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STATE OF WASHINGTON
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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
BRIEF OF AMICI CURIAE

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I. ADDITIONAL ARGUMENT

IF A PERSON HAS NOT BEEN COMPELLED TO INCRIMINATE HIMSELF, HE HAS NO CONSTITUTIONAL RIGHT TO IMMUNITY.

Amici claim that the Court of Appeals “openly acknowledged that the protections available to Mr. Michel-Garcia were insufficient to meet constitutional requirements.” Brief of Amici Curiae at 5. This statement reflects a fundamental misunderstanding of the relevant constitutional requirements.

The state and federal constitutions protect a person’s right not to be “compelled in any criminal case to be a witness against himself” or “to give evidence against himself.” U.S. Const., amend 5; Wash. Const., art. 1, § 9. They do not confer any right to immunity. Rather, a grant of immunity allows the government to compel a person’s testimony. Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). “Since immunity is granted as a substitute for a person’s Fifth Amendment rights, the refusal to grant immunity permits the defendant to exercise his usual rights under the Constitution.” United States v. Karas, 624 F.2d 500, 505 (4th Cir. 1980). In this case, the trial court expressly pointed out that the petitioner was free to exercise his right against

self-incrimination. CP 166. Under such circumstances, he had no right to a grant of immunity.

There is inevitable tension between the right against self-incrimination and the right to testify. State v. Russ, 93 Wn. App. 241, 246, 969 P.2d 106, 108 (1998). A person can choose one or the other, but not both. See State v. Robideau, 70 Wn.2d 994, 997, 425 P.2d 880 (1967) (defendant who chooses to testify is subject to same cross-examination as any other witness). In a dependency proceeding, a person can choose to provide potentially incriminatory information in the hope of favorably influencing the outcome of those proceedings. Or he can choose *not* to provide such information, in order to protect himself from future criminal proceedings. He cannot, however, choose to do both at the same time. His desire to do so does not give him any right to immunity.

Amici also suggest that RCW 26.44.053 should be construed as providing not only use immunity, but also *derivative* use immunity. No such claim has been raised by petitioner. The issue raised in the Petition for Review is whether courts have inherent authority to grant such immunity. P.R.V. at 1-2. Issues raised solely by amici need not be considered. State v. Hirschfelder, 170 Wn.2d 536, 242 P.3d 876, 884 (2010).

Moreover, no such claim has been raised at any point in these proceedings. See CP 364 (memorandum by father acknowledging that statutory immunity “would not be fully sufficient to protect a parent’s Fifth Amendment rights”). Under RAP 2.5, a statutory issue cannot ordinarily be raised for the first time in this court. The arguments of amicus do not support a grant of review.

II. CONCLUSION

The Petition for Review should be denied.

Respectfully submitted on April 1, 2020.

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The undersigned certifies that on the 1st day of April, 2020, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO BRIEF OF AMICI CURIAE

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to:

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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 1st day of April, 2020, at the Snohomish County Office.


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

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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