No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

KIMBERLY WATSO, INDIVIDUALLY AND ON BEHALF OF C.H. AND C.P., HER MINOR CHILDREN; KALEEN DIETRICH,

Petitioners,

v.

TONY LOUREY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF HUMAN SERVICES; SCOTT COUNTY; JUDGE JOHN E. JACOBSON, IN HIS OFFICIAL CAPACITY; TRIBAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY; JUDGE MARY RINGHAND, IN HER OFFICIAL CAPACITY; TRIBAL COURT OF THE RED LAKE BAND OF CHIPPEWA INDIANS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the lower court improperly deferred to the Indian Child Services Department Manual over state agency rules and interpretations of the Indian Child Welfare Act?

Whether the Indian Child Services Division has jurisdiction over Indian kids when the mother is not Indian and does not reside on the reservation?

Whether the Red Lake Band of Chippewa Indians tribe or the Shakopee Mdewakanton Sioux tribe have the right to terminate parental custody?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this Court are as follows:

Kimberly Watso, *et al.*, Petitioners and
Tony Lourey, *et al.*, Respondents

LIST OF PROCEEDINGS

EIGHTH CIRCUIT COURT OF APPEALS
Docket No. 18-1723
KIMBERLY WATSO, et al. v. TONY LOUREY, *et al.*
Judgment dated 7/16/19 District Court AFFIRMED.

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA - MINNEAPOLIS
Case No. 17-CV-00562-ADM-KMM
KIMBERLY WATSO, et al. v. EMILY PIPER, et al.
Judgment dated 3/27/18 Plaintiffs Kimberly Watso and Kaleen Dietrich's Objections to the December 5, 2017 Report and Recommendation are OVERRULED; The Report and Recommendation is ADOPTED;

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA
Case No. 17-CV-00562-ADM-KMM
KIMBERLY WATSO, et al. v. EMILY PIPER, et al.
Report and Recommendation dated 12/5/17 in favor of Emily Piper, et al.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari issue to review the Denial of his appeal by the United States Court of Appeals for the Eighth Circuit on March 12, 2019.

BASIS FOR JURISDICTION IN THIS COURT

The July 16, 2019 Order of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's judgment, which decision is herein sought to be reviewed *Watso v. Lourey*, 929 F.3d 1024 (8th Cir. 2019). The September 26, 2017, Opinion of the United States District Court for Minnesota was unpublished, but can be found at *Watso v. Piper*, No. CV 17-562 ADM/KMM, 2018 WL 1512059 (D. Minn. Mar. 27, 2018).

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1251.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

U.S. Constitution, Art. VI, cl. 2, Supremacy Clause; U.S. Constitution, Amend. XIV, sec. 1, Due Process Clause; ICWA, 25 U.S.C. § 1911, 1918; 42 U.S.C. § 1983; 25 C.F.R. § 23.106(b), 81 FR 38867 (Jun. 14, 2016).

STATEMENT OF THE CASE

This Petition brings a challenge to the District Court's refusal to dismiss both tribal court's proceedings without prejudice and remand any child welfare proceedings to State Court. The Petition's central argument is that the Eighth Circuit applied the incorrect law when it affirmed the District Court's position that the matters involving Petitioner's children rightfully proceeded under a tribal court. First, the children were not under tribal jurisdiction. Second, the court improperly deferred to an Indian Child Services Manual. Watso this Court grant Certiorari so the Court may address novel and important questions of Constitutional law that arise in this case, namely, whether a tribal court can deprive a non-Indian parental rights without the matters being addressed in state court under the Due Process Clause; and whether a Public Law 280 tribal court has jurisdiction over an Indian child who is a child of a non-Indian parent objecting to tribal jurisdiction in light of ICWA, state law, and the Supremacy Clause.

A. Factual Basis for the Writ.

Kimberly Watso is the mother of two minor children, C.P. and C.H. Watso is not Indian; However, both C.P. and C.H. are fathered by Indians. C.P. is a member of the Red Lake Band of Chippewa Indians through his father Donald Perkins. The Red Lake Band of Chippewa Indians is a Public Law 280 tribe. C.H. is a member of the Shakopee Mdewakanton Sioux (Dakota) Community

("SMSC") through his father Isaac Hall. Notably, SMSC is not a Public Law 280 tribe. Moreover, C.P. lived at the Red Lake reservation but would visit Watso regularly. C.H. lived with Watso. Subsequently, Watso objected to SMSC's tribal court jurisdiction over her child.

SMSC does not have a school system on their reservation, nor does SMSC have a hospital on their reservation. Additionally, SMSC subcontracts the Shakopee and Prior Lake police force to patrol their reservation. A Shakopee investigator conducted the initial investigation.

On January 22, 2015, an SMSC Tribal Court proceeding took place after reports of parental marijuana use surfaced. Soon thereafter in February 2015, SMSC Child Welfare Office filed an emergency ex parte petition requesting that the SMSC Tribal Court grant legal and physical custody of C.P. and C.H. to the SMSC's Family and Children Services Department ("Department"). The Tribal Court decided that the matter was not fit for an ex parte hearing.

During the January 2015 hearing, Watso requested that the matter get transferred to state court. This request was grounded in the fact that Watso, as a non-Indian did not have the same guaranteed rights she would have otherwise had in Tribal Court. At the hearing evidence was presented which ultimately led to the SMSC Tribal Court opening a child welfare case. In doing so, the Tribal Court found that the children were "children in need

of assistance" and ordered social services to be provided to the parents. Upon the child welfare proceedings in Tribal Court, Watso objected the Tribal Court's decision.

About one month after the Tribal Court proceedings, Watso and Hall took C.H. to a medical clinic to get examined, after tribal officials asserted that C.H. had an abnormally large head. The medical exam uncovered bleeding on C.H.'s brain and led doctors to report possible child abuse or neglect by Watso and Hall, despite finding no external injuries. Soon thereafter, Shakopee Police Department and Prior Lake Police Department placed both C.H. and C.P. on a 72-hour health and safety hold at the Children's Hospital in St. Paul, Minnesota. The Department was notified of the situation.

Rule 30.01 of the Minnesota Rules of Juvenile Protection Procedure require a hearing within 72 hours of when a county takes possession of a child from the child's parents. However, rather than adhering to Rule 30.01, Scott County officials transferred the children to SMSC's social service agency. They did so under the guidelines of a state published manual ("Manual"). The Manual states that "prior to initiating any proceeding in [state] court" the "local social service agency shall refer any proposed child custody proceeding involving an Indian child to the tribal social service agency for appropriate proceedings tin tribal court."

On March 8th, 2015, the first hearing after the children were taken from Watso occurred. Again, during this hearing, Watso requested that the matter get transferred to state court where she would have her parental rights protected. Once again, the Tribal Court refused.

Notably, the Department of Human Services nor Scott County had a discussion with Watso regarding the transfer of C.H. and C.P. Nor was there a hearing of any kind. Moreover, Watso was not given notice of the policies initiating the transfer of her children or her available Indian Child Welfare Act ("ICWA") rights.

Once the 72-hour hold expired, Scott County initiated an administrative transfer of C.P. and C.H. to SMSC. At this moment, the Tribal Court proceedings took jurisdiction over the children without a prior ICWA state court proceeding. Notably, SMSC had an ongoing case between Watso and C.H.'s father dating back to January 2015. After failing to effectively object to the Tribal Court's jurisdiction, Watso filed a federal habeas corpus petition.

At the very least, Watso was attempting to eliminate SMSC's custody over C.P., who is not a member of the SMSC tribe. Knowing their improper possession of C.P., SMSC invited the Red Lake tribe to take possession of C.P. one-day before the District Court's ruling. Once again, Watso was forced to object to the Red Lake tribe's physical custody over C.P on the grounds that C.P. was not domiciled nor a

reside of Red Lake Band reservation. Importantly, during the March 8th hearing, Watso provided SMSC with documentation proving C.P. resided with her grandmother, Kaleen.

Watso's federal petition for habeas corpus against SMSC regarding C.P. was dismissed as moot because C.P. was transferred to Red Lake Band. On March 27, 2018, the United States District Court for the District of Minnesota issued a final decision dismissing the complaint, denying the summary judgment motion as moot and adopting the Report and Recommendation dated December 5, 2017.

The District Court, in the Order and the adopted Report and Recommendation, dismissed the complaint on the ground that the Constitution, ICWA and its regulations only regulate when state court proceedings are started. The District Court reasoned that the Constitution's Due Process Clause and Supremacy Clause, ICWA and its regulations do not require state court due process prior to the state and county child protection agencies transferring Indian children to tribes. The District Court also decided that they had no jurisdiction over the Plaintiffs' claims for prospective relief against the tribal courts and their officials.

Watso appealed to the Eighth Circuit Court of Appeals. On March 12, 2019, the Court of Appeals issued their opinion and filed it on July 16, 2019. The Court of Appeals affirmed the District Court holding that the ICWA does not preempt the Manual and the ICWA does not grant jurisdiction first with

the states. Moreover, the Court of Appeals held that Public Law 280 does not require a state court hearing prior to tribal court proceedings. Lastly, the Court of Appeals, absent any analysis, determined that Watso's Due Process rights were not violated.

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS CONFLICTS WITH ESTABLISHED SUPREMACY CLAUSE DOCTRINE.

This Court should accept this Petition because the Eighth Circuit's decision below incorrectly construed and applied the Supremacy Clause. The Supremacy Clause is the legal foundation for express or implied preemption analysis. The Eighth Circuit's decision has enabled a state agency to deprive due process to parents.

A. The Tribal Court did not have jurisdiction over C.H. and C.P. given their domicile and Watso's status as a non-Indian.

C.P was domiciled on a reservation, and C.H. was never enrolled in the SMSC tribe.. Simply, their fathers' heritage took precedent over their own, and Watso's, due process rights. This case was initiated as an involuntary child custody proceeding concerning a child who was removed by tribal and involved the temporary termination of a

nonmember's parental rights. The involvement of nonmembers domiciled outside of Indian country defeated the tribe's assertion of jurisdiction and authority in this case.

In *Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002), the North Dakota Supreme Court concluded that, where two parents of different tribes both lived outside their respective reservations at all times relevant to a paternity dispute, "the existence of any tribal court jurisdiction, much less exclusive tribal court jurisdiction, is questionable." *Id.* at 576 (quoting William C. Canby, Jr., American Indian Law In A Nutshell, 194-95 (1998) ("When the tribe or its member sues a nonmember for a claim arising outside of Indian country, tribal jurisdiction is more doubtful.")); see also *In re Defender*, 435 N.W.2d 717, 721 n.4 (S.D. 1989) (in child custody dispute, tribal court had no subject matter jurisdiction over a nonmember parent who had conducted no activities on that tribe's reservation).

In *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37, 48 (1989), the Court held that twin babies born to members of a tribe were domiciled on the reservation for purposes of ICWA § 1911(a) by virtue of the fact that their parents lived on the reservation. This Court noted that ICWA § 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of

'good cause,' objection by either parent, or declination of jurisdiction by the tribal court." *Id*. at 36. Given that Watso made an objection and C.H. and C.P domiciled with a non-Indian, a state court proceeding was required. Nothing in federal or state law provided the Tribal Court with the exclusive jurisdiction the acted upon. It follows that if C.H. was wrongfully enrolled in the Tribe after parental custody was taken, does not enable the Tribe to exercise wrongful jurisdiction.

It is paramount to identify that the Tribal Court defeated the purpose of the ICWA. The ICWA was enacted to help keep Indian families intact. However, the Tribal Court's proceedings separated not only a mother and her two sons, but the Tribal Court separated two brothers. This sort of departure from the essence of the ICWA and Watso's fundamental liberty interests should not be rewarded.

B. The portions of the Manual authorizing local authorities to administratively transfer children to tribes runs contrary to the ICWA and is preempted by federal law.

The Indian Child Welfare Act ("ICWA")[1] establishes the federal policies involving the removal of Indian children from their families. Particularly, there was a concern, dating back to the 1970s, over "abusive child welfare practices that resulted in the separation of large numbers of Indian children from

[1] 25 U.S.C. §§ 1901–1963.

their families and tribes…" *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

Importantly, Congress noted that when families are torn apart, communities likewise deconstruct. See *Adoptive Couple v. Baby Girl*, 570 U.S 637, 642 (2013) noting that "Congress found that an 'alarmingly high percentage of Indian families [were being] broken up by the remove, often unwarranted, of their children.'" In most circumstances, ICWA provides exclusive jurisdiction to a tribe in custody proceedings involving Indian children.

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.[2]

In 21 U.S.C. § 1911(b), Congress established requirement that a state court hearing must take place before a state agency transfers an Indian child to a tribe:

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[2] 25 U.S.C. § 1911(a).

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian guardian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.[3]

Likewise, the Minnesota Uniform Child Custody Jurisdiction and Enforcement Act explains that a state court has jurisdiction to make the initiation custody ruling, and the ICWA preempts the state Act when the matter involves an Indian child as defined in the ICWA. In 25 C.F.R. § 23.106(b), congress emphasized that when the ICWA is in conflict with any state or federal laws, the federal court shall apply the higher legal protections for parents.

The Manual used in this case is preempted by federal law and regulation. Particularly, the Manual disregarded the Due Process Clause, Supremacy Clause, and ICWA language and pertinent regulations. Importantly, the Manual was not conceived through legislative process. Instead, it is a

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[3] 25 U.S.C. § 1911(b).

far reaching administrative device that, in this case, has deprived a mother custody of her children. C.P. and C.H. were never domiciled on the reservation. Simply, their heritage has allowed a state agency to divide the family.

The Manual unwittingly determined the judicial jurisdiction of the parent and child without any regard to the child's "best interests" and without a hearing to determine the "higher standard of protection" detailed in 25 C.F.R. § 23.106(b)2:

> Except in emergencies, the following child custody proceedings must be transferred to tribal court:
> (1) Any such proceeding involving a ward of tribal court; or
> (2) Any such proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe.

Manual 12, 16.a.

Notably, the Tribal Courts, under the ICWA, have exclusive jurisdiction if the child is domiciled on a reservation. Here, the children lived with their mother and under Holyfield, the children were domiciled with their mother. Holyfield, 490 U.S. at 44-47.

II. THE STATE'S DECISION TO DEFER TO THE MANUAL IS IMPROPER UNDER *CHEVRON* AND *KISOR*.

The Tribal Court's deference to the Manual over agency IWCA interpretations resulted in Watso's due process rights being violated. Watso's due process rights have been violated regarding her custodial status over her children. "[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). That liberty interest "does not evaporate simply because [a biological parent] . . . ha[s] lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

"In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces," courts apply "the two-step analysis set forth in Chevron" to determine whether deference to the agency's interpretation is appropriate. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016). At Chevron step one, the court must determine whether Congress has "directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. If not, then the question at Chevron step

two is "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

In Chevron Oil v. Huson, 404 U.S. 97, 105-107 (1971) this Court established a three-prong test for non-retroactivity. First, the rule to be applied non-retroactively "must establish a new principle of law," by "overruling clear past precedent" or by "deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106. Second, in light of the "prior history" and the "purpose and effect" of the rule, the Court should consider whether non-retroactivity would "further or retard its operation." *Id*. at 106-07. Finally, the Court should "weigh" the "inequity imposed by retroactive application." *Id*. at 107.

Respondents admit that their deference to the Manual and Tribal Court was not grounded in the existence of any particular fact or hearing. The transfer of the jurisdiction was going to occur regardless of Watso's objections and the children's domicile. This departure from reason and care for the children is damaging. See *Parharm v. J.R.*, 442 US. 584, 601–02 (1979) (recognizing the due process interests of both parents and children are implicated by child commitment proceedings); *Santosky*, 455 U.S. 745, 759 (decision to terminate parental rights works "'a unique kind of deprivation'" of a parent's fundamental liberty interests).

Here, the Manual does not make a distinction between a non-Indian, non-member parent and an Indian, tribal-member parent. Moreover, the Manual

does not make a distinction between Public Law 280 Tribes and non-Public Law 280 tribes, as prescribed in Minnesota law. Public Law 280 states in part:

> [Minnesota] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in [Indian country within Minnesota, except the Red Lake Reservation] to the same extent that [Minnesota] has jurisdiction over other civil causes of action, and those civil laws of [Minnesota] that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within [Minnesota].

28 U.S.C. § 1360(a).

The lack of such distinctions is contrary to the federal guidelines in the ICWA and relevant state laws. Given the inconsistencies in the Manual, state law and the ICWA, local authorities and the Tribal Court should have deferred to agency interpretation of the ICWA. Moreover, given the tribe's lack of Public Law 280 status, they did not have the jurisdiction or authority to transfer custody.

The 1979 Guidelines initially advised that the term "good cause" in ICWA section 1915 "was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." 44 Fed. Reg. 67,584. Importantly, section 23.132(b) of the Final Rule specifies that "[t]he party seeking departure

from [section 1915's] placement preferences should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." 25 C.F.R. § 23.132(b).

The issue of jurisdiction when there has not been a state proceeding at all satisfies the test established in *Chevron*. Moreover, since Watso objected to the transfer of her children, the authorities should have taken precaution and defaulted to the ICWA given its federal status. The ICWA prompted all of these proceedings. It follows that ICWA guidelines and legislative intent should have been consulted. By relying on the Manual, Scott County and the Tribal Court unilaterally deprive Watso and her children the very interests the ICWA intends to protect.

The Constitution, ICWA and ICWA regulations prevent the states and counties from transferring Indian children to tribes, and causing the foreseeable consequences of family separation, without due process of law—including a state court ICWA proceeding where non-Indian relatives can object and stop the transfer. The Manual, by not adhering to state court due process, violates the Due Process Clause, Supremacy Clause, ICWA and ICWA regulations.

The Constitution, ICWA and ICWA regulations prevent the states and counties from transferring Indian children to tribes, and causing the foreseeable consequences of family separation, without due process of law—including a state court

ICWA proceeding where non-Indian relatives can object and stop the transfer. The Manual, by not adhering to state court due process, violates the Due Process Clause, Supremacy Clause, ICWA and ICWA regulations.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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