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**SUPREME COURT OF THE STATE OF WASHINGTON**

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IN RE THE DEPENDENCY OF A.M.-S., Minor Child.

STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH,  
and FAMILIES,

Respondent,

v.

S.M.-G.,

Petitioner.

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**DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES’  
ANSWER TO AMICUS CURIAE BRIEF**

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## I. INTRODUCTION

The Department does not take a position on whether juvenile courts have the authority to grant use and derivative use immunity to individuals involved in dependency matters. But, a robust understanding of the complexities of the child welfare process is critical for properly analyzing the issue. The Department agrees with Amici that purpose of a dependency case is remedial and that a parent's ability to participate in evaluations and services in order to address barriers to reunification is critical. The Department responds to Amici solely to make two points. First, Amici significantly overstate the potential for a conflict between a parent's Fifth Amendment rights and a parent's fundamental liberty interest in family integrity. The ability of providers and courts to make logical inferences from the invocation of the Fifth Amendment resolves this tension in most cases. Second, Amici's attempt to expand the scope of this case to include dependent youths potentially subject to a juvenile offense adjudication demonstrates how broad the potential question is, and how difficult it is to apply the question unmoored from facts of a specific case. This Court should confine its analysis to the issues present in this case—the Court's authority to grant derivative use immunity to parents in juvenile dependency proceedings to supplement existing statutory immunity.

## II. ARGUMENT

### A. **Parents are Not Forced to Choose Between Constitutionally Protected Rights When They Retain the Right to Assert Their Fifth Amendment Right During Court-Ordered Evaluations**

Amici assert that “allegations of criminal conduct can place a parent’s Fifth Amendment right directly at odds with the parent’s fundamental right to family integrity.” Brief of Amicus Curiae at 7. Because many other protections exist within the child welfare system, such a scenario is likely rare or nonexistent. The facts regarding the father S.M.-G. certainly do not present such a case; the father completed both evaluations without derivative use immunity, and there is no allegation that he is facing criminal charges. This directly undermines Amici’s implication of an irreconcilable conflict. Neither Amici nor any party have identified any instance in which this worst-case scenario has actually occurred.

Amici rely on the mistaken premise the Department will interpret a parent’s invocation of the Fifth Amendment as the parent being “obviously in denial.” Brief of Amicus Curiae at 8 (quoting *In re Dependency of A.M.-S.*, 11 Wn. App. 2d 416, 427, 454 P.3d 117 (2019), *review granted*, 195 Wn.2d 1014, 461 P.3d 1204 (2020)). Amici’s reliance on this faulty premise is flawed for at least three reasons.

First, it ignores that there is a difference in kind between a parent denying conduct and a parent invoking the Fifth Amendment. By invoking

the Fifth Amendment, the parent permits a provider and a court to draw an inference that the parent engaged in the conduct, so long as that inference is logical and reasonable in light of the facts of the case. *See King v. Olympic Pipe Line Co.*, 104 Wn. App. 338, 355–56, 16 P.3d 45 (2000). In those circumstances, it will rarely be appropriate to treat a parent’s invocation of the Fifth Amendment as the parent being in denial. Additionally, the availability of a logical inference stands to benefit a parent. It allows the evaluator to discern whether the alleged abuse did occur and make specific recommendations, allowing the parent to have access to appropriate services to remedy parental deficiencies, and it does so without requiring the parent to disclose the alleged criminal behavior.

Second, a parent’s assertion of their Fifth Amendment right will rarely control the outcome of an evaluation. Most evaluations completed during a dependency have many components, including but not limited to: an interview with the parent, collection of collateral information, a standardized, normed battery of testing, and a personal observation by the evaluator of the parent’s interactions with his or her children. A parent’s invocation of the Fifth Amendment in response to specific questions is just one piece of information relied on by an evaluator. In turn, the evaluator’s diagnoses, conclusions, and recommendations guide the next step in the

remedial process—outlining the best way to assist the parent to develop the skills needed to become a safe parent.

Third, the determination of whether a parent has achieved adequate progress in addressing their parental deficiencies, such that their child can be safely returned, is a question ultimately decided by the court, not the Department. That is true even if the Department or a provider were to interpret a parent’s invocation of the Fifth Amendment as the parent being in denial. If the Department were to rely on that interpretation in support of an argument that the parent had not made adequate progress, it would still ultimately be up to the juvenile court to determine whether it is reasonable to conclude that the parent’s responses at an evaluation, together with other case-specific facts and circumstances, indicate denial or a lack of progress. The Department or provider’s input are merely recommendations.

More fundamentally, parental rights cannot be terminated based solely on the parent’s refusal to answer potentially-incriminating questions. If a parent is able to address his or her underlying parental deficiencies then reunification of the parent and child is appropriate, notwithstanding the parent’s invocation of the Fifth Amendment. Existing safeguards preclude termination of parental rights in such circumstances. *See In re Dependency of K.M.M.*, 186 Wn.2d 466, 479, 379 P.3d 75 (2016) (“[D]ue process protections require that a court make a finding of current unfitness before

parental rights can be terminated.”); *see also* RCW 13.34.180(1)(e) (requiring “[t]hat there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future”).

While the Department takes no position on whether a trial court has inherent authority to grant derivative use immunity, in general, a parent can both assert a Fifth Amendment right and pursue the care, custody, and control of their child. Amici’s alleged conflict between the two is greatly overstated.

**B. Amici’s Arguments Regarding Youths’ Engagement in Evaluations in Juvenile Offender Cases Takes This Court Far From the Controversy At Hand**

A substantial portion of the Amici’s brief is dedicated to a juvenile court’s authority to grant use and derivative use immunity to juveniles involved in the juvenile offender process. Brief of Amicus Curiae at 4-12. Amici argue that a court must have the inherent authority to grant use and derivative use immunity because of the way the issue may affect youth involved in the juvenile offender process. Amici’s arguments take this Court far afield from the actual controversy in this case originated below. The father and Amici are asking this Court to “[render] an advisory opinion on hypothetical facts.” Supplemental Brief of State at 11.

In light of the fact that the father has already completed the assessments for which he sought derivative use immunity, this Court is

considering the question at hand based on a hypothetical situation. There was no “cascading set of negative actions” as portended by Amici. Brief of Amicus Curiae at 8.

That said, the Department takes no position on whether, in light of the need for candid disclosure and the existing safeguards, juvenile courts have the authority to grant derivative use immunity.

**C. All Parties Agree that the Trial Court May Draw Logical Inferences from a Person’s Invocation of the Fifth Amendment**

Amici concede that case law permits a negative inference to be drawn as the result of the failure to testify at a dependency trial. Br. of Amicus Curiae at 7. The father also conceded this point. Father’s Supplemental Brief at 7. There is, therefore, no reason for this Court to reexamine this long-standing principle. Juvenile courts may use their discretion to draw reasonable and logical inferences from a parent’s invocation of their Fifth Amendment privilege during a court-ordered evaluation in a dependency proceeding.

**III. CONCLUSION**

In conclusion, while the Department takes no position on whether a juvenile court may grant a parent derivative use immunity, the Department urges the Court to be guided by an accurate understanding of the juvenile welfare system. A parent’s invocation of the Fifth Amendment’s protection against self-incrimination during court-ordered evaluations does not

necessarily impair the parent's ability to pursue reunification with their children. In fact, combined with the ability to draw an appropriate inference from that invocation, such a right may benefit the parent while permitting them to avoid self-incrimination.

RESPECTFULLY SUBMITTED this 22nd day of June, 2020.

ROBERT W. FERGUSON  
Attorney General



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RACHEL BREHM KING, WSBA #42247  
Assistant Attorney General

I, Dawn R. Perala, certify that I filed the **ANSWER TO AMICUS CURIAE BRIEF**, electronically with the Supreme Court, through the Court's online filing system.

With the permission of the recipient(s), an electronic version was delivered using the Court's filing portal to all parties on record. I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated: June 22, 2020 at Everett, WA.

By: *Dawn R. Perala*  
DAWN R. PERALA, Paralegal

# ATTORNEY GENERAL'S OFFICE - EVERETT

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## Transmittal Information

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