

STATE OF MICHIGAN
IN THE SUPREME COURT

^{re}
In ~~the~~ Matter of Contempt of KELLY MICHELLE
DORSEY .

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner-Appellee,

v

TYLER MICHAEL DORSEY,
Respondent,

and

KELLY MICHELLE DORSEY,
Appellant.

FOR PUBLICATION
September 9, 2014
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No. 309269
Livingston Circuit Court
Family Division
LC No. 08-012596-DL

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STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE CONTEMPT OF KELLY MICHELLE DORSEY, Supreme Court No. _____

Respondent-Appellant

Court of Appeals Case No. 309269

IN RE TYLER MICHAEL DORSEY

44th Circuit Court,
Livingston County,
Family Division
Case No. 08-012596-DL
Hon. David Reader

APPLICATION FOR LEAVE TO APPEAL
ON BEHALF OF RESPONDENT-APPELLANT,
KELLY MICHELLE DORSEY

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

INDEX OF AUTHORITIES iii

QUESTIONS PRESENTED..... x

JURISDICTIONAL STATEMENT xii

STATEMENT OF ORDER APPEALED AND RELIEF REQUESTED 1

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS 3

I. Delinquency Petitions and Background 3

II. The January 14, 2011 Drug Test Order..... 5

III. Tyler’s Probation Officer Requests Drug Testing OF MS.DORSEY..... 7

IV. The Show Cause Motions and Orders..... 8

V. The Show Cause Hearing..... 10

VI. Sentencing and The February 10, 2012 Contempt Order..... 11

VII. Post Judgment Motions 11

ARGUMENT 13

I. THE COLLATERAL BAR RULE DOES NOT APPLY WHERE A COURT LACKS JURISDICTION. FAMILY COURTS ARE COURTS OF LIMITED JURISDICTION AS DEFINED BY STATUTES. THOSE STATUTES PERMIT ONLY REASONABLE ORDERS AFFECTING ADULTS. FOURTH AMENDMENT VIOLATIONS ARE UNREASONABLE..... 13

A. STANDARD OF REVIEW 13

B. FAMILY COURTS HAVE LIMITED SPECIFIC JURISDICTION DEFINED BY STATUTE. THE STATUTES GRANTING JURISDICITON TO ISSUE ORDERS AFFECTING ADULTS MUST BE CONSTRUED TO LIMIT THAT JURISDICTION TO REASONABLE ORDERS ONLY. 14

C. THE TWICE WEEKLY FOR 90 DAYS DRUG TESTING ORDER IMPOSED ON THE PARENT VIOLATED THE FOURTH AMENDMENT AND THE MICHIGAN CONSTITUTION AND AS SUCH WAS UNREASONABLE. AS AN UNREASONABLE ORDER IT FALLS OUTSIDE THE CLASSES OF ORDERS A FAMILY COURT HAS THE JURISDICTION TO ISSUE AFFECTING ADULTS. 23

II. THE COLLATERAL BAR RULE PRESUMES THE AVAILABILITY OF EFFECTIVE REMEDIES AND MEANINGFUL REVIEW OF THE UNDERLYING ORDER PRIOR TO THE CONTEMPOUS ACT. HERE THERE WAS NO OPPORTUNITY FOR MEANINGFUL REVIEW. THE ORDER REQUIRED AN IRRETRIEVABLE SURRENDER OF CONSTITUTIONAL RIGHTS. 38

A. STANDARD OF REVIEW 38

B. THE ORDER REQUIRED AN IRRETRIEVABLE SURRENDER OF CONSTITUTIONAL RIGHTS AND THERE WAS NO MEANINGFUL OPPORTUNITY FOR REVIEW PRIOR TO THE CONTEMPTOUS ACT. 40

C. ISSUE PRESERVATION 42

III. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MS. DORSEY OF ALL THE ELEMENTS OF CRIMINAL CONTEMPT BEYOND A REASONABLE DOUBT. 43

A. STANDARD OF REVIEW 43

B. THE PROSECUTION DID NOT MEET ITS BURDEN TO PROVE GUILT OF CRIMINAL CONTEMPT BEYOND A REASONABLE DOUBT. MS. DORSEY’S REFUSAL TO DRUG TEST WAS NOT UNEQUIVOCAL. HER REFUSAL WAS CONDITIONAL AS SHE WANTED TO CONSULT A LAWYER FIRST. 43

C. BY FINDING GUILT OF CRIMINAL CONTEMPT BY A PREPONDERANCE OF THE EVIDENCE THE FAMILY COURT IMPLICITLY FOUND INSUFFICIENT EVIDENCE TO PROVE GUILT BEYOND A REASONABLE DOUBT. THE FAMILY COURT’S ATTEMPT TO CORRECT THIS AS A CLERICAL ERROR IS NOT EFFECTIVE AS THE BURDEN OF PROOF SHOWN AT TRIAL IS A SUBSTANTIVE MATTER OF FACT AND LAW. 45

CONCLUSION 50

RELIEF REQUESTED.....50**Error! Bookmark not defined.**

INDEX OF EXHIBITS 51

INDEX OF AUTHORITIES

CASES

<i>Agnello v United States</i> , 269 US 20, 33, 46 SCt 4, 70 LEd 145 (1925)	26
<i>Alderman v United States</i> , 394 US 165, 174, 89 SCt 961, 22 LEd2d 176 (1969)	24
<i>Altman v Nelson</i> , 197 Mich App 467; 495 NW2d 826 (1992)	15, 18
<i>Am Fed of State and Mun Employees Council v Scott</i> , 857 F Supp 2d 1322 (SDFL April 26, 2012).....	31
<i>Ass'n of County Clerks v Lapeer Circuit Judges</i> , 465 Mich 559; 640 NW2d 567 (2002)	13
<i>Bd. of Educ. v Earls</i> , 536 US 822, 122 SCt 2559, 153 LEd2d 735 (2002).....	30, 31, 35
<i>Bowie v Arder</i> , 441 Mich 23; 490 NW2d 568 (1992).....	17
<i>Brandt v Brandt</i> , 250 Mich App 68, 73; 645 NW2d 327 (2002).....	43
<i>Brinegar v United States</i> , 338 US 160, 176-77, 69 SCt 1302, 93 LEd 1879 (1949)..	27, 28, 34, 37
<i>Buczkowski v Buczkowski</i> , 351 Mich 216; 88 NW2d 416 (1958).....	17
<i>Bumpers v North Carolina</i> , 391 US 543, 550, 88 SCt 1788, 20 LEd2d 797 (1968)	29
<i>Burdeau v McDowell</i> , 256 US 465, 475, 41 SCt 574, 65 LEd 1048 (1921).....	24
<i>Camara v Municipal Court</i> , 387 US 523, 540, 87 SCt 1727, 18 LEd2d 930 (1967)	29
<i>Chandler v Miller</i> , 520 US 305, 313, 117 SCt 1295, 137 LEd2d 513 (1997)	25, 30, 32, 34
<i>City of Indianapolis v Edmond</i> , 531 US 32, 37, 121 SCt 447, 148 LEd2d 333 (2000).....	29, 32
<i>Davis v Henry (In re Contempt of Henry)</i> , 282 Mich App 656, 677; 765 NW2d 44 (2009).....	43
<i>Delaware v Prouse</i> , 440 US 648, 654, 99 SCt 1391, 59 LEd2d 660 (1979)	25

<i>Dep't of Human Servs. v. Laird (In re Sanders)</i> , 495 Mich 394; 852 NW2d 524 (2014) .	2, 14, 16, 22, 38
<i>Draper v United States</i> , 358 US 307, 79 SCt 329, 3 LEd2d 327 (1959).....	27
<i>F v Brown</i> , 306 SW3d 80 (Ky 2010).....	31
<i>Ferguson v City of Charleston</i> , 532 U.S. 67, 121 SCt 1281, 149 LEd2d 205 (2001)	32, 35, 36
<i>Fitch v Manitou County Bd of Auditors</i> , 133 Mich 178, 182-83; 94 NW 952 (1903).....	42
<i>Fox v Martin</i> , 287 Mich 147, 152; 283 NW 9 (1938).....	15
<i>Fox v. Bd of Regents of Univ of Michigan</i> , 375 Mich 238; 242; 134 NW2d 146 (1965).....	15
<i>Fritts v Krugh</i> , 354 Mich 97; 92 NW2d 604 (1958).....	18
<i>Gora v City of Ferndale</i> , 456 Mich 704; 576 NW2d 141 (1998).....	22
<i>Griffin v Wisconsin</i> , 483 US 868, 870-71, 107 SCt 3164, 97 LEd2d 709 (1987)	31
<i>Hicks v Feiok</i> , 485 US 624; 108 SCt 1423; 99 LEd2d 721 (1988).....	48
<i>Illinois v Lidster</i> , 540 US. 419, 124 SCt 885, 157 LEd2d 843 (2004).	32
<i>In re AMB</i> , 248 Mich App 144, 166; 640 NW2d 262 (2001).....	15, 18
<i>In re Contempt of Auto Club Ins Ass'n</i> , 243 Mich App 697, 714; 624 NW2d 443 (2000)	43
<i>In re Contempt of Dudzinski</i> , 257 Mich App 96, 99; 667 NW2d 68 (2003)	43
<i>In re Contempt of Dudzinski</i> , 257 Mich App 96; 667 NW2d 68 (2003)	17
<i>In re Ferris</i> , 852 NW2d 900 (2014).....	16
<i>In re Hague</i> , 412 Mich 532, 544-45; 315 NW2d 524 (1982)	14, 15
<i>In re Harper</i> , 302 Mich App 349, 356-57; 839 NW2d 44 (2013).....	20
<i>In re Hatcher</i> , 443 Mich 426; 505 NW2d 834 (1993).....	16, 18
<i>In re Kasuba Estate</i> , 401 Mich 560; 258 NW2d 731 (1977).....	18
<i>In re Linda Lou Griffin</i> , 88 Mich App 184 (1979)	18

<i>In re Macomber</i> , 436 Mich 386, 390-91, 398-99; 461 NW2d 671 (1990).....	19, 20, 21
<i>In re Novak</i> , 932 F2d 1397 (11th Cir 1991).....	39
<i>Jackson City Bank & Trust Co v Frederick</i> , 271 Mich 538; 260 NW 908 (1935).....	15, 16, 17
<i>Jacob v Township of West Bloomfield</i> , 531 F3d 385 (6th Cir 2008).....	33
<i>Jeffrey v Rapid American Corp</i> , 448 Mich 178; 529 NW2d 644 (1995).....	15
<i>Johnson v White</i> , 261 Mich App 332; 346; 682 NW2d 505 (2004).....	14, 15
<i>Langdon v Judges of Wayne County Circuit Court</i> , 76 Mich 358; 43 NW 310 (1889).....	14
<i>Lebron v Wilkins</i> , 990 F Supp 2d 1280 (MD Fla 2013).....	32
<i>Maness v Meyers</i> , 419 US 449; 95 SCt 584; 42 LEd 2d 574 (1975).....	17, 38
<i>Mapp v Ohio</i> , 367 US 643, 655, 81 SCt 1684, 6 LEd2d 1081 (1961).....	24
<i>Marchwinski v Howard</i> , 113 F Supp2d 1134, 1139-40 (ED Mich 2000), <i>aff'd</i> , 60 Fed Appx 601 (6th Cir 2003).....	32, 37
<i>Mario W v Kaipio</i> , CV-11-0344-PR ¶ 32 (Ariz June 27, 2012).....	31
<i>McDougall v Schanz</i> , 461 Mich 15, 23; 597 NW2d 148 (1999).....	13
<i>Nat'l Treasury Employees Union v Von Raab</i> , 489 US 656, 665, 109 SCt 1384, 103 LEd2d 685 (1989).....	25, 31, 35, 37
<i>New Jersey v T.L.O.</i> , 469 US 325, 340, 105 SCt 733, 83 LEd2d 720 (1985).....	29, 30, 31, 36
<i>New York Times v Jasclevich</i> , 439 US 1304; 98 SCt 3060; 58 LEd 12 (1978).....	40
<i>Nicholas v Goord</i> , 430 F3d 652 (2d Cir 2005).....	31
<i>Norris v Premier Integrity Solutions</i> , 641 F3d 695 (6th Cir. 2011).....	31
<i>O'Connor v Ortega</i> , 480 US 709, 715, 107 SCt 1492, 94 LEd2d 714 (1987).....	25
<i>Oberlies v Searchmont Resort, Inc</i> , 246 Mich App 424; 633 NW2d 408 (2001).....	15
<i>Payton v New York</i> , 445 US 573, 586, 100 SCt 1371, 63 LEd2d 639 (1980).....	25

<i>People v Brzezinski</i> , 243 Mich App 431, 433-34; 622 NW2d 528 (2000)	28
<i>People v Chowdhury</i> , 285 Mich App 509, 523-25, 775 NW2d 845 (2009)	28, 29, 33, 36, 37
<i>People v Hall</i> , 290 Mich 15; 287 NW 361 (1939).....	42
<i>People v Hill</i> , unpublished opinion per curium of the Court of Appeals, issued [February 14, 2012] (Docket No. 300350)	43, 47
<i>People v Kiyoshk</i> , 493 Mich 923; 825 NW2d 56 (2013).....	18, 19
<i>People v Levine</i> , 461 Mich 172, 178; 600 NW2d 622 (1999)	24
<i>People v Matish</i> , 384 Mich 568; 184 NW2d 915 (1971).....	44, 46
<i>People v McGee</i> , 247 Mich App 325, 335-36; 636 NW2d 531 (2001)	47
<i>People v Peck</i> , 481 Mich 863; 748 NW2d 235 (2008)	49
<i>People v Smith</i> , 420 Mich 1, 19-20; 360 NW2d 841 (1984)	24
<i>Platte v Thomas Twp</i> , 503 F Supp2d 227 (ED Mich, 2007).....	33
<i>Poolaw v Marcantel</i> , 565 F3d 721 (10th Cir 2009).....	27
<i>Porter v Porter</i> , 285 Mich App 450, 454-55; 776 NW2d 377 (2009).....	43
<i>Safford Unified Sch Dist No 1 v Redding</i> , 557 US 364; 129 SCt 2633; 174 LEd2d 354 (2009)..	36
<i>Schmerber v California</i> , 384 US 757, 770, 86 SCt 1826, 16 LEd2d 908 (1966).....	28
<i>Shane v Hackney</i> , 341 Mich 91, 99; 67 NW2d 256 (1954)	15
<i>Skinner v Ry. Labor Executives' Ass'n</i> , 489 US 602, 616-17, 109 SCt 1402, 103 LEd2d 639 (1989)	25, 30, 31, 37
<i>Spencer v Bay City</i> , 292 F Supp2d 932 (ED Mich, 2003)	33
<i>Stamadianos v Stamadianos</i> , 425 Mich 1; 385 NW2d 604 (1986).....	17
<i>State Bar of Michigan v Cramer</i> , 399 Mich 116; 249 NW2d 1 (1976)	14, 17, 38, 39, 43, 48
<i>State v Doe</i> , 233 P3d 1275 (Idaho 2010)	34, 35, 36, 37

<i>State v Moreno</i> , 203 P3d 1000 (Utah 2009)	2, 23, 34, 35, 36, 37
<i>State v Ochoa</i> , 792 NW2d 260 (Iowa 2010).....	31
<i>Taylor v Smithkline Beecham Corp</i> , 468 Mich 1; 658 NW2d 127 (2003)	14, 22
<i>Terry v Ohio</i> , 392 US 1, 19-20, 88 SCt 1868, 20 LEd2d 889 (1968).....	27, 30
<i>Travelers Ins Co v Detroit Edison Co</i> , 465 Mich 185; 631 NW2d 733 (2001).....	15
<i>TWM Mfg Co Inc v Dura Corp</i> , 722 F2d 1261, 1272 (6th Cir 1983).....	44
<i>United States v Burgess</i> , 576 F3d 1078, 1097 (10th Cir. 2009)	26
<i>United States v Knights</i> , 534 US 112, 122 SCt 587, 151 LEd2d 497 (2001)	27
<i>United States v Michigan</i> , 712 F2d 242 (6th Cir 1983).....	39
<i>United States v Montoya de Hernandez</i> , 473 US 531, 537, 105 SCt 3304, 87 LEd2d 381 (1985)	25
<i>United States v Ryan</i> , 402 US 530; 91 SCt 1580; 29 LEd 85 (1971).....	39, 40, 41
<i>United States v Scott</i> , 450 F3d 863 (9th Cir 2006)	31
<i>United States v United Mine Workers of America</i> , 330 US 258; 67 S Ct 677; 91 L Ed 884 (1947)	17, 18
<i>Verona School District v Acton</i> , 515 US 646, 115 SCt 2386, 132 LEd2d 564 (1995).....	30, 31, 35
<i>Walker v City of Birmingham</i> , 388 US 307; 87 SCt 1824; 18 LEd2d 1210 (1967).....	14, 15, 39
<i>Wexford Med Group v City of Cadillac</i> , 474 Mich 192, 202; 713 NW2d 734 (2006)	14
<i>Whitman v City of Burton</i> , 493 Mich 303; 831 NW2d 223 (2013).....	14
<i>Wyman v James</i> , 400 US 309, 325, 91 SCt 381, 27 LEd2d 408 (1971)	29
<i>York v Wahkiakum Sch Dist No 200</i> , 178 P3d 995 (Wash 2008)	30

STATUTES

28 USC § 1331	18
---------------------	----

MCL 333.7212.....	7
MCL 333.7403.....	26, 36
MCL 333.7404.....	26, 36
MCL 333.7416.....	26, 36
MCL 600.1009.....	18
MCL 600.1021.....	18
MCL 600.601.....	17
MCL 712A.1.....	18, 26
MCL 712A.18.....	20, 21, 22, 23
MCL 712A.2.....	18
MCL 712A.2(b).....	18
MCL 712A.32.....	18
MCL 712A.6.....	19, 20, 21, 22, 23, 38, 50
MCL 750.145.....	26, 36

OTHER AUTHORITIES

Jordan C. Budd, <i>Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment</i> , 19 WM & MARY BILL RTS J 751 (2011).....	32
Kuhns, <i>Limiting the Criminal Contempt Power: New Roles For the Prosecutor and the Grand Jury</i> , 73 MICH L REV 484, 504 (1975).....	14
S.B. 1082 (2012).....	7

RULES

MCR 3.901.....	ix
----------------	----

MCR 3.992.....	47
MCR 3.993.....	ix, 41
MCR 6.403.....	48
MCR 6.435(B)	47, 49
MCR 7.202.....	ix
MCR 7.203(A)(2).	ix
MCR 7.204.....	ix

TREATISES

Dobbs, The Law of Remedies (2d ed Abr) pp 154-55.....	14, 39
---	--------

CONSTITUTIONAL PROVISIONS

Const 1963, art 1, § 11	2, 23, 24, 25, 42
Const 1963, art 6, § 15	18
Tex Const art V, § 8.....	17
US Const, Am IV.....	vii, 2, 23, 24, 25, 26, 32, 41, 42, 50

QUESTIONS PRESENTED

I. The absence of jurisdiction may be asserted at any time and is not collaterally barred in contempt appeals. Family courts are courts of limited jurisdiction. Tyler Dorsey was adjudicated delinquent, but his mother was not on probation or convicted of a crime. Did the family court in a delinquency case possess subject matter jurisdiction to order the parent to submit to twice-weekly drug testing without a warrant at the request of the juvenile's probation officer based on the juvenile's failed drug test?

Appellant's answer: "No."

Appellee's answer: "Yes."

The Trial Court ruled: "Yes."

The Court of Appeals ruled: "Yes."

I-A. This Court ruled in *In re Macomber*, 436 Mich 386, 391-92; 461 NW2d 671 (1990) that MCL 712A.6 must be construed consistently with MCL 712A.18 as the legislature enacted them simultaneously. MCL 712A.18 allows the family court to issue orders including reasonable rules regarding the conduct of parents. Courts must construe statutes as constitutional when possible. Unreasonable searches are unconstitutional under the Fourth Amendment. Is this reasonability requirement in MCL 712A.18 a prerequisite for subject matter jurisdiction to issue orders on the conduct of adults?

Appellant's answer: "Yes."

Appellee's answer: "No."

The Trial Court Ruled: "No."

The Court of Appeals Ruled: "No."

I-B. Unreasonable searches are unconstitutional under the Fourth Amendment. Was the twice-weekly for 90 days warrantless drug testing ordered by the family court of the parent of a 17-year-old delinquent at the request of the juvenile's probation officer an unreasonable search?

Appellant's answer: "Yes."
Appellee's answer: "No."
The Trial Court ruled: "No."
The Court of Appeals ruled: "Yes."

II. The collateral bar rule presumes adequate and effective remedies and review of the underlying order exist prior to the contemptuous act. Does the collateral bar rule bar a collateral attack on the constitutionality of the underlying order where Ms. Dorsey as parent of the juvenile delinquent 1) was indigent, 2) was not represented by counsel at in the delinquency case until counsel was appointed for her after the order to show cause for contempt the was issued, and 3) there was no longer an appeal available and she was not allowed time to consult with a lawyer to file a motion to modify the order before the show cause motion was filed?

Appellant's answer: "No."
Appellee's answer: "Yes."
The Trial Court ruled: "Yes, in applying the collateral bar rule.."
The Court of Appeals ruled: "Yes, in applying the collateral bar rule.."

III. Ms. Dorsey desired legal counsel before submitting to the drug testing in her son's delinquency case. The family court held Ms. Dorsey in criminal contempt on a preponderance of the evidence without explicitly finding willfulness or unequivocal conduct. The family court changed this to proof beyond a reasonable doubt forty-one days later, but still made no explicit finding that her conduct was willful or unequivocal. The prosecution must prove all elements of criminal contempt beyond a reasonable doubt. Did the prosecution prove sufficient evidence to convict Ms. Dorsey of criminal contempt?

Appellant's answer: "No."
Appellee's answer: "Yes."
The Trial Court's ruled: "Yes."
The Court of Appeals ruled: "Yes."

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review by appeal decisions and opinions issued by the Court of Appeals. MCR 7.301(A)(2). This application for leave to appeal has been filed within 42 days after the filing of the opinion appealed from which was dated September 9, 2014. MCR 7.302(C)(2)(b).

The Court of Appeals had jurisdiction to hear the appeal as one of right. The criminal contempt order rendered by the family court against Kelly Dorsey was issued in the context of the juvenile delinquency case involving her son. The court rule regarding family court appeals, MCR 3.993, applies to juvenile delinquency cases. MCR 3.901(B)(1). By that court rule final orders and judgments of a family court may be appealed by right to the Michigan Court of Appeals. MCR 3.993(A)(4); MCR 7.203(A)(2). The general appellate rule regarding appeals of right from final orders is also applicable. MCR 7.203(A)(1). The clerk of the Court of Appeals designated this appeal as civil in nature. A civil order is final if it “disposes of all the claims and adjudicates the rights and liabilities of all the parties.” MCR 7.202(6)(a)(i). The February 10, 2012 criminal contempt order was final as it adjudicated the criminal contempt charge and imposed a sentence. Nothing else remained.

The family court in the Family Division of the 44th Circuit Court for Livingston County entered and signed the final order of criminal contempt against Ms. Dorsey on February 10, 2012. Ms. Dorsey, through counsel, filed the first post-judgment motions to correct sentence and for an appeal bond with the trial court within 21 days of the final order on March 2, 2012. (Register of Actions 7.) An additional post-judgment motion for a new trial was filed with the trial court on March 8, 2012. The family court denied both motions on March 22, 2012. Ms. Dorsey filed this appeal on March 23, 2012 within 21 days of the disposition of the post-judgment motions. MCR 7.204

STATEMENT OF ORDER APPEALED AND RELIEF REQUESTED

Kelly Dorsey was convicted of criminal contempt following a bench trial before the Honorable David Reader in the Livingston County Circuit Court. The family court had ordered her on January 14, 2011 to submit to random drug testing in her son's juvenile delinquency proceeding at the request of her son's probation officer Susan Grohman. A similar order existed in an abuse and neglect proceeding which terminated in 2011. After that order terminated, Ms. Grohman requested on the afternoon of January 9, 2012 that Ms. Dorsey submit to twice weekly drug testing for a period of 90 days under the order in the juvenile delinquency proceeding after her son tested positive for K2. Ms. Dorsey said on January 9 and January 10 that she wanted to seek legal advice before complying, but Ms. Grohman filed contempt show cause motions the morning of January 10, 2012 before Ms. Dorsey could obtain legal advice. The family court granted the show cause motions. On January 27, 2012 the family court appointed counsel to represent her in the contempt matter. The family court found her in contempt on February 2, 2012, but did not characterize the type of contempt and later issued a written order on February 6, 2012 finding her guilty of criminal contempt based on a preponderance of the evidence. This order required her to "submit to drug test forthwith" and scheduled sentencing for February 9, 2012 when she was sentenced to 93 days in jail, \$200 in costs, \$120 in attorney's fees, and \$500 in fines. On February 10, 2012 the family court issued another contempt order finding Ms. Dorsey in uncharacterized contempt of court (neither the civil nor the criminal box was checked) based on a preponderance of the evidence.

On March 2, 2012 Ms. Dorsey filed post-trial motions for 1) a judgment of acquittal or a new trial, 2) to correct sentence, and 3) a stay and appeal bond contesting, among other things, the application of the collateral bar rule by challenging 1) the subject matter jurisdiction of the family court to issue orders setting rules for the conduct of adults, 2) the constitutionality of the

underlying order under the Fourth Amendment, 3) the characterization of the contempt as criminal in nature, and 4) also asserting that the evidence was insufficient to convict for criminal contempt. The family court denied both motions, but granted the motion for a stay and bond pending appeal which was set at \$500 on personal recognizance. The appeal of right was filed with the Court of Appeals on March 23, 2012. The Court of Appeals affirmed the family court on September 9, 2014 by applying the collateral bar rule, however, it did find that the underlying January 14, 2011 drug testing order was an unconstitutional search violating the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Michigan Constitution. The Court of Appeals also found that the evidence was sufficient to convict Ms. Dorsey of criminal contempt.

This court should grant leave to appeal, because the subject matter jurisdiction, Fourth Amendment, and Article I, Section 11 issues are of major significance to the state's jurisprudence. The substantive versus clerical error issue is also important and there is very little published case law addressing the distinction between the two. The Court of Appeals correctly decided the Fourth Amendment and Article I, Section 11 issues, but it erroneously failed to realize that the Fourth Amendment argument was actually a component of the larger subject matter jurisdiction argument and simply shows that the drug testing order was unreasonable. *See State v Moreno*, 203 P3d 1000 (Utah 2009). Furthermore, in light of this Court's decision in *Dep't of Human Servs. v. Laird (In re Sanders)*, 495 Mich 394, 404; 852 NW2d 524 (2014) the Court of Appeal's simple construction of MCL 712A.6 that the family court obtains jurisdiction over adults simply by having jurisdiction over the child may render that statute unconstitutional as there are actually additional limitations to jurisdiction over adults by family courts sitting in juvenile delinquency proceedings.

Appellant requests that this Court grant leave to appeal to address the issues raised in this application and that this Court ultimately reverse the opinion of the Court of Appeals from this case, *In the Matter of the Contempt of Kelly Michelle Dorsey*, __ Mich App __; __ NW2d __ (2014) (Docket No. 309269), which affirmed the trial court's order of criminal contempt, and order any other relief that this Court deems just.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The criminal contempt order against Kelly Dorsey arose out of the juvenile delinquency proceedings concerning Ms. Dorsey's son Tyler Dorsey. Ms. Dorsey is a single mother. She only became Tyler's custodial parent several months after the death of Tyler's father in March 2010. (Mot. Hr'g. Tr. 12:5-9, Mar. 22, 2012.)

I. DELINQUENCY PETITIONS AND BACKGROUND

The first petition was brought before the family court in April 2008 where Tyler was charged with three counts of breaking and entering a vehicle. He was placed on the informal consent docket and successfully completed that program in July 2009. The second petition was filed in November/December 2009 in which Tyler was charged with 1) carrying a dangerous weapon (a make shift club), 2) receiving and concealing a stolen bicycle, 3) possession of the controlled substance hydrocodone, and 4) minor in possession (MIP) of alcohol. (Delinquency Pet. ¶ 2, Nov. 24, 2009.) While the weapon and MIP charges were dismissed, he admitted the receiving and concealing stolen property and the non-narcotic controlled substance possession charges in February 2010. (08-01259602-DL Case R.)

Tyler's father died in March 2010 and his father's girlfriend, became his guardian. (Ct. App. Op. 2.). At the dispositional hearing on the second petition Tyler's probation officer, Susan Grohman, noted that Ms. Dorsey had not been involved in his life for year and that Ms. Dorsey

had “alcohol/drug problems and a criminal record.”¹ (Ct. App. Op. 2.) In a subsequent biopsychosocial assessment Tyler stated that he felt his mother’s absence was due to substance abuse problems. (Ct. App. Op. 2.) On April 16, 2010 Tyler was placed on probation with several conditions including random drug testing. (Ct. App. Op. 2.)

In August 2010 Tyler tested positive for Benzodiazepines. (Ct. App. Op. 2.) The same month another petition was filed against Tyler for domestic violence towards his guardian’s daughter. (Ct. App. Op. 2.) They were in a relationship and resided together. (Ct. App. Op. 2.) At that point Tyler was sent to live with his mother Ms. Dorsey. (Ct. App. Op. 2.) Later that month on August 20, 2010 another petition was filed against Tyler for 1(first degree home invasion, 2) an alcohol MIP, and 3) larceny in a vacant building. (08-01259604-DL Register of Actions 1, 4.) On January 31, 2011 he was admitted the charge for larceny in a Vacant Building while Home Invasion and MIP charges were dismissed. (08-01259604-DL Case R., Register of Actions 1, 4.) Some evidence was suppressed in this case due to Ms. Grohman’s violation of Tyler’s Miranda rights and successful motion to suppress file on Tyler’s behalf.

In August 2010 Tyler was committed to the Maurice Spear Campus in Adrian due to the inability of Ms. Dorsey and his guardian to control him. (Ct. App. Op. 2.) Ms. Dorsey and her daughter visited Tyler at Maurice Spear and took part in family counseling sessions which they reasonably believed were confidential and not subject to reporting to the family court or her son’s probation officer. The counselor nevertheless filed a report with the family court noting that Ms. Dorsey and her daughter denied using drugs or keeping alcohol in the home. (Ct. App. Op. 2.) The counselor reported that Ms. Dorsey told him that “she had a serious drug problem several years ago when she got divorced [Ms. Dorsey] acknowledged that the only way she

¹ Ms. Dorsey disputes the allegation that she had a criminal record.

knew how to cope with her feelings was to escape by smoking crack cocaine.” (Ct. App. Op. 2.) Ms. Dorsey stated that her drug problems had happened eight years prior to the session. Ms. Dorsey told the counselor she could be a positive parent and change. (Ct. App. Op. 2.)

In December 2010 a need arose for Ms. Dorsey and her daughter to transport Tyler to a Christmas party at his grandparent’s house. (Ct. App. Op. 2-3.) The family court required that Ms. Dorsey and her daughter submit to a drug test. (Ct. App. Op. 3.) Both submitted to the drug tests, three days later than requested by the court, and both tests returned dilute results. (Ct. App. Op. 3.) A retest was requested and Ms. Dorsey tested negative for all substances. (Ct. App. Op. 3.) Her daughter did not retest. (Ct. App. Op. 3.)

A Department of Human Services (DHS) abuse and neglect case was closed in Ms. Dorsey’s favor in November 2011. (Show Cause Hr’g Tr. 5:21, 18:14-21, Feb. 2, 2012.) Susan Grohman, Tyler’s probation officer, testified that the two delinquency cases and the abuse and neglect case were concurrent, but “for a time they lapsed.” (Show Cause Hr’g Tr. 8:13-16.) The pending juvenile petitions against Tyler were closed on May 3, 2012. (08-01259602-DL Case R., 08-01259604-DL Case R.) Later that month Tyler reached his eighteenth birthday.

II. THE JANUARY 14, 2011 DRUG TEST ORDER

About two weeks before it adjudicated the August 20, 2010 petition against Tyler, the family court held a dispositional hearing. On January 14, 2011 the family court issued an order following its regular review the previous day of the disposition in the earlier delinquency case. (Supp. Order of Disp., Jan. 14, 2011.) At the time Tyler was 16 years old. The family court had previously placed Tyler Dorsey at the Maurice Spear Campus in August 2010 and ordered that he remain placed there. (Supp. Order of Disp. ¶ 4, ¶ 19.) At the review hearing the family court found it was “contrary to the welfare of the juvenile to remain in the home because [of] the

parent's inability to keep the juvenile free of illegal substances and incompliance [sic] with the law." (Supp. Order of Disp. ¶ 13.) Ms. Grohman requested that the random drug testing order from December 2010 be continued indefinitely by court order for both Ms. Dorsey and her daughter even while Tyler was at the Maurice Spear campus. (Ct. App. Op. 3.) The family court also ordered that, among other things: 1) "Kelly Dorsey shall submit to random drug testing as requested by Maurice Spear Campus or the probation department;" 2) "Destiny Dorsey [Tyler's sister] shall submit to random drug testing as requested by Maurice Spear Campus or the probation department," and 3) "The home that Kelly Dorsey resides in shall be alcohol/drug free. The home shall be subject to random searches." (Supp. Order of Disp. ¶ 27).

After entering the January 14, 2011 order the family court also included the drug testing provisions in its subsequent Supplemental Orders of Disposition. (Show Cause Hr'g Tr. 6:18-21, Feb. 2, 2012.) An order requiring Ms. Dorsey to drug test also existed in the DHS case until it was closed in late 2011. (Show Cause Hr'g Tr. 18:16-17, 23:11-14.) Ms. Dorsey was required to submit to random drug testing for 10 months in the DHS case so that she could transport her son and did so. (Show Cause Hr'g Tr. 23:2-4, 23:11-14.) Ms. Dorsey's March 7, 2011 DHS drug test was positive for alcohol, but negative for the other substances tested. (Ct. App. Op. 4.) She also tested at the request of Tyler's probation officer Ms. Grohman under the January 14, 2011 family court order. (Show Cause Hr'g Tr. 7:20-24, 10:18-20; 13:6-7, 22:21-22.) Ms. Dorsey's first drug test was dilute² and another was positive for a prescription drug for which Ms. Dorsey had a prescription, but she did not test positive for illegal substances. (Show Cause Hr'g Tr. 30:5-9.) According to Ms. Grohman, "[s]he was very cooperative up until January."

² The first drug test Ms. Dorsey took was dilute. (Show Cause Hr'g Tr. 30:6-10.) Ms. Dorsey disputed the prosecution's tampering allegation during her sentencing allocution. (Show Cause Hr'g Tr. 30:6-10.) The prosecution alleged in its sentencing allocution that "some were tampered with" apparently in reference to the dilute test result. (Show Cause Hr'g Tr. 28:10-14.)

(Show Cause Hr'g Tr. 13:1-7.) Ms. Dorsey's last drug test requested by Ms. Grohman, this was also a DHS test, before January 2012 was on September 29, 2011. Ms. Grohman testified that it "came out negative." (Show Cause Hr'g Tr. 11:1-2; Ct. App. Op. 4.) Tyler Dorsey was released from the Maurice Spear Campus following an August 26, 2011 placement review hearing and began living with Ms. Dorsey again. (Ct. App. Op. 3; Register of Actions 1.) At the hearing Ms. Grohman reported that both mother and son had responded "extremely well to services at the residential facility" and that DHS had reported Ms. Dorsey was in full compliance in the abuse and neglect case." (Ct. App. Op. 3.)

On January 9, 2012 the family court issued a criminal contempt show cause order for Tyler Dorsey, now over 17 years old, for violating an order to remain substance free. According to the January 9, 2012 show cause motion and order against Tyler Dorsey, "[o]n the following dates, Tyler tested positive for K2: 12/19/2012 and 12/27/2012."³ (Mot. and Order to Show Cause [Tyler Dorsey] ¶ 2, Jan. 9, 2012.) Until June 8, 2012, when Livingston County issued an emergency order banning their sale, K2 and other synthetic cannabinoids⁴ were sold locally.

III. TYLER'S PROBATION OFFICER REQUESTS DRUG TESTING OF MS.DORSEY

On January 9 and January 10⁵ Tyler's probation officer approached Ms. Dorsey after one of Tyler's regular dispositional hearings and requested that she submit to twice weekly drug testing through April 16, 2012 (Exhibit 6; Show Cause Hr'g Tr. 19:6-7, 25:1-3, Feb. 2, 2012) with Tyler based on Tyler's positive drug test. (Show Cause Hr'g Tr. 7:5-9, 15:12-21, 19:3-13,

³ Given that this was in January 2012 the test dates were actually 12/19/2011 and 12/27/2011.

⁴ 2010 P.A. 169 applied the marijuana possession and use penalties to synthetic cannabinoids. Bill S.B. 1082 (2012) added all synthetic cannabinoids to schedule 1 using much more inclusive language. S.B. 1082 was signed by the Governor on June 19, 2012 and is now P.A. 183 of 2012.

⁵ In the transcript the prosecutor stated in a question that Sue Grohman also requested that Ms. Dorsey drug test on January 11, 12, 13, and 17. (Show Cause Hr'g Tr. 7:10-16.) These dates are all after Ms. Grohman filed both Show Cause Motions against Ms. Dorsey on January 10, 2012.

23:8-9, 25:1-3.) Ms. Dorsey did not immediately refuse to drug test. (Show Cause Hr'g Tr. 19:11-13, 23:11-14, 23:18-22.) She signed up for testing at the court's drug testing provider A 2nd Chance Drug and Alcohol Testing (2nd Chance). (Show Cause Hr'g Tr. 23:18-19.) Later that day she advised her son's probation officer that she wished to consult with her attorney before submitting. (Show Cause Hr'g Tr. 19:11-13.) Ms. Dorsey testified she wanted legal advice because a similar random drug testing order in the DHS case had been lifted and she had thought she was only drug testing in that case and did not know which order her son's probation officer based the request on. (Show Cause Hr'g Tr. 15:13-16, 19:11-13., 23:11-14, 23:18-23.)

Ms. Grohman did not provide Ms. Dorsey a copy of the underlying January 14, 2011 order or the subsequent orders when she made the requests. (Show Cause Hr'g Tr. 12:5-16.) Megan Alcala, a juvenile probation officer, testified that Ms. Grohman did not specify which case the order was from when she talked to Ms Dorsey. (Show Cause Hr'g Tr. 16:5-9.) The paper Ms. Grohman gave Ms. Dorsey was paraphrased by Ms. Dorsey as stating: "It is requested by Sue Grohman, juvenile probation, and Second Chance that you drug test through Second Chance twice a week until April 16th for drugs, alcohol, and K2." (Show Cause Hr'g Tr. 25:1-3.) Ms. Alcala testified that "Ms. Grohman offered to screen her at the court that day." (Show Cause Hr'g Tr. 15:19-21.) Ms. Dorsey testified that Ms. Grohman wanted her and her son to "drug test that day." (Show Cause Hr'g Tr. 19:6-7.) The referral form requested that Ms. Dorsey test twice per week until April 16, 2012, and stated "Please screen today." (Exhibit 6.)

IV. THE SHOW CAUSE MOTIONS AND ORDERS

On January 10, 2012 Tyler's probation officer filed a motion to show cause why Ms. Dorsey should not be held in criminal contempt for violating the court order to "[s]ubmit to random drug testin[g]. (First Mot. and Order to Show Cause [Kelly Dorsey] ¶ 2, Jan. 10, 2012.)

The motion alleged that, “[o]n 01/09/2012, Kelly refused to submit to a random drug test as requested by the probation department and 2nd Chance.” (First Mot. and Order to Show Cause [Kelly Dorsey] ¶ 2.) The same day Tyler’s probation officer filed a second motion to show cause why Ms. Dorsey should not be held in criminal contempt for violating a court order to “[s]ubmit to random drug testing” that was granted on January 11, 2012. (Second Mot. and Order to Show Cause [Kelly Dorsey] ¶ 2, Jan. 10, 2012.) This motion alleged that, “[o]n 01/10/2012, Kelly Dorsey refused to submit to a random drug test as requested by the probation department.” *Id.* Both show cause orders referenced only the January 14, 2011 drug testing order as the order violated. Ms. Dorsey was personally served with the show cause orders on January 10, 2012 at 4:20 PM (Proof of Service [Kelly Dorsey], Jan. 10, 2012.)

On January 26, 2012 Tyler Dorsey was found guilty of criminal contempt by the family court for violating an April 19, 2010 family court order to remain “substance free” by testing positive for K2 based upon evidence proven beyond a reasonable doubt and was sentenced to 93 days in jail and to pay \$500 in costs and expenses. (Order of Contempt of Court [Tyler Dorsey] ¶¶ 6, 9, Jan. 27, 2012.) The family court also stated in the sentence section of the order that, “[u]pon release from jail, this case may be closed as unsuccessful with the court reserving the right to collect reimbursements.” (Order of Contempt of Court [Tyler Dorsey] ¶ 9, Jan. 27, 2012.) In the Show Cause hearing a week later the family court stated and the prosecutor confirmed that Tyler was done with the family court system. (Show Cause Hr’g Tr. 28:18-21, Feb. 2, 2012.) The show cause hearing for Ms. Dorsey was adjourned until February 2, 2012 due to her request for appointed counsel to represent her. (Order for Adjournment, Jan. 27, 2012.)

V. THE SHOW CAUSE HEARING

The court held a show cause hearing for Ms. Dorsey on February 2, 2012. The family court found Ms. Dorsey in contempt stating that “[t]he testing was required of the Respondent here, Ms. Dorsey, because of concerns regarding her use of substances. Specifically as it related to her son’s use of similar illegal substances.” (Show Cause Hr’g Tr. 27:21-24.) The family court also cited her “failure to comply with an appropriate aftercare program” and asserted that she contributed to her son’s behavior. (Show Cause Hr’g Tr. 27:12-20.) The family court held Ms. Dorsey in contempt, but made no reference to a burden of proof, the amount of proof shown at trial, or the type of contempt on the record. (Show Cause Hr’g Tr. 28:1-3.) The family court then heard allocution on sentencing and asked Ms. Dorsey what a drug test would show if she tested that day. The family court adjourned sentencing for one week and ordered Ms. Dorsey to test at 2nd Chance bringing with her copies of any prescriptions she had that same day. The court said “What I’m going to do, Mr. Hougaboom, I would like for her to go over and test at the Second Chance.” (Show Cause Hr’g Tr. 31:6-9.) At the conclusion of the hearing the prosecutor specifically asked that Ms. Dorsey be tested for K2 and the court granted that request. (Show Cause Hr’g Tr. 31:17-25.)

After the hearing on February 2, 2012 concluded at just after 2 p.m., Ms. Dorsey submitted to a drug test at 2nd Chance at around 5 or 6 p.m. (Show Cause Hr’g Tr. 32:4; Sentencing Hr’g Tr. 4:8-10, 4:25; Mot. Hr’g Tr. 17:13-14, 19:1-4 Mar. 22, 2012.) Ms. Dorsey also tested at 2nd Chance on February 6, 2012. Ms. Dorsey was required to pay a fee for each drug test though it was a larger fee than is stated in the exhibit due to the K2 testing. (Exhibit 6.) Both sets of test results were sent directly to the trial court or its probation department and have not been shared with the defense. The order of contempt signed on February 6, 2012 convicted

Ms. Dorsey of criminal contempt based upon a preponderance of the evidence for not submitting to random drug testing as required by the January 14, 2011 order of the family court in her son's delinquency case. (Order of Contempt [Kelly Dorsey] ¶ 6, Feb. 6, 2012.) In the sentence section the order directed her to "submit to drug test forthwith." *Id.* The word "forthwith" was not used by the family court at the show cause hearing and appears for the first time in the February 6, 2012 contempt order. (Show Cause Hr'g Tr. 31:6-11, Feb. 2, 2012; Sentencing Hr'g Tr. 4:3-5, Feb. 9, 2012.)

VI. SENTENCING AND THE FEBRUARY 10, 2012 CONTEMPT ORDER

At the February 9, 2012 sentencing hearing another judge filled in for the trial judge and imposed on Ms. Dorsey a 93 day jail sentence, a \$200 court service fee, and a \$500 fine. (Sentencing Hr'g Tr. 5:1-8.) Ms. Dorsey was not allowed any allocution at this hearing and the family court did not reveal the drug test results from the previous week. She was not advised of her rights to appeal and to appointed appellate counsel. (Sentencing Hr'g Tr. 4:11-25, 5:1-8.) Ms. Dorsey was taken to jail immediately after the sentencing hearing. (Sentencing Hr'g Tr. 5:10.) The Court did not characterize whether the contempt was civil or criminal in its February 10, 2012 order of contempt imposing sentence, but again indicated that contempt was proven by a preponderance of the evidence. (Order of Contempt [Kelly Dorsey] ¶ 6, Feb. 10, 2012.)

VII. POST JUDGMENT MOTIONS

On March 2, 2012 Ms. Dorsey, through her attorney, filed two of three post-conviction motions with the last motion filed on March 8, 2012. (Register of Actions 7.) These included a motion to correct an invalid sentence (MCR 6.429), a motion for a directed verdict of acquittal or a new trial (MCR 6.431), and a motion for an appeal bond. These motions were made under the

criminal court rules. The motions were heard by the trial court on March 22, 2012 (Mot. Hr'g Tr. 1, Mar. 22, 2012.) At that time the motion for a new trial was also made under the family court rules (MCR 3.992). (Mot. Hr'g Tr. 4:11-13.) The motions challenged, among other things, the family court's subject matter jurisdiction and the sufficiency of the evidence. (Mot. Hr'g Tr. 5:9-20, 6:6-20, 7:6-25, 8:1-25, 9:1-25, 10:1-25; 11:1-4.) The prosecution argued that in 2010, when Tyler was 16, Ms. Dorsey "was allowing him [Tyler] to reside in the same bedroom and in the same bed as his 16-year-old girlfriend." (Mot. Hr'g Tr. 12:9-12.) The prosecutor stated that the probation department's concern in January 2011 was:

[T]o find out and make sure that Tyler's not getting his drugs at home. He is not getting them from his mother or somewhere else in the house. And also, Tyler is a young man who warranted and required very strict supervision, parental supervision, in this case. There were concerns on the part of the probation department that the mother was under the influence of something, and that's why the order was entered. [Mot. Hr'g Tr. 12:18-25.]

The trial court ruled that "[t]he jurisdiction over the parent is in essence obtained, in the opinion of the Court, by way of jurisdiction over the juvenile." (Mot. Hr'g Tr. 20:22-24.) It further ruled that "there is a legitimate and public purpose for – and public policy that is advanced by having custodians of children in delinquency matters to assure where there's a suspicion that there has been or could be drug or alcohol abuse, to have them tested as part of the jurisdiction." (Mot. Hr'g Tr. 20:18-22.) The court denied the motion for a new trial. (Mot. Hr'g Tr. 21:1.) It also denied the motion to correct sentence under the criminal court rule MCR 6.429 ruling that "[c]ounsel has provided no authority which would allow that court rule to apply to contempt proceedings." (Mot. Hr'g Tr. 20:15-17.)

The prosecution acknowledged that the family court did not indicate what burden of proof it used on the record in the show cause hearing. (Mot. Hr'g Tr. 13:8-11.) The prosecution then made a verbal motion under the criminal rule MCR 6.435(A) to correct what it called a

clerical error that it asserted was made when the burden of proof shown at trial was cited in the family court's contempt orders as a preponderance of the evidence. (Mot. Hr'g Tr. 14:21-25.) The family court clarified that it had intended to make a criminal contempt finding based on proof beyond a reasonable doubt. (Mot. Hr'g Tr. 15:20-22, 19:22-25.) The family court then granted the prosecutor's motion to correct a clerical error under MCR 6.435(A). (Mot. Hr'g Tr. 21:1-2.) The family court also granted Ms. Dorsey's motion for a \$500 personal recognizance appeal bond. (Mot. Hr'g Tr. 21:2-5; Register of Actions 7.) Ms. Dorsey posted bond and was released from jail that day ending her 42 day incarceration. (Register of Actions 7.)

ARGUMENT

I. THE COLLATERAL BAR RULE DOES NOT APPLY WHERE A COURT LACKS JURISDICTION. FAMILY COURTS ARE COURTS OF LIMITED JURISDICTION AS DEFINED BY STATUTES. THOSE STATUTES PERMIT ONLY REASONABLE ORDERS AFFECTING ADULTS. FOURTH AMENDMENT VIOLATIONS ARE UNREASONABLE.

A. STANDARD OF REVIEW

Whether a trial court of limited jurisdiction lacked subject-matter jurisdiction is a question of law involving the interpretation of statutes and court rules and hence is reviewed de novo. *Ass'n of County Clerks v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002). The constitutionality of a statute is a question of law which is reviewed de novo. *McDougall v Schanz*, 461 Mich 15, 23; 597 NW2d 148 (1999). Questions of statutory interpretation are also questions of law which are reviewed de novo. *Wexford Med Group v City of Cadillac*, 474 Mich 192, 202; 713 NW2d 734 (2006). When interpreting a statute the judiciary must discern and effectuate the intent of legislature. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). Courts must construe a statute as constitutional where possible. *Dep't of Human Servs. v. Laird (In re Sanders)*, 495 Mich 394, 404; 852 NW2d 524 (2014); *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003).

Lack of subject matter jurisdiction is one of several exceptions to the collateral bar rule. This Court has written: "If a court order is invalid, its violation may nonetheless be treated as contempt, *except where the court lacks jurisdiction to issue the order or, perhaps, where the defendant has no opportunity to contest the validity of the order.*" *State Bar of Michigan v Cramer*, 399 Mich 116, 125; 249 NW2d 1 (1976), quoting Kuhns, *Limiting the Criminal Contempt Power: New Roles For the Prosecutor and the Grand Jury*, 73 MICH L REV 484, 504 (1975) (emphasis added). While generally even invalid court orders must be obeyed promptly to avoid the risk of contempt, if the court lacked jurisdiction to issue an order then it is void from its inception and any contempt is also void. *Walker v City of Birmingham*, 388 US 307, 314-21; 87 S Ct 1824; 18 LEd 2d 1210 (1967); *In re Hague*, 412 Mich 532, 544-45; 315 NW2d 524 (1982); *Johnson v White*, 261 Mich App 332, 346; 682 NW2d 505 (2004); Dobbs, *The Law of Remedies* (2d ed Abr) pp 154-55.

B. FAMILY COURTS HAVE LIMITED SPECIFIC JURISDICTION DEFINED BY STATUTE. THE STATUTES GRANTING JURISDICITON TO ISSUE ORDERS AFFECTING ADULTS MUST BE CONSTRUED TO LIMIT THAT JURISDICTION TO REASONABLE ORDERS ONLY.

1. JURISDICTION GENERALLY

Jurisdiction is the power of a court to act to hear and determine a cause or matter.

Langdon v Judges of Wayne County Circuit Court, 76 Mich 358, 367; 43 NW 310 (1889). In personam jurisdiction over a party of either the general or limited variety is required to obligate a party to comply with the orders of the court. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995); *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 427; 633 NW2d 408 (2001). Subject matter jurisdiction refers to the kind, character, or classes of cases and claims that a court has authority to address and it may not be waived, consented to, or exist by estoppel. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001);

In re AMB, 248 Mich App 144, 166; 640 NW2d 262 (2001). A court must have both subject matter jurisdiction and personal jurisdiction over the parties to decide a case.

A court lacks subject matter jurisdiction when a case is not within the classes of cases that the court has the authority to address. Jurisdiction does not depend on the truth or falsity of the charge, but upon the nature of the allegations, and it is determinable at the commencement of the proceeding. *Fox v Martin*, 287 Mich 147, 152; 283 NW 9 (1938). When a court lacks subject-matter jurisdiction any action by the court, other than a dismissal, is absolutely void ab initio. *Fox v Bd of Regents of Univ of Michigan*, 375 Mich 238; 242; 134 NW2d 146 (1965); *Jackson City Bank & Trust Co v Frederick*, 271 Mich 538, 544; 260 NW 908 (1935). As the actions of a court lacking subject matter jurisdiction are void, the subject matter jurisdiction of a court may be challenged at any time. *Shane v Hackney*, 341 Mich 91, 99; 67 NW2d 256 (1954). The subject matter jurisdiction of a court and any proceedings it conducts may be challenged collaterally and on direct appeal. *Jackson City Bank & Trust Co, supra* at 544; *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). While generally even invalid court orders must be obeyed promptly to avoid the risk of contempt, if the court lacked jurisdiction to issue an order then it is void from its inception and any contempt is also void. *Walker v City of Birmingham*, 388 US 307, 314-21; 87 SCt 1824; 18 LEd2d 1210 (1967) (involved a court of general jurisdiction); *In re Hague*, 412 Mich 532, 544-45; 315 NW2d 524 (1982); *Johnson v White*, 261 Mich App 332, 346; 682 NW2d 505 (2004).

In analyzing the jurisdiction of a court there is an important distinction between a court lacking jurisdiction and the erroneous exercise of jurisdiction already obtained. This is critical for courts of general jurisdiction. This Court discussed this in *In re Hatcher*:

Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous

and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked. Error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case depends, *the court having general jurisdiction of the cause and person*, is error in the exercise of jurisdiction. [*In re Hatcher*, 443 Mich 426, 438-39; 505 NW2d 834 (1993), quoting *Jackson City Bank & Trust Co v Frederick*, 271 Mich 538, 545-46; 260 NW 908 (1935).] [Emphasis added].

Hatcher and other similar cases are distinguishable on this point in relation to Ms. Dorsey's case, because, as quoted above, they apply to courts of general jurisdiction and situations in courts of limited jurisdiction where the challenge fails to assert that the case was outside of the classes of cases the court had jurisdiction to adjudicate. In *Hatcher*⁶, an abuse and neglect case, the challenge was to the family court's jurisdiction over the child and it was made only after the court terminated parental rights. *Hatcher, supra* at 428. The respondent in *Hatcher* did not attack the court's actual basis for jurisdiction over the child in its determination that there was probable cause to believe the facts in the complaint. *Id.* Instead he argued a procedural point that the facts could not be established by stipulation or consent, but this was the exercise of jurisdiction. *Id.* at 437.

In *Jackson City Bank & Trust Co* a divorce judgment in circuit court, with general jurisdiction, was challenged collaterally for lack of jurisdiction based on a procedural error. The court began hearing testimony before the statutory waiting period had elapsed. *Jackson City Bank & Trust Co, supra*, at 453. But that court had jurisdiction so the error was in the exercise of jurisdiction. *Id.* at 546. In *Bowie v Arder* the procedural error of a party filing a child custody petition in circuit court without standing was an error in the exercise of jurisdiction, but the lack of a bona fide custody dispute between the parties deprived the court of subject matter

⁶ This Court recently granted leave to appeal in *In re Ferris*, 852 NW2d 900 (2014) (Docket No. 147636) to reconsider *Hatcher* in light of the Court's recent decision in *Dep't of Human Servs. v. Laird (In re Sanders)*, 495 Mich 394, 404; 852 NW2d 524 (2014).

jurisdiction. 441 Mich 23, 27; 490 NW2d 568 (1992). In other cases the defendant claimed to challenge jurisdiction, but instead challenged the specific type of relief granted by the circuit court such as awarding title to real estate in a spousal separate maintenance action. *Buczowski v Buczowski*, 351 Mich 216, 218; 88 NW2d 416 (1958). These cases are distinguishable from situations like Ms. Dorsey's where the jurisdictional statute placed conditions and limitations on the existence of jurisdiction and her challenge is to the class of the order issued. The court lacks jurisdiction if it does not meet the conditions imposed by the statute. *Stamadianos v Stamadianos*, 425 Mich 1, 12-14; 385 NW2d 604 (1986) (A ten day residency requirement for divorce actions was jurisdictional).

The authorities cited by the Appellee that applied the contempt collateral bar rule also involved courts of general jurisdiction. *In re Contempt of Dudzinski*, 257 Mich App 96, 97; 667 NW2d 68 (2003) concerned the attire of a spectator in the courtroom where the court had inherent jurisdiction to regulate conduct in the courtroom. Both *Dudzinski* and *Cramer*, which involved an injunction against the unauthorized practice of law, were before a court of general jurisdiction as civil cases in Wayne County Circuit Court. MCL 600.601. *Maness v Meyers*, 419 US 449, 450; 95 SCt 584; 42 LEd 2d 574 (1975) involved a civil subpoena before a Texas district court possessing general jurisdiction. Tex Const art V, § 8. *United Mine Workers* was a suit by the federal government against federal employees in federal district court which has general jurisdiction over federal questions. 28 USC § 1331; *United States v United Mine Workers of America*, 330 US 258, 265-66; 67 S Ct 677; 91 L Ed 884 (1947).

2. THE JURISDICTION OF THE FAMILY DIVISION OF THE CIRCUIT COURT IS LIMITED TO THAT GRANTED BY STATUTE OR THE CONSTITUTION.

The Family Division of the Circuit Court has exclusive jurisdiction in enumerated areas rather than general jurisdiction. MCL 600.1021. This includes cases "involving juveniles"

governed by MCL 712A.1 to MCL 712A.32. MCL 600.1021(1)(e); MCL 600.1009 (references to the juvenile division of the probate court now refer to the family division). Family courts are courts of limited exclusive jurisdiction that may not be altered without legislative consent. Const 1963, art 6, § 15; MCL 712A.2(a); *In re Kasuba Estate*, 401 Mich 560, 566; 258 NW2d 731 (1977). The jurisdiction of the family court is not inherent, but rather depends on statutes and constitutional provisions which define and limit that jurisdiction. *Fritts v Krugh*, 354 Mich 97, 112; 92 NW2d 604, 612 (1958); *In re Linda Lou Griffin*, 88 Mich App 184, 191 (1979).

The family division has subject matter jurisdiction over juvenile dependents, except as otherwise provided by law. *Hatcher, supra* at 433. The word juvenile references the age of the defendant or party which is defendant-specific and does not pertain to the character or kind of the case. *People v Kiyoshk*, 493 Mich 923; 825 NW2d 56 (2013). Age is a matter of personal jurisdiction. *Id.* This subject matter jurisdiction does not automatically apply to all juvenile dependents. The juvenile dependent must also be within the class of children over whom the court has power to act. *Id.* The erroneous exercise of authority may deprive the court of subject matter jurisdiction if the error is made in the determination of questions of law or fact upon which the court's jurisdiction depends. *In re AMB, supra* at 169-70; *Altman, supra* at 473. Cases "may develop in a direction so unrelated to the grounds for assuming subject-matter jurisdiction under MCL 712A.2(b) that a family court may not proceed." *In re AMB, supra*, at 170.

In delinquency cases family courts possess "exclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 17 years of age who is found within the county" if, subject to various exceptions, "the juvenile has violated any municipal ordinance or law of the state or of the United States." *Id.*

3. MCL 712A.6 IS SUBJECT TO JUDICIAL CONSTRUCTION AS THIS COURT HAS ALREADY CONSTRUED IT TO SET LIMITATIONS ON THE CLASSES OF ORDERS THE FAMILY COURT MAY ISSUE AFFECTING ADULTS.

MCL 712A.6 grants the family court jurisdiction over adults and imposes limits on it. *In re Macomber*, 436 Mich 386, 390-91, 398-99; 461 NW2d 671 (1990). MCL 712A.6 states:

The court has jurisdiction over adults *as provided in this chapter* and as provided in chapter 10A of the revised judicature act of 1961, and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a *particular juvenile or juveniles under its jurisdiction*. *However, these orders shall be incidental* to the jurisdiction of the court over the juvenile or juveniles. [Emphasis added and citations omitted].

This Court has already engaged in the judicial construction of MCL 712A.6. *Macomber, supra* at 391; *Id.* at 400 (Levin, J. dissenting). In *Macomber* this Court construed that an earlier version but substantially similar version of MCL 712A.6 granted the family court subject matter jurisdiction to issue two kinds of orders affecting adults. *Macomber, supra* at 391. The family court obtains personal jurisdiction over adults within its geographical scope by the word “adult” in MCL 712A.6 which as an age term specific to the defendant. *Cf. Kiyoshk, supra* at 923.

The first kind are those orders specifically authorized by the other statutes in chapter 712A (juveniles) or chapter 10A (drug courts). *Id.* The second kind are orders “affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction.” For both of these two kinds of orders the family court must have jurisdiction over the child and the order must be incidental to the court’s jurisdiction over the juvenile. *Cf. Macomber, supra* at 391.

In response to the dissent’s concerns about breadth of the second kind of order under MCL 712A.6 the Court construed limits on the orders a family court can issue affecting adults:

While the language is broad, it provides sufficient guidance and needed flexibility to the court. The court is limited in that it can *only act after it has jurisdiction over a child*, and it *may only act to ensure a child’s well-being*. Any orders aimed at adults *must also be incidental to the court’s jurisdiction over children*. In

addition, under § 6, the court may only make orders affecting adults if “necessary” for the child’s interest. The word “necessary” is sufficient to convey to probate courts that they should be conservative in the exercise of their power over adults. Furthermore, upon review of an order affecting adults, if an appellate court finds the factual record insufficient to justify the “necessity” of the order, it may overturn the order as clearly erroneous. [*Macomber, supra* at 398-99.] [Emphasis added].

This means that to issue an order affecting adults the court must 1) have jurisdiction over the child; 2) only be acting to ensure the child’s well-being; 3) the order must be incidental to the court’s jurisdiction over the child; and 4) the order must be necessary for the child’s interest. *Id.* The first three requirements are clearly mandatory threshold requirements for jurisdiction to issue the order. The necessity requirement is not a threshold requirement and instead relates to the exercise of jurisdiction due to the “clearly erroneous” standard of review set by the Court and the language of MCL 712A.6. *Id.* *Macomber* cautioned family courts to be conservative in issuing orders affecting adults. *In re Harper*, 302 Mich App 349, 356-57; 839 NW2d 44 (2013).

4. MCL 712A.6 MUST BE CONSTRUED CONSISTENTLY WITH MCL 712A.18. AS SUCH A REASONABLY LIMITATION MUST BE IMPLIED ON THE JURISDICTION OF THE FAMILY COURT TO ISSUE ORDERS TO ADULTS.

As to the first kind of order allowed by MCL 712A.6, in *Macomber* there are three other statutes in chapter 712A of the Juvenile Code that allow a family court to issue orders affecting adults. MCL 712A.18(1)(b) permits the court to order reasonable rules for the conduct of parents in the terms and conditions of the child’s probation or home supervision. MCL 712A.18(1)(g) permits the court to order the parents to refrain from continuing conduct that caused or tended to cause the child to come under the court’s jurisdiction or obstructs placement. MCL 712A.18(2) requires the court to collect reasonable reimbursements from the parents, guardian, custodian, or juvenile. Of these three statutes only MCL 712A.18(1)(b) is relevant to an order to drug test as the order in this case requires an affirmative act rather than simply prohibiting one. In both statutes where the order contemplates an affirmative act these statutes

require that the order of the family court be reasonable in terms of “reasonable rules of conduct” and “reasonable reimbursements.” MCL 712A.18(1)(b); MCL 712A.18(2). To allow an end run around the reasonableness requirement for affirmative orders in MCL 712A.18 (The first kind of order as described in MCL 712A.6 and *Macomber*), by allowing unreasonable orders under the second kind of order in MCL 712A.6 would defeat the express intent of the legislature in MCL 712A.18 to limit the scope of the power granted to the family court to reasonable orders.

This Court has ruled that the legislature intended that these statutes to be interpreted consistently with MCL 712A.6, because they were originally adopted at the same time. *Macomber, supra* at 391-92. In order to read the statutes consistently with each other the reasonability requirement of MCL 712A.18(1)(b) must be imported into MCL 712A.6. *Cf. Id.* Correspondingly, all of these statutes are jurisdictional in nature and MCL 712A.6 and its limitations on jurisdiction to issue orders affecting adults must be applied to MCL 712A.18. *Cf. Macomber, supra* at 392-93.

Additionally, the drug testing order in this case is an action under the first kind of order allowed by MCL 712A.6 as the order is closely related to MCL 712A.18(1)(b). MCL 712A.18(1)(b) permits a family court to place a juvenile on probation, or under supervision in the juvenile’s own home and “order the terms and conditions of probation or supervision, including reasonable rules for the conduct of the parents, guardian, or custodian, if any, as the court determines necessary for the physical, mental, or moral well-being and behavior of the juvenile.” In this case Tyler was placed on probation by the family court and placed at the Maurice Spear campus at the time of the January 14, 2011 order and returned to live with his mother under supervision in August 2011 until his incarceration on January 26, 2012. Furthermore, the drug testing order mandates an affirmative act of conduct by Ms. Dorsey in that

she must submit to random drug testing. This is a rule of conduct imposed on the parent and as such it can only be imposed if it is reasonable. As such the family court invoked MCL 712A.18(1)(b) to issue its drug testing order.

5. THE DRUG TESTING ORDER WAS OUTSIDE THE CLASSES OF ORDERS A FAMILY COURT HAS JURISDICTION TO ISSUE AFFECTING ADULTS.

As explained above, even where the court had jurisdiction of the child, issued the order solely for the child's well-being, and issued an order incidental to its jurisdiction over the child, the court will lack subject matter jurisdiction if the order is not reasonable. MCL 712A.18(1)(b), its reasonability requirement as imported into MCL 712A.6, and MCL 712A.6 itself must be construed in such a manner that the underlying statute remains constitutional if possible. *Dep't of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 404; 852 NW2d 524 (2014); *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003); *Gora v City of Ferndale*, 456 Mich 704, 711, 721-23; 576 NW2d 141 (1998). Recently this Court overturned the one parent doctrine on due process grounds and wrote in regards to MCL 712A.6:

Because we have a duty to interpret statutes and court rules as being constitutional whenever possible, we reject any interpretation of MCL 712A.6 and MCR 3.973(A) that fails to recognize the unique constitutional protections that must be afforded to unadjudicated parents, irrespective of the fact that they meet the definition of "any adult." [*Dep't of Human Servs. v. Laird (In re Sanders)*, 495 Mich. 394, 414; 852 N.W.2d 524, (2014).]

A similar imperative must exist regarding other constitutional rights such as the right to be free of unreasonable searches and seizures.

Searches and seizures that violate the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Michigan Constitution are unreasonable and would render the underlying jurisdictional statutes unconstitutional if the statutes gave authority to issue them. US Const, Am IV; Const 1963, art 1, § 11. Also, as explained above the jurisdictional statutes themselves bar unreasonable orders. Ordering an unreasonable search in violation of the

Fourth Amendment and the Michigan Constitution fails to satisfy a mandatory requirement for subject matter jurisdiction to issue orders affecting adults under MCL 712A.18(1)(b) and MCL 712A.6.

The Utah Supreme Court dealt with a situation similar to this case where the parent of a juvenile delinquent was held in contempt for refusing to drug test and then challenged the subject matter jurisdiction of the juvenile court to issue the order in the appeal from the contempt order. *See State v Moreno*, 203 P3d 1000, 1008 (Utah 2009). The Utah Supreme Court reversed the contempt order ruling the order unconstitutional and unreasonable under the Fourth Amendment and that as such that the family court lacked the subject matter jurisdiction to issue it. *Id.* at 1008. Utah's jurisdictional statute⁷ allowing the juvenile court to issue orders affecting adults required that the order be reasonable. As *Moreno* held that the order violated the Fourth Amendment it was not reasonable and the juvenile court lacked the subject matter jurisdiction to issue it. *Id.* at 1012. It is noteworthy that the Court of Appeals opinion found *Moreno* persuasive as to the Fourth Amendment issue, but did not follow it on the contempt analysis.

(Ct. App. Op. 9.)

C. THE TWICE WEEKLY FOR 90 DAYS DRUG TESTING ORDER IMPOSED ON THE PARENT VIOLATED THE FOURTH AMENDMENT AND THE MICHIGAN CONSTITUTION AND AS SUCH WAS UNREASONABLE. AS AN UNREASONABLE ORDER IT FALLS OUTSIDE THE CLASSES OF ORDERS A FAMILY COURT HAS THE JURISDICTION TO ISSUE AFFECTING ADULTS.

The Fourth Amendment states 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

⁷ Utah Code Section 78A-6-117(2)(p)(i) gave the juvenile court power to “order reasonable conditions to be complied with by a minor’s parents or guardian” Utah Code Section 78A-6-117(2)(t) allowed “[the court to make any other reasonable orders for the best interest of the minor or as required for the protection of the public, except that a child may not be committed to jail or prison.” *Moreno, supra* at 1006.

violated.” US Const, Am IV. The Fourth Amendment is applied to the states through the Fourteenth Amendment. *Mapp v Ohio*, 367 US 643, 655; 81 SCt 1684; 6 LEd2d 1081 (1961). The Michigan Constitution provides that “[t]he person, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures.” Const 1963, art 1, § 11. The protections of the Michigan Constitution against unreasonable searches and seizures are generally coextensive with those under the Fourth Amendment of the United States Constitution absent a compelling reason to provide greater rights. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999); *People v Smith*, 420 Mich 1, 19-20; 360 NW2d 841 (1984).

Ms. Dorsey asserts her personal right to be free from the unreasonable search of her person and the seizure of her bodily fluids. Therefore, she has Fourth Amendment standing to challenge the search. *Alderman v United States*, 394 US 165, 174; 89 SCt 961; 22 LEd2d 176 (1969).

The Fourth Amendment only protects against unreasonable searches by state actors or agents of state actors. *Burdeau v McDowell*, 256 US 465, 475; 41 SCt 574; 65 LEd 1048 (1921). The drug testing here was a state action ordered by the family court, requested by the juvenile’s probation agent, and conducted by an agent engaged by the court for that purpose.

1. RANDOM DRUG TESTING IS A FOURTH AMENDMENT SEARCH.

Random drug testing required by government actors or agents acting under the color of law are searches under the Fourth Amendment. *Chandler v Miller*, 520 US 305, 313; 117 SCt 1295; 137 LEd2d 513 (1997); *Skinner v Ry. Labor Executives’ Ass’n*, 489 US 602, 616-17; 109 SCt 1402; 103 LEd2d 639 (1989); *Nat’l Treasury Employees Union v Von Raab*, 489 US 656, 665; 109 SCt 1384; 103 LEd2d 685 (1989). The court order compelled Ms. Dorsey to provide the sample for testing under pain of contempt hence this was a Fourth Amendment search.

2. SEARCHES WITHOUT A WARRANT ISSUED ON PROBABLE CAUSE ARE PRESUMED UNREASONABLE UNLESS AN EXCEPTION APPLIES. THERE WAS NO SEARCH WARRANT IN THIS CASE AND NO PROBABLE CAUSE.

To survive Fourth Amendment scrutiny a search must be reasonable. US Const, Am IV; Const 1963, art 1, § 11; *United States v Sharpe*, 470 US 675, 682; 105 SCt 1568; 84 LEd2d 605 (1985). This standard applies to searches ordered by the government even for purposes not related to criminal investigation. *O'Connor v Ortega*, 480 US 709, 715; 107 SCt 1492; 94 LEd2d 714 (1987). Whether a search is reasonable "depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *United States v Montoya de Hernandez*, 473 US 531, 537; 105 SCt 3304; 87 LEd2d 381 (1985). The reasonableness of a search is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v Prouse*, 440 US 648, 654; 99 SCt 1391; 59 LEd2d 660 (1979). Unless an exception to the warrant requirement applies, in criminal cases a search or seizure is presumed unreasonable unless it is conducted pursuant to a warrant issued by a neutral detached magistrate based on probable cause. *Payton v New York*, 445 US 573, 586; 100 SCt 1371; 63 LEd2d 639 (1980).

Juvenile delinquency cases concern criminal acts, but are not considered criminal in nature. MCL 712A.1(2). However, this drug testing order seeks to uncover illegal substance abuse by the parent. Without a valid prescription, the possession and use of controlled substances constitutes a criminal act. MCL 333.7403, 333.7404. Providing drugs to a minor would also be a criminal act as they contribute to the delinquency of a minor. MCL 333.7416, 750.145. The very act of a refusal to drug test has resulted in a criminal contempt charge.

The order itself, though issued by a judicial officer, was of indefinite duration, delegated the authority to determine the particularities of the search, and was not based on probable cause. Although the Fourth Amendment does not specify that a search warrant contain an expiration

date, a warrant of indefinite duration and for an unspecified number of drug tests undermines the requirement that the warrant be issued by a neutral and detached magistrate. It is no longer the magistrate determining whether probable cause continues to exist. *United States v Burgess*, 576 F3d 1078, 1097 (10th Cir. 2009).

The order to drug test in this case was issued by the court against the parent in a juvenile delinquency case in January 2011. The family court delegated authority to the juvenile's probation officer who in January 2012 specified twice-weekly testing for 90 days. (Supp. Order of Disp. ¶ 27, Jan. 14, 2011; Exhibit 6; Show Cause Hr'g Tr. 25:1-3, Feb. 2, 2012.) In this case the juvenile's probation officer, who was not neutral, determined whether probable cause continued to exist. The order specifically stated that Ms Dorsey was to submit to random drug testing at the request of her son's probation officer. Thus the drug testing order could not qualify as a search warrant. Unless an exception to the warrant requirement applies the lack of a search warrant cannot be cured by the existence of probable cause. *Agnello v United States*, 269 US 20, 33; 46 SCt 4; 70 LEd 145 (1925).

In *United States v. Knights* the United States Supreme Court applied the lesser standard of reasonable suspicion in light of Knights' reduced expectation of privacy as a probationer. *United States v Knights*, 534 US 112, 114; 122 SCt 587; 151 LEd2d 497 (2001). Ms. Dorsey was not on probation and was not convicted of a crime. *Knights* does not apply.

Probable cause exists if the facts and circumstances within the knowledge of the affiant or for which the affiant has reasonably trustworthy information were sufficient to warrant a belief the defendant committed or was committing an offense. *Draper v United States*, 358 US 307; 79 SCt 329; 3 LEd2d 327 (1959). Probable cause must exist at the inception of the drug testing and cannot be obtained through the testing. *Terry v Ohio*, 392 US 1, 19-20; 88 SCt 1868;

20 LE2d 889 (1968); *Relford v Lexington-Fayette Urban County Gov't*, 390 F3d 452, 458 (6th Cir. 2004). Mere suspicion is not sufficient to establish probable cause. *Brinegar v United States*, 338 US 160, 176-77; 69 SCt 1302; 93 LE2d 1879 (1949). Familial relationships without more do not constitute probable cause.. *Poolaw v Marcantel*, 565 F3d 721, 730 (10th Cir 2009).

In this case at the outset there was only a speculative suspicion of current drug use by Ms. Dorsey. The drug use suspicion was based on her son Tyler's drug use. (Mot. Hr'g Tr. 12:18-25, Mar. 22, 2012.) The prosecution and probation officer were adamant about testing Ms. Dorsey for K2 after Tyler tested positive for it. (Show Cause Hr'g Tr. 31:17-25, Feb. 2. 2012.) The family court presumed that if a 17-year-old is on drugs then the parent must be the cause and also on drugs. (Show Cause Mot. Hr'g Tr. 27:21-24, 28:7-11, 31:17-25; Mot. Hr'g Tr. 12:15-25.) There was also the added impact of the death of Tyler's father in March 2010 and the difficulties of raising a teenage son as a single mother. (Mot. Hr'g. Tr. 12:5-9, Mar. 22, 2012.)

Indeed the family court showed that its suspicion was speculative in that it also ordered Tyler's sister Destiny to drug test for Tyler's delinquency case and ordered random searches of any home that Ms. Dorsey lived in even while her son was still in the custody of the Maurice Spear Campus. (Supp. Order of Disp. ¶ 27, Jan. 14, 2011.) When the drug testing order was first entered the Juvenile Probation Department wanted "to make sure that Tyler's not getting his drugs at home. He is not getting them from his mother or somewhere else in the house." (Mot. Hr'g Tr. 12:16-20.) The prosecution also stated that "[t]here were concerns on the part of the probation department that mother was under the influence of something, and that's why the order was entered." (Mot. Hr'g Tr. 12:22-25.) Family relation does not create probable cause. *Poolaw, supra* at 730. Speculation or mere suspicion rises to the level of neither probable cause nor a reasonable suspicion. *Brinegar, supra* at 176-77. The order was not a warrant.

3. THE EXIGENCY, CONSENT, AND ADMINISTRATIVE SEARCH EXCEPTIONS TO THE WARRANT REQUIREMENT DO NOT APPLY.

The exigency, consent, and administrative search exceptions to the warrant requirement do not apply to this case. Reasonableness and probable cause are still required for warrant exceptions. *People v Brzezinski*, 243 Mich App 431, 433-34; 622 NW2d 528 (2000). The exigency exception is not applicable to this case. Without probable cause to believe that Ms. Dorsey was currently using drugs there was no emergency situation requiring the immediate preservation of evidence. *Schmerber v California*, 384 US 757, 770; 86 SCt 1826; 16 LEd2d 908 (1966). Furthermore, there was sufficient time to obtain a warrant. *People v Chowdhury*, 285 Mich App 509, 526-27; 775 NW2d 845 (2009) (No exigency where a warrant for testing could be obtained in one hour and 15 minutes and the alcohol would not dissipate for 2-3 hours).

The consent exception to the warrant requirement also does not apply to this case. Submission to a court order is not consent because it is not voluntary. Where there is coercion there is no consent. *Bumpers v North Carolina*, 391 US 543, 550; 88 SCt 1788; 20 LEd2d 797 (1968); *Chowdhury, supra* at, 523-25. The fact that Ms. Dorsey tested under the order on several occasions does not mean she consented to the drug testing as it was compulsory.

The administrative search exception to the warrant requirement also does not apply. In this instance Ms. Dorsey was not engaged in a pervasively regulated industry. An administrative health and welfare inspection unrelated to commercial regulation without a warrant is not permissible where the consequences of refusal include criminal sanctions such as contempt of court. *Wyman v James*, 400 US 309, 325; 91 SCt 381; 27 LEd2d 408 (1971); *Camara v Municipal Court*, 387 US 523, 540; 87 SCt 1727; 18 LEd2d 930 (1967); *Gora, supra* at 718-19.

4. THE SPECIAL NEEDS EXCEPTION TO THE WARRANT REQUIREMENT APPLIES TO AN INTEREST BEYOND THE NORMAL NEED FOR LAW ENFORCEMENT MAKING OBTAINING A WARRANT IMPRACTICABLE. A SEARCH PURSUANT TO IT OR REFUSAL MAY RESULT IN NON-PARTICIPATION IN EMPLOYMENT OR ACTIVITIES, BUT NOT IN A CRIMINAL SANCTION. HERE CRIMINAL SANCTIONS COULD RESULT.

The special needs exception to the warrant requirement does not apply in this case, because drug testing Ms. Dorsey is not a special need going beyond the normal needs of law enforcement. A search must generally be based upon a warrant supported by probable cause to be reasonable unless an exception to the warrant requirement exists. *New Jersey v T.L.O.*, 469 US 325, 340; 105 S Ct 733; 83 LEd 2d 720 (1985). However, where a search is based on neither a warrant nor probable cause, searches must be based on some degree of individualized suspicion as suspicionless searches are constitutional only in very limited circumstances. *City of Indianapolis v Edmond*, 531 US 32, 37; 121 S Ct 447; 148 LEd 2d 333 (2000). Exceptions to the warrant requirement and probable cause are only appropriate where “special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.” *T.L.O.*, *supra* at 351. Provided that the special need goes beyond the normal needs of law enforcement and makes obtaining a warrant impracticable, the special needs test is essentially a balancing test between the intrusion to the person’s Fourth Amendment interests weighed against legitimate government interests. *Skinner*, *supra*, at 619. Where the privacy interests invaded by the search are minimal and the important government interest that is furthered by the intrusion would be placed in jeopardy by requiring an individualized suspicion and a warrant supported by probable cause, a suspicionless search might be reasonable. *Chandler*, *supra*, at 314. The search must be justified at its inception and must be reasonably related to the circumstances justifying interference with the privacy interest. *T.L.O.*, *supra* at 342; *Terry*, *supra* at 19-20; *Relford*, *supra* at 458. The special needs test requires that a court

determine and balance the following factors: 1) whether a special governmental need or interest exists that goes beyond the normal needs of law enforcement to such an extent that it makes the warrant requirement impracticable; 2) the degree of the privacy interest of the individual searched; and 3) the degree of the intrusiveness of the search relative to the special need and the individual's privacy interest. *T.L.O.*, *supra* at 341-42, 351.

The Supreme Court has applied the special needs test to allow random suspicionless drug testing of student athletes and all students involved in extracurricular activities. *Bd of Educ v Earls*, 536 US 822; 122 S Ct 2559; 153 LEd 2d 735 (2002); *Verona School District v Acton*, 515 US 646; 115 S Ct 2386; 132 LEd 2d 564 (1995); *But See York v Wahkiakum Sch Dist No 200*, 178 P3d 995 (Wash 2008) (randomly drug testing student athletes violated the Washington state constitution). However, these searches have a voluntary aspect in the sense that the only penalty for not submitting is non-participation rather than any criminal sanction. *Earls*, *supra*; *Verona*, *supra*. In the employment context, likewise, random drug testing is permissible where the characteristics of the job implicate safety interests or the nation's first line of defense against drug smuggling and the consequence of refusal is merely non-employment rather than criminal sanctions. *Von Raab*, *supra* (drug tests for promotion in the customs service); *Skinner*, *supra* (drug testing railway workers involved in train accidents). In Florida the blanket random drug testing of all state employees and prospective hires regardless of job type did not meet the special needs test and violated the Fourth Amendment. *Am Fed of State County and Mun Employees Council v Scott*, 857 F Supp 2d 1322 (SD Fl 2012), *aff'd in part, rev'd in part*, 717 F3d 851 (11th Cir 2013).

The special needs exception allows greater intrusions on individuals with a lesser expectation of privacy without a warrant due to consent or their status as prisoners, probationers,

or parolees. *Griffin v Wisconsin*, 483 US 868, 870-71; 107 S Ct 3164; 97 LEd 2d 709 (1987); *State v Handy*, 2012 VT 1 (Vt Mar 23, 2012) (STD testing of convicted sex offender was permissible); *but see State v Ochoa*, 792 NW2d 260 (Iowa 2010) (parolees could not be subjected to random searches of their homes under the Iowa Constitution). Students within the school environment also have a lower expectation of privacy than society in general. *Verona, supra*; *Earls, supra*; *T.L.O., supra* at 348. Similarly, convicted prisoners are subject to a lesser expectation of the privacy in regards to searches such as blood draws for a DNA database. *F v Brown*, 306 SW3d 80 (Ky 2010); *Nicholas v Goord*, 430 F3d 652 (2d Cir 2005). That lessened expectation of privacy does not extend to those awaiting trial, but who have not yet been convicted unless they consent to obtain pretrial release. *Norris v Premier Integrity Solutions*, 641 F3d 695 (6th Cir 2011); *United States v Scott*, 450 F3d 863 (9th Cir 2006); *but see Mario W v Kaipio*, 281 P3d 476, 483 ¶ 32 (Ariz 2012).

The special needs exception allowed police to set up a checkpoint for handing out fliers in order to gather information from non-suspects about a fatal hit and run accident at a same place and time of night the crime occurred a week later. *Illinois v Lidster*, 540 US 419, 422-23; 124 S Ct 885; 157 LEd 2d 843 (2004). The *Lidster* arrest was unrelated to the hit and run incident. *Id.* However, searches are unreasonable if linked to normal law enforcement activities such as a checkpoint to interdict illegal drug trafficking. *Edmond, supra*, at 37. Random drug testing of welfare recipients has been ruled unconstitutional as the special needs test did not apply. *Lebron v Wilkins*, 990 F Supp 2d 1280 (MD Fla 2013); *Marchwinski v Howard*, 113 F Supp 2d 1134, 1139-40 (ED Mich 2000), *aff'd*, 60 Fed Appx 601 (6th Cir 2003) (affirmed en

banc by equally divided court).⁸ The random drug testing of candidates for state office was symbolic and not a special need. *Chandler, supra* at 321-22. The candidate's privacy interests outweighed any state interest in drug testing so the search was unreasonable. *Id.* at 323. The state had an interest in keeping drug abusers out of public office, but the class subject to testing presented no concrete danger. *Chandler, supra* at 318-19, 321-22.

In regards to parental drug testing the Supreme Court decided in *Ferguson v City of Charleston* the question of whether "the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a warrant." *Ferguson v City of Charleston*, 532 U.S. 67, 69-70; 121 S Ct 1281; 149 LEd 2d 205 (2001). The women drug tested were suspected of using cocaine. Because the immediate objective of the search was to generate evidence for law enforcement purposes as a means to compel substance abuse treatment, the drug tests did not fit the special needs test and were unreasonable. *Id.* at 84. Although the motive was benign and not punitive, the Court ruled that the motive cannot justify violations of the Fourth Amendment. *Id.* at 85. The "direct and primary purpose" of the program was to use law enforcement means to achieve the ultimate goal of substance abuse treatment. *Id.* at 83-84. The fact that law enforcement was involved combined with the undiminished expectation of privacy enjoyed by the women led the Court to conclude that the drug testing was not a special need beyond the normal needs of law enforcement.

The Sixth Circuit Court of Appeals has also ruled that searches based on special needs must be based on interests beyond the normal need for law enforcement. *Jacob v Township of West Bloomfield*, 531 F3d 385 (6th Cir 2008). The Michigan Court of Appeals reached a similar

⁸ See also Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM & MARY BILL RTS J 751 (2011).

conclusion in relation to preliminary chemical breath tests (PBTs) administered to minors without their consent in *People v Chowdhury*. *Chowdhury, supra* at 511-12. In *Chowdhury* Troy's city ordinance requiring minors to submit to a PBT which also made refusal to submit a civil infraction was ruled unconstitutional, because PBTs are searches requiring a warrant. *Id.* at 515. The city argued that the special needs test should be applied based on the compelling state interest in protecting young people from the dangers of alcohol and the public from alcohol use by young people. *Id.* Two federal district court cases had already ruled similar ordinances unconstitutional and this Court considered them persuasive in ruling the Troy ordinance unconstitutional. See *Spencer v Bay City*, 292 F Supp 2d 932 (ED Mich, 2003); *Platte v Thomas Twp*, 503 F Supp 2d 227 (ED Mich, 2007). The Court of Appeals wrote in *Chowdhury*:

Moreover as the *Spencer* Court explained, the 'Supreme Court has made clear... that laudable non-criminal purposes of a law authorizing warrantless searches will not exempt the practice from the traditional mandate of a warrant issued upon probable cause when an objective to gather evidence also exists. *Id.* at 942; see also *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001). [*Id.* at 518.]

As to the precise facts at hand the Supreme Courts of Idaho and Utah have ruled that the special needs exception to the warrant requirement does not apply to the random drug testing of the parent of a child subject to a juvenile delinquency proceeding. The drug testing is unreasonable under the Fourth Amendment and requires a warrant and probable cause. *State v Doe*, 233 P3d 1275 (Idaho 2010) (appeal from drug testing order); *State v Moreno*, 203 P3d 1000 (Utah 2009) (appeal from criminal contempt order for refusal to drug test). In *Moreno* the unconstitutionality of the search actually resulted in the family court lacking subject matter jurisdiction to issue a contempt order for the parent of the juvenile delinquent refusing to drug test. *Moreno, supra* at 1012 ¶ 39. Both state courts found in balancing the privacy interests against the governmental interests that the parents of children convicted in family court do not

have a lesser expectation of privacy based on their child's conviction or status as a probationer. *Doe, supra*, at 1280; *Moreno, supra* at 1010 ¶ 29 ("A parent does not surrender his expectation of privacy merely because he acquires the status of a parent of a minor who has been adjudicated delinquent."). Like *Chandler* there is no reason that the parents of juvenile delinquents as a class pose a particular danger. *Chandler, supra* at 318-19. As stated in *Moreno*, mere suspicion does not create probable cause. *Id.* at 1012 ¶ 38.; *Brinegar, supra* at 176-77. The special needs exception also does not apply even in circumstances where individual parents do have indications of drug use. In both *Doe* and *Moreno* there were reasons to suspect that the parents of the juvenile delinquent were abusing drugs and in *Doe* both parents admitted drug use on the record and in writing. *Doe, supra* at 1277; *Moreno, supra* at 1004-05 ¶2, 1012 ¶ 38.

The *Doe* Court went on to find that although a substantial state interest exists in rehabilitating the child and in the involvement of the parent in that process, it was "characterized by a general interest in law enforcement." *Doe, supra* at 1281. The fact that the failure to comply with the drug testing order could result in contempt sanctions and that nothing prevented the juvenile's probation officer from reporting positive drug tests to the prosecutor was determinative. *Id.* By contrast criminal sanctions were not possible in cases where the government prevailed on the special needs exception such as the school extracurricular activity drug testing and the employee drug testing. *See, e.g., Earls, supra; Verona, supra; Von Raab, supra.* The *Doe* court ruled that an order for a parent of a juvenile delinquent to undergo random drug testing is "presumptively invalid absent a warrant." *Id. at 1282.*

The *Moreno* court concluded that without a reduced privacy interest it would be almost impossible for the government to prevail as otherwise the government's compelling interest in combating drug abuse would justify the random drug testing of all citizens. *Moreno, supra* at

1011 ¶ 35. The *Moreno* court acknowledged that the government interest would be more compelling in abuse and neglect cases, however it also found that the interest would not be jeopardized by the requirement of probable cause for a search and thus the court concluded that probable cause is required for the random drug testing of a parent. *Id.* at 1011-12 ¶ 36.

In this case the special needs test must be analyzed by balancing the privacy interest of the parent and the intrusiveness of the testing against the government's interests, if they go beyond normal law enforcement and make a warrant impracticable, in preventing drug abuse, rehabilitating the minor, and ensuring that the parent is not providing an inappropriate example to the minor. The family court here performed only part of this analysis in finding that the government had a legitimate public policy that is advanced by having the parents of children in delinquency matters drug test. (Mot. Hr'g Tr. 20:17-22, Mar. 22, 2012).

The government does have a legitimate interest in protecting children. But that interest is characterized by a general interest in law enforcement. There is nothing about this interest that makes obtaining a warrant impracticable. Ms. Dorsey's drug test referral form was the same form used for criminal probation. It referred to Ms. Dorsey as "defendant", it had Tyler's "current offense" of larceny crossed out with parent written over it, and the drug testing requested was listed under "sentencing options." (Exhibit 6.) As in *Ferguson* law enforcement and the courts had access to the drug test results and had the option of bringing charges. Tyler's probation officer requested the drug tests, received the test results, and was not barred from reporting a positive drug test to the prosecutor. The use and possession of controlled substances without a prescription is a crime in Michigan as is providing controlled substances to a minor without a prescription and contributing to the delinquency of a minor. MCL 333.7403, 333.7404, 333.7416, 750.145. Also as evident in this case, criminal contempt can be imposed

by the court for failure to comply with the drug testing order. The threat of criminal sanctions decisively distinguishes this case from cases where the special needs exception applied for drug testing. *Ferguson, supra* at 82-85; *Chowdhury, supra* at 516-18; *Doe, supra* at 1281-82.

The interest of the government relating to the parent is lessened in delinquency cases because the juvenile's illegal conduct is the focus of the proceedings. *Moreno, supra* at 1011 ¶ 33. This is especially true where the juvenile was not living with the parent at the time the order was entered. (Supp. Order of Disp. ¶ 4, ¶ 19, Jan. 14, 2011.) An abuse and neglect proceeding is the proper forum for concerns about parenting skills or suitability; delinquency is not. Ms. Dorsey was in compliance with her obligations to drug test in her abuse and neglect case which was closed in her favor in 2011. (Show Cause Hr'g Tr. 5:21, 18:16-17, Feb. 2, 2012.)

The degree of the intrusion is also significant in this balancing test. *Safford Unified Sch Dist No 1 v Redding*, 557 US 364, 366; 129 S Ct 2633; 174 LEd 2d 354 (2009); *Ferguson, supra* at 78; *T.L.O, supra* at 341-42; *Doe, supra* at 1280-81. The content of the suspicion must match the degree of the intrusion. *Redding, supra* at 366. The court did not order merely a single drug test. Instead the court, through power delegated to the juvenile's probation officer, ordered twice-weekly drug testing for about 90 days. (Show Cause Hr'g Tr. 20:1-3.) By contrast Michigan's suspicionless random drug testing of welfare recipients, before it was ruled unconstitutional, consisted of one drug test during the application process and "after six months, twenty percent of adults and minor parent grantees with active cases up for redetermination will be randomly selected to be tested." *Marchwinski, supra* at 1139-40. The permissible drug testing in *Von Raab* was limited to customs employees applying for promotion and the testing in *Skinner* was limited employees involved in railway accidents. *Von Raab, supra*; *Skinner, supra*.

Here we have a scheduled testing regime extending for months. Ms. Dorsey, an indigent, was required to pay for these tests. She had already randomly drug tested over the previous year. (Show Cause Hr'g Tr. 7:20-24, 10:18-20, 13:6-7, 22:21-22, 23:2-4, 23:11-14, Feb. 2, 2012.) The Court of Appeals has found that a single PBT without a warrant is too intrusive. *Chowdhury, supra* at 511-12. Twice-weekly drug testing for 90 days is essentially a probation condition. Ms. Dorsey was not on probation and had an undiminished privacy interest.

Any government interest must be balanced against Ms. Dorsey's undiminished privacy interest and the degree of intrusion ordered by the family court. *Moreno* and *Doe* establish that unlike probationers and prisoners, the parent of a juvenile delinquent does not have a lesser expectation of privacy just by virtue of that status. *Doe, supra* at 1280; *Moreno, supra* at 1010 ¶ 29. In this case Ms. Dorsey was not on probation nor was she a convict. There was no warrant. Her son's drug use does not create probable cause as to her. *Brinegar, supra* at 176-77; *Poolaw, supra* at 730. The governmental interests are simply too general and characterized by normal law enforcement here to overcome the degree of intrusion that twice-weekly drug testing for 90 days entails to Ms. Dorsey's undiminished expectation of privacy.

Hence, the family court's random drug testing order against Ms. Dorsey is not supported by a special need beyond the normal needs of law enforcement that makes obtaining a warrant impracticable. The state's interest in protecting children from drug use by their parents and keeping drugs out of the home is too broad and too entangled with normal law enforcement functions. The order that Ms. Dorsey submit to random drug testing is invalid without a warrant supported by probable cause under the Fourth Amendment. Nothing about this set of facts renders obtaining a warrant burdensome or impractical. Ms. Dorsey's undiminished privacy interest outweighs the governmental law enforcement interest. In conclusion the family court's

order compelling Ms. Dorsey to submit to twice-weekly random drug testing for 90 days was an unreasonable search violating the Fourth Amendment. MCL 712A.6 cannot be construed to grant the family court subject matter jurisdiction to issue unconstitutional orders and an unreasonable search does not satisfy its own statutory reasonability requirement. *Sanders, supra* at 414. Therefore, the family court lacked subject matter jurisdiction to order the parental drug tests. The order and the ensuing contempt orders are void.

II. THE COLLATERAL BAR RULE PRESUMES THE AVAILABILITY OF EFFECTIVE REMEDIES AND MEANINGFUL REVIEW OF THE UNDERLYING ORDER PRIOR TO THE CONTEMPOUS ACT. HERE THERE WAS NO OPPORTUNITY FOR MEANINGFUL REVIEW. THE ORDER REQUIRED AN IRRETRIEVABLE SURRENDER OF CONSTITUTIONAL RIGHTS

A. STANDARD OF REVIEW

The collateral bar rule operates to prevent collateral challenges to underlying orders in the appeal of contempt orders provided that the court had jurisdiction to issue the underlying order. The most common statement of the rule is, "Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect." *State Bar of Michigan v Cramer*, 399 Mich 116; 125 249 NW2d 1 (1976), quoting *Maness v Meyers*, 419 US 449; 95 S Ct 584; 42 LEd 2d 574 (1975). A rather infamous application of the rule occurred when it was used to bar a constitutional challenge to an *ex parte* injunction issued by an Alabama circuit court against civil rights protestors to stop a protest march after the protestors were held in contempt. *Walker v City of Birmingham*, 388 US 307; 87 S Ct 1824; 18 LEd 2d 1210 (1967). Even in *Walker*, though, the court noted that the collateral bar rule would not apply where there was no meaningful opportunity to appeal the underlying order. *Id.* at 318-319; *See also* Dobbs, *The Law of Remedies* (2d ed Abr) pp 154-55.

The collateral bar doctrine also does not apply in four other situations: 1) where the court lacked personal or subject matter jurisdiction to issue the order, 2) where the order conflicts with a prior order from a federal court, 3) the order requires an irretrievable surrender of constitutional guarantees, or 4) where the order is transparently invalid or patently frivolous. *Maness, supra* at 460; *United States v Michigan*, 712 F2d 242, 244 (6th Cir 1983); *In re Novak*, 932 F2d 1397, 1401-02 (11th Cir 1991); *Cramer, supra*, at 125.

The Supreme Court subsequently noted that the holding in *Walker* “that the claims there sought to be asserted were not open to review of petitioners’ contempt convictions was based on the availability of review of those claims at an earlier stage.” *United States v Ryan*, 402 US 530, 532 n4; 91 SCt 1580; 29 LEd 85 (1971). In *United States v Ryan* and *Maness* the Supreme Court instituted an alternative procedure for challenging the underlying order in contempt cases where there is no immediate meaningful appeal available. *Ryan* involved a criminal subpoena on which an order to compel was not a final order so there was no immediate appeal in federal courts. *Maness* involved the contempt of lawyers who advised their client to not produce subpoenaed material in a state civil case in Texas and to assert his Fifth Amendment privilege against self-incrimination. In *Maness* the Supreme Court, after citing the collateral bar rule noted above, continued with an exception for the irretrievable surrender of constitutional guarantees:

When a court during trial orders a witness to reveal information, however, a different situation may be presented. Compliance could cause irreparable injury because appellate courts cannot always ‘unring the bell’ once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error. In those situations we have indicated the person to whom such an order is directed has an alternative: ‘We have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court’s order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.’ *United States v. Ryan*, 402 U.S. 530, 532-533 (1971). [*Maness, supra* at 460 (some citations omitted).]

This procedure allows a party to disobey a subpoena, be held in contempt by the trial court, and still contest the validity of the subpoena in an appeal of the contempt conviction. The Supreme Court stated in *Ryan*:

But compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review. *Ryan, supra*, at 532.

D. THE ORDER REQUIRED AN IRRETRIEVABLE SURRENDER OF CONSTITUTIONAL RIGHTS AND THERE WAS NO MEANINGFUL OPPORTUNITY FOR REVIEW PRIOR TO THE CONTEMPTOUS ACT.

Maness applied the procedure to state civil cases. *Maness, supra* at 450-461. It also applies to state criminal cases. *New York Times v Jasclevich*, 439 US 1304; 98 S Ct 3060; 58 LEd 2d 12 (1978). The procedure described in *Ryan* and *Maness* is applicable to this case. This is a state civil, quasi-criminal, case where an order that is akin to a subpoena demanded the production of information relating to substances in Ms. Dorsey's body at a given time. As noted by the Court of Appeals in its opinion nothing prevented this information from being turned over to the prosecutor's office for criminal charges in the event of a positive drug test. (Ct. App. Op. 10.) This situation is similar to that in *Maness* where the subpoena for allegedly obscene magazines in a civil case could well have led to criminal charges under a Texas obscenity law. *Maness, supra*, at 450-461. This is a situation where submitting to the drug test is an irretrievable surrender of the constitutional guarantee to be free of unreasonable searches and seizures by a state actor and could, if the result was positive for a controlled substance, result in a waiver of the Fifth Amendment privilege against self-incrimination. Once the state obtains the drug test results the appellate courts cannot "unring the bell." *Id.* Absent a grant of immunity

from prosecution, the ability to move to suppress the results of the drug test in a subsequent criminal proceeding would not provide an adequate remedy. *Id.* at 461-62.

This procedure for challenging the underlying order after contempt where no meaningful appellate review exists or where the order requires the irretrievable surrender of constitutional guarantees as described in *Ryan* and *Maness* is applicable to Ms. Dorsey's case at two points. The first point was when the January 14, 2011 drug testing order was issued by the trial court. At that time Ms Dorsey was indigent, had no legal training, and was not represented by counsel in her son's delinquency matter. The order itself was not appealable by right as it was not a final order, it was issued after the court asserted jurisdiction over her son, and it did not remove the minor from the home as that was done in a prior order. MCR 3.993(A). The order was only appealable by leave to the Court of Appeals. MCR 3.993(B). Without an attorney to aid in filing that appeal and without the financial resources to hire one she had no meaningful ability to file an appeal of the drug testing order. Filing a pro per appeal also would not have been meaningful review as she did not have the knowledge and training to successfully argue for a stay and for leave to be granted. As the Court of Appeals stated, the Fourth Amendment issue in this case was one of first impression in Michigan. The order requires an irretrievable surrender of constitutional guarantees and did not afford a meaningful opportunity for appeal prior to contemptuous act.

The second point was in the afternoon of January 9, 2012 when the random drug testing suddenly morphed from what had been one-off random screenings to a systematic twice weekly drug screening regime for three months. (Supp. Order of Disp., Jan. 14, 2011; Show Cause Hr'g Tr. 25:1-3; Exhibit 6.) Ms. Dorsey was not aware that such a material change in the nature of the drug testing was possible when the order was first issued in January 2011. This was done

entirely on the initiative of her son's probation officer based on her son's positive K2 test. (Show Cause Hr'g Tr. 7:5-9, 15:12-21, 19:3-13, 23:8-9, 25:1-3). By this point it was too late to appeal the order as the deadlines had passed. At this time Ms. Dorsey was still indigent and not represented by counsel in the delinquency matter.⁹ When Ms. Dorsey asked for time to consult an attorney, Ms. Grohman quickly filed the show cause motions the next morning before Ms. Dorsey could get a response from an attorney. (Show Cause Hr'g Tr. 15:13-16, 19:11-13., 23:11-14, 23:18-23.) This denied Ms. Dorsey any opportunity to seek counsel as to filing a motion to modify the drug testing order and any meaningful opportunity to file it as the contemptuous act for which she was eventually punished had already occurred.

E. ISSUE PRESERVATION

This argument may be raised for first time in this Court as the issue is merely an additional way of arguing that the collateral bar rule does not apply in this case. *People v Hall*, 290 Mich 15; 287 NW 361 (1939), citing *Fitch v Manitou County Bd of Auditors*, 133 Mich 178; 94 NW 952 (1903). The lack of subject matter jurisdiction exception to the collateral bar rule was raised and argued before the trial court and the court of appeals so as to obtain review of the constitutionality of both court's interpretation of MCL 712A.6 in light of the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Michigan Constitution. *Id.*

⁹ Ms. Dorsey was not represented in the delinquency case until after the show cause motions were granted. On January 27, 2012 the court appointed counsel to represent her at the show cause hearing. When she filed this appeal on March 23, 2012 she filed a motion to waive fees based on her indigent status and that motion was granted. (Ct. App. Order April 20, 2012.)

III. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MS. DORSEY OF ALL THE ELEMENTS OF CRIMINAL CONTEMPT BEYOND A REASONABLE DOUBT.

A. STANDARD OF REVIEW

Findings of contempt and refusals to find a person in contempt are reviewed for abuse of discretion. *In re Contempt of Dudzinski*, 257 Mich App 96, 99; 667 NW2d 68 (2003). A court has abused its discretion where the court's decision is outside the range of principled outcomes. *Porter v Porter*, 285 Mich App 450, 454-55; 776 NW2d 377 (2009). The factual findings made by the trial court within the contempt proceeding are reviewed for clear error. *Brandt v Brandt*, 250 Mich App 68, 73; 645 NW2d 327 (2002). The Court reviews a challenge to the sufficiency of the evidence in a bench trial de novo. *Davis v Henry (In re Contempt of Henry)*, 282 Mich App 656, 677; 765 NW2d 44 (2009). In determining sufficiency, the evidence is viewed in a light most favorable to the prosecution to determine whether the essential elements of the crime were proven beyond a reasonable doubt. *Id.* Questions of law that arise within a contempt proceeding are reviewed de novo. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 714; 624 NW2d 443 (2000). Whether a trial court had authority to modify a judgment to correct an error is an issue of law. *People v Hill*, unpublished opinion per curiam of the Court of Appeals, slip op at 3, issued [February 14, 2012] (Docket No. 300350). The Court does not defer to the trial court's characterization of the contempt as civil or criminal. *Cramer, supra* at 128.

F. THE PROSECUTION DID NOT MEET ITS BURDEN TO PROVE GUILT OF CRIMINAL CONTEMPT BEYOND A REASONABLE DOUBT. MS. DORSEY'S REFUSAL TO DRUG TEST WAS NOT UNEQUIVOCAL. HER REFUSAL WAS CONDITIONAL AS SHE WANTED TO CONSULT A LAWYER FIRST.

The evidence was insufficient to find Ms. Dorsey guilty of criminal contempt beyond a reasonable doubt. To do so was an abuse of discretion. Tyler Dorsey's probation officer requested that Ms. Dorsey drug test twice-weekly for 90 days on January 9 and 10, 2012

pursuant to the January 14, 2011 court order requiring her to submit to random drug testing at the request of her son's probation officer or the Maurice Spear Campus. (Show Cause Hr'g Tr. 25:1-3, Feb. 2, 2012; Supp. Order of Disp. ¶ 27, Jan. 14, 2011.) The family court convicted Ms. Dorsey of criminal contempt for refusing to drug test in its Feb. 6, 2012 order and in its February 10, 2012 order imposed a sentence consistent with criminal contempt without characterizing it. (Order of Contempt [Kelly Dorsey] ¶ 6, Feb. 6, 2012; Order of Contempt [Kelly Dorsey] ¶ 6, Feb. 10, 2012.) Both contempt orders were based upon a preponderance of the evidence. *Id.* No burden of proof was mentioned at the hearing when the family court made its findings and it did not make any findings regarding willfulness or whether the conduct was unequivocal. (Show Cause Hr'g Tr. 26:24-25, 27:1-25, 28:1-4, Feb. 2, 2012.)

A conviction for criminal contempt must be based upon evidence proven beyond a reasonable doubt showing 1) the willful disregard or disobedience of a court order, and 2) a contempt that is clearly and unequivocally shown. *People v Matish*, 384 Mich 568, 572; 184 NW2d 915 (1971); *People v Boynton*, 154 Mich App 245, 247; 397 NW2d 191 (1986). Willfulness "implies a deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation." *TWM Mfg Co Inc v Dura Corp*, 722 F2d 1261, 1272 (6th Cir 1983).

The non-submission to the twice-weekly drug testing for 90 days at the request of her son's probation officer on January 9 and 10 was not unequivocal. Ms. Dorsey's refusal to agree to drug test was conditional. She wanted to talk to a lawyer first. (Show Cause Hr'g Tr. 19:11-13, Feb. 2, 2012.) Ms. Dorsey merely temporarily conditioned her compliance with the court order on consulting with an attorney first. (Show Cause Hr'g Tr. 19:11-13, Feb. 2, 2012.) In fact

she had already started to comply by signing up for testing with 2nd Chance before she decided to consult a lawyer because she was confused. (Show Cause Hr'g Tr. 23:18-22.)

She was confused about the order to drug test as there was also a drug testing order in her abuse and neglect case that closed in November 2011. She was under the impression that she was only drug testing in that case. (Show Cause Hr'g Tr. 18:8-21, 26:4-21.) She had complied with drug testing orders in the past.. She did not understand that she was testing for both cases rather than just the abuse and neglect case. (Show Cause Hr'g Tr. 8:13-16, 11:1-3, 18:10-17, 19:8-13, 22:18-25, 23:1-4, 23:18-23.) Ms. Alcala testified that Ms. Grohman did not tell Ms. Dorsey which case the order was from. (Show Cause Hr'g Tr. 16:5-9.) She had been represented by counsel in the closed abuse and neglect case, but she was not represented by counsel in her son's delinquency case until January 27, 2012. (Show Cause Hr'g Tr. 20:19-25, 21:1-8.) Tyler's probation officer filed the show cause motions against Ms. Dorsey and had them served on her on January 10, 2012. (First Mot. and Order to Show Cause [Kelly Dorsey] ¶ 2, Jan. 10, 2012; Second Mot. and Order to Show Cause [Kelly Dorsey] ¶ 2, Jan. 10, 2012.) Less than one full day was not sufficient time to consult with an attorney given that Ms. Dorsey was indigent and not represented by counsel at the time. Ms. Dorsey did not outright refuse to test. She temporarily conditioned her compliance on obtaining legal advice prior to complying so she could consider her options including filing a motion to modify the order.

G. BY FINDING GUILT OF CRIMINAL CONTEMPT BY A PREPONDERANCE OF THE EVIDENCE THE FAMILY COURT IMPLICITLY FOUND INSUFFICIENT EVIDENCE TO PROVE GUILT BEYOND A REASONABLE DOUBT. THE FAMILY COURT'S ATTEMPT TO CORRECT THIS AS A CLERICAL ERROR IS NOT EFFECTIVE AS THE BURDEN OF PROOF AND THE CHARACTERISTICS OF CONTEMPT ARE SUBSTANTIVE MATTERS.

A conviction for criminal contempt must be based upon evidence proven beyond a reasonable doubt that shows 1) the willful disregard or disobedience of a court order, and 2) a

contempt that is clearly and unequivocally shown. *Matish, supra* at 572; 184 NW2d 915 (1971); *Boynton, supra* at 247. The family court did not reference a burden of proof standard or the amount of proof actually shown at any time during the show cause hearing when it found Ms. Dorsey in contempt. (Show Cause Hr'g Tr. 26:24-25, 27:1-25, 28:1-4, Feb. 2, 2012.) It ruled:

The testing was required of the Respondent here, Ms. Dorsey, because of concerns regarding her use of substances. Specifically as it relates to concerns for her son's use of similar illegal substances. There was an order in place for testing. She was required to test. She did not test as requested. I do, therefore, find based upon the above that she is in contempt of a lawful court order which required her to do that which she was requested. [Show Cause Hr'g Tr. 27:21-25, 28:1-3.]

Both contempt orders were based on a preponderance of the evidence. The February 6, 2012 contempt order convicted Ms. Dorsey of criminal contempt based on a preponderance of the evidence. (Order of Contempt [Kelly Dorsey] ¶ 6, Feb. 6, 2012.) The February 10, 2012 order of contempt did not specify the kind of contempt, but found her guilty by a preponderance of the evidence and imposed a fixed jail sentence of 93 days consistent with a criminal contempt sanction. (Order of Contempt [Kelly Dorsey] ¶ 6, Feb. 10, 2012.) Guilt of criminal contempt based on a preponderance of the evidence is indistinguishable from an acquittal. A court would have no choice but to enter a verdict of not guilty in any case requiring proof beyond a reasonable doubt where guilt was only proven to a preponderance of the evidence.

When this issue was raised in both post-judgment motions the prosecution moved to correct a clerical error and change the burden of proof in the two orders from a preponderance of the evidence to proof beyond a reasonable doubt under MCR 6.435(A). (Mot. Hr'g Tr. 14:21-25, Mar. 22, 2012.) The family court clarified that it intended to make its findings in the show cause hearing beyond a reasonable doubt. (Mot. Hr'g Tr. 15:20-22, 19:22-25.) The family court then granted the motion to correct a clerical error. (Mot. Hr'g Tr. 21:1-2.)

Criminal contempt cases are quasi-criminal in nature. *In re Contempt of Dougherty*, *supra* at 91. The application of the juvenile rules to the criminal contempt of an adult is problematic in terms of giving an adult a fixed jail sentence since the juvenile rules do not offer the same safeguards as the criminal rules. The defense made a motion, alternative to its motion under MCR 6.431, for a new trial under MCR 3.992. (Mot. Hr'g Tr. 4:11-13, Mar. 22, 2012.) MCR 3.992 allows the family court to modify a previous decision, but the family court did not expressly employ this rule. MCR 3.992(D). The family court also did not take the opportunity to correct the lack of any express finding on willfulness and unequivocality. Given that the family court was responding to the prosecutor's motion under MCR 6.435(A) when it made the clerical correction, the court was applying the criminal rules. (Mot. Hr'g Tr. 21:1-2.)

The burden of proof shown at a bench trial and on contempt orders is no mere clerical error. This Court has distinguished clerical and substantive errors by stating "errors that occur because a judge misspoke or a clerk made a typing error are clerical errors, while errors based on mistakes of fact or law are substantive errors." *People v Hill*, *supra* at slip op 3. The characterization of an error as clerical by a trial judge is presumed accurate unless there are indications to the contrary. *Lanzo Constr Co*, *supra* at 484-85. However, evidence of the trial judge's intentions at the time the error was made, rather than when it was corrected, is required to find that an error was clerical. *Hill*, *supra* at slip op 4. The staff comment to MCR 6.435(B) lists confusing co-defendants as an example of a substantive error. MCR 6.435(B). Erroneously granting a mistrial is a substantive error. *People v McGee*, 247 Mich App 325, 335-36; 636 NW2d 531 (2001). Omitting a sentencing term was a substantive error and it could not be added after the final judgment. *People v Olsen*, 482 Mich 881; 752 NW2d 465 (2008).

Whether a burden of proof has been met is a matter of fact and law in a bench trial. There was no evidence before March 22, 2012 that would support a claim that this was a clerical error. First, there was no mention of any burden of proof at the show cause hearing when the family court made its contempt finding. (Show Cause Hr'g Tr. 26:24-25, 27:1-25, 28:1-4, Feb. 2, 2012.) The findings and conclusions of the court in a bench trial must be stated in the record or a written opinion and facts must be found specially with conclusions stated separately. MCR 6.403. Second, the court never expressly found the criminal contempt elements of willfulness and unequivocality in those findings and conclusions. Third, Ms. Dorsey's two contempt orders both used the preponderance of the evidence standard four days apart. Yet Tyler Dorsey's contempt order from January 27, 2012 found him guilty of criminal contempt beyond a reasonable doubt. (Exhibit 4.)

Lastly the family court confused the elements and characteristics of civil and criminal contempt. The characterization given by a court to the contempt is not given deference by appellate courts which look to the facts and circumstances surrounding the case. *Cramer, supra* at 128. At the show cause hearing and in the February 6, 2012 contempt order the family court was still trying to coerce Ms. Dorsey to drug test. The family court adjourned sentencing without imposing any definite sentence except to report for drug testing (Show Cause Hr'g Tr. 31:6-25; Order of Contempt [Kelly Dorsey], Feb. 6, 2012). It essentially inferred an unknown determinate sentence awaited, but made it conditional on her drug test results to coerce her to take the drug test. *Hicks v Feiok*, 485 US 624, 634-40; 108 S Ct 1423; 99 LEd 2d 721 (1988); Dobbs, *The Law of Remedies* (2d ed Abr) pp 138-140. As the sentence was coercive the first contempt order was actually civil in nature even though the family court called it criminal. *Id.* The February 10, 2012 contempt order imposed a definite sentence and was criminal in nature,

but the civil coercive mindset still spilled over and the family court selected preponderance of the evidence as the burden of proof. The Court of Appeals characterized this as merely checking the wrong box, but clearly the family court confused the elements and characteristics of civil contempt with those of criminal contempt. This was not a clerical error, but one of substance.

As such MCR 6.435(A) is not the applicable rule as determining that the case was proven only to a preponderance of the evidence is not a clerical error. The amount of proof actually shown in a bench trial in relation to the burden of proof is a matter of substance involving determinations of fact and then applying the law to those facts. MCR 6.435(B) was the applicable criminal rule. At least one justice has recognized that “if ‘clerical errors’ are defined too broadly, judgments will lose their finality. Trial judges may be encouraged to amend their judgments by characterizing the amendment as the mere correction of a clerical mistake.” *People v Peck*, 481 Mich 863; 748 NW2d 235 (2008) (Kelly, J., dissenting). Any substantive mistakes can only be corrected by the trial court before the entry of a judgment or a final order. MCR 6.435(B). In this case the final order was entered on February 10, 2012. The family court did not act to correct it until March 22, 2012. The court had already issued the final criminal contempt order. It was too late for the family court to change the order.

Looking to the substance of the record as a whole does not support the contention that the prosecution proved beyond a reasonable doubt that Ms. Dorsey’s refusal to drug test until she could consult an attorney was willful and unequivocal. The family court did not make an express finding of the necessary elements for criminal contempt of willfulness and unequivocality. Without these two elements criminal contempt is reduced to a strict liability offense. The family court merely found, as modified 41 days later, beyond a reasonable doubt that Ms. Dorsey was required to test and did not test as required. (Show Cause Hr’g Tr. 26:24-

25, 27:1-25, 28:1-4.) That is not enough to convict for criminal contempt. A court must also find evidence beyond a reasonable doubt that the refusal to drug test was willful and unequivocal to find criminal contempt. It did not do so here. The family court effectively acquitted Ms. Dorsey when it found her in criminal contempt based on a preponderance of the evidence. The burden of proof shown is a substantive matter of fact and law as are the differences between criminal and civil contempt. The final judgment bars substantive changes.

CONCLUSION

The family court lacked the subject matter jurisdiction to intrude on Ms. Dorsey's person by ordering her to drug test and then holding her in contempt for refusing, because MCL 712A.6 cannot be construed in a way that violates the Fourth Amendment and the order was not reasonable. The evidence was also insufficient to convict Ms. Dorsey of criminal contempt. Her conduct was not was not unequivocal. The burden of showing proof beyond a reasonable doubt was not met by the prosecution.

RELIEF REQUESTED

Ms. Dorsey respectfully requests that the Court reverse the family court and the Court of Appeals and vacate the family court's finding of contempt and the corresponding February 6, 2012 and February 10, 2012 contempt orders. Ms. Dorsey also requests the entry of a judgment of acquittal on the two show cause orders issued in this case. Alternatively, Ms. Dorsey requests a new trial and any other relief this Court deems just.

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Respectfully submitted,



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