

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. CR 20-78-RAW
)	
PATRICK DWAYNE MURPHY,)	
)	
Defendant.)	

**MOTION TO DISMISS FOR PRE-INDICTMENT DELAY, AND
MEMORANDUM IN SUPPORT**

Defendant, Patrick Dwayne Murphy, moves to dismiss the indictment for prejudicial pre-indictment delay. In support of this motion, Defendant shows the following:

1. Mr. Murphy was charged with first degree murder in Oklahoma state court in 1999. He was convicted and sentenced to death in 2000. He spent two decades on death row under a conviction and sentence that was void from the outset. The state never had jurisdiction over Mr. Murphy or his alleged crime. *McGirt v. Oklahoma*, 591 U.S. ___ (2020); *Sharp v. Murphy*, 591 U.S. ___ 2020), *affirming Murphy v. Royal*, 875 F.3d 896 (10th Cir.2017). *See also, Murphy v. State*, 2002 OK CR 24, 47 P.3d 876 (state direct appeal opinion affirming murder conviction and death sentence of what was ultimately determined to be a void judgment).

2. The Supreme Court’s rulings in *McGirt* and Mr. Murphy’s case did not come

out of the blue. They were not just foreshadowed, but compelled by precedent. In addition, the black letter of the law passed by Congress establishing the Muscogee-Creek reservation showed in plain language what was true all along: that the Muscogee-Creek reservation was at all times and up until the present day in existence.

3. The statute of limitations provides the primary protection against stale criminal charges, but the due process clause of the Fifth Amendment has a limited role in protecting against excessive pre-indictment delay. *United States v. Lovasco*, 431 U.S. 783 (1977). An indictment may be dismissed as violative of due process for unjustified pre-indictment delay where a defendant can demonstrate the delay has resulted in actual prejudice to his case and his right to a fair trial. This is weighed against the length of the delay and the reason for the delay to determine whether due process has been violated and an indictment should be dismissed. The defendant bears a heavy burden in showing prejudice to a degree that would justify the remedy of dismissal. *United States v. Marion*, 404 U.S. 307, 322 (1971); *United States v. Manning*, 56 F.3d 1188 (9th Cir. 1995).

4. Because the state courts never had jurisdiction, and the ruling in *McGirt* is uncontroversial based on previous Supreme Court authority and the unambiguous black letter of the relevant treaties or statutes, the two decade-plus delay in bringing charges in the appropriate jurisdiction was and is inexcusable. The reason for the 20 year delay in bringing the federal indictment was the assumption of state jurisdictions in flagrant

disregard of long-existing law. The blatant illegality of keeping Mr. Murphy on state death row for two decades, when the state court never had a right to charge him and try him, is hardly a plus in the government's favor.

5. This pre-indictment delay prejudiced Mr. Murphy because potentially exculpatory evidence from deceased witnesses Kevin King and Billy Jack Long is not available to him. King and Long never testified at Mr. Murphy's state trial. If they were available to testify honestly (in contrast to some of their statements to law enforcement), their testimony could have shown Mr. Murphy is not as culpable as suggested by the state court verdict. The passage of time also means that it is problematic, to say the least, to raise the partial defense of intoxication based on two decade old accounts of Mr. Murphy's drinking at the time of the alleged offenses. This obviously hampers the defense in arguing that, if anything, Defendant is guilty of an offense less than first degree murder.

6. The very passage of time itself – two decades – is inherently prejudicial. This is magnified by the fact that Mr. Murphy spent 20 years, or just shy of it, in the most onerous and psychologically damaging of prison environments – death row. It is almost Kafkaesque to imagine – or in this case, not just imagine, but confront as a stark reality – the specter of a man spending two decades in the death house on a void judgment. This type of prejudice from pre-indictment delay is unique in its severity.

7. This is one of the admittedly rare cases where, under the particular

circumstances present, pre-indictment delay is so inexcusable and so prejudicial that dismissal of the indictment is the only adequate remedy.

WHEREFORE, Defendant asks that this motion be granted.

Respectfully submitted,

/s/ David Autry
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Certificate of Electronic Filing and Service

This is to certify that on this 27th day of November 2020, I caused the foregoing instrument to be filed with the Clerk of the Court using the ECF System for filing, with electronic service to be made via CM/ECF to Jarrod Leaman, AUSA, and to all counsel of record. To counsel's knowledge, there are no non-ECF registrants who are counsel in this case.

/s/ David Autry