No. _____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE: N.R., A.R., and A.W., minor children.

Ashley Rios, Mother, and Ashlee Rios, Father,
Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR WRIT OF CERTIORARI

Jeremy B. Cooper
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
(304) 376-0037
jeremy@blackwaterlawpllc.com
Counsel of Record
Attorney for the Petitioners

David Fuellhart
Isner Law Office LC
PO Box 1878
Elkins, WV 26241
Tel: (304) 636-7681
david@isnerlaw.com

QUESTIONS PRESENTED

In a case involving the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901 – 1923 (1978), may a court deny a petition to invalidate the proceeding when a foster placement was ordered without the testimony of any qualified expert witness pursuant to § 1912(e), simply because the parent of the Indian Child admits to an underlying act of abuse or neglect in the absence of a knowing waiver?

PARTIES TO THE PROCEEDINGS BELOW

1. Ashlee Rios, co-petitioner.

    a. Mr. Rios is the respondent father in abuse and neglect proceedings brought in the Circuit Court of Ohio County, West Virginia, 13-CJA-33, 34 & 35 and 14-CJA-76, 77 & 78.

    b. Mr. Rios is the petitioner in one of the four consolidated appeals filed in the Supreme Court of Appeals of West Virginia, and decided in *In Re: N.R., A.R., and A.W.,* Docket Nos.: 18-0842, 18-0849, 18-0850, 18-0854 (W. Va. Nov. 7, 2019), and a respondent in the other three consolidated appeals.

2. Ashley Rios, co-petitioner.

    a. Mrs. Rios is the respondent mother in abuse and neglect proceedings brought in the Circuit Court of Ohio County, West Virginia, 13-CJA-33, 34 & 35 and 14-CJA-76, 77 & 78.

    b. Mrs. Rios is the petitioner in one of the four consolidated appeals filed in the Supreme Court of Appeals of West Virginia, and decided in *In Re: N.R., A.R., and A.W.,* Docket Nos.: 18-0842, 18-0849, 18-0850, 18-0854 (W. Va. Nov. 7, 2019), and a respondent in the other three consolidated appeals.

3. West Virginia Department of Health and Human Resources ("DHHR"), respondent.

    a. The DHHR is the petitioner in abuse and neglect proceedings in the Circuit Court of Ohio County, West Virginia, 13-CJA-33, 34 & 35 and 14-CJA-76, 77 & 78.

    b. The DHHR is the petitioner in one of the four consolidated appeals filed in the Supreme Court of Appeals of West Virginia, and decided in *In Re: N.R., A.R., and A.W.,* Docket Nos.: 18-0842, 18-0849, 18-0850, 18-0854 (W. Va. Nov.

7, 2019), and a respondent in the other three consolidated appeals.

4. N.R., A.R., and N.W., infants represented by Guardian ad Litem Joseph Moses.

   a. N.R. and A.R. are the children of Mr. and Mrs. Rios. N.W. is the child of Mrs. Rios and another father who is not a party to the ongoing proceedings. All three children were the subject children of abuse and neglect actions in the Circuit Court of Ohio County, West Virginia, 13-CJA-33, 34 & 35 and 14-CJA-76, 77 & 78.

   b. The children, by their Guardian ad Litem, Joseph Moses, were the petitioners in one of the four consolidated appeals filed in the Supreme Court of Appeals of West Virginia, and decided in *In Re: N.R., A.R., and A.W.,* Docket Nos.: 18-0842, 18-0849, 18-0850, 18-0854 (W. Va. Nov. 7, 2019), and respondents in the other three consolidated appeals.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Ashley Rios, and Ashlee Rios, respectfully request that this Court issue a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia, for the reasons stated herein.

CITATIONS OF OPINIONS AND ORDERS

In Re: N.R., A.R., and A.W., Docket Nos.: 18-0842, 18-0849, 18-0850, 18-0854 (W. Va. Nov. 7, 2019). Opinion of the Supreme Court of Appeals of West Virginia (included in the Appendix to this Petition at p. 1).

STATEMENT OF JURISDICTION

The order of the Circuit Court of Ohio County West Virginia denying the Petitioner's motions to invalidate the proceedings was affirmed on appeal by the Opinion issued by the Supreme Court of Appeals of West Virginia on November 7, 2019. This Honorable Court has jurisdiction over final judgments of the highest court of a state pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

Indian Child Welfare Act, 25 U.S.C. §§ 1901-63 (1978):

25 U.S.C. § 1912(e):

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

25 U.S.C. § 1914:

> Petition to court of competent jurisdiction to invalidate action upon showing of certain violations
>
> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

25 U.S.C. § 1916(b):

> Removal from foster care home; placement procedure
>
> Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

STATEMENT OF THE CASE

This case began in 2013, when the first of two abuse and neglect actions was initiated following reported injuries to the child N.R., which were alleged to have been caused by Petitioner Ashlee Rios ("Father"). The petition in the 2013 action also alleged exposure to domestic violence. At the outset of the proceedings, the children were removed from the home and placed into a foster placement. Following a stipulated adjudication, both parents were placed on an improvement period. Ultimately, the Petitioner Ashley Rios ("Mother") was dismissed from the 2013 action following a successful completion of the improvement period, and the children were placed back in her home, while the Father's disposition was held in abeyance. However, in 2014, based upon allegations that the Mother exposed the children to the Father against the instructions of the West Virginia Department of Health and Human Resources ("DHHR"), and that the Father had initiated a violent episode at the Mother's home, additional post-disposition services were ordered for the Mother. Subsequent allegations of

continued contact with the Father resulted in a second abuse and neglect action being initiated against the Mother. Additionally, the parental rights of A.W.'s father, L.M., were terminated during the 2013 proceeding. He did not appeal at that time, and he is no longer a party to this action. (Appendix, at 6-10).

The Mother stipulated to the allegations in the 2014 action. During this period of time, the children were placed with the maternal grandparents; however that placement was interrupted in 2018 by the trial court based on allegations that the grandparents had allowed contact with the parents. Thereafter the children were placed in non-kinship foster care in a home or homes unknown to the Petitioners. (*Id.*, at 10, 34).

Of important note is that the Father is a Native American, and a member of the Manchester-Point Arenas Band of Pomo Indians ("the Tribe"), which intervened in the matter below. Therefore, this case is within this scope of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-63 (1978) (ICWA). Both parents filed respective motions to invalidate the abuse and neglect proceedings based upon multiple violations of ICWA, including a failure of notice to the Tribe, the failure to support foster placements with expert testimony, and the failure to provide active efforts, all of which were required by ICWA. (Appendix, at 43-69). A hearing was held on the matter, and the trial court held that the circumstances did not justify the dismissal of the case. (*Id.*, at 70-86).

Subsequently, numerous disposition hearings were held, in which the DHHR and the Guardian ad Litem ("GAL") for the children were permitted to put on their case requesting the termination of the parental rights of both parents. The Circuit Court, however, in considering all the evidence, entered a final dispositional order in which it granted a "Disposition 5" to the Petitioners, which, under W. Va. Code §49-4-604(b)(5), places the children in the home of a suitable person (generally either through a guardianship, or ongoing DHHR custody), without

actually terminating the parental rights of the parents. (Appendix, at 13-14).

The GAL and the DHHR both appealed that order of the trial court, requesting that the Supreme Court of Appeals of West Virginia reverse and remand for the entry of an order terminating the parental rights of the Mother and Father. The Mother and Father each filed their own appeals, seeking to have the cases dismissed for non-compliance with ICWA. Following oral argument on the four appeals, which were consolidated, the Supreme Court of Appeals of West Virginia reversed the trial court, directed that the trial court enter an order terminating the Mother's and Father's parental rights, and denied relief to the Mother and Father on the ICWA violations. (Appendix, at 1-42). The Mother and Father now seek a writ of certiorari so that this Court may review that decision on the merits.

ARGUMENT AMPLIFYING REASON FOR ALLOWANCE OF THE WRIT

This case is appropriate for the grant of a writ of certiorari because, in conformity with Rule 10(b) of the Rules of the Supreme Court of the United States: "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals[.]" Specifically, the decision of the Supreme Court of Appeals of West Virginia in this case is in conflict with the holdings of a number of other state courts of last resort on the question of whether ICWA's requirement for the testimony of a qualified expert witness in support of a foster placement may be disregarded simply because a parent made an admission to conduct constituting abuse or neglect.

25 U.S.C. § 1912(e) requires that

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

In this case, the trial court dispensed with the requirement for such testimony following

the removal of the children in the 2013 case, the subsequent removal from the Mother and placement with the maternal grandparents, as well as the re on the basis that the prior admissions of the parents obviated the need for expert testimony. The Supreme Court of Appeals of West Virginia found that the waivers of the mother and father in making those admissions satisfied the requirements of ICWA, relying on the holding of *In re Esther V.,* 149 N.M. 315, 248 P.3d 863, (2011) for the proposition that the waiver of certain rights by the Petitioners satisfied due process concerns relating to any rights relating to the children's placement under ICWA. (Appendix, at 24-25).

The holding of *Esther V.* is, in reality, opposed to the result for which the West Virginia court relied upon it, to an extent justifying a grant of certiorari to review the conflict between the two states. In *Esther V,* the New Mexico court required that [emphasis added]:

> before accepting an admission, the court must ensure that the admission is voluntary and that the parent understands (1) the allegations of the petition, (2) the possible dispositions should the allegations of the petition be found true, (3) the right to deny the allegations and have a full adjudicatory hearing, and (4) **that the admission waives the parent's right to contest the § 1912(d) and (e) findings in a full adjudicatory hearing.**

In re Esther V., 248 P.3d at 877.

In citing *Esther V.*, the West Virginia court ignored that final requirement. There is no indication that the parents were advised in any manner about the extent to which they would give up their rights regarding foster placements under ICWA. The opinion below does not even pretend that the Petitioners were informed of this fact:

> Upon review, we find no error with the circuit court's determination that the mother's and father's stipulations alleviated the need for the expert testimony required by 25 U.S.C. § 1912(e) at the adjudicatory hearing. The record shows that the court questioned the parents to ensure there was no coercion and that their stipulations were made voluntarily. The court made clear to them that their parental rights could be terminated and both indicated that they understood. See *In re*

> *Esther V.*, 248 P.2d at 876-77 (holding court must ensure parental admission is voluntary before accepting it to make 25 U.S.C. 1912(e) finding).

(Appendix, at 24-25). The record does not support any finding that the Petitioners were informed of the rights they possessed under ICWA that would be given up in the event of a stipulation to abuse or neglect.

Moreover, it was inappropriate for the court below to conflate a parent's admission to abuse or neglect with the question of whether continued foster placement would be necessary in light of the findings required under 25 U.S.C. § 1912(e). An entire abuse and neglect proceeding can take place under circumstances in which a child never leaves a parent's home, even while a parent admits to abuse or neglect. W. Va. Code §49-4-602 makes the removal of an allegedly abused or neglected child discretionary, and only if there is imminent danger to the child, and no alternatives, such as the provision of services in the home, that would prevent removal. Furthermore, once an adjudication takes place, W. Va. Code §49-4-604(b) gives a court authority to simply dismiss a petition, or to make a referral for services, in lieu of ordering a placement outside the home. There is no automatic assumption built into the statutory scheme that an admission to abuse and neglect must lead to a loss of custody.

In addition to the holding of *Esther V.* that a knowing waiver specific to the rights being given up pursuant to ICWA, the Supreme Court of Rhode Island has addressed a similar scenario in *In re Tamika R.*, 973 A.2d 547 (R.I. 2009). In that case, the court held that the failure to elicit the required expert testimony to support a foster placement, and the lower court's decision to substitute the party's own testimony for that of an expert, was reversible error. *Id.*, at 973 A.2d at 552-53.

Other state courts of last resort have acknowledged ICWA's requirement for expert testimony to support an out-of-home placement of an Indian child. *See, Steven H. v. DES*, 190

P.3d 180, 218 Ariz. 566 (Ariz. 2008) (while expert testimony need not explicitly parrot the statutory language, it must address the issue of harm in the event of continued custody); *In re Angeles*, 332 P.3d 578 (Alaska 2014) (error to decline to qualify social workers as qualified expert witnesses); *State v. Michelle P.*, 411 P.3d 576 (Alaska 2018) (remanding for evidentiary hearing when only an affidavit was submitted to support removal); and *In Re N.L.*, 754 P.2d 863 (Okla. 1988) (adjudication order vacated in absence of qualified expert testimony concerning risk of harm to child).

Although not a court of last resort, the Court of Appeals of Kansas held that the failure to put on expert testimony in this context was reversible error. *In re SMH*, 33 Kan.App.2d 424, 103 P.3d 976 (Kan. App. 2005). Conversely, another intermediate court came to a result similar to the outcome below in *In re Enrique P.*, 709 N.W.2d 676, 14 Neb. App. 453 (Neb. App. 2006).

Both the trial court and the Supreme Court of Appeals of West Virginia elided the requirements to support a foster placement with expert testimony by suggesting that such testimony at disposition would be sufficient. First, the trial court held in its order denying the motions to invalidate that

> even if said expert testimony is required under ICWA as suggested by the [Petitioners], the Court FINDS that the violation can be remedied by taking the testimony of a qualified expert witness at an upcoming hearing or the Disposition Hearing. ICWA, 25 U.S.C. Section 1912(f) requires that testimony from a qualified expert witness be taken before termination of parental rights can occur anyway.

(Appendix, at 78). The subsequent appellate opinion then held that "the error was harmless because such testimony was provided during the disposition phase." (Appendix, at 28).

However, harmless error analysis was misplaced. The Supreme Court of Kansas held the following concerning a violation of requirement for expert testimony:

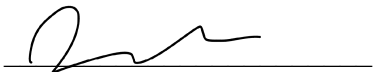
> Nevertheless, in applying the harmless error standard, it is difficult to conclude a procedural violation of the ICWA can be harmless in light of 25 U.S.C. § 1914 (2006), which provides:
>
> > "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title."
>
> The expert witness provision is found in section 1912, so a lack of qualified expert witness testimony creates the potential of future invalidation of the foster care placement and termination of parental rights. Under those circumstances, the lack of a qualified expert witness cannot be considered harmless.

In re M.F., 225 P.3d 1177, 1186-87 (Kan. 2010). Applying the harmless error doctrine to an ICWA violation blunts the clear remedy afforded under §1914, which is invalidation of the proceeding. There can be little doubt that the trial court in the instant case violated ICWA by both failing to require expert testimony, and by failing to obtain a knowing waiver of the requirement for expert testimony. At the time the motion was made, the Petitioners were entitled to the dismissal of the proceedings. If that remedy can be put off until for years until a reviewing state court sees fit to apply a more lenient standard than the one required by federal law, then ICWA loses its primary enforcement mechanism.

Because there is a conflict in the manner in which the Supreme Court of West Virginia has construed the Indian Child Welfare Act as compared to the courts of last resort of other states, the Petitioners respectfully request that this Court grant a Writ of Certiorari to that court, and consider this matter on the merits.

Respectfully Submitted,

Petitioners, Ashlee Rios and Ashley Rios,
by counsel,



Jeremy B. Cooper
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
(304) 376-0037
jeremy@blackwaterlawpllc.com
Counsel of Record
Attorney for the Petitioner

David Fuellhart
Isner Law Office LC
PO Box 1878
Elkins, WV 26241
Tel: (304) 636-7681
david@isnerlaw.com