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4 Attorney for Defendant
5 BRYAN JAMES EPIS

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7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)
11)

12 Plaintiff,)

13 v.)

14 BRYAN JAMES EPIS,)

15 Defendant.)
16)

No. CR-S 97-381-FCD

**MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE
PURSUANT TO 28 U.S.C. § 2255**

17 Name: Bryan James Epis

18 BOP Reg. No.: No. 09636-097

19 Place of Confinement: Terminal Island FCI, P.O. Box 3007, San Pedro, CA 90731

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21 **1. Name and location of Court which entered the sentence under attack:** U.S.
District Court for the Eastern District of California.

22 **2. Date of judgment:** October 9, 2007

23 **3. Length of Sentence:** 120 months

24 **Sentencing Judge:** Honorable Frank C. Damrell, Jr., U.S. District Judge

25 **4. Nature of Offense or Offenses For Which You Were Convicted:** Conspiracy to
26 manufacture 1,000 or more marijuana plants within 1,000 feet of a school in violation
27 of 21 U.S.C. §§ 846, 841(a)(1) & 860(a) (count 1); manufacture of 100 or more
marijuana plants within 1,000 feet of school in violation of 21 U.S.C. §§ 841(a)(1)
(count 3)

28 **5. What was your plea?** Not guilty

6. Kind of trial: Jury

1 7. Did you testify at trial? Yes

2 8. Did you appeal from the judgment of conviction? Yes

3 9. If you did appeal, answer the following:

4 (a) Name of Court: U.S. Court of Appeals for the Ninth Circuit

5 (b,c) Result and Date Of Result: Affirmed. *United States v. Epis*, Nos. 02-10523 &
6 07-10462, 2009 U.S. App. Lexis 7823 (9th Cir. Apr. 8, 2009); Order denying
7 rehearing and rehearing en banc, 2009 U.S. App. Lexis 17833 (9th Cir. Aug. 11,
8 2009); U.S. Supreme Court, No. 09-691, Order Denying Petition For Writ of
9 Certiorari filed Jan. 19, 2010

10 10. Other than a direct appeal from the judgment of conviction and sentence, have
11 you previously filed any petitions, applications, or motions with respect to this
12 judgment in any court, state, or federal? No

13 11. If your answer to 10 was "yes," give the following information: N/A

14 12. GROUNDS FOR RELIEF

15 **CLAIM ONE:**

16 THE PROSECUTOR VIOLATED EPIS'S FIFTH AND SIXTH AMENDMENT
17 RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY PRESENTING FALSE AND
18 MISLEADING TESTIMONY AND ARGUMENT REGARDING EXHIBITS 27
19 AND 38 THAT IMPROPERLY RESULTED IN THE JURY FINDING THAT THE
20 CONSPIRACY CHARGED AGAINST EPIS INVOLVED AT LEAST 1,000
21 MARIJUANA PLANTS SO AS TO TRIGGER A 10-YEAR MANDATORY
22 MINIMUM SENTENCE.

- 23 1. The government presented false testimony and argument at trial regarding
24 exhibits 27 and 38.
- 25 2. The government knew or should have known that its arguments and its agents'
26 testimony were false: exhibits 27 And 38 had nothing to do with the charged
27 Chico marijuana conspiracy.
- 28 3. The government presented other false and misleading evidence and argument in
convincing the jury to find the charged conspiracy involved at least 1,000
marijuana plants.
4. With no real evidence that the charged conspiracy involved at least 1,000 plants,
a jury would not have found Epis guilty of count 1 if not for the prosecution's
false and misleading evidence and argument.

For facts in support of claim, see attached Memorandum In Support of § 2255 Motion,
which is incorporated by reference herein.

1 **CLAIM TWO:**

2 THE GOVERNMENT'S BAD FAITH DESTRUCTION OF EXCULPATORY OR
3 POTENTIALLY EXCULPATORY EVIDENCE VIOLATED EPIS'S FIFTH
4 AMENDMENT RIGHT TO DUE PROCESS.

- 4 1. The government destroyed potentially exculpatory evidence in bad faith.
5 2. The government's explanations for its destruction of evidence are
6 not credible.
7 3. The government's destruction of potentially exculpatory evidence was in bad
8 faith and warrants dismissal.

8 For facts in support of claim, see attached Memorandum In Support of § 2255 Motion,
9 which is incorporated by reference herein.

10 **CLAIM THREE:**

11 EPIS'S COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN VIOLATION OF
12 THE SIXTH AMENDMENT.

- 12 1. Counsel rendered ineffective assistance during plea negotiations.
13 2. Counsel rendered ineffective assistance in trial preparation and at trial.
14 3. Counsel rendered ineffective assistance in failing to make a *Franks* challenge to
15 the 1997 search warrant affidavit and in not requesting that evidence from the
16 suppressed 1994 search be excluded from the trial on the 1997 marijuana grow.
17 4. Trial and appellate counsel failed to file a timely, meritorious motion for new
18 trial on the ground, *inter alia*, that the government presented false and
19 misleading testimony and arguments regarding Exhibits 27 and 38 that
20 convinced the jury that Epis conspired to grow more than 1,000 plants at his
21 Chico residence.
22 5. Appellate counsel unreasonably failed to argue that the district court erred in not
23 giving a lesser-included instruction on the number of plants in count 1.

21 For facts in support of claim, see attached Memorandum In Support of § 2255 Motion,
22 which is incorporated by reference herein.

23 **CLAIM FOUR:**

24 EVEN IF THE ERRORS ALLEGED IN EPIS'S PETITION ARE NOT
25 INDIVIDUALLY SUFFICIENT TO JUSTIFY RELIEF, THEIR CUMULATIVE
26 EFFECT IS SO PREJUDICIAL AS TO REQUIRE HABEAS RELIEF.

26 For facts in support of claim, see attached Memorandum In Support of § 2255 Motion,
27 which is incorporated by reference herein.
28

1 **13. If any of the grounds listed were not previously presented, state briefly what**
2 **grounds were not so presented, and give your reasons for not presenting them.**

3 The first two grounds were raised on direct appeal in a different form, but were more
4 limited because the appeal process does not permit the introduction of evidence and
5 arguments not presented in the district court. The third claim was not raised on direct appeal
6 because ineffective assistance of counsel claims are raised in habeas proceedings. The fourth
7 claim is cumulative error.

8 **14. Do you have any petition or appeal now pending in any court as to the judgment**
9 **under attack? No**

10 **15. Give the name and address, if known, of each attorney who represented you in the**
11 **following stages of the judgment attacked herein:**

12 (a) **At preliminary hearing:** N/A

13 (b) **At arraignment and plea:** J. Tony Serra
14 Law Offices of J. Tony Serra
15 506 Broadway
16 San Francisco, CA 94133
17 415-986-5591

18 Zenia Karen Gilg
19 Bustamonte, Gilg, et. al
20 809 Montgomery Street, 2nd Floor
21 San Francisco, CA 94133
22 415-394-3800

23 (c) **At trial:** Same

24 (d) **At sentencing:** Same

25 (e) **On appeal:** Brenda Grantland
26 Law Office of Brenda Grantland
27 20 Sunnyside, Suite A-204
28 Mill Valley, CA 94941
415-380-9108

(f) **In any post-conviction proceedings:** N/A

(g) **On appeal from any adverse ruling in post-conviction proceedings:** N/A

16. Were you sentenced on more than one count of an indictment, or on more than
one indictment, in the same court and at approximately the same time?

Yes, 2 counts in the same indictment

17. Do you have any future sentence to serve after you complete the sentence imposed
under attack? No

REQUEST FOR EVIDENTIARY HEARING

Epis requests an evidentiary hearing on all of his claims for relief.

PRAYER FOR RELIEF

Based on the foregoing reasons, Epis requests that the Court grant this motion, vacate the judgment and sentence, dismiss the Second Superseding Indictment or, alternatively, grant him all other relief to which he may be entitled to in this proceeding.

Dated: January 17, 2011

Respectfully submitted,

/s/ John Balazs
John Balazs

Attorney for Defendant
Bryan James Epis

VERIFICATION

I, Bryan James Epis, declare under penalty of perjury that the foregoing is true and correct. Executed this 12th of January 2011.



Bryan James Epis

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