No. COA17-516 THIRTIETH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Jackson
	)	12 CRS 1362, 51720
GEORGE LEE NOBLES	)	

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DEFENDANT-APPELLANT'S BRIEF

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ISSUES PRESENTED

I. DID THE STATE LACK SUBJECT MATTER JURISDICTION?

II. DID THE TRIAL COURT ERR BY DENYING THE REQUEST FOR A SPECIAL VERDICT?

III. DID THE TRIAL COURT ERR BY DENYING THE MOTION TO SUPPRESS?

IV. MUST A CLERICAL ERROR BE CORRECTED?

STATEMENT OF THE CASE

On December 3, 2012, the Jackson County Grand Jury indicted Defendant-Appellant for murder, armed robbery, and two counts of possession of firearm by felon (PFF). The State elected not to proceed on one PFF count. (1Rpp[1] 1, 4-9; 3/1/16p 65) After trial at the March 28, 2016 Criminal Session of Jackson County Superior Court before Judge Bradley B. Letts, the jury found Defendant guilty of murder, armed robbery, and PFF. Judge Letts arrested Judgment on armed robbery, entered Judgment and Commitment on PFF and murder, and sentenced Defendant to life without parole plus 14-26 months imprisonment. Defendant appealed. (4Rpp 565-66, 574, 577-80, 582-84; XVpp 3049, 3051)

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Appeal of right. G.S. §7A-27(b).

STATEMENT OF THE FACTS

A. Introduction.

On the evening of September 30, 2012, Barbara Preidt was killed outside the Fairfield Inn (the Fairfield), located across the street from a casino on the Qualla Boundary, a Cherokee Indian reservation. After Ms. Preidt and her

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[1] The record on appeal is referenced by volume number, *e.g.*, 1Rp ___, as is the trial transcript. *E.g.*, IIp ___. Pretrial hearings are referenced by date. The Rule 9(d)(2) Exhibits Supplement, filed today by mail, is referenced as Supp ___. The Appendix is referenced as App ___. "Finding of Fact" is abbreviated FF.

husband John exited their van to go to the Fairfield after leaving the casino, a man tried to steal Ms. Preidt's purse. As they struggled over the purse, the man shot Ms. Preidt. A Hornady .40-caliber shell casing was found under her body. The shooter ran behind the Fairfield. (IIIpp 829-34; IVpp 958, 987-89, 1060; VIpp 1271-72; XIpp 2402-03)

John Predit told Cherokee Indian Police Department (CIPD) officers the shooter was 5'9" to 6' tall[2] and wearing all black and a black mask. (IVpp 988-89; XIIpp 2590-91)

Tourist Glen Gronseth told police he walked out of the casino, heard loud bangs, saw a man running and lost sight of him, and then saw a pickup truck emerge from behind a building and turn right onto the highway. Prior to trial, no one asked Gronseth to describe the shooter. At trial, he testified the shooter was "a little under six feet." (IVpp 960-63, 967; XIpp 2420-21; Supp 77-79)

Video surveillance footage showed an unidentifiable person in the Fairfield parking lot ducking behind cars, then showed the Preidts' van driving back from the casino and a pickup truck leaving the Fairfield parking lot soon thereafter. Police did not canvass the Fairfield residents or attempt to determine who else was in the parking lot near the time of the shooting. (IVpp 929, 933; XIIpp 2426-51, 2566, 2582-84)

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[2] Mr. Nobles and Mr. Preidt are 5'6" tall. (XIIpp 2598, 2600)

Dewayne "Ed" Swayney lived with his mother, Catherine Gentry, and his cousin, Lexi McCoy, on the Qualla Boundary. Two months after Ms. Preidt's death, police found in Swayney's house the burnt remnants of Ms. Preidt's purse and a Hornady .40-caliber unfired round. In 2015, 11 shell casings fired from the murder weapon were found on Swayney's property. Swayney is six feet tall. (IVpp 948, 1065; Vpp 1110-12; VIpp 1363, 1367, 1484; VIIpp 1462, 1577-78; IXpp 2093-2121; XIpp 2467-71; XIIp 2601; Supp 85-87; 4Rp 533)

George Nobles and his girlfriend Ashlyn Carothers lived with Carothers' stepfather John Wolfe on the Qualla Boundary. Carothers and Mr. Nobles sometimes drove Wolfe's pickup truck. Swayney and Carothers were close friends, and Carothers called him "Dad." (VIIpp 1682-84, 1687-94; Xpp 2200, 2184-885)

B. Investigation and Arrest.

In late November 2012, CIPD Chief Ben Reed received a text message from Angela Kalonaheskie, who said her cousin Myra Calhoun's daughter Jessica told Myra that evidence from the crime was in a "burn pit" at Ed Swayney's house. Reed didn't save the text message and he didn't testify. There was no evidence Myra or Jessica Calhoun were interviewed. Myra Calhoun didn't testify. (VIpp 1315-16, 1329; XIpp 2457-61; XIIpp 2461, 2617, 2636)

Jessica Calhoun testified that a couple weeks after the Fairfield incident, she was hanging out with Mr. Nobles and Carothers. She did not talk with Mr.

Nobles, but talked to Carothers.[3] Jessica denied telling anyone the content of the conversation. (VIpp 1350-53, 1355)

On November 27, officers searched Swayney's fire pit and didn't find anything. (XIpp 2460-64) Gentry told Swayney about the search. (VIpp 1414-15)

On November 28, Ed Swayney told his nephew Carey Swayney he had clothing and a purse related to the murder at his house, and that Mr. Nobles and Carothers were trying to blame him for the killing. Carey took a shirt and pants from Ed's dresser, gave police the clothing, and told them what Ed said. Carey later made a claim on the $25,000 reward for information on the crime. He testified he would sue to get it. He knew if Mr. Nobles was convicted, he would get $25,000. (VIIpp 1634-39, 1654-55; XIpp 2458-60)

1. Swayney's Statement and the November 29, 2012 Search.

The next morning, CIPD Detective Daniel Iadonisi interviewed Ed Swayney. (XIpp 2465-67) Swayney said he heard about the Fairfield crime on his police scanner. Mr. Nobles and Carothers then came to his house. Mr. Nobles was cradling a gun toward his body and Carothers had a purse. They went in Swayney's bedroom. Mr. Nobles said he hit the woman with the gun so

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[3] Carothers testified Mr. Nobles told Jessica of his involvement in the Fairfield crimes. In Carothers' statement to police, she claimed she and Mr. Nobles didn't tell anyone about the crime except Swayney. (Xpp 2249-50, 2295-96; St. ex. 214, 1:57:56-1:58:10, 2:11:09-2:11:28)

she would let go of her purse, and the gun went off. The woman said, "Oh" and Mr. Nobles ran away as a man chased him. Mr. Nobles shot toward the man. Mr. Nobles was wearing a black shirt and pants, a stocking cap, and gloves. Swayney let him borrow a shirt and white and black camo shorts. Mr. Nobles removed an unfired round from the gun and Swayney put it in the bathroom. Carothers removed pills from the purse, and Mr. Nobles said they got $5,000 from it. They went outside and Carothers burned the purse in the burn barrel (not the fire pit). Swayney put the burnt items in a coffee can, which he hid in the attic. (VIpp 1376-1417, 1441-44; Supp 80-81)

Swayney told police that "Will" at the Belaire Motel had the murder weapon.[4] Swayney said he was at home with Gentry and McCoy at the time of the shooting.[5] Early in the interview, Iadonisi took Swayney at his word. Iadonisi heard Swayney was interested in the $25,000 reward. (XIIpp 2566-67, 2620-21)

Swayney went with police to his house. He removed the coffee can from the attic and handed it and the unfired round to the officers. The officers did not see Swayney retrieve the coffee can, as they allowed Swayney to enter his home before them. They did not tell Swayney not to touch the coffee can or

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[4] Police went to the Belaire Motel, but did not find Will. The visit was not documented. Police made no further efforts to locate Will or the gun. (XIIpp 2567-70, 2636)

[5] Gentry passed away during the year prior to trial. She was not interviewed. McCoy was first interviewed a week before trial. (VIIpp 1591, 1594; XIIp 2620-21)

bullet. The officers recovered black parachute pants and a black shirt from Swayney's dresser. They did not search Swayney's house or burn barrel. Swayney did not tell the officers the murder weapon had been fired on his property. Mr. Nobles was excluded from the DNA profile found on the unfired bullet. (Vp 1171; XIpp 2467-71; XIIpp 2571, 2620, 2608-13, 2624-25)

Swayney was charged in tribal court with misdemeanor "tampering with evidence." He had not been prosecuted at the time of Mr. Nobles' trial. No charges were pending against him in federal court, although he had admitted being an accessory after the fact to murder.[6] (XIIpp 2561-64)

That night, Wolfe's house was searched. Clothing was seized from Mr. Nobles' dresser, including black and white camo shorts. Police brought Mr. Nobles, Wolfe, and Carothers to the CIPD. Wolfe was interviewed and released. (VIIIpp 1783, 1803-05, 1907-16; XIpp 2480-84, 2487; XIIp 2634)

2. Carothers' Statement.

In Carothers' videotaped interview[7] and written statement, she implicated herself and Mr. Nobles in the crimes. Carothers said they drove

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[6] Swayney was an enrolled tribal member. (VIIpp 1452-53) As explained in Issue I, because the crimes occurred on a reservation, Swayney would be tried in federal or tribal court.

[7] Appellant has requested that the Jackson County Clerk of Court forward a copy of the interrogation DVD (State's Exhibit 214) to this Court. At trial, the State played the recording between 1:29:23 and 2:16:42. The State also stopped and started the recording between 1:35:39 and 1:35:43, and between 1:59:06 and 1:59:34. (XIpp 2417-19, 2453-54, 2494-96; XIIpp 2512-15)

Wolfe's pickup truck and parked at the hotel. Mr. Nobles left the truck with a black gun and said he was going to get a "book." Fifteen minutes later, Carothers heard shots and Mr. Nobles ran back to the truck with a purse, got in, and said, "Go, go, go." Carothers "took off," turning right, and drove to Wolfe's house. Mr. Nobles said the woman wouldn't give him her purse, so he hit her with the gun. He fired a warning shot and hit her again with the gun and it went off. The woman said, "Oh" and dropped to the ground. A man tried to chase Mr. Nobles, but he fell. Mr. Nobles counted the money in the purse, approximately $5,000, then they drove to Swayney's house. Mr. Nobles and Carothers went with Swayney to a back room where Carothers went through the purse. She took the battery out of the cell phone from the purse, and removed a pill bottle and money. They went outside and burned the purse and its remaining contents in the burn barrel. Swayney gave Mr. Nobles some clothes, including black nylon pants, and Mr. Nobles left his clothes at Swayney's. Later, Mr. Nobles sold the gun. After a reward was offered, Swayney told Carothers he could be $25,000 richer because he had Mr. Nobles' clothes. (St. ex. 214; Supp 95-96)

Carothers pled guilty to aiding and abetting "robbery by force and violence" in federal court.[8] (Xpp 2180-82; Supp 88-89)

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[8] Carothers was an enrolled member of a Cherokee tribe. (Xp 2183) *See* note 6.

3. Mr. Nobles' Statement.

The officers Mirandized and interrogated Mr. Nobles.[9] For over an hour, he denied involvement in the crimes. (XIIpp 2516-17, 2633-34) After part of Carothers' video confession was played for him, Mr. Nobles said, "Can I consult with a lawyer, I mean, or anything? I mean, I – I – I did it." The officers continued the interrogation. Mr. Nobles stated that after he exited the truck with his Glock .40-caliber handgun, he saw the Preidts exit their van. He grabbed Ms. Preidt's purse. As they struggled over the purse, he fired one shot in the air. As they continued to struggle, the gun went off. Mr. Nobles acted out the altercation. After getting the purse, he ran to the truck and told Carothers, "Man, go, go, go, go." He told Carothers he might have killed a woman when they struggled over her purse and the gun went off. Mr. Nobles and Carothers went to Swayney's, and Swayney said he heard about the shooting on the police scanner. Mr. Nobles sold the gun, and the purse "got burnt." Mr. Nobles thought he threw away the black parachute pants, gloves, and a mask he was wearing. Then he remembered Swayney may have given him some clothes. (Supp 154-69, 172-73, 179; St. ex 204A)

4. Additional Evidence.

On November 30, 2012, officers found four Hornady .40-caliber shell casings outside Wolfe's house; three were fired from the murder weapon. In

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[9] Appellant has requested that the Jackson County Clerk of Court forward a copy of the redacted DVD (State's Exhibit 204A) of the interrogation to this Court.

2015, 11 weathered shell casings that were fired from the murder weapon were found on Swayney's property.[10] Swayney testified Mr. Nobles brought the murder weapon to his house and they had shot it. (IVp 1065; Vpp 1161-62; VIIp 1484-85; IXp 2011-19, 2092, 2106-21; Supp 82-87; 4Rpp 533, 541-42)

John Wolfe testified that on September 30, 2012, Mr. Nobles and Carothers left at 8:30 or 9:00 p.m. in Wolfe's truck. The next day, he noticed his license tag had been removed from the back window and placed on the front bumper where his UNC tag had been. Carothers said the UNC tag was at Swayney's house and she later gave it to Wolfe. (VIIp 1687; VIIIpp 1760-68, 1795)

Lexi McCoy testified that on September 30, 2012, she was at home with Swayney and Gentry, watching television in the living room. Gentry was asleep. After McCoy heard about the shooting on the police scanner, Mr. Nobles and Carothers came over. Swayney went to his bedroom with them, walking past McCoy. McCoy didn't see a gun or purse. Then they walked past McCoy and went out the back door. McCoy didn't notice Mr. Nobles wearing different clothes. There was a fire in the burn barrel. McCoy went outside, then went inside because Carothers told her to. (VIIpp 1577-87, 1597-98, 1601, 1616, 1624)

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[10] Although the murder weapon was not recovered, markings on the 14 shell casings matched the markings on the shell casing under Ms. Preidt's body. (IXpp 2061-2107; Supp 83-86)

Mr. Nobles' mother testified she had once seen Mr. Nobles with a short, black pistol resembling a Glock. (VIpp 1296-98)

Swayney and Carothers testified against Mr. Nobles. (VIpp 1352-45; VIIpp 1452-61; Xpp 2168-73, 2178-2200, 2217-51)

The following did not testify: the lead investigator, CIPD Detective Sean Birchfield (VIIIp 2654); CIPD Lieutenant Gene Owle, who made important decisions about the investigation (XIIpp 2555-56, 2613-14, 2618, 2655); and SBI Agent Kelly Oaks, who was present at the crime scene and interrogations (XIIp 2596), and who participated in searching Wolfe's and Swayney's properties. (Vp 1162; VIIpp 1479, 1484)

STANDARDS OF REVIEW

The following are reviewed *de novo*, where the reviewing court considers the matter anew. *State v. Borders*, 236 N.C. App. 149, 157, 762 S.E.2d 490, 498-99 (2014).

- Whether the trial court lacked subject matter jurisdiction, or should have submitted the jurisdictional issue to the jury, *State v. Rick*, 342 N.C. 91, 463 S.E.2d 182 (1995) (Issues I-II);
- Constitutional issues, *State v. Graham*, 200 N.C. App. 204, 683 S.E.2d 437 (2009) (Issues I-III);
- Clerical errors. *State v. Edwards,* 164 N.C. App. 130, 595 S.E.2d 213 (2004). (Issue IV).

Upon a motion to dismiss for lack of subject matter jurisdiction, factual findings are binding if supported by competent evidence. *Cooke v. Faulkner,* 137 N.C. App. 755, 529 S.E.2d 512 (2000). (Issue I)

ARGUMENT

I. THE STATE LACKED SUBJECT MATTER JURISDICTION.

The State of North Carolina had no subject matter jurisdiction because Mr. Nobles is an Indian. When a "major crime" is committed by an Indian in Indian country, jurisdiction lies in federal court. 18 U.S.C. §1153. Absent federal legislation granting jurisdiction, a State may not assume jurisdiction over such a matter. *Worcester v. Georgia*, 31 U.S. 515, 8 L.Ed. 483 (1832). Here, it is undisputed that the crimes occurred in "Indian country"[11] (8/13p 8); and that if the crimes were committed by an "Indian," jurisdiction would lie in federal court. (1Rpp 116-18, FF 227-30, 237) It is also undisputed that Mr. Nobles is a First Descendant of the Eastern Band of Cherokee Indians (EBCI). (8/9/13pp 9-10) Because Mr. Nobles is an Indian, the State had no jurisdiction.

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[11] "Indian country" includes land held in trust by the United States for a federally-recognized tribe. 18 U.S.C. §1151; Felix S. Cohen, Cohen's Handbook of Federal Indian Law §9.02[1][b] (Lexis 2015) (Cohen); Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 507-13 (1976) (Clinton).

A. Pertinent Proceedings.

Mr. Nobles made a pretrial motion to dismiss based on lack of subject matter jurisdiction. U.S. Const., Art. I, §8, Art. III, §2, Art. IV, cl. 2, amend. XIV; N.C. Const. art. IV, §12; 18 U.S.C. §1153; G.S §1E-1. (1Rpp 17-30) An evidentiary hearing was held:

1. The Crime and Arrests.

On September 30, 2012, a man fatally shot Barbara Preidt, a white woman, and stole her purse on the Qualla Boundary, the reservation for the EBCI, a federally-recognized Indian tribe. (8/9/13pp 8, 29-30, 157)

George Nobles, Ashlyn Carothers, and Ed Swayney were suspects. Mr. Nobles and Carothers were living together on the Qualla Boundary. On the night of November 29, 2012, officers took the suspects into custody and brought them to the CIPD, where the suspects were arrested. (8/9/13pp 30-31, 38-40, 69; Supp 4-6)

Under Rule 6(a)(1) of the Cherokee Rules of Criminal Procedure (CRCP) (2Rpp 149a-c), "[a] person making an arrest within the Qualla Boundary must take the defendant without unnecessary delay before a Magistrate or Judge[.]" Then, "[t]he Magistrate shall conduct the '*St. Cloud*' test[12] to confirm that the defendant is an Indian." Rule 6(b)(1). Under the CRCP version of this test, if

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[12] As explained below, under this test, various factors are considered to determine if a person is an Indian for jurisdictional purposes.

the arrestee swears he is an EBCI enrolled member, an EBCI First Descendant,[13] or a member of another federally-recognized tribe, "the [Tribal] Court has jurisdiction over the defendant."[14] *Id.*

EBCI Magistrate Sam Reed testified that under Rule 6, when an arrest occurs on tribal land, the arrestee must be brought before a magistrate to complete an affidavit of jurisdiction. If the arrestee is an enrolled member of any federally-recognized tribe or an EBCI First Descendant, jurisdiction lies with the tribal court. Reed explained that "all persons" arrested on the Qualla Boundary must be brought before a tribal magistrate for a jurisdictional determination because "judging by one's complexion, you can't tell if they are Native American or not." (9/13/13pp 23-24, 32-33; 1Rp 24)

Here, although all three suspects were arrested on the Qualla Boundary, Mr. Nobles wasn't taken before a tribal magistrate. Detective Birchfield checked an EBCI enrollment book and determined Swayney was enrolled, but Mr. Nobles was not. Birchfield had heard that Carothers was enrolled in another tribe. (8/9/13pp 8-9, 38-40, 44-45)

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[13] An enrolled member is a person who meets the EBCI enrollment criteria and has been approved. (8/9/13p 91-92) First Descendants are "children of enrolled members who do not possess sufficient blood quanta to qualify for enrolment[.]" *In re Welch*, 3 Cher. Rep. 71, 75 (2003). (1Rpp 35-40)

[14] If the defendant is accused of a "major crime," the federal courts later assume jurisdiction. 18 U.S.C. §1153.

Jackson County ADA Jim Moore, EBCI tribal prosecutor and Special Assistant United States Attorney Jason Smith, and CIPD officers discussed what to do with the suspects. Although Birchfield knew that Mr. Nobles "was living on tribal land" and "affiliating with enrolled members of either the EBCI or another tribe," it was not known he was a First Descendant. No one asked Mr. Nobles if he was a First Descendant. Based on a National Crime Information Center report from 1993 designating Mr. Nobles as "white," it was decided Mr. Nobles would be charged in State court. (8/9/13pp 53-55, 62, 69-70)

Carothers appeared before Magistrate Reed and was served with homicide and robbery warrants. Reed's database of EBCI enrolled members did not list First Descendants or members of other tribes. Reed went through the affidavit of jurisdiction with Carothers. Carothers told Reed she was a member of the "Western Band of Cherokee." Therefore, Carothers was "an Indian and under the jurisdiction of the tribal court." (9/13/13pp 11-13, 22, 29; Supp 16-17; 1 Rp 141) Carothers was held at the CIPD pending a federal prosecution. (8/9/13p 54)

Reed followed this procedure for Swayney. Swayney was charged with tampering with evidence. (9/13/13pp 14-16; 1Rp 143; Supp 4)

Mr. Nobles was not brought before Reed. If he had been, and "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." (9/13/13pp 25-26)

Mr. Nobles was transported to Jackson County. (8/9/13p 32)

2. Mr. Nobles' Background.

Mr. Nobles was born in Florida in 1976 to George Robert Nobles, a non-Indian, and EBCI enrolled member Donna Mann. When Mr. Nobles was an infant, his father brought him to North Carolina and left him with Furman Smith, Mann's brother. Smith lived on the Qualla Boundary. Smith's family had been living on that property for 200 years. Smith is an EBCI enrolled member and his "father and all his people on his side were enrolled members." Other family members resided on the property, including Smith's sister-in-law, Tonya Crowe. (9/13/13pp 47, 50-53, 56-60; Supp 2-3)

Mann returned to Cherokee in 1983 or 1984. After that, Mann and her son lived on or near the Qualla Boundary. Until at least 1990, Mr. Nobles attended Cherokee tribal schools and Swain County schools. (9/13/13pp 61-67, 74-91; Supp 36-76) The Cherokee school enrollment forms stated the schools were "[f]unded or [o]perated" by the Bureau of Indian Affairs (BIA). (9/13/13pp 76, 79; Supp 39, 42, 48). On one BIA Student Enrollment Application, Mann listed her son's "Degree Indian" as "none." Mann believed "it was the father's degree of Indian blood that . . . mattered," but her mother corrected her. (9/13/13pp 96, 99-100; Supp 48) On two other enrollment applications, Mann listed her son's tribal affiliation as "Cherokee." (Supp 39, 42) On Mr. Nobles' "Individual Student Record" for the 1986-1987 school year, his race was listed as "I." (Supp 57) On BIA "Indian Student Certification" forms Mann filled out

in 1990, she listed her son as an "Eligible Child" and listed her tribe as "Cherokee Indian" and "Eastern Cherokee." Mr. Nobles' First Descendant status qualified him for government recognition as an Indian student. (9/13/13pp 82-87; Supp 43-44) The Cherokee School records also contained Mr. Nobles' BIA-issued "School Health Record." (Supp 53)

Mr. Nobles was in car accidents in 1983 and 1985 and received treatment at Swain County Medical Center and the Cherokee Indian Hospital (CIH). In both instances "Cherokee" paid for medical services not covered by insurance. (9/13/13pp 67-74; Supp 22-35) Mr. Nobles visited the CIH five times between 1985 and 1990. He was not charged because he is a First Descendant. The number assigned to him in CIH records indicated he is of EBCI Indian descent. His hospital chart identified him as an "Indian nontribal member." (8/9/13pp 168-82; Supp 8-15) While the hospital is now run by the EBCI, at that time CIH was part of the Indian Health Service (IHS), the federal agency that provides health care to Indians. 25 U.S.C. §1661(a). For Mr. Nobles to receive free medical services at CIH through the federal government, Mann was required to show her birth certificate – which lists tribal affiliation and blood quantum – or her tribal enrollment card. (8/9/13pp 170, 181; Supp 20)

When Mr. Nobles was 17 years old, he was convicted of crimes in Florida. In a presentence report, Mr. Nobles was designated "W/M." Although the defense stipulated the report was admissible as a business record, the defense

stated it did not stipulate that the information in the document was accurate. (8/9/13pp 10, 14; 1Rp 129)

In November 2011, Mr. Nobles was released from prison. His post-release supervision was transferred to Gaston County, North Carolina, where he lived with his mother. In March 2012, Mr. Nobles' supervision was transferred to Jackson County, where he lived on the Furman Smith property with Tonya Crowe. (8/9/13pp 14, 71-72; 9/13/13pp 51)

Mr. Nobles was supervised by Probation Officer Olivia Ammons. Ammons saw Mr. Nobles at Crowe's house in March 2012. In April 2012, Mr. Nobles told Ammons he was still living there and was working at a restaurant on the Qualla Boundary. In May 2012, he informed Ammons he was still living with Crowe. (8/9/13pp 70-74; Supp 7)

In June 2012, Mr. Nobles moved in with relatives in Bryson City, not on the Qualla Boundary. That month, Ammons visited the address and was told Mr. Nobles sometimes stayed with his girlfriend. Later that month, Mr. Nobles told Ammons he quit his job, and asked for help getting a photo ID. Ammons printed out a Division of Adult Correction document containing demographic information which listed Mr. Nobles' race as "white." (8/9/13pp 77-80, 83; Supp 1)

In July 2012, Mr. Nobles' supervision was transferred to Gaston County because he moved in with his mother. His Probation Officer was Christian

Clemmer. In the OPUS system and the Interstate Compact for Adult Supervision System, Mr. Nobles is classified as white. The latter classification was entered by the State of Florida. Clemmer had never discussed Mr. Nobles' race with him, or with anyone he supervised. Ammons testified issues of race and tribal membership don't come up during supervision. (8/9/13pp 15-17, 21-23, 82, 86)

3. Other Evidence.

EBCI Assistant Enrollment Officer Kathy McCoy testified Donna Mann is an enrolled EBCI member and Mr. Nobles is not. As a First Descendant, Mr. Nobles was entitled to a letter of descent from the enrollment office, but no letter had been issued. (8/9/13pp 90-96; 1Rp 145)

Detective Birchfield testified there was no record Mr. Nobles had been charged within the tribal system. A juvenile record would not have shown up in the record check. (8/9/13pp 101-02)

EBCI Attorney General Annette Tarnawsky testified that as the child of an enrolled member, Mr. Nobles was a First Descendant under tribal law. First Descendants receive health and dental care benefits; were not eligible for services funded by tribal money, but were eligible for federally-funded services; and have various use rights to possessory holdings[15] held by the First Descendant's parent at the time of death. First Descendants receive a hiring

[15] Tribal land is divided by the tribe into "possessory holdings." (8/9/13p 109)

preference for EBCI jobs over non-Indians. Enrolled members, their spouses, parents of enrolled children, and members of federally-recognized tribes receive preference over First Descendants. First Descendants can receive tribal funds for higher education, but enrolled members have priority. First Descendants cannot hold tribal office or vote in tribal elections. (8/9/13pp 103-16, 131; 1Rpp 43, 46-47, 51, 57)

Tarnawsky testified the rules recognizing and benefiting First Descendants were passed by the EBCI tribal council. CRCP Rule 6 was passed by the tribal council and ratified by the EBCI Principal Chief. Tarnawsky did not believe Rule 6 directed the tribal court to take jurisdiction over First Descendants, because "Jason Smith has . . . discretion to not pursue tribal charges," but agreed that the federal court had jurisdiction over MCA crimes with "an Indian perpetrator." (8/9/13pp 120-22, 133-36)

Myrtle Driver testified she had lived on the Qualla Boundary for much of her life, held positions in tribal government, and started a Cherokee language school. Driver testified about tribal events, most of which are open to the public. (8/9/13pp 137-43)

Driver testified that despite the fact that the Cherokee Code gives First Descendants access to tribal benefits, "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." Driver did not know Mr.

Nobles and had not seen him at Cherokee ceremonies. Driver testified Mr. Nobles' tattoos (an eagle and a Native American) were not Cherokee – the Native American headdress was not Cherokee, and the eagle is "generic" because all Native Americans honor the eagle. (8/9/13pp 145-48, 153)

The trial court denied the motion to dismiss. (1Rp 86 - 2Rp 165) Mr. Nobles filed in our Supreme Court[16] an interlocutory petition for writ of *certiorari*, which was denied. (2Rpp 183-265) Mr. Nobles' renewed motion to dismiss was denied. (3/24/16pp 513, 520-26; 2Rpp 271-81)

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), and the Constitution delegates broad legislative authority over Indian matters to the federal government. U.S. Const. Article I §8, cl. 3; Art. II, §2, cl. 2; Art. IV, cl. 2. The federal government's power over Indian tribes is "plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200, 158 L.Ed.2d 420, 428 (2004); *Wildcatt v. Smith*, 69 N.C. App. 1, 3, 316 S.E.2d 870, 873 (1984). State law is normally inapplicable to Indian affairs within a tribe's territory without the consent of Congress. *Williams v. Lee*, 358 U.S. 217, 3 L.Ed.2d 251 (1959); *EBCI v. Lynch*, 632 F.2d 373 (4th Cir. 1980); Clinton, at 574 (federal policy with respect to reservations is "the minimization of the State's role in tribal life").

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[16] The State initially intended to proceed capitally. (2Rpp 169, 268-69)

Under the Major Crimes Act (MCA),

> [a]ny Indian who commits against the person or property of another Indian or other person . . . murder, . . . robbery, and [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). Under the MCA, when an Indian commits an enumerated crime against another person – Indian or non-Indian – in Indian country, jurisdiction lies in federal court to the exclusion of state court.[17] *United States v. John*, 437 U.S. 634, 651, 57 L.Ed.2d 489, 501 (1978). In this case, the crimes occurred in Indian country, and they are enumerated crimes under the MCA, or are otherwise subject to federal[18] or tribal jurisdiction. Therefore, if there was insufficient evidence of State court jurisdiction, the matter should have been dismissed. *State v. Smith*, 328 N.C. 161, 400 S.E.2d 405 (1991).

The MCA does not define "Indian," but courts use a test derived from *United States v. Rogers*, 45 U.S. 567, 11 L.Ed. 1105 (1846): whether the defendant has some Indian blood, and is recognized as an Indian by a tribe or the federal government.

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[17] Tribal courts likely retain concurrent jurisdiction. Cohen, §9.04.

[18] PFF would not be covered under the MCA. However, federal jurisdiction may lie under 18 U.S.C. §§13 and 1152. Cohen, §9.02[c][ii-iii]; Clinton, at 532-37.

1. EBCI Decisions.

Tribal law determinations of Indian status for jurisdictional purposes must comport with federal law. Cohen, §9.04. Accordingly, the EBCI has applied the *Rogers* test to determine Indian status for tribal court jurisdiction.

In *EBCI v. Lambert*, 3 Cher. Rep. 62 (2003) (1Rpp 25-27), the defendant, an EBCI First Descendant, moved to dismiss her criminal charge because she was not an EBCI enrolled member. The Court acknowledged it did not have jurisdiction over non-Indians. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 55 L.Ed.2d 209 (1978). However, "Indian nations have jurisdiction over criminal acts by Indians, regardless of the individual Indian's membership status with the charging tribe." 3 Cher. Rep. at 64 (citations omitted). The Court held that under *Rogers*, the defendant was an Indian for the purposes of tribal jurisdiction:

> 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, . . . 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, . . . First Descend[a]nts may, as this Defendant has,

> seek recourse in the Judicial Branch of Tribal Government.[19] Most importantly, . . . First Descend[a]nts are participating members of this community and treated by the Tribe as such.

Id. at 64 (footnote added).

The Court asserted that "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." *Id.* Instead, the second part of the *Rogers* test also considers "whether the Government has provided [the defendant] formally or informally with assistance reserved only for Indians, whether the person enjoys the benefits of Tribal affiliation, and whether she is recognized as an Indian by virtue of her living on the reservation and participating in Indian social life." *Id.*

The Court concluded that First Descendants, categorically, meet the federal definition of an Indian and are under tribal court jurisdiction. *Id.* *See Welch*, 3 Cher. Rep. at 75 ("this Court . . . held [in *Lambert*] that first lineal descendants . . . are . . . subject to the criminal jurisdiction of the Court"). *Cf. EBCI v. Prater*, 3 Cher. Rep. 111, 112-13 (2004) (App 1-2) (distinguishing *Lambert* 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'").

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[19] The defendant was the plaintiff in a tribal court case.

2. Federal Court Decisions.

For the first *Rogers* prong ("some Indian blood"), "[t]here is no specific percentage of Indian ancestry required to satisfy the 'descent' prong of [the *Rogers*] test." Cohen, §3.03[4]; *see United States v. Maggi*, 598 F.3d 1073, 1080-1081 (9th Cir. 2009) (1/64 may satisfy test), *overruled in part on other grounds by United States v. Zepeda*, 792 F.3d 1103 (9th. Cir. 2015); *United States v. Stymiest*, 581 F.3d 759, 762, 766 (8th Cir. 2009) (3/32 sufficient).

For the second *Rogers* prong, federal courts consider the "*St. Cloud* factors" to determine if a person is recognized as an Indian by a tribe or the federal government:

- tribal enrollment;
- government recognition formally and informally through receipt of assistance reserved for Indians;
- enjoyment of 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.

Stymiest, 581 F.3d at 763; *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005); *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988).

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 ("these four factors . . . should not be deemed exclusive"), *overruled in part on other grounds by Zepeda*. The Eighth Circuit does not consider the factors in any

order of importance, unless the defendant is an enrolled tribal member, which is dispositive of Indian status. *See Stymiest*, 581 F.3d at 763-64 ("the *St. Cloud* factors may prove useful, . . . but they should not be considered exhaustive"). The Seventh Circuit employs a "totality of the circumstances" test and does not require that specific factors be considered in any order of importance. *United States v. Torres*, 733 F.2d 449, 456 (7th Cir. 1984).

Federal courts agree that tribal enrollment, while generally sufficient by itself to show Indian status, is *not* a requirement for Indian status under the MCA. *Bruce*, 394 F.3d at 1225, n.6; *United States v. Loera*, 952 F. Supp. 2d 862, 871 (D. Ariz. 2013); *Stymiest*, 581 F.3d at 766; *St. Cloud*, 702 F. Supp. at 1461; Cohen, §3.03[4].

3. North Carolina Decisions.

There are no modern North Carolina decisions concerning Indian country criminal jurisdiction.[20] In its civil jurisprudence regarding the EBCI, our appellate courts have recognized the broad nature of federal power over Indian country matters, and 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

[20] North Carolina asserted jurisdiction in older cases that are now invalid. *See discussions in Lynch*, 632 F.2d at 379 n.34; *Wildcatt*, 69 N.C. App. at 2 n.1, 316 S.E.2d at 872 n.1.

> 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. "[A]ny 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) (citation omitted; alteration in *McCracken*).

Therefore, North Carolina civil decisions defer to the EBCI's "right of tribal self-government." *E.g.*, *Jackson Co. ex rel. Smoker v. Smoker*, 341 N.C. 182, 459 S.E.2d 789 (1995) (Jackson County had no jurisdiction over action to recover AFDC payments where tribal court had assumed jurisdiction); *In re E.G.M.*, 230 N.C. App. 196, 750 S.E.2d 857 (2013) (favoring tribal jurisdiction where testimony suggested but did not establish agreement by EBCI to defer to State courts in Chapter 7B matters).

C. Mr. Nobles is an Indian.

1. Mr. Nobles Is an Indian Under the Rogers *Test.*

Mr. Nobles is an Indian under the *Rogers* test because he has some Indian blood, and he has been recognized as an Indian by the EBCI as a matter of law.

First, Mr. Nobles has "some Indian blood." (1Rp 121, FF 258-59)

Second, Mr. Nobles has met the "tribal recognition" requirement as a matter of law: in *Lambert*, the Cherokee Court held that all First Descendants are Indians under *Rogers* and are subject to tribal jurisdiction, as codified in CRCP Rule 6. 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 articulated as tribal *or* government recognition. *Bruce*, 394 F.3d at 1224-25; *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001); *Torres*, 733 F.2d at 45; *St. Cloud*, 702 F. Supp. at 1461. Setting out this requirement in the disjunctive acknowledges that Indian tribes are sovereign entities "with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-82, 30 L.Ed. 228, 230 (1886). "[T]he 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 "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 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). *See Santa Clara Pueblo* (refusing to recognize cause of action against tribe for challenge to tribe's membership

rule); *Cherokee Intermarriage Cases*, 203 U.S. 76, 51 L.Ed. 96 (1906) (deferring to tribal law on property rights of non-Indians married to Indians).

Here, *Lambert* and CRCP Rule 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, "The facts of *Lambert* are clearly distinguishable from the situation regarding the Defendant" because "Lambert presented testimony she was involved in the Cherokee community, availed herself of the opportunities open to First Descendants, and had . . . 'availed herself of the Court's civil jurisdiction.'" In contrast, the trial court found that Mr. Nobles "simply has no ties to the Qualla Boundary" and "presented no evidence of social recognition as an Indian and participation in the Indian social life of the Qualla Boundary." (1Rp 125, FF 270-72) (citation omitted).

The trial court's characterization of the facts of *Lambert* is inaccurate. In *Lambert*, the parties stipulated Lambert was a First Descendant and a plaintiff in a pending tribal court case. Further, "the Court heard testimony from Teresa B. McCoy, a member of the Tribal Council[,] and Dean White . . . of the [BIA] . . . [and] reviewed the submissions of the parties and heard the argument of counsel." 3 Cher. Rep. at 62. No other evidence was noted. Therefore, although "Lambert . . .'availed herself of the Court's civil jurisdiction,'" it is incorrect to state that "Lambert presented testimony she was involved in the Cherokee community [and] availed herself of the opportunities open to First

Descendants." Instead, Councilwoman McCoy testified First Descendants *in general* are considered by the tribe to be participating members of the community. *Id.* at 64.

The trial court's analysis also fundamentally misconstrues *Lambert*'s holding. *Lambert* did not simply hold that Lambert herself was an Indian; instead, *Lambert* held *all First Descendants* are Indians due to the benefits and recognition afforded them by the EBCI. This was confirmed in *Welch*, where the Court reiterated that "first lineal descendants . . . are . . . subject to the criminal jurisdiction of the Court," 3 Cher. Rep at 75, and *Prater*, where the Court contrasted First Descendants – who are all "Indians" – with Second Descendants, who may be Indians in some instances. 3 Cher. Rep. at 112-13.

Therefore, the EBCI has determined that First Descendants have a special status in relation to the EBCI, and has bestowed upon First Descendants benefits of tribal association and benefits available to Indians through the federal government. *Lambert* shows that First Descendants meet, as a matter of law, the second *Rogers* requirement.

Further, 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). Although the EBCI is not an entirely separate "nation," "the [EBCI], 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 (citation omitted). Similarly,

> the Tribal Court is a 'semi-independent' entity. It is neither a division of the General Court of Justice of . . . North Carolina, nor a federal court[.] . . . 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, 218 N.C. App. 179, 183, 720 S.E.2d 825, 828 (2012).

In accord with this policy of "comport[ing] with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence," *McCracken*, 201 N.C. App. at 491, 687 S.E.2d at 697, this Court should defer to the tribal court's holding in *Lambert* that all First Descendants are Indians under *Rogers*. *See Carden*, 218 N.C. App. at 185, 720 S.E.2d at 829 (citation omitted) (argument concerning jurisdiction of tribal court should be raised before tribal courts "as an exercise of 'the self-governance of the [EBCI]'"); *Hatcher v. Harrah's N.C. Casino*, 169 N.C. App. 151, 157, 610 S.E.2d 210, 213-14 (2005) (deferring to tribal procedure in resolving gaming conflicts because "exercise of state court jurisdiction . . . would unduly infringe on the self-governance of the [EBCI]"). *See also Iowa Mutual Insurance v. LaPlante*, 480 U.S. 9, 14-15, 94 L.Ed.2d 10, 20 (1987) ("Tribal courts play a vital role in tribal self-government, . . . and the Federal Government has consistently encouraged their development.").

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

As shown above, Mr. Nobles satisfied the *Rogers* test because he is of Indian descent and the EBCI has recognized him as an Indian as a matter of law. This Court is bound by *Rogers*, but is not bound by analyses of the second *Rogers* prong in lower federal decisions. *Pender County v. Bartlett*, 361 N.C. 491, 516, 649 S.E.2d 364, 379 (2007). Nevertheless, even if this Court chooses to apply the *St. Cloud* test, Mr. Nobles is an Indian under that test.

First, while Mr. Nobles is not an enrolled EBCI member, he has been afforded a special status as a First Descendant. As recognized by the Ninth Circuit – 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, *overruled in part on other grounds by Zepeda*.

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

In this regard, several of the trial court's findings relevant to the *St. Cloud* factors are unsupported.[21] No evidence was presented that Mr. Nobles "never

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[21] Challenged findings discussed in this section and section I.D. are provided in full in the Appendix.

enjoyed the benefits of a possessory interest by renting or leasing an interest in tribal lands;" "was never employed by the [EBCI] government or any of its enterprises;" "never applied for or received financial assistance available to First Descendants from the [EBCI] for attendance at any post-secondary educational institutions;" and "never hunted or fished on the Qualla Boundary." (1Rpp 122-23, FF 262.c., l., p., & q.) Although AG Tarnawsky testified she was "not aware" of "attempts to use any of these rights by Mr. Nobles" (8/9/13pp 116-17), this testimony does not show Mr. Nobles never engaged in these activities. *See 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 presented concerning whether Mr. Nobles can speak Cherokee. (1Rp 123, FF 262.t.)

Additionally, while Detective Birchfield testified there was no record Mr. Nobles had been prosecuted in tribal court (8/9/13p 101), there was no evidence Mr. Nobles was never a party in a tribal court civil matter. (1Rp 123, FF 262.h.) Juvenile matters would not have been revealed by a criminal records search. (8/9/13pp 101-02)

While Myrtle Driver testified she had never seen Mr. Nobles at an Indian cultural event, that Mr. Nobles "*never* participated in Indian religious ceremonies, cultural festivals or dance competitions" (1Rp 123, FF 262.r.) (emphasis added), is unsupported. Further, there was no evidence that "the annual fall festival . . . is the single most important social event in the life of the

Cherokee community." *Id.* Finally, although "Defendant . . . [did not] present[ ] evidence of . . . an aptitude for arts and crafts unique to the Cherokee," no evidence was presented that he never "demonstrated an aptitude for" these activities. (1Rp 123, FF 262.s.)

Contrary to the finding that Mr. Nobles "never benefited from his special status as a First Descendant and is not recognized as an Indian by the [EBCI] . . . or the federal government" (1Rp 126, FF 275), the evidence showed Mr. Nobles was recognized by the government through receipt of assistance reserved for Indians, and has enjoyed benefits of tribal affiliation. Mr. Nobles received federally-funded services from the IHS. He was not charged for these services because he is a First Descendant. CIH records indicated he is of EBCI descent, 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 IHS services as descendant of enrolled member satisfies second and third prongs of *Bruce* (*St. Cloud*) test, and distinguishing *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009), where "the record was *completely devoid* of evidence showing . . . Cruz had received *any* benefits from his tribe") (emphasis added); *United States v. Keys*, 103 F.3d 758, 760 (9th Cir. 1996) (unenrolled child was "*de facto* member" of tribe and an Indian where, *inter alia*, she received medical services at IHS hospital where her enrolled mother took her). *Cf. Loera,* 952 F. Supp. 2d at 872 (defendant not an Indian where, *inter alia*, he did not receive IHS services).

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. He attended Cherokee tribal schools. In enrolling Mr. Nobles, Mann declared his Indian status. He was recognized by the federal government as an Indian student. (Supp 39, 42-44, 57)

After leaving prison, Mr. Nobles returned to living on or near the Qualla Boundary, often with enrolled tribal members. He got a job on the reservation, and lived on the reservation with Carothers, a member of another tribe. *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*, Nos. 185415, 189441, 1996 Mich. App. LEXIS 960, at *5-6 (Mich. Ct. App. Oct. 11, 1996) (per curiam) (unpub.) (that defendant "lived on a reservation" and "attended school on the reservation" showed defendant socially recognized as an Indian); *cf. Loera*, 952 F. Supp. 2d at 873 (defendant not an Indian where he never worked on and could be excluded from reservation). Further, Mr. Nobles' tattoos show an attempt to hold himself out as an Indian. *See Stymiest*, 581 F.3d at 763-64.

Finally, the EBCI tribal court's exercise of jurisdiction over First Descendants shows Mr. Nobles has been recognized by the EBCI as an Indian. *See LaBuff*, 658 F.3d at 879; *Bruce*, 394 F.3d at 1226. Mr. Nobles would have been under tribal court jurisdiction on November 30, 2012 had Magistrate Reed not been bypassed. Reed testified if Mr. Nobles had "been brought in front of

[him] and . . . 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." (9/13/13pp 23-26)

Therefore, Mr. Nobles is an Indian, and Jackson County had no jurisdiction over him.

D. Alternately, the Case Must Be Remanded.

Alternately, Mr. Nobles must be granted a new hearing because several factual findings were unsupported; the trial court failed to make findings on relevant evidence; and the trial court erroneously found it was required to follow Ninth Circuit law in analyzing the second *Rogers* prong.

In addition to those noted above, unsupported findings include:

> 13. [T]he race of Defendant in the Interstate Commission Compact paperwork is white/Caucasian. [See Attachment 'B' (page 1 of Probation Records)] . . . [T]he Defendant was presented with the application[.] . . . [T]he Defendant signed the application on August 11, 2011.
>
> 25. . . . When the request for screening form . . . was completed, the information . . . identified Defendant as white/Caucasian. . . . Defendant signed the request on May 7, 2012. [See Attached 'C' (page 51 of Probation Records)]. It was at th[e] [May 12, 2012] meeting [with Ammons] that Attachment 'C' was generated.
>
> 263. As late as August 11, 2011 and May 7, 2012, Defendant identified himself as white/Caucasian in North Carolina probation documents. . . .

(1Rpp 88, 89, 123) (second and sixth brackets in original).

Although Officer Clemmer testified that "in the ICASOS, . . . [Mr. Nobles] is classified as white" and Officer Ammons testified that in general, a defendant signs his Interstate Compact transfer request (8/9/13pp 16, 83-84), Attachment B (1Rpp 131-32) was not shown to or identified by either officer or entered into evidence. With respect to the May 7, 2012 visit, Officer Ammons testified Mr. Nobles "advised me that he had kept his TASC assessment schedule that day, and I scheduled him an appointment for June." (8/9/13pp 74-75) Attachment C (1Rpp 133-34), was not shown to, identified by, or discussed by 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. At the hearing, the parties requested copies of the file. The trial court stated it would review the file *in camera* (8/9/13pp 18-19, 58), and later stated it would provide copies to the parties. (9/13/13pp 4-5) The file was not mentioned again at the hearing.

On October 9, 2013, almost a month after the hearing, the trial court ordered that the file be turned over to the parties. (1Rpp 84-85) Therefore, the documents referenced in Findings 13, 25, and 263 and attached to the trial court's Order were not in evidence or available to the parties during the hearing. Further, it is an overstatement to find that Mr. Nobles "identified himself as white/Caucasion" (1Rp 123, FF 263) by signing these ministerial documents.

> 15. [T]he Defendant neither informed DAC of any . . . Native American programs available to him nor sought

> assistance from any DAC employee seeking special programs available for Native American individuals . . . .

(1Rp 88)

Although Officers Clemmer and Ammons testified Mr. Nobles hadn't discussed his race with them, this does not mean Mr. Nobles *never* discussed Native American programs with *anyone* from DAC. Further, Mr. Nobles was supervised by two other probation officers who did not testify. (8/9/13p 21)

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

(1Rp 89)

Although Ammons testified she received a phone call from Crowe (8/9/13p 75), there was no evidence as to the content of the conversation.

> 58. . . . It has long been the policy of the United States Attorney for the [W.D.N.C.] that . . . for criminal offenses occurring on the Qualla Boundary[,] law enforcement officers making an arrest are required to provide documentation to the [U.S.] Attorney certifying the defendant being charged is an enrolled member of a federally recognized tribe.

(1Rp 93)

No one from the United States Attorney's Office testified. Although Detective Birchfield testified that in every case he has had that went to federal court he had to provide documentation of enrollment in a federally-recognized tribe (8/9/13p 56), Birchfield did not testify how many cases had required this, or whether this was an actual "policy" of the United States Attorney's Office. In

any event, tribal enrollment is clearly not required under federal law for federal jurisdiction. *Stymiest*, 581 F.3d at 766.

> 109. . . . For over 20 years . . . [Myrtle Driver] 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. . . . [T]hese translations assist older members of the Tribe who either may be unable to attend sessions or . . . who primarily speak Cherokee to better understand the issues being debated.

(1Rp 100)

Although evidence was presented that Driver had "served as English clerk, and . . . [was] the Indian Clerk translator for [the] tribal council" (8/9/13pp 118, 139-41), Driver did not testify as to how long she had served. AG Tarnawsky testified Driver had held the clerk positions for "over 14 years" (8/9/13p 118), not 20 years. There was no evidence "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 . . . who primarily speak Cherokee[.]"

> 112. [T]he [EBCI] is comprised of approximately 14,000 members. Many but not all enrolled members reside on the Qualla Boundary.

(1Rp 100)

Although Driver testified there are "a little more than 14,000" EBCI enrolled members (8/9/13p 139), there was no evidence as to how many members reside on the Qualla Boundary.

> 116. [A]s part of the culture and tradition of the [EBCI] there is every fall in October the Cherokee Indian Fair. This has been a tradition attended by enrolled members for over 100 years. . . . [T]here is the Kituwah Celebration in June of each year located at the Ferguson Fields property now owned by the [EBCI]. Both of these events celebrate the arts, crafts, language, traditions and uniqueness of the Cherokee culture.

(1Rp 101)

Driver testified, "Our major event would be the Cherokee Indian fair, but more special to fluent speakers would be the Gadua celebration . . . in June" which "is the celebration of when we gained some land that was lost during the removal. It was commonly known as Ferguson Fields[.]" (8/9/13p 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 "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 was based on several unsupported findings of fact. *See E.G.M.*, 230 N.C. App. at 200-04, 750 S.E.2d at 860-62 (in termination of parental rights case involving

EBCI family residing on Qualla Boundary, assumption of subject matter jurisdiction by State must be supported by sufficient findings of fact).

There was also relevant evidence for which the trial court made no findings. The trial court failed to find that had Mr. Nobles appeared before Magistrate Reed, Reed would have found him to be an Indian and under tribal jurisdiction. (9/13/13pp 23-24, 26) This omission is significant because exercise of such jurisdiction is a factor demonstrating tribal recognition as an Indian. *LaBuff*, 658 F.3d at 879; *Stymiest*, 581 F.3d at 765; *Bruce*, 394 F.3d at 1226.

Although the trial court found as fact that "Ms. Mann represented to school admissions officials that her son was not Indian" on a school admission form (1Rp 109, FF 183), Mann explained she believed "it was the father's degree of Indian blood that . . . mattered," but her mother corrected her. (8/9/13pp 99-100) The trial court failed to find that on two other enrollment applications Mann listed Mr. Nobles' tribal affiliation as "Cherokee;" that on Mr. Nobles' "Individual Student Record" for the 1986-1987 school year, his race is listed as "I;" and that the BIA recognized him as an Indian student. (Supp 39, 42-44, 57)

The trial court also erroneously found it was bound by Ninth Circuit case law: "following the mandate established in *Bruce*[,] the four factors under . . . *St. Cloud* . . . are to be considered in declining order of importance" and "to determine whether the Defendant is Indian as defined by the [MCA], the undersigned must apply the *Rogers* test using the four [*St. Cloud*] factors . . . in declining order of importance." (1Rp 121, FF 253-54) (emphasis added).

North Carolina courts are bound by *Rogers*, but are not bound by lower federal decisions. Therefore, the Ninth Circuit's strict adherence to considering the *St. Cloud* factors in declining order of importance is not a mandate to our courts. The trial court acted under a misapprehension of law in finding it was required to apply this rigid test.

In keeping with the broad construction given the MCA and statutes that benefit Indians in general, *St. Cloud*, 702 F. Supp. at 1462; *McCracken*, 201 N.C. App. at 491, 687 S.E.2d at 697; *Wildcatt*, 69 N.C. App. at 13, 316 S.E.2d at 879, a less restrictive totality of the circumstances analysis is more appropriate than the *Bruce* test. The *St. Cloud* factors were "gleaned from case law" by a lower federal court almost 30 years ago 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." 702 F. Supp. at 1461. The *St. Cloud* court acknowledged its factors "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 Stymiest*, 581 F.3d at 764 ("[T]he *St. Cloud* factors may prove useful, . . . 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, categorically, are Indians. Here, analysis 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.

Mr. Nobles is an Indian because he has some Indian blood and has been recognized by the EBCI and the federal government as an Indian. His convictions must be vacated. Alternately, the case must be remanded.

II. THE TRIAL COURT ERRED BY DENYING THE REQUEST FOR A SPECIAL VERDICT.

The trial court erred by denying the defense request for a special verdict on subject matter jurisdiction.

As shown above, the trial court denied Mr. Nobles' motions to dismiss for lack of subject matter jurisdiction.[22] Mr. Nobles also moved to submit a special verdict to the jury on the issue of whether the trial court had jurisdiction over him because he is an Indian. U.S. Const. XIV; N.C. Const., art. I, §19. The motion was denied. (2Rpp 271-81; 3/24/16pp 520-26)

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[22] Mr. Nobles incorporates Issue I by reference.

"When jurisdiction is challenged, the defendant is contesting the very power of this State to try him." *State v. Batdorf*, 293 N.C. 486, 493, 238 S.E.2d 497, 502 (1977). "[J]urisdiction is a matter which . . . should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment." *Id.*

When territorial jurisdiction is challenged, if the trial court makes a preliminary determination that sufficient evidence exists from which a jury could conclude beyond a reasonable doubt that the crime occurred in North Carolina, "the trial court should also instruct the jury that if it is not so satisfied, it must return a special verdict indicating a lack of jurisdiction." *State v. Rick*, 342 N.C. 91, 101, 463 S.E.2d 182, 187 (1995). The trial court is required to so instruct if there is sufficient evidence from which the jury could find that the crime "might not have taken place in North Carolina." *State v. White*, 134 N.C. App. 338, 341, 517 S.E.2d 664, 667 (1999). Failure to so instruct "is reversible error and warrants a new trial." *State v. Bright*, 131 N.C. App. 57, 62, 505 S.E.2d 317, 320 (1998).

Mr. Nobles challenged North Carolina's subject matter jurisdiction. Although the Qualla Boundary is located in North Carolina, it is land held in trust by the United States for the EBCI. (8/9/13p 8) Accordingly, Mr. Nobles' claim has a territorial jurisdiction component. *See* Comment, *Criminal Jurisdiction in Montana Indian Country,* 47 Mont. L. Rev. 513, 513 (1986) (Indian country criminal jurisdiction is allocated among federal, state, and

tribal courts depending on "the subject matter of the crime, the persons involved . . . , and *the locus of the crime*") (emphasis added).

Further, to the extent this issue is not purely one of territorial jurisdiction, there can be no reasoned argument that the above procedures should not be applied when the defendant challenges any aspect of the trial court's subject matter jurisdiction if there are factual issues that could be determined by a jury. Although *Batdorf*, *Rick*, and *Bright* dealt with territorial jurisdiction, it is clear these holdings apply to the larger question of "the authority of a tribunal to adjudicate the questions it is called to decide," because "[w]hen jurisdiction is challenged, the defendant is contesting the very power of the State to try him." *Batdorf*, 293 N.C. at 493, 238 S.E.2d at 502.

Here, the trial court denied Mr. Nobles' motion to dismiss for lack of jurisdiction, implicitly finding that sufficient evidence existed from which a jury could conclude beyond a reasonable doubt that Mr. Nobles is not an Indian. *See Bright*, 131 N.C. App. at 62, 505 S.E.2d at 320. However, because there was evidence from which the jury could conclude Mr. Nobles is an Indian, *see* Issue I, the trial court should have instructed the jury that if it was not satisfied beyond a reasonable doubt that Mr. Nobles was not an Indian, it must return a special verdict indicating lack of jurisdiction. *See Rick*, 342 N.C. at 101, 463 S.E.2d at 187.

The trial court ruled it would not submit the special verdict because "the State previously proved beyond a reasonable doubt that North Carolina has

jurisdiction[.]" (2Rp 276, FF 13) However, a pretrial determination of jurisdiction is preliminary, and the defendant has a right to a special verdict if the initial motion to dismiss is denied and there is evidence from which the jury could determine the issue in the defendant's favor. *Bright*, 131 N.C. App. at 62, 505 S.E.2d at 320. Further, at trial, the burden is on the State to prove jurisdiction to the jury beyond a reasonable doubt. *Rick*, 342 N.C. at 101, 463 S.E.2d at 187; *Batdorf*, 293 N.C. at 494, 238 S.E.2d at 503. Thus, even if the trial court initially ruled there was sufficient evidence North Carolina had jurisdiction, because there was a factual issue as to jurisdiction, the trial court's ruling did not preclude the jury from finding that North Carolina lacked jurisdiction.

The trial court also ruled that "the special issue regarding territorial jurisdiction is inapplicable" because the territorial jurisdiction pattern jury instruction "is only relevant when a question arises regarding whether the offense may have occurred outside North Carolina." (2Rp 276, FF 16) However, just because a pattern instruction does not exist for a particular situation does not mean it is impossible to craft one. *See generally State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). Indeed, in its Order, the trial court quoted an instruction used in federal court when the Indian jurisdictional issue is submitted to a jury. (2Rp 278, FF 25)

Finally, the trial court stated that although the Indian jurisdictional issue is submitted to juries in federal court, "the Defendant's case is situated in . . .

North Carolina state court and not . . . federal court" and "[t]he [MCA] is a federal statute. There is no element in any of the . . . offenses for which Defendant has been indicted which require[s] the State to prove the Defendant is an Indian or a first descendant[.]" (2Rp 278, FF 26-27) The trial court's reasoning is in error. First, the trial court assumed the very thing the State had to prove. Because the crimes were committed in Indian country, if Mr. Nobles is an Indian, his tribe and the federal government had jurisdiction over him, not North Carolina. *See* Issue I. Moreover, "[w]hether the United States has acquired jurisdiction is a federal question." *State v. Smith*, 328 N.C. 161, 165, 400 S.E.2d 405, 407 (1991). Thus, the elements of the North Carolina offenses are irrelevant.

Second, the fact that a crime has occurred within North Carolina does not necessarily mean North Carolina has jurisdiction. In *State v. Smith*, North Carolina assumed jurisdiction over crimes committed in Camp LeJeune in Onslow County. Because the parties agreed "the State has ceded and the federal government has accepted jurisdiction over this territory[,]" our Supreme Court ruled that "Onslow County does not have jurisdiction to try the defendant." *Id.* at 166, 400 S.E.2d at 408. Accordingly, a crime may occur in North Carolina and still be under federal jurisdiction.

Mr. Nobles' motion to dismiss for lack of jurisdiction, renewed motion to dismiss, and request for a special verdict preserved this issue for review. Indeed, in *Bright* and *Rick*, the defendants conceded on appeal they had not

requested a special verdict, but argued the issue was preserved as a matter of law. (App 5-14) In both cases, the appellate court reached the merits of the issue and reversed the defendant's convictions. *Rick*, 342 N.C. at 101, 453 S.E.2d at 187; *Bright*, 131 N.C. App. at 62-63, 505 S.E.2d at 320-21. *Accord State v. Tucker*, 227 N.C. App. 627, 743 S.E.2d 55 (2013).[23]

Accordingly, the trial court erred by denying the defense request for a special verdict on jurisdiction. Mr. Nobles must be granted a new trial.

III. THE TRIAL COURT ERRED BY DENYING THE MOTION TO SUPPRESS.

The trial court erred by denying Mr. Nobles' motion to suppress his custodial statement to law enforcement because he invoked the right to counsel.

On the evening of November 29, 2012, Mr. Nobles and Ashlyn Carothers were arrested and brought to the CIPD. Carothers was interrogated and implicated herself and Mr. Nobles in the Fairfield crimes. Mr. Nobles was Mirandized and interrogated by Agent Oaks and Detective Iadonisi. (3Rpp 435-36, 438-40, FF 18, 35, 37, 42, 43, 46-50, 53, 60; St. ex. 204A)

Mr. Nobles denied involvement in the crimes for over an hour. (3/23/16p 382; Supp 102-56) The officers told Mr. Nobles that Carothers had implicated herself and Mr. Nobles in the crimes. The officers showed Mr. Nobles a portion

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[23] This Court may take judicial notice of the defendants' briefs in those cases. *State v. Thompson*, 349 N.C. 483, 497, 508 S.E.2d 277, 286 (1998). (App 5-18)

of Carothers' video interrogation in which she admitted their involvement. (3Rp 440, FF 60, 62-64; Supp 56, 152)

Mr. Nobles stated, "Can I consult with a lawyer, I mean, or anything? I mean, I -- I -- I did it. I'm not laughing, man, I want to cry because it's fucked up to be put on the spot like this." (3Rp 442, FF 80; Supp 154)

The interrogation did not end:

> BY DETECTIVE IADONISI:
>
> Q George, you have that right, okay.
>
> A I mean, off the record, off the record, off the record.
>
> Q If you want to talk about it without [an attorney] here, that's fine, okay. We just read you your rights. I mean, you have the right to have him here. But if you want to talk to us eyeball to eyeball, that's fine too. It's up to you. It's up to you.
>
> BY AGENT OAKS:
>
> Q We can never make that choice for you one way or another.
>
> A Yeah, but ---
>
> BY DETECTIVE IADONISI:
>
> Q We kept up our end.
>
> A And I told you I'm going to keep up mine. But man, listen, now don't let that girl go down now. Because what happened that night, man, that girl did not know ---

(Supp 154-55)

Upon continued interrogation, Mr. Nobles fully confessed to the Fairfield crimes and acted out what occurred. (Supp 155-81)

Mr. Nobles moved to suppress his statement because his invocation of the right to counsel was not honored. U.S. Const. V, XIV; N.C. Const. art. I, §§19, 23. (3Rpp 323-39) After a hearing, the trial court denied the suppression motion in open court, ruling that the invocation was ambiguous.[24] (3/24/16 pp 506-12) At trial, over constitutional objections, Detective Iadonisi testified to what Mr. Nobles said in the interrogation; the jurors read transcripts of the interrogation as the video was played at trial; and the video and transcript were admitted into evidence. (XIIpp 2521-37, 2542-48; St. ex 204A; Supp 97-182) The trial court later entered two written Orders denying the motion. (3Rpp 434-50 – 4Rp 489)

"[A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation . . . until counsel has been made available to him, unless the accused himself initiates further communication . . . with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L.Ed.2d 378, 386 (1981). "*Edwards* set forth a 'bright-line rule' that *all* questioning must cease after an accused requests counsel." *Smith v. Illinois*, 469 U.S. 91, 98, 83 L.Ed.2d 488, 495 (1984) (per curiam) (citation omitted).

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[24] In its second *nunc pro tunc* written Order denying the motion to suppress the statement, the trial court also denied the motion on the basis that it was filed two days late. (4Rpp 474-75) However, such an order may only be used "to correct the record at a later date to reflect what actually occurred at trial." Black's Law Dictionary 1069 (6th ed. 1990).

Without "such a bright-line prohibition, the authorities through '[badgering]' or 'overreaching' – explicit or subtle, deliberate or unintentional – might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Id.* at 98, 83 L.Ed.2d at 495-96 (alteration in *Smith*; citations omitted). Accordingly, "a valid waiver 'cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation.' . . . Using an accused's subsequent responses to cast doubt on the adequacy of the initial request itself is even more intolerable." *Id.* at 98-99, 83 L.Ed.2d at 496 (citation omitted).

Here, Mr. Nobles' statement – "Can I consult with a lawyer, I mean, or anything?" – was an unambiguous request for counsel. The officers should have immediately ceased questioning him. Instead, through subtle persuasion, they "w[ore] down the accused and persuade[d] him to incriminate himself[.]" *See Smith*.

State v. Taylor, ___ N.C. App. ___, 784 S.E.2d 224 (2016) shows that Mr. Nobles' request for counsel was unambiguous. In *Taylor*, the defendant called his grandmother during a police interrogation. From the defendant's responses on the phone, it appeared his grandmother asked him if he had been informed of his right to counsel. The defendant asked the officer, "Can I speak to an attorney?" *Id.* at ___, 784 S.E.2d at 229. The officer answered affirmatively. The defendant told his grandmother, listened for several seconds, and hung up.

The officer Mirandized the defendant. Upon continued questioning, the defendant made an inculpatory statement and appealed.

With regard to whether the defendant's request was ambiguous, this Court cited with favor federal cases where similar questions were found to be unambiguous requests for counsel. *See Sessoms v. Grounds*, 776 F.3d 615, 626 (9th Cir. 2015) ("There wouldn't be any possible way that I could have . . . a lawyer present while we do this?"); *United States v. Lee*, 413 F.3d 622 (7th Cir. 2005) ("Can I have a lawyer?"); *U.S. v. Wysinger*, 683 F.3d 784 (7th Cir. 2012) ("I mean, but can I call [a lawyer] now? That's what I'm saying."); *U.S. v. Hunter*, 708 F.3d 938, 943-44 (7th Cir. 2013) ("Can you call my attorney?").

Although this Court agreed with the analyses in those decisions, this Court determined Taylor's invocation was ambiguous as to whether he was "conveying his own desire to receive the assistance of counsel or whether he was merely relaying a question from his grandmother[.]" ___ N.C. App. at ___, 784 S.E.2d at 230. However,

> [h]ad defendant asked the question — 'Can I speak to an attorney?' — before or after his phone conversation, *Lee* and *Hunter* would become much more factually similar. But defendant asked this question *during* the phone conversation with his grandmother after she raised the issue of his right to counsel. The context of defendant's request creates ambiguity concerning whether he was conveying his own desire to receive the assistance of counsel or whether he was . . . relaying a question from his grandmother to [the detective]. We distinguish *Wysinger* and *Sessoms* for the same reason.

Id.

Here, Mr. Nobles was conveying his own desire for counsel. Further, Mr. Nobles' question, "Can I consult with a lawyer, I mean, or anything?" is nearly identical to the questions in *Taylor*, *Lee*, *Wysinger*, and *Hunter*. Therefore, the trial court erred by denying the motion to suppress.

The State cannot show the error was harmless beyond a reasonable doubt, despite the fact that after his invocation, Mr. Nobles stated, "I mean, I -- I -- I did it." (Supp 154)

Evidence of a full confession "can have such a devastating and pervasive effect that mitigating steps, no matter how quickly and ably taken, cannot salvage a fair trial for the defendant." *United States v. Ince*, 21 F.3d 576, 583 (4th Cir. 1994).

> '[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury[.]'

Arizona v. Fulminante, 499 U.S. 279, 296, 113 L.Ed.2d 302, 322 (1991) (citation omitted). *See* prosecutor's closing argument: XIVp 2789 ("we know his words out of his mouth, not mine, not [the other ADA], not [defense counsel]"); XIVp 2803 ("That's the defendant's mouth, not anybody in this courtroom[.]").

Without the full confession, the State would have had a much more general statement of guilt – "I did it." The jury could have believed this statement was made in a misguided attempt to protect Carothers. The added

detail that followed made this scenario all but impossible. *See* 499 U.S. at 313, 113 L.Ed.2d at 333 (Kennedy, J., concurring in the judgment) ("the court conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact as distinguished . . . from the impact of an isolated statement"). The video of Mr. Nobles' confession was played throughout, and was relied upon heavily, by the prosecutor during closing argument. The prosecutor especially emphasized how details of Mr. Nobles' and Carothers' confessions coincided. (XIVpp 2784-2840, 2858-60)

Further, Mr. Nobles acted out how the crime occurred in a way that comported with the evidence, giving the jury a virtual "videotape of the crime[.]" *See* 499 U.S. at 313, 113 L.Ed.2d at 333 (Kennedy, J., concurring) ("[a]part . . . from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence" than a confession); XIVp 2860 (prosecutor's closing argument: "What's the definition of reenacting? Performing again, recreating. So his performance that you just saw was reenacting that act. He was doing it again.").

Besides have a "devastating" and "indelible" effect on the jury, "[a] wrongfully admitted confession . . . forces defendant to devote valuable trial resources neutralizing the confession or explaining it to the jury, resources that could otherwise be used to create a reasonable doubt as to some other aspect of the prosecution's case." *Rice v. Wood*, 77 F.3d 1138, 1142 (9th Cir. 1996).

Here, defense counsel devoted considerable trial resources explaining the confession to the jury. Counsel's strategy was to emphasize that Swayney was more likely the shooter; the police investigation was sloppy; and the informants against Mr. Nobles were unreliable. This strategy was severely undercut by the looming presence of the wrongly-admitted confession. Thus, the State cannot show the error was harmless.

IV. A CLERICAL ERROR MUST BE CORRECTED.

The jury convicted Mr. Nobles of felony murder, with armed robbery as the underlying felony; armed robbery (12 CRS 1363); and PFF (12 CRS 1362). (4Rpp 565-66, 574) The trial court stated it was arresting judgment on armed robbery. (XVp 3049) An Order in the court file states judgment was arrested on "POSSESS FIREARM BY FELON" in 12 CRS 1363, the case number for armed robbery. (4Rp 581) Mr. Nobles requests correction of the erroneous heading.

CONCLUSION

Defendant respectfully requests the following relief: dismissal of the charges; a new hearing on motion to dismiss; a new trial; reversal of the denial of the motion to suppress his statement; and/or correction of a clerical error.

Respectfully submitted, September 18th, 2017.

(Electronically Filed)
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ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATION OF COMPLIANCE WITH RULE 28(j)(2)(A)(2)

I hereby certify that the foregoing Defendant-Appellant's Brief complies with Appellate Rule 29(j)(2)(A)(2) in that, according to the word processing program used to produce this brief (Microsoft Word), the document does not exceed 13,500 words, exclusive of cover, index, table of authorities, signature block, certificate of compliance, certificate of service, and addendum.

This the 18th day of September, 2017.

(Electronically Filed)
Anne M. Gomez
Assistant Appellate Defender

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's Brief has been filed pursuant to Rule 26 by electronic means with the Clerk of the North Carolina Court of Appeals.

I further hereby certify that a copy of the above and foregoing Defendant-Appellant's Brief has been duly served pursuant to Rule 26 by electronic means upon Kathleen N. Bolton, Assistant Attorney General, kbolton@ncdoj.gov.

This the 18th day of September, 2017.

(Electronically Filed)
Anne M. Gomez
Assistant Appellate Defender

INDEX TO APPENDIX

E. Band of Cherokee Indians v. Prater

The Cherokee Court of North Carolina

March 16, 2004, Submitted ; March 18, 2004, Decided

No. CR 03-1616

Reporter
3 Cher. Rep. 111 *; 2004 N.C. Cherokee Ct. LEXIS 565 **

EASTERN BAND OF CHEROKEE INDIANS, v. Cassie PRATER, Defendant.

Counsel: **[**1]** James W. Kilbourne, Jr., Tribal Prosecutor, Eastern Band of Cherokee Indians, for the Tribe.

Gary Kirby, Sylva, North Carolina, for the defendant.

Judges: Before J. Matthew Martin, Judge.

Opinion by: J. Matthew Martin

Opinion

[*111] MARTIN, J.

MEMORANDUM ORDER

These matter came on before the Court on March 16, 2004. The Tribe was represented by its Prosecutor, James W. Kilbourne, Jr. The Defendant was present and represented by Gary Kirby, Esquire. The Defendant moved to dismiss this case on the grounds that the Court lacked jurisdiction over her, as she is not an enrolled member of any federally recognized Indian Tribe.

FINDINGS OF FACT

1. The Defendant, Cassie Maran Prater is not an enrolled member of any federally recognized Indian Tribe.

2. The Defendant, Cassie Maran Prater describes herself as a "Second Descendant." That is, the Defendant is the **[*112]** grandchild of an enrolled member, and she does not possess the minimum blood quanta to remain on the roll.

3. A Second Descendent has access to the Indian Health Service for health and dental care, but does not have access to other benefits reserved exclusively for Indians.

4. The Defendant was born in Florida and has lived most of **[**2]** her life on the Qualla Boundary.

5. The Defendant has a child who is an enrolled member of the Eastern Band of Cherokee Indians.

6. The Defendant is not treated as an Indian by the Indian members of the community.

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

DISCUSSION

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

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

Having established that the several Tribes are vested with jurisdiction over alleged criminal acts by Indians, the Court next must consider whether the Defendant is an Indian for the purposes of such jurisdiction. The Court concludes that she is not. Cf. EBCI v. Lambert, 2003NACE0003 http://www.versuslaw.com [3 Cher. Rep. 62] (Holding that First Lineal Descendants are Indians for the purposes of the exercise of this Court's jurisdiction).

Pursuant to 25 U.S.C. § 1301(4) an "'Indian" means any person who would be subject to the jurisdiction of the United States as an. Indian under section 1153 of Title 18 if that person were to commit an offense **[**4]** listed in that section Indian country to which that section applies." 18 U.S.C. § 1153 does not provide further definition. In Duro, the Supreme Court noted that "the federal jurisdictional statutes applicable to Indian country use the general term "Indian."' Duro, 495 U.S. at 689. Even earlier, the Supreme Court construed such a term to mean that it "does not speak of members of a tribe, but of the race generally, --of the family of Indians." United States v. Rogers, 45 U.S. (4 How.) 567, 573, 11 L. Ed. 1105 (1846). In Rogers, the Supreme Court recognized that, by way of adoption, a non-Indian **[*113]** could "become entitled to certain privileges in the tribe and make himself amenable to their laws and usages." Id.

Membership in a Tribe is not an "essential factor" in the test of whether the person is an "Indian" for the purposes of this Court's exercise of criminal jurisdiction. United States v. Driver, 755 F. Supp. 885, 888-89, affd, 945 F.2d 1410, cert, denied, 502 U.S. 1109, 117 L. Ed. 2d 448, 112 S. Ct. 1209 (1991), accord Rogers, see also, United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976), cert, denied, 429 U.S. 1099, 51 L. Ed. 2d 547, 97 S. Ct. 1118, 97 S. Ct. 1119 (1977). **[**5]** Rather, the inquiry includes whether the person has some Indian blood and is recognized as an Indian. Id. The second part of the test includes not only whether she is an enrolled member of some Tribe, but also whether the Government has provided her formally or informally with assistance reserved only for Indians, whether the person enjoys the benefits of Tribal affiliation, and whether she is recognized as an Indian by virtue of her living on the reservation and participating in Indian social life. Id.

In this case, the evidence is clear that the Defendant is not recognized as an Indian, notwithstanding the facts that she is the mother of one enrolled member, the grandchild of another, and for her elderly great-grandmother, also a member of the EBCI. While the Defendant does, apparently, qualify for the Indian Health Service, she receives no benefits to the exclusion of members of other tribes.

The evidence in this case is close, however, applying this test in this case, the Court can only conclude that the Defendant does not meet the definition of an Indian pursuant to 25 U.S.C. § 1301(4). Accordingly, the Court does not have jurisdiction over **[**6]** the Defendant In this case. The Court notes that It does not make a blanket ruling on the question of "Second Descendants." The evidence in these cases should be reviewed on a case by case basis.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter of this case.

2. The Court does not have personal jurisdiction over the Defendant as she is a non-Indian.

ACCORDINGLY, IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss for lack of jurisdiction is GRANTED.

End of Document

PEOPLE v. BOWEN

Court of Appeals of Michigan

October 11, 1996, Decided

Nos. 185415; 189441

Reporter
1996 Mich. App. LEXIS 960 *

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v BARRY BUSTER BOWEN, Defendant-Appellant.

Notice: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: LC No. 94-6024-FC.

Disposition: Reversed.

Judges: Before: Murphy, P.J., and O'Connell and M.J. Matuzak, * JJ.

Opinion

PER CURIAM.

Defendant pleaded guilty to third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and was sentenced to six to fifteen years' imprisonment. Defendant appeals as of right. The only question presented on appeal is whether the trial court erroneously concluded that defendant is not an "Indian" for the purposes of 18 USC 1153. We conclude that the court did err and, therefore, that the State of Michigan lacked jurisdiction to prosecute defendant for the instant sexual assault.

We review jurisdictional rulings de novo. Jeffrey v Rapid American Corp, 448 Mich 178, 184; 529 NW2d 644 (1995).

Defendant argues that the jurisdiction to prosecute him for the instant sexual assault lies exclusively with the federal government, pursuant to 18 USC 1153, [*2] which provided at the time of the commission of the offense as follows:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [18 USCS §§ 2241 et seq], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under *section 661* of this title 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.

This statute is to be afforded a broad construction and should be construed to favor Native Americans. St Cloud v United States, 702 F. Supp. 1456, 1462 (D SD, 1988).

In order to prosecute under 18 USC 1153, it must be established, as a jurisdictional requisite, that an "Indian" committed one of the enumerated crimes against another Indian, or any person, within Indian country. United States v Torres, 733 F2d 449, 453-454 [*3] (CA 7, 1984). The United States Congress has not defined the term "Indian" for purposes of establishing criminal jurisdiction. St Cloud, supra, 702 F. Supp. at 1460. Nevertheless, the courts have developed a two-part test to determine whether a person is an Indian for purposes of federal criminal jurisdiction. The first part of the test is whether the person has some Indian blood; the second part looks to whether the person is recognized as an Indian by a tribe or the federal government. United States v Driver, 755 F. Supp. 885, 888 (D SD, 1991), aff'd 945 F2d 1410 (CA 8, 1992); St Cloud, supra, 702 F. Supp. at 1460, 1461. The second part of the test involves the evaluation of four factors. The first factor is whether the person is enrolled in a tribe. This is the most important factor, Driver, supra, 755 F. Supp. at 888; St Cloud, supra, 702 F. Supp. at 1461, but it is not

* Circuit judge, sitting on the Court of Appeals by assignment.

necessarily determinative, *Driver, supra, n 7*; *St Cloud, supra.* The second factor is whether the government has, either formally or informally, provided the person with assistance reserved only [*4] to Indians. The third factor is whether the person enjoys the benefits of tribal affiliation. The fourth factor is whether the person is socially recognized as an Indian through living on a reservation and participating in Indian social life. *Driver, supra, 888-889*; *St Cloud, supra.*

Defendant satisfied the first prong of the test. The evidence established that defendant is one-half Ottawa Indian. Accordingly, defendant has Indian blood.

With regard to the second prong, the first question to be answered is whether defendant is enrolled in a tribe. This question must be answered in the negative. The evidence established that defendant was not a member of a federally-recognized tribe at any time pertinent to a jurisdiction determination.

With regard to whether the government has provided defendant with assistance reserved only to Indians, the evidence established that defendant received some assistance from various governmental entities, including schooling on the Bay Mills Indian Community Reservation, placement in Indian foster care homes licensed through the Michigan Indian Child Welfare Agency (MICWA), adoption through the Keeweenaw Bay Indian [*5] Community tribal court, and the provision of services through the Tribal Social Services Department. However, the evidence does not establish how much, if any, of this assistance had federal origins. Moreover, the circumstances under which defendant left an Indian boarding school suggests that he was denied some degree of federal assistance because he was not recognized as an Indian by the federal government.

With regard to the third factor, a person is shown to enjoy the benefits of tribal affiliation where it is shown that he or she benefited from various programs offered through the Indian tribe, such as a tribal alcohol abuse treatment and counseling program and a tribally-administered employment program. *St Cloud, supra, 702 F. Supp. at 1462*. The evidence established that defendant attended school on the reservation, that defendant's adoption was handled by a tribal court, that defendant was involved with the tribal courts and the Tribal Social Services Department as a result of the commission of criminal offenses as a juvenile and that defendant was placed in several licensed foster homes through MICWA.

With regard to whether defendant enjoyed social recognition [*6] as an Indian, the evidence established that defendant enjoyed such recognition as reflected by the fact that he lived on a reservation, attended school on the reservation and participated in a variety of social and cultural activities with members of defendant's adoptive father's tribe.

The four factors analyzed above lead us to the conclusion that while defendant failed to establish that he was recognized as an Indian by the federal government, he did establish that he was recognized as an Indian by a tribe. *Driver, supra, 755 F. Supp. at 888*; *S. Cloud, supra, 702 F. Supp. at 1460, 1461*. The evidence demonstrated that defendant's adoptive father's tribe informally recognized defendant as an Indian and invited his participation in social and cultural aspects of tribal life. Defendant's lack of membership in a federally-recognized tribe is not fatal. *St Cloud, supra, 702 F. Supp. at 1461*. Accordingly, we find that defendant satisfied the second prong of the two-pronged test.

We conclude, therefore, that defendant is an Indian within the meaning of *18 USC 1153(a)*. For that reason, the State of Michigan lacks jurisdiction [*7] to prosecute defendant for the instant sexual assault. Any prosecution must be brought by the federal government, which has exclusive criminal jurisdiction in this matter. Defendant's conviction must be reversed and his sentence vacated.

Reversed.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ Michael J. Matuzak

End of Document

App. 5

No. COA97-963 TWENTY-THIRD DISTRICT

NORTH CAROLINA COURT OF APPEALS

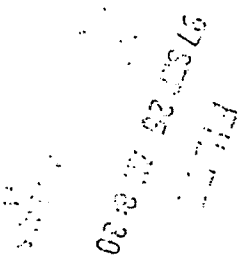
****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wilkes County
	)	95 CrS 8503, 05; 8602-03
RICKY BRIGHT	)	

****

DEFENDANT-APPELLANT'S BRIEF

****



III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST THE DEFENDANT FOR RAPE AND SEXUAL OFFENSE, BECAUSE IT WAS WITHOUT SUBJECT MATTER JURISDICTION OVER THESE CHARGES.

Assignment of Error No. 11, Rp. 62

The defendant challenged the subject matter jurisdiction of the Superior Court for Wilkes County. The trial court did not instruct the jury that it must find that the crimes were committed in North Carolina in order for the courts of our state to have subject matter jurisdiction. Accordingly, the judgments for sexual offense and rape must be vacated, and the case remanded for a new trial on these charges.

In *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977), the Supreme Court held that, once jurisdiction is challenged, the state must convince the trial court that there is sufficient evidence from which a jury could find beyond a reasonable doubt that part of the crime took place in North Carolina. The Court found that there was sufficient evidence in that case to raise a jury question on the location of the killing. The Court went on to hold that, because the jury found, by way of a special verdict, that the crime took place in North Carolina, the state proved jurisdiction. *See* N.C.P.I. - Crim. 311.10.

Batdorf, then, stands for the proposition that the determination of jurisdiction is a two-stage process. First, the trial court makes a preliminary determination that there is sufficient evidence from which the jury could conclude beyond a

reasonable doubt that the crime took place in this State. Then, the jury must find, as a matter of fact, that it did so.

In this case, one of the theories of the defense was that the rape and sexual offense took place (if at all) in the state of West Virginia. This formed a large part of the cross-examination of the complainant. (Tpp. 104-106) Thus, the defense put at issue the subject matter jurisdiction of the courts of North Carolina. This triggered the requirement that the trial court submit to the jury the question of whether these crimes were committed in this State. *See State v. Rick*, 342 N.C. 91, 463 S.E.2d 182 (1995). The defendant need not request such an instruction; the duty to give it arises as a matter of law. *Id.*

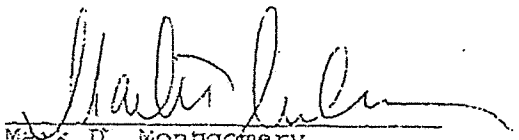
The state may attempt to argue that the defendant has waived his right to challenge jurisdiction by not requesting a special verdict. However, it is well-settled that subject matter jurisdiction may not be waived. *Branch v. Houston*, 44 N.C. (Bush) 85 (1852). The issue can be raised at any point, even in the Supreme Court. *In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962). Finally, the state has the burden of showing jurisdiction beyond a reasonable doubt. *Batdorf*. The prosecutor should have ensured that the jury was asked the critical question of where the alleged crimes took place.

Because the state has yet to prove to a jury that the crimes of rape and sexual offense took place in North Carolina, these cases must be remanded to the Superior Court for a new trial.

CONCLUSION

For these reasons, the defendant is entitled to a new trial.

Respectfully submitted, this 24th day of September, 1997.



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ATTORNEYS FOR DEFENDANT-APPELLANT

No. 226PA94 TWENTY-SEVEN-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)
)
v.) From Gaston
)
GEORGE McCALL RICK)

DEFENDANT APPELLEE'S NEW BRIEF

B. The Court of Appeals Correctly Determined that the State Has Not Proven Beyond a Reasonable Doubt That a Second Degree Murder Took Place in North Carolina.

1. The Trial Court's Preliminary Ruling on Jurisdiction, Although Erroneous, is Now Moot.

The state urges this Court to look only at the evidence adduced at the pre-trial hearing. This is understandable. The state's case -- thin at the hearing -- was pitifully emaciated at trial. For instance, at the hearing, Joyce Rick testified that she saw the defendant driving a blue Mustang at 11:00 a.m. on April 21. By the time of trial, her testimony changed. Ms. Rick testified to the jury that she saw this at 1:00 a.m., only two hours after the decedent left work. Moreover, the state presented at the hearing testimony that "the rapist up the street," who Ms. Rose feared, was "Mr. Rick," a possible reference to the defendant. At trial, no evidence of the identity of that "rapist" was offered. These, and the other changes in the evidence alluded to by the Attorney General, may appear minor. However, they further weaken an already weak case.

There was not enough evidence, even at the pre-trial hearing, to raise a jury question on jurisdiction. More importantly, the preliminary ruling on jurisdiction is moot. The question now is whether the state has proven, beyond a reasonable doubt, that Ms. Rose's death took place in North Carolina.

To resolve this question, the court below focused on the evidence at trial rather than the hearing. This was proper for two reasons. First, this was the only evidence heard by a jury. The determination of jurisdiction is a question of fact, to be proved to a jury beyond a reasonable doubt. *State v. Bardorf*, 293 N.C. 486, 238 S.E.2d 497 (1977).

In *Batdorf*, this Court held that, once jurisdiction is challenged, the state must convince the trial court that there is sufficient evidence from which a jury could find, beyond a reasonable doubt, that part of the crime took place in North Carolina. The Court found that there was sufficient evidence in that case to raise a jury question on the location of the killing. The Court went on to hold that, because the jury found, by way of a special verdict, that the crime took place in North Carolina, the state proved jurisdiction. *See* N.C.P.I - Crim. 311.10.

Batdorf, then, stands for the proposition that the determination of jurisdiction is a two-stage process. First, the trial court makes a preliminary determination that there is sufficient evidence from which the jury could conclude beyond a reasonable doubt that the crime took place in this State. Then, the jury must find, as a matter of fact, that it did so.[1]

In this case, based on the evidence at trial, the Court of Appeals ruled that it did not give rise to a *prima facia* showing of jurisdiction. That is, the court ruled that the jury could not reasonable have found that Ms. Rose was murdered (if at all) in North Carolina.

This case presents a second reason for focusing on the trial evidence rather than the evidence adduced at the hearing. The state's theory of the case changed between the hearing and trial.

At the time of the hearing, the state was torn between two inconsistent theories of guilt. First, the state thought that the killing might have taken place in North Carolina and the dead body transported across the state line. On the other hand, the prosecution suggested that the decedent might have been kidnapped from this state and transported to

---

[1] Where, as here, the evidence and the theory of prosecution changes between the hearing and trial, the trial court must make a fresh, albeit still preliminary, determination that there is a prima facia showing of jurisdiction. If such a showing has been made by the end of the trial evidence, the jury should be instructed to decide whether or not the crime took place in this state.

South Carolina, where she was killed. The hearing judge never determined as a fact that the killing took place in either of these ways. Rather, the judge deferred to the jury, who presumably was to answer the crucial question of where the killing took place. The hearing judge also declined to make findings of fact as to the location of Ms. Rose's death, and to require the state to choose from its mutually inconsistent theories of the case.

By the time of trial, the state had abandoned its kidnapping theory and relied exclusively on the theory that the killing took place in this state, followed by a trip to South Carolina to dispose of the body. The question at trial and on appeal, correctly resolved by the Court of Appeals, was whether the state presented sufficient evidence from which the jury could reasonably conclude that Ms. Rose was killed in North Carolina. That there may have been at one time another theory of jurisdiction is moot. *See Presnell v. Georgia*, 439 U.S. 14, 58 L.E.2d 207 (1978)(due process requires conviction to be reviewed in light of theory relied on by prosecution at trial).

2. *The Evidence at Trial Was Insufficient to Establish a Prima Facie Case of Jurisdiction.*

Even if the evidence adduced at the pretrial hearing had been sufficient to support one of the two pre-trial theories of prosecution, the evidence adduced at trial did not raise a jury question on the state's trial theory: that Ms. Rose was killed in North Carolina. The body was found in South Carolina, dressed in a party dress, panties and high heeled white shoes. She apparently dressed herself in those clothes after having come home dressed in jeans. There was no evidence of a struggle at her house, no testimony that any of her neighbors (who lived close nearby) saw or heard anything out of the ordinary that night. The only reasonable inference is that she left her house voluntarily. Nothing from the

decedent's house was found with the body. Even taken in the light most favorable to the state, there is no reasonable inference that Ms. Rose was killed or injured in North Carolina. As argued below, the state relies on the assumption that the defendant is guilty to explain the evidence. Assuming the jury did the same, the verdict is not the result of reasonable inferences, but circular logic.

3. *Even if the Evidence Were Sufficient to Establish a Prima Facie Case of Jurisdiction, No Fact-Finder has Determined that a Murder Took Place in this State.*

No finder of fact has yet been asked to infer, reasonably or otherwise, that the crime of murder took place in North Carolina. The trial court never submitted to the jury the question of whether the killing took place in North Carolina.[2] Nor is there any way to infer from the jury's general verdict that this was its view of the evidence. As a result, the state has yet to prove to a fact-finder that North Carolina has jurisdiction over this case. Because the state has yet to establish the validity of the judgment against the defendant, the Court of Appeals correctly vacated it.

---

[2] The state may attempt to argue that the defendant has waived his right to challenge jurisdiction by not requesting a special verdict. However, it is well-settled that subject matter jurisdiction may not be waived. *Branch v. Houston*, 44 N.C. (Bush) 85 (1852). The issue can be raised at any point, even in the Supreme Court. *In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962). Moreover, the defendant timely brought to the trial court's attention that the court did not have jurisdiction over this case. He should not be required to do more. Finally, the state has the burden of showing jurisdiction beyond a reasonable doubt. *Baldorf*. The prosecutor should have ensured that the jury was asked the critical question of where the alleged second degree murder took place.

C. The Court of Appeals Correctly Determined that the Evidence Was Insufficient to Support Any Verdict.

On a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element charged and that the defendant is the person who committed the offense. *State v. Olson*, 330 N.C. 557, 411 S.E.2d 592 (1992). "Substantive evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, *State v. Rogers*, 109 N.C. App. 491, 428 S.E.2d 220 (1993), but it must do more than merely raise a suspicion or conjecture as to the existence of a necessary element of the charged offense. *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984).

When a trial court rules upon a motion to dismiss, state and federal constitutional due process rights are at stake. Under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, when testing the sufficiency of the evidence in a criminal case, the court must find that, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed.2d 560, 573 (1979)(emphasis original). This standard for ruling on a motion testing the sufficiency of the evidence safeguards against a breach of due process which protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368 (1970). Federal due process rights are at least as protective as those state constitutional rights guaranteed by the Law of the Land Clause of Article I, Section 19 of the North Carolina Constitution. *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985).

No. COA12-1068 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford
	)	
DENNIS DWAYNE TUCKER	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON THE ISSUE OF TERRITORIAL JURISDICTION AND BY FAILING TO REQUIRE THE JURY TO RETURN A SPECIAL VERDICT FINDING JURISDICTION IN NORTH CAROLINA. BECAUSE DEFENSE COUNSEL CHALLENGED THE TRIAL COURT'S TERRITORIAL JURISDICTION, THE TRIAL COURT HAD A DUTY AS A MATTER OF LAW TO INSTRUCT THE JURY ON JURISDICTION.

Because defense counsel challenged the trial court's territorial jurisdiction to prosecute Mr. Tucker on the charge of embezzlement, the trial court erred by failing to instruct the jury on the issue of jurisdiction and by failing to require the jury to return a special verdict finding jurisdiction in this state. Where defense counsel challenged the trial court's jurisdiction, the trial court has a duty, as a matter of law, to instruct the jury on jurisdiction. The trial court's failure to properly instruct the jury on the issue of jurisdiction constitutes reversible error.

When territorial jurisdiction in a criminal prosecution is challenged, the State is required to prove beyond a reasonable doubt that the crime with which the defendant is charged occurred in North Carolina. *State v. Rick*, 342 N.C. 91, 100-101, 463 S.E.2d 182, 187 (1995) (citing *State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 503 (1977)). If the trial court makes a preliminary determination that sufficient evidence exists from which a jury could find beyond a reasonable doubt that the alleged crime was committed in North Carolina, the court is obligated to "instruct the jury that unless the State has satisfied it beyond a reasonable doubt that the [crime] occurred in North Carolina, a verdict of not guilty should be

returned." *State v. Bright*, 131 N.C. App. 57, 62, 505 S.E.2d 317, 320 (1998) (quoting *Rick*, 342 N.C. at 101, 463 S.E.2d at 187). "The trial court should also instruct the jury that if it is not so satisfied, it must return a special verdict indicating a lack of jurisdiction." *Id.* "Failure to charge the jury in this manner is reversible error and warrants a new trial." *Bright*, 131 N.C. App. at 62, 505 S.E.2d at 320. *See also Rick*, 342 N.C. at 101, 463 S.E.2d at 187.

In this case, defense counsel challenged the trial court's jurisdiction, arguing that none of the essential acts forming the offense of embezzlement occurred in North Carolina. (Tpp. 125-138). The trial court did not instruct the jury that the State bore the burden of proving jurisdiction and did not instruct the jury that if it was not convinced beyond a reasonable doubt that embezzlement, or the essential elements of embezzlement, occurred in North Carolina, it should return a special verdict so indicating. The trial court's failure to properly instruct the jury is reversible error. Therefore, Mr. Tucker's conviction should be vacated and his case remanded for a new trial. *See Bright*, 131 N.C. App. at 62, 505 S.E.2d at 320. *See also Rick*, 342 N.C. at 101, 463 S.E.2d at 187.

Where defense counsel challenged the trial court's jurisdiction, the issue of whether the trial court properly instructed the jury on jurisdiction is preserved for appellate review as a matter of law. Defense counsel did not request an instruction

on jurisdiction in either *Rick* or *Bright*.[1] These cases establish that the trial court's duty to give an instruction on territorial jurisdiction is triggered whenever the defense challenges the territorial jurisdiction of the court.

The State may argue that Mr. Tucker waived his right to challenge jurisdiction by not requesting a special verdict. It is well settled, however, that subject matter jurisdiction may not be waived. *Obo v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009). "The issue of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal." *State v. Frink*, 177 N.C. App. 144, 147, 627 S.E.2d 472, 473 (2006). Because Mr. Tucker challenged the jurisdiction of the court, the trial court's failure to properly instruct the jury regarding territorial jurisdiction is preserved for appellate review, and constitutes reversible error.

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[1] Mr. Tucker requests that the Court take judicial notice of the documents filed in this Court and in the Supreme Court of North Carolina in the cases of *Rick* and *Bright*. "This Court may take judicial notice of the public records of other courts within the state judicial system." *State v. Thompson*, 349 N.C. 483, 497, 508 S.E.2d 277, 286 (1998). Attached in the appendix to this brief are the relevant documents from *Rick* and *Bright*. In both *Rick* and *Bright*, defense counsel acknowledged on appeal that trial counsel did not request either an instruction or a special verdict on jurisdiction. In both cases, defense counsel argued that the trial court's duty to instruct on jurisdiction arises as a matter of law, and is triggered when the defendant challenges the territorial jurisdiction of the court. (App. 2-3, Defendant-Appellant's Brief in *Bright* at 17-18; App. 9, Defendant's New Brief in *Rick* at 10, fn2). In *Rick* and *Bright*, the Court reached the merits of the appeal without any suggestion that the issue was not properly preserved for appellate review. *Bright*, 131 N.C. App. at 62-63, 505 S.E.2d at 320-321; *Rick*, 342 N.C. at 100-101, 463 S.E.2d at 187.

of race, sex, age, wealth or the lack thereof, religious affiliation and any other personal factor unrelated to the primary function and mission of the DAC which is the care, custody and supervision of adults and juveniles after conviction for a violation of North Carolina law.

12. That as Defendant asserts he is Indian based upon a relationship with the Eastern Band of Cherokee Indians, issues of ancestry are, however, germane to this motion to dismiss filed by the Defendant and accordingly detailed inquiry is necessary.

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.

14. That the issue of race, a claim of being Native American or any affiliation with an Indian tribe by Defendant was never discussed with Mr. Clemmer. Moreover, Defendant neither asserted Native American ancestry nor questioned the various and divergent documentation which all identified Defendant as white/Caucasian at any time while being supervised with any DAC probation officer.

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.

16. That during the time of probation supervision the Defendant transferred his supervision from Gaston County to Swain County on March 26, 2012.

17. That the Court received testimony from Olivia Ammons. Ms. Ammons is employed with DAC. She has been employed for the previous nine years as a probation officer with her duty station located in Swain County.

18. That Ms. Ammons was employed as a probation officer during 2012 when the probation of Defendant transferred to Swain County from Gaston County on March 26, 2012.

19. That Ms. Ammons first met the Defendant March 28, 2012, at the residence located at 404 Furman Smith Drive, Cherokee, North Carolina. This residence is the home of Tonya Crowe, Aunt of the Defendant. In the mountainous and rural areas of Jackson and Swain Counties it can often be difficult to ascertain the exact boundary between counties. These occasional ambiguities are often exacerbated when locations are on the Cherokee reservation. It may be that that the residence of Tonya Crowe was just inside the Jackson County portion of the Qualla

Boundary but since the location was so close to the Swain County boundary Ms. Ammons graciously decided to continue supervision of the Defendant. In addition to the close proximity to Swain County Ms. Ammons in an effort of cooperation sought to assist her colleagues in the Jackson County probation office since during this period there did exist a reduced staff available to handle the workload.

20. That Ms. Ammons next met with Defendant on April 3, 2012, in an office visit at the Swain County Justice Center. Ms. Ammons reviewed all the requirements Defendant was subject to including the need for stable housing, employment, and mental health and substance abuse treatment. Additionally, it was stressed to Defendant the necessity of maintaining contact with his supervising officer and updating any changes in living arrangements and employment in a timely fashion.

21. That Defendant secured employment at Home Style Chicken restaurant located at 510 Paint Town Road, Cherokee, North Carolina. Defendant received payment for his work at Home Style Chicken and ancillary to his salary was issued a W-2 form.

22. That the next scheduled office visit for Defendant was May 1, 2012. The Defendant did not attend the meeting, call to cancel or reschedule the meeting or otherwise explain his absence to Ms. Ammons.

23. That Ms. Ammons next visited the residence of Defendant on May 2, 2012. Defendant was not home and Ms. Ammons left a notice hung on the door for Defendant to contact here immediately.

24. That Defendant attended a scheduled office visit on May 7, 2012.

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 that Attachment "C" was generated.

26. That Ms. Ammons conducted a successful home visit on May 8, 2012.

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.

28. That on May 17, 2012, Defendant called Ms. Ammons and advised he had left the residence of his Aunt, Tonya Crowe at 404 Furman Smith Drive and moved to Fort Wilderness Campground, 284 Fort Wilderness Road, Whittier, North

57. That at the time of arrest Detective Birchfield neither asked Defendant whether he was an enrolled member of the Eastern Band of Cherokee Indians nor whether his parents were enrolled members. However, as previously noted Detective Birchfield had reviewed the enrollment records kept at the CIPD and the name of the Defendant was not to be found.

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 States Attorney certifying the defendant being charged is an enrolled member of a federally recognized tribe.

59. That Detective Birchfield did not certify the Defendant was an enrolled member of the Eastern Band of Cherokee or any other federally recognized Tribe at the time of arrest since there was no evidence to warrant this determination or in any manner suggest a reasonable and prudent officer should make such a determination.

60. That Detective Birchfield testified he is aware of Rule 6 of the Cherokee Tribal Court Rules of Criminal Procedure.

61. That Detective Birchfield upon further investigation after Defendant was arrested and taken to the Jackson County magistrate, found no record of any prior adult criminal charges against the Defendant in the Cherokee Tribal Court. However, this search did not include a review of juvenile records in the Cherokee Tribal Court.

62. That arising out of the homicide on September 30, 2012, two other individuals were charged with various related criminal offenses. Dwayne Edward Swayney was charged and arrested on the Qualla Boundary. Dewayne Swayney is an enrolled member of the Eastern Band of Cherokee Indians. Law enforcement determined this fact by reviewing and finding the name of Dwayne Swayney in the enrollment records kept for reference by law enforcement at the CIPD. The other co-defendant was Ashlyn Carothers. She was arrested at the CIPD. Ashlyn Carothers was determined to not be an enrolled member of the Eastern Band of Cherokee Indians. However, Ms. Carothers was found to be an enrolled member of the Cherokee Nation of Oklahoma. Both Mr. Swayney and Ms. Carothers were taken before a Tribal magistrate at the Cherokee Tribal Court. The Arrest Report from CIPD for Mr. Swayney was admitted as Defendant's exhibit #2. The Arrest Report from CIPD for Ms. Carothers was admitted as Defendant's exhibit #3. The Affidavit of Jurisdiction for Ms. Carothers was completed by CIPD on November 30, 2012 which was admitted as Defendant's exhibit #8 [See Attachment "F"]. The Affidavit of Jurisdiction completed by CIPD for Mr. Swayney was admitted

the legal division required all counsel to utilize the talents of Ms. Myrtle Driver Johnson.

104. That the Court received testimony from Myrtle Driver Johnson.

105. That Ms. Johnson is an enrolled member of the Eastern Band of Cherokee Indians and has a blood quantum of 4/4.

106. That Ms. Johnson has resided on the Qualla Boundary her entire life and during these 69 years only left the area for extended periods related to educational studies.

107. That Ms. Johnson is a tribal elder and has been bestowed the title of "Beloved Woman" by the Eastern Band of Cherokee. This title is considered a great honor amongst the Cherokee. Her award is recognition of a life devoted to her people, her Tribe, and all the Chiefs, Vice-Chiefs and council members who have served in Tribal government for these past decades.

108. That Ms. Johnson was elected and did serve one term as a councilmember from her community.

109. That Ms. 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.

110. That in addition to her work in tribal government Ms. Johnson teaches the Cherokee language. Ms. Johnson is a founding member and instructor at the Kituwah Language Immersion Academy. This program seeks to teach the Cherokee language to young children at an early age in an effort to keep the Cherokee language alive.

111. That Ms. Johnson is richly versed in the history of the Eastern Cherokee.

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.

113. That presently there are approximately 300 enrolled members that are fluent in the Cherokee language.

114. That Ms. Johnson is deeply involved in and a leader of the Cherokee community regarding the language, culture and tradition of the Eastern Band of Cherokee. In Cherokee life language, culture and tradition are all inextricably intertwined.

115. That from a historical perspective the Cherokee, also known as the Kituwah people, comprised their social structure in the form of a matriarchal clan system. There exists seven clans of the Cherokee: Potato, Deer, Paint, Bird, Long Hair, Blue and Wolf. This matriarchal clan system remains in existence today. In the matriarchal clan system kinship was traced through the mother where all children joined the clan of their mother.

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.

117. That there are medicine ceremonies still held today which deal with native beliefs and local remedies which remain an important and vibrant feature in contemporary Cherokee life. These ceremonies are private and participation is only afforded to enrolled members.

118. That in the Cherokee language *a-ni-yo-ne-ga* is the word for people of white or light complexion. This word is a separate and distinct word from that used to identify a member of the Cherokee Tribe.

119. That Ms. Johnson opined there is a cultural belief held by the Cherokee people that white/Caucasian persons are non-Native American. Conversely, all Indians are Native American.

120. That Ms. Johnson expressed their exists a cultural and widely held community belief that to recognize non-Native Americans as Indians is inconsistent with the unique government to government relation between the Indian Tribes and the United States, contravening the historical promises made by the United States to the Native American populations.

121. That the State admitted into evidence State's exhibit #6. This exhibit is a photograph of tattoos on the Defendant consisting in total of two tattoos. The first was of an eagle. Based upon the experience and knowledge of Ms. Johnson the eagle and its symbolism is in her opinion a generic symbol in Native American culture. It is found and relevant to nearly all Indian Tribes in the United States and represents nothing unique to the Eastern Band of Cherokee. The second tattoo depicts an Indian with a headdress. This tattoo is of unique significance to Ms. Johnson. Headdresses were never worn, used or employed for ceremonial purposes by the Eastern Band of Cherokee. The headdress of the type found

262. That turning next to the second factor under the St. Cloud analysis, the primary assertion upon which Defendant argues he is Indian rests on the fact he is a First Descendent of the Eastern Band of Cherokee Indians. This position advanced by Defendant is not frivolous for the facts of each individual with ties to any given Indian tribe vary markedly from person to person. Upon a thorough examination of the evidence and circumstances specific to Defendant the facts clearly establish:

a. The Defendant was not born on the Cherokee Reservation.

b. The Defendant was not born near the Cherokee Reservation.

✓ c. The Defendant never enjoyed the benefits of a possessory interest by renting or leasing an interest in tribal lands.

d. The Defendant never inherited a possessory interest in tribal lands.

e. The Defendant never voted in tribal elections. In fact, because he is not an enrolled member of the Eastern Band the Defendant is ineligible to vote in all tribal elections.

f. That Defendant has never held an elected tribal office. Likewise, because Defendant is not an enrolled member of the Eastern Band of Cherokee the Defendant is ineligible to hold elected tribal office.

g. The Defendant never served on a tribal jury in the Cherokee Tribal Court (or its predecessor the CFR Court).

✓ h. The Defendant was never a party in either a civil or criminal matter in the Cherokee Tribal Court.

i. The Defendant never received any payments for settlements owed by the federal government to enrolled members of the Eastern Band of Cherokee.

j. The Defendant is not eligible to receive the biannual distribution of gaming proceeds shared by all enrolled members of the Eastern Band of Cherokee.

k. The Defendant never sought or received health care from the many public health programs administered by the Eastern Band of Cherokee and enjoyed by tribal members, with the exception of acute care at the CIH.

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

m. The Defendant does enjoy First Descendant status but never took steps to formalize his rights. Moreover, Defendant never applied for or received the corresponding certification from the tribal enrollment office establishing his First Descendant status.

n. The Defendant has no tribal identification card.

o. The Defendant attended Cherokee Schools but this same school system is open to non-Indian students.

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.

u. The Defendant presented no evidence of participation in any Indian medicine ceremonies.

v. The Defendant when arrested for these offenses neither informed any CIPD officer nor any Jackson County magistrate or other official that he was Indian. Likewise, at the time of arrest Defendant never presented any documentation identifying Defendant as Indian.

263. As late as August 11, 2011 and May 7, 2012, Defendant identified himself as white/Caucasian in North Carolina probation documents. Any attempt to attribute his actions of self-identification as an error made by his mother is unpersuasive since on these aforementioned dates the Defendant was over thirty years of age. Moreover, it must also be noted in addition to claiming at certain times to be white/Caucasian and then at other times to be Indian there is the recent and pronounced variation in his social security number. As found hereinabove, at one point in time on November 30, 2012, Defendant asserted his social security number was [redacted] while at a later time that day presented that his social security number was [redacted]. Thus, Defendant used two completely different social security numbers on the same day. Such extraordinary variations

in the identity one presents of himself is exceedingly unusual which therefore necessarily calls into question the veracity of Defendant.

264. That under the second St. Cloud factor the only evidence of government recognition of the Defendant as an Indian is the receipt of medical services at the CIH. The Federal government through the Indian Health Service provide benefits reserved only to Indians arising from the unique trust relationship with the tribes. Also, the government of the Eastern Band of Cherokee provides additional health benefits to the enrolled members. The only evidence Defendant presents of the receipt of health services available only to Indians is medical care at the CIH more than two decades ago as documented in his medical chart. While it is true that he did receive care from the CIH it is likewise true he sought acute care, this care was when he was a minor and he was taken for treatment by his mother. Since becoming an adult he has never sought further medical care from the providers in Cherokee. Moreover, the last time he sought care from the CIH was over 23 years ago.

265. That regarding education Defendant urges the undersigned to afford special recognition to his brief attendance in the Cherokee tribal school system. Yet, since the Cherokee tribal school system is open to children whether Indian or non-Indian to consider this as satisfying the second factor under the St. Cloud test would be erroneous. C.C. §115-2.

266. That except for the five visits to the CIH, there is no other evidence Defendant received any services or assistance reserved only to individuals recognized as Indian under the second St. Cloud factor.

267. That under the third St. Cloud factor the Court must examine how Defendant has benefited from his affiliation with the Eastern Band of Cherokee. The Defendant suggests he has satisfied the third factor under the St. Cloud test in that Cherokee law affords special benefits to First Descendants. To be sure the Cherokee Code as developed over time since the ratification of the 1986 Charter and Governing Document does afford special benefits and opportunities to First Descendants. Whilst it is accurate the Cherokee Code is replete with special provisions for First Descendants in areas of real property, education, health care, inheritance, employment and access to the Tribal Court, save however for use of medical services a quarter of a century ago Defendant has not demonstrated use of any of his rights as a First Descendant of the Eastern Band of Cherokee.

268. That as previously stated the third St. Cloud factor is 'enjoyment' of the benefits of tribal affiliation. Enjoyment connotes active and affirmative use. Such is not the case with Defendant. Defendant directs the undersigned to no positive, active and confirmatory use of the special benefits afforded to First Descendants. Defendant has never 'enjoyed' these opportunities which were made available for individuals similarly situated who enjoy close family ties to the Cherokee tribe. Rather, Defendant merely presents the Cherokee Code and asks the undersigned

available only to Indians with treatment at the CIH the evidence must be viewed through the prism of receiving acute medical treatment as child where as a child he took no active involvement in the decision for treatment and with his last visit being more than 23 years ago.

274. That in stark contrast to the case of Lambert, when the unique, specific and particular facts regarding George Lee Nobles are closely scrutinized his claim of being Indian must fail. To conclude Defendant is an Indian because of his modest blood quantum, the fact he was treated at the CIH on five occasions 23 years ago and then upon his release in 2011 from prison in Florida resided and worked on or near the Qualla Boundary for 14 months as urged by the Defendant would simply be contrary to the law applicable in such cases, thereby affording to Defendant an unreasonably broad application of the Rogers and St. Cloud tests. Accordingly, the undersigned declines to adopt this expansive interpretation of the law as urged by Defendant.

275. That accordingly after balancing all the evidence presented to the undersigned using the Rogers test and applying the St. Cloud factors in declining order of importance, that while Defendant does have, barely, a small degree of Indian blood he is not an enrolled member of the Eastern Cherokee, never benefited from his special status as a First Descendant and is not recognized as an Indian by the Eastern Band of Cherokee Indians, any other federally recognized Indian tribe or the federal government. Therefore, the Defendant for purposes of this motion to dismiss is not an Indian.

276. That the undersigned has considered the totality of the circumstances in determining whether the Defendant is an Indian and has considered all the evidence in light most favorable to the Defendant.

277. That because Defendant brings a motion to dismiss challenging the subject matter of the State, the burden of proof is on the State to prove beyond a reasonable doubt that the crime with which Defendant is charged occurred in North Carolina. State v. Batdorf, 293 N.C. 486, 494 (1977).

278. That having considered all of the evidence and stipulations, and after careful, thorough and exhaustive review of Federal, North Carolina and Cherokee statutes and prior court decisions, the Court determines that the State has proven beyond a reasonable doubt that the crime occurred in North Carolina, Defendant is not an Indian as contemplated under the 18 U.S.C. §1153, and under the McBratney rule jurisdiction is in the North Carolina General Courts of Justice.