Who Is A Native American?

And What Does That Mean?

And under the law, who cares?

NC State Recognized Tribes

- NC Gen stat 143B-405
  - § 143B-405. North Carolina State Commission of Indian Affairs -- purposes for creation

The purposes of the Commission shall be as follows:

(1) To deal fairly and effectively with Indian affairs.

(2) To bring local, State, and federal resources into focus for the implementation or continuation of meaningful programs for Indian citizens of the State of North Carolina.

(3) To provide aid and protection for Indians as needs are demonstrated; to prevent undue hardships.

(4) To hold land in trust for the benefit of State-recognized Indian tribes. **This subdivision shall not apply to federally recognized Indian tribes.**

(5) To assist Indian communities in social and economic development.

(6) To promote recognition of and the right of Indians to pursue cultural and religious traditions considered by them to be sacred and meaningful to Native Americans.

Presentation applies to FEDERALLY recognized Tribes ONLY

Factual Background

- Defendant is charged with murder in Jackson County, North Carolina.
- The parties stipulate the offense occurred on September 30, 2012.
- The parties stipulate the offense occurred in Jackson County.
- The parties further stipulate the offense occurred on the Cherokee Indian Reservation portion of Jackson County.
- The victim is a female and white/Caucasian.
- Defendant is a male.
- Defendant claims he is Native American or Indian.
- So the question is which court, Federal or State, has jurisdiction?

Historical Background

- Westward expansion of the US. Population of NC expanded from 45,000 in 1750 to 275,000 in 1775.
- Congress passed the Indian Removal Act, 14 Stat. 411 (1830), authorizing the President to "negotiate" the relocation of all eastern tribes west of the Mississippi River.
- Cherokee trilogy cases:
  - Johnson v. M'Intosh, 21 U.S. 543 (1823)
  - Cherokee Nation v. Georgia, 30 U.S. 1 (1831)
  - Worcester v. Georgia, 31 U.S. 515 (1832)

200+ Years of Federal Indian Law in Three Slides

- Chief Justice John Marshall wrote in 1831 that "the condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence". Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).
- Indian Tribes are "domestic dependent nations." Id. at 17.
- In the United States Indian tribes have jurisdiction to exercise their authority which derives from their inherent sovereignty over tribal members and tribal property. Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505 (1991) *citing* Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

200+ Years of Federal Indian Law (Slide 2)

- In the pivotal case of Worcester v. Georgia, 31 U.S. 515, 557-58, 560 (1832), Chief Justice John Marshall determined that the new states of the United States did not have jurisdiction over Indians or Indian governments. Mr. Chief Justice Marshall explained:

Indian Nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States. . . . Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil from time immemorial. . . . The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.

Contempt?

"Marshall has made his decision. Now let him enforce it." *President Jackson*

Removal of the Cherokee
(The Trail of Tears) 1838

200+ Years of Federal Indian Law (Slide 3)

- The unique position Native Americans and tribes possess **NOT** based upon race. It is the political relationship between the United States and Indian tribes expressly established in the United States Constitution which authorizes unique financial, medical, educational, residential and employment benefits not otherwise afforded to non-Indians.
- The Constitution of the United States gives Congress the power to provide "special treatment" to Indians based on membership in a quasi-sovereign Indian tribe. Morton v. Mancari, 417 U.S. 535 (1974).
- Each federally recognized Indian tribe decides who comprises their membership which is a determination left solely to the tribe based upon their inherent sovereignty and neither the State nor the Federal government may infringe on this most basic foundational criteria. Santa Clara Pueblo v. Martinez, 436 U.S. 72 (1978).

North Carolina

- In December 1838 after the final Cherokees were forced to leave for the Indian Territory (known today as Oklahoma), approximately 1000 Cherokee refused to leave Western North Carolina hiding in the Smoky Mountains of Western North Carolina.
- In 1838 the "modern" story of the Eastern Band of Cherokee begins.
- In 1924 the Eastern Band of Cherokee become a federally recognized Indian Tribe under President Coolidge. 43 Stat. 376 (1924)

Who Is A Member of the Eastern Band of Cherokee?

- Isn't the determination simple?
- Either a person is a member of the tribe or not.
- Do you really look to the quantum of Indian Blood?
- To be a member of the EBCI must have 1/16 blood quantum.

- The determination of the defendant **or** victim as an Indian is a material element in most Indian country offense prosecutions.
- The issue is generally not contested, but occasionally a serious question arises, as happened in my case.

So, Tell Us, Who Is An Indian?

- Simple, use the Rogers Test (Who is this Rogers fella?)
  - William Rogers, a white man, killed Jacob Nicholson, a white man, on land allotted to the Cherokee in what is now Arkansas. In 1845 he was indicted for murder in the Federal Court in Arkansas.
  - Rogers voluntarily moved to Cherokee country in 1836 without intending to return to the US, was adopted by the tribe, and became a citizen of the Cherokee nation. He married a Cherokee woman in 1836, they remained married until she died in 1843, and they had Cherokee children who continued to live in the Cherokee nation.
  - Similarly, Nicholson was alleged to have assimilated into the Cherokee tribe.
  - Thus, Rogers argued the US had no jurisdiction over the defendant because it was a crime committed by an Indian against an Indian in Indian Country.

DENIED

by Chief Justice Taney

The Rogers test

- From U.S. v. Rogers, 45 U.S. 567 (1846) arose the analysis used when making an inquiry into whether an individual is defined as an "Indian" under the law.
- The test established in Rogers asks whether the defendant:

(1) has some quantum of Indian blood, and

(2) is recognized as an Indian by a tribe or the federal government or both.

Congressional Action in 1885

- the Major Crimes Act was passed by Congress in reaction to the Supreme Court decision in Ex parte Crow Dog, 109 U.S. 556 (1883). Following the murder of Spotted Tail by Crow Dog the Supreme Court decided the federal courts lacked jurisdiction to punish crimes between Indians on reservations.
- In response Congress enumerated certain crimes which now comprise the Major Crimes Act. 23 Stat. 362 (1885).
- Federal courts now have jurisdiction over Indian on Indian crime when one of the crimes delineated in the Major Crimes Act is alleged. 18 U.S.C. §1153

"Interracial Crime" in Indian Country

- the Assimilative Crimes Act (18 U.S.C. §13) through the General Crimes Act (18 U.S.C. §1152) confers federal court jurisdiction over crimes where the defendant and victim are 'interracial.'
- Where the defendant is a non-Indian and the victim an Indian federal court jurisdiction exists. Donnelly v. US, 228 U.S. 243, 272 (1913).
- Where the defendant is an Indian and the victim a non-Indian federal court jurisdiction exists. US v. John, 587 F.2d 683, 687 (5th Cir. 1979).
- Where defendant and victim are non-Indian, state court jurisdiction exists. US v. McBratney, 104 U.S. 621 (1881).
- A state has jurisdiction over an Indian when he is outside of "Indian country." Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)
- When not a "Major Crime" and Indian on Indian, Tribal Court jurisdiction.

JURISDICTIONAL CHART
When the Crime Committed is a "Major" Crime

Persons Involved	***Jurisdiction***
Indian accused, Indian victim	Federal government (Major Crimes Act) and tribal government (inherent sovereignty)
Indian accused, non-Indian victim	Federal government (Major Crimes Act) and tribal government (inherent sovereignty)
Non-Indian accused, Indian victim	Federal government only (Major Crimes Act)
Non-Indian accused, non-Indian victim	State government only

The Rights of Indians and Tribes, by Stephen L. Pevar, 3rd Edition (2002), pages 145-146.

Remember William Rogers From 1846?

- The first prong of Rogers asks:
  Does the person have blood quantum in federally recognized tribe?
- The second prong of Rogers is fact driven and differs in each case.
  Is that person recognized as an Indian by the tribe or federal government?

- To be an "Indian" it is necessary that **BOTH** prongs of the Rogers test are answered in the affirmative.

The St. Cloud Test

- The second prong of the Rogers examines various factors in deciding whether the person is recognized as an Indian by the tribe or the federal government. This inquiry was best delineated by Judge Porter in his opinion in St. Cloud v. U.S., 702 F.Supp. 1456 (1988), where he looked at Four distinct factors.
- The four St. Cloud factors are:
  - 1) enrollment in a tribe;
  - 2) government recognition through receipt of assistance reserved only to Indians;
  - 3) enjoying benefits of tribal affiliation; and
  - 4) social recognition as an Indian.

In 2015 What Happens On Cherokee Lands In NC?

- The Rogers test from 1846 is still good law
- Courts still use Rogers & St. Cloud to decide "who is a Native American?"

- I applied these tests to decide jurisdiction for the case occurring Sept. 20, 2012 on Cherokee lands (in Jackson County)
  - Defendant did have Indian blood. The minimum blood quantum of EBCI is 1/16. D. is 11/256.
  - I made numerous findings applying St. Cloud non-racial factors regarding the Defendant.
- I determined Defendant was not a Native American as defined under federal law and jurisdiction was in State Superior Court, Jackson County.

Developing Jurisprudence in NC

- Since the first North Carolina criminal case involving Cherokee Indians in State v. Ta-cha-na-tah, 64 N.C. 614 (1870), I estimate less than 20 opinions from the Appellate courts of North Carolina regarding jurisdictional issues with the Eastern Band of Cherokee Indians.

Miss Cherokee Pageant

Circa 1924