

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

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**JAMES WILLIAM BUZZARD,**

**Defendant.**

**Case No. 21-CR-351-GKF**

**Government's Response to Defendant's Motion for Discovery**

The United States requests the Court to deny in part and grant in part Mr. Buzzard's Motion for Discovery. The United States has provided all records of meetings held with co-Defendant Cody Buzzard and has provided all Cellebrite extractions performed on all cell phones that were recovered and searched throughout the investigation. However, the Government objects to the compelled production of communications between the United States and the Cherokee Nation concerning the timing of the federal indictment or the dismissal of the tribal charges.

**A. Defendant is not entitled to internal government communications.**

Federal Rule of Criminal Procedure 16(a)(1)(E) requires the Government to disclose any document or object, if within the government's possession, if the item is material to preparing the defense, the government intends to use the item in its case-in-chief at trial or the item was obtained from or belongs to the defendant. The pre-indictment communications Mr. Buzzard seeks are not material to preparing his

defense to whether or not he is guilty of First Degree Murder in Indian Country, Assault with a Dangerous Weapon in Indian Country and Carrying, Using, Brandishing, and Discharging a Firearm During and in Relation to a Crime of Violence. Further, any pre-indictment communications between federal and tribal prosecutors would not be used in the Government's case-in-chief at trial and these communications were not obtained from or belong to the defendant.

The Federal Rules of Criminal Procedure explicitly prohibit the required disclosure of "reports, memoranda or other internal government documents made by an attorney for the government or other government agency in connection with investigating or prosecuting the case." Fed. R. Crim. P. 16(a)(2). Any communications by Cherokee Nation officials, including prosecutors, in connection with the investigation or prosecution of Mr. Buzzard should be afforded the same governmental protections.

Rule 16 is restrictive in the type of information a defendant is entitled to and in a prosecutor's ability to assert privilege. *United States v. Armstrong*, 517 U.S. 456, 462 (1996). Applying *Armstrong*, the Eleventh Circuit denied relief from the withholding of discovery in the pre-indictment delay context, despite finding prejudice from a prosecutorial delay, because the defendant had not shown "that the delay was a deliberate tactical maneuver by the government". *United States v. Lindstrom*, 698 F.2d 1154. While Mr. Buzzard generally relies on Rule 16(1)(E) to support his position that he is entitled to discovery to support a possible due process violation, he fails to support the position that he is somehow entitled to privileged attorney

communication by demonstrating that the timely filing of the federal indictment was a deliberate tactical maneuver by the government.

**B. Communications between prosecutors is attorney work product.**

Attorney work product privilege permits attorneys to withhold from production documents and other tangible things prepared in anticipation of litigation by or for another party or its representative. Fed. R. Civ. P. § 26(b)(3). The work product privilege protects attorney's mental process, including in criminal litigation. *United States v. Nobles*, 422 U.S. 225. As previously noted, Federal Rule of Criminal Procedure 16(a)(2) recognizes the work product privilege by exempting disclosure of internal government documents made by an attorney in connection with an investigation or prosecution of a case. Should the Court compel the discovery of the communications, the Court "must protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney." Fed. R. Crim. P. § 26(b)(3)(B).

In evaluating the application of work product privilege and the deliberative process to the United States Attorney's death penalty evaluation process, the Ninth Circuit has held that prosecutorial evaluations and memorandums were privileged because the documents were "pre-decisional", explaining that the work product was prepared before a final charging decision was made and contained opinions, recommendations, and advice and thus not discoverable. *United States v. Fernandez*, 231 F.3d at 1240, 1246.

Even if the communications Mr. Buzzard seeks exist, they may not be of the malevolent nature of which he suggests and therefore not relevant. However, if communications between a federal prosecutor and a tribal prosecutor of an ongoing murder investigation exist, they most certainly would contain mental impressions, conclusions, opinions and legal theories of the Assistant United States Attorney tasked with evaluating the decision to charge a suspect in federal court. Either way, the communications are protected work product, prepared in anticipation of litigation, and their production should not be required.

**C. Buzzard has failed to demonstrate any pre-indictment prejudice.**

Assuming communication existed between federal and tribal prosecutors as to the timing of dismissing the tribal charges and the filing of a federal indictment, thereby delaying the commencing of Mr. Buzzard's speedy trial clock, Mr. Buzzard has failed to show any prejudice caused by the pre-indictment delay. In order to show entitlement to relief for prejudicial pre-indictment delay, Mr. Buzzard would have to show that he suffered *actual* prejudice as a result of the delay and that the government *intentionally* delayed in order to obtain some tactical advantage or to harass the defendant. *United States v. Marion*, 404 U.S. 307, 322 (1971), *United States v. Lovasco*, 431 U.S. 783, 789 (1977), *United States v. Comosona*, 614 F.2d 695, 696 (10th Cir. 1980).

All Mr. Buzzard has shown is that he was incarcerated by the Cherokee Nation subsequent to a first-degree murder in Indian Country, charged in tribal court, those charges were later dismissed and that a federal indictment was filed within the

permitted federal statute of limitations. Mr. Buzzard's claims do not suggest that the timing of the federal indictment has caused him any *actual* prejudice or that any pre-indictment delay was done intentionally by the federal prosecutor to gain a tactical advantage or to harass.

### **Conclusion**

The Government has complied with its discovery obligations. Therefore, the United States asks that the Court deny Mr. Buzzard's request for attorney communications and grant his request for records of co-Defendant meetings and records of all Cellebrite extractions performed.

Respectfully submitted,

CLINTON J. JOHNSON  
United States Attorney

/s/ Reagan V. Reininger

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### **Certificate Of Service**

I hereby certify that on the 7th day of April 2023, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

Victor J. Abreu  
James McHugh  
Sam Welch  
Defense Counsel

/s/ Reagan V. Reininger  
Reagan V. Reininger  
Assistant United States Attorney