APPENDIX A

Supreme Court of North Carolina

State of North Carolina
v.
George Lee Nobles

No. 34PA14-2

Filed February 28, 2020

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 818 S.E.2d 129 (N.C. Ct. App. 2018), determining no error in part and remanding in part a judgment entered on 15 April 2016 by Judge Bradley B. Letts in Superior Court, Jackson County. Heard in the Supreme Court on 4 November 2019.

Joshua H. Stein, Attorney General, by Amy Kunstling Irene, Special Deputy Attorney General, for the State-appellee.Glenn Gerding, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Justice.

In this case, we must determine whether defendant has sufficiently demonstrated that he qualifies as an "Indian"[1] under the federal Indian Major Crimes Act (IMCA) such that he was not subject to the jurisdiction of North Carolina's courts. Because we conclude that defendant failed to demonstrate that he is an Indian for purposes of the IMCA, we affirm the decision of the Court of Appeals.

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[1] Throughout this opinion, we use the term "Indian" to comport with the terminology contained in the Indian Major Crimes Act.

Factual and Procedural Background

On 30 September 2012, Barbara Preidt was robbed at gunpoint and fatally shot outside of a Fairfield Inn in Jackson County. The crime took place within the Qualla Boundary—land that is held in trust by the United States for the Eastern Band of Cherokee Indians (EBCI).

After an investigation by the Cherokee Indian Police Department, defendant, Dwayne Edward Swayney, and Ashlyn Carothers were arrested for the robbery and murder on 30 November 2012. Because Swayney and Carothers were enrolled members of the EBCI and of the Cherokee Nation of Oklahoma, respectively, they were brought before an EBCI tribal magistrate for indictment proceedings. Tribal, state, and federal authorities, however, agreed that defendant should be prosecuted by the State of North Carolina given that he was not present in the EBCI enrollment records. Accordingly, defendant was brought before a Jackson County magistrate and then charged in Jackson County with first-degree murder, robbery with a dangerous weapon, and two counts of possession of a firearm by a felon.

On 15 April 2013, defendant moved to dismiss the charges against him for lack of subject matter jurisdiction, arguing that because he was an Indian he could only be tried in federal court pursuant to the IMCA. The IMCA provides, in pertinent part, that "[a]ny Indian" who commits an enumerated major crime in "Indian country" is subject to "the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a) (2012).

The trial court held a pre-trial hearing on defend-

ant's motion to dismiss on 9 August 2013. The parties stipulated that defendant was born in 1976 in Florida to Donna Lorraine Smith Crowe, an enrolled member of the EBCI. The parties also stipulated that although defendant himself is not an enrolled member of the EBCI, he "would be [classified as] a first descendant" due to his mother's status.

At the hearing, the trial court received testimony from Kathie McCoy, an employee at the EBCI Office of Tribal Enrollment. McCoy testified that while defendant is neither currently enrolled nor classified as a first descendant in the EBCI database, he was nevertheless "eligible to be designated as a [f]irst [d]escendant" because his mother was an enrolled member of the EBCI.

Annette Tarnawsky, the Attorney General for the EBCI, also provided testimony explaining that while first descendants are not entitled to the full range of tribal affiliation benefits that enrolled members enjoy, first descendants are eligible for some special benefits not available to persons lacking any affiliation with the tribe. These benefits include certain property rights (such as the right to inherit land from enrolled members by valid will and to rent dwellings on tribal land), health care benefits (eligibility to receive free care at the Cherokee Indian Hospital), employment benefits (a limited hiring preference for EBCI employment), and education benefits (access to financial assistance for higher education and adult education services). Tarnawsky also testified that the list of benefits available only to enrolled EBCI members includes the right to hunt and fish on tribal lands, the ability to vote in tribal elections, and the right to hold tribal office.

The State also presented evidence that defendant had been incarcerated in Florida from 1993 until 2011 and that his pre-sentence report in Florida listed his race and sex as "W/M." When defendant was released from Florida's custody in 2011, he requested that his probation be transferred to North Carolina and listed his race as "white" on his Application for Interstate Compact Transfer.

Defendant's probation officers, Christian Clemmer and Olivia Ammons, testified that in 2011, defendant began living with family members at an address near the Qualla Boundary and working at a fast food restaurant that was also located within the Boundary. For the next fourteen months, defendant lived at various addresses on or near the Qualla Boundary until his arrest on 30 November 2012. Defendant never represented to either of his probation officers that he was an Indian. On a mandatory substance abuse screening form completed by Ammons on 7 May 2012, defendant's race was listed as "white."

Defendant's mother also testified at the hearing, stating that she is an enrolled EBCI member but that defendant's father was white and not affiliated with any tribe. She testified that defendant lived on or near the Qualla Boundary for much of his childhood and that she had enrolled defendant in both the Cherokee tribal school system and the Swain County school system. On one Bureau of Indian Affairs (BIA) student enrollment application, she listed defendant's "Degree Indian" as "none." On two other BIA student enrollment applications, however, she listed defendant's "Tribal Affiliation" as "Cherokee."

As a child, defendant received treatment at the Swain County Hospital for injuries suffered in a car

accident, and the EBCI paid for the portion of his medical expenses not covered by health insurance. An employee of Cherokee Indian Hospital, Vickie Jenkins, testified that defendant received care at the hospital on five occasions between 1985 and 1990. The hospital serves only enrolled members of the EBCI and first descendants, both of whom receive medical services at no cost. Defendant's hospital records indicated that he was of EBCI descent and identified him as an "Indian nontribal member."

After hearing all the evidence, the trial court entered an order on 26 November 2013 denying defendant's motion to dismiss based on its determination that defendant was not an Indian within the meaning of the IMCA. The trial court's order contained hundreds of detailed findings of fact. On 31 January 2014, defendant filed a petition for writ of certiorari with this Court seeking review of the trial court's order. The petition was denied on 11 June 2014.

On 14 March 2016, defendant renewed his motion to dismiss the charges against him in the trial court for lack of jurisdiction, and, in the alternative, moved that the jurisdictional issue relating to his Indian status be submitted to the jury by means of a special verdict. The trial court denied both motions on 25 March 2016.

Defendant was subsequently tried in Superior Court, Jackson County, beginning on 28 March 2016, and was ultimately convicted of armed robbery, first-degree murder under the felony murder doctrine, and possession of a firearm by a felon. He was sentenced to life imprisonment without parole.

Defendant appealed his convictions to the Court of

Appeals. His principal argument on appeal was that the trial court had erred in denying his motion to dismiss on jurisdictional grounds. In a unanimous opinion, the Court of Appeals rejected his argument, based on its determination that defendant did not qualify as an Indian under the IMCA and that a special verdict was not required. *State v. Nobles*, 818 S.E.2d 129 (N.C. Ct. App. 2018).[2] Defendant filed a petition for discretionary review with this Court on 7 August 2018, which we allowed.

Analysis

The two issues before us in this appeal are whether the Court of Appeals erred in affirming the trial court's order denying defendant's motion to dismiss and in ruling that the jurisdictional issue was not required to be submitted to the jury by means of a special verdict. We address each issue in turn.

I. Denial of Motion to Dismiss

The IMCA provides that "[a]ny Indian who commits [an enumerated major crime] against the person or property of another ... within the Indian country[ ] shall be subject to ... the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a); *see United States v. Juvenile Male*, 666 F.3d 1212, 1214 (9th Cir. 2012) ("[The IMCA] provides federal criminal jurisdiction for certain crimes committed by Indians in Indian country."); *United States v. Sands*, 968 F.2d 1058, 1061 (10th Cir. 1992) ("[The IMCA] provides that federal criminal law applies to various of-

[2] The Court of Appeals remanded the case to the trial court for the sole purpose of correcting a clerical error. *Nobles*, 818 S.E.2d at 144. This portion of the Court of Appeals' decision is not before us in this appeal.

fenses committed by Indians ... 'within the Indian Country.'").

Here, there is no dispute that the shooting took place in "Indian country" as it occurred within the Qualla Boundary. Nor is there any dispute that the charges against defendant constituted major crimes for purposes of the IMCA. The question before us is whether defendant qualifies as an Indian under that statute.

The IMCA does not provide a definition of the term "Indian." The Supreme Court of the United States, however, suggested a two-pronged test for analyzing this issue in *United States v. Rogers*, 45 U.S. (4 How.) 567, 572–73, 11 L. Ed. 1105, 1107–08 (1846). To qualify as an Indian under the *Rogers* test, a defendant must (1) have "some Indian blood," and (2) be "recognized as an Indian by a tribe or the federal government or both." *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) (citing *Rogers*, 45 U.S. at 572–73, 11 L. Ed. at 1105); *see also United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc) ("We hold that proof of Indian status under the IMCA requires only two things: (1) proof of some quantum of Indian blood, ... and (2) proof of membership in, or affiliation with, a federally recognized tribe.").

In the present case, the parties agree that the first prong of the *Rogers* test has been satisfied because defendant possesses an Indian blood quantum of 11/256 (4.29%). Thus, only the second prong of *Rogers* is at issue—that is, whether defendant has received tribal or federal recognition as an Indian. This Court has not previously had an opportunity to apply the *Rogers* test. It is therefore instructive to

examine how other courts have done so.

In applying the second prong of *Rogers*, both federal and state courts around the country have frequently utilized—in some fashion—the four-factor balancing test first enunciated in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988). Under the *St. Cloud* test, a court considers the following factors:

> 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life.

Id. at 1461; *see, e.g., United States v. Nowlin*, 555 F. App'x 820, 823 (10th Cir. 2014) (using the *St. Cloud* factors to determine whether the defendant was an Indian); *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005) (applying the *Rogers* test as the "generally accepted test for Indian status" as well as the *St. Cloud* factors); *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995) (court's analysis of the second *Rogers* prong was "guided by consideration of four factors ... first enunciated in *St. Cloud*"); *State v. Sebastian*, 243 Conn. 115, 132, 701 A.2d 13, 24 (1997) ("The four factors enumerated in *St. Cloud* have emerged as a widely accepted test for Indian status in the federal courts."); *State v. George*, 163 Idaho 936, 939–40, 422 P.3d 1142, 1145–46 (2018) (relying on the *St. Cloud* factors to determine the defendant's Indian status); *State v. LaPier*, 242 Mont. 335, 341, 790 P.2d 983, 986 (1990) ("We expressly adopt the foregoing [*St. Cloud*] test."); *State v.*

Perank, 858 P.2d 927, 933 (Utah 1992) (relying on *St. Cloud* to determine whether the defendant met the definition of an Indian); *State v. Daniels*, 104 Wash. App. 271, 281–82, 16 P.3d 650, 654–55 (2001) (considering the *St. Cloud* factors in deciding whether the defendant qualified as an Indian).

Courts have varied, however, in their precise application of the *St. Cloud* factors. *See, e.g., State v. Salazar*, No. A-1-CA-36206, —— S.E.2d ——, —— n.4, 2020 WL 239879, at *3 n.4 (N.M. Ct. App. Jan. 15, 2020) ("[A] circuit split has emerged about whether certain factors carry more weight than others."). Some courts deem the four factors set out in *St. Cloud* to be exclusive and consider them "in declining order of importance." *Bruce*, 394 F.3d at 1224; *accord Sebastian*, 243 Conn. at 132, 701 A.2d at 24 (applying the four *St. Cloud* factors "in declining order of importance"); *LaPier*, 242 Mont. at 341, 790 P.2d at 986 (analyzing the *St. Cloud* factors "[i]n declining order of importance"); *Lewis v. State*, 137 Idaho 882, 885, 55 P.3d 875, 878 (Idaho Ct. App. 2002) ("[Of the *St. Cloud*] factors tribal enrollment is the most important."); *Daniels*, 104 Wash. App. at 279, 16 P.3d at 654 (using the four factors identified in *St. Cloud* "[i]n declining order of importance").

Other courts have utilized the *St. Cloud* factors differently. The Eighth Circuit has held that the four *St. Cloud* factors "should not be considered exhaustive ... [n]or should they be tied to an order of importance." *Stymiest*, 581 F.3d at 764. The Tenth Circuit has likewise determined that the *St. Cloud* factors "are not exclusive." *Nowlin*, 555 F. App'x at 823 ("These factors are not exclusive and only the first factor is dispositive if the defendant is an enrolled tribe member.").

After thoroughly reviewing the decisions from other jurisdictions addressing this issue, we adopt the application of the *St. Cloud* factors utilized by the Eighth Circuit and the Tenth Circuit. We do so based on our belief that this formulation of the test provides needed flexibility for courts in determining the inherently imprecise issue of whether an individual should be considered to be an Indian under the second prong of the *Rogers* test. We likewise recognize that, depending upon the circumstances in a given case, relevant factors may exist beyond the four *St. Cloud* factors that bear on this issue. *See, e.g., Stymiest*, 581 F.3d at 764 (holding that the trial court "properly identified two other factors relevant on the facts of this case" in addition to the *St. Cloud* factors—namely, that the defendant's tribe had previously "exercised criminal jurisdiction over" him and that the defendant "held himself out to be an Indian").

Before applying this test in the present case, however, we must first address defendant's threshold arguments. Initially, he contends that consideration of the *St. Cloud* factors is unnecessary because his status as a first descendant conclusively demonstrates—as a matter of law—his "tribal or federal recognition" under the second *Rogers* prong. We reject this argument, however, based on our concern that such an approach would reduce the *Rogers* test into a purely blood-based inquiry, thereby conflating the two prongs of the *Rogers* test into one. Were we to hold that defendant may be classified as an Indian solely on the basis of (1) his percentage of Cherokee blood; and (2) his status as the son of an enrolled member of the Cherokee tribe, this would transform the *Rogers* test into one based wholly upon genetics.

Such an approach would defeat the purpose of the test, which is to ascertain not just a defendant's blood quotient, but also his social, societal, and spiritual ties to a tribe.

Indeed, the Ninth Circuit rejected this exact argument in *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009), explaining that the four-factor test articulated in *St. Cloud* is designed to probe

> "whether the Native American has a sufficient non-racial link to a formerly sovereign people" .... Given that many descendants of Indians are eligible for tribal benefits based exclusively on their blood heritage, the government's argument [that the defendant's descendant status alone could satisfy this prong] would effectively render the second [*Rogers* prong] a de facto nullity, and in most, if not all, cases would transform the entire [*Rogers*] analysis into a "blood test."

Cruz, 554 F.3d at 849 (citations and emphasis omitted).

We are likewise unpersuaded by defendant's assertion that we should follow the decision of the Cherokee Court in *E. Band of Cherokee Indians v. Lambert*, 3 Cher. Rep. 62 (N.C. Cherokee Ct. 2003), on this issue. At issue in *Lambert* was whether the defendant in that case qualified as an Indian for purposes of EBCI tribal criminal jurisdiction. *Id.* at 62. The defendant filed a motion to dismiss, contending that the EBCI lacked jurisdiction over her because she was not an enrolled member of the tribe. *Id.* Both parties stipulated that the defendant was recognized by the tribe as a first descendant. *Id.*

After holding a hearing to gather additional evi-

dence, the court ruled that the defendant was "an Indian for the purposes of [tribal criminal] jurisdiction." *Id.* at 64. The court rejected the defendant's argument that her lack of enrollment in a tribe was dispositive of her status, explaining that "membership in a Tribe is not an 'essential factor' in the test of whether the person is an 'Indian' for the purposes of this Court's exercise of criminal jurisdiction." *Id.* Instead, the court relied on *Rogers* and the *St. Cloud* factors to conclude that "the inquiry includes whether the person has some Indian blood and is recognized as an Indian." *Id.*

The Cherokee Court ruled that "[a]pplying this test in this case, the [c]ourt can only conclude that the [d]efendant meets the definition of an Indian." *Id.* at 65. The court detailed the benefits and privileges available to EBCI first descendants, including "some privileges that only Indians have, [as well as] some privileges that members of other Tribes do not possess." *Id.* at 64. The court also took judicial notice of the fact that the defendant had "availed herself of the [c]ourt's civil jurisdiction" to file a pending lawsuit against another tribal member. *Id.* at 63. Finally, the court noted that "[f]irst [d]escend[a]nts are participating members of [the] community and treated by the [t]ribe as such." *Id.* at 64.

In the present case, we believe that defendant's reliance on *Lambert* is misplaced for several reasons. First, it is far from clear that the *Lambert* court intended to announce a categorial rule that all first descendants must be classified as Indians. There, despite the parties' stipulation that the defendant was, in fact, an EBCI first descendant, the court nevertheless determined that "additional evidence was required to decide the matter" and proceeded to hold

an evidentiary hearing. *Id.* at 62. The logical inference from the court's opinion is that if first descendant status alone was sufficient to decide the issue, the court would have had no need to seek additional evidence in order to determine whether the defendant was subject to tribal jurisdiction. Indeed, we note that the court in *Lambert* expressly made a finding of fact that the defendant had previously "availed herself of the [tribal] [c]ourt's civil jurisdiction" to file a lawsuit against another tribal member. *Id.* at 63. Such a finding would have been unnecessary had the defendant's first descendant status been enough by itself to resolve the issue.

Moreover, even if the Cherokee Court in *Lambert* did intend to articulate such a categorial rule, we would not be bound by it. The court that decided *Lambert* is a trial court within the EBCI judicial system. *See* Cherokee Code § 7-1(a) ("[T]he Trial Court shall be known as the 'Cherokee Court.'"). Defendant has failed to offer any persuasive argument as to why this Court should be bound by the decision of an EBCI trial court on this issue. We note that the Supreme Court of the EBCI has made clear that it "do[es] 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. E. Band of Cherokee Indians Minors Fund*, 13 Am. Tribal Law 180, 188 (E. Cher. Sup. Ct. 2015). Thus, the decision in *Lambert* does not have binding effect even within the EBCI courts.

Furthermore, as the Idaho Supreme Court has noted, the fact that a tribal court may have exercised its jurisdiction over certain defendants is not dispositive on the issue of whether a state court possesses jurisdiction over such defendants in a particular

case. *See George*, 163 Idaho at 940, 422 P.3d at 1146 ("[T]his [c]ourt 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."). Accordingly, we hold that defendant's status as a first descendant does not—without more—satisfy the second prong of the *Rogers* test.

Having rejected defendant's initial arguments, we now proceed to apply the four *St. Cloud* factors along with any additional factors relevant to the analysis. Before doing so, it is important to emphasize that defendant has not specifically challenged any of the hundreds of findings of fact contained in the trial court's order denying his motion to dismiss. Accordingly, those findings are binding upon us in this appeal. *See State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) ("It is well established that if a party fails to object to the [trial court's] findings of fact and bring[s] them forward on appeal, they are binding on the appellate court.").

A. Enrollment in a Tribe

We first consider whether defendant is enrolled in any "federally recognized tribe." *Zepeda*, 792 F.3d at 1114. Here, the inquiry is a simple one. It is undisputed that defendant is not enrolled in any such tribe.

B. Government Recognition Through Provision of Assistance

The second *St. Cloud* factor requires us to determine whether defendant was the recipient of "government recognition formally and informally through receipt of assistance reserved only to Indi-

ans." *Cruz*, 554 F.3d at 846. In arguing that this factor supports his argument, defendant lists the types of benefits for which first descendants are eligible. However, this factor is concerned with those tribal benefits a defendant has actually *received* as opposed to those benefits for which he is merely *eligible*. *See Cruz*, 554 F.3d at 848 (holding that defendant failed to satisfy this prong of the *St. Cloud* test because he "never 'received ... any benefits from the Blackfeet Tribe' "); *accord United States v. LaBuff*, 658 F.3d 873, 878 (9th Cir. 2011) (rejecting the argument that this factor "could be established by demonstrating eligibility rather than actual receipt of benefits").

Here, based on the trial court's findings of fact, the only evidence of governmental assistance to defendant consisted of five incidents of free medical treatment that he received as a minor at the Cherokee Indian Hospital, a hospital that serves only enrolled EBCI members and first descendants. Defendant's hospital records indicated that he was of EBCI descent and identified him as an "Indian nontribal member." The trial court made no findings as to any tribal assistance that defendant has received since reaching adulthood.

C. Enjoyment of Benefits of Tribal Affiliation

The third factor under *St. Cloud* addresses defendant's "enjoyment of the benefits of tribal affiliation." *Bruce*, 394 F.3d at 1224. In assessing this factor, we must examine whether defendant has received any broader benefits from his affiliation with a tribe—apart from the receipt of government assistance. *See, e.g., Cruz*, 554 F.3d at 848 (holding that the defendant failed to demonstrate that he "enjoy[ed] any benefits of tribal affiliation" when there

was "no evidence that he hunted or fished on the reservation, nor ... that his employment with the BIA was related to or contingent upon his tribal heritage").

Here, defendant was born in Florida and the trial court made no finding that he was born on tribal land. He did attend a school in the Cherokee tribal school system as a child after he and his mother moved back to North Carolina in the early 1980's, but the school was open to both Indian and non-Indian students. As an adult, defendant lived and worked on or near the Qualla Boundary for approximately fourteen months prior to the murder of Preidt in 2012. The trial court made no findings, however, suggesting that his employment at the restaurant was in any way connected to his first descendant status. Nor does the trial court's order show that he enjoyed any other benefits of tribal affiliation.

D. Social Recognition as an Indian

Under the fourth *St. Cloud* factor, we consider whether defendant received "social recognition as an Indian through residence on a reservation and participation in Indian social life." *Bruce*, 394 F.3d at 1224. Courts applying this factor have deemed relevant various types of conduct showing a defendant's connection with a particular tribe. *See, e.g., United States v. Reza-Ramos*, 816 F.3d 1110, 1122 (9th Cir. 2016) (defendant "spoke the tribal language" and "had lived and worked on the reservation for some time"); *LaBuff*, 658 F.3d at 878 ("[Defendant] lived, grew up, and attended school on the Blackfeet Reservation."); *Stymiest*, 581 F.3d at 765–66 (defendant "lived and worked on the Rosebud reservation," told others he was an Indian, and spent significant time

"socializing with other Indians"); *Bruce*, 394 F.3d at 1226 (defendant "was born on an Indian reservation and currently lives on one," she "participated in sacred tribal rituals," and her mother and children were enrolled members of a tribe).

Conversely, courts have determined that this factor weighs against a finding of Indian status under the IMCA as to defendants who have never been involved in Indian cultural, community, or religious events; never participated in tribal politics; and have not placed any emphasis on their Indian heritage. *See, e.g., Cruz*, 554 F.3d at 847 (defendant "never participated in Indian religious ceremonies or dance festivals, has never voted in a Blackfeet tribal election, and does not have a tribal identification card"); *Lawrence*, 51 F.3d at 154 (victim was not "recognized socially as an Indian" when she had only lived on the reservation for seven months and "did not attend pow-wows, Indian dances or other Indian cultural events; and ... she and her family lived without focusing on their Indian heritage").

In the present case—as noted above—defendant lived and worked on or near the Qualla Boundary for approximately fourteen months prior to the murder of Preidt. During this time, he had a girlfriend, Ashlyn Carothers, who was an enrolled tribal member. Defendant also emphasizes that his two tattoos—which depict an eagle and a headdress—demonstrate his celebration of his cultural heritage.

However, the trial court's findings are devoid of any indication that defendant ever attended any EBCI cultural, community, or religious activities; that he spoke the Cherokee language; that he possessed a tribal identification card; or that he partici-

pated in tribal politics. Indeed, we note that Myrtle Driver Johnson, an active elder and member of the EBCI community, testified that she had never seen defendant at EBCI events. Moreover, on several different official documents, defendant self-identified as being "white."

E. Other Relevant Factors

Finally, we consider whether any additional pertinent factors exist. For example, whether a defendant has been subjected to tribal jurisdiction in the past—in either a criminal or civil context—has been considered by several courts to be relevant. *See, e.g., LaBuff*, 658 F.3d at 879 (noting "that on multiple occasions, [the defendant] was arrested, prosecuted, and convicted under the jurisdiction of the tribal courts" and that "the assumption and exercise of tribal jurisdiction over criminal charges[ ] demonstrates tribal recognition"); *Stymiest*, 581 F.3d at 766 (observing that the defendant had "repeatedly submitt[ed] [himself] to tribal arrests and prosecutions"); *Bruce*, 394 F.3d at 1226–27 (deeming instructive the fact that the defendant had been "arrested tribal all her life" because "the tribe has no jurisdiction to punish anyone but an Indian").

Here, the trial court's findings do not show that defendant was ever subjected to the jurisdiction of the EBCI tribal court or, for that matter, any other tribal court. Nor has defendant directed us to any additional facts found by the trial court that would otherwise be relevant under the second prong of the *Rogers* test.

* * *

After carefully considering the trial court's exten-

sive findings of fact in light of the factors relevant to the second prong of the *Rogers* test, we conclude that defendant has failed to demonstrate that the trial court erred in denying his motion to dismiss. In essence, the trial court's findings show that (1) defendant is not enrolled in any tribe; (2) he received limited government assistance from the EBCI in the form of free healthcare services on several occasions as a minor; (3) as a child, he attended a Cherokee school that accepted both Indian and non-Indian students; (4) he lived and worked on the Qualla Boundary for approximately fourteen months as an adult; (5) his participation in Indian social life was virtually nonexistent and his demonstrated celebration of his cultural heritage was at best minimal; (6) he has never previously been subjected to tribal jurisdiction; and (7) he did not hold himself out as an Indian. The trial court therefore properly concluded that defendant was not an Indian for purposes of the IMCA. Accordingly, we affirm the court's denial of his motion to dismiss.

II. Special Jury Verdict

The only remaining issue before us concerns defendant's contention that he was entitled to a special jury verdict on the jurisdictional issue underlying his motion to dismiss. Defendant asserts that because this issue required resolution by a jury the trial court erred in ruling on the motion as a matter of law. In support of this contention, he cites our decisions in *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977) and *State v. Rick*, 342 N.C. 91, 463 S.E.2d 182 (1995).

In *Batdorf*, the defendant challenged the trial court's territorial jurisdiction, contending that there

was insufficient evidence that his crime was committed in North Carolina—as opposed to Ohio—"so as to confer jurisdiction on the courts of this State." *Batdorf*, 293 N.C. at 492, 238 S.E.2d at 502. We agreed with the defendant that the State bears the "burden of proving beyond a reasonable doubt that the crime with which an accused is charged was committed in North Carolina." *Id.* at 494, 238 S.E.2d at 502. We held that the trial court should have instructed the jury to "return a special verdict indicating lack of jurisdiction" if the jury was not satisfied that the crime occurred in North Carolina. *Id.* at 494, 238 S.E.2d at 503.

Rick likewise involved a challenge to the trial court's territorial jurisdiction in which the defendant contended that the State had not sufficiently proven whether the crime occurred in North Carolina or South Carolina. *Rick*, 342 N.C. at 98, 463 S.E.2d at 186. Citing the rule established in *Batdorf*, we determined that a remand was necessary because "the record reveals that although the defendant challenged the facts of jurisdiction, the trial court did not instruct the jury as to which party bore the burden of proving jurisdiction and that if the jury was unconvinced beyond a reasonable doubt that the murder ... occurred in North Carolina, it should return a special verdict so indicating." *Id.* at 101, 463 S.E.2d at 187.

Thus, *Batdorf* and *Rick* each involved a challenge to the court's *territorial* jurisdiction—that is, whether the crime occurred in North Carolina as opposed to another state. Here, conversely, defendant is making the entirely separate argument that he was required to be prosecuted in federal court pursuant to the IMCA. As a result, our decisions in *Batdorf* and

Rick have no application here.

The dissent appears to be arguing that *any* challenge to the trial court's jurisdiction in a criminal case must always be resolved by a jury—regardless of the nature of the jurisdictional challenge or whether any factual disputes exist regarding the jurisdictional issue. Such an argument finds no support in our caselaw and would extend the rulings in *Batdorf* and *Rick* well beyond the limited principle of law for which those cases stand.

The dissent fails to point to any factual dispute relevant to the IMCA analysis that exists in the record.[3] Given the absence of any such factual dispute, it would make little sense to hold that a jury was required to decide the purely legal jurisdictional issue presented here.

This principle is illustrated by our decision in *State v. Darroch*, 305 N.C. 196, 287 S.E.2d 856 (1982). There, the defendant was convicted of accessory before the fact to murder. *Id.* at 197, 287 S.E.2d at 857. The evidence showed that the defendant, a Virginia resident, had—while in Virginia—hired two persons to kill her husband and that the husband was subsequently killed in North Carolina by the individuals she had hired. *Id.* On appeal, the defendant argued that the trial court lacked jurisdiction over her based on the specific crime for which she had been charged given that the murder had been committed in North Carolina but arranged in another state. *Id.* at 200–01, 287 S.E.2d at 859–60. Relying on *Batdorf*, she contended that because she had

[3] The dissent similarly does not acknowledge the effect of defendant's failure to challenge on appeal any of the trial court's findings of fact.

raised a jurisdictional issue "the jury should have been allowed to return a special verdict" as to whether jurisdiction existed in the trial court. *Id*. at 212, 287 S.E.2d at 866. In rejecting her argument, we explained as follows:

> While *Batdorf* still represents the law in this state on the burden of proof on jurisdiction, it is applicable only when the facts on which the State seeks to base jurisdiction are challenged. In this case, defendant challenged not the *facts* which the State contended supported jurisdiction, but the *theory* of jurisdiction relied upon by the State. Whether the theory supports jurisdiction is a legal question; whether certain facts exist which would support jurisdiction is a jury question.

Id.

As in in *Darroch*, defendant here is not challenging the underlying "facts on which the State seeks to base jurisdiction." *Id*. Instead, defendant contests the trial court's determination that the IMCA is not applicable in this case—an inherently legal question properly decided by the trial court rather than by the jury.[4]

Finally, the dissent notes that some federal courts have concluded that a defendant's Indian status under the IMCA "is an element of the crime that must be submitted to and decided by the jury" because it is "essential to federal subject matter jurisdiction."

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[4] Therefore, this case does not require us to decide the question of whether a defendant's challenge to a trial court's jurisdiction based on the IMCA could ever require a special jury verdict on that issue in a case where—unlike here—a factual dispute exists that is relevant to the IMCA analysis.

Stymiest, 581 F.3d at 763. Such a requirement is not illogical given that "federal courts are courts of limited jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L. Ed. 2d 274, 282 (1978). The dissent, however, has failed to cite any authority for the converse proposition that in state court proceedings the *inapplicability* of the IMCA is an element of the crime that must be submitted for resolution by the jury. Accordingly, we conclude that the trial court did not err by denying defendant's request for a special jury verdict.

Conclusion

For the reasons stated above, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

I disagree with the majority's conclusion that defendant was not entitled to a special jury verdict on the question of whether he is an "Indian" under the Indian Major Crimes Act (the IMCA).[1] Further, assuming that the majority is correct that this question was not required to be submitted to the jury, I disagree with the majority's conclusion that defendant is not an Indian under the IMCA. Accordingly, I respectfully dissent.

As the majority notes, the fatal shooting of Barbara Preidt on 30 September 2012 occurred in Jackson County within the Qualla Boundary, which is land

[1] Like the majority, I use the term "Indian" to comport with the terminology contained in the IMCA.

that is held in trust by the United States for the Eastern Band of Cherokee Indians (the EBCI), a federally-recognized tribe. Following an investigation by the Cherokee Indian Police Department (the CIPD), defendant was arrested within the Qualla Boundary in connection with the shooting.

The Cherokee Rules of Criminal Procedure mandated that individuals arrested on tribal land must be brought before a tribal magistrate to "conduct the '*St. Cloud*' test" to determine whether the arrestee is an Indian, and further that if the arrestee is an enrolled member of any federally-recognized tribe or an EBCI First Descendant, jurisdiction lies with the tribal court. Despite these Rules of Criminal Procedure, CIPD Detective Sean Birchfield did not bring defendant before a tribal magistrate nor ask whether defendant was a First Descendant. Rather, after checking an EBCI enrollment book, which does not include First Descendants, and determining that defendant was not an enrolled member, and after discussing the situation with a Jackson County Assistant District Attorney and a Special Assistant United States Attorney, Detective Birchfield transported defendant to Jackson County, where he was charged in State court with first-degree murder, robbery with a dangerous weapon, and two counts of possession of a firearm by a felon.

On 15 April 2013, defendant filed a motion to dismiss in superior court, arguing that because he was an Indian under the IMCA, jurisdiction over his case lies exclusively in federal court. After a hearing, the trial court denied defendant's motion on 26 November 2013. Defendant later renewed his motion to dismiss and requested in the alternative that the question of whether he is an Indian be submitted to

the jury for a special verdict. The trial court denied these motions on 25 March 2016. On appeal, the Court of Appeals upheld the trial court's rulings, concluding that defendant received a fair trial free from error. *State v. Nobles*, 818 S.E.2d 129 (N.C. Ct. App. 2018).

Special Jury Verdict

Defendant argues that the trial court erred in denying his request for a special jury verdict because he has 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. In support of his contention, defendant relies, in part, upon two cases from this Court, *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977), and *State v. Rick*, 342 N.C. 91, 463 S.E.2d 182 (1995).

In *Batdorf*, the defendant argued that there was insufficient evidence that the murder at issue was committed in North Carolina "so as to confer jurisdiction on the courts of this State." 293 N.C. at 492, 238 S.E.2d at 502. The Court stated:

> A defendant's contention that this State lacks jurisdiction may be an affirmative defense in that it presents ... a matter "beyond the essentials of the legal definition of the offense itself." Jurisdictional issues, however, relate to the authority of a tribunal to adjudicate the questions it is called upon to decide. When jurisdiction is challenged, the defendant is contesting the very power of this State to try him. We are of the view that a question as basic as jurisdiction is not an "independent, distinct, substantive mat-

> ter of exemption, immunity or defense" and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, *when contested*, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment.

Id. at 493, 238 S.E.2d at 502 (citations omitted). Thus, the Court held that "when jurisdiction is challenged, as here, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused." *Id.* at 494, 238 S.E.2d at 502–03.[2]

Similarly, in *Rick*, the defendant filed a motion to dismiss for lack of jurisdiction on the basis that there was insufficient evidence that the murder with which he was charged occurred in North Carolina. 342 N.C. at 98, 463 S.E.2d at 186. The Court determined that there was sufficient evidence that the crime occurred in North Carolina, but that in light of *Batdorf* the trial court erred because it "did not instruct the jury as to which party bore the burden of proving jurisdiction and that if the jury was unconvinced beyond a reasonable doubt that the murder, or the essential elements of murder, occurred in

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[2] The Court concluded that while the trial court there should have instructed the jury "to return a special verdict indicating lack of jurisdiction" if the jury did not find the killing occurred in North Carolina, the instruction given "afford[ed] [defendant] no just grounds for complaint" because the instruction "properly placed the burden of proof and instructed the jury that unless the State had satisfied it beyond a reasonable doubt that the killing ... occurred in North Carolina, a verdict of not guilty should be returned." *Batdorf*, 293 N.C. at 494, 238 S.E.2d at 503.

North Carolina, it should return a special verdict so indicating." *Id.* at 99–101, 463 S.E.2d at 186–87.

In addressing defendant's argument, the majority suggests that unlike a challenge to a court's "territorial jurisdiction," "defendant is making the *entirely separate* argument that he was required to be prosecuted in federal court pursuant to the IMCA. *As a result*, our decisions in *Batdorf* and *Rick* have no application here." (Emphases added.) Yet, the majority does not explain why the characterization of *Batdorf* and *Rick* as cases involving challenges to "territorial jurisdiction" renders them "entirely separate" and inapplicable to a jurisdictional challenge in the context of the IMCA.[3] It is undisputed that defendant's Indian status has jurisdictional consequences here—that is, if defendant is an Indian under the IMCA, the trial court had no jurisdiction over the case. *See* 18 U.S.C. § 1153(a) (2012); *see also Negonsott v. Samuels*, 507 U.S. 99, 102–03, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993) ("As the text of § 1153 and our prior cases make clear, federal jurisdiction over the offenses covered by the [IMCA] is 'exclusive' of state jurisdiction." (citations omitted)); *United States v. John*, 437 U.S. 634, 651, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) (stating that "the assumption that § 1153 ordinarily is pre-emptive of state jurisdiction when it applies, seems to us to be correct"). Thus, defendant, like the defendants in *Batdorf* and *Rick*, "is contesting the very power of this State to try him." *Batdorf*,

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[3] If the issue was whether the crime occurred "within the Indian country" under the IMCA, I suspect the majority would hesitate to characterize the argument that the state court lacked jurisdiction as "entirely separate," such that, "*[a]s a result*, our decisions in *Batdorf* and *Rick* have no application here." (Emphasis added.)

293 N.C. at 493, 238 S.E.2d at 502.

Rather than elaborate on any differences between challenges to "territorial jurisdiction" and challenges to jurisdiction under the IMCA, the majority, shifting gears, alleges that the issue of defendant's Indian status here is a "purely legal" issue and therefore need not be decided by a jury.[4] According to the majority, there is no "factual dispute relevant to the IMCA analysis."[5] Yet, the majority ignores that un-

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[4] As defendant is not contending that *Batdorf* and *Rick* require "purely legal" issues to be submitted to the jury, this determination essentially renders the majority's previous paragraph *dicta*. That is—assuming that defendant's challenge here involved only a "purely legal" issue, there would be no need to suggest that *Batdorf* and *Rick* are "entirely separate" and, "[a]s a result," have no application in the context of a challenge to state court jurisdiction on the basis of the IMCA. The majority appears to concede this, stating later in its opinion that "this case does not require us to decide the question of whether defendant's challenge to a trial court's jurisdiction based on the IMCA could ever require a special jury verdict on that issue in a case where—unlike here—a factual dispute exists that is relevant to the IMCA analysis."

[5] The majority also notes "defendant's failure to challenge on appeal any of the trial court's findings of fact." This characterization is not wholly accurate, as defendant challenged on appeal numerous findings of fact in the court below. It is true that before this Court defendant has not again raised those challenges to those findings. Yet, given that defendant's argument is that with respect to the question of his Indian status he was entitled to have all facts found, and all evidence weighed, by the jury, I can see little relevance to this issue in his failure to again raise those challenges before this court. For instance, were a trial judge in a prosecution for first degree murder to make findings on the issue of premeditation and deliberation, and refuse to submit that issue to the jury, it would make little difference that the defendant requested a jury instruction on the issue but failed to challenge any of those specific findings. The real dispute here appears to be the extent to which we view

der the federal law it purports to follow, a determination of Indian status involves fundamental questions of fact such that a defendant's Indian status itself is a "factual dispute." *See, e.g.*, *United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005) (stating that a determination of Indian status is "a mixed question of law and fact"); *see also United States v. Gaudin*, 515 U.S. 506, 511–12, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) (rejecting the government's argument that in a prosecution for making material false statements in a matter within the jurisdiction of a federal agency the question of "materiality" is a "legal" question that need not be decided by a jury and stating that the ultimate question of "whether the statement was material to the decision" is an "application-of-legal-standard-to-fact sort of question ... commonly called a 'mixed question of law and fact,' " which "has typically been resolved by juries"). For example, the majority here expressly adopts the test used by the Eighth Circuit and Tenth Circuit to determine an individual's Indian status for the purposes of the IMCA. *See United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009); *United States v. Nowlin*, 555 F. App'x 820 (10th Cir. 2014). In these circuits, the courts submit this test—the same one the majority purports to apply here—to the jury to determine whether a defendant is an Indian. *See Stymiest*, 581 F.3d at 763 (stating that "the district court properly denied the motion to dismiss and submitted the issue of Indian status to the jury as an element of the § 1153(a) offense."); *Nowlin*, 555 F. App'x at 823 ("Under the Major Crimes Act, 18

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a determination of Indian status under the IMCA as inherently involving questions of fact.

U.S.C. § 1153, the prosecution must prove to the jury that the defendant is an Indian." (citing *Stymiest*, 581 F.3d at 763)).

Briefly addressing this concept, the majority notes that federal courts addressing this issue, where a conviction rests on a determination that the defendant *is* an Indian, have treated the question as an element of the offense, but that here the conviction depends upon a showing that defendant is *not* an Indian, and no state court has considered the inapplicability of the IMCA to be an element of an offense. The fact that in our courts a defendant's Indian status, or lack thereof, may not be an element of the offense does not necessitate a conclusion that this jurisdictional issue need not be submitted to the jury. In fact, this is precisely the import of the Court's decision in *Batdorf*, to wit—that while "[a] defendant's contention that this State lacks jurisdiction presents ... a matter 'beyond the essentials of the legal definition of the offense itself,'" "the defendant is contesting the very power of this State to try him" and "when jurisdiction is challenged, as here, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused." *Batdorf*, 293 N.C. at 493–94, 238 S.E.2d at 502–03.[6]

More importantly, the fact that in our state courts, unlike in federal courts, a defendant's Indian status is not an element of the crime does not trans-

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[6] Under *Batdorf*, the fact that a defendant's Indian status is not an element of the crime in our state courts would be relevant in prosecutions in which the defendant did not challenge jurisdiction, in which case the State would be relieved of its burden to prove jurisdiction beyond a reasonable doubt.

form an otherwise factual inquiry into a question purely of law. The majority is misapprehending the relevance of these federal decisions in which the jury is asked to decide whether the defendant is an Indian—specifically, the majority is explicitly adopting a test that is inherently a mixed question of fact and law appropriate for resolution by a jury,[7] but then denying defendant the right to have the question decided by a jury on the basis that it is a "purely legal" issue.

Certainly, a determination of whether an individual is an Indian for the purposes of the IMCA is a complicated inquiry. As the trial court stated, "deciding who is an 'Indian' has proven to be a difficult question. In fact upon closer examination when one looks to legal precedent the question quickly devolves into a multifaceted inquiry requiring examination into factual areas not normally considered in our courts." This inquiry is particularly complex in that it involves difficult questions of race, including the extent to which a defendant self-identifies as an Indian, as well as credibility determinations regarding instances of self-identification.[8] Nonetheless, in view of the fact that the test employed by federal courts, and adopted today by the majority, requires an inherently factual inquiry, as well as the fact that

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[7] After all, federal courts are not in the habit of submitting "purely legal" issues to the jury. As the majority itself notes, "it would make little sense" to submit questions strictly of law to the jury.

[8] For example, the trial court found that while defendant claimed "at certain times to be white/Caucasian and then at other times to be Indian," the "variations," including the use on two occasions of different social security numbers "necessarily call[ ] into question the veracity of Defendant."

our precedent requires jurisdiction, when contested, to be submitted to the jury and proven beyond a reasonable doubt, I must respectfully dissent from the majority's conclusion on this issue.

Denial of Motion to Dismiss

Assuming *arguendo* that defendant is not entitled to have the issue of his Indian status submitted to the jury, I disagree with the majority that the trial court correctly found that defendant was not an Indian under the IMCA. Applying the second prong of the *Rogers* test using the application of the *St. Cloud* factors utilized by the Eighth Circuit and Tenth Circuit, I would conclude that defendant is an Indian under the IMCA.

First, I disagree with the majority's reading of *Eastern Band of Cherokee Indians v. Lambert*, 3 Cher. Rep. 62 (N.C. Cherokee Ct. 2003), in which the Cherokee tribal court addressed whether the defendant was an Indian under the *Rogers* test such that the tribal court could exercise criminal jurisdiction over the defendant.[9] The majority states that because the parties stipulated that the defendant was an EBCI First Descendant, but nevertheless determined that additional evidence was necessary and therefore conducted an evidentiary hearing, "[t]he logical inference is that if first descendant status alone was sufficient to decide the issue, the court would have had no need to seek additional evidence in order to determine whether the defendant was

[9] The tribal court's criminal jurisdiction over the defendant depended upon whether the defendant was an "Indian" under the Indian Civil Rights Act, which defines "Indian" by reference to the meaning of an Indian under the IMCA. 25 U.S.C. § 1301(4).

subject to tribal jurisdiction." Given that the tribal court had not previously addressed this question, the logical inference in my view is that the court needed additional evidence because this was an issue of first impression for the tribal court. This is particularly apparent given that essentially all of the tribal court's findings from that evidence address first descendants generally:

> 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 may occupy, own, sell or 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 en-

rolled 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 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."

Lambert, 3 Cher. Rep. at 62–63. The majority holds up Finding of Fact 15 as proof that the tribal court was making its determination based on more than the defendant's mere status as a first descendant. Yet, the majority ignores the relevance of this finding to the court's analysis:

> 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 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.

Id. at 64 (emphasis added). In *Lambert*, the tribal court plainly ruled that first descendants are Indians.

As the tribal court stated later that same year, "this Court ... held [in *Lambert*] that first lineal descendants, children of enrolled members who do not possess sufficient blood quanta to qualify for enrolment [sic] themselves are nevertheless subject to the criminal jurisdiction of the Court." *In re Welch*, 3 Cher. Rep. 71, 75 (N.C. Cherokee Ct. 2003) (citation omitted); *see also E. Band of Cherokee Indians v. Prater*, 3 Cher. Rep. 111, 112–13 (N.C. Cherokee Ct. 2004) (citing *Lambert* as "[h]olding that First Lineal Descendants are Indians for the purposes of the exercise of [the tribal court's] jurisdiction"). The tribal court's position that first descendants are Indians is also reflected here in the trial court's findings regarding the Cherokee Rules of Criminal Procedure, which provided that when a tribal magistrate conducts the *St. Cloud* test, if a defendant is a First Descendant, "the inquiry ends there and the Court has jurisdiction over the defendant."

While I agree with the majority that the fact that a tribal court has exercised its jurisdiction over certain defendants is not dispositive of the issue, signif-

icant weight should be attributed to these tribal determinations that First Descendants are Indians, particularly in a test that is, at bottom, designed to determine whether an individual is "recognized as an Indian by [the] tribe." *Stymiest*, 581 F.3d at 762 (citing *United States v. Rogers*, 45 U.S. at 567, 572–73 (1846)). Yet, while the majority discusses *Lambert* in rejecting the notion that it alone satisfies the second prong of the *Rogers* test, the majority omits any mention of *Lambert*, the subsequent tribal court decisions, or the Cherokee Rules of Criminal Procedure, in its balancing of the *St. Cloud* factors.

Next, the trial court and the majority both, in my view, ignore the significance of the fact that defendant was incarcerated for nearly twenty years. The trial court's findings demonstrate that defendant was born in Florida on 17 January 1976. When defendant was an infant, his father abandoned him with his maternal uncle, Mr. Furman Smith Crowe, an enrolled member of the EBCI. Defendant's mother returned from Florida in the early 1980's and lived with defendant until at least 1990, at which time they moved back to Florida. Defendant was convicted in Florida on 28 January 1993 at the age of seventeen years old and was imprisoned there until his release on 4 November 2011, at which time he returned to North Carolina and eventually began living on or around the Qualla Boundary. Defendant was arrested on 30 November 2012 and has been imprisoned since that time. In short, defendant—now forty-four years old—has lived only about eighteen years of his life outside of prison. During the large majority of that time defendant was a minor and lived on or near the Qualla Boundary.

Here, in addressing the extent to which defendant

received government assistance reserved for Indians, the trial court made findings regarding the five separate instances that defendant, on the basis of his First Descendant status, received free medical treatment from Cherokee Indian Hospital ranging from when he was nine to fourteen years old, but then found that "there are no other records of accessing any other clinics or medical facilities overseen or related to the CIH for over 23 years." Similarly, in addressing how defendant enjoyed the benefits of tribal affiliation, the trial court found that "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" and that "Defendant has never 'enjoyed' these opportunities [afforded to First Descendants] which were made available for individuals similarly situated." The majority stresses these findings, stating that "[t]he trial court made no findings as to any tribal assistance that defendant has received since reaching adulthood." While I recognize that defendant's incarceration was a result of his own conduct, the fact that during the vast majority of those previous twenty-three years defendant was wholly incapable of receiving further tribal assistance or enjoying benefits of tribal affiliation is salient, particularly in a test that is, again, geared towards determining whether an individual is "recognized as an Indian by [the] tribe." *Stymiest*, 581 F.3d at 762 (citing *Rogers*, 45 U.S. at 572–73). The extent to which defendant received tribal assistance and enjoyed the benefits of affiliation when he was actually at liberty to do so should, in my view, weigh more heavily in such an analysis.

The disregard for defendant's incarceration simi-

larly pervades other portions of the majority's analysis. For example, the majority finds it significant that the trial court's findings are devoid of any indication that he participated in tribal politics. Given that defendant has spent the majority of his life outside of prison living on the Qualla Boundary, but that he was over the age of eighteen for less than a year of that time, I can see little significance in his lack of participation in tribal politics in terms of measuring his "social recognition as an Indian." *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988).

In sum, I would conclude that defendant has been "recognized by a tribe" and is an Indian for the purposes of the IMCA.[10] Of particular note, in my view, are the tribal court decisions and Cherokee Rules of Criminal Procedure providing that first descendants are subject to the tribal court's criminal jurisdiction on the basis that they are Indians under *Rogers* and the IMCA, as well as the findings that defendant has lived the large majority of his non-incarcerated life on or around the Qualla Boundary and during that time received free hospital care and attended Cherokee school.

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[10] With respect to the findings regarding defendant's tattoos, the extent to which his claims of being an Indian are potentially contradicted by other instances of identifying as "white/Caucasian," including by signing his name to probation documents that listed him as "white," and his living on or around the Qualla Boundary and dating a woman who is an enrolled tribal member—to the extent that the majority relies upon these in determining that defendant did not demonstrate any legitimate celebration of his cultural heritage and did not genuinely hold himself out as an Indian, this reliance undercuts its determination that this inquiry is a purely legal, rather than factual, determination.

Conclusion

For the reasons stated, I respectfully dissent from the majority's decision. I would reverse and remand for a new trial, at which defendant is entitled to have the question of his Indian status submitted to the jury. In the alternative, assuming that defendant is not entitled to have the question of his Indian status submitted to the jury, I would reverse the trial court and conclude that the trial court lacks jurisdiction on the basis that defendant is an Indian under the IMCA.

APPENDIX B

Court of Appeals of North Carolina

STATE of North Carolina
v.
George Lee NOBLES

No. COA17-516
Filed: July 3, 2018

Appeal by defendant from judgments entered 15 April 2016 by Judge Bradley B. Letts in Jackson County Superior Court. Heard in the Court of Appeals 21 March 2018. Jackson County, Nos. 12 CRS 51720, 1362–63

Attorney General Joshua H. Stein, by Assistant Attorney General Kathleen N. Bolton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant.

ELMORE, Judge.

Defendant George Lee Nobles, a non-enrolled member of any federally recognized Native American[1] tribe but a first descendant of an enrolled member of the Eastern Band of Cherokee Indians ("EBCI"), appeals from judgments sentencing him to life in prison after a North Carolina jury convicted him of armed robbery, first-degree felony murder, and firearm possession by a felon.

He argues the trial court erred by (1) denying his motions to dismiss the charges on the grounds that

[1] While we use the terms "Native American" and "Indian" interchangeably, we often use "Indian" to comport with the language used in the federal statute at issue in this case.

the State of North Carolina lacked subject-matter jurisdiction to prosecute him because he is an "Indian" and thus criminal jurisdiction lie exclusively in federal court under the Indian Major Crimes Act ("IMCA"), 18 U.S.C. § 1153 (2013); (2) denying his request to submit the question of his Indian status to the jury for a special verdict on subject-matter jurisdiction; and (3) denying his motion to suppress incriminating statements he made to police during a custodial interview after allegedly invoking his right to counsel. Defendant has also (4) filed a motion for appropriate relief ("MAR") with this Court, alleging that his convictions were obtained in violation of his constitutional rights. Finally, defendant (5) requests we remand the matter to the trial court with instructions to correct a clerical error in its order arresting judgment on the armed-robbery conviction, since although that order lists the correct file number of 12 CRS 1363, it lists the wrong offense of firearm possession by a felon.

As to the first three issues presented, we hold there was no error. As to the MAR, we dismiss the motion without prejudice to defendant's right to file a new MAR in the superior court. As to the clerical error, we remand the matter to the trial court with instructions to correct its order by listing the accurate offense of armed robbery.

I. Background

On 30 September 2012, Barbara Preidt, a non-Indian, was robbed at gunpoint and then fatally shot outside the Fairfield Inn in the Qualla Boundary, land held in trust by the United States for the EBCI. On 30 November 2012, officers of the Cherokee Indian Police Department arrested defendant, Dwayne

Edward Swayney, and Ashlyn Carothers for Preidt's robbery and murder. Soon after, tribal, federal, and state prosecutors conferred together to determine which charges would be brought and in which sovereign government criminal jurisdiction was proper for each defendant. After discovering that Swayney was an enrolled tribal member of the EBCI, and that Carothers was an enrolled tribal member of the Cherokee Nation of Oklahoma, authorities brought these two defendants before an EBCI tribal magistrate. After discovering that defendant was not an enrolled member of any federally recognized tribe, the three sovereignties agreed that North Carolina would exercise its criminal jurisdiction to prosecute him, and authorities brought defendant before a Jackson County magistrate, charging him with armed robbery, murder, and firearm possession by a felon.

In August 2013, defendant moved to dismiss those charges for lack of jurisdiction. He argued North Carolina lacked subject-matter jurisdiction because he was an Indian, and thus the offenses were covered by the IMCA, which provides for exclusive federal jurisdiction over "major crimes" committed by "Indians" in "Indian Country." *See* 18 U.S.C. § 1153. After a two-day pretrial jurisdictional hearing, the state trial court judge, applying a Ninth Circuit test to determine if someone qualifies as an Indian for purposes of criminal jurisdiction, *see United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005), concluded in a detailed forty-two page order entered on 26 November 2013 that defendant was not an Indian and thus denied defendant's motion to dismiss for lack of subject-matter jurisdiction. On 18 December 2013, the trial court granted defendant's motion to stay crimi-

nal proceedings pending resolution of his appeal from its 26 November 2013 order. On 30 January 2014, defendant petitioned our Supreme Court for *certiorari* review of that order, which it denied on 11 June 2014. On 23 June 2014, the trial court dissolved the stay.

In March 2016, defendant moved to suppress incriminating statements he made to police during a custodial interview, which the trial court denied by an order entered *nunc pro tunc* on 24 March. Also in March, defendant renewed his motion to dismiss the charges for lack of state criminal jurisdiction and moved, alternatively, to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction. By another order entered *nunc pro tunc* on 24 March, the trial court denied both motions, reaffirming its prior ruling that criminal jurisdiction properly lie in North Carolina, and concluding that a special instruction to the jury on defendant's Indian status as it implicated North Carolina's subject-matter jurisdiction was unwarranted.

From 28 March until 15 April 2016, defendant was tried in Jackson County Superior Court, yielding jury convictions of armed robbery, first-degree felony murder, and firearm possession by a felon. The trial court arrested judgment on the armed-robbery conviction; entered a judgment on the murder conviction, sentencing defendant to life imprisonment without parole; and entered another judgment on the firearm-possession-by-a-felon conviction, sentencing defendant to an additional fourteen to twenty-six months in prison. Defendant appeals.

II. Arguments

On appeal, defendant asserts the trial court erred by (1) denying his motions to dismiss the state-law charges for lack of subject-matter jurisdiction because North Carolina was preempted from prosecuting him under the IMCA; (2) denying his request to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction because he presented sufficient evidence at the jurisdictional hearing from which a jury could find that he is an Indian, and he thus raised a factual issue as to jurisdiction; and (3) denying his motion to suppress the incriminating statements he made to police during his custodial interview because he invoked his right to counsel. Defendant also asserts (4) the case must be remanded to correct a clerical error.

III. Denial of Motion to Dismiss

Defendant first asserts the State of North Carolina lacked criminal jurisdiction to prosecute him because he is an "Indian" and thus the IMCA applied to preempt state criminal jurisdiction. *See* 18 U.S.C. § 1153 (providing for exclusive federal jurisdiction when an "Indian" commits certain enumerated "major crimes" in "Indian Country"). The State asserts North Carolina enjoys concurrent criminal jurisdiction over all crimes committed in the Qualla Boundary, regardless of whether a defendant is an Indian. Alternatively, the State argues that even if the IMCA would preempt North Carolina from exercising criminal jurisdiction over these major crimes if they occurred in the Qualla Boundary, it is inapplicable here because defendant is not an "Indian."

A. Review Standard

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012) (citing *State v. Abbott*, 217 N.C. App. 614, 616, 720 S.E.2d 437, 439 (2011)).

B. IMCA Preempts State Criminal Jurisdiction

The State first argues that Fourth Circuit and North Carolina precedent establishes that "North Carolina at least has concurrent criminal jurisdiction over the Qualla Boundary without regard to whether the defendant is an Indian or non-Indian." Among other distinguishing reasons, those cases[2] are not controlling because they were decided before *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) (holding that the State of Mississippi lacked criminal jurisdiction over a Choctaw Indian for a major crime committed on the Choctaw Reservation pursuant to the IMCA, regardless of Choctaw Indians' dual status as citizens of Mississippi and members of a federally recognized Indian tribe). *Cf. Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373, 380 (4th Cir. 1980) (relying on *John*'s rationale to hold that, although EBCI Indians enjoy dual status as "citizens of North Carolina and Indians living on a federally held reservation," North Carolina lacked authority to impose an income tax on EBCI tribal members who derived their income from activities on the reservation).

"[T]he exercise of state-court jurisdiction ... is

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[2] *United States v. Hornbuckle*, 422 F.2d 391 (4th Cir. 1970) (per curium); *State v. McAlhaney*, 220 N.C. 387, 17 S.E.2d 352, 354 (1941); *State v. Ta-Cha-Na-Tah*, 64 N.C. 614 (1870).

preempted by federal law. ... upon a showing of congressional intent to 'occupy the field' and prohibit parallel state action." *Jackson Cty. v. Swayney*, 319 N.C. 52, 56, 352 S.E.2d 413, 415–16 (1987) (citations omitted). The IMCA provides in pertinent part:

> (a) Any *Indian* who commits against ... [any] other person ... murder, ... [or] robbery[ ] ... within ... 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) (emphasis added). This language demonstrates clear Congressional intent for "exclusive" federal criminal jurisdiction ousting parallel state action when the IMCA applies. *See Negonsott v. Samuels*, 507 U.S. 99, 102–03, 113 S.Ct. 1119, 1121–22, 122 L.Ed.2d 457 (1993) ("As the text of § 1153[ ] ... and our prior cases make clear, federal jurisdiction over the offenses covered by the [IMCA] is 'exclusive' of state jurisdiction." (citations omitted)); *see also John*, 437 U.S. at 651, 98 S.Ct. at 2550 (affirming that "§ 1153 ordinarily is pre-emptive of state jurisdiction when it applies").

Accordingly, when an "Indian" commits one of the enumerated "major crimes" in the "Indian Country" of the Qualla Boundary, the IMCA would ordinarily oust North Carolina's criminal jurisdiction. Murder and armed robbery are "major crimes" under the IMCA, and the offenses here were committed in undisputed "Indian Country." *See Lynch*, 632 F.2d at 380. At issue is whether defendant qualifies as an "Indian," such that the IMCA applied to preempt North Carolina from exercising its state criminal jurisdiction.

C. The *Rogers* Test

Defendant claims Indian status with the EBCI. Both parties concede the issue of whether someone qualifies as an Indian under the IMCA is an issue of first impression for both the Fourth Circuit and our state appellate courts. While the ICMA does not explicate who qualifies as an "Indian" for federal criminal jurisdiction purposes, to answer this question federal circuit courts of appeal employ a two-pronged test suggested by *United States v. Rogers*, 45 U.S. 567, 573, 4 How. 567, 11 L.Ed. 1105 (1846). 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. *See, e.g.*, *United States v. Zepeda*, 792 F.3d 1103, 1106–07 (9th Cir. 2015) (en banc) (interpreting *Rogers* as requiring the "government [to] prove that the defendant (1) has some quantum of Indian blood and (2) is a member of, or is affiliated with, the federally recognized tribe"); *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) ("The [IMCA] does not define Indian, but the generally accepted test—adapted from ... *Rogers*[ ] ... —asks whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both."). Here, 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.

While the Fourth Circuit has not addressed how to apply *Rogers* to determine whether someone qualifies as an Indian, there is a federal circuit split in assessing *Rogers*' second prong. The Ninth Circuit considers only the following four factors and "in de-

clining order of importance":

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

Zepeda, 792 F.3d at 1114. The Eighth Circuit also considers these factors but assigns them no order of importance, other than tribal enrollment which it deems dispositive of Indian status, and allows for the consideration of other factors, such as whether a defendant has been subjected to tribal court jurisdiction and whether a defendant has held himself out as an Indian. *See Stymiest*, 581 F.3d at 763–66.

Here, the trial court applied the Ninth Circuit's test and determined defendant was not an Indian for criminal jurisdiction purposes. Because defendant would not qualify as an Indian under either test, we find no error in the trial court's denial of his motion to dismiss. *Cf. State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) ("A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." (citing *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957)).)

D. *Rogers*' Second Prong

Rogers' second prong "asks whether the defendant ... is recognized as an Indian by a tribe or the federal government or both." *Stymiest*, 581 F.3d at 762. Defendant first argues he satisfied this prong as a matter of law because he presented evidence that he is a first descendant of an enrolled member of the EBCI, and the EBCI recognizes all first descendants as Indians for purposes of exercising tribal criminal jurisdiction.

Defendant relies on the Cherokee Court of the EBCI's decision in *Eastern Band of Cherokee Indians v. Lambert*, No. CR 03-0313, 2003 WL 25902446, at *2–3 (EBCI Tribal Ct. May 29, 2003) (holding that the EBCI had tribal criminal jurisdiction over a non-enrolled first descendant), and its subsequent decisions interpreting *Lambert* as "[h]olding that First Lineal Descendants are Indians for the purposes of the exercise of this Court's [tribal criminal] jurisdiction," *Eastern Band of Cherokee Indians v. Prater*, No. CR 03-1616, 2004 WL 5807679, at *1 (EBCI Tribal Ct. Mar. 18, 2004); *see also In re Welch*, No. SC 03-13, 2003 WL 25902440, *4 (Eastern Cherokee Ct. Oct. 31, 2003) (interpreting *Lambert* as holding that "first lineal descendants, children of enrolled members who do not possess sufficient blood quanta to qualify for enrollment themselves[,] are nevertheless subject to the criminal jurisdiction of the Court"). Additionally, defendant relies on Rule 6 of the Cherokee Rules of Criminal Procedure that instructs tribal magistrates when determining jurisdiction that tribal criminal jurisdiction exists if a suspect is a first descendant. *See* Cherokee Code § 15-8, Rule 6(b).

The State argues in relevant part that even if the EBCI recognizes all first descendants as Indians for purposes of exercising its tribal criminal jurisdiction, this is only one factor to consider when assessing *Rogers*' second prong. We agree.

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

E. *St. Cloud* Factors

Alternatively, defendant argues, he satisfied *Rogers*' second prong under the Ninth Circuit's test as applied by the trial court. In *St. Cloud v. United States*, 702 F.Supp. 1456, 1461 (D.S.D. 1988), the Central Division of the United States District Court of South Dakota set forth four factors to be considered in declining order of importance when evaluat-

ing *Rogers*' second prong. The Ninth Circuit adopted these "*St. Cloud*" factors, *see Bruce*, 394 F.3d at 1223, and its later *en banc* articulation of its test instructs that "the criteria are, in declining order of importance":

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

Zepeda, 792 F.3d at 1114.

1. First St. Cloud *Factor*

The first and most important *St. Cloud* factor asks whether a defendant is an enrolled member of a federally recognized tribe. *Id.* Here, the trial court found, and defendant concedes, he is not an enrolled tribal member of the EBCI or any federally recognized tribe, nor is he eligible to become an enrolled member of the EBCI, as his 4.29% Indian blood quantum fails to satisfy the minimum 16% necessary for enrollment.

Nonetheless, defendant argues, this factor weighs in his favor because "he has been afforded a special status as a First Descendant." The Ninth Circuit has stated that while descendant status "does not carry similar weight to enrollment, and should not be considered determinative, it reflects some degree of

recognition." *United States v. Maggi*, 598 F.3d 1073, 1082 (9th Cir. 2010), *overruled on other grounds by United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015). However, we find defendant's first descendant status carries little weight in this case.

First descendants are eligible for certain tribal benefits unavailable to non-members or members of other tribes. While the evidence showed that defendant would qualify for designation as a first descendant, it also showed that he is not classified by the EBCI as a first descendant, and he is thus currently ineligible to receive those benefits. The trial court's unchallenged findings established that individuals designated as first descendants are issued a "Letter of Descent" by the EBCI tribal enrollment office, which is used to establish eligibility for first descendant benefits, and that no "Letter of Descent" for defendant was found after a search of the official documents in the tribal enrollment office. *Cf. Cruz*, 554 F.3d at 847 (concluding that "mere eligibility for benefits is of no consequence under [the *St. Cloud* factors]" and rejecting "the dissent's argument that mere descendant status with the concomitant eligibility to receive benefits is effectively sufficient to demonstrate 'tribal recognition'"). Accordingly, the trial court properly determined the evidence presented failed to satisfy the first *St. Cloud* factor.

2. Second St. Cloud *Factor*

The second *St. Cloud* factor asks whether a defendant has been recognized by the government "through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes." *Zepeda*, 792 F.3d at 1114. Defendant argues this factor was satis-

fied because he received health care services reserved only for Indians. The record evidence indicated that defendant received free health care services on five occasions—31 October 1985, 1 October 1987, 12 March 1989, 16 March 1989, and 28 February 1990—from the Cherokee Indian Hospital ("CIH"), which at the time was a federally funded Indian Health Service ("IHS").

Applying this evidence to the second *St. Cloud* factor, the trial court found:

> 264. ... [U]nder the second *St. Cloud* factor the only evidence of government recognition of the Defendant as an Indian is the receipt of medical services at the CIH. The Federal government through the Indian Health Service provide[s] benefits reserved only to Indians arising from the unique trust relationship with the tribes. Also, the government of the Eastern Band of Cherokee provides additional health benefits to the enrolled members. The only evidence Defendant presents of the receipt of health services available only to Indians is medical care at the CIH more than two decades ago as documented in his medical chart. While it is true that he did receive care from the CIH it is likewise true he sought acute care, this care was when he was a minor and he was taken for treatment by his mother. Since becoming an adult he has never sought further medical care from the providers in Cherokee. Moreover, the last time he sought care from the CIH was over 23 years ago.
>
> ....
>
> 266. [E]xcept 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.

Defendant relies on *United States v. LaBuff*, 658 F.3d 873 (9th Cir. 2011), to argue that receipt of free health care services from an IHS satisfies the second *St. Cloud* factor. *LaBuff* is distinguishable because the defendant there, "since 1979, ... was seen at the Blackfeet Community Hospital for Well Child care services, walk-in visits, urgent care, and mental health assistance[,]" and "since 2009, [he] sought medical care approximately 10 to 15 times." *Id.* at 879 n.8. Here, defendant only sought medical care from the CIH five times when he was a minor, his last visit occurring approximately twenty-two years before he was arrested on the charges at issue in this case. *Cf. Zepeda*, 792 F.3d at 1113 ("In a prosecution under the IMCA, the government must prove that the defendant was an Indian *at the time of the offense* with which the defendant is charged." (emphasis added)). The trial court properly determined this evidence failed to sufficiently satisfy the second *St. Cloud* factor.

3. Third St. Cloud *Factor*

The third *St. Cloud* factor asks whether a defendant has "enjoy[ed] ... the benefits of affiliation with a federally recognized tribe." *Zepeda*, 792 F.3d at 1114. Defendant argues he satisfied this factor based on the same five CIH visits when he was a minor.

As to this third factor, the trial court found:

> 267. ... [U]nder the third *St. Cloud* factor the Court must examine how Defendant has bene-

> fited 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.

(Emphasis added.)

In his brief, defendant challenges the following factual finding on this factor:

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

Specifically, defendant challenges as unsupported by the evidence the part of this finding that he "never benefited from his special status as a First Descendant and is not recognized as an Indian by the EBCI ... or the federal government" because he was recognized by the federal government when he was benefited from his first descendant status by receiving federally-funded services from an IHS. To the degree defendant may have benefited from his first descendant status and was recognized by the federal government by receiving free medical care from the CIH on those five instances last occurring when he was a minor twenty-three years before the hearing, we conclude it is irrelevant in assessing this factor in light of the absence of evidence that defendant enjoyed any other tribal benefits he may have been eligible to receive based on his first descendant status. Accordingly, the trial court properly determined this evidence failed to satisfactorily satisfy the third *St. Cloud* factor.

4. Fourth St. Cloud *Factor*

The fourth and least important *St. Cloud* factor asks whether a defendant is "social[ly] recogni[zed] as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe." *Zepeda*, 792 F.3d at 1114. Defendant asserts he satisfied this factor because he "lived on or near the Qualla Boundary for significant periods of time," attended Cherokee schools as a minor, and, after leaving prison in Florida in 2011, he "returned to living on or near the Qualla Boundary, often with enrolled tribal members," "got a job on the reservation, and lived on the reservation with Carothers, a member of another tribe." Defendant also argues his two tattoos—an eagle and a Native American wearing a headdress—"show an attempt to hold himself out as an Indian."

As to this factor, the trial court issued, *inter alia*, the following finding:

> 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.

While the record evidence showed defendant re-

turned to the Qualla Boundary in 2011 for about fourteen months, resided on or near the Qualla Boundary with an enrolled member of another tribe, and worked for a restaurant, Homestyle Fried Chicken, located within the Qualla Boundary, no evidence showed he participated in EBCI cultural or social events, or in any EBCI religious ceremonies during that time.

Myrtle Driver Johnson, a sixty-nine-year old enrolled EBCI member who has lived on the Qualla Boundary her entire life and was bestowed the honor of "Beloved Woman" by tribal leaders for her dedication and service to the EBCI, testified about EBCI social and cultural life, and EBCI religious ceremonies. The trial court's unchallenged findings establish that Johnson is "richly versed in the history of the Eastern Cherokee" and "deeply involved in and a leader of the Cherokee community regarding the language, culture and tradition of the [EBCI]." Johnson testified she participated in various EBCI social and cultural events and ceremonies on the Qualla Boundary over the years and was unfamiliar with defendant or his enrolled mother. Johnson also testified about the potential EBCI cultural symbolism of defendant's tattoos, opining that "[a]ll Native American Tribes honor the eagle" and it thus represented nothing unique to the EBCI, and that the headdress depicted on defendant's tattoo was worn not by the Cherokee but by "western plains Native Americans." The trial court properly determined this evidence carried little weight under the fourth *St. Cloud* factor.

F. Sufficiency of Factual Findings

Defendant also challenges the evidentiary suffi-

ciency of ten of the trial court's 278 factual findings, and eight subsections of another finding. However, most of those findings either recite the absence of evidence pertaining to defendant's tribal affiliation with the EBCI as to assessing his Indian status under *Rogers*, or were based on probation documents indicating defendant's race was "white/Caucasian," which were presented after the jurisdictional hearing. Erroneous or irrelevant findings that do not affect the trial court's conclusions are not grounds for reversal. *See, e.g.*, *State v. Hernandez*, 170 N.C. App. 299, 305, 612 S.E.2d 420, 424 (2005) ("[A]n order 'will not be disturbed because of ... erroneous findings which do not affect the conclusions.'" (citation omitted)); *Goodson v. Goodson*, 145 N.C. App. 356, 360, 551 S.E.2d 200, 204 (2001) ("[I]rrelevant findings in a trial court's decision do not warrant a reversal of the trial court." (citations omitted)). Because we conclude the trial court's other factual findings adequately supported its conclusions, we decline to address the sufficiency of those findings.

G. Conclusion

Because the evidence presented did not demonstrate that defendant is an "Indian" or that he sufficiently satisfied any of the *St. Cloud* factors, the trial court properly concluded defendant did not qualify as an Indian for criminal jurisdiction purposes when applying the Ninth Circuit's test. Accordingly, the trial court properly denied defendant's motion to dismiss the charges for lack of jurisdiction.

III. Denial of Motion for Special Jury Verdict

Defendant next asserts the superior court erred by denying his pretrial motion to submit the issue of

his Indian status to the jury for a special verdict on subject-matter jurisdiction.

"[W]hen jurisdiction is challenged[ ] ... the State must carry the burden [of proof] and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused." *State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 502–03 (1977). In the territorial jurisdiction context, our Supreme Court has explained:

> When jurisdiction is challenged, the defendant is contesting the very power of this State to try him. We are of the view that a question as basic as jurisdiction is not an 'independent, distinct, substantive matter of exemption, immunity or defense' and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, *when contested*, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment.

Id. at 493, 238 S.E.2d at 502 (internal citation omitted); *see also State v. Rick*, 342 N.C. 91, 100–01, 463 S.E.2d 182, 186 (1995) ("[T]he State, when jurisdiction is challenged, [is required] to prove beyond a reasonable doubt that the crime with which defendant is charged occurred in North Carolina." (citing *Batdorf*, 293 N.C. at 494, 238 S.E.2d at 502–03); other citation omitted). However, unless sufficient evidence is adduced to create a jury question on jurisdiction, "a jury instruction regarding jurisdiction is not warranted." *State v. White*, 134 N.C. App. 338, 340, 517 S.E.2d 664, 666 (1999) (citation omitted). The "preliminary determination that sufficient evidence exists" to create a jury question on the factual

basis of jurisdiction is a question of law for the court. *Rick*, 342 N.C. at 100–01, 463 S.E.2d at 187 (citations omitted).

Here, defendant filed a pretrial motion to dismiss the charges against him for lack of state criminal jurisdiction. But his motion was grounded not in a challenge to North Carolina's territorial jurisdiction, but in a challenge to its subject-matter jurisdiction, based on his claim that he was an Indian. After the pretrial jurisdictional hearing, the trial court entered an order denying defendant's motion on the basis that defendant was not an Indian for criminal jurisdiction purposes and the State therefore satisfied its burden of proving jurisdiction beyond a reasonable doubt. Upon defendant's renewed jurisdictional motion to dismiss or, in the alternative, to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction, the trial court entered another order denying both motions.

In this second order, the trial court reaffirmed its prior ruling that North Carolina had criminal jurisdiction and thus denied the renewed jurisdictional motion to dismiss on that basis. As to defendant's alternative motion for a special jurisdictional instruction to the jury, the trial court concluded that because the crimes undisputedly occurred within North Carolina, and the only special instruction on jurisdiction concerned territorial jurisdiction, such an instruction was unwarranted. As to defendant's specific request that his Indian status be submitted to the jury, the trial court concluded that because it "already determined the Defendant is not an Indian for purposes of criminal jurisdiction" and "there exists no requirement that in order to convict the De-

fendant in the North Carolina state court of murder the State must prove beyond a reasonable doubt that the defendant is an Indian," submitting that issue to the jury was unwarranted. We conclude the trial court did not err in denying defendant's motion for a special instruction on the issue of his Indian status as it related to state criminal jurisdiction.

Defendant's cited authority concerns factual matters implicating territorial jurisdiction, not subject-matter jurisdiction. Unlike IMCA prosecutions, under which Indian status is a jurisdictional prerequisite that the Government must prove beyond a reasonable doubt, *see Zepeda*, 792 F.3d at 1110 ("Under the IMCA, 'the defendant's Indian status is an essential element ... which the government must allege in the indictment and prove beyond a reasonable doubt.'" (quoting *Bruce*, 394 F.3d at 1229)), neither have our General Statutes nor our state appellate court decisions burdened the State when prosecuting major state-law crimes that occurred in Indian Country to prove a defendant is *not* an Indian beyond a reasonable doubt. But even if the State had such a burden, in this particular case, we conclude defendant failed to adduce sufficient evidence to create a jury question on his Indian status.

The record evidence established that defendant failed to satisfy the first and most important *St. Cloud* factor of tribal enrollment, or even eligibility for tribal enrollment. While defendant presented evidence that on five instances during his childhood he received free health care based on his first descendant status, he presented no evidence he received or enjoyed any other tribal benefits based on that status. Indeed, the evidence showed that while defendant would qualify to be designated by the EBCI as a

first descendant for purposes of receiving such benefits, he was not currently recognized by the EBCI as a first descendant based on his failure to apply for and obtain a "Letter of Descent." While defendant returned to living on or near the Qualla Boundary in 2011 for fourteen months, he presented no evidence that during that time he was involved in any EBCI cultural or social activities or events or activities, or any EBCI religious ceremonies. Finally, while defendant is tattooed with an eagle and a Native American wearing a headdress, the State presented evidence that the EBCI affords no unique significance to the eagle, and that headdress was never worn during any EBCI ritual or tradition but was worn by western plain Native Americans.

Based on defendant's showing at the jurisdictional hearing, we conclude he failed to adduce sufficient evidence to create a jury question as to whether he qualifies as an Indian for criminal jurisdiction purposes. Accordingly, the trial court properly denied defendant's motion to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction.

IV. Denial of Motion to Suppress

Defendant contends the trial court erred by denying his motion to suppress incriminating statements he made to police during a custodial interview after allegedly invoking his constitutional right to counsel.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether

those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). Conclusions of law are reviewed *de novo*. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted).

The objective standard used to determine whether a custodial suspect has unambiguously invoked his right to counsel is whether "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994). "But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* (citing *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S.Ct. 2204, 2209, 115 L.Ed.2d 158 (1991)). For instance, "if a suspect is 'indecisive in his request for counsel,' the officers need not always cease questioning." *Id.* at 460, 114 S.Ct. at 2356 (quoting *Miranda v. Arizona*, 384 U.S. 436, 485, 86 S.Ct. 1602, 1633, 16 L.Ed.2d 694 (1966)).

Further, even if a suspect unambiguously invokes his right to counsel during a custodial interview, "he is not subject to further questioning until a lawyer has been made available *or the suspect himself reinitiates conversation*." *Id.* at 458, 114 S.Ct. at 2354–55 (emphasis added) (citing *Edwards v. Arizona*, 451 U.S. 477, 484–85, 101 S.Ct. 1880, 1884–85, 68 L.Ed.2d 378 (1981)); *see also Edwards*, 451 U.S. at 484–85, 101 S.Ct. at 1885 ("[A]n accused ... [after invoking his right to counsel], is not subject to further

interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police*." (emphasis added)).

Here, the trial court found, unchallenged on appeal, that before his custodial interview, defendant "was advised and read his *Miranda* ... rights," that he "initialed and signed the *Miranda* rights form," that he "understood his *Miranda* rights and at no time subsequent to the commencement of the interview indicated he failed to understand his *Miranda* rights," and that he "then waived his *Miranda* rights and spoke with law enforcement." The trial court also issued the following unchallenged and thus binding findings:

> 80. In this case Defendant said "Can I consult with a lawyer, I mean, or anything? I mean, I—I—I did it. I'm not laughing, man, I want to cry because it's f[*]cked up to be put on the spot like this."
>
> 81. Applying an objective standard in analyzing the statement of Defendant, the undersigned finds there never was an assertion of a right but rather simply a question. Further, Defendant did not stop talking after asking the question to allow law enforcement to respond. Defendant did not cease talking or refuse to answer more questions but rather continued talking to investigators for the entirety of the interview. The undersigned determines that no assertion of a right to counsel was made by Defendant.
>
> ....
>
> 83. This ambiguous statement by Defendant

fails to support a finding that *Miranda* rights were asserted.

84. Furthermore, the undersigned has also examined the claimed request for counsel by Defendant in the context of the questions posed and answers given both before and after page 58. Again, with the expanded examination of the statement made by Defendant and considering the context of that section of the interview, Defendant also fails to objectively establish he unequivocally and unambiguously invoked his *Miranda* rights to counsel.

85. Reviewing the entire transcript, the Defendant asked about the attorney as a question on page 58. Law enforcement clearly and appropriately answered the question posed. Most telling, Det. Iadonisi in response told Defendant he had a right to have an attorney followed immediately by SBI Agent Oaks further clarifying and explaining that law enforcement can never make the decision to invoke *Miranda* rights for a defendant. After answering Defendant's question, explaining he did have and continued to possess *Miranda* rights and that no person except Defendant could elect to assert and invoke *Miranda* rights, the Defendant continued to talk to law enforcement.

86. With further import, it is essential to note that for the entire remainder of the interview the Defendant never again mentioned an attorney or told law enforcement he wished to stop talking.

Our review of the video recording of defendant's interrogation comports with the trial court's findings

and its ultimate conclusion that defendant's statements were not obtained in violation of his constitutional rights. Merely one-tenth of a second elapsed between the time that defendant asked, "[c]an I consult with a lawyer, I mean, or anything?" and then stated, "I mean I—I—I did it. I'm not laughing man, I want to cry because its f[*]cked up to be put on the spot like this." The officers then immediately reminded defendant of his *Miranda* rights, that they had just read him those rights, that defendant "ha[d] the right to have [his attorney] here," and that the officers "[could] never make that choice for [him] one way or another." After police attempted to clarify whether defendant's question was an affirmative assertion of his *Miranda* rights, defendant declined to unambiguously assert that right, continued communications, and never again asked about counsel for the rest of the interview.

Although defendant explicitly asked if he could consult with a lawyer, considering the totality of the circumstances, we agree that defendant's invocation of his *Miranda* rights was ambiguous or equivocal, such that the officers were not required to cease questioning. Defendant did not pause between the time he asked for counsel and gave his initial confession, the officers immediately reminded defendant of his *Miranda* rights to clarify if he was indeed asserting his right to counsel, and defendant declined the offered opportunity to unambiguously assert that right but instead continued communicating with the officers. Even if defendant's question could be objectively construed as an unambiguous invocation of his *Miranda* rights, it was immediately waived when he initiated further communication. Accordingly, the trial court properly denied defendant's motion to

suppress.

V. Motion for Appropriate Relief

After defendant's appeal was docketed, he filed a motion for appropriate relief ("MAR") with this Court. *See* N.C. Gen. Stat. § 15A-1418(a) (2017) (authorizing the filing of MARs in the appellate division). Section 15A-1418(b), governing the disposition of MARs filed in the appellate division, provides in relevant part that "[w]hen a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings[.] ..." *Id.* § 15A-1418(b) (2017).

Defendant's MAR is primarily grounded in a claim that his convictions were obtained "in violation of the Constitution of the United States or the Constitution of North Carolina." *See* N.C. Gen. Stat. § 15A-1415(b)(3) (2017). Where, as here, "[t]he materials before [our appellate courts] are not sufficient for us to make that determination," our Supreme Court has instructed that despite section 15A-1418(b)'s "suggest[ion] that the motion be remanded to the trial court for hearing and determination, ... the better procedure ... is to dismiss the motion and permit defendant, if he so desires, to file a new motion for appropriate relief in the superior court." *State v. Hurst*, 304 N.C. 709, 712, 285 S.E.2d 808, 810 (1982) (per curiam) (footnote omitted). Accordingly, we dismiss defendant's motion without prejudice to his right to refile a new MAR in the superior court.

VI. Clerical Error

Both parties agree the matter must be remanded to the trial court to correct a clerical error in an order. After the jury convicted defendant of first-degree felony murder in 12 CRS 51720, armed robbery in 12 CRS 1363, and firearm possession by a felon in 12 CRS 1362, the trial judge rendered an oral ruling arresting judgment on the armed-robbery conviction. The written order arresting judgment reflects the correct file number of 12 CRS 1363; however, it incorrectly lists the offense as "possess firearm by felon," an offense for which defendant was separately sentenced. We remand the matter to the trial court for the sole purpose of correcting its order arresting judgment on 12 CRS 1363 to accurately reflect the offense of armed robbery.

VII. Conclusion

Because the evidence presented at the jurisdictional hearing failed to satisfactorily satisfy any *St. Cloud* factor, the trial court properly concluded under the Ninth Circuit's test that defendant does not qualify as an Indian for criminal jurisdiction purposes and thus properly denied defendant's motions to dismiss the charges for lack of subject-matter jurisdiction. Because the evidence of defendant's Indian status raised no reasonable factual jury question implicating the State's burden of proving North Carolina's criminal jurisdiction, the trial court properly refused defendant's request to submit the issue of his Indian status to the jury for a special verdict on the matter of subject-matter jurisdiction. Because defendant's incriminating statements were not obtained in violation of his constitutional rights, the trial court properly denied his motion to suppress.

Accordingly, we conclude defendant received a fair trial, free of error. Additionally, because the materials before us are insufficient to decide defendant's MAR, we dismiss his motion without prejudice to his right to file a new MAR in the superior court. Finally, we remand this matter to the trial court for the sole purpose of correcting the order arresting judgment on 12 CRS 1363 to accurately reflect the offense of armed robbery.

NO ERROR IN PART; DISMISSED IN PART; REMANDED IN PART.

Judges INMAN and BERGER concur.

APPENDIX C

STATE OF NORTH CAROLINA
COUNTY OF JACKSON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 12 CRS 1362-1363, 51719-51720

STATE OF NORTH CAROLINA
VS
GEORGE LEE NOBLES

ORDER ON DEFENDANT'S MOTION TO DISMISS

THIS matter is before the undersigned on the Defendant's Motion to Dismiss filed April 16, 2013 and the Amendment to Motion to Dismiss filed August 7, 2013. Present at the hearing was Jim Moore, Assistant District Attorney and Bridgette Aguirre, Assistant District Attorney representing the State. Todd Williams and Vincent F. Rabil, Assistant Capital Defenders were present representing the Defendant, and the Defendant George Lee Nobles was present. The Court makes the following

FINDINGS OF FACT:

I.

A. Brief Summary of the Case at Bar

In the parking lot of the Fairfield Inn located in Cherokee, North Carolina a shooting occurred resulting in the death of Barbra Wells Preidt on the evening of September 30, 2012. Following the death an exhaustive investigation lead by the Cherokee Indian Police Department culminated in the arrest of

George Lee Nobles on November 30, 2012 (hereinafter referred to as the "Defendant"). On November 30, 2012 the Defendant was charged with two counts of possession of a firearm by a felon, robbery with a dangerous weapon, and first degree murder in the North Carolina State Court located in Jackson County, North Carolina. Because the Defendant was charged with first degree murder counsel was appointed by Robert M. Hurley, Capital Defender on November 30, 2012. The Defendant by and through counsel filed a motion to dismiss on April 16, 2013, claiming he is an Indian[1] as defined by law and alleging the State Court of North Carolina lacks jurisdiction over Defendant based upon his affiliation with the Eastern Band of Cherokee Indians since the homicide occurred on the Cherokee reservation.[2] The undersigned schedule for hearing this Motion to Dismiss on August 9, 2013. The hearing concluded on September 13, 2013.

B. Facts

1. That the Court received testimony from Christian Clemmer. Mr. Clemmer is employed with the North Carolina Department of Public Safety in the Division of Adult Corrections (hereinafter referred to as "DAC"). He has been employed for the previous five years as a probation officer

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[1] The terms "Indian" and "Native American" are synonyms and are used interchangeably throughout this order with "Indian" being used primarily throughout this opinion as that is the term employed in the statutes at issue in this motion to dismiss.

[2] The terms "Qualla Boundary" and "Cherokee Indian reservation" are synonyms connoting the same meaning of "Indian country" and are used interchangeably throughout this order.

with his duty station located in Gaston County.

2. That Mr. Clemmer was employed as a probation officer on November 4, 2011 when a probation case was transferred to Gaston County, North Carolina from Polk County, Florida. The individual to be supervised was the Defendant.
3. That the Defendant was released from the custody of the Florida Department of Corrections on November 4, 2011, after being convicted of Armed Burglary and Grand Theft in Polk County, Florida on January 28, 1993.
4. That included in the information from Florida was a presentence report which was generated for the Florida Court on July 28, 1993. In the preparation of the presentence report in which Defendant participated, the document clearly states Defendant was white/Caucasian making no mention of any Indian affiliation. [See Attachment "A"].
5. That Mr. Clemmer first contacted the Defendant on November 10, 2011.
6. That in addition to Mr. Clemmer the Defendant was also supervised by Gaston County probation officers James Sparrow and Chelsea Harris.
7. That the Defendant upon his arrival in North Carolina resided with his mother Donna Lorraine Smith Crowe Mann at 5009 Tary Court, Kings Mountain, North Carolina.
8. That the home at 5009 Tary Court was approved as a suitable residence for the Defendant by the Gaston County probation department. Mr. Clemmer personally visited the residence on July 22, 2012.

9. That 5009 Tary Court, Kings Mountain is located in Gaston County, North Carolina.
10. That the probation officers in Gaston County interacted with Defendant approximately 15 times during the entire time of supervision between November 4, 2011 and the date of the homicide on September 30, 2012.
11. That Mr. Clemmer further testified and the Court would find that race is not an issue considered germane to, or of any relevance by, the DAC. In North Carolina issues of race have no bearing on who is accepted and supervised by the DAC. All persons subject to DAC supervision are treated in the same manner regardless of race, sex, age, wealth or the lack thereof, religious affiliation and any other personal factor unrelated to the primary function and mission of the DAC which is the care, custody and supervision of adults and juveniles after conviction for a violation of North Carolina law.
12. That as Defendant asserts he is Indian based upon a relationship with the Eastern Band of Cherokee Indians, issues of ancestry are, however, germane to this motion to dismiss filed by the Defendant and accordingly detailed inquiry is necessary.
13. That the race of Defendant in the Interstate Commission Compact paperwork is white/ Caucasian. [See Attachment "B" (page 1 of Probation Records)] This document is instructive since the Defendant was presented with the application which clearly described him as white/Caucasian. Notwithstanding this description the Defendant signed the application on Au-

gust 11, 2011.

14. That the issue of race, a claim of being Native American or any affiliation with an Indian tribe by Defendant was never discussed with Mr. Clemmer. Moreover, Defendant neither asserted Native American ancestry nor questioned the various and divergent documentation which all identified Defendant as white/Caucasian at any time while being supervised with any DAC probation officer.
15. That the Defendant neither informed DAC of any unique Native American programs available to him nor sought assistance from any DAC employee seeking special programs available for Native American individuals either in the corrections system specifically or available to the broader Native American population in general.
16. That during the time of probation supervision the Defendant transferred his supervision from Gaston County to Swain County on March 26, 2012.
17. That the Court received testimony from Olivia Ammons. Ms. Ammons is employed with DAC. She has been employed for the previous nine years as a probation officer with her duty station located in Swain County.
18. That Ms. Ammons was employed as a probation officer during 2012 when the probation of Defendant transferred to Swain County from Gaston County on March 26, 2012.
19. That Ms. Ammons first met the Defendant March 28, 2012, at the residence located at 404 Furman Smith Drive, Cherokee, North Carolina. This residence is the home of Tonya Crowe, Aunt

of the Defendant. In the mountainous and rural areas of Jackson and Swain Counties it can often be difficult to ascertain the exact boundary between counties. These occasional ambiguities are often exacerbated when locations are on the Cherokee reservation. It may be that that the residence of Tonya Crowe was just inside the Jackson County portion of the Qualla Boundary but since the location was so close to the Swain County boundary Ms. Ammons graciously decided to continue supervision of the Defendant. In addition to the close proximity to Swain County Ms. Ammons in an effort of cooperation sought to assist her colleagues in the Jackson County probation office since during this period there did exist a reduced staff available to handle the workload.

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

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

22. That the next scheduled office visit for Defendant was May 1, 2012. The Defendant did not attend the meeting, call to cancel or reschedule the meeting or otherwise explain his absence to Ms. Ammons.
23. That Ms. Ammons next visited the residence of Defendant on May 2, 2012. Defendant was not home and Ms. Ammons left a notice hung on the door for Defendant to contact here immediately.
24. That Defendant attended a scheduled office visit on May 7, 2012.
25. That the request for substance abuse screening dated May 7, 2012, is likewise instructive. When the request for screening form DCC26 was completed, the information clearly listed the background of Defendant and identified Defendant as white/Caucasian. Notwithstanding this description Defendant signed the request on May 7, 2012. [See Attached "C" (page 51 of Probation Records)]. It was at this meeting that Attachment "C" was generated.
26. That Ms. Ammons conducted a successful home visit on May 8, 2012.
27. That Ms. Ammons spoke by phone to Tonya Crowe regarding the Defendant. Ms. Crowe expressed growing concerns about Defendant which were slowly developing with the continued presence of Defendant in her home.
28. That on May 17, 2012, Defendant called Ms. Ammons and advised he had left the residence of his Aunt, Tonya Crowe at 404 Furman Smith Drive and moved to Fort Wilderness Campground, 284 Fort Wilderness Road, Whittier, North Carolina. This transition was not un-

expected by Ms. Ammons based upon the prior discussions with Ms. Crowe.

29. That due to this change in residence Ms. Ammons began the internal process for transferring supervision from Swain County to Jackson County on May 21, 2012. Whilst boundaries and points of demarcation were less ascertainable between Jackson and Swain counties near 404 Furman Smith Drive, Fort Wilderness Campground is indisputably situated in Jackson County.
30. That the transfer request was denied by Jackson County. The basis for denial was due solely to the inability of Jackson County to confirm an actual address and residence for Defendant.
31. That on June 20, 2012, Defendant moved to the residence of Ruth and Ricky Griggs, 460 Griggs Lane, Bryson City, North Carolina. This residence is located in Swain County.
32. That upon investigation by Ms. Ammons it was determined Defendant was spending approximately half his time at the Griggs' residence and half his time with his girlfriend at a residence unknown and unapproved by his probation officer.
33. That an office visit occurred June 25, 2012. At this visit Defendant advised he had moved to 460 Griggs Lane and further advised he had quit his job at Home Style Chicken eatery. Defendant further informed Ms. Ammons his time in the mountains had regrettably not gone as hoped and he was seriously considering returning to Gaston County and the residence of his mother.
34. That the next office visit was scheduled for July

11, 2012. Defendant attended the meeting and explained he was moving to Keener Avenue but provided no address.

35. That on July 12, 2012, the Defendant in yet another reversal of course advised he was returning to Gaston County. Ms. Ammons instructed Defendant to report to Chief Murray in Gaston County no later than July 16, 2012. Ms. Ammons completed all required internal documentation to close out the supervision of Defendant in Swain County which concluded her obligations and responsibilities in this matter. Supervision of the Defendant returned to Gaston County on July 12, 2012.

36. That during the whole period Ms. Ammons supervised Defendant he never at any time indicated he was an enrolled member of the Eastern Band of Cherokee Indians or that he was eligible for any services provided to Native Americans of any federally recognized Indian Tribe. Defendant never asked for referral to any programs or services offered by the Eastern Band of Cherokee Indians to its enrolled members or First Descendants.

37. That in the documentation in the custody of Ms. Ammons the final four numbers of the Defendant's social security number are #2669 which is consistent with the social security number given by Defendant on his Cherokee Police Rights Interrogation Form which was admitted as State's exhibit #2. [See Attachment "D"] The Court would note the social security number given in Attachment "D" is inconsistent with the social security number on the Florida presentence re-

port in Attachment "A" and the "Affidavit of Indigency" form Defendant completed on November 30, 2012. [See Attachment "E"].

38. That the Court received testimony from Sean Birchfield. Sean Birchfield is employed as a Sergeant/Detective with the Cherokee Indian Police Department (hereinafter "CIPD").
39. That Detective Birchfield obtained his BLET certificate in 1997. A year prior, in 1996, he received his certification as a Detention Officer. Detective Birchfield began working as an officer with the CIPD in January 2005. Detective Birchfield was employed prior to 2005 in law enforcement with the Swain County Sheriff's Department.
40. That Detective Birchfield is a certified Law Enforcement Officer by the State of North Carolina.
41. That Detective Birchfield is a First Descendant of the Eastern Band of Cherokee Indians.
42. That the CIPD is certified as a Law Enforcement Agency by the State of North Carolina.
43. That Detective Birchfield attended numerous professional and educational training courses since his employment began with the CIPD. These courses covered general law enforcement issues as well as updates in case law, statutes, issues of jurisdiction and matters unique to Indian law.
44. That in addition to general seminars and updates in law enforcement matters, Detective Birchfield and the entire CIPD received specialized trainings in Indian law issues in 2006 and 2010. The attendees received tuition from Don

Gast, Assistant United States Attorney for the Western District of North Carolina and also from agents in the employ of the FBI. Further training is scheduled for the fall of 2013.

45. That Detective Birchfield responded to the scene of the homicide at the Fairfield Inn located on the Qualla Boundary on September 30, 2012.
46. That on the evening of November 29-30, 2012, the Defendant was arrested at 1621 Olivet Church Road, Cherokee, North Carolina. This residence is located on trust land within the external borders of the Qualla Boundary.
47. That the Defendant following his arrest was transported to the CIPD station located on the Qualla Boundary.
48. That Detective Birchfield first met the Defendant at the CIPD station in the early morning hours of November 30, 2012, following his arrest by law enforcement at 1621 Olivet Church Road.
49. That Detective Birchfield spoke briefly to Defendant but did not conduct a formal interview.
50. That the Defendant was interviewed by other law enforcement officers at the CIPD and this interview was recorded. A rights form was provided to Defendant and he signed the waiver on November 30, 2012, at 3:35AM which was admitted as State's exhibit #2 and Attachment "D".
51. That Detective Birchfield both ran an NCIC criminal history on the Defendant whereupon he learned there were no alerts or outstanding State or federal process pending and reviewed the tribal enrollment book which is maintained at the CIPD to ascertain whether Defendant was

an enrolled member of the Eastern Band of Cherokee.

52. That at the time of the arrest NCAWARE was not available to law enforcement at the CIPD.

53. That as part of the investigation and arrest process Detective Birchfield discussed with other actors in the law enforcement community where jurisdiction existed for the Defendant in light of the specific criminal offenses being charged.

54. That more specifically, Detective Birchfield discussed what offenses would be charged and which Court had proper jurisdiction for these offenses with Benjamin Reed, Chief of Police for the CIPD, Lieutenant Gene Owle, CIPD, Jason Smith, Eastern Band of Cherokee Indian Tribal Court Prosecutor and Special Assistant United States Attorney, and James Moore, Assistant District Attorney for the 30th Judicial District of North Carolina.

55. That upon completing the background investigation of George Lee Nobles and discussing the matter with the officials described herein, Detective Birchfield charged the Defendant with the murder of Barbra Preidt at the CIPD.

56. That all agencies after discussion and consultation determined jurisdiction over Defendant was in the North Carolina State Court in general, and venue for these offenses in Jackson County in particular. After the decision to arrest and determination of jurisdiction was made, Detective Birchfield transported Defendant to the Jackson County detention facility for an immediate appearance before a Jackson County Magistrate. The Defendant arrived at the Jackson County

Magistrate's office at approximately 7:00AM on November 30, 2012.

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

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

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

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

61. That Detective Birchfield upon further investiga-

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

62. That arising out of the homicide on September 30, 2012, two other individuals were charged with various related criminal offenses. Dwayne Edward Swayney was charged and arrested on the Qualla Boundary. Dewayne Swayney is an enrolled member of the Eastern Band of Cherokee Indians. Law enforcement determined this fact by reviewing and finding the name of Dwayne Swayney in the enrollment records kept for reference by law enforcement at the CIPD. The other co-defendant was Ashlyn Carothers. She was arrested at the CIPD. Ashlyn Carothers was determined to not be an enrolled member of the Eastern Band of Cherokee Indians. However, Ms. Carothers was found to be an enrolled member of the Cherokee Nation of Oklahoma. Both Mr. Swayney and Ms. Carothers were taken before a Tribal magistrate at the Cherokee Tribal Court. The Arrest Report from CIPD for Mr. Swayney was admitted as Defendant's exhibit #2. The Arrest Report from CIPD for Ms. Carothers was admitted as Defendant's exhibit #3. The Affidavit of Jurisdiction for Ms. Carothers was completed by CIPD on November 30, 2012 which was admitted as Defendant's exhibit #8 [See Attachment “F”]. The Affidavit of Jurisdiction completed by CIPD for Mr. Swayney was admitted as Defendant's exhibit # 9 [See Attachment “G”]. The CIPD Warrants issued

against Ms. Carothers for the charges of Homicide in the First Degree; Robbery with a Dangerous Weapon; Aid and Abet Homicide in the First Degree and Aid and Abet Robbery with a Dangerous Weapon were admitted as Defendant's exhibit # 10, 11, 12 and 13 respectively.

63. That both enrolled members of the Eastern Band of Cherokee Indians and enrolled members of other federally recognized Indian tribes are subject to the criminal jurisdiction of the Cherokee Tribal Court. U.S. v. Wheeler, 435 U.S. 313 (1978); Cherokee Code Chapter 14-1.1(a); 25 U.S.C. §1301(2) (2013); U.S. v. Lara, 541 U.S. 193, 210 (2004).

64. That the Court received testimony from Kathie McCoy. Ms. McCoy is an employee of the Eastern Band of Cherokee Indians working in the office of tribal enrollment. She has worked in this office for the past 16 years.

65. That as part of her job duties Ms. McCoy works with the Tribal enrollment committee which is a committee comprised of the Tribe's elected governmental leaders handling matters related to enrollment issues.

66. That Ms. McCoy is aware of and knowledgeable regarding enrollment eligibility in the Eastern Band of Cherokee Indians. The three factors required by the Eastern Band of Cherokee for an individual to be eligible for enrollment are:

    a. being between the ages of 0-18;

    b. being at least a 1/16 blood quantum; and

    c. being a direct lineal descendant to an ancestor included in the 1924 Baker Roll.

Cherokee Code §49-2 (The Cherokee Code shall be cited as "C.C." or "Cherokee Code" hereinafter.)

67. That the required documentation sought by the tribal enrollment office consists of a certified birth certificate and photo ID. Applicants may submit additional documentation in addition to the required documents listed above but are not required to do so.

68. That the State admitted into evidence State's exhibit #4 [See Attachment "H"] which is an official document from the Eastern Band of Cherokee enrollment office stating that Defendant is not an enrolled member of the Eastern Band of Cherokee Indians.

69. That the State admitted into evidence State's exhibit #5 stating Donna Lorraine Mann the mother of Defendant is an enrolled member of the Eastern Band of Cherokee Indians.

70. That the Eastern Band of Cherokee Indians does recognize First Lineal Descendants (hereinafter referred to as "First Descendent") which are defined by Eastern Band of Cherokee Indian in Section 16 of the Charter and Governing Document of the Eastern Band of Cherokee Indians, as enacted and adopted May 8, 1986, and amended by Tribal referendum October 8, 1986 and September 5, 1995. [See Attachment "I" for Section 16 of the Charter in its entirety] Section 16 states in relevant part:

> The first generation of an enrolled member of the Eastern Band of Cherokee Indians shall enjoy all property, both real and personal, that is held in said enrolled mem-

ber's possession at their death. First generation shall include all children born to or adopted by an enrolled member.

71. That for individuals who are designated as First Descendants the tribal enrollment office issues documentation known as a "Letter of Descent." The document is issued by personnel in the enrollment office and is used to establish eligibility for services in areas including, but not limited to, health care, education and employment and for identification purposes.
72. That the Eastern Band enrollment office maintains all official enrollment records. This repository of records is the official database of all enrollment documentation for the Eastern Band of Cherokee. All documents in their possession have been scanned into this single database.
73. That a search was requested of the Eastern Band of Cherokee enrollment office for any records of the Defendant. Ms. McCoy conducted a search of the official enrollment database for any records pertaining to Defendant. No documents regarding the Defendant were found.
74. That there exists neither a certificate of enrollment nor a "Letter of Descent" for the Defendant issued by the Eastern Band of Cherokee Indians enrollment office.
75. That while Defendant is neither enrolled nor currently classified as a First Descendant, it is the opinion of Ms. McCoy based upon the information available to her and relying primarily on the fact that Defendant's biological mother is an enrolled member, Defendant is eligible to be designated as a First Descendant by the enrollment

office of the Eastern Band.

76. That the Court received testimony from Annette Tarnawsky. Ms. Tarnawsky is employed by the Eastern Band of Cherokee Indians as their Attorney General. She has been employed in the legal division of the Tribe for 13 years serving as associate counsel subsequently being promoted to the position of Attorney General in 2009.

77. That the legal division of the Tribe provides legal representation to the government of the Eastern Band of Cherokee and all of its ancillary programs. As Attorney General she is the primary legal advisor to the Tribe. Included amongst her many and varied tasks and responsibilities are the supervision of the legal division including its attorneys, paralegals and support staff, working with and advising the executive and legislative branch of the Tribe, representing the Tribe and its programs in judicial and administrative hearing and supervising the tribal prosecutor assigned to manage the criminal prosecutions in Tribal Court.

78. That the tribal prosecution team currently consists of two positions with a lead prosecutor and an assistant prosecutor. The lead tribal prosecutor is Jason Smith, Esq. The assistant tribal prosecutor is Justin Eason, Esq.

79. That the Eastern Band of Cherokee Tribal government is founded upon the Charter and Governing Document of the Eastern Band of Cherokee Indians, as enacted and adopted May 8, 1986, and amended by Tribal referendum October 8, 1986 and September 5, 1995. [See Attachment "I"]

80. That while Ms. Tarnawsky testified there are three distinct branches which comprise the government of the Eastern Band of Cherokee Indians, the structure of the Eastern Cherokee government must be analyzed closer. Section 1 of the Charter provides for an Executive Branch and a Legislative Branch of government. The Charter does not provide for a Judicial Branch. However, the Eastern Cherokee exercising the sovereign authority of the Tribe did establish the Cherokee Tribal Court in C.C. §7-1 *et. seq.* Accordingly, while the Cherokee tribal government is not in the Charter established as a distinctly divided three branched system of government as is commonly seen in the Federal and State structures, the Eastern Cherokee government functions as a de facto three branch system of government.

81. That each federally recognized Indian tribe decides who comprises their membership. This membership determination is left solely to the Tribes based upon their inherent sovereignty and neither the State nor Federal government may infringe on this most basic foundational criteria. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n. 36 (1978).

82. That the C.C. §49-2 defines qualifications for membership in the Eastern Band of Cherokee. Defendant is ineligible to become an enrolled member of the Eastern Cherokee.

83. That as previously stated the blood quantum for membership in the Eastern Band of Cherokee is 1/16. There did exist a period of time where this blood quantum was expanded to 1/32. This ex-

panded eligibility appears to have occurred during the 1950's. However, since August 14, 1963, the minimum blood quantum is 1/16. Moreover, since the date of birth of the Defendant, at all times during the life of the Defendant and on the date of the alleged offense, the required blood quantum has been 1/16 without variation or modification.

84. That Ms. Tamawsky testified that in her opinion Defendant is eligible to be designated as a First Descendant under the Cherokee Code.

85. That enrolled members are recognized as Native American by the Federal and Cherokee governments, treated differently and enjoy benefits from this tribal affiliation in the form of various services and opportunities not afforded to First Descendants. These benefits include disparate treatment in the areas of real estate, employment, education, inheritance, hunting & fishing and voting.

86. That in the field of health care the Eastern Band of Cherokee operate both health programs under its governmental services matrix and the Cherokee Indian Hospital (hereinafter referred to as "CIH") also provides health care as a separate Enterprise of the tribe under C.C. §130B.

87. The tribal government coordinates public health services for enrolled members through the Health and Medical Division consisting of among other services community health, diabetes program, home health, Tasli Care nursing home, WIC program, wound care and the women's wellness clinic.

88. That CIH operates a hospital on the Qualla

Boundary located at 1 Hospital Road, Cherokee, NC and provides services to enrolled members. A limited menu of services in the health field are afforded to First Descendants at both the CIH and the Health and Medical Division. The CIH will only expend federal funds on First Descendants. No Eastern Band of Cherokee Indian tribal monies are used to provide health care for First Descendants. The CIH provides contract health services to First Descendants only in life threatening situations and not to treat chronic conditions. Conversely, CIH expends funds for enrolled members in both life threatening and chronic situations. First Descendants living in the five counties of Jackson, Swain, Graham, Haywood and Cherokee Counties receive direct care and outside referrals. However, First Descendants living outside these five counties receive only direct care at the CIH and are not eligible for referrals.

89. That the distinctions, differences and variations in the provision for and receipt of health care between enrolled members and First Descendants is substantial, definable and articulable. There likewise exists many additional limitations on health care services provided to First Descendants as established by the CIH in its manuals, policies and procedures under requirements of the Indian Health Service. 25 U.S.C. §1661.

90. That the area of real estate in the context of lndian jurisprudence is complex and requires some background analysis which follows in this order. At this juncture, however, it is sufficient to note that the Cherokee Indian Reservation is somewhat mis-named in that the land is not a

reservation as understood in the context of Indian law. Regardless, these lands are held in trust for the use and benefit of the Eastern Band of Cherokee Indians and its members. The Eastern Band of Cherokee Indians issues "Possessory Holdings" to its members. Possessory Holdings are specifically contemplated in section §16 of the Tribal Charter and are codified Cherokee Code §47-3 and §47-4.

91. That in the field of real estate the rights of enrolled members and First Descendants vary markedly. Cherokee Code §47 delineates the different rights afforded to enrolled members and First Descendants regarding the control and use of real property. The rights of enrolled members include the right to live, rent, lease or sell the possessory interest subject to various other rights against alienation as established in C.C. §47-4. However, the limits of the use of a possessory interest for a First Descendant are established by tribal law at C.C. §28-2(b), (c) and (d). First Descendants cannot use timber, minerals or otherwise deplete the improvements of a possessory interest. C.C. §28-2(c). These very same limitations are not placed upon enrolled members in the use and enjoyment of their Possessory Holdings. Accordingly, the rights afforded to First Descendants are noticeably limited in comparison to enrolled members.

92. That the sale of a Possessory Holdings interest may only be made to another enrolled member or the Eastern Band of Cherokee Indians. Because only an enrolled member may purchase a Possessory Holdings yet another limitation on First Descendants in found in Cherokee law. C.C. §28-

2(d).

93. That the basis upon which an enrolled member may buy, use, divest and otherwise enjoy a Possessory Holdings flows to them as an enrolled member of the Eastern Band of Cherokee and the rights afforded to them flows from their unique status as an enrolled member. However, the sole basis upon which a First Descendent my use, lease, or sale a Possessory Holdings comes only from an interest previous enjoyed by the biological parent and not from the status of being a First Descendent.

94. That in the sphere of inheritance the rights of enrolled members and First Descendants is also substantively different. First Descendants may only take a Possessory Holdings by valid will. C.C. §28-2. A First Descendant may never take a Possessory Holdings by intestate succession. C.C. §28-l(b). Unlike a First Descendant, an enrolled member may take a Possessory Holding by ether a valid will or by intestate succession. C.C. §28-1.

95. That regarding employment the Cherokee Code provides employment preference for employment with the Eastern Band of Cherokee Indians, its Enterprises and all other Tribal governmental employing agencies. C.C. §96-4.00 *et. seq*. The employment preference of the Eastern Band is:

    a. Enrolled members;
    b. Spouses and parents of Enrolled Members;
    c. Members of other federally recognized Indian Tribes; and
    d. First Generation Descendant.

96. That in the field of education distinctions are also found between enrolled members and First Descendants. All children are welcome to attend the Cherokee schools. C.C. §115-2. In regards to higher education, while enrolled members receive education assistance no tribal monies may be expended on First Descendant until after all awards have been made to enrolled members. Pursuant to Cherokee Code §115-8, First Descendants are a second priority and will only receive financial assistance when all awards to enrolled members have been made and there exists additional funds which have been unspent.
97. That enrolled members enjoy unfettered rights to hunt and fish on tribal lands which is not afforded to First Descendants. C.C. §113-4(b)(l) and (2).
98. That in the area of voting and elections differences between First Descendant and enrolled members is most stark. In tribal elections enrolled members may hold elected office and may vote as established in Section 9 of the Charter. However, a First Descendant may never hold elected office and may never vote in any tribal election. C.C. §161-3 (a)(l) and (b)(l).
99. That regarding the decision to transport Defendant to a Jackson County Magistrate after arrest, Ms. Tamawsky believes that once a person is arrested they must be taken before a judicial official without unreasonable delay. This is a sound and wise precaution. Moreover, North Carolina likewise agrees and this practice is codified in North Carolina law and located at N.C. Gen. Stat. § 15A- 511.

100. That Rule 6 of the Cherokee Tribal Court Rules of Criminal Procedure seeks to afford these same protections for individuals arrested on the Qualla Boundary which are afforded to individuals arrested outside of "Indian country".

101. That in deciding where to take the Defendant, Ms. Tamawsky is of the opinion that tribal prosecutor Jason Smith correctly exercised his discretion and that the correct jurisdiction for the offense of murder with which Defendant is charged lies in the North Carolina State Court.

102. That prior to November 29, 2012, Ms. Tamawsky did not know Defendant or his mother and does not recall any previous interactions with them regarding any matter during the preceding 13 years.

103. That in addition to being the Attorney General and handling all legal issues brought before the Tribe, there also exist in "Indian country" the overlap of Indian language and Indian culture. Beyond mere statutes and decisions from our appellate courts throughout the United States, legal counsel to Indian tribes must also consider factors of culture, history, language and customs rarely considered in other legal fields.[3] For guidance on these issues Ms. Tamawsky as director of the legal division required all counsel to utilize the talents of Ms. Myrtle Driver Johnson.

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

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[3] One example is found in the Indian Child Welfare Act regarding social and cultural standards of an Indian community. 25 U.S.C. § 1915(d).

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

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

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

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

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

110. That in addition to her work in tribal government Ms. Johnson teaches the Cherokee lan-

guage. Ms. Johnson is a founding member and instructor at the Kituwah Language Immersion Academy. This program seeks to teach the Cherokee language to young children at an early age in an effort to keep the Cherokee language alive.

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

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

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

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

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

116. That as part of the culture and tradition of the Eastern Band of Cherokee there is every fall in

October the Cherokee Indian Fair. This has been a tradition attended by enrolled members for over 100 years. Also, there is the Kituwah Celebration in June of each year located at the Ferguson Fields property now owned by the Eastern Band of Cherokee. Both of these events celebrate the arts, crafts, language, traditions and uniqueness of the Cherokee culture.

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

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

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

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

121. That the State admitted into evidence State's exhibit #6. This exhibit is a photograph of tat-

toos on the Defendant consisting in total of two tattoos. The first was of an eagle. Based upon the experience and knowledge of Ms. Johnson the eagle and its symbolism is in her opinion a generic symbol in Native American culture. It is found and relevant to nearly all Indian Tribes in the United States and represents nothing unique to the Eastern Band of Cherokee. The second tattoo depicts an Indian with a headdress. This tattoo is of unique significance to Ms. Johnson. Headdresses were never worn, used or employed for ceremonial purposes by the Eastern Band of Cherokee. The headdress of the type found tattooed on Defendant is of a Western Plains Indian. In the opinion of Ms. Johnson the headdress tattoo is devoid of any relationship to the language, culture, history or traditions of the Eastern Band of Cherokee Indians.

122. That the Court received testimony from John Preidt, Jr. Mr. Preidt is 76 years old and resides in Shelbyville, Indiana. He was born in Austria and immigrated to the United States in 1952.

123. That Mr. Preidt was married as a younger man to Dorothy.

124. That following his marriage to Dorothy Mr. Preidt remarried Barbra Wells. Mr. Preidt and Barbra Wells married in 1962 or 1963.

125. That having been married to Barbra Wells Preidt since 1963, Mr. Preidt testified and the Court would find that Barbra Wells Preidt was white/Caucasian.

126. That during their marriage Mr. and Mrs. Preidt

were self-employed running a small business which focused primarily on the ownership and management of apartments.

127. That in the last days of September 2012 Mr. and Mrs. Preidt were traveling south from Indiana to Jacksonville, Florida on a pleasure trip to see the sister of Barbra who resides in the Jacksonville area.

128. That as their travels led them towards Florida they stopped for the evening in Cherokee, North Carolina and rented a room at the Fairfield Inn. The Fairfield Inn is located at 568 Paint Town Road, Cherokee, North Carolina. This hotel is located on the Jackson County portion of the Qualla Boundary.

129. That in the waning hours between 9 and 10PM on the evening of September 30, 2012, the Preidt's pulled their vehicle into the parking lot of the Fairfield Inn. It was dark outside. After driving around for a brief moment looking for a parking place Mr. Preidt the operator of the family vehicle chose and then parked in a parking space near the sidewalk in front of the Fairfield Inn. The parking lot and sidewalk were built for and used by guests of the Fairfield Inn.

130. That after parking Mr. and Mrs. Preidt exited their vehicle. Mr. Preidt existed the driver's side door since he was driving and Mrs. Preidt exited from the front passenger side door.

131. That as Barbra Preidt exited the car she lit a cigarette. Almost instantaneously as they alighted from the vehicle Mr. Preidt both heard and, then as he turned to look, saw Barbra Preidt being dragged by an unknown person. This

person came out of the darkness and was not seen by Mr. Preidt as he drove through the parking lot, when he parked his car or when he exited on his side of the vehicle.

132. That upon hearing and seeing these events Mr. Preidt immediately sprang into action running around his vehicle as quickly as he could to render aid and assistance to Barbra. As he traversed to the other side of the vehicle and approached Barbra, Mr. Preidt confronted a man wearing a mask. Because of the mask Mr. Preidt was unable to see the facial details of the individual. Mr. Preidt did notice the masked person was similar in height to his own 5' 6" frame and similar in weight to the approximately 228 pounds Mr. Preidt then weighed on that night.

133. That Mr. Preidt notwithstanding his age of 76 jumped on the masked person. However, Mr. Preidt despite his gallant efforts was almost instantly thrown to the ground by the masked man. Throughout these moments yelling was constant. Mr. Preidt heard Barbra say in a loud declaratory voice "leave me alone!!" and "get out of here!!"

134. That Mr. Preidt testified he heard the masked person respond to Barbra by saying "shut up!"

135. At the time Barbra was accosted by the masked person she had somewhere between $4,000 and $5,000 in cash in her purse. While an unusually large amount of money to carry on one's person, Mr. Preidt explained they were on vacation and planned to be away from Indiana for an extended period of time while visiting Barbra's sister

in Northern Florida.

136. That suddenly during the physical struggle between Barbra and the masked person Mr. Preidt heard a noise he described as a "popping sound." Mr. Preidt also described the sound he heard as a "shot" or "bang." Regarding the number of shots Mr. Preidt believes he heard the sound only one (1) time.

137. That after hearing the noise the masked man ran away and took with him the purse belonging to Barbra. As the masked individual ran into the woods Mr. Preidt lost sight of him in the darkness.

138. That contemporaneously with the masked person fleeing the scene Mr. Preidt heard Barbra say "I think I have been shot."

139. That Barbra Preidt had been shot.

140. That in an effort to render aid Mr. Preidt ran into the hotel lobby of the Fairfield Inn and asked the front desk clerk to immediately call 911. When Mr. Preidt left Barbra to seek assistance from 911 there were two female bystanders who remained with and comforted Barbra.

141. That after calling 911 as Mr. Preidt began to return to Barbra both ladies who had remained with Barbra informed Mr. Preidt that Barbra was mortally wounded and had succumbed to her wounds.

142. That Barbra Preidt died on the sidewalk in front of the Fairfield Inn in Cherokee, North Carolina on the evening of September 30, 2012.

143. That the Court received testimony from Vickie Jenkins. Ms. Jenkins is employed with the

Cherokee Indian Hospital and has worked at the CIH for the past 33 years. She is employed in the medical records department.

144. That Ms. Jenkins as custodian of the medical records at the CIH brought a copy of all medical records of Defendant to court pursuant to a lawfully issued subpoena. Ms. Jenkins was familiar with the medical records of Defendant and also during the hearing reviewed the records thereby affording her the opportunity to refresh her memory of these records.

145. That to receive medical services at the CIH a patient must be an enrolled member of the Eastern Band of Cherokee or prove they are a First Descendant and contemporaneously supply the required certification paperwork from the Cherokee tribal enrollment office.

146. That patients of the CIH do not receive a bill and do not pay for medical services.

147. That Ms. Jenkins testified based upon the information provided and after review of the medical records of the Defendant, in her opinion the Defendant would not have to pay for medical treatment at the CIH for services available to First Descendants.

148. That the medical records for the Defendant at the CIH indicated he was born on January 17, 1976. The last four digits of his social security number are #2669.

149. That like all other medical providers there are various codes used by the CIH. Coding is a normal and generally accepted practice in the health care industry.

150. That the code assigned to the Eastern Band of Cherokee Indians by the Indian Health Service is “023”.

151. That the coding assigned to the degree of Indian blood is “001” for a full blood quantum, “002” for less than a full but up to a half blood quantum, “003” for less than a half but up to a three-quarters blood quantum, and “004” for a blood quantum less than one-quarter. These codes were developed by the Indian Health Services and they are used by all Indian Health Services facilities throughout the United States including the CIH.

152. That the medical records of Defendant were admitted as Defendant's exhibit # 7. The CIH assigned the chart #01-23-92 to the Defendant.

153. That the first visit to the CIH by Defendant was on October 31, 1985. The last visit of Defendant was on February 28, 1990.

154. That the Defendant visited the CIH in total five (5) times. These visits occurred on:

    a. October 31, 1985

    b. October 1, 1987

    c. March 12, 1989

    d. March 16, 1989

    e. February 28, 1990

155. That the last time Defendant used the medical services at the CIH he was 14 years of age which was over 23 years ago. Likewise, there are no other records of accessing any other clinics or medical facilities overseen or related to the CIH for over 23 years.

156. That the Court received testimony from Sam

Reed. Mr. Reed is an enrolled member of the Eastern Band of Cherokee Indians. Mr. Reed has worked as a Magistrate in the Cherokee Tribal Court for the past three years. Prior to becoming a magistrate Mr. Reed worked for 13 years as a law enforcement officer with the CIPD.

157. That Mr. Reed has received extensive training as a magistrate which includes attending the School of Government course for North Carolina Magistrates in August of 2010. Also, he has attended numerous federal Indian law training courses offered by educational providers in the Indian law field.

158. That magistrates in the Tribal Court only handle criminal matters with their duties not extending into the civil field. The single exception to this practice is found where tribal magistrates review and when appropriate issue civil domestic violence protection orders.

159. That the Cherokee Tribal Court staffs two separate magistrate offices. One office is located at the CIPD. The other magistrate office is located at the Cherokee Tribal Court. At both offices there does exist computer access to the tribal enrollment database for the Eastern Band of Cherokee. This database is only available to court officials including magistrates and is the same enrollment database officially maintained by the Tribal enrollment office supervised by Kathie McCoy and Nancy Maney.

160. That the tribal enrollment database does not include First Descendants.

161. That Mr. Reed discussed the procedures for is-

suing criminal process in the Tribal Court. On average approximately 15-20 criminal warrants are issued by magistrates in a 24 hour period. The process begins when a law enforcement officer completes an affidavit of jurisdiction and criminal complaint form. The Affidavit of Jurisdiction is identical to the one admitted by Defendant as Defendant's exhibit#4 [See Attachment "J"]. After completion of the jurisdictional form, the defendants along with the complaint form are then taken to a tribal magistrate. The magistrate then issues a warrant or summons based upon the severity of the offense and other relevant factors considered by the tribal magistrate.

162. That Cherokee magistrates issue warrants and summons for violations of the Cherokee Code. These same tribal magistrates never issue process for violations of federal or North Carolina law.

163. That the affidavit of jurisdiction form is used by all tribal magistrates. That all tribal magistrates are familiar with the Rules of Criminal Procedure and the Criminal Code of the Eastern Band of Cherokee. This jurisdictional form is drafted so as to accommodate the provisions of Rule 6 of the Criminal Rules of Procedure as promulgated by the Cherokee Code.

164. That C.C. §15-8 Criminal Procedure authorizes the creation of the Cherokee Rules of Criminal Procedure. Rule 6 of the Cherokee Rules of Criminal Procedure states in relevant part:

(a) In General.

(1) *Appearance Upon Arrest.* A person mak-

ing an arrest within the Qualla Boundary must take the defendant without unnecessary delay before a Magistrate or Judge, unless the person taken into custody is arrested on Federal or State process, in which case they shall be taken before the appropriate person as provided for in N.C. Gen. Stat. §15A or the Federal Rules of Criminal Procedure. It is not necessary for persons arrested for violating conditions of release to be brought before the Magistrate.

(2) *Appearance Upon a Summons.* A person served with a criminal summons must appear before the Magistrate on duty during the first business day following service with the summons. Upon failure of any defendant to report as Ordered, the Magistrate on duty during the day shall issue a Warrant for the defendant's arrest and charge him or her with Failure to Obey a Lawful Order of the Court.

(b) Procedures.

(1) *Determining Jurisdiction.* The Magistrate shall conduct the "St. Cloud" test to confirm that the defendant is an Indian. This test is conducted as follows:

(A) Inquire if the defendant is an enrolled member of any Federally recognized Indian Tribe;

(B) Inquire if the defendant is a First Descendent of the EBCI;

(C) Inquire if the defendant is a citizen

of another country;

(D) Inquire if the defendant is a member of any State recognized Indian Tribe; and

(E) Inquire if the defendant participates in any Indian cultural events, lives on a Reservation, receives any benefits reserved exclusively for Indians, or otherwise holds herself out as an Indian.

If the answers to questions (A)-(C), or any one of them, is "yes," the inquiry ends there and the Court has jurisdiction over the defendant. If the answers to questions (A)-(C) is "no," but the answer to question (D) or (E) is "yes," further inquiry may be in order to satisfy the Magistrate that the defendant is an Indian for the purposes of the exercise of jurisdiction. If the Magistrate determines that the defendant is a non-Indian, then the Magistrate should notify the CIPD of same, dismiss the charges and tum the defendant over to the CIPD for transport to the appropriate State or local judicial officer or to the Federal authorities. In lieu of inquiring of the defendant as outlined above, an Affidavit such as the one attached in Appendix 1 to these Rules may be utilized. If the defendant exercises his or her right to remain silent the Magistrate shall determine that the defendant is an Indian for the purposes of jurisdiction, without prejudice to the defendant's right to challenge jurisdiction

at a later date. If the defendant is too intoxicated or impaired for the Magistrate to conduct this inquiry, the Magistrate shall order that the defendant appear before the Magistrate on duty on the following business day for the conclusion of this proceeding.

(2) *Waiver of Personal Jurisdiction.* A non-Indian may waive the issue of personal jurisdiction and consent to proceeding in the Cherokee Court.[4]

C.C. §15-8 Rules of Criminal Procedure, Cherokee Criminal Rules, Rule 6 (2013) [See Attachment "K" for Rule 6 in its entirety].

165. That Rule 6 closely tracks the St. Cloud v. United States factors discussed in more detail hereinafter.

166. That Defendant places great emphasis on the fact that Defendant was not taken before a tribal magistrate for his St. Cloud inquiry but rather was instead taken to the Jackson County State Court Magistrate. This protestation is misplaced. By focusing on where the St. Cloud inquiry occurred Defendant loses sight of the fundamental basis upon which St. Cloud rests.

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[4] In light of the ruling in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) where the Supreme Court clearly stated Indian tribes may not prosecute non-Indians without the express consent of Congress it must necessarily be asked how such an inquiry could ever be grounded in personal as opposed to subject matter jurisdiction and following this hurdle how an individual could "consent" to jurisdiction not conferred by Congress and expressly denied by the United States Supreme Court. Yet, an answer to this question is beyond the scope of this order.

The essential inquiry is not where the St. Cloud inquiry occurs. Rather, the paramount consideration is whether the St. Cloud inquiry occurs. To attach such importance to the location of the inquiry is to erroneously place form over substance. Moreover, Defendant was in actual fact afforded a hearing where the St. Cloud analysis was conducted. But in the case of this Defendant, the hearing was only conducted after Defendant was provided most competent and capable counsel, adequate notice, an opportunity to be heard and present evidence and an ancillary opportunity to supplement the hearing with any written briefs and case law deemed germane.

167. That the Court received testimony from Kelly Oaks who is a special agent with the North Carolina State Bureau of lnvestigations (hereinafter referred to as "SBI"). Agent Oaks has been employed with the SBI as a special agent for the preceding 15 years. That Agent Oaks' supervisor is SBI Agent Tom Ammons.

168. That the Court admitted into evidence Defendant's exhibits #14, #15 and #16 which are emails from the address of Agent Oaks regarding the investigation of the homicide.

169. That Agent Oaks testified the Cherokee Indian Police Department was the lead investigation agency in the criminal investigation surrounding the shooting of Barbra Preidt on September 30, 2012.

170. That Shannon Ashe, also a special agent for the SBI, was the original agent assigned to assist in this investigation. However, due to other du-

ties he became unavailable and Agent Oaks was then called upon for her assistance.

171. That Furman Smith Crowe testified at this hearing. Mr. Crowe is an enrolled member of the Eastern Band of Cherokee Indians and is the maternal Uncle of Defendant. Mr. Crowe has known the Defendant since he was two weeks old. Mr. Furman Smith Crowe is the brother to Donna Lorraine Smith Crowe Mann. Donna Lorraine Smith Crowe Mann is the mother of Defendant.

172. That when the Defendant was an infant his biological father George Robert Nobles abandoned the Defendant with Mr. Crowe.

173. That Mr. Crowe identified the plat set forth in Defendant's exhibit #17.

174. That Donna Lorraine Smith Crowe Mann testified. Ms. Mann was born May 9, 1955.

175. That Ms. Mann is the biological mother of the Defendant George Lee Nobles who was born January 17, 1976.

176. That Ms. Mann is an enrolled member of the Eastern Band of Cherokee Indians. Her enrollment number is #R03976 and she possesses an 11/128 blood quantum.

177. That the birth certificate of Ms. Mann was identified by her and admitted as Defendant's exhibit #18.

178. That the biological father of the Defendant was George Robert Nobles. Ms. Mann testified, and the Court would find, that the biological father George Robert Nobles was not Native American having no membership in any federally recog-

nized Indian tribe in the United States. George Robert Nobles was white/Caucasian.

179. That George Robert Nobles is now deceased.

180. That Ms. Mann has lived in both Florida and North Carolina over the past 30 years.

181. That Ms. Mann moved back to Cherokee, North Carolina from her residence in Florida in the early 1980's with Defendant.

182. That upon returning to the Cherokee area she enrolled her son in both the Cherokee Tribal school system and the Swain County school system. These school records are set forth in Defendant's exhibits #20 and #21.

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

184. That Defendant also provided medical records as evidence in this hearing. Defendant's exhibit #7 from the Cherokee Hospital and Defendant's exhibit #19 from Swain County Hospital were admitted into evidence.

185. That these medical records detail two separate events in 1983 and 1985 both being auto accidents involving Defendant which required medical treatment.

186. That in the 1983 automobile accident Ms. Mann was not in the vehicle with Defendant. In an accident near Jenkins Grocery in the Birdtown community of. the Qualla Boundary the Defendant was injured. The Defendant spent two

weeks in the hospital and Ms. Mann testified the Defendant sustained head injuries.

187. That in 1985 Defendant was again involved in an automobile accident. This accident occurred when Ms. Mann was present and in the same vehicle where again Defendant needed treatment for injuries sustained as a result of this accident.

188. That the Defendant sought and was allowed to recall Detective Sean Birchfield to testify at the hearing.

C. Stipulations

189. That the State and Defendant, by and through his attorney of record stipulated to the following prior to the commencement of the hearing on Defendant's Motion to Dismiss:

a. That on or about September 30, 2012 officers of the Cherokee Indian Police Department responded to a reported armed robbery and homicide occurring on the sidewalk in front of the Fairfield Inn located at 568 Paint Town Road, in Cherokee, Jackson County, N.C.

b. That the property located at 568 Paint Town Road is land held by the United States of America in trust for the Eastern Band of Cherokee Indians and is also known as the "Qualla Boundary" or as the "Eastern Band of Cherokee Indians Reservation".

c. That on or about November 30, 2012 at approximately 6:00 a.m., Cherokee Indian Police Department Officer Sean Birchfield

arrested the Defendant at the Cherokee Indian Police Department in connection with the incident referenced above;

d. That the Cherokee Indian Police Department is located within the Qualla Boundary and is situated on Cherokee trust land.

e. That pursuant to the arrest, Defendant was brought before Jackson County Magistrate A. 0. Reagan.

f. That Jackson County Magistrate A. 0. Reagan found probable cause for the arrest of Defendant on the charge of First Degree Murder and issued a Magistrate's Order dated November 30, 2012 and filed with the Jackson County Clerk of Superior Court.

g. That the November 30, 2012 Magistrate's Order was issued upon information furnished by arresting officer Sean Birchfield of the Cherokee Indian Police Department.

h. That George Lee Nobles was born on January 17, 1976 to Donna Lorraine Smith Crowe (dob May 5, 1955) in Polk County, Florida; the parties stipulate and agree to the admission of their respective birth certificates into evidence.

i. That Donna Lorraine Smith Crowe, now known as Donna Lorraine Mann, is an enrolled member of the Eastern Band of Cherokee Indians (EBCI), a federally recognized tribe, the EBCI having issued her the number "R03978" to reference her enrollment.

j. That George Lee Nobles is not an enrolled member of the EBCI however he would be a First Descendant of an enrolled member of the EBCI.

k. The parties stipulate to the W-2 form issued to the Defendant for the 2012 tax year by HOMESTYLE FRIED CHICKEN to the Defendant for wages and income paid to the Defendant as an employee of the HOMESTYLE FRIED CHICKEN restaurant located at 510 Paint Town Road, Cherokee NC 28719 situated within the Qualla Boundary on Cherokee trust lands and agree that the W-2 form is admissible into evidence.

l. The parties stipulate the document titled "Florida Department of Corrections Presentence Investigation" included in the State's discovery is a business record document kept in the regular course of business of the Florida DOC and agree to admit it into evidence beginning on page 8 at the heading marked "Identification" and continuing through the heading "Other Statements" on page 10; the parties also stipulate to page 12 at the paragraph beginning with "[i]t is felt" and continuing to the end of page 12; all other pages and content of this document have been redacted by agreement of the parties; the Defendant does not stipulate to the truth or accuracy of the information set out within any portion of this document.

m. The parties stipulate that the Cherokee

Central School records are records kept in the ordinary course of business and are admissible into evidence.

n. The parties stipulate that the Swain County School records are records kept in the ordinary course of business and are admissible into evidence.

o. That George Lee Nobles was released from the Florida Department of Corrections on November 4, 2011 and post release supervision was transferred from Florida to Kings Mountain, North Carolina.

D. Law and Exhibits

190. That the Eastern Band of Cherokee Indians has adopted and subsequently codified its law. This code is accessible at Municode Corporation via this link http://library.municode.com/index.aspx?clientid=13359.

191. That the undersigned takes Judicial Notice of the Cherokee Code pursuant to N.C. Gen. Stat. §201.

192. That the undersigned affords full faith and credit to the Cherokee Code and the prior decisions of the Tribal Court pursuant to N.C. Gen. Stat. §lE-1.

193. That the undersigned takes Judicial Notice of Jackson County file numbers 12 CRS 1362, 12 CRS 1363, 12 CRS 51719 and 12 CRS 51720.

194. That the Court admitted into evidence State's exhibits #1 through #8.

195. That the Court admitted into evidence Defendant's exhibits #1 through #21.

E. Harbison Inquiry of Defendant

196. That in support of the motion to dismiss, Defendant presented evidence at the hearing and entered into stipulations with the State.

197. That in so doing Defendant requested of his attorneys that specific facts regarding his age, background and ancestry be made part of the record.

198. That counsel has to date represented the interests of Defendant to the highest standards of professional competency any person charged with crime could hope to be afforded. To this end, counsel sought of the undersigned to inquire of Defendant that he fully and completely understand the nature of the proceeding he initiated and that the facts found at the conclusion of the hearing would be established as part of the record in the cases now pending against Defendant. Moreover, these same facts could be used against him in any subsequent hearings including a trial by jury determining quilt and innocence.

199. That while there were no admissions of guilt on behalf of Defendant by counsel, the Court did conduct an inquiry pursuant to State v. Harbison, 315 N.C. 175 (1985). This inquiry was done in open court, outside the presence of any jury and with counsel for Defendant present.

200. That Defendant understood in the course of the hearing evidence was presented and stipulations were made. Defendant understood he requested his counsel to present this evidence and sought there assistance in a judicial determination that Defendant was an "Indian" as

defined by 25 U.S.C. §1153. Furthermore, Defendant understood that such a determination would then subject him to the jurisdiction of the federal courts.

201. That Defendant clearly, articulately and without reservation informed the undersigned he consented to the hearing, stipulations and the efforts of his able counsel in seeking a determination he was an "Indian" as that term is employed in federal law. This decision by Defendant was made freely, voluntarily and knowingly.

II.

A. Eastern Band of Cherokee Indian Legal History

202. That the history of the Cherokees in North Carolina is a complex, unique and compelling story woven with the many and varied threads of history, culture, land, language, politics, law, and the foundation of the United States of America.

203. That it is beyond the scope of this order to delve deeply into the legal background of the Eastern Band of Cherokee. However, for the purposes of this order as it relates to issues of jurisdiction a limited survey of the applicable laws and cases is needed.[5]

204. That the peoples now known as the Eastern

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[5] That for a more detailed and insightful, albeit dated, discussion of the legal history of the Eastern Cherokee the undersigned would refer the reader to "An Historical Analysis of the Legal Status of the North Carolina Cherokees" 58 N.C. L. Rev.1075 (1979) by Ben Oshel Bridgers, Esq.

Cherokees are descendants of their ancestors who refused to move to the Indian Territory during the removal of 1838 which is now more commonly referred to as the Trail of Tears. The Trail of Tears was the result of the Treaty of New Echota dated December 29, 1835 where in exchange for the ceding to the United States of all remaining Cherokee land east of the Mississippi river the Cherokee received $5,000,000 and a common interest in land already occupied by the Western Cherokee west of the Mississippi river. Treaty of new Echota, 7 Stat. 478 (1835).[6]

205. That the existence of native peoples predated the formation of the Unites States. The same existence of these indigenous peoples who governed themselves for centuries before the founding of the United States forms the jurisprudential basis upon which the framework of tribal sovereignty rests.

206. That in the United States Indian tribes have jurisdiction to exercise their authority which derives from their inherent sovereignty over tribal members and tribal property. Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505 (1991) *citing* Cherokee Nation v. Georgia, 30 U.S. 1 (1831). See also U.S. v. Wheeler, 435 U.S. 313, 323 (1978) and Merrion v. Jicarilla Apache Tribe, 455 U.S. 103 (1982).

207. That inherent tribal sovereignty was discussed

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[6] That as an historical aside one is remiss by failing to note that the Treaty of New Echota was never signed by any official or officer of the Cherokee government.

by the United States Supreme Court in the pivotal case of Worcester v. Georgia, 31 U.S. 515 (1832), where Chief Justice John Marshall determined that the new states of the United States did not have jurisdiction over Indians or Indian governments. Mr. Chief Justice Marshall explained

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

Worcester, 31 U.S. at 561.

208. That another important facet in the unique status Native Americans hold in our jurisprudence is that the distinction Indians and tribes enjoy is not based upon race. Rather, as set forth in the Morton v. Mancari 417 U.S. 535 (1974) decision the United States Supreme Court unanimously established that the Constitution of the United States gives Congress the power to provide "special treatment" to Indians based on membership in a quasi-sovereign Indian tribe. Morton, 417 U.S. at 553-55. Therefore, it is the political relationship between the United States and Indian tribes expressly established in the United States Constitution which authorizes

unique financial, medical, educational, residential and employment benefits not otherwise afforded to non-Indians.

209. That after the final group of Cherokee who were forced to leave for the Indian Territory in December 1838 embarked, General Winfield Scott decided that capture of the roughly 1000 Cherokee who refused to leave Western North Carolina would be difficult. He agreed to allow governmental officials to handle each individual instead of the United States Army.

210. Therefore, the "modern" story of the Eastern Band of Cherokee begins in 1838.

211. That during these times the Cherokee where benefited by the efforts of William Holland Thomas, a non-Indian who had been adopted by the Cherokee Chief Drowning Bear. Bridgers, at 1089-90.

212. That William Thomas during this period used money from various sources to purchase land in his own name for the use of the Cherokee. That these purchases made by William Thomas during this period formed the corpus of land that subsequently became the Qualla Boundary. Bridgers, at 1090.

213. That in one of the first legislative acts by North Carolina in 1866, the General Assembly determined that the State had no objection to the Cherokees residing in North Carolina. Act of Feb. 9, 1866, ch. 54, Section 1, 1866 N.C. Pub. Laws, Special Sess., 120.

214. That the North Carolina Supreme Court decided in 1869 that the Cherokee Indians could own land since there existed nothing in the North

Carolina Constitution or statutes prohibiting ownership. Colvard v. Monroe, 63 N.C. 288 (1869).

215. That in 1870 the North Carolina Supreme Court then established that the criminal laws of North Carolina applied to Cherokee Indians when they decided State v. Ta-cha-na-tah, 64 N.C. 614 (1870).

216. That in 1924 Indians became citizens of the United States. 68 P.L. 175; 43 Stat. 253 (1924). [See Attachment "L"]

217. That following the granting of United States citizenship to Indians, Congress acted specifically in response to the issues then confronted by the Cherokee Indians located in North Carolina by Congressional legislation subsequently signed into law by President Coolidge. 68 P.L. 191; 43 Stat. 376 (1924). [See Attachment "M"]

218. That federal Indian policy was fundamentally altered by the administration of Franklin Roosevelt when in response to the sobering failures of the "allotment" policy begun in 1887, Congress passed the Indian Reorganization Act of 1934. The purpose of the Indian Reorganization Act was to assist Tribes to develop Constitutions and organize their individual governments which would then in turn promote economic, educational and culture preservation and development. Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (1934).

219. That the policy direction of the Federal Government again altered course following World War II when it was decided that Tribes and their unique governments should be finally

terminated. Congress determined that by terminating tribes and thereby ushering individual Indians into society the then perceived 'barriers' to prosperity believed to exist in the lives of Native Americans would be finally removed. This "Termination" policy was begun in 1958 with the passage of the Federal Indian Law of 1958. This "Termination" policy has come to commonly be referred to as Public Law 280. Act of August 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (1958).

220. That Public Law 280 sought among other matters to address the emerging issues of jurisdiction which were slowly giving rise in an increasing number of cases where the interplay between Tribes and States were conflicting. Five states were given jurisdiction over Indians on Indian lands: California, Minnesota, Nebraska, Oregon and Wisconsin. 67 Stat. 588 (1958).

221. That since 1958 additional states have assumed criminal jurisdiction pursuant to the parameters of Public Law 280. However, North Carolina has neither sought nor obtained criminal jurisdiction over Indians on the Qualla Boundary pursuant to Public Law 280.

222. That from most all actors involved in Indian Affairs it was conceded in the mid 1960's that the "Termination" policy was an abysmal failure in nearly every single respect.

223. That in 1968 the Johnson Administration sought to replace the "Termination" policy with one of "self-determination." 114 Cong. Rec. 5394 (1968).

224. That at nearly the same time Congress began to re-establish its support for Tribes and Tribal governments when it passed the Indian Civil Rights Act. This Act sponsored by Senator Sam J. Ervin, Jr., of North Carolina ushered in the modem era of self-determination which is the policy in effect today in "Indian country". Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 78 (1968).

B. Criminal Jurisdiction

1. Criminal Jurisdiction in "Indian country"

225. That as is necessary for purposes of this Order "Indian country" was first defined in the Indian Intercourse Act of June 30, 1834, 4 Stat. 729 (1834) which was subsequently repealed. Over the changing decades the definition of what constituted Indian land was in a state of flux. The definition of "Indian country" once again appeared in 1948 when it was included in the United States Code at 18 U.S.C. §1151. As discussed hereinabove, the lands purchased by William Thomas and now held in trust by the United States for the Eastern Band of Cherokee Indians form the corpus of the Qualla Boundary.

226. That the Fairfield Inn parking lot and sidewalk where the homicide occurred is "Indian country" as defined by 18 U.S.C. §1151. That the parties as their stipulation number two agree to this fact.

227. That the federal courts have criminal jurisdiction in "Indian country" through the Major Crimes Act as enacted by Congress. 18 U.S.C.

§1153 (2013).[7]

228. That the Major Crimes Act was passed by Congress in reaction to the Supreme Court decision in Ex parte Crow Dog, 109 U.S. 556 (1883). Following the murder of Spotted Tail by Crow Dog the Supreme Court decided the federal courts lacked jurisdiction to punish crimes between Indians on reservations. In response Congress enumerated certain crimes which now comprise the Major Crimes Act. Federal courts now have jurisdiction over Indian on Indian crime when one of the crimes delineated in the Major Crimes Act is alleged.

229. That the validity of the Major Crimes Act was upheld in US v. Kagama, 118 U.S. 375 (1886) where the Supreme Court determined the passage of this legislation was a valid exercise of

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[7] 18 USCS § 1153 (2013)

§ 1153. Offenses committed within "Indian country"

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [18 USCS §§2241 et seq], incest, a felony assault under section 113 [18 USCS §113], an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title [18 USCS §661] 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.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

congressional plenary power over Indian tribes and Indians.

230. That the Assimilative Crimes Act through the General Crimes Act confers federal court jurisdiction over crimes where the defendant and victim are 'interracial.' Where the defendant is a non-Indian and the victim an Indian federal court jurisdiction exists. Donnelly v. US, 228 U.S. 243, 272 (1913). Likewise, where the defendant is an Indian and the victim a non-Indian federal court jurisdiction exists. US v. John, 587 F.2d 683, 687 (5th Cir. 1979).

231. That a state continues to enjoy jurisdiction over an Indian when he is outside of "Indian country." Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

232. That when the defendant and victim are both non-Indian jurisdiction resides in the court system of the state wherein the "Indian country" is located. US v. McBratney, 104 U.S. 621 (1881).

233. That through over two hundred years of prior judicial precedent and Congressional legislation there can be no disagreement that "[o]nce the area is determined to be "Indian country", whether the federal courts have jurisdiction under [the Major Crimes Act or the Assimilative Crimes Act] hinges on the race and/or tribal membership of the victim and defendant. Sentelle at 346.

2. Criminal Jurisdiction of North Carolina on the Qualla Boundary[8]

234. That the first exercise of criminal jurisdiction over Cherokee Indians by the State of North Carolina occurred in 1870 in State v. Ta-cha-na-tah, 64 N.C. 614 (1870). North Carolina persisted in asserting criminal jurisdiction in a long line of cases continuing with State v. Wolf, 145 N.C. 440 (1907).

235. That in 1931 in United States v. Wright, 53 F.2d 300, 307 (4th Cir. 1931) the court opined in dicta that "no act of Congress in [the Cherokees] behalf would be valid which interfered with the exercise of the police power of the state." The Wright decision seems to ignore the 1924 Congressional enactment on behalf of the Eastern Band of Cherokee. Moreover the Fourth Circuit relied on this dicta from the Wright decision in deciding United States v. Hornbuckle, 422 F.2d 391 (4th Cir. 1970). Using this questionable pronouncement from Wright and ignoring the Congressional Act of 1924, 18 U.S.C. §1153, and the long line of cases from Ex parte Crow Dog to the present, the Hornbuckle court decided that North Carolina exercised *concurrent* criminal jurisdiction over the Cherokees on the Cherokee reservation. 422 F. 2d 391 (4th Cir. 1970).

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[8] That for a more detailed and insightful, albeit dated, discussion of criminal Jurisdiction on the Qualla Boundary the undersigned would refer the reader to "Criminal Jurisdiction on the North Carolina Cherokee Indian Reservation-A Tangle of Race and History" 24 Wake Forest L. Rev. 335 (1989) by The Honorable David B. Sentelle and Melanie T. Morris.

236. That notwithstanding these Fourth Circuit decisions, the dicta expressed in Wright was correctly muted in the Supreme Court decision of United States v. John, 437 U.S. 634 (1978). The holding in John established that the creation of the Choctaw reservation, which was nearly identical to the creation of the Cherokee reservation, conferred federal jurisdiction over the Mississippi Choctaw. Subsequently the Fourth Circuit applied the John decision and drawing on the similar history shared by the Eastern Cherokee and the Mississippi Band of Choctaws determined the Qualla Boundary located in North Carolina was "Indian country." The landmark decision of U.S. v. Welch, 822 F.2d 460 (4th Cir. 1987) established the Qualla Boundary as "Indian country" thereby erasing any lingering uncertainty on this question.

237. That based upon the John and Welch cases it is clear now that North Carolina has no jurisdiction over Indian on Indian crimes covered by the Major Crimes Act. Sentelle at 634. Therefore, based upon the Welch decision prior North Carolina precedents asserting criminal jurisdiction by the state over Indians on the Qualla Boundary must be examined closely.[9]

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[9] Prior to the Welch decision, North Carolina asserted jurisdiction over Indians charged with crimes on the Qualla Boundary. Cases such as State v. Ta-cha-na-tah, 64 N.C. 614 (1870), State v. Wolf, 145 N.C. 440 (1907), State v. McAlhaney, 220 N.C. 387 (1941), and State v. Dugan, 52 N.C. App. 136 (1981), all hold that North Carolina has jurisdiction over Indians for offenses committed within the boundary of the Cherokee reservation. In light of the Fourth Circuit decision in Welch, more recent decisions by the North Carolina appellant courts in Carden v. Owle

238. That under the holding in United States v. McBratney, 104 U.S. 621 (1881) jurisdiction for crimes by one non-Indian against another non-Indian rests with the states. The decision in McBratney is commonly referred to as the McBratney rule.

239. That the McBratney rule was affirmed subsequently by the Supreme Court when it held states had jurisdiction over offenses committed on the reservation between non-Indians. Williams v. United States, 327 U.S. 711, 714 (1946).

240. That in a schematic form jurisdictional analysis is best encapsulated by Attachment "N".

III.

A. Analysis of Current Criminal Jurisdictional Law

241. That deciding who is an "Indian" has proven to be a difficult question. In fact upon closer examination when one looks to legal precedent the question quickly devolves into a multifaceted inquiry requiring examination into factual areas not normally considered in our courts.

242. That this ambiguity is forefront when on its face the Major Crimes Act does not define who is an Indian. 18 USC §1153. Likewise, the Indian Civil Rights Act does not define who is an Indian. 25 USC §1301(4).

Construction, 720 S.E.2d 825 (2012) *citing* Jackson County v. Swayney, 319 N.C. 52 (1987), sovereignty analysis, infringement on Cherokee self-governance, and the existence today of the Cherokee Tribal Court which did not exist in 1981, it seem likely these decisions now rest upon unstable footing.

243. That one of the earliest cases to address this question was US v. Rogers, 45 U.S. 567 (1846). From Rogers arose the generally accepted analysis applied today when making an inquiry into whether an individual is defined under the law as an "Indian." Beginning in 1846 through the present, the test as proscribed in Rogers asks whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both. Rogers, at 572-573.

244. That the Fourth Circuit Court of Appeals whilst not applying the Rogers test in full did address this similar issue in U.S. v. Lossiah, 537 F.2d 1250 (1976). During trial in Bryson City, North Carolina the government introduced into evidence a certificate of enrollment from the enrollment office of the Eastern Band of Cherokee Indians. The Court held that the certificate of enrollment containing the enrollment number and the blood quantum of Mr. Lossiah was adequate proof he was an Indian as required under the Major Crimes Act. Lossiah at 1251. *(See also* U.S. v. Antelope, 430 U.S. 641, 646-47 (1977), wherein the Court determined that proof a defendant is an enrolled member of a federally recognized Indian tribe is sufficient to confer federal jurisdiction under 18 U.S.C. §1153.)

245. That while not specifically mobilized by the Fourth Circuit, the Rogers test has repeatedly been used and applied in four different federal court circuits. U.S. v. Torres, 733 F.2d 449, 456 (7th Cir. 1984); U.S. v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995); U.S. v. Stymiest, 581 F.3d

759, 762 (8th Cir. 2009); U.S. v. Keys, 103 F.3d 758, 761 (9th Cir. 1996); and U.S. v. Prentiss, 273 F.3d 1277, 1280 (10th Cir. 2001).

246. That before a person is determined to be an Indian it is necessary that both prongs of the Rogers test are sufficiently answered in the affirmative.

247. That an application of this test is found in the jury instruction used by the trial court in U.S. v. Torres, 733 F.2d 449,456 (7th Cir. 1984). In this case the judge instructed the jury:

> To be considered an Indian, a person must have some degree of lndian blood, and must be recognized as an Indian. In considering whether a person is recognized as an Indian, you may consider such factors, whether a person is recognized as an Indian by an Indian tribe, or society of Indians. Whether a person is recognized as an Indian by the federal government, whether a person resides on an Indian reservation, and whether a person holds himself out as an Indian. It is not necessary that all of these factors be present, rather you as jurors must consider the totality of circumstances in determining as a factual matter whether each defendant is an Indian.

Torres, 733 F.2d at 456.

248. That the first prong of the Rogers test discusses blood quantum. But blood quantum alone is not the sole determinative factor in this inquiry. As discussed hereinabove, blood quantum while it may appear facially to be a race determinative

factor is rather one based on ancestry and as discussed in U.S. v. Antelope, 430 U.S. 641, 646 (1977), a determination derived not from a racial classification but rather a recognition of the special status afforded to a formerly sovereign people by the government of the United States.

249. That the second prong of the Rogers analysis departs from a narrow examination of an individual's relations to his family ancestry and in turn examines various factors in deciding whether the person at issue is recognized as an Indian by the tribe or the federal government. This inquiry was best delineated by Judge Porter in his opinion in St. Cloud v. U.S., 702 F.Supp. 1456 (1988).

250. That in St. Cloud four separate and distinct factors were proscribed in an insightful effort to better elucidate the second prong of the Rogers test in determining what constitutes sufficient non-racial recognition as an Indian. St.Cloud, 702 F.Supp. at 1461.

251. That the four St. Cloud factors are: 1) enrollment in a tribe; 2) government recognition through receipt of assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian. *Id.* at 1461-62.

252. That since the St. Cloud decision in 1988, courts throughout the United States have continued to use and further refine these four factors. In 2009 the Ninth Circuit Court of Appeals in U.S. v. Cruz, citing its prior decision in U.S. v. Bruce wrote

In Bruce we outlined four factors that

> govern the second prong; those four factors are, "in declining order of importance, evidence of the following: l) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life." U.S. v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005) (quoting United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995)); *accord* United States v. Ramirez, 537 F.3d 1075, 1082 (9th Cir. 2008).

U.S. v. Cruz, 554 F.3d 840, 846 (9th Cir. 2009)

253. That following the mandate established in Bruce the four factors under the St. Cloud analysis are to be considered in declining order of importance.

B. Application of Current Jurisprudence to the Case at Bar

254. That to determine whether the Defendant is Indian as defined by the Major Crimes Act, the undersigned must apply the Rogers test using the four factors under the second prong of Rogers as established in the St. Cloud decision in declining order of importance.

255. That Defendant claims he is an Indian as defined by the Major Crimes Act and accordingly criminal jurisdiction over the Defendant lies in federal court.

256. That the Eastern Band of Cherokee Indians is a federally recognized Indian Tribe.

257. That looking at the first prong under the Rogers test, Defendant is not an enrolled member of the Eastern Band of Cherokee Indians. The Defendant is also not an enrolled member of any other federally recognized Indian tribe and claims no Indian blood from any other tribe other than the Eastern Cherokee.

258. That Defendant has one parent with a blood quantum of 11/128 and tribal enrollment in a federally recognized tribe. Accordingly, Defendant would under the first prong of the Rogers be 11/256 Eastern Cherokee.

259. That the 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%.

260. That the analysis of the Court must next tum to the second prong of the Rogers test. In so doing the undersigned engages in this analysis using the four St. Cloud non-racial factors in declining order of importance.

261. That Court finds and the Defendant stipulates under the first and most important St. Cloud factor he is not an enrolled member of the Eastern Band of Cherokee or of any other federally recognized Indian tribe. Moreover, it is undisputed Defendant is neither now nor will he ever be eligible for enrollment in the Eastern Band of Cherokee having an Eastern Cherokee blood quantum of 11/256.

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

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

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

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

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

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

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

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

predecessor the CFR Court).

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

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

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

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

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

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

n. The Defendant has no tribal identification card.

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

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

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

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

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

t. The Defendant is not fluent in the Cherokee language.

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

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

263. As late as August 11, 2011 and May 7, 2012, Defendant identified himself as white/

Caucasian in North Carolina probation documents. Any attempt to attribute his actions of self-identification as an error made by his mother is unpersuasive since on these aforementioned dates the Defendant was over thirty years of age. Moreover, it must also be noted in addition to claiming at certain times to be white/Caucasian and then at other times to be Indian there is the recent and pronounced variation in his social security number. As found hereinabove, at one point in time on November 30, 2012, Defendant asserted his social security number was 261-14-2669 while at a later time that day presented that his social security number was 261-30-4623. Thus, Defendant used two completely different social security numbers on the same day. Such extraordinary variations in the identity one presents of himself is exceedingly unusual which therefore necessarily calls into question the veracity of Defendant.

264. That under the second St. Cloud factor the only evidence of government recognition of the Defendant as an Indian is the receipt of medical services at the CIH. The Federal government through the Indian Health Service provide benefits reserved only to Indians arising from the unique trust relationship with the tribes. Also, the government of the Eastern Band of Cherokee provides additional health benefits to the enrolled members. The only evidence Defendant presents of the receipt of health services available only to Indians is medical care at the CIH more than two decades ago as documented in his medi-

cal chart. While it is true that he did receive care from the CIH it is likewise true he sought acute care, this care was when he was a minor and he was taken for treatment by his mother. Since becoming an adult he has never sought further medical care from the providers in Cherokee. Moreover, the last time he sought care from the CIH was over 23 years ago.

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

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

267. That under the third St. Cloud factor the Court must examine how Defendant has benefited from his affiliation with the Eastern Band of Cherokee. The Defendant suggests he has satisfied the third factor under the St. Cloud test in that Cherokee law affords special benefits to First Descendants. To be sure the Cherokee Code as developed over time since the ratification of the 1986 Charter and Governing Document does afford special benefits and opportunities to First Descendants. Whilst it is accurate the Cherokee Code is

replete with special provisions for First Descendants in areas of real property, education, health care, inheritance, employment and access to the Tribal Court, save however for use of medical services a quarter of a century ago Defendant has not demonstrated use of any of his rights as a First Descendant of the Eastern Band of Cherokee.

268. That as previously stated the third St. Cloud factor is 'enjoyment' of the benefits of tribal affiliation. Enjoyment connotes active and affirmative use. Such is not the case with Defendant. Defendant directs the undersigned to no positive, active and confirmatory use of the special benefits afforded to First Descendants. Defendant has never 'enjoyed' these opportunities which were made available for individuals similarly situated who enjoy close family ties to the Cherokee tribe. Rather, Defendant merely presents the Cherokee Code and asks the undersigned to substitute opportunity for action. To ascribe enjoyment of benefits where none occurred would be tantamount to finding facts where none exist.

269. That under the fourth St. Cloud factor the Court must determine if Defendant is recognized socially as an Indian. When an individual holds themselves out as an Indian, participates in the Native American community and has some Indian blood, courts have under particular facts and circumstances declared such individuals who are otherwise not enrolled members of a federally recognized tribe to be "Indian" as defined by law.

U.S. v. Stymiest, 581 F.3d 759 (8th Cir. 2009). Conversely, where there exists little affiliation with a tribe and use of tribal benefits, courts have declined to identify these individuals as "Indians."U.S. v. Cruz, 554 F.3d 840 (9th Cir. 2009) and U.S. v. Maggi, 598 F.3d 1073 (9th Cir. 2010).

270. That while there are no opinions from the Fourth Circuit Court of Appeals, the opinions of the other Federal Circuits coupled with decisions from the Cherokee Tribal Court assist the undersigned in drawing important and salient distinctions which are instructive in the case under consideration. In Eastern Band v. Lambert, 2 Cher. Rep. 62 (2003), the Tribal Court was called upon to address whether the Tribal Court has jurisdiction over First Descendants. The facts of Lambert are clearly distinguishable from the situation regarding the Defendant. In Lambert, Ms. Lambert was a First Descendant just as is Mr. Nobles. Ms. Lambert presented testimony she was involved in the Cherokee community, availed herself of the opportunities open to First Descendants, and had in a civil matter "availed herself of the [Cherokee Tribal] Court's civil jurisdiction in that she is the plaintiff in the case of Sarella C. Lambert v. Calvin James, CV-99- 566..." Lambert at 63. The civil case commenced in 1999 some four years prior to the criminal action.

271. That contrary to the actions of a First Descendant described in Lambert, where Ms. Lambert lived in the Cherokee community with ties at least beginning in 1999 and

sought redress of her wrongs in the Cherokee Tribal Court, the Defendant simply has no ties to the Qualla Boundary. That under 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.

272. That Defendant has simply presented no evidence of social recognition as an Indian and participation in the Indian social life of the Qualla Boundary.

273. That of the four St. Cloud factors, Defendant has failed to establish any evidence in support of tribal enrollment, enjoyment of any tribal benefits or any recognition as an Indian by the Indian community. While there is evidence of use of benefits available only to Indians with treatment at the CIH the evidence must be viewed through the prism of receiving acute medical treatment as child where as a child he took no active involvement in the decision for treatment and with his last visit being more than 23 years ago.

274. That in stark contrast to the case of Lambert, when the unique, specific and particular facts regarding George Lee Nobles are closely scrutinized his claim of being Indian must fail. To conclude Defendant is an Indian be-

cause of his modest blood quantum, the fact he was treated at the CIH on five occasions 23 years ago and then upon his release in 2011 from prison in Florida resided and worked on or near the Qualla Boundary for 14 months as urged by the Defendant would simply be contrary to the law applicable in such cases, thereby affording to Defendant an unreasonably broad application of the Rogers and St. Cloud tests. Accordingly, the undersigned declines to adopt this expansive interpretation of the law as urged by Defendant.

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

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

277. That because Defendant brings a motion to dismiss challenging the subject matter of the State, the burden of proof is on the State to

prove beyond a reasonable doubt that the crime with which Defendant is charged occurred in North Carolina. State v. Batdorf, 293 N.C. 486, 494 (1977).

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

BASED UPON THE FOREGOING FINDINGS OF FACT THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. That the Court has jurisdiction over the subject matter and persons.
2. That the homicide committed on September 30, 2012, occurred on the Cherokee Indian reservation, also referred to as the Qualla Boundary, which is "Indian country" as defined by law.
3. That the victim, Barbra Wells Preidt, was white or Caucasian.
4. That the Defendant, George Lee Nobles, is white or Caucasian.
5. That pursuant to the rule established in US v. McBratney, 104 U.S. 621 (1881) jurisdiction for a crime committed by a white defendant upon a white victim occurring in "Indian country" is in the court of the state wherein the crime oc-

curred.

6. That jurisdiction over the Defendant, George Lee Nobles, for the trial of the offenses of murder, robbery with a dangerous weapon and possession of a firearm by a previously convicted felon which are alleged by the state of North Carolina to have occurred on September 30, 2012, is in the Superior Court Division of the North Carolina General Courts of Justice and venue is in Jackson County.

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW THE COURT HEREBY ORDERS, ADJUDGES AND DECREES:

1. That the Motion to Dismiss for lack of jurisdiction filed by Defendant, George Lee Nobles, shall be, and hereby is, **DENIED.**
2. That venue for the trial of these offense shall be in the Jackson County Superior Court.

Entered this the 26th day of November, 2013.

Signed this the 26th day of November, 2013.

/s/ Honorable Bradley B. Letts
Senior Resident Superior Court Judge
Judicial District 30B