

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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4 IN THE MATTER OF THE PARENTAL)
5 RIGHTS AS TO:)
6 A.D.L. AND C.L.B., JR. MINORS)

Electronically Filed
Jan 02 2018 02:40 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

7 KEAUNDRA D.; A.D.L. AND C.L.B., JR.)
8 Appellants)

9 vs.)

10 CLARK COUNTY DEPARTMENT OF)
11 FAMILY SERVICES)
12 Respondent)

13 **PETITION FOR EN BANC RECONSIDERATION**

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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL
RIGHTS AS TO:
A.D.L. AND C.L.B., JR., MINORS,

Case No. 69047

KEAUNDRA D.; A.D.L. AND C.L.B., JR.,
Appellants.

VS.

CLARK COUNTY DEPARTMENT OF
FAMILY SERVICES,

Respondent.

PETITION FOR EN BANC RECONSIDERATION

COMES NOW the Clark County District Attorney STEVEN B. WOLFSON, through his Chief Deputy District Attorney Ronald Cordes, on behalf of the Clark County Department of Family Services (“DFS”) and submits this Petition for Rehearing of the published opinion issued by a Panel of this Honorable Court on October 5, 2017. This Petition is based on the following memorandum and all papers and pleadings on file herein and incorporates the facts and arguments presented in Respondent’s Answering Brief, filed with the Court on

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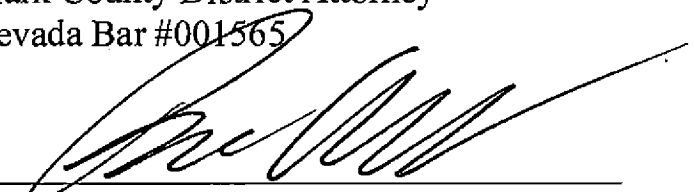
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1 April 12, 2016, as well as the facts and arguments in Petitioner's Request for
2 Rehearing, filed with the Court on October 24, 2017.

3 DATED this 2nd day of January, 2018.

4 Respectfully submitted,
5 STEVEN B. WOLFSON
6 Clark County District Attorney
7 Nevada Bar #001565

8 By

9 
10 Ronald Cordes
11 Chief Deputy District Attorney
12 Nevada Bar #004955

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **STATEMENT OF FACTS**

15 The facts are well documented within the two files maintained by the
16 Nevada Supreme Court and will not be restated herein for the sake of brevity.
17 Petitioner incorporates those filings herein for purpose of reference to appendix
18 documents and transcripts.¹

19 **STATEMENT OF THE CASE**

20 The procedural posture of the case is well documented within the two files
maintained by the Nevada Supreme Court and will not be restated herein for the
sake of brevity. Petitioner incorporates those filings herein for purpose of reference

¹ Respondent's Answering Brief filed April 12, 2016.

1 to appendix documents and transcripts. The Order Denying Rehearing from the
2 Panel was filed on December 22, 2017.

3 LEGAL ARGUMENT

4 I. En Banc Reconsideration is Necessary to Secure or Maintain the 5 Uniformity of This Court's Prior Decisions.

6 A. **The Panel's Reliance and Citation to *Spevack v. Klein* is 7 Inconsistent with *Baxter Et. Al. v. Palmigiano*.**

8 The Panel's Decision states that "an individual cannot be penalized for
9 invoking his Fifth Amendment right. *Spevack v. Klein*, 385 U.S. 511, 514-15
10 (1967)" and then analyzes that statement to mean that Ms. DeBerry cannot lose her
11 parental rights because to do so would be coercive.

12 The United States Supreme Court recognized that individuals in civil cases
13 can be forced to choose between invoking their Fifth Amendment privilege and
14 other fundamental rights. In *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Court
15 stated that "[O]ur conclusion is consistent with the prevailing rule that the Fifth
16 Amendment does not forbid adverse inferences against parties to civil actions
17 when they refuse to testify in response to probative evidence offered against them:
18 the Amendment does not preclude the inference where the privilege is claimed by a
19 party to a civil cause'. Similarly, the United States Supreme Court as stated that
20 "The cost to respondent of exercising his Fifth Amendment privilege -- denial of

1 certain perquisites that make his life in prison more tolerable -- is much less than
2 that borne by the defendant in, e.g., *McGautha v. California*, 402 U.S. 183, 217, 28
3 L. Ed. 2d 711, 91 S. Ct. 1454, 58 Ohio Op. 2d 243, where the Court upheld a
4 procedure that allowed statements made by a criminal defendant to mitigate his
5 responsibility and avoid the death penalty to be used against him as evidence of his
6 guilt. The hard choices faced by the defendants in, e.g., *Baxter v. Palmigiano*,
7 *supra*, at 313; *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 287-288,
8 140 L. Ed. 2d 387, 118 S. Ct. 1244; and *Minnesota v. Murphy*, 465 U.S. 420, 422,
9 79 L. Ed. 2d 409, 104 S. Ct. 1136. See *McKune v. Lile*, 536 U.S. 24, 29, 122 S. Ct.
10 2017, 2022, 153 L. Ed. 2d 47, 54, (2002).

11 There must be a balance between a parent's rights and those of the children,
12 especially in child protection cases. The above cases demonstrate that the United
13 States Supreme Court has found exceptions to the Fifth Amendment, even in a
14 criminal death penalty case. Surely, the Nevada Supreme Court must acknowledge
15 that statements by parents in child abuse/neglect proceedings are necessary to
16 insure safety and simply permitting parents to never provide an explanation would
17 result in children being returned to unsafe homes.

18 In light of the United States Supreme Court decisions above, the Nevada
19 Supreme Court should follow the significant body of case law holding that the
20 privilege of invoking the Fifth Amendment without consequence does not apply in

1 parental termination hearings. See, e.g., *In Re Samantha C.*, 268 Conn. 614, 847
2 A.2d 883, 912-15 (Conn. 2004); see also *Balt. City Dep't of Soc. Servs. v.*
3 *Bouknight*, 493 U.S. 549, 551, 555-56, 110 S. Ct. 900, 107 L. Ed. 2d 992 (1990)
4 (holding that a mother, the custodian of a child pursuant to a court order, could not
5 invoke the Fifth Amendment privilege against self-incrimination to resist an order
6 of the juvenile court to produce the child). Moreover, in Nevada, parental
7 termination proceedings are civil in nature, see NRS 128.090(2), and in civil cases
8 generally, a negative inference may arise from a witness's invocation of the Fifth
9 Amendment where prima facie evidence has been introduced of the fact the
10 negative inference is being used to bolster. See *Aspen Fin. Servs., Inc. v. Eighth*
11 *Judicial Dist. Court*, 128 Nev. 635, 289 P.3d 201, 209 (2012), See also *Meyer v.*
12 *Second Judicial District Court*, 95 Nev. 176, 180-181, 591 P.2d 259, 262-263
13 (1979).

14 **B. The Panel's Reliance of *Lefkowitz v. Cunningham* was Misplaced.**

15 "The Cunningham Court confined its holding to situations where "refusal to
16 waive the Fifth Amendment privilege leads automatically and without more to
17 imposition of sanctions." *Id.* at 808 n. 5, 97 S. Ct. at 2138. See *Ryan v. Montana*,
18 580 F.2d 988, 991, (1978). In the instant case, Ms. Deberry's parental rights were
19 not terminated automatically as a result of her refusal to discuss the actual physical
20 abuse in counseling. Her rights were terminated after the District Court determined

1 that she had not adjusted her circumstances to the point where Christopher could
2 be safely returned to her care and that she maintained an explanation which was
3 inconsistent with the medical testimony and the Court's findings.

4 **C. The Panel's Decision Is Inconsistent with Prior Decisions**
5 **Regarding Application of Fifth Amendment in Nevada and**
6 **Related to Child Welfare Proceedings.**

7 In *Mejia v. State*, 122 Nev. 487 (2006), the Nevada Supreme Court analyzed
8 a Fifth Amendment issue in a joint child welfare and criminal case. In *Meija*, the
9 Court found that the DFS interview with Mejia did not constitute "extortion" that
10 was designed to compel him to incriminate himself. Rather, Guesman's testimony
11 indicates that she was attempting, if possible, to reunite the family. Under those
12 circumstances, Mejia's admission did not implicate Miranda.

13 Similarly, the admissions sought from Ms. DeBerry were designed to assist
14 in counseling her to prevent the physical abuse of her children. There was
15 absolutely no testimony that criminal charges were being sought or even
16 implicated by the case plan's requirement to be honest about the injuries causation.
17 *Meija v. State*. Id.

18 Further, by the time Ms. Deberry testified in the termination of parental
19 rights trial, the statute of limitations had run on any potential criminal charges
20 which could have been filed for the child abuse or child neglect.

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1 **D. The Panel's Decision Failed To Address Nevada Precedence from**
2 **Meyer v. Second Judicial District Court and Aspen Fin. Sers. v.**
3 **Eighth Judicial Dist. Court of Nev.**

4 In *Meyer v. Second Judicial District Court*, 95 Nev. 176, 180-181, 591 P.2d
5 259, 262-263 (1979), the Nevada Supreme Court analyzed the invocation of the
6 Fifth Amendment in the context of a civil custody case. The Court stated "In the
7 case at hand, the questions which petitioner refused to answer go to the heart of the
8 major issues before the court; her fitness, and the fitness of the children's father and
9 his present wife, to serve as custodial parents of the couple's three minor children.

10 Similarly, the questions asked of Ms. DeBerry were directly related to her
11 parental fitness and ability to provide for the safe care of the children. The
12 therapeutic sessions Ms. DeBerry participated in were of minimal assistance
13 without Ms. DeBerry providing truthful information about the injury Christopher
14 sustained while solely in her care. The Hearing Master and District Court clearly
15 found that she physically injured Christopher and she did not provide a credible
16 explanation to the court or in therapy. The District Court did not terminate her
17 rights solely based on her failure to admit criminal conduct, rather it was based
18 upon the totality of the evidence and the ineffectiveness of Ms. DeBerry's
19 counseling in addressing the circumstances which led to her children's placement
20 in foster care.

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1 The extent to which a party's Fifth Amendment privilege against self-
2 incrimination is implicated is generally determined by reference to the overlap
3 between the civil and criminal cases and the status of the criminal matter. *Alcala*,
4 *625 F. Supp. 2d at 400. Aspen Fin. Servs. v. Eighth Judicial Dist. Court of Nev.*,
5 *128 Nev. 635, 643, 289 P.3d 201, 206-207, (2012).*

6 In the instant case, Ms. DeBerry chose to testify and provide the District
7 Court with all of the possible changes she had made since the children's removal.
8 She also chose to maintain her version of Christopher's injury which was
9 determined to be medically inconsistent for a period in excess of five years. Also,
10 there were never any criminal charges filed and there was no evidence to indicate
11 that they were even being considered.

12 **E. Public Policy Considerations Regarding Child Safety Necessitate**
13 **En Banc Reconsideration.**

14 Recently, in *Abid v. Abid*, 133 Nev. Adv. Rep. 94 (December 2017), the
15 Nevada Supreme Court, en banc, reiterated the historical regard for child safety
16 expressed throughout decades of legal precedence when balancing against a
17 parent's constitutional protections. The Court stated, "Similarly, in the related child
18 abuse/neglect context, courts routinely hold that evidence obtained in violation of
19 the Fourth Amendment is admissible because "the substantial social cost of
20 ignoring children's safety" exceeds "the minimal additional deterrence achieved by

1 applying the exclusionary rule." *In re W.L.P.*, 345 Ore. 657, 202 P.3d 167, 173
2 (Or. 2009); accord *In re Mary S.*, 186 Cal. App. 3d 414, 230 Cal. Rptr. 726, 728
3 (Ct. App. 1986) ("[T]he potential harm to children in allowing them to remain in an
4 unhealthy environment outweighs any deterrent effect which would result from
5 suppressing evidence unlawfully seized." (internal quotation marks omitted)); *In re*
6 *Diane P.*, 110 A.D.2d 354, 494 N.Y.S.2d 881, 884 (App. Div. 1985) ("[T]he State's
7 overwhelming interest in protecting and promoting the best interests and safety of
8 minors in a child protective proceeding far outweighs the rule's deterrent value.");
9 *State ex rel. A.R. v. C.R.*, 1999 UT 43, 982 P.2d 73, 79 (Utah 1999) ("Whatever
10 deterrent effect there might be is far outweighed by the need to provide for the
11 safety and health of children in peril.").

12 **F. The Panel's Decision Negatively Impacts The District's Court's**
13 **Ability to Analyze NRS 128. 105(e)**

14 NRS 128.105(e) provides a parental fault ground where the parent's
15 behavior demonstrates a "risk of serious physical, mental or emotional injury to the
16 child if the child were returned to, or remains in, the home of his or her parent or
17 parents." The unresolved risk and safety factors are at the heart of this case.
18 Without the manner of abuse being disclosed, the Department of Family Services
19 cannot ensure safety, permanency or reduce the risk of re-offense. Christopher's
20

1 abusive injury remains unexplained and the risk of serious physical injury to him if
2 reunified has not been quelled. *Id.* at 47, 200.

3 NRS 128.105 (e) exists especially for Christopher's circumstances who
4 needs protection from abusive injuries where there are no credible explanations for
5 those injuries; therefore no ability to safely plan for the child's return to the
6 parents.

7 Though, this is a case of first impression in Nevada, there are several
8 jurisdictions that terminate parental rights where there is a risk of harm if the child
9 is returned to his/her parents because of the impossibility to plan for safety where
10 the child suffered abusive injuries, the parents' explanation is medically consistent,
11 and the child was in the care, custody, and control of his/her parents at the time the
12 abuse occurred.

13 **G. The Panel's Decision is Overly Broad.**

14 The Fifth Amendment Protection was extended beyond the scope necessary
15 to protect Ms. Deberry. In many treatment models, a parent's statements regarding
16 their involvement in a potential crime is necessary to affectively treat their
17 problems. The Panel's decision is overly broad resulting in substance abusers and
18 domestic violence abusers being able to avoid discussing the details of their
19 abusive behavior.

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DATED this 2nd day of January, 2018.

By


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RONALD CORDES, being first duly sworn, deposes and says:

I am the Chief Deputy District Attorney assigned to this matter for the District Attorney and the Petitioners in the above captioned Petition; that I have read the foregoing PETITION FOR EN BANC RECONSIDERATION and know the contents therein. The same are true and correct to my own knowledge except as to those matters therein set forth on information and belief and as to those matters I believe the same to be true. The Petitioner has no other remedy at law available, and that the only means to address this issue is through the instant Petition. Counsel signs this verification on behalf of the Department of Family Services, under its direction and authorization.

Notary Public in and for said State and County

 **HEATHER S. AJOLO**
Notary Public, State of Nevada
No. 06-104308-1
My Appt. Exp. Dec. 15, 2018

CERTIFICATE OF COMPLIANCE

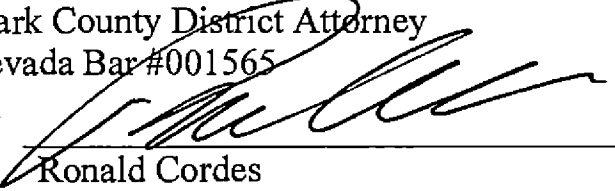
1. I hereby certify that this Petition for En Banc Reconsideration complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.

2. I further certify that this Petition complies with the page or type-volume limitations of NRAP 40, 40(b)(3)-(4), and NRAP 32(a)(4)-(6), because it is either proportionately spaced, has a typeface of 14 points or more and contains no more than 4,667 words or 433 lines of text.

Dated this 2nd day of January, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

By 
Ronald Cordes
Chief Deputy District Attorney
Nevada Bar #004955

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