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SUPREME COURT
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.

RSPONSE OF RESPONDENT
STATE OF WASHINGTON
TO BRIEF OF AMICI CURIAE

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I. ADDITIONAL ARGUMENT

A. THE NEED TO PROTECT CHILDREN VIA DEPENDENCY PROCEEDINGS SHOULD NOT OVERRIDE THE NEED TO PROTECT THEM VIA PROSECUTION OF CHILD ABUSERS.

There are two ways of protecting children from abuse: by dependency proceedings, and by prosecution of abusers. The Legislature has committed these distinct proceedings to two separate agencies. Dependency proceedings brought on behalf of the State are handled by the Department of Children, Youth, and Families. RCW 26.44.195. Legal counsel for the Department is provided by the Attorney General. RCW 13.04.093 Criminal prosecutions (including juvenile offense proceedings) are handled by the Prosecutor or a city attorney. RCW 13.04.093, RCW 26.44.030(5).

Amici's brief ignores the protective function served by criminal prosecution. Instead, they focus solely on dependency proceedings. They argue that to facilitate such proceedings, participants should be granted derivative use immunity. As discussed in the State's supplemental brief, such immunity will often have a severe impact on criminal proceedings. Supp. Brief of Resp. State at 5-9. Under amici's argument, the decision to initiate dependency proceedings by one agency (the Department) would

impede or prevent proceedings by another agency (the Prosecutor).

Both dependency proceedings and criminal prosecutions are vital for the protection of children. There is no need to sacrifice either one to the other. Dependency proceedings can occur without derivative use immunity. The constitutional rights of parents and other participants can be protected by allowing them to exercise their privilege against self-incrimination. This does not prevent the court from obtaining evaluations and providing necessary services. Parents are further protected by the statutory prohibition against use of their statements in criminal proceedings. RCW 26.44.053(2). There is no need for this court to create further impediments to criminal prosecution.

B. THIS CASE IS NOT AN APPROPRIATE FORUM FOR ISSUING AN ADVISORY OPINION ABOUT THE RIGHTS OF JUVENILES IN DEPENDENCY OR JUVENILE OFFICE PROCEEDINGS.

Amici's brief raises arguments relating to juvenile offenders and those who are the subject of dependency proceedings. The short answer to these arguments is that no such persons are involved in the present case. This case involves a parent who sought derivative use immunity in a dependency proceeding. The

rights of non-parents or of persons in other types of proceedings are not involved. Anything that this court might say on the subject would be an advisory opinion based on hypothetical facts. Dicta in this court's decisions are not binding on either this court or any other. State ex rel. Todd v. Yelle, 7 Wn.2d 443, 450, 110 P.2d 162 (1941); Protect the Peninsula's Future v. City of Port Angeles, 175 Wn. App. 201, 215 ¶ 33, 304 P.3d 914 (2013). Any discussion of the rights of non-parents or juvenile offenders should await a case in which that issue is presented.

C. SUSPECTED OR ACCUSED PERSONS HAVE A RIGHT TO TESTIFY OR REMAIN SILENT, BUT NO RIGHT TO DO BOTH AT ONCE.

There is also a longer answer to amici's claims. A person has a right against self-incrimination. A person in judicial proceedings also has a right to testify on his or her own behalf. But the person has no right to do both at once. It would undoubtedly be advantageous to many accused or suspected persons to testify or provide information, while at the same time impeding future prosecutions. But advantage to a suspect is not the measure of constitutional rights.

Consider, for example, the situation of a person on trial for a crime. Obviously the outcome of the trial may affect the person's

fundamental right to personal liberty. The person has a right to testify on his or her own behalf. Const., art. 1, § 22. The person likewise has a privilege against self-incrimination. Const., art. 1, § 9. But the person cannot exercise both rights at once. If the person chooses to testify, he or she waives the privilege as to matters within the scope of direct testimony. State v. Epefanio, 156 Wn. App. 378, 388 ¶ 26, 234 P.3d 253 (2010); see Brown v. United States, 356 U.S. 148, 155, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958). The person has a tactical choice, but the existence of that choice does not give rise to a right to immunity.

The same is true of a juvenile offender following adjudication. The offender might want to provide information to the court that could lead to a more lenient disposition. The offender might also fear that the information could lead to prosecution for other offenses. This gives the offender a choice — provide the information or exercise the right against self-incrimination. It does not give the offender the right to do both at once.

In criminal cases, no negative inferences can be drawn from the defendant's assertion of the privilege. Mitchell v. United States, 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999). Amici point to the Court of Appeals' dicta that such inferences are allowed

in dependency cases. As pointed out in the State's supplemental brief, the validity of that dicta need not be considered in the present case. Supp. Brief of State at 12. If, however, that inference would constitute an improper penalty for exercising the privilege, the remedy is to bar the inference, not to grant immunity.

In short, amici have not established any constitutional right to derivative use immunity in dependency proceeding. If such immunity is considered desirable as a policy matter, that is for the Legislature to decide. This court has not basis for overturning the policy decision set out in RCW 26.44.053(2).

II. CONCLUSION

For these reasons, as well as those set out in the State's previous briefs, the Court of Appeals should be affirmed.

Respectfully submitted on June 22, 2020.

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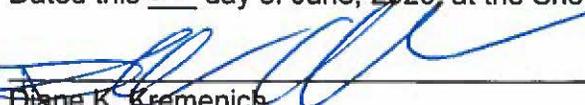
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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of June, 2020, at the Snohomish County Office.


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Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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