1-12-2018

State v. George Respondent's Brief Dckt. 45196

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant,	)	**NO. 45196**
	)	
v.	)	**KOOTENAI COUNTY**
	)	**NO. CR-16-0021089**
	)	
SHAULA MARIE GEORGE,	)	**RESPONDENT'S BRIEF**
	)	
Defendant-Respondent.	)	
_____	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE CYNTHIA K.C. MEYER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Shaula Marie George asserts that the State has failed to demonstrate error in the district court's order granting her motion to dismiss. The district court held a hearing during which evidence was admitted establishing that, in nearly every regard, Ms. George is treated like an Indian,[1] through her schooling, her religion, and by her participation in descendant-only tribal benefits. While Ms. George is 3% short of being able to enroll as a member of the Coeur d'Alene Tribe, the only benefit she does not receive from the Tribe is royalties from Casino profits. As such, the district court did not err when it found Ms. George is an Indian arrested for conduct occurring on a reservation, and therefore the State does not have jurisdiction over Ms. George.

The district court properly dismissed Ms. George's case, finding it was a case within the jurisdiction of the Coeur d'Alene Tribe, because Ms. George was an Indian. The State appealed.

Statement of the Facts and Course of Proceedings

At approximately six o'clock in the afternoon on September 6, 2016, Shaula George spoke to a tribal police officer at her home in Worley, Idaho. (R., p.8.) Ms. George's home was searched pursuant to a request by her probation officer. (R., p.10.) A small amount of methamphetamine, two Oxycodone pills, a small amount of heroin, and several pipes were found at her home. (R., p.11.) The items were found in a bedroom Ms. George shared with Armando

[1] The term "Indian" is a legal term, and its meaning within federal law such as the Major Crimes Act, 18 U.S.C. § 1153, is at issue in this case. Although the term "Native American" or "American Indian" may be preferable, Ms. George will necessarily use "Indian" throughout her Respondent's Brief as that term is employed in the statutes at issue in this appeal.

Garcia.[2] (R., pp. 10-11.) Ms. George was charged with two misdemeanors under Coeur d'Alene Tribal Code for possession of a controlled substance and possession of drug paraphernalia. (R., p.8.) She was issued a tribal citation and booked on the charges. (R., p.8.) Upon learning that Ms. George was not an enrolled member of the Coeur d'Alene Tribe, the arresting tribal officer attempted to change the court of jurisdiction to Idaho State court. (R., p.8.)

Based on these facts, Ms. George was charged with violating Idaho State law for one count of possession of Oxycodone, one count of possession of methamphetamine, one count of possession of heroin, and one count of misdemeanor possession of drug paraphernalia. (R., pp.52-54.)

Ms. George filed a motion to dismiss for lack of jurisdiction because she is an Indian, and the home where the incident allegedly occurred is on "Indian land." (R., pp.57-62.) Ms. George asserted that, when Congress amended the Indian Civil Rights Act in 1990 in response to the United States Supreme Court's ruling in *Duro v. Reina*, 495 U.S. 676 (1990), it provided criminal jurisdiction for all Indians in Indian Country, not simply member Indians. (R., p.61.) Ms. George provided documentation showing that she is a descendent of an enrolled member in the Coeur d'Alene Tribe, her mother, Jean Marie Moffitt. (R., p.63.) A Letter of Descendency from the Enrollment Department of the Coeur d'Alene Tribe was attached to Ms. George's motion to dismiss. (R., p.63.)

A hearing was held and both Ms. George and her mother, Aileen George, testified regarding Ms. George's lineage and tribal involvement. (*See generally*, Tr.,)

At the hearing on Ms. George's motion to dismiss, the court took the matter under advisement but told the parties, "I do find that – and I'm not making a finding, so don't

[2] Mr. Garcia was also charged with possessing the methamphetamine and the pipe. (R., p.11.)

misconstrue my language here, but I find it very nearly offensive to say that Miss George is not an Indian." (Tr., p.53, Ls.21-24.)

In ruling on Ms. George's motion, the district court made the following findings of fact:

> Ms. George is a 24-year-old American Indian. Ms. George's biological mother, Jean Moffitt, has 14/32nds combined Coeur d'Alene, Spokane, and Colville blood, or is 44% Indian. The Letter of Descendency for Shaula Marie Moffitt (aka Shaula Marie George) from the Coeur d'Alene Tribe declares that Ms. George is not an enrolled member of the Coeur d'Alene Tribe, but is a child, grandchild, or great-grandchild of a Coeur d'Alene Tribal Member with reference to Ms. George's biological mother, Jean Marie Moffitt.
>
> Ms. George's biological father's ancestry is unknown. Ms. George's Family Ancestry Chart contains no information in her paternal line. She does not know her biological father. Ms. George's adoptive mother, Alieene George, testified that there are some errors on Ms. George's family tree when it goes back into the Spokane Tribe area. The Coeur d'Alene Tribe would need to petition the Spokane Tribe to go back into Ms. George's biological mother's heritage two or three generations to have the corrections made, but based on the evidence presented at the hearing, what is presently undisputed is that Ms. George has 14/64ths combined Coeur d'Alene, Spokane, and Colville blood, or is nearly 22% Indian. Ms. George's adoptive father, Oswald ("Ozzie") George, is an enrolled member of the Coeur d'Alene Tribe. Ms. George's adoptive mother is an enrolled member of the Flathead Tribe.
>
> Ms. George has two children and one on the way. The children are being enrolled with the Coeur d'Alene Tribe; the children's fathers are enrolled tribal members.
>
> It is undisputed that Ms. George is not an enrolled member of the Coeur d'Alene Tribe. According to Alieene George, a person must be 25% Coeur d'Alene Indian to be an enrolled member. In addition, according to counsel for the State and Defendant, the Coeur d'Alene Tribe will not prosecute crimes committed on the reservation by persons who are not enrolled members of the Tribe.
>
> Ms. George was born in a hospital in Spokane, but has lived on the Coeur d'Alene Reservation for the vast majority of her life. Ms. George lived in Coeur d'Alene at St. Vincent's transitional housing for a couple of months three years ago. Other than that, she testified that she has lived on the Coeur d'Alene Reservation. Ms. George has received medical, housing, food, educational, and other benefits from the Coeur d'Alene Tribe. Ms. George has received [ ] [ ] these [various] benefits from the time she was born and Alieene George testified that these benefits will be extended to Ms. George for the duration of her life. Alieene George testified that Ms. George qualifies for the benefits even though she is not an enrolled Coeur d'Alene tribal member because she is a descendent of a tribal

> member. Ms. George and her mother testified that Ms. George has throughout her life taken part in tribal sponsored events and activities such as the Tribe's taking tribal members to Silverwood, concerts, boxing matches, state games, and cultural events such as the Julyamsh powwows (although Ms. George explained that the Coeur d'Alene Tribe lost its unique culture to the Jesuits in the 1800s and that the annual Julyamsh event is not a true powwow).
>
> Ms. George is qualified to be an adopted enrolled Tribal member because her father is an enrolled member of the Coeur d'Alene Tribe. Alieene George further testified that when the Coeur d'Alene Casino was built in the early 1990s, the Tribe put a moratorium on tribal adoptions to limit the number of people who would qualify for royalties from Coeur d'Alene Casino profits. Apparently many tribal members who were enrolled in different tribes "decided to jump ship and transfer from one tribe into the Coeur d'Alene Tribes. So they closed the adoption enrollment." Alieene George testified that the only tribal benefit Ms. George does not receive is royalties from Coeur d'Alene Casino profits.
>
> The Court is aware from other cases involving Ms. George in which jurisdiction is not an issue that she has been employed at the Benewah Market, a grocery store located on the reservation, and that she received substance abuse treatment from Benewah Medical & Wellness Center, the Tribe's health care provider/facility.

(R., pp.103-105.[3])

The court ruled that it did not have jurisdiction over Ms. George in a thorough and comprehensive thirty-page memorandum. (R., pp.101-131.) The district court recited the history of state jurisdiction over crimes committed by Indians in Indian county, noting that "[t]he Coeur d'Alene Tribe has a fully functioning Tribal Court system and exercises criminal authority." (R., pp.106-107.) The district court analyzed *State v. Ambro*, 142 Idaho 77 (Ct. App. 2005), which held that the Coeur d'Alene Tribal Code addressed controlled substances and "clearly exercised its right to self-government in the area of controlled substances." (R., pp.111-112.)

The district court noted that the parties agreed that Ms. George's status as an Indian is key to its decision, and analyzed who is an Indian for purposes of jurisdiction using cases such

[3] The district court's citations to the record have not been reproduced for the reader's ease.

as: *United States v. Rogers*, 45 U.S. 567 (1846), *Ex parte Pero*, 99 F.2d 28 (7th Cir. 1938), *United States v. Broncheau*, 597 F.2d 1260 (9th Cir. 1978), *State v. Bonaparte*, 114 Idaho 577 (Ct. App. 1988), and *Lewis v. State*, 137 Idaho 882 (Ct. App. 2002), to determine whether Ms. George was an Indian. (R., pp.113-116.) The *Rogers* test utilized to determine who in an "Indian" for purposes of federal jurisdiction requires: (1) the person have a significant percentage of Indian blood, and (2) the person be recognized as an Indian either by the federal government or by some tribe or society of Indians. (R., p.117, quoting *Lewis*, 137 Idaho at 885.) The district court found the State's contention that "Indian tribes typically require that a person have at least 25% Indian blood to satisfy the first prong" was flawed. (R., p.120.) The court concluded that, based on the applicable case law which does not require a particular quantum of Indian blood for prong one purposes, Ms. George was an Indian. (R., p.125.)

The district court dismissed the case for lack of jurisdiction (R., pp.134-135), and the State appealed (R., pp.136-171).

ISSUE

Did the district court correctly grant Ms. George's motion to dismiss for lack of subject matter jurisdiction?

ARGUMENT

The District Court Correctly Granted Ms. George's Motion To Dismiss For Lack Of Subject Matter Jurisdiction

A. Introduction

A tribal police officer arrested Ms. George for possession of methamphetamine during a probation search at her home on the Coeur d'Alene Reservation. After the charges were re-filed in Idaho state court, Ms. George moved the district court to dismiss her case because Ms. George is an Indian and the alleged offense occurred on tribal lands. After a hearing, the district court found Ms. George was an Indian and dismissed the charges against her for lack of jurisdiction. This Court should affirm the order granting Ms. George's motion to dismiss.

B. Standard Of Review

This Court reviews a trial court's findings of fact for whether these findings are clearly erroneous. *See, e.g., Steiner v. Gilbert*, 144 Idaho 240, 243 (2007). A factual finding is clearly erroneous if it is not supported by substantial and competent evidence. *Id.* "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Fearn v. Steed*, 151 Idaho 295, 298 (2011).

The State has the burden of proof in determining jurisdiction of an accused. *State v. Ambro*, 142 Idaho 77, 79 (Ct. App. 2005). Issues involving jurisdiction are issues of law over which the appellate court has free review. *Id.*

C. The District Court Correctly Dismissed Ms. George's Case Due To Lack Of Subject Matter Jurisdiction And The State's Reliance On *Bonaparte* Is Misplaced

The State has not challenged any of the district court's factual findings in this appeal. As such, the question for this Court is whether, in light of the facts found by the district court, the district court erred in granting Ms. George's motion to dismiss. Ms. George submits that the

district court's ruling granting her motion to dismiss was amply supported both by the evidence and by governing case law, and that this Court should therefore affirm the district court.

The State encourages the court to look no further than *State v. Bonaparte* to determine Ms. George's Indian status, stating that the facts in *Bonaparte* are "indistinguishable" from the facts Ms. George brings forward. (Appellant's Brief, p.4.) The State ignores the plethora of controlling case law in order to arrive at the erroneous conclusion that Ms. George's Indian status is dependent *only* on her enrollment or lack thereof. (Appellant's Brief, pp.6-7.) The State fails to address or even acknowledge the four additional factors identified in the second prong of the *Rogers*' test. (Appellant's Brief, pp.6-7.) Such an argument ignores controlling Idaho Court of Appeals case law, namely its decision in *Lewis v. State,* 137 Idaho 882 (Ct. App. 2002).

In *Lewis*, the Idaho Court of Appeals found that there are factors in addition to tribal enrollment when deciding whether a defendant is Indian. *Id*. at 885. Specifically, courts have looked into "governmental recognition formally and informally through receipt of assistance reserved only to Indians, enjoyment of benefits of tribal affiliation, and social recognition as an Indian through residence on a reservation and participation in Indian social life." *Id*. The Court of Appeals in *Lewis* stated that even though *Bonaparte* only looked at whether the defendant was an enrolled member of a tribe, enrollment was not an absolute requirement. *Id.* Essentially, the *Lewis* court qualified the Court's 1988 decision in *Bonaparte*, by acknowledging that, while tribal enrollment is the most important indicium of recognition as an Indian, it is not an absolute requirement. *Id.* Thus, the district court in this case properly considered binding Idaho Court of Appeals precedent when it relied on the more recent *Lewis* decision instead of *Bonaparte*.

The Supreme Court of the United States has explained "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian

defendant lived on the reservation and 'maintained tribal relations with the Indians thereon.'" *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977) (quoting *Ex parte Pero*, 99 F.2d 28, 30 (7th Circ. 1938). As the Ninth Circuit explained in *United States v. Broncheau*, "[e]nrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative." *Broncheau*, 597 F.2d at 1263.

The court in *St. Cloud*, found that the defendant was an Indian even though he lacked enrollment in an active tribe because of his connection with a terminated Indian tribe. *St. Cloud v. United States*, 702 F. Supp 1456, 1461-62 (D.S.D. 1988). Although the defendant did not receive benefits reserved to Indians under a federal trust, he did receive treatment at a hospital under the federal Indian Health Services program, he benefitted from tribal programs including an employment program and an alcohol treatment and counseling program, he lived on the reservation in federal housing, he participated in tribal social events, and he identified himself as an Indian. *Id.* at 1462.

There are many examples of cases in which defendants who were not enrolled in an Indian tribe were recognized as Indian under the *Roger*'s two-prong test. *See generally, United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009) (holding defendant was an Indian as, among other things, he lived and worked on the reservation, submitted to tribal arrests, and held himself out as an Indian); *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005) (finding that defendant produced enough evidence to establish she was an Indian, even though she was not enrolled in a tribe because she participated in tribal rituals, was born and lived on an Indian reservation, her children were both enrolled members, she was treated at a tribal health and treatment center, and she had been arrested by tribal police in the past); *c.f., United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009) (holding defendant was not an Indian because not only was he not enrolled, but he did

not use any tribal services designated to him through his heritage, and did not participate in any religious ceremonies); *State v. LaPier*, 790 P.2d 983 (Mont. 1990) (finding that even though defendant enjoyed some benefits from affiliation with the tribe, he lived most of his life off tribal lands and was integrated into non-Indian society, therefore he was not a federally recognized Indian).

Ms. George's jurisdictional claim in this case involves the interplay of state and federal law with regard to certain criminal charges that occur within Indian country and that involve Indians in the commission of the offense:

> Criminal jurisdiction over Indians is divided among federal, state, and tribal governments. A determination of whether one or more of these sovereigns possesses criminal jurisdiction in a particular instance depends upon the type of offense committed, where the offense was committed, and whether either the perpetrator or the victim is an Indian.

State v. Mathews, 133 Idaho 300, 310 (1999).

The federal government, and Congress in particular, possesses plenary authority over Indian affairs, and this authority extends to crimes occurring on tribal lands. *Id*. at 311. "As a corollary to federal sovereignty it is clear that state law has no force and effect, except as granted by federal law, within the territory of an Indian tribe in matters affecting Indians." *Boyer v. Shoshone-Bannock Indian Tribes*, 92 Idaho 257, 260 (1968). "States have no jurisdiction over Indians in Indian country absent the clear consent of Congress." *State v. Major*, 111 Idaho 410, 416 (1986). Additionally, the Idaho State Constitution "expressly recognizes that the Indian lands within the boundaries of the state 'shall remain under the absolute jurisdiction and control of the congress of the United States.'" *State v. Allen*, 100 Idaho 918, 922 (1980); IDAHO CONST. Art. 21, § 19. In light of this, the State bears the burden to establish jurisdiction over an Indian in Indian country, or to establish that the tribe has consented to the State's jurisdiction. *Major*, 111

Idaho at 418. Additionally, this Court narrowly construes any statute purporting to extend state jurisdiction over Indian country. *State v. Barros*, 131 Idaho 379, 382 (1998); *State v. Ambro*, 142 Idaho 77, 81 (Ct. App. 2005).

In the exercise of its plenary authority over Indian affairs, Congress enacted two primary provisions regarding subject matter jurisdiction over crimes occurring within Indian country. *Id*. First, Congress enacted the General Crimes Act, 18 U.S.C. § 1152,[4] which extends federal jurisdiction and the application of federal criminal law over crimes committed by non-Indians against Indians in Indian country. 18 U.S.C. § 1152; *United States v. LaBuff*, 658 F.3d 873, 877 (9th Cir. 2011); *Mathews*, 133 Idaho at 311. The second provision enacted by Congress regarding the commission of criminal offenses within Indian country is the Major Crimes Act, which provides exclusive federal jurisdiction over certain enumerated offenses when those crimes are committed by an Indian within Indian country. 18 U.S.C. § 1153; *LaBuff*, 658 F.3d at 877; *Mathews*, 133 Idaho at 311.

For those offenses not governed by the Major Crimes Act, Congress further enacted Public Law 280, which permitted the states to exercise concurrent jurisdiction over Indian affairs through legislative action. *Mathews*, 133 Idaho at 311. Pursuant to this law, the State of Idaho enacted I.C. § 67-5101, which set out certain areas upon which the State assumed and accepted jurisdiction for both civil and criminal enforcement of state law. I.C. § 67-5101; *Mathews*, 133 Idaho at 311. As was noted by the Idaho Supreme Court in *Mathews*, the State of Idaho did not

[4] This statutory provision provides in pertinent part that, "[e]xcept as otherwise provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian country." *See* 18 U.S.C. § 1152.

assume jurisdiction over the offense of murder within I.C. § 67-5101. *Mathews*, 133 Idaho at 311.

Public Law 280 was subsequently replaced by 25 U.S.C. § 1321, which permitted the states to assume additional jurisdiction over criminal matters occurring within Indian country that are committed by or against Indians, but only with the consent of the particular Indian tribe occupying that territory. 25 U.S.C. § 1321; *Mathews*, 133 Idaho at 311. Similarly, Idaho adopted I.C. § 67-5102, which likewise required tribal consent for the assumption of additional state jurisdiction for criminal or civil causes of action arising out of Indian country. I.C. § 67-5102; *Mathews*, 133 Idaho at 311; *Major*, 111 Idaho at 417. Accordingly, while the State of Idaho may assume additional jurisdiction over offenses that would otherwise be within the jurisdiction of the federal court under the General Crimes Act, it can only do so through a resolution adopted by the tribal governing body in which the tribe consents to that jurisdiction. I.C. § 67-5101.

As to whether the alleged offense in this case occurred within Indian country for purposes of federal jurisdiction, there appears to be no material dispute on this issue. (*See* Appellant's Brief, p.1.) The Coeur d'Alene Reservation has already been deemed by the Idaho Supreme Court to be "Indian country" for purposes of determining whether the state or federal court has jurisdiction over a charged offense pursuant to both the General Crimes Act and the Major Crimes Act. *See State v. Ambro*, 142 Idaho 77, 89 n.1 (Ct. App. 2005); 18 U.S.C. §§ 1502, 1503; *see also* 18 U.S.C. § 1151. Accordingly, the record reflects that Ms. George's charged offense was one that occurred within Indian country, and was an offense for which the Coeur d'Alene tribe had not consented to Idaho State jurisdiction. *See Ambro*, 142 Idaho at 83 (holding that the

Coeur d'Alene Tribal Code addressed controlled substances and "clearly exercised its right to self-government in the area of controlled substances.")

Thus, the only issue before the district court was whether Ms. George is an Indian under federal law. Whether there was subject matter jurisdiction in Idaho state court for the charges against Ms. George turns upon whether she qualifies as an "Indian," as that term is used in the General Crimes Act. Neither the General Crimes Act, nor the Major Crimes Act, defines the term "Indian" as used in these statutes. *LaBuff*, 658 F.3d at 877. However, the Ninth Circuit Court of Appeals has developed a two-part test for determining whether either the victim or the defendant qualifies as an "Indian" for purposes of these statutes that is instructive for this Court. First, the individual in question must possess a "sufficient 'degree of Indian blood.'" *LaBuff*, 658 F.3d at 877 (quoting *United States v. Bruce*, 394 F.3d 1215, 1223-1224 (9th Cir. 2005)). Second, that individual must also have "tribal or federal government recognition as an Indian." *Id*.

The requirement that the individual possess a sufficient degree of "Indian blood" does not require a showing that the person in question has a majority Native American ethnic heritage. In fact, federal courts have found that this requirement is met by evidence that the person had 1/8 or 5/32 Indian blood. *LaBuff*, 658 F.3d at 877; *United States v. Bruce*, 394 F.3d 1215, 1223-1226 (9th Cir. 2005).

The second prong—the question of whether there is governmental or tribal recognition of the individual's status as an Indian—is more factually intensive. There are four general factors that have been employed by the Ninth Circuit Court of Appeals in resolving this question, although these factors are non-exclusive. *LaBuff*, 658 F.3d at 877. In declining order of importance, these factors are: (1) whether the individual has enrolled as a tribal member; (2)

government recognition, either formally or 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. *Id.*; *see also Lewis v. State*, 137 Idaho 882, 885 (Ct. App. 2002).

1. Ms. George Possesses "A Sufficient Degree Of Indian Blood"

The state concedes that Ms. George has Indian ancestry (Appellant's Brief, p.6.) The evidence shows, and the district court found, that Ms. George had at least 14/64ths Indian blood. (R., p.103.) The district court found that 14/64ths is a significant or substantial amount of Indian blood. (R., p.125.) The State has taken the position that, unless Ms. George is enrolled as a tribal member, she cannot establish that she has Indian status and, thus, that she falls under tribal jurisdiction. (Appellant's Brief, p.6.) The State relies on the Idaho Court of Appeals decision in *Bonaparte* to support its contention; however, the State's reliance is misplaced.

In analyzing whether Ms. George has a sufficient degree of Indian blood under prong one of the test, the district court found the analysis in *Bonaparte* to be "short-sighted," noting that "while enrollment is an important consideration, it is not dispositive." (R., p.127.) In concluding such, the court relied on the Ninth Circuit's analysis in *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005). (R., pp.127-128.)

To the extent the language of *Bonaparte* may be an aberration in that it is inconsistent with precedent and cases decided thereafter, it is also distinguishable in that, in addition to the lack of enrollment, the Court of Appeals found "no other substantial indicia of federal recognition of Bonaparte's Indian status," presumably because Bonaparte had absolutely no connection to the tribe at all; thus, the Court implied it was unnecessary to further examine the recognition prong. *Bonaparte*, 114 Idaho at 580. In its memorandum decision, the district court

accurately pointed out the flaws in the *Bonaparte* decision, but relied on the decision in *Lewis*, a more recent (and more well-reasoned) Court of Appeals case. (R., pp.117-130.)

There are multiple factors to be reviewed to determine whether a person is recognized as an Indian. While tribal enrollment may be the most important indicium of recognition, it certainly is not the sole indicium, and the analysis certainly does not just end when the person in question is not enrolled in the tribe. *See Lewis*, 137 Idaho 882, 885 (Ct. App. 2002); *Broncheau*, 597 F.2d 1262-63 (finding that enrollment could be an absolute requirement, but is not the only means of requirement for determining Indian status); *United States v. Bruce*, 394 F. 3d 1215, 1224 (9th Cir. 2005) (discussing evidence that courts have used to determine tribal or federal government recognition of Indian status).

The first prong is not conditioned on whether the defendant has enough blood to enroll in a specific tribe, but whether the defendant has enough to meet the requisite "degree" of Indian blood. *See St. Cloud v. United States*, 702 F. Supp. 1456, 1460 (D.S.D. 1988) (holding that the defendant's 15/32 of Indian blood was "sufficient to satisfy the first requirement of having a degree of Indian blood.") Although there is no set percentage of blood a defendant must have, some Courts have stated that under twenty-five percent Indian blood is enough to satisfy the first-prong while others have stated that just having an identified Indian parent, grandparent or great-grandparent is enough. In *United States v. Cruz*, the Ninth Circuit held that a defendant with twenty-two percent American Indian blood met the first prong. *United States v. Cruz*, 554 F.3d 840, 846 (9th Cir. 2009). In *Goforth v. State*, the Oklahoma Court of Appeals found that an appellant with "slightly less than one-quarter" Indian blood was enough to satisfy the first prong of the two-prong test. *Goforth v. State*, 644 P. 2d 114, 116 (Okla. Ct. App. 1982). In *United States v. Bruce*, the Ninth Circuit court explained that the first prong requires "ancestry living in

America before the Europeans arrived" and that "evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong." *Bruce*, 394 F. 3d 1215, 1223 (9th Cir. 2005). Courts in numerous jurisdictions have held that just under a quarter of Indian blood is enough to satisfy this prong.

The *Bruce* Court used the same analysis as the Idaho Court of Appeals did in *Lewis*. In *Lewis v. State*, the Court held that the defendant was not an Indian because the only evidence that the defendant brought forward regarding his ties to an Indian tribe was that he lived on a reservation until he was five or six, he inherited an interest in some land on the reservation, his brother and sister were enrolled members, and he attended an Indian festival as a child. *Lewis*, 137 Idaho at 885. The Court stated that these minor associations with the tribe were not enough to outweigh the evidence that after leaving the reservation, the defendant never attempted to enroll in the tribe, never participated in tribal activities save the one from his childhood, never sought federal assistance for being an Indian and was never affiliated with Indian religions. *Id.*

2. Ms. George Is Recognized As An Indian By The Coeur d'Alene Tribe

The second prong, frequently referred to as the recognition prong, requires recognition as an Indian by a Tribe or the Federal Government. *Lewis v. State*, 137 Idaho 882, 885 (Ct. App. 2002). The second-prong "probes whether the Native American has a sufficient non-racial link to a formerly sovereign people." *Bruce*, 394 F.3d at 1224 (quoting *St. Cloud*, 702 F. Supp. at 1461). The second-prong is comprised of four factors: 1) tribal enrollment; 2) governmental recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life. *Id.* If the individual is not enrolled in a

tribe, courts look at these factors separately and then weigh them to decide whether the defendant is recognized as an Indian. *See Id* and *see generally Lewis,* 137 Idaho at 885.

i. Ms. George Is Not An Enrolled Member Of The Coeur d'Alene Tribe

As to the first, and most significant, consideration, the district court found that Ms. George was not an enrolled member of the Coeur d'Alene Tribe. (R., p.103.) However, that fact is not determinative on whether she is an Indian under federal jurisdiction.

The State relies almost exclusively on *State v. Bonaparte*, stating that the facts in *Bonaparte* are "indistinguishable" from the facts Ms. George brings forward (Appellant's Brief, p.4); however, the State virtually ignores controlling case law such as *Lewis v. State,* 137 Idaho 882 (Ct. App. 2002) (examining the enrollment as just one of the four factors in the second prong of the analysis). (Appellant's Brief, pp.6-7.) Ultimately, Ms. George's Indian status is not solely dependent on her enrollment or lack thereof, as discussed in Section C, pages 8-10, of this Respondent's Brief.

ii. Ms. George Receives Assistance Reserved For Indians

The second consideration of whether there was government recognition of a person's status as an Indian in light of assistance reserved for Indians, was met in light of the record in this case. Among the exhibits provided to the district court was evidence that Ms. George had been receiving medical treatment at Benewah Medical Center. (R., p.83.) The district court found Ms. George received medical benefits from the Coeur d'Alene Tribe. (R., p.104.)

The Ninth Circuit in *LaBuff* has held that the receipt of medical services intended for tribal members and other non-member Indians is sufficient to establish the second and third factors regarding recognized status as a tribal member. *LaBuff*, 658 F.3d at 878. Accordingly,

Ms. George asserts that evidence such as her receipt of medical services through the Benewah Medical Center demonstrates government recognition of her status as an Indian through the receipt of services reserved for Indians and that she received benefits as a result of her tribal affiliation.

iii. Ms. George Receives Benefits Of Tribal Affiliation

The third consideration of whether there was government recognition of a person's status as an Indian in light of tribal affiliation, also appears to be met in light of the record in this case. The district court found that Ms. George has, throughout her life, participated in tribal sponsored events and activities such as a trip for tribal members to Silverwood, concerts, boxing matches, state games and other cultural events. (R., p.104.)

iv. Ms. George Is Socially Recognized As An Indian Where She Has Resided On A Reservation For Nearly Her Entire Life And Participates In Indian Social Life

The last of the non-exclusive factors employed by the Ninth Circuit is whether there is evidence of social recognition as an Indian through residence on a reservation and participation in Indian social life. *LaBuff*, 658 F.3d at 877. The district court found Ms. George has resided on the reservation nearly her entire life. (R., p.129.) The court found that the Tribe recognizes her as an Indian and she has received benefits from the Tribe or through the Tribe reserved for Indians including: health care, substance abuse treatment, housing assistance, job assistance, education, social benefits (such as trips to Silverwood), and food assistance. (R., p.130.) Ms. George has lived and worked on the reservation and participated in Tribal social and cultural events throughout her life. (R., p.130.)

In addition to living as an Indian her entire life, the record indicates that Ms. George was initially arrested by the Coeur d'Alene Tribal police because the police officer believed Ms. George *was* a member of the Coeur d'Alene Tribe. (R., p.8.)

v. The District Court Properly Held Ms. George Is Recognized As An Indian Where She Meets Three Of The Four Factors

The evidence contained within the record demonstrates that Ms. George is an Indian for purposes of determining subject matter jurisdiction under the General Crimes Act. Because Ms. George in an Indian, her offense occurred within Indian country, and was an offense for which the Coeur d'Alene tribe had not provided for Idaho state jurisdiction, there was no subject matter jurisdiction for her possession charge and conviction within Idaho courts. Following the Idaho Court of Appeals' decision in *Lewis*, as well as applicable Ninth Circuit decisions, the district court correctly found that Ms. George met both prongs of the *Rogers* test and therefore it did not have jurisdiction over the case. Accordingly, Ms. George asks that this Court affirm the district court's order granting her motion to dismiss.

CONCLUSION

Ms. George respectfully requests that this Court affirm the district court's Order Granting her Motion to Dismiss.

DATED this 12th day of January, 2018.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of January, 2018, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

SHAULA MARIE GEORGE
PO BOX 205
WORLEY ID 83876

CYNTHIA K C MEYER
DISTRICT COURT JUDGE
E-MAILED BRIEF

JAY LOGSDON
KOOTENAI COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

SJC/eas