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STATE OF WASHINGTON  
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NO. 98094-2

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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In re the Dependency of:

A.M.-S., A.M.-S., B.G.M.-S.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... iii

A. INTRODUCTION ..... 1

B. ISSUE PRESENTED ..... 2

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT ..... 3

    1. The Court of Appeals correctly held that the court-ordered psychological evaluation threatened Mr. M.-G.’s Fifth Amendment rights, and that existing statutory immunity was insufficient protection..... 3

        a. Mr. M.-G. was entitled to invoke the Fifth Amendment privilege and refuse to answer questions that might incriminate him during the court-ordered dependency evaluation..... 4

        b. Failure to participate in the evaluation risked termination of Mr. M.-G.’s constitutionally protected parental rights and frustration of the purpose of the dependency proceedings. .... 5

        c. Statutory use immunity under RCW 26.44.053 does not eliminate the threat of self-incrimination. .... 8

    2. The Court of Appeals erred in holding that the juvenile court lacked authority to grant derivative use immunity concerning Mr. M.-G.’s statements to the evaluator. .... 10

        a. Juvenile courts have inherent authority to grant derivative use immunity to protect parents’ constitutional rights..... 11

        b. A grant of derivative use immunity for the limited purpose of protecting a parent’s Fifth Amendment

rights during a dependency evaluation does not invade the prosecutorial function. ....	17
E. CONCLUSION.....	20

TABLE OF AUTHORITIES

**Washington Supreme Court**

*City of Fircrest v. Jensen*, 158 Wn.2d 384, 143 P.3d 776 (2006) ..... 16

*In re C.S.*, 168 Wn.2d 51, 225 P.3d 953 (2010)..... 7

*In re Johnson*, 71 Wn.2d 245, 427 P.2d 968 (1967) ..... 4

*In re Key*, 119 Wn.2d 600, 836 P.2d 200 (1992)..... 6

*In re Schermer*, 161 Wn.2d 927, 169 P.3d 452 (2007) ..... 6

*In re Silva*, 166 Wn.2d 133, 206 P.3d 1240 (2009)..... 11

*McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012) . 11, 18

*Seattle Sch. Dist. No. 1 of King Cty. v. State*, 90 Wn.2d 476,  
585 P.2d 71 (1978)..... 10, 17

*State v. Betancourth*, 190 Wn.2d 357, 413 P.3d 566 (2018) .. 12

*State v. Carroll*, 83 Wn.2d 109, 515 P.2d 1299 (1973) ..... 8

*State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991) ..... 3

*State v. Escoto*, 108 Wn.2d 1, 735 P.2d 1310 (1987) ..... 13

*State v. Hobble*, 126 Wn.2d 283, 892 P.2d 85 (1995)..... 4

*State v. King*, 130 Wn.2d 517, 925 P.2d 606 (1996) ..... 5

*State v. Mayfield*, 192 Wn.2d 871, 434 P.3d 58 (2019)..... 20

*State v. Runions*, 100 Wn.2d 52, 665 P.2d 1358 (1983) ..... 8

**Washington Court of Appeals**

*Eastham v. Arndt*, 28 Wn. App. 524, 529, 624 P.2d 1159 (1981)..... 10

*In re A.M.-S.*, 11 Wn. App. 2d 416, 454 P.3d 117 (2019) passim

*In re B.F.*, 197 Wn. App. 579, 389 P.3d 748 (2017)..... 6

*In re J.R.U.-S.*, 126 Wn. App. 786, 110 P.3d 773 (2005) passim

*In re Q.L.M.*, 105 Wn. App. 532, 20 P.3d 465 (2001)..... 14

*In re W.W.S.*, --- Wn. App. 2d ---, 460 P.3d 651 (2020)..... 6

*King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 16 P.3d 45 (2000)..... 7

*State v. Bryant*, 97 Wn. App. 479, 983 P.2d 1181 (1999)..... 8, 9

*State v. Carlisle*, 73 Wn. App. 678, 871 P.2d 174 (1994) . 16, 17

*State v. Decker*, 68 Wn. App. 246, 842 P.2d 500 (1992).... 3, 13, 14

*State v. Fish*, 99 Wn. App. 86, 992 P.2d 505 (1999) ..... 17

*State v. Matson*, 22 Wn. App. 114, 587 P.2d 540 (1978) ..... 17

**Federal Opinions**

*Adams v. Maryland*, 347 U.S. 179, 74 S. Ct. 442, 98 L. Ed. 608 (1954)..... 5

*Hoffman v. United States*, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951)..... 20

*Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972) ..... 9, 18

<i>Lefkowitz v. Turley</i> , 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973) .....	4
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) .....	10, 11
<i>Santosky v. Kramer</i> , 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) .....	6
<i>Simmons v. United States</i> , 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968) .....	12, 13, 17
<i>United States v. North</i> , 910 F.2d 843 (D.C. Cir.) .....	18
<i>United States v. Quinn</i> , 728 F.3d 243 (3d Cir. 2013) .....	15, 17
<b>Non-Washington State Court Opinions</b>	
<i>Harding v. People</i> , 708 P.2d 1354 (Colo. 1985) .....	15
<i>In re Jessica B.</i> , 207 Cal. App. 3d 504, 254 Cal. Rptr. 883 (1989) .....	8, 13, 19
<i>State v. Montgomery</i> , 467 So. 2d 387 (Fla. Dist. Ct. App. 1985) .....	15
<b>Constitutional Provisions</b>	
Const. art. I, § 3 .....	6
Const. art. I, § 9 .....	3
U.S. Const. amend. V .....	3
U.S. Const. amend. XIV § 1 .....	6
<b>Statutes</b>	
RCW 13.34.030 .....	10
RCW 13.34.180 .....	6, 7

RCW 13.34.190 .....	6
RCW 26.44.053 .....	passim
RCW 6.32.200 .....	17
<b>Rules</b>	
CrR 6.14 .....	17
<b>Law Review Articles</b>	
Comment, Kendra Weber, <i>Life, Liberty, or Your Children: California Parents' Fifth Amendment Quandary Between Self-Incrimination and Family Preservation</i> , 12 Chap. L. Rev. 155 (2008) .....	8
William W. Patton, <i>Rethinking the Privilege Against Self-Incrimination in Child Abuse Dependency Proceedings: Might Parents Be Their Own Worst Witnesses?</i> 11 U.C. Davis. J. Juv. L. & Pol'y 101 (2007) .....	13, 18

## A. INTRODUCTION

Mr. M.-G. faced an impossible choice in these dependency proceedings. On the one hand, he could participate fully in a court-ordered psychological evaluation, despite the danger that his answers to the evaluator's questions may incriminate him. On the other, he could refuse to answer potentially incriminating questions, which would render the evaluation less effective, risk a finding that he refused to comply with court-ordered services, and possibly result in termination of his parental rights.

In short, Mr. M.-G. was trapped in a tug-of-war between his Fifth Amendment right against self-incrimination and his due process right in his relationship with his children. The Court of Appeals recognized this predicament, as well as the solution—a judicial grant of use and derivative use immunity coextensive with the Fifth Amendment. Nonetheless, the Court of Appeals held that the juvenile court lacked authority to grant this form of immunity.

## B. ISSUE PRESENTED

A court has inherent power to act to protect a person's constitutional rights. Where a real and substantial danger of incrimination exists, a court-ordered evaluation forces a parent to choose between the privilege against self-incrimination and the due process right to care and custody of children. Existing statutory immunity does not protect these rights. Juvenile courts have inherent authority to grant parents use and derivative use immunity to avoid forcing them to choose between their constitutional rights.

## C. STATEMENT OF THE CASE

Mr. M.-G. is the father of three minor children. CP 91, 485. Due to suspected abuse by both parents, the predecessor of the Department of Children, Youth, and Families (the "Department") removed the children from the home and began a dependency proceeding. CP 460, 483–92.

The parents agreed to a finding of dependency. CP 368, 373, 379, 384. The court ordered a psychological evaluation for Mr. M.-G. CP 385. Because a criminal investigation was

underway, Mr. M.-G. requested immunity under *State v. Decker*, 68 Wn. App. 246, 842 P.2d 500 (1992). CP 281, 363.

The juvenile court denied the motion, CP 236, and the Court of Appeals affirmed, *In re A.M.-S.*, 11 Wn. App. 2d 416, 420, 454 P.3d 117 (2019). The appellate court recognized the evaluation threatened Mr. M.-G.’s Fifth Amendment rights, and that existing statutory immunity was inadequate to protect them. *Id.* at 428, 429–30. Nonetheless, the court held that no remedy is possible because the juvenile court lacked authority to grant the required immunity. *Id.* at 441–42.

#### D. ARGUMENT

- 1. The Court of Appeals correctly held that the court-ordered psychological evaluation threatened Mr. M.-G.’s Fifth Amendment rights, and that existing statutory immunity was insufficient protection.**

Under the Fifth Amendment to the U.S. Constitution, no one may be “compelled in any criminal case to be a witness against himself.” Article I, section 9 of the Washington Constitution is nearly identical, substituting “give evidence” for “be a witness.” These two provisions are coextensive. *State v. Earls*, 116 Wn.2d 364, 374–75, 805 P.2d 211 (1991).

a. *Mr. M.-G. was entitled to invoke the Fifth Amendment privilege and refuse to answer questions that might incriminate him during the court-ordered dependency evaluation.*

The Fifth Amendment privilege is available not only in criminal cases, but in any proceeding, “civil or criminal, formal or informal.” *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973). It may be invoked against any question that poses a real and substantial threat of incrimination, in that the answer may “furnish a link in the chain of evidence needed to prosecute.” *State v. Hobble*, 126 Wn.2d 283, 290, 892 P.2d 85 (1995); *In re Johnson*, 71 Wn.2d 245, 250, 427 P.2d 968 (1967) (en banc) (quoting *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

Here, the dependency proceedings were based in part on allegations that Mr. M.-G. abused his children. *A.M.-S.*, 11 Wn. App. 2d at 420. Answers to questions about these allegations during a psychological evaluation may contain facts the State could use to prosecute Mr. M.-G.—in fact, a criminal investigation was in progress, *id.* The Court of Appeals correctly held that the evaluation posed “a real and

substantial danger of incrimination.” *Id.* at 427 (citing *In re J.R.U.-S.*, 126 Wn. App. 786, 798–800, 110 P.3d 773 (2005)).

The State argues dependency evaluations do not implicate the Fifth Amendment because parents’ statements are not “compelled.” State Ans. to PFR at 5. To the contrary, whether a person faces a penalty for refusing to answer bears on whether the privilege is “self-executing”—whether a person must invoke it to avoid waiver. *J.R.U.-S.*, 126 Wn. App. at 793 & n.7 (citing *United States v. McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997)); *see Adams v. Maryland*, 347 U.S. 179, 180–81, 74 S. Ct. 442, 98 L. Ed. 608 (1954) (no waiver where witness did not invoke privilege during Senate hearing). The privilege itself is available in any proceeding. *J.R.U.-S.*, 126 Wn. App. at 793; *accord State v. King*, 130 Wn.2d 517, 523–24, 925 P.2d 606 (1996).

*b. Failure to participate in the evaluation risked termination of Mr. M.-G.’s constitutionally protected parental rights and frustration of the purpose of the dependency proceedings.*

Parents have a fundamental liberty interest in their relationships with children, protected by the state and federal

constitutions. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Key*, 119 Wn.2d 600, 609, 836 P.2d 200 (1992) ; U.S. Const. amend. XIV § 1; Const. art. I, § 3. If the Department believes parental deficiencies endanger a child, it may intervene in this relationship with a dependency action, *In re Schermer*, 161 Wn.2d 927, 942, 169 P.3d 452 (2007), the goals of which are to help “alleviate the problems that led to intervention” and “reunite families,” *In re B.F.*, 197 Wn. App. 579, 587, 389 P.3d 748 (2017).

When a juvenile court finds a child dependent, it orders parents to enroll in services to address parental deficiencies. *In re W.W.S.*, --- Wn. App. 2d ---, 460 P.3d 651, 664 (2020). Failure to participate may lead to a petition to terminate the parents’ rights to the child. RCW 13.34.180(1)(d)–(f). If the Department proves the parents failed to redeem the deficiencies despite being offered appropriate services, the juvenile court may grant the petition. RCW 13.34.190(1)(a).

A parent’s refusal to answer all questions during a dependency evaluation could be construed as a failure to

comply with court-ordered services, which may lead to termination of parental rights. *J.R.U.-S.*, 126 Wn. App. at 794. And, if a parent invokes the Fifth Amendment privilege, the court may draw an adverse inference. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 355–56, 16 P.3d 45 (2000). As the Court of Appeals noted, Mr. M.-G. faced an intolerable choice—participate in the evaluation and risk incriminating himself, or invoke the privilege and risk termination of his parental rights. *A.M.-S.*, 11 Wn. App. 2d at 428.

The specter of self-incrimination hinders dependencies in other ways. Courts order services to help parents correct their deficiencies. RCW 13.34.180(1)(d); *In re C.S.*, 168 Wn.2d 51, 55–56, 225 P.3d 953 (2010). A parent who fears to give truthful answers during a psychological evaluation, domestic violence assessment, or the like is less likely to overcome the issues that triggered the Department’s intervention.

Comment, Kendra Weber, *Life, Liberty, or Your Children: California Parents’ Fifth Amendment Quandary Between Self-Incrimination and Family Preservation*, 12 Chap. L. Rev.

155, 161 (2008); *see* Dep't Ans. to MDR at App. 11–12 (denying immunity would hinder dependency). This harms not only the parent, but also the children kept from their home and co-parents also deprived of custody. *In re Jessica B.*, 207 Cal. App. 3d 504, 520–21, 254 Cal. Rptr. 883 (1989).

*c. Statutory use immunity under RCW 26.44.053 does not eliminate the threat of self-incrimination.*

Immunity permits a person to provide information to the State or its agencies without fear of prosecution, fulfilling both the person's Fifth Amendment rights and the purpose of the proceeding. *State v. Runions*, 100 Wn.2d 52, 57, 665 P.2d 1358 (1983). To be effective, however, the immunity's scope must be at least as broad as the Fifth Amendment privilege. *State v. Carroll*, 83 Wn.2d 109, 111–12, 515 P.2d 1299 (1973).

The broadest immunity is transaction immunity, which prohibits charges related to the same "transaction" as the immunized statement. *State v. Bryant*, 97 Wn. App. 479, 484, 983 P.2d 1181 (1999). The narrowest is use immunity, which bars the statement's use at trial. *Id.* In between is derivative use immunity, which, combined with use immunity, bars the

immunized statement and evidence derived from it. *Id.* at 484–85; *J.R.U.-S.*, 126 Wn. App. at 797–98.

At least use and derivative use immunity are required to permit a person to speak without fear of incrimination.

*Kastigar v. United States*, 406 U.S. 441, 453, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). Use immunity is not enough, as it permits facts derived from an immunized statement to be used as “investigatory leads.” *Bryant*, 97 Wn. App. at 484–85 & n.8 (citing *Eastham v. Arndt*, 28 Wn. App. 524, 529, 624 P.2d 1159 (1981)).

The Court of Appeals rejected the State’s argument that RCW 26.44.053 affords adequate protection. *A.M.-S.*, 11 Wn. App. 2d at 430. A dependency court may order a parent suspected of child abuse or neglect to undergo a psychological examination, and no statements during the examination “may be used” against the parent in a criminal case. RCW 26.44.053(2). By its terms, the statute bars only use of the parent’s statements to the evaluator as evidence, and not derivative use of the statements as, say, “investigatory leads”

to discover additional incriminatory evidence. *Eastham*, 28 Wn. App. at 529. In short, RCW 26.44.053 provides only use immunity, which is insufficient to safeguard a parent’s Fifth Amendment rights. *J.R.U.-S.*, 126 Wn. App. at 798; *Eastham*, 28 Wn. App. at 529.

RCW 26.44.053 fails to provide adequate protection also because it is available only where abuse or neglect is alleged as a basis for the dependency. RCW 26.44.053(1); *see* RCW 13.34.030(6)(b). In dependencies based on either of the two other statutory categories, RCW 26.44.053 does not apply at all. *See* RCW 13.34.030(6)(a), (c).

**2. The Court of Appeals erred in holding that the juvenile court lacked authority to grant derivative use immunity concerning Mr. M.-G.’s statements to the evaluator.**

“The power of the judiciary to enforce rights recognized by the constitution, even in the absence of implementing legislation, is clear.” *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 90 Wn.2d 476, 503 n.7, 585 P.2d 71 (1978); *accord Miranda v. Arizona*, 384 U.S. 436, 490–91, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). This authority—and duty—“is as old as

the United States.” *Seattle Sch. Dist.*, 90 Wn.2d at 503 n.7. And the courts’ exercise of this power binds other branches, even where it limits their actions or contradicts their “view of the constitution.” *McCleary v. State*, 173 Wn.2d 477, 515, 269 P.3d 227 (2012) (quoting *Seattle Sch. Dist.*, 90 Wn.2d at 496).

The scope of a court’s authority is a question of law this Court reviews de novo. *In re Silva*, 166 Wn.2d 133, 140, 206 P.3d 1240 (2009). Here, the Court of Appeals disregarded its power and duty to protect constitutional rights in the mistaken belief that the State holds a veto over all immunity decisions. Reversal is required.

*a. Juvenile courts have inherent authority to grant derivative use immunity to protect parents’ constitutional rights.*

Courts use their power to enforce constitutional guarantees to adopt rules to protect individual rights. For example, the U.S. Supreme Court instated Fifth Amendment “safeguards” requiring police to inform accused persons of their rights before interrogating them. *Miranda*, 384 U.S. at 467–74. And this Court recognizes a broad exclusionary rule

to protect people from unlawful searches and seizures, protect the courts from illegally seized evidence, and deter the State from acting outside the law. *State v. Betancourth*, 190 Wn.2d 357, 364, 413 P.3d 566 (2018).

Courts will even grant immunity where necessary, whether or not a statute authorizes it. *Simmons v. United States*, 390 U.S. 377, 393–94, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). *Simmons* addressed whether the government may use a defendant’s testimony at a pretrial suppression hearing against the defendant at trial. *Id.* If so, the defendant must choose between a possibly “valid Fourth Amendment claim” and the Fifth Amendment privilege. *Id.* at 394. Rather than require “one constitutional right . . . to be surrendered in order to assert another,” the Court held that testimony at a suppression hearing may not be used at trial. *Id.*

Mr. M.-G. faced a choice just as intolerable— participate fully in the court-ordered examination and risk self-incrimination, or invoke the privilege and jeopardize his due process right in the care and custody of his children.

*J.R.U.-S.*, 126 Wn. App. at 794. A grant of derivative use immunity to avoid this constitutional dilemma was well within the juvenile court’s power.<sup>1</sup> *Simmons*, 390 U.S. at 394; see *Jessica B.*, 207 Cal. App. 3d at 520–21 (parent “forced to choose between incriminating himself or having little chance of complete reunification with his daughter”).

Case law supports this conclusion. In *State v. Escoto*, 108 Wn.2d 1, 735 P.2d 1310 (1987), this Court upheld an order that a juvenile submit to a presentencing psychological evaluation, in part because it “limit[ed] use of the evaluation to matters already adjudicated.” *Id.* at 3, 7. In effect, the order immunized statements related to unadjudicated conduct. *Id.* at 7; *Decker*, 68 Wn. App. at 252–53. The Court of Appeals affirmed use and derivative use immunity<sup>2</sup> for a

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<sup>1</sup> See William W. Patton, *Rethinking the Privilege Against Self-Incrimination in Child Abuse Dependency Proceedings: Might Parents Be Their Own Worst Witnesses?* 11 U.C. Davis. J. Juv. L. & Pol’y 101, 114 & n.61 (2007) (judicial immunity coheres with a court’s “role of interpreter of the Constitution regarding Fifth Amendment rights”).

<sup>2</sup> Though the *Decker* court did not use the term “derivative use immunity,” the order limited the State to

juvenile’s presentencing psychological evaluation in *Decker*, citing *Escoto*. 68 Wn. App. at 252–53. Later opinions reasoned that *Decker*-like immunity would be appropriate in dependencies. *In re Q.L.M.*, 105 Wn. App. 532, 544, 20 P.3d 465 (2001); *J.R.U.-S.*, 126 Wn. App. at 790.

The Court of Appeals distinguished these cases on untenable grounds. It reasoned that *Escoto* did not concern immunity, ignoring that the order granted immunity in practical effect. *A.M.-S.*, 11 Wn. App. 2d at 431. It asserted that *Q.L.M.* limited *Decker* to its facts, *id.* at 432–33, when *Q.L.M.* suggested *Decker*-like immunity “may be appropriate” in dependencies, 105 Wn. App. at 544.<sup>3</sup> It dismissed as “dicta” *J.R.U.-S.*’s holding that courts may grant immunity in dependencies, *id.* at 434–35, though *J.R.U.-S.* relied on it to

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matters “discovered independently of the evaluation.” 68 Wn. App. at 252–53; *see J.R.U.-S.*, 126 Wn. App. at 799.

<sup>3</sup> Likewise, in *State v. Diaz-Cardona*, 123 Wn. App. 477, 98 P.3d 136 (2004), the trial court granted immunity to a juvenile’s statements during a presentencing evaluation, and the Court of Appeals did not hold that this was error. *Id.* at 488–89; *see A.M.S.*, 11 Wn. App. 2d at 433.

reject the claim that protecting parents' Fifth Amendment rights would frustrate the purpose of dependency evaluations, 126 Wn. App. at 790, 800–01. And it made no attempt to distinguish *Decker*, acknowledging that judicial immunity is proper in some circumstances. 11 Wn. App. 2d at 432–33.

The federal and out-of-state cases the Court of Appeals cited each concerned a criminal defendant's request that the court grant immunity to a witness. *United States v. Quinn*, 728 F.3d 243, 249 (3d Cir. 2013); *Harding v. People*, 708 P.2d 1354, 1356 (Colo. 1985); *State v. Montgomery*, 467 So. 2d 387, 389–90 (Fla. Dist. Ct. App. 1985). Denying immunity to a defense witness, however, does not force a choice between two constitutional rights. *Quinn*, 728 F.3d at 255. The right to present an effective defense is not threatened because, if the government refuses to immunize a clearly essential witness “for no strong countervailing reason,” the court can dismiss for prosecutorial misconduct. *Id.* at 259–60. The right to compulsory process is not implicated either, because it does not permit the defendant to override a witness's privilege

against self-incrimination. *Montgomery*, 467 So. 2d at 394–95; see *State v. Carlisle*, 73 Wn. App. 678, 681–82, 871 P.2d 174 (1994) (denying immunity to defense witness did not violate “compulsory or due process”).

The Court of Appeals concluded by holding, without reasoning, that use and derivative use immunity are “matters of substantive law falling within the legislature’s powers.” *A.M.-S.*, 11 Wn. App. 2d at 441. Substantive law “creates, defines, and regulates primary rights.” *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). A grant of immunity to a parent in Mr. M.-G.’s position neither confers nor modifies any substantive rights; rather, it protects rights guaranteed by the state and federal constitutions.

Here, the Court of Appeals recognized Mr. M.-G. was forced to choose between his Fifth Amendment privilege and his due process right in his relationship with his children. *A.M.-S.*, 11 Wn. App. 2d at 428. Nevertheless, the court held no judicial remedy existed. *Id.* at 441–42. In doing so, it abdicated its power to enforce constitutional guarantees and

shirked its duty to protect Mr. M.-G.'s rights. *See Simmons*, 390 U.S. at 394; *Seattle Sch. Dist.*, 90 Wn.2d at 503 n.7.

*b. A grant of derivative use immunity for the limited purpose of protecting a parent's Fifth Amendment rights during a dependency evaluation does not invade the prosecutorial function.*

CrR 6.14 permits a prosecutor, and only a prosecutor, to request transaction immunity for a witness in a criminal trial. This is the reason courts have held that a “defendant has no right to demand immunity for defense witnesses,” *Carlisle*, 73 Wn. App. at 681; *State v. Fish*, 99 Wn. App. 86, 93, 992 P.2d 505 (1999), and described immunity as “only a prosecutorial tool,” *State v. Matson*, 22 Wn. App. 114, 120, 587 P.2d 540 (1978); *see A.M.S.*, 11 Wn. App. 2d at 440.<sup>4</sup> Statutes that grant immunity in other contexts do not require the State’s approval. RCW 6.32.200; RCW 26.44.053(2).

CrR 6.14 therefore cannot be read to grant prosecutors a veto over immunity in noncriminal contexts, including

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<sup>4</sup> Likewise, immunity in federal criminal cases is committed to the government by an act of Congress. *Quinn*, 728 F.3d at 253 (3d Cir. 2013) (citing 18 U.S.C. § 6003(b)).

dependencies. The State clearly lacks that power here, where immunity is necessary to protect Mr. M.-G.'s constitutional rights. *See McCleary*, 173 Wn.2d at 515. Granting derivative use immunity to protect a parent's rights, then, cannot invade any legitimate province of the prosecutorial function.<sup>5</sup>

The Court of Appeals asserts derivative use immunity may make prosecuting crimes more difficult. *A.M.-S.*, 11 Wn. App. 2d at 439–40. True, the State must prove its evidence does not derive from any immunized statements. *Kastigar*, 406 U.S. at 461–62. But this merely leaves the State in “the same position as if the witness had claimed the Fifth Amendment privilege” and made no statement at all. *Id.* at 462. Any incidental burden on the State is an unavoidable consequence of protecting Fifth Amendment rights.<sup>6</sup>

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<sup>5</sup> *See Patton*, *supra* note 1, at 114 & n.61 (judicial immunity to protect Fifth Amendment rights “does not abrogate executive discretion”).

<sup>6</sup> The State can avoid proof problems by isolating its evidence before any immunized statement is made. *United States v. North*, 910 F.2d 843, 872–73 (D.C. Cir.), *modified on other grounds on reh'g*, 920 F.2d 940 (D.C. Cir. 1990). The Court of Appeals guessed this is not always possible in a

Neither the State nor the Court of Appeals mentions the converse problem—that the State might try to lighten its load by exploiting dependency proceedings as a discovery tool. Dependencies “are designed to facilitate reunification of the family,” not to assist the State in “marshaling evidence of guilt.” *Jessica B.*, 207 Cal. App. 3d at 520. Allowing the State to “take advantage of evidence from a dependency proceeding” would “substantially lighten[]” its burden of gathering evidence to prove guilt beyond a reasonable doubt. *Id.*<sup>7</sup>

The State asserts granting immunity to protect Fifth Amendment rights will “hamper criminal prosecutions.” State Ans. to PFR at 1. Be that as it may, when “unhampered enforcement of the criminal law” prevails over basic freedoms, society pays too high a price. *Hoffman v. United States*, 341

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dependency, as the State might learn of an immunity request only after it was granted. *A.M.-S.*, 11 Wn. App. 2d at 440. But the Department informed the State of the request here, *id.* at 421–22—nothing prevents it from doing so in all cases.

<sup>7</sup> *Cf.* Christopher Slobogin, *Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation*, 31 Emory L.J. 71, 93–94 (1982) (noting danger that prosecutors may exploit competency evaluations for evidence of guilt).

U.S. 479, 485–86, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). Courts may not shrink from enforcing constitutional rights merely because doing so might “obstruct prosecution.” *State v. Mayfield*, 192 Wn.2d 871, 885, 434 P.3d 58 (2019) (quoting *State v. Rousseau*, 40 Wn.2d 92, 99, 241 P.2d 447 (1952)). If civil rights burden law enforcement, that burden is a feature of our state and federal constitutions, not a bug.

#### E. CONCLUSION

This Court should reverse the Court of Appeals and hold that, where a parent shows a real and substantial risk that questions asked during a court-ordered evaluation may be incriminating, the juvenile court can and must grant use and derivative use immunity to the parent's statements.

DATED this 29th day of May, 2020.



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*Attorney for Mr. M.-G.*

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE B.G.M-S., A.M-S. AND A.M-S.,
MINOR CHILDREN. NO. 98094-2

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SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF JUNE, 2019.

Handwritten signature in blue ink.

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