

IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUELA HERNANDEZ,

Petitioner

vs.

EIGHTH JUDICIAL DISTRICT
COURT JUDGE; THE HONORABLE
ROBERT W. TEUTON, DISTRICT
COURT JUDGE,

Respondents,

and

THE STATE OF NEVADA,

Real Party in Interest.

Supreme Court No. —
District Court No. J-17-3374-
Tracy K. Lindeman
Clerk of Supreme Court

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**PETITION FOR WRIT OF MANDAMUS
OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION**

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vs.

EIGHTH JUDICIAL DISTRICT
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Supreme Court No. _____

District Court No. J-14-332774-U1

**PETITION FOR WRIT OF MANDAMUS
OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION**

COMES NOW Petitioner, Manuela Hernandez, (hereinafter “Ms. Hernandez”), by and through her attorneys, DAVID M. SCHIECK, Special Public Defender and ABIRA GRIGSBY, Deputy Special Public Defender, and pursuant to NRS 34.150 and NRS 34.320 et. seq., respectfully petitions this Honorable Court to issue a writ of mandamus ordering the District Court to amend the Case Plan and delete the objective of drug testing, or in the alternative,

a Writ of Prohibition precluding the District Court from allowing Department of Family Services to drug test Ms. Hernandez.

Prior to seeking writ relief from this Honorable Court, Ms. Hernandez objected to the condition of drug testing being placed in her case plan, Judge Teuton denied Ms. Hernandez's Objection. Denial of a Motion to amend case plan is not appealable.¹ Therefore, Ms. Hernandez has no plain, speedy, adequate remedy under the law. As such, Ms. Hernandez herein seeks writ relief from this Court.

This Petition is based upon the Memorandum of Points and Authorities and Appendix submitted herewith, portions of the record relevant to the determination of this Petition, and any argument should this Honorable Court order oral argument on this matter.

RELIEF SOUGHT BY PETITIONER

Writ directing the District Court to amend the case plan to delete the requirement for Ms. Hernandez to take random drug tests for the Department of Family Service.

ISSUE PRESENTED

1. Whether the Case Plan has to rationally relate to the allegations in the abuse/neglect Petition.

¹ NRAP 3A(b).

2. Whether requiring a Parent to randomly drug test without probable cause is a violation the Fourth and Fourteenth Amendments of the Constitution.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

A protective custody hearing was held on February 6, 2014 before District Court Judge, Robert Teuton. (AA I, pg. 1-3). The District Court made a finding that it was contrary to the welfare of the children to remain in their home due to concerns of physical abuse. (Id.). The concern regarding Ms. Hernandez was her failure to protect the children from physical abuse by her boyfriend. (AA I, pg. 9). A Petition was filed on February 19, 2014. (AA I, pg. 4). An adjudicatory trial was set for March 13, 2014. At that time, Ms. Hernandez plead to the Petition pursuant to negotiations. (AA I, pg. 46-47). An amended petition was filed on March 26, 2016, reflecting the revisions in the Petition that were negotiated. (AA I, pg. 8-10). A Report and Disposition hearing was held on March 31, 2014. (AA I, pg. 11).

At the Review and Disposition hearing, Ms. Hernandez was presented with her case plan and the District Court reviewed it with her. (AA I, pg. 19-30). Ms. Hernandez objected to random drug testing as listed as an action step under the Objective to cooperate with the Department of Family Services. (AA I, pg. 27).

Ms. Hernandez argued that there were not any allegations in the Petition regarding substance abuse and Ms. Hernandez already submitted to a clean drug test, which was intrusive enough. (AA I, pg. 27-28). There is no nexus between the drug testing and the negotiated amended petition. (AA I, pg. 27).

The District Court asked the reasoning for the action step of drug testing. (Id.). The caseworker, Chandler Levrich responded that “she is habitually in the presence of people that are using drugs, and the fact that she may not be an ongoing and continuous user does bring up the possibility that she may be nevertheless an infrequent use.” (AA I, pg. 27-28). Ms. Hernandez argued that there is not any evidence that she has ever used drugs. (AA I, pg. 28).

The District Court amended the case plan to state that Ms. Hernandez will submit to drug testing if there is a reasonable belief that she is using non-prescribed controlled substances. (AA I, pg. 28-29). Ms. Hernandez argued that it should be probable cause standard not a reasonable belief. (AA I, pg. 29). The District Court found that it is not a criminal proceeding therefore he is not going to require a warrant. (AA I, pg. 29). Ms. Hernandez requested written findings. (AA I, pg. 30). The District Court stated that it is changing the objective and Ms. Hernandez can do what she wants. (Id.). The District Court refused to enter written findings.

STATEMENT OF REASONING FOR ISSUANCE OF A WRIT

A writ of mandamus is available “to compel the performance of an act that the law requires as a duty resulting from an ‘office, trust or station’ or to control an arbitrary or capricious exercise of discretion.”² Writs of prohibition are “the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.”³ Such writs may be issued when no plain, speedy and adequate remedy exists in the ordinary course of law.⁴ This court has held that as a writ protection seeks an extraordinary remedy, it will exercise its discretion to consider such a petition only when there is no “plain, speedy and adequate remedy in the ordinary course of law” or there are either urgent circumstances or important legal issues that need clarification in order to promote judicial economy and administration.⁵ Additionally, this court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification.⁶

² Cheung vs. Dist. Ct., 121 Nev. 867, 868-69, 124 P.3d 550, 552 (2005) (quoting NRS 34.160).

³ NRS 34.320.

⁴ NRS 34.020; NRS 34. 170; NRS 34.330.

⁵ Cheung vs. Dist. Ct., 121 Nev. 867, 869, 124 P.3d 550, 552 (2005)(quoting NRS 34.170 and NRS 34.330)

⁶ State v. Second Judicial Dist. Court, 120 Nev. 254, 89 P. 3d 663 (2004)

A question of law is reviewed de novo.⁷ There is not an appeal allowed from the denial of a motion to amend case plan.⁸ As such, the only remedy available to Ms. Hernandez is the writ relief sought in the instant Petition.

1. Whether the Case Plan has to rationally relate to the Petition.

Parents have a fundamental constitutionally protected interest in continuity of legal bond[s] with their children.⁹ The rights of parents to the care, custody and nurture of their children is of such character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and such right is a fundamental right protected by the First (1st), Fifth (5th), Ninth (9th) and Fourteenth (14th) amendments¹⁰. Parent's interest in custody of [their] children is a liberty interest which has received considerable constitutional protection; a parent who is deprived of custody of his or her child, even though temporarily, suffers thereby grievous loss and such loss deserves extensive due process protection¹¹.

The abuse/neglect Petition was substantiated in the underlying juvenile case. As a result, Ms. Hernandez was given a case plan. NRS 128.0155 defines a plan as

⁷ State, Div. of Insurance v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 484 (2000).

⁸ NRAP 3A

⁹ Matter of Delaney, 617 P.2d 886

¹⁰ Doe v. Irwin, 441 F. Supp 1247

¹¹ Interest of Cooper, 621 P. 2d 437

1. A written agreement between the parents of a child who is subject to the jurisdiction of the juvenile court or family court pursuant to title 5 of NRS or [chapter 432B](#) of NRS and the agency having custody of the child; or
2. Written conditions and obligations imposed upon the parents directly by the juvenile or family court, ~which have a primary objective of reuniting the family or, if the parents neglect or refuse to comply with the terms and conditions of the case plan, freeing the child for adoption.

Parents are given a case plan with the primary objective of reunifying the family.¹² They have to abide by certain objectives with the understanding that following the case plan will lead to reunification with their children. A Case plan focuses on safety threats that need to be alleviated for the children to reunify. The allegations in the abuse/neglect Petition gives the parents notice of what services they need to engage in order to regain custody of their children. The child's health and safety is a paramount concern in the government's efforts to preserve and reunify the family unit, but it must be balanced with the protection of a parent's constitutional rights.¹³ The adjudicated allegations in the Petition are the basis for the State's interference in the parental-child relationship. Therefore, a case plan must be rationally related to the allegations in the Petition that were adjudicated in order to provide due process to the parent.

¹² NRS 129.0155

¹³ Matter of Parental Rights as to N.J., 116 Nev. 790, 801-02, 8 P.3d 126, 133-34 (2000)

In the instant case, the District Court Ordered that Ms. Hernandez shall submit to random drug testing as part of her case plan. There were not any allegations of substance abuse in the Petition. In fact, Ms. Hernandez had already submitted to a drug test and tested clean. The District Court abused its discretion in allowing drug testing to be part of Ms. Hernandez's case plan when there was not a nexus between the allegations in the Petition that were adjudicated and the requirement of random drug testing.

2. Whether requiring a Parent to randomly drug test without Probable cause is a violation of the Fourth and Fourteenth Amendment of the Constitution.

The Fourth Amendment protects only against unreasonable invasions of privacy. Traditionally, in resolving issues implicating the Fourth Amendment right to privacy, the touchstone question is whether the invasion of privacy is reasonable. The reasonableness of an intrusion on the Fourth Amendment right to privacy is determined by balancing the public interest and the individual's right to personal security free from arbitrary interference by law officers¹⁴.

A primary concern, when determining the reasonableness of an intrusion on the Fourth Amendment right to privacy, is to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered

¹⁴ Pennsylvania v. Mimms, 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)

discretion of officers in the field¹⁵. However, this right to privacy is not absolute¹⁶. Like all freedoms we enjoy, it includes both limitations and responsibilities.

The overriding purpose of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusions¹⁷. A Fourth Amendment search for evidence must be based on probable cause¹⁸. In Missouri v. McNeely, the United States Supreme Court ruled that an officer must obtain a search warrant to forcibly draw a sample of a DUI suspect's blood for testing. In addition, a Fourth Amendment police search for evidence must be based on probable cause¹⁹.

This Court in Bolin v. State stated, “acquiring blood samples constituted searches within the ambit of the Fourth Amendment and were thus subject to its stringent probable cause requirements²⁰.” Evidence and the “fruits” thereof obtained in violation of the Fourth Amendment are inadmissible²¹. The Fourth Amendment is controlling on the States through the Fourteenth Amendment of the United States Constitution²².

¹⁵ Delaware v. Prouse, 440 U.S. 648, 654-55, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)

¹⁶ Id

¹⁷ Schmerber v. California, 384 U.S. 757, 767 (1966)

¹⁸ Henry v. United States, 361 U.S. 98 (1959); Schmerber v. California, *supra* and Bolin v. State, *supra* at 523

¹⁹ Henry v. United States, 361 U.S. 98 (1959)

²⁰ Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998)

²¹ Wong Sun v. United States, 371 U.S. 471 (1963)

²² Mapp v. Ohio, 367 U.S. 643 (1961)

The taking of blood from an individual for evidence in a criminal prosecution triggers Fourth Amendment protections. The Court in Schmerber v. California, stated:

The values protected by the Fourth Amendment thus substantially overlap those of the Fifth Amendment helps to protect. History and precedent have required that we today reject the claim that the Self-Incrimination Clause of the Fifth Amendment requires the human body in all circumstances to be held inviolate against state expeditions seeking evidence of crime. But if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment. The Amendment expressly provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.” It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of “persons,” and depend antecedently upon seizures of “persons,” with the meaning of that Amendment²³.

The United States Supreme Court has set a “special needs” exception to the both the probable cause and warrant requirement. “A search unsupported by probable cause can be constitutional [the Court] when special needs beyond the normal need for law enforcement²⁴, make the warrant and probable cause requirement impracticable²⁵. An emergency is one of the narrow exceptions to the

²³ Schmerber, at 467

²⁴ .”(emphasis added) Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164 (1987)

²⁵ Special needs have been found to exist in primarily government administrative actions such as railroad operators who were involved in accidents, Skinner , *supra.*; automobile checkpoints to discover drunk drivers and illegal immigrants, Michigan

warrant requirement.²⁶ An “inchoate and unparticularized suspicion or hunch cannot withstand scrutiny under the Fourth Amendment²⁷. The United States Supreme Court has criticized assertions of special needs based on hypothetical hazards that are unsupported by any indication of concrete danger demanding departure from the Fourth Amendment’s main rule.²⁸

In U.S. v. Scott²⁹, Defendant was arrested on charges of drug possession and released on his own recognizance. One of the conditions of Defendant’s release was random drug testing without a warrant. Acting on an informant's tip, state officers went to defendant's home and drug tested him without a warrant. The government conceded there was no probable cause to test defendant for drugs. The Ninth Circuit found that the warrantless drug test violated the Fourth Amendment as it was not supported by probable cause.

In the instant case, the District Court has given Department of Family Services the authority to drug test Ms. Hernandez if the worker has reasonable belief that Ms. Hernandez is using illegal drugs. The only reason presented for the

Dept of State Police v. Sitz, 496 U.S. 444, 110 S. Ct. 2481 (1990); United States v. Martinez-Fuerte , 428 U.S. 543, 96 S.Ct. 3074 (1976); inventory searches of an automobile after a suspect is taken into custody, Colorado v. Bertine , 479 U.S. 367, 107 S. Ct. 738 (1987).

²⁶ State v. Rodriguez, 156 P.3d 771, 775 (Utah 2007)

²⁷ United States v. Sokolow, 490 U.S. 1,7, 104 L. Ed. 2d1, 109 S. Ct. 1581 (1989) (quoting Terry, 392 U.S. at 27)

²⁸ Chandler v. Miller, 520 U.S. 305, 319, 117 S. S. Ct. 1295

²⁹ United States v. Scott, 450 F.3d 863 (9th Cir. Nev. 2006)

requirement that Ms. Hernandez submit to drug testing was that Ms. Hernandez may use drugs because Ms. Hernandez is around people who abuse drugs. This clearly does not rise to probable cause. Ms. Hernandez has a Fourth Amendment right to privacy. Parents do not lose their constitutional rights because they have temporarily lost custody of their children. To require that Ms. Hernandez submit to random drug testing without probable cause violates the Fourth Amendment of the Constitution.

CONCLUSION

Ms. Hernandez respectfully petitions this Honorable Court to issue a writ of mandamus ordering the District Court to amend the Case Plan and delete the objective of drug testing, or in the alternative, a Writ of Prohibition precluding the District Court from allowing DFS to drug test Ms. Hernandez.

DATED this 26th day of June, 2014.

RESPECTFULLY SUBMITTED

DAVID M. SCHIECK:
SPECIAL PUBLIC DEFENDER

/s/ABIRA GRIGSBY

BY _____
ABIRA GRIGSBY
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VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

ABIRA GRIGSBY, being first duly sworn, deposes and says:

1. That I am an attorney duly licensed to practice law in the State of Nevada
and a deputy for the Special Public Defender, appointed counsel for Manuela
Hernandez;

2. I have read the foregoing Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition and knows the contents therein and as to those matters they are true and correct and as to those matters based on information and belief I am informed and believe them to be true;

3. That Manuela Hernandez has no other remedy at law available, and that the only means to address this issue is through the instant writ;

4. That Counsel signs this verification on behalf of Manuela Hernandez,
under Manuela Hernandez direction and authorization.

Further your Affiant sayeth naught

/s/ABIRA GRIGSBY

Abira Grigsby

SUBSCRIBED AND SWORN to before me
this 26th day of June, 2014.

/s/Kathleen Fitzgerald
NOTARY PUBLIC

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 26th day of June 2014 a copy of the foregoing Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition was served as follows:

BY ELECTRONIC FILING TO

Jin Kim, Esq.
District Attorney's Office
601 N. Pecos
Las Vegas, NV 89101

BY HAND DELIVERY TO

The Honorable Robert Teuton
601 N. Pecos
Las Vegas NV 89101

/s/ABIRA GRIGSBY

An employee of the Special
Public Defender