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No. 98094-2

SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE DEPENDENCY OF A.M.-S.  
SERGIO MICHEL-GARCIA,  
Petitioner,

v.

STATE OF WASHINGTON,  
Respondent.

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**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION  
OF WASHINGTON, LEGAL COUNSEL FOR YOUTH AND  
CHILDREN, WASHINGTON DEFENDER ASSOCIATION AND  
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE**

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**TABLE OF CONTENTS**

**I. IDENTITY OF AMICI ..... 1**

**II. COURT OF APPEALS DECISION ..... 1**

**III. ISSUES PRESENTED FOR REVIEW ..... 1**

**IV. STATEMENT OF THE CASE..... 2**

**V. REASONS WHY REVIEW SHOULD BE GRANTED ..... 2**

    A. A SIGNIFICANT CONSTITUTIONAL QUESTION IS PRESENTED WHEN A PARENT UNDERGOING PSYCHOLOGICAL EVALUATIONS IN DEPENDENCY PROCEEDINGS IS UNABLE TO PROTECT THEIR RIGHT AGAINST SELF-INCRIMINATION ..... 2

    B. A MATTER OF SUBSTANTIAL PUBLIC INTEREST IS INVOLVED WHEN THE LAW IS UNNECESSARILY INTERPRETED TO REQUIRE A VIOLATION OF PARENTS’ RIGHT AGAINST SELF-INCRIMINATION ..... 5

    C. IT IS A MATTER OF SUBSTANTIAL PUBLIC INTEREST WHEN PARENTS ARE LEFT UNCERTAIN WHETHER THEY CAN FULLY PARTICIPATE IN CHILD DEPENDENCY PROCEEDINGS, WHICH IMPLICATE THE FUNDAMENTAL RIGHT TO FAMILY INTEGRITY, WITHOUT LOSS OF THEIR RIGHT AGAINST SELF-INCRIMINATION ..... 9

**VI. CONCLUSION ..... 10**

## TABLE OF AUTHORITIES

### Cases

<i>Eastham v. Arndt</i> , 28 Wn.App. 524, 624 P.2d 1159 (1981) .....	7
<i>In re C.C.M.</i> , 149 Wn.App. 184, 202 P.3d 971 (2009).....	8
<i>In re Custody of Smith</i> , 137 Wn.2d 1, 969 P.2d 21 (1998), <i>judgment aff'd sub nom. Troxel v. Granville</i> , 530 U.S. 57, 87 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).....	4
<i>In re Dependency of J.B.S.</i> , 123 Wn.2d 1, 863 P.2d 1344 (1993) .....	2
<i>In re Dependency of Q.L.M.</i> , 105 Wn.App. 532, 20 P.3d 465 (2001) .....	6
<i>In re Dependency of T.L.G.</i> , 126 Wn.App. 181, 108 P.3d 156 (2005).....	8
<i>In re K.J.B.</i> , 187 Wn.2d 592, 387 P.3d 1072 (2017); .....	8
<i>In re the Dependency of A.M.- S.</i> , 2019 WL 6837779, 455 P.3d 117, (No. 79364-1-I, December 16, 2019) .....	passim
<i>In re Welfare of Sumey</i> , 94 Wn.2d 757, 621 P.2d 108 (1980) .....	5
<i>J.R.U.-S.</i> , 126 Wn. App. 786, 110 P.3d 773 (2005).....	6, 8
<i>Kastigar v. United States</i> , 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).....	3
<i>Lefkowitz v. Turley</i> , 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973) ....	3
<i>Parham v. J.R.</i> , 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979)....	5
<i>Santosky v. Kramer</i> , 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) .....	5
<i>State v. Bryant</i> , 97 Wn.App. 479, 983 P.2d 1181 (1999) .....	7
<i>State v. Carroll</i> , 83 Wn.2d 109, 515 P.2d 1299 (1973) .....	3
<i>State v. Decker</i> , 68 Wn.App. 246, 842 P.2d 500 (1992).....	3, 6
<i>State v. Escoto</i> , 108 Wn.2d, 734 P.2d 1310 (1987) .....	3

### Statutes

Laws of 1975, ch. 217, § 8.....	7
Laws of 1987, ch. 524, §11.....	7
RCW 26.44.053(2).....	passim
RCW 6.32.200 .....	8

### Rules

RAP 13.4(b)(3) .....	5
RAP 13.4(b)(4) .....	8, 10

**Constitutional Provisions**

U.S. Const. amend. V..... 3,6  
Washington Const. art. I, § 9 ..... 3,6

## **I. IDENTITY OF AMICI**

The identity and interest of Amici are set forth in the Motion for Leave to File Brief of *Amici Curiae* filed with this brief.

## **II. COURT OF APPEALS DECISION**

This brief is filed in support of the Petition for Review of the published Court of Appeals decision in *In re the Dependency of A.M. - S.*, 2019 WL 6837779, 455 P.3d 117, (No. 79364-1-I, December 16, 2019).

## **III. ISSUES PRESENTED FOR REVIEW**

The Court of Appeals correctly recognized that “the psychological evaluation or other parenting assessments that Michel-Garcia has undergone or may be ordered to undergo in this dependency proceeding threaten his right against self-incrimination.” Slip Op. at 10. It correctly held “a combination of use and derivative use immunity is necessary to protect a person’s Fifth Amendment privilege.” Slip Op. at 12. It proceeded, however, to hold that neither the applicable statute, RCW 26.44.053(2), nor the inherent power of the courts is sufficient to protect Mr. Michel-Garcia against violation of his Fifth Amendment rights.

- A.** Is a significant constitutional question presented when a parent undergoing psychological evaluations in dependency

proceedings is unable to protect their right against self-incrimination?

- B. Is a matter of substantial public interest involved when the law is unnecessarily interpreted to require a violation of parents' right against self-incrimination?
- C. Is it a matter of substantial public interest when parents are left uncertain whether they can fully participate in child dependency proceedings, which implicate the fundamental right to family integrity, without loss of their right against self-incrimination?

#### **IV. STATEMENT OF THE CASE**

Amicus adopts Petitioner's Statement of the Case and supplements it only to point out that the Court of Appeals held both that RCW 26.44.053(2) does not confer derivative use immunity and that courts do not have the inherent authority to confer such immunity. Each element of the Court of Appeals' holding poses a significant constitutional and public policy issue.

#### **V. REASONS WHY REVIEW SHOULD BE GRANTED**

- A. A Significant Constitutional Question Is Presented When a Parent Undergoing Psychological Evaluations in Dependency Proceedings Is Unable to Protect Their Right Against Self-Incrimination**

The dilemma of protecting all the constitutional rights at stake here warrants review in this case. As noted above, the Court of Appeals effectively acknowledged that Mr. Michel-Garcia is faced with choosing which fundamental right to forfeit: the right to parent or the right to remain silent. “[P]arents have a fundamental liberty and privacy interest in the care and custody of their children.” *In re Dependency of J.B.S.*, 123 Wn.2d 1, 12, 863 P.2d 1344 (1993). Yet, if he fails to participate fully in the parenting evaluation, he faces loss of his children. If he participates fully and truthfully in the parenting evaluation, however, he does so with an incomplete grant of immunity.

As the trial court found:

The choice is either successfully completing requirements of the evaluations and treatment and incriminating themselves in subsequent criminal proceedings or refusing to make the required admissions and be[ing] found in denial and noncompliance, with the knowledge that such refusal would be used as a basis for either not returning the children or termination of parental rights.

Slip Op. at 9, quoting trial court findings.

The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. Washington State’s Constitution affords similar protections against being “compelled in any criminal case to give evidence against himself.” Washington Const. art. I, § 9. The privilege may be raised in any



proceeding if the answers an individual is to provide might incriminate them in future criminal proceedings. *See Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973).

A grant of immunity must “be coextensive with the scope of the privilege against self-incrimination.” *State v. Carroll*, 83 Wn.2d 109, 111, 515 P.2d 1299 (1973). *See also, e.g., Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). In the case of use immunity, this requires a grant of both direct use and derivative use immunity. *Id.*<sup>1</sup>

To ensure that these protections are meaningful, courts have inherent authority to provide direct and derivative immunity in order to ensure that the Fifth Amendment’s protections are meaningful. *See State v. Escoto*, 108 Wn.2d, 1, 734 P.2d 1310 (1987) (affirming a trial court’s ability to limit use of information derived from an evaluation to matters already adjudicated); *State v. Decker*, 68 Wn. App. 246, 842 P.2d 500 (1992) (affirming the court’s authority to grant direct and derivative use immunity and bar the use of any information obtained in a subsequent proceeding).

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<sup>1</sup> The Answer to Pet. for Review argues that because derivative use immunity imposes a burden on the prosecutor, then as a policy reason it should not be required. *See Answer to Pet. for Review 1-2*. Nothing in the case law supports such a conclusion. To satisfy the Fifth Amendment, use immunity must include both direct use and derivative use immunity.

The Court of Appeals, however, interpreted the law and applicable statutes to create a situation where it openly acknowledged that the protections available to Mr. Michel-Garcia were insufficient to meet constitutional requirements. *See* Slip Op. at 12, 25.

As interpreted by the Court of Appeals, the laws of the State of Washington create an inevitable infringement of Mr. Michel-Garcia's constitutional rights against self-incrimination. The questions whether the court has the authority to protect against an unlawful infringement of Fifth Amendment protections and whether there is a constitutional violation when a statute is interpreted to in a manner that unlawfully infringes on the right against self-incrimination are significant constitutional issues and should be resolved by this Court. *See* RAP 13.4(b)(3).

**B. A Matter of Substantial Public Interest Is Involved  
When the Law is Unnecessarily Interpreted to Require  
a Violation of Parents' Right Against Self-Incrimination**

This Court has recognized that a parent's right to a relationship with their children is a "fundamental 'liberty' interest protected by the Fourteenth Amendment and also a fundamental right derived from the privacy rights inherent in the constitution." *In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *judgment aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 87 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). *See also, e.g., Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d

599 (1982). The right does not belong just to parents; it is fundamentally important for children to maintain a relationship with their parents. *In re Smith, supra*, at 15 (citing *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)). See also *Parham v. J.R.*, 442 U.S. 584, 603, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

Just as fundamentally, every individual is entitled to the protections of the Fifth Amendment of the United States Constitution and Article I, § 9 of the Washington State Constitution.

It is a matter of substantial public interest when these two sets of rights are interpreted as being in inevitable conflict. The public interest in preventing this result is particularly strong where, as here, a solution that avoids the harm is readily available.

The statute at issue here, RCW 26.44.053(2), is properly read as providing the necessary constitutional protections; indeed if it did not, it would be part of an unconstitutional structure. The statute provides that “[n]o information given at any . . . examination of the parent or any other person having custody of the child may be used against such person in any subsequent criminal proceedings against such person or custodian concerning the alleged abuse or neglect of the child.”

The obvious intent of the statute is to ensure that state actors do not infringe on an individual’s constitutional rights by forcing the parent to

choose between self-incrimination or losing their child. Indeed, the statute originally provided that “no testimony” given in a parenting evaluation could be used against the parent. Laws of 1975, ch. 217, § 8. In 1987, this was changed to provide that “no information” given at such examination could be used against the parent. Laws of 1987, ch. 524, §11. Regardless of the intent in 1975, the intent in 1987 was clearly to go beyond testimony and prevent use of all information gained as a result of the examination – both direct use and derivative use immunity.

The lower court here relied on *J.R.U.-S.*, 126 Wn. App. 786, 798, 110 P.3d 773 (2005), for the proposition that the immunity provided in RCW 26.44.053(2) does not include immunity for evidence derived from immunized statements. Slip Op. at 12. The *J.R.U.-S.*, court itself, however, recognized examples in both cases and commentary that treat grants of “use immunity” as covering both direct use and derivative use, *see J.R.U.-S.*, *supra*, at n.26,. It also recognized that cases in Washington have treated “use immunity” as encompassing both direct use and derivative use. *See J.R.U.-S.*, *supra*, at 798-99, *citing State v. Decker*, 68 Wn.App. 246, 842 P.2d 500 (1992), and *In re Dependency of Q.L.M.*, 105 Wn.App. 532, 20 P.3d 465 (2001).

The cases cited by the court in *J.R.U.-S.* to conclude that RCW 26.44.053(2) grants only direct use immunity have nothing to do with

statutory construction and are inapplicable to the facts of this case. *State v. Bryant*, 97 Wn.App. 479, 983 P.2d 1181 (1999) dealt with an agreement entered into with the prosecutor that provided in part that the defendant's testimony could not be "utilized by law enforcement to find additional evidence," *Id.* at 484. There is no such agreement here.

*Eastham v. Arndt*, 28 Wn.App. 524, 624 P.2d 1159 (1981), addressed RCW 6.32.200 which provides that in supplemental proceedings "an answer cannot be *used as evidence* against the person so answering in a criminal action or criminal proceeding." *See Eastham, supra*, at 530 (emphasis provided by the court in quoting the statute). *Eastham* correctly found that such a narrow statute does not grant derivative use immunity. Nothing in the opinion, however, answers the question whether the prohibition in RCW 26.44.053(2) grants both direct and derivative use immunity.

This Court has yet to answer the question whether RCW 26.44.053(2) is part of an unconstitutional structure because it provides inadequate protection – resulting necessarily in a constitutional and public policy issue -- or whether it provides protection sufficient to allow the parent to answer fully without fear of loss of the right against self-incrimination. This is clearly a matter of substantial public importance that requires resolution by this Court. *See* RAP 13.4(b)(4).

**C. It is a Matter of Substantial Public Interest When Parents are Left Uncertain Whether They Can Fully Participate in Child Dependency Proceedings, Which Implicate the Fundamental Right to Family Integrity, Without Loss of Their Right Against Self-Incrimination**

“The paramount goal of child welfare legislation is to reunite the child with the legal parents if reasonably possible.” *In re K.J.B.*, 187 Wn.2d 592, 597, 387 P.3d 1072 (2017); *In re C.C.M.*, 149 Wn.App. 184, 202, 202 P.3d 971 (2009). “The primary purpose of a dependency is to allow courts to order remedial measures to preserve and mend family ties...” *In re Dependency of T.L.G.*, 126 Wn.App. 181, 203, 108 P.3d 156 (2005).

RCW 26.44.053(2) “is designed to promote candid disclosures in dependency evaluations.” *J.R.U.-S.*, *supra* at 797.

These policies work in concert. Only if the parent can be candid in dependency evaluations can the courts create the appropriate remedial plan to preserve and mend family ties and thereby reunite the child with their parent.

The uncertainty left by the decision below necessarily chills parental participation in dependency evaluations, and many parents are affected. As the Court of Appeals recognized: “Because criminal investigations into alleged child abuse occur frequently, dependency courts would benefit from guidance on what authority they have to grant

derivative use immunity. And future recurrence is not merely likely, it is probable.” Slip Op. p.6.

It is a matter of substantial public interest when parents’ uncertainty over the risks they run in candidly participating in dependency proceedings is allowed to persist. This Court should remove this uncertainty and promote effective and productive dependency proceedings. *See* RAP 13.4(b)(4).

## VI. CONCLUSION

For the reasons stated, Amici ask this Court to grant review and find that courts have the power to grant both direct and derivative use immunity, as required by the constitutional privilege against self-incrimination, to parents participating in dependency proceedings.

DATED this 12<sup>TH</sup> day of March, 2020.

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