

No. 19-_____

In the
Supreme Court of the United States

ALBERT S.N. HEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

It is fundamental that the constitutional right of due process is violated when the Principal Government Agent lies by fabricating evidence in order to initiate a criminal prosecution, yet that is exactly what the Government did in my case. Agents with the Internal Revenue Service ("IRS") fabricated evidence against me that was used to justify referral of my civil audit to the IRS's Criminal Investigation Division ("CID").

The Federal Circuit Courts have uniformly held that a criminal prosecution based on a Government's agent fabricating evidence violates substantive Constitutional Due Process. The Hawaii District Court and Ninth Circuit violated "the laws of the circuit" and stare decisis when deciding my Habeas Corpus Motion and Petition for a Certificate of Appealability.

This court should resolve the issue by granting certiorari to firmly establish a constitutional right not to be prosecuted based on fabricated evidence by the government.

THE QUESTION PRESENTED IS:

Does the Doctrine of Stare Decisis require the Federal Courts to follow its prior Circuit Decisions of substantive constitutional rights although this court has not ruled on the issue?

LIST OF PROCEEDINGS

HABEAS PROCEEDINGS

United States District Court for the District of Hawaii
Civ. No. 18-00104 SOM-RLP, Cr. No. 14-00826 SOM
Albert S.N. Hee, Petitioner, v.
United States of America, Respondent.
Decision Date: September 25, 2018

United States Court of Appeals for the Ninth Circuit
No. 19-15170
United States of America, Plaintiff-Appellee, v.
Albert S.N. Hee, Defendant-Appellant.
Decision Date: July 19, 2019

CRIMINAL PROCEEDINGS

United States District Court for the District of Hawaii
United States of America, v.
Albert S.N. Hee, Defendant
Cr. No. 14-00826 SOM
Judgment Date: May 28, 2015

United States Court of Appeals for the Ninth Circuit

No. 16-10018

United States of America, Appellee, v.

Albert S.N. Hee, Defendant-Appellant.

Decision Date: March 14, 2017

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Albert Hee (“I, me, my”) respectfully submits this petition for a writ of certiorari.



OPINIONS BELOW

The September 25, 2018, opinion of the United States District Court for the District of Hawaii on Petitioner’s Habeas Corpus Motion is included at App.3a.

The July 19, 2019, Ninth Circuit Order denying Petitioner a Certificate of Appealability is included at App.1a.



JURISDICTION

This petition is filed within 90 days of the Ninth Circuit Order. This Court has jurisdiction under 28 U.S.C. § 1254(1) .



CONSTITUTIONAL PROVISION AND LEGAL DOCTRINE INVOLVED

Article V of the United State Constitution guarantees all citizens the right of Due Process including

being free from unjust criminal prosecution, and states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Doctrine of Stare Decisis under which courts adhere to precedent on questions of law, ensures certainty, consistency, and stability in the administration of justice with departure from precedent decisions only permitted for compelling reasons (as to prevent the perpetuation of injustice).



STATEMENT OF FACTS

Background

On July 13, 2015, Petitioner was found guilty of one count of corrupt interference with the administration of internal revenue laws, in violation of 26 U.S.C. § 7212(a)¹ and six counts of filing a false indi-

¹ In *Marinello v. United States*, 200 L.Ed 2d 356, 584 U.S. ____ (2018), the Court held that prosecutors must establish a “nexus”

vidual income tax returns, in violation of 26 U.S.C. § 7206.

On March 14, 2017, the Ninth Circuit issued a memorandum opinion denying Petitioner's appeal using the "harmless error" standard to evaluate due process violations. My counsel did not cite or argue *Devereaux*, 263 F.3d 1070.

Petitioner immediately filed, pro se, a request for rehearing/rehearing en banc citing for the first time the Ninth Circuit's precedent case *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001) (en banc).

On May 9, 2017, the Ninth Circuit denied Petitioner's request for rehearing/rehearing en banc.

On August 7, 2017, I filed a petition for a writ of certiorari which this court denied.

On March 16, 2018, I filed a 28 U.S.C. § 2255 Motion to Vacate, Set Aside or Correct Sentence ("Habeas Motion") with the District Court. The basis of my Habeas Motion was the Government's fabrication of evidence violated my substantive due process rights as established by *Devereaux*.

On September 25, 2018, the District Court denied my Habeas Motion without a hearing and did not distinguish my case from the *Devereaux* precedent

between a particular administrative proceeding and a taxpayer's conduct in order to obtain a conviction under the "Omnibus Clause" in Section 7212(a) of the Internal Revenue Code. "Just because a taxpayer knows that the IRS will review her tax return annually does not transform every Tax Code Violation into an obstruction charge. The Court found the IRS was abusing the interpretation of the Omnibus Clause to initiate criminal prosecution and obtaining criminal convictions.

claiming the issue of the Government fabricating evidence was settled by the Ninth Circuit² in its March 14, 2017, Memorandum Opinion.³

On October 10, 2018, I filed a Petition for Writ of Mandamus with the Ninth Circuit Court requesting the Court direct the District Court to follow the Circuit Court's precedent ruling in *Devereaux* (en banc).

On January 29, 2019, the Ninth Circuit converted my Mandamus Petition as a Notice of Appeal.

On February 6, 2019, the Ninth Circuit remanded my case to the District Court for the limited purpose of granting or denying a certificate of appealability on its September 25, 2018, denial of my Habeas Motion.

The same day, February 6, 2019, the District Court denied me a certificate of appealability.

On February 19, 2019, I filed a Petition for Certificate of Appealability with the Ninth Circuit citing *Stare Decisis* and the violation of my substantive constitutional right to due process as per *Devereaux*.

On July 19, 2019, the Ninth Circuit denied me a Certificate of Appealability holding I had not stated "a valid claim of the denial of a constitutional right . . ." without distinguishing my case from *Devereaux*.

² "the Ninth Circuit squarely considered and ruled on the IRS's allegedly "fabricated evidence" . . . Hee may not now raise these issues in his 2255 petition. *See Olney*, 433 F.2d at 162." App.11a

³ The Memorandum Opinion directly contradicts *Devereaux* (en banc).



REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH ITS DECISION IN *DEVEREAUX V. ABBEY*, 263 F.3D 1070 (9TH CIR. 2001) (EN BANC) AND ITS PROGENY.

Devereaux was the precedent case in which the Ninth Circuit found “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.” *Id.* at 1074-75. “A *Devereaux* claim is a claim that the Government violated due process rights by subjecting the plaintiff to criminal charges based on deliberately fabricated evidence.” *Bradford v. Scheschligt*, 803 F.3d 382, 386 (CA9 2015).

The Ninth Circuit has reaffirmed its *Devereaux* binding precedent, most recently in *Spencer v. Peters*, 857 F.3d 789 (CA9 2017). In *Constanich v. Washington*, 627 F.3d 1101, 1111 (CA9 2010) the Ninth Circuit clarified the *Devereaux* test to include “...direct evidence that the investigator had fabricated evidence—for example, direct misquotation [written mischaracterization] of a witness in investigative reports.”

Throughout my trial, appeal, Habeas Motion, Writ of Mandamus and Petition for a Certificate of Appealability the Government has not disputed: 1. it fabricated evidence; 2. the affidavits provided by the witnesses the government attributed the fabricated statements too; or, 3. it recorded the fabricated evidence on official IRS forms. The facts in my case are four square with

the *Deveraux* standard established in *Constanich*, 627 F.3d and reaffirmed in *Spencer*, 857 F.3d. In issuing its March 14, 2017, Memorandum Opinion, the court did not consider *Deveraux*, 263 F.3d and its progeny because my attorneys failed to cite them.

A *Deveraux* violation is a substantive constitutional due process violation which introduces structural error into the trial mechanism. Had the audit remained civil, jurisdiction would rest in Tax Court not the District Court. The “harmless error” standard is not applicable when structural error occurs. The only mechanism available to me to have the courts consider the violation of my substantive constitutional due process as per *Deveraux*, 263 F.3d, was a Habeas Motion.

In *California v. Roy*, 519 U.S. 2, 5, 117 S.Ct. 337, 338, 136 L.Ed.2d 266 (1996), the Court recognized that the harmless error standard set forth in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), did not apply to “structural defects in the constitution of the trial mechanism, which defy analysis by the ‘harmless-error’ standards.” *Id.* (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 1721, 123 L.Ed.2d 353 (1993)). Such structural defects deprive a defendant of the “basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991) (citing *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986)).

II. THE CIRCUIT COURTS HAVE ESTABLISHED *DEVEREAUX* PRECEDENT AS STARE DECISIS

The First Circuit stated, “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.” *Limone v. Condon*, 372 F.3d 39, 45 (CA1 2004) citing *Devereaux*, 263 F.3d at 1074-75.

In *United States v. Peters*, 153 F.3d 445, 451 (7th Cir. 1998), the court noted that a “consensual search is unreasonable under the Fourth Amendment or violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery or misrepresentation by the revenue agent.”

In *Morris v. Dearborne*, 181 F.3d 657, 668 (5th Cir. 1999), the Fifth Circuit held that a teacher’s fabrication of evidence in a sexual abuse case which resulted in incarceration violated due process, stating: “We conclude that the district court was correct in holding that a teacher’s fabrication of sexual abuse against a student’s father shocks the contemporary conscience . . . Such behavior is an abusive, irrational malicious, and oppressive use of Governmental power.” *Id.* (citing *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972)).

“Significantly, all courts that have directly confronted the question before us agree that the deliberate manufacture of false evidence contravenes the Due Process Clause.” *Whitlock v. Brueggemann*, 682 F.3d 567, 585 (7th Cir. 2012).

III. THIS COURT HAS CONSISTENTLY ESTABLISHED STARE DECISIS ON SUBSTANTIVE CONSTITUTIONAL DUE PROCESS RIGHTS

Stare decisis is a legal doctrine that obligates courts to follow historical cases when making a ruling on a similar case unless overruled by the same court or a higher court such as this Court. Stare decisis promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

The due process clause is intended to protect individuals from the Government's arbitrary exercise of power. *Daniels v. Williams*, 474 U.S. 327, 330, 106 S.Ct. 662, 664, 88 L.Ed.2d 662 (1986). Substantive constitutional due process rights are violated when a Government action violates due process when it "offend[s] the community's sense of fair play and decency" and "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952).

The court refined the "conscience-shocking" standard in *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 1717, 140 L.Ed.2d 1043 (1998). In reversing the Ninth Circuit's decision in that case, the Court explained that whether substantive due process rights are violated under the conscience-shocking standard are dependent on the circumstances surrounding the Government's action.

The "guarantee of due process . . . applied to deliberate decisions of Government officials to deprive a person of life, liberty, or property," *Daniels*, 474 U.S. at 331, 106 S.Ct. at 664, is not always substantive.

“Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of the circumstances before any abuse of power is condemned as conscience shocking.” *County of Sacramento*, 523 U.S. at 834, 118 S.Ct. at 1711.

Recognizing due process is more fluid than other constitutional rights, the Court compared Government decisions made in prison during a riot to decisions in the provision of medical care, recognizing “the markedly different circumstances” under which the two scenarios must be judged. “[D]ecisions necessarily made in haste, under pressure and frequently without the luxury of a second chance,” as in a prison riot, are deserving of more latitude. *Id.* at 852, 118 S.Ct. at 1720 (citation omitted).

Government actions that shock the conscience rise to the level of a substantive constitutional due process violation when they are taken, “upon the luxury enjoyed by . . . officials . . . having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated; by the pulls of competing obligations[.]”

All of these attributes are present in a civil tax audit as the Government determines the pace of the audit. Deliberate fabrication of three false statements during a civil tax audit to require criminal prosecution, shocks the conscience and violates my substantive constitutional due process.



CONCLUSION

The IRS is the only government institution that annually affects each citizen, "the only sure things in life are death and taxes." The IRS is an enormously powerful agency which if allowed to fabricate evidence during civil audits has the discretion to bring criminal charges against each citizen.

This Court has repeatedly recognized the great latitude the IRS has in conducting civil and criminal investigations. But even when validating questionable IRS actions, the Court has recognized a baseline standard of constitutional rights which even the IRS cannot violate. Fabrication of evidence falls below even this minimal standard.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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