UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CRIMINAL NO. 2:18-CR-63-GZS**
	)	
BRIAN J. BILODEAU	)	
BRIAN BILODEAU, LLC	)	

DEFENDANT BRIAN BILODEAU AND BRIAN BILODEAU, LLC'S MOTION TO DISMISS WITH INCORPORATED MEMORANDUM OF LAW

NOW COMES the Defendant, Brian Bilodeau, by and through his counsel, Timothy E. Zerillo, and respectfully moves the Court to dismiss Counts 12 and 13 in this matter as a result of the Drug Enforcement Agency's destruction of the marijuana evidence. In support thereof, Counsel states as follows:

1. Defendant is charged in Count 1 of the Superseding Indictment with Conspiracy. The Government alleges that the Defendant manufactured and/or possessed with intent to distribute marijuana. Presumably, this relates to the allegation that Defendant conspired with Timmy Bellmore and others relative to a drug trafficking organization that the Government is referencing as the "Bellmore Drug Trafficking Organization" (hereafter "Bellmore DTO"). To the extent that Defendant was ever involved with that conspiracy, he withdrew well prior to the seizures in this case[1].
2. On or about February 27, 2018, the Government executed search warrants for 72 Danville Corner Road, Auburn, Maine, which is the Defendant's residence. While there, they seized what they now allege to be 157 pounds of marijuana. Thereafter, they destroyed all but samples of the marijuana they seized. This forms the basis of Count 13.

[1] Defendant does not concede that he ever engaged in the criminal conspiracy charged in Count 1. However, it is clear that Mr. Bilodeau disassociated himself with Timmy Bellmore between six and eight months prior to his arrest.

3. Also on February 27, 2018, the Government executed search warrants for 230 Merrow Road, Auburn, Maine, which is a marijuana caregiver facility. There, they destroyed alleged marijuana plants. This forms the basis of Count 12.
4. Defendant argues that the destruction of this evidence requires the dismissal of Counts 12 and 13 against him for the reasons set forth in the Memorandum below.
5. Attached to this Motion as *Exhibit 1* is the *Declaration of Hillary Lister*, incorporated by reference herein.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR GOVERNMENT DESTRUCTION OF EVIDENCE

On February 27, 2018, DEA Agents searched Brian Bilodeau's home located at 72 Danville Corner Road in Auburn, Maine (hereafter "72 Danville"). They claim to have found approximately 157 pounds[2] of marijuana. The Agents weighed the marijuana and recorded the weight. They photographed the marijuana, but did not photograph the marijuana sufficiently for the Undersigned to understand the character of the marijuana[3]. Moreover, DEA agents appear to have photographed segments of the marijuana to make up the representative sample, but they, or the lab responsible for testing the marijuana, put all the segments into one bag.

Likewise, on February 27, 2018, DEA Agents searched 230 Merrow Road, Auburn, Maine. This is a facility alleged to be partially owned by Brian Bilodeau. Therein, agents destroyed alleged marijuana plants. The agents inadequately documented the nature and characteristics of the plants before destroying them.

[2] This is drawn from the video taken by DEA Agents of the weighing of the marijuana seized from 72 Danville. There are a variety of other weights for this marijuana given in various documents, depending on the discovery source. The evidence has now been destroyed, other than samples, and the Undersigned cannot properly verify the weight, nor the characteristics of the alleged marijuana.

[3] The marijuana representative sample was said to have been divided into subexhibits, but has been presented to the defense as one bag of marijuana, which is undivided into subexhibits, and is not fully processed marijuana.

FACTUAL BACKGROUND

Brian Bilodeau is a medical marijuana caregiver. He is licensed and empowered to possess, cultivate and distribute marijuana pursuant to the Maine Medical Use of Marijuana Program (hereafter "MMUMP").

On January 10, 2018, Maine Sheriffs Association Compliance Specialists Matthew A. Clark and Mark Desjardin conducted a site inspection of 586 Lewiston Junction Road, Lewiston, Maine. This inspection focused on the medical marijuana grow of Brian Bilodeau. The inspection revealed that Brian Bilodeau was compliant with the MMUMP and he was permitted to continue with his caregiver operation. Messrs Clark and Desjardin determined that Mr. Bilodeau was in compliance with the MMUMP. The marijuana seized at 72 Danville was the same marijuana inspected and approved on January 19, 2018 by Messrs Clark and Desjardin.

The Undersigned issued a letter to AUSA David Joyce on March 9, 2018. Therein, the Undersigned requested that the Government preserve and allow inspection of all of the Defendant's property.

Although it is not entirely clear to the Undersigned, the DEA destroyed all the marijuana but a representative sample. The representative sample does not appear to have been properly documented, nor collected. Moreover, the DEA does not appear to have secured authorization for the destruction of evidence. This unauthorized destruction was quickly and haphazardly done despite the Government's clear understanding that Mr. Bilodeau's compliance with the MMUMP would be critical to his case. The destruction of evidence in such an instance, standing alone, represents a violation of Mr. Bilodeau's due process rights.

ARGUMENT

I. THE GENERAL METHODOLOGY OF SAMPLING AND DESTRUCTION OF DRUG

EVIDENCE

The Code of Federal Regulations permits the destruction of drugs to avoid the warehousing of large amounts of drug evidence. 28 CFR s.50.21(c). However, destruction of drug evidence is only permitted when the evidence is "unnecessary for due process in criminal cases." *Id*.

The Regulations permit the taking of a "representative sample" of marijuana evidence, which means "the exemplar for testing and a sample aggregate portion of the whole amount sufficient for current criminal evidentiary practice." 28 CFR s.50.21(d)(3). For all marijuana evidence in addition to the representative sample, the DEA must notify the appropriate United States Attorney or Assistant United States Attorney that the sample will be destroyed after 60 days. 28 CFR s.50.21(e)(1). A copy of the DEA form for the same is attached as *Exhibit 2*. In response, the prosecutor may request that the evidence in addition to the samples be preserved. 28 CFR s.50.21(f)(2).

The DEA has provided guidance for its agents related to the preparation of a representative sample of marijuana. The agent is to:

- Extract an approximately one kilogram sample of marijuana;
- Extract 10 samples at "dispersed locations" of approximately five grams each;
- Each of these 10 sub-exhibit samples, together, constitute the representative sample and
- Photograph and/or take video of the entire display.

See Exhibit 3, DEA Agents Manual.

II. THE METHODOLOGY OF SAMPLING AND DESTRUCTION OF DRUG EVIDENCE EMPLOYED IN MR. BILODEAU'S CASE

There is little evidence related to the DEA's destruction of evidence in this matter, despite repeated requests by the Undersigned for discovery. Mr. Bilodeau has requested of the Government:

> Documentary evidence, including photographs, reports and other documents consistent with the DEA preparation of a representative sample of the marijuana. This includes the photographing and weighing of samples of the sub-exhibits, along with the photographing and weighing of the entire display...
>
> ...Disposition of Drug Evidence Forms, Drug Evidence Destruction Notices and any other reports, correspondence, emails, notices or records related to the destruction of the evidence.

In response, the Government has provided some limited photographs, a short video of the destruction of evidence, and a report authored by DEA SA Michael Wadrop on July 2, 2019, a year and a half after the seizure. The Government has not provided:

- Photographs or videos of the representative sample;
- Reports relative to the destruction of the representative sample (save SA Wadrop's report);
- Any information, photographs or videos regarding the weight of the representative sample sub-exhibits;
- Any information, photographs or videos depicting the representative sample sub-exhibits;
- DEA Disposition of Evidence Forms;
- Any reports, correspondence, emails, notices or records evidencing the permission by the United States Attorney's Office for the destruction of the evidence.

The Government indicates that the marijuana evidence was destroyed the same date as the seizure, February 27, 2018. The Undersigned has sought information related to the Government's authorization to the DEA to destroy the marijuana evidence prior to the 60 day waiting period. On May 10, 2019, AUSA Joyce indicated in a letter to the Undersigned that

"This office approved DEA's request to handle bulk marijuana exhibits in accordance with agency policy." No correspondence regarding this destruction of evidence has been provided to Counsel, despite request.

It appears from the limited information the Undersigned does have, that the DEA filled out their Form 48 - Destruction of Drug Evidence forms - incorrectly. The Undersigned has not been given the original Form 48, but was given new Form 48's, authored by DEA SA Michael Wardrop on July 1, 2019. Therein he indicates that these are "corrected" forms, corrected because they originally reported the destruction of the representative sample, not the bulk marijuana they now claim to have destroyed.

III. THE GOVERNMENT WAS AWARE THAT THE DEFENDANT WAS A MEDICAL MARIJUANA CAREGIVER

The Government cannot escape the ramifications of their destruction of evidence by claiming to be ignorant as to Mr. Bilodeau's status as a marijuana caregiver, protected by Maine law. Mr. Bilodeau, at all times relevant, was a medical marijuana caregiver operating under the MMUMP.

Case agents knew Mr. Bilodeau to be a medical marijuana caregiver since at least January 27, 2016. *Affidavit of Barry Kelly*, January 24, 2018, paragraph 21(c). The agents even acquired Mr. Bilodeau's *Medical Marijuana Caregiver Application* with the City of Lewiston, dating back to January 27, 2016.

In his later Affidavits used to search Mr. Bilodeau's home, SA Kelly entirely neglects to mention that Mr. Bilodeau is a medical marijuana caregiver. Instead, he claims that he has "generated substantial income from unlawful marijuana trafficking," without mentioning that Mr. Bilodeau was, at all times, a caregiver. *Affidavit of Barry Kelly*, February 26, 2018, fn 6.

Regardless of this deception, it is apparent that SA Kelly and others were well aware at all times that Mr. Bilodeau was a caregiver.

The Department of Justice must have known of Mr. Bilodeau's caregiver status at the time they authorized the destruction of the marijuana. Government agents were keenly aware that Mr. Bilodeau was protected by Maine law. The exculpatory nature of the marijuana evidence was readily apparent.

Moreover, the Government was aware that the Rohrabacher-Blumenaeur prohibitions protected caregivers like Mr. Bilodeau, and they ignored that fact regardless. *See Affidavit of SA Barry Kelly*, January 24, 2018, fn 6. The Government did not care that there was a federal law that protected Mr. Bilodeau. *Id.*

This bolsters Mr. Bilodeau's claim that it was readily apparent that the agents knew that the evidence seized from 72 Danville and 249 Merrow was exculpatory. They knew that the Rohrabacher-Blumenaeur Amendment created a defense based on Mr. Bilodeau's status as a caregiver, provided that he could establish his compliance with Maine law. *See Defendant's Motion to or Enjoin Prosecution Pursuant to the Rohrabacher-Blumenaeur Amendment*. The agents intentionally deprived Mr. Bilodeau of that right.

IV. THE DESTRUCTION OF EVIDENCE MERITS DISMISSAL

The Due Process Clause of the Fourteenth Amendment provides that criminal prosecutions must comport with prevailing notions of fundamental fairness. *California v. Trombetta*, 467 U.S. 479 (1984). Criminal defendants must be accorded a meaningful opportunity to present a complete defense, including guaranteed access to evidence. *Id.*, at 485.

In *Trombetta*, the Supreme Court established the framework for determining whether the

destruction of evidence deprives a defendant of due process. The Court found that the Constitution imposes a duty upon the government to preserve "evidence that might be expected to play a significant role in the suspect's defense." To be constitutionally material, however, the evidence must "possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id*. at 489. Mr. Bilodeau is without any means to defend the charges against him, as he cannot refute the Government's tests nor conduct his own tests on the alleged marijuana. Additionally, he cannot determine the state and characteristics of the marijuana, other than by a review of the samples. By failing to preserve the evidence, the government has deprived Mr. Bilodeau of his due process right to "a meaningful opportunity to present a complete defense." *Id.* at 485.

Arizona v. Youngblood, 488 U.S. 51 (1988) was decided after *Trombetta*, and added another element to the analysis. In *Youngblood*, the failure of the State to preserve potentially useful evidence must be coupled with bad faith on the part of the police. Under *Youngblood*, bad faith exists when the police intentionally destroy evidence they know may be potentially useful to the defense. *Id*. at 58.

In order to establish a due process violation that the government has destroyed evidence material to the defense, "a defendant must show: (1) first, that the evidence had an exculpatory value that was apparent prior to its destruction; and (2) that the evidence was irreplaceable." *Olszewski III v. Spencer*, 466 F.3d 47, 55-58 (1st Cir. 2006). If the evidence was only potentially (and not apparently) exculpatory, the defendant must show bad faith. *United States v. Esquilin-Montañez*, 268 F.Supp.3d 314 (Puerto Rico 2017). When evidence has been destroyed

in violation of the Due Process Clause, the Court must choose between barring further prosecution or suppressing the State's probative evidence. *Trombetta*, at 486-487.

Production of exculpatory evidence to the accused, thereby protects him from erroneous conviction and ensures the integrity of the criminal justice system. *Trombetta*, at 485. The prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. *Id*. "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *Id*, at 488. It must be apparent that the evidence is exculpatory before it is lost or destroyed. *Olzewski*, 466 F.3d at 56.

In *Olzewski*, the petitioner was convicted of first-degree murder. *Id*, at 47. The Defendant argued that his due process rights were violated when the Commonwealth of Massachusetts permitted the destruction of exculpatory evidence prior to trial. *Id*. The Defendant submitted an alibi showing that he was with his friend, Philip Strong, during the time of the murder. *Id*, at 51. Strong provided a written statement corroborating the Defendant's alibi. *Id*. Strong was questioned a second time, where said that his first statement was false. *Id*. Contrary to police established procedures, the officers did not copy the first statement and left Strong alone with the only copy. *Id*. Subsequently, Strong tore up the statement and the pieces were placed in the trash. *Id*. Strong provided the officers with a second statement, indicating that the Defendant told him that he had murdered the victim. *Id*. The first statement was never retrieved, and never provided to the Defendant. *Id*. The First Circuit held that the first statement corroborating the Defendant's alibi was apparently exculpatory. *Id*, at 57.

In *United States v. Belcher*, 762 F. Supp. 666 (W.D. Va. 1991), defendants were charged

with manufacturing marijuana. The government destroyed the alleged marijuana without testing it. The court recited the applicable test under *Trombetta*, but noted, "The Supreme Court has recently added a caveat to the *Trombetta* test: 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process.'" *Belcher supra* at 672, citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). However, the *Belcher* Court found the *Youngbloo*d caveat inapplicable in the Belchers' case for two reasons. First, in *Youngblood*, "the prosecution did not attempt to make any use of the [lost evidence] in its own case in chief." *Id*. Rather, *Youngblood* was convicted based on evidence independent of that which was lost. In *Belcher*, by contrast, the court noted that "the government must use testimony regarding the alleged marijuana if it is to convict the Belchers." *Id*.

The *Belcher* court also distinguished *Youngblood* based on its requirement of "potentially useful evidence." In *Youngblood*, the government had sufficient evidence to convict the defendant without the evidence that had been lost. In *Belcher*, however, the court noted that the destroyed evidence was crucial and determinative to this prosecution's outcome. *Id.* at 673.

After finding the *Youngblood* bad faith requirement was inapplicable, the *Belcher* court analyzed the facts solely under the *Trombetta* test. This required a showing that the evidence had exculpatory value that was apparent before it was destroyed, and they were unable to obtain comparable evidence by other reasonably available means. *Id*. at 672, *citing Trombetta*, 467 U.S. at 489. The court found the second prong of the *Trombetta* test easily satisfied because "it is clear that the Belchers certainly could not secure 'comparable evidence by other reasonably available means.'" *Id.* The court stated, "[T]he Belchers' alleged crimes concern formerly-distinct plants that no longer exist and that were never tested to determine what they

were. The information those plants contained is lost forever and will never be available to the Belchers." *Id*.

The court found it less clear, however, whether the plants had an exculpatory value that was apparent before the State officials destroyed the plants, as required to satisfy the first prong of *Trombetta*. The court reasoned that the law enforcement agents would swear that the plants were marijuana. From that, the government would plainly argue that the plants had no exculpatory value because their agents were certain the plants were marijuana. Thus, "It is a troubling prospect if government officials can routinely destroy drugs, then argue that the drugs had no exculpatory value because the government officials 'knew' that the drugs were indeed drugs. *Id*. at 672-73.

In *United States v. Elliott*, 83 F. Supp. 2d 637, (E.D. Va. 1999), the defendant was arrested following a traffic stop, when a search incident to arrest yielded laboratory glassware, tubing, stoppers, chemicals, plastic gloves and filters. The interior of some of the glassware contained residue of an unidentified substance. The items were tested for fingerprints and destroyed. No tests were conducted to determine the chemical composition of the residue. The defendant was charged with conspiracy to possess, manufacture and distribute methamphetamine. The *Elliott* court considered, under *Trombetta*, whether the glassware had an exculpatory value that was apparent to law enforcement before it was destroyed. The court found:

> A reasonable law enforcement officer, vested with the knowledge that the glassware could be used in making methamphetamine, would be warranted in concluding that the reside on the inside of some of the glassware might be residue of methamphetamine or the chemical components from which it is manufactured, or both. ... On the other hand, a reasonable law enforcement agent would recognize that, if the residue was not that of methamphetamine or

> its chemical constituents, that evidence would be of exculpatory value for it would suggest a use other than an illegal one.

Id. at 643. Accordingly, the court held, "[I]t is beyond serious question that a reasonable law enforcement agent would recognize, before the glassware was destroyed, that it was of potentially exculpatory value." *Id*. Moreover, the *Elliott* Court found the second prong of *Trombetta* satisfied, because the evidence that was destroyed could not be obtained by the defense. *Id*. at 643-44.

V. THE EVIDENCE DESTROYED HERE WAS EXCULPATORY

The exculpatory nature of the evidence described in *Trombetta* should be analyzed under the *Brady v. Maryland*, 373 U.S. 83 (1963) line of cases. In *Trombetta*, the Court indicated that only the destruction of evidence that is of constitutional materiality would violate due process: "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta* at 488–489.

The *Trombetta* Court did not distinguish between evidence that must be *retained* for due process purposes and the kind of evidence that must be *disclosed* for due process purposes. However, the *Trombetta* Court held that "In our prosecutorial disclosure cases, we have imposed a similar requirement of materiality . . ." then citing *United States v. Agurs* 427 U.S. 97 (1976). *Trombetta* at 488, fn. 8, *emphasis added*. It follows then that evidence that might be expected to

play a significant role in the suspect's defense is the same kind of evidence that would be described in the *Brady* and *Agurs* line of cases, meaning evidence that is "favorable to an accused . . . where the evidence is material either to guilt or to punishment." *Agurs* at 110, fn. 17, citing *Brady v. Maryland* 373 U.S. 83, 87 (1963).

Moreover, the Supreme Court in *Illinois v. Fisher* compared the "potentially useful evidence" referred to in *Youngblood* with "the "material exculpatory evidence addressed in *Brady* and *Agurs*." *Fisher* at 548-549 ("the applicability of the bad-faith requirement in *Youngblood* depended not on the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between 'material exculpatory' evidence and 'potentially useful' evidence."). This is consistent with the Court's interpretation in *Olszewski III* (equating "apparently exculpatory" evidence with "material exculpatory evidence" under *Brady* based on language in *Youngblood*.) *Olszewski III supra* at 56. As a result, this Court should analyze the exculpatory nature of the destroyed evidence consistent with the failure to disclose evidence under the *Brady* line of cases.

Of course, *Brady* provides a starting point for a simple but important creed, that the suppression of evidence favorable to a defendant violates due process where the evidence is material either to guilt or to punishment. Pursuant to the mandate of *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

The Undersigned expects that a determination as to whether the evidence is favorable under *Brady* will provide the lynchpin for this Court's determination as to whether the evidence

is exculpatory[4] under Trombetta.

Of course, what is favorable evidence under the *Brady* tree has grown and become invigorated by judicial interpretation of *Brady* over time. Favorable evidence includes some of the following:

- **Evidence Necessary To Provide a Complete Defense**: In determining what must be disclosed under Brady "the [prosecution's] guiding principle must be that the critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for defense counsel, who has a different perspective and interest from that of the police or prosecutor." *Zanders v. United States*, 999 A.2d 149, 163-64 (D.C. 2010).

- **Impeaching Information Concerning Witnesses**. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

- **Impeaching Information Is Favorable Exculpatory Information**: Evidence that casts doubt on the reliability of evidence against a defendant is exculpatory in that it undermines the prosecution's case. *See United States v. Bagley*, 473 US 667, 676 (1985) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.") (internal quotation and citation omitted).

- **Any Information That Tends To Support An Affirmative Defense**. *United States v. Udechukwu*, 11 F.3d 1101, 1105 (1st Cir. 1993) (government withheld information that person defendant claimed coerced her was a known, prominent drug-trafficker and government target); *Mahler v. Kaylo*, 537 F.3d 494, 500-01 (5th Cir. 2008) (*Brady* violated where prosecution failed to disclose witness statements that decedent and defendant were actively fighting when gun went off); *United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992) (government withheld psychiatric report demonstrating that defendant may have a disorder, which could have made an insanity defense viable and otherwise changed defense strategy); *Finley v. Johnson*, 243 F.3d 215 (5th Cir. 2001) (prosecution withheld fact that there had been a restraining order placed against victim to protect his wife and child, which would have supported defendant's affirmative defense that he kidnapped victim in order to protect the victim's wife and child); *United States Attorney's Manual* § 9-5.001.C.1 (requiring disclosure of information "that establishes a recognized affirmative defense.").

[4] It is axiomatic that the marijuana evidence is material.

It is apparent that the marijuana evidence seized here was not all processed marijuana. *Hillary Lister's Declaration Exhibit 1* attached, indicates the following regarding the status of the marijuana:

- "The contents consisted of marijuana flowers, stem, and some shake. It appeared the contents were mixed together from separate packages that contained marijuana in different states of processing." *Exhibit 1* at ¶25.
- The marijuana reviewed contains noticeable stems. *Exhibit 1* at ¶26.
- "I observed noticeable amounts of stem and leaf, indicating that the marijuana was in need of further processing before being fully prepared in a form that a qualified patient would be likely to purchase for medical use." *Exhibit 1* at ¶77.
- Given the destruction of the marijuana evidence, "it is impossible to determine what the contents of those bags included and what the contents were intended for, and whether possession was in compliance with amounts allowed by state law, since the destroyed evidence is irreplaceable." *Exhibit 1* at ¶89.
- Further, "...it is not possible to determine how much of the weight of what is reported to be prepared marijuana seized from Bilodeau's residence also included non-marijuana waste products such as soil and stakes, and incidental amounts of marijuana allowed in unlimited amounts such as stalks and roots." *Exhibit 1* at ¶84.

The marijuana evidence here was apparently exculpatory. Even from the representative sample, which is poorly preserved, it is apparent that considerable amounts of the alleged marijuana was not processed, was continuing to cure, and contained waste.

Since impeachment evidence is also exculpatory evidence, the destruction of the marijuana has robbed the Defendant of valuable impeachment material. First, the Government has destroyed the packaging materials, so it is impossible to determine the weight of the same. *Exhibit 1* at ¶88. Second, the weighing process itself is completely ridiculous. The process was partially videotaped, the scale is uncalibrated, the numbers weighed do not add up and the agents appear to be questioning the reporting of the scale during the recording. *Exhibit 1* at ¶¶38-45.

While, the video itself provides impeachment fodder, the defense's ability to re-create the weighing with the actual evidence would have been more than impeaching. It would have permitted the defendant the opportunity to actually contest the weight of the evidence provided by the Government[5]. Third, the destruction of the marijuana evidence prevents Mr. Bilodeau from impeaching the agents regarding the nature of the alleged marijuana evidence, namely, whether it was marijuana, whether it was curing marijuana, and how much of the seized marijuana was waste. *Exhibit 1* at ¶¶83-84.

Mr. Bilodeau has been deprived of evidence that would have permitted his further assertion of a Public Authority Defense[6]. The public authority defense "applies where the conduct of the defendant was undertaken at the behest of a government official with power to authorize the [criminal activity]." *US v. Cao*, 471 F.3d 1, 4 (1st Cir. 2006). A defendant is entitled to an instruction on a relevant defense, but only if the evidence would permit a jury to accept the defense. *US v. Gamache,* 156 F.3d 1, 9 (1st Cir. 1988). In making this judgment, the judge must draw reasonable inferences and assume credibility issues in favor of the defense; but the defendant, who ordinarily bears the burden of proving an affirmative defense, must point to the evidence from which a rational jury could find the defense to be proved. *US v. Rodriguez,* 858 F.2d 809, 812 (1st Cir. 1988). Here, Mr. Bilodeau would have set about to establish that the marijuana seized was the same marijuana approved of by Maine DHHS, providing a powerful defense to the *Possession With Intent To Distribute* charge.

[5] One might question how the Defendant can determine this would prove favorable to him. Counsel suggests that because the Government has provided various different weights for the marijuana seized from 72 Danville, that a scientifically valid measurement is very likely to have provided favorable evidence.

[6] Mr. Bilodeau files a *Notice of Public Authority Defense* concurrent with this motion. However, the destruction of the marijuana evidence by the Government has limited his ability to establish that the evidence seized and destroyed at 72 Danville was the same marijuana inspected by Maine DHHS.

Finally, Mr. Bilodeau had a defense to the prosecution pursuant to Rohrabacher-Blumenaeur Amendment (see *Motion to Dismiss or Enjoin Prosecution Under Rohrabacher-Blumenaeur Amendment*, filed concurrently to this Motion). Hillary Lister cannot determine that Mr. Bilodeau is out of compliance with the MMUMP. *See Exhibit 1*. Had the evidence been preserved, Ms. Lister describes what she would have done to determine Mr. Bilodeau's compliance with the MMUMP:

> Had the evidence been preserved, I would have visually inspected the contents of the bags to determine whether the contents appeared to be processed marijuana, or marijuana in varying stages of processing. If I had been permitted to inspect the evidence that was destroyed, I would have asked to sort the contents to separate flower from shake, and separate that from any stalks, seeds, seedlings, or roots. In order to determine how much of the seized marijuana was prepared, and determine how much was incidental marijuana, I would have sought to weigh the different types of marijuana plant products.

Exhibit 1 at ¶69.

This is a tightrope the Government cannot walk without falling. The Government will assert that they have destroyed evidence pursuant to their policies (even though it seems they have violated federal regulations and DEA policies regarding the destruction of evidence). At the same time, they will argue that we cannot establish Mr. Bilodeau's compliance with the MMUMP because we cannot review the very evidence they destroyed. The benefit of any doubt here should be resolved in Mr. Bilodeau's favor. The Government plainly destroyed exculpatory evidence and the case against Mr. Bilodeau should be dismissed.

VI. THE DEFENDANT CANNOT OBTAIN COMPARABLE EVIDENCE BY OTHER REASONABLE AVAILABLE MEANS

Olszewski III determined that the "proof of irreplaceability is required in both apparent and potentially exculpatory evidence cases." *Olszewski III* at 59. There, the petitioner's claims

failed because the missing statement was short, and was able to be recreated in cross-examination of the author. *Id*.

However, the First Circuit differentiated the facts in *Olszewski III* with *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993) (destruction of methamphetamine laboratory equipment). In *Cooper*, the Government argued that the defense expert could consult with the manufacturer of the equipment in issue and examine photographs of the equipment to determine if it was capable of manufacturing methamphetamine. *Id*. at 932. Moreover, the Government offered a jury instruction supporting an inference in the defenses' favor as inadequate. *Id*. Allowing the case to proceed forward with a favorable jury instruction as a remedy "...would cheat…(defendants) out of the opportunity to establish the weight of their claim to innocence." *Id*. at 932.

It is readily apparent that the Defendant and his expert cannot recreate the destroyed evidence. This destroyed evidence is irreplaceable. *Exhibit 1* at ¶89. Moreover, since the representative sample sub-exhibits were not properly preserved, the defense cannot use the limited photographs of the representative sample to recreate the characteristics of the different bags of marijuana that were seized.

VI. IF THIS COURT FINDS THAT THE EVIDENCE WAS ONLY POTENTIALLY USEFUL AT THE TIME IS WAS DESTROYED, THIS COURT SHOULD ALSO FIND THAT THE GOVERNMENT ACTED WITH BAD FAITH

Under the Due Process Clause of the Fourteenth Amendment, a state's "failure to preserve potentially useful evidence" constitutes a denial of due process if the "defendant can show bad faith on the part of the police." *Youngblood*, 488 U.S. at 58. This Court reaffirmed this principle in *Illinois v. Fisher*, 540 U.S. 544, 545 (2004). *Youngblood* and *Fisher*, however, left

undecided the parameters of what constitutes "bad faith" under this standard. If this Court finds that the destroyed evidence does not meet the standard of material exculpatory evidence set forth in the *Brady* line of cases, a finding of government bad faith will be necessary to suppress the evidence. *Olszewski III* at 56.

The First Circuit has **not** required evil motive or intent on the part of law enforcement to meet the *Youngblood* bad faith standard. In other words, the decisional law in this Circuit does not require bad intent to prove "bad faith." *United States v. Femia*, 9 F.3d 990, 996 (1st Cir. 1993).

The Court in *United States v. Elliott*, 83 F. Supp. 2d 637, (E.D. Va. 1999) took up the bad faith standard from *Youngblood*. The government argued there that a finding of bad faith was precluded because the evidence was destroyed pursuant to the same regulation at issue here. *Id.* at 645, citing 28 C.F.R. § 50.21(c).

It is likely the Government will make a similar argument in this case. The regulation at issue permits the destruction of all but a representative sample of marijuana. Those regulations define a representative sample to mean 'the exemplar for testing and a sample aggregate portion of the whole amount seized sufficient for current criminal evidentiary practice.'" 28 C.F.R. § 50.21(d)(3). The regulation also requires 60 days notice to the United States Attorney before destruction may be had. *Id*. And, in the event of destruction, the regulation explicitly requires that the United States "isolate and retain the appropriate threshold amount of contraband drug evidence ... until the evidence is no longer required for legal proceedings." 28 C.F.R. §§50.21(e)(4) and (5). The DEA did not follow these procedures, however, and the *Elliott* Court found that bad faith was evident, holding:

> Where, as here, there is no evidence of an established practice which was

> relied upon to effectuate the destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the Trombetta/Youngblood test.

Id. at 647-48.

Moreover, the Government's arguments in *Elliott* that it did not attempt to harm the defendant there, were unavailing:

> Viewed as a whole, neither *Trombetta* nor *Youngblood* nor their progeny require a defendant to prove that the mental state of the police officer at the time of destruction was to foreclose a defense or to deliberately deny the defendant's due process rights. ... Contrary to the argument of the United States, [bad faith] is not confined to the circumstance in which the DEA agent deliberately says unto himself, "I shall deprive the defendant of due process or hurt his case." If that were the test, there would be no check on the destruction of evidence because law enforcement agents would be able to defend the destruction of evidence by lying about subjective intent or by violating, with impunity, the rules they are obligated to follow. ... In any event, bad faith exists when conduct is knowingly engaged in or where it is reckless.

Id. at 650.

Here, it was readily apparent to law enforcement and the Department of Justice that caregiver defendants, such as Mr. Bilodeau, would seek the protection of the MMUMP and the Rohrabacher-Blumenaeur Amendment. It was at least reckless to destroy the evidence that Mr. Bilodeau would use to establish his compliance with the medical marijuana laws.

The Government plainly knew that Mr. Bilodeau was a caregiver, yet they refused to preserve his evidence to establish compliance. In fact, they flaunted the Maine marijuana scheme entirely, refusing to check with Maine DHHS concerning Mr. Bilodeau's caregiver

status. SA Barry Kelly indicated in one Affidavit that law enforcement made an election not to check with Maine DHHS relative to caregivers to protect the covert nature of the investigation[7]. *SA Barry Kelly Affidavit* January 24, 2018, fn 5. Had law enforcement taken the simple step of gathering this information, they would have seen that Brian Bilodeau was recently inspected by Maine DHHS, and that he passed the inspection with flying colors. *Exhibit 1* at ¶¶88-89.

Moreso, government agents were aware that the Rohrabacher Amendment protected caregivers like Mr. Bilodeau. *See Affidavit of SA Barry Kelly*, January 24, 2018, fn 6. By destroying the evidence seized from 72 Danville, they robbed Mr. Bilodeau of his ability to prove compliance with Maine's medical marijuana laws. Worse yet, they knew that their destruction of the marijuana evidence prevented Mr. Bilodeau from proving his compliance.

CONCLUSION

The Government's destruction of evidence here, the same day as the search and seizure from Mr. Bilodeau, plainly violated his due process rights, and the cases pending against him based on that evidence must be suppressed.

WHEREFORE, based on the foregoing, Defendants respectfully requests that this Honorable Court grant their Motion.

Dated this 10th day of July, 2019 at Portland, Maine.

Respectfully submitted,
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[7] This is a common refrain from drug agents who want to protect the identify of their informants. It is hard to square how law enforcement could take the position that Maine DHHS would hurt their investigation if they made inquiries as to caregiver records.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CRIMINAL NO. 2:18-CR-63-GZS**
	)	
BRIAN J. BILODEAU	)	
BRIAN BILODEAU, LLC	)	

CERTIFICATE OF SERVICE

I, Timothy Zerillo, hereby certify that I have caused the above *Motion to Dismiss* to be electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) to all counsel of record.

Dated this 10th day of July, 2019 at Portland, Maine.

Respectfully submitted,
ZERILLO LAW FIRM, LLC

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