No. 923-2014

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IN THE

# Supreme Court of the State of Whittier

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DANIEL LITTLE BEAR,
*Petitioner*,

v.

STATE OF WHITTIER,
Kathryn Chandler,
Director of the Whittier Department of Child Welfare,
*Respondent*,

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**ON WRIT OF CERTIORARI**
**TO THE STATE OF WHITTIER COURT OF APPEAL**

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**Brief for the Respondent**

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Team 21
January 2, 2015

Counsel for Respondent

## QUESTION PRESENTED

1. Whether the Juvenile Court correctly found by clear and convincing evidence that the Department of Child Welfare made active efforts to provide Mr. Little Bear with remedial services when a two year case plan yielded an unsuccessful reunification and Mr. Little Bear was soon after incarcerated in state prison.
2. Whether the Juvenile Court correctly found there was good cause to deviate from the adoptive placement preferences outlined in the Indian Child Welfare Act when Sienna has developed a significant attachment to Messrs. Davidson and Pratt, and expert testimony established that Sienna is likely to suffer irreparable trauma if removed from their care.

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**BRIEF FOR THE RESPONDENT**

## OPINION BELOW

The orders of the Jenning County Juvenile Court are unpublished. The unpublished opinion of the State of Whittier Court of Appeal's opinion appear on pages 1-17 of the record. *Daniel Little Bear v. State of Whittier*, No. 923-2014 (Nov. 15, 2014).

## JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked pursuant to 25 U.S.C. § 1911 (1978).

## STATEMENT OF THE CASE

A. Statement of Facts

On November 1, 2012, Sienna Little Bear was born to Melissa Diaz and Daniel Little Bear (a member of the Cherokee Nation). R.1. Immediately after birth Sienna was registered with the Cherokee Nation and given a traditional Cherokee blessing by her paternal aunt, Patricia Redbird. R.1. At Sienna's six month pediatric check-up in May 2013, she was noted as being one pound underweight and diagnosed with plagiocephaly. R. 2. One week later, Mr. Little Bear again presented with Sienna to the clinic where her weight had decreased another three ounces. R. 2. On May 21, 2012, Sienna returned to the clinic having gained three ounces. R.2. At each of the above visits, Mr. Little Bear was provided with diapers and formula due to an inability to afford these items. R. 2.

From the time of Sienna's birth, Ms. Diaz suffered from postpartum depression leading to excessive substance abuse, ultimately culminating in her drug related homicide of May 22, 2012. R.3. On the date of Ms. Diaz's death, social worker Sonia White, accompanied by police, informed Mr. Little Bear of her death and notified him that the Department of Child Welfare was conducting an investigation pertaining to Sienna's welfare and safety. R. 3. Mr. Little Bear agreed to cooperate with the investigation welcoming DCW's assistance. R. 3. Ms. White directed Mr. Little Bear to a support group for Native American fathers, and assisted him in obtaining a crib and clothing for Sienna. R. 3. Moreover, Ms. White ensured that Mr. Little Bear would receive ten free session of grief counseling. R. 3.

Struggling with Ms. Diaz's death, Mr. Little Bear failed to return to Sienna's doctor as requested. R.3. Unemployed and unable to pay his obligations, Mr. Little Bear faced eviction for non-payment of rent. R. 3. In response, Ms. White referred Mr. Little Bear to a job training program and subsidized housing. R. 3. With eviction imminent, Ms. White successfully relocated Mr. Little Bear to an emergency shelter. R. 4. Immediately thereafter, Ms. White filed a petition to adjudge Sienna a dependent child of the court. R. 4. On June 15, 2012, the Juvenile Court adjudged Sienna a dependent child of the court under Whittier Juvenile Code § 100(b), also

finding her subject to the provisions set forth under the Indian Child Welfare Act (hereinafter "ICWA"). R. 4. After the above adjudication, the court appointed Mr. Stone and Ms. Sanchez as attorneys for Sienna and Mr. Little Bear, respectively. R. 4. Sienna was placed temporarily with her maternal grandparents during the reunification period. R. 5.

On August 20, 2013, the court conducted adjudication and disposition hearings, ordering Mr. Little Bear to receive remedial services for the purpose of reunification. R. 5. At the same hearing, Sienna's maternal grandparents requested her removal from their home because of perfuse crying and digestive problems. R. 5. The court re-placed Sienna in the non-relative foster home of Messrs. Davidson and Pratt, a non-Indian, Caucasian, married couple. R. 5. The Cherokee tribe consented to this re-placement to facilitate reunification efforts. R. 5. During her placement with Messrs. Davidson and Pratt, Sienna experienced overall health improvements. R. 5. These improvements included: a cessation of excessive crying; a cessation of digestive problems; experiencing a normal sleep schedule; proper nutrition; her enrollment in private physical therapy to strengthen her neck; and prescription of a helmet, which she wore at night, so that her head could regain its proper shape. R. 5

In November 2013, Sienna's doctor noted that her plagiocephaly had nearly resolved itself due to the efforts of Messrs. Davison and Pratt. R. 5. Sienna was then enrolled in play therapy, for which both her foster parents participated in. R. 5.

During Sienna's first two months in foster care, Mr. Little Bear, with the assistance of DCW, made efforts to reunite with his daughter, including: attended parenting classes at the Indian Family Support Center, which Ms. White often transported him to and from; visiting with Sienna during her first months in foster care; attending one-on-one therapy for a period of six weeks, which Ms. White arranged; procuring part-time employment at a local cafe; and saving money for Sienna's return. R. 6. In November 2013, Mr. Little Bear was cited for public intoxication and began missing regularly scheduled visits with Sienna. R. 6.

At the six-month hearing on December 15, 2013, after taking note of Mr. Little Bear's progress toward reunification along with his recent citation for public intoxication, the court ordered his enrollment in substance abuse counseling. R. 5. Mr. Little Bear complied with the

court order, attending meetings regularly. R. 5. Additionally, on December 23, 2013, Mr. Little Bear visited with Sienna at the mall where they exchanged gifts and took pictures. R. 6. Messrs. Davidson and Pratt also attended this meeting. R. 6. During the next six months, Mr. Little Bear regularly visited with Sienna. R. 6.

Despite Mr. Little Bear's recent efforts toward rehabilitation, he was arrested on March 17, 2014 for driving while under the influence, convicted, and sentenced to 12-18 months incarceration. R. 6. During confinement, Mr. Little Bear called Sienna, sent mail, and was visited by her on occasion through the efforts of Messrs. Davidson and Pratt. R. 6. Additionally, Mr. Little Bear participated in parenting courses, and requested weekly updates from Messrs. Davidson and Pratt. R. 9.

At the June 2014 hearing, the court terminated remedial services due to Mr. Little Bear's incarceration and the limitations it imposed, notwithstanding his desire to continue reunification efforts. R. 6. Ms. Redbird, paternal aunt of Sienna, displayed interest in adopting Sienna. R. 7. However, Mr. Stone, joined by counsel for DCW, objected to Sienna's change in placement. R. 7. Accordingly, the matter was set for contest to address whether good cause existed to depart from the ICWA placement preferences. R. 7.

B. Procedural History

On June 15, 2013 the court adjudged Sienna a dependent child of the state. R. 4. Subsequently, on August 20, 2013, the court conducted adjudication and disposition hearings, offering remedial services to further reunification R. 5. On December 15, 2013, after discovering Mr. Little Bear's citation for public intoxication, the court ordered Mr. Little Bear to participate in substance abuse counseling. R. 6.

At the twelve month hearing in June 2014, the court terminated remedial services. R. 6. Maria Sanchez, counsel for Mr. Little Bear, objected to the termination, asserting that DCW failed to make active efforts toward reunification. R. 6. The court overruled her objection, finding that active efforts were made by clear and convincing evidence. R. 6-7. Further, the court opined that Mr. Little Bear's incarceration made further efforts by DCW futile. R. 7. Ms. Sanchez objected, asserting the court inappropriately applied a clear and convincing standard

where the higher threshold of beyond a reasonable doubt should have applied. R. 7. The court again overruled her objection. R. 7. Thus, pursuant to the ICWA pre-adoptive placement preferences, Ms. Redbird was contacted first regarding placement of Sienna. R. 7. However, DCW declined to place Sienna with her out of state paternal aunt because reunification could not be facilitated interstate. R. 7. The matter was set for contest to determine if good cause existed to deviate from the ICWA placement preferences. R.7.

On the July 2, 2014 good cause hearing, Mr. Stone, counsel for Sienna, argued that good cause existed to deviate from the ICWA placement preferences and advocated that she remain with Messrs. Davidson and Pratt because of the emotional trauma she would sustain if removed from their care. R.7. To support his position that good cause existed, Mr. Stone presented testimony from three expert witnesses. R. 7.

First, Ms. Swift, Sienna's play therapist, testified that Sienna appeared uninterested in Mr. Little Bear at play therapy and highlighted the instances where Sienna requested assistance from Messrs. Davidson and Pratt, as opposed to Mr. Little Bear. R.7.

Mr. Stone then called Ms. White, Sienna's social worker, who testified that a bond was created between Sienna and her foster parents; noting that Sienna was enrolled in yoga, gymnastics, part-time preschool, and other age appropriate tasks. R. 8. Ms. White also noted the attachment between Sienna and her fosters fathers' golden retriever named Buddy. R. 8. Ms. White concluded that in her observation, Messrs. Davidson's and Pratt's entire world seemed to revolve around Sienna and likewise Sienna's entire world revolved around them. R. 8.

Finally, Mr. Stone called Mr. Peabody, a child development specialist. R. 8. He testified that with any removal from a loving home there is risk the child may not recover or find attachment again. R. 8. Mr. Peabody then concluded that Sienna was likely to suffer trauma if removed from her foster parents and the damage may be irreparable. R. 8.

To rebut the argument for good cause, Ms. Sanchez called three expert witness. R. 8. First, Mr. Sky, a tribal elder and expert from the cherokee nation, opined that while there may be attached to Messrs. Davidson and Pratt such attachment was not as important as her Cherokee heritage. R. 8-9. Further, Mr. Sky testified that Ms. Redbird could form a bond equal to that of

Messrs. Davidson and Pratt. R. 9. Lastly, Mr. Sky was confident that any trauma suffered could be cured through proper parenting, therapy, and support from the Cherokee community. R. 9.

Ms. Sanchez next called Ms. Marcus, a child psychologist from the Indian Child Support Center. R. 9. She testified that Sienna is clearly able to form attachment and although Sienna may experience temporary loss by removal from her foster parents, Sienna's attachment to her paternal aunt and indian heritage was paramount. R. 9. Ms. Marcus' testimony was predicated entirely on her own research. R. 9.

Finally, Ms. Sanchez called Mr. Gutierrez, Mr. Little Bear's therapist. R. 9. Mr. Gutierrez testified that Mr. Little Bear was making positive progress prior to his incarceration and is an active participant in Sienna's life. R. 9. Mr. Gutierrez testified to the proactive reunification efforts Mr. Little Bear has made even while incarcerated. R.9.

At the conclusion of testimony, the court found by clear and convincing evidence that good cause existed to deviate from the ICWA placement preferences, and ordered Sienna adoptively place with Messrs. Davidson and Pratt. R. 9. Mr. Little Bear timely appealed the Juvenile court ruling to the Whittier Court of Appeals who later affirmed the Juvenile court opinion. R. 10. The appellate court opined that the burden to prove active efforts prior to termination of remedial services is clear and convincing evidence, and that any further efforts would be futile because of Mr. Little Bear's incarceration. R. 13. Secondly, the lower court found that good cause existed to deviate from the ICWA placement preferences. R. 17. The disposition of Petitioner's case is now brought before this Court on Appeal.

C. Statutory Provision Involved

This case involves the interpretation of 25 U.S.C. §§ 1912(d) and 1915(a). Both statutory provisions have been recreated, in relevant part, in Appendices I and II respectively.

## SUMMARY OF ARGUMENT

I. The proper burden applied under § 1912(d) is clear and convincing evidence because the highest burden of proof beyond a reasonable doubt was conspicuously and deliberately left absent from the subsection's text. Although § 1912(d) has no express burden of proof delineated by Congress, the legislature's intent is readily apparent not by reading into the statute what

Congress purposefully omitted; but rather in examining the facts and circumstances enveloping the statute. § 1912(d)'s plain and ordinary language suggests that Congress intentionally envisioned a lower standard to apply than reasonable doubt. Additionally, legislative history advises that subsec. (d)'s inclusion under § 1912, *et seq.* was modeled after existing state laws—these laws carrying their own applicable burdens of proof—further supporting the notion that Congress envisioned state sovereigns as the final arbiters concerning which burden would apply under subsec. (d). Lastly, Congress revisited § 1912, *et seq.*, subsequent to the statute's creation, amending the burden applicable under subsec. (e), yet declining to amend the silent burden under subsec. (d).

Moreover, any inference seeking to impute the burdens of proof associated under subsecs. (e) and (f) onto (d), contradicts permitted methods of statutory interpretation and ignores the intent underlying subsec. (d)'s inclusion within the ICWA. Court's have amply noted a prudent reluctance to expand the scope of legislation where credible evidence suggests the legislative body deliberately intended a textual vacancy.

Additionally, the Juvenile court properly applied the futility test to the present case because Mr. Little Bear's failure to benefit from the state's prolonged and substantial efforts demonstrated a reasonable likelihood that further active efforts exerted by the state would be futile in nature. Moreover, the present incarceration of a parent indeed presents a considerable barrier toward reunification and a court may consider the continuation of remedial services ineffectual in light of this hindrance. Thus, when active efforts provided by the state have reached their futility—either in the present dependency proceeding or through a parent's demonstrated conduct in a previous matter—a court may terminate remedial services and move forward under subsecs. (e) or (f).

Accordingly, the lower court properly found the burden applicable under § 1912(d) is clear and convincing evidence. Further, the lower court was correct when it found the state had provided Mr. Little Bear active efforts aimed at reunification and properly terminated said efforts only after their continuation was proven futile.

II. The State of Whittier Court of Appeals did not abuse its discretion when the court found, by a showing of clear and convincing evidence, that good cause existed to depart from the ICWA placement preferences.

Although the *Bureau of Indian Affairs: Guidelines for State Courts* (hereinafter "*Guidelines*") are persuasive the lower court appropriately found that they are not exclusive nor binding. This is evidence by the introductory language to the *Guidelines*, which stands in contrast to the minority jurisdictions who have inappropriately determined that the *Guidelines* are exclusive to the determination of good cause. In doing so these courts have violated the expressed congressional intent in enacting the ICWA by refusing to consider the best interests of the child. Furthermore, by refusing to consider the best interests of the child these courts also jeopardize the future stability and security of the Indian community.

Congressional intent in enacting the ICWA provided flexibility to state courts in determining adoptive placement. This affords courts the ability to consider other factors in addition to those delineated within the ICWA.

Moreover, in applying the factors contained within the Guidelines, the lower court properly found that Sienna's emotional needs necessitated continued placement with her foster parents. The Court of Appeals correctly determined that the best interest of the child are central to the determination of good cause, and likewise, properly considered Sienna's attachment to her foster parents as well as their ability to provide for a safe and stable environment for Sienna.

Thus, Mr. Little Bear should not overcome the standard of abuse of discretion and accordingly the decision of the State of Whittier Court of Appeals should be affirmed, and this Court should find that good cause existed to deviate from the placement preferences.

## STANDARD OF REVIEW

With respect to section I.A., "[i]ssues involving the application and interpretation of the ICWA [are reviewed] *de novo* as questions of law." *In re JL*, 770 N.W.2d 853, 863 (Mich. 2009). With respect to section I.B., whether the state has satisfied the "active efforts" requirement of the ICWA is a mixed question of law and fact and is reviewed *de novo*. *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 621 (S.D. 2005).

With respect to section II the court will "review a finding of good cause to deviate from [the] ICWA preferences for abuse of discretion. It would be an abuse of discretion for a . . . court to consider improper factors or improperly weigh certain factors in making its determination." *In re Adoption of Sara J.*, 123 P.3d 1017, 1021 (Alaska 2005).

## ARGUMENT

### I. THE LOWER COURT PROPERLY CONCLUDED THAT ACTIVE EFFORTS UNDER § 1912(D) ARE TO BE PROVEN BY CLEAR AND CONVINCING EVIDENCE AND THAT THE STATE HAD PROVIDED ACTIVE EFFORTS BECAUSE THEIR CONTINUATION WOULD BE FUTILE IN MR. LITTLE BEAR'S CASE.

The appellate court properly held the State of Whittier had made "active efforts" in providing Mr. Little Bear remedial services under a clear and convincing standard, because proof beyond a reasonable doubt does not apply to § 1912(d). Accordingly, this Court should affirm the appellate court's holding. 25 U.S.C. § 1912(d) provides that "[a]ny party seeking to effectuate a foster care placement 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 (1978).

The state will show the appropriate standard of proof applicable under § 1912(d) is clear and convincing evidence, as this standard places an adequately heightened burden on the state when determining whether active efforts were made prior to terminating remedial services. Additionally, the state will also show the lower court's application of a futility test was proper because Mr. Little Bear's own conduct demonstrated the futility in continuing remedial services. Therefore, the lower court's ruling should be affirmed because the state has satisfied a showing of active efforts by clear and convincing evidence under § 1912(d).

#### A. Clear and convincing evidence is the appropriate standard to apply under § 1912(d) because: 1) Congress did not intend a uniform standard of proof to be applied under this section; and 2) imputing § 1912(f)'s reasonable doubt burden on to subsection (d) is an improper form of statutory interpretation.

Unlike the provisions set forth in 25 U.S.C. § 1912 (e) and (f), congress did not expressly indicate which burden of proof would apply when assessing whether the state actor made active

efforts in avoiding the break-up of an Indian family. Further, termination of remedial services serves as a predicate to both termination of parental rights (hereinafter "TPR") and foster care placement of an Indian child. The former requires a showing beyond a reasonable doubt that continued custody is likely to result in serious physical or emotion injury to the child. 25 U.S.C. § 1912(f) (1978). Conversely, the latter, under § 1912(e), requires a showing of clear and convincing evidence of the same. 25 U.S.C. § 1912(e) (1978). Notably, § 1912(e) originally mandated a showing of proof beyond a reasonable doubt, but was later amended by Congress to require a lesser showing of clear and convincing evidence. *Matter of Baby Boy Doe*, 902 P.2d 477, 483 (Idaho 1995) (*quoting* H.R.Rep. No. 1386, 95th Cong.2nd Sess. 22 (1978)).

Using the above framework, the state will show that the burden required to prove active efforts under § 1912(d) was left vacant not by congressional inadvertence, but rather by corroborated intent. As "Congress displayed considered precision in articulating the evidentiary burdens it was imposing" when amending the burden applicable under § 1912(e), yet preserving subsec. (d)'s silent burden, a credible inference may be drawn emphasizing legislative intent to defer its burden applicable to state courts. *Baby Boy Doe*, 902 P.2d at 483.

1. <u>The burden to be applied under § 1912(d) is a matter for state governments to decide, as evidenced by the statute's language, creation, and congressional activities subsequent to its adoption.</u>

In *Baby Boy Doe*, the Idaho Supreme Court considered whether the lower court erred in its application of a clear and convincing standard when determining whether the state had made active efforts in providing an Indian father with remedial services prior to a TPR. *Id.* at 482. The Idaho court ruled the trial court did not err in its application of a clear and convincing standard, noting that: 1) the plain language of § 1912(d) gives rise to the conclusion that Congress did not intend the highest standard when evaluating active efforts; 2) Congress did not intend to place a higher burden under subsec. (d) than those state laws which it was modeled after; and 3) Congress demonstrated an opportunity to revise subsec. (d) when it amended (e)'s burden, yet chose not to. *Id.* at 482-83. The circumstances in our present case conform perfectly to the legislative intent behind Congress' drafting of the ICWA and its inclusion of § 1912(d) therein.

Firstly, as the *Baby Boy Doe* court explained, the inclusion of the language "shall *satisfy* the court" within subsec. (d)—on its face—implies a showing of proof below that of reasonable doubt. *Id.* at 482; *citing E.g., Ada County v. Roman Catholic Diocese,* 849 P.2d 98, 101 (Idaho 1993) (explaining ordinary words are to be given their ordinary meaning when interpreting statutes, unless conflicting intent is clearly manifested) (emphasis added). Here, the Juvenile court thoroughly examined and was "satisfied" by the remedial services provided to Mr. Little Bear. Moreover, this satisfaction arose not under a diminutive standard. The burden of clear and convincing evidence remains a heightened standard, operating well above that of preponderance. Thus, this heightened burden applied by the Juvenile court remains consistent with the statutory scheme of the ICWA and, particularly, § 1912(d), in that such a standard provides an enhanced measure of oversight when the removal of Indian children is at issue. *See In re Vaughn R*., 770 N.W.2d 795, 810 (Wis. Ct. App. 2009) (holding that while Congress clearly drafted the ICWA to protect Indian families by imposing minimum federal standards, such an design does not presume Congress intended the highest burden of proof under § 1912(d), especially where the burden went undisclosed); *See also K.N. v. State*, 856 P.2d 468, 476 (Alaska 1993) (holding that preponderance of the evidence was an appropriate standard for determining whether active efforts were made by the state); *But see Matter of Welfare of M.S.S*., 465 N.W.2d 412, 418 (Minn. Ct. App. 1991) (finding the protective purpose behind the ICWA required proof of active efforts beyond a reasonable doubt). Accordingly, the Juvenile court appropriately found that the state had made active efforts pursuant to the plain meaning of § 1912(d)'s ordinary language.

Secondly, the *Baby Boy Doe* court recognized that subsec. (d) was molded after many states' existing laws mandating the performance of reasonable efforts prior to terminating remedial services. *Baby Boy Doe*, 902 P.2d at 482-83. Further, these provisions carry burdens of proof which the state's legislature and/or judiciary deemed appropriate under their current juvenile dependency system. *Id.* While it is unclear whether the State of Whittier maintains a comparable statute under its child welfare laws, the lower court's holding that a clear and convicting standard applies in the state conforms to the legislative intent behind subsec. (d). State authority is the ultimate arbiter when deciding the burden applicable under subsec. (d), not the

federally mandated burden delineated under subsec. (f). "Congress did not intend in 25 U.S.C. § 1912 to create a wholesale substitution of state juvenile proceedings for Indian children. Instead . . . Congress created additional elements that must be satisfied for some actions but did not require a uniform standard of proof for the separate elements." *In re Interest of Walter W.*, 744 N.W.2d 55, 60 (Neb. 2008); *See also People ex rel. C.Z.*, 262 P.3d 895, 905 (Colo. App. 2010) (rejecting an application of a reasonable doubt standard in proving active efforts, instead applying the state's clear and convincing burden for non-ICWA showings of reasonable efforts).

Lastly, had Congress wished to express a reasonable doubt standard under subsec. (d), it could easily have done so at the statute's advent or when it revisited § 1912, *et seq.* and amended subsec. (e)'s burden. *Baby Boy Doe*, 902 P.2d at 483. The court in *In re Michael G.* reached a similar conclusion, holding that "[t]he insertion of a specific standard of proof in subdivision (f), but not in subdivision (d), of § 1912 evidences the intent that no specific federal standard applies to a determination made under the latter provision." *In re Michael G.*, 63 Cal. App. 4th 700, 710 (1998). In reaching its decision, the *Michael G.* court further relied on *Suman v. BMW of North America, Inc.*, which held where congress carefully placed a term in one section of a statute, yet omitted the same term in another section, no implication should be drawn regarding the term's inclusion. *Suman v. BMW of North America, Inc.*, 23 Cal. App. 4th 1, 10–11 (1994). Consequently, no conclusory inference should be drawn regarding subsec. (d)'s silent burden. A more coherent inference exists when examining the totality of congressional action surrounding the statute, thus supporting the notion that Congress intended a lesser standard than reasonable doubt to apply and deferred the determination of said standard to the states' existing laws.

2. <u>An assertion that the reasonable doubt burden under subsec. (f) is applicable to subsec. (d) ignores congressional intent and employs improper means of statutory interpretation.</u>

Contrary to the analysis above, the court in *People in Interest of R.L.* reached an opposite conclusion, holding that a reasonable doubt standard was the appropriate burden under § 1912(d). *People In Interest of R.L.*, 961 P.2d 606, 608 (Colo. App. 1998); *See also In re L.N.W.*, 457 N.W.2d 17 (Iowa Ct. App. 1990); *In re Welfare of M.S.S.*, 465 N.W.2d at 412; *In re Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986). The *R.L.* court noted that logic compelled an application

of a reasonable doubt standard because the same standard is statutorily mandated in TPR hearings under § 1912(f). *People In Interest of R.L.*, 961 P.2d at 609. The *R.L.* court further reasoned that because a § 1912(d) hearing is often a predicate to a subsec. (f) hearing, an application of the TPR's heightened standard appeared consistent with the statute's intent. *Id.*

However, the *R.L.* court's logic is errant for two reasons. Firstly, the court failed to consider that subsec. (d) also serves as a predicate to subsec. (e) in many instances. In this sense, an equally valid case could be made for the clear and convincing standard's adoption under subsec. (d), as (d) also serves as a vehicle effectuating foster care placement. Accordingly, this logic compels a cyclical argument, resulting in the very ambiguity § 1912(d)'s silent burden has created. Moreover, such a result strips state governments of their autonomy in applying the burdens already in place concerning a showing of active efforts.

Secondly, after taking notice of § 1912(d)'s silent burden and the expressed burden under subsec. (f), the court concluded "that logic compel[ed] . . . [an] . . . application of the same 'beyond a reasonable doubt' standard of proof as to both statutory provisions". *Id.*; *See also In re G.S.*, 59 P.3d 1063, 1071(Mont. 2002)(holding that subsec. (d)'s burden of proof corresponds to whichever proceeding it serves as a predicate to); *But see In re Vaughn R.*, 770 N.W.2d at 810 (rejecting the notion that the subsec. (d)'s silent burden coincides with subsecs. (e) and (f)'s express burdens). The *R.L.* and *G.S.* courts' holdings take great liberty with legislative intent and appear to employ, without reference, the doctrine of *expressio unius est exclusion alterius* meaning "to express or imply one thing implies the exclusion of the other, or of the alternative." *Black's Law Dictionary* (9th ed. 2009), *available at* Westlaw BLACKS. However, the Supreme Court has consistently held the doctrine of *expressio unius* may not be used as a primary means for inferring congressional intent where a statutory term is expressed in one section and silent in another. "[T]he cannon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (*quoting United States v. Vonn,* 535 U.S. 55, 65 (2002)). In § 1912, *et seq.*, the provisions enumerated

under subsecs. (d), (e), and (f) operate independently and bear no association with each other—except to the extent that each involve the welfare of an Indian child to some degree. As subsec. (d) technically concerns the status of an Indian parent and his relationship to the state's active efforts, while subsecs. (e) and (f) concern the child's removal, it cannot be said that these subsections are closely related enough by group or series, such as to justify the imputation of the reasonable doubt burden on to subsec. (d).

Building off the abovementioned logic, the court in *Yvonne L. v. Arizona Dep't of Econ. Sec.* confronted the issue of which burden is appropriate under § 1912(d). *Yvonne L. v. Arizona Dep't of Econ. Sec.,* 258 P.3d 233, 239 (Ariz. Ct. App. 2011). The Arizona court found the state's clear and convincing evidence standard was applicable, stating "Congress plainly intended for the most stringent standard of proof to apply . . . [under subsec. (f)] . . . and [w]ith equal clarity, Congress chose not to specify a standard of proof applicable to the 'active efforts' requirement when it easily could have done so." *Id.* at 239. In further elaboration, the *Yvonne* court articulated a judicial reluctance to expand the scope and/or requirements of a statute where not expressly stated. *Id.*; *Cf. Dean v. United States*, 556 U.S. 568, 573 (2009) (holding that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (*quoting Russello v. United States,* 464 U.S. 16, 23 (1983)).

Accordingly, § 1912(d)'s standard of proof ought not be inferred from either burden associated under subsecs. (e) or (f), as the *R.L.*, *G.S.*, and *M.S.S.* courts have opined. To do so would run contrary to the binding authority set forth in *Dean* and *Russello,* because it hastily presumes legislative intent by the mere fact that subsec. (d) was drafted without an express burden. Rather, as discussed fully above, legislative intent is properly gleaned when applying the plain language of the statute; whether the statute was modeled after comparable state laws containing their own burdens of proof; and after close examination of congressional activities surrounding the statute subsequent to its adoption. Based on these factors, it is clear that Congress intended state sovereigns to govern which burden of proof would apply under § 1912(d). In light of the above, this court should find that the application of a clear and

convincing standard under § 1912(d) adequately reflects congressional intent, given the circumstances surrounding the statute's adoption and its subsequent legislative history.

B. The Juvenile court correctly applied a futility test to Mr. Little Bear's case, and therefore the state proved by clear and convincing evidence that active efforts were made prior to terminating remedial services.

A test measuring whether a state actor has made active efforts in providing remedial services prior to their termination is not described in § 1912(d). Moreover, the ICWA statute provides no guidance concerning Indian parents who have been furnished remedial services over a protracted period of time and whether continued services by the state would be fruitless. Accordingly, many states have adopted a "futility test" addressing the situation described above.

Under the ICWA, a state is required to make active efforts toward furthering reunification; however, it is not required to persist in futile efforts. *People ex rel. J.S.B., Jr.*, 691 N.W.2d at 621; *See also Letitia V. v. Superior Court of Orange County,* 81 Cal.App.4th 1009, 1016 (2000); *State ex rel. C.D.*, 200 P.3d 194, 207 (Utah Ct. App. 2008); *People in Interest of A.R.P.*, 519 N.W.2d 56, 60 (S.D. 1994) (holding an examination of facts surrounding parents' prior TPR's was proper to assess the futility of active efforts in the current proceeding); *But see In re J.L.*, 770 N.W.2d at 853 (declining to adopt a futility test when determining whether active efforts were made prior to terminating remedial services). Futile efforts are present when a state has exerted substantial, yet unsuccessful efforts, over several years and there is no reasonable belief further efforts would promote reunification. *People ex rel. K.D.*, 155 P.3d 634, 637 (Colo. App. 2007). Moreover, the "active efforts . . . need not be part of a treatment plan offered as part of the current dependency proceedings. A department may engage in 'active efforts' by providing formal or informal efforts to remedy a parent's deficiencies before dependency proceedings begin." *Id.* at 637.

Applying the above, the state will show the futility test was properly applied to Mr. Little Bear's case because his previous and substantial receipt of remedial services, coupled with an inability to correct his delinquent behavior, has made further efforts by the state futile. Additionally, the state will show that Mr. Little Bear's current incarceration is an insurmountable barrier toward reunification, and thus, further efforts by the state would constitute futile acts.

1. Mr. Little Bear's prior and substantial receipt of remedial services, over the course of two years, has made future efforts futile.

In *People ex rel. J.S.B., Jr.*, the South Dakota Supreme Court addressed whether further active efforts by the state were futile given the Indian family's lengthy history within the child welfare system. *Id*. The court found the state was not required to continue active efforts where such services would be futile. *Id.* at 621. In concluding, the *J.S.B.* court noted that because "DSS worked with the parents for several years . . . that the child has been in foster care for much of his life, and that both parents continued their debilitating substance abuse," further efforts by the state would be futile in nature and a TPR was appropriate under § 1912(f). *Id*.

Similarly, Sienna has resided in foster care for a majority of her life. Moreover, Mr. Little Bear's substance abuse has proven incessant, given his previous success in rehab yet subsequent relapse resulting in his arrest and incarceration.

Furthermore, as the *K.D.* court noted, substantial services offered by the state may be reviewed even when preceding a dependency action and may encompass formal, as well as informal, services. *People ex rel. K.D.*, 155 P.3d at 637. In the present case, Ms. White assisted Mr. Little Bear in signing up for a supplemental nutrition program; in obtaining a crib and clothing for Sienna; directed him to a support group and ensured he receive ten free grief counseling sessions. R. 3. Additionally, she referred him to emergency housing, job placement programs, subsidized housing, and even assisted him in relocating when facing eviction. R. 3-4. After the court adjudged Sienna a dependent child on June 15, 2013, Mr. Little Bear was furnished substance abuse counseling, one-on-one therapy, and transportation to and from parenting classes. R. 5-6. In sum, these substantial services continued in excess of two years, resulting only in a realized impossibility of reunification via his recent incarceration.

Accordingly, the protracted and substantial efforts exerted by the state support a showing by clear and convincing evidence that active efforts by the state have been made and that further efforts would be futile.

2. Mr. Little Bear's incarceration would make further active efforts by the state futile.

In supporting its position that further active efforts by the state were futile due to Mr. Little Bear's incarceration, the lower court relied on *Idaho Dep't of Health & Welfare* and *A.A. v. State Dep't of Family & Youth Servs.* R. 13. The lower court's reliance on these cases was appropriate because both cases demonstrate insuperable hurdles toward reunification when the parent is incarcerated for an extended period of time.

In *Idaho Dep't*, the Idaho appellate court considered whether further remedial services would be futile, given the father's present incarceration. *Idaho Dep't of Health & Welfare*, 275 P. 3d 23, 25 (Idaho Ct. App. 2012). The court found that further remedial services would be futile and their discontinuation was merited because the father himself had frustrated the possibility of reunification based on his own actions. *Id.* at 33. Likewise, the court in *A.A. v. State Dep't of Family & Youth Servs.* held incarceration would constitute an insurmountable barrier to reunification, thus making further efforts by the state futile. *A.A. v. State Dep't of Family & Youth Servs.*, 982 P.2d 256, 258 (Alaska 1999); *See also Jon S. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 212 P.3d 756, 763 (Alaska 2009) (holding the incarceration of a parent is a significant factor affecting the scope of active efforts a state is compelled to exert under § 1912(d)).

Similar here, Mr. Little Bear's present dilemma is of his own design and the state should not be compelled to exhaust further resources on a parent who has frustrated all possibility of reunification through his own actions. *Idaho Dep't*, 275 P.3d at 25. Nor, as the lower court amply noted, should Sienna pay for the sins of the father by "languish[ing] in foster care" for a reunification which is unlikely to occur. R. 13.

It should be noted that the "length of sentence is an appropriate factor to consider in evaluating the state's efforts." *A.A. v. State Dep't of Family & Youth Servs.*, 982 P.2d at 263. Though Mr. Little Bear was sentenced to 12-18 months imprisonment, a stark contrast to the sixty-six and fifteen year incarcerations seen in *A.A.* and *Idaho Dep't*, this figure ought not exist in a vacuum. The particularities concerning each case and the child's age must be balanced alongside the prison term. At best, Mr. Little Bear will be released from prison when Sienna is

two and one half years of age, having spent eighty percent of her life in the care of others. Moreover, his status as a convicted felon will frustrate employment opportunities, further delaying the prospect of reunification with his aging daughter.

Based on the above, this court should find further active efforts were indeed futile in Mr. Little Bear's case and the lower court's application of the futility test was a proper application of recognized law. Consequently, the state has demonstrated by clear and convincing evidence that active efforts were made prior to its termination of Mr. Little Bear's remedial services.

## II. THE JUVENILE COURT CORRECTLY FOUND, BY A SHOWING OF CLEAR AND CONVINCING EVIDENCE, THAT GOOD CAUSE EXISTED TO DEVIATE FROM THE ADOPTIVE PLACEMENT PREFERENCES OUTLINED IN THE ICWA.

The ICWA adoptive placement preferences provide that, in any "adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915 (1978). The ICWA does not provide a definition for good cause within the statute itself. "Although [placement preferences and good cause] are part of a common statutory scheme, inquiries into suitable preferred placements are separate from inquiries into good cause." *In re Sara J.*, 123 P.3d at 1023. Additionally, § 1915(a) "expressly envisions 'good cause' as an exception to the general rule of preferred placements, . . . [and] the proponent of placing a child in a non-preferred placement bears the burden of demonstrating that the child's special needs require that placement." *Id.* at 1028. The present case addresses the Appellate court's application of the good cause standard and therefore abuse of discretion is the appropriate standard to apply.

The state will show that the *Guidelines* are not exclusive nor binding upon state courts, but rather merely persuasive. Moreover, to find that the *Guidelines* are exclusive opposes congressional intent and the introductory language to the *Guidelines*. Furthermore, under the *Guidelines*, good cause exists to deviate from the placement preferences because of Sienna's emotional needs. Lastly, in considering Sienna's best interest in conjunction with her emotional

needs the court appropriately concluded that good cause existed to deviate from the placement preferences.

A. The Bureau of Indian Affairs Guidelines for State Courts are not binding upon state courts nor exclusive with respect to the determination of good cause under the ICWA because it conflicts with the congressional intent and the majority of jurisdictions.

The *Guidelines* identify three factors to consider when determining whether good cause exists to deviate from placement preferences in an adoptive proceeding. The *Guidelines* state,

> "[f]or the purposes of . . . adoptive placement, a determination of good cause not to follow the order of preferences set out [in the ICWA] shall be based on: (1) the request of the biological parents or the child when the child is of sufficient age; (2) [t]he extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness; and (3) [t]he unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria."

Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67584 (Nov. 26, 1979). The determination of whether good cause exists should be based upon one or more of the following factors. *Id.* Furthermore, the burden of proof is upon the party seeking to depart from the preference. *Id.*

There are only two jurisdictions that have found the *Guidelines* to be exclusive and binding. *In re C.H.*, 997 P.2d 776, 782 (Mont. 2000) (holding that the *Guidelines* provide "the only circumstances constituting good cause to avoid the § 1915(a) adoptive placement preferences"); *Matter of Custody of S.E.G.*, 521 N.W.2d 357, 363 (Minn. 1994) ("[I]t seems 'most improbable' that Congress intended to allow state courts to find good cause whenever they determined that a placement outside the preferences of § 1915 was in the Indian child's best interests"). However, both of these jurisdictions violated the underlying policies of the *Guidelines* and the expressed intent of Congress in § 1902.

1. The Guidelines introductory language stands in stark contrast to the propositions set forth by the minority jurisdictions and therefore ought not be considered as exclusive or binding upon state courts.

The introduction to the *Guidelines* provides, "the legislative history of the Act states explicitly that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." Sen. Rep. No 95-597, 95th Cong., 1st Sess., p. 17 (1977). As stated by the Oregon Court of Appeals, "the introduction to the guidelines indicate[d] that 'they are not intended to have binding legislative effect' and that courts that decide ICWA cases have 'primary responsibility' for 'interpreting' the term 'good cause.'" *Dep't of Human Servs. v. Three Affiliated Tribes of Fort Berthold Reservation*, 238 P.3d 40, 48 (Or. Ct. App. 2010) (quoting the introductory language of the *Guidelines*) (hereinafter "*Three Affiliated Tribes*").

Subsequently, the minority jurisdictions inappropriately applied the *Guidelines* and erred in refusing to consider additional factors essential to determine good cause. By excluding all other relevant factors, these courts have imposed rigid standards, which are inconsistent with the *Guidelines*. In essence, these courts have contradicted the very authority used to support their position, and have relied on the strict applicability of the *Guidelines'* three factors while failing to adhere to the introductory language mandating flexibility.

2. Minority jurisdictions erred by failing to consider alternative factors thereby violating congressional intent specified in § 1902.

The express purposes of the ICWA, as portrayed in § 1902, is twofold: (1) to protect the best interests of Indian children and (2) to promote the stability and security of Indian tribes and families. 25 U.S.C. § 1902 (1978). By holding that good cause must be based solely upon one of the factors listed within the *Guidelines*, these courts have ignored the dual policies of the ICWA.

a) These courts violated congressional intent by disregarding the best interests of the child.

The Minnesota and Montana courts both established fallacious presumptions that placement according to the *Guidelines* may only be refuted though proving one or more of the factors within the *Guidelines*. *S.E.G.*, 521 N.W.2d at 363 ("[U]se of the word "shall" in § F.

3(a) strongly suggests that a consideration of whether good cause exists should be limited to the factors described in the guidelines"); In re C.H., 997 P.2d at 780 (holding that the court will "apply [the Guidelines] when interpreting the ICWA"). In adopting these presumptions the court disallowed the use of a best interests analysis because the court found that since best interests are inherently subjective, the application of a best interest analysis, which is comprised of a multitude of factors, would only impart the values of majority culture upon a minority. *S.E.G.*, 521 N.W.2d at 363. However, by ignoring other factors relevant to best interests these courts inappropriately restricted the purview of good cause and ignored a primary policy "to protect the best interest of Indian children." 25 U.S.C. § 1902.

Contrarily, the *Alexandria* court correctly opined that the presumption of "following the placement preferences is in a child's best interest is a starting point, not the end of the inquiry into a child's best interests." *In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 495 (Cal. Ct. App. 2014). That presumption should only be a starting point to the analysis that must be weighed against other relevant factors. *Id.* (citing *Navajo Nation v. Arizona Dep't of Econ. Sec.*, 284 P.3d 29, 35 (Ariz. Ct. App. 2012)). An overwhelming majority of jurisdictions support and utilize this multifactorial approach to resolve the issue of good cause. *See Navajo Nation v. Arizona Dep't of Econ. Sec.*, 284 P.3d at 35 ("Congress intended that the child's best interests be considered in placement"); *See also C.L. v. P.C.S.*, 17 P.3d 769, 776 (Alaska 2001) ("Whether there is good cause to deviate in a particular case depends on many factors"); *Matter of Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993) (adopting a multi-factor determination of good cause); *Seminole Tribe of Florida v. Dep't of Children & Families*, 959 So. 2d 761, 766 (Fla. Dist. Ct. App. 2007) ("While not binding on state courts, the guidelines are considered important"); *In re C.F.*, 690 N.W.2d 464 (Iowa Ct. App. 2004) ("In determining whether good cause exists, we consider many factors"); *In re Adoption of Baby Girl B.*, 2003 67 P.3d 359, 372, (Okla. Civ. App. 2003) ("[A] child's best interest is a criterion to consider, albeit not the sole criterion"); *Three Affiliated Tribes*, 238 P.3d at 48 ("[T]he guidelines are not an exclusive statement of the considerations that are pertinent to a 'good cause' determination"); *Matter of Adoption of M.*, 832 P.2d 518, 522 (Wash. Ct. App. 1992) ("Good

cause is a matter of discretion, and discretion must be exercised in light of many factors"); *In re Interest of Bird Head*, 331 N.W.2d 785, 791 (Neb. 1983) (declaring that "the best interests of the child are paramount").

These jurisdictions appropriately considered factors in addition to the *Guidelines* when determining good cause, thereby adhering to congressional intent. Although courts must employ caution whenever engaging in a best interest analysis, neither the *Guidelines* nor the ICWA necessitate that courts willfully ignore the fundamental question of the child's best interests—a question central to all dependency proceedings.

b) By disregarding the best interests of the child, the minority courts have undermined the future stability of the indian tribes.

The best interests of Indian children facilitate the stability and security of Indian tribes and families. To ignore the best interest of the child, and contribute to or cause the emotional instability of a child at a critical period within a child's life will adversely effect the child's willingness to contribute to Indian communities and foster resentment and discord against the tribe undermining the fundamental purposes of the ICWA. Although sometimes placement according to the Guidelines purport the best interest of the child, a determination of the best interest should be addressed in every case to fulfill the purposes of the statute. Although every effort should be made to comply with the twin aims of the ICWA, where compliance with both is impossible, the best interest of the child should control because this determination is critical to the child's future development and thus substantially impact the future stability and security of the Indian tribes.

Moreover, placement within the home of Messrs. Davidson and Pratt satisfies the second aim of § 1902 because they have manifested a willingness to preserve Sienna's cultural ties. This is evidenced by the giving of traditional Cherokee gifts by family members of Messrs. Davidson and Pratt consisting of dolls and moccasins, and a Cherokee children's book. R. 8. These facts negate the testimony proffered by Mr. Sky, whom advocated for Sienna's removal based upon the importance in preserving her cultural heritage. R. 9.

These observations taken together illustrate that the lower court correctly ruled in adoptively placing Sienna with her foster parents. The court reached this determination after considering the best interests of Sienna, and in doing so fulfilled the twin aims of the ICWA. Furthermore, the risk concerning the stability and security of the indian tribe is mitigated because of Messrs. Davidson and Pratt's willingness to preserve Sienna's cultural ties.

As illustrated by a majority of jurisdictions, the *Guidelines* are not binding upon the states. The purpose of the *Guidelines* is to offer "interpretive guidance and assistance to state courts applying the Act." Denise L. Stiffarm, *The Indian Child Welfare Act: Guiding the Determination of Good Cause to Depart from the Statutory Placement Preferences*, 70 Wash. L. Rev. 1151, 1157 (1995). The above mentioned purpose is inconsistent with the notion that the *Guidelines* provide an exclusives list of factors used to establish good cause. Although the *Guidelines* provide guidance and assistance, it does not restrict state courts ability in considering other factors pertinent to good cause. Such a restriction would frustrate congressional intent by disallowing flexibility among the courts. The ICWA nor the *Guidelines* require a finding of good cause to be based solely upon the factors enumerated within the *Guidelines.* Therefore the lower court correctly considered other factors including Sienna's best interest in its good cause determination, and did not abuse its discretion when it adoptively placed her with Messrs. Davidson and Pratt.

B. Under the *Guidelines*, the lower court correctly found that Sienna's emotional needs necessitate her adoptive placement with Messrs. Davidson and Pratt.

The *Guidelines* state that good cause may be shown through "[t]he extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness." *Guidelines*, *Supra*. The lower court adopted the reasoning set forth in *Alexandria*, which stated that "a court may find good cause . . . [where] there is a significant risk that a child will suffer serious harm as a result of a change in placement." *In re Alexandria P.*, 176 Cal. Rptr. 3d at 493. The *Alexandria* court therefore suggested that although the risk need not be certain, the risk must be significant and not merely hypothetical or speculative. *Id.*

The reasoning imposed by the *Alexandria* court is in contrast to that of *In re C.H.*, which adopted the proposition that extraordinary emotional needs required certainty that harm will result. *In re C.H.*, 997 P.2d at 781 ("[N]one of the expert witnesses testified that C.H. was certain to develop an attachment disorder"). The *C.H.* court criticized the uncertainty of risk that a child "might develop such problems in the future [as] simply too nebulous and speculative a standard on which to determine that good cause exists to avoid the ICWA placement preferences." *Id.* at 783. However, the requirement establishing such certainty is unrealistic and equally speculative. In *Navajo Nation* the Arizona court observed that the "[p]rediction of psychological or emotional harm is not an exact science. All [the court] can expect is that, given the expert's experience, there is a reasonable prospect for significant emotional harm to the child by removal from a home." *Navajo Nation*, 284 P.3d at 38. Such a standard creates an analytical framework designed to mitigate speculation on behalf of the courts and experts alike. The court in *C.H.* engaged in equally speculative practices by requiring experts to testify to the certainty of emotional harms when the occurrence and degree of such harms cannot be predicted with any degree of accuracy. The *C.H.* court thus requires experts to make conclusory statements that are incapable of being substantiated. Therefore, the lower court correctly adopted the reasoning imposed by the *Alexandria* court.

In establishing a reasonable prospect for significant emotional harm the state provided testimony through qualified expert witnesses. Ms. White testified that Sienna's entire world revolves around her foster fathers, clinging to them and referring to them as "Dad" and "Daddy." R. 8. This statement taken in connection with the testimony of Mr. Peabody, a child development specialist, illustrate significant risks in removing Sienna from her foster fathers. Mr. Peabody stated that Sienna was likely to suffer trauma if removed from their loving home, to the extent that the trauma may be irreparable. R. 8.

Thus, the court did not abuse its discretion when it found that Sienna's emotional needs supported the conclusion that there was good cause to deviate from the ICWA placement preferences.

C. Sienna's continued placement with Messrs. Davidson and Pratt is in her best interest because of her attachment, and their ability to adequately attend to her needs.

The majority of courts have held that the child's best interest ought be considered when addressing the issue of good cause. *See Supra* Part II.A.2.a. The ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus." *Bird Head*, 331 N.W.2d at 785. In considering the child's best interest, the *Alexandria* court mandated the consideration of attachment stating, that the "bond between [a child] and her caretakers and the trauma that [a child] may suffer if that bond is broken are essential components of what the court should consider when determining whether good cause exists to depart from the ICWA's placement preferences." *In re Alexandria P.*, 176 Cal. Rptr. 3d at 494. Furthermore, the court concluded that "no ICWA violation precludes the court from considering the bond that [a child] has with her foster family." *Id.* In light of the facts and supporting expert testimony, Sienna's continued placement with her foster fathers is necessary.

From the time Sienna was eight months old she has remained in the loving care of her foster parents who have nurtured and provided for Sienna's emotional and physical needs. R. 5. For most of her life she has only known their care. R. 5-10. As such, the testimony of Ms. Swift illustrated Sienna's reliance upon her foster fathers to complete day to day tasks, recalling that "Sienna reached for Mr. Davidson when she needed help with her snack, and to Mr. Pratt when she wanted help with her coloring book." R. 7. Furthermore, Ms. White noted that "Sienna clings to [them] and refers to them as 'Dad' and Daddy.'" R. 8. She concluded her testimony stating that Sienna's "entire world revolves around [Mr. Davidson and Mr. Pratt]." R. 8. Collectively these facts demonstrate Sienna's healthy dependence on two persons who she views as her fathers. The maintenance of this relationship would continue to furnish growth and stability, whereas severance (as shown through the testimony of Mr. Peabody) would likely cause trauma that Sienna may not recover from, and thereby forcing Sienna to attempt re-attachment to Ms. Redbird who Sienna has only encountered on the day of her birth. Although Ms. Marcus alleges that Sienna may be capable of establishing such an

attachment with Ms. Redbird this Court should not subject Sienna to the severe emotional trauma that is likely to occur if removed from her foster parents.

Furthermore, Messrs. Davidson and Pratt have been active participants in Sienna's physical and intellectual development. Under their care, Sienna's plagiocephally resolved itself in a matter of months. They provided her with private physical therapy to strengthen her neck and obtained a prescribed helmet so her head could regain its proper shape. R. 5 As a result, Sienna is able to participate in other physical activities such as gymnastics and yoga. R. 8.

Moreover, Ms. White testified that due to the efforts of Messrs. Davidson and Pratt, Sienna is performing age appropriate tasks and is enrolled in a part-time preschool program where she has "advanc[ed] with her peers." R. 8. Ms. White observed that "it was though Mr. Davidson and Mr. Pratt's entire world revolves around Sienna's happiness, growth, and stability." R. 8. Messrs. Davidson and Mr. Pratt have demonstrated their abilities to address the needs of Sienna not only in the opportunities they afford but more importantly in their ability to facilitate a safe, stable, and healthy environment for Sienna. Therefore, the Court did not abuse its discretion when it found that there was clear and convincing evidence to deviate from the adoptive placement preferences outlined within the ICWA due to Sienna's best interests and her emotional attachment to Messrs. Davidson and Pratt.

## CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Court affirm the ruling of the State of Whittier Court of Appeals.

January 2, 2015

Respectfully submitted,

_____

Team 21

Counsel for Respondent

No. 923-2014

IN THE

# Supreme Court of the State of Whittier

DANIEL LITTLE BEAR,
*Petitioner*,

v.

STATE OF WHITTIER,
Kathryn Chandler,
Director of the Whittier Department of Child Welfare,
*Respondent*,

**ON WRIT OF CERTIORARI**
**TO THE STATE OF WHITTIER COURT OF APPEAL**

## REQUEST FOR ORAL ARGUMENT

Respondent respectfully requests that this matter be set for oral argument to address the issues of termination of remedial services and good cause to deviate from placement preferences, as it will aid this Court in deciding this case.

January 2, 2015

Respectfully Submitted

Team 21

Counsel for Respondent

APPENDIX I

**§ 1902. CONGRESSIONAL DECLARATION OF POLICY**

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. 25 U.S.C.A. § 1902 (West).

APPENDIX II

**25 U.S.C. §1912 PENDING COURT PROCEEDINGS**

**(d) Remedial services and rehabilitative programs; preventive measures**

Any party seeking to effect a foster care placement 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.

**(e) Foster care placement orders; evidence; determination of damage to child**

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

**(f) Parental rights termination orders; evidence; determination of damage to child**

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C.A. § 1912 (West).

APPENDIX III

**§ 1915. PLACEMENT OF INDIAN CHILDREN**

**(a) Adoptive placements; preferences**

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. 25 U.S.C.A. § 1915 (1978).