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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 vs.

13 GERALD DELEMUS,
14 Defendant

) Case No.: 2:16-cr-0046-GMN-PAL

) **MOTION TO REHEAR OR**
) **RECONSIDER MOTION TO**
) **WITHDRAW GUILTY PLEA**

) **OR IN THE ALTERNATIVE**

) **MOTION TO APPOINT COUNSEL**
) **TO PURSUE A PETITION UNDER**
) **28 U.S.C.S. §2255 TO VACATE, SET**
) **ASIDE, OR CORRECT SENTENCE**
) **BY A PERSON IN FEDERAL**
) **CUSTODY**

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21 COMES NOW, Defendant Gerald Delemus, by and through his counsel of
22 record, DUSTIN R. MARCELLO, ESQ., of the law firm of PITARO & FUMO,
23 CHTD., hereby moves this Honorable Court appoint counsel to vacate or set aside
24 the judgment in this case pursuant to 28 U.S.C.S. §2255.
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1 This Motion is made and based upon all the papers and pleadings on file
2 herein, the attached points and authorities in support hereof, and oral argument at
3 the time of hearing, if deemed necessary by this Honorable Court.
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7 **MEMORADUM OF POINTS AND AUTHORITIES**

8 Delemus entered a plea agreement accepted by this Court on August 25,
9 2016 with his then Counsel Brian Smith, Esq. (Docs. ## 646, 649). On
10 November 10, 2016, Delemus filed a motion to withdraw Mr. Smith as counsel
11 because he wanted to withdraw his plea. (Doc. #919). Current counsel was
12 appointed on November 16, 2016. (Doc. #979).
13
14

15 Prior to sentencing, a motion with withdraw plea was filed on January 13,
16 2017. (Doc. #1298). Delemus raised claims that his plea was not knowingly and
17 voluntarily entered; that he was threatened with further prosecution; that he
18 received ineffective assistance of counsel; and, claims of actual innocence. An
19 evidentiary hearing was requested on all issues raised in the motion withdraw
20 plea. (*Id.*).
21
22

23 The motion withdraw plea and request for evidentiary hearing was denied
24 by written order on May 9, 2017 (Doc. #1953). On May 31, 2017, Delemus was
25 sentenced to 84-months in the Federal Bureau of Prisons. A notice of appeal was
26 filed on June 1, 2017. (Doc. #2033).
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1 Consistent with the appellate rules, Counsel limited the appeal to the
2 sentence because a record related to the constitutionality of the plea had not been
3 established for review on appeal. (9th Cir. ECF #7). On October 6, 2017, the
4 Government filed a motion to dismiss based on the plea waiver of appellate rights.
5 (9th Cir. ECF #7). The Government's motion to dismiss was granted on October
6 27, 2017. (9th Cir. ECF #13). A motion to reconsider dismissal was filed on
7 October 31, 2017 but was denied. (9th Cir. ECF #14, 15). The mandate was issued
8 April 6, 2018. (9th Cir. ECF #16).

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12 On December 20, 2017, this Court granted a mistrial against Tier 2
13 Defendants. (Doc. #2856). The mistrial was granted finding that the
14 Government's failure to disclose evidence resulted in numerous *Brady* violations.
15 (Mins. Of Proceedings ECF No. 3041).

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18 Following the Court's declaration of mistrial, the Court ordered a hearing
19 on the issue of dismissal. On January 8, 2018, the Court granted those
20 Defendants' motions to dismiss with prejudice, (Docs. ##2883, 2906, 3082,
21 3085). The dismissal was based on the Government's outrageous conduct
22 amounting to a due process violation and that the Government's flagrant
23 misconduct resulted in substantial prejudice to the Defendants. (R. 21:8-11; 21:14-
24 15 respectively from Doc. # 3122).

1 On July 3, 2018, the Court filed a written order denying the Government's
2 motion to reconsider. (Doc. #3273). Counsel has been working on a Writ of
3 Habeas Corpus for Delemus for a number of months but the claims here were
4 related to the Court's ruling as it went to the heart of the wrongs in Delemus' case.
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6
7 Included with this motion is the substance of the issues identified by
8 counsel warranting a §2255 petition. However, after speaking with the Federal
9 Public Defender's Office it is their belief that because current counsel did the
10 direct appeal that was dismissed, there may be procedural and potential conflict
11 issues with counsel continuing representation for the Writ.
12

13
14 Delemus would like current counsel to remain on the case, however, if there
15 is a potential that continued representation may result in forfeiting some right or
16 the imposition of some procedural default rule by the Government then in the best
17 interest of Delemus, independent counsel should be appointed to pursue this Writ.
18 Attached, are the issues Counsel believes warrant either himself or independent
19 counsel to pursue on behalf of Delemus.
20
21

22
23 DATED 13th day of July 2018
24

25 **PITARO & FUMO, CHTD.**

26 /s/ Dustin R. Marcello, Esq..
27 DUSTIN R. MARCELLO, ESQ.
28 Nevada Bar No.: 10134

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8 Attorney for Defendant: Gerald Delemus

9
10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 vs.

15 GERALD DELEMUS,
16 Defendant

17 Case No.: 2:16-cr-0046-GMN-PAL

18 **PETITION UNDER 28 U.S.C.S.**
19 **§2255 TO VACATE, SET ASIDE,**
20 **OR CORRECT SENTENCE BY A**
21 **PERSON IN FEDERAL CUSTODY**

22 COMES NOW, Defendant Gerald Delemus, by and through his counsel of
23 record, DUSTIN R. MARCELLO, ESQ., of the law firm of PITARO & FUMO,
24 CHTD., hereby moves this Honorable Court to vacate or set aside the judgment in
25 this case pursuant to 28 U.S.C.S. §2255.

26 This Writ is made and based upon all the papers and pleadings on file
27 herein, the attached points and authorities in support hereof, and oral argument at
28 the time of hearing, if deemed necessary by this Honorable Court.

1 DATED 13th day of July 2018

2
3 **PITARO & FUMO, CHTD.**

4
5 /s/ Dustin R. Marcello, Esq.._____.

6 DUSTIN R. MARCELLO, ESQ.
7 Nevada Bar No.: 10134

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9 **I.**

10 **INTRODUCTION**

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13 “I hoped to be a deterrent, and I did hope to deter
14 the government's action, yes, I did. I'm completely
15 guilty of that.

16 I did not -- those government actions that I came
17 out to deter were not about those cattle, it was
18 about killing that family and those kids.

19 **Gerald Delemus Statement at Sentencing**

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21 Gerald Delemus is serving seven years in prison. This statement was at his
22 sentencing nearly six months prior to the Court’s discovery of the Government’s
23 *Brady* violations. Throughout this case, Delemus has consistently stated his intent
24 when traveling to Nevada was to protect people. Based on what he had read in the
25 media, heard through social media, and was told by Cliven Bundy, he believed his
26 presence would act as a deterrent to what appeared to be provocative and
27
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1 militaristic actions by the BLM. His intent was always to protect and seek a
2 peaceful compromise, but also to prevent and protect from provocative and
3 dangerous conduct.
4

5 Delemus' prior attorney advised him to plead guilty because he believed
6 there was no evidence supporting a claim of self-defense or defense of others.
7 The Court accepted Delemus' plea without any knowledge of the significant and
8 extensive discovery that was wrongly withheld by the Government. That
9 discovery would have supported a potential defense for Delemus. He was also
10 sentenced more harshly because his statements that he came here in defense of the
11 Bundy's seemed outlandish to the Court in light of what the Government claimed,
12 and the Court relied on, throughout this case.
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16 At his sentencing, Delemus told his Court his intent when he came to
17 Nevada. Delemus could not bear the thought of the Bundy family being killed
18 while he sat at home in New Hampshire and did nothing. He cared not about
19 cows and land, but only about people and reaching a peaceful resolution between
20 the Bundy and the BLM.
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24 The Government should not get to benefit from their misconduct by
25 continuing to maintain Delemus' plea and keeping Delemus in prison. That plea
26 was to the superseding indictment that has since been dismissed with prejudice.
27 Based on principals of fairness, deterrence of outrageous government conduct, and
28

1 to protect the integrity of the legal system it is respectfully requested the Court
2 grant vacate the judgment of conviction.
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4 **II.**

5 **FACTUAL SUPPORT FOR GROUNDS OF RELIEF**
6

7 **The Indictment**
8

9 On March 2, 2016, Defendant, Gerald Delemus (“Delemus”) was charged
10 by way of Indictment as follows: Count One – Conspiracy to Commit an Offense
11 against the United States in violation of Title 18 U.S.C. 371; Count Two –
12 Conspiracy to impede or Injure a Federal Officer in violation of Title 18 U.S.C.
13 372; Count Three – Use and Carry of Firearm in Relation to a Crime of Violence
14 in violation of Title 18 U.S.C. 924(c); Count Five – Assault on a Federal Officer
15 in violation of Title 18 U.S.C. 111(a)(1) and (b); Count Eight – Threatening a
16 Federal Law Enforcement Officer in violation of Title 18 U.S.C. 115(a)(1)(B);
17 Count Nine – Use and Carry of Firearm in Relation to a Crime of Violence in
18 violation of Title 18 U.S.C. 924(c); Count Twelve – Obstruction of the Due
19 Administration of Justice in violation of Title 18 U.S.C. 1503; Count Fourteen –
20 Interference with Interstate Commerce by Extortion in violation of Title 18 U.S.C.
21 Sections 1951; Count Fifteen – Use and Carry of Firearm in Relation to a Crime
22 of Violence in violation of Title 18 U.S.C. 924(c); Count Sixteen – Interstate
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1 Travel in Aid of Extortion in violation of Title 18 U.S.C. 1952; and, a number of
2 forfeiture allegations related to the above listed offenses. (ER. 36-99, Doc. #27).
3

4 **Arraignment and Detention**

5 Delemus was arrested and a detention hearing took place in his home state
6 of New Hampshire on March 7, 2016. (ER 100, Doc. #104) After being ordered
7 detained, Delemus was transferred to this District. Delemus was appointed CJA
8 counsel, Brian Smith, Esq. (“Mr. Smith”) on April 4, 2016. (Doc. # 225) Mr.
9 Smith filed a motion seeking to appeal the detention order entered in New
10 Hampshire, however, the Motion was dismissed as untimely on June 8, 2016.
11 (Doc. # 336 – minute order) A motion to reopen detention hearing was filed on
12 June 17, 2016. (Doc. # 544) The motion was denied by order on August 9, 2016.
13 (Doc. # 630). The Court would receive a signed plea agreement a week later and
14 set a change of plea hearing was set for August 25, 2016. (Doc. #649).
15
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19 **Plea Agreement**

20 The plea agreement submitted to the Court on August 16, 2016, was not the
21 plea agreement signed and submitted at the change of plea hearing. The
22 Government had believed the agreement section of 18 U.S.C 1952 (a)(2), instead
23 of subsection (a)(3), which was listed in the agreement initially signed by
24 Delemus. The new plea agreement (“Agreement”) that is the subject of this
25 motion was filed in open court on August 25, 2016. (Doc. # 649).
26
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1 According to the Agreement, Delemus was pleading guilty to Count One of
2 the Superseding Indictment charging Conspiracy to Commit an Offense Against
3 the United States in violation of Title 18 United States Code, Section 371; and, to
4 Count Sixteen of the Superseding Indictment charging Interstate Travel in Aid of
5 Extortion in violation of Title 18 United States Code Section 1952(a)(2). (Doc.
6 #649, pp. 3-4). The Agreement contained eight numerated paragraphs of facts in
7 support of the elements of the offense being pled. Id., at 5-6.
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11 **Change of Plea Hearing**

12 An initial status conference took place before the change of plea hearing in
13 order to address changes the Government needed to make to the Agreement.
14 (Doc. # 942). Before going off record for the Government to type up a revised
15 plea agreement, the following exchange took place between the Court and
16 Delemus:
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21 THE DEFENDANT: Attorney Smith's (sic) told me to ask you, if
22 that's all right, is what I'm concerned about is some of the verbiage
23 in here, if a I agree to it and I believe it to be unfactual, I'd be
24 perjuring myself, correct" If I swore to this to be a factual document
25 and raised my hand under oath or—

26 THE COURT: Well, I can't give – I can't give you any legal advice –

27 ...
28

1 THE COURT: -- to assist you in determining what your options are
2 and whether or not you would be committing a crime by asserting
3 under oath something is true if you know it's not true.

4 (Cont.)

5 THE DEFENDANT: Well, that's perfectly – and I – believe me, I'm
6 from a Christian carpenter, I'm not an attorney by any stretch of the
7 imagination. And –

8 THE COURT: But Mr. Smith is an attorney.

9 THE DEFENDANT: Right, he is. And – but also is – well, what my
10 concern being is that if – if I sign something and I know it factually
11 to be untrue, isn't that like the definition of perjury and I swear to it?

12 THE COURT: It's much more complicated than that. If I swear
13 right now that it's not raining because when I came in this morning
14 it's not raining and then I walk outside and it's raining and I didn't
15 know it was raining, yeah, there's a whole range of different ways.
16 It's not black and white.

17 So it's really – depends on the facts and circumstances. And Mr.
18 Smith is the one to talk to about that.

19 He'll counsel you, and you can either accept or not accept his counsel
20 or ask for a second opinion.

21 (Doc. #942, pp. 7-9).

22 After the status conference the Court went back on record to conduct the
23 standard plea colloquy. (Doc. #646) This hearing generally included: (1) the
24 charges to be plead to, (2) a brief description of the elements constituting those
25 offenses (3) recitation of the Parties understanding of the applicable guidelines,
26 and, (4) the Parties position at sentencing. Id.

1 During the colloquy, Delemus stopped to confer with Mr. Smith after
2 almost every question asked by the Court. Delemus states that each time he asked
3 Mr. Smith a question during the plea colloquy, the response was always the same
4 – If you want to accept this plea, answer “_____”. Delemus would in turn give
5 the appropriate yes/no response to continue with the plea colloquy and for his plea
6 to be accepted.
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10 When the Court inquired on the conspiracy charge, there was a back and
11 forth conference between Mr. Smith and Delemus. (Doc. # 649, pp. 27-30). The
12 specific issue being discussed was Delemus telling Mr. Smith, that Delemus never
13 discussed or had any intent to “display force and aggression to influence or
14 interfere with the ability of federal law enforcement to perform or carry out their
15 duties”. Id. Delemus’ sole purpose and intention when coming to Nevada was to
16 protect people and show support for the Constitutional execution of the laws of
17 the United States. Delemus repeatedly told his counsel and asserted he had
18 specifically told Bundy and instructed others that they were in no way to interfere
19 with Government agents if the agents were performing a lawful duty.
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23
24 Rather than continue to press Delemus on this point, the Court relied on the
25 more generic statement in the plea and asked whether Delemus “traveled to
26 Nevada with the intent to further one of the objects of the conspiracy”. Again
27 Delemus stated his concerns with Mr. Smith.
28

1 The Court would then move on to the next factual statement asking
2 Delemus to admit that on “April 12, 2014, at least one of the members of the
3 conspiracy brandished a firearm . . . to intimidate the officers and to instill in them
4 fear and apprehension of immediate bodily injury or death”. (Doc. # 646, p. 31)
5 Delemus would not answer the Court whether this fact was true. Id. Instead, the
6 Court relied on Delemus stating that if the Court and the Government said it was
7 true, he had no reason to dispute it because he was not present when the alleged
8 act occurred. (Doc.# 646 p. 32-3).
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12 Likewise, the Court asked whether Delemus had any reason to believe that
13 “the armed assault did not force the law enforcement officers to relinquish custody
14 of the impounded cattle.” (Doc. #646, p. 34). And again, Delemus did not admit
15 this fact. The closest Delemus would come, is to say that if the Court was telling
16 him it was true, he had not reason to dispute that assertion. Id.
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19
20 When the Court then moved on to Paragraph 8 of the factual statement
21 underlying the plea to Count Sixteen of the Superseding Indictment, the following
22 exchange took place:
23

24 THE COURT: Did you make public statements to show and threaten force
25 to influence public officers?”

26 THE DEFENDANT: I don’t known that I threatened anyone but I did make
27 public statements hoping that that end peacefully. So I don’t –
28

1 THE COURT: All right, so what it says here on page 6 paragraph 9, is
2 displayed firearms and made public statements to show and threaten force,
3 all in order to influence any public officer in violation of NRS 205.320.
4 Is that true?

5 (Discussions between the defendant and his counsel off record)

6 THE DEFENDANT: I'm advised to say yes.

7 (Doc. 646, Exhibit C, p. 36).
8

9 Following these exchanges, the Court asked the Government if they were
10 satisfied and accepted the plea. The matter was then set for sentencing. After
11 meeting with Delemus sometime in October, Mr. Smith filed a motion to
12 withdraw as attorney citing the reason that Delemus wished to withdraw his guilty
13 plea and that his reasons were in conflict with continued representation by Mr.
14 Smith. (Doc. 979).
15
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18 **Motion to Withdraw Plea**
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20 A motion to withdraw guilty plea was filed on January 13, 2017. (ER 219-
21 38, Doc. #1298). The motion challenged whether the plea was knowingly and
22 voluntarily made with effective assistance of counsel. (Id.) The Government
23 filed a response on March 27, 2017 arguing that Delemus only wanted to
24 withdraw his plea after individuals were found not guilty in Oregon on similar
25 charges involving BLM and no fair and just reason existed for withdrawing the
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1 plea. (ER 241, Doc #1769). The Motion was denied by written order on May 9,
2 2017 (ER 251, Doc. #1953).

3
4 In denying the motion, the Court noted that Delemus admitted to traveling
5 to Nevada and since there was no evidence of potential government provocation
6 his presence could have only been as a show of force to prevent lawful BLM
7 activities. Secondly, the Court found that Delemus was liable under an aiding and
8 abetting theory because none of the co-defendants could claim they acted in self-
9 defense and therefore Delemus aided and abetted their unlawful actions. Again
10 these conclusions were based on the lack of evidence not turned over by the
11 Government and without the benefit of the later trials were all conspiracy charges
12 were rejected by two juries.
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16 **Sentencing**

17
18 The Court started by restating the calculation by probation of total offense
19 level of 25 corresponding to a guideline range of 57-71 months and the PSR
20 recommendation of 71-months. (Doc. #2151).
21

22 Defense Counsel for Delemus presented argument in justification of a lower
23 guideline sentence and argued for application of the 3-level downward adjustment
24 of acceptance of responsibility.
25

26
27 The Court denied the 3-level downward adjustment for acceptance of
28 responsibility finding that Delemus did admit to the factual basis for the essential

1 elements of the offense but then “backpedaled and limited his conduct” and
2 showed lack of remorse and minimization of his conduct.
3

4 The Court otherwise applied all adjustment agreed to by the Parties in the
5 plea agreement and determined an applicable guideline range of 87-108 months.
6 The Court imposed a sentence a sentence of 84-months. The notice of appeal was
7 filed June 1, 2017.
8

9
10 **Direct Appeal**

11 Delmus filed an appeal on June 1, 2017. The appeal was dismissed by the
12 9th Circuit based on the plea waiver. The order of dismissal was entered October
13 27, 2017. On December 20, 2017 this Court granted a mistrial find that the
14 Government’s failure to disclose evidence resulted in numerous *Brady* violations.
15 (Doc. #2856). Thereafter, the Government filed a motion to reconsider (Doc
16 #3175). The Government’s motion was denied by written order on July 3, 2018.
17 (Doc. #3273).
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III.

GROUNDS FOR RELIEF

**GROUND ONE – WILL FULL AND EGREGIOUS *BRADY* VIOLATION
DENIED DELEMUS’ DUE PROCESS RIGHTS**

**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**

I. Brady v. Maryland¹

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 this Court found the government was responsible for numerous *Brady* violations. This 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.

¹ 373 U.S. 83 (1963)

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

4
5 This Court found this was a willful *Brady* violation based on the contents of
6 the reports, the dates on which these reports were prepared (2014), the fact that the
7 FBI, who is part of the prosecution team, prepared both of these reports, the fact
8 that the U.S. Attorneys were aware of the existence of the surveillance camera and
9 failed to provide information about it when Ryan Bundy made his request, and
10 because the Government “falsely represented that the camera view of the Bundy
11 home was incidental and not intentional, and claimed that the defendants' request
12 for the information was a ‘fantastic fishing expedition.’” Transcript December 20,
13 2017, p. 10.
14
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17 **B. “BLM snipers”: FBI 302s Delmolino, Felix, and Racker**
18

19 This Court found this was a willful *Brady* violation based on the content of
20 these reports and dates on which they were prepared (2014 and 2015) and the fact
21 that the FBI, who is part of the prosecution team, prepared these report. This
22 Court found important that one of the prosecuting attorneys on this case was
23 present during the interview which was later memorialized in the FBI 302
24 concerning Delmolino. In essence, this Court found that the Government was
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1 “aware of the evidence and chose not to disclose it.” Transcript December 20,
2 2017, p. 12.

3
4 **C. Unredacted TOC log**

5 This Court found this was a willful *Brady* violation, citing the date on
6 which the log was prepared and its content, and the fact that the FBI, who is part
7 of the prosecuting team, created the document and was aware of it (the FBI knew
8 this log was saved on a thumb drive and located in the TOC vehicle). This Court
9 associated the content of the TOC log (“snipers inserted”, “deployed”) and its
10 suppression with the fact that the FBI and the U.S. Attorneys prosecuting this case
11 were present at the interview of BLM Ranger Brunk for the purpose of clarifying
12 whether he was acting as a “spotter” to a “sniper.” These factors combined with
13 “the Government's strong insistence in prior trials that no snipers existed justifies
14 the Court's conclusion that the nondisclosure was willful.” December 20, 2017, p.
15 14.

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21 **D. Willfulness of the violations**

22 In prior motions there have been insinuations of “serious government
23 misconduct” that are highly redacted. Delemus currently does not have access to
24 these materials, but as they relate to his motion he would preserve his right to
25 supplement this motion with that information or through further inquiry. (See
26 Doc # 3087).
27
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3 **II. Effect of Discovery Violations On Delemus**

4 The Court should not permit the Government to benefit from the
5 Government's misconduct in this case. Throughout this case, Delemus has
6 disputed he had any criminal intent. He readily admitted to his actions and in
7 doing so the Government, the Court and his lawyer derived his intention from
8 those actions. However, this assumption had now been shown to be based on a
9 false premise because they Government wrongly withheld critical evidence.
10
11

12 Delemus conviction was based on a guilty plea to two counts: travel in aid
13 of extortion and conspiracy to commit a crime against the United States. The
14 facts alleged in support of this plea were listed in eight paragraphs as stated in the
15 plea agreement. (Doc # 649 p.5-6).
16
17

18 **A. Plea Agreement**

19 The in support of the plea, the agreement cited two paragraphs relevant
20 here:
21

22 (1) Delemus left New Hampshire with the intent to "display force and
23 aggression in order to to influence a federal law enforcement officer, and
24 thereby impede or interfere with that officers duties". (See Doc. #649, p. 5,
25 paragraph 3); and,

26 (2) that from April 13, 2014, Delemus, provided personal security to Bundy
27 another conspirators, organized and led other gunmen in conducting patrols
28 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

1 made public statements to show and threat of force, all in 'order to influence
2 any public officer in violation of NRS 205.320. (See Doc. #649, p. 5,
3 paragraph 3).

4 To be clear, Delemus was not at the Wash and was not present during the
5 events of April 12, 2014. The factual allegations were based off of the intent and
6 actions of the other people involved and tied him in after the fact by his presence
7 at the Bundy ranch after the April 12, 2014 events. Moreover, the intent
8 requirements, both of the conspiracy and the substantive underlying offense both
9 hinged on the intent of Delemus and of the co-defendants.
10
11

12 **B. Plea Colloquy**

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14 At the entry of plea, Delemus made multiple statements disagreeing with
15 the intent requirement. Before going off record for the Government to type up a
16 revised plea agreement, the following exchange took place between the Court and
17 Delemus:
18

19 THE DEFENDANT: Attorney Smith's (sic) told me to ask you, if
20 that's all right, is what I'm concerned about is some of the verbiage
21 in here, if a I agree to it and I believe it to be unfactual, I'd be
22 perjuring myself, correct" If I swore to this to be a factual document
23 and raised my hand under oath or—

24 THE COURT: Well, I can't give – I can't give you any legal advice –

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26 THE COURT: -- to assist you in determining what your options are
27 and whether or not you would be committing a crime by asserting
28 under oath something is true if you know it's not true.

1
2 (Cont.)

3 THE DEFENDANT: Well, that's perfectly – and I – believe me, I'm
4 from a Christian carpenter, I'm not an attorney by any stretch of the
5 imagination. And –

6 THE COURT: But Mr. Smith is an attorney.

7 THE DEFENDANT: Right, he is. And – but also is – well, what my
8 concern being is that if – if I sign something and I know it factually
9 to be untrue, isn't that like the definition of perjury and I swear to it?

10 THE COURT: It's much more complicated than that. If I swear
11 right now that it's not raining because when I came in this morning
12 it's not raining and then I walk outside and it's raining and I didn't
13 know it was raining, yeah, there's a whole range of different ways.
14 It's not black and white.

15 So it's really – depends on the facts and circumstances. And Mr.
16 Smith is the one to talk to about that.

17 He'll counsel you, and you can either accept or not accept his counsel
18 or ask for a second opinion.

19 (Doc. #942, pp. 7-9).

20 When the Court inquired on the conspiracy charge, there was a back and
21 forth conference between Mr. Smith and Delemus. (Doc. 649, Exhibit C, pp. 27-
22 30). The specific issue being discussed was Delemus telling Mr. Smith, that
23 Delemus never discussed or had any intent to “display force and aggression to
24 influence or interfere with the ability of federal law enforcement to perform or
25 carry out their duties”. Id.
26
27

28 In a now relevant exchange the record indicates the following:

1 THE COURT: So it says here that you learned of. Mr. Cliven Bundy and
2 you initiated a telephone call to him from New Hampshire -- to him, and he
3 was in Nevada, and that phone call occurred on or about April 8th. of 2014.
4 Is that correct?

5 THE DEFENDANT: That is correct.

6 THE COURT: All right. And it says that as a result of this communication
7 you agreed to assist him, which you understood to mean bringing firearms
8 and gunmen to Nevada. Is that correct?

9 THE DEFENDANT: Not exactly, ma'am.

10 MR. SMITH: Your Honor, if I may?

11 THE COURT: Sure.

12
13 MR. SMITH: We we kind of went-back and forth on this issue. Mr. Myhre
14 was very cooperative with us. And I just want to point out to the Court the
15 language in item number 1 on page 5 towards the bottom it says,
16 "Defendant Delemus agreed to assist Bundy_ Defendant Delemus brought
17 firearms and gunmen to Nevada in support of Bundy

18 Those two sentences reflect the changes that were made from the previous
19 version of the statement of facts.

20 THE COURT: All right. **I'm not sure that I understand the distinction,**
21 **but there must be some distinction** here. So I'll defer to what his recitation
22 of the facts is. So that's what I want to make sure that I understand.

23 So, Mr. Delemus " you agreed to assist Mr. Bundy?

24 THE DEFENDANT: That's correct.

25 The distinction was that Delemus traveled to Nevada to assist Mr. Bundy
26 from getting killed by BLM agents, not to stop BLM from taking Bundy's cows.
27 Mr. Myhre was well aware Delemus believed his intent was lawful back in 2016,
28

1 however, with the benefit of hindsight it has become clear his withholding of
2 evidence was specifically designed from making the defendants and Delemus
3 aware there was evidence supporting a defense.
4

5 The Court would then move on to the next factual statement asking
6 Delemus to admit that on “April 12, 2014, at least one of the members of the
7 conspiracy brandished a firearm . . . to intimidate the officers and to instill in them
8 fear and apprehension of immediate bodily injury or death”. (Doc. 646, P. 31)
9 Delemus would not answer the Court whether this fact was true. Id. Instead, the
10 Court relied on Delemus stating that if the Court and the Government said it was
11 true, he had no reason to dispute it because he was not present when the alleged
12 act occurred. (Doc. #646, pp. 32-3).
13
14
15

16 Likewise, the Court asked whether Delemus had any reason to believe that
17 “the armed assault did not force the law enforcement officers to relinquish custody
18 of the impounded cattle.” (Doc. 646, Exhibit C, p. 34). And again, Delemus did
19 not admit this fact. The closest Delemus would come, is to say that if the Court
20 was telling him it was true, he had not reason to dispute that assertion. Id.
21
22
23

24 When the Court then moved on to Paragraph 8 of the factual statement
25 underlying the plea to Count Sixteen of the Superseding Indictment, the following
26 exchange took place:
27
28

1 THE COURT: Did you make public statements to show and threaten force
2 to influence public officers?”

3 THE DEFENDANT: I don't know that I threatened anyone but I did make
4 public statements hoping that that end peacefully. So I don't –

5 THE COURT: All right, so what it says here on page 6 paragraph 9, is
6 displayed firearms and made public statements to show and threaten force,
7 all in order to influence any public officer in violation of NRS 205.320.
8 Is that true?

9 (Discussions between the defendant and his counsel off record)

10 THE DEFENDANT: I'm advised to say yes.

11 (Doc. # 646, p. 36).

12
13 Delemus started off the colloquy by asking the court if it would be perjury
14 to admit to facts he knew to be untrue. (Doc. #942, pp. 7-9). The facts he
15 believed to be untrue were the same facts he was being asked to admit to. More
16 specifically, Delemus was stating he had no knowledge whether individuals had
17 used force or intimidation to get property back for the Bundy family or whether
18 any public officer had been intimidated by any actions occurring before he arrived
19 in Nevada. Instead, as it related to the overt acts constituting the conspiracy,
20 Delemus' statements were claims of innocence rather than allocations of wrong
21 doing.
22
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25

26 **C. Motion to Withdraw Plea**

1 Immediately after pleading guilty, Delemus moved to withdraw his plea. In
2 his motion, he told the Court that after speaking with his current counsel he know
3 understood the intent requirement and believed he had a valid defense to the
4 charges. It was his contention that his attorney did fully explain to him the intent
5 requirement of traveling in aid of extortion count, or the intent requirement for the
6 conspiracy in general. However, what really occurred was that the Government
7 purposely withheld evidence preventing his prior attorney from being able to give
8 proper counsel of possible defenses should he go to trial.
9
10
11

12 **D. Statements at Sentencing**
13

14 Here are relevant statements made by Delemus at his sentencing:
15

16 “I hoped to be a deterrent, and I did hope to deter
17 the government's action, yes, I did. I'm completely
18 guilty of that.

19 I did not -- those government actions that I came
20 out to deter were not about those cattle, it was
21 about killing that family and those kids.

22 Gerald Delemus Statement at Sentencing (ER
23 389).

24
25 I still fail to understand why you would put snipers
26 above someone's home and not have a warrant for
27 their arrest. Especially on a process that's been
28 going on so long.

1 Why not just go arrest him and stop all this
2 nonsense? If it's a problem, put him in jail and then
3 deal with him in the court.

4 But my faith wouldn't let me stay home.

5 I'm one of those guys who's either loved or hated.
6 And I've had some pretty bad things said about me,
7 some of them in here in this court, which I would
8 argue, but I'm not going to.

9 But I just want you to see I've heard that the path
10 to hell is paved with good intentions. I'm praying
11 that I'm not paving that path, that I'm doing what
12 would be pleasing to God. The scripture that came
13 to me when I talked to Cliven was: There's no
14 greater love than a man who will give his life for
15 his brother.

16 I may not have gave it out there on the field, might
17 not have got shot, but I've been giving it here for
18 16 months in prison. And if it could save a life, a
19 law enforcement officer's life, or one of those
20 children's life, I would do it again. But I would
21 have left my guns at home. That I would have
22 done.

23 Gerald Delemus Statement at Sentencing (ER 388)

24 Delemus went on to recall prior incidents where the Government, even with
25 the best of intentions, had engaged in actions that resulted in the death of innocent
26 persons and children. Every statement attributed to Delemus included by the
27 Government in their Memorandum, states that he did not want to harm anyone and
28

1 was never going to attack first, but he did want the ability to defend himself. In
2 his words:

3
4 “[m]y intention wasn’t to go out there and fire a
5 single round. That was not my intention
6 whosoever [sic] and but I’ve got to tell you is my
7 foremost intention was not to let them intimidate
8 or attack that family. An if it took my life at that
9 particular point in time, we only live so long
10 anyways and if your’re [sic] going to die, you
11 might as well die standing up doing something for
12 what you believe is right.”

13 (ER 310-11)

14 All of these statements from the beginning of the case until his sentencing
15 paint a clear picture. Delemus traveled to Nevada believing his presence would
16 deter provocative and potentially dangerous government conduct. *See United*
17 *States v. Moore*, 483 F.3d 1361, 1385 (9th. Cir. 1973). The statements were made
18 long before the Court’s findings of willful *Brady* violations by the Government.
19 The Government’s theory of prosecution has always relied on the fact that the
20 Defendants were acting offensively instead of defensively. The evidence that the
21 Government failed to disclose would have changed the outcome considerably in
22 Delemus’ case by supporting his belief that his actions were done with a defensive
23 and protective intent and not with a threatening or ill intent. Accordingly, relief
24 should be granted.
25
26
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28

E. Delemus Intent When Traveling

1
2 In early April of 2014, Delemus read an article from the news media site
3 “The Drudge Report”. The Drudge Report isn’t exactly a typical
4 point/counterpoint news source and painted the events at the Bundy ranch in a
5 very hostile tone. The headline read “Heavily-Armed Feds Surround Nevada
6 Ranch.”² The article claimed the Government, not just enforcing its rights to
7 claimed property, but attempting to take the Bundy ranch and property by force. It
8 is widely agreed the Drudge Report recklessly fueled the confrontation.³
9
10
11

12 Regardless of the report, Delemus, like many Americans, was surprised to
13 see images of BLM agents in full tactical gear, carrying M-16’s, and holding
14 snarling attack dogs while other agents used tasers on protestors and forcefully
15 arrested members of the Bundy family.⁴ There was certainly a counterpoint to
16 these events, but most people were surprised to see such a massive use of force to
17 address a dispute over trespassing cattle. Before this incident, it is unlikely people
18 would have considered the possibility of a park ranger enforcing park rules with a
19 sniper rifle.
20
21
22

23
24 ² http://www.drudgereportarchives.com/data/2014/04/11/20140411_164038.htm

25 ³ [https://www.mediamatters.org/blog/2014/04/11/drudge-report-recklessly-hypes-
26 confrontation-be/198859](https://www.mediamatters.org/blog/2014/04/11/drudge-report-recklessly-hypes-confrontation-be/198859)

27 ⁴ https://www.youtube.com/watch?v=JBpzB86SA_w
28

1 Delemus did not go to Nevada to “fight” with BLM. During the
2 conversation with Cliven Bundy on April 8, 2014, Delemus understood there to be
3 BLM Special Agents in the hills around his house pointing sniper rifles at
4 Bundy’s children and grandchildren. This was consistently stated by Delemus in
5 his motion to withdraw guilty plea and at sentencing and was finally confirmed by
6 the Government years after the fact.
7

8
9 The Government repeatedly asserted that Delemus’ and the other
10 defendants’ actions were unreasonable because there was no evidence of
11 provocation by BLM agents, only lawful government conduct. It has however,
12 become quite clear that the Government withheld evidence from the Court and
13 from Delemus that would have greatly changed the understanding of this case by
14 Delemus, his prior attorney who advised him to plead guilty, and the Court.
15
16
17

18 When Delemus arrived in Nevada, he had no reason to believe the events of
19 April 12th were as significant as he would later find out.
20

21 His understanding was that the Clark County Sherriff had spoken to the
22 head of the BLM, who in turn agreed to stop operations. This erroneous belief
23 was subsequently validated by public officials, including the Governor of the State
24 of Nevada who plainly stated the BLM action was improper, and they supported
25 the BLM decision to stop the impoundment operations. The exact quote from
26 Governor Brian Sandoval, a former Federal judge in this District, stated:
27
28

1 “No cow justifies the atmosphere of intimidation which
2 currently exists nor the limitation of constitutional rights that
3 are sacred to all Nevadans,” Sandoval, a Republican, said. “The
4 BLM needs to reconsider its approach to this matter and act
5 accordingly.”⁵

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

8 “I told him very clearly that law-abiding Nevadans must not be
9 penalized by an over-reaching BLM,”⁶

10 During his time at so-called “Camp Liberty,” Delemus didn’t surveil
11 Government employees or organize troops. He was trying to contact the Sherriff
12 and BLM officials to negotiate a compromise and get the parties to communicate.
13 Delemus had previously told Bundy, he would not interfere with the execution of
14 any warrant or arrest. Delemus met with the Sherriff and informed his staff that
15 Delemus would take the responsibility to ensure law enforcement had access to
16 perform any necessary duty.
17
18
19

20 **III. Misconduct of the Government**

21 Prosecutors have intentionally withheld helpful and exculpatory
22 information from the defense; they have neglected to diligently search for and
23 discover exculpatory information and materials in the possession of law
24
25

26 _____
27 ⁵ <http://www.foxnews.com/politics/2014/04/07/nevada-officials-blast-feds-over-treatment-cattle-rancher-cliven-bundy.html>

28 ⁶ Id.

1 enforcement; and they have falsely assured the Court and the defense – on more
2 than one occasion - that evidence and information related to the camera used to
3 surveil the Bundy Ranch house and derivative information related to the
4 surveillance, did not exist.
5

6
7 It would become clear why the Government was reluctant to disclose and
8 produce this information. We now know, for example, based upon this new
9 information, that the government’s prior refusal to disclose information about the
10 camera – isn’t about the camera itself, instead its connected to a much larger,
11 undisclosed set of information regarding the presence, use and deployment of
12 heavily armed BLM agents, FBI snipers, armored trucks, and a previously
13 undisclosed Forward Operating Base for the pre-planned FBI “Rapid Response”
14 tactical team surrounding the Bundy Ranch house from April 5 thru 8, 2014,
15 including two man teams from the FOB acting as security for the Electronics
16 Technicians setting up and maintaining the very camera at issue.
17
18
19
20

21 This United States Attorney’s Office has been previously sanctioned by
22 both the District Court and the Appellate Court, for remarkably similar conduct to
23 that which is manifest here. *See e.g. USA v. Daniel Chapman, et al.*, 2:03-cr-347
24 (Doc. 304); *United States v. Chapman*, 524 F.3d 1073, 1088 (9th Cir. 2008). The
25 same kind of conduct at issue in this motion has also been repeatedly condemned
26 in recent decisions by the United States Supreme Court and the Ninth Circuit
27
28

1 Court of Appeals. *See e.g. Smith v. Cain*, 565 U.S. 73, 75 (2012); *United States v.*
2 *Sedaghaty*, 728 F.3d 885 (9th Cir.2013); *Aguilar v. Woodford*, 725 F.3d 970 (9th
3 Cir.2013); *United States v. Kohring*, 637 F.3d 895 (9th Cir.2010). The prevalence
4 of Brady related prosecutor misconduct is what caused Chief Judge Kozinski to
5 famously warn in 2013, “There is an epidemic of Brady violations abroad in the
6 land. Only judges can put a stop to it.” *United States v. Olsen*, 737 F.3d 625, 626
7 (9th Cir. 2013) (Kozinski, C.J., joined by Pregerson, Reinhardt, Thomas, and
8 Waterford, JJ., dissenting from denial of rehearing en banc).

9
10
11
12 Nevertheless, the most important reason this information could not be
13 withheld under Brady, and under Rule 16, is that it is centrally related – and
14 contrary to the fundamental theory of the government’s prosecution. As the Court
15 is aware, the case at bar has been centrally defined by the government as the result
16 of a “massive armed assault against federal law enforcement officers that occurred
17 in and around Bunkerville Nevada, on April 12, 2014.” (Doc. #27 at p. 2).

18
19
20
21 Defendant Ammon Bundy along with all other indicted members of his
22 family and several co-defendants- have all vehemently disagreed with this
23 characterization. Additionally, the two prior mistrials on identical conspiracy
24 counts involving other defendants in this case further calls into question the
25 credibility of this government narrative.
26
27
28

1 This is significant because “all” of the actions of the defendants, according
2 to the Superseding Indictment, were undertaken and performed with the intent and
3 purpose of “threaten[ing], intimidate[ing], and extort[ing]” federal officers. Doc.
4 27 at 3, ¶1. As a primary support for this allegation, the indictment alleges that
5 “leaders and organizers” of the purported “conspiracy” engaged in specific overt
6 acts of “force, threats, and intimidation to stop the impoundment” of Bundy cattle,
7 by “flooding the internet with false and deceitful images and statements”, *id.*, and
8 further alleges that to recruit others into the conspiracy the defendants in this case
9 communicated a false claim by Cliven Bundy that “they have my house
10 surrounded” and “[the BLM] are armed with assault rifles...they have snipers[.]”
11 *Id.* at p. 21.

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

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

19 In turn, Delemus actions were a sole result of speaking with Cliven Bundy
20 on April 8, 2014, wherein Cliven told Delemus of the provocative nature of the
21

1 BLM agents and the danger to his family. It was in response to this call, that
2 Delemus travelled to Nevada. The evidence affecting the validity of Cliven's
3 statements on these matters to Delemus goes to the heart of his intent when he left
4 New Hampshire and thus his criminal liability, or lack thereof.
5

6
7 On top of this, the existence of this information and the content of these
8 records was repeatedly and falsely denied by prosecutors in proffers and offers of
9 proof to the Court and to the defense. Not only does this new information flatly
10 contradict repeated assurances given by prosecutors to the Court and the defense,
11 but it directly confirms the Court's suspicions raised on the record on November
12 7, 2017 and the legal basis for both mistrial and dismissal.
13
14

15 The Government's willful Brady violations and outrageous conduct has
16 irreparably prejudiced Delemus and has undermined the confidence in the
17 outcome of this case. The Government has obtained a plea through guile and
18 deception and even after dismissing the indictment on which Delemus was
19 charged continues to see no issue with their conduct in this case or his remaining
20 in prison. Relief is warranted in this instance and it is respectfully requested the
21 Court set aside the verdict.
22
23
24

25
26 **GROUND TWO - INEFFECTIVE ASSISTANCE OF COUNSEL**

27 **Delemus' Received Deficient Performance From His Prior Trial Counsel**
28 **Who Advised Him To Accept The Plea In This Case Without Requesting**

1 **Production Of Discovery In Support Of Delemus' Claims, Not Investigating**
2 **And Developing Delemus' Proffered Defense; And Failing To Advise**
3 **Delemus On The Essential Elements Of The Charges Against Him All In**
4 **Violation Of Delemus' Sixth And Fourteenth Amendment Rights**

5 Defendants have a Sixth Amendment right to counsel, a right that extends
6 to the plea-bargaining process. *Padilla v. Kentucky*, 559 U.S. 356, 364, 130 S. Ct.
7 1473, 176 L. Ed. 2d 284 (2010). ("During plea negotiations defendants are
8 "entitled to the effective assistance of competent counsel.") *McMann v.*
9 *Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).
10

11
12 When analyzing representation during the plea process the court is to use
13 the two part *Strickland v. Washington* test. 474 U.S., at 58, 106 S. Ct. 366, 88 L.
14 Ed. 2d 203. The performance prong of Strickland requires a defendant to show
15 ""that counsel's representation fell below an objective standard of reasonableness."
16 474 U.S., at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (quoting Strickland, 466 U.S., at
17 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674).
18

19
20 To establish Strickland prejudice a defendant must "show that there is a
21 reasonable probability that, but for counsel's unprofessional errors, the result of
22 the proceeding would have been different." *Id.*, at 694, 104 S. Ct. 2052, 80 L. Ed.
23 2d 674. In the context of pleas a defendant must show the outcome of the plea
24 process would have been different with competent advice. *See Frye, ante*, at 148,
25 132 S. Ct. 1399, 182 L. Ed. 2d 379 (noting that *Strickland's* inquiry, as applied to
26
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28

1 advice with respect to plea bargains, turns on "whether 'the result of the
2 proceeding would have been different'" (*quoting Strickland, supra*, at 694, 104 S.
3 Ct. 2052, 80 L. Ed. 2d 674)); see also *Hill*, 474 U.S., at 59, 106 S. Ct. 366, 88 L.
4 Ed. 2d 203 ("The . . . 'prejudice,' requirement . . . focuses on whether counsel's
5 constitutionally ineffective performance affected the outcome of the plea
6 process"). In *Hill*, when evaluating the petitioner's claim that ineffective assistance
7 led to the improvident acceptance of a guilty plea, the Court required the
8 petitioner to show "that there is a reasonable probability that, but for counsel's
9 errors, [the defendant] would not have pleaded guilty and would have insisted on
10 going to trial." *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203
11 (1985).
12
13
14
15

16
17 Mr. Smith did not make a request for discovery after Delemus told him why
18 he came to Nevada. He further did not investigate or attempt to develop a defense
19 based on what Delemus told him of why he came to Nevada. To some extent, it
20 was not Mr. Smith's fault because the Government clearly always intended to
21 prevent him from discovery information that likely would have altered his advice
22 to Delemus that he did not have a valid defense and should be proceed to trial.
23 But the lack of any attempt to seek out information in support of a potential
24 defense rendered his advice to plead guilty constitutionally deficient.
25 Accordingly, it is requested that relief be granted in this case.
26
27
28

1 **GROUND THREE – GOVERNMENT’S *BRADY* VIOLATIONS**
2 **RENDERED DELEMUS’ PLEA INVALID**

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

7 In *Sanchez v. United States*, 50 F.3d 1448 (1995), the Court held that guilty
8 pleas "cannot be deemed intelligent and voluntary if entered without knowledge of
9 material information withheld by the prosecution." *Id.* at 1453 (quotation marks
10 omitted).

11 A plea is not voluntary if induced by threats, misrepresentation, or other
12 acts "which deprive it of the character of a voluntary act." *United States v.*
13 *Kaczynski*, 239 F.3d 1108, 1114 (9th Cir. 2001) (quoting *Sanchez v. United States*,
14 50 F.3d 1448, 1454 (9th Cir. 1995)).

15 “A defendant's decision whether or not to plead guilty is often heavily
16 influenced by his appraisal of the prosecution's case." *Sanchez v. United States*,
17 1454. "[i]f a defendant may not raise a Brady claim after a guilty plea, prosecutors
18 may be tempted to deliberately withhold exculpatory information as part of an
19 attempt to elicit guilty pleas." *Id.*

20 The rationale of *Sanchez* applies with equal force to plea agreements. Plea
21 agreements, like guilty pleas, must be entered voluntarily and intelligently to
22

1 satisfy due process requirements. *United States v. Navarro-Botello*, 912 F.2d 318,
2 321-22 (9th Cir. 1990).
3

4 The disclosure of *Brady* evidence is just as important in ensuring the
5 voluntary and intelligent nature of a plea bargain as it is in ensuring the voluntary
6 and intelligent nature of a guilty plea. In both situations, the defendant's decision"
7 is often heavily influenced by his appraisal of the prosecution's case." *Sanchez*, 50
8 F.3d at 1453. Moreover, the same prosecutorial incentive to withhold *Brady*
9 information that would arise if guilty pleas extinguished *Brady* rights, would arise
10 if plea agreements could extinguish those rights. See *id.* Therefore, plea
11 agreements, and any waiver of *Brady* rights contained therein, "cannot be deemed
12 intelligent and voluntary if entered without knowledge of material information
13 withheld by the prosecution." *Id.* (quotation marks omitted). ³Link to the text of
14 the noteAs noted above, one factor to consider is whether a guilty plea was
15 entered into knowingly and voluntarily. A plea can be rendered involuntary if it is
16 the product of an objectively reasonable misapprehension of law and facts.
17 Further, a defendant must be fully aware of the consequences of his plea and the
18 plea must not be the product of duress.
19
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25 In this case, the withheld evidence clearly went to the heart of the case
26 against Delemus. His liability was always derivative of his co-defendants. He
27 wasn't in the wash on April 12, 2018. Never came in contact with any BLM or
28

1 other Government agent. And never committed any provocative act towards any
2 Government official. The entire case against him was premised on the idea that
3 the mere presence of all of the individuals as a whole was designed as a show of
4 force to prevent lawful activity.
5

6
7 This premise was therefore condition on there being no other plausible
8 reason for the protestors, including Delemus, to have been at the Bundy ranch
9 from April to June. Although, Delemus did agree to come to Nevada, it was never
10 for an illegal purpose or to prevent or intimidate any public official or agent to
11 prevent performance of public duties. He was here because he didn't want
12 another Waco, or other incident where people died due to a "misunderstanding"
13 after provocative Government conduct. He believed his presence would deter
14 unlawful Government aggression but still allow for any other lawful actions such
15 as arresting Bundy or charging him with a crime.
16
17
18

19
20 Delemus did not admit to the acts necessary to support a finding he
21 intimidated a public officer in violation of the Nevada Revised Statute. The
22 closest he came was to say "I was advised to say yes". (Doc. 646, p. 36).
23 Delemus was never provided the Nevada Revised Statutes or United States Code
24 or advised his lack of criminal intent was a critical issue and a possible defense to
25 a charge of intimidation and by extension against the charge of traveling in aid of
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27
28

1 extortion. Had Delemus been aware of this possible defense, and more
2 importantly, the evidence supporting this defense he would not have plead guilty.
3

4 Accordingly, this Court should provide relief and set aside or vacate the
5 judgment.
6

7 IV.

8 CONCLUSION

9 It is a peculiar thing that there is no area of law where discovery violations
10 are punished less severely than in criminal cases where it matters the most. The
11 standards for disclosure are skewed heavily in the Government's favor giving
12 them the power to decide what should be disclosed and requiring defendants to
13 establish the existence of, and relevance, of any requested discovery that is solely
14 in the possession of the Government.
15
16
17

18 Prosecutors do not fear imposition of attorney's fees, sanctions, or penalties
19 as other litigants due in administrative and civil law. Even willful misconduct
20 results in no sanctions or penalties for the wrongful actor, only dismissal or retrial
21 of the case. Both of those outcomes it is society and the defendant that suffer not
22 the wrongdoer.
23
24

25 The only remedy available – dismissal or reversal of a case – is considered
26 so drastic it is only imposed in the most egregious of cases. This produces a
27 perverse incentive to commit discovery violations with the knowledge that only a
28

1 handful of cases will be at risk of reversal or dismissal. This risk and incentive of
2 discovery violations becomes institutionalized when the Courts and the
3 Government find ever more clever and ingenious ways to deny these violations
4 are even occurring and denying relief.
5

6
7 It is commendable that this Court has tried to remedy the Government's
8 egregious conduct in this case, but the USAO will never admit or concede that
9 there was anything wrong. Not a big deal, already been disclosed, not relevant are
10 always the responses to discovery violations. It's easy to make these statements
11 when the only persons who suffer from your actions are a defendant you are trying
12 to punish to begin with. And make no mistake, Delemus has suffered punishment.
13
14 A man who has given his life to his country, been a father, a husband and worked
15 hard for his family, his country and his God, has had everything taken away. Out
16 of all of the people who protested the BLM, out all the people who owned cattle,
17 out of all of the people simply present at the Bundy ranch, Delemus is the only
18 one in prison serving seven years who never had any interaction or confrontation
19 with any Government official. This situation is unjust
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24 It is therefore respectfully requested that the Court grant relief.
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V.

PRAYER FOR RELIEF

Wherefore Delemus prays that this Court:

1. Issue a writ of habeas corpus pursuant to 28 U.S.C. 2255 to have Delemus brought before it, to that end that he might be discharged from his unconstitutional confinement;
2. Conduct a hearing at which proof may be offered concerning the allegations this Motion and any affirmative defenses raised by the United States;
3. Grant Delemus the authority to obtain subpoenas for witnesses and documents, conduct, depositions, and conduct any other discovery reasonably necessary to prove the facts alleged in this Motion; and,
4. Grant such other and further relief as the Court deems appropriate in the interest of Justice.

Respectfully submitted this 13th day of July 2018

PITARO & FUMO, CHTD.

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CERTIFICATE OF SERVICE

On July 13, 2018 the undersigned caused a true and correct copy of the
aforementioned **MOTION TO APPOINT COUNSEL** via the ECF system.

PITARO & FUMO, CHTD.

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