No. 34PA14-2 THIRTIETH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Jackson County
	)	
GEORGE LEE NOBLES	)	

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DEFENDANT-APPELLANT'S NEW BRIEF

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ISSUES PRESENTED

I. IS MR. NOBLES AN INDIAN BECAUSE THE EASTERN BAND OF CHEROKEE INDIANS RECOGNIZES ALL FIRST DESCENDANTS AS INDIANS, AND THEREFORE, NORTH CAROLINA HAD NO JURISDICTION OVER THIS CASE?

II. IS MR. NOBLES AN INDIAN BECAUSE HE SATISFIED THE TWO-PART TEST DERIVED FROM *UNITED STATES V. ROGERS*, AND THEREFORE, NORTH CAROLINA HAD NO JURISDICTION OVER THIS CASE?

III. ALTERNATELY, DID MR. NOBLES PRESENT SUFFICIENT EVIDENCE THAT HE IS AN INDIAN TO REQUIRE THE TRIAL COURT TO SUBMIT A SPECIAL VERDICT ON SUBJECT MATTER JURISDICTION TO THE JURY?

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. The State elected not to proceed on one count of possession of firearm by felon. (1Rpp[1] 1, 4-9; 3/1/16p 65) After a 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 possession of firearm by felon. Judge Letts arrested Judgment on the armed robbery verdict, entered Judgment and Commitment on the possession of firearm by felon and murder verdicts, and sentenced Defendant to life without parole plus 14-26 months imprisonment. (4Rpp 565-66, 574, 577-80; XVpp 3049-50) Defendant appealed (4Rpp 582-84; XVp 3051), filing both an appellate brief and a motion for appropriate relief in the North Carolina Court of Appeals.

On July 3, 2018, in a unanimous, published opinion, a Court of Appeals panel (Elmore, J., with Inman, J., and Berger, J., concurring) affirmed Defendant's convictions, dismissed Defendant's motion for appropriate relief without prejudice, and remanded the case for correction of a clerical error.

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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 ___. "Finding of Fact" is abbreviated FF.

State v. Nobles, No. COA17-516, ___ N.C. App. ___, 818 S.E.2d 129 (July 3, 2018).

Defendant petitioned for discretionary review in this Court and entered notice of appeal based on a substantial constitutional question. In its response, the State moved to dismiss the appeal based on a substantial constitutional question, argued that discretionary review should not be allowed, and listed additional issues the State would present pursuant to North Carolina Rule of Appellate Procedure 15(d). On December 5, 2018, this Court allowed the State's motion to dismiss the appeal based on a substantial constitutional question, allowed Defendant's petition for discretionary review, and allowed the State to present additional issues pursuant to North Carolina Rule of Appellate Procedure 15(d). On December 28, 2018, this Court allowed Defendant's motion for a 30-day extension of time to file his new brief.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Defendant appeals pursuant to G.S. §7A-31 based on this Court's grant of his petition for discretionary review.

STATEMENT OF THE FACTS

A. Introduction.

On September 30, 2012, Barbara Preidt, an elderly white tourist, was shot and killed outside the Fairfield Inn ("the Fairfield"), located in Jackson County on the Qualla Boundary, which is land held in trust by the federal

government for the Eastern Band of Cherokee Indians ("EBCI"), a federally-recognized tribe. As Ms. Preidt and her husband were exiting their van to go to the Fairfield, a man tried to steal Ms. Preidt's purse. As they struggled over the purse, the man fatally shot Ms. Preidt with a single bullet. The shooter ran behind the Fairfield. (1Rp 64, paras. 1-2; 1Rpp 102-04, FF 128-42; 1Rp 110, FF 189.a. b.; IIIpp 830-34; IVpp 988-89; VIpp 1271-72)

After an investigation by the Cherokee Indian Police Department ("CIPD"), Mr. Nobles, his girlfriend Ashlyn Carouthers, and their friend Dewayne Swayney were arrested on the Qualla Boundary in connection with the crime. Mr. Nobles is a First Descendant of the EBCI, Swayney is an enrolled member of the EBCI, and Carouthers is an enrolled member of another federally-recognized tribe.[2] (1Rpp 91, FF 45-46; 1Rpp 93, FF 62; 1Rpp 110-11, FF 189.c., j.; VIIpp1682-83; XIpp 2409-15, 2419-22, 2425-51, 2455-71, 2479-83)

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[2] An enrolled member of the EBCI is a person who meets the EBCI enrollment criteria and has been approved for enrollment. 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). (1Rp 39)

B. Motion to Dismiss.

Mr. Nobles made a pretrial motion to dismiss the indictments based on lack of subject matter jurisdiction, claiming that because he is an Indian,[3] jurisdiction over his case was in federal court under the federal Major Crimes Act ("MCA"), 18 U.S.C. §1153. (1Rpp 17-30) At a hearing on the motion to dismiss, evidence was presented concerning the EBCI, Mr. Nobles' background, and the circumstances of his arrest.

1. The Arrest.

On the night of November 29, 2012, officers took Mr. Nobles, Carothers, and Swayney into custody on the Qualla Boundary and brought them to the CIPD, where the suspects were arrested. (8/9/13pp 30-31, 39-42)

Under Rule 6(a)(1) of the Cherokee Rules of Criminal Procedure ("CRCP"), "[a] person making an arrest within the Qualla Boundary must take the defendant without unnecessary delay before a Magistrate or Judge[.]" (2Rp 149a) Then, "[t]he Magistrate shall conduct the '*St. Cloud*' test[4] to confirm that the defendant is an Indian." Rule 6(b)(1). (2Rp 149a) Under the CRCP, if the arrestee swears he is an EBCI enrolled member, an EBCI First

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[3] "Indian" is a legal term of art. *See* Felix S. Cohen, Cohen's Handbook of Federal Indian Law §3.03 (Lexis 2012) ("Cohen").

[4] Under this test, developed by lower federal courts, various factors are considered to determine if a person is an Indian for jurisdictional purposes. *See St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988).

Descendant, or a member of another federally-recognized tribe, "the [Tribal] Court has jurisdiction over the defendant."[5] *Id.* (2Rp 149a)

EBCI Magistrate Sam Reed testified that under the Cherokee Code, when an arrest occurs on tribal land, the arrestee must be brought before a magistrate to complete an affidavit of jurisdiction. (913/13p 32) If the arrestee is an enrolled member of any federally-recognized tribe or an EBCI First Descendant, jurisdiction lies with the tribal court. (9/13/13pp 12-16, 24) 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." (9/13/13 pp 32-33)

Here, although all three suspects were arrested on the Qualla Boundary, Mr. Nobles was not taken before a tribal magistrate. (8/9/13pp 30-31, 38-40, 45-46) CIPD Detective Sean Birchfield checked an EBCI enrollment book and determined that Swayney was an enrolled member of the EBCI, but Mr. Nobles was not. Birchfield had heard that Carothers was enrolled in another tribe. (8/9/13pp 44-46) Birchfield did not ask Mr. Nobles if he was a First

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[5] If the defendant is arrested in "Indian country" for a "major crime" enumerated in the MCA, the federal court may later assume jurisdiction. *See* 8/9/13p 54. Indian country includes land held in trust by the United States for a federally-recognized tribe. 18 U.S.C. §1151; Cohen, §9.02[1][b]; Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 507-13 (1976) ("Clinton").

Descendant. (8/9/13p 46) Birchfield admitted he did not comply with the Cherokee Rules of Criminal Procedure when he did not bring Mr. Nobles before a tribal magistrate. (8/9/13pp 46-47)

A Jackson County Assistant District Attorney, a Special Assistant United States Attorney, and CIPD officers discussed what to do with the suspects. (8/9/13p 5) Based on a designation of Mr. Nobles' race on a National Crime Information Center report from 1993 and the fact that Mr. Nobles' name did not appear in the EBCI enrollment records, it was determined that Mr. Nobles would be charged in State court. (8/9/13pp 45-46, 54-56)

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; 1Rp 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, a misdemeanor. (9/13/13pp 14-16; 1Rp 143; Supp 5)

Mr. Nobles was not brought before Reed. If he had been, and if he "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) Instead, 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 indicated that 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 is 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 a car accident in 1984 and received treatment at Swain County Medical Center. "Cherokee" paid for medical services not covered by insurance. (9/13/13pp 67-74; Supp 21-35) Mr. Nobles also visited the Cherokee Indian Hospital ("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 run by the Indian Health Service ("IHS"), the federal agency that provides health care to Indians. (8/9/13p 170) *See* Indian Health Service, https://www.ihs.gov/aboutihs/ (last visited Dec. 28, 2018). For Mr. Nobles to receive free medical services at CIH through the federal government, Mann was required to show her birth certificate – which lists her tribal affiliation and blood quantum – or her tribal enrollment card. (8/9/13pp 170, 181; Supp 20)

In 1993, Mr. Nobles was convicted of crimes in Florida. In a presentence report, Mr. Nobles was designated "W/M." (8/9/13p 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 that Mr. Nobles sometimes stayed with his girlfriend. Later that month, Mr. Nobles told Ammons he had quit his job, and asked for help getting a photo ID. Ammons printed out a Division of Adult Correction document 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 that 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 that 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 generated. (8/9/13pp 90-96; 1Rp 145) The letter is used to prove First Descendant status to receive benefits available to First Descendants. (8/9/13pp 93-94)

Detective Birchfield testified there was no record that 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 land held by the First Descendant's parent at the time of death. First Descendants receive a hiring 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 a tribal office or vote in tribal elections. (8/9/13pp 103-16, 131; 1Rpp 43, 46-47, 51, 57)

Tarnawsky testified that 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. (8/9/13pp 120-22)

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 that 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)

4. Ruling on Motion to Dismiss and Convictions.

The trial court denied the motion to dismiss. (1Rp 86 - 2Rp 165) Mr. Nobles filed in this Court an interlocutory petition for writ of *certiorari*, which was denied.[6] (2Rpp 183-265) At trial, Mr. Nobles' renewed motion to dismiss was denied. (3/24/16pp 513, 520-26; 2Rpp 271-81)

Mr. Nobles was convicted of first-degree murder under the felony murder rule with armed robbery as the underlying felony, armed robbery, and possession of firearm by felon. (4Rpp 565-66, 574) The trial court arrested Judgment on the armed robbery conviction. (XVp 3049)

C. The Proceedings on Appeal.

On appeal, Mr. Nobles argued that the State of North Carolina did not have jurisdiction over him because he is an Indian, or, alternately, that the jurisdictional issue should have been submitted to the jury.

The Court of Appeals held that the test to determine who is an Indian for jurisdictional purposes is the test derived from *United States v. Rogers*, 45 U.S. 567, 11 L.Ed 1105 (1846), that the defendant has "some Indian blood" and that he is "recognized as an Indian by a tribe and/or the federal government."

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[6] The State initially intended to proceed capitally. (1Rp 14)

State v. Nobles, ___ N.C. App. ___, ___, 818 S.E.2d 129, 135-36 (2018) (citations omitted). If the defendant is an Indian, and the crime is covered by the MCA and occurred in Indian country, then jurisdiction is in federal court to the exclusion of State court. *Id.* at ___, 818 S.E.2d at 135.

Because both parties agreed that Mr. Nobles has "some Indian blood," "[a]t issue [wa]s *Rogers*' second prong." *Id.* at ___, 818 S.E.2d at 136. The Court noted that there was a circuit split on how to interpret the second prong. *Id.* However, the Court did not find it necessary to adopt any circuit's interpretation because the Court held that Mr. Nobles' claim would fail under any version of the test.[7] *Id.*

The Court first rejected Mr. Nobles' argument that all First Descendants are Indians under EBCI jurisprudence, specifically under *EBCI v. Lambert*, 3 Cher. Rep. 62 (2003) (1Rpp 25-27), and as codified in CRCP Rule 6. (2Rpp 149a-c) In *Lambert*, the Cherokee Court of North Carolina held that under *Rogers*, all First Descendants are Indians for the purposes of tribal jurisdiction.

In rejecting Mr. Nobles' claim, the Court of Appeals reasoned:

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[7] Nevertheless, all of the federal circuit court cases relied upon by the Court of Appeals on this issue are from the Ninth Circuit, which uses a stricter test than other circuits. *See* Cohen, §3.03[4]; 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). *See also* Issue II.

> While exercising tribal criminal jurisdiction over first descendants reflects a degree of tribal recognition, the Ninth Circuit has determined that 'enrollment, and, indeed, even eligibility therefor, is not dispositive of Indian status.' [*United States v. Bruce*, 394 F.3d 1215, 1225 (9th Cir. 2005)]. As tribal enrollment has been declared insufficient to satisfy *Rogers*' second prong as a matter of law, it follows that the exercise of criminal tribal jurisdiction over first descendants is also insufficient.

Nobles, ___ N.C. App. at ___, 818 S.E.2d at 137.

The Court then rejected Mr. Nobles' alternative argument that he satisfied *Rogers*' second prong under the factors set out in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988), "four factors to be considered in declining order of importance when evaluating *Rogers*' second prong." ___ N.C. App. at ___, 818 S.E.2d at 137.

With regard to the first factor, tribal enrollment, the Court found, as Mr. Nobles' had conceded, that he is not an enrolled member of the EBCI. *Id.* Mr. Nobles argued that his First Descendant status – and the benefits the EBCI had made available to him based on that status – showed tribal recognition as an Indian. *Id.* However, the Court concluded that "Mr. Nobles' first descendant status carries little weight[.]" The Court reasoned that "[w]hile the evidence showed that defendant would qualify for designation as a first descendant, it also showed that he is not classified by the EBCI as a first descendant, and he is thus currently ineligible to receive those benefits." *Id.* The Court based its conclusion on the fact that Mr. Nobles did not have a letter

of descent from the EBCI tribal enrollment office. *Id.* at ___, 818 S.E.2d at 137-38.

The Court listed the second factor as "'receipt of assistance available only to individuals who are members, or are eligible to become members of federally recognized tribes.'" *Id.* at ___, 818 S.E.2d at 138 (citation omitted). The Court found that the only such service Mr. Nobles had received was free health care from the CIH and IHS on five occasions as a minor,[8] and that "the trial court properly determined that this evidence failed to sufficiently satisfy the second *St. Cloud* factor." *Id.*

The third factor the Court examined was whether Mr. Nobles had "'enjoy[ed] . . . the benefits of affiliation with a federally recognized Indian tribe.'" *Id.* (citation omitted; alterations in *Nobles*). The Court found that Mr. Nobles had not satisfied this factor:

> To the degree defendant may have benefited from his first descendant status and was recognized by the federal government by receiving free medical care from the Cherokee Indian Hospital on those five instances last occurring when he was a minor twenty-three years before the hearing, we conclude it is irrelevant in assessing this factor in light of the absence of evidence that defendant enjoyed any other tribal benefits he may have been eligible to receive based on his first descendant status.

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[8] Mr. Nobles also received health care from Swain County Medical Center that Mr. Nobles' mother testified was paid for by "Cherokee." (9/13/13pp 67-74; Supp 21-35)

Id. at ___ 818 S.E.2d at 139.

With regard to the fourth factor, whether Mr. Nobles is "'social[ly] recogni[zed] as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe,'" *id.* (citation omitted), the Court found that

> [w]hile the record evidence showed defendant returned to the Qualla Boundary in 2011 for about fourteen months, resided on or near the Qualla Boundary with an enrolled member of another tribe, and worked for a restaurant . . . located within the Qualla Boundary, no evidence showed he participated in EBCI cultural or social events, or in any EBCI religious ceremonies during that time.

Id. at ___, 818 S.E.2d at 140. The Court also noted the opinion of Myrtle Driver concerning Mr. Nobles' tattoos, that "'[a]ll Native American Tribes honor the eagle' and it thus represented nothing unique to the EBCI, and that the headdress depicted on defendant's tattoo was worn not by the Cherokee but by 'western plains Native Americans.'" *Id.* (alteration in *Nobles*). Therefore, the Court held, "[t]he trial court properly determined this evidence carried little weight under the fourth *St. Cloud* factor." *Id.*

The Court held that the trial court properly overruled the motion to dismiss. *Id.*

Mr. Nobles argued in the alternative that the jurisdictional issue should have been submitted to the jury as a special verdict because there was

sufficient evidence from which the jury could have found that North Carolina did not have subject matter jurisdiction because Mr. Nobles is an Indian. *Id.*

The Court of Appeals rejected Mr. Nobles' argument on two bases:

> Defendant's cited authority concerns factual matters implicating territorial jurisdiction, not subject-matter jurisdiction. Unlike [MCA] prosecutions, under which Indian status is a jurisdictional prerequisite that the Government must prove beyond a reasonable doubt, . . . neither have our General Statutes nor our state appellate court decisions burdened the State when prosecuting major state-law crimes that occurred in Indian Country to prove a defendant is *not* an Indian beyond a reasonable doubt. But even if the State had such a burden, in this particular case, we conclude defendant failed to adduce sufficient evidence to create a jury question on his Indian status.

Id. at ___, 818 S.E.2d at 141. The Court then listed the evidence it had analyzed for the first jurisdictional issue, including that Mr. Nobles "was not currently recognized by the EBCI as a first descendant based on his failure to apply for and obtain a 'letter of descent,'" and concluded that Mr. Nobles "failed to adduce sufficient evidence to create a jury question on his Indian status." *Id.* at ___, 818 S.E.2d at 141-42.

The Court of Appeals affirmed Mr. Nobles' convictions. *Id.* at ___, 818 S.E.2d at 144.

STANDARD OF REVIEW

On appeal of a Court of Appeals decision, this Court reviews "whether there was any error of law in the decision of the Court of Appeals." *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010) (citation omitted).

ARGUMENT

I. MR. NOBLES IS AN INDIAN BECAUSE THE EASTERN BAND OF CHEROKEE INDIANS RECOGNIZES ALL FIRST DESCENDANTS AS INDIANS. THEREFORE, NORTH CAROLINA HAD NO JURISDICTION OVER THIS CASE.

North Carolina had no subject matter jurisdiction over this case because Mr. Nobles is an Indian. When a "major crime" is committed by an Indian in Indian country, jurisdiction lies in federal court under the MCA. 18 U.S.C. §1853. This federal jurisdiction is exclusive of State jurisdiction. *United States v. John*, 437 U.S. 634, 651, 57 L.Ed.2d 489, 501 (1978). Here, it is undisputed that the crimes occurred in Indian country, and that if the defendant is an Indian, jurisdiction would lie in federal court. (1Rp 64, paras. 1-2; 1Rp 110, FF 189.a., b.; 1Rp 116, FF 226-27) It is also undisputed that Mr. Nobles is a First Descendant of the EBCI.[9] (1Rp 65, para. 10; 1Rp 111, FF

[9] The Court of Appeals was incorrect when it stated that Mr. Nobles was not recognized by the EBCI as a First Descendant because he had not obtained a letter of descent. *See State v. Nobles*, ___ N.C. App. ___, ___, 818 S.E.2d 129, 137-38, 141-42 (2018). The parties stipulated that Mr. Nobles is a First Descendant. (1Rp 65, para. 10; 1Rp 111, FF 189.j.; 8/9/13pp 9-10) The Cherokee Code also recognizes Mr. Nobles as a First Descendant by virtue of the fact that he is the child of an enrolled member. Cherokee Indians Eastern Band, North Carolina, Code of Ordinances §28-

189.j.; 8/9/13p 106) The EBCI, in its jurisprudence, has recognized that all First Descendants are Indians. Accordingly, because Mr. Nobles is an Indian, the State had no jurisdiction.

A. Pertinent Proceedings.

Mr. Nobles made a pretrial motion to dismiss based on lack of subject matter jurisdiction, citing Article I, Section 8, Article III, Section 2, and Article IV of the United States Constitution; Art. IV, Section 12 of the North Carolina Constitution; 18 U.S.C. §1153; and G.S §1E-1. (1Rpp 17-30) After an evidentiary hearing, *see* Statement of the Facts, Section B., the trial court denied the motion to dismiss. (1Rp 86 - 2Rp 165) Mr. Nobles filed in this Court an interlocutory petition for writ of *certiorari*, which was denied. (2Rpp 183-265) At trial, 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,

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2(a). (1Rp 46) The letter of descent is merely a mechanism by which Mr. Nobles could prove his status to obtain various benefits offered by the tribe to First Descendants. (1Rp 95, FF 71; 8/9/13pp 93-94)

cl. 2; Art. IV, cl. 2; *Worcester v. Georgia*, 31 U.S. 515, 8 L.Ed. 483 (1832). 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").

Under the 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 from a federally-recognized tribe 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.[10] *John*, 437 U.S. at 651, 57 L.Ed.2d at 501. In this case, the crimes occurred in Indian country, and they are enumerated crimes

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

under the MCA, or are otherwise subject to federal[11] 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. Cohen, §3.03[4].

Because tribes may not take jurisdiction over non-Indian defendants, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 55 L.Ed.2d 209 (1978), 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 purposes of tribal court jurisdiction.

In *EBCI v. Lambert*, 3 Cher. Rep. 62 (2003) (1Rp 25-27), the defendant, an EBCI First Descendant, moved in tribal court to dismiss her criminal charge because she was not an EBCI enrolled member. The Court held that

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[11] Possession of firearm by felon would not be covered under the MCA. However, federal jurisdiction may lie under 18 U.S.C. §§13 and 1152. Cohen, §9.02[1][c][ii-iii]; Clinton, at 532-37.

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

Id. at 64 (footnote added).

Based on this, "the Court c[ould] only conclude that the Defendant meets the definition of an Indian in 25 U.S.C. §1301(4)": "'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code [the MCA], if that person were to commit an offense listed in that section in Indian country to which that

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[12] The defendant was the plaintiff in a tribal court case. 3 Cher. Rep. at 63.

section applies." 25 U.S.C. §1301(4) ("Definitions" section of the "Indian Civil Rights Act").

Therefore, the Court concluded that First Descendants, categorically, meet the federal definition of an Indian for purposes of the MCA and are under tribal court jurisdiction. 3 Cher. Rep. at 64. *See In re Welch*, 3 Cher. Rep. 71, 75 (2003) (1Rp 39) ("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) (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'").

Nevertheless, relying on Ninth Circuit case law, the Court of Appeals held that

> [w]hile exercising tribal criminal jurisdiction over first descendants reflects a degree of tribal recognition, the Ninth Circuit has determined that *'enrollment, and, indeed, even eligibility therefor, is not dispositive of Indian status.'* [*United States v. Bruce*, 394 F.3d 1215, 1225 (9th Cir. 2005)]. *As tribal enrollment has been declared insufficient to satisfy Rogers' second prong as a matter of law, it follows that the exercise of criminal tribal jurisdiction over first descendants is also insufficient. Cf. United States v. Cruz*, 554 F.3d 840, 851 (9th Cir. 2009) ('[A] showing that a tribal court on one occasion may have exercised jurisdiction over a defendant is of little if any consequence in satisfying the [Indian] status element [beyond a reasonable doubt] in a §1153 prosecution.'). As the Ninth Circuit's application of the *Rogers* test contemplates a balancing of multiple factors to

> determine Indian status, we reject defendant's argument that the EBCI's decision to exercise its criminal tribal jurisdiction over first descendants satisfies *Rogers*' second prong as a matter of law.

____ N.C. App at ___, 818 S.E.2d at 137 (first and second alterations and emphasis added).

The Court of Appeals' analysis is in error. Initially, as discussed in more detail in Issue II, our State courts are not bound by *Bruce* and other federal circuit court cases. This Court can, and should, as a matter of comity, recognize and respect the EBCI's determination that all First Descendants are Indians. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32, 56 L.Ed.2d 106, 124 n.32 (1978) (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"); *Cherokee Intermarriage Cases*, 203 U.S. 76, 51 L. Ed. 96 (1906) (deferring to tribal law on the matter of property rights of non-Indians married to Cherokee Indians); *United States v. Kagama*, 118 U.S. 375, 381-82, 30 L.Ed. 228, 230 (1886) (Indian tribes are sovereign entities "with the power of regulating their internal and social relations"); *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* G.S. §1E-1(a) ("The courts of this State shall give full faith

and credit to a judgment, decree, or order signed by a judicial officer of the [EBCI] and filed in the Cherokee Tribal Courts[.]").

Second, the Court's interpretation of *Lambert* is inaccurate. In *Lambert*, the Court concluded, based on the rights and privileges extended to *all* First Descendants due to their status, that all First Descendants meet the tribal and federal definition of an Indian. Therefore, under the Cherokee Court's analysis, First Descendants are not only subject to tribal court jurisdiction, they are subject to federal jurisdiction if they have committed an MCA enumerated felony.

Finally, the Court of Appeals has taken a statement from *Bruce* ("enrollment, and, indeed, even eligibility therefor, is not dispositive of Indian status," ___ N.C. App. at ___, 818 S.E.2d at 137 (quoting *Bruce*, 394 F.3d at 1225)) out of context and misconstrued it, thus tainting the Court's analysis of whether all First Descendants are recognized as Indians under *Lambert*.

Bruce did not state that enrollment in a tribe is insufficient as a matter of law to meet the second *Rogers* prong. Instead, the *Bruce* court's statement "that enrollment, and, indeed, even eligibility therefor, is not dispositive of Indian status," *id.* at 1225, was directed at the *Bruce* dissent's suggestion that the entire *Rogers* test should be conflated into one requirement: enrollment or eligibility for enrollment in a federally-recognized tribe. *Id.* ("Motivated in part by equal protection concerns, the dissent proposes a new test for determining

Indian status; one that would conflate our two-pronged *Rogers* inquiry and multi-faceted 'recognition' guidelines into a single question: whether the individual is enrolled or eligible for enrollment in a federally recognized tribe."). The *Bruce* majority's statement concerning enrollment, in this context, was meant to convey that lack of enrollment or eligibility for enrollment does not necessarily preclude a finding of Indian status because Ninth Circuit case law also requires consideration of whether the person has been recognized by the tribe or the federal government as an Indian. Indeed, the Ninth Circuit also stated that "[t]ribal enrollment is 'the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative[,]" *id.* at F.3d at 1224, and then cited numerous cases standing for the proposition that one does not have to be enrolled in a tribe or eligible for enrollment to be considered an Indian.[13] Moreover, *Bruce*'s holding was that although Bruce was not enrolled in a tribe,

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[13] *See Bruce*, 394 F.3d at 1224-25 (citing *United States v. Antelope*, 430 U.S. 641, 646 n. 7, 51 L.Ed.2d 701, 708 n.7 (1977) ("Enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction . . . ."); *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996) ("While tribal enrollment is one means of establishing status as an 'Indian' under 18 U.S.C. § 1152 [the "Indian Country Crimes Act," another statute establishing federal jurisdiction over crimes in Indian country that utilizes the same definition of "Indian" as the MCA, Cohen §9.02[1]], it is not the sole means of proving such status."); *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938) ("The lack of enrollment . . . is not determinative of status. . . . The refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian."); *St. Cloud*, 702 F. Supp. at 1461 ("[A] person may still be an Indian though not enrolled with a recognized tribe.")) (alterations in *Bruce*).

she "presented sufficient evidence to establish both her Indian blood and recognition." *Id.*

Accordingly, the Court of Appeals' misconstruction of *Bruce* has tainted its analysis of this issue.

In summary, the Court of Appeals erred by concluding, contrary to the EBCI's jurisprudence, that all First Descendants are not Indians. The Court of Appeals opinion undermines the sovereignty of the EBCI and fails to extend comity to the tribe's jurisprudence.

II. MR. NOBLES IS AN INDIAN BECAUSE HE SATISFIED THE TWO-PART TEST DERIVED FROM *UNITED STATES V. ROGERS*. THEREFORE, NORTH CAROLINA HAD NO JURISDICTION OVER THIS CASE.

North Carolina appellate courts are bound by decisions of the United States Supreme Court, but are not bound by lower federal court decisions. *Pender County v. Bartlett*, 361 N.C. 491, 516, 649 S.E.2d 364, 380 (2007). The controlling Supreme Court precedent in this case is *United States v. Rogers*, 45 U.S. 567, 11 L.Ed. 1105 (1846), which has been interpreted to mean that an Indian for federal jurisdictional purposes is someone who has some Indian blood, and has been recognized as an Indian by a tribe or the federal government. The Court of Appeals erred by applying a much stricter test developed by the Ninth Circuit.

A. Pertinent Proceedings.

As shown in Issue I, Mr. Nobles made a pretrial motion to dismiss based on lack of subject matter jurisdiction, citing Article I, Section 8, Article III, Section 2, and Article IV of the United States Constitution; Art. IV, Section 12 of the North Carolina Constitution; 18 U.S.C. §1153; and G.S §1E-1. (1Rpp 17-30) After an evidentiary hearing, *see* Statement of the Facts, Section B., the trial court denied the motion to dismiss. (1Rp 86 - 2Rp 165) Mr. Nobles filed in this Court an interlocutory petition for writ of *certiorari*, which was denied. (2Rpp 183-265) At trial, Mr. Nobles' renewed motion to dismiss was denied. (3/24/16pp 513, 520-26; 2Rpp 271-81)

B. 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 either he has been recognized as an Indian by the EBCI as a matter of law, or he has otherwise satisfied the second *Rogers* prong.

First, the trial court found as fact that Mr. Nobles has "some Indian blood." (1Rp 121, FF 258-59)

Second, Mr. Nobles either has met the "tribal recognition" requirement as a matter of law as set out in Issue I, or, if Mr. Nobles' status must be analyzed under the second prong of the *Rogers* test, he has satisfied that prong because he has been recognized by his tribe and the federal government as an Indian. The evidence showed that Mr. Nobles received federally-funded

services from the IHS. He was not charged for these services because he is an EBCI First Descendant. CIH records indicate he is of EBCI descent, and his hospital chart identified him as an "Indian nontribal member." (8/9/13pp 168-82; Supp 8-15) Mr. Nobles also received treatment at Swain County Medical Center and "Cherokee" paid for medical services not covered by insurance. (9/13/13pp 67-74; Supp 21-35) He attended Cherokee tribal schools, (9/13/13pp 61-67, 74-91; Supp 36-56), which were funded or operated by the BIA. (9/13/13pp 76, 79; Supp 39, 42, 48) In enrolling Mr. Nobles, his mother declared his Indian status. He was recognized by the federal government as an Indian student. (9/13/13pp 82-87; Supp 39, 42-44, 57)

Third, the Cherokee Court's exercise of criminal jurisdiction over First Descendants shows that Mr. Nobles has been recognized by the EBCI as an Indian. Magistrate Reed testified that 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 25-26)

Finally, the EBCI has recognized that all First Descendants are Indians by extending rights and privileges to them through the Cherokee Code and the tribal Charter. (1Rpp 43-47, 51, 57; 8/9/13pp 103-06, 120-22, 131) Therefore, Mr. Nobles is an Indian, and Jackson County had no jurisdiction over him.

The Court of Appeals applied a test developed by the Ninth Circuit that is much stricter than the *Rogers* test. The test is derived from a set of factors originally set out in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988), but the Ninth Circuit test is even narrower than the original *St. Cloud* test, specifically with respect to the second factor. The factors considered by the Ninth Circuit, and our Court of Appeals, "in declining order of importance," are as follows:

> (1) enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe.[14]

State v. Nobles, ___ N.C. App. ___, ___, 818 S.E.2d 129, 137 (2018) (citing *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015)).

These factors are not an accurate reflection of the *Rogers* test. The Ninth Circuit test lists "government recognition formally and informally *through*

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[14] The factors as originally set out in *St. Cloud* were: "1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life." *St. Cloud*, 702 F. Supp. at 1461 (footnote omitted).

receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes[.]" *Zepeda*, 792 F.3d at 1114 (emphasis added). Although to be considered an Indian, a person must be associated with a federally-recognized tribe, *Antelope*, 430 U.S. at 646, 51 L.Ed.2d at 707-08, *Rogers* does not require "receipt of assistance available only to individuals who are members, or are eligible to become members" of such tribes. With respect to governmental recognition, *Rogers* requires only that the federal government has recognized a person as an Indian. Not all individuals recognized by the government as Indians are "members, or are eligible to become members" of tribes. *See United States v. Stymiest*, 581 F.3d 759, 763-64 (8th Cir. 2009); Cohen §3.03[4]; n. 13, *supra*. Further, *Rogers* only requires "recognition" as an Indian, not "receipt of assistance." *Cf. United States v. Cruz*, 554 F.3d 840, 852 (9th Cir. 2009) (Kozinski, J., dissenting) ("That Cruz may not have taken advantage of these benefits [to which he was entitled based on his "descendant" status] doesn't matter because the [second prong of the *Rogers*] test is whether the *tribal authorities* recognize him as an Indian, not whether he considers himself one.").

Because the Court of Appeals used the Ninth Circuit test, it discounted, and failed to mention, that the BIA considered Mr. Nobles to be an Indian student. Indeed, the Court of Appeals only considered with regard to governmental recognition that Mr. Nobles was seen by the IHS several times, and determined that Mr. Nobles' utilization of these services reserved for

Indians was "irrelevant." ___ N.C. App. at ___, 818 S.E.2d at 139. The Court of Appeals also failed to mention all of the benefits available to Mr. Nobles from the EBCI that show tribal recognition of his Indian status.

Finally, even if tribal exercise of jurisdiction is not enough on its own to satisfy the second *Rogers* prong, as shown in Issue I, the Court of Appeals took a statement from *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005) out of context and misconstrued it to mean that enrollment in a tribe is insufficient to meet the second *Rogers* prong as a matter of law. The Court of Appeals' misconstruction of *Bruce* ("As tribal enrollment has been declared insufficient to satisfy Rogers' second prong as a matter of law, it follows that the exercise of criminal tribal jurisdiction over first descendants is also insufficient," ___ N.C. App. at ___, 818 S.E.2d at 137), has tainted its analysis of this issue and caused the Court to put far less weight on the exercise of tribal jurisdiction than it should have. *See id.* ("defendant's first descendant status carries little weight in this case").

The Court of Appeals erred by utilizing a test from non-binding case law, rather than the test derived from the United States Supreme Court decision in *Rogers.* 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.

III. ALTERNATELY, MR. NOBLES PRESENTED SUFFICIENT EVIDENCE THAT HE IS AN INDIAN TO REQUIRE THE TRIAL COURT TO SUBMIT A SPECIAL VERDICT ON SUBJECT MATTER JURISDICTION TO THE JURY.

The Court of Appeals erred by ruling that the trial court properly denied 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. 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. Mr. Nobles cited the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 19, 21, and 23 of the North Carolina Constitution; and Chapter 15A of our General Statutes. (2Rpp 271-73) The motion was denied. (2Rpp 274-81; 3/24/16pp 520-26))

"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. (1Rp 116, FF 225) *EBCI v. Lynch*, 632 F.2d 373 (4th Cir. 1980). Accordingly, Mr. Nobles' claim has a territorial jurisdiction component.

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 to be determined by a jury. Although *Batdorf*, *Rick*, and *Bright* deal 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 sufficient evidence from which the jury could conclude Mr. Nobles is an Indian, *see* Statement of the Facts, Section B., 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 fact that a crime has occurred within North Carolina does not necessarily mean that North Carolina has jurisdiction. In *State v. Smith*, 328 N.C. 161, 400 S.E.2d 405 (1991), North Carolina assumed jurisdiction over crimes committed in Camp LeJeune in Onslow County. Because the parties agreed that "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.

Nevertheless, the Court of Appeals found:

> Defendant's cited authority concerns factual matters implicating territorial jurisdiction, not subject-matter jurisdiction. Unlike [MCA] prosecutions, under which Indian status is a jurisdictional prerequisite that the Government must prove beyond a reasonable doubt, *see* [*United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015)] ('Under the [MCA], the defendant's Indian status is an essential element . . . which the government must allege in the indictment and prove beyond a reasonable doubt.' (quoting [*United States v. Bruce*, 394 F.3d 1215, 1229 (9th Cir. 2005])), neither have our General Statues nor our state appellate court decisions burdened the State when prosecuting major state-law crimes that occurred in Indian Country to prove a defendant is *not* an Indian beyond a reasonable doubt.

State v. Nobles, ___ N.C. App. ___, ___, 818 S.E.2d 129, 141 (2018) (some quotation marks omitted).

However, it does not matter whether this specific issue has previously been addressed in North Carolina by statute or case law. Mr. Nobles had a constitutional right to a jury trial, with the burden on the State to prove every factual matter necessary for his conviction and sentence beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435 (2000); *United States v. Gaudin*, 515 U.S. 506, 132 L.Ed.2d 444 (1995). It also does not matter that subject matter jurisdiction is not described as an "element" in our State. Territorial jurisdiction is not an element, yet the State still must prove beyond a reasonable doubt that North Carolina has jurisdiction if there is evidence that it does not. Therefore, if there is a factual dispute as to subject matter jurisdiction, the burden is on the State to prove jurisdiction beyond a

reasonable doubt. *See*, *e.g.*, *State v. Collins*, 245 N.C. App. 478, 484, 783 S.E.2d 9, 14 (2016) (citing *Batdorf*, and finding a lack of jurisdiction in Superior Court because "no substantive evidence was presented from which a jury could find beyond a reasonable doubt that Defendant was sixteen years old at the time of the commission of either the second or third offenses").

The Court of Appeals also stated, "But even if the State had such a burden, in this particular case, we conclude defendant failed to adduce sufficient evidence to create a jury question on his Indian status." ___ N.C. App. at ___, 818 S.E.2d at 141. However, as shown in the Statement of the Facts, Mr. Nobles presented evidence that he has some Indian blood and that he is recognized by the EBCI and the federal government as an Indian. Therefore, Mr. Nobles presented at least enough evidence to create a jury question as to whether he is an Indian.

Accordingly, the Court of Appeals erred by holding that the trial court did not err by denying the defense request for a special verdict on jurisdiction.

CONCLUSION

For all the foregoing reasons, Defendant respectfully contends his conviction should be vacated. Alternately, Defendant should be granted a new trial.

Respectfully submitted this the 4th day of February, 2019.

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CERTIFICATE OF FILING AND SERVICE

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

I further hereby certify that a copy of the above and foregoing Defendant-Appellant's New Brief has been duly served pursuant to Rule 26 by electronic means upon Special Deputy Attorney General Amy Kunstling Irene, airene@nccourts.org.

This the 4th day of February, 2019.

Electronic Submission

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