No.

IN THE SUPREME COURT OF THE UNITED STATES

TYLER JAY MULLINS,
PETITIONER,
V.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX

Katayoun A. Donnelly
Azizpour Donnelly LLC
2373 Central Park Blvd.,
Suite 100
Denver CO, 80238
(720) 675-8584
katy@kdonnellylaw.com

Member of the Tenth Circuit's CJA Appellate Panel
Counsel for Petitioner

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Opinion of the Tenth Circuit Court of Appeals

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TYLER JAY MULLINS,

Defendant - Appellant.

No. 24-7003

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:21-CR-00060-CBG-1)

Katayoun A. Donnelly, Azizpour Donnelly LLC, Denver, Colorado, for Defendant-Appellant.

Patrick M. Flanigan, Assistant United States Attorney (Christopher J. Wilson, United States Attorney, with him on the brief), Muskogee, Oklahoma, for Plaintiff-Appellee.

Before **PHILLIPS**, **KELLY**, and **MORITZ**, Circuit Judges.

PHILLIPS, Circuit Judge.

In 2002, Tyler Jay Mullins pleaded guilty in Oklahoma state court to murdering his ex-girlfriend. But after the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020), the state court vacated his conviction for

lack of jurisdiction. Soon after, a federal grand jury charged Mullins with murder in Indian country, in violation of 18 U.S.C. §§ 1111(a), 1151, and 1153; using, carrying, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(i)–(iii); and causing the death and murder of another while violating 18 U.S.C. § 924(c), in violation of 18 U.S.C. § 924(j)(1). The district court dismissed the § 924(c) count as time-barred. A jury convicted Mullins on the other two counts.

Mullins now appeals. He argues that the district court erred in three ways: (1) by denying his motions to stay proceedings or dismiss the indictment for substantial failure to comply with the Jury Selection and Service Act, 28 U.S.C. §§ 1861–78; (2) by denying his motion to suppress his statements directing law enforcement to the location of his ex-girlfriend's body; and (3) by denying his motion to compel disclosure of communications between the government and his former counsel.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. First, because Mullins never satisfied the Jury Act's procedural requirements, the district court did not err in denying his Jury Act motions. Second, because Mullins did not direct officers to his ex-girlfriend's body during plea discussions with the prosecuting authority, the court did not err in denying his motion to suppress. And third, even if the court erred in denying Mullins's motion to compel, that error was harmless.

BACKGROUND

I. Factual Background

Early one morning in 2002, Rachel Woodall disappeared from her home in Ada, Oklahoma. Woodall's ex-boyfriend Tyler Mullins quickly became a suspect.

A neighbor had seen him rifling through Woodall's car the morning she disappeared. And later that morning, Mullins had called Woodall's mother and boyfriend. Mullins acted oddly on the calls and asked about Woodall's whereabouts.

When officers located Mullins soon after, he had several superficial injuries. Though he claimed some guys beat him up, his injuries seemed inconsistent with that claim. For example, he had several "fingernail-like scratches" and bruising on his right hand.

Later that day, officers searched Mullins's car and house. They found blood in his car trunk. They also found bloodstained shoes in his house.

The next day, after speaking with his attorney, Mullins led law enforcement to Woodall's body. She was buried in a shallow grave and wrapped in a blue tarp. She also had several injuries, including three gunshot wounds to the head.

II. Procedural History

A. State Proceedings

Oklahoma charged Mullins with first-degree murder. He pleaded guilty about eight months later, and the state court sentenced him to life without parole.

About seventeen years after that, the Supreme Court decided *McGirt*. There, the Court held that some portions of eastern Oklahoma were Indian country. 591 U.S. at 897–98. And under the Major Crimes Act, only the federal government can prosecute certain crimes committed by Indians in Indian country. *Id.* at 932; *see also* 18 U.S.C. § 1153.

Because Mullins was an enrolled member of a federally recognized Indian tribe and the crime occurred within the Chickasaw Nation Reservation,[1] Oklahoma had lacked jurisdiction to prosecute him. As a result, a state-court judge granted Mullins's request for post-conviction relief.

B. Federal Proceedings

In 2021, a federal grand jury indicted Mullins for (1) murder in Indian country, in violation of 18 U.S.C. §§ 1111(a), 1151, and 1153; and (2) causing the death and murder of a person while violating 18 U.S.C. § 924(c), in

[1] In *Bosse v. Oklahoma*, the Oklahoma Court of Criminal Appeals held that "the Chickasaw Reservation was never disestablished by Congress, and the lands within its historic boundaries are Indian Country." 499 P.3d 771, 774 (Okla. Crim. App. 2021) (citing 18 U.S.C. § 1151).

violation of 18 U.S.C. § 924(j)(1).[2] A jury ultimately convicted Mullins on both counts.

Three district-court rulings take center stage. We detail them below.

1. Motion to Suppress under Federal Rule of Evidence 410(a)(4)

Before trial, Mullins moved to suppress his statements directing law-enforcement officers to Woodall's body, as well as all derivative evidence. Mullins argued that he made these statements during plea negotiations, making them inadmissible under Federal Rule of Evidence 410. That rule prevents the government from using against a defendant any "statement made during plea discussions with an attorney for the prosecuting authority if the discussions . . . resulted in a later-withdrawn guilty plea." Fed. R. Evid. 410(a)(4).

The government opposed, arguing that the prosecutor never engaged in plea discussions with Mullins or his counsel. It also emphasized that Mullins gave law-enforcement officers, not the prosecutor, directions to Woodall's body.

a. Hearing

The district court held a hearing on the motion. Three witnesses testified: former county Assistant District Attorney Chris Ross, Mullins's

[2] The grand jury also charged Mullins for using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(i)–(iii). The district court later dismissed that count as time-barred.

former counsel Frank Stout, and Mullins. Below, we summarize the district court's factual findings from their testimony.

The day Woodall disappeared, Mullins agreed to speak with officers at the police station. *United States v. Mullins*, No. CR-21-60, 2022 WL 2306819, at *1 (E.D. Okla. June 27, 2022). Soon after, Mullins's uncle, Harry Jordan, retained Stout to represent Mullins. *Id.* Sometime that day, Stout spoke with Ross about Woodall's body. *Id.* at *2. According to Stout, Ross said that—if Mullins revealed Woodall's location—Ross would not seek the death penalty.[3] *Id.* In contrast, Ross testified that Stout approached *him* about the body's location and that he told Stout he had no interest in making a deal. *Id.*

Ross also testified that Jordan called him the next day to discuss Mullins. *Id.* Jordan asked what would happen to Mullins; Ross responded that he could not say, but that "the worst he could do was ask for the death penalty." *Id.* (citation modified).

Later that day, Stout told police that Mullins would take them to Woodall's body. *Id.* Officers from various agencies formed a "caravan" of cars and drove to the body's location. *Id.* Stout, Mullins, and some law-enforcement officers rode together in a bus, while Ross drove in his own car at the end of the caravan. *Id.* Based on Mullins's directions, law-enforcement officers found

[3] Mullins also testified that he believed he would get "a lighter sentence" by disclosing Woodall's location. *Mullins*, 2022 WL 2306819, at *2.

Woodall's body buried and wrapped in a tarp. *Id.* The next day, the state charged Mullins with Woodall's murder. *Id.*

Stout stopped representing Mullins about a month later. *Id.* About seven months after that, Mullins entered a blind guilty plea, and the state court sentenced him to life imprisonment. *Id.*

b. Ruling

After hearing the witnesses' testimony, the district court denied Mullins's suppression motion. *Id.* at *7. The court assumed Stout's version of events was true. *Id.* at *2. But it determined that, because Mullins directed law-enforcement officers—not the prosecutor—to Woodall's body, Rule 410(a)(4) did not apply. *Id.* at *4.

That said, the district court acknowledged two "exceptions" to its interpretation of Rule 410(a)(4). *Id.* at *5. It noted that some courts have applied the rule to conversations with police when the defendant had a reasonable subjective belief that he was speaking during plea negotiations. *Id.* And other courts have applied it when officers had express authority to negotiate a plea. *See id.* Even so, the district court ruled that neither exception applied because Mullins "ha[d] not presented facts to support the application of either of these exceptions." *Id.*

The court also rejected Mullins's request that it suppress all evidence derived from his statements. *Id.* Noting that Mullins had "no authority to support a finding that Rule 410(a)(4) is so far reaching," the court concluded

that the rule's plain language applied only to statements made during plea discussions. *See id.* Thus, the court reasoned that even if Rule 410(a)(4) applied to Mullins's statements about the body, it would not exclude any derivative evidence. *Id.* at *6.

2. Motion to Compel under Federal Rule of Criminal Procedure 16(a)(1)(E)

Mullins also moved to compel production of communications between the government and Robert Gifford, his former counsel in his federal case. Gifford was defense co-counsel for about seven months. After Gifford withdrew from the case, Mullins grew concerned that Gifford had disclosed attorney-client privileged information and failed to act in his best interest. So Mullins asked the government to provide its communications with Gifford. When the government failed to respond, Mullins moved the court to compel disclosure, suggesting the communications would support an ineffective-assistance claim.

The government opposed the motion, asserting that none of the communications included attorney-client privileged information. It also argued that the documents were not material to the defense, nor something the government planned to use at trial. Plus, the government noted that it did not obtain the records from Mullins and that he could "mak[e] a written demand of Mr. Gifford" for the documents. R. vol. I at 422.

a. Hearing

The court held a hearing to discuss outstanding motions before trial. It briefly addressed Mullins's motion to compel:

> [I]t appears . . . that these communications would not fall in something that would be discoverable under Rule 16 of the Federal Rules of Criminal Procedure. That said, I suppose that there is some small possibility that material or facts were disclosed by Mr. Gifford in the course of communications with counsel for the government in a way that would cause the Court to need to address some issue about effective assistance of counsel.

R. vol. III at 41. So the court reviewed the documents in camera.

b. Ruling

After reviewing the communications, the court denied Mullins's motion. It concluded that the documents were not discoverable under Rule 16(a)(1)(E), nor did they reflect any inappropriate disclosures by Gifford. The court emphasized, though, that it did "not address the ability of [Mullins] to obtain any such document, from the Government or from Mr. Gifford directly, for another purpose or in another proceeding." R. vol. I at 426.

3. Jury Act Motions under 28 U.S.C. § 1867

a. Pretrial Motion

Before voir dire, Mullins orally moved to dismiss the indictment and stay proceedings under the Jury Act. He argued that the jury pool was neither randomly selected nor a fair cross-section of the community. For example, he noted that seven people from the jury pool came from Ada, Oklahoma, which he claimed was statistically unlikely. He suggested that this could "affect[]

[him] in a racially discriminatory manner" because some counties with more diverse populations were underrepresented. *See* R. vol. III at 58.

The district court denied the motion. It reasoned that "[t]he group of potential jurors here was selected through an established process for the Eastern District of Oklahoma based on a cross section of persons in that district eligible to serve on juries." *Id.* at 59. The court determined that "[t]he mere fact that the process may have resulted in a higher-than-average number of potential jurors from a certain area does not mean that a particular area was purposely favored or disfavored." *Id.* The court also noted that "[r]andom selection can result in clusters, and that may have been the case here." *Id.*

The parties then selected a jury and went to trial.

b. Trial Motions

Mullins raised his Jury Act motion twice more during trial. The court denied them for the same reasons as before.

c. Post-trial Motion

Mullins renewed his Jury Act motion again three days after the verdict. This time, he attached a sworn statement from his counsel supporting his claims. Mullins noted that under 28 U.S.C. § 1867(d), if a sworn statement of facts, taken as true, "would constitute a substantial failure to comply with" the Jury Act, then the movant is "entitled to present" supporting evidence. R. vol. I

at 609 (citation modified). Mullins argued that his renewed motion satisfied this standard and merited a hearing.

First, he claimed that the odds of seven jurors coming from Ada was "so remote that it had to be intentionally done." *Id.* at 611. In support, his motion contained statistics about the number of jurors from each county in the jury pool and those counties' demographics. Second, he argued that the jury pool had a disproportionate number of women and—based on his and his family's observations—lacked Native American and African American jurors.

The government opposed the motion as untimely and meritless. The district court agreed. On timeliness, it explained that defendants must bring Jury Act motions either before voir dire "or within seven days after the defendant discovered . . . the grounds" for the motion, "*whichever is earlier*." *United States v. Mullins*, No. CR-21-60, 2023 WL 6323079, at *2 (E.D. Okla. Sept. 28, 2023) (citation modified). Because Mullins renewed his motion three days after trial, the court found it "untimely and procedurally barred." *Id.*

As for the merits, the court held that Mullins failed to show "a deviation" from the Eastern District's established jury plan. *Id.* at *3. What's more, Mullins made only "visual observations" to support his claim that the jury pool was not a fair cross-section of the community. *Id.* at *4. The court found this insufficient to establish "systematic exclusion of Native Americans or African Americans" in the jury-selection process. *Id.*

4. Jury Trial

To briefly recap Mullins's trial, nine witnesses testified for the government. One witness testified that, the night before the murder, Mullins kept asking whether Woodall's roommate would be home that night. Woodall's neighbor testified that he saw Mullins outside Woodall's house the morning of the murder and watched him rifle through her car. Next, both Woodall's boyfriend and her mother testified about strange phone calls they received from Mullins that morning asking about Woodall's whereabouts.

The government also called Stout, who explained that Mullins led law-enforcement officers to Woodall's body. The next several witnesses testified about evidence recovered from Mullins's house, his car, and the crime scene. And an FBI agent testified that about a year after the murder, Mullins "volunteered that he had killed Rachel Woodall" during an unrelated interview. R. vol. III at 347–48.

On the defense side, both Mullins and his mother testified.[4] Mullins admitted to killing Woodall but suggested he did so in self-defense. In brief, he testified that he went to Woodall's house the morning of the murder to talk to her, but she didn't answer the door. So he went into her car to leave her a note. There, he found her journal, read it, and left with it.

[4] Mullins's mother testified about his decision to plead guilty in state court.

Woodall called him soon after, so he went back to her house and picked her up. While they were driving, they started fighting about things she wrote in her journal. The fight turned physical, and she hit or scratched him. So he pulled off the highway onto a side road.

Mullins stopped the car, got out, and grabbed the journal from his trunk. When Woodall saw he had her journal, she got angry and tried to hit him. Mullins walked back to the driver's seat and asked her to get in the car. Then he saw her approaching him with his gun, which he kept in his trunk, pointed at him.

Scared, Mullins tried to get away. He found a tire rim on the ground and held it between him and the gun. He heard something click and "just snapped," swinging the tire rim at Woodall. He could not remember how many times he hit her—he swung the rim until it flew out of his hand.

Woodall, lying on the ground, was not moving. Thinking she was dead, Mullins wrapped her in a tarp, put her in the trunk, and drove to a gravel pit. After placing Woodall in a shallow grave, he considered shooting himself; but instead, he pointed the gun at the ground and started shooting, hitting Woodall multiple times in the head. He then covered the tarp with dirt and drove away.

5. Verdict, Sentencing & Appeal

The jury found Mullins guilty on both counts. The district court sentenced him to two concurrent life sentences. He timely appealed.

Mullins argues that the court reversibly erred by (1) denying his Jury Act motions, (2) denying his motion to suppress his statements directing officers to Woodall's body, and (3) denying his motion to compel disclosure of Gifford's communications with the government. We disagree and affirm.

DISCUSSION

I. Jury Act Motions

First, Mullins challenges the district court's denials of his motions for relief under the Jury Act.

A. Standard of Review

We review de novo a district court's legal conclusions "involving a jury-composition claim." *United States v. Kamahele*, 748 F.3d 984, 1022 (10th Cir. 2014). We review the court's factual findings for clear error. *Id.* "A finding of fact is clearly erroneous only if it is without factual support in the record" or if, after reviewing the evidence, we are "left with a definite and firm conviction that a mistake has been made." *United States v. Craine*, 995 F.3d 1139, 1157 (10th Cir. 2021) (citation omitted).

B. Analysis

The Jury Act gives federal defendants entitled to a jury trial "the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. § 1861. Every federal district court must implement "a written plan for random

selection" of jurors that is "designed to achieve" the Act's objectives. *Id.* § 1863(a).

Section 1867 provides "the exclusive means by which a person accused of a Federal crime[] . . . may challenge any jury on the ground that such jury was not selected in conformity with" the Act. *Id.* § 1867(e). And § 1867(a) states that

> before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

Such motions must "contain[] a sworn statement of facts." *Id.* § 1867(d); *United States v. Stein*, 985 F.3d 1254, 1262 (10th Cir. 2021). And when the sworn statement of facts, "if true, would constitute a substantial failure to comply" with the Act, the movant "shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence." *Id.* § 1867(d).

If the court finds a substantial failure to comply with the Act in selecting the grand jury, it shall either "stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment." *Id.* On the other hand, if there's a substantial failure to comply "in selecting the *petit* jury,

the court shall stay the proceedings pending the selection of a petit jury in conformity with this title." *Id.* (emphasis added).

"Strict compliance with [the Jury Act's] procedural requirements is essential." *Stein*, 985 F.3d at 1262 (citation omitted). This is because the Act's procedural requirements were "designed to give the district court an opportunity to evaluate the alleged noncompliance and to correct such noncompliance before precious judicial resources are invested in a trial." *United States v. Contreras*, 108 F.3d 1255, 1266 (10th Cir. 1997).

Mullins moved four times to stay proceedings or dismiss the indictment for noncompliance with the Jury Act.[5] The district court denied all four motions. That wasn't error, because each motion failed to satisfy the Act's procedural requirements.

Start with Mullins's motion on the first day of trial. He moved to stay proceedings "before the voir dire examination" began, so this motion was timely. *See* 28 U.S.C. § 1867(a). Yet it lacked a sworn statement of facts.

We have held that if a defendant fails "to accompany [his] motion[] challenging the jury selection process with a sworn affidavit," then his Jury Act claim "is precluded." *Contreras*, 108 F.3d at 1267–68; *see also United States v. Cooper*, 733 F.3d 1360, 1366 (10th Cir. 1984). Thus, because Mullins's motion

[5] We note that because Mullins's Jury Act motions centered on the petit jury, dismissal was not an available remedy. *See* 28 U.S.C. § 1867(d).

lacked a sworn statement of facts, his first Jury Act motion was procedurally barred.[6] *See Contreras*, 108 F.3d at 1267–68.

Next, consider the two motions Mullins raised during trial. Neither contained a sworn statement of facts. Like the first motion, this failure "precluded" Mullins's Jury Act claim. *See id.*

What's more, the motions were untimely, too. Under 28 U.S.C. § 1867(a), a defendant must move to stay proceedings "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered[] . . . the grounds therefor, whichever is earlier." Because Mullins raised these motions after voir dire, they were untimely. *See United States v. Phillips*, 239 F.3d 829, 840–41 (7th Cir. 2001) (concluding that Jury Act motion "made orally approximately three-quarters of the way into voir dire" was untimely).

Finally, turn to Mullins's renewed Jury Act motion, raised three days after trial ended. This time, he included a sworn statement of facts. So his final motion complied with § 1867(d)'s procedural requirements. But like the last two motions, his final motion was untimely because he filed it after voir dire.

[6] The district court denied Mullins's first motion on the merits. But we can affirm "on any ground supported by the record." *United States v. Spradley*, 146 F.4th 949, 958 (10th Cir. 2025); *see also Stein*, 985 F.3d at 1263 (holding that we may "affirm[] the district court's judgment on [procedural] ground[s], even though the court did not address any procedural deficiencies of the [Jury Act] motion").

See id. As a result, his final motion did not comply with § 1867(a)'s procedural requirements.

Mullins emphasizes that he filed the final motion less than seven days after he discovered the alleged noncompliance. But his motion was still untimely under § 1867(a). Again, defendants must move for Jury Act relief "before the voir dire examination" or "within seven days after [they] discovered or could have discovered[] . . . the grounds therefor, *whichever is earlier*." *See* 28 U.S.C. § 1867(a) (emphasis added).

Put differently, Mullins had to file his motion "no later than before the voir dire examination begins." *United States v. DeFries*, 129 F.3d 1293, 1299 (D.C. Cir. 1997) (citation modified); *see also United States v. Rosbottom*, 763 F.3d 408, 416 (5th Cir. 2014) ("It is obvious that the commencement of voir dire is the cut-off point for challenges under the Act, both under its express terms and because the only remedy it provides is a stay in the proceedings until a jury can be selected in conformity with the statute." (citation modified)).[7] So by raising his renewed Jury Act motion after voir dire, Mullins failed to comply with the Act's procedural requirements. *See Phillips*, 239 F.3d at 840.

[7] We note that both *DeFries* and *Rosbottom* suggest that there may be an exception to the Jury Act's procedural requirements when "counsel could not reasonably have been expected to comply with the procedural prerequisites to a statutory challenge to the jury." *DeFries*, 129 F.3d at 188 (citation omitted); *see also Rosbottom*, 763 F.3d at 415. Because Mullins never argues that such an exception applies, we need not consider it here.

Lastly, Mullins argues that the district court should have stayed the case and held a hearing so that he could inspect records about the jury pool's composition under 28 U.S.C. § 1867(f). True enough, § 1867(f) gives parties the right to inspect such records to prepare a § 1867(a) motion. And in *Test v. United States*, the Supreme Court held that § 1867(f) gives litigants "essentially an unqualified right to inspect jury lists." 420 U.S. 28, 30 (1975) (per curiam); *see also United States v. Lawson*, 670 F.2d 923, 926 (10th Cir. 1982) (similar).

But importantly, the *Test* and *Lawson* defendants "request[ed] permission to inspect and copy the jury lists pertaining to" their jury venires. *Test*, 420 U.S. at 29 (citation modified); *Lawson*, 670 F.2d at 926. Mullins, though, never moved to inspect or copy records under § 1867(f). Instead, he requested relief under § 1867(d). And again, he failed to comply with that section's procedural requirements.

In sum, all four Jury Act motions were procedurally deficient.[8] So the district court did not err in denying them.

II. Rule 410 Motion

Next, Mullins argues that the district court erred by denying his motion to suppress his statements directing law-enforcement officers to Woodall's body.

[8] For that reason, we need not consider whether the motions also failed on the merits.

A. Standard of Review

We review de novo "legal interpretations of the Federal Rules of Evidence." *United States v. Silva*, 889 F.3d 704, 709 (10th Cir. 2018). But we review evidentiary rulings for abuse of discretion. *United States v. Channon*, 881 F.3d 806, 809 (10th Cir. 2018). So we reverse an evidentiary ruling only if it rests "on a clearly erroneous finding of fact or an erroneous conclusion of law," or if it "manifests a clear error in judgment." *Id.* at 809–10 (citation omitted).

Mullins's claim involves the district court's interpretation of Federal Rule of Evidence 410(a)(4). We review the court's interpretation of the rule de novo and its factual findings for clear error. *See Silva*, 889 F.3d at 709; *Channon*, 881 F.3d at 809–10.

B. Analysis

Under Rule 410, "a statement made during plea discussions with an attorney for the prosecuting authority" is inadmissible against a criminal defendant "if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea." Fed. R. Evid. 410(a)(4). This rule "grew out of longstanding case law excluding th[e] type of especially damning evidence" surrounding guilty pleas. *United States v. Mitchell*, 633 F.3d 997, 1003 (10th Cir. 2011).

Another federal rule informs our understanding of Rule 410(a)(4): former Federal Rule of Criminal Procedure 11(e)(6)(D). Rule 11(e)(6)(D) prohibited

"admission of any statement made in the course of plea discussions with an attorney for the government which d[id] not result in a plea of guilty." *United States v. Browning*, 252 F.3d 1153, 1158 (10th Cir. 2001) (citation modified). Though Rule 410(a)(4) uses slightly different language, we often treated the two rules interchangeably. *See, e.g.*, *United States v. Ruminer*, 786 F.2d 381, 385 (10th Cir. 1986) ("Rule 11(e)(6) is essentially identical to Rule 410."); *United States v. Acosta-Ballardo*, 8 F.3d 1532, 1534–35 (10th Cir. 1993) (similar); *United States v. Medina-Estrada*, 81 F.3d 981, 985 n.3 (10th Cir. 1996) (similar). Because of the rules' similarities, we consider caselaw discussing Rule 11(e)(6)(D) persuasive when interpreting Rule 410(a)(4).

Mullins argues that his statements directing officers to Woodall's body were part of "plea discussions with an attorney for the prosecuting authority," making them inadmissible under Rule 410(a)(4). The district court held that because Mullins spoke to law-enforcement officers instead of a prosecutor, Rule 410(a)(4) did not protect his statements.[9] *Mullins*, 2022 WL 2306819, at *4.

We, too, think that Mullins's statements fall outside Rule 410(a)(4)'s scope. Rule 410 protects statements made "during plea discussions *with an attorney for the prosecuting authority*." Fed. R. Evid. 410(a)(4) (emphasis

[9] Rule 410(a)(4) also requires there be "a later-withdrawn guilty plea." Neither party disputes that we should treat Mullins's state-court guilty plea as withdrawn.

added). Relying on its plain language, some circuits have held that Rule 410(a)(4) applies only to statements made to prosecuting attorneys. *See, e.g.*, *United States v. Bauzó-Santiago*, 867 F.3d 13, 19–20 (1st Cir. 2017); *United States v. Bernal*, 719 F.2d 1475, 1478 (9th Cir. 1983), *abrogated on other grounds by, Crawford v. Washington*, 541 U.S. 36, 68–69 (2004). Other circuits have read Rule 410(a)(4) more broadly to cover conversations with government agents expressly or impliedly authorized to negotiate a plea. *See, e.g.*, *United States v. McCauley*, 715 F.3d 1119, 1125–26 (8th Cir. 2013); *cf. United States v. Serna*, 799 F.2d 842, 848–49 (2d Cir. 1986) (interpreting Rule 11(e)(6)(D)), *abrogated on other grounds by*, *United States v. DiNapoli*, 8 F.3d 909, 914 n.5 (2d Cir. 1993) (en banc).

When we considered Rule 11(e)(6)(D)'s scope in *Browning*, we favored a strict reading. There, we considered whether Rule 11(e)(6)(D) covered a defendant's statements to DEA agents. 252 F.3d at 1158. Relying on the rule's plain language, we suggested that it protected only statements made when "speaking with an attorney for the government." *Id.* (citation modified). Because the defendant spoke to DEA agents, not a government attorney, we held that his statements did not "fall within the [rule's] plain language." *Id.*

That said, we also acknowledged the Eighth Circuit's ruling in *United States v. Lawrence*, 952 F.2d 1034 (8th Cir. 1992). *See Browning*, 252 F.3d at 1158. *Lawrence* held that Rule 11(e)(6)(D) also applied to "situations where law-enforcement officials enter into negotiations with *express* authority from a

government attorney." 952 F.2d at 1037. Without adopting *Lawrence*'s reading of Rule 11(e)(6)(D), we dismissed the defendant's related arguments because he provided no evidence that the agents had express authority to negotiate a plea. *Browning*, 252 F.3d at 1158.

Here, as in *Browning*, Mullins's motion fails under either interpretation of Rule 410(a)(4).

First, Mullins's motion fails under a strict reading because Mullins directed law-enforcement officers—not Ross or another prosecutor—to the body. *See id.*; *see also Bauzó-Santiago*, 867 F.3d at 19–20.

Second, Mullins's motion fails under a broad reading, too, because no evidence supports that the officers Stout spoke to or the ones Mullins directed to the body were authorized to negotiate a plea. *See Browning*, 252 F.3d at 1158; *McCauley*, 715 F.3d at 1125–26. Indeed, though the district court held that Rule 410(a)(4) did not apply to statements made to law-enforcement officers, the court also considered whether Mullins's claim would succeed under *Lawrence*. *See Mullins*, 2022 WL 2306819, at *5. The court found "no evidence suggesting that ADA Ross had authorized police officials to make a plea agreement." *Id.*

Mullins has not shown that this factual finding was clearly erroneous.[10] *See Channon*, 881 F.3d at 809–10. Instead, he focuses on comparing his facts to

[10] In fact, Mullins does not challenge any of the district court's factual findings. *See* Op. Br. at 13.

Serna's. But *Serna* is distinguishable. There, the defendant, his counsel, an AUSA, and two DEA agents met "to discuss the possibility of [the defendant's] cooperation with the Government." 799 F.2d at 848. The AUSA told the defendant that his statements "would not be used against him." *Id.* Then a DEA agent interviewed the defendant without the AUSA present. *Id.*

The Second Circuit concluded that Rule 11(e)(6)(D) protected the defendant's statements to the DEA agent. *Id.* at 849. It held that "[i]n light of the initial meeting with the AUSA, th[at] . . . discussion must be considered as part of the overall plea bargaining process." *Id.* The court also didn't think that the AUSA's absence from the meeting mattered. It explained that Rule 11(e)(6)(D) "require[s] the *participation* of a Government attorney in the plea discussions, but not necessarily his physical *presence* when a particular statement is made to agents whom the attorney has authorized to engage in plea discussions." *Id.* So because the DEA agent acted "under the AUSA's authority" when the defendant made the statements, the court concluded that Rule 11(e)(6)(D) applied. *Id.*

Here, no similar meeting occurred between Ross, Stout, and any officers. Instead, Stout and Ross—alone—discussed Woodall's body and the death penalty. *Mullins*, 2022 WL 2306819, at *2. Then a day later, without speaking to Ross, Stout and Mullins directed officers to the body. *See id.* Unlike in *Serna*, no officers were present or involved in the earlier discussion between

Stout and Ross. Simply put, no evidence supports that Ross authorized law-enforcement officers to negotiate a plea with Mullins. *See id.* at *5.

All that said, Mullins proposes another approach to Rule 410(a)(4)'s prosecuting-authority requirement. In his view, "[w]hether law enforcement agents were authorized to *negotiate* the terms of a plea deal with Mr. Mullins is . . . immaterial." Op. Br. at 18. He argues that "[w]hat matters" instead "is whether the plea deal that was the subject of Mr. Mullins' *discussions* with the prosecutor contemplated the provision of information to law enforcement."[11] *Id.*

This argument misses the mark. The court never found, nor does the record support, that Stout and Ross entered a "plea deal" during their discussion. Instead, the court noted that Ross merely "suggested" to Stout that he would not request the death penalty if Mullins revealed Woodall's location. *Mullins*, 2022 WL 2306819, at *2. And Stout never agreed to those terms during the meeting. In fact, Mullins wasn't even present for that discussion. The next day, Stout told police that Mullins would direct them to the body. *Id.*

[11] Mullins also argues that Rule 410(a)(4) protects his statements because he reasonably believed he made them during plea discussions. Though some courts have found a defendant's reasonable subjective belief relevant when deciding whether statements were made during plea discussions, *see, e.g.*, *United States v. Merrill*, 685 F.3d 1002, 1013 (11th Cir. 2012), we need not address that issue here. Whether or not Mullins reasonably believed he made his statements during plea discussions, he did not speak to someone with authority to negotiate a plea. *See Browning*, 252 F.3d at 1158 (concluding that the defendant's "reasonable subjective belief is an additional requirement for invoking Rule 11(e)(6)," separate from the prosecuting-authority requirement).

Yet as the district court emphasized, Stout knew whom to contact about a plea deal: Ross, not law-enforcement officials. *Id.* at *5. And though Mullins highlights that Ross traveled with the caravan to Woodall's body, Ross's presence alone does not establish that he had entered a plea deal with Mullins.

All in all, when Mullins directed officers to Woodall's body, he had not entered a plea deal with Ross. Instead, any plea deal was still in the "discussions" stage. And so, for Rule 410(a)(4) to protect Mullins's statements, he had to be speaking with someone with "prosecuting authority." *See* Fed. R. Evid. 410(a)(4). He provides no evidence that he was.

Thus, the district court did not err in denying Mullins's suppression motion.[12]

III. Rule 16 Motion

Lastly, Mullins challenges the district court's denial of his motion to compel disclosure of communications between his prior counsel and the government.

A. Standard of Review

We review discovery decisions for abuse of discretion. *United States v. Muhtorov*, 20 F.4th 558, 629 (10th Cir. 2021). But Mullins argues that de novo

[12] Mullins also asks us to "import the fruit of the poisonous tree doctrine" to Rule 410(a)(4) and exclude all evidence derived from his statements. Op. Br. at 20 (citation modified). We need not address this issue because Rule 410(a)(4) does not protect his statements.

review applies because the communications' discoverability is a question of law.[13]

We disagree. Though we review de novo interpretations of the Federal Rules of Criminal Procedure, *United States v. Freeman*, 70 F.4th 1265, 1286 (10th Cir. 2023), Mullins challenges the court's *application* of Rule 16, not its interpretation of the rule. So we review the district court's decision for abuse of discretion. *See Muhtorov*, 20 F.4th at 629.

B. Analysis

Under Rule 16, a defendant may request—and the government must produce—documents or other items within the government's "possession, custody, or control" if "(i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant." Fed. R. Crim. P. 16(a)(1)(E). "At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." Fed. R. Crim. P. 16(d)(1).

Mullins moved for production of communications between the government and his former counsel, Robert Gifford, because he feared Gifford disclosed attorney-client privileged information. The district court construed his motion as a Rule 16(a)(1)(E) discovery motion, reviewed the documents in

[13] Mullins cites *Craine,* 995 F.3d at 1153, to support this contention. *Craine* reviewed de novo the district court's application of the Sentencing Guidelines. *See id.* It says nothing about the standard of review for discovery decisions.

camera, and then denied the request. The court reasoned that the documents were not discoverable under Rule 16(a)(1)(E), nor did they show any inappropriate disclosures by Gifford.

Mullins now argues that Gifford's communications belonged to him as part of his client file, making them discoverable under Rule 16(a)(1)(E)(iii).

Even if the district court erred by denying Mullins's motion, that error was harmless.[14] *See* Fed. R. Crim. P. 52(a). Applying the nonconstitutional harmless error standard, we ask whether the error had "a substantial influence on the outcome of the trial" or leaves us "in grave doubt as to whether it had such effect." *United States v. Blechman*, 657 F.3d 1052, 1067 (10th Cir. 2011) (citation omitted).

Mullins never argued that he needed the documents for trial. Instead, he requested the communications because he believed they may support an ineffective-assistance claim. And regardless, the government's evidence of Mullins's guilt was overwhelming. *See United States v. Chavez*, 976 F.3d 1178, 1210 (10th Cir. 2020) (explaining that courts consider "the overall strength of the other evidence against the defendant" as part of the harmless-error analysis (citation omitted)). So we do not believe that the district court's discovery ruling substantially influenced the jury's verdict.

[14] Mullins argues that the government waived its harmless-error argument by not meaningfully briefing it. We disagree. The government adequately addressed harmless error in its response brief.

We also note that, in the district court, Mullins never requested the documents because they "belonged" to him; instead, he raised only ineffective-assistance concerns. And the court reviewed the documents with that in mind. Finding no improper disclosures, it denied the motion. But the court clarified that Mullins could still seek the records "for another purpose." R. vol. I at 426. This, too, supports that any error was harmless, because the court left open the door for other requests.

Mullins argues that we cannot review this issue for harmlessness because the communications are not in the record. But courts have applied harmless-error review to denied discovery motions before. *See, e.g.*, *United States v. Hodges*, 480 F.2d 229, 233 (10th Cir. 1973) (applying harmless-error analysis to "failure to require discovery"); *United States v. Sanders*, 106 F.4th 455, 475–76 (6th Cir. 2024) (en banc) (applying harmless-error analysis to denial of Rule 16(a)(1)(E) motion); *United States v. Owens*, 18 F.4th 928, 940–41 (7th Cir. 2021) (same). And Mullins provides no persuasive reason why we should change tack here. We therefore find this argument unconvincing.

CONCLUSION

For these reasons, we affirm Mullins's convictions.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

January 16, 2026

Ms. Katayoun A. Donnelly
Azizpour Donnelly
2373 Central Park Boulevard, Suite 100
Denver, CO 80238

RE: 24-7003, United States v. Mullins
Dist/Ag docket: 6:21-CR-00060-CBG-1

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(d)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rule 40 and 10th Cir. R. 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Linda A. Epperley
Patrick Miller Flanigan

CMW/sls

APPENDIX B

Order of the District Court, Denying the Motion to Suppress

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CR-21-60-CBG**
	)	
TYLER JAY MULLINS,	)	
	)	
Defendant.	)	

ORDER

Now before the Court is a Motion to Suppress (Doc. No. 82) and a Motion in Limine (Doc. No. 80), filed through counsel by Defendant Tyler Jay Mullins. The Government has filed an omnibus Response in opposition (Doc. No. 93) addressing each of the pretrial motions filed by Defendant.

On February 8, 2022, the Court conducted an evidentiary hearing. Defendant appeared personally and through counsel, Kevin D. Adams and Robert D. Gifford II. The Government appeared through Assistant United States Attorneys Patrick M. Flanigan and Gregory Dean Burris. The Court heard argument from counsel, as well as the testimony of Chris Ross, Frank Stout, and Defendant.[1]

In his Motion to Suppress, Defendant requests suppression of "any statements by Defendant Tyler Jay Mullins, and evidence obtained thereafter, subject to plea negotiations, unlawful disclosure of privileged statements and the poisoned fruits thereof,

[1] The Court finds that the testimony of these witnesses is credible as to the portions relied upon herein.

or in the alternative for ineffective assistance of counsel should be suppressed." Def.'s Mot. to Suppress at 10. After the presentation of evidence at the hearing, Defendant's counsel expressly withdrew Defendant's argument that suppression was required on the basis of ineffective assistance of counsel in violation of the Sixth Amendment, leaving for the Court's determination whether the evidence that the Government intends to offer at trial are subject to exclusion under Federal Rule of Evidence 410(a)(4) or based upon attorney-client privilege. Upon consideration of the evidence and the parties' arguments, the Court makes its determination.

I. Background

In the early morning hours of Saturday, April 20, 2002, Rachel Woodall disappeared. Ms. Woodall's ex-boyfriend, Defendant Tyler Jay ("T.J.") Mullins was immediately suspected of wrongdoing. Ms. Woodall's neighbor had spotted Defendant looking through Ms. Woodall's car at around 3:30 a.m. the morning Ms. Woodall disappeared. Later that same morning, Defendant made allegedly unusual phone calls to Ms. Woodall's mother and new boyfriend, prompting suspicion. Additionally, when police contacted Defendant, they noted he had multiple injuries that the officers believed were inconsistent with Defendant's claim that he was attacked by two unknown men.

Based on these factors, Detective Hood of the Ada Police Department went to Defendant's residence at approximately 1:00 p.m. on April 20, 2002. Detective Hood spoke with Defendant, who repeated the story of being attacked by two men in the early morning hours of April 20, 2002. After conferring with Detective Captain Crosby, Detective Hood went to Defendant's residence and asked Defendant if he would come to

the police department to speak with Captain Crosby. Defendant agreed. Captain Crosby and Detective Hood[2] interviewed Defendant.

Attorney Frank Stout testified that after Defendant went to the police department for questioning, Defendant's uncle, Harry Jordan,[3] retained Stout to represent Defendant. After Stout arrived at the police department, police ceased questioning Defendant and Stout conferred with him.

At some point on April 20, 2002, Stout and Pontotoc County Assistant District Attorney Chris Ross engaged in a conversation regarding the recovery of Ms. Woodall's body.[4] There is disagreement regarding what exactly was said by whom. Stout testified that ADA Ross suggested that if Defendant disclosed the location of Ms. Woodall's body, the State would not seek the death penalty. ADA Ross testified that Stout had approached him to inquire about whether the State would decline to seek the death penalty in exchange for Defendant disclosing the location of Ms. Woodall's body, but Ross never attempted to "make a deal" over the body. Defendant testified that his understanding was that if Defendant led police to Ms. Woodall's body, he would get "a lighter sentence." For the purpose of evaluating Defendant's Motion to Suppress, the Court will assume that Stout's version of events is true.

ADA Ross testified that on Sunday, April 21, 2002, Defendant's uncle, Harry

[2] Captain Crosby and Detective Hood are now deceased.

[3] Harry Jordan is now deceased.

[4] ADA Ross' testimony suggests that at the time of this conversation, ADA Ross believed Defendant had killed Ms. Woodall.

Jordan, who was previously acquainted with ADA Ross, talked to ADA Ross on the phone and asked what he thought he would be doing with Defendant. ADA Ross testified that he made no promises to Mr. Jordan but expressed that "the worst [he] could do was ask for the death penalty." ADA Ross states he made clear to Mr. Jordan that ADA Ross could not tell Mr. Jordan what would happen to Defendant because ADA Ross did not know what had happened to Ms. Woodall.

Later that afternoon, Stout informed police that Defendant was willing to take them to Ms. Woodall's body. Law enforcement officers from various agencies formed a caravan and drove to the site of the body. Stout testified that he and Defendant rode in a bus with Crosby and several other law enforcement officers, and ADA Ross testified that he drove at the rear of the caravan in his personal vehicle.

The caravan stopped at a "gravel or rock pit." ADA Ross testified that after searching for a while OSBI agent Gary Perkinson discovered Ms. Woodall's body wrapped in a blue tarp and buried under gravel. Upon discovery of the body, Iris Dalley of the OSBI examined and photographed the scene. ADA Ross testified that as they waited for the medical examiner to arrive, Stout told ADA Ross an "unofficial version" of what Defendant had done to Ms. Woodall. Stout denies that this conversation took place.

The next day, April 22, 2002, Defendant was charged in the District Court of Pontotoc County with the first-degree murder of Rachel Woodall. One month later, on May 22, 2002, Stout withdrew as Defendant's attorney. On December 30, 2002, Defendant entered a "blind" guilty plea, and on February 13, 2003, Defendant was sentenced to life in prison without the possibility of parole. On August 4, 2020, Defendant filed an

application for Post-Conviction Relief citing the Supreme Court's ruling in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2021). The Pontotoc County District Court granted the application and vacated Defendant's state conviction and sentence.

The United States Attorney's Office for the Eastern District of Oklahoma is now prosecuting Defendant for the 2002 killing of Rachel Woodall. Defendant is charged in a Superseding Indictment with: (1) Murder in Indian Country, in violation of 18 U.S.C. §§ 1111(a), 1151, and 1153; and (2) Causing the Death and Murder of a Person in the Course of a Violation of Title 18 U.S.C. § 924(c), in violation of 18 U.S.C. § 924(j)(1). *See* Superseding Indictment (Doc. No. 45). The matter is currently set for trial on the Court's June 2022 jury trial docket.

In his Motion to Suppress, Defendant requests suppression of "any statements by Defendant Tyler Jay Mullins, and evidence obtained thereafter, subject to plea negotiations, unlawful disclosure of privileged statements and the poisoned fruits thereof." Def.'s Mot. to Suppress at 10. Additionally, Defendant requests that the Government be prohibited from introducing privileged communications between Stout and Defendant and "having any conversations with Mr. Stout without permission from Mr. Mullins." Def.'s Mot. in Limine at 3.

At the suppression hearing, the parties identified the following potential evidence as implicated by Defendant's Motion:

1) testimony of Stout regarding Defendant's provision of directions to Ms. Woodall's body;

2) testimony of Iris Dalley of the OSBI regarding what she observed at the site of the body on April 21, 2002;

3) photographs taken by Iris Dalley at the site of the body on April 21, 2002

4) testimony of Gary Perkinson of the OSBI regarding what he observed at the site of the body on April 21, 2002;

5) shell casings and a discharged bullet recovered by Gary Perkinson from the site of the body on April 22, 2002;

6) photographs of the site of the body taken by Gary Perkinson on April 22, 2002;

7) the Medical Examiner's evaluation and report;[5]

8) autopsy photos of Ms. Woodall's body; and

9) the testimony of FBI Special Agent Craig Overby regarding a 2003 in-custody statement by Defendant.

II. Relevant Standards

"The purpose of a suppression hearing is 'to determine preliminarily the admissibility of certain evidence allegedly obtained in violation" of the defendant's constitutional rights. *United States v. Maurek*, 131 F. Supp. 3d 1258, 1261-62 (W.D. Okla. 2015) (quoting *United States v. Merritt*, 695 F.2d 1263, 1269 (10th Cir. 1982)). "The proponent of a motion to suppress bears the burden of proof." *United States v. Moore*, 22 F.3d 241, 243 (10th Cir. 1994). "The controlling burden of proof at a suppression hearing is proof by a preponderance of the evidence." *Maurek*, 131 F. Supp. 3d at 1262. Further, when a defendant seeks to suppress the fruits of a constitutional violation, the defendant "has the initial burden of establishing a causal connection between [the constitutional violation] and the evidence he seeks to suppress." *United States v. Shrum*, 908 F.3d 1219,

[5] The Government states it anticipates that it will remove the portions of the Medical Examiner's Report containing statements by Defendant before presenting the Report at trial.

1233 (10th Cir. 2018). "Specifically, the defendant must establish the incriminating evidence 'would not have come to light *but for* the [constitutional violation].'" *Id.* (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

"A motion *in limine* is a request for guidance by the court regarding an evidentiary question, which the court may provide at its discretion to aid the parties in formulating trial strategy." *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995) (internal quotation marks omitted). Generally, the proponent of a motion in limine bears the burden of proof. *See e.g., First Sav. Bank v. U.S. Bancorp*, 117 F. Supp. 2d 1078, 1082 (D. Kan. 2000); *Pinon Sun Condo. Ass'n, Inc. v. Atain Specialty Ins. Co.*, No. 17-cv-01595, 2020 WL 1452166, at *3 (D. Colo. Mar. 25, 2020). "A party claiming the attorney-client privilege must prove its applicability, which is narrowly construed." *In re Foster*, 188 F.3d 1259, 1264 (10th Cir. 1999).

III. Defendant's Motion to Suppress

A. Privileged Communications

Initially, Defendant argued that Stout violated attorney-client privilege by disclosing the content of privileged communications between Stout and Defendant to ADA Ross in two separate conversations. Def.'s Mot. to Suppress at 7. At the hearing, however, the Government stated that it does not intend to introduce evidence of those two conversations at trial.

The evidence that the Government intends to offer through Stout—testimony by Stout that Defendant led police to Ms. Woodall's body—does not implicate privileged communications. Stout testified that Defendant himself provided directions to police.

Communications made in the presence of a third party or disclosure of a privileged communication to a third party waives attorney-client privilege as to that communication. *See In re Grand Jury Proc.*, 616 F.3d 1172, 1184 (10th Cir. 2010) ("Because confidentiality is the key to maintaining the attorney-client privilege, a party waives the privilege when he voluntarily discloses to a third party material or information that he later claims is protected."). For these reasons, the portion of Defendant's Motion seeking to suppress allegedly privileged communications is denied.

B. Plea Discussions

Defendant argues that "any statements by Defendant Tyler Jay Mullins, and evidence obtained thereafter, subject to plea negotiations . . . should be suppressed." Def.'s Mot. to Suppress at 10. Defendant further contends that the nine items of evidence listed above should be suppressed under Rule 410(a)(4) of the Federal Rules of Evidence as either statements made during plea discussions or evidence derived from such plea discussions.

Federal Rule of Evidence 410(a)(4) prohibits admission of evidence against a defendant of "a statement made during plea discussions with an attorney for the prosecuting authority if the discussions . . . resulted in a later-withdrawn guilty plea."[6] Fed. R. Evid.

[6] In *United States v. Magnan*, 622 F. App'x 719 (10th Cir. 2015), the Tenth Circuit held that, while Rule 410(a) does not apply to all vacated convictions, "if a trial court is held to have lacked jurisdiction, a plea entered before it is invalidated" and "must be treated as 'withdrawn'" under that Rule. *Id.* at 724; *see also* Fed. R. Evid. 410(a)(1), (3); Def.'s First Mot. in Limine (Doc. No. 32) at 4. This ruling would indicate that Defendant's now-vacated state-court guilty plea must likewise be treated as "later-withdrawn" under Rule 410(a)(4). Accordingly, evidence of any statements made during plea discussions that resulted in that plea would be inadmissible against Defendant pursuant to Rule 410(a)(4). The statements and evidence that the Government seeks to introduce at trial, however, are not "plea discussions" subject to Rule 410(a)(4).

410(a)(4); *see also* Fed. R. Crim. P. 11(f) ("The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.").

The Government argues that the Rule does not exclude evidence "derived" from plea discussions and, in any event, that ADA Ross never engaged in plea discussions with Defendant, his attorney Stout, or his uncle Jordan, and so Rule 410(a)(4) does not apply to the evidence at issue. *See* Gov't Omnibus Resp. at 11-12. Further, the Government contends that Defendant provided the directions to law enforcement, not to an attorney for the State, as required for exclusion by Rule 410(a)(4). *See id.*

i. Statements to Law Enforcement

At the hearing, Defendant argued that Federal Rule of Evidence 410(a)(4) extends to exclude Defendant's statements to law enforcement officials made outside of ADA Ross' or other prosecutors' presence.

As a threshold matter, such statements would not have been made to "an attorney for the prosecuting authority" as expressly required for exclusion under Rule 410(a)(4). Fed. R. Evid. 410(a)(4). The District Court for the Northern District of Oklahoma has declined to consider statements made to law enforcement as statements made during "plea discussions" under Rule 410(a)(4), no matter the defendant's subjective expectation. The Court finds these decisions persuasive in the instant matter. *See, e.g., United States v. Williams*, No. 04-CR-167, 2005 WL 8160648, at *1 (N.D. Okla. Oct. 21, 2005) ("[S]tatements made in connection with plea negotiations involve, at a minimum, discussion with an attorney for the prosecuting authority. Exclusion of Williams'

statements to law enforcement personnel is therefore inappropriate."); *United States v. Thompson*, No. 07-CR-0008, 2007 WL 613990, at *1 (N.D. Okla. Feb. 22, 2007) ("[D]efendant in this case spoke with law enforcement officials who did not have the authority to negotiate plea agreements. There is no reason to believe that, even expanding the plain language of Fed. R. Evid. 410, defendant's subjective beliefs affect the admissibility of his statements.").[7]

There is authority suggesting that a defendant's conversation with law enforcement agents could nevertheless constitute a plea discussion under Rule 410(a)(4) if (1) "'the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion'" and (2) "'the accused's expectation was reasonable given the totality of the objective circumstances.'" *See United States v. Williams*, No. 08-CR-21, 2008 WL 1732954, at *4 (N.D. Okla. Apr. 10, 2008) (quoting *United States v. Robertson*, 582 F.2d 1356, 1366 (5th Cir. 1978)); *see also United States v. Browning*, 252 F.3d 1153, 1158 (10th Cir. 2001). Further, the Eighth Circuit has held that the former Federal Rule of Criminal Procedure 11(e)(6)(D) "cover[ed] plea discussions with law enforcement officials 'with *express* authority from a government attorney' to conduct plea negotiations." *Browning*,

[7] Federal Rule of Evidence 410(a)(4) "limit[s] protection to statements made in connection with discussions with a prosecutor, on the rationale that discussions between law enforcement and defendants do not involve the sort of negotiations that should be encouraged by exclusion of admissions made during those negotiations." 1 *McCormick on Evidence* § 160 (8th ed.) (noting that "generally no protection is afforded to statements made to law enforcement officers").

252 F.3d at 1158 (quoting *United States v. Lawrence*, 952 F.2d 1034, 1037 (8th Cir. 1992)).[8]

Defendant has not presented facts to support the application of either of these exceptions. Relevant to the Eighth Circuit's broader application of Rule 410(a)(4), there is no evidence here suggesting that ADA Ross had authorized police officials to make a plea agreement with Defendant on behalf of the State. Nor is there any apparent basis for Defendant to have had a reasonable, subjective expectation to negotiate a plea when he made statements to law enforcement agents concerning directions to the site of the body. The hearing testimony suggests that on April 20, 2002, Stout and ADA Ross had a discussion concerning the State declining to seek the death penalty if Defendant led police to Ms. Woodall's body. Consequently, it appears that on April 21, 2002, Stout was aware that ADA Ross was the official with whom to negotiate any plea deal, not Captain Crosby or other law enforcement agents. Stout was with Defendant when Defendant rode on the bus to the site of the body, providing law enforcement agents directions to that site. ADA Ross did not ride the bus with Defendant, Stout, and law enforcement, but rather followed behind in his personal vehicle. Therefore, "[w]ithout the presence of an attorney authorized to enter plea negotiations" on behalf of the State, "[D]efendant's subjective expectation to negotiate a plea bargain [with law enforcement officials] was unreasonable." *Williams*,

[8] Prior to 2002, Rule 11(e)(6)(D), as well as Rule 410(a)(4), prohibited "admission of 'any statements made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty.'" *Browning*, 252 F.3d at 1158 (quoting Fed. R. Crim. P. 11(e)(6)(D)). The Tenth Circuit's reasoning in *Browning* remains relevant when considering whether a statement was "made during plea discussions" under Rule 410(a)(4). *Thompson*, 2007 WL 613990, at *1 & n.1.

2008 WL 1732954, at *5 (citing *United States v. Stein*, No. 04-269-9, 2005 WL 1377851, at *10 (E.D. Pa. June 8, 2005)).

Therefore, assuming without deciding that the conversation between Stout and ADA Ross on April 20, 2002, was a plea discussion under Rule 410(a)(4), the subsequent statements that Defendant made to law enforcement on April 21, 2002, regarding directions to the site of the body, were not "made during plea discussions" and therefore are not subject to exclusion under Rule 410(a)(4).

ii. Evidence Derived from Plea Discussions

Defendant argues that Fed. R. Evid. 410(a)(4) extends not just to the alleged plea discussions between ADA Ross and Stout and between Ross and Jordan, but to all evidence derived from those discussions, such as Defendant's statements to police regarding the location of Ms. Woodall's body, the testimony of those present at the site of the body, the photos of Ms. Woodall's body taken at the site, the shell casings and bullet recovered from the site, and the Medical Examiner's report. Defendant, however, provides no authority to support a finding that Rule 410(a)(4) is so far reaching. To the contrary, Rule 410(a)(4)'s plain language "[applies] only to 'statements' made in the course of plea discussions and contain no restrictions on the use of any evidence derived from those statements." *Stein*, 2005 WL 1377851, at *14 (declining to suppress derivative evidence that the government had obtained in reliance on statements made in a plea agreement proffer).

> Neither the language nor the legislative history of these statutes shows any evidence that Congress ever contemplated, much less intended, that FRE 410 and FRCrP 11(f) would apply to derivative evidence. . . . .
>
> . . . .

> Every federal court to have considered the issue has similarly found that FRE 410 and FRCrP 11(f) do not require suppression of derivative evidence. [*United States v. Rutkowski*, 814 F.2d 594, 598-99 (11th Cir. 1987)]; *United States v. Cusack*, 827 F.2d 696, 697-98 (11th Cir. 1987); *United States v. Millard*, 235 F.3d 1119, 1120 (8th Cir. 2000); [*United States v. Fronk*, 173 F.R.D. 59, 62 (W.D.N.Y. Apr. 9, 1997)]; *but see United States v. Ankeny*, 30 M.J. 10, 14-15 (C.M.A. 1990) (holding substantively identical provision of the Military Code of Evidence, Mil. R. Evid. 410 should be "broadly construe[d]" to require the suppression of derivative evidence in order "to encourage plea negotiations"); *Weinstein's Federal Evidence* § 410.09[4] (Joseph M. McLaughlin, ed. 2d ed. 2005) ("It would seem that, to enforce the policy underlying Rule 410, the better approach would be to import the 'fruit of the poisonous tree' doctrine into this area.").
>
> FRE 410 and FRCrP 11(f) represent a balance struck by Congress between the rules' beneficial purpose of encouraging "the unrestrained candor which produces effective plea discussions" (1979 Advisory Committee Notes) and the countervailing cost of excluding probative evidence from the trier of fact. Altering that balance by extending the reach of the rules to derivative evidence would impose significant additional costs upon the government and the courts, including the burden of determining whether any evidence discovered after plea negotiations had begun was the inadmissible "fruit" of those negotiations. *See, e.g.*, *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).
>
> It is for Congress, not this Court, to weigh those competing costs and benefits. Accordingly, this Court will decline to go beyond the plain language of FRE 410 and FRCrP 11(f) and will not extend those rules to require the suppression of derivative evidence.

Id. at *14-15.

Therefore, assuming without deciding that plea discussions did take place, the Court disagrees that evidence allegedly derived from such plea discussions is subject to exclusion under Defendant's expansive view of Federal Rule of Evidence 410(a)(4).

C. The State's Communications with Defendant's Family Members

Harry Jordan is now deceased and the Government has stated it does not intend to call ADA Ross as a trial witness. Therefore, it appears that the Government has no

available avenue through which to introduce statements made during discussions between ADA Ross and Jordan. This appears to moot any argument for exclusion of evidence of such discussions.

Further, to the extent Defendant argues that the discussions between ADA Ross and Jordan rendered the directions Defendant provided to police an involuntary confession obtained in violation of the Fourteenth Amendment, such an argument is unavailing. The fact that ADA Ross told Jordan that "the worst [he] could do was ask for the death penalty" is not enough by itself to render a subsequent confession involuntary. *See United States v. Jones*, 32 F.3d 1512, 1517 (11th Cir. 1994) ("[D]iscussions of realistic penalties for cooperative and non-cooperative defendants, are normally insufficient to preclude free choice."); *see also Parker v. North Carolina*, 397 U.S. 790, 795 (1970) ("[A]n otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial."). Here, Defendant's decision to disclose the location of Ms. Woodall's body was according to Defendant the result of plea discussions, or according to the Government a unilateral attempt by Defendant to avoid the death penalty. Under either interpretation of events, the directions Defendant provided were not a product of overborne will and so were not involuntary. Therefore, ADA Ross' communications with Harry Jordan do not require the exclusion or suppression of Defendant's subsequent cooperation with police or evidence derived from

that cooperation.

IV. Defendant's Motion in Limine

Defendant's Motion in Limine seeks to prevent the Government from obtaining attorney-client privileged communications from Stout, to exclude the introduction of privileged statements through Stout, and to prohibit the Government from having any conversations with Stout without first obtaining Defendant's permission. *See* Def.'s Mot. in Limine at 3-4. As stated above, the Government has informed the Court that it does not intend to elicit testimony from Stout at trial regarding privileged communications. Rather, the Government intends to ask questions regarding Defendant's provision of directions to the site of the body. This subject does not implicate privileged communications, as set forth above. Additionally, Stout testified that the Government has not attempted to initiate conversations with him other than by calling him to confirm that he would be present at the suppression hearing.

Therefore, based on the Government's representations and Stout's testimony, the Court denies Defendant's Motion in Limine.

CONCLUSION

For the reasons outlined above, Defendant's Motion in Limine (Doc. No. 80) and Motion to Suppress (Doc. No. 82) are DENIED.

IT IS SO ORDERED this 27th day of June, 2022.

Charles B. Goodwin

CHARLES B. GOODWIN
United States District Judge

APPENDIX C

Order of the District Court, Denying the Oral Jury Act Motion

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	CASE NO. CR-21-60-CBG
TYLER JAY MULLINS,	)	
	)	
Defendant.	)	

* * * * * *

VOLUME I OF III

TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE CHARLES B. GOODWIN

UNITED STATES DISTRICT JUDGE

JUNE 27, 2022

* * * * * * *

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

Emily Cripe, CSR
United States Court Reporter
U.S. Courthouse, 200 N.W. 4th St.
Oklahoma City, OK 73102 * 405.609.5094

APPEARANCES

FOR THE GOVERNMENT:

Mr. Patrick Miller Flanigan
Mr. Gregory Dean Burris
Assistant United States Attorneys
U.S. Attorney's Office
520 Denison Avenue
Muskogee, Oklahoma 74401

FOR THE DEFENDANT:

Mr. Kevin D. Adams
Kevin D. Adams, PLLC
36 E Cameron Street, Suite 16
Tulsa, Oklahoma 74103

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once those exhibits are sought to be admitted into evidence, probably during the testimony of Dr. Pfeifer.

THE COURT: What says the defendant on that question?

MR. ADAMS: Judge, Mr. Flanigan's suggestion seems very reasonable to me.

THE COURT: Very good. Then we'll proceed in that way.

Okay. What other -- what other issues do the parties have?

The defendant mentioned one specifically.

Let me ask, anything from the government that we need to take up before begin jury selection?

MR. FLANIGAN: Your Honor, just as noted, it had been the government's hope that we would reach some agreement preadmission of exhibits. That wasn't -- that didn't occur, so there's nothing more from the government at this time.

THE COURT: All right. From the defendant? You mentioned one issue specifically, but tell me anything else that -- or tell me about that issue and anything else that you think we need to take up prior to beginning jury selection.

MR. ADAMS: Judge, I don't have anything else, just this issue. And this is something that I did not anticipate would be a problem until we got the jury list and started going through it.

Specifically, we are objecting under Title 28, 1861, that reads, in relevant part, "It's the policy of the United States that all litigants in federal courts entitled to a trial by jury shall have the right to a grand and petite jury selected at a random from a fair cross section of the community in the district or division where the court convenes."

I'm not objecting because we're trying it in the Western District with an Eastern District jury.

The objection is, is that we don't believe that this panel is a fair cross section of that district, of the Eastern District. I don't know how this was raised, but I'll just tell you the first thing that brought my attention is that the city of Ada has about 16,000 people in the city of Ada. We have seven prospective jurors from the city of Ada.

Pontotoc County only has -- and this is -- these are numbers I'm getting from clicking on the links on the Eastern District website. This is something I just put together here while we were waiting this morning. Pontotoc County only has 37,000 people in it and we have eight prospective jurors from Pontotoc County.

To make -- to state it as clear as I can statistically, that we figure there's approximately -- based upon the links from the Eastern District website, there's approximately 739,000 people in the Eastern District of Oklahoma. And with 50 jurors, that means for every 14,780 people that we would

have one juror, just statistically speaking.

Well, Ada's 16,000 people, we got seven. I'm not a statistician. I'm not even that good at it, but I understand it. I don't see how that's possible. Okay?

If we have a fair cross section randomly selected, I think the odds of that are -- are remote to say the best. For example, Okmulgee has 40,000 people in it. We ought to have two and a half jurors from Okmulgee. We have zero.

Ada has got 22,000 people, we have zero. Atoka is zero.

You have more people in Muskogee and Broken Arrow, the Wagoner County part of Broken Arrow -- substantially more than you're going to have in Pontotoc County or Ada itself.

We have no -- we have more jurors from Pontotoc County than anywhere else. This case was very high profile, very unpopular.

And there is another -- I told the Court there was an issue. One of the jurors we see from Pontotoc County, on her jury selection thing, circled that she knew nobody. She works with my client's sister. My client's sister talked to her Friday. So we just have concerns because of this --

THE COURT: Who is that particular juror?

MR. ADAMS: That is Ms. --

THE COURT: Or potential juror, I should say.

MR. ADAMS: Hannah Parker.

THE COURT: Spell the last name for me.

MR. ADAMS: Parker, P-A-R-K-E-R.

And she didn't circle that she knew anybody, but I inquired, telling my client's sister not to be letting anybody know, only answering questions from lawyers about this, but she said, yes, she knows her and she spoke with her Friday.

So we -- we just have grave concerns, because of this case, the history of the case, the history of that community. And this -- the way that this was selected, we don't think that that's a possibility.

So in accordance with 28, United States Code, 1867, and this is before the voir dire examination begins, we would move to dismiss the indictment or stated proceedings because -- on the grounds of a substantial failure to comply with the provisions of this title in selecting the grand or the petite jury. And we believe that, if given some time and the opportunity to hire a statistician, that we could make a real strong case that that's not possible, that it was a fair cross section of the community based upon this draw.

THE COURT: All right. Thank you.

What says the government?

MR. FLANIGAN: Your Honor, this objection was raised to me a very short time ago. I have done very cursory research. I haven't found a case directly from the Tenth Circuit, but from the Eastern District of Michigan, *United States vs. Mills*, 389 F.Supp. 3d, 528, seems to be on point.

Obviously, the -- the government opposes any attempt to or -- or any motion to dismiss the indictment, further opposes any stay.

Importantly, citing *United States vs. Mills*, "A defendant's right to an impartial jury drawn from a fair cross section of the community is not based on the actual composition of either the petit jury." And that's citing *Taylor vs. Louisiana*, a United States Supreme Court case, 419 U.S. 522, which stated that, "There's no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population, or the petite jury venire."

And that's *Ambrose vs. Booker*, 684, Federal Third, 638, at Page 645, Sixth Circuit case from 2012, which stated that "a defendant raising a cross-section claim is challenging the pool from which the jury is drawn and not necessarily the venire panel directly before him."

There's also a *United States vs. Ferguson*, 863 Federal Supp. 2d, 661, at Page 668, another Eastern District of Michigan case from 2012. "It's not sufficient to make general observations about the assembled venire. To prove a fair cross-section violation, a defendant must demonstrate the systemic exclusion of a distinctive group and that has resulted in an unreasonable underrepresentation of that group in jury venires."

The Supreme Court has established a well-known three-part test to establish a prima facie violation of the fair cross-section requirement. And that's, one, that the group alleged to be excluded is a distinctive group in the community; two, that the representation of this group and venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and, three, that this underrepresentation is due to systemic exclusion of the group in the jury selection process.

And that's -- in that -- *United States vs. Mills* is citing *Duren* vs. Missouri, a U.S. Supreme Court case, at 439 U.S. 357, at Page 364, from 1979.

Random is random, Your Honor. Random numbers end in clusters, and it seems in this one we have a cluster of some people from Ada. Nothing that gives rise to what the defendant is arguing for.

The government's position is their motion should be denied both for the dismissal and for a stay.

THE COURT: Thank you.

MR. ADAMS: Judge, as everybody's aware, my client is a native American.

There's two issues here. One of them is you could have a claim under your constitutional rights that you're not -- along the lines of *Batson*, you know. But there's also a specific statute on point that gives you a right -- that gives a

defendant a right, and that's 28 U.S.C. 1861, using my research mechanism that I use, I use Casetext -- a lot of people aren't that familiar with it, but it gives me cases that cited the statute, and the cases that he -- that the government's talking about are not in there. So I'm not sure if it's directly on point under a *Batson* claim.

I haven't raised a *Batson* issue as much yet, but, you know, for example, Okmulgee has a very high population of minorities. You know, there's a lot of native Americans, there's a lot of blacks in Okmulgee. 40,000 people in Okmulgee. It's bigger than Pontotoc County. We have eight from Pontotoc County, we have zero from Okmulgee.

So I haven't had a chance to put the numbers to it and compare it to the ethnicity of those particular counties, but I -- I have a suspicion that if -- which is part of the reason in the alternative we're asking for a stay, I have a suspicion if we had an opportunity to do that with some very basic statistics that we could explain how this is affecting my client in a racially discriminatory manner.

It would be problematic as far as *Batson* is concerned as well. But in addition to -- but I just want to make that point, 28 U.S.C. 1861 stands on its own outside of a due process claim based upon constitutional grounds.

THE COURT: All right. Thank you.

Everybody rest at ease for just a moment.

All right. Thank you. The Court denies the defendant's objection. The group of potential jurors here was selected through an established process for the Eastern District of Oklahoma based on a cross section of persons in that district eligible to serve on juries.

The mere fact that the process may have resulted in a higher-than-average number of potential jurors from a certain area does not mean that a particular area was purposely favored or disfavored. Random selection can result in clusters, and that may have been the case here.

Therefore, the defendant's objection to the pool of potential jurors is denied. The Court assumes that any objection to a specific juror based on familiarity with Mr. Mullins or Ms. Woodall, or any witness, or familiarity with the allegations at issue here will be resolved through the jury selection process directed to the individual jurors.

All right. With that, is there any issue that we need to take up prior to beginning the jury selection process?

MR. FLANIGAN: Not from the government, Your Honor.

MR. ADAMS: Not from Mr. Mullins, Your Honor.

THE COURT: All right. Thank you.

I will say that, as part of my introductory remarks to the potential jury panel, I do read the indictment. And so here it's my intent to read the July 27th, 2021, superseding indictment as far as Count 1 and Count 3, but exclude any

APPENDIX D

Order of the District Court,
Denying the Renewed Written Jury Act Motion

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CR-21-60-CBG**
	)	
TYLER JAY MULLINS,	)	
	)	
Defendant.	)	

ORDER

Now before the Court is Defendant Tyler Jay Mullins' Renewed Motion to Dismiss Indictment (Doc. No. 151), seeking to dismiss the Superseding Indictment (Doc. No. 45) pursuant to 28 U.S.C. § 1867(d) for substantial failure to comply with the provisions of the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (the "Jury Act"). *See also* Def.'s Suppl. (Doc. No. 152). The Government has submitted a Response (Doc. No. 162), and Defendant has submitted a Reply (Doc. No. 163). Having reviewed the parties' filings, the Court makes its determination.

I. Background

On July 27, 2021, a federal grand jury returned a Superseding Indictment charging Defendant with: (1) Murder in Indian Country, in violation of 18 U.S.C. §§ 1111(a), 1151, and 1153; (2) Use, Carry, Brandish, and Discharge of a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i),(ii) & (iii); and (3) Causing the Death and Murder of a Person in the Course of a Violation of Title 18 U.S.C. § 924(c), in violation of 18 U.S.C. § 924(j)(1). *See* Superseding Indictment at 1-2. The

Court later dismissed Count Two of the Superseding Indictment at the Government's request. *See* Order of June 27, 2022 (Doc. No. 148).

A jury trial commenced on Count One and Count Three of the Superseding Indictment on June 27, 2022. On the first day of trial, prior to jury selection, Defendant, through counsel, orally moved to dismiss the Superseding Indictment for substantial failure to comply with the provisions of the Jury Act. After hearing argument, the Court denied Defendant's motion. *See* June 27, 2022 Court Min. (Doc. No. 153). The jury trial proceeded, and on June 30, 2022, the jury returned a verdict of guilty as to both Counts One and Three. *See* Verdict (Doc. No. 161).

On July 3, 2022, Defendant filed the instant Motion to Dismiss Indictment, contending again that the 49 prospective jurors at his criminal trial did not represent a fair cross section of the community and were not randomly selected. *See* Def.'s Mot. at 1.

II. Applicable Standards

The Jury Act provides in relevant part that "[i]t is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to . . . petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. § 1861. The Jury Act is "the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of [the Act]." *Id.* § 1867(e). "A defendant must raise a Jury Act challenge 'before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence,

the grounds therefor, whichever is earlier.'" *United States v. Stein*, 985 F.3d 1254, 1262 (10th Cir. 2021) (quoting 28 U.S.C. § 1867(a)). Strict compliance with this procedural requirement is essential. *See id.*

Regarding remedies available to a defendant under the Jury Act, the Act states:

> If the court determines that there has been a substantial failure to comply with the provisions of [the Jury Act] in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of [the Jury Act] in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

28 U.S.C. § 1867(d).

III. Discussion

A. Timeliness

The Government argues that the instant Motion is untimely under 28 U.S.C. § 1867(a) and so is barred. *See* Gov't's Resp. at 1-3. Defendant responds that the Motion was timely filed within seven days from the date Defendant and his counsel could have, in the exercise of due diligence, discovered the grounds for Defendant's challenge. *See* Def.'s Mot. at 1-2; 28 U.S.C. § 1867(a).

The Court agrees with the Government. "A defendant must raise a Jury Act challenge 'before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, *whichever is earlier*.'" *Stein*, 985 F.3d at 1262 (emphasis added) (quoting 28 U.S.C. § 1867(a)). Defendant's first Jury Act challenge may have been timely made, as Defendant's counsel raised his objection to the composition of the petit jury panel prior to voir dire and

immediately after he received the list of potential jurors. *See* Def.'s Reply at 2. Defendant's renewed Motion to Dismiss, made three days after his conviction, however, is untimely and procedurally barred. *See Stein*, 985 F.3d at 1263 ("A defendant's failure to file a challenge within seven days after being put on notice of the allegedly deficient jury selection procedures precludes a Jury Act claim.").[1]

B. Substantial Failure

Even if Defendant's Jury Act challenge was not procedurally barred, Defendant has not established that any failure to comply with the Jury Act was substantial. "The Jury Act provides remedies when a jury selection procedure 'involves a substantial failure to comply with the statute.'" *Stein*, 985 F.3d at 1263 (quoting *United States v. Kamahele*, 748 F.3d 984, 1022 (10th Cir. 2014)). "A failure is considered 'substantial' when it frustrates one of the three principles underlying the Act: (1) the random selection of jurors, (2) culling of the jury from a fair cross-section of the community, and (3) determination of disqualifications, exemptions, and exclusions based on objective criteria." *Id.* (internal quotation marks omitted).

Defendant argues that the 49 potential jurors in his case were not randomly selected and did not represent a fair cross section of the community. *See* Def.'s Mot. at 5-8; Def.'s

[1] Additionally, Defendant has not shown that the grant of the relief he seeks is authorized by the Jury Act. Defendant requests dismissal of the Superseding Indictment and for the Court to set aside the conviction and order a new trial. *See* Def.'s Mot. at 8. The relevant statute, however, provides that dismissal of the indictment is an option where there has been a substantial failure to comply with the Jury Act in selecting the grand jury. *See* 28 U.S.C. § 1867(d). If there is a substantial failure to comply with respect to the petit jury, as Defendant alleges here, the statute sets forth only one remedy: "[T]he court shall stay the proceedings pending the selection of a petit jury in conformity with [the Jury Act]." *Id.*

Reply at 2-5. In his Reply, Defendant clarifies that he is not challenging the Eastern District of Oklahoma's Jury Plan itself. *See* Def.'s Reply at 2. Rather, Defendant argues that "EDOK's Jury Selection Plan was not followed because the forty-nine potential jurors [were] not randomly selected." *Id.* (emphasis omitted). Defendant argues that this must be so because out of the 49 potential jurors, seven of those potential jurors were from the town of Ada in Pontotoc County, Oklahoma, the hometown of Defendant and the victim. *See* Def.'s Mot. at 6. Defendant contends that the probability of this occurring is ".29 of a single percentage point." *Id.* Additionally, Defendant argues that the fact that 33 of the 49 potential jurors were women also shows that the panel was not randomly selected. *See id.* at 7. Finally, in further support of his argument that the 49 potential jurors were not randomly selected, Defendant contends that out of the 26 counties that comprise the Eastern District of Oklahoma, ten of those counties were not represented at all in the panel of 49 potential jurors. *See id.* at 8.

The Eastern District of Oklahoma's Jury Plan sets forth a two-step process for the selection of potential jurors. *See* Jury Plan (Doc. No. 162-1) at 1-2. The Jury Plan was approved by the Judicial Council of the Tenth Circuit on March 3, 2020, and has been in effect since that time. *See id.* at 8. Under the Jury Plan, first a Master Jury Wheel is created by selecting names at random from the most current registered voter lists. *See id.* at 2-3. Names are then randomly drawn from the master jury wheel to receive juror qualification questionnaires. *See id.* at 3. Those potential jurors who are qualified then go into a second wheel, the "Qualified Jury Wheel." *See id.* at 4. As prospective jurors are needed for grand or petit jury panels, the Clerk of Court draws names from the Qualified Jury Wheel at

random. *See id.* at 4. All selections are carried out through a programmed electronic data processing system to ensure the mathematical odds of any single name being picked are substantially equal. *See id*. at 2.

Defendant offers no evidence supporting that the plan detailed above was not followed. Defendant's observations concerning overrepresentation of potential jurors from Pontotoc County, the underrepresentation of potential jurors from other counties in the Eastern District, and the female majority on the panel do not demonstrate a deviation from the Jury Plan. As the Court explained when denying Defendant's first motion, the Eastern District's Jury Plan provides for random selection, and sometimes random selection results in clusters. In this instance, the Jury Plan resulted in a cluster of potential jurors from Pontotoc County and a slightly disproportionate number of female potential jurors.

Defendant also argues that his jury panel did not represent a fair cross section of the community because there were no identifiable Native Americans or African Americans on the jury panel. *See* Def.'s Mot. at 7. Defendant represents that the population of the Eastern District of Oklahoma is comprised of roughly 19% Native Americans, and so "if the jury panel reflected a fair cross section of the community, you would expect approximately nine (9) Native Americans in a group of forty-nine (49)." *Id*. Defendant also represents that there were no identifiable African Americans in the group of potential jurors. *Id*.

"The Sixth Amendment guarantees a defendant the right to a jury pool comprised of a fair cross-section of the community." *United States v. Green*, 435 F.3d 1265, 1270 (10th Cir. 2006). "A defendant does not have a right to a jury of 'any particular composition' and the jury actually chosen does not have to 'mirror the community.'" *Id.*

(quoting *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975)). "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

Native Americans and African Americans are both distinctive groups. *See United States v. Yazzie*, 660 F.2d 422, 426 (10th Cir. 1981); *United States v. Shinault*, 147 F.3d 1266, 1272 (10th Cir. 1998). Defendant, however, does not present statistics regarding the representation of Native Americans or African Americans in the venires from which juries are selected in the Eastern District. Instead, Defendant simply claims that neither he nor his family visually recognized any Native American or African American in the panel of 49 potential jurors for his case. *See* Def.'s Mot. at 7-8. Finally, other than Defendant's own visual observations about the 49 potential jurors, Defendant does not present any

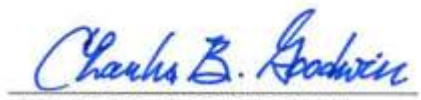
evidence of a systematic exclusion of Native Americans or African Americans in the Eastern District's jury selection process.

For these reasons, Defendant has not established substantial failure to comply with the provisions of the Jury Act.

CONCLUSION

Defendant's Renewed Motion to Dismiss Indictment (Doc. No. 151) is therefore DENIED.

IT IS SO ORDERED this 28th day of September, 2023.



CHARLES B. GOODWIN
United States District Judge