NO. 34PA14-2 THIRTY-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

****

NEW BRIEF FOR THE STATE
(Appellee)

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NEW BRIEF FOR THE STATE
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ISSUES PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY REJECT DEFENDANT'S ARGUMENT THAT HE SATISFIED THE SECOND PART OF THE TEST DERIVED FROM UNITED STATES v. ROGERS AS A MATTER OF LAW BASED ON HIS CONTENTION THAT THE EASTERN BAND OF CHEROKEE INDIANS RECOGNIZES ALL FIRST DESCENDANTS AS INDIANS?

II. DID THE COURT OF APPEALS CORRECTLY RULE THAT DEFENDANT IS NOT AN INDIAN UNDER THE TWO-PART TEST DERIVED FROM UNITED STATES v. ROGERS?

III. DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE TRIAL COURT DID NOT ERR BY DENYING DEFENDANT'S MOTION TO SUBMIT THE ISSUE OF SUBJECT MATTER JURISDICTION TO THE JURY?

STATEMENT OF THE CASE

On 3 December 2012, the Jackson County Grand Jury indicted defendant for first degree murder, robbery with a dangerous weapon, and possession of a firearm by a felon.[1] (1R pp. 4-9) The State initially announced its intention to conduct a Rule 24 conference. (1R pp. 14-16; 2R pp. 169-70, 181-82) See Gen. R. Pract. Sup. and Dist. Ct. 24 ("Pretrial Conference in Capital Cases").

On 16 April 2013, defendant filed a pre-trial motion to dismiss for lack of jurisdiction. The basis of defendant's motion was that jurisdiction is governed by federal law known as the Indian Major Crimes Act, 18 U.S.C. § 1153 ("MCA"), and, under the MCA, jurisdiction for the murder and armed robbery offenses lies in the federal courts because he is an Indian.[2] (1R pp. 17-30)

Defendant's motion was heard on 9 August 2013 and 13 September 2013 before the Honorable Bradley B. Letts, Senior Resident Superior Court Judge, who grew up in the Cherokee community and is an enrolled member of the Eastern Band of Cherokee Indians.[3] (2R pp. 166-68; 8/9/13 T pp. 5-6) The State

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[1] Defendant was indicted for two counts of possession of a firearm by a felon, but one count (12 CRS 51719) was not joined for trial. (3/1/16 T pp. 65, 93-95)

[2] As noted by defendant (Def's New Br. p. 5 n.3), "Indian" is a legal term of art in this context.

[3] Judge Letts advised the parties of these facts and neither party raised any objection. (2R pp. 166-68; 8/19/13 T pp. 5-6)

filed a brief on the motion in the Superior Court on 13 September 2013. (1R pp. 59-63) Defendant filed a reply on 19 September 2013. (1R pp. 66-78) In a 42-page, written order filed on 26 November 2013, Judge Letts concluded that defendant is not an Indian within the meaning of the MCA and thus denied defendant's motion to dismiss for lack of jurisdiction. (1R p. 86 - 2R p. 165)

On 30 January 2014, defendant filed a petition for writ of certiorari in this Court, seeking pre-trial review of the trial court's order denying his motion to dismiss. (2R pp. 183-264) The State filed a response on 26 February 2014. See No. 34P14. By order entered 12 June 2014, this Court denied the petition. (2R p. 265)

On 12 February 2015, the State gave notice that it intended to proceed noncapitally. (2R pp. 268-69) Before trial, defendant filed a "Motion to Require Jury Finding of Subject Matter Jurisdiction" dated 14 March 2016, renewing his motion to dismiss for lack of jurisdiction and, alternatively, requesting that the court submit the issue of subject matter jurisdiction to the jury. (2R pp. 271-73) After hearing arguments, Judge Letts denied the motion. (2R pp. 274-81; 3/24/16 T pp. 512-26)

Defendant was tried at the 28 March 2016 Criminal Session of the Superior Court, Jackson County, before Judge Letts and a jury. (1R p. 1) The jury found defendant guilty of first degree murder under the theory of felony

murder; robbery with a dangerous weapon; and possession of a firearm by a felon. (4R pp. 565-66, 574; 14T pp. 2959-69; 15T pp. 3037-39) Defendant was sentenced to life imprisonment without parole for first degree murder and 14-26 months imprisonment for possession of a firearm by a felon. Judgment was arrested on the robbery with a dangerous weapon conviction. (4R pp. 577-80; 15T pp. 3049-50)

Defendant appealed to the Court of Appeals. (4R pp. 582-85; 15T p. 3051) Defendant also filed a motion for appropriate relief ("MAR") in the Court of Appeals. See No. COA17-516.

In a published, unanimous opinion authored by Judge Elmore, with Judges Inman and Berger concurring, the Court of Appeals held that the trial court did not err by: (1) denying defendant's motion to dismiss for lack of jurisdiction,[4] (2) denying defendant's motion to submit the issue of subject

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[4] The Court of Appeals concluded that the MCA preempts the exercise of North Carolina's jurisdiction over major crimes committed by Indians on the Qualla Boundary. State v. Nobles, ___ N.C. App. ___, ___, 818 S.E.2d 129, 135 (2018). In so concluding, the Court of Appeals stated that prior decisions of this Court and the Fourth Circuit holding that North Carolina has jurisdiction over crimes committed on the Qualla Boundary without regard to whether the defendant was an Indian or non-Indian are not controlling because they were decided before United States v. John, 437 U.S. 634, 57 L. Ed. 2d 489 (1978). Nobles, ___ N.C. App. at ___ & n.2, 818 S.E.2d at 135 & n.2 (citing United States v. Hornbuckle, 422 F.2d 391 (4th Cir. 1970) (per curiam), State v. McAlhaney, 220 N.C. 387, 17 S.E.2d 352 (1941), and State v. Ta-cha-na-tah, 64 N.C. 614 (1870), as decisions that are not controlling). The Court of Appeals,

matter jurisdiction to the jury, and (3) denying defendant's motion to suppress incriminating statements he made to law enforcement. State v. Nobles, ___ N.C. App. ___, 818 S.E.2d 129 (2018). The Court of Appeals also remanded the matter to the Superior Court for the correction of a clerical error in the order arresting judgment on the robbery conviction. Id. at ___, 818 S.E.2d at 133, 144. The Court of Appeals dismissed defendant's MAR without prejudice to defendant's right to file a new MAR in the Superior Court. Id.

On 7 August 2018, defendant filed in this Court a notice of appeal (constitutional question) and a petition for discretionary review ("PDR"). The State filed in this Court on 20 August 2018 a motion to dismiss defendant's appeal and a response to defendant's PDR, in which the State included additional issues pursuant to N.C. R. App. P. 15(d). On 5 December 2018, this Court allowed the State's motion to dismiss defendant's appeal, allowed defendant's PDR, and allowed the State to present additional issues.

STATEMENT OF THE FACTS

A. Defendant's crimes.

The State's evidence at trial showed that on 30 September 2012, defendant robbed at gunpoint and fatally shot Barbara Preidt, a 76-year-old,

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however, did not have to reach this issue because it upheld the trial court's determination that defendant is not an Indian.

non-Indian tourist traveling with her husband, in front of the Fairfield Inn in Cherokee, North Carolina. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 133 (3T pp. 830-36, 844-47; 4T pp. 895-96, 958, 984-91, 1003-04, 1012-16, 1037; 6T pp. 1232-33, 1271-74, 1393-97; 10T pp. 2228-30, 2243-44, 2246; 11T pp. 2403-06, 2441-46; 12T pp. 2528-33; 13T pp. 2703-05; State's Ex. 204A) The Fairfield Inn is located on the Qualla Boundary, land held in trust by the United States for the Eastern Band of Cherokee Indians ("EBCI") (1R p. 64; 8/9/13 T p. 8). Nobles, ___ N.C. App. at ___, 818 S.E.2d at 133. The State's evidence included, inter alia, defendant's confession to law enforcement on 30 November 2012 that he committed the crimes. (12T pp. 2519-22, 2526-37, 2543-50, 2626, 2630-33; 13T pp. 2676, 2686-87; COA Supp. pp. 97-182 (State's Ex. 204); State's Ex. 204A) [5]

B. Evidence at the pre-trial hearing.

The evidence at the pre-trial hearing on defendant's 16 April 2013 motion to dismiss for lack of jurisdiction tended to show the following:

1) Stipulations of the parties.

The parties entered into stipulations. (1R pp. 64-65; 8/9/13 T pp. 6-11)

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[5] The Documentary Exhibits defendant filed in the Court of Appeals ("COA Supp.") included State's Exhibit 204, a redacted transcript of the 30 November 2012 interview. State's Exhibit 204A, a redacted video of the interview, was transmitted to the Court of Appeals.

These stipulations included, inter alia, that defendant was born on 17 January 1976 in Polk County, Florida, to Donna Lorraine Smith Crowe, now known as Donna Mann (1R p. 64; 8/9/13 T p. 9); Donna Mann is an enrolled member of the EBCI, a federally-recognized tribe (1R pp. 64-65; 8/9/13 T p. 9); and defendant "is not an enrolled member of the EBCI however he would be a first descendant of an enrolled member of the EBCI" (1R p. 65; accord 8/9/13 T pp. 9-10).

2) State's evidence.

On 28 January 1993, defendant was convicted in Florida of armed burglary and grand theft. In a pre-sentence report, defendant's race/sex is designated as "W/M." Defendant was released from Florida's custody on 4 November 2011, and his post-release supervision was transferred from Florida to Gaston County, North Carolina. Defendant is classified as white in both the OPUS system and the Interstate Compact for Adult Supervision System ("ICAOS"). When defendant arrived in North Carolina, he lived with his mother in Kings Mountain until he transferred his supervision to Swain County on 26 March 2012. (8/9/13 T pp. 13-16, 26-27, 71, 166-67; 1R pp. 65, 87-88, 129)

When defendant's supervision was transferred to Swain County, he lived with his aunt at an address located on the Qualla Boundary. On 3 April 2012,

defendant told Probation Officer Olivia Ammons that he was employed at a restaurant, which also was located on the Qualla Boundary. From 17 May 2012 until 11 July 2012, defendant reported living at two different addresses, neither of which were on the Qualla Boundary. When Ammons visited an address in Bryson City where defendant reportedly was living on 22 June 2012, defendant was not there. Ammons learned that defendant stayed there part of the time and with his girlfriend at an unapproved and unknown residence part of the time. (8/9/13 T pp. 71-78, 81-82)

On 25 June 2012, defendant advised Ammons that he had quit his job at the restaurant and was going to stay in Bryson City. He also asked for help obtaining a photo ID, so Ammons printed off and gave to defendant a document (State's Ex. 3) with his photograph and demographic information. The document designated defendant's race as white, and defendant never indicated to Ammons that this designation was incorrect. Thereafter, defendant said he was returning to his mother's house, and his supervision was transferred back to Gaston County on 12 July 2012. Defendant reported no changes of address to his Gaston County probation officer from 12 July 2012 until 30 September 2012 -- the date Mrs. Preidt was robbed and fatally shot in front of the Fairfield Inn. (8/9/13 T pp. 13, 15, 20-30, 32, 77-83; Supp. p. 1 (State's Ex. 3))

On 29 November 2012, Cherokee Indian Police Department ("CIPD")

officers brought defendant to the CIPD, where he was interviewed. CIPD officers conferred with an Assistant District Attorney and "tribal prosecutor and Special Assistant United States Attorney Jason Smith" to determine which sovereign had jurisdiction and would bring criminal charges against defendant. Based on a National Crime Information Center ("NCIC") report designating defendant as white and the fact that defendant was not in the enrollment book that is maintained at the CIPD, all involved agencies determined defendant would be charged in state court. On 30 November 2012, CIPD Detective Sergeant Sean Birchfield arrested defendant at the CIPD for murder, armed robbery, and possession of a firearm by a felon. Defendant was then brought before a Jackson County magistrate. (8/9/13 T pp. 8-9, 30-32, 38-39, 41, 43, 45-46, 53-55, 63-65, 134; 1R p. 64; Supp. p. 4)

Detective Birchfield testified that there was no record of any prior criminal charges against defendant as an adult in tribal court. (8/9/13 T pp. 101-02)

EBCI Assistant Enrollment Officer Kathy McCoy testified that defendant's mother is an enrolled member of the EBCI, but defendant is not an enrolled member. To be an enrolled member, the EBCI requires an Eastern Cherokee blood quantum of at least 1/16, among other requirements. (8/9/13 T pp. 90-96, 106-08; 1R p. 145)

EBCI Attorney General Annette Tarnawsky testified that the Cherokee Code provides, "'By definition in the charter, a first generation descendant shall include all children born to or adopted by an enrolled member.'" (8/9/13 T pp. 102-03, 106) When asked, "So [defendant] being born to his mother who is an enrolled member, would he be classified under tribal law as a first generation descendant?", Attorney General Tarnawsky answered, "Yes." (8/9/13 T p. 106) When asked, "Is every child born to an enrolled member automatically a first generation descendant, or can they be something else?", Attorney General Tarnawsky answered, "They can be enrolled. It depends on the blood quantum of their biological parents." (8/9/13 T p. 106)

The document issued to first generation descendants ("first descendants") by the Tribal Enrollment Department is called a "Letter of Descent." McCoy explained that "[m]ost of them get it so they can use the Indian Health Service." Although defendant would have been eligible to receive a "Letter of Descent" if he provided the required supporting documentation to the Tribal Enrollment Department, no "Letter of Descent" for defendant was found after a search of the Tribal Enrollment Department database. (8/9/13 T pp. 93-100, 106)

The EBCI provides benefits and opportunities to EBCI enrolled members that are not afforded to first descendants. Enrolled members receive monetary

disbursements from the casino; first descendants do not. In addition, as set forth below, first descendants are treated differently than EBCI members in the areas of real property, inheritance, health care, employment, education, and voting/holding elected office. (8/9/13 T pp. 96-97, 108-16)

- Real property: Tribal land is held by the United States government in trust for the EBCI. It is then tribally divided into possessory holdings, which can be held only by enrolled members of the tribe. First descendants cannot purchase a possessory holding or hold property in their name. Instead, first descendants only have use rights to the possessory holdings that their enrolled member parent had at the time of his or her death. These use rights, however, are limited. For example, first descendants have the right to sell, rent, or lease dwellings on the property, but only at fair market value to an enrolled member and only with the approval of the Tribal Business Committee. Further, a first descendant cannot enter into a lease that extends beyond his life expectancy. First descendants also cannot minimize or destroy the value of the possessory holding (e.g., they cannot deplete the mineral rights, remove any permanent structures, or harvest timber except for their own personal use). These same restrictions are not placed on enrolled

members. (8/9/13 T pp. 109-110, 115-16, 122; see also 1R pp. 46-47, 97-98, 111-12)

•Inheritance: The sole basis upon which a first descendant is given the right to use or occupy a possessory holding is from a parent through a valid will. Unlike a first descendant, an enrolled member can inherit a possessory holding either by will or intestate succession. If a first descendant inherits a possessory holding, he cannot devise it. (8/9/13 T pp. 110-12; see also 1R pp. 46-47, 98, 111-12)

•Health care: First descendants do not receive the same health care benefits as enrolled members. One major distinction is that first descendants cannot receive any services that are funded by tribal money; they are eligible to receive only those services funded by federal money. First descendants living in one of five designated counties can receive direct care at the Cherokee Indian Hospital ("CIH") and contract health services for life-threatening conditions; they cannot receive contract services for chronic conditions. First descendants living outside the five designated counties can receive only direct care at CIH; they are ineligible for outside referrals. Enrolled members, however, receive all health care services for free wherever such services are needed. (8/9/13 T pp. 108-09)

- Employment: The EBCI has four levels of employment preferences and gives first preference in initial hiring decisions to enrolled members who meet minimum requirements. The fourth and last employment preference is given to first descendants. (8/9/13 T pp. 112-13; see also 1R pp. 43, 98, 111-12)
- Higher education: Enrolled members have first priority to funds provided for higher education and adult education services. First descendants may receive such funds only when they are available. (8/9/13 T pp. 113-14; see also 1R pp. 51, 99, 111-12)
- Voting and holding elected office: First descendants cannot vote in tribal elections or hold a tribal elected office. (8/9/13 T pp. 114-16)

Attorney General Tarnawsky testified she is not aware of any applications or attempts by defendant to use any of the rights and benefits provided to first descendants. (8/9/13 T pp. 116-17)

Rule 6 of the Cherokee Rules of Criminal Procedure is a procedural rule governing a defendant's initial appearance. (2R pp. 149a-c) Rule 6(b)(1) sets forth the inquiry for a magistrate to conduct at an initial appearance to determine whether a defendant is an Indian for purposes of tribal jurisdiction. The answers to the questions are recorded in an affidavit of jurisdiction. Attorney General Tarnawsky testified that she disagrees with the proposition

that tribal courts are directed to exercise jurisdiction over first descendant defendants with no other prerequisites. She explained that after an initial appearance before a magistrate, a defendant has a first hearing in front of a judge, "who has more knowledge of the existing federal law[,]" at which time matters regarding jurisdiction can be argued under the relevant federal law. Attorney General Tarnawsky testified that the actions Detective Birchfield described of taking defendant before a State magistrate, rather than a tribal magistrate, were appropriate under the circumstances and not a violation of Rule 6, in her opinion as the chief legal officer of the EBCI. (8/9/13 T pp. 48-49, 103, 123, 126-27, 131-34)

Myrtle Driver Johnson ("Driver"), age 69, is an enrolled member of the EBCI with a blood quantum of 4/4. She was bestowed the title of "Beloved Woman" by the EBCI, which is an honor the Tribal Council and Chief and Vice Chief give to females for accomplishments and dedication to service with the Cherokee people. Driver is "somewhat of an icon in the Cherokee culture," very well-recognized, and accepted as a tribal elder. Driver has preserved and taught the Cherokee language since 1974. A word in the Cherokee language that can be used for "first descendant" is "aniyonega," which means people of light or white complexion. Driver testified that the societal view held by the EBCI is that first descendants are non-Native American. The EBCI believe

that the government promised health, education, and welfare to Indians, not descendants. (8/9/13 T pp. 117-18, 137-39, 141-45)

Driver explained that defendant's tattoos, which are a Native American with a headdress and an eagle, are not Cherokee symbols. The headdress is that of a Western Plains Indian and the eagle is "generic" because all Native American tribes honor the eagle. Driver further explained that the elders frown on tattoos, and that defendant's tattoo of a Native American with a headdress would be particularly frowned on "[b]ecause it makes us feel like that if you're going to display yourself, then display yourself of who you are, and that would be frowned upon, because, you know, you have that tattoo, you're not proud of your Cherokee heritage, because that is not of Cherokee." (8/9/13 T pp. 146-48)

Driver is familiar with and testified about various tribal events, many of which the public and first descendants may attend, that are held on the Qualla Boundary. She testified she does not know defendant and is unaware of defendant's participation in EBCI social life. (8/9/13 T pp. 141-48)

John Preidt, the husband of victim Barbara Preidt, testified that Mrs. Preidt was white. (8/9/13 T pp. 155-57; 1R p. 102)

3) Defendant's evidence.

Defendant's mother, Donna Mann, testified that she is an enrolled

member of the EBCI and defendant was born on 17 January 1976 in Polk County, Florida. Mann's birth certificate shows her EBCI blood quantum as 11/128. Defendant's father was white and not affiliated with any tribe. In 1983 or 1984, when defendant would have been approximately seven or eight years old, Mann moved from Florida to Cherokee. Thereafter, she and defendant lived both on and off the Qualla Boundary. After moving to the Cherokee area and, it appears, until around 1990, defendant attended both Swain County and Cherokee Central schools. Cherokee Central schools are open to both Indians and non-Indians. School records for defendant were admitted into evidence. On one Bureau of Indian Affairs ("BIA") Student Enrollment Application, Mann left blank the space after "Tribal Affiliation" and listed defendant's "Degree Indian" as "none." On two other BIA Student Enrollment Applications, Mann listed "Cherokee" in the space after "Tribal Affiliation" and left blank the space after "Degree Indian."[6] (9/13/13 T pp. 56-67, 74-96, 99; Supp. pp. 20, 39, 42, 48; 1R pp. 50, 109, 111-12)

Mann testified that defendant received treatment at Swain County Hospital and CIH for injuries suffered in automobile accidents in 1984 and

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[6] The "Individual Student Record" defendant has said lists his race as "I" (Def's New Br. p. 9) is from Swain County school records. (Supp. p. 57; 9/13/13 T pp. 90-93)

1985. According to Mann, "Cherokee" paid for the medical expenses not covered by third-party insurance. (9/13/13 T pp. 67-74)

Vicky Jenkins, the medical records director at CIH, testified that CIH serves enrolled members and first descendants. Patients of CIH do not receive a bill or pay for medical services. Jenkins testified that defendant's records show he received services at CIH on 5 occasions: 10/31/85, 10/1/87, 3/12/89, 3/16/89, and 2/28/90. CIH is currently a tribal facility run by the EBCI, but was a federal Indian Health Service ("IHS") facility at the time defendant received services. (8/9/13 T pp. 168-82)

Defendant's maternal uncle, an enrolled member of the EBCI who lives in Cherokee, testified that defendant's father left defendant at his house when defendant was about two weeks old. Defendant's father returned in a week or two and retrieved defendant. (9/13/13 T pp. 46-53)

EBCI tribal magistrate Sam Reed testified that if defendant had been brought before him and checked the box on the affidavit of jurisdiction that defendant is a first lineal descendant, Reed would have found defendant to be an Indian under the jurisdiction of the tribal court. Reed acknowledged that determining jurisdiction among tribal, federal, and state courts can be complex. He explained that the affidavit of jurisdiction is done only after either a criminal complaint or warrant has been issued and served on the potential

defendant; if the defendant was never charged in tribal or federal court, there would not be an affidavit of jurisdiction. (9/13/13 T pp. 6, 23-29)

STANDARD OF REVIEW

This Court reviews whether there is any error of law in the Court of Appeals' decision. State v. Brooks, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). The Court of Appeals has ruled that a trial court's ruling on a motion to dismiss for lack of subject matter jurisdiction is reviewed de novo, but the trial court's findings of fact are binding on appeal if supported by competent evidence. Cooke v. Faulkner, 137 N.C. App. 755, 757, 529 S.E.2d 512, 513-14 (2000). The trial court's unchallenged findings of fact are binding on appeal. State v. Sparks, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008).

ARGUMENT

The basis of defendant's pre-trial motion to dismiss was that jurisdiction is governed by the MCA, and, under the MCA, jurisdiction for the murder and armed robbery offenses lies in federal court because, he claimed, he is an Indian. (1R pp. 17-21, 28-30) The MCA provides in pertinent part that:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, . . . robbery . . . 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).[7]

The MCA does not define "Indian." As the Court of Appeals correctly stated, federal circuit courts of appeals have accepted and applied a two-part test derived from the United States Supreme Court's decision in United States v. Rogers, 45 U.S. 567, 11 L. Ed. 1105 (1846), to determine whether someone is an Indian. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 135-36. To satisfy the two-part test, defendant must (1) have some Indian blood; and (2) be recognized as an Indian by a tribe or the federal government. Rogers, 45 U.S. at 572-73, 11 L. Ed. at 1107; United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009) (recognizing test), cert. denied, 559 U.S. 1055, 176 L. Ed. 2d 573 (2010); United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005) (same); United States v. Zepeda, 792 F.3d 1103, 1110, 1113-14 (9th Cir. 2015) (en banc) (explaining that second prong of test stated in Bruce requires membership in or affiliation with a federally-recognized tribe), cert. denied, ___ U.S. ___, 194 L. Ed. 2d 810 (2016); Scrivner v. Tansy, 68 F.3d 1234, 1241 (10th Cir. 1995) (recognizing test), cert. denied, 516 U.S. 1178, 134 L. Ed. 2d 223 (1996); United

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[7] As acknowledged by defendant, possession of a firearm by a felon is not an enumerated offense under the MCA. Defendant does not argue that the State lacked jurisdiction over this offense, stating in a footnote only that "federal jurisdiction may lie under 18 U.S.C. §§ 13 and 1152." (Def's New Br. p. 22 n.11 (emphasis added)). In any event, for the reasons argued in this brief, defendant is not an Indian.

States v. Torres, 733 F.2d 449, 456 (7th Cir.) (concluding that jury instruction setting forth the two-part test was "in accord with present Federal law" regarding "what constitutes an Indian for purposes of 18 U.S.C. § 1153"), cert. denied, 469 U.S. 864, 83 L. Ed. 2d 135 (1984).

The second part of the test derived from Rogers (i.e., whether the defendant is recognized as an Indian by a tribe or the federal government) "probes whether the [defendant] has a sufficient non-racial link to a formerly sovereign people." Bruce, 394 F.3d at 1224 (internal quotation omitted). In St. Cloud v. United States, 702 F. Supp. 1456 (D. S.D. 1988), the federal district court identified from case law the following factors, in declining order of importance, used to evaluate the second part of the Rogers test: "1) enrollment in a tribe; 2) government recognition formally and informally through providing [the defendant] 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." Id. at 1461 (footnote omitted). The court in St. Cloud explained, "These 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. Other courts consider these St. Cloud factors in determining the second part of the Rogers test. See, e.g., Zepeda, 792 F.3d at 1114 (second prong of test stated

in Bruce requires membership in or affiliation with a federally-recognized tribe; considers the St. Cloud factors in declining order of importance to determine this); Stymiest, 581 F.3d at 763-64 (St. Cloud factors are useful but not exhaustive and not tied to an order of importance unless the defendant is an enrolled tribal member, which the court considers dispositive); State v. Sebastian, 701 A.2d 13, 24 (Conn. 1997) (listing St. Cloud factors and noting those factors "have emerged as a widely accepted test for Indian status in the federal courts"), cert. denied, 522 U.S. 1077, 139 L. Ed. 2d 756 (1998); State v. LaPier, 790 P.2d 983, 986 (Mont. 1990) (adopting St. Cloud factors).

In this case, the trial court applied the two-part Rogers test, as interpreted by St. Cloud and the Ninth Circuit, to determine whether defendant is an Indian within the meaning of the MCA. The trial court found that defendant "has, barely, satisfied the first prong under the Rogers test in that he has some Indian blood. The modest degree of Indian blood for the Defendant is 11/256 or 4.29%." (1R p. 121, FOF 259; accord 1R p. 121, FOF 258) Under the second Rogers prong, the trial court considered the St. Cloud factors in declining order of importance. (1R pp. 120-21) Based on extensive findings of fact, none of which defendant has challenged in this Court, the trial court concluded that defendant is not an Indian, and the court therefore denied defendant's motion to dismiss. (1R pp. 126-27) The Court of Appeals correctly

upheld the trial court's order denying defendant's motion to dismiss because defendant is not an Indian. See New York ex rel. Ray v. Martin, 326 U.S. 496, 500, 90 L. Ed. 261, 264 (1946) (explaining that States have jurisdiction over crimes committed in Indian country "between whites and whites which do not affect Indians"); accord United States v. McBratney, 104 U.S. 621, 624, 26 L. Ed. 869, 870 (1882).

I. THE COURT OF APPEALS CORRECTLY REJECTED DEFENDANT'S ARGUMENT THAT HE SATISFIED THE SECOND PART OF THE TEST DERIVED FROM UNITED STATES v. ROGERS AS A MATTER OF LAW BASED ON HIS CONTENTION THAT THE EASTERN BAND OF CHEROKEE INDIANS RECOGNIZES ALL FIRST DESCENDANTS AS INDIANS.

Rather than apply the St. Cloud factors to determine whether defendant is recognized as an Indian under the second part of the Rogers test, defendant argues, as he did in the Court of Appeals, that he satisfied the second part of the Rogers test as a matter of law because he is a first descendant of an enrolled member of the EBCI and the EBCI recognizes all first descendants as Indians. This argument fails, and the Court of Appeals correctly rejected it.

The trial court made findings of fact regarding first descendant status. (1R pp. 95, 97, 111, 123-24, FOF 70-75, 84, 189(j), 262(m), 267) These findings of fact, which defendant has not challenged, include that although defendant is not currently classified as a first descendant, he is eligible to be designated

as a first descendant (1R pp. 95, 97, FOF 75, 84); that defendant "does enjoy First Descendant status but never took steps to formalize his rights" and "never applied for or received the corresponding certification from the tribal enrollment office establishing his First Descendant status" (1R p. 123, FOF 262(m)); and that the parties stipulated defendant "would be a First Descendant of an enrolled member of the EBCI" (1R pp. 110-11, FOF 189(j)).

In support of his argument, defendant relied in the Court of Appeals primarily on the Cherokee Court's decision in Eastern Band of Cherokee Indians v. Lambert, 3 Cher. Rep. 62 (E. Cher. Ct. 2003) (App. pp. 1-3), and Rule 6 of the Cherokee Rules of Criminal Procedure.[8] (Def's COA Br. pp. 27-31) The Court of Appeals correctly rejected defendant's argument, ruling that even if the EBCI recognizes all first descendants as Indians for purposes of exercising its tribal criminal jurisdiction, this would be only one factor to consider and would be insufficient to show defendant satisfies the second Rogers prong as a matter of law.[9] Nobles, ___ N.C. App. at ___, 818 S.E.2d at 136-37. The Court

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[8] Judge Letts provided in his order a website address at which the Cherokee Code may be accessed. (1R p. 111, FOF 190) Upon accessing that website, it appears that Rule 6 has been amended since the time of this case.

[9] In this case, there is no evidence that the tribal court has ever actually exercised tribal criminal jurisdiction over defendant (1R pp. 93, 122, FOF 61, 262(h)), but even if the tribal court had, that would be, at most, only one factor to consider.

of Appeals also correctly recognized that the application of the Rogers test contemplates a balancing of multiple factors to determine Indian status. Id. at ___, 818 S.E.2d at 137.

In his New Brief, defendant contends that "the Court of Appeals erred by concluding, contrary to the EBCI's jurisprudence, that all First Descendants are not Indians." (Def's New Br. p. 28) To be clear, the Court of Appeals did not conclude that all first descendants are not Indians. Instead, the Court of Appeals rejected defendant's argument that a decision by the EBCI to exercise its criminal tribal jurisdiction over first descendants would be sufficient as a matter of law to show defendant satisfied Rogers' second prong. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 137.

Defendant further contends that the Court of Appeals' analysis is in error, claiming: (1) our State courts should, "as a matter of comity, recognize and respect the EBCI's determination that all First Descendants are Indians[]" in the Lambert case; (2) "the Court[] [of Appeals'] interpretation of Lambert is inaccurate;" and (3) the Court of Appeals took a statement from Bruce out of context which, in turn, tainted the Court of Appeals' analysis of whether all first descendants are recognized as Indians under Lambert. (Def's New Br. pp. 25-26)

In general, trial court decisions are not binding precedent for appellate

courts, and this principle applies equally here. The Cherokee Court, which is the court that decided Lambert, is the trial court for the EBCI. See Cherokee Code § 7-1(a) (App. p. 4) ("the Trial Court shall be known as the 'Cherokee Court'"). The Supreme Court of the EBCI has said, in the context of rejecting a party's argument based on two Cherokee Court decisions, "We do not consider the Cherokee Court opinions as having any precedential value since the Cherokee Court is the trial court for this appellate court." Teesateskie v. Eastern Band of Cherokee Indians Minors Fund, 13 Am. Tribal Law 180, 188 (E. Cher. 2015) (App. pp. 5-13).

Even if the Cherokee Court had held in Lambert that all first descendants are Indians for purposes of the exercise of tribal criminal jurisdiction (which, as explained below, it did not), the Cherokee Court's ruling on that subject would not be binding precedent for the Supreme Court of the EBCI, see Teesateskie, 13 Am. Tribal Law at 188, much less for this Court. It also would not be a ruling this Court should follow or adopt without independent analysis and evaluation.

State v. George, 422 P.3d 1142 (Idaho 2018), is analogous in this regard. In George, the defendant was not an enrolled member of the Coeur d'Alene Tribe, which will only prosecute enrolled members of the Tribe. Id. at 1143, 1146. The Idaho Supreme Court rejected the State's argument that because

the Coeur d'Alene Tribe did not consider the defendant to be an Indian for purposes of tribal jurisdiction, the State courts also should not consider the defendant to be an Indian. Id. In so doing, the Idaho Supreme Court explained that the lower court correctly stated, "this court either has jurisdiction or it does not, and it is not determined by whether other agencies have or do not have jurisdiction or exercise discretion in determining whether to prosecute." Id. at 1146 (internal quotation and brackets omitted).

In any event, however, defendant's contentions are based on his inaccurate interpretation of Lambert and are without merit. In particular, defendant asserts that the Cherokee Court in Lambert concluded that all first descendants, categorically, meet the federal definition of being an Indian and are under tribal court jurisdiction. He further contends that under the Cherokee Court's analysis in Lambert, all first descendants are subject to federal jurisdiction if they have committed an MCA-enumerated felony. (Def's New Br. p. 26) Defendant misconstrues the analysis and holding in Lambert.

At issue in Lambert was whether the defendant was an Indian for purposes of tribal criminal jurisdiction. The parties stipulated that the defendant was not an enrolled member of any federally-recognized tribe and was recognized, politically, by the Tribe as a first descendant. Lambert, 3 Cher. Rep. at 62. Nonetheless, the Cherokee Court determined that

"additional evidence was required to decide the matter" and held a hearing. Id. If all that was needed to satisfy the second Rogers prong was to establish that the defendant was a first descendant -- as defendant here contends -- then it would have been unnecessary for the court to hold a hearing because the parties already had stipulated to the defendant's first descendant status.

After holding a hearing, the court made findings of fact. Id. at 62-63. These findings of fact not only included findings about the benefits and privileges afforded to first descendants, but also included a finding that the defendant had previously availed herself of the Cherokee Court's civil jurisdiction as a plaintiff in a pending civil case on the court's docket. Id. at 63.

The court explained 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. at 64 (internal quotation omitted). "Rather, the inquiry includes whether the person has some Indian blood and is recognized as an Indian." Id. "The second part of the test," the court explained,

> includes not only whether the person 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. at 64-65.

The court went on to say, "Applying this test in this case, the Court can only conclude that the Defendant meets the definition of an Indian pursuant to 25 U.S.C. § 1301(4). Accordingly, the Court has jurisdiction over the Defendant in this case." Lambert, 3 Cher. Rep. at 65 (emphases added).

The Cherokee Court thus did not say or hold in Lambert that all first descendants of the EBCI are, categorically, Indians over which it has tribal criminal jurisdiction. Instead, it applied the two-part Rogers test and the same factors as listed in St. Cloud to the case before it and concluded that the defendant in Lambert was an Indian over whom the court had jurisdiction. Lambert, 3 Cher. Rep. at 64-65.

Defendant cites statements regarding Lambert that appear in two subsequent Cherokee Court decisions in support of his contention that Lambert held that all first descendants are Indians for purposes of tribal court jurisdiction. (Def's New Br. p. 24) Those two cases are Eastern Band of Cherokee Indians v. Prater, 3 Cher. Rep. 111, 112 (E. Cher. Ct. 2004) (App. pp. 14-15), and In re Welch, 3 Cher. Rep. 71, 75 (E. Cher. Ct. 2003) (App. pp. 16-19). Prater applied the Rogers test/St. Cloud factors to determine that the

defendant, who was a "second descendant," was not an Indian based on the specific facts of the case. Prater, 3 Cher. Rep. at 113. Welch was a contempt proceeding against a CIPD officer who refused to serve a warrant on a person who was not an enrolled member of a federally-recognized tribe. Welch, 3 Cher. Rep. at 72, 75. Neither Prater nor Welch involved the question of whether the tribal court had jurisdiction over a first descendant, and the statements in them regarding Lambert are thus dicta that should not be given weight in this context. See Trustees of Rowan Tech. College v. Hammond Assoc., Inc., 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is obiter dictum and later decisions are not bound thereby.").

Defendant contends that the Court of Appeals took a statement from the Ninth Circuit's decision in Bruce out of context and misconstrued it, which, in turn, "taint[ed] the Court[] [of Appeals'] analysis of whether all First Descendants are recognized as Indians under Lambert." (Def's New Br. p. 26) The statement from Bruce defendant refers to is: "enrollment, and, indeed, even eligibility therefor, is not dispositive of Indian status." Bruce, 394 F.3d at 1225.

The Court of Appeals correctly quoted what Bruce says. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 137. Regardless, that statement from Bruce would

not have impacted the Court of Appeals' analysis of whether Lambert held that all first descendants of the EBCI are, categorically, Indians as a matter of law, and it would not affect this Court's own analysis of Lambert now.

Moreover, the Court of Appeals also cited United States v. Cruz, 554 F.3d 840 (9th Cir. 2009). Nobles, ___ N.C. App. at ___, 818 S.E.2d at 137. In Cruz, the Ninth Circuit held that the defendant, who had "descendant" status in the Blackfeet Tribe due to his mother being an enrolled member, was not an Indian. Cruz, 554 F.3d at 846-47 & n.9, 850-51. The Ninth Circuit correctly explained that descendant status is not dispositive of Indian status. Id. In Cruz, the defendant even had been prosecuted previously in tribal court (although the outcome of the prosecution was unclear), Id. at 846 & n.7, 850-51, unlike in this case in which there was no evidence defendant had been prosecuted previously in tribal court (1R pp. 93, 122, FOF 61, 262(h)).

In sum, the Court of Appeals correctly rejected defendant's argument that he satisfied the second Rogers prong as a matter of law based on his contention that the EBCI recognizes all first descendants as Indians by exercising tribal criminal jurisdiction over first descendants.

II. THE COURT OF APPEALS CORRECTLY RULED THAT DEFENDANT IS NOT AN INDIAN UNDER THE TWO-PART TEST DERIVED FROM UNITED STATES v. ROGERS.

In the Court of Appeals, defendant argued, in the alternative to Argument I, above, that the trial court erred by denying his motion to dismiss because he satisfied the second Rogers prong using the St. Cloud factors. (Def's COA Br. pp. 32-36) The Court of Appeals correctly rejected this argument.

A. The Court of Appeals applied the two-part test derived from Rogers.

Defendant contends the Court of Appeals erred because it failed to apply the two-part Rogers test when assessing defendant's Indian status and, instead, applied a test developed by the Ninth Circuit that is stricter than the Rogers test. Contrary to defendant's contention, the Court of Appeals did apply the two-part test derived from Rogers. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 135-40. Indeed, the Court of Appeals began its analysis of this issue by setting forth the two-part test derived from Rogers: "To satisfy the first prong, a defendant must have some Indian blood; to satisfy the second, a defendant must be recognized as an Indian by a tribe and/or the federal government." Nobles, ___ N.C. App. at ___, 818 S.E.2d at 135-36. The Court of Appeals stated that "the trial court found, and neither party disputes, that Rogers' first prong was satisfied because defendant has an Indian blood quantum of 11/256 or

4.29%. At issue is Rogers' second prong." Nobles, ___ N.C. App. at ___, 818 S.E.2d at 136.

As explained above, other courts have considered the St. Cloud factors to determine whether a defendant is recognized as an Indian under the second prong of the Rogers test. See St. Cloud, 702 F. Supp. at 1461 (stating factors). The Court of Appeals noted that "there is a federal circuit split" in assessing the St. Cloud factors under the second Rogers prong. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 136. The Court of Appeals explained that the Ninth Circuit considers these factors in declining order of importance. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 136 (citing and quoting Zepeda, 792 F.3d at 1114). The Court of Appeals further explained that the Eighth Circuit considers these factors, too, but has not assigned them any order of importance, other than tribal enrollment, which it deems sufficient itself to show defendant is recognized as an Indian. Id. (citing Stymiest, 581 F.3d at 763-66). The Eighth Circuit also allows for the consideration of other factors, such as whether the defendant has been subjected to tribal court jurisdiction and whether the defendant has held himself out as an Indian. Id. (citing Stymiest, 581 F.3d at 763-66).

The "Ninth Circuit test" referenced by defendant, thus, is not a separate test from the two-part test derived from Rogers. Instead, defendant is referring

to the way in which the Ninth Circuit assesses the second prong of the Rogers test.

Here, the trial court followed Ninth Circuit precedent when analyzing the St. Cloud factors under the second Rogers prong. However, the Court of Appeals ruled that "defendant would not qualify as an Indian under either test[.]"[10] Nobles, ___ N.C. App. at ___, 818 S.E.2d at 136. Thus, contrary to defendant's argument that the Court of Appeals erred by applying Ninth Circuit precedent, which defendant claims applies too strict of a "test," the Court of Appeals also ruled that defendant is not an Indian under either "test" used by the federal circuit courts.

B. The Court of Appeals correctly held that defendant is not an Indian.

The Court of Appeals used the St. Cloud factors to assess whether defendant satisfied the second Rogers prong. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 137-40. As to the first and most important St. Cloud factor -- enrollment in a federally-recognized tribe -- the Court of Appeals noted that the trial court found, and defendant conceded, that he is not an enrolled member of the EBCI or any federally-recognized tribe, nor is he eligible to

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[10] The Court of Appeals used the term "test" to refer to the way in which the federal circuit courts assess the second prong of the Rogers test.

become an enrolled member of the EBCI because his blood quantum of 11/256 does not satisfy the minimum required blood quantum of 1/16. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 137. (See 1R pp. 65, 94, 121, FOF 66-68, 257-59, 261)

As to the second St. Cloud factor -- government recognition through receipt of assistance reserved only to Indians -- the Court of Appeals correctly noted that defendant received federally-funded medical services at CIH on five occasions when he was a minor, with the last visit being over 22 years before his arrest on the instant charges. Nobles, ___ N.C. App. at ___, ___, 818 S.E.2d at 133, 138. As the trial court found in an unchallenged finding of fact, "it is likewise true [defendant] 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." (1R p. 124, FOF 264) Further, "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." (1R p. 124, FOF 266).

The trial court's unchallenged findings also establish that defendant was not born on or near the Qualla Boundary, never inherited a possessory interest

in tribal land, has no tribal identification card, and has never voted in tribal elections or held elected office. Defendant is ineligible to receive the biannual distribution of gaming proceeds shared by all enrolled members. Further, defendant never received any payments for settlements owed by the federal government to enrolled members of the EBCI, nor has he served on a tribal jury. (1R pp. 122-23, FOF 262)

Although defendant attended Cherokee schools for a portion of his schooling, this school system is open to both Indian and non-Indian students. (1R pp. 50, 99, 109, 123-24, FOF 96, 182, 262(o), 265)

As to the third St. Cloud factor -- enjoyment of the benefits of tribal affiliation -- the Court of Appeals noted that the trial court made the following unchallenged findings of fact:

> "267. . . . [U]nder 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. . . . [T]he 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 to substitute opportunity for action. To ascribe enjoyment of benefits where none occurred would be tantamount to finding facts where none exist."

Nobles, ___ N.C. App. at ___, 818 S.E.2d at 138-39 (quoting 1R pp. 124-25, FOF 267-68); (accord 1R p. 124, FOF 266). As the trial court properly found, the receipt of defendant's medical services "must be viewed through the prism of receiving acute medical treatment as [a] 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." (1R pp. 125-26, FOF 273; accord 1R p. 124, FOF 264)

As to the fourth St. Cloud factor -- social recognition as an Indian -- the Court of Appeals noted that the trial court made the following finding of fact:

> "271. . . . [T]he Defendant simply has no ties to the Qualla Boundary. . . . [U]nder the fourth St. Cloud factor Defendant points to no substantive involvement in the fabric of the Cherokee Indian community at any time. The Defendant did reside and work on or near the Cherokee reservation for about 14 months when his probation was transferred from Florida to North Carolina. Yet in these 14 months near Cherokee the record is devoid of any social involvement in the Cherokee community by the Defendant."

Nobles, ___ N.C. App. at ___, 818 S.E.2d at 139-40 (quoting 1R p. 125, FOF

271).[11] The trial court also found that defendant "simply presented no evidence of social recognition as an Indian and participation in the Indian social life of the Qualla Boundary." (1R p. 125, FOF 272) Further, the Court of Appeals correctly noted that Driver, an enrolled EBCI member who was bestowed the title of "Beloved Woman" by tribal leaders for her dedication and service to the EBCI and who participated in EBCI social and cultural events over the years, did not know defendant. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 140.

In sum, defendant has an Indian blood quantum of 11/256; defendant is not an enrolled member of the EBCI or any other federally-recognized tribe; defendant received medical services at CIH on 5 occasions when he was a minor, with his last visit being more than 23 years before the date of the hearing; defendant never applied for or received a "Letter of Descent" from the Tribal Enrollment Department; defendant attended school for a period of time in the Cherokee schools, which are open to non-Indian students; and while defendant lived on or near the Qualla Boundary for some period of time, there

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[11] It appears from the Superior Court's order that defendant lived on or near the Qualla Boundary for substantially less time than 14 months. The court found that defendant was released from Florida's custody in November 2011 and that same month transferred his probation to Gaston County, North Carolina; and that defendant did not transfer his supervision to Swain County until March 2012, thereafter living intermittently on or near the Qualla Boundary until the time of the murder on 30 September 2012. (1R pp. 87-91, FOF 1-10, 16-35, 45)

is no evidence defendant was socially recognized as an Indian or socially involved with the EBCI community. Based on these facts, the Court of Appeals correctly held that the trial court properly concluded defendant is not an Indian.

In his New Brief, defendant argues that the Court of Appeals failed to mention all the benefits available to defendant as a first descendant, which he claims show tribal recognition of his Indian status. He also argues that the Court of Appeals' alleged misconstruction of the statement in Bruce[12] "caused the Court [of Appeals] to put far less weight on the exercise of tribal jurisdiction than it should have." (Def's New Br. p. 33) In support, he notes that the Court of Appeals stated that "defendant's first descendant status carries little weight in this case." Nobles, ___ N.C. App. at ___, 818 S.E.2d at 137.

Although the Court of Appeals did not specifically list all the benefits available to first descendants, the Court of Appeals expressly recognized that "[f]irst descendants are eligible for certain tribal benefits unavailable to non-members or members of other tribes." Id. However, "mere descendant status with the concomitant eligibility to receive benefits" is insufficient to demonstrate "tribal recognition." Cruz, 554 F.3d at 847.

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[12] See Argument I, supra.

The Court of Appeals further noted that a document issued to first descendants by the Tribal Enrollment Department known as a "Letter of Descent" "is used to establish eligibility for first descendant benefits." Nobles, ___ N.C. App. at ___, 818 S.E.2d at 137 (See also 1R p. 95, FOF 70-71) Defendant, however, had not obtained a "Letter of Descent." Nobles, ___ N.C. App. at ___, 818 S.E.2d at 137-38 (See also 1R pp. 95, 123, FOF 71-75, 262(m)) It appears to be for this reason that the Court of Appeals stated that "defendant's first descendant status carries little weight in this case." Nobles, ___ N.C. App. at ___, 818 S.E.2d at 137.

The facts of this case are analogous to the facts of other cases in which courts have held defendants did not satisfy the second part of the Rogers test and were not Indians. For example, in Cruz, 554 F.3d at 846-49, the Ninth Circuit held that the defendant was not an Indian where he was not an enrolled member and not eligible to be enrolled; he was a "descendant" due to his mother being an enrolled member, which entitled him to certain benefits of which he had never taken advantage; he lived on the reservation from age 4 until age 7 or 8 and he rented a room on the reservation shortly before the offense; he was prosecuted once in tribal court; he attended a public school on the reservation that is open to non-Indians; he worked as a firefighter for the BIA, which is a job open to non-Indians; and he had never participated in

Indian religious ceremonies or dance festivals, had never voted in a tribal election, and did not have a tribal identification card.

Similarly, in LaPier, 790 P.2d at 986-88, the Montana Supreme Court held that the defendant, who had a "significant amount of Indian blood," was not an Indian where he was not an enrolled member of a tribe; he attended a BIA-sponsored college; he received some educational assistance through a Native American program; he received some health benefits through IHS, although those services were not reserved solely for Indians; he spent a few summers and his last year of high school on a reservation, but lived most of his life off the reservation; he had been prosecuted in tribal courts for criminal offenses and as an Indian in federal court for theft; and his tribal affiliation and social recognition as an Indian were "tenuous at best." See also Lewis v. State, 55 P.3d 875, 876, 878 (Idaho Ct. App.) (holding that the defendant was not an Indian where his mother was a "full-blooded Indian;" he was not an enrolled member of tribe; he lived on the reservation as a young child; he co-owned property on the reservation with his siblings, who were enrolled members; and he attended an Indian festival as a child), rev. denied, 2002 Ida. LEXIS 155 (Idaho 2002).

C. Defendant's factual assertions do not show he has been recognized as an Indian.

In support of his position that he has been recognized as an Indian, defendant states that his mother, Donna Mann, "declared his Indian status" in enrolling him in Cherokee schools and that he "was recognized by the federal government as an Indian student." (Def's New Br. p. 30) Defendant further argues that the Court of Appeals "discounted, and failed to mention, that the BIA considered [him] to be an Indian student[]" when analyzing the second Rogers prong. (Def's New Br. p. 32) Defendant's factual assertions are not supported by the evidence or the trial court's unchallenged findings of fact.

Although Mann listed defendant as an "Eligible Child" on "Indian Student Certification" forms (Supp. 43-44), there was no evidence presented that the BIA or the federal government considered defendant to be an Indian student. Further, none of the BIA Student Enrollment Applications support defendant's factual assertion that Mann "declared his Indian status" when enrolling him. On one BIA Student Enrollment Application, Mann left the space for "Tribal Affiliation" blank and listed defendant's "Degree Indian" as "none." (Supp. p. 48) Although on the other two BIA Student Enrollment Applications Mann wrote "Cherokee" in the spaces for "Tribal Affiliation," she left blank the spaces after "Degree Indian" on both. (Supp. 39, 42) The trial

court made an unchallenged finding of fact that Mann represented to school officials that defendant was not an Indian, and defendant was admitted as a non-Indian student. (1R p. 109, FOF 183)

D. Defendant's argument about the factors considered by the Ninth Circuit and the Court of Appeals being an inaccurate reflection of the Rogers test is not properly before this Court.

Defendant argues in this Court that the St. Cloud factors, which are considered in declining order of importance by the Ninth Circuit and were applied by the trial court and Court of Appeals in this case, are not, as articulated in the Ninth Circuit's cases, an accurate reflection of the Rogers test. (Def's New Br. pp. 31-33) Defendant, however, did not make this argument in the trial court or the Court of Appeals.

In the motion to dismiss for lack of jurisdiction that defendant filed in the trial court, defendant himself relied on Ninth Circuit precedent and set out the same factors he now challenges when analyzing the second Rogers prong. (1R p. 19) Defendant also stated in his motion that courts have considered these factors in declining order of importance. (Id.) At the end of the hearing on defendant's motion to dismiss, the defense argued the St. Cloud factors to the trial court, including "[g]overnment recognition, formally or informally, through receipt of benefits," and referred to the Ninth Circuit's case law as well

as to the Stymiest decision from the Eighth Circuit. (9/13/13 T pp. 127-31) In the Court of Appeals, defendant stated that the trial court and the Court of Appeals were not bound by lower federal courts' analysis of the second prong of the Rogers test, but argued that even using the St. Cloud factors, he is an Indian. (Def's COA Br. pp. 32-36, 41-43)

It is well-settled that an appellate court should not consider a different theory on appeal from the one presented to the trial court. State v. Benson, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). Likewise, this Court will not consider arguments that are first raised to it that were not raised by the appellant in the Court of Appeals, and were also not the basis of the Court of Appeals' opinion. Brooks, 337 N.C. at 149, 446 S.E.2d at 590; State v. Miller, 282 N.C. 633, 643, 194 S.E.2d 353, 359 (1973).

Because defendant failed to argue below that the St. Cloud factors, as articulated by the Ninth Circuit, are not an accurate reflection of the Rogers test and, in fact, relied on these factors in his motion to dismiss, this argument is not properly before this Court and should not be considered. In any event, however, defendant's claim that he is an Indian would still fail under any formulation of the second prong of the Rogers test in light of the evidence described supra and the trial court's unchallenged findings of fact.

For these reasons, the Court of Appeals correctly ruled that defendant is not an Indian under the two-part test derived from Rogers.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT DID NOT ERR BY DENYING DEFENDANT'S MOTION TO SUBMIT THE ISSUE OF SUBJECT MATTER JURISDICTION TO THE JURY.

In the trial court, defendant filed a pre-trial "Motion to Require Jury Finding of Subject Matter Jurisdiction," renewing his motion to dismiss for lack of jurisdiction and, alternatively, requesting that the court submit the issue of subject matter jurisdiction to the jury "for a special finding with Defendant's particular status as a first descendant of the Eastern Band of Cherokee Indians and the issue of subject matter jurisdiction." (2R pp. 271-73) After hearing arguments, Judge Letts denied the motion. (2R pp. 274-81; 3/24/16 T pp. 512-26)

In the Court of Appeals, defendant argued the trial court erred by denying his request "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," and "the trial court should have instructed the jury that if it was not satisfied beyond a reasonable doubt that [defendant] was not an Indian, it must return a special verdict indicating lack of jurisdiction." (Def's COA Br. pp. 43, 45) The Court of Appeals correctly rejected defendant's argument.

A. Defendant did not preserve this argument for appellate review.

Defendant argues in this Court that he "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." (Def's New Br. p. 37) Defendant, however, did not raise this constitutional argument in the trial court or in the Court of Appeals. (2R pp. 271-73; 3/24/16 T pp. 517-19; Def's COA Br. pp. 43-48) Defendant's motion in the trial court, which merely listed various constitutional provisions with no explanation or argument (2R p. 271), was not sufficient to raise this constitutional argument. See N.C. R. App. P. 10(a)(1) (party must state specific grounds for desired ruling to preserve an issue for appellate review); cf. State v. Colson, 274 N.C. 295, 305, 163 S.E.2d 376, 382 (1968) (mere mouthing of constitutional phrases is not enough to show substantial constitutional question), cert. denied, 393 U.S. 1087, 21 L. Ed. 2d 780 (1969). Defendant made no constitutional argument when arguing the motion. (3/24/16 T pp. 512-19) Defendant did not obtain a ruling from the trial court on the constitutional argument (2R pp. 274-81; 3/24/16 T pp. 519-26). See N.C. R. App. P. 10(a)(1) (party must obtain a ruling to preserve an issue for appellate review). Moreover, the constitutional argument was not ruled on by the Court of Appeals. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 140-42. For

all of these reasons, this constitutional argument is not properly before this Court. Brooks, 337 N.C. at 149, 446 S.E.2d at 590; Benson, 323 N.C. at 322, 372 S.E.2d at 519; N.C. R. App. P. 10(a)(1).

In addition, although defendant asked the trial court to "submit the special issue of subject matter jurisdiction to the trial jury" (2R p. 272), defendant did not specifically ask that a "special verdict" be submitted to the jury. As a result, any argument that the trial court erred by not submitting a special verdict is not preserved for appellate review. N.C. R. App. P. 10(a)(1).

B. For multiple reasons, the trial court did not err by denying defendant's motion.

As the Court of Appeals correctly pointed out, the cases cited in defendant's brief on this issue concern factual matters involving territorial jurisdiction (i.e., whether the crimes occurred in North Carolina), not subject matter jurisdiction. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 141. In particular, in defendant's Court of Appeals brief and in his New Brief, he relies on State v. Rick, 342 N.C. 91, 463 S.E.2d 182 (1995), State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977), and State v. Bright, 131 N.C. App. 57, 505 S.E.2d 317 (1998), disc. rev. improvidently allowed, 350 N.C. 82, 511 S.E.2d 639 (1999). (Def's COA Br. 43-46; Def's New Br. pp. 34-36) These cases hold that when jurisdiction is challenged on the ground the crimes did not occur in North

Carolina and the trial court makes a preliminary determination that sufficient evidence exists upon which the jury could conclude beyond a reasonable doubt that the crimes occurred in North Carolina, "the trial court must also instruct the jury that unless the State has satisfied it beyond a reasonable doubt that the murder occurred in North Carolina, a verdict of not guilty should be returned." Rick, 342 N.C. at 100-01, 463 S.E.2d at 187 (citing Batdorf, 293 N.C. at 494, 238 S.E.2d at 503); accord Bright, 131 N.C. App. at 62, 505 S.E.2d at 320. The cases further hold that the court also should instruct the jury that if it is not so satisfied, it must return a special verdict indicating a lack of jurisdiction. Rick, 342 N.C. at 101, 463 S.E.2d at 187 (citing Batdorf, 293 N.C. at 494, 238 S.E.2d at 503).

In this case, the parties stipulated the crimes occurred in North Carolina. (1R pp. 64-65) Because territorial jurisdiction was not challenged here, the cases cited by defendant do not control. See State v. White, 134 N.C. App. 338, 341, 517 S.E.2d 664, 666 (1999) (rejecting the defendant's argument that he was entitled to an instruction on jurisdiction under Batdorf and Bright where it was undisputed the offenses occurred in North Carolina).

The issue of where a crime occurred is purely a question of fact, whereas

the issue of subject matter jurisdiction is a question of law.[13] State v. Kostick, 233 N.C. App. 62, 72, 755 S.E.2d 411, 418, disc. rev. denied, 367 N.C. 508, 758 S.E.2d 872 (2014); see State v. Daniels, 134 N.C. 671, 678, 46 S.E. 991, 993 (1904) (stating that a defendant "is entitled to be tried by 'the ancient mode of trial by jury,' in which the court decides all questions of law, and the jury all questions of fact"). Defendant has cited no cases holding that the issue of subject matter jurisdiction -- or defendant's non-Indian status for purposes of determining state court jurisdiction -- is an issue that must be determined by a jury. In fact, State v. Darroch, 305 N.C. 196, 287 S.E.2d 856, cert. denied, 457 U.S. 1138, 73 L. Ed. 2d 1356 (1982), supports the contrary conclusion. In that case, this Court held that the defendant was not entitled to an instruction on jurisdiction where his jurisdictional challenge related to the State's legal theory of jurisdiction, rather than the facts which the State contended supported jurisdiction. Id. at 211-12, 287 S.E.2d at 865-66. See also N.C.G.S. § 15A-954(a)(8) (providing that the court on motion of the defendant must dismiss the charge if it determines the court has no jurisdiction of the charged offense).

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[13] The issue of whether a person is an Indian for purposes of federal criminal jurisdiction is a mixed question of law and fact. See Bruce, 394 F.3d at 1218 (stating the determination of the defendant's Indian status under 18 U.S.C. § 1152 is a mixed question of law and fact).

Furthermore, as the Court of Appeals correctly explained, unlike certain federal prosecutions in which the defendant's Indian status is an element of the offense that the Government must allege and prove to a jury beyond a reasonable doubt, Bruce, 394 F.3d at 1229 ("the defendant's Indian status is an essential element of a § 1153 offense which the government must allege in the indictment and prove beyond a reasonable doubt"), neither North Carolina's statutes nor North Carolina's appellate case law burdens the State with proving beyond a reasonable doubt that defendant is not an Indian. Nobles, ___ N.C. App. at ___, 818 S.E.2d at 141; see N.C.G.S. § 14-17 (first degree murder); N.C.G.S. § 14-87 (robbery with a dangerous weapon); N.C.G.S. § 14-415.1 (possession of a firearm by a felon). The Court of Appeals also correctly explained that "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." Nobles, ___ N.C. App. at ___, 818 S.E.2d at 141-42 (discussing the evidence).

For all of these reasons, the Court of Appeals correctly held that the trial court did not err by denying defendant's motion to submit the issue of subject matter jurisdiction or defendant's non-Indian status to the jury.

However, even assuming arguendo that an instruction on that issue would have been appropriate, the trial court did not err by failing to give such

an instruction because defendant failed to request the instruction in writing. If defendant's request had been allowed, it would have required the trial court to give the jury special instructions. State v. McNeill, 346 N.C. 233, 239-40, 485 S.E.2d 284, 288 (1997), cert. denied, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998). The party seeking special instructions should submit the proposed special instructions to the trial court in writing at or before the charge conference. State v. Augustine, 359 N.C. 709, 729, 616 S.E.2d 515, 530 (2005), cert. denied, 548 U.S. 925, 165 L. Ed. 2d 988 (2006). The trial court does not err by not giving special instructions if the proposed special instructions are not submitted in writing. Id.; McNeill, 346 N.C. at 240, 485 S.E.2d at 288; State v. Martin, 322 N.C. 229, 237, 367 S.E.2d 618, 623 (1988).

In this case, defendant did not submit any proposed special instructions on this issue in writing to the trial court. (2R pp. 271-73; 13T p. 2749) As a result, the trial court did not err by not instructing the jury on it.

C. Defendant suffered no prejudice in any event.

Even if there were error from the trial court not submitting the issue of subject matter jurisdiction or whether defendant is an Indian to the jury, which there was not, defendant would not be entitled to relief. This is so because he suffered no prejudice.

Defendant would have the burden of showing there is a reasonable possibility that if the alleged error had not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a). Defendant cannot make this showing in light of the evidence presented at the pre-trial hearing, which overwhelmingly showed that defendant is not an Indian. See Statement of Facts, supra. Given this evidence, there is no reasonable possibility the jury would have found that defendant was an Indian if the issue had been submitted to it.

The standard for the existence and showing of prejudice for constitutional error, N.C.G.S. §15A-1443(b), does not apply here, but even if it did, the State has met its burden of showing the alleged error would be harmless beyond a reasonable doubt in light of the evidence presented at the pre-trial hearing, which overwhelmingly showed that defendant is not an Indian. See Statement of Facts, supra. In fact, Judge Letts found and concluded in his order that the State had proven beyond a reasonable doubt that it had jurisdiction over defendant. (2R pp. 276, 279, FOF 13, COL 2)

In sum, under any standard for the existence and showing of prejudice, defendant suffered no prejudice. As a result, even if there were error from the trial court not submitting this issue to the jury, which there was not, defendant would not be entitled to relief.

CONCLUSION

The State respectfully requests that this Court affirm the decision of the Court of Appeals.

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

JOSHUA H. STEIN
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing NEW BRIEF FOR THE STATE upon the DEFENDANT by electronic mail, addressed to his ATTORNEY OF RECORD as follows:

Ms. Anne M. Gomez
Assistant Appellate Defender
Office of the Appellate Defender
anne.m.gomez@nccourts.org

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

Electronically Submitted
Amy Kunstling Irene
Special Deputy Attorney General

APPENDIX

E. Band of Cherokee Indians v. Lambert

the Cherokee Court of North Carolina

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

No. CR 03-0313

Reporter
3 Cher. Rep. 62 *; 2003 N.C. Cherokee Ct. LEXIS 993 **; 2003 WL 25902446

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

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

Core Terms

Tribe, Tribal, enrolled, criminal jurisdiction, purposes

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

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

Judges: Before J. Matthew Martin, Judge.

Opinion by: J. Matthew Martin

Opinion

[*62] MARTIN, J.

MEMORANDUM ORDER

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

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

During deliberations, the Court determined that additional evidence was required to decide the matter, **[**2]** and ex mero motu, the Court set the Motion for further hearing on Friday, May 23, 2003. At that hearing, the Court heard testimony from Teresa B. McCoy, a member of the Tribal Council and Dean White, the Superintendent of the Cherokee Agency of the Bureau of Indian Affairs, United States Department of the Interior. Additionally, the Court has reviewed the submissions of the parties and heard the argument of counsel. The matter is now ready for a ruling.

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

2. The Defendant should not be required to serve the remainder of the seventy two hours of detention for which the Court previously entered a stay.

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

End of Document

Eastern Band of the Cherokee Nation Currentness
The Cherokee Code of the Eastern Band of the Cherokee Nation
Part II. Code of Ordinances
Chapter 7. Judicial Code

Eastern Band Cherokee Indians Code § 7-1

Sec. 7-1. Composition of the Judicial Branch

(a) The Judicial Branch shall be comprised of one Supreme Court, one Trial Court, and such other Trial Courts of Special Jurisdiction as established by law. The Supreme Court shall be known as the "Cherokee Supreme Court" and the Trial Court shall be known as the "Cherokee Court." Trial Courts of Special Jurisdiction shall be established by the Tribal Council and named according to their function (e.g., Cherokee Juvenile Court).

(b) The Supreme Court shall be comprised of one Chief Justice and two Associate Justices. The Trial Court shall be comprised of one Chief Judge and two Associate Judges, and other Associate Judges of the Trial Courts of Special Jurisdiction.

(c) All Justices and Judges shall be appointed upon nomination by the Principal Chief, and confirmation by the Tribal Council.

(d) The Court shall maintain a list of temporary justices, judges and magistrates available for assignment to particular cases or duties by the Chief Justice. Prior to assignment by the Chief Justice, temporary justices, judges or magistrates must be nominated and confirmed in accordance with subsection (c) of this section.

Credits
(Ord. No. 29, 4-1-2000)

Current through June 8, 2010

Eastern Band of Cherokee Indians Code § 7-1, Cherokee Code § 7-1

End of Document

13 Am. Tribal Law 180
Supreme Court of the Eastern
Band of Cherokee Indians.

Steve TEESATESKIE, Jr., on behalf of himself and all others similarly situated, Appellant,
v.
EASTERN BAND OF CHEROKEE INDIANS MINORS FUND; Investment Committee of the Eastern Band of Cherokee Indians Minors Fund; Adele Madden as Trustee and Individually; Michael Ray Cooper as Trustee and Individually; Tiani D. Osborn as Trustee and Individually; John Cameron Cooper as Trustee and Individually; Jo A. Blaylock as Trustee and Individually; and Chief Michell Hicks in his Individual and Official Capacity, Appellees.

No. 12–CV–059.
|
Oct. 12, 2015.

Synopsis

Background: Plaintiff class of 17–year–old beneficiaries of Minors Trust Fund filed lawsuit against Tribe, individual trustees of the Fund, and Principal Chief, alleging that trustees failed to transfer funds held in trust to a pre-payment sub-account, causing economic harm to each member of the class. The Cherokee Court, Danny E. Davis, J., dismissed, and appeal was taken.

Holdings: The Eastern Cherokee Supreme Court held that:

[1] Tribe's purchase of liability insurance did not waive tribal sovereign immunity;

[2] any failure to comply with sovereign immunity endorsement in liability insurance policy did not waive tribal sovereign immunity; and

[3] individual trustees and Principal Chief were entitled to public officer immunity.

Affirmed.

West Headnotes (19)

[1] Indians
⇐ Scope of review

Plaintiff, in lawsuit challenging failure of trustees of Minors Trust Fund to transfer funds held in trust for certain beneficiaries to a pre-payment sub-account, abandoned any argument as to trial court's ruling that the Minors Trust Fund and the Investment Committee were not proper defendants, where plaintiff failed to challenge that ruling.

Cases that cite this headnote

[2] Indians
⇐ Scope of review

Plaintiff, in lawsuit challenging failure of trustees of Minors Trust Fund to transfer funds held in trust for certain beneficiaries to a pre-payment sub-account, abandoned any argument as to trial court's dismissal of plaintiff's unjust enrichment, constructive trust, or punitive damages claims, where plaintiff failed to make any arguments appealing that ruling. Rules App.Proc., Rule 28(a).

Cases that cite this headnote

[3] Indians
⇐ Scope of review

Reviewing a court order of dismissal for lack of subject matter jurisdiction carries a de novo standard of review; this standard allows Supreme Court to consider matters outside the pleadings and weighed by the lower court when coming to its conclusions in determining whether subject matter jurisdiction is properly asserted or denied. Rules Civ.Proc., Rule 12(b)(1), West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[4] Indians
⇐ Scope of review

A de novo standard of review means that appellate court evaluates the materials without needing to pay deference to lower court's order.

Cases that cite this headnote

[5] **Indians**
Liability of Tribes, Tribal Officers and Agents;Immunity

A motion to dismiss based on tribal sovereign immunity is a motion to dismiss for lack of subject matter jurisdiction. Rules Civ.Proc., Rule 12(b)(1), West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[6] **Indians**
Waiver and consent

As a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.

1 Cases that cite this headnote

[7] **Indians**
Particular cases

Pursuant to statute, provision of Cherokee Code governing Tribe's purchase of liability insurance did not waive tribal sovereign immunity for purposes of lawsuit alleging various torts arising out of failure, by trustees of Minors Trust Fund, to transfer funds held in trust to a pre-payment sub-account; lawsuit involved a dispute over distribution of per capita payments, and statute creating the trust fund expressly rescinded any waiver of immunity that could be found therein. Cherokee Code §§ 1–2(g)(3), 7–13, 16C–5(*l*)(13); Rules Civ.Proc., Rule 12(b)(1), West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[8] **Statutes**
Plain Language;Plain, Ordinary, or Common Meaning

Under the rules of statutory interpretation, court should first look to plain meaning or plain language of a statute to determine if the statute speaks directly to issue presented.

Cases that cite this headnote

[9] **Indians**
Liability of Tribes, Tribal Officers and Agents;Immunity

Tribal sovereign immunity is fundamentally a matter of federal law.

1 Cases that cite this headnote

[10] **Indians**
Particular cases

Any failure of Tribe, individual trustees of Minors Trust Fund, or Principal Chief to comply with sovereign immunity endorsement in liability insurance policy did not waive tribal sovereign immunity for purposes of lawsuit alleging various torts arising out of failure, by trustees, to transfer funds held in trust to a pre-payment sub-account; endorsement contained no language expressly and unequivocally waiving tribal sovereign immunity by purchasing, complying, or failing to comply with the policy. Rules Civ.Proc., Rule 12(b)(1), West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[11] **Indians**
Waiver and consent

While it is possible for a tribe to waive its tribal sovereign immunity through a contractual provision, that provision must be an express and unequivocal waiver of the tribe's sovereign immunity.

1 Cases that cite this headnote

[12] **Indians**
Particular cases

Although guidelines for administration of Minors Trust Fund required trustees to

transfer funds held in trust to a pre-payment sub-account at such time as a participant reached age of 17, individual trustees and Principal Chief were entitled to public officer immunity in lawsuit alleging various torts arising out of alleged failure to transfer such funds; pursuant to statute, trustees were acting in an official capacity that required them to use their discretion, and there was no allegation that their actions were corrupt or malicious. Cherokee Code § 16C–6(a)(2).

Cases that cite this headnote

[13] **Indians**
⇦ Scope of review

Court reviewing lower court's ruling on motion to dismiss for failure to state a claim uses a de novo standard of review. Rules Civ.Proc., Rule 12(b)(6), West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[14] **Indians**
⇦ Liability of Tribes, Tribal Officers and Agents;Immunity

A motion to dismiss on basis of public officer immunity is properly considered under standard for a motion to dismiss for failure to state a claim. Rules Civ.Proc., Rule 12(b)(6), West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[15] **Indians**
⇦ Dismissal

Reviewing a motion to dismiss for failure to state a claim requires court to determine whether, as a matter of law, the allegations of the complaint treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not; court may properly dismiss an action under this standard if there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. Rules Civ.Proc., Rule 12(b)(6), West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[16] **Indians**
⇦ Dismissal

Well-pleaded factual allegations of a complaint are treated as true for purposes of a motion to dismiss for failure to state a claim; conclusions of law or unwarranted deductions of facts are not admitted. Rules Civ.Proc., Rule 12(b)(6), West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[17] **Civil Rights**
⇦ Good faith and reasonableness; knowledge and clarity of law;motive and intent, in general

Public officer immunity is applicable when a government official is performing a discretionary function as long as the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known; a discretionary function is one that involves an element of judgment or choice.

Cases that cite this headnote

[18] **Public Employment**
⇦ In general;official immunity

A public official is not protected by the public officer immunity doctrine if the official's actions are shown to be corrupt or malicious or outside the scope of the official's duties.

Cases that cite this headnote

[19] **Public Employment**
⇦ In general;official immunity

Under the public officer immunity doctrine, as long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtues of his office, keeps within the scope of his official authority, and acts

without malice or corruption, he is protected from liability.

Cases that cite this headnote

*183 Appeal by plaintiff Steve Teesateskie, Jr., on behalf of himself and all others similarly situated, from order entered 19 December 2013 by Judge Danny E. Davis in the Cherokee Court. Heard in the Cherokee Supreme Court 26 May 2015.

Attorneys and Law Firms

McLean Law Firm, P.A., by Russell L. McLean III, and Martin & Jones, P.L.L.C., by G. Christopher Olson, for plaintiff-appellant.

The Van Winkle Law Firm, by Lynn Dee Moffa and W. Carleton Metcalf, for defendants-appellees.

OPINION

PER CURIAM.

Steve Testateskie, Jr., and the other members of the plaintiff class (collectively "plaintiff"), appeal from the trial court's order dismissing their claims against the Eastern Band of Cherokee Indians, the individual trustees, and Chief Michell Hicks (collectively "defendants"). Defendants filed a motion to dismiss plaintiff's claims. The trial court granted defendants' motion to dismiss based on Rule 12(b)(1) of the N.C. Rules of Civil Procedure due to the Eastern Band of Cherokee Indians' (hereinafter "EBCI") tribal sovereign immunity and on Rule 12(b)(6) due to the individual defendants' public officer immunity. After thoughtful review of the issues and relevant materials, we affirm the trial court's decision to dismiss plaintiff's claims based on Rule 12(b)(1) lack of subject matter jurisdiction because there was no waiver of sovereign immunity and pursuant to Rule 12(b)(6) because the individual defendants, including Chief Michell Hicks, are entitled to public officer immunity as trustees for the EBCI Minors Trust Fund, and as Chief for the EBCI.

Background

Section 16C of the Cherokee Code sets out a gaming revenue allocation plan to distribute monies received from tribal gaming operations. As part of that plan, § 16C–6 established an EBCI Minors Trust Fund and set up a Minors Trust Fund Investment Committee (hereinafter "Investment Committee") to serve as trustees for that fund. The Minors Trust Fund was created "to promote the general welfare of the EBCI and its members." Cherokee Code Ch. 16C § 16C–1 (2009). *184 The Code directed that the Minors Trust Fund assets "shall be invested in a reasonable and prudent manner so as to protect the principal and seek a reasonable return." Cherokee Code Ch. 16C § 16C–6(a)(2) (2010). That section also authorized distributions to the recipients when the individual enrolled members obtained the age of 18 with a high school diploma or GED, or age 21. Thus establishing that these assets be properly handled so that the members of the EBCI receive their rightful distribution.

In September of 2008, the individual trustees who make up the Investment Committee did not transfer funds held in trust for seventeen year old beneficiaries to a pre-payment sub-account. Plaintiff alleges this failure to set aside trust fund monies caused economic harm of approximately $22,000 to each member of the class. Plaintiff argues that the Trustees breached their fiduciary duty when they failed to follow guidelines regarding how Trustees could handle Minors Trust Fund assets. The guidelines as presented by plaintiff in his brief read as follows:

> However, as such time a participant reaches the age of 17, the participant's balance shall be transferred to a separate, designated "pre-pay-out" sub-account (the sub-account), the emphasis of which shall be principal preservation. The purpose of this special account for 17 year olds is to prevent erosion of the participant's account balance in the period prior to payout from the Minors Fund. The collective assets of said sub-account shall be invested in a combination of short-term, high quality investment instruments including 90–day T-bills, short term high-grade commercial paper, money market funds, and various cash equivalent investments.

Pl.'s Br. Appeal 25–26.

Teesateskie was 17 years old when the Investment Committee decided not to transfer trust funds into a pre-payment sub-account. Teesateskie's account in the Minors Trust Fund was $90,016.53 on December 31, 2007 and dropped in value to $78,419.37 over the following year. Teesateskie received disbursement on June 2, 2011. The net payment after withholding for taxes was $65,186.99. *See* Cherokee Code Ch. 16C § 16C–6(h) (2010) and § 16C–7 (2009) (calling for a tax amount to be set aside rather than paid to the individual member). Chief Hicks issued an "Update on Minors' Fund" which called for the Tribe to create a means for it to indemnify the minors who lost principal due to the decrease in the Minors' Fund value. Teesateskie learned on June 2, 2011 that the Tribe would not indemnify his claimed losses. Defendants had previously purchased insurance through Allied World Assurance Company (hereinafter "Allied") that may provide coverage on the claims alleged by plaintiff. Plaintiff argues that the defendants' failure to follow the recommendations under the guidelines resulted in the financial loss and that the Allied policy subjects the EBCI to suit regarding how it handled the Minors Trust Fund assets.

Plaintiff brought suit against defendants on February 21, 2012. Plaintiffs claims against defendants were: (1) violation of Cherokee Code; (2) negligence; (3) breach of fiduciary duty; (4) unjust enrichment; (5) constructive trust; and (6) punitive damages.

[1] [2] The trial court held a hearing on defendants' motion to dismiss plaintiff's claims on November 21, 2013. It ruled in favor of defendants by dismissing all of plaintiff's claims based on tribal sovereign immunity and public officer immunity. Plaintiff appeals this ruling. The only ***185** claims before this Court [1] are plaintiff's claims of violating the Cherokee Code, negligence, and breach of fiduciary duty against the EBCI, against the individual trustees, and against Chief Hicks. [2]

I. Tribal Sovereign Immunity

A. Standard of Review

[3] [4] Reviewing a court order of dismissal based on Rule 12(b)(1) of the Rules of Civil Procedure carries a *de novo* standard of review. *See Hatcher v. Harrah's N.C. Casino Co., LLC.*, 169 N.C.App. 151, 155, 610 S.E.2d 210, 212 (2005). This review also allows us to consider matters outside the pleadings and weighed by the lower court when coming to its conclusions in determining whether subject matter jurisdiction is properly asserted or denied. *See State ex rel. Cooper v. Seneca–Cayuga Tobacco Co.*, 197 N.C.App. 176, 181, 676 S.E.2d 579, 583 (2009). A *de novo* standard of review also means that the appellate court evaluates the materials without needing to pay deference to the lower court's order.

[5] [6] A motion to dismiss based on tribal sovereign immunity is a question of subject matter jurisdiction. *See Seneca–Cayuga,* 197 N.C.App. at 182, 676 S.E.2d at 584 (evaluating tribal sovereign immunity under Rule 12(b)(1) as a question of subject matter jurisdiction). The *Seneca–Cayuga* court explained that "[t]ribal sovereign immunity is a matter of federal law." *Id.* at 181, 676 S.E.2d at 583. "As a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *See Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed.2d 981 (1998). The *Seneca–Cayuga* court also described the standard for waiver as one where "the tribe has expressly and unequivocally waived its sovereign immunity," *Seneca–Cayuga,* 197 N.C.App. at 181, 676 S.E.2d at 583, and "that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *Id.* at 182, 676 S.E.2d at 584 (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58–59, 98 S.Ct. 1670, 1676–78, 56 L.Ed.2d 106 (1978)). We find the *Seneca–Cayuga* court's method for evaluating tribal sovereign immunity persuasive, and therefore hold that as a threshold matter, a motion to dismiss based on tribal sovereign immunity is a motion to dismiss pursuant to Rule 12(b)(1).

B. Analysis

[7] Plaintiff argues on appeal before this Court that defendants waived their tribal sovereign immunity in one of two ways. First, they argue that § 1–2(g)(3) of the Cherokee Code governs this case and should be interpreted as a waiver of tribal sovereign immunity when the EBCI purchases liability insurance. Second, they argue that defendants waived tribal sovereign immunity by failing to comply ***186** with the sovereign immunity endorsement in the Allied insurance agreement. We disagree.

Plaintiff first argues that § 1–2(g)(3) of the Cherokee Code governs this case and should be interpreted as a waiver of tribal sovereign immunity when the EBCI purchases liability insurance. Section 1–2(g)(3) reads as follows:

> (g) The Cherokee Court of Indian Offenses or any successor Cherokee Court shall exercise jurisdiction over actions against the Eastern Band of Cherokee Indians seeking the following relief: ...
>
> (3) Damages for tort claims where the Tribe maintains insurance coverage for such claims, with recovery not to exceed the amount of liability coverage maintained by the Tribe.

Cherokee Code Ch. 1 § 1–2(g)(3) (2003). However, we find that Chapter 16C § 16C–5(*l*)(13) and Chapter 7 § 7–13 govern this case and explicitly read these two provisions to prevent § 1–2(g)(3) from being interpreted as a waiver of tribal sovereign immunity in an action involving a distribution dispute under Chapter 16C. Chapter 16C, Gaming Revenue Allocation Plan, is the chapter that covers the creation of the Minors Trust Fund. Specifically, § 16C–6(a) is its creation statute. Section 16C–5 covers distributions from the Minors Trust Fund to its beneficiaries and subsection (*l*)(13) reads as follows:

> Nothing in this Chapter shall be deemed a waiver of the sovereign immunity of the Eastern Band of Cherokee Indians, or its officers, agents, or employees acting in their official capacities. *To the extent that any other tribal law may be interpreted as such a waiver of sovereign immunity for any claim or action related to distribution of per capita payments, it is hereby rescinded.*

Cherokee Code Ch. 16C § 16C–5(*l*)(13) (2013) (emphasis added). Chapter 7 covers the judicial code of the EBCI. Section 7–13 specifically covers tribal sovereign immunity and reads as follows:

> Nothing in this chapter shall be construed as a waiver of the sovereign immunity of the Eastern Band of Cherokee Indians. The Judicial Branch shall dismiss any claim or cause of action against the Eastern Band of Cherokee Indians, or any of its programs, enterprises, authorities, officials, agents, or employees acting in their official capacities, unless the complaining party demonstrates that the Cherokee Tribal Council or the United States Congress has expressly and unequivocally waived the Eastern Band's sovereign immunity for such a claim in a written ordinance, law, or contract.

Cherokee Code Ch. 7 § 7–13 (2000).

[8] Under the rules of statutory interpretation, a court should first look to the plain meaning or the plain language of a statute to determine if the statute speaks directly to the issue presented. *See City of Arlington, Tex. v. F.C.C.*, — U.S. —, 133 S.Ct. 1863, 1868, 185 L.Ed.2d 941 (2013). This case involves a statute that speaks directly to the issue presented; and we, therefore, do not need to evaluate the EBCI's interpretation of the statute. The issue plaintiff presents is one regarding distribution of per capita payments. Section 16C–5(*l*)(13) speaks directly to this issue; and thus, this case is governed by § 16C–5(*l*)(13).

Section 16C–5(*l*)(13) is explicit and clear. By its terms, it supersedes other Cherokee Code provisions that could be interpreted as a waiver of tribal sovereign immunity when the cause of action is one related to per capita payment distribution under Chapter 16C. The dispute at hand is one "related to distribution of per capita payments." Plaintiff's argument is that ***187** the per capita payments were lower than they otherwise would have been had defendants handled the Minors Trust Fund's assets according to the guidelines. Since this case is directly covered under § 16C–5(*l*)(13), § 1–2(g)(3) cannot be interpreted as a waiver of tribal sovereign immunity because any waiver of immunity that could be found therein was "rescinded" under § 16C–5(*l*)(13).

Moreover, § 7–13's plain language leads us to conclude that § 1–2(g)(3) cannot constitute a waiver of tribal sovereign immunity under a Chapter 16C per capita distribution claim. Section 7–13 explains that we "shall dismiss" claims against the EBCI or its officials and agents "acting in their official capacities," unless the Tribal Council or Congress "has expressly and unequivocally waived the Eastern Band's sovereign immunity" for the specific claim in a "written ordinance, law, or contract." Cherokee Code § 7–13.

[9] This conclusion is further supported by established case law. The Supreme Court of the United States has determined that "the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa Tribe of Okla.*, 523 U.S. at 756, 118 S.Ct. at 1703. Tribal sovereign immunity is fundamentally a matter of federal law. *See id.* at 754–58, 118 S.Ct. at 1702–1705. North Carolina courts, like most courts across the country, have followed the principle that waiver of tribal sovereign immunity cannot be implied but must be unequivocally expressed. *See Seneca–Cayuga,* 197 N.C.App. at 182, 676 S.E.2d at 584. It is in this vein that other courts have determined that purchasing liability insurance is not itself a waiver of tribal sovereign immunity. *See Atkinson v. Haldane,* 569 P.2d 151 (Alaska 1977) (holding that the purchase of liability insurance did not waive tribal sovereign immunity because doing so could motivate tribes to not purchase insurance leading to uncovered loss); *Seminole Tribe of Fla. v. McCor,* 903 So.2d 353 (Fla.Dist.Ct.App.2005) (determining that purchasing liability insurance is not a clear and unequivocal waiver of tribal sovereign immunity). "Although it may be a plausible inference that the purchase of insurance indicates an intention to assume liability and waive tribal immunity, such an inference is not a proper basis for concluding that there was a clear waiver by the Tribe." *Seminole Tribe of Fla.,* 903 So.2d at 359 *basing its holding on Atkinson v. Haldane,* 569 P.2d 151 (Alaska 1977) and *Miccosukee Tribe of Indians v. Napoleoni,* 890 So.2d 1152 (Fla.Dist.Ct.App.2004).

Section 1–2(g)(3) should not be interpreted as constituting an expressed and unequivocal waiver. The section itself does not use the terms "waiver" or "sovereign immunity" at all, either in the main paragraph, (g), or in sub-paragraph (3). To read it as constituting a waiver of tribal sovereign immunity would clearly violate § 16C–5(*l*)(13) and § 7–13. Such an interpretation would also contradict the case law previously cited. If the EBCI intended for § 1–2(g)(3) to be a waiver of the tribe's sovereign immunity in Chapter 16C per capita payment distribution claims, then the Tribal Council should amend the Cherokee Code to expressly and unequivocally so state.

[10] Plaintiff next argues that defendants waived tribal sovereign immunity by failing to comply with the sovereign immunity endorsement in the Allied insurance agreement. We find this argument without merit.

[11] While it is possible for a tribe to waive its tribal sovereign immunity through a contractual provision, that provision must be an express and unequivocal waiver of the tribe's sovereign immunity. ***188** Plaintiff points to the Allied Sovereign Immunity Endorsement in the joint appendix on appeal (hereinafter "J.A."), which reads:

> In the event of a claim or suit, the "Carrier" agrees not to use the Sovereign immunity of the "Insured" as a defense, unless the "Insured" authorizes the company to raise such a defense by written notice to the "Carrier". Any such notice will be sent not less than 10 days prior to the time required to answer any suit. Any use of the Sovereign Immunity defense will only apply to coverage and limits of this insurance policy.
>
> The "Carrier" is not authorized or empowered to waive or otherwise limit the "Insured's" Sovereign Immunity outside or beyond the scope of coverage or limits of this insurance policy.
>
> Further, the "Insured", by accepting this policy, agrees to release the company from any and all liability to them or their members because of the failure on the part of the "Carrier" to raise the defense of Sovereign Immunity, except in cases where the "Insured" specifically request the company to do so in the manner provided herein.

J.A. at 304; Allied Insurance Policy Endorsement. This endorsement contains no language that expressly and unequivocally waives EBCI's tribal sovereign immunity by purchasing, complying, or failing to comply with this policy; and is therefore not a proper waiver. This policy provision could not be interpreted as a waiver of tribal sovereign immunity given our reading of § 7–13. Since plaintiff has failed to show that the policy contains a provision that contains a proper waiver of tribal sovereign immunity, this argument is overruled.

Plaintiff points to *Welch v. Eastern Band of Cherokee Indians,* 6 Cher.Rep. 20, —— Am. Tribal Law ——, ——– ——, 2007 WL 7079613, *1–2 (E.Cher.Ct.2007), and *Jacobson v. Eastern Band of Cherokee Indians,* 4 Cher.Rep. 31, —— Am. Tribal Law ——, ——, 2005 WL 6438040, *1 (E.Cher.Ct.2005), in support of their argument that the EBCI waived its tribal sovereign immunity under § 1–2(g)(3) by purchasing insurance. We do not consider the Cherokee Court opinions as having any precedential value since the Cherokee Court is the trial court for this appellate court. In addition, these cases did not involve § 16C–5(*l*)(13).

For these reasons, we hold that plaintiff failed to establish that defendants explicitly waived their tribal sovereign immunity.

II. Public Officer Immunity

A. Standard of Review

[12] [13] [14] [15] [16] A court reviewing a lower court's ruling on a Rule 12(b)(6) motion uses a *de novo* standard of review. *See Jackson v. Long,* 102 F.3d 722, 728 (4th Cir.1996) (reviewing a lower court's decision regarding public officer immunity under a *de novo* standard of review). A motion to dismiss for failure to state a claim based on the defense of public officer immunity is properly considered under the standard for a Rule 12(b)(6) motion to dismiss. *See Dalenko v. Wake Cnty. Dept. of Human Servs.,* 157 N.C.App. 49, 54–55, 578 S.E.2d 599, 602–03 (2003). Reviewing a Rule 12(b)(6) motion requires a court to determine "whether, as a matter of law, the allegations of the complaint treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Id.* at 54, 578 S.E.2d at 603 (citations omitted). A court may properly dismiss an action under this standard "if there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure ***189** of some fact which will necessarily defeat the claim." *Id.* at 54–55, 578 S.E.2d at 603 (citation omitted). "[W]ell-pleaded factual allegations of the complaint are treated as true for purposes of a 12(b)(6) motion, conclusions of law or unwarranted deductions of facts are not admitted." *Id.* at 56, 578 S.E.2d at 604 (citation omitted).

B. Analysis

Plaintiff argues that defendants waived any public officer immunity because the individual defendants acted outside the scope of their duties. Plaintiff bases this argument on the individual defendants' failure to comply with investment guidelines that plaintiff argues were mandatory, requiring the defendants to put plaintiffs funds in a pre-payment sub-account. We disagree.

[17] [18] [19] Public officer immunity is applicable when a government official is performing a discretionary function as long as the official's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). A discretionary function is one that "involves an element of judgment or choice." *Berkovitz by Berkovitz v. U.S.,* 486 U.S. 531, 537, 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988); *see also U.S. v. Gaubert,* 499 U.S. 315, 323, 111 S.Ct. 1267, 1274, 113 L.Ed.2d 335 (1991). A public official is not protected by the public office immunity doctrine if the official's actions are shown to be corrupt or malicious or outside the scope of the official's duties. *See Smith v. Hefner,* 235 N.C. 1, 68 S.E.2d 783 (1952). Thus, "[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtues of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability." *Smith v. State,* 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976).

Defendants were acting in an official capacity that required them to use their discretion. Chapter 16C § 16C–6(a)(2) reads:

> Members of the Investment Committee shall serve as the Trustees of the Minors Trust Fund, provided that there shall be no fewer than three Trustees. The Trustees shall select an institutional Manager and such other advisers as they deem necessary, with suitable expertise and discretion to administer the Minors Trust Fund and invest its assets. The Minors Trust Fund shall be invested in a reasonable and prudent manner so as to protect

> the principal and seek a reasonable return.

Cherokee Code Ch. 16C § 16C–6(a)(2) (2010). In contrast, the guidelines required that "as such time a participant reaches the age of 17, the participant's balance shall be transferred to a separate, designated 'pre-pay-out' sub-account (the sub-account), the emphasis of which shall be principal preservation." Pl.'s Br. Appeal 25–26.

Plaintiff has made no argument that defendants' actions were corrupt or malicious. Instead, plaintiff solely argues that defendants acted outside the scope of their official duties. Plaintiff maintains that the guidelines were mandatory and because defendants did not follow them, their actions are therefore outside the scope of their official duties. While the guidelines are clear, they are merely guidelines. The Cherokee Code under § 16C–6(a)(2) provides the Minor Fund trustees power to exercise their discretion in investing the Funds' assets. The decrease in the per capita distributions appeared to have been due to the economic downturn of 2008 rather than the management of the Minors ***190** Trust Fund assets. There was no statutory requirement that trust fund monies be set aside in a pre-payment sub-account for 17 year old beneficiaries. Defendants exercised their discretion, as allowed under statute, to invest the funds' assets in a reasonable manner. The Minors Trust Fund trustees must act as to what is required under statute, not what is required under guidelines. Thus, we hold that the individual defendants, including Chief Hicks, are entitled to public officer immunity protection from individual liability.

Conclusion

For the reasons stated above, we affirm the trial court's decision to dismiss plaintiff's claims for lack of subject matter jurisdiction due to defendants' tribal sovereign immunity and for a failure to state a valid claim due to defendants' public officer immunity.

Affirmed.

Chief Justice BOYUM, Justice PIPESTEM, and Justice HUNTER, concur.

All Citations

13 Am. Tribal Law 180

Footnotes

1 Plaintiff, at oral argument, attempted to file a supplemental brief and an index of exhibits and authority which the Court denied.

2 Plaintiff failed to challenge the trial court's ruling that the Minors Trust Fund and the Investment Committee were not proper defendants and they are thus abandoned. *See* Appellants' Br. at 11 n. 8 (Cite to brief intentionally left in). Plaintiff also failed to make any arguments appealing the trial court's ruling to dismiss plaintiff's unjust enrichment, constructive trust, or punitive damages claims and they are also abandoned. *See* Cherokee Code § 7–14(a) (2000) (explaining that Cherokee Court appellate procedure will be done in accordance with N.C. Rules of Appellate Procedure and with N.C. Rules of Civil Procedure) *and see* N.C. R. App. Pro. 28(a) (2015) (explaining that issues not discussed in appellate briefs are abandoned).

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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 **; 2004 WL 5807679

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

Core Terms

Tribe, enrolled

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. Kllbourne, 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.

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In re Welch

the Cherokee Court of North Carolina

September 13, 2003, Submitted; October 17, 2003, Re-submitted ; October 31, 2003, Decided

No. SC 03-13

Reporter
3 Cher. Rep. 71 *; 2003 N.C. Cherokee Ct. LEXIS 994 **; 2003 WL 25902440

IN RE: Tosh C. WELCH, Respondent.

Core Terms

Tribal, Tribe, training, criminal jurisdiction, police officer, enrolled, non-Indian, parties

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

Tosh C. Welch, respondent, Pro se.

Judges: Before J. Matthew Martin, Judge.

Opinion by: J. Matthew Martin

Opinion

[*71] MARTIN, J.

JUDGMENT

Officer Tosh C. Welch appeared before the Court on Tuesday, September 23, 2003 in a plenary hearing pursuant to C.C. § 1-24 to show cause, if any there be, why he should not be held in criminal contempt of Court pursuant to C.C. §§ 1-20(a)(3), (6) and (7) and 1-22(b) for his failure to serve a Warrant for Arrest in the case of Eastern Band of Cherokee Indians v. Sammy Lee Evans, case number CR-03-1319. The Tribe was represented by its Prosecutor, James W. Kilbourne, Jr., Esquire. Officer Welch appeared pro se. The Court inquired of Officer Welch in person as to whether he would like counsel, and he did not. The Court heard from both Mr. Kilbourne and Officer Welch.

Following the hearing, the Court took the matter under advisement, and allowed both parties to submit any supplemental information they wished. The Court notes [*72] that it received a letter from Special Agent David R. Nicholas of the United States Department of the Interior, Bureau of Indian Affairs dated October 2, 2003. The [**2] Court has considered Agent Nicholas' letter, and it is received into evidence. Additionally, on October 1, 2003, the Court received a call from Dean White, Director of the Cherokee Agency, United States Department of the Interior, Bureau of Indian Affairs. The Court did not relate any information to Mr. White that was not adduced in open Court, and offered Mr. White an opportunity to appear on October 17, 2003. Mr. White did not appear, and thus the Court will not consider any telephone conversation with Mr. White.

On October 17, 2003, the Court was prepared to rule in this case, but gave both parties an opportunity to be heard further. Both parties presented additional evidence, and, after closing the evidence, the Court, once again, took the matter under advisement.

The Court has reviewed the transcripts of the hearings on September 23 and October 17, 2003. Based upon the evidence, the testimony of the witnesses, the argument and stipulations of the parties, the Court makes the following:

FINDINGS OF FACT

1. Tosh C. Welch is an Officer of the Cherokee Indian Police Department (CIPD), wearing badge number 739.

2. Tosh C. Welch is an Officer of this Court.

3. [**3] On August 19, 2003, Magistrate Selene Pheasant issued a Warrant for Arrest in the case of Eastern Band of Cherokee Indians v. Sammy Lee Evans, Case Number CR-03-1319 (the Warrant).

4. The face of the Warrant did not disclose the race of Mr. Evans.

5. In the ordinary course of business, the Warrant came to the CIPD for service on August 19, 2003.

6. On August 25, 2003, Officer Welch signed the return of service.

7. On the line noting that the Warrant was not served, Officer Welch wrote, "See above".

8. In the body of the Warrant, Officer Welch wrote: "Mr. Evans is not an enrolled member of a Federally Recognized Tribe. Therefore, any officer who takes away his freedom on a 'Tribal Criminal Warrant' would be in violation of Federal law. The Tribe has Civil Jurisdiction over Non Indians. This is a criminal matter. This is not a valid warrant. I will enforce a warrant[,] but I will not leave myself civilly liable nor will I jeopardize my Special Law Enforcement Commission by the BIA on a Tribal Warrant. TCW."

9. The Warrant was returned to the Court unserved.

10. The failure to serve the Warrant interfered with the regular business of the Court.

11. Officer Welch **[**4]** believes that the holding of the *Supreme Court in Oliphant v. Suquamish Tribe, 435 U.S. 191, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978)* places the responsibility on officers in the field to determine what race people belong to and, consequently, to decide, on their own, which Orders of the Court they will enforce.

12. As a prerequisite to receiving his Special Law Enforcement Commission from the United States Department of Interior, Bureau of Indian Affairs, Officer **[*73]** Welch attended the U.S. Indian Police Academy in Artesia, New Mexico, a fourteen week course. During this course, students receive training with regard to criminal jurisdiction in Indian Country.

13. Officer Troy Anthony attended the same training as Officer Welch.

14. Officer Welch stated that he was acting "in defense ... of [his] own paycheck."

15. The only CIPD "policy" regarding jurisdiction comprises a copy of a June 25, 1992 letter from the Assistant United States Attorney to Ann Hines Davis, Esquire, an Assistant District Attorney in North Carolina's 30th Judicial District, a September 3, 1993 letter from the Assistant United States Attorney to former Chief of Police Ray Swayney, and three photocopied jurisdictional **[**5]** charts, all stapled together.

16. CIPD Officers were not aware of C.C. § 14-1.5, which provides:

(a) All persons, regardless of race, age, or sex will comply and be subject to the laws of the Eastern Band of Cherokee Indians whenever they are within the boundaries of Qualla Boundary and its territories.

(b) All persons, regardless of race, age, or sex will be subject to all of the same charges, convictions, and fines that enrolled members of the Eastern Band are subject to.

(c) The Cherokee Police Department shall have the right to issue citations to non members, as well as members.

(d) The Cherokee Court system shall have the right to hear cases, impose fines and penalties on non members, as well as members.

(e) Tribal jurisdiction on all persons shall be equal and nondiscriminatory towards anyone, regardless of race, age, or sex as long as they are visiting or living or doing business on the lands of the Eastern Band of Cherokee Indians.

(f) The intent of this ordinance shall be carried out by the Chief of the Cherokee Police Department, the Chief Justice of the Tribal Court, and the Legal Department.

17. Officers Anthony and Watty learned of C.C. § 14-1.5 **[**6]** only minutes before the hearing on October 17th, and have received no training whatsoever regarding it.

18. C.C. § 14-1.5(f) directs the Chief Justice, the Chief of the CIPD and the Legal Department of the Tribe to implement it.

19. The Officers who testified are unaware of the legal test to determine whether a defendant is an Indian for the purposes of the exercise of the Court's jurisdiction

20. The CIPD has received insufficient and deficient training with regard to the Cherokee Court's criminal jurisdiction.

21. The CIPD Officers erroneously believe that they possess a semi-judicial function to screen criminal Warrants for validity.

22. CIPD Officers have received insufficient and deficient training with regard to the service of process.

DISCUSSION

At the outset, the Court notes its appreciation and respect for the law enforcement Officers who come before it. **[*74]** Police Officers undertake the most dangerous job in our society in an effort to serve and protect the people. In the course of their work, they can be shot at, cursed, cut, spat upon, and perhaps worst of all, unappreciated. Suspects tear their uniforms and urinate in their squad cars. And yet, **[**7]** night after night, dedicated law enforcement Officers respond to cries for help in the darkness in their never-ending mission to protect and serve.

The Court is very deferential to the decisions Police Officers

make in the field, as "police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving..." *Graham v. Connor, 490 U.S. 386, 396-397, 109 S. Ct. 1865, 104 L. Ed. 2d 443, (1989)*. This however, is not one such decision, as Officer Welch obviously made the decision not to go into the field and serve this Warrant.

The CIPD Officers' testimony and Officer Welch's manifesto discloses that they misapprehend the issues. Granted, criminal jurisdiction in Indian Country can be complicated, but this is yet another, practical, reason why Police Officers cannot serve as the Court of Appeals for the Magistrates. Officer Welch believes: "Mr. Evans is not an enrolled member of a Federally Recognized Tribe. Therefore, any officer who takes away his freedom on a 'Tribal Criminal Warrant' would be in violation of Federal law." This misstates the law. Likewise, Officer Anthony is unable to articulate a difference between not being an enrolled member in **[**8]** a Federally recognized Tribe and being a non-Indian. Officer Watty uses similar language.

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 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.)*(en banc), cert. granted *539 U.S. 987, 156 L. Ed. 2d 704, 124 S. Ct. 46 (2003)*; *25 U.S.C. § 1302(2)*. Thus, as amended, ICRA clarifies that the Indian nations have jurisdiction over criminal acts by Indians, regardless of the individual **[**9]** Indian's membership status with the charging Tribe. The import of this distinction has never been made clear to the Officers of the CIPD.

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 listed in that section in 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)*.

The Officers of the CIPD have apparently been trained that the **[*75]** appropriate jurisdictional analysis is whether the Defendant is a member of a Federally recognized Tribe. This is not the test, however. Membership in a Tribe is not an "essential[] factor" in **[**10]** 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 (D. S.D. 1991)*, aff'd, *945 F.2d 1410 (8th Cir. 1991)*, cert. denied, *502 U.S. 1109, 117 L. Ed. 2d 448, 112 S. Ct. 1209 (1991)*, accord Rogers, see also, *United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976)*, cert. denied, *429 U.S. 1099, 51 L. Ed. 2d 547, 97 S. Ct. 1118, 97 S. Ct. 1119 (1977)*. Rather, the inquiry includes whether the person has some Indian blood and is recognized as an Indian. Id. The second part of the test includes not only whether he is an enrolled member of some Tribe, but also whether the Government has provided him formally or informally with assistance reserved only for Indians, whether the person enjoys the benefits of Tribal affiliation, and whether he is recognized as an Indian by virtue of his living on the reservation and participating in Indian social life. Id. For instance, this Court has held that first lineal descendants, children of enrolled members who do not possess sufficient blood quanta to qualify for enrolment themselves are nevertheless subject to the criminal jurisdiction of the Court. EBCI v. Lambert, **[**11]** 2003NACE00003 *http://www.versuslaw.com* (2003). *[3 Cher. Rep. 62]*.

The Officers of the CIPD have apparently been trained that they possess a quasi-judicial role to screen or vet criminal warrants issued by the Magistrates for sufficiency of process. This demonstrates a total misunderstanding of criminal procedure and the roles of the Magistrate, the CIPD and the Court.

If a person is a non-Indian, that status is a defense to the exercise of the Court's jurisdiction. *Means v. Northern Cheyenne Tribal Court, 154 F.3d 941, 949 (9th Cir. 1998)* ("Tribal courts [are to be allowed] to 'have the first opportunity to evaluate the factual and legal bases for the challenge to [their] jurisdiction.'"(quoting *Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15-16, 94 L. Ed. 2d 10, 107 S. Ct. 971(1987))*, overruled on other grounds, *United States v. Enas, 255 F.3d 662 (9th Cir. 2001)*. That defense may be raised before the Court, and it is on occasion. Lambert. *[3*

Cher. Rep. 62] Indeed, a defendant cannot even seek habeas relief in the United States District Courts until she has exhausted her Tribal remedies. *Selam v. Warm Springs Tribal Corr. Facility, 134 F.3d 948, 954 (9th Cir. 1998).* **[**12]** These principles apply even when the issue involves whether the Court has jurisdiction to prosecute a non-Indian. Accord *Armstrong v. Mille Lacs County Sheriff's Dep't., 112 F. Supp.2d 840 (D. Minn. 2000).*

The Court takes very seriously its obligations with respect to its jurisdiction. Officer Welch is not the Court. He is not the Court of Appeals for the Magistrates. He is an officer of the Court. His job is, with respect to this matter, to serve the process of the Court.

If he feels that some part of the process of the Court is problematic he has a number of avenues he may pursue. He may report a suspected problem to his superiors. He may speak to the issuing Magistrate, as Officer Watty testified that he would do. He may confer with the Tribal Prosecutor. He may seek out the advice of the Attorney General. He may bring the issue before a Cherokee Court Judge. Lastly, he may take up the matter with the Chief Justice. However, simply refusing to serve the process and writing a defiant manifesto on the Warrant is not an option. [1]

[13]** **[*76]** Officer Welch's actions were impudent and disrespectful. Whether they were wilfully contemptuous, requires however, further inquiry. Officer Welch does not understand that his actions were wrong. He does not recognize the threat to the Judicial Branch of government itself created when Police Officers are left to determine on their own which Orders they feel like enforcing and which they do not. It appears to the Court that the Officers of the CIPD have simply not been given adequate instruction in these areas. To the extent that the collection of photocopies of letters and jurisdictional charts constitute a "policy," there is no evidence before the Court that the CIPD Officers are given any meaningful procedures or policies as to how implement the "policy." [2] The Officers are asking for instruction and training. The Court will oblige them.

[14]** For the Court cannot long endure unless its officers faithfully execute the Orders and directives of the Court. When police officers take the law into their own hands, they become something other than police officers; they become vigilantes.

CONCLUSIONS OF LAW

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

2. Officer Tosh C. Welch has disobeyed, resisted and interfered with the Court's lawful process, and its execution pursuant to C.C. § 1-20(3).

3. Officer Tosh C. Welch has failed to perform his duties in an official transaction pursuant to C.C. § 1-20(5).

4. Officer Tosh C. Welch's disobedience, resistance, interference and failure to perform his duties was not willful.

5. The Court has a reasonable doubt, and thus Officer Tosh C. Welch is not guilty of criminal contempt of this Court.

ACCORDINGLY IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Officer Tosh C. Welch is NOT GUILTY of criminal contempt of this Court. However, although Officer Welch is acquitted of these charges, the Court retains jurisdiction over the subject matter of this action: the service of process of the Court, as a function of its inherent authority **[**15]** and supervisory power over its officers. ACCORDINGLY, IT IS HEREBY ORDERED that the Tribal Prosecutor coordinate with the Attorney General and provide proper training for the Officers of the CIPD on a quarterly basis. This training shall have an emphasis on the Court's civil and criminal jurisdiction, including updates on the latest case law, as well as the role of CIPD Officers in the service of criminal process. IT IS FURTHER ORDERED that the Prosecutor report to the Court in writing after each training session. IT IS FURTHER ORDERED that the first such training session shall be completed on or before December 23, 2003. It is the intention of the Court that, within nine months, all current Officers of the CIPD will have received the training.

End of Document

[1] Officer Welch expresses concern that he could be subject to an action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971)* if he were to charge a non-Indian with Tribal process. The letter from Special Agent Nicholas implies the same. Nevertheless, the evidence before the Court is that the Attorney General stands ready to defend CIPD Officers should they ever be sued for serving the process of the Court.

[2] **[*77]** This is not the first time this year that the Court has been presented with evidence of inadequate policies and procedures at the CIPD. See Biello v. EBCI, 2003NACE00001