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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA EX. REL.
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,**

Petitioner,

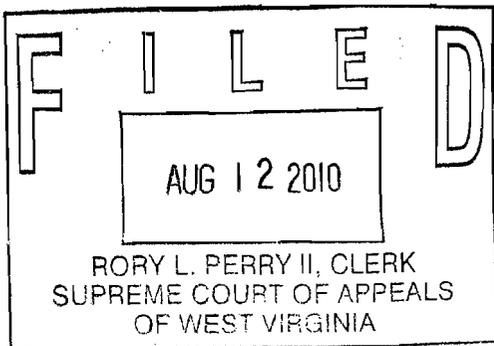
v.

**DOCKET NO. _____
(Berkeley County Case No. 09-JA-15)**

**THE HONORABLE JOHN C. YODER,
CIRCUIT COURT JUDGE OF BERKELEY
COUNTY, WEST VIRGINIA,**

Respondent.

**PETITION FOR WRIT OF PROHIBITION
AND MEMORANDUM OF LAW**



**DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL**

**C. CARTER WILLIAMS
ASSISTANT ATTORNEY GENERAL
112 Beans Lane
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WVSB No. 5727**

Counsel for WVDHHR

Dated: August 11, 2010

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**MEMORANDUM OF NAMES AND ADDRESSES FOR RULE TO SHOW CAUSE
TO BE SERVED UPON IF GRANTED**

RESPONDENT JUDGE:

Honorable John C. Yoder
Berkeley County Circuit Court
Berkeley County Judicial Center
380 W. South Street, Suite 3411
Martinsburg, WV 25401

RESPONDENT MOTHER, CRYSTAL W.:

Nancy A. Dalby, Esq.
202 N. Charles Street
Charles Town, WV 25414-1510

RESPONDENT FATHER, JAMES A.:

Nicholas F. Colvin, Esq.
P.O. Box 1720
Martinsburg, WV 25402

INFANT, LAWRENCE A.:

Tracy Weese, Esq. – Guardian Ad Litem*
P.O. Box 3254
Shepherdstown, WV 25443

PETITIONER:

West Virginia Department of
Health and Human Resources
By Counsel:
C. Carter Williams
Assistant Attorney General
112 Beans Lane
Moorefield, WV 26836

* The Guardian Ad Litem, Tracy Weese, Esq., also filed a Petition for Writ of Prohibition in this matter on behalf of the child, Lawrence A.

PETITION FOR WRIT OF PROHIBITION

COMES NOW the West Virginia Department of Health and Human Resources ("DHHR" or "Department"), pursuant W. Va. Code § 51-1-3 and § 53-1-1, et seq., and pursuant to Rule 4 of the West Virginia Rules of Appellate Procedure, and would respectfully petition this Honorable Court for issuance of a Rule to Show Cause against the Respondent, the Honorable John C. Yoder, Berkeley County Circuit Court Judge, pertaining to a recent Order directing return of custody of the infant, Lawrence A., to his mother, Crystal W., and granting said Respondent mother a dispositional improvement period.

The Department is aware that the Guardian Ad Litem ("GAL"), Tracy Weese, has also filed a Petition for Writ of Prohibition along with a designation of record/appendix. The Department would hereby make specific reference and citation to, and further join said designation of record and appendix for any and all pertinent purposes herein.

In support of this Petition for Writ of Prohibition, the Department would respectfully represent as follows:

I. PROCEDURAL HISTORY AND NATURE OF RULING BELOW

Child Protective Services ("CPS") received a referral on or about January 25, 2009 alleging that Lawrence A. was born having tested positive for amphetamines, cocaine and opiates. The Department entered into an in-home safety plan with the Respondent parents, James A. and Crystal W., on or about January 26, 2009. The parents agreed, *inter alia*, not to use drugs in the home, to submit to random drug screening, to complete substance abuse evaluations, and to attend NA meetings three

(3) times per week.

The Department filed an imminent danger petition pursuant to W. Va. Code § 49-6-1, et seq., on or about March 26, 2009 alleging Lawrence A. to be an abused and neglected child and seeking an order granting emergency custody to the Department. The petition was precipitated by the Respondent parents' failure to comply with the in-home safety plan and their testing positive for cocaine. The Circuit Court forthwith entered an Order finding that imminent danger to the child did exist, and that reasonable efforts had been made to keep the child in the home. As a result, the Court awarded temporary legal custody of the child to the Department.

The Adjudicatory hearing was held on May 21, 2009. Based upon admissions of the parties, the Respondent parents were adjudicated to have abused and neglected Lawrence A. and both were granted post-adjudicatory improvement periods. The improvement period included a term specifically prohibiting both parents from having any contact with anyone involved in illegal activities and directing that neither participate in any illegal activity. A trial reunification of the child with the parents was commenced at the end of September 2009 with the Department retaining legal custody.

On or about November 2, 2009 the GAL filed a Motion to revoke the improvement periods of both Respondent parents predicated upon a drug raid executed by law enforcement officials on the Respondents' home on or about October 30, 2009 resulting in a seizure of cocaine from the residence. The Department removed the child at this time and placed him back with the foster family that cared for him from March through September 2009. The Respondent mother also filed a motion on or about November 16, 2009 requesting return of physical custody of Lawrence A.

Evidentiary hearings¹ were held on February 28, 2010 and March 24, 2010 on the GAL's motion as well as the motion filed by Crystal W. for return of custody of her child. By Order entered on June 18, 2010 the Respondent Court denied the GAL's motion to revoke the mother's improvement period and granted the mother's motion for return of custody of the child.

The Department subsequently filed a Motion to Reconsider Ruling and Reverse Order Denying Motion to Revoke Improvement Period of Mother on or about June 30, 2010. The Circuit Court denied the Department's Motion to Reconsider by Order entered on July 22, 2010 and specifically ordered the Department to move forward the transition of the child to the mother's physical custody. By Order dated July 27, 2010, the Circuit Court denied the Department's request for a stay of the Court's June 18, 2010 Order directing transition of the child back to the mother's physical custody. The Court did grant the GAL's request staying unsupervised visits with the Respondent mother for a limited period of twenty (20) days. The Court also granted Crystal W. a dispositional improvement period.

The limited stay order will expire in this matter on or about August 16, 2010.

II. STATEMENT OF FACTS

1. Lawrence A. was born on January 22, 2009. Test results from his meconium were positive for amphetamines, cocaine and opiates. A referral was made to CPS on or about January 25, 2009. On January 26, 2009, CPS interviewed the Respondent parents, James A. and Crystal W., who admitted to smoking crack cocaine

¹ The evidentiary hearings were not immediately set in this proceeding due to the filing of motions to disqualify against Respondent Circuit Court Judge Yoder in all JA cases pending in Berkeley County.

and using heroine during the mother's pregnancy.

2. The Department initiated an in-home safety plan with the Respondent parents on January 26, 2009 requiring them to: refrain from using drugs, submit to random drug screening, complete a substance abuse evaluation, attend NA meetings three (3) times per week, and for James A. to supervise the mother at all times with the infant. Crystal W. was also mandated to continue in drug therapy.

3. By early March 2009 both parents had tested positive for cocaine. Subsequently, CPS met with Crystal W. and discovered that neither parent had attended any NA meetings, that both parents were spending \$50.00 each time they bought cocaine, and that they used cocaine together. The Respondent mother denied that she or the father had a drug problem. She also advised that she could not attend inpatient drug treatment because James A. has a suspended license and she had to drive him to work.

4. Consequently, the Department filed an abuse and neglect petition alleging imminent danger of the child on or about March 26, 2009. The Circuit Court forthwith entered an Order awarding the Department with temporary legal custody of the child and finding that the Department had made reasonable efforts in attempt to prevent removal of the child from the home.

5. The Respondent parents made admissions before the Court on May 21, 2009, and began post-adjudicatory improvement periods also on that day. The improvement periods were memorialized in a May 20, 2009, letter from the CPS Worker, Jennifer Foster. The terms of the improvement period specifically included a provision that both parents "may not have contact with anyone involved in illegal

activities and he/she may not participate in any illegal activity of any kind during his/her improvement period." The terms also included a provision that the Respondent parents would retain "safe housing" for the child.

6. Initially, based upon the reported progress of the parents on their respective improvement periods, the Department moved the Court for return of physical custody of the child to the Respondents for a trial reunification while maintaining legal custody of the child. On or about September 28, 2009, the Court granted the request of the Department and ordered that physical custody of the child be returned to the parents for a trial reunification.

7. Less than a month later, on or about October 30, 2009, the Eastern Panhandle Drug and Violent Crimes Task Force ("Task Force") executed a raid on the Respondent parents' home at 226 Avondale Road, in Berkeley County, West Virginia.

8. The Task Force seized crack cocaine from inside a fire alarm in the kitchen. The Task Force also seized \$500.00 in cash. \$300.00 of this amount belonged to the Respondent Crystal W. and was maintained in her jewelry box where it was retrieved by law enforcement officers. This \$300.00 in cash was identified by serial numbers as money previously provided by the Task Force to its confidential informant who performed a controlled buy of illegal drugs at the Respondent's home on 226 Avondale Road.

9. As a result of the raid upon the home, James A. was arrested and charged by the State of West Virginia with the distribution of crack cocaine in violation of W. Va. Code § 60A-4-4-1. Those charges were later dismissed in anticipation of charging Mr. Alston in Federal District Court with similar federal charges.

10. That on or about October 30, 2009 and subsequent to the aforementioned drug raid, the Department removed Lawrence A. (now nine (9) months old) from the home and placed physical custody of the child back with the foster family who had cared for him from March 2009 (upon initial removal) until the end of September 2009 (upon commencement of the trial reunification).²

11. That on or about November 2, 2009, the GAL filed a motion to revoke the Respondents' improvement periods based upon the illegal drug activity at the home.

12. That on or about November 16, 2009, the Respondent mother filed a motion for return of physical custody of the child. Among the representations included in this motion were that the mother had complied with all of the terms of her improvement period, that she did not know that the Respondent father, James A., was engaging in criminal activity in the home, and that she was no longer living with nor maintaining a relationship with James A.

13. Evidentiary hearings were held on February 18, 2010 and March 24, 2010 to consider the GAL's motion to revoke the improvement periods of the Respondent parents and the Respondent mother's motion for return of custody of the child.

14. During the presentation of evidence, West Virginia State Trooper Brian Bean testified regarding the Task Force's raid upon the Respondents' home. He testified that the Task Force had information on Crystal W. prior to the date of executing

² The Department maintained legal custody of Lawrence A. throughout the trial reunification in the home. After the drug raid on 226 Avondale Road, the Department removed the child and placed him back in the foster home where he had been from March through September 2009. Filing of a new petition was not required under the circumstances. The Department did not secure an order to place the child back into foster care, but clearly acted in the child's best interests. Crystal W. did file a motion for return custody on or about November 16, 2009; James A. did not challenge the removal of the child after October 30, 2009. Evidentiary hearings were eventually held in February and March 2010 after the motions to disqualify Judge Yoder were resolved by this Honorable Court.

a search warrant of her residence.³ March 24, 2010, Hearing Transcript ("Mar. Tr."), p. 63, 75. At the conclusion of search, a list was made of the property seized by law enforcement; the list was presented to Crystal W. and she signed it. Mar. Tr., p. 65. Among the property seized was cash buy-money identified by the Task Force, TV's, a printer and crack cocaine which had been concealed inside of a fire alarm. Mar. Tr., pp. 66-67. Trooper Bean testified that the crack cocaine seized was found to be in a form commonly used for sale or distribution. Mar. Tr., pp. 68-72. The cocaine was discovered in the common kitchen area of the home. Mar. Tr., p 73. The child, Lawrence A., was present and residing in the home during the time of the drug search.

15. The Respondent mother, Crystal W., testified at the hearing convened on February 18, 2010 that she had cut off contact and association with James A. as follows:

- A. That she had not seen James A. since his arrest except for their Court dates in this proceeding. February 18, 2009, Hearing Transcript ("Feb. Tr."), p. 43.
- B. That she had no contact with James A. because it would not be safe for her son. Feb. Tr., p. 44.
- C. That she had no knowledge of the Respondent father's drug activities, and if she had she would have removed herself and her son from the situation. Feb. Tr., pp. 49-50.

³ During the hearing held on February 19, 2010, the following exchange occurred between the GAL and Crystal W.:
Q. Are you familiar with crack cocaine? A. Yes. Q. And tell us how you are familiar with crack cocaine? A. Because I am a recovering addict. Q. And isn't it true you also sold crack cocaine? A. Yeah, but I never got charged for that. I got charged—pled guilty to possession of a controlled substance. Feb. Tr., p 26.

- D. That being around drug use and dealing can be a dangerous activity, and it often involves law enforcement investigations. Feb. Tr., p. 54.
- E. That after talking with the Respondent father's bondsman the day of his arrest, she had no contact with James A. Feb. Tr., p. 56.
- F. That she had no occasion to even talk with him since his arrest. Feb. Tr., p. 56.
- G. That she decided that it would be better not to have James A. involved in her life at this moment. Feb. Tr., p. 56
- H. That she cut ties with all people involved in drug activity because she is vulnerable to relapse and it's dangerous for her son. Feb. Tr., p. 56.

16. At the commencement of the second day of testimony, March 24, 2010, Crystal W. was given the opportunity to clarify, change or otherwise correct any of her testimony from the February 18, 2010, hearing. At this time, she continued to represent that she had had no contact with James A. except for an encounter on March 3, 2010.

She further testified regarding contact with James A. as follows:

- A. That she did meet with the Respondent father on March 3, 2010 at a gas station in Charles Town, West Virginia. Mar. Tr., pp. 16-17.
- B. That she acknowledged that she and James A. were observed together at the gas station by Kimberley Crockett, Counsel for the Department, and that evidence of said encounter was provided to her prior to the March 24, 2010, hearing. Mar. Tr., pp. 16-17.
- C. That the aforesaid encounter on March 3, 2010 was the only time that she had physical contact of any kind with James A. March Tr., p. 18.

D. That she had spoken with James A. on the phone to discuss their property, but had not seen him. Mar. Tr., pp. 18-19.

17. James A. testified at the March 24, 2010, hearing and invoked his Fifth Amendment right against self-incrimination on numerous occasions. Mar. Tr., pp. 4-5, 10, 53, 55. He also represented that the March 3, 2010, encounter was the only physical contact that he had had with the Respondent mother.

18. Berkeley County Deputy Sheriff Thomas Funk testified that on December, 11, 2009, he went to the Respondents' home on 226 Avondale Road to serve forfeiture papers on both of them. James A. answered the door and advised that Crystal W. was also present in the home; he accepted service from Deputy Funk for himself and Crystal W. Mar. Tr., pp. 57-59. James A. also advised the Deputy on this date that Crystal W. was his girlfriend, and that he and the Respondent mother lived together. Mar. Tr., p. 59.

19. Deputy Funk further testified that sometime in January 2010 he again went to the Respondents' home on 226 Avondale Road to serve papers. At this time Crystal W. answered the door and called out to James A. to come and accept the paperwork. James A. appeared from within the home and accepted the paperwork. Mar. Tr., pp. 60-61.

20. Travis Luttrell, an acquaintance of James A. and Crystal W., testified that approximately a week or so before the 2010 Super Bowl he and his wife ran into the Respondent parents in the K-mart parking lot where the Respondent parents were together in a white Cadillac. Mar. Tr., pp. 82-83. Mr. Luttrell described an encounter with Crystal W. at this time whereby she got out of the car to argue with him about the

drug raid and specifically blamed him for the removal of the child from her home. Mar. Tr., 84-86. She later returned to the Cadillac and she and James A. left. Mar. Tr., p. 86.

21. During the testimony of Crystal W., she initially questioned whether the contact with Mr. Luttrell ever took place, but in responding to another question posed she effectively confirmed Mr. Luttrell's description of the encounter. Mar. Tr., pp. 241-43.

22. Jimmie Williams, an employee of the Berkeley County Prosecuting Attorney's Office, testified that he conducted surveillance of the Respondent parents' home on 226 Avondale Road on two occasions, February 18, 2010 and March 24, 2010. On the morning of February 18, 2010, he saw two individuals whom he later identified as James A. and Crystal W. both leave the home, separately in different vehicles, and travel to the Berkeley County Courthouse. Mar. Tr., pp. 92-97. Mr. Williams also performed surveillance on the Respondents' home on the morning of March 24, 2010, and again observed James A. and Crystal W. leave the home at separate times taking separate transportation to the Berkeley County Courthouse. Mar. Tr., pp. 92, 110.

23. Although Crystal W. initially denied having contact with James A. (including on the days she appeared for the aforesaid evidentiary hearings), once confronted with the evidence that she had been with the Respondent father at 226 Avondale Road she admitted that she had contact with James A. and that she lied about her contact with him during her sworn testimony provided on February 18, 2010 and earlier in the hearing on March 24, 2010. Mar. Tr., pp. 238-44.

24. At the conclusion of the evidentiary hearing held on March 24, 2010, the Circuit Court directed that the parties submit respective proposed findings of fact and conclusions of law related to the pending motions of the GAL and the Respondent mother. By Order dated June 18, 2010 the Court denied the GAL's motion to revoke the improvement period of Crystal W., and granted the Respondent mother's motion for return of the child. The Court further ordered the Department to present a transition plan for this purpose upon the convening of an MDT within fifteen (15) days.

25. On or about June 30, 2010, the Department filed a Motion to Reconsider the aforesaid ruling returning custody of the child to Crystal W. and denying the GAL's motion to revoke the Respondent mother's improvement period. The Circuit Court denied the Department's motion and directed that the reunification plan set forth in the Court's prior order move forward.

26. A status hearing was held on July 27, 2010 following the convening of an MDT as previously ordered by the Court. The Department submitted a July 23, 2010 letter outlining the proposed terms of the dispositional improvement period granted by the Court, though remaining opposed thereto. The Department requested a stay of the Court's June 18, 2010 Order which was denied. The GAL requested the Court to stay any unsupervised visits until such time as the GAL and/or DHHR could seek writs before this Honorable Court. The Circuit Court granted a limited stay of any unsupervised visits in this matter for a period of twenty (20) days.

III. ARGUMENT

A. Standard of Review

"In determining whether to entertain and issue the writ of prohibition for cases not

involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, the Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." State ex rel. WVDHHR v. Pancake, 680 S.E.2d 54, 55 (W. Va. 2009).

"In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of jurisdiction, the Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. Pt. 2, State ex rel. WVDHHR v. Fox, 218 W.Va. 397, 624 S.E.2d 834 (2005).

B. The Circuit Court's Order is not a final, appealable order leaving the Petitioner with no other adequate remedy.

The Circuit Court's Order of June 18, 2010 denied the GAL's motion to revoke the improvement period of Crystal W. It further directed the return of Lawrence A. to the custody of his mother. The Department filed a motion to reconsider said Order which was also denied. The Court's most recent Order dated July 27, 2010 further directs that Crystal W. be granted a dispositional improvement period upon similar terms as were prescribed by Order dated May 21, 2009. Pursuant to W. Va. Code § 49-6-12(c), a dispositional improvement period may be granted for a period not to exceed six (6) months. Rule 38 of the West Virginia Rules of Procedure for Child Abuse and Neglect further provides for a hearing to be convened no later than sixty (60) days after the end of the dispositional improvement period to determine the final disposition of the case.

Accordingly, the Circuit Court's order directing the return of the child to the Respondent mother and granting her a dispositional improvement period is not a final order subject to direct or immediate appeal. As a result, if the Circuit Court's order is permitted to stand the only protection for Lawrence A., a year and a half old child, is the assertion of Crystal W. that she will comply with the improvement period terms and protect the child from harm's way. That scenario does not bode well for the infant child given the continued association of his mother with James A., and the extent to which she misrepresented same under oath on two separate occasions below.

C. The Circuit Court's Order granting Crystal W. a dispositional improvement period and directing return of Lawrence A. to her custody is clearly erroneous as a matter of law.

W. Va. Code § 49-6-12(c) provides that, "The court may grant an improvement period . . . as a disposition pursuant to section five [§ 49-6-5] of this article when: (1) The respondent moves in writing for the improvement period; [and when] (2) The respondent demonstrates, **by clear and convincing evidence**, that the respondent is likely to fully participate in the improvement period..." W. Va. Code 49-6-12(c) (2009 Repl. Vol.), Emphasis added. The Court's Order dated July 27, 2010 granting Crystal W. a dispositional improvement period does not evidence that the Respondent mother ever moved for same in writing or otherwise. Moreover, and most emphatically, said Order does not contain a finding by the Circuit Court that Crystal W. has demonstrated, by clear and convincing evidence, that she will likely fully participate in the improvement period. Even if the Court would have purported to adopt such a requisite finding, the Department asserts that same would have been clearly erroneous based upon the plain, undisputed evidentiary record established below.

Though it did not require a mandated statutory showing by the Respondent mother in granting her an improvement period, the Court did hold the GAL and the Department to an erroneous standard of clear and convincing evidence in attempting to negate whether Crystal W. substantially complied with the terms of her initial improvement period. The Court's Order of June 18, 2010 provides:

That based upon the guardian ad litem's failure and the Department's failure to offer clear and convincing evidence that Ms. [W] was involved in, knew of, or should have known of Mr. [A.'s] illegal activity, the Court finds that Ms. [W.] substantially complied with the terms of her improvement period, specifically the terms requiring Ms. [W.] to avoid contact with persons engaged in illegal activity and to provide safe housing for the infant.

June 18, 2010, Order, p. 9. If statute mandates a demonstration, by clear and

convincing evidence, by a respondent parent that she is likely to fully participate in an improvement period in order to be granted such right, logically the same standard carries through in determining if the parent substantially carried out the terms of the plan.

In short, the Circuit Court's finding is clearly erroneous and quite contrary to the credible evidence adduced in this proceeding. First, this case was referred to CPS as a "drug baby" referral. This case arose due to the parents' drug use. An in-home safety plan was attempted and failed as they continued to use and to buy drugs. This was occurring with Lawrence A. in the home. Even after the Department implemented a trial reunification of the child in September 2009, the child was exposed to a continued drug lifestyle and a law enforcement drug raid during the night.

Other crucial factors appear to have been minimized or ignored by the Circuit Court in deriving the above finding. Crystal W. was previously charged with selling drugs. Trooper Bean also testified that the Task Force had knowledge of Crystal W. prior to the drug raid that occurred on October 30, 2009, and that it is still possible that she could be charged with a federal "crack house" (aiding and abetting) offense. Mar. Tr., pp. 76-78. He further advised that crack cocaine in a form ready to sell was seized from a fire alarm in the kitchen of the home. The family kitchen was not some locked area of the home only accessible to James A. The "marked" bills (\$300 in cash) seized from the home were found in the Respondent mother's jewelry box. The family's purported legitimate income was minimal and derived from James A. selling pit bulls and Crystal W.'s job at Walgreens.

Even if it were somehow plausible to be convinced that Crystal W. did not know.

about illegal drug activity being carried on in the home prior to October 30, 2009, she surely had no doubt thereafter. Nevertheless, she continued to maintain a relationship with James A. The testimony of eyewitnesses and even Crystal W. herself places her with James A. on numerous occasions in the home after October 30, 2009. Deputy Funk's observations of the couple together in the home were not chance encounters in the community. On both occasions (in December 2009 and in January 2010) upon arriving at the home to serve court papers, he observed and/or spoke to James A. and Crystal W. Mr. Williams observed Crystal W. and James A. leave from the home on two separate mornings. Kim Crockett, Assistant Prosecutor, observed the couple together at a local gas station. Even Mr. Luttrell's testimony, which the Circuit Court somehow found not to be credible, was confirmed by Crystal W. during the final day of testimony on March 24, 2010.

However, perhaps what is most troubling in this case is the extent to which the Respondent mother has misrepresented herself in the instant proceeding. In its June 18, 2010, Order, the Circuit Court even asserted, "While the Court does not look favorably upon Ms. [W]'s lack of candor and willingness to be forthcoming with information regarding her contact with Mr. [A.], the Court does not find that Ms. [W.] lacks credibility with regards to all matters." June 18, 2010, Order, p. 9. The Circuit Court has erroneously compartmentalized the veracity of Crystal W. in spite of the credible evidence and logical inferences drawn herein that the Respondent mother knew or should have known that illegal drug activity was occurring in the home where an infant child lives.

A respondent's willingness and ability to tell the truth about crucial issues of

concern to not only the Department, but the Court, is paramount to the success of remedying conditions of abuse and neglect in a home. Crystal W. has testified, after being confronted with undisputed facts, that she has continued to have contact with James A. In fact, she has testified that she believes that James A. has turned his life around since October 30, 2009. However, a drug screen ordered by the Court's July 27, 2010, Order has now come back positive for cocaine against James A.

This case began as a drug case, and it continues, either by direct use, involvement or association by both Respondent parents to be a drug case. We are now more than a year and a half past the initial referral in this matter and the birth of Lawrence A. We are also now well beyond a failed in-home safety plan, and an improvement period negated by the events of October 30, 2009. Crystal W. has failed to demonstrate marginally, and certainly by much less than clear and convincing evidence, that she deserves an additional improvement period or the return of custody of her son at this time. In lieu of erroneously rewarding Crystal W. with an additional improvement period and return of custody of her child, the grant of a writ of prohibition by this Court would rightly protect this vulnerable infant child from further exposure to the untold dangers of illegal drugs and accomplish the goal of serving the best interests of Lawrence A.

IV. PRAYER FOR RELIEF

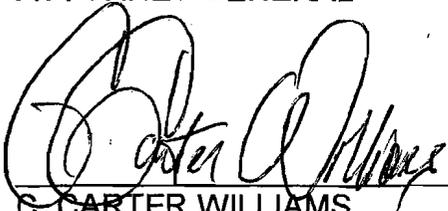
WHEREFORE, in consideration of the foregoing, the Petitioner respectfully prays that this Court: 1) Issue a Rule to Show Cause against Respondent, the Honorable John C. Yoder, directing said Respondent Circuit Court Judge to show cause why a Writ of Prohibition should not be awarded prohibiting Respondent from ordering the

return of custody of Lawrence A. to his mother, Crystal W., and further granting said Respondent mother an additional improvement period herein; 2) grant the Writ of Prohibition to prohibit the Respondent Circuit Court Judge from enforcing its Order as described above; 3) issue an Order to stay the aforesaid Order of the Respondent Circuit Court Judge; 4) in the event that a Writ of Prohibition is granted, direct that the proposed order previously submitted herein by the Department entitled, "Order Revoking Crystal W.'s Improvement Period and Order Denying Motion for Return of Child," be adopted by the Respondent Circuit Court Judge below and direct that this matter be immediately set for dispositional hearing in concert with said findings and conclusions thereof; and, 5) grant such other and further relief as this Honorable Court deems appropriate and equitable.

Respectfully submitted,

STATE OF WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

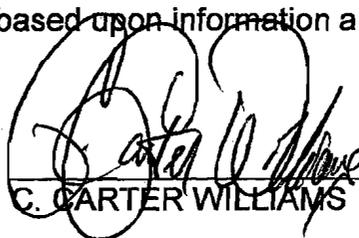


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Counsel for WVDHHR

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF HARDY TO-WIT:

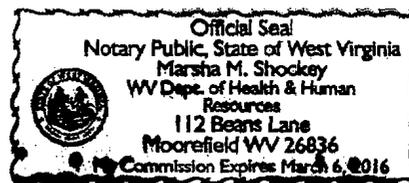
C. CARTER WILLIAMS, Assistant Attorney General and Counsel for the West Virginia Department of Health and Human Resources, after first being duly sworn, upon his oath, hereby deposes and states that the facts and allegations contained in the foregoing Petition for Writ of Prohibition and Memorandum of Law are true and correct, except insofar as they are therein stated to be based upon information and belief, and insofar as they are therein stated to be based upon information and belief, he believes them to be true and correct.


C. CARTER WILLIAMS

Taken, subscribed and sworn to before me, the undersigned authority,
this the 10th day of August, 2010.

My commission expires: March 6, 2016

Marsha M. Shockey
Notary Public



CERTIFICATE OF SERVICE

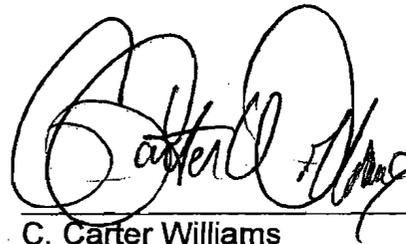
I, C. Carter Williams, do hereby certify that I have served a true copy of the foregoing PETITION FOR WRIT OF PROHIBITION AND MEMORANDUM OF LAW upon the following by United States First Class Mail, postage prepaid, on this the 11th day of August, 2010:

Honorable John C. Yoder
Berkeley County Circuit Judge
380 W. South Street, Suite 3411
Martinsburg, WV 25401

Nancy A. Dalby, Esq.
Counsel for Crystal W.
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