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 BECAUSE THE APPLICABLE STATUTE OF LIMITATIONS HAS RUN, AND MEMORANDUM IN SUPPORT

Defendant, Patrick Dwayne Murphy, moves to dismiss the indictment and superseding indictment because the applicable statute of limitations has expired. As grounds for this motion, Defendant shows the following:

1. In the indictment and superseding indictment, Mr. Murphy is charged with first degree premeditated malice murder and murder (of the same victim) in the course of kidnapping the victim and another man.

2. Federal jurisdiction is based on the fact that the offenses involve Indians (both Mr. Murphy and the victim) and were allegedly committed in Indian Country, within the Muscogee-Creek reservation.

3. Because federal jurisdiction is based on "Indian Country" and the Muscogee-Creek Nation has not "opted in" to permit the death penalty to be sought for offenses committed by Indians within the reservation, the death penalty is not available under the

Federal Death Penalty Act. *E.g., United States v. Gallaher,* 624 F.3d 934 (9th Cir. 2010).

4. There is no statute of limitations for a capital charge. 18 U.S.C. 3281 (defining a capital charge as "any offense punishable by death," and stating "an indictment for any offense punishable by death may be found at any time without limitation.") If the charge is not capital, then the statute of limitations is 5 years. 18 U.S.C. § 3282 ("[N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within 5 years next after such offense shall have been committed.")

5. Because the death penalty is not being sought in this case, Mr. Murphy is not facing a capital charge. Since he is not facing a capital charge, the statute of limitations applicable to the offenses alleged in the indictment and the superseding indictment is 5 years. Mr. Murphy was charged in federal court in 2020. The offenses charged were committed in August 1999. The indictment and superseding indictment should be dismissed because the 5 year statute of limitations ran approximately 15 years or more ago.

6. There are a few cases dealing with this issue. *United States v. Martinez,* 505 F.Supp.2d 1024 (D.N.M. 2007), *appeal dismissed,* 272 Fed.Appx. 658 (10th Cir. 2008) involved an Indian Country case where the defendant was charged with first degree murder. For the same reasons as exist in Mr.Murphy's case, Martinez was not facing the death penalty. The district court rejected the argument that because the defendant was

ineligible for the death penalty (or, at any rate, that the death penalty was not being sought) his first degree murder case was a "non-capital" case for which the 5 year statute of limitations applied. It was reasoned that statutes of limitations are aimed at a category of offenses, not the punishment that may be faced by a particular individual defendant.

United States v. Manning, 56 F.3d 1188 (9th Cir. 1995) held in a like fashion that the statute of limitations is concerned with the general nature of the offense charged, not the particular punishment sought against a certain defendant.

In *United States v. Johnson,* 270 F.Supp.2d 1060 (D. Iowa 2003), the defendant was charged with the murders of witnesses. At the time of the murders, the federal death penalty had been declared unconstitutional. The death penalty was not being sought for these particular murders. Despite this, and the argument that "capital murder" is a distinct crime from unadorned first degree murder, since additional elements in the nature of aggravating circumstances must be proved, *Ring v. Arizona,* 536 U.S. 584 (2002), the court rejected the argument that the 5 year statute of limitations applied. As a general matter, first degree murder is a capital crime for which the death penalty *may be* imposed.

In *United States v. Gallaher,* 624 F.3d 934 (9th Cir. 2010), the court noted death was ordinarily an available punishment for first degree murder committed within the territorial jurisdiction of the United States. Premeditated murder remains a capital offense regardless of whether the death penalty could be imposed in a particular case. According to *Gallaher*, the statute of limitations is tied to the nature of the offense. The

question is whether death *may* be imposed for the crime of conviction. As a general matter, is death an available punishment? The court seemed to reason that death is even an available punishment in "opt out" Indian Country cases, since the Tribes could choose to allow for the death penalty and could enter into an agreement to this effect with the federal government. 18 U.S.C. § 1398.

7. The reasoning in these cases ignores the plain language of 18 U.S.C. § 3281. This statute is titled "Capital offenses." It reads, "[a]n indictment for any offense punishable by death may be found at any time without limitation."

A statute should be construed according to the plain meaning of its words. The word :"indictment" refers to a specific instrument filed against a specific individual. There are no indictments simply as a general concept. "[A]ny offense punishable by death" refers to the offense charged in the specific indictment at issue. (Again, indictments cannot exist merely as a general concept without being manifested in a specific thing.)

The offenses charged against Mr. Murphy in the indictment are not punishable by death. The death penalty is not being sought. This goes beyond a particular punishment for a particular defendant, but embraces an entire class within the Muscogee-Creek reservation. It really makes no sense to say that the offense charged in the indictment is a capital offense if the death penalty is not and cannot be sought. It is also not accurate to say, as the courts did in the opinions discussed above, that "capital offense" refers to a

class or category of crimes regardless of the punishment, let alone the punishment possible in the particular case under discussion. An "offense" (which must refer to a specific crime) is "capital" only if death is a possible punishment. Otherwise, it is non-capital. Mr. Murphy's offenses are non-capital. Therefore, the 5 year statute of limitations applied and the indictment and superseding indictment should be dismissed.

Instructive in this regard is the holding in *United States v. Maestos,* 523 F.2d 316, 319 (10th Cir. 1975). The defendant was charged with rape and first degree murder. He wanted to be accorded the 20 peremptory challenges defendants in capital cases receive. The government announced it was not seeking the death penalty. The trial judge therefore gave the defense only 10 peremptory challenges. The Tenth Circuit found no error on appeal. Because the government was not seeking the death penalty, the "case lost its capital nature as charged in the indictment." So it is in Mr. Murphy's case. If the death penalty is not being sought, a capital offense is not being charged in the indictment, and the 5 year statute of limitations applies.

WHEREFORE, Defendant asks that this motion be granted.

Respectfully submitted,

/s/ David Autry
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Certificate of Electronic Service and Filing

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