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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**

9 UNITED STATES OF AMERICA, )

10 Plaintiff, )

11 v. )

12 RYAN W. PAYNE, )

13 Defendant. )

2:16-CR-00046-GMN-PAL

**GOVERNMENT'S RESPONSE IN  
OPPOSITION TO DEFENDANT  
PAYNE'S MOTION TO DISMISS  
(C.R. 291)**

14  
15 **CERTIFICATION:** Pursuant to Local Rule 12-1, this response is timely filed.

16 The United States, by and through the undersigned, respectfully submits  
17 its Response in Opposition to Defendant Ryan W. Payne's ("Payne's") Motion to  
18 Dismiss (C.R. 291) (hereinafter "Motion" or "Motion to Dismiss"). In his Motion,  
19 Payne asks this Court to dismiss with prejudice the Superseding Indictment,  
20 arguing that his Fifth and Sixth Amendment rights have been violated by the  
21 "simultaneous prosecution" of two federal criminal cases in two different federal  
22 districts. (C.R. 291) As discussed below, Payne's motion has no basis in fact or  
23 law and should, therefore, be dismissed.

**BACKGROUND**

1  
2 On February 17, 2016, Payne and four other co-defendants were charged by  
3 Indictment in the District of Nevada (“Nevada Indictment”) with numerous crimes  
4 of violence in connection with their alleged participation in a conspiracy to use  
5 force, violence and firearms to assault and extort federal officers on April 12, 2014,  
6 near Bunkerville, Nevada. The charges included assault with a deadly weapon on  
7 federal law enforcement officers, threatening federal law enforcement officers,  
8 obstruction of justice, extortion of federal officers, use and brandish a firearm in  
9 relation to a crime of violence, and conspiracy to commit same, all in violation of  
10 Title 18, United States Code, Sections 111(a)(1) and (b), 115, 924(c), 1503, 1951  
11 and 371, respectively. A warrant for Payne’s arrest issued from the Indictment.  
12

13 Before the return of the Nevada Indictment, Payne, along with many other  
14 co-defendants including some named in the Nevada Indictment, had been charged  
15 by Indictment in the District of Oregon (“Oregon Indictment”), for felony violations  
16 arising from their alleged involvement in an armed takeover of the Malheur  
17 National Wildlife Refuge (MNWR) in Harney County, Oregon, in and around  
18 January 2016. See Oregon Case No. 3:16-cr-00051. Arrested on January 27, 2016,  
19 Payne was detained in Oregon pending trial on the Oregon Indictment.

20 On March 2, 2016, the Superseding Indictment (“Nevada Superseding  
21 Indictment” or “Superseding Indictment”) in this case was returned in the District  
22 of Nevada, joining Payne with 14 additional defendants, bringing the total number  
23 of joined defendants to 19. That same day and at the request of the government,  
24 the Court issued a writ of habeas corpus *ad prosequendum* (hereinafter “writ” or

1 “writ *ad pros*”) requiring the United States Marshal Service (USMS) to transport  
2 Payne from pretrial detention in Oregon to a detention facility in Nevada so that  
3 he could be arraigned on the Nevada Superseding Indictment and joined for trial  
4 with his co-defendants. Payne and four other co-defendants in this case – who had  
5 been arrested with Payne in Oregon on the Oregon Indictment (hereinafter  
6 referred to as the “common defendants”)<sup>1</sup> – filed motions to stay the execution of  
7 the writs.

8 On March 22, 2016, United States District Court Judge Anna Brown, the  
9 presiding judge in the Oregon case, held a hearing on the motion to stay the writs  
10 and, following the hearing, ordered that Payne (and other common defendants) be  
11 transported to Nevada for their initial appearances on the Nevada Superseding  
12 Indictment. She further ordered that Payne and the other common defendants be  
13 returned to Oregon on or before April 25 to stand trial on the Oregon charges.

14 Pursuant to Judge Brown’s Order, Payne was transferred to the District of  
15 Nevada on April 13, 2016. On April 15, Payne made his initial appearance on the  
16 Nevada Superseding Indictment, at which time he was arraigned, entered pleas of  
17 not guilty to all charges, and was joined for trial with the other 18 co-defendants  
18 named in the Nevada Superseding Indictment with a trial date of May 2, 2016.  
19 Following arraignment, the government moved that the case be declared complex  
20 under Local Rule (Criminal) 16-1, and sought a complex case schedule.  
21

22  
23 <sup>1</sup> Those defendants are: Ammon and Ryan Bundy, Blaine Cooper, and Brian Cavalier. In addition,  
24 Joseph O’Shaughnessy and Peter Santilli are also common defendants, having been arrested on the  
Oregon Indictment but subsequently released on terms and conditions. Both of them were later  
arrested and detained pending trial in the Nevada case.

1 Five days after his arraignment, on April 20, 2016, Payne filed this Motion  
2 seeking dismissal of the Superseding Indictment on the basis that his prosecution  
3 in Nevada violated his Sixth Amendment right to a speedy trial and denied him  
4 effective assistance of counsel.

5 On April 22, 2016, United States Magistrate Judge Peggy Leen held a  
6 pretrial scheduling conference with all 19 defendants, including Payne, to  
7 determine a case management schedule. At that hearing, the government stated  
8 that the case should be declared complex on the following bases: (1) discovery was  
9 voluminous; (2) nineteen defendants had been joined for trial; and (3) seven of the  
10 nineteen defendants were pending trial in Oregon and were under court order to  
11 return to Oregon on or before April 25, 2016 to prepare for a September 2016 trial.  
12 The government further explained the nature of the discovery in this case,  
13 describing for the Court the volume of evidence adduced during the course of the  
14 investigation, culminating in approximately 1.4 terabytes of digital data  
15 comprised mostly of audio and video recordings.

16  
17 Following the hearing and on April 26, 2016, Magistrate Judge Leen  
18 entered a 14-page Case Management Order, vacating the May 2 trial setting and  
19 setting trial for February 6, 2017, as to all defendants, including Payne. In her  
20 Order, Judge Leen made specific findings regarding exclusions of time under the  
21 Speedy Trial Act, excluding all time between arraignment and the February trial  
22 date and setting milestone dates for the production of discovery and pretrial  
23 motions. (C.R. 321 (Judge Leen's Case Management Order of April 26, 2016).)

1 For the reasons discussed below, the Motion to Dismiss should be denied.  
2 Payne cannot establish a speedy trial violation solely on the basis that he has been  
3 joined for trial with his co-defendants and there is nothing about his joinder that  
4 interferes with his right to the effective assistance of counsel.

#### 5 **LEGAL STANDARD**

6 The Sixth Amendment right to speedy trial attaches at the time the case is  
7 indicted. *United States v. Lovasco*, 431 U.S. 783, 788-89 (1977). A defendant's  
8 right to speedy trial under the Sixth Amendment is a "more vague concept than  
9 other procedural rights." *Barker v. Wingo*, 407 U.S. 514, 527 (1972). "The nature  
10 of the speedy trial right does make it impossible to pinpoint a precise time in the  
11 process when the right must be asserted or waived." *Id.*

12  
13 In assessing whether a Sixth Amendment violation occurred, the Court  
14 weighs the following factors: (1) the length of the delay; (2) the reason for the  
15 delay; (3) the defendant's assertion of the right; and (4) the prejudice resulting  
16 from the delay. *Id.* at 531-33. Courts presume prejudice after a delay of more than  
17 one year from indictment. *Doggett v. United States*, 505 U.S. 647, 652 (1992).

18 Because of the imprecise nature of the Sixth Amendment analysis, courts  
19 traditionally review claims of speedy trial violations within the context of the  
20 Speedy Trial Act (STA), Title 18, United States Code, Sections 3161-3174. The  
21 Ninth Circuit has noted that "it will be an unusual case in which the time limits of  
22 the Speedy Trial Act have been met but the Sixth Amendment right to speedy  
23 trial has been violated." *United States v. Nance*, 666 F.2d 353, 360 (9th Cir. 1982).

1 This is so because the “Speedy Trial Act affords greater protection to a defendant's  
2 right to a speedy trial than is guaranteed by the Sixth Amendment, and therefore  
3 a trial which complies with the Act raises a strong presumption of compliance  
4 with the Constitution.” *United States v. Baker*, 63 F.3d 1478, 1497 (9th Cir. 1995).

5 The Speedy Trial Act provides:

6  
7 In any case in which a plea of not guilty is entered, the trial of a  
8 defendant charged in an information or indictment with the  
9 commission of an offense shall commence within seventy days from the  
10 filing date (and making public) of the information or indictment, or  
11 from the date the defendant has appeared before a judicial officer of  
12 the court in which such charge is pending, whichever date last occurs.

13 18 U.S.C. § 3161(c)(1).

## 14 ARGUMENT

15 Payne has properly been joined for trial with eighteen (18) other co-  
16 defendants charged with serious crimes of violence arising in Nevada. The  
17 government acted diligently and properly in seeking writs *ad pros* to compel  
18 Payne to be transported to Nevada so he could be joined for trial with his co-  
19 defendants. No Sixth Amendment violation occurred as a result and Payne cites  
20 no authority to the contrary.

21 Payne’s Sixth Amendment right to a speedy trial was triggered on February  
22 17, 2016, when the first Nevada Indictment was returned – not, as Payne  
23 contends, at the time of his arraignment on the Superseding Indictment. Thus,  
24 upon indictment, the Sixth Amendment placed “the primary burden on the courts  
and the prosecutors to assure that [his case is] brought to trial.” *Barker*, 407 U.S.

1 at 527. To meet that burden, the government took the post-indictment steps  
2 necessary – among them seeking a writ *ad pros* on Payne – to join all of the  
3 defendants for trial.

4 Payne contends that by doing so, the government forced him to elect  
5 between his Fifth and Sixth Amendment rights in either Oregon or Nevada  
6 because he cannot exercise both at the same time. Payne is wrong for several  
7 reasons.

8  
9 First, while the Sixth Amendment guarantees Payne's right to a speedy  
10 trial, it does not guarantee that he can never be charged in a conspiracy case while  
11 he is pending charges in another district. Were it otherwise, the government  
12 would be forced to forebear from ever charging and joining all defendants for trial  
13 whenever a single co-defendant is pending trial someplace else -- even if it meant  
14 losing the charges to the statute of limitations. There simply is no authority for  
15 the proposition that the Sixth Amendment dictates when or where a case will be  
16 indicted. To the contrary, it is well established that prosecutorial discretion  
17 extends not only to whom to prosecute, *see Town of Newton v. Rumerv*, 480 U.S.  
18 386, 396 (1987); *Wayte v. United States*, 470 U.S. 598, 607 (1985), but when to  
19 prosecute. *See United States v. Lovasco*, 431 U.S. 783, 790 (1977). And, as a  
20 general matter, decisions made within prosecutorial discretion are beyond judicial  
21 review. *See United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996).

22  
23 Here, **nineteen** defendants – including Payne – have been charged jointly  
24 by a grand jury in an alleged conspiracy to commit serious crimes of violence

1 against federal law enforcement officer in Nevada. The government cannot “just  
2 wait” to indict Payne and his co-conspirators until such time as when and if Payne  
3 completes his trial in Oregon. That is an enormous price for the victims and the  
4 community to pay for Payne’s vague and wholly unsupported notion that everyone  
5 must wait on him.

6 Second, the Sixth Amendment guarantees Payne a speedy trial – not an  
7 immediate one. The fact that Payne is now joined for trial with his co-defendants  
8 in Nevada – by virtue of the writs *ad pros* – does no violence to his right to speedy  
9 trial as long as the government makes good faith efforts to bring him to trial  
10 timely in the Nevada case. Here, all indications are that the case is proceeding  
11 forward toward trial in a timely manner.

12  
13 Payne’s trial date is set for February 6, 2017 – less than the one year from  
14 the initial Nevada indictment, the period of time that *Barker v. Wingo* (five years  
15 delay did not violate the Sixth Amendment) and its progeny contemplated as  
16 triggering the inquiry into whether a trial occurs sufficiently speedily. *Doggett*,  
17 505 U.S. at 505. At less than one year, there is no need even to balance the  
18 *Barker* factors. *United States v. Waters*, No. 2:15-CR-80-JCM-VCF, 2016 WL  
19 1688622, at \*4 (D. Nev. Apr. 5, 2016) (“The length of the delay is to some extent a  
20 triggering mechanism.”).

21  
22 Moreover, any delay contemplated by the Court’s trial setting has been  
23 addressed and specifically excluded under the STA – the starting point for any  
24 speedy trial analysis under current case law. United States Magistrate Judge



1 Leen held a two-hour hearing to determine whether the nature of the case was  
2 complex and to ascertain all defendants' proposed trial dates, some of whom had  
3 agreed to a February 2017 trial date. At that hearing, Judge Leen considered the  
4 government's showing, Payne's arguments, and those of his eighteen co-  
5 defendants. Among other things, Payne raised the very same arguments he raises  
6 here but never proposed a date when he wanted to go to trial, other than the  
7 vague notion of a date that "falls within the normal timeframes of case  
8 preparation." None of the defendants, including Payne, sought trial on the  
9 original setting of May 2 and the only other date that was proposed to Judge Leen  
10 at the hearing was February 6, 2017, a date agreed upon by some of the co-  
11 defendants.

12  
13       Following the hearing and in a very detailed and well-reasoned Order,  
14 Judge Leen designated this case as complex and set the February 2017 trial date.  
15 In so doing, she found that all time between Payne's arraignment on April 15,  
16 2016, and the trial setting was excluded under the STA, making very specific and  
17 detailed findings, including Payne's joinder with other co-defendants who sought a  
18 February 6, 2017, trial date and the complex nature of the case. (C.R. 321 at pp.  
19 7-13.)

20       This hardly evidences a lackadaisical attempt to get Payne to trial which is  
21 what *Barker v. Wingo* attempts to prevent in the first place. To the contrary,  
22 Magistrate Judge Leen set very clear milestones for the government's production  
23 of discovery and the filing of motions, including motions for severance. The case is  
24

1 proceeding to trial along the lines outlined in the Order and the exclusions of time  
2 identified in the Order are consistent with the STA and, hence, the Sixth  
3 Amendment.

4 Further in this same vein, any delay in the Nevada case that is attributed  
5 to Payne's trial on the charges in Oregon is specifically addressed in the STA.  
6 Section 3161(h)(1)(B) allows for excludable time due to "delay resulting from trial  
7 with respect to other charges against the defendant." This provision encompasses  
8 not only "the trial itself but also the period of time utilized in making necessary  
9 preparations for trial." *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th  
10 Cir. 2001) (internal quotations and citation omitted).

11  
12 The exclusion is most often applied when a delay has been caused by a  
13 separate trial (and the preparation necessary for that separate trial) on other  
14 charges, even when the charges are before another court. *See United States v.*  
15 *Drake*, 542, F.3d 1080 (9th Cir. 2008). The provision would not exist at all if  
16 Congress considered it unconscionable for a defendant's trial to be delayed while  
17 he answers for other crimes. *Zedner v. United States*, 547 U.S. 489, 497 (2006)  
18 ("[T]he Act recognizes that criminal cases vary widely and that there are valid  
19 reasons for greater delay in particular cases.").

20 Nor have courts found anything improper under the Sixth Amendment in  
21 applying the exclusion. *See United States v. Lopez-Espindola*, 632 F.2d 107, 110  
22 (9th Cir. 1980) (accommodating a delay in a federal trial while state proceedings  
23 were ongoing); *Lopez-Osuna*, 242 F.3d 1191 (upholding a delay in proceedings  
24

1 where the defendant was charged separately in the same federal district); *United*  
2 *States v. Arellano-Rivera*, 244 F.3d 1119, 1123 (9th Cir. 2001) (same).

3         Indeed, the same claim raised by Payne in this Motion – no simultaneous  
4 prosecutions – was rejected by the Ninth Circuit in *United States v. Matta-*  
5 *Ballesteros*, 72 F.3d 136 (Table), 1995 WL 746007 (9th Cir. 1995). There, the  
6 defendant, a drug trafficker convicted of numerous serious drug-related offenses,  
7 complained that his right to speedy trial under the STA had been denied because  
8 of the delay caused by a trial in another case involving the kidnapping and  
9 murder of a DEA agent. The Ninth Circuit found:

10  
11         Matta’s theory that the [DEA agent murder] trial caused excessive  
12 delay is directly refuted by the text of the Act. The Act expressly  
13 *excludes* from computation “[a]ny period of delay resulting from other  
14 proceedings concerning the defendant, including ... delay resulting  
15 from trial with respect to other charges against the defendant.” 18  
16 U.S.C. § 3161(h)(1)(D). The Ninth Circuit has several times denied  
17 speedy trial challenges on this basis.

18  
19 *Id.* at \*2 (citing *United States v. Lopez-Espindola*, 632 F.2d 107, 109 (9th Cir.  
20 1980); *United States v. Allsup*, 573 F.2d 1141, 1144 (9th Cir. 1978) (emphasis in  
21 original)). Finally, weighing the *Barker v. Wingo* factors, the *Matta* court  
22 specifically rejected the notion that there was any Sixth Amendment violation,  
23 finding that “the reason for the delay was legitimate and in good faith: Matta was  
24 on trial elsewhere.” *Id.*

       Payne further claims that the government’s conduct – joining him for trial  
in Nevada – confronts him with a “Hobson’s choice” of waiving his Sixth

1 Amendment right to speedy trial or waiving his right to effective assistance of  
2 counsel. Mot. at 13. Payne erects a false dilemma.

3 From the outset, Payne’s claim of ineffective assistance of counsel is  
4 speculative. Payne has a right to effective assistance of counsel at trial, but there  
5 has yet to be a trial and the government has done nothing pretrial to interfere  
6 with his right to counsel. Payne fails to show how his joinder in the Nevada case  
7 causes his counsel’s representation to fall below constitutional requirements  
8 under the circumstances of this case.

9  
10 Moreover, to the extent his claim is based on counsel’s need for more time to  
11 prepare for the February 2017 trial, the remedy is to request a continuance – not  
12 to dismiss the Superseding Indictment. A continuance – as shown above – is fully  
13 consistent with the STA and does no violence to Payne’s Sixth Amendment right  
14 to speedy trial. Thus, Payne is not “forced” to give up or “waive” any Sixth  
15 Amendment guarantees when seeking a continuance. As the court in *Matta*  
16 stated when addressing this issue under the STA:

17 [...]  
18 [...] *Matta* does not demonstrate prejudice due to the delay. He  
19 complains that he was “required to prepare for two protracted cases  
20 simultaneously,” and that he was forced to start the trial in this case  
21 “with only a few weeks re-preparation between the two cases.” But  
22 those are not speedy trial problems. They are just the opposite:  
23 problems arising because the second trial started *too soon*. *Matta*'s real  
24 complaint, in other words, is that the delay for the [DEA agent  
murder] trial was *not long enough*, forcing him to try two large  
criminal cases back-to-back. Whatever hardship that may have caused  
*Matta* cannot be attributed to excessive delay. The delay did not  
prejudice *Matta* in the sense relevant to speedy trial challenges.

*Matta*, 1995 WL 746007, at \*2 (emphasis in original).

1 Payne makes no showing – nor can he – that the government has interfered  
2 with his counsel’s ability to effectively represent him at trial. The fact that a  
3 grand jury has found probable cause to charge him and 18 co-defendants with  
4 serious crimes of violence in Nevada is not an action by the government designed  
5 to deprive Payne of counsel. Nor is the fact that it will take time to prepare for a  
6 complex conspiracy trial attributable to government interference. Continuances to  
7 prepare for trial are routinely sought (and granted) in the vast mine run of even  
8 the simplest single-defendant cases – let alone 19-defendant conspiracy cases.

9  
10 To the extent Payne would rather go to trial sooner than February 2017 to  
11 the detriment of case preparation that is his choice also and the government has  
12 done nothing to interfere with it. Payne is set for trial in Oregon in September  
13 2016 and, pursuant to Court Order in that case, he has been ordered to remain  
14 detained in Oregon to prepare for trial in that case and is unavailable for trial in  
15 Nevada. Nevertheless, if Payne desires to go to trial in Nevada before September  
16 2016, he can always attempt to show cause why he should be severed from the  
17 Oregon case and transported to Nevada so he can stand trial on a date of his  
18 choosing – and the Court can then rule. Ultimately it is the courts, and not the  
19 government, that will set trial dates in both cases, consistent with both the right  
20 to a speedy trial and the needs of counsel to adequately prepare. *United States v.*  
21 *Kimberlin*, 805 F.2d 210, 226 (7th Cir. 1986) (defendant charged in two federal  
22 district courts has no right to choose which case will be tried first).

23 ////  
24

1 Nor is Payne effectively deprived of assistance of counsel because his  
2 counsel cannot have constant in-person contact with him. Courts have repeatedly  
3 rejected such arguments. *See United States v. Lucas*, 873 F.2d 1279, 1281 (9th  
4 Cir. 1989) (finding defendant not actually or constructively denied all access to  
5 counsel where pretrial facility was 120 miles from court-appointed counsel):

6 Lucas's pretrial detention in a facility located two hours distant from  
7 the place of his trial did not prevent *all* communications between client  
8 and counsel. Lucas and his counsel were free to communicate by  
9 telephone; alternatively, Lucas's counsel could easily endure the  
inconvenience of a two-hour drive to Phoenix.

10 *Id.* at 1280; see also *Aswegan v. Henry*, 981 F.2d 313, 314 (8th Cir. 1992)  
11 (“Although prisoners have a constitutional right of meaningful access to the  
12 counsel, prisoners do not have a right to any particular means of access, including  
13 unlimited telephone use”); *United States v. Parker-Taramona*, 778 F.Supp. 21 (D.  
14 Hi. 1991) (finding that moving of prisoners from Hawaii to the mainland pending  
15 trial where no housing was available on Hawaii did not violate the Sixth  
16 Amendment right to counsel); *United States v. Allick*, No. CRIM.A. 2011-020, 2012  
17 WL 32630, at \*2 (D.V.I. Jan. 5, 2012) (In cases where a Defendant's “Sixth  
18 Amendment claim is based on alleged inconvenience caused by the distance  
19 between a court and a pretrial detention facility, courts have required defendants  
20 to show that access to counsel was actually or constructively deprived, or that  
21 defendant was prejudiced, in order to sustain the claim.”).

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1 Payne's due process claims are equally unfounded. He claims that allowing  
2 the "facts, evidence and witness [sic] that are more distant in time lay idle" and  
3 that delay in trial will therefore prejudice him. Mot. at 19. At bottom, this is a  
4 reiteration of Payne's speedy trial claim. Yet much longer delays have been found  
5 reasonable. *See United States v. Corona-Verbera*, 509 F.3d 1105, 1114 (9th Cir.  
6 2007) (holding that, under the *Barker* factors, an eight-year delay from the time of  
7 indictment to the defendant's arrest did not violate the defendant's Sixth  
8 Amendment right to a speedy trial); *Barker v. Wingo*, 407 U.S. 514, 533-36 (1972)  
9 (five-year delay did not violate Sixth Amendment right to a speedy trial).

10  
11 Lastly, Payne cannot establish prejudice by his joinder in Nevada. Having  
12 been detained pretrial in the Oregon case, Payne will spend no more time in  
13 pretrial detention as a result of being joined in the Nevada case than he would if  
14 the government had waited to join him until the moment his trial in Oregon had  
15 concluded. Instead, he will have the advantages of lawyers in both districts and  
16 discovery in both districts. Rather than prejudicing Payne, moving forward with  
17 discovery in both cases presents rather obvious possible benefits: including, among  
18 others, the possibility of joint resolution, of avoiding inconsistent representations,  
19 and collaboration between both sets of attorneys. *See, e.g., United States v. Kelly*,  
20 661 F.3d 682 (1st Cir. 2011).

21 Payne's Motion should therefore be denied.

22 ////

23 ////

1           **WHEREFORE**, for all the foregoing reasons, the government requests that  
2 the Court enter an Order, denying Payne’s Motion to Dismiss.

3           DATED this 9<sup>th</sup> day of May, 2016.

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Respectfully,

DANIEL G. BOGDEN  
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*//s//*

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