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8 Attorneys for Ryan W. Payne

9 UNITED STATES DISTRICT COURT
 10 DISTRICT OF NEVADA

-oOo-

11 UNITED STATES OF AMERICA,)
 12)
 Plaintiff,)
 13)
 vs.)
 14)
 RYAN W. PAYNE,)
 15)
 Defendant.)
 16)

2:16-cr-046-GMN-PAL

**MEMORANDUM OPPOSING ENTRY
 OF PROTECTIVE ORDER**

17
18 **Certification:** This Memorandum is timely filed.

19 Defendant RYAN W. PAYNE, through his counsel, SHARI L. KAUFMAN, WILLIAM
 20 CARRICO and RYAN NORWOOD, Assistant Federal Public Defenders, respectfully submits this
 21 objection to the Proposed Protective Order circulated by the government. The basis for this
 22 opposition is premised on the points and authorities set forth below.
 23
 24

1 DATED this 28th day of April, 2016.

2
3 RENE VALLADARES
4 Federal Public Defender

5 By: /s/ Shari L. Kaufman
6 SHARI L. KAUFMAN
7 Assistant Federal Public Defender

8 By: /s/ William Carrico
9 WILLIAM CARRICO
10 Assistant Federal Public Defender

11 By: /s/ Ryan Norwood
12 RYAN NORWOOD
13 Assistant Federal Public Defender
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POINTS AND AUTHORITIES

The government is seeking a broad protective order regarding the extensive discovery to be provided in this case. See Attachment A (“Proposed Protective Order” (PPO) circulated to the parties by the government on April 21, 2016). By its terms, the PPO would presumptively apply to “materials and documents created or written by the government, or obtained by the government through warrants or court orders.” The PPO would prohibit the dissemination of these materials to anyone, excepting (1) the defendants, (2) persons “employed by the attorney of record who are necessary to assist counsel of record in preparation for trial or other proceedings in this manner,” and (3) persons whom “defense counsel deems necessary to further legitimate investigation and preparation of the case.”

Mr. Payne objects to the PPO for several reasons. First, there is no good cause for the PPO. Second, the PPO will unfairly and unduly prejudice Mr. Payne. Third, the PPO is not in the public’s interest. The Court should accordingly reject the PPO.

A. The Government has not demonstrated “good cause” for any type of protective order.

Federal Rule of Criminal Procedure 16(d)(1) does not give the government carte blanche to request a protective order regarding discovery. The party seeking a protective order has the burden of demonstrating “good cause.” Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003). This Court has recognized that “good cause” requires a showing that disclosure to third parties “will result in a clearly defined, specific, and serious injury.” United States v. Beezer, 2015 WL 9200365 at *5 (D. Nev. 2015) (citing United States v. Smith, 985 F.Supp. 2d 506, 523 (S.D.N.Y. 2013)). “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing.” United States v. Wecht, 484 F.3d 194, 211 (3rd Cir. 2007). And even when a showing is made, a resulting protective order

1 must be “no broader than is necessary” to accomplish the order’s goals. Smith, 985 F.Supp. 2d at
2 524 (citing United States v. Lindh, 198 F.Supp. 2d. 739, 741-42 (E.D. Va. 2002)).

3 At most, the government has asserted it seeks a protective order “[o]ut of concerns for
4 witness safety and security.” CR 270, pg. 16. This wholly conclusory, unsubstantiated, and
5 unarticulated concern does not justify any sort of protective order, let alone the broad order sought
6 in the PPO. See United States v. Jones, 2007 WL 44044682 at *2 (E.D. Tenn. 2007) (rejecting
7 protective order sought under Rule 16(d)(1) when government failed to “outline[] a compelling
8 argument, nor one supported by law, that would establish or furnish good cause” for finding that
9 protective order governing specified documents would subject a government agent “to any
10 realistic, appreciable risk of harm or that the information would be used against him for improper
11 purposes.”).

12 Indeed, the government’s own conduct in this case belies any general claim of necessity
13 for keeping discovery in this case confidential. Although this litigation is still in its early stages,
14 the government has already on numerous occasions chosen to selectively reveal “materials and
15 documents created or written by the government, or obtained by the government through
16 warrants or court orders” in public filings and court hearings. In support of its attempts to detain
17 the defendants in this matter, the government has filed extensive memoranda that include
18 photographs and video stills, many of which appear to have been produced in the course of
19 government investigations (see e.g., CR 110, 127, 128, 130, 133, 281), Facebook postings,
20 presumably obtained via warrants (id.), and statements purportedly made by the co-defendants to
21 law enforcement and government employees/contractors, which are presumably contained in
22 government-generated reports. See e.g., CR 281 (Ex.5, pp. 13-16). At the April 20, 2016
23 detention hearing for co-defendant Ammon Bundy, the government made an extensive proffer
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1 about the purported strength of its case that included lengthy quotations of statements that Mr.
2 Bundy purportedly made to a law enforcement officer. Having profited from the selective public
3 disclosure of its investigation, the government cannot now assert a general interest in keeping the
4 results of that investigation confidential.

5 Rule 16(d)(1) states that the Court “may permit a party to show cause by a written statement
6 that the court will inspect *ex parte*.” Parties, however, cannot respond to a good cause claim that
7 is not revealed to them. The Court should not allow or consider any such *ex parte* communication
8 in this case. Even assuming, *arguendo*, that there was a legitimate reason for the government to
9 make *some* part of its showing *ex parte*, the government should still be required to reveal the
10 remainder of its good cause claim, so that the necessity and breadth of the PPO can be
11 meaningfully litigated and resolved by this Court.

12 **B. Any protective order will prejudice Mr. Payne and violate his rights.**

13 A good cause inquiry must also consider whether the protective order “would prejudice the
14 defendant.” Smith, 985 F.Supp. 2d. at 523, citing United States v. Carrilles, 654 F.Supp. 2d. 557,
15 566 (W.D. Tex. 2009). Mr. Payne, of course, has the right to the effective assistance of counsel
16 and a fair and speedy trial, as guaranteed by the United States Constitution. Although the
17 government has not provided any specific reason to the parties why a protective order is necessary
18 in the first place, the PPO would necessarily prejudice Mr. Payne’s ability to effectively prepare
19 for trial.

20 The provisions in the PPO that purport to limit its scope do not ameliorate this prejudice.
21 The PPO contains a provision that defense counsel may disseminate the discovery to other parties
22 when “necessary to further legitimate investigation and preparation of the case.” This vague
23 provision, however, will inevitably lead to confusion and further litigation. The government will
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1 likely have a different view than defense counsel about what is “necessary” and “legitimate” to
2 defend against this case. Defense counsel will be placed in a situation where they will either: (a)
3 risk being sanctioned as a result of a legitimate disagreement about the scope of the order; or (b)
4 have to “pre-clear” their investigative efforts with the government and/or the Court, thus revealing
5 defense strategies. Any such litigation will also expend time and effort that defense counsel will
6 not be able to spend on other matters essential to Mr. Payne’s defense.

7 Though there are many practical impediments to the PPO, several examples are already
8 identifiable. Mr. Payne, like several other co-defendants, is charged in a separate indictment with
9 offenses in the District of Oregon concerning events at the Mahleur Wildlife Refuge, where is he
10 represented by a different set of appointed attorneys. The incidents underlying the indictments in
11 Oregon and in Nevada are alleged to involve many of the same actors, and both incidents were
12 allegedly spurred by underlying concerns about the federal government’s land ownership and
13 policy. Yet the PPO does not specifically state that defense counsel may provide discovery to the
14 lawyers who represent Mr. Payne in the Oregon case. There is no legitimate reason why appointed
15 federal counsel who are representing Mr. Payne in Oregon in a matter that bears at least some
16 relation to the instant case should be prohibited from seeing discovery to determine whether it is
17 of any relevance to Mr. Payne’s defense in the Oregon case. But, under the proposed PPO, defense
18 counsel might risk sanction if they allowed the lawyers representing Mr. Payne’s in the Oregon
19 case to view the discovery in the instant case.

20 Additionally, the PPO also purports to be limited to “materials and documents created or
21 written by the government, or obtained by the government through warrants or court orders,” and
22 does not “restrict reproduction of dissemination of discovery materials the defense may otherwise
23 obtain through open sources.” In this case, which has received extensive national media
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1 coverage and in which the defendants are alleged to have made extensive statements on social
2 media, the distinction between materials that are created, written, or obtained by the government,
3 and materials available via “open sources,” is inherently vague and susceptible to confusion.
4 Indeed, much of the information the government may provide—such as the Facebook materials
5 the government has obtained via search warrant—may *also* be available via open sources. As
6 outlined above, the potential for disagreement about this provision will place defense counsel in a
7 situation where they must either risk sanction or reveal defense strategies by seeking to “pre-clear”
8 issues with the government and/or the Court.

9 Finally, the PPO contains a provision that defense counsel may seek an “exception” for
10 “specific discovery material” that should not be subject to disclosure restrictions. This provision
11 reverses the burden required by Rule 16(d)(1), explained *supra*, which requires the party seeking
12 the protective order to explain why such an order is necessary before the order is granted. The
13 PPO instead places the burden on the defense to first “confer” with the government and then seek
14 relief from the court. Given the extensive discovery in this case, it is not realistic or fair to require
15 the defense to seek “exceptions” for individual documents and, in the process of doing so,
16 potentially revealing defense strategies to the government in order to exempt materials that never
17 should have been subject to a protective order in the first place.

18 **C. Any protective order will not be in the public’s interest.**

19 “It is well established that the fruits of pretrial discovery are, in the absence of a court order
20 to the contrary, presumptively public.” San Jose Mercury News v. U.S. Dist. Court, 187 F.3d
21 1096, 1103 (9th Cir. 1999); *see also* In re Roman Catholic Archbishop of Portland Oregon, 661
22 F.3d 417, 424 (9th Cir. 2011) (“As a general rule, the public is permitted ‘access to litigation
23 documents and information produced during discovery.’”). For purposes of Rule 16(d)(1), “[t]he
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1 good cause determination must also balance the public interest in the information against the
2 injuries that disclosure would cause.” Wecht, 484 F.3d at 211. The government has yet to identify
3 any “injuries” that any disclosure of discovery would cause, but in any event the PPO’s blanket
4 disclosure restrictions are not in the public interest.

5 More so than any other recent criminal case brought in this District, this matter has
6 generated extensive media coverage, and the actions and motivations of the defendants have been
7 the subject of extensive public debate and discussion. The government’s unusually long
8 indictment includes a lengthy narrative—drawing upon and citing the discovery that has yet to be
9 provided—providing the government’s side of the narrative, in which the defendants are portrayed
10 as violent criminals. Numerous national and local media outlets have reported and extensively
11 cited the government’s claims.¹ Numerous government officials have commented on the
12 indictment. See e.g., [https://www.splcenter.org/hatewatch/2016/02/22/deeper-look-cliven-](https://www.splcenter.org/hatewatch/2016/02/22/deeper-look-cliven-bundys-criminal-indictment)
13 [bundys-criminal-indictment](https://www.splcenter.org/hatewatch/2016/02/22/deeper-look-cliven-bundys-criminal-indictment) (quoting the United States Attorney, the FBI chief for Nevada, and
14 the director of the Bureau of Land Management). United States Senator Harry Reid has labeled
15 Cliven Bundy and his supporters as “domestic terrorists,” and, in remarks delivered on the Senate
16 floor just a few weeks ago, described the lead co-defendant as an “outrageous lawbreaker” who
17 was properly in jail. See [http://www.reid.senate.gov/press_releases/2016-04-07-reid-we-must-](http://www.reid.senate.gov/press_releases/2016-04-07-reid-we-must-protect-nevadas-gold-butte-lands-across-america#.VyI6M_32bcs)
18 [protect-nevadas-gold-butte-lands-across-america#.VyI6M_32bcs](http://www.reid.senate.gov/press_releases/2016-04-07-reid-we-must-protect-nevadas-gold-butte-lands-across-america#.VyI6M_32bcs).

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20 ¹ See e.g., *Cliven Bundy and sons indicted on federal conspiracy charges: ‘A Man who will*
21 *do whatever it takes’* WASHINGTON POST, February 18, 2016, available at
22 [https://www.washingtonpost.com/news/morning-mix/wp/2016/02/18/a-man-who-will-do-what-](https://www.washingtonpost.com/news/morning-mix/wp/2016/02/18/a-man-who-will-do-what-ever-it-takes-cliven-bundy-and-sons-indicted-on-conspiracy-charges/)
23 [ever-it-takes-cliven-bundy-and-sons-indicted-on-conspiracy-charges/](https://www.washingtonpost.com/news/morning-mix/wp/2016/02/18/a-man-who-will-do-what-ever-it-takes-cliven-bundy-and-sons-indicted-on-conspiracy-charges/); *Cliven Bundy and Sons*
24 *Charged in Case that Gave Rise to Oregon Standoff*, NEW YORK TIMES, February 18, 2016,
available at [http://www.nytimes.com/2016/02/19/us/charges-for-5-in-nevada-are-linked-to-](http://www.nytimes.com/2016/02/19/us/charges-for-5-in-nevada-are-linked-to-oregon-case.html?_r=0)
[oregon-case.html?_r=0](http://www.nytimes.com/2016/02/19/us/charges-for-5-in-nevada-are-linked-to-oregon-case.html?_r=0); *Cliven Bundy Indicted for Role in 2014 Bunkerville Confrontation*, LAS
VEGAS REVIEW-JOURNAL, February 17, 2016, available at [http://www.reviewjournal.com/](http://www.reviewjournal.com/news/nation-and-world/cliven-bundy-indicted-role-2014-bunkerville-confrontation)
[news/nation-and-world/cliven-bundy-indicted-role-2014-bunkerville-confrontation](http://www.reviewjournal.com/news/nation-and-world/cliven-bundy-indicted-role-2014-bunkerville-confrontation).

CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that she is an employee of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on April 28, 2016, she served an electronic copy of the above and foregoing **MEMORANDUM OPPOSING ENTRY OF PROTECTIVE ORDER** by electronic service (ECF) to the person named below:

DANIEL G. BOGDEN
United States Attorney
ERIN M. CREEGAN
Assistant United States Attorney
NADIA JANJUA AHMEN
Assistant United States Attorney
NICHOLAS DICKINSON
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/s/ Karen Meyer
Employee of the Federal Public Defender

EXHIBIT A

EXHIBIT A

1 RENE L. VALLADARES
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7 Attorneys for Ryan W. Payne

8 UNITED STATES DISTRICT COURT
 9 DISTRICT OF NEVADA

-oOo-

11 UNITED STATES OF AMERICA,)
)
 12 Plaintiff,)
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 13 vs.)
)
 14 RYAN W. PAYNE,)
)
 15 Defendant.)

2:16-cr-046-GMN-PAL

DEFENDANT RYAN W. PAYNE'S
MOTION TO DISMISS

16
17 **Certification:** This Motion is timely filed.

18 Defendant RYAN W. PAYNE, through his counsel, WILLAIM CARRICO and RYAN
 19 NORWOOD, Assistant Federal Public Defenders, respectfully submits that the government's
 20 decision to simultaneously prosecute Mr. Payne in two separate federal District Courts violates
 21 Mr. Payne's Sixth Amendment rights to a speedy trial and to effective assistance of counsel as
 22 well as his Fifth Amendment right to due process. To both restore and continue to protect Mr.
 23 Payne's critical constitutional rights, Mr. Payne requests the Court dismiss this case with prejudice.

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1 Further support for this request is set forth in the following Memorandum of Points and
2 Authorities.

3 DATED this 20th day of April, 2016.

4 RENE VALLADARES
5 Federal Public Defender

6 By: /s/ William Carrico
7 WILLIAM CARRICO
8 Assistant Federal Public Defender

9 By: /s/ Ryan Norwood
10 RYAN NORWOOD
11 Assistant Federal Public Defender
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1 **Memorandum of Points and Authorities**

2 **I. Introduction**

3 This Motion is precipitated by the government’s decision to simultaneously pursue two
4 separate federal criminal cases against Defendant Ryan Payne in two separate federal district
5 courts nearly 1,000 miles away from each other. Each case alleges multiple charges against
6 numerous defendants. Each case involves an overwhelming volume of discovery. Each case
7 exposes Mr. Payne to substantial imprisonment terms. Each case is handled by a different team
8 of defense attorneys. Thus, each case requires Mr. Payne’s defense counsel to spend considerable
9 time with Mr. Payne reviewing voluminous discovery with him, preparing his defense, and
10 consulting with him about a multitude of pretrial and trial issues.

11 The government’s decision to engage in dual prosecutions places Mr. Payne in a
12 precarious position. The dual prosecutions require Mr. Payne to choose between which of the
13 two cases will be litigated without violating his Fifth and Sixth Amendment rights—rights that
14 are among the most fundamental and critical rights guaranteed to criminal defendants. Mr. Payne
15 cannot be forced to make this choice as it is no choice at all. Mr. Payne faces irreparable prejudice
16 and jeopardy if he must choose one competing case over another as the forum to invoke his Fifth
17 and Sixth Amendment rights. As such, the only constitutionally sound remedy is for the Court to
18 dismiss the instant case with prejudice.

19 Through this motion, Mr. Payne unequivocally makes clear his invocation of all his
20 constitutional rights, including his constitutional right to a speedy trial, his right to effective
21 assistance of counsel, and his right to due process. Mr. Payne also continues to invoke all of his
22 constitutional trial rights with respect to his case in Oregon, and he does not waive any arguments
23 he has made previously with regard to either case.

1 **II. Procedural History**

2 **A. District of Oregon Proceedings**

3 On January 27, 2016, the government moved to unseal a redacted criminal complaint filed
4 against Mr. Payne and seven co-defendants in the District of Oregon. *See United States v. Payne*,
5 D. Or., Case No. 3:16-cr-00051-BR-4 (hereinafter "Oregon case"). Mr. Payne made his
6 appearance that day and has since been ordered detained in the Oregon case. *Id.* at CR ##21-29.
7 On February 3, 2016, an unsealed, redacted indictment in the Oregon case was filed against Mr.
8 Payne and 15 co-defendants. *Id.* at CR #58. The indictment alleges the defendants conspired to
9 impede United States officers under 18 U.S.C. § 372 from October 5, 2015 through January 26,
10 2016. *Id.* On March 9, 2016, an unsealed redacted six-count superseding indictment was filed
11 against Mr. Payne and 26 named and unnamed co-defendants. The charges pertaining to Mr.
12 Payne allege:

13 Count 1: conspiracy to impede United States officers in violation of 18 U.S.C. § 372,
14 from November 5, 2015 through February 12, 2016;

15 Count 2: possession of firearms and dangerous weapons in federal facilities in
16 violation of 18 U.S.C. §§ 930(b), (2), from January 2, 2016 through
 February 12, 2016; and

17 Count 3: use and carry of a firearm in relation to a crime of violence in violation of
18 18 U.S.C. §§ 924(c)(1)(A), (2), from January 2, 2016 through February 12,
 2016.

19 *Id.* at CR # 282.

20 In addition, on March 9, 2016, the district court in the Oregon case ordered that the case
21 of *United States v. Cooper*, D. Or., Case No. 3:16-cr-00064-JO, is deemed to be part of the Oregon
22 case. *Id.* at CR #285. The district court also declared the Oregon case complex. *Id.* at #289.
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1 The discovery in the Oregon case is incredibly voluminous. The government has stated
2 the discovery issues in that case will be greater than any before seen in the history of the District
3 of Oregon. *Payne*, D. Or., Case No. 3:16-cr-00051-BR-4 , CR #185 at 2 (“The government
4 anticipates that the discovery issues in defendants’ case will be some of the most complicated in
5 the history of the district.”). To date, the government has disclosed six volumes of discovery
6 comprised of 14,079 Bates pages, 48,050 files, and 94 gigabytes of data to the defense team in
7 the Oregon case. *Payne*, D. Or., Case No. 3:16-cr-00051-BR-4, CR #404. The data exists in
8 multiple formats, including .pdfs, text files, tiffs, load files, and natives. *Id.* The government is
9 currently processing additional discovery encompassing more than 150 gigabytes of data. *Id.*
10 The government has also conferred with one defense attorney to provide estimates about the
11 volume and nature of future discovery production to assist the defense in obtaining a contractor
12 to facilitate discovery hosting by a third-party vendor. *Id.*

13 On April 11, 2016, the district court issued an order setting a single trial for all defendants
14 in early September 2016, though some defendants have indicated they will not be prepared to
15 proceed to trial on that date. *Payne*, D. Or., Case No. 3:16-cr-00051-BR-4, CR #389. The district
16 court indicated it would consider a motion to continue the trial date premised upon insufficient
17 time to prepare after July 7, 2016. *Id.*

18 **B. District of Nevada Proceedings**

19 On February 17, 2016, a grand jury returned a federal indictment against Mr. Payne and
20 four others in the District of Nevada. *United States v. Payne*, 2:16-cr-046-GMN-PAL-4, CR #5.
21 On March 2, 2016, the grand jury returned a superseding indictment against Mr. Payne and 18
22 others, alleging:

23 Count 1: conspiracy to commit an offense against the United States in violation of
24 18 U.S.C. § 371 , between March 2014 and March 2, 2016;

- 1 Count 2: conspiracy to impede or injury a federal officer in violation of 18 U.S.C.
2 § 372 , between March 2014 and March 2, 2016;
- 3 Count 3: use and carry of a firearm in relation to a crime of violence in violation of
4 18 U.S.C. §§ 924(c), (2), between March 2014 and March 2, 2016;
- 5 Count 4: assault on a federal officer in violation of 18 U.S.C. §§ 111(a)(1), (b) , 2,
6 on April 9, 2014;
- 7 Count 5: assault on a federal officer in violation of 18 U.S.C. §§ 111(a)(1), (b), 2,
8 on April 12, 2014;
- 9 Count 6: use and carry of a firearm in relation to a crime of violence in violation of
10 18 U.S.C. §§ 924(c), 2, on April 12, 2014;
- 11 Count 7: threatening a federal law enforcement officer in violation of 18 U.S.C. §§
12 115(a)(1)(B), 2, on April 11, 2014;
- 13 Count 8: threatening a federal law enforcement officer in violation of 18 U.S.C. §§
14 115(a)(1)(B), 2, on April 12, 2014;
- 15 Count 9: use and carry of a firearm in relation to a crime of violence in violation of
16 18 U.S.C. §§ 924(c), (2), on April 12, 2014;
- 17 Count 10: obstruction of the due administration of justice in violation of 18 U.S.C.
18 §§ 1503, 2, on April 6, 2014;
- 19 Count 11: obstruction of the due administration of justice in violation of 18 U.S.C.
20 §§ 1503, 2, on April 9, 2014;
- 21 Count 12: obstruction of the due administration of justice in violation of 18 U.S.C.
22 §§ 1503, 2, on April 12, 2014;
- 23 Count 13: interference with interstate commerce by extortion in violation of 18
24 U.S.C. § 1951, 2, on April 2, 2014, and April 9, 2014;
- Count 14: interference with interstate commerce by extortion in violation of 18
U.S.C. § 1951, 2, on April 12, 2014;
- Count 15: use and carry of a firearm in relation to a crime of violence in violation of
18 U.S.C. §§ 924(c), 2, on April 12, 2014; and
- Count 16: interstate travel in aid of extortion in violation of 18 U.S.C. §§ 1952, 2,
between April 5, 2014, and April 12, 2014.

CR #27.

1 On March 2, 2016, a federal arrest warrant was issued for Mr. Payne. CR #42. The
2 government also requested this Court issue a writ of habeas corpus ad prosequendum for Mr.
3 Payne. CR #50. The petition for the writ requested the Warden of the Multnomah County Jail in
4 the District of Oregon, where Mr. Payne was then detained in the Oregon case, to transfer Mr.
5 Payne to the District of Nevada for arraignment on the superseding indictment in the instant case
6 and then return Mr. Payne to the District of Oregon thereafter. *Id.* This Court issued the writ that
7 same day. CR #53.

8 On March 25, 2016, this Court issued an order directing the parties to meet and confer
9 regarding whether this case should be deemed complex. CR #198. It also required the parties to
10 individually propose a schedule by April 18, 2016, for discovery, pretrial motions, trial, and any
11 exclusions of time appropriate under 18 U.S.C. § 3161. *Id.* On April 18, 2016, Mr. Payne filed
12 his proposed schedule with this Court. CR #269. Therein, Mr. Payne stated this case is not
13 complex and requested that this Court set his trial date within the speedy trial limit or leave in
14 place the current calendared trial date of May 2, 2016. *Id.* The government then filed a proposed
15 schedule, suggesting that this case is complex and requesting a trial date in February 2017. CR
16 #270.

17 The parties have already conferred regarding discovery. The government advised it would
18 anticipate producing discovery “if and when a coordinator is appointed and then once to the
19 coordinator for further dissemination to defense counsel.” The government does not intend to
20 provide discovery separately to each defendant. Additionally, the government refused to provide
21 defense counsel with any portion of the discovery or an index for the discovery prior to defense
22 counsel meeting Mr. Payne for the first time after he was transported to the District of Nevada for
23 his initial appearance. In fact, the government has indicated it will not even begin its discovery
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1 disclosures until this Court enters a Scheduling Order. CR #270 at 14. When it does disclose
2 discovery, which it presently estimates exceeds 1.4 terabytes of disk space, the government
3 intends to do so in “phases”—a proposition to which Mr. Payne objects. *Id.* Given the nature
4 of the charges and the time period covered in the superseding indictment, it is anticipated the
5 volume of discovery in this case will eclipse the discovery in the Oregon case.

6 As of the date of this filing, Mr. Payne has been transferred to the District of Nevada for
7 his arraignment on the superseding indictment and made his initial appearance on April 15, 2016.
8 It is anticipated that, pursuant to the writ issued and the apparent informal agreement between the
9 Districts of Oregon and Nevada, Mr. Payne will be returned to the District of Oregon after the
10 status conference scheduled before this Court on April 22, 2016.

11 C. Ninth Circuit Court of Appeals

12 On March 30, 2016, Mr. Payne’s counsel in the Oregon case challenged the legality of
13 this Court’s writ of habeas corpus ad prosequendum and asked that the writ be stayed pending
14 Mr. Payne’s interlocutory appeal of the writ. *See United States v. Payne*, Ninth Cir. Case No. 16-
15 30080, Dkts. 4, 5. In his interlocutory appeal, Mr. Payne asks if:

16 After arraignment and detention on an indictment in one federal
17 district court, does the non-consensual transfer of the defendant to
18 another federal district court for arraignment on a different charge,
19 before the resolution of the first case, lack a jurisdictional basis and
infringe on the due process-based rules for priority of warrants, the
Speedy Trial Act, and the Sixth Amendment right to counsel?

20 *Id.* at Dkt. 5, p. 9. The Ninth Circuit denied the stay but referred Mr. Payne’s appeal of the writ
21 to the next available merits panel. *Id.* at Dkt. 20. Thus, although Mr. Payne is presently in this
22 District, the legality of his presence in this District remains under appellate review in the Ninth
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1 Circuit. Mr. Payne submits his forced presence in this District via the writ does not waive his
2 objection to this Court's authority to issue the writ in the first instance.

3 **III. The Government's Decision to Simultaneously Prosecute Mr. Payne on Criminal**
4 **Charges in Two Separate Federal District Courts Impermissibly Forces Mr.**
5 **Payne to Choose Between Guaranteed Constitutional Trial Rights.**

6 The government has elected to simultaneously prosecute two separate federal criminal
7 cases against Mr. Payne in two separate federal district courts. The government's conduct in the
8 particular circumstances of this case denies Mr. Payne constitutional protections guaranteed him
9 by the Constitution.

10 The government's conduct in this case forces Mr. Payne to elect between exercising his
11 constitutional rights under the Fifth and Sixth Amendment rights in the Oregon case or the Nevada
12 cases. Mr. Payne can either invoke his constitutional rights to a speedy trial, to effective
13 assistance of counsel, and to due process in the Oregon case *or* in the Nevada case. He cannot
14 invoke his constitutional trial rights in both cases simultaneously—the logistics of the Oregon
15 and Nevada cases render this impossible.

16 Mr. Payne is currently ordered detained in his Oregon case and is being held at the
17 Multnomah County Jail in Portland, Oregon. He is also currently ordered detained in his Nevada
18 case and is housed in a federal contract facility while he is in this District. CR #249. The Oregon
19 and Nevada cases contain multiple counts, multiple defendants, and each exposes Mr. Payne to
20 substantial imprisonment if he is convicted. The government has already projected the discovery
21 issues involved in the Oregon case “will be some of the most complicated in the history of the
22 district.” *Payne*, D. Or., Case No. 3:16-cr-00051-BR-4, CR #185 at 2. The charges in the Nevada
23 case are even more numerous, span a longer and earlier time frame, and involve more defendants
24 than the Oregon case. At present, the discovery in the instant case is so voluminous the

1 government seeks to disclose it to a coordinator for distribution in phases, not to individual
2 defendants.

3 The rights to a speedy trial, effective assistance of counsel, and due process are
4 fundamental constitutional rights. *Moore v. Arizona*, 414 U.S. 25, 27-28 (1973) (stating “the right
5 to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment”) (internal
6 quotation marks and citation omitted); *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (finding
7 the Sixth Amendment right to effective assistance of counsel exists to protect the fundamental
8 right to a fair trial). The Supreme Court has been “unyielding” in its insistence that a defendant’s
9 waiver of constitutional trial rights must be “knowing, intelligent, *and voluntary*.” *Schriro v.*
10 *Landigan*, 550 U.S. 465, 484 (2007) (emphasis added). Mr. Payne cannot proceed in the Oregon
11 and Nevada cases simultaneously without being forced to waive constitutional rights that the
12 government may not force him to waive.

13 Whether a defendant can knowingly, intelligently, and voluntarily waive his constitutional
14 rights is dependent upon the particular circumstances of the case and the nature of the right
15 involved. *Gete v. I.N.S.*, 121 F.3d 1285, 1293 (9th Cir. 1997) (citing *Johnson v. Zerbst*, 304 U.S.
16 458 (1938)). There can be no argument that Mr. Payne has waived any of his constitutional trial
17 rights in the instant case: Mr. Payne invokes, through this Motion, his constitutional rights to a
18 speedy trial, to effective assistance of counsel, and to due process. There also can be no argument
19 that Mr. Payne has waived any of his constitutional trial rights in the Oregon case: he has already
20 invoked his constitutional trial rights in the Oregon case. *See Payne*, D. Or., Case No. 3:16-cr-
21 00051-BR-4, CR #183, p. 2 (stating Mr. Payne invokes his rights under the Fifth and Sixth
22 Amendment); CR #340 p. 15 (defense counsel stating Mr. Payne’s then-impending transfer to
23 Nevada for arraignment starts the clock for his statutory and constitutional speedy rights, the

1 impact of which interferes with his right to effective assistance of counsel, speedy trial, and due
2 process in the Oregon case).

3 The government fails to understand the gravity of the rights at issue, fails to acknowledge
4 Mr. Payne has the right to decide which rights to invoke in which case, and fails to understand
5 that the status of the Oregon and Nevada cases renders Mr. Payne's constitutional trial rights
6 illusory. In a recent hearing, the government indicated the case in "Oregon will be tried first" and
7 stated:

8 The U.S. Attorney's Office, in Nevada and Oregon, we're speaking
9 with one voice. The Oregon case was filed first. The Oregon case
10 should go first. But the Oregon case does not have to be completed
11 before the Nevada case begins. There are ways where practically
12 we can arrange for both cases to proceed on a parallel track; where
defendants can be present in Nevada and present in Oregon to attend
all of their court appearances and have significant and meaningful
interaction and assistance with counsel.

13 *Payne*, D. Or., Case No. 3:16-cr-00051-BR-4, CR #340, pp. 20, 21. As explained below,
14 proceeding in both cases simultaneously is not possible without violating Mr. Payne's
15 constitutional trial rights.

16 Notably, Mr. Payne's counsel in the instant case tried to avoid the litigation firestorm that
17 has erupted from the government's decision to simultaneously prosecute Mr. Payne in two
18 separate federal districts at the same time. Defense counsel suggested one avenue to avoid forcing
19 Mr. Payne to waive his constitutional trial rights would be to refrain from transferring him from
20 Oregon to Nevada for his first appearance—an appearance that triggers, among other rights, his
21 constitutional trial rights under the Fifth and Sixth Amendments, stating:

22 There's no necessity to [have Mr. Payne] come back to Nevada to
23 start this case. If the [Oregon] case is going to go to trial in Oregon
24 in September, let the case to go to – go to trial in go Oregon. When

1 the [Oregon] case is over, it will come here [to Nevada]. . . . And
2 the reason is, Judge, realistically you cannot have a meaningful
3 conversation or a meaningful dialogue with your client in a - - in a -
4 - in a facility that is a thousand miles away or 800 miles away. It
5 requires -- certainly for CJA panel attorneys, they cannot
6 economically do that. Even for the federal defender, it would be
7 almost impossible, in a case of this magnitude, with the amount of
8 discovery that we're anticipating, to not have one-on-one, face-to-
9 face access with our clients with meaningful amounts of time. . . .

10 So I'm unsure what the necessity is to bring the clients [to Nevada]
11 here till their speedy trial rights start. There appears to be no
12 necessity. Because then we're going to have two parallel speedy trial
13 issues at the same time.

14 *Payne*, D. Or., Case No. 3:16-cr-00051-BR-4, CR #340, pp. 33-34.

15 The government did not heed undersigned counsel's predictions, and the constitutional
16 infringements counsel predicted have now materialized. Mr. Payne made his first appearance in
17 the instant case on April 15, 2015. CR #249. Mr. Payne is now entitled to the full panoply of his
18 constitutional rights in *both cases*. However, because both prosecutions are going forward
19 simultaneously, it is simply not possible, as explained below, for Mr. Payne to exercise his Fifth
20 and Sixth Amendment rights in both federal cases at the same time.

21 That the government suggests it will try the Oregon case before the Nevada case and allow
22 Mr. Payne to be transferred back and forth between the two districts for court proceedings during
23 the Oregon pretrial, trial, and post-trial stages only complicates the problem. The constitutional
24 trial rights at issue belong to Mr. Payne. The government cannot dictate which rights Mr. Payne
may invoke and in which case he make invoke them. Yet, by choosing to proceed to trial in the
Oregon case first, the government is forcing Mr. Payne to waive his constitutional trial rights in
the instant case. These circumstances force Mr. Payne to forego or waive his constitutional rights
in the Nevada case. There is nothing voluntary about this.

1 In *United States v. Simmons*, 390 U.S. 377, 394 (1969), the Supreme Court found “it
2 intolerable that one constitutional right should have to be surrendered in order to assert another.”
3 There, the Supreme Court considered the interplay between the Fourth and Fifth Amendments
4 and held a defendant’s testimony offered to support suppression of evidence under the Fourth
5 Amendment claim should not be admissible against him at trial on the question of guilt or
6 innocence under the Fifth Amendment. *Simmons*, 390 U.S. at 394. Otherwise, the defendant
7 would face a Hobson’s choice: refuse to testify to raise the Fourth Amendment claim to preserve
8 his Fifth Amendment right against self-incrimination. *Id.* at 392-94.

9 In *United States v. Jackson*, 390 U.S. 570, 581 (1968), the Supreme Court struck a portion
10 of the Federal Kidnaping Act that allowed imposition of the death penalty solely by means of a
11 jury verdict, a circumstance that operated “to discourage assertion of the Fifth Amendment right
12 not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.”
13 The Supreme Court found this constitutionally impermissible as it would needlessly chill the
14 exercise of basic constitutional rights. *Jackson*, 390 U.S. at 582 (citations omitted).

15 Under *Simmons* and *Jackson*, the government cannot force Mr. Payne to choose which
16 case should receive the benefit of guaranteed constitutional trial rights. Such a choice is
17 intolerable as it is no choice at all. The government’s conduct in this case requires this Court to
18 serve as an accomplice in the intolerable infringement upon Mr. Payne’s constitutional rights, lest
19 the Court invoke the one true remaining remedy. The Court can dismiss the instant case with
20 prejudice and return Mr. Payne to the District of Oregon so that he may proceed to trial in the
21 Oregon case. If the Court does dismiss this case with prejudice, Mr. Payne’s Fifth and Sixth
22 Amendment rights will be violated in the following ways.

1 **A. Mr. Payne’s Sixth Amendment Right to a Speedy Trial Will Be Violated if He is**
2 **Forced to Litigate Both the Oregon and Nevada Cases Simultaneously.**

3 The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall
4 enjoy the right to a speedy . . . trial.” U.S. Const. amend VI. In *Barker v. Wingo*, the Supreme
5 Court explained the Constitution’s guarantee of a speedy trial is to be determined through
6 application of a balancing test that “compels courts to approach speedy trial cases on an ad hoc
7 basis.” 407 U.S. 514, 530 (1972).

8 There are four factors courts should consider as part of this inquiry: (1) the “[l]ength of
9 delay; (2) the reason for the delay; (3) the defendant’s assertion of his right to a speedy trial; and
10 (4) prejudice to the defendant.” *Id.* “While each of the factors is relevant, ‘[t]he flag all litigants
11 seek to capture is the second factor, the reason for delay.’” *Boyer v. Louisiana*, 133 S. Ct. 1702,
12 1706 (2013) (quoting *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986)). Additionally, the
13 Supreme Court has explained “different weights should be assigned to different reasons.” *Boyer*,
14 133 S. Ct. at 1706 (quoting *Barker*, 407 U.S. at 531). “‘A deliberate attempt to delay the trial in
15 order to hamper the defense’ is particularly serious, and ‘should be weighted heavily against the
16 government.’” *Id.* (same). Analysis of these factors demonstrates Mr. Payne cannot exercise his
17 constitutional right to a speedy trial in this case.

18 As to the first factor, the delay in proceeding to trial in this case is ominous. Though the
19 Oregon case presently has a projected trial date in September 2016,¹ the circumstances of that
20

21 ¹ In addition to the reasons set forth within, it is unrealistic for the government to suggest
22 the Oregon case will actually proceed to trial in September of 2016. The CJA counsel who
23 represent co-defendants in the Oregon case who are also charged in the Nevada case will face the
24 same economic and access burdens as undersigned counsel, rendering the September 2016 trial
date illusory.

1 case may render a September 2016 trial date unobtainable. There are 27 defendants in the Oregon
2 case, including one whose name has not yet been unsealed. Additionally, there is a second
3 criminal case that has been incorporated into the Oregon case. *See Cooper*, D. Or., Case No.
4 3:16-cr-00064-JO. Even at this early stage in the proceedings, the district court has declared the
5 Oregon case complex. Moreover, the government admits the discovery issues involved in the
6 Oregon render the case more complicated than any prior case in the history of the district.

7 As such, no one can predict with precision at this point how long it will take to actually
8 bring the Oregon case to trial. There are simply too many variables to project a viable trial date.
9 That said, there is good reason to believe the trial in the Oregon case will not be completed by
10 September of 2016. The 2015 statistics from the United States Courts reveal the median time
11 between the filing of a criminal case and disposition by trial is 16.8 months.² Complex charges,
12 such as those involving racketeering, endure a substantially longer period of time between the
13 filing and trial disposition.³ *See id.* (noting median of 23.6 months). This factor should therefore
14 be viewed in favor of Mr. Payne.

15 The second factor, the reason for the delay, also weighs in Mr. Payne's favor. The
16 government alone is responsible for the delay that will inevitably occur. The government chose
17 when to indict Mr. Payne, where to indict Mr. Payne, and whether to initiate proceedings to start
18 the speedy trial clock in each case. The government's conduct was intentional and with full notice
19 that its conduct would create the speedy trial quandary before the Court.

21 ² U.S. District Courts-Median Time Intervals from Filing to Disposition for Criminal
22 Defendants Disposed of, by Offense, During the 12-Month Period Ending September 30, 2015, at
23 p. 1, available at <http://www.uscourts.gov/statistics/table/d-10/judicial-business/2015/09/30> (last
24 visited April 17, 2016).

³ *Id.*

1 **B. Mr. Payne’s Sixth Amendment Right to Effective Assistance of Counsel Will Be**
2 **Violated if He is Forced to Litigate Both the Oregon and Nevada Cases**
3 **Simultaneously.**

4 The Sixth Amendment also guarantees the accused effective assistance of counsel both
5 before trial and after trial. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 684-
6 686 (1984). Within this realm, the Supreme Court has suggested the most critical period of the
7 litigation is that between arraignment and the beginning of trial. *Powell v. Alabama*, 287 U.S.
8 45, 57 (1932). The government violates an accused’s “right to effective assistance when it
9 interferes in certain ways with the ability of counsel to make independent decisions about how to
10 conduct the defense.” *Strickland*, 466 U.S. at 686.

11 The District of Oregon has ordered Mr. Payne detained and has housed him in the
12 Multnomah County Jail in the Inverness facility. Undersigned counsel understands Mr. Payne is
13 not permitted access to electronic devices to view the discovery in this case and is only permitted
14 a certain number of pages to review at any one time. The only manner in which Mr. Payne can
15 view the discovery in this case is for undersigned counsel to bring a laptop during visitation
16 sessions.

17 For undersigned counsel to investigate this case, prepare a defense, and communicate with
18 Mr. Payne, counsel must fly to Portland and review the discovery in person with Mr. Payne during
19 scheduled visitation sessions. The economic costs required of this procedure notwithstanding,
20 counsel cannot hope to effectively represent Mr. Payne if he only has access to the electronic case
21 materials during scheduled in-person visits with counsel.

22 Additionally, the simultaneous litigation of both cases in both districts would require Mr.
23 Payne to somehow apportion time between two sets of discovery, two separate lines of defense
24 preparation, two different defense teams, and two different sets of court proceedings.

1 Effective trial preparation in this case demands the assistance of Mr. Payne—assistance
2 that has been rendered nearly impossible as there is a phenomenal amount of work to be done to
3 meet the government’s accusations. Detention of Mr. Payne in a district approximately 1,000
4 miles away eviscerates any possibility for effective communication and necessary dialogue
5 between Mr. Payne and his counsel. The Sixth Amendment’s guarantee of the assistance of
6 counsel, coupled with basic principles of fairness, which should inhere in any criminal
7 proceeding, command that Mr. Payne is entitled to prepare his defense *with* defense counsel. Mr.
8 Payne’s detention in Oregon at the Multnomah County Jail prohibits this from occurring in any
9 meaningful way. Dismissal of the instant indictment with prejudice is warranted as the present
10 circumstances of Mr. Payne’s detention and the dual prosecutions prohibit undersigned from
11 providing effective assistance of counsel to Mr. Payne.

12
13 **C. Mr. Payne’s Fifth Amendment Right to Due Process Will Be Violated if He is**
14 **Forced to Litigate Both the Oregon and Nevada Cases Simultaneously.**

15 The Fifth Amendment’s Due Process Clause provides “[n]o person shall . . . be deprived
16 of life, liberty, or property, without due process of law. . . .” U.S. Const. amend. V. The Supreme
17 Court has held the Due Process Clause contains a substantive and a procedural component.
18 Substantive due process protects defendants from government conduct that shocks the
19 conscience, *Rochin v. California*, 342 U.S. 165, 172 (1952), or interferes with rights “implicit in
20 the concept of ordered liberty,”—“life, liberty, or property.” *Id.* (quoting *Palko v. Connecticut*,
21 302 U.S. 319, 325-326 (1937)); *Herrera v. Collins*, 506 U.S. 390, 435-36 (1993). If the
22 government’s conduct survives substantive due process scrutiny, procedural due process requires
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24

1 that the government's conduct in depriving a defendant of life, liberty, or property must be
2 implemented in a fair manner. *United States v. Salerno*, 481 U.S. 739, 746 (1987).

3 The government intends to engage in "parallel" proceedings, pursuing trial in both the
4 Oregon and Nevada cases at the same time. The government has also unilaterally decided to try
5 the Oregon case first, forcing Mr. Payne to delay trial and trial preparation in a case for which the
6 factual underpinnings are alleged to have begun in 2014—two years before the 2016 allegations
7 in the Oregon case. Mr. Payne should not be forced to allow the facts, evidence, and witnesses
8 that are most distant in time to lay idle while the more recent Oregon case proceeds. Witnesses'
9 memories fade with time, and witnesses who may be available to assist his defense in Nevada
10 now may not be available to him while he waits for the government to litigate to conclusion the
11 Oregon case, whenever that might be. The conditions and layout of the land where much of the
12 conduct is alleged to have occurred will also change with time due to natural causes, weather
13 patterns, and public use and access. Mr. Payne must be present in Nevada to assist his counsel in
14 investigating and mounting his defense in the Nevada case. Dismissal of the instant indictment
15 with prejudice is warranted as the government's charging and prosecution decisions in this case
16 deny Mr. Payne substantive and procedural due process.

17 VI. Conclusion

18 The government chose to force Mr. Payne to make his appearance in this case, over his
19 objection. That appearance started Mr. Payne's speedy trial clock in this case. Despite defense
20 counsel's suggested remedy to avoid the constitutional problems induced by the ticking of dual
21 speedy trial clocks—that the government wait to seek Mr. Payne's appearance in Nevada until
22 the Oregon case is concluded—the government pushed forward on both cases. The only available
23 remedy for the government's conduct is dismissal with prejudice.

1 Notably, even if the Constitution permitted the government to force Mr. Payne to choose
2 between his fundamental constitutional trial rights in the Oregon case or in the Nevada case, the
3 government has failed to provide Mr. Payne with the information necessary to make such a critical
4 choice. The government has not yet provided a single page of discovery in this case and has
5 indicated it will only disclose discovery in three phases over time and only with the assistance of
6 a coordinator once the Court issues a Scheduling Order. As a result, Mr. Payne does not presently
7 have the information necessary to make an informed decision, and undersigned counsel lack the
8 information necessary to effectively advise Mr. Payne on this issue.

9 Thus, in order to preserve Mr. Payne's rights on the issues raised herein and without
10 waiving Mr. Payne's request for dismissal with prejudice, undersigned counsel in the instant case
11 alternatively request the Court: (1) not return Mr. Payne to the District of Oregon; (2) order Mr.
12 Payne detained in the District of Nevada so undersigned defense counsel may properly advise
13 him; and (3) order the government to immediately disclose all discovery to Mr. Payne.
14 Undersigned counsel acknowledges this request will necessarily prejudice Mr. Payne and his
15 defense team in the Oregon case, but this prejudice is the result of the government's conduct.
16 Undersigned counsel still have an obligation to provide effective assistance of counsel to Mr.
17 Payne in *this* case. In order to do so, undersigned counsel cannot acquiesce to his transfer back
18 to Oregon. Rather, undersigned counsel must be able to meaningfully consult with Mr. Payne
19 and review the discovery with him. Otherwise and assuming for purposes of argument the
20 constitutionality of forcing Mr. Payne to choose whether he must be prejudiced in the Oregon
21 case or Nevada case, Mr. Payne will not be in a position to make an informed decision on the
22 constitutional issues raised in this Motion.

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Dated this 20th day of April, 2016.

Respectfully Submitted,

RENE VALLADARES
Federal Public Defender

By: /s/ William Carrico
WILLIAM CARRICO
Assistant Federal Public Defender

By: /s/ Ryan Norwood
RYAN NORWOOD
Assistant Federal Public Defender

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CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that she is an employee of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on April 20, 2016, she served an electronic copy of the above and foregoing **DEFENDANT RYAN W. PAYNE'S MOTION TO DISMISS** by electronic service (ECF) to the person named below:

DANIEL G. BOGDEN
United States Attorney
ERIN M. CREEGAN
Assistant United States Attorney
NADIA JANJUA AHMEN
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/s/ Karen Meyer
Employee of the Federal Public Defender