

18-6945

In the
Supreme Court of the United States
October Term, 2018

WILLIAM NATHANIEL WASHINGTON,
Petitioner,

v.

SCOTT FRAUENHEIM, Warden,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

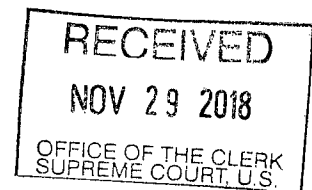
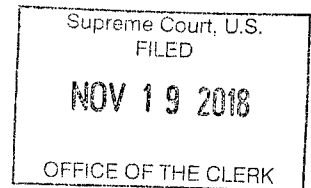
PETITION FOR WRIT OF CERTIORARI

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ORIGINAL



QUESTIONS PRESENTED

1. If there exist authentic uncontradicted testimonial evidence in the record of a criminal proceedings that proves that a member of a law enforcement agency deliberately fabricated evidence to frame an individual, on the day this individual was arrested, should a state be permitted to continue prosecution against this individual, without having rebutted this evidence?

2. Is there a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government?

3. Where the lower court has made a factual finding in a civil rights action, after having taken judicial notice of appellant's state criminal proceedings, in which it found that: (1) an expert in the field of handwriting testified to the fact that a signature on a Miranda waiver form had been forged, and had not been written by the appellant; (2) the state prosecution conspicuously avoided challenging appellant's expert's findings that evidence had been deliberately fabricated, when it appeared; (3) the state preliminary hearing judge found that there was probable cause, based in part on the evidence that appellant's expert had testified to the fact had been deliberately fabricated; (4) the state prosecution during appellant's trial proceedings deliberately suppressed the Miranda waiver form and confession from being presented to the jury for their consideration; and (5) the state trial judge barred appellant from introducing the fact that the signature on the Miranda waiver form was a forgery and that appellant had not confessed to the charges he was on trial for; would not a jurist of reason find it debatable whether the petition stated a valid claim of the denial of a constitutional right and would not a jurist of reason have found it debatable whether the district court was correct in its procedural ruling?

TABLE OF CONTENTS

QUESTIONS PRESENTED	2.
TABLE OF AUTHORITIES	4.
OPINIONS BELOW	5.
JURISDICTION	5.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	6.
STATEMENT	6.
REASONS FOR GRANTING THE PETITION	11.
I. THE NINTH CIRCUIT REASONING IS FLAWED; THE SECOND CIRCUIT REASONING CORRECTLY CAPTURES THE REQUIREMENT OF DEVEREAUX V. ABBEY	
II. RICCIUTI IS SOUND WHEREAS DEVEREAUX IS UNFAIR AND INVITES FUTURE MISTAKES	
CONCLUSION	18.

TABLE OF AUTHORITIES

CASES

Brittain v. Hanser, 451 F.3d 982, 991 (9th Cir. 2006)	13.
Costanich v. Dep't of Soc. & Health servs., 627 F.3d 1101, 1111-12 (9th Cir. 2010)	12,13.
Devereaux v. Abbey, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc)	11.
Garner v. Harrod, 656 Fed.Appx 755 (6th Cir. 2016)	12,15.
Limone v. Condon, 372 F.3d 39, 45 (1st Cir. 2004)	12.
Napue v. Illinois, 360 U.S. 264, 269-70	9.
Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 130 (2d Cir. 1997)	11,15.
Spencer v. Peters, 857 F.3d 789, 798 (9th Cir. 2017)	13.
Washington v. Wilmore, 407 F.3d 274, 283 (4th Cir. 2005)	12.
Whitlock v. Brueggemann, 682 F.3d 567, 585 (7th Cir. 2012)	12.
Wilson v. Lawrence Cnty., 260 F.3d 946, 954 (8th Cir. 2001)	12.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI	
United States Constitution, Amendment XIV	

STATUTES

28 U.S.C. § 1254 (1)	
28 U.S.C. § 2101 (c)	
28 U.S.C. § 2241	
42 U.S.C. § 1983	
Federal Rules of Civil Procedure 60 (b)(6)	

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PETITION FOR A WRIT OF CERTIORARI

William Nathaniel Washington (hereinafter "petitioner") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, rendered in his appeal, which judgment affirmed the denial by the district court of his Federal Rules of Civil Procedure 60(b)(6) motion for resolution of his claims not resolved by the state court to reinstate his habeas case in light of the United States District Court for the Central District of California's ruling made on May 3, 2018, or alternatively, to allow an evidentiary hearing to attempt to determine if evidence had been deliberately fabricated by the law enforcement agency on the day of his arrest to frame him and thus his case should have been dismissed with prejudice due to a violation of the Fourteenth Amendment Due Process Clause.

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a) and the district court (Pet. App. 2a-4a; 5a-7a; 8a-15a; 16a-41a) were not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2018. [App. 1a] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely filed pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor...."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The United States Constitutional Due Process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government effective in September, 2001, provided that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit. Any actions taken in contravention of this prohibition necessarily violate due process.

STATEMENT

The court of appeals in this case held that petitioner had not shown that jurists of reason would find it debatable whether his petition stated a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling, even though (1) the district court's ruling on May 3, 2018, in petitioner's civil rights action, made factual findings that established that (a) an expert in the field of handwriting had testified to the fact that a signature on a Miranda waiver form was a forgery that had not been written by the petitioner (b) the state prosecution did not rebut this expert's findings (c) the state preliminary hearing judge found that there was probable cause to hold petitioner in-custody based in part on the Miranda waiver form and a confession that was subsequently made after this Miranda waiver form was signed (d) the state prosecution deliberately suppressed

the Miranda waiver form and confession from being presented to the jury for their consideration, during trial (e) the state trial judge barred petitioner from introducing the fact that the signature on this Miranda waiver form was a forgery and that he had not confessed to the charges that he was on trial for [App. 4a, 6a]; *** (2) the district court in its denial of petitioner's "Emergency Petition for a Writ of Habeas Corpus" filed two months before petitioner's trial proceedings commenced stated that the petitioner must make the demonstration that he would be unable to present a defense based on his allegations of police misconduct in the state proceedings if that court was to invoke its general supervisory powers to intervene in his state criminal proceedings. [App. 6a.] and (3) the district court hearing this refused to hold a hearing to make a determination of whether petitioner had, in fact, made the necessary demonstration of being unable to present a defense based on his allegations that the police, on the day of his arrest, framed him by forging his signature on a Miranda waiver form, so that it could be stated in the police reports that he had confessed to being guilty of every charge that petitioner was on trial for. Petitioner seeks review of this refusal.

The facts underlying the Sixth and Fourteenth Amendment claims are set forth in the opinions below. Petitioner was arrested on January 26, 2012. On this same day, it was reported by Los Angeles Police Department Detective Marc Diamond that petitioner had signed a Miranda waiver form and confessed to him of being guilty of committing the criminal charges that he had been arrested as a suspect to. However, detective Diamond did not file criminal charges against petitioner, but falsely reported to petitioner's parole agent that (1) petitioner had already been charged with several crimes; and (2) petitioner had confessed to being guilty of committing these crimes. In turn, this false report caused petitioner's parole agent to place a parole hold on petitioner, keeping him in-custody to allow further investigation by the police, into this criminal matter. Criminal charges were not actually filed until forty-one days later.

On October 31, 2012, at petitioner's state preliminary hearing,

Handwriting Expert, Laurie Hoeltzel testified to the fact that after having examined the signature on the Miranda waiver form, and comparing it to several exemplars belonging to the petitioner, that she had reached the conclusion that the signature on the Miranda waiver form was a forgery that had not been written by the petitioner. [App. 11a.] The state prosecution did not challenge this expert's findings at this hearing, nor was this expert's testimony ever rebutted. Yet, the state preliminary hearing judge still found that there was probable cause based in part on the Miranda waiver form and confession. [App. 11a.]

On June 19, 2013, petitioner filed an Emergency Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2241, in the United States District Court for the Central District of California, alleging that the state court would not permit him to present a defense based on his allegations of police misconduct. Petitioner argued that the district court must invoke its general supervisory powers and intervene in his state criminal proceedings. [App. 5a-6a.] On June 26, 2013, the district court denied the emergency petition on the ground that the petitioner had not demonstrated that he would be unable to present a defense based on his allegations of police misconduct in the state proceedings. [App. 6a.]

From August 20, 2013 through August 30, 2013, trial proceedings were held in petitioner's state criminal case. During the trial, the state prosecution deliberately suppressed the Miranda waiver form and confession in the police reports, from being presented to the jury for their consideration [App. 11a, 13a.] and the state trial judge barred petitioner from introducing the fact that the signature on the Miranda waiver was a forgery and that he had not confessed. [App. 11a-13a.]

In November 2016, petitioner filed a petition for writ of habeas corpus, challenging his August 2013 state conviction and sentence. All but one of the grounds of error centered on petitioner's claim that Los Angeles Police Detective Marc Diamond had forged petitioner's signature on a Miranda waiver form and falsely claimed that petitioner

had confessed to the thefts he was charged with. In March 2018, the district court denied the petition, finding that: (1) petitioner's Sixth Amendment right to present a defense was not violated, and petitioner was not prejudiced by the exclusion of the testimony of his handwriting expert; (2) the state prosecution did not violate the mandate in *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) requiring the correction of false evidence when it appears; (3) petitioner's Fourteenth Amendment due process right not to be subjected to criminal charges that are based on false evidence deliberately fabricated by the government was not violated; (4) trial counsel was not ineffective with his assistance for failing to present the fact that Detective Diamond during cross-examination had stated that petitioner had signed the Miranda waiver form, thus, allowing for the introduction of the testimony of a handwriting expert and police practice expert, which would have impeached Detective Diamond testimony that petitioner had signed the Miranda waiver form, and found that petitioner was not prejudiced by this failure of trial counsel; (5) the police's failure to preserve exculpatory evidence did not violate petitioner's Fourteenth Amendment Due Process right. The district court ruled that petitioner was not entitled to habeas relief and denied to issue a certificate of appealability. [App. 16a-41a.]

Petitioner sought review in the Ninth Circuit but that court denied his application for a certificate of appealability. [App. 3a.]

While petitioner's habeas case was pending, in January 2017, he filed a civil rights action, claiming, among other things, that Detective Diamond had forged his signature on the Miranda waiver form and falsely claimed that he had confessed to the crimes. In September 2017, Diamond moved to dismiss the Complaint on the ground that the claims were Heck barred. On May 3, 2018, the district court, after having taken judicial notice of petitioner's state criminal proceedings, denied the motion to dismiss, ruling that a finding in the civil case that Diamond had forged petitioner's signature and lied about the confession would not undermine the integrity of petitioner's conviction because the waiver form and confession were not introduced at trial.

In July 2018, petitioner filed the Federal Rules of Civil Procedure 60(b)(6) motion, in light of the United States District Court for the Central District of California's ruling made on May 3, 2018, seeking to reopen his habeas case on the ground that when the district court took judicial notice of petitioner's state criminal proceedings, the factual finding that was made which allowed the district court to arrive at its conclusion, established that (1) an expert in the field of handwriting had placed testimonial evidence in the record of petitioner's state criminal proceedings that proved that the police had deliberately fabricated evidence to frame the petitioner; (2) since the state prosecution failed to rebut this expert's testimony and correct a showing of false evidence when it appeared, this failure led to a conclusive presumption occurring, in which it became a fact that evidence had been deliberately fabricated by the police to frame petitioner; (3) the state preliminary hearing judge by making a finding of probable cause based in part on the Miranda waiver form and confession violated petitioner's Fourteenth Amendment Due Process right, thus, subjecting him to criminal charges that were based on deliberately fabricated evidence; (4) the state prosecution by deliberately suppressing the Miranda waiver form and confession during petitioner's state criminal trial proceedings, violated petitioner's Mooney rights; (5) the state trial court violated petitioner's Sixth Amendment right to present a defense based on his allegations of police misconduct, thus, making the necessary demonstration required by the district court for it to invoke its supervisory powers and intervene in petitioner's state criminal proceedings.

The district court refused to acknowledge that its ruling on May 3, 2018 established any constitutional violations, and rejected petitioner's argument, denying the Rule 60(b) motion. Furthermore, the district court found that petitioner had not made a substantial showing of the denial of a constitutional right or that the court erred in its procedural ruling and therefore, denied to issue a certificate of appealability. [App. 3a-4a.]

On appeal of the district court's denial of the F.R.C.P. 60(b) motion, the Court of Appeals noted that petitioner had not shown that

"jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." [App. 1a.]

REASONS FOR GRANTING THE PETITION

There is a conflict among the Circuits on the exact point involved in this case. The Ninth Circuit has ruled that there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government. See *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001)(en banc).

Since this ruling, the Ninth Circuit has a long line of cases (mostly unreported and many brought in *propria persona*) holding that there does exist a constitutional due process right, but have never answered a number of questions that must be answered to provide the necessary guidance to the lower courts. If this right does exist, when does the violation accrue? Is it at the first presentation to the prosecutor, at the time charges are filed, at arraignment on those charges, or at some earlier or later point? All of those issues remain to be decided. And when should an officer have had such positive knowledge that the defendant was truly innocent that the further conduct of the investigation, or presentation to the prosecutor, violated the defendant's constitutional rights?

The Second Circuit has actually answered when this violation of due process accrues. In *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997), the Second Circuit stated: "Like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable...[violation of due process.]"

It is without doubt that the majority of the Circuits agree that deliberately fabricating evidence violates the Fourteenth Amendment

Due Process Clause. See e.g., *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1111-12 (9th Cir.2010)("Deliberately fabricating evidence...violates the Due Process Clause of the Fourteenth Amendment when a liberty or property interest is at stake."); *Wilson v. Lawrence Cnty.*, 260 F.3d 946, 954 (8th Cir. 2001)("If officers use false evidence, including false testimony, to secure a conviction, the defendant's due process is violated."); *Whitlock v. Brueggemann*, 682 F.3d 567, 585 (7th Cir. 2012)("Significantly, all courts that have directly confronted the question before us agree that the deliberate manufacture of false evidence contravenes the Due Process Clause."); *Washington v. Wilmore*, 407 F.3d 274, 283 (4th Cir. 2005)(holding that a conviction and incarceration resulting from fabricated evidence may violate due process); *Limone v. Condon*, 372 F.3d 39, 45 (1st Cir. 2004) (observing that actions involving fabricating evidence and framing individuals "necessarily violate due process".)

Conversely, the Sixth Circuit has ruled that the same circumstances do not violate the Constitution. *Garner v. Harrod*, 656 Fed.Appx 755 (6th Cir. 2016). As shown below, the Second Circuit on this point is correct and much more consistent with our Constitutionally mandated protection of an individual against being criminally charged based on evidence that has been deliberately fabricated by the government.

Although constitutional interpretation occasionally can prove recondite, some truths are self evident. This is one such: "if any concept is fundamental to our American System of Justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." Actions taken in contravention of this prohibition necessarily violate due process (indeed, we are unsure what due process entails if not protection against deliberate framing under color of official sanction). This Court can, by granting this petition, assure that counsel, or the court, or the prosecutor, or the police protect an individual from ever being criminally charged on the basis of evidence that has been deliberately fabricated by the government.

I. THE NINTH CIRCUIT REASONING IS FLAWED; THE SECOND CIRCUIT REASONING CORRECTLY CAPTURES THE REQUIREMENT OF DEVEREAUX V. ABBEY

The Ninth Circuit

Like every other Circuit that has ruled on the matter, the Ninth Circuit has held that, to establish a substantive due process violation, "a [petitioner] must show both a deprivation of liberty and conscience shocking behavior by the government." See e.g., *Brittain v. Hanser*, 451 F.3d 982, 991 (9th Cir. 2006). The *Devereaux* test envisions an investigator whose unlawful motivation is illustrated by his state of mind regarding the alleged perpetrator's innocence, or one who surreptitiously fabricates evidence. *Costanich*, *supra*, 627 F.3d at 1111. A claim for fabrication of evidence requires [petitioner] to show that [the government] deliberately fabricated evidence, and that this fabricated evidence caused [petitioner] to be deprived of his liberty. *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017). Deliberate fabrication of evidence may be shown by any of the following: (1) the [government] deliberately reporting something the [government] knew to be untrue, or deliberately mischaracterizing a witness statement; (2) continuing the investigation of the [petitioner] despite knowing [petitioner] was innocent or being deliberately indifferent to his innocence; or (3) using investigative techniques that were so coercive and abusive that [the government] knew or was deliberately indifferent, that those techniques would yield false information. *Id.* While trivial inaccuracies, "mistakes of tone," or mere carelessness are not sufficient to give rise to a constitutional claim, intentional conduct, such as purposely mischaracterizing witness statements in an investigative report, establishes a constitutional claim based on fabrication. *Id.* (misquotations of witness statement contrary to witness's disavowal that any crime occurred were deliberate fabrication). Likewise, use of impermissibly suggestive procedures that the officer knew or should have known would yield false information establishes a constitutional violation. *Costanich*, *supra*, 627 F.3d at 1111.

Yet the Ninth Circuit turns the table dramatically in the context of habeas relief. While clearly providing guidance to the lower courts on how to sustain a deliberate fabrication of evidence claim in the context of a § 1983 suit, the Ninth Circuit completely fails to provide guidance to the lower courts on how to sustain a deliberate fabrication of evidence claim in the context of a habeas corpus petition, or more importantly, when the substantive due process violation first accrues.

As to why such a failure does not prejudice the [petitioner], the Ninth Circuit is silent on this issue, however, the district court in the denial of petitioner's habeas corpus petition stated that:

"Even if Petitioner could prove that Detective Diamond forged his signature and lied about it and Petitioner's alleged confession at the preliminary hearing, that would not support relief because there is no federal constitutional right to a preliminary hearing. As such, alleged errors occurring at the preliminary hearing cannot form the basis of a federal habeas corpus claim. Accordingly, this claim is not cognizable on federal habeas corpus review."

Furthermore, the district court stated that since the claim of deliberate fabrication of evidence is not cognizable on federal habeas corpus review that the "constitutional right to be free from prosecution based on deliberately fabricated evidence" "it does not apply". [App. 36a-37a.]

Several other circuits are in accord with Devereaux, but their reasoning is the same and thus similarly flawed.

The Ninth Circuit law here sets an embarrassingly incomplete standard (the constitutional right to be free from prosecution based on deliberately fabricated evidence is not cognizable on federal habeas corpus review because there is no federal constitutional right to a preliminary hearing) and imposes a "Catch-22" burden on habeas petitioners: even if you can prove that evidence was deliberately

fabricated by the government to frame you at the preliminary hearing, this substantive due process violation does not matter, and as such, criminal prosecution can continue against you. So what that the lead detective in your criminal case forged your signature on a Miranda waiver form so that he could bring criminal charges against you, the rest of the evidence that has been compiled against you by this detective is not tainted, but can be trusted because the end justifies the means, and excuses this Fourteenth Amendment Substantive Due Process violation.

The Sixth Circuit:

The Sixth Circuit holds just the opposite of *Devereaux* in *Garner v. Harrod*, 656 Fed.Appx 755 (6th Cir. 2016). In a reasoned approach, the Sixth Circuit concludes, based on similar circumstances as are involved in this case and in the Ninth Circuit case of *Devereaux*, that there is no constitutionally protected right to the manner in which a criminal investigation is conducted, so, if in the process of apprehending an alleged perpetrator evidence is deliberately fabricated so that criminal charges could be brought against this individual, as long as he is convicted no violation of the Constitution has occurred.

The Second Circuit

The Second Circuit holds the same view as *Devereaux* in *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997). However, the Second Circuit opinion actually occurred four years before the *Devereaux* court held that the Fourteenth Amendment Due Process right to be free from criminal charges that are based on evidence deliberately fabricated by the government exist.

The Second Circuit concluded that: "Like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable...[violation of due process.]" So, this

surely is or ought to be the standard generally and even more so in relation to the constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government. It simply disgraces standards generally to label as acceptable the allowance of criminal prosecution against an individual where uncontradicted evidence has been presented at the preliminary hearing that proves that the lead law enforcement officer deliberately fabricated evidence so that criminal charges could be brought against this individual in the first place. That the judge and the prosecutor did not intervene or themselves raise and dispose of the deliberate fabrication of evidence allegation that the police may have framed the individual that is before them, does not excuse the Fourteenth Amendment Substantive Due Process violation, much less insulate it from immediate judicial review at the preliminary hearing stage and/or any stage in the criminal proceedings, where actual evidence surfaces proving that the police framed an individual. The other professionals present had their own responsibilities and were not "duty bound to pursue [the issue] with professional zeal." Indeed, their failure to intervene assures the lapse, allows criminal prosecution to proceed to trial, thus generating the prejudice.

It is prejudicial to ignore evidence, especially evidence that has not been rebutted by the state prosecution, which proves that an individual has been framed by the police. This is particularly so where all of the evidence that has been compiled against this individual was compiled by the very person that framed him. Ricciuti points out that, the police officer's fabrication and forwarding to prosecutors of known false evidence is what violates due process. The very evidence that has been forwarded to the prosecution is tainted and untrustworthy. The lower courts cannot consider any of the evidence presented by the prosecution at the preliminary hearing, unless the prosecutor rebuts the evidence offering proof of deliberate fabrication of evidence. In these circumstances, a holding that a criminal defendant is not prejudiced requires an Alice-in-Wonderland-like reasoning to this effect: "As a defendant, you can insist that the government

prove that the very police officer that gathered all of the evidence against you, did not frame you, at the preliminary hearing; but it does not matter because there is no federal constitutional right to a preliminary hearing, and any such error occurring at the preliminary hearing cannot form the basis of a federal habeas corpus claim. So, you lose the right to be free from prosecution based on deliberately fabricated evidence and later must prove in a civil rights action, after you have already been wrongfully convicted and imprisoned for many years that the lead detective in your state criminal case deliberately fabricated evidence to frame you, on the day that you were arrested. Incidentally, we also will not give you a hearing at which you can attempt such proof, and gain your freedom.

Ricciuti should be the rule.

II. RICCIUTI IS SOUND WHEREAS DEVEREAUX IS UNFAIR AND INVITES FUTURE MISTAKES

Mooney itself commands that the ultimate test for relief is not formalistic:

Due process is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured, and/or the State although not soliciting false evidence allows it to go uncorrected when it appears.

Napue v. Illinois, 360 U.S. 264, 269, 3 L.Ed. 2d 1217, 79 S.Ct. 1173 (1959). If Devereaux rather than Ricciuti is to be the nationwide standard, petitioner, at least during his criminal proceedings, may just as well go to sleep. After all, an evidentiary hearing is the Guidelines Manual and a debate over whether evidence was deliberately fabricated by the lead police officer to frame petitioner on the day

of his arrest. That debate did not take place in this case.

If Devereaux stands, it will affect determinations relating to virtually every criminal proceeding, in which there exist actual evidence proving that the government deliberately fabricated evidence to frame a person. Our national standards should be higher than Devereaux would allow. The Second Circuit has not shown to have suffered by insisting that evidence that has been forwarded to the prosecutor known to be false violates due process. Were Ricciuti the national rule, the court and the prosecutor would step in if defense counsel did not, just as they frequently do in other phases of the criminal proceeding, in order to protect the record, while at the same time giving the defendant his due.

A remand for hearing in this case on the deliberate fabrication of evidence issue would promote such courtroom-wide vigilance, not to mention the insistence of fairness which undergirds Mooney. At such a hearing, the government should have the burden. Burdens should not shift because a defendant does not have a constitutional right to a preliminary hearing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


WILLIAM NATHANIEL WASHINGTON, Pro se

Dated: November 19, 2018