

**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.*

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**UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR  
PRE-INDICTMENT DELAY**

**COMES NOW** the United States of America, by and through Brian J. Kuester, United States Attorney for the Eastern District of Oklahoma, and Jarrod Leaman, Assistant United States Attorney, and respectfully asks this Court to deny defendant's Motion to Dismiss for Pre-indictment Delay, Doc. No. 69 (motion).

**I. FACTUAL BACKGROUND**

The murder and kidnappings in this case occurred along Vernon Road, just south of Highway 9. The location is within the Eastern District of Oklahoma and within the borders of the Muscogee (Creek) Nation. For purposes of federal jurisdiction, Patrick Murphy (the defendant) is an enrolled member of the Muscogee (Creek) Nation.

In 1993, the defendant and Ms. Patsy Jacobs began a romantic relationship. By 1999, the defendant developed a certain dislike for Ms. Jacobs' ex-partner, George Jacobs (George). On August 26, 1999, the defendant told Ms. Jacobs he we would "get" George, George's brothers, and George's two sons. The defendant told Ms. Jacobs "I'll kill them

all one by one.”

On August 28, 1999, George and his friend, Mark Sumka, were drinking at Mr. G’s bar in Vernon, OK. When they left, Sumka drove while George, passed out drunk, sat in the passenger seat. As they left the bar, Sumka drove past a truck driven by the defendant with Billy Jack Long (Long) and Kevin King (King) as passengers. Sumka, who knew the defendant, slowed to briefly talk. During the conversation, the defendant asked Sumka about the passed out person in the front seat. Sumka identified the person as George. Sumka knew the defendant did not like George, so Sumka drove off. The defendant pursued Sumka and forced Sumka to stop. The defendant, Long, and King then rushed Sumka’s vehicle on foot. Long approached Sumka and punched Sumka in the face causing Sumka to flee on foot.

After Sumka fled, the defendant, Long, and King savagely murdered George by beating George, slashing George’s throat, slashing George’s abdomen, and emasculating George. After the murder, the defendant made Sumka accompany him from the scene, and the defendant drove to his mother’s house where he burned some of the clothes the parties were wearing. The defendant then drove King and Long to where Jacobs’ son lived, but was refused entry into the house. A short time after that, the OSBI arrested the defendant.

The defendant made confessions to four people: Sumka, Patsy, Mark Taylor, and OSBI agents in a post *Miranda* interview. The Government believes both Long and King are deceased.

In 1999, law enforcement agents arrested the defendant for murdering George Jacobs. In 2000 an Oklahoma District Court jury convicted the defendant of the murder.

*Murphy v. Royal*, 875 F.3d at 905-906. The defendant filed a direct appeal with the OCCA in *Murphy v. State*, 2002 OK CR 24, 47 P.3d 876), and in 2002, the OCCA affirmed the conviction but later ordered additional proceedings regarding the death penalty sentence. *Id.*

Prior to 2004, the record does not indicate the defendant ever brought a claim asserting that the state lacked jurisdiction because the crime occurred Indian Country; however, in 2004, the defendant filed a second appeal to OCCA asserting Indian Country jurisdiction, and in 2005, the OCCA “affirmed the ultimate determination that Oklahoma’s jurisdiction was proper.” *Id.*, 875 F.3d at 907-908. The defendant then added the jurisdictional issue to his pending federal Habeas Application in the Eastern District of Oklahoma. *Id.*, 875 F.3d at 910-911. The Federal District Court rejected the Indian Country jurisdictional claim. *Id.*

No court held that the geographic area where the crime took place was within Indian Country until 2017 when the Tenth Circuit released its opinion in *Murphy v. Royal*. *Id.*, 875 F.3d at 966. The Tenth Circuit held its opinion in abeyance while the State appealed to the United States Supreme Court, and the Supreme Court resolved the matter in favor of the defendant in July of 2020 via *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). The Supreme Court’s decision overturned over 100 years of jurisprudence in Oklahoma. Two months later, a grand jury sitting in the Eastern District of Oklahoma returned an Indictment charging the defendant with the murder of George Jacobs.

## **II. ARGUMENT & AUTHORITY**

The defendant’s motion requests dismissal of the Indictment due to pre-indictment

delay citing *United States v. Lovasco*, 431 U.S. 783 (1977). In that case, law enforcement learned of defendant Lovasco's offense conduct approximately eighteen months prior to the indictment. During the period of delay between discovery and indictment, Lovasco claimed two important defense witnesses died causing prejudice to Lovasco's defense. *Id.*, 431 U.S. at 784-786. The Supreme Court held the Sixth Amendment is not implicated in the analysis of pre-indictment delay. *Id.*, 431 U.S. at 788. The Court reasoned it is "obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt;" to impose such a duty would have a deleterious effect upon the rights of the accused. *Id.*, 431 U.S. at 791 (internal citations and quotations omitted). The Court held the statute of limitations provides the primary protection against overly stale criminal charges, but the Due Process Clause plays a limited role against oppressive delay. *Id.* 431 U.S. at 788.

One year after *Lovasco*, and relying on *Lovasco's* holding, the Tenth Circuit, reviewed its jurisprudence on the matter of pre-indictment delay and reaffirmed a two part test for when pre-indictment delay triggers the protections secured by the Due Process Clause. In *United States v. Revada*, 574 F.2d 1047, 1048 (10<sup>th</sup> Cir. 1978), the Court held a defendant raising a Due Process Clause claim of pre-indictment delay must show both (1) actual prejudice resulting from the pre-indictment delay and (2) the delay was purposefully designed to gain a tactical advantage or to harass the defendant. In *United States v. Trammell*, 133 F.3d 1343, 1351 (10<sup>th</sup> Cir. 1998), the Tenth Circuit again reaffirmed the test. Specifically, the Court held that: "Pre-indictment delay is not a

violation of the Due Process Clause unless the defendant shows both that the delay caused actual prejudice and that the government delayed purposefully in order to gain a tactical advantage.” *Id.* (internal citations and quotations omitted). It is the defendant’s responsibility to meet this burden. *Id.* In *United States v. Woodard*, 817 Fed.Appx. 626, 628 (10<sup>th</sup> Cir. 2020)(unpublished), a case originating from the Northern District of Oklahoma, the Tenth Circuit held the defendant does not meet the burden by showing negligent acts by the government, rather, the defendant must show the government intentionally or purposefully employed delay to gain a tactical advantage.

In *United States v. Avants*, 367 F.3d 433 (5<sup>th</sup> Cir. 2004), the Fifth Circuit Court of Appeals dealt with a pre-indictment delay of approximately 34 years. In 1966, Mississippi law enforcement officers investigated the murder of Mr. Ben White and quickly developed Avants and two other coconspirators as suspects. *Id.*, 367 F.3d at 439-440. Mississippi investigators knew the murder of Mr. White occurred in a national forest and was racially motivated. In early 1967, the FBI also developed Avants as a suspect in another murder and interviewed Avants. *Id.* In the 1967 interview with FBI, Avants confessed to killing Mr. White, and Avants used racially derogatory language in describing the murder. *Id.* By late 1967, a state court jury acquitted Avants of Mr. White’s murder. *Id.* The federal government elected not to indict Avants at that time.

In 1999, government agents saw a news program where Avants described the murder as having occurred in a national forest thus giving the government jurisdiction. *Id.* In 2000, the government indicted Avants for the murder of Mr. White and used the site of the murder, the national forest, as the nexus for federal jurisdiction. *Id.* Avants was

convicted in a trial in federal court in 2003. *Id.* In the time between the offense conduct in 1967 and the federal trial in 2003, several witnesses died including both coconspirators, the police officer who took a coconspirator's statement, and the medical examiner. *Id.*

Avants raised several claims on appeal, including a claim that a pre-indictment delay of 34 years violated the Due Process Clause even for a crime that has no statute of limitations. *Id.* The Fifth Circuit held it is the defendant's burden to prove (1) "the improper delay caused actual, substantial prejudice to his defense" and (2) the "delay was intentionally brought about by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other bad faith purpose." *Id.*, 376 F.3d at 441-442. For the prejudice prong, Avants alleged much of the original evidence from his state trial was now unavailable and the passage of time made it impossible to impeach other evidence. *Id.* For the intentional delay prong, Avants alleged the prosecution intentionally or negligently delayed the indictment in order to obtain a tactical advantage and contended there was no legitimate investigatory need for the delay. In the absence of such a need, the court should infer that the decision was made in order to gain an advantage over Avants. *Id.*, (internal quotations omitted). The government responded that it originally only considered charging a civil rights offense, but ultimately elected not to indict the matter until the jurisdictional issue of the national forest was brought to its attention over 30 years later. *Id.*

The District Court denied Avants' motion to dismiss on the intentional delay prong holding Avants failed to show "an intentional ... tactical decision to delay the prosecution for the purpose of disadvantaging Avants." *Id.* The District Court also denied Avants

claim on the prejudice prong and held Avants had not made the requisite showing of actual and substantial prejudice. On appeal, the Circuit affirmed the District Court's denial of the motion on the intentional delay prong and did not address the prejudicial prong as moot. *Id.*

Other Circuit Courts also hold lengthy periods of pre-indictment delay do not violate the Due Process Clause.

- 20 year delay between offense conduct and indictment did not violate the Due Process Clause. *Young v. Jackson-Mitchell*, 2020 WL 1481615 (6<sup>th</sup> Cir. 2020)(unpublished).
- 19 year delay between offense conduct and indictment did not violate the Due Process Clause. *Stoner v. Graddick*, 751 F.2d 1535 (11<sup>th</sup> Cir. 1985).
- 10 plus year delay between offense conduct and indictment did not violate the Due Process Clause. *Jones v. Angelone*, 94 F.3d 900 (4<sup>th</sup> Cir. 1996).
- 21 year delay between offense conduct and indictment did not violate the Due Process Clause. *Aleman v. The Honorable Judges Of The Circuit Court Of Cook County*, 138 F.3d 302 (7<sup>th</sup> Cir. 1998).

Here, the defendant's motion misstates the legal analysis for analyzing the Due Process Clause's protections for pre-indictment delay. In the motion, the defendant asserts "[a]n 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 dismissed." Doc. No. 69 ¶ 3. That is not the test in the Tenth Circuit. As show above, it is the defendant's burden to show (1) the pre-indictment delay caused actual prejudice and (2) the United States used delay purposefully to gain a tactical advantage

over the defendant. *Trammell*, 133 F.3d 1343, 1351. Regardless, the defendant did not meet the burden on either prong of the test.

For the actual prejudice prong, the defendant's motion alleges "potentially exculpatory evidence from deceased witnesses Kevin King and Billy Jack Long is not available to him." Doc. No. 69 ¶ 5. The motion further alleges 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 offense." Put simply, the aforementioned is not enough to establish *actual* prejudice.

The facts of this case are straight forward: the defendant told Patsy Jacobs he was going to kill George Jacobs. Two days later, the defendant killed Georg Jacobs in front of Long, King, and partially in front of Mark Sumka. After killing George Jacobs, the defendant told Patsy Jacobs what he had done, told Mark Sumka and M.T. what he had done, and told law enforcement officials much of what he had done. Although King and Long are believed to be deceased, the other witnesses are available to testify. Moreover, the defendant testified in his own defense at trial, and that testimony included statements about his alleged intoxication at the time of the offense. A transcript of the testimony has been provided to the defendant, and that transcript can certainly refresh the defendant's recollection and aid his defense. As shown by *Avants*, deceased codefendants, without more, is not enough to establish actual prejudice.

Lastly, for the purposeful delay to gain tactical advantage prong, the defendant only offers that "[t]he reason for the 20 year delay in bringing the federal indictment was the assumption of state jurisdiction in flagrant disregard of long-existing law." Doc. No. 69 ¶

4. It is the defendant's burden to show the United States purposefully employed delay as a tactic to gain an advantage over the defendant. The defendant failed to allege any purposeful delay which provided the government a tactical advantage. The motion fails to satisfy that prong of the test. In the alternative, to the extent the defendant's motion is construed to allege purposeful delay by the United States, that allegation is unsupported by any facts. As shown in *Murphy v. Royal*, for nearly 100 years the United States did not exercise Indian Country jurisdiction over the geographic area implicated in this case. In July of 2020, the Supreme Court held the area was Indian Country. The United States indicted the defendant two months later in September of 2020. Clearly the United States did not purposefully delay to gain an advantage over the defendant. The United States immediately indicted the defendant after learning it had jurisdiction in 2020.

WHEREFORE, the United States submits the defendant did not establish pre-indictment delay actually prejudiced his defense, and the defendant did not show the United States purposefully employed delay to gain a tactical advantage over the defendant. The defendant's motion should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on December 14, 2020, I electronically transmitted the foregoing to the Clerk of the Court and to the following:

David B. Autry, Counsel for Defendant

s/ Jarrold Leaman  
JARROD LEAMAN  
Assistant United States Attorney