APPEAL NO.: 08-30312

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

DAVID STRUCKMAN,

Defendant-Appellant.

ON APPEAL FROM CRIMINAL JUDGMENT
IN THE U.S. DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
THE HONORABLE ROBERT M. TAKASUGI, JUDGE PRESIDING
DISTRICT COURT CASE NO. 2:04-cr-00229-RMT

DAVID STRUCKMAN'S OPENING BRIEF

Robert G. Bernhoft, Esquire
THE BERNHOFT LAW FIRM, S.C.
Attorney for Appellant, David Struckman
207 East Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333
Counsel for Defendant – Appellant

CERTIFICATE OF INTERESTED PERSONS

The following persons or entities, believed to be within the classes of persons set out in Cir. R. 28-2.1, have an interest in the outcome of this case.

1. Daniel Andersen, Co-defendant;

2. Robert E. Barnes, Esq., Attorney for Defendant-Appellant David Struckman;

3. Robert G. Bernhoft, Esq., Attorney for Defendant-Appellant David Struckman;

4. Carl H. Blackstone, Asst. U.S. Attorney, Attorney for Plaintiff-Appellee;

5. Helen J. Brunner, Asst. U.S. Attorney, Attorney for the Plaintiff-Appellee;

6. Sonja Chahin, Esq., Attorney for Co-defendant Kuldrip Singh;

7. Catherine Ann Chaney, Esq., Attorney for Co-defendant Lorenzo Lamantia;

8. William A Cohan, Esq., Attorney for Co-defendant Daniel Andersen;

9. Gregory V. Davis, U.S. Department of Justice Tax Division/Appellate Section, Attorney for the Plaintiff-Appellee;

10. Jeffrey A. Dickstein, Esq., Attorney for Defendant-Appellant David Struckman;

11. William H. Fligeltaub, Esq., Attorney for Co-defendant Dwayne Robare;

12. Carole A. Grayson, Esq., Attorney for Co-defendant Dwayne Robare;

13. Alan Hechtkopf, U.S. Department of Justice Tax Division/Appellate Section, Attorney for the Plaintiff-Appellee;

14. Lori A. Hendrickson, U.S. Department of Justice Tax Division, Attorney for the Plaintiff-Appellee;

15. Terrance Kellog, Esq., Attorney for Co-defendant Kuldrip Singh;

16. Lorenzo Lamantia, Co-defendant;

17. Robert Michael Leen, Esq., Attorney for Co-defendant Kuldrip Singh;

18. Christopher Maietta, U.S. Department of Justice, Attorney for the Plaintiff-Appellee;

19. Mark T. Odulio, U.S. Department of Justice Tax Division, Attorney for the Plaintiff-Appellee;

20. Dwayne Robare, Co-defendant;

21. Michelle Shaw, Esq., Attorney for Co-defendant Dwayne Robare;

22. Kuldrip Singh, Co-defendant;

23. David Struckman, Defendant-Appellant;

24. Jeffrey C. Sullivan, U.S. Attorney, Attorney for the Plaintiff-Appellee;

25. Robert M. Takasugi, U.S. District Judge;

26. Kathryn A. Warma, Asst. U.S. Attorney, Attorney for the Plaintiff-Appellee;

27. Michael J. Watling, U.S. Department of Justice Special Litigation Section, Attorney for the Plaintiff-Appellee;

28. Larry J. Wszalek, U.S. Department of Justice Tax Division/Appellate Section, Attorney for the Plaintiff-Appellee.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF CONTENTS iv

TABLE OF CITATIONS vii

STATEMENT REGARDING ORAL ARGUMENT xi

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 5

1. Summary of Outrageous Government Misconduct: the District Court Found a "Pattern of Misconduct in the Case," including Secret Illegal Deals with Government Witnesses, Massive Discovery Violations, and IRS Special Agents Laundering Illegally Obtained Evidence through a Fictitious Confidential Informant. 5

2. "AI-1/Ted": The Fictitious Confidential Informant through which IRS Special Agents Laundered Illegally Obtained Evidence, in Support of both the Illegal Panama Extraction and the Trial of this Case. 6

3. The Bowden *Quid Pro Quo*: The Lead IRS Special Agent Illegally Shut Down a Civil Fraud Audit in Exchange for "Helpful" Testimony from a Government Witness, and then Covered it Up and Lied About the Cover-Up. 10

4. The Panama "Habeas Grabbus": The Government's Lies and Deception Finally Induced the Panamanians to Assist in Locating and Arresting Struckman so the United States Could Take Him into Custody and Extract Him from Panama. 16

DETENTION STATUS 20

SUMMARY OF THE ARGUMENT 21

ARGUMENT 24

I. THE GOVERNMENT'S OUTRAGEOUS MISCONDUCT, USING LIES, DECEIT, MISREPRESENTATIONS AND FRAUD AGAINST A FOREIGN NATION IN CONTEMPT OF SACRED TRADITIONS AND LAW TO VIOLATE STRUCKMAN'S RIGHTS TO COUNSEL, DUE PROCESS, AND ACCESS TO THE COURTS, IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES, THE TREATIES OF THE UNITED STATES, AND THE JUS COGENS NORMS OF INTERNATIONAL LAW, AUTHORIZED DISMISSAL OF THE CHARGES 25

A. Habbeas Grabbus, Part A: United States Officials Repeatedly Violate Extradition Treaties Through Lies and Deceit 27

1. An Extradition in Violation of an Extradition Treaty Compels Mandatory Dismissal. 27

2. The District Court Erred When It Concluded Form Trumped Substance in Defining Whether a Person Was Extradited or Deported for Purposes of Interpreting and Enforcing the Treaties of the United States. 30

3. The District Court Erred When it Concluded It Did Not Have the Discretionary Authority to Dismiss For Circumvention of Extradition Treaties 33

4. Facts Show Struckman Was Extradited in Violation of the Extradition Treaty, Divesting the District Court of Personal Jurisdiction. 38

B. Habbeas Grabbus, Part B: Violate Struckman's Right to Counsel, Right to Due Process and Right of Access to the Courts, in Violation of the United States Constitution, United States Treaties, and the Jus Cogens Norms of International Law. 46

1. The United States Constitution, the Treaties of the United States, and the Jus Cogens Norms of International Law Recognize the Right to Habeas Corpus, Right to Counsel, the Right to Due Process and the Right of Access to the Courts 46

2. *This Court Obtained Personal Jurisdiction Over Struckman Through Violations of Struckman's Right to Habeas Corpus, Right to Counsel, Due Process and Access to the Courts* 49

C. Habbeas Grabbus Part C: Deceit, Lies and Fraud Upon A Foreign Government By the United States Officials Charged with Enforcing A Federal District Court Judicial Process in a Foreign Land, In Complicity with the High Ranking Officials of the Department of State and the Department of Justice 52

1. *Obtaining Personal Jurisdiction Through Fraud and Deceit Compels Supervisory Dismissal.* 52

2. *The District Court Erred in Concluding it Could Not Dismiss the Charges Without a Constitutional or Statutory Violation.* 54

3. *The Fraudulent Method of Vesting Personal Jurisdiction in a Federal District Court Through an International Campaign of Deceit Compelled a Remedy.* 54

II. WHEN THE PURPOSE OF GOVERNMNT MISCONDUCT – INCLUDING ILLEGAL INVESTIGATIONS, LAUNDERED ILLICITLY OBTAINED INFORMATION THROUGH BOGUS INFORMANTS, ROUTINE DISCOVERY ABUSES AND EVIDENT PERJURY – IS TO PROCURE THE PROSECUTION AND PERSONAL JURISDICTION OF THE DEFENDANT, MERE SUPPRESSION OF UNLIKELY EVIDENCE AT TRIAL CANNOT SUFFICE AS A REMEDY 55

CONCLUSION 59

CERTIFICATE OF COMPLIANCE 60

CERTIFICATE OF SERVICE 61

TABLE OF CITATIONS

Cases

Armstrong v. Manzo, 380 U.S. 545 (1965) 52

Balzac v. Puerto Rico, 258 U.S. 298 (1922) 46

Blackmer v. United States, 284 U.S. 421 (1932) 46

Commercial Mut. Acc. Co. v. Davis, 213 U.S. 245 (1909) 52

Cook v. United States, 288 U.S. 102 (1933) 28

Doe I v. Unocal, 395 F.3d 932 (9th Cir. 2001) 33

Factor v. Laubenheimer, 290 U.S. 276 (1933) 28

Fitzgerald Construction Co. v. Fitzgerald, 137 U.S. 98 (1890) 53

Fong Yue Ting v. United States, 149 U.S. 698 (1893) 31, 32

Ford v. United States, 273 U.S. 593 (1927) 29

In re Johnson, 167 U.S. 120 (1896) 53

Kennon v. Hill, 44 F.3d 904 (10th Cir. 1995) 30

North Sea Continental Shelf Cases (*Germany v Denmark*; *Germany v Netherlands*), 1969 Intl. Ct. Justice 3, 43 (Feb. 20) 43

Regina v Bow Street Magistrates (*Ex parte Mackeson*), 75 Crim. App. 24 (1981) (United Kingdom) 36

Regina v. Horseferry Road Magistrates' Court (*Ex Parte Bennett*), 3 All ER 138 (HL 1993) (United Kingdom) 37

Reid v. Covert, 354 U.S. 1 (1957) 46

Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) 48

Sneed v. State, 872 S.W.2d 930 (Tenn. 1993) 43, 53

Stevenson v. United States, 381 F.2d 142 (9th Cir. 1967) 32

Terlinden v. Ames, 184 U.S. 270 (1902) 32

The Nereide, 13 U.S. 388 (1815) 33, 38

The Paquette Habana, 175 U.S. 677 (1900) 33, 34, 43

The Scotia, 81 U.S. 170 (1871) 34, 42, 43

United States v. Alvarez-Machain, 504 U.S. 655 (1992) 30, 37

United States v. Anderson, 472 F.3d 662 (9th Cir. 2006) 27, 48, 50, 53

United States v. Andonian, 29 F.3d 1432 (9th Cir. 1994) 28, 52

United States v. Archer, 486 F.2d 670 (2nd Cir. 1973) 53

United States v. Brodson, 528 F.2d 214 (7th Cir. 1976) 56

United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979) 47

United States v. Cuevas, 847 F.2d 1417 (9th Cir. 1988) 28

United States v. Ferris, 19 F.2d 925 (D.C. Cal. 1927) 29

United States v. Levy, 577 F.2d 200 (3rd Cir. 1978) 51

United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000) 48

United States v. Lun, 944 F.2d 642 (9th Cir. 1991) 25

United States v. Marshank, 777 F.Supp. 1507 (N.D. Cal. 1991) 51

United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995) ..... passim

United States v. Orman, 417 F.Supp. 1126 (D.C. Col. 1976) 55, 57

United States v. Rauscher, 119 U.S. 407 (1886) 27, 28, 36

United States v. Stein, 495 F.Supp.2d 390 (S.D.N.Y. 2007) 51, 55

United States v. Stringer, 408 F.Supp.2d 1083 (D. Or. 2006) 53, 56

United States v. Valot, 625 F.2d 308 (9th Cir. 1980) 30

United States v. Ziskin, 360 F.3d 934 (9th Cir. 2003) 25

Statutes

18 U.S.C. § 3231 1

28 U.S.C. § 1291 1

Fed. R. App. P. 4 1

Other Authorities

Booysen, Hercules, *Jurisdiction to Try Abducted Persons and the Application of International Law in South African Law*, 16 S. African Yearbook Intl. L. 133 (1990-91) 38

Bouvier Law Dictionary (1856) 32

Cowling, M.G., *Unmasking "Disguised" Extradition–Some Glimmer of Hope*, 109 S. African L.J 241 (1992) 38

Depalma, Anthony *U.S. Releases Cuban Terrorist, Angers Venezuela and Cuba*, New York Times, April 22, 2007 44

Dugard, John, *No Jurisdiction Over Abducted Persons in Roman-Dutch Law: Male Captus, Male Detentus*, 7 S. African J. Human Rights 199 (1991) 38

Lowe, Vaughan, *Circumventing Extradition Procedures is an Abuse of Process*, 1993 Cambridge L.J. 371 37

Resolutions of the XVth International Congress of Penal Law, Section IV, The Regionalization of International Criminal Law and the Protection of Human Rights in International Cooperative Procedures in Criminal Matters, 66 Int'l Rev. Penal L. 67 (1995) .35

Restatement of Foreign Relations, § 102 comment (b) (1987) 43

The Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261 ..... 34, 35, 48

Treaty of 1904 Between Panama & the United States 40

Treaty Between The United States of America and The Republic of Panama on Mutual Assistance in Criminal Matters, 1991 U.S.T. Lexis 174 40

U.S. Department of Justice Memo on *United States v, Alvarez-Machain*, 32 Intl. Legal Mat. 277 (1993) 38

Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev.1082 (1992) 43

Wilskie, Stephen & Teresa Schiller, *Jurisdiction Over Persons Abducted in Violation of International Law in The Aftermath of United States v. Alvarez-Machain*, 5 U. Chi. L. Sch. Roundtable 205 (1998) 37, 41, 42, 47

STATEMENT REGARDING ORAL ARGUMENT

The factual complexity and singular importance of the legal issues presented by this case on appeal counsel strongly for oral argument. Oral argument can only improve the quality of the decision-making, and Defendant-Appellant David Struckman, therefore, respectfully requests oral argument.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231 in that the case involved an offense against the laws of the United States. The Ninth Circuit Court of Appeals has jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

Judgment was entered on August 15, 2008. Defendant-Appellant filed his timely notice of appeal on August 25, 2008 pursuant to Fed. R. App. P. 4(b)(1). This judgment disposed of all of Struckman's claims as to this case before the district court.

STATEMENT OF THE ISSUES

I. Whether the district court erred in assuming it did not have the authority to dismiss criminal charges where the district court acquired personal jurisdiction over the defendant contrary to extradition treaties and international law, when the court found the government showed contempt for sacred legal traditions recognized in constitutional and jus cogens international law, including lies, extensive fraud and deceit by some of the highest ranking law enforcement members of our government in acting as agents of the federal courts?

II. Whether mere suppression of unlikely evidence at trial can suffice as a remedy when the purpose of government misconduct – including court found extensive government misconduct, violations of constitutional rights, bogus

informants, and secret quid pro quos with grand jury witnesses who engaged in sneak and peek illicit search and seizure operations – is to procure the prosecution and personal jurisdiction of the defendant, not evidence at trial?

STATEMENT OF THE CASE

This is a criminal tax case. Defendant-Appellant David Struckman ("Struckman") was indicted on May 11, 2004, along with four co-defendants, on one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. (R. 8.) However, Struckman had left the United States for Panama and was never arraigned on these charges. A superceding indictment realleging the conspiracy charge and adding nine counts of attempted tax evasion was retuned against Struckman and two codefendants on July 20, 2005. (R. 131; Excerpts, p. 99.) On December 15, 2005, those two codefendants entered guilty pleas. (R. 168, 174.) Struckman was extracted from Panama on January 13, 2006. (R. 178.) Accompanied by two Panamanian representatives, Struckman was delivered into the custody of the U.S. Marshals Service in Houston, Texas. Struckman made his initial appearance before a United States Magistrate Judge in the Southern District of Texas on January 17, 2006. *Id.*

On January 25, 2006 the magistrate judge entered an order pursuant to 18 U.S.C. § 3142 directing Struckman detained. *Id.* The court also ordered Struckman transferred to the Western District of Washington. *Id.* Struckman was

arraigned in Seattle on the superceding indictment on March 16, 2006 entering pleas of "not guilty" to each of the four charges against him. (R. 186.)

On March 28, 2006, Judge Robert M. Takasugi, pursuant to a joint motion to continue the trial, (R. 187), ordered the trial continued until January 29, 2007, (R. 194). Provided a requested joint status report concerning modification of the trial schedule on December 20, 2006, (R. 272), the court again continued the trial date until March 12, 2007, (R. 273).

With several discovery issues outstanding, the court granted Struckman's motion for an evidentiary hearing and scheduled the hearing for February 28, 2007. (R. 289.) Due to the unavailability of the critical government witness and ongoing, late breaking discovery provisions, however, the court vacated the hearing and granted Struckman's emergency motion to continue the trial until May 7, 2007. (R. 309 and 329.)

On April 24, 2007 Struckman filed a motion to dismiss the indictment for outrageous government misconduct. (R. 361.) However, due to late breaking discovery the evidentiary hearing, to be followed by trial, was again continued until July 9, 2007. (R. 385, 390.) Due to this late breaking discovery Struckman filed an additional motion to dismiss for unnecessary delay. (R. 387.)

The court heard three days of testimony, from July 9, 2007 through July 11, 2007, at the evidentiary hearing. Before ruling on Struckman's motions to dismiss,

the court required supplemental briefing from both parties and adjourned the trial date accordingly. (R. 430.) After filing the requested briefs, (R. 436, 437, 438), the court made an additional request concerning remedies, (R. 440, 445, 446, 447). Ultimately, on October 19, 2007 as a result of the evidentiary hearing and supplemental briefing, the court denied Struckman's motions to dismiss the indictment but did strike a government witness and precluded the admission of specific government evidence. (R. 449; Excerpts, p. 1.)

Trial began on October 31, 2007. After seven days of trial, Struckman was found guilty on all counts, namely counts 1, 8, 9, 10 of the Indictment. (R. 483.) Sentencing was held on July 28, 2008 whereby Struckman was to committed to custody for 70 months. (R. 537; Excerpts, p. 91.) As to Count 1 custody for 40 months, as to Counts 8 and 9 custody for 40 months, as to count 10 custody for 30 months. *Id.* The terms of imprisonment on counts 8 and 9 are to run concurrent to each other and concurrently to Count 1. *Id.* The term of imprisonment on Count 10 is to run consecutive to Counts 1, 8, and 9. *Id.* Struckman was also given credit for 30 months as time served. *Id.* The judgment of conviction and sentence was entered on August 15, 2008. *Id.* Struckman filed a timely notice of appeal on August 25, 2008. (R. 541; Excerpts p. 89.)

STATEMENT OF THE FACTS

1. Summary of Outrageous Government Misconduct: the District Court Found a "Pattern of Misconduct in the Case," including Secret Illegal Deals with Government Witnesses, Massive Discovery Violations, and IRS Special Agents Laundering Illegally Obtained Evidence through a Fictitious Confidential Informant.

"From July 9 through July 11, 2007, the court held an evidentiary hearing on defendant's motions . . . . to dismiss the indictment for outrageous government misconduct . . . [and] for unnecessary delay in the trial procured by government misconduct." (R. 449, p. 2; Excerpts, p. 2.) After three days of testimony and evidence, the district court issued an 83-page page order, reciting 65 pages of factual findings of government misconduct, including:

a. The IRS Special Agents fabricated the existence of a confidential informant, denominated as "AI-1/Ted", through which they laundered illegally obtained information from other sources necessary for search warrant affidavits, grand jury proceedings, and to locate Struckman in Panama, then suppressed the true source of that information from the defense to the very end by making false, contradictory, and deceptive statements – both in written submissions to the court and in actual evidentiary hearing testimony. *Id*, pp. 2-10, 21-31, 39-44, 72-77.

b. Lead IRS Special Agent Michael Hardaway had a secret, illegal, *quid pro quo* arrangement with Dave Bowden, a critical government witness, to shut down an IRS civil fraud audit in exchange for "helpful" testimony before several

grand juries and criminal trial courts. The prosecution steadfastly and vociferously denied the fact of Bowden's audit in written representations to both defense counsel and the court, then suddenly retracted it's "misstatements" on the very eve of the trial's commencement when the district court ordered disclosure of all Bowden's tax records, precipitating yet another trial continuance. *Id.*, pp. 10-16, 31-39, 44-65, 77-82.

c. United States government officials routinely lied to and misled Panama officials about Struckman's legal status and alleged crimes, schemed to pull off the "habeas grabbus" on Struckman to extract him from Panama before the Panama Supreme Court could hear his habeas corpus petition, and deliberately interfered with and obstructed Struckman's Sixth Amendment right to counsel. *Id.*, pp. 16-21, 67-72.

2. "AI-1/Ted": The Fictitious Confidential Informant through which IRS Special Agents Laundered Illegally Obtained Evidence, in Support of both the Illegal Panama Extraction and the Trial of this Case.

On November 15, 2006, Struckman filed his first motion to compel disclosure of government informants and cooperators, including the now-infamous "AI-1/Ted," after the prosecution refused to disclose the requested information. (R. 244, 266.) The prosecution opposed by arguing that Ted was a mere "tipster," and therefore not "an 'informant' whose identity must be disclosed." (R. 259.) The court adjourned the trial date to March 12, 2007, (R. 273), and Struckman

filed a subsequent motion alleging that the government had falsely attributed illegally obtained documents and information to "Ted," and requested an evidentiary hearing, (R. 275). Based upon Struckman's showing that the Special Agents' Memorandums of Interview ("MOIs") read like illegal wiretap transcriptions, the court ordered the prosecution to produce "Ted" at an *in camera* evidentiary hearing for the court to examine the basis for Ted's detailed knowledge of Struckman's most intimate personal and financial matters. (R. 289.)

Once the court ordered the prosecution to produce Ted for examination in defense counsel's presence, the prosecution filed a series of papers alleging that Ted had recently fallen off a roof and sustained head injuries, and was therefore medically unable to travel for the evidentiary hearing. (R. 449, pp. 22-24; Excerpts, pp. 22-24.) In lieu of Ted's presence at an evidentiary hearing, the court ordered the government to file, under seal and *in camera*, a declaration stating the identity of Anonymous Informant No. 1, his connection to Struckman, and how he came about his detailed knowledge of Struckman's intimate personal and financial matters. *Id.*, p. 24. As the court subsequently observed: "The government failed to file the declaration as ordered." *Id.*

On April 4, 2007, the court issued an order "finding that the statements submitted by the two agents concerning AI-1 were not declarations and as such, the court was unable to ascertain the trustworthiness of such statements." *Id.* The

prosecution identified "Ted" as Gary Moritz, who was married to Struckman's first wife. *Id.*, p. 26. "The court then ordered the government, one more time, to file a declaration or other evidence" regarding Ted's position and knowledge basis vis-à-vis Struckman, but "[t]he government again failed to file the declaration ordered." *Id.*, p. 25. On April 26, 2007, after Struckman filed extensive and proper declarations undermining the veracity of the prosecution's claim that Gary Moritz was Ted, "the court found that the government's April 16, 2007 submission suffered from the same infirmities as its previous submissions since nowhere in the government's submission did the agents state under penalty of perjury that the contents of their statements were true and correct." *Id.*, p. 31. "The court therefore granted defendant's motion to disclose the identity of AI-1 and vacated the protective order placed on defense counsel not to disclose the identity of AI-1 as Gary D. Moritz." *Id.*

After detailing the contradictions, irregularities, and outright falsity of Special Agents Chinn's, Holm's, and Hardaway's evidentiary hearing testimony, (*see id.*, pp. 39-44), the court concluded that:

> Here, the sheer volume of discrepancies in the testimony of the agents who claim to have handled the informant, the degree of irregularities in the record concerning the alleged informant, as well as the uncontested testimony of two declarants testifying that Gary Moritz could not have been the informant, lead the court to find that there was no single source of information for all the information attributed

> to Ted, and that the source of all that information could not have been Gary Moritz.

Id., p. 73.

Commenting on the obvious correlation between the timing of Ted's contacting the Special Agents and the agents declared need for search warrant affidavit and grand jury material, the court observed: "Although both SA Hardaway and Chinn testified that but for two occasions Ted always initiated the contact by phoning the agents, *Ted phones the Agents when the agents needed him the most.*" *Id.*, p. 74 (emphasis added).

Going further, the court observed that:

> Not only does the January 25th contact follow the January 11th email from SA Holm requesting more information in preparation for the upcoming search warrant affidavit, but more tellingly, the rough notes reflect the type of information SA Holm identified as "still need[ing]" from SA Hardaway . . . .
>
> Although both SA Chinn and Hardaway testified that they had no way of contacting Ted, the informant appears at the most propitious times for the investigators: less than a month after SA Chinn announces surveillance activities on Struckman will commence because they need probably cause for the upcoming search warrants, and when SA Holm tells SA Hardaway he needs more information for the search warrant affidavit . . . .
>
> Although alleged contacts with Ted occurred sometimes every other day in the months leading to the search warrants, the contacts subside after the warrant is executed but increase around the time of Struckman's grand jury appearance.

Id., pp. 74-76.

In wrapping up it's findings of pervasive government misconduct relating to Ted, the court also noted that when the Special Agents finally got around to filing "declarations under penalty of perjury just days before the evidentiary hearing . . . such declarations were remarkably different from their previous statements when it comes to details." *Id.*, pp. 76-77. As the court concluded regarding its enumerated misconduct findings:

> [I]n the aggregate, they add up to nothing more than a house of cards built to support the illusion of the existence of Anonymous Informant No. 1. The court thus finds that by suppressing the source of the information attributed to AI-1/Ted, information that would be material to a defense of government misconduct, the government has committed a *Brady* violation that would result in a due process violation at trial.

Id., p. 77.

3. The Bowden *Quid Pro Quo*: The Lead IRS Special Agent Illegally Shut Down a Civil Fraud Audit in Exchange for "Helpful" Testimony from a Government Witness, and then Covered it Up and Lied About the Cover-Up.

After the prosecution's multiple discovery miscues early in the case led to substantial "late-breaking" discovery conveyances in January 2007, the defense uncovered evidence that prosecution witness Dave Bowden perjured himself to the grand jury and was performing black bag operations for Special Agent Hardaway[1],

[1] Dave Bowden testified before the grand jury. He admitted to black bag operation for the government by telling the grand jury he searched the vehicles of David Struckman and his family for documents, making copies of those documents, returning the original documents, and then giving copies "to the

information Struckman asserted had been laundered through attributions to fictional informants including AI-1/Ted. Struckman demanded the tax and financial records of Dave Bowden, which were missing from the discovery.

On April 18, 2007, after multiple requests over many months went unheeded by the prosecution, Struckman filed a motion to compel disclosure of exculpatory material concerning four government witnesses, including Dave Bowden. (R. 351.) The motion alleged an illicit *quid pro quo* arrangement between the prosecution and Bowden, and that Bowden had perjured himself before the grand jury – false testimony the government either did or should have know was perjury. *See id.* The prosecution responded by accusing defense counsel variously of frivolity, fictional accounts, fantastic allegations, and comparing defense counsel to conspiracy theorists Art Bell and Oliver Stone for suggesting the existence of a Bowden audit and an illicit *quid pro quo* between the IRS lead special agent and Bowden. (R. 355.)

The prosecution declaimed it "neither had possession nor knowledge of any IRS audit materials" relating to Bowden. *Id.*, p. 4. The prosecution went on to chide that "defense counsel is aware the criminal and civil components of the IRS function separately and the degree of interaction between the two components is

---

detective." (R. 361, Ex. K, p. 15.) "When Bowden testified before the grad jury that he provided copies of documents taken from appellant's car to 'the detective,' Bowden meant that he provided copies of these documents to SA Hardaway." (R. 449, p. 38; Excerpts, p. 38) (citing Def. Ex. 85).

regulated" such that no agreement could even "take place" concerning favorable civil treatment. *Id.*, p. 5. Finally, the prosecution implied that defense counsel was falsely representing to the court that a two-page IRS transcript on Bowden showed he'd been audited: "[T]here is no evidence that Mr. Bowden has been audited or been non-compliant in his tax practices." *Id.*, pp. 3-4; R. 449, p. 34; Excerpts, p. 34. All these prosecution statements were blatant misrepresentations to the court.

On May 3, 2007, less than 24 hours after the court granted Struckman's motion to compel disclosure of all Bowden's tax records, and with the trial now scheduled to commence on May 7th, the prosecution's full-scale retrenchment and retreat began, first with a telephone call and letter memorandum to defense counsel, then a motion to correct its filing numbered 355. (R. 382.) Although the prosecution's motion to correct its previous filing merely admitted to a "'misstatement' concerning the existence of an audit on Bowden," the prosecution's May 3rd letter to defense counsel admitted "it had been in possession of additional impeachment evidence relating to Bowden . . . . '[that] should have immediately triggered a *Giglio* disclosure.'" (Doc. 449, pp. 33-34; Excerpts, pp. 33-34.) The prosecution now admitted that Bowden contacted SA Hardaway to advise him the IRS was auditing him, that SA Hardaway had a "one-time" telephonic contact with the IRS auditor, that Hardaway failed to generate any memoranda regarding these contacts, and finally, that Hardaway reported he had

advised the prosecutors on several occasions about these contacts. (R. 449, p. 36; Excerpts, p. 36) (citing Def.'s Ex. 88).

The very next day, on May 4th, the prosecution provided the defense with an MOI authored by SA Hardaway that amplified on his audit contacts with Bowden and the IRS auditor, and asserted that the two contacts with Bowden and the auditor "'cumulatively took approximately 5 minutes or so . . .'" *Id.*, p. 38 (citing Def.'s Ex. 53). This proved false. As the testimony of Joseph Michael Battaglino, the IRS Revenue Agent who audited Bowden, confirmed, SA Hardaway had met personally with RA Battaglino for approximately six hours. *Id.*, pp. 44-50, 56-64. Although SA Hardaway testified that his memory "is pretty good . . . quite good, usually," he professed not remembering that RA Battaglino had traveled to his Everett office and met personally with him for approximately 6 hours, reviewing documents, discussing Bowden's audit, and talking about Bowden's testimony for the government at various grand jury and trial proceedings. *Id.*, p. 62.

"On May 4, 2007, at the request of government counsel, the court held a telephonic status conference." *Id.*, p. 36. The prosecution advised the court that it could take up to 6 months to obtain Bowden's tax records. (R. 388, p. 2.) The court admonished the prosecution that such a long time would be "ridiculous," to which government counsel responded that indeed such a long time seemed unreasonable. *Id.* The court subsequently vacated the May 7th trial date and

ordered "that an evidentiary hearing will take place on July 9, 2007. Trial, if necessary, will follow forthwith." (R. 385.)

The defense received a portion of the court-ordered discovery on June 12th, including Bowden's audit file. On June 27th, the prosecution provided two additional documents to the defense, an MOI and a Memorandum of Activity ("MOA"), dated June 22nd and 23rd, respectively. IRS SAs Rose and George interviewed Bowden by telephone on the 22nd in an effort to memorialize Bowden's recollection of events and circumstances in preparation for the evidentiary hearing. (R. 449, pp. 36-39; Excerpts, pp. 36-39) (citing Def.'s Ex. 85). Then, as the court observed:

> On the following day, June 23rd, when SA Rose and George went to Bowden's residence . . . to have Bowden sign the declaration, "Bowden showed SA George several pictures and a document which were in his possession which Bowden said belonged to Struckman. Bowden offered the pictures and documents to SA George . . . Bowden asked if he was going to get in trouble for having taken the documents from Struckman's car."

(R. 449, p. 38; Excerpts, p. 38) (citing Def's Ex. 86).

Bowden further advised the SAs that "[w]hen he testified before the grand jury that he provided copies of documents taken from Struckman's care to 'the detective,' Bowden meant that he provided copies of these documents to Hardaway." *Id.* In spite of Bowden's grand jury testimony and subsequent confirming sworn statement that he had stolen documents from Struckman's and Struckman's family

members' cars, photocopied them, and given them to SA Hardaway, Hardaway repeatedly denied ever receiving such documents from Bowden. (Doc. 449, pp. 56, 65; Excerpts, pp. 56, 65) (citing R. 434, p. 306:3-10.) Noting SA Hardaway's recalcitrance at the evidentiary hearing, the court observed that: "When asked about the May 2, 2007 court order granting defendant's motion to compel *Brady/Giglio* material as to Bowden, SA Hardaway evaded a clear answer." *Id.*, p. 58 (citing R. 434, pp. 313:5-315:17).

After reciting Bowden's evolving grand jury and trial testimony for the government in the prosecution and conviction of Struckman's former wife, Laura Struckman, for a single count of structuring a currency transaction, *id.*, pp. 10-16, the court concluded that: "The gradual development of Bowden's statements concerning the extent of Laura Struckman's involvement in Struckman's enterprises and activities indicate a more than reasonable explanation for SA Hardaway's behavior concerning Bowden's audit." *Id.*, p. 79. As the court further observed:

> The court does not consider the changes in Bowden's testimony insignificant. In a case where a defendant was charged with knowingly, intentionally, and unlawfully conspiring and agreeing to structuring, changes in testimony that satisfy such elements become very significant.

Id., p. 80.

As to the benefit conferred upon Bowden:

> Not only was Bowden not prosecuted, but in return for his testimony in the Laura Struckman trial, and in the upcoming trial of David Struckman, SA Hardaway prevented a proper audit of Dave Bowden by the civil branch of IRS. SA Hardaway vouched for Bowden's honesty and integrity to the revenue agents. Although SA Hardaway apparently had in his possession documents to the contrary, SA Hardaway confirmed to the revenue agents that Bowden had ended his trust activities and had closed his trust in 1999.

Id.

And in final conclusion, the court found that:

> While it may be a coincidence that the box of documents Bowden gave to SA Hardaway were simply kept out of the knowledge of the prosecutors, it is more likely that SA Hardaway was trying to maintain those records separate from the investigatory file in this case.
>
> In order for the court to conclude there was no secret deal between SA Hardaway and Bowden, the court would have to explain away, let alone ignore, all the above discrepancies, contradictions, and Bowden's changing testimony. Given all this evidence, the court is compelled to conclude the government, in the person of SA Hardaway, has not disclosed its arrangement with Bowden.

Id., p. 81.

4. The Panama "Habeas Grabbus": The Government's Lies and Deception Finally Induced the Panamanians to Assist in Locating and Arresting Struckman so the United States Could Take Him into Custody and Extract Him from Panama.

As with all other aspects of this case, the defense was hampered in preparing for the evidentiary hearing by the prosecution's discovery violations. The majority of the emails cited to and quoted from in the court's 83-page misconduct order were not provided to the defense until June 30, 2007, approximately one week

prior to the evidentiary hearing, in spite of the fact the defense requested all State Department files relating to Struckman as early as December 2006. (R. 309.) Upon receipt of the first government production of State Department files on February 15, 2007 – many of which documents were in un-translated Spanish – several documents revealed new informants previously undisclosed, new predicates of government misconduct at the behest of IRS special agents, and that the then-controversial "AI-1/Ted" was an "unregistered" informant. *Id.*, pp. 4-5. With a March 12, 2007 trial date looming, for this and other reasons (*see* AI-1 facts, *supra*), the court ordered the trial continued until May 7, 2007. (R. 329.)

After translation into English and subsequent review of all the investigative file documents provided on February 15, 2007, Struckman again requested missing documents relative to Timothy O'Brien, Regional Security Officer ("RSO") U.S. Embassy, Panama. Subsequently, on June 22, 2007 – four months after Struckman originally received RSO O'Brien's investigative file and approximately two weeks prior to the scheduled evidentiary hearing – the prosecution submitted to the court for *in camera* review the remaining State Department file documents concerning Struckman. (R. 402.) The court ordered disclosure of the materials in a sealed order dated June 25, 2007, which the defense received from the prosecution on June 30, 2007. (R. 400.)

Included in the materials were dozens of emails between RSO O'Brien and various representatives from the Department of Justice ("DOJ") and IRS Criminal Investigation Division ("IRS-CI"), including SA Hardaway, SA Holm, and DOJ Tax Division prosecutor Mark Odulio. (Odulio withdrew as counsel of record before trial on October 22, 2007. (R. 452.)) Many of the emails concerned procedures used by RSO O'Brien to locate and secure custody of Struckman in Panama – including using informant information provided by SAs Hardaway and Holm from the United States – and how to extract Struckman from Panama as quickly as possible regardless of Struckman's constitutional rights. (R. 449, pp. 16-21; Excerpts, pp. 16-21; R. 437, 445, 447.)

The government had attempted since at least 2004 to elicit the Panamanians' support in arresting Struckman for U.S.' extraction. (R. 449, pp. 16-17; Excerpts, pp. 16-17.) RSO O'Brien admitted that one of his main goals was to obstruct Struckman's Sixth Amendment right to counsel and legal process: "He may be able to get a lawyer to slow things down (but that's a big reason we want to move quickly if we nab him – we don't want to give him that chance . . ." *Id.*, pp. 18-19 (citing Def.'s Ex. 89(v)). In contrast, O'Brien initially denied knowing that Struckman had an attorney during the seizure days between January 11 and 13, 2006. (R. 433, pp. 153:2-4). But as the court observed: "On January 12, 2006, RSO O'Brien sent a facsimile transmition [sic] to Mark Odulio, one of the

prosecutors in this case. The fax stated: 'A lawyer for Struckman came sniffing around police HQ this morning, the race has begun . . .'" *Id.*, p. 21 (citing Def.'s Ex. 89(w)). RSO O'Brien also displayed "contempt for the sacred tradition of *habeas corpus*." *Id.*, p. 70. As O'Brien explained to a DOJ trial attorney: "'[I]t's just putting the **habeas grabbus** on him that's holding up executing everything.'" *Id.*, p. 19 (citing Def.'s Ex. 89(s)) (emphasis in Order).

O'Brien also routinely lied to and deceived the Panamanians about Struckman's legal status: "'RSO O'Brien stated it was worth mentioning that Struckman '[had been] sentenced and at this moment is a fugitive of the federal authorities and is [awaiting] to serve his sentence.'" *Id.*, p. 20 (citing Def.'s Ex 57(i)). This was patently false. O'Brien also lied to Panamanian immigration officials, "claiming defendant was charged with 'defrauding investors of over $50 million' and accusing defendant of perpetuating the 'same kind of fraud scheme that he used with such success in the U.S.'" *Id.*, p. 70. O'Brien admitted his statements to Panama law enforcement that Struckman had been convicted and sentenced for investment fraud were each false. (R. 433, pp. 132:1-6, 134:13-25, 135:1-7, 137:4-8, 144:17-22, 156:21-157:8.) The court was also unimpressed with "O'Brien's attempts to pretend he did not understand the Spanish version of his own letter dated January 11, 2006 . . ." (R. 433, p. 70, n.21; Excerpts, p. 70, n.21.)

Testimony was also taken from Renaldo Milwood, Struckman's Panamanian attorney. When shown Panamanian Deportation Resolution 10886, dated August 25, 2004, (Def.'s Ex. 57(k); Excerpts, p. 84), Attorney Milwood testified that he had never seen that document until Struckman was transferred out of the country on January 13, 2006. (R. 434, pp. 223:3–225:12.) As evidenced by the endorsement of a Panamanian authority, Struckman was noticed and served the resolution on the same day he was extracted from Panama: "Today, January 13, 2006, I notified David Alan Struckman of the previous resolution at 9:15 a.m. of the Deportation Resolution." (Def.'s Ex. 57(k); Excerpts, p. 88.) Using both his signature and fingerprint as identification, Struckman also acknowledged service and notice on that same day. *Id.* The Deportation Resolution also advised Struckman – in Spanish, which he did not speak – that he had the right to "interpose the Resources of Reconsideration and Appeals" as against the resolution. *Id.* Struckman was deprived of his legal right to appeal the resolution, because he was transferred to U.S. custody immediately after being noticed and served at Tucomen International Airport, and escorted by IRS special agents onto a plane headed for Houston, Texas: O'Brien's "habeas grabbus" was complete.

DETENTION STATUS

Currently, Defendant-Appellant David Struckman is in custody at the Bureau of Prisons Terminal Island Federal Correctional Institution. Previously,

appellant was held at the SEA-TAC detention center in Seattle, Washington since January of 2006. Appellant's anticipated release date is spring of 2012.

SUMMARY OF THE ARGUMENT

Bogus informants (attributing extraordinary information to a brain-damaged distant family member, no less) laundering illegal wiretaps, sneak and peeks, and unlawful surveillance by the lead agents of the Seattle Criminal Investigative unit of the IRS; secret *quid pro quos* with private citizens to steal and copy documents in exchange for hushed audits and no charges; chief regional security officers, lead special agents, United States attorneys' making less than credible claims straight from the stand denying facts manifestly proven true with their own emails, faxes and documents they attempted to hide in discovery; "habeas grabbus," the wide efforts by multiple lead officers of the Department of Justice and Department of State representing the courts of the United States overseas, who lied, schemed, and showed "contempt" for one of the *jus cogens* norms of international law and Constitutional right, to steal a man from a foreign nation. An episode of HBO's the Wire? No. The case of United States against David Struckman.

"AI-1/Ted." The ubiquitous informant who managed to gather information from telephone calls around the country from disparate people, track the whereabouts, conversations and legal strategies of Struckman and his involvement with counsel from Seattle to Panama, find unlikely document trails in improbable

places, go "behind the net" to track bank accounts, domestic and foreign, and sit in on Struckman's most private and legal strategy conversations concerning everything from grand jury work to presence in Panama. When ordered to produce him, the prosecution could not; they said he'd fallen off a roof and had no memory. The name they blamed? A brain-damaged distant family member. After a full hearing, the judge called it what it was: a crock.

"Habeas grabbus." The unofficial project title given by the lead officials of the United States government as enforcers of this court's judicial process and for the purposes of conveying personal jurisdiction in a district court of the United States. What was "habeas grabbus"? "Lies," multiple and material "misrepresented" statements of the nature of federal judicial process to foreign officials by the official highest ranking United States law enforcement representatives of this court, evidencing a continuous "contempt" for sacred legal traditions (such as the *jus cogens* norms of the rights of habeas corpus, counsel and due process), "less than credible" testimony (in truth, perjury) from government agents right to the court in the evidentiary proceeding, all in the name of effectuating this court's process and invoking this court's personal jurisdictional authority. Is that what the imprimatur of American federal courts now stands for?

After extensive evidentiary hearings, exhibits, expert testimony, declarations and legal briefings, the court concluded the United States government used lies and

lawless methods in their efforts to give the court personal jurisdiction over Struckman. Such methods violated Struckman's rights under the Fourth Amendment, Fifth Amendment and Sixth Amendment to the United States Constitution, the treaties of the United States, the Vienna Convention (their Regional Security Officer who at the hearing denied knowing the Convention and also pretending not to know the meaning of the Spanish in his own letters of lies to Panama officials), the Constitution of Panama, and the norms of international law. The court also found the government made multiple and material violations of basic due process rights, had presented "less than credible" testimony from their own agents, (a nice way of saying "perjury"), demonstrated a pattern of cover-up and discovery violations for their nefarious conduct of their agents, and ordered a remedy.

Indeed, the uncontested testimony at the hearing documented that but for the violation of Struckman's right to counsel, right to due process, and right of access to the courts, preserved and protected under the United States Constitution, the treaties of the United States, and international *jus cogens* law, Struckman would not have been removed from Panama. The conduct of the government made the courts of this country complicit in their agents' misconduct. Where the misconduct is aimed at indictment and securing the personal jurisdiction of a person, the court simply chose the wrong remedy – suppression of evidence at trial, which was

neither the aim of nor the profit gained from the misconduct. How did the government react to the court's findings? Not one agent has been disciplined in any way.

The question for this court is whether the district court properly conceived of its own authority, and even if so, whether the district court properly interpreted the opinion of a Panama court on the matter. The district court erred in its interpretation of the Panama court order, based on an incorrect assumption, Struckman prays this court either: (1) remand for dismissal of the charges, or (2) remand for a further hearing on the appropriate "repercussions" of the lies, deceit and misconduct of agents of the United States in purported enforcement of this court's judicial process based on a corrected understanding of the Panama court opinion in the matter. Equally, this court must resolve whether the district court improperly limited the authority to dismiss as a remedy, especially when the misconduct is aimed at procuring an indictment and personal jurisdiction over the person, not evidence at trial.

ARGUMENT

Standard of Review

Both issues are governed by the same standard of review. A pretrial motion to dismiss a criminal complaint is reviewed *de novo*. All factual findings by the district court are accepted "unless they are clearly erroneous." *United States v.*

Ziskin, 360 F.3d 934, 942 (9th Cir. 2003) (citing *United States v. Lun*, 944 F.2d 642, 644 (9th Cir. 1991)). This issue was raised in Struckman's motion to dismiss filed on April 24, 2007. (R. 361.)

I. THE GOVERNMENT'S OUTRAGEOUS MISCONDUCT, USING LIES, DECEIT, MISREPRESENTATIONS AND FRAUD AGAINST A FOREIGN NATION IN CONTEMPT OF SACRED TRADITIONS AND LAW TO VIOLATE STRUCKMAN'S RIGHTS TO COUNSEL, DUE PROCESS, AND ACCESS TO THE COURTS, IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES, THE TREATIES OF THE UNITED STATES, AND THE JUS COGENS NORMS OF INTERNATIONAL LAW, AUTHORIZED DISMISSAL OF THE CHARGES.

The district court did not dismiss the charges against Struckman for the "habeas grabbus" for two principal reasons. First, the district court misapprehended the limits of its authority, concluding a defendant's right to counsel, as well as his collective rights to due process, extradition-based arrests, Vienna Convention notice, Panama Constitutional rights, and the norms of international law to access to counsel and the courts, could not be protected through dismissal unless the defendant could show the government formally invoked extradition procedures. Second, the district court misinterpreted the order of a Panama court concerning the reasons for the removal of Struckman from the country, by misreading the section of the opinion outlining the arguments of the parties as a legal conclusion of the opinion itself. In short, the district court concluded that the Supreme Court of Panama had ruled on the legality of

Struckman's removal when the district court's own order in a separate section admits precisely otherwise.

The Panama court, as the uncontested testimony below demonstrated, concluded it could not rule on the legality of the actions toward Struckman under its habeas laws because Struckman had been removed from Panama before the hearing could be conducted, due to the effective misconduct of American officials acting on behalf of the government in their formal roles. "A lawyer for Struckman came sniffing around police headquarters this morning. The race has begun." (R. 433, p. 153:2-4.) (Fax by Regional Security Officer Timothy O'Brien of the United States Embassy in Panama to Assistant United States Attorney Mark Odulio of the Department of Justice of the United States of America of January 12, 2006). The race was the "habeas grabbus" to seize Struckman as an extradition without following any of the procedural protections, Constitutional safeguards, judicial review, treaty requirements, or enshrined *jus cogens* norms like habeas corpus, due process and right to counsel.

Is this now the law of this land? Is this how federal courts want their official representatives to act in front of foreign nations with signed treaties with the United States? The agents who performed the misconduct and presented "less than credible testimony" received no disciplinary action whatsoever for the misconduct found as fact by the trial court. Federal law enforcement officers cannot be above

the law, any more than federal courts can. Justice must be done, even though it has not been done yet.

A. Habbeas Grabbus, Part A: United States Officials Repeatedly Violate Extradition Treaties Through Lies and Deceit.

1. An Extradition in Violation of an Extradition Treaty Compels Mandatory Dismissal.

"Extradition is the means by which a requesting country obtains a limited form of personal jurisdiction over a defendant." *United States v. Anderson*, 472 F.3d 662, 668 (9th Cir. 2006). As the Ninth Circuit recently held, "a court is deprived of jurisdiction over an extradited defendant, if either: (1) the transfer of the defendant violated the applicable extradition treaty, or (2) the United States government engaged in misconduct of the most shocking and outrageous kind to obtain his presence." *Id.* at 666 (quoting *United States v. Matta-Ballesteros*, 71 F.3d 754, 762-64 (9th Cir. 1995) (internal quotations omitted). The government's outrageous misconduct in any effort to seize a man overseas will mandate dismissal. *See id.* at 667.

The long standing *Rauscher* rule divests federal district courts of personal jurisdiction over any defendant whose jurisdiction was obtained pursuant to the invocation of a foreign nation's legal process if the order transferring custody of the individual did not authorize jurisdiction over that particular crime. *See United States v. Rauscher*, 119 U.S. 407 (1886).

A treaty is "the supreme law of the land, of which the courts are bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty." *Id.* at 419. Any "country receiving the offender against its laws from another country has no right to proceed against him for any other offense that that for which he had been delivered up." *Id.* As the Court repeated, "the principles of international law recognize no right to extradition apart from treaty." *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933). This requires "the observance of the laws of the place of refuge is exacted in apprehending and detaining the fugitive." *Id.* at 291.

This limitation on "the jurisdiction of domestic courts to try or punish" a criminal defendant for criminal charges not authorized by a treaty "is based on principles of international comity: to protect its own citizens in prosecutions abroad, the United States guarantees that it will honor limitations placed on prosecutions in the United States. Our concern is with ensuring that the obligations of the requested nation are satisfied." *United States v. Andonian*, 29 F.3d 1432, 1438 (9th Cir. 1994) (citing *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988)). A "violation of the treaty could not form the basis of a conviction." *Cook v. United States*, 288 U.S. 102, 111 (1933).

There was no criminal personal jurisdiction over a person when their vessel was seized in violation of the United States-Panama treaty. *See United States v.*

Ferris, 19 F.2d 925, 926 (D.C. Cal. 1927). Treaties are "the supreme law of the land" and must be "given effect by the courts to extent they are capable of judicial enforcement." *Id.* at 926. Jurisdiction obtained in contravention of the treaty is "not to be sanctioned by any court and cannot be the basis of any proceeding adverse to defendants." *Id.* "A decent respect for the opinions of mankind, national honor, harmonious relations between nations, and avoidance of war require that the contracts and law represented by treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed" such that treaties "shall not be reduced to mere scraps of paper." *Id.* There is no doubt that "one illegally before the court in violation of a treaty like cannot be subjected to trial." *Id.*

As the Supreme Court consistently articulated,

> [T]he country receiving the offender against its laws from another country, in the absence of treaty, **has no right to proceed against him for any other offense than that for which he had been delivered up**; second, that the enumeration of the offenses in the treaty there involved marked such a clear line in regard to the magnitude and importance of those offenses that it was impossible to give any other interpretation to it than the exclusion of the right of extradition in others; third, the provisions of the treaty giving a party an examination before a judicial tribunal in which before he should be delivered up, the offense for which he was to be extradited must be proven to the satisfaction of the tribunal, left no doubt that the purpose of the treaty was that the person delivered up should be tried for that offense and no other.

Ford v. United States, 273 U.S. 593, 615 (1927) (emphasis added).

This conforms to the principle that where the government chooses to limit its own conduct, it cannot benefit from violation of that voluntary undertaking and self-limitation on its jurisdictional power within the meaning of due process. *See Kennon v. Hill*, 44 F.3d 904 (10th Cir. 1995). It is only when foreign legal proceedings have never been invoked and no such order exists, that a court is permitted, but not compelled, to exercise personal jurisdiction over the defendant as long as no other treaty or law was violated. *See United States v. Alvarez-Machain*, 504 U.S. 655, 662 (1992) (only "if we conclude that the treaty does not prohibit respondent's abductions" and no foreign legal proceedings were invoked, that the "rule in *Ker* applies").

2. *The District Court Erred When It Concluded Form Trumped Substance in Defining Whether a Person Was Extradited or Deported for Purposes of Interpreting and Enforcing the Treaties of the United States*.

As this court further noted, a person is extradited, not deported, regardless of the label given to the manner of arrest and seizure, whenever the United States made a demand for his arrest in the foreign nation in order to secure his person for punitive purposes, such as criminal sentencing. *See United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980). It is only "where no demand for extradition is made" that "no 'extradition has occurred and failure to comply with the extradition treaty does not bar prosecution." *Id.* at 310. By law, in protecting the enshrined tradition of extradition law and treaty, a person is legally extradited, not deported,

regardless of the extrinsic label given the action on a piece of paper, whenever a person's removal from a country is with "any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken." (R. 371, p. 4, fn. 1.) The legal definition of deportation deliberately restricts governments from routinely violating domestic and/or international law governing extradition under disguised "deportation."

The Supreme Court adopted this universal international definition of segregating extradition from deportation, with a necessary focus on substance over form. *See Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893). A person was extradited, not deported, if one of two facts were met: one country surrendered a person to another country at their request to face criminal prosecution or punishment; or, the person was removed out of a country with punishment either imposed or contemplated under the laws of the country the person was taken to. *See id.* Deportation was the right to convey a person "to the frontier" for purely internal reasons with no external request, not a right to transfer a person to face criminal punishment. This conforms with the well-established, treaty-conforming, international definition of extradition: "The act of sending, by authority of law, a person accused of a crime to a foreign jurisdiction where it was

committed, in order that he may be tried there." *See Bouvier Law Dictionary* (1856).

> Extradition is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished. Deportation is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, **and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken.**

Fong Yue Ting, 149 U.S. at 709 (emphasis added).

The Supreme Court reaffirmed that the act of surrendering an individual to face criminal prosecution upon any kind of demand for his surrender constitutes an extradition under the law. *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

The Ninth Circuit accepted and applied this standard. Deportation is a "unilateral act" which removes someone "for its own purposes"; if the removal was "initiated by the United States" or there was any kind of "demand in some form" for the arrest or transfer, then it is an extradition, regardless of the label. *Stevenson v. United States*, 381 F.2d 142, 144 (9th Cir. 1967). As the Ninth Circuit noted, a court lacks person jurisdiction if a person's surrender "violated any applicable laws, including the Extradition Treaty." *Id.* at 143.

3. *The District Court Erred When it Concluded It Did Not Have the Discretionary Authority to Dismiss For Circumvention of Extradition Treaties*.

As the Ninth Circuit concluded in *Doe*, a rule has "achieved the status of a *jus cogens*" norm when the subject misconduct is "widely condemned" by sister nations, as articulated by their jurists and as documented by scribes and scholars of international law. *Doe I v. Unocal*, 395 F.3d 932, 945 (9th Cir. 2001). The *jus cogens* norms extend beyond slavery and torture prohibitions; they even extend so far as to acts of racial discrimination and anything else widely condemned. Here, jurists, scribes, and scholars all agree: just such a change has taken place for extradition-less seizures and removals from one nation to another, vesting a discretionary power of dismissal in all courts of all nations for such actions.

As the Supreme Court long held from its inception, in the absence of a contrary congressional act, "the court is bound by the law of nations, which is part of the law of the land." *The Nereide*, 13 U.S. 388, 423 (1815); *see also The Paquette Habana*, 175 U.S. 677, 700 (1900). Rules of international law to every court "administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty of other public act of their own government in relation to the matter." *The Paquette Habana*, 175 U.S. 677, 708 (1900).

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as

> often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. at 700.

The law of nations "is of force" whenever it has been "generally accepted as a rule of conduct." *The Scotia*, 81 U.S. 170, 187 (1871).

Each of the international treaties below compel good faith conduct, territorial respect, and treaty adherence between nations before one nation seizes and surrenders a person from their nation to another for criminal prosecution or punishment. The Charter of the Organization of American States and the United Nations Charter compel adherence to extradition procedures to protect territorial integrity and national sovereignty. The Vienna Convention compelled Panama to entrust protection of Struckman's rights with the United States Embassy in Panama. *The Vienna Convention on Consular Relations*, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261. Panama was compelled under the treaty, which it religiously enforces and protects, whenever any American is "detained in any other manner" of his rights thereto. *See id.* Those rights include the right to legal counsel, the right to familial visits, and the right to any legal process concerning

the matter. *See id.* at 36(1)(c). The facts at the evidentiary hearing will show violation of those rights. Lastly, Article 16 of the *Convention Against Torture* prohibits unlawful seizures and imprisonments, and references its applicability to extradition as enhancing, not limiting, those rights.

Independent of the treaties, the law of nations now recognizes dismissal as appropriate whenever a person is seized and surrendered without the nation following the extradition laws and treaties in procedure and in substance. The old allowance of forcible abduction without invoking foreign legal process relied upon the now disputed English concept of "male captus, bene detentus." That is no longer the law of nations.

The XVth International Congress of Penal Law in 1994 prohibited jurisdiction by any abducting state outside the procedures, protections and protocols of an existing extradition treaty. The Congress found international abduction to be "contrary to public international law" and urged that it be "a bar to prosecution." The resolution specifically demands that the victim of an abduction be brought into the position which existed prior to the abduction. *See Resolutions of the XVth International Congress of Penal Law*, Section IV, The Regionalization of International Criminal Law and the Protection of Human Rights in International Cooperative Procedures in Criminal Matters, 66 Int'l Rev. Penal L. 67, 70 (1995).

The United States Supreme Court repeatedly recommends reference to English and foreign tribunals for understanding of international law norms and treaty constructions. *See Rauscher*, 119 U.S. 407. Cases from those jurisdictions recognize that any federal court has the discretionary right, even when not compelled, to dismiss on jurisdictional grounds when one nation obtains jurisdiction over a defendant in another nation through an extradition disguised as a deportation:

> [T]he mere fact that his arrival might have been procured by illegality did not in any way oust the jurisdiction of the Court; nevertheless, since the applicant had been removed from Zimbabwe-Rhodesia by unlawful means, i.e. by a deportation order in the guise of extradition, he had in fact been brought to the United Kingdom by unlawful means. Thus, the Divisional Court would, in its discretion, grant the application for prohibition and discharge the applicant.

Regina v Bow Street Magistrates (*Ex parte Mackeson*), 75 Crim. App. 24 (1981) (United Kingdom).

The Law Lords confirmed the same rule: all courts have the discretion to dismiss on jurisdictional grounds where domestic police forego extradition laws in obtaining jurisdiction over a criminal defendant located in a foreign jurisdiction.

> To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view...[it] represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an

> offence which the courts would not be dealing with if the rule of law had prevailed.

Regina v. Horseferry Road Magistrates' Court (Ex Parte Bennett), 3 All ER 138 (HL 1993) (United Kingdom).

> Courts concur across the globe.
>
> National tribunals are increasingly holding that when a State's authorities are a knowing or participating party to the seizure of a person in violation of international law, or to the illegal handing over of a person outside of applicable extradition laws, such knowledge or participation either vitiates jurisdiction or constitutes a discretionary ground for the court to refuse to exercise jurisdiction by reason of abuse of process.

Stephan Wilskie & Teresa Schiller, *Jurisdiction Over Persons Abducted in Violation of International Law in The Aftermath of United States v. Alvarez-Machain*, 5 U. Chi. L. Sch. Roundtable 205, 229 (1998).

The court in *Alvarez-Machain* had no opportunity, and did not, address whether "sources of international law" other than a treaty "provide an independent basis for the right not to be tried in the United States." *Alvarez-Machain*, 504 U.S. at 666. Even that rule – whether a defendant had a right to dismissal as opposed to whether the court had the discretion to dismiss – only stood for allowing, but not compelling, personal jurisdiction when no foreign legal process was invoked to acquire jurisdiction over a criminal defendant in a foreign land. *See e.g.*, Vaughan Lowe, *Circumventing Extradition Procedures is an Abuse of Process*, 1993 Cambridge L.J. 371, 373; John Dugard, *No Jurisdiction Over Abducted Persons in*

Roman-Dutch Law: Male Captus, Male Detentus, 7 S. African J. Human Rights 199, 200 (1991); M.G. Cowling, *Unmasking "Disguised" Extradition–Some Glimmer of Hope*, 109 S. African L..J 241 (1992); Hercules Booysen, *Jurisdiction to Try Abducted Persons and the Application of International Law in South African Law*, 16 S. African Yearbook Intl. L. 133 (1990-91). The United States has recognized the same principle. *See* U.S. Department of Justice Memo on *United States v, Alvarez-Machain*, 32 Intl. Legal Mat. 277 (1993).

Nor is this power and importance of discretionary jurisdictional dismissal inconsonant to long-held legal standards.

> Dismal would be the state of the world, and melancholy the office of a judge, if all the evils which the perfidy and injustice of power inflict on individual man, were to be reflected from the tribunals which profess peace and good will to all mankind.

The Nereide, 13 U.S. 388, 432 (1815).

4. Facts Show Struckman Was Extradited in Violation of the Extradition Treaty, Divesting the District Court of Personal Jurisdiction.

The treaty with Panama, like many nations, does not authorize the foreign seizure of a man within their land for tax crimes. *See* Treaty Between the United States of America and the Republic of Panama, Providing for the Extradition of Criminals, 34 Stat. 2851, Treaty Series 445.[2] The treaty also imposes the

[2] Also available at http://www.oas.org/JURIDICO/MLA/en/traites/en_traites-ext-usa-pan.pdf.

requirements of dual criminality and specialty for such seizures of a person within their borders:

> Provided that this shall only be done upon such evidence of Criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime or offense had been there committed.

Id., at Art. I.

Investment fraud, like securities fraud by a corporate officer or someone with a fiduciary duty to his victim, is an extradictable offense. *See id.*, Art. II, ¶ 7. Tax crimes are not. *See id.*

The Panama treaty provides that no person shall be delivered up to another nation for prosecution or punishment but by the treaty, stating this "*shall only be done* upon such evidence of Criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime of offense had been there committed." Treaty of 1904 Between Panama & the United States, Art. I (emphasis added). Notably, the word "fugitive" refers to convicted felons while the word "person" refers to those simply accused.

Article I further compels that such transfer only be for the "crimes and offenses specified" specified in Article II. Serious embezzlements and frauds in a fiduciary capacity are included therein; tax crimes are not.

Article III requires delivery of the actual warrant and the evidence in support thereof or the sentence of conviction to procure extradition, and further requires going through each nation's "diplomatic agents." Article IV further compels a method of temporary seizure through application to the "Foreign Office" and proper presentation of proofs.

Article VIII compels the same conclusion as Article I: "no person surrendered by either of the high contracting parties to the other shall without his consent freely granted and publicly declared by him, be triable, or tried or be punished for any crime of offense committed prior to his extradition other than that for which he was delivered up, until he shall have had an opportunity of returning to the country from which he was surrendered."

The subsequent Mutual Assistance Treaties reiterated that pure tax crimes (unrelated to drug dealing or money laundering for drug dealing) were not part of any mutual assistance between the nations. *See Treaty Between The United States of America and The Republic of Panama on Mutual Assistance in Criminal Matters*, 1991 U.S.T. Lexis 174. As the notice noted, the United States recognized that "pure tax cases" would not qualify for any form of assistance, confirming the meaning of the extradition treaty. *Id.* at *6. Art. 2(2) "excludes tax matters from the definition of an offense under the Treaty" with exceptions only for drug dealing and money laundering from drug dealing. *Id.* As the article itself states: any

"offense for the purposes of this Treaty does not extend to any matter which relates directly or indirectly to the regulation, including the imposition, calculation and collection of taxes" with the only exception for illegal source income (e.g., drug laundering). *Id.*

Aside from the express limitations in the treaty, reiterated and repeated in the mutual assistance treaties, the treaty expressly provides for incorporation of the law of nations in custom and in force at the time of the seizure and surrender of Struckman. Article III incorporates both contemporary international law and the municipal law of Panama into the treaty, mandating each nation conduct any such surrender of a person "in conformity with the laws regulating extradition for the time being in force in the state on which the demand for surrender is made." The "rule of customary international law" now "prohibits jurisdiction over a person abducted from abroad" without following proper extradition procedure and substantive limitations." Wilskie, *supra*, at 221.

> National tribunals are increasingly holding that when a State's authorities are a knowing or participating party to the seizure of a person in violation of international law, or to the illegal handing over of a person outside of applicable extradition laws, such knowledge or participation either vitiates jurisdiction or constitutes a discretionary ground for the court to refuse to exercise jurisdiction by reason of abuse of process.

Id. at 229.

Independently, under the same doctrine as statutory construction, the rejection of the Court's treaty interpretation by the nation parties from *Alvarez-Machain* "effectively overrules" that interpretation, and gives it no precedential value for the interpretation of other treaties with other nations for conduct decades later. *Id.* Mexico and the United States quickly ratified the *Treaty to Prohibit Transborder Abductions* after the decision clarifying their respective treaty obligations, due to widespread public outrage, scholastic condemnation, and international legal ridicule of the decision. That Treaty made clear what international law requires to make extradition treaties more than an empty piece of paper: the treaty expressly strips domestic courts of jurisdiction over anyone not transferred pursuant to an extradition treaty and extradition procedures. Such changes in treaty application to the novel question of the interpretation of the Panama treaty would compel a different outcome than the fifteen-year old questioned and discarded interpretation of the different Mexican-United States treaties. So is the conclusion of every leading international law scholar in the nation and across the globe. *See id.*

As the High Court previously recognized, historical changes in conceptions of the customs amongst nations modifies the law of nations and the interpretation of treaties between nations. *See The Scotia*, 81 U.S. 170 (1871). This has always been the custom in international legal understanding and interpretation of treaties.

See North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands), 1969 Intl. Ct. Justice 3, 43 (Feb. 20) ("[T]he passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law."); *see also* Restatement of Foreign Relations, § 102 comment (b) (1987). In the international legal order, treaties are concluded by states against a background of customary international law. Norms of customary international law specify the circumstances in which the failure of one party to fulfill its treaty obligations will permit the other to rescind the treaty, retaliate, or take other steps." *See* Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev.1082, 1157 (1992).

Ascertaining the rule of international law requires a "review of the precedents and authorities on the subject" as they appear to the court "at the present day." *Paquette Habana*, 175 U.S. at 708. A change in any historical general custom changes the law of nations accordingly. *The Scotia*, 81 U.S. at 187.

Sister courts agree extradition law must reflect changes in the relations amongst states and the laws correspondent thereto. Thus, obtaining personal jurisdiction without extradition authorization given post-1991 changes in extradition norms amongst sister states, "suspends the jurisdictional authority of our courts in the criminal prosecution." *Sneed v. State*, 872 S.W.2d 930, 937 (Tenn. 1993) (Uniform Extradition Act changes inter-state relations the same way

customs of international norms change the law of nations, such that *Alvarez-Machain* did not apply).

Panama neighbors Venezuela, which disputes the current administration's United States extradition refusals to turn over one of Latin America's most infamous terrorists. *See* Anthony Depalma, *U.S. Releases Cuban Terrorist, Angers Venezuela and Cuba*, New York Times, April 22, 2007 (noting his activities involved terrorist plots in Venezuela, Cuba and Panama). Panama, like Venezuela, rightfully refused to extradite or deport Struckman when such requests did not conform to the extradition treaty – until, that is, the American government lied to Panama about what Struckman had been indicted for and made other material false misrepresentations.

Just as the American government was "free" to deport Posada for illegal alien status, they chose not to, relying on international legal standards for extradition and the decisions of the American administration. It is in that context that Panama refused to act on the Struckman request: American refusals to extradite Latin American terrorists and corrupt, deposed Panamanian officials precipitating difficult relations in the region for the nation and new President. The most logical act for Panama was to refuse to return the favor in kind and refuse deportation for all but those whom extradition laws compelled to be arrested, seized, and handed over. The political difficulties between the two countries –

from the Canal debate to the Noriega invasion – continue to fester in the central nation, whose international economy disinclines them, like Switzerland, to deportation or extradition of mere tax defendants in a foreign land.

Here, the undisputed evidence documents that the United States requested Panama seize Struckman and transfer him to their custody for the purpose of facing criminal punishment, though they lied about the nature of the crime charged and deliberately circumvented Struckman's access to counsel and the Panama courts to document their lies and preclude the personal jurisdiction of United States courts. This defines precisely a request for extradition. Consequently, the extradition treaty forbids any criminal prosecution except as permitted by the extradition treaty. It is beyond dispute that the manner of Struckman's seizure and transfer violated the Extradition Treaty. It is beyond dispute that this court compels dismissal when a court's personal jurisdiction was obtained in contravention of the Extradition Treaty. The only issue in the court below was whether the United States requested Struckman seized and transferred to their custody for the purposes of facing criminal punishment. The undisputed evidence shows he was.

The district court concluded it was bound by the "acts of state" doctrine from evaluating whether Struckman was extradited, in turn misconstruing a Panama court order on the subject. This was clear error. As the district court itself concluded, but for these misapprehensions, dismissal or another "result" may have

been necessary. Hence, remand to the district court to determine what result is appropriate with the corrected interpretation of the Panama court opinion and the acts of state doctrine, is proper.

B. Habbeas Grabbus, Part B: Violate Struckman's Right to Counsel, Right to Due Process and Right of Access to the Courts, in Violation of the United States Constitution, United States Treaties, and the Jus Cogens Norms of International Law.

Panama, once the administrations changed and the old corrupt regime was removed, refused to arrest and extradite Struckman until the United States officials deliberately circumvented his right to counsel, right to due process and right of access to the courts. "A lawyer for Struckman came sniffing around police headquarters this morning. The race has begun." (R. 433, p. 153:2-4.)

1. The United States Constitution, the Treaties of the United States, and the Jus Cogens Norms of International Law Recognize the Right to Habeas Corpus, Right to Counsel, the Right to Due Process and the Right of Access to the Courts.

It is equally well recognized that the Bill of Rights applies abroad to the conduct abroad of federal officials directed at United States citizens. *See Reid v. Covert*, 354 U.S. 1 (1957) (Fifth & Sixth Amendments); *see also Balzac v. Puerto Rico*, 258 U.S. 298, 313 (1922) (due process clause). In all cases, "for the exercise of judicial jurisdiction in personam, there must be due process." *Blackmer v. United States*, 284 U.S. 421, 438 (1932). Violation of a deportation law can render any conviction unlawful if the violation prejudiced an interest of the defendant

protected by the law. *See United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979).

Two truths have always been present: "American courts cannot exercise jurisdiction over a defendant abducted the government in violation of a treaty obligation" and due process "requires a court to divest itself of jurisdiction over the defendant where the defendant established governmental conduct of a most shocking and outrageous character" in the method of extradition. Wilskie, *supra*, at p. 208. A third truth is now equally present. The "rule of customary international law" now "prohibits jurisdiction over a person abducted from abroad in violation of international law." *Id.* at 221. One internationally approved and judicially sanctioned remedy is discretionary jurisdictional dismissal; another is dismissal for governmental misconduct. *See id.*

Independent of the United States Constitution and United States treaties, a court cannot obtain personal jurisdiction over a defendant if the manner of so obtaining violates jus cogens norms of international law, such as violations of the right to habeas corpus in a foreign land, the right to counsel, the right to due process and the right of access to the courts. The Ninth Circuit expressly recognized the requirements of dismissal for treaty violations and dismissals for *jus cogens* violations, which are determinative at the time of the surrender under then-existing international law, noting that "jus cogens norms are nonderogable and

premptory, enjoy the highest status within customary international law, are binding on all nations, and cannot be preempted by treaty." *United States v. Matta-Ballesteros*, 71 F.3d 754, 764, n.5 (9th Cir. 1995). Equally, the Ninth Circuit accepted the likely assumption that "some judicial remedies are available for the violation of Article 36" of the Vienna Convention, only holding that post-*Miranda* statements to United States officials need not be suppressed for failure to give notice of consular notification rights. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000). The Ninth Circuit's latest decision guideposts this court: treaty violations, *jus cogens* violations, and outrageous governmental misconduct all warrant dismissal. *See Anderson*, 472 F.3d 662.

The Vienna Convention on the Law of Treaties defines *jus cogens* as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992) (citing Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679.)

2. *This Court Obtained Personal Jurisdiction Over Struckman Through Violations of Struckman's Right to Habeas Corpus, Right to Counsel, Due Process and Access to the Courts.*

"A lawyer for Struckman came sniffing around police headquarters this morning. The race has begun." (R. 433, p. 153:2-4.)

In order to give this court personal jurisdiction over Struckman, agents of the United States, by the evidence found by the court, showed contempt for the law, lied and misrepresented the judicial process of the federal courts, and worked to circumvent the rights to counsel, due process and the courts. The court found the "repercussions" of this misconduct would have been different had the court not concluded a Panama court had already ruled on the legality of Struckman's removal from the country. The problem was the Panama courts made no such ruling, expressly holding they could not make such a ruling due to Struckman's physical removal from the country before the hearing could be held. The undisputed testimony at the evidentiary hearing from multiple Panama experts evidenced the same.

The critical misapprehension of the district court was the court's misreading of a Panama court opinion. Struckman's counsel filed a habeas corpus action before the Panama courts while Struckman was present in Panama. The United States Department of Justice and the State Department knew Struckman had counsel, though the prosecutor in this case initially denied on the

stand knowing this information despite a contemporaneous facsimile documenting otherwise. The exhibited testimony from internal government documents demonstrated knowing government complicity in circumventing Struckman's access to counsel and the courts, where the lies of the United States would be exposed and this court's personal jurisdiction over Struckman precluded.

After learning of Struckman's seizure, Struckman's counsel filed a habeas corpus action in Panama. Before the court could hear the matter, Struckman was removed from the country. The Panama court recited the various legal positions of the parties, including the government's pronouncement that the removal of Struckman was pursuant to a prior administrative order. The court noted it could not rule on whether the order was valid or whether Struckman was legally removed from the country due to the fact of his removal prior to the court hearing. Yet, the district court in this case concluded "the decisions of the Supreme Court of Justice of the Republic of Panama" concluded the "deportation" was not "illegal." The court concluded the court of Panama determined the deportation order was "valid" and "properly issued" based on this misreading of the Panama court opinion. The court noted but for its conclusion on this subject, "the repercussions of RSO O'Brien' may have been different," e.g. dismissal of the charges. Resorting to deceit and fraud to illicitly obtain jurisdiction over Struckman mandated dismissal in its own right. *See Anderson*, 472 F.3d at 666.

Nor is dismissal an unusual remedy for such violations of the right to counsel. *United States v. Stein*, 495 F.Supp.2d 390 (S.D.N.Y. 2007). *See United States v. Marshank*, 777 F.Supp. 1507 (N.D. Cal. 1991); *see also United States v. Levy*, 577 F.2d 200 (3rd Cir. 1978) (A knowing undermining of the attorney-client relationship compelled dismissal where prejudicial to the defendant). When mere "deliberate indifference" to the rights of the defendant "improperly impinged" on the "right to fairness in the criminal process," then a sister district court ordered dismissal in the KPMG case. *Stein*, 495 F.Supp.2d at 412-15. An indictment "must be dismissed" for violation of the right to counsel. *Id.* at 422.

Deliberate indifference to the right of counsel – to win the "habeas grabbus race" – is precisely the kind of governmental misconduct "intolerable in a society that holds itself out to the world as a paragon of justice. The responsibility for the dismissal of this indictment . . . lies with the government." *Id.*, at 427-28. If mere financial withdrawal of the means of supporting high-priced counsel compels dismissal, then a systematic, well-planned effort, far and beyond the deliberate indifference found in *Stein*, warrants dismissal here, where the prejudice is crystal clear and beyond all reasonable doubt. If Struckman had access to his retained Panamanian counsel, or his counsel had not been deceived and kept in the dark, then Struckman is not removed from Panama and does not stand trial today. Put simply, the only way to restore Struckman to the *status quo ante* – the position he

would have been in but for the governmental misconduct – is Struckman not standing trial on these charges and returned to Panama.

As *Manzo* recognized, the Supreme Court must take sufficient action to remedy a due process violation "that would have wiped the state clean" in order to restore the defendant to the position he would have occupied "had due process of law been accorded to him in the first place." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). No due process was afforded Struckman to test the lawfulness of his arrest, detention, and removal from the country, so the government's unfounded speculation that their lies and deceit had no prejudicial effect runs afoul of the very principle identified in *Manzo*: only vacating the effects of what was done and restoring the defendant to the *status quo ante* can remedy the violation.

C. Habbeas Grabbus Part C: Deceit, Lies and Fraud Upon A Foreign Government By the United States Officials Charged with Enforcing A Federal District Court Judicial Process in a Foreign Land, In Complicity with the High Ranking Officials of the Department of State and the Department of Justice.

1. *Obtaining Personal Jurisdiction Through Fraud and Deceit Compels Supervisory Dismissal.*

This court has always recognized it will not allow personal jurisdiction through fraudulent means. *See Andonian*, 29 F.3d at 1438 (recognizing that fraudulent evidence or false statements to obtain an arrest and transfer could nullify personal jurisdiction, but finding no such evidence in that case); *see also Commercial Mut. Acc. Co. v. Davis*, 213 U.S. 245, 256 (1909) ("It is undoubtedly

true that if a person is induced by artifice or fraud to come within the jurisdiction of the court for the purpose of procuring service of process, such fraudulent abuse of the writ will be set aside upon proper showing.") Jurisdiction secured by fraud has always compelled dismissal. *See In re Johnson*, 167 U.S. 120 (1896); *see also Fitzgerald Construction Co. v. Fitzgerald*, 137 U.S. 98 (1890). The "use of trickery or deceit" by governmental agents "is a due process violation" which equally compels dismissal when the target is to undermine the defendant's rights. *United States v. Stringer*, 408 F.Supp.2d 1083, 1088 (D. Or. 2006). The "willful disregard of our extradition law" would be "outrageous conduct" compelling dismissal to enforce the rule of law. *Sneed*, 872 S.W.2d at 937; *see also Anderson*, 472 F.3d 662. Flagrantly illegal law enforcement practices can constitute such misconduct. *See United States v. Archer*, 486 F.2d 670, 674-75 (2nd Cir. 1973).

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would

bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Matta-Ballesteros, 71 F.3d at 775 (Noonan, J.) (concurring).

2. *The District Court Erred in Concluding it Could Not Dismiss the Charges Without a Constitutional or Statutory Violation.*

> This court has inherent supervisory powers to dismiss prosecutions in order to deter illegal conduct. The "illegality" deterred by exercise of our supervisory power need not be related to a constitutional or statutory violation.... *McNabb's* pre-*Miranda* posture provides helpful guidance to this post-*Alvarez-Machain* case because it teaches us that even where the Constitution does not explicitly prohibit certain reprehensible acts, federal courts exercising their supervisory powers must establish and maintain civilized standards.

Matta-Ballesteros, 71 F.3d at 774 (Noonan, J.) (concurring).

3. *The Fraudulent Method of Vesting Personal Jurisdiction in a Federal District Court Through an International Campaign of Deceit Compelled a Remedy.*

In order to accomplish this fraudulent method of personal jurisdiction, the agents of the government awaited a change in law enforcement personnel in Panama because earlier law enforcement personally had uncovered there was no such conviction and demanded strict compliance with the lawful method of deportation and extradition. Upon multiple lies to multiple law enforcement officers, United States officials then failed to perform their duties to protect Struckman's rights, including his right to counsel, and lied to Panama officials about Struckman's waiver of rights, to evade judicial scrutiny of their conduct.

The expedited transfer and transport of Struckman out of Panama prevented the Panama courts from investigating and uncovering the truth of what transpired.

The pervasive pattern of deception and fraud by our law enforcement officers domestically and overseas, the "lies," the "less than credible" testimony, the "contempt" for some of our most sacred rights and law cannot comport with civilized standards of justice and decency enforced in our hallowed courts of law if our courts of justice are to remain hallowed courts of law and justice. Dismissal, however "drastic," is the remedy required whenever it is "otherwise impossible to restore a criminal defendant to the position he would have occupied but for the misconduct." *Stein*, 495 F.Supp.2d at 419. Until the agents of the United States began their campaign of official "lies," "misrepresented" court orders from our own federal courts, and violated Struckman's rights to counsel, due process and access to courts, the district court would not have obtained personal jurisdiction over Struckman.

II. WHEN THE PURPOSE OF GOVERNMNT MISCONDUCT – INCLUDING ILLEGAL INVESTIGATIONS, LAUNDERED ILLICITLY OBTAINED INFORMATION THROUGH BOGUS INFORMANTS, ROUTINE DISCOVERY ABUSES AND EVIDENT PERJURY – IS TO PROCURE THE PROSECUTION AND PERSONAL JURISDICTION OF THE DEFENDANT, MERE SUPPRESSION OF UNLIKELY EVIDENCE AT TRIAL CANNOT SUFFICE AS A REMEDY.

The aggregate misconduct warranted dismissal as the requisite and only effective remedy. *See United States v. Orman*, 417 F.Supp. 1126 (D.C. Col. 1976)

(illicit surveillance, particularly when such surveillance accessed a defendant's defense strategy, compelled dismissal); *see also United States v. Brodson*, 528 F.2d 214 (7th Cir. 1976) (use of illicit surveillance compelled dismissal of indictment). The "use of trickery or deceit" by governmental agents "is a due process violation" which equally compels dismissal when the target is to undermine the defendant's rights. *United States v. Stringer*, 408 F.Supp.2d 1083, 1088 (D. Or. 2006).

> This court has inherent supervisory powers to dismiss prosecutions in order to deter illegal conduct. The "illegality" deterred by exercise of our supervisory power need not be related to a constitutional or statutory violation . . . . *McNabb's* pre-*Miranda* posture provides helpful guidance to this post-*Alvarez-Machain* case because it teaches us that even where the Constitution does not explicitly prohibit certain reprehensible acts, federal courts exercising their supervisory powers must establish and maintain civilized standards.

Matta-Ballesteros, 71 F.3d at 774 (Noonan, J.) (concurring).

As in *Orman*, the government's use of surveillance here obtained unique previews of Struckman's anticipated defense, with the AI-1/Ted memorandums littered with references to legal strategies for the grand jury and criminal proceedings. Like *Orman*, the United States government employed surveillance, including known surveillance on Struckman's counsel in Panama, the likely source of the unusual information obtained from Panama but attributed to the same ubiquitous brain-damaged Gary Mortiz. The government simply cannot explain how a mentally defective man from Seattle could have such information regarding

Panama events, circumstances, and situations, without any contact with Struckman in Panama, whatsoever. As the *Orman Court* concluded: "there is no way to isolate the prejudice resulting from an eavesdropping activity," and if "the investigating officers and the prosecution know that the most severe conduct which can follow their violation of one of the most valuable rights of a defendant is that they will have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy." *Orman*, 417 F.Supp. at 1137. Since "it is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law," then dismissal only is the appropriate remedy for such misconduct. *Id.*

The ubiquitous use of laundering illicitly obtained information in violation of Constitutional protections through bogus "confidential" informants is so socially engrained, it played a feature role on the popular HBO Series "The Wire." Repeatedly, the officers portrayed on the show, crafted by a long-time Baltimore journalist, celebrate the easy use of a mythical confidential informant to launder illegally obtained information. *See* http://www.hbo.com/thewire/episode/season5/episode55.shtml.

The principal problem becomes when the illicitly-procured and falsely-attributed information, in violation of Brady rights, privacy rights, and

relationships with counsel, is used to obtain the indictment or personal jurisdiction over the defendant rather than for evidence at trial, as was present here. In such an instance, excluding evidence at trial provides no remedy.

Nor can the government be trusted to discipline their own. Despite the detailed findings of the court, the prosecution and the agencies involved in this case failed to even report the incidents for any form of punishment of any kind of the agents and officials involved in the misconduct. Here, the factual findings of extensive misconduct and pervasive perversion of our criminal justice system stand out for their inadequate and ineffective remedy. Dismissal was the only and most efficacious remedy for such extraordinary and unique misconduct.

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Matta-Ballesteros, 71 F.3d at 775 (Noonan, J.) (concurring).

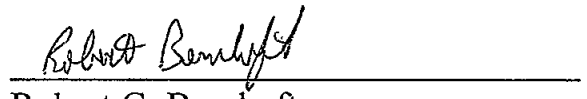
This case cries out for no less.

CONCLUSION

Habbeas grabbus, bogus informants, and secret *quid pro quo* deals with witnesses – all covered up by massive discovery violations – is not, and should not be, the law of this, or any other land. A legendary Haitian proverb observes that: "constitution made of paper; blade made of steel." Let that not be the case in the leading law courts of the world.

Dated at Milwaukee, Wisconsin, on this the 9th day of December, 2008.

THE BERNHOFT LAW FIRM, S.C.
Attorneys for the Defendant-Appellant

By: 

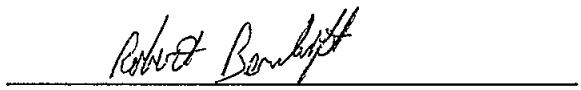
Robert G. Bernhoft
Wis. State Bar No. 1032777

207 East Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333 telephone
(414) 276-2822 facsimile
rgbernhoft@bernhoftlaw.com

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. R. 32(a)(7)(B) because this brief contains 13,999 words, excluding the parts of the brief not mentioned in Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportional spaced typeface in Times New Roman font, 14-point for text and footnotes.



Robert G. Bernhoft, Esquire
Counsel for the Plaintiff – Appellant

Dated: December 9, 2008

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was sent to the Respondents, by sending a copy to its attorney of record, by Federal Express or U.S. Mail next-day delivery pre-paid, to the following addresses:

Alan Hechtkopf, Esq.
U.S. Dept. of Justice Tax Division/Appellate Section
P.O. Box 502
Washington, D.C. 20044
(202) 514-5396 telephone
(202) 305-8687 facsimile

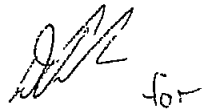
Larry J. Wszalek, Esq.
U.S. Dept. of Justice Tax Division/Appellate Section
P.O. Box 502
Washington, D.C. 20044
(202) 616-3866 telephone
(202) 514-9623 facsimile

Helen J. Brunner, Asst. U.S. Attorney
700 Stewart Street
Seattle, WA 98101
(206) 553-7970 telephone
(206) 553-0755 facsimile

Gregory V. Davis, Esq.
U.S. Dept. of Justice Tax Division/Appellate Section
P.O. Box 502
Washington, D.C. 20044
(202) 247-0131 telephone
(202) 305-8687 facsimile

Michael J. Watling, Esq.
U.S. Dept. of Justice Special Litigation Section
Room 7025
601 D. Street NW
Washington D.C. 20004

Dated: December 9, 2008



Robert G. Bernhoft