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Recent Developments: In re: Maurice M.: Civil Contempt Order Directing Mother Suspected of Child Abuse to Produce the Juvenile Held to Violate Fifth Amendment

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Recent Developments

In re: Maurice M.: CIVIL CONTEMPT ORDER DIRECTING MOTHER SUSPECTED OF CHILD ABUSE TO PRODUCE THE JUVENILE HELD TO VIOLATE FIFTH AMENDMENT

The Court of Appeals of Maryland in *In re Maurice M.*, 314 Md. 391, 550 A.2d 1135 (1988), held that a civil contempt order from the Juvenile Court which directed a mother suspected of child abuse to produce her son before the court or to reveal his exact whereabouts violated her fifth amendment right to avoid self-incrimination. The mother's act of producing the juvenile before the court is implicitly a testimonial communication by which she could incriminate herself in the circumstances of this case, and so falls within the protection afforded by the fifth amendment.

Maurice M. is the son of Jacqueline Bouknight. In January 1987, at the age of three months, Maurice was admitted to the hospital with a broken leg. This injury and the presence of other, partially healed fractures on his body, together with his mother's history of emotional problems and the fact that his father had just been released from prison for drug violations, prompted the Baltimore City Department of Social Services (DSS) to obtain an authorization from the Juvenile Court in February 1987 to provide shelter care for Maurice. The child was placed in foster care until July 17, 1987, at which time the Shelter Care Order was modified and Maurice was returned to Bouknight.

At a hearing on August 18, 1987, Maurice was found to be a child in need of assistance (CINA) under Md. Cts. & Jud. Proc. Code Ann. §§ 3-801(e)—3-804. As such, he was placed under an Order of Protective Supervision to DSS. Under this order, Bouknight retained custody of Maurice, agreed to "cooperate" with DSS, to utilize the assistance of a parent aide, and to refrain from physically punishing the child. Bouknight, however, failed to cooperate with DSS. Maurice was last seen on March 23, 1988.

On April 18, 1988, DSS filed a Motion for Contempt against Bouknight, alleging that she had refused to provide the whereabouts of Maurice to DSS representatives who visited her home on April 7. At a hearing before the Juvenile Master on April 20, which Bouknight did not attend, DSS was awarded custody of Maurice due to Bouknight's failure to comply with the Order of Protective Supervision. The court also held a hearing on the contempt motion and ordered Bouknight to show cause why she should not be held in contempt for failure to produce the child in court.

Bouknight was arrested and appeared before the court on April 27, 1988. She told the court, although the was not under oath and no fifth amendment objections were raised at the time, that Maurice was in Texas with her sister. A police investigation revealed that Maurice had not been seen by Bouknight's sister, and on April 28, Bouknight was found in contempt for not producing Maurice or revealing his whereabouts. Counsel responded that Bouknight's opportunity to purge herself of the contempt was not a constitutional one if "her purging herself may involve admitting to a crime of some sort." *Id.* at 396, 550 A.2d at 1137.

On May 18, 1988, Bouknight moved to strike the contempt order on fifth amendment grounds. She contended that the basis of the contempt order was that she must produce statements or evidence that might incriminate her. The court rejected the argument, finding that Bouknight was not required to give any testimony, but only to perform an act, i.e., to produce the child. Failure to produce Maurice was the reason the contempt order was issued, not any failure to testify. Bouknight appealed this ruling, and the Court of Appeals of Maryland granted certiorari prior to a decision by an intermediate appellate court to consider this important issue.

The court stated that the fifth amendment privilege against self-incrimination "protects a witness from being required to make disclosure, otherwise compellable in the trial court's contempt power, which could incriminate him in a later criminal prosecution." *Whitaker v. Prince George's County*, 307 Md. 368, 385, 514 A.2d 4 (1986). Although the historic function of the fifth amendment privilege has been to protect an individual from self-incrimination through his own testimony, the court examined several Supreme Court cases in which fifth amendment protection was also sought by individuals under court order to produce documents and other physical evidence.

In *Fisher v. United States*, 425 U.S. 391 (1976), the Court held that a client's fifth amendment privilege was not violated by enforcing a summons directing his attorney to produce the client's documents, since the client was not thereby compelled to be a witness against himself. But, in *United States v. Doe*, 465 U.S. 605 (1984) (Doe I), the Court held that the act of producing the subpoenaed business records of a sole proprietorship *was* privileged. Complying with the subpoena, the Court reasoned, tacitly conceded the existence of the records, their possession or control by the party under subpoena, and the authenticity of the records. *Id.* at 613. Hence, the act of producing the documents had testimonial aspects and an incriminating effect.

In *Doe v. United States*, 108 S. Ct. 2341 (1988) (Doe II), the Court affirmed its *Doe I* stance that "the act of production could constitute protected testimonial communication, because it might entail implicit statements of fact: by producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic." *Id.* The Court held that

the compelled execution of consent forms authorizing foreign banks to disclose records of the defendant's accounts did not infringe upon the fifth amendment privilege, because neither the consent form nor its execution communicated any factual assertion. The Court explained that "to be testimonial, an accused's communication must itself, explicitly or implicitly, relate an actual assertion or disclose information [because] [o]nly then is a person compelled to be a 'witness' against himself." *Id.*

Similarly, in *United States v. Campos-Serrano*, 430 F.2d 173 (7th Cir. 1970), the court found a violation of the fifth amendment privilege when a defendant was coerced into producing a forged alien registration card. The court ruled that, in producing the card, the defendant implicitly admitted the existence, location and control over the card and so was "compelled to produce the crime itself." *Id.* at 176.

The Court of Appeals of Maryland recognized, in the case *sub judice*, that Bouknight had a reasonable apprehension of prosecution if, in accordance with the court's order, she produced Maurice or revealed his whereabouts, and the information disclosed that the child had suffered further abuse or was even dead. If a crime has been committed upon Maurice's person, Bouknight, by disclosing the demanded information, would be incriminating herself. The court ruled that such communication, whether in the form of the compelled act of production or verbal disclosure, is implicitly a testimonial communication and so falls within the contemplation of the fifth amendment privilege.

The court also addressed the State's argument that Bouknight waived her fifth amendment privileges when she told the court that Maurice was in Texas. The court noted that Bouknight was not a witness when she imparted this information, nor was she under oath, and the inaccurate information she revealed was not directly incriminating. Thus, the court ruled that Bouknight's fifth amendment privilege remained intact.

The State's alternative contention that the public right to protect its children, as manifested by the Juvenile Causes Act, Md. Cts. & Jud. Proc. Code Ann. §§ 3-801—3-836 (1984), outweighs Bouknight's fifth amendment privilege was rejected by the court. Although the court recognized the validity of the State's argument that applying the constraints of the fifth amendment in cases of child abuse would afford a parent "carte blanche to conceal any negative information about the child's status and thereby strip the Juvenile Court of its ability to protect children suspected of being abused," it held that case law does not favor statutory requirements over constitutional protection when there is a strong possibility of incrimination. *Maurice M.* at 408, 550 A.2d at 1143. Under the circumstances of this case, where the risk to Bouknight of prosecution is so substantial, the court could not totally expunge Bouknight's fifth amendment rights. Thus, the court vacated the civil contempt order.

In a strong dissent, Judge McAuliffe stated that by producing Maurice, Bouknight would implicitly admit that 1) the child is Maurice, and that 2) she has sufficient control and dominion over the child to produce him. Although these facts might be used against Bouknight in a criminal prosecution, Judge McAuliffe argued that communications which can be classified as foregone conclusions or as self-evident information are of minimal testimonial significance, and consequently should not be afforded fifth amendment protection. Since Maurice could be identified solely by the scope of his injuries, and since evidence of who had control and dominion over the child furnishes no evidence of who had control over him at the time of his injuries, no significant evidence which merits fifth amendment protection can be gleaned from the production of Maurice.

The Court of Appeals of Maryland vacated a civil contempt order of the Juvenile Court by which a mother suspected of child abuse was directed to produce the juvenile before the court or disclose his whereabouts. Under the circumstances of the case, the court decided that the mother's act of producing the child had testimonial implications that could incriminate her in the event of a criminal prosecution. Thus, the mother's claim of privilege under the fifth amendment was upheld.

— *Mary Jo Murphy*

Richmond v. Croson Co.: SUPREME COURT INVALIDATES SET-ASIDE PLAN DESIGNED TO PROVIDE JOBS FOR MINORITIES

The United States Supreme Court struck down a city ordinance that channeled 30% of public funds to minority-owned construction companies because it violated the fourteenth amendment's equal protection clause. *Richmond v. Croson Co.* 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989). For the first time, a majority of the Court has adopted strict scrutiny as the standard for equal protection review of race-conscious legislation.

The Richmond City Council adopted the Minority Business Utilization Plan ("the Plan"), a minority set-aside program that required prime contractors of city construction projects to subcontract at least 30% of the dollar amount of the contract to Minority Business Enterprises (MBEs). The Plan was modeled after the congressional program in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which was held constitutional. The Plan's proponents claimed, *inter alia*, that although Richmond's general population was 50% black, only .67% of the city's prime construction contracts had been awarded to MBEs in a five-year period. Thus, the plan was declared "remedial."

A facial challenge to the ordinance was brought in 1983 by J.A. Croson Co. ("Croson"), a white-owned plumbing company which lost a $126,000 contract to provide plumbing fixtures for the city jail. Croson, the sole bidder on the project, tried to comply with the set-aside requirement but was unable to obtain any MBEs to subcontract for the job. Croson sought waiver of the set-aside requirement, indicating that the MBEs contacted were either unqualified, unresponsive, or unable to quote a bid. *Id.* at 4436. Richmond denied Croson's request and decided to rebid the project. *Id.*

Because the Plan was patterned after the program in *Fullilove*, both the federal district court and the Court of Appeals for the Fourth Circuit relied on the *Fullilove* precedent and upheld the Plan. Croson sought certiorari; the Supreme Court vacated the court of appeal's decision and remanded the case in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). On remand, the court of appeals struck down the Plan because it violated both prongs of strict scrutiny under the equal protection clause.

In an opinion written by Justice O'Connor, the Court held that strict scrutiny was the proper standard of review, and that the Plan failed both prongs of that test: (1) that the state had a compelling interest; and (2) that its Plan was narrowly tailored to achieve that interest. As to the first prong of the test, the Court held that the city failed to "demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race" because it adduced no evidence of "any identified discrimination in the Richmond construction industry." *Croson* at 4142. Although Richmond argued that it was attempting to remedy various forms of past discrimination, it did not offer specific acts of discrimination, but rather it relied on general assertions of past discrimination coupled with the similar inference drawn from various statistical disparities. Richmond