PETITION FOR PARDON

To the President of the United States:

The undersigned petitioner, the Committee to Pardon Gerald Delemus (the "Committee")[1], prays for a pardon and in support hereof states as follows:

I. Personal Information

Full Name: Gerald Allen Delemus
Address: [redacted]
Telephone Number: The Committee can be reached through its counsel:
Dustin R. Marcello, Esq.: (702)474-7554
601 Las Vegas, Blvd.
Las Vegas, Nevada 89101
Social Security No.: [redacted]
Date and Place of Birth: [redacted].
Physical Characteristics
Sex: Male Height: 5'9
Weight: 180 Hair Color: Grey
Eye Color: Blue
Citizenship: United States of America

II. Offense For Which Pardon Is Sought

Petitioner's Conviction:

Count 1: Conspiracy to Commit an Offense Against the United States 18 U.S.C. § 371, Not more than 5 years imprisonment/$250,000 fine (Class D Felony)

Count 16: Interstate Travel in Aid of Extortion 18 U.S.C. § 1952(a)(2), 18 U.S.C. § 1952(a)(1)(B) Not more than 20 years imprisonment/$250,000 fine (Class C Felony)

Petitioner's Sentence

A total of 60-months as to Count 1, and 27-months as to Count 2, consecutive to one another, for a total of 87-months.

[1] The members of the Committee to Pardon Jack Johnson are set forth in the Appendix annexed hereto.

Petitioner's Custody Status

On March 3, 2016, Mr. Delemus was arrested by the Federal Bureau of Investigations and booked into the Strafford County Jail, in Dover, New Hampshire. On March 3, 2016, pursuant to. Fed. R. Crim. P. 5(c)(3), he appeared for an Identity/Removal Hearing before the Honorable Andrea K. Johnstone, United States Magistrate Judge, for the District of New Hampshire; identity was waived. On April 4, 2016, he appeared in the District of Nevada (2:16-cr-00046) before the Honorable Carl W. Hoffman, United States Magistrate Judge, for an Initial Appearance, Arraignment, and for detention consideration. The Mr. Delemus entered a plea of Not Guilty, and was subsequently detained. Mr. Delemus has been in continuous federal custody since March 3, 2016. Mr. Delemus is currently held in the Federal Bureau of Prisons, FMC-Devens with a scheduled release date of May 8, 2022.

III. Detailed Account of Offense for Which Pardon is Sought

INTRODUCTION

> "I hoped to be a deterrent, and I did hope to deter the government's action, yes, I did. I'm completely guilty of that.
>
> I did not -- those government actions that I came out to deter were not about those cattle, it was about killing that family and those kids.
>
> Gerald Delemus Statement at Sentencing

Gerald Delemus is serving seven years in prison. This statement was at his sentencing nearly six months prior to the Court's discovery of the Government's Brady violations. Throughout this case, Delemus has consistently stated his intent when traveling to Nevada was to protect people. Based on what he had read in the media, heard through social media, and was told by Cliven Bundy, he believed his presence would act as a deterrent to what appeared to be provocative and militaristic actions by the BLM. His intent was always to protect and seek a peaceful compromise, but also to prevent and protect from provocative and dangerous conduct. Delemus' prior attorney advised him to plead guilty because he believed there was no evidence supporting a claim of self-defense or defense of others.

The Court accepted Delemus' plea without any knowledge of the significant and extensive discovery that was wrongly withheld by the Government. That discovery would have supported a potential defense for Delemus. He was also sentenced more harshly because his statements that he came here in defense of the Bundy's seemed outlandish to the Court in light of what the Government claimed, and the Court relied on, throughout this case.

At his sentencing, Delemus told his Court his intent when he came to Nevada. Delemus could not bear the thought of the Bundy family being killed while he sat at home in New Hampshire and did nothing. He cared not about cows and land, but only about people and reaching a peaceful resolution between the Bundy and the BLM.The Government should not get to benefit from their misconduct by continuing to maintain Delemus' plea and keeping Delemus in prison. That plea was to the superseding indictment that has since been dismissed with prejudice. Based on principals of fairness, deterrence of outrageous government conduct, and to protect the integrity of the legal system it is respectfully requested Mr. Delemus be granted pardon in this case.

The Indictment

On March 2, 2016, Defendant, Gerald Delemus ("Delemus") was charged by way of Indictment as follows: Count One – Conspiracy to Commit an Offense against the United States in violation of Title 18 U.S.C. 371; Count Two – Conspiracy to impede or Injure a Federal Officer in violation of Title 18 U.S.C. 372; Count Three – Use and Carry of Firearm in Relation to a Crime of Violence in violation of Title 18 U.S.C. 924(c); Count Five – Assault on a Federal Officer in violation of Title 18 U.S.C. 111(a)(1) and (b); Count Eight – Threatening a Federal Law Enforcement Officer in violation of Title 18 U.S.C. 115(a)(1)(B); Count Nine – Use and Carry of Firearm in Relation to a Crime of Violence in violation of Title 18 U.S.C. 924(c); Count Twelve – Obstruction of the Due Administration of Justice in violation of Title 18 U.S.C. 1503; Count

Fourteen – Interference with Interstate Commerce by Extortion in violation of Title 18 U.S.C. Sections 1951; Count Fifteen – Use and Carry of Firearm in Relation to a Crime of Violence in violation of Title 18 U.S.C. 924(c); Count Sixteen – Interstate Travel in Aid of Extortion in violation of Title 18 U.S.C. 1952; and, a number of forfeiture allegations related to the above listed offenses. (ER. 36-99, Doc. #27)[2].

Arraignment and Detention

Delemus was arrested and a detention hearing took place in his home state of New Hampshire on March 7, 2016. (ER 100, Doc. #104) After being ordered detained, Delemus was transferred to this District. Delemus was appointed CJA counsel, Brian Smith, Esq. ("Mr. Smith") on April 4, 2016. (Doc. # 225) Mr. Smith filed a motion seeking to appeal the detention order entered in New Hampshire, however, the Motion was dismissed as untimely on June 8, 2016. (Doc. # 336 – minute order) A motion to reopen detention hearing was filed on June 17, 2016. (Doc. # 544) The motion was denied by order on August 9, 2016. (Doc. # 630). The Court would receive a signed plea agreement a week later and set a change of plea hearing was set for August 25, 2016. (Doc. #649).

Plea Agreement

The plea agreement submitted to the Court on August 16, 2016, was not the plea agreement signed and submitted at the change of plea hearing. The Government had believed the agreement section of 18 U.S.C 1952 (a)(2), instead of subsection (a)(3), which was listed in the agreement

[2] "Doc.__" Numbers refers to the electronically filed case documents as part of the ecf electrnic case filing system with PACER: https://ecf.nvd.uscourts.gov/cgi-bin/HistDocQry.pl?511721111964619-L_1_0-1. The documents are not included with this initial Petition due to the volume and size, but can be furnished upon request and are available.

initially signed by Delemus. The new plea agreement ("Agreement") that is the subject of this motion was filed in open court on August 25, 2016. (Doc. # 649).

According to the Agreement, Delemus was pleading guilty to Count One of the Superseding Indictment charging Conspiracy to Commit an Offense Against the United States in violation of Title 18 United States Code, Section 371; and, to Count Sixteen of the Superseding Indictment charging Interstate Travel in Aid of Extortion in violation of Title 18 United States Code Section 1952(a)(2). (Doc. #649, pp. 3-4). The Agreement contained eight numerated paragraphs of facts in support of the elements of the offense being pled. Id, at 5-6.

Change of Plea Hearing

An initial status conference took place before the change of plea hearing in order to address changes the Government needed to make to the Agreement. (Doc. # 942). Before going off record for the Government to type up a revised plea agreement, the following exchange took place between the Court and Delemus:

> THE DEFENDANT: Attorney Smith's (sic) told me to ask you, if that's all right, is what I'm concerned about is some of the verbiage in here, if a I agree to it and I believe it to be unfactual, I'd be perjuring myself, correct" If I swore to this to be a factual document and raised my hand under oath or—
>
> THE COURT: Well, I can't give – I can't give you any legal advice –
>
> . . .
>
> THE COURT: -- to assist you in determining what your options are and whether or not you would be committing a crime by asserting under oath something is true if you know it's not true.
>
> (Cont.)
>
> THE DEFENDANT: Well, that' perfectly – and I – believe me, I'm from a Christian carpenter, I'm not an attorney by any stretch of the imagination. And –
>
> THE COURT: But Mr. Smith is an attorney.

> THE DEFENDANT: Right, he is. And – but also is – well, what my concern being is that if – if I sign something and I know it factually to be untrue, isn't that like the definition of perjury and I swear to it?
>
> THE COURT: It's much more complicated than that. If I swear right now that it's not raining because when I came in this morning it's not raining and then I walk outside and it's raining and I didn't know it was raining, yeah, there's a whole range of different ways. It's not black and white. So it's really – depends on the facts and circumstances. And Mr. Smith is the one to talk to about that. He'll counsel you, and you can either accept or not accept his counsel or ask for a second opinion.
>
> (Doc. #942, pp. 7-9).

After the status conference the Court went back on record to conduct the standard plea colloquy. (Doc. #646) This hearing generally included: (1) the charges to be plead to, (2) a brief description of the elements constituting those offenses (3) recitation of the Parties understanding of the applicable guidelines, and, (4) the Parties position at sentencing. Id. During the colloquy, Delemus stopped to confer with Mr. Smith after almost every question asked by the Court. Delemus states that each time he asked Mr. Smith a question during the plea colloquy, the response was always the same – If you want to accept this plea, answer "_____". Delemus would in turn give the appropriate yes/no response to continue with the plea colloquy and for his plea to be accepted.

When the Court inquired on the conspiracy charge, there was a back and forth conference between Mr. Smith and Delemus. (Doc. # 649, pp. 27-30). The specific issue being discussed was Delemus telling Mr. Smith, that Delemus never discussed or had any intent to "display force and aggression to influence or interfere with the ability of federal law enforcement to perform or carry out their duties". Id. Delemus' sole purpose and intention when coming to Nevada was to protect people and show support for the Constitutional execution of the laws of the United States. Delemus repeatedly told his

counsel and asserted he had specifically told Bundy and instructed others that they were in no way to interfere with Government agents if the agents were performing a lawful duty.

Rather than continue to press Delemus on this point, the Court relied on the more generic statement in the plea and asked whether Delemus "traveled to Nevada with the intent to further one of the objects of the conspiracy". Again Delemus stated his concerns with Mr. Smith.

The Court would then move on to the next factual statement asking Delemus to admit that on "April 12, 2014, at least one of the members of the conspiracy brandished a firearm . . . to intimidate the officers and to instill in them fear and apprehension of immediate bodily injury or death". (Doc. # 646, p. 31)

Delemus would not answer the Court whether this fact was true. Id. Instead, the Court relied on Delemus stating that if the Court and the Government said it wastrue, he had no reason to dispute it because he was not present when the alleged act occurred. (Doc.# 646 p. 32-3).

Likewise, the Court asked whether Delemus had any reason to believe that "the armed assault did not force the law enforcement officers to relinquish custody of the impounded cattle." (Doc. #646, p. 34). And again, Delemus did not admit this fact. The closest Delemus would come, is to say that if the Court was telling him it was true, he had not reason to dispute that assertion. Id.

When the Court then moved on to Paragraph 8 of the factual statement underlying the plea to Count Sixteen of the Superseding Indictment, the following exchange took place:

> THE COURT: Did you make public statements to show and threaten force to influence public officers?"
>
> THE DEFENDANT: I don't known that I threatened anyone but I did make public statements hoping that that end peacefully. So I don't –
>
> THE COURT: All right, so what it says here on page 6 paragraph 9, is displayed firearms and made public statements to show and threaten force, all in order to influence any public officer in violation of NRS 205.320. Is that true?
>
> (Discussions between the defendant and his counsel off record)
>
> THE DEFENDANT: I'm advised to say yes.
>
> (Doc. 646, Exhibit C, p. 36).

Following these exchanges, the Court asked the Government if they were satisfied and accepted the plea. The matter was then set for sentencing. After meeting with Delemus sometime in October, Mr. Smith filed a motion to withdraw as attorney citing the reason that Delemus wished to withdraw his guilty plea and that his reasons were in conflict with continued representation by Mr. Smith. (Doc. 979).

Motion to Withdraw Plea

A motion to withdraw guilty plea was filed on January 13, 2017. (ER 219- 38, Doc. #1298). The motion challenged whether the plea was knowingly and voluntarily made with effective assistance of counsel. (Id). The Government filed a response on March 27, 2017 arguing that Delemus only wanted to withdraw his plea after individuals were found not guilty in Oregon on similar charges involving BLM and no fair and just reason existed for withdrawing the plea. (ER 241, Doc #1769). The Motion was denied by written order on May 9, 2017 (ER 251, Doc. #1953).

In denying the motion, the Court noted that Delemus admitted to traveling to Nevada and since there was no evidence of potential government provocation his presence

could have only been as a show of force to prevent lawful BLM activities. Secondly, the Court found that Delemus was liable under an aiding and abetting theory because none of the co-defendants could claim they acted in self-defense and therefore Delemus aided and abetted their unlawful actions. Again these conclusions were based on the lack of evidence not turned over by the Government and without the benefit of the later trials were all conspiracy charges were rejected by two juries.

Sentencing

The Court started by restating the calculation by probation of total offense level of 25 corresponding to a guideline range of 57-71 months and the PSR recommendation of 71-months. (Doc. #2151). Defense Counsel for Delemus presented argument in justification of a lower guideline sentence and argued for application of the 3-level downward adjustment of acceptance of responsibility.

The Court denied the 3-level downward adjustment for acceptance of responsibility finding that Delemus did admit to the factual basis for the essential elements of the offense but then "backpedaled and limited his conduct" and showed lack of remorse and minimization of his conduct.

The Court otherwise applied all adjustment agreed to by the Parties in the plea agreement and determined an applicable guideline range of 87-108 months. The Court imposed a sentence a sentence of 84-months. The notice of appeal was filed June 1, 2017.

Direct Appeal

Delmus filed an appeal on June 1, 2017. The appeal was dismissed by the 9th Circuit based on the plea waiver. The order of dismissal was entered October 27, 2017. On

December 20, 2017 the District Court granted a mistrial find that the Government's failure to disclose evidence resulted in numerous Brady violations. (Doc. #2856). Thereafter, the Government filed a motion to reconsider (Doc #3175). The Government's motion was denied by written order on July 3, 2018. (Doc. #3273).

I.

INTRODUCTION

> "Who controls the past controls the future. Who controls the present controls the past."
>
> ― George Orwell, 1984.

> I hoped to be a deterrent, and I did hope to deter the government's action, yes, I did. I'm completely guilty of that.
>
> I did not -- those government actions that I came out to deter were not about those cattle, it was about killing that family and those kids.

Gerald Delemus Statement at Sentencing (Doc. #2151 at p. 79).

> I still fail to understand why you would put snipers above someone's home and not have a warrant for their arrest. Especially on a process that's been going on so long.
>
> . . .
>
> I may not have gave it out there on the field, might not have got shot, but I've been giving it here for 16 months in prison. And if it could save a life, a law enforcement officer's life, or one of those children's life, I would do it again. But I would have left my guns at home. That I would have done.

Gerald Delemus Statement at Sentencing (Doc. #2151 at p. 80)

Brady v. Maryland[3]

Brady violations have largely become institutionalized in the criminal justice system. As noted in repeated filings, appeals, amicus briefs, Federal Decisions, and district court decisions, prosecutors at the State and Federal level show clear contempt with the general principal of *Brady* and the Constitutional rights of defendants.[4]

There is no punishment for discovery violations. No penalty assessed to violators. In the context of discovery, the only person who suffers is the defendant who the State is seeking to punish to begin with.

Whenever the Government gets caught for a discovery violation the remedy is simply to provide the withheld material before trial. When the Government gets caught after conviction they then can argue – as they do here – that the evidence was not relevant because there was other evidence of guilt. By denying discovery in the past they change the appellate and post-conviction standards applied to address their wrongful conduct in the future. The Government's Response

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[3] *Brady v. Maryland*, 373 U.S. 83 (more) 83 S. Ct. 1194; 10 L. Ed. 2d 215; 1963 U.S. LEXIS 1615.

[4] *See, McMurry v. State of Nevada*, Case No.: 72805 (Nev. 2017) (opening brief, and amicus brief of National Association of Criminal Justice Lawyers); *See also*, *See*, *McMurry v. State of Nevada*, Case No.: 72805 (Nev. 2017) (NACJ Amicus Curiae Brief, appx. 92-129; Order regarding Discovery Issues, *Homick v. McDaniel*, CV-N-99-0299 (Sept. 1, 2014); *See also*, *United States v. Olsen*, 2013 WL 6487376 (9th Cir. 2013) (*Justice Kozinski's Dissent*, ord. denying reh'g en banc); *See U.S. v. Bundy*, Case No.: 2:16-cr-0046 (2014) (Doc # 3273 Order) denying reconsideration of prior order dismissing case due to flagrant *Brady* violations).

consistently asks the District Court all manner of wrongfully attained waivers, procedural presumptions against consideration and relief, and heightened or more stringent standards for review. The Government's controls of the flow of information in the past controls a wronged defendant's future.

In most cases, discovery violations are a missing document or statement, failing to disclose a witness, evidence affecting witness credibility, an incomplete recording, or notes from an investigation. Individually, a discovery violation almost never warrants dismissal but looking at the violations as a whole and the systemic nature of them over time, it is clear there is a structural problem affecting the overall integrity of criminal prosecutions.

The insidious nature of discovery is that the Government controls the present and thereby controls the past and ultimately a Defendant's future. The Government withheld discovery to get Delemus to take a plea and now uses that plea to control his future making him the only person – not in the Wash – that is sitting in prison for being in Bunkerville. This is unjust and must be addressed by way of this Reply:

"Relevance of BLM Snipers"

Incredulously, the Government argues: "Delemus fails to explain how the information contained in these documents is relevant, let alone material, as to his intent to join a conspiracy to thwart legal activities by federal law enforcement officers." Here is the Reply:

> I hoped to be a deterrent, and I did hope to deter the government's action, yes, I did. I'm completely guilty of that.
>
> I did not -- those government actions that I came out to deter were not about those cattle, it was about killing that family and those kids.

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> I may not have gave it out there on the field, might not have got shot, but I've been giving it here for 16 months in prison. And if it could save a life, a law enforcement officer's life, or one of those children's life, I would do it again. But I would have left my guns at home. That I would have done.
>
> Gerald Delemus Statement at Sentencing (Doc. #2151 at p. 80)

At sentencing Delemus was quoted by the Government in memorandum exhibits as saying:

> "My intention wasn't to go out there and fire a single round. That was not my intention whatsoever. And but I got to tell you is my foremost intention was not to let them intimidate or attack that family. And if it took my life at that particular point in time, we only live so long anyways, and if you're going to die, you might as well die standing up for something you believe in."
>
> (Doc. #2151, p. 29)
>
> "We weren't stopping law enforcement," and this is of the government's exhibit. "We don't fire first. We don't even aim a firearm at law enforcement, their vehicles, anything. The only way you respond is if deadly force is used against you, so we could go out there alive and peacefully and law enforcement too. "
>
> *Id.*

Just as he maintained throughout this case, Delemus traveled to Nevada in defense of others. He maintained this position long before the Government's misconduct was discovered.[5] He told his counsel Mr. Smith that he traveled to Nevada to use his armed presence as a general deterrent to prevent another "Waco" or "Ruby Ridge" type incident. (Doc. #2151, at p. 47). He came to Nevada so the Bundy children could play outside again without fear. (Sentencing, Doc. #2151,

[5] (Doc #1298, p. 12-7; 20-1); (Doc. #2151 at p. 80; 85).

at p. 83-85). Additionally, Delemus believed he could use his negotiating skills and experience to allow BLM agents to take lawful action against the Bundy's without inciting violence either by the Government or protestors. *Id.*

Delemus did not travel to Nevada over court orders and cows. He went so far as to visit the local Sherriff's office to arrange service of any arrest or search warrants. He came to Nevada to work out a peaceful resolution to protect himself, the Bundy's the protestors, and law enforcement. Yes he was armed, but so were hundreds of other protestors who are now at home with their families.

Delemus was repeatedly told by his prior counsel that there was no evidence of a general theory of self-defense – or in the case of Delemus - defense of others based on the law enforcement's aggressive and provocative conduct made towards the Bundy family. However, his prior counsel's statements were a result of being misled by the Government.

At sentencing, the District Court likewise dismissed Delemus' claims as fantastical and not supported by any evidence stating:

> Why are you trying to interfere with the federal government with these innocent peacekeepers that are just following what they're told to do? This is what they take an oath, to follow the law and enforce the law. Whether they agree with it or not, they have to enforce the law. And in this case they're innocent bystanders when they're trying to enforce a court order.
>
> (Sentencing, Doc. #2151, at p. 85).

Over a year later, the District Court would find the Government withheld: (1) the Federal Bureau of Investigation's ("FBI's") Law Enforcement Operation Order; (2) the FBI Burke 302 about Egbert; (3) the FBI 302 about BLM Delmolino authored by Special Agent Willis; (4) the FBI 302 about BLM Special Agent Felix observing the listening post/observation posts ("LPOPs"); (5) the FBI 302 about BLM Racker assignment to LPOP; (6) the unredacted FBI TOC log; and (7) the various threat assessments by different agencies including the FBI and BLM. (See generally Tr., Doc# 3049); (*see also*, Doc # 3122, at p. 13:7–22).

The District Court granted a motion for mistrial finding that the Government's failure to disclose evidence resulted in numerous *Brady* violations. (Mins. Of Proceedings, Doc #3041).

The Parties were then asked to brief a motion to dismiss. The Court found dismissal proper because the Government's flagrant misconduct was outrageous and amounted to a due process violation and resulted in substantial prejudice the Defendants. (Doc. # 3273 p. 1).

The District Court also found that "[a]t least some of the subject matter pertaining to perceived government conduct at least some of the subject matter pertaining to perceived government misconduct is relevant to defending against these charges. In particular, such evidence and testimony supports a defense to Count Sixteen, Interstate Travel in Aid of Extortion pursuant to 18 U.S.C. § 1952." (See Doc 3273, p. 4).

Count 16 is what Delemus pled to. When asked by the District Court whether he had unlawful intent when he traveled to Nevada, Delemus stated: "I have been advised by my attorney to say yes". (Doc. #942 30-1; 36). Delemus refused to say he came to Nevada for an illegal purpose saying that to do so would be perjury. (Doc. 989, p. 8).

Delemus pled without knowing evidence supporting a defense to the charge. Surely, if the evidence is relevant to Cliven's claims of self-defense, it is relevant to Delemus intent who came out solely based on Cliven's plea of danger. Even the case cited by the Government – *United States v. Morton*, 999 F.2d 435, 437 (9th Cir. 1993), specifically states that the issue is whether "excessive force" is used to justify self-defense.

The Supreme Court recently acknowledged that the reality that criminal justice today is for the most part a system of pleas, not a system of trials." *Missouri v. Frye*, 566 U.S. 134, 143-144, 132 S. Ct. 1399, 182 L. Ed. 2d 379. Pp. 163-170, 182 L. Ed. 2d, at 406-411. If the integrity of the judicial process is to be respected, then the rights of Defendants exist as much when entering a plea as those that go to trial. His attorney told him he had no defense, but only because the evidence in support of a defense was wrongly withheld.

Circling back to the Government's original question: the evidence they withheld was clearly relevant to Delemus claim of defense of others; the Government purposefully withheld such evidence, and, but for withholding this evidence Delemus would not have pled guilty.

It is an open question of whether a jury would have agreed with a claim of self-defense, it is not a question that Delemus deserved to know there was evidence directly supporting a defense at trial and would have proceeded to trial had he been aware of the information.

Setting aside the legalese and lenses of litigation, how can any rational person look at what happened in this case, and be confident in the integrity of the conviction against Delemus. The indictment he was charged with has been dismissed. He wasn't present during the Wash incident. He repeatedly stated he travel to Nevada to protect the Bundy family, not a bunch of cows. Not a single law enforcement officer even knew he was at that ranch. Out of the hundreds of armed protestors that weren't in the Wash, every single one of them is free. Delemus is doing eight years in prison because the Government was clever enough to trick him before their misdeeds were discovered.

Dismissed Indictment

The Government's actions were so egregious they dismissed the superseding indictment against all remaining "named" Defendants. (Doc. #3178). The Government did so "in the interests of justice". (Doc. #3178, p. 3). That superseding indictment previously contained the name of Gerald Delemus. (Doc. #27). The Government's conduct in withholding evidence was so blatantly wrong that it did not continue with prosecution "in the interests of justice", but still feels entitled to keep Delemus' in prison based on a plea obtained from the same wrongful conduct. (Doc. #3178, p. 3).

Counsel would like this point to really be considered: had the District Court granted Delemus' motion to withdraw his plea in the past, all charges against him would have been dismissed by the Government. In the present, Delemus would be home with his family just as the other individuals he was charged with. However, the Government now argues that their past misconduct should justify a future where Delemus is the only person that was at Bunkerville, not present at the Wash, who will rot in prison. Again the Government's control of the past, controls Delemus' future.

The Government's Brady Violations Violated The Due Process Right Of Delemus To Enter A Plea Knowingly And Voluntarily With Full Knowledge Of All Defenses And Exculpatory Evidence In His Favor

Brady v. Maryland[6]

Prosecutors have an affirmative duty to disclose material evidence favorable to a criminal defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "Impeachment evidence . . . as well as exculpatory evidence, falls within the Brady rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985). A prosecutor is responsible for any favorable evidence known to the government or others acting on behalf of the government. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

On December 20, 2017 the District Court found the government was responsible for numerous *Brady* violations. The Court made clear that each of these constituted a willful *Brady* violation despite the fact that it did not have to make such finding: "it doesn't matter for this purpose whether it's willful or inadvertent, but the Court does analyze that and wants to provide that information to the parties." December 20, 2017 p. 9.

A. Information relating to surveillance camera: FBI Law Enforcement Operation Order and FBI 302 prepared by SA Egbert

[6] 373 U.S. 83 (1963)

The District Court found this was a willful *Brady* violation based on the contents of the reports, the dates on which these reports were prepared (2014), the fact that the FBI, who is part of the prosecution team, prepared both of these reports, the fact that the U.S. Attorneys were aware of the existence of the surveillance camera and failed to provide information about it when Ryan Bundy made his request, and because the Government "falsely represented that the camera view of the Bundy home was incidental and not intentional, and claimed that the defendants' request for the information was a 'fantastic fishing expedition." Transcript December 20, 2017, p. 10.

B. "BLM snipers": FBI 302s Delmolino, Felix, and Racker

The District Court found this was a willful *Brady* violation based on the content of these reports and dates on which they were prepared (2014 and 2015) and the fact that the FBI, who is part of the prosecution team, prepared these report. The District Court found important that one of the prosecuting attorneys on this case was present during the interview which was later memorialized in the FBI 302 concerning Delmolino. In essence, The District Court found that the Government was "aware of the evidence and chose not to disclose it." Transcript December 20, 2017, p. 12.

C. Unredacted TOC log

The District Court found this was a willful *Brady* violation, citing the date on which the log was prepared and its content, and the fact that the FBI, who is part of the prosecuting team, created the document and was aware of it (the FBI knew this log was saved on a thumb drive and located in the TOC vehicle). The District Court associated the content of the TOC log ("snipers inserted', "deployed") and its suppression with the fact that the FBI and the U.S. Attorneys

prosecuting this case were present at the interview of BLM Ranger Brunk for the purpose of clarifying whether he was acting as a "spotter" to a "sniper." These factors combined with "the Government's strong insistence in prior trials that no snipers existed justifies the Court's conclusion that the nondisclosure was willful." December 20, 2017, p. 14.

D. Willfulness of the violations

In prior motions there have been insinuations of "serious government misconduct" that are highly redacted. Delemus currently does not have access to these materials, but as they relate to his motion he would preserve his right to supplement this motion with that information or through further inquiry. (See Doc # 3087).

Effect of Discovery Violations On Delemus

The Court should not permit the Government to benefit from the Government's misconduct in this case. Throughout this case, Delemus has disputed he had any criminal intent. He readily admitted to his actions and in doing so the Government, the Court and his lawyer derived his intention from those actions. However, this assumption had now been shown to be based on a false premise because they Government wrongly withheld critical evidence.

Delemus conviction was based on a guilty plea to two counts: travel in aid of extortion and conspiracy to commit a crime against the United States. The facts alleged in support of this plea were listed in eight paragraphs as stated in the plea agreement. (Doc # 649 p.5-6).

A. Plea Agreement

The in support of the plea, the agreement cited two paragraphs relevant here:

> (1) Delemus left New Hampshire with the intent to "display force and aggression in order to to influence a federal law enforcement officer, and thereby impede or interfere with that officers duties". (See Doc. #649, p. 5, paragraph 3); and,
>
> (2) that from April 13, 2014, Delemus, provided personal security to Bundy another conspirators, organized and led other gunmen in conducting patrols and manning security

> checkpoints, called for others to travel to Bunkerville, Nevada, as a show of force in support of Bundy, and displayed firearms and made public statements to show and threat of force, all in 'order to influence any public officer in violation of NRS 205.320. (See Doc. #649, p. 5, paragraph 3).

To be clear, Delemus was not at the Wash and was not present during the events of April 12, 2014. The factual allegations were based off of the intent and actions of the other people involved and tied him in after the fact by his presence at the Bundy ranch after the April 12, 2014 events. Moreover, the intent requirements, both of the conspiracy and the substantive underlying offense both hinged on the intent of Delemus and of the co-defendants.

B. Plea Colloquy

At the entry of plea, Delemus made multiple statements disagreeing with the intent requirement. Before going off record for the Government to type up a revised plea agreement, the following exchange took place between the Court and Delemus:

> THE DEFENDANT: Attorney Smith's (sic) told me to ask you, if that's all right, is what I'm concerned about is some of the verbiage in here, if a I agree to it and I believe it to be unfactual, I'd be perjuring myself, correct" If I swore to this to be a factual document and raised my hand under oath or—
>
> THE COURT: Well, I can't give – I can't give you any legal advice –
>
> . . .
>
> THE COURT: -- to assist you in determining what your options are and whether or not you would be committing a crime by asserting under oath something is true if you know it's not true.
>
> (Cont.)
> THE DEFENDANT: Well, that' perfectly – and I – believe me, I'm from a Christian carpenter, I'm not an attorney by any stretch of the imagination. And –
>
> THE COURT: But Mr. Smith is an attorney.
>
> THE DEFENDANT: Right, he is. And – but also is – well, what my concern being is that if – if I sign something and I know it factually to be untrue, isn't that like the definition of perjury and I swear to it?

> THE COURT: It's much more complicated than that. If I swear right now that it's not raining because when I came in this morning it's not raining and then I walk outside and it's raining and I didn't know it was raining, yeah, there's a whole range of different ways. It's not black and white.
>
> So it's really – depends on the facts and circumstances. And Mr. Smith is the one to talk to about that.
>
> He'll counsel you, and you can either accept or not accept his counsel or ask for a second opinion.
>
> (Doc. #942, pp. 7-9).

When the Court inquired on the conspiracy charge, there was a back and forth conference between Mr. Smith and Delemus. (Doc. 649, Exhibit C, pp. 27-30). The specific issue being discussed was Delemus telling Mr. Smith, that Delemus never discussed or had any intent to "display force and aggression to influence or interfere with the ability of federal law enforcement to perform or carry out their duties". Id.

In a now relevant exchange the record indicates the following:

> THE COURT: So it says here that you learned of. Mr. Cliven Bundy and you initiated a telephone call to him from New Hampshire -- to him, and he was in Nevada, and that phone call occurred on or about April 8th. of 2014. Is that correct?
>
> THE DEFENDANT: That is correct.
>
> THE COURT: All right. And it says that as a result of this communication you agreed to assist him, which you understood to mean bringing firearms and gunmen to Nevada. Is that correct?
>
> THE DEFENDANT: Not exactly, ma'am.
>
> MR. SMITH: Your Honor, if I may?
>
> THE COURT: Sure.
>
> MR. SMITH: We we kind of went-back and forth on this issue. Mr. Myhre was very cooperative with us. And I just want to point out to the Court the language in item number 1 on page 5 towards the bottom it says, "Defendant Delemus agreed to assist Bundy_ Defendant Delemus brought firearms and gunmen to Nevada in support of Bundy

> Those two sentences reflect the changes that were made from the previous version of the statement of facts.
>
> THE COURT: All right. **I'm not sure that I understand the distinction, but there must be some distinction** here. So I'll defer to what his recitation of the facts is. So that's what I want to make sure that I understand.
>
> So, Mr. Delemus " you agreed to assist Mr. Bundy?
>
> THE DEFENDANT: That's correct.

The distinction was that Delemus traveled to Nevada to assist Mr. Bundy from getting killed by BLM agents, not to stop BLM from taking Bundy's cows. Mr. Myhre was well aware Delemus believed his intent was lawful back in 2016, however, with the benefit of hindsight it has become clear his withholding of evidence was specifically designed from making the defendants and Delemus aware there was evidence supporting a defense.

The Court would then move on to the next factual statement asking Delemus to admit that on "April 12, 2014, at least one of the members of the conspiracy brandished a firearm . . . to intimidate the officers and to instill in them fear and apprehension of immediate bodily injury or death". (Doc. 646, P. 31) Delemus would not answer the Court whether this fact was true. Id. Instead, the Court relied on Delemus stating that if the Court and the Government said it was true, he had no reason to dispute it because he was not present when the alleged act occurred. (Doc. #646, pp. 32-3).

Likewise, the Court asked whether Delemus had any reason to believe that "the armed assault did not force the law enforcement officers to relinquish custody of the impounded cattle." (Doc. 646, Exhibit C, p. 34). And again, Delemus did not admit this fact. The closest Delemus would come, is to say that if the Court was telling him it was true, he had not reason to dispute that assertion. Id.

When the Court then moved on to Paragraph 8 of the factual statement underlying the plea to Count Sixteen of the Superseding Indictment, the following exchange took place:

> THE COURT: Did you make public statements to show and threaten force to influence public officers?"
>
> THE DEFENDANT: I don't known that I threatened anyone but I did make public statements hoping that that end peacefully. So I don't –
>
> THE COURT: All right, so what it says here on page 6 paragraph 9, is displayed firearms and made public statements to show and threaten force, all in order to influence any public officer in violation of NRS 205.320.
> Is that true?
>
> (Discussions between the defendant and his counsel off record)
>
> THE DEFENDANT: I'm advised to say yes.
>
> (Doc. # 646, p. 36).

Delemus started off the colloquy by asking the court if it would be perjury to admit to facts he knew to be untrue. (Doc. #942, pp. 7-9). The facts he believed to be untrue were the same facts he was being asked to admit to. More specifically, Delemus was stating he had no knowledge whether individuals had used force or intimidation to get property back for the Bundy family or whether any public officer had been intimidated by any actions occurring before he arrived in Nevada. Instead, as it related to the overt acts constituting the conspiracy, Delemus' statements were claims of innocence rather than allocations of wrong doing.

C. Motion to Withdraw Plea

Immediately after pleading guilty, Delemus moved to withdraw his plea. In his motion, he told the Court that after speaking with his current counsel he know understood the intent requirement and believed he had a valid defense to the charges. It was his contention that his attorney did fully explain to him the intent requirement of traveling in aid of extortion count, or the intent requirement for the conspiracy in general. However, what really occurred was that the

Government purposely withheld evidence preventing his prior attorney from being able to give proper counsel of possible defenses should he go to trial.

D. Statements at Sentencing

Here are relevant statements made by Delemus at his sentencing:

> "I hoped to be a deterrent, and I did hope to deter the government's action, yes, I did. I'm completely guilty of that.
>
> I did not -- those government actions that I came out to deter were not about those cattle, it was about killing that family and those kids.
>
> Gerald Delemus Statement at Sentencing (ER 389).

> I still fail to understand why you would put snipers above someone's home and not have a warrant for their arrest. Especially on a process that's been going on so long.
>
> Why not just go arrest him and stop all this nonsense? If it's a problem, put him in jail and then deal with him in the court.
>
> But my faith wouldn't let me stay home.
>
> I'm one of those guys who's either loved or hated. And I've had some pretty bad things said about me, some of them in here in the District Court, which I would argue, but I'm not going to.
>
> But I just want you to see I've heard that the path to hell is paved with good intentions. I'm praying that I'm not paving that path, that I'm doing what would be pleasing to God. The scripture that came to me when I talked to Cliven was: There's no greater love than a man who will give his life for his brother.
>
> I may not have gave it out there on the field, might not have got shot, but I've been giving it here for 16 months in prison. And if it could save a life, a law enforcement officer's life, or one of those children's life, I would do it again. But I would have left my guns at home. That I would have done.
>
> Gerald Delemus Statement at Sentencing (ER 388)

Delemus went on to recall prior incidents where the Government, even with the best of intentions, had engaged in actions that resulted in the death of innocent persons and children. Every statement attributed to Delemus included by the Government in their Memorandum, states that he did not want to harm anyone and was never going to attack first, but he did want the ability to defend himself. In his words:

> "[m]y intention wasn't to go out there and fire a single round. That was not my intention whosoever [sic] and but I've got to tell you is my foremost intention was not to let them intimidate or attack that family. An if it took my life at that particular point in time, we only live so long anyways and if your're [sic] going to die, you might as well die standing up doing something for what you believe is right."
>
> (ER 310-11)

All of these statements from the beginning of the case until his sentencing paint a clear picture. Delemus traveled to Nevada believing his presence would deter provocative and potentially dangerous government conduct. *See United States v. Moore,* 483 F.3d 1361, 1385 (9th. Cir. 1973). The statements were made long before the Court's findings of willful *Brady* violations by the Government. The Government's theory of prosecution has always relied on the fact that the Defendants were acting offensively instead of defensively. The evidence that the Government failed to disclose would have changed the outcome considerably in Delemus' case by supporting his belief that his actions were done with a defensive and protective intent and not with a threatening or ill intent. Accordingly, relief should be granted.

E. Delemus Intent When Traveling

In early April of 2014, Delemus read an article from the news media site "The Drudge Report". The Drudge Report isn't exactly a typical point/counterpoint news source and painted

the events at the Bundy ranch in a very hostile tone. The headline read "Heavily-Armed Feds Surround Nevada Ranch."[7] The article claimed the Government, not just enforcing its rights to claimed property, but attempting to take the Bundy ranch and property by force. It is widely agreed the Drudge Report recklessly fueled the confrontation.[8]

Regardless of the report, Delemus, like many Americans, was surprised to see images of BLM agents in full tactical gear, carrying M-16's, and holding snarling attack dogs while other agents used tasers on protestors and forcefully arrested members of the Bundy family.[9] There was certainly a counterpoint to these events, but most people were surprised to see such a massive use of force to address a dispute over trespassing cattle. Before this incident, it is unlikely people would have considered the possibility of a park ranger enforcing park rules with a sniper rifle.

Delemus did not go to Nevada to "fight" with BLM. During the conversation with Cliven Bundy on April 8, 2014, Delemus understood there to be BLM Special Agents in the hills around his house pointing sniper rifles at Bundy's children and grandchildren. This was consistently stated by Delemus in his motion to withdraw guilty plea and at sentencing and was finally confirmed by the Government years after the fact.

The Government repeatedly asserted that Delemus' and the other defendants' actions were unreasonable because there was no evidence of provation by BLM agents, only lawful government conduct. It has however, become quite clear that the Government withheld evidence

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[7] http://www.drudgereportarchives.com/data/2014/04/11/20140411_164038.htm

[8] https://www.mediamatters.org/blog/2014/04/11/drudge-report-recklessly-hypes-confrontation-be/198859

[9] https://www.youtube.com/watch?v=JBpzB86SA_w

from the Court and from Delemus that would have greatly changed the understanding of this case by Delemus, his prior attorney who advised him to plead guilty, and the Court.

When Delemus arrived in Nevada, he had no reason to believe the events of April 12th were as significant as he would later find out.

His understanding was that the Clark County Sherriff had spoken to the head of the BLM, who in turn agreed to stop operations. This erroneous belief was subsequently validated by public officials, including the Governor of the State of Nevada who plainly stated the BLM action was improper, and they supported the BLM decision to stop the impoundment operations. The exact quote from Governor Brian Sandoval, a former Federal judge in this District, stated:

> "No cow justifies the atmosphere of intimidation which currently exists nor the limitation of constitutional rights that are sacred to all Nevadans," Sandoval, a Republican, said. "The BLM needs to reconsider its approach to this matter and act accordingly."[10]

Likewise, Sen. Dean Heller told BLM director Neil Kornze that he believed the situation was being handled poorly and stated the following in the media:

> "I told him very clearly that law-abiding Nevadans must not be penalized by an over-reaching BLM,"[11]

During his time at so-called "Camp Liberty," Delemus didn't surveil Government employees or organize troops. He was trying to contact the Sherriff and BLM officials to negotiate a compromise and get the parties to communicate. Delemus had previously told Bundy, he would not interfere with the execution of any warrant or arrest. Delemus met with the Sherriff and informed his staff that Delemus would take the responsibility to ensure law enforcement had access to perform any necessary duty.

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[10] http://www.foxnews.com/politics/2014/04/07/nevada-officials-blast-feds-over-treatment-cattle-rancher-cliven-bundy.html

[11] Id.

Misconduct of the Government

Prosecutors have intentionally withheld helpful and exculpatory information from the defense; they have neglected to diligently search for and discover exculpatory information and materials in the possession of law enforcement; and they have falsely assured the Court and the defense – on more than one occasion – that evidence and information related to the camera used to surveil the Bundy Ranch house and derivative information related to the surveillance, did not exist.

It would become clear why the Government was reluctant to disclose and produce this information. We now know, for example, based upon this new information, that the government's prior refusal to disclose information about the camera – isn't about the camera itself, instead its connected to a much larger, undisclosed set of information regarding the presence, use and deployment of heavily armed BLM agents, FBI snipers, armored trucks, and a previously undisclosed Forward Operating Base for the pre-planned FBI "Rapid Response" tactical team surrounding the Bundy Ranch house from April 5 thru 8, 2014, including two man teams from the FOB acting as security for the Electronics Technicians setting up and maintaining the very camera at issue.

This United States Attorney's Office has been previously sanctioned by both the District Court and the Appellate Court, for remarkably similar conduct to that which is manifest here. *See e.g. USA v. Daniel Chapman*, et al., 2:03-cr-347 (Doc. 304); *United States v. Chapman*, 524 F.3d 1073, 1088 (9th Cir. 2008). The same kind of conduct at issue in this motion has also been repeatedly condemned in recent decisions by the United States Supreme Court and the Ninth Circuit Court of Appeals. *See e.g. Smith v. Cain*, 565 U.S. 73, 75 (2012); U*nited States v. Sedaghaty*, 728 F.3d 885 (9th Cir.2013); *Aguilar v.Woodford*, 725 F.3d 970 (9th Cir.2013); *United*

States v. Kohring, 637 F.3d 895 (9th Cir.2010). The prevalence of Bradey related prosecutor misconduct is what caused Chief Judge Kozinksi to famously warn in 2013, "There is an epidemic of Brady violations abroad in the land. Only judges can put a stop to it." *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., joined by Pregerson, Reinhardt, Thomas, and Waterford, JJ., dissenting from denial of rehearing en banc).

Nevertheless, the most important reason this information could not be withheld under Brady, and under Rule 16, is that it is centrally related – and contrary to the fundamental theory of the government's prosecution. As the Court is aware, the case at bar has been centrally defined by the government as the result of a "massive armed assault against federal law enforcement officers that occurred in and around Bunkerville Nevada, on April 12, 2014." (Doc. #27 at p. 2).

Defendant Ammon Bundy along with all other indicted members of his family and several co-defendants- have all vehemently disagreed with this characterization. Additionally, the two prior mistrials on identical conspiracy counts involving other defendants in this case further calls into question the credibility of this government narrative.

This is significant because "all" of the actions of the defendants, according to the Superseding Indictment, were undertaken and performed with the intent and purpose of "threaten[ing], intimidate[ing], and extort[ing]" federal officers. Doc. 27 at 3, ¶1. As a primary support for this allegation, the indictment alleges that "leaders and organizers" of the purported "conspiracy" engaged in specific overt acts of "force, threats, and intimidation to stop the impoundment" of Bundy cattle, by "flooding the internet with false and deceitful images and statements", id., and further alleges that to recruit others into the conspiracy the defendants in this case communicated a false claim by Cliven Bundy that "they have my house surrounded" and "[the BLM] are armed with assault rifles…they have snipers[.]" *Id*. at p. 21.

For this allegation to stand, Cliven Bundy's statement had to be false. But, the previously hidden information, disclosed just this week, is that his statement was precisely true. Or, at the very least, provides a good evidentiary basis to explain to the jury why he believed that was the case.

It is impossible to overstate how this relates directly to the alleged motives, plans and actions statements and for urgently requesting help via the internet – encouraging others to come to the Bundy Ranch in April 2014.

In turn, Delemus actions were a sole result of speaking with Cliven Bundy on April 8, 2014, wherein Cliven told Delemus of the provocative nature of the BLM agents and the danger to his family. It was in response to this call, that Delemus travelled to Nevada. The evidence affecting the validity of Cliven's statements on these matters to Delemus goes to the heart of his intent when he left New Hampshire and thus his criminal liability, or lack thereof.

On top of this, the existence of this information and the content of these records was repeatedly and falsely denied by prosecutors in proffers and offers of proof to the Court and to the defense. Not only does this new information flatly contradict repeated assurances given by prosecutors to the Court and the defense, but it directly confirms the Court's suspicions raised on the record on November 7, 2017 and the legal basis for both mistrial and dismissal.

The Government's willful Brady violations and outrageous conduct has irreparably prejudiced Delemus and has undermined the confidence in the outcome of this case. The Government has obtained a plea through guile and deception and even after dismissing the indictment on which Delemus was charged continues to see no issue with their conduct in this case or his remaining in prison. Relief is warranted in this instance and it is respectfully requested the Court set aside the verdict.

Delemus' Guilty Plea Was Not Entered Knowingly And Voluntarily With Full Knowledge Of The Material Information Against Him Due To Willful Withholding Of Evidence By The Government Preventing Him From Knowing And Asserting A Potentially Valid Legal Defense To The Charges

In this case, the withheld evidence clearly went to the heart of the case against Delemus. His liability was always derivative of his co-defendants. He wasn't in the wash on April 12, 2018. Never came in contact with any BLM or other Government agent. And never committed any provocative act towards any Government official. The entire case against him was premised on the idea that the mere presence of all of the individuals as a whole was designed as a show of force to prevent lawful activity.

This premise was therefore condition on there being no other plausible reason for the protestors, including Delemus, to have been at the Bundy ranch from April to June. Although, Delemus did agree to come to Nevada, it was never for an illegal purpose or to prevent or intimidate any public official or agent to prevent performance of public duties. He was here because he didn't want another Waco, or other incident where people died due to a "misunderstanding" after provocative Government conduct. He believed his presence would deter unlawful Government aggression but still allow for any other lawful actions such as arresting Bundy or charging him with a crime.

Delemus did not admit to the acts necessary to support a finding he intimidated a public officer in violation of the Nevada Revised Statute. The closest he came was to say "I was advised to say yes". (Doc. 646, p. 36). Delemus was never provided the Nevada Revised Statutes or United States Code or advised his lack of criminal intent was a critical issue and a possible defense to a charge of intimidation and by extension against the charge of traveling in aid of extortion.

Had Delemus been aware of this possible defense, and more importantly, the evidence supporting this defense he would not have plead guilty.

IV. Biographical Information[12]

Marital Status: Mr. Delemus Is married to Susan C. Delemus.

Children: Mr. Delemus has three children

Residence: Mr. Delemus is still in the custody of the Federal Bureau of Prisons

Military Service: Mr. Delemas was in the United States Marine Core from October 29, 1973 to October 29, 21978 and received an honorable discharge along with National Defense Medal, Meritorious, Mast and Good Conduct.

Employment History: Prior to his arrest, Mr. Delemus was a carpenter and contractor for over 20-years.

V. Charitable and Community Activities

As noted above, Mr. Delemus appears to have served his country during times of national crisis, both after his conviction, and after serving his sentence. Over the years, Mr. Delemus has participated in numerous charity works and acts through his Church, political organizations, and through his wife's work at the New Hampshire State legislature.

VI. Reasons for Seeking a Pardon

Mr. Delemus has attached a hand written reason for seeking pardon, but this the following is also submitted for consideration.

There seems to be a growing method of prosecution for what essentially thought crimes, where an otherwise legal act is deemed illegal simply by the Government assigning a nefarious

[12] The handwritten Petition of Gerald Delemus with personal information is attached hereto as well for reference.

intent to a person. To defend himself or herself, the person must depend on the integrity of the prosecution to turn over all items that would bear on the person's lawful intent. However, prosecutors have been engaged in a game where the person asks for exculpatory evidence and the government refuses to turn it over saying the person cannot show it exists because he does not know about it's existence.

It is a peculiar thing that there is no area of law where discovery violations are punished less severely than in criminal cases where it matters the most. The standards for disclosure are skewed heavily in the Government's favor giving them the power to decide what should be disclosed and requiring defendants to establish the existence of, and relevance, of any requested discovery that is solely in the possession of the Government.

Prosecutors do not fear imposition of attorney's fees, sanctions, or penalties as other litigants due in administrative and civil law. Even willful misconduct results in no sanctions or penalties for the wrongful actor, only dismissal or retrial of the case. Both of those outcomes it is society and the defendant that suffer not the wrongdoer.

The only remedy available – dismissal or reversal of a case – is considered so drastic it is only imposed in the most egregious of cases. This produces a perverse incentive to commit discovery violations with the knowledge that only a handful of cases will be at risk of reversal or dismissal. This risk and incentive of discovery violations becomes institutionalized when the Courts and the Government find ever more clever and ingenious ways to deny these violations are even occurring and denying relief.

It is commendable that the District Court has tried to remedy the Government's egregious conduct in this case, but the USAO will never admit or concede that there was anything wrong. Not a big deal, already been disclosed, not relevant are always the responses to discovery

violations. It's easy to make these statements when the only persons who suffer from your actions are a defendant you are trying to punish to begin with. And make no mistake, Delemus has suffered punishment. A man who has given his life to his country, been a father, a husband and worked hard for his family, his country and his God, has had everything taken away. Out of all of the people who protested the BLM, out all the people who owned cattle, out of all of the people simply present at the Bundy ranch, Delemus is the only one in prison serving seven years who never had any interaction or confrontation with any Government official. This situation is unjust.

The Government's case against Gerald Delemus has never been about actions, it has always been about intent. Delemus never disputed he was at the Bundy ranch. Never disputed what activities he engaged in while at the Bundy ranch. The Government likewise never disputed that Delemus did nothing directly to any Federal agent or BLM officer.

Delemus was present with thousands of protestors, hundreds of whom were armed. Delemus was not present during the Wash standoff and had nothing to do with what took place that day. He wasn't even aware what took place until he arrived in Nevada later that evening. Out of all of the people present in Bunkerville during this time including the Bundy's, the thousands of protestors, the hundreds of armed protestors, and the dozens of Defendants, Delemus is the only one in prison.

Delemus has always maintained that he travelled to the Bundy ranch because it was communicated to him by Cliven Bundy that the Government may try to kill him, his family, and the protestors. (Doc. #2151 at p. 75-82). He thought his presence would be a deterrent to military action by an increasingly hostile federal law enforcement agency. He was right. Peace was kept and it is impossible to say the presence of the protestors isn't the reason why.

The District Court showed remarkable conviction in holding the Government accountable for it's misconduct in this case. However, to be clear, the Court did not do so out of fairness to the Defendants necessarily, it did so to protect the integrity of the judicial process. The Government now seeks again to attack the integrity of the judicial process by asking the District Court to enforce a plea that was obtained through the same deceit justifying dismissal of charges against most of the other Defendants.

It was wrong for the Government withheld crucial evidence to mislead the Defendants and the District Court. It was wrong for the Government to obtain a plea from Delemus without telling him of evidence supporting a defense. It is wrong that the Court refuses to grant relief despite dismissing the indictment on which Delemus was originally charged. It was, and is, wrong that Delemus is still in prison.

WHEREFORE, the Committee to Pardon Gerald Delemus respectfully requests that a pardon be issued pursuant to Article II, § 2 of the United States Constitution and 28 C.F.R. § 1 et seq. pardoning Gerald Delemus.

Dated: December 23, 2019

Respectfully submitted,

THE COMMITTEE TO PARDON GERALD DELEMUS

BY: _____.

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