IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0209

IN RE THE PARENTING OF:
E.C.D., minor child,

MARK DAVID WRIGHT,

Petitioner and Appellant,

and

CATIE LEIGH KELLEHER,
f/k/a Catie Leigh Duncan,

Respondent and Appellee.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Brett D. Linneweber, Presiding

APPEARANCES:

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RESPONDENT AND APPELLEE
PRO SE

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STATEMENT OF THE ISSUE

In an order of protection hearing, did the district court err when it ruled that adoption of the Informal Domestic Relations Trial process (Rule 17) fully waived Mark David Wright's constitutional right to assert his privilege against self-incrimination under the U.S. and Montana Constitutions?

STATEMENT OF THE CASE

Catie Leigh Kelleher filed a petition for an order of protection under Mont. Code Ann. § 40-15-101 *et seq.* against her daughter's father, Mark David Wright. (Doc. 54; 2/29/24 Tr. 6.)[1] The district court set an initial hearing to inquire whether the upcoming order of protection hearing should proceed under the Rules of Evidence or under the recently adopted Informal Domestic Relations Trial process, now in effect as U.D.C.R. 17 or Rule 17; *see* Appendix C. (Doc. 59.) Both parties agreed to follow the process provided for in Rule 17. (2/22/24 Tr.

[1] The underlying district court case, DR-17-574, is a parenting plan proceeding where Mark David Wright is the Petitioner and Catie Leigh Kelleher (f/k/a Catie Leigh Duncan) is the Respondent. For this appealed order of protection that is also nested inside the parenting plan proceeding (allowable under Mont. Code Ann. § 40-15-301), Kelleher is acting as Petitioner and Appellee while Wright is acting as Respondent and Appellant. For sake of convenience this brief refers to the parties simply as Wright and Kelleher.

4-5, 9, 13.) The district court told both parties they still had the right to object. (2/22/24 Tr. 3, 11, 13.)

The next week the district court presided over the evidentiary hearing on Kelleher's petition for an order of protection. (Doc. 65.) Kelleher testified under the informal rules by answering questions asked by the judge. (2/29/24 Tr. 4-23, 25-32, 35-39.) During this questioning Kelleher made statements of stalking, threats, and physical confrontations that—if left unchallenged—served as evidence in favor of granting a protection order. (*See* 2/29/24 Tr. 7-9, 11-12, 15, 17, 19.)

After Kelleher finished testifying, the district court told Wright he may be exposing himself to criminal liability if he decided to testify. (2/29/24 Tr. 45.) The district court said, "I'm obviously not going to – find that the informal rules trump his constitutional rights, **but if he comes to testify – it's a full waiver. It's not one or the other.** And so, he's going to have to decide whether he wants to testify or not." (2/29/24 Tr. 45-46, emphasis added, attached as App. B.)

After a recess, Wright's attorney told the district court that Wright had chosen not to testify and would submit exhibits for the district court to examine instead. (2/29/24 Tr. 47.) The district court,

relying on Kelleher's testimony and exhibits, issued a three-year order of protection against Wright. (Doc. 68, attached as App. A.) The district court did not hear Wright's testimony and the order made only a passing reference to Wright's submitted exhibits. (*See* Doc. 68 at 1-2.) Wright filed a timely appeal. (Docs. 68, 77.)

STATEMENT OF THE FACTS

Catie Leigh Kelleher sent her ex-partner Mark David Wright these text messages between November 2023 and January 2024:

> "I Hate you – I will sue you You can bet."
>
> "You're about to REALLY GOD DAMN PUSS ME OFF YOU STUOID FUCKER – WHERE IS MY GOD DAMN COFFEE FUCKERS"
>
> "When I find out who you've been giving money to for sex or whatever I'm going to destroy you too. You and Bob are both fucked"
>
> "Keep her you jew PIS – I am leaving uou both!!!"
>
> "You are going down asshole. That's a FACT."
>
> (Doc. 66, Ex. 1 at pgs. 5, 7, 12, 14, 21.)

Kelleher filed for an order of protection on February 2, 2024. (Doc. 54.) Kelleher and Wright share a daughter, E.C.D. (2/29/24 Tr. 6.)

Wright's goal is to make sure E.C.D. is cared for and fed, even when Kelleher yells at Wright to get her food and that her child support won't be going towards taking care of E.C.D. (*See* Ex. 1 at 17, 19, with Kelleher stating "THE CS GOES TO MY OTHER CHILD THIS MONTH" and "Buy FKN FOOD ASSHILE" to which Wright responded "Okay".)

Under the parenting plan case, Kelleher has leveled prior accusations and litigated against Wright in the past. Kelleher previously filed an order of protection against Wright; it was denied and a no-contact order issued instead. (Docs. 9, 12.) Wright also had to file an order of protection against Kelleher when she broke out glass windows, screamed profanities—including calling Wright a "dumb jew" via text—and threatened to shoot herself. (Doc. 35.) The district court ultimately denied that order of protection as well, limiting contact to only text message exchanges concerning the child. (Doc. 41.)

Kelleher has faced felony charges of Criminal Endangerment, Felony DUI, Assault with a Weapon, and misdemeanor charges of Obstructing a Peace Officer and Resisting Arrest. (Doc. 61 at 2.) A couple of weeks before filing her order of protection, Kelleher taunted

Wright again, texting Wright on January 14th, "Just wait. Court for us is SOON" (*See* Ex. 4 at pg. 3.)

Kelleher filed her latest order of protection that is the subject of this appeal on February 2, 2024. (Doc. 54.) Kelleher did so without the assistance of an attorney, while Wright had legal counsel. (2/22/24 Tr. 3.) As a result, the district court ordered a status hearing to explain to Kelleher the availability of U.D.C.R. 17, which this Court recently adopted on October 1, 2023. (App. C.)

The district court informed the parties that in family law cases there is an option for relaxed rules of evidence. (2/22/24 Tr. 3.) The district court added, "However, either party has the right to object." (2/22/24 Tr. 3.) The district court generally explained the court would ask the questions, the questioned party would be able to answer the questions without being blocked by rules of hearsay or the like, and each side would have an opportunity to give a closing statement. (*See* 2/22/24 Tr. 5-8.) Both parties agreed to follow Rule 17. (2/22/24 Tr. 5, 9.) The district court again told both parties they could object, explaining the court would still entertain objections, but they would be less likely to be sustained because of the informal rules. (2/22/24 Tr. 11-

13.)

A week later at the evidentiary hearing, the district court stated it would ask questions of Kelleher first, and then ask questions of Wright next. (2/29/24 Tr. 4.) The judge asked questions and guided the conversation while Kelleher answered in response. (*See* 2/29/24 Tr. 4-5.) Kelleher said that on January 27th Wright chased her and E.C.D. when they were walking from the apartment to the park. (2/29/24 Tr. 7-9.) Kelleher said that Wright yelled he would call CPS and the police. (2/29/24 Tr. 9.) When asked if Wright was making a physical threat or legal threat, Kelleher clarified, "No physical threats." (2/29/24 Tr. 9.)

Wright and Kelleher lived in the same building at the time, but in different apartments on different floors. (2/29/24 Tr. 7.) Kelleher accused Wright of walking upstairs and making multiple phone calls to her a day. (2/29/24 Tr. 13-14.) Kelleher admitted Wright calls her to discuss parenting matters concerning E.C.D., but said Wright called too many times in August and October of last year and on one day in January. (2/29/24 Tr. 39-44.) That specific day was January 14th, the same day Kelleher told Wright that court was coming "SOON." *See* (2/29/24 Tr. 39; Ex. 4 at pg. 3.)

Kelleher also alleged that on January 27th Wright put his foot in the doorway as she was trying to shut it. (2/29/24 Tr. 17.) "He put his foot in the door, and it slammed against my chest." (2/29/24 Tr. 17.) Kelleher also claimed Wright said he would kill her if she moved away from the apartment. (2/29/24 Tr. 18.)[2]

Kelleher also told the district court that last year she was sanding the corners of a table in the kitchen and when Wright saw this, she said Wright got angry. (2/29/24 Tr. 19.) Kelleher testified, "and then he pushed the table and it hit me and gave me a bruise on my leg, which I shared with him." (2/29/24 Tr. 19.)

Finally, Kelleher alleged on Valentine's Day that Wright came up to her door "and shoved his way in again." (2/29/24 Tr. 25.) The video in evidence, however, does not show Wright entering the apartment. (Ex. I.) Instead, the video is a recording of E.C.D. being emotional and distraught while she is with Kelleher. (Ex. I, 20240214_081031 at 2:15-3:15.) E.C.D. cried and is shown being upset with Kelleher for at least three minutes. (*Id.*; Ex. I, 20240214_081440 at 0:00-1:55.) Through a

[2] Kelleher no longer resides in that apartment and had moved into a new apartment on February 8, 2024. (*See* Ex. I, 20240208_135718 at 0:25-0:50.)

crack in the door, Wright said, "[E.C.D.], I found your lipstick." Wright did not make any shoving motion nor enter the apartment, and Kelleher closed the door. (Ex. I, 20240214_081440 at 1:55-2:05.)

The district court's questioning of Kelleher lasted one hour and twenty-five minutes. (Doc. 59; 2/29/24 Tr. 45-46.) The court said it would take a break. (2/29/24 Tr. 45.) The district court then told Wright's attorney to talk to Wright before taking the stand, saying if Wright chose to testify, he may be exposing himself to criminal liability:

> We've actually been going since 1:15. I'm actually inclined to take a break even without the Court Reporter for a couple of reasons. One, to give the staff in here a break, but second, [Wright's attorney], some of the stuff that was testified to, if your client does take the stand, he may actually be exposing himself to – incriminating himself on something that is criminal.
>
> And so, I want you to actually have time to discuss whether he's – I'm not going – even with the informal rules, I'm obviously not going to – find that the informal rules trump his constitutional rights, but if he comes here to testify – it's a full waiver. It's not one or the other. And so, he's going to have to decide whether he wants to testify or not.
>
> Given – again, this is just regarding the Order of Protection. It's not regarding the Parenting Plan since we've limited the scope. So, I'm going to take a recess for 15 minutes and we'll be back at 2:55. That should give you – if you need more time to discuss or strategize about that – just let me know at that time.

(2/29/24 Tr. 45-46, attached as App. B.)

After the recess, the judge then said, "what I had indicated was the sole allegation is based on stalking, and so, all the conduct that I'd be asking about would be based on testimony regarding that. Does your client wish to testify or not?" (2/29/24 Tr. 47.)

Wright's attorney said she talked it over with her client and that Wright would not be testifying, but did want the district court to look at some submitted exhibits. (2/29/24 Tr. 47.) The district court told Wright he would do that but also told Kelleher "you've submitted what I call a sufficient case for me to consider whether there's a physical threat basis for me to consider your Order of Protection." (2/29/24 Tr. 47-48.)

Afterwards, the district court issued a permanent order of protection against Wright for a period of three years. (Doc. 68, attached as App. A.) The district court's findings cited to Kelleher's testimony and exhibits and did not discuss Wright's exhibits. (Doc. 68 at 2.) The district court wrote, "[Kelleher] testified and presented exhibits. [Wright] invoked his right against self-incrimination; however, the Court received exhibits on his behalf," citing to Rule 17. (Doc. 68 at 1.)

STANDARD OF REVIEW

"Our review of constitutional questions is plenary, and we review for correctness a district court's interpretation of constitutional law." *State v. Kelm*, 2013 MT 115, ¶ 18, 370 Mont. 61, 300 P.3d 687 (internal citations omitted).

SUMMARY OF THE ARGUMENT

The district court erred when it ruled that proceeding under the Informal Domestic Relations Trial process (Rule 17) also constituted a full waiver of Wright's privilege to assert his Fifth Amendment protection against self-incrimination, boxing him into a false choice between exposure to criminal liability or leaving Kelleher's version of the facts unchallenged. After only hearing one side of the story, the district court told Wright he may be exposing himself to criminal liability and warned if he testified "it's a full waiver. It's not one or the other."

An assertion of the Fifth Amendment during testimony is a constitutional right whose application is addressed on a case-by-case basis at the time of questioning and dependent on the facts and

circumstances at issue. A party's decision to testify in a civil case does not waive their right to assert constitutional protections. A judge's warning of a "full waiver" of constitutional protections to a person who intends to testify destroys that person's power to protect their own rights. The district court's "full waiver" statement to Wright of not being able to assert his self-incrimination privilege during questioning was an incorrect statement of the law.

The district court's incorrect ruling muzzled Wright and deprived him of an opportunity to tell his side of the story. After telling Wright he was allowed to object at the hearing's outset, the district court later changed its tune and warned Wright that if he testified, it would be a "full waiver" of his self-incrimination protection. Wright did not receive due process in one of the most high-risk proceedings in civil litigation, an order of protection. This unlawful order of protection must be dismissed.

ARGUMENT

The district court erred when it ruled Wright could not testify in an order of protection hearing unless he fully waived his Fifth Amendment rights prior to questioning.

"The Fifth Amendment to the United States Constitution and Article II, Section 25 of the Montana Constitution both provide that no person shall be compelled, in any criminal case, to be a witness against himself." *Kelm*, ¶ 29. The Fifth Amendment protection against self-incrimination also applies to civil proceedings, formal or informal, where the answers might incriminate the person in future criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The U.S. Supreme Court elaborated on the importance of the Fifth Amendment privilege:

> "The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values that underlie the privilege."
>
> *Kastigar v. U.S.*, 406 U.S. 441, 444-445 (1972).

The right to assert the Fifth Amendment—also described as the right to remain silent or the right not to answer on the grounds that it may incriminate yourself—is a right that is claimed "at the time of questioning" when the claimant affirmatively invokes the right. *State*

v. Plouffe, 2014 MT 183, ¶ 23, 375 Mont. 429, 329 P.3d 1255. The Fifth Amendment, in fact, must be claimed during questioning and asserted by the witness to be effective. *U.S. v. Monia*, 317 U.S. 424, 427 (1943); *Plouffe*, ¶ 23 (stating that if a person fails to invoke the right at the time of questioning, then the right will be deemed waived). The U.S. Supreme Court also describes the privilege as occurring during questioning, stating, "The privilege protects a mere witness as fully as it does one who is also a party defendant." *Lefkowitz*, 414 U.S. at 77.

"A necessary corollary to the right against self-incrimination is the right to testify in one's own behalf." *In re J.S.W.*, 2013 MT 34, ¶ 18, 369 Mont. 12, 303 P.3d 741, *citing Rock v. Arkansas*, 483 U.S. 44, 52 (1987). Not only does a defendant have the right to remain silent, but they have a corollary right to be able to testify and present their side of the story. A witness (or party) must be able to explain themselves while also still having basic constitutional protections. In *Lefkowitz*, the Court presented and dismissed the suggestion that a government could ask employees about their job performance without regard to the Fifth Amendment and use any incriminating answers in a subsequent criminal prosecution, while also being allowed to fire those who refused

to answer questions unless they waived. *Lefkowitz*, 414 U.S. at 78. The Court does not condone a false choice between having no Fifth Amendment protection when testifying or invoking the Fifth Amendment only by waiving any right to testify at all. *See Id.*

Invoking the Fifth Amendment during testimony may not always be successful depending on the facts and circumstances present at the time the privilege is raised, but a witness or party is not barred from trying. An example of applying the Fifth Amendment with nuance occurs during cross-examination. When a party testifies and is subject to cross, the breadth of their Fifth Amendment waiver is determined by the scope of relevant cross-examination, which in turn is set by the subject matters put into dispute by the party during their testimony. *State v. Wilson*, 193 Mont. 318, 324-325, 631 P.2d 1273, 1277 (1981). The Fifth Amendment is not an immunity from cross-examination, but rather is "a humane safeguard against judicially coerced self-disclosure." *Id.*

There are a few situations when the Fifth Amendment privilege can be foreclosed at the outset, most notably by the granting of immunity, but the immunity provided "must afford protection

commensurate with that afforded by the privilege." *See Kastigar*, 406 U.S. at 453. When immunity is granted that prevents testimony from directly leading to criminal penalties, then forced testimony at the outset is permitted. *Id*. Otherwise, a party has both a right to testify and a right to assert the Fifth Amendment at the time of questioning. *Plouffe*, ¶ 23; *J.S.W.*, ¶ 18; *Monia*, 317 U.S. at 427.

Rule 17 of the Uniform District Court Rules does not afford protection commensurate with Fifth Amendment privilege against self-incrimination, therefore, the Fifth Amendment cannot be waived by a court at the outset prior to a witness's expected testimony and must instead be addressed at the time of questioning if and when the witness invokes the privilege.

Rule 17 presents a more informal process for litigating actions in domestic relations cases, including orders of protection. U.D.C.R. 17(a). Under this process, parties may "present any evidence they believe is relevant," even if that evidence might be inadmissible under the formal Rules of Evidence. U.D.C.R. 17(e). The traditional format used to question witnesses during a hearing under this rule does not apply. U.D.C.R. 17(e). Rather, the judge conducts the questioning and cross-

examination is not allowed. U.D.C.R. 17(i)(3), 17(i)(4). The judge then repeats this process for the other party. U.D.C.R. 17(i)(5). The Rule is silent on the Constitution or testimonial immunity. As an informal civil proceeding without any grant of immunity, the Fifth Amendment is applicable and invokable by either party at the time of questioning.

Contrary to a traditional trial, this process actually contains fewer opportunities for a waiver of the Fifth Amendment. Cross-examination is not used, rather, a judge directs the parties to answer questions about matters it deems relevant to resolving the dispute at hand. Should one of these questions be directed to a party or witness whose answer may result in criminal penalties, the Fifth Amendment is precisely the humane safeguard needed against a judicially coerced self-disclosure. *See Wilson*, 193 Mont. at 324-325, 631 P.2d at 1277.

The district court imposed a false choice, much like the government in *Lefkowitz*, when it told Wright that if he chose to testify, "it's a full waiver. It's not one or the other." (2/29/24 Tr. 45-46.) The district court issued a ruling barring invocation of the Fifth Amendment without a commensurate immunity protection before even allowing Wright to speak a single word. Wright now had the impossible choice of

having to choose between not telling his side of the story or testifying under oath and being required to answer questions with no Fifth Amendment protections.

This was not the action of a district court only trying to look out for a party's constitutional rights. There is no such thing as a "full waiver," before taking the stand to testify under oath, not under Rule 17 and not under any other proceeding—with the rare exception of a grant of immunity that provides commensurate protection to the Fifth Amendment. *See Kastigar*, 406 U.S. at 453. The district court provided no such protection and deviated from normal constitutional procedure of when the Fifth Amendment can be invoked, which is at the time of questioning. *Plouffe*, ¶ 23; *Monia*, 317 U.S. at 427.

Nor is Wright's voluntary agreement to abide by the informal Rule 17 process a waiver of his constitutional rights here. As part of the discussion before even agreeing to enter the process, the district court repeatedly informed Wright he had a right to object. (2/22/24 Tr. 3, 11, 13.) But after hearing Kelleher's testimony, and without getting Wright's side of the story, his right to object had disappeared. Instead, Wright was left with an option of all or nothing, a "full waiver. It's not

one or the other." (*See* 2/29/24 Tr. 45-46.) Wright could no longer object (i.e. invoke) his Fifth Amendment rights at the time of questioning. Instead, he'd "have to decide whether he wants to testify or not." (*See* 2/29/24 Tr. 45-46.) The district court's ruling unconstitutionally boxed-in Wright and muzzled him from presenting his side of the story.

The district court's error here is a "structural error" that "affects the framework within which the trial proceeds, rather than simply an error in the trial process itself." *State v. Van Kirk*, 2001 MT 184, ¶ 38, 306 Mont. 215, 32 P.3d 735. The absence of the evidence not presented that resulted from the constitutional error cannot be qualitatively or quantitatively weighed against the admissible evidence that was introduced. *See Van Kirk*, ¶ 38. This error is one of constitutional dimensions that undermined the fairness of the entire proceeding. Alternatively, the error is not harmless. Wright was the sole witness to the defense case. His entire defense rested on his own testimony, and that testimony was never heard.

Orders of protection proceedings, while civil proceedings, are some of the most high-risk proceedings in civil litigation and where the interests of being able to invoke the Fifth Amendment at the time of

questioning is vital. Petitioners can and do assert claims of assault, stalking, sexual misconduct, unlawful restraint, and more. *See* Mont. Code Ann. § 40-15-102(1). Petitioners, as was done here, are allowed to present allegations of past harm and other matters far beyond the scope of what a judge can decide in a petition. Courts can grant temporary orders of protection before the defendant's hearing based on the petition's allegations alone. A constitutional, fair hearing is essential to protecting the due process rights of all parties. A defendant in an order of protection proceeding, formal or informal, has both corollary rights to testify on their own behalf and to invoke the Fifth Amendment at the time of questioning.

Had Wright been able to present his side of the story and expose falsehoods raised by Kelleher, he could have very well been required to answer questions from the district court on the subject matters that Wright had voluntarily raised. *See Wilson*, 193 Mont. at 324-325, 631 P.2d at 1277. But it was Wright's constitutional choice to choose what subject matters to get into to defend himself from Kelleher's accusations, not the district court's choice.

CONCLUSION

Wright respectfully requests reversal of the district court with instructions on remand to dismiss the order of protection.

Respectfully submitted this 12th day of July, 2024.

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CERTIFICATE OF COMPLIANCE

Adhering to Rule 11 of the Montana Rules of Appellate Procedure, I certify this brief is printed with proportionately spaced Century Schoolbook text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,006, excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

By: /s/ James Reavis
JAMES REAVIS

APPENDIX

CERTIFICATE OF SERVICE

I, James Richard Reavis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-12-2024:

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Service Method: Conventional

Electronically signed by Lindsey Adams on behalf of James Richard Reavis
Dated: 07-12-2024