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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.)
14)

2:16-CR-00046-GMN-PAL

**GOVERNMENT'S MOTION TO
FILE CORRECTED RESPONSE
AND ITS CORRECTED
RESPONSE IN OPPOSITION TO
DEFENDANT PAYNE'S MOTION
TO DISMISS (ECF No. 291)**

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

17 The United States, by and through the undersigned, respectfully moves to file
18 its Corrected Response in Opposition to Defendant Ryan W. Payne's ("Payne's")
19 Motion to Dismiss (ECF No. 291) (hereinafter "Motion" or "Motion to Dismiss").

20 **POINTS AND AUTHORITIES**

21 In its opening Response, the government improperly cited to the unpublished
22 9th Circuit decision in *United States v. Matta-Ballesteros*, 72 F.3d 136 (Table), 1995
23 WL 746007 (9th Cir. 1995), in violation of Ninth Circuit Rule 36-3 which prohibits
24 citation to unpublished orders or decisions that were issued before 2007.

1 Accordingly, the Corrected Response that follows redacts all citations to that
2 decision. The content otherwise remains the same as the opening Response.

3 **WHEREFORE**, for all the foregoing reasons, the government respectfully
4 requests that the Court grant its Motion and permit the government to file the
5 Corrected Response as set forth below.

6 **CORRECTED RESPONSE IN OPPOSITION TO**
7 **DEFENDANT PAYNE’S MOTION TO DISMISS (ECF No. 291)**

8 In his Motion, Payne asks this Court to dismiss with prejudice the
9 Superseding Indictment, arguing that his Fifth and Sixth Amendment rights have
10 been violated by the “simultaneous prosecution” of two federal criminal cases in
11 two different federal districts. (ECF No. 291) As discussed below, Payne’s motion
12 has no basis in fact or law and should, therefore, be dismissed.

13 **BACKGROUND**

14 On February 17, 2016, Payne and four other co-defendants were charged by
15 Indictment in the District of Nevada (“Nevada Indictment”) with numerous crimes
16 of violence in connection with their alleged participation in a conspiracy to use
17 force, violence and firearms to assault and extort federal officers on April 12, 2014,
18 near Bunkerville, Nevada. The charges included assault with a deadly weapon on
19 federal law enforcement officers, threatening federal law enforcement officers,
20 obstruction of justice, extortion of federal officers, use and brandish a firearm in
21 relation to a crime of violence, and conspiracy to commit same, all in violation of
22 Title 18, United States Code, Sections 111(a)(1) and (b), 115, 924(c), 1503, 1951
23 and 371, respectively. A warrant for Payne’s arrest issued from the Indictment.
24

1 Before the return of the Nevada Indictment, Payne, along with many other
2 co-defendants including some named in the Nevada Indictment, were charged by
3 Indictment in the District of Oregon for felony violations arising from their alleged
4 involvement in an armed takeover of the Malheur National Wildlife Refuge
5 (MNWR) in Harney County, Oregon, in and around January 2016. *See United*
6 *States v. Ammon Bundy, et al.*, Case No. 3:16-cr-00051 (D. Oregon) (hereinafter
7 referred to as “Oregon case” or “Oregon Indictment”). Arrested on January 27,
8 2016, Payne was detained in Oregon pending trial on the Oregon Indictment.

9 On March 2, 2016, the Superseding Indictment (“Nevada Superseding
10 Indictment” or “Superseding Indictment”) in this case was returned in the District
11 of Nevada, joining Payne with 14 additional defendants, bringing the total number
12 of joined defendants to 19. That same day and at the request of the government,
13 the Court issued a writ of habeas corpus *ad prosequendum* (hereinafter “writ” or
14 “writ *ad pros*”) requiring the United States Marshal Service (USMS) to transport
15 Payne from pretrial detention in Oregon to a detention facility in Nevada so that
16 he could be arraigned on the Nevada Superseding Indictment and joined for trial
17 with his co-defendants. Payne and four other co-defendants in this case – who had
18 been arrested with Payne in Oregon on the Oregon Indictment (hereinafter
19 referred to as the “common defendants”)¹ – filed motions to stay the execution of
20 the writs.
21

22 On March 22, 2016, United States District Court Judge Anna Brown, the

23 ¹ 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 presiding judge in the Oregon case, held a hearing on the motion to stay the writs
2 and, following the hearing, ordered that Payne (and other common defendants) be
3 transported to Nevada for their initial appearances on the Nevada Superseding
4 Indictment. She further ordered that Payne and the other common defendants be
5 returned to Oregon on or before April 25 to stand trial on the Oregon Indictment.

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

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

17 On April 22, 2016, United States Magistrate Judge Peggy Leen held a
18 pretrial scheduling conference with all 19 defendants, including Payne, to
19 determine a case management schedule. At that hearing, the government stated
20 that the case should be declared complex on the following bases: (1) discovery was
21 voluminous; (2) nineteen defendants had been joined for trial; and (3) seven of the
22 nineteen defendants were pending trial in Oregon and were under court order to
23 return to Oregon on or before April 25, 2016 to prepare for a September 2016 trial.
24

1 The government further explained the nature of the discovery in this case,
2 describing for the Court the volume of evidence adduced during the course of the
3 investigation, culminating in approximately 1.4 terabytes of digital data
4 comprised mostly of audio and video recordings.

5 Following the hearing and on April 26, 2016, Magistrate Judge Leen
6 entered a 14-page Case Management Order, vacating the May 2 trial setting and
7 setting trial for February 6, 2017, as to all defendants, including Payne. In her
8 Order, Judge Leen made specific findings regarding exclusions of time under the
9 Speedy Trial Act, excluding all time between arraignment and the February trial
10 date and setting milestone dates for the production of discovery and pretrial
11 motions. (ECF No. 321 (Judge Leen's Case Management Order of April 26, 2016).)

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

16 **LEGAL STANDARD**

17
18 The Sixth Amendment right to speedy trial attaches at the time the case is
19 indicted. *United States v. Lovasco*, 431 U.S. 783, 788-89 (1977). A defendant's right
20 to speedy trial under the Sixth Amendment is a "more vague concept than other
21 procedural rights." *Barker v. Wingo*, 407 U.S. 514, 527 (1972). "The nature of the
22 speedy trial right does make it impossible to pinpoint a precise time in the process
23 when the right must be asserted or waived." *Id.*

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

6 Because of the imprecise nature of the Sixth Amendment analysis, courts
7 traditionally review claims of speedy trial violations within the context of the
8 Speedy Trial Act (STA), Title 18, United States Code, Sections 3161-3174. The
9 Ninth Circuit has noted that “it will be an unusual case in which the time limits of
10 the Speedy Trial Act have been met but the Sixth Amendment right to speedy trial
11 has been violated.” *United States v. Nance*, 666 F.2d 353, 360 (9th Cir. 1982). This
12 is so because the “Speedy Trial Act affords greater protection to a defendant's right
13 to a speedy trial than is guaranteed by the Sixth Amendment, and therefore a trial
14 which complies with the Act raises a strong presumption of compliance with the
15 Constitution.” *United States v. Baker*, 63 F.3d 1478, 1497 (9th Cir. 1995).

17 The Speedy Trial Act provides:

18 In any case in which a plea of not guilty is entered, the trial of a
19 defendant charged in an information or indictment with the
20 commission of an offense shall commence within seventy days from the
21 filing date (and making public) of the information or indictment, or
22 from the date the defendant has appeared before a judicial officer of
23 the court in which such charge is pending, whichever date last occurs.

24 18 U.S.C. § 3161(c)(1).

1 **ARGUMENT**

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

8 Payne's Sixth Amendment right to a speedy trial was triggered on February
9 17, 2016, when the first Nevada Indictment was returned – not, as Payne contends,
10 at the time of his arraignment on the Superseding Indictment. Thus, upon
11 indictment, the Sixth Amendment placed “the primary burden on the courts and the
12 prosecutors to assure that [his case is] brought to trial.” *Barker*, 407 U.S. at 527. To
13 meet that burden, the government took the post-indictment steps necessary –
14 among them seeking a writ *ad pros* on Payne (and other common defendants) – to
15 join all of the defendants for trial.
16

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

20 First, while the Sixth Amendment guarantees Payne's right to a speedy trial,
21 it does not guarantee that he can never be charged in a conspiracy case while he is
22 pending charges in another district. Were it otherwise, the government would be
23 forced to forebear from ever charging and joining all defendants for trial whenever a
24

1 single co-defendant is pending trial someplace else – even if it means losing the
2 charges to the statute of limitations. There simply is no authority for the
3 proposition that the Sixth Amendment dictates when or where a case will be
4 indicted. To the contrary, it is well-established that prosecutorial discretion
5 extends not only to whom to prosecute, *see Town of Newton v. Rumerv*, 480 U.S.
6 386, 396 (1987); *Wayte v. United States*, 470 U.S. 598, 607 (1985), but when to
7 prosecute. *See United States v. Lovasco*, 431 U.S. 783, 790 (1977). And, as a general
8 matter, decisions made within prosecutorial discretion are beyond judicial review.
9 *See United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996).

10
11 Here, **nineteen** defendants – including Payne – have been charged jointly by
12 a grand jury in an alleged conspiracy to commit serious crimes of violence against
13 federal law enforcement officer in Nevada. The government cannot “just wait” to
14 indict Payne and his co-conspirators until such time as when and if Payne
15 completes his trial in Oregon. That is an enormous price for the victims and the
16 community to pay for Payne’s vague and wholly unsupported notion that everyone
17 must wait on him.

18 Second, the Sixth Amendment guarantees Payne a speedy trial – not an
19 immediate one. Payne’s joinder in Nevada – by virtue of the writs *ad pros* – does no
20 violence to his right to speedy trial as long as the government makes good faith
21 efforts to bring him to trial timely in the Nevada case. Here, all indications are that
22 the case is proceeding forward toward trial in a timely manner.

1 Payne's trial date is set for February 6, 2017 – less than the one year from
2 the initial Nevada indictment, the period of time that *Barker v. Wingo* (five years
3 delay did not violate the Sixth Amendment) and its progeny contemplated as
4 triggering the inquiry into whether a trial occurs sufficiently speedily. *Doggett*, 505
5 U.S. at 505. At less than one year, there is no need even to balance the *Barker*
6 factors. *United States v. Waters*, No. 2:15-CR-80-JCM-VCF, 2016 WL 1688622, at
7 *4 (D. Nev. Apr. 5, 2016) (“The length of the delay is to some extent a triggering
8 mechanism.”).

9
10 Moreover, any delay contemplated by the Court's trial setting has been
11 addressed and specifically excluded under the STA – the starting point for any
12 speedy trial analysis under current case law. United States Magistrate Judge Leen
13 held a two-hour hearing to determine whether the nature of the case was complex
14 and to ascertain all defendants' proposed trial dates, some of whom had agreed to a
15 February 2017 trial date. At that hearing, Judge Leen considered the government's
16 showing, Payne's arguments, and those of his eighteen co-defendants. Among other
17 things, Payne raised the very same arguments he raises here but never proposed a
18 date when he wanted to go to trial, other than the vague notion of a date that “falls
19 within the normal timeframes of case preparation.” None of the defendants,
20 including Payne, sought trial on the original setting of May 2 and the only other
21 date that was proposed to Judge Leen at the hearing was February 6, 2017, a date
22 agreed upon by some of the co-defendants.
23
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1 Following the hearing and in a very detailed and well-reasoned Order, Judge
2 Leen designated this case as complex and set the February 2017 trial date. In so
3 doing, she found that all time between Payne's arraignment on April 15, 2016, and
4 the trial setting was excluded under the STA, making very specific and detailed
5 findings, including Payne's joinder with other co-defendants who sought a February
6 6, 2017, trial date and the complex nature of the case. (ECF No. 321 at pp. 7-13.)

7 This hardly evidences a lackadaisical attempt to get Payne to trial which is
8 what *Barker v. Wingo* attempts to prevent in the first place. To the contrary,
9 Magistrate Judge Leen set very clear milestones for the government's production of
10 discovery and the filing of motions, including motions for severance. The case is
11 proceeding to trial along the lines outlined in the Order and the exclusions of time
12 identified in the Order are consistent with the STA and, hence, the Sixth
13 Amendment.

14 Further in this same vein, any delay in the Nevada case that is attributed to
15 Payne's trial on the charges in Oregon is specifically addressed in the STA. Section
16 3161(h)(1)(B) allows for excludable time due to "delay resulting from trial with
17 respect to other charges against the defendant." This provision encompasses not
18 only "the trial itself but also the period of time utilized in making necessary
19 preparations for trial." *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir.
20 2001) (internal quotations and citation omitted).

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

7
8 Nor have courts found anything improper under the Sixth Amendment in
9 applying the exclusion. *See United States v. Lopez-Espindola*, 632 F.2d 107, 110
10 (9th Cir. 1980) (accommodating a delay in a federal trial while state proceedings
11 were ongoing); *United States v. Allsup*, 573 F.2d 1141, 1144 (9th Cir. 1978) (same)
12 *Lopez-Osuna*, 242 F.3d 1191 (upholding a delay in proceedings where the defendant
13 was charged separately in the same federal district); *United States v. Arellano-*
14 *Rivera*, 244 F.3d 1119, 1123 (9th Cir. 2001) (same).

15 Payne further claims that the government’s conduct – joining him for trial in
16 Nevada – confronts him with a “Hobson’s choice” of waiving his Sixth Amendment
17 right to speedy trial or waiving his right to effective assistance of counsel. Mot. at
18 13. Payne erects a false dilemma.

19
20 From the outset, Payne’s claim of ineffective assistance of counsel is
21 speculative. Payne has a right to effective assistance of counsel at trial, but there
22 has yet to be a trial and the government has done nothing pretrial to interfere with
23 his right to counsel. Payne fails to show how his joinder in the Nevada case causes
24

1 his counsel's representation to fall below constitutional requirements under the
2 circumstances of this case.

3 Moreover, to the extent his claim is based on counsel's need for more time to
4 prepare for the February 2017 trial, the remedy is to request a continuance – not to
5 dismiss the Superseding Indictment. A continuance – as shown above – is fully
6 consistent with the STA and does no violence to Payne's Sixth Amendment right to
7 speedy trial. Thus, Payne is not "forced" to give up or "waive" any Sixth
8 Amendment guarantees when seeking a continuance.

9
10 Payne makes no showing – nor can he – that the government has interfered
11 with his counsel's ability to effectively represent him at trial. The fact that a grand
12 jury found probable cause to charge him and 18 co-defendants with serious crimes
13 of violence in Nevada is not an action by the government designed or intended to
14 deprive Payne of counsel. Nor is the fact that it will take time to prepare for a
15 complex conspiracy trial attributable to government interference. Continuances to
16 prepare for trial are routinely sought (and granted) in the vast mine run of even the
17 simplest single-defendant cases – let alone 19-defendant conspiracy cases.

18 To the extent Payne would rather go to trial sooner than February 2017 to
19 the detriment of further case preparation that is his choice also and the government
20 has done nothing to interfere with it. Payne is set for trial in Oregon in September
21 2016 and, pursuant to Court Order in that case, he has been ordered to remain
22 detained in Oregon to prepare for trial in that case and is, therefore, unavailable to
23 stand for trial in Nevada. Nevertheless, if Payne desires to go to trial in Nevada
24

1 before September 2016, he can always attempt to show cause why he should be
2 severed from the Oregon case and transported to Nevada so he can stand trial on a
3 date of his choosing – and the Court can then rule. Ultimately it is the courts, and
4 not the government, that will set trial dates in both cases, consistent with both the
5 right to a speedy trial and the needs of counsel to adequately prepare. *United States*
6 *v. Kimberlin*, 805 F.2d 210, 226 (7th Cir. 1986) (defendant charged in two federal
7 district courts has no right to choose which case will be tried first).

8
9 Nor is Payne effectively deprived of assistance of counsel because his counsel
10 cannot have constant in-person contact with him. Courts have repeatedly rejected
11 such arguments. *See United States v. Lucas*, 873 F.2d 1279, 1281 (9th Cir. 1989)
12 (finding defendant not actually or constructively denied all access to counsel where
13 pretrial facility was 120 miles from court-appointed counsel):

14 Lucas's pretrial detention in a facility located two hours distant from the
15 place of his trial did not prevent *all* communications between client and
16 counsel. Lucas and his counsel were free to communicate by telephone;
17 alternatively, Lucas's counsel could easily endure the inconvenience of a two-
18 hour drive to Phoenix.
19 *Id.* at 1280; see also *Aswegan v. Henry*, 981 F.2d 313, 314 (8th Cir. 1992) (“Although
20 prisoners have a constitutional right of meaningful access to the counsel, prisoners
21 do not have a right to any particular means of access, including unlimited telephone
22 use”); *United States v. Parker-Taramona*, 778 F. Supp. 21 (D. Hi. 1991) (finding that
23 moving of prisoners from Hawaii to the mainland pending trial where no housing
24 was available on Hawaii did not violate the Sixth Amendment right to counsel);
United States v. Allick, No. CRIM.A. 2011-020, 2012 WL 32630, at *2 (D.V.I. Jan. 5,
2012) (In cases where a Defendant's “Sixth Amendment claim is based on alleged

1 inconvenience caused by the distance between a court and a pretrial detention
2 facility, courts have required defendants to show that access to counsel was actually
3 or constructively deprived, or that defendant was prejudiced, in order to sustain the
4 claim.”).

5 Payne’s due process claims are equally unfounded. He claims that allowing
6 the “facts, evidence and witness [sic] that are more distant in time lay idle” and that
7 delay in trial will therefore prejudice him. Mot. at 19. At bottom, this is a
8 reiteration of Payne’s speedy trial claim. Yet much longer delays have been found
9 reasonable. *See United States v. Corona-Verbera*, 509 F.3d 1105, 1114 (9th Cir.
10 2007) (holding that, under the *Barker* factors, an eight-year delay from the time of
11 indictment to the defendant's arrest did not violate the defendant's Sixth
12 Amendment right to a speedy trial); *Barker v. Wingo*, 407 U.S. 514, 533-36 (1972)
13 (five-year delay did not violate Sixth Amendment right to a speedy trial).
14

15 Lastly, Payne cannot establish prejudice by his joinder in Nevada. Having
16 been detained pretrial in the Oregon case, Payne will spend no more time in pretrial
17 detention as a result of being joined in the Nevada case than he would if the
18 government had waited to join him until the moment his trial in Oregon had
19 concluded. Instead, he will have the advantages of lawyers in both districts and
20 discovery in both districts. Rather than prejudicing Payne, moving forward with
21 discovery in both cases presents rather obvious possible benefits: including, among
22 others, the possibility of joint resolution, of avoiding inconsistent representations,
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1 and collaboration between both sets of attorneys. *See, e.g., United States v. Kelly,*
2 661 F.3d 682 (1st Cir. 2011).

3 Payne's Motion should therefore be denied.

4 **WHEREFORE**, for all the foregoing reasons, the government requests that
5 the Court enter an Order, denying Payne's Motion to Dismiss.
6

7 DATED this 15th day of May, 2016.

8 Respectfully,

9 DANIEL G. BOGDEN
10 United States Attorney

11 //s//

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **GOVERNMENT’S RESPONSE IN OPPOSITION TO DEFENDANT PAYNE’S MOTION TO DISMISS** was served upon counsel of record, via Electronic Case Filing (ECF).

Dated this 15th day of May, 2016.

/s/ Steven W. Myhre
STEVEN W. MYHRE
Assistant United States Attorney