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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION**

UNITED STATES OF AMERICA,

Case No. 3:16-cr-00051-BR

Plaintiff,

**DEFENDANT RYAN PAYNE'S
MOTION TO DISMISS**

v.

RYAN PAYNE,

Defendants.

Defendant Ryan Payne, through Federal Public Defender Lisa Hay and Assistant Federal Public Defender Rich Federico, respectfully requests the Court dismiss the above-captioned matter with prejudice. In the alternative, should the Court find that dismissal is not warranted, Mr. Payne respectfully requests the Court bar future transports to Nevada pursuant to the writ of habeas corpus *ad prosequendum* issued by the District of Nevada, until the conclusion of his trial in the District of Oregon.

Mr. Payne's rights to the effective assistance of counsel and due process of law have been violated by his recent transport to and from Nevada, and by the continuing division of his attention

between two simultaneous prosecutions. Each day of simultaneous prosecution compounds the harm. Because the government has refused to choose which prosecution should proceed first, Mr. Payne requests the Court dismiss this case.

RELIEF REQUESTED: That the Court dismiss the charges against Ryan Payne with prejudice on the basis that his rights to effective assistance of counsel and due process of law have been and will continue to be violated. In the alternative, should the Court find that dismissal is not warranted, Mr. Payne requests the Court bar future transport to Nevada pursuant to the writ of habeas corpus *ad prosequendum* issued by the District of Nevada until the conclusion of trial in the District of Oregon.

CERTIFICATION OF CONFERRAL: Defense counsel conferred with Assistant United States Attorney Ethan Knight regarding this motion. The government objects to defendant's motion. It is the government's position that the Court should manage the transport of defendants consistent with its earlier Orders and in conjunction with the District of Nevada in a manner that best serves the interests of justice.

Additionally, defense counsel notes the following co-defendants are similarly situated in that they are being prosecuted simultaneously in both the Districts of Oregon and Nevada: Ammon Bundy, Joseph O'Shaughnessy, Ryan Bundy, Brian Cavalier, Peter Santilli, and Blaine Cooper.

I. Introduction

By electing to prosecute Mr. Payne in two separate federal districts on separate, complicated matters simultaneously, the government has violated and is violating Mr. Payne's rights to the effective assistance of counsel and due process of law. Most importantly for the purposes of this motion, Mr. Payne and his Oregon counsel lost thirteen (13) days of contact during the two weeks preceding an important motions deadline (April 27, 2016). Trial is less than five (5)

months away, and future interruptions to the trial preparations process will be catastrophic. This Court declined Mr. Payne's previous request to keep him in Oregon in preservation of his constitutional rights, in part on the grounds that his claims of prejudice were premature. Now that prejudice has occurred (and will only escalate), the Court should take affirmative action to restore and protect Mr. Payne's constitutional rights by dismissing the case against him.

II. Factual and Procedural History Relevant to this Motion

As this Court is aware, Mr. Payne requested that the Court prevent his transfer to the District of Nevada until the Oregon proceedings have finished. *See* Unopposed Emergency Motion for Court Order Prohibiting U.S. Marshals from Removing Ryan Payne and Listed Defendants from the District of Oregon (Dkt. 331). Mr. Payne made this request based on the undisputed fact that the transport to Nevada would unnecessarily trigger the beginning of legal proceedings against him in Nevada and place him in the impossible position of simultaneously defending himself against complicated criminal charges in two districts roughly 1,000 miles apart.

In deciding Mr. Payne's previously-filed motion to prevent the Nevada transfer, the Court made a series of findings. Most relevant to this motion, the Court found: (1) a single, isolated transport to Nevada "for the purpose of first appearances" would not interfere with the Oregon proceedings; (2) it was premature for the defendants to claim that their constitutional rights in the Oregon case were being violated; and (3) any claims regarding the violation of the defendants' rights stemming from the Nevada case needed to be litigated in Nevada. *See* Order, Dkt. 334. The Court ruled that Mr. Payne and the other affected defendants were to be transported to Nevada "on this single occasion for the purpose of first appearances in the District of Nevada." *Id.* at 4.

The defendants filed an interlocutory appeal and alternative request for writ of mandamus with the Ninth Circuit Court of Appeals and simultaneously sought a stay with this Court and with

the Ninth Circuit. *See* Motion for Stay of Order Pending Appellate Review (Dkt. 357). The Ninth Circuit denied the defendants' request to stay this Court's order allowing transport to Nevada but assigned the case to the next available merits panel. *See* Order No. 16-30080, Dkt. Entry 20. This Court also denied the motion to stay, concluding that one "short-term trip to Nevada for the purpose of making their initial appearances in a separate, but similarly complex criminal proceeding in that District, will not cause these Defendants irreparable harm." *See* Order, Dkt. 389 at 10.

The United States Marshals transported Mr. Payne out of Oregon on April 13, 2016. Mr. Payne arrived in Nevada on April 14, 2016, and was booked into the Nevada Southern Detention Center, located roughly seventy (70) miles from Las Vegas. He made his first appearance in court in Nevada on Friday, April 15, 2016.

From the time he left Oregon on April 13, 2016, to the time he was returned to Oregon on the night of April 25, 2016, Mr. Payne and his Oregon counsel had no privileged communications. There was no means or mechanism to contact Mr. Payne during the transport and booking into the Nevada correctional facility, and on the afternoon of April 14, 2016, Mr. Payne met with his Nevada counsel in preparation for his first appearance on Friday, April 15, 2016. On Monday, April 18, 2016, Mr. Payne's Oregon counsel attempted to schedule an attorney-client phone call on a non-recorded line for April 20, 2016 at 2:00pm in compliance with the Nevada Southern Detention Center's policies. *See* Exhibit 1, Email Correspondence from Rich Federico. When that call did not occur as requested on April 20, 2016, Mr. Payne's Oregon counsel repeated the request for an attorney-client call on a non-recorded line for April 21, 2016 at 11:00am—again in compliance with the Nevada Southern Detention Center's policies. *See id.* The second scheduled call did not occur, either. Mr. Payne was forced to call his Oregon attorneys collect on a recorded

line on April 22, 2016. The April 22, 2016 call was terminated after 15 minutes and, along with a second non-privileged call, represented the only contact between Mr. Payne and his Oregon counsel during the roughly two weeks he was away. And while Mr. Payne was able to take a limited number of his personal papers with him, he was unable to review Oregon discovery while in Nevada. Additionally, Mr. Payne's legal papers were taken from him by the U.S. Marshals in Nevada and not returned to him.

The Nevada Court arraigned Mr. Payne on April 15, 2016. *See* Minutes of Proceedings, *United States v. Bundy, et al*, Case. No. 2:16-cr-00046-GMN-PAL-4, Dkt. Entry 249 (hereinafter "Nev. Dkt."). The Nevada Court also held a status and case management conference on April 22, 2014. *See* Nev. Dkt. 310. On April 20, 2016, Mr. Payne's Nevada counsel filed a Motion to Dismiss with the Nevada Court, outlining the impossible situation in which Mr. Payne finds himself (having to choose the case in which he wants to enforce his constitutional rights) and asking the Nevada Court to dismiss the charges against him in Nevada with prejudice. *See* Nev. Dkt. 291 (04/20/16). Mr. Payne's Nevada counsel also filed an emergency motion to stay his transport back to Oregon until the motion to dismiss could be litigated. *See* Nev. Dkt. 301. Mirroring this Court's Order of March 22, 2016, the Nevada Court denied the emergency motion to stay, finding that "Defendants' Motion to Stay fails to provide the legal basis for this Court's jurisdiction and why this Motion should not be heard by the Oregon District Judge." *See* Nev. Dkt. 308. The Nevada Court vacated a status conference that had been scheduled for April 25, 2016 and the trial date of May 2, 2016. *See* Nev. Dkt. 310. Mr. Payne's motion to dismiss is pending, presumably to be decided within the next 60 days. *See* Nev. Dkt. 291 (setting government's deadline to respond to Nevada motion to dismiss for May 7, 2016); Nev. Dkt. 301 (setting government's deadline to respond to Nevada motion to stay transport for May 8, 2016).

A jury trial is scheduled to begin in Oregon on September 7, 2016. *See* Dkt. 389 at 3. There are several other status conferences and motion hearings scheduled, and to be scheduled, in Oregon prior to jury selection. This includes argument on Round 1 motions in Oregon, set for May 23, 24 and 25, 2016.

Trial is scheduled in Nevada for February 6, 2017. *See* Nv. Dkt. 321. The government is to provide the defense in Nevada the first two phases of discovery by May 6, 2016. *See* Nv. Dkt. 321. Presumably, defense counsel in Nevada will seek to review that discovery with Mr. Payne, just as he has done in Oregon. Additionally, the Nevada Court set a pretrial motions deadlines that includes dates that will directly interfere with the Oregon case. For example, pretrial motions are due in Nevada on October 3, 2016. *See* Nv. Dkt. 321 at 13. Mr. Payne will be in Oregon on that date in the middle of trial, as he will have been for the preceding four weeks.

III. The Government’s Decision to Pursue the Oregon and Nevada Cases Simultaneously Violates Mr. Payne’s Constitutional Rights, Forces Mr. Payne to Choose Where to Demand his Rights, and—Unless this Court Acts—Leaves Mr. Payne without an Adequate Forum in which to Vindicate his Rights

Mr. Payne now finds himself in the impossible situation he sought to avoid. *See, e.g.*, Transcript of March 22, 2016, Hearing, Dkt. 340 at 45:8-11 (where counsel for defendant Peter Santilli explained, “[I]t is almost impossible for a lawyer to have an effective relationship for his or her client when they are a thousand miles away.”). Because the government refused to choose which case should proceed first, Mr. Payne is in the untenable situation of somehow preparing for two separate trials, each involving enormous volumes of discovery in multiple different formats, with two separate sets of counsel 1,000 miles apart, at the same time. Or, he must instead prioritize one case over the other. This is not how our system was designed to function. As the United States Supreme Court stated in *United States v. Simmons*, 390 U.S. 377, 394 (1969), “it [is] intolerable that one constitutional right should have to be surrendered in order to assert another.” The same

can and should be said about a defendant's constitutional rights in two, distinct cases brought by the same prosecutorial entity. *See* 28 U.S.C. § 519 (“[T]he Attorney General shall supervise all litigation to which the United States . . . is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys . . . in the discharge of their respective duties.”).

The mere fact that Mr. Payne would be faced with this Hobson's choice offends the Constitution. As the United States Supreme Court recognized in *Powell v. Alabama*, 287 U.S. 45, 68 (1932), the time between arraignment and trial is “vitaly important” and “perhaps the most critical period of the proceedings.” *Powell*, 287 U.S. at 57. However, Mr. Payne now finds himself—involuntarily—in the middle of the most critical period of two proceedings and has been deprived of any meaningful contact with his Oregon counsel for two weeks prior to an important case deadline. By virtue of time and geography, Mr. Payne cannot both claim and vindicate his constitutional rights in both districts. *See Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922) (“One accused of crime, of course, cannot be in two places at the same time.”).

Should Mr. Payne devote the time and energy required to review the terabytes of data and prepare for trial in the Oregon case, set for trial in less than five (5) months, he will have to ignore (or place minimal effort) in to reviewing the pending motions and impending discovery in Nevada. If Mr. Payne continues to exercise his rights to a speedy trial in both cases and attempts to prepare for both trials at the same time, it will be impossible for him to obtain meaningful representation and mount an adequate defense in both proceedings. *See United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980) (“It is clear that government interference with a defendant's relationship with his attorney may render counsel's assistance so ineffective as to violate his Sixth Amendment right to counsel and his Fifth Amendment right to due process of law.”); *United States v. Bergeson*, 425

F.3d 1221, 1226 (9th Cir. 2005) (“A client’s confidence in his lawyer, and continuity of the attorney-client relationship, are critical to our system of justice.”). Mr. Payne should not be forced to waive his rights to effective assistance of counsel and speedy trial in one location in order to adequately defend himself in the other. As long as Mr. Payne is forced to defend himself against these two cases simultaneously, he will be deprived of the above-mentioned rights in one jurisdiction or the other—and likely in both. Mr. Payne should not be forced to make these kinds of impossible decisions.

This is especially the case when the two courts involved are deferring to each other on the critical issue of his transport between Oregon and Nevada, leaving Mr. Payne with no meaningful avenue for relief. In denying Mr. Payne’s request to be held in Oregon until the conclusion of this case, the Court found that Mr. Payne was unlikely to suffer any meaningful prejudice in the Oregon case and that he must instead litigate the deprivation of his constitutional rights in Nevada. However, when he attempted to do so by filing a motion to dismiss and an emergency motion to stay in Nevada, the Nevada court denied his request for a stay, in part, on the basis that Mr. Payne did not explain “why this Motion should not be heard by the Oregon District Judge.” *See Nev. Dkt. 310.*

The defense expects the Nevada Court will hold a hearing on Mr. Payne’s motion to dismiss in the next 60 days. If Mr. Payne is again transported to Nevada, he again loses critical time preparing and time in contact with his Oregon counsel. *See Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) (“the assistance of counsel is among those ‘constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error’”) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). If he attempts to stay in Oregon—and is not forcibly transported—he risks missing “stages of the [Nevada] proceedings where fundamental fairness might be thwarted by his

absence.” See *Faretta v. California*, 422 U.S. 806, 816 (1975). This cannot continue. The prejudice to Mr. Payne has begun, his constitutional rights have been violated, and the harm will escalate as both the Oregon and Nevada proceedings gain speed and near trial. The Nevada Court is unwilling to interfere with the continued transport of Mr. Payne between Nevada and Oregon, leaving this Court in the position of making a difficult decision. Mr. Payne thus respectfully requests that this Court dismiss this matter. In the alternative, counsel for Mr. Payne respectfully request that the Court bar future transports to Nevada pursuant to the writ of habeas corpus *ad prosequendam* previously issued.

The Ninth Circuit has identified two sources of federal court authority to dismiss indictments:

First, a court may dismiss an indictment if it perceives constitutional error that interferes with the grand jury's independence and the integrity of the grand jury proceeding. “Constitutional error is found where the ‘structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice’ to the defendant.” *United States v. Larrazolo*, 869 F.2d 1354, 1357–58 (9th Cir.1989). Constitutional error may also be found “if [the] defendant can show a history of prosecutorial misconduct that is so systematic and pervasive that it affects the fundamental fairness of the proceeding or if the independence of the grand jury is substantially infringed.” *Id.* at 1358.

Second, a district court may draw on its supervisory powers to dismiss an indictment. The supervisory powers doctrine “is premised on the inherent ability of the federal courts to formulate procedural rules not specifically required by the Constitution or Congress to supervise the administration of justice.” *Id.* at 1358. Before it may invoke this power, a court must first find that the defendant is actually prejudiced by the misconduct.

United States v. Isgro, 974 F.2d 1091, 1094 (9th Cir. 1992), *as amended on denial of reh'g* (Nov. 25, 1992).

In this case, the constitutional errors arise because the ordinary structural protections of a fair trial have been and are being compromised by the government’s decision to pursue dual

prosecutions. Mr. Payne's right to consult with counsel to prepare a defense and the right to the effective assistance of counsel have been affected by his 13-day absence from the district directly before pretrial motions are due. Mr. Payne's right to a speedy trial may be compromised in the future if his required attention to the Nevada case renders him unable to assist counsel in the Oregon case. Mr. Payne's right to be present at all proceedings may be violated if he is again taken to Nevada. These harms were avoidable if the government had not insisted on moving Mr. Payne to Nevada to start the speedy trial clock in that district.

In light of the unprecedented nature of the simultaneous prosecutions, the harm to Mr. Payne that has already occurred, and the inevitable future harm that will occur as Mr. Payne is forced to divide his attention between two serious federal cases, the defense requests that the Court exercise its equitable and supervisory powers to dismiss the case.

IV. Conclusion

Wherefore, for the reasons described above, Mr. Payne respectfully requests that the Court dismiss this matter with prejudice, or, in the alternative, bar future transports to Nevada pursuant to the writ of habeas corpus *ad prosequendum* previously issued.

Respectfully submitted on April 27, 2016.



Rich Federico
Attorney for Defendant (Payne)

EXHIBIT 1



RE: Request for Attorney-Client Phone Call
Rich Federico to: Najarian, Anthony
Cc: zzORml_Payne

04/21/2016 05:18 PM

Mr. Najarian,

Mr. Payne called us. However, he did so on his own initiative and was not told by his counselor we were trying to schedule a call. So, the call was not on an attorney line so it was recorded, and the call was limited to 15 minutes.

Very Respectfully,

Rich Federico
Assistant Federal Public Defender
District of Oregon

101 SW Main Street, Suite 1700
Portland, Oregon 97204
Phone: (503) 326-2123
Fax: (503) 326-5524

"Najarian, Anthony" Good afternoon did this individual call you toda... 04/21/2016 02:58:27 PM

From: "Najarian, Anthony" <Anthony.Najarian@cca.com>
To: 'Rich Federico' <Rich_Federico@fd.org>
Date: 04/21/2016 02:58 PM
Subject: RE: Request for Attorney-Client Phone Call

Good afternoon did this individual call you today ?.

-----Original Message-----

From: Rich Federico [mailto:Rich_Federico@fd.org]
Sent: Wednesday, April 20, 2016 4:02 PM
To: Nevada Southern Attorney Schedule- <NSDCAAttorneySchedule@cca.com>
Cc: zzORml_Payne <zzORml_Payne@fd.org>
Subject: Re: Request for Attorney-Client Phone Call

*** This is an EXTERNAL email. Please exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email. ***

Per the instructions of the CCA at the Southern Nevada Detention Center, I submitted the request below to schedule an appointment for a phone call with my client, Mr. Payne. I never received a response, nor a call from Mr. Payne. Please reschedule the call for tomorrow, Thursday, April 21st at 11:00AM (Pacific). Please acknowledge receipt of this request.

Very Respectfully,

Rich Federico
Assistant Federal Public Defender
District of Oregon

101 SW Main Street, Suite 1700
Portland, Oregon 97204
Phone: (503) 326-2123
Fax: (503) 326-5524

From: Rich Federico/ORF/09/FDO
To: nsdcattorneyschedule@cca.com
Cc: zzORml_Payne@FDO
Date: 04/18/2016 03:05 PM
Subject: Request for ~~Attorney-Client~~ Phone Call

Please schedule a call from Ryan Payne (79402-065) to his lawyers in Oregon on Wednesday, April 20 at 2:00PM. This call should be made on a line that is not recorded.

Please let me know if there is any issue scheduling this call at that date/time. Many thanks.

Very Respectfully,

Rich Federico
Assistant Federal Public Defender
District of Oregon

101 SW Main Street, Suite 1700
Portland, Oregon 97204
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