

## Response of Matthew J. Ballard to Questions for the Record

### Hearing Before the House Subcommittee for Indigenous Peoples of the United States

#### Oversight Hearing on *Examining Oklahoma v. Castro-Huerta: The Implications of the Supreme Court's Ruling on Tribal Sovereignty*

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1. **Question:** Can you provide the committee with further examples of acts that are currently criminal under Oklahoma law that would not be prosecutable if *Castro-Huerta* were not in effect?

In Oklahoma, school children are considered a vulnerable population and state law prohibits sexual contact between a school teacher and a secondary student, regardless of the age of consent. Under federal law, no such prohibition exists. This means that prior to *Castro-Huerta*, it was illegal for a teacher to have sexual contact with a student, unless that student was Native American. The concern that this could lead to Native Americans being targeted, particularly in the realm of criminal conduct that frequently involves grooming and the selection of particularly vulnerable students, is obvious.

Similarly, state law prohibits sexual contact between detention officers in jails or prisons and the detainees under their supervision. Federal law only extends to federal detention facilities and federal detention officers, therefore providing no protection to Native Americans in the facilities with which the tribes contract to hold tribal citizens awaiting trial.

Under Oklahoma law, an assault and battery on a law enforcement officer is a felony crime. Federal law, however, only extends to federal law enforcement officers, so if an offender assaults a Native American serving in state or tribal law enforcement, the crime is only a misdemeanor and is no different than an assault and battery on a civilian. In Rogers County, the sheriff is a member of the Cherokee Nation and numerous other law enforcement officers are Native American, making this a very real concern. In Mayes County, the first published case establishing *Castro-Huerta* was a case involving an assault and battery on a Mayes County Sheriff's deputy while she was on duty. The case was dismissed by the trial court and the state appealed. Following *Castro-Huerta*, the case was reinstated, but without *Castro-Huerta*, the crime would have been only a federal misdemeanor offense.

2. **Question:** Have there been instances where criminals exploit the criminal jurisdiction issues in Oklahoma that existed prior to *Castro-Huerta*?

Although data is difficult to quantify, anecdotally law enforcement has seen an increase in crimes committed against Native Americans. I am aware that some Native Americans elected to remove tribal tags from their vehicles out of concern that criminals would recognize that any crime committed against a Native American was much more likely to go un-prosecuted and would therefore target vehicles owned by Native Americans.

This gap is exacerbated by the inability of the federal U.S. Attorneys' offices to function as front line District Attorneys' offices. U.S. Attorney offices in the Northern and Eastern Districts accept only approximately 31% and 22%, respectively, of cases referred to them. This means that the vast majority of cases referred to the federal government for prosecution are not filed. This has been confirmed by my own anecdotal observations. I have seen numerous cases that we filed that the federal government declined and refused to prosecute.

I have personally listened to jail calls between offenders and family members where the offender is asking if they or the victim are Native American and indicated that this would lead to more favorable treatment in the criminal case. We have offenders who are active members of racial gangs that persecute races including Native Americans, who have later researched family ties to establish tribal citizenship to avoid prosecution or obtain more favorable sentences. My attorneys have literally been put in the position of advocating for victims who claim they are not Native American for purposes of *McGirt*, while the person who victimized them is arguing that they are in fact Native American. Criminal defendants fully realize that it is in their best interest to claim their victims are Native American and state prosecutors are put in the delicate position of litigating this issue. Prior to *Castro-Huerta*, it was heart wrenching to explain to victims that if they are Native American, their case will be dismissed.

**3. Question: In your experience, how has *Castro-Huerta* impacted the federal law enforcement workload? Has it decreased, remained the same, or increased?**

*Castro-Huerta* helped to alleviate investigation of crimes that formerly fell solely under federal jurisdiction: Non-Natives committing crimes against Native Americans. Because these fell solely under federal jurisdiction, both the state and tribes were limited in their authority to respond and provide timely investigation. While both the state and tribes have a limited number of officers with federal credentials, these officers are very sparse in number and availability, with the effect being crimes going without timely investigation, or with no investigation.

*Castro-Huerta* enabled state prosecutors to begin tackling the backlog of cases that have been left unprosecuted. I have maintained open lines of communication with federal prosecutors and they have been consistently referring cases back to my office for prosecution. We have been addressing these cases on a consistent basis and have been able to reach out to a number of Native American victims to tell them their case has been refiled in state court.

This has also allowed us to tackle a particularly troubling manifestation my office was seeing prior to *Castro-Huerta*. In one case involving numerous sexual assault victims, the offender targeted several school students. As is common throughout Oklahoma, the school had both Native American and non-Native American students and the offender's victims included students in both categories. Prior to *Castro-Huerta*, we were not able to seek justice for the Native American victims, and were instead limited solely to bringing charges involving non-Native Americans, resulting in two tiers of justice for individuals depending on their racial and political identity as defined by federal law.

**4. Question: Can you further explain your understanding of the differences in capacity and/or focus between Oklahoma state prosecutors and federal prosecutors for the federal districts of Oklahoma?**

U.S. Attorney offices have never functioned like District Attorneys' offices. In 2019, prior to *McGirt*, the 11 counties that make up the federal Northern District of Oklahoma filed 27,726 state criminal cases. Last year, the Northern District of Oklahoma filed 444. Federal courts across the country are correctly focused on the enforcement of the laws of the United States, crimes involving interstate commerce, international criminal organizations, securing our borders, and other federal interests. The federal system of justice is not set up to prosecute local crime like District Attorneys' offices. In Tulsa County District Court, state prosecutors typically conduct approximately 20-30 murder jury trials on an annual basis. In the entirety of the United States of America, federal prosecutors took 21 homicide cases to jury trial last year.

This is further exacerbated by the lack of local accountability. As a local elected official, I engage with my constituents at local sporting events, the grocery store, church, and elsewhere on a daily basis. I am constantly receiving feedback on the performance of my prosecutors and I am well aware that I am one election away from no longer serving as District Attorney. On the federal level, however, there is no such local accountability. The closest elected official to a U.S. Attorney office is President Joe Biden.

While I have a great deal of respect for my federal law enforcement partners, their role in the criminal justice system is different than mine. There are a variety of reasons for this. Federal law regarding speedy trial allows much less time for a criminal prosecution and forces a compressed trial schedule. Department of Justice protocols allow for less individual flexibility among prosecutors. I have always enjoyed an excellent working relationship with federal prosecutors and have relied on them to take on the complex, international, or other cases that my office does not have the resources or experience to handle. On the other hand, my office excels at handling the volume of cases that is seen by state prosecutors across the nation. Prior to *McGirt*, my office and the U.S. Attorney's office formed a cohesive law enforcement wall against crime. While we continue to work together, the state and federal systems of justice are different and the volume of cases now being referred to the federal government is overwhelming a system not set up to handle it.

**5. Question: Can you further expand beyond your written testimony, and speak to how you have seen the *McGirt* and *Castro-Huerta* decisions play out day-to-day in Oklahoma?**

The *McGirt* case instantly thrust Oklahoma law enforcement into chaos and uncertainty. For 113 years, the state functioned cohesively with Native Americans and non-Native Americans living and working as a unified community. Now, law enforcement is thrust into a world where jurisdiction is constantly uncertain. While the state, tribes and federal government work together to fill the gaps, doing so consistently and effectively is impossible. State court judges are left without jurisdiction over persons who appear before it. If a Native American witness commits perjury in state court, the state is left without recourse. Courts cannot enforce their own subpoenas.

Native American jurors in state court cases swear an unenforceable oath “under penalty of perjury under the laws of Oklahoma.” Among our state citizens are a number of Native American elected officials, from our state congress to our governor, who can pass laws to which they are not subject in half the state.

In the day-to-day world of law enforcement, the situation is untenable. In a recent election, it was discovered that a candidate had set up a tent within 300 feet of a polling location, a violation of state electioneering law on election day. In that same election, numerous state offices in my District involved Native American candidates. This prompted a discussion about the ability of state law enforcement to prevent Native American candidates (or Native American supporters) from electioneering near polling locations. While the issue was fortunately not pressed, the ultimate conclusion was that state officers could not enforce state election law against Native Americans in state elections.

When it comes to investigation of Native American victims, *Castro-Huerta* served as a lifeline. Although law enforcement work to investigate crimes against Native Americans, federal declination rates that approach 70-80% are hard to ignore. Cases like one in my district in which a two year old was admitted to a hospital after ingesting drugs are being shut down with no investigation and no prosecution (crushingly, the sheriff’s investigator assigned to that particular case and seeking justice for this tribal toddler is himself Native American).

**6. Question: How difficult is it to determine whether a victim is Native American and is the non-prosecution of cases with Native American victims a wide-spread issue?**

Determining the Native American status of victims is an intricate process that, prior to *Castro-Huerta*, was dispositive of how a case should progress. The test for whether a victim is Native American is complex. It requires recognition by a federally recognized Indian tribe and a degree of Indian blood. However, if the victim is not an enrolled member, they may still be considered Native American depending on a variety of factors including government recognition and the receipt of benefits reserved for Native Americans, enjoying the benefits of tribal affiliation, and social recognition as a Native American. These factors do not lend themselves to quick determination, leading to confusion as to who has jurisdiction to investigate a particular crime.

To give just one example of how this plays out in the real world, J.S. was a five month old infant when he was taken to the emergency room at a local hospital because he was writhing uncontrollably, he was inconsolable, and he was vomiting. At the hospital, he tested positive for amphetamines and spent days in the hospital going through withdrawal from his exposure to methamphetamine. J.S.’s mother was not Native American. The identity of his father, however, was unknown. It was not until a DNA paternity test established the father’s identity that it was discovered that his father was in fact Native American, making J.S. also Native American. By the time this was discovered, however, months had passed. There is a reason that investigators launch immediate investigations, before facts grow cold or evidence becomes stale. Situations such as this force law enforcement into the difficult decision of attempting to make a determination about a victim’s ancestry, which can be absolutely critical to the success of a criminal case.

Further complicating this process is the realization by victims that it is not in their best interest to cooperate. We have seen this personally, as one case was remanded by the appellate court to determine whether the victim, a minor child, was Native American. When we asked the child's parents if they were Native American, they replied, "What if we refuse to tell you?" This raised additional issues, due to the fact that if the parents were in fact Native American, state court subpoenas would not be enforceable and if they refused to testify, a state court judge would have no jurisdiction over them. In this same case, the state court ultimately determined that the children, although not enrolled tribal members at the time they were molested, were Native American for purposes of *McGirt* and dismissed the case. Although charges were initially filed in federal court, federal prosecutors ultimately decided that the children were not Native American and dismissed the federal case. Splits of authority such as this are unfortunately too common where the decision of Native American status is very fact intensive and can change during the pendency of a case.

As to the non-prosecution of cases with Native American victims, it is an insult to law enforcement and evinces a complete lack of understanding of the culture of Oklahoma. In my own family, three of my nieces are Native American. The Sheriff of Rogers County is Native American. I have prosecutors who are Native American. My office manager is Native American. I work every day with Native American police officers. Cherokee Nation citizens make up approximately 25% of the population of my District. Native and non-Native Americans make up one community. Our children attend the same schools, we worship at the same churches, our families live in the same neighborhoods. Prior to *McGirt*, we never inquired as to the racial or political identities of offenders or victims, unless a hate crime was committed. We sought to protect Oklahomans and those visiting our state. And my District is not alone. Other Districts in Oklahoma actually have a higher percentage of Native American citizens and it is my experience that every District Attorney works to protect all of their citizens. To suggest that I would advocate for anything but the best interest of a sizeable category of my constituents that includes my own family members is disappointing and inaccurate.

Prior to *McGirt*, we would simply have no way of knowing when a Native American was even involved in a case. It was not until such a determination became dispositive that the inquiry into Native American status began. Before *Castro-Huerta*, defense attorneys were probing the background of victims to make the argument that state charges should be dismissed, to the benefit of those preying on Native Americans. I am thankful for *Castro-Huerta* and I am thankful that such offensive practices have been stopped. Just like the other District Attorneys in Eastern Oklahoma, I will continue to pursue justice for all victims and to stand against those who would exploit the loopholes that have now been filled by the Supreme Court.