

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES, Petitioner V.
JACQUELINE BOUKNIGHT;
and
MAURICE M., Petitioner V. JACQUELINE BOUKNIGHT

CASE NO: 88-1182; 88-6651

PLACE: WASHINGTON, D.C.

DATE: November 7, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 BALTIMORE CITY DEPARTMENT OF :
4 SOCIAL SERVICES, :
5 Petitioner :
6 v. : No. 88-1182
7 JACQUELINE BOUKNIGHT; :
8 and :
9 MAURICE M., :
10 Petitioner :
11 v. : No. 88-6651
12 JACQUELINE BOUKNIGHT :
13 -----x

14 Washington, D.C.

15 Tuesday, November 7, 1989

16 The above-entitled matter came on for oral
17 argument before the Supreme Court of the United States at
18 11:06 a.m.

19 APPEARANCES:

20 RALPH S. TYLER, III, ESQ., Assistant Attorney General of
21 Maryland, Baltimore, Maryland; on behalf of the
22 Petitioner in No. 88-1182.

23 MITCHELL Y. MIRVISS, ESQ., Baltimore, Maryland; on
24 behalf of the Petitioner in No. 88-6651.

25 GEORGE E. BURNS, JR., ESQ., Baltimore, Maryland; on

1 behalf of the Respondent.

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PROCEEDINGS

(11:06 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-1182, Baltimore City Department of Social Services v. Jacqueline Bouknight.

Mr. Tyler, you may proceed whenever you're ready.

ORAL ARGUMENT OF RALPH S. TYLER, III
ON BEHALF OF THE PETITIONER IN NO. 88-1182

MR. TYLER: Mr. Chief Justice, and may it please the Court:

This case presents two questions. First, whether a court order directing a parent to produce her child compels incriminating testimony in violation of the Fifth Amendment and, secondly, whether in this case the mother's privilege claim is overcome by the important societal interest in protecting a child plainly at risk.

I will address the first of these issues and the child's counsel will address the second.

The child who is the subject of this case was born in October 1986. As of four months of age he had been hospitalized twice with confirmed fractures of major bones. During his second hospitalization his mother was observed shaking him and dropping him into his crib while he was in a cast.

1 The Baltimore City Department of Social Services
2 filed a petition with the juvenile court in Baltimore
3 asserting that Maurice was a child in need of assistance,
4 as defined by Maryland law.

5 A court hearing was held on that petition at
6 which all parties were represented by counsel and the
7 parties stipulated to the facts of the petition. Maurice
8 was placed in foster care, where he remained for some
9 months when the order was modified to return physical
10 custody to the mother.

11 QUESTION: Why was that done? This is another
12 "Poor Joshua" case, isn't it?

13 MR. TYLER: It certainly has absolutely the same
14 tragic facts, Your Honor.

15 QUESTION: Can you defend that action?

16 MR. TYLER: I think -- certainly with benefit of
17 hindsight it was a great error to return the child. The
18 record reflects that the agency opposed that before the
19 Master, but did not take an appeal.

20 QUESTION: Why do we need hindsight? Wasn't it
21 apparent at the time?

22 MR. TYLER: Well, I would have to respectfully
23 answer no, it wasn't apparent. The parties determined and
24 the court concurred that the child should be returned.

25 At a further hearing in the case in August, the

1 parties, again all represented by counsel, agreed to an
2 order of protective supervision finding Maurice to be a
3 child in need of supervision under the supervision of the
4 Department of Social Services and the mother had physical
5 custody.

6 Importantly, that order provided, among other
7 things, that the mother was required to cooperate with the
8 Department. She, represented by counsel, agreed to that
9 order.

10 Agency personnel have last seen this child in
11 December -- in September of 1987. In April of '88, after
12 making repeated efforts to locate the child, the Agency
13 filed a petition in the juvenile court in Baltimore
14 seeking a review of the court order and ordered a show of
15 cause and a petition for contempt.

16 After arrest, the mother, with counsel at her
17 side, told the juvenile court that the child was with the
18 mother's sister in Dallas. This proved to be false and
19 she gave other information as to the child's whereabouts,
20 which similarly proved to be false.

21 The court held her in contempt and sent her to
22 jail providing that she could purge herself of contempt by
23 either producing the child before the court or revealing
24 his exact whereabouts.

25 QUESTION: Where is she now?

1 MR. TYLER: She is in the jail in Baltimore
2 City, Your Honor.

3 QUESTION: Mr. Tyler, does -- would the act of
4 production of the child be a testimonial statement of some
5 kind?

6 MR. TYLER: Not in our view, Your Honor. The --

7 QUESTION: Well, in cases where orders have been
8 entered to require turning over some kind of paper, this
9 Court has indicated in its opinions that to do so has
10 testimonial aspects. Why wouldn't turning over the child
11 have some testimonial aspects as to her possession or
12 control, or something of that sort?

13 MR. TYLER: Because, Justice O'Connor, in the
14 cases where the Court has said that there would be
15 testimonial content to an act of production, the
16 identified variables have been existence, possession,
17 authentication. And if those items are foregone
18 conclusions or not in dispute, which we submit is this
19 case, then the act of production has no testimonial
20 effect.

21 QUESTION: Well, is that strictly speaking true?
22 You don't know where the child is. She has apparently
23 given untrue statements. And so it isn't known. And I
24 assume the state would want to use the testimonial aspects
25 if it were ever to file criminal proceedings against her.

1 MR. TYLER: It is, of course, true that we do
2 not know where the child is. But what we do now and what
3 has never been disputed in the case is that the mother has
4 custody of the child.

5 QUESTION: Physical custody?

6 MR. TYLER: She -- she certainly had physical
7 custody. She affirmatively asserted that she had custody
8 before the juvenile court. But for the juvenile court's
9 --

10 QUESTION: Well, but the custody -- she has not
11 conceded -- correct me if I'm wrong, perhaps she has --
12 that she now has physical custody of the child. She
13 couldn't while she's in jail. And she hasn't conceded, I
14 take it, that she had physical custody of the child the
15 day before she went before the court.

16 MR. TYLER: Well, what she -- what she did
17 concede, Justice Kennedy, at the hearings in the juvenile
18 court in April of '88 is, first, her counsel on her behalf
19 represented that the child was fine and that there was no
20 basis for concern. Secondly, she was then arrested and
21 brought before the court and gave the court an address in
22 Dallas where the child was to be found. She gave other
23 officials information about the child being with a
24 relative in Baltimore or -- and relatives elsewhere.

25 At no point has she asserted an inability to

1 comply with the order and -- nor has she ever claimed that
2 there has been an intervening custodial relationship which
3 somehow relieved her of her undisputed custody. Rather --

4 QUESTION: Well, certainly there may not be any
5 question about her legal custody. But the fact of
6 physical possession and control would seem to me to be
7 testimonial aspects of compliance with the production.

8 MR. TYLER: Well --

9 QUESTION: I just don't understand why it
10 wouldn't be.

11 MR. TYLER: Well, it wouldn't be in our view,
12 Justice O'Connor, because this is the only living parent
13 of a child who at the time the case was in the juvenile
14 court was 19 months old. There is no one else that the
15 state can look to and, indeed, she has pointed us to no
16 one else. So --

17 QUESTION: Well, that may be an argument for an
18 exception. It seems to me, to make it even more
19 testimonial significant.

20 Let me ask you this. Would you have any
21 objection to giving use immunity? I understand use
22 immunity is available under Maryland law.

23 MR. TYLER: Your Honor, the status of immunity
24 under Maryland law has changed dramatically while this
25 case has been pending and as of April -- as of July of '89

1 there is a broader immunity statute in Maryland. But --

2 QUESTION: Well, wouldn't use immunity suffice
3 for your concerns and the concerns of -- of others in this
4 very important case? If you say it's not testimonial,
5 then you can have no objection to use immunity.

6 MR. TYLER: Well, our objection, Your Honor, is
7 that she has asserted a Fifth Amendment privilege which we
8 claim does not exist. If she were asked to stand in a
9 lineup, she could not say to the State of Maryland, I will
10 not do so until give me immunity, because that Fifth
11 Amendment privilege she does not have. It is our view
12 that that is this case.

13 QUESTION: Well, if we thought she did, is
14 Maryland now in a position to grant limited use immunity
15 for the testimonial aspects of the compliance with the
16 production order?

17 MR. TYLER: Yes. As a matter of law, that would
18 now be possible, Your Honor. It was not possible at the
19 time the case was pending in the juvenile court. But I
20 would stress that the state that the state --

21 QUESTION: And the state could make it a
22 laser-like limited immunity so that just the testimonial
23 aspects of production could be protected, I gather.

24 MR. TYLER: Yes. But, again, I would stress
25 that first we should not be put to that choice until she

1 prevails entirely in this Court as would any person who
2 was asked to perform an act if it is not protected by the
3 Fifth Amendment.

4 The state should not be required to provide
5 immunity because, for example, as the court noted in
6 Braswell, there are costs to doing so. The costs of
7 granting immunity should be considered and the state
8 should not be required to grant it until she absolutely
9 prevails here.

10 But the state's position, we believe, is
11 supported really by two lines of authority in this court.
12 First, the Schmerber line of authority and then the Fisher
13 and act of production cases.

14 The Schmerber line certainly established that
15 the general rule is that the Fifth Amendment does not
16 relieve a person of the obligation to produce
17 incriminating evidence. And we submit that the great flaw
18 in the decision below, and a flaw which is largely
19 conceded in the brief of the Respondent, is to put all the
20 weight in the case on the potential incrimination of
21 producing the child when in fact that is only half the
22 test and that we do not dispute that it may have some
23 incriminating effect.

24 But that does not make it testimonial any more
25 than a person is relieved of the obligation to provide a

1 blood sample, a handwriting exemplar, stand in a lineup,
2 and so on.

3 Further, the elements in the act of production
4 cases of existence, possession, authentication are here
5 not in dispute. Maurice was with his mother. She has
6 never claimed to the contrary. She has never claimed that
7 she cannot comply with the court order. Her sole defense
8 in this case and the holding of the Maryland court was not
9 that she could not comply, but that she need not comply.
10 That the order was -- was void the moment it was entered.

11 And that, in our view, is a dangerous and
12 unwarranted extension of the Fifth Amendment privilege.
13 To hold as a matter of federal constitutional law that a
14 parent cannot be required to produce her child in court
15 because to do so would constitute testimony, would
16 ultimately remove from the juvenile court the single most
17 important power it must have, and that is the minimal
18 power to require a parent to bring her child before the
19 court so that the court can satisfy itself that the child
20 is safe or if not safe, to provide protection.

21 And that is what is at issue in this case. It
22 is the power of the court to command the parent to bring
23 her child into court.

24 Thank you. I reserve the balance of my time.

25 QUESTION: Thank you, Mr. Tyler.

1 Mr. Mirviss.

2 ORAL ARGUMENT OF MITCHELL Y. MIRVISS

3 ON BEHALF OF THE PETITIONER IN NO. 88-6651

4 MR. MIRVISS: Mr. Chief Justice, and may it
5 please the Court:

6 The second question in this case considers
7 whether the important societal interest in protecting
8 children at risk of serious injury can overcome the
9 privilege against self-incrimination. At two levels, this
10 issue has extreme ramifications.

11 First, this Court must decide whether the needs
12 of my client, an infant who is defenseless, who has been
13 previously abused and whose whereabouts have been unknown
14 for the past 18 months, must be abandoned in favor of an
15 unprecedented extension of the -- of the Fifth Amendment.

16 Second, if this Court decides against Maurice,
17 family courts and juvenile courts across the country will
18 lose their *parens patriae* authority to protect thousands
19 upon thousands of children from serious abuse.

20 QUESTION: Well, why is that so if limited use
21 immunity is available for just the act of production?

22 MR. MIRVISS: Your Honor, limited use immunity
23 is available only upon the consent or the request of the
24 state's attorney. The state's attorney was not a party to
25 the juvenile court proceeding. The state's attorney has

1 discretion whether his or her law enforcement interests
2 outweigh the needs of the juvenile court.

3 The juvenile court does not have the power to
4 confer use immunity nor did any of the other parties in
5 the juvenile court proceeding. Similarly, in other states
6 where use immunity may not be available, that solution --
7 would not assist the juvenile court at all.

8 In this particular case, however, limited use
9 immunity would satisfy the need for Maurice's production,
10 but it is a speculative assumption.

11 And if we look at the availability of immunity
12 for every conflict which arises between civil regulatory
13 systems and potential incriminations, then the entire line
14 of cases of this court, dating from United States v.
15 Sullivan in the income tax reporting system through
16 wartime price regulation in Shapiro v. United States, on
17 through deterrence of drunk driving and traffic accident
18 reporting in Byers v. California, would automatically fall
19 out.

20 Immunity is not the answer that this Court has
21 held to those fundamental clashes between civil regulation
22 and potential incriminating disclosures.

23 QUESTION: Mr. Mirviss, straighten me out on one
24 thing. Had she not given assurance that the child would
25 be produced to the court?

1 MR. MIRVISS: Justice Blackmun, the mother,
2 through her counsel, informed the court that the child
3 would be produced and that the mother was on her way.
4 Unfortunately, the mother never appeared in court and the
5 mother never produced the child.

6 QUESTION: But counsel gave that assurance?

7 MR. MIRVISS: That is correct, Your Honor.

8 QUESTION: Her counsel?

9 MR. MIRVISS: Her counsel. In the view of the
10 court below, the mother was lying to the court and to her
11 counsel.

12 Your Honor, the impact of this case is dramatic.
13 In every state juvenile courts would lose the power to
14 compel parents who are suspected of maltreating their
15 children to bring their children to court. Any element of
16 suspicion would be enough to block the juvenile court's
17 inherent or statutory powers.

18 QUESTION: Is that -- is that the way it
19 usually works or does the social welfare worker simply
20 have the authority to go out and investigate the home and
21 take the child? I take it -- would the social welfare
22 worker need some kind of warrant in order to do that or --

23
24 MR. MIRVISS: Ordinarily, and in Maryland, the
25 statute governing child protective services investigations

1 has a probable cause requirement written into it such that
2 a social worker with a police officer can go into a home
3 when there is probable cause to believe that a child is in
4 danger.

5 QUESTION: There's a -- as I say, it would be an
6 exigent circumstances so no warrant is required?

7 MR. MIRVISS: That's correct, Your Honor.

8 However --

9 QUESTION: Isn't this the way it usually
10 happens?

11 MR. MIRVISS: That is the ordinary course in
12 emergencies. However, there are cases where reports of
13 abuse -- of possible abuse or neglect come in through
14 other methods. In other words, independent agencies, such
15 as a school or a hospital, may phone in a report. The
16 social worker or the police go out to investigate but no
17 one is home, they're not let in, they're not able to find
18 the child.

19 But those cases arise and produce the need to
20 go to court to compel the parent to produce the child.

21 One can imagine a sexual abuse case where a
22 report comes from the school of extreme behavioral
23 problems and possible statements of sexual abuse. The
24 social worker goes out to the home and not gained access
25 to the child. In that situation, the only other authority

1 which can assist is the juvenile court or the family
2 court.

3 QUESTION: Mr. Mirviss, it seems to me the
4 record is silent about a father. Is there a father in
5 this picture at all?

6 MR. MIRVISS: Your Honor, my client's father was
7 killed approximately a year and a half ago to two years
8 ago -- I believe in March of 1988 -- in a drug-related
9 shooting incident.

10 QUESTION: Were they married? Not that it makes
11 any difference, I guess.

12 MR. MIRVISS: No, Your Honor, they were not
13 married.

14 QUESTION: But just to conclude the point,
15 you're saying that there are scores, hundreds, many cases
16 in which courts today routinely issue subpoenas to parents
17 requiring the parents to come to the court with the child?

18 MR. MIRVISS: No, Your Honor. What we believe
19 will happen is if the juvenile court loses its power to
20 compel parents to produce children, then --

21 QUESTION: Well, but I mean, does it now
22 exercise that power on a wide scale?

23 MR. MIRVISS: Not on that scale, but that power
24 is the authority underlying social worker access to
25 children and into parents' homes. If in fact social

1 workers cannot tell parents that if they do not cooperate,
2 they can be arrested and brought to court to bring their
3 children, then parents will have a much greater incentive
4 to not cooperate.

5 They will essentially be immunized by the Fifth
6 Amendment. There will be no power from the juvenile court
7 to compel, and the social worker will be resigned to
8 finding the child through the social worker's own wiles.
9 That's met that --

10 QUESTION: Well, I take it then that in most
11 cases the only testimonial implications of producing the
12 child are something that's known already through
13 independent evidence that the child was living at the
14 house and that the child has injuries. That's -- that's
15 not something that's protected by the Fifth Amendment.

16 The testimonial aspect is, in this case, where
17 the link between the parent and the child could provide a
18 very important chain in a criminal prosecution.

19 MR. MIRVISS: Your Honor, the testimonial
20 inferences that could be drawn from the production of this
21 child are slight, just as they would be in that situation.

22

23 In both cases there is a legal order of custody.
24 In both cases there is a presumption of continuing custody
25 as a matter of state law. In both cases there is -- there

1 are avenues for the parent to comply with the request that
2 the child be produced for inspection without in any way
3 involving the parent directly in the child's production.

4 Ms. Bouknight has alternatives available to her
5 which she has not chosen to exercise. And those
6 alternatives do not involve any testimonial incrimination.
7 She could use her lawyers to produce the child. She could
8 arrange for the child's production anonymously. She could
9 use another privileged confidante.

10 Those have not been utilized by her, and yet
11 none would involve any type of testimonial incrimination.

12
13 QUESTION: Mr. Byers -- I mean, Mr. Mirviss, are
14 you going to address the California v. Byers aspect of the
15 case?

16 MR. MIRVISS: Yes, Your Honor. This case
17 squarely falls within California v. Byers. In that case,
18 the court upheld a less vital state interest, the
19 adjudication of civil property damage claims against
20 appreciably stronger Fifth Amendment interests.

21 Byers held that neutral noncriminal statutes can
22 compel incriminating information if they are part of a
23 civil regulatory system which in no way targets criminal
24 activity.

25 That was a plurality opinion, and Justice Harlan

1 joined that opinion to create a majority by establishing a
2 balancing test when valid civil governmental interests are
3 asserted against possible Fifth Amendment incrimination.
4 Justice Harlan phrased the balance test by looking at the
5 nature of the governmental interest, the nature of the
6 type -- or the type of incrimination which would incur,
7 and, finally, the necessity for the information which
8 would be produced.

9 Under either approach, the plurality approach,
10 or Justice Harlan's approach, this case amply satisfies
11 those tests. In this case we have a specific neutral
12 court which is acting not to further any type of criminal
13 prosecution but only to serve one purpose, and that's to
14 ensure my client's safety. And, second, a court
15 exercising authority specifically granted to it by a
16 neutral statute within an entire regime --

17 QUESTION: Well, it's a little different, isn't
18 it, because here the operation of the contempt order is
19 particularly individualized and based on specific showings
20 that also lead to criminal prosecution probably. And so
21 it's not really exactly like Byers is it?

22 MR. MIRVISS: Your Honor --

23 QUESTION: Much more individualized.

24 MR. MIRVISS: Your Honor, Byers focused on the
25 general risk or the general degree of incrimination.

1 Byers, the defendant in that case, had a tremendous
2 personal fear of incrimination. He was already under
3 indictment for two counts. There is no doubt that the
4 information he was required to provide, his name and
5 address, would be vital elements within any prosecution
6 against him. Nevertheless, both the plurality and Justice
7 Harlan's approach looked at the statutory --

8 QUESTION: Well, but in Byers you have a system
9 whereby everybody involved in an accident has to file a
10 report.

11 MR. MIRVISS: That's correct.

12 QUESTION: Here it's only the person whose
13 conduct is such to give rise to concern for the physical
14 safety of the child that would lead to the imposition of a
15 contempt order that would give rise to your suggested
16 Byers exception.

17 MR. MIRVISS: Your Honor, the concerns that
18 could prompt this juvenile court to exercise its statutory
19 authority are not limited to instances of extreme abuse.
20 They could extend to the whole host of issues which the
21 juvenile court addresses on a regular basis. Delinquency
22 cases, truancy cases, runaway cases, neglect cases, are
23 all part and parcel of the juvenile court's docket. All
24 of those cases could invoke or could require a child's
25 production to court.

1 And a child's production to court is not
2 necessarily to prove that the child has been abused. It
3 could be to facilitate the child's placement into
4 substitute care which in fact was part of the reason for
5 the court's order here.

6 QUESTION: Mr. --

7 MR. MIRVISS: The court divested the mother of
8 custody in order that the child, the infant, be placed in
9 emergent' foster care.

10 QUESTION: May I ask you a question? You've
11 suggested the various ways in which compliance with the
12 order would be possible without giving incriminating
13 testimony. But you haven't considered -- and I don't know
14 quite what the answer is -- the possibility that the child
15 may not be alive.

16 And if that's the fact and that's suggested in
17 your opponent's brief, that there's a homicide
18 investigation going on and so forth, how can compliance
19 with the order be had without giving incriminating
20 testimony?

21 MR. MIRVISS: Your Honor, if in fact the
22 Respondent is not able to comply with the court order, it
23 is her duty to inform the court that she is no longer able
24 to comply. Essentially she is required to plead
25 impossibility.

1 This Court, in the case of --

2 QUESTION: Would that be incriminating?

3 MR. MIRVISS: Your Honor, the mere statement
4 that she is unable to comply would not necessarily be
5 incriminating.

6 QUESTION: But do you think the judge would take
7 that?

8 MR. MIRVISS: That, of course, would be up to
9 the judge's discretion. Under the United States v.
10 Rylander --

11 QUESTION: She is obviously unable to comply
12 while she's in jail.

13 MR. MIRVISS: Well, Your Honor, she still has
14 privileged intermediaries she could utilize.

15 But if we look at the scenario of the child
16 being dead --

17 QUESTION: Right.

18 MR. MIRVISS: -- her explanation for why she
19 cannot comply is not a violation of the Fifth Amendment.
20 Under United States v. Rylander this Court specifically
21 held that a party unable to comply with a valid unappealed
22 court order is not able to assert the Fifth Amendment as
23 an excuse for explaining to the court why she cannot
24 comply with its valid court order.

25 And that principle extends back for decades and

1 decades for the burden that any individual must face when
2 confronted with a court order or even a burden of
3 persuasion that an individual bears in this civil or
4 criminal proceeding. The Fifth Amendment does not shift
5 the burden of proof upon the state or the burden of
6 persuasion away from her.

7 I would like to also point out that in addition
8 to the alternatives the mother has in this case, the
9 actual order of the court is very limited in terms of its
10 incursion upon the Fifth Amendment.

11 The mother is not required to testify. The
12 mother is not required to make any type of oral
13 disclosure. She need not provide records or documents
14 which convey the thoughts, beliefs, or feelings of her.
15 Those are all the fundamental principles that this Court
16 has upheld in looking at acts of production.

17 Your Honor, my time is up. That will conclude
18 my remarks.

19 QUESTION: Thank you, Mr, Mirviss.

20 Mr. Burns.

21 ORAL ARGUMENT OF GEORGE E. BURNS, JR.

22 ON BEHALF OF THE RESPONDENT

23 MR. BURNS: Mr. Chief Justice, may it please the
24 Court:

25 Turning to issue number one is -- there is no

1 question about where legal custody is. In terms of
2 physical custody, I think Mr. Mirviss answered Mr. Tyler's
3 contention when he said, and I quote, "The child's
4 whereabouts have been unknown for the last 18 months."

5 Obviously, we know who has legal custody. We
6 don't know physical custody after that. So I think in
7 that case obviously is -- producing the child would be
8 incriminating.

9 The state also --

10 QUESTION: Well, stop --

11 QUESTION: In what -- in what respect?

12 MR. BURNS: Well, if, for example, the child is
13 injured, if the child were unfortunately dead, then
14 admitting that you had custody of that is certainly a
15 reasonable conclusion that you're responsible for the
16 injuries or the death of the child. Physical custody at
17 that moment, as opposed to sometime in the past that you
18 had legal custody and physical custody.

19 Obviously there could have been intervening
20 circumstances that you had no control over that caused
21 this condition to occur. But if you produce the child,
22 it's difficult to see how you can draw any conclusion
23 except that you have now current physical --

24 QUESTION: I don't follow that. If I may
25 interrupt. The production of the child on November 7th,

1 1989 admits physical custody on November 7th, 1989. The
2 child might have been killed or injured on August 1st,
3 1989. How does the later fact necessarily prove the
4 former?

5 MR. BURNS: I -- I'm not sure I follow, Justice
6 Stevens. What I think I'm saying is this, if I say I
7 produce the child today, there is some injury -- if I'm
8 the defendant -- it seems to me that doesn't necessarily
9 prove -- I'm not suggesting that that proves beyond a
10 reasonable doubt. I'm suggesting it is incriminating --
11 is that I have the child, I have this child who's injured
12 and I'm admitting physical custody right now.

13 I mean, I think it's, for example, a byword of
14 police officers -- is whoever you find next to the body
15 there's a 50 percent chance they're the person that did
16 it. So, while it wouldn't prove beyond a reasonable doubt
17 certainly, I think it certainly is incriminating and
18 certainly could be used by the state if they had other
19 evidence for prosecution.

20 Well, then, any -- any mother who is given
21 custody by a juvenile court and ordered to appear every so
22 often perhaps or for reason, can always defend by saying
23 I'm not going to produce the child I have custody of
24 because it might incriminate me.

25 MR. BURNS: Mr. Chief Justice, I think that's

1 incorrect for two reasons.

2 One, obviously in many cases there is no
3 question -- in this case it's conceded by the state that
4 you have this reasonable possibility of incrimination in
5 terms of the ongoing homicide investigation. Obviously if
6 that doesn't exist, if no one thinks anything happened to
7 the child, there is going to be no problem.

8 Second, I --

9 QUESTION: Well, but our cases say, you know,
10 that the court can't inquire in any detail once the claim
11 of privilege is invoke. That it -- it -- it's almost up
12 to the witness to --

13 MR. BURNS: I think that's to some extent, Mr.
14 Chief Justice. But I think the court can say, is this
15 reasonable? Is there something to suggest that, the mere
16 fact that someone says it.

17 But I think the second part may be more
18 important. It's been contended that the court of appeals
19 has said mothers don't have to comply with orders. Well,
20 the court of appeals didn't say that. The court of
21 appeals said the way to proceed is under the Maryland
22 statute 3-831 which is a neglect statute, which, if you're
23 under order, it seems to me and it seemed to the court of
24 appeals, to bring the child in to comply with the order,
25 you have violated the neglect as a matter of law. And --

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QUESTION: Why can't you raise the same privilege when you're ordered to bring it in under that statute?

MR. BURNS: Because under -- no, you wouldn't be ordering him to bring it under that statute, your Honor, you would be prosecuting him for the failure to bring it in. So I don't think there is a privilege there.

Obviously a prosecutor, any prosecutor, can go to the person and say we're going to prosecute under the statute. If indeed you produce the child in good health, we won't prosecute or this will be a mitigation factor. So there is no question that the state still has the power in this case. In that case there would be nothing to do with the privilege against self-incrimination.

QUESTION: But it would be by a criminal prosecution rather than by a juvenile proceeding?

MR. BURNS: Well, it -- it -- it's a funny statute. It's literally criminal but it's in our court's article 3-831.

QUESTION: Yeah, you put them in jail under the neglect statute but you can't put them in jail for refusal to produce.

MR. BURNS: Well, I think the key difference -- as a practical matter I have to agree with that, Justice

1 White. But I think the key difference is this. Under the
2 3-831 there are two possibilities obviously.

3 If the child is unharmed, that acts as a good
4 reason for the mother to bring her in. If it is not
5 unharmed, and the mother isn't going to comply, it's a
6 means of punishing her for not following this court order.

7

8 QUESTION: Putting her in jail.

9 MR. BURNS: But when we're talking about civil
10 contempt, however, we're looking at two problems. Not
11 just putting her in jail for that order. We're also
12 looking at the problem of we're going to have you do
13 something that may be testimonial for some future
14 prosecution, another unrelated criminal act --

15 QUESTION: Like for a --

16 MR. BURNS: -- which I think gives the
17 distinction.

18 QUESTION: Like for a neglect prosecution.

19 MR. BURNS: No, Your -- no, Justice White. I
20 was thinking, for example, child abuse, assault, or even
21 unfortunately homicide. I think that's the distinction.

22 QUESTION: Mr. Burns, let's talk about homicide.
23 Suppose you have a very nasty divorce and the husband gets
24 custody of the child and let's assume it's conceded that
25 the husband has locked the child in a cellar with three

1 days' worth of food and everybody knows that. And the
2 mother brings the husband in the court and gets the court
3 to demand from the husband where the child is.

4 The child is starving to death. It's two and a
5 half days now, right?

6 MR. BURNS: Well, Justice --

7 QUESTION: And the court cannot compel the
8 husband to --

9 MR. BURNS: Well, Justice Scalia, I think as
10 this case shows, that the court being able to say bring it
11 in three days and these cases, if they are determined, is
12 not going to have any effect, if indeed -- if indeed
13 everything --

14 QUESTION: That's not going to have an effect?

15 MR. BURNS: Well, Your Honor, with --

16 QUESTION: We say you're going to stay in jail
17 until you produce the child.

18 MR. BURNS: Well, Your Honor, I think the same
19 thing. You can say under 3-831 there may be a duty.
20 Obviously, if this child is being held in a room without
21 food and that's what you're saying, this is certainly a
22 neglect statute and you can be held in jail.

23 But I think the other problem is if indeed --
24 and that's certainly a terrible hypothetical -- but if
25 indeed --

1 QUESTION: I'm not worried about neglect. I'm
2 worried about saving the child. Okay?

3 MR. BURNS: That's certainly true, Justice
4 Scalia.

5 QUESTION: And prosecuting him for murder if the
6 child dies.

7 MR. BURNS: Certainly true, Justice Scalia. But
8 if indeed we're going to say all that matters is that,
9 then I don't see why the obvious solution is not to
10 torture the person to get the information because that's
11 the only sure way we have in this three-day time limit.

12 As the Morgan case shows, there are people that
13 are willing to stay a lot longer than three days in jail.
14 So if the only thing we're going to focus on and we're
15 going to ignore all constitutional rights, then we also
16 have to ignore that.

17 QUESTION: I suppose for the same reason that we
18 don't torture people after they've been convicted of
19 murder.

20 MR. BURNS: Well, Your Honor, I agree we
21 shouldn't. But I don't see how --

22 QUESTION: Well, no. To say -- to say you can
23 impose imprisonment for a coercive purpose that does not
24 -- that does not offend the Fifth Amendment because it's a
25 coercive purpose that has some other societal end than

1 convicting the individual of a crime, the end of saving
2 the life of the child -- to say that you can't use torture
3 for that is -- is no more extraordinary than saying that
4 you can't use torture for purposes of punishing him after
5 he's been convicted of --

6 MR. BURNS: And I agree.

7 QUESTION: -- a crime. But it's an entirely
8 different question --

9 MR. BURNS: Well, Justice --

10 QUESTION: -- whether you can use normal means
11 of punishment to -- to fulfill an important societal end
12 such as --

13 MR. BURNS: Sure, Justice --

14 QUESTION: -- saving the life of the child.

15 MR. BURNS: -- Scalia. But I think the problem,
16 the underlying premise there is that if you say we're
17 holding you for civil contempt, the person will
18 immediately say this is where the child is. If we're
19 holding you under 3-831, although we're holding you in the
20 same jail, the person will not say.

21 I think the problem here is -- is -- I agree
22 with your hypothetical if there were a real need for it.

23 QUESTION: There is no child abuse statute in
24 existence. All right?

25 MR. BURNS: You mean as a hypothetical, I

1 assume.

2 QUESTION: Yes.

3 MR. BURNS: Well, the difficulty there --

4 QUESTION: Then, tough luck, kid, you're going
5 to have to die, huh?

6 MR. BURNS: Justice Scalia, I think there the
7 question is, is can the legislature say, well, we don't
8 like the Fifth Amendment very much so we won't provide any
9 statutes to protect against these circumstances and get
10 rid of the Fifth Amendment.

11 QUESTION: Well, it seems to me you're begging
12 the question.

13 MR. BURNS: I'm sorry, Your Honor --

14 QUESTION: It seems to me -- or, I could think
15 of another hypothetical. But you have to fall back on the
16 position that if there is no other way to prevent the
17 social harm, even if it's a social harm as -- as severe as
18 the death of an individual -- if there's no other way to
19 prevent that other than to punish the person who doesn't
20 give you the information to prevent it, that's too bad;
21 you must let the harm occur.

22 MR. BURNS: The difficulty, Justice Scalia, is I
23 may in the abstract agree with that. The problem I'm
24 pointing out is here in the real world, in Maryland, that
25 problem does not and cannot exist.

1 And so the state is not saying that this is the
2 situation. The state is simply saying we don't want to
3 proceed the other way. We have to do it because.

4 There's no reason. If you're --

5 QUESTION: But they're entirely -- they're free
6 to do that if there is no problem in doing it that way.

7 MR. BURNS: Well, I think then --

8 QUESTION: What do you do with the income tax
9 cases where -- where you have to go in and say what your
10 gambling earnings were?

11 MR. BURNS: Well, for example, Justice Scalia,
12 certainly you have a duty. You have a duty to file an
13 income tax return. But the question is --

14 QUESTION: And this woman has a duty to produce
15 the child.

16 MR. BURNS: Yes, Justice Scalia. But the
17 question is, can the state say, well, we're not going to
18 prosecute Burns for not filing his income tax return.
19 We're going to hold him civil contempt until he files it
20 because we're very interested in him filing an income tax
21 return.

22 So, the state's using the option -- in fact, in
23 this case it seems to me if the state can use that option,
24 we really don't have much need of criminal laws.

25 For example, let's suppose we know someone has

1 illegal narcotics. Instead of going to the trouble of
2 prosecuting them, we bring them in, say, you come in,
3 bring us the narcotics, or you stay in jail. It's a much
4 simpler procedure and we don't have to worry about things
5 like proving beyond a reasonable doubt --

6 QUESTION: That ignores the context here, which
7 is a civil -- civil proceeding which has many other ends
8 in view than the enforcement of the criminal law, which is
9 what Byers and the Holmes opinion in the Sullivan case are
10 about.

11 MR. BURNS: Well, I think, Mr. Chief Justice,
12 the problem with Byers is that we're talking about a
13 statute. We're not contending any statute is
14 unconstitutional in this case.

15 What we're contending -- in Byers I might point
16 out -- and in page 14 of our brief we quote -- says the
17 Fifth Amendment does protect what may be incriminating
18 specific inquiries. So, Byers isn't saying that the Fifth
19 Amendment doesn't apply in any case. They're saying in a
20 general statute where there's nothing on its face that
21 looks incriminating, it may be okay.

22 QUESTION: It may be okay to require the
23 production of statements by someone who has a very
24 substantial claim that those statements incriminate him.

25 MR. BURNS: Well, Byers of course -- in -- in

1 Byers, it seems to me, that when you -- if you look at the
2 statute and you look at the conduct, there may be by
3 chance that case. But when we're looking at thousands of
4 motorists, it's hard to say that this statute is aimed at
5 any motorist.

6 This particular order is aimed at precisely one
7 person who the state at the same time -- and there's been
8 something made of this distinction between the state's
9 attorney and others -- but, of course, the attorney
10 general is part of the state, indeed, represents on
11 appeal cases from the state's attorney. So I don't think
12 you can say because the state's attorney is involved it's
13 easy enough to contact the state's attorney and get them
14 involved.

15 QUESTION: Well, what does that point go to?

16 MR. BURNS: I think that point goes to this
17 whole question that we can't do anything because it's a
18 civil matter. Because obviously it does have criminal
19 ramifications, and there is something that can be done.

20 QUESTION: If there were not this investigation
21 of the possible murder, you wouldn't have any case, would
22 you?

23 MR. BURNS: I think if there were no evidence
24 that there's some risk, yes --

25 QUESTION: Is that the only point you have?

1 MR. BURNS: Well, I think that goes to that
2 there's a reasonable -- a reasonable opportunity --

3 QUESTION: That's the only thing that you have?

4 MR. BURNS: I think that's true, that it goes to
5 reasons -- if there were no reasonable, I would agree --

6 QUESTION: So anybody that's ordered to produce
7 the child, all they have to do is start a rumor that the
8 child is dead?

9 MR. BURNS: I don't think so, Justice Marshall.

10 QUESTION: No?

11 MR. BURNS: I think the police --

12 QUESTION: Well, why not?

13 MR. BURNS: I think the police are more
14 sophisticated than that. What I mean by that is, in this
15 case -- and we've set out -- is you have the records of
16 the social workers talking to the police, giving their
17 opinions, not giving their opinions for any reason except
18 they obviously are conducting the investigation. You have
19 an extensive homicide investigation in this case.

20 I think it's a far different thing, the mere
21 fact that I may ask a police officer to drop by and see if
22 everything is okay. Well, that doesn't necessarily mean
23 that there's any real risk of -- of prosecution.

24 In this case I think the state has throughout
25 quite rightly conceded that under all the facts and

1 circumstances it would be unreasonable to conclude that
2 there wasn't a risk of prosecution.

3 QUESTION: (Inaudible.)

4 MR. BURNS: I -- I agree, Justice Marshall, and
5 I think that was one of my earlier case -- my earlier
6 points. In many of these cases if no one is concerned
7 that there is any criminal prosecution possibility, then
8 you don't have the problem.

9 But, of course, the other thing turns around.
10 if you're not concerned with that, then you're not
11 concerned either with use immunity because the simple
12 point is if there is no -- if the state -- no matter what
13 the defendant may say, if the state doesn't believe there
14 is a serious risk of this being involved in criminal
15 prosecution, you simply give use immunity and that
16 resolves the entire problem.

17 So I think our point is that this doesn't really
18 present a balancing case because there are reasonable
19 alternatives which the state can utilize if --

20 QUESTION: The only way to save the kid who is
21 dying with two and a half days food is to say, okay, you
22 tell us where he is, and if he's dead, you can walk free.
23 That seems rather an extreme -- an extreme price for the
24 state --

25 MR. BURNS: I don't think so --

1 QUESTION: -- to pay.

2 MR. BURNS: -- Justice Scalia. What I'm saying
3 is, if you really believe that -- if those facts are known
4 to the state, obviously you do have this case. What I'm
5 saying, in a case where the state is going to argue -- and
6 that was my answer to Justice Marshall -- in a case where
7 the state is going to say the defendant may say this --
8 there is a concern with prosecution but we know better, we
9 know perfectly well the child is in great health with
10 another family member. Well, the state can call that
11 bluff very easily.

12 All I'm saying is, in a case where the state is
13 not concerned with that, there is no problem.

14 QUESTION: Well, Counsel, correct me if I'm
15 wrong. As I understand the case, although there is a
16 possibility of a homicide here, there is also the very
17 real possibility that while we sit here this morning that
18 child is in need of care.

19 MR. BURNS: I suppose --

20 QUESTION: And -- and -- is that a possibility,
21 a significant possibility in this case?

22 MR. BURNS: I think it's -- I can't say it's not
23 a possibility. I think under all the facts and
24 circumstances whether it's significant is -- to be frank,
25 your judgment is as good as mine under these facts where

1 the child is --

2 QUESTION: Well, on -- on this --

3 MR. BURNS: -- gone for 18 months.

4 QUESTION: -- this record of previous
5 demonstrated serious abuse, let's stipulate, if we can,
6 that it's a serious possibility. I just want to make very
7 clear that your answers to Justice Scalia's question is
8 that the Fifth Amendment overrides any interest we have in
9 the welfare of that child in ordering her production.

10 MR. BURNS: Well, I think, if I may, give two
11 answers to that.

12 First, I think the answer would be, yes. And,
13 of course, the factual problem here is, although you have
14 this history of abuse of the mother, we know for a fact in
15 recent times the mother has not abused anyone, she's been
16 in jail.

17 But the second point is, I think, Justice
18 Kennedy -- and I think equally important -- is -- is the
19 -- Justice Scalia's hypothetical is built on the premise
20 that the state can do nothing. And I think the court of
21 appeals as a matter of law found that to be contrary. As
22 a matter of Maryland law the state can do something
23 without forfeiting any right under 3-831.

24 And if that's true, we don't have a true
25 balancing case because all we have is the state saying

1 we're going to resist doing it this way for whatever
2 reason. I don't know what that reason is. It's not a
3 matter of we can't do it; we just won't do it. Because it
4 seems to me the court of appeals is in Maryland law the
5 final decider of Maryland law. They concluded this was
6 the applicable statute.

7 And as I said, I think a prosecutor certainly

8 --

9 QUESTION: What statute is that?

10 MR. BURNS: 3-831 court's article. It's cited
11 -- it's been reproduced in 6(a) of petitioner Maurice's
12 brief.

13 QUESTION: And so how precisely is the state
14 supposed to proceed now?

15 MR. BURNS: Well, I think the state simply can
16 say, we're going to prosecute you; you -- we're charging
17 under this. If the state is concerned that what we have
18 --

19 QUESTION: But that -- but that is just -- still
20 avoids Justice Scalia's hypothetical and my concern that
21 we're interested in the welfare of the child.

22 MR. BURNS: Exactly, Judge Kennedy -- Justice
23 Kennedy.

24 QUESTION: And so you're saying that there is
25 nothing that can be done for the welfare of the child.

1 MR. BURNS: I'm not saying that because what I'm
2 saying -- and I'd be willing to say that I'm sure at this
3 very moment there is somewhere some prosecutor saying to a
4 defendant that, if you do what I want -- in this case, if
5 you comply, if you tell me where the child is, if you
6 produce it, we'll either not prosecute you under this;
7 there's going to be a mitigating factor under this. That
8 is, all the things that basically you can do with civil
9 contempt you can do with 3-831.

10 And it has a three-year penalty on it. So we're
11 not talking about some minor regulatory thing.

12 QUESTION: Well, let me ask you, while we're
13 talking about prosecutors. I take it -- or, correct me if
14 you disagree -- that in a case where the court awards
15 custody to a mother but with a warning that the mother is
16 to cooperate with social service workers, I take it the
17 court could require a waiver of the Fifth Amendment as a
18 condition to remitting the child to the custody of the --

19
20 MR. BURNS: My view, Justice Kennedy, is,
21 assuming all the proper forms going through, the answer
22 would be yes. There wasn't anything in this case. I
23 think that's certainly another. Obviously you can't use
24 it in retrospect, but certainly in future cases that's a
25 perfectly reasonable explanation. You have the mother,

1 you have the lawyer, and you simply make it clear that you
2 can't use the Fifth Amendment for this limited thing, for
3 producing the baby.

4 So, although I don't know of a case where that's
5 actually happened, I haven't seen any, I see in principle
6 no reason why it isn't a perfectly suitable basis for
7 avoiding all of these problems.

8 QUESTION: Oh, but wait a minute on that.
9 Supposing there is no history like you have here, which
10 is fights between parents and so a mother says she's
11 entitled to custody and they say, well, in order to get
12 custody you've got to waive your Fifth Amendment privilege
13 and she says, why should I waive my Fifth Amendment
14 privilege, I never did any --

15 MR. BURNS: Well --

16 QUESTION: -- do you just think you could you
17 could routinely require waivers of constitutional --

18 MR. BURNS: Justice Stevens --

19 QUESTION: -- rights?

20 MR. BURNS: -- I think the question of whether
21 it would be proper would be looked in a particular case.
22 If you're just doing it as a matter of routine, I think a
23 mother --

24 QUESTION: All right. If you do it on a
25 particular case -- supposing you've got a case, maybe a

1 divorce proceeding that seems normal as it starts but
2 later on it gets acrimonious, and then there is a dispute
3 about custody and somewhere along the line the court says,
4 I think the mother should surrender custody by such and
5 such a date. She refuses to do it. He orders her, bring
6 the child in, and she refuses. You don't know the details
7 of it. Could she claim the Fifth Amendment privilege?
8 And she had no reason to waive her Fifth Amendment rights
9 before.

10 MR. BURNS: But the problem -- I don't think --
11 I may have misunderstood your hypothetical, Justice
12 Stevens. But I don't think there was any -- suggested any
13 criminality involved or anything happening to the child.

14 QUESTION: No, but when she comes in, she --
15 maybe the husband's allegations are rather extreme. There
16 could be all sorts of variations in the facts. But does
17 she have a Fifth Amendment privilege just like this --

18 MR. BURNS: I think only if, again, there is a
19 reasonable prospect of this prosecution. And, again, I
20 think the state in many cases is going to be sure, despite
21 allegations of husband and wives which are made -- that's
22 not the case. And you do have the example saying limited
23 immunity; you have no rights whatsoever.

24 Going back to Justice Kennedy's with the waiver,
25 I think it might be a problem in the routine case, but it

1 seems to me in any case where you're taking what I would
2 call a high-risk placement, and certainly you are if there
3 is some prior history of abuse, I see nothing wrong either
4 in law or principle with saying that we're going to
5 condition this custody which, after all, is some risk to
6 the child, on a waiver of exercising your Fifth Amendment
7 privilege in these circumstances.

8 QUESTION: Maybe you'd also --

9 QUESTION: If you can require that -- but only
10 in certain circumstances. I take it you say you can't
11 require the waiver unless there is some previous element
12 of criminality. Then it's going to be litigated in every
13 case whether the waiver was any good.

14 MR. BURNS: No, Mr. Chief Justice. No, I don't
15 think the matter of waiver would be any good. The
16 litigation would come if social services said, we're not
17 going to give you the child because you didn't waive.
18 Then I think the burden would be on the parent to say,
19 well, it was an unreasonable thing.

20 I don't think that goes to whether the waiver is
21 good or not.

22 QUESTION: Well, supposing that Mrs. Bouknight
23 here had waived and then the time comes for her to bring
24 her child into court and she says, no, I'm going to claim
25 my Fifth Amendment. The court says, well, you waived it.

1 And she says, well, they have no business exacting that
2 requirement of me.

3 MR. BURNS: I think, Mr. Chief Justice, it's too
4 late then. I think if she wanted to litigate it, she had
5 to litigate it at the time when you were exacting --

6 QUESTION: Well, who knows -- who knows -- that
7 may be what you think but who knows what courts are going
8 to say?

9 (Laughter.)

10 MR. BURNS: Of course, Mr. Chief Justice, I
11 can't be responsible for what courts might do. However,
12 the problem here to some extent, I think, is we're working
13 in a vacuum because, as I pointed out, I don't know of any
14 specific case where this has been done although -- I'm not
15 saying there will never be any difficulties, but I suspect
16 that every rule of law there is provides --

17 QUESTION: Mr. Burns, the rule that you're
18 urging upon us is full of these difficulties. For
19 example, you say that it's no good in this case because
20 you could have done it a different way. There is this
21 other statute that you say is after all a big deal statute
22 which requires a three-year term.

23 Now, what if -- what if the child is so badly
24 injured that the incrimination she's worried about will
25 get her a jail term much more than three years? So she

1 says, it is still worth it for me to serve three years.
2 Are we supposed to weigh in each case whether the other
3 available means that the state has is really going to be
4 effective enough to save the child's life or to achieve
5 whatever other the state is legitimately seeking?

6 MR. BURNS: No, Justice Scalia, because I think
7 what you're doing there is you're saying that -- exactly
8 what we think is the concern here, is we really think
9 something's happened to the child and we want to
10 prosecute. Now, obviously, if you want to do that --

11 QUESTION: I want to save the child.

12 MR. BURNS: -- then you have to collect
13 evidence.

14 QUESTION: I don't want to -- I want to save the
15 child.

16 MR. BURNS: Well, then I'd --

17 QUESTION: And you're saying, well, three years
18 -- a three-year term ought to be enough to coerce her into
19 producing the child. And I say maybe not. Maybe the only
20 thing that will coerce her into producing the child is to
21 say you sit there until you produce him.

22 MR. BURNS: Well, of course -- well, it hasn't
23 come up in this case, I think -- and I don't think this
24 Court has actually ruled on it -- is there are
25 limitations, I think, on whether civil contempt can be,

1 for example, turned into a life sentence because then it
2 no longer has the purpose of coercing you to do this, but
3 it's becoming essentially punitive.

4 To my knowledge, there's no case where someone
5 has been held even three years under civil contempt.

6 QUESTION: Well, I would think if the state
7 moved to this other procedure, this 3-831, or whatever it
8 is, you would be making the same argument.

9 MR. BURNS: I wouldn't --

10 QUESTION: Why not?

11 MR. BURNS: -- Justice White.

12 QUESTION: Why not?

13 MR. BURNS: Because I think --

14 QUESTION: She exercises her Fifth Amendment
15 privilege and the court puts her in jail under civil
16 contempt and they say, well, now, we're going to prosecute
17 you for -- for disobeying this order to produce. And she
18 says, well you can't prosecute me for exercising my Fifth
19 Amendment privilege.

20 MR. BURNS: Justice White, you're not
21 prosecuting for exercising that Fifth Amendment privilege.
22 You're prosecuting for not complying with the order which
23 requires you to keep the child from being -- neglectful to
24 submit to this supervision.

25 It's like any other criminal case. A defendant

1 certainly can come forth and say something, but he doesn't
2 have to, and the fact that he doesn't say anything has
3 nothing to do with the Fifth Amendment.

4 QUESTION: Well, what the state is going to
5 prosecute her for is not producing the child.

6 MR. BURNS: That's true, Justice White.

7 QUESTION: Which is a -- you say is a
8 testimonial act.

9 MR. BURNS: No. What we're saying -- we're
10 saying is she that she has no right not to comply with
11 this order as a matter of criminal law. What we're saying
12 is you can't use the civil proceeding contempt to force
13 her to incriminate herself for some other crime. The
14 3-831 prosecution --

15 QUESTION: I know, but you're not -- I didn't
16 know the state could penalize somebody for exercising a --

17
18 MR. BURNS: They're not penalizing them for
19 that, Justice White. All our suggestion is -- totally in
20 those circumstances is you're penalizing them not for
21 exercising any right and you're not trying to necessarily
22 collect evidence for some other crime. All you're saying
23 is this was a valid order --

24 QUESTION: Well, if you're right in this case, I
25 would suggest that if your client is prosecuted under this

1 other statute, you ought to think twice about not making
2 this argument.

3 (Laughter.)

4 MR. BURNS: Well, Justice White, lots of
5 arguments are made, but I think --

6 QUESTION: And vice versa.

7 MR. BURNS: In any event, I think is -- there is
8 nothing to suggest at this stage of the proceedings, at
9 least, that this isn't a viable means of prosecuting and
10 accomplishing precisely the same factor.

11 Rylander was cited by the state. Rylander
12 concerned a prior enforcement proceeding, a subsequent
13 contempt proceeding. Here the prior proceeding that we
14 would be talking about is when the child is given to the
15 mother. It's difficult for me to understand what it is
16 she'd be contesting or talking about in the Fifth
17 Amendment at that time.

18 QUESTION: And how about the Byers-type
19 exception to the Fifth Amendment requirement?

20 MR. BURNS: I think the problem with the Byers
21 is, again, the specific order. Again, we're not attacking
22 the statute. As I think I've suggested many times here
23 today, there are certainly many cases where the content
24 would be perfectly proper, and in the ordinary course of
25 events, there would be no problem.

1 But here we have a judge acting with all these
2 facts before him knowing precisely that we're after one
3 individual and knowing at the same time, as the state
4 concedes, that there is a real significant problem with
5 the threat of criminal prosecution.

6 QUESTION: May I just clarify one thing, Mr.
7 Burns. Is your attack on the order or on the contempt?

8 MR. BURNS: Order or the -- the order -- if I
9 may say one thing, I would refer the Court to 72 and 74 --
10 pages 74 of the Joint Appendix, where the judge talks
11 about, in reference to one of your earlier questions --
12 that he requires there be verification of whatever the
13 petitioner says.

14 QUESTION: Is that -- again, are you saying the
15 order violated the Fifth Amendment or the order holding
16 her in contempt violated the Fifth Amendment?

17 MR. BURNS: Which -- I don't --

18 QUESTION: The order to produce the child.

19 MR. BURNS: Oh, I'm saying the contempt. I'm
20 sorry. I misunderstood you. Yes.

21 QUESTION: So you -- do you concede the order to
22 produce the child was valid?

23 MR. BURNS: I think you can -- I don't have any
24 problems with that.

25 QUESTION: Oh, okay.

1 MR. BURNS: No, that's purely contempt. I'm
2 sorry. I misunderstood.

3 But I did want to refer back to 72 and 74(a) in
4 reference to one of your earlier questions to the other
5 side -- is that where the judge makes it clear not only
6 do I want someone to say I can't do it; it has to be
7 verified and I have to accept it. So the judge is making
8 perfectly clear in the hypothetical where you can't
9 produce it -- just saying or telling your lawyer to say,
10 "I can't produce it," is simply not going to be enough.

11 Thank you.

12 QUESTION: Thank you, Mr. Burns.

13 Mr. Tyler, you have three minutes remaining.

14 REBUTTAL ARGUMENT OF RALPH S. TYLER, III

15 ON BEHALF OF THE PETITIONER IN NO. 88-1182

16 MR. TYLER: Without any doubt, the interests in
17 this case are the most fundamental and important interests
18 that the state has to protect and that we as a people have
19 to protect, and none of the arguments advanced today or in
20 the brief or in the opinion of the Court of Appeals of
21 Maryland meet either half of this case.

22 With respect to the testimonial issue, on page
23 10 of Respondent's brief they say this case need not be
24 decided on the narrow ground of whether the effect of
25 producing the child is testimonial. Were that proposition

1 to be accepted, it would largely reverse a vast body of
2 this Court's decisions, and it should be rejected. If it
3 is not testimonial, she has no Fifth Amendment privilege.

4 I think they've largely conceded that it's not
5 testimonial. The order -- judgment below should be
6 reversed on that ground alone.

7 QUESTION: Mr. Tyler, do you agree -- I thought
8 the question presented was whether the order directing a
9 parent to produce a child and so forth violated the Fifth
10 Amendment. And he's just said to me that that order is
11 conceded to be valid. The only issue is the contempt. Is
12 that your understanding of the case?

13 MR. TYLER: Well, I think the sequence, your
14 Honor -- really the one followed the other quite quickly.
15 The order --

16 QUESTION: Yeah, I know, but they are legally
17 distinct.

18 MR. TYLER: I'm not disputing that. The order
19 to produce was given by the judge. That led to some
20 information being provided. She was held in jail
21 overnight. Then the following day the information is
22 verified as false. He asks her, do you want to produce
23 the child? She says, no. Judge Mitchell then cites her
24 in contempt and the contempt order is entered. So, I --

25 QUESTION: So you agree the issue is the

1 validity of the contempt order, not the order to produce.

2

3 MR. TYLER: Yes, and that the -- the order --
4 the contempt order plainly is an order to enforce the
5 order to produce. And I think that it is -- it is
6 incorrect to look at this case only from the point of view
7 of well, that specific order is directed at one person as
8 to whom there is some risk of incrimination.

9 The fact is that order grows out of a plainly
10 neutral state regulatory system which exists for an
11 entirely legitimate, non-prosecutorial purpose, namely,
12 child protection, and no answer that has been given today
13 can meet the problem of where will we be if the state
14 cannot require a parent to produce her child in court.

15 The idea that criminal --

16 QUESTION: You're saying that the order to
17 produce is the -- which is not contested, is the
18 equivalent of the income tax statute, and the contempt for
19 failure to obey it is the equivalent of the prosecution
20 for not filing --

21 MR. TYLER: Right.

22 QUESTION: -- as the statute required?

23 MR. TYLER: I would not concede that it's
24 prosecution, Your Honor.

25 QUESTION: Well, --

1 MR. TYLER: It is -- it is enforcement, and it
2 is enforcement in this case, as it is really in any civil
3 case. I mean, the judicial arsenal is limited. What's at
4 stake in this case is will the most effective remedy
5 that's been identified in literally centuries of cases be
6 taken away from the only court that exists in our system
7 to protect children.

8 Thank you.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tyler.

10 The case is submitted.

11 (Whereupon, at 12:02 p.m., the case in the
12 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the

Supreme Court of The United States in the Matter of:

NO. 88-1182 - BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES, Petitioner V. JACQUELINE BOUKNIGHT; and

NO. 88-6651 - MAURICE M., Petitioner V. JACQUELINE BOUKNIGHT

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Leona M. May

(REPORTER)