CASE NO: 12-35824

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

US District court Civil Action 2012-cv-196-RCT
from
US District court Criminal Action 1:04-cr-00127-RCT-1

UNITED STATES OF AMERICA,
Respondent/Plaintiff.

vs

DAVID R. HINKSON,
Petitioner/Defendant

APPLICATION FOR CERTIFICATE OF APPEALABILITY

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TABLE OF CONTENTS

General Index

Table of Authorities
Federal:

Federal Statutes:

Constitutional References:

PRELIMINARY STATEMENT

COMES NOW DAVID R. HINKSON, Defendant in the above styled action, hereinafter referred to as "Defendant," or "Hinkson" by and through his own hand, and files this Application for Certificate of Appealability. Defendant requests that the Court issue a Certificate of Appealability pursuant to Section 102 of the Anti-Terrorism and Effective Death Penalty Act of 1996. Defendant hereby certifies that he has demonstrated that the issues he has raised in his §2255 motion are debatable among jurists of reason, that a Court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. The definitive and controlling case in this regard is *Miller-El v. Cockrell*, 537 U. S. 322 (2003) wherein the US Supreme Court held that:

> "Before a prisoner seeking post-conviction relief under §2254 may appeal a district court's denial or dismissal of the petition, he must first seek and obtain a COA from a circuit justice or judge, §2253. This is a jurisdictional prerequisite. A COA will issue only if §2253's requirements have been satisfied. When a habeas applicant seeks a COA, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. E.g., *Slack,* 529 U. S., at 481.[1] This inquiry does not require full consideration of the factual or legal bases supporting the claims. Consistent with this Court's precedent and the statutory text, the prisoner need only demonstrate 'a substantial showing of the denial of a constitutional right.' §2253(c)(2). He satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate

[1] *Slack v McDaniel,* 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)

> to deserve encouragement to proceed further. E.g., id., at 484. He need not convince a judge, or, for that matter, three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, ibid. Pp. 335-338."

Furthermore, the Defendant asserts that he has been denied substantial constitutional rights as further defined below.

JURISDICTION STATEMENT

Defendant timely filed a motion for relief under 28 U.S.C. §2255, the government filed it's response out of time (procedurally defaulted), Hinkson filed a timely reply, and on 8/28/2012 the US District Court for the District of Idaho filed its denial of Defendant's 2255 Motion, simultaneously denied a Certificate of Appealability; Memorandum Decision and Order, Docket #326 ("Order Denying"); and on October 9, 2012 Hinkson filed his Notice of Appeal with the District Court of Idaho. Pursuant to the Rules Governing Section 2255 Motions, Rule 11(b) and Fed.R. Appellate Procedure 4(a)(1)(B)(i), this appeal is timely taken. This request for a Certificate of Appealability arises from that denial. Defendant requests a Certificate of Appealability to proceed forward with this appeal and for the attached Notice of Appeal to be provided to the Ninth Circuit Court of Appeals. The Appellate Court has jurisdiction pursuant to 28 U.S.C. §1291, §2253 and §2255.

In this pleading, the MEMORANDUM AND DECISION ORDER which

denied Mr. Hinkson's 2255, trial court Docket #326 is known as "Order Denying"; A Certificate of Appealability is known as "COA"; Ineffective Assistance of Counsel is abbreviated "IAC"; and Mr. Hinkson's "MOTION UNDER 28 U.S.C. §2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY" is known as the "2255 Motion". There were two appeals in the Hinkson matter the first, *U.S. v. Hinkson,* 526 F.3d 1262 (9th Cir., 2008), will be referred to as "The 1st Hinkson Appeal" and the second one, *US v David R. Hinkson,* 585 F.3d 1247 (2009), as either "The 2nd Hinkson Appeal" or "the *en banc* opinion".

STANDARD OF REVIEW IN GRANTING

A CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. Section 2253(c)(I)(B) of the Anti-Terrorism and Effective Death Penalty Act:

> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).
> Paragraph (1) states that:
>
> > "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals...."

Prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act referred to above, now referred to as a Certificate of Appealability (C.O.A.),

this Act was known as a Certificate of Probable Cause (C.P.C.). While there are technical differences between the two, the standard for issuing a C.O.A. is the same as that for issuing a C.P.C. *Blankenship v. Johnson,* 106 F.3d 1202, 1203 n.2 (5th Cir. 1997). To obtain a C.O.A. the Defendant must make a "substantial showing of the denial of a federal right." *Barefoot v. Estelle,* 463 U.S. 880 (1983). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-EI v. Cockrell, 537 U.S. 322, 338 (2003); Stonebarger v. Williams (9th Cir., 2011)*(issuing a certificate of appealability if the Applicant has made a substantial showing of the denial of a constitutional right).

In determining whether the Defendant has demonstrated a substantial showing of a denial of a constitutional right, this Court need only conduct "an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-EI v. Cockrell, 537 U.S. 322, 336 (2003).* In this instance, the Defendant asserts that he has made a substantial showing of a denial of a constitutional rights and that reasonable jurists would find the trial court's assessment debatable or wrong. *Miller-EI v. Cockrell, 537 U.S. 322, 338 (2003).* In fact at least six (6) Ninth Circuit Judges have already found the trial court's

rulings to be wrong.[2] The Defendant further asserts that the issues outlined below demonstrate a denial of constitutional rights, and are herein stated pursuant to paragraph (3) of 28 U.S.C. §2253(c)(l)(B):

BRIEF STATEMENT OF ISSUES

ISSUE I:

Use of perjured testimony:

Did the trial judge, in denying Hinkson's 2255 err by ignoring controlling Ninth Circuit law and controlling US Supreme Court law regarding the use of perjured testimony and it's influence on juror verdicts? [3]

Hinkson's 2255 motion raised several issues, one of which was the fact that the only witness which the jury placed any credibility in, Elven J. Swisher, lied on the witness stand by testifying to his alleged (but false) military combat record, thereby making himself out to be a highly credible witness in the minds of the jurors. The trial judge erred by insisting on three things:

1) That evidence of Swisher's perjury was cumulative and non-probative;

2) That Swisher's lies were not known to the court or the government,

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[2] In *U.S. v. Hinkson,* 526 F.3d 1262 (9th Cir., 2008), two (2) of the 3 assigned judges found for Hinkson and in *US v David R. Hinkson,* 585 F.3d 1247 (2009), four (4) of the assigned judges found for Hinkson.

[3] Ignoring controlling precedence is a denial of due process under both the 5th and 14th Amendments to the US Constitution.

but rather that the defense knew of these lies and did not follow-through in an effective manner to expose this within the narrow confines of the court's evidentiary rulings regarding this matter; and

3) That Swisher's lies were of no import because it wasn't what he told they jury that mattered, but rather that it was what Hinkson believed about Swisher's military experiences that mattered.

Not any one of the foregoing is accurate from either a factual (item 2) or legal (items 1 and 3) standpoint. Rather than merely re-argue items 1 and 2 above,[4] Mr. Hinkson hereby submits that the most grievous error committed [5] is that the trial court, by asserting that Swisher's lies to the jury were not really important because it was what the defendant believed about Swisher, not how or what Swisher's perjury might have influenced the jury, stands in stark and sole contradiction to years of controlling precedence in this Circuit and in the US States Supreme Court.[6]

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[4] The argument regarding these matters is well documented in previous pleadings related to the instant 2255 proceeding and they are fully incorporated herein by this reference.

[5] This error is one which mandates the relief Mr. Hinkson sought in his 2255 motion.

[6] When the only witness the government has on the charge, came before the jury with the express purpose of lying to them, and showing them forged documents, can't possibly be an appropriate or correct standard for a fair trial." – Dennis Riordan, former counsel for David Hinkson

ISSUE 2:

Jurisdiction:

Mr. Hinkson argued and briefed, extensively and quite cogently, the problem the jurisdictional nexus brings to his case. The trial judge denied this issue on the grounds that there is no jurisdictional nexus in the Hinkson matter, ruling that Congress was legislating (via 18 U.S.C. §1114) without regard to the geographical location, and that the charging statute, section 1114, can be judicially bifurcated [7] from the specifically imbedded 18 U.S.C. §1113, without regard to 20 plus decades of American jurisprudence regarding statutory construction.

A failure by the trial court here is error which rises to the very top of Constitutional violations as being tried on a charge for which the government lacked jurisdiction to indict is a gross violation of Mr. Hinkson's due process rights under the 5th Amendment.

ISSUE 3:

Ineffective Assistance of Counsel ("IAC"):

Mr. Hinkson raised a number of points regarding his deprivation of

[7] "Hinkson's attempt to graft the jurisdictional element from §§ 1111–13 onto § 1114 is unavailing. Section 1114 incorporates only the penalties from these sections." – Order Denying at pg 37.

Constitutionally protected right to effective assistance of counsel. The trial judge denied that Hinkson had received Constitutionally defective assistance of counsel,[8] primarily for the reason that counsel had extensively questioned Mr. Swisher and the results of his cross-examination had "thoroughly discredited" that witness.[9] Order Denying at pg 27. The trial judge incorrectly characterized the results of the alleged impeachment of Swisher as having created a thoroughly discredited witness. If that was an actual fact, how then did the jury find him so credible that they voted to convict based on his testimony alone and found completely un-credible the testimony of others and did not vote to convict on their allegations?

ISSUE 4:

Did the trial court err in denying Hinkson's claim of improper contact between the government's star witness and the trial judge just prior to the witness testifying?

The issue of the ex parte, unauthorized, illegal, and disqualifying meeting between Judge Tallman and the government witness, Swisher, is additional

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[8] The IAC denial begins on page 22 of the Order Denying.

[9] OPINION DENYING AT PAGE 27: "Memorandum in Support of Ground Four at 3, Hinkson has provided no explanation of how that likely inadmissible evidence would help further discredit an already thoroughly impeached witness."

grounds proving that Mr. Hinkson did not get a Constitutionally required fair and unbiased trial or trial judge. The reference is to a meeting which took place BEFORE (AND JUST moments BEFORE) SWISHER WAS TO TESTIFY and was not denied by either government or Judge Tallman, but rather both attempted to justify as if it was a regular, ordinary, or meaningless occurrence.

This error is not merely unethical behavior – it is that of course – but it demonstrates the lack of a fair and impartial tribunal before which Mr. Hinkson could have otherwise presented his case – a complete failure of Constitutionally required due process.

> "Due process of law actually stretches back to the year 1215, when the great barons of England extracted an admission from their king that his powers over the citizenry were not unlimited but instead were limited by fundamental principles of fairness and justice. Included among the restrictions on power to which King John acceded in the Magna Carta — the Great Charter — was a prohibition against the exercise of arbitrary seizure of people or their property by government officials:
>
> > "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land." — Quoted from *The Bill of Rights: Due Process of Law*, by Jacob G. Hornberger. [10]

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[10] Jacob G. Hornberger is founder and president of The Future of Freedom Foundation. He was born and raised in Laredo, Texas, and received his B.A. in economics from Virginia Military Institute and his law degree from the University of Texas. He was a trial attorney for twelve years in Texas. He also was an adjunct professor at the University of Dallas, where he taught law and economics. In 1987, Mr. Hornberger left the practice of law to become director (continued...)

Nothing in the nearly 800 years since then has changed in this most fundamental precept of justice here in America.

SUMMARY OF ARGUMENT IN SUPPORT OF GRANTING A CERTIFICATE OF APPEALABILITY

ARGUMENT RE ISSUE 1 – PERJURED TESTIMONY:

What is at issue here is not whether Hinkson believed the lies told by Swisher, ***what is at issue here is what the jury believed*** from Swisher's testimony – when **Swisher lied to the jury.** That he lied to Hinkson is of minimal importance, if any at all. Swisher lied to the jury and the government assisted him by failing to inform them of the perjury when it knew perfectly well that his testimony was peppered with lies designed to promote his credibility by creating a false image of himself as an American combat hero; A man who supposedly served his country in battle, unselfishly, at great risk to his own life, when in fact, this heroic image was a lie and when in fact the exact opposite was true; his 2008 conviction proved he was a coward, convicted and guilty of stealing valor from those who had earned the right to make such claims, using forgery, fraud and perjury to steal nearly two hundred thousand dollars in

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[10] (...continued)
of programs at The Foundation for Economic Education in Irvington-on-Hudson, New York, publisher of *The Freeman*.

government funding from other veterans and the taxpayers.

In other words, either Swisher was a credible witness whom the jury had a right to believe, or he was a lying witness, self-clothed with a false persona of credibility that belonged to real combat heroes? We now know that he was not and we know, WITHOUT having to speculate that at least one juror would not have convicted Hinkson had he known that Swisher was a perjurer. Affidavit of Juror Casey dated February 24, 2005 and attached as EXHIBIT A-8 to Defendant's 2255 Motion, incorporated herein by this reference.

No admonition or instruction from the bench could un-ring the bell which Swisher tolled with his lies about his military record and by waiving a supposed (but forged) certified copy of his DD-214 around in front of the jury. Besides, the instruction to disregard was not an attempt to strike all the testimony of Swisher's military experience from the record, to the contrary it was an instruction to disregard testimony about his alleged Purple Heart; an instruction woefully inadequate to address the broader prejudice to Hinkson, because Swisher's military heroism permeated the prosecutions case. The trial court, in denying Mr. Hinkson's 2255 opined: "With the concurrence of the defense, the Court instructed the jury to disregard Swisher's entire testimony regarding his Purple Heart. It was stricken from the record. Tr. 1131–32" – Order Denying 2255 at page 8. But the exact words used to the jury were:

> "Ladies and gentlemen, it's been a long day; and I now realize that I made a mistake in allowing the questioning with regard to the Purple Heart Medal. So I am going to instruct you to disregard completely all of Mr. Swisher's testimony with regard to that military commendation. You are certainly entitled to consider all of the rest of his testimony. Just everything from where I asked [defense counsel] to re-open, please strike that from your minds; and you are not to consider it as evidence in the case."

There was in fact considerable testimony[11] from Swisher about his military and combat experiences, about shooting and always hitting his targets. All this talk inextricably connected for the jury the man on the stand to an idyllic figure of a "super-hero."

Rebuttal evidence in the form of Swisher's conviction for forgery and perjury based on exactly the same misrepresentations to the VA in 2004 would not be known for three years after the 2005 Hinkson trial. Such testimony was elicited by the prosecution and was foundational to the notion that Swisher's other testimony about being solicited as a hitman by Hinkson was also credible. Not one word of any of this other testimony about his military and combat record was ordered stricken nor was the jury told to disregard it.

INDEED, the prosecution used Swisher's perjured testimony during it's closing arguments to the jury, in full knowledge that they were compounding the perjury by failing to tell the jury the truth about Swisher's false combat and

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[11] See the *en banc* opinion in the Hinkson matter, *US v. Hinkson,* 585 F. 3d 1247,

military testimony. [12]

The government used Swisher's perjured testimony to bolster it's closing arguments to the jury, with the full knowledge that they were compounding the perjury by failing to tell the jury the truth about Swisher's false combat and military testimony. The prosecution re-affirmed the lies told by Swisher and

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[12] Taken verbatim from *US v. Hinkson,* 585 F. 3d 1247, at 1278-1279:

* * * The government made several references to Swisher's military experience during closing arguments to the jury. The prosecutor began by explaining the significance of Swisher's testimony:

> The judge will further instruct you that the fourth sort of circumstance that you can consider to be strongly corroborative of Mr. Hinkson's intent to solicit murder would be the fact that an accused believed or was aware that the person solicited had previously committed similar offenses.
>
> Mr. Swisher's testimony was powerful. He talked about how Mr. Hinkson understood that Mr. Swisher had been in the military and had killed a lot of people. He was very impressed by that.
>
> In fact, according to Mr. Swisher, Mr. Hinkson asked, "Have you killed somebody?"
>
> And when Mr. Swisher says, "Yes," Mr. Hinkson's response is not, "Wow, that must be terrible," but it is, "How many people have you killed?" He was very impressed by that.
>
> The prosecutor stated that "[a]nother reason Mr. Hinkson liked Joe Swisher and they were friends is Mr. Swisher had been in the Marine Corps. Mr. Hinkson had served in the Navy. Joe Swisher told you they talked about their experiences in the Service." The prosecutor stated later, "Mr. Swisher, I suggest to you a reasonable juror could find, told the truth about the solicitation." At the end of the government's closing, the prosecutor stated that Hinkson "understood Mr. Swisher had a military record and that he had served in combat and killed people. It's the kind of person he thinks will do such a thing."

insured that the jury left the courtroom believing Swisher was a highly-trained combat-experienced killer. The government emphasized Swisher's military background as if it was real. The government insisted that Hinkson's supposed understanding of that background was also real when in fact, the only witness to such alleged understanding was the perjurer they were quoting to the jury.

In his opening statement to the jury on January 11, 2005, the prosecutor stated that Swisher:

> "... was a Marine, a Combat Veteran from Korea during the Korean conflict. He was not adverse to this kind of violent, dangerous activity; but he wanted no part of murdering federal officials." Swisher testified that he had served in the Marine Corps. He testified further that he discussed his military exploits with Hinkson on several occasions and told Hinkson that he had been in combat in Korea as a Marine. According to Swisher, Hinkson asked whether he had ever killed anyone, to which Swisher said he responded, "Too many."

No— it was not what Hinkson supposedly believed about Swisher's violent life that counted — it was what the jury believed that counted in this matter. If Swisher's credibility failed, the government's entire case failed. One very important point to be made here is that the **only evidence** that Hinkson believed the lies of Swisher about his military combat was from Swisher himself – now a known and convicted perjurer.[13] The trial court was wrong as Swisher's

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[13] Importantly, Swisher's perjury conviction is for the very lies he told in the Hinkson trial, not about some other facts or only marginally connected subject matter, but about this very same combat record he used to sway the jury into (continued...)

lies did matter because they go directly to the issue of witness credibility: Swisher was the ONLY WITNESS AGAINST HINKSON REGARDING WHAT HINKSON SAID WHEN HE WAS SUPPOSEDLY SOLICITING MURDER. There was no other so-called evidence submitted to corroborate Swisher's claim that Hinkson asked Swisher to murder federal officials, or anyone else for that matter.

Hinkson was convicted on ONLY the counts of the indictment in which Swisher testified. In all other counts the jury denied conviction. Swisher was the only witness found credible enough to believe; therefore his credibility was of paramount importance – a fact strikingly overlooked by the trial judge in consideration of Hinkson's 2255 motion – an error of law affecting Mr. Hinkson's Constitutional right to due process and a fair trial untainted by government complicity in the perjury by Swisher.

Of considerable importance here is the fact that following Hinkson's conviction, the Ninth Circuit Court of Appeals correctly overturned Hinkson's conviction on the basis that Swisher's testimony was not credible – which of course it wasn't, and isn't. A subsequent *en banc* decision rendered at the request of the government, upheld the conviction on different, AND much

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[13] (...continued)
believing him against David Hinkson.

narrower grounds that the trial court was correct in denying Hinkson's timely motion for a new trial – NOT BECAUSE SWISHER'S TESTIMONY SUDDENLY BECAME CREDIBLE, BUT BECAUSE OF A PROCEDURAL ISSUE REGARDING THIS COURT'S AUTHORITY TO EXAMINE THE TRIAL COURT'S RULING REGARDING AN ORDER DENYING A NEW TRIAL UNDER AN ABUSE OF DISCRETION STANDARD.

The trial court is in error when it declares that the evidence of Swisher's perjury was properly withheld from the jury because it was cumulative. The trial judge concluded that the Miller and Woodring affidavits were cumulative because "the Tolbert letter and the Dowling letter ... established... that the replacement DD-214 was a forgery and that Swisher had lied about receiving military awards." But, the jury was not allowed to see either document and was never told about the Dowling Report which debunked not only the military awards but also the idea that Swisher had served in Korea. As the 1st Hinkson Appeal panel found, the trial court would be on firmer ground in so concluding if it had actually agreed with this statement at the time and not at a later date when it can only be characterized as self-serving. The trial court was very clear at the time in saying precisely the opposite of what it now claims. Indeed, the district court concluded that Swisher's entire personnel file, including the Tolbert and Dowling letters, was insufficient to "establish that the replacement

DD-214 was a forgery and that Swisher had lied about receiving military awards." Given the district court's view of the evidence then available, it is impossible to conclude that the Miller and Woodring affidavits were cumulative.

The trial court keeps insisting that the evidence of Swisher's perjury was "merely impeaching." In its order denying Hinkson's new trial motion, the district court wrote that "the proffered evidence [*i.e.*, the Miller and Woodring affidavits] is impeachment evidence and so is not a valid basis for a new trial." The trial court merely repeats this mantra in denying Mr. Hinkson's 2255 Motion. The 1st Hinkson Appeal panel wrote:

> "It is apparent from this statement that the trial court mistakenly believed that impeachment evidence may never provide the basis for a new trial. Our cases do not so hold. The relevant question under *Harrington* is whether the newly discovered evidence makes it probable that a new trial would result in acquittal. The dissent relies on *Davis* to conclude that the Miller and Woodring affidavits are impeaching and therefore cannot satisfy the fourth requirement of *Harrington*. It relies on the sentence from *Davis*, quoted above, stating that if the impeached witness's testimony was "uncorroborated and provided the only evidence of an essential element of the government's case," impeachment evidence would satisfy *Harrington*. *Davis*, 960 F.2d at 825; diss. at 6183. The dissent writes, "But that circumstance does not describe the evidence here." *Id.* The dissent is wrong." – *U.S. v. Hinkson,* 526 F.3d 1262 (9th Cir., 2008) at page 1286.

The question is whether Hinkson solicited *Swisher* to commit murder within the meaning of §373. On that precise question, Swisher was the only witness. And for that reason alone, the evidence that Swisher had committed perjury in the Hinkson trial is not "merely impeaching." It shows concretely and

materially that Swisher lied about an essential component of the government's case. The distinction is profound, Swisher did not say that he merely led Hinkson to believe a lie about his combat heroism, rather, Swisher told the jury that he was a combat hero and that Hinkson knew it. The trial court is in error, and nothing in the majority's opinion in the 2nd Hinkson Appeal changes that fact.

The 2nd Hinkson appeal[14] (*en banc*) stands in strikingly sole opposition to the holdings and opinions in the US Supreme Court, the circuit courts in other circuits and perhaps most strikingly of all, CONTRARY TO THE OPINIONS IN THIS CIRCUIT; namely the 1st Hinkson appeal, the *Sivak* case, and others. All these cases combine to highlight the inapplicability of the split panel opinion in The 2nd Hinkson Appeal. Not that the opinion in The 2nd Hinkson Appeal is being opposed on the grounds which were reviewed,[15] but it is hereby directly opposed by many other cases which hold that the use of perjured testimony is

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[14] US v. Hinkson, 585 F. 3d 1247 (2009)

[15] The 2nd Hinkson Appeal was a review of the abuse of discretion standard, not about the use of perjured testimony. The court's review was stated by: *BEA, Circuit Judge: Today we consider the familiar "abuse of discretion" standard and how it limits our power as an appellate court to substitute our view of the facts, and the application of those facts to law, for that of the district court."* The overturning of The 1st Hinkson Appeal was based on the grounds stated by Judge Bea; whereas the original Hinkson panel's decision was based on the use of perjured testimony. It is this mixing of grounds for review which has caused the problem we are considering herein.

grounds for reversal that the perjury, had it been known by the jury, would have resulted in a different verdict – even if the possibility is somewhat remote.

The trial judge, in denying Hinkson's 2255 motion, failed to take into consideration any of the controlling Ninth Circuit law, or US Supreme Court precedents[16] on the issue of the relevancy of perjured testimony in securing a conviction. Mr. Hinkson deserves an opportunity to have this issue decided and the issuance of a Certificate of Appealability is necessary.

For example: in the recent *Sivak* case[17] decided a year ago (Sept 2011), this court ruled that:

> "...under *Napue,* [18] a conviction (or capital sentence) is "set aside whenever there is 'any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " *Jackson,* 513 F.3d at 1076 (quoting *Hayes,* 399 F.3d at 985). Although " *Napue* does not create a 'per se rule of reversal[,]' " "[w]e have gone so far as to say that 'if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic.' " Id. (quoting *Hayes,* 399 F.3d at 978, 984)." – *Sivak v. Hardison,* 658 F.3d 898, 912

The 1st Hinkson Appeal panel's opinion demonstrated conclusively that the government knew of the use of the false testimony by Swisher. By the close of Hinkson's trial, the judge, prosecution team, and defense counsel were in

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[16] Just one example on which Mr. Hinkson firmly relies is: *Napue v. People of the State of Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)

[17] *Sivak v. Hardison,* 658 F.3d 898, 11 Cal. Daily Op. Serv. 11516, 2011 Daily Journal D.A.R. 13666 (9th Cir., 2011)

[18] *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)

possession of irrefutable confirmation that Swisher had perpetrated a fraud on the court. His military records by that time had been obtained by subpoena. Only the jury remained ignorant that they had been lied to, because the court barred admission of the records, and the prosecution in closing relied on Swisher's tales of military heroics without warning jurors that its chief witness had lied to them under oath – a fact which denied Hinkson a Sixth Amendment fair trial. Evaluation under a Certificate of Appealability is necessary to restore Hinkson's Constitutional right to a fair trial without perjured testimony.

ARGUMENT RE ISSUE 2 – JURISDICTION:

The sole basis for the trial judge's denial of Mr. Hinkson's 2255 Motion under the jurisdictional claim in his Section 2255 Motion (Claim Five) was that there isn't any jurisdictional statement within the words of Section 1114 of Title 18; asserting that the penalty section of the implicated statute (Section 1113) is divorced from the geographical limitation in that statute because the penalty provision is all that the trial court wants to incorporate.

There is, however, a serious flaw in the inherent reasoning in holding that the court can ignore one portion of the wording of the statute but apply another portion of the statute. The flaw is that nowhere in over 200 years of law making, judicial interpretations, and applications of these, can it be found where a court

is allowed to select some words out of a statute and apply only those words and ignore the remaining statutory language.

In this instant matter, Mr. Hinkson was sentenced on the basis of Section 1114 of Title 18. It is therefore, appropriate subject matter for Mr. Hinkson's 2255 and this request for COA, to question the jurisdiction when a court fails to apply the language of the entire statute. Section 1114 was also one of the two statutes charged in each of the three counts on which he was found guilty – the other being 18 U.S.C. §373. Mr. Hinkson was sentenced pursuant to the statute charged, §1114. But wait! There is no penalty specified by words within section 1114 [19] – because it must be read in conjunction with one of three other statutes. In this matter the statute relied upon was, supposedly,[20] Section 1113. 18 U.S.C. §1113 reads in its entirety as follows:

> * * * Except as provided in section 113 of this title, whoever, within the special maritime and territorial jurisdiction of the United States, attempts to commit murder or manslaughter, shall, for an attempt to commit murder be imprisoned not more than twenty years or fined under this title, or both, and for an attempt to commit manslaughter be imprisoned not more than seven years or fined under this title, or both."

The trial court has simply ignored the fact that Congress intended to

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[19] This absence of a penalty specification is undoubtedly due to the fact that there are three different crimes punishable under §1114; each of which has a different penalty and those are specified in §§1111, 1112 and 1113.

[20] The word "supposedly" is used because there is no actual reference to the penalty statute anywhere in the entire record of the proceedings, pre-trial, trial, or post-trial.

penalize a person who committed the crime of "attempted murder" when he was at the time within the "special maritime and territorial jurisdiction of the United States." But this (Section 1113) WAS THE STATUTE under which a sentence was imposed on Mr. Hinkson. If Congress intended to allow Section 1114 or Section 1113 to apply to a person who committed the crime of attempted murder of a federal official ANYWHERE on planet earth to be imprisoned, it would have written a law which said so. There are any number of laws which have such far reaching jurisdiction, and many, many more which apply anywhere the US Government has jurisdiction – **but not when Congress has explicitly restricted the geographical jurisdiction**. When the words of the statute require that the jurisdiction be limited to a specific geographical location, BEFORE PUNISHMENT CAN BE IMPOSED, then the trial court is not free to declare otherwise, and to do so is gross Constitutional error of due process.

Mr. Hinkson could recite lengthy list of the many dozens of federal cases which control statutory construction, but it would be a waste of paper and of this court's time: it is too well settled, black-letter law, that all the words in a statute must be given effect and that picking and choosing some and ignoring others because they are inconvenient is absolutely verboten. If a defense lawyer tried that trick he'd be quickly and severely chastised by this, or any other court. The same long held prohibition and level of intolerance for bifurcating and selectively

enforcing some language of a statute while ignoring other language, such ignoring the geographical restriction on the ability of a court to inflict punishment must be invoked and enforced herein. The statute says **"whoever"** is within the geographical nexus as stated, can be punished, not whoever the US government decides to charge, regardless of where the alleged crime was committed.[21] Mr. Hinkson hereby incorporates 100% of the memorandum filed in support of ground five, "jurisdiction" in his 2255 Motion and 100% of the memorandum filed in support of ground five, "jurisdiction" in his reply to the government's response to the 2255 Motion and specifically every case cited therein, is hereby incorporated as if fully set forth herein.

The trial court cited one case, *United States v. Peltier,* 446 F.3d 911 (8th Cir. 2006) as its authority for the proposition of bifurcating section 1113 into two distinct parts, a punishment section and a jurisdictional section. However, the *Peltier* case is completely distinguished from the Hinkson case because in the former, there was no jurisdictional argument made about section 1111, 1112 or 1113 or whether the "special maritime jurisdiction" was a limitation on

[21] In Mr. Hinkson's 2255 Motion memorandum in support of Ground Five (Jurisdiction), there are cited numerous cases regarding the limiting of the penalty to the "special maritime and territorial jurisdiction" of the US. In every case where it was considered, the courts have upheld the jurisdictional component such that when the defendant was in fact within the jurisdiction as specified, the statute was found to apply and when the defendant was not within the geographical jurisdiction, even when an attempt to murder a federal official was made, the statute was found to be inapplicable. The trial judge is in error.

prosecution. In *Peltier* the defense attempted to assert that Congress had no authority to make a law which could be enforced on land belonging to the Sioux Nation. But the courts held that such land indeed fell within the special maritime or territorial jurisdiction of the United States, and therefore there was no bifurcating of the punishment portion of the statute from the geographical jurisdiction portion. The words the district court quoted from mere dicta within the case show that *Peltier* is inappropriate as an authority in this instant matter.

A conviction secured at the expense of a plain reading of the law; a judgment imposed contrary to the charging statute, results in a gross travesty of justice, falling way short of any Constitutional requirement as envisioned by the framers of the laws regarding 2255 proceedings and applications for certificates of appealability.

ARGUMENT RE ISSUE 3 – IAC:

A. The very essence of an effective defense – in fact, one which is REQUIRED OF ALL CRIMINALLY CHARGED INDIVIDUALS, is the ability to participate meaningfully in their own defense. This was denied Mr. Hinkson, and neither the government's response to his 2255 motion, nor Judge Tallman's parroting of it in the Order Denying, come anywhere near

this issue. And for good reason: a defendant who, for reasons of mental capacity, cannot participate meaningfully in his own defense cannot, by law be tried. By the exact same token, a defendant who, like me, was denied and refused the opportunity to participate meaningfully in my defense and was forced into had a trial which was structurally and fatally defective by Constitutional standards, is denied his Constitutional protections under the due process clause.

B. By the very absence of rebuttal, this denial of my Constitutionally guaranteed right to participate in my own defense, to assist my attorney and to have my defense conducted with due consideration to my express wishes, it is hereby shown, that neither the trial, nor the denial of my Section 2255 motion is Constitutionally firm. See Hinkson's Section 2255 motion at: Page 5, at D Ground four.[22]

C. This failure is the main, though not exclusive, proximate cause of Defendant's assertion of ineffective assistance of counsel.

ARGUMENT RE ISSUE 4 – IMPROPER EX-PARTE JUDICIAL CONTACT:

The trial judge in denying Mr. Hinkson's 2255 motion kind of addressed

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[22] The original 2255 motion reads: "Hinkson was deprived of his Sixth Amendment right to the effective assistance of counsel at trial which was below the relevant standard of professional conduct and said failure materially prejudiced Hinkson. Nolan's failure to conduct an adequate investigation, to present available evidence, to allow Hinkson to assist in his own defense."

this matter in a sideways fashion NEVER DENYING THAT THE MEETING TOOK PLACE. Rather the court tried to rationalize away the malfeasance by asserting that Attorney Hoyt didn't bring it up at trial and that no one overheard what was said (as if anyone could hear what was said down the hall and inside the judge's chambers), and that no prosecutor was seen or seemed to be present, as if that had some relevance – which it absolutely doesn't. But these are not reasons to ignore that the meeting took place and that is was completely improper *ex parte* judicial contact with a witness.

The trial court has attempted to bifurcate the denial of Mr. Hinkson's 2255 Motion and the judicial impropriety by failing to address the matter in the Order Denying the 2255 Motion, and only addressing it in a separate order, "ORDER DENYING RECUSAL MOTION" Docket #325, filed contemporaneously with the Order Denying the 2255 Motion, Docket #326.

Notice that the matter of the improper contact was briefed to the district court in Hinkson's 2255 Motion, captioned as: "DEFENDANT HINKSON'S MEMORANDUM IN SUPPORT OF GROUND TWO: JUDICIAL BIAS AND JUDICIAL MISCONDUCT AS IS HEREBY APPENDED TO HINKSON'S MOTION TO VACATE THE CONVICTION AND SENTENCE UNDER SECTION 2255, TITLE 28 U.S.C.", Docketed as Document 323-3 Filed 4/17/12, and is therefore proper subject matter for this Court and this proceeding.

The trial court claimed (self-servingly [23]) that the Affidavit of Hoyt seems to mean nothing, and is completely irrelevant. Order Denying Recusal (Docket #325). This order denying recusal cavalierly treated the allegations as if they were one-hundred percent immaterial.

1. What is material are two things: 1) the meeting took place and was not denied; and 2) that the meeting took place and this fact was fully admitted by Judge Tallman by virtue of his very telling failure to deny it and dismissing it as insignificant. The trial judge might like to believe it was insignificant, but it wasn't and his admission that it was insignificant is a direct admission that it took place. Order Denying Recusal at page 12.

   a. Judge Tallman wrote in his opinion,

      > * * * "Without more, Hoyt's affidavit is simply insufficient. "Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters do not form the basis of a successful recusal motion." *Sivak v. Hardison*, 658 F.3d 898, 926 (9th Cir. 2011) (internal quotation marks and brackets omitted)."

      Unfortunately for Judge Tallman (or whoever wrote the opinion for him), the foregoing quote does NOT APPEAR anywhere in the case as

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[23] Definition: self-serving adj. referring to a question asked of a party to a lawsuit or a statement by that person that serves no purpose and provides no evidence, but only argues or reinforces the legal position of that party. Example: Question asked by a lawyer of his own client: "Are you the sort of person who would never do anything dishonest?" Such a question may be objected to as "self-serving" by the opposing lawyer, and then will be disallowed by the judge, unless there is some evidentiary value.– http://legal-dictionary.thefreedictionary.com/self-servingly

cited; **it was made up for the sole purpose of discrediting Hoyt's affidavit**.

i. Instead the mis-cited case only discredits the district court, and casts a strong light in favor of the presumption that there was in fact bias operating in this matter. The fact is, the law is clear that it is completely improper to allow *ex parte* contact between the ONLY WITNESS the jury believed, and the trial judge, to go unquestioned via a discovery and evidentiary hearing process.

ii. The trial judge's treatment of Hoyt's affidavit as constituting 1) Rumor, 2) speculation, 3) beliefs, 4) conclusions, 5) innuendo, 6) suspicion, 7) opinion, and 8) similar non-factual matters is both legal and factual error requiring a grant of COA.

iii. Even if the quote supposedly from Sivak were true, which it isn't, the district court's illicit and improper judicial conduct remains just that: IMPROPER; And it demonstrates either complete ignorance of the judicial canon of ethics or unwarranted bias for the government or malicious prejudice against Mr. Hinkson (or both) and is fully within the

mandatory recusal criteria expressed in statute and in standing, controlling case law. The trial judge's denial of Mr. Hinkson's 2255 Motion was clearly in error.

b. Finally, even if the exact words which were put in quotation marks by the district court were to be considered the case cited by has absolutely NOTHING to do with the proposition put forward. The *Sivak* case has nothing whatsoever to do with recusal or affidavits regarding a judge's qualifications or possible bias.

i. More to the point than the made up quote from *Sivak,* is **an actual quote which CAN be found in that opinion,** where it is stated that the Supreme Court precedence requires recusal when:

> "... an appearance of bias – as opposed to evidence of actual bias – necessitates recusal. First, due process requires recusal of a judge who 'has a direct, personal, substantial pecuniary interest in reaching a conclusion against one of the litigants.' Second, due process requires recusal if a judge becomes 'embroiled in a running, bitter controversy' with one of the litigants.... Third, due process requires recusal if the judge acts as 'part of the accusatory process.'" – *Sivak at 924.*

ii. The fact that *Sivak* mentions a recusal motion filed by that defendant, doesn't make the case about recusals and cannot be cited as any authority regarding what both happened and failed to happen in the Hinkson case.

2. By the standards ACTUALLY cited in the case (*Sivak)* cited by the district court, the trial judge should have recused himself, and in the absence of justice being fairly administered thereby, this court should immediately order his removal from any further consideration of this matter.

CONCLUSION

The Defendant respectfully requests that the Court issue a Certificate of Appealability for the issues listed above and permit him the opportunity to appeal the District Court's denial of his Writ of Habeas Corpus Petition to the Ninth Circuit Court of Appeals.

DATED this _____ day of October, 2012.

Respectfully submitted,

David R. Hinkson, *pro se*
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CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that on October _____ 2012, a true and correct copy of the foregoing **NOTICE OF APPEAL and APPLICATION FOR CERTIFICATE OF APPEALABILITY** was deposited in the U.S. Mail, postage prepaid, and sent to the following:

John F. De Pue
Michael Taxay
Attorneys National Security Division
U.S. Department of Justice
Washington, D.C. 20530

Clerk of the US District Court
District of Idaho
550 W Fort St. Rm 400
Boise, ID 83724

Served by:

_____