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. 65939

District Court No. J-14-332774-U

PETITIONER'S REPLY BRIEF

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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. 65939 District Court No. J-14-332774-U1

PETITIONER'S REPLY BRIEF

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 submits her Reply Brief.

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MEMORANDUM OF POINTS AND AUTHORITIES

The Real Party in Interest (hereinafter referred to as "the State and/or State") has not accurately stated the facts in its Answering Brief. The State has alleged that "The case plan proposed that Petitioner attend physical abuse assessment, domestic violence classes, cooperation with DFS, and randomly drug testing based on her diminished protective capacity and being around people who are using drugs."[1] State's assertion is not completely accurate. The case plan for Ms. Hernandez requires her to do an assessment to assess protective capacity; it is not a physical abuse assessment. (AA I, pg. 41). In addition, the drug testing is not based on diminished protective capacity as alleged by the State. The only justification presented to the Court by the Department of Family Services was that Ms. Hernandez is "habitually in the presence of people who are using drugs. (AA I, pg. 27-28).

State alleges that "Petitioner's counsel opposed the random drug testing because Petitioner tested clean."[2] This is not entirely true. Ms. Hernandez's counsel opposed the drug testing as there were not any allegations of substance abuse in the underlying abuse/neglect Petition also Ms. Hernandez took a drug test

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[1] State of Nevada's, Real party in Interest, Answer to the Petitioner's Writ of Mandamus or, In the alternative, Writ of Prohibition (hereinafter "State's Answering Brief") page 4, lines 7-10.

[2] State's Answering Brief page 4, lines 12-13.

and tested clean. There was not a nexus between the drug testing and the safety of the children. (AA I. pg. 27).

State also alleges that "the court found that requiring a warrant for a drug test was unnecessary and that reasonable belief and court order would suffice."[3] The Court did state that it was not going to require that the worker seek a warrant and he was going to allow the worker to give Ms. Hernandez a drug test if he has reasonable belief that she is under the influence. However, the Court did not find that worker would need to get a Court Order to give a drug test. (AA I, pg. 28-30).

Lastly, State alleges that "in approving drug testing if there is reasonable belief that Petitioner is under the influence, the court noted that Petitioner already lacked protective capacity that she would otherwise possess."[4] This is simply not true. The transcript that State cites for this assertion states "See if she's got the protection that she'd otherwise have, but it's not – you can't just arb –." (AA I, pg. 29). In reviewing the transcripts, this discussion was regarding the protection Ms. Hernandez would have from random drug testing.

A. Extraordinary Relief is warranted in this case.

Ms. Hernandez does not have any other legal remedies available to her besides the instant Writ. The State alleges that Ms. Hernandez should file a

[3] State's Answering Brief page 4, lines 20-23.
[4] State's Answering Brief page 5, lines 1-4.

Motion to modify the Court Order pursuant to NRS 432B.570.[5] This is not a remedy available to Ms. Hernandez.

NRS 432B.570 provides that :

> 1. A motion for revocation or modification of an order issued pursuant to NRS 432B.550 or 432B.560 may be filed by the custodian of the child, the governmental organization or person responsible for supervising the care of the child, the guardian ad litem of the child or a parent or guardian. Notice of this motion must be given by registered or certified mail to all parties of the adjudicatory hearing, the custodian and the governmental organization or person responsible for supervising the care of the child.
> 2. The court shall hold a hearing on the motion and may dismiss the motion or revoke or modify any order as it determines is in the best interest of the child.

NRS 432B.570 does not mandate that a Motion be filed to modify a Court Order. In the instant matter, such motion would have been futile and delayed justice for Ms. Hernandez. The District Court made it clear that it was not going to entertain any Fourth Amendment argument regarding the drug testing. The District Court specifically said "this is not a criminal proceeding." (AA I, pg. 29). In addition, in response to Ms. Hernandez requesting written finding, the District Court said "I changed the objective. You can do what you want." (AA I, pg. 30). This clearly shows that the District Court did not have any intention of changing its orders. Therefore, the instant Writ is the only remedy available to Ms. Hernandez.

[5] State's Answering Brief page 6, lines 6-11.

B. The Court does not have broad discretion to Order objectives in case plans that violate due process and the Constitution.

This Court has recognized that a parent's interest in raising his or her child is a fundamental right.[6] Therefore, this Court applies a strict scrutiny standard when fundamental constitutional right is at issue. Under a strict scrutiny standard a statute must be narrowly tailored to serve a compelling State interest.[7] Under a strict scrutiny standard the District Court's Order must comply with the Nevada Statues and the Constitution.

NRS 432B.530 provides in pertinent part that "If the court finds by a preponderance of the evidence that the child was in need of protection at the time of the removal of the child from the home, it shall record its findings of fact and may proceed immediately or at another hearing held within 15 working days, to make a proper disposition of the case." This statue makes it clear that the focus of the Petition shall be the time of removal.

NRS 432B.540 provides that:

> 1. If the court finds that the allegations of the petition are true, it shall order that a report be made in writing by an agency which provides child welfare services, concerning:
> (a) Except as otherwise provided in paragraph (b), the conditions in the child's place of residence, the child's record in school, the mental, physical and social background of the family of the child, its financial situation and other matters relevant to the case; or

[6] Matter of Parental Rights as to J.L.N., 118 Nev. 621, 55 P.3d 955, 958 (2002).
[7] Id.

(b) If the child was delivered to a provider of emergency services pursuant to NRS 432B.630, any matters relevant to the case.

2. If the agency believes that it is necessary to remove the child from the physical custody of the child's parents, it must submit with the report a plan designed to achieve a placement of the child in a safe setting as near to the residence of the parent as is consistent with the best interests and special needs of the child. The plan must include, without limitation:

(a) A description of the type, safety and appropriateness of the home or institution in which the child could be placed, including, without limitation, a statement that the home or institution would comply with the provisions of NRS 432B.3905, and a plan for ensuring that the child would receive safe and proper care and a description of the needs of the child;

(b) A description of the services to be provided to the child and to a parent to facilitate the return of the child to the custody of the parent or to ensure the permanent placement of the child;

(c) The appropriateness of the services to be provided under the plan; and

(d) A description of how the order of the court will be carried out.

NRS 432B.540 clearly states that after a Petition has been found to be true by the Court it must order that an agency that provides child welfare services must make a report. If the child is removed from the custody of the parents, a plan must be developed to safely return the child. When the statue is read as a whole, it is clear that the services must address the allegations found to be true by the Court. The focus of the Court is at the time the child is removed and what needs to be done in order to cure the safety threats that exist at the time of removal. The Statues do not give the Court broad discretion to force the parent to undergo any and all services that the Court could conjure. There must be a rational basis for the services based on the allegations in the Petition.

Furthermore, NRS 432B.560 gives the Court the authority to make Orders that result from finding the Petition to be true and ordering parents to engage in a case plan. NRS 432B.560 states in pertinent part "The court may also order: (a) The child, a parent or the guardian to undergo such medical, psychiatric, psychological, or other care or treatment as the court considers to be in the best interests of the child. (b) A parent or guardian to refrain from:

(1) Any harmful or offensive conduct toward the child, the other parent, the custodian of the child or the person given physical custody of the child."

Nowhere in any of the Statutes cited by the State is the District Court given unfettered discretion to order anything that Department of Family Services Proposes. Due process at its minimum requires that notice be given and the Defendant must be afforded an opportunity to be heard. The notice of what a parent is required to address in a case plan is the underlying Abuse/Neglect Petition. A parent has an opportunity to be heard on the Petition through the process outlined in NRS 432B.530. If the District Court had unlimited discretion to order a parent to do anything it wants, it would violate due process. Any statue designed for that purpose would not pass a strict scrutiny test. However, Nevada Statutes cited by the State do not give such power to the District Court.

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C. Requiring Ms. Hernandez to submit to drug testing based on reasonable suspicion violates her Fourth Amendment Rights.

The State argues that "the court ordered Petitioner to undergo drug testing if DFS has reason to believe Petitioner is under the influence so that her parenting case be addressed with a sober and sound mind."[8] State does not cite to anything in the record for this assertion. The Court did not state any reason for why it was requiring Ms. Hernandez to drug test. State argues that there is a reasonable belief standard for drug testing in abuse/neglect cases.[9] However, State does not cite to any authority that provides that parents have a diminished right to privacy based on an abuse/neglect Petition adjudicated against them.

State argues that this Court should apply the standard for drug testing in Skinner.[10] State makes broad assertions as to why it should apply but fails to analyze why this Court should deviate from requiring probable cause for the search and a warrant for the seizure. State does have a compelling interest in ensuring the safety of children but the means must be narrowly tailored. Depriving a parent of their constitutionally protected right to privacy is not narrowly tailored to its interest.

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[8] Answering Brief page 12, lines 9-12.
[9] Answering Brief page 12, lines 13-16.
[10] Skinner v. Ry. Labor Executives' Ass's, 489 U.S. 602, 109 S. Ct. 1402 (1989).

The United State Supreme Court has long recognized that a "compelled intrusio[n] into the body for blood to be analyzed for alcohol content" must be deemed a Fourth Amendment search.[11] In light of our society's concern for the security of one's person[12], it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of privacy interests.[13] Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, these intrusions must be deemed searches under the Fourth Amendment. [4]

Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.[14] The United Supreme Court has recognized exceptions to this rule, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"[15] When faced with such special needs, the United States Supreme Court has

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[11] Schmerber v. California, 384 U.S. 757, 767-768 (1966). See also Winston v. Lee, 470 U.S. 753, 760 (1985).
[12] Terry v. Ohio, 392 U.S. 1, 9 (1968).
[13] Cf. Arizona v. Hicks, 480 U.S. 321, 324-325 (1987).
[14] See, *e. g.*, Payton v. New York, 445 U.S. 573, 586 (1980); Mincey v. Arizona, 437 U.S. 385, 390 (1978).
[15] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

balanced the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.[16] Our cases indicate that even a search that may be performed without a warrant must be based, as a general matter, on probable cause to believe that the person to be searched has violated the law.[17]

In Skinner, The United States Supreme Court held that the Government's interest in regulating the conduct of railroad employees engaged in safety-sensitive tasks in order to ensure the safety of the traveling public and of the employees themselves plainly justifies prohibiting such employees from using alcohol or drugs while on duty or on call for duty and the exercise of supervision to assure that the restrictions are in fact observed. That interest presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.[18]

That Court further found that those charged with administering the tests had minimal discretion, and would, by causing a delay result in the elimination of at least a portion of the alcohol or drugs that might have been in an employee's bloodstream at the time of the event that triggered the testing, significantly

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[16] See, *e. g.*, Griffin v. Wisconsin, *supra*, at 873 (search of probationer's home); New York v. Burger, 482 U.S. 691, 699-703 (1987) .
[17] New Jersey v. T. L. O., 469 U.S. 325; 105 S. Ct. 733; 83 L. Ed. 2d 720 (9185).
[18] Skinner v. Ry. Labor Executives' Ass's, 489 U.S. 602, 618-621, 109 S. Ct. 1402 (1989).

hindering in many cases frustrate, the governmental purpose of determining whether alcohol or drugs were in an employee's bloodstream at that time. The compelling government interest in deterring on-duty railroad employees' alcohol and drug use and in obtaining information about the causes of major train accidents both of which interest were served by the FRA regulations, outweighed the railroad employees privacy expectations, which were diminished by the employees participation in an industry that was regulated pervasively to insure safety which depended substantially on the health and fitness of the employees.[19]

Abuse/Neglect cases filed under NRS 432B have absolutely nothing in common with the facts and circumstances of the Skinner case. In Skinner there was a broad public safety interest. In a 432B proceeding, the State is infringing upon a parent's fundamental right to raise their children. The State does have a compelling interest in ensuring the safety of the child but its means must be narrowly tailored. A Petition alleging abuse/neglect of a child is the basis for the State's infringement on the parent's fundamental right. The Petition provides the parent of notice as to what is at issue and allows a parent to have an opportunity to contest the allegations contained therein.

Once a Petition is found to be true, parents are given a plan to safely reunify with their children. A case plan must be narrowly tailored to the allegations in the

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[19] Id.

Petition. In the instant matter, there were not any allegations of substance abuse. The District Court allowed the Department of Family Services to put into the case plan that Ms. Hernandez can be drug tested if the worker has a reasonable belief that she is under the influence. The District Court did not provide any justification for this intrusion into Ms. Hernandez's right to privacy. There is no authority to support State's contention that Ms. Hernandez has a diminished expectation of privacy because she is under the family court jurisdiction. State failed to articulate a compelling governmental interest in drug testing Ms. Hernandez. Ms. Hernandez has a constitution right to privacy, which the State cannot deny without showing of probable cause and obtaining a warrant.

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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 21st day of August, 2014.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 21st day of August 2014 a copy of the foregoing Petitioner's Reply Brief was served as follows:

BY ELECTRONIC FILING TO

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BY HAND DELIVERY TO

The Honorable Robert Teuton
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Shadonna Lacy
An employee of the Special Public Defender