RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
BRENDA WEKSLER
Nevada State Bar No. 8124
Assistant Federal Public Defender
RYAN NORWOOD
Assistant Federal Public Defender
411 E. Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577/Phone
(702) 388-6261/Fax
Brenda_Weksler@fd.org

Attorneys for Ryan W. Payne

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
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UNITED STATES OF AMERICA, Plaintiff, vs. RYAN W. PAYNE, Defendant.	Case No. 2:16-cr-046-GMN-PAL **DEFENDANT RYAN PAYNE'S OBJECTIONS TO REPORT AND RECOMMENDATION TO DENY MOTION TO DISMISS COUNTS THREE, SIX, NINE, AND FIFTEEN FOR FAILURE TO ALLEGE A CRIME OF VIOLENCE (ECF 1218)**

Certification: This pleading is timely filed.

COMES NOW defendant Ryan W. Payne, through his counsel, RYAN NORWOOD and BRENDA WEKSLER, Assistant Federal Public Defenders, and respectfully submits these objections to the Magistrate Judge's Report of Findings and Recommendation (ECF No. 1218) that his Motion to Dismiss (ECF 710) be denied. This pleading is supported by the following Memorandum of Points and Authorities.

DATED this 13th day of January, 2017

RENE VALLADARES
Federal Public Defender

By: */s/ Ryan Norwood*
RYAN NORWOOD
Assistant Federal Public Defender

By: */s/ Brenda Weksler*
BRENDA WEKSLER
Assistant Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Report and Recommendation (hereinafter, "R&R") denying Payne's motion to dismiss Counts 3, 6, 9, and 15 is based on anomalous legal conclusions that go beyond any arguments raised by the parties, and that run contrary to controlling case law and other decisions (including decisions of this Court) that have considered the same issues. The R&R erroneously fails to rule that the residual clause is unconstitutionally vague, and then erroneously determines that the 18 U.S.C. § 372 offense involved in Count 3 satisfies that clause. The R&R goes on to conclude that the statutes underlying Counts 6, 9, and 15 satisfy the force clause via an unprecedented and unsupportable construction of those statutes.

The Counts should be dismissed. By allowing trial to go forward on these charges, the R&R would create a serious risk of reversible error. The Court should not adopt the R&R's findings and recommendations.

This pleading addresses the specific findings of the R&R, and assumes the Court is familiar with the framework of the "crime of violence" inquiry required by the United States Supreme Court. *See* ECF No. 710, pp. 4-7. Payne otherwise preserves all arguments made in his Motion (ECF No. 710), Reply (ECF No. 950), and during oral arguments on December 9, 2016.

II. ARGUMENT

This Court reviews de novo a Magistrate Judge's R&R resolving dispositive motions. 18 U.S.C. § 636(b)(1).

A. The residual clause of 18 U.S.C. § 924(c) is unconstitutional

Contrary to every district court in the Circuit that has considered the issue, including this Court, the Report and Recommendation (hereinafter, "R&R") concludes *Dimaya v. Lynch*, 803

F.3d 1110 (9th Cir. 2015), does not compel a finding that the residual clause of 18 U.S.C. § 924(c) is unconstitutionally vague. ECF No. 1218, p. 26. The R&R then invokes "the canon of constitutional avoidance" to avoid independently analyzing the issue – and then proceeds on the assumption that the residual clause is constitutional. ECF NO. 1218, pp. 26-28. The analysis should not be adopted by the Court.

1. *Dimaya v. Lynch* compels a finding that the residual clause is unconstitutional

In *Dimaya*, the Ninth Circuit ruled the residual clause of the crime of violence definition in 18 U.S.C. § 16(b) was unconstitutionally vague, and thus could not compel the petitioner's removal in an immigration proceeding. *Dimaya*, 803 F.3d at 1120. *Dimaya*'s reasoning compels the same finding with respect to 18 U.S.C. § 924(c)(3)(B).

The language of the residual clauses in § 16(b) and § 924(c)(3)(B) is materially identical, and neither the R&R nor the government contends otherwise.[1] If the language in *Dimaya* was unconstitutionally vague, then the language in § 924(c) must be as well. *See Clark v. Martinez*, 543 U.S. 371, 380 (2005) (government "cannot justify giving the *same* detention provision a different meaning" when invoked in a different context (emphasis in original)).

Nor is there any reason why a vagueness challenge should be any less cognizable in a motion to dismiss a criminal charge than it was in the collateral immigration context at issue in *Dimaya*. Criminal prosecutions are at the core of the vagueness doctrine. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (Fifth Amendment's due process clause "requires that a penal statute

[1] The residual clause in 18 U.S.C. § 924(c)(3)(B) defines a "crime of violence" as felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. The residual clause in 18 U.S.C. § 16(b) defines a "crime of violence" as "any other offense that is a felony that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing that offense."

define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). *Dimaya* acknowledged that vagueness challenges are "most often invoked in the context of criminal statute." *See Dimaya*, 803 F.3d at 1113. *Dimaya* reserved the question of whether its extension of the vagueness doctrine might apply in other *non-criminal* contexts, see *id.* at 1120, n. 17 ("Our decision does not reach the constitutionality of applications of 18 U.S.C. §16(b) outside of 8 U.S.C. § 1101(a)(43)(F) . . ."), but it did not and could not reserve the question of whether the language in § 16(b) would be unconstitutional in the criminal context; it obviously would. *See also Leocal v. Ashcroft*, 543 U.S. 1, 11-12 & n. 8 (2004) ("we must interpret the statute consistently, whether we encounter its application in a criminal or non-criminal context.").

In a footnote, the R&R cites Third Circuit case law suggesting § 924(c) challenges may be distinguishable from § 16(b) and other "crime of violence" challenges because they involve underlying offenses that will be "contemporaneously" tried with the gun enhancement, and not "predicate" offenses that have already resulted in convictions. R&R, p. 22 n.7. The Ninth Circuit, however, has held that a "crime of violence" inquiry remains a "matter of law" governed by a categorical inquiry whether or not the underling offense is a predicate offense. *United States v. Amparo*, 68 F.3d 1222, 1226 (9th Cir. 1995) (applying categorical inquiry to § 924(c) prosecution); *see also United States v. Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006) (applying categorical approach in determining whether the defendant's "instant offense of conviction is a felony that is . . . a crime of violence"). Nor is there any reason why this distinction should make a difference in a vagueness inquiry. Vagueness looks to the clarity of the law at the time of the defendant's conduct, not at the time of his trial. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The relevant conduct of Payne and the other defendants in this case occurred over two

years ago. The fact that they have yet to be convicted of any offense resulting from this conduct does not make § 924(c) any less vague, or make their categorical and constitutional challenges to that statute any less cognizable.

Numerous district courts in this Circuit have concluded that *Dimaya* (if not *Johnson v. United States*, 135 S. Ct. 2551 (2015)) compels a finding that § 924(c)'s residual clause must be deemed unconstitutional. *See United States v. Bell*, 158 F.Supp. 3d 906, 923 (E.D. Cal. 2016) ("And, as Dimaya and Vivas-Ceja make clear, the differences in the language used in the ACCA residual clause versus the § 924(c)(3) residual clause are not material insofar as the reasoning in Johnson is concerned."); *United States v. Baires-Reyes*, 2016 WL 3163049 at **3-5 (N.D. Cal. 2016) ("Applying the reasoning of Dimaya, the Court finds that Section 924(c)'s residual clause is unconstitutionally vague."); *United States v. Lattanaphom*, 2016 WL 393545 at **3-6 (E.D. Cal. 2016) (holding the residual clause in 18 U.S.C. § 924(c) void for vagueness and therefore unconstitutional after *Johnson*); *United States v. Luong*, 2016 WL 1588495 (E.D. Cal. Apr. 20, 2016) (holding the residual clause in § 924(c)(3)(B) is unconstitutional under *Johnson*). Payne is not aware of any district court in this Circuit that has held otherwise in the wake of *Dimaya*. Notably, the District Court of Oregon, in a case involving some of the same defendants and the same 18 U.S.C. § 372 offense involved here, recently agreed that *Dimaya* compels a finding that the § 924(c) residual clause is unconstitutionally vague. *See United States v. Bundy*, 2016 WL 3361490 at **5-6 (D. Ore. 2016) (residual clause in § 924(c)(3) void for vagueness). More notably, Judge Dorsey has ruled there was "no basis to distinguish 18 U.S.C. § 16(b) from § 924(c)'s residual clause or *Dimaya* from the case." *United States v. Smith*, 2:11-cr-00058-JAD-CWH, 2016 WL 2901661 at *5-6 (D. Nev. May 18, 2016) (granting pretrial motion to dismiss a

§ 924(c) robbery). It is unusual for an R&R to squarely disagree with a legal conclusion already reached by a District Court judge in the same District.

It may be that the R&R, which repeatedly cites the dissenting opinion in *Dimaya*, ECF No.1218, pp. 24-26, does not agree with *Dimaya*'s ruling. It may also be that the R&R's conclusions are influenced by the fact that *Dimaya* is pending certiorari review to resolve a Circuit split on its holdings. But as the R&R acknowledges, none of this changes the fact that *Dimaya* remains "binding precedent in this Circuit" until and unless it is overruled. ECF No. 1218, p. 26; *see also U.S. v. Shumillo*, 2016 WL 6302524 (C.D. Cal. 2016) at *2-5 (holding *Dimaya* compelled finding that § 924(c) residual clause was unconstitutionally vague even though the Supreme Court had accepted *Dimaya* for certiorari review). The R&R errs in ruling that this binding precedent does not compel a finding that the § 924(c) residual clause is unconstitutionally vague.

2. Even if *Dimaya* were not controlling, the R&R errs by failing to independently resolve whether the § 924(c) residual clause is unconstitutionally vague.

The finding that *Dimaya* does not control the outcome does not mean Payne loses; at most it means that the R&R had to determine based on other controlling authority—most notably, the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015)—whether the § 924(c) residual clause is unconstitutionally vague. The R&R erroneously fails to do so.

The R&R discusses at length the "canon of constitutional avoidance." ECF No. 1218, pp. 26-28. The R&R apparently concludes that because the question of § 924(c)'s residual clause's validity involves difficult constitutional issues, the Court can and should avoid the question by assuming that Payne loses. This reasoning involves a fundamental misunderstanding of the canon of constitutional avoidance.

The basic principle of this canon is that a Court should avoid deciding a constitutional issue when it can instead resolve a matter by means of statutory interpretation. The canon is applicable when a statute "is open to a construction that obviates deciding" an underlying constitutional issue. *Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578 (1988). The Supreme Court generally invokes this principle in cases (like this one) where a litigant/defendant alleges both that a statute does not apply to him, and that it is unconstitutional. In such cases, including the cases cited by the R&R, courts construe the statute so that it does not apply to the litigant, so that they do not have to reach the underlying constitutional issue. *See Debartolo Corp.*, 485 U.S. at 588 (finding that restriction on communication did not apply to the litigant's handbilling, so as to avoid "passing on the serious constitutional questions" that such application would present); *Clark v. Martinez*, 543 U.S. 371, 384-86 (rejecting government's broad interpretation of statute in favor of defendant's construction when the Court had previously recognized the broader construction could implicate the constitution); *Jones v. U.S*, 526 U.S. 227, 251-52 (1999) (agreeing with defendant's construction of statute to avoid "serious constitutional questions" that would otherwise need to be resolved); *Allentown Mack Sales v. NLRB*, 522 U.S. 359, 387 (1998) (Rehnquist, J., concurring) (avoiding finding that administrative agency's construction of statute would violate First Amendment by not deferring to that agency's construction of statute); *Crowell v. Benson*, 285 U.S. 22, 62-63 (1932) (construing statute narrowly to avoid constitutional issue); *United States v. Jin Fuey Moy*, 241 U.S. 394, 399-402 (1916) (upholding dismissal of indictment on grounds that the underlying statute "did not apply to the case," to avoid constitutional question about which the Court had "grave doubts."); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1106-1112 (9th Cir. 2001) (construing immigration statute so as not to permit Ma's indefinite detention, to

avoid the constitutional issues that such detention would raise); *compare Almendarez-Torres v. United States*, 523 U.S. 224, 237-248 (1998) (declining to adopt defendant's version of statute under canon of "constitutional doubt," and then discussing and rejecting defendant's constitutional claim on its merits).

If the Court wished to apply this principle to this matter, it could do so by ruling the underlying offenses in Counts 3, 6, 9, and 15 do not satisfy § 924(c)'s residual clause, even assuming that the clause was constitutional.[2] As Payne has explained in his pleadings, and further explains below, such a ruling would be correct. In any event, the canon of constitutional avoidance counsels the Court to give the defendants the benefit of the doubt on the statutory issue, so as to avoid deciding what the R&R acknowledges to be a difficult constitutional issue. *See, e.g., DeBartolo*, 485 U.S. at 575 (courts must construe statute to avoid constitutional issues "unless such construction is plainly contrary to the intent of Congress"); *Jin Fuey Moy*, 241 U.S. at 401 (statute must be construed, "if fairly possible," to avoid difficult constitutional issue).

But the R&R doesn't do this. It does the exact opposite. The Court assumes that the residual clause is constitutional (ECF No. 1218, p. 28), and then *denies* Payne's Motion to Dismiss Count 3 on the basis that the § 372 offense satisfies that residual clause. ECF No. 1218, p. 32. By resolving the case in this manner, the Court does not and cannot "avoid" the constitutional issue, but instead necessarily decides it against Payne – and it does so without even

[2] The Court could also theoretically avoid the constitutional question by ruling that all four of the offenses satisfy the "force" clause of § 924(c), which Payne does not contend is unconstitutionally vague. Indeed, the R&R makes these findings with respect to the offenses in Counts 6, 9, and 15. But aside from the fact that such a ruling would be incorrect (for the reasons stated in Payne's briefing, and further stated infra), the Court cannot avoid the constitutional question by making this ruling with respect to Count 3. At oral argument on December 9, 2016, the government conceded the § 372 offense involved in Count 3 could not satisfy the "force" clause.

fairly addressing the issue. The R&R's reasoning turns the canon of constitutional avoidance on its head.

If the Court believes that the residual clause can be reasonably construed to encompass the § 372 offense in Count 3 (or any other of the offenses involved in Payne's motion), then the Court must fully and fairly adjudicate the underlying constitutional issue. Even if *Dimaya* does not directly dictate the result, the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015)) invalidating the residual clause in ACCA should lead the Court to the same result.

The R&R claims that *Leocal v. Ashcroft*, 543 U.S. 1 (2004), a pre-*Johnson* case that assumes the constitutionality of 18 U.S.C. § 16(b), is "binding Supreme Court precedent." R&R p. 26. But *Leocal*, like every Supreme Court decision prior to the 2015 *Johnson* decision, predates any finding that the residual clause for any version of the "crime of violence" definition was unconstitutionally vague. *Johnson* is now the Court's "binding precedent," and a reviewing court must re-evaluate prior precedent based on *Johnson*'s holding that the residual clause of the Armed Career Criminal Act ("ACCA"). As *Dimaya* correctly recognized, *Johnson* compels a finding that the 18 U.S.C. § 16 residual clause language, which is identical to that of § 924(c)(3)(B), is unconstitutionally vague.

The language of § 924(c)(3)(B) (and 18 U.S.C. § 16) differs from the ACCA because it focuses on the risk of "force" rather than "injury." But it is hard to see how that makes a difference. Either way, the residual clause forces a court "to imagine how the idealized ordinary case of the crime subsequently plays out" to determine whether there is a "substantial risk" of particular result. *Johnson*, 135 S.Ct. at 2557-58. If anything, "force" is an even more indefinite and amorphous concept that "injury" for a Court to define, let alone to assess the risk of

occurrence. *Dimaya* correctly recognized that the differences in wording between the ACCA and 18 U.S.C. § 16 did not fix the vagueness problem. *See id. at* 1118-1119.

The ACCA, unlike § 924(c) (3)(B) and 18 U.S.C. § 16(b) included a list of "enumerated offenses" that automatically qualified as crime of violence. The existence of a prefatory list of examples may be confusing, but it was not determinative of the outcome in *Johnson*. The "fundamental reason" for *Johnson*'s holding "was the residual clause's 'application of the serious potential risk standard to an idealized ordinary case of the crime." *Dimaya*, 803 F.3d at 1118; *Johnson*, 135 S. Ct. at 2557-60 (explaining that the "grave uncertainty" about estimating and quantifying "serious potential risk" rendered the residual clause unconstitutional). At any rate, and as *Dimaya* recognized, § 924(c)'s residual clause may be *more* vague than the ACCA's because it is not preceded by a list of enumerated crimes, which "provide at least some guidance as to the sort of offenses Congress intended for the provision to cover." *Dimaya*, 803 F.3d at 1118 n.13. Section 924(c)(3)(B), "by contrast, provides no such guidance at all." *Dimaya*, 803 F.3d at 1118 n.13.

The government had contended § 924(c)'s residual clause was not unconstitutional because the Supreme Court has never expressed concern about § 924(c)'s proper construction and disagreement among the lower courts has been limited. ECF No. 921, pp. 13-14. *Dimaya* considered a similar argument in the 18 U.S.C. § 16(b) context and pointed out the government's argument ignores the realities of judicial review. *Dimaya*, 803 F.3d at 1119. One "can discern very little regarding the merits of an issue from the composition of the Supreme Court's docket." *Id.* And, at any rate, the government's argument confused correlation for causation. The fact that the Supreme Court has decided more ACCA cases than § 924(c) cases does not indicate that it

believes the latter statute to be any more capable of consistent application. *See id.* As explained, *supra*, the § 924(c) residual clause has exactly the same problems that the ACCA's clause does.

Johnson compels a finding that the residual clause of § 924(c) is unconstitutional even if *Dimaya* does not. The R&R errs by misapplying the canon of constitutional avoidance, and then by failing to address this issue.

B. The predicate offenses alleged in Counts 3, 6, 9, and 15 are not crimes of violence.

1. Conspiracy to impede federal officers under 18 U.S.C. § 372 is not categorically a crime of violence (Count 3).

Since the government conceded at the December 9, 2016 hearing that the § 372 offense could not satisfy the "force" clause, the R&R was left to consider whether the offense could meet the "residual" clause of that statute. The R&R concluded that it did. ECF No. 1218, pg. 32. As noted above, the residual clause is unconstitutionally vague. And in any event, the R&R's purported reliance on the canon of constitutional avoidance should have led it to find that the § 372 offense did not satisfy the residual clause. But even assuming the R&R correctly concluded the residual clause was not unconstitutionally vague, it erred in finding that the § 372 offense qualified as a crime of violence under that clause.

The R&R first rules that § 372 is divisible into five separate offenses, and determines via the "modified categorical approach" that only two of these offenses are alleged in the indictment: namely (1) a conspiracy to "prevent, 'by force, intimidation, or threat,' any officer of the United States from discharging his official duties, and (2) a conspiracy to "induce, 'by like means' any officer of the United States to leave the place where is required to perform his official duties." ECF No. 1218, p. 29-30. Payne does not concede this analysis is correct; indeed, the government's objection never contended that the § 372 was divisible into different offenses and

thus susceptible to a "modified categorical approach" that only considers the "offenses" alleged in the indictment, as opposed to the entire range of conduct proscribed by § 372. *See* ECF No. 710, p. 11; ECF No. 921, pp. 17-18.

But even assuming this analysis was correct, the R&R' still reaches the wrong conclusion. The R&R does not dispute that § 372 is "not divisible as to whether the object of the conspiracy was accomplished by 'force, intimidation, or threat.'" *Bundy*, 2016 WL 3361490, at *4. Thus, the question is whether a conspiracy to impede/induce federal officers by "force, intimidation, or threat" is an offense that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B).

The R&R reasons that a "conspiracy to commit an offense recognized as a crime of violence is itself a crime of violence" under the residual clause. ECF No. 1218, p. 31. It primarily cites *United States v. Mendez*, 992 F.3d 1488, 1491-92 (9th Cir. 1993), where the Circuit first determined that robbery was a crime of violence under the force clause, and then reasoned that a conspiracy to commit the robbery must therefore involve a "substantial risk" of force under the residual clause. *See* ECF No. 1218, p. 31.

Mendez is the very case that this Court recognized was no longer good law in light of *Johnson* and *Dimaya*. *See Smith*, 2016 WL 2901661 at *5-6. *Mendez*'s simple analysis bears little relation to the inquiry the Supreme Court required in the *Johnson* case, under which a Court must first determine the "idealized ordinary case" of the offense, and then determine whether that offense necessarily involved a "significant" risk of physical force. *Johnson*, 135 S.Ct. at 2557-60.

But even if *Mendez*'s logic were still valid, the R&R omits a crucial step: it fails to determine whether the underlying offense of impeding or inducing federal officers by "force, intimidation, or threat" was necessarily a crime of violence under the force clause. "Physical force," as required by that clause means "violent force –that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). A court cannot make any finding that § 372 is limited to physical force because its general requirement of "force, intimidation, or threat" contains no such limitation. *See Bundy*, 2016 WL 3361490 at *3 (noting that "threats" or "intimidation" under § 372 encompass conduct broader than the "force" clause" because they include nonviolent threats and intimidation).

If the act of impeding or inducing federal officers by means of force, intimidation, or threat is not a crime of violence under the force clause, then the mere act of conspiring to commit such acts prohibited by § 372 cannot be deemed to create a "substantial risk" of physical force under the residual clause. It is telling that the reported decisions for this offense cited by the parties and in the R&R (at ECF No. 1218, p. 29 n.11) rarely seem to involve the actual use (or even the threatened or attempted use) of physical force or violence. *See, e.g., United States v. Fulbright*, 105 F.3d 443 (9th 1997), *overruled on other grounds by United States v. Heredia*, 105 F.3d 443, 446 (9th Cir. 2007) (upholding § 372 conviction where defendant harassed a bankruptcy judge by mailing him documents, including a "Notice and Demand for Declaration of Judge's Impartiality" and a "Citizen's Arrest Warrant for Citizens' Arrest"); *Finn v. United States*, 219 F.2d 894, 898 (9th Cir. 1955) (upholding § 372 conviction based on "citizen's arrest" of a United States District Attorney that involved no force other than placing handcuffs on him); *United States v. Hall*, 342 F.2d 849 (4th Cir. 1965) (evidence of a conspiracy to arrest an undercover officer, with no other evidence of a plan for violence, sufficient to affirm § 372 conviction); *United States*

v. Myers, 524 F. Appx. 479, 483-84 (11th Cir. 2013) (defendant mailed letters to officials demanding release of other defendants, and threatening to "indict" or "arrest" those officials); *United States v. Gerhard*, 615 F.3d 7, 12 (1st Cir. 2010) (defendants provided "material support" to two criminals during a standoff); *United States v. Beale*, 620 F.3d 856, 864 (8th Cir. 2010) (defendants conspired to "arrest" judge, but never carried out plan); *United States v. Crozier*, 268 F. App'x 604, 606 (9th Cir. 2008) (defendant convicted of "injuring the property owned by the federal government."). If § 372 was an offense that "by its nature" created a "substantial risk" of physical force, one would expect more evidence of the actual presence of such force in the decisions upholding such convictions.

It might be said that determining the "idealized ordinary case" based on such evidence, particularly for an amorphous, infrequently prosecuted offense such as § 372, is a hopeless or unclear task. But that's exactly why the Supreme Court ruled the residual clause's required analysis is unconstitutionally vague. The Court should rule likewise, but if it doesn't, it should overrule the R&R's finding that § 372 can satisfy the residual clause of §924(c), and dismiss Count 3 from the indictment.

2. Assault on a federal officer under 18 U.S.C. § 111(a)(1) and (b) is not categorically a crime of violence (Count 6).

The R&R rules that the assault offense involved in Count 6 constitutes a crime of violence, largely because it believed the issue is controlled by *United States v. Juvenile Female*, 566 F.3d 943 (9th Cir. 2009). ECF No. 1218, p. 33. Payne addressed this issue at length in his Motion (ECF No. 710, pp. 15-20, 28-29) and his Reply (ECF No. 950, pp. 10-11), and would respectfully ask the Court to overrule the R&R and dismiss Count 6 for the reasons stated therein.

3. Threatening a federal law enforcement officer under 18 U.S.C. § 115(a)(1)(B) is not categorically a crime of violence (Count 9).

The government made no attempt to argue that the § 115(a)(1)(B) offense could satisfy the force clause. ECF No. 921, pp. 27-28; ECF No. 950, p. 11 (noting the government's failure to provide argument should be deemed a waiver and concession of the issue). But the R&R finds the offense could satisfy the force clause anyway. ECF No. 1218, p. 36.

At the outset, the R&R acknowledges that § 115(a)(1)(B) "does not require that a defendant threaten an official with *violent* force . . ." ECF No. 1218, p. 35 (emphasis added). That should be the end of the matter, because a categorical inquiry is limited to the "statutory definition" of an offense. *See, e.g., United States v. Piccolo*, 441 F.3d 1084, 1088 (9th Cir. 2006)

The R&R nonetheless reasons: (1) Ninth Circuit case law requires proof of a "true threat" to constitute the § 115(a)(1)(B) offense, and (2) a "true threat" necessarily requires a threat of violence that would satisfy the force clause. ECF No. 1218, pp. 35-36. Payne does not concede that the plain language of a statute can be overridden by a constitutional narrowing interpretation for purposes of a categorical analysis, but even if it could, the R&R's reasoning is erroneous.[3]

A "true threat" is "criminally actionable, unprotected speech." *United States v. Hinkson*, 349 F. Supp. 1350, 1355 (D. Idaho 2004). A "serious expression of intent to harm or assault" is not protected speech. *Planned Parenthood of the Columbia/Williamette, Inc. v, American Coalition of Life Activists*, 290 F.3d 1058, 1088 (9th Cir. 2002).[4] An expression of intent to harm

[3] Indeed, Payne has prepared and will file objections to the R&R that addressed the motions to dismiss counts 2 and 3 as 18 U.S.C. § 372 as unconstitutionally overbroad and vague. *See* ECF No. 1225. That R&R also erroneously invents a limiting reading of § 372 to conclude the statute criminalizes only true threats. *See* ECF No. 1225. Payne will fully explain in objections why this construction is erroneous and cannot be adopted by the Court.

[4] *Planned Parenthood* elsewhere defines a true threat as one involving "intent to inflict bodily harm." *Id.* at 1077. Since the underlying conduct in that case would meet both definitions,

or assault *might*, of course, involve an intent to commit physical violence. *See, e.g., Orozco-Santillan*, 903 F.2d at 1265. But that does not mean a threat of "physical violence" is *necessary* for the threat to be unprotected speech. One could, for example, have the subjective intent to threaten simple assault under the meaning of § 111(a), an offense which does not require physical force and which is thus not categorically a crime of violence. *Dominguez-Maroyoqui*, 748 F.3d at 920-22. Under the R&R's logic, threats to commit crimes are constitutionally protected speech so long as those crimes do not necessarily involve physical violence. This cannot be the case. The "true threat" doctrine may be based in part on protecting persons from the "fear" and "possibility" of violence, *Virginia v. Black*, 538 U.S. 343, 359 (2003) but that does not mean that all unprotected speech necessarily must involve such violence.

Although they have nothing to do with the "true threat" analysis, the R&R also cites the decisions in *United States v. Bonner*, 85 F.3d 522, 526-27 (11th Cir. 1996), and *United States v. Ludwig*, 432 F.3d 1001 (9th Cir. 2005). ECF No. 1218, pp. 35-36. *Bonner* is a 20-year old case that makes errors that were common in lower courts before the Supreme Court's recent clarifications of its "crime of violence" jurisprudence. *Bonner* relies on the fact that the defendant actually "threatened to use physical violence" in his underlying threat. *Id.* at 527. But a categorical analysis only considers the statutory definition of the offense, and not the "particular facts underlying the defendant's conviction." *Decamps v. United States*, 133 S.Ct. 2276, 2283 (2013). As *Bonner* acknowledges, the § 115(a)(1)(B) statute itself only requires the "use or threatened use of force" as an element. *Id.* The Supreme Court has since made clear this is not enough to satisfy the force clause – the statute must require the use of physical, violent force

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this narrower definition should be viewed as dicta. In any event, the differing and imprecise definitions demonstrate that "true threat" jurisprudence should not be read to limit such threats to "violent force," as that term is defined and required for a categorical force analysis.

"capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. *Ladwig*, to the extent it adopts *Bonner*'s reasoning, is erroneous for the same reasons. 432 F.3d at 1005. In any event, *Ladwig* did not (and could not) conclude that a merely "harassing" telephone call was a crime of violence. It concerns a Washington offense that specifically required proof of an "intent to kill" during the phone call. *Id.* at 1003-1004 ("[T]he only way to be convicted of a felony under this subsection is to threaten to kill."). Section 115(a)(1)(B) contains no such requirement.

The R&R's finding that § 115(a)(1)(B) satisfied the force clause is erroneous and should not be followed. The R&R did not analyze § 115(a)(1)(B) under the residual clause, but that clause is unconstitutional anyway. Even if the Court did consider the issue, it should find the statute cannot satisfy the residual clause for the reasons stated at ECF No. 710, p. 29 and ECF No. 950, pp. 11-12. Count 9 should be dismissed.

4. Hobbs Act Extortion under 18 U.S.C. § 1951 is not categorically a crime of violence (Count 15).

Finally, the R&R finds that the extortion offense involved in Count 15 is a crime of violence. The R&R does so by finding that Hobbs Act extortion is a divisible offense. The government made no such contention in its Response, and only belatedly made the contention during oral argument. The Court's division of the offense, however, goes beyond anything argued by the government or supported by the statute.

The operative portion of the Hobbs Act is a single paragraph forbidding robbery and extortion, and attempts or conspiracies to do the same. 18 U.S.C. § 1951. This Court has found the Hobbs Act is a divisible statute that "contains disjunctive phrases that essentially creates six functionally separate crimes: interference with commerce by robbery, interference with

commerce by extortion, attempt to interfere with commerce by robbery, attempt to interfere with commerce by extortion, conspiracy to interfere with commerce by robbery, and conspiracy to interfere with commerce by extortion." *Smith*, 2:11-cr-00058-JAD-CWH, ECF No. 230,, p. 8 (D. Nev. May 18, 2016).

Payne contends the Hobbs Act must be viewed as a single, indivisible offense (ECF No. 710, pp. 23-24). But even if *Smith* were correct, the R&R erroneously subdivides the statute even further. The R&R contends there are actually three different "extortion" offenses, which it describes as "(1) extortion by public officials under color of official right; (2) extortion by private individuals by force, and (3) extortion by private individuals by non-violent threat." ECF No. 1218, pg. 37.

This further subdivision finds no support in the statute. The Hobbs Acts defines extortion as the "obtaining of property from another, with his consent, inducted by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). The short list of disjunctive means at the end of this definition is hardly sufficient to create a divisible offense. *See Mathis v. United States*, 136 S.Ct. 2243, 2253 (2016) (statute not divisible simply because it "lists alternative means" of committing an offense even when such means are "disjunctive"). It is not meaningfully different than the Iowa statue found indivisible in *Mathis*, 136 S.Ct. at 2250. *See* I.C.A. § 702.12 (defining "occupied structure" as "any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value"). Nor does it meaningfully differ from the disjunctive statutes (or parts of statutes) involved in this case

that are not disputed to be indivisible, such as the "force, intimidation, or threat" element of § 372, or the threat to "assault, kidnap, or murder" element of § 115(a)(1)(B).

Even if Hobbs Act Extortion could be deemed divisible, the statute does not support the divisions created in the R&R. The statutory definition of extortion does not mention "violence" at all, let alone create disjunctive extortion offenses based on the presence, or lack thereof, of violence. Nor does it say anything about "public officials" or "private individuals." The Ninth Circuit's model jury instructions might provide different instructions for different means of extortion similar to those found in the R&R as a matter of convenience, *see* ECF No. 1218 p. 38, but that is hardly sufficient to create divisible offenses that don't exist in the statute itself.

Because Hobbs Act Extortion is indivisible, the modified categorical analysis cannot be used, and the language of the indictment is irrelevant. Since extortion plainly encompasses acts that do not involve the use of violence or even force, it cannot satisfy the force clause. ECF No. 1218, p. 39 (acknowledging that two of the three variants of extortion identified by the R&R could not qualify under the force clause).

But even if extortion were divisible in the manner imagined by the R&R, and even if a look at the indictment were thus appropriate under the modified categorical approach, there would still be no crime of violence. The Court's consideration of the charging document is limited to determining "which of a statute's alternative elements formed the basis" of the defendant's conviction. *Descamps*, 133 S.Ct. at 2284. The R&R acknowledges the indictment charges the defendants with extortion "without specifying a variant of the separate Hobbs Act extortion offenses." ECF No. 1218, p. 40. This should be the end of the matter. If the indictment does not limit itself to a divisible extortion "offense," then the modified categorical analysis cannot narrow the statute.

At most, it might be contended that the indictment fails to charge the third of three extortion "offenses" identified by the R&R, because it omits the "under color of right" language connected with "public officials." *See* ECF No. 1218, pp. 37-38. But the indictment otherwise tracks the language of the extortion definition.[5] It thus cannot be read to distinguish between either of the two variants that the R&R recognizes to encompass acts of "private individuals," one of which is expressly based on "non-violent" threats. ECF No. 1218, p. 37.

Finally, the R&R cannot rebut Payne's argument that extortion by wrongful use of "force, violence, or fear" is categorically overbroad in any event because it can be accomplished by fear of economic loss. The R&R cites cases holding that Hobbs Act *robbery* accomplished by fear or intimidation may qualify as a crime of violence. ECF No. 1218, pp. 41-42. This is irrelevant because robbery, which unlike extortion requires the "unlawful taking or obtaining" of property against the will of the victim, is inherently a more dangerous offense than extortion. 18 U.S.C. § 1951(a). The R&R overlooks an entire line of precedent that recognizes extortion can be accomplished solely by creating fear of economic loss. *See, e.g.*, *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1130-33 (9th Cir. 2014) (recognizing threats of economic harm can be a federal extortion offense when the defendant does not have a legitimate claim to the property obtained through such threats); *United States v. Marsh*, 26 F.3d 1496, 1501 (9th Cir. 1994) ("reasonable fear of economic harm" may establish extortion conviction); *United States v. Nedza*, 880 F.2d 896, 902 (7th Cir. 1989) ("showing that the defendant preyed upon or exploited the victim's fear of

[5] The R&R correctly attributes no significance to the indictment's substitution of "and" for "or" when it alleges the wrongful use of "force, violence, and fear." Neither the extortion definition nor the R&R's subdivision of the statute recognizes a divisible offense based upon the conjunctive, rather than disjunctive, use of these terms. The government cannot avoid the categorical overbreadth by inventing and charging the defendants with a narrower offense or by making disjunctive elements conjunctive.

"economic harm" was sufficient evidence); *United States v. Lisinski*, 728 F.2d 887, 889-90 (7th Cir. 1984) (fear of losing liquor license sufficient to support Hobbs Act extortion); *United States v. Margiotta*, 688 F.2d 108, 134 (2d Cir. 1982), *overruled on other grounds by McNally v. United States*, 483 U.S. 350 (1987) ("putting the victim in fear of economic loss can satisfy the element of fear required by the Hobbs Act"); *United States v. Sander*, 615 F.2d 215, 218 (5th Cir. 1980) (same).

The R&R's finding that the Hobbs Act Extortion offense in Count 15 satisfied the force clause is erroneous and should not be adopted. The R&R did not analyze the offense under the residual clause, but that clause is unconstitutional anyway. Even if the Court did consider the issue, it should find Hobbs Act Extortion cannot satisfy the residual clause for the reasons stated at ECF No. 710, p. 29 and ECF No. 950, pp. 13-14. Count 15 should be dismissed.

CONCLUSION

Counts 3, 6, 9, and 15 of the superseding indictment fail to allege predicate statutory offenses that constitutes "crimes of violence" under the meaning of 18 U.S.C. § 924(c). As such, they must all be dismissed with prejudice. The R&R's conclusions to the contrary are legally erroneous, and should not be adopted.

DATED this 13th day of January, 2017.

Respectfully Submitted,

RENE VALLADARES
Federal Public Defender

By: */s/ Ryan Norwood*
RYAN NORWOOD
Assistant Federal Public Defender

By: */s/ Brenda Weksler*
BRENDA WEKSLER
Assistant Federal Public Defender

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 January 13, 2017, he served an electronic copy of the above and foregoing **DEFENDANT RYAN PAYNE'S OBJECTIONS TO REPORT AND RECOMMENDATION TO DENY MOTION TO DISMISS COUNTS THREE, SIX, NINE, AND FIFTEEN FOR FAILURE TO ALLEGE A CRIME OF VIOLENCE (ECF 1218)** 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
Assistant United States Attorney
NICHOLAS DICKINSON
Assistant United States Attorney
STEVEN MYHRE
Assistant United States Attorney
501 Las Vegas Blvd. South
Suite 1100
Las Vegas, NV 89101

/s/ Karen Meyer
Employee of the Federal Public Defender