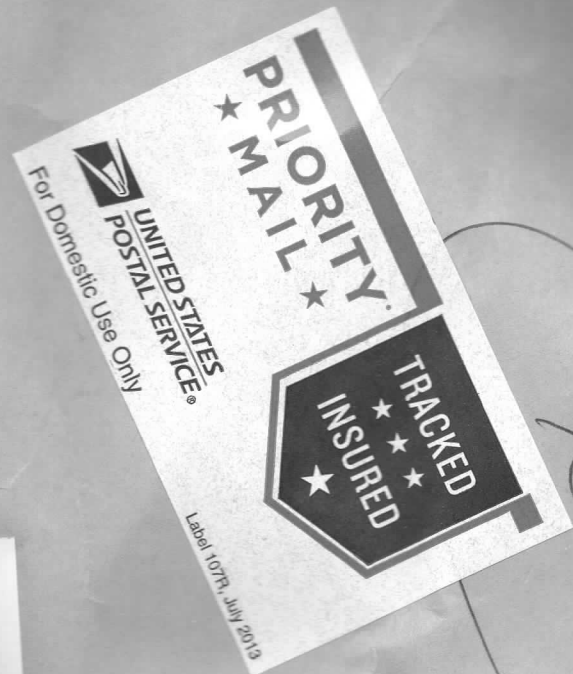


David Hinkson  
08795 023  
United States Bientony Mc Creary  
P.O. Box 3000 3B  
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↔08795-023↔  
Rud Davis  
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United States

FROM: David R. Hinkson, Pro Se  
Reg. No. 08795-023  
USP McCreary  
P.O. Box 3000  
Pine Knot, KY 42635

DATE: June 11, 2018

TO: Clerk of the Court  
U.S. Court of Appeals  
Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103

RE: Pro Se Filing of 28 U.S.C. § 2244 Application  
(re: 1:04-cr-00127-RCT, U.S. District Court, Idaho)

Dear Sir or Ma'am:

I am the pro se applicant in the instant case. Enclosed for filing with the Court please find my (1) Application for Authorization to File a Second § 2255 Motion in the District Court Pursuant to 28 U.S.C. § 2244 and 28 U.S.C. § 2255(h)(2), (2) Memorandum of Fact and Law in Support of Application; and (3) Attachments A-E.

Please note that Attachment-B is missing because I do not have a copy of the prior § 2255 ruling. However, my family is sending the prior § 2255 ruling to this Court immediately to be added to the application (Attachment-B to the Memorandum of Fact and Law).

If anything else is necessary, please let me know and I will promptly act. Thank you.

Sincerely

  
\_\_\_\_\_  
David R. Hinkson, Pro Se

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

APPLICATION FOR LEAVE TO FILE A SECOND OR  
SUCCESSIVE MOTION TO VACATE, SET ASIDE  
OR CORRECT SENTENCE  
28 U.S.C. § 2255  
BY A PRISONER IN FEDERAL CUSTODY

Name David Roland Hinkson Prisoner Number 08795-023

Institution United States Penitentiary McCreary

Street Address P.O. Box 3000

City Pine Knot State Kentucky Zip Code 42635

INSTRUCTIONS--READ CAREFULLY

- (1) This application must be legibly handwritten or typewritten and signed by the applicant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.
- (2) All questions must be answered concisely in the proper space on the form.
- (3) The Judicial Conference of the United States has adopted the 8½ x 11 inch paper size for use throughout the federal judiciary and directed the elimination of the use of legal size paper. All pleadings must be on 8½ x 11 inch paper, otherwise we cannot accept them.
- (4) All applicants seeking leave to file a second or successive petition are required to use this form, except in capital cases. In capital cases only, the use of this form is optional.
- (5) Additional pages are not permitted except with respect to additional grounds for relief and facts which you rely upon to support those grounds. DO NOT SUBMIT SEPARATE PETITIONS, MOTIONS, BRIEFS, ARGUMENTS, ETC., EXCEPT IN CAPITAL CASES.

- (6) In accordance with the "Antiterrorism and Effective Death Penalty Act of 1996," as codified at 28 U.S.C. § 2255, effective April 24, 1996, before leave to file a second or successive motion can be granted by the United States Court of Appeals, it is the applicant's burden to make a prima facie showing that he satisfies either of the two conditions stated below.

A second or successive motion must be certified as provided in [28 U.S.C.] section 2255 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

- (7) When this application is fully completed, the original and three copies must be mailed to:



APPLICATION

1. (a) State and division of the United States District Court which entered the judgment of conviction under attack United States District Court, District of Idaho.
- (b) Case number 1:04-cr-00127-RCT
2. Date of judgment of conviction June 13, 2005
3. Length of sentence 43 Years Sentencing Judge Richard C. Tallman
4. Nature of offense or offenses for which you were convicted: 18 U.S.C. § 373 Solicitation to commit a "crime of violence," i.e., murder for hire (Three Counts) (Note: Petitioner is also serving a consecutive 10 + 3 year sentence for an aggregate 43-year sentence in unrelated case).
5. Related to this conviction and sentence, have you ever filed a motion to vacate in any federal court?  
Yes  No  If "yes", how many times? Once (if more than one, complete 6 and 7 below as necessary)
- (a) Name of court U.S. District Court, District of Idaho
- (b) Case number 1:12-cv-000196-RCT
- (c) Nature of proceeding 28 U.S.C. § 2255
- (d) Grounds raised (list all grounds; use extra pages if necessary) Newly Discovered Evidence; Judicial Bias; Brady Violation; Ineffective Assistance of Counsel; Lack of Jurisdiction; Jury misconduct; Governmental Misconduct; And Prosecutorial Misconduct.
- (e) Did you receive an evidentiary hearing on your motion? Yes  No
- (f) Result Petition Denied
- (g) Date of result August 28, 2012
6. As to any second federal motion, give the same information:
- (a) Name of court U.S. District Court. Eastern District of California
- (b) Case number 1:13-cv-01571-AWT-JLT
- (c) Nature of proceeding 28 U.S.C. § 2241

(d) Grounds raised (list all grounds; use extra pages if necessary) Hinkson presented several arguments relating to his actual innocence of the offenses of conviction (i.e., solicitation to commit a crime of violence, murder for hire, Three Counts).

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No (x)

(f) Result Petition Denied

(g) Date of result June 3, 2014

7. As to any third federal motion, give the same information: None

(a) Name of court U.S. District Court, Eastern District of Kentucky

(b) Case number 6:18-cv-00104-DLB

(c) Nature of proceeding 28 U.S.C. § 2241

(d) Grounds raised (list all grounds; use extra pages if necessary) (1) Whether Hinkson's convictions under 18 USC § 373 are a single unit of prosecution...; (2) Whether Solicitation to murder is a crime of violence; and (3) Whether the solicitation sentences and other sentences should have been run concurrently.

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No (x)

(f) Result Pending

(g) Date of result \_\_\_\_\_

8. Did you appeal the result of any action taken on your federal motion? (Use extra pages to reflect additional petitions if necessary).

(1) First motion No ( ) Yes (x) Appeal No. ?

(2) Second motion No ( ) Yes (x) Appeal No. ?

(3) Third motion No ( ) Yes ( ) Appeal No. \_\_\_\_\_

9. If you did not appeal from the adverse action on any motion, explain briefly why you did not: \_\_\_\_\_

10. State concisely every ground on which you now claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

A. Ground one: Hinkson was sentenced as if his § 373 offenses were crimes of violence. He should be resentenced because they are not.  
Supporting FACTS (tell your story briefly without citing cases or law):

At the time of sentencing, the Ninth Circuit held that solicitation to murder is a crime of violence. Hinkson was convicted under 18 USC § 373 and his offenses were classified as crimes of violence under 18 USC § 16(b) at the time of sentencing, appeal and first § 2255 motion. He should be entitled to resentencing because the offenses are not crimes of violence after Dimaya.

Was this claim raised in a prior motion? Yes ( ) No ( )

Does this claim rely on a "new rule of law?" Yes (x) No ( )

If "yes," state the new rule of law (give case name and citation):

Sessions v Dimaya, 138 S. Ct. 1204 (2018)

Welch v United States, 136 S. Ct. 1257 (2016)

Does this claim rely on "newly discovered evidence?" Yes ( ) No (x)

If "yes," briefly state the newly discovered evidence, and why it was not previously available to you \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

B. Ground two: \_\_\_\_\_

Supporting FACTS (tell your story briefly without citing cases or law):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Was this claim raised in a prior motion? Yes ( ) No ( )

Does this claim rely on a "new rule of law?" Yes ( ) No ( )  
If "yes," state the new rule of law (give case name and citation):

Does this claim rely on "newly discovered evidence?" Yes ( ) No ( )  
If "yes," briefly state the newly discovered evidence, and why it was not  
previously available to you \_\_\_\_\_

[Additional grounds may be asserted on additional pages if necessary]

11. Do you have any motion or appeal now pending in any court as to the judgment now under  
attack? Yes ( ) No (x)  
If "yes," name of court \_\_\_\_\_ Case number \_\_\_\_\_

Wherefore, applicant prays that the United States Court of Appeals for the Eleventh Circuit  
grant an Order Authorizing the District Court to Consider Applicant's Second or Successive  
Motion to Vacate under 28 U.S.C. § 2255.

David R. Henderson  
Applicant's Signature

I declare under Penalty of Perjury that my answers to all the questions in this Application are true  
and correct.

Executed on June 11 2018  
[date]

David R. Henderson  
Applicant's Signature

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re David Roland Hinkson, )  
 )  
 Applicant. )

No.

)  
)  
) (re: 1:04-cr-00127-RCT)

)  
) (re: 1:12-cv-000196-RCT)  
)  
)

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MEMORANDUM OF FACT AND LAW IN SUPPORT OF APPLICATION FOR  
LEAVE TO FILE A SECOND OR SUCESSIVE MOTOIN TO VACATE, SET  
ASIDE OR CORRECT SENTENCE BY A FEDERAL PRISON AND PURSUANT  
28 U.S.C. § 2255 AND 28 U.S.C. § 2244

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NOW COMES the Applicant, David Roland Hinkson,  
pro se and pursuant to 28 U.S.C. § 2255(h)(2), 28 U.S.C.  
§ 2244(a), Sessions v Dimaya, 138 S. Ct. 1204 (2018),  
Haines v Kerner, 404 U.S. 519 (1972), and any and all  
other applicable legal authority, hereby submits his  
memorandum of fact and law in support of his application  
for leave to file a second § 2255 motion in the district  
court, and would state and argue as follows.

STATEMENT OF FACTS

The Applicant (Hereinafter "Hinkson") would incorporate herein the statement of the case as outlined in the Application For Leave To File A Second Motion To Vacate Sentence under 28 U.S.C. § 2255.

Hinkson was convicted in the United States District Court for the District of Idaho in case no. 3:02-cr-142-RCT for, inter alia, willful failure to file tax return, willful failure to collect federal tax, misbranded drug, adulterated device, structuring transactions to avoid reporting requirements and aiding and abetting.

Hinkson was then charged and convicted in the United States District Court for the District of Idaho in case no. 1:04-cr-127-RCT for three counts of solicitation to commit a crime of violence (i.e., murder for hire).

The sentencing court imposed a term of imprisonment as follows: three 10-year consecutive sentences for each solicitation count for an aggregate sentence of 30-years. The sentencing court also imposed a consecutive sentence of 10-years for case no. 02-cr-142, and an additional three 1-year sentences (for committing the solicitation counts while on pretrial release) for a total term of imprisonment for 43-years or 516 months imprisonment.

Because Hinkson's solicitation counts were considered to be "crimes of violence" [t]his significantly influenced the

sentencing court to impose consecutive terms of imprisonment on each count even though Hinkson was a business man with no criminal history.

After the Supreme Court's recent decision in Sessions v Dimaya, 138 S. Ct. 1204 (2018), it is clear that Hinkson's convictions for solicitation to commit a crime of violence under 18 U.S.C. § 373 are not crimes of violence, and therefore, Hinkson should be entitled to stand before a judge for resentencing without being looked upon as having committed crimes of violence, and further, to have a fair and impartial court to consider the applicable factors in imposing sentence, including those articulated in 18 U.S.C. § 3553.

QUESTION PRESENTED

WHETHER HINKSON HAS MADE A PRIMA FACIE SHOWING PERMITTING THIS COURT TO GRANT HIM AUTHORIZATION TO FILE A SECOND SECTION 2255 MOTION IN THE DISTRICT COURT IN LIGHT OF SESSIONS V DIMAYA, 138 S. CT. 1204 (2018) AND WELCH V UNITED STATES, 136 S. CT. 1257 (2016).

ARGUMENT AND AUTHORITIES

In Johnson v United States, 135 S. Ct. 2551 (2015) the Supreme Court held that the "residual clause" contained in Title 18 U.S.C. § 924(e)(2)(B)(ii), known as the Armed Career Criminal Act ("ACCA"), is unconstitutionally vague and void "in all its applications." at 2555. The ACCA defined a "violent felony" as:

any crime punishable by imprisonment for a term exceeding one year...that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The underlined portion of the Act is known as the "residual clause." 18 U.S.C. § 924(e)(2)(B)(ii).

The Supreme Court in Johnson explained that the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," and therefore, "increasing a defendant's sentence under the clause denies due process of law." 135 S. Ct. at 2557.

Applying Johnson, the Ninth Circuit Court of Appeals



held that the "residual clause" contained in the Federal Criminal Code's definition of "crime of violence" is also unconstitutionally vague. See Dimaya v Lynch, 803 F.3d 1110, 1120 (9th Cir. 2015).

More specifically, 18 U.S.C. § 16 articulates:

The term "crime of violence" means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Section 16(b) is known as the Act's "residual clause."

The Ninth Circuit held that if the ACCA's definition of "violent felony," as contained in § 924(e)(2)(B)(ii), is unconstitutionally vague, then so too is the Federal Criminal Code's definition of "crime of violence," as contained in 18 U.S.C. § 16(b). Dimaya, supra.

The Government, however, claimed that the Supreme Court's Johnson decision only applied to the ACCA, and thus, was not applicable to other unconstitutionally vague criminal statutes such as 18 U.S.C. § 16(b). But the Supreme Court disagreed with the Government and, applying its precedents as it should, affirmed the Ninth Circuit's Dimaya decision. See Sessions v Dimaya, 138 S. Ct. 1204 (2018)(affirming the Ninth Circuit's Dimaya v Lynch decision and holding that the residual clause of the Federal Criminal Code's definition of

"crime of violence" was impermissibly vague in violation of due process).

In the case at bar, Hinkson was convicted in 2004 of three counts of solicitation to commit a crime of violence (i.e., murder) in violation of 18 U.S.C. § 373. At the time of his conviction, sentencing, direct appeal and available post-conviction remedy (28 U.S.C. § 2255), the Ninth Circuit had held that solicitation to commit murder was a crime of violence. See United States v Cox, 74 F.3d 189 (9th Cir. 1996)(finding that the district court properly considered defendant's prior conviction for solicitation of murder as a crime of violence for sentencing purposes, and affirming the district court's judgment). See also United States v Raymundo, 628 F.3d 1169 (9th Cir. 2011)(holding that solicitation of murder is a crime of violence).

18 U.S.C. § 373 articulates:

(a) whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against the property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term

of imprisonment or fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

Here, Hinkson was charged in an Eleven Count Superseding Indictment with alleged solicitation and threat offenses. The jury, however, disbelieved many of the allegations and evidence presented by the government at trial. The jury acquitted Hinkson on several counts and hung on others. It ultimately found Hinkson guilty on counts seven, eight and nine. In these counts, the government's only witness was Elven Joe Swisher, an alleged decorated Korean war veteran who, according to federal prosecutors and Swisher, was solicited by Hinkson because Hinkson had investigated Swisher's war experience and learned that Swisher had fought in active combat in the Korean war, was awarded many medals of honor including a purple heart, and had killed many people.<sup>1</sup>

---

1. After Hinkson's jury trial, the government prosecuted Elven Joe Swisher for defrauding the government. Specifically, it was exposed that Swisher had [not] served in active combat in the Korean war, had not earned [any] medals of honor including the purple heart he wore on his lapel at Hinkson's jury trial while he testified, and had [never] killed anyone. See *United States v Swisher*, No. CR-07-182-BLW, U.S. District Court, District of Idaho & Montana.

At Hinkson's sentencing, the court applied the 2002 United States Sentencing Guideline ("U.S.S.G.") Manual § 2A1.5 "Conspiracy or Solicitation to Commit Murder." Under § 2A1.5, Hinkson's starting base offense level ("BOL") was 28. Four (4) levels were added under § 2A1.5(b)(1) (offer or receipt of anything or pecuniary value). Three (3) levels were added under § 3A1.2 (official victim). Three (3) levels were added under § 2J1.7 (commission of offense while on release), for a total offense level of 38.

However, and while the alleged scheme as outlined in the indictment reveals that this case is [a] unit of prosecution,<sup>2</sup> the Probation Officer, as set forth in the Presentence Investigation Report ("PSR"), treated the three § 373 offenses as separate units of prosecution and added three (3) additional levels under § 3D1.4 (determining the combined offense level).<sup>3</sup> Thus, the final base offense level was calculated at 41, criminal history category I, and a guideline sentencing range of 324-405 months.

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2. See *United States v Charles*, 626 Fed. Appx. 691, No. 13-50233, 2015 U.S. App. Lexis 16875 (9th Cir. Sept. 23, 2015) (holding that to determine whether counts are multiplicitous, a court looks to how the indictment defines the scheme and examines how many executions of the scheme are alleged, a factually intensive inquiry).

3. See *United States v Gordon*, 2017 U.S. App. Lexis 22249, No. 16-1896 (1st Cir. Nov. 7, 2017) (holding that indictment was multiplicitous where murder for hire was a single plot).

Based on this Court's precedents and how the indictment defined the scheme in this case, Hinkson should have been prosecuted under a single unit of prosecution, not three.

Moreover, U.S.S.G. § 5G1.2 articulates:

(a) Except as provided in subsection (e), the sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.

In the instant case, Hinkson was convicted under 18 U.S.C. § 373. The statute outlines that a person convicted "shall be imprisoned for not more than twenty years." The statute does not state that the sentences imposed under the statute shall be run consecutive. Yet the sentencing court ran the sentences consecutive, no doubt, because under Ninth Circuit precedent at the time, convictions for solicitation to commit murder were held to be crimes of violence, and conspiracy and solicitation are treated the same under the Guidelines. See U.S.S.G. § 2A1.5 ("Conspiracy or Solicitation to Commit Murder").

Recently, in United States v McCollun, 2018 U.S. App. Lexis 6953, No. 17-4296 (4th Cir. 2018) the court held that under the categorical approach conspiracy to commit murder is not a crime of violence.

Like conspiracy, solicitation to commit murder can

only be a crime of violence under the residual clause of 18 U.S.C. § 16(b). Pursuant to the Supreme Court's recent decision in Sessions v Dimaya, 138 S. Ct. 1204 (2018), § 16(b) is unconstitutionally vague and void. Therefore, Hinkson's convictions under 18 U.S.C. § 373 are not crimes of violence and he should be entitled to resentencing without the offenses for which he was convicted being labeled "crimes of violence."

Standard for Obtaining Permission to File  
a Second § 2255 Motion in District Court

A federal prisoner may not file a second or successive petition unless he or she makes a prima facie showing to the Court of Appeals that the petition is based on (1) a new rule, (2) of constitutional law, (3) made retroactive to cases on collateral review by the Supreme Court, (4) that was previously unavailable. Ezell v United States, 778 F.3d 762 (9th Cir. 2014) citing Tyler v Cain, 533 U.S. 656, 662 (2001). 28 U.S.C. § 2255(h)(2).

A prima facie showing in the United States Court of Appeals for the Ninth Circuit is a sufficient showing of possible merit to warrant a fuller exploration by the district court. Cox v Powers, 525 Fed. Appx. 541, No. 11-56954, (9th Cir. 2013).

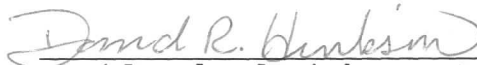
Hinkson would submit that the Supreme Court's

decision in Sessions v Dimaya, 138 S. Ct. 1204 (2018) is a new rule of constitutional law that, pursuant to the Supreme Court's decision and standard articulated in Welch v United States, 136 S. Ct. 1257 (2016), is retroactively applicable to collateral review no less than the Supreme Court's decision in Johnson v United States, 135 S. Ct. 2551 (2015). Therefore, Hinkson has made a prima facie showing sufficient to warrant the filing of a second § 2255 motion in the district court.

#### CONCLUSION

For the foregoing reasons, Hinkson respectfully moves the Court for authorization to file a second motion to vacate sentence under 28 U.S.C. § 2255 in the district court.

Respectfully submitted

 6-11-18

David Roland Hinkson, Pro Se  
Reg. No. 08795-023  
USP McCreary  
P.O. Box 3000  
Pine Knot, KY 42635

ATTACHMENT A

A. Proposed Motion To Vacate Sentence, 28 U.S.C. § 2255.



Case No.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

---

DAVID ROLAND HINKSON  
PETITIONER

V.

UNITED STATES OF AMERICA  
RESPONDENT

---

PRO SE MOTION TO VACATE, SET ASIDE OR CORRECT  
SENTENCE PURSUANT TO 28 U.S.C. § 2255

---

Case No. 1:04-cr-00127-RCT

---

David R. Hinkson, Pro Se  
Reg. No. 08795-023  
USP McCreary  
P.O. Box 3000  
Pine Knot, KY 42635

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY

<b>United States District Court</b>		District <b>IDAHO</b>
Name of Movant <b>David Roland Hinkson</b>	Prisoner No. <b>08795-023</b>	Case No.
Place of Confinement <b>USP McCreary, P.O. Box 3000, Pine Knot, Kentucky 42635</b>		
UNITED STATES OF AMERICA		v. <u>David Roland Hinkson</u> <small>(name under which convicted)</small>
MOTION		
<p>1. Name and location of court which entered the judgment of conviction under attack <u>United States District Court, District of Idaho.</u></p> <p>2. Date of judgment of conviction <u>June 13, 2005</u></p> <p>3 Length of sentence. <u>30 Years (10, 10, 10 consecutive)</u></p> <p>4. Nature of offense involved (all counts) <u>18 U.S.C. § 373 (Solicitation to commit a "crime of violence," i.e., murder-for-hire).</u></p> <p>5. What was your plea? (Check one)</p> <p>(a) Not guilty <input checked="" type="checkbox"/></p> <p>(b) Guilty <input type="checkbox"/></p> <p>(c) Nolo contendere <input type="checkbox"/></p> <p>If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:</p> <p><u>N/A</u></p> <p>6. If you pleaded not guilty, what kind of trial did you have? (Check one)</p> <p>(a) Jury <input checked="" type="checkbox"/></p> <p>(b) Judge only <input type="checkbox"/></p> <p>7. Did you testify at the trial? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/></p> <p>8. Did you appeal from the judgment of conviction? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/></p>		

9. If you did appeal, answer the following:

- (a) Name of court Ninth Circuit Court of Appeals (Case No. 05-30303)  
 (b) Result Appeal Granted but reversed En Banc (Change of Standard)  
 (c) Date of result May 30, 2008; En Banc Decision November 5, 2009

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?  
 Yes  No

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court Sentencing Court, District of Idaho, No. 1:12-cv-196-RCT

(2) Nature of proceeding 28 U.S.C. § 2255

(3) Grounds raised Newly Discovered Evidence; Judicial Bias; Brady Violation; Ineffective Assistance of Counsel; Lack of Jurisdiction; Jury Misconduct; Government Misconduct; And Prosecutorial Misconduct.

(4) Did you receive an evidentiary hearing on your petition, application or motion?  
 Yes  No

(5) Result Petition Denied

(6) Date of result August 28, 2012

(b) As to any second petition, application or motion give the same information:

(1) Name of court U.S. District Court, E.D. California, No. 1:13-cv-1571-AWI-JLT

(2) Nature of proceeding 28 U.S.C. § 2241

(3) Grounds raised Hinkson presented several arguments relating to his actual innocence of the offenses of conviction (i.e., solicitation to commit a "crime of violence, three counts, under 18 U.S.C. § 373, murder-for-hire).

(4) Did you receive an evidentiary hearing on your petition, application or motion?  
Yes  No

(5) Result Petition Denied

(6) Date of result June 3, 2014

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes  No  (COA Denied)  
(2) Second petition, etc. Yes  No  (COA Denied)

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
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\_\_\_\_\_  
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\_\_\_\_\_

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law) Hinkson was convicted of three counts of solicitation to commit a crime of violence (murder for hire) under 18 USC § 373. Pursuant to Ninth Circuit precedent the offenses were "crimes of violence" at the time of his sentencing in 2005, and also under the Federal Criminal Code's definition of "crime of violence" as outlined in 18 USC § 16(b). In Sessions v Dimaya, 138 S.Ct. 1204 (2018), the Supreme Court, applying its decision in Johnson v United States, 135 S.Ct. 2551 (2015), held that the residual clause contained

Supporting FACTS (state *briefly* without citing cases or law): in 18 USC § 16(b) is unconstitutionally vague and void. See also United States v McCollum, 2018 U.S. App. Lexis 6953, No. 17-4296 (4th Cir. 2018)(holding that conspiracy to commit murder is not a crime of violence). See also United States v Cody Herr, 2016 U.S. Dist. Lexis 144201, No. 16CR10038-IT (Dist. Mass. Oct. 18, 2016), and United States v Gordon, 2017 U.S. App. Lexis 22249, No. 16-1896 (1st Cir. 2017)(addressing unit of prosecution under murder for hire offense). The § 373 offense(s) are not crimes of

Supporting FACTS (state *briefly* without citing cases or law): violence and Hinkson should be entitled to resentencing without his offenses being labeled crimes of violence because such a label affects the Court's sentencing analysis, including the § 3553(a) factors, Guidelines, and ultimate sentence, among other things.

D. Ground four: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: \_\_\_\_\_

The instant grounds for relief were not previously available to the Petitioner, as they are based on new court decisions.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes  No

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing \_\_\_\_\_

(b) At arraignment and plea \_\_\_\_\_

(c) At trial Wesley W. Hoyt, HC 66, Box 313A, Kooskia, Idaho 83539; and

Thomas Nolan, 600 University Avenue, Palo Alto, California 94301

(d) At sentencing Curtis R. Smith, Idaho Falls, Idaho

(e) On appeal Dennis P. Riordan, Esq., 523 Octavia Street, San Francisco, CA 94102,  
and Curtis R. Smith, Idaho Falls, Idaho.

(f) In any post-conviction proceeding Pro Se

(g) On appeal from any adverse ruling in a post-conviction proceeding Pro Se

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?  
Yes  No


17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?  
Yes  No

(a) If so, give name and location of court which imposed sentence to be served in the future: Note: Petitioner  
Was also convicted in the U.S. District Court, District of Idaho, in case  
No. 3:02-cr-142-RCT (Note: Petitioner has an aggregate sentence of 43 years).

(b) Give date and length of the above sentence: June 3, 2005, 10 years consecutive; Plus 3-  
years consecutive for obtaining instant offenses while on pretrial release.

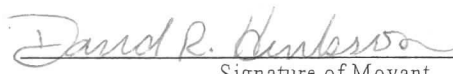
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?  
Yes  No

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

  
\_\_\_\_\_  
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

6-11-18  
\_\_\_\_\_  
(date)

  
\_\_\_\_\_  
Signature of Movant

ATTACHMENT-B

B. Prior Ruling on previous § 2255 Motion.<sup>1</sup>

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1. Please note that Hinkson does not possess the prior ruling on his previous § 2255 motion, and therefore, the ruling is being mailed to this Court to be added to Attachment-B.



ATTACHMENT-C

C. Prior Ruling on § 2241 Petition.

6-3-2014

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DAVID ROLAND HINKSON,

Petitioner,

v.

WARDEN PAUL COPENHAVER,

Respondent.

) Case No.: 1:13-cv-01571-AWI-JLT  
 )  
 ) ORDER ADOPTING FINDINGS AND  
 ) RECOMMENDATIONS (Doc. 5)  
 )  
 ) ORDER DISMISSING PETITION FOR WRIT OF  
 ) HABEAS CORPUS (Doc. 1)  
 )  
 ) ORDER DENYING ALL PENDING MOTIONS  
 ) (Docs. 20, 21, & 22)  
 )  
 ) ORDER DIRECTING CLERK OF COURT TO  
 ) ENTER JUDGMENT AND CLOSE CASE  
 )  
 ) ORDER DECLINING TO ISSUE CERTIFICATE  
 ) OF APPEALABILITY

Petitioner is a federal prisoner proceeding in propria persona with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. On October 21, 2013, the Magistrate Judge assigned to the case issued Findings and Recommendations to dismiss the petition for lack of habeas jurisdiction. (Doc. 5). This Findings and Recommendations was served upon all parties and contained notice that any objections were to be filed within twenty-one days from the date of service of that order. On

December 31, 2013, after receiving an extension of time, Petitioner filed objections to the Magistrate Judge's Findings and Recommendations. (Doc. 9). On December 31, 2013, Petitioner also filed a motion for leave to file a second supplement to the petition. (Doc. 10). That proposed supplement was lodged with the Court. (Doc. 11).

In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), this Court has conducted a *de novo* review of the case. Having carefully reviewed the entire file, including Petitioner's objections and supplements, the Court concludes that the Magistrate Judge's Findings and Recommendations is supported by the record and proper analysis. As the facts and procedural history are well known to the parties and addressed in the Findings and Recommendations and the parties' briefs, they will not be repeated here. Petitioner's basic objection is addressed below.

As explained in more detail by the Magistrate Judge, 28 U.S.C. § 2255 provides that a federal prisoner attacking his sentence "may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). In general, Section 2255 "provides the exclusive procedural mechanism by which a federal prisoner may test the legality of detention." Harrison v. Ollison, 519 F.3d 952, 955 (9th Cir. 2008); Lorentsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000). A federal court cannot consider a petition for habeas relief pursuant to Section 2241 unless it appears that the petitioner's remedy under Section 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e); Harrison, 519 F.3d at 956. A federal prisoner may avail himself of "Section 2255's escape hatch" only when he "(1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." Harrison, 519 F.3d at 960; Ivy v. Pontesso, 328 F.3d 1057, 1060 (9<sup>th</sup> Cir. 2003).

The Court must agree with the Magistrate Judge that, despite Plaintiff's arguments to the contrary, Petitioner has had a procedural shot at presenting his claims. The petition and objections focus on Witness Swisher's credibility. Witness Swisher's credibility is attacked based on false testimony surrounding his military career, awards, and duties. This is not the first time Witness Swisher's credibility has been called into question. There is a lengthy history to Petitioner's criminal

case. The issue of Witness Swisher's credibility concerning Witness Swisher's own military service and how it may have influenced a guilty verdict has been debated and resolved numerous times by numerous courts. See U.S. v. Hinkson, 526 F.3d 1262 (9<sup>th</sup> Cir. 2008) (direct appeal); U.S. v. Hinkson, 585 F.3d 1247 (9<sup>th</sup> Cir. 2009) (appeal en banc); Hinkson v. U.S., 2012 WL 3776023 (D.Idaho Aug 28, 2012) (section 2255 petition).

When reviewing this issue it appears neither the trial court nor the Ninth Circuit had the additional detail that Witness Swisher was eventually convicted of perjury regarding his false military service statements. However, the impact of the false testimony on Petitioner's guilty verdict was greatly discussed by the Ninth Circuit. The United States District Court for the District of Idaho was made aware of Witness Swisher's perjury conviction in Petitioner's Section 2255 petition.

Witness Swisher's perjured testimony concerned Witness Swisher's background in the military. Witness Swisher has not been convicted of perjury for his testimony or contradicted by formal records on the issue of whether Petitioner solicited Witness Swisher to murder three federal officials. The Court has reviewed Petitioner's Section 2255 petition. It cites to evidence showing inconsistencies about Witness Swisher's military service and the fact Witness Swisher has now been convicted of perjury regarding his military service claims. Because the issues raised in the petition have been raised and addressed in Petitioner's appeals and Section 2255 petition, the Court cannot find relief is available pursuant to Section 2241. Thus, the objections provide no grounds for questioning the Magistrate Judge's analysis.

Moreover, the Court declines to issue a certificate of appealability. A successive petition under 28 U.S.C. § 2255 that is disguised as a § 2241 petition requires a certificate of appealability. Harrison v. Ollison, 519 F.3d 952, 958 (9th Cir. 2008); Porter v. Adams, 244 F.3d 1006, 1007 (9th Cir. 2001). The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

- (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
- (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
- (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(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).

If a court denied a petitioner's petition, the court may only issue a certificate of appealability when a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further'." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

In the present case, the Court finds that Petitioner has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists would not find the Court's determination that Petitioner is not entitled to federal

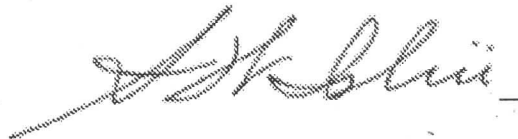
habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. Thus, the Court DECLINES to issue a certificate of appealability.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations, filed October 21, 2013 (Doc. 5), is ADOPTED IN FULL;
2. The petition for writ of habeas corpus (Doc. 1), is DISMISSED;
3. All pending motions (Docs. 20, 21, and 22), are DENIED;
4. The Clerk of Court is DIRECTED to ENTER JUDGMENT and close the file; and,
5. The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: June 3, 2014

A handwritten signature in black ink, appearing to read "K. Blui", is written over a horizontal line.

MIME-Version:1.0 From:caed\_cmecf\_helpdesk@caed.uscourts.gov To:CourtMail@localhost.localdomain  
Message-Id: Subject:Activity in Case 1:13-cv-01571-AWI-JLT (HC) Hinkson v. Copenhagen Order  
Adopting Findings and Recommendations Content-Type: text/html

*This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.*

**\*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\*** *Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.*

*U.S. District Court*

*Eastern District of California – Live System*

**Notice of Electronic Filing**

The following transaction was entered on 6/4/2014 at 11:45 AM PDT and filed on 6/4/2014

**Case Name:** (HC) Hinkson v. Copenhagen

**Case Number:** 1:13-cv-01571-AWI-JLT

**Filer:**

**WARNING: CASE CLOSED on 06/04/2014**

**Document Number:** 25

**Docket Text:**

**ORDER ADOPTING FINDINGS and RECOMMENDATIONS [5] ORDER DISMISSING Petition for Writ of Habeas Corpus [1]; ORDER DENYING All Pending Motions [20], [21], [22]; ORDER DIRECTING Clerk of Court to Enter Judgment and Close Case; ORDER DECLINING TO ISSUE CERTIFICATE OF APPEALABILITY, signed by District Judge Anthony W. Ishii on 6/3/14. (CASE CLOSED)(Hellings, J)**

**1:13-cv-01571-AWI-JLT Notice has been electronically mailed to:**

Bureau of Prisons Regional Counsel wxrolegalinfo@bop.gov

Litigation Coordinator atw/attorney~@bop.gov

Audrey Benison Hemesath audrey.hemesath@usdoj.gov, jeanette.glenn@usdoj.gov,  
usacae.ecfsacrm@usdoj.gov

**1:13-cv-01571-AWI-JLT Electronically filed documents must be served conventionally by the filer to:**

David Roland Hinkson  
08795-023  
ATWATER U.S. PENITENTIARY  
Inmate Mail/Parcels  
P.O. BOX 019001  
ATWATER, CA 95301-0910

The following document(s) are associated with this transaction:

ATTACHMENT-D

D. Amended Judgment In A Criminal Case.



RECEIVED UNITED STATES DISTRICT COURT

U.S. MARSHAL'S SERVICE District of

Idaho

UNITED STATES OF AMERICA

2005 JUN 13 PM 3:26

AMENDED JUDGMENT IN A CRIMINAL CASE

V.

BOISE, IDAHO

DAVID ROLAND HINKSON

Case Number: 3:02-CR-00142-RCT

1:04-CR-00127-RCT

USM Number: 08795-023

Curtis Smith, Steven Anderson

Defendant's Attorney

Date of Original Judgment: June 3, 2005

(Or Date of Last Amended Judgment)

Reason for Amendment:

- Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

- Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- Direct Motion to District Court Pursuant to  28 U.S.C. § 2255 or  18 U.S.C. § 3559(c)(7)
- Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

pleaded guilty to count(s) 17 and 26 of the Indictment in Case #3:02-CR-00142-RCT

pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.

was found guilty on count(s) 1, 3, 4, 16, 31, 33, 38, 40, 42 of the Indictment in Case #3:02-CR-00142-RCT and counts 7, 8 and 9 of the Superseding Indictment in Case #1:04-CR-00127-RCT after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
26 § 7203	Case #3:02-CR-00142-RCT. Willful Failure to File Tax Return	4/17/2000	1-3
26 § 7202	Case #3:02-CR-00142-RCT. Willful Failure to Collect Federal Taxes	11/1/2000	4-16
21 § 331 (a)	Case #3:02-CR-00142-RCT. Misbranded Drug	1/22/2002	17
21 § 331 (a)	Case #3:02-CR-00142-RCT. Adulterated Device	4/04/2002	26
31 § § 5324(a)(3) & (c)(2) & 18 § 2	Case #3:02-CR-00142-RCT. Structuring Transactions to Avoid Reporting Requirements and Aiding and Abetting	2/23/2001	31, 33-38, 40-42
18 § 373	Case #1:04-CR-00127-RCT. Solicitation to Commit a Crime of Violence	February 2003	7
18 § 373	Case #1:04-CR-00127-RCT. Solicitation to Commit a Crime of Violence	February 2003	8
18 § 373	Case #1:04-CR-00127-RCT. Solicitation to Commit a Crime of Violence	February 2003	9

The defendant is sentenced as provided in pages 2 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) \*4, 5, 6, 10 & #11 of the Superseding Indictment in Case #1:04-CR-00127-RCT. No verdict on counts 1, 2 & #3 of the Indictment in Case #1:04-CR-00127-RCT.

Count(s) 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, \_\_\_\_\_ is/are dismissed on the motion of the United States. 29, 30, 32, and 39 in Case #3:02-CR-00142-RCT and counts 1, 2 & 3 in Case #1:04-CR-00127-RCT.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 3, 2005

Date of Imposition of Judgment

Richard C. Tallman (Signature)

Signature of Judge

Richard C. Tallman, United States Circuit Judge

Name and Title of Judge

6/13/05

Date

Certified to be a true and correct copy of original filed in my office.

Cameron S. Burke, Clerk

United States Courts, District of Idaho

By: [Signature] Deputy Dated: [Signature]

DEFENDANT: DAVID RONALD HINKSON  
CASE NUMBER: 3:02-CR-00142-RCT  
1:04-CR-00127-RCT

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 516 months. The total term in Case # 3:02-CR-00142-RCT consists of: terms of 12 months each on counts 1-3, 17 & 26; terms of 60 months each on counts 4-16; and terms of 120 months each on counts 31, 33-38, 40-42. All such terms in Case # 3:02-CR-00142-RCT shall be served concurrently with each other but consecutive to the imprisonment imposed in Case # 1:04-CR-00127-RCT. The total term in Case # 1:04-CR-00127-RCT consists of terms of 120 months each on counts 7, 8 and 9, which shall run consecutively to one another and consecutively to the criminal Case # 3:02-CR-00142-RCT. An additional 36 months shall run consecutively to counts 7, 8 and 9 pursuant to 18 U.S.C. § 3147. The total imprisonment term of 396 months imposed in Case # 1:04-CR-00127-RCT shall not begin to run until the Defendant has completed service of the total imprisonment term of 120 months imposed in Case # 3:02-CR-00142-RCT.

X The court makes the following recommendations to the Bureau of Prisons:  
That the defendant be credited with all time served, from the date of his arrest on April 4, 2003; and that the defendant be initially classified as a high risk inmate who refuses to comply with institutional security rules, who poses a continuing danger to witnesses and Federal officers, and who poses a risk of flight with access to money secreted in foreign bank accounts.  
The defendant is to be placed in the maximum security facility at Florence, Colorado.

X The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:  
 at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_  
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:  
 before 2 p.m. on \_\_\_\_\_  
 as notified by the United States Marshal.  
 as notified by the Probation or Pretrial Services Office.

### RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

\_\_\_\_\_ with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DAVID RONALD HENKSON  
CASE NUMBER: 3:02-CR-00142-RCT  
1:04-CR-00127-RCT

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.  
a term of 1 year supervised release on counts 1-3, 17 & 26 in Case #3:02-CR-00142-RCT. 3 years supervised release on counts 4-16, 31, 33-38, 40-42 in Case #3:02-CR-00142-RCT. All such terms of supervised release to be served concurrently with one another.  
3 years supervised release on counts 7, 8 and 9 in Case #1:04-CR-00127-RCT. All such terms of supervised release to be served concurrently with one another and concurrently with the three year term of supervised release in Case #3:02-CR-00142-RCT.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

Because this judgment imposes a fine and restitution, it is a condition of supervised release that the defendant pay it in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

### STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: DAVID RONALD HINKSON  
CASE NUMBER: 3:02-CR-00142-RCT  
1:04-CR-00127-RCT

### SPECIAL CONDITIONS OF SUPERVISION

- 1) Defendant shall comply with the rules and regulations of the Probation Department.
- 2) Defendant shall not possess a firearm or other dangerous weapon.
- 3) Defendant shall provide the probation officer with access to any requested financial information.
- 4) Defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.
- 5) Defendant shall submit to a search of his person, place of residence, or automobile at the direction of the U.S. Probation Officer and submit to seizure of any contraband found therein.
- 6) The defendant shall cooperate with the IRS in paying his back taxes owed. Also, he shall file any and all tax returns required by law and maintain compliance with all applicable tax laws and provide the probation officer with verification of his compliance.
- 7) Defendant shall participate in mental health counseling as directed by the U.S. Probation Officer. The costs of such treatment shall be paid by both the defendant and government based upon the defendant's ability to pay for treatment.
- 8) Defendant shall pay the special assessment, fine and the restitution obligation that is imposed by this judgment and any monies that remain unpaid at the commencement of the term of supervised release shall be made payable to the Clerk of the U.S. District Court, 550 W. Fort Street, MSC 039, Boise, Idaho, 83724. The defendant shall complete all financial payments no later than September 6, 2005.
- 9) Defendant, his agents, managers, officers, and responsible persons operating defendant's sole proprietorship under the name WaterOz, shall cooperate with the Food and Drug Administration in maintaining and insuring compliance by WaterOz with all Food and Drug Act laws and regulations.

Special conditions of supervised release shall supersede any standard condition that is inconsistent with the special conditions.

DEFENDANT: DAVID RONALD HINKSON  
CASE NUMBER: 3:02-CR-00142-RCT  
1:04-CR-00127-RCT

**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$ 2,725.00	\$ 100,000.00	\$ 720.00

Special assessment \$2,425.00 is imposed on Case #3:02-CR-00142-RCT.  
 Special assessment \$300.00, Fine \$100,000.00, Restitution \$720.00 is imposed on Case #1:04-CR-00127-RCT.  
 The determination of restitution is deferred after such determination. An Amended Judgment in a Criminal Case (AO 245C) will be entered

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.  
 If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

The Court defers to the Internal Revenue Service Civil Division the collection of all back taxes, interest, and penalties owed by the defendant and his sole proprietorship WaterOz. Accordingly, the Court declines to order restitution of such losses in these criminal proceedings because the amounts owed are substantial and it would complicate and unduly prolong the sentencing process to fashion such an order where an alternative civil collection mechanism is readily available to the IRS. 18 U.S.C. § 3663(a)(1)(B)(ii).

<u>Name of Payee</u>	<u>Total Loss</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Steven Hines		\$720.00	100%

**TOTALS** \$ \_\_\_\_\_ \$ 720.00

- Restitution amount ordered pursuant to plea agreement: \$ \_\_\_\_\_
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  - the interest requirement is waived for the  fine  restitution.
  - the interest requirement for the  fine  restitution is modified as follows:



DEFENDANT: DAVID RONALD HINKSON  
CASE NUMBER: 3:02-CR-00142-RCT  
1:04-CR-00127-RCT

### SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A  Lump sum payment of \$ \$100,000 due immediately, balance due
  - not later than September 6, 2005, or
  - in accordance  C,  D,  E, or  F below; or
- B  Payment to begin immediately (may be combined with  C,  D, or  F below); or
- C  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E  Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F  Special instructions regarding the payment of criminal monetary penalties:  
 \$2,725.00 special assessment and \$720.00 restitution are due immediately. Payments to be made to Clerk of the Court, District Idaho, 550 W. Fort St., MSC 039, Boise, ID 83724. Clerk shall disburse restitution payments to the victim, IRS Special Agent Steven Hines.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several  
Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution of \$ 13,741.54, due on or before September 6, 2005.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

\$ 135,500.00 in U.S. currency as previously ordered by the Court on March 25, 2005, in Case Number 3:02-CR-00142-RCT.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

ATTACHMENT-E

E. Indictment.

BARRY M. SABIN  
ACTING UNITED STATES ATTORNEY

2004 JUN 22 PM 5:06

MICHAEL P. SULLIVAN  
SPECIAL ASSISTANT UNITED STATES ATTORNEY

RECEIVED  
U.S. DISTRICT COURT  
D. IDAHO

DENA DOUGLAS-PATTERSON  
TRIAL ATTORNEY  
UNITED STATES DEPARTMENT OF JUSTICE  
601 D STREET, NW  
WASHINGTON, DC 20005  
TELEPHONE: (202) 353-3116

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	)	Cr. No. <b>CR 04-0127-C-BLW</b>
	)	
Plaintiff,	)	INDICTMENT
	)	
vs.	)	
	)	
DAVID ROLAND HINKSON,	)	
	)	
Defendant.	)	
_____	)	

THE GRAND JURY CHARGES:

INTRODUCTION

At all times relevant to this indictment:

1. The defendant, DAVID ROLAND HINKSON, was the owner and operator of the business Water Oz in Idaho County, Idaho;
2. Edward J. Lodge was a United States District Court Judge for the District of Idaho assigned as the principal judge hearing federal civil and criminal cases in the Northern and Central Divisions of the District of Idaho, in Moscow and Coeur d' Alene;



3. Nancy D. Cook was an Assistant United States Attorney (AUSA) for the District of Idaho assigned to the Coeur d'Alene branch office and specifically assigned to the grand jury investigation of and subsequent prosecution of defendant DAVID ROLAND HINKSON on federal criminal charges arising out of his operation of the business Water Oz in the case titled United States of America v. David Roland Hinkson, Cr. No. 02-142-C-EJL;

4. Steven M. Hines was the Internal Revenue Service, Criminal Investigation Division, Special Agent assigned to the criminal investigation of defendant DAVID ROLAND HINKSON and his business, Water Oz;

5. Beginning in approximately the summer of 2000, the Internal Revenue Service, Criminal Investigation Division, through Special Agent Steven M. Hines, initiated a criminal investigation into whether defendant DAVID ROLAND HINKSON had failed to file income tax returns and to account for, collect and pay employment taxes for his Water Oz workers. In the summer of 2000, Special Agent Hines sent defendant DAVID ROLAND HINKSON a letter informing him of the criminal investigation.

6. In July of 2001, Assistant United States Attorney Nancy D. Cook caused grand jury subpoenas to be prepared and served on certain Water Oz employees for their appearance at the grand jury in Coeur d'Alene in September of 2001 in connection with the investigation into defendant DAVID ROLAND HINKSON's tax violations. The subpoenas bore AUSA Cook's name and were served by Special Agent Hines. At least one Water Oz employee discussed the requested grand jury appearance with defendant DAVID ROLAND HINKSON.

7. On April 16, 2002, defendant DAVID ROLAND HINKSON filed a civil suit against Special Agent Hines, AUSA Cook, and others in the United States District Court for the District of Idaho, Case No. CV 02-171-C. The case ultimately was assigned to Judge Lodge.

8. On July 17, 2002, a federal grand jury in Coeur d'Alene returned a 43 count indictment charging defendant DAVID ROLAND HINKSON with three counts of failure to file an income tax return, thirteen counts of failure to account for, collect and pay over employment taxes, four counts of introducing and causing to be delivered for introduction into interstate commerce a misbranded drug, four counts of introducing and causing to be delivered for introduction into interstate commerce an adulterated drug, one count of introducing and causing to be delivered for introduction into interstate commerce a misbranded device, one count of introducing and causing to be delivered for introduction into interstate commerce an adulterated device, sixteen counts of structuring financial transactions and one count of criminal forfeiture.

9. On November 21, 2002, the defendant, DAVID ROLAND HINKSON, was arrested by Special Agent Hines and others and made his initial appearance on the charges contained in the July 17, 2002, indictment. The criminal case also was assigned to Judge Lodge.

10. On February 11, 2003, Judge Lodge dismissed the civil case in its entirety.

COUNT ONE  
(Violation 18 U.S.C. §373)

Paragraphs 1 through 10 of this indictment are hereby realleged in their entirety and incorporated by reference herein.

In or about January of 2003, the precise date being unknown to the grand jury, in the District of Idaho, the defendant, DAVID ROLAND HINKSON, with the intent that JH engage in conduct constituting a felony that has as an element the use of physical force against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, did solicit, command, induce and endeavor to persuade JH to engage in such conduct, that is, to murder United States District Court Judge Edward J. Lodge, an officer of the United States, in

violation of Title 18, United States Code, Section 1114; in violation of Title 18, United States Code, Section 373.

COUNT TWO  
(Violation 18 U.S.C. §373)

Paragraphs 1 through 10 of this indictment are hereby realleged in their entirety and incorporated by reference herein.

In or about January of 2003, the precise date being unknown to the grand jury, in the District of Idaho, the defendant, DAVID ROLAND HINKSON, with the intent that JH engage in conduct constituting a felony that has as an element the use of physical force against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, did solicit, command, induce and endeavor to persuade JH to engage in such conduct, that is to murder Assistant United States Attorney Nancy D. Cook, an officer of the United States, in violation of Title 18, United States Code, Section 1114; in violation of Title 18, United States Code, Section 373.

COUNT THREE  
(Violation 18 U.S.C. §373)

Paragraphs 1 through 10 of this indictment are hereby realleged in their entirety and incorporated by reference herein.

In or about January of 2003, the precise date being unknown to the grand jury, in the District of Idaho, the defendant, DAVID ROLAND HINKSON, with the intent that JH engage in conduct constituting a felony that has as an element the use of physical force against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, did solicit, command, induce and endeavor to persuade JH to engage in such conduct, that is to murder Internal Revenue Service Special Agent Steven M. Hines, an officer of the United States,

in violation of Title 18, United States Code, Section 1114; in violation of Title 18, United States Code, Section 373.

COUNT FOUR  
(Violation 18 U.S.C. §373)

Paragraphs 1 through 10 of this indictment are hereby realleged in their entirety and incorporated by reference herein.

On or about March 17, 2003, the precise date being unknown to the grand jury, in the District of Idaho, the defendant, DAVID ROLAND HINKSON, with the intent that JH engage in conduct constituting a felony that has as an element the use of physical force against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, did solicit, command, induce and endeavor to persuade JH to engage in such conduct, that is to murder United States District Court Judge Edward J. Lodge, an officer of the United States in violation of Title 18, United States Code, Section 1114; in violation of Title 18, United States Code, Section 373.

COUNT FIVE  
(Violation 18 U.S.C. §373)

Paragraphs 1 through 10 of this indictment are hereby realleged in their entirety and incorporated by reference herein.

On or about March 17, 2003, the precise date being unknown to the grand jury, in the District of Idaho, the defendant, DAVID ROLAND HINKSON, with the intent that JH engage in conduct constituting a felony that has as an element the use of physical force against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, did solicit, command, induce and endeavor to persuade JH to engage in such conduct, that is to murder Assistant United States Attorney Nancy D. Cook, an officer of the United States, in

violation of Title 18, United States Code, Section 1114; in violation of Title 18, United States Code, Section 373.

COUNT SIX  
(Violation 18 U.S.C. §373)

Paragraphs 1 through 10 of this indictment are hereby realleged in their entirety and incorporated by reference herein.

On or about March 17, 2003, the precise date being unknown to the grand jury, in the District of Idaho, the defendant, DAVID ROLAND HINKSON, with the intent that JH engage in conduct constituting a felony that has as an element the use of physical force against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, did solicit, command, induce and endeavor to persuade JH to engage in such conduct, that is to murder Internal Revenue Service Special Agent Steven M. Hincs, an officer of the United States, in violation of Title 18, United States Code, Section 1114; in violation of Title 18, United States Code, Section 373.

COUNT SEVEN  
(Violation 18 U.S.C. §373)

Paragraphs 1 through 10 of this indictment are hereby realleged in their entirety and incorporated by reference herein.

Between about December 2002 and February 2003, the precise date being unknown to the grand jury, in the District of Idaho, the defendant, DAVID ROLAND HINKSON, with the intent that EJS engage in conduct constituting a felony that has as an element the use of physical force against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, did solicit, command, induce and endeavor to persuade EJS to engage in such conduct, that is to murder United States District Court Judge Edward J. Lodge, an officer of

the United States, in violation of Title 18, United States Code, Section 1114; in violation of Title 18, United States Code, Section 373.

COUNT EIGHT  
(Violation 18 U.S.C. §373)

Paragraphs 1 through 10 of this indictment are hereby realleged in their entirety and incorporated by reference herein.

Between about December 2002 and February 2003, the precise date being unknown to the grand jury, in the District of Idaho, the defendant, DAVID ROLAND HINKSON, with the intent that EJS engage in conduct constituting a felony that has as an element the use of physical force against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, did solicit, command, induce and endeavor to persuade EJS to engage in such conduct, that is to murder Assistant United States Attorney Nancy D. Cook, an officer of the United States in violation of Title 18, United States Code, Section 1114; in violation of Title 18, United States Code, Section 373.

COUNT NINE  
(Violation 18 U.S.C. §373)

Paragraphs 1 through 10 of this indictment are hereby realleged in their entirety and incorporated by reference herein.

Between about December 2002 and February 2003, the precise date being unknown to the grand jury, in the District of Idaho, the defendant, DAVID ROLAND HINKSON, with the intent that EJS engage in conduct constituting a felony that has as an element the use of physical force against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, did solicit, command, induce and endeavor to persuade EJS to engage in such conduct, that is to murder Internal Revenue Service Special Agent Steven M. Hines, an

officer of the United States, in violation of Title 18, United States Code, Section 1114; in violation of Title 18, United States Code, Section 373.

COUNT TEN  
(Violation 18 U.S.C. §115)

Paragraphs 1 through 10 of this indictment are hereby realleged in their entirety and incorporated by reference herein.

Between about January 2003 and March 31, 2003, the precise date being unknown to the grand jury, in the District of Idaho, the defendant, DAVID ROLAND HINKSON, did unlawfully threaten to murder the children of Nancy D. Cook, Assistant United States Attorney, by stating to AB, a woman living in his house, that he wanted to kill AUSA Cook's children in front of AUSA Cook, with the intent to impede, intimidate, interfere with and retaliate against AUSA Cook on account of the performance of her official duties, in violation of Title 18, United States Code, Section 115(a)(1)(B).

COUNT ELEVEN  
(Violation 18 U.S.C. §115)

Paragraphs 1 through 11 of this indictment are hereby realleged in their entirety and incorporated by reference herein.

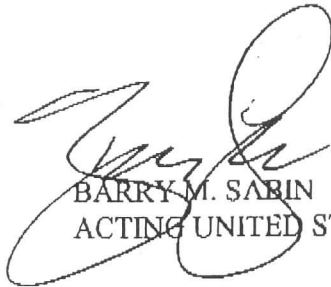
Between about January 2003 and March 31, 2003, the precise date being unknown to the grand jury, in the District of Idaho, the defendant, DAVID ROLAND HINKSON, willfully and unlawfully did threaten to murder the children of Steven M. Hines, Special Agent, Internal Revenue Service, by stating to AB, a woman living in his house, that he wanted to kill Special Agent Hines' children in front of Special Agent Hines, with the intent to impede, intimidate, interfere with and retaliate against Special Agent Hines on account of the performance of his official duties, in violation


of Title 18, United States Code, Section 115(a)(1)(B).


Dated this \_\_\_\_\_ day of June, 2004.

A TRUE BILL

Kristine J. Crawford,  
FOREPERSON

  
BARRY M. SABIN  
ACTING UNITED STATES ATTORNEY

  
for DENA DOUGLAS-PATTERSON  
Trial Attorney  
United States Department of Justice

  
MICHAEL P. SULLIVAN  
Special Assistant United States Attorney



**CRIMINAL COVERSHEET**

DEFENDANT'S NAME: DAVID ROLAND HINKSON

Juvenile: No

DEFENSE ATTORNEY: Wesley Hoyt  
 Address: HC 66 Box 313A  
 Kooskia, Idaho 83539  
 Telephone No.: (208) 926-7553

Service Type: Warrant/ Non-Secret

Interpreter: No  
 If yes, language:

INVESTIGATING AGENCY & AGENT: William long  
 FBI  
 208/661-7266

CR 04-0127-C BLW

CASE INFORMATION: (List any miscellaneous, magistrate, CVB or other related defendants/case numbers.)  
 CR No. 02-142-C-EJL; CV 02-171-C-EJL

**CRIMINAL CHARGING INFORMATION**

Complaint	<input checked="" type="checkbox"/> Yes	Indictment	<input type="checkbox"/>	Information	<input type="checkbox"/>	Superseding Indictment	<input type="checkbox"/>
<input checked="" type="checkbox"/> Yes	Felony	<input type="checkbox"/>	Class A Misdemeanor	<input type="checkbox"/>	Class B or C Misdemeanor (Petty Offense)		
County of Offense: Idaho				Estimated Trial Time: 15 days			

TITLE/SECTION	COUNTS	BRIEF DESCRIPTION	PENALTIES (Include Supervised Release and Special Assessments)
18 U.S.C. 373	1-9	Solicitation to Commit a Crime of Violence	Not more than 20 years imprisonment; \$125,000 fine; \$100 Special Assessment per count; Not more than 5 years supervised release.
18 U.S.C. 115-(a)(1)(B)	10-11	Influencing, Impeding or Retaliating Against a Federal Official by Threatening or Injuring a Family Member	Not more than 10 years imprisonment; \$250,000 fine; \$100 Special Assessment per count; Not more than 3 years supervised release.

Date: June 22, 2004

DOJ Trial Attorney: Dena Dougl-Patterson  
 Telephone No.: (202) 353-3116  
*M. P. Sullivan*