STATE OF NORTH CAROLINA
JACKSON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. 12CRS1362, 1363, 51719, 51720

STATE OF NORTH CAROLINA

V.

STATE'S BRIEF ON MOTION TO DISMISS DUE TO LACK OF JURISDICTION

GEORGE LEE NOBLES,
Defendant.

The Defendant has moved to dismiss the charges of two counts of possession of firearm by felon, one count of robbery with a dangerous weapon, and first degree murder on the grounds that the State lacks personal and subject matter jurisdiction due to the Defendant being of Indian descent. The State believes that it has jurisdiction over the Defendant and of the subject matter of these cases, and the State believes the motion to dismiss should be dismissed for the following reasons:

FACTS

1. On September 30, 2012, the Defendant robbed Barbara Preidt with a firearm in the parking lot of the Fairfield Inn & Suites, 568 Paint Town Road, Cherokee, Jackson County, North Carolina, that was located within the Eastern Band of Cherokee Indian (EBCI) boundary. During the robbery, the Defendant shot and killed Mrs. Preidt.

2. After an investigation by the Cherokee Indian Police, with the assistance of the North Carolina State Bureau of Investigations, the Defendant was arrested at the Cherokee Indian Police Office on November 30, 2012, after he was found on November 29, 2012 within EBCI boundary at 1621 Olivet Church Road, Jackson County, Cherokee, North Carolina and he was in possession of an additional firearm for which he was charged.

3. The Defendant's mother, Donna Loraine Mann, is an enrolled member of the EBCI, and the EBCI is a federally recognized Indian tribe.

4. The Defendant is not an enrolled member of the EBCI or any federally recognized Indian tribe.

5. The Defendant was born on January 17, 1976 in Polk County, Florida.

6. The Defendant, by virtue of being born to his mother, is a first generation descendant of the EBCI.

7. The Defendant was enrolled by his mother in the educational system operated by the EBCI for a couple of years while he was very young.

8. Also the Defendant in 1984 and 1987 and 1989 and 1990 was taken by his mother to the hospital operated by the EBCI on four occasions.

9. In 1993 the Defendant was convicted in Florida, and he was incarcerated for his crimes in Florida until November 4, 2011 when he was released from prison on parole.

10. When the Defendant was released from prison, he came to live in Gaston County, North Carolina on March 26, 2012, and then he moved to live with his aunt, Tonya Crowe, within the EBCI Boundary on or about March 28, 2012.

11. The Defendant got a job at a restaurant located on the EBCI for a short period of time while he was living in the area during 2012.

12. On or about May 21, 2012, the Defendant left his aunt's residence, and moved to Fort Wilderness Camp in Whittier, North Carolina which is not located on the EBCI boundary.

13. On or about June 20, 2012, the Defendant moved to live with another aunt, Ruth Griggs, in Bryson City, North Carolina, which is not located on the EBCI boundary.

14. After this move the Defendant sought to move his place of residence to Jackson County, but he did not do so.

15. The Defendant transferred his place of residency for parole purposes back to Gaston County on July 12, 2012, and this was where his residence remained until he was arrested on November 29, 2012. The total amount of time the Defendant advised parole officers that he was living on the EBCI boundary was under 2 months.

16. The Defendant has a tattoo of an Indian head with a headdress on his back, and according to an EBCI tribal elder, Myrtle Driver, this is not a tattoo specific to the Eastern Band of Cherokee Indians.

17. The Defendant did not discuss or even mention his Indian heritage with the probation officers under whom he was being supervised on parole.

18. The Defendant never sought a letter of first generation descendant from the EBCI.

19. Upon the Defendant's release from prison, the Defendant sought no benefits for which he would have been eligible as a first generation descendant of the EBCI.

20. The Defendant's prison records, as well as some of his educational records, state that his race is White, and the Defendant has never sought to change this indication of race.

21. The defendant has never had any kind of governmental identification upon which he would have listed his race.

## LEGAL ANALYSIS

The Court must determine if it has jurisdiction over the subject matter and defendant charged in this case. First, the Court has to look at the location and type of crime that has been committed to determine if it has subject matter jurisdiction.

In this case, the two locations that the Defendant is charged with committing crimes at are on the Jackson County, North Carolina portion of the EBCI. The crimes that were committed, being robbery with a dangerous weapon, possession of a firearm by felon and first degree murder, are all felonies which have original jurisdiction in the Superior Courts of North Carolina pursuant to N.C.G.S. 7A-271. Therefore, the Court clearly has subject matter jurisdiction over these crimes.

However, the issue of personal jurisdiction is more complicated, and in this case one of first impression in the State of North Carolina. Because these crimes occurred on Indian Country (18 U.S.C. Sec. 1151; and see "Criminal Jurisdiction on the North Carolina Cherokee Indian Reservation – A Tangle of Race and History", by The Honorable David B. Sentelle and Melanie T. Morris, 24 Wake Forest L. Rev. 335 (1989)), there is the potential for three different courts to have jurisdiction: State, Tribal, and Federal.

To determine which court has jurisdiction the Court must determine the races of the Defendant and of the Victim. It would appear after a review of the Major Crimes Act (18 U.S.C. Sec. 1153), the Indian Countries Crime Act (18 U.S.C. Sec. 1152), and United States v. McBratney, 104 U.S. 621 (1882), that if a non-Indian commits a crime against another non-Indian in Indian Country, the State courts would have exclusive jurisdiction to prosecute such crimes because neither the Federal or Tribal courts would have interest in such crime. In this case, the victim is a non-Indian, so the only issue remaining is whether the Defendant is Indian or non-Indian. If he is Indian, then the Major Crimes Act and the Indian Countries Crime Act will control whether the Defendant is tried in Tribal or Federal Court. If he is non-Indian, the State courts will have jurisdiction.

As this is an issue of first impression in North Carolina, the Court could look to the federal cases that have interpreted who or what makes a person an "Indian." A series of cases, including but not limited to United States v. Bruce, 394 F.3d 1215 (9th Cir. 2005), United States v. Cruz, 554 F.3d 840 (9th Cir. 2009), and United States v. Labuff, 658 F.3d 873 (9th. 2011), have developed a two prong test to determine when someone is Indian and thus subject to federal prosecutions. The first prong is does the defendant have a sufficient degree of Indian blood from a federally recognized tribe. Unfortunately, no federal case has ever said what was a minimum quantum of Indian blood to be a sufficient degree. In Bruce, the Court found that one-eighth was sufficient. The United

States Court of Appeal for the Ninth Circuit in United States v. Maggi, 598 F.3d 1073 (9th Cir. 2010) was considering a very small percentage of Indian blood, 1/64th, but did not reach a decision as to whether that was too little or not because they found that the Defendant did not meet the second prong of the test. Prior to passing on making this decision, the Court noted that several commentators had suggested that only "some blood", or "there is no specific percentage of Indian ancestry required to satisfy the descent prong", or that a "very low quantum of Indian blood, such as one-sixteenth" was sufficient to satisfy this prong. In the case before this Court, the Defendant's mother is an enrolled member of the EBCI, which has a minimum requirement of one sixteenth percent blood quanta of Cherokee Blood. Based on his mother's percentage, the Defendant must have no less than one thirty-seconds percent Cherokee Indian blood, therefore he has less Indian blood than has ever been recognized by a federal court as a sufficient quantity.

If the Court does find that the Defendant does possess a sufficient amount of Indian blood from a federally recognized tribe, the Court must proceed to the second prong of the test: has the Defendant been recognized as an Indian by tribal or federal government?

> When analyzing this prong, 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.

Bruce, 394 F. 3d at 1224.

In Cruz, the Court looked at seven points, and after considering those facts, the Court decided that the Defendant in that case was not Indian for federal prosecution purposes. The comparisons in this case are similar and are therefore set out with the Cruz points below:

1. Cruz, like Nobles, is not an enrolled member of a federally recognized tribe.
2. Cruz, like Nobles, is a descendant of an enrolled member (his mother), which entitles him to medical services.
3. Cruz, like Nobles, never took advantage of any descendant benefits, except that Nobles was seen at the Cherokee Hospital on several occasions when he was taken there as a minor child by his mother.
4. Cruz lived on the Blackfeet Reservation as a child and rented a room on the reservation shortly before the offense. Nobles was born in Florida, moved to the EBCI Boundary when he was in the third grade, moved away when he was in the ninth grade, and then had only recently moved back to the EBCI Boundary after being released from the Florida prison system, and living briefly in Gaston County, North Carolina. The total amount of time that he was officially living on the Boundary after being released from prison was approximately 2 months.

5. Cruz was subject to the criminal jurisdiction of the tribal court and was at one time prosecuted in tribal court. Nobles maybe subject to the criminal jurisdiction of the tribal court as a first descendant, but he was never been prosecuted in tribal court.
6. Cruz attended public school on the reservation and worked for the Bureau of Indian Affairs. Nobles attended a year or two of public schools on the EBCI Boundary, and worked for a very short period of time at a restaurant on the EBCI Boundary after he was released from prison.
7. Cruz never participated in Indian ceremonies or dance festivals, never voted in a tribal election, and did not have a tribal identification card. Mr. Nobles has a tattoo of a non-Cherokee Indian head on his back, however he cannot vote in EBCI elections, and has not applied for a first generation descendant letter that he would need to show to agencies with the EBCI that he is a first generation descendant to receive their services.

In conclusion, even if the Defendant has a sufficient quantum of Eastern Band of Cherokee Indian blood, he has not been recognized by the EBCI or any governmental agency as an Indian, nor has he enjoyed the benefits of his affiliation with the EBCI, nor has he prior to this hearing held himself out as an Indian, nor has he been socially involved with or accepted by the EBCI. In short, the Defendant should be treated as non-Indian for jurisdictional purposes by this Court.

This the 9th day of August, 2013.

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