IN THE SUPREME COURT OF CALIFORNIA

In re: W. B., Jr., A Person Coming Under The Juvenile Court Law.	
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **W. B., Jr.,** Defendant and Appellant.	Supreme Court No. S181638 Court of Appeal No. E047368 Superior Court No. RIJ114127

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

APPELLANT'S OPENING BRIEF ON THE MERITS

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By Appointment of the
Supreme Court, with the
assistance of Appellate
Defenders, Inc.

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IN THE SUPREME COURT OF CALIFORNIA

In re: W. B., Jr., A Person Coming Under The Juvenile Court Law.	)	
THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Supreme Court No. S181638
Plaintiff and Respondent,	)	Court of Appeal No. E047368
v.	)	
W. B., Jr.,	)	Superior Court No. RIJ114127
Defendant and Appellant.	)	

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

APPELLANT'S OPENING BRIEF ON THE MERITS

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 minor is at risk of entering foster care, even if a termination of parental rights is not involved.

STATEMENT OF THE CASE

The original petition concerning appellant 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, appellant 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 appellant (also styled "Petition New"), involving an alleged battery, was filed on May 3, 2007. (C.T.I 8-9.) The petition indicates that appellant 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 (appellant'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 appellant'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 appellant'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 appellant 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 [appellant's mother] reported her mother [*i.e.*, appellant'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 appellant "be adjudged a ward of the Court and serve 7/14 days in juvenile hall." (C.T.I 26.)

A third petition concerning appellant (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 appellant 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 because "the minor's parents are

not exercising the care and control needed to keep the minor from involvement in delinquent behavior . . . . The willingness and/or ability of the parents to control the minor's activities must be strengthened before the minor can be safely returned to their custody." (C.T.I 56-57.)

At a hearing on July 5, 2007, appellant 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.) Appellant was released on home supervision. (C.T.I 80, 95, 121.)

A second Probation Officer's Report concerning appellant 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, appellant 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.) At a subsequent hearing on August 28, 2007, however, the

previous disposition was vacated and appellant 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 appellant, 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 appellant 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, once again noting that "the minor's parents are not exercising the care and control needed to keep the minor from involvement in delinquent behavior" and the "willingness and/or ability of the parents to control the minor's activities must be strengthened before the minor can be safely returned to their custody." (C.T.II 6-7.)

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 appellant 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, appellant was released to the custody of his mother, Nicole Jones. (C.T.II 75; R.T.III 95.)

The fifth petition concerning appellant, which is the subject of the instant appeal, was filed on October 14, 2008, and alleges that appellant 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 appellant was arrested on October 13, 2008, and placed in juvenile hall. (C.T.II 87-88.) 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] The report recommended against

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[2] There is no probation officer's report dated August 4, 2008, in either the

home supervision because, as stated in previous reports, appellant's parents were not exercising the care and control needed to keep him from involvement in delinquent behavior and their willingness to control appellant's activities needed to be strengthened before appellant could be safely returned to their custody. (C.T.II 91.)

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 appellant 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

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record on appeal or appellant's superior court file. August 4, 2008, was the date of appellant'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 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, which states "ICWA may apply".

mother had Cherokee ancestry and the appropriate paperwork was completed." (C.T.II 125.) The probation officer's evaluation in the report stated that appellant's "treatment needs can no longer be met at home . . . and out of home placement in a supervised and structured setting is appropriate. Placement with his grandparents was considered, however, it is believed his treatment needs can best be met in a placement program." (C.T.II 138.) The report recommended that appellant "be placed in a suitable foster/group home, relative home, county or private facility (no preference) for such period as deemed necessary by staff/probation officer" and that the superior court "make findings by clear proof that continuance in the home of the parent . . . would be contrary to the child's welfare." (C.T.II 140-141.) Appellant's Juvenile Probation Case Plan dated December 8, 2008, also recommended placement. (C.T.II 160.)

At a dispositional hearing on December 17, 2008, appellant 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. (C.T.II 167, 169, 174, 175; R.T.III 139, 140, 142.) Appellant was further ordered "detained pending placement" in juvenile hall. (C.T.II 169, 176.)

The superior court also ordered that "all additional recommended findings and orders as set forth in Nos. 3 through 19 [in the Probation Officer's Reported dated December 12, 2008] be adopted." (R.T.III 142.) Recommendations 3 through 6 of the recommendations referred to above by the superior court are as follows:

> 3. Court make findings by clear proof that continuance in the home of the parent . . . would be contrary to the child's welfare; (CHC)
>
> 4. Court make findings that reasonable efforts have been made to prevent or eliminate the need for removal of the child from his . . . home and make it possible for the child to return to his . . . home; (REM)
>
> 5. Minor be removed from the custody of parents, [naming appellant's mother and father]; (MRCC)
>
> 6. Court make findings pursuant to Section 726[(a)(2) & (3)] of the Welfare and Institutions Code; (F726)

(C.T.II 141-142.)

Appellant filed his notice of appeal on December 17, 2008. (C.T.II 178-79.) The Court of Appeal affirmed the judgment of the superior court in an opinion filed on January 25, 2010, and granted respondent's request for publication of its opinion on February 23, 2010. Appellant filed his petition for review on April 7, 2010, and this Court granted review on May 12, 2010.

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 appellant, 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 appellant 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 appellant, hiding in a hole in the wall. (R.T.III 114-15.) Vasquez found several items taken from the 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. CALIFORNIA'S INDIAN CHILD WELFARE LAW AND RELATED RULES OF COURT HAVE EXTENDED THE NOTICE REQUIREMENTS OF THE INDIAN CHILD WELFARE ACT OF 1978 (25 U.S.C. § 1901 ET SEQ.) TO APPLY TO JUVENILE DELINQUENCY CASES LIKE THIS ONE IN WHICH THE MINOR IS AT RISK OF ENTERING FOSTER CARE

A. Introduction

In 2006, recognizing that, "[t]here 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 California Legislature passed Senate Bill 678, which codified certain procedures and requirements in juvenile court cases involving Indian children in order to protect the "essential tribal relations and best interest of an Indian child." (Welf. & Inst. Code, § 224, subd. (a)(1).) This statute builds upon the "minimum standards" previously established by Congress in the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) ("ICWA") and, as permitted by the federal statute, extends ICWA's protections to certain juvenile delinquency cases not previously covered by

ICWA. Specifically, unlike the federal statute, which does not apply to any case arising from an act that would be a crime if committed by an adult, California's statute does apply in such cases if the minor is at risk of entering foster care or is already in foster care. This augmentation of the federally-mandated minimum standards is both permitted by ICWA and in complete harmony with the important policy goals of the federal statute. The California Rules of Court have also been revised accordingly.

The threshold requirement set forth in the California statute --on which the efficacy of both the federal and state ICWA provisions entirely depends-- is that the child's tribe be notified of the juvenile court proceedings. This requirement reflects the Legislature's goal of protecting Indian children and empowering the Indian child's tribe in relation to any proceeding in which an Indian child is at risk of entering foster care, regardless of whether that child has entered the juvenile court system by way of dependency or delinquency proceedings.

The issue presented in this case is whether the notice requirements set forth in California's ICWA legislation apply to juvenile delinquency proceedings like this one in which the minor is at risk of entering foster care. The Third District Court of Appeal recently addressed this very issue,

holding that the notice requirements set forth in the California statute and related rules apply to juvenile delinquency proceedings in which the child is at risk of entering foster care, even if a termination of parental rights is not involved. (*R.R. v. Superior Court* (2009) 180 Cal.App.4th 185.) The Court of Appeal in this case took the opposite view, holding that the California Legislature was powerless to expand the protections set forth in ICWA by virtue of federal preemption, despite clear language in the federal statute describing those protections as "minimum standards," as well as a specific provision in the federal statute permitting states to enact a higher level of protection.

Because the Court of Appeal's opinion in this case is both inconsistent with the plain language of California's Indian Child Welfare legislation and contrary to the important goals of both the California and the federal statutes, this Court should reverse the Court of Appeal and hold that, under California law, ICWA's notice requirements apply to all juvenile delinquency cases in which the minor is at risk of entering foster care.

B. The Standard of Review

Whether California's ICWA legislation and related California Rules of Court require the superior court and the probation department to comply with ICWA's notice requirements in juvenile delinquency cases where the minor is at risk of entering foster care is a question of statutory construction. Such issues of law are reviewed *de novo*. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387.)

C. 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).) "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." (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) 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.) "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.

D. The Expanded Notice Requirements Under California Law

"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, "'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.)

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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).)

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

(Welf. & Inst. Code, § 224.3, subd. (a).) "Thus, California law, unlike ICWA, imposes a duty of inquiry in juvenile proceedings arising out of an act which would be deemed a crime if committed by an adult, where the child is at risk of being placed in foster care." (*R.R. v. Superior Court, supra*, 180 Cal.App.4th at p. 199; see *In re Alejandro A.* (2008) 160 Cal.App.4th 1343, 1347-1348 ["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"].)

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: "'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 expanded notice requirements established by California's ICWA legislation are further clarified by the California Rules of Court, which were revised following passage of the legislation.

E. The Expanded Notice Requirements Under the California Rules of Court

"The California Rules of Court expressly make ICWA as codified by California statute applicable to proceedings under section 602 where the child is at risk of entering foster care or is in foster care." (*R.R. v. Superior*

Court, supra, 180 Cal.App.4th at p. 204; see 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:

> 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"

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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.)

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).)

Moreover, "[u]nlike the statutory provisions, which do not expressly make ICWA's placement standards and preferences applicable to delinquency cases, the Rules specifically apply the standards and preferences of a placement under ICWA to delinquency proceedings where

the child is at risk of entering foster care or is in foster care. (Cal. Rules of Court, rule 5.484.)" (*R.R. v. Superior Court, supra*, 180 Cal.App.4th at p. 204.)

In view of the straightforward language of both the California statute and the related California Rules of Court, the Legislature clearly intended ICWA's notice requirements to apply to juvenile delinquency cases like this one where the minor is at risk of entering foster care.

G. 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 In Which the Minor Is At Risk of Entering Foster Care

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 appellant'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 its recent opinion in *R.R. v. Superior Court, supra*, 180 Cal.App.4th 185, the Third District Court of Appeal 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 cases arising from an act 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, however, 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 of Appeal in this case took the opposite view, holding that the California Legislature was powerless to expand the protections set forth in ICWA by virtue of federal preemption: "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." (Opn. at 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." (Opn. at p. 6.)

The salient flaw in the Court of Appeal's analysis is the fact that the relevant provisions of the California statute contain no such language limiting their application to "dual status" situations, despite the ease with

which the Legislature might have included such limiting language if that had been its intent. By the plain language of the statute, its protections arise "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." (Welf. & Inst. Code, § 224.3, subd. (a) [emphasis added].) Nowhere in California's Indian Child Welfare statute does the federal statutory language excluding child custody proceedings based on "an act which, if committed by an adult, would be deemed a crime" (25 U.S.C. § 1903(1)) ever appear -- a curious omission if the Legislature intended to limit the application of the California statute to only those cases that already fall within the scope of the federal statute.

"Under well-established rules of statutory construction, we must ascertain the intent of the drafters so as to effectuate the purpose of the law." (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268.) "Because the statutory language is generally the most reliable indicator of legislative intent, we first examine the words themselves, giving them their usual and ordinary meaning and construing them in context. If the language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls." (*People v. Anderson* (2010) 50 Cal.4th 19,

29.) The plain language of section 224.3 clearly demonstrates the Legislature's intent to include juvenile delinquency cases like this one where the child is at risk of entering, or is already in, foster care. The Court of Appeal's vastly more limited interpretation finds no support in the straightforward language chosen by the Legislature. As the Third District stated in *R.R.* in rejecting a similar interpretation proposed by the Attorney General in that case, "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." (*R.R. v. Superior Court, supra*, 180 Cal.App.4th at p. 201.)

The Third District's straightforward interpretation is thus consistent with the plain language of the statute. It also finds support in the legislative history of California's Indian Child Welfare provisions. In describing the purpose of the legislation at a hearing of the Senate Judiciary Committee on May 17, 2005, the bill's sponsor, Senator Denise Moreno Ducheny, announced one of its important goals: "[To a]mend the Welfare and Institutions Code to clarify what ICWA requires in juvenile court and of the

county agencies in delinquency cases. Again, a different category, but *we're trying to put the same rules in place all the way through the system.*" (Sen. Com. on Judiciary, Informational Hearing on Sen. Bill 678, "The Indian Child Welfare Act and Related Compliance Problems," May 17, 2005, transcript at p. 4 [emphasis added].) In discussing the importance of applying ICWA's protections consistently, Senator Ducheny explained, "what we hope this bill will do is make this consistent, not just in the dependency cases, which are where most of the heartbreaking cases and the most difficult situations arise, but to say guardianships matter, family law custody proceedings matter, and delinquency proceedings . . . matter. And ICWA applies in all of those proceedings; how we do it; how we make the consistency in all of our statutes so that as a state, we are in fact recognizing not only the sovereignty but the necessity from a human perspective, if you will, of trying to perpetuate the lineage of tribes." (*Id.* at p. 40.)

The Senate Judiciary Committee's briefing notes on Senate Bill 678 lend further support to this interpretation. Addressing section 29 of the bill, which sets forth the language of what would become section 224, subdivision (a), the briefing notes explain: "Section 224 is a revision and

renumbering of § 360.6, introduced into the Welf. & Inst. Code by AB 65 in 1999. A renumbering is needed because it moves the provision to the general provisions applicable to Indian child custody proceedings, rather than in the dependency provisions it had been in. This change will help ensure the provision is applied not only to dependency cases but delinquency cases as well." (Sen. Com. on Judiciary, Briefing Notes on Sen. Bill 678 (2005-2006 Reg. Sess.) p. 33.) Addressing section 54 of the bill, which proposed amendments to section 727.4 of the code, the notes explain: "Section 727.4 sets out the notice requirements in juvenile delinquency proceedings. Subdivision (a)(1) is amended to direct the court to comply with the notice requirements set out in Section 31 of the Bill [Welf. & Inst. Code, section 224.2]." (*Id.* at p. 83.)

Thus, contrary to the Court of Appeal's holding in this case, both the plain language and the legislative history of the California statute support the conclusion that it was intended to extend ICWA's notice requirements to "juvenile proceedings arising out of an act which would be deemed a crime if committed by an adult, where the child is at risk of being placed in foster care." (*R.R. v. Superior Court, supra*, 180 Cal.App.4th at p. 199.) As discussed below, the case at bar falls squarely within this class of cases.

H. This Case Falls Squarely Within the Class of Delinquency Cases Requiring Compliance With ICWA's Notice Provisions

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 minor 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, appellant's section 602 proceedings met these criteria in every respect. 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.) Furthermore, both the superior court and the probation department "had reason to know" of appellant's potential status as an Indian child as those terms are defined in both the California ICWA statute and the California Rules of Court, and appellant was clearly "at risk of entering foster care."

1. Both the Superior Court and the Probation Department "Had Reason To Know" of Appellant's Potential Status as an Indian Child

Both the superior court and the probation department clearly "had reason to know" of appellant's potential status as an Indian child as those terms are defined in both the California 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 appellant, including a detention hearing report and a probation officer's report filed in connection with the proceedings that are the subject of this appeal. In all of these reports save one, the probation department reported to the superior court that "ICWA may apply", and the only report 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 appellant's mother had advised the probation department that her mother

(*i.e.*, appellant's grandmother) had Cherokee ancestry. (See C.T.I 16, 55, 109; C.T.II 5, 35, 125.)

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).) Moreover, "'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 clearly had reason to know that appellant may be an Indian child.

2. Appellant Was "At Risk of Entering Foster Care" As Defined In Both the Federal and the State Statutes

Appellant was also clearly "at risk of entering foster care" as those terms are defined in both the federal and state statutes. The Riverside County Probation Department Detention Hearing Report filed on October 14, 2008, the day after appellant's arrest, recommended against home supervision, stating that, "it appears that the minor's parents are not exercising the care and control needed to keep the minor from involvement in delinquent behavior . . . . The willingness and/or ability of the parents to control the minor's activities must be strengthened before the minor can be safely returned to their custody." (C.T.II 91.) These observations echoed remarks included in previous probation reports concerning appellant. (C.T.I 56-57; C.T.II 6-7.) The report added that removal from the home was necessary, in part, "for the protection of the minor." (C.T.II 92.)

The Probation Officer's Report filed on December 12, 2008, in preparation for appellant's dispositional hearing, observed that appellant's "treatment needs can no longer be met at home . . . and that out of home

placement in a supervised and structured setting is appropriate." (C.T.II 138). The report went on to recommend that appellant "be placed in a suitable foster/group home, relative home, county or private facility (no preference) for such period as deemed necessary by staff/probation officer . . ." (C.T.II 140.) The report requested that the superior court "make findings by clear proof that continuance in the home of the parent . . . would be contrary to the child's welfare." (C.T.II 141.) Appellant's Juvenile Probation Case Plan, dated December 8, 2008, also recommended placement. (C.T.II 160.)

At the dispositional hearing on December 17, 2008, the superior court followed this recommendation and ordered appellant "placed in suitable licensed foster home, group home, relative home, county or private facility suitable to meet specific needs." (C.T.II 167, 175; R.T.III 139, 140, 142.) The superior court found that continuance in the home of his parent would be contrary to appellant's welfare, and that reasonable efforts had been made to prevent or eliminate the need for appellant's removal from his home and to make it possible for appellant to return to his home. (R.T.III 142; C.T.II 141.) The superior court also found, pursuant to Welfare and Institutions Code section 726, subdivision (a)(3), that "the welfare of the

minor requires that custody be taken from the minor's parent." (R.T.III 142; C.T.II 142.) In accordance with these findings, appellant was ordered removed from the custody of parents. (*Ibid.*)

In view of the above, appellant was "at risk of entering foster care" as defined in the federal statute, which defines "foster care placement" as "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand . . . ." (25 U.S.C. § 1903(1)(i).)

Appellant was also "at risk of entering foster care" as defined by Welfare and Institutions Code, section 727.4, subdivision (d)(2): "'At risk of entering foster care' means that conditions within a minor's family may necessitate his or her entry into foster care unless those conditions are resolved." As noted above, three different probation reports recommended against continued home supervision because "it appears that the minor's parents are not exercising the care and control needed to keep the minor from involvement in delinquent behavior . . . . The willingness and/or ability of the parents to control the minor's activities must be strengthened before the minor can be safely returned to their custody." (C.T.I 56-57;

C.T.II 6-7; C.T.II 91.) Furthermore, the December 12, 2008, report advised the court that appellant's "treatment needs can no longer be met at home" and requested that the superior court "make findings by clear proof that continuance in the home of the parent . . . would be contrary to the child's welfare." (C.T.II 138, 141.) Thus, the superior court was explicitly advised that, as far as the Probation Department was concerned, conditions within appellant's family required his entry into foster care.

Moreover, appellant's disposition, pursuant to which he was ordered "placed in suitable licensed foster home, group home, relative home, county or private facility suitable to meet specific needs" (C.T.II 167, 175), explicitly contemplated appellant's potential placement in one of several "settings" that fall within section 727.4(d)(1)'s definition of "foster care," which includes "residential care provided in any of the settings described in Section 11402," which in turn includes most, if not all, of the options included in appellant's dispositional order.[5]

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[5] "Foster care, pursuant to section 727.4, subdivision (d)(1), is defined as 'residential care provided in any of the settings described in Section 11402.' As is applicable in a juvenile delinquency proceeding, these are: (1) the approved home of a relative; (2) the licensed family home of a nonrelative or the approved home of a nonrelative extended family member as described in section 362.7; (3) a licensed group home as described in section 11400, subdivision (h) (i.e., 'a nondetention privately operated

Accordingly, appellant was very much at risk of remaining in foster care in view of the probation department's recommendations, which were ultimately followed by the superior court.

Although the Court of Appeal's holding in this case was based primarily on its conclusion that ICWA preempts any state legislation that extends ICWA's protections beyond the minimum standards set forth in the federal statute, the court also held that "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." (Opn. at p. 4.) According to the Court of Appeal, "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

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residential home, organized and operated on a nonprofit basis only ... that provides services in a group setting to children in need of care and supervision') if a placement worker has documented that the placement is necessary to meet the treatment needs of the child and the facility offers those treatment services; (4) an exclusive-use home; (5) a licensed transitional housing placement facility as described in section 11400 (a licensed community care facility for persons 16 to 18 years of age who are in out-of-home placement and who are participating in an independent living program) and Health and Safety Code section 1559.110; and (7) an out-of-state group home, if the placement worker complies with all other statutory requirements for placing a minor in such a home and documents that the requirements of Family Code section 7911.1 have been met." (*R.R. v. Superior Court, supra*, 180 Cal.App.4th at p. 203, fn. 5.)

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).)" (Opn. at p. 4.)

The fact that appellant spent time in juvenile hall simply has no bearing, however, on whether he was "at risk of entering foster care" at the commencement of his juvenile court proceedings. As a threshold matter, even juvenile hall, though it does not constitute "foster care" as defined in section 727.4, would appear to fall within the federal statute's much broader definition, which encompasses "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand . . . ." (25 U.S.C. § 1903(1)(i).) In any event, the Court of Appeal's focus on where appellant was actually placed overlooks the fact that ICWA's notice requirements apply not just to delinquency cases in which the minor is already in foster care, but also to cases in which the minor is "at risk of

entering" foster care. Hindsight is simply not a workable frame of reference; for ICWA's notice requirements to have any efficacy, they must be complied with *before* juvenile court proceedings begin, not after those proceedings are concluded.

The Court of Appeal's alternate holding is really just a variation on the theme of federal preemption, as indicated by the Court of Appeal's failure to mention or even cite the relevant provisions of California law discussed above. (See Opn. at p. 4.) The court's broad assertion that a juvenile delinquency proceeding is entirely different from an Indian child proceeding as contemplated in the federal statute is no substitute, however, for a proper analysis of whether a minor falls within the statutory definition of "at risk of entering foster care." As the Third District Court of Appeal explained: "The definition of the phrase, 'at risk of entering foster care' found in section 727.4, subdivision (d)(2) is the appropriate definition of the phrase in section 224.3 because the same wording is used and because section 727.4 specifically deals with placements in delinquency cases." (*R.R. v. Superior Court, supra*, 180 Cal.App.4th at p. 203.) Because appellant was "at risk of entering foster care" as those terms are defined in

section 727.4, his case falls within the category of delinquency cases that require compliance with ICWA's notice provisions.

To the extent that the Court of Appeal's alternative holding assumes that any state law definition of "at risk of entering foster care" is also preempted by the federal statute, that holding --like the Court of Appeal's broader federal preemption argument-- is both wrong on the law and contrary to the important goals of both the federal and the California Indian Child Welfare statutes, as discussed below.

H. The Expanded Protections of the California Statute Are Not Preempted By the Federal Statute

The Court of Appeal in this case held that "any attempt by the State of California to expand ICWA's application to delinquencies is unauthorized under the federal preemption doctrine." (Opn. at p. 1.) Federal preemption of state law may arise in three ways: (1) by an express statement of the extent to which the enactment preempts state law; (2) by regulating the area to such an extent that an intent exclusively to occupy the field is implied; or (3) by virtue of a conflict between state and federal law. (*R.R. v. Superior Court, supra*, 180 Cal.App.4th at p. 208; *In re Brandon M.* (1997) 54 Cal.App.4th 1387, 1393.) "The first two principles do not

apply to ICWA." (*R.R. v. Superior Court, supra*, 180 Cal.App.4th at p. 208; see *In re Brandon M, supra,* 54 Cal.App.4th at p. 1396.) Accordingly, the analysis of whether California's ICWA provisions are preempted by the federal statute turns on whether there is a conflict between the California law and the federal statute.

This issue was squarely addressed by the Third District Court of Appeal's opinion in *R.R. v. Superior Court*: "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." (180 Cal.App.4th at p. 194.) Rejecting the Attorney General's argument in that case that the federal statute preempted California's expanded notice requirements, the court looked to the language of the federal statute: "The language of the federal statute and Federal Guidelines indicates the states may, as California has done, pass laws that are more protective than federal law of the relationship between the Indian tribes and their children." (*Id.* at p. 206.)

The *R.R.* court held that, because the standards set forth in the federal statute "are expressly defined as minimum standards, the undeniable

implication is that higher standards may be implemented by states . . . . Such higher standards must be in furtherance of the expressed policy of ICWA, which is: (1) to protect the best interest of Indian children, (2) to promote the stability and security of Indian tribes, and (3) to promote the stability and security of Indian families." (*Id.* at p. 207.) "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.)

The Court of Appeal in this case disagreed, asserting that, "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." (Opn. at p. 3.) Addressing the Third District Court of Appeal's *R.R.* opinion directly, the Court of Appeal 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." (Opn. at p. 4 [citation omitted].)

As a threshold matter, the Court of Appeal's contention that the decision in *R.R.* is "contrary to . . . the weight of current published decisions " seems an odd claim considering that the court cites only one case touching on this issue (and appellant is unaware of any other published decision) decided after California's ICWA legislation was enacted. (See Opn. at p. 4 [citing *In re Alejandro A.* (2008) 160 Cal.App.4th 1373].) Moreover, in that case the court concluded that "there is simply no evidence appellant is an Indian child such that [ICWA] applies to him. Appellant told the probation officer he is not Native American. The social study prepared by the probation officer lists appellant, without contradiction anywhere in the record, as 'Mexican/Hispanic.'" (*In re Alejandro A., supra,* 160 Cal.App.4th at p. 1347.) The court in *Alejandro A.* also concluded that appellant was neither in, nor at risk of entering, foster care. (*Id.* at p. 1348.)

Thus, *Alejandro A.* is clearly distinguishable on its facts from the instant case. (See *R.R. v. Superior Court, supra*, 180 Cal.App.4th at p. 206 [distinguishing *Alejandro A.* on the same grounds].)

The only other case included in the "weight of authority" invoked by the Court of Appeal is *In re Enrique O.* (2006) 137 Cal.App.4th 728, a case that was decided *prior* to the passage of California's ICWA legislation and that therefore seems a curious precedent to rely on in interpreting the scope of a statute that did not yet exist. *Enrique O.* addressed the proper interpretation of former rule 1439 of the California Rules of Court in view of the more limited federal ICWA statute on which it was based (as opposed to California's Indian Child Welfare statute, which did not yet exist): "[W]e note that the interpretation appellant seeks of Rule 1439 would render the rule inconsistent with the federal statute on which it is based, which is an untenable result." (*In re Enrique O., supra*, 137 Cal.App.4th at p. 734.)[6] As the *Enrique O.* court explained, "we do not interpret the California Rules of Court here to expressly contradict the

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[6] Following the enactment of California's ICWA statute, former rule 1439 was repealed and replaced by current rule 5.480, which is based on California's ICWA statute. (See Welf. & Instit. Code § 224.3; Cal. Rules of Court, rule 5.480.)

[federal] ICWA by ordering ICWA notices and procedures to occur in all out of home placements arising out of acts that would be deemed crimes if committed by an adult." (*Id.* at p. 735.)

Because it was decided prior to the enactment of California's Indian child welfare legislation, *Enrique O.* can be of no help in determining whether that legislation is in conflict with the federal statute. The court in *Enrique O.* was constrained to follow the language of the federal statute upon which the rule was based, noting that "the offenses appellant committed here placed him squarely and unavoidably within the delinquency exception to the [federal] ICWA." (*In re Enrique O., supra*, 137 Cal.App.4th at p. 734.) As the Third District Court of Appeal pointed out in *R.R.* in distinguishing *Enrique O.* on the same grounds, section 224.3 of the subsequently-enacted California ICWA statute "provides the legislative authority for the Rules of Court applying ICWA to section 602 proceedings." (*R.R. v. Superior Court, supra*, 180 Cal.App.4th at p. 206.) In short, the Court of Appeal's reliance on *Enrique O.* in interpreting the scope of a statute that did not yet exist at the time that case was decided is misplaced.

Thus, the Court of Appeal's claim that the Third District's earlier holding in *R.R.* is contrary to the "weight of authority" --consisting of two cases, both of which are clearly distinguishable-- is unpersuasive. There is, however, an even more fundamental flaw in the Court of Appeal's federal preemption argument. Nowhere in the court's opinion is there any explanation --or even any suggestion-- as to *why* Congress might have intended the so-called "delinquency exception" in section 1903(1) of the ICWA to preempt any state law seeking to extend ICWA's protections to delinquency cases.

Given the care Congress took to describe ICWA's protections as "minimum standards" (25 U.S.C. § 1902), logic dictates that Congress anticipated that states might enact *higher* standards --otherwise, the term "minimum" in such a context would be meaningless. Yet, in its opinion in this case, the Court of Appeal argues that any variation between the statutes of different states would inherently impair the interests advanced by the federal statute: "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. [Citation.] We have no authority to rewrite a federal statute in a manner inconsistent with Congress's expressed intention to exclude delinquency proceedings from ICWA." (Opn. at p. 3.)

This argument cannot be reconciled, however, with Congress's choice of the words "minimum standards" to describe the protections set forth in the federal statute. If any variation among state ICWA standards amounts to an impairment of the program overall, then all states must simply conform to the federal standards, which could not then be described as "minimum standards" in any meaningful sense. The Court of Appeal's argument is also inconsistent with section 1921 of the ICWA --not even mentioned in the opinion-- which specifically provides that states may enact standards that are higher than the federal standards, and therefore contemplates variations between the Indian Child Welfare legislation of different states. (25 U.S.C. § 1921.) It is clear, then, that Congress did not intend nationwide uniformity with respect to Indian child welfare legislation, though no state is permitted to go below the minimum federal standards.

Given the substantial obligations ICWA imposes on state courts and state agencies, it is easy to understand why Congress would opt not to impose such obligations in delinquency cases, in which additional state interests, such as protecting the community from criminal conduct, come into play. By carving out an exception for proceedings arising from an act that would be a crime if committed by an adult, Congress may quite sensibly be understood as having chosen to stay out of state delinquency proceedings, preferring to allow states to regulate such proceedings without federal interference. But the Court of Appeal's opinion fails to identify -- and appellant is unaware of-- any legitimate federal concern that might impel Congress to do exactly the opposite, *i.e.*, to intrude broadly upon state juvenile delinquency court proceedings nationwide by seeking to *prohibit* states from extending ICWA's protections to delinquency cases.

While it may not be difficult for opponents of California's Indian Child Welfare legislation to come up with a litany of reasons why ICWA's notice requirements *should not* apply in delinquency cases --ranging from the additional administrative burdens to the potential for procedural conflicts in juvenile delinquency cases, to cite but two conceivable examples-- such reasons invariably implicate *state* concerns. It is far more

difficult, if not impossible, to conceive of any federal interest or concern implicated by state legislation imposing ICWA's protections on state juvenile delinquency courts --aside from the Indian child welfare interests advanced by the federal statute, which are only advanced yet further by California's legislation extending ICWA's proceedings to an additional category of cases not covered by the federal statute.

The Court of Appeal in this case certainly did not present any reason why Congress should be so seemingly contradictory as to pass sweeping legislation to protect Indian child welfare interests in dependency cases only to mysteriously forbid states from extending those same protections to delinquency cases. Simply put, in this context, what makes perfect sense as a floor makes absolutely no sense as a ceiling.

Accordingly, because California's legislation is in harmony with both the language and the purpose of the federal statute, that legislation is not preempted.

I. The Superior Court's Failure To Comply With California's ICWA's Notice Requirements Was Prejudicial

Courts have subjected failure to comply with ICWA's notice requirements to harmless error analysis, noting that such failure may be

held harmless if the child's tribe has either (1) actually participated in the proceedings or (2) expressly indicated no interest in the proceedings. (See *In re Kahlen W., supra*, 233 Cal.App.3d at p. 1424; *In re S.B., supra*, 130 Cal.App.4th at p. 1162.) Neither of these circumstances applies to the facts of the instant case. Accordingly, the superior court's failure to comply with California's ICWA notice requirements warrants reversal of its dispositional order, invalidation of the proceedings below, and remand of this case to the superior court with directions to comply with those requirements. (See *In re Desiree F., supra*, 83 Cal.App.4th at p. 472 ["The failure to provide the necessary notice requires this court to invalidate actions taken in violation of the ICWA and remand the case unless the tribe has participated in or expressly indicated no interest in the proceedings."]; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111 ["The juvenile court's failure to require compliance with the Act's notice provisions is prejudicial error."]; *In re Kahlen W., supra*, 233 Cal.App.3d at p. 1424 ["The juvenile court's failure to secure compliance with the notice provisions of the Act is prejudicial error."].)

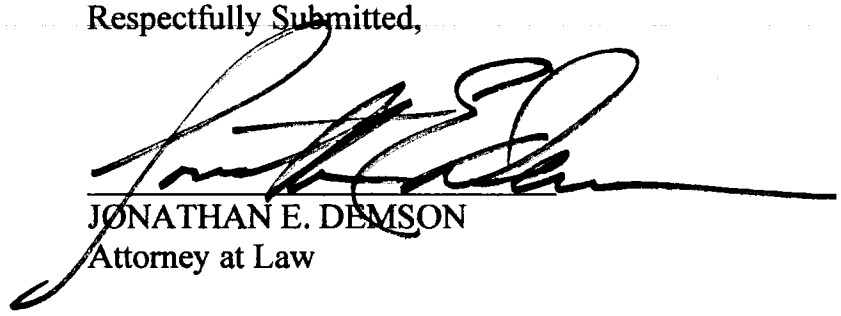
CONCLUSION

Both the plain language and the legislative history of California's Indian Child Welfare legislation evince a clear intent on the part of the California Legislature to extend ICWA's notice requirements to juvenile delinquency cases like this one in which the minor is at risk of entering foster care. This requirement reflects the California Legislature's goal of protecting Indian children and empowering the Indian child's tribe in relation to any proceeding in which an Indian child is at risk of entering foster care, regardless of whether that child has entered the juvenile court system by way of dependency or delinquency proceedings. Furthermore, this augmentation of the federally-mandated minimum standards is both permitted by ICWA and in complete harmony with the important policy goals of the federal statute.

Accordingly, this Court should reverse the Court of Appeal and hold that, under California law, ICWA's notice requirements apply to all juvenile delinquency cases in which the minor is at risk of entering foster care. Consistent with such holding, this Court should reverse the superior court's dispositional order, invalidate appellant's section 602 proceedings below,

and remand the case with directions to the superior court to comply with all federal and state ICWA notice requirements.

Respectfully Submitted,



Dated: September 20, 2010

JONATHAN E. DEMSON
Attorney at Law

Telephone: (888) 827-9153

IN THE SUPREME COURT OF CALIFORNIA

In re: W. B., Jr., A Person Coming Under The Juvenile Court Law.	
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	Supreme Court No. S181638
v.	Court of Appeal No. E047368
W. B., Jr., Defendant and Appellant.	Superior Court No. RIJ114127

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.360(b)(1) of the California Rules of Court, appellant certifies that the Petition for Review filed in connection with the above-captioned matter consists of approximately 11,312 words, as determined by using the "word count" feature of the Microsoft Word program used in drafting the brief.

Respectfully Submitted,

Dated: September 20, 2010

JONATHAN E. DEMSON
Attorney for Appellant

DECLARATION OF SERVICE

In re: W. B., Jr. Supreme Court No. S181638

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 September 20, 2010, I served the attached document described as APPELLANT'S OPENING BRIEF ON THE MERITS 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:

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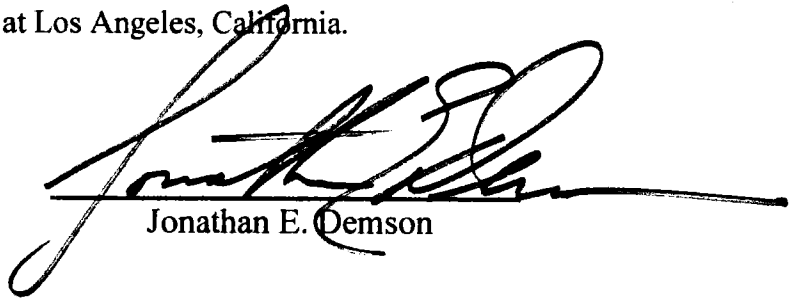
I mailed an additional copy to appellant W.B., Jr.

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

Executed on September 20, 2010 at Los Angeles, California.



Jonathan E. Demson