NO. 98094-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re Dependency of A.M.-S.

SERGIO MICHEL-GARCIA,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied.

II. STATEMENT OF THE CASE

The facts are correctly set out in the Court of Appeals' opinion.

III. ARGUMENT

A. AS THE COURT OF APPEALS CORRECTLY HELD, IMMUNITY IN DEPENDENCY PROCEEDINGS EXISTS ONLY TO THE EXTENT PROVIDED BY STATUTE.

This case implicates a potential conflict between two ways of protecting children: by dependency proceedings, or by prosecution of people who abuse them. A grant of immunity may facilitate dependency proceedings, by making it safer for alleged abusers to participate in evaluations. That grant may, however, seriously hamper criminal prosecutions.

When the State prosecutes a person who was granted derivative use immunity, the State has "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." Kastigar v. United States, 406 U.S. 441, 461–62, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). When a witness has been exposed to immunized statements, his or her

testimony must be examined "line-by-line and item-by item." The prosecution must show that "no use whatsoever was made of any of the immunized testimony." United States v. North, 910 F.2d 843, 872, modified on other grounds on rehearing, 920 F.2d 940 (D.C. Cir. 1990). Among other things, the State must prove that the witness was not *motivated* to testify by the immunized testimony. Absent such proof, the witness cannot testify. See State v. Bryant, 97 Wn. App. 479, 490, 983 P.2d 1181 (1999).

This problem is especially acute in dependency proceedings. The abused child, the child's siblings, and the abuser's spouse will all usually be parties to the proceedings. As such, they will usually learn the content of any evaluations. But all of these people are likely to be critical witnesses at any criminal trial. It may be impossible to prove that their testimony was not affected in any way by the immunized statements. As a result, a grant of derivative use immunity may make criminal prosecution impossible.

The legislature balanced the competing policies by enacting RCW 26.44.053(2). That statute provides *use* immunity for information giving during examinations in dependency proceedings. It does not, however, provide *derivative* use immunity. In re Dependency of J.R.U.-S., 126 Wn. App. 786, 798 ¶ 21, 110 P.3d

773 (2005). This statute allows parents in dependency proceedings to participate in evaluations, without the fear that their statements could be used against them in a criminal trial. At the same time, the statute relieves the State from the heavy burden of proving that the testimony of other witnesses was not *affected* by the statements. The statute thus protects dependency proceedings without unduly impacting criminal prosecutions.

The petitioner nonetheless claims that courts have "inherent authority" to grant derivative use immunity. This authority purportedly exists even though the legislature chose to grant only a lesser degree of immunity. Indeed, it does not appear that the Washington Legislature has *ever* authorized derivative use immunity. All of the statutes and court rules dealing with immunity provide either transactional immunity or use immunity only. See, e.g., CrR 6.14 (transactional immunity in criminal proceedings); RCW 10.27.130 (transactional immunity in special inquiry proceedings); RCW 6.32.200 (use immunity in proceedings supplemental to execution).

In criminal proceedings, courts have consistently held that they lack inherent authority to grant immunity. See, e.g., State v. Matson, 22 Wn. App. 114, 119-21, 587 P.2d 540 (1978); State v.

Carlisle, 73 Wn. App. 678, 681-82, 871 P.2d 174 (1994); United States v. Quinn, 728 F.3d 243, 251 (3rd Cir. 2013) (citing cases from 11 other circuits). The Court of Appeals applied this same principle to dependency proceedings. That decision does not warrant review by this court.

B. WHEN A PERSON IS NOT COMPELLED TO TESTIFY, A DENIAL OF IMMUNITY DOES NOT VIOLATE ANY CONSTITUTIONAL RIGHT.

The petitioner claims that the denial of derivative use immunity presents a significant issue of constitutional law. To evaluate that claim, it is necessary to review basic principles of immunity. A person has, of course, a right not to "be compelled in any criminal case to be a witness against himself." U.S. Const., amend. 5; see Wash. Const., art. 1, § 9 (right not to "be compelled in any criminal case to give evidence against himself.") A witness can, however, be compelled to testify to incriminatory facts. For such an order to be valid, the witness must be given immunity that is "coextensive with the scope of the privilege against self-incrimination." At a minimum, such immunity must preclude use and derivative use of the compelled testimony. Kastigar, 406 U.S. at 452.

A person is compelled to testify if he is "threatened with serious penalties if the evidence is not produced." Ordering a parent to participate in a dependency evaluation does not have this effect, if the parents remain free to refuse to answer self-incriminatory questions. Compulsion only exists if "a penalty would follow directly and more or less automatically from the refusal to answer questions." Absent evidence of a "concrete, imminent threat," there is no "compulsion." J.R.U.-S., 126 Wn. App. at 794-95 ¶¶ 14-16.

In the present case, the trial court specifically said that the petitioner could refuse to answer incriminatory questions during court-ordered evaluations. CP 166. He was therefore not compelled to be a witness against himself (or to "give evidence" against himself). Neither the federal nor state constitutions give a person a right to immunity. Rather, they provide a right not to be compelled to testify to self-incriminatory facts *unless* adequate immunity is granted. Since the petitioner was not compelled to incriminate himself, he had no constitutional right to immunity. The Court of Appeals holding to this effect does not warrant review.

IV. CONCLUSION

The petition for review should be denied.

Respectfully submitted on January 31, 2020.

ADAM CORNELL
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IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

In re Dependency of: A.M.-S., DOB: 12-17-08, Sergio Michel-Garcia, Petitioner, v. State of Washington, Respondent.	No. 98094-2 DECLARATION OF DOCUMENT FILING AND E-SERVICE

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ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Thomas Michael Kummerow; tom@washapp.org; wapofficemail@washapp.org; Kirsten Jensen Haugen; Kirsten.haugen@snoco.org; Ann Margaret Brice; Brice_Timm@frontier.com; Lauren Danskine; LaurenD2@atg.wa.gov

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 31st day of January, 2020, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

January 31, 2020 - 9:18 AM

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