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

STATE OF IDAHO, Plaintiff, vs. SHAULA MARIE GEORGE, Defendant.	)	CASE NO. CR-16-21089 MEMORANDUM DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Defendant's Motion to Dismiss for Lack of Jurisdiction came on for hearing before the Honorable Cynthia K.C. Meyer on the 13th day of April, 2017. Defendant was present and was represented by Jay Logsdon, Deputy Kootenai County Public Defender. The State was represented by Donna C. Gardner, Deputy Kootenai County Prosecuting Attorney. Two witnesses for the defense testified at the hearing, Defendant Shaula George, and her adoptive mother, Alieene George. The State did not call any witnesses of its own nor present any other evidence.

The Court, having read and considered the memoranda submitted by the parties and the documents in the file, having considered the testimony and evidence adduced at the hearing, and good cause appearing therefore, hereby enters the following Memorandum Decision and Order.

I. PERTINENT FACTUAL AND PROCEDURAL HISTORY

A. Arrest and Charges. On September 6, 2016, Ms. George was arrested by Erica Calderon, a peace officer employed by the Coeur d'Alene Tribal Police, at Ms. George's

residence located at 719 Bald Eagle Lane, Worley, Kootenai County, Idaho, located on the Coeur d'Alene Reservation, for violation of Coeur d'Alene Tribal Code section 37-2732(C)(1), possession of a controlled substance, and Code section 37-2734(A), possession of drug paraphernalia with intent to use, both of which are misdemeanors under Tribal Code. Probable Cause Affidavit in Support of Arrest ("P.C. Affidavit"), p. 1. Officer Calderon later learned George is not an enrolled member of the Coeur d'Alene Tribe and should be charged in "Kootenai County District Court" under Idaho Code § 37-2732(c)(1) for possession of controlled substance and § 37-2734A for possession of paraphernalia. *Id.*

According to the Idaho State Repository, a new case, CR 2016-17549, was filed on or about September 6, 2016, charging possession of controlled substance under Idaho Code § 37-2732(c)(1), and the case was dismissed on the motion of the prosecuting attorney's office on September 20, 2016.

On September 14, 2016, a new misdemeanor case, CR-2016-18670, was filed charging possession of drug paraphernalia under Idaho Code § 37-2734A(1).

On November 3, 2016, a new case, CR-2016-21089, was filed charging three counts of felony possession of controlled substance under Idaho Code § 37-2732(c)(1) for oxycodone, methamphetamine, and heroin, and two counts of possession of paraphernalia under Idaho Code § 37-2734A(1). The State filed a motion for joinder of CR-2016-21089 and CR-2016-18670, but wanted the cases to be consolidated rather than joined as a result of the motion for joinder. Thereafter the State filed a motion to consolidate and CR-2016-18670 was consolidated into CR-2016-21089. Defendant has pled not guilty to all charges which currently consist of the three felony possession of controlled substance charges and one count of possession of drug

paraphernalia. All of the charges emanate from the September 6, 2016, arrest of Ms. George by Officer Calderon.

B. Shaula George's blood line and family. The Court finds the following facts:

Ms. George is a 24-year-old American Indian. P.C. Affidavit Crime Report p. 1 of 2. Ms. George's biological mother, Jean Moffitt, has 14/32nds combined Coeur d'Alene, Spokane, and Colville blood, or is 44% Indian. Family Ancestry Chart of Shaula George, Exhibit B to Defendant's Motion and Memorandum to Dismiss for Lack of Jurisdiction. 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. Letter of Descendency, Exhibit A to Defendant's Motion and Memorandum to Dismiss for Lack of Jurisdiction.

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. Exhibit B to Defendant's Motion. 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.

C. Shaula George's Tribal Membership and Benefits. The Court further finds the following: 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 in 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 various of these 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 descendant 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 Mrs. 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 Tribe. 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.

II. STANDARDS FOR DECISION

The Idaho Supreme Court in *State v. Allan*, 100 Idaho 918, 607 P.2d 426 (1980), a case involving the issue of jurisdiction over an Indian for a crime committed in Indian country, stated:

> Where the jurisdiction of an accused depends upon his status [as an Indian], his status is a question of fact to be determined by the evidence, and the burden of proof is on the government to sustain the jurisdiction of the court by evidence. Under the facts as stipulated Allan is recognized racially as an Indian. Thus, if Allan is not recognized jurisdictionally as an Indian, some reason must be advanced by the state for this contention.

Id. at 920, 607 P.2d at 428 (citations omitted). The Court in *Allan* reversed and remanded with instructions to set aside the conviction and dismiss for lack of subject matter jurisdiction, holding that the state "failed to carry its burden of proof on the issue of jurisdiction." *Id*. at 921, 607 P.2d at 429.

The Court of Appeals in *Lewis v. State*, 137 Idaho 882, 55P.3d 875 (Ct. App. 2002), cited to *Allan*:

> Where jurisdiction over an accused depends on his status, the burden initially falls upon the state to provide evidence of the court's jurisdiction. *State v. Allan*, 100 Idaho 918, 920, 607 P.2d 426, 428 (1980). However, "a valid guilty plea admits all essential allegations including jurisdictional facts, thus relieving the government of the burden of making proof." *Hays v. State*, 113 Idaho 736, 740, 747 P.2d 758, 762 (Ct.App.1987), *aff'd,* 115 Idaho 315, 766 P.2d 785 (1988). Because the jurisdictional facts were admitted when Lewis entered his guilty plea, the State was relieved of the burden of proving subject matter jurisdiction in the criminal action.

Id. at 884, 55 P.3d at 877.

III. ANALYSIS AND DISCUSSION

A. State Jurisdiction over Crimes Committed by Indians in Indian Country.

Jurisdiction over crimes committed in Indian country is historically convoluted and often complicated.

In 1953, during the

> federal Indian law policy era of termination in the late 1940s and through the early 1970s, the U.S. Congress initiated a policy of terminating the federal recognition of tribal governments. As part of this termination era, federal legislation was passed delegating certain federal authority to state governments involving American Indians in Indian Country. One of the major pieces of legislation is commonly referred to as Public Law 280 which contained a criminal law component and a civil law component.

Idaho Tribal-State Court Bench Book, p. 16 (2014 ed.) ("Bench Book").

Six states, California, Alaska (then a territory), Minnesota, Oregon, Wisconsin, and Nebraska, were delegated authority over offenses committed in Indian country:

> Each of the States or Territories listed in the following table [the six states listed above] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country

> listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

18 U.S.C. § 1162(a).

In 1885, Congress had passed the Major Crimes Act, 18 U.S.C. § 1153,

> providing for federal prosecution of American Indians within Indian country committing any of the listed felony level crimes in the statute. The Major Crimes Act did not oust tribal jurisdiction, but during this time period tribal custom and laws were severely restricted by BIA [Bureau of Indian Affairs] Indian agents.
> . . .
> The MCA has been amended several times to add and reword listed felonies for federal prosecution of American Indians in Indian Country.

Bench Book, pp. 41-42. Federal criminal law was expanded with the passage of the General Crimes Act, 18 U.S.C. § 1152, commonly known as the Indian Country Crimes Act (ICCA). *Id.* at p. 42.

The Coeur d'Alene Tribe has a fully functioning Tribal Court system and exercises criminal authority. *Id.*

> With the starting point of inherent criminal jurisdiction within the tribal territory over all persons, there has been a marked narrowing and restricting of this authority with the enactment of federal statutes and U.S. Supreme Court decisions. Tribal governments have concurrent criminal jurisdiction generally with the federal government or, where delegated to state governments, with state government within Indian country.
> . . . The federal statutory limitations of tribal criminal jurisdiction are largely found in the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301, 1302. In 1990, the U.S. Congress amended 25 U.S.C. § 1301(2) to include within the definition of "powers of self-government" the following: "and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." This amendment is commonly referred to as the "*Duro* fix" and is the rare example of the U.S.

> Congress overriding a U.S. Supreme Court decision by express federal legislation to the contrary. Thus, tribal criminal jurisdiction extends to all Indians within the tribal territory.

Id. at p. 43.

As noted above, Congress enacted Public Law 280 for the "primary purpose of delegating federal criminal authority in Indian country to state governments." *Id*. at p. 45-46. Between 1953 and 1968, states other than the original six Public Law 280 states and territories were given the opportunity to seek federal delegation of criminal authority and pass state legislation that would conform with the federal law. In 1968 a tribal consent provision was added by way of the Indian Civil Rights Act, and since the consent provision was added, no tribal government has consented to state criminal jurisdiction. *Id.* p. 47.

However, in 1963, the Idaho legislature passed Idaho Code § 67-5101, Idaho's response to Public Law 280. Section 67-5101 provides as follows:

> **67-5101. State jurisdiction for civil and criminal enforcement concerning certain matters arising in Indian country.** – The state of Idaho, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280) hereby assumes and accepts jurisdiction for the civil and criminal enforcement of state laws and regulations concerning the following matters and purposes arising in Indian country located within this state, as Indian country is defined by title 18, United States Code 1151 [18 U.S.C. § 1151], and obligates and binds this state to the assumption thereof:
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> A. Compulsory school attendance
> B. Juvenile delinquency and youth rehabilitation
> C. Dependent, neglected and abused children
> D. Insanities and mental illness
> E. Public assistance
> F. Domestic relations
> G. Operation and management of motor vehicles upon highways and roads maintained by the county or state, or political subdivisions thereof.

Idaho Code § 67-5101. Public Law 280 is currently codified as 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-25 and 28 U.S.C. § 1360. The criminal jurisdiction component is found at 18 U.S.C. § 1162. "With the enactment of this state law, the seven listed categories that correspond to criminal offenses under state law apply to American Indians committing such offenses in Indian country and allow for prosecution in Idaho state courts." *Id.*

However, Idaho state courts cannot exercise jurisdiction over criminal matters outside the scope of categories listed in Idaho Code § 67-5101 if the crimes are allegedly committed by an Indian in Indian country. In *State v. Allan*, 100 Idaho 918, 607 P.2d 426 (1980), a Quinault Indian was convicted of bribing a county official, committed within the Coeur d'Alene Reservation boundaries. The stipulated facts demonstrated that defendant was of Indian descent and had substantial Indian blood, was an enrolled member of the Quinault Tribe of Indians, inherited a share in his late mother's allotment which was administered by the BIA on his behalf, and at the time of his arrest on the Coeur d'Alene Reservation, resided in Worley, Idaho, a city located on the reservation. The magistrate and district courts considered defendant a non-Indian for jurisdictional purposes and held he was subject to state prosecution. *Id.* at 920, 607 P.2d at 428. The magistrate determined that since defendant no longer resided on the Quinault Reservation, he was a non-Indian while on the Coeur d'Alene reservation and subject to state court jurisdiction. *Id.* The district court determined that the state had jurisdiction because the record showed that he was an *emancipated* Indian based on his leaving the Quinault Reservation and residing on the Coeur d'Alene Reservation. *Id.*

The Supreme Court disagreed, noting that whether an Indian was emancipated was based on a totality of the circumstances determination which neither the magistrate nor district court seemed to have made.

> The record before us shows that Allan has not severed his relations with the Quinault Tribe. As stipulated by the state, Allan is of Indian descent and substantial blood; he is an enrolled member of the Quinault Tribe of Indians; he has inherited a share of his late mother's allotment, which is being administered by the Bureau of Indian Affairs. The only indication in the record of Allan's emancipation is the fact that he resided on a reservation other than the Quinault Reservation. This fact, standing alone, is insufficient to prove emancipation. The lower court thus erred in concluding that Allan was emancipated. As a non-emancipated Indian, Allan is not subject to state prosecution.
>
> In addition, there is nothing in the record to indicate that the state proved or attempted to prove that Allan was emancipated, other than its stipulation that Allan lived off the Quinault Reservation. . . . In the absence of evidence indicating that Allan was emancipated, we hold that the state failed to carry its burden of proof on the issue of jurisdiction. We thus reverse the decision of the district court and remand with instructions to set aside the conviction and dismiss the information for lack of subject matter jurisdiction.

Id. at 921, 607 P.2d at 429 (citations omitted) (*see also* Justice McFadden's concurring opinion for additional commentary on Idaho Code § 67-5101). [1]

The Court of Appeals more recently held that the state could not exercise jurisdiction over an enrolled member of the Coeur d'Alene Tribe for possession of a controlled substance. *State v. Ambro*, 142 Idaho 77, 123 P.3d 710 (Ct. App. 2005). In that case, the defendant was driving her vehicle on the Coeur d'Alene Indian Reservation on a state-maintained highway. A

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[1] > If I accept the state's argument of inherent sovereignty over the Indians, I am hard pressed to explain the function of 67 Stat. 588 (1953) (P.L. 280), which offers to the states the opportunity to assume jurisdiction over Indian reservations in various enumerated areas. Idaho accepted this offer by enacting I.C. §§ 67-5101 to 5103 in 1963. (The state did not there assert jurisdiction over the offense with which Allan is here charged). If the state already possessed inherent jurisdiction, why was it necessary for it to enact the sections above mentioned? The answer is that the inherent jurisdiction did not exist. As a leading commentator on Indian law puts it, "(s)tate law does not apply to Indian affairs except so far as, and to the extent that, the United States gives or has given its consent." Cohen, Federal Indian Law 501 (1966). . . . Thus, absent Congressional or treaty provisions to the contrary, jurisdiction over matters arising on Indian reservations remains with the tribes.
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> *Id*. at 922, 607 P.2d at 430 (McFadden, J., concurring).

tribal officer stopped her for a traffic infraction and a county sheriff then arrested her on an outstanding bench warrant for an unrelated case. Following her arrest, tribal and county officers obtained a search warrant for Ambro's home located on the reservation and found drugs and paraphernalia. The state charged her with possession of marijuana and methamphetamine and drug paraphernalia. The state then amended the information dismissing the original charges and charged her with possession of methamphetamine, stating that it intended to prove that at the time of her arrest on a state highway, she was in possession of methamphetamine. *Id*. at 79, 123 P.3d at 712.

The Court of Appeals characterized the issue as whether the state had authority to prosecute an Indian for possession of a controlled substance in Indian country, while in a vehicle operated on a state highway. *Id*. at 80, 123 P.3d at 713. The Court noted that the district court concluded that Idaho Code § 67-5101(G) provided the state jurisdiction to prosecute defendant because she was in possession of the drug while driving a vehicle on a state maintained highway. Defendant argued that because the alleged offense took place on the reservation and had nothing to do with the operation or management of motor vehicles, the state lacked jurisdiction. *Id.*

According to the Court of Appeals, analyzing the state's assumption of jurisdiction in Indian country involves mindfulness of Congress's "plenary authority over Indian affairs."

> There are two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members—the exercise of state authority may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them or it may be preempted by federal law. The two barriers are related because the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress.

Id. at 80-81, 123 P.3d at 713-14 (citations omitted).

The Court further observed that

> [t]he law is well established that this Court is required to narrowly construe any statutes extending state jurisdiction over Indian country. Such narrow construction is necessary so as to minimize erosion of tribal sovereignty. When addressing issues of state jurisdiction in Indian country, we are guided by the canon of construction that state and federal legislation passed for the benefit of Indians is to be construed in the Indians' favor. Any ambiguous provisions in laws involving Indians must be interpreted to the Indians' benefit.

Id. at 81, 123 P.3d at 714 (citations omitted).

The Court rejected the notion that Idaho Code § 67-5101(G) was broad enough to encompass possession of a controlled substance, pointing out that crimes such as leaving the scene of an accident or DUIs necessarily involve motor vehicles. By contrast, the statute making possession of a controlled substance illegal does not reference motor vehicles.

> The possession statute at issue has no connection to the "operation and management" of motor vehicles. Because Section 67-5101(G) refers to the enforcement of "state laws" concerning the "operation and management of motor vehicles," we must look to the law the state is seeking to enforce and not to the facts of an individual case when determining whether a particular offense falls within the purview of that section.
> . . . We conclude that Section 67-5101(G)'s plain language is not broad enough to encompass enforcement of controlled substance laws that do not involve the operation or management of motor vehicles as an element of the offense.

Id. at 82, 123 P.3d at 715.

Finally, the Court observed that the Coeur d'Alene Tribal Code addressed controlled substances, adopted the Uniform Controlled Substance Act, Idaho Code §§ 37-2701 to -2751 for the purpose of defining drug offenses, and set forth maximum sentences for offenses contained in the act. "Therefore, the Coeur d'Alene Tribe has clearly exercised its right to self-government in the area of controlled substances." *Id*. at 83, 123 P.3d at 716. The Court vacated Ambro's judgment of conviction. *Id.*

B. Who is an Indian for Purposes of Jurisdiction.

The point of agreement between the parties in this case is that Ms. George's status as an Indian is key to the Court's decision. In fact, it is the only issue argued by the parties. The State did not present evidence at the hearing on the Motion to Dismiss other than by cross examining the defense witnesses, Ms. George and her mother.

The State contends that Ms. George is a non-Indian for purposes of this jurisdictional analysis, as she is not an enrolled member of the Coeur d'Alene Tribe. The State also essentially contends that because the Coeur d'Alene Tribe declines to prosecute non-enrolled tribal members, this Court has subject matter jurisdiction and must prosecute Ms. George. The defense contends that Ms. George is indisputably an Indian from a racial standpoint, and the Court need go no further in analyzing whether Ms. George qualifies jurisdictionally as an Indian. Both parties' positions fall short of a full jurisdictional analysis.

The case of *United States v. Rogers*, 45 U.S. 567, 11 L. Ed. 1105 (1846), involved an indictment against William Rogers for the murder of Jacob Nicholson. The crime was committed in Indian country west of the state of Arkansas. *Id.* at 567. The defendant claimed that the United States did not have jurisdiction because, although he was a white man and a citizen of the United States, as an adult, he voluntarily moved to Indian country, incorporated himself with the Cherokee Tribe, married a Cherokee woman in 1836 and lived with her until her death in 1843, and produced with her several children all living in the Cherokee nation. *Id.* at 567-68. Defendant claimed that the Tribe treated, recognized, and adopted him as an Indian and that he exercised all rights and privileges of a Cherokee Indian. Defendant further claimed that Mr. Nicholson, another white man, was also treated, recognized, adopted as an Indian and had married a Cherokee woman. *Id*. at 568.

The Court noted that Congress had the jurisdiction to punish any offense committed by an Indian or non-Indian within the territorial limits of the United States unless the defendant came within the exception to the law at issue providing that the law would not apply to crimes committed by one Indian against the person or property of another Indian. *Id*. at 572. The Court held:

> And we think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, --of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.

Id. at 572-73.

An argument was made that a particular treaty made with the Cherokees should have some influence, but the Court determined that the treaty did not conflict with the law as construed by the Court. The Court concluded:

> Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress.

Id. at 573.

Thus, under *Rogers*, it was clear that to qualify as an Indian, a person must racially be an Indian.

Many years later, in *Ex parte Pero*, 99 F.2d 28 (7th Cir. 1938), *cert. denied Lee v. Pero*, 306 U.S. 643 (1939) (cited with approval by *State v. Allan*, 100 Idaho 918, 607 P.2d 426 (1980)

(McFadden, J., concurring)), the Seventh Circuit Court of Appeals determined whether Pero and Moore were Indians for jurisdictional purposes. Pero and Moore had been convicted in Wisconsin state court of murder. The state contended Moore was not an Indian for jurisdictional purposes because he had not been enrolled with any tribe. His mother was a full blood and his father was a half blood Indian. The family, including Moore, lived on the reservation and were known to other Indians as Chippewa Indians. *Id*. at 30.

The Court noted that the federal statute giving federal courts exclusive jurisdiction over the crime when committed by an Indian on an Indian reservation (18 U.S.C. § 548) did not define "Indian" for the purposes of the act. The Court discussed *United States v. Rogers*, 45 U.S. 567, 11 L. Ed. 1105 (1846), which required that for one to be considered an Indian, one had to be regarded racially as an Indian. The *Pero* Court discussed other cases in which persons of varying degrees of Indian blood from one-half to one-eighth were of "sufficient Indian blood . . . that they were Indians . . . ." *Pero*, 99 F.2d at 30-31. The Court held that Moore was an Indian under three tests: (1) preponderance of blood; (2) habits of the person, and (3) substantial amount of Indian blood plus a racial status in fact as an Indian. *Id*. at 31.

> The lack of enrollment in the case of Moore is not determinative of status. Only Indians are entitled to be enrolled for the purpose of receiving allotment and *the fact of enrollment would be evidence that the enrollee is an Indian. But the refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian.* Moore's mother failed to be enrolled as a St. Croix Indian because she was too young.—not because she was not an Indian. She failed to be placed upon the Bad River Reservation rolls because at the time the roll was made her mother was away. And when Moore's mother sought to have him enrolled on the Bad River Reservation rolls the enrolling officer refused to enroll him because 'her children belonged to the St. Croix Lost Band.' Obviously a refusal of the enrolling agent to enroll Moore on the ground that he belonged to the 'St. Croix Lost Band' cannot be

> taken as evidence that Moore is not an Indian. On the contrary it is evidence that he is an Indian.

Id. at 31-32 (emphasis added).

In a federal case emanating from Idaho, *U.S. v. Broncheau*, 597 F.2d 1260 (9th Cir.), *cert. denied* 444 U.S. 859, 62 L. Ed.2d 80 (1979), the defendant contended that the United States did not have jurisdiction over him because he was an Indian and the alleged crime was committed on the Nez Perce reservation in Idaho. He moved to dismiss the indictment on the grounds that tribal courts had exclusive jurisdiction over the commission of crimes by Indians on Indian reservations. *Id.* at 1262. He claimed that the indictment was insufficient because it did not claim that he was an *enrolled* Indian in the Nez Perce tribe. The Court rejected his arguments. Regarding the enrollment argument, the Court stated:

> Moreover, although an allegation of enrollment may be sufficient for purposes of alleging federal jurisdiction, enrollment has not yet been held to be an absolute requirement of federal jurisdiction. Nor should it be. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.

Id. at 1262-63 (citations omitted).

The defendant in *Broncheau* also argued that the statute at issue was impermissibly vague as it did not define "Indian." The Court rejected that notion and cited to the *Rogers* decision:

> Unlike the term "Indian country," which has been defined in 18 U.S.C. § 1151, the term "Indian" has not been statutorily defined but instead has been judicially explicated over the years. The test, first suggested in United States v. Rogers, 45 U.S. 567, 11 L.Ed. 1105 (1845), and generally followed by the courts, considers (1) the degree of Indian blood; and (2) tribal or governmental recognition as an Indian.

Id. at 1263.

State v. Bonaparte, 114 Idaho 577, 759 P.2d 83 (Ct. App. 1988), involved the question of whether the defendant was an Indian. Although the Court mentioned the two-element test suggested by *Rogers*, the Court determined that it need not decide whether Bonaparte's 15/64ths degree of Indian blood was "significant" because the second element of the test, recognition by the federal government or a tribe as an Indian, was not met due to Bonaparte's not being an enrolled member of any tribe. The Court distinguished *Broncheau. See id.* at 579-80, 759 P.2d at 85-86.

More recently, the Court of Appeals considered the issue in *Lewis v. State*, 137 Idaho 882, 55 P.3d 875 (Ct. App. 2002), an appeal of denial of a petition for post-conviction relief, the Court cited to *Broncheau* and *Bonaparte* in discussing the term "Indian."

> The term "Indian" is not statutorily defined for purposes of federal criminal jurisdiction under 18 U.S.C. § 1153, but as we noted in *State v. Bonaparte,* 114 Idaho 577, 578, 759 P.2d 83, 84 (Ct.App. 1988), courts have developed a two-part test for this purpose. The test requires that: (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. *Id.* at 579, 759 P.2d at 85.

Id. at 885, 55 P.3d at 878.

In that case, the parties agreed Lewis had a significant percentage of Indian blood as his mother was full-blooded Indian. Regarding the second prong, there was no contention that Lewis was recognized as an Indian by a federal agency; thus the determination turned on whether "he has been recognized as an Indian by a tribe or society of Indians." *Id.* The Court conceded that enrollment in a tribe is not an absolute requirement, despite the holding in *Bonaparte.*

> In *Bonaparte,* this Court held that the defendant did not satisfy the recognition prong of the test because he was not an enrolled member of any tribe and was not even eligible to become a

> member of the tribe with which he claimed affiliation. *Id.* at 579-80, 759 P.2d at 85-86. Lewis contends, however, that enrollment in a tribe is not an absolute requirement for recognition as an Indian. Lewis is correct in his assertion that courts have looked to factors in addition to tribal enrollment, including governmental recognition formally and informally through receipt of assistance reserved only to Indians, enjoyment of the benefits of tribal affiliation, and social recognition as an Indian through residence on a reservation and participation in Indian social life. *See, e.g., United States v. Lawrence,* 51 F.3d 150, 152 (8th Cir.1995); *Daniels,* 16 P.3d at 654. Nevertheless, as the *Lawrence* and *Daniels* decisions note, of these factors tribal enrollment is the most important indicium of recognition as an Indian.

Id.

However, the Court held that the district court's finding that Lewis did not meet his burden of proof on the issue[2] was sustained on the record. Lewis' proof on the second element was the following: he had lived on the Fort Hall Indian Reservation until he was five or six years old when his parents divorced and he moved to Idaho Falls to live with his father, his brother and sister were enrolled members of the Shoshone-Bannock Tribe, he held a one-third interest in real property on the reservation that he and his siblings inherited from a parent, and he attended a single Shoshone-Bannock Indian festival as a child. "As the district court held, these minor contacts with the reservation and tribes are far outweighed by the countervailing evidence that Lewis had never sought nor expressed interest in tribal enrollment until after his conviction in the underlying criminal case." *Id*. He was never employed on the reservation, did not receive assistance due to his status as an Indian, and was not associated with Indian religion. *Id.*

C. Application of Law to Facts of This Case.

Against this backdrop, the Court must determine whether it has subject matter

[2] The Court held that Lewis had the burden of proof on this issue because his unconditional guilty plea operated to admit all essential allegations including jurisdictional facts, thus relieving the state of the burden of proof. As a petitioner for post-conviction relief, Lewis had the burden of proving the allegations on which his petition was based. *Id*. at 884, 55 P.2d at 877.

jurisdiction in this case. This turns on whether Ms. George has some Indian blood and whether she is recognized by the federal government or a tribe or society of Indians as an Indian.

1. *Whether Ms. George has Some Indian Blood.* It is undisputed that Ms. George has 22% Indian blood. There is some question whether she has a greater percentage of Indian blood based both on her biological father's ancestry and any errors in her maternal Family Ancestry chart. In *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005), the Court noted that the first prong requires only "some" Indian blood:

> The first prong requires ancestry living in America before the Europeans arrived, but this fact is obviously rarely provable as such. *See* CANBY, *supra*, at 9. *Because the general requirement is only of "some" blood, evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong*. *Id.*

Id. at 1223 (citing William C. Canby, Jr., American Indian Law in a Nutshell 133 (2004) (emphasis added)).

With respect to the first prong requiring some Indian blood, the State argues that Ms. George is not an Indian. *See* State's Opposition to Defendant's Motion to Dismiss for Lack of Jurisdiction, p. 3, 4:

> Indian Tribes generally require that a person have a least a quarter of Indian blood to satisfy this [first] prong [regarding degree of Indian blood]. *See e.g. St. Cloud v. United States*, 702 F. Supp. 1456, 1460 (D.S.D. 1988) (Yankton Sioux required one quarter of Indian blood); *Goforth v. State*, 1982 OK CR 48, 644 P.2d 114, 116 (1982) (Cherokee tribe required more than one quarter of Indian blood for membership purposes); *Vezina v. United States*, 245 F. 411 (8th Cir. 1917) (women ¼ to 3/8 Chippewa Indian held to be Indian); *Sully v. United States*, 195 F. 113 (8th Cir. 1912) (1/8 Indian blood held sufficient to be Indian); *Makah Indian Tribe v. Clallam County*, 73 Wash.2d 677, 440 P.2d 442 (1968) (1/4 Makah blood sufficient to satisfy first prong of Rogers test). *Cf. United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005) (requiring 1/8 Indian blood). In *Bonaparte*, the Nez Perce required a one-quarter degree of Indian blood for enrollment,

> and the court held that because the defendant possessed a combined 15/64ths degree of Indian blood, he did not qualify as an Indian. *State v. Bonaparte*, 114 Idaho 577, 579, 759 P.2d 83, 85 (Ct. App. 1988).
>
> The defense submitted a letter of decadency [sic] that shows the Defendant has 14/64 Indian blood. That is less Indian blood that [sic] what the defendant in *Bonaparte* had and significantly less than one quarter -- .21875 to be specific. To be a member of the Coeur d'Alene tribe, one must have both ¼ (.25) Indian blood and at least one parent must be Coeur d'Alene Indian [See *blog.nmai.si.edu/main/2014/01/meet-native-america-james-allan.html.*] The defense fails to prove the first prong of the test, therefore making it clear that she is not an "Indian" for purposes of tribal jurisdiction.

State's Opposition, p. 3. The foregoing is the State's entire written argument on the first prong of the status test, but the errors in the analysis are manifest.

The State, not the Defense, has the burden of proving the Defendant's status. *State v. Allan*, 100 Idaho 918, 920, 607 P.2d 426, 428 (1980); *Lewis v. State*, 137 Idaho 882, 884, 55 P.3d 875, 877 (Ct. App. 2002). The State put on no evidence during the hearing on Defendant's Motion to Dismiss for Lack of Jurisdiction. The State has failed to bear its burden of proving that Ms. George is not an Indian. The State's claim in the last sentence of the quoted material, that the Defense "fails to prove the first prong of the test," is therefore incorrect in its implied assertion that the Defendant has the burden of proof.

In addition, the State's premise that Indian tribes typically require that a person have at least 25% Indian blood to satisfy the first prong is flawed for several reasons. The first reason is that tribal requirements of a certain percentage of Indian blood usually go to enrollment as a tribal member. Tribal enrollment is a second prong consideration. Whether a person is jurisdictionally an Indian is rooted in legal analysis and is only partly based on tribal recognition, and when it is based on tribal recognition, it is a prong two issue. The second reason the premise

is flawed is that the case law consistently requires some degree or quantum of Indian blood and that degree or quantum is often described as significant or substantial or is not described at all.

Finally, the State does not seem to have carefully analyzed the cases it relied on.[3] For example, the State claims that *Goforth v. State*, 1982 OK CR 48, 644 P.2d 114, 116 (1982), stands for the proposition that the Cherokee tribe required more than one quarter of Indian blood for membership purposes. In fact, *Goforth* did not discuss what the Cherokee tribe required for membership (and even if it did, that is a prong two issue). Virtually the entire discussion of Goforth's status as an Indian is contained in the following passage:

> Two elements must be satisfied before it can be found that the appellant is an Indian under federal law. Initially, it must appear that *he has a significant percentage of Indian blood*. Secondly, the appellant must be recognized as an Indian either by the federal government or by some tribe or society of Indians.
>
> In the instant case, the appellant failed to establish his status as an Indian under federal law. *The first element of this two-prong test was **satisfied** by the testimony of the appellant's parents to the effect that the appellant was **slightly less** than one-quarter Cherokee Indian.* The record is devoid, however, of any evidence tending to show that the appellant was recognized as an Indian. Absent such recognition, we cannot hold that the appellant is an Indian under federal law, since such a determination at this point would allow the appellant to assert Indian heritage only when necessary to evade a state criminal action.

Goforth, 644 P.2d at 116 (citations omitted) (emphasis added).

[3] The State apparently borrowed its string citation from *St. Cloud*, 702 F. Supp. at 1460-61, and in fairness, the *St. Cloud* Court did not use its parenthetical descriptions as accurately as it should have. And the string citation may not have originated with *St. Cloud*, as it is found in some form or another in several other cases as well. Nevertheless, a reading of the cases reveals that they do not stand for the proposition that generally speaking, Indian Tribes require at least one quarter Indian blood for enrollment. The cases are much more complex and nuanced than that and often turn on whether the person at issue has sufficient ties with a tribe to be considered an Indian, regardless of the person's quantum of Indian blood.

The State's description of *St. Cloud v. U.S.*, 702 F. Supp. 1456 (1988), is bewildering. The Court was unable to detect in the written decision the premise that the Yankton Sioux required one quarter of Indian blood as maintained by the State in the above-quoted section of the State's brief. St. Cloud was a nearly full-blooded Indian (15/32nds or 47% Yankton Sioux and 7/16ths or 44% Ponca). His father was a member of the Yankton Sioux Tribe and his mother a member of the Ponca Tribe. As a young child, St. Cloud was enrolled as a Ponca tribal member. However, in 1962, Congress passed legislation to terminate the Ponca Tribe and assets were distributed to Ponca Tribe members including St. Cloud. St. Cloud moved to the Lower Brule Sioux Indian Reservation, married a member of the Lower Brule Sioux Tribe and had several children who were tribal members. He lived on the reservation for several years. During that time, he applied for enrollment in the Yankton Sioux Tribe which was rejected because of a tribal constitutional provision prohibiting him from becoming a member due to his enrollment in a terminated tribe and receipt of assets from a tribal judgment fund upon the termination. Regarding his degree of Indian blood, the Court stated: "As a virtually full-blooded Native American, St. Cloud obviously is ethnically an Indian." *Id*. at 1458.

Regarding the second prong of the status analysis, the Court determined that enrollment in a tribe was not determinative of whether St. Cloud was an Indian, that the government considered him a terminated Indian, that he enjoyed benefits of tribal affiliation, that he was socially recognized as an Indian, identified as an Indian, and was not integrated into non-Indian society, and that under the *Rogers* analysis, *St. Cloud was an Indian*. *Id*. at 1461-62. "Generally, an ethnic Indian with ties to a tribe like St. Cloud comes within the group of individuals to whom the Government bears a special fiduciary responsibility." *Id*. at 1462.

However, following an exhaustive analysis of the effect of the Ponca termination, the Court concluded:

> St. Cloud, due to his ties to a recognized Indian tribe, normally would qualify as an Indian subject to federal criminal jurisdiction. However, because St. Cloud was an enrolled member of the Ponca tribe at termination, the Ponca termination statute ended the federal trust relationship with St. Cloud and explicitly exposed St. Cloud to state law as is any other state citizen. Consequently, this Court lacked subject matter jurisdiction to convict St. Cloud since both he and his victim are non-Indians under the law. This Court therefore must grant St. Cloud's writ under 28 U.S.C. § 2255 and set aside this Court's prior rulings.

Id. at 1466.

The *St. Cloud* case does not say that the Yankton Sioux required one quarter Indian blood. In fact, the *St. Cloud* Court, regarding the degree of Indian blood for prong one of the analysis, does not give a percentage (or even a description such as "substantial" or "significant") of what is required: "Even assuming away St. Cloud's Ponca heritage, St. Cloud's 15/32 of Yankton Sioux blood is sufficient to satisfy the first requirement of *having a degree* of Indian blood." Id. at 1460 (emphasis added).

In addition, given the unique circumstances in *St. Cloud* consisting of St. Cloud's having nearly 100% Indian blood, the Court's recognition that enrollment, while important, was not controlling in that case, the Court's determination that aside from the Ponca termination, St. Cloud was jurisdictionally an Indian, and his enrollment in a terminated tribe, this Court is at a loss to understand why the State relies on *St. Cloud* in support of any aspect of its argument.

The citation to *Vezina v. United States*, 245 F. 411 (8th Cir. 1917), is also misplaced. This case involved whether an elderly woman, Mrs. Vezina, was entitled to an allotment of land. The case discussed Mrs. Vezina's maternal family ancestry (her father was a French-Canadian trapper) and mentioned that a witness had said that her mother was "three-fourths Indian by

blood, more like a full-blood than three-fourths, and she acted like a squaw." *Id*. at 413-14. The Court ultimately determined that Mrs. Vezina was an Indian and entitled to an allotment, but did not mention a percentage of blood in its analysis. The case extensively discussed the family ancestry and family history, the history of the particular band of Indians and certain treaty negotiations concerning reservations and the settling of Indians on the various reservations. The legal analysis is brief and it does not turn on the quantum of blood:

> We are clearly of the opinion that the plaintiff is by blood a member of the Fond du Lac band of the Chippewas of Lake Superior. . . .
>
> But it is contended that she and her mother abandoned their membership in the tribe. This is not specially pleaded by either of the defendants; but, even if it were pleaded, we have reached the conclusion that it is not sustained. The act of the Fifty-fifth Congress (Act June 7, 1897, c. 3, 30 Stats. 62, 90 (Comp. St. 1916, Sec. 4106) provides:
>
> > 'That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such right.'
>
> Mrs. Delaney was up to at least her marriage fully recognized as a member of the Fond du Lac band of the Chippewas of Lake Superior and there is nothing to indicate that she ceased to be so recognized up to the time of her death. Under this statute Mrs. Vezina is clearly entitled to be recognized and treated in all respects as if she had remained upon the reservation.

Id. at 419-20.

Sully v. United States, 195 F. 113 ([8th] Cir. 1912), is similar to *Vezina* but involved the claims of many family members under the allotment statute. The Court found the family members who were one-fourth or one-eighth Indian to be entitled to allotments. However, as in *Vezina*, much of the analysis turned on the claimants' living as Indians and not simply on their degree of blood.

Makah Indian Tribe v. Clallam County, 73 Wash. 2d 677, 440 P.2d 442 (1968), concerned the taxability of personal property located on the Makah reservation and owned by a one quarter blood Indian woman and her Caucasian husband. The case did not hold that one quarter Indian blood was sufficient to satisfy the first prong of the *Rogers* test. Rather, the Court overruled the lower court's determination that a person of less than one-half Indian blood should be subject to taxation under certain circumstances:

> Her status as an enrolled Makah and a tribal Indian for this case would, therefore, be established were it not for the learned trial judge's findings and conclusions that a person of less than one-half Indian blood should not be exempt from taxation where the state and its subdivisions, as in the case of the Makahs, provide the Indians with important public services. . . .
> . . . [H]er own enrollment in the official census of the Makah Tribe implied that quarter blood was deemed by the tribe as of sufficient blood degree to grant her tribal status as a member of the tribe. Neither the County of Clallam nor the State of Washington . . . denied plaintiff's status as an enrolled Indian[.] Accordingly, we must disagree with the learned trial court in its finding that Esther H. Elvrum, though admittedly of only one-fourth Indian blood, could not legally qualify as a tribal Indian.

Id. at 679-80.

It is undisputed that Shaula George has some Indian blood. Based on the case law, which does not require a particular quantum of Indian blood for prong one purposes, the Court finds that under prong one, Ms. George is an Indian. The Court further finds and concludes that Ms. George's nearly 22% Indian blood is a significant or substantial amount. For economic reasons

pertaining to the Tribe's limiting the number of people to whom it must pay royalties, Ms. George apparently does not qualify for Coeur d'Alene Tribal enrollment based on her known blood quantum. Ms. George also qualifies to be adopted by the Tribe and enrolled as an adopted member, but again, the Tribe's economic decision to put a moratorium on adoptions so as to limit the number of royalty payees has prevented her adoption by the Tribe. The Court's determination that Ms. George has a significant percentage of Indian blood for jurisdictional purposes does not turn on the Tribe's economic decisions, which go to a prong two analysis in any event.

2. *Whether Ms. George is Recognized as an Indian by a Federal Agency or a Tribe.*

The second prong of the Indian status determination considers federal or tribal recognition of the person as an Indian:

> The second prong of the test-tribal or federal government recognition as an Indian-"probes whether the Native American has a sufficient non-racial link to a formerly sovereign people." *St. Cloud*, 702 F.Supp. at 1461. When analyzing this prong, courts have considered, in declining order of importance, evidence of the following: "1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life." *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir.1995) (citing *St. Cloud*, 702 F.Supp. at 1461).

United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005).

Relying in large part on *State v. Bonaparte*, 114 Idaho 577, 759 P.2d 83 (Ct. App.1988), *overruled on other grounds*, *State v. Larson*, 158 Idaho 130, 344 P.3d 910 (2115), the State contends that Ms. George does not meet the prong two requirement because she is not an enrolled member of an Indian tribe. If *State v. Bonaparte* were the only or the controlling authority on the issue, the State may well be correct.

The defendant in *Bonaparte* was 15/64ths Indian. He claimed to be affiliated with the Nez Perce Tribe of north-central Idaho, but was not an enrolled member of any tribe. For enrollment, the Nez Perce tribe required at least one quarter Indian blood, so Bonaparte was 1/64th short to qualify. "Although this was a narrow difference, the tribe was required to draw a line somewhere. The line was not drawn unreasonably." *Bonaparte*, *id.* at 579, 759 P.2d at 85. Although Bonaparte argued that lack of tribal enrollment was not dispositive, the Court of Appeals was not convinced:

> Bonaparte would have us hold, in effect, that the two-part test does not always have two parts—that a lack of tribal or federal recognition does not invariably defeat Indian status. We acknowledge that some federal decisions contain statements that tribal enrollment is not dispositive on the question of jurisdiction. . . . .
>
> Bonaparte lacks tribal membership because he fails to meet a reasonable enrollment requirement. We find no other substantial indicia of federal recognition of Bonaparte's Indian status for the purpose of criminal jurisdiction. Consequently, we hold that federal jurisdiction does not exist. The judge properly exercised state jurisdiction in this case.

Id. at 579-80, 759 P.2d at 85, 86.

The *Bonaparte* Court's analysis is short-sighted, particularly in the statement that Bonaparte "lacks tribal membership because he fails to meet a reasonable enrollment requirement." Prong two of the status test does not require tribal membership; it requires "'a sufficient non-racial link to a formerly sovereign people.'" *Bruce*, *id.* at 1224 (quoting *St. Cloud*, 702 F. Supp. at 1461). And while enrollment is an important consideration, it is not dispositive. For example, in *Bruce*, the district court determined that Bruce met the first prong by establishing that she had 1/8th Chippewa blood, but failed in establishing the second prong because she was not an enrolled member of a tribe. The Court of Appeals disagreed:

> The district court cited the fact that she was not enrolled in a tribe and failed to present evidence that the federal government had recognized her to be an Indian. On the basis of this evidence, it found that Bruce had not met her burden on this prong and concluded that she had not satisfied her burden of production as to the affirmative defense.
>
> We disagree. Tribal enrollment 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; *accord Antelope,* 430 U.S. at 646 n. 7, 97 S.Ct. 1395 ("[E]nrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction ....") (citations omitted); *Keys,* 103 F.3d at 761 ("While tribal enrollment is one means of establishing status as an 'Indian' under 18 U.S.C. § 1152, it is not the sole means of proving such status.") (citation omitted); *Ex parte Pero,* 99 F.2d 28, 31 (7th Cir.1938) ("The lack of enrollment ... is not determinative of status.... [T]he refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian."); *St. Cloud,* 702 F.Supp. at 1461 ("[A] person may still be an Indian though not enrolled with a recognized tribe.").

394 F.3d at 1224.

In *Bruce*, the Court did not need to determine whether Bruce "conclusively established" that she was an Indian; rather, it needed only to decide whether she presented sufficient evidence of tribal recognition to permit her defense to be heard by the jury, and the Court concluded that she did. *Id.* at 1226. Bruce presented evidence that she had participated in sacred tribal rituals, was born and resided on a reservation, that two of her children were enrolled members, and that she was treated by Indian Health Services. Significant to the Court was her mother's testimony that whenever she was arrested on the reservation, it was tribal, and that during those times, she was treated by the tribe as an Indian person. *Id.*

In *Lewis v. State*, 137 Idaho 882, 55 P.3d 875 (Ct. App. 2002), the Court considered whether Lewis met the second prong of the status test. As a nearly full-blooded Indian, there was no question that he met the first prong.

> In *Bonaparte,* this Court held that the defendant did not satisfy the recognition prong of the test because he was not an enrolled member of any tribe and was not even eligible to become a member of the tribe with which he claimed affiliation. *Id.* at 579-80, 759 P.2d at 85-86. Lewis contends, however, that enrollment in a tribe is not an absolute requirement for recognition as an Indian. Lewis is correct in his assertion that courts have looked to factors in addition to tribal enrollment, including governmental recognition formally and informally through receipt of assistance reserved only to Indians, enjoyment of the benefits of tribal affiliation, and social recognition as an Indian through residence on a reservation and participation in Indian social life. *See, e.g., United States v. Lawrence,* 51 F.3d 150, 152 (8th Cir.1995); *Daniels*, 16 P.3d at 654. Nevertheless, as the *Lawrence* and *Daniels* decisions note, of these factors tribal enrollment is the most important indicium of recognition as an Indian.

Lewis at 885, 55 P.3d at 878.

That enrollment is not a requirement for the second prong was confirmed by a more recent Ninth Circuit case, *United States. v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015). The Court in that case overruled *United States v. Maggi*, 598 F.3d 1073 (9th Cir. 2010), in its requirement that the first prong—some quantum of Indian blood—be traceable to a federally recognized tribe.

> We now hold that under the first prong of the *Bruce* test the government need only prove that the defendant has some quantum of Indian blood, whether or not traceable to a federally recognized tribe. We thus hold that in order to prove Indian status under the IMCA, the government must prove that the defendant (1) has some quantum of Indian blood and (2) is a member of, *or is affiliated with*, a federally recognized tribe.

Zepeda at 1106-07 (emphasis added).

And so the question is whether Ms. George is recognized federally or by a tribe as an Indian. In other words, does she have "a sufficient non-racial link to a formerly sovereign people" to meet the second prong of the test.

Despite Ms. George's not being qualified for enrollment for tribal economic reasons, it is apparent to the Court that the Tribe recognizes her as an Indian. She has lived virtually her

whole life on the Coeur d'Alene Reservation as an Indian. She is the adopted daughter of an enrolled member of the Coeur d'Alene Tribe and an enrolled member of the Flathead Tribe. Throughout her life she has received benefits from the Tribe or through the Tribe reserved for Indians and these benefits include health care, substance abuse treatment, housing assistance, job assistance, education, social benefits (the Tribe's taking tribal members including Ms. George to Silverwood, for example), and food assistance. She has worked on the reservation. Throughout her life she has participated in Tribal social and cultural events. Thus, while case law indicates that tribal enrollment is an important consideration, and if it exists, is determinative of the second element of the status test, it is not an absolute requirement for recognition as an Indian. *See Lewis* at 885, 55 P.3d at 878. The Court determines that Ms. George has sufficient links to the Coeur d'Alene Tribe to establish prong two.

IV. CONCLUSION

Ms. George is for all intents and purposes an Indian. She has Indian blood which the Court determines to be substantial or significant at nearly twenty-two percent. Moreover, she has lived her entire life as a Coeur d'Alene Indian. She is not an enrolled member of the Tribe and does not qualify to receive royalties from the Coeur d'Alene Casino based on the Tribe's determination to limit the number of persons who qualify for royalties. In every other way, however, she lives as and is recognized as an Indian. She qualifies for and receives benefits available only to Indians. She has lived her whole life on the reservation. Her children are being enrolled as tribal members. She has participated in tribal social and cultural events and activities throughout her life.

Because Ms. George is an Indian jurisdictionally, this Court does not have subject matter jurisdiction. The state only has jurisdiction to prosecute crimes committed by Indians in Indian

country if the crimes fall within the categories contained in Idaho Code § 67-5101. Possession of a controlled substance and possession of paraphernalia do not fall within the listed categories. Moreover and significantly, the Tribe prosecutes these very crimes committed by Indians on the reservation.

Finally, subject matter jurisdiction is not determined by reverse engineering. Apparently the Tribe only prosecutes enrolled trial members according to counsel for the parties. That is not a consideration for this Court in determining whether it has subject matter jurisdiction. Nor is it a consideration that the United States would not be willing to prosecute Ms. George. This Court either has jurisdiction or it does not, and it is not determined by whether other agencies have or do not have jurisdiction or exercise discretion in determining whether to prosecute.

Based on the foregoing, it is ORDERED that this case be and the same is hereby dismissed.

DATED this 9th day of May, 2017

/s/ CYNTHIA K.C. MEYER
DISTRICT JUDGE #005

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that on this_____day of _____, _____, a true and correct copy of the foregoing was sent via facsimile:

KOOTENAI COUNTY PROSCECUTOR
EMAIL: kcpareports@kcgov.us

JAY LOGSDON
EMAIL: pdfax@kcgov.us

JIM BRANNON
CLERK OF THE DISTRICT COURT

By_____
Deputy