David Hinkson
08795-023 3-B
United States Penitentiary McCreary
P.O. Box 3000
Pine Knot, KY 42635

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Forney, TX 75126
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75126-208888

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4-16-2012

Affidavit of Wesley W. Hoyt

State of Idaho)
ss.
County of Idaho)

I, Wesley W. Hoyt, the Affiant, a resident of 165 Deer Field Dr., Clearwater, Idaho 83552, County, Idaho, being over the age of 18 years and competent to testify, according to my own personal knowledge, upon oath, state under penalty of perjury pursuant to 28 USC §1746 as follows:

1. I am an attorney licensed to practice law in the States of Idaho and Colorado, having been first admitted in 1972. I was one of the attorneys of record representing David R. Hinkson in the following Federal District Court cases in the District of Idaho: 02-cr-145-RCT (the "Tax Case") and 04-cr-127-RCT (the "Solicitation Case").

2. My co-counsel in 04-cr-127-RCT, attorney Thomas Nolan, of 600 University Ave., Palo Alto, California 94301 was not admitted to practice in Idaho. For him to practice in this court he needed an Idaho attorney to provide a *pro hac vice* admission for him.

3. Mr. Nolan was retained by Mr. Hinkson in November 2004 and we agreed that a primary objective was to obtain the military record of Elven Joe Swisher, a government's informant. Swisher had attached himself to WaterOz, Mr. Hinkson's business and found a way to profit from the association providing laboratory testing for the products starting in 2000. By 2002, Swisher was billing and receiving between $2,000 and $3,000 per month from WaterOz for testing its products. For WaterOz, product testing was essential as it ensured that the mineral content of the products matched the representations on the labels; compliance with the "branding" requirements of the law of such products was enforced by the FDA. In a 42 count Indictment which was issued in July 2002 in the Tax Case, but held for service until November 21, 2002, among other thing, there were counts alleging misbranding of Hinkson's WaterOz products. When that Indictment was served, Mr. Hinkson became aware that his products had been tested by an independent lab and found to be substantially less than the labels provided.

4. Background information had already been obtained on Swisher which included hundreds of pages of deposition testimony from other Swisher cases in 1996 to 1999 where he was accused of defrauding California doctors and other investors in a scam related to his gold mine and his purported secret gold processing formula. There also was the court file related to Swisher's 1980 prosecution for sexual assault of all three of his daughters when under 10 years old.

5. In November 2004, a nationally known investigator was hired to obtain Swisher's military record and together, we worked on locating that file. As it turned out, the Swisher military file could not be obtained as it had been sequestered by the Commandant's office of the US Navy and Marine Corps in Washington D.C. to facilitate a fraud investigation to determine if Swisher's claims of Korean War Era combat heroism were true.

6. Swisher, in order to obtain a financial benefit from the VA, claimed that he was a wounded and decorated combat hero. The specific allegation by Swisher was that he was in the Korean War, but when it was pointed out that his birthdate proved he was 13 when the Korean conflict started and 16 when it ended, the story was not believable. Swisher modified his story by claiming that he was wounded in a post Korean War secret mission as a member of an expeditionary force whose assignment it was to liberate prisoners of war held in secret prison camps in North Korea. Swisher claimed to have received multiple medals and awards for heroism but, because of the secret nature of the mission, he had not been allowed to talk about it and the fact of the awards and the underlying mission had been kept top secret by the military; hence, he claimed, he had been deprived of VA benefits.

7. The investigation by the Commandant's Office of the USMC ended with the report of a Colonel Dowling issued December 30, 2004. The conclusion was that all of Swisher's claims i.e., claims of combat, stories of having been wounded in action, being decorated for heroism and being entitled to VA medical benefits was a total fraud based on the forgery of his US military discharge document, a form DD-214.

8. Trial started January 10, 2005 and Swisher testified on January 14, 2005. Investigative efforts had not been able to locate his military file by that date because, as it turned out, it was being held in the Commandant's office. In his testimony, Swisher claimed under oath that the above items of combat heroism and awards were true and that the forged DD-214 was an authentic US Government document. Swisher even perjured himself to state that the copy held in his hand had been certified by the Commandant's Office of the US Marine Corps, which was not true, the certification came from the Idaho County, Idaho recorder stating that such document had been previously been recorded in that county.

9. The record arrived in the trial court several days later after one of the record keepers in the office of the National Records Center had written a letter explaining that Swisher's file did not contain any evidence that he had received medals. Swishers file showed that he had joined the Marines after the Korean conflict ended and that during his tour of service he had not been in combat or wounded but he had been court marshaled and reduced in rank from a corporal to a private first class. Before his discharge, he was injured in a motor vehicle accident in Bremerton, Washington and apparently was hospitalized for a short time. He did not acquire any VA benefits from this injury or from his military service.

10. By June 2002, some 45 years after his discharge from the Marine Corps, Swisher suffered a massive heart attack and almost died according to his and his wife's account. He received treatment in the VA hospital, Spokane, Washington. But, since he had not previously had any veteran's benefits granted by the VA, his right to receive free medical attention came into question. In order to provide for payment of his medical bills, he needed a story to explain why he was, so late in life, seeking benefits. It was not clear why, if he had been entitled to benefits since the late 1950s, he had not used them.

11. Swisher's medical bills were extremely large (over $100,000, see judgment in Case No. 07-cr-182-BLW) from his heart attack when he was near death and in a coma and in the ICU or otherwise bedridden for a large part of his stay throughout the summer of 2002. By September 15, 2002 he had open heart surgery to install a pacemaker (see Exhibit A, Affidavit of Swisher) and Swisher was fond of saying he had "died on the table".

12. In order to obtain payment of his medical bills from the VA, Mr. Swisher developed the above mentioned fraud story of a top secret mission and being wounded in combat in North Korea after the war to rescue POWs and the secret nature of the mission was supposedly what kept him from obtaining VA benefits previously. When this was presented to the VA in mid-2004, it was the grandiosity of the tale with all the medals he awarded to himself that first caught the eye of Ben Keeley of the Lewiston, Idaho Office, US Veteran's Administrat-ion. Swisher had even written a book about his purported courageous exploits in Korea from which he borrowed the story line and actual experiences of other decorated servicemen from WWII and the Viet Nam conflict and from movies such as MASH and its follow up TV series. In fact, Swisher's book, "A Marine Remembers", contains many direct quotes from the script of the movie "Sands of Iwo Jima" plagiarized as if those words were original to Swisher. On the list of awards were some of the highest and most prestigious medals the U.S. military has to offer, all spread out on of his forged DD-214 including the Purple Heart, the Bronze Star (twice), Silver Star and the Navy and Marine Corps Commendation Medal which had been created many years after Swisher was discharged from the service.

13. In spite of some of the more obvious mistakes, the VA had conditionally agree to pay Swisher's medical charges because of its internal rules required it to give the benefit of the doubt to veterans, provided there was some reasonable evidence of a valid claim. The VA reserved the right to investigate his claims of wounds, combat heroism, entitlement to military awards pending the investigation by the Commandant's Office of the US Marine Corps.

14. Swisher's background reveals that he concocted a number of extortion schemes against Mr. Hinkson and with each one he threatened, that if he did not get what he wanted, he would testify against Mr. Hinkson who then would spend the rest of his life in

prison. For instance, in a January 3, 2003 phone call to Mr. Hinkson, Swisher's extortion was, in exchange for not testifying in federal court that there was poison in his products, Swisher demanded $800,000 and a one-half interest in Mr. Hinkson's lucrative dietary supplement business known as WaterOz. Swisher had laced a sample of Hinkson's WaterOz potassium with cyanide and when Hinkson immediately turned down that extortion offer, Swisher sent the cyanide laden product to a lab for testing (Exhibits A-11 and A-14). Also, when he did not get what he wanted, the complaint of cyanide in WaterOz products was turned over to the FDA (Exhibit A-12). Because there never was any verification of that claim, the FDA did not act on it and no other such complaint has ever surfaced nor has any product user ever been harmed. Also, a few days after being turned down on the first extortion attempt, Swisher developed another extortion scheme by claiming that Hinkson had agreed to purchase from Swisher for $12,000 an out-of-date Atomic Absorption Machine and claimed Hinkson had agreed to buy it for that price (Exhibit A-10). Further, Swisher fraudulently claimed Hinkson owed him approximately $5,000 in past bills which had been paid by WaterOz (Exhibit A-13). By the summer of 2003 when these bills had not been paid, Swisher again threatened to testify against Hinkson, whom he said would go to prison for the rest of his life if his bills were not paid. In the office of Hinkson's lawyer, Britt Groom, and in front of Gregory Towerton (who later became manager at WaterOz) Swisher claimed that $10,000 was due and if not paid, he would testify and Hinkson would spend the rest of his life in jail (Exhibit A-9). In September 2003, Swisher claimed that on a visit to WaterOz, Mr. Towerton had frisked him, implying physical harm and potentially a lawsuit for damages, but there was no evidence of physical contact. Swisher's pattern had become established, he would make up a story which could result in financial gain to him and he would threaten some serious consequence that involved the legal system.

15. In December 2003, Swisher filed for and obtained a Temporary Restraining Order giving him control over the WaterOz factory by fabricating another story that required a week to unravel before the Idaho County District Court vacated the TRO, returning the control of WaterOz to those whom Mr. Hinkson had designated as his management team. Again, following his pattern, when the TRO was vacated and Swisher did not get what he wanted he escalated his demands and threatened more entanglement in the legal process. This time he demanded: $500,000 cash; 20 acres behind the WaterOz factory; a three-story building; and a Road Patrol road grader. Swisher did not obtain any of these items, but later in the Solicitation Case, he testified that Mr. Hinkson had given all of those items to him as a gesture of friendship.

16. In September 2003 Swisher had managed to have his attorney, Britt Groom, who also was Hinkson's attorney, hire Swisher as Hinkson's expert on dietary supplement products. Swisher testified in federal court at a hearing in mid-September 2003, but, never mentioned to anyone, prosecutors, FBI, IRS or court personnel that he had been solicited to murder federal officials. Swisher was paid $5,000 for that expert testimony.

17. By trying to make it appear that Swisher and Hinkson had a close relationship, it was Swisher's intent to created a plausible story that Hinkson somehow would know of Swisher's personal military career details that Swisher had killed "many, too many" in combat. This then was the link to getting the jury to believe that Hinkson was close enough to his "best friend" Swisher to ask and then beg Swisher to torture-murder Hinkson's supposed enemies and their family members, women and children included.

18. After the November 21, 2002 raid on the WaterOz factory by the FDA and other federal agencies, it was discovered by Mr. Hinkson that the results of his WaterOz product testing as reported by Mr. Swisher for the past two years were bogus. From the evidence, it appeared that Swisher was not performing any testing but rather simply certifying, in writing, that the amount stated on the labels was the amount in the WaterOz liquid mineral product. On occasion, Swisher would send samples of WaterOz products out to be tested by other labs, in an effort to tie his reports to reality, but, Swisher was charging as if he was conducting all testing regularly, which itself involved a separate fraud.

19. According to the Affidavit signed by Mr. Swisher on January 3, 2003, (attached as Exhibit A), he blamed a WaterOz employee, Karl Waterman, alias "Chris Jon Paitreyot" for the low mineral content in products sold by WaterOz, and theorized that Chris had added just enough mineral concentrate to the samples delivered for testing at his Cottonwood, Idaho "laboratory" that the samples proved to be the same as the labeled amount in Swishers reports.

20. Mr. Hinkson maintains would be impossible for anyone to pour the exact amount of concentrate, used with a 1,500 gallon tank, into a 16 Oz bottle of product and come up with the exact label amount every time. With 22 bottles of product to be tested monthly, the possibility of that happening consistently over a two year period, would be statistically impossible.

21. Since that was Swisher's theory, Mr. Hinkson wanted him to put it in writing so he could not change it at another time. According to Mr. Hinkson, it was later that same day, January 3, 2003, after Swisher signed and returned the Affidavit dated January 3, 2003, that he called Mr. Hinkson and made an extortion demand in which he said he wanted $800,000 in cash to be paid by Hinkson and a one-half interest in WaterOz signed over to him or he would testify against Hinkson in Federal Court and as a result, Mr. Hinkson would spend the rest of his life in prison. In the January 3, 2003 extortion incident by Swisher, the threat was based on cyanide in the WaterOz products.

22. Both the extortion demand of January 3, 2003 as well as the demand for payment of Swisher's fraudulent overdue bill made at Britt Groom's office in July 2003 in the presence of Gregory Towerton carried with them the threat that Swisher would testify

against Hinkson in federal court and as a result Hinkson would spend the rest of his life in prison.

23. There is a similarity between the different schemes by Swisher to collect something of value from Mr. Hinkson and the story by Swisher in the Solicitation Case. At first there was the threat to testify about cyanide in Hinkson's product in January 2003, then to testify against Hinkson in July 2003, both of which would, Swisher said, result in life imprisonment so the actual consequence of Swisher's testimony from the Solicitation Case, effectively life in prison, is not far off the mark of his stated goal from two years earlier. Although the reason for the testimony changed, the theme remained constant, it was that Swisher threatened to give fabricated, but very harmful testimony about Mr. Hinkson in federal court. When Mr. Hinkson refused to accept the offer of extortion, Mr. Swisher then, in the case of the cyanide, turned over a false report to the FDA, with no adverse effect on Mr. Hinkson. In the case of the murder-for-hire plot, Mr. Swisher was able to obtain a different result, as shown by the verdict in the Solicitation Case.

24. Mr. Nolan, who acted as lead counsel in the Solicitation Case was totally ineffective in his representation of Mr. Hinkson. Because he was confused about the counts it is no wonder that he did not understood this concept of extortion by Swisher, nor did he present any such evidence in Hinkson's defense.

25. As Mr. Nolan's co-counsel I was totally ineffective in my attempts to represent Mr. Hinkson in the Solicitation Case from lack of criminal trial experience in Federal Court.

26. Mr. Nolan, in his memorandums regarding the Solicitation Case stated that he was always "confused" by this case. (See attached, Exhibit D-1), correspondence from Thomas Nolan of January and February 2005).

27. Mr. Nolan stated in writing that he was confused about the counts, which he could not get straight in his mind during the trial. The trial record shows that Mr. Nolan was confused as to who the witnesses were, what they had to say, and why the testimony of each might be relevant to Mr. Hinkson's defense. For instance, on more than one occasion, Mr. Nolan referred to witness by the wrong name.

28. Mr. Nolan admitted in writing that he was confused about the Dowling Report proving that Swisher's claims as an injured combat veteran from the Korean War Era were bogus and said that he suspected the Gov't had it before Swisher's testimony, but he did not know how to go about proving it. Even though the date received stamp on that Report was January 10, 2005, it was faxed to an undisclosed location on January 13, 2005 and Swisher testified on January 14, 2005. (See attached Exhibit B, copy of the Dowling Report.)

29. Mr. Nolan stated that he believed that there was no investigation of Swisher, when in fact on numerous occasions I asked Mr. Nolan to review the hundreds of pages in my files of Swisher's prior deposition and trial testimony in other cases where he was accused of fraud, including the case involving the TRO and takeover of WaterOz from December 2003 with hearings extended into February 2004. Mr. Nolan refused to review the investigative files containing information regarding Swisher and therefore, was not prepared to examine him when he was called as a witness in the Solicitation case. Mr. Nolan did come to Denver in November 2004 to meet with two investigators and the family of David Hinkson where a case plan was discussed. However, he took no active role in case preparation.

30. Mr. Nolan stated that he believed that there was no investigation of Swisher, when in fact on numerous occasions I asked Mr. Nolan to review the hundreds of pages in my files of Swisher's prior deposition and trial testimony in other cases where he was accused of fraud, including the case involving the TRO and takeover of WaterOz from December 2003 with hearings extended into February 2004. Mr. Nolan refused to review the investigative files containing information regarding Swisher and therefore, was not prepared to examine him when he was called as a witness in the Solicitation case. Mr. Nolan did come to Denver in November 2004 to meet with two investigators and the family of David Hinkson where a case plan was discussed. However, he took no active role in case preparation. Nolan mentions as if it was an important issue that he could not establish a financial interest in WaterOz for either Bellon or Swisher with which to impeach them because neither witness wouldn't admit it on the witness stand. But, although Nolan was told about the Bellon/Swisher takeover of WaterOz by Temporary Restraining Order, attorney Nolan refused to use that highly damaging information, showing the used of force to take what was not theirs, in order to impeach them. Again, Nolan was confused and missed the point that any reasonable attorney would have seen: that both witnesses, conspired to take over WaterOz by the force of a TRO and they succeeded for a short period of time. And that takeover gave them control, which is the same as a financial interest. And they used the takeover and financial interest to steal valuable assets of WaterOz while Mr. Hinkson was in jail and could not defend himself causing permanent damage to the business. There was evidence that Bellon contacted a business broker who would have testified that Bellon called within minutes of the issuance of the TRO and demanded that the broker to find a buyer for WaterOz; which explains how it was that Messers Bellon and Swisher were really going to "save the company" they had gained control over by TRO (i.e., they were going for a quick sale and obviously split the profits while Hinkson was in jail). What more would any attorney who met the standard of objective reasonableness need to know than Swisher and Bellon obtained a controlling interest in WaterOz by force through a TRO and thus had an expectancy of a financial interest in the business (albeit for only a few days until the TRO was vacated).

31. Mr. Nolan's statement that the prior lawsuits against Mr. Swisher was completely inaccurate because those files were available but he refused to look at them. In fact, Mr. Nolan would not ever sit down and look at any of the information I had accumulated in preparation for the defense of Mr. Hinkson, which included several hundred pages of Swishers depositions in three lawsuits from 1996-1999 involving Swisher's fraud of doctors who had invested in a mineral extraction process and/or mine claims; prior grand jury testimony before the indictment in the Tax Case; the documents related to Swisher's prosecution for raping all three of his daughters 1975-1980; the lawsuit papers, transcripts of trial and his deposition from the WaterOz takeover case that started December 3, 2003 and continued into February 2004.

32. Before and during trial, Mr. Nolan did not want to look at anything pertaining to the case against Mr. Hinkson; all he wanted to know on the few occasions that we met was, where was his check, and when he received his check, he left immediately from that meeting, did not take any information with him and never did any analysis other than read the pleadings and a summary of witness information which I had prepared. I was very concerned about the trial because Mr. Nolan would not engage in any pretrial case analysis.

33. While Mr. Nolan says that he felt that neither he nor I fell below "the standard," it was quite obvious to a knowledgeable observer that he and I both were operating below the standard in the community for competent representation of our client and that was based on the fact that Mr. Nolan willfully refuses to look at the file, other than a cursory look at the pleadings and a summary of the investigation of potential witnesses.

34. In aid of the defense of Mr. Hinkson's case, I rented a separate hotel room in Boise a week before trial and created an office where the bed was pulled out. Five tables were set up around the room which had 15 boxes containing all the information about the case which had been gathered. I was ready to give that information to Mr. Nolan chapter and verse, in minute detail if he wanted it, however, when he came to that room once before trial, all he wanted was his check and he left town. I, in consultation with Mr. Nolan, set dates and times for meetings so that Mr. Nolan and I could discuss the case and I could present him with document supporting points that needed to be raised; and each time I was fully prepared and ready to give him a full and detailed briefing. Nolan repeatedly missed those meetings or if he showed up, all Nolan wanted was his check and when he got it, he abruptly left town. I, on one occasion deliberately withheld the installment check due that day in an effort to engage Mr. Nolan in a discussion regarding several points needing his attention as lead counsel. He visibly became angry, demanded the check, refused to engage and stormed out when he received it. The point is that Mr. Nolan did not want to be bothered by any details of this case, such as advance preparation for the cross examination of Mr. Swisher.

35. Look, I know I was operating below the standard and could never have taken this case myself. Nolan, the great, was there to guide the proceedings, except he refused to provide any guidance. He says that opinion (not being below the standard) can be challenged…Yes it should be challenged.

36. Mr. Nolan's criticism about not getting the military record of Mr. Swisher in time to help with the defense of the case was simply not true. It was not learned until mid-January 2005 that the file had been sequestered in the office of the Commandant of the US Marine Corps because a confidential investigation was ongoing. All we knew was that throughout the fall of 2004, as we checked every week with the National Records Center, the file had been checked out by some undisclosed party and we would be notified when it was returned so that it could be subpoenaed.

37. The file was actually returned to the National Records Center about the time that Judge Tallman in the Solicitation Case issued his subpoena for it to be produced in his court room. The defense team had no way to obtain it because it was an arm of the US Government that was sequestering the file and another arm of that Government was prosecuting Mr. Hinkson and pointing the finger at the defense saying, see, you were not diligent, you should have obtain the file and your failure is not our fault. Even the Judge, another arm of that same Government joined in that criticism in his Order Denying the Motion for New Trial and made the same ridiculous assertion that somehow, the defense team was less than diligent for not coming up with Swisher's military record before trial when it was held by the Commandant's Office of the US Marine Corps in charge of the investigation into Swisher's fraud and criminal conduct.

38. After the trial started, and at the time Mr. Swisher testified, the best we could do (without the help of the two investigators who were hired) was to obtain a letter a Mr. Tolbert who stated that Mr. Swisher was not entitled to any awards. Even he said that he did not have the file in hand yet. All of this searching for the Swisher military record was conducted by my office without the help or support of Mr. Nolan. Because we were able to come up with the Tolbert letter during trial, we were able to request that the judge to subpoena it.

39. Mr. Nolen did not handle the management of trial issues according to the standard expected of a competent trial lawyer. He did not even meet with Mr. Hinkson, ever.

40. One of the most amazing admissions is that Nolan says he took Swisher's Military file home and then decided not to look at it…what is that? Was that below the standard?

41 Nolan says he could kick himself for not going after Swisher on cross…what is that? Was that below the standard?

42. Nolan implies he made a tactical decision to drop the Motion for Mistrial...what is that? Was that below the standard when he knows, as he said, that Swisher's credibility was the only issue in the case...What is that?

43. Nolan makes a big deal about the putative financial interest that either Bellon or Swisher had in WaterOz which he had trouble proving because they wouldn't admit it. But, he misses the point, both of them conspired to take over WaterOz and they succeeded for a short period of time. That takeover gave them control, which is the same as a financial interest. Bellon even had a business broker who would testify that Bellon called him 5 minutes after the TRO was issued and asked the broker to find a buyer for WaterOz. So that's how the dirty bastards were going to save the company, they were going to sell it and split the profits while David was in jail. What more do you need to know than Swisher and Bellon had a financial interest or at least an expectancy? They conspired to steal WaterOz and almost got away with it had it not been for....

44. Nolan was completely incompetent on this case, nothing he did was tactical, it was all incompetence from neglect and I would so testify.

Further Affiant sayeth naught.

I declare under penalty of perjury that the foregoing is correct this 16th day of April 2012.

Wesley W. Hoyt

NORTHWEST ANALYTICAL, INC.
Route 1, Box 166, Cottonwood, ID 83522
208-962-7190/Fax 208-962-5114

Billed To	Address	Invoice No.	Date
Water Oz	Route 1, Grangeville, Idaho 83530	41679	05/27/03

Attention: Geri
Rich
Brit

Previous Balance as of February 14, 2003, Invoice No. 41620	$ 2,297.00
Payment of April 28, 2003	$ 738.00
Balance Due from Invoice No. 41620	$ 1,559.00
Previous Balance as of March 28, 2003, Invoice No. 41654	$ 3,936.00
TOTAL DUE This Invoice	$ 5,495.00

This Debt is long overdue! If a payment is not made immediately, we will regrettably be forced to take other action.

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EXHIBIT
tabbies

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