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8 Attorneys for Ryan W. Payne

9 UNITED STATES DISTRICT COURT
 10 DISTRICT OF NEVADA

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

2:16-cr-046-GMN-PAL

DEFENDANT RYAN W. PAYNE'S
MOTION TO SEVER

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18 **Certification:** This Motion is timely filed.

19 Defendant RYAN W. PAYNE, through his counsel, SHARI L. KAUFMAN,
 20 WILLIAM CARRICO, and RYAN NORWOOD, Assistant Federal Public Defenders, moves for
 21 severance of his trial from the trial of his co-defendants, as it is anticipated: (1) a joint trial will
 22 violate Mr. Payne's Sixth Amendment right to confront witnesses against him; (2) a joint trial
 23 will violate Mr. Payne's Fifth Amendment right to due process; and (3) at a joint trial, one or
 24 more co-defendants will present a mutually exclusive and/or impermissibly antagonistic defense

1 to Mr. Payne's anticipated trial defense. The attached Memorandum of Points and Authorities is
2 submitted in support of this request.

3 DATED this 25th day of May, 2016.

4 RENE VALLADARES
5 Federal Public Defender

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

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

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

1 **Memorandum of Points and Authorities**

2 Defendant Ryan Payne and 18 co-defendants are charged in a 16-count superseding
3 indictment that includes four forfeiture allegations. ECF No. #27. The charges stem from an
4 alleged standoff with law enforcement agents near Bunkerville, Nevada in April 2014. *Id.* Not
5 all of the co-defendants are charged in each count. This case is schedule to go to trial in February
6 of 2017.

7 Mr. Payne and 26 co-defendants are also charged in a six-count superseding indictment
8 in the District of Oregon in *United States v. Payne*, D. Or., Case No. 3:16-cr-00051-BR-4
9 (hereafter “the Oregon case”). The charges in the Oregon case stem from an alleged incident at
10 a federal wildlife refuge in early 2014. Some of the co-defendants in the Oregon case are co-
11 defendants in the instant case, namely: Ammon Bundy, Ryan Bundy, Joseph O’Shaughnessy,
12 Brian Cavalier, Peter Santilli, and Blaine Cooper. The Oregon case is scheduled to go to trial in
13 September of 2016.

14 The Court has ordered that severance motions be filed by May 27, 2016. At present,
15 however, Mr. Payne cannot state with particularity the grounds necessitating severance, as:

- 16 (1) the discovery produced to date is voluminous¹ and defense counsel has not had the
17 ability to review and analyze for purposes of identifying *Bruton*² issues and mutually
18 exclusive and/or impermissibly antagonistic defenses between Mr. Payne and his co-
19 defendants;

20 ¹ The government provided what is believed to be the first two phases of a three-phase
21 disclosure on May 18, 2016. This disclosure included 35 separate CDs containing law
enforcement dashcam videos and a hard drive containing 1.34 terabytes of data.

22 ² *Bruton v. United States*, 391 U.S. 123 (1968)

1 (2) Mr. Payne has had no means to review any of the discovery where he is detained and
there is no means to allow him to do so at present;³

2 (3) the government has not disclosed all of the relevant discovery to the defense; and

3 (4) the government has not yet identified which of the co-defendants' statements, if any,
4 it intends to introduce at trial.

5 Nonetheless, due to the nature of the charges, the number of co-defendants, and the type
6 of discovery that has been disclosed, it is anticipated the discovery may reveal that Mr. Payne's
7 co-defendants have made statements against his interests—statements that may implicate *Bruton*
8 and his Sixth Amendment right to confrontation. It is further anticipated the one or more co-
9 defendants' trial defenses may be mutually exclusive to Mr. Payne's anticipated trial defense.

10 This severance request is therefore submitted to comply with the Court's filing deadline
11 and to set forth the legal grounds upon which a severance may be granted. It will be necessary
12 for Mr. Payne to supplement this Motion when the defense completes its review and analysis of
13 the May 18th discovery disclosure and, again, when the government discloses the remainder of
14 the discovery and the defense completes its review and analysis of it. Only then will Mr. Payne
15 be in a position to identify for the Court with particularity the propriety of severance in this case.
16 Thus, Mr. Payne respectfully requests the opportunity to supplement this Motion.

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22 ³ Mr. Payne has pending before the Court a Motion to Compel to address his inability to
review the discovery. ECF No. #442.

1 **A. Mr. Payne’s Trial May Need to Be Severed From the Trial of His Co-**
2 **Defendants Pursuant to *Bruton*, The Sixth Amendment’s Confrontation**
3 **Clause, and the Fifth Amendment’s Due Process Clause.**

4 The Supreme Court held in *Bruton v. United States* that admission of a co-defendant’s
5 confession that implicated defendant Bruton at a joint trial constituted prejudicial error, even
6 though the trial court gave clear instructions to the jury to disregard the inadmissible hearsay
7 inculcating Bruton. 391 U.S. at 123, 136-37 (1968). The Supreme Court reversed Bruton’s
8 conviction because the admission of his co-defendant’s statement against him violated Bruton’s
9 Sixth Amendment right to confrontation and the opportunity to cross-examine witnesses against
10 him. *Id.* at 126.

11 In *Richardson v. Marsh*, the Supreme Court held the *Bruton* rule applies to confessions of
12 non-testifying co-defendants that are facially incriminating to another co-defendant. 481 U.S.
13 200, 201 (1987). Additionally, in *Gray v. Maryland*, the Supreme Court held a co-defendant’s
14 statements that are redacted to exclude explicit references to another co-defendant are forbidden
15 at a joint trial if the redaction is done in such a way as to make the identity of the omitted person
16 obvious to the jury. 523 U.S. 185, 192 (1998).

17 A joint trial in which Mr. Payne is tried along with one or more co-defendants may give
18 rise to violations of Mr. Payne’s Sixth Amendment constitutional to confrontation and to cross-
19 examine witnesses against him. The Federal Rules of Criminal Procedure allow the joint trial of
20 defendants. *See* Fed. R. Crim. P. 8, 14. However, a defendant’s constitutional confrontation
21 rights trump the government’s right to insist on such joinder when the “defendant may be
22 prejudiced by the admission in evidence against a co-defendant of a statement or confession made
23 by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant

1 does not take the stand,” and “[l]imiting instructions to the jury may not in fact erase the
2 prejudice.” *Bruton*, 391 U.S. at 132 (quoting Fed. R. Crim. P. 14 advisory committee’s notes).

3 Once the government complies with its discovery obligations and identifies what
4 inculpatory statements co-defendants are alleged to have made against Mr. Payne, the defense
5 will be able to discern whether any of those statements require severance. Such statements would
6 unduly prejudice Mr. Payne in the eyes of the jury if presented at trial and if the co-defendant
7 who made the respective statement does not testify at trial.

8 Spillover is also a viable threat in this case. Spillover exists when evidence against one
9 co-defendant enables transference of guilt to another co-defendant. *See Kotteakos v. United*
10 *States*, 328 U.S. 750, 774 (1946) (“The dangers for transference of guilt from one to another
11 across the line separating conspiracies, subconsciously or otherwise, are so great that no one really
12 can say prejudice to substantial right has not taken place.”). Spillover implicates Mr. Payne’s
13 Fifth Amendment due process rights. *See Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) (“[T]he
14 Due Process Clause guarantees the fundamental elements of fairness in a criminal trial.”); *cf.*
15 *United States v. Bruno*, 383 F.3d 65, 91 (2d Cir.2004) (recognizing spillover effect that warranted
16 vacatur of counts other than those primarily infected with error).

17 In complex cases, the jury may not be able to compartmentalize evidence offered against
18 the respective co-defendants. The Ninth Circuit has stated that, “[w]hile a great disparity in proofs
19 may be sufficient to allow a severance in certain cases, the prime consideration is whether the
20 jury can reasonably be expected to compartmentalize the evidence as it relates to separate
21 defendants in the light of its volume and the limited admissibility.” *United States v. Monks*, 774
22 F.2d 945, 949 (9th Cir. 1985) (internal quotation marks and citation omitted).

1 Here, not all co-defendants are named in each count. The government's proof at trial will
2 therefore not be identical for each co-defendant. Compounding these issues is the possible
3 admission of a co-defendant's statements against other co-defendant. The jury would therefore
4 be asked to separately consider evidence the government presents for each of the 16 counts against
5 the respectively named co-defendants and, possibly, be asked to consider statements co-
6 defendants made against each other only against certain co-defendants and not others. The
7 onerous and confusing nature of such tasks would unduly prejudice Mr. Payne and deny him his
8 Fifth Amendment right to a fair trial. *See United States v. Lane*, 474 U.S. 438, 446 n.8 (1986)
9 (misjoinder constitutes a constitutional violation "if it results in prejudice so great as to deny a
10 defendant his Fifth Amendment right to a fair trial").

11 For these reasons, Mr. Payne requests the Court to allow him to supplement this Motion,
12 once the defense has completed its discovery review, to identify for the Court evidence that
13 supports severance of Mr. Payne's trial from that of his co-defendants.

14
15 **B. Mr. Payne May Present a Mutually Exclusive Defense to that of His Co-**
16 **Defendants.**

17 Rule 14 of the Federal Rules of Criminal Procedure gives trial courts broad discretion to
18 order severance if it appears that a defendant is prejudiced by a joinder of the parties even if the
19 joinder is technically proper under Rule 8. Fed. R. Crim. P. 14; *see Zafiro v. United States*, 506
20 U.S. 534, 541 (1993). Thus, courts should grant a defendant's motion for severance when "there
21 is a serious risk that a joint trial would compromise a specific trial right of one of the defendants,
22 or prevent the jury from making a reliable judgment about guilt[] or innocence." *United States*

1 *v. Angwin*, 271 F.3d 786, 795 (9th Cir. 2001) (quoting *Zafiro v. United States*, 506 U.S. 534, 538-
2 39 (1993)); *see also* Fed. R. Crim. P. 14(a) (permitting relief from joinder).

3 A joint trial is not permitted when co-defendants present inconsistent or conflicting
4 defenses, often referred to as mutually exclusive defenses. *Angwin*, 271 F.3d at 795; *United States*
5 *v. Tootick*, 952 F.2d 1078, 1080-82 (9th Cir. 1991). This is because, when co-defendants present
6 mutually exclusive defenses, the jury often cannot assess the guilt or innocence of the co-
7 defendants on an individual and independent basis. *Tootick*, 952 F.2d at 1082. And, “[co-
8 defendants] who accuse each other bring the effect of a second prosecutor into the case with
9 respect to their co-defendant . . . [c]ross examination of the government’s witnesses becomes an
10 opportunity to emphasize the exclusive guilt of the other defendant . . . [c]losing arguments allow
11 a final opening for co-defendant’s counsel to portray the other defendant as the sole perpetrator
12 of the crime.” *Id.*

13 Mr. Payne proffers at this time that his defense at trial will be that of innocence. However,
14 in light of the volume of discovery, the presence of co-defendants, and the present inability to
15 ascertain whether the co-defendants’ defenses will be mutually exclusive or impermissibly
16 antagonistic to his, Mr. Payne raises this possible severance ground in an abundance of caution
17 and for purposes of preserving this issue for future review by this Court. Mr. Payne requests the
18 Court to allow him to supplement this Motion, once the defense has completed its discovery
19 review, and identify for the Court evidence that supports severance of Mr. Payne’s trial from that
20 of his co-defendants.

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CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that he 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 May 25, 2016, he served an electronic copy of the above and foregoing **DEFENDANT RYAN W. PAYNE’S MOTION TO SEVER** 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/ Brandon Thomas
Employee of the Federal Public Defender