

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF:

T.M.

Case No. 07-2317

On Appeal from the Madison
County Court of Appeals
Twelfth Appellate District
Court of Appeals Case Nos.
CA2007-04-016 & CA2007-05-020

**MERT BRIEF OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF
APPELLANTS SUMMER OVERFIELD AND SHANE MANLEY**

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STATEMENT OF THE FACTS

Amicus adopts by reference the statement of the case and facts set forth by Appellants, Summer Overfield and Shane Manley.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Office of the Ohio Public Defender is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. Along with these responsibilities, the Ohio Public Defender also plays a key role in the promulgation of Ohio statutory law and procedural rules. By participating in the law-making process and by zealously representing the interests of his clients, the Public Defender endeavors to ensure that the laws of this State protect all who find themselves within its borders: the permanent citizen and the itinerant traveler; the wealthy, as well as the indigent; the corporation and the private person.

Like this Court, the Ohio Public Defender is interested in the effect of the law that the instant case will have on those parties who are not yet, but may someday be involved in, similar litigation. The inalienable constitutional protection at stake in this case reaches far beyond the factual foundation in which it is presented here. The result of this case will affect all manner of cases in the State of Ohio, and accordingly, the Ohio Public Defender has an enduring interest in protecting the integrity of the justice system and ensuring equal treatment under the law.

PROPOSITION OF LAW

Compelling A Parent To Admit To The Abuse Of A Child, As A Requirement Under A Case Plan For Reunification Of The Child With The Parent, Is Unconstitutional And A Violation Of The Parent's Fifth Amendment Right Against Self-Incrimination.

This appeal raises the critical question of whether, in the “best interests of the child,” the State may require a natural parent to admit to abusing the child, before it will consider reunification. In this case, the State sought, successfully, to predicate potential reunification upon a case plan that reads, in pertinent part: “the person or persons responsible for [injuries to the child] will verbally admit their responsibility for the physical abuse.” A social worker with Children Services unambiguously testified that the only way Appellants could comply with the requirements of the case plan, and thus be considered for reunification with their child, was for one of them to admit to physically abusing the child. This Court has been called upon, in this case, to defend and preserve the privilege of the Fifth Amendment to the United States Constitution against self-incrimination. Because the State, here, attempted to compel Appellants to make “disclosures that [Appellants] reasonably believe[s] could be used in a criminal prosecution or could lead to other evidence that might be so used,” Amicus Curiae the Office of the Ohio Public Defender respectfully requests this Court to reverse the decision of the Twelfth District Court of Appeals and adopt the position of the Appellants, Summer Overfield and Shane Manley, in this case. *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt Co.* (2004), 542 U.S. 177, syllabus.

The right to remain silent arises from the Fifth Amendment to the United States Constitution, which provides that “[n]o person . . . shall be compelled in any criminal case

to be a witness against himself." *Miranda v. Arizona* (1966), 384 U.S. 436, 442. The Fifth Amendment guarantee not only protects the individual against being made to testify against himself in a criminal proceeding, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *McCarthy v. Arndstein* (1924), 266 U.S. 34, 40. In *Arndstein*, the United States Supreme Court squarely held that "the privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant."

Unless a person "chooses to speak in the unfettered exercise of his own free will . . . and to have no penalty for that silence, the Fifth Amendment guarantees the right to remain silent." *Malloy v. Hogan* (1964), 378 U.S. 1, 8. A confession "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Bram v. United States* (1897), 168 U.S. 532, 542-43. Confessions can be involuntary, whether coerced by physical intimidation or psychological pressure. *Townsend v. Sain* (1963), 372 U.S. 293, 307. Subtle psychological pressure can be as coercive as hair pulling or arm twisting. *Malloy, supra*.

The Fifth Amendment's protection against self-incrimination provides the cornerstone upon which the entire body of law concerning custodial interrogation is built. In *Miranda v. Arizona* (1966), 384 U.S. 436, the Supreme Court clearly and succinctly set forth certain constitutional rights which must be announced to a suspect before custodial interrogation occurs. "Once warnings have been given, the subsequent procedure is clear.

If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” *Michigan v. Mosley* (1975), 423 U.S. 96, 100. Moreover, “[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain or appointed counsel.” *Escobedo v. Illinois* (1964), 378 U.S. 478, 490.

As Appellee points out in its Memorandum in Response to Appellants’ Memorandum in Support of Jurisdiction, “[t]he case plan did contain a provision that there had to be an admission by the guilty party before reunification could occur.” Accordingly, there is no dispute that Children Services conditioned reunification upon one of the appellants admitting to child abuse, an admission that would rise to the level of a confession to criminal conduct. Applying Fifth Amendment principles, it is patent that Children Services’ act in requiring Appellants to admit to child abuse in order to regain custody of their children blatantly ignores and dispenses with the Fifth Amendment’s basic protection that no person be forced to testify against himself. That the case plan required Appellants to admit to a perpetrating a crime is a fact that the court of appeals chose to evade, and a fact that Appellee State of Ohio would have this Court ignore as well.

The court of appeals simply avoided reference to the Fifth Amendment claims implicated by this case, whereas the State contends that any error arising from inclusion of the provision requiring the admission would amount only to harmless error. This Court, however, must not dispense with its duty to ensure that the lower courts of the State of

Ohio are upholding the rights conferred upon this state's citizens by both the Ohio Constitution as well as the United States Constitution.

The Fifth Amendment is a foundational tenet of American criminal procedure, but the protection also extends to protect the individual from “[answering any] official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” *Arndstein*, supra, 266 U.S. at 40. Exploring the parameters of the Fifth Amendment privilege against self-incrimination in the non-criminal context, the Supreme Court has stated that “[b]ecause the failure to assert the privilege will often forfeit the right to exclude the evidence in a subsequent ‘criminal case,’ it is necessary to allow assertion of the privilege prior to the commencement of a ‘criminal case’ to safeguard the core *Fifth Amendment* trial right.” *Chavez v. Martinez* (2003), 538 U.S. 760, 771, emphasis in original. Surveying its jurisprudence on Fifth Amendment violations, the Court noted that it “has allowed the *Fifth Amendment* privilege to be asserted by witnesses in noncriminal cases in order to safeguard the core constitutional right defined by the *Self-Incrimination Clause* – the right not to be compelled in any criminal case to be a witness against oneself.” *Id.* at 772.

Though the court of appeals in this case failed to reach the Fifth Amendment issue, other Ohio appellate courts have not only reached the issue but have protected the significant constitutional right. For instance, in *State v. Wardlow*, 20 Ohio App.3d 1, 484 N.E.2d 276 (Hamilton App. 1985), the court was asked to consider the constitutionality of R.C. 2921.22, which criminalized the failure to report a serious crime about which a person has knowledge. Wardlow was convicted of child endangering, R.C. 2919.22, and failure to report a crime, in violation of R.C. 2921.22. Wardlow's convictions were based on the fact

that she failed to immediately report to the police the attempted rape of her daughter by her live-in boyfriend. *Wardlow*, 20 Ohio App.3d at 2. In finding R.C. 2921.22 unconstitutional as applied, the court of appeals held:

it is obvious, by virtue of her prosecution for the offense of child endangering under R.C. 2919.22, that appellant's reporting of the April 21, 1984 rape of her daughter by [boyfriend] would have led to her own prosecution. Additionally, we perceive that such disclosure by appellant would have led to appellant's prosecution for welfare fraud in that [boyfriend] had been a permanent resident of the household for over two years. Thus, appellant's privilege against self-incrimination was unconstitutionally infringed under the facts of the case *sub judice*.

Id., at 6, citing *In re Groban* (1957), 352 U.S. 330. As demonstrated by the *Wardlow* case, the state cannot, through the legislature or any of its agencies, secure criminal convictions by requiring individuals to offer self-incriminating statements in any type of proceeding.

In this appeal, the State, through Children Services, sought to barter with T.M.'s parents, requiring them to come up with an admission to abusing their child, in exchange for a purported return of the child. The Supreme Court has declared it "plain beyond the need for multiple citation" that a natural parent's 'desire for and right to 'the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right." *Santosky v. Kramer* (1982), 455 U.S. 745, 758, quoting *Stanley v. Illinois* (1972), 405 U.S. 645, 651. Further, "when the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Id.* When the State successfully seeks to terminate parental rights, as here, the State "will have worked a unique kind of deprivation[.]" and "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." *Id.*, citations omitted.

Here, the State not only successfully deprived Appellants of the care and custody of their child, thus working the “unique deprivation” to which the Supreme Court referred, but piled infringement on infringement, when it sought termination by way of compelling Appellants to make admissions that undoubtedly would lead to criminal prosecution. And, the court of appeals’ treatment of Appellants’ claim that their Fifth Amendment right to remain silent had been violated by the State agency was nothing but a ringing endorsement of the agency securing termination through duress. In analyzing Appellants’ claim, the court of appeals did not once mention or refer to the Fifth Amendment. The court of appeals overruled Appellants’ Fifth Amendment claim “because there is significant evidence supporting the fact that the parents can not safely parent the child, and the decision to grant permanent custody is not based *solely* on the parents (sic) failure to admit to abusing the child.” *In re T.M.*, Madison App. Nos. CA2007-04-016 and CA2007-05-020, 2007-Ohio-5789, at ¶ 43. Instead of citing to and basing its reasoning on the wealth of Fifth Amendment jurisprudence available to it, the court of appeals reasoned that “there is other substantial credible evidence to support the trial court’s findings that it was in the child’s best interest to grant permanent custody and that the child could not be placed with the parents within a reasonable time.” *Id.* at ¶ 40.

Thus, in the eyes of the Twelfth District Court of Appeals, it is acceptable for the State to require a natural parent to confess to perpetrating a crime before it will even consider reunification. The Twelfth District, in overruling Appellants’ Fifth Amendment claim, has made it clear that State’s determination of what is in the best interests of the child is of paramount importance to protecting inalienable federal constitutional rights of individuals. The Twelfth District’s decision in this case stands for the proposition that the

State is within its authority to use duress to secure temporary or permanent custody, as long as there is "substantial credible evidence" to support termination. Thus, allowing the decision of the Twelfth District to stand would legitimize the infringement of the Fifth Amendment's privilege against self-incrimination to justify termination of parental rights, in the words of the Supreme Court, a "unique deprivation." *Santosky*, 455 U.S. at 758.

CONCLUSION

For the foregoing reasons, the Office of the Ohio Public Defender requests this Court to reverse and remand the matter to the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellants Summer Overfield and Shane Manley** was forwarded by regular U.S. Mail, postage pre-paid to Rachel M. Price, Madison County Assistant Prosecutor, 59 North Main Street, London, Ohio 43140, Richard A. Dunkle, 2 North Main Street, London, Ohio 43140, Renae E. Zabloudil, 58 East High Street, Suite B, London, Ohio 43140, and J. Michael Murray, 8 East Main Street, West Jefferson, Ohio 43162, on this 31st day of March, 2008.


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