Montana Law Review

Volume 73
Issue 1 *Winter 2012*

Article 5

1-1-2012

To Be or Not To Be: Who is an "Indian Person"?

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TO BE OR NOT TO BE: WHO IS AN "INDIAN PERSON"?

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I. INTRODUCTION

The United States Supreme Court and the Ninth Circuit Court of Appeals have accurately observed: "The exercise of criminal jurisdiction over Indians and Indian country is a 'complex patchwork of federal, state, and tribal law,' which is better explained by history than by logic."[1] Federal jurisdiction for Indian country crimes requires proof that the defendant or the victim is an Indian. Despite this jurisdictional requirement, Congress has not defined "Indian." For purposes of federal criminal jurisdiction, courts have struggled to fill this void. Under federal criminal law, who is an "Indian" is frequently a difficult question to answer—at times, shockingly difficult. In our opinion, this complexity reflects the uneasy historical and current relationship between the United States and Native America. The resulting caselaw embodies this tension, highlighted by a circuit split over tests for determining who is an Indian.

This article reviews the origins and current state of this caselaw, identifies practice pointers for litigants, and discusses ideas for refining the law. With respect to our ideas, we believe that a choice needs to be made: should the law be more rigid and, thus, more easily applied? Or should the law reach even further to reflect the reality that who is an Indian can be a frustratingly complex issue?

Passed in 1885, the Major Crimes Act, 18 U.S.C. § 1153, established federal criminal jurisdiction over specified serious crimes committed in Indian country solely by Indian defendants.[2] The crimes include murder,

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1. *U.S. v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005) (quoting *Duro v. Reina*, 495 U.S. 676, 680 n. 1 (1990)).

2. *U.S. v. Maggi*, 598 F.3d 1073, 1077 (9th Cir. 2010); 18 U.S.C. § 1153(a) (2006). The Major Crimes Act reads:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a

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manslaughter, assault, sexual abuse, and arson.[3] The General Crimes Act, 18 U.S.C. § 1152, provides federal criminal jurisdiction over federal enclave crimes in Indian Country.[4] "[U]nder the Indian General Crimes Act, the criminal laws of the United States apply to offenses committed in Indian country by non-Indians against Indians and by Indians against non-Indians."[5] As the Tenth Circuit summarized, the General Crimes Act "establishes federal jurisdiction over interracial crimes only."[6] If neither the defendant nor the victim is an Indian, even where the crime occurs in Indian country, there is no federal jurisdiction.[7] Neither § 1152 nor § 1153 define "Indian."[8] The absence of a definition has resulted in an ongoing judicial effort to determine who is, and who is not, "Indian." The courts clearly, indeed expressly, struggle with this task.

The differing burdens under §§ 1152 and 1153 illustrate the inherent challenges of federal Indian criminal law. If the government charges a crime under the Major Crimes Act (§ 1153), it must prove the defendant's Indian status beyond a reasonable doubt. But in a General Crimes Act prosecution (§ 1152), the defendant must meet the burden of proving his or her Indian status to the factfinder by affirmatively producing evidence, which if met, requires the government to refute Indian status beyond a reasonable doubt.

Congress passed the Major Crimes Act in response to *Ex parte Crow Dog*,[9] where the United States Supreme Court overturned the federal court

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dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

3. 18 U.S.C. § 1153(a).

4. *Bruce*, 284 F.3d at 1219; 18 U.S.C. § 1152 (2006). The General Crimes Act, also known as the Federal Enclaves Act, was passed in 1817; *see also Maggi*, 598 F.3d at 1077. The General Crimes Act reads:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

5. *Bruce*, 394 F.3d at 1219.

6. *U.S. v. Prentiss*, 256 F.3d 971, 974 (10th Cir. 2011) (per curiam) (en banc).

7. *See e.g. U.S. v. McBratney*, 104 U.S. 621, 624 (1881).

8. By contrast, Congress has defined "Indian country" at 18 U.S.C. § 1151 (2006).

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

conviction of Chief Crow Dog, who was sentenced to death in 1884 for the murder of Chief Spotted Tail on the Rosebud Indian Reservation in Dakota Territory.[10] The Court reasoned that the tribe's authority to prosecute such an offense had not been sufficiently abrogated by an act of Congress.[11] As a result, Crow Dog was released from custody.[12] Congress's legislative response limited the sovereignty of Indian tribes by removing tribal jurisdiction over certain serious offenses in Indian country.[13] The underlying theory "was that Indian tribes were not competent to deal with serious issues of crime and punishment."[14] The Court has since explained that the Major Crimes Act was a "carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land."[15] Nonetheless, for specified crimes, the Major Crimes Act created federal criminal jurisdiction over Indian defendants in Indian country. Prior to the Major Crimes Act, Congress established federal jurisdiction over federal enclaves generally in 1817 through passage of the General Crimes Act.[16] Although passed to provide federal jurisdiction over federal enclaves generally, the General Crimes Act works together with the Major Crimes Act to broadly provide federal jurisdiction over Indian Country.

A defendant's Indian status is an essential element of a § 1153 Major Crimes Act offense, which the government must allege in the indictment and prove beyond a reasonable doubt at trial.[17] In years past, as a matter of custom and practice, the government could establish the Indian status element by simply proving that the defendant was an enrolled member of a federally recognized Indian tribe.[18] However, over time, as racial intermarriage by subsequent generations of Indians has diluted the amount of Indian blood in many people of Indian descent,[19] tribal membership is no longer the only determinative factor,[20] and some tribal members may not even

10. *Id*. at 557, 572.

11. *Id.* at 567–568, 572.

12. *Id.* at 572.

13. Phillip J. Prygowski, *From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty*, 12 Compleat Law. 14, 16 (Fall 1995).

14. *Id.*

15. *Keeble v. U.S.*, 412 U.S. 205, 209 (1973).

16. *See supra* n. 4.

17. *U.S. v. James*, 980 F.2d 1314, 1317–1319 (9th Cir. 1992); *U.S. v. Broncheau*, 597 F.2d 1260, 1262 (9th Cir. 1979).

18. *See e.g. LaPier v. McCormick*, 986 F.2d 303, 306 (9th Cir. 1993); *U.S. v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974).

19. *See generally* Christine Metteer, *The Trust Doctrine, Sovereignty, and Membership: Determining Who Is Indian*, 5 Rutgers Race & L. Rev. 53 (2003); Margo S. Bronwell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. Mich. J.L. Reform 275 (Fall & Winter 2000 & 2001).

20. *Broncheau*, 597 F.2d at 1263; *accord U.S. v. Antelope*, 430 U.S. 641, 647 n. 7 (1977).

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consider themselves to be Indians. The ever-evolving domestic American diaspora confounds this complexity.

The question of who is an Indian has not captured the attention of the Supreme Court since the Antebellum Period, fostering circuit splits[21] and biting dissents[22] during the 21st century. Indeed, two of the most prominent Indian country circuit splits conflict over the fundamental issue: how to define "Indian."[23] Congress's recent focus on criminal justice in Indian country promises more prosecutions.[24] And whether the executive branch prosecutes under the Major Crimes Act or the General Crimes Act, Indian status—be it of the defendant or the victim—is a jurisdictional element.

II. Definition of "Indian Person"—The *Rogers* Test

Whether a person is "Indian" is a political, not a racial, determination. Federal criminal jurisdiction over Indians is "not over a discrete racial group" but rather is based upon membership in "quasi-sovereign tribal entities whose lives and activities are governed by the [Bureau of Indian Affairs] in a unique fashion."[25] There is no statutory definition of "Indian" for determining the Indian status element under the federal criminal jurisdiction statutes, which has led one commentator to observe: "the question of Indian status for purposes of criminal jurisdiction is perplexing."[26] And an appellate court lamented the result as a "bewildering maze of rules."[27]

In general, guided by a two-part test derived from the 1846 Supreme Court case *United States v. Rogers*,[28] the federal appellate courts have defined the term "Indian" as "an individual who has Indian blood and who is regarded as an Indian by his or her tribe or Indian community."[29] In contrast to *Crow Dog*, where an Indian murdered an Indian, *Rogers* involved a white man, Rogers, who was charged with murdering a white man. The alleged location of the murder—Cherokee country—created the case's controversy. The defendant maintained that because he and the victim lived in

21. *See e.g. Bruce*, 394 F.3d 1215; *U.S. v. White Horse*, 316 F.3d 769 (8th Cir. 2003); *see also infra* pt. III for details on this circuit split.

22. *See e.g. Bruce*, 394 F.3d at 1231 (Rymer, J., dissenting); *see also U.S. v. Cruz*, 554 F.3d 840, 852 (9th Cir. 2009) (Kozinski, C.J., dissenting).

23. *Compare Cruz*, 554 F.3d 840 (majority) *with U.S. v. Stymiest*, 581 F.3d 759 (8th Cir. 2009).

24. *See e.g.* Quintin Cushner & Jon M. Sands, *Tribal Law and Order Act of 2010: A Primer, with Reservation*, 34 Champion 38 (Dec. 2010) (reviewing the Act's enhanced law enforcement initiatives on reservations).

25. *Morton v. Mancari*, 417 U.S. 537, 554 (1974).

26. Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 513 (1976).

27. *Bruce*, 394 F.3d at 1222.

28. *U.S. v. Rogers*, 45 U.S. 567, 572–573 (1846).

29. *Felix S. Cohen's Handbook of Federal Indian Law* 24 (Rennard Strickland et al. eds., 1982 ed., Michie Bobbs-Merrill 1982).

Cherokee country as citizens of the Cherokee nation, the courts of the United States lacked jurisdiction.[30] The Supreme Court started its analysis with an overview of the discovery doctrine and domestic dependant nation status of Indian tribes first established in *Johnson v. M'Intosh*[31] and *Cherokee Nation v. Georgia*,[32] respectively. From our current perspective, the racist underpinnings of these legal doctrines reverberated in the language of *Rogers*, as did Manifest Destiny:

> It would be useless at this day to inquire whether the principle thus adopted is just or not . . . . [T]he United States . . . has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices.[33]

From there, and likely in conflict with *Crow Dog*, the Court in *Rogers* reasoned that tribes residing within the territorial limits of the United States, and not within state jurisdiction, are subject to Congressional jurisdiction "no matter whether the offender be a white man or an Indian."[34] In contrast to the painstaking statutory and treaty analysis in *Crow Dog*,[35] the Court in *Rogers* summarily concluded that an 1834 Act of Congress, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve the peace of the frontiers," provided jurisdiction over the defendant.[36] While that act jurisdictionally exempted Indian-on-Indian crimes, the Court ruled that "it [is] very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian . . . ."[37]

In conflict with the current jurisprudential definition of Indian as a political concept, the Court rooted its conclusion in race, invoking the concept of "Indians born" and repeatedly using the word "race" to define Indians.[38] Perhaps reflecting prevailing attitudes, but regardless continuing its race-based analysis, the Court added that Congress could not have intended to include white men adopted into Indian tribes as exempt from jurisdiction: "It can hardly be supposed that Congress intended to grant such exemptions, especially to men of that class who are most likely to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country."[39] *Rogers* emphatically concluded its racial analysis, stating: "He was still a white man, of the white

30. *Rogers*, 45 U.S. at 571.
31. *Johnson v. M'Intosh*, 21 U.S. 543 (1823).
32. *Cherokee Nation v. Ga.*, 30 U.S. 1 (1831).
33. *Rogers*, 45 U.S. at 572.
34. *Id.*
35. *Crow Dog*, 109 U.S. at 557–571.
36. *Rogers*, 45 U.S. at 573.
37. *Id.*
38. *Id.*
39. *Id.*

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race, and therefore not within the exception in the act of Congress."[40] More recent caselaw demonstrates that Indian status is not so black and white now.

In *Rogers*, the Court ruled that while there was federal jurisdiction generally, the precursor statute to 18 U.S.C. § 1153 did not apply to a white man who had been adopted into an Indian tribe.[41] While the later-gleaned test from *Rogers* is not crystal clear in the decision itself, the appellate courts have determined that *Rogers* "suggested" the "generally followed" two-part test, which "considers (1) the degree of Indian blood and (2) tribal or governmental recognition as an Indian."[42] What is clear is that the United States Supreme Court has not revisited the issue since the time of *Crow Dog*, and the lower courts have labored over it. In the meantime, the seeming clarity with which the *Rogers* Court could identify an Indian has been fogged by more recent American dynamics, such as ever-increasing inter-marriage, social and geographic mobility, cross-cultural understanding and respect, and more assertive self-identity. While generally considered positive changes, these developments have complicated the legal issue of who is an Indian.

III. Circuit Split Over the Expanded *Rogers* Test

In implementing the *Rogers* test, the appellate courts have adopted and expanded the test for determining federal criminal jurisdiction, resulting in a split between the Eighth and Ninth Circuits over the definition of "Indian."[43]

A. Ninth Circuit's Rogers *Test*

The Ninth Circuit adopted a version of the *Rogers* test from the Eighth Circuit and, by adding to it, created a circuit split. In a series of cases from Montana reservations, beginning with *United States v. Bruce*,[44] followed by *United States v. Cruz*,[45] and further refined by *United States v. Maggi*,[46] the Ninth Circuit first adopted then modified the Eighth Circuit's approach to

40. *Id.*

41. *Id.*

42. *Broncheau*, 597 F.2d at 1263; *see also Prentiss*, 273 F.3d at 1280 (citing the *Rogers* test as applied by the Tenth Circuit, Ninth Circuit, Seventh Circuit, District of South Dakota, and the Connecticut and Montana Supreme Courts); *see also U.S. v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995), *overruled*, *Stymiest*, 581 F.3d at 759.

43. *See generally* Brian L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals*, 26 Harv. J. Racial & Ethnic Just. 241 (2010).

44. *Bruce*, 394 F.3d at 1224.

45. *Cruz*, 554 F.3d at 845–846, 849 n. 13.

46. *Maggi*, 598 F.3d at 1081.

determining "Indian" status. These cases culminated in the following test, since adopted as a Model Jury Instruction:

> In order for the defendant to be found to be an Indian, the government must prove the following, beyond a reasonable doubt:
>
> First, the defendant has descendant status as an Indian, such as being a blood relative to a parent, grandparent, or great-grandparent who is clearly identified as an Indian from a federally recognized tribe; and
>
> Second, there has been tribal or federal government recognition of the defendant as an Indian.
>
> Whether there has been tribal or federal government recognition of the defendant as an Indian is determined by considering four factors, *in declining order of importance*, as follows:
>
> 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.[47]

In *Bruce* and *Cruz*, the Ninth Circuit adopted this test from the Eighth Circuit and modified its application, ultimately creating a conflict between two of the three circuits that encompass the vast majority of the Country's Indian reservations.

1. United States v. Bruce

The federal government charged Violet Bruce for simple assault of an Indian child in violation of 18 U.S.C. §§ 1152 and 113(a)(5) and gained a conviction despite her objection that she was an Indian and thus should have been charged under § 1153.[48] Bruce resided on the Fort Peck Indian Reservation in northeastern Montana, where the alleged offense occurred.[49] Before and during trial, Bruce's defense centered on her Indian status.[50] She offered evidence that she was 1/8th Chippewa, her mother was an enrolled member of the Turtle Mountain Tribe of Oklahoma, she was born on a reservation, and that she currently lived on the Fort Peck Indian Reservation. She also offered evidence showing that she had been treated by Poplar Indian Health Services, she had been arrested by tribal authorities, and the Fort Peck Tribal Court had treated her as an Indian child under the Indian Children Welfare Act, 25 U.S.C. § 1901.[51] The district court rejected her

47. 9th Cir. Model Jury Instr. Crim. 8.113 (2010) (emphasis added) (available at http://www3.ce9.uscourts.gov/ web/sdocuments.nsf/crim).

48. *Bruce*, 394 F.3d at 1217.

49. *Id.*

50. *Id.*

51. *Id.* at 1217–1218.

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pretrial, trial, and post-trial motions to dismiss and refused to submit the issue to the jury, reasoning that Bruce failed to meet her burden of production to raise her Indian status as an affirmative defense.[52] Following her conviction, she appealed on the basis of her asserted Indian status.[53]

The Ninth Circuit reviewed Bruce's Indian status de novo as a mixed question of law and fact.[54] The court began its discussion with a historical review of federal criminal jurisdiction in Indian Country, including the advent of the Major Crimes Act and the General Crimes Act.[55] It noted that federal crimes of general applicability, such as federal drug offenses, apply to Indians.[56] Further, it reviewed the jurisdiction of tribal courts under the Indian Civil Rights Act.[57] The court summarized: "The one point that emerges with clarity from this otherwise bewildering maze of rules is that the question of who is an Indian bears significant legal consequences."[58]

After the circuit court discussed the history of federal jurisdiction over Indians in Indian country, it turned to the procedural nuances of litigating the issue of Indian status. Relying on its precedent, the Ninth Circuit identified Indian status as an affirmative defense.[59] A defendant must properly raise the Indian status issue and produce "enough evidence of her Indian status to permit a fact-finder to decide the issue in her favor."[60] The court noted that no court has defined that quantum of evidence.[61] Once the defendant satisfies the evidentiary threshold, however, the burden of persuasion shifts to the government to prove the nonexistence of Indian status beyond a reasonable doubt.[62]

The court then turned to the crux of the issue—who is an "Indian"?[63] The court started with the *Rogers* test, the first prong of which requires only "some" Indian blood, meaning "evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian . . . ."[64] The Ninth Circuit next considered the second prong, adopting a four-part test from the Eighth Circuit, which focuses on whether tribal or federal governments recognize the defendant as an Indian.[65] The court reviewed the four-part test,

52. *Id.*
53. *Id.* at 1217.
54. *Bruce*, 394 F.3d at 1218.
55. *Id.* at 1218–1220.
56. *Id.* at 1220 (citing *U.S. v. Begay*, 42 F.3d 486, 499 (9th Cir. 1994)).
57. *Bruce*, 394 F.3d at 1218–1220; 25 U.S.C. §§ 1301–1303 (2006).
58. *Bruce*, 394 F.3d at 1222.
59. *Id.* at 1222–1223.
60. *Id.* at 1223.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Bruce*, 394 F.3d at 1223.
65. *Id.* at 1224 (citing *Lawrence*, 51 F.3d at 152).

which, at the time, the Eighth Circuit analyzed in declining order of importance.[66] The four-part test considers: "(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."[67]

Turning to the facts of the case, the Ninth Circuit acknowledged that Bruce had presented evidence of Indian blood and recognition as an Indian.[68] The court reviewed her 1/8th Chippewa Indian blood, her mother's and children's tribal enrollment, her life on the reservation, her participation in Indian ceremonies, her treatment by Indian hospitals, and her treatment as an Indian in tribal court.[69] The Ninth Circuit disapproved of the district court's reasoning that because Bruce failed to produce evidence that the federal government recognized her as an Indian and failed to produce evidence that she was an enrolled tribal member, she did not meet her burden for the affirmative defense.[70]

The court rejected the formalistic nature of the district court's adjudication, which demanded enrollment or federal recognition and emphasized instead that government *or tribal* recognition suffices, reflecting Indian tribes' sovereign authority to determine their own membership.[71] Honoring that sovereignty, albeit a highly qualified sovereignty, plays a central role in federal Indian law generally and the Indian question particularly. The Supreme Court in *Crow Dog* opined:

> "The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, State and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals."[72]

Given the court's explication of the *Rogers* test and the reservation-based evidence adduced by Bruce, the Ninth Circuit concluded that she met her burden of production to present her defense to a jury, emphasizing that

66. *Bruce*, 394 F.3d at 1224 (citing *Lawrence*, 51 F.3d at 152).

67. *Id.* The dissent criticized this test "because until now, no one has ever held that an adult may be an Indian (for purposes of legal status, not for purposes of ethnicity) when she is neither enrolled as a member of a tribe nor eligible for membership, nor entitled to tribal or government benefits to which only Indians are entitled . . . ." *Bruce*, 394 F.3d at 1231 (Rymer, J., dissenting).

68. *Id.* at 1224 (majority).

69. *Id.*

70. *Id.*

71. *Id.* at 1224–1225.

72. *Crow Dog*, 109 U.S. at 572 (quoting *U.S. v. Joseph*, 94 U.S. 614, 617 (1876)).

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the "burden is one of mere production."[73] The government then claimed harmless error and argued that Bruce was guilty under either § 1152 or § 1153, thus her Indian status was effectively irrelevant because the government proved she committed the assault it charged.[74] The Ninth Circuit rejected the harmless error claim for an equally practical reason:

> By prosecuting Bruce under § 1152, rather than § 1153, the government did not have to prove that Bruce was an Indian. In so doing, the government released itself of its obligation to prove an element of the offense beyond a reasonable doubt. . . . Absent proof of Bruce's Indian status, there is no federal crime under § 1153.[75]

The court concluded its decision by noting a gap in the statutory framework:

> We note, however, that this statutory framework creates an obvious and troubling conundrum. It is entirely probable that the government may be simultaneously unable either to prove or disprove a claim of Indian status, effectively foreclosing conviction under either statute. This is especially likely given that the burden of proof required for a defendant to place Indian status at issue in a § 1152 case may be as low as a preponderance, whereas the burden of proof required for the government to both disprove Indian status under § 1152 and to prove Indian status under § 1153 is proof beyond a reasonable doubt.[76]

Despite this conundrum, Congress has not acted to remedy it. The Ninth Circuit returned to the perplexing Indian status issue a few years later.

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73. *Bruce*, 394 F.3d at 1225–1227. The dissent lists a host of factual considerations to determine Indian status that practitioners can draw upon to litigate the Indian issue. *Id.* at 1235 (Rymer, J., dissenting).

74. *Id.* at 1227 (majority).

75. *Id.* at 1229–1230; *but see White Horse*, 316 F.3d at 772–773, which ruled:

> Even if a defendant's Indian status is an element of the offense under § 1152, we conclude that Mr. White Horse is not entitled to plain error relief because of the complementary nature of § 1152 and § 1153. There is no contention that the evidence was insufficient to establish that Mr. White Horse committed the physical acts charged in the indictment, and regardless of which statute applied (one of them certainly did) Mr. White Horse was guilty of a federal crime because he, like everyone else, is either an Indian or he is not. Between them, the statutes apply to all defendants whatever their race or ethnicity. In other words, we believe that the situation here is the same as it would be if we were dealing not with two statutes but with a single one that provided that it applied whether or not the defendant was an Indian. Indeed, as they pertain to the crime of aggravated sexual abuse, the two relevant sections could have been codified as one to render ethnic or racial status altogether irrelevant. In the circumstances, therefore, we cannot say that Mr. White Horse's conviction seriously affected the fairness, integrity, or public reputation of judicial proceedings.

These conflicting holdings suggest another circuit conflict beyond the conflict over how to define "Indian."

76. *Bruce*, 394 F.3d at 1230.

2. United States v. Cruz

The Ninth Circuit next fully addressed the Indian status issue in *United States v. Cruz*.[77] The court began its decision by noting a striking feature of who is an Indian:

> At first glance, there appears to be something odd about a court of law in a diverse nation such as ours deciding whether a specific individual is or is not "an Indian." Yet, given the long and complex relationship between the government of the United States and the sovereign tribal nations within its borders, the criminal jurisdiction of the federal government often turns on precisely this question—whether a particular individual "counts" as an Indian—and it is this question that we address once again today.[78]

The court stated that *Bruce* had "distilled a specific test" to determine Indian status.[79] The *Cruz* court then applied that test to the facts before it.[80] Cruz was 29/128 Blackfeet Indian and 32/128 Blood Indian.[81] He had lived on the Blackfeet Indian Reservation in Browning, Montana for three or four years as a child; otherwise, Cruz did not live on a reservation until shortly before the incident resulting in his prosecution.[82]

Following an altercation at a Browning hotel, the government charged Cruz with assault resulting in serious bodily injury, pursuant to 18 U.S.C. §§ 1153 and 113(a)(6).[83] At trial, Cruz contested his Indian status, including moving for a judgment of acquittal at the close of the government's case.[84] Cruz was convicted by a jury on all charges.[85] On appeal, Cruz challenged the sufficiency of the evidence that he was an Indian under § 1153 and the district court's jury instructions regarding Indian status.[86] Because Cruz testified in his own defense but did not renew his motion to dismiss following his defense, the appellate court reviewed for plain error.[87]

Cruz conceded that his Indian blood satisfied *Bruce*'s first prong, so the appeal focused on the second prong and its four factor test "in declining order of importance."[88] The court stressed that satisfaction of the first fac-

77. *Cruz*, 554 F.3d 840. In the interim, *U.S. v. Ramirez*, 537 F.3d 1075, 1082 (9th Cir. 2008), exclusively focused on whether trial documents sufficiently demonstrated tribal enrollment, the first of the four *Bruce* factors. *See Cruz*, 554 F.3d at 846 n. 6 (summarizing *Ramirez*).

78. *Cruz*, 554 F.3d at 842 (internal citation omitted).

79. *Id*.

80. *Id*.

81. *Id*. at 843.

82. *Id*.

83. *Id*.

84. *Cruz*, 554 F.3d at 843.

85. *Id*.

86. *Id*.

87. *Id.* at 844–845.

88. *Id.* at 846. Chief Judge Kozinski's dissent blistered the majority for transforming what the dissent labeled "not even dicta," "the declining order of importance" language in *Bruce*, into precedent. *Id*. at 852 (Kozinski, C.J., dissenting). The dissent accused the decision of turning "the four factors into

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tor—tribal enrollment—is not dispositive of Indian status and thus, focused on the remaining three *Bruce* factors.[89] The court listed the relevant facts: (1) Cruz was not an enrolled tribal member; (2) his descendent status entitled him to use Indian Health Services, some educational grants, and fish and hunt on the reservation; (3) he never utilized those benefits; (4) he lived on the reservation as a young child but did not do so again until he rented a hotel room in Browning shortly before the offense; (5) Cruz was once prosecuted in tribal court with an unknown result and his descendent status subjected him to the tribal court's jurisdiction; (6) Cruz attended a public school on the reservation and was a firefighter for the Bureau of Indian Affairs (both the school and the job were open to non-Indians); and (7) Cruz did not participate in Blackfeet cultural events, did not vote in tribal elections, and did not have a tribal identification card.[90]

The Ninth Circuit ruled that "it is clear that Cruz does not satisfy *any* of the four *Bruce* factors."[91] In doing so, it repeatedly emphasized what the dissent condemned—the hierarchy of import of the four factors.[92] The court promoted strict construction because § 1153 "creates a '*carefully limited* intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes . . . .'"[93] The court also highlighted that under *Bruce*, "the extent to which an individual considers himself an Indian . . . is most certainly relevant to determining his Indian status."[94]

In light of these considerations, the court held: "Because the evidence viewed in the light most favorable to the government does not demonstrate that Cruz is an Indian or that he meets *any* of the *Bruce* factors, no rational trier of fact could have found that the government proved the statutory element of § 1153 beyond a reasonable doubt."[95] The court thus vacated Cruz's conviction and remanded to the district court with instructions to grant the motion for judgment of acquittal.[96]

Before announcing its holding, the court emphasized the procedural posture in *Cruz*—by charging a crime under § 1153, the government obligated itself to prove Cruz's Indian status beyond a reasonable doubt.[97]

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a rigid multi-part balancing test, with the various prongs reinforcing or offsetting each other, depending on how they are analyzed." *Cruz*, 554 F.3d at 852. In contrast, the dissent characterized *Bruce* as offering a "descriptive rather than prescriptive" test. *Id.*

89. *Id.* at 847 (majority).

90. *Id.* at 846–847.

91. *Id.* at 847 (emphasis in original).

92. *Id.* at 847–849.

93. *Cruz*, 554 F.3d at 849 (emphasis added in *Cruz*) (quoting *Bruce*, 394 F.3d at 1220 in turn quoting *Antelope*, 430 U.S. at 642–643 n. 1).

94. *Cruz*, 554 F.3d at 849–850.

95. *Id.* at 851 (emphasis in original).

96. *Id.*

97. *Id.* at 850–851.

Bruce, in contrast, involved a charge under § 1152, thus requiring Bruce to meet the burden of production to raise the affirmative defense of Indian status, which the government must then disprove beyond a reasonable doubt.[98]

The court's holding relieved it of reaching Cruz's claim that the district court improperly instructed the jury regarding Cruz's Indian status.[99] The court nonetheless availed itself of the opportunity to instruct that "the words 'in declining order of importance' should, as a matter of course, always be included in a *Bruce* instruction," as part of the four-factor test delineating *Rogers*' second prong.[100] Other circuits have not adopted hierarchical factors.

B. Eighth Circuit's Rogers *Test*

After *Bruce* and *Cruz*, the Eighth Circuit announced a similar but distinct test in *United States v. Stymiest*.[101] The government indicted Stymiest of assault resulting in serious bodily injury in violation of 18 U.S.C. §§ 1153 and 113(a)(6).[102] On appeal, Stymiest challenged his Indian status, raising three issues.[103] The Eighth Circuit began by noting that the *Rogers* test was the "generally accepted test" for defining Indian and that "four circuits and state courts apply this test."[104] Deeming the Indian status issue an element of a § 1153 crime, the court first ruled that the Indian status issue cannot be resolved by a motion to dismiss and instead must be submitted to the jury.[105] Thus, the court rejected Stymiest's appeal of the trial court's order denying his motion to dismiss.[106]

98. *Id.*

99. *Id.* at 851 n. 17.

100. *Cruz*, 554 F.3d at 851; *see also* 9th Cir. Model Jury Instr. Crim. 8.113 cmt. (2010) ("It is error for the court to fail to instruct the jury of the 'declining order of importance' of the four factors used to determine whether there has been tribal or federal government recognition of the defendant as a Native American. *United States v. Cruz*, 554 F.3d 840, 851 n. 17 (9th Cir. 2009).").

101. *Stymiest*, 581 F.3d at 764. The test originated in the South Dakota district court case, *U.S. v. St. Cloud*, 702 F. Supp. 1456, 1461 (D.S.D. 1988), but the Eighth Circuit did not address the test until 1995 in *Lawrence*, 51 F.3d 150.

102. *Stymiest*, 581 F.3d at 762.

103. *Id.* at 762–765.

104. *Id.* at 762 (citing *Prentiss*, 273 F.3d at 1280) (listing the *Rogers* test applied by the Ninth Circuit, Seventh Circuit, District of South Dakota, and Connecticut and Montana Supreme Courts); *see also Lawrence*, 51 F.3d at 152.

105. *Stymiest*, 581 F.3d at 762–763.

106. *Id.* at 763. This ruling echoes the holding in *White Horse*, 316 F.3d at 772 ("Mr. White Horse's assertion that he is an Indian is relevant to the matter of proof but irrelevant on the matter of jurisdiction."); *accord* 9th Cir. Model Jury Instr. Crim. 8.113 cmt. (2010) ("The question of Indian status operates as a jurisdictional element under 18 U.S.C. § 1153." (internal citation omitted)).

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The Eighth Circuit next addressed Stymiest's challenge to a jury instruction.[107] The district court instructed the jury on the second *Rogers* prong—recognition by a tribal or federal government—using a nonexclusive five-factor test, in the following instruction:[108]

> The second element is whether Matthew Stymiest is recognized as an Indian by the tribe or by the federal government or both. Among the factors that you may consider are:
>
> 1. enrollment in a tribe;
> 2. government recognition formally or informally through providing the defendant assistance reserved only to Indians;
> 3. tribal recognition formally or informally through subjecting the defendant to tribal court jurisdiction;
> 4. enjoying benefits of tribal affiliation; and
> 5. social recognition as an Indian through living on a reservation and participating in Indian social life, including whether the defendant holds himself out as an Indian.
>
> It is not necessary that all of these factors be present. Rather, the jury is to consider all of the evidence in determining whether the government has proved beyond a reasonable doubt that the defendant is an Indian.[109]

Stymiest objected to the instruction, arguing that the proper instruction required the factors to be considered in declining order of importance and that the court's instruction included two irrelevant factors—tribal recognition by tribal court jurisdiction and holding himself out as an Indian.[110] The Eighth Circuit ruled that "there is no single correct way to instruct a jury on this issue."[111] The court thus split from the Ninth Circuit in *Cruz*, which interpreted *Bruce* to require a jury to be instructed using the four-factor test in declining order of importance.[112]

The court solidified its conflict with *Bruce* and *Cruz* by further explaining that the factors listed "may prove useful, depending upon the evidence, but they should not be considered exhaustive. Nor should they be tied to an order of importance, unless the defendant is an enrolled tribal member, in which case that factor becomes dispositive."[113] The court thus split from *Bruce* by not adopting the declining order of importance rule[114] and from *Cruz* by ruling that tribal membership is dispositive of Indian status.[115]

107. *Stymiest*, 581 F.3d at 763.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 764.
112. *Cruz*, 554 F.3d at 846.
113. *Stymiest*, 581 F.3d. at 764.
114. *Compare with Bruce*, 534 F.3d at 1224. Given the fact-specific focus on "Indian" litigation, from an analytical perspective, this circuit split could produce different results under the same facts.
115. *Compare with Cruz*, 554 F.3d at 847.

As for the two factors Stymiest argued were legally irrelevant, the court deemed them relevant based on the facts of the case.[116] And then the court held that the district court did not abuse its discretion in rejecting Stymiest's objection to the instruction.[117] The Eighth Circuit offered:

> We have some concern that the instruction given would permit a jury to find Indian status without finding, as the second part of the *Rogers* test requires, that the defendant be recognized as an Indian *by the tribe or by the federal government*. Holding oneself out as an Indian by submitting to tribal court jurisdiction or seeking care at a tribal hospital or participating in tribal community activities is relevant to being recognized by the tribe, but it is not otherwise sufficient to satisfy the political underpinnings of the *Rogers* test. *Compare United States v. Cruz*, 554 F.3d 840, 848 (9th Cir. 2009) (minimal participation in Indian social life alone may be insufficient). However, this objection was not raised, and thus we have no difficulty concluding that the instruction as a whole was not an abuse of the district court's discretion.[118]

This observation indicates there may be yet another circuit split: in the Ninth Circuit, the fact-finder could rely solely on the defendant's participation in Indian activities to find Indian status.

The Eighth Circuit finally denied Stymiest's third argument that insufficient evidence supported the jury's conclusion that he was an Indian under § 1153.[119] The court first noted that Stymiest possessed the requisite Indian blood because his grandfather was an enrolled member and a medicine man in the Leech Lake Band of Ojibewe Indians.[120] The court then ruled that the jury properly considered the second prong of the *Rogers* test to be satisfied: Stymiest repeatedly submitted to tribal arrests, he reported to the Indian Health Services clinic that he was an Indian, receiving treatment six times, five times in an emergency room and one follow-up visit to an outpatient clinic, where he identified himself as an enrolled member of the Leech Lake Band. He also lived on an Indian reservation, and presented himself as an Indian to his girlfriend and while socializing with Indians.[121] He thus held himself out as an Indian and received tribal recognition.[122] The court finally acknowledged that Stymiest was not enrolled as a tribal member, explaining that enrollment is not necessary to establish Indian status.[123]

116. *Stymiest*, 581 F.3d at 764.

117. *Id.*

118. *Id.* (emphasis in original).

119. *Id.* at 766.

120. *Id.*

121. *Id.*

122. *Stymiest*, 581 F.3d at 766 (citing *Cruz*, 554 F.3d at 850; *Bruce*, 394 F.3d at 1226–1227; and *Lawrence*, 51 F.3d at 152 n. 4).

123. *Stymiest*, 581 F.3d at 766.

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C. *Tenth Circuit's* Rogers *Test*

In a series of appeals, the Tenth Circuit did not initially expand the *Rogers* test and instead limited its analysis of Indian status to whether the defendant (1) had some Indian blood and (2) was recognized as an Indian by either a tribal or the federal government.[124] In the process, the Tenth Circuit "acknowledge[d] that the issue of how one ought to determine Indian status under the federal statutes governing crimes in Indian country is extraordinarily complex and involves a number of competing policy considerations."[125]

In *United States v. Drewry*,[126] the defendant challenged the government's satisfaction of the second *Rogers* prong requiring proof that the victims were recognized as Indians.[127] A jury convicted Drewry of aggravated sexual abuse of children, abusive sexual contact with a child under the age of twelve, and assault against a victim under the age of sixteen.[128] The government brought the charges under § 1152 because the victims each had one-quarter Indian blood.[129] The defendant contended that the victims were not recognized as Indians.[130]

To resolve that claim, the Tenth Circuit turned to the four-factor test first outlined by the Eighth Circuit in *Lawrence*, and then modified by the Ninth Circuit in *Bruce* and *Cruz*.[131] Although the victims were not enrolled tribal members at the time of the offense, the court ruled that tribal membership was not the exclusive means of establishing Indian status.[132] It then recounted facts that satisfied the three remaining factors: the children received medical care from Indian Medical Services, attended a summer camp open only to Comanche Indians (after the Comanche tribal chairman indicated to camp officials that the children were Comanche), attended pow-wows, and when the sexual abuse was reported the children were taken into tribal—not state—custody.[133] The Tenth Circuit thus held that, viewing the evidence in the light most favorable to the government, a rational jury could conclude that the government established the victims' Indian sta-

124. *Scrivner v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995); *Prentiss*, 273 F.3d at 1280; *see also U.S. v. Romero*, 136 F.3d 1268 (10th Cir. 1995).

125. *Prentiss*, 273 F.3d at 1282.

126. *U.S. v. Drewry*, 365 F.3d 957 (10th Cir. 2004), *vacated on other grounds*, *Drewry v. U.S.*, 543 U.S. 1103 (2005)). The Supreme Court vacated Drewery's conviction pursuant to its decision in *U.S. v. Booker*, 543 U.S. 220 (2005), which held that the federal mandatory Sentencing Guidelines violated the Sixth Amendment. *Id.* at 226.

127. *Drewry*, 365 F.3d at 961.

128. *Id.* at 959.

129. *Id.* at 960–961.

130. *Id.* at 961.

131. *Id.*

132. *Id.* (citations omitted).

133. *Drewry*, 365 F.3d at 961.

tus beyond a reasonable doubt and, therefore, the district court did not err in denying the defendant's motion for judgment of acquittal.[134]

D. Seventh Circuit's Rogers *Test*

Although not generally recognized as an Indian country circuit, the Seventh Circuit considered the Indian status issue in the 1984 case, *United States v. Torres*.[135] There, because the defendants were members of the Menominee Tribe, the court utilized the *Rogers* test and held that the district court properly instructed the jury and that it would not disturb the jury's finding that the defendants were Indians.[136] Citing *Rogers*, the court stated that the following instruction complied with federal law:

> To be considered an Indian, a person must have some degree of Indian blood, and must be recognized as an Indian. In considering whether a person is recognized as an Indian, you may consider such factors, whether a person is recognized as an Indian by an Indian tribe, or society of Indians. Whether a person is recognized as an Indian by the federal government, whether a person resides on an Indian reservation, and whether a person holds himself out as an Indian. It is not necessary that all of these factors be present, rather you as jurors must consider the totality of circumstances in determining as a factual matter whether each defendant is an Indian.[137]

The Seventh Circuit has not revisited this issue since *Torres*. Given its relative lack of reservations and Wisconsin's subjection to Public Law 280,[138] this inaction is not surprising.

E. Summary of Circuit Split(s)

The Eighth and Ninth Circuits conflict over the most basic question: How is "Indian" defined? According to the Eighth Circuit, "there is no single correct way to instruct a jury on this issue."[139] The Eighth Circuit utilizes a non-exclusive, five-factor list when determining whether a person has been recognized by a tribal or federal government under the second prong of the *Rogers* test. Conversely, the Ninth Circuit requires a rigid four-factor test applied in declining order of importance.[140] Furthermore, tribal membership is dispositive in the Eighth Circuit—an enrolled tribal

134. *Id.*

135. *U.S. v. Torres*, 733 F.2d 449, 456 (7th Cir. 1984).

136. *Id.*

137. *Id.* (internal quotations omitted).

138. Passed in 1953, Public Law 280 excised federal jurisdiction over Indian country and transferred it to state courts in Wisconsin, among other states. *See* 18 U.S.C. § 1162 (2006); 25 U.S.C. §§ 1321–1326 (2006); 28 U.S.C. § 1360 (2006).

139. *Stymiest*, 581 F.3d at 764.

140. *Cruz*, 554 F.3d at 846; 9th Cir. Model Jury Instr. Crim. 8.113 (2010).

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member, as a matter of law, satisfies the multi-factor test,[141] while it is not dispositive in the Ninth Circuit.[142]

At least two other potential splits may lurk in the caselaw. In the Eighth Circuit, "[h]olding oneself out as an Indian by submitting to tribal court jurisdiction or seeking care at a tribal hospital or participating in tribal community activities is relevant to being recognized by the tribe, but it is not otherwise sufficient to satisfy the political underpinnings of the *Rogers* test."[143] In the Ninth Circuit, "the extent to which an individual considers himself an Indian . . . is most certainly relevant to determining his Indian status."[144] While not fully developed, this law may further split into a ripened conflict: both circuits consider the individual's self-image as an Indian or non-Indian relevant to the *Rogers* analysis, but only the Eighth Circuit requires objective criteria beyond self-direction for discerning whether the individual believes he or she is "Indian."

Another conflict may exist over the self-imposed burden attendant to the government's charging decision. Sometimes, the government must choose to prosecute under the Major Crimes Act, § 1153, or the General Crimes Act, § 1152. In the case of *Bruce*, "[b]y prosecuting Bruce under § 1152, rather than § 1153, the government did not have to prove Bruce was an Indian. In so doing, the government released itself of its obligation to prove an element of the offense beyond a reasonable doubt."[145] The Ninth Circuit thus refused a harmless error claim by the government, by declining to substitute a § 1153 conviction for the § 1152 conviction from the jury.[146] Conversely, applying plain error review, the Eighth Circuit ruled in *United States v. White Horse*:

> [R]egardless of which statute applied (one of them certainly did) Mr. White Horse was guilty of a federal crime because he, like everyone else, is either an Indian or he is not. . . . In other words, we believe that the situation here is the same as it would be if we were dealing not with two statutes but with a single one that provided that it applied whether or not the defendant was an Indian.[147]

That sentiment diverges from the Ninth Circuit's, and it does not seem to be rooted in the differing procedural posture of the government's harmless error claim in *Bruce*, as opposed to the defendant's plain error claim in *White*

141. *Stymiest*, 581 F.3d at 764.

142. *Cruz*, 554 F.3d at 847; *Bruce*, 394 F.3d at 1224.

143. *Stymiest*, 581 F.3d at 764 (comparing the jury instruction with the instruction in *Cruz*, 554 F.3d at 848).

144. *Cruz*, 554 F.3d at 849–850.

145. *Bruce*, 394 F.3d at 1229–1230.

146. *Id.* at 1230.

147. *White Horse*, 316 F.3d at 773.

Horse. Nonetheless, unlike the definition of an Indian, a clear circuit conflict inherent in the government's charging decision has not yet crystallized.

IV. Examples of Case-by-Case Analysis: How Does It Work in Practice?

This morass of history-derived law matters today. Indians, non-Indians, defense attorneys, prosecutors, and judges have inherited this difficult framework for defining "Indian." At a practical level, the Ninth Circuit summarized the issue's vexing perplexity: "We have little guidance as to the quantum of evidence necessary to sustain Indian status jurisdiction. Sorting through the handful of circuit cases addressing the issue simply underscores the need for case-by-case analysis and the necessity of invoking the *Jackson v. Virginia* standard, as we do in other criminal cases."[148] Prosecutions in Montana's federal district court demonstrate the adjudicatory confusion and the case-by-case, fact-by-fact status of the law. The Ninth Circuit's affirmances of the district court outcomes on the Indian issue demonstrate the primacy of persuading the fact-finder on the Indian issue.

A. Gordon Mann

Gordon Mann, who was charged with committing aggravated sexual abuse under § 1153(a) (Count I) and aggravated sexual abuse under § 1152 (Count II) on the Blackfeet Indian Reservation in Montana, was an enrolled member of the Little Shell Tribe of the Chippewa Cree.[149] The Little Shell Tribe is not a federally recognized tribe.[150] Mann's enrollment record shows that his degree of Indian blood was 10/64 Chippewa and 11/64 other Indian blood for a total of 21/64 Indian blood.[151]

Mann held himself out to be an Indian person.[152] He lived and hunted on the Blackfeet Indian Reservation.[153] He qualified for, and had received, free healthcare (limited to emergency and urgent care) from the Indian Health Services hospital on the Blackfeet Indian Reservation, which is re-

148. *Maggi*, 598 F.3d at 1083. The "*Jackson v. Virginia* standard" emanates from that case, 443 U.S. 307 (1979), and requires appellate courts reviewing the sufficiency of the evidence supporting a conviction to do so in the light most favorable to the prosecution and to affirm the conviction if a rational trier of fact could find the elements of the offense beyond a reasonable doubt. *Id.* at 326.

149. *Maggi*, 598 F.3d at 1076. The following facts are derived from the transcript of the jury trial, Jury Tr. Transcr., *U.S. v. Mann*, No. CR 08–68–GF–SEH (D. Mont. Feb. 9, 2009), and from the case opinion, *U.S. v. Maggi*, 598 F.3d 1073 (9th Cir. 2010). The Ninth Circuit consolidated the *Maggi* and *Mann* cases on appeal.

150. *Maggi*, 598 F.3d at 1076.

151. *Id.* at 1076, 1080.

152. Jury Tr. Transcr., 74, 78, 140, 142, *Mann*, No. CR 08–68–GF–SEH.

153. *Id.*

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served only to Indians or tribal members on the Blackfeet Reservation.[154] Mann also participated in Indian social, cultural, and religious events, such as beading, pow-wows,[155] eating fry bread, and ceremonial dancing with members of the Blackfeet Tribe.[156] He was invited by members of the Blackfeet Tribe to attend Indian religious ceremonies such as sweats.[157]

The district court submitted a bifurcated verdict form to the jury because §§ 1152 and 1153 were alternative charges for the same conduct. Section 1153 would apply if the jury determined Mann was Indian, but if not, the jury could still convict under § 1152 if they determined that the victim was Indian. The jury determined that Mann was an Indian person, thus finding him guilty on Count I under § 1153.[158] The jury, therefore, did not reach a verdict on Count II under § 1152.

On appeal, the Ninth Circuit held that these facts did not prove that Mann was an "Indian person" beyond a reasonable doubt. Applying the first prong of the *Bruce* test, the Ninth Circuit found there was no evidence that Mann had any blood from a federally recognized tribe.[159] The court ruled that Mann "cannot meet the first prong of *Bruce*, and his conviction must be vacated."[160]

B. Shane Maggi

Shane Maggi, who was charged with committing two counts of assault with a dangerous weapon under § 1153 and two related firearms offenses under 18 U.S.C. § 924(c) on the Blackfeet Indian Reservation, was not an enrolled member of a federally recognized tribe.[161] His Indian blood came

154. *Id.* at 65, 74.

155. Pow-wows are an American Indian social gathering, or fair, usually including competitive traditional dancing. Frederick E. Hoxie, *Encyclopedia of North American Indians* 513–514 (Frederick E. Hoxie ed., Houghton Mifflin Harcourt 1996).

156. Jury Tr. Transcr., 74, 78, 140, 142, *Mann*, No. CR 08–68–GF–SEH.

157. A sweat lodge is an American Indian tradition where individuals enter a dome-shaped dwelling to experience a sauna-like environment. The lodge itself is typically a wooden-framed structure made from tree branches. Hot rocks are placed inside an earthen-dug pit located in the center of this man-made enclosure. Water is periodically poured over the heated rocks to create a hot and steamy room. The sweat ceremony is intended as a spiritual reunion with the creator and a respectful connection to the earth itself as much as it is meant for purging toxins out of the physical body. Hoxie, *Encyclopedia of North American Indians* at 616–617; Arlene Hirschfelder & Paulette Molin, *Encyclopedia of Native American Religions* 293 (updated ed., Facts On File, Inc. 2000).

158. *Maggi*, 598 F.3d at 1076.

159. *Id.* at 1080.

160. *Id.* at 1078–1080. The court reasoned: "A defendant whose only claim of membership or affiliation is with an Indian group that is not a federally acknowledged Indian tribe cannot be an Indian for criminal jurisdiction purposes." *Id.* at 1078.

161. *Id.* at 1076–1077. The following facts are derived from the transcript of the jury trial, Jury Tr. Transcr., *U.S. v. Maggi*, No. CR 07–125–GF–SEH (D. Mont. June 11, 2008), and from the case opinion, *U.S. v. Maggi*, 598 F.3d 1073 (9th Cir. 2010).

from his mother who was an enrolled member of the Blackfeet Tribe.[162] Maggi had 3/64 Indian blood consisting of 1/64 Blackfoot and 1/32 Cree.[163] Thus, he had only 1.5 percent Blackfeet blood and was not an enrolled member of the Blackfeet Tribe.

Maggi was not eligible to be a member of the Blackfeet Tribe because, after August 30, 1962, a person must have 1/4 Blackfeet blood to be an enrolled member of the Blackfeet Tribe.[164] Any person who has less than 1/4 Blackfeet blood and who has an enrolled member parent is only considered a "descendant."[165] As a descendant, Maggi was entitled to receive (1) medical treatment from the Indian Health Service,[166] (2) the opportunity to obtain a license to hunt and fish on the reservation, and (3) the opportunity to apply for college grants from the tribe.[167] On one occasion, he received treatment at the Blackfeet Community Hospital, but he never applied for a hunting or fishing license or any college grants.[168] Maggi was also prosecuted in the Blackfeet Tribal Court on several occasions.[169] However, in that court, he was not represented by a lawyer who was licensed to practice in the State of Montana or in the United States District Court for the District of Montana.[170]

At trial, one of the victims testified that he "thought" Maggi had "held himself out to be an Indian person" because Maggi "talked about going to sweats."[171] However, other than having heard Maggi talking about going to sweats, this victim was "not sure" if Maggi held himself out to be an Indian person.[172] The other victim gave her opinion that Maggi "[h]eld himself out as an Indian person or as a Native American" because he went "to powwows, sweats, and smudgings,"[173] but she admitted that she had never seen

162. *Maggi*, 598 F.3d at 1076.

163. *Id.*

164. *See* Blackfeet Const. art. II, § 1(c); Blackfeet Ordin. 14, § 2(B) (2012) (available at http://www.blackfeet enrollment.org/docs/Ordinance14.pdf).

165. Blackfeet Ordin. 14, § 2(B); *see also* Blackfeet Const. art. II, § 1(c).

166. A person who has "some quantum" of Native American blood is eligible to receive treatment at Indian Health Services. 42 C.F.R. § 136.12 (2012).

167. *Maggi*, 598 F.3d at 1076–1077.

168. *Id.* at 1082.

169. *Id.* at 1083.

170. Jury Tr. Transcr., 60–61, *Maggi*, CR 07–125–GF–SEH. Maggi's tribal court lawyer apparently failed to challenge the fact that the Blackfeet Tribal Court had no jurisdiction over Maggi.

171. *Id.* at 63.

172. *Maggi*, 598 F.3d at 1077, 1083.

173. *Id.* According to American Indian tradition, before a person can be healed or heal another, he or she must be cleansed of any bad feelings, negative thoughts, bad spirits or negative energy—cleansed both physically and spiritually. To accomplish this, one common ceremony is to burn certain herbs, take the smoke in one's hands and rub or brush it over the body. This is called "smudging." The three plants most frequently used in smudging are sage, cedar, and sweetgrass. Ruth Sanchez-Way & Sandie Johnson, *Cultural Practices in American Indian Prevention Programs—References*, 7 J. of Juv. Just. 20 n. 1 (Dec. 2000).

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Maggi participate in a sweat, never seen him personally smudging, and had never seen him at a pow-wow.[174]

The government did not produce any evidence that Maggi ever resided on the Blackfeet Indian Reservation.[175] Nor did the government produce any evidence that he either attended school on the reservation or was employed on the reservation.[176] Furthermore, there was no evidence that Maggi ever voted in a tribal election or that he had a tribal identification card.[177]

Maggi appealed, and the Ninth Circuit ruled that this evidence did not prove beyond a reasonable doubt that Maggi was an "Indian person." The Ninth Circuit found that the facts in *Maggi* were "remarkably close to *Cruz*," in which the court held that the government did not sustain its burden at trial.[178] Holding that the district court erred in denying Maggi's motion to acquit, the court found that the government's "sparse collection"[179] of evidence did not provide sufficient proof of any of the *Bruce* factors and, in particular, failed "to demonstrate tribal or government recognition of Maggi as an Indian."[180]

C. Gentry LaBuff

Gentry LaBuff, who was charged with a § 1153(a) robbery committed on the Blackfeet Indian Reservation, was not an enrolled member of a federally recognized tribe.[181] His mother was white.[182] From his father, an enrolled member of the Blackfeet Tribe, LaBuff was 7/32 Indian with 5/32 Blackfeet blood and 1/16 Cree blood.[183] Through his father, LaBuff had been designated as a "descendant of a member" of the Blackfeet Tribe, thus making him eligible to receive medical care at the Blackfeet Community

174. Jury Tr. Transcr., 63, 108, *Maggi*, CR 07–125–GF–SEH.

175. *Maggi*, 598 F.3d at 1083.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* The court reasoned:

> When the record is boiled down, the evidence produced by the government to show tribal or government recognition of Maggi as an Indian consists of (a) status as a descendant member of the Blackfeet Tribe; (b) one instance of accessing Indian Health Services; (c) prosecutions in tribal court, without evidence regarding the result of those prosecutions or whether jurisdiction based on Indian status was determined by the court; and (d) testimony based on second-hand knowledge that Maggi participated in some tribal ceremonies. *Id*.

180. *Maggi*, 598 F.3d at 1083.

181. *U.S. v. LaBuff*, 658 F.3d 873, 875 (9th Cir. 2011). The following facts are derived from the transcript of the jury trial, Jury Tr. Transcr., *U.S. v. LaBuff*, No. CR 10–23–GF–SEH (D. Mont. July 15, 2010), and from the Ninth Circuit's opinion, *U.S. v. LaBuff*, 658 F.3d 873.

182. *LaBuff*, 658 F.3d at 875.

183. *Id.*

Hospital, to receive educational grants, and to fish and hunt on the reservation.[184] Having lived most of his life on the reservation, he had received free health care services there since 1979, but had never received educational grants or hunted or fished on the reservation.[185] LaBuff, born and raised on the reservation, attended a reservation public school that was open to non-Indians.[186] Although he had "descendant status," he was not eligible to vote in tribal elections and he had not participated in tribal activities or Indian cultural events.[187] LaBuff had been prosecuted in the Blackfeet Tribal Court but had never challenged court jurisdiction on the basis that he was not an enrolled member of an Indian tribe.[188]

LaBuff always considered himself to be a white person, and he never held himself out to be an Indian person.[189] As to his physical appearance, he was described as a "tall, white-looking guy . . . . a taller, light-skinned gentleman."[190] Members of the Blackfeet Tribe had never treated LaBuff as an Indian person.[191] When he attended school, he was taunted and teased for being a white person.[192] They called LaBuff "a little white boy."[193] He even had to fight to protect himself.[194] Although he lived, grew up, and went to school on the Blackfeet Indian Reservation, LaBuff was not socially recognized as an Indian, and he did not participate in Indian social life.[195] LaBuff never wore traditional Indian clothing nor had he participated in Blackfeet social or ceremonial activities such as pow-wows or sweats.[196] He also never participated in smudging or other Indian ceremonies or religious activities.[197]

Nonetheless, the Ninth Circuit rejected LaBuff's argument that the government did not prove beyond a reasonable doubt that LaBuff was an "Indian person" under § 1153.[198] The court began its analysis by again recognizing that "determining who is an Indian under § 1153 is *not easy*, as

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *LaBuff*, 658 F.3d at 875. Under Blackfeet law: "The Blackfeet Tribal Court has jurisdiction over all persons of Indian descent, who are members of the Blackfeet Tribe of Montana and over all other American Indians unless its authority is restricted by an Order of the Secretary of the Interior." Blackfeet Tribal L. & Or. Code ch. 1, § 1 (1999).

189. Jury Tr. Transcr., 246, *LaBuff*, No. CR 10–23–GF–SEH.

190. *Id.* at 121, 205.

191. *Id.* at 249–251.

192. *Id.* at 250.

193. *Id.*

194. *Id.* at 250–251.

195. Jury Tr. Transcr., 64, 147, 161, 183, 200, 249–250, 251, *LaBuff*, No. CR 10–23–GF–SEH.

196. *Id.* at 249–250.

197. *Id.* at 250.

198. *LaBuff*, 658 F.3d at 879.

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the statute does not define the term 'Indian.'"[199] The Ninth Circuit found, as LaBuff conceded, that the government satisfied the first prong of the *Bruce* test.[200] Because LaBuff was 5/32 Blackfeet Indian, "he possesse[d] a *sufficient* degree of Indian blood."[201] The panel then applied the second *Bruce* prong, the four Indian recognition factors, in declining order of importance.[202]

As to the first *Bruce* Indian-recognition factor—tribal enrollment—the Ninth Circuit acknowledged that LaBuff was not a member of a federally recognized tribe.[203] However, the court found that "tribal enrollment is not required to establish 'recognition as an Indian.'"[204] Because LaBuff "resided on the reservation and maintained relations with the tribe," the panel concluded that the lack of evidence of tribal membership "is not dispositive of his Indian status."[205]

As to the "second most important *Bruce* factor"—government recognition through receipt of assistance reserved only to Indians—the Ninth Circuit found that LaBuff was eligible for, and did receive, healthcare services at the reservation hospital "which is operated by the federal government and which limits services to tribal members and other non-member Indians."[206] The court concluded that the government presented sufficient evidence to establish the second Indian recognition factor because "LaBuff repeatedly accessed healthcare services 'reserved only to Indians.'"[207]

Based on this same evidence, the court also concluded that the government proved the third *Bruce* factor—enjoyment of the benefits of tribal affiliation—as "LaBuff frequently received healthcare services on the basis of his status as a descendant of an enrolled member."[208] The panel concluded that "the second and third *Bruce* factors can be satisfied by demonstrating receipt of a substantial benefit reserved only to Indians, such as the free medical care provided to LaBuff."[209]

199. *Id.* at 874 (emphasis added).

200. *Id.* at 877.

201. *Id.* (emphasis added).

202. *Id.* at 877–879.

203. *Id.* at 877.

204. *LaBuff*, 658 F.3d at 877 (quoting *Antelope*, 430 U.S. at 747 n. 7 ("[E]nrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and 'maintained tribal relations with the Indians thereon.'") and *Broncheau*, 597 F.2d at 1263 ("Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.")).

205. *LaBuff*, 658 F.3d at 877–878.

206. *Id.* at 878.

207. *Id.* (quoting *Bruce*, 394 F.3d at 1224).

208. *Id.*

209. *Id.* (internal quotation omitted).

Turning to the fourth *Bruce* factor—social recognition as an Indian through residence on a reservation and participation in Indian social life—the Ninth Circuit found that, although LaBuff lived, grew up and attended school on the Blackfeet Reservation, "there was no evidence that he participated in tribal activities or voted in tribal elections."[210] This evidentiary void had apparently little significance as the court concluded that the lack of voting and participation in tribal activities "does not preclude a reasonable inference of social recognition, especially where the defendant has lived his entire life on the reservation."[211]

Noting that the four *Bruce* Indian-recognition factors are "not exclusive," the Ninth Circuit found significant that "on multiple occasions, LaBuff was arrested, prosecuted, and convicted under the jurisdiction of the tribal courts."[212] Citing *Bruce*, the court concluded that tribal recognition can be demonstrated by "the assumption and exercise of tribal jurisdiction over criminal charges."[213] Ignoring the *Cruz* court's determination that a tribal conviction "does not necessarily mean the tribal court had jurisdiction over [the defendant]"[214] and that a federal court cannot determine tribal court jurisdiction in "the absence of any true judicial consideration,"[215] the panel apparently considered it important that "LaBuff did not challenge the authority of tribal officers to arrest him or the exercise of tribal criminal jurisdiction by the Blackfeet Tribal Court."[216] In sum, the Ninth Circuit held that, when viewed in the light most favorable to the government, the evidence "was sufficient for any rational factfinder to have found, beyond a reasonable doubt, that LaBuff is an Indian for purposes of § 1153."[217]

D. Ronnie Smith

Arising on the Fort Peck Indian Reservation, the case of Ronnie Lynn Smith endured a complex procedural history before its final result on his

210. *Id.* The court ignored, and did not even discuss, that LaBuff never held himself out to be an Indian person, had never been treated as an Indian person by members of the Blackfeet Tribe, was not socially recognized as an Indian, and did not participate in Indian social life. *See supra* nn. 189–197.

211. *LaBuff*, 658 F.3d at 878–879.

212. *Id.* at 879.

213. *Id.* (citing *Bruce*, 394 F.3d at 1227).

214. *Cruz*, 554 F.3d at 846 n. 7.

215. *Id.* at 850 n. 15.

216. *LaBuff*, 658 F.3d at 879. The panel also ignored Blackfeet Tribal Law & Order Code, *see supra* n. 188, and the fact that LaBuff was never given legal advice to challenge jurisdiction as he was represented by Blackfeet Tribal Court defenders who are not trained lawyers but simply advocates who rely on practical experience.

217. *LaBuff*, 658 F.3d at 879.

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Indian status.[218] The government charged Smith with assault with a dangerous weapon, under 18 U.S.C. §§ 1153 and 113(a)(3), and a jury convicted him.[219]

Smith appealed his conviction and his sentence. The Ninth Circuit affirmed the conviction[220] and subsequently remanded the case for further proceedings regarding the sentence, pursuant to *United States v. Ameline*.[221] The district court confirmed the sentence and, in the next appeal, the Ninth Circuit again remanded for compliance with *Ameline*.[222] The district court again confirmed the sentence, and Smith again appealed. Defense counsel filed an *Anders* brief,[223] and the Ninth Circuit affirmed the district court's judgment.[224] Smith timely filed a motion to vacate, set aside or correct his sentence, pursuant to 28 U.S.C. § 2255.[225] The post-conviction proceedings centered on the Indian status issue.[226] At the trial, the issue first arose during jury selection.

Relevant here, during jury selection, the judge discussed the involvement of Native Americans in the trial. "Well, I want to follow up on this topic that I addressed initially with you concerning ethnic background of persons and other topics of that sort. *The defendant in this case is in fact a Native American*. A very substantial number of the persons whose [sic] appear and give testimony at this trial may be Native Americans as well."[227] The court asked the panel members if any had such strong views on the subject of ethnic background or tribal affiliation that they could not

218. *U.S. v. Smith*, 442 Fed. Appx. 282, 284 (9th Cir. 2011) [hereinafter *Smith V*]. The following facts are derived from the transcript of the jury trial, Jury Tr. Transcr., *U.S. v. Smith*, No. CR 03–145–GF–SEH (D. Mont. June 17, 2004), and the Ninth Circuit's opinion in *Smith V*.

219. *Smith V*, 442 Fed. Appx. at 283.

220. *U.S. v. Smith*, 130 Fed. Appx. 876, 877–878 (9th Cir. 2005).

221. *U.S. v. Smith*, 138 Fed. Appx. 966, 967 (9th Cir. 2005) (citing *Booker*, 543 U.S. 220 and *U.S. v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc)). *Booker* invalidated the mandatory United States Sentencing Guidelines because they violated the Sixth Amendment right to a jury trial and remedied the violation by making the Guidelines advisory. *Ameline* was the Ninth Circuit's answer to adjudicating appellate cases in which sentence was imposed under the invalidated mandatory Guidelines. Under an "*Ameline* remand," the case is remanded to the district court "to answer the question whether the sentence would have been different had the court known that the Guidelines were advisory." *Ameline*, 409 F.3d at 1079.

222. *U.S. v. Smith*, 203 Fed. Appx. 31 (9th Cir. 2006).

223. *Anders v. Cal.*, 386 U.S. 738 (1967). In an *Anders* brief, defense counsel analyzes and advocates the lack of non-frivolous appellate issues and seeks to be relieved as counsel. *See Penson v. Ohio*, 488 U.S. 75, 82 (1988).

224. *U.S. v. Smith*, 235 Fed. Appx. 449 (9th Cir. 2007).

225. *Id.*

226. *Id.*

227. Jury Tr. Transcr., 34–35, *Smith*, No. CR 03–145–GF–SEH (emphasis added).

serve as fair and impartial jurors.[228] No panelist responded affirmatively to this inquiry.[229]

The prosecutor acknowledged in the government's opening statement that the government had to prove that Smith was an Indian person.[230] During the government's case-in-chief, an investigator with the Fort Peck Tribe, who had known Smith most of his life, testified regarding Smith's Indian status and laid foundation for admitting three exhibits.[231] The first exhibit was an application by Smith for enrollment in the Fort Peck Tribe, as an associate member.[232] The second was a certificate of Indian blood, which stated that Smith has a blood degree of 25/128 Assiniboine and Sioux blood and was an associate member of the Tribe.[233] The investigator testified that an associate member had the right to use the Indian Health Service facility but did not have the right to vote, to share in per-capita payments, or to own tribal property.[234] The investigator also testified regarding a tribal resolution, in which a tribal enrollment committee had voted to allow Smith to give up his tribal associate member rights.[235] The reason behind this relinquishment was not in evidence. The investigator finally testified that Smith had lived on the reservation.[236] In response to the prosecutor's question of whether Smith held himself out as Indian, the investigator stated "[a]s far as I've known, yes."[237]

During the trial, Smith did not challenge the sufficiency of the government's evidence as to his Indian status. During closing argument, the prosecutor asserted that the three exhibits introduced through the investigator satisfied the element regarding Smith's Indian status.[238] The prosecutor argued: "The defendant has Indian blood and was a member of the tribe at one point, and is eligible for enrollment in the tribe. That makes him an Indian person."[239] Defense counsel did not challenge the government's proof as to Smith's Indian status, however, during closing argument.

Furthermore, during settlement of jury instructions, the defense did not offer any instruction on the definition of "Indian," nor did Smith object to the court's proposed instructions.[240]

228. *Id.* at 35.
229. *Id.*
230. *Id.* at 110.
231. *Id.* at 231.
232. *Id.* at 233.
233. Jury Tr. Transcr., 234, *Smith*, No. CR 03–145–GF–SEH.
234. *Id.*
235. *Id.* at 236.
236. *Id.*
237. *Id.* at 237.
238. *Id.* at 330.
239. Jury Tr. Transcr., 330, *Smith*, No. CR 03–145–GF–SEH.
240. *Id.* at 336–341.

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Before the court instructed the jury, a juror submitted a note inquiring into the significance of Smith's Indian status:

> [T]he prosecutor presented documentation regarding Ronnie Smith's status and tribal affiliation. Specifically, that he is no longer a member of the Fort Peck Reservation. My question is: What was the relevance of this information? It was the night of tribal elections, yet Ronnie Smith wasn't a voting member of the tribe. A point for clarification only, please.[241]

The court discussed the note and the propriety of a response with counsel, and, with consent, the court told the jury that it would not be appropriate to comment further.[242]

As part of its final instructions, the court informed the jury that the government had to prove, beyond a reasonable doubt, that Smith was an Indian person.[243] Yet, the term "Indian" was not defined in the instructions, and neither party requested such an instruction.[244] The jury nevertheless convicted Smith.

Following his direct appeals and resentencings, Smith claimed ineffective assistance of counsel in his § 2255 motion for relief.[245] He alleged, inter alia, that trial counsel had rendered ineffective assistance by failing: to request a jury instruction specifying the government's burden of proof with respect to the Indian status element, particularly in light of the juror's note; to object to the prosecutor's misstatement of the law that Smith's membership with the Tribe made him an Indian; and to argue at trial and on appeal that the government had failed to prove Smith's Indian status.[246] Smith also alleged that the trial court had erred and abused its discretion when it informed the venire that Smith was a Native American, thus relieving the government of the burden of proving this element of the offense.[247] Finally, in an addendum to his petition, Smith claimed the court lacked subject-matter jurisdiction under § 1153 because he is not an Indian.[248] At trial, the government had presented evidence that Smith was eligible for enrollment as an associate member in the tribe.[249] Post-conviction, as an addendum to his § 2255 petition, Smith submitted a letter from someone affiliated with the Enrollment Office of the Fort Peck Tribes, who stated

241. *Id.* at 320.

242. *Id.* at 321–323.

243. *Id.* at 325.

244. Jury Tr. Transcr., 318–319, 323–329, *Smith*, CR 03–145–GF–SEH.

245. Petr.'s Mot. to Vacate, Set Aside, or Correct Sentence, *U.S. v. Smith*, No. CR 03–145–GF–SEH (D. Mont. June 17, 2004) (available on PACER at Dkt. No. 106).

246. *Id.* at 5–7.

247. *Id.* at 7.

248. Petr.'s Req. for Leave of Court to File Attached Addendum to Mot. 28 U.S.C. § 2255; and for Permission to Introduce and Submit Ex. 2–4, *U.S. v. Smith*, No. CR 03–145–GF–SEH (D. Mont. June 17, 2004) (available on PACER at Dkt. No. 114).

249. Jury Tr. Transcr., 234, *Smith*, No. CR 03–145–GF–SEH.

that "Mr. Smith does not meet the required blood quantum of 1/8 for Associate Membership nor 1/4 Full Enrollment" in the Tribe.[250]

The district court rejected each of the ineffective assistance of counsel claims, finding that Smith failed to meet the prejudice prong under the *Strickland* test.[251] Since the court found the evidence of Smith's Indian status was sufficient, it also rejected his claim that the court lacked jurisdiction under § 1153.[252] The Ninth Circuit reviewed whether the jurisdictional element of Indian status was met under the Major Crimes Act.[253] Smith presented multiple arguments on this issue.

Smith was not an enrolled member of the Tribe. He once was an associate member, which meant that he was eligible to receive limited benefits from the Tribe, including access to the Indian Health Service.[254] Smith relinquished his associate membership in 1996.[255] The government presented no evidence that Smith ever actually used Indian Health Services. In terms of other potential benefits, Smith could not vote in tribal elections, share in tribal per capita distributions, or own tribal property.[256]

A panel of the Ninth Circuit ruled the government had presented sufficient evidence to establish Smith's Indian status.[257] The court first ruled the government sufficiently established "Smith's Indian blood to satisfy *Bruce*'s first prong" because "the government presented evidence that Smith has 25/128 (19.5 percent) Assiniboine and Sioux blood, well in excess of the 1/8 we approved in *Bruce* and *Maggi*."[258] The court "acknowledge[d] that Smith's § 2255 motion attached a letter from the Fort Peck Tribes Enrollment Office stating that Smith does not meet the required blood quantum of 1/8 for Associate Membership [in the Fort Peck tribes], nor 1/4 Full Enrollment."[259] The court responded, however, that the letter had not been submitted at trial, and "even if it had been, a rational trier of fact could have chosen to credit the more specific, higher figure established by the government's evidence."[260]

250. Petr.'s Req., *supra* n. 248, at 9.

251. Or., 13, *U.S. v. Smith*, No. CR 03–145–GF–SEH and CV–08–029–GF–SEH (D. Mont. June 17, 2004) (available on PACER at Dkt. No. 123); *Strickland v. Wash*., 466 U.S. 668 (1984). *Strickland* established a two-part test to adjudicate ineffective assistance of counsel claims. First, counsel's performance must be deficient under the Sixth Amendment and second, the deficiency must have affected the result. *Id.* at 692.

252. Or., *supra* n. 251, at 12–13.

253. *Smith V*, 442 Fed. Appx. at 283–284.

254. *Id.* at 284.

255. *Id.* at 285.

256. Jury Tr. Transcr., 234, *Smith*, No. CR 03–145–GF–SEH.

257. *Smith V*, 442 Fed. Appx. at 285.

258. *Id.* at 284 (noting that the Ninth Circuit had previously held this requirement to be "satisfied by as little as 1/8 (12.5%) Indian blood") (citing *Maggi*, 598 F.3d at 1080 and *Bruce*, 394 F.3d at 1223).

259. *Smith V*, 442 Fed. Appx. at 284 (internal quotation omitted).

260. *Id.*

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The court then reviewed the evidence satisfying *Bruce*'s second factor. Referencing Smith's prior Associate Membership, the court noted that "Smith at one time enjoyed formal tribal enrollment, the most important indicator of tribal recognition of a defendant's Indian status."[261] Contrasting previous opinions, the Ninth Circuit explained, "[a]lthough *Cruz* and *Maggi* held that 'descendant status' in the Blackfeet tribe, available to the children of formally enrolled Blackfeet members, was insufficient to show tribal enrollment, Smith's membership in the Sioux and Assiniboine tribes was more formal than Cruz and Maggi's descendant status."[262] The court detailed, "Smith was actually enrolled as a tribe member by virtue of his own quantum of Indian blood. He was not a mere descendant eligible for tribal affiliation by virtue of a parent's enrollment alone."[263] This analysis exemplifies the Ninth Circuit's attraction to objective facts in determining Indian status.

The court analyzed Smith's relinquishment of his tribal enrollment in 1996.[264] "This decision does not definitively show . . . that Smith or the tribe ceased to consider Smith an Indian person."[265] The court noted that the tribal investigator "testified he had known Smith for most of his life, that Smith had lived on the reservation that entire time and that, as far as [the investigator] knew, Smith held himself out to be an Indian person."[266] In this regard, the court appeared to minimize Smith's self-identification in seizing upon conflicting evidence offered by a non-Indian witness.

The court summarized, "[a] rational jury could have concluded that because Smith was once formally enrolled in the tribe and continued to hold himself out as an Indian even after his enrollment ended, both Smith and the tribe continued to view Smith as an Indian despite his unexplained decision to relinquish his formal enrolled status."[267] The panel concluded that there was sufficient proof for the factfinder to determine that Smith was an "Indian person."[268]

Smith stands as a warning to defense counsel. After all, *Smith*'s procedural context of post-conviction review, with the attendant heightened standards to reverse, was undoubtedly important and likely dispositive. Had the Indian issue been pressed at trial and incorporated into the jury instructions,

261. *Id.* (citing *Cruz*, 554 F.3d at 846).

262. *Smith V*, 442 Fed. Appx. at 284 (internal citations omitted).

263. *Id.* (internal citations omitted).

264. *Id.* at 285.

265. *Id.* (citing *Cruz*, 554 F.3d at 850 (holding that *Bruce* requires an analysis of Indian status from the perspective of the individual as well as from the perspective of the tribe)).

266. *Smith V*, 442 Fed. Appx. at 285.

267. *Id.*

268. *Id.*

the jury may have reached a different verdict, or the Ninth Circuit may have viewed the jury verdict differently on appeal.

E. Juvenile Male

Juvenile Male was charged with a § 1153 crime.[269] The Ninth Circuit limited its factual discussion to the following: "The juvenile is at least one quarter Indian by blood, and is an enrolled member of a federally recognized tribe."[270] Additionally, the court noted that the juvenile resided on the reservation and used his membership to receive tribal member benefits.[271] The court continued, stating that the juvenile "claims not to have obtained social recognition as Indian, and, despite living on the reservation, does not identify as Indian himself."[272] According to the Ninth Circuit, this adds up to proof beyond a reasonable doubt that the juvenile is an "Indian person."[273]

The court determined that the juvenile had conceded that the government proved the first three *Bruce* Indian-recognition factors: "he is enrolled in a tribe, received assistance and benefits reserved only to Indians, and enjoys the benefits of tribal affiliation."[274] Even if the government had not proven the fourth *Bruce* factor, "a trier of fact may conclude [that the juvenile] is Indian."[275] The Ninth Circuit cited *LaBuff* for the proposition that the government does not have to prove all four *Bruce* Indian recognition factors to establish the Indian status element.[276]

Because the juvenile had "sufficient Indian blood" and satisfied the first three *Bruce* Indian-recognition factors, "including the most important factor—tribal enrollment," the Ninth Circuit held that "a reasonable trier of fact could find the juvenile to be an Indian beyond a reasonable doubt."[277] The court reasoned that, although they "may prove to be relevant in a closer case," the juvenile's "claims" that he has never held himself out as an In-

269. *U.S. v. Juvenile Male*, 666 F.3d 1212, 1213–1214 (9th Cir. 2012). The record in this case was sealed because the defendant was a juvenile. Because the court declined to address specific facts which were not "discussed in open court during oral argument," *id.* at 1214 n. 1, this article's presentation of the facts, as well as our "case-by-case" analysis is severely restricted.

270. *Id.* at 1214.

271. *Id.* at 1215 (noting that the juvenile "received assistance and benefits reserved only to Indians and enjoys the benefits of tribal affiliation.").

272. *Id.*

273. *Id.*

274. *Juvenile Male*, 666 F.3d at 1215.

275. *Id.*

276. *Id.* Note that in *LaBuff*, however, the government could not prove the *most* important *Bruce* factor, tribal enrollment, 658 F.3d at 877, whereas here, the government arguably could not prove the *least* important *Bruce* factor, social recognition as an Indian through residence on a reservation and participation in Indian social life, *Juvenile Male*, 666 F.3d at 1215.

277. *Id.*

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dian person and that he has not been socially recognized or accepted as an Indian do not outweigh the proof of the first three *Bruce* Indian-recognition factors in this case.[278]

V. Practice Pointers and State of the Law

If the government invokes §§ 1152 or 1153 in the indictment, the litigants must closely analyze the "Indian" status of the defendant. Litigants should be mindful that the appellate courts have analyzed this issue on a "case-by-case" basis.[279]

First, litigants should focus on the two parts of the Supreme Court's *Rogers* test upon which all the circuit tests are based. An "Indian person" is an individual who has Indian blood and who is regarded as an Indian.[280] The caselaw demonstrates that if the defendant has some Indian blood and is recognized as an Indian by either a tribe or the federal government, he or she will be considered to be an "Indian person" for jurisdictional purposes.

Does the defendant have any Indian blood? If no, he or she cannot be an "Indian person."[281] If yes, what is the degree of Indian blood? In most cases, individuals have not been found to be an "Indian person" unless he or she has at least 1/8 Indian blood.[282] However, the Eighth Circuit determined that a defendant with 3/32 Indian blood was an "Indian person."[283] Although the Ninth Circuit requires a "sufficient"[284] quantity of Indian blood, the minimum percentage to satisfy the sufficiency test has not been specified.[285]

278. *Id.*

279. *Maggi*, 598 F.3d at 1083 ("We have little guidance as to the quantum of evidence necessary to sustain Indian status jurisdiction.").

280. *Rogers*, 45 U.S. at 572–573. For example, in the Ninth Circuit, the Government must prove beyond a reasonable doubt first that "the defendant has a sufficient 'degree of Indian blood'" and second that the defendant "has 'tribal or federal government recognition as an Indian.'" *Cruz*, 554 F.3d at 845–846 (quoting *Bruce*, 394 F.3d at 1223–1224).

281. *Rogers*, 45 U.S. at 572–573; *Bruce*, 394 F.3d at 1219 ("[T]he criminal laws of the United States apply to offenses committed in Indian country by non-Indians against Indians and by Indians against non-Indians" and "by one Indian against the person or property of another Indian.").

282. *See e.g. Bruce*, 394 F.3d at 1223–1224 (collecting cases where defendant had 1/8 or more Indian blood). Violet Bruce had 1/8 Indian blood. *Id.* at 1224.

283. *Stymiest*, 581 F.3d at 762.

284. *Cruz*, 554 F.3d at 845.

285. *Maggi*, 598 F.3d at 1080 ("[W]e have not had occasion to test just how 'low' is too low."). In *Maggi*, the court side-stepped the defendant's contention that, with only 3/64 Indian blood, he did not satisfy the first prong of the *Bruce* (*Rogers*) test: "We need not resolve . . . the question whether there is a baseline quantum of Indian blood required because Maggi does not meet *Bruce*'s second prong of tribal or government recognition." *Id.* at 1080–1081.

If the defendant has Indian blood, has he or she been recognized as an Indian by a tribe or by the federal government?[286] Enrollment in a tribe is the "common evidentiary means of establishing Indian status."[287]

In the Eighth Circuit, tribal enrollment is dispositive.[288] In the Ninth Circuit, which also requires that the tribe be recognized by the federal government,[289] tribal enrollment is not dispositive.[290] But from a practical standpoint, tribal enrollment likely satisfies the second part of the *Rogers* test and will typically be sufficient to prove Indian status.[291]

If the defendant has Indian blood and is not a member of a tribe, counsel must carefully consider the other Indian recognition factors. These factors include the government's formal and informal recognition of the defendant's Indian status through the granting of assistance reserved only to Indians, the defendant's enjoyment of the benefits of tribal affiliation, the tribe's formal or informal recognition of the defendant's Indian status by subjecting him to tribal court jurisdiction, the tribe's social recognition of the defendant's Indian status through his residence on the reservation and his participation in Indian social life, and whether the defendant holds himself out as an Indian.[292] Any other recognition factor should also be considered.[293] Investigation is critical and visiting the reservation is necessary.

Counsel should get a detailed history of the defendant's life. The following information must be obtained: the defendant's current or past relationships with formal Indian entities (e.g., tribal enrollment, Indian Health Services, or tribal courts); the defendant's residential history; the defendant's family history and its involvement with Indians and tribes; the defendant's attendance at Indian social, cultural, or religious events; the defendant's participation in any such events; the defendant's self identity as an Indian or non-Indian person; and other individuals' perception—both Indians and non-Indians—of the defendant's identity. Counsel must gather these facts and any other Indian recognition evidence—or lack thereof—to analyze whether there may be a reasonable doubt as to the defendant's Indian status.

286. *See Bruce*, 394 F.3d at 1223 ("[T]ribal or government recognition as an Indian.") (citing *U.S. v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996); *see also Rogers*, 45 U.S. at 57.

287. *Broncheau*, 597 F.2d at 1263. The litigants should obtain written proof, if any, of the defendant's enrollment in a federally recognized tribe. The enrollment certification will also include the defendant's percentage of Indian blood.

288. *Stymiest*, 581 F.3d. at 764.

289. *Maggi*, 598 F.3d at 1079–1080.

290. *Bruce*, 394 F.3d at 847.

291. *See Juvenile Male*, 666 F.3d at 1215. The juvenile's tribal membership was not outweighed by the fact that he did not consider himself to be Indian and was not socially recognized as Indian. *Id.*

292. *See Bruce*, 394 F.3d at 1224; *see also Stymiest*, 581 F.3d. at 764.

293. *See Maggi*, 598 F.3d at 1081; *see also LaBuff*, 658 F.3d. at 879.

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A defendant's Indian status "is an essential element of a § 1153 offense which the government must allege in the indictment and prove beyond a reasonable doubt."[294] However, as a "jurisdictional" element, it appears that the appellate courts do not search for reasonable doubt. For example, in both *LaBuff* and *Juvenile Male*, the Ninth Circuit disregarded the lack of proof of the fourth *Bruce* factor, social recognition as an Indian through residence on a reservation and participation in Indian social life.[295] The caselaw demonstrates that the courts are not likely to find reasonable doubt unless there is a significant lack of evidence of at least three, and perhaps all four, of the Indian recognition factors.[296] For defense counsel, the seeming reluctance of the appellate courts to identify reasonable doubt underscores the importance of persuading the fact-finder at trial. If trial is by jury, counsel should submit an instruction to guide the jury in the determination of Indian status.[297] The additional "Indian person" element should be included in the instruction as an element of the offense.[298]

Counsel must also consider whether to waive a jury trial.[299] If the evidence of the alleged crime is strong, or if the alleged crime is violent, a jury may be reluctant to acquit even if the Indian status evidence is weak. If the evidence of the alleged crime is weak, counsel may lose credibility

294. *Maggi*, 598 F.3d at 1077.

295. *LaBuff*, 658 F.3d. at 879; *Juvenile Male*, 666 F.3d at 1215.

296. *See Cruz*, 554 F.3d at 847 ("Cruz does not satisfy *any* of the four *Bruce* factors.") (emphasis in original); *see also Maggi*, 598 F.3d at 1083 ("This sparse collection does not provide sufficient evidence of any of the factors set out in *Bruce*.").

297. *See e.g.* 9th Cir. Jury Instr. Crim. 8.113 (2010) (available at http://www3.ce9.uscourts.gov/web/sdocuments.nsf/crim).

298. Following is a sample offense elements jury instruction:

> In order for [name of defendant] to be found guilty of [name of offense], the government must prove each of the following elements beyond a reasonable doubt.
>
> FIRST: That [name of defendant] is an Indian person;
> SECOND: That the incident occurred on or within the boundaries of the _____ Indian Reservation, being Indian country;
> THIRD: [insert elements of offense];
> FOURTH: [insert elements of offense];
> FIFTH: [insert elements of offense].
>
> If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find [name of defendant] guilty of [name of offense].
>
> If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find [name of defendant] not guilty of [name of offense].

299. If there is no real dispute, the case may be submitted to the district court via written stipulated facts. In one case where the Federal Defenders of Montana used this tactic, the district court entered a judgment of acquittal. *See* Def.'s Stip. Facts, *U.S. v. Barnhart*, No. CR 10–63–GF–SEH–02 (D. Mont. Oct. 19, 2010) (available on PACER at Dkt. No. 69); *see also* Findings of Facts, Or. & Judgm., *Barnhart*, No. CR–10–CR–10–63–GF–SEH (D. Mont. Oct. 19, 2010) (available on PACER at Dkt. No. 75).

with the jury by emphasizing the Indian status issue. In the latter situation, counsel may argue the issue to the court in a Rule 29 motion for judgment of acquittal and then simply tell the jury in passing that the government has failed to prove the Indian status element.[300] The record must be preserved.

In sum, if the defendant is enrolled in a federally recognized tribe, the likelihood of success in challenging the Indian status element is slim unless the defendant has left the reservation and does not receive any tribal or government benefits reserved only for Indians. If the defendant is not enrolled in a federally recognized tribe, *LaBuff* suggests that the courts are likely to focus only on the two *Rogers* issues writ large, preferring not to delve into the intricacies of the four-part test; instead, it appears the courts will look only to whether the defendant has Indian blood and whether the defendant has been recognized as an Indian by the government or by a tribe, particularly as to any receipt of money or medical and hospital services.[301] At bottom, it is a fact-based inquiry that plays out on a case-by-case basis.

For the courts, *Smith* reflects that, even where the parties do not press the Indian issue, judges and juries must still adjudicate it. Juries resolve the issue on an ad hoc one-time basis. The courts do not have that luxury, and instead must deal with it systematically. The Supreme Court has not done so since 1846. The stark and racial language of *Rogers* reflects a bygone era. The Indian-country district and appellate courts of today adjudicate in a different culture, in which the law does not consider Indian to be a racial, but instead a political determination. Given that shifted perspective, should the law shift as well?

We see it as a matter of conflicting policy choices. If ease of application is the priority, tribal membership alone could define Indian status. Some may argue that such a law enhances tribal sovereignty by respecting a tribe's determination of who is a member of their tribe. Yet many tribal members, and perhaps even the tribe as a political entity, would readily admit that such a construction is a legal fallacy because it would limit Indian status to only those enrolled in the tribe and would exclude even blood relatives of tribal members.

If the law should reflect reality, and all of its complexities, then self-identity and community perspective should become paramount, or at least more important than the current law values. Of course, reality is complex and often times, if not inherently, subjective. The law currently favors objective facts (i.e., tribal enrollment or federal government recognition) over the reality of daily existence (i.e., social recognition as an Indian). Yet, the law permits the jury to consider evidence of self-identity and social expres-

300. Fed. R. Crim. P. 29(a).

301. *LaBuff*, 658 F.3d. at 879.

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sion. That vacillation embraces our history but perplexes the courts and troubles adjudications.

One legal conclusion is certain. Ultimately, the Supreme Court must engage this issue. In the meantime, federal prosecutions in Indian country continue, and this aspect of the American Experience marches on.

VI. Conclusion

To many Americans, Indians are confined to history, at most a marginalized relic of the past, isolated on rural reservations. The reality is, Indian country survives. Indian status is central to establishing federal jurisdiction in Indian country cases under both the Major Crimes Act and the General Crimes Act. It cannot be ignored. Perhaps reflecting this tortured aspect of our history, the issue is complex, controversial, and conflicted. For the practitioner, its fact intensity demands a close working relationship with the client and record development. For the courts, this remains a "perplexing" issue and at least one circuit conflict must be resolved.