

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOHN BALAZS
Attorney At Law
916 Second Street, Suite F
Sacramento, California 95814
Telephone: (916) 447-9299
John@Balazslaw.com

Attorney for Defendant
BRYAN JAMES EPIS

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

UNITED STATES OF AMERICA,)	No. CR-S 97-381-FCD
)	
Plaintiff,)	
)	
v.)	
)	
BRYAN JAMES EPIS,)	
)	
Defendant.)	

**DEFENDANT BRYAN JAMES EPIS'S
MEMORANDUM IN SUPPORT OF
MOTION TO VACATE, SET ASIDE, OR CORRECT
SENTENCE PURSUANT TO 28 U.S.C. § 2255**

TABLE OF CONTENTS

I.	<u>INTRODUCTION</u>	1
II.	<u>STATEMENT OF THE CASE</u>	2
	A. Procedural History	2
	B. Statement Of Facts	5
III.	<u>ARGUMENT</u>	6
	A. THE PROSECUTOR VIOLATED EPIS’S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY PRESENTING FALSE AND MISLEADING TESTIMONY AND ARGUMENT REGARDING EXHIBITS 27 AND 38 THAT IMPROPERLY RESULTED IN THE JURY FINDING THAT THE CONSPIRACY CHARGED AGAINST EPIS INVOLVED AT LEAST 1,000 MARIJUANA PLANTS SO AS TO TRIGGER A 10-YEAR MANDATORY MINIMUM SENTENCE.....	6
	1. The Government Presented False Testimony And Argument At Trial Regarding Exhibits 27 And 38	9
	2. The Government Knew Or Should Have Known That Its Agent s’ Testimony And Its Arguments Were False: Exhibits 27 And 38 Had Nothing To Do With The Charged Chico Marijuana Conspiracy	13
	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	18

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 Prosecutions’s False And Misleading Evidence And Argument.....	20
5.	To The Extent The Court Does Not Find Prosecutorial Misconduct On The Record, The Court Should Hold An Evidentiary Hearing.....	21
B.	THE GOVERNMENT’S BAD FAITH DESTRUCTION OF EXCULPATORY OR POTENTIALLY EXCULPATORY EVIDENCE VIOLATED EPIS’S FIFTH AMENDMENT RIGHT TO DUE PROCESS.....	23
1.	The Government Destroyed Potentially Exculpatory Evidence In Bad Faith.....	23
2.	The Government’s Explanations For Its Destruction Of Evidence Are Not Credible.....	24
3.	The Government’s Destruction Of Potentially Exculpatory Evidence Was In Bad Faith And Warrants Dismissal. Alternatively, The Court Should Grant An Evidentiary Hearing.....	26
C.	EPIS’S COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN VIOLATION OF THE SIXTH AMENDMENT.....	29
1.	Counsel Rendered Ineffective Assistance During Plea Negotiations.....	31

2. Counsel Rendered Ineffective Assistance In Trial Preparation And Trial.....	32
a. Counsel Rendered Ineffective Assistance In Failing To Show That Exhibits 27 And 38 Had Nothing To Do With The Marijuana Cultivation Charges, But Rather Were Part Of A Completely Unrelated “Silicon Valley Cannabis Caregivers” Proposal.....	32
(1) Epis’s Counsel Failed To Move In-Limine To Exclude Exhibit 27 And The Silicon Valley Proposal From Which It Was Derived Under The Court’s In-Limine Ruling And Federal Rules Of Evidence 401, 404(b), And 403.....	33
(2) Counsel Failed To Cross-Examine Agents Mancini And Redmon To Show That Exhibit 27 Was Unrelated To The Charged Marijuana Cultivation Conspiracy, But Rather Was Part Of A Completely Separate, Never Utilized Silicon Valley Proposal.....	34
(3) Counsel Rendered Ineffective Assistance In Failing To Review Discovery And Prepare Epis For Examination Regarding Exhibits 27 And 38.....	35

(4)	At Trial, Counsel Bungled An Attempt To Introduce An Incomplete Version Of The Silicon Valley Proposal To Show That Exhibits 27 And 38 Were Unrelated To The Chico Cultivation Charges.....	37
(5)	Counsel Failed To Obtain And Use The San Jose Rules That Would Have Further Corroborated That The Silicon Valley Proposal Had Nothing To Do With The Chico Charges.....	39
b.	Besides Ineffective Assistance Concerning Exhibits 27 And 38, Epis’s Counsel Also Failed To Provide Reasonably Competent Assistance In Otherwise Challenging The 1,000 Plant Element Of Count 1.....	39
c.	Trial Counsel Acted Incompetently In Relying On “Jury Nullification” In Putting On A Multiple Conspiracy Trial Defense And Calling Epis To Testify At Trial.....	42
d.	Trial Counsel Rendered Ineffective Assistance In Failing To Request A Lesser-Included Instruction On Count 1 To Permit The Jury To Find That The Charged Conspiracy Was To Grow At Least 100, But Less Than 1,000, Marijuana Plants.....	44

3.	Counsel Rendered Ineffective Assistance In Failing To Make A <i>Franks</i> Challenge To The 1997 Search Warrant Affidavit And In Not Requesting That Evidence From The Suppressed 1994 Search Be Excluded From The Trial On The 1997 Marijuana Grow.....	45
a.	Counsel’s Failure To Make A <i>Franks</i> Challenge To The 1997 Search Warrant.....	46
b.	Counsel’s Failure To Request That Evidence From The Suppressed 1994 Search Be Excluded From The Trial In The 1997 Case.....	48
4.	Trial And Appellate Counsel Failed To File A Timely, Meritorious Motion For New Trial On The Ground, <i>Inter Alia</i>, That The Government Presented False And Misleading Testimony And Arguments Regarding Exhibits 27 And 38 That Unfairly Convinced The Jury That Epis Conspired To Grow More Than 1,000 Plants At His Chico Residence.....	49
5.	Appellate Counsel Unreasonably Failed To Argue That The District Court Erred In Not Giving A Lesser-Included Instruction On The Number Of Plants In The Conspiracy Charged In Count 1.....	51
D.	EVEN IF THE ERRORS ALLEGED IN EPIS’S PETITION ARE NOT INDIVIDUALLY SUFFICIENT TO JUSTIFY RELIEF, THEIR CUMULATIVE EFFECT IS SO PREJUDICIAL AS TO REQUIRE HABEAS RELIEF	51
IV.	<u>CONCLUSION</u>.....	51

TABLE OF AUTHORITIES

CASES:

<i>Arizona v. Youngblood</i> , 488 U.S. 51 (1988).....	23
<i>Beech Aircraft Corp v. Rainey</i> , 488 U.S. 153 (1988).....	38
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	7
<i>California v. Trombetta</i> , 467 U.S. 479 (1984).....	23
<i>Capps v. Sullivan</i> , 921 F.2d 260 (10 th Cir. 1990).....	42
<i>Franks v. Delaware</i> , 438 U.S. 154 (1978).....	46
<i>Gonzales v. Raich</i> , 545 U.S. 1 (2005).....	3, 23
<i>Hall v. Dir. of Corr.</i> , 343 F.3d 976 (9 th Cir. 2003).....	8
<i>Harris v. Wood</i> , 64 F.3d 1432 (9 th Cir. 1995).....	31
<i>Hayes v. Brown</i> , 399 F.3d 972 (9 th Cir. 2005).....	7, 20
<i>Hein v. Sullivan</i> 601 F.3d 897 (9 th Cir. 2010).....	7
<i>Hoffman v. Arave</i> , 455 F.3d 926 (9 th Cir. 2005).....	30
<i>Iaea v. Sunn</i> , 800 F.2d 861 (9 th Cir. 1986).....	30
<i>Jackson v. Brown</i> , 513 F.3d 1057 (9 th Cir. 2008).....	7
<i>Keeble v. United States</i> , 412 U.S. 205, 208 (1973).....	45
<i>Killian v. Poole</i> , 282 F.3d 1204, 1211 (9 th Cir. 2002).....	51
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986).....	46
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	7

<i>Mask v. McGinnis</i> , 233 F.3d 132 (2d Cir. 2000).....	31
<i>Maxwell v. Roe</i> , 2010 U.S. App. Lexis 24432 (9 th Cir. Nov. 30, 2010).....	8, 21
<i>Miller v. Vasquez</i> , 868 F.2d 1116 (9 th Cir. 1989).....	23
<i>Mills v. Graves</i> , 930 F.2d 729 (9 th Cir. 1991).....	47
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959).....	6
<i>Nobles v. Johnson</i> , 127 F.3d 409 (5 th Cir. 1997).....	7
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005).....	31
<i>Riggs v. Fairman</i> , 399 F.3d 1179 (9 th Cir. 2004).....	29, 31
<i>Sanders v. Ratelle</i> , 21 F.3d 1446 (9 th Cir. 1994).....	32
<i>Schad v. Ryan</i> , 606 F.3d 907 (9 th Cir. 2010).....	7
<i>Shah v. United States</i> , 878 F.2d 1156 (9 th Cir. 1989).....	22
<i>Stone v. Powell</i> , 428 U.S. 465 (1976).....	46
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	29, 31
<i>Turner v. Calderon</i> , 281 F.3d 851 (9 th Cir. 2002).....	31
<i>United States v. Anderson</i> , 200 F.3d 1344 (11 th Cir. 2000).....	32
<i>United States v. Anderson</i> , 201 F.3d 1145 (9 th Cir. 2000).....	51
<i>United States v. Bagley</i> , 473 U.S. 667 (1985).....	6
<i>United States v. Barrera-Moreno</i> , 951 F.2d 1089 (9 th Cir. 1991).....	8
<i>United States v. Blaylock</i> , 20 F.3d 1458 (9 th Cir. 1994).....	29

<i>United States v. Chapman</i> , 524 F.3d 1073 (9 th Cir. 2008).....	8
<i>United States v. Clark</i> , 31 F.3d 831 (9 th Cir. 1994).....	48
<i>United States v. Condo</i> , 782 F.2d 1502 (9 th Cir. 1986).....	46
<i>United States v. Cooper</i> , 983 F.3d 928 (9 th Cir. 1993).....	23
<i>United States v. Day</i> , 285 F.3d 1167 (9 th Cir. 2002).....	30
<i>United States v. Dorrell</i> , 758 F.2d 427 (9 th Cir. 1985).....	38
<i>United States v. Epis</i> , 373 F.3d 1383 (9 th Cir. 2004).....	3
<i>United States v. Epis</i> , 324 Fed. Appx. 560, 2009 U.S. App. Lexis 7823 (9 th Cir. Apr. 8, 2009).....	5
<i>United States v. Epis</i> , 332 Fed. Appx. 409, 2009 U.S. App. Lexis 17833 (9 th Cir. Aug. 11, 2009).....	5, 41
<i>United States v. Greger</i> , 716 F.2d 1268 (9 th Cir. 1983).....	47
<i>United States v. Heffington</i> , 952 F.2d 275 (9 th Cir. 1991).....	23
<i>United States v. Kojayan</i> , 8 F.3d 1315 (9 th Cir. 1993).....	8
<i>United States v. LaPage</i> , 231 F.3d 488 (9 th Cir. 2000).....	7
<i>United States v. LeFevour</i> , 798 F.2d 977 (7 th Cir. 1986).....	38
<i>United States v. Leon</i> , 468 U.S. 897 (1984).....	45
<i>United States v. Leonti</i> , 326 F.3d 1111 (9 th Cir. 2003).....	30
<i>United States v. McQuilkin</i> , 78 F.3d 105 (3d Cir. 1996).....	32
<i>United States v. Pedlin</i> , 861 F.2d 1522 (11 th Cir. 1988).....	7

<i>United States v. Pimental</i> , 654 F.2d 538 (9th Cir. 1981)	50
<i>United States v. Restrepo</i> , 930 F.2d 705 (9 th Cir. 1991).....	8
<i>United States v. Schaflander</i> , 743 F.2d 714 (9 th Cir. 1984).....	22
<i>United States v. Skinner</i> , 667 F.2d 1306, 1309 (9th Cir. 1982).....	45
<i>United States v. Stanert</i> , 762 F.2d 775, amended, 769 F.2d 1410 (9 th Cir. 1985).....	44, 46
<i>United States v. Wallach</i> , 935 F.2d 445 (2d Cir. 1991).....	7
<i>United States v. Williams</i> , 989 F.2d 1061 (9 th Cir. 1993).....	46
<i>United States v. Young</i> , 17 F.3d 1201 (9 th Cir. 1994).....	8
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963).....	48

OTHER AUTHORITIES:

Fourth Amendment, United States Constitution.....	46, 48
Fifth Amendment, United States Constitution.....	23
Sixth Amendment, United States Constitution.....	29, 33, 46
21 U.S.C. § 841(a)(1).....	1
21 U.S.C. § 846.....	1
21 U.S.C. § 860(a).....	1, 4
28 U.S.C. § 2255.....	Passim
Fed. R. Crim. P. 33	50
Fed. R. Evid. 106.....	37

Fed. R. Evid. 401.....	33
Fed. R. Evid. 403.....	34
Fed. R. Evid. 404(b).....	33, 34
Fed. R. App. P. 10(e).....	3
California’s Compassionate Use Act of 1996 (Proposition 215)....	2
ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-4.1 (3d Ed. 1993).....	31
ABA Standards for Criminal Justice 4-6.1(b).....	30
ABA Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992).....	30

1 JOHN BALAZS
Attorney At Law
2 916 Second Street, Suite F
Sacramento, California 95814
3 Telephone: (916) 447-9299
John@Balazslaw.com

4 Attorney for Defendant
5 BRYAN JAMES EPIS

6
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)

16 Defendant.)
17)

No. CR-S 97-381-FCD

**DEFENDANT BRYAN JAMES EPIS'S
MEMORANDUM IN SUPPORT OF
MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE
PURSUANT TO 28 U.S.C. § 2255**

18 I. INTRODUCTION

19 Defendant Bryan James Epis was convicted by jury trial of one count of conspiracy to
20 grow at least 1,000 marijuana plants within 1,000 feet of a school in violation of 21 U.S.C.
21 §§ 846, 841(a)(1), and 860(a) and one count of manufacturing at least 100 marijuana plants
22 within 1,000 feet of a school in violation of 21 U.S.C. §§ 841(a)(1) and 860(a). When
23 officers arrested Epis at his home in Chico, they found and seized 458 small marijuana plants.
24 Nonetheless, the government charged Epis with a conspiracy to grow 1,000 or more
25 marijuana plants so as to trigger a ten-year minimum sentence. Epis was found guilty of the
26 1,000 plant quantity enhancement as a result of the government's substantial misconduct and
27 his own attorneys' deficient performance in violation of the Fifth Amendment's Due Process
28 Clause and Sixth Amendment's guarantees of a fair trial and effective assistance of

1 counsel.

2 To prove the aggravated quantity enhancement to obtain the 10-year mandatory
3 minimum penalty, the government relied heavily on false and misleading evidence and
4 argument regarding a spreadsheet that it knew had nothing to do with the Chico marijuana
5 grow and Epis's charges. Indeed, when the issue came up at a safety valve evidentiary
6 hearing, the Court noted that the spreadsheet "had nothing [to] do with what happened in
7 Chico." Appendix (App.) 5, Reporter's Transcript (RT), 2/23/07, at 46. On appeal, when the
8 defense asked to review important evidence, the government announced that it had
9 inexplicably destroyed virtually all the evidence in the case, including the grow equipment,
10 documents, and its only back-up of the computer's hard drive. Further, Epis's own attorneys
11 rendered ineffective assistance of counsel in advising him to reject a 4-year plea offer, in
12 failing to counter effectively the government's misuse of Exhibits 27 and 38 at trial, and
13 through other constitutionally-deficient representation. These and other constitutional errors
14 set forth in this Memorandum require that the Court grant Epis's § 2255 motion and dismiss
15 the Second Superseding Indictment or order a new trial. Alternatively, the Court must vacate
16 Epis's conviction on count 1 and re-sentence him without application of the 10-year
17 mandatory minimum.

18 19 II. STATEMENT OF THE CASE

20 **A. Procedural History**

21 On June 25, 1997, defendant Bryan Epis was arrested for the indoor cultivation of
22 marijuana in his home in Chico, California. Officers seized 458 small marijuana plants in
23 various stages of growth. Before trial, Epis sought to show his cultivation of "medical
24 marijuana" was legalized by California's Compassionate Use Act of 1996 (hereinafter
25 Proposition 215), but the Court barred the defense from introducing medical marijuana
26
27
28

1 evidence and instructed the jury that the state medical marijuana law was not a defense under
2 federal law.¹

3 Epis was tried before a jury beginning on June 26, 2002. On July 11, 2002, the jury
4 returned a guilty verdict on count 1 of a Second Superseding Indictment, conspiracy to
5 manufacture 1,000 or more marijuana plants within 1,000 feet of a school, and count 3, the
6 manufacture of 100 or more marijuana plants within 1,000 feet of a school. On October 7,
7 2002, the Court sentenced Epis to 120 months on each count, to run concurrently with each
8 other, and a \$17,500 fine.

9 On appeal, the government disputed whether the Exhibit A in Epis's excerpts of record
10 was the same exhibit the defense sought to admit at trial. The appellate court remanded for a
11 hearing under Federal Rule of Appellate Procedure 10(e) for the district court to determine
12 the contents of trial Exhibit A. A hearing was held for this purpose on October 29, 2003. At
13 the conclusion, the district court found that the 10-page document proposed by the
14 government was the same Exhibit A the defense attempted to introduce at trial. App. 3. That
15 document contained the same text as the Silicon Valley Cannabis Caregivers proposal at
16 discovery 2179-93, App. 2, but it was missing pages, was out of order, and had different
17 fonts.

18 Thereafter, the parties submitted new briefs on appeal. Shortly after oral argument, the
19 panel issued another order remanding to the district court, this time to await the outcome of
20 the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), and for resentencing.
21 *United States v. Epis*, 373 F.3d 1383 (9th Cir. 2004). Before resentencing, the Ninth Circuit
22
23

24 ¹ Now, more than seven years after Epis's trial, the Attorney General has announced
25 that the federal government will no longer prosecute medical marijuana cases where the
26 defendant's conduct is consistent with state law. See 10/19/09 Memorandum of Assistant
27 Attorney General David W. Ogden, "Investigations and Prosecutions in States Authorizing
28 The Medical Use of Marijuana" (available at <http://blogs.usdoj.gov/blog/archives/192>). As a
result, Epis would likely not even be prosecuted for the same conduct today for which he is
serving a 10-year prison sentence.

1 also granted Epis bail pending final resolution of his appeal in a series of orders filed August
2 6, 9, and 10, 2004.

3 On remand, Epis asked for an evidentiary hearing on prosecutorial misconduct, but the
4 district court refused on the ground that it was beyond the scope of the remand order. The
5 defense also asked the government to view the physical evidence. After a several month
6 delay, the prosecutor revealed that the evidence that the defense had asked to view was
7 destroyed. App. 5, RT, 12/5/05, at 10-13. The Court initially granted the defense's request to
8 depose the agents involved in the destruction of evidence and ordered the government to
9 submit declarations explaining what evidence had been destroyed and the circumstances
10 regarding the destruction. *Id.* at 14-15. After the declarations were filed but before any
11 depositions, the government moved for reconsideration. On May 22, 2006, the Court granted
12 the motion, denying the request for any further discovery or an evidentiary hearing as beyond
13 the scope of the remand. App. 5, RT, 5/22/06, at 7-14. On August 21, 2006, the Court ruled
14 that Epis was ineligible for the safety valve because the safety valve did not apply to his
15 conviction for conspiring to grow marijuana within 1,000 feet of a school in violation of 21
16 U.S.C. § 860(a). App. 5, RT, 8/21/06, at 4-9. Nonetheless, the Court granted the request for
17 an evidentiary hearing on whether there were additional reasons why the safety valve didn't
18 apply.

19 On February 23, 2007 and June 22, 2007, the Court held evidentiary hearings on issues
20 involving the applicability of the safety valve. At the conclusion of the hearings, the Court
21 set a schedule for the parties to file post-hearing briefs and for resentencing. At the
22 September 14, 2007 resentencing hearing, the Court reaffirmed its ruling that the safety valve
23 did not apply to a § 860(a) drug conviction as charged in count 1. App. 5, RT, 9/14/07, at 34-
24 35. The Court also found Epis did not qualify because a managerial role enhancement
25 applied. *Id.* at 35-36. The Court initially found that the government had not proved by a
26 preponderance that Epis was untruthful in his safety valve debriefing. *Id.* at 36. After being
27 informed that the defendant bears the burden of showing the safety valve applied, the Court
28 held that Epis did not sustain his burden. *Id.* at 44. The Court then resentenced Epis to the

1 120-month mandatory minimum on count 1 and 87 months on count 3, to run concurrently.
2 Thereafter, pursuant to the Ninth Circuit's orders, the Court permitted Epis to remain released
3 on bail pending final resolution of his appeal.

4 In Epis's second appeal, the Ninth Circuit affirmed. *United States v. Epis*, 324 Fed.
5 Appx. 560, 2009 U.S. App. Lexis 7823 (9th Cir. Apr. 8, 2009). On Epis's petition for
6 rehearing and rehearing en banc, the Court denied the petition and amended its original
7 memorandum decision. *United States v. Epis*, 332 Fed. Appx. 409, 2009 U.S. App. Lexis
8 17833 (9th Cir. Aug. 11, 2009). The Supreme Court denied Epis's petition for writ of
9 certiorari on January 19, 2010. 130 S. Ct. 1159. On February 22, 2010, the district court
10 granted the government's motion to remand Epis into the custody of the Bureau of Prisons.
11 He is currently incarcerated at FCI Terminal Island, California.

12 This § 2255 motion is thus timely filed within one-year of the denial of his petition for
13 writ of certiorari.

14 **B. Statement Of Facts**

15 At trial, the government presented evidence that law enforcement seized a total of 458
16 indoor marijuana plants in various stages of growth at Bryan Epis's home in Chico,
17 California during execution of a search warrant on June 25, 1997. App. 5, RT, 6/27/02, at
18 165. This total included 128 plants in a bloom room, 169 seedlings, and 9 dead or discarded
19 plants. *Id.* The marijuana was grown within 1,000 feet of Chico High School. *Id.* at 91-93.
20 Without much more, this evidence essentially established the charge of manufacturing more
21 than 100 marijuana plants within 1,000 feet of a school in count 3, which carried a 5-year
22 mandatory minimum sentence.

23 Although less than 500 plants were found, the prosecution also charged Epis with a
24 conspiracy to grow at least *1,000 plants* within 1,000 feet of a school, which carried a 10-year
25 mandatory minimum sentence. The government charged that Epis conspired with unindicted
26 co-conspirators David Kasakove and others to grow the marijuana found in Epis's basement.
27 It did not call any witnesses to testify about the length or substance of any so-called
28

1 conspiratorial agreement and it presented no other real evidence to prove beyond a reasonable
2 doubt the 1,000 plant allegation.

3 Instead, it relied on false and misleading evidence and argument to persuade the jury
4 that the conspiracy involved over 1,000 plants. The government relied on evidence that the
5 basement door was fortified (App. 5, RT, 7/1/02, at 213-15), the lights were ventilated with
6 fans (App. 5, RT, 7/1/02, at 226, 231), and there were additional mylar and other supplies
7 (App. 5, RT, 7/2/02, at 446) to show that Epis intended the grow to last a long time. But the
8 jury was never told that this evidence was from a prior 1994 marijuana grow at Epis's house.
9 Moreover, as set forth in more detail in Section III(A)(1), *infra*, the government relied heavily
10 on false and misleading testimony and argument regarding two exhibits (Exhibits 27 and 38)
11 that purportedly represented Epis's projections for the amount of marijuana he intended to
12 grow and distribute to medical marijuana patients. In fact, although the jury never learned of
13 it, these exhibits had nothing to do with the marijuana Epis was growing in Chico; but rather
14 were part of a completely unrelated draft proposal for a dispensary in San Jose that required
15 all marijuana to be grown on-site. Indeed, the figures in the exhibits were absurd. The
16 numbers included an impossible monthly doubling rate of growth and did not match the other
17 evidence in the case or the marijuana grown at Epis's residence. Largely based on these
18 misleading exhibits, the jury found that the charged conspiracy was to grow at least 1,000
19 marijuana plants at Epis's residence. This unjustly doubled his statutory minimum sentence
20 from 5 to 10 years.

21 22 III. ARGUMENT

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

“[T]he knowing use of false testimony to obtain a conviction violates due process
regardless of whether the prosecutor solicited the false testimony or merely allowed it to go

1 uncorrected when it appeared.” *United States v. Bagley*, 473 U.S. 667, 679 n.8 (1985); *Napue*
2 *v. Illinois*, 360 U.S. 264 (1959) (the State violates a defendant’s right to due process when it
3 does nothing to correct a witness’s false testimony on a material point). “[E]very *Napue*
4 claim has an implicit accompanying *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] claim:
5 Whenever the prosecution knowingly uses false testimony, it has a *Brady* obligation to
6 disclose that witness’s perjury to the defense.” *Jackson v. Brown*, 513 F.3d 1057, 1076 n.12
7 (9th Cir. 2008). “Evidence is ‘false’ if . . . it is ‘specific misleading evidence important to the
8 prosecution’s case in chief.’” *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997) (*quoting*
9 *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974); *United States v. Pedlin*, 861 F.2d 1522,
10 1530 n.14 (11th Cir. 1988) (“[T]he *Napue* rule applies where testimony, ‘even though
11 technically not perjurious, would surely be highly misleading to the jury”). The
12 prosecutor’s ethical duty to refrain from putting on false testimony “is not discharged merely
13 because defense counsel knows . . . that the testimony is false.” *United States v. LaPage*, 231
14 F.3d 488, 492 (9th Cir. 2000).

15 To prevail on such a due process claim in a habeas action, the petitioner must show that
16 (1) the testimony or evidence was false; (2) the prosecution knew or should have known it
17 was false; and (3) the false evidence was material. *Schad v. Ryan*, 606 F.3d 1022, 1037 (9th
18 Cir. 2010) (*citing United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003), *petition for*
19 *writ of certiorari*, filed 8/27/10). False testimony is material if “there is any reasonable
20 likelihood the false testimony could have affected the judgment of the jury.” *Hayes v.*
21 *Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc). Where multiple *Napue* claims are
22 raised, the claims are reviewed cumulatively for purposes of materiality. *Jackson v. Brown*,
23 513 F.3d 1057, 1072 (9th Cir. 2008); *see also Kyles v. Whitley*, 514 U.S. 419, 436 n.10
24 (1995); *Hein v. Sullivan*, 601 F.3d 897, 915 (9th Cir. 2010) (“instances of false evidence are
25 analyzed first under *Napue*’s materiality standard, and, if those errors are not material
26 standing alone, false evidence is then considered together with non-disclosure, and both are
27 analyzed under *Brady*’s more demanding standard”). “[I]f it is established that the
28 government knowingly permitted the introduction of false testimony reversal is ‘virtually

1 automatic.” *Hayes*, 399 F.3d at 978 (quoting *United States v. Wallach*, 935 F.2d 445, 456
2 (2d Cir. 1991)). Regardless whether the prosecutor knew the testimony was false at the time
3 of trial, “to allow [a] conviction to stand, based on the present knowledge that the evidence
4 was falsified, is a violation of [the defendant’s] right to due process.” *Maxwell v. Roe*, 2010
5 U.S. App. Lexis 24432 (9th Cir. Nov. 30, 2010), at * 48 (quoting *Hall v. Dir. of Corr.*, 343
6 F.3d 976, 981 (9th Cir. 2003) (per curiam)). “[E]ven if the government unwittingly presents
7 false evidence, a defendant is entitled to a new trial ‘if there is a reasonable probability that
8 [without the evidence] the result of the proceeding would have been different.’” *United States*
9 *v. Young*, 17 F.3d 1201, 1204 (9th Cir. 1994) (quoting *United States v. Endicott*, 869 F.2d
10 452, 455 (9th Cir. 1989)).

11 Government misconduct also may be so egregious as to require dismissal of an
12 indictment to remedy a due process violation or under the court’s supervisory powers. *United*
13 *States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008). To warrant dismissal for a violation of
14 due process, the conduct must be “so grossly shocking and so outrageous as to violate the
15 universal sense of justice.” *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991); *see*
16 *also United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993). Even absent a due process
17 violation, a court may still dismiss under its supervisory powers for three reasons: to remedy
18 a constitutional or statutory violation; to protect judicial integrity by ensuring that a
19 conviction rests on appropriate considerations validly before a jury; or to deter future illegal
20 conduct. *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991). Under the
21 court’s supervisory powers, “[d]ismissal is appropriate when the investigatory or
22 prosecutorial process has violated a federal constitutional or statutory right and no lesser
23 remedial action is available.” *Id.* at 1092. Although the usual remedy for a *Brady/Giglio*
24 violation is a new trial, dismissal is appropriate to sanction flagrant prosecutorial misconduct,
25 including reckless violations of its constitutional discovery duties and repeated
26 misrepresentations to the court. *Chapman*, 524 F.3d at 1086. “In determining the proper
27 remedy [for prosecutorial misconduct], [the court] must consider the government’s
28

1 willfulness in committing the misconduct and the willingness to own up to it.” *Kojayan*, 8
2 F.3d at 1318.

3 **1. The Government Presented False Testimony And Argument At Trial**
4 **Regarding Exhibits 27 And 38.**

5 At trial, the government sought to prove that Epis was involved in a conspiracy to grow
6 more than 1,000 marijuana plants even though officers seized only a total of 458 marijuana
7 plants (including dead seedlings) from his house. App. 5, RT, 6/27/02, at 165. The
8 government presented no witnesses or other substantial evidence that Epis intended to grow
9 at least 1,000 marijuana plants during the charged conspiracy. Rather, the government simply
10 asked the jury to speculate on the number of plants that Epis would have grown in his Chico
11 operation, if officers had not shut him down and arrested him. The government had no
12 evidence that the Chico marijuana grow would continue for the substantial period necessary
13 to reach 1,000 plants. In fact, the evidence indicated the opposite, i.e., Epis knew that
14 officers would soon shut him down because they had a Butte County prosecutor tell his
15 attorney that they knew Epis was growing again, App. 5, RT, 6/21/00, at 81, 126, and, since
16 Epis had placed a notice on his door stating that his would be a test case in federal court of
17 the lawfulness of marijuana cultivation under California’s Proposition 215. App. 4 (excerpts
18 from government’s discovery), pages 308-09.

19 Ignoring the lack of evidence that Epis intended to grow 1,000 marijuana plants, the
20 government simply made some up. To reach the 1,000 plant threshold and trigger the 10-
21 year mandatory minimum sentence, the government relied heavily on a spreadsheet that the
22 prosecutor falsely told the jury represented a “business plan” for the marijuana grow in Epis’s
23 basement in Chico, but which actually had nothing to do with the charged marijuana
24 conspiracy. In his opening statement, the prosecutor stressed to the jury that the “most
25 damaging evidence” against Epis is a “business plan” showing that he anticipated increased
26 weekly sales of marijuana and intended to net \$1,856,000 per week by January 1998:

27 The documentary evidence included a business plan that set forth a plan of
28 selling increased amounts every month from March of 1997 including up to
January, 1998 such that the operation would necessarily need to grow over 1,000
marijuana plants in order to supply all the marijuana in the business plan.

1 App. 5, RT, 6/27/02, at 58.

2 . . . But the most damaging evidence against Epis is a business plan showing
3 that he anticipated increased weekly sales of marijuana in his operation
4 beginning in March, 1997 and ending in January, 1998. It shows an intent to
5 continue manufacturing marijuana during that time period.

6 The business plan documents how much marijuana they hoped to sell and
7 how much profit they hoped for. It shows a series of five ounces of smoked
8 marijuana in 75 days, multiply 360 by 16 ounces. He was going to be selling it
9 for well over \$5,000 a pound, and it increases to 50 ounces, netting after
10 payment of all expenses \$7,250 per week.

11 In May, 1997, it was anticipated to be a better month where it would
12 increase to 100 ounces of smoked marijuana at \$320 per ounce netting \$15,500
13 per week. June sales were planned to be higher at 200 ounces of smoked
14 marijuana per week at a reduced price of \$240 per ounce netting the operation
15 \$7,420 for each week.

16 The month of June anticipated increases each month until January of 1998
17 with sales projected at \$55,000. Six ounces of smoked marijuana netting
18 \$1,856,000 per week. The business plan also documents sales of baked goods
19 containing marijuana which yields a net profit of \$40 a week in 1997 of and a
20 projected profit of \$40,960 per week.

21 App. 5, RT, 6/27/02, at 67-68.

22 At trial, the prosecutor did not introduce the “business plan” itself into evidence. This
23 so-called “business plan” was an unrelated draft proposal to provide medical marijuana in the
24 San Jose Area pursuant to Proposition 215 under the name “Silicon Valley Cannabis
25 Caregivers.” App. 2. Instead of introducing the business plan itself into evidence,² which
26 would have disclosed that it had nothing to do with the Chico conspiracy, the government
27 admitted only a 1-page spreadsheet excerpt from the Silicon Valley proposal identified as
28 Exhibit 27. App. 5, RT, 7/1/02, at 245; *see also* App. 1 (Trial Exhibit 27). It then called
DEA Agent Ronald Mancini and Butte County Sheriff’s Deputy Michael Shane Redmond, to
testify falsely that Exhibit 27 showed the amount of marijuana that Epis expected to grow in

² Presumably, the prosecutor was banking on the fact that the Court’s pretrial ruling
barring any discussion of Proposition 215 and medical marijuana would prevent the defense
from being able to bring out the entire Silicon Valley proposal before the jury to show that it
had nothing to do with the Chico conspiracy. As it turned out, the prosecutor strategized
correctly as the Court barred Epis’s counsel’s attempt to introduce a more complete Silicon
Valley draft proposal under the Rule of Completeness.

1 the Chico conspiracy. Agent Mancini testified that Exhibit 27 was “a computer printout” that
2 represented Epis’s projected growth “from the marijuana cultivation.” App. 5, RT, 7/1/02, at
3 244. He added that the figures in the “Gross/wk” column indicated how much Epis would be
4 grossing per week so that by January 1998, about seven months after Epis arrest, “he’s
5 netting \$1,856,000 a week.” *Id.* at 246-48. Deputy Redmond also testified that the
6 exponentially increasing figures represented Epis’s actual or expected receipts from his Chico
7 marijuana grow. App. 5, RT, 7/2/2002, at 483-89, 491-96.³ Neither Mancini nor Redmond
8 disclosed to the jury that the figures were from a proposal entitled “*Silicon Valley Cannabis*
9 *Caregivers.*”

10 When the prosecutor cross-examined Epis about Exhibit 27, he did not show Epis the
11 Silicon Valley plan from which the spreadsheet was derived. Epis could not recall the
12 document and speculated that it was a spreadsheet he created to figure out how to bring down
13 the prices of medical marijuana to patients. App. 5, RT, 7/9/02, at 883-84. On cross-
14 examination, the prosecutor then showed Epis a new two-page document, Exhibit 38a-b. *See*
15 App. 1 (Trial Exhibit 38a-b). When the prosecutor initially asked on cross-examination if he
16 recognized the document, Epis responded “not exactly” and that he thought it was “probably
17 something on his computer.” App. 5, RT, 7/9/02, at 889. Exhibit 38a-b contained the same
18 spreadsheet figures as Exhibit 27, but it added some of the text from the Silicon Valley plan.
19 The first page was titled “Marketing Plan” and listed Epis as the “Vice-President/Secretary”
20 and a director. App. 1, Exh. 38a. The bottom of the second page referred to the “Anticipated
21 Center Hours” as Friday-Monday, 11 a.m. - 7 p.m. App. 1, Exh. 38b. The prosecutor
22 purposefully presented only an excerpt of the Silicon Valley plan in Exhibits 27 and 38 so
23

24 ³ At trial, Redmond testified at trial that the “net/wk” on Exhibit 27 was “just profit.”
25 App. 5, RT, 07/2/02, at 484. After trial, Redmond testified that he had reviewed all the
26 government’s discovery binders before trial, App. 5, RT, 2/23/07, at 14, 25-26, and thus he
27 knew the Silicon Valley proposal provided that 30% of the net proceeds per week would be
28 donated to charity and was for a non-profit organization, App. 2, Disc. 2179, 2190. Mancini
also acknowledged that the Silicon Valley proposal was for a non-profit organization. App.
4, RT, 2/23/07, at 96-97.

1 that the jury would not learn that the exhibits were part of an unrelated proposal--not the
2 Chico operation. Even worse, the prosecutor told the jury that he was showing them “the
3 entire document” in a manner designed to mislead them into believing it was a stand-alone
4 “marketing plan” for the Chico operation. App. 5, RT, 7/9/02, at 889 (“Let me show the jury
5 the entire document first.”).⁴

6 Over a lunch break, Epis realized that Exhibit 38 was from his long-abandoned Silicon
7 Valley Cannabis Caregivers’ (Silicon Valley) proposal. App. 5, RT, 7/9/02, at 898-99. That
8 night, he found pages 6-15 of the full draft proposal and brought it to his attorney the next
9 day. When the defense attempted to introduce these pages from the Silicon Valley proposal
10 as Exhibit A under the Rule of Completeness, the prosecutor objected that it prejudiced the
11 government because it discussed dispensing medical marijuana under Proposition 215. App.
12 5, RT, 7/10/02, at 1002-03. The prosecutor had earlier falsely informed the Court and Epis’s
13 counsel that Exhibit 38 was in discovery at pages 1263-64 (App. 5, RT 7/9/02, at 888), and
14 then claimed that Epis’s Exhibit A was not from the same proposal because the next
15 discovery page “doesn’t have this information that Mr. Epis has in his document.” App. 5,
16 RT, 07/10/02, at 1032. But Exhibit 38 was at 1623-24 (not 1263-64) of discovery and, the
17 very next page (1625) is another page from the Silicon Valley proposal that explicitly states
18 that it is for a “Proposal to the San Jose City Council to support the activities of Silicon
19 Valley Cannabis Caregivers (SVCC).”⁵ App. 4, Disc. 1623-25. Page 1625 is also part of the
20

21 ⁴ After Epis’s computer was seized, a forensics laboratory in Virginia examined the
22 hard drive and purportedly turned over all files that appeared to be case related, App. 4, Disc.
23 2173, to the local prosecution team. These files were provided to Epis’s trial counsel in
24 discovery at pages 2173-2330. The Silicon Valley draft proposal from Epis’s computer was
25 at 2179-2193. The prosecutor knew that Exhibit 38 was not a separate, stand-alone document
26 from the Silicon Valley proposal because it was not found anywhere in this discovery, except
27 as part of the Silicon Valley proposal at 2190-92.

28 ⁵ At a recess, the prosecutor showed Epis’s trial attorney J. Tony Serra 50 pages of
discovery before and after pages 1263-64, which misled him into believing that the rest of the
Silicon Valley proposal was not in discovery. App. 12, *Declaration of Bryan James Epis*, at
¶10. If the prosecutor had correctly advised that Exhibit 38 was at 1623-24 instead of 1263-

1 full Silicon Valley proposal. App. 2, at 2186-87. The Court excluded the defense exhibit
2 under Federal Rule of Evidence 403 on the ground that it dealt with California's medical
3 marijuana law, emphasizing the same city council page in doing so. App. 5, RT, 7/10/02, at
4 1002-03.

5 In closing argument, the prosecutor commented on Epis's purported long silence when
6 questioned about Exhibit 38, App. 5, RT, 7/10/02, at 1070, and stressed the document showed
7 Epis's "plan . . . to grow marijuana at his residence and buy marijuana from other marijuana
8 growers and sell it through [a] dispensary." *Id.* at 1075.

9 **2. The Government Knew Or Should Have Known That Its Arguments And**
10 **Agents' Testimony Were False: Exhibits 27 and 38 Had Nothing To Do**
11 **With The Charged Chico Marijuana Conspiracy.**

12 The prosecutor and testifying DEA agents knew or should have known that its
13 testimony and argument regarding its spreadsheet excerpts were false and misled the jury into
14 believing the figures in Exhibits 27 and 38 were for the Chico marijuana grow rather than a
15 never implemented, draft proposal for an unrelated Silicon Valley medical marijuana
16 dispensary. In its opening statement, the prosecutor referred to the spreadsheet figures as part
17 of a "business plan," App. 5, RT, 6/27/2002, at 67-68, which showed that the prosecutor had
18 reviewed the entire Silicon Valley proposal and knew that the spreadsheet excerpts came
19 from it. In its case-in-chief, the prosecutor admitted only the 1-page spreadsheet excerpt
20 (Exhibit 27) and elicited testimony from its DEA agents regarding only this page.

21 On cross-examination of Epis, the prosecutor introduced a new 2-page excerpt titled
22 "Marketing Plan" (Exhibit 38) with the same figures and some additional text. App. 5, RT,
23 7/9/02, at 889. He did so to attempt to show Epis lied in answering that Exhibit 27 was not

24 64, defense counsel would have seen that the next page (1625) after Exhibit 38 was titled
25 "Proposal to the San Jose City Council to Support the Activities of Silicon Valley Cannabis
26 Caregivers (SVCC)." This would have refuted the prosecutor's claim that the next page of
27 discovery didn't have the information that was in Epis's excerpt from the proposal. In any
28 event, as discussed in Section III(C)(2)(a), *infra*, Epis's trial attorney was ineffective in
failing to review his own discovery, which would have allowed him to show that Exhibits 27
and 38 were excerpts from the Silicon Valley draft proposal.

1 “part of a marketing plan.” App. 5, RT, 07/09/02, at 883. By asking Epis on cross-
2 examination whether Exhibit 27 was part of a marketing plan, the prosecutor certainly had
3 Exhibit 38 with its title in mind. As the entire Silicon Valley proposal from which these
4 exhibits were derived was in discovery, *supra*, p. 12, n.4, the prosecutor must have known
5 that Exhibits 27 and 38 were part of the Silicon Valley proposal rather than related to the
6 Chico grow. In fact, the prosecutor revealed his knowledge of this outside the presence of the
7 jury at trial, stating that “the information in the blue rectangular blocks that are on Exhibit 27,
8 and I think it’s Exhibit 38b, are members of an organization that Mr. Epis is organizing.”
9 App. 5, RT, 7/10/02, at 1029. But the prosecutor never introduced the entire Silicon Valley
10 proposal or otherwise told the jury that Exhibits 27 and 38 were part of that proposal. By
11 keeping this critical fact from the jury, the prosecutor intentionally mislead the jury into
12 believing Exhibits 27 and 38 concerned the charged Chico conspiracy to grow marijuana
13 within 1,000 feet of a school.

14 Although a simple comparison of Exhibits 27 and 38 to the full Silicon Valley proposal
15 establishes the exhibits were part of that proposal rather than the Chico grow, the testimony at
16 a post-trial evidentiary hearing further confirmed that Exhibits 27 and 38 did not relate to the
17 Chico grow at all and that the government knew so. On remand from appeal, Epis asked for
18 an evidentiary hearing on prosecutorial misconduct. The Court first granted the request, App.
19 5, RT 12/5/05, at 23, but later denied an evidentiary hearing on the ground that it was beyond
20 the scope of the Ninth Circuit’s remand order. The Court did hold evidentiary hearings on
21 the applicability of the safety valve on February 23, 2007 and June 22, 2007. The
22 government argued that Epis lied in his debriefing interview, including that “Exhibit 27 was
23 part of a marketing plan pertaining to the Silicon Valley proposal, which was never in
24 business.” *Plaintiff’s Memorandum*, document 366, filed 2/9/2007, at 2. As a result,
25 evidence was presented at the safety valve evidentiary hearing concerning whether Exhibit 27
26 was part of a separate Silicon Valley marketing plan or was related to the Chico marijuana
27 conspiracy of which Epis was convicted.
28

1 The complete draft Silicon Valley proposal that had been turned over in discovery
2 (bates ## 2179-93) was admitted at the hearing by the defense as Hearing Exhibit A. App. 5,
3 RT, 2/23/07, at 14-15; App. 2 (Hearing Exhibit A).⁶ Agent Mancini testified that he obtained
4 Exhibit A from Epis's computer. *Id.* at 97. The draft proposal is titled "Silicon Valley
5 Cannabis Caregivers" and describes a proposal to distribute medical marijuana in the San
6 Jose area pursuant to Proposition 215. App. 2. At page 2192, the Silicon Valley proposal
7 includes figures regarding anticipated member growth and revenues that match the data in
8 Exhibits 27 and 38. Eventually, the government stipulated that the data in the spreadsheets in
9 Exhibits 27 and 38 were identical to the data in the Silicon Valley proposal marked as
10 Hearing Exhibit A (App. 5, RT, 2/23/07, at 17-18) demonstrating that Exhibits 27 and 38
11 dealt with the Silicon Valley proposal--not the charged Chico marijuana conspiracy.

12 At the hearing, agent Redmond also admitted that Epis could not have grown the
13 amount of marijuana in the spreadsheet in his basement. App. 5, RT, 2/23/07, at 31. Agent
14 Redmond could not explain why the expenses in the spreadsheet did not increase as the
15 production figures doubled. *Id.* at 39. When asked whether the electricity costs in the
16 spreadsheet (PG&E expenses of \$250 for 1st month, \$300 for 2nd and 3rd months, and \$400
17 for months 4-12) could support an indoor grow producing the volumes projected in the
18 spreadsheet, Redmond replied, "No. But I don't know if these numbers are for his house,
19 CMMC, or for some other thing." *Id.* at 40. Redmond also conceded that Epis did not have
20 members in his basement garden and there was no evidence of baked goods. *Id.* at 41-42.
21 When asked directly by the Court whether Epis's basement garden was at the level of 800
22 members, 200 ounces of smoked pot, and grossing \$48,000 per week by June 1, 1997 as set
23 forth in Exhibit 27, Redmond admitted it was not. *Id.* at 42. The Court appeared incredulous
24

25 ⁶ On appeal, after the parties disputed what pages comprised trial Exhibit A, the
26 Ninth Circuit remanded to the district court to conduct a Rule 10(e) hearing to determine what
27 pages were in Exhibit A. On remand, the Court determined that the government's version
28 had the pages out of order; the proper order of Exhibit A is as follows: 9, 7, 5, 4, 6, 8, 10, 3,
1, and 2. The court's order with the exhibit is attached as Appendix 3.

1 that the government still claimed that Exhibit 27 related to the Chico grow. *Id.* at 44-50. The
2 Court stated what at this point had become obvious: “[t]his plan had nothing [to] do with
3 what happened in Chico.” *Id.* at 46; *see also id.* at 37-38, 44-46, 48-50.

4 Agent Mancini testified that he was the lead case agent and had the responsibility of
5 examining the evidence in determining the government’s theories of the case. *Id.* at 91.
6 Mancini examined all the evidence, including the Silicon Valley proposal. *Id.* at 92. When
7 he was shown the spreadsheet excerpt at pages 2191-92, Mancini agreed that the figures were
8 the same as in trial Exhibit 27. *Id.* at 92-93. Mancini considered both Exhibit 27 and the
9 Silicon Valley proposal to be important documents. *Id.* at 93. He did not recall whether he
10 told either AUSA Wong or his predecessor that the data in both documents were the same.
11 *Id.* at 92-93. Mancini acknowledged that he had no evidence that the Silicon Valley proposal
12 was ever carried out. *Id.* at 96-97, 101.

13 When the evidentiary hearing continued on June 22, 2007, Epis testified that Exhibit
14 27 was a Microsoft Excel spreadsheet that was never meant to be a stand-alone document.
15 He created the Excel spreadsheet to import into the Silicon Valley proposal, which was
16 created with a word processing program. App. 5, RT 6/22/07, at 5-6, 8-9.⁷ The starting date
17 of the spreadsheet--March 21, 1997--was probably the date he created the spreadsheet, which
18 was shortly after the Chico club opened on March 13, 1997. *Id.* at 12, 14, 35-36. The figures
19 in the spreadsheet were arbitrary numbers, a “wild guess” “from out of the blue.” *Id.* at 11,
20 14. Because Proposition 215 had just passed, there was no data to base the numbers on. *Id.*
21 at 11-12, 14. Epis picked 20 as the starting number of members arbitrarily, such as he did
22 with the other figures. *Id.* at 12, 36. The figures did not need to be accurate as it was just an
23 early, rough draft. *Id.* at 14.

24 In fact, the figures in the spreadsheet did not correspond at all to the evidence the
25 agents found when they raided Epis’s home and the Chico dispensary: the Chico dispensary
26 had 40 members when it was raided on June 25, 1997 (App. 5, RT, 7/8/02, at 741), while the
27

28 ⁷ Agents also found on Epis’s computer a draft proposal for a Newhall dispensary. It
was obviously made from the same template but did not contain any spreadsheets.

1 spreadsheet shows 1,600 members by July 1, 1997. In a report Deputy Redmond wrote to the
2 prosecutor one week before trial, Redmond estimated that “[i]n reality,” Epis was only
3 harvesting 18 plants approximately every seven days at the time his residence was raided on
4 June 25, 1997. App. 4, Disc. 14005-06. This further demonstrates that Exhibit 27 in no way
5 related to the much-smaller marijuana grow at Epis’s residence.

6 Although Deputy Redmond and the prosecutor knew that only 18 plants were being
7 harvested every week and the figures in Exhibit 27 did not match the marijuana at Epis’s
8 residence, Redmond nonetheless presented false testimony that the number of marijuana
9 plants being cultivated at Epis’s residence “supported the business plan based on the increase
10 in the amount of plants being produced.” App. 5, RT, 7/2/02, at 488. Exhibit 27 projected its
11 (Silicon Valley) members medical marijuana needs at 50 ounces/week on April 1, 1997, 100
12 ounces/week on May 1, 1997, and doubling every month thereafter so that 400 ounces/week
13 would be needed by July 1, 1997 and 25,600 ounces/week by January 1, 1998. To supply the
14 100 ounces/week by May 1, 1997, Redmond testified that it would require approximately 200
15 plants per week, or 800 plants per week for the 400 ounces/week of marijuana listed for July
16 1, 1997. *Id.*⁸

17 The prosecutor then asked Redmond whether there would be 1,000 or more plants
18 grown in that six-month period from the March 21, 1997 starting date on Exhibit 27. *Id.* at
19 492. In response, Redmond testified that if the marijuana grow doubled every month as
20 projected in Exhibit 27, by July 1, 1997, there would be “2,000 plants right there being
21 harvested just based on what we saw or what it looks like was going on there.” *Id.* at 495.
22 This is false and misleading. Redmond knew that the number of marijuana plants harvested
23 had not doubled in April, May, and June 1997. He had acknowledged that only 18 marijuana
24 plants were being harvested a week at the time of the raid on June 25, 1997. Yet, at trial, he

25
26 ⁸ Given space and electrical output constraints at Epis’s 2,000 square foot house, it
27 would not have been possible to grow the marijuana contemplated in Exhibit 27 at his house.
28 For example, to harvest 18 plants/week required 126 square feet. App. 5, RT, 7/2/02, at 482.
So 800 plants/week would require 5,600 square feet, not including work space or a vegetation
room.

1 still started the doubling from the March 21 starting date in Exhibit 27. *Id.* at 494. Indeed,
2 though he didn't say this in front of the jury, Redmond gave different projections to the
3 prosecutor in his report one week before trial:

4 In reality EPIS was probably only harvesting approximately 18 ounces a week or
5 one ounce of useable material per harvested plant. If you double that figure for
6 each month over the next sixth months, at the end of six months EPIS would be
7 harvesting approximately 1152 ounces of useable material per week, which is
8 approximately 1152 plants

9 App. 4, Disc. 14006.⁹ In short, Redmond falsely told the jury (based on a premise he knew to
10 be false that the doubling had started months earlier) that the marijuana being cultivated at
11 Epis's residence and the projections in Exhibit 27 showed that at least 1,000 marijuana plants
12 would be grown within a couple weeks of the raid when he knew this was not true.

13 Moreover, as Epis testified at a post-trial hearing, he never finished drafting the Silicon
14 Valley proposal and had abandoned it. App. 5, RT, 6/22/07, at 10. The only steps he took in
15 connection with the Silicon Valley proposal were the ones he took before drafting the
16 proposal: Epis met with the San Jose Planning Department and obtained their rules for
17 setting up medical marijuana dispensaries and talked with San Jose Police Officer Scott
18 Savage, who advised him to write up and submit a proposal. *Id.* at 9. The Silicon Valley
19 proposal was the one Savage suggested Epis write. *See* App. 12, *Declaration of Bryan*
20 *James Epis*, at ¶1.

21 **3. The Government Presented Other False And Misleading Evidence And**
22 **Argument In Convincing The Jury To Find The Charged Conspiracy**
23 **Involved At Least 1,000 Marijuana Plants.**

24 Not only did the government present false and misleading testimony about Exhibits 27
25 and 38, it provided other significant false testimony regarding the number of plants that Epis
26 conspired to grow in the charged Chico marijuana operation. When asked at a post-trial
27 hearing what other than Exhibits 27 and 38 showed a conspiracy to grow 1,000 plants, the
28 prosecutor mentioned the cost, sophistication, and time to install the equipment; that there

⁹ Redmond clarified at trial that 1/2 ounce would be bud, required for the "Amount smoked" on the top spreadsheet on Exhibit 27, and the other 1/2 ounce would be leaf, used for the "baked goods" spreadsheet on Exhibit 27. App. 5, RT, 7/2/02, at 482.

1 were 500 new rockwool cubes; and there was documentation of a prior harvest. App. 5, RT,
2 12/5/05, at 19-20.

3 First, the government presented false or misleading evidence that the cost, required
4 work, sophistication and time to install the “fortified door,” soundproofing, insulation,
5 ducting for the lights, electrical work, circuit breakers, timers, squirrel cage fans, tables, trays,
6 fans, pumps, and reservoir with plywood siding showed evidence of “permanency” to inform
7 the jury that the marijuana cultivation operation at Epis’s home would “be in existence for
8 quite a while” so as to reach the 1,000 plant threshold. App. 5, RT, 6/27/02, at 154-55; RT,
9 7/1/02, at 213-15, 226, 230-31; RT, 7/3/02, at 504-08. This was misleading because the
10 government knew that this equipment was all bought and installed for the prior 1994
11 marijuana grow. App. 4, Disc. 4, 49, 75-76, 83, 86, 88-89, 92, 96-99, 122-24, 175; App. 5,
12 RT, 2/23/07, at 106, 110. Moreover, although Deputy Redmond testified that there was extra
13 equipment for two tables as evidence of an intent to expand the operation (App. 5, RT,
14 7/3/02, at 502), he acknowledged that a table was “missing the legs” and he couldn’t “tell for
15 sure” what was in the box. App. 5, RT, 7/2/02, at 468-69. There were three unused trays not
16 four as Redmond testified, *id.*, damaged by agents in the 1994 search. Redmond also knew
17 there were only two corners. *Id.* at 472, and no extra required wheel extensions, pumps, or
18 light sets. There was testimony that there was enough room in the basement to set up two
19 extra tables (App. 5, RT, 6/27/02, at 128; RT, 7/3/02, at 502), but the video and Exhibit 8F
20 show that only one extra table could be added. One table would produce only 18 plants per
21 harvest.

22 Deputy Redmond also testified that there were over 500 new rockwool cubes available
23 to start over 500 additional plants. App. 5, RT, 7/2/02, at 467-68 (11 flats with 54 cubes per
24 flat). These purportedly “new” rockwool cubes were actually used, molding, 3-foot long
25 slabs left over from the 1994 marijuana grow, which were cut into three, 1 foot long by 8
26
27
28

1 inches wide. RT, 7/9/02, at 960-63.¹⁰ See App. 12, Declaration of Bryan Epis, at ¶8. Even a
 2 cursory view shows these were not 594 “new cubes.” Compare App. 1 (Exh. 8d) with App. 6
 3 (photos).

4 Next, agent Redmond testified that the grow cycle from start to harvest was
 5 approximately 60 days in Epis’s operation (App. 5, RT, 7/2/02, at 478-79), instead of the 90-
 6 day cycle testified by other government agents in pretrial and trial testimony. App. 5, RT,
 7 8/03/01, at 79 (deputy Dickie); RT, 7/2/02, at 299 (agent Mancini). Agent Redmond did so
 8 by shortening the flowering or bloom stage of the cycle from 60 days to 30 days. By using a
 9 30 rather than 60-day cycle, he doubled the speed at which Epis would have been expected to
 10 grow 1,000 plants if he had not been shut down and arrested. App. 5, RT, 7/3/02, at 502-03.
 11 The evidence showed there were 128 plants in the bloom room. With 18 plants harvested
 12 four times a month and one “void week” every two months, App. 5, RT, 7/9/02, at 929-30, it
 13 would take two months to harvest them all.¹¹ Instead, Agent Redmond improperly used a 30-
 14 day bloom cycle with Exhibit 27 to conclude that Epis would have reached 1,000 plants twice
 15 as fast than he would otherwise have if a proper 60-day bloom cycle were used. App. 5, RT,
 16 7/2/02, at 474-75, 478-79, 481, 488-96; RT, 7/3/02, at 502-03.

17 **4. With No Real Evidence That The Charged Conspiracy Involved At Least**
 18 **1,000 Plants, A Jury Would Not Have Found Epis Guilty Of Count 1 If Not**
 19 **For The Prosecution’s False And Misleading Evidence And Argument.**

20 False testimony is material and requires a new trial if “there is any reasonable
 21 likelihood the false testimony could have affected the judgment of the jury.” *Hayes v.*
 22 *Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc). “[I]f it is established that the
 23 government knowingly permitted the introduction of false testimony reversal is virtually
 24

25 ¹⁰ At the safety valve hearing, the court precluded the defense from questioning agent
 26 Redmond concerning these 11 used, molding slab portions left over from the 1994 case on the
 27 ground that it went beyond the scope of the remand order. App. 5, RT, 2/23/07, at 43.

28 ¹¹ This 60-day bloom cycle is also supported by paper and a calendar on the wall in
 the basement grow room, which can be seen in the video taken during execution of the search
 warrant. App. 12, *Declaration of Bryan James Epis*, at ¶4.

1 automatic.” *Id.* Here, the government had no co-conspirator testimony and little evidence to
2 justify finding a conspiracy to grow more than 1,000 plants. Instead, the prosecutor relied
3 heavily on the false testimony about Exhibits 27 and 38 to convince the jury that the charged
4 conspiracy to manufacture marijuana in Chico involved 1,000 or more plants so as to trigger
5 the 10-year mandatory minimum penalty. Starting in his opening statement, the prosecutor
6 called the spreadsheet exhibits the “most damaging” evidence that Epis intended to grow at
7 least 1,000 plants in his Chico operation. App. 5, RT, 6/27/02, at 67-68. Agent Mancini
8 testified that Exhibit 27 represented “[p]rojected growth . . . from the marijuana cultivation”
9 at Epis’s house. App. 5, RT, 7/1/02, at 244. Deputy Redmond also relied on the spreadsheet
10 figures in opining that the Chico marijuana grow was intended to continue long enough to
11 grow over 1,000 marijuana plants. App. 5, RT, 7/2/02, at 483-95. Significantly, the
12 prosecutor emphasized Exhibit 27 again in successfully opposing a Rule 29 motion for
13 acquittal on count one (App. 5, RT, 7/3/02, at 582), and in his closing argument to the jury.
14 App. 5, RT, 7/10/02, at 1075.

15 At a minimum, the false testimony and argument regarding the excerpts from the
16 Silicon Valley draft certainly influenced the jury in finding the charged conspiracy involved
17 1,000 or more marijuana plants. Even if the prosecutor and agents hadn’t known the
18 evidence used to convince the jury that the 1,000 plant threshold was false, a new trial is
19 required on count 1 because there is more than a reasonable probability that without the false
20 and misleading evidence, the result of the proceeding would be different. *Maxwell v. Roe*,
21 2010 U.S. App. Lexis 24432 (9th Cir. Nov. 30, 2010), at * 47. In the alternative, the knowing
22 presentation of false evidence and argument on such a critical issue combined with repeated
23 misrepresentations and the failure to own up to the misconduct warrants dismissal as a
24 sanction for the government’s “outrageous” misconduct.

25 **5. To The Extent The Court Does Not Find Prosecutorial Misconduct On The**
26 **Record, The Court Should Hold An Evidentiary Hearing.**

27 As noted earlier, at the safety valve evidentiary hearing, the Court noted that the
28 Silicon Valley marketing plan had nothing to do with what happened in Chico. App. 5, RT
2/23/07, at 46. In discussing Epis’s request for bail pending appeal immediately after his

1 resentencing, the Court found that the figures in Exhibit 27 “obviously affected the thousand
2 plant growing finding by the jury.” App. 5, RT, 9/14/07, at 70. If the Court does not find
3 prosecutorial misconduct established on the existing record, the Court should grant an
4 evidentiary hearing on Epis’s prosecutorial misconduct claim. Section 2255 requires that a
5 district court grant an evidentiary hearing “unless the [2255] motion and the files and records
6 of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255. An
7 evidentiary hearing is required where “the movant has made specific factual allegations that,
8 if true, state a claim on which relief could be granted.” *United States v. Schaflander*, 743
9 F.2d 714, 717 (9th Cir. 1984).

10 On appeal, the Ninth Circuit denied Epis’s misconduct claim because he had presented
11 insufficient evidence to prove his claim on direct review since there had been no evidentiary
12 hearing on the prosecutorial misconduct claim and there were no factual findings in the
13 district court. At the conclusion of the re-sentencing hearing, the Court denied the
14 prosecutor’s request for a finding that Epis lied regarding Exhibit 27. *Id.* at 45. As in earlier
15 hearings, the Court held that the issue of prosecutorial misconduct was not on the table
16 because no new trial motion was filed, *id.* at 4-6, 33-34, and thus the Court did not decide
17 whether the prosecutor or its agents committed misconduct. *Id.* at 33, 45.

18 Epis now has timely filed a motion to vacate his conviction and sentence under 28
19 U.S.C. § 2255, and his prosecutorial misconduct claim is ripe for review. The Court may also
20 grant Epis relief without an evidentiary hearing in this case by relying on the record,
21 supplemented by discovery documents and other supplied evidence, the judge’s own notes
22 and recollections of the trial, and common sense. *Shah v. United States*, 878 F.2d 1156, 1159
23 (9th Cir. 1989). If the Court does not find the government knowingly presented false
24 testimony and argument regarding Exhibit 27 and 38 and the other issues set forth in Section
25 III(A)(3), *supra*, on the existing record, the Court must hold an evidentiary hearing on the
26 claim.
27
28

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

4 While Epis’s case was on remand from the Ninth Circuit for resentencing and other
5 proceedings, the defense discovered that the government destroyed essentially all the
6 evidence in the case, including growing supplies and equipment, documentary evidence, and
7 the computer’s back-up hard drive. The government’s destruction of exculpatory and
8 potentially exculpatory evidence in violation of its own rules and regulations pending
9 resentencing proceedings can only be viewed as done in bad faith. The government’s
10 destruction or failure to collect potentially exculpatory evidence in bad faith requires
11 dismissal for a violation of due process under the Fifth Amendment. *Arizona v. Youngblood*,
12 488 U.S. 51, 53-57 (1988); *California v. Trombetta*, 467 U.S. 479 (1984); *United States v.*
13 *Cooper*, 983 F.2d 928 (9th Cir. 1993) (methamphetamine indictment dismissed where agents
14 destroyed defendants’ laboratory equipment where agents had reason to know it might reveal
15 legitimate uses for laboratory); *Miller v. Vasquez*, 868 F.2d 1116, 1120 (9th Cir. 1989). “A
16 police department’s compliance with ‘departmental procedure’ should be regarded as an
17 indication that the disposal of evidence was not performed in ‘bad faith.’” *United States v.*
18 *Heffington*, 952 F.2d 275, 281 (9th Cir. 1991). Conversely, non-compliance with
19 departmental procedure should be regarded as an indication that the disposal of evidence was
20 performed in bad faith, because bad faith is shown where “the police themselves by their
21 conduct indicate that the evidence could form a basis for exonerating the defendant.”
22 *Youngblood*, 488 U.S. at 58.

23 **1. The Government Destroyed Potentially Exculpatory Evidence In Bad Faith.**

24 After the Ninth Circuit heard oral argument in Epis’s direct appeal, the panel remanded
25 to the district court to await the outcome of *Gonzalez v Raich*, 545 U.S. 1 (2005), and for
26 resentencing. During the remand period, on July 18 and 19, 2005, Epis’s attorney Brenda
27 Grantland asked to view the physical evidence to look for, among other things, corroboration
28 that the agents’ trial testimony exaggerated the quantity of supplies and extra equipment
seized and to show that the equipment the agents cited as evidence that the conspiracy would

1 last for an extended period was actually left behind after the 1994 raid. Epis also sought the
2 backup hard drive the agents made from his computer to show the government had
3 manipulated the draft Silicon Valley proposal on Epis's computer to generate the two
4 excerpts the government used as Exhibits 27 and 38 and that those exhibits did not exist
5 except as part of the Silicon Valley proposal.

6 The prosecutor delayed several months. At a hearing on December 5, 2005, he
7 revealed that the evidence the defense sought had been destroyed. App. 5, RT, 12/5/05, at
8 10-13. The Court initially expressed disbelief, stating that this had never happened before in
9 its court. *Id.* at 14. The Court granted the defense's request to depose the agents involved in
10 the destruction of the evidence and ordered the government to provide declarations under
11 oath explaining what evidence had been destroyed and the circumstances surrounding its
12 destruction before an evidentiary hearing was held. *Id.* at 14-15, 23.

13 Before any depositions were taken or discovery provided, the government moved for
14 reconsideration on the ground that the circumstances surrounding the destruction of evidence
15 was beyond the scope of the remand order. *Memorandum in Support of Motion For*
16 *Reconsideration of Court's Orders To Allow Depositions*, filed 3/27/06 (document 346). The
17 Court granted the motion for reconsideration, agreeing that further discovery or hearings were
18 not appropriate because it was beyond the scope of the remand order. App. 5, RT, 5/22/06, at
19 3-6.

20 **2. The Government's Explanations For Its Destruction Of Evidence Are Not**
21 **Credible.**

22 Before filing for reconsideration, the government filed declarations from three DEA
23 agents regarding the destruction of the evidence. These declarations and the government's
24 explanations for the evidence's destruction while the appeal was pending defy credibility.
25 According to Deputy Redmond, the Sergeant-in-Charge of the Sheriff Department's
26 marijuana eradication unit, the growing supplies and equipment seized from Epis's home had
27 been stored *outdoors in a fenced lot* at the Butte County Sheriff's Department. App. 7,
28 *Declaration of Michael Shane Redmond*, filed 2/06/06, at 2-3. Although the raid was federal,
Redmond claimed the DEA stored the evidence at the Butte County Sheriff Department's

1 outdoor storage lot temporarily because of a shortage of space at DEA storage facilities.
2 Inexplicably, however, this evidence was never booked into the Sheriff's evidence unit and
3 no reports were generated to document it. *Id.* The DEA also never removed the evidence to a
4 proper DEA storage facility. In 2003, the Sheriff's Department purportedly discovered that
5 the evidence tags on the items stored in the outdoor lot were no longer readable, and
6 destroyed the items. App. 7, *Declaration of Rob Alston*, filed 2/6/06, at 4.

7 The documents seized from Epis's home were held in a DEA storage facility. DEA
8 Task Force Agent Cary Trzcinski was responsible for preparing some of the status reports
9 required by DEA regulations to be filed quarterly. App. 7, *Declaration of Cary Trzcinski*,
10 filed 2/7/06, at 2. Even though Epis's case went to a widely-publicized jury trial and he had
11 to contact Assistant U.S. Attorney Samuel Wong before filing each quarterly status report,
12 Trzcinski claimed he didn't know that Epis had appealed after he was sentenced. *Id.* at 2-3.
13 Rather, Trzcinski stated that he thought the only thing keeping the case open was the pending
14 case against Godwin. *Id.* at 2. Trzcinski added that, on January 6, 2004, AUSA Wong told
15 him that the government would not be filing charges against Godwin, so Trzcinski submitted
16 forms authorizing the destruction of the evidence. *Id.* In reality, Godwin's 1994 case was
17 dismissed on August 7, 2002, when the government withdrew its appeal from Godwin's
18 successful suppression motion. Document 234. The 1994 case against Epis was dismissed
19 after the evidence was suppressed on August 30, 2001. Godwin was not implicated in the
20 1997 case against Epis.

21 DEA Agent Brian Nehring stated in his declaration that he spoke to Wong in June 2005
22 about the status of the case and learned that Epis's appeal was still pending. App. 7,
23 *Declaration of Brian Nehring*, 2/27/06, at 3. After unsuccessfully trying to stop the
24 destruction of the evidence, he informed Wong that the evidence had been destroyed. In their
25 June 2005 conversation, Wong assured him that Epis would not obtain a new trial anyway.
26 *Id.* This contradicts Wong's representation to the Court at a December 5, 2005 hearing that
27 he had just learned of the destruction the prior Friday. App. 5, RT, 12/5/05, at 12.

1 The DEA sent Epis's computer to the Digital Evidence Laboratory in Lorton, Virginia.
2 Agents duplicated the hard drive and printed out all of the documents. According to a
3 declaration by DEA Agent Clayton Schilling, the case number (R7-97-0131) was
4 inadvertently changed to R1-97-0131, when the entries in an old log book were transferred to
5 a new log book. App. 7, *Declaration of Clayton D. Schilling*, at 3-4. R1-97-0131 was a
6 number for a case from Los Angeles which had been closed on June 13, 1997. *Id.* Agent
7 Schilling then claimed that the "case number R1-97-0131 was subsequently entered into its
8 Laboratory Management System ("LEMS") database on November 4, 1997, and was used for
9 all future evidence related transactions to include evidence destruction." *Id.* at 4, ¶7. As a
10 result, the government claimed the lab mistakenly destroyed the duplicate copy of the hard
11 drive on August 16, 2000. *Id.*

12 **3. The Government's Destruction Of Potentially Exculpatory Evidence Was In**
13 **Bad Faith And Warrants Dismissal.**

14 The government's bad faith destruction of virtually all the evidence in the case other
15 than its trial exhibits requires Epis's convictions be vacated and the charges against him be
16 dismissed. It goes far beyond reason and common sense to believe that the government
17 accidentally destroyed practically all of the physical evidence not once, but on three separate
18 occasions: first, at the Butte County storage facility; second, by DEA agents who did not
19 check whether an appeal was filed; and third, by a DEA laboratory through an error in
20 transcribing a DEA case number. One error might be negligence; three separate destructions
21 of evidence must be intentional.

22 The government's explanations simply do not ring true and demonstrate the
23 government's destruction of evidence was done in bad faith. Epis's attorney asked to see the
24 evidence on July 18 and 19, 2005. Five months later, at the December 5, 2005 hearing, the
25 prosecutor informed the Court that he had learned the prior Friday that the evidence had been
26 destroyed. App. 5, RT, 12/5/05, at 12. But this is contradicted by Agent Nehring's report.
27 Agent Nehring informed the prosecutor about the evidence being destroyed in June 2005,
28 which he documented in a 9/27/05 report of the evidence's destruction. *See App. 7, Exh 3 to*
Declaration of Nehring, filed 2/6/06. The prosecutor's explanation that he had just learned

1 the evidence was destroyed the week before the December 5, 2005 hearing is false and
2 constitutes egregious misconduct warranting dismissal.

3 Significantly, the DEA failed to follow its own procedures, demonstrating its actions
4 were in bad faith. According to the DEA's own manual, evidence seized by the DEA must be
5 stored at a DEA facility whenever possible. App. 8, DEA Agents Manual, Rev. 2002 (DEA
6 Manual) § 6654.22(I)(3). If the DEA evidence custodian cannot take possession of the
7 evidence the day it is seized, it may be temporarily stored at another law enforcement agency-
8 -only if it is stored in an evidence safe, file safe, or secure locker, accessible only to the
9 responsible DEA agent. App. 8, DEA Manual § 6663.42(B). It is simply improbable that the
10 DEA would disregard its own regulations and store evidence in an outdoor fenced lot. Doing
11 so would disregard Butte County Sheriff Department rules that "all property must be properly
12 tagged or marked with case identifying information, [including] a case number and item
13 number" and that "all property must be listed on a completed property report form before
14 being received by Evidence personnel." App. 4, Disc. 19190-91. The lack of any
15 documentation that the Butte County Sheriff's Department received this evidence makes the
16 government's story incredible. Indeed, photos provided in discovery of the property in the
17 evidence yard do not show Epis's six vented hoods, 20 black 3' x 3' trays and table pieces,
18 ducting, 6' tall fan, and other equipment. App. 4, Disc. 19199-19221. And, the 22 hoods
19 seen in the two photos at discovery #19204 and 19218 were the hoods seized in 1994. *See*
20 App. 4, Disc. 122, 142. The evidence indicates that the 1997 equipment was never brought to
21 the Butte County evidence yard.

22 Furthermore, DEA regulations require that evidence be preserved pending an appeal
23 unless and until the prosecutor provides authorization for its destruction. The evidence
24 custodian must contact the prosecutor and prepare status reports every 60 days during the
25 pendency of an appeal. App. 8, DEA Manual § 6663.51(C). The forms are kept in a separate
26 active inventory file with the DEA's evidence custodian and a copy is given to the prosecutor.
27 App. 8, DEA Manual §§ 6663.51(C), 6662.46(B), and 6663.41(D); *see also* App. 4, Disc.
28 19010-12. This refutes the government's claims that the documentary evidence was

1 destroyed inadvertently because agents did not know of the pendency of Epis's appeal and
2 had not obtained authorization from the prosecutor. The prosecutor can hardly claim
3 ignorance that the evidence was on track for destruction as he received a copy of the report
4 dated January 13, 2004. App. 4, Disc. 19010. Even if the prosecutor had given authorization
5 for the evidence's destruction, DEA rules require agents to give notice for the property to be
6 returned to the owner, and if not picked up, further notice is required to treat the property as
7 abandoned, App. 8, DEA Manual §§ 6663.53-6663.55, which was not done in this case. See
8 App. 4, Disc. 19005-19007.

9 Finally, the evidence indicates the government's explanation regarding the supposed
10 destruction of the copy of Epis's hard drive is not true. In his declaration, Agent Schilling
11 claims that the R7-97-0131 case number had been inadvertently changed to R1-97-0131 when
12 transcribing data from an old log book to a new log book in late 1997, and the R1-97-0131
13 number was subsequently entered into the LEMS database on November 4, 1997. App. 7,
14 *Declaration of Schilling*, at 4, ¶7. But that can't be true. Case R1-97-0131 was closed on
15 June 13, 1997, before Epis's case even began. The computer wasn't received until November
16 4, 1997, App. 4, Disc. 19015, and was logged in as R7-97-0131 at that time. App. 4, Disc.
17 19184. In late December 1997, Agent Brown recorded his analysis in a DEA 6 with the case
18 number R7-97-0131. App. 4, Disc. 19025. In that same report, Agent Brown stated that he
19 placed the back-up of the hard drive in a sealed envelope labeled # 51-215604, which would
20 have had the same R7 number he used in his report. An employee looking to destroy the
21 back-up hard drive under the mistaken impression that it belonged to closed case R1-07-0131
22 would not have found and destroyed the bag starting with "R7" that contained the back-up.¹²

23
24
25 ¹² Further, the new "SF" evidence log on its face does not appear legitimate. App. 4,
26 Disc. 19186-87. Although there is a category for "Name of Defendant," the log lists only the
27 case number and is missing substantial information set forth in the original "ST" log. App. 4,
28 Disc. 19184-85. The "SF" evidence log also contains supposed FedEx tracking numbers of
various lengths, including one for 12 digits (D0105) and one for 13 digits (lab No. D0099).
App. 4, Disc. 19186-87. Federal Express used 10-digit tracking numbers starting in
approximately June 1997, App. 9 (Affidavit of Tracey Ferrera), not the 12-digit system it uses

1 The destroyed evidence was potentially exculpatory evidence that would likely have
2 shown that Epis was in no way planning to grow 1,000 plants in the Chico operation and may
3 have shown that the Exhibits 27 and 38 were excerpts taken and manipulated from Epis's
4 hard drive. The destroyed back up files could have conclusively shown that Exhibit 27's only
5 function on Epis's computer was to import it into the Silicon Valley proposal file and was not
6 part of any other spreadsheet or document relevant to the Chico grow on Epis's computer.
7 An expert could have verified this by looking at the computer code.

8
9 C. EPIS'S COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN VIOLATION OF
THE SIXTH AMENDMENT.

10 To prevail on a claim of ineffective assistance of counsel, a defendant must establish
11 his attorney's performance fell below an objective standard of reasonableness and that the
12 attorney's deficient performance "prejudiced" the defendant. *Strickland v. Washington*, 466
13 U.S. 668 (1984). "[A] court deciding whether an attorney's performance fell below
14 reasonable professional standards can look to the ABA standards for guidance." *United*
15 *States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1994). Prejudice is shown where "there is a
16 reasonable probability that, but for counsel's unprofessional errors, the result of the
17 proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable
18 probability is a probability "sufficient to undermine confidence in the outcome." *Id.* "This
19 burden represents a fairly low threshold" and is "a lower standard than preponderance of the
20 evidence." *Riggs v. Fairman*, 399 F.3d 1179, 1183 (9th Cir. 2005). Prejudice in an
21 ineffective assistance of counsel claim is determined cumulatively. *Harris v. Wood*, 64 F.3d
22 1432, 1438-39 (9th Cir. 1995).

23 When discussing a plea bargain, "the gross mischaracterization of the likely outcome . .
24 . . , combined with the erroneous advice of the possible effects of going to trial, falls below the
25

26
27 today. It has never used 13-digit tracking numbers. This suggests the evidence log was
28 manipulated and does not provide an adequate explanation for the missing back-up hard
drive.

1 level of competence required of defense attorneys.” *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir.
2 1986).

3 When plea advice is based on “incomplete research,” it is deficient. *Hoffman v. Arave*,
4 455 F.3d 926, 940 (9th Cir. 2005). “The American Bar Association standards advise defense
5 attorneys that ‘under no circumstances should a lawyer recommend to a defendant acceptance
6 of a plea unless a full investigation and study of the case has been completed, including an
7 analysis of controlling law and the evidence likely to be introduced at trial.’” *United States v.*
8 *Leonti*, 326 F.3d 1111, 1121 (9th Cir. 2003), *quoting* ABA Standards for Criminal Justice 4-
9 6.1(b). “A defense lawyer in a criminal case has the duty to advise his client fully on whether
10 a particular plea to a charge appears to be desirable.” ABA Model Code of Professional
11 Responsibility, Ethical Consideration 7-7 (1992). It is “ineffective to fail to advise a client to
12 enter a plea bargain when it is clearly in the client’s best interest.” *Leonti*, 326 F.3d at 1117.

13 Prejudice is shown in the context of bad advice or no advice regarding plea agreements
14 when it is shown that “there is a reasonable probability that [the defendant] would have
15 accepted the plea agreement had he received accurate advice from his attorney.” *Hoffman*,
16 455 F.3d at 942-43. If a defendant “never had the opportunity to consider intelligently his
17 plea offer and to make an informed decision about it . . . on the bad advice of counsel. ... [he
18 has] met the second prong of the *Strickland* analysis.” *United States v. Day*, 285 F.3d 1167,
19 1172 (9th Cir. 2002). “The prejudice requirement [is] satisfied when defendant [states] his
20 willingness to accept a reasonable plea bargain and a great disparity existed between the
21 sentence exposure at trial and in the plea bargain.” *Riggs*, 399 F.3d at 1183-84, *citing* *Mask*
22 *v. McGinnis*, 233 F.3d 132, 142 (2d Cir. 2000).

23 “It flouts prudence to deny that a defense lawyer should try to look at a file he knows
24 the prosecution will call for aggravating evidence, let alone when the file is sitting in [his
25 office].” *Rompilla v. Beard*, 545 U.S. 374, 389 (2005). Referring to ABA Standards for
26 Criminal Justice, Prosecution Function and Defense Function 4-4.1 (3d Ed.1993) (Duty to
27 Investigate), the Supreme Court explained that it could not “think of any situation in which
28 defense counsel should not make some effort to learn the information in the possession of the

1 prosecution and law enforcement authorities.” *Rompilla*, 545 U.S. at 387 n.6. A defense
2 attorney has a “duty to make reasonable investigations or to make a reasonable decision that
3 makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691; *see also Harris v.*
4 *Wood*, 64 F.3d 1432, 1435-36 (9th Cir. 1995). “Thus we have found counsel ineffective
5 where he neither conducted a reasonable investigation nor made a showing of strategic
6 reasons for failing to do so.” *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994).

7 The *Strickland* standard for ineffective assistance claims applies as well to claims that
8 *appellate* counsel was ineffective on appeal. *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir.
9 2002).

10 Epis’s counsel rendered ineffective assistance for the following reasons, among others:

11 **1. Counsel Rendered Ineffective Assistance During Plea Negotiations.**

12 After Assistant U.S. Attorney Johnny Griffin left the U.S. Attorney’s Office, the case
13 was reassigned to Assistant U.S. Attorney Samuel Wong, who refused to abide by a plea offer
14 made by Griffin. After a motion for specific performance of the plea agreement failed, the
15 parties undertook some efforts at settlement. In early 2002, Wong offered a plea bargain for a
16 4-year prison sentence in exchange for Epis’s guilty plea, an offer the prosecutor held open
17 for only one day. After relaying the offer to Epis, Serra rendered ineffective assistance of
18 counsel in not advising Epis to accept the deal. Serra told Epis that “if we get any of our jury
19 instructions, we’re going to win. . . . [w]e probably won’t, but if not, I can relate it as a
20 medical marijuana case, there’s a shot at jury nullification. Otherwise it would be 5 years.
21 There’s pretty much no chance you’ll get 10 years.”¹³ App. 12, *Declaration of Bryan James*
22 *Epis*, at ¶6. At no time did Serra advise Epis to take the deal because it was clearly in his best
23 interest. *Id.* Moreover, before trial, neither Serra nor the prosecutor realized that Epis was

24
25 ¹³ Of course, 10 years was the *minimum* sentence for a conspiracy to cultivate at least
26 1,000 marijuana plants. The charge also carried a *maximum* sentence of life imprisonment.
27 Although Exhibit 27 was not related to the Chico grow at all, the prosecutor added up the
28 weights listed and arrived at an exorbitant figure of 180,000 tons in his First Opposition to
Defendant’s Sentencing Memorandum, filed September 30, 2002. If followed (which it was
not), this could have led to a sentence of life in prison.

ineligible for the safety valve if he went to trial. If Serra had researched the law at the time of the offer, he would have realized that the safety valve would likely be ruled to be unavailable because Epis's marijuana drug offenses were charged as occurring within 1,000 feet of a school. *See, e.g., United States v. Anderson*, 200 F.3d 1344, 1348 (11th Cir. 2000); *United States v. McQuilkin*, 78 F.3d 105, 108-09 (3d Cir. 1996). Epis's counsel's failure to adequately research the law also contributed to counsel giving Epis poor advice to reject the prosecutor's 4-year plea bargain. If Serra had properly advised Epis that there was a fair chance of a 10-year sentence, Epis would have taken the deal. Counsel's failure to advise Epis to take the deal constituted ineffective assistance of counsel in violation of the Sixth Amendment.

2. Counsel Rendered Ineffective Assistance In Trial Preparation And Trial.

a. Counsel Rendered Ineffective Assistance In Failing To Show That Exhibits 27 And 38 Had Nothing To Do With the Marijuana Cultivation Charges, But Rather Were Part Of A Completely Unrelated "Silicon Valley Cannabis Caregivers" Proposal.

As set forth more fully in Section III(A), the prosecutor relied heavily on false and misleading testimony and arguments regarding spreadsheet Exhibits 27 and 38 to show a conspiracy to grow 1,000 or more marijuana plants, going so far as to refer to the spreadsheet in his opening statement as Epis's "business plan" and the "most damaging evidence" against him. App. 5, RT, 6/27/02, at 67-68. Although Exhibits 27 and 38 were turned over in discovery and emphasized in the prosecution's opening statement, Epis's trial counsel was woefully unprepared to rebut the government's use of them at trial. Moreover, Serra's deficient handling of the exhibits prejudiced Epis. If Epis's counsel had adequately defended against the prosecutor's improper use of these exhibits, Epis would have been acquitted of the 1,000 plant element in count one: the Court would have granted a motion for judgment of acquittal as to the 1,000 plant enhancement in count one or, alternatively, a jury would not have found Epis guilty of conspiring to cultivate *at least 1,000 marijuana plants* as charged in count one.

(1) Epis’s Counsel Failed To Move In-Limine To Exclude Exhibit 27 And The Silicon Valley Proposal From Which It Was Derived Under The Court’s In-Limine Ruling And Federal Rules Of Evidence 401, 404(b), And 403.

The government filed an exhibit list almost three weeks before trial that contained Exhibit 27 as an exhibit. *See Gov’t Exh. List*, Doc. #205, filed 6/7/02. It also provided defense counsel the entire Silicon Valley proposal in discovery, including the two pages that it introduced as Exhibit 38 during cross-examination of Epis.¹⁴ When he received the government’s exhibit list, Epis’s counsel should have moved to exclude Exhibit 27 and the pages from which it was derived before trial on a number of grounds. First, Exhibit 27 violated the Court’s in-limine ruling barring any evidence regarding medical marijuana at trial. Exhibit 27 was part of a proposal entitled “Silicon Valley Cannabis Caregivers” and dealt entirely with an idea for a San Jose medical marijuana dispensary. Trial counsel should have moved to exclude Exhibit 27—as well as Exhibit 38 and the entire proposal—under the Court’s in-limine ruling. Further, as set forth more fully above in Section III(A), because these exhibits had nothing to do with the charged marijuana cultivation offenses, Exhibits 27 and 38 were inadmissible as irrelevant under Federal Rule of Evidence 401.

The government’s exhibits also are evidence of uncharged “other acts” that were inadmissible under Federal Rule of Evidence 404(b), which generally prohibits “[e]vidence of other crimes, wrongs, or acts” unless the evidence is probative for some other relevant purpose with an appropriate limiting instruction and notice to the defense. This evidence had no relevant purpose. Inexplicably, the government never sought to introduce this evidence under Rule 404(b), but as direct evidence of the charged offense. But Exhibits 27 and 38 dealt with a separate, completely unrelated Silicon Valley project that Epis never acted on. If Epis’s counsel had moved to exclude Exhibit 27 and evidence of the Silicon Valley proposal, the Court would have excluded the evidence under the Court’s in-limine ruling, as irrelevant,

¹⁴ The government’s exhibit list did not contain Exhibit 38, which was not introduced in its case-in-chief.

1 and as inadmissible other acts evidence under Rule 404(b).¹⁵ Further, exhibits 27 and 38
2 were inadmissible under Federal Rule of Evidence 403 because their probative value, if any,
3 was “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or
4 misleading the jury.” Fed. R. Evid. 403. This is exactly what happened. With little evidence
5 that Epis conspired to grow more than 1,000 plants, the government hammered on irrelevant
6 exhibits that dealt with a separate medical marijuana proposal in connection with guidelines
7 for such dispensaries that had been recently enacted in San Jose. Trial counsel’s ineffective
8 assistance prejudiced Epis as there is no way he would have been convicted of conspiring to
9 grow at least 1,000 marijuana plants if the government was barred from using Exhibits 27 and
10 38 at trial.

11 **(2) Counsel Failed To Cross-Examine Agents Mancini And**
12 **Redmond To Show That Exhibit 27 Was Unrelated To The**
13 **Charged Marijuana Cultivation Conspiracy, But Rather Was**
14 **Part Of A Completely Separate, Never Utilized Silicon Valley**
15 **Proposal.**

16 Even if Exhibit 27 was admitted over the proper objections at trial, counsel should have
17 effectively cross-examined agents Redmond and Mancini to show that Exhibit 27 came from
18 a completely separate Silicon Valley plan that had nothing to do with the charges against
19 Epis. Exhibit 27 was provided in discovery at page 2071; the entire Silicon Valley proposal
20 had been found on Epis’s computer and was provided to defense counsel in discovery at
21 pages 2179-93. A reasonably competent attorney would have reviewed discovery and, after
22 realizing that Exhibit 27 was just an excerpt of the full, unrelated Silicon Valley proposal,
23 would have shown at trial that the exhibit had nothing to do with the marijuana cultivation
24 charges. With even a cursory review of discovery, Serra could have pointed out that none of

25 ¹⁵ To make matters worse, Serra did make an attempt to exclude Exhibit 27 at the
26 start of trial, but on the mistaken basis that it was a projection of what all clubs in California
27 could produce, not because it was excerpted from the Silicon Valley proposal and thus, taken
28 out of context. App. 5, RT, 6/27/02, at 45-47. This was because Serra did not know Exhibit
27 came from the Silicon Valley proposal. He also did not realize the proposal was in
discovery at 2179-93, App. 2, and that scattered portions of the proposal were at 1449-52,
1502, 1623-25, 1981-85, 2039, and 2071. App. 4.

1 the proposed operators of the Silicon Valley dispensary, App. 2, Disc. 2190, were ever
2 mentioned as possible growers at Epis's house in 1997. Instead, because Serra had not
3 adequately reviewed discovery, he floundered and did not ask any questions designed to
4 show that Exhibit 27 was part of the Silicon Valley proposal.

5 Indeed, at the "safety valve" evidentiary hearing, Epis's appellate attorney Brenda
6 Grantland demonstrated through more effective cross-examination of government agents that
7 the spreadsheet exhibits introduced at trial were part of a separate Silicon Valley proposal that
8 had nothing to do with the Chico marijuana cultivation charges. App. 5, RT, 2/23/07, at 31-
9 50, 91-93. At that hearing, agent Mancini admitted that he had reviewed the Silicon Valley
10 proposal and that all the data in Exhibit 27 was part of that proposal. *Id.* at 91-93. Agent
11 Redmond also acknowledged--after trial--that the numbers in the spreadsheet did not match
12 the much smaller, marijuana growing operation in Chico and that he didn't know if the
13 figures were for the marijuana grow at Epis's house, CMMC, "or for some other thing." *Id.*
14 at 40. As a result, the Court grew increasingly skeptical of the government's insistence that
15 Exhibit 27 was related to the Chico grow, until finally the Court declared "[t]his plan had
16 nothing [to] do with what happened in Chico." *Id.* at 46. If Serra had simply done a similar
17 cross-examination at trial, the court and the jury would have seen that the evidence the
18 prosecutor called the "most damaging" at trial was completely unrelated to the charged
19 offenses.

20 **(3) Counsel Rendered Ineffective Assistance In Failing to Review**
21 **Discovery and Preparing Epis For Examination Regarding**
22 **Exhibits 27 and 38.**

23 Before trial, counsel did not give Epis a full copy of discovery. Rather, Epis only
24 received the initial set with bates numbered pages 1-1230 from his attorney. App. 12,
25 *Declaration of Bryan James Epis*, at ¶9. This did not include the full Silicon Valley draft
26 proposal from Epis's computer at pages 2179-93 or other individual pages from the proposal
27 at pages 1449-52, 1502, 1623-25, 1981-85, 2039, and 2071. App. 4. Epis also was neither
28 shown nor given copies of either Exhibit 27 or the pages of discovery that became Exhibit 38
at trial. When the government admitted Exhibit 27 and Serra questioned Epis about it on

1 direct examination, Epis thus did not realize it came from the Silicon Valley proposal that he
2 drafted more than five years earlier. As a result, he initially testified (wrongly) on direct and
3 cross-examination that he thought it reflected some form of projection for all the medical
4 marijuana dispensaries combined in California.

5 Likewise, Epis was surprised on cross-examination when the prosecutor showed him a
6 document entitled “Marketing Plan” marked as Exhibit 38 (App. 5, RT, 7/9/02, at 888-89),
7 which Epis had not reviewed before trial. Serra objected to Exhibit 38 on the ground that he
8 had not seen the exhibit and it was not provided in discovery. *Id.* at 886-87. (Since Serra had
9 not seen the exhibit and claimed it was not in discovery, Serra obviously had neither shown
10 nor discussed Exhibit 38 with Epis in preparation for trial.) But after the prosecutor pointed
11 out that the previous prosecutor had provided it in discovery years earlier, Serra did not
12 pursue his objection to Exhibit 38. He never realized that Exhibit 38 was part and parcel of
13 the Silicon Valley draft plan that had been provided elsewhere in discovery.

14 After a break in his testimony, Epis realized that Exhibits 27 and 38 were part of the
15 Silicon Valley proposal. After his first day of testimony, Epis found a printout of most of the
16 pages of the proposal and brought them to Serra the next day. As discussed in the next
17 section, Serra attempted to introduce it as defense Exhibit A under the Rule of Completeness
18 to explain the meaning of Exhibits 27 and 38, but the Court granted the government’s motion
19 to exclude Exhibit A. App. 5, RT, 7/10/02, at 1003. If counsel had given Epis a full copy of
20 discovery and had reviewed it with his client in preparation for trial, Serra and Epis would
21 have discovered that Exhibits 27 and 38 were derived from the Silicon Valley plan and were
22 not projections for the Chico grow as the government claimed. Because Serra had not
23 reviewed all of the discovery with Epis, Epis did not remember that Exhibits 27 and 38 were
24 merely excerpts from the Silicon Valley plan and the government was able to exploit his
25 inability to remember at trial.
26
27
28

(4) At Trial, Counsel Bungled An Attempt To Introduce An Incomplete Version Of The Silicon Valley Proposal To Show That Exhibits 27 and 38 Were Unrelated To The Chico Cultivation Charges.

After Epis brought Serra pages from the Silicon Valley proposal that Epis found at home, Serra attempted to introduce it during re-direct examination of Epis as defense Exhibit A under the Rule of Completeness. *See* Fed. R. Evid. 106. The prosecutor objected on the ground that it had not been previously disclosed and was different than Exhibit 38. App. 5, RT, 7/10/02, at 1029-33. Serra generally argued that it was part of the discovery provided by the government, but he was unable to point out where in discovery the pages of Exhibit A could be found. *Id.* at 1030-33. The Court excluded Exhibit A under Federal Rule of Evidence 403 because some pages referred to medical marijuana. *Id.* at 1002-03.

On appeal, the Ninth Circuit rejected the argument that the district court erred in excluding defense Exhibit A because Epis's counsel had abandoned his argument during trial that the prosecutor had a copy of the exhibit in its own discovery:

Epis challenges the district court's decision to exclude the Silicon Valley proposal under Federal Rule of Evidence 403, rather than admitting it under the rule of completion. This was not erroneous, given Epis's trial counsel's abandonment of the position that the *proposal was turned over during discovery*.

United States v. Epis, 332 Fed. Appx. 409, 412 n.2, 2009 U.S. App. Lexis 17833 (2009) (emphasis added).

The Silicon Valley proposal had been turned over in discovery to defense counsel and was at pages 2179-93. Serra's lack of familiarity with discovery prevented him from pointing this out to the Court. Either the partial proposal brought in by Epis (defense Exhibit A) or the full Silicon Valley proposal at 2179-93 should have been admitted under the Rule of Completeness. *See* Fed. R. Evid. 106. If Serra had located the proposal during the recess and showed where the government's exhibits were excerpted from it, Rule 106 would have required the full Silicon Valley proposal's admission to prevent the misleading impression created when the government admitted only one and two page excerpts from the proposal. "When one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required

1 for completeness is ipso facto relevant and therefore admissible under [Rules] 401 and 402.”
2 *Beech Aircraft Corp v. Rainey*, 488 U.S. 153, 172 (1988); *see also United States v. Dorrell*,
3 758 F.2d 427, 434 (9th Cir. 1985) (“Rule 106 seeks to avoid the unfairness inherent in ‘the
4 misleading impression created by taking matters out of context.’”) (*quoting* Fed. R. Evid.
5 106, Advisory Comm. Note). As the Court noted at Epis’s resentencing hearing, instead of
6 seeking to introduce the full proposal, “Mr. Serra attempted to introduce a clearly incomplete
7 document, Exhibit A. . . . [When the prosecutor objected,] Mr. Serra said, “Well, the
8 complete document is in my office or at home somewhere in San Francisco. Did he ask for a
9 continuance? Did he ask for anything? No.” App. 5, RT, 9/14/07, at 53.

10 Nor was the Silicon Valley proposal inadmissible under Rule 403. To the extent that
11 some of its language referred to a “medical marijuana” plan, the Court could have redacted
12 the proposal to exclude mention of “medical” marijuana if it deemed necessary. More
13 fundamentally, it was the government that introduced the partial exhibit. “If otherwise
14 admissible evidence is necessary to correct a misleading impression, then either it is
15 admissible for this limited purpose by the force of Rule 106 . . . or, if it is inadmissible
16 [because of Rule 403], . . . *the misleading evidence must be excluded too. United States v.*
17 *LeFevour*, 798 F.2d 977, 980-82 (7th Cir. 1986) (emphasis added). A more complete Silicon
18 Valley proposal that would have explained the context of Exhibits 27 and 38 should have
19 been admitted at trial, or Exhibits 27 and 38 should have been excluded as incomplete and
20 misleading under Rule 403. If Serra had rendered even minimally competent representation,
21 the result of the proceeding would have been different. Exhibits 27 and 38 should have been
22 excluded or should have been rendered insignificant at trial by showing that the exhibits
23 concerned an unrelated proposal to dispense medical marijuana in San Jose. Either way, Epis
24 was prejudiced because the evidence would have been wholly insufficient to convince a jury
25 beyond a reasonable doubt (or withstand a Rule 29 motion) that Epis conspired to grow at
26 least 1,000 marijuana plants at his Chico residence.
27
28

1 **(5) Counsel Failed To Obtain And Use The San Jose Rules That**
2 **Would Have Further Corroborated That The Silicon Valley**
3 **Proposal Had Nothing To Do With The Chico Charges.**

4 The Silicon Valley Cannabis Caregivers proposal, from which Exhibits 27 and 38 were
5 derived, states that the cooperative would conduct itself with all relevant California laws,
6 including “the regulations recently adopted by the San Jose City Planning Department, and
7 the San Jose Police.” App. 4, Disc. 2187. The Silicon Valley plan also requires that “the San
8 Jose City Council ratify this proposal.” *Id.* In mentioning San Jose City and Police rules and
9 regulations, the proposal referred to the San Jose City Council adopting regulations in March
10 1997 to permit and monitor medical marijuana dispensaries as well as San Jose Police rules
11 regulating medical marijuana. *See* App. 10, at 1 (San Jose Mercury News, “S.J. Oks
12 Medicinal Marijuana Clubs,” 3/26/97). The San Jose police rules required that all medical
13 marijuana be grown “on-site” because at the time they believed the transportation of
14 marijuana was prohibited. App. 10, at 2 (San Jose Mercury News, “San Jose Cops Unveil
15 Restrictions On Selling Medical Marijuana, On-Site Cultivation Required,” 5/17/97).
16 Moreover, according to the Council’s regulations, such cultivation was only permitted in
17 accordance with a special “use permit” from the City of San Jose. App. 10, at 3-9 (City of
18 San Jose Ordinance 25378, as amended 3/21/97).

19 At trial, Epis testified that he talked to San Jose police officer Scott Savage about the
20 rules for a medical marijuana dispensary. App. 5, RT, 7/9/02, at 974. Yet, Serra neither
21 obtained nor attempted to use the San Jose rules at trial. If he had done so, he could have
22 shown the supplemental rules provided by Scott Savage required *on-site* cultivation. Thus,
23 Epis could not have used any of the marijuana plants at his house in Chico to supply Exhibit
24 27. This would also have shown that the Chico marijuana grow in Epis’s basement was
25 completely unrelated to Exhibits 27 and 38, and the entire Silicon Valley proposal.

26 **b. Besides Ineffective Assistance Concerning Exhibits 27 and 38, Epis’s**
27 **Counsel Also Failed To Provide Reasonably Competent Assistance In**
28 **Otherwise Challenging The 1,000 Plant Element Of Count 1.**

 Epis’s counsel also rendered ineffective assistance in a number of ways with respect to
the government’s other evidence and argument that Epis conspired and intended to grow at

1 least 1,000 marijuana plants in Chico. First, Serra should have emphasized that the 458
2 plants seized by law enforcement overstates the size of the marijuana cultivation enterprise.
3 169 of the plants were seedlings, half of which would be discarded because they were male
4 plants that would not produce bud.¹⁶ Second, it is undisputed that Epis knew he was going to
5 be raided by law enforcement. Butte County agents knew that Epis was continuing to
6 cultivate marijuana and told his attorney so. App. 5, RT, 6/21/00, at 81, 126. Thus, “[Epis]
7 expected [the] raid” and had put a sign on his door stating that his would be a test case in
8 federal court for the lawfulness of California’s Proposition 215. App. 4, Disc. 308-09. He
9 did not intend to continue to grow marijuana long enough to reach 1,000 plants; rather, he
10 was passionate enough to risk a prison sentence to test the legality of California’s medical
11 marijuana law in federal court.

12 Further, Serra failed to rebut the government’s evidence and argument that the
13 presence, cost, amount of work involved, and time to install the equipment at Epis’s residence
14 demonstrated that he intended to grow marijuana for an extended period such that he’d
15 eventually reach 1,000 plants by pointing out that it was left over from a 1994 grow. For
16 example, Mancini testified that Epis’s use of a “fortified door” at his house shows that he
17 “was intending to grow over a period of time” and that “the marijuana cultivation site is going
18 to be around for a while.” App. 5, RT, 7/1/02, at 213-15. The government also presented
19 substantial testimony concerning other equipment left installed at Epis’s residence. App. 5,
20 RT, 7/1/02, at 230-31; RT, 7/3/02, at 504, 507, 633-34 (ducting); RT, 7/2/02, at 467-69 (used
21 rockwool slabs); RT, 7/3/02, at 633; 634 (ducting); 504, 508, 635, RT, 7/8/02, at 715, 716
22 (wiring); RT, 7/3/02, at 504, 508 (electrical work and circuit breakers); 505 (squirrel cage fan,
23 tables, trays, and reservoir with plywood siding); 504, 507 (lights with hoods). Serra didn’t
24 present evidence or argue that because the other growers didn’t buy or install anything, it’s

25
26 ¹⁶ But these plants would take up two-thirds of the 126 plant bloom room for one
27 month before showing their sex, adding two-thirds of a month to the time to reach 1,000
28 plants. The other 84 seedlings would wait their turn with the 77 vegetative plants and 75
clones to go in the bloom room, at 18 plants per week. So Epis would have had to go many
more months after the raid to reach 1,000 plants.

1 presence doesn't show they agreed with Epis to grow 1,000 plants. Serra knew or should
2 have known that the reinforced door and almost all of the equipment, save for a florescent
3 shop light, App. 5, at RT 635, was left there from a 1994 grow because it was mentioned
4 repeatedly in discovery and was subject to a successful motion to suppress. App. 4, Disc. 4,
5 49, 75-76, 83, 86, 88-89, 92, 98-99, 175. Instead of arguing the conspiracy couldn't go past
6 June 25, 1997, *see* App. 5, RT, 7/1/02, at 226-29, 453, Serra should have argued the
7 government's testimony and argument about the "reinforced door" and other equipment was
8 misleading and had been installed at the house years earlier.¹⁷ He also should have
9 introduced evidence to show that the 11 cut 1' x 8" used, molding slab portions mentioned in
10 Section III(A)(3), *supra*, were not rockwool cubes.

11 Finally, Serra also failed to present evidence and rebut Agent Redmond's false
12 testimony concerning a 4-week bloom cycle. If Serra had consulted with and retained an
13 expert, the expert would have agreed with the pretrial testimony of Deputy Dickie and the
14 trial testimony of agent Mancini that the length of time to grow marijuana from start to
15 harvest is generally accepted to be 90 days--not 60 days as Agent Redmond testified. *See*
16 App. 5, RT, 7/2/02, at 478-79. As set forth in Section III(A)(3), an expert would have
17 rebutted Agent Redmond's testimony and conclusion on the length of time it would have
18 taken to reach 1,000 plants.

21
22 ¹⁷ Nor could Serra have strategically decided to forgo evidence and argument that
23 this equipment was installed prior to the 1994 grow as an attempt to avoid opening the door
24 to testimony about the suppressed 1994 marijuana grow. Once the court permitted the
25 prosecutor to question Epis about the 1994 marijuana grow at his house, Serra should have
26 brought out on Epis's redirect testimony that the fortified door, electrical wiring, etc. were not
27 put it in for the charged marijuana operation but were there from the prior grow. *See United*
28 *States v. Epis*, 332 Fed. Appx. 409, 413 n.3, 2009 U.S. App. Lexis 17833 (9th Cir. 2009)
("After the district court decided to allow the government to cross-examine Epis for
impeachment purposes in relation to the prior growing operation, any reason Epis may have
had to avoid proffering his own explanation of the door lost its force.").

c. **Trial Counsel Acted Incompetently In Relying On “Jury Nullification” In Putting On A Multiple Conspiracy Trial Defense And Calling Epis To Testify At Trial.**

Serra rendered ineffective assistance in attempting to put on a “multiple conspiracies” defense at trial, which largely confirmed the government’s evidence that Epis was involved in growing marijuana with others and was a wholly ineffective, thinly disguised attempt at jury nullification rather than a bona fide defense. After the government finished its case-in-chief, defense counsel called David Kasakove and Bonnie Metcalf, who each admitted conspiring to grow marijuana with Epis at his house, though not with each other. Both Kasakove and Epis testified that they began growing marijuana together in March 1997. App. 5, RT, 7/3/02, at 631; RT, 7/8/02, at 752. Kasakove testified that he and Epis harvested 18 plants per cycle between 11 and 15 times overall. App. 5, RT, 7/3/02, at 630-31; RT, 7/8/02, at 752; RT, 7/9/02, at 928-31. Far from presenting a viable “multiple conspiracies” defense, the defense witnesses confirmed that Epis had been growing marijuana with others at his residence over a period of time. In instructing the jury, the Court defined a conspiracy as “a kind of criminal partnership, an agreement of two or more persons to commit one or more crimes.” App. 5, RT, 7/10/02, at 1140. In his closing, the prosecutor stressed that Epis’s testimony helped establish the conspiracy: “We have Bryan Epis’ own admissions on the stand that he was involved in a conspiracy with others,” App. 5, RT, 7/10/02, at 1065. Any reasonably competent counsel would have known that this so-called defense actually corroborated-- rather than refuted--much of the government’s case. *See, e.g. Harris v. Wood*, 64 F.3d 1432, 1437 (9th Cir. 1995) (counsel rendered ineffective assistance in putting the defendant on to testify in a manner that supported the government’s case). “[W]hen a defendant takes the stand in his own behalf and admits all of the elements of the crime, exactly in accord with the court’s instructions to the jury, it is surely inadequate legal representation to hope that the jury will ignore the court’s instructions and acquit from sympathy.” *Capps v. Sullivan*, 921 F.2d 260, 262 (10th Cir. 1990).

Indeed, after Serra informed the Court on the first day of trial that he intended to present a multiple conspiracy defense, the prosecutor responded that “what the defendant is

1 trying to do is back-door the marijuana medical defense which the Court has ruled to be
2 irrelevant.” App. 5, RT, 6/26/02, at 37-38. The prosecutor also recognized in closing that
3 defense counsel’s true defense was an attempt at jury nullification on the ground that all the
4 marijuana was grown for patients with medical marijuana needs: “Mr. Serra spent most of
5 his closing argument, I submit to you, not talking about the evidence in this case, but making
6 a political speech to you about medical marijuana.” App. 5, RT, 7/10/02, at 1127.

7 By calling Epis to testify, defense counsel also rendered ineffective assistance by
8 opening the door to the prosecutor questioning Epis about the 1994 marijuana grow that had
9 been suppressed from the government’s case-in-chief. Before trial, the court had barred any
10 evidence or reference to medical marijuana at trial, going so far as preventing the parties from
11 using the word “patient.” App. 5, RT, 6/27/02, at 81-82, 88. Once Epis testified, however,
12 the Court granted the prosecutor’s motion to permit questioning of Epis about the 1994 grow
13 under Federal Rule of Evidence 608(b) because the defense had put “motive” into issue
14 through the defense witnesses’ testimony. App. 5, RT, 7/9/02, at 818.¹⁸ As a result, Epis
15 admitted on cross-examination that, in 1994, law enforcement seized approximately 450
16 plants from his house and that he may have grown over 1,000 plants during a 9-month period
17 that year. App. 5, RT, 7/9/02, at 906-07. The prosecution then exploited this testimony in
18 arguing to the jury that Epis also intended to grow at least 1,000 plants in the 1997 grow
19 operation. App. 5, RT, 7/10/02, at 1072-73, 1077.

20 By presenting an ill-conceived multiple conspiracy defense and calling Epis to testify,
21 Epis was prejudiced in that there was a reasonable probability that Epis would not have been
22 convicted of a “conspiracy” based on the government’s case-in-chief. In the alternative,
23 especially in combination with his ineffective assistance regarding Exhibits 27 and 38 and
24 other issues, *see, supra*, Serra’s chosen defense prejudiced Epis in that it adversely affected
25 the jury’s finding that Epis conspired to grow *1,000 or more marijuana plants*. At the
26

27 ¹⁸ On appeal, the Ninth Circuit upheld the Court’s ruling allowing the prosecution
28 to question Epis about the 1994 marijuana grow. *United States v. Epis*, 332 Fed. Appx. 409,
413, 2009 U.S. App. Lexis 17833 (9th Cir. 2009).

1 resentencing hearing, the Court noted that “[t]here was a long speech about medical
2 marijuana, but there wasn’t enough attention, in my view, paid to the evidence. . . . My
3 concern here is that not enough attention was paid to the evidence and more attention was
4 paid to the cause. Maybe that wasn’t necessarily in [Epis’s] best interest.” App. 5, RT,
5 9/14/07, at 53-54.

6 **d. Trial Counsel Rendered Ineffective Assistance In Failing To Request**
7 **A Lesser-Included Instruction On Count 1 To Permit The Jury To**
8 **Find That The Charged Conspiracy Was To Grow At Least 100, But**
9 **Less Than 1,000, Marijuana Plants.**

10 Count 1 charged Epis with conspiring to manufacture at least 1,000 marijuana plants
11 within 1,000 feet of a school. The instructions asked the jury to determine whether the
12 government proved beyond a reasonable doubt that Epis conspired to manufacture marijuana
13 within 1,000 feet of a school. App. 5, RT, 7/10/02, at 1138-39. If they found that charge to
14 be true, the verdict form asked the jury whether they found beyond a reasonable doubt that
15 the “defendant conspired to manufacture at least 1,000 plants within 1,000 feet of an
16 operating school.” *Id.* at 1156. The jury returned a guilty verdict on count 1 and then found
17 true the 1,000 plant element. *Id.* at 1155-56.

18 Trial counsel provided constitutionally deficient representation in failing to request a
19 lesser-included offense instruction on the number of plants involved in count 1, namely,
20 whether the government had proven beyond a reasonable doubt that the charged conspiracy
21 was to grow only 100-999 plants, rather than 1,000 or more. Before trial, Epis’s counsel
22 requested jury instructions on medical necessity, entrapment by estoppel, and the fair notice
23 requirement of the due process clause. But counsel did not request a lesser included
24 instruction on count 1 on the number of plants involved in the charged conspiracy.¹⁹ A lesser
25 included offense instruction is appropriate where a lesser offense is necessarily included in

26 ¹⁹ The prosecution asked for a lesser included offense on both counts 1 and 3,
27 permitting the jury to find Epis guilty of the conspiracy and manufacturing offenses charged
28 in those counts without the element that the offenses took place within 1,000 feet of a school.
The fact that Epis’s residence was within 1,000 feet of Chico High School was undisputed at
trial. Nonetheless, the defense did not object and the Court gave this instruction.

1 the greater offense and a rational jury could find the defendant guilty of the lesser offense, but
2 not guilty of the greater one. *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982);
3 *see also* Ninth Circuit Model Crim. Jury Instr. 3.14. The court must give a lesser offense
4 instruction if one is requested and appropriate to the case. *Keeble v. United States*, 412 U.S.
5 205, 208 (1973).

6 Here, there is no good reason why trial counsel failed to request a lesser-included
7 instruction on count 1. Agents found only 458 plants at Epis's residence and the parties hotly
8 disputed the 1,000 plant element on count 1. Counsel largely conceded that Epis had
9 manufactured more than 100 plants as charged in count 3, which subjected Epis to a 5-year
10 mandatory minimum regardless of the jury's verdict on count 1. If counsel had simply asked
11 for the lesser-included instruction, the jury likely would have returned a verdict on the lesser
12 offense of conspiring to grow between 100-999 marijuana plants rather than the greater one
13 involving 1,000 or more plants. As a result, Epis was prejudiced because he would likely
14 now be facing only a 5-year, rather than 10-year, mandatory minimum on count 1.

15 **3. Counsel Rendered Ineffective Assistance In Failing to Make A *Franks***
16 **Challenge To The 1997 Search Warrant Affidavit And In Not Requesting**
17 **That Evidence From The Suppressed 1994 Search Be Excluded From The**
18 **Trial On The 1997 Marijuana Grow.**

19 In the original indictment filed July 18, 1997, Epis was charged with two separate
20 marijuana grows. In counts 1 and 2, Epis and defendant Michael James Godwin were
21 charged with two counts based on marijuana plants found when officers executed a search
22 warrant at Epis's residence on or about February 1, 1994 (1994 search). Epis was also
23 charged in a third count with manufacturing marijuana due to marijuana plants found during a
24 second search at his residence in June 1997.

25 Before trial, Epis's attorneys filed a motion to suppress evidence unlawfully obtained
26 during the two searches of his residence. *See* Motion and Memorandum in Support of
27 Motion to Suppress Evidence And Request For Hearing Pursuant to *Franks v. Delaware*,
28 filed May 15, 1998. The motion focused primarily on the 1994 search, arguing only that the
1997 search warrant was invalid because it contained information from the prior 1994 search
and violated a 1995 state court order. On August 30, 2001, following an evidentiary hearing,

1 the Court granted Epis's motion to suppress evidence, in part, by suppressing all evidence
2 obtained as a result of the search warrant executed at his residence in 1994, but denying the
3 motion with respect to the 1997 search. The Court held that, even if the information from the
4 1994 search is excised from paragraph 6 of the 1997 warrant affidavit, the remaining portions
5 of the search warrant affidavit established probable cause for the search. Thereafter, the
6 government dismissed the charges related to the 1994 search and proceeded to trial against
7 only Epis on charges related to the 1997 search.

8 **a. Counsel's Failure to Make A *Franks* Challenge To The 1997 Search
9 Warrant**

10 Epis's attorneys rendered ineffective assistance in failing to investigate and challenge
11 the 1997 affidavit under *Franks v. Delaware*, 438 U.S. 154 (1978), as they did with respect to
12 the 1994 affidavit.²⁰ Under the *Franks* doctrine, even where an affidavit supplies probable
13 cause for a search, a defendant may challenge the search warrant on the ground that the
14 affidavit contains intentional or reckless false statements, or omissions of fact, that tend to
15 mislead the judge who issued the warrant. *United States v. Williams*, 989 F.2d 1061, 1066
16 (9th Cir. 1993). If after an evidentiary hearing,²¹ the district court concludes that the judge

17 ²⁰ Although Fourth Amendment claims are not cognizable in § 2255 proceedings or
18 other post-conviction challenges under *Stone v. Powell*, 428 U.S. 465 (1976), the restriction
19 does not extend to Sixth Amendment ineffective assistance of counsel claims that are based
20 on incompetent representation with respect to a Fourth Amendment issue. *Kimmelman v.*
21 *Morrison*, 477 U.S. 365 (1986). The defendant must show "that his Fourth Amendment
22 claim is meritorious and there is a reasonable probability that the verdict would have been
different absent the excludable evidence in order to demonstrate actual prejudice." *Id.* at 375.

23 ²¹ A defendant is entitled to an evidentiary hearing upon a substantial preliminary
24 showing that a false statement (or omission) was intentionally or recklessly included in the
25 affidavit, where the false statement was necessary to the finding of probable cause. *Franks*,
26 438 U.S. at 155-56; *United States v. Stanert*, 762 F.2d 775, 780-81, *amended*, 769 F.2d 1410
27 (9th Cir. 1985). In the case of intentional or reckless omissions from an affidavit, the
28 affidavit is evaluated for probable cause as if the omitted information were included in the
affidavit. *United States v. Condo*, 782 F.2d 1502, 1506 (9th Cir. 1986). "The effect of
misrepresentations and omissions on the existence of probable cause is to be considered
cumulatively." *United States v. Greger*, 716 F.2d 1268, 1275 (9th Cir. 1983).

1 who issued the warrant was “misled by information in the affidavit that the affiant knew was
2 false or would have known was false except for his reckless disregard for the truth,” the
3 warrant is invalid and evidence obtained during the unlawful search should be suppressed.
4 *Stanert*, 762 F.2d at 780 (quoting *United States v. Leon*, 468 U.S. 897 (1984)). “There is no
5 ‘good faith’ exception to the *Franks* doctrine: a warrant based upon knowing or recklessly
6 made falsehoods in the affidavit will be invalid.” *Mills v. Graves*, 930 F.2d 729, 733 (9th Cir.
7 1991).

8 The 1997 warrant was supported by a 12-page affidavit sworn by DEA agent Ronald
9 W. Mancini dated June 23, 1997. App. 11. While the affidavit included boilerplate
10 paragraphs and a few purported observations by officer Redmond at the CMMC, it relied
11 primarily on information from a confidential informant (CI) to establish probable cause to
12 believe that Epis was growing marijuana plants at his 302 W. Frances Willard Avenue
13 residence in Chico. App. 11, at ¶¶11, 13, 14, 18, 20. Nonetheless, Epis’s attorneys did little,
14 if anything, to determine the identity of the informant or to evaluate the accuracy of his
15 purported information or other information in the affidavit. For example, they should have
16 attempted to interview alleged co-conspirator David Kasakove. He would have advised
17 Epis’s attorneys that he believed the “CI” was Gary H. and that much of the information in
18 the affidavit from the CI and otherwise was false. In particular, Kasakove never talked to, or
19 in the presence of, Gary H. about Epis, and Epis never met Gary H. This refutes the
20 information in the affidavit in at least paragraphs 11, 13, 14, and 18. *See* App. 12,
21 *Declaration of Bryan James Epis*, at ¶2. Moreover, Kasakove smoked marijuana with Gary
22 H. and knew that he grew marijuana for years and continued to do so in 1997. But the
23 government withheld this information concerning the informant’s credibility and biases.
24 Without the false information from the CI and with material omissions about the CI’s
25 background added in, the affidavit would have been wholly lacking in probable cause.²² Epis

27 ²² The affidavit also intentionally or recklessly mischaracterized the power usage at
28 Epis’s residence in March 1997 as “abnormal.” App. 11, at ¶15. It did so based on PG&E
records for Epis’s house that showed he was billed for the consumption of 1,247 kilowatt-

1 was prejudiced in that the Court would have granted a *Franks* suppression motion
2 challenging the 1997 warrant affidavit as it did with the 1994 warrant affidavit if his attorneys
3 had competently investigated and prepared such a challenge.

4 **b. Counsel's Failure To Request That Evidence From The Suppressed
1994 Search Be Excluded From The Trial In the 1997 Case.**

5 It has long been established that the Fourth Amendment requires not only evidence
6 seized during an unlawful search be suppressed, but also all evidence derived therefrom in
7 criminal trials under the "fruit of the poisonous tree" doctrine. *Wong Sun v. United States*,
8 371 U.S. 471 (1963). Nonetheless, at trial the government used significant evidence from the
9 unlawful 1994 search in its attempt to convince the jury that Epis conspired to grow 1,000 or
10 more marijuana plants, including evidence of supplies and equipment it contended were used
11 to grow marijuana in the 1997 case. In particular, the government emphasized Epis's use of a
12 "fortified door," lights, ducting for the lights, wiring, circuit breakers, timers, a squirrel cage
13 fan, tables, trays, fans, pumps, reservoir with plywood siding, and soundproofing insulation,
14 even though these items were left at the house after the 1994 search. App. 5, RT, 2/23/07, at
15 106, 110; App. 4, Disc. 4, 49, 75-76, 83, 86, 88-89, 92, 96-99, 122-24, and 175. Likewise,
16 agent Mancini acknowledged that a number of items of equipment that were used in the 1997
17 marijuana grow were present and left behind after the 1994 search, including "the tables, the

18
19
20 hours (KW) at a cost of \$163.12 for October 1996, and for 4,904 KWs at a cost of \$387.50
21 for March 1997. *Id.* Agent Mancini wrote that October and May are "base" months, used by
22 the power company to measure the minimum amount of electricity in comparison with the
23 rest of the year. *Id.* at ¶16. PG&E records show this is not the case. App. 13, at 4-5 (PG&E
24 records). Agent Mancini then claimed that, due to the climate in the Chico area, the power
25 usage for May and October should be similar. App. 11 at ¶16. This conclusion is wholly
26 unsupported. Without more facts and analysis, there were so many potential variables that
27 could have affected the power consumption for these two months (e.g., average temperature,
28 additional appliances) to make this skeleton comparison meaningless. App. 13, at 9 (email
from PG&E); *see also United States v. Clark*, 31 F.3d 831, 833 (9th Cir. 1994) ("high []
consumption is consistent with numerous entirely legal activities"). At a minimum, agent
Mancini should have compared the power usage for Epis's home to the power used by similar
homes in the area, as is commonly done in indoor marijuana cultivation affidavits. But he did
not do even this minimal investigation. App. 5, RT, 6/21/00, at 164.

1 trays, some venting, some insulation, some hoods.” App. 5, RT, 2/23/07, at 110; *see* App. 4,
2 Disc. 122-24 (only two trays and one table seized during 1994 search). Likewise, officers did
3 not seize the 11 1' x 8" used, molding rockwool slabs during the 1994 search (App. 4, Disc.
4 122-24), and Deputy Redmond relied on those old rockwool slabs as evidence of Epis’s
5 supposed intent to conspire to grow 1,000 plants by counting them as 594 new 4" x 4"
6 rockwool cubes. App. 5, RT, 7/2/02, at 467-68. Redmond also relied on the extra equipment
7 left from 1994 as evidence of Epis’s supposed intent to expand his marijuana growing
8 operation at his house. Since the Court had already suppressed evidence from the unlawful
9 1994 search, Epis’s counsel should have moved to exclude not only the marijuana plants, but
10 also the other items set forth above from the trial on the charges involving the 1997 marijuana
11 grow.

12 Counsel’s failure to do so constituted ineffective assistance of counsel. If Epis's trial
13 counsel had moved to have this evidence excluded because it was the fruit of a successful
14 suppression motion, there is more than a reasonable probability that the Court would have
15 granted a Rule 29 motion as to the 1,000 plant enhancement in Count 1, or alternatively, a
16 jury would not have convicted him of conspiring to cultivate 1,000 plants, especially when
17 viewed cumulatively with the deficient performance discussed in Section III(C)(2), *supra*.

18 **4. Trial And Appellate Counsel Failed To File A Timely, Meritorious Motion**
19 **For New Trial On The Ground, *Inter Alia*, That The Government Presented**
20 **False And Misleading Testimony And Arguments Regarding Exhibits 27**
21 **and 38 That Unfairly Convinced The Jury That Epis Conspired To Grow**
22 **More Than 1,000 Plants At His Chico Residence.**

23 At the resentencing hearing, Epis’s counsel, Brenda Grantland, argued that Epis’s
24 convictions were unlawfully obtained through false and misleading testimony and arguments
25 regarding Exhibits 27 and 38 and other evidence. App. 5, RT, 9/14/07, at 3-4. The district
26 court cut off such arguments on the ground that it has “to accept the verdict as it stands” and
27 that only issues relating to the resentencing were properly before the Court. *Id.* at 4. The
28 Court repeatedly stated that those issues were not properly before the Court because Epis’s
counsel did not file a motion for a new trial on those grounds. *Id.* at 4-6, 34; *see also* Fed. R.
Crim. P. 33.

1 Counsel's failure to timely file a motion for new trial constituted ineffective assistance
2 of counsel. As set forth above, there were a number of reasons for the Court to grant a new
3 trial motion, most significantly that the prosecution presented false testimony and misleading
4 arguments at trial regarding Exhibits 27 and 38 and in destroying evidence before trial and
5 while Epis's appeal was still pending. Trial counsel also had a reasonable likelihood that a
6 new trial motion would have been granted if one had been filed on the 1,000 plant element of
7 count 1 on the ground that "the evidence preponderates heavily against the verdict." *United*
8 *States v. Pimental*, 654 F.2d 538, 545 (9th Cir. 1981) (quoting 2 Wright, Federal Practice and
9 Procedure, Criminal § 553, at 487 (1969)). After the verdict, the Court granted trial counsel's
10 request for a continuance to file post-trial motions for acquittal and/or new trial. *Order*, filed
11 7/23/02 (document # 230). But trial counsel then filed no post-trial motions at all. If Epis's
12 counsel had filed a motion for new trial raising these issues, Epis would have been granted a
13 new trial as to at least the conspiracy to grow *1,000 or more marijuana plants*. As the Court
14 stated in permitting Epis to remain on bail after his resentencing hearing, the government's
15 use of these exhibits "obviously affected the judgment of the jury." RT, 9/14/07, at 70.

16 In addition, counsel should have filed a motion for new trial in learning that
17 government agents had destroyed critical evidence in the case. Because no new trial motion
18 had been filed concerning the evidence's destruction, the district court denied the defense's
19 request for further discovery, including depositions, and for an evidentiary hearing. Trial and
20 appellate counsel rendered ineffective assistance by failing to file such motions for new trial.
21
22
23
24
25
26
27
28

