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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**
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13 UNITED STATES OF AMERICA,
14 Plaintiff,
15 v.
16 CLIVEN BUNDY, ET AL.
17 Defendants.
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Case No. 2:16-cr-00046-GMN-PAL-4

DEFENDANT RYAN PAYNE'S
MOTION TO DISMISS,
WITH PREJUDICE,
DUE TO GOVERNMENT'S
COLLECTION OF PRIVILEGED
ATTORNEY-CLIENT PHONE CALLS

(Expedited Treatment Requested)

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

21 Defendant Ryan Payne, through his counsel of record, Assistant Federal Public
22 Defenders Brenda Weksler and Ryan Norwood, moves this Court to dismiss the instant case,
23 with prejudice, because after the government collected privileged attorney-client phone calls
24 from an incarcerated defendant, it denied possessing such privileged materials. The
25 government's conduct and misrepresentations regarding the most sacrosanct of client
26

1 communications warrant dismissal of this case with prejudice. A Memorandum of Points and
2 Authorities is attached.

3 DATED this 8th day of November, 2017.

4 RENE L. VALLADARES
5 Federal Public Defender

6 By: /s/ Brenda Weksler

7 BRENDA WEKSLER
8 Assistant Federal Public Defender
9 Attorney for Ryan Payne

10 By: /s/ Ryan Norwood

11 RYAN NORWOOD
12 Assistant Federal Public Defender
13 Attorney for Ryan Payne
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MEMORANDUM OF POINTS OF AUTHORITIES

I. STATEMENT OF FACTS

On September 11, 2017, the government disclosed to Mr. Payne prior statements made by its prospective trial witnesses, consistent with its obligation under the Jencks Act, 18 U.S.C. § 3500. The statements included hundreds of phone calls that required substantial time for undersigned counsel to review. Among those phone calls, undersigned counsel discovered calls made from jail by co-defendant Blaine Cooper, who pled guilty and is cooperating with the government. Several of those recordings capture conversations between Mr. Cooper and the attorney representing him in the related federal criminal case in Oregon. The recordings, which were made while Mr. Cooper was incarcerated at the Las Vegas City Jail between January 22, 2017, and February 17, 2017, address matters relating to the instant case, including preparation, criminal allegations, and strategy.

For most of the instant prosecution, Mr. Payne was detained pending trial at the Nevada Southern Detention Center in Pahrump, Nevada (“CCA-Pahrump”).¹ While detained at CCA-Pahrump, Mr. Payne routinely used the facility’s phone system to speak with undersigned counsel.

In October of 2016, Mr. Payne filed a motion informing this Court of his good faith belief that CCA-Pahrump may have been recording his privileged attorney-client conversations with undersigned counsel. ECF No. 727 at 3-4. Mr. Payne requested this Court issue an order (1) compelling the government to produce any recordings of conversations with counsel, and (2) instructing officials at CCA-Pahrump to cease and desist from recording privileged attorney-client phone communications. ECF No. 727 at 4. On November 18, 2016, this Court denied Mr. Payne’s motion based on the government’s “affirmative[] represent[ation] that **it has no**

¹ This Court ordered Mr. Payne be detained in Henderson for the duration of his trial. ECF No. 2632.

1 **recordings of conversations between Payne and his counsel, or between Payne’s co-**
2 **defendants and their counsel.”** ECF No. 997 at 7 (emphasis added).

3 In light of the government’s disclosure regarding co-defendant Mr. Cooper, the
4 government’s representation that it has no recordings of conversations between the defendants
5 in this case and their attorneys is no longer accurate. The government can no longer make such
6 a representation. And, despite having notice of Mr. Payne’s concerns that attorney-client
7 conversations were being recorded and turned over to the government, the government engaged
8 in the very conduct it previously denied.

9 Upon receiving proof of Mr. Cooper’s privileged attorney-client calls from the
10 government, undersigned counsel contacted the government on November 8, 2017.
11 Undersigned counsel requested the government provide all jail calls the government may have
12 from Mr. Payne. Undersigned counsel also requested the government clarify its previous
13 representation that it did not possess any such materials “and further clarify what, if any,
14 procedure exists to prevent the U.S. Attorney from coming into possession of recorded calls
15 between co-defendants and their attorney’s offices, and if such a procedure exists, how the U.S.
16 Attorney’s Office came into possession of Mr. Cooper’s calls.”

17 As of the time of the instant filing, the government has not responded to any of
18 undersigned counsel’s inquiries.

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1 **II. LEGAL AUTHORITY AND ARGUMENT**

2 **A. The Sixth Amendment protects defendants' confidential**
3 **communications with counsel.**

4 “The Sixth Amendment provides that ‘[i]n all criminal prosecutions, the accused shall
5 enjoy the right . . . to have the Assistance of Counsel for his defence.’” *Nordstrom v. Ryan*,
6 762 F.3d 903, 909 (9th Cir. 2014) (quoting U.S. Const. amend. VI). “The right to counsel ‘is a
7 fundamental component of our criminal justice system,’ and ‘[l]awyers in criminal cases are
8 necessities, not luxuries.’” *Id.* (quoting *United States v. Cronin*, 466 U.S. 648, 653 (1984)
9 (brackets in original)). “The Sixth Amendment is meant to assure fairness in the adversary
10 criminal process. The very premise of our adversary system of criminal justice is that partisan
11 advocacy on both sides of a case will best promote the ultimate objective that the guilty be
12 convicted and the innocent go free.” *United States v. Danielson*, 325 F.3d 1054, 1066 (9th Cir.
13 2003) (citation and internal quotation marks omitted). Accordingly, the “Supreme Court has
14 long recognized that ‘the Sixth Amendment right to counsel exists, and is needed, in order to
15 protect the fundamental right to a fair trial.’” *Varghese v. Uribe*, 736 F.3d 817, 824 (9th Cir.
16 2013) (quoting *Strickland v. Washington*, 466 U.S. 668, 684 (1984)).

17 To vindicate that fair trial right, a defendant must be able to communicate with his
18 attorney. “A criminal defendant’s ability to communicate candidly and confidentially with his
19 lawyer is essential to his defense. In American criminal law, the right to privately confer with
20 counsel is nearly sacrosanct.” *Nordstrom*, 762 F.3d at 910. Indeed, it “is well established that
21 an accused does not enjoy the effective aid of counsel if he is denied the right of private
22 consultation with him.” *Id.* (internal quotation marks omitted); *see also Bittaker v. Woodford*,
23 331 F.3d 715, 723 n.7 (9th Cir. 2003) (en banc) (“Utmost candor between an attorney and client
24 is essential to effective assistance of counsel.” (brackets and internal quotation marks omitted)).

25 The law secures this right to confidential communication through the attorney-client
26 privilege, which “protects confidential disclosures made by a client to an attorney in order to

1 obtain legal advice. . . . as well as an attorney’s advice in response to such disclosures.” *United*
2 *States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) (ellipsis in original) (internal quotation
3 marks omitted); *see* Fed. R. Evid. 501. The privilege “protects fundamental liberty interests by
4 allowing individuals to seek the legal advice they need to guide them through the thickets of
5 complex laws.” *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1090 (9th Cir. 2007)
6 (brackets and internal quotation marks omitted), *abrogated on other grounds by Mohawk*
7 *Indus., Inc. v. Carpenter*, 558 U.S. 100 (9th Cir. 2009). “The assurance of confidentiality
8 promotes open attorney-client communications, which are central to the legal system and the
9 adversary process.” *Id.* (internal quotation marks omitted).

10 Its pedigree makes the attorney-client privilege “arguably [the] most fundamental of the
11 common law privileges recognized under Federal Rule of Evidence 501.” *In re Napster*, 479
12 F.3d at 1090; *see also Gomez v. Vernon*, 255 F.3d 1118, 1131 (9th Cir. 2001) (“The attorney-
13 client privilege has been recognized as ‘the oldest of the privileges for confidential
14 communications known to the common law.’” (quoting *Upjohn Co. v. United States*, 449 U.S.
15 383, 389 (1981))); *In re Grand Jury Proceedings Grand Jury No. 97-11-8*, 162 F.3d 554, 556
16 (9th Cir. 1998) (“The attorney-client privilege is not only the oldest privilege known to the
17 common law, but the attorney-client privilege is also, perhaps, the most sacred of all legally
18 recognized privileges, and its preservation is essential to the just and orderly operation of our
19 legal system.” (internal quotation marks omitted)).

20 Given the importance of the privilege, courts guard zealously against government
21 interference with attorney-client communications. They recognize the “Constitution’s . . .
22 guarantees of due process of law and effective representation by counsel[] lose most of their
23 substance if the Government can with impunity place a secret agent in a lawyer’s office to
24 inspect the confidential papers of the defendant and his advisers, to listen to their conversations,
25 and to participate in their counsels of defense.” *Bittaker*, 331 F.3d at 723 n.7 (internal quotation
26 marks omitted) (alterations in original). Defendants “have to be able to talk to their lawyers
candidly without fear that what they say to their own lawyers will be transmitted to the

1 government.” *United States v. Chen*, 99 F.3d 1495, 1499 (9th Cir. 1996). Therefore, “[w]hen
2 the government deliberately interferes with the confidential relationship between a criminal
3 defendant and defense counsel, that interference violates the Sixth Amendment right to counsel
4 if it substantially prejudices the criminal defendant.” *Williams v. Woodford*, 384 F.3d 567, 584-
5 85 (9th Cir. 2002).

6 **B. This Court should dismiss this case with prejudice as the record**
7 **indicates the government possesses privileged attorney-client calls.**

8 Mr. Payne’s ability to prepare for trial requires that his communications with counsel
9 be kept confidential. Dissemination of Mr. Payne’s attorney-client conversations to the
10 government or to counsel for his co-defendants will interfere with his ability to mount a
11 vigorous defense.

12 Given the distance between undersigned counsel’s office and CCA-Pahrump, phone
13 calls have been the only feasible option for remaining in regular communication with counsel.
14 Absent the protections of the attorney-client privilege, Mr. Payne cannot use the phone to speak
15 with counsel about trial strategy, plea negotiations, or other matters related to his case. *See*
16 *Nordstrom*, 782 F.3d at 910 (“It takes no stretch of imagination to see how an inmate would be
17 reluctant to confide in his lawyer about the facts of the crime, perhaps other crimes, possible
18 plea bargains, and the intimate details of his own life and his family members’ lives, if he knows
19 that a guard is going to be privy to them, too.”); *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4
20 (1977) (“One threat to the effective assistance of counsel posed by government interception of
21 attorney-client communications lies in the inhibition of free exchanges between defendant and
22 counsel because of the fear of being overheard.”).

23 Mr. Payne thus previously requested this Court order the government and CCA-
24 Pahrump to make independent representations to Mr. Payne and the Court about whether any
25 of his attorney-client calls have been recorded and provided to the government. The
26 government denied possessing such material. Indeed, the government denied that it possessed

1 any calls between any defendant and his attorney. The Court trusted the government's
2 representation and denied Mr. Payne's request to enter an order prohibiting the government
3 from disclosing any of those calls to any of Mr. Payne's co-defendants, their counsel, or anyone
4 else. The Court also denied Mr. Payne's request that the Court enter an order instructing the
5 government that it may not subpoena CCA-Pahrump for copies of any such calls.

6 The Jencks material the government provided to Mr. Payne reveals the government
7 possesses recordings of privileged attorney-client calls for at least one of Mr. Payne's co-
8 defendants. It is unclear exactly how the government came to possess these calls. It is clear,
9 however, that the government sought and obtained the co-defendant's phone calls without
10 exercising the care necessary to ensure it did not invade the attorney-client privilege. Moreover,
11 the government not only obtained such phone calls, it also disseminated the calls to other co-
12 defendants, including Mr. Payne.

13 This inability or unwillingness to respect the attorney-client privilege casts doubt on the
14 continuing credibility of the government's previous representation that it does not possess any
15 of Mr. Payne's attorney-client calls. In light of the government's violation of Mr. Cooper's
16 Sixth Amendment rights, it is not clear the government can be trusted concerning recordings of
17 any calls Mr. Payne or his co-defendants have made while at CCA-Pahrump.

18 Mr. Payne previously and repeatedly requested this Court appoint a Special Master to
19 address and resolve this issue in the first instance (as well as to address the government's
20 delayed discovery disclosures) and instruct the government not to subpoena CCA-Pahrump to
21 obtain recordings of any of Mr. Payne's calls. However, given the procedural posture of this
22 case, appointment of a Special Master now would come too late to cure the harm caused by the
23 government's interference with the attorney-client privilege.²

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25 ² Mr. Payne's requested Special Master was similar to that appointed in *United States*
26 *v. Black*, Case No. 2:16-cr-20032 (D. Kan.). At present, the Special Master in *Black* is in the
midst of Phase III of his investigation, which is "directed toward assessing the possession and

1 Mr. Payne is in the midst of his jury trial. The government has demonstrated it obtained
2 at least one co-defendant's privileged attorney-client phone calls. The government's conduct
3 reveals it does not honor the privileged, confidential relationship between defendants and their
4 counsel. The government not only reviewed the privileged recordings itself, it distributed the
5 recordings to Mr. Payne and presumably the other co-defendants. As has been well
6 documented, the government has not taken its ethical obligations seriously in this case, as it has
7 repeatedly failed to timely provide discovery and *Brady/Giglio* material. The government's
8 decision to not only obtain but review and distribute privileged attorney-client communications
9 violates the most protected of defendants' rights. And, given the government's questionable
10 history of disclosure in this case, most recently involving the defense's discovery of the extent
11 and nature of the FBI's involvement, undersigned counsel have a good faith belief that Mr.
12 Cooper's are not the only attorney-client calls the government possesses. By possessing
13 attorney-client calls between the defendants and their counsel, the government has already
14 received privileged information that cannot be erased or unshared. There is no suitable remedy
15 other than dismissal with prejudice.

16 Dismissal of an indictment with prejudice is appropriate under two theories. First, a
17 court may dismiss on the ground of outrageous government conduct that violates a defendant's
18 due process rights. *United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008) (citation
19 omitted). Second, if the government's conduct does not rise to the level of a due process
20 violation, a court may dismiss under its supervisory power. *Id.* "A district court may exercise
21 its supervisory power 'to implement a remedy for the violation of a recognized statutory or
22 constitutional right; to preserve judicial integrity by ensuring that a conviction rests on
23 appropriate considerations validly before a jury; and to deter future illegal conduct.'" *Id.*
24 (quoting *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991)). However, because

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26 use of CCA audio- and video-recordings by the Office of the United States Attorney for the
District of Kansas ('OUSA'), as well as the investigative agencies with which the OUSA
works." *Black*, ECF No. 298, p. 10.

1 “[d]ismissing an indictment with prejudice encroaches on the prosecutor’s charging authority,”
2 this sanction is appropriate “in cases of flagrant prosecutorial misconduct.” *Chapman*, 524 F.3d
3 at 1084 (citing *Simpson*, 927 F.2d at 1091).

4 Mr. Payne submits the government’s possession of an incarcerated defendant’s
5 privileged conversations with counsel constitutes flagrant conduct that constitutes a due process
6 violation. Mr. Payne also submits the government’s conduct in this case provides a good faith
7 basis to believe the government’s conduct is not limited to Mr. Cooper and his counsel. Rather,
8 Mr. Payne has cause to believe the government’s conduct extended to his attorney-client calls.

9 As Mr. Payne has requested dismissal with prejudice, Mr. Payne requests the Court
10 order the government to respond to the following:

11 (1) Has any member of the United States Attorney’s Office or any agency affiliated
12 with the prosecution or investigation of any of the defendants in this case requested, obtained,
13 or subpoenaed any phone calls or recordings of phone calls involving Mr. Payne or any other
14 co-defendant in this case, including any calls to attorneys or their legal teams?

15 (2) Has any member of the United States Attorney’s Office or any agency affiliated
16 with the prosecution or investigation of any of the defendants in this case reviewed, listened to,
17 summarized, or reviewed a summary of recorded conversations involving Mr. Payne or any
18 other co-defendant in this case, including any calls to attorneys or their legal teams?

19 (3) Has any member of the United States Attorney’s Office or any agency affiliated
20 with the prosecution or investigation of any of the defendants in this case distributed any phone
21 calls or recordings of phone calls involving Mr. Payne or any other co-defendant in this case,
22 including any calls to attorneys or their legal teams? If so, please identify who distributed the
23 calls or recordings and who received them.

24 (4) What procedure exists to prevent the United States Attorney’s Office from
25 coming into possession of recorded conversations or the content of recorded conversations
26 between incarcerated co-defendants and the offices of their attorneys and legal teams? If such

1 a procedure exists, how did the United States Attorney’s Office come into possession of Mr.
2 Cooper’s attorney-client calls?

3 Mr. Payne believes the government’s responses to these inquiries are necessary to assess
4 the scope and nature of the government’s conduct in this case. And, given the procedural
5 posture of this case, it is necessary that these inquiries be undertaken in an expedited manner.

6 **III. CONCLUSION**

7 For the reasons described above, Mr. Payne asserts the record thus far in this case gives
8 him good reason to believe the government has engaged in flagrant conduct and conduct that
9 has violated his due process rights. He requests the Court order the government to answer the
10 questions above in support of his request that this Court dismiss the indictment with prejudice.

11 DATED this 8th day of November, 2017.

12 Respectfully submitted,

13 RENE L. VALLADARES
14 Federal Public Defender

15 By: /s/ Brenda Weksler

16 BRENDA WEKSLER
17 Assistant Federal Public Defender
18 Attorney for Ryan Payne

19 By: /s/ Ryan Norwood

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