



U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

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MEMORANDUM - Sent via Electronic Mail

DATE: September 2, 2022

TO: ALL UNITED STATES ATTORNEYS
ALL FIRST ASSISTANT UNITED STATES ATTORNEYS
ALL EXECUTIVE ASSISTANT UNITED STATES ATTORNEYS
ALL CRIMINAL CHIEFS
ALL TRIBAL LIAISONS
ALL VICTIM WITNESS COORDINATORS

FROM: Monty Wilkinson
Director

SUBJECT: Oklahoma v. Castro-Huerta: Interim Guidance for Coordination with Tribal, State, and Local Governments

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On June 29, 2022, the Supreme Court issued its decision in *Oklahoma v. Castro-Huerta*, No. 21-429, 2022 WL 2334307 (June 29, 2022), which addressed the scope of a state's criminal jurisdiction over non-Indian defendants in Indian country.¹ While the Department continues to

¹ Indian country is defined in 18 U.S.C. § 1151.

assess the impact and implications of *Castro-Huerta*, this memorandum provides interim guidance to United States Attorneys' offices (USAOs) in light of the decision.

In *Castro Huerta*, the Supreme Court held that 18 U.S.C. § 1152 does not preempt state criminal jurisdiction to prosecute non-Indian defendants committing crimes in Indian country. Following *Castro-Huerta*, concurrent federal and state criminal jurisdiction exists when non-Indian defendants commit crimes against Indians in Indian country.² Prior to *Castro-Huerta*, the Department and our Tribal, state, and local partners had understood that, absent specific authorization from Congress or state statutory authority, 18 U.S.C. § 1152 provided exclusive federal criminal jurisdiction over certain offenses committed by or against Indians in Indian country. While *Castro-Huerta* altered that understanding, the holding does not alter federal jurisdiction to prosecute crimes in Indian country pursuant to 18 U.S.C. §§ 1152 and 1153. Nor does the decision diminish the federal government's trust responsibility to Tribes.

Consistent with the Deputy Attorney General's July 13, 2022 [directive](#), U.S. Attorneys should continue to prioritize bringing cases to promote public safety in Indian country, including to address violence against women, children, and families. As the Department evaluates the decision's impact, USAOs should maintain pre-*Castro-Huerta* intake practices regarding crimes involving non-Indian defendants who commit crimes against Indians in Indian country. Additionally, USAOs should not alter referral practices without formal consultation with Tribes in their districts, bearing in mind the important principles of Tribal sovereignty, our government-to-government relationship, and the importance of partnership and open communication. If, after Tribal consultation, your office refers certain matters to state or local partners, you should maintain a list of all such cases.

Relationships and existing statutory jurisdictional authority among federal, Tribal, and state partners vary by district and specific Tribal or state partner.³ In districts in which state and local governments seek to exercise jurisdiction following *Castro Huerta*, USAOs are encouraged to communicate and coordinate closely with Tribal, state, and local partners, including on the following topics:

- *Investigations.* Federal, Tribal, and state law enforcement partners should coordinate and collaborate with respect to investigative responsibilities. Determinations about the use of federal, Tribal, and state investigative tools and resources should be coordinated with the respective law enforcement and prosecution partners. Specifically, law enforcement partners will need to determine which agency will lead the investigation; conduct case-related interviews; collect and maintain physical and digital evidence; submit evidence for forensic analysis; coordinate the scheduling of child forensic interviews, sexual assault examinations, medical examinations, or autopsies; and prepare legal process, including search warrants and complaints. In coordinating and collaborating on investigative action, federal, Tribal, and state law enforcement and prosecution partners

² Effective October 1, 2022, the Violence Against Women Reauthorization Act of 2022 authorizes implementing Tribes to exercise jurisdiction over non-Indians for certain covered crimes committed in Indian country. See 25 U.S.C. § 1304.

³ The Department's Office of Tribal Justice serves as a useful resource for USAOs to facilitate conversations with Tribes in their districts.

should consider statutes of limitation in each jurisdiction, as well as due process guarantees.

- *Victim Coordination.* Federal, Tribal, and state victim witness coordinators and advocates must communicate to meet victim's needs and make appropriate resource referrals during the investigation and prosecution of a criminal matter involving a non-Indian defendant in Indian country. USAOs may collaborate on appropriate protocols to ensure that victims of crimes committed by non-Indians in Indian country are supported throughout the investigation and prosecution. For example, such protocols may address which law enforcement agency will handle victim services at the outset of an investigation and how coordination between victim services representatives from law enforcement and ultimately, the prosecution team, will take place.
- *Considerations Guiding the Appropriate Prosecution Venue.* USAOs should collaborate with state, local, and Tribal partners in the determination of the most appropriate venue for filing charges. In reaching these determinations, USAOs should emphasize the importance of Tribal sovereignty and encourage all partners to solicit and respect Tribal views on the appropriate forum for prosecution. During these discussions, considerations may include the nature and circumstances of the offense, evidentiary issues or challenges, the non-Indian defendant's criminal history and ties to the Tribal community, statutes of limitation, and available sentencing options and rehabilitative services.
- *Other Considerations.* Other considerations will arise based on the unique relationships and issues in each district. USAOs should be prepared to address state law enforcement activity in Indian country, juvenile prosecutions based on 18 U.S.C. § 5032, extradition, and the role of state law enforcement partners on multi-disciplinary teams or in law enforcement meetings. Federal, Tribal, state and local law enforcement partners should also coordinate to share investigative materials (e.g., interview summaries, crime lab reports, and grand jury information) in cases where an investigation is transferred to a different venue for prosecution.

The Department recognizes that Federal, Tribal, state, and local law enforcement partners may need additional training and guidance to understand the effects of *Castro-Huerta* on criminal jurisdiction issues in Indian country. The National Indian Country Training Initiative (NICTI) is updating training materials to address this decision, and NICTI and EOUSA's Legal Programs Office are also developing a training toolkit for USAOs to share with state law enforcement.

As the Department continues to monitor and evaluate the issues that arise from *Castro-Huerta*, additional guidance will be issued as necessary. If you have questions or need assistance, please contact EOUSA's Native American Issues Coordinator Ben Whittemore and Indian Country Attorney Advisor Deidre Aanstad at the contact information above.

The Department considers it a priority to address the disproportionately high rates of violence experienced by American Indians and Alaska Natives by promoting public safety in Indian country. The *Castro-Huerta* decision does not alter this mission, and communication, collaboration, and coordination among federal, Tribal, and state partners will help meet that goal. The Department is grateful to its dedicated employees who continue to carry out the mission of promoting public safety in Indian country and who collaborate with each other to ensure that justice is achieved fairly and impartially.

cc: All United States Attorneys' Secretaries