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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA **3:16-CR-00051-BR**

v.

AMMON BUNDY, et al.,

Defendants.

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS (#480)

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, and through Ethan D. Knight, Geoffrey A. Barrow, and Craig J. Gabriel, Assistant United States Attorneys, hereby responds to defendants' Motion to Dismiss (ECF No. 480), filed by defendant Payne on behalf of defendants Payne, Ammon Bundy, O'Shaughnessy, Ryan Bundy, Cavalier, Santilli, and Cooper (hereafter the "Nevada defendants").

I. Government's Position

The fact that the Nevada defendants have been indicted in two separate cases has not created an unconstitutional "Hobson's choice" depriving them of effective assistance of counsel.

Trial on the case filed here in the District of Oregon will proceed first; the Nevada defendants' trial on the District of Nevada case will follow. Rank speculation that the Nevada defendants' constitutional rights to effective assistance of counsel or to a speedy trial inherently are violated by the existence of two scheduled trials is not supported by either the record or case law. The claim that counsel in both Districts cannot effectively prepare for trial within the time frames presently scheduled in these separate prosecutions is belied by defendants' previous objections to the declaration of these cases as complex under the Speedy Trial Act and defendants' demands for trial even sooner than presently scheduled. The Motion to Dismiss with prejudice should therefore be denied.

II. Legal Argument

A. Factual Background

Preliminarily, we note what the record before this Court shows and what it does not. The Nevada defendants were arrested and indicted in Oregon in Case No. 3:16-CR-00051-BR for charges surrounding the unlawful occupation in 2016 of the Malheur National Wildlife Refuge. After their arrests and indictment in this District, the Nevada defendants were also indicted in District of Nevada Case No. 2:16-CR-00046-GMN for charges surrounding a massive armed assault in 2014 against federal law enforcement officers near Bunkerville, Nevada.

The Nevada court issued Writs of Habeas Corpus *ad Prosequendum* for seven defendants common to both indictments. After motions to quash these writs were filed in this District, this Court ordered that the seven Nevada defendants be temporarily transferred by the U.S. Marshal to Nevada "on this single occasion for the purpose of first appearances in the District of Nevada and for a prompt return to Oregon within approximately ten (10) days." (Order 4, Mar. 22,

2016, ECF No. 334). The U.S. Marshal complied with the Court's order and the majority of the Nevada defendants (including defendant Payne) were transferred to Nevada on April 13, 2016, arraigned, had counsel appointed, and returned to Portland on April 25, 2016. (Defs.' Mot. 4).[1]

Trial in the Oregon case is currently set for September 2016 while trial for the Nevada defendants in the Nevada case has been set in the District of Nevada for February 2017. No subsequent writs have been issued by the court in Nevada requiring the Nevada defendants to be transferred once again from Oregon before their September trial, and no hearing is presently scheduled in the Nevada case which would require those defendants' personal appearance in Nevada before the February 2017 trial date.[2]

B. The Motion to Dismiss

Defendants claim that their constitutional rights to a speedy trial and effective assistance of counsel have been violated solely by the existence of two pending prosecutions, and that this violation is so extreme only dismissal with prejudice is appropriate. Since both current prosecutions are within the boundaries of the right to a speedy trial, and since two able United States District Judges should be able to manage their separate litigation without causing ineffective assistance of counsel, the Nevada defendants cannot prevail.

The Ninth Circuit has noted that "it will be an unusual case in which the time limits of the Speedy Trial Act have been met but the sixth amendment right to speedy trial has been violated."

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[1] Defendant Santilli, having previously been released on conditions in the Oregon case, is currently detained in Nevada on the Nevada case.

[2] Counsel for the government in Nevada has indicated that the government's position is that defendant Payne's motion to dismiss in Nevada (referenced in Defs.' Mot., at 5) can be decided on the pleadings alone.

United States v. Nance, 666 F.2d 353, 360 (9th Cir. 1982) (Kennedy, J.). This is so because the "Speedy Trial Act affords greater protection to a defendant's right to a speedy trial than is guaranteed by the Sixth Amendment, and therefore a trial which complies with the Act raises a strong presumption of compliance with the Constitution." *United States v. Baker*, 63 F.3d 1478, 1497 (9th Cir. 1995). Here, no claim of a Speedy Trial Act violation has been or can be raised. Defendants were arraigned in a timely fashion, this Court has found the case to be complex and excluded time under the Act through the present trial date. (Order 3, Apr. 11, 2016, ECF No. 389).

The Speedy Trial Act itself also squarely addresses the effect of multiple pending prosecutions. Title 18 U.S.C. § 3161(h)(1)(B) allows for excludable time due to "delay resulting from trial with respect to other charges against the defendant." This provision encompasses not only "the trial itself but also the period of time utilized in making necessary preparations for trial." *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2001) (internal quotation marks and citation omitted). The provision is most often applied when a delay has been caused by a separate trial (and the preparation necessary for that separate trial). *United States v. Arellano-Rivera*, 244 F.3d 1119, 1123 (9th Cir. 2001) (upholding a delay in proceedings where the defendant was charged separately in the same federal district); *United States v. Montoya*, 827 F.2d 143, 147-50 (7th Cir. 1987); *United States v. Lopez-Espindola*, 632 F.2d 107, 110 (9th Cir. 1980) (accommodating a delay in a federal trial while state proceedings were ongoing). This provision would not exist at all if Congress considered it unconscionable for a defendant's trial to be delayed while he answers for other crimes. *See Zedner v. United States*, 547 U.S. 489, 497 (2006) ("[T]he

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Act recognizes that criminal cases vary widely and that there are valid reasons for greater delay in particular cases.").

Nor have defendants shown any exception to the strong presumption that compliance with the Speedy Trial Act equates to compliance with the Sixth Amendment. The factors to be considered in the Sixth Amendment analysis are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the prejudice resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972). As to the first factor, the court must consider whether the time from indictment to trial crossed the line "dividing ordinary from 'presumptively prejudicial' delay," which is normally considered to be approximately a year. *Doggett v. United States*, 505 U.S. 647, 652 & n.1 (1992); *United States v. Corona-Verbera*, 509 F.3d 1105, 1114 (9th Cir. 2007). Today, it has only been a few months since indictment, and even if the September trial date for the Oregon case were further delayed, it is unlikely that the trial would be delayed for more than a year since indictment. Thus, no showing of prejudicial delay can be made. Without such a showing, there is no need even to weigh the other factors. The pending prosecution in Oregon does not compromise the Nevada defendants' rights to a speedy trial.

Just as two prosecutions can exist simultaneously without compromising the right to a speedy trial, there is nothing to prevent the defendants from receiving effective assistance of counsel in both cases. Defendants argue, in a nutshell, that because they are being prosecuted in two separate districts for two separate courses of conduct the charges must be dismissed in one (or both) districts because they cannot possibly have effective counsel in both cases.

This Court and the District Judge in Nevada are well equipped to manage the respective matters without causing ineffective assistance of counsel. Most, if not all, of the Nevada

defendants objected to this Court's finding that the case was complex and resetting the trial date to September 2016. They cannot then make the contradictory argument that although they want to go to trial quickly they cannot be adequately prepared for the litigation, so there is no solution other than to throw up one's hands and dismiss the case. The Oregon case was filed first, is scheduled to be tried first, and presumably will continue to proceed first. If anything, the Nevada defendants' position is that they may need even more time than the months of preparation between the end of the Oregon case this fall and the scheduled beginning of the Nevada case in 2017 in order to be adequately prepared and best represented by counsel in Nevada. In that event, they can file a motion for an extension of the Nevada trial date at the appropriate time.

As a practical matter, it is worth noting that defendants now have the advantages of lawyers in both districts and discovery in both districts. Rather than being prejudiced, the defendants here reap rather obvious benefits: They have attorneys in both Districts who can discuss the possibility of joint resolution, can assist in finding evidence and witnesses in both cases, can provide advice on avoiding inconsistent positions, and generally can collaborate on both cases. *See, e.g.*, *United States v. Kelly*, 661 F.3d 682 (1st Cir. 2011) (rejecting a Speedy Trial Act claim made by a defendant being prosecuted in one federal district who was transferred to another federal district pursuant to a writ of habeas corpus *ad prosequendum* where he was also being prosecuted on a separate charge).

To establish prejudice, defendant Payne asserts that his Nevada team cannot obtain his full attention or have constant, in-person contact with him while he is in Oregon. Of course, appointed counsel in Nevada can seek funds to travel to Oregon if an in-person meeting with a client is occasionally necessary. Also, defendant Payne's trial in Nevada will occur months after

his scheduled trial in Oregon. That will include months of time in which he can work exclusively with his Nevada counsel. If that time is insufficient, defendant Payne can request additional time in Nevada to prepare. Such a request does not compromise defendant Payne's right to counsel in either the Oregon or Nevada cases. A contrary argument is nonsensical if followed to its logical conclusion: that, in any complex case, because the accused cannot both have an immediate trial and, at the same time, prepare thoroughly, the only solution is dismissal—with prejudice.

Even while they are in Oregon, the defendants are not entitled to constant, in-person access to both sets of their lawyers. In *United States v. Lucas*, 873 F.2d 1279, 1281 (9th Cir. 1989), the Ninth Circuit held that a defendant was not actually or constructively denied all access to counsel where his pretrial facility was 120 miles from court-appointed counsel):

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

Id. at 1280; *see also Aswegan v. Henry*, 981 F.2d 313, 314 (8th Cir. 1992) ("Although prisoners have a constitutional right of meaningful access to the counsel, prisoners do not have a right to any particular means of access, including unlimited telephone use."); *Barr v. Levi*, No. 06-4683, 2007 WL 1410900 (E.D. Pa. May 11, 2007) (holding telephone restrictions did not violate defendant's Sixth Amendment rights because the Constitution does not require unfettered access to legal telephone calls); *United States v. Parker-Taramona*, 778 F. Supp. 21 (D. Haw. 1991) (refusing to enjoin transfer of prisoners from Hawaii to the mainland pending trial where no housing was available on Hawaii despite the claim such transfer violated the Sixth Amendment right to counsel); *United States v. Allick*, No. 2011-020, 2012 WL 32630, at *2 (D.V.I. Jan. 5, 2012)

("When a Sixth Amendment claim is based on alleged inconvenience caused by the distance between a court and a pretrial detention facility, courts have required defendants to show that access to counsel was actually or constructively deprived, or that defendant was prejudiced, in order to sustain the claim."). Defendant Payne's counsel sets forth that he had difficulty calling his client on an unmonitored line while defendant was in Nevada. But defendant is now back in Oregon and any future problems obtaining access to the defendant either by phone or otherwise can be raised and solved with the U.S. Marshals, which is surely a more appropriate and less drastic remedy than dismissal with prejudice.

C. Motion to Bar Future Transport to Nevada

As noted above, there is presently no scheduled hearing in Nevada necessitating the presence of those Nevada defendants currently in Oregon before the February 2017 trial date in Nevada. It is premature to speculate that there will be such hearing in the future. It is therefore equally premature to "bar any future transport" unless and until such a situation should arise. Only at that time would the Court be in a position to know when such a hearing was to occur, the specific time a defendant would have to be out of this District should he not choose to waive his presence for the Nevada hearing, and how that specific time would impact defense preparation in the Oregon case. As a consequence, the motion to bar future transport to Nevada is moot.

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III. Conclusion

For the reasons given above, the Motion to Dismiss with prejudice should be denied and the alternative motion to bar future transport should be dismissed as moot.

Dated this 11th day of May 2016.

Respectfully submitted,

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