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IN THE
SUPREME COURT OF MISSOURI

No. SC97165

JEREME J. ROESING,

Appellant,

v.

DIRECTOR OF REVENUE,
STATE OF MISSOURI,

Appellee.

Appeal from the Circuit Court of Jackson County, Missouri
Honorable Robert Trout, Associate Circuit Judge
Associate Circuit Case No. 1616-CV10573

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF MISSOURI

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Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* AND AUTHORITY TO FILE 6

STATEMENT OF FACTS 7

ARGUMENT 8

I. The plain, ordinary meaning of Section 577.041 is to convey a right to speak privately with counsel. 8

II. Alternatively, the Court should construe Section 577.041 to include a right to speak privately to counsel in order to avoid an absurd outcome. 13

CONCLUSION 17

CERTIFICATE OF SERVICE AND COMPLIANCE 19

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

TABLE OF AUTHORITIES

Cases

Abrams v. Ohio Pac. Express,
819 S.W.2d 338 (Mo. banc 1991) 8

Blaske v. Smith & Entzeroth, Inc.,
821 S.W.2d 822 (Mo. banc 1991) 14

Denius v. Dunlap,
209 F.3d 944 (7th Cir. 2000) 14

Frye v. Levy,
440 S.W.3d 405 (Mo. banc 2014) 10

Hunt v. Blackburn,
128 U.S. 464 (1888) 10

Kilpatrick v. Dir. of Revenue,
756 S.W.2d 214 (Mo. App. E.D. 1988) 13

Lewis v. Gibbons,
80 S.W.3d 461 (Mo. banc 2002) 13

Lucas Subway MidMo, Inc. v. Mandatory Poster Agency, Inc.,
524 S.W.3d 116 (Mo. App. W.D. 2017) 8

McNeil v. Wisconsin,
501 U.S. 171 (1991) 14

Metro Auto Auction v. Dir. of Revenue,
707 S.W.2d 397 (Mo. banc 1986) 8

Murray v. Mo. Hwy. & Transp. Comm'n,
37 S.W.3d 228 (Mo. banc 2001) 14

In re Page,
257 S.W.2d 679 (Mo. banc 1953) 9

Reichert v. Bd. of Educ. of City of St. Louis,
217 S.W.3d 301 (Mo. banc 2007) 14

Roesing v. Dir. of Revenue,
2018 WL 1276969 (Mo. App. W.D. Mar. 13, 2018) 12, 13

S. Metro. Fire Protection Dist. v. City of Lee's Summit,
278 S.W.3d 659 (Mo. banc 2000) 10

Spradlin v. City of Fulton,
982 S.W.2d 255 (Mo. banc 1998) 14

State ex rel. Great Am. Ins. Co. v. Smith,
574 S.W.2d 379 (Mo. banc 1978) 10

State v. Milliman,
802 N.W.2d 776 (Minn. Ct. App. 2011) 9

Swidler & Berlin v. United States,
524 U.S. 399 (1998) 9

Texas v. Cobb,
532 U.S. 162 (2001) 14

Union Elec. Co. v. Dir. of Revenue,
425 S.W.3d 118 (Mo. banc 2014)) 14

United States v. DiDomenico,
78 F.3d 294 (7th Cir. 1996) 11, 13

United States v. Rimell,
21 F.3d 281 (8th Cir. 1994) 9

Upjohn v. United States,
449 U.S. 383 (1981) 10

Weatherford v. Bursey,
429 U.S. 545 (1977) 11

Statutes

RSMo. § 40.050 16

RSMo. § 190.165 16

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

RSMo. § 211.059 ... 16

RSMo. § 484.020 ... 8

RSMo. § 544.170 ... 15

RSMo. § 575.320 ... 17

RSMo. § 577.041 ... *passim*

RSMo. § 600.048 ... 15

Rules

Mo. Sup. Ct. R. 4-1.6 ... 9

Mo. Sup. Ct. R. 31.01 ... 13, 15

Other Authorities

Investigation of the St. Louis County Family Court, U.S. DEP'T OF JUSTICE, https://www.justice.gov/sites/default/files/crt/legacy/2015/07/31/stlouis_findings_7-31-15.pdf ... 17

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

INTEREST OF *AMICUS CURIAE* AND AUTHORITY TO FILE

This brief is filed with the consent of the parties.

The American Civil Liberties Union is a nationwide nonprofit, nonpartisan organization with more than 1.6 million members dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the state and federal constitutions. The ACLU of Missouri is the statewide affiliate of the ACLU, with a longstanding interest in preserving Missourians' rights to meaningful access to counsel and, more broadly, the rights of Missourians during interactions with government officials, including police officers. The ACLU of Missouri maintains offices in St. Louis and Kansas City and has approximately 19,000 members.

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

STATEMENT OF FACTS

Amicus adopts the statement of facts as set forth in Appellant's brief.

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

ARGUMENT

I. The plain, ordinary meaning of RSMo. § 577.041 is to convey a right to speak privately with counsel.

The courts' primary role when considering the meaning of a statute "is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent." *Abrams v. Ohio Pac. Express*, 819 S.W.2d 338, 340 (Mo. banc 1991). Words in the statute should be considered "in their plain and ordinary meaning." *Metro Auto Auction v. Dir. of Revenue*, 707 S.W.2d 397, 401 (Mo. banc 1986) (quoting *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 598 (Mo. banc 1977)). There is no need for statutory construction when the language is plain and unambiguous. *Abrams*, 819 S.W.2d at 340.

Section 577.041 conveys a right to "twenty minutes in which to attempt to contact an attorney." The word "attorney" is most telling: in its plain and ordinary meaning, it denotes a person who gives legal advice and maintains a professional Bar license. Like in every other state, no person without a Bar license can practice law in Missouri. *See, e.g.*, RSMo. § 484.020 ("No person shall engage in the practice of law . . . unless he shall have been duly licensed therefor"); *Lucas Subway MidMo, Inc. v. Mandatory Poster Agency, Inc.*, 524 S.W.3d 116, 126 (Mo. App. W.D. 2017) ("This ban is designed to protect the public from receiving legal advice or assistance from a person unqualified to give such advice or assistance."). Even a person who is likely qualified to give legal advice—for example, who has graduated from law school, sat for a state Bar exam, and demonstrated legal ability—cannot practice law without first obtaining a license. *E.g.*, *United States v.*

Rimell, 21 F.3d 281, 286 (8th Cir. 1994) (holding that there is "no doubt" that recent J.D. graduate's participation in criminal trial violated Missouri ethics rules).

More importantly, a person who does not maintain a license is not only barred from actually practicing law but also from calling herself an "attorney." *See In re Page*, 257 S.W.2d 679, 684 (Mo. banc 1953) (holding disbarred attorney in contempt for using the word "lawyer" on letters and collecting other state cases where disbarred persons were disciplined for using words "attorney at law" in letters or on office signs); *see also State v. Milliman*, 802 N.W.2d 776, 779 (Minn. Ct. App. 2011) (considering legislative intent behind the word "attorney" and concluding that, in accordance with plain language, dictionary definition, and judicial usage, "the unambiguous meaning of the word 'attorney,' as used in [state statute] is an attorney-at-law, *i.e.,* a lawyer who is **licensed** to practice law") (emphasis added).

There are many differences among attorneys—including in experience, practice area, and availability to take a late-night telephone call from a driver suspected of drinking too much—but because they are all licensed they all share a legal duty of confidentiality. *See* Mo. Sup. Ct. R. 4-1.6. The circumstances under which an attorney can reveal the content of client communications to a third party are few in number and closely circumscribed. *See id.* Protections for the secrecy of attorney-client communications are ubiquitous; indeed, the sanctity of few other relationships has garnered such universal and longstanding solicitude from courts and policymakers. *See, e.g.*, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) ("The attorney-client privilege is one of the oldest recognized privileges for confidential communications.");

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."); *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 383 (Mo. banc 1978) (commenting that attorney-client privilege dates from the reign of Elizabeth I of England and "secrecy has always been considered important" in the attorney-client relationship).

The General Assembly must be presumed to be aware of the context in which it passed Section 577.041. *See Frye v. Levy*, 440 S.W.3d 405, 420 (Mo. banc 2014) ("this Court presumes the legislature is aware of the existing law"); *S. Metro. Fire Protection Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2000) (holding that statutory "words must be considered in context"). That context reveals that the plain, ordinary meaning of "attorney" is a person with a Bar license and therefore a person from whom a client or potential client can seek confidential legal advice without fear that information will be revealed.

Because the ability to seek legal advice without fear of disclosure is central to efficacy of legal counsel and respect for the rule of law, courts have long held that the right to consult with counsel in all but the most exceptional circumstances is understood to include the right to consult with counsel *privately* vis-à-vis the government, regardless of whether the government actually attempts to admit attorney-client communications into evidence. *E.g.*, *Upjohn v. United States*, 449 U.S. 383, 389 (1981) (holding that

attorney-client privilege "encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice"); *Weatherford v. Bursey*, 429 U.S. 545, 551 (1977) (commenting that remanding in past cases had been appropriate where government had secretly recorded attorney-client conversations, even though conversations had not been used at trial or in briefs); *United States v. DiDomenico*, 78 F.3d 294, 299 (7th Cir. 1996), *cert. denied*, 519 U.S. 1006 (1996) (commenting that, hypothetically, government practice of recording all conversations between criminal defendants and their lawyers without ever using them for prosecution would still "greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel, because knowledge that a permanent record was being made of the conversations between the defendants and their lawyers would make the defendants reluctant to make candid disclosures").

In fact, in *State ex rel. Smith*, this Court examined the historical underpinnings of attorney-client privilege and rejected the view that the privilege should be seen as a narrow exception to the general rule that all admissible, relevant evidence be available to a trier of fact. Instead, the Court framed "confidentiality of communications between attorney and client as the more fundamental policy," and disclosure as its narrow exception. *Id.* at 383. In the *Smith* Court's view, the expectation of confidentiality when speaking with an attorney was not only derived from the common law and responsive to "greater societal need" but also "essential for [attorney-client] relationships to be fostered

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

and to be effective." *Id.* That societal need is just as acute in civil and administrative proceedings as in criminal prosecutions.

In light of the plain meaning of "attorney," the right to "contact an attorney" is subverted by a reading of § 577.041 that allows government surveillance of resulting attorney-client conversations. Given the diversity of experience and specialty of the members of the Bar, it is the obligation not to disclose client information that most plainly separates attorneys from non-attorneys. And it is attorneys' non-disclosure obligation that makes them uniquely suited, as a class, to provide legal advice. Clients can share information with their attorneys that is embarrassing, shameful, or potentially inculpatory without fear of exposure, since lawyers must conceal that information or face liability and discipline. By corollary, attorneys can provide superior legal advice to that of informal advisers because they have access to a more complete set of facts. Section 577.041 provides a specific right to speak with an *attorney*, as opposed to a general right to phone a friend, and that term is meaningful.

To disregard the plain meaning of "attorney" is to presume the legislature intended to create some lesser facsimile of the attorney-client relationship whose defining feature is something other than confidentiality of communications. Judge Witt, dissenting in the appellate court, commented rightly that "the legislature cannot be assumed to have established such a relationship by simply not clarifying that a driver is allowed to consult with an attorney privately—as are all other attorney/client consultations." *Roesing v. Dir. of Revenue*, No. WD 80585, 2018 WL 1276969, at *7 (Mo. Ct. App. Mar. 13, 2018) (Witt, J., dissenting). Allowing government surveillance of attorney-client conversations

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

initiated under Section 577.041, in situations where the client has no way to protect the confidentiality of his communications, would reduce the attorney-client relationship to a notional formalism.[1] *See DiDomenico,* 78 F.3d at 300 (commenting that to "prevent[] effective communication between client and lawyer" would be to "empty[] the right to the assistance of counsel of much of its meaning").

As Judge Witt commented in dissent below, "[t]he legislature did not 'exclude' the word 'privately' because it did not intend to grant a private consultation." *Roesing*, 2018 WL 1276969, at *8 (Witt, J., dissenting). Instead, "[t]he term was not included because consultation with an attorney implicitly and necessarily includes privacy." *Id.*; *see also Lewis v. Gibbons*, 80 S.W.3d 461, 465 (Mo. banc 2002) ("The construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical and [to] give meaning to the statutes.") (internal quotations omitted). Considering the plain, ordinary meaning of "attorney," the right of consultation embodied in Section 577.041 entails a right to private communication.

II. Alternatively, the Court should construe Section 577.041 to include a right to speak privately to counsel in order to avoid an absurd outcome.

When ambiguity exists, or when the ordinary meaning of the statute would lead to illogical results, the Court must turn to statutory construction. *Spradlin v. City of Fulton*,

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[1] It is also hard to square with the courts' earlier characterization of Section 577.041 as creating a limited right to "consult with counsel," whose terms also necessarily imply private communication. *E.g.*, *Kilpatrick v. Dir. of Revenue*, 756 S.W.2d 214, 216 (Mo. App. E.D. 1988) (also citing Mo. Sup. Ct. R. 31.01, which provides persons in custody upon suspicion of alleged commission of crime right to "consult with counsel").

982 S.W.2d 255, 258 (Mo. banc 1998). "Construction of statutes should avoid unreasonable or absurd results." *Reichert v. Bd. of Educ. of City of St. Louis*, 217 S.W.3d 301, 305 (Mo. banc 2007) (citing *Murray v. Mo. Hwy. & Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo. banc 2001)). Assuming the Court determines Section 577.041.1 is ambiguous, it should still reverse the appellate court because its interpretation will lead to absurdities: either the statute will endorse routine disregard for constitutional and statutory protections of the right to counsel, or police officers will be forced to predict what other parties will do in the future to understand the scope of their legal obligations in the present.

There would be no question that Roesing would have had the right to counsel—and its corollary right to speak privately with counsel—if criminal charges had been pressed after he had been arrested and taken into custody. *See, e.g.*, *Denius v. Dunlap*, 209 F.3d 944, 953 (7th Cir. 2000) ("Where the Sixth Amendment right to the effective assistance of counsel attaches, that right includes the ability to speak candidly and confidentially with counsel free from unreasonable government interference."). Although the Sixth Amendment does not attach until prosecution has commenced, a constitutional right to counsel rooted in the Fifth Amendment privilege against self-incrimination attaches once custodial interrogation begins and a request for counsel has been made. *See McNeil v. Wisconsin*, 501 U.S. 171, 176–77 (1991) (describing holdings of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451. U.S. 477 (1981)); *Texas v. Cobb*, 532 U.S. 162, 171 n.1 (2000) (noting "Fifth Amendment's role . . . in protecting a defendant's right to consult with counsel before talking to police").

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

In addition, the General Assembly has commanded via statute that anyone detained upon suspicion of a crime is entitled to converse privately with an attorney. Section 600.048.3 even compels jailers to maintain a private *space* for attorney communications. *Id.* ("It shall be the duty of every person in charge of a jail . . . to make a room or place available therein where any person held in custody under . . . suspicion of a crime will be able to talk privately with his or her lawyer, lawyer's representative, or any authorized person responding to a request for an interview concerning his or her right to counsel."); *see also* RSMo. § 544.170.2 (requiring that anyone confined in a jail on suspicion of a criminal offense "shall be permitted at any reasonable time to consult with counsel"); Mo. Sup. Ct. R. 31.01 (requiring that anyone arrested or confined in a jail on suspicion of a criminal offense "shall promptly, upon request, be permitted to consult with counsel"). The Fifth Amendment and statutory rights to consult counsel attach even if a person is never charged with a crime.

So if Section 577.041 is construed to exclude a right to private communications with counsel, it will not only permit but *endorse* what the Constitution and other state statutes prohibit: government interference with the right of a person accused of a crime to speak candidly with his or her attorney. Courts have a duty to read ambiguous statutes in harmony with other laws on the same subject and to avoid constitutional problems. *See Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo. banc 2014); *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838–39 (Mo. banc 1991). The appellate court's reading of Section 577.041 abrogates those responsibilities.

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

But even if the Court were to conclude that other related constitutional and statutory protections do not apply, the outcome of the appellate court's reading is absurd as a matter of fact: the rights of drivers asked to take breathalyzer tests can be determined only after future events have occurred. A police officer who has arrested a driver like Roesing will have to predict whether the state will ultimately decide to press criminal charges before deciding whether to listen in on that driver's conversation with his or her attorney. In other words: two people arrested under identical circumstances and asked to take a breathalyzer test would have different rights *in the present* depending solely on whether criminal charges are filed *in the future*. From the perspective of a police officer trying to make a decision about whether to forego surveilling an attorney-client call that could contain potentially useful leads on potential criminal activity, the appellate court's reading of Section 577.041 creates an absurd time loop more at home in science fiction than law. A right to speak with counsel confidentially should not be like Schrödinger's Cat, both alive and dead until a later determination. Even without considering other constitutional and statutory protections, a right to private consultation with an attorney is the only sensible reading of § 577.041.

Further, if § 577.041 is not read to include a right to speak privately with an attorney, the scope of other statutes conveying a right to consult counsel also becomes uncertain. *See, e.g.*, RSMo. §§ 40.050 (defendants in courts-martial, before accused can request a judge-only trial); 190.165.3(1) (defendants in license revocation proceedings for emergency vehicle drivers); 211.059(4) (juveniles taken into custody); 491.685 (defendants in child victim cases before cross-examination by counsel without defendant

Electronically Filed - SUPREME COURT OF MISSOURI - October 29, 2018 - 09:22 PM

present); 575.320(4)(b) (persons in custody, generally).[2] This unwieldly and absurd result can be avoided by construing—to the extent construction is necessary—Section 577.041 to include a right to communicate privately with counsel.

CONCLUSION

Amicus respectfully requests the Court hold that the right to speak to an attorney under § 577.041 includes a right to speak privately, without surveillance or recording by agents of the government.

[2] Although persons in some of these situations also have a constitutional right to counsel, their statutory rights are more extensive. *See, e.g.*, *Investigation of the St. Louis County Family Court*, U.S. DEP'T OF JUSTICE, at 8, https://www.justice.gov/sites/default/files/crt/legacy/2015/07/31/stlouis_findings_7-31-15.pdf (commenting that "the U.S. Constitution provides children with the right to counsel in delinquency proceedings" and "Missouri law provides that children have a right to counsel *at every stage* of delinquency proceedings") (emphasis added). But the confidentiality of attorney-client communications is not dependent on the existence of a constitutional right to engage in such communications.

In its investigation of the St. Louis County Family Court, DOJ found "substantial deficiencies" in indigent juveniles' right to access counsel, including the fact that "despite their quasi-prosecutorial functions, [deputy juvenile officers] have unfettered access to children during the pendency of proceedings, particularly those in detention." *Id.* at 15. Because it turns on what the General Assembly means when it conveys a statutory right to consult with counsel that has no constitutional analogue, the appellate decision in this case undermines the vitality of children's statutory right to counsel in delinquency proceedings and exacerbates the role confusion that already exists.

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on October 29, 2018, the foregoing amicus brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 3640 words (excluding the cover, signature block, and this certificate of service and compliance), as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that the electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert