SUPREME COURT NO. _____

IN THE SUPREME COURT OF CALIFORNIA

S181638

In re: W. B., A Person Coming Under The Juvenile Court Law.	)	
THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Court of Appeal No. E047368
Plaintiff and Respondent,	)	
v.	)	Superior Court No. RIJ114127
W. B.,	)	
Defendant and Petitioner.	)	

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY
Honorable Christian F. Thierback, Judge

PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH DISTRICT, DIVISION TWO, AFFIRMING THE DISPOSITION

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By appointment of the Court of Appeal under the Appellate Defenders, Inc. assisted case system.

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TO THE HONORABLE RONALD GEORGE, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner respectfully petitions for review pursuant to California Rules of Court, rule 8.500. The Court of Appeal, Fourth Appellate District, Division Two, filed its opinion on January 25, 2010, affirming the

judgment of the Riverside County Superior Court. On February 23, 2010, the court of appeal ordered that its opinion be published. Copies of the opinion and the publication order are attached as Appendix A. No petition for rehearing has been filed.

ISSUE PRESENTED FOR REVIEW

Whether the notice requirements set forth in California's recent Indian Child Welfare legislation apply to juvenile delinquency proceedings such as the case at bar in which the child is at risk of entering foster care, even if a termination of parental rights is not involved.

NECESSITY FOR REVIEW

Pursuant to California Rules of Court, rule 8.500(b)(1), this issue merits review in order to secure uniformity of decision and to settle important questions of law. The court of appeal's decision in the instant case expressly contradicts the holding in the recent decision by the Court of Appeal for the Third Appellate District in *R.R. v. Superior Court* (2009) 180 Cal.App.4th 185. Moreover, these two conflicting published decisions affect an entire class of cases involving Indian (or potentially-Indian)

children who are in juvenile delinquency proceedings based on an act that, if committed by an adult, would be deemed a crime and who are at risk of entering foster care. In the case at bar, the court of appeal held that the provisions of California's Indian Child Welfare legislation requiring that notice of the proceedings be sent to the relevant Indian tribes do not apply in cases like this one. By contrast, the Third District in *R.R. v. Superior Court* held that they do apply in such cases. Review should be granted in order to clarify the proper interpretation and application of California law to such cases.

STATEMENT OF THE CASE

The original petition concerning petitioner pursuant to Welfare and Institutions Code section 602 (styled "Petition New") was filed on March 27, 2007, and involved allegations concerning the theft of a laptop computer. (C.T.I 1-2.)[1] Following his arrest in connection with this petition, petitioner was released to the custody of his mother, having spent two days in custody. (C.T.I 1, 5, 12, 30, 128.)

A second petition concerning petitioner (also styled "Petition New"), involving an alleged battery, was filed on May 3, 2007. (C.T.I 8-9.) The petition indicates that petitioner was not taken into custody. (C.T.I 8.)

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[1] "C.T.I" refers to the Clerk's Transcript originally filed in the court of appeal on September 13, 2007, in connection with DCA NO. E043965 (petitioner's prior appeal). "S.C.T.I" refers to the Supplemental Clerk's Transcript originally filed in the court of appeal on December 28, 2007, and "S.C.T.II" refers to the Supplemental Clerk's Transcript originally filed in the court of appeal on January 29, 2008, in connection with petitioner's prior appeal. "C.T.II" refers to the Clerk's Transcript filed in the court of appeal on January 29, 2009, in connection with the instant appeal. "R.T.I" refers to the Reporter's Transcript originally filed in the court of appeal on September 13, 2007, and "R.T.II" refers to the Reporter's Transcript originally filed in the court of appeal on December 28, 2007, in connection with petitioner's prior appeal. "R.T.III" refers to the Reporter's Transcript filed in the court of appeal on January 29, 2009, in connection with the instant appeal.

The first Probation Officer's Report concerning petitioner was filed on May 14, 2007. (C.T.I 12-29.) In that report, the box indicating "ICWA [the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.)] may apply" was checked, and the comments stated: "Ms. Jones [petitioner's mother] reported her mother [*i.e.*, petitioner's grandmother] had Cherokee ancestry. The appropriate paperwork was completed, except Ms. Jones needs to sign it." (C.T.I 16.) The report recommended that petitioner "be adjudged a ward of the Court and serve 7/14 days in juvenile hall." (C.T.I 26.)

A third petition concerning petitioner (also styled "Petition New"), involving an alleged burglary, was filed on May 23, 2007. (C.T.I 51-52.) A Riverside County Probation Department Detention Hearing Report filed on May 23, 2007, indicates that petitioner was arrested on May 22, 2007, and placed in juvenile hall. (C.T.I 54.) In this report, the box indicating "ICWA may apply" was checked, and the comments stated: "As of 5/17/07, Ms. Jones still needed to sign and submit the appropriate paperwork to register for Cherokee ancestry. See social history obtained in Probation officer's report from 5/17/07." (C.T.I 55.) The report

recommended against home supervision and in favor of continued detention. (C.T.I 57-58.)

At a hearing on July 5, 2007, petitioner admitted to one count of burglary contained in the petition filed on March 27, 2007, and one count of battery contained in the petition filed on May 3, 2007; the remaining counts (including the petition filed on May 23, 2007) were dismissed subject to comment and restitution. (C.T.I 78-92; R.T.I 10-12.) Petitioner was released on home supervision. (C.T.I 80, 95, 121.)

A second Probation Officer's Report concerning petitioner was filed on August 3, 2007. (C.T.I 96-125.) In that report, the box indicating "ICWA may apply" was checked, and the comments stated: "Ms. Jones reported her mother had Cherokee ancestry. The appropriate paperwork was completed. Ms. Jones has not yet signed it." (C.T.I 109.)

At a dispositional hearing on August 8, 2007, petitioner was ordered "placed in suitable licensed foster home, group home, relative home, county or private facility suitable to meet specific needs." (C.T.I 145, 147, 152; R.T.I 22.) Petitioner was further ordered "detained pending placement" and remanded to juvenile hall. (C.T.I 146, 148, 152; R.T.I 23, 25.)

At a subsequent hearing on August 28, 2007, the previous disposition was vacated and petitioner was released on home supervision to his grandmother, Pamela Jones. (S.C.T.I 9, 10-11; R.T.II 8-10.)

A fourth petition concerning petitioner, involving an alleged robbery, was filed on June 13, 2008. (C.T.II 1-2.) A Riverside County Probation Department Detention Hearing Report filed on June 13, 2008, indicates that petitioner was arrested on June 12, 2008, and placed in juvenile hall. (C.T.II 3-4.) In this report, the box indicating "ICWA may apply" was checked, and the comments stated: "In the last probation officer's report, the mother reported she may have Cherokee ancestry, but had not yet completed the registration papers." (C.T.II 5.) The report recommended against home supervision and in favor of continued detention. (C.T.II 6-8.)

At an adjudication on July 21, 2008, the court found the allegations in the June 13, 2008 petition to be true. (C.T.II 28; R.T.III 90.)

A third Probation Officer's Report concerning petitioner was filed on July 30, 2008. (C.T.II 30-52.) In that report, the box indicating "ICWA may apply" was checked, and the comments stated: "According to the Probation Officer's report dated August 8, 2007, Ms. Jones reported her

mother had Cherokee ancestry and the appropriate paperwork was completed." (C.T.II 35.)

At a dispositional hearing on August 4, 2008, petitioner was released to the custody of his mother, Nicole Jones. (C.T.II 75; R.T.III 95.)

The fifth and most recent petition concerning petitioner, which is the subject of the instant appeal, was filed on October 14, 2008, and alleges that petitioner entered a building with intent to commit a theft and a felony, in violation of Penal Code section 459. (C.T.II 85-86.)

A Riverside County Probation Department Detention Hearing Report filed on October 14, 2008, indicates that petitioner was arrested on October 13, 2008, and placed in juvenile hall. (C.T.II 87-88.) The report recommended against home supervision and in favor of continued detention. (C.T.II 91-92.) In this report, the box indicating "ICWA does not apply" was checked, and the comments stated: "The Probation Officer's Report dated 8/4/08, reported ICWA does not apply." (C.T.II 89.)[2]

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[2] There is no probation officer's report dated August 4, 2008, in either the record on appeal or petitioner's superior court file. August 4, 2008, was the date of petitioner's dispositional hearing, for which the July 30, 2008 Probation Officer's Report (discussed above) was prepared. Assuming that this is the probation officer's report to which the October 14, 2008 detention hearing report intended to refer, it would appear that the preparer of the October 14, 2008 detention hearing report misread the July 30, 2008

After a contested adjudication on December 3, 2008, the court found the burglary count true. (C.T.II 119; R.T.III 134.)

A fourth Probation Officer's Report concerning petitioner was filed on December 12, 2008. (C.T.II 121-143.) In that report, the box indicating "ICWA may apply" was checked, and the comments stated: "According to the Probation Officer's report dated August 8, 2007, Ms. Jones reported her mother had Cherokee ancestry and the appropriate paperwork was completed." (C.T.II 125.) The report recommended that "out of home placement in a supervised and structured setting is appropriate." (C.T.II 138.)

At a dispositional hearing on December 17, 2008, petitioner was ordered "placed in suitable licensed foster home, group home, relative home, county or private facility suitable to meet specific needs" with a maximum (aggregate) term of confinement of eight years and eight months.

Probation Officer's Report, which unambiguously indicated that "ICWA may apply". (See C.T.II 35.)

On the form used to prepare the probation officer's report, an "X" is to be placed ***after*** the appropriate box indicating whether or not ICWA applies (see C.T.II 35); it may be that the preparer of the October 14, 2008 detention hearing report misinterpreted that section of the July 30, 2008 Probation Officer's Report by misreading the "X" as referring to the box after it, which states "ICWA does not apply", instead of the box before it,

(C.T.II 167, 169, 174, 175; R.T.III 139, 140, 142.) Petitioner was further ordered "detained pending placement" in juvenile hall. (C.T.II 169, 176.)

STATEMENT OF FACTS

Valerie Torres was in the kitchen at her home in Moreno Valley, California, on October 13, 2008, when she observed three individuals, including petitioner, making their way along the side of her yard toward her next-door-neighbor's back patio. (R.T.III 100-03.) She telephoned the police, and subsequently heard the sound of glass breaking. (R.T.III 103.) After the police arrived, she identified petitioner as one of the three individuals she had seen earlier. (R.T.III 104.)

When Deputy Jose Vasquez of the Riverside County Sheriff's Department arrived at the house, one of the suspects had already been detained, and Vasquez was asked to help search another house that had been found with an open door. (R.T.III 114.) Upon searching that house, Vasquez found two individuals, including petitioner, hiding in a hole in the wall. (R.T.III 114-15.) Vasquez found several items taken from the

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which states "ICWA may apply".

victim's house in a dirt field nearby, and saw that the victim's sliding glass patio door had been shattered. (R.T.III 116-19.)

Kimberly Baker identified the items found in the dirt field behind her home as her belongings. (R.T.III 127-28.)

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO CLARIFY WHETHER THE NOTICE REQUIREMENTS SET FORTH IN CALIFORNIA'S INDIAN CHILD WELFARE LAWS APPLY TO JUVENILE DELINQUENCY PROCEEDINGS IN WHICH THE CHILD IS AT RISK OF ENTERING FOSTER CARE

There is now a conflict in the published case law with respect to whether the notice requirements set forth in California's Indian Child Welfare legislation and related rules apply to juvenile delinquency proceedings such as the instant case in which the child is at risk of entering foster care. Petitioner respectfully submits that the Third District's holding in *R.R. v. Superior Court* is consistent with both the clear language of the statute and the express purpose of both the federal and the California Indian Child Welfare statutes, as discussed below. Accordingly, review should be granted to settle this important question of law.

A. The Indian Child Welfare Act of 1978

Congress enacted the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) ("ICWA" or "the Act") in order 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 . . . .

(25 U.S.C. § 1902.) Congress set forth in the Act certain findings, which guide its proper interpretation. Observing that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," the United States "has a direct interest . . . in protecting Indian children who are members of or are eligible for membership in an Indian tribe." (25 U.S.C. § 1901(3); see *In re Desiree F.* (2000) 83 Cal.App.4th 460, 469 ("The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource.").) Congress further observed that "an alarmingly high percentage of Indian families are broken up by the removal . . . 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); see *In re Desiree F., supra,* 83 Cal.App.4th at p. 469 ("Congress has concluded the state courts have not protected these interests and drafted a statutory scheme intended to afford needed protection.").)

Section 1911(c) of the Act provides: "In any State court proceeding for the foster care placement of . . . an Indian child, the . . . Indian child's tribe shall have a right to intervene at any point in the proceeding." (25 U.S.C. § 1911(c).) "Of course, the tribe's right to assert jurisdiction over the proceeding or to intervene in it is meaningless if the tribe has no notice that the action is pending." (*In re Junious M.* (1983) 144 Cal.App.3d 786, 790-791.) "Notice ensures the tribe will be afforded the opportunity to assert its rights under the [ICWA] irrespective of the position of the parents, Indian custodian or state agencies." (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) Accordingly, section 1912(a) of the Act establishes a clear notice requirement: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of . . . an Indian shall notify . . . the Indian child's tribe . . . of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) Section 1912(a) further provides that "No foster care placement . . . proceeding shall be held until at least ten days after receipt of notice by . . . the tribe . . . ." (*Ibid.*)

Section 1903 of the Act defines "child custody proceeding" to include "'foster care placement' which shall mean any action removing an Indian child from its parent . . . for temporary placement in a foster home or institution . . . where the parent . . . cannot have the child returned upon demand, but where parental rights have not been terminated." (25 U.S.C. § 1903(1)(i).) Section 1903(1) further states that "Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime . . . ." (25 U.S.C. § 1903(1).) The Act is clear, however, that it is intended only to establish "minimum Federal standards" (25 U.S.C. § 1902); as the court of appeal has observed, "The ICWA expressly permits '[s]tate or [f]ederal law [to] provide[] a higher standard of protection . . . than the rights provided under' the ICWA." (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1158 (citing 25 U.S.C. § 1921).)

The California legislature has done just that, by enacting comprehensive legislation implementing and expanding the scope of ICWA, as discussed below.

B. The Expanded Notice Requirements Under California Law

As the court of appeal has observed, "Our Legislature has adopted statutes and rules of court to implement the ICWA." (*In re A.B.* (2008) 164 Cal.App.4th 832, 838.) Specifically, Welfare and Institutions Code section 224, which concerns Indian child custody proceedings, both mirrors the stated purposes of the federal ICWA statute and expands the scope of its notice requirements. Section 224, subdivision (a)(1) declares:

> There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe. The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with [ICWA] and other applicable law, designed to prevent the child's involuntary out-of-home placement and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community.

(Welf. & Inst. Code, § 224, subd. (a)(1).) In furtherance of these objectives, and in parallel with the federal statute, section 224.4 provides that "The Indian child's tribe . . . ha[s] the right to intervene at any point in an Indian child custody proceeding." (Welf. & Inst. Code, § 224.4.)

Section 224.3, subdivision (d) provides that "If the court . . . or probation officer knows or has reason to know that an Indian child is involved, the . . . probation officer shall provide notice in accordance with [the notice provisions] of Section 224.2." (Welf. & Inst. Code, § 224.3, subd. (d).) Section 224.2 sets forth in detail the notice requirements that are triggered "If the court . . . or probation officer knows or has reason to know that an Indian child is involved" in a custody proceeding. (Welf. & Inst. Code, § 224.2, subd. (a).) Furthermore, "No proceeding shall be held until at least 10 days after receipt of notice by . . . the tribe, or the Bureau of Indian Affairs." (Welf. & Inst. Code, § 224.2, subd. (d).)

Clarifying what constitutes "reason to know" in this context, section 224.3, subdivision (b) provides:

> The circumstances that may provide reason to know the child is an Indian child include . . . (1) A person having an interest in the child, including . . . a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe.

(Welf. & Inst. Code, § 224.3, subd. (b).)[3] Moreover, as the court of appeal has observed, "'The Indian status of the child need not be certain to invoke the notice requirement.'" (*In re Dwayne P.* (2002) 103 Cal.App.4th 247, 254 (quoting *In re Desiree F., supra*, 83 Cal.App.4th at p. 470).) "The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408; *In re Dwayne P., supra*, 103 Cal.App.4th at p. 258.)

Section 224.3, subdivision (a) explicitly extends the ICWA notice requirements to juvenile delinquency proceedings initiated, as in the instant case, by the filing of a Welfare and Institutions Code section 602 petition, if the subject of the petition is at risk of entering or is already in foster care:

> The court . . . and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child in . . . any juvenile

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[3] Section 224.3, subdvision (c) further provides that "If the court . . . or probation officer knows or has reason to know that an Indian child is involved, the . . . probation officer is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable", and sets forth specific requirements for such inquiry. (Welf. & Inst. Code, § 224.3, subd. (c).)

> wardship proceedings if the child is at risk of entering foster care or is in foster care.

(Welf. & Inst. Code, § 224.3, subd. (a).) As the court of appeal has observed, "where a petition is to be, or has been, filed pursuant to section 602, ICWA will apply in any wardship proceedings if the child is at risk of entering foster care, or is then in foster care." (*In re Alejandro A.* (2008) 160 Cal.App.4th 1343, 1347-1348.)

Recognizing that section 224's provisions constitute an expansion of the protections established by the federal ICWA statute, section 224, subdivision (d) specifically provides that "In any case in which this code or other applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or the Indian child's tribe, than the rights provided under the Indian Child Welfare Act, the court shall apply the higher standard." (Welf. & Inst. Code, § 224, subd. (d).) This reflects the California legislature's intention to protect the important interests of the tribes even when the parties to, or agencies involved in, the proceedings fail to raise or vigorously pursue the issue; as the court of appeal has observed, "'Notice ensures the tribe will be afforded the opportunity to assert its rights under the [ICWA] irrespective of the position of the parents, Indian custodian or state agencies.'" (*In re*

Dwayne P., supra, 103 Cal.App.4th at p. 253 (quoting *In re Kahlen W., supra*, 233 Cal.App.3d at p. 1421).)

The California Rules of Court further implement and expand upon ICWA's notice requirements, and by their own terms "appl[y] to all proceedings involving Indian children that may result in an involuntary foster care placement . . . including: (1) Proceedings under Welfare and Institutions Code . . . sections 601 and 602 et seq. in which the child is at risk of entering foster care or is in foster care . . ." (Cal. Rules of Court, rule 5.480.)[4] Rule 5.481(a) directs that "The court, court-connected investigator, and party seeking a foster-care placement . . . have an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all proceedings identified in rule 5.480." (Cal. Rules of Court, rule 5.481(a).) Rule 5.481(a) also sets forth in detail the ways in which the pertinent agency must go about inquiring as to whether the child involved in the proceedings is an Indian child. (*Ibid.*)

Rule 5.481(b)(2) specifically provides:

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[4] The current rules pertaining to ICWA were adopted effective January 1, 2008, and thus govern in relation to the proceedings related to the petition filed on October 14, 2008, which are the subject of this appeal. (See Cal. Rules of Court, rule 5.480 et seq.; *In re H.B.* (2008) 161 Cal.App.4th 115, 121 fn.5.)

> If it is known or there is reason to know that an Indian child is involved in a wardship proceeding under Welfare and Institutions Code sections 601 and 602 et seq., and the probation officer has assessed that it is probable that the child will be entering foster care, or if the child is already in foster care, the probation officer must send Notice of Child Custody Proceeding for Indian Child (form ICWA-030) to the parent . . . and the child's tribe . . . .

(Cal. Rules of Court, rule 5.481(b)(2).) Rule 5.481(b)(3) adds that "The circumstances that may provide reason to know the child is an Indian child" include (by reference to rule 481(a)(5)(A)) "The child or a person having an interest in the child, including . . . a member of the child's extended family, informs or otherwise provides information suggesting that the child is an Indian child to the court . . . [or] the probation department . . ." (Cal. Rules of Court, rules 5.481(a)(5)(A) and 5.481(b)(3).)

Rule 5.482(a)(1) provides that "If it is known or there is reason to know that a child is an Indian child, the court hearing must not proceed until at least 10 days after the parent . . . the tribe, or the Bureau of Indian Affairs have received notice . . ." (Cal. Rules of Court, rule 5.482(a)(1); see also rule 5.482(a)(2) (permitting detention hearings to proceed without delay provided that notice of the hearing is given as soon as possible after the filing of the petition initiating the proceedings).) Rule 5.482(e) provides that "The Indian child's tribe . . . may intervene, orally or in

writing, at any point in the proceedings . . ." (Cal. Rules of Court, rule 5.482(e).)

C. The Plain Language of California's Indian Child Welfare Legislation Evinces a Clear Intent To Extend ICWA's Notice Requirements To Juvenile Delinquency Cases Like This One

As the foregoing discussion makes clear, under the provisions of Welfare and Institutions Code section 224.3, subdivision (a), as well as rule 5.481(b)(2) of the California Rules of Court, California's notice requirements were intended to apply to petitioner's section 602 proceedings. Both Welfare and Institutions Code section 224.3, subdivision (a) and rule 5.481(b)(2) of the California Rules of Court, by their very terms, specifically and expressly extend the application of ICWA's notice requirements to juvenile wardship proceedings brought pursuant to Welfare and Institutions Code section 602 if the subject of the proceedings is at risk of entering, or is already in, foster care. (See Welf. & Inst. Code, § 224.3, subd. (a); Cal. Rules of Court, rule 5.481(b)(2).)

In the instant case, petitioner's section 602 proceedings met these criteria in every respect. First, the petition filed on October 14, 2008, was by its own express terms filed pursuant to Welfare and Institutions Code section 602. (See C.T.II 85.) Second, petitioner was arrested on October

13, 2008, and placed in juvenile hall. (See C.T.II 87-88.) Moreover, the Riverside County Probation Department Detention Hearing Report filed on October 14, 2008, the day after petitioner's arrest, recommended against home supervision and in favor of continued detention (C.T.II 91-92), and the Probation Officer's Report filed on December 12, 2008, in preparation for petitioner's dispositional hearing, recommended that "out of home placement in a supervised and structured setting is appropriate" (C.T.II 138). At the dispositional hearing on December 17, 2008, the superior court followed this recommendation and ordered petitioner "placed in suitable licensed foster home, group home, relative home, county or private facility suitable to meet specific needs" with a maximum term of confinement of eight years and eight months (C.T.II 167, 169, 174, 175; R.T.III 139, 140, 142), and ordered petitioner "detained pending placement" in juvenile hall (C.T.II 169, 176).

Thus, petitioner had been placed in juvenile hall from the time that his section 602 proceedings were initiated, and the probation department continued to recommend that he remain in placement throughout those proceedings, which recommendation was ultimately followed by the superior court at petitioner's dispositional hearing. Juvenile hall clearly

qualifies as "foster care" under the terms of both the federal and the California ICWA statutes. (See 25 U.S.C. § 1903(1)(i); Welf. & Inst. Code, § 224.1, subd. (c).) Accordingly, petitioner was both ***in*** foster care from the inception of his section 602 proceedings and very much at risk of remaining in foster care given the probation department's recommendations, which were ultimately followed by the superior court.[5]

Third, both the superior court and the probation department clearly "had reason to know" of petitioner's potential status as an Indian child as those terms are defined in both the California ICWA statute and the California Rules of Court. From the time the first section 602 petition was filed on March 27, 2007, a total of seven probation department reports were filed concerning petitioner, including a detention hearing report and a probation officer's report filed in connection with the proceedings that are the subject of this appeal. As discussed in the "Statement of the Case" section above, in all of these reports save one, the probation department reported to the superior court that "ICWA may apply", and the only report

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[5] In addition, petitioner had already served a total of 122 days in juvenile hall in connection with previous section 602 proceedings in 2007 and 2008, setting a precedent for further foster care placement in any future proceedings. (See C.T.II 14, 75.)

that indicated "ICWA does not apply" was clearly erroneous and almost certainly based on a misreading of an earlier probation report to which it referred and upon which it based its information, which clearly indicated that "ICWA may apply". (See C.T.I 16, 55, 109; C.T.II 5, 35, 89, 125.) Moreover, in all of these reports except the one erroneous report, the probation department specifically informed the superior court that petitioner's mother had advised the probation department that her mother (*i.e.*, petitioner's grandmother) had Cherokee ancestry. (See C.T.I 16, 55, 109; C.T.II 5, 35, 125.)

As discussed in section B above, pursuant to the California ICWA statute, the court has "reason to know" that the subject of a section 602 proceeding may be an Indian child if a member of the child's extended family, which certainly includes his mother, provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe. (See Welf. & Inst. Code, § 224.3, subd. (b).) This statutory provision is mirrored in rule 5.481(b)(3) of the California Rules of Court, which provides that the court has "reason to know" of a child's potential Indian status if a member of the child's

extended family informs or otherwise provides information suggesting that the child is an Indian child to the court or the probation department. (See Cal. Rules of Court, rules 5.481(a)(5)(A) and 5.481(b)(3).) As the court of appeal has observed, "'The Indian status of the child need not be certain to invoke the notice requirement.'" (*In re Dwayne P., supra*, 103 Cal.App.4th at p. 254 (quoting *In re Desiree F., supra*, 83 Cal.App.4th at p. 470).) Accordingly, both the superior court and the probation department in the instant case had clear reason to know that petitioner may be an Indian child.

Thus, by its plain language, California's ICWA statute was intended to extend the notice requirements to juvenile delinquency cases like this one. This conclusion is fully supported by the Third Appellate District's recent opinion in *R.R. v. Superior Court*, discussed below.

C. The Third District's Opinion In R.R. v. Superior Court

In its recent opinion in *R.R. v. Superior Court, supra*, 180 Cal.App.4th 185, the Third District squarely addressed the question of "whether provisions of the Indian Child Welfare Act apply in juvenile delinquency proceedings where the child is at risk of entering foster care, but where a termination of parental rights is not involved." (*Id.* at p. 193.) Noting the provision in the federal act that exempts from ICWA's reach

cases involving the placement of a child based upon an act by the child that would be deemed a crime if committed by an adult, the court observed: "Historically, this has meant that most juvenile delinquency proceedings have been exempt from ICWA, because they are based on a juvenile's act of committing a crime." (*Id.* at p. 193.) Recognizing that the California legislation expands the scope of the federal notice provisions, the court observed that, "[w]hile ICWA may not by its own terms apply to a juvenile delinquency case in which the case plan anticipates foster care placement, the California Legislature has expressly made the inquiry and notice requirements of ICWA applicable in such cases, and impliedly made the remaining ICWA requirements applicable in such cases as well." (*Id.* at p. 194.)

The court clearly noted that "[s]tate law differs from federal law" in these provisions. (*Id.* at p. 117.) Rejecting the argument that the federal statute was intended to preclude California's expanded notice requirements, the court looked to the language of the federal statute: "Because ICWA sets the minimum standards for the protection of Indian children with respect to their tribal relationships, California law imposing a higher standard is not inconsistent with the purpose of the federal law, and is not

preempted." (*Ibid.*) Rejecting the argument that the California legislation was intended to apply only to dependency proceedings, the court explained: "We cannot simply ignore the language of section 224.3 requiring inquiry and notice in delinquency proceedings. Furthermore, the clear implication of this section is that all of the ICWA protections be applied in delinquency proceedings if the child is at risk of entering foster care or is in foster care." (*Id.* at p. 118.)

Thus, the Third District's recent decision supports petitioner's contention that the notice requirements set forth in California's Indian Child Welfare legislation apply to his case. As discussed below, however, the court of appeal's opinion in the instant case contradicts the Third District's opinion in virtually every respect.

E. The Court of Appeal's Opinion in the Case at Bar

In rejecting petitioner's contention that California's Indian Child Welfare legislation extends the notice requirements to his case, the court of appeal based its decision primarily on the following sweeping pronouncement: "Finding that ICWA excludes delinquencies from its notice requirements, we hold that any attempt by the State of California to

expand ICWA's application to delinquencies is unauthorized under the federal preemption doctrine." (*In re W.B., Jr.* (2010) 182 Cal.App.4th 126 [p. 2].)

While relying primarily on its federal preemption argument, the court also interpreted the California statute as having a far more limited application than would appear from its plain language: "[T]he inclusion of references to section 602 and wardship proceedings does not mean that California has or is authorized to expand the reach of ICWA. To the contrary, it appears that the statute included the references to section 602 and wardship proceedings to address 'dual status' situations where foster care placement is intended to promote the best interests of the child . . . or cases in which the delinquency proceedings are based on acts which would not be a crime if committed by an adult, such as underage drinking." (*Id.* at p. 6.) It should be noted, however, that the relevant provisions of the California statute contain no such language limiting their application to "dual status" situations.

The court held that, in any event, federal law precludes any extension of the scope of ICWA's notice requirements: "More importantly, to interpret section 224.3 as a legislative expression of an intent to expand

the scope of ICWA to all delinquency proceedings, would be to directly conflict with the Act's provisions. . . . The state has no power to expand on a federal statute concerning jurisdiction over Indian child custody proceedings because federal law is preemptive on that subject." (*Id.* at p. 7.) This directly contradicts the Third District's holding in *R.R. v. Superior Court*, in which that court stated: "The ICWA provisions limiting the application of ICWA to placements that are not 'based upon an act which, if committed by an adult, would be deemed a crime[,]' do not preempt California law applying such provisions in section 602 proceedings where the child is at risk of entering foster care because the California provisions are consistent with the force and purpose of the federal law." (*R.R. v. Superior Court, supra*, 180 Cal.App.4th at pp. 207-208.) As the Third District explained: "California law is more protective of tribal interests than ICWA because it provides for the application of ICWA in a broader range of cases. Thus, it is not incompatible with federal or tribal interests, but provides the higher standard of protection to those interests, as allowed under the terms of ICWA." (*Id.* at p. 208.)

Addressing the Third District's opinion directly, however, the court of appeal in the case at bar stated: "We decline to follow *R.R.* because it is

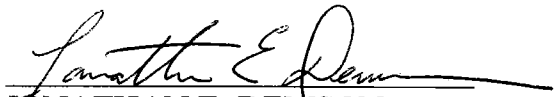
contrary to both the weight of current published decisions, and the purpose of the notice requirements of ICWA. While it may be true that in some situations state law may provide greater protection than the minimum federal protections, state law may not expand the jurisdictional basis for application of ICWA, especially where the federal Act expressly excludes certain types of cases from the reach of ICWA." (*In re W.B., Jr.*, at pp. 8-9 (citation omitted).)

Thus, by their express language, these two published decisions are irreconcilable and create a conflict in the law governing an entire class of cases. Furthermore, the importance of these cases is clearly reflected in the statements of purpose included by both Congress, in the ICWA, and the California Legislature, in its Indian Child Welfare provisions, discussed in sections A and B, above. Review should therefore be granted in order to secure uniformity of decision and settle these important questions of law.

CONCLUSION

For all the reasons set forth above, petitioner respectfully requests that this court grant review.

Respectfully Submitted,



Dated: April 5, 2010

JONATHAN E. DEMSON
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Telephone: (888) 827-9153

IN THE SUPREME COURT OF CALIFORNIA

In re: W. B., A Person Coming Under The Juvenile Court Law.	)
THE PEOPLE OF THE STATE OF CALIFORNIA,	) Court of Appeal) No. E047368
Plaintiff and Respondent,	)
v.	) Superior Court) No. RIJ114127
W. B.,	)
Defendant and Petitioner.	)

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.360(b)(1) of the California Rules of Court, petitioner certifies that the Petition for Review filed in connection with the above-captioned matter consists of approximately 6,512 words, as determined by using the "word count" feature of the Microsoft Word program used in drafting the brief.

Respectfully Submitted,

Dated: April 5, 2010

JONATHAN E. DEMSON
Attorney for Petitioner

Filed 1/25/10 Certified for publication 2/23/10 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re W.B., JR., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. W.B., JR., Defendant and Appellant.	E047368 (Super.Ct.No. RIJ114127) OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Meredith A. Strong, Deputy Attorneys General, for Plaintiff and Respondent.

The minor, W.B., appeals from a dispositional order removing him from his mother's custody and ordering him placed in a foster home, group home, relative home, county or private facility. The minor contends the dispositional order must be reversed because the court failed to comply with the notice provisions of the Indian Child Welfare Act (ICWA, or the Act). Finding that ICWA excludes delinquencies from its notice requirements, we hold that any attempt by the State of California to expand ICWA's application to delinquencies is unauthorized under the federal preemption doctrine. We affirm.

BACKGROUND

The minor has been the subject of several delinquency petitions (Welf. & Inst. Code, § 602)[1] commencing in 2007, for his commission of offenses that would be crimes if committed by an adult. He was first declared a ward on August 8, 2007, and ordered placed at the Van Horn or Twin Pines facilities. That order was reconsidered on August 28, 2007, when the minor was ordered to participate in the Wraparound Program.[2] In August 2008, following a court trial on an allegation of robbery (Pen. Code, § 211), the

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] The Wraparound service program was implemented in 1997 pursuant to Senate Bill (SB) 163. (See §§ 18250, et seq.) SB 163 allows California Counties to use non-federal Aid to Families with Dependent Children-Foster Care dollars to provide children and families with family-based service alternatives to group home care using intensive, individualized services and support to families that would allow children to live and grow up in a safe, stable and permanent family environment. The target population for the program is children in or at risk of placement in group homes at the "Rate Classification Level" of 10-14. (California Dept. of Social Services Web site http://www.childsworld.ca.gov/PG1320.htm [as of Jan. 20, 2010].)

wardship was continued and the minor was ordered to spend no less than 54 days nor more than 108 days in juvenile hall or a county facility, based on an incident occurring on June 12, 2008. Although information received from the minor's mother regarding possible Cherokee heritage had been noted, no notice was given to the Cherokee Tribe. No appeal was taken from that order.

On October 13, 2008, the minor and two others broke into a home through the sliding glass door and ransacked the house. In pursuing the burglars, officers found a pillowcase containing a video game console, two remote controls, three video games, and a pink shirt, all taken during the burglary. The minor was identified as one of the burglars.

On October 14, 2008, a subsequent petition was filed alleging the minor committed a residential burglary. (Pen. Code, § 459.) After a court trial, the court found the burglary allegations of the petition were true and set the minor's maximum confinement time at six years. At the disposition hearing, the court ordered the minor placed in a suitable foster home, group home, relative home, county or private facility, and directed the minor to comply with terms of probation. Specifically, the court directed that the minor be placed in a suitable public or private facility as deemed necessary. The court set the aggregate term of confinement at eight years eight months.

On December 17, 2008, the minor appealed.

DISCUSSION

The minor asserts that the dispositional order must be reversed because the court failed to comply with the notice requirements of ICWA. Respondent argues that ICWA

specifically excludes delinquency proceedings from the application of the Act. We agree with respondent.

ICWA establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child who resides or is domiciled within the reservation of such tribal courts, except where such jurisdiction is otherwise vested in the State by existing federal law. (25 U.S.C. § 1911(a).) In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding. (25 U.S.C. § 1911(c).) In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. (25 U.S.C. § 1912(a).)

The notice requirements are intended to ensure a tribe's right to intervene where the court knows or has reason to know that an Indian child is involved. (25 U.S.C. § 1912(a); *In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) Section 224.3, requires notice to the tribes in "all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care." The question presented here is whether section 224.3 extends ICWA to all delinquency proceedings where the minor is at risk of placement in foster care or a public or private institution

following a finding he has committed an act which would be a crime if committed by an adult. To answer this question, we turn to the language of ICWA itself to see if the Act can be interpreted to apply in delinquency proceedings.

The ICWA establishes minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes. (25 U.S.C. § 1902.) In addition to jurisdiction over child custody proceedings relating to Indian children residing within a tribal reservation, it applies in any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child. (25 U.S.C. § 1911(c).)

Section 1903 of the Act explains that the terms "child custody proceeding" and "foster care placement" "shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime . . . ." This language has been interpreted to mean it excludes placements made in delinquency cases. (*In re Enrique O.* (2006) 137 Cal.App.4th 728, 733 (*Enrique O.*); *In re Alejandro A.* (2008) 160 Cal.App.4th 1343, 1347-1348 (*Alejandro A.*).)

The minor acknowledges the express language of ICWA, but argues that section 224.3 represents a state law that provides a higher standard of protection, and that we should interpret that statute to expand the protections afforded by the federal ICWA statute to delinquency proceedings. This we cannot do.

It is true that section 224.3, subdivision (a), provides, "[t]he court . . . and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may

be an Indian child in all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care." However, the inclusion of references to section 602 and wardship proceedings does not mean that California has or is authorized to expand the reach of ICWA. To the contrary, it appears that the statute included the references to section 602 and wardship proceedings to address "dual status" situations where foster care placement is intended to promote the best interests of the child (§ 241.1; see *Enrique O.*, *supra*, 137 Cal.App.4th at p. 734), or cases in which the delinquency proceedings are based on acts which would not be a crime if committed by an adult, such as underage drinking. (*Id.* at p. 734, fn. 3.) In such cases, the minor is charged with an offense that would not be a crime if committed by an adult, so ICWA would apply.

Section 224.3 was added by SB 678. (Stats. 2006, ch. 838, § 32.) That bill made changes and additions to various codes with the intent to revise, recast, and expand various provisions of state law to authorize Indian tribes that are not recognized under federal law to intervene in guardianship and child custody proceedings. (SB No. 678 (2005-2006 Reg. Sess.); Stats. 2006, ch. 838, § 2.) The provisions were intended to apply to certain children who do not come within the definition of an Indian child under ICWA because their tribes are not registered, but who reside on an Indian reservation or have some other special relationship to a tribe. In addition to section 224.3, the bill enacted section 224.1, which incorporated the definition of "child custody proceeding" as provided in "Section 1903 of the Indian Child Welfare Act." (SB No. 678 (2005-2006

Reg. Sess.); Stats. 2006, ch. 838, § 30.) Thus, the minor's assertion that the Legislature intended to expand ICWA to all delinquency proceedings is unfounded.

More importantly, to interpret section 224.3 as a legislative expression of an intent to expand the scope of ICWA to all delinquency proceedings, would be to directly conflict with the Act's provisions. At the heart of ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. (*In re Brandon M.* (1997) 54 Cal.App.4th 1387, 1395.) The state has no power to expand on a federal statute concerning jurisdiction over Indian child custody proceedings because federal law is preemptive on that subject.

A federal law may be found to preempt state law by virtue of a conflict between the provisions of federal and state law. (*In re Brandon M., supra*, 54 Cal.App.4th at p. 1396.) State jurisdiction is preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. (*New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324, 334 [103 S.Ct. 2378, 76 L.Ed.2d 611].)

The minor's position interferes and is incompatible with the federal and tribal interests as reflected in the definition of "child custody proceeding" found in ICWA. Because the federal statute includes an express definition of the types of proceedings to which it applies, and because that definition affects jurisdiction under the Act, the state is powerless to expand that definition. Subject matter jurisdiction cannot be conferred by consent, waiver or estoppel. (2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 13, p. 585.)

By its express terms, ICWA is inapplicable to delinquency proceedings. (25 U.S.C. § 1903(1).) To allow the states to expand the scope and subject matter jurisdiction of the Act would impair the program, leading to disparate results depending on the state in which the delinquency proceedings are initiated. If we were to interpret section 224.3 to expand ICWA to all delinquency proceedings, we would be rewriting to make it conform to a presumed intention that was not stated, which we are not authorized to do. (*Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 801-802.) We have no authority to rewrite a federal statute in a manner inconsistent with Congress's expressed intention to exclude delinquency proceedings from ICWA.

Further, ICWA applies only to child custody proceedings in which a child may be placed in foster care or in an adoptive placement, not to placements in public or private institutions designed for the reform or rehabilitation of the minor. Placement in a juvenile detention facility, or other public or private institution pursuant to a dispositional order in a delinquency proceeding, is not a court proceeding for the foster care placement of, or termination of parental rights to, an Indian child (25 U.S.C. § 1911(c)), and thus is excluded from ICWA. (25 U.S.C. § 1903(1).)

The minor further argues that the Act only established the minimum federal protections and that state law can provide greater protection. He cites the recent decision of *In re R.R.* (2009) 180 Cal.App.4th 185, in support of his position. We decline to follow *R.R.* because it is contrary to both the weight of current published decisions, and the purpose of the notice requirements of ICWA. While it may be true that in some situations state law may provide greater protection than the minimum federal protections

(*id.* at pp. 207-208), state law may not expand the jurisdictional basis for application of ICWA, especially where the federal Act expressly excludes certain types of cases from the reach of ICWA.

The minor also argues that we should not follow *Alejandro A.* or *Enrique O.* because they were decided before the enactment of section 224.3. It is irrelevant when California enacted the statute requiring notice to tribes because we interpret that statute to apply to a limited class of wardship proceedings, not including delinquencies based on acts which would be crimes if committed by adults. The state Legislature lacks the authority to expand the subject matter jurisdiction of the federal Act to include all wardships as suggested by the minor.

Under the Supremacy Clause, the congressional Act preempts a conflicting state law. (*In re Brandon M., supra*, 54 Cal.App.4th at p. 1393; see also *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372-373 [120 S.Ct. 2288, 147 L.Ed.2d 352] [state foreign trade act concerning Burma undermined purpose of, and was preempted by, the federal Act, where it penalized individuals who were exempted from sanctions by the federal Act].) Here, ICWA, expressly excludes from its application cases involving a placement based on an act which, if committed by an adult, would be deemed a crime. (25 U.S.C. § 1903(1).)

To the extent that section 224.3 may be interpreted to apply ICWA notice requirements to all wardship proceedings, including delinquency proceedings arising from the commission of acts that would be a crime if committed by an adult, it has been preempted by federal law. In any event, ICWA does not apply to this delinquency

proceeding, because it involved a placement in a public or private institution rather than a foster care placement. Under any interpretation, the lack of notice to Indian tribes does not constitute reversible error.

DISPOSITION

The judgment is affirmed.

s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/Miller
J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re W.B., JR., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. W.B., JR., Defendant and Appellant.	E047368 (Super.Ct.No. RIJ114127) **ORDER**

IT IS ORDERED that the request of Respondent filed February 16, 2010, for publication of the opinion filed January 25, 2010, is GRANTED. The opinion meets the standard for publication as specified in California Rules of Court, rule 8.1105(c).

s/Gaut
J.

s/Richli
Acting P.J.

s/Miller
J.

DECLARATION OF SERVICE

In re: W. B., Jr. Court of Appeal No. E047368

I hereby declare that I am a citizen of the United States, am over eighteen years of age, and am not a party in the above-entitled action. I reside in the County of Los Angeles and my business address is 1158 26th Street #291, Santa Monica, CA 90403.

On April 5, 2010, I served the attached document described as a PETITION FOR REVIEW on the parties in the above-named case by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then delivered the envelopes to the U.S. Postal Service in Los Angeles, California, addressed as follows:

Office of the Attorney General
110 West "A" Street, Suite 1100
P.O. Box 85266-5299
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Office of the District Attorney
Appeals & Writ Division
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Michael Burns, Esq.
Juvenile Defense Panel
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Office of the Clerk of the Court
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Fourth Appellate District, Division Two
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Clerk of the Superior Court
Riverside Juvenile Court
9991 County Farm Road
Riverside, CA 92503

I mailed an additional copy to petitioner W.B., Jr.

I, Martha E. Demson, declare under penalty of perjury that the foregoing is true and correct.

Executed on April 5, 2010 at Los Angeles, California.

Martha E. Demson