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-14-332774-W

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

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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. _____ 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. Ms. Hernandez then filed a Writ with this Court. This Court directed Ms. Hernandez to file a Motion to Amend Case plan in case number 65939. Ms. Hernandez filed her Motion to amend case plan and it was denied. 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 submit to drug testing if Department of Family Service has a reasonable belief that she is under the influence of non-prescribed controlled substances.

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[1] NRAP 3A(b).

ISSUE PRESENTED

1. Whether the Case Plan has to rationally relate to the allegations in the abuse/neglect Petition.
2. Whether requiring a Parent to drug test without probable cause is a violation of 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. (AA I, pg. 27-28). There is not a 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 filed a Writ with this Court in case number 65939. This Court denied her Writ as it found that Ms. Hernandez had a remedy, which was to

file a Motion to Amend the Case Plan. Ms. Hernandez did file a Motion to Amend Case Plan and it was denied by the District Court. (AA I, pg. 48). The District Court found that "the invasion of Ms. Hernandez's liberty has occurred by the fact that this court has jurisdiction over her children. Accordingly, whether it is in the case plan or not, the Department of Family Services has the right to request Ms. Hernandez to submit to drug testing if they have reason to believe she is under the influence." (AA I, pg. 88).

The District Court further found that the mandatory reporting child abuse and neglect statute has a reasonable belief burden of proof. The Court found that it does not see any "distinction between a requirement a person report abuse and neglect and that the Department of Family Services have authority to request testing if they have reasonable cause to believe that a person is under the influence of alcohol or a controlled substance." (AA I, pg. 88).

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

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

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]

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

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[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)
[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

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) amendments[10]. 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 protection[11].

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

> 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

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[10] Doe v. Irwin, 441 F. Supp 1247
[11] Interest of Cooper, 621 P. 2d 437
[12] NRS 129.0155

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.

In the instant case, the District Court Ordered that as part of her case plan Ms. Hernandez shall submit to drug testing if the Department has a reasonable belief that she is under the influence. 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 drug testing.

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

In this Court's Order denying the Petition for Writ in case number 65939 this Court cited to In Re Sergio C.[14] In that case, the Appellant argued that there was not sufficient evidence to require drug testing and the Appellate Court agreed. The California Appellate Court found that the only evidence of the Appellant's alleged drug use was the mother's unsworn and unconfirmed allegation, which was flatly denied by Appellant. The Court held that drug testing cannot be imposed based solely on the unsworn and uncorroborated allegation of an admitted drug addict who has abandoned her children. There must be some investigation by DCFS to warrant the kind of invasive order that was made. For that reason, the Court reversed the order and remanded to the dependency court with directions to order a further investigation before deciding whether, in fact, drug testing is necessary.[15]

In this case, there is not any evidence that Ms. Hernandez uses drugs. In fact, she submitted to a negative drug test. There is nothing that was presented to the Court that would be sufficient to warrant drug testing in the case plan.

The District Court found that the invasion of Ms. Hernandez's liberty has occurred by the fact that the Court has jurisdiction over her children. It does not matter whether it is in the case plan or not the "Department of Family Services has the right to request Ms. Hernandez to submit to drug testing if they have reason to

[14] 83 Cal. Rptr. 2d 51, 53 (Ct. App. 1999).
[15] Id.

believe she is under the influence." (AA I, pg. 88). This finding is not supported by law. In fact, it is directly in violation of due process. It lacks the basic requirement of notice. A parent is given notice of what safety threats exist through the allegations in the Petition. State's intrusion on a fundamental right has to be narrowly tailored to a compelling state interest. However, the District Court has found that just by virtue of having one's children under Court's jurisdiction parents lose all of their liberties. The Nevada Legislature has not given Department of Family Services a right to drug test a parent anytime that they have a reasonable belief that the parent in under the influence. Moreover, there is no statute that gives the Department of Family Services the authority to drug test individuals.

The District Court found that "the statute on reporting child abuse and neglect has the burden of proof as: if a person has reasonable cause to believe that a child has been abused or neglected, they are required to report it. This Court sees no distinction between a requirement that a person report abuse and neglect and that the Department of Family Services have authority to request testing if they have reasonable cause to believe that person is under the influence of alcohol or a controlled substance." (AA I, pg. 88). The District Court clearly misapplied the law. There is absolutely no correlation between the mandatory reporting statute and the Department of Family Services ability to drug test parents absent a Court Order. The District Court also failed to take into consideration that once a report is

made, there is an investigation[16], if abuse and/or neglect is found, it is brought to the Court[17], and the parent is given an opportunity to defend through an adjudicatory hearing.[18] If the Petition is substantiated then a parent is required to do services that relate directly with the allegations in the Petition.[19]

The District Court further found that Ms. Hernandez case plan is "tailored in a manner that will preclude a subsequent removal of these children in the event that she is in fact under the influence." The District Court seems to assume that drug use alone means that a child has been abused and/or neglected. The District Court fails to understand that the Nevada Legislature has not made a per se Statute that drug use equals abuse and/or neglect. In fact, the Nevada statute on drug use provides that "A child may be in need of protection if the child is identified as being affected by prenatal illegal substance abuse or as having withdrawal symptoms resulting from prenatal drug exposure."[20] The Nevada legislature clearly intended that there be showing of harm to the child when drug use is at issue.

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[16] NRS 432B.260
[17] NRS 432B.390
[18] NRS 432B.530
[19] NRS 128.0155
[20] NRS 432B.330(4)

2. Whether requiring a Parent to 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 officers[21].

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 discretion of officers in the field[22]. However, this right to privacy is not absolute[23]. 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 intrusions[24]. A Fourth Amendment search

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[21] Pennsylvania v. Mimms, 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)
[22] Delaware v. Prouse, 440 U.S. 648, 654-55, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)
[23] Id
[24] Schmerber v. Calfornia, 384 U.S. 757, 767 (1966)

for evidence must be based on probable cause[25]. 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 cause[26].

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 requirements[27]." Evidence and the "fruits" thereof obtained in violation of the Fourth Amendment are inadmissible[28]. The Fourth Amendment is controlling on the States through the Fourteenth Amendment of the United States Constitution[29].

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

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[25] Henry v. United States, 361 U.S. 98 (1959);Schmerber v. Calfornia, si[ra and Bolin v. State, supra at 523
[26] Henry v. United States, 361 U.S. 98 (1959)
[27] Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998)
[28] Wong Sun v. United States, 371 U.S. 471 (1963)
[29] Mapp v. Ohio, 367 U.S. 643 (1961)

> 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 Amendment[30].

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 enforcement[31], make the warrant and probable cause requirement impracticable[32]. An emergency is one of the narrow exceptions to the warrant requirement.[33] An "inchoate and unparticularized suspicion or hunch cannot withstand scrutiny under the Fourth Amendment[34]. The United States Supreme Court has criticized assertions of special needs based on hypothetical

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[30] Schmerber, at 467

[31] ."(emphasis added) Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164 (1987)

[32] 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 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).

[33] State v. Rodriguez, 156 P.3d 771, 775 (Utah 2007)

[34] 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)

hazards that are unsupported by any indication of concrete danger demanding departure from the Fourth Amendment's main rule.[35]

In U.S. v. Scott[36], 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 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 drug testing without probable cause violates the Fourth Amendment of the Constitution.

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[35] Chandler v. Miller, 520 U.S. 305, 319, 117 S. S. Ct. 1295

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

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 29th day of December, 2014.

RESPECTFULLY SUBMITTED

DAVID M. SCHIECK:
SPECIAL PUBLIC DEFENDER

BY _____
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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

Abira Grigsby

SUBSCRIBED AND SWORN to before me
this 29th day of December, 2014.

NOTARY PUBLIC

SHADONNA SCURRY
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 04-08-18
Certificate No: 10-1953-1

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 29th day of December 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

Felicia Quinlan, 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

Shadonna Lavy
An employee of the Special
Public Defender