No. THIRTIETH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Jackson
	)	12 CRS 51719-20, 1362-63
GEORGE LEE NOBLES	)	

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PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES THE PETITIONER, George Lee Nobles, by and through counsel, and respectfully moves this Court to issue its writ of *certiorari* and review an Order entered by Superior Court Judge Bradley B. Letts denying Mr. Nobles' motion to dismiss for lack of State subject matter jurisdiction over his case. N.C. R. App. P. 21. Because the charged crimes were alleged to have been committed in "Indian Country" by an Indian against a non-Indian, well-established federal law confers jurisdiction over this case in the federal courts. Allowing the State to retain jurisdiction in this matter is a usurpation of the federal government's plenary and supreme power over Indian tribes, and infringes upon the sovereignty of the Eastern Band of Cherokee Indians.

SUMMARY[1]

On September 30, 2012, officers of the Cherokee Indian Police Department (CIPD) responded to an armed robbery and homicide of a non-Indian tourist in front of the Fairfield Inn in Cherokee, North Carolina. The Fairfield Inn is located on the Qualla Boundary in Jackson County, North Carolina. The Qualla Boundary is land held in trust by the United States for the Eastern Band of Cherokee Indians (EBCI), a federally-recognized Indian tribe.

Mr. Nobles and two co-defendants, Dwayne Edward Swayney and Ashlyn Carothers, were developed by the CIPD as suspects and were taken into custody by CIPD officers on November 29 and 30, 2012. Mr. Nobles and Ms. Carothers were taken into custody together on the Qualla Boundary at a residence where they had been living together. Mr. Swayney was taken into custody separately, but also on the Qualla Boundary.

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[1] The two-volume transcript of the hearing on the motion to dismiss has been filed in this Court as an exhibit contemporaneously with this Petition. The transcript is referenced in the Petition by volume and page number, *e.g.*, IIp ___. The trial court's Order, with attachments, is in the Appendix to this Petition at pages 60 through 146. The text of the Order is referenced in the Petition by Appendix page number and the paragraph number of the finding of fact or conclusion of law, *e.g.*, Order, Ap ___, FF ___-___.

Mr. Nobles is a "First Descendant" of an enrolled member of the ECBI.[2] Pursuant to Cherokee tribal case law, First Descendants have been held to be Indians[3] for purposes of federal law. The Cherokee Rules of Criminal Procedure require that when a person is arrested for a crime on the Qualla Boundary, that he be taken before a tribal magistrate for a determination of jurisdiction. If the arrestee is a First Descendant, the tribal court has jurisdiction. Cherokee Code [hereinafter, "C.C."] §15-8, Rule 6(b).[4]

Under the federal Major Crimes Act (MCA), 18 U.S.C. §1153, the federal courts have jurisdiction over certain enumerated felonies when committed by an

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[2]An enrolled member is a person who meets the EBCI criteria for enrollment, *see* pages 17 through 18, *infra*, and has gone through the EBCI enrollment process and been approved. (Ipp 90-92) First Descendants (also called First Lineal Descendants or First Generation Descendants) are "children of enrolled members who do not possess sufficient blood quanta to qualify for enrol[l]ment themselves." *In re Welch*, 3 Cher. Rep. 71, 75 (2003). (Ap 29) *See* note 9, *infra*.

[3] "Indian" is a legal term of art rather than a racial term, and in this Petition refers to Indian political status for purposes of federal and tribal jurisdiction. *See Morton v. Mancari*, 417 U. S. 535, 553-54, 41 L. Ed. 2d 290, 302-03 (1974). *See generally* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* §3.03 (Lexis 2012) [hereinafter, "Cohen"]; Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 505, 513-20 (1976) [hereinafter, "Clinton"].

[4] Rule 6 is in the Appendix at pages 128 through 130. The Cherokee Code may be found at http://library.municode.com/index.aspx?clientID=13359&stateID=33&statename=North%20Carolina. *See also* Order, App 80, 85-86, FF 164, 190-92.

Indian in Indian country.[5] If a person is determined to be an Indian by the tribal magistrate, and his alleged crime is covered by the MCA, he can be turned over to federal authorities for federal prosecution. (Ip 54; IIp 30) *See* Cohen, §9.07. *See also* notes 8 & 16, *infra*.

Although Mr. Nobles was arrested on the Qualla Boundary, no CIPD officer took Mr. Nobles before a Cherokee magistrate for a determination of jurisdiction. Although his alleged crimes are covered by the MCA, he was not turned over to federal authorities. Instead, CIPD officers took Mr. Nobles to the Jackson County magistrate. In contrast, Ms. Carothers and Mr. Swayney were taken before a Cherokee tribal magistrate and were determined to be under the jurisdiction of the tribal court by virtue of their Indian status.

Mr. Nobles is currently awaiting trial in Jackson County Superior Court for first-degree murder. The defense filed a pretrial motion to dismiss the action on the ground that because Mr. Nobles is an Indian, jurisdiction lies in federal court under the MCA. After an evidentiary hearing, Judge Bradly B. Letts denied the motion to dismiss. This Petition follows.

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[5] "Indian country" includes, *inter alia*, land held in trust by the United States government for a federally-recognized tribe. 18 U.S.C. §1151; Cohen, §9.02[b]; Clinton, at 507-13.

STATEMENT OF THE FACTS

The hearing on the motion to dismiss was held on August 9 and September 13, 2013. Mr. Nobles was represented by Assistant Capital Defenders Todd M. Williams and Vincent F. Rabil, and the State was represented by Assistant District Attorneys James H. Moore, Jr. and Bridgett Aquirre. The following evidence was presented at the hearing or was stipulated to[6] by the parties:

A. The Crime and Arrests.

On the afternoon of September 30, 2012, John Preidt, Jr. and his wife Barbra Preidt checked into the Fairfield Inn on Paint Town Road in Cherokee, North Carolina, located on the Qualla Boundary. The Preidts were stopping for the night on their way to Florida. The Preidts drove to the casino across the street from the Fairfield Inn, then drove back to the hotel at 9:30 p.m. When Barbra Preidt got out of the car, a man fatally shot her and stole her purse. Ms. Preidt was white. (Ipp 29-30, 155-62)

The CIPD investigated the crime and eventually developed three suspects: George Lee Nobles, Ashlyn Carothers, and Dwayne Edward Swayney. (Ipp 30-31, 39) Mr. Nobles and Ms. Carothers were living together in a residence on the Qualla Boundary. (Ipp 30, 40, 69; App 159, 161) On the night of November 29,

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[6] *See* Order, App 84-85, FF 189.

2012, CIPD officers took Mr. Nobles and Ms. Carothers into custody at that residence. (Ipp 31, 40) Swayney was taken into custody on the morning of November 30 at another location on the Qualla Boundary. (Ip 40)

All three suspects were taken to the CIPD, which is located on the Qualla Boundary. (Ipp 38-40) Under Rule 6(a)(1) of the Cherokee Rules of Criminal Procedure, "[a] person making an arrest within the Qualla Boundary must take the defendant without unnecessary delay before a Magistrate or Judge, unless the person taken into custody is arrested on Federal or State process." (Ap 128) At that point, "[t]he Magistrate shall conduct the '*St. Cloud*' test[7] to confirm that the defendant is an Indian." Rule 6(b)(1). (Ap 128) Pursuant to the version of this test codified in the Cherokee Code, if the arrestee swears that he is, *inter alia*, an EBCI enrolled member, an EBCI First Descendant, or an enrolled member of another federally-recognized tribe "the Court has jurisdiction over the defendant." Rule 6(b)(1). (Ap 128)

EBCI tribal magistrate Sam Reed, an EBCI enrolled member, testified for the defense that Rule 6 requires that "when an arrest occurs on tribal land, the person making the arrest is to bring the arrestee before a magistrate for completion

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[7] Under the different versions of the *St. Cloud* test developed by lower federal courts, various factors are considered to determine if a person is an Indian for jurisdictional purposes. *See* pages 32 through 34, *infra*.

of an affidavit of jurisdiction." (IIpp 27, 32; Ap 126 (affidavit of jurisdiction)). Reed testified that if the person is, *inter alia*, an enrolled member of any federally recognized tribe or an EBCI First Descendant, jurisdiction lies with the tribal court. (IIpp 23-24) Reed explained that "all persons" arrested on the Qualla Boundary – even individuals whom officers believe are "non-Indians" – must be brought before a tribal magistrate for a determination of jurisdiction "to ensure that [the person is] not a first descendant or an actual member of any other tribe because at this time, judging by one's complexion, you can't tell if they are Native American or not." (IIpp 32-33)

In this case, although all three suspects were arrested on the Qualla Boundary, not all of the suspects were taken before a tribal magistrate. A CIPD officer checked the National Crime Information Center (NCIC) database and determined there was no outstanding process for Mr. Nobles. (Ip 39) CIPD Detective Sean Birchfield, who is an EBCI First Descendant, checked the EBCI enrollment book maintained at the CIPD and determined that Swayney was an enrolled member, but Mr. Nobles was not. Detective Birchfield explained with respect to Carothers that he had heard from other individuals and officers "that she was not an enrolled member of the [EBCI], but that she was enrolled in the Cherokee nation in Oklahoma." (Ipp 44-45)

Detective Birchfield testified that at some point that night, he, Jackson County Assistant District Attorney Jim Moore, EBCI tribal prosecutor and Special Assistant United States Attorney Jason Smith, CIPD Chief Benjamin Reed, and CIPD Lieutenant Gene Owle discussed what to do with Nobles, Carothers, and Swayney. (Ipp 53, 55, 69-70) Although Birchfield knew that Mr. Nobles "was living on tribal land" and "was affiliating with enrolled members of either the EBCI or another tribe," Birchfield testified that "[i]t was believed that Mr. George Nobles was not Indian. We had no knowledge that he was a first linear (sic) descendant from any of the documentation that we've been able to receive." (Ipp 53-54) No one asked Mr. Nobles if he was an enrolled member or First Descendant of the EBCI or if he was associated with any tribe. (Ip 62) Based on a notation on an NCIC report – in which the data likely had not been updated since 1993 – designating Mr. Nobles as "white," the gathering of prosecutors and law enforcement officers "made the decision for Mr. Nobles to be charged in State court." (Ipp 54-55)

Detective Birchfield testified that even if he had known that Mr. Nobles was a First Descendant, he still would not have taken Mr. Nobles before the tribal magistrate because of the nature of the charges. (Ip 56) If Mr. Nobles had been charged with a misdemeanor, Birchfield would have brought him before the tribal magistrate. (Ip 48) However, Birchfield does not do this for charges that could potentially go to federal court. Birchfield acknowledged that "Mr. Nobles being a

first descendant[, he] is subject to tribal court jurisdiction;" however, Birchfield explained: "[E]very case that I have charged where it's alleged that an Indian committed a crime in Federal Court, I have to provide documentation as to their enrollment, and it has to say that they are an enrolled member of a federally recognized tribe." (Ip 56)

It was decided that Ms. Carothers and Mr. Swayney were to be treated differently from Mr. Nobles. Because Ms. Carothers "was believed" to be an enrolled member of the Cherokee Nation of Oklahoma, Detective Birchfield had been "instructed by tribal prosecutor and Special Assistant United States Attorney Jason Smith to charge her in tribal court pending a federal prosecution that would be forthcoming against her." (Ipp 53-54) Further, "[b]ecause of the level of the crime that ... Swayney is charged with [tampering with evidence, a misdemeanor] and because it is known he is an enrolled member of the [EBCI], he was charged in tribal court." (Ip 54; Ap 160)

Accordingly, Detective Birchfield filed criminal complaints with the tribal magistrate for Carothers' and Swayney's arrests, and Magistrate Reed issued tribal court warrants. (IIpp 8-9, 17-21; App 171-74) No criminal complaint was filed and no warrant issued for Mr. Nobles in tribal court. (Ipp 32; IIp 25-26) There was no outstanding State warrant for his arrest. (Ip 39)

Ashlyn Carothers appeared before Magistrate Reed in the early morning of November 30, 2012. (IIp 11) Reed testified that the normal procedure is to serve the arrestee with the warrant and go through the affidavit of jurisdiction. (IIpp 12-13) Reed had access to a database of EBCI enrolled members, but the database did not list First Descendants or enrolled members of other tribes. (IIpp 22, 29) Ms. Carothers was served with warrants and charged in tribal court with homicide in the first degree and robbery with a dangerous weapon. (IIpp 16, 54; App 161, 171-72) Reed made a determination of jurisdiction by going through the affidavit of jurisdiction with Ms. Carothers. (IIp 13; Ap 115) When Ms. Carothers was asked if she was a member of a federally-recognized tribe, she said she was a member of the "Western Band of Cherokee;" therefore, Reed testified, Carothers was determined to be "an Indian and under the jurisdiction of the tribal court." (IIp 13) Carothers was held at the CIPD "pending a federal prosecution that would be forthcoming against her."[8] (Ip 54)

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[8] On October 1, 2013, after the evidentiary hearing in Jackson County Superior Court at issue in this Petition had taken place, Ms. Carothers was indicted in the District Court for the Western District of North Carolina for murder, armed robbery, and a weapons charge. The indictment is in the Appendix at pages 221 through 223. This Court may take judicial notice of this document. *See* G.S. §8C-1, Rule 201 (a fact that is "not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" may be judicially noticed).

Dwayne Swayney also appeared before Magistrate Reed. (IIp 14) Reed followed the same procedure for Swayney as he did for Carothers. (IIp 15) Swayney was an enrolled member of the EBCI – his name was in the EBCI database and Reed also personally knew Swayney – and Swayney therefore was determined to be under tribal court jurisdiction. (IIpp 15-16) Swayney was charged in tribal court with tampering with evidence. (IIp 16; Ap 160)

Magistrate Reed testified that Mr. Nobles was not brought before him on November 30, 2012. (IIpp 25-26) Reed testified that if Mr. Nobles had "been brought in front of [him] and [Mr. Nobles] had checked the box that he is a first lineal descendant," Reed "would have found [him] to be Indian under the jurisdiction of the Indian tribal court." (IIp 26)

Mr. Nobles was interrogated at the CIPD, then was arrested by Detective Birchfield and transported to the Jackson County Detention Center, where Mr. Nobles was charged with first-degree murder. (Ipp 32, 38; Order, Ap 84, FF 189 c., e.-g.; Ap 159; *see* App 1-4).

B. Mr. Nobles' Background.

Mr. Nobles was born in Florida on January 17, 1976 to Donna Mann and George Robert Nobles. Ms. Mann is an enrolled member of the EBCI with a

blood quantum[9] of 11/128. (IIpp 57-60; App 158, 175) Ms. Mann has lived in Cherokee on and off throughout her life. George Robert Nobles was a non-Indian. (IIpp 56-60, 64)

When George Lee Nobles was about two weeks old, his father brought him back to North Carolina and left him with Furman Smith, Donna Mann's brother. (IIpp 51, 53) Smith lived on the Qualla Boundary in a log house on Furman Smith Road in Cherokee. (IIpp 51, 73) Smith testified that his family had been living on that property for 200 years. (IIp 50) Furman Smith is an enrolled member of the EBCI and his "father and all his people on his side were enrolled members." (IIp 52) A number of other family members resided on the property, including Mann's and Furman Smith's mother Mildred Smith, and their brother and sister-in-law, Sam and Tonya Crowe. (IIp 51)

Ms. Mann came back to Cherokee in 1983 or 1984. At different points, Ms. Mann and her son lived in the "Old White Tree House" near the back of the casino on Paint Town Road; with Mildred Smith on the Furman Smith Road land; and in Bryson City. (IIpp 61-67) Between 1983 and at least 1990, George Lee Nobles

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[9] A person's "blood quantum" is his or her percentage of Indian "blood." *See, e.g.*, *United States v. Loera*, No. 3:13 MJ 4039 PCT MEA, 2013 U.S. Dist. LEXIS 92704, at *19 (D. Ariz. July 1, 2013). *See generally* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. Rev. 1 (2006) [hereinafter, "Spruhan"].

attended Cherokee tribal school and Swain County schools. (IIpp 62, 66-67, 74-91; App 176-216) The enrollment forms for the Cherokee schools indicated that the schools were "[f]unded or [o]perated" by the Bureau of Indian Affairs (BIA). (IIp 76, 79; App 179, 182, 188). On one BIA Student Enrollment Application, Ms. Mann had listed George Lee Nobles' "Degree Indian" as "none." (IIp 96; Ap 188) Ms. Mann explained that she filled out the form that way because she "was always under the assumption that it was the father's degree of Indian blood that ... mattered. So when it said 'degree of Indian,' [she] put 'none' for George because his father was not" (IIp 99), but that her mother later straightened out the misconception. (Ip 100) On two other enrollment applications Ms. Mann listed her son's tribal affiliation as "Cherokee." (IIpp 80, 83; App 179, 182)

On BIA "Indian Student Certification" forms that Ms. Mann filled out for George Lee Nobles in 1990, she listed him as an "Eligible Child," gave her EBCI enrollment number, and listed her tribe as "Cherokee Indian" and "Eastern Cherokee." (IIpp 83-87; App 183-84) On these forms, it was explained that the tribal information as to the enrollee was necessary so that the school district could "apply for a formula grant under the Indian Education Act." (App 183-84) George Lee Nobles' First Descendant status qualified him for government recognition as an Indian student. (App 183-84, 186) The Cherokee School records also contained a BIA-issued "School Health Record" for George Lee Nobles. (Ap 193)

Donna Mann testified that her son was involved in car accidents in about 1983 and 1985 that required medical attention. George Lee Nobles received services for injuries from the accidents at Swain County Medical Center and the Cherokee Indian Hospital (CIH). Ms. Mann testified that in both instances "Cherokee" paid for the medical services not covered by third-payer insurance. (IIpp 67-74) The CIH medical records director testified that George Lee Nobles had five visits to the CIH between 1985 and 1990. He was not charged for the hospital's services because he is a First Descendant, and he would not have to pay for these services were he to receive them as an adult. The filing number associated with George Lee Nobles' name in the CIH records ("1 023 004") indicated that he is a male of Indian descent from the EBCI who has less than a 1/4 blood quantum. (Ipp 175-78; Ap 164) The demographic data page of his hospital chart identified him as an "Indian nontribal member." (App 169-70) While the hospital is now run by the EBCI, at the time George Lee Nobles received services, CIH was a federal facility that was part of the Indian Health Service (IHS).[10] (Ipp 170, 181) For George Lee Nobles to receive free medical services at CIH through the federal government, Ms. Mann was required to show her birth certificate –

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[10] The Indian Health Service, the federal agency statutorily charged with providing health care services to Indians, is a component of the Public Health Service of the Department of Health and Human Services. 25 U.S.C. §1661(a); *Doonkeen v. United Urban Indian Health Council, Inc.*, 2008 U.S. Dist. LEXIS 32157, at *4 n.2 (W.D. Okla. Apr. 18, 2008).

which lists tribal affiliation and blood quantum – or her tribal enrollment card. (Ip 170; IIp 58; Ap 175)

On January 28, 1993, when Mr. Nobles was 17 years old, he was convicted of armed burglary and grand theft in Polk County, Florida. (Ip 14) In a presentence report generated for the Florida court, Mr. Nobles was designated as "W/M." (Ap 103; Order, Ap 85, FF 189 l.)

On November 4, 2011, Mr. Nobles was released from the Florida prison system. His post-release supervision was transferred to Gaston County, North Carolina where Mr. Nobles moved in with his mother in Kings Mountain. (Ip 14)

On March 26, 2012, Mr. Nobles' supervision was transferred to Swain County, where Mr. Nobles lived on Furman Smith Road on the Qualla Boundary in the residence of his aunt, Tonya Crowe. (Ipp 71-72) This was the same property where Mr. Nobles had been brought by his father when he was two weeks old. (IIpp 50-51)

Mr. Nobles was supervised by Probation Officer Olivia Ammons. Ammons saw Mr. Nobles at the Furman Smith Road residence on March 28, 2012. At an office visit on April 3, 2012, Mr. Nobles told Ammons he was still living at that address and that he was working at a restaurant in Cherokee on the Qualla

Boundary.[11] Mr. Nobles had another office visit on May 7, 2012 and informed Ammons he was still living on Furman Smith Road. (Ipp 70-74)

On May 17, 2012, Mr. Nobles asked Officer Ammons to transfer his supervision to Jackson County as he was now living at Fort Wilderness Campground in Whittier, close to the Qualla Boundary. (Ip 75; IIpp 53, 87-88) A few days later, the transfer request was denied because it could not be confirmed that Mr. Nobles was living there. (Ip 75)

On June 20, 2012, Mr. Nobles moved in with his aunt and uncle, Ruthie and Rickie Griggs in Bryson City, located in Swain County. The address was not on the Qualla Boundary. On June 22, 2012, Officer Ammons visited the address. Ruthie Griggs and Donna Mann were present, but Mr. Nobles was not. Griggs and Mann informed Ammons that Mr. Nobles sometimes stayed with his girlfriend. On June 25, 2012, Mr. Nobles informed Officer Ammons that he had quit his job. Mr. Nobles asked Ammons to help him get a photo ID because it was hard to get a job without one. Ammons printed out the paperwork that came from Florida in connection with Mr. Nobles' parole transfer request. (Ipp 77-79, 83-84; Ap 156)

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[11] Mr. Nobles' W-2 form was introduced into evidence as Defendant's Exhibit 6. (Ap 162; Order, Ap 85, FF 189 k.)

On July 12, 2012, Mr. Nobles' supervision was transferred back to Gaston County because he was moving back in with his mother. Probation Officer Christian Clemmer was assigned to supervise Mr. Nobles. (Ipp 15-16, 82)

Officer Clemmer testified that in the North Carolina OPUS system and the Interstate Compact for Adult Supervision System (ICAOS), Mr. Nobles is classified as white. The ICAOS classification is information entered by the State of Florida. Officer Clemmer had never had a discussion with Mr. Nobles about his race. However, the Department of Adult Correction supervises people of all races. Officer Clemmer had never discussed race with anyone he had supervised; it was not something he would normally inquire about. (Ipp 16, 21-23)

Officer Ammons also testified that she supervises people of all races and ethnicities. As a general rule, issues of race and tribal membership don't come up during the supervision. (Ip 86) Whether people Mr. Nobles was living with were enrolled members was not germane to the supervision. (Ip 89)

C. Other Evidence.

Kathy McCoy, an assistant enrollment officer at the EBCI Enrollment Department, confirmed that Donna Mann is an enrolled member of the EBCI and that Mr. Nobles is not. (Ip 90, 92, 95-96; Ap 157) Requirements for enrollment

are: a blood quantum of 1/16; a direct lineal ancestor on the 1924 Baker Roll;[12] and enrollment before age 19. (Ipp 91-92) As a First Descendant, Mr. Nobles was entitled to a letter of descent from the enrollment office. (Ip 93) There was no record that such a letter had been issued for Mr. Nobles. (Ipp 94-95) Mr. Nobles was still eligible to obtain a letter of descent from the enrollment office. (Ip 98)

Detective Birchfield testified that before September 30, 2012, there was no record Mr. Nobles had ever been charged or arrested within the tribal system. A juvenile record would not have shown up during the record check. (Ipp 101-02)

EBCI Attorney General Annette Tarnawsky testified for the State that because Mr. Nobles was the child of an enrolled member, he was a First Descendant under tribal law. (Ipp 103, 106) She explained that First Descendants receive benefits with respect to health and dental care. First Descendants were not eligible for services funded by tribal money, but were eligible for federally-funded services. (Ipp 108-09) Further, First Descendants had particular use rights to the

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[12] The 1924 Baker Roll is "[t]he final roll of the Eastern Cherokee," a census prepared in 1924 pursuant to an Act of Congress. Access Genealogy Website, http://www.accessgenealogy.com/native/1924-baker-roll.htm. *See* Act of June 4, 1924, ch. 253, sec. 2, 43 Stat. 376. (Ap 376) "[T]he Tribe continue[s] to use the 1924 Baker Roll as its base roll." Access Genealogy Website, *supra*. *See* C.C. §49-2(a). *See also* Spruhan, at 23-47 (discussing history of tribal rolls and allotment).

possessory holdings[13] that were held by the First Descendant's parent at the time of death. The right to use must be given through a will. The First Descendant can live within dwellings on the property, or sell or rent the dwelling to an enrolled member. The First Descendant cannot minimize or destroy the value of the property, deplete mineral rights, harvest timber other than for personal use, remove permanent structures, or devise the property. (Ipp 109-12; *see* App 41-42 (C.C. §28-2 – "First Generation heirs"); Ap 123 (EBCI Charter, sec. 16)).

Attorney General Tarnawsky further explained that First Descendants receive a preference in hiring for EBCI jobs over non-Indian applicants. Enrolled members, spouses of enrolled members, parents of enrolled members who are under 18 years old, and members of other federally-recognized tribes receive preference over First Descendants. (Ipp 112-13; *see* Ap 38 (C.C. §4.00 – "Employment preference and equal employment opportunity")). First Descendants can receive tribal funds for higher education, although enrolled members receive higher priority. (Ipp 113-14; *see* Ap 34 (C.C. §115-8 – "Funding for first generation descendants")). First Descendants cannot hold tribal office or vote in tribal elections. (Ip 116)

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[13] Attorney General Tarnawsky explained that "the tribal land is held by the United States government in trust for the Eastern Band of Cherokee Indians. It is then tribally divided into what is known as possessory holdings." (Ip 109)

Attorney General Tarnawsky testified that all of the rules that recognized and benefited First Descendants had been passed by the EBCI tribal council. (Ip 120) Similarly, Criminal Procedure Rule 6 was drafted by a former tribal judge, was passed by the tribal council, and was ratified by the Principal Chief of the EBCI. (Ipp 121-22) Attorney General Tarnawsky testified that she did not agree that Rule 6 directed the tribal court to take jurisdiction over First Descendants. (Ipp 124, 131, 133-34) Tarnawsky believed that Detective Birchfield acted properly in failing to take Mr. Nobles before the tribal magistrate because

> there were three agencies who were somewhat looking at the matter that evening, ... tribal prosecutor, State District Attorney's Office, the U.S. Attorney's office. Based on the information that they had available to them, the nature of the crime, the applicable federal laws, I believe that from a professional standpoint in looking at our ordinances they acted properly. (Ipp 131-32)

Tarnaswsky further explained that "[e]very prosecutor has prosecutorial discretion. ... The State said they wanted to take jurisdiction, because they felt it was appropriate under the law. ... And so Jason Smith has that discretion to not pursue tribal charges." (Ip 134)

Myrtle Driver, age 69, testified for the State that her Cherokee blood quantum was 4/4, that she had lived on the Qualla Boundary for much of her life, that she had held various positions in the tribal government, and that she had started a Cherokee language immersion school. (Ip 137-41) Only about 300 of

the 14,000 EBCI enrolled members speak Cherokee. (Ip 139) Ms. Driver testified concerning various tribal events such as the Cherokee Indian fair and the Gadua celebration. These events are open to the public. There are only a few events that are only open to enrolled members, such as medicine ceremonies. (Ipp 141-43)

Ms. Driver testified that despite the fact that the Cherokee Code gives First Descendants access to some tribal benefits (Ip 153), "societally" in the EBCI, First Descendants "are viewed as non-Native American, and our belief is that the government promised us health, education and welfare to Indian people, which would be Native American, not the descendants." (Ipp 144-45, 153) A First Descendant with a light or white complexion was considered to be "aniyonega" or white. (Ip 143) Ms. Driver did not know Mr. Nobles or his mother and had not seen them at any Cherokee ceremonies. Ms. Driver testified that Mr. Nobles' tattoos (an eagle and a Native American) were not Cherokee symbols – the headdress worn by the Native American is not the type of headdress worn by the Cherokee, and the eagle was "generic" because "[a]ll Native Americans tribes honor the eagle, so it's not just Cherokee." (Ipp 146-47) The latter tattoo would be frowned upon by the Cherokee elders "because, you know, you have that tattoo, you're not proud of your Cherokee heritage, because that is not of Cherokee." (Ipp 147-48)

Ms. Driver further testified that "in the old way of doing things, ... the Cherokee were a matrilineal society." (Ip 150) In such a society, "everyone gets their clan from their mother, and ... they kind of ran the show." (Ip 150) In the matrilineal system, you would be a part of your mother's clan within the Cherokee even if your father were from another tribe: "[i]f your mother had a clan, you had a clan." (Ip 152) It was only "in the early 50's[,] ... well after European contact" that the Cherokee people became more conscious of blood quantum as a way to measure membership in the tribe. (Ip 151)

The trial court denied the motion to dismiss in a written Order on November 26, 2013. (App 60-146) The trial court ruled that Mr. Nobles was not an Indian, and that the North Carolina state courts had jurisdiction over the case. (Order, Ap 101, CL 4, 6) Also on that day, Judge Letts *sua sponte* filed an Order finding there was no basis to recuse himself. (App 147-49) On December 2, 2013, Assistant Capital Defender Williams contacted the Appellate Defender to request that a petition for writ of *certiorari* be filed in this Court to request review of the trial court's Order. On December 3, 2013, the State moved in Jackson County Superior Court for a Rule 24 hearing. (Ap 152) On December 4, 2013, the Appellate Defender appointed undersigned counsel to prepare the petition for writ of *certiorari*. (Ap 153) On December 16, 2013, Mr. Williams moved in Jackson

County Superior Court to continue the Rule 24 hearing and stay the proceedings until the petition could be ruled upon. (Ap 154) On December 18, 2013, the State gave notice of aggravating circumstances. (Ap 153a) Also on that day, the trial court granted the motion for a stay. (App 154-55)

REASONS WHY WRIT OF CERTIORARI SHOULD ISSUE

I. THE STATE OF NORTH CAROLINA LACKS JURISDICTION TO TRY MR. NOBLES, AN INDIAN, FOR THESE CRIMES, WHICH WERE ALLEGED TO HAVE BEEN COMMITTED AGAINST A NON-INDIAN IN INDIAN COUNTRY. UNDER THE FEDERAL MAJOR CRIMES ACT, JURISDICTION LIES IN THE FEDERAL COURTS.

A. Introduction.

The assumption of jurisdiction over this matter by the State of North Carolina is null and void because Mr. Nobles is an Indian. Where a crime is committed by an Indian in Indian country, jurisdiction lies in the tribal court or in the federal court system. 18 U.S.C. §§1152, 1153. *St. Cloud v. United States*, 702 F. Supp. 1456, 1459 (D.S.D. 1988); Cohen, §§6.01[1], 9.02. Absent federal legislation granting jurisdiction,[14] a State may never assume jurisdiction over such

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[14] Public Law 280, a federal statute that delegated to some states jurisdiction over various crimes and civil matters within Indian country and that offered to other states the option of accepting the same jurisdiction, is not at issue in this case. *Wildcatt v. Smith*, 69 N.C. App. 1, 6-7, 316 S.E.2d 870, 874-75 (1984) (explaining that "North Carolina was not among the states ordered to assume

a matter. *Worcester v. Georgia*, 31 U.S. 515, 8 L. Ed. 483 (1832). In this case, it is undisputed that these alleged crimes were committed on the Qualla Boundary, in "Indian country." (Order, Ap 84, FF 189 a.-b., Ap 90, FF 226, Ap 92, FF 236; *see* note 5, *supra*). It is also undisputed that if the alleged crimes were committed by an "Indian," jurisdiction would lie in the federal court system under the Major Crimes Act.[15] (Order, App 90-91, FF 227-29; IIpp 119-20, 124-25; App 7-8, 45, 53). Because Mr. Nobles is an Indian, the State has no jurisdiction over this matter.

B. Applicable Law.

"The policy of leaving Indians free from state jurisdiction is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789, 89 L. Ed. 1367, 1370 (1945). Also deeply rooted is the notion that the Constitution delegates broad legislative authority over Indian matters to the federal government. U.S. Const. art. I §8, cl. 3 (the Indian Commerce Clause), art. II, §2, cl. 2 (the Treaty Clause), art. IV, cl. 2 (the Supremacy Clause); *Worcester v. Georgia*, *supra*. The federal

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jurisdiction, nor has our legislature acted to assume jurisdiction under ... the act."); Cohen, §6.04[3]; Clinton, at 565-67; Order, Ap 89, FF 221.

[15] The two counts of possession of firearm by felon would not be covered under the MCA. However, jurisdiction over all of the charged crimes would lie in federal court pursuant to the Indian Country Crimes Act, also known as the General Crimes Act. 18 U.S.C. §1152. *See* Cohen, §§6.04[3], 9.02; Clinton, at 527 n.107 & 537. The General Crimes Act provides an alternate basis for federal jurisdiction for some crimes covered by the MCA.

government's power over Indian tribes has been consistently described as "plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200, 158 L. Ed. 2d 420, 428 (2004) (citations omitted). *See Wildcatt*, 69 N.C. App. at 3, 316 S.E.2d at 873 ("federal power to regulate Indian affairs is plenary and supreme"). Accordingly, state law is normally inapplicable to Indian affairs within the territory of an Indian tribe without the explicit consent of Congress. *Williams v. Lee*, 358 U.S. 217, 3 L. Ed. 2d 251 (1959); *Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373 (4th Cir. 1980); *see* Clinton, at 574 ("the federal policy with respect to ... [Indian] reservations remains the minimization of the State's role in tribal life"). Thus, as a general rule, "Indian tribes retain jurisdiction over persons, property, and events in Indian country." Cohen, §6.01[1]. However, in the exercise of its plenary constitutional powers over Indian affairs, Congress may allocate jurisdiction over particular matters expressly to the federal government or the states. *Id.*

Under the federal Major Crimes Act,

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, ... robbery, and [various other enumerated felonies] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. §1153(a). Therefore, under the MCA, where an Indian commits an enumerated crime against another person – either Indian or non-Indian – in Indian country, jurisdiction lies in federal court to the exclusion of state court.[16] *United States v. John*, 437 U.S. 634, 651, 57 L. Ed. 2d 489, 501 (1978). *Cf. United States v. McBratney*, 104 U.S. 621, 26 L. Ed. 869 (1882) (states have jurisdiction over crimes by non-Indians against non-Indians in Indian country). In this case, it is undisputed that the alleged crimes occurred in Indian country, and that they are enumerated crimes under the MCA. Therefore, whether jurisdiction lies with the North Carolina or federal court system depends on whether Mr. Nobles is an Indian under the MCA. Where, as here, the defendant has challenged the subject matter jurisdiction of the court, the burden of proof is on the State to prove beyond a reasonable doubt that North Carolina has jurisdiction. *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 835 (1993); *State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 502 (1977).

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[16] Where an Indian country offense falls under the MCA, tribal courts likely retain concurrent jurisdiction. *See* Cohen, §9.04; Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. Pitt. L. Rev. 1, 18 n.77 (1993). *See also Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. Colo. 2010) (citation omitted) ("'Tribes retain those attributes of inherent sovereignty not withdrawn either expressly or necessarily as a result of their status' until Congress acts to withdraw those powers."). Federal jurisdiction under the MCA and any inherent tribal jurisdiction is exclusive of State

The MCA does not define "Indian," but courts have generally followed the basic test derived from *United States v. Rogers*, 45 U.S. 567, 11 L. Ed. 1105 (1846), which considers whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government. *United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009); *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005); *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001); *United States v. Torres*, 733 F.2d 449, 456 (7th Cir. 1984).

1. EBCI Decisions.

Because federal law is Supreme with respect to Indian affairs in Indian country, tribal law determinations of Indian status for purposes of jurisdiction must comport with federal law. Cohen, §9.04. Accordingly, the Cherokee Court of North Carolina has applied the *Rogers* test to determine who is an Indian in the exercise of tribal court jurisdiction. In *Eastern Band of Cherokee Indians v. Lambert*, 3 Cher. Rep. 62 (2003),[17] the defendant moved to dismiss the criminal case against her on the ground that she was not an enrolled member of a federally-recognized tribe. The parties stipulated to this fact and also to the fact that she

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jurisdiction. *United States v. Kagama*, 118 U.S. 375, 30 L. Ed. 228 (1886); Clinton, at 537, 560 n.299, & 570.

[17] The Cherokee Court decisions referenced in this Petition – *Lambert*; *In re Welch*, 3 Cher. Rep. 71 (2003); and *Eastern Band of Cherokee Indians v. Prater*, 3 Cher. Rep. 111 (2004) – are in the Appendix at pages 15 through 17, 25 through 30, and 217 through 218, respectively.

was recognized by the EBCI as a First Descendant. The Court further found as fact that as a First Descendant, the defendant:

- "may inherit Indian Trust property by testamentary devise and may occupy, own, sell or lease it to an enrolled member during her lifetime. ... However, she may not have mineral rights or decrease the value of the holding. ...;"
- "has access to the Indian Health Service for health and dental care;"
- "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;"
- "has access to Tribal funds for educational purposes, provided that funds have not been exhausted by enrolled members;"
- "may use the appeal process to appeal administrative decisions of Tribal entities;" and
- "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."

Id. at 62-63.

The Court also found that

- "[o]ther than the Trust responsibility owed to a First Descend[a]nt who owns Indian Trust property ..., the United States Department of the Interior, [BIA] has no administrative or regulatory responsibilities with regard to First Descend[a]nts;"
- "[a] First Descend[a]nt may not hold Tribal elective office;"
- "[a] First Descend[a]nt may not vote in Tribal elections;" and
- "[a] First Descend[a]nt may not purchase Tribal Trust land."

Id. at 63. The Court also took judicial notice of the fact that the defendant was the plaintiff in a civil case in tribal court. *Id.*

The Court acknowledged that under *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 55 L. Ed. 2d 209 (1978), it did not have jurisdiction to prosecute non-Indians. 3 Cher. Rep. at 63. Nevertheless, the Court explained, "Indian nations have jurisdiction over criminal acts by Indians, regardless of the individual Indian's membership status with the charging tribe." *Id.* at 64. *See United States v. Lara*, *supra*. The Court held that under the *Rogers* test, the defendant was an Indian for the purposes of tribal jurisdiction. 3 Cher. Rep. at 64.

The Court explained its reasoning:

> By political definition First Descend[a]nts 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 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 Descend[a]nts who own Tribal Trust lands. Also, First Descend[a]nts 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 Descend[a]nts 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 Descend[a]nts may, as this Defendant has, seek recourse in the Judicial Branch of Tribal Government. Most importantly, ...

> First Descend[a]nts are participating members of this community and treated by the Tribe as such.

Id. The Court rejected the defendant's argument that she was not an Indian because she could not vote or serve in tribal government, explaining that "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."[18] *Id.* (citations omitted). The Court reasoned that the second part of *Rogers* test "includes not only whether she is an enrolled member of some tribe," but also considers "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."[19] *Id.* (citations omitted).

The Court concluded that First Descendants, categorically, met the federal definition of an Indian and hence were under tribal court jurisdiction. *Id.* *See Welch*, 3 Cher. Rep. at 75 ("this Court has held [in *Lambert*] that first lineal descendants, children of enrolled members who do not possess sufficient blood

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[18] *See* page 34, *infra*.

[19] *See* pages 32 through 34, *infra*.

quanta to qualify for enrollment themselves are nevertheless subject to the criminal jurisdiction of the Court"). *Cf. Eastern Band of Cherokee Indians v. Prater*, 3 Cher. Rep. 111, 112-13 (2004) (distinguishing the holding in *Lambert* – "that First Lineal Descendants are Indians for the purposes of the exercise of th[e] Court's jurisdiction" – and concluding that the "Second Descendant" defendant was not an Indian in that particular case but refusing to "make a blanket ruling on the question of 'Second Descendants'").

Accordingly, in *Lambert*, the Cherokee Court of North Carolina held that all First Descendants are Indians under federal law by virtue of the tribal and government recognition extended to them.

2. Federal Court Decisions.

Federal courts have devised various interpretations of the *Rogers* test. With respect to the first *Rogers* requirement ("some Indian blood"), the federal courts agree that "racial classification [does not] drive[ ] the Indian status identification under §1153." *United States v. Maggi*, 598 F.3d 1073, 1079 (9th Cir. 2010) (citing *United States v. Antelope*, 430 U.S. 641, 646, 51 L. Ed. 2d 701, 707-08 (1977)). Instead, the status of "Indian" under federal law is political rather than racial. *Mancari*, 417 U.S. at 554 n.24, 41 L. Ed. 2d at 303 n.24 ("Federal regulation of Indian tribes ... is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of

'Indians[.]'"). *See also* Order, Ap 88, FF 208 (finding that "it is the political relationship between the United States and Indian tribes expressly established in the United States Constitution which authorizes unique financial, medical, educational, residential and employment benefits not otherwise afforded to non-Indians"). The blood requirement therefore exists "not to identify individuals as Indian solely in a racial or anthropological sense, but to identify individuals who share a special relationship with the federal government." *Maggi*, 598 F.3d at 1078 (citation omitted). Accordingly, "[t]here is no specific percentage of Indian ancestry required to satisfy the 'descent' prong of [the *Rogers*] test." Cohen, §3.03[4]. *See, e.g., Maggi,* 598 F.3d at 1080-81 (1/64 Indian blood may satisfy test); *Stymiest*, 581 F.3d 759, 762, 766 (8th Cir. 2009) (3/16 sufficient).

For the second prong of the *Rogers* test, federal courts have considered various factors to determine if a person is recognized as an Indian by a tribe or the federal government, including:

- tribal enrollment;
- government recognition formally and informally through receipt of assistance reserved only to Indians;
- enjoyment of the benefits of tribal affiliation;
- social recognition as an Indian through residence on a reservation and participation in Indian social life;
- holding oneself out as an Indian; and

- tribal recognition through subjecting the defendant to tribal court jurisdiction.

See Stymiest, 581 F.3d at 763; *Bruce*, 394 F.3d at 1224; *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988).[20]

The Ninth Circuit considers the first four factors, in declining order of importance. *Bruce*, 394 F.3d at 1224. *But see Maggi*, 598 F.3d at 1081 (noting that "these four factors, while broad, should not be deemed exclusive"). The Eighth Circuit, in contrast, in addressing a challenge to a jury instruction[21] that included all of the above factors and that did not require that the jury consider the factors in declining order of importance, concluded that "there is no single correct way to instruct a jury on this issue" and that the factors should not be considered in any order of importance, unless the defendant is an enrolled tribal member, which is dispositive of Indian status. *Stymiest*, 581 F.3d at 763-64. The Court reasoned that "the two-part *Rogers* test ... provides the essential elements of a proper [jury] instruction [on jurisdiction]. Beyond that, the *St. Cloud* factors may

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[20] The factors pertaining to the second *Rogers* requirement were first set out in *St. Cloud*. Although the *St. Cloud* court considered only the first four factors listed above, in declining order of importance, in this Petition the term "*St. Cloud* factors" will be used to generally describe all of the factors courts have used for the second *Rogers* requirement, whether in declining order of importance or not.

[21] In federal court, the defendant's Indian status "while essential to federal subject matter jurisdiction, is an element of the crime that must be submitted to and decided by the jury." *Stymiest*, 581 F.3d at 763 (citation omitted).

prove useful, depending upon the evidence, but they should not be considered exhaustive." *Id.* at 764. The Seventh Circuit similarly has employed a "totality of the circumstances" test and does not require that specific factors be considered in any particular order of importance, as long the jury is instructed in accord with *Rogers*. *Torres*, 733 F.2d at 456

Federal courts have overwhelmingly agreed that tribal enrollment, while generally sufficient by itself to show Indian status, is *not* a requirement for being considered an Indian under the MCA. *Loera*, 2013 U.S. Dist. LEXIS at *20; *Stymiest*, 581 F.3d at 766; *St. Cloud*, 702 F. Supp. at 1461. *See Bruce*, 394 F.3d at 1225, n.6 (rejecting District Court reasoning that defendant not an Indian because not enrolled in tribe, and explaining that "unenrolled Indians are eligible for a wide range of federal benefits directed to persons recognized by the Secretary of Interior as Indians without statutory reference to enrollment"); Cohen, §3.03[4].

3. North Carolina Decisions.

There are no modern North Carolina decisions concerning jurisdiction for crimes occurring in North Carolina Indian country.[22] Nevertheless, in its civil

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[22] North Carolina had asserted jurisdiction in older cases that are no longer valid under current law. *E.g.*, Order, Ap 89, FF 215 (discussing *State v. Ta-cha-na-tah*, 64 N.C. 614 (1870)). *See John*, 587 F.2d at 687 ("Congress has stripped the States of power to punish Indians for offenses committed against non-Indians in Indian country."); *Williams*, 358 U.S. at 220, 3 L. Ed. 2d at 270-71 (jurisdiction conferred by Congress over crimes involving Indians is exclusive of state

jurisprudence regarding the EBCI, our appellate courts have recognized the broad nature of federal power over Indian country civil matters, as well as the importance of deferring to tribal sovereignty:

> The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' ... against which the vague or ambiguous federal enactments must always be measured.

Wildcatt, 69 N.C. App at 13, 316 S.E.2d at 879 (citation omitted). Accordingly, our courts have ruled that "any doubt as to the proper interpretation of a federal statute enacted for the benefit of an Indian tribe will be resolved in favor of the tribe" because '[a]mbiguities in federal law have been construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'" *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 491, 687 S.E.2d 690, 697 (2009) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, 65 L. Ed. 2d 665, 673 (1980)). *See also St. Cloud*, 702 F. Supp. at 1462 (Congress intended broad construction of "Indian" status under MCA); Clinton, at 528 ("as the federal jurisdiction over Indian lands is intended to be protective in nature, it should be given an expansive interpretation").

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jurisdiction); *Wildcatt*, 69 N.C. App. at 2 n.1, 316 S.E.2d at 872 n.1; *see also Lynch*, 632 F.2d at 379 n.34; Clinton, at 570-71.

Therefore, North Carolina civil decisions have deferred to the EBCI's "right of tribal self-government." *Wildcatt. See, e.g., Jackson Co. ex rel. Smoker v. Smoker*, 341 N.C. 182, 459 S.E.2d 789 (1995) (Jackson County District Court had no jurisdiction over action by State to recover AFDC payments where tribal court had already assumed jurisdiction over the matter); *In re E.G.M.*, ___ N.C. App. ___, ___, 750 S.E.2d 857, 861-62 (2013) (favoring tribal jurisdiction where testimony suggested but did not establish an agreement by EBCI to defer to State civil courts in matters concerning Chapter 7B of the North Carolina General Statutes).

C. Mr. Nobles is an Indian and Jurisdiction Lies in the Federal Court System.

1. Mr. Nobles Is an Indian Under the United States Supreme Court Test Set Out in Rogers.

As shown above, under *United States v. Rogers*, the only test devised by the United States Supreme Court to determine Indian status for purposes of federal criminal jurisdiction, a person is an Indian if he (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both.

Mr. Nobles is an Indian under the *Rogers* test because he has some Indian blood, and he has been recognized as an Indian by both the EBCI and the federal government.

First, as was found by the trial court (Order, Ap 95, FF 258-59), Mr. Nobles has "some Indian blood." Although the trial court found Mr. Nobles' blood quantum of 11/256 to be "modest" (Order, Ap 95, FF 259), the trial court also acknowledged that "blood quantum while it may appear facially to be a race determinative factor[,] is rather one based on ancestry ..., a determination derived not from a racial classification but rather a recognition of the special status afforded to a formerly sovereign people by the government of the United States." (Order, Ap 94, FF 248) Accordingly, the trial court correctly found that Mr. Nobles had satisfied the first *Rogers* requirement. (Order, Ap 95, FF 259)

Second, Mr. Nobles has been recognized as an Indian by his tribe and by the federal government. Indeed, as shown above, Mr. Nobles has met the "tribal recognition" requirement as a matter of law: in *Lambert*, the Cherokee Court of North Carolina determined that all First Descendants are Indians under *Rogers* and therefore subject to tribal jurisdiction. Further, the Cherokee tribal council codified this principle in Rule 6 of the Cherokee Rules of Criminal Procedure. C.C. §15-8, Rule 6(b)(1)(B). (Ap 128) Therefore, *Lambert* and Rule 6 are conclusive on the question of tribal recognition under *Rogers*.

In this regard, it is significant that the second part of the *Rogers* test is always articulated as "tribal *or* government recognition." *See, e.g., Maggi*, 598 F.3d at 1078; *Prentiss*, 273 F.3d at 1280; *Torres*, 733 F.2d at 45; *St. Cloud*, 702 F. Supp. at 1461 (noting that courts phrase second *Rogers* inquiry as "whether the person is recognized as an Indian by the tribe *or* the federal government") (citations omitted; emphasis in original). *See also Bruce*, 394 F.3d at 1224-25 (explaining that tribal enrollment is not required, nor is government recognition; instead, the court has "emphasized that there must be some evidence of government or *tribal* recognition") (emphasis in original). Setting out this requirement in the disjunctive is an acknowledgment that Indian tribes are sovereign entities "with the power of regulating their internal and social relations." *Kagama*, 118 U.S. at 381. The United States Supreme Court has cautioned that "the judiciary should not rush to ... intrude on these delicate matters," as the tribe's decisions concerning to which individuals they wish to extend tribal recognition are decisions "central to [the tribe's] existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32, 56 L. Ed. 2d 106, 124 n.32 (1978). Deferring to the tribe in this area promotes "the well-established federal 'policy of furthering Indian self-government.'" *Id.* at 62, 56 L. Ed. 2d at 117 (citation omitted). In contrast, abrogating such tribal decisions "for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it." *Martinez v. Romney*, 402 F. Supp. 5, 19 (D.N.M. 1975) (quoted with

approval in *Santa Clara Pueblo*, 436 U.S. at 54, 56 L. Ed. 2d at 113). *See Santa Clara Pueblo*, *supra* (refusing to recognize implied cause of action against tribe under Indian Civil Rights Act for challenge to Santa Clara Pueblo's membership rule denying membership to children of female tribal members who marry outside tribe); *Cherokee Intermarriage Cases*, 203 U.S. 76, 51 L. Ed. 96 (1906) (deferring to tribal law on the matter of property rights of non-Indians married to Cherokee Indians).

Therefore, *Lambert* and Cherokee Rule of Civil Procedure 6 show that the EBCI "as an independent political community" has determined that all First Descendants have met the *Rogers* requirement of tribal recognition.

The trial court found that "[t]he facts of *Lambert* are clearly distinguishable from the situation regarding the Defendant" because although both Ms. Lambert and Mr. Nobles were both First Descendants, "Ms. Lambert presented testimony she was involved in the Cherokee community, availed herself of the opportunities open to First Descendants, and had in a civil matter 'availed herself of the [Cherokee Tribal] Court's civil jurisdiction.'" (Order, Ap 99, FF 270) In contrast, the trial court found, Mr. Nobles "simply has no ties to the Qualla Boundary." (Order, Ap 99, FF 271)

Initially, the trial court's characterization of the facts of *Lambert* is inaccurate. According to the *Lambert* opinion, the parties "stipulated ... to the

fact that the Defendant is recognized, politically, by the Tribe as a 'First Lineal Descendent' (First Descendent)" and the "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 [BIA] ... [and] reviewed the submissions of the parties and heard the argument of counsel." *Lambert*, 3 Cher. Rep. at 62. The Court also took "judicial notice of ... the fact that the Defendant has availed herself of the Court's civil jurisdiction in that she is the Plaintiff in ... a case currently pending on the Court's civil docket." *Id.* at 63. There was no other evidence noted by the Court. Therefore, although there was evidence that "Ms. Lambert ...'availed herself of the [Cherokee Tribal] Court's civil jurisdiction,'" it is incorrect to state that "Ms. Lambert presented testimony she was involved in the Cherokee community [and] availed herself of the opportunities open to First Descendants." The only testimony of this sort was that of Councilwoman McCoy who testified that First Descendants *in general* are considered by the tribe to be participating members of the community.[23] *Id.* at 64.

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[23] It is also incorrect to state that Mr. Nobles has "no ties to the Qualla Boundary," as is explained in detail below. *See also* Order, Ap 99, FF 272 ("Defendant has simply presented *no evidence* of social recognition as an Indian and participation in the Indian social life of the Qualla Boundary.") (emphasis added).

Aside from the factual inaccuracy, the trial court's analysis represents a fundamental misunderstanding of the holding of *Lambert*. *Lambert* did not simply hold that Ms. Lambert as an individual was an Indian; instead, *Lambert* held that *all First Descendants* are Indians for purposes of *Rogers* due to the benefits and recognition afforded them by the EBCI. This was confirmed in *Welch*, where the Court reiterated its holding in *Lambert* that "first lineal descendants ... are ... subject to the criminal jurisdiction of the Court," *Welch*, 3 Cher. Rep at 75, and *Prater*, where the Court contrasted First Descendants – who are all "Indians" under *Rogers* – with Second Descendants, who may be Indians in some instances, depending on "the totality of the circumstances." *Prater*, 3 Cher. Rep. at 112-13. *See also* C.C. §15-8, Rule 6(b)(1)(B) (a defendant is an Indian if, *inter alia*, he "is a First Descendent of the EBCI").

Therefore, notwithstanding Myrtle Driver's opinion of community sentiment concerning First Descendants, the EBCI has, through its tribal council, determined that First Descendants have a special status in relation to the EBCI not shared by non-Indians and members of other federally-recognized tribes. Accordingly, the EBCI has bestowed upon First Descendants benefits of tribal association as well as benefits available to Indians through the federal government. The holding in *Lambert* shows that First Descendants, through their status, meet as a matter of law the second *Rogers* requirement of tribal or government recognition as an Indian.

Alternately, as a matter of comity, North Carolina courts should respect the EBCI's recognition of First Descendants as Indians. Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164, 40 L. Ed. 95, 143 (1895). As the Third Circuit has explained, comity

> is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.

Somportex, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971). *See also Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) ("Federal courts must ... be careful to respect tribal jurisprudence[.]").

Although the EBCI is not an entirely separate "nation," "the Eastern Band, like all recognized Indian tribes, possesses the status of a 'domestic dependent nation' with certain retained inherent sovereign powers." *Wildcatt*, 69 N.C. App. at 5-6, 313 S.E.2d at 874 (citations omitted). Similarly,

> the Tribal Court is a 'semi-independent' entity. It is neither a division of the General Court of Justice of the State of North Carolina, nor a federal court for which procedures ... are dictated by the United States Code. An analogue to the relationship between the Tribal Court and a North Carolina state court would be the relationship between a North Carolina state court and a court of another state.

Carden v. Owle Construction, L.L.C., ___ N.C. App. ___, ___, 720 S.E.2d 825, 828 (2012).

In accord with our State appellate courts' policy of "comport[ing] with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence," *McCracken & Amick*, *supra*, this Court should find *Lambert* controlling in this case and defer to the tribal court's holding that all First Descendants are Indians under the *Rogers* test. *See Carden*, ___ N.C. App. at ___, 720 S.E.2d at 829 (ruling that plaintiff's jurisdictional claim not properly before the court because "[a]ny argument concerning the jurisdiction of the Tribal Court would not be a matter for this Court to consider and rule upon. Rather, such issues should be raised before the Tribal Court and the appellate courts of that jurisdiction, as an exercise of 'the self-governance of the [EBCI]'"); *Hatcher v. Harrah's N.C. Casino Co.*, 169 N.C. App. 151, 157, 610 S.E.2d 210, 213-14 (2005) (deferring to tribal procedure in resolving gaming conflicts and explaining that "the exercise of state court jurisdiction in the present case would unduly infringe on the self-governance of the [EBCI]"). *See also Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 14-15, 94 L. Ed. 2d 10, 20 (1987) (citation omitted) ("Tribal courts play a vital role in tribal self-government, ... and the Federal Government has consistently encouraged their development."); Gordon K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 Stan. L. Rev. 1397, 1409 (1985) ("when state courts refuse to abide by tribal court decisions, they

implicitly deny the sovereignty of the tribes, contrary to congressional policy"); Clinton, at 555-57 (tribal courts represent an important exercise of tribal sovereignty); Order, Ap 86, FF 192 ("That the undersigned affords full faith and credit to the Cherokee Code and the prior decisions of the Tribal Court pursuant to N. C. Gen. Stat. § 1E-1.").

2. Mr. Nobles Has Satisfied the Second Part of the Rogers *Test via the* St. Cloud *Factors.*

As shown above, Mr. Nobles is an Indian for purposes of the MCA. He has met the *Rogers* test because he is of Indian descent and because the EBCI and the federal government have recognized him as an Indian. This Court is bound by the United States Supreme Court's decision in *Rogers*, but is not bound by *St. Cloud* and other federal decisions that rely on specific factors to guide the analysis of the second *Rogers* prong. *See Pender County v. Bartlett*, 361 N.C. 491, 516, 649 S.E.2d 364, 379 (2007) ("North Carolina courts are not bound by decisions of the Fourth Circuit or any other lower federal court, but only by a decision of the United States Supreme Court."). Nevertheless, even if this Court chooses not to treat the Cherokee Court's decision in *Lambert* as conclusive on the question of the second *Rogers* factor as a matter of law or comity, and if this Court chooses to apply the test set out in lower federal court cases, the State of North Carolina failed to show beyond a reasonable doubt that Mr. Nobles is not an Indian pursuant to the *St. Cloud* factors.

First, while Mr. Nobles is not an enrolled member of the EBCI, as shown above he has been afforded a special status within the tribe as a First Descendant. As recognized by the Ninth Circuit in *Maggi* – where the defendant was entitled to benefits due to his status as a non-enrolled "descendant member" – "[w]hile descendant status does not carry similar weight to enrollment, ... it reflects some degree of recognition." *Maggi*, 598 F.3d at 1082 (citation omitted).

Second, that Mr. Nobles has received benefits through his status as a First Descendant shows that he has satisfied the second and third *St. Cloud* factors – government recognition through receipt of assistance reserved only to Indians, and enjoyment of the benefits of tribal affiliation.

Initially, Mr. Nobles notes that several factual findings relied upon by the trial court in his analysis of the final *St. Cloud* factors are wholly or partly not supported by the evidence:

> 262. ... Upon a thorough examination of the evidence and circumstances specific to Defendant the facts clearly establish:
>
> ...
>
> c. The Defendant never enjoyed the benefits of a possessory interest by renting or leasing an interest in tribal lands.
>
> ...
>
> h. The Defendant was never a party in either a civil or criminal matter in the Cherokee Tribal Court.

...

l. The Defendant was never employed by the Eastern Cherokee government or any of its enterprises.

...

p. The Defendant never applied for or received financial assistance available to First Descendants from the Eastern Band of Cherokee for attendance at any post-secondary educational institutions.

q. The Defendant never hunted or fished on the Qualla Boundary.

r. The Defendant never participated in Indian religious ceremonies, cultural festivals or dance competitions. No evidence was presented that Defendant attended the annual fall festival which is the single most important social event in the life of the Cherokee community.

s. The Defendant neither presented evidence of nor demonstrated an aptitude for arts and crafts unique to the Cherokee such as wood carving or basket weaving.

t. The Defendant is not fluent in the Cherokee language. (Order, App 96-97)

There was no evidence presented at the hearing that Mr. Nobles "never enjoyed the benefits of a possessory interest by renting or leasing an interest in tribal lands;" "was never employed by the Eastern Cherokee government or any of its enterprises;" "never applied for or received financial assistance available to First Descendants from the Eastern Band of Cherokee for attendance at any post-secondary educational institutions;" and "never hunted or fished on the Qualla Boundary." (Order, App 96-97, FF 262 c., l., p., & q.) Although Attorney General

Tarnawsky testified that she "had no knowledge" and was "not aware" of any "attempts to use any of these rights by Mr. Nobles" (Ipp 116-17), this testimony does not meet the State's burden of proof. *See Batdorf, supra* (the burden is on the State to prove jurisdiction beyond a reasonable doubt); *United States v. Acosta-Gallardo*, 656 F.3d 1109 (10th Cir. 2011) ("absence of evidence is not evidence of absence"). Further, there was no evidence whatsoever presented concerning Mr. Nobles' ability to speak Cherokee. (Order, Ap 97, FF 262 t.)

Additionally, while Detective Birchfield testified that there was no record that Mr. Nobles had ever been prosecuted in tribal court, there was no evidence presented that Mr. Nobles "was never a party in ... a civil ... matter in the Cherokee Tribal Court." (Order, Ap 96, FF 262 h.) Indeed, Detective Birchfield testified that juvenile matters would not have been revealed by his criminal records search.

While Myrtle Driver testified that she herself had never seen Mr. Nobles at an Indian cultural event, that Mr. Nobles "*never* participated in Indian religious ceremonies, cultural festivals or dance competitions," (Order, Ap 97, FF 262 r.) (emphasis added), is not supported. In addition, there was no evidence presented that "the annual fall festival ... is the single most important social event in the life of the Cherokee community." *Id.*

Finally, while it is true that "[t]he Defendant ... [did not] *present[ ] evidence* of ... an aptitude for arts and crafts unique to the Cherokee such as wood carving or basket weaving," no evidence was presented that Mr. Nobles never "demonstrated an aptitude for" these activities. (Order, Ap 97, FF 262 s.) (emphasis added).

Accordingly, to the extent the trial court's ruling finding Mr. Nobles was not an Indian relied on numerous unsupported findings of fact, the ruling was erroneous. *See also* Issue II, *infra* (listing additional unsupported findings).

Contrary to the trial court's ruling,[24] the evidence shows that Mr. Nobles has been recognized by the government through receipt of assistance reserved only to Indians, and has enjoyed the benefits of tribal affiliation. As testified to at the hearing (Ipp 108-09, 168-82; IIpp 67-74), and as acknowledged by the trial court (Order, App 71, 78-79, FF 85-88, 143-54), Mr. Nobles received federally-funded services from the IHS reserved only to Indians. He was not charged for these services because he is a First Descendant, and he would not have to pay for these services were he to receive them as an adult. The filing number associated with his name in the CIH records indicated that he is a male of Indian descent from the

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[24] *See, e.g.*, Order, Ap 100, FF 275 ("Defendant ... never benefited from his special status as a First Descendant and is not recognized as an Indian by the [EBCI] ... or the federal government.").

EBCI, and his hospital chart identified him as an "Indian nontribal member." *See United States v. LaBuff*, 658 F.3d 873, 878 (9th Cir. 2011) (receipt of medical services through IHS shows Indian status because these services are "reserved only to Indians" and are limited to tribal and nontribal members); *United States v. Keys*, 103 F.3d 758, 760 (9th Cir. 1996) (finding unenrolled child was a "*de facto* member" of tribe and an Indian where, *inter alia*, she was provided medical services at IHS hospital where her enrolled mother had taken her). *Cf. Loera,* 2013 U.S. Dist. LEXIS at *23-24, 40 (defendant not an Indian where, *inter alia*, there was no evidence he had received medical services paid for by IHS, and distinguishing *LaBuff* on that basis).

Because Mr. Nobles received free health care services from the IHS through the CIH, this also shows that he "enjoyed the 'benefits' of his tribal affiliation." *See LaBuff*, 658 F.3d at 878 (finding that receipt of IHS health care services based on status as descendant of enrolled member satisfies both second and third prongs of the *Bruce* [*St. Cloud*] test, and distinguishing *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009)[25] because in that case "the record was *completely devoid* of evidence showing that Cruz had received *any* benefits from his tribe") (emphasis added).

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[25] *See* Order, App 94-95, 99, FF 252, 269 (citing *Cruz*); State's Brief on Motion to Dismiss Due to Lack of Jurisdiction, App 45-46 (same).

With respect to the fourth *St. Cloud* factor – social recognition as an Indian – Mr. Nobles lived on or near the Qualla Boundary for significant periods of time. Although born in Florida, Mr. Nobles was brought to the Qualla Boundary when he was two weeks old. He attended Cherokee tribal schools as a child and teenager. Although the Cherokee tribal schools were open to non-Indians, (Order, Ap 98, FF 265), in enrolling Mr. Nobles, Ms. Mann declared his Indian status so that the school could receive federal funding reserved for schools that have a certain number of Indians as students. (App 183-84) Therefore, while the schools were not reserved only to Indians, Mr. Nobles' Indian status under federal law helped to provide important funding for schools serving the EBCI.

After serving his prison time in Florida, Mr. Nobles immediately returned to living on or near the Qualla Boundary, much of the time living with enrolled members of the tribe. Mr. Nobles got a job on the Qualla Boundary, and had a girlfriend, Ashlyn Carothers, who was a member of another federally-recognized tribe. When Mr. Nobles was arrested for these crimes, he was living on the Boundary with Ms. Carothers. *See Stymiest*, 581 F.3d at 765 (that defendant "lived and worked on the ... reservation during the year prior to" the charged crime shows social recognition as an Indian); *People v. Bowen*, 1996 Mich. App. LEXIS 960, at *5-6 (Mich. Ct. App. Oct. 11, 1996) (per curiam) (unpub.) (App 219-20) (that defendant "lived on a reservation" and "attended school on the reservation" shows that defendant enjoyed social recognition as an Indian); *cf.*

Loera, 2013 U.S. Dist. LEXIS at *16, 27 (defendant not an Indian where he never worked on reservation and could be removed and excluded from reservation). Further, Mr. Nobles' tattoos, although disparaged by Myrtle Driver, show some attempt on Mr. Nobles' part to hold himself out as an Indian. *See Stymiest*, 581 F.3d at 763-64 (social recognition factor may include holding oneself out as an Indian).

Finally, the EBCI tribal court's exercise of jurisdiction over First Descendants shows that Mr. Nobles has been recognized by the EBCI as an Indian. *LaBuff*, 658 F.3d at 879 (assumption of tribal jurisdiction over criminal charges demonstrates tribal recognition); *Bruce*, 394 F.3d at 1226 (fact that defendant was "treated as an Indian" by tribal authorities shows Indian status); *cf. Loera*, 2103 U.S. Dist. LEXIS at *25, 29, 32 (defendant not an Indian under federal law where tribal court refused to assume jurisdiction over case because tribal court determined it did not have jurisdiction under tribal law). Mr. Nobles undoubtedly would have been under the jurisdiction of the tribal court on November 30, 2012 had the tribal magistrate not been bypassed. Magistrate Reed testified that if a person is a First Descendant, jurisdiction lies with the tribal court, and that if Mr. Nobles had "been brought in front of [him] and [Mr. Nobles] had checked the box that he is a first lineal descendant," Reed "would have found [him] to be Indian under the jurisdiction of the Indian tribal court." (IIpp 23-24, 26) *See also* Order, Ap 81, FF 165 (finding "[t]hat Rule 6 closely tracks the *St.*

Cloud v. United States factors"). As discussed above, recognizing and deferring to the EBCI's statutory determination of jurisdiction over First Descendants promotes tribal sovereignty and comity between North Carolina and the EBCI.

Accordingly, Mr. Nobles is an Indian as a matter of law because he has some Indian blood and has been recognized by the EBCI and the federal government as an Indian. The trial court's Order must be reversed because North Carolina does not have subject matter jurisdiction over Mr. Nobles.

II. THE ORDER MUST BE VACATED AND THIS CASE REMANDED FOR A NEW HEARING BECAUSE THE ORDER IS BASED ON UNSUPPORTED FINDINGS OF FACT, BECAUSE FINDINGS ON RELEVANT EVIDENCE WERE OMITTED, AND BECAUSE THE TRIAL COURT ACTED UNDER A MISAPPREHENSION OF GOVERNING LAW.

As shown above, Mr. Nobles is an Indian under the United States Supreme Court's test from *United States v. Rogers*, 45 U.S. 567, 11 L. Ed. 1105 (1846). If this Court chooses not to reverse the trial court's Order on this basis, the Order must be vacated and Mr. Nobles granted a new hearing on the motion to dismiss because 1) numerous factual findings were unsupported by the evidence at the hearing; 2) the trial court failed to make findings on evidence relevant to the question of Mr. Nobles' Indian status; and 3) the trial court erroneously believed that for the analysis of the second prong of the *Rogers* test it was required to

consider "the four factors under the *St. Cloud* analysis ... in declining order of importance."

A. Unsupported Findings of Fact.

In addition to those noted above, *see* pages 45 through 48, unsupported or partly unsupported findings of fact include the following:

> 13. That the race of Defendant in the Interstate Commission Compact paperwork is white/Caucasian. [See Attachment 'B' (page 1 of Probation Records)] This document is instructive since the Defendant was presented with the application which clearly described him as white/Caucasian. Notwithstanding this description the Defendant signed the application on August 11, 2011. (Order, Ap 62) (brackets in original).
>
> 25. That the request for substance abuse screening dated May 7, 2012, is likewise instructive. When the request for screening form DCC26 was completed, the information clearly listed the background of Defendant and identified Defendant as white/Caucasian. Notwithstanding this description Defendant signed the request on May 7, 2012. [See Attached 'C' (page 51 of Probation Records)]. It was at this meeting [on May 7, 2012 with Officer Ammons] that Attachment 'C' was generated. (Order, Ap 63) (first brackets in original).
>
> 263. As late as August 11, 2011 and May 7, 2012, Defendant identified himself as white/Caucasian in North Carolina probation documents. .... (Order, Ap 97)

Although Officer Clemmer testified at the hearing that "in the ICASOS, the interstate compact for adult supervision system, [Mr. Nobles] is classified as white" (Ip 16), Attachment B (Ap 106) was not shown to or identified by Officer

Clemmer or entered into evidence. With respect to the May 7, 2012 visit, Officer Ammons testified, "[Mr. Nobles] came in to see me on May the 7th. ... [H]e advised me that he had kept his TASC assessment schedule that day, and I scheduled him an appointment for June." (Ipp 74-75) Attachment C, the "Request for Substance Abuse Screening" (Ap 108), was not shown to or identified by Officer Ammons and was not entered into evidence.

Mr. Nobles' probation file was not entered into evidence, and was not available to the parties during the hearing. Near the beginning of the first day of the hearing, the parties requested copies of the probation file, which Officer Clemmer had brought with him. (Ipp 18-19) The trial court ordered that the probation records be turned over for *in camera* review, after which the trial court would supply copies to the parties, with redactions if necessary. (Ipp 19, 58) At the beginning of the second day of the hearing, the following occurred:

> THE COURT: We ... received some documentation from the probation officer from Gaston County. Did I provide copies of those reports to you? I took his – we made copies of his records. Did I give those to you?
>
> MR. MOORE: I thought we did, but I don't remember seeing them this morning.
>
> MR. WILLIAMS: I don't think you did.
>
> THE COURT: We'll make sure we get copies of those to you. (IIpp 4-5)

The probation documents were not mentioned again at the hearing. On October 9, 2013, almost a month after the hearing concluded, the trial court entered an Order concerning the probation documents in which the trial court found that after *in camera* review, it had determined the probation records should be disclosed to the parties, and ordered that copies of the records be supplied to the State and to defense counsel. (App 150-51) Therefore, the documents referenced in Findings of Fact 13, 25, and 263 and attached to the trial court's Order as Attachments B and C were not in evidence or available to the parties during the hearing.

> 15. That the Defendant neither informed DAC of any unique Native American programs available to him nor sought assistance from any DAC employee seeking special programs available for Native American individuals either in the corrections system specifically or available to the broader Native American population in general. (Order, Ap 62)

Although Officers Clemmer and Ammons testified that Mr. Nobles had never discussed his race with them, this does not mean that Mr. Nobles *never* discussed Native American programs with *anyone* associated with the Department of Adult Correction. It is notable that Mr. Nobles was supervised by two other probation officers besides the two who testified. (Ip 21)

> 27. That Ms. Ammons spoke by phone to Tonya Crowe regarding the Defendant. Ms. Crowe expressed growing concerns about Defendant which were slowly developing with the continued presence of Defendant in her home. (Order, Ap 63)

Although Officer Ammons testified that she received a phone call from Mr. Nobles' aunt on May 9 (Ip 75), there was no evidence presented as to the content of the conversation.

> 32. That upon investigation by Ms. Ammons it was determined Defendant was spending approximately half his time at the Griggs' residence and half his time with his girlfriend at a residence unknown and unapproved by his probation officer. (Order, Ap 64)

Officer Ammons testified that Ruthie Griggs and Donna Mann told her that Mr. Nobles stayed at the Griggs residence "part time" and stayed with his girlfriend "part time" (Ip 77), but Ammons did not testify that the women specified any particular percentages.

> 58. That the United States Attorney for the Western District of North Carolina has for many decades enforced criminal laws against members of the Eastern Band of Cherokee Indians pursuant to the Major Crimes Act 18 U.S.C. §1153. It has long been the policy of the United States Attorney for the Western District that as part of the charging process for criminal offenses occurring on the Qualla Boundary law enforcement officers making an arrest are required to provide documentation to the Unites (sic) States Attorney certifying the defendant being charged is an enrolled member of a federally recognized tribe. (Order, Ap 67)

There was no evidence to support this. No one from the United States Attorney's Office testified. The only evidence concerning any possible policy by the United States Attorney's Office was Detective Birchfield's testimony that "[E]very case that I have charged where it's alleged that an Indian committed a

crime in Federal Court, I have to provide documentation as to their enrollment, and it has to say that they are an enrolled member of a federally recognized tribe." (Ip 56) Detective Birchfield did not testify how many of his cases had required this documentation, whether this was an actual "policy" of the United States Attorney's Office or the whim of a particular prosecutor, or whether any other officers had encountered this same "policy."[26] In any event, enrollment in a tribe is clearly *not* required under federal law for federal jurisdiction. *E.g.*, *Stymiest*, 581 F.3d at 766. Therefore, this finding, even if supported, is irrelevant to whether Mr. Nobles is an Indian under federal law.

> 109. That Ms. [Myrtle Driver] Johnson is fluent in the Cherokee language. For over 20 years Ms. Johnson has worked as the English Clerk and the Indian Clerk translating English-Cherokee and Cherokee-English in Tribal Council. This role is especially important in that Cherokee Council sessions are broadcast over the local cable television channel and re-broadcast in an effort to inform the community of governmental actions. Moreover, these translations assist older members of the Tribe who either may be unable to attend sessions or to aid those older members who primarily speak Cherokee to better understand the issues being debated. (Order, Ap 74)

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[26] *See In re Welch*, 3 Cher. Rep. 71, 75 (2003) (castigating CIPD officers for believing they possess "a quasi-judicial role" in determining who is subject to the jurisdiction of the tribal court and ordering that "the Tribal Prosecutor coordinate with the Attorney General and provide proper training for the officers of the CIPD ... [with] an emphasis on the Court's civil and criminal jurisdiction, ... as well as the role of CIPD officers in the service of criminal process").

Although evidence was presented that Ms. Driver is fluent in Cherokee and that she had "served as English clerk, and ... [was] presently the Indian Clerk translator for tribal council" (Ipp 118, 139-41), Ms. Driver did not testify as to how long she had served. Attorney General Tarnawsky testified that Ms. Driver "has been involved in the Cherokee government through the tribal council as both the English clerk and the tribal clerk for over 14 years" (Ip 118), not 20 years. There was no evidence presented that "[t]his role is especially important in that Cherokee Council sessions are broadcast over the local cable television channel and re-broadcast in an effort to inform the community of governmental actions," or that "these translations assist older members of the Tribe who either may be unable to attend sessions or to aid those older members who primarily speak Cherokee to better understand the issues being debated."

> 112. That at the time of this hearing in August 2013, the Eastern Band of Cherokee Indians is comprised of approximately 14,000 members. Many but not all enrolled members reside on the Qualla Boundary. (Order, Ap 74)

Although Myrtle Driver testified that there are "a little more than 14,000" enrolled members of the EBCI (Ip 139), there was no evidence presented that "[m]any but not all enrolled members reside on the Qualla Boundary."

> 116. That as part of the culture and tradition of the Eastern Band of Cherokee there is every fall in October the Cherokee Indian Fair. This has been a tradition attended by enrolled members for over 100 years. Also, there is the Kituwah Celebration in June of each year located at the

> Ferguson Fields property now owned by the Eastern Band of Cherokee. Both of these events celebrate the arts, crafts, language, traditions and uniqueness of the Cherokee culture.

In response to the prosecution's question concerning whether the EBCI has any event "like ... the 4th of July or something," Myrtle Driver testified, "Our major event would be the Cherokee Indian fair, but more special to fluent speakers would be the Gadua celebration that is held each year in June." (Ipp 141-42) Driver explained that the latter "is the celebration of when we gained some land that was lost during the removal. It was commonly known as Ferguson Fields, but to the Cherokee people it's always been Gadua." (Ip 142) There was no evidence presented that "every fall in October the Cherokee Indian Fair ... has been a tradition attended by enrolled members for over 100 years." Further, although presumably "[b]oth of these events celebrate the arts, crafts, language, traditions and uniqueness of the Cherokee culture," no evidence was presented as such.

Therefore, the trial court's ruling that Mr. Nobles was not an Indian and that the State had jurisdiction over this matter was based on numerous unsupported findings of fact. *See Cooke v. Faulkner*, 137 N.C. App. 755, 757, 529 S.E.2d 512, 513 (2000) (trial court's findings of fact concerning subject matter jurisdiction must be supported by competent evidence); *In re E.G.M.*, ___ N.C. App. ___, ___, 750 S.E.2d 857, 860-63 (2013) (in termination of parental rights case involving EBCI family residing on Qualla Boundary, assumption of subject matter

jurisdiction by State under Indian Child Welfare Act must be supported by sufficient findings of fact).

B. Omitted Findings of Fact.

There was evidence relevant to the question of whether Mr. Nobles is an Indian for which the trial court made no findings:

a. The Trial Court Failed to Find that First Descendants in General, and Mr. Nobles in Particular, Are Subject to Tribal Court Jurisdiction under Tribal Law.

Tribal Magistrate Sam Reed specifically testified that Rule 6 of the Cherokee Rules of Criminal Procedure requires that "when an arrest occurs on tribal land, the person making the arrest is to bring the arrestee before a magistrate for completion of an affidavit of jurisdiction" (IIp 32), and that if the person is a First Descendant, he is an Indian and jurisdiction lies with the tribal court. (IIpp 23-24, 26) Accordingly, had Mr. Nobles appeared before him, Magistrate Reed would have found him to be an Indian, and under tribal jurisdiction. (IIp 26) Although the trial court recited Rule 6 in his Order (Order, App 80-81, FF 164), and found that the affidavit of jurisdiction "is drafted so as to accommodate the provisions of Rule 6 of the Criminal Rules of Procedure as promulgated by the Cherokee Code" (Order, Ap 80, FF 163), the trial court failed to find as fact that Reed testified that as a First Descendant, Mr. Nobles was under the jurisdiction of the tribal court as a matter of tribal law. This omission is significant because

exercise of tribal court jurisdiction is a factor that demonstrates tribal recognition as an Indian. *United States v. LaBuff*, 658 F.3d 873, 879 (9th Cir. 2011); *United States v. Stymiest*, 581 F.3d 759, 765 (8th Cir. 2009); *United States v. Bruce*, 394 F.3d 1215, 1226 (9th Cir. 2005).

b. The Trial Court Failed to Find that Ms. Mann's Designation of Mr. Nobles as "White" on a School Enrollment Form Was an Error Based on Her Misapprehension that a Child's Father Determines his Race.

The trial court found as fact:

> 183. That upon a more detailed examination of [Mr. Nobles' Cherokee tribal] school records as the admitting parent Ms. Mann represented to school admissions officials that her son was not Indian. Specifically, page 13 in Defendant's exhibit #20 provides that Defendant-student was admitted as non-Indian.

This is correct. (IIp 96; Ap 188) However, Ms. Mann explained in her testimony that she filled out the form that way because she "was always under the assumption that it was the father's degree of Indian blood that ... mattered. So when it said 'degree of Indian,' [she] put 'none' for George because his father was not," but that her mother later straightened out the misconception. (Ipp 99-100) The trial court failed to find that on two other enrollment applications Ms. Mann listed Mr. Nobles' tribal affiliation as "Cherokee." (IIpp 80, 83; App 179-80)

Accordingly, the trial court failed to make findings of fact on relevant evidence.

B. The Trial Court Erroneously Found that the Court Was Bound by Ninth Circuit Case Law.

As shown above, *see* pages 39 through 41, the trial court misconstrued the Cherokee Court's decision in *Eastern Band of Cherokee Indians v. Lambert*, 3 Cher. Rep. 62 (2003). In addition, the trial court also erroneously found that it was bound by Ninth Circuit case law with respect to how to apply the *Rogers* test. In its Order, the trial court found that "following *the mandate* established in *Bruce*[, *supra*, 394 F.3d 1215 (9th Cir. 2005)] the four factors under the *St. Cloud* analysis are to be considered in declining order of importance" and that "to determine whether the Defendant is Indian as defined by the Major Crimes Act, the undersigned *must* apply the *Rogers* test using the four factors under the second prong of *Rogers* as established in [ ] *St. Cloud* [*v. United States*, 702 F. Supp. 1456 (D.S.D. 1988)] ... in declining order of importance." (Order, Ap 95, FF 253-54 (emphasis added)).

As shown above, *see* page 44, North Carolina courts are bound by the United States Supreme Court's decision in *Rogers*, but are not bound by *St. Cloud* and other federal decisions that rely on specific factors to guide the analysis of the second *Rogers* prong. *Pender County v. Bartlett*, 361 N.C. 491, 516, 649 S.E.2d 364, 379 (2007). Therefore, the Ninth Circuit's strict adherence in *Bruce* to the

four *St. Cloud* factors in declining order of importance is not a mandate to North Carolina courts. The trial court was acting under a misapprehension of the law in finding that it was required to apply the rigid Ninth Circuit test.

In keeping with the broad construction that is to given the MCA and statutes that benefit Indians in general, *see McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 491, 687 S.E.2d 690, 697 (2009); *St. Cloud*, 702 F. Supp. at 1462; *Wildcatt v. Smith*, 69 N.C. App 1, 13, 316 S.E.2d 870, 879 (1984), Petitioner contends that a less restrictive totality of the circumstances analysis is more appropriate. The *St. Cloud* factors were "gleaned from case law" by a United States District Court over 25 years ago in an effort to provide a framework for the second *Rogers* prong because "[n]o court ... ha[d] carefully analyzed what constitutes sufficient non-racial recognition as an Indian." *St. Cloud*, 702 F. Supp. at 1461. Even the *St. Cloud* court itself acknowledged that the four factors of its test "do not establish a precise formula for determining who is an Indian. Rather, they merely guide the analysis of whether a person is recognized as an Indian." *Id.* *See also Stymiest*, 581 F.3d at 764 ("[T]he *St. Cloud* factors may prove useful, depending upon the evidence, but they should not be considered exhaustive. Nor should they be tied to an order of importance[.]"); Brian L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of*

Appeals, 26 Harv. J. Racial & Ethnic Just. 241, 242 (2010) (Eighth Circuit's more flexible test promotes discharge of federal trust responsibilities).

Further, *St. Cloud* and subsequent federal decisions did not involve a situation where an Indian tribe has recognized – through its statutory code and tribal court rulings – that all of its First Descendants, as a category, are Indians. In such a situation, analysis by a state or federal court of the second *Rogers* requirement through use of the *St. Cloud* factors is unnecessary because the tribe's recognition of First Descendants as Indians constitutes "tribal recognition" sufficient to meet the second *Rogers* prong as a matter of law.

In summary, the faulty and omitted factual findings, as well as the erroneous finding that the trial court was required to apply Ninth Circuit case law require that the Order be vacated.

III. THIS IS AN APPROPRIATE CASE FOR THIS COURT TO ISSUE ITS WRIT OF *CERTIORARI*.

This case is an appropriate one for this Court to issue its writ of *certiorari* to consider the trial court's denial of Mr. Nobles' motion to dismiss for which no right of appeal exists. *See* N.C. R. App. Pro. 21(a)(1). First, *certiorari* is appropriate in this Court – as opposed to the Court of Appeals – because this is a first-degree murder case for which the State has given notice of aggravating circumstances and requested a Rule 24 hearing. (App 152, 153a) To the extent

Appellate Rule 21(b) directs that this Petition be filed in the Court of Appeals, Mr. Nobles requests that this Court invoke Rule 2 to suspend Rule 21(b) "to expedite decision in the public interest." N.C. R. App. P. 2. Alternately, Mr. Nobles requests review pursuant to this Court's constitutional authority under N.C. Const. art. IV, §12. *See Park Terrace, Inc. v. Phoenix Indem. Co.*, 243 N.C. 595, 597, 91 S.E.2d 584, 586 (1956) (explaining that this Court's "general supervisory authority over ... the Superior Courts of the State ... is a prerogative which, in a proper case, when necessary to promote the expeditious administration of justice, [this Court] will not hesitate to exercise"); *see also In re A.R.G.*, 361 N.C. 392, 397, 646 S.E.2d 349, 352 (2007) (exercising constitutional supervisory power in termination of parental rights case despite lack of final order where respondent contended that the trial court lacked subject matter jurisdiction).

Second, review of the trial court's interlocutory Order is appropriate because if Mr. Nobles were to be convicted in State court of any of the charged crimes – including capital murder – and were our appellate courts ultimately to rule on direct appeal that the trial court lacked jurisdiction over the case, substantial judicial resources will have been needlessly wasted. *See Greene v. Charlotte Chemical Laboratories, Inc.*, 254 N.C. 680, 694, 120 S.E.2d 82, 91 (1961) (exercise of supervisory jurisdiction appropriate to prevent unnecessary delay in the administration of justice); *Brown v. City of Winston-Salem*, 171 N.C. App. 266, 269, 614 S.E.2d 599, 601 (2005) (issuing writ of *certiorari* to review

denial of dismissal of claim where if claim proceeds to trial and denial of motion to dismiss is reversed on appeal, "[t]his additional litigation would be a waste of judicial resources"). *See also* Ap 154 (Order Staying Proceedings), para. 4 (noting that "unless a stay is granted, counsel for the Defendant will be required to proceed with mitigation efforts and assistant legal counsel will be appointed at taxpayer expense").

Finally, and most importantly, review of the trial court's Order is appropriate because of the nature of the claim at issue. As discussed above, *see* page 34, there are no modern North Carolina decisions concerning criminal jurisdiction in Indian country. This issue involves the complex jurisdictional relationship between this State, the EBCI, and the federal government, as well as significant issues of EBCI tribal sovereignty. This Court's resolution of these issues will provide guidance to trial courts and the Court of Appeals. *See A.R.G.*, 361 N.C. at 397, 646 S.E.2d at 352 (addressing interlocutory challenge to trial court's jurisdiction where "there may be questions in the district courts and in our intermediate appellate court as to which provisions of Article 4 of the Juvenile Code are jurisdictional in nature"). *See also Harris v. Matthews*, 361 N.C. 265, 643 S.E.2d 566 (2007) (allowing interlocutory appeal to review pastor's motion to dismiss church members' suit for access to church financial records to decide whether First Amendment prevented trial court from resolving dispute concerning internal church matters).

In summary, the trial court's ruling allowing the State to assume jurisdiction in this matter is an intrusion on the federal government's plenary authority over Indian tribes, and infringes upon the sovereignty of the EBCI. Mr. Nobles requests that this Court review the trial court's decision.

CONCLUSION

WHEREFORE, Petitioner requests the following relief:

1. Entry of an order allowing a writ of *certiorari,* and reversing or vacating and remanding the trial court's Order denying Mr. Nobles' motion to dismiss, or

2. Entry of an order granting a writ of *certiorari* and ordering briefing and oral argument, or

3. Such other relief as this Court deems appropriate.

This is the 30th day of January, 2014.

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Bar No. 24252

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Appellate Defender
Office of the Appellate Defender
123 West Main Street, Suite 500
Durham, North Carolina 27701

(919) 354-7210

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that the original of Petitioner's Petition for Writ of Certiorari, including the Appendix to Petition for Writ of Certiorari, and the original and one copy of the two-volume transcript of the hearing on Petitioner's motion to dismiss, have been filed in the Supreme Court of North Carolina, 2 East Morgan Street, Raleigh, North Carolina 27601 by sending them by first-class mail, postage prepaid, by placing them in a depository for that purpose.

I further hereby certify that a copy of Petitioner's Petition for Writ of Certiorari, including the Appendix to Petition for Writ of Certiorari, has been served upon Robert C. Montgomery, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, by sending it first-class mail, postage prepaid, by placing it in a depository for that purpose, and that an electronic copy of the two-volume transcript of the hearing on Petitioner's motion to dismiss has been emailed to Mr. Montgomery at rmont@ncdoj.gov.

Electronic copies of the Petition and Appendix have been provided to the following:

- James H. Moore, Jr., Assistant District Attorney, James. H. Moore @nccourts.org;
- Todd M. Williams, Assistant Capital Defender, Todd.M.Williams @nccourts.org; and
- Vincent F. Rabil, Assistant Capital Defender, Vincent.F.Rabil @nccourts.org.

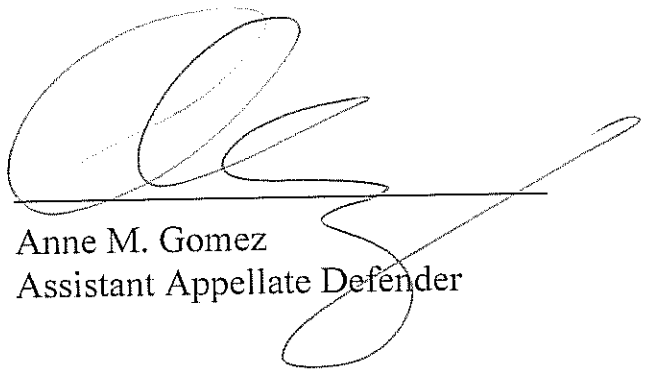
This the 30th day of January, 2014.

Anne M. Gomez
Assistant Appellate Defender

VERIFICATION

STATE OF NORTH CAROLINA)
)
COUNTY OF DURHAM)

Anne M. Gomez, being duly sworn, deposes and says that she is the attorney for petitioner, that she has read the forgoing petition and the same is true to her knowledge expect upon matters and things therein alleged upon information and belief, and as to those matters and things, she believes them to be true.



Anne M. Gomez
Assistant Appellate Defender

Sworn to and subscribed before me,

this 29 day of January, 2014.

Ann Marie DeLong
Notary Public

My commission expires: 12.06.2015.

No. THIRTIETH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Jackson
	)	12 CRS 51719-20, 1362-63
GEORGE LEE NOBLES	)	

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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