

FILED
STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12CRS 1362-3, 51719-20

JUN 16 AM 11:31
COUNTY OF JACKSON

JACKSON COUNTY, C.S.C.

STATE OF NORTH CAROLINA

-VS-

MOTION TO DISMISS

GEORGE LEE NOBLES

.....

NOW COMES, the Defendant, by and through his attorney, Assistant Capital Defender Todd. M. Williams, pursuant to the Constitution of the United States, Articles I, § 8, cl. 3 (the “Indian Commerce Clause”), Art. III, § 2, cl. 3 (the “Trial by Jury Clause”), and Art. VI, cl. 2 (the “Supremacy Clause”), the V, VI, VIII, and XIV Amendments to the Constitution of the United States, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), 18 U.S.C.S. § 1153 et. seq. (the “Major Crimes Act of 1885”), 25 U.S.C.S. § 1301, St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988), the Constitution of North Carolina, Article IV, § 12, and N.C. Gen. Stat. §§ 1E-1, 15A-2010 et. seq. (the “Racial Justice Act”), and 15A-954(a)(8) and does hereby move this Honorable Court for dismissal of the above-referenced matters for lack of personal and subject matter jurisdiction and shows unto this court in support of said motion as follows:

1. That on information and belief, Congress enacted the Major Crimes Act, 18 U.S.C. § 1153, to confer jurisdiction on the federal courts to punish certain offenses committed by Indians in Indian country. United States v. Broncheau, 597 F.2d 1260, 1264 (9th Cir., 1979);
2. That on information and belief, the alleged crime set out in the above-captioned matter occurred in “Indian Country” as defined by federal statutes and is a “major crime” as defined by 18 U.S.C. § 1153;
3. That on information and belief, the alleged victim in this matter, Barbara Preidt, was a non-Indian;

4. That, on information and belief, crimes in which the perpetrator, but not the victim, is Indian are subject to federal jurisdiction under either 18 U.S.C. § 1152 (except where the tribe has already imposed punishment or the tribe has exclusive jurisdiction through treaty), or 18 U.S.C. § 1153. United States v. Bruce, 394 F.3d 1215, 1222 (9th Cir., 2005);
5. The term "Indian" has not been statutorily defined but instead has been judicially explicated over the years. Broncheau, 597 F.2d at 1263;
6. That on information and belief, defendant's mother, Donna Loraine Mann, is an enrolled member of the Eastern Band of Cherokee Indians with an identification number of [REDACTED] /R03978 issued by the Eastern Band – a federally recognized Indian tribe. See attached defense exhibit "1";
7. That on information and belief, defendant is not an enrolled member of the Eastern Band of Cherokee Indians but would be recognized as "Indian" by the Eastern Band of Cherokee Indians under tribal law as a "First Descendent". E. Band of Cherokee Indians v. Lambert, 3 Cher. Rep. 62 (N.C. Cherokee Ct. 2003) (attached);
8. That on information and belief, Defendant lived within the Qualla Boundary and/or Eastern Band of Cherokee Indians Reservation during the years 1984 thru 1990;
9. That on information and belief, in 1984 defendant was involved in a severe motor vehicle accident with his mother in the vehicle and received payment for medical services from the Indian Health Service as a result of the accident;
10. That on information and belief, in 1986 defendant was again involved in a motor vehicle accident also involving defendant's mother and was taken to Cherokee Indian Hospital for medical treatment;
11. That on information and belief, defendant was enrolled in Cherokee Central School System and completed the 9th Grade before moving to Florida in 1990;
12. That on information and belief, in 2011, upon release from the Florida state prison system, defendant returned to Indian Country within the Qualla Boundary where he resided until the date of the alleged offense in October 2012;

13. The generally accepted test for Indian status considers "(1) the degree of Indian blood; and (2) tribal or government recognition as an Indian." United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir., 2005) (citing United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996));
14. That federal courts have determined that a blood quantum as low as 1/64th Indian blood may satisfy the first prong of the test at ¶13, *supra*. United States v. Maggi, 598 F.3d 1073 (9th Cir. 2010);
15. That on information and belief, defendant may satisfy the first prong of the test by having a blood quantum of more than 1/64th Cherokee blood;
16. When analyzing the second prong of the test set out at ¶13, courts have considered, in declining order of importance, evidence of the following: "1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life." United States v. Bruce, 394 F.3d at 1224 (quoting United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995)).
17. Tribal enrollment is "the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative." Broncheau, 597 F.2d at 1263;
18. That enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and maintained tribal relations with the Indians thereon. United States v. Antelope, 430 U.S. 641, 708 (1977);
19. That on information and belief, defendant can satisfy the second prong of the test by showing 1) that he is a First Descendent under tribal law, 2) through tribal assistance received, and 3) through the enjoyment of the benefits of tribal affiliation and 4) through social recognition as an Indian by residence on the Eastern Band of Cherokee Indians reservation;
20. That on information and belief, these principles of federalism and Indian law are incorporated into an "Affidavit of Jurisdiction" form drafted by the

Cherokee Court and used to establish competent jurisdiction in cases arising on tribal lands. See attached defense exhibit "2";

21. That, on information and belief, defendant was never presented with an "Affidavit of Jurisdiction" nor ever asked about his Indian status even though the alleged crime was investigated by the Cherokee Indian Police Department and such an inquiry would not have taken longer than a few minutes' investigation;
22. If so, that on information and belief, North Carolina Courts have no jurisdiction to prosecute defendant for the murder of a non-Indian in Indian Country. St. Cloud v. United States, 702 F. Supp. 1456, 1459 (D.S.D. 1988);
23. That on information and belief, defendant's right to Due Process requires notice and hearing on these jurisdictional questions in a federal forum; such facts may only be developed fully in a court with jurisdiction over Indian conduct within Indian Country as defined and developed under federal statutes and case-law.

WHEREFORE, defendant prays this Honorable Court to issue an Order dismissing this matter for lack of jurisdiction in that this action is pre-empted by legislation of the United States Congress and the operation of the Supremacy Clause of the United States Constitution and for such other relief as is just and proper.

THIS the ____ day of April, 2013.

TODD M. WILLIAMS
Assistant Capital Defender
17 N Market Street, Suite 102
Asheville NC 28801
828/251-6785

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been served on the District Attorney's Office for the 30th Prosecutorial District, by either delivering it to the District Attorney's _____ office or Courthouse _____ mailbox in the appropriate county of service within the 30th Judicial District.

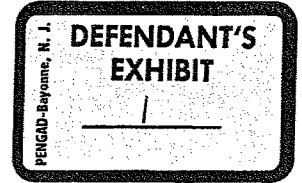
This is the _____ day of April, 2013.

TODD M. WILLIAMS
Assistant Capital Defender
17 N Market Street, Suite 102
Asheville NC 28801
828/251-6785



Eastern Band Of Cherokee Indians

PO Box 2069
Cherokee, NC 28719
Phone: (828) 497-8110
Fax: (828) 497-8199



AFFIDAVIT
(Not Valid If Altered)

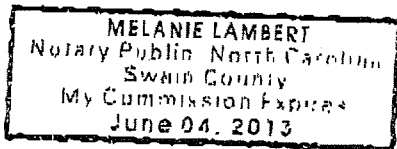
STATE
COUNTY/BOROUGH

I, Kathie Mccoy, being duly sworn, depose and say that I am the Assistant Enrollment Officer
of the Eastern Band Of Cherokee Indians. I verify
that Donna Loraine Mann is an enrolled member of the Eastern Band Of Cherokee Indians.
Our records indicate a birth date of May 09, 1955. The individual's Social Security Number / Tribal
Enrollment Number is / R03978

Kathie Mccoy

Kathie Mccoy
Assistant Enrollment Officer
Eastern Band Of Cherokee Indians

SUBSCRIBED AND SWORN BEFORE ME THIS 07th DAY OF January, 2013



Melanie Lambert

NOTARY PUBLIC

6-4-13

My Commission Expires Date

EASTERN BAND OF CHEROKEE INDIANS

The Cherokee Court



File No. (if any)

For Victim

For Accused

IN RE

AFFIDAVIT OF JURISDICTION

Name and Address of Affiant

Name and Address of Accused

Date of the Offense

Victim

Potential Offense

AFFIDAVIT OF JURISDICTION

1. Are you an enrolled member of any Federally Recognized Tribe? Yes No

Which Tribe

INSTRUCTIONS: If the answer to Question No. 1 is Yes then the Affiant is an Indian for the purposes of jurisdiction. If the answer is No, proceed to Question No. 2.

2. Are you a first linear descendant under the laws of the Eastern Band of Cherokee Indians? Yes No

INSTRUCTIONS: If the answer to Question No. 2 is Yes then the Affiant is under the jurisdiction of the Cherokee Court. If the answer is No, proceed to Question No. 3.

3. (for Accused Only) Are you a citizen of any country other than the United States of America? Yes No

INSTRUCTIONS: If the answer to Question No. 3 is Yes then the Affiant is under the jurisdiction of the Cherokee Court. If the answer is No, proceed to Question No. 5.

4. (If the accused answers No to the preceding questions) If it is determined that you are a non-Indian and therefore not subject to prosecution by the Cherokee Court, you may freely and knowingly waive any objection to jurisdiction of the Cherokee Court. Would you like to do that? Yes No

INSTRUCTIONS: If the answer to Question No. 4 is Yes then the Affiant is under the jurisdiction of the Cherokee Court. If the answer is No, proceed to Question No. 5.

5. Do you or your ancestors have any Indian Blood? Yes No

INSTRUCTIONS: If the answer to Question No. 5 is No then the Affiant is a Non-Indian for the purposes of jurisdiction. If the answer is Yes, proceed to Question No. 6-9.

6. Have you been provided formally or informally with any assistance that is reserved only for Indians? Yes No

Describe:

7. Do you enjoy the benefits of Tribal Affiliation (i.e., First Lineal Descendant, or other special status bestowed by a tribe)? Yes No

Describe:

8. Do you live on an Indian Reservation? Yes No

Describe:

9. Do you participate in Indian Social Life (i.e., Attend Indian Dinners, Community Meetings, Traditional Ceremonies, or Dance at Pow-Wows)? Yes No

Describe:

INSTRUCTIONS: The Magistrate must consider all answers and information provided in response to questions No. 5-9, applying Cherokee Law and Traditions, Treaties, and Acts of the United States Congress and decision of the Courts of the United States to determine whether the Affiant is an Indian for the purposes of Jurisdiction.

DETERMINATION OF JURISDICTION

SWORN AND SUBSCRIBED BEFORE ME

Date

Date Signature

Signature of Affiant

Deputy CSC Assistant CSC Clerk of Superior Court Notary Public Magistrate Judge

Name of Affiant (Type or Print)

INITIAL DETERMINATION

Indian Non-Indian

Signature of Judicial Official

Judge Magistrate

Date

NORTH CAROLINA
BUNCOMBE COUNTY

VERIFICATION

Todd M. Williams, after being duly sworn, deposes and says:

That I have read the foregoing Motion and know the contents thereof to be true of my own knowledge except as to those matters and things alleged upon information and belief and as to those matters and things I believe them to be true.

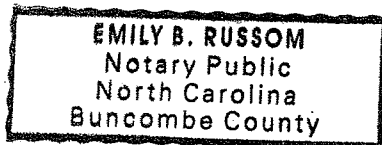
AFFIANT

Sworn to and subscribed before me this

15th day of April, 2013

NOTARY PUBLIC

My Commission Expires: 11-16-16





EASTERN BAND OF CHEROKEE INDIANS v. Sarella C. LAMBERT, Defendant.

No. CR 03-0313

THE CHEROKEE COURT OF NORTH CAROLINA

3 Cher. Rep. 62; 2003 N.C. Cherokee Ct. LEXIS 993

**March 12, 2003, Submitted; May 23, 2003, Re-submitted
May 29, 2003, Decided**

DISPOSITION: [**1] Defendant's motion to dismiss for lack of jurisdiction is DENIED.

COUNSEL: James W. Kilbourne, Jr., Tribal Prosecutor, Eastern Band of Cherokee Indians, for the Tribe.

J. Frank Lay, II, Sylva, North Carolina, for the Defendant.

JUDGES: Before J. Matthew Martin, Judge.

OPINION BY: J. Matthew Martin

OPINION

[*62] MARTIN, J.

MEMORANDUM ORDER

These matter came on before the Court on March 12, 2003. The Tribe was represented by its Prosecutor, James W. Kilbourne, Jr. The Defendant was present and represented by Frank Lay, Esquire. The Defendant moved to dismiss this case on the grounds that the Court lacked jurisdiction over her, as she is not an enrolled member of any federally recognized Indian Tribe. The parties stipulated to this fact, and to the fact that the Defendant is recognized, politically, by the Tribe as a "First Lineal Descendent" (First Descendent).

Other than these two stipulations, the parties presented no other evidence and the Court took the Motion to Dismiss under advisement. Additionally, the Court entered a stay of the seventy-two hour custodial provision of C.C. § 14-40.1(j)(1).

During deliberations, the Court determined that additional evidence was required to decide the matter, [**2] and ex mero motu, the Court set the Motion for further hearing on Friday, May 23, 2003. At that hearing,

the Court heard testimony from Teresa B. McCoy, a member of the Tribal Council and Dean White, the Superintendent of the Cherokee Agency of the Bureau of Indian Affairs, United States Department of the Interior. Additionally, the Court has reviewed the submissions of the parties and heard the argument of counsel. The matter is now ready for a ruling.

FINDINGS OF FACT

1. The Defendant, Sarella C. Lambert is not an enrolled member of any federally recognized Indian Tribe.

2. The Defendant, Sarella C. Lambert is recognized by the Eastern Band of Cherokee Indians as a "First Lineal Descendent" (First Descendent).

3. To be an enrolled member of the Eastern Band of Cherokee Indians, one must have at least one ancestor on the 1924 Baker roll of tribal members and possess at least one sixteenth blood quanta of Cherokee blood.

4. A First Descendent is a child of an enrolled member, but who does not possess the minimum blood quanta to remain on the roll.

5. A First Descendent may inherit Indian Trust property by testamentary devise and [*63] may occupy, own, sell or [**3] lease it to an enrolled member during her lifetime. C.C. § 28-2. However, she may not have mineral rights or decrease the value of the holding. C.C. § 28-2(b).

6. A First Descendent has access to the Indian Health Service for health and dental care.

7. A First Descendent has priority in hiring by the Tribe over non-Indians, on a par with enrolled members of another federally recognized Tribe as part of the Tribe's Indian preference in hiring.

8. A First Descendent has access to Tribal funds for educational purposes, provided that funds have not been exhausted by enrolled members.

9. A First Descendent may use the appeal process to appeal administrative decisions of Tribal entities.

10. A First Descendent may appear before the Tribal Council to air grievances and complaints and will be received by the Tribal Council in relatively the same manner that an enrolled member from another Indian Nation would be received.

11. Other than the Trust responsibility owed to a First Descendent who owns Indian Trust property pursuant to C.C. § 28-2, the United States Department of the Interior, Bureau of Indian Affairs has no administrative or regulatory responsibilities with [**4] regard to First Descendents.

12. A First Descendent may not hold Tribal elective office.

13. A First Descendent may not vote in Tribal elections.

14. A First Descendent may not purchase Tribal Trust land.

15. The Court takes judicial notice of its own records, and specifically of the fact that the Defendant has availed herself of the Court's civil jurisdiction in that she is the Plaintiff in the case of Sarella C. Lambert v. Calvin James, CV-99-566, a case currently pending on the Court's civil docket.

16. The Defendant was charged with a proper warrant and criminal complaint for Domestic Violence Assault pursuant to C.C. §§ 14-40.1(b)(6) and 14-40.10.

17. C.C. § 14-1.5 provides "The Cherokee Court system shall have the right to hear cases, impose fines and penalties on non members as well as members."

DISCUSSION

The Defendant argues that *Oliphant v. Suquamish Indian Tribe, et al.*, 435 U.S. 191, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978) prohibits this Court from exercising criminal jurisdiction over her. To be sure, in *Oliphant*, the Supreme Court held that Indian tribal courts do not have criminal jurisdiction over non-Indians. *Id.* at 195. Then, in *United States v. Wheeler*, 435 U.S. 313, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978), [**5] a case decided shortly after *Oliphant*, the Supreme Court reaffirmed Tribal courts' jurisdiction over tribal members. In *Duro v. Reina*, 495 U.S. 676, 109 L. Ed. 2d 693, 110 S. Ct. 2053 (1990), the Supreme Court ruled that the Indian Tribes also lacked the authority to prosecute non-member Indians for criminal acts.

Immediately after *Duro* issued, Congress amended the Indian Civil Rights Act (ICRA). The effect of this amendment was to "revis[e] the definition of 'powers of self-government' to include 'the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.'" *United States v. Lara*, 324 F.3d [*64] 635 (8th Cir. 2003)(en banc); 25 U.S.C. § 1302(2). Thus, as amended, ICRA clarifies that Indian nations have jurisdiction over criminal acts by Indians, regardless of the individual Indian's membership status with the charging Tribe

Having established that the several Tribes are vested with jurisdiction over alleged criminal acts by Indians, the Court next must consider whether the Defendant is an Indian for the purposes of such jurisdiction. The Court concludes that she is.

Pursuant to 25 U.S.C. § 1301 [**6] (4) an "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section Indian country to which that section applies." 18 U.S.C. § 1153 does not provide further definition. In *Duro*, the Supreme Court noted that "the federal jurisdictional statutes applicable to Indian country use the general term 'Indian.'" *Duro*, 495 U.S. at 689. Even earlier, the Supreme Court construed such a term to mean that it "does not speak of members of a tribe, but of the race generally, -of the family of Indians." *United States v. Rogers*, 45 U.S. (4 How.) 567, 573, 11 L. Ed. 1105 (1846). In *Rogers*, the Supreme Court recognized that, by way of adoption, a non-Indian could "become entitled to certain privileges in the tribe and make himself amenable to their laws and usages." *Id.*

The same concept is true here. By political definition First Descendents are the children of enrolled members of the EBCI. They have some privileges that only Indians have, but also some privileges that members of other Tribes do not possess, not the least of which is [**7] that they may own possessory land holdings during their lifetimes, if they obtain them by will. During this time, the Government will honor its trust obligations with respect to First Descendents who own Tribal Trust lands. Also, First Descendents have access to Tribal educational funds, with certain limitations, and may appeal the adverse administrative decisions of Tribal agencies. Like members of other tribes, First Descendents may apply for jobs with the EBCI and receive an Indian preference and they may also address the Tribal Council in a similar manner as members of other Tribes. Of course, it almost goes without saying that First Descendents may, as this Defendant has, seek recourse in the Judicial Branch of Tribal Government. Most importantly, according to the testimony of Councilwoman McCoy, First

Descendants are participating members of this community and treated by the Tribe as such.

Defendant relies heavily on the fact that she cannot vote or serve in Tribal Government (and presumably, although she did not argue it, serve on a jury in the Cherokee Court) to support her position that she should not be treated as an Indian for the purposes of this Court's criminal [**8] jurisdiction. And while it is true that members of other Tribes may participate in their respective governments, membership in a Tribe is not an "essential factor" in the test of whether the person is an "Indian" for the purposes of this Court's exercise of criminal jurisdiction. *United States v. Driver*, 755 F. Supp. 885, 888-89, aff'd, 945 F.2d 1410, cert. denied, 502 U.S. 1109, 117 L. Ed. 2d 448, 112 S. Ct. 1209 (1991), accord Rogers, see also, *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976), cert. denied, 429 U.S. 1099, 51 L. Ed. 2d 547, 97 S. Ct. 1118, 97 S. Ct. 1119 (1977). Rather, the inquiry includes whether the person has some Indian blood and is recognized as an Indian. *Id.* The second part of the test includes not only whether she is an enrolled member of some Tribe, but also [**65] whether the Government has provided her formally or informally with assistance reserved only for Indians, whether the person enjoys the benefits of Tribal affiliation, and whether she is recognized as an Indian by virtue of her living on the reservation and participating in Indian social life. *Id.*

Applying this test in this case, the Court can only conclude that the Defendant meets the definition of an Indian pursuant [**9] to 25 U.S.C. § 1301(4). Accordingly, the Court has jurisdiction over the Defendant in this case.

The Court next turns to the question of whether the Defendant should be returned to custody, as the Court entered a stay of her seventy two hour detention required by C.C. § 14-40.1(j)(1). The Court finds that this provision is to ensure that a victim has a buffer period in which to seek safety or shelter from those who would batter them. The Court finds that so much time has elapsed, without any other allegation of a domestic violence incident by the Defendant since the stay was issued on March 12, 2003, that it would frustrate the purposes of C.C. § 14-40.1(j)(1) by making the detention punitive were the Court to require the Defendant to be returned to the custody of the Swain County Jail.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this case.
2. The Defendant should not be required to serve the remainder of the seventy two hours of detention for which the Court previously entered a stay.

ACCORDINGLY, IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss for lack of jurisdiction is DENIED. IT IS [**10] FURTHER ORDERED that the stay, previously entered by the Court of the seventy two hour detention of the Defendant is VACATED. IT IS FURTHER ORDERED that the Defendant is not required to be detained further pre-trial, and is released under the conditions of her bond. This case is retained for trial before this Court, and IT IS FURTHER ORDERED that the Tribal Prosecutor set this matter back on the regular criminal docket.