IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, v. CHARLES EDWARD LEPP, Petitioner.	CIVIL ACTION NO.: 3:12-cv-05836-WHA Criminal Case No.: 3:04-cr-00317-WHA

MOTION FOR LEAVE TO AMEND
OR SUPPLEMENT THE RECORD PURSUANT TO RULE 15(a)(2)

COMES NOW, Charles Edward Lepp, the Petitioner in the above-captioned action, acting pro se and upon his own behalf, to hereby move this Honorable Court for leave to amend his "Memorandum of Facts and Law In Support of his 28 U.S.C. § 2255 Motion" pursuant to Fed.R.Crim.Proc. Rule 15(a)(2) or any other rule that this Court deems appropriate and just. In support of his motion, Petitioner contends that he has discovered important and relevant information and documentation that is included in his "Motion To Amend Petitioner's Motion Made Pursuant To 28 U.S.C. § 2255" that should be considered by the Court when deciding his 28 U.S.C. § 2255 motion.

Moreover, the government has not yet responded to Petitioner's original § 2255 motion, and allowing him to amend or supplement the record would unduly burden the government.

WHEREFORE, Petitioner respectfully prays that this Honorable Court will grant him leave to amend or supplement his "Memorandum of Facts and Law In Support of his 28 U.S.C. § 2255 Motion."

Respectfully submitted this 12TH day of January, 2013.

CHARLES EDWARD LEPP

Charles Edward Lepp, Pro Se
Federal Register NO. 90157-011
Federal Correctional Institution La Tuna Texas
P.O. Box 3000
Anthony, TX/NM 88021

CERTIFICATE OF SERVICE

I, Charles Edward Lepp, the Petitioner in the foregoing action, do hereby certify that on this date, a true and accurate copy of Petitioner's "MOTION FOR LEAVE TO AMEND OR SUPPLEMENT THE RECORD PURSUANT TO RULE 15(a)(2)," was placed in the United States Mail, First Class, proper postage being pre-paid, and addressed to:

Alexa Summer
Assistant United States Attorney
For The Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

by placing said document in the prisoners' mail box depository at the Federal Correctional Institution La Tuna.

CERTIFIED THIS 12TH day of January, 2013.

CHARLES EDWARD LEPP

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Federal Register No. 90157-011
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent,	CIVIL ACTION NO.: 3:12-cv-05836-WHA
v.	Criminal Case No.: 3:04-cr-00317-WHA
CHARLES EDWARD LEPP, Petitioner.	

MOTION TO AMEND PETITIONER'S MOTION MADE PURSUANT TO 28 U.S.C. § 2255

COMES NOW, Charles Edward Lepp, the Petitioner in the above-captioned action, acting pro se and upon his own behalf, to hereby move this Honorable Court for leave to amend his "Memorandum of Facts and Law In Support of his 28 U.S.C. § 2255 Motion" to include the following facts, reasons and supporting legal authority:

1. Rule 15(a)(1) and (a)(2) permits a party to amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when

justice so requires.

2. In addition to the issues presented in Petitioner's original 28 U.S.C. § 2255 Motion and his "Memorandum of Facts and Law In Support of his 28 U.S.C. § 2255 Motion," Petitioner also seeks to include the following:

3. Petitioner contends that his constitutional Equal Protection rights have been violated as a result of his conviction; and that as a result of recent developments, the Court lacks subject matter jurisdiction to uphold his conviction.

4. Cannabis or Marijuana has been legalized in two states, therefore, it is unequal application of the law for one to be prosecuted under federal law, when the use or possession of cannabis or marijuana is legal for adults in other states.

5. The "Compassionate Investigative New Drug" program (IND Program) has distributed marijuana to patients for medical purposes since 1978 and still sends cannabis by the U.S. Postal Service to patients currently in the program. This substantiates the fact that the government is well aware that cannabis has a medical value, but has deliberately mislabeled it as a Schedule I substance with no medical value.

6. Supporting documentation shows that the government has issued a U.S. Patent, under number 6,630,507 as Cannabidiol (CBD) and THC, and studies reveal that they both decrease the size of a stroke by fifty-percent. The mis-labeling of "CBD" prevents physicians from even studying "CBD", much less the ability to research and develop more uses for much more complex medical issues.

7. Moreover, the mis-labeling of cannabis or marijuana allows for deliberate and unjust prosecutions.

8. Currently, "THC" is contaiend in two schedules simultaneously. 1) "THC" is derived from plants that is considered Schedule I; 2) "THC" which is made synthetically (Marinol) is classified as a Schedule III substance. This blatant incongruity is amplified by recent government application to make syntehtic "THC" from whole plant extract. (The government is making application to produce hash from the plant and not synthetic derivations.) (See Federal Register, Volume 72, No. 184; Technical Amendment to the listingin Schedule III of approved drug products containing tetrahydrocannabinol) (See Attached Exhibit A)

9. Federal law does not overrule the will of the people in a democratic vote. The California State is required to notify the federal government of any inconsistency between federal and state law so as the will of the people is paramount. The federal government must then adapt its law to comply with the will of the people and democratic vote.

10. Previous UN single convention treaties were signed by our federal government but not ratified by the individual states.

11. Courts are now upholding religious rites of sacred use of cannabis.

12. California courts allow testimony of medical necessity, which was omitted at Petitioner's trial.

13. The legality of a substance which is an intoxicant

is established by the Eighteenth Amendment.

14. In 1972, the Shafer Commission stated that marijuana was illegal by unconstitutional means.

15. The science of the ECS or EndoCannabinoid System has proven that the body's own EndoCannabinoid are responsible for ALL human physiology. This system incorporates both a communication between cells and an oxygen free radical scavenging system that protects us from disease. The ECS protects individuals from oxidative damage from metabolizing food and other oxidative stresses.

16. Cannabis use decreases the lifetime incidence of diabetes by sixty-six-percent, cannabis kills cancer by four mechanisms including apoptosis, and use of cannabis for over twenty-years is associated with improved lung function compared to non-smokers in normal individuals. Cannabis successfully treats seizures when all other combinations of pharmaceuticals fail.

17. In Gonzales v. Raich, 545 U.S. 1 (2005) the U.S. Supreme Court found the CSA constitutional as applied to state authorized medical use of marijuana. Often overlooked in the conventional analysis is the comment from the U.S. Supreme court which stated that "marijuana may be incorrectly classified (scheduled)." Id. at 28 n.37. This determination was further amplified a year later when the U.S. Supreme Court held that state authorized medical use of controlled substances is beyond the power of a federal administrative agency to criminalize federally using administrative rules. See Gonzales v. Oregon, 546 U.S. 246, 258

(2006) ("The Attorney General ... is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law"). The U.S. Supreme Court pointed to the non-preemption clause in the CSA, 21 U.S.C. § 903, id. at 251, and the CSA's purpose of preventing the non-authorized use of controlled substances.

18. In addition, two additional states have passed laws allowing for the use of marijuana or cannabis for recreational purposes. These states include Washington and Colorado.

19. As such, Petitioner contends that he is a similar situated citizen of the United States as those individuals in the States of California, Washington, and Colorado who are permitted by law to use cannabis or marijuana. Prosecuting Petitioner for the same conduct as allowed by the citizens of California, Colorado, and Washington, clearly violates the equal protection laws of the United States Constitution.

20. The Equal Protection Clause of the United States Constitution, the Fourteenth Amendment, guarantees that the government must treat a person or class of persons the same as it treats other persons or classes in like circumstances.

21. As such, Petitioner's conviction cannot stand without violating his Equal Protection rights as noted above.

22. Moreover, when states have passed laws allowing for the use of marijuana or cannabis, Petitioner was acting within the clear authority of the laws of California, and as such, and

based on the reasons, facts and supporting case law contained herein, the Court clearly lacked subject-matter jurisdiction to convict Petitioner for the use and possession of cannabis or marijuana, and a complete miscarriage of justice will result if his conviction and sentence is not vacated.

Respectfully submitted this 12TH day of January, 2013.

CHARLES EDWARD LEPP

Charles Edward Lepp, Pro Se
Federal Register No. 90157-011
Federal Correctional Institution La Tuna Texas
P.O. Box 3000
Anthony, TX/NM 88021

CERTIFICATE OF SERVICE

I, Charles Edward Lepp, the Petitioner in the foregoing action, do hereby certify that on this date, a true and accurate copy of Petitioner's "MOTION TO AMEND PETITIONER'S MOTION MADE PURSUANT TO 28 U.S.C. § 2255," was placed in the United States Mail, First Class, proper postage being pre-paid, addressed to:

Alexa Summer
Assistant United States Attorney
For The Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

by placing said document in the prisoners' mail box depository at the Federal Correctional Institution La Tuna.

CERTIFIED THIS 12TH day of January, 2013.

CHARLES EDWARD LEPP

Charles Edward Lepp, Pro Se
Federal Register No. 90157-011
Federal Correctional Institution La Tuna Texas
P.O. Box 3000
Anthony, TX/NM 88021

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION, PURSUANT TO SECTION 2255 OF TITLE 28
UNITED STATES CODE

ATTACKING A SENTENCE IMPOSED BY THAT COURT

UNITED STATES OF AMERICA

VS.

CHARLES EDWARD LEPP

CASE NO.
(To be supplied by the
Clerk of the District Court)

(name of movant)
(Full name under which you were convicted)

INSTRUCTIONS-READ CAREFULLY

In order for this motion to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten) by the Movant, under penalty of perjury, and it shall set forth in concise form the answers to each applicable question. If necessary, Movant may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Movant shall make it clear to which question any such continued answer refers.

Since every motion under Section 2255 of Title 28, United States Code, must be made under penalty of perjury, any false statement of a material fact therein may serve as the basis of prosecutions and conviction for perjury. Movant should therefore exercise care to assure that all answers are true and correct.

If the motion is made in forma pauperis, it shall include an affidavit (page 6 of this form) setting forth information which establishes that the Movant will be unable to pay the fees and costs of the 2255 proceedings. When the form is completed, the original and 2 copies shall be mailed to

the Clerk of the District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102.

1. Place of detention FCI La Tuna, P.O. Box 3000, Anthony, Texas, 88021

2. Name and location of Court which, and name of judge who, imposed sentence USDC N. Distr. Cal. (S.F. Div.), 450 Golden Gate Ave., San Francisco, CA 94102; J. Marilyn Patel

3. The indictment number or numbers (if known) upon which the offense or offenses for which sentence was imposed.:

(a) CR-04-0317
(b)
(c)

4. The date upon which sentence was imposed and the terms of the sentence:

(a) March 16, 2008; 120 mo. imprisonment; 5 yr. supervised release
(b)
(c)

5. Check whether a finding of guilty was made:

(a) after a plea of guilty
(b) after a plea of not guilty X
(c) After a plea of nolo contenders

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

(a) a jury X
(b) a judge without a jury

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If you answered "yes" to question 7, list

(a) the name of each court to which you appealed:

I 9th Circuit Court of Appeals
II U.S. Supreme Court
III

(b) the result of each such court to which you appealed:

I Judgment and Sentence Affirmed
II Certiorari Denied
III

(c) the date of each such result:

I July 27, 2011
II
III

(d) If known, citations of any written opinions or orders entered pursuant to such results:

I
II
III

9. State concisely the grounds on which you base your allegation that the sentence which was imposed on you is invalid.

(a) (See attched Sheets)

(b) (See Attached Sheets)

(c) (See Attached Sheets)

(d), (e), (f) (See Attached Sheets)

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) (See Attached Sheets)

(b) (See Attached Sheets)

(c) (See Attached Sheets)

(d), (e), (f) (See Attached Sheets)

(g), (h) and (i) (See Attached Sheets)

11. Have you previously filed petitions for habeas corpus motions under section 2255 of Title 28, United States Code, or any other applications, petitions or motions with respect to this conviction? No

12. If you answered "yes" to (11), list with respect to each petition, motion or application

(a) the specific nature thereof:

I _____
II _____
III _____

(b) the name and location of the court in which each was filed:

I _____
II _____
III _____

(c) the disposition thereof:

I _____
II _____
III _____

(d) the date of each disposition

I _____
II _____
III _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

I _____
II _____
III _____

13. Has any ground set forth in (9) been previously presented to this or any other federal court by way of petition for habeas corpus, motion under section 2255 of Title 28, United States Code, or any other petition, motion or application? No

14. If you answered "yes" to (13), identify

(a) which grounds have been previously presented:

I _____
II _____
III _____

(b) the proceedings in which each ground was raised:

I _____
II _____
III _____

15. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction of the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

16. If you answered "yes" to one or more parts of (15), list

(a) the name and address of each attorney who represented you:

I Unknown
II Trial: Michael J. Hinkley, Stiglich & Hinkley, San Fran., CA
III Appeal: Katherine Alfieri, POB 460238, San Francisco, CA 94146

WHEREFORE, movant prays that the Court grant movant relief to which he may be entitled in this proceeding.

Signed under penalty of perjury _____ at ~~Lompoc, CA~~ LAFAYETTE, TX

6-NOV-12
Date

CHARLES EDWARD LEPP
Signature of Movant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Respondent,	§	
v.	§	Case No. _____
	§	Criminal Case No. 3:04-CR-00317-MHP
CHARLES EDWARD LEPP Petitioner.	§	

MEMORANDUM OF LAW IN SUPPORT OF HABEAS CORPUS MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE, PURSUANT TO 28 U.S.C. §2255

Comes Now, Charles Edward Lepp, Petitioner, pro se, and timely moves this Honorable Court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255. In support, Petitioner states:

I.

STATEMENT OF FACTS

Petitioner is an ordained minister of three churches, including the Rastafarian faith. A tenant of the Restafarian faith requires the cultivation, distribution and consumption of marijuana as a sacred herb. Petitioner founded a church (congregation) named Eddy's Medicinal Gardens and Multi-Denominational Ministry of Cannabis and Rastafari (herein "Church"), and located the ministry on his and his wife's "Residential Property," which was adjacent to but separate from his "Rural Property". The Church had approximately 2,500 members between 2004 and 2008, and averaged approximately 1,000 members at all times.

Petitioner and his wife (now deceased), Linda Senti, later decided, through their ministry, to open up their "Rural Property"

to Church members who were also carded medicinal marijuana patients, and who wished to grow their own marijuana for both religious and medicinal needs. In order to participate, an individual was required to be a Church member, have a valid California medical marijuana identification card, and to otherwise comply with the applicable medical marijuana laws. Linda Senti (as a Church minister and part owner of the Rural Property), to the exclusion of Petitioner, handled all matters respecting Church members use of the Rural Property.

Several police raids were conducted on two separate and distinct locations, Petitioner's residential property and the 20-acre rural property used by church parishoners. First, in August of 2002, agents from the federal DEA and sheriff's deputies from Lake County confiscated marijuana plants from the rural property. Then on August 18, 2004, marijuana plants, kilos of dried marijuana and related materials were seized from the two locations while Petitioner was initially charged with offenses stemming from materials seized from the residential property, these criminal charges were later severed from the prosecution regarding the materials seized from the rural property that were used by the parishoners. Thus, the specific offense of conduct alleged at trial was limited to the marijuana plants seized from the rural property. Petitioner's direct testimony given in those subsequent criminal proceedings therefore related only to the rural property, and specifically the raid in August of 2004.

II.

HISTORY OF THE CASE

Petitioner was convicted after a jury trial of two counts of violations of the Controlled Substance Act, 18 U.S.C. §§841, 846 and 856, for conspiracy to possess 1,000 plants or more of marijuana with the intent to distribute, and for manufacture and possession of marijuana with the intent to distribute. Both of these counts of conviction related to marijuana seized on Petitioner's and his wife's "rural property".

Petitioner was sentenced March 16, 2008 to a term of 120 months of imprisonment and five years of supervised release.

Petitioner appealed to the Ninth Circuit Court of Appeals, who affirmed the conviction July 27, 2011 (2011 U.S. App. LEXIS 15578).

III.

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Ineffective assistance of counsel is evaluated under the standard articulated by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). To establish constitutionally ineffective assistance of counsel under Strickland, a Petitioner must show that his counsel's performance was inadequate and that inadequate performance prejudiced the Petitioner. In order to demonstrate inadequate performance, a Petitioner must show that "counsel's representation fell below an objective standard of reasonableness." Id. at 688. The Supreme Court held, "scrutiny of counsel's performance must be highly deferential [ ]" and the Court "must indulge a strong presumption that a

counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

Petitioner now raises multiple issues concerning his counsel's deficient performance and subsequent prejudice resulting:

TRIAL COUNSEL WAS INEFFECTIVE DUE TO HIS FAILURE TO INVESTIGATE, DEVELOP, AND INCORPORATE AVAILABLE MATERIAL INFORMATION IN THE DEFENSE

Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; Wiggins, 539 U.S. at 521, 123 S.Ct. at 2535; see also: Cox v. Ayers, 588 F.3d 1038, 1046 (9th Cir. 2009) ("Counsel's investigation must, at a minimum, permit informed decisions about how best to represent the client."). This includes a duty to investigate the prosecution's case and to follow up on any exculpatory evidence. Morrison, 477 U.S. 384-85, 106 S.Ct. at 2588; Duncan v. Ornoski, 528 F.3d 1222, 1234-35 (9th Cir. 2008), cert denied, 129 S.Ct. 1614, 173 L.Ed. 2d 1001 (2009).

A. Physical disability precluding capability to cultivate

Petitioner did not own, cultivate or sell any of the marijuana grown on the "rural property". Moreover, Petitioner's physical disabilities from his military services in the Vietnam conflict prevented him from actively participating in the cultivation of marijuana. There was ample documentation concerning Petitioner's physical disabilities.

Trial counsel was ineffective for not obtaining material medical records concerning medical disabilities and physical restrictions. Moreover, he was ineffective in not obtaining

medical expert to ascertain significance of Petitioner's physical handicap and inability to cultivate marijuana. No informed tactical decision on trial counsel's behalf could be made without adequate investigation into the disabilities and consultation with medical expert. See: Sanders v. Ryder, 183 Fed. Appx. 666, 2006 U.S. App. LEXIS 16991 (9th Cir. June 7, 2006) (failing to consult or hire an expert regarding and failing to interview them).

There is a reasonable probability that had counsel obtained the available medical records and an expert witness to firmly establish Petitioner's handicap and inability to cultivate the marijuana, the result of the proceedings would have been different. Great weight is often given to expert testimony in a trial situation by a jury (Counsel was ineffective in failing to obtain medical records). Tucker v. Prelesnik, 181 F.3d 747 (6th Cir. 1999).

B. Failure to Investigate Facts and Controlling Legal Authorities and Effectively Litigate Religious Freedom and Restoration Act ("RFRA") defense

Petitioner's trial attorney (Hinkley) was highly ineffective in his advancement of Petitioner's defense under the Religious Freedom and Restoration Act ("RFRA"), 42 U.S.C. §2000bb, et seq. defense.

At a pretrial, motion in limine hearing, seeking to present a religious defense under the "RFRA". The District Court refused the motion, denying the RFRA defense, applying the criminal laws prohibiting possession and manufacturing of marijuana is the least restrictive means of furthering the government's compelling interest in preventing diversion of sacramental marijuana to non-religious uses.

The Religious Freedom Restoration Act (RFRA), 42 U.S.C.S. §2000bb et seq., provides that the government may substantially burden a person's free exercise of religion only if it demonstrates that application of the burden to the person: (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest. 42 U.S.C.S. §2000bb-1(b). To establish a prima facie case, a defendant must show that the statute at issue works a substantial burden on his ability to freely practice his religion. If the defendant establishes that the prosecution substantially burdens his free exercise of religion, the burden shifts to the government to establish that prosecuting defendant is the least restrictive means of furthering compelling government interest.). United States v. Adeyemo, 624 F. Supp. 2d 1081 (Dist. of Nevada, 2008).

The Court's denial of the decisive motion in limine was not predicated upon any ground advanced by the government or Petitioner (emphasis added). Instead, it was based sua sponte, on facts not presented by either party, but rather on facts apparently gleaned from the docket, prior pleadings, prior hearing transcripts, and additional pleadings from two earlier civil actions in which Petitioner or his wife had been pro se plaintiffs. These earlier civil actions contained numerous pro se pleadings relevant to the Petitioner's criminal defense (see ER 46-63, Dkt. 219).

(Under the Religious Freedom Restoration Act (RFRA), 42 U.S.C.S. §2000bb et seq., defendant need only satisfy general U.S. Const. art. III case or controversy requirements to have standing to assert RFRA as a defense. Under 42 U.S.C.S. §2000bb-1(c), a

person whose religious exercise has been burdened in violation of 42 U.S.C.S. §2000bb-1 may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under 42 U.S.C.S. §2000bb-1 shall be governed by the general rules of standing under U.S. Const. art. III.). United States v. Adeyemo, supra.

Although the previous civil actions and related documents that the Court utilized to piecemeal their reasoning together in their judicial holding, that denied Petitioner the ability to present the RFRA defense, were highly material to Petitioner's defense, trial counsel failed to make meaningful objections. He failed to adequately know the available material and issues. Moreover, he was unable to understand how critical it was to establish that the prosecution was substantially burdening his free exercise of religion. Had he done so, the burden then shifts to the Government to establish that prosecuting Petitioner is the least restrictive means of furthering a compelling governmental interest. See United States v. Tawahongva, 456 F. Supp. 2d 1120, 1131 (D. Ariz. 2006). Counsel's failings here prohibited him in making meaningful objections and rebuttals to the Court's position regarding the RFRA defense ("a strategic decision predicated on inadequate investigation is not a reasonable strategy.") Ben-Sholom v. Ayers, 566 F. Supp. 2d 1053, 1129 (E. Dist. (A, 2008) (quoting: Reynoso v. Giurhino, 462 F.3d 1099, 1112 (9th Cir. 2006); ("defense counsel's tactical decisions are only appropriate where counsel has conducted a reasonable investigation enabling him to make informed decisions about how best to represent

his client.") Id. (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994).

These failings to investigate and adequately understand the issues were highly prejudicial to the Petitioner. Although the Court recognized the sincerity of Petitioner's religious beliefs, an evidentiary hearing was necessary to properly resolve fact issues of how the government was substantially burdening his free exercise of religion, and that the Government was not utilizing the least restrictive means of furthering compelling governmental interests. Because counsel was unfamiliar with the facts and controlling case law, he failed to make meaningful objections. Trial counsel simply was not prepared. "It has been recognized that the adversarial process will not function normally unless the defense team has done a proper investigation." Siripongs v. Calderon, 133 F.3d 732, 734 (9th Cir. 1998) (citing Kimmelman v. Morrison, 477 U.S. 365 at 384, 91 L.Ed. 2d 305 (1986)).

The onus was on Petitioner's trial counsel to adequately pursue this significant issue, that was decisive to the defense. Counsel dropped the ball at a critical juncture due to his failing to conduct a reasonable investigation into the available information, fully understand the issues, controlling legal authorities and make proper objections. Had Counsel known the law and presented supporting evidence, he could have shifted the burden to the Government, forcing them to "demonstrate that the law is the least restrictive means of vindicating a compelling interest." See 42 U.S.C. z2000bb-1. Instead, he dropped the ball, because he didn't understand controlling authorities and statutes.

The Ninth Circuit has held that Counsel must, "at minimum, conduct reasonable investigation enabling him to make informed decisions about how best to represent his client." Hendricks v. Calderson, 70 F.3d 1032, 1035 (9th Cir. 1995).

Although trial counsel perfunctorily raised Gonzales v. O Centro Espirita, 546 U.S. 416, 126 S.Ct. 1211, 163 L.Ed. 2d 1017 (2006), he failed to articulate to the Court that under O Centro Espirita, the Controlled Substance Act is not and cannot be the "compelling interest" in denying the RFRA defense.

The Supreme Court held:

> "We [do not] doubt the general interest in promoting public health and safety by enforcing the Controlled Substance Act, but under RFRA invocation of such interests, standing alone, is not enough."
>
> O Centro Espirita, 546 U.S. at 438.

Counsel's performance was deficient when he failed to meaningfully object due to his lack of adequate knowledge of controlling Supreme Court law, rather than reasonable trial strategy.

The Court was simply using boilerplate language in an effort to avoid the slipper slope the RFRA defense would create in the approaching trial. They were failing to look beyond the broadly formulated governmental interests and scrutinize the potential harm to Petitioner in denying him the RFRA defense.

The Supreme Court held:

> RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" - the particular claimant whose sincere exercise of religion is being substantially burdened [ ]. RFRA expressly adopted the compelling interest test 'as set forth in Sherbert v. Verner, 374 U.S. 398... (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)' [ ]. In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the aserted harm

of granting specific exemptions to particular religious claimants."

O Centro Espirita, 546 U.S. at 431.

The Government had not offered evidence demonstrating that granting Petitioner an exemption from the Controlled Substance Act for religious use of marijuana would cause the kind of administrative harm recognized as compelling interest. Moreover, they did not properly apply the compelling interest test. The Court cannot compensate for that failing with boilerplate language and a sua sponte argument that there can be no RFRA defense to the Controlled Substance Act, as addressed herein above.

Counsel's performance fell below an objective standard of reasonablenes when he failed to make proper objections concerning the Court's erroneous conclusions of law. Let alone did it fail to preserve the issue properly for appeal, but it resulted in the immediate denial of an available, applicable defense. Moreover, the failing to move for a writ of mandamus about the Court's holding significantly prejudiced the defense and Petitioner's ability to get a meaningful trial.

C. **Failure to Investigate and Present Relevant Information Concerning Defense**

Petitioner's trial counsel's advancement of intended defense was so egregiously inadequate or ineffective that Counsel's presence actually hindered the Petitioner's exercise of his rights. Counsel failed to investigate and present material evidence that was key to the defense, that being that there were more than 2,500 Rastafarian, medical marijuana card holders (recognized as lawful by the State of California), who were

parishoners to Petitioner, and his wife's church, between 1999 and 2008. Each marijuana plant was property to specific parishoners.

This information was highly material, as it would drop the marijuana plant count down for the 1,000 or over, that Petitioner was held liable for, down to less than twenty plants per member of the congregation.

Moreover, Petitioner's culpability is reduced to a mere 14 to 20 plants, from the 1,000 plants that he was convicted of cultivating. Petitioner was also a member of the congregation, and plants were being cultivated for his personal religious and medical use.[1]

Counsel did seek to prove that there were 2,500 adherents in Petitioner's religious congregation, however, he failed to present material evidence that would have established: (1) that the plants were each property of specific parishoners; (2) Petitioner's physical and mental disabilities precluded him in being able to cultivate marijuana for other parishoners. This information and relevant evidence was available to counsel, yet he failed to adequately investigate, and educate himself on this issue. Material witnesses were available to substantiate these relevant issues but counsel failed to conduct investigative interviews concerning this and/or call them to testify. (Counsel was ineffective in failing to conduct investigative interviews of two alleged eyewitnesses and failing to cross-examine these witnesses: "Although

1 In December of 1998, Superior Court of Lake County, State of California, Petitioner was tried and acquitted at jury trial for cultivation of marijuana. It was adjudicated that due to his serious physical and mental disabilities that he needed a minimum of 132 plants per year for his medical marijuana needs.

trial counsel is typically afforded leeway in making tactical decisions regarding trial strategy, counsel cannot be said to have made a tactical decision without first procuring the information to make such a decision.") Reynoso v. Giurbino, 462 F.3d 1099 (9th Cir. 2006). But for counsel's unprofessional errors, the result of the proceedings would have been different.

D. **Counsel's Failing to Investigate and Make Meaningful Objections Permitted Prejudicial Testimony to Be But Before the Jury**

Petitioner incorporates by reference the specific facts from Grounds 1-3, inclusive. Prior to trial, the District Court suppressed all evidence from the "sting operation" as an agregious violation of Massiah and severed the sale count (ER 37-38). However, at trial, the government counsel incorrectly argued that the tenor of Petitioner's direct testimony had "opened the door" to permit evidence from the severed 2005 sale count to be adduced on cross-examination (ER 314). Over counsel's objection, the court agreed, finding the alleged sale to be inconsistent with Petitioner's direct testimony about" "...what that marijuana is, and who its for, and so on, and so forth." (ER 314-316).

Trial Counsel (Hinkley) was highly ineffective in opposing cross-examination and presentation of evidence on this issue. Although he objected to the government's argument and the Court's ruling, he committed a myriad of failures by neglecting to investigate, recognize and argue facts demonstrating Petitioner had not "opened the door" on his direct testimony. Of ultimate import, Petitioner's direct testimony solely addressed the time period of August

2004, the 24,784 marijuana plants seized from the Rural Property, his lack of ownership of those specific plants, his explanation of how the marijuana came to be planted there, and his identification of the owners of those specific plants. The "evidence" sought to be used by the government in cross-examining Petitioner was unrelated to Petitioner's testimony in both time and subject matter.

Firstly, on August 18, 2004, the marijuana plants, kilos of dried marijuana and related materials were seized from two separate and distinct locations: Petitioner's residential property and the 20-acre rural property on which marijuana was grown by the parishoners. While Petitioner was initially charged with offenses stemming from materials seized from the residential property, these charges later had been severed from the prosecution regarding the materials seized from the rural property; thus, the specific offense conduct alleged at trial was limited to the marijuana plants seized from the rural property.

Secondly, Petitioner's testimony did not concern any time period other than August 2004, nor any property other than the rural property, nor any plants other than those seized from that property. There simply was nothing in Petitioner's testimony that was in any way inconsistent with an alleged sale of one pound of marijuana the following year in January of 2005, so there was no basis for allowing the cross examination. It is critical to note that although Petitioner disavowed ownership of the plants from the rural property, he never disclaimed the marijuana plants, the dried cannabis, and the paraphernalia

seized simultaneously from his residential property (which were not at issue). Trial counsel's failure to investigate this issue, understand it, and present it effectively to the Court led to the Court's misunderstanding of the facts (or being completely unaware of the salient facts), leading to its mistaken allowance of the cross-examination.

Petitioner was prejudiced by the ineffectiveness of trial counsel's representation in the described regards, in that had he properly and effectively argued against cross-examination on the previously suppressed issue and charge, the Court would have denied the cross-examination, the jury would not have heard the issue or corss-examination, and there is a strong liklihood that defendant would not have been convicted by the jury. Moreover, even if the Court had still denied Petitioner's motion in limine, he would have established a record on which the Court of Appeals would have reversed and remanded.

The Ninth Circuit has held:

> "Where counsel's deficiency involves the failure to investigate a possible defense, we evaluate whether there is a 'reasonable probability' that a competnet investigation would have turned up evidence bearing on that defense that would have affected the outcome of trial."
>
> Hoffman v. Arave, 455 F.3d 926, 934 (9th Cir. 2005).

See also Stankewitz v. Woodford, 365 F.3d 706, 717-719 (9th Cir. 2004) (focusing the prejudice inquiry on the information that a reasonable investigation would have unearthed).

Counsel's performance fell below an objective standard of reasonableness in his above addressed failings. Petitioner was significantly prejudiced as a result.

E. Failure to Investigate and Present Outrageous Governmental Conduct Occurring in Petitioner's Case

Petitioner incorporates by reference the facts set out under Grounds 1-3, inclusive, herein.

In an obvious effort to undermine the dual defenses Petitioner posited from day one of this litigation (and his multiple civil cases against the government) - namely: medical marijuana and religious freedom - the Government, months after the September 2004 indictment concocted a clever, but outrageous scheme to entice Petitioner into selling marijuana to a government agent. The operative facts in this case (which included, inter alia, multiple unconstitutional searches based on warrants found to be deficient, and the Government approaching an indicted, represented, Petitioner who was suffering from a variety of mental, physical and psychological illnesses that made him particularly vulnerable to the chosen ruse of offering him secret government photos which would be helpful in his pending federal criminal prosecution) establish government misconduct that was outrageous in the extreme and violated fundamental fairness under the Due Process Clause. The record reflects that trial counsel (Hinkley) failed and refused to investigate this issue, and failed to effectively raise, litigate, and preserve this issue for appeal.

Petitioner was prejudiced by the described ineffective assistance of trial counsel Hinkley, because there is a strong liklihood the District Court would have granted a proper and supported motion to dismiss the within case due to government misconduct. Moreover, even if the District Court would not have

so dismissed the case, the Ninth Circuit Court of Appeals would likely have found the District Court's failure to grant a motion to dismiss to be an abuse of discretion, had this issue been properly presented in the first place, and so preserved for appeal.

A claim of negligence in conducting pretrial investigations can form the basis for a claim of ineffective assistance. See United States v. Tucker, 716 F.2d 576 (9th Cir. 1983); Hines v. Enomoto, 658 F.2d 667, 676 (9th Cir. 1981). Counsel must, at a minimum, conduct a reasonable investigation enabling them to make informed decisions about how best to represent their client. Sanders v. Ratelle, 21 F.3d 1446, 1457 (9th Cir. 1983). The duty of reasonable investigation extends to the issue of mental health. Douglas v. Woodford, 316 F.3d 1079, 1085 (9th Cir. 2003) ("Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired."). See also: Deutscher v. Whitley, 884 F.2d 1152, 1160 (9th Cir. 1989), vacated on other grounds, 506 U.S. 935, 113 S.Ct. 367, 121 L.Ed. 2d 279 (1992) (no strategic decision where defense based on Petitioner's psychiatric problems but failed to even consider investigating evidence to bolster defense); Evan v. Lewis, 855 F.2d 631, 637 (9th Cir. 1988) (failure to investigate possibility of mental impairment cannot be construed as trial tactic where relevant available documents not even reviewed by counsel).

Here, Petitioner's mental disabilities were well documented and known by the federal government, when they conducted their

unconstitutional sting operation. This was material to the court's dismissal of the charges relating to the sting operation. The fact counsel would not investigate and consider an "outrageous governmental conduct defense" was unreasonable in light of the existing evidence available.

It is possible for subversive law enforcement action to violate a person's Fifth Amendment due process rights if the action violates "fundamental fairness" and is thereby "shocking to the universal sense of justice." United States v. Russell, 411 U.S. 423, 432, 93 S.Ct. 1637, 36 L.Ed. 2d 3360 (1973). This due process defense based upon the alleged outrageous conduct of government agents is often pleaded. See United States v. Pemberton, 853 F.2d 730, 735 (9th Cir. 1988). Here, counsel refused to even investigate the available information that had occurred and familiarize himself with controlling authorities. The duty to investigate is part of a defendant's right to reasonably competent counsel. "The principle is so fundamental that the failure to conduct a reasonable pretrial investigation may in itself amount to ineffective assistance of counsel." United States v. Tucker, 716 F.2d 576, 583 n. 16 (9th Cir. 1983).

F. Failed to Present Material Evidence that Petitioner was Eligible for the "Safety Valve" Provision at Sentencing

Counsel was ineffective in his representation of Petitioner at his sentencing to adduce and present the evidence and material information available to establish Petitioner's eligibility for the "safety valve" provision of 18 U.S.C. §3553(e) and the United States Sentencing Guidelines §5C1.2 providing for a sentence

below the statutory mandatory minimum.

Specifically, counsel failed to present evidence that (1) Petitioner had no more than 1 criminal history point, (2) his alleged crime(s) did not involve violence or a weapon, (3) his alleged crime(s) did not involve death or serious bodily harm, (4) Petitioner was not an organizer, leader, manager, or supervisor with respect to cultivation of the marijuana on the Rural Property, (5) Petitioner was not involved in a continuing criminal enterprise, and (6) Petitioner provided complete and truthful information to the government concerning the alleged offenses.

Counsel was ineffective for failing to secure a two level safety valve reduction and getting him out from under the statutory, mandatory minimum sentence. Counsel had Petitioner meet with U.S. Attorney Dave Hall, and a DEA agent and himself at the Santa Rosa Sheriff's Department. Petitioner was told that if he recanted his testimony and in sum claim he was the "leader/organizer" that they would see that he got the "safety valve", but he refused as he was not the leader/organizer and had testified truthfully at the trial. As a result, the government objected to any safety valve provision.

G. The Frye and Lafler Decisions, and Petitioner's Rejection of a Plea Agreement

The United States Supreme Court has recently issued two decisions addressing the question of ineffective assistance of counsel with regard to a defendant's rejection of a plea agreement. Lafler v. Cooper, 566 U.S. ___, 132 S.Ct. 1376, 182 L.Ed. 2d 379 (2012).

The Frye Court stated:

> To show prejudice from ineffective assistance of counsel where a plea offer lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel... To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Id. at 1408-09.

In Lafler, a defendant charged with assault with intent to commit murder and other charges was offered a plea agreement that included a recommendation for a sentence of 51 to 85 months. 132 S.Ct. at 1383. Counsel advised the Defendant to reject the offer because, counsel said, the prosecution could not establish intent to commit murder Id. Both sides agreed that the advise was deficient. Id. at 1384. The defendant proceeded to trial, was convicted and received a sentence of 185 to 360 months. Id. at 1383.

The Lafler Court stated:

> Defendants have a Sixth Amendment right to counsel, a right that extneds to the plea-bargaining process. During plea negotiations, defendants are "entitled to the effective assistance of competent counsel"... In this case, all parties agree the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial... The question for this Court is how to apply Strickland's prejudice test where ineffective assistance results in a rejection of a plea offer and the defendant is convicted at the ensuing trial. To establish Strickland prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In the context of pleas, a defendant must show the outcome of the plea process would have been different with competent advice."

Id. at 1384 (citations omitted).

To prevail, Petitioner must establish that trial counsel provided ineffective assistance in regard to his decision to reject the offered plea agreement and that, but for the ineffective assistance, there is a reasonable probability that the result would have been different. See Frye, 132 S.Ct. at 1409; Lafler, 132 S.Ct. at 1384.

The instant case has Petitioner being informed by his counsel: (1) That a RFRA defense was possible, based on Petitioner's religious beliefs, and would probably succeed; (2) That the government's case was weak, and that suppressed evidence in earlier raids on Petitioner and his wife's property could not be raised in his trial; (3) That he would probably be sentenced to only 30 months, if he did lose in trial, because he was eligible for the "safety valve" provision.

Petitioner's counsel provided ineffective assistance in regard to his decision to reject the verbally offered plea offer of: 18 months in prison, 6 months in a halfway house, and six months in home confinement. But for the ineffective assistance, there is a reasonable probability that the result would have been different. See Frye, 132 S.Ct. at 1409; Lafler, 132 S.Ct. at 1384. "A defendant suffers prejudice when counsel's ineffective performance leads to an increased sentence for the defendant. Daniels v. Woodford, 428 F.3d 1181, 1206 (9th Cir. 2004), citing Glover v. United States, 531 U.S. 198, 202-05, 121 S.Ct. 696, 148 L.Ed. 2d 604 (2001). Had Petitioner been given competent advice concerning his defense and potential sentence, he would not have gone to trial, but he would have accepted the plea.

H. Counsel Failed to Ensure that the Prosecution Obtained the Video Taped Statement of Petitioner's Deceased Wife, as Ordered by the Court

The Court had ordered the government to tape a video deposition of Petitioner's deceased wife Linda Senti, before she passed away. The government failed to do this. Petitioner's counsel was ineffective for failing to ensure that the government obtained the video tape statement. Linda Senti would have testified that: (1) she was the organizer/supervisor with respect to the cultivation of marijuana on the Rural Property; (2) That Petitioner's mental and physical health prohibited him from being able to cultivate the large sum of marijuana in the rural garden, or supervising others to do so for him; (3) That the parishoners to the Church each had specific plants that belonged to them; (4) Petitioner was not responsible for the oversight of church business, to include record-keeping of specific parshioners, etc.

Counsel failed in his duties to take reasonable and basic steps to ensure that this material disposition was conducted. Such information was highly probative to Petitioner's defense and subsequent sentencing. Counsel could have used Linda Senti's testimony to call into question: (1) Petitioner's culpability in the cultivation case; (2) His eligibility to receive the "safety valve".[2]

Court obviously believed that Linda Senti's testimony

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2 The prosecution put objection down concerning Petitioner's eligibility for the "safety valve" because he would not state he was the leader organizer and also give information about church business. He claimed he wasn't the leader/organizer of the cultivation of marijuana and unknowledgeable about specific church business. This deposition would have shored up his position concerning these material issues.

was material to the Petitioner's case, thus why he ordered the government to depose her. Petitioner is prejudiced because he does not have the deposition now to support his other claims. She has since passed away. See Dows v. Wood, 211 F.3d 480, 486 (9th Cir. 2000) (ineffective assistance claim based on an alleged failure to investigate witness rejected where Petitioner did not present an affidavit from witness demonstrating that he would have provided testimony helpful to the defense); Villafuerte v. Stewart, 111 F.3d 616, 632 (9th Cir. 1997) (Petitioner's ineffective assistance claim rejected where he presented no evidence concerning what counsel would have found had he investigated further, or what lengthier preparation would have accomplished). Accordingly, Petitioner is prejudiced because counsel either did not ensure that the deposition was done, as the Court ordered, or doing one himself, before Linda Senti passed away. The result of the trial and subsequent sentence would have been different had counsel been providing reasonably competent representation.

I. A Cumulation of Ineffective Assistance of Counsel

If the Court fails to view any one or all of these ineffective counsel claims independently, Petitioner prays that the Court will evaluate the cumulation of counsel's deficiencies and how they impacted the Petitioner's trial. A cumulative analysis establishes counsel's performance feel below an acceptable standard of reasonableness and prejudiced Petitioner.

IV.

DOUBLE JEOPARDY IN VIOLATION OF PETITIONER'S FIFTH AMENDMENT PROTECTIONS IS OCCURRING

Petitioner was convicted of conspiracy to possess 1,000 plants or more of marijuana with the intent to distribute, and for manufacture and possession of marijuana with the intent to distribute. These charges concern the same marijuana.

The Ninth Circuit Court of Appeals held:

> "When a defendant has violated two different criminal statutes, the double jeopardy prohibition is implicated when both statutes prohibit the same offense or when one offense is a lesser included offense of the other." U.S. v. Davenport, 519 F.3d 940, 943 (9th Cir. 2008).

-and-

> Only one punishment allowed when distribution and possession with intent to distribute charges are both based on the same criminal undertaking. United States v. Palafox, 764 F.2d 555, 558 (9th Cir. 1985) (en banc). A defendant may be charged under multiple statutes so long as each charge requires proof of an independent fact without running afoul of double jeopardy. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). "The [Double Jeopardy] Clause prohibits the government from splitting a single conspiracy into separate charges and bringing successive prosecutions against a defendant. United States v. Ziskin, 360 F.3d 934, 943 (9th Cir. 2003).

The conspiracy to possess marijuana plants is a lesser included offense to the manufacture and possession of marijuana. These two offenses are multiplicitous. In general, an "indictment is multiplicitous if it charges a single offense in several counts." United States v. Rude, 88 F.3d 1538, 1546 (9th Cir. 1996), cert denied, 519 U.S. 1058, 117 S.Ct. 690, 136 L.Ed. 2d 613 (1997). The test for multiplicity "is whether each separately violated statutory provision requires proof of an additional

fact which the other does not." United States v. McKittrich, 142 F.3d 1170, 1176 (9th Cir. 1998), quoting Blockburger, supra, U.S. at 304.

Petitioner was highly prejudiced by these constitutional violations, as it painted a picture of the Petitioner to the jury and the Court that was inaccurate. The prosecution split up one count into more than one, intending to stack the deck against Petitioner and impede his ability to defend the charges against him. Such constitutional violations are not harmless, but tainted Petitioner's right to a fair trial.

Finally, the Court noted at the sentencing hearing that if at any point the class schedule changed for marijuana that she would bring Petitioner back for resentencing. In that regard, there is such a case currently pending in the United States Court of Appeals For The District of Columbia, cited as Americans For Safe Access, et al., v. Drug Enforcement Administration, Appellate No.: 11-1265, which will likely be decided in the coming months, and Petitioner raises this issue now to preserve his right on that issue.

CONCLUSION

WHEREFORE, Petitioner Charles Edward Lepp, respectfully moves this Honorable Court for relief, and to vacate, set aside, or correct his sentence, and for any and all further relief that the Court deems just and proper.

In addition, Petitioner respectfully moves the Court for an evidentiary hearing to resolve the multiple ineffective assistance of counsel claims and due process violation. To the extent the Court does not find prosecutorial misconduct on the record, the Court should hold an evidentiary hearing on the safety valve issue, as Petitioner was not found to be a leader or organizer. Petitioner prays that in the event that this Honorable Court deems that an evidentiary hearing is necessary, that they appoint counsel at that time.

Respectfully submitted this 6TH day of November, 2012.

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