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STATE v. NOBLES: CHANCE TO SETTLE NEEDLESS JURISDICTIONAL TURBULENCE

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I. Introduction

Under the Major Crimes Act (MCA)[1], federal courts have exclusive jurisdiction over several enumerated criminal offenses that occur in Indian Country and are committed by "Indians." When an individual is an enrolled member of a federally recognized tribe, "Indian" status is easily established and federal courts hold the authority to prosecute. A jurisdictional issue arises whenever courts hear cases involving individuals that fall slightly outside specified membership requirements. Although such individuals are not qualified for tribal membership, many tribal courts exercise jurisdiction over them, still considering them to be "Indian" under the MCA. Additionally, some tribes recognize "Indian" status by extending benefits to these non-members because they are close descendants of enrolled members.

Courts have long searched for the most suitable and consistent way to define "Indian" under the MCA to settle jurisdictional battles between states and the federal government. The United States Supreme Court has not specified the appropriate way to reach that definition, and it declined to rule on the issue once again after a petition for writ was filed in *State v. Nobles*, a case arising out of the North Carolina Supreme Court.[2]

Part I of this Note serves to introduce the issues surrounding the lack of a clear definition of the word "Indians" in the MCA. Part II will examine the background leading up to the current circuit split regarding this subject matter. Part III specifies the particulars of that circuit split. Part IV breaks down North Carolina's case of first impression regarding this issue. Part V discusses the writ petition that defendant George Nobles filed in his case. Finally, Part VI argues, consistent with the writ petition, that the federal jurisprudence on this issue is needlessly convoluted. The correct and most effective entity to decide whether an individual is considered "Indian" under the MCA is the respective tribe itself.

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1. Otherwise known as the Indian Major Crimes Act (MCA).
2. 838 S.E.2d 373 (N.C. 2020).

II. Background Leading to the Major Crimes Act (MCA) and the Court's Attempt to Define "Indian"

The second section of this Note offers a brief explanation of the events that ultimately produced the circuit split surrounding the issue of determining Indian status under the MCA.

A. Enactment of the MCA

In 1854, the Indian Country Crimes Act (ICCA) extended the general criminal laws of the United States to crimes committed in Indian Country.[3] However, this extension had three exceptions: (1) offenses committed by one Indian against the person or property of another Indian; (2) offenses committed by an Indian in Indian Country against anyone, if the perpetrator of that offense has already been punished by the local law of the tribe; and (3) any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be reserved to the Indian tribe.[4] In 1883, the Supreme Court held, in accordance with the ICCA, that federal courts did not have jurisdiction over crimes committed by one Indian against another Indian in Indian country.[5]

In response to this decision, Congress enacted the Major Crimes Act (MCA) in 1885.[6] The MCA extended federal jurisdiction over "any Indian" who committed any of the listed major crimes in the statute "against the person or property of another Indian or other person."[7] The MCA did not define the term "Indian," leaving courts to interpret its meaning.

B. United States v. Rogers

The test for determining who qualifies as an Indian for the purposes of the ICCA and the MCA originated in an 1845 Supreme Court decision—*United States v. Rogers*[8]—and remains controlling today. In this case, William Rogers, a white man, was charged with murdering another white man on land belonging to the Cherokee Tribe.[9] Rogers claimed that, despite being white men, he and his victim had essentially been adopted into the Tribe, were recognized as Indians by the Tribe, and both exercised all the

3. Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV. 49, 51 (2017).

4. 18 U.S.C. § 1152.

5. *See Ex parte* Crow Dog, 109 U.S. 556 (1883).

6. 18 U.S.C. § 1153.

7. *Id.*

8. 45 U.S. (4 How.) 567 (1845).

9. *Id.* at 571.

rights and privileges of Cherokee Indians.[10] Thus, Rogers asserted that the court did not have jurisdiction over his case.[11]

The predecessor statute to the ICCA withheld federal jurisdiction over crimes committed by one Indian against another Indian.[12] In interpreting this statute, the Supreme Court reasoned that "the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race."[13] Rogers was not an Indian solely because of his political affiliation to the Tribe, therefore enumerating the ancestral requirement for Indian status.[14]

Lower courts interpreted *Rogers* as creating a two-pronged test for determining whether a person is an Indian under the MCA.[15] Pursuant to this test, an "Indian" must: (1) have some quantum of Indian blood; and (2) be recognized as an Indian by a tribe or the federal government.[16] Because the first prong merely requires "some" Indian blood, "evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong."[17] The tribal or federal recognition prong "probes whether the Native American has a sufficient non-racial link to a formerly sovereign people."[18]

III. The Current Circuit Split

The first prong of the *Rogers* test is typically determined with ease, seeing that it only requires a finding that a defendant has some quantum of Indian blood. Thus, the circuit split primarily lies within the second prong of the *Rogers* test: whether a defendant has obtained tribal recognition as an Indian. Lower courts approach recognition by a tribal entity in three different ways—by directly asking whether a specific tribe recognizes the defendant as Indian, by using a four-factor analysis, and lastly through a more wholistic approach that examines those four factors, as well as any other aspects the court finds relevant.

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10. *Id.*
11. *Id.*
12. Act of June 30, 1834, ch. 161, § 25, 92 Stat. 729, 733.
13. *Rogers*, 45 U.S. at 573.
14. *Id.*
15. *See, e.g.*, United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009); United States v. Zepeda, 729 F.3d 1103, 1113 (9th Cir. 2015).
16. *See, e.g., Stymiest*, 581 F.3d at 762; *Zepeda*, 729 F.3d at 1113.
17. United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005).
18. *Id.* at 1224 (quoting St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988)).

A. Approach One

The first approach is to simply ask whether the respective tribe recognizes the defendant as Indian for purposes of their own criminal jurisdiction or in other respects such as offering benefits to certain non-member descendants.[19] The Seventh Circuit, the Utah Supreme Court, and a dissenting judge in the Ninth Circuit utilize this method.[20] For example, in *United States v. Cruz*, the defendant was classified as a "descendant."[21] This classification gave the defendant access to certain tribal benefits "including medical treatment at any Indian Health Service facility in the United States, certain educational grants, housing assistance and hunting and fishing privileges on the reservation."[22] For the dissenting Chief Judge Kozinski, the mere fact that the Tribe categorized the defendant as a "descendant" and extended those benefits to him because of that status was enough to establish tribal recognition required by the second prong of *Rogers*.[23] Ultimately, this method defers to the tribal entities' determination of tribal recognition.

B. Approach Two

The second enumerated approach courts apply in determining the second prong of the *Rogers* test uses a four-factor analysis in which the factors are considered in declining order of significance. The test arises out of *St. Cloud v. United States*, a decision handed down by the United States District Court for the District of South Dakota, which considers: "1)

19. For example, in the *Nobles* case covered in this Note, defendant Nobles' mother is an enrolled member of the Eastern Band of Cherokee Indians (EBCI), which makes Nobles what the tribe considers a "first descendant." State v. Nobles, 838 S.E.2d 373, 375 (N.C. 2020). While first descendants are not entitled to all benefits that enrolled members are, the EBCI extends certain benefits to them. *Id.* at 376. For the purposes of the first method, this would be the EBIC "recognizing" Nobles as an Indian because they are extending benefits from their tribe to him due to his status as a first descendant. *Id.*

20. *See* United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984) (stating that the test was simply "tribal or governmental recognition as an Indian," not delving into any list of factors that would establish that recognition); *see also* State v. Perenk, 858 P.2d 927, 933 (Utah 1993) (finding that defendant being formally recognized by the tribe as an Indian was enough to satisfy the second prong of *Rogers* test, not stating any additional factors considered); United States v. Cruz, 554 F.3d 840, 852 (9th Cir. 2009) (Kozinski, C.J., dissenting) (criticizing the majority's use of a four-factor test as overly convoluted and not supported by *Rogers*).

21. 554 F.3d at 840.

22. *Id.* at 852.

23. *Id.*

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."[24] Several cases in the Ninth Circuit have utilized this method through a process by which they consider numerous factual findings that help them weigh the factors and ultimately determine whether a defendant is recognized as an Indian.[25]

C. Approach Three

The final method considers the *St. Cloud* factors non-exhaustively and in no order of importance, virtually using the four-factor test as a starting point for determining recognition by a tribal entity.[26] Various courts, including the Eighth Circuit,[27] the Idaho Supreme Court,[28] and North Carolina Supreme Court,[29] utilize this method for determining the second prong of the *Rogers* test. This approach considers *any* possible factors that the court finds relevant in determining Indian status.[30]

IV. Nobles v. North Carolina

On February 28, 2020, the Supreme Court of North Carolina filed its first-ever opinion addressing the determination of Indian status under the MCA.[31] Aside from Indian status determination, the Court also decided whether that designation should be a question for the judge or the jury[32] The Court used the third approach to determining Indian status mentioned above to conclude that the defendant did not satisfy the "recognition prong" of the *Rogers* test, and opined that Indian status was to be decided by a jury, rather than the judge.

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24. 702 F. Supp. 1456, 1461 (D.S.D. 1988).

25. *See* United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005); United States v. Zepeda, 729 F.3d 1103, 1114 (9th Cir. 2015).

26. *See* United States v. Stymiest, 581 F.3d 759, 764 (8th Cir. 2009); *see also* State v. George, 422 P.3d 1142, 1146 (Idaho 2018); State v. Nobles, 838 S.E.2d 373, 380 (N.C. 2020).

27. *Stymiest*, 581 at 764.

28. *George*, 422 P.3d at 1146.

29. *Nobles*, 838 S.E.2d at 380.

30. *Id.* at 382 (also considering whether the defendant had been subjected to civil or criminal tribal jurisdiction in the past).

31. *Id.* at 373.

32. *Id.* at 377.

A. Factual and Procedural Background

On September 30, 2012, Barbara Preidt was robbed and fatally shot outside of a hotel in Jackson County, North Carolina.[33] The crime occurred "within the Qualla Boundary—land [] held in trust by the United States for the Eastern Band of Cherokee Indians (EBCI)."[34] As a result, the Cherokee Indian Police arrested the defendant, George Lee Nobles, and two others for the crime.[35] Because Nobles' co-defendants were enrolled members of the Cherokee Nation, "they were brought before an EBCI tribal magistrate for indictment proceedings."[36] However, because Nobles was not an enrolled member of the EBCI, he was brought before a county magistrate and charged in Jackson County with "first-degree murder, robbery with a dangerous weapon, and two counts of possession of a firearm by a felon."[37]

Nobles moved to dismiss the charges for lack of jurisdiction, arguing he was an Indian pursuant to the MCA and thus could not be tried in state court.[38] At the trial court's pre-trial hearing on Nobles' motion, the parties stipulated that, since Nobles' mother was an enrolled member of the EBCI, Nobles would be considered a first descendant of the Tribe.[39] Testimony offered at the hearing indicated that, while first descendants do not receive the full range of benefits that enrolled members enjoy, they are eligible for some benefits that persons not affiliated with the Tribe are not.[40] These benefits pertain to property, health care, employment, and education.[41]

The trial court heard a multitude of testimonies that aided in its ruling on the motion. Significantly, testimony revealed that, in a pre-sentence report for prison time Nobles served from 1993 to 2011, his race was listed as "white."[42] When Nobles was released from that prison stint, he listed his race as "white" on an Application for Interstate Compact Transfer.[43] Nobles' probation officers testified that, after he was released in 2011, he lived at various addresses on or near the Qualla Boundary up until his arrest

33. *Id.* at 375.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 376.
41. *Id.*
42. *Id.*
43. *Id.*

in the current case.[44] The probation officers also testified that Nobles never presented to them that he was an Indian.[45]

Nobles' mother testified that, as a child, Nobles attended both Cherokee tribal school and county public school.[46] On one Bureau of Indian Affairs enrollment application, Nobles' mother listed his "Degree Indian" as "none" and on another enrollment application she listed his tribal affiliation as "Cherokee."[47] Additional testimony was heard regarding Nobles' health care history.[48] This testimony uncovered that, as a child, portions of Nobles' medical bills for treatment at a county hospital were covered by the Tribe.[49] Nobles received care at the Cherokee Indian Hospital on five occasions as a minor.[50]

The trial court ultimately denied Nobles' motion to dismiss, finding he was not an Indian within the meaning of the MCA.[51] Nobles then filed a petition for writ of certiorari to the North Carolina Supreme Court seeking review of the trial court's order, but his writ was denied.[52] In 2016, Nobles "renewed his motion to dismiss . . . in the trial court for lack of jurisdiction and, in the alternative, moved that the [] issue relating to his Indian status [should] be submitted to the jury[.[53]] The trial court denied both motions."[54]

Nobles was subsequently tried for the crimes, convicted, and sentenced to life in prison without the possibility of parole.[55] He appealed his conviction to the North Carolina Court of Appeals, which ultimately held that he was not an Indian under the MCA and that the question of that status was not one for the jury.[56] Nobles filed a petition for discretionary review with the North Carolina Supreme Court in 2018.[57] The court accepted Nobles' petition and rendered a decision in 2020.[58]

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44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 377.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

B. Holding and Reasoning

The North Carolina Supreme Court considered whether Nobles was classified as an Indian under the MCA and whether that determination should be presented to a jury.[59] The court held that Nobles did not qualify for Indian status under the MCA.[60] It additionally held that this determination was reserved solely for a judge rather than a jury.[61]

1. Denial of Nobles' Motion to Dismiss

The court stated that there was no dispute as to the fact that the crime at issue took place in "Indian Country," nor was there a dispute that the charges against Nobles constituted major crimes under the MCA.[62] Instead, the dispute before the court was whether Nobles qualified for Indian status under the Act.[63] The court reasoned that, since the term "Indian" was not defined by the MCA, its reliance would need to fall on *Rogers*' two-pronged test.[64] The court noted that the first prong—whether a given individual has some Indian blood—was not at issue because both parties agreed that Nobles possessed an Indian blood quantum of 4.29%.[65] Therefore, only the second prong—whether the given tribe or the federal government recognizes the individual as an Indian—was up for consideration.[66]

The court relied on other courts' analyses on this issue since Nobles' case was one of first impression in North Carolina.[67] It then noted that the majority of tribunals utilize the four-factor balancing test first articulated in *St. Cloud*.[68] The factors include: "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."[69]

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59. *Id.*
60. *Id.*
61. *Id.* at 383.
62. *Id.* at 377.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 377–78.
69. *Id.* (quoting St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988)).

The court explained the current split regarding the application of the *St. Cloud* factors; some courts view the factors as exclusive and in descending order of significance while others hold that the factors should not be viewed as exhaustive nor tied to any order of importance.[70] The *Nobles* court then adopted the latter application, citing the "needed flexibility for courts in determining the inherently imprecise issue of whether an individual should be considered to be Indian."[71] Further, "relevant factors may exist beyond the four *St. Cloud* factors that bear on this issue."[72]

Before applying the *St. Cloud* factors, the court addressed Nobles' threshold argument that applying the factors was unnecessary because his first-descendant status irrefutably demonstrated tribal recognition under the second prong of *Rogers*.[73] The court rejected this argument and cited its 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."[74] Accepting Nobles' argument 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."[75]

Moreover, the court was not persuaded by Nobles' argument that the North Carolina Supreme Court was bound by the decision of the Cherokee Court in *Eastern Band of Cherokee Indians v. Lambert* on this matter.[76] The issue in *Lambert* was whether the defendant was an Indian for the purposes of EBCI tribal criminal jurisdiction.[77] Though not an enrolled member of the Tribe, the *Lambert* defendant was recognized as a first descendant.[78]

The Cherokee Court rejected the *Lambert* defendant's argument that lack of enrollment was dispositive of her Indian status, explaining that membership in a tribe is not a crucial factor in the test for determining whether a person is Indian for the purpose of criminal jurisdiction.[79] Instead, the *Lambert* court relied on the *Rogers* test and the *St. Cloud* factors, citing the benefits available to EBCI first descendants.[80] The court

70. *Id.* at 378.
71. *Id.*
72. *Id.*
73. *Id.* at 378–79.
74. *Id.*
75. *Id.* at 379.
76. *Id.* (citing E. Band of Cherokee Indians v. Lambert, 3 Cher. Rep. 62 (N.C. Cherokee Tribal Ct. 2003)).
77. *Id.* (citing *Lambert*, 3 Cher. Rep. at 62).
78. *Id.*
79. *Id.* (citing *Lambert*, 3 Cher. Rep. at 64).
80. *Id.*

in *Lambert* ruled the defendant met the definition of an Indian because she availed herself to the civil jurisdiction of the Cherokee Court under a pending lawsuit against a tribal member and because first descendants are participating members of the tribal community and treated as such by the Tribe.[81]

The Court rejected Nobles' reliance on *Lambert* for a variety of reasons. First, the court noted that it was "far from clear that the *Lambert* court intended to announce a categorial rule that all first descendants must be classified as Indians."[82] If first-descendant classification was itself enough to suffice Indian status, the court would not have sought additional evidence to make its determination of whether the defendant was subject to its jurisdiction.[83]

Secondly, the *Nobles* court concluded that, even if the Cherokee Court did intend to make such a categorial rule, the North Carolina Supreme Court was not bound by it.[84] The court noted that the Supreme Court of the EBCI has clarified that it does not consider Cherokee Court opinions "as having any precedential value since the Cherokee Court is the trial court for [the Cherokee Supreme Court]."[85]

Lastly, the Supreme Court of North Carolina rejected Nobles' reliance on *Lambert* on precedential and jurisdictional grounds.[86] A prior exercise of jurisdiction by a tribal court "is not dispositive on the issue of whether a state court possesses jurisdiction over such defendant in a particular case."[87]

a) Applying the St. Cloud *Factors*

Having rejected Nobles' initial arguments, the court applied the four *St. Cloud* factors. It also decided that it would consider any other relevant factors, if any were raised by Nobles, in making this determination. As for the first *St. Cloud* factor, enrollment in a tribe, it was an undisputed fact that Nobles was not an enrolled member of any federally recognized tribe.[88] Therefore, that element was easily settled.

81. *Id.* (citing *Lambert*, 3 Cher. Rep. at 65).
82. *Id.*
83. *Id.*
84. *Id.* at 379–80.
85. *Id.* at 380 (quoting Teesateskie v. E. Band of Cherokee Indians Minors Fund, 13 Am. Tribal Law 180, 188 (E. Cher. Sup. Ct. 2015)).
86. *Id.*
87. *Id.* (citation omitted).
88. *Id.*

The second *St. Cloud* factor, government recognition through provision of any assistance, required the *Nobles* court to decide whether Nobles was the "recipient of 'government recognition formally and informally through receipt of assistance reserved only to Indians.'"[89] The court pointed out that Nobles failed to satisfy this factor solely by offering a list of benefits available to descendants.[90] It opined that this factor of the *St. Cloud* test is concerned with the tribal benefits a defendant has actually received and not just benefits for which that individual is eligible.[91] The court made notice of the benefits that Nobles actually received, which consisted of five occurrences of free medical care that he acquired as a minor at the Cherokee Indian Hospital.[92]

In analyzing the third factor, enjoyment of benefits of tribal affiliation, the court had to determine whether Nobles "received any broader benefits from his affiliation with a tribe—apart from the receipt of government assistance."[93] The court referred to the trial court's showing that, aside from the fact that Nobles lived on or near the Qualla Boundary for the fourteen months leading up to the murder, as well as his partial attendance in the Cherokee tribal school system as a child, he enjoyed no other benefits of tribal affiliation.[94]

For the fourth and final *St. Cloud* factor, social recognition as an Indian, the court considered "whether [Nobles] received 'social recognition as an Indian through residence on a reservation and participation in Indian social life.'"[95] The court pointed to various relevant factors that other courts consider, such as whether the individual speaks a tribal language, lives on the reservation, attends school on the reservation, socializes with other Indians, and participates in tribal rituals.[96] Other courts have found that this fourth factor weighs against 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."[97] Nobles lived on or near the Qualla Boundary for about fourteen months, had a girlfriend who was an enrolled tribal member, and had two tattoos

89. *Id.* (quoting United States v. Cruz, 554 F.3d 840, 846 (9th Cir. 2009)).
90. *Id.*
91. *Id.* (citation omitted).
92. *Id.*
93. *Id.* at 380–81.
94. *Id.* at 381.
95. *Id.* (quoting United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005)).
96. *Id.*
97. *Id.*

purporting to demonstrate celebration of his Indian heritage.[98] Despite these facts, the court emphasized that the trial court revealed no findings that Nobles ever attended any cultural, community, or religious activities; that he spoke the tribal language; that he possessed a tribal ID; or that he partook in tribal politics.[99] Additionally, an active elder of the EBCI Tribe testified she had never seen Nobles at any EBCI events and on several documents Nobles identified himself as "white."[100]

(5) Other Relevant Factors

Since the court determined that it would analyze the factors non-exclusively and in no order of importance, it kept open the possibility that Nobles could point to other relevant factors that may play a role in examining the second prong of the *Rogers* test.[101] The court noted that several other courts consider the additional relevant fact of whether an individual was ever subject to tribal jurisdiction in the past.[102] Nobles, however, had never been subject to any tribal jurisdiction in the past, nor did he point the court to any additional factors that would be relevant under the second prong of the *Rogers* test.[103]

After analyzing all relevant factors under the *Rogers* test, the court concluded that Nobles was not an Indian for purposes of the MCA.[104] Therefore, the trial court did not err in denying Nobles' motion to dismiss.[105]

2. Special Jury Verdict

Next, the court moved to address Nobles' second claim that the determination of his Indian status should have been presented to the jury rather than the judge.[106] Nobles cited two of the Supreme Court of North Carolina's decisions in support of this contention: *State v. Batdorf*[107] and *State v. Rick*.[108]

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98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 381–82.
103. *Id.* at 382.
104. *Id.*
105. Id.
106. *Id.*
107. 238 S.E.2d 497 (N.C. 1977)).
108. 463 S.E.2d 182 (N.C. 1995)).

The *Nobles* court recounted that, in *Batdorf*, the defendant challenged the trial court's territorial jurisdiction and cited that there was "insufficient evidence that his crime was committed in North Carolina . . . 'so as to confer jurisdiction on the courts of [North Carolina].'"[109] In deciding *Batdorf*, the North Carolina Supreme Court reasoned that the trial court "should have instructed the jury to 'return a verdict indicating lack of jurisdiction' if the jury was not satisfied that the crime occurred in North Carolina."[110]

Similarly, in *State v. Rick*, the North Carolina Supreme Court noted that the defendant challenged the trial court's territorial jurisdiction, contending that the State did not adequately prove whether the crime took place in North Carolina.[111] Citing *Batdorf*, the *Rick* court held that the question of jurisdiction should have been submitted to the jury.[112]

In *Nobles*, the court rejected Nobles' reliance on *Batdorf* and *Rick*; unlike Nobles' case, the issue in *Batdorf* and *Rick* was the court's *territorial* jurisdiction.[113] The *Nobles* court pointed out that Nobles was "making an entirely separate argument that he was required to be prosecuted in federal court pursuant to the MCA."[114] Therefore, since Nobles' claim was not a territorial jurisdiction challenge, the court's decisions in *Batdorf* and *Rick* did not apply.[115]

To the *Nobles* court, the absence of any factual dispute relevant to the MCA analysis made it senseless to hold that a jury was required to determine a "purely legal jurisdictional issue . . . ."[116] The court illustrated this principle in *State v. Darroch*.[117] The *Darroch* defendant, a Virginia resident, hired two people to kill her husband.[118] The defendant's husband was killed in North Carolina by the hitmen.[119] On appeal, the defendant argued the North Carolina trial court lacked jurisdiction considering the murder took place in North Carolina but was arranged in another state.[120]

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109. *Nobles*, 838 S.E.2d at 382 (quoting *Batdorf*, 238 S.E.2d at 502).
110. *Id.* (quoting *Batdorf*, 238 S.E.2d at 503).
111. *Id.* (citing *Rick*, 463 S.E.2d at 186).
112. *Rick*, 463 S.E.2d at 186 (citing *Batdorf*, 238 S.E.2d at 503).
113. *Nobles*, 838 S.E.2d at 382.
114. *Id.*
115. *Id.*
116. *Id.* at 383.
117. 287 S.E.2d 856 (N.C. 1982).
118. *Nobles*, 838 S.E.2d at 383 (citing *Darroch*, 287 S.E.2d at 857) (discussing the North Carolina's Supreme Court decision in *Darroch*).
119. *Id.*
120. *Id.* (citing *Darroch*, 287 S.E.2d at 859–60).

The *Darroch* defendant cited *Batdorf* and contended that, because she raised a jurisdictional issue, it was a question of fact for the jury.[121] The *Darroch* court rejected this argument, explaining that *Batdorf* is only applicable when the facts on which the State bases its jurisdiction are in dispute.[122] The *Darroch* defendant was challenging the legal *theory* of jurisdiction rather than raising any disputes in the *facts* that the State argued supported jurisdiction.[123]

The *Nobles* court concluded that, as in *Darroch*, Nobles did not challenge the underlying facts on which the State based its jurisdiction; rather, Nobles challenged the trial court's determination that the MCA was not applicable to his case.[124] The court ultimately opined that Nobles' challenge was an "inherently legal question properly decided by the trial court rather than by the jury."[125]

3. Justice Earls' Dissent

The lone dissenter, Justice Anita Earls, believed Nobles was entitled to a special jury verdict on the issue of his "Indian" status.[126] Justice Earls asserted that, if the majority *was* correct in concluding that the question was not meant for a jury, she disagreed with its conclusion that Nobles was not an Indian under the MCA.[127]

a) Special Jury Verdict

In her dissent, Earls first attacked the majority's argument that its decisions in *Batdorf* and *Rick* were not applicable to Nobles' case.[128] As a reminder, the *Nobles* court rejected Nobles' reliance on these cases because the challenges there were to the court's *territorial* jurisdiction and, here, Nobles challenged the State's ability to prosecute him pursuant to the MCA.[129] Earls argued that, regardless of this distinction, Nobles, "like the defendants in *Batdorf* and *Rick*, '[was] contesting the very power of [the] State to try him.'"[130] Earls reminded the court that contesting this jurisdictional power was determined in *Batdorf* to be an issue presented for

121. *Id.* (citing *Darroch*, 287 S.E.2d at 866).
122. *Id.*
123. *Id.*
124. *Id.* (citing *Darroch*, 287 S.E.2d at 866).
125. *Id.*
126. *Id.* at 383–84 (Earls, J., dissenting).
127. *Id.* at 384.
128. *Id.*
129. *Id.* at 385.
130. *Id.* (quoting State v. Batdorf, 238 S.E.2d 497, 502 (N.C. 1977)).

a jury's determination; thus, it should be determined by a jury here in this case.[131] Earls then pointed out that, instead of explaining what made the challenge to territorial jurisdiction *different* from a jurisdictional challenge under the MCA, the majority erroneously alleged that the issue of Nobles' Indian status was a "purely legal" issue that should not be decided by a jury.[132] Absent any explanation of these differences by the majority, Earls' dissent asserted that the issue of Indian status under the MCA "involves fundamental questions of fact," making it a *factual* dispute for the jury alone.[133]

The dissent acknowledged that this factual determination would not be an easy one for a jury; the issue "quickly devolves into a multifaceted inquiry requiring examination into factual areas not normally considered" by the courts, and "involves difficult questions of race, including the extent to which a defendant self-identifies as an Indian . . . ."[134] Earls opined that, regardless of this difficulty, the determination was still factual, rendering it only suitable to be decided by a jury.[135] In light of this "inherently factual inquiry," as well as the court's precedent in *Batdorf* and *Rick* that jurisdictional challenges are meant for jury determination, Earls respectfully opined that the issue should be submitted to a jury and proven beyond a reasonable doubt.[136]

b) Denial of Nobles' Motion to Dismiss

For hypothetical purposes, Earls conceded that Nobles was not entitled to a special jury verdict.[137] But in light of this fact, Earls still would have concluded that the defendant was an Indian under the MCA.[138]

First, Earls addressed the majority's interpretation of *Lambert*. The majority's interpretation was this: because the parties stipulated as to Lambert's status as an EBCI first descendant but still conducted a further evidentiary hearing to make the determination of her Indian status, the logical inference was that first-descendant status alone was not enough to determine the issue.[139] Earls explained that, because the tribal court had not

131. *Id.*
132. *Id.*
133. *Id.* at 395–86.
134. *Id.* at 387.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* (citing E. Band of Cherokee Indians v. Lambert, 3 Cher. Rep. 62 (N.C. Cherokee Tribal Ct. 2003)).

previously addressed the issue of Indian status of a non-member, the correct logical inference is that the court needed additional evidence only because the issue was one of first impression.[140]

To Earls, this logical inference was particularly apparent given that nearly all factual findings from the tribal court addressed *first descendants* generally.[141] Earls declared that *Lambert* "plainly ruled that first descendants are Indians."[142] She explained that this interpretation was further fostered by the tribal court's subsequent ruling that same year in *In re Welch*, 3 Cher. Rep. 71 (N.C. Cherokee Ct. 2003), which relied on its conclusion in *Lambert* that first descendants were Indians for the purpose of criminal jurisdiction of the court.[143] Earls specifically emphasized the *Lambert* court's statement 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.'"[144]

Second, the dissent points out that, in examining the second prong of the *Rogers* test and applying the *St. Cloud* factors, the majority failed to recognize the significance of the fact that Nobles was incarcerated for nearly twenty years.[145] Justice Earls reminds the court the importance this fact holds when examining Nobles' ability to receive assistance and benefits due to tribal affiliation.[146] Moreover, Nobles' extended incarceration is significant when considering other parts of the *St. Cloud* factors, such as if Nobles participated in tribal politics.[147]

In sum, Justice Earls focused on previous tribal court decisions and the Cherokee Rules of Criminal Procedure to conclude that first defendants were considered Indians under *Rogers* and the MCA. She additionally measured the *St. Cloud* factors while keeping in mind that Nobles spent a large portion of his life incarcerated. In doing all this, Earls would have determined that Nobles had been recognized by a tribe and as an Indian under the MCA.[148]

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140. *Id.*
141. *Id.*
142. *Id.* at 388.
143. *Id.* at 388–89.
144. *Id.* at 389 (quoting CHER. R. CRIM. PROC. 6(b)(1), Cherokee RCRP Rule 6 (Westlaw)).
145. *Id.*
146. *Id.*
147. *Id.* at 389–90.
148. *Id.* at 390.

V. Nobles' Petition for Writ of Certiorari

After the North Carolina Supreme Court affirmed the court of appeals decision, Nobles petitioned the United States Supreme Court to review his case on July 27, 2020.[149] The writ petition, specifically asked the Court to answer the following questions: (1) "How does one determine whether a defendant is an Indian?" and (2) "Is Indian status a jury question?"[150] On October 5, 2020, the Supreme Court declined to review the petition.[151]

A. Reasons to Grant the Petition

Nobles' petition gave two main reasons as to why the Court should grant his writ petition. First, Nobles cited the practical problem of not having a delineated way for courts to determine Indian status.[152] Nobles offered that "a person who is an Indian in some jurisdictions (and who is thus triable only in the federal courts) is not an Indian in other jurisdictions (and is thus triable only in the state courts)."[153] Second, pertaining to the question of whether Indian status is a jury question, was Nobles' concern that the North Carolina Supreme Court veered from the conventional manner in which all other courts have considered the question, each finding that whether a defendant is an Indian *is* a factual question for the jury.[154] Thus, Nobles pled that both questions demanded an answer from the Court to settle the jurisdictional tussle.[155]

1. The Court Should Decide How to Determine Indian Status Under the MCA

Nobles' writ petition pointed to the legal silence that ultimately created this issue.[156] First to blame is the lack of any definition for the word "Indian" in the Major Crimes Act, mandating exclusive jurisdiction over Indians who commit certain crimes within Indian Country.[157] Without any

149. Petition for a Writ of Certiorari, Nobles v. State, 838 S.E.2d 373 (N.C. 2020) (No. 20-87), 2020 WL 4369698 [hereinafter Writ Petition].
150. *Id.* at i.
151. 141 S. Ct. 365 (2020).
152. Writ Petition, *supra* note 149, at 12.
153. *Id.*
154. *Id.*
155. *Id.* at 13.
156. *Id.* at 14.
157. *Id.*

statutory guidance to define "Indian," Nobles stated that lower courts are forced to rely on the guidance provided by *Rogers*.[158]

Nobles elucidated that *Rogers* has been interpreted to mean that a defendant is an Indian under the MCA "if (1) he is of Indian decent (often crudely described as having some 'Indian blood'), and (2) he is recognized as an Indian by either the federal government or a federally-recognized tribe."[159] Nobles further explained that the lower courts are in agreement on two things regarding the two-pronged test enumerated in *Rogers*: first, that no specific percentage of Indian blood is required to satisfy the first prong and, second, that one can be considered Indian without being an enrolled member of a recognized tribe.[160] Beyond these two clarifications, Nobles stated, the lower courts haven't agreed on much more.[161]

a) Three Methods Used by Lower Courts

In this section of his writ petition, Nobles described the three differing approaches in determining the second prong of the *Rogers* test used by the lower courts, mentioned previously in greater detail in Part III of this Note.[162] To briefly review, these three methods are: (1) simply asking whether the tribe recognizes the defendant as an Indian for the purposes of their own jurisdiction; (2) applying a four-factor test, in which the factors are considered in declining order of importance; and (3) considering all potential relevant factors in addition to the four-factor test in no order of importance.[163]

b) The Supreme Court of North Carolina's Decision Was Wrong

After laying out the current split for the Court, Nobles explained why the method the North Carolina Supreme Court followed was both wrong and unworkable. This portion of Nobles' writ petition was used to defend the first specified method, which asks the tribe if it recognizes a certain defendant as an Indian.

First, Nobles made the claim that the multi-factor test used in method three by many courts, and now the North Carolina Supreme Court, is "no way to make threshold decisions about which court system has jurisdiction

158. *Id.* at 15 (citing United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1845)).
159. *Id.* (citation omitted).f
160. *Id.* at 15–16.
161. *Id.* at 16.
162. *See supra* Part III.
163. *See supra* Part III.

to try a defendant."[164] According to Nobles, complicated tests like these waste time and money, focusing not on the merits of the case but on the issue of jurisdiction.[165] Nobles then demonstrated to the Court that, in this case alone, the trial court heard twelve different witnesses, examined school, medical, employment, and probation records, and became versed in many aspects of the Cherokee tribal government, "including the health care and education it provides, the property rights it administers, and its system of voting."[166] All of these considerations ultimately led to 278 numbered findings of fact aiding in the jurisdictional determination before even touching the actual case at bar.[167] To Nobles, bright lines are much more efficient than a test that considers potentially endless amounts of facts to determine which court takes the reins.[168]

Nobles then outlined why, rather than using either the multi-factor test or the four-factor test other courts employ, simply asking whether the defendant is recognized as an Indian by the tribe is the most efficient way of determining Indian status for jurisdictional purposes.[169] Nobles pointed out that tribes already make this determination when they exercise their own jurisdiction because their jurisdiction extends generally to "Indians" and not exclusively enrolled tribal members.[170] Additionally, "[j]ust as tribes have the right to define their own membership, they have the right to define whom they will recognize as 'Indian' for criminal jurisdiction purposes."[171] From this, Nobles argued that "tribes are certainly in a better position to make this determination than state or federal judges are."[172]

Nobles bolstered his argument in favor of consulting directly with a given tribe by arguing that it is consistent with the intent of Congress at the time the MCA was enacted in 1885.[173] The controlling definition of "Indian," for jurisdictional purposes, at the time of the MCA's enactment came from the Court's holding in *Rogers*, which was "extremely simple and included no 'factors' for the courts to balance."[174] The Court in *Rogers* held

164. Writ Petition, *supra* note 149, at 21.
165. *Id.* (citing Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010)).
166. *Id.*
167. *Id.*
168. *Id.* at 21–22.
169. *Id.* at 22.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*; *see* 18 U.S.C. § 1153.
174. Writ Petition, *supra* note 149, at 22.

that an Indian was a person "whom Indians themselves 'regarded as belonging to their race.'"[175]

Retaining *Rogers*' deference to the tribes is also consistent with both the *actual text* and *purpose* of the MCA. Here, Nobles reminded the Court that the MCA was enacted in direct response to *Ex parte Crow Dog*,[176] a case in which the Court ruled that federal courts lacked jurisdiction over an Indian-on-Indian murder occurring in Indian Country.[177] When enacting the MCA, Congress "used a phrase virtually identical to the [statute] the Court had interpreted in *Rogers*."[178] The statute being interpreted in *Rogers* referred to "crimes committed by one Indian against the person or property of another Indian," whereas the subsequent original wording in the MCA was "all Indians, committing against the person or property of another Indian or other person any of the following crimes."[179] Nobles argued that, "[b]y using language with an established meaning in the statute, Congress signaled its intent to retain that meaning."[180]

To show how retaining this deference to the tribes is consistent with the purpose of the MCA, Nobles reminded the Court of its reason for upholding the constitutionality of the MCA: the federal government owes a "duty of protection" to tribes from being mistreated in state court systems.[181] For this reason, "it would have made no sense to let the state courts decide who is an 'Indian.'"[182]

Additionally, Nobles offered the fact that the statute the Court was interpreting in *Rogers* still exists today, rarely amended, as the Indian Country Crimes Act, with Section 1152 proscribing intra-Indian crime.[183] Nobles presumes that the term "Indian" holds the same meaning in both the ICCA and the MCA; otherwise "it would be possible for federal law to *proscribe* an offense under [a section of the Indian Country Crimes Act] but for federal courts to lack jurisdiction to *try* that offense under [the MCA]."[184] The definition of "Indian" under section 1152 of the Indian

175. *Id.* (quoting United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1845)).
176. 109 U.S. 556 (1883).
177. Writ Petition, *supra* note 149, at 23.
178. *Id.*
179. *Id.* (quoting *Rogers*, 45 U.S. at 572 and 23 Stat. 362, 385 (1885)).
180. *Id.*
181. *Id.* at 24 (quoting United States v. Kagama, 118 U.S. 375, 384 (1886)).
182. *Id.*
183. *Id.*
184. *Id.* (emphasis added).

Country Crimes Act must then hold the same definition as "Indian" in *Rogers*, meaning someone whom the tribes themselves regard as Indian.[185]

Turning toward the instant case, Nobles argued his case was a good demonstration of Congress's intent to defer to the tribe's determination of whether a person is an Indian.[186] Nobles posited that the trial court could have simply "consulted Rule 6(b) of the Cherokee Rules of Criminal Procedure . . . which showed that the Eastern Band of Cherokee Indians classified First Descendants as Indians for criminal jurisdictional purposes."[187] Instead, the trial court engaged in what Nobles argued was a needless, lengthy factual determination to ascertain whether he was recognized by the Tribe as an Indian.[188]

Finally, Nobles claimed that the North Carolina Supreme Court grossly misinterpreted *Rogers*.[189] Specifically, the court erred in holding that deferring to the tribes would reduce the *Rogers* test to one based solely upon genetics and would undermine the purpose of the test, which, according to the court, is to determine not only blood quantum but also a defendant's other ties to the given tribe.[190] Nobles explained that "Indian status under *Rogers* extends to 'those who by the usages and customs of the Indians are regarded as belonging to their race.'"[191] From this, *Rogers* did not require *defendants* to prove their own "ties" to a tribe, like the North Carolina Court held; rather, *Rogers* merely requires that tribes "classify the defendant as an Indian, based on whatever 'usages and customs' the tribes themselves consider relevant."[192]

2. The Court Should Decide Whether Indian Status Under the MCA Is a Question for the Jury

The second question Nobles presented to the Court concerned whether he was entitled to a special jury verdict regarding his Indian status.[193] This section of the writ petition began by asserting that the North Carolina Supreme Court appeared to be the only court in the country to ever hold that Indian status under the MCA was not a jury question.[194] Nobles argued

185. *Id.*
186. *Id.* at 25.
187. *Id.*
188. *Id.*
189. *Id.* at 25–26.
190. *Id.*
191. *Id.* at 26 (quoting United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1845)).
192. *Id.*
193. *Id.* at 26–27.
194. *Id.*

that this conventional view of the issue was the correct one, considering that both prongs of the *Rogers* test are indeed questions of fact.[195]

Nobles then contended that the North Carolina Supreme Court may have been led astray because it considered this question only after deciding what *legal standard* was most appropriate for determining Indian status.[196] This is likely why the lower court found that determining this status was an inherently legal question for the judge alone.[197] Nobles pointed out that "factual questions decided by juries are always governed by legal standards."[198] Nonetheless, "[t]hat does not make them questions of law."[199] Regardless of which legal approach the Court found appropriate for determining Indian status, stated Nobles, all approaches hinge on factual determinations to ultimately decide whether a defendant is or is not recognized as an Indian.[200] Therefore, the question is only suitable for a jury.[201]

VI. Analysis

Although Nobles' petition was denied, the jurisprudence on this issue rightfully begged the Supreme Court to clarify the second prong of the *Rogers* test and declare the appropriate approach for defining "Indian" under the MCA. If this question is ever presented for review in the future, the most effective solution would be to defer to the Tribe and ask if it recognizes Nobles as an Indian. This approach is best for the purposes of consistency, conservation of litigation time and resources, and, above all, protection of tribal sovereignty.

A. Consistency Is Vital in Jurisdictional Determinations

Using either the four-factor or the multi-factor approaches to determine tribal recognition under the *Rogers* test has created nothing close to a consistent pattern.[202] These approaches have created the possibility of a

195. *Id.* at 27.
196. *Id.* at 28.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 28–29.
201. *Id.*
202. *See also* Jacqueline F. Langland, Note, *Indian Status Under the Major Crimes Act*, 15 J. GENDER RACE & JUST. 109, 136–37 (2012) (detailing how factually similar these cases were and their contradicting outcomes). *Compare* United States v. Stymiest, 581 F.3d 759 (8th Cir. 2009), *with* United States v. Cruz, 554 F.3d 840 (9th Cir. 2009) (both courts

person being Indian, for purposes of the MCA, in one court and not in another. Using an approach that simplifies and gives a bright-line answer to a jurisdictional question will promote a court's consistency and predictability.[203] Courts should ask a respective tribe if it recognizes an individual in a case as Indian rather than engage in countless findings of fact.

Under this approach, an individual will satisfy the "tribal recognition" prong of the *Rogers* test if the court plainly verifies with the claimed tribe whether it recognizes that person as Indian for tribal purposes. Deferring to the tribes will undeniably bring about the most consistent results, as many tribes recognize certain non-members as Indians for purposes of criminal jurisdiction and assistance extension.[204] Following this approach, the inquiry would stop there.

The majority of requests of tribal recognition will be easily accessible from tribal entities if the Court adopts this approach. Most importantly, these recognitions will be reliable and undeviating. The alternative, nebulous multi-factor tests undeniably hold too much potential for producing inconsistent outcomes, which is no way to declare or deny a court's power to hear a case. A person who is "Indian" in one jurisdiction, therefore only triable in federal court, should be "Indian" in another to preserve the dependability of the justice system.

B. The Alternative Approaches Waste Time and Resources

Not only will deferring to tribal recognition produce more consistent results, but it will also preserve judicial time and resources. Following the alternative approaches requires lengthy hearings, countless findings of fact, and understanding the complex ins and outs of tribal government. Under a non-tribal recognition approach, these efforts must be completed to declare jurisdictional authority while the merits of the case wait idly by.

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utilizing factor tests, having similar facts regarding Indian recognition, yet coming to opposite conclusions on defendant's Indian status).

203. *See* Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) ("[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case. Simple jurisdictional rules also promote greater predictability.") (citations omitted).

204. For example, in Nobles' case, Rule 6(b) of the Cherokee Rules of Criminal Procedure extended the tribe's criminal jurisdiction to first descendants. Writ Petition, *supra* note 149, at 25; *see* CHER. R. CRIM. PRO. 6(b), Cherokee RCRP Rule 6 (Westlaw). Additionally, the Eastern Band of Cherokee Indians held out certain tribal benefits to "first descendants." State v. Nobles, 838 S.E.2d 373, 376 (N.C. 2020). Thus, under this approach, the EBCI clearly "recognized" Nobles—a first descendant—as an Indian.

The time and resource consumption that comes with relying on multi-factor tests is highly evident when looking at Nobles' case. The *Nobles* trial court took a deep and lengthy look into Nobles' life to determine his Indian status. At this pre-trial hearing, the court made itself aware, through numerous witnesses and other offerings of evidence, of the following: all benefits Nobles was entitled to as a first descendant of the EBCI; how Nobles identified his race on various sentencing documents; his residence history; how he identified himself regarding race to his probation officers; the history of his attendance in the tribal school system; how his mother identified his race on school enrollment forms; and his receipt of Indian health services as a child.[205] The hearing ultimately "contained *hundreds* of detailed findings of fact."[206] This pre-trial determination would have been dramatically reduced if the court had used the "deferral to tribes" method in establishing tribal recognition. The inquiry would have been simplified to a single question to the EBCI of whether it recognized Nobles as an Indian for its own purposes. Deferring this determination to tribal entities will eliminate the need for courts to delve into all of this factual information and ultimately save parties time and money—resources that would then be reserved for the main purpose of the litigation at bar.

C. Deferring to Tribes Best Upholds Tribal Sovereignty

When Congress enacted the MCA, it essentially assigned jurisdictional power to the federal government for certain major crimes committed by Indians within Indian Country.[207] Although jurisdiction was undoubtedly granted to the federal government by the MCA, it is worth asking if it also gave courts the authority to decide who is "recognized" as an Indian in those cases. Nobles makes valid legal arguments as to why leaving this determination up to the tribes falls in line with the Court's decision in *Rogers*, the text of the MCA, and the purpose of the MCA.[208] Arguably more important, however, is the fact that letting federal and state courts delve into what constitutes a person "recognized" as Indian considerably chips away at tribal sovereignty.

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205. *Nobles*, 838 S.E.2d at 376.

206. *Id.* (emphasis added).

207. 19 FEDERAL PROCEDURE: LAWYERS EDITION § 46:1012 (Supp. 2021), FEDPROC § 46:1012 (Westlaw) ("Congress intended full implementation of federal criminal jurisdiction in those situations to which the Major Crimes Act extends. When the Major Crimes Act applies, jurisdiction is exclusively federal.")

208. *See* Writ Petition, *supra* note 149, at 21–26.

Certainly, if tribes have the absolute right to determine tribal membership,[209] they have the same right to define who they *recognize* as an Indian (whether for purposes of criminal jurisdiction or for the extension of benefits to certain non-members). It is inarguable that courts attempting to determine correct jurisdiction over a person claiming Indian status under the MCA have an interest in making sure that person meets the second prong of the *Rogers* test and is indeed recognized as Indian by a tribal entity. However, that recognition should be verified by the tribe itself, not federal and state judges and juries. With the alternative approaches, judges and juries in the United States are, in a very literal sense, deciding what factors make a certain individual "Indian" enough to be recognized as such. This declaration of recognition should be left to the tribe. There is no better certification of recognition as an Indian than a tribe's own determination. Therefore, this is the approach the Supreme Court should adopt if, at some point, it ever considers this issue.

VII. Conclusion

Nobles' writ petition gave the Supreme Court an opportunity to clean up the jurisdictional predicament that has been fostered by the lack of a bright-line definition for "Indian" under the MCA. Hopefully, it will reconsider reviewing this matter if another defendant was to raise the issue once more. The legal silence around this subject has created three differing approaches to determining the second prong of the *Rogers* test, meaning one person may be considered Indian in one jurisdiction and not in another. The circuit split has created critically inconsistent jurisdictional results across the United States and rightfully warrants a clarifying answer from the Supreme Court.

As Nobles argued in his petition, the Court, if is presented with the opportunity again, should adopt the approach deferring the "tribal recognition" determination to the respective tribe itself. This approach allows for more consistency, considering most tribes regularly make this determination already. It additionally allows for preservation of valuable litigation time and resources; under this approach, a single inquiry will suffice, in contrast to lengthy hearings for the determination. Most importantly, this approach best safeguards tribal sovereignty by letting tribal entities decide who they recognize as an Indian.

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209. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.").

This circuit split has long muddied the waters of federal and state jurisdictional authority over Native American peoples. *State v. Nobles* offered an overdue moment of clarity to be delivered by the Supreme Court and should have been treated as such.