

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

UNITED STATES OF AMERICA,)	
)	
Plaintiff/Appellee,)	
)	
v.)	Case No. 22-7021
)	
PATRICK DWAYNE MURPHY,)	
)	
Defendant/Appellant.)	

BRIEF OF DEFENDANT/APPELLANT

Appeal from the United States District Court
for the Eastern District of Oklahoma
The Honorable Ronald A. White,
United States District Judge
D.C. No. CR-20-78-RAW

David Autry, OBA #11600
1021 N.W. 16th Street
Oklahoma City, OK 73106
(405) 521-9600
(405) 521-9669 [fax]
dbautry77@gmail.com

Lawyer for Defendant/Appellant,
Patrick Dwayne Murphy

ORAL ARGUMENT REQUESTED
Digital/Scanned Documents Attached
December 5, 2022

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**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

UNITED STATES OF AMERICA,)	
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Plaintiff/Appellee,)	
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v.)	Case No. 22-7021
)	E.D. Okl. No. CR-20-78-RAW
PATRICK DWAYNE MURPHY,)	(Lower docket)
)	
Defendant/Appellant.)	

PRIOR OR RELATED APPEALS

There are no prior or related appeals with respect to Mr. Murphy's federal indictment and convictions. Defendant was charged with murder in Indian country in federal court after his Oklahoma first degree murder conviction and death sentence were vacated for lack of subject matter jurisdiction. The state had no authority to try Mr. Murphy, because he is an Indian who allegedly committed the homicide in Indian country (specifically, within the boundaries of the federally recognized Muscogee-Creek Nation). *Murphy v. Royal*, 875F.3d 896, 907 (10th Cir. 2017), *aff'd Sharp v. Murphy*, 591 U.S.____, 140 S.Ct. 2412 (2020).

The holding in *Sharp v. Murphy*, *supra* was dictated by the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S.____, 140 S.Ct. 2452 (2020). *McGirt* held that under the federal Major Crimes Act, an Indian defendant who is alleged to have committed an enumerated offense against an Indian victim within a still-established reservation (Indian country) must be tried in federal court. The state courts have no jurisdiction under these circumstances.

PARTIES TO THE PROCEEDING

The United States is the Plaintiff/Appellee in this case. Patrick Dwayne Murphy, an individual, is the Defendant/Appellant.

STATEMENT OF JURISDICTION

This is a direct appeal taken pursuant to Fed.R.App.P. 4(b)(1). This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

1. Should the felony murder convictions on counts 2 and 3, which were premised on the alleged kidnapping of the victim, George Jacobs, be vacated with instructions to dismiss because the supposed kidnapping was indistinguishable from and part and parcel of the homicide, and not a separate act, because Defendant derived no “benefit” from any alleged kidnapping, and because the victim was not detained against his will?

2. Because the death penalty was unavailable based on the crimes charged in the indictment, which alleged murder (and related offenses) committed within the Indian country of a federally recognized tribe which had not “opted in” to the federal death penalty statutes, had the statute of limitations expired on these 1999 crimes?

3. Should the indictment and superseding indictment have been dismissed due to pre-indictment delay, where the alleged offenses were committed in 1999, but federal charges were not filed until 2020, particularly in light of the fact the state never had jurisdiction to convict and sentence Mr. Murphy to death in the first

instance?

PRELIMINARY STATEMENT

The record on appeal will be referred to as (R.O.A.), followed by the volume number and page number. The transcript of the two motion hearings will be referred to by district court docket number, with the transcripts designated M.Tr. I and M.Tr. II. The three transcripts of the jury trial, the pages of which are sequentially numbered, will be called Tr., along with the district court docket numbers. The transcript of the sentencing hearing will be referred to as S.Tr., and its district court docket number.

STATEMENT OF THE CASE

After Mr. Murphy's state court first degree malice aforethought murder conviction and death sentence were vacated for want of state subject matter jurisdiction, *Sharp v. Murphy*, 591 U.S.____, 140 S.Ct. 2412 (2020), *relying on McGirt v. Oklahoma*, 591 U.S.____, 140 S.Ct. 2452 (2020), he was charged in a four count indictment in the Eastern District of Oklahoma. (ROA 20-21) The indictment charged first degree premeditated murder in Indian country in violation of 18 U.S.C. §§ 1111(a), 2, 1151 and 1153 (count 1); murder in Indian country in perpetration of kidnapping in violation of §§ 1111(a), 2, 1151 and 1153 (count 2); kidnapping resulting in death in violation of 18 U.S.C. §§ 1201(a)(2), 2, 1151 and 1153 (count 3); and kidnapping resulting in death in violation of 18 U.S.C. §§ 1201(a)(2), 2, 1151 and 1153. A superseding indictment charging the same four offenses was returned. (ROA 87-88)

Mr. Murphy went to jury trial before the Honorable Ronald A. White, District Judge on August 3-5, 2021. The government presented six witnesses and a number of exhibits. Defendant was the sole defense witness. The jury was instructed on Mr. Murphy's imperfect defense of voluntary intoxication as to count 1, charging premeditated murder. (ROA 312-49) Defendant was acquitted of this charge, but was convicted of the lesser included offense of second degree murder. Mr. Murphy was as convicted as charged on counts 2 and 3. He was found not guilty on count 4. (ROA 352-54)

Defendant was sentenced to life imprisonment on each count of conviction, with the sentences ordered to run concurrently. Against Mr. Murphy's arguments, the district court held that life was the mandatory punishment for counts 2 and 3, and it had no discretion to deviate from that under either statute or the advisory guidelines. (S.Tr. 20-24)

Mr. Murphy filed a notice of appeal. (ROA 392-93)

STATEMENT OF THE FACTS

This case concerns the late August 1999 murder of George Jacobs, Sr., an Indian, in rural McIntosh County Oklahoma. The homicide took place within Muscogee-Creek Indian country. Mr. Murphy is a member of the Muscogee-Creek Tribe.

On the morning and during part of the day on August 28, 1999, Mr. Murphy helped his friend and cousin Mark Taylor move Taylor's brother's furniture to a new residence. (Tr. 307-08) Defendant started this weekend morning as he

usually did, with a six pack of beer. (Tr. 307-08) Mr. Murphy drank beer steadily throughout the day and night.. (Tr. 308-18) Mr. Taylor also drank. (Tr. 151-52) After completing the moving job, Defendant and Taylor went to a restaurant in Okmulgee, Oklahoma, where more beer was consumed. (Tr. 309) After equivocating on whether Defendant was drunk at the restaurant, Taylor conceded, based on his previous testimony, that Mr. Murphy was indeed drunk. (Tr. 152-53) Defendant and Taylor then went to another residence, where they picked up Billy Jack Long. (Tr. 310) From there, they went to Mr. Murphy's trailer and drank with a neighbor. (Tr. 312)

After Taylor left for home, Mr. Murphy and Long went to Katherine Jacobs's residence, where they picked up Kevin King. Katherine Jacobs, who was at the time living with George Jacobs, Jr. testified that she told Mr. Murphy to leave her property, and he did so after Kevin King joined him and Long. (Tr. 313) There was testimony that Defendant had it out for George Jacobs, Jr. (Tr. 171-74) It was said that on the two occasions Mr. Murphy went to Katherine King's residence on the night of the murder (once before and once after), Mr. Murphy was trying to get someone to lure George Jacobs, Jr. out of the house to do him harm. The evidence suggested otherwise. Mr. Murphy got out of his truck once and left the property when Katherine King told him to do so. (Tr. 164-66, 174-76, 313)

After leaving the King residence, Mr. Murphy, Long and King drove around the back roads, steadily drinking beer. (Tr. 315) They wound up on Vernon Road, looking to go to a tavern called Mr. G's. Even though Defendant knew the area

intimately, his degree of intoxication prevented him from finding it. (Tr. 315-18) While driving on Vernon Road, Mr. Murphy stopped briefly to ask another where Mr. G's Bar was. She gave him directions. (Tr. 315-18)

On the late night or early morning of August 28-29, 1999, Mark Sumka was driving his friend George Jacobs's car down rural Vernon Road in McIntosh County. He saw a Chevrolet truck driven by Mr. Murphy, whom he knew well, coming in the other direction. (Tr. 191-92) Both vehicles stopped in the road, and Defendant had Mr. Sumka had a brief conversation. (Tr. 192) There were two passengers in Defendant's truck, Kevin King, Jr. and Billy Jack Long. King was a fourteen year old juvenile. (Tr. 159) According to Sumka, Mr. Murphy asked who was in the car with him. Sumka told Defendant it was George Jacobs, who was passed out in the back seat. (Tr. 192, 194) There was reputedly bad blood between Mr. Murphy and Jacobs. According to Patsy Jacobs, George Jacobs's ex-wife and Defendant's then-girlfriend, he threatened to kill Jacobs and every member of his family a few days before the fatal attack occurred. (Tr. 48-49) In his testimony, Defendant denied making such a threat. (Tr. 203)

After this brief encounter on Vernon Road, Sumka continued to drive on. Mr. Murphy drove after him, and then passed and "cut off" the car Sumka was driving. (Tr. 193) When the vehicles came to a stop, Defendant and his two passengers got out of the truck. (Tr. 194) Billy Jack Long and Kevin King immediately went to the other vehicle, forcibly removed the still unconscious George Jacobs, whom Long and King proceeded to beat severely. (Tr. 194) There

was a dispute in the testimony whether Mr. Murphy, who stood by while the beating was in progress, tried to prevent Sumka from going to Mr. Jacobs's aid by placing a hand on his chest and stopping him. (Tr. 220-21) Without being prevented from doing so, Sumka briefly ran down the road away from the scene, but soon returned because he did not want to leave Mr. Jacobs behind. (Tr. 195) When he returned, Mr. Jacobs was mortally wounded in a ditch by the side of the road. (Tr. 196) Sumka never saw Mr. Murphy do anything to George Jacobs. (Tr. 216-17, 219) However, after he returned to the scene, Sumka testified he saw Mr. Murphy throw a knife, which was later recovered near the homicide scene and found to have traces of the victim's blood,, into field adjoining the roadway. (Tr. 196) The evidence showed the removal of the unconscious George Jacobs from the car, the beating that was administered, and the fatal wounds that were inflicted all occurred in a brief, uninterrupted episode of violence. (Tr. 193-97) The medical examiner testified that George Jacobs bled to death from a sliced throat, which partially cut the carotid artery; a slash across his abdomen; and from being emasculated. The victim's penis and scrotum were cut off and thrown into the middle of Vernon Road. (Tr. 266, 270, 272, 276-77, 279-80) Mr. Jacobs's blood alcohol content was .23, several times the legal limit. (Tr. 281)

After George Jacobs was beaten and cut and was lying in the ditch at the side of the road, another motorist came on the scene and stopped to see what was going on. (Tr. 196) He was told there was nothing wrong with the man lying in the ditch, and drove off when the men, whom he really could not describe,

approached him. He did, however, describe the truck he saw, which law enforcement connected to Mr. Murphy based on the description given. (Tr. 97)

After the encounter with motorist, Mr. Murphy told Sumka he was going with them. Sumka got into the truck. He was never forced or threatened to do so. (Tr. 196, 222-24) According to Sumka, the quartet then went to Mr. Murphy's trailer, where Defendant supposedly collected everybody's clothing so it could be destroyed. Sumka stated that he was also told to take a shower. (Tr. 199-200) The four men then went to Mark Taylor's house, where Defendant supposedly bragged about what he had done, telling Taylor that he had stomped Jacobs, cut his throat and "cut his dick and balls off," or words to that effect. (Tr. 143, 200) Mr. Murphy denied making this statement. (Tr. 328-29) After dropping off Kevin King and Billy Jack Long at their respective residences, Mr. Murphy took Mark Sumka to his house so he could get a pair of shoes. (Tr. 224-26) Sumka claimed Defendant threatened him and his family if Sumka did not come back to the truck after getting the shoes. (Tr. 224)

At some point, Sumka and Defendant went to Mr. Murphy's mother Elizabeth Murphy's residence, where Sumka testified Defendant burned everyone's clothing in a burn pit on the property. (Tr. 230-31) When law enforcement examined the burn pit the following day, they found debris, but could not identify any remnants of clothing. (Tr. 133) Patsy Jacobs was staying at Elizabeth Murphy's residence at the time. (Tr. 50) She claimed Defendant told her what he had done to George Jacobs, including the emasculation, at which point

Mr. Murphy supposedly told her that George would not be able to “fuck anybody else again, even you.” (Tr. 50) Mr. Murphy denied making this statement, and also denied burning any clothes on the property. (Tr. 332-33) At some point in the early morning hours of August 29, Defendant left Mark Sumka at his mother’s residence and drove home to his trailer.¹

Law enforcement arrived at the scene of the murder in the early morning hours of August 29. (Tr. 97) Based on the information provided by the motorist witnesses, they identified Mr. Murphy as a suspect. (Tr. 97) The authorities went to Mr. Murphy’s trailer, and saw his truck parked on the property. Using a flashlight, OSBI Agent John Jones shined a flashlight into the truck and saw what he believed to be a blood smear in the passenger compartment. (Tr. 97-98) They knocked on Defendant’ trailer door, but got no answer. Based on the information from the witnesses who saw Mr. Murphy at the murder scene and the apparent blood seen in the truck, Agent Jones obtained a state search warrant. (Tr. 98) Law enforcement returned to Mr. Murphy’s trailer, knocked and announced, and entered, where they found Defendant asleep in a bedroom. (Tr. 99) He was awakened and immediately handcuffed. (Tr. 99)

Late on the afternoon of August 29, Mr. Murphy was interrogated by Agent Jones and OSBI Agent Harshaw at the Eufaula, Oklahoma Police Department. (Tr.

¹ Mr. Murphy was acquitted of count 4 relating to the alleged kidnapping of Mark Sumka, during which George Jacobs’s death resulted. (ROA 352-54) Mr. Sumka testified he willingly went with Defendant and the others, and, when asked directly if he had been kidnapped, answered “no.” (Tr. 248-50)

101) After at first denying being at the scene of the murder, Mr. Murphy admitted being there, but denied repeatedly doing anything to George Jacobs. (Govt's Exh.

12) Eventually, Defendant admitted to kicking Jacobs in the ribs several times as well as in "the balls," and to cutting (but not severing) Jacobs's penis with a knife. (Tr. 106-07)

As alluded to above, in his testimony, Mr. Murphy denied having killed George Jacobs, and denied assaulting him in any way, placing the blame on Billy Jack Long and Kevin King. (Tr. 317-19, 321-22, 335 337-39) He said he did not have the type of character to have done such a thing, and had no trouble with Jacobs and his family. (Tr. 302-05) In addition, Mr. Murphy related his extensive and practically non-stop drinking on the day and night of August 28 and the early morning of August 29, and said he was extremely intoxicated at the time George Jacobs was attacked and killed. (Tr. 308-18, 324) On cross-examination, Defendant was impeached on several points with testimony he had given at his state trial in 2000, where he claimed a repeated failure of memory due to drinking. (E.g. Tr, 34-53) Mr. Murphy said much of his testimony in the federal trial was based on what other witnesses said.

SUMMARY OF ARGUMENTS

1, In counts 2 and 3 of the superseding indictment, Defendant was charged, respectively, with murder in Indian country in perpetration of kidnapping and kidnapping resulting in death. The evidence was insufficient to sustain either conviction because the alleged kidnapping, or seizure of George Jacobs, was incidental and inherent to his murder, and not a separate and independent offense, temporally, physically, or otherwise. This alone requires that Mr. Murphy's two kidnapping-based felony murder convictions be vacated. In addition, as to count 3, the government failed to prove beyond a reasonable doubt that the alleged kidnapping of George Jacobs was done for some benefit or purpose. Finally, because Mr. Jacobs was unconscious even before he was attacked, and remained so throughout based on the evidence, he was not seized against his will, and was therefore not kidnapped.

2, Mr. Murphy's federal prosecution on each count of conviction was barred by the applicable statute of limitations. Because the death penalty was not and could not be sought under the indictment and superseding indictment returned against Defendant, or the class of defendants and potential defendants to whom he belongs, the applicable statute of limitations was five years, not unlimited.

3. The events surrounding the offenses of conviction occurred in late August 1999. Despite the fact that the State of Oklahoma never rightfully had subject matter jurisdiction, Mr. Murphy was convicted and sentenced to death illegally, and spent approximately twenty years on Oklahoma's death row.

Waiting two decades to indict Defendant in federal court prejudiced Mr. Murphy. The twenty years of pre-indictment delay constituted a violation of Defendant's Fifth Amendment due process rights.

ARGUMENTS

I. THE GOVERNMENT FAILED TO PROVE THAT GEORGE JACOBS'S MURDER WAS COMMITTED IN THE PERPETRATION OF THE SEPARATE CRIME OF KIDNAPPING. THIS INVALIDATES BOTH KIDNAPPING-BASED FELONY MURDER CONVICTIONS. AS TO COUNT 3, THE GOVERNMENT FAILED TO PROVE MR. MURPHY "KIDNAPPED" THE VICTIM FOR SOME BENEFIT. THE KIDNAPPING PREDICATE FOR THE FELONY MURDER CONVICTIONS ALSO FAILS BECAUSE THE VICTIM WAS NOT SEIZED AGAINST HIS WILL.

A. Portion of the record where the issue was raised and ruled upon: At the conclusion of the government's case, Mr. Murphy moved under Rule 29 of the Federal Rules of Criminal Procedure for judgment of acquittal on counts 2 and 3 (as well as the other counts charged). In part, it was argued that the alleged act of kidnapping was indistinguishable and not separate from the murder itself, but part of a continuous, uninterrupted series of events which were part of the murder. It was also argued, with respect to count 3, that bragging about the murder afterward was not a "benefit" that motivated the so-called kidnapping. (Tr. 287-98) The trial court denied the motion for judgment of acquittal. (Tr. 287-98)

B. Standard of Review: This Court reviews *de novo* a claim that the evidence was insufficient to sustain a conviction. *United States v. Gabaldon*, 389 F.3d 1090, 1095 (10th Cir. 2004); *United States v. Walker*, 137 F.3d 1217, 1220 (10th Cir. 1998). The evidence is sufficient to uphold a conviction if, viewed in the

light most flattering to the government, it would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt. *Walker*, 137 F.3d at 1220. Review is highly deferential. A conviction will be overturned due to legally insufficient evidence only if no reasonable juror could have concluded that the accused was guilty of the crime charged. *Id.*

C. Discussion

As demonstrated below, there was no kidnapping in this case. The seizure and so-called confinement of the George Jacobs was purely incidental and inherent to the murder, which occurred immediately after the already-unconscious George Jacobs was pulled from the car, then beaten, cut and emasculated. The entire incident took mere minutes. There was no “independent” kidnapping separate from the acts committed to effect the homicide. The murder was committed during one short, uninterrupted series of events. If what preceded the murder in this case could be called kidnapping, then (assuming jurisdictional requirements were satisfied) any time someone was momentarily “seized” or “detained” in the course of an assault and battery, or any other crime, a kidnapping charge would be appropriate. This is not the law.

In addition, the evidence was insufficient to show George Jacobs was seized against his will, since, based on the evidence, he was unconscious throughout the entire incident. Finally, with respect to count 3, there was no “benefit” derived by Defendant from Mr. Jacobs’s supposed kidnapping.

1. The “kidnapping” was incidental to and inherently part of the

homicide, not a separate offense.

Count 2 of the superseding indictment charged Mr. Murphy with murder in Indian country in perpetration of the kidnapping of George Jacobs. This required the government to prove beyond a reasonable doubt that the death of Mr. Jacobs occurred as a consequence of, and while Defendant was engaged in committing or attempting to commit, kidnapping. Count 3 charged kidnapping resulting in death. The government was required to prove Mr. Murphy kidnapped George Jacobs by seizing and confining him; that the kidnapping was perpetrated by Defendant for some purpose or benefit; and that George Jacobs's death resulted from the act of kidnapping. (ROA 87-88, 312-49)

The kidnapping statute upon which counts 2 and 3 were founded is 18 U.S.C. § 1201(a)(2). In pertinent part, this provision states that “whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts or carries away and holds for ransom or reward or otherwise any person ... when ... (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States.” To support a kidnapping conviction, the government must show that the victim was held against his will for some benefit to the captor. *United States v. Walker*, 137 F. 3d at 1220; *United States v. Toledo*, 985 F.2d 1462, 1467 (10th Cir. 1993), *relying on* *Chatwin v. United States*, 326 U.S. 455, 464 (1946)(involuntariness of the seizure and detention of the kidnapping victim is the “very essence” of the crime of kidnapping”).

This Court's decision in *United States v. Gabaldon*, 389 F.3d 1090, 1095-97

(10th Cir. 2004) is highly instructive, and shows that no kidnapping occurred here which could serve as the anchor for the felony murder charges in counts 2 and 3. Like Mr. Murphy, Gabaldon was convicted of a kidnapping and murder, with 18 U.S.C. § 1201(a)(2) kidnapping as the predicate felony. The female victim initially voluntarily got into the defendant's car, where she was beaten into unconsciousness. Before she lost consciousness during the beating, the victim naturally resisted against and protested what she was being subjected to. After the victim was rendered unconscious, Gabaldon and his accomplice then drove away from the location of the beating and went to a remote, "secretive" location, where the victim was murdered.

On appeal, Gabaldon argued that the evidence was insufficient to support his kidnapping conviction under 18 U.S.C. § 1201(a)(2) because: 1) the victim was not held against her will, because she voluntarily got into his car; 2) after being beaten into unconsciousness, the victim was not being held against her will because she could not exercise her will; 3) the evidence was insufficient to show that the victim was kidnapped for some benefit; and 4) the alleged kidnapping (confinement) was "merely incidental," or indistinguishable, from her murder.

This Court rejected each contention. Taking the last first, because it is highly relevant to Mr. Murphy's insufficiency of the evidence claim, the Court addressed Gabaldon's reliance on *Government of the Virgin Islands v. Berry*, 604 F.2d 221, 228 (3rd Cir. 1979). In *Berry*, the Third Circuit overturned the defendant's conviction under the territorial kidnapping statute (the same one

Mr. Murphy was convicted under) because the victim's confinement had been purely incidental to and part of the robbery or attempted robbery committed against him, and thus did not amount to an "independent" seizure or confinement that would support a kidnapping conviction. *Berry*, 604 F.2d at 228.

The court in *Berry* founded its approach on an interpretation of state kidnapping statutes, which did not include incidents where the seizure of a victim was "merely incidental to the commission of other substantive crimes." *Id.* at 227. The court was concerned that a literal application of the kidnapping statute would give the green light to overzealous prosecutors to charge those who had committed relatively minor crimes involving "some degree of restraint or asportation" with the more serious offense of kidnapping. *Id.* at 226-27.

In assessing the sufficiency of the evidence for the type of kidnapping offenses that served as the anchor for the felony murder convictions in Mr. Murphy's case, the Third Circuit adopted a four-part test for "distinguishing crimes for which kidnapping charges are justified from those where they are not":

- 1) the duration of detention or asportation;
- 2) whether the detention or asportation occurred during the commission of a separate offense;
- 3) whether the detention or asportation which occurred is inherent in the separate offense; and
- 4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense.

Berry, 604 F.2d at 227.

This Court noted that the *Berry* test had not been widely adopted by other courts of appeal, which was probably because most federal kidnapping cases involved § 1201(a)(1) offenses, which concern the interstate transportation of the abducted individual. On the other hand, the defendant in *Berry* and Mr. Murphy faced kidnapping allegations (in one form or another) based on the territorial jurisdiction of the United States. In *Gabaldon*, this Court stated that where “the statute requires only that the seizure or restraint take place within the territorial jurisdiction of the United States, the difficulty highlighted by the *Berry* court is more likely to arise.” *Gabaldon*, 389 F.3d at 1096-97. *Gabaldon* cited *United States v. Howard*, 918 F.2d 1529, 1534, 1536-37 (11th Cir. 1990), which applied the *Berry* test and held the defendants’ kidnapping convictions under 18 U.S.C. § 1201(a)(5) were not supported by sufficient evidence. The attempted seizure of the DEA agent victim was merely incidental to their crime of armed robbery. In vacating the conviction, the Eleventh Circuit said the evidence was insufficient for a rational jury to conclude beyond a reasonable doubt that the defendants’ planned to detain the victim longer than necessary to rob him, or that the defendants’ limited detention of the DEA agent exceeded what would have been necessary for a successful robbery. *Gabaldon* also cited Judge Kleinfeld’s concurring opinion in *United States v. Etsitty*, 130 F.3d 420, 428-29 (9th Cir. 1997), which argued that a § 1201(a)(2) conviction required a seized or confined person to be held for an “appreciable period” beyond what would be required for the assailant to attempt a

sexual assault.

Gabaldon did not adopt or repudiate the *Berry* test, but noted there was “much ... to commend its use” in a § 1201(a)(2) case such as Mr. Murphy’s. However, it was unnecessary to adopt or explicitly endorse the *Berry* test in *Gabaldon*. The evidence against Gabaldon “clearly established” that he committed the separate crime of kidnapping, even under the *Berry* test. Gabaldon conceded he detained or held the victim for longer than would have been “minimally necessary” to murder her. He drove around for a period of time while trying to decide what to do with the victim. There was also substantial evidence Gabaldon decided to continue transporting the unconscious victim in his vehicle, not only because he wanted to kill her at some point, but because he wanted to skirt arrest and prosecution for the separate assault and battery that had been committed earlier.

Mr. Murphy asks the Court to adopt the *Berry* test in deciding this appeal. As the Court already noted in *Gabaldon*, that test has much to recommend it in § 1201 (a)(2) prosecutions such as this one. And, unlike *Gabaldon*, application of that test shows that the evidence was insufficient to convict Defendant of felony murder in counts 2 and 3 based on a § 1201(a)(2) kidnapping. As in *United States v. Howard, supra*, the seizure of George Jacobs from the automobile was an inseparable and indistinct step toward the commission of murder. As soon as Mr. Jacobs was forcibly removed from the automobile, he was beaten by Kevin King and Billy Jack Long. In short order, regardless of who inflicted the injuries, Mr.

Jacobs's throat and abdomen were cut, his penis and testicles were excised, and he expired in a ditch at the side of the road. There was an uninterrupted series of events which quickly culminated in Jacobs's murder. The seizure of Mr. Jacobs from the car and the events that followed were temporally no longer than necessary to accomplish the objective of murder. The "limited detention" of Mr. Jacobs did not exceed what was inherently necessary to commit the homicide. Jacobs was not seized or detained for an appreciable period of time beyond what was required to commit the murder.

This is entirely unlike the situation in *Gabaldon*, where the defendant first beat the victim into unconsciousness after she got in his car, then drove her to a separate, secret location where she was murdered. The victim was not transported to this location simply for the purpose of committing the murder. The homicide was committed to evade arrest and prosecution for the earlier, separate and independent crime of a serious assault and battery which rendered the victim unconscious. The assault and battery occurred a significant period of time before she was transported to another location to be killed.

Application of the four *Berry* factors to Mr. Murphy's case demonstrates that there was no separate kidnapping offense committed here. The duration of the detention or asportation was short and inherently related to the lethal attack. The detention or asportation occurred during and as part of the separate offense of murder. In other words, the detention or asportation was inherent to the separate offense of murder. Last, the detention or asportation of Mr. Jacobs, which was

inseparable from the homicide, did not create, by itself, a significant danger to Jacobs independent of the murderous attack.

2. As to count 3, the government failed to prove Defendant “kidnapped” the victim for some benefit.

The argument made above shows that because the supposed kidnapping of George Jacobs was incidental and inherent to the murder itself, and not a separate offense, there was no kidnapping that could serve as the basis for the felony murder convictions in counts 2 and 3. Count 3 is infirm also because there was no evidence that Jacobs was “kidnapped” for some benefit. *DeHerrera v. United States*, 339 F.2d 587, 588 (10th Cir. 1964); *United States v. Sarracino*, 131 F.3d 943, 947 (10th Cir. 1997)(statutory requirement that the kidnapping be done “for ransom or reward or otherwise” is satisfied where “the kidnapers had some reason for the kidnapping which, to them, would be of some benefit”; that requirement was met when the defendant and an accomplice drove the victim to a remote and secluded location in order to kill the victim without being observed by others); *United States v. Walker*, 137 F.3d at 1220 (finding that the defendant’s detention or holding of the victim in order to have the opportunity to persuade or convince her to stay in their romantic relationship was a sufficient “benefit”). In *Gabaldon*, 389 F.3d at 1095-96, it was held, similar to the finding in *Sarracino*, that the defendant derived a benefit from his transportation of the unconscious victim to a remote location to be murdered and so evidence of the earlier assault and battery could be destroyed.

In Mr. Murphy's case, there was no benefit, real or imagined, obtained from any "kidnapping." George Jacobs, Sr. was killed immediately after being pulled from the car. There was not "transportation" to another, distant (let alone secret and secluded) location such as occurred in *Gabaldon*, *Sarracino*, and *Walker*. The government argued that the "benefit or purpose" derived by Mr. Murphy from the "kidnapping" was that he got to "brag" about what he had done by confessing to Mark Taylor, and by eliminating a rival for the affections of Patsy Jacobs. (Tr.____) But something as vague and insubstantial as "bragging rights" has never been held by any court, so far as counsel knows, to constitute a "benefit" from an alleged kidnapping. And, to the extent the testimony of Taylor and Patsy Jacobs is credited, the boasting or credit-taking had nothing to do with any kidnapping, but with a murder that the above discussion showed was *not preceded* by the separate and distinct offense of kidnapping.

3. Any "kidnapping" was not committed against George Jacobs, Sr.'s will.

In addition to the argument made in subpart (a), there was no evidence to show that any kidnapping which could serve as a predicate for felony murder was committed because the alleged kidnapping was not committed against the victim's will. This is an indispensable element to any kidnapping offense. *United States v. Toledo*, 985 F.2d at 1467 (involuntariness of the seizure or detention "is the very essence of the crime of kidnapping"). Again, it is helpful to contrast this Court's holding in *Gabaldon*, 389 F.3d at 1095-97, with the facts in Mr. Murphy's case.

As noted, in *Gabeldon*, the kidnap/homicide victim initially got into the defendant's car voluntarily, protested her treatment at being beaten, and was then rendered unconscious, after which she was transported to a remote location and murdered. The fact that the victim was conscious when she got into the car and resisted the initial stages of the beating showed that she was taken against her will. Had she not been knocked unconscious, it was entirely reasonable to assume she would have withdrawn any previous voluntary consent to get into the defendant's car.. In Mr. Murphy's case, George Jacobs was already unconscious when he was removed from the vehicle, beaten and fatally cut with a knife. He was unable to express his will even before the initial assault, which quickly devolved into a lethal attack.

D. Conclusion

For three distinct reasons, Mr. Murphy's convictions on counts 2 and 3, which were grounded on an alleged kidnapping, should be vacated with instructions to dismiss the charges due to insufficient evidence. *Burks v. United States*, 437 U.S. 1 (1978).

II. MR. MURPHY'S FEDERAL PROSECUTION WAS BARRED BY THE STATUTE OF LIMITATIONS.

A. Portion of the record where this issue was raised and ruled upon:

Mr. Murphy filed a pretrial motion arguing that all federal charges should be dismissed because the indictment was returned long after the applicable five year statute of limitations for the four charged non-capital offenses had expired. (ROA 90-95) The government filed a response. (ROA 207-213) The District Court

issued a written order denying the motion. (ROA 243-47)

B. Standard of review: Questions involving the applicability of statutes of limitation are reviewed *de novo*. *Moya v. Garcia*, 895 F.3d 1229 (10th Cir. 2018); *Fulgham v. Embarq Corp.*, 785 F.3d 395 (10th Cir. 2015).

C. Discussion

Federal jurisdiction in this case is based on the fact that the offenses charged involve Indians (both the victim and Mr. Murphy) and were committed in Indian country, within the Muscogee-Creek reservation. *Sharp v. Murphy*, 591 U.S.____, 140 S.Ct. 2412 (2020), *relying on McGirt v. Oklahoma*, 591 U.S.____, 140 S.Ct. 2152 (2020). Because the Muscogee-Creek Tribe has not “opted in” to permit the death penalty to be sought for Major Crimes committed by Indians within the reservation, the death penalty was not available as a punishment option under the Federal Death Penalty Act. *E.g., United States v. Gallaher*, 624 F.3d 934 (9th Cir. 2010).

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, the statute of limitations is five 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 an offense shall have been committed.”)

Because the death penalty could not be sought in Mr. Murphy’s case as a

matter of law, Defendant did not face capital charges. Because a capital charge or charges were not possible from the outset, the statute of limitations applicable to the four crimes alleged in the superseding indictment was five years. Mr. Murphy was indicted in federal court in 2020. The offenses were committed in August 1999. The applicable five year statute of limitations ran approximately fifteen years before Mr. Murphy was indicted in federal court.

Granted, this argument has failed to find much favor in the cases addressing it. The district court relied on some of the cases cited below, as well as similar holdings, in denying the motion to dismiss, although it said Mr. Murphy's argument was "straightforward," as well as "understandable" and "rational." (ROA 243-47)

In *United States v. Martinez*, 505 F.Supp.2d 1024 (D.N.M. 2007), *appeal dismissed*, 272 Fed.Appx. 658 (10th Cir. 2008), the defendant was charged with first degree murder in Indian country. For the same reasons that Mr. Murphy was not facing the federal death penalty, Martinez's prosecution was non-capital. The district court in *Martinez* rejected the argument that because the defendant was ineligible for the death penalty (or, at any rate, the death penalty was not being sought), his first degree murder case was a "non-capital" case for which the five year statute of limitations applied. It was reasoned that statutes of limitation are aimed at a category of offenses, not the punishment that may be faced by a particular individual defendant. The court in *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 (N.D. Iowa 2003), the defendant was charged with the murders of witnesses to her boyfriend co-defendant's methamphetamine ring. The federal death penalty had been declared unconstitutional at the time the homicides were committed. The death penalty was not sought for those particular homicides. 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 five year statute of limitations applied. The court reasoned that as a general matter, first degree murder is a capital crime for which the death penalty *may* be imposed.

The Ninth Circuit in *United States v. Gallaher*, *supra* noted the death penalty was ordinarily an available punishment for first degree murder committed within the territorial jurisdiction of the United States, remaining a capital offense regardless of whether the death penalty could be imposed in a particular case. Per *Gallaher*, the statute of limitations is tied to the nature of the offense. The question is whether the death penalty *may* be imposed for the crime of conviction. Put another way, is death an available punishment? The Ninth Circuit apparently reasoned that death is even an "available punishment" in "opt out" Indian county cases, since the Tribes could choose to allow the death penalty and could enter into an agreement to this effect with the government. 18 U.S.C. § 1398.

In addition to cases like those cited above, the district court relied on its own decision in *United States v. Magnan*, No.6:13-CR-13-069-RAW (E.D. Okl. April 21, 2014), which employed the same reasoning as the cases cited above. (ROA 243-47) In denying Defendant's motion, the district court also opined that acceptance of Mr. Murphy's argument would "risk[] a grave injustice," since "killers may permanently escape justice simply because their victims were killed on lands associated with a Native American tribe that objects to the death penalty," citing *Gallagher*, 624 F.3d at 942. (ROA 243-47) On the other hand, one might say that any injustice began (and continued) when the State of Oklahoma embarked on prosecutions of Indian country crimes it had no subject matter jurisdiction to prosecute in the first place.

In the final analysis, the authority against the argument being urged by Mr. Murphy is not persuasive. It ignores the plain and unambiguous language of 18 U.S.C. § 3281. This statute reads, "[a]n indictment for any offense punishable by death may be found at any time without limitation."

A statute should be construed and applied according to the ordinary meaning of the words used in it. *United States v. Torres-Laranega*, 476 F.3d 1148, 1157 (10th Cir. 2007); *FTC v. Kuykendall*, 466 F.3d 1149, 1154 (10th Cir. 2006). The context in which the words appear in the overall statutory scheme is also evaluated. *United States v. Brune*, 767 F.3d 1009, 1022 (10th Cir. 2014). The words "an indictment" in the statute refer to a specific instrument filed against a specific individual. The words "an indictment" do not refer to "indictments" as a general,

global concept. The words “any offense punishable by death” refers to the offense charged in the specific indictment at issue. Indictments cannot exist merely as a general concept without being manifested in a specific indictment against a specific named individual.

The offenses charged against Mr. Murphy in the indictment and superseding indictment were simply not punishable by death. The death penalty was not sought and could not have been sought, not only against Mr. Murphy, but against an entire class of individuals within the Muscogee-Creek Nation. It makes no sense to say that the offense charged in the indictment is capital offense if, as in this case, the death penalty could not be sought in the first instance. It is also inaccurate to say, as the courts in the above-cited opinions did, that the words “capital offense” refer to a class or category of crimes regardless of the available 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. Defendant’s offenses were non-capital. Therefore, the five year statute of limitations applied, and the indictment and superseding indictment should have been dismissed.

Instructive on this point is the Court’s 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 given the twenty peremptory challenges capital case defendants are entitled to. The government declined to seek the death penalty. Because of this, the trial judge gave the defense the standard ten peremptory

challenges accorded to defendants who are charged with non-capital felonies. On appeal, this Court found no error. Because the government was not seeking the death penalty, the “case lost its capital nature as charged in the indictment.”

The same is true in Mr. Murphy’s case, to an even greater degree. The government was barred at the outset from seeking the death penalty, because it was unavailable as a punishment option as a matter of law. If the death penalty cannot be sought, a capital offense is not charged in the indictment, and the five year statute of limitations applies. The district court dismissed any reliance on *Maestos* because it dealt with a question of criminal procedure attending a trial. (ROA 243-47) But the point is whether Mr. Murphy could have been charged with a capital offense. He could not be so charged. And, the prohibition against a capital option against Defendant is not unique or particular to his case alone, but applies to an entire class of Native Americans who are charged with committing murder in Indian country.

Accordingly, because the statute of limitations had long elapsed before Mr. Murphy was indicted in federal court, his convictions and sentences should be vacated and the charges dismissed.

III. MR. MURPHY’S FIFTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED BY TWO DECADES OF PRE-INDICTMENT DELAY BEFORE FEDERAL CHARGES WERE BROUGHT.

A. Portion of the record where the issue was raised and ruled upon: Mr. Murphy filed a pretrial motion asking that the charges be dismissed due to pre-indictment delay in bringing federal charges. (ROA 96-99) The government filed

a response. (ROA 159-69) The district court issued a written order denying the motion. (ROA 248-50)

B. Standard of review: As a general matter, a district court's denial of a motion to dismiss an indictment is reviewed for an abuse of discretion. *United States v. Stevens*, 881 F.3d 1249, 1252 (10th Cir. 2018), relying on *United States v. Amborr*, 405 F.3d 1009, 1116 (10th Cir. 2005). The constitutional question raised here is reviewed *de novo*. *E.g.*, *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008).

C. Discussion

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 were void from the outset. The state never had jurisdiction over Mr. Murphy or his alleged crime. *McGirt v. Oklahoma*, 591 U.S.____, 140 S.Ct. 2452 (2020); *Sharp v. Murphy*, 591 U.S.____, 140 S.Ct. 2152 (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).

The Supreme Court's rulings in *McGirt* and Mr. Murphy's case were not conjured out of thin air. They were not just foreshadowed, but compelled, by precedent. *McGirt v. Oklahoma*, ____ S.Ct. at 2459-60, 2462-68, 2470-78, 2480.. Also, the 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 (now known as Indian country) was at all times, up to the present, in existence.

The arguments Defendant makes here complement, but are not identical, to the statute of limitations claim made in Proposition II. 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 a violation of due process for unjustified pre-indictment delay where a defendant can demonstrate the delay 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. Admittedly, 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*, *supra*.

Because the state courts never had jurisdiction over Mr. Murphy's alleged crime or crimes, 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 delay in bringing charges in the appropriate jurisdiction was inexcusable. The reason for the twenty year delay in securing the federal indictment was the false assumption of state jurisdiction, in complete derogation of

the long-standing law upon which the Supreme Court majority in *McGirt* relied. Mr. Murphy spent twenty years on death row under a judgment that was void from the beginning. In rejecting Defendant's pre-indictment delay argument, the district court held that Mr. Murphy could point to no actual prejudice to his case and his right to a fair trial. (ROA 248-50) But, the very passage of two decades is inherently prejudicial. The prejudice to Mr. Murphy personally was magnified many times over by the fact that he unjustly spent twenty years in the most onerous and psychologically damaging of prison environments – death row. As was noted in Mr. Murphy's pretrial motion, it is highly worrisome to confront the specter of an individual spending two decades in the death house on a void judgment. This kind of prejudice from pre-indictment delay is unique in its severity.

Because of the unusual circumstances present here, this is one of the rare cases where pre-indictment delay is so inexcusable and prejudicial in actual fact that dismissal of the indictment was the only appropriate remedy. Accordingly, the judgments of conviction should be vacated, and the charges should be dismissed.

CONCLUSION

Based on the foregoing argument and authority, Mr. Murphy's convictions should be reversed with instructions to dismiss the charges. If the convictions on counts 2 and 3 are vacated, the case should be remanded for resentencing on count 1.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Murphy requests oral argument. There are important issues involving

whether, due to the passage of time, this prosecution could even be brought. There is also a significant issue as to whether the evidence was sufficient to support the felony murder convictions predicated on an alleged kidnapping.

Respectfully submitted,

/s/ David Autry
David Autry, OBA #11600
1021 N.W. 16th Street
Oklahoma City, OK 73106
(405) 521-9600
(405) 521-9669 [fax]
dbautry77@gmail.com

Lawyer for Defendant/Appellant,
Patrick Dwayne Murphy

CERTIFICATE OF MAILING AND ELECTRONIC SERVICE

This is to certify that on this 5th day of December 2022, a true and correct copy of the foregoing instrument was served electronically via CM/ECF to Linda Epperley, AUSA, at her email address.

/s/ David Autry

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing brief:

1. All required privacy redactions have been made;
2. If required to file additional hard copies, that the ECF submission is an exact copy of those documents;
3. The ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program, is free of viruses.

/s/ David Autry

CERTIFICATE OF COMPLIANCE

As required by Fed.R.App. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 8307 words, including the cover sheet and index. I relied on my word processor to obtain the count, and it is WordPerfect 8. I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ David Autry

UNITED STATES DISTRICT COURT

Eastern District of Oklahoma

UNITED STATES OF AMERICA

v.

PATRICK DWAYNE MURPHY

JUDGMENT IN A CRIMINAL CASE

Case Number: CR-20-00078-001-RAW

USM Number: 04963-509

David B. Autry

Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.
- ☒ was found guilty on count(s) 2 & 3 of the Superseding Indictment, and the lesser charge of Murder in the Second Degree as to Count 1 of the Superseding Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:1111(b), 2, 1151 & 1153	Murder in the Second Degree in Indian Country	August 28, 1999	1
18:1111(a), 2, 1151 & 1153	Murder in Indian Country in Perpetration of Kidnapping	August 28, 1999	2
18:1201(a)(2), 1, 1151 & 1153	Kidnapping Resulting in Death	August 28, 1999	3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☒ The defendant has been found not guilty on count(s) 4 of the Superseding Indictment
- ☒ Count(s) 1, 2, 3 & 4 of the Indictment ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 10, 2022

Date of Imposition of Judgment



Ronald A. White
United States District Judge
Eastern District of Oklahoma

May 11, 2022

Date

DEFENDANT: Patrick Dwayne Murphy
CASE NUMBER: CR-20-00078-001-RAW

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Life on each of Counts 1, 2 & 3 of the Superseding Indictment. The terms of imprisonment imposed on each count shall be served concurrently with one another.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the Bureau of Prisons evaluate and determine if the defendant should be given credit toward this sentence for any time previously served in custody and further award the defendant credit for such time served in accordance with Bureau of Prisons policy.

The Court shall be informed in writing as soon as possible if the Bureau of Prisons is unable to follow the Court's recommendations, along with the reasons for not following such recommendations made by the Court.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .
☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Patrick Dwayne Murphy
CASE NUMBER: CR-20-00078-001-RAW

SUPERVISED RELEASE

If ever released from imprisonment, you will be on supervised release for a term of :
5 years on each of Counts 1, 2 & 3 of the Superseding Indictment. The terms of supervised release imposed on each count shall run concurrently with one another.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight (8) drug tests per month.
☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Patrick Dwayne Murphy
CASE NUMBER: CR-20-00078-001-RAW

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer, after obtaining Court approval, may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Patrick Dwayne Murphy
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SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program approved by the United States Probation Office for the treatment of narcotic addiction, drug dependency, or alcohol dependency, which will include testing to determine if he has reverted to the use of drugs or alcohol, and may include outpatient treatment.
2. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA</u> <u>Assessment*</u>	<u>JVTA</u> <u>Assessment**</u>
TOTALS	\$ 300.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
---------------	---------------	---------------------	------------------------

TOTALS \$ _____ \$ _____

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Patrick Dwayne Murphy
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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
 ☐ not later than _____, or
 ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
 Said special assessment of \$300 shall be paid through the United States Court Clerk for the Eastern District of Oklahoma, P.O. Box 607, Muskogee, OK 74402, and is due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number

Defendant and Co-Defendant Names
 (including defendant number)

Total Amount

Joint and Several
 Amount

Corresponding Payee,
 if appropriate

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.