Supreme Court No. S275578
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF Dezi C., Minor.	Court of Appeal No. B317935 Superior Court Nos. 19CCJP08030A,B
Los Angeles Department of Children and Family Services, Petitioner and Respondent, v. A.A., Objector and Appellant.	

After the Published Decision by the Second District Court of Appeal, Division Two Filed June 14, 2022

Application For Leave to File Brief as Amicus Curiae and Proposed Brief in Support of Petitioner and Respondent, A.A.

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Table of Contents

Table of Authorities

US SUPREME COURT CASES

CALIFORNIA CASES

CALIFORNIA STATUTES

OTHER

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Application For Leave to File Brief as Amicus Curiae

TO THE HONORABLE PATRICIA GUERRERO, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

California Appellate Defense Counsel (hereinafter "CADC") hereby requests leave to file the attached brief as amicus curiae in support of appellant and petitioner in this matter, A.A. (Cal. Rules of Court, Rule 8.520, subd. (f).) This application is timely made as it is within 30 days of the date Appellant and Petitioner filed her Reply Brief on February 6, 2023. (Cal. Rules of Court, Rule 8.520, subd. (f)(2).)

Identity of Amicus Curiae

California Appellate Defense Counsel is a statewide non-profit organization comprised of approximately 400 appellate attorneys who regularly represent indigent appellants in criminal, juvenile, dependency, and civil commitment matters in the California Supreme court and Courts of Appeal. Our members handle a significant majority of the state's appointed non-capital criminal, dependency, and civil commitment appeals in every Appellate District in the state. CADC is administered by a Board of Directors, made up of appointed appellate counsel practicing within the state of California. CADC promotes quality representation of children and adults by providing training and education for attorneys. It also runs an Amicus Curiae Program through which the organization participates in Supreme Court cases and appellate cases of particular importance to appointed appellate counsel.

Members who handle appeals from dependency hearings participate in CADC's forums and chapters devoted to the discussion of issues important in the dependency law field. CADC members focus on identifying and arguing errors occurring in dependency proceedings to ensure the statutory and due process rights of indigent parties. Appeals play an important role in maintaining the legitimacy of the court system by ensuring accurate findings are made in the trial courts.

The time the authors spent on this case was donated on a pro bono basis. The individuals who authored the proposed brief are Sean Burleigh and Christopher Blake, each members of the

CADC dependency amicus committee and who are regularly appointed by Courts of Appeal to represent indigent parents on appeal in juvenile dependency matters.

Interest of Amicus Curiae

CADC's members are appointed counsel for indigent appellants. As such, the members and the organizations have an interest in any issue that affects the rights of our clients. CADC is additionally interested in the outcome of the present case due to the undue burden this holding places on our members. We also believe we are able to provide meaningful input to this Court.

Where appellant challenges an inadequate inquiry under ICWA, *Dezi C.* requires reversal only where appellant can show a "reason to believe" that the child is an Indian child. (*In re Dezi C.* (2022) 79 Cal.App.5th 769, 779 (*Dezi C.*).) If this standard is not satisfied by the appellate record, appellant must make a "proffer" to avoid a finding of harmless error. (*Ibid.*) A "proffer" is evidence gathered after the judgment appealed from was entered and submitted to the appellate court pursuant to California Code of Civil Procedure section 909. (*Id.* at p. 779 fn. 4.) As explained further in the attached brief, if this Court were to adopt this holding our members could be placed in a legally and ethically precarious position. To conduct the investigation required by the *Dezi C.* holding potentially violates several laws and ethical mandates placed on our members. In addition, as explained further in the attached brief, this holding would severely hamper

the review process and undermine the purpose of the Indian Child Welfare Act and related California statutes.

Conclusion

CADC therefore respectfully requests leave to file the attached PROPOSED BRIEF as amicus curiae in this matter.

DATED: March 2, 2023

Respectfully submitted by,

California Appellate Defense Counsel
Amicus Committee
Suzanne Nicholson, Chair

By: /s/ Sean Burleigh
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Proposed Brief in Support of Petitioner and Respondent, A.A.

Introduction

The errors in the present case and the hundreds of similar appeals across the state are apparent and uncontradicted. Beginning in 2019, all social services agencies in California were required by Welfare and Institutions Code section[1] 224.2, subdivision (b) to interview "extended family members" of a child in protective custody as part of the "initial inquiry" to determine the applicability of the Indian Child Welfare Act (ICWA). Social

[1] Further statutory references will be to the California Welfare and Institutions Code unless otherwise stated.

Services Agencies across the state have not complied with this mandate.

Courts of Appeal agree that the failure to interview extended family members regarding possible Indian ancestry is error; the question of what to do about these pervasive errors is where the confusion lies. The various prejudice tests developed by Courts of Appeal have been discussed extensively by appellant and Amici will discuss them when necessary.

In the present case, the Second District Court of Appeal, Division Two held that a failure to comply with section 224.2, subdivision (b) is only reversible if the parent's appellate attorney can show that there is a "reason to believe" that the child may be an "Indian child" within the meaning of ICWA. "For this purpose, the 'record' includes both the record of proceedings in the juvenile court and any proffer the appealing parent makes on appeal." (*In re Dezi C.* (2022) 79 Cal.App.5th 769, 779 (*Dezi C.*).) Looking to the "record of proceedings in the juvenile court", under *Dezi C.* reversal based on an inadequate *initial* inquiry will only happen when despite the lack of an inadequate initial inquiry, there is information that should have triggered a further inquiry. (§ 224.2, subd. (e); *Dezi C., supra,* at pp. 779, 780.) Rarely, if ever, will a record which shows an inadequate initial inquiry also contain information suggesting a "reason to believe" that the child is an Indian child. Therefore, reversibility will often, if not always, hinge on whether the parent's appellate counsel has conducted a post-judgment investigation in the manner the

Agency's social worker should have conducted at the beginning of the proceedings and discovered possible Indian ancestry.

By considering whether a "proffer" has been made when deciding whether to grant relief, the *Dezi C.* court has placed the burden of investigation on to parents' appellate counsel. As expounded upon within this brief, this holding rests on faulty logic and places our members in legally and ethically precarious positions. While proposed as a simple solution, this "proffer" notion causes many more problems than it solves. CADC requests this Court avoid any formulation of prejudice that encourages appellate courts to consider whether or not the parent's appellate counsel has introduced facts outside the appellate record. Accordingly, amicus curiae CADC submits this brief in support of appellant.

Argument

I. This Court should not adopt the *Dezi C.* holding. The "proffer" consideration inappropriately places the burden of investigation on to parents' appellate counsel.

As explained, *infra,* I.A., pp. 13-18, introduction of post-judgment evidence for the purposes of establishing a "reason to believe" the child is an Indian child is not a proper utilization of California Civil Procedure Code section 909. As explained, *infra,* I.B., pp. 18-23, the routine consideration by appellate courts of whether court appointed counsel have made a "proffer" of Indian ancestry will cause lengthy delays and will not serve the child's interests in permanency and finality. As explained, *infra,* I.C.,

pp. 24-27, there are several ethical and legal ramifications that the *Dezi C.* court did not consider. For these reasons, this Court should adopt a formulation of prejudice that does not consider whether court appointed appellate counsel have submitted post-judgment evidence of Indian ancestry.

A. A "proffer" of post-judgment evidence related to Indian ancestry cannot be properly considered by a reviewing court pursuant to California Code of Civil Procedure section 909.

The reasoning of *Dezi C.* relies on the notion that if the Agency's failure to complete an initial inquiry has in fact overlooked possible Indian ancestry, then the parent's appellate counsel can "simply" submit evidence outside of the appellate record. (*Dezi C., supra,* 79 Cal.App.5th at p. 779.) Under the *Dezi C.* holding, reversal is only warranted if the appellate court has evidence before it to support the factual finding that the child is an "Indian child" within the meaning of ICWA. (*Ibid.*) Under the *Dezi C.* holding the appellate court's prejudice determination is actually a fact-finding inquiry into whether there is evidence that there is "reason to believe" the child is an Indian child and therefore a further inquiry should be conducted. (*Ibid.*)

It is a cardinal principle of appellate review though that "an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." (*In re James V.* (1979) 90 Cal.App.3d 300, 304.) This rule reflects an "essential distinction between the trial and the appellate court…that it is the province of the trial

court to decide questions of fact and of the appellate court to decide questions of law…" (*Tupman v. Haberkern* (1929) 208 Cal. 256, 262-63.) This rule promotes the orderly settling of factual questions and disputes in the trial court, provides a meaningful record for review, and serves to avoid prolonged delays on appeal.

Dezi C. claims in a footnote that this well-established rule should be departed from by allowing, in any appeal concerning an inadequate initial inquiry, evidence to be submitted pursuant to Code of Civil Procedure section 909 (CCP 909). (*Dezi C., supra*, 79 Cal.App.5th at p. 779 fn. 4.) CCP 909 reads:

> In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues.

It is well established that while CCP 909 allows a reviewing court to make a finding of fact, "the authority should be exercised sparingly. *Absent exceptional circumstances, no such findings should be made.*" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405 [emphasis in original].)

In the 1990's, appellate courts, particularly in the Fourth Appellate District, began accepting additional evidence in dependency appeals. (E.g., *In re Jonathan M.* (1997) 53 Cal.App.4th 1234, 1236 fn. 2 ["This court routinely accepts evidence per Code of Civil Procedure section 909…"].) This evidence was normally taken from the child's attorney. (E.g., *In re Jayson T.* (2002) 97 Cal.App.4th 75, 91.) This Court disapproved of this practice in *In re Zeth S.* (2003) 31 Cal.4th 396 (*Zeth S.*) and clarified the purpose of CCP 909. The question at issue in *Zeth S.* was: "May a reviewing court look to post-judgment evidence that is outside the record on appeal and was never considered by the trial court [] to reverse the trial court's judgment terminating parental rights?" (*Zeth S., supra,* at p. 407.) This Court answered with an emphatic no, explaining:

> Under the Court of Appeal's expansive view of the scope of an appeal terminating parental rights, postjudgment evidence of circumstances…would be routinely and liberally considered. Appointed counsel for the minor in the appeal would be encouraged, and indeed obligated, to independently investigate such evidence outside the record and bring it to the reviewing court's attention…

(*Id.* at p. 412.)

Roughly twenty years later, while the context is different, this same question is before this Court yet again: "May a reviewing court look to post-judgment evidence that is outside the record on appeal and was never considered by the trial court [] to reverse the trial court's judgment terminating parental rights?" (*Zeth S., supra,* 31 Cal.4th at p. 407.) Under the *Dezi C.* approach, instead of the minor's attorney the parent's court appointed appellate counsel "would be encouraged, and indeed obligated, to independently investigate such evidence outside the record…" (*Id.* at p. 412.) "There is no blanket exception to the general rule for juvenile dependency appeals" and this Court should reject Respondent's request to make a blanket exception for questions of ICWA compliance in dependency appeals. (*Id.* at p. 405.)

CCP 909 may only be utilized in a "rare and compelling case." (*Zeth S., supra,* 31 Cal.4th at p. 399.) "Claims of error under ICWA are not rare and will not typically present the type of exceptional circumstances warranting deviation from the general rule…" (*In re E.C.* (2022) 85 Cal.App.5th 123, 149 [citations omitted].) The sheer number of recent appeals similar to the present one show: a claim that the Agency did not fulfill its duties of inquiry is not rare and is not exceptional. Under *Dezi C.*, "[r]outinely requiring an appealing parent to affirmatively demonstrate prejudice through the submission of evidence, and authorizing the reviewing court to consider it, invites "the [very] deviat[ion] from settled rules on appeal" disapproved of in *Zeth*

S." (*In re K.H.* (2022) 84 Cal.App.5th 566, 612 [citations omitted].)

Further, it is established that "[t]he power to invoke the statute should be exercised sparingly, ordinarily only in order to affirm the lower court decision and terminate litigation." (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1388 [citations omitted].) The plain language of CCP 909 states: "This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court…" CCP 909 may be used "[i]n very rare cases where the record or new evidence compels a reversal with directions to enter judgment for the appellant."[2] (*In re Noreen G., supra,* at p. 1388.) "The purpose of the statue and the rule implementing it 'is to enable appellate courts, in appropriate cases, to terminate litigation by affirmance or modification and affirmance, of the judgment, or by reversal with directions to enter judgment for appellant if it appears that no reasonable theory could respondent make a further showing in the trial court." (*People v. Pena* (1972) 25 Cal.App.3d 414, 422.) CCP 909 is meant to be used to introduce indisputable facts that will finally decide the issues. The *Dezi C.* court, in a footnote, turns these well-established principles on their head and encourages the introduction of outside evidence on a routine basis

[2] E.g., *In re Elise K.* (1982) 33 Cal.3d 138, 139 [indisputable evidence that the child is no longer adoptable as agreed by all parties]; *In re B.D.* (2020) 35 Cal.App.5th 803, 817 [indisputable evidence that the agency did not report criminal convictions of prospective adoptive parents of a child who was only specifically adoptable].

to resolve issues of ICWA compliance. (*Dezi C., supra,* 79 Cal.App.5th at p. 779 fn. 4.) This outside evidence would be admitted, contrary to the purpose of CCP 909, for the purpose of disturbing the court's judgment; the outside evidence would also not finally decide the issues, if there is a "reason to believe" then remand would be required for further proceedings in the trial court. [3] For these reasons, the *Dezi C.* holding is contrary to the purpose of section 909 and basic principles of appellate review.[4]

B. The routine utilization of California Code of Civil Procedure section 909 in order to make a "proffer" of Indian ancestry will lead to lengthy delays and will undermine dependent children's interest in finality.

The routine utilization of section 909 for the purpose of establishing prejudice from inadequate ICWA investigations will cause more problems than it solves. Respondent raises policy considerations of finality and permanency in support of the *Dezi C.* holding. (E.g., Answer Brief (AB), p. 38.) To the contrary,

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[3] This Court has granted review in *In re Kenneth D.* (2022) 82 Cal.App.5th 1027, *review granted* November 30, 2022 S276649, to resolve the related question of when the Agency may submit post-judgment evidence in support of affirmance.

[4] This Court has recently approved of the use of CCP 909 "to introduce additional evidence in support of discretionary review [of an appeal from jurisdiction] if appropriate." (*In re D.P.* (Cal., Jan. 19, 2023, No. S267429) 2023 WL 310256, at p. 10.) The present matter is distinguishable. The review of the jurisdictional findings on the merits would still be confined to the appellate record. The reviewing court would be utilizing outside evidence to determine its own exercise of discretion and not to revise the lower court's factual findings.

adopting the *Dezi C.* holding will inevitably contribute to lengthy delays on appeal and will fundamentally undermine the child's interest in finality.

In appeals from an order terminating parental rights, parent's court appointed appellate counsel first receive records ranging from a few hundred to several thousand pages. Counsel is provided thirty days to fully review the record, locate and consult with the parent and draft an Opening Brief. *Dezi C.* creates an entirely new, cumbersome and unnecessary step in this process: the investigation of possible Indian ancestry if the record shows a deficient initial inquiry by the Department. (See *Dezi C.,* (2022) 79 Cal.App.5th at p. 779.) Justice Menetrez of the Fourth District Court of Appeal, Division Two, explained in a dissenting opinion, some of the problems with this approach:

> Appellate attorneys ordinarily do not, need not, and are not paid to conduct any investigation of facts outside the record…But in a case like this one…the majority opinion require Father's counsel to interview Father about his Native American ancestry and then, in defiance of *Zeth S.*, provide the information to the Court of Appeal as a basis for reversal. And what if counsel is unable to interview Father in time? Parents in dependency cases are sometimes homeless or otherwise hard to find. If counsel cannot reach Father, must counsel interview paternal relatives? Moreover, a parent appealing from the termination of parental rights can assert ICWA error as to a nonappealing parent…Must counsel for the appealing parent interview the nonappealing

> parent? Just how much of the trial court's and CFS's jobs does the majority opinion reassign to appellate counsel?

(*In re A.C.* (2021) 65 Cal.App.5th 1060, 1078 (*A.C.*) [Diss. Opn. Menetrez J.].)

Respondent argues "*Dezi C.* never said appellate counsel are *required* to conduct investigations regarding a parent's potential Indian ancestry, it merely opens the door to a parent supplement the record in order to demonstrate prejudice…" (AB, p. 73.) As this Court aptly recognized in *Zeth S.* when such a door is "opened", counsel are quickly forced through it. (*Zeth S., supra,* 31 Cal.4th at p. 412.) CADC members are zealous advocates and will rarely ignore an investigation they have the "option" to pursue. Under the *Dezi C.* approach, court appointed appellate counsel are at the least strongly encouraged to perform the investigation that the social worker did not complete and this will inevitably lead to lengthy delays.

If the ICWA error relates to counsel's client, the first step will be to contact the client. This step may sound simple but as CADC members can attest, is often anything but. As Justice Menetrez asked: "And what if counsel is unable to interview Father in time? Parents in dependency cases are sometimes homeless or otherwise hard to find. If counsel cannot reach Father, must counsel interview paternal relatives?" (*A.C., supra,* 65 Cal.App.5th at p. 1078 [Diss. Opn. Menetrez J.].) Then, "a parent appealing from the termination of parental rights can assert ICWA error as to a nonappealing parent…" (*Ibid.*) Counsel will often have to track down the non-appealing parent which

may be difficult or impossible. The non-appealing parent may not wish to cooperate for a variety of reasons, such as animosity to the appealing parent. Thus, the delays begin.

Then counsel will need to locate and interview the relatives that the Agency overlooked in the ICWA inquiry. If counsel is unable to obtain relative contact information from the record or either parent, then counsel will have to look elsewhere. While relatives' contact information will rarely be in the appellate record, sometimes it will be in the social worker's case file. Therefore, counsel would have to contact the social worker. Best practice would be for counsel to contact county counsel first and ask permission to then speak to the social worker. (Cal. Rules of Prof. Conduct, Rule 4.2, subd. (a).)[5] Counsel will have to ask the social worker to provide any and all relative contact information appearing in the case file. The Department as a whole will have to decide whether they will routinely cooperate with these requests or whether a court order should be required due to the confidential nature of the case file. (§ 827.) If a court order is required then there is the question of which court would order the release of this information – the trial court or the Court of Appeal. If the non-appealing parent's relatives must be contacted they, like the non-appealing parent, may not wish to cooperate

[5] In many counties, including Los Angeles County, a deputy county counsel is not normally assigned until after an Opening Brief has been filed. Thus, additional delay may be caused while a deputy county counsel is assigned to the case and takes the necessary time to become familiar with the case before making a decision to allow counsel to speak to the social worker and disclose any information from the case file.

for various reasons such as the wish not to disturb their plans to adopt the child. And with that, more delays.

Then there's the logistical concerns related to how any information concerning possible Indian ancestry will be submitted to the court. Respondent states that the "proffer" requirement of *Dezi C.* "may involve minimal questioning by the parent and/or appellate counsel and possibly the filing of a declaration by the parent or extended family member explaining why further inquiry is warranted." (AB, p. 73.) This process will often not be so simple.

When a social worker conducts an adequate investigation at the trial court level, the social worker is authorized by law to include hearsay statements in her report. (§ 281; *In re M.B.* (2011) 201 Cal.App.4th 1057, 1061.) These hearsay statements may be relied upon by the trial court as "evidence." (*Ibid.*) If a matter is remanded to the trial court for proper ICWA inquiry, the social worker would be able to do just this. By contrast, there is no specific allowance for hearsay statements in a declaration provided to the reviewing court. Therefore, counsel cannot simply tell the reviewing court that Grandmother said she has a tribal membership card. A declaration from Grandmother would be required.

Grandmother may not have access to a computer, and therefore a declaration will have to be drafted by counsel then sent through the mail for Grandmother to review, sign and send back. If any changes to the declaration are necessary, the process will begin again. Counsel will inevitably have to follow up with

Grandmother to ensure a signed copy is mailed back. An interpreter will be necessary to speak to Grandmother and draft the declaration if Grandmother does not speak English or speaks only minimal English. In some cases, travel may be required to speak to relatives or complete necessary declarations. And with that, even more delays.

This is all assuming the Department will have no objection to the proffered evidence and/or will not wish to submit conflicting evidence. We concede that the Department would have every right to object to the consideration of outside evidence, reserve the right to cross examine any declarants, and/or present counter evidence. This would require more delay. In the case of conflicting evidence, the reviewing court will be placed in the position of making credibility determinations. This will require additional briefing and argument and of course more delays.

For the foregoing reasons, the *Dezi C.* approach will contribute to lengthy delays while appellate counsel conducts the investigation the Legislature intended for the social worker.[6]

[6] In addition, appointed counsel will of course require payment for their time - at $120 per hour billed to the state. (California Appointed Counsel Claims Manual <https://www.capcentral.org/claims/statewide_claims_manual.pdf >, p. 16.) Counsel will also be entitled to reimbursement for any additional expenses such as the payment for interpreters or travel. (*Id.* at pp. 5, 19, 50.)

C. The expectation to conduct an investigation into Indian ancestry under *Dezi C.* will place court appointed appellate counsel in an ethically and legally precarious position.

This proposed process is already unappealing and cumbersome without even considering the precarious ethical and legal dilemmas *Dezi C.* places parents' appellate counsel in. If this door is "opened", counsel will again inevitably be forced through it and then must navigate this new terrain. As discussed, *supra,* I.B., p. 20, the first step for counsel after discovering an inadequate ICWA inquiry will be to contact the client. Again, as CADC members can attest, this is often difficult. In the case where the client is difficult to locate and communicate with on a regular basis, counsel will face ethical and legal questions. To move forward with an investigation without explicit authorization from the client would require disclosure of confidential information. (Bus. & Prof. Code § 6068, subd. (e)(1) [attorney has the duty "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client"].) On the other hand, if counsel does not move forward with an investigation, counsel will forfeit the parent's right to challenge a possibly meritorious issue.

Even if a client cannot be located in sufficient time, CADC members are ethically required to pursue any meritorious argument on behalf of the client that has any likelihood of benefitting the client. (See *People v. Johnson* (1981) 123

Cal.App.3d 106, 109.)[7] When we cannot do so and do not intend to file an Opening Brief on the merits, the normal course of action is to file with the appellate court what is colloquially referred to as a "no issue" brief or letter and declare to the court that we have thoroughly reviewed the record and found no arguable issues. (*In re Phoenix H.* (2009) 47 Cal.4th 835, 844.) Amici questions whether this is ethically permissible if counsel knows there is an arguable error but has been unable to pursue an investigation that could possibly show prejudice from that error because of difficulty in locating and/or communicating with the client in the time provided.

Ethical and legal concerns also arise even if the client is readily available. After interviewing the client, the next step would be to contact relatives. This would often require counsel to contact relatives that the Agency overlooked. This means the relatives may not even know the child is a dependent of the court. Disclosure of the child's name and dependent status is forbidden by law though. (§ 827 [case files are confidential]; Penal Code § 11167.5, subds. (a), (b) [report *and information contained therein*

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[7] *People v. Johnson* holds that in a criminal case appointed counsel has the duty to raise any arguable issue on appeal. "[A]n arguable issue on appeal consists of two elements. First the issue must be one which, in counsel's professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that the result will either be a reversal or modification of the judgment, if the issue is resolved favorably to the appellant." (*Id.* at p. 109.)

is confidential] [emphasis added]; see also § 10850.)[8] Counsel will be forced to disclose these confidential facts to explain the purpose for the inquiry. Confidentiality laws in juvenile dependency exist to protect the child. The Legislature has specified that the *social worker* is allowed to discuss the case with various individuals for the purpose of ICWA inquiry but has not sanctioned court appointed appellate counsel representing parents to do the same. (§ 224.2, subd. (b).)

As discussed previously, it may be necessary for counsel to interview the non-appealing parent. For illustrative purposes, let's say that counsel represents Mother on appeal but the social worker failed to interview any *paternal* relatives. Father has not appealed. Father is technically unrepresented at this point. He was represented at the time the orders were made though. It is at least unclear whether Mother's appellate counsel can ethically contact Father directly to discuss the substantive issues of the appeal. (See Cal. Rules of Prof. Conduct, Rules 4.2, subd. (a); 4.3, subds. (a), (b).) If appellate counsel routinely must contact the nonappealing parent, this will lead to confusion by non-appealing parents about who represents who and for what purpose. In addition, trial courts regularly terminate representation for parents following the sixty-day period to file a Notice of Appeal. This practice relies on the basic rule of appellate procedure that

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[8] While imposition of these criminal sanctions against court appointed appellate attorneys may be unlikely, few attorneys would take this risk. Certainly, a test of prejudice for ICWA inquiry errors should not require or encourage actions that are technically criminal violations.

any forthcoming appeal will concern only the appellate record and there will not be an ongoing investigation. For the foregoing reasons, if this Court adopts the *Dezi C.* holding, lengthy delays will ensue and court appointed counsel will face numerous ethical and legal questions that have no clear answers.

II. The holding of *Dezi C.* rests on faulty reasoning.

The *Dezi C.* holding rests on several faulty premises. First, as explained, *infra,* II.A., pp. 27-29*,* the reasoning of *Dezi C.* misunderstands the purpose of an ICWA inquiry and therefore, the relevant "interest" and "outcome" a prejudice standard should consider. As explained, *infra.* II.B., pp. 29-32, the *Dezi C.* holding also inaccurately assumes that parents know whether they have Indian ancestry. Important to amicus curiae CADC, as explained, *infra,* II.C., pp. 32-35, the *Dezi C.* court relied on an inaccurate and demeaning characterization of our clients and members of our profession.

A. In purporting to apply a harmless error analysis, the *Dezi C.* court focuses on the incorrect interest and the incorrect outcome.

The *Dezi C.* court justifies its approach "because the governing test for harmlessness is *outcome* focused…" (*Dezi C., supra,* 79 Cal.App.5th at p. 781.) The problem is that the *Dezi C.* court focused on the wrong *outcome*. As the *Dezi C.* court explained, the rule for Court of Appeal, Division Eight stated in a dissent: harmlessness is that reversal is required if "it is reasonably probable that a *result* more favorable to the appealing

party would have been reached in the absence of error." (*Ibid.*) The *Dezi C.* court failed to recognize *who* the relevant party is in an appeal challenging an error in ICWA inquiry. (*Ibid.*) The parent is technically the appealing party but steps in as a "surrogate for the tribe" and it is therefore the *tribe* and not the *parent's* interest at play. (*In re K.R.* (2018) 20 Cal.App.5th 701, 708.) Consequently, the question of *outcome* must be linked to the *outcome* that the tribe would be seeking. As Justice Wiley of the Second District Court of Appeal, Division Eight aptly stated:

> The right here belongs to tribes. What is the tribes' view of this controversy? We do not know. They have never been invited to the discussion. The entire appellate conversation has proceeding in their absence. The real parties in interest have no idea their rights are on the line in these cases…
>
> [Because of an error in inquiry] we do not know what these extended family members would have said. The Legislature told the Department to find out. It did not.
>
> With every failure to identify a child with Indian ancestry, tribes lose an opportunity, one child at a time, to transmit their culture to future generations. Tribes have been losing futures for 500 years. The Legislature recently sought to do something about it. The Department, charged with defending the tribes' interest, has faltered. The tribes will discover, eventually, that once again their interest has been balanced away."

(*In re M.M.* (2022) 81 Cal.App.5th 61, 73-74 [Diss. Opn. Wiley, J.].)

The tribe's interest is not simply in intervening when ICWA does apply, or even in receiving notice when there is a

"reason to believe" or "reason to know" but also in ensuring that no Indian child is erroneously deprived the protections of the ICWA. (§ 224.2.) To require the "record of proceedings" to contain evidence that there is a "reason to believe" the child is an Indian child, essentially removes the legislatively mandated "first-step inquiry." (*In re H.V.* (2022) 75 Cal.App.5th 433, 438.) Reversal would only be warranted where the error is not in fact in the *initial* inquiry but in the failure to discharge a *further* inquiry. (§ 224.2, subd. (e).) The "outcome" a reviewing court should be concerned with in cases of initial inquiry error is whether the court's order finding no further inquiry is needed can be relied upon. That finding can only be relied upon if an adequate initial inquiry has been conducted. (§ 224.2, subd. (i)(2).) The tribe's *interest* would then be served by the *outcome* of certainty that an Indian child has not been overlooked.

B. *Dezi C.* rests on an unproven assumption that parents know their own ancestry. This assumption is at odds with the law and logic.

Dezi C. also claimed that unless the parent is adopted then the parent could "be presumed to be knowledgeable." (*Dezi C., supra,* 79 Cal.App.5th at p. 784.) Respondent repeatedly points to the parents ICWA-020 forms in the present case. Respondent claims that through these forms the parents assert under penalty of perjury "no Indian ancestry." (E.g., AB, pp. 10, 11.) This is neither correct nor possible. Parents sign an ICWA-020 form asserting all they possibly can assert: that there is no Indian

ancestry *to their knowledge*. (Judicial Council Form ICWA-020 ["I have no Indian ancestry *as far as I know*"] [emphasis added].)

The presumption that parents know whether there is Indian ancestry is unsupported by the law. As the California Attorney General's Bureau of Children's Justice observed in recommending California law be amended to require inquiry of family members beyond the parents, "[t]he parents or Indian custodian may be fearful to self-identify, and social workers are ill-equipped to overcome that by explaining the rights a parent or Indian custodian has under the law. Parents may even wish to avoid the tribe's participation or assumption of jurisdiction." (Cal. ICWA Compliance Task Force, Rep. to Cal. Atty. Gen.'s Bur. of Children's Justice (2017), p. 28; *In re Ezequiel G.* (2022) 81 Cal.App.5th 984, 1021 [Diss. Opn., Lavin J.].)[9] With the very history of persecution and degradation that the ICWA was designed to remedy, it is fundamentally at odds with the law's purpose to presume that a parent will both know their Indian ancestry and proudly acknowledge it. The Legislature has been clear that for these reasons, inquiry does not end with a parent.

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[9] The fact pattern in *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30 serves as an example of parents attempting to avoid tribal intervention. The parents were both members of the Mississippi Band of Choctaw Indians and were residents and domicilliaries of the Choctaw Reservation in Neshoba County, Mississippi. (*Id.* at p. 38.) The parents left the reservation and attempted to proceed with an adoption in state court without the tribe's consent. (*Id.* at p. 38.) The US Supreme Court reversed the Supreme Court of Mississippi's affirmance finding that because the children at issue were Indian children domiciled on a reservation, the tribe had exclusive jurisdiction. (*Id.* at pp. 40-41.)

(§ 224.2, subd. (b).) It is not for courts to then disagree with this clear legislative directive.

This presumption that parents know fully their own ancestry also does not bear out in reality. (E.g., *In re S.R.* (2021) 64 Cal.App.5th 303, 314 ["[T]he children's parents apparently had no idea of their family's connection to the Yaqui tribe of Arizona, even though the children's great-grandmother was a member and still lived with the grandparents in Colorado"]; *In re T.G.* (2020) 58 Cal.App.5th 275, 289 ["Oral transmission of relevant information from generation to generation and the vagaries of translating from Indian languages to English combine to create the very real possibility that a parent's or other relative's identification of the family's tribal affiliation is not accurate"].)

Individuals often find out brand new information about their family history during a family dinner or phone call with a relative and that is without the societally enforced shame attached to Indian ancestry. There are also "family secrets," things families choose not to disclose to younger generations. This phenomenon is encapsulated in the popular Disney song "We Don't Talk About Bruno" where the cartoon family has chosen not to discuss a mysterious family member and instead act as if he never existed. There are entire television shows devoted to the reality that people do not know their own ancestry. These include: "Who do you think you are?", "Genealogy Roadshow," "Ancestors" and "Roots Less Traveled." *Dezi C.* rests on the assumption that people have detailed knowledge about

their own ancestry when, in fact, reality shows us they often do not.

As appellant points out the ICWA was enacted to remedy a history of persecution and abusive child welfare practices that caused large numbers of Indian children to be separated from their families and tribes. (Appellant's Reply Brief, p. 14.) We cannot then ignore the sad fact that many may have chosen to conceal their tribal ties and stopped passing this information down to younger generations. The shameful history that the ICWA was designed to remedy fundamentally undermines *Dezi C.*'s assumption that parents will surely know if they have Indian ancestry.

C. *Dezi C.* inappropriately shifts the burden of the Agency's error onto parents' court appointed appellate counsel. In doing so, the *Dezi C.* court relied on an inaccurate characterization which demeans our clients and members of our profession.

Dezi C. supports its "proffer" requirement by claiming that it discourages "game playing" by parents in dependency proceedings. (*Dezi C., supra,* 79 Cal.App.5th at p. 781.) The *Dezi C.* court claims without evidence that there is a problem with "parents who hold back any objection to the adequacy of the agency's inquiry until an appeal of the termination of their parental rights in the hopes of delaying finality of that termination." (*Ibid.*) Respondent likewise passionately critiques *parents* stating:

> *Parents* are routinely remaining silent after an ICWA finding – in some cases, for several ***years*** – then raising ICWA error for the first time on appeal, often from an order terminating parental rights.

(AB, p. 39 [emphasis added].)

Respondent neatly sidesteps any discussion of the other players in this so-called game, who have also sat by for those same "years." The ones whose job it was to notice at any point during those "years" that more needed to be done. The parent throughout these "years" is not mischievously sitting on an objection related to ICWA. Instead, the parent is likely struggling with severe issues related to poverty, mental health and/or substance use, and is trying but sadly failing in attempts to preserve her family. Throughout these "years" the parent has no legal duty to bring forth information related to Indian ancestry and on a practical level this important law is likely far from her mind. In stark contrast, throughout these "years" the Agency and trial court have both had an affirmative and ongoing duty to inquire into possible Indian ancestry. (§ 224.2, subd. (a).) Throughout these "years" the social worker and county counsel have repeatedly submitted filings to the court representing that ICWA has been dealt with and no further investigation is needed. Throughout these "years" the trial court has repeatedly taken the social worker and county counsel at their word without ensuring the truth of these statements. Respondent is correct – these matters normally should have been dealt with "years" ago. Respondent is incorrect in who is to blame. These latent

objections would not be necessary if the Agency's affirmative and *continuing* duty was actually performed "years" ago.

In reality, this "game playing" claimed by *Dezi C.*, is not done by parents. Parents do not have detailed knowledge of the requirements of the ICWA to understand that an error has even occurred and then to strategically withhold an objection. Any "game playing" would have to be by lawyers. (See *Dezi C., supra,* 79 Cal.App.5th at p. 781.)

Amici are saddened in having to clarify first that trial attorneys as a widespread practice are not holding back possible objections in order to allow a last minute appellate challenge. (Compare with Bus. & Prof. Code § 6068, subd. (c) [an attorney has a duty to "maintain those actions, proceedings, or defenses only as appear to him or her legal or just"]; Cal. Rules of Prof. Conduct, Rule 3.2 ["In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense"].) More realistically, in these cases a separate appellate attorney reviews the record on appeal and discovers an error that no one has noticed. Sometimes appellate attorneys notice errors that trial counsel or the trial court overlooked. Massive case-loads and packed dockets are the likely culprit, and not a desire to play games. (*System on the Brink: How Crushing Caseloads in the California Dependency Courts Undermine the Right to Counsel, Violate the Law, and Put Children and Families at Risk* (2015) < https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/05/DependencyCourtsWhitePaper-CA.pdf>)

Amici are likewise saddened to clarify that appellate attorneys raise these objections as part of their duty to their client and the courts, not to "game play." To be abundantly clear, none of this is a game to us.

Judging by the care various Courts of Appeal have taken to delicately balance the interests of the child against the interest of the tribes, they also don't see this as a game but something to be taken very seriously. A holding from this Court placing the burden squarely on the Agency and not parents' court appointed appellate counsel will help ensure that ICWA is investigated early and Indian children are identified in a timely manner and therefore are able to enjoy the protections of ICWA in the way the Legislature intended. After all, this is also not a game to Indian tribes or Indian children.

III. Amici join in appellant's request to adopt a rule of automatic reversal or in the alternative a hybrid substantial evidence/abuse of discretion test.

Amici Curiae CADC join in appellant's requests for this Court to adopt a rule of automatic reversal. (*Infra,* III.A., pp. 36-37.) In the alternative, Amici Curiae CADC urges this Court to adopt a hybrid substantial evidence/abuse of discretion test as articulated by the Fifth District in *In re K.H.* (2022) 84 Cal.App.5th 566. (*Infra,* III.B., pp. 37-40.)

A. A rule of automatic reversal appropriately balances the various interests at stake. A rule of automatic reversal protects the important purposes of the ICWA and related California statutes while also encouraging a fast resolution to any inquiry errors allowing minimal disruption to the child's permanence and stability.

The Fourth District Court of Appeal, Division Three has adopted a rule of automatic reversal, explaining: "[i]n our view, the correct approach is to focus on the wider interest at play – i.e., the federal and state public policy of ensuring that potential Native American heritage is considered, and thus inquired about, in *every* dependency case." (*In re A.R.* (2022) 77 Cal.App.5th 197, 206 (*A.R.*).) This is in keeping with the recognition that parents are acting as a surrogate for the tribe. (*Id.* at p. 207.) "Any other rule would potentially make enforcement of the tribes' rights dependent on the quality of the parents' effort on appeal. That would be inconsistent with the statutory schemes which place that responsibility squarely on the courts and child welfare agencies. Stated plainly, it is the obligation of the government, not the parents in individual cases, to ensure the tribes' interests are considered and protected." (*Id.* at p. 207.)

Unlike the lengthy and cumbersome delay encouraged by *Dezi C.,* under the *A.R.* approach any "delay need not be a significant one." (*In re A.R., supra,* 77 Cal.App.5th at p. 207.) A rule of automatic reversal protects tribal interests while also serving the interests of judicial economy and stability for children. This approach encourages the practice of a stipulated reversal with immediate issuance of the remittitur. This way, the

social worker may conduct a proper investigation and the matter can be dealt with quickly opposed to through a lengthy appeal. "In other words, because we have eliminated the possibility of a 'harmless error' ruling, SSA can start fulfilling its statutory obligation as soon as it has notice of error. As we observed in the *A.R.* opinion, SSA can likely complete its ICWA obligation before the briefing on appeal is complete, resulting in very little delay when the matter is remanded to the juvenile court." (*In re E.V.* (2022) 80 Cal.App.5th 691, 700.)

B. In the alternative, this Court should adopt the holding of *K.H.* A hybrid substantial evidence/abuse of discretion test.

Respondent claims that the statute does not identify automatic reversal as the proper remedy. (E.g., AB, p. 54.) The statute does specifically state a finding that ICWA does not apply is "subject to reversal based on sufficiency of the evidence." (§ 224.2, subd. (i)(2).) That same subdivision specifies that a court may only find that ICWA does not apply after "the court makes a finding that proper and adequate further inquiry and due diligence as required in this section have been conducted…" (*Ibid.*) Under the *K.H.* approach, the finding that ICWA does not apply in accordance with the statute is reviewed for substantial evidence. *(Ibid.*) The "determination that the agency's inquiry was proper, adequate, and duly diligent should be reviewed under a hybrid substantial evidence and abuse of discretion standard." (*Ibid.*) This is because the trial court's determination of whether the investigation was adequate requires a "balancing

of various factors." (*In re K.H., supra,* 84 Cal.App.5th at p. 601 [citing *Caden C.* (2021) 11 Cal.5th 614, 640.)

The *K.H.* approach appropriately focuses on the *evidence* of an adequate investigation opposed to the *Dezi C.* approach with focuses on the *evidence* of Indian ancestry gathered by a deficient investigation. "[S]ubstantial evidence must be of ponderable *legal* significance." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) Again, the statute requires a finding that an adequate investigation be completed and specifies what an adequate investigation entails. (§ 224.2, subds. (b), (i)(2).) Therefore, a reviewing court cannot look only to whether there is evidence of Indian ancestry and must also consider whether there is evidence of an adequate investigation into the possibility of Indian ancestry. (*In re Josiah T.* (2021) 71 Cal.App.5th 388, 408.) Faced with a record that lacks both evidence of Indian ancestry and evidence of an adequate investigation, "the probability of such ancestry is reasonable enough to require the Department and the court to pursue it." (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 743.)

Put differently, a record that lacks clear evidence of tribal enrollment or eligibility has no ponderable *legal* significance to a finding that the ICWA does not apply, unless that record also includes evidence of an adequate investigation into the possibility of Indian ancestry. A record lacking any evidence of a thorough inquiry into the possibility of Indian ancestry is not evidence that is reasonable, credible or of solid value to support a finding that ICWA does not apply. (*In re A.M.* (2020) 47 Cal.App.5th 303,

314.) The Department cannot be allowed to point to a deficient record, the deficiency of which it is responsible for, to argue against reversal. Accordingly, the *K.H.* court explained: "[o]n a well-developed record, the court has relatively broad discretion to determine whether the agency's inquiry was proper, adequate, and duly diligent on the specific facts of the case. However, the less developed record, the more limited that discretion necessarily becomes." (*In re K.H., supra,* 84 Cal.App.5th at p. 589.) The holding of *K.H.* crafts a test for prejudice informed by the relevant statutes and basic principles of appellate review.

Respondent claims to be concerned with the vast array of individuals that the Agency is required to interview but makes no attempt to argue that this concern is relevant to the present case or the majority of recent appeals. (E.g., AB, p. 12.) The problem is not that in vast numbers, appellate courts are reversing where the Agency interviewed numerous but not all available relatives – the majority of reversals are coming where no relatives were asked about Indian ancestry. (E.g., *Dezi C., supra,* 79 Cal.App.5th at p. 774; *In re E.V., supra,* 80 Cal.App.5th at p. 700.) The Agency as a practice is not inquiring further than the parents. This "slippery slope" argument is not persuasive when we are not even at the base of the mountain yet. To utilize a different metaphor: while it may be debatable how far the Agency must cast the net, we can all agree they need to start casting it further than they currently are. All that said, the *K.H.* court addressed Respondent's concern: "On remand, the juvenile court shall direct the Department to conduct a proper, adequate, and duly diligent

inquiry under section 224.2, subdivision (b), and document its inquiry in the record in compliance with rule 5.481(a)(5)…the inquiry should be of sufficient reach to ensure that if there is information suggesting [the child] is or may be an Indian child, it is gathered. This should not be interpreted as requiring an exhaustive search for and questioning of every living relative of [the child]." (*In re K.H., supra,* 84 Cal.App.5th at p. 621.) In other words, the search must be sufficiently broad that the court can determine with confidence, that further searching is not necessary. Amici suggests that the focus be on the more senior members of the dependent child's extended family such as grandparents, great-grandparents, great aunts and uncles opposed to more distant relatives.

Conclusion

For the foregoing reasons, this Court should reject the holding of *Dezi C.* This Court should not adopt any test of prejudice that rests on the "option" for post-judgement evidence. Such a holding would be contrary to this Court's well-reasoned holding in *Zeth S.* that additional evidence outside the appellate record should only be considered in rare circumstances and such consideration should never become routine. All parties, especially the child, are best served when questions about ICWA applicability are resolved early and not years into a case after the termination of parental rights. Adopting a rule of automatic reversal would appropriately balance the interests involved, encourage compliance with the statute, and allow for quick resolution of any outstanding errors. In the alternative, this

Court should adopt a hybrid substantial evidence/abuse of discretion test as articulated in *In re K.H.* (2022) 84 Cal.App.5th 566 which appropriately focuses on the *evidence* of the Agency's inquiry opposed to the *Dezi C.* approach which focuses on *evidence* of Indian ancestry in a record also showing a deficient inquiry.

DATED: March 2, 2023

Respectfully submitted by,

California Appellate Defense Counsel
Amicus Committee
Suzanne Nicholson, Chair

By: /s/ Sean Burleigh
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CERTIFICATE OF WORD COUNT

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Executed on March 2, 2023 at Tucson, AZ.

Respectfully submitted by,

/S/

Sean Burleigh, Attorney for Petitioner

PROOF OF SERVICE
IN THE SUPREME COURT OF CALIFORNIA

In re Dezi C.
Supreme Court Case No: S275578
Appellate Court Case No.: B317935

I, Sean Burleigh, declare and state:

That I am not a party to the within action; that I am an attorney admitted to practice law in the State of California appointed by this Court to represent Appellant.

That on March 2, 2023, I served the following:

CADC Amicus Curiae Application and Proposed Brief

Upon the persons or organizations listed below electronically. I utilized service through the true filing electronic system.

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I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 2, 2023 at Tucson, Arizona.

/S/
Sean Burleigh

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S275578**
Lower Court Case Number: **B317935**

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