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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JULY 19, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALBERT S.N. HEE,

Defendant-Appellant.

No. 19-15170

D.C Nos. 1:18-cv-00104-SOM-RLP,
1:14-cr-00826-SOM-1,
District of Hawaii, Honolulu

IKUTA and N.R. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 6) is denied because appellant has not shown that "jurists of reason would find it debatable whether the [section 2255 motion] 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134,

140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII DENYING HEE'S MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE (SEPTEMBER 25, 2018)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

ALBERT S.N. HEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civ. No. 18-00104 SOM-RLP, Cr. No. 14-00826 SOM

Susan Oki Mollway, United States District Judge

I. INTRODUCTION.

Petitioner Albert Hee was convicted of having corruptly interfered with the administration of Internal Revenue Service ("IRS") laws in violation of 26 U.S.C. § 7212(a) and of six counts of having filed false tax returns in violation of 26 U.S.C. § 7206(1). The evidence at trial established that Hee had characterized millions of dollars in personal expenses as business expenses incurred by his company, Waimana Enterprises, Inc. ("Waimana"). He is currently serving a sentence of 46 months imprisonment.

Hee, proceeding *pro se*,[1] now seeks to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. He argues that the IRS fabricated evidence to support a criminal investigation of him and that the U.S. Attorney's Office for the District of Hawaii ("Government") suppressed exculpatory evidence. He also argues that his trial attorneys provided ineffective assistance of counsel by failing to review documents prior to trial and by failing to preserve certain evidentiary objections during trial.

This court denies Hee's petition without an evidentiary hearing, concluding that Hee's claims were already addressed on appeal or that the record establishes that they lack merit.

II. BACKGROUND.

Three indictments were filed in this case. The first indictment, filed on September 17, 2014, charged Hee with one count of willfully filing a false tax return in violation of 26 U.S.C. § 7206. *See* ECF No. 1. The Superseding Indictment, filed on December 17, 2014, added five more counts for the filing of false tax returns, and one count alleging corrupt interference with the administration of IRS laws in violation of 26 U.S.C. § 7212(a). *See* ECF No. 14. The Superseding Indictment also introduced allegations that Hee had failed to properly report Waimana's payment of $1,313,261.34 for a Santa Clara house as personal income, and that he had falsely declared Waimana's payment of $718,559.09 for his children's college tuition and expenses as a "loan to shareholder." *Id.*, PageID # 48.

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[1] Hee was represented by counsel at trial and on appeal.

In the Second Superseding Indictment, filed on March 25, 2015, the Government omitted the allegation that the entire purchase price of the Santa Clara house should be deemed income to Hee. *See* ECF No. 56. Instead, the indictment alleged that Hee's use of Waimana to purchase the house was part of Hee's interference with the IRS's computation of his income and tax liability. *See id.*, PageID # 393.

Trial commenced on June 23, 2015. *See* ECF Nos. 17882, 189-95. Trial evidence established that, between 2002 and 2012, Hee used Waimana to pay millions of dollars in personal expenses, including personal massages, college tuition for his children, living expenses for his children, and credit card charges such as those for family vacations to France, Switzerland, Tahiti, Disney World, and the Mauna Lani resort. Hee also had Waimana pay salaries and benefits to his wife and children, even while his children were full-time students doing no work for the company. And although Hee claimed that he purchased the Santa Clara house as an investment by Waimana, Hee's son and daughter lived in the house while attending college and rented out rooms to classmates without submitting the rent proceeds to Waimana. Waimana wrongfully deducted the expenses on corporate tax returns, and Hee failed to report the receipt of any rental income on his personal tax returns. After an eleven-day trial, the jury returned a verdict of guilty beyond a reasonable doubt on all counts. *See* ECF No. 196.

This court sentenced Hee to (1) 36 months for six counts of filing false tax returns and a consecutive 10 months for one count of corrupt interference with the administration of IRS laws, for a total sentence of 46

months; (2) supervised release of one year as to the seven counts, with all terms to run concurrently; (3) a fine of $10,000.00 to be paid within 14 days of sentencing; (4) restitution of $431,793.00; and (5) a special assessment of $700.00 ($100.00 as to each of the seven counts). *See* ECF No. 242.

Hee appealed. On March 14, 2017, the Ninth Circuit filed a memorandum opinion affirming the judgment. *See United States v. Hee*, 681 F. App'x 650 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 268 (2017). Hee timely filed the present § 2255 petition on March 16, 2018.

III. STANDARD OF REVIEW.

Under 28 U.S.C. § 2255, a federal prisoner may file a petition challenging the imposition or length of his or her sentence on any of the following four grounds: (1) that the sentence was imposed in violation of the Constitution or laws of the United States; (2) that the court was without jurisdiction to impose such sentence; (3) that the sentence was in excess of the maximum authorized by law; or (4) that the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). To obtain relief from a conviction under § 2255, a petitioner must demonstrate that an error of constitutional magnitude had a substantial and injurious effect on the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993).

A petitioner must file a § 2255 motion within one year from the latest of four dates: (1) when the judgment of conviction becomes final; (2) when the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was

prevented from making a motion by such governmental action; (3) when the right asserted is initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; and (4) when the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f).

A § 2255 petition cannot be based on a claim that has already been disposed of by the underlying criminal judgment and ensuing appeal. *See Olney v. United States*, 433 F.2d 161, 162 (9th Cir. 1970) ("Having raised this point unsuccessfully on direct appeal, appellant cannot now seek to relitigate it as part of a petition under § 2255.").

Even when a § 2255 petitioner has not raised an alleged error at trial or on direct appeal, the petitioner is procedurally barred from raising an issue in a § 2255 petition if the issue could have been raised earlier, unless the petitioner can demonstrate both "cause" for the delay and "prejudice" resulting from the alleged error. *United States v. Frady*, 456 U.S. 152, 167-68 (1982) ("[T]o obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double procedural default, and 2) 'actual prejudice' resulting from the errors of which he complains."). To show "actual prejudice," a § 2255 petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170.

A judge may dismiss a § 2255 petition if "it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief." Rule 4(b), Rules Governing Section 2255 Proceedings For The United States District Courts. A court need not hold an evidentiary hearing if the allegations are "palpably incredible" or "patently frivolous" or if the issues can be conclusively decided on the basis of the evidence in the record. *See Blackledge v. Allison*, 431 U.S. 63, 76 (1977); *see also United States v. Mejia-Mesa*, 153 F.3d 925, 929 (9th Cir. 1998) (noting that a "district court has discretion to deny an evidentiary hearing on a § 2255 claim where the files and records conclusively show that the movant is not entitled to relief").

IV. ANALYSIS.

The vast majority of Hee's § 2255 petition relates to the IRS's alleged fabrication of evidence and the Government's alleged suppression of exculpatory evidence. *See* ECF No. 268-2, PageID #s 5681-5712. These arguments were thoroughly litigated before this court and on appeal to the Ninth Circuit. Hee's ineffective assistance of counsel claims are new, but he fails to demonstrate that his trial attorneys were deficient in their representation of him or that he suffered any prejudice. *See id.* at 5712-16. Finding no bases supporting the requested relief, this court denies Hee's § 2255 petition.

A. Hee's Claim that the IRS Fabricated Evidence Was Disposed of on Appeal.

In his § 2255 petition, Hee argues that IRS Revenue Agent Crystal Carey "fabricated evidence" to

"contrive[] a criminal trial from a civil tax audit." ECF No. 268-2, PageID # 5681. Hee identifies the following "fabricated evidence" from Carey's testimony at trial:

> (1) Carey's false depiction of my initial interview to make it appear I was being deceptive; (2) Carey's fabrication of a statement attributed to independent CPA Chinaka ("Chinaka") that I "would rather play the odds of being audited" to show deceptiveness; and (3) Carey's fabrication of a "threat" I made that was told to her by CPA Yee ("Yee").

Id. at 5683. Hee argues that "Carey's fabricated statements, as recorded on official forms, are the basis upon which the [Fraud Technical Adviser[2]] referred the civil tax audits for criminal investigation which resulted in the loss of my liberty and property." *Id.* at 5687 (footnote omitted). These arguments were all made to this court and in Hee's appeal to the Ninth Circuit.

Prior to trial, on March 23, 2015, Hee filed a motion to dismiss the entire case "because of the government's institutional bad faith in the investigation of this case," or, in the alternative, for an order suppressing evidence collected by Carey. ECF No. 50-1, PageID # 304. Hee argued that the IRS's Internal Revenue Manual "advised Agent Carey how to conduct a secret criminal investigation" and was "evidence of a calculated effort by the IRS to instruct its

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[2] Fraud Technical Advisors assist in fraud investigations and offer advice on matters concerning tax fraud. Internal Revenue Manual ("IRM") § 25.1.1.1(7).

agents how to deceive taxpayers into thinking they are facing a routine civil tax examination when they are facing a criminal tax fraud investigation." *See id.* at 315. This court denied the motion, determining that "Hee appears to be raising a general challenge to IRS procedures rather than one to the agent's individual actions." ECF No. 81, PageID # 622.

In his motion for new trial filed on August 26, 2015, Hee sought a new trial based on "new evidence." *See* ECF No. 198. This evidence is the same allegedly fabricated evidence Hee relies on in his § 2255 petition: (1) Carey mischaracterized Hee's statements about the payments to masseuse Diane Doll; (2) Carey falsely reported that one of Hee's accountants, David Chinaka, said Hee "would rather play the odds of being audited" than keep receipts; and (3) Carey falsely implied that accountant Alan Yee had conveyed a "threat" by advising Carey not to meet with Hee alone because he was "frustrated" with the audit. ECF No. 198-1, PageID #s 3525-30. Hee attached to his motion for new trial a declaration from Chinaka, denying making the "playing the odds" statement, and one from Yee, denying making a threat. *See* ECF Nos. 198-4, 1986. Hee further argued in seeking a new trial that a Carey Activity Report ("AR")[3] of the Waimana audit demonstrated that Carey had sufficient indicia of fraud to justify a criminal referral by August 5, 2009. ECF No. 198-1, Page ID #s 3534-35, 5343-45. This court denied the motion for new trial, concluding that Carey had only preliminary indications of fraud in 2009 and was not required to make an immediate

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[3] An AR is "used to document each action taken on the case." IRM § 4.10.9.5(1).

criminal referral at that time. *See* ECF No. 213, PageID #s 3927-30.

On appeal to the Ninth Circuit, Hee argued the same issues raised in his March 2015 motion to dismiss and August 2015 motion for new trial. *See* Appellant's Opening Brief, No. 16-10018, (Apr. 12, 2016) ("Opening Brief") at 14-15, 21-28, 32-33, 39-46. Hee's § 2255 petition admits as much: "My appeal challenged both the denial of my pre-and post-trial motions citing IRS misconduct. . . ." ECF No. 268, PageID # 5667.

The Ninth Circuit affirmed this court's denials of Hee's motions, noting, "A criminal defendant can suppress evidence from a civil tax audit if he shows 'clear and convincing' evidence of an 'affirmative misrepresentation' by the IRS." *Hee*, 681 F. App'x at 650 (citing *United States v. Bridges*, 344 F.3d 1010, 1020 (9th Cir. 2003)). The Ninth Circuit held that "[b]ecause Hee presented *no such evidence*, the district court did not err in denying his motions." *Id.* (emphasis added). Thus, the Ninth Circuit squarely considered and ruled on the IRS's allegedly "fabricated evidence" and "secret criminal investigation." As a result, Hee may not now raise these issues in his § 2255 petition. *See Olney*, 433 F.2d at 162.

Hee's § 2255 petition asserts that he has discovered "'new' evidence that irrefutably shows that the Government's actions were known and taken intentionally." ECF No. 268, PageID # 5670. In a minute order, this court directed Hee to "identify the 'new evidence' he is relying on, as well as the date on which he or his attorney discovered or received the 'new evidence.'" ECF No. 283. In his reply, Hee confirms that he has not identified any evidence that

was not available prior to the jury verdict, or even prior to the start of trial. *See* ECF No. 284, PageID # 5967 ("The 'new' evidence was produced on June 19, 2015. I understood [that] 'new' referred to what has been presented to the Court.").

Hee's § 2255 motion also argues that this court lacked jurisdiction over his case because the Government charged Hee based on fabricated evidence, and that his case should therefore have been tried in Tax Court. *See* ECF No. 284, PageID #s 596768. These arguments are necessarily tied to the arguments in his March 2015 and August 2015 motions because they are based on the idea that the IRS fabricated evidence to bring criminal charges against Hee. Given the Ninth Circuit's determination that there was "no . . . evidence" of "an 'affirmative misrepresentation' by the IRS," his arguments cannot succeed here.

B. Hee's Claim that the Government Suppressed Exculpatory Evidence Was Disposed of on Appeal.

Hee's § 2255 petition argues that the Government intentionally suppressed exculpatory evidence "until the eve of trial" in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). ECF No. 268-2, PageID # 5681. He appears to refer to four documents that the Government turned over to the defense with its *Jencks* production on June 19, 2015: (1) a "third version" of Carey's AR;[4] (2) an email dated October 22, 2009, from

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[4] The Government asserts that that this version of Carey's AR was turned over on May 15, 2015. *See* ECF No. 282, PageID # 5950. However, for the purposes of this order, the exact date of disclosure need not be determined.

IRS leasing specialist Pete Puzakulics concerning the tax treatment of a Waimana subsidiary's lease;[5] (3) Carey's Notice of Proposed Adjustment ("NOPA"),[6] which documented Hee's initial interview statement that Doll, a person whose fees he characterized as business expenses, was a masseuse; and (4) Chinaka's grand jury testimony. *Id.* at 5689, 5693. This *Brady* argument was raised on appeal and addressed by the Ninth Circuit.

As Hee concedes in his § 2255 petition, he has already challenged on appeal "the suppression of material evidence until just before trial." ECF No. 268, PageID # 5667. In the Opening Brief supporting his appeal, Hee argued that the Government had failed to timely produce "a third version of Carey's AR for Waimana," which constituted "evidence that Carey harbored a 'secret intent' to refer Mr. Hee's case to the [IRS Criminal Investigation Division]." Opening Brief at 13, 38. More broadly, Hee argued, "If the Government had timely produced all discovery, including all internal IRS emails, multiple versions of the Waimana AR, the Summary of Activity Record, and Chinaka's grand jury testimony, there would have been a reasonable probability that [Hee's motion to dismiss filed on March 23, 2015,] would have resulted in an evidentiary hearing. . . . " *Id.* at 37.

The Ninth Circuit found no *Brady* violation. That court explained that, for a *Brady* violation, "[t]he suppression must be 'so serious that there is a reasonable probability that the suppressed evidence would have produced a different' outcome." *Hee*, 681 F. App'x

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[5] A NOPA is issued by the IRS and provides a summary of a proposed tax adjustment. *See* IRM § 4.46.4.11.

at 650 (citing *Strickler v. Greene*, 527 U.S. 263, 281 (1999)). The Ninth Circuit held that "[b]ecause evidence of guilt was overwhelming, there's no reasonable probability that the allegedly suppressed evidence would have changed the outcome of Hee's March 2015 motion, August 2015 motion or trial." *Id.* Having been unsuccessful in arguing this issue in his direct appeal, Hee may not now raise it in his § 2255 petition. *See Olney*, 433 F.2d at 162.

The Government states that it "does not believe Defendant explicitly raised the Puzakulics email in motions or on direct appeal." ECF No. 282, PageID # 5951. Nor does it appear that Hee specifically mentioned the NOPA in his Opening Brief on appeal. In a minute order, this court directed Hee to "specifically identify any argument that was not or could not have been raised before this court or the Ninth Circuit Court of Appeals." ECF No. 283. Otherwise, this court said, it would "presume that [the arguments] were either raised before this court or the Ninth Circuit." *Id.* Hee has identified no such arguments. *See* ECF No. 284. Even if the documents Hee points to were not addressed as part of Hee's *Brady* argument on appeal, Hee may not now raise these alleged *Brady* errors absent a showing of both "cause" for the delay and "prejudice" resulting from the alleged errors. *Frady*, 456 U.S. at 167-68. Having demonstrated neither cause nor prejudice, Hee may not now argue that the timing of the Government's disclosure of the NOPA and Puzakulics email constitutes a *Brady* violation.

C. Hee Has Not Demonstrated That His Trial Attorneys Failed to Review Documents or That He Suffered Any Prejudice.

Hee argues that his trial attorneys failed to review certain "Jencks and non-Jencks documents containing uncontroverted evidence of the Government's misconduct, and violations of statute and the rules of the court." ECF No. 2682, PageID # 5714. He appears to be referring to the same documents discussed above-*i.e.*, the four documents that the Government turned over to the defense with its *Jencks* production on June 19, 2015: (1) the "third version" of Carey's AR; (2) Puzakulics's email dated October 22, 2009, regarding the tax treatment of a Waimana subsidiary's lease; (3) Carey's NOPA regarding Hee's initial interview statement that Doll was a masseuse; and (4) Chinaka's grand jury testimony. *Id.* at 5689, 5693. He argues that, had his attorneys properly reviewed this evidence prior to trial, "they would have uncovered evidence of the Government's misconduct and had the charges dismissed" or "moved to delay the start of the trial." ECF No. 268-2, PageID #s 5972, 5682.

The standard for ineffective assistance of counsel "requires a showing of both deficient performance by counsel and consequent prejudice." *Ellis v. Harrison*, 891 F.3d 1160, 1164 (9th Cir. 2018) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish deficient performance, a claimant must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Prejudice exists when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Id.* at 694. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

The Government's opposition attaches a declaration from Hee's trial counsel Steven Toscher, which states that the trial attorneys did review the Government's *Jencks* production. *See* ECF No. 282-1. The declaration states, "By June 22, 2015, the date that the trial in this matter began, the Firm had reviewed all of the documents which had been produced by the government as part of the Jencks production." *Id.*, PageID # 5965. To support this statement, the declaration describes steps taken by Hee's trial attorneys following their review of the production: (1) on June 20, 2015, Toscher sent several emails to the Government asking about "the absence of Jencks material for various witnesses that had been listed on the government's witness list"; (2) on June 22, 2018, trial attorneys prepared a trial cross-examination outline for Carey and accompanying exhibits from the *Jencks* production, including Carey's NOPA; and (3) because the Government did not call Carey as a witness at trial, documents from the *Jencks* production were used in support of Hee's post-trial motions. *See id.* (citing ECF Nos. 166, 198, 213). Hee does not dispute that these steps occurred. And as explained above, the documents in the *Jencks* production served as the basis for some of Hee's arguments on appeal. Thus, there is no indication that Hee's trial attorneys failed to appropriately review the *Jencks* production.

Hee's reply argues that the Government committed several discovery violations and that a "reasonable attorney would have realized he needed a stay once

their review of the Jencks production revealed the non-Jencks evidence." *See* ECF No. 284, PageID #s 5972-73. The decision whether to move to stay a trial or to ask for a continuance is a tactical one. Tactical decisions are given "great deference," and Hee has not offered any persuasive reason as to why a stay was necessary. *See Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000). Hee attempts to argue that the documents are evidence of the IRS's fabrications and therefore constitute "exculpatory evidence" that his attorneys should have further explored. *See* ECF No. 284, PageID # 5974 (citing *Stankewitz v. Wong*, 698 F.3d 1163 (9th Cir. 2012)). This argument is unavailing because, as the Ninth Circuit held, Hee has presented "no such evidence" of any IRS misrepresentation. *Hee*, 681 F. App'x at 650.

In addition to failing to demonstrate that his attorneys failed to review *Jencks* material, Hee fails to demonstrate that he suffered any prejudice. He simply asserts that the charges against him would have been dismissed, without explaining how his attorneys' alleged failure to review the documents affected the proceedings. As mentioned above, the Ninth Circuit reviewed these documents in the context of Hee's *Brady* argument and held that the "evidence of guilt was overwhelming" and that "there's no reasonable probability that the allegedly suppressed evidence would have changed the outcome of Hee's March 2015 motion, August 2015 motion or trial." *Hee*, 681 F. App'x at 650. Thus, the Ninth Circuit has already ruled that these documents had limited impact on Hee's trial.

Because Hee has not demonstrated that his trial attorneys provided ineffective assistance in their

review of the Government's *Jencks* production, the court does not grant Hee § 2255 relief on this ground.

D. Hee's Trial Counsel's Failure to Object to an Evidentiary Ruling Does Not Constitute Ineffective Assistance of Counsel.

Finally, Hee argues that his trial attorneys provided ineffective assistance by "fail[ing] to properly object to the trial court's rulings on the admissibility of testimony by [Hee's] family." ECF No. 268-2, PageID # 5716. Hee argues that, "[b]y not properly objecting, my trial counsel denied me the opportunity to have the appellate court review the evidence ruled hearsay and inadmissible by the trial court." *Id.* This argument relates directly to the Ninth Circuit's ruling on Hee's appeal.

At trial, Hee sought to have his wife and children testify about their "understanding" of why Hee did certain things and why Waimana made certain payments. As discussed extensively in the court's order denying Hee's motion for new trial, the court ruled that such testimony was inadmissible hearsay, although the witnesses could testify about their understandings upon the laying of a foundation that the understandings were based on something other than out-of-court statements by Hee. *See* ECF No. 213, PageID #s 3931-38.

On appeal, Hee raised this ruling as a point of error. *See* Opening Brief at 47. The Ninth Circuit held:

> *Because Hee failed to properly object below*, we review the district court's decisions concerning the admissibility of testimony for plain error. *See United States v. Lopez*, 762 F.3d 852, 859 (9th Cir. 2014). Under this stan-

> dard, Hee must show that any error was not "subject to reasonable dispute." *Id.* at 863 (citations and internal quotation marks omitted). But it's a matter of reasonable dispute whether questions concerning "the understanding" of Hee's family members were intended to elicit hearsay rather than evidence of Hee's contemporaneous good faith. Nor did the exclusion of this line of questioning affect the outcome of the proceeding. Hee's defense, which lasted five days and included seventeen witnesses, amply aired the available evidence of his alleged good faith.

Hee, 681 F. App'x at 650 (emphasis added). In his § 2255 petition, Hee focuses on the Ninth Circuit's mention of the "fail[ure] to properly object below" and asserts that it indicates ineffective assistance of counsel.

Hee's ineffective assistance of counsel argument fails for several reasons. First, Hee was not deprived of review by the Ninth Circuit because, in issuing the memorandum opinion quoted above, the Ninth Circuit carefully considered the excluded testimony by Hee's family.

Second, Hee does not establish deficient performance by his trial attorneys. The failure to object to an evidentiary ruling, without more, does not constitute representation "below an objective standard of reasonableness" because such a decision could be understood as an objectively reasonable tactical decision. *See Strickland*, 466 U.S. at 688-89 (explaining the strong presumption that challenged actions were sound trial strategy and that counsel's tactical deci-

sions are given "wide latitude"); *see also Larimer v. Yates*, 483 F. App'x 317, 319-20 (9th Cir. 2012) (holding that trial counsel did not provide ineffective assistance in failing to object to the admission of testimony). The Ninth Circuit held that Hee's trial attorneys "amply aired the available evidence of [Hee's] alleged good faith," further indicating that his trial attorneys were not deficient in eliciting testimony going to the reasoning behind Hee's actions. *See id.*

Finally, Hee has not argued that he suffered any prejudice at trial—*i.e.*, that "the result of the proceeding would have been different" had his trial attorneys objected. *See Strickland*, 466 U.S. at 694. Nor does Hee demonstrate that the outcome of the proceeding would have been different had his family members testified as to their "understanding" of the reasons for Hee's actions. The Ninth Circuit concluded that "the exclusion of this line of questioning [did not] affect the outcome of the proceeding," effectively holding that Hee suffered no prejudice. *Hee*, 681 F. App'x at 650.

As a result, Hee's ineffective assistance of counsel claim with respect to the evidentiary objection fails.

V. CONCLUSION.

Hee's § 2255 petition is denied. The Clerk of Court is directed to enter judgment for the Government and to close

Civil No. 18-00104 SOM-RLP.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September 25, 2018.

/s/ Susan Oki Mollway
Susan Oki Mollway
United States District Judge

Albert S.N. Hee v. United States of America, Civ. No. 18-00104 SOM-RLP, Cr. No. 14-00826 SOM; ORDER DENYING HEE'S MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE.

ALBERT S.N. HEE PETITION FOR WRIT MANDAMUS FILED IN THE NINTH CIRCUIT (OCTOBER 10, 2018)

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT S.N. HEE,

Petitioner,

v.

UNITED STATES DISTRICT COURT OF HAWAII

PETITION FOR WRIT MANDAMUS;

PETITIONER'S 2255 REPLY BRIEF

PETITION FOR WRIT MANDAMUS

Albert S.N. Hee ("Petitioner, I, me, my"), requests this court issue a Writ of Mandamus to direct the District Court of Hawaii to follow this Court's precedent rulings in *Devereaux v. Abbey*, 263 F.3d 1070 (CA9 2001)(en banc) and *United States v. Bogart*, 783 F.2d 1428 (CA9 1986)(en banc) and immediately vacate my conviction. The district court did not follow several binding precedents cited in my 28 USCS Section 2255 Motion ("habeas motion") and did not

address its reasoning on any of them. The first occurred in denying a protective order I requested, citing *Bittaker v. Woodford*, 331 F.3d 715 (CA9 2003) (en banc). The district court's refusal to follow stare decisis continued with the binding precedents cited in my briefs showing why the law of the case was incorrectly decided due to structural error citing *Kotteakos v. United States*, 328 US 750 (1946). These and other cases cited in my habeas briefs are binding precedents ("stare decisis, law of the circuit)" which demonstrate the government violated my substantive constitutional due process. By not following stare decisis, the district court committed 'clear error.'

BACKGROUND

On September 25, 2018, the District Court of Hawaii denied Petitioner's 28 USCS 2255 Motion to Vacate, Set Aside, or Correct Sentence in Civil Case No. 18-00104 SOM-RLP without a hearing. Petitioner represented himself pro se.

Petitioner was represented by counsel during trial and direct appeal. Petitioner's counsel did not cite this court's *Devereaux* and *Bogart* binding precedent decisions in my post trial briefs before the district court or in my briefs before this Circuit Court during direct appeal. Counsel argued procedural instead of substantive due process violations. This court's holdings in *Devereaux* and *Bogart* are directly on point to the material facts in petitioner's criminal trial and should have resulted in vacating of my conviction. The material facts were not properly litigated commensurate with the laws of the circuit at the trial or on direct appeal because of my counsels' failure to cite the applicable binding precedents. Petitioner only became

aware of the binding precedent cases after deciding to represent myself. In preparing my request for reconsideration of this court's unpublished memorandum opinion, I stumbled across this court's binding precedent decisions in *Devereaux*, *Bogart* and *Atkins v. County of Riverside*, 151 Fed Appx 501 (2005).

My counsels' failure to raise and argue the legal issues at trial and on direct appeal prevented this court from considering them on my motion for reconsideration. *ITOW v. Washington*, 350 F.3d 925,929 (CA9 2003) ([This court] "will not consider any claims that were not actually argued in appellant's opening brief.") The United States Supreme Court was similarly unable to grant certiorari. Petitioner's only venue was a habeas motion. "The writ of habeas corpus stands as a safeguard against imprisonment . . . judges must be vigilant and independent in reviewing petitions . . . " *Harrington v. Richer*, 562 US 86, 90 (2011). Petitioner's habeas motion is based on this court's binding precedent cases. Instead of following or distinguishing the binding precedent cases, the district court purposely ignored this court's laws of the circuit. The district court did not follow stare decisis in its decision and closed the case. The district court's decision, including closing the case, denies me the right to appeal on this Court's binding precedents.

MANDAMUS

This court issued at least two Writs of Mandamus to enforce stare decisis in 2017. *In (In Re: Dan Farr Prod.) v. United States District Court*, 874 F.3d 590 (CA9 2017) and *In re: Zermeno-Gomez v. United States* District Court, 868 F.3d 1048 (CA9 2017), this Court found the district courts' refusal to follow stare decisis

involving substantive constitutional rights justified the use of the Writ of Mandamus to correct. *In re: Dan Farr Prod.* involved a prior restraint on speech, violating the First Amendment. *In re: Zermeno-Gomez* involved the physical restraint of pre-trial detainees, violating the Fifth Amendment. The district court's refusal to follow this court's *Devereaux* and *Bogart* binding precedents in my case violates my substantive constitutional right to due process and is a restraint on my liberty and property. Attached is my 2255 Reply brief to show *Devereaux* comprised the heart of my arguments

My issue is the same as *In re: Dan Farr Prod.* and *In re: Zermeno-Gomez*: 'Is the district court bound by binding precedent.' In all three cases, the district court made a tactical decision to manipulate the preclusive effect of this circuit's prior judgment, a right that even this court does not have. "It is indeed, a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court." *United States v. United States Dist. Ct.*, 334 U.S. 258, 264 (1948). Stare Decisis requires this court and all courts within this circuit to follow the binding precedent until it is overturned. A circuit court's binding precedent can only be superseded by the same circuit court or the United States Supreme Court. A district court cannot overturn, disregard or ignore binding precedent.

The standards for a Writ of Mandamus is set out in *Bauman v. United States*, 557 F.2d 650 (CA9 1977). the five *Bauman* factors are whether the: (1) petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) petitioner will be damaged or prejudiced in any way not correctable on

appeal; (3) district court's order is clearly erroneous as a matter of law; (4) district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) district court's order raises an important problem or issue of first impression. Only the absence of clear error is fatal to the issuing of a writ. The other factors need not be present. In re: *Zermeno-Gomez.*

(1) PETITIONER HAS NO OTHER MEANS, SUCH AS DIRECT APPEAL, TO OBTAIN THE DESIRED RELIEF;

I already exhausted my direct appeal of my conviction. This court was unable to consider its laws of the circuit because my counsel did not argue them.

To appeal the district court's decision denying my habeas motion requires a Certificate of Appealability. This court requires I first apply to the district court before this court may, in the interest of "substantial justice" issue a Certificate of Appealability if the district court denies my request. *United States v. Martin*, 226 F.3d 1042, 1046 (CA9 2000). The district court did not address my request for a Certificate of Appealability in the 'relief requested' section of my briefs. Instead, as part of denying my habeas motion, the district court ordered the "Clerk to close the case." The district court's decision not to address the laws of the circuit and my request for a Certificate of Appealability, set in motion a prejudicial process of trying to find a method to obtain relief and making arguments without benefit of the district court's distinguishing conclusions on the laws of the circuit.

Obtaining relief from my forty six (46) month sentence before serving the entire sentence can only

come from this petition. I have twelve (12) months remaining.

(2) PETITIONER WILL BE DAMAGED OR PREJUDICED IN ANY WAY NOT CORRECTABLE ON APPEAL;

My tax conviction has precipitated other civil cases, one of which is a foreclosure action currently before the District Court of Hawaii. The United States, represented by Department of Justice ("DOJ") in Washington DC, has moved for summary judgment in Civil No. 18-145 JMS-KSC which names several companies I established, several former officers of those companies and myself as individuals. I am appearing pro se. The hearing is currently scheduled for November 13, 2018. The government has cited my tax conviction in cases related to this action to prejudice me. The expected publicity of my tax conviction if allowed to stand, will be damaging. The companies I established and the individual defendants have been and will continue to be prejudiced because of my wrongful conviction. If the government prevails, native Hawaiians living on Hawaiian Home Lands could lose communications service that is being provided by the defendant companies in this case.

My health was a major consideration in my sentencing. I now have five potentially fatal health issues. When I was incarcerated, I had four. My health has suffered and continues to suffer while incarcerated. The same month I arrived at Terre Haute, the Terre Haute, Bureau of Prisons ("BOP") doctor, requested I be immediately transferred because I was not safe at this facility. The transfer was denied twice, with the last by DOJ-BOP in

Washington DC. More than a year later, I am still here. The District Court of Southern Indiana is currently considering my request to be moved to a more suitable facility. My health continues to decline. The vast majority of *Devereaux* cases are after the defendant has served his complete sentence. *Devereaux* should also serve to prevent incarceration. "Substantive due process protects individuals from arbitrary deprivation of their liberty by government." *Constanch v. Washington*, 627 F.3d 1101, 1110 (CA9 2010).

(3) DISTRICT COURT'S ORDER IS CLEARLY ERRONEOUS AS A MATTER OF LAW; LAW OF THE CIRCUIT—*DEVEREAUX*

This court reaffirmed its *Devereaux* binding precedent as recently as 2017. "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 definition of a *Devereaux* claim was refined by *Costanich v. Washington*, 627 f.3d 1101 (CA9 2010) and *Spencer v. Peters*, 857 F.3d 789 (CA 9 2017). In *Costanich*, this court clarified the *Devereaux* test to include " . . . direct evidence that the investigator had fabricated evidence-for example, direct misquotation [written mischaracterization] of witnesses in investigative reports." at 1111. In *Spencer*, this court established an objective test. Deliberate fabrication can be established either by: (1) circumstantial evidence that government officials continued their investigation, despite the fact that they knew or should have known that the person was innocent; OR (2) direct evidence, such as when an interviewer deliberately mischaracterizes

a witness statement. My case meets both elements of the test.

In *Spencer*, the detective and her supervisor fabricated false evidence. The original prosecutor declined to prosecute concluding the case was 'legally insufficient.' The detective and her supervisor continued the investigation, fabricating additional false evidence, including mischaracterizing witness statements, which led to a guilty plea in 1985. In 2004, after nearly 20 years of incarceration, the Governor commuted Spencer's sentence. Spencer then filed a section 1983. complaint. All of the fabrications, including the mischaracterizations, were recorded on investigative forms.

My case is remarkably similar to *Spencer*. IRS civil agent Carey and her group manager Kamigaki fabricated false evidence during a civil audit of my companies. After beginning the audit, Carey interviewed me on May 7, 2008. Amongst other questions, Carey asked me about a consulting fee Waimana Enterprises, Inc. ("Waimana") paid to Diane Doll. I immediately answered that Doll was my masseuse. However, in her Corporate Interview Questionnaire, Carey mischaracterized my truthful answer instead recording; "[question] 18. $6,000 consulting fee paid to Diane Doll. What for? [answer] Albert Hee: "You never know where you are going to get information about the competition from." My case was forwarded to the IRS Fraud Technical Advisor ("FTA") for review. Over a year later when Carey was preparing her Notice of Proposed Adjustment ("NOPA") documents, Carey recorded my truthful statement.

On October 22, 2008, the FTA concluded there was 'no civil or criminal fraud.' Two weeks later, on

November 5, 2008, Carey interviewed David Chinaka, one of Waimana's Certified Public Accountants ("CPA") and fabricated another false statement 'from whole cloth.' Carey recorded Chinaka as saying "Mr. Hee was aware of the requirements, but . . . would rather play the odds of being audited rather than keep receipts." Chinaka later testified that he had no recollection of making the statement, affirmatively denied making them and provided an affidavit.

On May 26, 2009, Carey and Kamigaki met with CPA Alan Yee, a partner with KMH, the accounting firm representing Waimana in the audit and fabricated another false statement by mischaracterization. According to Carey, Yee "repeated to me at least four times: Mr. Hee is frustrated, I wouldn't go alone [to meet], please take your manager." Carey thought the "kindest interpretation" of that message was "that Mr. Yee thought Mr. Hee would be better behaved with a manager present," while "the worst interpretation is that Yee deemed Mr. Hee to be a threat to me." Carey and Kamigaki "discussed whether this had been a threat, and agreed that it seemed like it." After being informed of his statement, Yee stated he never intended for his comments to be construed as a threat in an affidavit. The Internal Revenue Manual ("IRM") identifies a threat as requiring immediate criminal referral. There is no record of Kamigaki informing the FTA or calling the police or IRS criminal agents.

Carey recorded all of the above on the multiple copies of IRS Form 9984, examining Officer's Activity Record ("AR") she was keeping. Carey also kept at least one unofficial activity record. The IRM 4.10.9.5, describes the AR as a contemporaneous record that

provides "a complete and concise case history," chronicling "all actions on the part of the examiner, group manager, clerical support staff," taxpayer and others during the audit. The [AR] "should include the date, location, time charged and an explanation of each activity or contact . . . " After my indictment in September 2014, the prosecutors produced three ARs over a period of nine (9) months. The first on October 20, 2014, was completely redacted; the second on February 11, 2015 and the third on June 19, 2015, without Bates evidentiary numbers. Of the thousands of documents produced, the third AR is the only document without Bates evidentiary numbers on its pages.

The entries on the second AR do not match the entries on the third AR. One specific discrepancy is the date of the interview with CPA Chinaka. The second AR records the date as November 5, 2008. The third AR records the interview date as November 5, 2007, before Carey began her audit. The 2007 date is wedged between all other entries with the correct dates. The third AR, with the wrong date and without Bates evidentiary numbers, was produced without notice on the Friday before Monday's trial with the Jencks material, nine months after I was indicted. The wrong date, absence of Bates evidentiary numbers, extremely late production without notice, Chinaka's affidavit and the absence of the government contesting the fabrications or submitting counter affidavits, indicates Carey deliberately fabricated the statement and recorded it after the fact. The government did not contest my fabrication 'allegations' in the post trial, direct appeal or habeas motion.

The first prong of the *Devereaux* test; 'circumstantial evidence that Carey and Kamigaki contin-

ued the investigation after knowing I was innocent' is met. Carey was conducting a civil audit. The fabricated false statements have nothing to do with the calculation of the amount of taxes my companies owed. The fabricated statements were made to show I was deceptive and threatening, issues which typically trigger the conversion of a civil audit to a criminal investigation.

The FTA found there was no criminal or civil fraud after the first fabricated statement. Carey and Kamigaki continued their investigation fabricating two more false statements. The first prong of the *Devereaux* test is satisfied by Carey and Kamigaki continuing to use the civil audit to obtain a criminal referral from the FTA by fabricating false statements.

The second prong of the *Devereaux* test is satisfied by direct evidence of Carey's mischaracterization of both: my statement made during the May 7, 2008 interview; and CPA Yee's statement made during his May 26, 2009 interview. All of the fabricated false statements are recorded on Carey's ARs. The prosecutors produced one Form 2797, Referral Report of Potential Criminal Fraud Cases ("referral report"). The referral report contains only two "badges of fraud" implicating me of deception. Both were the result of the first two fabricated false statements. The prosecutors never produced a referral referral report that generated the FTA's first finding of 'no criminal or civil fraud.'

LAW OF THE CIRCUIT—OUTRAGEOUS GOVERNMENT CONDUCT—*BOGART*

Outrageous Government Conduct ("OGG") is a claim that government conduct in securing an indictment was so shocking to due process values that the indictment must be dismissed. *United States v. Montoya*, 46 F.3d 1286, 1300 (CA9 1995). A district court may dismiss an indictment on the ground of OGC if the conduct amounts to a substantive due process violation. *United States v. Simpson*, 813 F.2d 1462, 1464-65 (CA9 1987).

The court established guidelines which when met indicate OGC are: (1) the government engineers and directs a criminal enterprise from start to finish *United States v. Smith*, 924 F.2d 889, 897 (CA9 1991); and (2) the government generates crimes merely for the sake of making criminal charges. *United States v. Gurolla*, 333 F.3d 944, 950 (CA9 2003).

A civil tax audit can end in one of four ways: (1) no findings; (2) issuing of NOPA(s); (3) a civil fraud trial in tax court; or (4) a criminal fraud tax trial in district court. I was not aware of Carey and Kamigaki fabricating statements until the government produced Carey's second AR on February 11, 2015, five (5) months after my indictment. In October 2008, the FTA told Carey and Kamigaki there was 'no civil or criminal fraud.' Carey and Kamigaki continued to fabricate false statements until the FTA reversed his original finding, referring my case to IRS Criminal Investigative Division ("CID") in October 2009. During the August 21, 2013; investigative Grand Jury of CPA Chinaka, the Prosecutor acknowledged in his answer to the Grand Jury foreman, that Carey fabricated

evidence and recorded it on two ARs. The conversion of Waimana's civil tax audit to criminal charges against me was engineered and directed from start to finish by the government, meeting the first prong of the OGC test.

The government could have continued with the civil tax audit after the FTA found 'no civil or criminal fraud.' If they found taxes were due, the government could have issued a NOPA. Additionally, after the August 21, 2013, investigative Grand Jury, the prosecutor should have notified me about Carey's fabricated statement or dropped the criminal investigation. "Evidence that a chief investigator fabricated evidence while attempting to build a case against the defendant undermines the credibility of that investigator as well as the evidence compiled in that investigation." *Atkins* at 504. Instead, the prosecutor continued his investigation and indicted me in September 2014. The government chose to generate a crime by continuing the civil audit to fabricate more evidence and not stopping the criminal investigation.

They did this 'merely for the sake of making criminal charges.' The government's actions meet the second prong of OGC.

This Court also established the following guidelines which if present do not constitute OGC; (1) the defendant was already involved in a continuing series of similar crimes, or the charged criminal enterprise was already in process at the time the government agent became involved; (2) the agent's participation was not necessary to enable the defendants to continue the criminal activity; (3) the agent used artifice and stratagem to ferret out criminal activity; (4) the agent infiltrated a criminal organization; and (5) the

agent approached persons already contemplating or engaged in criminal activity. *United States v. Williams*, 547 F.3d 1167 (CA9 2008). The five prongs that do not constitute OGC are not present.

I was not a criminal until being wrongfully convicted and the companies are not criminal organizations.

To violate due process, outrageous governmental conduct must be so grossly shocking and so outrageous as to violate the universal or public's sense of justice. Substantive due process rights are violated when a Government action "offend[s] the community's sense of fair play and decency" and "shocks the conscience." *Rochin v. California*, 342 US 165, 172 (1952). "Deliberate indifference that shocks in one environment may not be so patently egregious in another . . . " *County of Sacramento v. Lewis*, 523 US 833, 834 (1998). 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 . . . " *Id.*

Carey and Kamigaki decided to fabricate false evidence during a civil tax audit. An unhurried process they controlled which therefore allows for repeated reflection. Similarly, the prosecutors made their decisions to continue the criminal investigation, after acknowledging Carey's fabrication during an investigative Grand Jury. The US Attorney's office controls the investigative process which therefore allows for 'unhurried and repeated reflection.' The prosecutors also decides whether to suppress exculpatory evi-

dence and lie to the court. Everyone who pays taxes would agree: deliberate fabrication of evidence by the IRS agent and her supervisor conducting a civil audit; and the prosecutor continuing a criminal investigation after acknowledging the fabrication, indicting me, then suppressing exculpatory evidence "shocks the conscience" and violates the substantive due process right protected by the constitution.

From start to finish, my criminal trial was wholly manufactured by the government. The IRS fabricated evidence to justify converting a corporate civil audit to a personal criminal prosecution and, after acknowledging the fabrication, the US Attorney deliberately withheld exculpatory evidence. I did not participate or know about this misconduct until after being indicted. The government acted alone when it engaged in these wrongful acts to manufacture a crime simply for the 'sake of bringing criminal charges' against me.

In *Bogart*, this court recognized that there are "occasions when the factual nature of the government's conduct is not disputed or perhaps, is very obvious and straightforward [thus allowing] an appellate court . . . to resolve the appeal without the benefit of findings of fact by the district court." *Bogart* at 1434. Here, the evidence of the government's outrageous conduct are all documented. The district court decided not to hold a hearing before making a decision. I was prepared to argue the laws of the circuit. A hearing would have made it extremely difficult for the district court to ignore stare decisis. Most OGC cases are entrapment cases where the court has to weigh the defendant's role. This is simply a case of framing. I had no role. The documents

which record the government's actions are part of the record on appeal (Appeal No 16-10018). Most of them are also attached to my habeas brief. The majority of material facts that violate my substantive due process under *Devereaux* and *Bogart* were pointed out in my opening brief for my direct appeal. I do not have the access or facilities to copy and attach the documents to this Petition. A decision can and should be reached by this court without remanding for a hearing.

(4) DISTRICT COURTS ORDER IS AN OFT REPEATED ERROR OR MANIFESTS A PERSISTENT DISREGARD OF FEDERAL RULES;

The district court repeatedly ignored and did not address the laws of the circuit I cited. The first instance was in my request for a protective order before the court waived my attorney-client privilege. Citing *Bittaker v. Woodford*, 331 F.3d 7158 (CA9 2003) (en banc), as binding precedent, the prosecutor moved for a waiver. In response, I requested a protective order also citing Bittaker (If a district court exercises its discretion to allow such discovery . . . it must ensure compliance with the fairness principle. To that end, it must enter appropriate orders clearly delineating the contours of the limited waiver BEFORE commencement of discovery, and strictly police those limits thereafter.) at 728 emphasis added; *see also Cheney v. United States District Court*, 542 US 367, 376, 379 (2004) (defendant moved for protective order, but district court issued order allowing discovery to proceed.) In my response to the motion for waiver, I stated; " . . . I request that [the waiver] come in the form of a protective order as in *Bittaker* . . . This is especially necessary as; (i) there are a number of Government agencies, including USDOJ that have

been following my case and may pursue criminal and/or civil actions . . . " The district court allowed discovery to proceed without addressing *Bittaker*, it its final order denying me a protective order, the district court simply stated: "To the extent Defendant Albert Hee renews his request for a protective order, that renewed request is denied in light of the Government's response of April 27, 2018."

The district court did not consider any of the binding precedent cases I cited in my briefs simply relying on this court's unpublished memorandum opinion as the law of the case. The law of the case does not supersede the law of the circuit. While there is some discussion as to whether a three judge panel may be able to overturn the law of the circuit, there is no disagreement that a district court is bound by the law of the circuit. *see Miller v. Gammie*, 335 F.3d 889, 899-903 (CA9 2003). In my habeas briefs, I cited laws of the circuit and showed structural error negating the harmless-error standard used by this court in reaching its opinion. The district court should not ignore explanations, including legal arguments, of why the law of the case is wrong then issue its decision without including an explanation.

The district court has found a novel way to disregard stare decisis.

(5) DISTRICT COURT'S ORDER RAISES AN IMPORTANT PROBLEM OR ISSUE OF FIRST IMPRESSION.

"The issue of whether a published decision of this court is binding on lower courts within the circuit . . . is plainly an issue of "major importance to the administration of the district courts." *In re: Dan*

Farr Prod. at 1051 citing *In re Cement Antitrust Litig.* (MDL No. 296) 688 F.2d 1297, 1307 (CA9 1982). "The exercise of our authority is therefore appropriate in this matter." *id.* This court should continue to exercise its authority regarding stare decisis by another Writ of Mandamus.

SUMMARY

This whole ordeal, tax audit, criminal referral, indictment, prosecution, trial, post trial and habeas motion has been marked by the government denying me my procedural due process to hide a denial of my substantive constitutional due process. The chief investigator, Carey, and her IRS supervisor, Kamigaki, began by fabricating evidence all of which is documented on official IRS forms. That led to the IRS FTA reversing his finding of no criminal or civil fraud. The prosecutors then hid the evidence of the fabrications beginning during an investigative grand jury when the prosecutor acknowledged that Carey fabricated evidence. Rather than immediately notify me as required by *Giglio v. United States*, 405 US 150 (1972), they indicted me. The prosecutors continued to suppress exculpatory evidence by lying in open court during my pre-trial discover motion hearing both stating, "all of the evidence had been produced." Based on their lies, I was denied my pre-trial motions for discovery and to dismiss. The prosecutors finally produced the exculpatory evidence I needed on the Friday before Monday's trial, without notice and mixed in with the Jencks evidence. My attorneys did not understand the significance of the non-Jencks evidence and did not move to prevent the trial from beginning.

In my post trial appeal, I submitted affidavits from my CPAs about the fabrications attributed to them and pointed out the deliberate misstatement attributed to me. The prosecution did not contest the fabrications. My attorneys did not know about the *Devereaux* or *Bogart* cases, so presented the same material facts as procedural due process violations. During my direct appeal hearing, the Circuit Court used the harmless-error standard asking my attorney for, "any case, civil or criminal," that stood for the proposition that a trial does not cure procedural due process. The more correct question, had my attorneys argued *Devereaux* and *Bogart*, would have been to the prosecutor asking for, "any case, civil or criminal," that stood for the proposition the government can fabricate evidence to frame and convict an individual.

The district court's decision and closing of my case without acknowledging the law of the circuit or granting me a Certificate of Appealability, gives a new twist to the inherent institutional bias recognized in *United States v. Goodwin*, 457 US 368, 376 (1982) ("The decisions in these cases reflect a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of stare decisis, res judicata, the law of the case, [law of the circuit] and double jeopardy are all based, at least in part, on that deep seated bias.") In issuing Writs of Mandamus in: *In re: Zermeno-Gomez* and *In re: Dan Farr Prod.*, this court recognized "it is clear error for a district court to disregard a published opinion of this court." *In re: Zermeno-Gomez* at 1053. Ignoring the law of the circuit in favor of the law of the case without comment has at the very least, made the process

unnecessarily complex, cumbersome and is designed to keep me incarcerated for as long a period as possible.

The Constitution stands for protecting individual rights against the excess of government power perpetrated through its officials. "[N]o sensible concept of ordered liberty is consistent with law enforcement [IRS] cooking up its own evidence." *Spencer* at 800 citing *Halsey v. Pfeiffer*, 750 F.3d 273, 292-93 (CA3 2014). Indeed we are unsure what due process entails if not protection against deliberately framing under the color of official sanction." *Limone v. Condon*, 372 F.3d 39, 44-5 (CA1 2004) citing *Devereaux*. One of the ways to ensure judicial conformity is following the law of the circuit. Under our "law of the circuit doctrine," a published decision of this court constitutes binding authority "which 'must be followed unless and until overruled by a body competent to do so.' *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (CA9 2012)(quoting *Hart v. Massanari*, 266 F.3d 1155, 1170 (CA9 2001). *Devereaux* is not only the law of this circuit, it is the law of all circuits. "Significantly, all courts that have directly confronted the question . . . agree that the deliberate manufacture of false evidence contravenes the Due Process Clause." *Whitlock v. Brueggeman*, 682 F.3d 567,585 (CA7 2012).

RELIEF REQUESTED

I respectfully request a Writ of Mandamus ordering the district court to immediately vacate my conviction be issued. If this court feels the district court needs to hold a hearing, I respectfully request this court order another judge hold the hearing. I no longer believe I can get a fair hearing before this judge. If this court does not feel a writ is appropriate, I

respectfully request this court issue a Certificate of Appealability and grant my appeal. The standards for the writ of mandamus is higher than for an appeal. *Bauman* 654-55. This court has considered issuing writs in place of appeals. See: *United States v. Sanchez-Gomez*, 859 F.3d 649 (CA9 2017); *Calif. Dept. of Water Res. v. Powerex Corp.*, 533 F.3d 1087 (CA9 2008); and *Miller v. Gammie*, 335 F.3d 889 (CA9 2003).

Signed this 10th day of
October, 2018 at Terre Haute.

/s/ Albert S.N. Hee
Pro Se Petitioner

ALBERT S.N. HEE PETITION FOR CERTIFICATE OF APPEALABILITY IN THE NINTH CIRCUIT (OCTOBER 10, 2018)

Albert S.N. Hee
04602-122
FPC Terre Haute
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT S.N. HEE,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR CERTIFICATE OF APPEALABILITY

Cr. No. 14-00826 SOM

In accordance with 28 USC 2253(c)(2), Albert S.N. Hee ("Petitioner, I, me, my"), requests this court issue a Certificate of Appealability ("COA"). On March 16, 2018, I filed a Motion under 28 USC 2255 ("habeas") with the District Court of Hawaii. On September 25, 2018, my habeas motion was denied. On October 10, 2018, I filed a Petition for a Writ of Mandamus, No. 18-72798 ("mandamus") with this Court. On January 29, 2019, this Court ordered the District Court of Hawaii to treat my mandamus petition as a Notice of Appeal filed on. October 15, 2018. On February 6,

2019, this Court ordered the District Court of Hawaii to either issue or deny a COA. That same day, February 6, 2019, the District Court of Hawaii denied my request for a COA, a copy of which I received on February 12, 2019. It appears under FRAP 22(b)(2), that the Notice of Appeal became a request for a COA with this court when the district court denied me a COA. *see also Slack v. McDaniel*, 529 US 473, 483 (2000). If so, this petition supplements the mandamus-notice of appeal-request for a COA. If not, please treat this as a stand alone petition for COA. Prisoners do not have access to Pacer, therefore I cannot reference ECF numbers unless they have been previously referenced in another document.

A COA is requires "a substantial showing of the denial of a constitutional right" that "reasonable jurists would find the district court's assessment debatable. *id.* at 484. In *Barefoot v. Estelle*, 463 US 880, 883 n.4 (1983) the court explains: "This threshold inquiry does not require full consideration of the factual or legal basis adduced in support of the claims. In fact the statute forbids it . . . [A] COA does not require a showing that the appeal will succeed." Here, the district court denied me a COA on the merits of my Ineffective Assistance of Counsel constitutional allegation and disposed of my other constitutional allegations on procedural grounds. "When the district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists 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 . . . Determining whether a COA should issue where a petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." *Slack* at 484, 485. Where the claims in my petition(s) are rulings of law and the province of the court, the "jurists of reason" are assumed to be judges instead of ordinary citizens who would make up a jury.

BACKGROUND

This case is about a civil tax audit that the IRS changed to a criminal proceeding resulting 'in my indictment. In my trial and direct appeal, I was represented by counsel. During the civil audit, I was represented by several Certified Public Accountants ("CPA"). The IRS assigned an experienced revenue agent to complete the audit of Sandwich Isles Communications, Inc. ("Sandwich Isles") which resulted in a Notice of Proposed Adjustment ("NOPA"). Immediately thereafter, the IRS assigned a brand new revenue agent to audit Waimana Enterprises, Inc. ("Waimana"); ClearCom Communications, Inc. ("ClearCom") and me. The CPAs, each of which had represented clients in other civil tax audits, found it unusually difficult to work with the new IRS agent. Conversion of a civil tax audit to a criminal investigation requires the IRS Fraud Technical Advisor's ("FTA") approval. The FTA was created after the circuit courts established circuit law for the IRS to follow during a civil audit to avoid violating due process. *see United States v. Tweel*, 550 F.2d 297 (CA5 1977); *United States v. Gruenwald*, 987 F.2d 531 (CA8 1993). It goes without saying that if the revenue agent must discover evidence of

criminal activity without conducting a criminal investigation, she cannot deliberately fabricate it.

The brand new revenue agent conducting the civil audit, with the concurrence of her supervisor, deliberately fabricated evidence of criminal activity, recording the fabricated evidence on official IRS forms. During a grand jury proceeding, my CPA denied making the fabricated false statement attributed to him. The US Assistant District Attorney ("prosecutor") read the fabricated statements from two IRS forms during questioning of my CPA. The prosecutor then acknowledged the deliberate fabrication when answering questions from the grand jury foreman. "The Constitution prohibits the deliberate fabrication of evidence . . . " *Spencer v. Peters*, 857 F.3d 789, 800 (CA9 2017). The exculpatory evidence, forms and grand jury transcript, were not produced until three (3) days before my trial began. During my trial and direct appeal, my counsels alleged the government's deliberate fabricated statements were part of a larger *Brady* (*Brady v. Maryland*, 373 US 83 (1963)) violation of my due process rights involving suppression of the documents on which the statements were recorded. The district court denied my request for a new trial and this court affirmed my conviction in an unpublished memorandum opinion (*United States v. Hee*, 681 Fed Appx 650 (CA9 2017))("law of the case"). In my post-trial motion for a new trial, my counsel produced several affidavits from my CPAs attesting they did not make the false statements. habeas exhibits G, H. The government did not contest my allegations that the IRS revenue agent deliberately fabricated false evidence, nor did they provide contrary affidavits. My counsels failed to allege a

Devereaux claim. "A *Devereaux* claim [*Devereaux v. Abbey*, 263 F.3d 1070 (CA9 2001)(en banc)] is a claim that the government violated due process rights by subjecting the plaintiff to criminal charges based on deliberately fabricated evidence." *Bradford v. Schesch-ligt*, 803 F.3d 382, 386 (CA9 2015). This court considered the evidence the context of a *Brady* not *Devereaux* violation. "[T]he Ninth Circuit squarely considered and ruled on the IRS's allegedly 'fabricated evidence.'" ECF 288, pg. 5991

It was only when I proceeded pro se seeking this court's reconsideration of its "law of the case" that I discovered that if the government's deliberate fabrications were alleged as a *Devereaux* "law of the circuit," violation, the criminal charges would have been dropped. *Costanich v. Washington*, 627 F.3d 1101, 1110 (CA9 2010)("Substantive due process protects individuals from arbitrary deprivation of their liberty by government.") However, this court was unable to consider my *Devereaux* claim on reconsideration because my appellate counsel had not argued it in the appellate briefs. I properly alleged a *Devereaux* claim in my habeas motion. *Alaimalo v. United States*, 645 F.3d 1042, 1046 (CA9 2011)("As a general rule, "[section] 2255 provides the exclusive procedural mechanism by which a federal prisoner may test the legality of his detention." citing *Ivy v. Pontesso*, 328 F.3d 1057, 1059 (CA9 2003)")

In denying my habeas motion and request for a COA, the district court viewed all of my arguments and allegations as an "attempt to retry issues already decided by this court" in "the law of the case". Assuming arguendo that the district court is correct, I would be forever barred relief under the

correct *Devereaux* "law of the circuit" simply because my counsels argued the material facts by incorrectly citing the wrong case law. The district court also used "the law of the case" in denying my ineffective assistance of counsel ("IAC") arguments. Although in-artfully stated, the criminal trial is the prejudice I suffered because of the IAC and is alleged throughout my habeas and mandamus.

CONSTITUTIONAL VIOLATIONS

In my habeas motion, I alleged a violation of two constitutional rights: 1) substantive due process; and 2) IAC.

The court denied the first constitutional right violations procedurally, without ruling on the merits. The court denied the IAC violation on the merits.

The first constitutional violation, my right to substantive due process under the Fifth Amendment, was not alleged correctly and considered as a *Devereaux* claim in my trial and direct appeal. Specifically, I alleged in my habeas motion, the government's primary investigator and her supervisor deliberately fabricated evidence during a civil tax audit which resulted in my criminal charges, trial and conviction. The deliberate fabricated evidence, recorded on official IRS forms, was uncontested by the prosecutors. Even if they did contest it, "an interviewer who deliberately mischaracterizes witness statements in her investigative report . . . commits a constitutional violation" *Costanich*, 627 F.3d at 1111. The government's deliberate fabrications and my subsequent criminal charges are the only two elements of a *Devereaux* claim. This court has held; a violation of substantive due process rights in a *Devereaux* claim, prohibits the government

from bringing criminal charges as the "law of the circuit." Reasonable jurists would agree with the jurists sitting en banc in *Devereaux*; *Costanich*; *Bradford v. Scheschligt*, 803 F.3d 382 (CA9 2015); and *Spencer v. Peters*, 857 F.3d 798 (CA9 2017) that my uncontested allegations of the government's deliberate fabricated false statements violates my constitutional due process rights and find the district court's refusal to grant me habeas relief and vacate my conviction debatable and wrong.

The district court dismissed my second constitutional violation claim, ineffective assistance of counsel, on its merits. However, consideration of the merits of my arguments were prejudiced by the district court's decision to rely on this court's memorandum opinion in my direct appeal. The district court's reliance on the unpublished "law of the case" negated each of my arguments and concluded there was no prejudice. "These arguments were all made to this court and the Ninth Circuit." ECF 288, pg 5989. The standard for ineffective assistance of counsel "requires a showing of both deficient performance by counsel and consequent prejudice." ECF 288, pg 5996, citing *Ellis v. Harrison*, 891 F.3d 1160, 1166 (CA9 2018)(citing *Strickland v. Washington*, 466, US 668, 687 (1984)). "He[e] argues that, had his attorneys properly reviewed this evidence prior to trial, "they would have uncovered evidence of the government's misconduct and had the charges dismissed" or "moved to delay the start of the trial." ECF 288 pg 5996, citing ECF 268-2, pg 5972, 5682. Both my habeas and mandamus argued that the Charges would have been dismissed under the *Devereaux* "law of the circuit" resulting in NO trial.

The district court dismissed my allegation that my counsels' decision not to delay the start of the trial without consulting me was IAC because the decision was tactical and deserved deference in view of "the law of the case." Reliance on the "law of the case" assumes I received a fair trial. In *Lafler v. Cooper*, 182 L Ed 2d 398, 407-8 (2012), the government argued that a fair trial cures any prejudice caused by IAC. The court disagreed, finding a fair trial does not preclude prejudice. In fact the trial itself is the prejudice. "Hee fails to demonstrate that he suffered any prejudice . . . the Ninth Circuit reviewed these documents in the context of a Brady argument . . . " ECF 288, pg 5998-9. This is the error. The decision to allow the trial to continue was' not trial counsel's to make. If my counsels had delayed the trial to conduct a full investigation of the documents just produced which contained the exculpatory evidence of a *Devereaux* claim, they would have separated the deliberate fabrications from the *Brady* claim, "the Ninth Circuit would have reviewed these these documents in the context of a *Devereaux* argument." The *Strickland* prejudice was the trial itself. "Far from curing the error, the trial caused the injury from the error." Lafler at 409.

CERTIFICATE OF APPEALABILITY

In denying my request for a COA, the district court did not consider the merits of my claim that I was denied my substantive constitutional due process rights as a *Devereaux* claim, instead dismissing my request for a COA on the same procedural grounds it dismissed my habeas motion. There is no indication or reference to the merits of the contro-

versy between the "law of the case" and "law of the circuit" contained in my notice of appeal. The courts are required to consider the claims in the habeas petition before denying a COA. *United States v. Zuni-Acre*, 339 F.3d 886, 889 (CA9 2003):see *Miller-El v. Cockrell*, 537 US 322, 123 S.Ct. 1029, 1039 (2003) ("The COA determination under [section] 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits . . .): The district court again cited this court's unpublished memorandum opinion as the "law of the case" to procedurally deny my request for a COA without distinguishing the material facts from those in the *Devereaux* "law of the circuit."

Under the "law of the case," a district court generally cannot reconsider an issue that has already been decided by this court. However, this court has recognized exceptions to the "law of the case" doctrine, where "the decision is clearly erroneous and its enforcement would work a manifest injustice." *Jeffries v. Wood*, 114 F.3d 1484, 1489 (CA9 1997)(en banc). When the "law of the case" conflicts with the "law of the circuit," a court should be especially aware such an exception may be present. This court did not have the opportunity to rule on the similarities of my case to *Devereaux* law in deciding the "law of the case." The district court procedurally denied my COA because it did not want to consider a *Devereaux* claim. A *Devereaux* claim requires two material facts; first, the government deliberately fabricated false evidence; and second, the government brought criminal charges based on the fabrications. Both of these material facts are uncontested in my case. The denial of my habeas motion and COA based

on the "law of the case" when the material facts are the same as *Devereaux* law, denies me due process and my loss of liberty is a manifest injustice. *id.* at 1492 ("at a minimum, the challenged decision should involve a significant inequity of a right before being characterized as manifestly unjust." The "law of the circuit" takes precedence over an unpublished opinion. *In Re: Rodrigo Semenov-Gomez*, 868 F.3d 1048, 1052 (CA9 2017)("Under our "law of the circuit doctrine," a published decision of this court constitutes binding authority "which 'must be followed unless and until overruled by a body competent to do so.'" citing *Gonzalez v. Arizona*, 677 F.3d 383, 389 (CA9 2012)(en banc)).

The district court is not a "body competent" to overrule a "law of the circuit". *Hart v. Missionary*, 266 F.3d 1155, 1170 (CA9 2001)("A district judge may not respectfully (or disrespectfully) disagree with his [her] learned colleagues on his [her] own court of appeals who have ruled on a controlling legal issue . . . Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, case law on point IS the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect.") When I brought the *Devereaux* law to the district court's attention, it should have determined there were no differences in material facts and granted my habeas motion or distinguished my case from *Devereaux* law. The three judge panel deciding the unpublished memorandum opinion could not have made its ruling if my counsel had pointed out the

Devereaux law especially since *Devereaux* was decided en banc. Hart at 1171 ("[Binding authority] "binds all courts within a particular circuit, including the court of appeals itself. Thus, the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals. Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.")

The district court's procedural dismissal of my habeas motion and COA based on an unpublished opinion by a three judge panel of this circuit as being the "law of the case" defies previous "law of the circuit" precedence and the exceptions to the "law of the case." *see Miller v. Gammier*, 335 F.3d 889, 900 (CA9 2003)(en banc)(holding that unless a case is overruled, a three judge panel is bound by the decisions of a previous en banc panels. "A goal of our circuit's decisions, including panel and en banc decisions, must be to preserve the consistency of circuit law."); *Antonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (CA9 1987)("A panel faced with [a conflict between precedent] must call for en banc review . . . unless the prior decision can be distinguished."); *Marshall v. Rodgers*, 185 L.Ed.2d 540, 545 (2013) (holding that in a habeas action an appellate panel may, in accordance with its usual law of the circuit procedures look to circuit precedence, but, may not look to other circuits to determine the likelihood of a Supreme Court decision.) Here there are no differences in the material facts with *Devereaux* law. Jurists of reason would agree with the jurists of this court in Miller, supra, finding the district court's continued

reliance on unpublished "law of the case" to procedurally dismiss my habeas motion and COA after being made aware of the published, en banc, *Devereaux* "law of the circuit" debatable and wrong.

STRUCTURAL ERROR

My habeas motion pointed out the errors were structural and therefore the district court's decision was not subject to the harmless error standard of review. I will not restate them here. Additionally, the district court's decision denying my IAC claim based on deference to my counsels' "tactical decision" to let the trial begin is wrong. Tactical decisions deserve difference if it does not challenge the objective of the trial. Here, the objective was to dismiss the charges. Any decision which does not support the objective must be made by me. *McCoy v. Louisiana*, 200 L.Ed 2d 821 (2018) (holding the Federal Constitution's Sixth Amendment guarantees criminal defendant's right to choose objective of his defense. The accused and not counsel is the master of his own defense. The violation of the Sixth Amendment-secured autonomy is a structural error.)

INTERVENING AUTHORITY

Since my trial, this court has decided intervening authority clarifying *Devereaux* law. *see Spencer v. Peters supra.* Additionally, the US Supreme Court has decided an IRS case which directly effects my case and was unavailable to me via the prison law library, until after filing my habeas motion. In *Marinello v. United States*, 200 L.Ed 2d 356, (2018), the court established minimum standards for conviction under 26 USCS section 7212(a). Based on the deci-

sion, I was wrongly convicted which resulted in an additional 10 months added to my sentence. As in *Marinello*, the government wrongly added on this charge as "a catchall for every violation that interferes with what the Government describes as the "continuous, ubiquitous and universally known" administration of the IRS code. . . . the Code creates numerous misdemeanors [including] failure to pay any tax owed, Section 7203." *Marinello* at 363. The court has held that the government must prove a nexus, "an intent to influence judicial or grand jury proceedings [and] the acts must have a relationship in time, causation, or logic with the judicial proceedings." [citations omitted] *id.* at 362. The IRS proceeding took nine (9) years from beginning of the civil audit to trial. During this time, I continued to operate the businesses in the same manner as I had during the previous 10 years. I did not change anything. "As one of my CPAs commented after I was convicted, "I don't understand why this is criminal. We gave them everything and explained each step. We did not make any effort to hide or change any of our procedures." If this court finds in my favor, *Marinello* will be of no consequence. However, if this court is not able to, I intend to pursue both the *Devereaux* and *Marinello* claims. I do not want to do anything which may slow this current case from being decided. I bring this to the court's attention to comply with equitable tolling of seeking relief as I did not have a chance to include this in my habeas.

CONCLUSION

The circuit law regarding reliance on an unpublished "law of the case" which is inapposite to a

published "law of the circuit," decided en banc, is clear and unambiguous. The use of a habeas motion to correct my counsels' failure to cite the correct circuit law is proper. The "law of the circuit" deals with violations of my constitutional right to substantive due process. My counsels' failures were constitutionally deficient. I request his court grant relief by vacating my conviction and immediately releasing me from custody. In the alternative, I request this court order the district court to reverse its decision in my habeas motion to conform with the "laws of this circuit" by vacating my conviction, finding my counsels deficient and immediately release me from custody.

Signed this 19 day of February, 2019
at Terre Haute, FPC

/s/ Albert S.N. Hee
Petitioner, Pro Se

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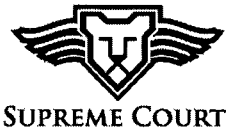

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