No. _____

In the
Supreme Court of the United States

Justin Dale Little,

Applicant-Petitioner,

v.

United States of America,

Respondent.

Application for Extension of Time Within
Which to File for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

Application to the Honorable Justice
Neil M. Gorsuch as Circuit Justice

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Under Supreme Court Rule 13.5, Applicant-Petitioner Justin Dale Little respectfully applies to the Honorable Neil M. Gorsuch for a 60-day extension of time, to and including August 1, 2025, within which file his petition for writ of certiorari with this Court.

1. The Tenth Circuit entered judgment and affirmed Mr. Little's conviction and life sentence for murder in Indian Country in the Northern District of Oklahoma on October 11, 2024. *See United States v. Little*, 119 F.4th 750 (10th Cir. 2024); Appx. A.

2. Mr. Little sought panel and en banc rehearing. Appx. B. The Tenth Circuit ordered the government to respond. Appx. C. After receiving the government's response, Appx. D, the Tenth Circuit denied rehearing on March 3, 2025. *See United States v. Little*, No. 23-5077, ECF No. 99 (10th Cir. March 3, 2025); Appx. E.

3. Unless extended, the time to file a petition for certiorari will expire on June 2, 2025. This application is being filed more than ten days before a petition is currently due. *See* S. Ct. R. 13.5. This Court will have jurisdiction over any timely filed petition for certiorari under 28 U.S.C. § 1254(a).

4. This case involves at least two important issues: (1) the continued existence of the Muscogee (Creek) Reservation, *see McGirt v. Oklahoma*, 591 U.S. 894 (2020); and (2) the Fourth Amendment's good faith reliance exception.

In April 2018, Oklahoma state officers arrested Justin Little, who is Native American, without a warrant on the Muscogee Reservation. They also searched his home on the reservation without a warrant. Just five months earlier, however, the

Tenth Circuit held that Oklahoma officials lacked any authority on the reservation. *Murphy v. Royal*, 875 F.3d 896, 904, 914–22, 929–66 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 591 U.S. 977 (2020). Despite all parties agreeing that Little's arrest was illegal, the Tenth Circuit refused to order suppression of the fruits of that arrest. *Little*, 119 F.4th at 787. The court, instead, applied the good faith reliance exception to suppression. *Id.* at 766–70.

The Tenth Circuit's decision conflicts with precedents of this Court, squarely splits with several other Circuits, and presents questions of tremendous importance about the Fourth Amendment and tribal sovereignty. The good faith reliance exception operates where "police conduct a search in objectively reasonable reliance on binding judicial precedent." *Davis v. United States*, 564 U.S. 229, 239 (2011). Conversely, good faith reliance cannot exist where officers should know their conduct is unlawful under binding precedent. *Id.* at 241. Here, binding precedent instructed state officials they lacked authority on the reservation where they arrested Mr. Little. *Murphy*, 875 F.3d at 904, 914–22, 929–66.

In avoiding the typical remedy of suppression, the Tenth Circuit contorted its precedent to conflict with existing authority. *First*, the panel held that the non-issuance of the mandate in *Murphy* deprived it of relevance. *Little*, 119 F.4th at 768–69. But "[t]he fact that a mandate has not yet issued means only that jurisdiction of the case has not yet shifted back to the district court; it does not undermine the immediate precedential weight of [the] decision." *Cox v. Dep't of Just.*, 111 F.4th 198, 209 (2d Cir. 2024); *see also In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (similar). *Second*, the panel thought that the historical

exercise of jurisdiction over the reservation by Oklahoma officials supported good faith. *Little*, 119 F.4th at 769–70. However, "the good-faith exception does not apply when officers rely on their own prior conduct." *United States v. Bagley*, 877 F.3d 1151, 1156 (10th Cir. 2017). *Third*, the panel worried about the "substantial social costs" of the exclusionary rule in rejecting its application. *Little*, 119 F.4th at 767. But this type of cost-benefit analysis "is not a freestanding basis for avoiding the application of the exclusionary rule." *United States v. Ngumezi*, 980 F.3d 1285, 1291 (9th Cir. 2020).

Leaving these errors unreviewed would condone an expansion of the good faith exception that is untethered from existing precedent. And given the complexity and importance of these issues, an extension of time will allow counsel to analyze existing authorities and present a helpful petition.

5. The extension of time is also necessary because of difficulty in speaking with Mr. Little. Undersigned counsel must speak with Mr. Little on a confidential legal call before filing any petition for writ of certiorari. Mr. Little has been in custody at USP McCreary throughout his direct appeal. Undersigned counsel has contacted the staff at USP McCreary four times in the last three weeks to try and schedule a legal call with Mr. Little. Yesterday, USP McCreary staff responded that Mr. Little was no longer at that facility. Undersigned counsel then learned that Mr. Little has been transferred to USP Lee. Undersigned counsel has started the process for trying to schedule a legal call through USP Lee staff. However, given undersigned counsel's chronic difficulties in getting timely legal calls throughout BOP facilities, we request that this Court grant a 60-day extension

of time out of an abundance of caution and to ensure that Mr. Little's right to effective counsel in challenging his sentence of life imprisonment is upheld.

6. For these reasons, Mr. Little respectfully requests that an order be entered extending the time to file a petition for certiorari to and including August 1, 2025.

Respectfully submitted,

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/s/ Rohit Rajan
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May 22, 2025

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Justin Dale Little,

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v.

United States of America,

Respondent.

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Appendix To Application to the Honorable Justice Neil M. Gorsuch as Circuit Justice

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Appendix A – Opinion**,** *United States v. Little*,
119 F.4th 750 (10th Cir. 2024)……APP 1

Appendix B – Petition for Panel and En Banc Rehearing,
United States v. Little, No. 23-5077, ECF No. 95
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Appendix C – Order Directing Government to Respond,
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APPENDIX A

United States v. Little
119F.4th 750 (10th Cir. 2024)
Opinion

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

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **JUSTIN DALE LITTLE,** **Defendant.**	**Case No. 21-CR-162-JFH**

OPINION AND ORDER

Before the Court are two (2) motions to suppress evidence filed by Defendant Justin Dale Little ("Defendant"): one on Fourth Amendment grounds and one on Fifth Amendment grounds. Dkt. No. 54; Dkt. No. 56. The United States of America ("Government") opposes the motions. Dkt. No. 68; Dkt. No. 64. The Court held a hearing on the motions on October 26, 2022. For the reasons stated below, both motions are DENIED.

STANDARD

A suppression motion under Federal Rule of Criminal Procedure 12(b)(3)(C) is meant to "determine preliminarily the admissibility of evidence allegedly obtained in violation of defendant's rights under the Fourth and Fifth Amendments." *United States v. Merritt*, 695 F.2d 1263, 1269 (10th Cir. 1982). The Federal Rules of Evidence generally do not apply to suppression issues. *Id.* (citing Fed. R. Evid. 104(a)). "On a motion to suppress, the district court must assess the credibility of witnesses and determine the weight to give to the evidence presented; the inferences the district court draws from that evidence and testimony are entirely within its discretion." *United States v. Goebel*, 959 F.3d 1259, 1265 (10th Cir. 2020). "The defendant has the burden of showing the Fourth [or Fifth] Amendment was implicated, while the government has the burden of proving its warrantless actions were justified." *Id.* (citing *United States v.*

Carhee, 27 F.3d 1493, 1496 (10th Cir. 1994); *United States v. Simpson*, 609 F.3d 1140, 1146 (10th Cir. 2010)). Both these burdens require proof by a preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974). The Court must state essential factual findings on the record. Fed. R. Crim. P. 12(d).

BACKGROUND[1]

Defendant is charged with one count of first degree murder in the killing of Johnathon Weatherford[2] ("Weatherford") on April 22, 2018. Dkt. No. 2. Weatherford was found by a bystander laying on train tracks in Jenks, Oklahoma with a gunshot to the back around noon that day. The bystander called 911, which dispatched Jenks Police Department ("JPD") and other emergency responders. JPD Detective Melissa Brown ("Brown") arrived at the scene around 12:09 p.m. and took the lead on the investigation. Dkt. No. 55-1 at 2.

The morning of the charged conduct, Weatherford had been at a residence with Hannah Watkins ("Watkins"), who had romantic history with each Weatherford and Defendant. Watkins and Defendant have a son ("E.L.") together and had legally married two (2) days before the charged conduct, as Watkins believed the marriage was necessary for their son to receive full benefits as Defendant's dependent. The morning of the charged conduct, Watkins asked Weatherford to leave the residence before Defendant brought E.L. to her. Watkins did not witness the shooting.

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[1] The evidentiary basis for the background recapped herein includes the exhibits to Dkt. No. 54 (filed as Dkt. No. 55 and Dkt. No. 62) and Dkt. No. 56 (filed as Dkt. No. 57 and Dkt. No. 61), which the Government stipulated to at hearing, as well as the testimony of Melissa Brown at the October 26, 2022 hearing.

[2] The indictment spells the alleged victim's first name as "Jonathan." The Court adopts the spelling used in reports issued by the Jenks Police Department and the Office of the Chief Medical Examiner.

During the afternoon and evening of April 22, 2018, patrol officers canvased the area near where Weatherford was found, searching for witnesses and video surveillance. Dkt. No. 55-1 at 3. Witnesses described a white Chevrolet Silverado pickup truck with a sticker of multiple firearms and the word "family," which matched the description of Defendant's vehicle. Brown testified that JPD was able to review video surveillance that day showing a white Chevrolet Silverado pickup truck that drove down the road, around the corner, and to the location of the shooting. She explained on cross-examination that JPD reviewed these videos during the day of April 22, 2018 but that it was only able to obtain still pictures, not digital copies of the full videos, at the time. *See also* Dkt. No. 55-1 at 4 (explaining that recordings from Jenks Public Schools cameras needed a third party to access them). Officers obtained physical copies of several videos in the days after the shooting. *Id.*

Watkins was interviewed several times. During the first interview—which occurred on the afternoon of the charged conduct and was recorded on Brown's body camera—she told Brown that she was not aware of threats between Defendant and Weatherford.[3] However, she also told Brown, "I feel like he's the only person that could have done this—I mean, not could have; I mean, it could have been any other person, but I feel like that's not likely" because Defendant was the only person Watkins knew who was "crazy enough" and "had enough motive" to "flip some shit." Watkins told Brown that she was concerned for E.L's safety with Defendant because she "heavily believe[d]" Defendant had shot Weatherford. Watkins told Brown that Defendant owned multiple firearms and always carried a 9mm handgun with him.

[3] During later interviews, Watkins told Brown that Defendant "had made threats to Weatherford in the past, near the end of January or early February and that many people knew of those threats." Dkt. No. 55-1 at 3.

Brown testified that although Watkins did not report threats between Defendant and Weatherford on the day of the charged conduct, other people did. She stated multiple people came to the JPD station after the news of the shooting broke, with three or four people reporting that there had been past violence or threats between Defendant and Weatherford. Multiple search warrants state that Weatherford's ex-girlfriend, Jana Robinson ("Robinson"), came to JPD on April 22, 2018 around 7:00 p.m. and reported that Defendant had previously made death threats to Weatherford, including some through social media. Dkt. No. 55-5 at 3, 6-7, 10, 15, 19, 26. One search warrant states another witness, Landon Ellenburg ("Ellenburg"), told officers at an unspecified time on April 22, 2018 that "messages . . . involving conflict" between Defendant and Weatherford had been exchanged on Facebook Messenger and Snapchat. *Id.* at 26. Brown also testified that Ellenburg reported prior incidents between Defendant and Weatherford.

During Watkins' April 22, 2018 interview, Brown asked her if Defendant would come to Watkins' apartment if Watkins called him. Watkins said she believed he would. In the evening of April 22, 2018, around 8:00 p.m., Watkins called Defendant and asked him to come visit her. Defendant drove a red Toyota Camry sedan owned by his mother, Sherri Bear ("Bear"), rather than his white Chevrolet Silverado pickup truck. When he arrived outside Watkins' front door, body camera footage shows several JPD officers approached him with firearms drawn, told him to lay down, and then told him to put his hands out and cross his feet. Brown approached and handcuffed Defendant, then helped him to stand and walked him toward a cluster of squad cars.

During the walk from Watkins' apartment to a squad car, Brown asked Defendant if he had things in his pockets and why he did not drive his car. Defendant said he had gotten a flat tire and that his truck had gotten stuck when he had gone to Edna, Oklahoma, that morning. Brown then told Defendant he was being detained in Weatherford's homicide, to which Defendant responded,

"What?" Brown repeated that Defendant was being detained in Weatherford's homicide, and Defendant asked, "Was he killed?" When Brown answered affirmatively, Defendant asked when and what time. Brown responded that they would talk when they got to the JPD station and that other officers were coming to pat him down. Defendant said he had left his jacket and phone somewhere and asked officers to get them, which Brown said they would. JPD Officer Nicholas Chandlee ("Chandlee") then patted down Defendant, who informed Chandlee that there were keys in his shorts pocket along with dog tags around his neck.

At one point in the video, Brown says that she wanted to "take" the red Toyota sedan Defendant drove to Watkins' apartment even though he had not driven the sedan that morning, as she believed the weapon from the shooting may have been in it based on Watkins' statement that Defendant always carried a gun with him. Several officers then surrounded the vehicle and located a cell phone in plain sight. They retrieved the phone and Brown handed it to Chandlee, who made a frustrated noise after discovering the phone required a "fingerprint pattern" to unlock it. Chandlee then said that he was going to take the phone to Defendant to see if he would put it in airplane mode, making air quotes as he said, "so that 'the battery wouldn't die'" and remarking that that would yield Defendant's pattern or passcode. Chandlee then approached Defendant, who was seated in a squad car. When Chandlee asked Defendant if the phone was his, Defendant replied, "Yes. Need the passcode?" Chandlee responded, "Yeah, I was gonna put it in airplane mode for you so that the battery wouldn't die." Chandlee offered Defendant the option to "swipe" it or have Chandlee swipe it, and Defendant volunteered the pattern to unlock the phone.

After JPD transported Defendant to its station, Brown and Officer Jason Weis ("Weis") placed him in an office with a round table around 9:30 p.m. Brown immediately mirandized Defendant, reading his rights to him and then presenting him with a written waiver, which he

signed. Brown asked Defendant if he wished to talk to them right now, to which Defendant said, "I just wanna know what's all goin' on." Det. Brown then told Defendant that he could tell them he didn't want to answer questions at any time. Brown and Weis questioned Defendant for approximately forty-three (43) minutes. Defendant gave several conflicting stories, discussed Watkins' various past boyfriends, and denied being acquainted with Weatherford. At one point, he told the officers he thought that an ex-girlfriend of the alleged victim had put a hit on Weatherford. Defendant denied driving his pickup truck to Jenks, saying it had already gotten stuck and that he was driving his mother's car. He also repeatedly denied shooting Weatherford. After approximately forty-three (43) minutes, the officers left Defendant alone in the room for almost thirty (30) minutes.

When they returned, Brown and Weis were more confrontational in their questions than before. Brown told Defendant she knew Defendant was the one who shot Weatherford. In response, Defendant asked if they had him on video and, when Brown said yes, he asked to see the video. Defendant also continued to deny that he drove his truck to Jenks. Defendant repeatedly requested the surveillance video and wanted to review the video with Brown and Weis. He then changed his story, admitting he did drive his truck the first time he went to Jenks that day and admitting that he saw Weatherford near the tracks. Defendant told Brown and Weis that he was going to confront Weatherford about taking care of E.L. during Defendant's upcoming deployment, but he changed his mind. Defendant also made conflicting statements about how long or well he knew Weatherford.

Toward the end of the recording, Weis and Defendant raised their voices with each other. Defendant reached across more than half the table and pointed at something on Weis' notepad. Weis brushed Defendant's hand back, which caused Defendant to immediately recoil and say,

"Please don't touch me." When Weis asked why, Defendant said he felt "a little bit threatened right now," and Weis immediately apologized. The interview concluded approximately two (2) hours after it initially began.

Later in the evening of April 22, 2018, Brown visited Bear's home, where Defendant had been living. Bear confirmed that Defendant drove his pickup truck to Jenks that morning. When Brown asked if there were guns in the residence, Bear said she had some and that Defendant had some "in the living room" because they only had one bedroom. Brown asked Bear if she could show them the guns. After they entered the living room, Brown asked Bear if the living room was where Defendant and E.L. slept and Bear said yes before pointing out several firearms she said belonged to Defendant. Brown also asked Bear if Bear came into the living room to watch television, to which Bear said, "Eh, sometimes, yeah."

Brown questioned Defendant again on the morning of April 23, 2018. Chandlee, rather than Weis, sat in on this second interview. At the beginning of the interview, Brown told Defendant that his *Miranda* rights still stood. She then asked Defendant if he still wanted to talk to them. Defendant replied, "Yeah, I can still talk to you. I wanted to talk to a lawyer—I just, wanted to see where I stand at right now." Brown then gave a summary of the case and theory so far and Defendant actively participated in the conversation.

The April 23, 2018 interview included questions about details, such as places where Defendant was parked, where cameras were located, what roads he drove, and what his timeline was like. Defendant was calm and level-headed throughout the interview. He requested to watch surveillance video again. Brown tells Defendant at one point that they were "bluffin' him a little bit" the night before. Throughout the interview, Brown told Defendant that it looked likely that he will be booked on and charged with first degree murder. She asked him for mitigating

information that would support a lesser booking or a lesser charge, which would potentially carry a lighter sentence. Brown expressed regret at the idea of Defendant and his son being separated indefinitely if he was booked on and later convicted of first degree murder, but her references to Defendant's son and Defendant's responses were made in even tones of voice with no particular emphasis or emotion distinct from the overall conversation.

Approximately an hour into the April 23, 2018 interview, Defendant attempted to invoke counsel by saying, "You know, I really came out here at first to actually talk to a lawyer." Brown asked, "Out where?" and Defendant replied, "Y'all said you were going to appoint me a lawyer." Brown then asked if he wants to talk to a lawyer and he said, "Yeah. I just kinda want to see where I stand at and everything." Brown answered, "You don't want to talk to me anymore?" Defendant replied, "I would gladly, but I'd like to just see where I stand at right now." Brown asked if he had a lawyer he would like to call and he said no, that he would like them to appoint him one. She explained that JPD couldn't appoint him a lawyer, but that they could let him call Bear so that she could try to hire an attorney for him. Brown and Chandlee then left to arrange Defendant's phone call.

Between April 23 and April 26, 2018, officers obtained search warrants for Defendant's phone; AT&T cell phone location data; Defendant's white pickup truck; Bear's red sedan; and Defendant's Facebook account. Dkt. No. 55-5. Each warrant is between seven (7) and fourteen (14) individual numbered paragraphs describing investigative efforts, such as JPD's interview of Bear, its review of security camera footage, and the reports Robinson and Ellenburg made on April 22, 2018. The search warrants also mention that Jenks High School video footage showed "a white, single cab, Chevrolet Silverado" and that Defendant "was found at the residence of

[Watkins] at approximately 8:00pm and was detained for questioning and brought to the Jenks Police Department."

Defendant's arrest warrant was issued on April 30, 2018. Dkt. No. 55-6. The affidavit is seven (7) single-spaced pages, printed in 11-point Calibri typeface. *Id.* It has sixteen (16) numbered paragraphs, with most paragraphs having multiple lettered subparagraphs. *Id.* The warrant has almost two (2) full single-spaced pages describing the positioning of multiple cameras and videos from those cameras reviewed by officers, including multiple videos showing the distinctive "gun family" sticker on Defendant's vehicle. *Id.* at 4-5. There is also one mention that "at 1140 hours J. Little was seen by Larry Kern [sic] parked in a parking lot." *Id.* at 5. Other statements in the affidavit include but are not limited to summaries of Ellenburg's report of social media threats; Defendant's two JPD interviews; a forensic interview of E.L., who said that "Daddy shot his friend and he died [and E.L.] watched Weatherford fall and die;" forensic investigation of Defendant's phone, which indicated most of the day of April 22, 2018 had been deleted; and cell phone tower location information placing Defendant in the area of the shooting during the relevant time frame. *Id.* at 5-8.

AUTHORITY AND ANALYSIS

I. Fourth Amendment motion [Dkt. No. 54]

A. Probable cause for arrest

Defendant alleges that he was placed under arrest on the evening of April 22, 2018 when officers "surrounded [him] at gunpoint, handcuffed him, searched his person, locked him up overnight, and subjected him to multiple interrogations." Dkt. No. 54 at 6. He claims the arrest lacked probable cause and that all fruits of the arrest—including data from his phone; the

statements he made during interviews with JPD on April 22 and April 23, 2018; and the evidence found in his and his mother's vehicles—must be suppressed. *Id.* at 6-9.

"An investigative detention is a seizure within the meaning of the Fourth Amendment but, unlike an arrest, it need not be supported by probable cause." *Cortez v. McCauley*, 478 F.3d 1108, 1115 (10th Cir. 2007) (quotation omitted). Conversely, "[a]n arrest is distinguished by the involuntary, highly intrusive nature of the encounter." *Id.* (quotations and citations omitted). Brevity is important for investigative detentions—neither the Supreme Court nor the Tenth Circuit has considered detentions lasting ninety (90) minutes or longer "to be anything short of an arrest." *Manzanares v. Higdon*, 575 F.3d 1135, 1148 (10th Cir. 2009) (citing *United States v. Place*, 462 U.S. 696, 709-10 (1983)). "Whether an investigative detention has evolved into an arrest is always a case-specific inquiry, but it has been clear for some time that the use of handcuffs generally converts a detention into an arrest." *Id.* at 1150; *see also id.* (detention in a squad car while handcuffed was an arrest, not an investigative detention). Use of firearms may also convert a detention to an arrest. *Cortez*, 478 F.3d at 1116.

The Court agrees with Defendant that the events of April 22, 2018 constituted an arrest. Body camera footage shows that JPD approached Defendant with firearms drawn, told him to lay on the ground with hands and feet visible, and immediately handcuffed him. Defendant was then placed in a squad car with an officer for an unclear amount of time before being taken to JPD's station. Once at the station, he was interviewed for more than an hour, held overnight, and interviewed again in the morning. However, the Court disagrees with Defendant's conclusion that the arrest occurred without probable cause.

"A police officer may arrest a person without a warrant if he [or she] has probable cause to believe that person committed a crime." *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir. 1995).

"Probable cause is a concept 'incapable of [a] precise definition or quantification into percentages.'" *Hinkle v. Beckham Cnty. Bd. of Cnty. Comm'rs*, 962 F.3d 1204, 1220 (10th Cir. 2020) (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)). However, the Supreme Court and the Tenth Circuit have described that an officer has probable cause to make a warrantless arrest if the facts and events known to the officer at the time of the arrest would be sufficient for an objectively reasonable police officer familiar with those facts and events to believe with "substantial probability[,] as opposed to a bare suspicion," that an offense has been or is being committed. *Id.* *See also District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). This is "not a high bar" and requires only "the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Hinkle*, 962 F.3d at 1220 (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)). Officers may rely on the totality of the facts available to them in establishing probable cause. *See id.* at 1221.

The Court finds Brown and other JPD officers had probable cause to arrest Defendant on the evening of April 22, 2018. According to Brown's testimony, they had reviewed video footage of Defendant's distinctive vehicle at the crime scene. The fact that investigators had not obtained their own copies of the digital files with this footage does not dissipate their knowledge of what the videos contained. Watkins had told Brown that Defendant was always armed. Multiple people, including Robinson and Ellenburg, had reported a history of antagonism or threats between Defendant and Weatherford. Although Watkins said she did not know of past threats by Defendant toward Weatherford, she also told Brown, "I feel like [Defendant is] the only person that could have done this—I mean, not could have; I mean, it could have been any other person, but I feel like that's not likely" because Defendant was the only person Watkins knew who was "crazy enough" and "had enough motive" to "flip some shit." Watkins also reported that she feared for

the safety of the child she shared with Defendant because of the day's events. These facts, along with the totality of the circumstances depicted in Brown's body camera footage and testimony at hearing, satisfy the threshold for probable cause. No Fourth Amendment violation occurred in JPD's arrest of Defendant on April 22, 2018.

B. Search of Defendant's residence

Defendant challenges the search of his mother's one-bedroom residence, where he had been sleeping in the living room with his son. Body camera footage shows that Bear allowed officers to search the living room after they asked her if she watched television there and she replied "Eh, sometimes, yeah." Defendant claims Bear did not have authority to consent to the search because the "footage demonstrates that the room was not used as a common living room but was in fact [Defendant's] and his son's bedroom." Dkt. No. 54 at 11.

"A third party's consent to search is valid if that person has either the actual authority or the apparent authority to consent to a search of that property." *United States v. Kimoana*, 383 F.3d 1215, 1221 (10th Cir. 2004) (quotation and citation omitted).[4] Actual authority exists if the third party has "either (1) mutual use of the property by virtue of joint access, or (2) control for most purposes over it." *Id.* (quoting *United States v. Rith*, 164 F.3d 1323, 1329 (10th Cir. 1999)). The "gravamen" of this rule is "it is reasonable to recognize that 'any of the co-habitants has the right to permit the inspection in his [or her] own right and . . . the others have assumed the risk that one of their number might permit the common area to be searched.'" *Id.* (quoting *Matlock*, 415 U.S. at 171 n.7). Apparent authority exists if "the facts available to the officer at the moment warrant[ed] a [person] of reasonable caution to believe that the consenting party had authority over the

[4] The Court notes that Defendant does not cite or discuss *Kimoana* or other third-party consent cases, such as *Rith* or *Matlock*. He relies instead on *United States v. Werking*, 915 F.2d 1401 (10th Cir. 1990), which addressed only a defendant's consent to search.

premises." *Id.* (quoting *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1230 (10th Cir. 1998)). Common authority cannot be implied from a "mere property interest," nor does it require a property law inquiry; it rests "on mutual use of the property generally having joint access or control for most purposes." *Id.* (quoting *Matlock*, 415 U.S. at 171 n.7).

The Court finds that Bear had actual or apparent authority to consent. Contrary to Defendant's depiction of Brown's body camera footage, the recording shows that Bear referred to the room in question as "the living room"—not as Defendant's bedroom. After Brown and Bear entered the living room, Brown asked Bear if the living room was where Defendant and E.L. had been sleeping. Bear did not volunteer that information, nor did she treat the room like she was entering another's private space. Bear reached into a large pile of personal property without hesitation, pulling out firearms she said belonged to Defendant. Bear also said that she sometimes came to watch television in the room. The facts depicted in this recording create a reasonable objective conclusion that Bear had authority over the premises, including the room where Defendant slept.

C. Seizure of the red Toyota sedan

When JPD arrested Defendant on April 22, 2018, he had driven his mother's car to Watkins' apartment. Body camera footage shows officers planning to seize the vehicle and get a warrant before searching it. Defendant alleges that the warrantless seizure of the car was illegal because the search warrant obtained the next day was based on information that officers did not have at the time that they seized the vehicle.[5]

[5] The Government does not contest Defendant's standing to object to seizure of the car he was driving. Dkt. No. 68 at 6-9. Nevertheless, "standing is a matter of substantive fourth amendment law" and Defendant "may not challenge an allegedly unlawful search or seizure unless he demonstrates that his *own* constitutional rights have been violated." *United States v. Rubio-Rivera*, 917 F.2d 1271, 1275 (10th Cir. 1990) (emphasis added). Body camera footage from

The general rule that warrantless search or seizure is per se unreasonable under the Fourth Amendment has a few specifically established and well-delineated exceptions, one of which is the "automobile exception." *United States v. Burgess*, 576 F.3d 1078, 1087 (10th Cir. 2009).[6] This doctrine developed first because "a 'necessary difference' exists between searching 'a store, dwelling house or other structure' and searching 'a ship, motor boat, wagon or automobile' because a 'vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.'" *Collins v. Virginia*, 138 S. Ct. 1663, 1669 (2018) (quoting *Carroll v. United States*, 267 U.S. 132, 153 (1925)). Later, the Supreme Court "introduced an additional rationale based on 'the pervasive regulation of vehicles capable of traveling on the public highways.'" *Id.* (quoting *California v. Carney*, 471 U.S. 386, 392 (1985)).

Under the automobile exception, "officers may search an automobile without having obtained a warrant so long as they have probable cause to do so." *Id.* (quotation omitted). "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." *United States v. Lopez*, 777 F.2d 543, 550 (10th Cir. 1985) (quoting *Carroll*, 267 U.S. at 158-59). *See also id.* at 551 ("The probable cause requirement is satisfied when the officers conducting the search have reasonable or probable cause to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin

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officers' interactions with Bear demonstrate that Defendant had driven the car with Bear's permission. "Where the defendant offers sufficient evidence indicating that he has permission of the owner to use the vehicle, the defendant plainly has a reasonable expectation of privacy in the vehicle and standing to challenge the search of the vehicle." *Id.* The Bear video is sufficient to establish standing.

[6] The Court notes that Defendant again did not cite the appropriate doctrine, relying on the general per se unreasonableness rule without mention of the century-old and well-developed automobile exception. *See* Dkt. No. 54 at 11-12.

their warrantless search." (quoting *United States v. Matthews*, 615 F.2d 1279, 1287 (10th Cir. 1980))). When officers "have probable cause to believe a vehicle contains contraband or evidence of criminal activity, the police may seize it without a warrant and hold it for 'whatever period is necessary to obtain a warrant for the search.'" *United States v. Shelton*, 817 F. App'x 629, 634 (10th Cir. 2020) (quoting *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970)).[7]

Here, the officers seized but did not search the vehicle before obtaining a warrant. The warrantless seizure was simultaneous with Defendant's arrest and probable cause existed based on similar facts—particularly that Watkins had told JPD that Defendant was always armed, which created a reasonable basis to believe that officers would find a firearm from the charged conduct in the vehicle Defendant was driving. Hence, the automobile exception applies, and no constitutional violation occurred in the seizure of Defendant's mother's vehicle.

D. Location records

Defendant invokes *Carpenter v. United States*, 138 S. Ct. 2206 (2018), to advance a theory that investigators' subpoena of his PikePass automated toll road payment records was a Fourth Amendment violation. Dkt. No. 54 at 12-13. *Carpenter* was a narrowly tailored decision on facts that involved years of data compiled from an individual's cell phone. *See* 138 S. Ct. at 2220 (describing the case as being "about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years"). It specifically did not address "a person's movement at a particular time" or "business records that might incidentally reveal location information." *Id.* Toll transaction records are primarily business records which incidentally reveal

[7] Unpublished opinions are not binding precedent but may be cited for their persuasive value. *See* 10th Cir. R. 32.1; Fed. R. App. P. 32.1.

discrete location information. *Carpenter* does not control. Nor does Defendant's theory withstand scrutiny under general Fourth Amendment law.

"A defendant invoking the protection of the Fourth Amendment 'must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable.'" *United States v. Maestas*, 639 F.3d 1032, 1035 (10th Cir. 2011) (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)). This requires both subjective and objective components. *United States v. Johnson*, 584 F.3d 995, 999 (10th Cir. 2009). "[T]he Supreme Court has appeared to utilize four distinct but coexisting approaches to the reasonable expectation of privacy test, reflecting four models of Fourth Amendment protection: a probabilistic model, a private facts model, a positive law model, and a policy model." *Id.* (quotation and citation omitted). Defendant has not demonstrated that he had either a subjectively reasonable or an objectively reasonable privacy interest in PikePass records under any of these theories. As the Government correctly points out, Defendant "chose to use the toll road when he could have taken non-toll roads," he "chose to pay with PikePass rather than pay the toll in cash," and "[t]he same information could be obtained from a security camera recording at the toll booth." Dkt. No. 68 at 10. No Fourth Amendment violation occurred in investigators' subpoena of PikePass records.

E. Warrant affidavits

In his last Fourth Amendment argument, Defendant alleges that warrant affidavits omitted crucial information that tended to dissipate probable cause, misrepresented evidence crucial to establishing probable cause, and misrepresented circumstances relating to Defendant's arrest on April 22, 2018. Dkt. No. 54 at 13-17. Defendant identifies three (3) alleged material misrepresentations. First, Kerns told police that he saw a man between the ages of twenty-five (25) and thirty-five (35) with dark hair and a mustache, but Defendant says he did not have a

mustache at the time. *Id.* at 14. Second, warrant affidavits said that security camera footage showed the make and model of the vehicle near the shooting, but still photos collected from the surveillance do not show that detail. *Id.* And third, the affidavits state that Defendant was "found" at Watkins' apartment when actually "Ms. Watkins[] coordinated [Defendant's] arrest by calling him and asking him to come to her home so that the police could arrest him." *Id.* at 15.

To merit suppression from misrepresentations or omissions in a warrant, a defendant must establish at "hearing by a preponderance of the evidence that the false statement was included in the affidavit by the affiant 'knowingly and intentionally, or with reckless disregard for the truth,' and the false statement was 'necessary to the finding of probable cause.'" *United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir. 1997) (quoting *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)).[8] The Tenth Circuit elaborated,

> [W]hether we're talking about acts or omissions the judge's job is much the same—we must ask whether a warrant would have issued in a but-for world where the attesting officer faithfully represented the facts. If so, the contested misstatement or omission can be dismissed as immaterial. If not, a Fourth Amendment violation has occurred and the question turns to remedy.

United States v. Herrera, 782 F.3d 571, 575 (10th Cir. 2015). When considering whether a false statement was necessary to probable cause, the Court should keep in mind the general rule that "One of the Supreme Court's central teachings on the Fourth Amendment is that probable cause is a practical, nontechnical conception, designed to operate in conjunction with the commonsense, practical considerations of everyday life, rather than the elaborate rules employed by legal technicians." *United States v. Biglow*, 562 F.3d 1272, 1281 (10th Cir. 2009) (quotations omitted).

[8] At the October 26, 2022 hearing, the Court made an oral finding that Defendant had met the preliminary threshold required for a *Franks* hearing. However, Defendant did not question Brown about the warrant affidavits at the October 26, 2022 hearing despite the opportunity to do so.

"Because probable cause is a flexible, commonsense standard, we must interpret the Government's affidavit in a flexible, commonsense way." *Id.* at 1282. Here, Defendant has failed to establish that there were knowing, intentional, or reckless false statements made in the warrant affidavits, and certainly failed to establish that any such statements were necessary to a probable cause finding.

Regarding Defendant's facial hair or lack thereof, the warrants are silent.[9] Only Defendant's arrest warrant—not the various search warrants—describes his physical appearance or mentions Kerns at all. His physical appearance was stated only briefly, while the vast majority of affidavit describes physical and digital evidence connecting Defendant to the scene of the charged conduct. Defendant has not proven a false statement or omission here. And even if he had, Defendant's facial hair was immaterial to probable cause given the location data, surveillance footage, and admissions by Defendant himself all demonstrating he was in proximity to the scene of the charged conduct at the relevant time.

Regarding the video footage, search warrants do mention that Jenks High School video footage showed "a white, single cab, Chevrolet Silverado." Defendant attempts to demonstrate falsity through several still photos which do not show the make or model of the white pickup truck pictured in them. However, Brown testified that more was visible in the videos JPD reviewed than was visible in the still photos they captured that day. Defendant has not proven a false statement. Further, even if the statement that video footage showed make and model was proven to be false and excised from the relevant[10] warrant affidavits, probable cause would still exist. The affidavits

[9] Moreover, the Kerns statement upon which Defendant relies is equivocal about facial hair: it states "person was 25-35 dark hair & mustache *(I think)*." Dkt. No. 55-8 at 2 (emphasis added).

[10] The search warrant for Bear's red Toyota sedan does not mention the video footage since the sedan was not present that morning.

described the way that Defendant's story shifted throughout his interviews with law enforcement and the way Defendant eventually admitted that he was at the scene of the charged conduct. They also included Bear's confirmation that Defendant had been driving his white Chevrolet pickup truck that morning, as well as Robinson's and Ellenburg's statements that Defendant had sent threatening messages to Weatherford over social media.

Finally, Defendant has not established that the statement that JPD "found" Defendant at Watkins' apartment was false. Defendant's whereabouts were unknown during the afternoon of April 22, 2018. JPD was trying to locate him. They asked Watkins for her help and Watkins invited Defendant to her apartment. When he arrived, JPD did indeed "find" him in at least one sense of the word. And once again, the warrants affidavits had plenty of factual detail for probable cause even if the sentence about Defendant being "found" were removed.

II. Fifth Amendment motion [Dkt. No. 56]

A. *Miranda* issues

1. Pre-*Miranda* April 22 statements

At hearing, Defendant argued that the questions at the time of his April 22, 2018 arrest coupled with later post-*Miranda* questions once Defendant was at the JPD station constituted an improper two-step interrogation under *Missouri v. Seibert*, 542 U.S. 600 (2004). There were two main types of questioning at the time of Defendant's arrest: first, Brown asking him about the contents of his pockets and why he did not drive his pickup truck to Watkins' apartment, and second, Chandlee asking him for his phone passcode.

The Court finds *United States v. Carrizales-Toledo*, 454 F.3d 1142 (10th Cir. 2006), instructive. There, a law enforcement officer initiated a traffic stop with a defendant who had more than five hundred (500) pounds of marijuana in his vehicle. When the officer initially

stopped the defendant, the officer asked him, "What he's doing." Defendant replied with a "brief (albeit damning) reply that he was trying to evade the agent to avoid being caught with 'that stuff.'" *Id.* at 1151. The officer asked, "With what stuff," and the defendant said, "This stuff. The marijuana." *Id.* at 1152. Defendant was subsequently arrested and read *Miranda* warnings, after which he again confessed. *Id.* at 1148. He sought suppression on the theory that the situation constituted an improper two-step interrogation under *Seibert* because he was not mirandized before his first confession and the second confession was a direct result of the first. *Id.*

The Tenth Circuit distinguished *Seibert* from an earlier Supreme Court case, *Oregon v. Elstad*, 470 U.S. 298 (1985). In *Elstad*, the Court "rejected the theory that [an] initial, unwarned statement creates a 'lingering compulsion' based on the 'psychological impact of the suspect's conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate.'" *Carrizales-Toledo*, 454 F.3d at 1149 (quoting *Elstad*, 470 U.S. at 311). It reasoned instead that "absent deliberately coercive or improper tactics in obtaining the initial statement . . . subsequent administration of *Miranda* warnings ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.* (quoting *Elstad*, 470 U.S. at 314). Conversely, in *Seibert*, a plurality of the Court found that interrogating officers withheld *Miranda* warnings "'to obscure both the practical and legal significance of the admonition when finally given' and that the interrogation reflected a strategy 'dedicating to draining the substance out of *Miranda*.'" *Id.* (quoting *Seibert*, 542 U.S. at 617).

In *Carrizales-Toledo*, the Tenth Circuit ruled that the brief exchange between agent and defendant was more analogous to *Elstad* than to *Seibert*. It explained that even if the questions were considered to be a custodial interrogation, they were made with "brevity and spontaneity" that "[fell] far short of the interrogator's conduct in *Seibert*, where 'the initial questioning was

systematic, exhaustive, and managed with psychological skill.'" 454 F.3d at 1152 (quoting *Seibert*, 542 U.S. at 616). It also considered four other factors set out by *Seibert*'s plurality: the two confessions had differing content; there was a time lapse, a change in location, and additional officers present between the first and second confessions, which "all allowed Mr. Carrizales-Toledo to see that the second round of questioning was a new and distinct experience rather than a coordinated and continuing interrogation"; and there was "no evidence that the agents ever referred back to [the] initial statements during the second interrogations." *Id.* (quotation omitted).

So too here. Brown's questions to Defendant were brief. Her question about the contents of his pockets had immediate relevance to safety. Her question about him driving a different car was spontaneous. It was Defendant who continued the conversation, asking whether, when, and where Weatherford was killed. Brown immediately prevented any further discussion by saying they would talk after they arrived at the JPD station. Although Defendant gave similar stories in the first and the beginning of the second interactions, the other factors discussed in *Carrizales-Toledo* weigh against finding a *Seibert* violation. The second and third interviews happened after a time lapse, a change of location, and a change of personnel; and there was no point in the mirandized interviews when Brown referred back to the brief exchange while she walked Defendant to the squad car. Defendant has not demonstrated any indicia of a systematic, exhaustive, or skillful interrogation in violation of *Seibert* in Brown's brief questioning.

Since *Seibert* does not warrant suppression of Defendant's pre-*Miranda* statements to Brown, "the only remaining question with respect to the admissibility of [the] statements is whether they were voluntary," as *Elstad* held that "subsequent administration of *Miranda* warnings after a voluntary but unwarned custodial confession will 'remove the conditions that precluded admission of the earlier statement.'" *Carrizales-Toledo*, 454 F.3d at 1153 (quoting *Elstad*, 470

U.S. at 314). "The essence of voluntariness is whether the government obtained the statements by physical or psychological coercion such that the defendant's will was overborne." *Rith*, 164 F.3d at 1333. Nothing indicates Defendant's will was "overborne" in the moments of his arrest. As stated, *he* attempted to continue the conversation, asking Brown for details of the homicide. She refrained from engaging with him at this point and told him that there would be time for discussion at the station, presumably after the warnings she immediately administered once in the interview room.

Chandlee's approach to Defendant's passcode is closer to the situation *Seibert* contemplated, but other circumstances weigh against exclusion. Chandlee is seen on camera using air quotes as he discusses taking Defendant's phone to him so that they could put the phone in airplane mode to conserve the battery. This indicates a purposeful intention to get Defendant's passcode before mirandizing him. However, before Chandlee can put this plan into action, Defendant asks if he would like the passcode. Defendant made this voluntary statement in the same situation and time when Defendant attempted to engage Brown in conversation about the homicide. This does not give rise to a situation where the "substance" of *Miranda* is "drained out." *See Carrizales-Toledo*, 454 F.3d at 1149. Moreover, even if a *Seibert* violation had occurred with Chandlee's passcode ruse, the Court has ruled that the search warrant for Defendant's phone was not unconstitutionally obtained. Thus, any information that JPD may have obtained from Defendant's phone would fall within the inevitable discovery doctrine, which "permits evidence to be admitted if an independent, lawful police investigation inevitably would have discovered it." *United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005).

2. April 23 statements

Defendant next challenges his April 23, 2018 JPD interview, claiming his *Miranda* rights should have been readministered in full. Dkt. No. 56 at 8-9. That morning, Brown entered the interview room and immediately told Defendant, "Your *Miranda* rights still stand." Defendant contends this was insufficient. This argument fails under Tenth Circuit law.

> The mere passage of time does not compromise a *Miranda* warning. Courts have consistently upheld the integrity of *Miranda* warnings even in cases where several hours have elapsed between the reading of the warning and the interrogation. In *United States v. Andaverde*, 64 F.3d 1305, 1313 (9th Cir. 1995), for example, the court determined that new warnings were not required when the defendant was interviewed the day after the warnings had been given.

Mitchell v. Gibson, 262 F.3d 1036, 1057-58 (10th Cir. 2001) (quotations and citations omitted). "An earlier *Miranda* warning is sufficient to cover a subsequent interrogation 'unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a knowing and intelligent relinquishment or abandonment of his rights.'" *Silsby v. Hamilton*, No. 16-CV-098-JHP-JFJ, 2019 WL 470909, at *4 (N.D. Okla. Feb. 6, 2019) (quoting *Mitchell*, 262 F.3d at 1058). Defendant has not highlighted any serious changed circumstances. The one changed circumstance he references—that Chandlee, rather than Weis, sat in on the second interview—did not fundamentally alter the interview dynamic, as both Chandlee and Weis had been part of the investigative team the night before and all other elements of the two interviews were similar. Defendant and Brown were in the same room, discussing the same events, based on the same history. There was no *Miranda* violation.

B. Invocation of counsel

Early in the April 23, 2018 interview, Brown asks Defendant if he still wanted to talk to her. Defendant response, "yeah, I can still talk to you. I wanted to talk to a lawyer—I just, wanted to see where I stand at right now." Brown then gives a summary of their theory so far and

Defendant engages in conversation for approximately an hour before saying "You know, I really came out here at first to actually talk to a lawyer." Brown immediately stops the interview, the two discuss appointment of a lawyer, and Defendant says again, "I just kinda want to see where I stand at and everything." Brown asks whether that meant that Defendant did not want to talk to her any longer and Defendant replies, "I would, gladly, but I'd like to just see where I stand at right now." Brown then helps arrange for Defendant to call his mother about retaining an attorney. Defendant argues that his first statement was a clear invocation of his right to counsel. Dkt. No. 56 at 9-10.

The Supreme Court has held that "custodial interrogation may continue unless and until the suspect *actually invokes* his right to counsel; ambiguous or equivocal statements that *might* be construed as invoking the right to counsel do not require the police to discontinue their questioning." *United States v. Nelson*, 450 F.3d 1201, 1212 (10th Cir. 2006) (emphasis in original) (citing *Davis v. United States*, 512 U.S. 452, 458-59 (1994)). *See also Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) ("If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression if they guess wrong."). Invocation of counsel is an objective determination based on the question of "whether the suspect's statement is 'sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *Nelson*, 450 F.3d at 1212 (quoting *Davis*, 512 U.S. at 459).

The circumstances at the beginning of the April 23, 2018 interview are equivocal at best. The first statement Defendant made to Brown was "Yeah, I can still talk to you." He then followed this statement with an unclear remark that he wanted "to see where I stand." The "see where I

stand" statement coupled with "yeah, I can still talk to you" could be construed that he wanted to see where he stood with JPD before spending the time and money of retaining counsel. At the same time, the "see where I stand" statement could mean he wanted to see where he stood with a lawyer before continuing to talk to JPD. This is exactly the sort of ambiguous situation that *Davis* and *Nelson* indicate does not require cessation of questioning. The ambiguity of the situation was compounded when Brown gave him her summary of the case, as Defendant did not object and did not reiterate any sort of desire to consult a lawyer. He instead chose to engage for approximately an hour before again mentioning a lawyer. This second time, he did not say "yeah, I can still talk to you" and instead made his request for counsel clear. While hindsight can discern similarities between the initial and later statements—both at the beginning and at the end of the interview, Defendant wanted to "see where he stood"—Brown and Chandlee did not have the benefit of hindsight at the beginning of the interview. With the circumstances as they were at the start of the April 23, 2018 interview, it was not a Fifth Amendment violation for JPD to continue its questioning.

C. Voluntariness

Defendant's last Fifth Amendment argument is that his statements at the JPD station on April 22 and April 23, 2018 were made involuntarily and through psychological coercion because officers employed the "Reid technique," lied to Defendant, repeatedly referred to his three-year-old son and how Defendant would not see E.L. for a prolonged period if he was charged with and convicted of first degree murder, and refused to watch surveillance video with him. Dkt. No. 56 at 10-18.

"Voluntariness is determined under the totality of the circumstances, and no single factor is determinative." *United States v. Young*, 964 F.3d 938, 942 (10th Cir. 2020). "A number of

factors must be considered in assessing whether a confession is voluntary. These factors include the age, intelligence, and education of the suspect; the length of the detention and questioning; the use or threat of physical punishment; whether *Miranda* safeguards were administered; the accused's physical and mental characteristics; and the location of the interrogation." *United States v. Perdue*, 8 F.3d 1455, 1466 (10th Cir. 1993). The Government bears the burden to establish voluntariness by a preponderance of the evidence. *Id.*

> The question this court must resolve is whether "the confession [is] the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

United States v. Lopez, 437 F.3d 1059, 1063 (10th Cir. 2006) (quoting *Perdue*, 8 F.3d at 1466).

Here, Defendant was a legal adult over the age of twenty-one (21). He had been enlisted in the United States military for six (6) years and had completed high school. JPD questioned him for approximately two (2) hours the first evening and one (1) hour the next morning. Brown, Weis, and Chandlee did not use or threaten the use of physical punishment. The only brief physical contact occurred when Defendant reached across a table to point at something on Weis' notepad and Weis brushed his hand back. *Miranda* safeguards were clearly given and, as stated earlier, applied to both the April 22 and April 23 interviews. Defendant did not exhibit any physical or mental difficulties, instead remaining coherent, generally polite, and conversational throughout the interviews. The interrogations took place in an office at JPD with padded chairs, good lighting, and drinking water easily available. None of these factors indicate that Defendant's will and self-determination had been critically impaired.

The Court next examines the specific reasons Defendant claims his statements were involuntary. First, Defendant describes the Reid technique as an approach that "heavily relies on

false evidence ploys and other forms of deceit." Dkt. No. 56 at 11. He does not present any caselaw indicating that the Tenth Circuit has rejected the Reid technique, instead citing only a dissenting opinion from the Seventh Circuit. Nor has he presented evidence that the Reid technique happened in this case, as he does not demonstrate *heavy* reliance on false ploys or deceit. Brown admitted on April 23 that she was "bluffin' him a little bit" on April 22 as far as what evidence JPD did or did not have. The majority of what Brown, Weis, and later Chandlee referenced, however, was based on the video surveillance and witness testimony discussed earlier. Similarly, Defendant does not cite any cases that Brown's "bluffin'" negated the voluntariness of his statements considering the totality of the circumstances.

Defendant alleges the references to his son were psychological coercion. Brown repeatedly described the consequences of a first degree murder charge, including a potential long period of incarceration and separation from Defendant's son. These were descriptions of potential future realities, not an instance of manipulation. Brown was not trying to extract a confession of premeditated murder to trump up greater chargers—it was clear from her questioning that premeditated murder *was* the planned charge at the time of Defendant's interviews. Rather, Brown repeatedly asked Defendant for extenuating or mitigating circumstances that could form the basis for a lesser charge, which in turn could potentially mean less incarceration time and less separation from his son. Describing the serious consequences of a first degree murder conviction was not coercion. In fact, *mis*representing potential penalties may affect the voluntariness of a statement. *See Young*, 964 F.3d at 944 ("Although we do not require a law enforcement officer to inform a suspect of the penalties for all the charges he may face, if he misrepresents these penalties, then that deception affects our evaluation of the voluntariness of any resulting statements.").

Defendant's argument that he was deprived the opportunity to review surveillance footage fares no better. Even once indicted, a criminal defendant has no constitutional right to the discovery against him. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one . . . ."). JPD had no obligation to show the surveillance video to Defendant, and their refusal to watch it with him was not an overpowering of his will. Brown was clear that they would not review the videos with Defendant, yet he continued to talk with JPD. That was Defendant's free and unconstrained choice.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant's motions to suppress [Dkt. No. 54 and Dkt. No. 56] are hereby DENIED.

DATED the 2nd day of November 2022.

JOHN F. HEIL, III
UNITED STATES DISTRICT JUDGE

Appendix B

United States v. Little
No. 23-5077, ECF No. 95
(10th Cir. Jan. 24, 2025)
Petition for Panel and En Banc Rehearing

Case No. 23-5077

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff/Appellee, v. Justin Dale Little, Defendant/Appellant.	Appeal from the United States District Court, Northern District of Oklahoma D.C. No. 4:21-cr-00162-MWM (Judge Michael Mosman)

Appellant Justin Little's Petition for Panel and En Banc Rehearing

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Federal Rules

Fed. R. App. P. 40 2

Statement in Support of Rehearing and En Banc Review

The Supreme Court has instructed that the good faith reliance exception to the exclusionary rule may apply when the government demonstrates "the police conduct[ed] a search in objectively reasonable reliance on binding judicial precedent." *Davis v. United States*, 564 U.S. 229, 239–41 (2011). Conversely, the government cannot meet its burden under the good faith reliance exception when precedent at the time of the officer's actions held that those actions were illegal. *United States v. Herrera*, 444 F.3d 1238, 1253–54 (10th Cir. 2006).

Here, binding precedent—issued from this Court—instructed that Oklahoma state authorities did not have authority over the Muscogee (Creek) Nation Reservation as of 2017. *Murphy v. Royal*, 875 F.3d 896, 904, 914–22, 929–66 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020). Oklahoma state officers arrested Justin Little, who is Native American, without a warrant on the Creek Reservation in April 2018. Yet instead of ordering suppression of the fruits of that undisputed illegal arrest, the panel held the good faith reliance exception applied because Oklahoma officials continued to assert

jurisdiction and the mandate was stayed in *Murphy*. *United States v. Little*, 119 F.4th 750, 768–70 (10th Cir. 2024).

En banc review is warranted. The panel's opinion directly conflicts with Supreme Court and this Court's precedent concerning the contours of the good faith reliance standard and whether state police can rely on their own longstanding conduct instead of following the law. Fed. R. App. P. 40(b)(2)(A)–(B). The decision also conflicts with numerous other Circuit's rules stating that staying the mandate does not affect a party's obligation to follow a published opinion. Fed. R. App. P. 40(b)(2)(C). The opinion also implicates numerous questions of exceptional importance, including whether this Circuit can rewrite the good faith reliance standard to avoid suppressing evidence obtained by all Oklahoma state officers who violated *Murphy* between 2017 and 2020. Fed. R. App. P. 40(b)(2)(D). For the same reasons, panel rehearing is also warranted. Fed. R. App. P. 40(b)(1)(A).

Analysis and Authority

In 2017, this Court confirmed the continued existence of the Creek Reservation. *Murphy*, 875 F.3d at 904, 914–22, 929–66 (vacating state conviction and sentence because the state did not have jurisdiction).

Thus, all agree that because Little is Native American and the crime occurred on the Creek Reservation, the state police did not have jurisdiction to arrest Little without a warrant or execute state search warrants in April 2018. *Little*, 119 F.4th at 766; OB-13–20; AB-18–19; RB-1–8.

Rather than faithfully apply well-established Fourth Amendment law and suppress the fruits of these illegal actions, the panel here rewrote the careful contours of the good faith reliance exception to the exclusionary rule. The panel held officers could violate *Murphy* because of Oklahoma authorities' longstanding practice of illegally exercising jurisdiction and because the mandate was stayed.

The panel's wholesale revision of the good faith reliance exception occurred even though the government had not demonstrated below that the officers here actually relied on the mandate stay or longstanding practices to act. En banc rehearing is necessary.

I. The panel rewrote the good faith reliance exception to allow for its application when officers act in the face of binding precedent instructing otherwise.

A. The opinion removes the reliance requirement from the good faith reliance exception, conflicting with Supreme Court precedent.

For decades, the Supreme Court has consistently explained the limits of the exceptions to the exclusionary rule. One well-known exception with specific limitations is the good faith reliance standard. *United States v. Leon*, 468 U.S. 897, 920–23 (1984). In particular, the Supreme Court has instructed that the good faith reliance exception extends to where the government demonstrates "the police conduct[ed] a search in objectively reasonable reliance on binding judicial precedent." *Davis*, 564 U.S. at 239–41.[1]

Until recently, this Court has faithfully applied *Davis*. *See, e.g., United States v. Madden*, 682 F.3d 920, 926 (10th Cir. 2012) ("The good-faith exception to the exclusionary rule applies when a search is objectively reasonable under the binding, settled case law of a United

[1] There are other circumstances in which the Supreme Court has endorsed application of the good faith reliance exception. *See United States v. Taylor*, 121 F.4th 590, 598 (6th Cir. 2024) (listing the four circumstances). Here, the government invoked only the binding precedent exception outlined in *Davis*. AB-18–19.

States Court of Appeals, even if the search is later rendered unconstitutional by a Supreme Court decision."); *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 882 (10th Cir. 2014) ("The Supreme Court has held that the 'good faith' an officer must possess in the context of the exclusion of evidence from an illegal search only applies where the police 'act with an objectively 'reasonable good-faith belief' that their conduct is lawful.'"). And because police officers "are presumed to have a reasonable knowledge of the law," the government cannot meet its burden when precedent at the time of the officer's actions instructs that those actions were illegal. *United States v. Gonzales*, 399 F.3d 1225, 1230 (10th Cir. 2005); *Herrera*, 444 F.3d at 1253–54 (exception not met because trooper deemed "to have been aware of" precedent holding the state regulatory scheme did not permit the stop at issue); *United States v. Knox*, 883 F.3d 1262, 1274 (10th Cir. 2018) ("Law enforcement officers are responsible for having a reasonable knowledge of what the law prohibits, and for conforming their conduct to these rules." (cleaned up)).

Yet, when faced with the inevitable conclusion that suppression was required here because the police acted in contradiction to this

Court's *Murphy* decision, the panel rewrote the good faith reliance exception to no longer require objective good faith, reasonable knowledge of the law, or even reliance on any law at all. Though the opinion recognizes that *Murphy* was the law at the time of the police action here, the panel held the officers nonetheless "could reasonably believe that they could lawfully investigate offenses on the Creek Reservation." *Little*, 119 F.4th at 768.

To achieve this outcome, the opinion reasoned that *Murphy* did "not defeat application of the good faith exception" because: the mandate was stayed in *Murphy*; *Murphy* would have required "an overnight sea change in criminal investigation and prosecution"; and Oklahoma state officials "appear[ed] … to continue to operate after *Murphy* under the assumption that it had jurisdiction." *Id.* at 768–70. None of these reasons are reconcilable with the long-established limitations of the good faith *reliance* exception to suppression.

Other Circuits require the government to cite to clear and well-settled law that existed at the time of the police action on which the officers relied to meet the *Davis* good faith reliance standard. *See, e.g., United States v. Sparks,* 711 F.3d 58, 64 (1st Cir. 2013) ("[T]he

exception is available only where the police rely on precedent that is 'clear and well-settled.'"); *United States v. Katzin*, 769 F.3d 163, 174 (3d Cir. 2014) ("For a law enforcement officer's conduct to fall under the ambit of *Davis*, a court must answer in the affirmative that he or she has 'conduct[ed] a search [or seizure] in objectively reasonable reliance on binding judicial precedent.'"); *United States v. Curtis*, 635 F.3d 704, 714 n.28 (5th Cir. 2011) ("[O]ur precedent on a given point must be unequivocal before we will suspend the exclusionary rule's operation." (citation omitted)); *United States v. Buford*, 632 F.3d 264, 276 (6th Cir. 2011) (stressing the same, just "as the Eleventh Circuit"), *citing United States v. Davis*, 598 F.3d 1259, 1266 (11th Cir. 2010), *aff'd*, 564 U.S. 229 (2011); *United States v. Berrios*, 990 F.3d 528, 532 (7th Cir. 2021) (recognizing the distinction between established law, under which officers may invoke the good faith reliance exception, and unsettled law, under which they may not); *United States v. Lara*, 815 F.3d 605, 613–14 (9th Cir. 2016) (rejecting application of good faith reliance where the government at most cited "only cases from which it could have plausibly argued that the searches were permissible").

But the new standard adopted by the *Little* opinion allows the government to meet its burden and avoid suppression based on the majority of state police ignoring binding precedent and conducting their business as usual in direct violation of binding law. En banc review is necessary to vacate the opinion and ensure that this Court's rules on the limits of the good faith reliance exception are internally consistent and do not contradict Supreme Court opinions.

B. The opinion is contrary to four other Circuits in relying on the non-issuance of the mandate to support applying the good faith reliance exception.

The panel primarily relies on the non-issuance of the mandate in *Murphy* to deprive it of precedential effect. *Little*, 119 F.4th at 768–70. This understanding misapprehends the mandate's limited role. The mandate has no effect on the obligation to immediately comply with binding authority. In concluding otherwise, the panel splits with every other Circuit to consider this issue.

"Issuance of [the] mandate is largely a ministerial function." *Bastien v. Off. of Senator Ben Nighthorse Campbell*, 409 F.3d 1234, 1235 (10th Cir. 2005) (per curiam) (quoting *Finberg v. Sullivan*, 658 F.2d 93, 97 n.5 (3d Cir.1980) (en banc)). Its effect "is to bring the

proceedings in a case on appeal . . . to a close and to remove it from the jurisdiction of this Court." *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978). Given this purely jurisdictional role, the "issuance of the mandate is wholly separate from [this Court's] consideration of the merits." *In re Chambers Dev. Co., Inc.*, 148 F.3d 214, 224 n.8 (3d Cir. 1998) (cleaned up). Rather, "the entry of judgment," which accompanied the issuance of the opinion in *Murphy*, "marks the effective end" to considerations of the merits. *Finberg*, 658 F.2d at 97 n.5.

This limited role for the mandate means that its non-issuance "does not undermine the immediate precedential weight of [the] decision." *Cox v. Dep't of Just.*, 111 F.4th 198, 209 (2d Cir. 2024). A published decision "is final for such purposes as stare decisis, and full faith and credit" as soon as it is issued "until overruled by a body competent to do so." *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (cleaned up). Even when courts have "stayed the mandate to allow filing of a petition for certiorari," they have acknowledged that the published opinion is still "the law of th[e] circuit" and cannot be "ignore[d]." *United States v. Gomez-Lopez*, 62 F.3d 304, 306 (9th Cir. 1995); *see also Yong v. INS*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000)

(courts "have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority").

Because *Murphy* was binding when issued, "[r]esponsible law enforcement officers" had to immediately "learn what is required of them" and "conform their conduct to these rules." *Davis*, 564 U.S. at 241 (cleaned up). In excusing state police from complying with this obligation, the panel opinion places this Court alone against at least four other Circuits who have directly held that the non-issuance of the mandate is legally irrelevant to the binding nature of a published opinion:

Courts Attributing No Significance to the Non-Issuance of the Mandate	Courts Attributing Significance to the Non-Issuance of the Mandate
• **First Circuit**: Party was "expected to treat" published opinion "as good law, notwithstanding the ministerial fact that the mandate had not yet issued." *Glob. Naps, Inc. v. Verizon New England, Inc.*, 489 F.3d 13, 19 (1st Cir. 2007) • **Second Circuit**: A published opinion "becomes binding precedent when it is decided. The fact that a mandate has	• **Tenth Circuit**: This Court, standing alone, now recognizes undefined "unique circumstances" where the stay of the mandate affects whether the public must comply with an opinion. *Little*, 119 F.4th at 770

not yet issued means only that jurisdiction over the case has not yet shifted back to the district court; it does not undermine the immediate precedential weight of our decision." *Cox v. Dep't of Just.*, 111 F.4th 198, 209 (2d Cir. 2024) • **Ninth Circuit**: Notwithstanding the stay of the mandate, "a published decision of this court constitutes binding authority which must be followed unless and until overruled by a body competent to do so." *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (cleaned up) • **Eleventh Circuit**: A stay of the mandate "in no way affects the duty of this panel and the courts in this circuit to apply" the precedent "as binding authority." *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992)	

The context surrounding the mandate stay in *Murphy* does not support a different rule. *Little*, 119 F.4th at 768–70. The panel first relied on the reasoning in the unopposed motion to stay the mandate.

Id. at 768–69. The *Murphy* parties—without citing authority—reasoned that issuance of the mandate would have triggered a shift in law enforcement authority. *Id.* All relevant precedent teaches the opposite conclusion: *Murphy*'s obligations triggered as soon as the opinion issued. *See supra*, pp. 8–11. En banc review, which was denied, or Supreme Court reversal are the exclusive means for avoiding immediate compliance under *Murphy*. *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1042 (10th Cir. 2017).

The panel also attributed significance to Judge Tymkovich's concurrence accompanying the denial of rehearing in *Murphy*. *Little*, 119 F.4th at 769. But a "concurring opinion . . . does not alter [the] duty to apply binding Tenth Circuit precedent." *Cummings v. Norton*, 393 F.3d 1186, 1189 n.1 (10th Cir. 2005). Although Judge Tymkovich thought *Murphy* deserved Supreme Court attention, that observation did not affect the obligation to immediately abide by the decision. "If the mere possibility of reversal were enough to make authority non-binding, no precedent would ever control." *S.E.C. v. Amerindo Inv. Advisors, Inc.*, 2014 WL 405339, at *5 (S.D.N.Y. Feb. 3, 2014), *aff'd*, 639 F. App'x 752 (2d Cir. 2016). To avoid that result, courts maintain that a

published opinion "becomes binding precedent when it is decided." *Cox*, 111 F.4th at 209.

The panel's attempt to rely on the "unique circumstances facing state officers in Oklahoma" after *Murphy* is untenable. *Little*, 119 F.4th at 770. Indeed, this Court held that for incarcerated individuals *Murphy* established the law even before *McGirt* to deny habeas relief. *See Allen v. Crow*, No. 22-6141, 2023 WL 5319809, at *3 n.3 (10th Cir. Aug. 18, 2023); *Johnson v. Louthan*, No. 22-5064, 2022 WL 4857114, at *3 (10th Cir. Oct. 4, 2022). The panel fails to address its creation of a two-track analysis for when precedent applies and offers no guidance to discern when the legal landscape is too confusing or the consequences too stark for an opinion not to be afforded immediate precedential effect. *Little*, 119 F.4th at 769–70. This uncabined "unique circumstances" exception conflicts with precedent's value in providing guidance. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). Using the mere possibility of revision to avoid consequences from precedent would "create a trap for the unwary and paradoxically encourage those who bother to consult the law to disregard what they find." *Robles v. Lynch*,

803 F.3d 1165, 1178–79 (10th Cir. 2015). The panel—in creating this "unique circumstances" exception—encourages exactly that result.

En banc rehearing is necessary to correct the opinion's holding giving improper legal significance to the mandate and align this Court's precedent with those of its sister circuits.

C. The opinion conflicts with this Court's law that the police may not rely on longstanding practices in place of the law.

Though "*McGirt* changed long-standing practice of the criminal-justice system in Oklahoma . . . such practice does not define the law." *United States v. Budder*, 76 F.4th 1007, 1016 (10th Cir. 2023). This understanding is consistent with this Court's rulings in the good faith reliance exception to suppression context that the exception "does not apply when officers rely on their own prior conduct." *United States v. Bagley*, 877 F.3d 1151, 1156 (10th Cir. 2017).

Perhaps to address this tension, when addressing whether the good faith reliance exception could apply to Oklahoma state action in 2004, well before Murphy was decided, this Court previously set forth a test that recognized longstanding precedent itself was insufficient to meet the exception. *United States v. Pemberton*, 94 F.4th 1130, 1140

(10th Cir. 2024). Instead, the Court held that government meets its good faith reliance burden when:

1. The practices are "consistent with the state's traditional exercise of jurisdictional authority," providing an objectively reasonable basis to conclude that state officials believed they were acting legally,

2. There are "no clear legal precedent from the Supreme Court or Tenth Circuit expressly contradicting" those presumptively legal practices, and

3. Applying the good faith reliance exception does not undermine the exclusionary rule's deterrence principles.

Id. Notably, even this iteration of the good faith reliance test violated *Budder*'s holding that longstanding Oklahoma practice is not the same as the law and is therefore not binding. *See United States v. Rosales-Miranda*, 755 F.3d 1253, 1261 (10th Cir. 2014) (panels must follow "earlier, settled precedent over a subsequent deviation therefrom" (cleaned up)).

But even applying the flawed *Pemberton* rule would have required suppression here: *Murphy* "expressly contradict[ed]" the April 2018 warrantless arrest and home search here. To avoid this outcome, and even though *Pemberton* made clear that its ruling turned on the "unique situation" present there where the challenged police action occurred in

2004, the panel here expanded the good faith reliance exception to also cover when officers act in direct violation of existing binding precedent based on the magnitude of the "sea change" the binding precedent created. *Little*, 119 F.4th at 769.

The effective adoption of a test that allows law enforcement to rely on longstanding practice, whether in the face of contradictory law or not, warrants rehearing to resolve the conflict in this Court's caselaw created by the panel's opinion.

D. The opinion effectively adopts a freestanding exception to exclusion based on balancing deterrence and cost.

The panel ultimately retreats to a freestanding cost-benefit analysis to find suppression inappropriate:

> Given the unlikely deterrent value of the exclusionary rule under these circumstances and the substantial social costs that would result from its application here—the suppression of all evidence obtained by Oklahoma state officers investigating offenses in Indian country between *Murphy* in 2017 and *McGirt* in 2020—we conclude that exclusion is not warranted.

Little, 119 F.4th at 770. To be sure, "the deterrence benefits of suppression must outweigh its heavy costs." *Davis*, 564 U.S. at 237. But

no court uses a freestanding cost-benefit analysis to supplant the application of the good faith reliance exception. Rather, the parameters of the good faith reliance exception already account for this balancing. *See United States v. Nicholson*, 24 F.4th 1341, 1353 (11th Cir. 2022).

The "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations." *Davis*, 564 U.S. at 236–37. Deterrence is best served "[w]hen police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights." *Id.* at 238 (cleaned up). Because the good faith reliance exception applies where police act "in objectively reasonable reliance" on some external authority, it operates consistently with the principal benefit of exclusion. *Id.* at 239.

No court holds, however, that the exclusionary rule is still inapplicable when confronted with "intentional conduct that was patently unconstitutional." *Herring v. United States*, 555 U.S. 135, 143 (2009). Suppression is instead required "if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* (quoting *Illinois v. Krull*, 480 U.S. 340, 348–49 (1987)). "Responsible law enforcement officers" are charged with

knowing "'what is required of them' under Fourth Amendment precedent" and must "conform their conduct to these rules." *Davis*, 564 U.S. at 241 (quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006)). Because *Murphy* was binding precedent, state police here should have known its conduct was unconstitutional, which means exclusion here would discourage intentionally unlawful conduct.

Consistent with this understanding, other Circuits refuse to find good faith in such circumstances. *See, e.g.*, *United States v. Sheehan*, 70 F.4th 36, 54–55 (1st Cir. 2023); *United States v. Vasquez-Algarin*, 821 F.3d 467, 482–84 (3d Cir. 2016); *United States v. Edwards*, 666 F.3d 877, 886 (4th Cir. 2011); *United States v. Holmes*, 121 F.4th 727, 734–37 (9th Cir. 2024). And contrary to the panel, these courts consider "the systemic nature," *Little*, 119 F.4th at 770, of police malfeasance as a factor favoring suppression. *See Herring*, 555 U.S. at 147 (acknowledging that exclusion applies when confronted with "systemic error"); *United States v. Medina*, --- F.4th ----, 2025 WL 99835, at *6 (1st Cir. 2025) (same); *Nicholson*, 24 F.4th at 1353 (same); *United States v. Campbell*, 603 F.3d 1218, 1226 (10th Cir. 2010) (same).

En banc rehearing is therefore necessary to correct the panel's misapplication of the good faith reliance exception and its invention of a freestanding balancing test for suppression.

II. This case presents the best vehicle for en banc review because even under the unprecedented new rules the government did not meet its evidentiary burden.

The record here does not support the adoption of the new rules. The government never established what the state officers here actually relied on when arresting Little without a warrant, further demonstrating the opinion's adoption of new tests based on assumptions and generalities about Oklahoma untethered to the record before the Court. For example, the government did not present evidence that officers were trained to ignore *Murphy*, to the extent such facts are relevant. ROA Vol. I, at 283–89; *see, e.g., United States v. Patterson*, No. 21-7053, 2022 WL 17685602, at *5–7 (10th Cir. Dec. 15, 2022) (finding good faith reliance based on the officer's legally improper training). *But see United States v. Knox*, 883 F.3d 1262, 1272 (10th Cir. 2018) (recognizing that the good faith inquiry asks whether officer actions were "objectively reasonable," comporting with the "general trend of preferring objective tests of law enforcement reasonableness over

subjective inquiries into the knowledge or motivations possessed by individual officers" (cleaned up)). The government also did not present evidence that the officers relied on the stay of the mandate in *Murphy*, the contents of the motion to stay the mandate, or the reasoning in the concurrence to granting the motion to stay. ROA Vol. I, at 283–89.

Furthermore, it is undisputed that the Fourth Amendment violations are not harmless. OB-19–21; RB-7–8. The Court should accept en banc review to vacate the opinion and reverse the suppression denial based on *Davis*'s limited and long-established good faith reliance standard.

Conclusion

To avoid the severe limitation to the Fourth Amendment rights of those in this Circuit, and to avoid legal confusion about the mandate, that the panel's opinion will cause, this Court should grant en banc review.

Dated: January 24, 2025

Respectfully submitted,

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Certificate of Compliance

I hereby certify that, to the best of my knowledge and belief, formed after a reasonable inquiry, this brief is proportionally spaced and contains 3,834 words and therefore complies with the applicable type-volume limitations.

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Certificate of Service

I hereby certify that on January 24, 2025, I electronically filed the foregoing using the court's CM/ECF system which will send notification of the filing to the following:

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APPENDIX

119 F.4th 750
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Justin Dale LITTLE, Defendant - Appellant.

No. 23-5077
|
FILED October 11, 2024

Synopsis

Background: Defendant was convicted in the United States District Court for the Northern District of Oklahoma, John F. Heil, III, J., of first-degree murder in Indian country, and sentenced to life in prison. Defendant appealed.

Holdings: The Court of Appeals, Ebel, Circuit Judge, held that:

good-faith exception to exclusionary rule applied to evidence obtained from state police officers' investigation of homicide on Muscokee Creek Reservation underlying charged offense;

officers had probable cause to arrest defendant;

officers had implied consent to enter defendant's home and seize defendant's rifle;

officers did not violate Fifth Amendment by not reiterating defendant's *Miranda* rights before second interview;

defendant did not unequivocally invoke his right to counsel at start of second interview;

defendant's statements to officers during custodial interviews were voluntary;

defendant's evidentiary challenges lacked merit:

district court did not violate procedural rules governing jury instructions;

district court's jury instructions were proper;

district court's denial of defense request to re-cross defendant's spouse did not warrant reversal;

prosecutor's statements during closing argument did not warrant reversal;

cumulative error doctrine did not provide basis to reverse conviction; and

evidence was sufficient to sustain conviction.

Affirmed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection; Pre-Trial Hearing Motion.

***763 Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 4:21-CR-00162-MWM-1)**

Attorneys and Law Firms

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Before TYMKOVICH, EBEL, and EID, Circuit Judges.

Opinion

EBEL, Circuit Judge.

This case presents an issue generated by the sea change in criminal investigation and prosecution that was initiated by the Supreme Court's decision in McGirt v. Oklahoma, 591 U.S. 894, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). Defendant Justin Little was investigated and arrested by state police in Oklahoma in April 2018 after his wife's boyfriend was shot and killed on the Muscogee Creek Reservation. Under the Supreme Court's holding two years later in McGirt that the Creek Reservation had not been disestablished, state police lacked jurisdiction over Little's offense when they investigated him. No one disputes the fact that the state of Oklahoma lacked jurisdiction over this offense. Little was convicted of first-degree murder ***764** in federal court. The issue before us is only whether the evidence previously

collected by state officers who it turned out lacked jurisdiction could be used in the federal prosecution against Little.

We hold that such evidence was admissible against Little under the good faith exception to the Fourth Amendment's exclusionary rule. As previously explained by this court, the Creek, the federal government, and the State of Oklahoma all believed for at least a century before and during the investigation in this case that Oklahoma had jurisdiction over offenses committed on Creek land after Oklahoma became a state. While we held in 2017, in Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017), aff'd sub nom. Sharp v. Murphy, 591 U.S. 977, 140 S. Ct. 2412, 207 L.Ed.2d 1043 (2020), that the Creek Reservation had not been disestablished and therefore the State of Oklahoma lacked jurisdiction over offenses committed on the Reservation, likely because that decision was so novel and impactful, we stayed the mandate in that case pending Supreme Court review. See id. at 966. The context surrounding our decision to stay the mandate could reasonably have been interpreted by Oklahoma law enforcement officers as indicating that they could continue investigating offenses on Creek land pending Supreme Court review. Specifically, the motion to stay the mandate in Murphy argued that without a stay, Oklahoma would have to immediately cease investigating offenses on Creek land, and the federal government would have to fill that law enforcement void overnight. Oklahoma's state law enforcement and judicial system continued to operate after Murphy under the assumption that it still had jurisdiction over such offenses. Under these unique circumstances, we conclude that exclusion of the evidence collected through the state investigation of Little is unwarranted—state officers' conduct was not sufficiently deliberate or culpable to suggest that exclusion would have a significant deterrent effect, and any deterrent effect is heavily outweighed by the social costs of exclusion—the loss of evidence generated in good faith by state officers in Oklahoma between our Murphy decision in 2017 and the Supreme Court's McGirt decision in 2020.

Little raises many other arguments for reversal, all of which are either waived, forfeited or lack merit. Having jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we therefore AFFIRM.

I. BACKGROUND

Prior to 2015, Defendant Justin Little and Hannah Watkins dated for many years and eventually had a baby together. In early 2015, Watkins told Little that she no longer wanted to be romantically involved with him. After that time, Watkins had other boyfriends, and Little frequently tried to interfere with her relationships. For example, Watkins began dating Leon Hoang in late 2015. The first time Watkins stayed with Hoang, Little drove two hours to his residence, arrived at 3:00 or 4:00 a.m., and informed Watkins that he was worried about her and had a colleague track her phone for him. In January 2017, Little was at a gathering with Watkins and her then-boyfriend, Justin Lackey. Watkins noticed Little leave the building and re-enter with dust and grass on his back—as if Little had been lying on the ground—and Lackey later discovered that his brake lines had been cut. After Lackey, Watkins dated Dennis Mitchell. Little found out about the relationship and messaged Mitchell on Facebook, falsely telling Mitchell that he and Watkins were intimate again and that Watkins had sent him photos. Little sent Mitchell semi-clothed and nude photos of Watkins.

***765** Watkins then began dating Jonathan Weatherford, the victim in this case, in November 2017. About a month later, Little messaged Watkins on Facebook and stated that he wished their son "could enjoy his family together." (I ROA 538.) On March 19, 2018, Little purchased a 783 Remington .300 Winchester Magnum rifle. He also owned a handgun, which he regularly kept in his truck. Little's truck was a white Chevy Silverado with a sticker on the back left windshield.

In April 2018, Watkins told Little that she was very serious about Weatherford and planned to stay with him for the rest of her life. Little—who served in the military and had been enlisted for six years—told Watkins that their son could only receive military benefits if he and Watkins were married. This was a lie, but Watkins believed it and married Little on April 19, 2018. Three days later, on April 22, Little had plans to visit Watkins's apartment in Jenks, Oklahoma, but called to tell her he was running late.

At about the same time, Weatherford, who had been staying with Watkins, apparently left her apartment and began walking down railroad tracks near a high school aquatic center. Weatherford was subsequently found shot and killed on the railroad tracks around 12:00 p.m. Little arrived at Watkins's apartment around 12:10 p.m.

Jenks Police Department (JPD) Assistant Chief Melissa Brown arrived at the crime scene and initiated the investigation. JPD officers canvassed the area surrounding the

crime scene and determined that the shooting occurred around 11:55 a.m. after speaking to over thirty people. Chief Brown spoke to Watkins near the scene, and Watkins provided details regarding Little's vehicle. Officers reviewed surveillance footage from various locations near the crime scene and identified a white Chevy Silverado matching the description of Little's vehicle in the area around the time of the shooting. Surveillance footage collected from the investigation showed Little's truck turning into the aquatic center parking lot, driving to a nearby industrial lot, and parking moments before a gunshot could be heard on the footage. Surveillance footage also showed Weatherford walking along the train tracks near where Little had parked and a figure in dark clothing following him.

Shortly after the shooting, multiple people came to the police station and told police about prior incidents between Weatherford and Little. Oklahoma state officers arrested Little later that day.

Little was taken to the police station, where he was read the Miranda rights and signed a waiver. Little was then interviewed by Chief Brown and Officer Jason Weis. He eventually admitted that he was in Jenks that day and saw Weatherford walking on the train tracks.

Officers went to the home shared by Little and his mother. Little's mother consented to the officers' seizure of Little's rifle, which was found in the living room where Little slept. Officers also found a lens cap to the scope of Little's rifle in the bed of his truck.

The next morning, April 23, Chief Brown interviewed Little with Detective Nicholas Chandlee. Chief Brown began the interview by telling Little that his Miranda rights "still st[ood]" and asking whether Little still wanted to speak with the officers, and Little responded affirmatively. (Id. at 354.) Chief Brown stopped the interview after Little expressed his desire to speak with an attorney.

II. PROCEDURE

A federal grand jury indicted Little for first-degree murder in Indian country. ***766** 18 U.S.C. §§ 1111(a), 1153. After a jury trial, Little was convicted on that charge. The district court imposed a mandatory life sentence.

III. DISCUSSION

1. The district court did not err in denying Little's motions to suppress the evidence gathered by the JPD investigation, which was used in the subsequent federal criminal trial.

a. Standard of Review

"In reviewing a district court's denial of a motion to suppress, this court considers the totality of the circumstances and views the evidence in the light most favorable to the government." United States v. Madden, 682 F.3d 920, 924 (10th Cir. 2012) (citing United States v. Kimoana, 383 F.3d 1215, 1220 (10th Cir. 2004)). "The district court's factual findings are reviewed for clear error." Id. The district court's legal conclusions are reviewed de novo. United States v. Smith, 606 F.3d 1270, 1275 (10th Cir. 2010).

b. Evidence obtained through the Jenks Police Department investigation was admissible in the subsequent federal prosecution of Little under the good faith exception, even though the JPD lacked jurisdiction to gather that evidence.

Little, an Indian, shot and killed Weatherford on the Muscogee Creek Reservation, and therefore officers of the Jenks, Oklahoma, Police Department lacked jurisdiction when they investigated the homicide, arrested and interrogated Little, and searched Little's home. See McGirt v. Oklahoma, 591 U.S. 894, 932, 937-38, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020) (holding Congress had not disestablished the Creek Reservation, and therefore state lack jurisdiction over offenses committed thereon); 18 U.S.C. § 1153. Little moved to suppress all evidence obtained from the JPD investigation on that basis. The district court denied that motion on the ground that the JPD officers reasonably could have believed at the time of the investigation that Oklahoma had jurisdiction to investigate and prosecute this offense.

The question we must answer here is whether the evidence obtained from JPD's investigation without jurisdiction should have been excluded in the subsequent federal prosecution or whether the Leon [1] good faith exception to the exclusionary rule applies. "To remedy Fourth Amendment violations, federal courts ordinarily invoke and apply the exclusionary

rule, precluding the government from introducing at trial unlawfully seized evidence." United States v. Pemberton, 94 F.4th 1130, 1137 (10th Cir. 2024). But exclusion is not an automatic remedy—instead, "applying the exclusionary rule may not always be the appropriate remedy for a Fourth Amendment violation in a particular case." Id. The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Calandra, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Given the rule's deterrence rationale, the Supreme Court has explained:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly ***767** negligent conduct, or in some circumstances recurring or systemic negligence.

Herring v. United States, 555 U.S. 135, 144, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009).

The Court has further explained that "[r]eal deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one." Davis v. United States, 564 U.S. 229, 237, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (quoting Hudson v. Michigan, 547 U.S. 586, 596, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006)). The exclusion analysis "must also account for the 'substantial social costs' generated by" the exclusionary rule, such as the loss of "reliable, trustworthy evidence bearing on guilt or innocence." Id. (quoting Leon, 468 U.S. at 907, 104 S.Ct. 3405). Ultimately, "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." Id.

The Supreme Court has recognized a good faith exception to the exclusionary rule. In Leon, the Supreme Court held that when officers execute a search "in objectively reasonable reliance on a subsequently invalidated search warrant," exclusion of the fruits of that search is generally not warranted. 468 U.S. at 922, 104 S.Ct. 3405. The Court explained that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable police activity." Id. at 919, 104 S.Ct. 3405. Since Leon, the Supreme Court has extended its holding and applied the good faith exception in a variety of cases where officers acted objectively reasonably under the circumstances, even in the absence of a search warrant. See Illinois v. Krull, 480 U.S. 340, 342, 349-50, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) (applying the good faith exception where officers acted in objectively reasonable reliance on a state statute authorizing warrantless administrative searches that was subsequently declared unconstitutional); Arizona v. Evans, 514 U.S. 1, 3–4, 14–15, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995) (applying the good faith exception where officers acted in objectively reasonable reliance on erroneous information in a database maintained by judicial employees); Davis, 564 U.S. at 239–41, 131 S.Ct. 2419 (applying the good faith exception where officers conducted a warrantless traffic stop and arrest in objectively reasonable reliance on binding appellate precedent).

We recently applied the good faith exception to a case involving circumstances similar to Little's case. In United States v. Pemberton, this court addressed a murder committed in McIntosh County, Oklahoma, which "straddle[s] the Creek Nation and the Cherokee Nation reservations"; "the murder, certain parts of the investigation, and Mr. Pemberton's arrest occurred within these reservations." 94 F.4th 1130, 1133-1134 (10th Cir. 2024).[2] In Pemberton, we held that exclusion of evidence was unwarranted where state officers—acting without jurisdiction—obtained and executed a search warrant and arrested a defendant in 2004 for an offense committed on the Cherokee Reservation because the state officers acted with a reasonable, good faith belief that they had jurisdiction to conduct their activity. Id. at 1138, 1140. We reasoned, "the historical record provides evidence that government officials from the Creek, the State of Oklahoma, and the United States held and expressed the belief that the Creek reservation did not continue to exist after Oklahoma became a state." Id. at 1138. As detailed by Chief Justice Roberts's dissent in McGirt, Congress ***768** eliminated the tribal courts on the Creek Reservation in 1898, and when Oklahoma became a state in 1907, "the federal government immediately ceased prosecuting [serious crimes committed by Indians] in federal court," and "Oklahoma immediately began prosecuting those crimes in state court." McGirt, 591 U.S. at 952, 963, 140 S.Ct. 2452; Pemberton, 94 F.4th at 1138. Given this background, we held in Pemberton that the state officers who investigated and arrested the defendant in that case, which involved an offense that had occurred on the Cherokee Reservation, could

reasonably believe that they had jurisdiction. Pemberton, 94 F.4th at 1138. [3]

While Pemberton is instructive here, it is materially distinguishable. The state investigation and arrest in Pemberton occurred in 2004, whereas the investigation in Little's case occurred in April 2018. Between those two dates, this court published (and then stayed the mandate pending certiorari) its decision in Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017), aff'd sub nom. Sharp v. Murphy, 591 U.S. 977, 140 S. Ct. 2412, 207 L.Ed.2d 1043 (2020). In Murphy, we held that Congress had not disestablished the Creek Reservation—the same holding reached by the Supreme Court three years later in McGirt. Murphy, 875 F.3d at 966. Therefore, Little argues, Murphy put JPD officers on notice before April 2018 (when the current state investigation occurred) that they lacked jurisdiction to investigate the homicide in this case, which occurred on the Creek Reservation—notice that was lacking in Pemberton in 2004 when state officers there conducted the investigation and arrest.

We conclude that Murphy does not defeat application of the good faith exception in this case. To the contrary, between this court's Murphy decision and the Supreme Court's decision in McGirt, the holding of Pemberton controls—state officers could reasonably believe that they could lawfully investigate offenses on the Creek Reservation.

First, after we issued our opinion in Murphy, we granted the appellee's unopposed motion to stay the mandate in that case, and that stay lasted until after the Supreme Court decided McGirt and affirmed our decision in Murphy in 2020. [4] Second, as explained in Pemberton, the Creek, the State of Oklahoma, and the United States all believed for over a century that the state had jurisdiction over offenses committed on the Creek Reservation, and the state had been investigating ***769** and prosecuting such offenses during that time. Therefore, immediate compliance with our decision in Murphy, notwithstanding that the mandate had been stayed, would have required an overnight sea change in criminal investigation and prosecution—the state criminal system would have had immediately to cease its operations regarding offenses on the Creek Reservation, and the federal government would have had to take over all investigations and prosecutions. Third, the context surrounding our decision to stay the mandate in Murphy specifically indicated to law enforcement that the issuance of our opinion in that case did not require the overnight sea change described above. While we granted the motion to stay the mandate in a brief order without substantive analysis, the unopposed motion that we granted argued that there was "good cause" to stay the mandate under Fed. R. App. P. 41(d)(2)(A) because:

> [i]f the mandate issue[d], it would [have] create[d] the need to execute a significant shift in how law enforcement and criminal prosecution is conducted in the area at issue, involving substantial resource expenditure by state, federal, and tribal governments that may not be necessary in light of the possibility of reversal by the U.S. Supreme Court.

Unopposed Motion to Stay the Mandate Pending the Filing of a Petition for Writ of Certiorari at 3, Murphy, 875 F.3d 896 (Nos. 07-7068, 15-7041). Additionally, in his concurrence in the denial of rehearing en banc in Murphy, then-Chief Judge Tymkovich stated, "this case might benefit from further attention by the Supreme Court." Murphy, 875 F.3d at 966 (Tymkovich, C.J., concurring in the denial of rehearing en banc). [5] Fourth, it appears that the criminal justice system in Oklahoma continued to operate after Murphy under the assumption that it had jurisdiction over offenses committed on the Creek Reservation. For example, in our recent unpublished decision in United States v. Bailey, we applied the good faith exception where state officers obtained and relied on a state warrant when investigating an offense committed on the Creek Reservation in May 2020—before the Supreme Court decided McGirt. No. 23-5044, 2024 WL 3101681, at *1 (10th Cir. June 24, 2024); see also Bosse v. State, 499 P.3d 771, 774 (Okla. Crim. App. 2021) ("[N]o final decision of an Oklahoma or federal appellate court had recognized any of the Five Tribes' historic reservations as Indian Country prior to McGirt in 2020." (emphasis added)).

Based on these facts, a state officer acting in good faith after Murphy—but before McGirt—could reasonably have believed that they could continue lawfully to investigate offenses committed on the Creek Reservation. Our stay of the mandate in Murphy, suggestions of the likely reason for doing so—to prevent a massive sea change in criminal law enforcement that could have been entirely undone had the Supreme Court reversed—and the systemic continuation of generally accepted Oklahoma state law enforcement operations regarding offenses committed on

the Creek Reservation all supported that conclusion. Or, at the very least, these circumstances created significant uncertainty that we cannot conclude that there was clearly established law that Oklahoma officials lacked authority to arrest and investigate Little. Oklahoma state officers faced a difficult decision after we decided Murphy ***770** and stayed the mandate—immediately comply with our opinion, while potentially allowing offenses in Indian country to go without investigation while the federal government scrambled to fill the law enforcement void, or rely on multiple sources, including the motion to stay the mandate that we granted and authority from Oklahoma courts, that suggested that state officers did not need to cease their operations regarding such offenses during that time. The doubts surrounding the state of the law after Murphy were only conclusively resolved by the Supreme Court's decision in McGirt in 2020. Given that fact and the unique nature of the issue presented in Murphy and McGirt, we are not persuaded that application of the exclusionary rule in this case would have any meaningful deterrent effect. Ultimately, we cannot say that the wrongful conduct of the JPD officers who investigated and arrested Little was "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring v. United States, 555 U.S. at 144, 129 S.Ct. 695.

This is especially true given the systemic nature of investigations and arrests by state officers without jurisdiction that occurred in Indian country between our decision in Murphy and the Supreme Court's decision in McGirt. Here, unlike the typical good faith case, the constitutional issue extends far beyond the facts of Little's case—it implicates every investigation conducted by state officers in Indian country after our Murphy decision but before the Supreme Court decided McGirt. Given the unlikely deterrent value of the exclusionary rule under these circumstances and the substantial social costs that would result from its application here—the suppression of all evidence obtained by Oklahoma state officers investigating offenses in Indian country between Murphy in 2017 and McGirt in 2020—we conclude that exclusion is not warranted.

Our analysis in this case is limited to the circumstances faced by Oklahoma state officers here. Therefore, we are not altering the generalized rule that our opinions have precedential effect when issued, even when the mandate has not yet issued. See, e.g., In re Zermeno-Gomez, 868 F.3d 1048, 1052 (9th Cir. 2017) ("[W]e have held that a stay of the mandate does not 'destroy the finality of an appellate court's judgment,' and that a published decision is 'final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court.' " (citation omitted)). Nor are we suggesting that states and officers need not immediately comply with our precedential decisions when issued. Instead, we hold only that, given the combination of unique circumstances facing state officers in Oklahoma after our Murphy decision in 2017 but before McGirt in 2020, and the policy reasons behind the exclusionary rule, exclusion of evidence collected during the investigations of offenses on the Creek Reservation is not warranted.

c. Officers had probable cause to arrest Little.

We review the district court's probable cause determination de novo. United States v. Biglow, 562 F.3d 1272, 1280 (10th Cir. 2009). "Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." United States v. Johnson, 43 F.4th 1100, 1107 (10th Cir. 2022) (citations omitted). "The probable-cause standard requires only a fair probability, a standard understood to mean something more than a bare suspicion but less than a preponderance of the evidence at hand." Id. (cleaned up). "Whether probable cause exists depends ***771** upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." Devenpeck v. Alford, 543 U.S. 146, 152, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004).

Officers arrested Little just eight hours after the shooting, and they had done the following by that time: taken statements from over thirty people in the areas surrounding the scene of the shooting from which officers determined that the shooting occurred around 11:55 AM; received a statement from Watkins providing Little's name and a description of his vehicle; reviewed surveillance video from nearby cameras and identified a vehicle matching the description of Little's vehicle driving towards the scene around the time of the shooting; taken grainy photos of a screen displaying the surveillance video because they could not get a tape of the video; and taken statements from multiple witnesses who visited the police station and informed officers of prior altercations between Little and Weatherford—including Weatherford's ex-girlfriend, who informed police that Little had previously threatened Weatherford.

This evidence supported a "fair probability" that Little killed Weatherford at the time officers arrested Little. Johnson, 43 F.4th at 1107.[6] Therefore, we reject Little's challenge to the district court's probable cause determination.

d. Officers' entry into Little's home and seizure of his rifle did not violate the Fourth Amendment.

Little argues that officers' entry into his home violated the Fourth Amendment because the government has failed to establish that his mother, who shared the home with Little and was present at the time, voluntarily consented to the officers' entry—and consent is the only basis by which the government attempts to justify the search. Therefore, Little argues, his rifle, which was seized during the allegedly unlawful search of his home, should have been suppressed. Little's arguments lack merit.

"Consent is an exception to the Fourth Amendment's warrant requirement for a search of a residence." United States v. Romero, 749 F.3d 900, 905 (10th Cir. 2014). "For consent to be valid, two conditions must be met: '(1) There must be a clear and positive testimony that consent was unequivocal and specific and freely given; and (2) The government must prove consent was given without duress or coercion, express or implied.' " United States v. Guerrero, 472 F.3d 784, 789 (10th Cir. 2007) (quoting United States v. Butler, 966 F.2d 559, 562 (10th Cir. 1992)).

Little argues that the government has not presented any evidence that Little's mother consented to the initial entry into his home, as the government relies solely on footage from Chief Brown's body camera, which did not start recording until officers had already entered the home. Little has forfeited this argument by failing to raise it below or argue plain error on appeal. United States v. Wright, 848 F.3d 1274, 1281 (10th Cir. 2017). Little only ***772** argued below that his mother lacked authority to consent to the search and that the government cannot prove that her consent was free, voluntary, and not the product of duress—not that his mother did not consent to officers' initial entry.[7] Had Little raised that argument below, the government could have developed evidence on that issue. See United States v. Dominguez-Perez, 772 F. App'x 623, 627 (10th Cir. 2019) (unpublished) (holding that the defendant waived factual challenges because the defendant "failed to advance them below," and therefore this court "lack[ed] an adequate record against which to review them").

Little also argues that the government failed to prove that his mother clearly consented to the officers' entry into the living room, which was also Little's bedroom. We disagree. "[C]onsent must be clear, but it need not be verbal. Consent may instead be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer." Guerrero, 472 F.3d at 789-90. Here, when officers asked Little's mother if she could show them Little's firearms, she led officers into the living room and pulled Little's rifle from a pile of his property. Officers then asked if they could take the rifle, and Little's mother responded, "[y]eah," while nodding. (Aplee. Br. 23.) Little's mother's actions—leading the officers into the living room—demonstrate implied consent to the officers' entry into the living room. See, e.g., United States v. Guillen, 995 F.3d 1095, 1104 (10th Cir. 2021) ("The district court likewise did not clearly err when it determined Ethan impliedly consented to the entry by stepping away from the doorway and allowing the agents to enter the house.").

Finally, Little argues that his mother was distraught during her interaction with the police, and therefore her consent was not voluntary but was instead given under duress. As an initial matter, this argument is likely forfeited. Little raised this argument in a cursory manner below and did not explain the basis for his argument that Little's mother was under duress when she gave officers consent to enter the home. Nonetheless, even if Little's mother was "emotionally distraught with the news of the shooting and her son's arrest," nothing in the record indicates that her emotions were "so profound as to impair her capacity for self-determination or understanding of what the police were seeking." (Aplt. Br. 27-28); United States v. Duran, 957 F.2d 499, 503 (7th Cir. 1992) (primary case upon which Little relies). Therefore, we conclude that her consent was voluntarily given.

e. Officers' interrogation of Little did not violate the Fifth Amendment.

Little makes three arguments with respect to the Fifth Amendment: 1. Officers violated his Fifth Amendment rights under Miranda by interviewing him a day after giving him Miranda warnings without repeating the warnings; 2. Officers ignored Little's purported invocation of his right to counsel during his second interview; and 3. Officers coerced Little's

statements during his interviews. None of these arguments have merit.

i. Officers did not violate the Fifth Amendment when they did not re-Mirandize Little a day after giving him the warnings.

The Supreme Court held in Miranda v. Arizona that a person's statements made ***773** during custodial interrogation are not admissible at trial against that person unless the person was apprised of his rights before questioning. 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The parties here do not dispute that Little was subject to custodial interrogation during both interviews by police, and therefore the protections of Miranda applied. When Chief Brown and Officer Weis first interviewed Little immediately after his arrest on April 22, Chief Brown read him the Miranda warnings, and Little signed a waiver and agreed to speak with them. However, after that interview ended and Chief Brown and Detective Chandlee initiated a second interview on April 23, they did not read Little the Miranda warnings again. Instead, Chief Brown informed Little that his Miranda rights "still st[ood]" and asked Little if he wanted to continue talking with the officers. (I ROA 148). Little responded affirmatively, and the officers continued to question Little.

Miranda warnings remain effective for subsequent questioning "unless the circumstances change[ ] so seriously that [the subject's] answers no longer were voluntary, or unless he no longer was making a 'knowing and intelligent relinquishment or abandonment' of his rights." Mitchell v. Gibson, 262 F.3d 1036, 1058 (10th Cir. 2001) (quoting Wyrick v. Fields, 459 U.S. 42, 47, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982)). "In making this assessment, the Court look[s] to whether the character of the interrogation had changed significantly, and whether the questions put to the defendant subsequently would have caused him to forget the rights of which he had been advised and which he had previously understood." Mitchell, 262 F.3d at 1058 (citing Wyrick, 459 U.S. at 47-49, 103 S.Ct. 394). In Mitchell, this court rejected "the argument that the passage of time alone invalidates previously given Miranda warnings." Id. at 1057. In doing so, this court joined other circuits—including the Ninth Circuit in United States v. Andaverde, which this court cited in Mitchell. See United States v. Andaverde, 64 F.3d 1305, 1313 (9th Cir. 1995) (holding statements by the defendant to his parole officer the day after the defendant received Miranda warnings were admissible); United States v. Clay, 408 F.3d 214, 222 (5th Cir. 2005) (holding the defendant's confession, made two days after he received Miranda warnings, was admissible).

Applying these principles here, we conclude that the circumstances of the April 23 interrogation did not change so seriously that Little's statements were no longer voluntary or Little no longer understood and knowingly relinquished his rights. While there was a change in secondary officers —Officer Weis joined Chief Brown during the April 22 interrogation, and Detective Chandlee replaced Weis for the April 23 interrogation—Chief Brown was involved in both interrogations. And, as found by the district court, all other aspects of the interrogations were similar—they took place in the "same room, discussing the same events, based on the same history." (I ROA 354). Therefore, officers did not need to re-Mirandize Little for his statements on April 23 to be admissible against him. [8]

***774 ii. Little did not unequivocally invoke his right to counsel.**

Little argues that he unequivocally invoked his right to counsel at the start of the April 23 interrogation. Chief Brown told Little that his Miranda rights "still st[ood]" and asked Little, "[s]o you still want to talk to us?" (I ROA 148). Little's response was, "[y]eah, I can still talk to y'all." "I wanted to talk to a lawyer because I just wanted to see where I stand at right now is all." (Id.).

"[C]ustodial interrogation may continue unless and until the suspect *actually invokes* his right to counsel; ambiguous or equivocal statements that *might* be construed as invoking the right to counsel do not require the police to discontinue their questioning." United States v. Nelson, 450 F.3d 1201, 1212 (10th Cir. 2006) (emphasis in original) (citing Davis v. United States, 512 U.S. 452, 458-59, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994)). The test for whether a suspect invoked his right to counsel is an objective inquiry which asks whether the suspect's statement is " 'sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.' " Nelson, 450 F.3d at 1212 (quoting Davis, 512 U.S. at 459, 114 S.Ct. 2350).

Here, Little's statement was ambiguous. He began by stating that he could "still talk" to the officers. Additionally, his statement that he "wanted to talk to a lawyer" so that he could "see where he [stood] at" could have been understood by a reasonable officer to mean multiple different things—

for example, that Little wanted to speak to a lawyer at that moment, or that Little had previously wanted to speak to a lawyer but no longer wanted to. Therefore, Little did not unequivocally invoke his right to counsel at the start of the April 23 interrogation, and officers did not violate his rights under Miranda by continuing the interrogation. See Nelson, 450 F.3d at 1212 (officers need not ask "clarifying questions in response to an equivocal or ambiguous statement"). [9]

iii. Little's statements were voluntary.

"The voluntariness of a statement depends upon an assessment of the totality of all the surrounding circumstances including both the characteristics of the accused and the details of the interrogation." United States v. Cash, 733 F.3d 1264, 1280 (10th Cir. 2013) (cleaned up). [10]

> In applying a totality of circumstances analysis, we have considered "(1) the age, intelligence, and education of the defendant; (2) the length of detention; (3) the length and nature of the questioning; (4) whether the defendant was advised of his constitutional rights; and ***775** (5) whether the defendant was subject to any physical punishment."

Id. at 1280-81 (citation omitted). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.' " Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). "Ultimately, the proper inquiry is whether the confession was 'the product of an essentially free and unconstrained choice,' or whether the individual's 'will has been overborne.' " Carter v. Bigelow, 787 F.3d 1269, 1295 (10th Cir. 2015) (citation omitted).

The district court provided a summary of the circumstances of the interrogation:

> JPD questioned him for approximately two (2) hours the first evening and one (1) hour the next morning. Brown, Weis, and Chandlee[, the three officers involved in the interrogation,] did not use or threaten the use of physical punishment. The only brief physical contact occurred when Defendant reached across a table to point at something on Weis' notepad and Weis brushed his hand back. Miranda safeguards were clearly given and ... applied to both the April 22 and April 23 interviews. Defendant did not exhibit any physical or mental difficulties, instead remaining coherent, generally polite, and conversational throughout the interviews. The interrogations took place in an office at JPD with padded chairs, good lighting, and drinking water easily available.

(I ROA 357).

Under these circumstances, we conclude that Little's statements during the interrogations were voluntary. None of Little's counterarguments are persuasive. First, Little argues that his age at the time of the interrogation—twenty four—and the fact that he had no previous experience with the criminal justice system weigh against a finding that his statements were voluntary. While these are relevant factors, Little's personal characteristics do not, on the whole, suggest he was "unusually susceptible to coercion"—instead, the record shows that he has a high school education and was enlisted in the military for six years prior to the interrogation. United States v. Toles, 297 F.3d 959, 966 (10th Cir. 2002) (citing the fact that the defendant was twenty one and received his GED as weighing against a finding of unusual susceptibility to coercion).

Second, Little argues that Chief Brown promised leniency if he confessed. "Promises of leniency ... 'may render a confession coerced.' " United States v. Young, 964 F.3d 938, 943 (10th Cir. 2020) (citation omitted). The district court, however, characterized Chief Brown's statements differently: "Throughout the interview, Brown told [Little] that it looked likely that he will be booked on and charged with first degree murder. She asked him for mitigating information that would support a lesser booking or a lesser charge, which would potentially carry a lighter sentence." (I ROA 338-39). Ultimately, officers did not promise leniency in exchange for a confession, but instead told Little he was likely facing a first-degree murder charge but might face a lesser charge if he provided "mitigating information."

Third, Little challenges the officers' "use[ ] [of] Little's son as leverage." (Aplt. Br. 31) See United States v. Jacques, 744 F.3d 804, 811 (1st Cir. 2014) ("statements that a defendant's

refusal to cooperate may lead to an extended separation from his or her loved ones may contribute to a finding that the defendant's confession was coerced," but "the mere fact that a defendant is placed 'under some psychological pressure' by agents does not ***776** necessarily render a confession involuntary" (citation omitted)). As described by the district court, "Brown expressed regret at the idea of [Little] and his son being separated indefinitely if he was booked on and later convicted of first degree murder." (I ROA 339). But the district court also found that the "Defendant was calm and level-headed throughout the interview." (Id. at 338). So Chief Brown's references to Little's son do not weigh heavily for a finding of involuntariness. See Jacques, 744 F.3d at 811 (finding that officers' reference to the suspect's father's health did not make the statement involuntary in part because the suspect did not manifest an emotional response to the statement and the record did not suggest a particular susceptibility to manipulation).

Fourth, Little argues that the officers relied on false evidence and deceit which rendered his statements involuntary. Chief Brown admitted to "bluffin" during the interrogation—for example, "[o]fficers told Little everyone knew he committed the shooting, referencing non-existent witness statements and Snapchat messages." (I ROA 358) (Aplt. Br. 31). Given the totality of the circumstances surrounding the interrogation as described above, these misrepresentations do not strongly support the conclusion that Little's statements were involuntary. See Lucero v. Kerby, 133 F.3d 1299, 1311 (10th Cir. 1998) ("[M]isrepresentations [about the state of the evidence], without more, do not render an otherwise voluntary confession involuntary.").

Finally, Little argues that the officers physically intimidated him during the interrogation. Statements that result from physical coercion are inadmissible. Young, 964 F.3d at 942. The incident challenged by Little occurred as follows:

> Toward the end of the recording, Weis and Defendant raised their voices with each other. Defendant reached across more than half the table and pointed at something on Weis' notepad. Weis brushed Defendant's hand back, which caused Defendant to immediately recoil and say, "Please don't touch me." When Weis asked why, Defendant said he felt "a little bit threatened right now," and Weis immediately apologized.

(I ROA 337-38). The record does not support Little's contention that he was physically intimidated into making his statements.

2. Little has waived some of his appellate arguments under the invited-error doctrine.

This court's " 'invited-error doctrine precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt.' " United States v. McBride, 94 F.4th 1036, 1041 (10th Cir. 2024) (citation omitted).

Here, Little agreed to preadmit evidence of a handgun found in his truck and messages he sent to Watkins. Additionally, he proposed the jury instruction regarding the permissible purposes for which the jury could consider evidence of Little's "other acts" admitted under Fed. R. Evid. 404(b). Therefore, under the invited-error doctrine, Little has waived his challenge to that evidence and jury instruction.

3. Little's remaining challenges fail on their merits.

a. None of Little's evidentiary challenges have merit.

This court reviews the district court's evidentiary rulings for abuse of discretion. United States v. DeChristopher, 695 F.3d 1082, 1095 (10th Cir. 2012).

***777** For challenges not raised by motion or objection below, this court reviews for plain error. Fed. R. Crim. P. 52(b); United States v. Cristerna-Gonzalez, 962 F.3d 1253, 1260 (10th Cir. 2020). "To prevail, Defendant must show '(1) error, (2) that is plain, which (3) affects his substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.' " Cristerna-Gonzalez, 962 F.3d at 1260 (citation omitted).

i. The district court did not abuse its discretion in admitting other acts evidence.

After the government filed a notice of intent to offer other acts evidence under Fed. R. Evid. 404(b), Little moved to exclude the evidence. The district court granted Little's motion in part but allowed the admission of evidence of some prior acts, three of which are at issue here: 1. In 2015, Watkins was staying at the home of her coworker, Hoang, when Little appeared at 4:00 AM and eventually informed Watkins that he was tracking her cell phone; 2. In late 2016 or early 2017, Watkins and her boyfriend at the time,

Lackey, suspected Little of cutting Lackey's brake lines; and 3. Little sent nude photographs of Watkins to another of her boyfriends, Mitchell. We review Little's appellate challenge to the admission of that evidence for abuse of discretion.

When analyzing the admissibility of other acts evidence, the court must first determine whether the evidence is "intrinsic" or "extrinsic." United States v. Kupfer, 797 F.3d 1233, 1238 (10th Cir. 2015). Evidence is intrinsic when it is " 'directly connected to the factual circumstances of the crime and provides contextual or background information to the jury,' " and it is extrinsic when it " 'is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense.' " Id. Intrinsic evidence is admissible so long as it satisfies the requirements of Fed. R. Evid. 403—which asks whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice—while the admissibility of extrinsic other acts evidence is controlled by Fed. R. Evid. 404(b).[11] The district court reached two alternative conclusions regarding the other acts evidence challenged by Little: 1. It was intrinsic, as it provided a complete picture of the background and context surrounding the homicide, and it was admissible under Rule 403; and 2. Even if it was extrinsic, it was admissible for a non-propensity purpose under Rule 404(b)—to prove Little's motive, which was to keep his wife to himself. We agree with the latter conclusion, so we need not consider the former.

There are four requirements for evidence to be admissible under Rule 404(b): 1. It must be "offered for a proper purpose"; 2. It must be relevant; 3. Its probative value must not be substantially outweighed by its potential for unfair prejudice; and 4. Upon request, the trial court must "instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted." Huddleston v. United States, 485 U.S. 681, 691-92, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). All four requirements were satisfied here.

***778** First, in the government's notice of intent to offer evidence under Rule 404(b), it explained, "Little's history with Watkins and her romantic partners illustrates Little's motive for killing Weatherford." (I ROA 49). Second, the evidence was relevant. The government was required to show that Little shot and killed Weatherford with malice aforethought and premeditation, and the evidence of Little's history of hostility towards Watkins's other partners was highly probative of Little's motive for killing Weatherford—Watkins's partner at the time with whom she intended to stay for "the rest of [her] life." (Id. at 546). For this same reason, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Finally, as explained above, Little waived his appellate challenge to the Rule 404(b) jury instruction by proposing the instruction below.

Little raises two counterarguments. We find neither persuasive. First, he argues that the government did not provide sufficient evidence to prove that Little cut Lackey's brake lines in 2017. While "similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor," there was sufficient evidence supporting those conclusions here. Huddleston, 485 U.S. at 689, 108 S.Ct. 1496. Specifically, Watkins testified that after a conversation at her grandmother's house between Lackey, Little, and her, Little went outside, where Lackey's car was located, and "sidestep[ped]" back inside. When Little came back inside, his back was dirty. Then, when Lackey and Watkins left, they realized Lackey's brake lines had been cut. (I ROA 522-25).

Little's second counterargument is that the prior acts were not similar enough to the charged offense—homicide—to support admission under Rule 404(b). See United States v. Zamora, 222 F.3d 756, 762 (10th Cir. 2000) ("This court has previously recognized the probative value of uncharged acts to show motive, intent, and knowledge, whether the acts involved previous conduct or conduct subsequent to the charged offense, as long as the uncharged acts are similar to the charged crime and sufficiently close in time."). While the prior acts occurred years before the homicide and one of the acts at least did not involve violent conduct—e.g., sending nude photographs—they all involved attempts by Little to interfere with Watkins's relationships and evinced a similar state of mind—Little's jealousy of Watkins's partners. In Zamora, we explained, "[t]he more similar the act or state of mind is to the charged crime, the more relevant it becomes." Zamora, 222 F.3d at 762 (emphasis added). Ultimately, we conclude that Little's prior acts were sufficiently similar to his shooting Weatherford to be admissible under Rule 404(b), and the district court did not abuse its discretion in denying Little's motion to exclude them.

ii. The district court did not abuse its discretion in admitting Little's rifle.

Little argued in his trial brief below that the district court should exclude the .300 caliber Remington rifle seized from his home and the lens cover to the rifle's scope, which was found in his truck. [12] The district court ruled that the ***779** rifle was admissible. Therefore, even though Little did not object to the admission of that evidence at trial when it was presented, this court reviews for abuse of discretion, not plain error. See Fed. R. Evid. 103(b) ("Once the court rules definitively on the record--either before or at trial--a party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

Little argues that the rifle was not relevant, as required under Fed. R. Evid. 402, and that any probative value it had was substantially outweighed by the risk of unfair prejudice (see Fed. R. Evid. 403). To be relevant, as defined by Fed. R. Evid. 401, evidence need only have "any tendency to make a fact more or less probable than it would be without the evidence," and that fact must be "of consequence in determining the action." The rifle and scope are relevant under this standard: Weatherford was killed by the same caliber bullet as those shot from a .300 caliber Remington rifle; Little purchased the rifle a month before the homicide; the rifle was found in Little's home; and the lens cover for the rifle's scope was found in Little's truck shortly after the homicide. Given these facts, the rifle tended to make it more probable that Little killed Weatherford. [13] Additionally, given the high probative value of the rifle, the district court did not abuse its discretion in concluding that the probative value was not substantially outweighed by the danger of unfair prejudice. [14]

iii. The district court did not plainly err in admitting the bullet recovered from Weatherford's body.

Little concedes that plain error review applies to his challenge to the district court's admission of the bullet recovered from Weatherford's body, as he did not move to exclude the bullet or object to its admission below. Little argues that the district court plainly erred in admitting the bullet because the bullet was not relevant, as the government "did not establish [it] was the bullet recovered from Weatherford." (Aplt. Br. 48). We are unpersuaded: Chief Brown testified at trial that she attended Weatherford's autopsy and that ***780** photos from the autopsy—including photos of the bullet recovered from his body—accurately reflected the autopsy; the government's expert testified that the physical bullet admitted at trial was the bullet given to him by the government for examination; and the expert viewed autopsy photos of the bullet at trial and testified that the photos "appear[ed] to be consistent" with the bullet admitted at trial (I ROA 679-80). Therefore, admission of the bullet was not plain error.

iv. The district court did not abuse its discretion in admitting statements by Watkins.

Little raises two preserved challenges to statements made by Watkins that were admitted at trial. First, he argues that Watkins's statement to Little that she "planned on being with" Weatherford for "the rest of [her] life" was inadmissible hearsay under Fed. R. Evid. 802. (I ROA 546). The district court concluded that the statement was not hearsay because it was offered to prove the effect on the listener—Little—rather than "to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c) (defining hearsay). We agree. The government did not use Watkins's statement to prove that Watkins, in fact, intended to stay with Weatherford for the rest of her life. Instead, the government used the statement to prove that Little believed she was going to do so and therefore had a motive for killing Weatherford. [15]

Second, Little argues that Watkins testified, contrary to a pretrial order, that she told police that she believed Little committed the homicide. We disagree. In a pretrial order, the district court granted Little's "motion to exclude Watkins[']s statements regarding who she believed was responsible for the murder." (I ROA 495). However, Watkins did not testify that she believed Little was responsible. Instead, the prosecutor asked Watkins, "[n]ot referencing Mr. Little, were you aware of anyone who wanted to hurt [Weatherford]?" Watkins responded, "[o]ther than him, no." (Id. at 556). This question did not violate the pretrial order and Mr. Little did not ask that the answer be stricken or limited. [16]

b. None of the district court's jury instructions constitute reversible error.

Little forfeited his challenges to the district court's jury instructions by ***781** failing to object below, and therefore we review for plain error. Fed. R. Crim. P. 52(b); Wright, 848 F.3d at 1278-79. [17]

i. The district court did not violate the procedural rules governing jury instructions.

As an initial matter, Little argues that the district court violated Fed. R. Crim. P. 30 when it gave the jury copies of the jury instructions on the first day of trial. Rule 30(c) provides, "[t]he court may instruct the jury before or after the arguments are completed, or at both times." We have recognized that Rule 30(c) gives the district judge wide discretion when determining how to instruct the jury. See United States v. Starks, 34 F.4th 1142, 1163 (10th Cir. 2022).[18] Ultimately, we reject Little's challenge under Rule 30 because here, unlike in Starks, the district court read the final instructions to the jury at the close of the case before the jury began deliberations.

ii. The district court did not plainly err in failing to give Little's requested "mere presence" instruction.

Little challenges the district court's denial of his request to give the jury the following instruction: "Mere presence at the scene of a crime or mere knowledge that a crime is being committed is not sufficient to establish that the defendant committed the crimes charged in this case." (I ROA 453).

Generally, "[c]riminal defendants are entitled to jury instructions upon their theory of defense provided there is evidentiary and legal support." United States v. Gallant, 537 F.3d 1202, 1233 (10th Cir. 2008) (citation omitted). However, "[i]t is not error to refuse to give a requested instruction if the same subject matter is adequately covered in the general instructions." United States v. Miller, 460 F.2d 582, 588 (10th Cir. 1972). We have previously applied this principle and held that a district judge did not err in refusing to give a "mere presence" instruction requested by the defendant when the jury was instructed that, to find the defendant guilty, there must be evidence of the defendant's "willful association and willful participation." United States v. Alonso, 790 F.2d 1489, 1496-97 (10th Cir. 1986). In other words, a "mere presence" instruction—explaining that mere presence at the scene is insufficient—is effectively redundant of an instruction explaining that the defendant must have willfully participated in the criminal activity to be found guilty.

Here, the first-degree murder instruction given by the district court explained ***782** that, to find Little guilty, the jury needed to conclude that he "killed the victim with malice aforethought." (I ROA 881). Therefore, the "mere presence" instruction was not necessary—if the jurors concluded that Little killed the victim, they were necessarily not convicting based only on Little's "mere presence" at the scene. Ultimately, Little fails to establish that the district court's denial of his requested "mere presence" instruction was error, let alone plain error.

iii. The district court's reasonable doubt instruction was not plainly erroneous.

The district court's reasonable doubt instruction stated, in relevant part:

> If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

(I ROA 874) (emphasis added). Little argues that the underlined sentence shifted the burden to him. We disagree, as we have previously approved the language challenged by Little. See United States v. Petty, 856 F.3d 1306, 1310 (10th Cir. 2017) ("[T]he firmly convinced language, juxtaposed with the insistence that a jury must acquit in the presence of a real possibility that the defendant is not guilty, is a correct and comprehensible statement of the reasonable doubt standard." (cleaned up)). Therefore, Little has failed to establish that the reasonable doubt instruction was plainly erroneous.

iv. The district court's credibility instruction was not plainly erroneous.

Little challenges the district court's credibility instruction, which stated, in relevant part: "[Y]ou should keep in mind that innocent misrecollection—like failure of recollection—is not uncommon." (I ROA 879). Little argues that this instruction favored the government's evidence because

multiple government witnesses failed to recall important information. Little has failed to establish plain error.

The Supreme Court has explained that district courts must "use great care that an expression of opinion upon the evidence should be so given as not to mislead, and especially that it should not be one-sided." Quercia v. United States, 289 U.S. 466, 470, 53 S.Ct. 698, 77 L.Ed. 1321 (1933) (cleaned up). But the district court's instruction here was not one sided—it merely instructed the jury to consider that misrecollection is not uncommon when evaluating the credibility of all witnesses. Additionally, Little has failed to cite authority finding the challenged instruction unlawful, and this court has previously concluded that the instruction did not constitute plain error. United States v. Marshall, 307 F.3d 1267, 1270 (10th Cir. 2002) (holding the district court's use of the same language in credibility instruction was not plain error because there was no Supreme Court or Tenth Circuit precedent considering the language, and the Eighth Circuit had approved the language).

c. The district court's denial of Little's request to recross-examine Watkins does not warrant reversal.

Little argues that the district court erred by denying his counsel's request to recross Watkins after she testified for the first time on redirect that Weatherford was not a drug dealer. One of Little's defense theories at trial was that Weatherford ***783** could have been killed by someone related to his drug dealing activities, and therefore, Little argues, it violated his rights under the Confrontation Clause to be denied the opportunity to recross Watkins on that issue. [19]

"When a district court restricts cross-examination at trial, the party seeking to cross-examine forfeits a challenge on appeal by failing to state the ground for objection; stating a different ground at trial than on appeal; or by failing at trial to object to the limitation at all." United States v. Roach, 896 F.3d 1185, 1192 (10th Cir. 2018) (cleaned up). Little forfeited his challenge below by failing to offer any explanation of the grounds for his request to recross Watkins. [20] While Little did not argue plain error in his opening brief on appeal, we review for plain error because he argued under that standard in his reply brief after the government raised the preservation issue in its brief. See United States v. Leffler, 942 F.3d 1192, 1198 (10th Cir. 2019) (this court has "left open the door for a criminal defendant to argue error in an opening brief and then allege plain error in a reply brief after the Government asserts waiver").

We conclude that even if Little could establish the first three prongs of the plain error standard, he has failed to establish that any error "seriously affects the fairness, integrity, or public reputation of judicial proceedings. Cristerna-Gonzalez, 962 F.3d at 1260 (citation omitted). A denial of recross-examination on material matters brought out for the first time on redirect violates the Confrontation Clause of the Sixth Amendment, which weighs in favor of reversal under plain error review. See United States v. Riggi, 951 F.2d 1368, 1375 (3d Cir. 1991); United States v. Hauk, 412 F.3d 1179, 1197 (10th Cir. 2005) (when reviewing for plain error, "if the underlying right is constitutional, we are more likely to conclude that a remand would be appropriate"). However, it is not clear that the district judge had notice of the materiality of Watkins's testimony that Weatherford was not a drug dealer when Little's counsel requested recross—Little's counsel did not explain the basis for her request, and it does not appear that Little had presented his argument that Weatherford was a drug dealer before that time. And there was substantial evidence against Little—including the .300 caliber Remington rifle seized from his home, the bullet found in Weatherford, Little's placement near the scene at the time of the homicide, and the evidence of Little's hostility towards Watkins's past partners. United States v. Turrietta, 696 F.3d 972, 985 (10th Cir. 2012) (concluding error did not affect the integrity of judicial proceedings when the ***784** evidence left "no doubt the defendant was guilty of the charged offense"). Therefore, any error by the district court does not warrant reversal under the plain error standard.

d. None of the government's statements during closing argument warrant reversal.

Little challenges statements made by the prosecutor during closing argument, but he did not object to any of the statements below. When a "defendant fails to object to a prosecutor's statement, reversal is warranted only when: (1) the prosecutor's statement is plainly improper and (2) the defendant demonstrates that the improper statement affected his or her substantial rights." United States v. Fleming, 667 F.3d 1098, 1103 (10th Cir. 2011). "To make the prejudice determination, courts consider the trial as a whole, including the curative acts of the district court, the extent of the misconduct, and the role of the misconduct within the case." United States v. Christy, 916 F.3d 814, 826 (10th Cir. 2019)

(cleaned up). Ultimately, none of the prosecutor's statements below warrant relief.

"Repeated references to prejudicial facts not in evidence." (Aplt. Br. 60). "[P]rosecutorial comments may be improper when they refer to matters not in the evidence or distort the record by misstating the evidence." United States v. Hammers, 942 F.3d 1001, 1014 (10th Cir. 2019).

Little first points to the prosecutor's statement that "all" of the witnesses who spoke with police immediately after the shooting said "[l]ook at Justin Little." (II ROA 51-52). On appeal, the government concedes that this statement "overstated the evidence." (Aplee. Br. 46). That is correct—Chief Brown testified that "three or four" witnesses came to the police station and provided information, but she did not testify that each witness told the police to look at Little. (I ROA 636). Therefore, the statements were plainly improper. However, the statements were not "enough to influence the jury to render a conviction on grounds beyond the admissible evidence presented," as required for reversal. United States v. Orr, 692 F.3d 1079, 1097 (10th Cir. 2012). Chief Brown testified that "multiple people ... told police about incidents [between Weatherford and Little] that had happened prior to" the murder, and she testified that police spoke to Jana Robinson, who gave information regarding a suspect that was "consistent [with the investigation]." (I ROA 779, 851-52). Additionally, Little had an opportunity to respond to the prosecutor's statements in closing, and the district judge instructed the jury that "[t]he lawyers' statements and arguments are not evidence." (II ROA 30); see United States v. Lopez-Medina, 596 F.3d 716, 740 (10th Cir. 2010) (case involving prosecutor's statement that was not supported by the evidence, explaining that " 'a stray improper remark in closing is no basis for upsetting a trial and requiring the parties and district court to redo their ordeal,' " "especially ... where ... the jury is advised that arguments of counsel are not evidence" (citation omitted)).

Little next challenges the prosecutor's statement that "every single time [Watkins] tried to have a relationship with anybody after [her relationship with Little ended, Little] found a way to interfere with it in some way." (II ROA 37-38). This statement was not plainly improper, as it was supported by Watkins's testimony. When asked, "[a]fter you broke up with Mr. Little for good in 2015, did you ever again date a man that he did not attempt to interfere with in some way?" Watkins ***785** responded, "[n]o." (I ROA 595). [21]

Finally, Little challenges the prosecutor's speculation that Little "[c]ould ... have had a dark colored jacket." (II ROA 87). That statement was not plainly improper. In her closing argument, Little's counsel highlighted the fact that Little was wearing a light shirt when he was arrested and interviewed by police on the day that Weatherford was killed, and therefore his physical description did not match the individual seen in surveillance footage following Weatherford—that individual was wearing dark pants and a dark shirt. In response, the prosecutor highlighted the fact that Little was wearing dark pants and "[c]ould ... have had a dark colored jacket." (II ROA 87). "Prosecutors have considerable latitude to respond to an argument made by opposing counsel." United States v. Franklin-El, 555 F.3d 1115, 1126 (10th Cir. 2009) (citation omitted); see also United States v. Dazey, 403 F.3d 1147, 1170 (10th Cir. 2005) ("The prosecutor is entitled to argue to the jury that it should draw reasonable inferences from the evidence to support the government's theory of the case.").

"Vouching for the credibility of [a government] witness." (Aplt. Br. 63). "An argument is only improper vouching if the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' credibility, either through explicit personal assurance of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witness' testimony." Franklin-El, 555 F.3d at 1125 (cleaned up).

Little challenges the prosecutor's statement that Lackey, one of Watkins's ex-boyfriends who testified for the government, had "no dog in this fight"—meaning he had no motivation to lie. (II ROA 82). Lackey testified that he believed Little cut the brake lines to his car in 2017, and the prosecutor referenced this testimony at closing to support the government's argument that Little showed a pattern of interfering with Watkins's relationships. In response, Little's counsel argued that the evidence of the brake-cutting was speculative. The prosecutor then responded by stating that Lackey had "no dog in this fight" and explaining that "[Lackey] wants no part of any of this. He wants no part of the Justin Little drama that follows in [Watkins's] wake." (Id.). The prosecutor's statement accurately characterized testimony by Lackey, who explained that, after the brake-cutting incident, his relationship with Watkins ended and he left the National Guard unit in which he served with Little because he "just did not want to be around any of that." (I ROA 663). Therefore, the prosecutor's statement was not improper vouching.

"Improper comments on Little's guilt." (Aplt. Br. 64). It is generally improper for a prosecutor to provide his personal opinion about the defendant's guilt. United States v. Meienberg, 263 F.3d 1177, 1179-80 (10th Cir. 2001).

Little argues that the prosecutor made two statements in closing that improperly commented on Little's guilt: when discussing Little's interrogation, during which Little was asked whether a lie detector ***786** would reveal that his statements to officers were truthful and Little initially answered affirmatively but then admitted to lying, the prosecutor said that was not "what an innocent person does" (II ROA 43); and when discussing Little's request to see the evidence collected by police before continuing to answer questions in the interrogation, the prosecutor again said, "none of this is what an innocent person does" (II ROA 47).

These statements were plainly improper—the prosecutor stated that an innocent person would not behave the way Little behaved, and this statement had no basis other than the prosecutor's personal opinion. However, given the strength of the evidence against Little, the opportunity for Little's counsel to respond, and the district court's instruction to the jury that the lawyers' arguments were not evidence, Little has failed to establish that the statements affected the jury's decision, as required for relief. See Meienberg, 263 F.3d at 1180 (finding prosecutor's comments on the defendant's guilt not prejudicial in part because the district court instructed the jury that the lawyers' arguments were not evidence).

e. Even when considered cumulatively, any errors by the district court do not warrant reversal.

Little argues that errors by the district court cumulatively warrant reversal. When there are both preserved and unpreserved errors, we first consider whether the preserved errors are cumulatively harmless. United States v. Caraway, 534 F.3d 1290, 1302 (10th Cir. 2008). If they are, "the prejudice from the unpreserved error is examined in light of any preserved error that may have occurred." Id. Little has identified no preserved errors, and, at most, three unpreserved errors—two statements by the prosecutor that Little displayed conduct that did not match that of an innocent person, and the district court's denial of Little's counsel's request to recross Watkins. Little has failed to carry his burden of establishing that these errors cumulatively affected the jury's decision in his case, as required for relief.

f. Substantial evidence supported Little's conviction.

Little challenges the sufficiency of the evidence against him. This court

> review[s] the sufficiency of the evidence de novo, considering the evidence in the light most favorable to the government to determine whether any rational jury could have found guilt beyond a reasonable doubt. ... In conducting our review, we consider all of the evidence, direct and circumstantial, along with reasonable inferences, but we do not weigh the evidence or consider the relative credibility of witnesses. ... Consequently, our review of the evidence is highly deferential[, and] we may reverse only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

United States v. Griffith, 928 F.3d 855, 868-89 (10th Cir. 2019) (cleaned up).

Based on the evidence described above, (see supra Part I), we conclude that a rational trier of fact could have found beyond a reasonable doubt that Little committed first-degree murder.

g. Little's Eighth Amendment challenge to his mandatory life sentence is foreclosed by precedent.

Little challenges his mandatory life sentence under the Eighth Amendment on the ground that "he was 24 at the time of the offense and neuroscience now demonstrates that the adolescent brain develops ***787** until age 25 or 26." (Aplt. Br. 69) (citing Miller v. Alabama, 567 U.S. 460, 471-72, 480, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (holding mandatory life without parole for juveniles violated the Eighth Amendment in part because juveniles' brains are not fully developed and are therefore both less culpable and more capable of reform)). Little's challenge is foreclosed by

this court's precedent. United States v. Williston, 862 F.3d 1023 (10th Cir. 2017) (rejecting eighteen-year-old defendant's argument that Miller should be applied to him, and not just juveniles, and stating, "[i]f the Miller ruling is to be expanded, it is the province of the Supreme Court to do so.").

IV. CONCLUSION

In sum, we hold that the Oklahoma state officers who investigated Little's offense on the Creek Reservation in April 2018 could reasonably believe that they had jurisdiction to investigate and arrest Little. While our 2017 decision in Murphy held that the Creek Reservation had not been disestablished, that decision still does not warrant exclusion here. The state officers who investigated and arrested Little could still reasonably have believed after Murphy that they had jurisdiction to do so based on a combination of multiple unique facts, none of which are independently sufficient—the stay of the mandate in Murphy, suggestions of potential reasons for our stay of the mandate, the potential for Supreme Court review, and the continued understanding in Oklahoma that the state had jurisdiction over offenses on the Creek Reservation.

Finally, none of Little's other arguments warrant relief. Therefore, we AFFIRM Little's conviction and sentence.

All Citations

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Footnotes

1 United States v. Leon, 468 U.S. 897, 907, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

2 While McGirt and the present case involve offenses committed on the Creek Reservation, this court relied on a concession by counsel in Pemberton that the disestablishment analysis from McGirt applies equally to the Cherokee Reservation. Pemberton, 94 F.4th at 1136 n.4.

3 Pemberton specifically supports the application of the good faith exception to the warrantless police conduct at issue here. Generally, "Leon's good-faith exception to the exclusionary rule ... applies only narrowly outside the context of a warrant." United States v. Herrera, 444 F.3d 1238, 1251 (10th Cir. 2006). However, we applied the good faith exception in Pemberton to evidence obtained from a warrantless arrest. Pemberton, 94 F.4th at 1140. We explained that, if officers could reasonably believe that they had jurisdiction to seek a search warrant to investigate such offenses, then they could also reasonably believe that they had jurisdiction to conduct lawful warrantless investigative operations for the same offenses.

4 We stayed the mandate "for 90 days and/or until the deadline passe[d] for filing a certiorari petition in the Supreme Court," and provided that the stay would continue "until the Supreme Court's final disposition" if this court received notice that the respondent had filed a certiorari petition. Order Granting Unopposed Motion to Stay the Mandate Pending the Filing of a Petition for Writ of Certiorari, Murphy, 875 F.3d 896 (Nos. 07-7068, 15-7041). Royal filed a petition for certiorari on February 6, 2018. The mandate issued on August 26, 2020.

5 While the Supreme Court did not grant certiorari in Murphy until May 21, 2018—after the April 2018 investigation in this case—there was still uncertainty regarding the future of our Murphy decision in April 2018 given the pending certiorari petition and the context surrounding the stay of our mandate.

6 We are unpersuaded by Little's argument that the evidence at trial indicates that officers did not actually view the surveillance footage of Little's vehicle before they arrested him. Chief Brown testified at trial that police did not "have" surveillance video before arresting Little, but only "had" the grainy photos of the video. (I ROA 636). But Chief Brown also provided testimony indicating that police reviewed the video before the arrest: "Although there were a lot of people at the aquatic center, there weren't a lot of people driving on the road at

that time, surprisingly enough, so [Little's vehicle] just kind of stood out when we were looking at the video footage." (Id. at 634) (emphasis added).

7 Little does not argue on appeal that his mother lacked authority to consent to the search.

8 We are not persuaded by the cases Little cites to support his argument that officers needed to re-Mirandize him on April 23. See, e.g., Coddington v. Sharp, 959 F.3d 947, 951, 959-60 (10th Cir. 2020) (rejecting argument that the defendant needed to be re-Mirandized when he was interrogated at a police station about three hours after he was Mirandized at his home when officers asked the defendant if he remembered being read, and waiving, the Miranda rights, and the defendant responded affirmatively—especially given the defendant's previous experience with law enforcement and the Miranda warnings). While Chief Brown did not ask Little if he remembered the Miranda warnings and his waiver, and therefore Coddington is distinguishable, she did inform Little that his rights "still st[ood]" and confirmed that he wanted to continue speaking to the officers. When combined with the factors discussed above, this was sufficient to support our conclusion that circumstances had not changed so seriously that Little no longer understood his rights.

9 The case upon which Little relies to support his invocation argument, United States v. Giles, 967 F.2d 382 (10th Cir. 1992), does not help him, as that case was decided before the Supreme Court clarified the standards to be applied when considering invocations in Davis (1994).

10 A criminal defendant can challenge the admission of his own involuntary statements under both the privilege against self-incrimination and the Due Process Clause. It is unclear from Little's brief which theory he is presenting on appeal. However, the inquiry is the same under either theory. Cash, 733 F.3d at 1280.

11 Fed. R. Evid. 404(b) provides: "(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. (2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

12 Little does not challenge the admission of the lens cover on appeal. He appears separately to challenge the admission of the rifle and the rifle's scope, which was attached to the rifle. However, he did not raise a separate challenge to the admission of the scope before the district court. To the extent that he raises a separate challenge on appeal to the admission of the scope, that challenge is waived because he did not argue plain error in his appellate briefs. Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1130-31 (10th Cir. 2011).

In his reply brief, Little argues, "[t]he scope was attached to the rifle and therefore challenging the admission of the rifle encompassed the scope." (Aplt. Reply Br. 24). Therefore, we do not address the scope separately and instead focus on whether the district court abused its discretion in denying Little's request to exclude the rifle.

13 Little points to other evidence to suggest that the rifle was not relevant: "[t]here was not a rifle depicted in the surveillance videos that allegedly showed the killer running after Weatherford"; and "[t]he ballistics evidence demonstrated the bullet may have been fired from a Remington rifle or one of 42 other makes and models of guns." (Aplt. Br. 47). This evidence does not establish that the rifle was not relevant, but instead goes to the extent of the rifle's probative value. Given the very low threshold presented by Fed. R. Evid. 401 and 402, the district court did not abuse it discretion in concluding that the rifle was relevant.

14 Little raises a second argument—that the rifle was not relevant because the government did not prove that the rifle was seized from Little's home—although he also stated in his reply, "[t]he issue is not chain of custody." (Aplt. Reply Br. 24). Nonetheless, the government presented evidence establishing that the rifle admitted at trial was the one seized from Little's home: Chief Brown testified that she seized the rifle from

Little's home; she testified that a photograph admitted at trial depicted the rifle taken from Little's home; and a government expert who examined the rifle before trial testified that the rifle admitted at trial was the same rifle that was depicted in the photograph admitted at trial.

15 Neither of Little's counterarguments is persuasive. First, Little argues that Watkins never testified regarding Little's reaction to her statement, and therefore the statement was not really admitted for the purpose of showing its effect on Little. (Aplt. Br. 50) (quoting United States v. Graham, 47 F.4th 561, 567 (7th Cir. 2022) ("A statement is offered to show an effect on the listener only if the listener heard and reacted to the statement ... and if the 'actual use' of the statement at trial was to demonstrate the listener's response" (citations omitted)). That is incorrect—the prosecutor asked Watkins how Little responded to her statement, and Watkins described Little's reaction.

Second, Little points to examples in the record that it believes demonstrate that the government used the statement for its truth. For example, the government asked Watkins why she told Little that she intended to stay with Weatherford. This does not undermine the government's argument that the statement was admitted to demonstrate its effect on Little—the government wanted the jury to hear Watkins's motivation for the statements, which was informing Little that she intended to be with Weatherford, not Little.

16 To the extent that Little argues on appeal that Watkins's statement was inadmissible hearsay, we disagree. Watkins did not testify about her prior statement when she was interviewed by police, but instead answered the prosecutor's question about her present recollection of what she believed at that time.

17 Before selecting the jury, the district court asked both parties if they had "any exceptions either to an instruction I am giving or to one I'm not giving that you wish – that you proposed?" (I ROA 719). Both parties said no. The judge provided the jury with copies of the approved instructions on the first day of trial. Then, on the last day of trial, the judge gave the jury the final set of instructions—which were the same as the initial set of instructions except one instruction had been deleted and one had been added. Before giving the final instructions to the jury, the district court reviewed the instructions with the parties, and Little did not object.

18 In Starks, the district court provided the jury with printed copies of the instructions and read the instructions to the jury before the parties presented evidence. Starks, 34 F.4th at 1150. The district court did not re-read most of the instructions before the jury began deliberations two days later. Id. at 1154. This court in Starks recognized the discretion provided to district judges by Rule 30(c), but we also explained "that some courts have deemed such an unconventional approach—involving the pre-evidence oral delivery of instructions—to be problematic and even legally erroneous, where, as here, the full set of instructions is not repeated at the end of the presentation of evidence." Id. at 1163.

19 As an initial matter, it does not appear that Little asserted his theory regarding Weatherford's alleged drug-dealing activities until after Watkins testified. On appeal, Little cites testimony by an investigating officer that Weatherford was a known drug dealer and was warned to "be careful." (I ROA 862). However, that testimony occurred after Little's counsel's request to recross Watkins. Additionally, Little cites his trial counsel's opening statement, but that statement did not include any indication of Little's argument that Weatherford was a drug dealer. (Id. at 761-64).

20 After the government completed its redirect of Watkins, Little's counsel stated, "Your honor, just a few – brief redirect – I'm sorry – recross questions." (I ROA 597). The district judge responded, "That's okay. We'll go ahead," and dismissed Watkins. (Id.).

We are unpersuaded by Little's argument that the district court cut off his counsel before she could explain the grounds for the recross request, especially given that, before cross-examining a different witness at trial,

she requested a side bar and provided the exact explanation that was lacking with respect to the request to recross Watkins.

21 Little also argues that the prosecutor's statement violated the district court's Rule 404(b) order, which limited the government's ability to present prior acts evidence regarding specific incidents involving some of Watkins's ex-boyfriends. We disagree. The Rule 404(b) order did not prohibit Watkins's broad statement about Little's interference with her past relationships, but instead listed a few specific prior acts which could not be presented at trial. Therefore, the prosecutor did not violate the order by referring to Watkins's generalized statement.

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Appendix C

United States v. Little
No. 23-5077, ECF No. 97 (10th Cir. Feb. 3, 2025)
Order Directing Government to Respond

02/03/2025	☐	97	[11155738] Order filed by Clerk of the Court, at the direction of the court, directing the appellee to file a response to appellant's petition for panel and en banc rehearing. Response due on 02/13/2025 for United States of America. Served on 02/03/2025. Text only entry - no attachment. [23-5077] [Entered: 02/03/2025 12:28 PM]

Appendix D

United States v. Little, No. 23-5077, ECF No. 98 (10th Cir. Feb. 13, 2025)
Response to Petition for Rehearing

CASE NO. 23-5077

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

JUSTIN DALE LITTLE,
Defendant/Appellant.

On Appeal from the United States District Court
for the Northern District of Oklahoma

The Honorable John F. Heil, III, Chief District Judge (Pretrial Matters)
The Honorable Michael W. Mosman (Trial and Sentencing)
Case No. 21-CR-00162-MWM

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February 13, 2025

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Introduction

En banc review is not warranted where this Court held that the evidence obtained pre-*McGirt* by a local police department was admissible in the federal prosecution under the good-faith exception, even though the local police lacked jurisdiction when they collected the evidence. *See United States v. Little*, 119 F.4th 750 (10th Cir. 2024). The panel's decision is consistent with Supreme Court precedent and this Court's precedent. None of Little's claims of error are meritorious, and he fails to identify any issue of exceptional public importance or any conflict with decisions from the Supreme Court or this Court. Therefore, this Court should deny Little's Petition for Panel Rehearing and Rehearing En Banc.

Background

In late 2019, a jury in Tulsa County jury convicted Little of first-degree murder for killing Jonathan Weatherford, his ex-girlfriend's new boyfriend. *See Little v. State of Oklahoma*, F-2020-125 (OCCA June 17, 2021) (unpublished). Little successfully argued on appeal that the Supreme Court's 2020 opinion in *McGirt v. Oklahoma* required dismissal of his state case because he is a Seminole and the offense occurred on the Muscogee (Creek) Reservation. *Id*. Shortly after the Oklahoma court vacated Little's conviction, a federal grand jury

charged Little with first-degree murder in Indian Country. (R. Vol. I at 17, 878).

At the federal trial, the jury heard evidence that Little shot and killed Mr. Weatherford in cold blood, out of jealousy that Mr. Weatherford was now dating Hannah Watkins, whom Little used to date. (R. Vol. I at 512).

When Mr. Weatherford's body was found with fatal rifle wounds in Jenks, Oklahoma, on April 22, 2018, local police investigated the murder. (*Id.* at 855–58). Officers canvassed the area, spoke to dozens of people, and found surveillance footage from nearby businesses. (*Id*. at 626–27). Little spoke to the officers and gave inconsistent statements about whether he had been in Jenks at the time of the killing and whether he had seen Weatherford that day. (Supp. R. Vol. III at Ex. 31 at 13:58–19:33; 24:18–24:34; 32:41–33:10; 39:08–40:46). He admitted he owned a rifle but claimed it was at a shooting range. (*Id*. at 39:27–40:05). Police obtained a search warrant for Little's truck and spoke to Little's mother, who consented to their seizure of the Remington rifle, which was in her home, not at the shooting range. (R. Vol. I at 785–86). The rifle had a scope on it, and officers found its lens cap in Little's truck. (*Id*. at 786–87). Surveillance videos and phone records helped police identify Little as the shooter. (R. Vol. I at 799–811).

A few months before the shooting, this Court decided *Murphy v. Royal*, holding that Congress had not disestablished the Muscogee (Creek) Reservation, and therefore the State of Oklahoma lacked criminal jurisdiction over an Indian who committed a felony on the Creek reservation. 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 591 U.S. 977 (2020). After the *Murphy* decision was issued, the panel granted an unopposed motion to stay the mandate arguing that the issuance would require "a significant shift in how law enforcement and criminal prosecution is conducted in the area at issue," involving "substantial resource expenditure," that might not be necessary if the Supreme Court reversed. *Little*, 119 F.4th at 768–69. This Court granted that motion. *Id.* at 769. Concurring in the denial of rehearing en banc, Judge Tymkovich noted that "this case might benefit from further attention by the Supreme Court." *Murphy*, 875 F.3d at 966 (Tymkovich, C.J. concurring). Between *Murphy* and the Supreme Court's decision in *McGirt*, the state of Oklahoma continued to "operate … under the assumption that it had jurisdiction over offenses committed on the Creek reservation." *Little*, 119 F.4th at 769 (*citing Bosse v. State*, 499 P.3d 771, 774 (Okla. Crim. App. 2021) ("[N]o final decision of an Oklahoma or federal appellate court had recognized any of the Five Tribes' historic reservations as Indian Country prior to *McGirt* in 2020.") (emphasis in *Little*)).

Before trial, Little moved to suppress, arguing that the local police did not have jurisdiction to investigate his case in 2017, and therefore all evidence collected during that investigation should be excluded. (R. Vol. I at 172–78). The government responded that even if the local officers lacked jurisdiction, the good-faith exception to the exclusionary rule should apply. (R. Vol. I at 283–90). The district court denied Little's motion, noting that Oklahoma federal courts had uniformly refused to suppress evidence gathered by police officers who reasonably acted under the belief Oklahoma had jurisdiction after *Murphy* but before *McGirt*. (*Id*. at 324–25).

Little appealed the Fourth Amendment ruling, arguing that the good-faith exception did not apply because after *Murphy,* local officers could not reasonably believe they had jurisdiction. Apl't. Br. at 13–16. In response, the government conceded that the local officers lacked jurisdiction over Indians in Indian Country but noted that the exclusionary rule did not mandate suppression of the evidence against Little. It observed that Oklahoma state and federal courts did not regard *Murphy* as binding because the Tenth Circuit had stayed its mandate, and the officers acted in accordance with the historical practice of investigation and prosecution in Oklahoma. Aple. Br. at 18–19.

The panel held that *Murphy* did not "defeat application of the good faith exception in this case," and that, until *McGirt*, "state officers could reasonably

believe that they could lawfully investigate offenses on the Creek Reservation." *Little*, 119 F.4th at 768.

Argument

En banc review is unwarranted because the panel's opinion creates no conflict with precedent and Little's appeal presents no issue of exceptional public importance.

"En banc review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court." 10th Cir. R. 35.1(A); *see also* Fed. R. App. P. 35(a). Neither exists in this case. The panel correctly interpreted authority from the Supreme Court and this Court in applying the good-faith exception to the exclusionary rule.

A. The panel correctly determined that the good-faith exception applied.

En banc review is unwarranted because the panel correctly held that given the circumstances that existed between *Murphy* and *McGirt*, a state officer could reasonably believe he could lawfully investigate offenses on the Creek reservation. *Little*, 119 F.4th at 768. Additionally, the panel correctly found that the deterrence benefit of suppression did not outweigh the heavy cost of holding that the fruits of every investigation, warrant, and arrest conducted by state officials between *Murphy* and *McGirt* in Indian Country should be

suppressed. *Id.* at 770.

"To remedy Fourth Amendment violations, federal courts ordinarily invoke and apply the exclusionary rule, precluding the government from introducing at trial unlawfully seized evidence." *Id.* at 766 (*citing United States v. Pemberton*, 94 F.4th 1130, 1137 (10th Cir. 2024)). But exclusion is not an automatic remedy. *Id.* The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *Id.* (*citing United States v. Calandra*, 414 U.S. 338, 348 (1974)). "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system . . . the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct." *Herring v. United States*, 555 U.S. 135, 144 (2009). Deterrent value is necessary for exclusion but not sufficient. *Davis v. United States*, 564 U.S. 229, 237 (2011). For exclusion to be appropriate, "the deterrence benefits of suppression must outweigh its heavy costs." *Id.*

As the panel noted, the good-faith exception may apply in cases where officers act objectively reasonably under the circumstances. *Little*, 119 F.4th at 767. This Court has already held that the historical context of *McGirt* bears on whether officers were objectively reasonable in believing they had jurisdiction.

United States v. Pemberton, 94 F.4th 1130, 1136 (10th Cir. 2024) (*cert. denied Pemberton v. United States*, __ S.Ct. __ (Nov. 25, 2024)). In *Pemberton*, this Court recognized that Oklahoma state courts had entertained prosecutions for major crimes by Indians for over a hundred years. *Id*. While *McGirt* shows this practice was legally erroneous, it was not unreasonable for officers to rely on that precedent absent a clear statement that they did not have such jurisdiction. *Id*. at 1139. This Court identified *McGirt*, rather than *Murphy*, as the decision that provided that clear statement. *Id*. ("But that rationale would not apply here . . . officers did not seek and execute a state warrant in the face of clearly established law recognizing that such a warrant would be beyond the jurisdiction of the state court . . . *McGirt* did not come along for sixteen more years.").

Murphy did not change the status quo. Although *Murphy* held that the Creek reservation had not been disestablished and that the state did not have jurisdiction to prosecute major crimes against Indian defendants, immediate compliance *Murphy* "would have required an overnight sea change in criminal investigation and prosecution." *Id*. at 769. The context surrounding the decision to stay the mandate "specifically indicated to law enforcement that the issuance of [the *Murphy* opinion] did not require [that] overnight sea change." *Id*. The motion to stay the mandate sought to avoid a significant,

expensive, and potentially unnecessary shift in law enforcement and criminal prosecution between state, federal, and tribal authorities. *Id*. This Court granted the stay without questioning the motion's central premise: that staying *Murphy*'s mandate would also stay *Murphy*'s enforcement. *Id*. Indeed, Chief Judge Tymkovich, in concurring with the denial of rehearing en banc in *Murphy*, openly invited the Supreme Court to weigh in on the potentially watershed decision. *Id*.

Through their actions after *Murphy* and the ensuing stay, Oklahoma officials demonstrated their belief they still had jurisdiction over offenses like Little's. *Id*.; *see e.g., United States v. Bailey*, 2024 WL 3101681 at *1 (10th Cir. June 24, 2024); *Bosse* 499 P.3d at 774. Likewise, multiple federal judges in Oklahoma concluded the stay of the mandate stayed the enforcement of *Murphy*. (R. Vol. I. at 323–24). Considering those circumstances, the panel was correct to hold that in 2017, a reasonable Oklahoma officer could have believed they still had jurisdiction to investigate a murder in the Creek reservation. *Id*. at 768–70.

When a court of appeals signals that law enforcement need not yet change their processes, following that signal can hardly be "deliberate, reckless, or grossly negligent disregard for the Fourth Amendment," sufficient to warrant the heavy toll on the judicial system and society of suppressing evidence of a

crime. *See Davis*, 564 U.S. at 236–38.

As the panel noted, this case is "unlike the typical good faith case." *Little*, 119 F.4th at 770. It does not concern a misguided law enforcement tactic, a mistaken police department policy, or an incorrect database. This rule finally decided by *McGirt* implicates *every investigation* conducted by state officers in Indian Country after *Murphy* and before *McGirt*. *Id*. Suppressing evidence from all pre-*McGirt*/post-*Murphy* investigations where officers relied on the state's 100-year-old interpretation of the scope of its criminal jurisdiction would carry a tremendous social cost. Such a result would have a correspondingly low deterrent value because the law enforcement situation in Oklahoma between *Murphy* and *McGirt* was unprecedented and is not likely to be replicated. Therefore, the panel correctly held that this was not the sort of "sufficiently deliberate" conduct as would justify the price of applying the exclusionary rule. *Id*. (*citing Herring*, 555 U.S. at 144).

Little misapprehends both the panel's holding and the exclusionary rule. First, Little relies on out-of-circuit, distinguishable cases to argue that an opinion is always binding as soon as the court issues it and that no motions practice or orders issued thereafter could bear on a reasonable officer's interpretation of the significance of the opinion. Apl't Pet. at 8–14. None of the out-of-circuit cases Little cites involve a situation analogous to the present

case. *See Glob. Naps, Inc. v. Verizon New England, Inc.*, 489 F.3d 13, 19 (1st Cir. 2007) (discussing whether district court could properly accept a pleading from a party before the appellate court issued a mandate); *Cox v. Dep't of Just.*, 111 F.4th 198 (2d Cir. 2024) (chastising party for failing to cite binding authority in argument regarding FOIA definition of "agency record" based on belief the authority could be overturned on appeal); *Hernandez-Gutierrez v. United States Dist. Court (In re Zermeno-Gomez)*, 868 F.3d 1048 (9th Cir. 2017) (issuing writ of mandamus for defendants shackled in court without an "individualized decision that a compelling government purpose" required them to be shackled); *Martin v. Singeltary*, 965 F.2d 944 (11th Cir. 1992) (finding a death row inmate's third federal habeas petition was abusive or successive and the petitioner had not demonstrated the necessary cause or prejudice to overcome procedural bars). More importantly, in none of the cases cited by Little did a circuit court "*specifically indicate[]* to law enforcement that the issuance of [an opinion] *did not* require the overnight sea change." *Little*, 119 F.4th at 769.

Little misreads the panel's holding in claiming it has created an "undefined unique circumstances," test that will determine whether the public must comply with an opinion when the mandate was stayed. Apl't Pet. at 10. Far from creating a vague, generally applicable test, the panel explicitly re-affirmed the general rule that this Court's "opinions have precedential effect when

issued, even when the mandate has not yet issued," and that it was "not suggesting that states and officers need not immediately comply with our precedential decisions when issued." *Id.* at 770. The panel followed longstanding precedent that the existence of the good-faith exception requires inquiry into the specific circumstances facing the officers at the time they obtained a warrant or made an arrest. Considering the unique circumstances facing Oklahoma law enforcement officers between *Murphy* and *McGirt*, including an indication by this Circuit that the status quo had not changed, the panel did not contravene precedent when it held the officers here acted in good faith. *Id.*

Little understates the scope of the good-faith exception when he argues that the exception applies only if officers act in reliance on binding judicial precedent. Apl't Pet. at 4–5. Although *Davis* held that evidence obtained by officers acting in reasonable reliance on then-binding precedent is not subject to the exclusionary rule, *Davis* did not cabin the good-faith exception to only those circumstances. *Davis*, 564 U.S. at 236–42. In fact, *Davis* approvingly cited cases involving various different scenarios where the good-faith exception was successfully invoked. *Id.* at 238–39 (explaining that the Court has applied the good-faith exception when police rely on a warrant later held invalid, a subsequently invalidated statute, or an error in a judicial or police-generated

warrant database). Regardless, under the unique circumstances between *Murphy* and *McGirt*, Oklahoma local and state officials continuing to investigate and prosecute major crimes committed by Indians were not behaving "clearly contrary to the law." *Id*. at 768–70.

B. Little's other authorities warrant no different conclusion.

United States v. Budder, 76 F.4th 1007 (10th Cir. 2023), cannot hold the weight Little attempts to place on it. *Budder* was not an exclusionary rule case. Rather, *Budder* considered whether a defendant could be prosecuted in federal court post-*McGirt* based on Indian Country jurisdiction for a crime he committed before *McGirt* was decided. This Court answered yes. 76 F.4th at 1015–16. But the answer was yes in *Budder* because the Due Process Clause plays only a limited role in the context of retroactive application of judicial decision-making. "[T]he prohibition of the ex post facto application of judicial decisions" under the Due Process Clause "is less extensive than the prohibition of ex post facto statutes" under Article I. *Evans v. Ray*, 390 F.3d 1247, 1251 (10th Cir. 2004). So long as a new judicial interpretation of a criminal law is not "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," retroactive application of that new judicial interpretation will not give rise to a due process violation. *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001).

Budder lost under *Rogers'* exacting rubric because the result in *McGirt* was not so "unexpected and indefensible" compared to what had come before that charging him in federal court with what was unmistakably a federal crime violated Due Process. 76 F.4th at 1015–16. *Budder* is not inconsistent with the panel's result here. The result in *McGirt* was not inconceivable between 2017 and 2020. But it was far from a foregone conclusion. The former principle helps explain the result in *Budder*, and the latter supports the panel's holding here. Moreover, based on how this Court reacted to the motion to stay mandate in *Murphy*, it was not unreasonable for officers after *Murphy* but before *McGirt* to believe (albeit incorrectly) that they had the same jurisdiction they thought they had before *Murphy*.

Little is simply mistaken that the panel's decision in this case is contradictory to *Allen v. Crow*, No. 22-6141, 2023 WL 5319809 (10th Cir. Aug. 18, 2023) (unpublished) *and Johnson v. Louthan*, No. 22-5064, 2022 WL 4857114 (10th Cir. Oct. 4, 2022) (unpublished). Apl't Pet. at 13–14. First, both are unpublished dispositions involving 28 U.S.C. § 2254 petitions. *Id.* Second, neither case had a similar procedural posture, and neither case deals with the exclusionary rule. *Id*. Both involve untimely petitions found to be procedurally barred. (*Id*.). Separate panels noted that Allen and Johnson could have brought jurisdictional challenges to the exercise of state-court jurisdiction over them

even before *McGirt* was issued (as Jimcy McGirt himself did) and denied Certificates of Appealability to appeal the district court's time-bar rulings. 2023 WL 5319809, at *2–3; 2022 WL 4857114, at *3. Therefore, *Allen* and *Johnson* do not conflict with the panel's decision here.

C. Little's argument about the specific instruction the officers here received is procedurally barred and would also fail on the merits.

Similarly, Little wrongly suggests that the government's failure to present testimony that the officers were instructed not to follow *Murphy* provides a basis for en banc review. Apl't Pet. at 19–20. First, Little did not advance this argument in any lower court proceeding or the merits briefing, and it is therefore waived. *See United States v. Warwick*, 928 F.3d 939, 944–45 (10th Cir. 2019) (arguments not presented to the district court at the suppression hearing are waived on appeal). Second, the good-faith analysis is objective, not subjective. *Heien v. North Carolina*, 574 U.S. 54, 66 (2014) ("The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes – whether of fact or of law – must be *objectively* reasonable. We do not examine the subjective understanding of the particular officer involved."). But even if the standard were not objective, the panel listed multiple previous state and federal decisions establishing that prosecutors and judges in Oklahoma subjectively believed that the stay in *Murphy* maintained the status quo, pre-*Murphy*. *Little*,

119 F.4th at 769.

Conclusion

Because Little fails to identify an aspect of the panel's holding that conflicts with authority from the Supreme Court or of this Court or that presents an issue of exceptional public importance, the Court should deny Little's Petition for Rehearing En Banc.

Respectfully submitted,
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I certify that on February 13, 2025, I electronically transmitted the foregoing to the Clerk of the Court using the ECF System for filing, which will send notification of that filing to the following ECF registrant:

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Appendix E

United States v. Little, No. 23-5077, ECF No. 99
(10th Cir. Mar. 3, 2025)
Order Denying Rehearing

FILED
United States Court of Appeals
Tenth Circuit

March 3, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUSTIN DALE LITTLE,

Defendant - Appellant.

No. 23-5077
(D.C. No. 4:21-CR-00162-MWM-1)
(N.D. Okla.)

ORDER

Before **TYMKOVICH**, **EBEL**, and **EID**, Circuit Judges.

This matter is before the court on Appellant's Petition for Panel and En Banc Rehearing and Appellee's Response to the Petition for Rehearing En Banc. Upon consideration, Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk