No. 923-2014

IN THE SUPREME COURT OF THE

STATE OF WHITTIER

JANUARY TERM 2015

Daniel LITTLE BEAR,
Petitioner,

v.

STATE OF WHITTIER, Ms. Kathryn Candler,
Director of the Whittier Department of Child Welfare,
Respondent.

ON APPEAL FROM THE

WHITTIER COURT OF APPEAL

BRIEF FOR PETITIONER

Team 17
January 3, 2015

Counsel for Petitioner

QUESTIONS PRESENTED

I. Did the Juvenile Court err when it determined that the Department of Child Welfare made active efforts to provide Mr. Little Bear with remedial services, given that the proper standard of proof is "beyond a reasonable doubt" and given the likelihood that additional services would have prevented the breakup of Mr. Little Bear and Sienna?

II. Did the Juvenile Court err when it overlooked the importance of preserving Sienna's attachment to her cultural identity and found there was good cause to deviate from the adoptive placement preferences outlined in the Indian Child Welfare Act?

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF CONTENTS (CONT.)

TABLE OF AUTHORITIES

Page(s)

CASES

UNITED STATES SUPREME COURT

STATE COURTS

TABLE OF AUTHORITIES (CONT.)

TABLE OF AUTHORITIES (CONT.)

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OPINION BELOW

The unreported opinion of the State of Whittier Court of Appeal appears on pages 1-17 of the record. *Little Bear v. State of Whittier* (Whit. Ct. App. Nov. 15, 2014), *cert. granted* (923-2014) (Whit. Nov. 15, 2014).

JURISDICTION

This Court granted the petition for writ of certiorari on November 15, 2014 pursuant to 28 U.S.C. § 1257 (2012).

STATEMENT OF THE CASE

Preliminary Statement

In June 2014, at Sienna Little Bear's twelve month hearing, the Juvenile Court terminated Daniel Little Bear's remedial services. R. 6. It found, by "clear and convincing" evidence, that the state made active efforts to prevent the breakup of Mr. Little Bear and Sienna and further efforts would be futile in light of Mr. Little Bear's incarceration. R. 6-7. On July 2, 2014, the court held a final hearing addressing whether there existed good cause to depart from Indian Child Welfare Act ("ICWA") placement preferences. R. 7. The court declined to place Sienna with her paternal aunt, Patricia Redbird, and adoptively placed Sienna with Matthew Davidson and Howard Pratt, a non-Indian, Caucasian couple. R.10. Mr. Little Bear timely appealed both the termination of his remedial services and the adoptive placement order. R. 10. On November 15, 2014, the State of Whittier Court of Appeal affirmed the Juvenile Court. R. 1.

Statement of the Facts

Sienna Little Bear was born on November 1, 2012 to Melissa Diaz and Daniel Little Bear. R. 1. Mr. Little Bear, a member of the Cherokee Nation, was ecstatic to have his first, and only, child take part in his Cherokee heritage. R. 1. He quickly registered Sienna with the Cherokee Nation and asked his sister, Ms. Redbird, to perform a Cherokee blessing for Sienna. R. 1.

In May 2013, at Sienna's six-month checkup, her doctor noted two minor health concerns: Sienna was underweight and suffering from plagiocephaly, a condition that occurs when babies are left on their backs for too long. R. 2. Over the next few weeks, Sienna's health improved, but the doctor remained concerned about Sienna's well being. R. 2. The doctor's concern grew when she learned Ms. Diaz was abusing drugs and

alcohol, prostituting, and living on the streets. R. 2-3. Although Sienna's doctor believed Mr. Little Bear was doing his best to care for his daughter, she felt his efforts were insufficient in light of Ms. Diaz's aggravating circumstances. R. 3.

On May 22, 2013, Ms. Diaz was shot and killed. R. 3. Sonia White, a Department of Child Welfare ("DCW") social worker, informed Mr. Little Bear and began investigating Sienna's welfare. R. 3. Mr. Little Bear agreed to cooperate with the investigation and expressed his desire to become a better parent during the process. R. 3. Ms. White helped Mr. Little Bear sign up for a supplemental nutrition program, assisted him in obtaining a crib and clothing for Sienna, and directed him to a support program for Native American fathers. R. 3. Ms. White also referred Mr. Little Bear to a grief counselor. R. 3. Though Mr. Little Bear attended the sessions with the grief counselor, he still struggled immensely with Ms. Diaz's death. R. 3. Over the next few weeks, Mr. Little Bear did not return to the doctor's office, lost his job, and faced eviction. R. 3. In response, Ms. White referred Mr. Little Bear to a job training program and subsidized housing. R. 4. Both programs had waitlists. R. 4.

On June 15, 2013, the Juvenile Court adjudicated Sienna a dependent child under Whittier Juvenile Code § 100(b). R. 4. The court properly found Sienna subject to ICWA. R. 4. The Juvenile Court concluded that Mr. Little Bear's continued custody of Sienna was likely to result in emotional or physical damage to her. 25 U.S.C. § 1912(d) (2012); R. 4. Consequently, Sienna was placed with her maternal grandparents. R. 5. A few months later, the Juvenile Court concluded adjudication and disposition hearings. R. 5. At the August 20, 2013 hearing, Sienna's maternal grandparents asked that Sienna be removed from their home. R. 5. As no other relative was available to accept Sienna, she

was re-placed in a non-relative, non-Indian foster home with Mr. Davidson and Mr. Pratt. R. 5. The court offered remedial services to Mr. Little Bear to facilitate the reunification process, but did not create a specific plan for him. R. 5.

During Sienna's first two months in foster care, Mr. Little Bear made substantial progress. R. 5. He participated in parenting classes and did not miss a single visit with Sienna. R. 5. Mr. Little Bear also attended a six-week, one-on-one therapy session, arranged for by Ms. White. R. 5-6. In addition, Mr. Little Bear secured a part-time job and began saving for his daughter's return. R.6. However, in November 2013, the police ticketed Mr. Little Bear for being inebriated in public and he started missing scheduled visits with Sienna. R. 6. On December 15, 2013, at the sixth month hearing, the Juvenile Court ordered Mr. Little Bear to enroll in substance abuse counseling. R. 6. Unfortunately, Ms. White delayed his enrollment paperwork. R. 6. Ms. White's mistake forced Mr. Little Bear to start class a month later than anticipated. R. 6. Once enrolled, Mr. Little Bear attended the group regularly. R. 6.

Over the next few months, Mr. Little Bear was actively involved in Sienna's life; he gave her traditional Cherokee gifts and visited her as often as possible. R.6. Then, on March 17, 2014, Mr. Little Bear was arrested for driving under the influence. R.6. He was found guilty and incarcerated for twelve to eighteen months. R.6. Even though Mr. Little Bear's incarceration made visits with Sienna more challenging, he called Sienna and sent her mail whenever he could. R. 6.

In June 2014, the Juvenile Court terminated remedial services under the belief that further efforts would be futile because of Mr. Little Bear's incarceration. R. 6-7. In accordance with ICWA's pre-adoptive placement preferences, DCW contacted Sienna's

paternal aunt, Ms. Redbird, to ask if she would be interested in adopting Sienna. R. 7. Ms. Redbird had previously expressed interest in adopting Sienna, but DCW declined placement because the court could not facilitate reunification out of state. R.7. Counsel for Sienna objected to a change of placement, arguing that there was evidence Sienna had already bonded with Mr. Davidson and Mr. Pratt. R. 7. On July 2, 2014, a hearing was held to determine whether good cause existed to depart from ICWA's placement preferences. R. 7. At the hearing, Sienna's play therapist and a Whittier University child development specialist recommended Sienna remain with Mr. Davidson and Mr. Pratt. R. 7. An expert from the Cherokee Nation and a child psychologist from the Indian Support Center recommended Sienna be placed with Ms. Redbird. R. 8-9.

SUMMARY OF THE ARGUMENT

The Juvenile Court erred when it applied the "clear and convincing" standard to the determination of whether the state provided active efforts. The court should have applied the "beyond a reasonable doubt" standard to ICWA § 1912(d)'s active efforts requirement because that standard is consistent with § 1912(f), the other provision dealing with the termination of parental rights, and best fulfills Congress's intent. Even under the "clear and convincing" standard, there was insufficient evidence that active efforts were made to prevent the breakup of Mr. Little Bear and Sienna. The court did not create a specific plan for Mr. Little Bear and Ms. White made egregious errors in implementing what little plan there was. The lower court further erred when it indiscriminately applied the futility test to Mr. Little Bear's case, ignoring his personal progress and willingness to parent Sienna. Moreover, the court abused its discretion when it found good cause to depart from ICWA placement preferences and deny Sienna

placement with her biological, Cherokee aunt. The State's testifying witnesses were not qualified experts under ICWA and the social worker report is merely an account of Sienna's assimilation into non-Indian culture. The court failed to recognize the traumatic effects, which ICWA was drafted to prevent, of severing Sienna from her Indian identity. Finally, bonding with a foster family is insufficient to meet the high burden of extraordinary emotional needs warranting good cause.

STANDARDS OF REVIEW

Whether the state has complied with the "active efforts" requirement of ICWA presents a mixed question of fact and law. *See A.M v. State (A.M.II)*, 945 P.2d 296, 304 n.10 (Alaska 1997). This Court reviews questions of law *de novo*, while factual determinations are reviewed for clear error. *A.A. v. State, Dep't of Family & Youth Servs.*, 982 P.2d 256, 259 (Alaska 1999). The question of whether there exists good cause to deviate from ICWA placement preferences should be reviewed for abuse of discretion. *Porter v. Comstock* (*In re D.L.*), 298 P.3d 1203, 1205 (Okla. Civ. App. 2013).

ARGUMENT

I. THE JUVENILE COURT ERRED WHEN IT FOUND BY CLEAR AND CONVINCING EVIDENCE THAT THE STATE MADE ACTIVE EFFORTS TO PROVIDE MR. LITTLE BEAR WITH REMEDIAL SERVICES.

ICWA, passed in 1978, governs jurisdiction over the removal of Indian children from their families. 25 U.S.C. § 1901 (2012). This federal law acknowledges "that an alarmingly high percentage of Indian families are broken up by removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4) (2012). Terminating Mr. Little

Bear's parental rights to his only child epitomizes the situation Congress sought to avoid with ICWA. To prevent warrantless terminations, such as this one, Congress provided for § 1912(d), which federally mandates that states make active efforts to assist Indian parents before breaking up the Indian family. H.R. REP. NO. 95-1386, at 7545 (1978).

Under U.S.C. § 1912(d), "any party seeking to effect a foster care proceeding of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d) (2012). Active efforts are affirmative; they require that the state actually help the parent develop the skills required to keep custody of the children. *A.M.I*, 891 P.2d at 827; *see also A.A.*, 982 P.2d at 261 (noting that active efforts require the case worker to take the client through the steps of a plan).

A. In Whittier, "Beyond a Reasonable Doubt" Is the Proper Standard to Apply When Determining Whether the State Made Active Efforts to Prevent the Breakup of an Indian Family.

The Juvenile Court erroneously applied a "clear and convincing" standard of proof to the predicate finding of whether the state made active efforts to prevent the breakup of Mr. Little Bear and Sienna. Having never addressed this issue before, this Court should now find that the proper standard to apply is "beyond a reasonable doubt." R. 11. Congress did not specify a burden of proof under U.S.C. § 1912(d). *See In re Vaughn R.*, 770 N.W.2d 795, 808 (Wis. Ct. App. 2009). Thus, it is up to the states to determine what burden of proof should apply. This Court, unlike a majority of courts that have considered this issue, does not have to resolve a conflict between state and

federal law. Therefore, this Court should follow the minority position and adopt the "beyond a reasonable doubt" standard of proof.

1. Because Whittier follows federal law and does not have a state law equivalent of U.S.C. § 1912(d), there is no need to apply a less stringent standard of review.

Courts applying ICWA have adopted varying standards of proof for the "active efforts" requirement in § 1912(d). *Yvonne L. v. Ariz. Dept. of Econ. Sec.*, 258 P.3d 233, 238 (Ariz. Ct. App. 2011). Of these courts, a majority has rejected a finding that the standard of proof in § 1912(d) is "beyond a reasonable doubt." *See, e.g., Yvonne L*, 258 P.3d at 238-39 (adopting the state law requirement of "clear and convincing" evidence over "beyond a reasonable doubt"); *In re Baby Boy Doe*, 902 P.2d 477, 482-83 (Idaho 1995) (holding that remedial efforts need only be established by clear and convincing evidence in accordance with Idaho's statute); *In re Interest of Walter W.*, 744 N.W.2d 55, 60-61 (Neb. 2008) (adopting the "clear and convincing" standard consistent with Nebraska state law); *In re Vaughn R.*, 770 N.W.2d at 801-02 (concluding that the clear and convincing standard properly harmonized Wisconsin state law with ICWA).

In determining what burden of proof to apply, these state courts had to resolve a conflict between their state law version of § 1912(d), which required a "clear and convincing" standard of proof, and ICWA, which is silent. *See Yvonne L*, 258 P.3d at 238-39 (Arizona state law required "clear and convincing" standard); *Doe*, 902 P.2d at 482-83 (Idaho state law required "clear and convincing" evidence; *Walter W.*, 744 N.W.2d at 60-61 (Nebraska state law required "clear and convincing" standard); *In re Vaughn R.*, 770 N.W.2d at 801-02 (Wisconsin state law required "clear and convincing" standard). These courts were forced to harmonize state law with federal law and did so

by concluding that Congress never intended to override state law with its silence. *See, e.g., Yvonne L*, 258 P.3d at 238-39.

The above cases illustrate a well-established canon of statutory interpretation: federal guidelines should be interpreted to change state law to the least extent possible. *In re Annette P.*, 589 A.2d 924, 927 f.8 (Maine 1991). Adopting the "beyond a reasonable doubt" standard, a standard not explicitly stated in § 1912(d), would have drastically changed their state laws and been incongruent with traditional notions of statutory interpretation. Due to the absence of a direct order from Congress, these courts adopted the "clear and convincing" standard found in their state law.

In this case, adopting a "beyond a reasonable doubt" standard does not implicate the statutory interpretation concerns mentioned above. Whittier, unlike the aforementioned cases, does not have a state law directly in conflict with § 1912(d) because it follows federal law exclusively. R. 6. Therefore, the "beyond a reasonable doubt" standard will not drastically change current Whittier law, and it is unnecessary to settle for a less stringent standard of review merely to harmonize specific state law standards of proof with the silence of federal law.

2. Under U.S.C. § 1912(f), the termination of parental rights can only be ordered upon a factual basis shown "beyond a reasonable doubt," therefore, any predicate to the termination of parental rights must be similarly supported by proof "beyond a reasonable doubt."

This Court should find that the proper standard of proof under § 1912(d) is "beyond a reasonable doubt" because that standard is consistent with U.S.C. § 1912(f), the only other ICWA provision governing the termination of parental rights. Several jurisdictions have adopted the "beyond a reasonable doubt" standard for § 1912(d) as

"logic compels" such a result. *See People ex rel. R.L.*, 961 P.2d 606, 609 (Colo. App. 1998); *In re L.N.W.*, 457 N.W.2d 17, 18 (Iowa App. 1990); *In re Kreft*, 384 N.W.2d 843, 848 (Mich. Ct. App. 1986); *People ex rel. S.R.*, 323 N.W.2d 885, 887 (S.D. 1982). In *In re Welfare of M.S.S.*, 465 N.W.2d 412, 418 (Minn. Ct. App. 1991), the court reasoned:

> If termination of parental rights of Indian parents to their children can be ordered only upon a factual basis shown beyond a reasonable doubt (§1912(f)), and if termination cannot be effected without a showing of active efforts to proven the breakup of the Indian family and a failure thereof (§ 1912(d)) then the adequacy of efforts and futility of them, as predicates to termination, must likewise be established beyond a reasonable doubt.

This Court should also conclude that the only logical way of interpreting § 1912(d) is to adopt the same standard of proof articulated in § 1912(f). Applying the standard from § 1912(f) to § 1912(d) ensures that all findings related to the termination of parental rights are treated the same. In addition, a higher standard of proof prevents states from merely providing lackluster services to Indian parents.

3. Requiring a "beyond a reasonable doubt" standard for 25 U.S.C. § 1912(d) best fulfills the congressional purpose of protecting the Indian family.

Another reason this Court should apply a "beyond a reasonable doubt" standard to § 1912(d) is because it best fulfills Congress's intent in enacting ICWA. As mentioned above, § 1912(d) does not specify a burden of proof, so other courts, in interpreting this provision have looked beyond the statute's text to Congress's intent. *See, e.g., In re Welfare of Child of E.A.C.*, 812 N.W.2d 165, 175 (Minn. Ct. App. 2012).

The plain meaning of legislation should be conclusive, except in "rare cases [in which] the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564,

571 (1982). There, the intention of the drafters, instead of the strict language, controls. *Id.* Moreover, when interpreting a statute pertaining to Indians, the Supreme Court has stated, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see, e.g., In re J.S.B.*, 691 N.W.2d 611, 619 (S.D. 2005).

Here, a literal application of § 1912(d) would be at odds with Congress's intent. Namely, Congress, in enacting ICWA, "indicated its intent to diminish the effect of having culturally biased government officials, who perceive the necessity of terminating parental rights of Indian citizens through quite different cultural lenses, decide whether to terminate an Indian's parental rights." *M.S.S.*, 465 N.W.2d at 418. Allowing for a less stringent burden of proof for the active efforts requirement would conflict with Congress's intent to prevent warrantless breakups of the Indian family. Under a "clear and convincing" standard, states can do less for the Indian family before terminating a parent's rights. "Beyond a reasonable doubt," on the other hand, fully protects Indian families and the rights of Indian parents, and satisfies Congress's intent. Moreover, the "beyond a reasonable doubt" standard is a more liberal construction of ICWA, and as such, it is consistent with the Supreme Court's position on statutes pertaining to Indians. Therefore, this Court should apply the "beyond a reasonable doubt" standard to the active efforts requirement in § 1912(d).

B. Even Under the "Clear and Convincing" Standard, the Evidence that DCW Utilized Active Efforts to Provide Remedial Services Is Insufficient.

Even if Whittier adopts the "clear and convincing" standard, the lower court erred in concluding that DCW provided active efforts to Mr. Little Bear as there is insufficient evidence to support this finding. "Clear and convincing" evidence is evidence producing

"a firm belief or conviction about the existence of a fact to be proven." *In re Johnstone*, 2 P.3d 1226, 1234 (Alaska 2000) (quoting *Buster v Gale*, 866 P.2d 837, 844 (Alaska 1994)). Given the State's meager efforts, there is insufficient evidence to produce a firm belief or conviction that DCW made active efforts.

Active efforts are affirmative. *A.A.*, 982 P.2d at 261. Caseworkers are required to take the client through the steps of the plan, and should not merely leave the client on his own to perform the plan. *A.M. I*, 891 P.2d at 827. The Bureau of Indian Affairs has elaborated on active efforts, stating: "these efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian Child's tribe. They shall also involve and use the available resources of extended family, the tribe, Indian social service agencies and individual Indian caregivers." Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67584 (Nov. 26, 1979), *available at* http://nicwa.org/administrative_regulations/icwa/ICWA_guidelines.pdf.

1. Given the court's meager remedial service plan and Mr. Little Bear's willingness to participate, there was not "clear and convincing" evidence to support a finding that DCW's efforts satisfied § 1912(d).

Active efforts "require taking a parent through the steps of a plan and helping the parent develop the resources to succeed; drawing up a case plan and leaving the client to satisfy it are merely passive efforts." *Jon S. v. State, Dep't of Health & Soc. Servs.*, 212 P.3d 756, 763 (Alaska 2009) (citing *A.A.*, 982 P.2d at 261). In determining whether a state has made active efforts, courts undertake a detailed, case-by-case analysis. *See Pravat P. v. State, Dep't of Health & Soc. Servs.*, 249 P.3d 264, 271 (Alaska 2011); *Walter W.*, 744 N.W.2d at 62.

In some cases, minimal efforts can satisfy the active efforts requirement. *See, e.g., Doe*, 902 P.2d at 484 (holding that active efforts were satisfied when the mother, not the social worker, encouraged the father to attend counseling); *Walter W.*, 744 N.W.2d at 62 (holding that active efforts were satisfied when the case manager contacted various substance abuse programs, provided information about the programs, and reviewed a list of homeless shelters with mother). However, courts that conclude minimal services are sufficient to satisfy the "clear and convincing" standard have done so because of a parent's failure to respond to the state's remedial measures. *See, e.g., Pravat P.*, 249 P.3d at 271 (parent's unwillingness to participate in treatment was a factor in determining whether the state made active efforts); *Doe*, 902 P.2d at 484 (father's failure to cooperate in any way over the past four years led the court to conclude that minimal efforts were sufficient); *Walter W.*, 744 N.W.2d at 61 (mother's disappearance for nearly a year, along with her failure to attend outpatient chemical dependency treatment programs, led the court to conclude that minimal efforts were sufficient).

In this case, there is not "clear and convincing" evidence to support the lower court's findings for two reasons. First, the lower court did not create a "specific plan" for Mr. Little Bear to succeed as required by law. The only "plan" the court ordered was for Mr. Little Bear to attend alcohol counseling after he was ticketed for being inebriated in public. R. 6. The court did not implement this "plan" until six months after it first ordered remedial services. R. 5-6. Even more egregious was Ms. White's delay in filing Mr. Little Bear's paperwork. Her mistake forced him to start the one program the court ordered a month later than anticipated. R. 6. Mr. Little Bear received one other remedial service—a six-week therapy session—rendering this "plan" passive at best. R. 5-6.

Second, the fact that Mr. Little Bear eagerly complied with the State's inadequate plan does not warrant a finding that those services amounted to "clear and convincing" evidence of active efforts. Unlike the parents in *Pravat P.*, *In re Baby Boy Doe*, and *Walter W.*, Mr. Little Bear did not show consistent indifference when the State did provide him with remedial services. He enrolled in substance abuse counseling as soon as possible, regularly attended, visited Sienna whenever he could, and even continued taking parenting classes while he was incarcerated. R. 3-7. In addition, Mr. Little Bear has consistently demonstrated a willingness to parent Sienna since she was born. R. 2. He never relinquished his parental rights or ran from his responsibilities. Instead, he fully cooperated with the DCW when they conducted their investigation. R. 3. Even when Mr. Little Bear was incarcerated, he did everything he could to improve his chances of reunification. R. 6-7. In short, the considerations present in *Pravat P.*, *In re Baby Boy Doe*, and *Walter W* that allowed minimal efforts to satisfy the active efforts requirement in § 1912(d) are not present here. As a result, the State cannot meet the "clear and convincing" standard of proof.

2. The Juvenile Court further erred when it applied the futility test because Mr. Little Bear received remedial services for less than a year, and, given Mr. Little Bear's prior success, he was likely to respond to additional treatment.

In accordance with § 1912(d), prior active efforts must prove unsuccessful before a court can terminate parental rights. *See, e.g., In re Welfare of Child of E.A.C.*, 812 N.W.2d at 175 (concluding that the lower court erred when it failed to indicate whether the active efforts previously made were unsuccessful). At the same time, however, ICWA does not require the state to continuously provide services that have already proven unsuccessful. *People ex rel. A.V.*, 297 P.3d 1019, 1022 (Colo. App. 2012). Thus,

in rare instances, the court can terminate parental rights without offering additional services. *See, e.g., People ex rel. K.D.*, 155 P.3d 634, 637 (Colo. App. 2012); *J.S.B.*, 691 N.W.2d at 621.

Terminating parental rights without additional services can only happen if DCW "has expended substantial, but unsuccessful, efforts over several years to prevent the breakup of the family, and there is no reason to believe additional treatment would prevent the termination of parental rights." *K.D.*, 155 P.3d at 637. Typically, this occurs only in the most egregious circumstances. In *J.S.B.*, for example, the court determined that additional services would be futile when a social services department had worked with the family for several years, the child had been removed from parental custody *three* times because of substance abuse related neglect, and, despite years of intervention, the parents continued using drugs. 691 N.W.2d at 621. In *State ex rel. C.D.*, the court was not required to provide additional services when the grandfather, who had *seven* years of experience working for division of child and family services, emotionally abused his grandchildren to the extent that one child attempted suicide. 200 P.3d 194, 196 (Utah Ct. App. 2008). The court found the provision of additional parenting classes to be futile because the department had already "taught those skills specifically to Grandfather at a level that qualified him to teach others." *Id.* at 207. Finally, in *K.D.*, the court terminated parental rights without providing additional services when the child was removed *twice* before, and the parents failed to complete their treatment plans. 155 P.3d at 636.

Mr. Little Bear's situation, unlike those described above, does not warrant a finding that additional services would be futile. First, DCW has not expended "substantial, yet unsuccessful efforts." The court initiated remedial services in August

2013, and, since that order, Ms. White enrolled Mr. Little Bear in *one* substance abuse class. R. 5. To make matters worse, she mishandled that effort. R. 6. Other than providing minor services, there is no indication Ms. White expended substantial efforts to help Mr. Little Bear regain custody of Sienna once the court ordered remedial services.

Second, the court only offered Mr. Little Bear remedial services from August 2013 to June 2014. R. 5-6. All told, Mr. Little Bear received court ordered services for ten months. Mr. Little Bear was afforded much less time to succeed than his counterparts in *J.S.B.*, *C.V.*, and *K.D.*, who were allowed years of remedial measures before a court terminated additional services. This Court should not allow a mere ten months of remedial services to constitute "efforts over several years." *K.D.*, 155 P.3d at 637.

Finally, Mr. Little Bear's case is far less extreme than the situations in *J.S.B.*, *C.V.*, and *K.D.*. Unlike the parents in those cases, Mr. Little Bear does not have a history of substance abuse; he started abusing alcohol only after Ms. Diaz died and Sienna was removed from his care. R. 6. And, rather than ignoring his problem, like the parents in *J.S.B.*, *C.V.*, and *K.D.*, Mr. Little Bear regularly attended his substance abuse group so that he could eventually be reunited with Sienna. R. 6. Furthermore, Mr. Little Bear remained active in Sienna's life. He visited her as often as possible, gave her gifts, and shared his heritage with her. R. 5-6. Given the nature of Mr. Little Bear's disease,[1] the limited time Mr. Little Bear received services, and his desire to be a good father, it appears that the provision of additional services would prevent the need for termination. Therefore, this Court should find that the lower court erred in refusing to provide additional services.

[1] Historically Native Americans have had extreme difficulty with the use of alcohol.

3. Mr. Little Bear's incarceration did not frustrate reunification efforts, and, therefore, it was error for the court to conclude that the provision of additional services would be futile.

A parent's incarceration will not relieve Whittier of its duty under § 1912(d) to provide active remedial efforts. *A.A.*, 982 P.2d at 261 (citing *A.M. I*, 891 P.2d at 827). Nevertheless, circumstances surrounding a parent's incarceration, like the difficulty of providing resources to inmates, the length of incarceration, and the parent's own behavior may have a direct bearing on what active remedial efforts are possible. *See, e.g. Dashiell R. v. State Dept. of Health and Social Services*, 222 P.3d 841, 844 (Alaska 2009) (finding that active efforts were met and additional services were futile when the father was in jail for twelve years); *Idaho Dep't of Health & Welfare v. Doe*, 275 P.3d 23, 30 (Idaho Ct. App. 2012) (Doe's misconduct in jail caused visitation privileges to be suspended).

Here, Mr. Little Bear's incarceration has not frustrated his ability to receive remedial services. He has access to and attends the jail's parenting courses. R. 9. In addition, his prison sentence is relatively short. At most, Mr. Little Bear will be incarcerated for eighteen months, a mere drop in the bucket considering Sienna's young age. R. 6.; *but cf. Dashiell*, 222 P.3d 841,844 (twelve-year minimum sentence made additional services futile). Finally, and most importantly, Mr. Little Bear continued forging a relationship with Sienna while he was incarcerated. He visited her whenever Mr. Davidson and Mr. Pratt would allow, and regularly called and sent her mail. R. 6. Mr. Little Bear's eagerness to parent Sienna, along with his short prison sentence, does not warrant a finding that additional services would be futile. Therefore, the lower court erred when it concluded by "clear and convincing" evidence that the State made active efforts to prevent the breakup of Mr. Little Bear and Sienna.

II. THE JUVENILE COURT ERRED WHEN IT FOUND GOOD CAUSE TO DEVIATE FROM THE PLACEMENT PREFERENCES OUTLINED IN ICWA BECAUSE FEDERAL LAW GIVES PRECEDENCE TO EXTENDED FAMILY ADOPTIONS AND THE PROTECTION OF INDIAN TRIBAL CULTURE.

Even if the Juvenile Court properly terminated Mr. Little Bear's rights, the court further erred when it found good cause to deviate from ICWA placement preferences. ICWA was enacted to address the frequent failure of states in recognizing the essential cultural and social relations of Indian families and communities. 25 U.S.C. § 1901(5) (2012). The Act is grounded in the belief that, "the members of a tribe are its culture" and "[a]bsent the next generation, any culture is lost . . . " *In re M.E.M.*, 635 P.2d 1313, 1316 (Mont. 1981).

A. The Juvenile Court Abused Its Discretion When It Improperly Found Good Cause to Depart from ICWA Adoptive Placement Preferences.

ICWA specifies that in the adoption of an Indian child under state law, preference is given to placement with: (1) a member of the child's extended family, (2) other members of the Indian child's tribe, and (3) other Indian families. 25 U.S.C. § 1915(a) (2012). Adoptive placement preference is predicated on the absence of good cause to the contrary. *Id.* A court abuses its discretion when it, "considers improper factors, fails to consider relevant statutory factors, or assigns disproportionate weight to some factors while ignoring others." *In re Adoption of Bernard A.*, 77 P.3d 4, 7 (Alaska 2003).

1. The Juvenile Court erred by not considering the effect of Sienna's severance from her Indian identity in its extraordinary emotional needs analysis.

For the purposes of adoptive placement, a finding of good cause to modify the preferences outlined in the Act shall be based on one or more of the following considerations: (1) The request of the biological parents or the child when the child is of

sufficient age, (2) The *extraordinary physical or emotional needs* of the child as *established by testimony of a qualified expert witness*, (3) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria. *Guidelines for State Courts*, *supra* (emphasis added). Although nonbinding, the Bureau of Indian Affairs' Guidelines for State Courts on Indian Child Custody Proceedings ("Guidelines") represent the Department of the Interior's interpretation of ICWA and are entitled to great deference. *In re Krystle D.*, 30 Cal. App. 4th 1778, 1801 (1994).

a. Respondent's argument fails because it relies on a majority culture view of the child's best interests.

The finding of good cause must involve a subjective evaluation of the child's best interests as a Native American. *In re Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994) (see also *Cutright v. State*, 244 S.W.3d 702, 709 (Ark. Ct. App. 2006) (holding that it was clearly erroneous for the trial court to rely solely on a general "best interests" test)). ICWA's placement preferences provision creates a presumption that placement with the Indian family is in the child's best interests despite the child's attachment to her foster family. *People ex rel. A.R.*, 310 P.3d 1007, 1020 (Colo. App. 2012).

In *A.R.*, the Colorado Court of Appeals held that the child's attachment to her foster family and the harm resulting from the disruption of that attachment did not outweigh the cultural benefits of the child being placed with a Navajo family. *Id.* at 1019-20. "It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe—and perhaps the children themselves—in having them raised as part of the [Indian] community." *Id.* at 1020 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S.

30, 54 (1989)). Although ICWA does not require a best interests consideration to depart from the placement preferences, if this Court does make such a consideration, it should engage an assessment of Sienna's best interests *as a child of Indian heritage*. R. 16.

b. Respondent's argument fails because it does not meet the high burden required to establish extraordinary emotional needs.

The need for stability does not amount to an extraordinary emotional need. *S.E.G.*, 521 N.W.2d at 362. In *S.E.G.*, non-Indian foster parents appealed to adopt three Indian children on the basis that the children's, particularly S.E.G.'s, "extraordinary emotional needs" amounted to good cause to depart from ICWA placement preferences. *Id.* at 358. S.E.G.'s special needs consisted of behavioral problems and a language disorder. *Id.* at 359. The Supreme Court of Minnesota held that the need for stability alone was insufficient to find good cause to deviate from the preferences and that the testimonies on record failed to support the conclusion that the children had "extraordinary emotional needs." *Id.* at 358.

In the case the Juvenile Court relied upon, *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1354 (2014), the court held that good cause may exist when there is "clear and convincing" evidence that there is significant risk of the child suffering serious harm from the placement. That case involved an Indian child with a history of difficulty with attachment placed with a non-Indian family. R. 16. However, the facts of *Alexandria P.* are distinguishable from Mr. Little Bear's case. Unlike the child in *Alexandria P.*, Sienna does not exhibit a history of difficulty with attachment—in fact, the State's evidence illustrates quite the opposite. Sienna's history of forming positive attachments with her

foster fathers only further evidences her capacity to form a meaningful bond with her biological aunt.

The burden of establishing good cause is on the party seeking to depart from the outlined preferences—here, Mr. Davidson and Mr. Pratt. R. 15. Respondent's argument for the departure from adoptive placement preferences because Sienna "would suffer emotional harm" if separated from her foster fathers does not meet the high burden of establishing that the child's emotional needs are so extraordinary as to warrant good cause. R. 7. Emotional harm must in this case be looked at contextually, not from a cultural majority perspective, but rather through the lens of Indian culture and values. The Act makes it clear that, "The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community." 25 U.S.C. § 1915(d) (2012). A finding of good cause requires a balancing of interests that weighs in favor of placing Sienna with a family member within her tribe.

2. Bonding between an Indian child and her foster parents is not sufficient to establish good cause to deviate from ICWA placement preferences.

Where a child is placed in a loving foster home, the fact that separation from the foster parents will be initially painful is not good cause to defeat ICWA preferences. *In re Adoption of M.T.S.*, 489 N.W.2d 285, 287 (Minn. Ct. App. 1992). Reliance on bonding alone cannot satisfy the high burden of proving that separating an Indian child from adoptive custody will result in serious emotional or physical damage to her. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 564 (S.C. 2012). In *Baby Girl*, adoptive mother and father appellants unsuccessfully contested the transfer of a child to her

biological father, a registered member of the Cherokee Nation, claiming the child would suffer serious emotional harm from severing their bond. *Baby Girl*, 731 S.E.2d at 552. Appellants' expert conceded that even though a child may have successfully bonded once, a child can bond again. *Id.* at 563. The Supreme Court of South Carolina noted that the plain language of § 1912(d) requires a showing that the custody transfer is likely to result in *serious damage* to the Indian child, while appellants' expert admitted that the emotional damage was likely *temporary*. *Id.* at 564 (emphasis added).

It cannot be denied that Sienna has formed a bond with Mr. Davidson and Mr. Pratt. However, the decision of who will adopt this child cannot be made on the fact that a bond was formed, for if that were the standard, all caring foster parents would be the first choice for adoptive placement. Adoption is much more than a continuation of foster placement. Sienna has a right, one protected by the legislature, to form a new bond with her family and tribe.

3. The evidence in support of Respondent's case is insufficient to establish good cause to depart from ICWA preferences.

Beyond a child's best interests, factual support in the record as to "good cause" for failure to comply with statutory adoptive preferences is necessary for appropriate appellate review. *In re Interest of Bird Head*, 331 N.W.2d 785, 791 (Neb. 1983).

a. <u>The testifying expert witnesses supporting the State of Whittier's case were unqualified under ICWA.</u>

In Indian child custody proceedings, the following characteristics meet the requirements for expert witnesses: (1) a member of the Indian child's tribe recognized by the community as knowledgeable in tribal customs as they pertain to family practices, (2) an expert with substantial experience in the delivery of child and family services to

Indians with extensive knowledge of prevailing social and cultural standards within the Child's tribe, (3) a professional having substantial education and experience in his or her area of specialty. *Guidelines for State Courts*, *supra*. The Guidelines note that knowledge of tribal culture is highly valuable to the court in Indian adoption cases. *Guidelines for State Courts*, *supra*. These three qualification standards work in unison, with references to tribal childrearing practices and customs found in the first two subparts of the Guidelines helping to define who can be considered a qualified ICWA expert under the third subpart. *In re K.H.*, 981 P.2d 1190, 1196 (Mont. 1999).

In *In re Interest of Mahaney*, expert witnesses to an Indian child custody dispute were deemed unqualified, despite having substantial education and experience in their fields, due to a lack of tribal knowledge and a failure to have observed the family relations first-hand. 20 P.3d 437 (Wash. Ct. App. 2001). The Juvenile Court gave deference to Respondent's witnesses—Carolyn Swift, Sienna's play therapist, and Thomas Peabody, a child development specialist form the University of Whittier—over those presented by Maria Sanchez, counsel for Mr. Little Bear. R. 7-8. Neither Ms. Swift nor Mr. Peabody is a specialist in Indian custody cases or Indian family relations.[2] In contrast, Mr. Little Bear's testifying witnesses include Tribal Elder Mr. Ed Sky, an expert from the Cherokee Nation, and Deborah Marcus, a child psychologist form the Indian Family Support Center, two individuals with qualifications clearly more aligned with the provisions set out by the Guidelines. R. 8-9. In any other custody case, Respondent's expert witnesses would likely be qualified, but because this is a case governed by ICWA, they lack the necessary experience.

[2] Petitioner does not dispute that Respondent's third, non-testifying expert Sonia White is a qualified witness under the Guidelines.

b. The social worker report relied on at trial is merely an account of Sienna's assimilation into Anglo culture.

An expert witness with experience delivering child and family services to Indians should place specific behavior patterns in the context of the total culture to determine whether they are likely to cause serious emotional harm. *Guidelines for State Courts*, *supra*. The only individual with experience in Indian family relations included to support the State's case was DCW social worker Ms. White, who was not called to testify at the July 2, 2014 hearing addressing whether good cause existed to depart from ICWA preferences. R. 7-8. Ms. White is of American Indian heritage, but not necessarily of Cherokee heritage. R. 4.; *see In re M.H.*, 691 N.W.2d 622, 627 (S.D. 2005) (holding that the State of South Dakota's expert witness was unqualified because while he had experience dealing with other Native American tribes, his contacts and knowledge of the tribe in question were limited). In a Supreme Court of Montana case, two social workers whose reports were admitted for evidence at trial were found not to be expert witnesses under ICWA for lack of testifying in person as to their experience with Indian culture specifically at the hearing. *In re Adoption of H.M.O.*, 962 P.2d 1191, 1194, 1196 (Mont. 1998) (holding that departure from ICWA custody preferences would result in serious emotional or physical damage to Indian child H.M.O.).

While Ms. White's testimony was heard on June 15, 2013, when the Juvenile Court initially ordered that Sienna be placed with her maternal grandparents during reunification, only Ms. White's reports were used in the July 2, 2014 good cause hearing. R. 4-5. Her reports neglected to investigate Sienna's extended family open to adopting her. Rather, the reports are merely accounts of Sienna's assimilation into non-Cherokee culture, chronicling for instance Sienna's involvement in "yoga for toddlers" and

"practicing her ABCs." R. 8. While Sienna's knowledge of the English alphabet is valuable, she lacks comprehension of Cherokee, which is its own language desperately in need of preservation.[3] The report's mention of Sienna's "entire world revolv[ing] around" Mr. Davidson and Mr. Pratt, speaks only to the demise of her Cherokee identity. R. 8. This Court should find issue with the fact that Ms. White did not testify at the relevant hearing and that her report is not culturally sensitive and fails to address the value in Cherokee culture beyond receiving "Cherokee gifts" and owning one "Cherokee children's book." R. 8.

B. Sienna Was Improperly Denied Adoptive Placement with Her Biological Aunt, Which Directly Contradicts ICWA and Congressional Intent.

ICWA mandates the prioritization of the placement of Indian children into foster or adoptive homes that reflect the unique values of Indian culture. 25 U.S.C. § 1902 (2012). As noted in the Guidelines, with the enactment of ICWA, Congress expressed its clear preference for keeping Indian children who must be removed from their homes with their families or Indian tribes. *Guidelines for State Courts*, *supra*. Specifically, the Act states that the extended family of the child should be looked to first, preferably within the same tribe due to differences in culture among tribes.

1. Ms. Redbird, Sienna's biological aunt, is the preferred caretaker for adoptive placement.

The enactment of ICWA was predicated upon Congress's recognition of the differences between Anglo notions of family and Indian culture, where the "nuclear family" is believed to include extended family. *In re K.H.*, 981 P.2d at 1197. The Act

[3] For example, ᏩᎳᎩ for "Cherokee," ᎣᏏᏲ for "hello," and ᏩᏙ for "thank you." *see* Cherokee Heritage Center, *A Handbook of the Cherokee Verb*, *available at* http://www.cherokee.org/LinkClick.aspx?fileticket=KGTYObDvXKE%3d&tabid=6877&portalid=0&mid=9018.

defines "extended family member" as a person over the age of eighteen who is the Indian child's, "grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent." 25 U.S.C. § 1903(2) (2012). Further, the Guidelines provide, "[t]he court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision." *Guidelines for State Courts*, *supra*.

DCW contacted Ms. Redbird to inquire about her interest in adopting Sienna, to which Ms. Redbird responded that she would gladly have Sienna in her home and adopt her. R. 7. As a member of the Cherokee Nation, Ms. Redbird's connection with Sienna is more than her bloodline alone. Ms. Redbird visited Sienna after her birth and registration with the Cherokee Nation to perform a Cherokee blessing for her niece. R. 1. Furthermore, Mr. Little Bear has personally expressed his interest in having Sienna placed with his sister, Ms. Redbird, and ICWA recommends this outcome. R. 17.

2. Sienna was not placed with Ms. Redbird when she first entered foster care because reunification could not be facilitated out of state, but that issue is no longer relevant when dealing with adoptive placement.

ICWA indicates that an Indian child placed in foster care or preadoptive placement shall be placed within reasonable proximity to his or her home and in the absence of good cause to the contrary, the order of preference is first with a member of the Indian child's extended family, followed by foster homes approved by or run by members of the child's or another Indian tribe. 25 U.S.C. § 1915(b) (2012). Adoptive placement per § 1915(a) does not have a "reasonable proximity" requirement like § 1915(b), which governed Sienna's initial placement with Mr. Davidson and Mr. Pratt.

The Oklahoma Indian Child Welfare Act states that, "the person or placement agency shall utilize to the *maximum extent possible* the services of the Indian tribe of the child in securing placement." 10 OKLA. STAT. ANN. tit. 10, § 40.6 (West 2014) (emphasis added). Ms. Redbird resides in Oklahoma. R. 1. Absent good cause, which Respondent has failed to prove, Ms. Redbird is Sienna's preferred adoptive caretaker. If Sienna is placed per ICWA preferences with Ms. Redbird she will not only return to her family, she will also be reunited with her Cherokee community.[4]

CONCLUSION

For the aforementioned reasons, this Court should reverse the decision of the Whittier Court of Appeal.

Dated: January 3, 2015

Respectfully submitted,

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Team 17
Counsel for Petitioner

[4] The Cherokee Nation's jurisdiction is comprised of fourteen counties in northeastern Oklahoma. Cherokee Nation, *Cherokee Nation Jurisdiction*, *available at* http://www.cherokee.org/Portals/0/Documents/2013/01/33080Cherokee_Nation_Jurisdiction.pdf.