

State of Wisconsin:

Circuit Court:

Milwaukee County:

State of Wisconsin,

Plaintiff,

v.

Case No. 2010CF000487

Luis Gamboa,

Defendant.

Motion to Dismiss Count Six for the Reason That it Denies Gamboa Substantive Due Process

In the event that the court denies Gamboa's motion to dismiss Count Six of the amended information for the reason that it is unconstitutionally multiplicitous, then Gamboa moves the court dismiss Count Six for the reason that it impinges upon Gamboa's fifth amendment right to be free of compulsory self-incrimination; and, therefore, the count violates Gamboa's right to substantive due process.

This motion is based on the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of June, 2010.

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By: _____

Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Ave.
Twelfth Floor
Milwaukee, WI 53233

414.671.9484

State of Wisconsin:

Circuit Court:

Milwaukee County:

State of Wisconsin,

Plaintiff,

v.

Case No. 2010CF000487

Luis Gamboa,

Defendant.

**Memorandum in Support of Motion to Dismiss Count Six for the Reason That it
Denies Gamboa Substantive Due Process**

Argument

I. Count six alleges that Gamboa committed the crime of child neglect by failing to disclose to medical personnel that he had committed the crime of child abuse (shaking the child); and, therefore, Count Six impinges upon Gamboa's constitutional right to be free of compulsory self-incrimination.

Count One of the amended information alleges that Gamboa committed the crime of child abuse. The criminal complaint alleges that Gamboa engaged in a course of physical abuse of the child that included shaking. Count Six of the amended information alleges that Gamboa committed the crime of child *neglect*, contrary to Sec. 948.21, Stats., by "failing to disclose the shaking/abuse to the medical treatment providers."

In other words, Count Six alleges that Gamboa committed the crime of child neglect by failing to disclose to the doctors that he (Gamboa) had committed the crime of child abuse. Gamboa has a fifth amendment right to be free of compulsory self-incrimination.

Thus, because Count Six impinges upon Gamboa's fifth amendment rights, the count violates substantive due process, and the charge must be dismissed.

An individual's substantive and procedural due process rights are rooted in the Fourteenth Amendment to the United States Constitution, and Article I, Section 1 of the Wisconsin Constitution. (internal citations omitted) "The right to substantive due process addresses 'the content of what government may do to people under the guise of the law.'" (citation omitted). An individual's substantive due process rights protect against a state action that is arbitrary, wrong, or oppressive, without regard for whether the state implemented fair procedures when applying the action. (citations omitted) In contrast, the question of fairness is addressed as a matter of procedural due process. In other words, even if a challenge that a government action deprives "a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner."

State v. Wood, 2010 WI 17, P17 (Wis. 2010).

"A court's task in a challenge based on substantive due process 'involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it.'" *Id.*

Here, the State alleges in Count Six that Gamboa committed the crime of child neglect by failing to disclose the abuse, or the shaking of the child, to medical personnel. Shaking the child (if Gamboa did it), and causing injury, is a crime. Gamboa has an absolute constitutional right to be free of compulsory self-incrimination. The fifth amendment protection against compulsory self-incrimination is made applicable to the states by the fourteenth amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). It commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. It protects an individual against being compelled to answer questions in any proceeding, civil or criminal, formal or informal, if the answer might be incriminating. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

Count Six, then, plainly impinges upon Gamboa's fifth amendment rights. Once he went to the hospital with the child, he was faced with the prospect of either admitting the crime of child abuse causing bodily injury; or committing the crime of child neglect by failing to inform the doctors as to how the child received the injuries.

Conclusion

For these reasons, it is respectfully requested that the court find that Count Six, as alleged, denies Gamboa substantive due process, and dismiss the count.

Dated at Milwaukee, Wisconsin, this _____ day of June, 2010.

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By: _____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Ave.
Twelfth Floor
Milwaukee, WI 53233

414.671.9484