality of the circumstances were not such as to overbear Murphy's free will, and that no identifiable factor was present which would deny Murphy his "free choice to admit, to deny, or to refuse to answer." *Id.* at 429. Murphy was a probationer who repeated incriminating statements to his probation officer that he had previously made to a treatment counselor, without being advised of the Fifth Amendment privilege. *Id.* at 423-424. The Court found that no factors were present that would have compelled Murphy to waive his privilege. *Id.* at 440.

Similarly, Petitioner Brogan engaged in a voluntary, non-custodial conversation with federal IRS agents, who advised Brogan that if he wished to cooperate, he should have an attorney contact the United States Attorney's Office, and that if he could not afford an attorney, one could be appointed for him. *Brogan*, 522 U.S. at 399. Brogan decided not to talk to an attorney; the agents then asked petitioner if he would answer some questions, and he agreed. *Id.* During the course of that conversation, Brogan made a statement that the agents could affirmatively prove was a lie. *Id.* at 399-400. Brogan moved to suppress the statement as violating his Fifth Amendment privilege. In denying his claim, the Court held that "cruel trilemma" of self-accusation, perjury or contempt, that first appeared in *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964), was used to explain the importance of a suspect's Fifth Amendment right to remain silent when subpoenaed to testify in an official inquiry, and that the

same concerns would not be altered to apply in the situation facing Brogan. *Id.* at 404.

Brenda's situation could not be more different than Murphy's and Brogan's. In the face of Brenda's explicit and repeated request for counsel – a right to which she was statutorily and constitutionally entitled when State actors attempted to assert custody of her child alleging her abuse and neglect of the child – the juvenile court refused to grant her request. Instead, the judge – who had previously, as prosecutor, severed Brenda's parental rights to her other children – told her that she must still submit to questioning and that anything done on that day "would be a temporary matter." (State's Ex. 1, p. 24). This was coercive and compulsive and Brenda's statement should be suppressed as she was not advised of her privilege and was not allowed to have counsel present.

For the reasons presented here and in her opening brief, Brenda's statement should have been suppressed, and this Court must reverse her conviction.

CONCLUSION

Brenda respectfully requests that this Court reverse her conviction and discharge her from her sentence.

Respectfully submitted,

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Certificate of Compliance

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certificate of compliance and service, and appendix, the brief contains **4,314** words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 12th day of September, 2014, an electronic copy of Appellant's Substitute Reply Brief was placed for delivery through the Missouri e-Filing System to Evan Buchheim, Assistant Attorney General, at Evan.Buchheim@ago.mo.gov.

/s/ Amy M. Bartholow

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