

it in plain view. Contrary to this insinuation, defendant complied with California Law Proposition 215, thus requiring parishioners of the church to have a valid medical marijuana card from the State of California for at least a one-year minimum expiration date and to be a member of the church and held a sincere belief that as a member of the Rastafarian, smoking marijuana was a significant part of the spiritual experience. Moreover, defendant held sincere beliefs that he was covered under California State law by Proposition 215, and "RFRA" under Federal law.

More important to note, is the fact that based on defendant's sincere beliefs of his religion, and his compliance with both State and Federal laws, that defendant had four (4) foot by eight (8) foot signs on his property advertising "Eddy's Medicinal Gardens and Multi-Denominational Ministry of Cannabis and Rastafari Church." These signs are not just conclusory allegations or an unsupported claim, as there were photographs taken of these signs and introduced at defendant's trial and are part of the record.

Next, the Government contends that, "In January 2005, a Sonoma County Sheriff's Detective, working undercover for the Drug Enforcement Administration, met defendant and negotiated a one-pound purchase of marijuana for \$2,500. (Exhibit 7d at 504-11, 517-18.) On February 11, 2005, the government applied for and received another search warrant for defendant's properties. (Exhibit 6 at 1.) Based on evidence seized pursuant to that warrant, and evidence obtained as the result of the undercover sale in January 2005, defendant was charged in a superseding indictment

with four additional counts. (Exhibit 1.) However, the Government conveniently fails to note that defendant was never convicted on the alleged one-pound sale, as that charge was dismissed. Defendant contends that it was dismissed because there was insufficient evidence to support that charge in the first instance.

As the Government correctly notes next, defendant claims a religious defense to the charges against him, and rightfully so. The Government argues in sum, that defendant's motion should be denied because it does not include specific factual allegations or any sworn facts in support. Again, contrary to the Government's assertion, defendant submitted a declaration stating that he was a practicing Rastafarian, and smoking marijuana was a significant part of the spiritual experience. (Exhibit 9 at 16-17, 21.) The Government acknowledges this declaration on page 3 of it's reply in opposition of defendant's § 2255 motion.

Further, the Government notes that "At a hearing on December 12, 2006, the court questioned the sincerity of defendant's religious beliefs, finding that his earlier testimony demonstrated a "pretty superficial" familiarity with Rastafarianism. (Exhibit 10 at 44) At a May 30, 2007 hearing, when defendant again raised a Religious Freedom Restoration Act ("RFRA") defense, the court found that "the amount of marijuana that was seized in this case was not consistent" with religious or sacramental use. (Exhibit 11 at 7.) However, the Court failed to consider "the amount of marijuana that was seized in this case" to the approximate 2,500

congregation and members of the church, all of whom had a specific number of plants on their plot that was assigned to them.

Thereafter, defendant filed a written motion on July 10, 2008, to present his "RFRA" defense, and the Government filed an opposition. (Dkt. Nos. 216-19). At the outset of the hearing on that motion, the court made two FACTUAL FINDINGS: first, that defendant's BELIEFS were "SINCERELY HELD," and second, that the government had "a compelling interest" in controlling the trafficking, selling, and possession of marijuana with the intent to distribute. (Exhibit 12 at 3-4, 22). The court next addressed whether the prohibition forming the basis for criminal charges in this case was narrowly tailored to serve the government's compelling interest as required by case law. (Id. at 4). In deciding that issue, the court observed that while the Ninth Circuit had considered this issue in "simple possession cases," no cases were comparable to the amount of marijuana seized in this case - close to 25,000 plants. (Id. at 5, 22). To counter the court's concerns regarding the number of plants, defendant claimed for the first time that, at the time of the seizure, his church had 2,500 members and his land was divided into plots per member in a "kind of a sharecropper" arrangement. (Id. at 6, 9, 17). Noting that defendant had never before claimed that he had a large number of parishioners, the court made clear that regardless of the number of parishioners defendant had, there would still be a "diversion" problem, i.e. marijuana distributed to non-Rastafarians and non-medical marijuana

qualified users. (Id. at 7, 9, 16). Based on the "extraordinary amount" of plants in this case, the court applied the "sensible balancing" mandated by the Supreme Court and denied defendant's motion, noting it would do so regardless of any declaration setting forth the number of defendant's parishioners. (Id. at 22-24, 26, 29). In these rulings, and based on the assessment of the Court, it is clear that in the plain language of the Supreme Court's holding in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017, that the district court erred in its ruling.

First and foremost, defendant claimed numerous times that he had a large number of parishioners, and the court threatened defendant with charging each of the parishioners if he introduced any such records establishing the large number of parishioners, but the record shows that defendant had claimed before that he had a large number of parishioners.

Second, the district court clearly erred in holding that there would still be a "diversion" problem regardless of the number of parishioners defendant had.

The Supreme Court's decision in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017, clearly rejected the "Government's argument that evidentiary equipoise as to potential harm and DIVERSION is an insufficient basis for a preliminary injunction against enforcement of the Controlled Substances Act."

The Supreme Court in that case also noted that, "RFRA and its strict scrutiny test contemplate an inquiry more focused than the Government's categorical approach. 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. 42 U.S.C. § 2000bb-1(b). The Court further stated that, "Under RFRA's more focused inquiry, the Government's mere invocation of the general characteristics of Schedule I substances cannot carry the day."

The Supreme Court in UDV, and the Ninth Circuit in Oklevueha Native American Church of Hawaii, Inc. v. Eric H. Holder, 676 F.3d 829 (9th Cir. 2012) clearly suggests that neither diversion nor quantity can support the Government's compelling interest theory in overcoming RFRA under 42 U.S.C. §§ 2000bb - 2000bb-4 through factual evidence that the church's members use, possess, cultivate and distribute marijuana to its members based on their sincerely held beliefs to their religion.

Moreover, based on the number of parishioners that defendant claimed were members of his church (2,500) the number of plants recovered are not an "extraordinary amount" and are clearly reasonable under any "sensible balancing test," in relation to 2,500 members.

Third, and most important, the district court clearly made factual findings that defendant's beliefs were "SINCERELY HELD." In addition, the district court found in a 18-page

written order, finding that (1) defendant had established a prima facie case that his adherence to Rastafarianism was sincere; (2) manufacturing and possessing marijuana with the intent to distribute and conspiracy to possess with intent to distribute marijuana were tenets of the Rastafari religion; and (3) the Controlled Substances Act substantially burdened defendant's ability to practice his religion. (Exhibit 13 at 5-9).

The district court then found that "the potential for diversion" of the marijuana to non-Rastafarians and non-medical marijuana users was a compelling government interest. (Id. at 14-15).

However, as noted above, the Supreme Court in UDV clearly noted that "potential harm and DIVERSION" is an insufficient basis for a preliminary injunction against enforcement of the Controlled Substances Act.

While the district court noted that "there were signs on defendant's property informing people that marijuana was being grown, it was common knowledge within the community that defendant openly possessed "great amounts" of marijuana, and the marijuana itself was in "plain view" with no barriers to prevent access to it." (Id.)

The district court is correct in its contention that there were signs on defendant's property informing people that marijuana was being grown, as well as designating its use for current and valid medical marijuana card holders and parishioners of his

sincerely held religious beliefs and church. However, the district court is clearly wrong when it contends that there "were no barriers to prevent access to it." There were fences along the road to prevent access to the property, and this is supported by the fact that a truck containing law enforcement personnel attempted to enter the property, and subsequently surrounded that truck when the officers had to reveal their identity by drawing their weapons on workers and ordering them to the ground.

Next, the district court erred in finding that defendant was himself diverting marijuana as evidenced by the January 2005 one-pound marijuana sale to the undercover officer, because there was no direct evidence to support this claim, and more importantly, the charges involving that one-pound marijuana sale were dropped for lack of evidence to support that charge. More importantly, the district court erred in denying defendant's motion to present a religious defense after noting that his religious beliefs were sincerely held, and that the use of marijuana was crucial to the practice of his religion.

Next, the Government states that on September 19, 2005, defendant filed a motion to quash the 2004 and 2005 search warrants and suppress all evidence seized pursuant to those warrants. (Dkt. Nos. 74-75). He subsequently moved to suppress all evidence on the additional grounds that the warrants violated RFRA, arguing that failure to inform the magistrate of the religious nature of his marijuana possession required a hearing under Franks v. Delaware, 438 U.S. 154 (1978). (Dkt. Nos. 139-141, 146, 149).

The court held that, to the extent defendant challenged the seizure under RFRA, the government's interest trumped defendant's religious claim. (Exhibit 14 at 5-6). Additionally, there was no need for a Franks hearing because a defendant's religious background need not be included in the warrant and omission of that information was not material and thus did not render the search warrant invalid. (Id. at 6-7)

However, what the Government failed to note in its reply in opposition is that all of the 2004 and 2005 search warrants were either later suppressed or thrown out. In fact, the Government had submitted photographs of marijuana growing on property that was not defendant's, claiming that it was that of defendant.

As to the trial, and as noted by the Government, "During jury selection, the trial court told the panel that medical marijuana and religious marijuana were not defenses to the charges in the case. (Exhibit 7a at 61-62).

By instructing the jury as such, the Court effectively denied defendant his right to present an affirmative defense under "RFRA," and thus denying him the right to a fair trial. Moreover, counsel failed to object and present sufficient case law to persuade the judge that he was wrong in this decision.

The Government rehashes numerous issues relating to this case prior to addressing his Section 2255 Motion, and rather than addressing each of those matters, and in the interest of judicial economy, defendant will specifically address the response of the Government to defendant's Section 2255 Motion.

Defendant agrees with the Government's analysis of the legal standard. In subsection (c) of that "Analysis", the Government notes that a "Defendant cannot succeed in his Section 2255 motion by arguing that the trial court committed error. Relief pursuant to Section 2255 is limited to claims of constitutional or jurisdictional error... .Therefore, Section 2255 does not allow defendants to challenge every alleged error made during their trial or sentencing." However, a claim of ineffective assistance of counsel at every stage of a criminal proceeding is constitutional in nature, and thus any and every alleged error made by counsel during trial or sentencing requires a court to review the conduct of counsel and the error that denies the defendant the right to a fair trial, a greater sentence, and the right to an affirmative defense, all of which results in prejudice to a defendant.

As the Supreme Court noted in Kimmelman v. Morrison, 477 U.S. 365, 385-87, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986) and reaffirming its Strickland decision, "...a single, serious error may support a claim of ineffective assistance of counsel."

AS to defendant's claim that his trial counsel was ineffective due to his failure to investigate, develop, and incorporate available material information in the defense regarding "physical disability precluding capability to cultivate," the Government argues that since defendant's motion includes no sworn facts in support regarding any such physical disabilities, their effect on defendant's ability to cultivate, whether trial counsel failed to obtain records, and

whether trial counsel failed to engage a medical expert, that the Court should deny the motion. Defendant disagrees.

First, defendant has made specific, factual allegations regarding his physical disability precluding his capability to cultivate, and that he has physical disabilities from his military service in the Vietnam War, which this Court must accept as true for the purpose of considering whether to hold an evidentiary hearing, because they are not "conclusively" disproven by the "files and records" of this case.

Second, the signature page on defendant's Section 2255 Motion reveals that defendant signed the motion under penalty of perjury, declaring that the facts contained therein are true and accurate.

Third, defendant made a specific claim that his counsel failed to investigate, develop, and incorporate material information in the defense regarding "physical disability precluding capability to cultivate." This is a specific claim and allegation, and one which is not just conclusory or inherently incredible.

In fact, had counsel obtained the available medical records and consulted with an expert witness, it could have been determined that defendant in no way could have cultivated the number of plants alleged by the government. Moreover, defendant's physical disability is documented by the Probation Department's "PSR", and thus not just conclusory or inherently incredible.

Although the Government contends that "Without any support

in the record, defendant has not met his burden to show that his trial counsel was constitutionally deficient." Contrary to the Government's contention, the fact that defendant has a physical disability that would have precluded him from cultivating such number of plants, is clearly documented by the Probation Department's "PSR," and any reasonable person would have known that an expert witness before a jury would likely have had an impact on their decision had counsel researched, investigated and consulted with an expert in this area. Failure to employ these methods and preparations for a trial such as defendant's it can easily be determined that counsel's performance did not fall within the wide range of reasonable and professional assistance.

Although the Government argues that the record includes sworn facts presented at trial of defendant's statements to law enforcement that the marijuana was his, the Government fails to recall the fact that when defendant had informed the Court that the marijuana belonged to some 2,500 parishioners of his church, and each were responsible for maintaining and cultivating their marijuana, the Court threatened to charge each of those members with a federal charge. As a result, defendant took the responsibility for the marijuana so that his parishioners would not be charged, and counsel provided no advice to defendant in this regard.

Next, the Government contends that even if this was deficient performance, there was no prejudice. Defendant disagrees. Had the jury heard the testimony of an expert witness regarding

defendant's physical disability they would have likely determined that defendant could not have maintained and cultivated such quantity, and concluded that he was not responsible for the quantity alleged in the indictment, and thus returned a verdict of not guilty. The ability of defendant to maintain the care and cultivate the number of plants alleged were crucial, and a defense containing an expert witness on the issue was very important and relevant to a valid defense. Therefore, there is a reasonable probability that the result of the proceeding would have been different had counsel researched, investigated and presented factual documentation and expert testimony as to defendant's physical disability.

Next, the Government argues that, "Even if his trial counsel had proven that defendant was physically disabled through other evidence, that would not have negated the facts supporting the elements of the crimes proven at trial. The elements of conspiracy with intent to distribute marijuana are: that there was an agreement between two or more persons to distribute marijuana; and that the defendant joined in the agreement knowing of its purpose and intending to help accomplish that purpose."

However, the Government fails to realize that defendant's physical disability in conjunction with his religious beliefs and practices regarding the use of marijuana by him and his 2,500 parishioners, whose beliefs are that marijuana use is a necessary sacrament in the practice of their religion, and therefore exempt under the "RFRA" were necessary factual and legal determinations

necessary to present a sufficient defense to the jury. Had counsel presented such sufficient defense, the jury would have likely concluded that defendant was exempt and could not have cultivated such number of marijuana plants on his own, and found him either not guilty of the offense because of his exempt status under "RFRA" or that he was not capable of cultivating the number of plants alleged in the indictment, or alleged at trial.

Therefore, defendant's claim that his counsel was deficient in failing to research, investigate, and present factual documentation of defendant's physical disability in conjunction with a "RFRA" defense, prejudice can certainly be implied by counsel's failure to present documentation of his physical disability and an expert witness. While standing alone, the physical disability may not have been sufficient to overcome the elements of a conspiracy to possess with intent to distribute, but together with the "RFRA" defense and defendant's sincerely held religious beliefs, the physical disability documentation, and the testimony of an expert witness would have been crucial for the jury to have heard.

Next, the Government contends that there was no prejudice even if counsel had argued the O Centro decision differently. Defendant disagrees.

The Government argues that, "First, in its ruling on the RFRA issue, the trial court assumed the truth of defendant's assertion that the government's prosecution burdened his exercise of his religion, but nevertheless found that the government had a

compelling interest and used the least restrictive means."

The Religious Freedom Restoration Act "RFRA", 42 U.S.C. § 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. § 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 the compelling government interest.

However, the district court erred in finding that the government's prosecution burdened defendant's exercise of his religion, while also finding that the government had a compelling interest. It appears that the court's ruling contradicts its finding that the government had a compelling interest. In fact, when the court determined that the prosecution burdened defendant's exercise of his religion, the burden should have then shifted to the government, but the court relieved the government of its burden by finding that the government had a compelling interest, thereby making such findings without any arguments from the government. As such, the court acted as a party to the action, instead of being an impartial

fact-finder, thereby seemingly biased in its ruling. In fact, counsel should have filed a motion for recusal of the judge, because the judge actually threatened to have the government charge all 2,500 parishioners of defendant's church if defendant introduced their names and records at the preliminary hearing.

Moreover, closing defendant's church, seizing the marijuana plants belonging to its 2,500 parishioners, and sending defendant to prison for a substantially long period cannot be construed as "using the least restrictive means of furthering the government's compelling interest," especially in light of the court's finding that defendant's beliefs were "SINCERELY HELD."

Once an individual establishes that the exercise of his religion is being substantially burdened by the government, the [Government] must demonstrate that application of the burden to the person represents the least restrictive means of advancing the compelling interest. See 42 U.S.C. § 2000bb-1(b).

In the instant case, once the court determined that defendant's religious beliefs were "sincerely held," the burden should have shifted to the government to advance its compelling interest and that its action is the least restrictive means in advancing the compelling interest. However, the court, acting as a party to the action or biased in favor of the government, took it upon its self to find, and without shifting the burden to the government, that the government had a compelling interest and that its action was the least restrictive means of advancing that compelling interest.

Counsel clearly failed to object to this conduct by the court, a circumstance that resulted in counsel's performance being deficient, and as a result defendant was prejudiced because he was denied the ability to present a "RFRA" defense, that was crucial for the jury to hear.

It is quite strange that defendant was credited with his religious beliefs, and still was not able to present a "RFRA" defense to the jury. It is also clear why this happened, and the reason is that counsel failed to properly object, to the court's action, failed to file a motion for the judge's recusal, and failed to appropriately argue the "Religious Freedom Restoration Act," "RFRA" appropriately and effectively. Moreover, counsel failed to apply the standard and criteria to the Supreme Court's decision in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). In that regard, and as noted above, counsel should have argued that once the court determined that his religious beliefs were sincerely held, that the burden should have shifted to the government so that they could have presented their reasons for their contention that the government had a compelling interest, and that they were using the least restrictive means in advancing that interest, instead of allowing the court to relieve the government of its burden in a biased manner. As such, counsel's performance was deficient and it also prejudiced defendant in not being able to present a "RFRA" defense to the jury.

The Government attempts to confuse the second claim. In doing so, they claim that "defendant claims that trial counsel was unprepared regarding RFRA, but states that the trial court denied the defense motion for a RFRA defense based on grounds not advanced by either party. If the trial court decided the motion on independent grounds, obviously any failing by defense trial counsel to object to government evidence was irrelevant to the basis for the trial court decision. There cannot be prejudice if any unmade objections had no bearing on the basis for the trial court's decision." However, this is not what defendant is arguing. Instead, defendant is arguing that counsel failed to advance any arguments for a defense under "RFRA" by holding that (the defense's motion for a RFRA defense based on grounds not advanced by either party). This clearly suggests that counsel did not present sufficient grounds in his motion to support a "RFRA" defense. Obviously, and contrary to the Government's assertion to this claim, defendant is not arguing that counsel failed to make any objections, because if the government did not advance any grounds, why would defense counsel make any objections ?

In it's third claim, the Government contends that, once again, there are no sworn facts to support the notion that trial counsel was unprepared on this issue or failed to make objections."

However, as stated above, the signature page of defendant's 28 U.S.C. § 2255 motion is signed under the penalty of perjury and is thus a sworn statement of the issues and facts presented therein. Also, the facts, reasons and claims addressed above clearly show

that counsel was unprepared, and that his conduct was deficient, which resulted in prejudice to defendant.

As to the Government's fourth claim, it contends that, "defendant includes no specific objections that went unmade, and no specific facts regarding which trial counsel was unprepared." (See Motion 5-10). The closest defendant comes to asserting any specific error is to state that trial counsel only 'perfunctorily raised Gonzales v. O Centro Espirita,' to argue that 'the Controlled Substance[s] Act is not and cannot be a 'compelling [government] interest.'" (Motion 9).

However, although counsel may have made perfunctory objections regarding the Court's ruling on the right to present the RFRA defense, counsel clearly failed to present relevant facts based on the clearly established Supreme Court precedent in Gonzales v. O Centro Espirita, in making the necessary and relevant argument in persuading the Court to allow the RFRA defense. This failure was fatal to defendant's defense.

In fact, the Court and the Government attempts to side-step the Supreme Court's decision in Gonzales v. O Centro Espirita, by claiming that the Court "did not find the Controlled Substances Act to be a compelling government interest, but rather that the Act is the least restrictive means of achieving the compelling interest of prevent transfer of marijuana for nonreligious use."

In this regards, counsel failed to object, argue and present documentation that this ruling was flawed because there was no supporting evidence that any transfer of marijuana was for

nonreligious use. In fact, and to the contrary, the evidence, had counsel researched, investigated, prepared and submitted to the Court, showed that the marijuana plots with a specific number of plants on each plot actually belonged to each of the 2,500 parishioners of the church; that each of those parishioners had a current and valid California medical marijuana card, and were of the Rastafarian Religion, which the Court clearly acknowledged that marijuana use was a necessary sacrament in the practice of his religion.

Also, contrary to the Government's argument, in which it contends that "the trial court did not find the Controlled Substances Act to be a compelling government interest, but rather that the Act is the least restrictive means of achieving the compelling interest of prevent transfer of marijuana for nonreligious use."

But, on page 25 of the Government's "Opposition to Defendant's Section 2255 Motion" the Government plainly states that, "In fact, the trial court did not find the Controlled Substances Act to be a compelling government interest, but rather that the Act is the least restrictive means of achieving the compelling interest of prevent transfer of marijuana for nonreligious use."

In other words, first the Government contends on page 3 of it's "Opposition to Defendant's Section 2255 Motion" that the Court found "that the government had 'a compelling interest' in controlling the trafficking, selling, and possession of marijuana with the intent to distribute.." Then on page 20 of that same "Opposition," contends that, "the trial court did not find the Controlled

Substances Act to be a compelling government interest of prevent transfer of marijuana for nonreligious use."

In fact, it was counsel who failed to argue and point out the Court's contradictory rulings. Moreover, counsel failed to argue that there was no proof or evidence to support that any marijuana had been distributed to anyone other than one or more of the several parishioners of defendant's church and strictly for their religious beliefs and as a result of their current and valid California medical marijuana card allowing their use.

In addition, the Government offered no evidence that was sufficient to establish that any marijuana had been transferred to anyone whatsoever for any reason other than for religious purposes. Counsel's deficient conduct failed to present this and other arguments mentioned above to the Court which would and should have defeated the Court's rationale for denying him a RFRA defense. Finally, in that regards, counsel failed to argue and present sufficient evidence that the decision in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006) also prevented the Government under RFRA, from finding that the Controlled Substances Act was a compelling government interest, and that it could not use the Act as the least restrictive means of achieving the compelling interest of preventing transfer of marijuana for defendant's sincerely held religious beliefs under RFRA, as the Court clearly found that to be the case, and that marijuana use was a necessary sacrament in the practice of defendant's

religion.

Next, the Government contends that defendant's claim that trial counsel failed to preserve the RFRA issue for appeal, is simply false - because "the Court of Appeals considered the issue on appeal." (See Exhibit 4). Although counsel may have raised and preserved this issue on appeal, he simply did not present sufficient facts and evidence in conjunction with the Supreme Court's precedent in the Gonzales v. O Centro Espirita decision, which would have likely been reversed had counsel made the appropriate arguments with sufficient facts and evidence, which included the fact that there was no evidence of any transfer of marijuana to any other person other than for sincerely held religious beliefs; that marijuana was acknowledged by the Court to be a necessary sacrament in the practice of defendant's religion; that there were in fact, 2,500 parishioners that held plots of marijuana; that the Government could not use the Controlled Substances Act as a compelling interest under RFRA, or as it being the reason for the least restrict means of achieving the compelling interest.

Had counsel made these arguments and presented the relevant language discussed in Gonzales v. O Centro Espirita, accompanied by sufficient facts and evidence that supported that decision, then there is a strong likelihood that the case would have been reversed by the Court of Appeals. Defendant's claim and argument is not conclusory as the Government contends, as he has made specific factual allegations in this and his § 2255 motion, and is sworn

and certified under penalty of perjury on the last page of his 28 U.S.C. § 2255 Motion. As such, the Government's contention is without merit.

In the "Investigation of 'Relevant Information'" the Government contends that the defendant's motion reiterates arguments made in the prior two sections: that trial counsel failed to investigate and present information related to the religious defense. In this regards, the Government specifically alleges that defendant has not provided any sworn facts to support any of these assertions. However, as defendant has continuously pointed out, defendant has clearly made specific factual allegations in this and his § 2255 motion, and they are sworn and certified to under penalty of perjury on the last page of his 28 U.S.C. § 2255 Motion.

As the Government acknowledges, defendant did pursue a religious defense, and such defense was disallowed by the trial court. However, what the Government fails to realize and acknowledge is the fact that the reason the religious defense was disallowed is because counsel failed to present sufficient and relevant facts as stated above, to the Court. In fact, the Supreme Court decision clearly suggested that "diversion" could not be a problem under RFRA in conjunction with the 2,500 parishioners associated with defendant's church under the Controlled Substances Act. What the Government also fails to realize is that "diversion" cannot be a problem when the 2,500 parishioners have sincerely held religious beliefs in the Rastafarian Religion, and which the Court clearly acknowledged that marijuana use was a necessary sacrament in the

practice of their religion.

Next, the Government contends that "Defendant asserts no specifics regarding alleged error by trial counsel in his attempt to prevent the trial court from ruling that defendant had opened the door through his testimony." This is simply incorrect.

Defendant contends that when he was examining him on direct examination during the defense, that trial counsel inappropriately 'opened the door', which effectively prejudiced defendant by allowing the government to cross-examine him about the 2005 undercover sale, which had been previously excluded by the trial court. However, when defense counsel opened the door on direct examination, it allowed the government to cross-examine defendant about that 2005 undercover sale, a circumstance that, did in fact, prejudice defendant. Defendant has not, nor could he, argue that the trial court committed error, because his own counsel opened that door, a circumstance that was highly prejudicial to defendant.

At no time in his § 2255 Motion under his claim of "Counsel's Failing to Investigate and Make Meaningful Objections Permitted Prejudicial Testimony to be put Before the Jury" did defendant argue that the trial court committed the error. Defendant clearly argued that it was counsel's deficient performance in which he elicited testimony that opened the door for the government to cross-examine him about matters that had been previously excluded by the trial court.

Also, defendant in no way, is attempting to reargue or present another issue in an attempt at a second appeal as the

government suggests. This is solely and clearly an argument based on the deficient performance of trial counsel, which has not been raised on direct appeal, and is only appropriate in a collateral proceeding such as this 28 U.S.C. § 2255 Motion. In fact, it is the Government who is appearing to present this case as a direct appeal and rearguing and re-hashing previously decided issues. The format in which the Government uses in their response clearly gives that impression as well.

Moreover, the Government is simply wrong when it contends that defendant has presented no specific facts or sworn statement regarding the shortcomings of defense counsel that led to him opening the door on direct examination about the one-pound sale that had been previously excluded by the trial court, and as a result of his actions, permitted the government to cross-examine defendant about that sale. Contrary to the Government's contention, defendant was substantially prejudiced by defense counsel's opening the door on direct examination so that the Government could cross-examine him about this sale. Lastly, and as noted previously, defendant has sworn under penalty of perjury that the facts contained in his 28 U.S.C. § 2255 Motion are true and correct, which is evidenced on the § 2255 Motion on the signature page.

Next, in regards to counsel's failure to investigate and present a claim of outrageous governmental misconduct in defendant's case, the Government contends that defendant cannot succeed in a Section 2255 Motion by arguing that the trial court committed

error, thus using his § 2255 Motion as a second attempt of appeal. Again, the Government is attempting to mislead the Court as he is not seeking a second chance of an appeal. Defendant is clearly raising the issue under a claim of ineffective assistance of counsel, a claim that he could not have raised on direct appeal.

As noted in his § 2255 motion, defendant contends that the government, in an obvious effort to undermine the dual defenses of defendant 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 defendant into selling marijuana to a government agent. The operative facts in this case (which included, inter alia, multiple unconstitutional searches based on warrants that were found to be deficient, as well as the Government approaching defendant 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) clearly establishes government misconduct that was outrageous in the most extreme degree and violated the fundamental fairness under the Due Process Clause.

However, in defendant's § 2255 Motion, he has not raised this issue as a sole claim in an attempt to have a second chance at appeal, but rather that his counsel was ineffective for failing to thoroughly investigate this issue, and his failure to effectively

raise, litigate, and effectively preserve this issue for appeal.

In that regard, defendant contends that had counsel presented all the detailed facts about the government's conduct that is outlined above, and presented and argued available supporting case law of the United States Supreme Court and the Ninth Circuit, there is a strong likelihood that the district court would have granted defendant's motion to dismiss the case, or the Ninth Circuit Court of Appeals would have reversed the case for the Government's outrageous misconduct.

As defendant noted, "A claim of negligence in conducting pretrial investigations can form the basis for a claim of ineffective assistance of counsel." See United States v. Tucker, 716 F.2d 576 (9th Cir. 1983); Hines v. Enomoto, 658 F.2d 667, 676 (9th Cir. 1981).

Again, the Government incorrectly asserts that defendant has failed to assert or swear to any facts that support such a claim, but the actual 28 U.S.C. § 2255 Motion that defendant has submitted, contains defendant's signature that asserts and swears under penalty of perjury that the facts contained therein are true and correct.

Defendant's mental disabilities were well documented and known by the federal government when they conducted their unconstitutional sting operation. Had counsel presented sufficient facts and details regarding this matter to the district court it would have likely dismissed the charges relating to the sting

operation as being unconstitutional. Presenting sufficient facts and details of the conduct and supporting case law to show that dismissal of the case was warranted, was crucial in defendant's motion and on appeal. However, counsel erred in this regard and it prejudiced his case and cause.

Next, in regards to counsel's failure to present material evidence that defendant was eligible for the "Safety Valve" provision at sentencing, the Government once again argues that "defendant asserts no specific or sworn facts that were not investigated or presented to the trial court by defense counsel that would affect the safety-valve issue." As noted above, defendant has clearly sworn in his § 2255 Motion that under penalty of perjury the facts contained therein are true and correct.

Defendant contends that counsel's performance was deficient when he failed to present evidence and material available to establish defendant's eligibility for the "safety valve" provision pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5C1.2 providing for a sentence below the statutory mandatory minimum. Specifically, counsel failed to present sufficient case law precedent in comparison to his circumstances, that he met the six requirements of § 3553(e), including that, (1) defendant had no more than one (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 injury; (4) that the defendant was not a leader, organizer, manager, or supervisor with respect to cultivation of

the marijuana on the Rural property; (5) defendant was not involved in a continuing criminal enterprise; and (6) defendant provided complete and truthful information to the government concerning the alleged offense. In fact, counsel had defendant meet with U.S. Attorney, Dave Hall, and a DEA Agent, along with himself at the Santa Rosa Sheriff's Department. During that meeting defendant was informed that if he recanted his testimony and in sum claimed and acknowledged that he was the "leader/organizer" that they would see that he got the "safety valve." More importantly, counsel failed to advise and inform defendant at the time, that admitting he was a "leader or organizer" would have automatically precluded him from being eligible for the "safety valve" provision under subsection (4) of 18 U.S.C. § 3553(e).

As recently noted by the United States Supreme Court in Lafler v. Cooper, 132 S.Ct. 1376, 182 L.Ed.2d 398, U.S. LEXIS 2322, (March 21, 2012) and its companion case, Missouri v. Frye, 132 S.Ct. 1399 (2012) "The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial. See, e.g., Halbert v. Michigan, 545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005); Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

The precedents also establish that there exists a right to counsel during sentencing in both noncapital, see Glover v. United States, 531 U.S. 198, 203-204, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001); Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), and capital cases, see Wiggins v. Smith, 539 U.S. 510, 538, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because "any amount of [additional] jail time has Sixth Amendment significance." Glover, supra, at 203, 121 S.Ct. 696, 148 L.Ed.2d 604.

In the instant case, defendant was clearly prejudiced by counsel's acts and omissions in failing to inform him that if he admitted he was a leader or organizer, he would have certainly been precluded from obtaining "safety valve" relief. In addition, and as noted above, counsel also failed to present sufficient facts and clearly established case law precedent that would have entitled him to "safety valve" relief.

The Government contends that "It is not ineffective assistance of counsel when an attorney does not make an argument that would not have been successful..." However, that statement brings the next question, then why did counsel have defendant meet with U.S. Attorney, Dave Hall, and a DEA Agent, along with himself under the guise and pretense that he would be eligible for the "safety valve" provision? If defendant was not eligible for the "safety valve" provision, then counsel was ineffective for having

defendant meet with U.S. Attorney, Dave Hall, and a DEA Agent, along with himself under the guise and pretense that he would be eligible. If defendant was eligible, then counsel was ineffective for failing to present relevant facts necessary to establish his eligibility under the "safety valve" provision and present clearly established case law that he was, in fact, eligible for "safety valve" application.

Next, as to defendant's claim that counsel was ineffective for not properly advising him of the government's proposed plea agreement offer in comparison with the possibility of winning the case under the Religious Freedom Restoration Act "RFRA", and that even if he lost at trial, he would likely be sentenced to no more than thirty (30) months in prison.

It is apparent that defendant did not make his initial 28 U.S.C. § 2255 Motion clear, as he made only general assertions about counsel being ineffective for failing to properly advise him about the possibility of the government's proposed plea agreement offer of eighteen (18) months in prison; six (6) months in a half-way house; and six (6) months in home confinement. However, what defendant should have made clear is that it was defendant's original counsel that failed to properly advise him on whether to accept the government's proposed plea agreement offer, and his wrong advice about the possible sentence in the event that he was found guilty.

In any event, trial counsel was clearly ineffective for failing to pursue any favorable plea agreement with the government,

and for failing to provide him with any advice about the eventual outcome of the case in the event that the court did not allow a RFRA defense or in the event that he was found guilty, about any possible sentence that he would likely be facing.

Under the Supreme Court's Lafler and Frye decisions, the Court noted that the constitutional guarantee applies to critical stages of a criminal proceeding, and defendants cannot be presumed to make critical decisions without counsel's advice. In defendant's instant case, counsel failed to provide him with any advice whatsoever in this regard, nor did trial counsel pursue a favorable plea agreement offer with the government.

The Government argues that "Defendant does not assert - even without sworn facts in support - that his trial counsel received a plea offer that trial counsel did not communicate to defendant." Defendant has clearly acknowledged here, that trial counsel did not pursue any favorable plea agreement offer with the government, or properly advise him of any eventual outcome of the case if the court did not allow a RFRA defense, or in the event that he was found guilty, about any possible sentence that he would likely be facing. This itself, is a clear violation of constitutional magnitude as addressed by the Supreme Court in Lafler and Frye. However, it was defendant's original counsel that failed to properly advise him about the possibility of the government's proposed plea agreement offer of eighteen (18) months in prison; six (6) months in a half-way house; and six (6) months in home confinement, and

his wrong advice about the possible sentence in the event that he was found guilty. All of the counsel that represented defendant claimed that he had an excellent chance to win the case under a RFRA defense, thereby explaining his reason for not accepting the government's original plea agreement offer.

Although the Government now contends that the Lafler Court made no finding regarding whether counsel was ineffective because the parties agreed that he was, that Court still explained defense counsel's obligations to provide a defendant with advice about critical decisions at all critical stages of a criminal proceeding and the possibility of any likely sentence that he would likely receive, including any mandatory minimums, any sentencing enhancements or sentencing departures.

Again, and as previously stated, defendant's facts are sworn to as indicated on the signature page of his 28 U.S.C. § 2255 Motion, and contrary to the Government's assertion.

Next, and in regards to defendant's claim that counsel failed to ensure that the prosecution obtained the video taped statement of defendant's defendant's deceased wife, Linda Senti, before she passed away, the Government contends that "There are several problems with defendant's claim that his trial counsel was ineffective because the government allegedly failed to comply with a court order." First, the Government contends that defendant provides no information about where such order exists in the record, and that after a diligent search in a large record, government counsel

has not uncovered this alleged order. Defendant contends that he does not know for certain that the court ever put this demand in a formal written order. However, during a motions hearing, the district court clearly directed the Government to take a video deposition of defendant's wife, Linda Senti, before she passed away. This order of the court would be included in the transcripts of one of the motion hearings.

The Government next contends that defendant has provided no information or sworn facts regarding what his deceased wife would have testified to, how that would have been material to his defense, and how such evidence would be admissible at trial. Contrary to the Government's assertion, defendant has clearly pointed out on page 21 of his "Memorandum of Law in Support of his 28 U.S.C. § 2255 Motion" what his wife would have testified to: "That she (1) was the organizer/supervisor with respect to the cultivation of the marijuana on the Rural property; (2) that defendant's mental and physical health prohibited him from being able to cultivate the large quantity of marijuana in the rural garden, or supervising others to do so for him; (3) that the parishioners of the church each had specific plants that belonged to them; and that (4) defendant was not responsible for the oversight of church business, which included the record-keeping of specific parishioners.

As noted supra, defendant has sworn to the facts contained in his § 2255 Motion as indicated on the signature page of his motion. This evidence would have also been relevant and material to

defendant's defense because it would have established to the jury that she was responsible for having the various parishioners cultivate their own plot of marijuana, or that she would contract others to cultivate the marijuana for those who wanted to pay to have it done instead of cultivating it themselves; that the jury could have heard evidence about defendant's past mental and physical health that prohibited him from being able to cultivate the large quantity of marijuana on the Rural property, or supervising others to do the same; that each plot belonged to each of the 2,500 parishioners of the church, which would have been critical not only to the charge itself, but to defendant being able to present a defense under RFRA; and that it would have established that defendant was not involved with any record keeping of the church. This evidence was critical in presenting a defense in the case at bar, due to the magnitude of plants that were attributed to only defendant. Had the jury had an opportunity to hear a religious defense, and the fact that there were 2,500 members of the church, and the quantity was not great in comparison to the number of church members or parishioners, but such a quantity of plants attributed to a sole defendant seemed unlikely for not only the religious defense under RFRA, but as a whole under the circumstances.

Moreover, the failure of counsel to follow-up on the order or direction of the court to have the government tape a video deposition of defendant's wife, Linda Senti, before she passed away, effectively caused defendant to be denied his Sixth Constitutional Amendment right to compulsory process to have witnesses on his

own behalf as his defense. As such, the Government's attempt to confuse the facts and claims are unpersuasive and should be disregarded by the Court.

Next, the Government argues that defendant's claim that his convictions are unconstitutional because they violate the Double Jeopardy Clause of the Fifth Amendment, is both procedurally barred and it is also wrong according to binding law. Defendant disagrees for several reasons.

First, defendant was charged with a conspiracy to possess with intent to distribute and distribute a Schedule I controlled substance in violation of 21 U.S.C. § 846. He was also charged with one count of manufacturing and possession with intent to distribute and distribution of a Schedule I controlled substance in violation of 21 U.S.C. § 841(a)(1). Both counts contain the same conduct of "possess with intent to distribute".

As the Ninth Circuit has held, "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). 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).

Second, defendant was charged with these offenses in the indictment which alleged a quantity of 1,000 plants OR more.

However, at sentencing approximately 25,000 plants were attributed to defendant. Since the language of 1,000 plants "OR" more is in the disjunctive form, the "or more" portion is ambiguous on its face, and thus defendant can and should not be held accountable for more than 1,000 plants since that language is ambiguous.

The United States Supreme Court in Chapman v. United States, 500 U.S. 453, 114 L.Ed.2d 524, 111 S.Ct. 1919 (1991) noted that ambiguous language will necessarily produce sentences that are so anomalous that they will undermine the very uniformity that Congress sought to achieve when it authorized the Sentencing Guidelines.

The Ninth Circuit in United States v. Ducasse-Herrera, 1997 U.S. App. LEXIS 27076, No. 97-35087 (9th Cir. 1997) that the statute prohibits the offense in disjunctive language.

More importantly, the Ninth Circuit has also held that under the rule of lenity, the Court is required to resolve ambiguity in favor of the defendant. See United States v. Burke, 694 F.3d 1062 (9th Cir. 2012). Therefore, to hold defendant accountable for approximately 24,000 more plants than he was charged in the indictment with certainly constitutes double jeopardy. Counsel was also ineffective for failing to object and argue this claim and the disjunctive quantity of marijuana plants contained in the indictment.

The Government contends that "Defendant's double jeopardy argument is procedurally defaulted because he failed to raise it in the trial court or on direct appeal." However, defendant faults

his attorney for failing to raise it in the district court and for failing to present this issue on direct appeal.

Defendant contends that holding him accountable for approximately 25,000 marijuana plants instead of the charged 1,000 plants in the indictment would substantially prejudice him as to the amount of time in prison he spends. Any cause for the default in previously raising this claim is attributed to counsel's deficient performance. Because the indictment charges the number of plants in the disjunctive, i.e., 1,000 "OR" more, the rule of lenity requires this Court to resolve this ambiguity in favor of the defendant. As such, defendant has shown cause and prejudice, and actual innocence as to the remaining 24,000 marijuana plants that was not alleged in the indictment. Attributing over 25 times the amount alleged in the indictment clearly constitutes double jeopardy. Defendant has clearly established cause and prejudice based on these established facts.

As to the violation of the double jeopardy clause of the Fifth Amendment under binding law, the Government contends that defendant's convictions do not violate the double jeopardy clause because each of the counts require proof of an additional fact which the other did not. As the Government points out, the elements of conspiracy with intent to distribute marijuana are: that there was an agreement between two or more persons to distribute marijuana; and that the defendant joined in the agreement knowing of its purpose and intending to help accomplish that purpose.

It is important to note, that the Government has never established or proved who the other person or persons are that defendant is alleged to have conspired with. There is no mention of any other person, either directly or indirectly, by reference of a "CI" or "unindicted co-conspirator" or "any other reference" whatsoever. In other words, there must be at least one other person other than defendant involved in the instant case to meet the elements of a conspiracy.

The Government next points out that the elements of distribution and possession with intent to distribute marijuana are: the defendant knowingly possessed marijuana; and the defendant possessed it with the intent to distribute it to another person.

As to that count, the Government has not provided any proof as to who the defendant intended to distribute any marijuana to.

Finally, the Government contends that the Court should not hold an evidentiary hearing, stating that all of the claims made in defendant's motion either (i) do not entitle defendant to relief, (ii) are palpably incredible or patently frivolous, or (iii) are based on no specific factual allegations - with one potential exception. Defendant disagrees.

Defendant has clearly presented specific factual allegations which are supported by the Court records and files. Defendant has also sworn under the penalty of perjury that the contents in his 28 U.S.C. § 2255 Motion are true and correct. This Court must

accept defendant's specific factual allegations as true because they are not disproven by the Court records and files. In addition, the specific factual allegations state a claim on which relief could be granted.

To be clear, defendant restates that it was not trial counsel who informed him of the 18 months imprisonment plea offer from the government, but it was instead his original counsel. However, it should be noted that trial counsel never pursued any plea agreement with the government and he failed to provide defendant with any advice about the eventual outcome of the case in the event that the Court did not allow a RFRA defense or in the event that he was found guilty, about any possible sentence that he would likely receive. Counsel had a duty to go over the Sentencing Guidelines range applicable to defendant, and any possibilities of enhancements and mandatory minimum penalties. Likewise, defendant's original counsel was obligated to inform defendant of the strengths and weaknesses of his case, any defenses that he may have, and any potential sentence that he might likely receive, however, both counsel failed to provide defendant with the advice and guidance needed to make any rational decision as to whether to plead guilty or not.

Therefore, an evidentiary hearing is necessary to determine what both counsel will testify under oath as to what advice they gave defendant, and to what efforts they made in pursuing any plea agreement with the government.

CONCLUSION

Throughout the Government's response in their "Opposition to Defendant's Section 2255 Motion," the Government has made numerous attempts to present this matter as if it were a direct appeal. It has also rehashed the facts and arguments over and over again, and made repetitive claims that defendant has not made any sworn factual allegations, when in fact, defendant has. On the signature page of defendant's actual 28 U.S.C. § 2255 Motion he signed under the penalty of perjury that the facts presented therein were true and correct, thus sworn.

Defendant contends that he has made specific factual allegations which the Court must accept as true when determining to hold an evidentiary hearing.

Defendant further contends that he has been harmed by his former original counsel's failure to properly advise him on the likelihood of a RFRA defense, the time he would likely receive if he lost at trial, and discuss the Sentencing Guidelines range applicable to defendant, including any possibilities of enhancements and mandatory minimum sentence he might receive. Likewise, defendant has been harmed by trial counsel in the same regard, with the exception that he never pursued any plea agreement offer from the government at all. As such, this Court should vacate defendant's sentence and conviction for the facts and reasons presented herein, or at a minimum, grant him an evidentiary hearing so that this

Court can more fully develop the record in this matter. In the event that the Court wishes defendant to submit a sworn affidavit, other than the sworn statement he makes on the signature page of his actual 28 U.S.C. § 2255 Motion, regarding any of the facts presented, he will be glad to do so.

For the facts and reasons presented in defendant's 28 U.S.C. § 2255 Motion, and in this "Reply" defendant respectfully requests that this Honorable Court will grant his motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. At a minimum, defendant requests that this Court will grant him an evidentiary hearing so that this Court can more fully develop the record in this matter.

Respectfully submitted this 23rd day of February, 2013.



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CERTIFICATE OF SERVICE

I, Charles Edward Lepp, the Defendant in the foregoing action, do hereby certify that on this date, a true and accurate copy of "PETITIONER'S REPLY TO THE GOVERNMENT'S OPPOSITION TO DEFENDANT'S SECTION 2255 MOTION," 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, Anthony, TX/NM.

CERTIFIED THIS 23rd day of February, 2013.



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