AFFIDAVIT OF WESLEY W. HOYT
In Re: Hinkson Petition for Habeas Corpus under 28 USC §2241, and
For the Establishment of a Right to Relief that is Satisfactory to the Court under Rule 55

STATE OF COLORADO)
) ss.
COUNTY OF BOULDER)

WESLEY W. HOYT, upon his oath, deposes and states:

I am an attorney who has been licensed to practice law in Colorado for the past forty years and in Idaho for over twenty years; I am currently licensed and have an active practice in both states. From 1994 through 1997, I served as the Deputy Prosecutor of Idaho County, Idaho.

The facts stated in this Affidavit are true, based on my own personal knowledge, except as to matters based on information and belief; and, as to such matters, I believe them to be true because they are derived from trustworthy and reliable sources.[1] The cumulative effect of all the evidence presented herein supports David Hinkson's claim of actual innocence. Some facts were excluded, some were not presented at Hinkson's 2005 trial on the solicitation charges and the remainder were not considered for their cumulative effect or ruled upon in accordance with the actual innocence doctrine and false evidence standard.

I. BACKGROUND

David Hinkson, now age 57, has been incarcerated for ten years and eleven months on false murder-for-hire charges trumped up by Elven Joe Swisher who, subsequent to Hinkson's 2005 trial, was convicted in 2008 on perjury, forgery, theft and stolen valor charges. Hinkson developed a dietary supplement product and founded a manufacturing and distribution company located near Grangeville, Idaho in 1997. Swisher was a service-provider (assayer) for Hinkson's company, performing testing of the dietary supplement product(s) for mineral content. At some time during the professional relationship, Swisher, recognizing the lucrative nature of the business, attempted to extort both money and a share of the business from Hinkson. When Hinkson refused, Swisher proclaimed publicly that he wanted to make sure Hinkson went to "jail for the rest of his life", and in order to make sure that happened, said that he "would go to Boise to testify." In fact, Swisher went to Boise and began a nightmarish scenario by testifying in front of a Grand Jury in 2004. As a private attorney in Idaho, as the Deputy Prosecutor and as a lawyer associated with Hinkson since 2003, I have observed the facts and am aware of the information in this affidavit detailing the methodology used by Swisher and the Prosecution (the

1This Affidavit provides evidence about which I have personal knowledge that bears on Hinkson's claim of actual innocence as to events that occurred in Idaho County, Idaho, where I served as Deputy Prosecutor. Idaho County is the home of both David R. Hinkson ("Hinkson") and Elven Joe Swisher who was the only witness the jury believed in Hinkson's 2005 solicitation of murder-for-hire trial (the "Solicitation Case", Idaho Federal District Court Case No. CR-04-0127-C-RCT). Swisher's testimony was the basis of Hinkson's conviction of three out of eleven counts of solicitation for the murder of federal officials under 28 USC §373 (the "Swisher Counts") at the 2005 trial. Swisher testified that the time period of Hinkson's murder solicitations supposedly occurred in Idaho County on three occasions, in (a) April 2002 (after April 16th); (b) in July or August 2002; and , (c) in mid-January 2003. The evidence in this Affidavit shows that it was impossible for Hinkson to have held the solicitation meetings with Swisher at the times and places stated by him. Therefore, the proof of actual innocence turns on the credibility of the witness Swisher, without whom there was no case.

United States Government) to wrongfully convict Hinkson.

This case involves 'offsetting witness credibility', i.e., wherein one said something happened, and the other said it did not. It is a classic 'he said – he said' debate, and after accusations were made by Swisher (the Prosecution's 'star witness'), Hinkson was left with having to prove a negative. Therefore, the evaluation of Swisher's credibility is critical, especially when it has been clearly demonstrated that he has a pattern of lying relative to other facts in this case.

II CASE SUMMARY

1. **David Hinkson---Extreme Intelligence/Asperger's.** Mr. Hinkson, like others with Asperger Syndrome (such as Albert Einstein), presents with classic signs, such as high intelligence and lack of social skills. He is extremely creative, unusually outspoken (sometimes to the point of being irritating or offensive) and completely non-violent, having never harmed anyone (see ¶ 11 below.) He is an in-depth researcher, voracious reader, has a photographic memory and is considered by some to be a "genius". He has been a radio talk-show host, inventor, businessman and a paralegal in a Las Vegas law firm from 1990 to 1995, prior to developing a line of dietary supplement products in 1996 along with his manufacturing and distribution company, "WaterOz". Hinkson has always been interested in and active regarding political matters and was instrumental in "un-electing" several Clark County, Nevada Commissioners whom he believed were corrupt[2] and derailing the election-bid of Attorney Dennis Albers for the office of Idaho County Prosecutor in 2000.

2. **Hinkson's Work as a Paralegal Trained Him to Petition for Redress of Grievances**. As a paralegal, Hinkson learned to prepare and submit complaints and petitions to his government for redress of grievances; he also became skilled in 'dispute letter-writing' seeking administrative action.

3. **Hinkson Discovered the Ionization Process and Started WaterOz Business.** Hinkson made a significant contribution to the health-sciences in 1994 when he discovered the process of "ionizing" minerals into angstrom-sized particles (smaller than nano) suitable for human consumption in their most absorbable form. He perfected the method of suspending the ionized minerals in highly purified water and bottled it for everyday dietary-supplement use in mineral replacement therapy. The liquid mineral supplement product, useful for addressing mineral deficiencies often caused by diet, lifestyle and mineral-depleted soils, is produced from 99.9998% pure minerals that are non-toxic to the environment. After starting his WaterOz company in Las Vegas, Nevada in 1994, Hinkson re-located the business and his family to unincorporated Idaho County (twenty miles north of Grangeville) in late July 1997.

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2 In connection with the mid-1990 Clark County Nevada election of County Commissioners, Hinkson explained their corruption in 600,000 fliers he printed then recruited homeless people to pass them out. After moving to Idaho County and in 2000 he sent out 10,000 letters in a campaign to remind Idaho County voters that Dennis Albers, who was running for Prosecuting Attorney, had been sanctioned by a disciplinary decision of the Idaho Supreme Court which told him not to run for Prosecutor again because of jury tampering by Albers in Swisher's 1980 child molestation case (involving the rape of his three daughters, each under age 10). When the mistrial occurred, because Albers was seen "chatting" with one of the jurors during a recess, the case was not reset for trial by Albers, allowing Swisher to escape justice. While I was Deputy Prosecuting Attorney, Albers admitted to me that he had carried on a conversation directly with one of the jurors in the hallway during a court recess which was the event that caused the mistrial.

Hinkson holds an honorary Naturopathic degree and, until his detention in April 2003, was highly sought after as a speaker at various health conferences nationwide.

4. **The "Tax Case."** On November 21, 2002, Hinkson was arrested and immediately released on his own recognizance after the execution of a Federal Search Warrant at his home and factory involving FDA product-labeling violations, failing to file tax returns and structuring of currency transactions (herein the "Tax Case.")[3]

5. **WaterOz Profitability Attracts Those with Takeover Mentality**. WaterOz products gained recognition, popularity and acceptance in 1998, which resulted in gross revenues accelerating from less than $80,000 in 1997 to over $4.0 million per year by 2000. The extraordinarily rapid rise in profitability of the company attracted the attention of certain parties in Hinkson's circle who schemed up a plan for a 'hostile takeover' of the company since Hinkson was often physically absent from the manufacturing plant in much of 2001 and 2002 while traveling abroad to develop an international market for his product. Between 1998 and 2004, at least four separate individuals or groups attempted to take over the WaterOz business (mainly employees or contractors who seemed to think it was "okay" to take a business from a self-made "science guy." Each of these takeover people went after what they perceived should be their 'piece of the pie,' and Swisher, the local mineral assayer became one of the most persistent. On January 3, 2003, as a part of his attempt to take money from Hinkson, Swisher schemed up a "cyanide-extortion" plan (see ¶ 28(e)) demanding a one-half interest in WaterOz and $800,000 as his 'slice' of the pie (see Affidavit of David R. Hinkson Ex A-2, ¶ 72). Swisher, who was unsuccessful at the extortion attempt, joined up with some current and former employees who decided to file a lawsuit to gain control of the company. Hinkson was required to defend this, and various other lawsuits, to ward off these takeover attempts, including a 1998 lawsuit filed by Annette Hasalone (daughter-in-law of Hinkson's then general manager, Bobbie Eve) who was represented by attorney Dennis Albers. When Hasalone was unable to obtain an interest in Hinkson's business, she sued for over $600,000. The final result of her suit in August 1999 was a judgment amounting to $100,000 which was paid by Hinkson in the fall of that year. Swisher later claimed that Hinkson was obsessed with the Hasalone judgment and that it drove him to demand the torture-murder of Hasalone's attorney, Dennis Albers. However, by 2002, when Swisher claimed to have been solicited by Hinkson, $100,000 amounted to less than 1% of Hinkson's gross revenues and Hinkson was consumed with building the international side of his WaterOz business, inspecting sites for regional bottling plants in foreign countries and had thus 'moved beyond' Hasalone's victory.

6. **Pending Cases:** I was retained by David Hinkson on December 3, 2003, to handle matters related to his dietary supplement business, including defending the company against Swisher's lawsuit that was in process at that time based on a Temporary Restraining Order.

7. **Swisher's Motive Shown by Extortion Attempts and Hostile Takeover**. On

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3 The Tax Case: Idaho Federal District Court Case No. 3:02-cr-00142-BLW-RCT, involved a forty-three Count Indictment set for trial in late April 2004 related to three subject areas: (a) Failure to File Tax Returns; (b) Improper Product Labeling under FDA Law; and (c) Structuring of Currency Transactions.

December 2, 2003, the date the TRO was entered Hinkson was defending the Tax Case and had been in detention on false murder-for-hire accusations trumped up by his former housekeeper, Mariana Raff (of which it was later proven he was actually innocent) who used the charge to cover up her theft of $6,000 travel money that she found in his home). For eight months (since April 4, 2003) Hinkson had been sitting in a county jail because of these false Raff charges (see ¶ 21(a) and fn 30) unable to actively manage his business while several of his employees and Swisher planned the takeover.

a. Swisher Set Up Hinkson for FDA Charges. Hinkson had been 'set up' for FDA violations by Swisher based on the mineral content in his products not matching the amount specified on the label. Swisher turned in assay reports that showed his product mineral content was accurate while another employee, Hinkson's trusted mineral-maker, 'Chris' deliberately made the product with less than the specified amount of mineral content. As a result, when his products were tested by the FDA, they were deficient, a misdemeanor law violation.

b. History of Hinkson's Arrest and Incarceration. His initial arrest was November 21, 2002 supported by an indictment on FDA product labeling violations, failure to file tax returns and currency structuring charges. Initially, he was released from custody on his own recognizance, but five months later, the false Raff Charges arose and he was arrested and placed in pretrial detention. Since the Raff charges were only supported by her statement, the objective observer would expect the FBI agent she spoke with to investigate the truth of the matter because it involved the safety and security of federal officials. These were proven to be absolutely false allegations but it took over a year to galvanize the FBI into taking a serious look at the Raff accusations.

c. Hinkson's Absence Opened Door to Takeover. The net result was that Hinkson remained in jail from April to December 2003 when the takeover occurred (and beyond). Hinkson had been absent from his business for eight months, by December 2, 2003 when Swisher, WaterOz employees Lonnie Birmingham and Richard Bellon (a felon who went to prison for assaulting an elderly female IRS agent in California, see Ex A-12) and the other collaborators obtained a TRO by fraud and commenced a hostile takeover.[4] This group misrepresented facts to the local Idaho State Judge, causing him to grant the TRO based on false testimony.

d. Defense of TRO Lawsuit. I was hired to defend that TRO lawsuit and to work with Hinkson's designated WaterOz management team on other civil matters and

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4 In his 2005 trial testimony in the Hinkson Solicitation Case, Swisher pretended that he was not a part of the hostile takeover of WaterOz; however, I defended the case and observed Swisher's participation in every aspect of that proceeding, providing the "expert witness" testimony to the Idaho State Judge at the TRO hearing, falsely stating that the WaterOz products were unsafe for the public and alleging there were unclean working conditions, all in order to obtain the TRO that permitted him and his co-conspirators to take over the business. Swisher, who pretended to be an expert in "Best Manufacturing and Management Practices," entered WaterOz with his co-conspirators on December 2, 2003, ejecting Hinkson's management team, declaring himself to be CEO of WaterOz and rifling through the WaterOz company records (see Ex A-9, Towerton Aff. of 04-15-12 ¶ 27-28) stealing customer lists and trade secrets. Swisher, an assayer, who worked with minerals in the context of mining, was seeking to clone the process for himself.

business-related issues. Swisher and his co-conspirators were able to do a great deal of damage in the week that they had control of the company. By December 10, 2003, the TRO was vacated and the 'takeover conspirators' ejected, although it required several months of litigation to get the case dismissed.

e. **Swisher and Cohorts Believed Lawsuit would Put them in Control of WaterOz**. During those months, as litigation was pending, Swisher and Bellon actually believed that they would win the case and thus be able to obtain ultimate control of WaterOz. Acting on that belief, Swisher stepped up his tactics and went "to Boise to testify against Hinkson' before the Grand Jury on February 10, 2004 in aid of his plan to send Hinkson to prison for the rest of his life (to keep him from claiming his business). Swisher's plan was to testify that Hinkson was the mastermind behind a plot to torture-murder many people, including three specifically designated, Idaho federal officials, IRS Special Agent Steven Hines, Federal Prosecutor, AUSA Nancy Cook and Federal District Court Judge, Edward Lodge (the "Designated Federal Officials").

f. **Plan to Imprison Hinkson for Life**. These very serious charges were supported by the Government and Swisher, who was certain that if Hinkson was locked away and never got out of prison, leaving a void in the management of WaterOz, the control would fall to him because of the lawsuit. Since part of Swisher's plan was to put Hinkson in "jail for the rest of his life" (see ¶23(c)(iii)) he wanted to get Hinkson out of the way to avoid any claim by Hinkson related to his interest in WaterOz. Thus, Swisher's plan was to clear the way for the complete takeover of the company.

g. **Swisher wanted Hinkson's Property**. In that TRO lawsuit, Swisher made bogus claims for over a half-million dollars of property which he said Hinkson owed him, based on a 'trade-out' or 'set off' theory alleging that he had only partially billed for, and only been paid partially in cash for mineral-testing services and what he claimed was the remaining outstanding amount due, supposedly was to be paid by "in-kind' transfers of real property and heavy equipment plus $250,000 in cash to help Swisher start up a new business. When these false allegations of 'in-kind' property transfers were finally dismissed in October 2003, they were reinvented by Swisher for the Solicitation Case as "verbal gifts," which Swisher implied were to be disguised payments in the murder-for-hire scheme Swisher claimed Hinkson had developed to eliminate his "tormentors" (which consisted of a list of anyone identified by Swisher that grew over time). Swisher chose the same list of property that he wanted from Hinkson, but for the Solicitation Case, put a different spin on it. In the TRO lawsuit, it was 'trade-out' for assay work, in the Solicitation Case it was a 'trade-out' as part-payment on the alleged murder-for-hire plot.

8. **The "Solicitation Case."** The indictment in the Solicitation Case was served on Hinkson in June 2004, after the May verdict in the Tax Case, and refers to eleven counts of murder-for-hire solicitation, eight of which (the "Bates and Harding Counts") were ultimately dismissed. The three charges of murder solicitation that were not dismissed (as to the Designated Federal Officials) and on which Hinkson

was convicted, form the basis for Hinkson's §2241 Habeas petition and stem from allegations by Swisher (herein the "Swisher Counts").

a. The Swisher Counts came about because Swisher testified before the Grand Jury in Boise on February 10, 2004 at a time when he believed he would be able to get control of WaterOz via the pending TRO lawsuit (which had been filed a few months before, on December 2, 2003).

b. The facts show that Swisher's pattern of lying to various federal tribunals revolves around what he believed would lead to his own financial gain. For instance, Swisher lied to the Veterans Administration about his fake military career to obtain over $150,000 in medical payment for his 2002 massive heart attack, life-flight to Spokane, open heart surgery, ICU, double pacemaker, therapy and recovery expenses) all paid for by the VA because Swisher pretended to be a wounded combat veteran from the Korean War era. Swisher also fraudulently obtained a substantial monthly disability income payment for which he was also convicted.

c. Using the same lies he told to the VA, Swisher built of a false credibility as a Korean combat hero, as a springboard to accusing Hinkson of soliciting him to murder the Designated Federal Officials and that would put Hinkson "in jail for the rest of his life;" clearing the way for Swisher to obtain a half-interest of Hinkson's business that, as of 2002 was producing $4,000,000 per year. One of Swisher's co-conspirators, Bellon, fraudulently claimed he had a partnership agreement with Hinkson giving him half of Hinkson's business which also, Bellon claimed allowed him to take over the business. Ultimately, all of these take over claims were defeated in the litigation process.

9. **Hinkson's Trial Counsel**. As of December 2003, Hinkson's former criminal defense attorney, Britt Groom, had withdrawn from the Tax Case and I was asked to find Hinkson an Idaho federal criminal lawyer to defend him. None of the dozen or so qualified attorneys in Idaho I contacted would take the case, as it was considered to be too "icky" (a term used by a noted Idaho criminal attorney who turned down the case because of what he called the "ick" factor) due to the (false) allegations that Hinkson had plotted the murder of an Idaho federal judge, IRS agent and prosecutor (i.e., the Designated Federal Officials). It was therefore necessary to hire an experienced criminal trial attorney from out of Idaho. The same situation occurred in 2004 when the Solicitation Case Indictment was served on Hinkson, i.e., because no Idaho federal criminal trial attorney would accept Hinkson's representation, an out-of-state attorney was retained. This Affidavit is based on my knowledge of facts pertaining to the alleged solicitation of Swisher acquired while acting as lead counsel in the civil TRO case and as co-counsel in both the Hinkson Tax Case and the Solicitation Case. I assisted the two seasoned criminal trial lawyers[5] who represented Hinkson, both of whom appeared *pro hac vice* as lead counsel in those cases.

10. **Hinkson's Sentencing in the Tax Case in 2004 Postponed**. After Hinkson's May 2004 conviction in the Tax Case for non-violent charges of (1) failing to file tax returns; (2) structuring currency transactions; and (3) FDA misdemeanor product labeling violations (mineral content of product found below label specifications) sentencing was postponed

5 In the Tax Case, Hinkson was represented by Sean Connelly and in the Solicitation Case, by Thomas Nolan.

and combined with the Solicitation Case (the trial of which took place in January 2005). The final combined sentencing on the Tax and Solicitation cases occurred in June 2005.

11. **Hinkson, who did not Present a Risk of Violence to Anyone, was Convicted of Crimes of Violence in the Solicitation Case**. Hinkson recently (in January 2014) had a Violence Threat Level Assessment performed at Atwater Prison, whereby it was reaffirmed that he is a non-violent individual that presents no threat to others. Nonetheless, in January 2005, Hinkson was convicted of three violent crimes (the Swisher Counts) for soliciting the murder of the three designated federal officials (a Judge, a Prosecutor and an IRS Agent) under 18 USC §373 based strictly on the false accusations of Swisher as set forth herein.

12. **Sentencing.** At his June 2005 combined sentencing hearing, Hinkson was condemned to what amounts to a life sentence of 43 years in prison (consecutive sentencing of a 10 year term on the Tax Case and three 10 year terms on the Solicitation Case, plus an upward departure of 3 years, of which he has served ten years, ten months; he will be age 90 at completion). He was initially placed in solitary confinement in the United States Penitentiary, Administrative Maximum Facility (ADMAX) in Florence, Colorado unofficially known as *the Alcatraz of the Rockies* at the direction of Judge Richard C. Tallman (a federal appeals court judge who sat by Ninth Circuit Court designation as the trial judge in both the Tax and Solicitation Cases).

13. **Hinkson's Previous Political Involvement in Petitioning the Government for Redress of Grievances Held Against Him.** Seven years after the sentencing hearing Judge Tallman finally articulated his deep-seated antagonism toward Hinkson based on previous activity in petitioning the Government for redress of grievances and for his political activism. The following disclosure was made by Judge Tallman as he described Hinkson in his August 28, 2012 *Order Denying Recusal Motion*[6] as follows:

(a) "…demonstrated pattern of vexatious conduct";
(b) "…a long history of obstructing justice…";
(c) "…repeated and persistent misconduct and abuse of the legal system…";
(d) "…engage(ed) in protracted frivolous civil litigation…";
(e) "…seeking to abuse the legal process and intimidat(ion) of federal officials from performing their duties…";
(f) "…filed…a number of administrative complaints…" and
(g) "…all [a]s a component of this general strategy to 'game the system'…"

This rhetoric shows that Judge Tallman had-deep seated concerns about many extra-judicial matters not a part of the Solicitation Case (some of his comments were related to well-taken recusal motions involving other judges which had been filed by noted attorneys and were not frivolous[7]). In any event, Judge Tallman's statements listed above show that he had judicial bias against Hinkson[8] and reflect his inability to put such matters out of his mind. What

6 See Ex B-2, Order denying Recusal Motion dated August 28, 2012, pgs. 3-5.

7 Some of the recusal motions filed by Hinkson (that Judge Tallman found offensive) were submitted by Sean Connelly, former Assistant United States Attorney who acted as Special Prosecutor in the Timothy McVey series of cases, and is now a Colorado State Appeals Court Judge.

8 *U.S. Philips Corp. v. U.S. Dist. Court for the Cent. Dist. of Calif*., Case# 12-71696 (9th Cir. March 5, 2013). Judicial bias was found: "The district judge had shown substantial difficulty in putting out of his mind his

Judge Tallman thought about Hinkson's other administrative and court filings does not bear on Hinkson's guilt or *actual innocence* in the instant proceeding and a separate adjudication would be required on those issues, which are extra-judicial. (Id., Ex B-2, Idaho Federal District Court Case 1:04-cv-00196-RCT, Doc. # 17, filed 08-28-12 pgs. 3-5.)

14. **Solitary Confinement was Retaliatory**. During his five years of imprisonment in ADMAX (home to some of America's most dangerous criminals) Hinkson had virtually no human contact, with meals shoved through a slot in the door of his 6' x 8' cell and where the guards did not speak (except when taking him out of his cell in ankle and belly chains). He used the time to learn Spanish and Russian and to design inventions for a new generation of "green-energy" products. Retaliation is sign of judicial bias (see ¶ 34).

15. **From Solitary Confinement to General Prison Population**. The ADMAX staff learned Hinkson was harmless and relocated him to the general prison population. He was then transferred to the United States Penitentiary, Atwater, California, where he is housed at present. He was recently removed from the Atwater general population and placed in protective custody for his own safety after threats from a group of "white" inmates (who practice racial discrimination) and believed they should receive what Hinkson paid to a black inmate for legal research. The black inmate also protected Hinkson from prison violence. Hinkson was removed from the general population in January 2014 as the "whites" threatened to kill him if he declined their proposal to provide "legal research and protection."

III ESSENTIAL ELEMENTS OF CASE

16. **Summary of Hinkson's Present § 2241 Case**. The facts in this Affidavit present evidence that supports Hinkson's claim of actual innocence[9]; if considered with all available evidence, the cumulative effect would be that, more likely than not, no reasonable juror would convict Hinkson on the Swisher Counts (assuming the jury was also informed about Swisher's false testimony as to his military career.)[10] The Swisher Counts, which are the only charges for which Hinkson now stands convicted, are based solely on Swisher's testimony that, in "mid-January" 2003 (Tr. 1013, at 7) in a one-on-one meeting, in Hinkson's private office on the second floor of the WaterOz factory building, Hinkson solicited Swisher to torture-murder the Designated Federal Officials. Swisher went to great lengths to build his credibility with the jury based on falsehoods

previously expressed views" where the Appeals Court found that this was a good enough reason to assign a new judge.

9 *Alaimalo v. U.S.*, 636 F.3d 1092, 1096 (9th Cir. 2010) "To establish actual innocence for the purposes of habeas relief, a petitioner 'must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.'"

10 The Swisher Counts are limited to solicitation for the murder of the Designated Federal Officials at a discrete moment in time (at an alleged meeting between Hinkson and Swisher in mid-January 2003) which solicitation, if it occurred, is within the scope of federal law. To avoid confusion, it should be noted that Swisher testified about Hinkson supposedly soliciting him to murder many other people, none of whom were federal officials, including Idaho District Court Judge George Reinhardt, former Idaho County Prosecutor, Dennis Albers and Hinkson's ex-wife, Marie Hinkson, a resident of Idaho County. Hinkson, in filing his §2241 Habeas Petition recognizes that there is a connective thread between all of Swisher's allegations, and for that reason this Affidavit briefly addresses all murder-for-hire allegation by Swisher. Once the *modus operandi* of Swisher is understood, and his capacity to weave extensive and elaborate tales is exposed, it is believed that the objective observer reviewing this case will be convinced that Swisher added additional names to the list of possible victims in order to increase the seriousness of his allegations to make it appear Hinkson was masterminding the murder of many and in order, in a very sick way, to aggrandize himself and elevate his sense of self importance.

and forgery to put Hinkson in prison in order to obtain a piece of Hinkson's lucrative WaterOz business. Swisher stated in public that he wanted to make sure Hinkson went to prison for "the rest of his life" if Hinkson refused to pay his extortion demands as discussed below. With Hinkson out of the way, Swisher believed (although mistakenly) that he and his cohorts could win the TRO lawsuit which would give him control of WaterOz.

a. **Without Swisher There was No Case**. In the words of Ninth Circuit Court Chief Judge Alex Kozinski, "[w]ithout Swisher the Government had no case."[11]

b. **Swisher's 2008 Conviction**. We now know what the jury in the Hinkson 2005 Solicitation trial never could have known, i.e., that Swisher was convicted of perjury in 2008 for having told the same lies in July 2004 to the Administrative Law Judge ("ALJ") at a Veteran's Administration Disability Benefits hearing[12] as he told to the jury in the January, 2005

Hinkson trial—i.e., that he was a decorated veteran, wounded in combat during a post-Korean War secret rescue mission for POWs in North Korea.

c. **Swisher's Parallel Deceptive Schemes**. The elaborate deceptive scheme that Swisher presented to the VA in 2004 in order to obtain unearned benefits mirrors the elaborate scheme Swisher presented in order to deceive the Hinkson jury which caused Hinkson to be convicted of soliciting Swisher as a 'hit-man,' in Swisher's purported murder-for-hire plot. Common to both schemes was Swisher's false claims of military combat experience in Korea; the truth of which was that he had never set foot in Korea during his military career and was never in combat never wounded and never killed anyone (see ¶16(j) and Miller Aff. Ex B-9).

d. **Fake Military Heroism was Leverage in Both Cases.** Swisher claimed VA benefits he had no right to receive by leveraging his bogus claims of military heroism, just as he leveraged those same fake heroism claims that cause the jury to believe that Hinkson solicited him to torture-murder various people. Both the ALJ in the 2004 VA case and the jury in the 2005 Hinkson case were favorably impressed with Swisher's military credentials and believed his false testimony (i.e., he was awarded VA benefits and Hinkson was convicted.)

e. **If Juror had Known, he would not have Voted to Convict.** One of the Hinkson jurors, in a post-trial affidavit, stated that he would not have voted to convict Hinkson on the Swisher Counts if he had known that Swisher was lying about his military career.[13]

f. **Correction of Known False Testimony would have Prevented Hinkson's Conviction**. If the prosecution had corrected Swisher's false testimony, as it was required to do (see fn 17 and 18), it is likely that the jury would not have

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11 *U.S. v. Hinkson*, 611 F.3d 1098, 1099 (9th Cir. 2010).

12 *US v. Swisher*, 760 F. Supp. 2d 1215 (D. Idaho 2011) see also 360 Fed. Appx. 784 (9th Cir. 2009).

13 See Ex A-8, Aff. of juror Ben Casey.

convicted Hinkson (especially considering juror Ben Casey's resolute state of mind; see Ex A-8).

g. **Mistrial Justified**. When the myriad of lies became apparent during the 2005 Hinkson trial, the trial court should have granted defendant's motion for a mistrial (see ¶ 34).

h. **Applying the Cumulative Effect Doctrine**. When all known facts are considered together, the cumulative effect of the evidence supports the proposition advanced by Hinkson's §2241 Habeas Petition, which is that he is actually innocent because he did not commit a crime and that no crime was ever committed, except in Swisher's furtive imagination.

i. **Swisher's Motive in Testifying against Hinkson**. As shown below (see ¶ 21(c)(iii)) Swisher's principal motive was greed; he was seeking financial gain by attempting to acquire an interest in WaterOz. Coupled with Swisher's greed was revenge because Hinkson would not agree to make extortion payments to him.[14]

j. **Obtaining Justice after Swisher's VA Fraud took Years**. The evidence shows Swisher was highly skilled at forgery and extremely experienced at concocting elaborate stories and giving false testimony in order to bolster fraud schemes that were in his own self-interest. Swisher used perjury, forgery and stolen valor claims as the tools of his trade, in order to steal VA medical and disability benefits that involved expertly-crafted Government documents that took the United States Marine Corps Commandant's Office at least five months (August–December 2004, see Ex B-13) to figure out and discredit.[15] Over a dozen of Swisher's deceptive statements were also presented at the Hinkson trial (see ¶ 22(d)) which contributed to the jury's high (but false) regard for his credibility. It was two years after Hinkson's conviction (in 2007) before Swisher was charged through the US Inspector General's Office with the VA-related crimes, and took another year to convict him for the theft of over $150,000 in VA medical and disability benefits (see fn 12).

k. **Report on Swisher's Fraud Available During and After Hinkson Trial**. During the Hinkson trial, the prosecution obtained a copy of the "Dowling Report" (see Ex B-5) which discredited Swisher's rendition of his military history and proved he did not serve in Korea and had lied during the 2005 Hinkson Solicitation trial. Although the prosecution tendered a copy of the Dowling Report to Hinkson's defense team in the second week of trial, the Government failed to correct Swisher's false testimony and false evidence that had already been presented to the jury.

l. **Court gives Jury "Limiting Instruction" as an attempt to Cover Up Swisher Lies.** The Court, in an attempt to cover up the effect that Swisher's lies had on the jury as to his Korean military combat experience eventually

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14 See Ex B-1, Aff. Towerton ¶ 16; and Ex A-2, Aff. Hinkson ¶ 72.

15 See Ex B-5, Dowling Report of December 30, 2004 (issued four business days before Hinkson's 2005 trial.)

gave the jury a limiting instruction[16] and told them to "disregard" all testimony concerning the Purple Heart and commendations, which by no means undid or reversed the damage from the Government's vouching for Swisher as a combat veteran from Korea, nor did it negate the effect of the other false testimony and evidence presented. The limiting instruction failed to point out the untruthfulness of the entire "Swisher Story" and it specifically allowed the jury to consider Swisher's testimony on direct examination where Swisher had falsely testified, as follows:

[Prosecutor Sullivan] Q: "Did Hinkson ever ask you about your service in the Armed Forces?
[Swisher] A: "Yes."
[Sullivan] Q: "What branch did you serve in?"
A: "United States Marine Corps."
Q: "Did you ever discuss that with Mr. Hinkson?"
A: "Yes."
Q: "And what was the nature of your discussion with him?"
A: "He [Hinkson] asked if I had served in any combat situations. I explained – or told him, "Yes."
Q: "What else did he ask you about <u>combat</u> situations?"
A: "He asked if I had ever killed anyone."
Q: "What did you say?"
A: "I told him, 'Yes.' He asked, 'How many?' I told him, "Too many."
(Emphasis added.) (Tr. pg. 988 lns. 12-25 and 989 lns. 1-6)

To be clear, the prosecution brought up and discussed "combat" with Swisher on direct. In this segment of direct testimony, Swisher ratified the Government's theory that he was a combat soldier. The prosecution represented to the jury in its opening statement that Swisher was a "veteran" from "Korean combat." Thus, Swisher's direct testimony ratified the prosecution's statement and expanded on it by claiming that he had, prior to being solicited by Hinkson, informed him that he had killed "many" in combat; which we now know, unequivocally, was a blatant lie. Thus, the limiting instruction was ineffective on its face because it did not deal with Swisher's direct examination testimony or any other false Swisher-testimony that also supported false evidence as well as fake-facts relied upon by the Government in presenting its theory of the case to the jury.

m. **Swisher's Forging of his DD-214 (Military Discharge Document) Officially Confirmed.** During trial there were two official letters presented that showed Swisher's military claims were fraudulent, the 'Dowling' (Ex B-5) and 'Tolbert' (Ex B-11) letters. In addition, after the verdict in the Hinkson

16 The trial court's limiting instruction: THE COURT: "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 certainly are entitle to consider all of the rest of his testimony. Just everything from where I (sic) asked Mr. Nolan to re-open, please strike that from your minds; and you are not to consider it as evidence in the case." (Tr. 1131, 23-25 and 1132, 1-9.)

case was rendered, Hinkson submitted a *Motion for New Trial* to which an affidavit from Chief Warrant Officer, W. E. Miller was attached (see Aff. "CWO Miller," Ex B-9). Miller was the individual at the National Personnel Records Center charged with determining the authenticity of military documents submitted by veterans, such as Swisher's "replacement DD-214." CWO Miller's Affidavit (Ex B-9) explains in detail why the Swisher "replacement DD-214" was a forgery and why Swisher's tale of serving in combat in Korea and receiving war wounds as presenting to the jury was fraudulent.

n. **Hinkson's Motion for New Trial Denied by Judge Tallman Despite Undisputed Evidence that Swisher was a Liar and a Forger.** The case law requires a new trial if the false testimony and evidence used to convict a defendant was not corrected.[17] But, Judge Tallman, who participated in the Hayes decision (fn 17) denied Hinkson a new trial.

17. **Lack of Unobstructed Procedural Shot**. Hinkson has never had an unobstructed 'procedural shot' at presenting his actual innocence claim, which was ignored when his §2255 Habeas Petition was considered in 2012 by Judge Tallman. No opinion was rendered applying the doctrines necessary to have a complete adjudication under the actual innocence doctrine and the cumulative effect doctrine, nor did Judge Tallman enter a ruling concerning the effect that correcting Swisher's false testimony would have had on the jury (because he did not recognize Swisher's testimony as false, in fact, throughout the trial, Judge Tallman continually made his personal views known, that he believed the Swisher Story was trur, that Swisher was a combat veteran who served in Korea). Further, Judge Tallman revealed judicial bias (see ¶ 13 above) by reflecting his deep-seated antagonism toward Hinkson which obstructed his Constitutional right to procedural and substantive due process. Judge Tallman also disregarded the Ninth Circuit standard set for the materiality of the false testimony and his own higher standard for materiality[18] because, by either standard, the false evidence met the materiality test and it was imperative that it be corrected.

18. **No Reasonable Juror Would Have Convicted.** Reducing the above to its essence, the cumulative effect doctrine is essential to Hinkson's claim of actual innocence, which is that no reasonable juror would have convicted him based on the "Swisher Story" if all the

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17 *Alcorta v. Texas*, 355 U.S. 28, 32 (1957) constitutional due process requires a prosecutor to correct false evidence when it appears; see *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) the Government violates constitutional due process when, although not soliciting false evidence, it allows false evidence to go uncorrected when it appears.

18 *Hayes v. Brown at 979* (9th Cir. 2005) see also Judge Tallman's dissent on materiality; where the Tallman dissent in *Hayes* suggests a different materiality test be applied than the one used by the majority in *Hayes*, which is, despite the false evidence, did the defendant receive a fair trial and was the verdict worthy of confidence. *Hayes*, at 989-90. The facts in this Affidavit demonstrate that Hinkson did not receive a fair trial, which eliminates the first prong of the Tallman analysis. To satisfy the second prong, Judge Tallman would have the reviewing court ask the question whether, in the context of all the evidence, there was a reasonable likelihood that the false evidence could have affected the jury's judgment. (Id.) In the Hinkson case, the Affidavit of Ben Casey (Ex A-8) shows empirically that the jury's verdict would have been different if the false evidence about Swisher's military history had been corrected. Thus, using Judge Tallman's higher standard, the evidence presented in this Affidavit is material and supports Hinkson's contention that no reasonable juror would have convicted him.

evidence had been considered, and the false evidence contained therein had been corrected by the prosecution during the trial. Although the Government did not elicit the dozen lies from Swisher on direct examination (for the dozen lies, see ¶22(d), which came out on cross examination), the prosecution opened the door by vouching for his credibility based on military service in Korea as presented in its opening statement (see ¶22(a)). Then on direct examination the prosecutor asked about "combat" and Swisher testified that he had previously informed Hinkson about killing "many" in combat (see ¶16(l)). The objective reviewer now sees that Swisher's criminal conviction proved he was never in combat. Under US Supreme Court and Ninth Circuit case law, the prosecution had a duty to correct the false testimony from its own witness whether or not the dozen lies were elicited by the prosecution or not (see fn 17 "…the Government violates constitutional due process when, although not soliciting false evidence, it allows false evidence to go uncorrected when it appears").

19. **Swisher's Lies Inextricably Connected to the Government's Case.** Swisher's lies about his military valor were inextricably connected to the Government's case, as was demonstrated when the prosecution vouched for Swisher as a Korean combat veteran in its Opening Statement. We know now, as the prosecution knew then, that the opening statement was based on a complete falsehood (see fn 12 and ¶ 22(a) below). Given that Swisher was (a) vouched for by the prosecution in its opening statement, (b) wore a Purple Heart medallion (a crime) throughout his testimony asserting that he was a wounded veteran of a foreign war, (c) testified he told Hinkson he killed "many" in combat in his direct examination, (d) told the jury a dozen lies (see ¶ 22(d)) about a secret mission that never occurred, (e) presented a forged DD-214 (Government document) and (f) informed the jury the forged document was 'certified' by the Commandant's Office of the US Marine Corps in Washington D.C., a mere limiting instruction (see fn 16) from the court to "disregard" the testimony about the Purple Heart and commendations was not enough to wash the effect from the juror's minds as proven by juror Ben Casey (see Ex A-8). Both the US Supreme Court and Ninth Circuit Court held that justice demands that the prosecution must correct false evidence (see fn 17 and 18).

II. OVERVIEW AND COMPREHENSIVE STATEMENT

20. **New Evidence**. The new evidence supporting this §2241 Habeas Petition is Swisher's 2008 conviction for perjury, forgery, theft and stolen valor, establishing that Swisher lied under oath, pretending to be a wounded and disabled veteran from post-War combat in Korea on a secret mission to rescue American POWs in order to obtain over $150,000 in Veteran's Administration medical and disability benefits to which he was not entitled.
    a. **Credibility Based on Lies Used to Convict Swisher**. Using the same lies that he used in the VA case, Swisher established virtually unassailable credibility as a Korean combat hero in the eyes of Hinkson's 2005 jury. The full extent of Swisher's lies are set forth in ¶ 22(d) below. Since Swisher was subsequently convicted of perjury for testifying as to these same lies, it is important to chronicle them for the objective reviewer in this Affidavit. In order to view the cumulative effect of all the evidence, whether previously excluded, actually presented or new evidence that has not yet been considered to see whether Hinkson meets the *Alaimalo* standard that no reasonable juror

would have convicted him based on a full account of the "Swisher Story;" provided the false evidence is corrected (see fn 17 and 18) it is necessary to look at all of the available evidence.

b. **Limiting Instruction Not Enough**. Further, as detailed in ¶ 19 above, Swisher's lies were inextricably connected to the Government's case, and given his direct testimony about killing "many" in combat and illegally wearing a Purple Heart medallion throughout the entire time he presented himself before the Hinkson jury, a mere limiting instruction to simply "disregard" the testimony regarding military commendations (see fn 16) was not enough to wash the effect of Swisher's lies about being in combat in Korea from the juror's minds (see Aff. Casey, Ex A-8).

c. **Swisher Violated Criminal Law**. The wearing of the Purple Heart, combined with Swisher's tale that he had previously informed Hinkson he had killed "many" in combat (see ¶ 16(l)) as a part of his falsified military career, together with his forged 'replacement DD-214' and the dozen lies Swisher told about his fabricated military history were each separate criminal law violations that needed to be corrected by the prosecution (see fn 17) to take away the effect that the false testimony had on the jury, rather than merely relying upon a inadequate limiting instruction (see fn 16) that only requested the jury "disregard" part of the offending litany of falsehoods. A full statement as to what the jury must consider as false testimony was needed.

d. **Courtroom Became a Crime Scene.** Swisher's wearing of a Purple Heart violated 18 USC §704(a) and was a crime, known as stolen valor. It along with all of his other lies constituted felony perjury before a federal tribunal under 18 USC §1621. The "replacement DD-214" was the felony crime of forgery. Swisher's law violations converted the Courtroom into a crime scene. Swisher's claim to have killed "many" in combat violated 18 USC 1515(a)(3)(A) knowingly making a false statement; submitting his "replacement DD-214" violated subsection (C) of 1515(a)(3) as knowingly submitting a writing that is forged. The prosecutor's opening statement violated 18 USC 1515(a)(3)(A) and the statement by Swisher that his "replacement DD-214" had been "certified by the Commandant's Office" of the USMC in Washington D.C. when it had not, was perjury under 18 USC §1621. It was prosecutorial misconduct for AUSA Sullivan to claim later in the proceeding that he never raised "combat" on Swisher's direct, which was a lie (compare Tr. 988, ln 25 Sullivan in a direct examination question to Swisher: "Sullivan Q: What else did he ask you about ***combat*** situations"; then, said Sullivan to the Court, at Tr. 1114, ll 21-22: "The Government never went in on its direct about … ***combat***"). (Emphasis added).

e. **Swisher, as the Government's Star Witness, Subsequently Went to Prison for Perjury, Forgery, Theft and Stolen Valor, all part of Falsely Testifying to the VA of the Same Fake Heroic Military History Presented to the Hinkson Jury.** In 2008, Swisher was convicted of perjury, forgery, theft of VA medical and disability benefits[19] and stolen valor and went to prison for telling the same lies used in the Hinkson trial, to

19 *US v. Swisher*, 760 F. Supp. 2d 1215 (D. Idaho 2011) see also 360 Fed. Appx. 784 (9th Cir. 2009).

the ALJ at the VA Disability Benefits Hearing. (See ¶ 22(d).) The lies he told to the Hinkson jury, were buttressed by the prosecutor's vouching[20] based on the prosecutor's claim that Swisher was a Korean combat veteran. In so doing, the prosecution lent its prestige to enhance Swisher's credibility by clothing him as a military combat hero. Once on the pedestal of a military combat hero, Swisher's tale of supposedly being solicited by Hinkson to torture-murder the Designated Federal Officials was virtually impossible to rebut, that is until the fraudulent 'cloak' of a military hero could be removed and the false testimony corrected.

f. **Fraud Permeated the Government's Case.** By relying upon Swisher as the sole source of all information regarding the Swisher Counts (alleging Hinkson's solicitation of torture-murder of federal officials) the Government allowed fraud to permeate its case; which fraud has now been conclusively proven by Swisher's 2008 conviction; i.e., the new evidence.

g. **Cumulative Evidence Presented in this Affidavit**. Facts are presented in this Affidavit regarding the prosecution's theory that were either (a) not available to the Hinkson petit jury; (b) available but excluded at trial; or (c) have come to light since the 2005 verdict, all of which bear upon Hinkson's claim for Habeas relief under the actual innocence doctrine of 28 USC §2241. Under the Cumulative Error Doctrine in the context of a §2241 proceeding, a reviewing court looks at all evidence, whether admitted or not, and the effect of all rulings that frustrated efforts to develop a defense through exculpatory evidence; basically, anything that could have been raised to discern if multiple errors accumulated to deprive a defendant of a Constitutionally fair trial.[21]

e **Government's Theory in Prosecuting Hinkson Required Eight Fundamental Elements.** The Government's theory of the case with regard to the "Swisher Counts" rested on the jury trusting and believing the following eight fundamental facts. (If one had been disproven, it is likely the prosecution would fail, because the basis of Swisher's murder solicitation allegation was 'wafer-thin.')

i. Profiling. Hinkson needed to fit the profile of a violent 'mastermind' soliciting the murder of many people;

ii. Credibility. Swisher needed to be viewed as credible based on his heroic military history;

iii. Opportunity. Swisher needed to show he had the opportunity to be solicited by Hinkson in a close, personal relationship as a "best friend;"

iv. Experience: Swisher needed to be perceived by the jury as 'experienced,' having killed "many" in combat and having conveyed that message to Hinkson;

v. Ability: Swisher had to possess the ability to perform as a 'hit-man based on strength, health and stamina;

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20 *US. v. Yarbrough*, 852 F.2d 1522, 1539 (9th Cir. 1988) Vouching places the prestige of the Government behind a witness through personal assurances by the prosecution of the witness' veracity and is considered to be prosecutorial misconduct. *US v. Weatherspoon* , 410 F.3d 1142 (9th Cir. 2005)

21 *Chambers v. Miss*., 410 US 287, 302-03 (1973); *Perle v. Runnels*, 505 F.3d 922 (9th Cir. 2007); and see *Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002) "Even if no single error were prejudicial, where there are several substantial errors, their cumulative effect may nevertheless be so prejudicial as to require reversal."

vi. Compensation: for torture-murdering various people; Swisher had to have been (or was to be) compensated by Hinkson

vii. Motive: Hinkson had to have a motive to want his "tormentors" torture-murdered; and

viii. Solicitation: Hinkson's solicitation of Swisher had to occur at a certain time and place.

21. **Element 1 –Profiling –** Preface - Definition of Terms:

A. *Violent Mastermind*. Below is a table showing the names of the confidential informants used to accuse Hinkson of murder-for-hire. On seven occasions, Hinkson, a non-violent person (per USP Atwater Threat-level Assessment, ¶ 15, above) was accused of plotting to murder others. It was essential to the Government's case to create for the jury a picture of a mastermind, repeatedly plotting the violent death of others in order for Swisher's accusation to be believed by the Hinkson jury. The objective followed the old adage, 'where there's smoke, there's fire.' The Government's approach by sponsoring seven CI's, created enough complexity and confusion that it would be difficult to unravel all the accusations. By blaming Hinkson for multiple murder for hire plots, it was the Government's plan that a jury would likely pick at least one and convict. Some of the plots fell short of prosecutorial indictment standards and had to be abandoned. Others, were part of the Indictment but dismissed. One became F.R.E. 404(b) evidence at trial. Swishers accusation involving the Designated Federal Officials formed the basis for Hinkson's conviction in the Solicitation Case. It was the FBI's *modus operandi* to paint Hinkson as a violent mastermind killer in enough murder-for-hire schemes that it improved the odds of a conviction. All but the Swisher Counts were proven false.

B. *Six Times Hinkson was Proven Actually Innocent*. Hinkson's actual innocence was proven six times in the seven 'trumped-up' schemes listed below (with the exception of the Swisher Counts) all others were (a) proven to be false reports; (b) dismissed by the Court; or (c) abandoned by the prosecution.

Confidential Informant	Claim	End Result of Accusations
1. Raff	Murder-for-Hire, Pre-Indictment	Fictitious Crime – Abandoned
2. Bates	Murder-for-Hire, Two Counts	Fictitious Crime – Dismissed
3. Harding	Murder-for-Hire, Six Counts	Fictitious Crime – Dismissed
4. Swisher	Backwoods Shooter-Murder Contract	False Report - Per Sheriff's Investigation
5. Croner	Jailhouse Murder-for-Hire	Fictitious Crime – 404(b) Evid-Abandoned
6. Nicholai	Jailhouse Murder-for-Hire	Fictitious Crime – Abandoned
7. Swisher	Torture Murder-for-Hire, Three Counts	Convicted (Issue: Actual Innocence)

a. **Raff Accusations.** At the time I was retained as counsel for Hinkson in December 2003, he was being held in federal custody on a detention order in the Tax Case, which was based on murder-for-hire allegations raised by Confidential Informant Mariana Raff from Idaho County in which she informed SA Long that Hinkson, while on a 2001 business trip to Mexico, solicited her two brothers (who lived in Mexico) to murder federal officials in Idaho. Ms. Raff (a repeat felony offender) claimed this incident to be a serious threat to the safety

and security of federal officials in Idaho because, as she supposedly put it, they, (her brothers) had "done this before."

i. *No Investigation for 15 Months-Then Hinkson Cleared*. SA Long did not investigate Raff's allegation for over a year[22] which was unreasonable, a dereliction of duty and leads the objective reviewer to believe that if the threat had been legitimate, he would have investigated it immediately to protect the federal officials who allegedly were the target of the purported murder plot. The Raff scheme was disproven when I called Raff's brothers and discovered they were credible business men, who were irate that their sister had falsely accused them (they reported she was a known liar who frequently contrived stories for her own personal financial advantage). When they learned they were the target of an international terrorist investigation, the Raff brothers stated that if FBI SA Long did not immediately clear them of any wrong doing, they would seek a diplomatic resolution of the matter. SA Long immediately cleared them as suspects, which cleared Hinkson as a suspect, which he easily could have done 15 months earlier.

ii. *Raff's False Accusations Caused 15 Month Incarceration*. Ms. Raff did not testify about the alleged plot at Hinkson's detention hearing, but rather, SA Long recounted the fabricated "Raff Story" and it was the basis for Hinkson's initial 15-month detention (which commenced April 4, 2003 and continued until another detention order was entered in the Hinkson Solicitation Case on July 7, 2004).

iii. *Government Abandons Raff Accusations-Hinkson Actually Innocent*. Because the fraudulent story was eventually discredited and abandoned by the Government. It was not used as a Count in the Solicitation Case Superseding Indictment or brought up as 404(b) evidence at the Hinkson Solicitation trial, which shows that the Government knew that Hinkson was *actually innocent* of any wrongdoing in reference to Ms. Raff's accusations.

b. **Bates and Harding Accusations.** It is significant the Ann Bates and J.C. Harding's false accusations made up eight of the eleven Counts of Hinkson's Superseding Indictment but all

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22 SA Long has never explained the delay that lasted over a year in investigating the Raff Story, but if he truly suspected Ms. Raff's Mexican-national brothers of having "done this before" he should not have waited to find out because there were unsolved murders of two Assistant US Attorneys pending at the time, one in Baltimore and one in Seattle. As is turned out, Ms. Raff's brothers had not recently traveled to America and were not and had not previously been involved in international terrorism or the murder of federal officials and never had a conversation with Hinkson about plotting to murder federal officials in Idaho. The only explanation is that the year plus delay in investigating this crime is that it fulfilled the "agenda" of keeping Hinkson in pre-trial detention. For SA Long, not investigating was supported by a commonly used government shield from taking responsibility known as: 'plausible deniability'…which means that, so long as he avoided doing the actual investigation, he could continue claiming that the Raff Story presented a credible threat to federal officials and was a valid basis to keep Hinkson incarcerated, then he could claim actual ignorance of the truth. Once he knew the truth, of course, he had to discredit, reject and abandon the Raff Story as the basis for charging Hinkson because the Raff brothers proved the story was a fraud.

were dismissed; again proving Hinkson's actual innocence. Both Bates and Harding were confidential informants whose handler was also SA Long, and both claimed that they were witnesses to murder-solicitations by Hinkson when they were guests in his home for a short period of time in the first quarter of 2003. Even though their 'stories' were similar to each other in that they both alleged that they witnessed Hinkson offer money to kill federal officials, their stories were inconsistent in several material respects and thus, the jury simply did not believe them.-

i. *Hearsay, 'He Said – She Said' Accusations Insufficient*. The collective common wisdom of the jurors discerned that when the *actus reus and mens rea* were combined derived from the same hearsay source, Bates and Harding, who lacked credibility and their stories were inconsistent, the jury could not convict. When there was no corroboration that a crime occurred, no physical body of a crime (no *corpus delicti*) and the only evidence of a crime was the supposed hearsay statement by Hinkson's words alone, that means in technical terms the *actus reus* and the *mens rea* of the crime were merged. Harding's father came from Southern California to testify that his son was a chronic liar who could not be believed as to anything he said and Bates changed her story making her unbelievable. Because there was no independent corroboration and the credibility of Bates and Harding as prosecution witnesses was the paramount deciding factor, the jury could not convict on these eight Counts. Here, the jury recognized that when the witnesses had no credibility and the entire case depended on what the witnesses recalled of what the accused said, and their statements were inconsistent, there was no foundation for a guilty verdict; hence, no guilty verdict was rendered on the eight Bates and Harding Counts.

ii. *Analogy to Swisher Counts*. By analogy, no guilty verdict should have been entered with regard to the Swisher Counts which presented the same scenario to the jury. The difference was Swisher's credibility as a "Super Hero" vouched for by the Government.

c. **Swisher Accusations-"Backwoods" Shooting.** Swisher's claim made during trial that Hinkson put out a "contract" to have some unknown person shoot him while he was at his gold mine in the backwoods of Idaho (Tr.1069, ln. 12) was contemporaneously investigated by Idaho County Sheriff's Deputy Herbert Lindsey (now retired) who found it to be another false report by Swisher (see Ex B-4) who had a long history of making false reports.[23]

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23 **Swisher's History and Reputation as a Liar**. Not only did Swisher lie to the Grand Jury, in 2002 stating that he had been wounded as a US Marine combatant at the end of the Korean War (2002 Grand Jury: Answer: [Swisher] "I'm an old disabled veteran and that was all caused by a hand grenade at the end of the Korean War." (Swisher grand jury testimony, April 16, 2002, pg. 4, lines 21-23.) Answer: [Swisher]: "... I guess that my lower spine from the grenade is pretty fouled up...." (Swisher grand jury testimony, April 16, 2002, pg. 14, lines 22-23.) Swisher also had a reputation in his community for being untruthful that spans a period of over 35 years. By 1997, when I left the Idaho County Prosecutor's Office, Swisher, who had lived in Idaho County for over 20 years at that point, was well known among law enforcement personnel in Idaho County as a habitual liar who frequently made false reports to authorities. Among many other things, he was known to have defrauded numerous doctors from California out of hundreds of thousands of dollars of investments over a phony gold-rendering process that he invented; he had told inconsistent stories about the disappearance of his gold-mining partner in the 1980s, whom Swisher said was "lost," possibly underground, which made him a person-of-interest, but since no body was ever found, the case did not result in a criminal prosecution. By 2004, Swisher was generally regarded by his community as untruthful in virtually all his dealings. He also was known as a child molester since the 1980 child-rape case involving his own daughter and two step-daughters, who were all under the age of ten when violated. Swisher escaped conviction in that case because, as attorney Dennis Albers, then the Idaho County Prosecutor, said to me, he was simply "chatting"

Deputy Lindsey said in his Affidavit, "[i]t was my opinion Swisher manufactured the whole story." (See Ex B-4, Affidavit of Deputy Lindsey.)

i. *Swisher Gets Away with False Reports*. I have observed over the years that Swisher often used his influence with one branch of law enforcement for his own protection from adverse action by another. In this instance, Swisher used the imprimatur of SA Long to legitimize his false "backwoods shooter" report not prosecuted in Idaho County as false reporting (Ex B-4)

ii. *Investigation Shows False Report*. Deputy Lindsey's official incident report attached to his Affidavit (Ex B-4) noted that while the event supposedly occurred on August 31, 2004, Swisher didn't report it to the Idaho County Sheriff's Office until a week later (September 7, 2004) because, as Swisher stated, he needed to consult with SA Long in the interim. Swisher blamed Hinkson, who was incarcerated at that time 200 miles away in Boise under a detention order. It is obvious that Swisher concocted the story with the assistance of his FBI handler. Deputy Lindsey made a finding that the incident was baseless and it appeared that Swisher himself shot through the walls of his own metal outhouse with a small caliber hand gun so that he could use a welder's rod to fit through the holes and establish the trajectory of the bullet. Swisher was then able to locate the place where he (the shooter) stood when the trigger was pulled but there was no disturbed ground, making it obvious to Deputy Lindsey that the shooting was self-inflicted. One of Deputy Lindsey's key issues was that Swisher had no concern for his safety, since Swisher and his buddy who were at the gold mine were expecting their wives to arrive for a social event that afternoon and Swisher had no safety plan to avoid being the target of a repeat shooting. Logic would suggest that if someone was hired to shoot Swisher and had missed him, that person might try again. Neither Swisher nor anyone else whose life was threatened by a shooting would have waited until September 10, 2004 to meet with local law enforcement regarding such a murder-attempt, making this incident another example of Swisher getting away with making a false report to the authorities. It also stands as another instance of Hinkson being actually innocent.

d. **Croner's Accusations.** The evidence is clear that, shortly before the Hinkson trial, the FBI concocted the Croner 'jailhouse murder-for-hire plot' which was refuted by four eye witnesses. Again this was an attempt to promote a violent profile for Hinkson. It was a "late-breaking" accusation and came immediately before trial, involving yet another unfounded, illogical and fabricated murder-for-hire plot. For this purpose, the FBI engaged the services of Chad Croner (a felon looking for a 'break' for himself and his mother, both of whom had pending criminal charges) who happened to have been an inmate at the Ada County Jail, in Boise, Idaho at the same time as Hinkson.

i. *Witnesses Proved No Solicitation Occurred*. The "story" was that Hinkson solicited Croner, who was his cellmate, to murder a list of people. The allegation was immediately rebutted by the four other cellmates that were housed in the six-person cell, who provided their statements and affidavits showing that Hinkson spoke with Croner

with one of the jurors in the court hallway during a trial recess, which caused a mistrial. After the mistrial, Albers, who was reprimanded by Idaho's Supreme Court for jury tampering, never re-set the case against Swisher for a new trial date, which means Swisher got off scot-free.

only once in the few days Croner was placed in the cell, and only had a brief discussion with Hinkson regarding a tax-related matter. The third-party witnesses testified that there were no other conversations between Hinkson and Croner.

ii. *Witnesses Observed Everything*. They stated that the rest of the time Croner was in the cell that he sat 'cross-legged' on one of the upper bunks, staring across the room and spoke to no one, and that because they were in such close quarters (three bunk beds in one small cell) they could at all times overhear the conversations between any of the six cellmates. They specified that neither Croner nor Hinkson ever talked about killing anyone or about murder-for-hire, and if it had of happened, they would have heard it and stopped it immediately because of their fear of being implicated as accessories. The third-party witnesses also reported that the FBI pulled Croner out of the cell regularly during that period to talk to him (giving the impression they were "up" to something.)

iii. *Croner's Testimony Worthless*. While the Government presented Croner as a 404(b) witness of Hinkson's "other bad acts" at his 2005 trial, his testimony was worthless because of (a) the testimony of the other four cell-mate witnesses; and (b) because a venirman in the original jury pool who was from Croner's hometown, who recognized his name when the witness list was read, and although that prospective juror was excused, he came back to testify that Croner was known in their small community as a liar an nothing he said could ever be believed. The Croner story is another example of Hinkson being actually innocent.

e. **Nicolai Accusations**. Because I was able to obtain statements and affidavits from the third-party witnesses who debunked the Croner accusations, the Government went to one of them, Frank Nicolai and had him accuse Hinkson of plotting to murder 23 people on a list, one of whom was Judge Tallman, the sitting judge. Nicolai eventually recanted his statement, but it raised conflict of interest issues. The statement was a bit garbled, but implied that I, as Hinkson's attorney, plotted with my client and Nicolai for the murder of the people named. Even though this was a false accusation, I filed a *Motion to Withdraw* as counsel. Judge Tallman entered findings that neither he nor the Government ever believed the allegations were true, but that as a result of those allegations, the Court found that I had an irreconcilable conflict of interest with my client and new counsel substituted into the case. (See Ex B-14). These accusations were abandoned which is another example of Hinkson's actual innocence.

f. **Failure to Show Hinkson was a Violent Mastermind**. In summary, the Government failed miserably in its attempt to profile Hinkson as a violent mastermind of murder because of multiple other accusations, all of which were shown to be false and fictitious crimes and can be seen in retrospect as evidence of a pattern by the Government to repeatedly falsely accuse Hinkson

when he was *actually innocent*. It also shows that the Government uses illegal methods to remove from a case an attorney who sees through their false accusations and is willing to call them on their unlawful activities; i.e., governmental misconduct.

22. **Element 2 – Credibility –** The essence of Swisher's claim to credibility was military valor that elevated his credibility to the level of a "Super-Hero;" as one presumed to be above lying, deceit and deception. Swisher's heightened credibility came from vouching by the prosecution.

a. **Swisher Story**. Swisher concocted an elaborate false tale of being a Korean combat veteran which was supported and vouched for by the prosecution in its Opening Statement; "Swisher Story." The Swisher Story solidified him as a credible witness, and in essence, put him on a 'pedestal', which resulted in the jury believing whatever he had to say about Hinkson soliciting him to murder the Designated Federal Officials.

b. **Conviction would have Defeated Swisher Story**. Swisher's 2008 conviction for perjury, forgery, stolen-valor and for theft of benefits from the Veteran's Administration should have eliminated any reliability that Swisher's trial testimony would have had against Hinkson when he used the same "Story" as in the VA case. The story against Hinkson unfolded in four steps:

i. **Step 1:** the Government vouched for Swisher during its opening statement when it said, "Mr Swisher…was…a Combat Veteran from Korea during the Korean conflict [Korean War]." (Emphasis Supplied.) (See Ex B-3, Prosecutor's Opening Statement, 2005 Trial Tr. Pg. 291, lns. 16-17).
[Counterpoint: Even though the prosecution became aware, during trial, of official Government-issued letters[24] proving that its three above statements were false (i.e., Swisher had never been in 'combat,' never went to Korea, thus was not a 'veteran from Korea' and never served in Korea 'during the Korean conflict') the prosecution failed to correct its false statements during trial. If there was any doubt about the falsity of these statements, Swisher's 2008 conviction (fn 21) absolutely proved these three statements were lies.]

ii. **Step 2**: During his direct testimony, Swisher stated he had told Hinkson that he had killed "many" while in combat (see ¶ 16(l)), which, under the prosecution's theory, was Hinkson's basis for selecting Swisher as a 'hit-man.' We know that the prosecution was aware, at least by the middle of Hinkson's trial, based on the two Government-issued letters (fn 3) that Swisher had never seen combat, nor had he ever gone to Korea, and he did not serve in the Korean

24 The two Government issued letters that came to light during trial are: the "Tolbert Letter" (Ex B-11) and the "Dowling Report" (Ex B-5).

conflict. The prosecution also knew that Swisher lied to the 2002 Grand Jury testifying that he had been injured "at the end of the Korean War"[25] when he had not. However, in order to perpetuate the prosecution's theory, Swisher told the 2005 Hinkson jury that he had previously informed Hinkson, that he had killed "many" people in "combat," when he had never been in combat or in Korea. (One may ask how the jury could discern the truth, if the prosecution's case was based 'one lie upon another.' Hinkson's testimony was that he did not hear of, or know about, Swisher's (supposed) military history until his 2005 trial, see Hinkson Aff. Ex A-2, ¶ 33.) Therefore, not only was Swisher lying about his secret mission rescue POWs in Korea, it follows that he also lied about having told Hinkson he had killed "many" in combat, because he never was in combat. The prosecution expected Swisher to be believed when he said he told Hinkson he killed "many" in combat, when it became apparent that Swisher lied about being in combat and the prosecution then took the position that it didn't matter whether Swisher lied about his military history, its what Hinkson thought about his military history that counts.

[Counterpoint: if the jury had been told the truth that Swisher was never in Korea and never in combat and never killed anyone in a military battle, then the jury likely would have concluded that his trial testimony was full of lies about his military career and likely was full of lies about the murder-for-hire solicitation. The credibility of both witnesses, Swisher and Hinkson, was crucial to the outcome of this case, and the jury only heard it through the lense of Swisher's elevated status, as promoted by the prosecution. Swisher prevailed because he had been 'cloaked' with the "Super-Hero" status by the prosecution, which raised the reliability of his testimony several notches above Hinkson. Had the prosecution corrected the false testimony, as it is required to do by US Supreme Court and Ninth Circuit law (see fn 17), Swisher would have been exposed as a liar and it would have been, more likely than not, that no reasonable juror, possessed of all the facts would have convicted Hinkson.]

iii. **Step 3:** Swisher elevated his credibility even further and perpetuated his image as a wounded "veteran from the Korean conflict" by wearing the Purple Heart medallion, which constantly testified to the jury as he was on the witness stand that he was a wounded veteran from a declared foreign war. Swisher committed a crime by wearing it on the lapel of his black leather coat on the witness stand (with a white background and purple coloring, it stood out like a neon sign, and was a crime in violation of 18 USC §704(a)). If he had been in the Korean War and had been injured in battle (as he said he was in his 2002 Grand Jury testimony, see fn 34) he would have been entitled to wear

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25 Swisher lied to the Grand Jury, in 2002 stating that he had been wounded as a US Marine combatant at the end of the Korean War when he was age 15. Swisher (DOB 01-13-37): "I'm an old disabled veteran and that was all caused by a hand grenade at the end of the Korean War." (Swisher grand jury testimony, April 16, 2002, pg. 4, lines 21-23.) Answer: [Swisher]: "... I guess that my lower spine from the grenade is pretty fouled up...." (Swisher grand jury testimony, April 16, 2002, pg. 14, lines 22-23.)

the Purple Heart (if actually awarded to him). When in trial, Swisher changed his story from being in the Korean War (see ¶ 24, 2002 Grand Jury) to being injured in a post-War mission (see ¶ 22(d)), he made himself ineligible to wear the Purple Heart. Once he asserted that he was on a post-War mission, he disqualified himself from entitlement to wear the Purple Heart because the Purple Heart is only for individuals who have been injured in an officially declared war and Swisher did not enter the US Marine Corps until after the 1953 Armistice when the Korean War was over (Swisher's date of birth is January 13, 1937, making him sixteen years old at the end of the Korean War).

[Counterpoint: From his colloquy with the trial court, AUSA Michael Sullivan, chief prosecutor in the Hinkson Solicitation Case, said he knew that Swisher was wearing a Purple Heart medallion prior to Swisher mounting the witness stand on January 14, 2005. Because the prosecutor knew his witness was wearing the Purple Heart and knew he was not claiming to be an actual Korean War veteran (because he had been forced to change his story due to his age) then it was a double law violation for Swisher and the prosecutor to enable Swisher to perpetuate the fraud, and for Swisher to have worn the medallion illegally with the knowledge and consent of the prosecutor, as that was the crime of Stolen Valor. Thus, prosecutor Sullivan was aiding and abetting this crime when he said (on the record) that the Purple Heart medallion was "…a little…something stuck in his lapel." (Tr. pg 1115, lns 10-13.) Minimizing one of this nation's greatest honors given to a wounded veteran of a foreign war, he called it "a little..something stuck in his lapel." which was to say, 'the Purple Heart is insignificant' and 'don't look at what is really going on here.' It was an attempt to 'cover-up' a crime, and AUSA Sullivan was an accessory before, during and after the fact.]

iv. **Step 4:** While it is true Swisher did not testify about the Purple Heart award on direct examination, he wore the Purple Heart which silently conveyed a message of heroism and credibility while he testified (prosecutor Sullivan made the following false statement: "The Government never went in on its direct about winning medals or combat." Tr. 1114, lns. 21-22. It was the "or combat" that was a direct misrepresentation, because the record is absolutely clear that the Government asked Swisher about what "combat situations" were talked over with Hinkson, this was the question and answer:

Sullivan Q: "What else did he ask you about <u>combat</u> situations?"
A: "He asked if I had ever killed anyone."
Q: "What did you say?"
A: "I told him, 'Yes.' He asked, 'How many?' I told him, "Too many."
(Emphasis added.) (Tr. pg. 988 lns.19-25 and 989 lns.1-6).

c. **Forged Document Authorized Swisher to Wear Purple Heart**. Swisher's testimony that he had killed "many" in combat on the Government's direct examination was a lie, because he was never in combat. On cross-examination, when Swisher (falsely) testified that he was authorized to wear the Purple Heart, he simultaneously pulled from his pocket a forged

government document as "proof that he was entitled to wear it" (i.e., his (so-called) "replacement DD-214", his discharge paper). When questioned about his document, he proceeded to tell a dozen lies.

d. **Swisher's Dozen Lies**. Swisher then proceeded to perjurer himself further by telling the following dozen lies about his fictitious military history:

(1) that he had authority to wear a Purple Heart medallion [false] (id., Tr. Pg. 1115, lns. 7-9);
(2) that he had earned the right to wear a Purple Heart while serving in Korea [false] (id. Pg. 1116, lns. 16-25 and Pg. 1117, ln. 1);
(3) that he served in combat, not during the Korean War (contrary to his testimony before the 2002 Grand Jury) but following the Korean War [false] (id. pg. 1117, lns. 2-4);
(4) that he had been engaged in the field of battle as a part of a special Marine Corps expeditionary unit [false] (id. pg. lns. 6-7 and 10-11);
(5) that the combat he engaged in was after the Armistice [false] (id. pg. 1117, ln. 12);
(6) that he was on a secret mission to free POWs in secret prison camps in North Korea [false] (id. pg. 1117, ln. 13);
(7) that the information regarding his secret mission remains classified [false] (id. pg. 1117, lns. 14-15);
(8) that when he was awarded the Purple Heart and was also given a document reflecting his entitlement to wear that Purple Heart [false] (id. pg. 1118, lns. 13-18);
(9) that he had a valid document entitling him to wear the Purple Hear in his pocket [false] (id. pg. 1118, lns. 19-20);
(10) that the document produced from his pocket was an authentic [although proven to be a forgery] official U.S. Government document, which he called a "replacement DD-214"(id. pg. 1118, lns. 21-22);
(11) that the document produced from his pocket had an Idaho County certification on it, but Swisher insisted it was certified as authentic by the Commandant's Office of the U.S. Marine Corps in Washington D.C., [false] (id. Pg. 1118, lns. 25, Pg. 1119, ln. 1); and
(12) that because of the classification of his official military record, along with the other purported survivors of that mission, all records had "pretty much been purged;" [when no such records existed in the first place] (id. Pg. 1119, lns. 2-4). (See Ex B-7 from 2005 Trial, excerpt of trial record pgs. 1116-1119.)

e. **Forged Document Part of Government's Case**. The four steps mentioned above made Swisher's lies and forgery an integral part of the Government's theory of the case, which was that Hinkson had decided to hire Swisher (who purportedly was his "best friend" (see "Element Two: Opportunity" ¶ 23) to commit a series of torture-murders because Swisher had "done this before" (that is, Swisher had been in combat and killed "many" human beings previously, and therefore, the Government presumed that Hinkson believed that such experience would cause him to be willing to kill others for money).

f. **Limiting Instruction Ineffective as to the Dozen Lies**. Because these falsehoods were inextricably connected to each other, and also inextricably connected to the Government's theory of the case, merely telling the jury to "disregard" part of

Swisher's lies in the limiting instruction was ineffective because it could not erase from the juror's minds the overwhelming effect of Swisher's false testimony that Hinkson was a 'mastermind' who arranged for the torture-murder of other people. Even if the limiting instruction had been comprehensive (which it was not, it specifically gave the jury permission to consider the rest of Swisher's testimony, including his lies on the Government's direct such as killing "many" in combat) there was no way that the limiting instruction could "un-ring the bell;" i.e., once the jury heard all of Swisher lies in the context of his claims of heroism there is no way they could "disregard" it as seen in the Affidavit of juror Ben Casey (see Ex A-8).

g. **Court Compounded the Felony**. The limiting instruction actually compounded the felony committed by Swisher, because it covered up Swisher's false statements with what appeared to be officialism, and did not bring to light the fact that Swisher had never set foot in Korea, had never been in combat anywhere, had not killed anyone during his military service, and in fact, had lied about all of this to the jury. In addition, the forged government document ('replacement DD-214') was false evidence and Swisher falsely claimed it had been certified by the USMC. The limiting instruction did not deal with these lies. The objective observer would ask, what was the jury supposed to believe if everything Swisher said was untrue?

h. **Government Finally Admits Swisher was Lying**. The Government (at the Ninth Circuit *en banc* oral argument hearing in 2009 on the Hinkson Appeal, after Swisher's 2008 conviction) conceded that it knew the truth, that Swisher was never deployed to Korea and never served in combat and was never on a secret mission, was never wounded and never received any awards and that the Government never informed Hinkon's jury of this. The question in retrospect concerns what form the corrective 'statement should have been given and how should it have informed the jury of the truth that Swisher was never in Korea, or never in combat or never decorated for valor? The Government's statement to the Ninth Circuit would have been a good start as to what should have been told to the Hinkson petit jury.

i. **What Should have been Disclosed to the Jury?** Swisher lied under oath to the 2002 Grand Jury, the 2004 Grand Jury as well as to the Hinkson petit jury in 2005. Should the advisement to the jury also have included a statement that the prosecution offered false information in its Opening Statement? (See ¶ 22(a) "Step 1".) The answer is that, according to the case law, both were necessary, and a reviewing court needs to determine if these false statements violated Hinkson's constitutional due process rights and whether the falsehoods were material.[26] Hinkson's position is that these falsehoods were material as they affected the outcome of the case, and if exposed, it is more likely than not that no reasonable juror would have voted to convict Hinkson.

j. **Credibility of the Witnesses**. Once the high level of credibility had been ascribed to Swisher, it was easy for the jury to believe the gruesome tale that Hinkson solicited Swisher to torture-murder various people.[27] However, had they been told the truth

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26 Hayes v. Brown, 399 F.3d 972, 985-86 (9th Cir. 2005) and Judge Tallman's dissent on materiality at 977 (see fn 18).

27 Swisher testified: "He [Hinkson] would like to see them stripped, bound and gagged, and then burned with

about Swisher's lies, the playing field would have been leveled so that Hinkson's denial of soliciting murder and of ever having attended any meetings where murder solicitation was discussed, coupled with Hinkson's explanation as to his whereabouts (out of Idaho, out of the USA) at the appointed times would likely have been given equal weight and consideration by the jury. Further, had Hinkson's United States Passport been allowed into evidence, Hinkson's creditiblity and truthfulness would have been established as it related to his whereabouts.

23. **Element 3 – Opportunity** – The essence of Swisher's assertion that he had the "opportunity" for confidential communications with Hinkson regarding his supposed desire to murder others was his claim of being "best friends" which justified access to Hinkson's private office and gave Swisher insight into Hinkson's innermost thoughts and feelings.

a. **Illusion of "Best Friends" Required for Government Theory**. The Government's theory of the case required the jury to believe that Hinkson felt comfortable soliciting Swisher to murder. Thus, Swisher needed to show that he had a confidential relationship with Hinkson because in human behavior it would be expected that a plan to murder would be kept secret and shared with the public. In fact, only those a part of Hinkson's inner circle would be expected to know of such plans. Therefore, Swisher had to move himself from outside Hinkson's inner circle as he described in Swisher's 2002 Grand Jury, to being "best friends" as described in Swisher's 2004 Grand Jury; all aimed at the same time period, from 1999 to mid-January 2003.

b. **Arms-length Relationship Changed, Strawman Deception Create**. Initially, Swisher carefully described his arms-length association with Hinkson in his 2002 Grand Jury testimony as a mere acquaintanceship, where he did not want to be "cornered" by the talkative Hinkson, but kept his distance. Swisher then reversed himself and completely altered his story in 2004 and retrospectively promoted himself to be Hinkson's "best friend," thus, creating a "Strawman Deception"[28] to justify his claim to confidential communications, such as asking Swisher to murder the Designated Federal Officials. The theory was that Hinkson would not likely have asked a mere 'acquaintance' to act as a hit-man and a mere acquaintance would not likely have been brought into Hinkson's 'inner circle' of confidence to hear things such as how Hinkson supposedly preferred to have his 'victims' tortured.

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cigarettes or cigars. And then while Albers was down on his knees observing this occurring to his wife and any other family members that might be present, he wanted to have a plastic bag put over her head so that she would suffocate to death in front of him, along with other family members. Then he wanted that procedure repeated on Albers, himself." (See Ex B-3, Excerpt of Swisher Trial Testimony, January 14, 2005, TR. Pg. 25, lns. 4-13.)

28 Here "strawman deception" refers to Swisher's fake "best friends." Under the rubric of "straw-man" is a game theory for wining arguments by setting up a false proposition to be knocked down. A false image is substituted for reality, which if believed creates a false image, then it can be knocked down to win a point in the debate. The usage of the term in rhetoric suggests a human figure made of straw which is easily knocked down or destroyed, such as a military training dummy, a scarecrow, or effigy. One common folk etymology is that it refers to men who stood outside courthouses with a straw in their shoes in order to indicate their willingness to be a false witness. Brewer, E. Cobham (1898). "Man of Straw (A)." *Dictionary of Phrase and Fable*. Retrieved 13 May 2009.

c. **Specific Description of Arms-length Relationship**. Swisher, in his 2002 Grand Jury testimony described perfectly an arms-length relationship with Hinkson that did not allow for any confidential communications, access to his private office or "best friend" relationship; in fact, Swisher's 2002 description was the antithesis of a "best friend" relationship:

1. That he "had no problems with" Hinkson and wouldn't expect them. "I've never caught him lying to me…." (Ex B-6, Swisher's April 16, 2002 Grand Jury testimony, pg. 18, lns. 18-21);
2. That he (Swisher) had only spoken to Hinkson about a "dozen times" since he originally met him in 2000 (id. at pg.18, Lns. 1-7) [Note that Swisher changed his testimony in 2004 and conveniently moved the date of their meeting back to 1999];
3. That he and Hinkson had talked as recently as "about a year ago" [that would have been April 2001] (id. at pg. 35, Lns. 1-2);
4. That "I (Swisher) don't seek Mr. Hinkson out when I go out there" [to the WaterOz plant] (id. at pg. 35, Lns. 4-5);
5. That he (Swisher) preferred not to be "cornered" by a talkative Hinkson (id. at pg. 35, ln. 6);
6. That Hinkson "may still be in litigation" with Hasalone and Albers (which case had been resolved two and one-half years earlier), clearly demonstrating that he (Swisher) was not 'best friends' with Hinkson, as he also said that he did not want to be "prying";
7. That while Hinkson had "strong feelings" about the Government being "too intrusive," Swisher had not heard Hinkson "talk against the United States" other than he felt the "Government was too repressive" (id. at pg.43, Lns. 1-3);
8. That Hinkson mentioned that "federal agents always were trying to build a case on honest people"[29] (id. at pg. 43, Lns. 4-6);
9. That Hinkson had come up with new technology (i.e., the WaterOz product) that "works" (id. at pg. 18, Ln. 18); and
10. That "…there's no question he had a superior product to anything I've tested, and I wouldn't be taking it if that weren't true" (id. at pg. 44, Lns. 13-15).

b. **Reversal of Relationship**. In his 2004 Grand Jury testimony, Swisher totally reversed himself in several respects: he claimed to be Hinkson's "best friend," he claimed that Hinkson had, by "verbal gifts" given him over a half million dollars in property and he claimed that Hinkson had been soliciting him to torture-murder various people that Hinkson had been complaining about since 1999 who supposedly Hinkson considered to be his "tormentors." Swisher's 2002 testimony that he had known Hinkson since 2000, had "no problems" with Hinkson and did not expect any and the denial that Hinkson had strong feelings about the Government were all reversed and presented a fertile field for impeachment (except that as shown below, Judge Tallman interfered and prevented Hinkson's counsel from impeaching Swisher on these points).

29 For an example of Hinkson's claim that federal agents were trying to build a case against honest people, see ¶21(a), "Bogus 'Raff Story' Discredited, Rejected and Abandoned-Instructive as to Hinkson's Actual Innocence" and ¶¶ 21(b), (c), (d) and (e), all false charges by FBI Special Agent Will Long based on a fictitious story from Mariana Raff, the first in the series of four other false accusers of Hinkson who claimed he was soliciting murder-for-hire.

c. **Strawman Establishes Swisher as Confidant**. Being Hinkson's best friend was not a sustainable assertion. Swisher could not prove that he had a long term "best friend" relationship, so in order for the Strawman Deception to work with this jury, Swisher had to create a 'snap shot' of his newly revised "best friend" relationship that seemed believable. Once the Strawman Deception of a "best friend" relationship was firmly set in the minds of the jurors, then the game theory was to use it to establish a confidential relationship wherein Hinkson supposedly progressed from talking about killing his "tormentors" to actually soliciting Swisher to torture-murder the Designated Federal Officials. Then the next play was for Swisher to knock down the Strawman, or destroy the "best friend" relationship as a tool to emphasize the seriousness of the purported criminal act of solicitation and to explain why he and Hinkson were no longer friends.

d. **Dropping the "Hammer" Knocked Down the Strawman**. Critical to the Strawman Game Theory used by the Government was Swisher's testimony that he terminated their "best friend" relationship (i.e., he dropped the "hammer") when Hinkson supposedly was "pleading"[30] with him to carry out torture-murders at a "mid-January 2003" meeting (Tr. 1013 at 7). Swisher's message to the jury was:

'I've got values, I've got standards, when that Hinkson fellow solicited me in April to torture-murder attorney Albers and family, that was 'okay,' and it was 'okay' to be solicited by him to torture-murder an IRS agent named Hines and a prosecutor named Cook and their families in July or August, but, when he "pleaded" with me in mid-January to torture-murder a federal judge in addition; well, that was it, that was the last straw, I brought the hammer down on our friendship and all the benefits thereof, such as the "verbal gifts" so that from that moment on, I would have nothing to do with Hinkson.'

e. **Hinkson Denied and has Evidence to Prove the Meeting Didn't Happen**. Hinkson vehemently denies (1) being "best friends" or even being friends with Swisher; (2) having any private meetings with Swisher, ever; and (3) discussing murder of anyone with Swisher. There is documentary and third-party testimonial evidence showing that the "mid-January 2003" meeting did not and could not have occurred.

f. **Documentary Evidence that Meeting Did Not Occur**. Swisher's claim that he terminated the "best friend" relationship with Hinkson, gave Swisher a way to lie around his extortion attempt of January 3, 2003. That day, Swisher had sent his Affidavit (Ex A-15) to WaterOz for Hinkon's review. That afternoon, Swisher called Hinkson with the following extortion demand: Swisher said he would not send a sample of WaterOz Potassium laced with cyanide to an independent lab and would not submit the report of that independent lab to the FDA, if Hinkson would pay him $800,000 cash and give Swisher a one-half interest in his WaterOz company. The 'cyanide-extortion' attempt of January 3, 2003 has been proven by Swisher's own documents, see Ex A-11 and A-14, the cover letter transmitting the

30 Swisher's trial testimony -- Hinkson was "Pleading" Tr. pg. 1009, ln 16.

sample to the lab and the lab report, which documents were produced by the prosecution showing that Swisher submitted them to the Government making good on his extortion threat. Part of Swisher's threat was that he would go to "Boise and testify" and Hinkson would "spend the rest of his life in jail." (Aff. Hinkson, Ex A-2, ¶ 72.) (For an additional extortion attempt by Swisher in early-July 2003 see Aff. Towerton, Ex B-1, ¶16, where Hinkson stated that if he did not get the extortion payments he wanted, he would "go to Boise and testify," so that, "Hinkson would 'spend the rest of his life in jail.")

g. **Swisher's Extortion Demands Completed and his Credibility Solidified.** Because Hinkson would not pay Swisher as demanded, and because both of Swisher's extortion demands were Swisher marched himself down to the Grand Jury and then the trial petit jury in Boise and 'spilled his guts', telling the biggest 'whopper' he could invent about a torture-murder-for-hire scheme that no rational person would have believed, unless of course, the tale had been spun by a military "Super-Hero," posing as a self-sacrificing, battle-wounded soldier from Korean combat, who happened to be a trusted member of the armed-services possessing top secret, classified information on a mission to rescue POWs, which is the essence of Swisher's elevated credibility.

h. **Swisher's Credibility Supported by Both Prosecutor and Judge**. As discussed below, the 'whopper' story was validated by the US Government starting in the opening statement (see ¶22(a) Step 1) and then endorsed by Judge Tallman who recited fabricated facts as to how Swisher traveled to and arrived in Korea by amphibious landing craft, and referred to facts that no one else knew about except Judge Tallman (see ¶35) indicated he probably learned the information in his *ex parte* with Swisher just prior to his testimony, all of which facts were subsequently proven in Swisher's 2008 conviction to be utter lies.

24. **Element 4 – Experience** – For the Government's theory to make logical sense, Swisher had to have some background or experience in killing people and Hinkson needed to know of that experience so that he could "select" Swisher to be the 'hit-man.'

a. **If Swisher Never Killed Anyone in Combat, What would Jury Believe Hinkson was Told about Swisher's Experience**? Hinkson was supposedly told (at some unspecified prior date) about Swisher's (fake) heroic military history, including Swisher having killed "many" in Korean combat (see ¶ 16(l)). Swisher's story was that he told Hinkson about it because Hinkson supposedly wanted to know. [Counterpoint: It has already been shown that: (1) Swisher's combat military history was false in that he was never in combat and never killed anyone; (2) Hinkson denied he ever asked or learned about Swisher's military history; (3) Hinkson testified that he first heard about Swisher's purported military combat history during the 2005 trial; and, (4) because Swisher falsified his entire Korean combat history, his statement that he previously told Hinkson about having killed "many" would likely have been seen as another lie; or more correctly, a lie upon a lie. Could the jury trust Swisher to report accurately what was supposedly reported to Hinkson about killing "many" in "combat" if he had never done so? And if so, what

portion of the lie would a reasonable juror rely upon? These and other questions would be asked by an objective reviewer.]

b. **Swisher's Military Experience Just a 'Pack of Lies'.** Since we know that Swisher did not kill "many" in combat or even kill any in combat, because he was never in combat, then can it be inferred that whatever else Swisher said to the jury about his meeting with Hinkson was also a lie because he was lying about everything else that never happened. If the truth that Swisher was never in combat and never killed anyone was disclosed to the jury, no reasonable juror would have believed that Hinkson ever knew anything about Swisher's military past, because whatever Swisher had to say about his military past has now been proven to be just a 'pack-of-lies.'

25. **Element 5 – Ability –** For the Government's theory to work, Swisher needed to be healthy enough to attend the meetings he described and have the physical ability to overcome the normal resistance expected from a torture-murder victim.

a. **Swisher did not have the Physical Ability to Attend Meetings or Kill People.** The defense was unable to obtain Swisher's medical records that would have shown his poor health at the time he claims to have been solicited in 2002 and mid-January 2003, which medical condition made him unable to have attended the "solicitation meetings" at the times and places he described. Said medical records would also have shown that Swisher was not likely to have been considered a qualified candidate to perform as a "hit-man." [Counterpoint evidence from multiple witnesses,[31] including Swisher himself [see Ex A-15] shows that he was in a debilitated physical condition, ashen grey in skin color from a massive heart attack, open-heart surgery and insertion of a double pacemaker; was in a wheelchair wearing diapers and catheterized during most of 2002 and 2003, which would have prevented him from attending any meetings or being qualified as a "hit man."]

b. **Swisher's Medical History that Proves Lack of Ability**. Hinkson was with Robert Sandberg on or about June 2, 2002 (see Aff. Sandberg A-4 ¶12) when in Hinkson's private office on a speaker phone with Swisher talking about testing WaterOz products the phone was dropped on Swisher's end and it sounded like Swisher had collapsed with a thud. Within a moment or two, Hinkson and Sandberg heard a woman's voice exclaim, "Oh my God!" repeated several times, and then heard the phone hang up. It was later confirmed by his wife that Swisher had a massive heart attack and almost died, was 'life-flighted' to a hospital in Spokane and had an extremely slow and long recovery lasting well over a year, with a subcutaneous "double pacemaker" surgically inserted on September 15, 2002 (Ex A-15). When seen in public, Swisher was ashen-grey, wearing diapers that showed at his waist and had a catheter tube at the leg (mentioned by Swisher himself in his trial testimony, Tr. 1100, ll 21-22) having to be lifted in and out of his vehicle to his wheelchair and was so weak that it required him to be strapped in by a seat belt to keep him from falling out of the wheelchair (see Ex A-3, Aff. Ponomarenko ¶9-18) and this condition continued through January 2003 (see Ex A-5, Aff. Doty ¶3-9) and later into 2003 see Ex A-6, Aff. Lewis , Ex A-7, Aff. Brockmann and Ex B-1, Aff. Towerton,

31 Multiple witnesses who observed Swisher's extremely poor health in 2002 and 2003 include: Ex A-2 David Hinkson Aff., Ex A-3 Aff. Roman Ponomarenko; Ex A-5 Aff. Debbie Doty; Ex A-6 Aff. David Lewis; Ex A-7 Aff. Allen Brockmann;and Ex B-1 Aff. Gregory Towerton.

¶26, each of these affiants confirm Swisher's poor health, his limited mobility and lack of ability to engage in anything physical through summer 2003).

26. **Element 6 - Compensation** – For the Government's theory to work, Swisher needed to receive a significant amount of compensation in order to induce him to murder a large number of people.

a. **Swisher's Fantasy of a Half Million in Gifts was Disguised Compensation for Murders**. It was not until 2004 that Swisher started claiming he was paid by Hinkson with "verbal gifts"[32] of property valued at over $500,000, plus, Swisher claimed he was to be paid "$10,000 a head" for each murder. [Counterpoint evidence shows, (1) Hinkson denied ever making a gift of any property to Swisher; (2) Swisher lost a lawsuit in 2003 wherein he falsely claimed he had earned all of that same property by trading with Hinkson for half the value of Swisher's past mineral testing services (such services valued at a few thousand dollars at best); (3) the meetings at which Swisher claimed he had been promised these "verbal gifts" plus $10,000 "a head" for each murder logistically could not have taken place;[33] and (4) Swisher's 2002 Grand Jury testimony is contrary to Swisher's 2004-2005 story of being hired to kill for compensation, thus impeaching Swisher's later testimony. Since Swisher was exposed as a liar, perjurer and forger by his 2008 conviction, it is more likely than not that no reasonable juror would have believed Swisher's Story about "verbal gifts" of vast amounts of property, if the jury had known the truth.

b. **Curious that the Jury did not See Swisher's Pretext Shift as Dishonesty**. The credibility of a "Super-Hero" kept the Hinkson jury from deeply evaluating the Swisher Story; but, if the false testimony had been corrected, no reasonable juror would have voted to convict knowing that Swisher was fraudulently making inconsistent claims for the same items of Hinkson's property. There was an attempt by Swisher to get money by extortion from Hinkson (on January 3, 2003 and in early-July 2003). Then when that did not work, Swisher sued claiming property from Hinkson as a set-off for mineral testing (as a part of the TRO lawsuit December 2003). While that lawsuit was pending, Swisher's third try to get money from Hinkson occurred when he said the property had been given as a payment for 'hit-man' services in the 2005 trial. (Certainly, because the law will not enforce agreements to pay for illegal conduct, Swisher couched his claim in terms of a "verbal gift" of over $500,000 in property which Hinkson supposedly had given to Swisher because they were "best friends" (see Tr. 1097, 20-25) and which Swisher claimed was given with "no strings attached;" however, Swisher never got title, Tr. 1096, ll 19-20 and 1098, ll 13-18, and then there was the implied obligation to murder as directed by Hinkson according to the Government's theory.)

c. **Swisher's Expectation of Winning TRO Lawsuit**. When Swisher gave testimony to the 2004 Grand Jury he believed he was going to win the TRO lawsuit. But in order to justify such a grandiose murder plot, that could include as many as ten victims, Swisher reinvented his claim to the half-million dollars in Hinkson's property by asserting it was a

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32 Swisher's fantasy recounting of gifts from Hinkson is delusional going on for several pages, ending with "…and there was this extra money and actually, more if I needed it." (Tr. pg 1010-1012, see pg 1012 lns 23-25)

33 See ¶ 28, below showing none of the meetings could have taken place.

"verbal gift." Merely saying the property was a gift. The story that Hinkson had given property to Swisher emanated solely from Swisher's credibility as a "Super-Hero" alone and was not corroborated by any documents or testimony of third-parites. no reasonable juror would have believed that Hinkson gave Swisher $500,000 in property (which Swisher claimed Hinkson did with "no strings attached" Tr. 1065, ll 4-12, 1096, ll 19-20 and 1098, ll 13-18) without some type of writing. Previously, Swisher's theory in the TRO lawsuit had been that Hinkson had agreed to trade the half-million dollar list of property for a few thousand dollars' worth of mineral-testing services supposedly performed by Swisher's assay lab. (The value of that testing is questionable since it was Swisher's testing, or lack thereof, and the phony reports from Swisher's lab that caused Hinkson's products to be determined to be deficient in mineral content, resulting in FDA criminal charges being brought against Hinkson.)

27. **Element 7 - Motive** – Swisher's testimony supported the Government's theory that Hinkson was motivated by revenge to kill the Designated Federal Officials.

a. **Revenge Supposedly Based on Money**. Swisher alleged 'revenge' as Hinkson's motive for wanting his 'tormentors' killed, and 'set the stage' for Hinkson's supposed solicitation to kill the Designated Federal Officials by first concocting a grandiose tale of being asked to torture-murder attorney Albers and family at the supposed April 2002 meeting. Hinkson's 'revenge' motive for wanting Albers killed was supposedly based on a $100,000 judgment Albers obtained for Hasalone in 1999. According to Swisher, Hinkson was so dysfunctional that he was still, in 2002, fixated on the injustice of that 1999 $100,000 judgment and was "pleading" with Swisher to commit torture-murder in mid-January 2003. (Note: counterpoint evidence shows that by 2002, $100,000 amounted to less than 1% of Hinkson's gross revenues, and also by that time, Hinkson was heavily involved in trying to expand his business internationally. Like most people who experience a business set-back, Hinkson had moved on.)

b. **Revenge for Federal Officials**. In the case of the federal officials and their families whom Swisher identified as future torture-murder victims, Hinkson supposedly wanted them killed as 'revenge' for their part in the 2002 Grand Jury investigation which looked into Hinkson's tax filings, his dietary supplement business and his currency transactions and from which the Tax Case indictment arose. [Counterpoint evidence shows Hinkson spoke of the prosecutor and IRS agent by saying he wished that "God would smite them" and he also filed a *Bivens* action against them for recovery of civil damages believing his "pen was mightier than the sword," which is consistent with his intellectual profile and his non-violent nature, see ¶¶ 1 and 15; Hinkson denies ever being motivated to solicit anyone to do harm to others.]

c. **Swisher's Prior Testimony Proves Hinkson No Motive**. In his 2002 Grand Jury testimony, Swisher went to great lengths to establish, not only that he had a casual acquaintanceship with Hinkson, but that Hinkson was a 'good guy' who was a little 'hyper,' well-versed technologically and had invented a health product that really "worked." When the 2002 Grand Jury subpoenaed Swisher to tell all he knew about Hinkson and his WaterOz products, if Swisher had known at that time that Hinkson was obsessed with thoughts and ideas of violence against federal officials and attorney Albers,

and others, Swisher had a duty to share that information at that time especially when Swisher was asked how Hinkson felt about the Government and Swisher's reply was very mild, he said the government was "intrusive" and "repressive" (see ¶23(a)(7)), not disclosing an obsession to kill federal officials, if it was true, was perjury (Swisher took an oath to tell "the whole truth").

d. **Where there was No Motive, Swisher Invented a Motive**. The adage that '*the lie closest to the truth is the greatest deception'* applies to Swisher, who, now proven to be a proficient liar, perjurer and forger of Government documents, created a motive for Hinkson's pretended crime of solicitation in his 2005 trial testimony, taking the fact that Hinkson had a reputation for saying: "*God would smite them;*" nonetheless, it was known that Hinkson did not want to "hurt them" physically; or "wish they were dead:" he wanted to file a "lawsuit against them" and Judge Lodge was not included in those he was concerned about.[34] To make the Government's theory work, Swisher had to translate Hinkson's rhetoric into an action plan for torture-murder with Swisher as the purported hit-man. Revenge was the motive chosen by Swisher for Hinkson, but because Swisher lied about every other material aspect of this case, had the truth been known about Swisher's military history and his other false testimony, it is unlikely that a reasonable juror would have believed that Hinkson was motivated to have his "tormentors" killed when he was so thoroughly engaged in expanding his business into the international sector.

28. **Element 8 – Solicitation and Timing**

a. **Jury Believed Hinkson was Mastermind Killer**. Hinkson has denied ever soliciting Swisher to kill anyone.[35] Swisher's act of combining his enhanced credibility based on his 'combat hero' lies with the "horror factor"[36] convincingly deceived the jury into believing that Hinkson was an "evil mastermind' who was mentally unstable and that he was guilty of ordering the killing of other people.[37]

b. **Graphic Description Brought Chills**. When Swisher, the amateur psychologist, graphically described details of Hinkson's alleged demand for the 'torture-murder' of attorney Albers and his family, Swisher (who was at that point viewed as a "Super-Hero") and his chilling words (see fn 29) made an indelible impression on the juror's minds.

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34 Tr. 2352, ll 5-15; 2338, ll 17-24 and , 2339, ll 1-24, Testimony of Attorney Britt Groom.

35 Ex A-2, Hinkson's Affidavit ¶ 78.

36 "He [Hinkson] would like to see them stripped, bound and gagged, and then burned with cigarettes or cigars. And then while Albers was down on his knees observing this occurring to his wife and any other family members that might be present, he wanted to have a plastic bag put over her head so that she would suffocate to death in front of him, along with other family members. Then he wanted that procedure repeated on Albers, himself." (See Ex B-3, Excerpt of Swisher Trial Testimony, January 14, 2005, TR. Pg. 25, lns. 4-13.)

37 See Juror Misconduct, ¶ 32 concerning a note from one of the jurors on the fourth day of trial which reads. "*Your honor, I do not know if this is allowed for me to ask; but can Mr. Swisher be asked about the mental capacity of Mr. Hinkson? Did he do a clinical evaluation of Mr. Hinkson? Is David Hinkson on medication? Is Mr. Hinkson mentally ill? Are <u>we</u> or are <u>we</u> not supposed to consider his mental capacity*?" (Tr. 1036, ll 13-20.) The <u>we</u> indicates deliberation had already taken place and the question about a clinical evaluation, medication and being mentally ill, implicates the jury had already determined Hinkson guilty and they, the jury, were ready to move onto make a mental competency determination, and wanted a professional opinion from Mr. Swisher whom they relied upon and had great faith in as an expert in mental health.

c. **Swisher's Change of Testimony Critical to Solicitation Plot**. In his 2004 Grand Jury testimony, Swisher claimed Hinkson had solicited him to torture-murder federal officials every time they met since 1999. That extreme statement had to be recanted at trial because, for if it was true, that statement, by itself, impeached Swisher's April 16, 2002 Grand Jury testimony showing that up to that point in time Hinkson was mild-mannered. In his 2002 Grand Jury Swisher was specifically asked if Hinkson had any "strong feelings" about the Government to which he responded: Hinkson thought the Government was "too intrusive;" however, Swisher had not heard Hinkson "talk against the United States" other than he felt the "Government was too repressive" (see Ex B-6, Swisher's 2002 Grand Jury testimony, at pg.43, lns. 1-3). If Hinkson had been soliciting torture-murder every time they met (as suggested in his 2004 Grand Jury) and, having been asked that specific question if he had any strong feelings about the Government, it would have been a material omission of fact and perjury for Swisher not to mention the torture-murder solicitations every time they met since 1999. Thus, at the 2005 trial, Swisher changed his testimony with the help of the trial Judge who protected him from impeachment. Swisher denied that Hinkson actually "solicited" him prior to April 16, 2002, even though Swisher was adamant in his 2004 Grand Jury testimony that Hinkson solicited Swisher to have his "tormentors" killed every time they met since 1999.

d. **Time and Place of Solicitation Meetings**. Once he changed his testimony (note the pattern of deception whereby Swisher changed his 2002 testimony in 2004 about acquaintanceship and Hinkson's demeanor and then again changed his 2004 testimony at the trial in 2005 as to the timing of the demands for torture-murder). As stated above, Swisher designated three separate time periods (Tr. 1092, ln 17) in his 2004 Grand Jury testimony when the solicitation meetings supposedly occurred: (1) late April 2002 (but not before April 16th); (2) on some unspecified date in either July or August 2002, and (3) at some unspecified time in either December 2002 or January 2003, which he then specified at trial to be in "mid-January 2003." (Note: counterpoint evidence shows that when the first two solicitation meetings were supposedly taking place in 2002, Hinkson was not in the State of Idaho and when the third meeting supposedly occurred, Swisher had been prohibited from entering the WaterOz factory as a result of his January 3, 2003 cyanide-extortion attempt. If given all the evidence, no reasonable juror would have believed Swisher was solicited by Hinkson to murder anyone, if Swisher's false testimony had been corrected.

e. **Hard Evidence Shows Meetings Never Occurred**. The state of the evidence in this case supports Hinkson's contention that no solicitation meetings occurred in either late-April 2002 or in July or August 2002 for independent reasons, beyond the mere denials of Hinkson (i.e., Hinkson's physical absence from Idaho). The remaining solicitation meeting described by Swisher allegedly occurred in mid-January 2003 (Tr. 1013, ll 6-25) where Hinkson supposedly was "pleading" (see fn 23) with Swisher to torture-murder the Designated Federal Officials and their families and is the basis for Hinkson's conviction on the Swisher Counts. While the evidence pertaining to a "mid-January 2003" meeting shows it was highly unlikely to have taken place (see ¶ 28(a) and (b) below), a review of the cumulative effect of all the evidence is necessary for a showing of actual innocence as to said mid-January alleged Solicitation.

f. **Chronology of Events Leading Up to Critical Mid-January Meeting**. In his direct testimony at the 2005 trial, Swisher was asked to specify when the December 2002 – January 2003 meeting occurred at which Hinkson was supposedly "pleading" (fn 23) with him to torture-murder federal officials. Swisher said it occurred in "mid-January 2003" (Tr. 1013 at 7), which testimony excludes the possibility of any meeting having occurred in December, 2002 and agrees with Hinson that there were no in-person December 2002 meetings with Swisher (along with evidence as to Swisher's poor health also excluding him from meeting in December). The chronology of events that led to the supposed mid-January 2003 meeting are:

i. Preparation of 20+ WaterOz product samples by Swisher's lab to send with Roman Ponomarenko to be tested in a Ukrainian lab in mid-November 2002, Swisher had to be lifted from his vehicle to his wheelchair because he was too weak, had to be strapped into the wheelchair so he would not fall out as he was too weak to maintain his seated position on his own, had a catheter and bladder bag and diapers, was ashen grey and extremely weak;

ii. Arrest of Hinkson on November 21, 2002 with his immediate release on OR bond;

iii. Hinkson's travel to be a featured speaker at a health conference in Southern California in early December 2002;

iv. Test results arrived in late December 2002 concerning lack of mineral content of the 20+ WaterOz product samples which had been hand carried to the Ukrainian lab (see Ex A-16);

v. Hinkson calling Swisher in late December 2002 seeking an explanation on two matters: first, what did he know about the 20+ mineral samples that tested as mere tap water by the Ukranian lab; and, second, what did Swisher know about why the WaterOz products tested by the FDA showed a low mineral content, i.e., below the amount specified on the WaterOz product label;

vi. Hinkson demanded that Swisher provide an affidavit (Ex A-15 dated January 3, 2003) explaining why his products were shown to be deficient in mineral content by the FDA lab when Swisher's lab had certified Hinkson's WaterOz products to be within plus-or-minus 5% of the amount specified on the label for the previous three years. (The latter question dealt with the Government's justification for the search warrant and was ostensibly the reason for Hinkson's November 21, 2002 arrest);

vii. After Swisher's affidavit of January 3, 2003 was picked up by a WaterOz employee and delivered to Hinkson on the same day (because Swisher was to weak to deliver it himself), Swisher called Hinkson with an extortion demand, seeking $800,000 and a one-half interest in the WaterOz business or he threatened to turn over a sample of WaterOz product that contained cyanide to a laboratory for testing and then turn over those test results to the FDA; which likely would

bring more serious (felony) charges against Hinkson from the FDA and maybe shut down the factory. (See Ex A-2, Affidavit of David R. Hinkson, ¶ 72.); and

viii. In his testimony, Swisher makes the bald assertion, without any supporting evidence, based on his word only, that a solicitation meeting took place in "mid-January 2003" in Hinkson's private office (Tr. 995, ll 1-14) at the WaterOz factory where Hinkson was "pleading" with Swisher to kill three federal officials (the Swisher Counts). Hinkson is in the position of having to prove the negative, i.e., that the "mid-January" solicitation meeting did not happen, but the corroboration is that Swisher admits that he was banned from the WaterOz factory and Hinkson refused to take his calls in January, there is documentary proof (Ex A-11 and A-14) that Swisher followed through with his January 3, 2003 cyanide-extortion threat, and one of the workers at WaterOz, Debbie Doty, testified that Swisher was too weak to get out of his vehicle in December and late January so she hand carried his WaterOz products given to him by Jeri Gray) out to his vehicle, where he engaged her by telling her how sick an weak he was. (See Ex A-5.)

[Note: Knowing now that Swisher is a convicted perjurer, the question is, whether his word or his bare testimony, without the backup of corroborative evidence is sufficient to sustain Hinkson's conviction, when there is other hard evidence supporting Hinkson's testimony such as the cyanide-extortion attempt for which Swisher was exiled from Wateroz as of January 3, 2003, making the "mid-january" solicitation meeting impossible?]

g. Swisher offers only his word without any objective evidence or connective facts or even circumstantial evidence as to how he would have overcome his health challenges from the lingering effects of his recovery from his massive heart attack as seen by many others as of January 2003 (see ¶ 25). Swisher does not address the fact that he was banned from the factory without further communication over the cyanide-extortion attempt. In his trial testimony, Swisher did mention that he had been barred from the factory as of some unspecified date in January 2003 and that Hinkson refused to take his calls, which he attributes to bringing the "hammer" down on their friendship at the alleged "mid-January 2003" meeting with no further personal contact (Tr. 1013, ll 22-25). Hinkson has concrete evidence, generated by Swisher, proving he carried out his threat regarding the cyanide-extortion (Ex A-11 and A-14).

h. **Testimonial Evidence from Late January 2003 Shows Swisher Still too Sick to Attend Meeting**. Also, there is testimonial evidence from witness Debbie Doty who asserts, that in late January 2003, because of his health, Swisher was in no physical condition to get out of his vehicle, so that she was required to carry his WaterOz products from Geri Gray out to his vehicle as he sat there immobilized, unable to do anything on his own power; certainly he could not enter WaterOz for a meeting or climb a steep flight of stairs to Mr. Hinkson's private office in that physical condition, or be a qualified candidate as a hit-man in a torture-murder scenario. Thus, the likelihood that there was a "mid-Januaury 2003" solicitation meeting in Hinkson's private office is somewhere around "zero," and Hinkson's position is that no reasonable juror would have voted to convict if all the evidence was made available.

i. **Swisher's Scheme to Takeover WaterOz**. By late December 2002, it appeared to Hinkson that Swisher had been engaging in a scheme whereby he deliberately certified Hinkson's WaterOz products as meeting the labeled mineral-content when they were not in compliance, so that when the products were FDA tested as deficient, it would set-Hinkson-up for arrest and prosecution. It seemed that Swisher had issued false lab testing reports to WaterOz to make it appear the products were in compliance, when they were not. See Swisher's Affidavit of January 3, 2003 wherein he recognizes that the WaterOz products were tested by the FDA below compliance levels and blames that on Chris, the mineral-maker.

j. **Swisher's Affidavit Shows Knowledge of Scheme to Create FDA Violations.** Swisher speculated that Chris must have brought lab samples to Swisher to test that had an extra measure of mineral so that what Swisher tested would be in compliance. This is a highly unlikely scenario because the liquid mineral in the factory is made up in large 700 to 1500 gallon vats, then bottled in one gallon, one quart and one pint units-making the likelihood of being able to calculate the exact portion to put into a sample to bring it up to meet the label specification virtually impossible. However, Swisher's statement in his Affidavit that Christ was involved in a scheme to create FDA law violations for Swisher implicates Swisher.

k. **Hinkson was Finally Seeing Swisher's Involvement**. In the Tax Case, the criminal charges related to the FDA violations were based on the product that the FDA had ordered from the WaterOz factory and sent it to its lab for testing which reported the deficient mineral content. There may have been an inside person, such as "Chris" the mineral-maker who was assisting Swisher in making certain that the product sent to the FDA was deficient. Swisher told Hinkson and stated in his affidavit that it was Chris who was totally responsible for the deficient product problem. Swisher said he was willing to go to court and swear that he tested the product and it was in compliance and he would give his opinion that it was the FDA lab that was wrong. However, Hinkson became suspicious that there were too many unanswered questions as far as Swisher's involvement was concerned and was beginning to see that Swisher might have an ulterior motive to harm WaterOz especially since the lab report from the Ukraine came back deficient (tap water). Hinkson felt that Swisher was responsible for the FDA charges against him and the Search Warrant obtained by the FDA and Hinkson's November 21, 2002 arrest.

l. **Sorting out the Information of a Plot to Takeover WaterOz**. Trying to reconcile all of these issues and sort them out in 'real time' at the end of 2002 when there was so many other issues on Hinkson's plate was difficult. When Swisher's cyanide-extortion attempt occurred on January 3, 2003, it became the clarifying event for Hinkson. At that moment, Hinkson felt Swisher was involved in many other attacks on WaterOz and barred Swisher from the company; Swisher tried to spin-it as the consequence of bringing the "hammer" down. Clearly, the credibility of these two witnesses plays a significant role for the trier of fact in deciding who was lying and who was telling the truth.

m. **Hinkson's Other Business Interests Kept Him From Focusing On a Takeover**. Being distracted with business expansion can have some positive prospects, however, when the core of Hinkson's operation was threatened by serious events that are not clearly understood, it was time for Hinkson to re-evaluate his situation. Swisher, in his January 3,

2003 Affidavit (see Ex A-15) blamed the deficient product on Hinkson's mineral-maker "Chris" (alias, Karl Waterman) who disappeared three days before the November 21, 2002 raid. Ironically, one of the last things Chris had done before he disappeared was to bring into the WaterOz mixing laboratory an array of controlled substances that were unusual drugs related to veterinary medicine which Chris said he "found." Chris put all of these veterinary related drugs on a shelf in the WaterOz lab without Hinkson's permission. When Hinkson found out about it, he had all of those veterinary drugs hauled off to a dumpster because he wanted nothing to do with them and did not want them on his property. It appeared that some of those drugs were controlled substances for which Hinkson was not licensed, which could have meant very serious drug charges if they had been in his possession at the time of the FDA raid on November 21, 2002. Again, it appeared to Hinkson that he was being set up for criminal charges and Swisher's, through his friend, Chris was somehow involved.

n. **Swisher Makes False Reports and Gets Away Without Consequences.** Swisher got another free pass on his false report to the FDA about the cyanide-laced WaterOz product as no charges were filed. At Ex A-14 is Swisher's cover letter to the independent lab in Kellogg, Idaho transmitting the contaminated sample of WaterOz Potassium asking the lab to test for cyanide. (See also Ex A-11 the lab report confirming the presence of cyanide in the sample of potassium.) Both of these exhibits were produced by the Government in discovery from the FDA in the Tax Case indicating that Swisher had 'made good' on this threat to report the lab results of the cyanide-contaminated sample to the FDA. No new charges were filed against Hinkson, because, obviously the FDA determined that Swisher (the assayer) who regularly used cyanide in his gold-mining and assaying business was the cause of the contamination. It was known that WaterOz did not have on hand any cyanide or utilize cyanide in its business because of the raid on November 21, 2002. Thus, it was readily apparent that Hinkson was actually innocent with regard to producing a cyanide-adulterated product, which could have been a felony-level offense. But, Swisher was never charged with making a false report. Another free pass.

29. **Shock Wave from Swisher's Telling of Torture-Murder Details Parallel's Double Homicide Combined with "Super Hero" Credibility**. As a further tactic to persuade the jury to believe Swisher, in addition to his lies, forgeries about his military career and in addition to his prosecutorial vouching which served to establish Swisher's enhanced credibility with the jury, Swisher offered graphic and compelling testimony concerning the details of what he alleged were Hinkson's specific instructions as to how he wanted the torture-murders of the numerous individuals (including Attorney Dennis Albers and his family, Hinkson's ex-wife Marie and Judge George Reinhardt all of Idaho County, and the federal officials previously named and their families) carried out in what Swisher related as a most cruel, gruesome and methodical manner (see fn 30). The shock effect of Swisher's horror story of torture-murder was stunning and painted a picture for the jury of someone the Government wanted to profile as a most evil and vile mastermind who would solicit these murders.

a. **Torture Murder Details Analagous to Unsolved Peeples 1997 Torture-Murder Homicide.** The details Swisher imparted about the utterly inhumane, disgusting and repulsive manner in which Hinkson supposedly

wanted attorney Albers and his family torture-murdered (see fn 29) were eerily very similar to those of the actual torture-murder of a local Grangeville, Idaho pawnbroker and his new wife, Bruce and Lynn Peeples, who died in the spring of 1997.

b. **Peeples Torture-Murder Remains Unsolved**. The Peeples homicide is an unsolved 'cold case' about which I, as the Deputy Prosecutor in Idaho County in 1997 was aware, I was aware of details about the Peeples homicides that were only known by the prosecutor and investigative team and, of course, the perpetrator. In any event, Swisher was graphic, passionate and convincing when he recounted these details as he applied them to what he said was the Hinkson solicitation, and the story had a chilling effect upon all who heard it.

c. **Swisher Would Consider Killing for Half A Million Dollars.** Chilling as it seems, Swisher had an epiphany during trial and revealed part of his dark-side, when he said he would indeed "consider killing somebody for half a million dollars." (Tr. 1062, ll 16-25, 1063, ll 1-2.)

XII. OTHER EVIDENCE BEARING ON HINKSON'S ACTUAL INNOCENCE

30. **Information Available to Trial Court was Suppressed**. In the midst of trial, two official letters pertaining to the authenticity of Swisher's claims of Korean combat valor came to the attention of the trial court and both were excluded as evidence and not shown to the jury. Both letters showed the nature of the fraudulently claims made by Swisher before the VA and that official US Government findings by the USMC proved that none of his claims were true. One of the letters was from the National Personnel Records Center, by Bruce R Tolbert dated January 14, 2005 (Exhibit B-11) and the other from the Commandant's Office of the United States Marine Corps, Lt. Col. K.G. Dowling, Assistant Head of Military Awards Branch at the HQ USMC, Quantico, VA dated December 30, 2004 (Exhibit B-5) both indicating that Swisher's claims of military valor by secret mission in Korea during his tour of duty from 1954 to 1957 after the Korean War were absolutely false for a variety of reasons. Also see the Affidavit of Chief Warrant Officer W.E. Miller dated February 24, 2005 filed in conjunction with Hinkson's New Trial Motion (Exhibit B-9), whose duty assignment it was at that time to determine the authenticity of records such as the "replacement DD-214" submitted by Swisher. CWO Miller, explains in eight pages the detailed reasons why Swisher's claims of being a wounded and decorated combat soldier from Korea were false. The main points are: 1) Swisher did not step foot in Korea during his tour of duty; 2) Swisher never was in combat; 3) Swisher had not received the training to be in an expeditionary mission; 4) Swisher did not hold the rank necessary to participate in an expeditionary force; 5) there were no secret missions that occurred after the Armistice (to free POWs or otherwise); 6) Swisher never received war wounds; 7) Swisher received no awards or decorations; and 8) Swisher's discharge paper, what he called a "Replacement DD-214" was a forgery, with the real discharge document showing he was court-martialed and busted from the rank of a corporal to a private first class while in the US Marine Corps. Basically, Swisher was a discipline problem while in the USMC, who rendered unremarkable and undistinguished military service and was a failure. However, the grandiosity of his claims such as wining the Purple Heart and twice wining one of the most coveted medals, i.e., the Silver Star, was absurd. The cleverness of Swisher's fraud and forgeries took the USMC five months, from August 2004 to December 30, 2004 to unravel and neither Judge Tallman nor the prosecution

was willing to either unravel Swisher's fraud themselves during the trial or call in an expert who knew how to unravel it. Judge Tallman, who received Swisher's official military record, without his "replacement DD-214" because it was held "not to exist" in his official military record, insisted that it was a part of Swisher's file and relied upon it as authentic, providing reliable information contrary to the Dowling Report. In fact, Swisher was treated like a celebrity by the prosecution and Judge Tallman during the trial for a variety of reasons that show his reputation as an effective 'con-artist' is well deserved. For Hinkson, Swishers trickery was the cause of his conviction because of vouching by the Government and unwarranted validation by Judge Tallman allowing Swisher to pretend he was the equivalent of a military "Super-Hero" before the jury.

a. **Swisher's Other Multiple Deceptions.** Understanding the full range of deceptions created by Swisher reinforces Hinkson's Petition for Habeas Corpus under the Actual Innocence Doctrine where cumulative evidence that might not otherwise be admissible may be considered (the equivalent of FRE 404(b) evidence of 'other bad acts' by Swisher, who is now known to be a criminal who had committed crimes in the courtroom while testifying against Hinkson in this case). It is also important to understand that Swisher has been accustomed to getting away with crimes for as long as he has resided in Idaho County because he has never been held accountable, or made responsible or required to pay any consequences for his frauds and deceptions, nor his theft or for the wreckage he has caused in the lives of others until he was convicted of cheating the VA in 2008. Although convicted of three serious felonies in 2008, he was only sentenced to a-year-and-a-day (an extremely light sentence considering the vast number of people disaffected by Swisher's Korean-combat fraud). Swisher was protected from a twenty year sentence by the FBI and US Attorney for Idaho. Even though Swisher 'got-off' easy, he was such a coward that he complained constantly because he had to spend a few nights in a country club prison. He actually filed a motion with the Federal District Court in Boise to be relieved of sleeping on a "hard" bed. (Note: there were 30 veterans of the US Armed Services in Idaho who were ready to testify to the damage Swisher caused the community by his stolen valor crimes all related to his 2008 conviction, yet his trial judge refused to look at any of their written statements and affidavits prepared by these honorable men and women-at-arms who were simply asking the judge to consider their input before sentencing. Again, it was the FBI and the US Attorney for Idaho who was protecting Swisher--the judge said he felt there was an "agenda" associated with submitting the statements of some 30 service men and women who were calling upon that judge to render a just sentence in the Swisher case. (The objective observer would see that it was the US Attorney for Idaho and the FBI that were the ones with the "agenda," i.e., protecting one of their CI's from adverse consequences). Swisher's bad behavior has been repeatedly reinforced by a system that allows itself to be used by some of the vilest criminals in America under the cloak of being confidential informants, who like Swisher, know the system and know how to lie and simply promise to cooperate with the Government (such as in the debacle over the false Mariana Raff allegations, see ¶ 21(a) above), involving schemes used to put innocent people behind bars (this is a known problem in the American Criminal Justice System, see US Congressman Bauman's dilemma[38]).

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38 Raff's and Swisher's deceptions affect all of the American people and should be recognized as an example of what Congressman Robert E. Bauman, J.D. described as "a real menace to our society," in an article entitled: *The U.S.-An Informer's Paradise*, 1997, citing Ninth Circuit Court Judge Stephen S. Trott of Boise, Idaho, formerly the head of the Criminal Division of the U.S. Department of Justice under President Reagan, in his warning that because of police informants "[t]he integrity of the criminal justice system is at stake." (Id.)

b. **Effect of Swisher's Subsequent Conviction Plus His Lies to the Grand Jury**. At the 2005 Hinkson trial, none of the parties knew (nor could they have known) that in 2008, Swisher would be convicted of perjury, forgery, theft of VA benefits and stolen valor; which occurred three years after the trial of the Hinkson Solicitation case. Swisher's conviction stands as new evidence relevant to Hinkson's 2005 conviction (see Swisher's 2008 conviction, fn 19). What was known at the 2005 trial is that Swisher's military record, after being sequestered for five months, was subpoenaed by Judge Tallman and was available during trial along with the Report of Col. Dowling (Ex B-5) and the letter from Bruce R. Tolbert (Ex B-11) of the National Personnel Records Center NPRC. Despite Judge Tallman's finding that there was insufficient evidence to make a determination of authenticity of Swisher's official military record which Judge Tallman subpoenaed which included the Dowling Report,[39] despite the fact that he had personally issued the subpoena, and the original file came to his chambers by overnight delivery and he was the one who opened the shipping packet containing Swisher's official military record which included the Dowling Report, he still questioned its authenticity. He did not have a rational reason to doubt the authenticity of the Dowling Report nor did he have a rational reason to doubt that Swisher had testified falsely as to his military history and presented a forged DD-214 to the court, which is perjury and forgery, both felonies, committee in Judge Tallman's courtroom. The Dowling Report was dated December 30, 2004, just four (4) business days prior to the start of the trial of the Hinkson Solicitation Case, but it was not disclosed to the defense team until late January 2005, in the middle of trial. The Dowling Report was self-explanatory and came directly from the Commandant's Office of the US Marine Corps (meaning it had true authenticity) and was sufficient, if it had been shown to the jury along with the official military record that no reasonable juror would have voted to convict. (For confirmation, see Affidavit of juror Ben Casey Ex A-8). Further, the Government never admitted to the defense or the jury that its star witness, Swisher had lied to them during the 2002 Grand Jury then lied again at the 2004 Grand Jury and then again lied at the 2005 Hinkson trial. Ninth Circuit law[40] requires the prosecution to disclose those lies to the jury, which disclosure would have allowed the jury to reevaluate his testimony and acquit Hinkson.

c. **One of Swisher's False Reports had a Lasting Effect on Judge Tallman Seven Years Later; the Effect was Sufficient to Deny Hinkson's §2255 Habeas Petition by Implicating him in Fake Backwoods Idaho Murder Plot that Judge Tallman Believed was Real**. During his trial testimony in the Hinkson Solicitation Case on January 14,

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39 Tr. 2317, ll 18-19, Judge Tallman "…the letter itself, is neither self-authenticating or self-explanatory." The problem was that Judge Tallman had refused to credit Dowling Report, an official document. (Tr. 2609, ll 10-19).

40 *US v. Basurto*, 479 F.2d 781, 785-86 (9th Cir. 1974), *Alcorta* and *Hayes*, supra.

2005, Swisher testified he was the victim of a new Hinkson murder plot (Tr. pg. 1069, ln 12). In that segment of the Swisher Story, he speculated that Hinkson had sent a gunman to kill him in a remote part of Idaho while Swisher was in his outhouse near his goldmine (see Ex B-4, Aff. Lindsay). While this story fits Swisher's profile for making up false reports that defy logic, it appears that Judge Tallman believed it, relied upon it and cited it as if true seven years later because obviously the Swisher Story was still valid in Judge Tallman's mind (see Denial of Recusal Motion, see Ex B-1). The facts are: Hinkson, had been in jail in Boise for 20 months as of August 31, 2004 which would limit his opportunities to hire a hit-man; there was no proof that Swisher had any idea how to find Swisher's gold mine or how Hinkson would get current information as to when Swisher might be there (Swisher did report that he thought the shot had been fired by a US Forest Service worker who had been in the area); then there is the issue of picking the time that Swisher entered his tin-sided outhouse when it was occupied; Swisher was able to trace the bullet's trajectory by applying a welding rod through the bullet holes demonstrating the angle of fire which he showed Deputy Lindsey. It was suspicious that Swisher had to first 'run it past' his handler, FBI SA Long for a week before he presented his report to the Idaho County Sheriff's Office. Deputy Lindsey believed it was suspicious that Swisher had no plan of escape and no concern about protecting himself from a repeat shooting by this hired killer (if there truly was a third party shooter). An objective observer would expect that the human target of such a plot (Swisher) to be extremely concerned that the shooter might return to finish the job, but, not so with Swisher. In fact, Swisher mentioned to Deputy Lindsey that he was expecting his wife and the wife of his friend to come to the mine for a social gathering that afternoon. If an objective observer was aware of Swisher's pattern of lying about such matters, he probably would arrive at the same conclusion as Deputy Lindsey, who after thoroughly investigation of the so-called backwoods shooting incident at the time stated, "[i]t was my opinion Swisher manufactured the whole story." (See Ex B-4, Affidavit of Deputy Lindsey; note also that Swisher revealed that his report of a shooting had something to do with a dispute Swisher was having with Hinkson.) The fact that Judge Tallman, holds himself out to be objective or truly a neutral judicial official when, in he denied Hinkson's §2255 Habeas Corpus Petition on August 28, 2012 based on the 2005 trial record and the obviously phony and speculative account of the August 2004 backwoods shooting incident as an example of Hinkson's supposed acrimonious relationship with Swisher, when such account lacked authenticity when first delivered. (See Doc. #326, Order Denying Hinkson's §2255 Habeas Petition, pg. 7, Case 1:04-cr-00127-RCT, Idaho Federal District Court dated August 28, 2012.) Judge Tallman demonstrated judicial bias as he failed to take into account the fact that Swisher was a proven a liar, convicted of perjury in 2008 on charges identical to the crimes committed in Judge Tallman's courtroom. Judge Tallman, by incorporating said incident in his August 28, 2012 Order

showed that he was still embracing Swisher's testimony as if he was a credible witness who deserved to be believed. It now appears that be strong support Judge Tallman has had for Swisher, is a product of his *ex parte* interview in chambers with Swisher, immediately before he testified in the Hinkson trial. Judge Tallman's August 28, 2012 holding, reads in part:

"Their relationship had gotten so acrimonious, Swisher explained, that Swisher suspected Hinkson had 'put a contract out' on his life, and someone had recently fired a shot at him in the woods of rural Idaho." Tr. 1067, Id. see, Pg. 7, Dkt #326 Order Denying Habeas Corpus under 28 US §2255; Case 1:04-cr-00127-RCT, in the Idaho Federal District Court.)

Knowing that Swisher was a convicted perjurer should have made this speculative "backwoods shooter" story a 'non-starter.' When an objective observer sees that seven years after the Hinkson trial, and four years after Swisher's conviction for perjury, Judge Tallman gave credit to Swisher's bogus account of a totally illogical and delusional fantasy story of a backwoods shooting, then the depth of Judge Tallman's deep seated favoritism for the Government and deep seated antagonism toward Hinkson (see ¶ 34 below) becomes apparent. Judge Tallman revealed the source of his antagonism toward Hinkson which is based on extra-judicial reasons (see ¶ 13 above, i.e., antagonism because Hinkson exercised his First Amendment Constitutional Right to petition his Government for redress of grievances, based on extra-judicial matters, extrinsic to the Solicitation Case).

d. **The Extent of Swisher's Deceptions Permeated all of his known Activities-Pretense of Running an 'Umpire' Lab-Filled with Obsolete Equipment in Rundown Garage**. In his testimony, Swisher claimed that his assay lab was in fact, an 'Umpire Lab;' i.e., of such high reliability and repute that other labs relied upon his assay work to decide a disputed question of mineral content. But, that was just another Swisher fraud. On or about November 5, 2002, Ponomarenko visited that lab and described his experience as follows (see Ex A-3):

"11. On or about November 5, 2002, I [Ponomarenko] rode with Paitreyot to Cottonwood, Idaho and arrived at Northwest Analytical and what was referred to as a "Laboratory". I was surprised that the so-called "lab" was actually <u>in a rundown building with an overhead garage door</u>, next to a private home in an economically depressed residential area.

12. I learned that Hinkson had never seen this "lab" and did not know how to get there. I was concerned that this lab did <u>not appear to be a professional lab</u>, nor did it compare to other scientific labs I had seen in Russia and Ukraine.

13. It was at the November 5th visit that I met Swisher for the first time. He was strapped down in a wheel chair, his skin color was very grey and he looked sick. He told me that he had just had open heart surgery. He informed me that his lab assistant, Doug Sellers, would

have all 20 of the samples tested before I departed on Monday, November 8, 2002.

14. As I talked with Swisher he coughed frequently and looked very pale. I noticed the edges of a diaper and he had a bladder bag hanging from his wheel chair. It seemed to me that he belonged in the hospital.

15. That evening, I informed Hinkson about the rundown condition of Swisher's Laboratory and how pale and sick he appeared. Hinkson was shocked to learn these things because his business depended upon accurate testing by a laboratory." [Emphasis Added.]

e. **Swisher's Fraud and the Plan with His Co-Conspirators**. Part of the Bellon-Swisher-Birmingham[41] takeover plan for WaterOz was to assert themselves as witnesses at the Hinkson Solicitation trial, each would make separate, fraudulent claims that they believed Hinkson was planning to murder other people. Their goal was to present a cascade of false testimony that they believed would convince a judge and jury that Hinkson was an 'evil mastermind' planning murder-for-hire as a fundamentally violent person, who needed to be imprisoned for "the rest of his life." All three believed that with Hinkson out of the way and if they were at the helm, they could take its revenues for themselves.

i. *Swisher Declares Himself to be CEO of WaterOz*. With Hinkson incarcerated since April 2003, it was apparent that, by December 2, 2003, the co-conspirators felt enough time had elapsed that their takeover would be successful. The co-conspirators went to the WaterOz factory with the TRO accompanied by the Deputy from Idaho County Sheriff and threw out Gregory Towerton, Geri Gray and a host of others who were loyal to Hinkson. Swisher declared himself to be CEO and Bellon contacted a business broker and listed WaterOz for sale. By this time, the co-conspirators believed that Hinkson should have been sufficiently weakened and would not have been able to stop them (because he was incarcerated in Boise, 200 miles away). If it had not been for the employees of WaterOz, they would have succeeded. What the co-conspirators did not anticipate that their collective fraud would be exposed in the TRO case.

ii. *Swisher Morphs his Claim for Property*. In the TRO lawsuit, Swisher filed claims seeking over $500,000 in cash, real estate and heavy equipment that he falsely claimed Hinkson had promised to trade for what Swisher said was a past due bill for mineral assay testing of the WaterOz product. On this subject, Swisher started out by testifying in the 2002 Grand Jury, that he was taking the remained of the WaterOz product he was testing for health reasons and that he gave the company a discount. Then Swisher changed his testimony in

41 Lonnie Birmingham was overheard by WaterOz employee Jerry Smith saying to Swisher, after Swisher had taken control of WaterOz with the TRO: "The takeover only took a year, and I think it will be worth it." (Tr. 1520, ll 1-3.)

2004 and stated that he had accumulated a past due account charge against the company for half the cost of Swisher's assay testing and was willing to trade it for the land, heavy equipment and cash. When that did not work, and Swisher's claims in the lawsuit were dismissed, Swisher pretended that the same property had been the subject of a "verbal gift" to him from Hinkson because Swisher and Hinkson were "best friends" (Tr. 1009, ll 14-21). Although he did not testify to this, Swisher implied that he had been given this half-million dollars in property as an incentive payment to commit murder.

b. **Swisher and Co-conspirators Fraudulent Takeover of WaterOz Exposed**. All three conspirators, Bellon, Swisher and Birmingham, had worked for WaterOz (Birmingham and Bellon as employees, and Swisher as an independent contractor and vendor of mineral-testing services). All three played a major role in the conspiracy to take over Hinkson's business, the objective of which was to keep him incarcerated for the "rest of his life;" a goal shared by Judge Tallman, who viewed Hinkson as a nuisance to the Government whose only purpose was to "game the system" (see ¶ 16). The plan was to make the business vulnerable to a takeover from a lack of leadership while Hinkson was incarcerated, then the three co-conspirators could fill the void by presenting themselves as the new WaterOz management. At the time they obtained the TRO, they perjured themselves before the Idaho State District Court by alleging that their purpose was to "save" the company from: 1) embezzlement of $60,000; 2) unsafe products; and 3) unhealthy working conditions none of which were a problem. In order to obtain the TRO on December 2, 2003 it was necessary to lie to the State District Court Judge who issued the TRO. As it turned out, some $60,000 had been set aside to pay for Hinkson's defense from criminal charges and was properly accounted for; the WaterOz product was proven to be safe for public consumption and the working conditions were proven to be healthy.

c. **Swisher's 2008 Conviction Shows he Committed Crimes in the Courtroom and Supports Hinkson's Claim of Actual Innocence**. If the defense could cross examine Swisher now on his 2008 felony conviction, it would prove devastating for the Government's case, showing that none of his claims of Korean combat or heroism or valor were true and that he had lied repeatedly about them to the 2002 Grand Jury and to the 2004 VA benefits hearing and to the Hinkson jury in the Solicitation Case. As those lies were calculated to win the confidence of the fact finder by sharing with them the fiction that he had served in Korea, on a top-secret mission while he was in combat, and wounded in battle where he killed "many," received awards and he had the papers to prove it. Just as in the VA's prosecution of Swisher, all of this was: 1) perjury; 2) forgery; and 3) stolen valor for wearing the Purple Heart medallion in the courtroom, which was a crime just as claiming that he had been awarded the Silver Star (twice) and the award of the other medals he claimed was also theft of valor. In fact, the wearing of the Purple Heart on the witness stand was one of the law violations that made Judge Tallman overlooked, in spite of the fact that it turned his courtroom into a crime scene (even Judge Tallman recognized at the time the wearing of medals without

authority could be illegal, but he failed and refused to credit as authentic the official report from the USMC (the Dowling Report, Ex B-5) which was in front of him, which laid out that Swisher was not entitled to any decorations, was never in Korea, nor in combat and his "replacement DD-214" was a forgery). Then there was the separate crime of forgery for presenting a forged Government document, the "replacement DD-214" to a federal court and perjury for falsely claiming that it had been certified by the Commandant's Office of the US Marine Corps when it had been certified by the recorder of Idaho County as a document Swisher had recorded earlier. All of these, as well as the dozen lies from ¶22(d) and the claim that Swisher had killed "many" in combat were central to the Government's theory of prosecution because these lies built false credibility for Swisher to be able to overcome the natural skepticism that most jurors would have for the accusation that Hinkson solicited him to torture-murder the designated federal officials and their families. Because all of these involved false testimony and false evidence, the jury should have been entitled to know they were false before passing judgment on Hinkson. Hinkson's claim that no reasonable juror who knew all of these fact would have voted to convict.

d. **Unraveling Swisher's Fraud**. It was not until the first element of proof came from the NPRC in the form of the "Tolbert Letter" (see Exhibit B-11) during Swisher's testimony of January 14, 2005, that the light of understanding began to shine into this case. Then, there was the "Dowling Report" (see Exhibit B-8) from the Commandant's Office of the US Marine Corps dated December 30, 2004, which brought forth greater light and knowledge that Swisher's story was fraudulent. Even though Judge Tallman received the Dowling Report as a part of Swisher's official military record, which had been subpoenaed by him, he denied its authenticity as a means of protecting Swisher.[42] However, in a fresh evidentiary hearing, no reasonable juror would vote to convict Hinkson if all evidence regarding Swisher's fraud should be made available to them so that they could unravel the extent of Swisher's fraud. At trial, the Government had the duty to disclose the false testimony to the jury and present exculpatory information in a timely manner so that Hinkson be able to defend his case.

i. *Blaming Hinkson for not Obtaining Swisher's Military Record when it was a Government Agency, i.e., the USMC that had Checked out the file and Sequestered it, Blocking the Defense Team's Access*. Hinkson's defense team was blamed by Judge Tallman and the prosecution for not obtaining Swisher's military records sooner and not obtaining a witness to testify that the record was authentic when it was impossible because another branch of the Government, the USMC, was trying to unravel Swisher's fraud (Tr. 2603, ll 6-25 THE COURT: "The answer is, no, you didn't conduct any further investigation?" lns 19-20 and when the Dowling Report had only been disclosed by the

42 Judge Tallman made the following statement referring to Swisher's "replacement DD-214," "…other documents available to the court suggest that Swisher might, indeed, have earned such medals." (Tr. 2609, ll 23-25.) This statement shows the extent to which Judge Tallman had become enamored with and an apologist for Swisher and was willing to make up facts in order to validate his false claims such as Judge Tallman's assertion that Swisher 1) traveled to Korea by ship; 2) Swisher entered Korea by amphibious landing craft; and 3) Swisher was a member of the Amphibious Rifle Co. (Tr. 2309, ll 6-10). It was judicial bias to take Swisher's side in this dispute as proven by Swisher's 2008 conviction.

Government that day; then the prosecution attacked the defense team when it was the Government that was responsible for sequestering the Swisher official military record, see Tr. 2604, ln 1-24, Mr. Sullivan: "Three months is quite a period to obtain all this. Now, suddenly, they want everyone to drop what they are doing and assist them in their search. The Government got that one document [Dowling Report] within one day from the V.A." lns 8-13) because the Government has a direct pipeline to itself and Hinkson had no access to that pipeline. Hinkson and his defense team did not know what they could not know. The accusations by the Court and prosecution were baseless, frivolous and meritless and for them to gang up on the defendant and suggest a lack of due diligence, when the Government had the inside track and obtained the Dowling Report, which had only been issued on December 30, 2004 (four (4) business days before commencement of trial) and was kept in Swisher's official military record, which was not available to the defense team, even by subpoena, until it was actually returned and reintegrated into the files of the NPRC, because it was impossible for anyone outside the Commandant's Office of the USMC to obtain Swisher's file while they were holding it. Swisher is the one who had committed fraud on the VA and it was the USMC and the VA that had a reasonable suspicion Swisher had committed fraud. It was the VA that had referred Swisher's file to the Commandant's Office of the USMC for investigation (see Ex B-13). Blaming the defense team for something clearly beyond the defense team's control or scope of knowledge was a part of the judicial bias and prosecutorial misconduct that contributed to Hinkson's wrongful conviction. Note: the defense team had, in good faith made every effort they were capable of to find Swisher's official military record, it was a false accusation by Judge Tallman and the prosecution to assert that the defense team had the ability to obtain the record sooner and is an element of their respective misconduct to attack the defense team for not producing the record or producing a witness to explain it, when it was the Government that had Swisher's military file sequestered and the defense team had no knowledge of the scope or extent of the file until it was subpoenaed by Judge Tallman. It was a secret that the USMC was the agency holding the file until after its investigation was completed; especially since the prosecution hid the Dowling Report from the defense team for several days (the copy of the Dowling Report produced in Court indicates it was obtained on 01-13-2005 but it was not disclosed to the defense team until the next week, well after Swisher testified).

ii. *Hinkson's Defense Team Made Showing of Diligence in Seeking Swisher's Military Record*. As a part of Judge Tallman's judicial bias, he chastised Hinkson's defense team for not obtaining Swisher's military record, when that record had been held in secret at the highest level of the USMC in order to investigate and expose the fraud by Swisher, who was the Government's witness. Counsel for Hinkson made a contemporaneous on-the-record showing of due diligence, that the defense team had been for 90 days before trial actively seeking Swisher's military record and hired a private investigator. The defense team showed Judge Tallman that after three months of diligently searching for Swisher's military record the only document that could be obtained was the Tolbert letter on 01-14-2005 (see Ex B-11) received during the exact time that Swisher was testifying which showed up in the courtroom at the last second in what the prosecution referred to as a "Perry Mason Moment."

iii. *Hinkson had No Control Over the Date the Dowling Report was Released*. It was the Dowling Report issued December 30, 2004 which was not released to Hinkson's defense team by the prosecution or the Government until the second week of trial, well after Swisher testified, which became another late-breaking development over which Hinkson had no control. Clearly, it was no fault of Hinkson's defense team that Swisher's military file was sequestered in the Office of the Commandant of the USMC since at least August 2004 (Ex B-16) and was not released back to the NPRC until at least December 30, 2004 when the Dowling Report was written, four (4) business days prior to the commencement of the Hinkson Solicitation Trial on January 10, 2005. But, the Hinkson defense team was not on the list of parties entitled to receive the Dowling Report because Hinkson did not have an Authorization for the Release of Confidential Information signed by Swisher nor did they operate with the power and authority of the Government which was able to send SA Long to the VA to fulfill its requests for information. The defense team was not even on the list of those receiving notice that the file was back and available to be subpoenaed. All of this was kept secret from the defense team by various branches of the Government including the VA, which is the source from which the prosecution claims that it obtained the Dowling Report.

iv. *Blaming Hinkson's Defense Team for Not Producing what is a Government Secret is Judicial Retaliation*. If the Government desires to keep something secret, members of the public, such as Hinkson and his defense team cannot be held accountable for failing to produce that which constitutes a Government secret. Even the fact that the file was returned to the NPRC was a secret, so that Hinkson's defense team knew not who to subpoena through the fall of 2004 until January 14, 2005. Erroneously blaming Hinkson's defense team for a lack of due diligence in obtaining Swisher's military record suited Judge Tallman's retaliatory approach. My office was in touch with the NPRC every day trying to determine if Swisher's file had been returned by the unnamed agency (now known to have been the USMC) that had 'checked it out.' The best we could do was to obtain the Tolbert Letter during his testimony which barely touched on the issue of Swisher's fraud.

v. *The Defense Team was Hyper Vigilant Rather than Lacking Diligence.* Counsel for Hinkson, rather than a lack of due diligence, was hyper-vigilant in seeking Swisher's military record; however, the NPRC would not disclose its location or the name of the agency that had checked out the file (which we now know was the Commandant's Office of the USMC). Part of the problem was that, in order to cover up his fraud, Swisher claimed he was on a top-secret mission and that the records had been purged and he was not permitted to talk about the mission so that he could hide behind the secrecy and not be subject to questioning. When the USMC received the request for analysis, it had to treat the matter as potentially "Top Secret" until they could verify the origin of Swisher claims. So, neither the VA, nor the NPRC was willing to provide any information at the time, just in case Swisher's claim was right and it did involve a "Top Secret" mission. Nor was the Hinkson defense team notified by the NPRC once the file had been returned to the NPRC. Rather, Hinkson's defense team continued to be vigilant and reported to the Court the information it received as it received it. Compare the defense teams diligence and reporting to the Government having the inside track and hiding the Dowling Report for at least a week.

v. *Hinkson Denied Fair Opportunity to Impeach Swisher on His Official Military Record.* In an erroneous ruling, when Judge Tallman said he would permit the defense to recall Swisher, the offer was illusory because Judge Tallman was protecting Swisher from impeachment and would not allow the use of his official military record as an exhibit; according to Judge Tallman only questions could be asked without the use of his military record as an impeachment tool and he said the defense would be "stuck" with the answer. We now know that everything Swisher said about his military record was a lie based on his 2008 conviction and we know that he was an effective liar and had been vouched for by the Government and enabled by the Judge Tallman who as recently as August 28, 2012 still believed that Swisher was a credible witness. Plus we know that Judge Tallman, who had been stating false information about Swisher fictitious military service in Korea that Judge Tallman apparently learned in his *ex parte* meeting with Swisher in chambers immediately before he testified on January 14, 2005. Judge Tallman had inserted into the record that Swisher was transported to Korea by ship, entered Korea by amphibious landing craft and was the member of a specific rifle company, Tr. 2309, ll 6-10, none of which was true and in fact, all of which was false. Because that *ex parte* meeting was not properly disclosed, it constituted additional judicial bias and is a cause of Hinkson's wrongful conviction. Recalling Swisher as a witness would have been a disaster for defendant without his official military record to impeach him with. Considering Swisher's ability to spin stories and with the Government vouching for him and the Judge validating him and issuing unfair rulings that protected him from impeachment (see below), the defense had no ability to effectively cross examine Swisher. When faced with a very cagy liar that was being protected, there was no way for the Hinkson defense team to have held him to account for his lies. Without the proper tools for cross examination, there was a substantial risk that the skilled liar in Swisher would have taken that opportunity to put a spin on his story in a manner that would have caused more damage to Hinkson's case.

g. **Swisher Demanded "Correction" for his Prior Grand Jury Testimony**. Swisher Story made a major change to his story in the murder-for-hire segment of his trial testimony on January 14, 2005 when Swisher suddenly claimed that he needed to "correct" his prior testimony. It is interesting that he wanted to "correct" a lie with another lie and Judge Tallman assisted him. The problem was that what he wanted to correct was testimony given before a 2004 Grand Jury proceeding before a different judicial official, rather than testimony given that day at trial. Procedurally, he was in the midst of cross examination and should have been subject to impeachment for his prior testimony. Clearly, the Government on redirect would have the opportunity to rehabilitate him. However, Judge Tallman was protecting Swisher from impeachment, probably because of the discussion they had in their *ex parte* meeting in chambers immediately before Swisher took the witness stand. Swisher

had a transcript of this February 10, 2004 Grand Jury testimony with him. He knew that what he had said at page 9 of the transcript was clearly inconsistent with the tale he was telling at trial. So, at some point in his cross examination it was as if Swisher uttered a predetermined 'code.' As soon as Swisher made a random statement (totally out of context with the question being asked) about 'correcting' his testimony, Judge Tallman jumped in and insisted that Swisher be given the opportunity to "correct" his testimony. It was as if Judge Tallman was 'foaming the runway' to help Swisher avoid a 'crash landing' over lies told at the 2004 Grand Jury. This was clearly favoritism for the prosecution. This was a highly irregular procedure, which now makes it appear that the judge was a part of a scheme that was trying to fool the jury. What happened is that Swisher was able to go from the story he told in his 2002 testimony that Hinkson presented no "problems" and was a mild-mannered individual, to Hinkson was a raging mad-man who was constantly soliciting Swisher from 1999 to 2002 to torture-murder various people. When it came time for the 2005 trial version of Swisher's testimony, he or the prosecution realized that if the 'mad-man raging from 1999 story was true,' then he should have told the 2002 Grand Jury something other than he no "problems" with the mild-mannered Hinkson. So, with Judge Tallman's help, Swisher took the position that there had been no "direct" solicitation to torture-murder anyone until after April 16, 2002, the date of Swisher's 2002 Grand Jury testimony. (Tr. 1085, ll 1-8 and see Judge Tallman's colloquy with counsel regarding the protection for Swisher so that he could "correct" prior testimony, rather than be impeached because of his prior inconsistent statement, Tr.1022, ln 19, Swisher's random request to "correct" his testimony, then Judge Tallman ordered that Swisher be given the opportunity to "correct" his Grand Jury testimony Tr. 1030, ll 22-25 and directs counsel that they must ask Swisher the questions to allow him to "correct" his Grand Jury testimony Tr. 1040, ll 17-22; all of which makes it appear Judge Tallman had prior knowledge that this correction was coming and that Judge Tallman would help facilitate a 'soft landing' for Swisher.)

31. **HINKSON, ADDITIONAL INFORMATION REGARDING ACTUAL INNOCENCE.**

a. **Innocence Maintained**. Hinkson has always maintained his innocence of the solicitation charges, and asserts that he was only convicted because he was denied a Sixth Amendment "fair trial in a fair tribunal" before a fair jury, which are constitutional errors.[43] Hinkson is in the position where he must petition for Habeas relief under 28 USC §2241 based on his *actual innocence* which he claims can be clearly seen when looking at the cumulative effect of all the evidence,[44] including newly discovered evidence (such as Swisher's 2008 conviction, and evidence such as the Miller Affidavit, Ex B-9 and the Woodring Affidavit, Ex B-10 which were filed with Hinkson's Motion for New Trial and provided to the Court exactly what Judge Tallman said he wanted to be able to determine if Swisher's "replacement DD-214" was authentic). To be clear, Hinkson made statements about his "tormentors" such as "God will smite them" (see fn 41) but as for solicitation of Swisher or any person to kill or torture-murder them, he maintained that it never happened (Ex A-2, ¶ 32) and he never was a party to any conversation or meeting where,

43 *Shulp v. Delo*, 513 US 298 (1995) 115 S.Ct, 851, 861 (1995).

44 *Killian v. Poole*, 282 f.3d 1204 (9th Cir. 2002) which held "[e]ven if no single error were prejudicial, where there are several substantial errors, their cumulative effect may nevertheless be so prejudicial as to require reversal."

what was discussed, such as the repulsive and disgusting torture-murder of other human beings as described by Swisher (see fn 29); Hinkson maintains that conversation simply never occurred. What Hinkson had jokingly said was that he wanted to invent a "Fed-a-Pult," a catapult-type device to be mounted on the front bumper of a truck to cast federal employees who made up false charges against innocent people into a canyon. Hinkson's *modus operandi* has always been to use his mind to combat what he felt was corruption and injustice, and he believed that his 'pen was mightier than a sword" which is consistent with him filing petitions with his government for redress of grievances (for which Judge Tallman felt antagonism against Hinkson (see ¶ 13) and with his non-violent assessment (see ¶ 15 above) Hinkson had "zero" potential to do harm to others.

b. **The Facts Show Hinkson's Actual Innocence as to All Three of Swisher's Alleged Solicitations.** According to Swisher in his trial testimony, Hinkson only made three (3) "direct" solicitations (see Tr. 1092, ll 17-18 Swisher said: "When he made the three direct solicitations to me, they were made in private."). Even though Hinkson was not charged with a crime associated with (1) the solicitation of the torture-murder of attorney Albers and family in late-April 2002 or (2) the torture-murder of two federal officials, IRS SA Steven Hines and AUSA Nancy Cook at a solicitation meeting supposedly in July-August 2002, this §2241 Habeas Petition eventually grows into an evidentiary hearing, Hinkson must address these accusations with counterpoints because they are all inextricably connected to the torture-murders alleged in the Swisher-Counts (which were related in time only to the alleged mid-January 2003 meeting). It was Swisher who effectively used the graphic and gruesome torture-murder description of the Albers family as a short-hand or abbreviated way of describing how he was also supposedly instructed by Hinkson to murder various federal officials and their families connecting the three time periods. Hinkson was not charged with crimes related to solicitation meetings in either (1) late-April 2002 (Albers related) or (2) in the July-August 2002 time frame (Hines and Cook related), nevertheless, it will be necessary for him to establish that he is *actually innocent* of those solicitations as well as the mid-January 2003 alleged solicitation in order to show that he never engaged in solicitation for the murder of anyone; which would be foundational proof of his actually innocent.

i. **First Two Solicitations by Swisher were Not Charged**. Looking at the late-April time frame by itself (Tr. 1085, ll 1-8) and according to his trial testimony, Swisher said no threats were made from 1999 to April 2002. Witness Sandberg and Hinkson himself, along with his Passport (to date not disclosed by the Government) prove that after April 16, 2002, Hinkson was in Ukraine looking for a bottling plant (see Ex A-2, Aff. Hinkson ¶1; and see Aff. Sandberg Ex A-4, ¶10). These confirm Hinkson's absence from Idaho during late April 2002. Swisher also claims that he met with and was solicited by Hinkson on a second occasion at the WaterOz factory in either July or August, 2002. For July Hinkson claims he was with his children out of Idaho on vacation for the entire month (see Ex A-2, Aff. Hinkson ¶6-13 and B-1, Aff. Towerton

¶26) and again out of Idaho from the first of August to the first of November 2002, traveling to Venezuela, attending a class in Florida then visiting other foreign venues, such as Ukraine for two months. (See Hinkson's Passport for August to November 2002 confirmation and the Towerton Affidavit of December 11, 2013, Ex B-1, ¶26, and the Hinkson Affidavit, Ex A-2, ¶¶18-23, also confirm Hinkson's absence from Idaho and the USA.)

ii. **Swisher Counts are based Only on Supposed Mid-January 2003 Meeting**. Swisher claimed a third and final solicitation meeting took place at the WaterOz factory in December 2002 or January 2003 in his 2004 Grand Jury testimony. Then, in his 2005 trial testimony, Swisher specified the date of the third solicitation meeting was "mid-January 2005." (Tr. 1013, ln 7, fn 39). (To avoid unnecessary duplication the facts that negate a third solicitation meeting took place were previously recited, which are: (1) Swisher's health prevented him from getting out of his vehicle or climbing the stairs to Hinkson's office and (2) Swisher was banned from the WaterOz factory based on the cyanide-extortion attempt of January 3, 2003, see ¶28 (a) through (g).)

c. **Swisher Fraud to Demand Hinkson Purchase Obsolete AA Machine when WaterOz had Purchased its Own ICP Testing Machine.** Once Swisher had his massive heart attack of early June 2002, WaterOz needed a new way to test its minerals. Hinkson purchased a used ICP machine (an all-in-one-machine with modern 'turnkey' testing capability, as opposed to purchasing Swisher's obsolete Atomic Absorption Machine). The cost of the newer ICP machine was $30,000 so that WaterOz could perform in-house mineral tests to avoid the problems he had experienced with outside labs. Despite the fact that Swisher knew Hinkson had purchased his own ICP machine, Swisher persisted in demanding that Hinkson purchase Swisher's obsolete AA Machine (see Ex A-10, Invoice dated April 1, 2003, Swisher's Northwest Analytical bill for $12,000 for the purchase of Swisher's obsolete AA machine which he admits "came over on the Mayflower.") The relevance of this information is that it was the predicate for Swisher's desperate attempt to extort at least $10,000 from Hinkson (at a discounted price for the AA machine) in July 2003 (see Ex B-1, Aff. Towerton, ¶9-16) or Swisher threatened, Hinkson would "spent the rest of his life in jail." (Apparently, in his desperation to obtain money from Hinkson, Swisher lowered the price of the AA Machine from $12,000 to $10,000 as Swisher's verbal demand was for the lesser amount than the invoice, Ex A-10, to purchase the obsolete equipment.)

d. **Passport Information Proves Hinkson Out of Country**. According to Swisher, he was solicited by Hinkson to kill attorney Albers and his family later in the same month that he delivered his April 16, 2002 Grand Jury testimony. In late April 2002, Hinkson had gone to Russia-Ukraine to look for a suitable location for his bottling plant as shown by his Passport as well as by the Affidavit of Robert Sandberg (see Ex A-4 attached). An evidentiary hearing would be needed to subpoena Hinkson's Passport to establish these facts. (In 2012 Hinkson's father, under a Power of Attorney presented a FOIA request for the release of his son's Passport (or copy thereof) from Pretrial Services in Boise, Idaho (Judge Tallman controls the evidence held by Pretrial Services) and a FOIA request to the US Passport Office as the other place where Hinkson's Passport would eventually be sent

after trial. Hinkson's father has been unable to obtain a copy of his son's Passport because the Government refuses to respond to his FOIA request. With regard to Hinkson's Passport, it would apply to both the April 2002 and the July-August 2002 time frames but not to the mid-January 2003 period. It is highly relevant to establishing that Swisher was lying as to two of the three solicitation meetings, used as a part of the Government's theory that Hinkson was ramping up to the mid-January 2003 meeting where he was supposedly "pleading" for Swisher to torture-murder the designated federal officials. This is the classic case of credibility of the witnesses where one said something happened the other said it did not. It is a 'he said – he said' debate and after the accusation was made by Swisher, Hinkson was left with proving a negative. Therefore, credibility of both witnesses is critical, especially if there is a pattern of lying relative to other facts in this case.

32. **JUROR MISCONDUCT-Violation of Constitutional Due Process and Fair Trial Rights.** The fact that a juror, Claudia Haines, sent a note (see below) to Judge Tallman in mid-trial admitting that she and other jurors had already deliberated and had already determined Hinkson was guilty and wanted to know if Swisher had completed a psychological evaluation of Hinkson, was evidence of the deprivation of Constitutional due process and fair trial rights. From this note, the fair inference can be drawn that at least some of the jurors had deliberated and decided that the 'guilt' phase of the trial was over and that their remaining role as a jury was to be make a sanity determination (such as in a death penalty case); although they were never asked to do so. This was irrefutable evidence of a structural error and classic juror misconduct (because premature deliberation was in direct violation of the Court's original instruction not to do so). This juror misconduct could not be rectified, and the only remedy would have been to have declared an immediate mistrial. The juror note read as follows:

"*Your honor, I do not know if this is allowed for me to ask; but can Mr. Swisher be asked about the mental capacity of Mr. Hinkson? Did he do a clinical evaluation of Mr. Hinkson? Is David Hinkson on medication? Is Mr. Hinkson mentally ill? Are <u>we</u> or are <u>we</u> not supposed to consider his mental capacity*?" (Tr. 1036, ll 13-20.)

a. **Juror Misconduct-Judge's Failure to Question Jurors was Structural Error**. Swisher not only claimed he was a Korean combat hero, he also presented himself to the jury in the Hinkson case as a certified 'political social worker' as a 'psychotherapist' and 'certified forensic counselor' and engaged in doctorial studies but was just short of a dissertation for his doctorate in psychology. (See Ex B-3, testimony Swisher Tr. 976, ll 4-25 and 977, ll 1-23). He made a connection with juror Claudia Haines because, she, along with other jurors, submitted the above note under the impression that Mr. Swisher was capable of doing a clinical evaluation of Hinkson. In the note to Judge Tallman, which arose shortly after Swisher described the manner in which Hinkson supposedly wanted attorney Albers and his family torture-murdered, the jurors demonstrated that they participated in misconduct by prematurely deliberating and determining that Hinkson was guilty. From that point on, any hope that the jury would be impartial was dashed. Judge Tallman failed to engage in the required questioning (see fn 49) to determine if the jury was prejudiced against Hinkson at that point because they apparently thought the

trial was over, Hinkson was guilty and their remaining role would be limited to an analysis of Hinkson's sanity; which violated their oath as jurors.

b. **Asking If Swisher Examined Hinkson**. The question in the mid-trail note sent by Juror Haines which asked if Swisher had performed the psychological evaluation of Hinkson was obviously asked because she believed that Swisher was qualified to make such an evaluation, and because she trusted him and believed that Swisher had a confidential relationship with Hinkson because they had been billed as being "best friends" by Swisher, which relationship would have allowed him insights into Hinkson's thought processes. Since there was counterpoint evidence offered by Hinkson showing he did not consider Swisher to be a "friend" let alone his "best friend," it was unfair for the jury to have prematurely deliberated prior to hearing all the evidence and it was a violation of both Hinkson's Constitutional Fifth and Sixth Amendment rights to a fair trial before a fair minded jury of his peers.

c. **Juror Note Requires Court Inquiry into Premature Deliberation.** The juror's note was cast in the plural, making it appear that "we" (i.e., several of the jurors) were involved in a discussion with her about the case and appeared to have already deliberated at that point in the trial, at least upon the testimony of Swisher and the mental stability of Hinkson, such action being clear evidence of juror misconduct. At this point it was up to Judge Tallman to make a searching inquiry into the potential prejudice to Hinkson from manifest juror misconduct.[45] In the *Resko* case cited in fn 49, the defendants had not established prejudice from the mid-trial deliberations, here Hinkson has shown that the jury already found him guilty at an early stage in the proceeding. The minds of the jurors were made up once Swisher, as the falsely promoted "Super-Hero" introduced the "horror factor" by describing what he called the

45 In *US v. Resko*, 3 F.3d 684, 686 (3rd Cir. 1993) the appellate court held that Constitutional due process demanded more than a simple two-part questionnaire from the trial judge, after it became apparent that mid-trial deliberations had taken place. Asking each juror, (1) if they participated in any "discussions of the facts of this case" and (2) whether they had "formed an opinion as to guilt," was not enough. The *Resko* Court held, "We conclude that the district court erred by refusing to conduct a more searching inquiry into the potential prejudice to the defendants from the jury's misconduct. Ordinarily, a defendant must show that the error was prejudicial in order to obtain a new trial. However, because the two-part questionnaire did not provide any significant information about the nature or extent of the jurors' discussions, we fail to see how the district court could have made a reasoned determination that the defendants would suffer no prejudice due to the jurors' premature discussions. Under these circumstances, i.e., where the jury misconduct was discovered mid-trial but there is no way for us to determine whether the defendants were or were not prejudiced, we will vacate the convictions and remand for a new trial, even though the defendants have not established prejudice." The Ninth Circuit has adopted the holding in *Resko*, in the case of *Anderson v. Calderon,* 232 F.3d 1053, 1098 (9th Cir. 2000) citing *U.S. v. Klee*, 949 F.2d 394, 396 (9th Cir. 1974) holding that for juror misconduct to cause a reversal, it must deprive the defendant of a fair trial; which is exactly what happened to Hinkson.

manner in which Hinkson ordered the torture-murder of the Albers family, at that point the jurors were deliberating prematurely which is a Constitutional deprivation of both Hinkson's right to Fifth Amendment due process and his Sixth Amendment right to "a fair trial in a fair tribunal" with a fair jury, because they made up their minds before he had the opportunity to put on his case.

33. **GOVERNMENTAL MISCONDUCT-CONSTITUTIONAL LAW VIOLATIONS AGAINST HINKSON.** FBI Special Agent Long told David Hinkson's father, Roland C. Hinkson shortly after David Hinkson's April 4, 2003 arrest, that he knew David was not violent and would not hurt anyone (see Ex B-12).

a. **Excuse for a Search Warrant**. The FDA was able to test WaterOz product ordered from the company which was low in mineral content. Swisher's lab certifications showed that all of Hinkson's WaterOz products were in compliance with the label when they were not (see ¶ 28(c) and (3)). These FDA violations were the catalyst for the Search Warrant that was served November 21, 2002 along with a 25 member, machine gun armed SWAT team and 25 other agents to search and load the moving van. SA Long worked in concert with SA Hines and FDA Agent Blankensop in a coordinated effort to search Hinkson's home, factory and records for evidence of a crime (such as the controlled substances put on the shelf of the WaterOz factory immediately before Chris the mineral-maker disappeared three days prior to the raid but that attempt to set up Hinkson for a greater crime was defeated when Hinkson disposed of the evidence that had been planted on him by Chris, the mineral-maker, who was operating as an undercover agent for the Government, and acting in concert with Swisher). The only concrete reason for a search warrant was the FDA 'adulterated product' charges associated with misdemeanor labeling violations. Nonetheless, the FBI and IRS were able to piggy back on the FDA Warrant, in a coordinated effort to raid Hinkson's home and factory on November 21, 2002. It seemed excessive for the FBI to have sent 25 machine gun carrying SWAT team members, in full battle gear to roust one geeky-scientist out of bed. The other 25 agents were sent to break down the doors and to fill the Government's moving van with financial records and product-manufacturing samples. Both SA Long and Hines, as well as Agent Vernon, were at the raid, which was only the beginning of their 'we'll-show-you-whose-boss' crusade.

b. **Government Repeatedly Made Up False Claims of Violence Against Hinkson.** Just as with Swisher, Raff's Brothers, Chad Croner and J.C. Harding all claimed Himkson wanted to hire them to kill someone. It was a part of SA Long's *modus operandi* to promote false allegations against Hinkson as an innocent person with claims that Hinkson wanted to hire that person as a 'hit-man' because he had 'done this before,' a repeated pattern of using individuals who had never done anything like "this" before (such a Raff's Brothers and Swisher) to create a false impression with devastating consequences to the person targeted.

c. **Presenting False Allegation against Hinkson for Prosecution**. It was shortly after Hinkson was detained on the Mariana Raff accusations when SA Long informed Roland C. Hinkson, (father of Petitioner Hinkson) that he knew David would not harm anyone (see Ex B-12, Aff. Roland C. Hinkson) that he admitted he knew David Hinkson was actually innocent of the Raff accusations. Even though he had this knowledge, as pointed out above, it was over a

year before SA Long conducted an investigation to clear Raff's Mexican-national brothers leaving Hinkson incarcerated so that he could not defend himself. It is blatant Governmental misconduct to use accusations that FBI agent knows or should know are false.

34. **PROSECUTORIAL MISCONDUCT by Failing to Correct False Evidence and False Testimony from its Star Witness in Trial and Grand Jury Proceedings.** Hinkson had a Fifth and Sixth Amendment US Constitutionally-guaranteed right to a fair trial, free of due process violations. When the prosecution vouching for Swisher before the jury as a Korean combat veteran (see ¶ 21(a)), it did so at its peril, creating repeated due process violations, which were material.

a. **Prosecutorial Misconduct in Representing to the Jury that Swisher was a Korean Combat Veteran in Government's Case in Chief**. As pointed out above (see ¶ 22(a)) the Government made three false statements about Swisher, that he was a veteran from Korea, that he had been in combat in Korea and that he was in the Korean Conflict, all of which were false. Then, in direct examination, prosecutor Sullivan inquired of Swisher if he discussed his "combat" experience with Hinkson. Then, when it became apparent that these lies were unraveling, prosecutor Sullivan lied to the Court and Hinkson by saying he had not discussed "combat" with Swisher on direct (see Tr. 989, ll 1-6). The point is that it was an integral part of the prosecution's case in chief that Swisher was in "combat" both as to ascribed credibility and to experience in killing people. Therefore, it was prosecutorial misconduct for Sullivan to present these lies to the jury and then say to the Court that he had not inquired of Swisher on direct examination about "combat" when his exact words were:

   Sullivan, Q: "What else did he ask you about **combat** situations?" Id. [Emphasis added.]

b. **Prosecutorial Misconduct by Failing to Correct False Testimony**. As has been pointed out (see ¶¶ 21(a)) the Prosecution and Swisher claimed he was a wounded Korean combat veteran, which claim was inextricably connected to the Government's theory of the case, which means the Government's theory was based on fraud (because it has now been proven that Swisher was never wounded, never in combat and never in Korea). The ability of Hinkson to contradict and impeach Swisher with his own testimony and to overcome Swisher's lies by effective cross examination involved the use of Swisher's official military record along with the freedom to ask him the hard questions which was obstructed by the trial court. The only other way that the truth would have been presented to the jury is if the prosecution or court corrected the false testimony. If the jury had been advised of the facts listed in his official military record (as shown in the Dowling Report, Ex B-5, and the Affidavit of CWO W.E. Miller, Ex B-9) no reasonable juror would have believed Swisher served in Korea or in combat, which would have taken Swisher down off of his pedestal, restored balance between Swisher and Hinkson as witnesses and completely nullified Swisher's virtually 'unassailable' credibility.

c. **Disclosure of False Testimony is Required**. If the Government had disclosed the false testimony to the jury as it is required to do (see fn 17 & 18) then Hinkson would have had the right to cross examine Swisher without a Purple Heart medallion on his lapel, showing that he offered false testimony in the Government's case in chief and would

have tipped the scales justice back to balance so that the jury would have been open to consider whether Swisher had lied to them, not only about his military service but also about having had private solicitation meetings with Hinkson to torture-murder various human beings. Having a constitutionally protected right to a fair trial means that Hinkson would have had the right to conduct an effective cross examination using Swisher's official military record as an admitted trial exhibit to rebut the statement that Swisher told Hinkson he had killed "many" in combat. In a fair trial, Swisher's official military record would have been available to Hinkson so that he could have proven Swisher was lying about his claim of being a Korean combat veteran, opening the door to proving Hinkson's *actual innocence* of murder solicitation charges. Not correcting the false testimony by Swisher for the jury was prosecutorial misconduct regarding a material matter that otherwise prejudiced Hinkson's constitutional right to a fair trial.

d. **Prosecution had Opportunity to Correct Swisher's False DD-214 Certification Claim and Did Not**. Certainly, when Swisher started telling his lies before the jury in the Hinkson trial, such as the statement that his "replacement DD-214" had been certified by the Commandant's Office of the USMC, AUSA Michael Sullivan, chief prosecutor in the Hinkson case, had both the knowledge and the opportunity to correct the false testimony. In fact, according to his own statement, Prosecutor Sullivan obtained a copy of that forged "replacement DD-214" earlier in the morning, prior to Swisher's testimony (prosecutor Sullivan had a copy of Swisher's 'replacement DD-214' as well) and could easily have seen that the "certification" was not from the USMC, rather it was from the recorder's office of Idaho County, Idaho (it was blatant and obvious). And the certification on the document did not certify the information to be correct, all it did was certify that Swisher had previously recorded a copy of that document in the real estate and mortgage records of Idaho County (Idaho law permits veterans to record their DD-214's in the county of their residence to facilitate claims for veteran's benefits, some of which are managed by a local county coordinator empowered by the VA such as medical claims). Correcting the false evidence about having the document certified by the USMC Commandant's Office would have opened the door to a fair trial, the same as correcting the Government's lies about Swisher being a Korean combat veteran in ¶ 33(a) above.

e. **Prosecutor had duty to Take down the False Credibility-Shield.** Had Swisher's false testimony been disclosed, the 'credibility-shield' would have been taken down and the truth about the three solicitation meetings could have been explored on cross examination. Also Swisher could have been asked about his false testimony regarding the certification of the "replacement DD-214"; and if he had denied falsifying the same, other credible witnesses could have been called to prove where the certification was actually obtained (i.e., that it was simply recorded in Idaho County, Idaho, not that it was certified by the Commandant's Office of the USMC.)

   i. *With the False-Credibility Shield Down, Open Cross Exam Could Occur*. Swisher could have been cross examined about his own health during the time solicitation meetings were supposed to have taken place and other credible witnesses could have been called showing that Swisher, for health reasons, would not have been able to attend those meetings because he was either in a coma, or in the ICU or hospitalized, or wheelchair-bound at the times he indicated because of his own poor health

(subpoenaing his medical records and presenting a medical technician to interpret them would have impeached his testimony) and because of poor health the jury would have been perceptive enough to ask themselves how a man in diapers wearing a bladder bag, being so weak he could not get himself in or out of his own wheelchair or the passenger seat of his own vehicle, could go through the physical steps necessary to overpower Dennis Albers and his family, especially if they should choose to resist that is defend themselves.

ii. *With the False Credibility-Shield Down, Swisher Could Not have Presented Himself as a Qualified Hit-Man Candidate*. With that false "credibility-shield" down, the jurors could have then asked themselves, was Swisher a candidate who could have been considered qualified to be a 'hit-man,' because of health and because he never killed anyone before? Then because of Hinkson's travel schedule, the jury would have balanced that information as to how he could have attended the solicitation meetings as specified by Swisher. If the Court directed the production of Hinkson's Passport, it would have shown that in August 2002 through the first of November 2002 he was out of the USA and unavailable to attend a purported solicitation meeting.

iii. *None of the Other Fabrications were Viable when Credibility-Shield Down*. With the credibility shield down, an entirely different picture would have been painted for the jury than the one presented by the Government; especially when it came to such fabrications as the "best friend" scenario; which, in light of Swisher's 2002 Grand Jury testimony stating that he was a mere acquaintance of Hinkson and then changed to "best friends" in 2004, clearly shows it was a recent fabrication, concocted to accommodate the Government's theory. All of the other elements of the Government's case could have been clarified if the credibility-shield was down, but especially, manufacturing a false report to Idaho County Sheriff's Deputy Lindsey regarding a backwoods shooting. (See Ex B-4, Aff. Lindsey.) With Swisher's failure to show concern that there might be a follow up attack, and the fact that he was planning to have his wife and the wife of his friend visit the gold mine that afternoon, on the day of the investigation (September 10, 2004) for a social hour, was also a tip-off that this was a false report. Cross examination would have contained a review of Swisher's backwoods shooter story to show that Swisher was involved in a dispute with Hinkson at the time that he blamed the shooting on Hinkson, who was in jail. An objective observer would have been able to see that Swisher dealt in fabrications, especially when he supposedly informed Hinkson that he had killed "many" while he was in combat, which the Government should have disclosed was false testimony).

iv. *With False Credibility-Shield Down, a Merits Challenge to Solicitation Meetings*. Once the credibility-shield of the "Super-Hero" was down, Swisher could be cross examined effectively as to where the solicitation conversation took place, under what circumstances it occurred and the exact content of the conversation as a further means of impeaching Swisher on the Solicitation counts. Thus, the prosecutorial misconduct of creating a false identity for Swisher was material and prevented the defense from effectively impeaching Swisher. The objective would be to fully inform the jury about Swisher's false testimony, leaving open to cross examination all the flaws and holes in the Swisher Story that would have been exposed, especially when the motive issue

was explored and he was asked to explain his extortion attempts with a sample of cyanide laces WaterOz product on January 3, 2003 and his threat in attorney Britt Groom's office in Mr. Towerton's presence in early-July 2003 that if Hinkson did not pay Swisher he (Hinkson) would spend the "rest of his life in prison." (See Towerton Affidavit Exhibit B-11 ¶ 16). Such cross examination would have been devastating to the Government's case and certainly the cumulative effect, along with all the other evidence mentioned here, would have supported Hinkson's *actual innocence* claim.

e. **Failing to Prosecute Swisher was Prosecutorial Misconduct**. While the prosecutor will claim prosecutorial discretion, in failing to prosecute Swisher clearly, it is an established fact that the office of the US Attorney in Idaho failed to prosecute Swisher for his perjury, forgery and stolen valor committed in Judge Tallman's courtroom in January 2005 because he was a confidential informant. It also failed to refer for prosecution the charges to an independent prosecutor associated with the above crimes and those committed at the 2002 and 2004 Grand Juries. These crimes show a pattern of criminal behavior on Swisher's part (when compared with the VA charges) and show the Idaho US Attorney aided and abetted Swisher by letting him get away with flagrant criminal conduct. If there is an evidentiary hearing that results from Hinkson's Petition for a Writ of Habeas issued on the actual innocence Petition, Swisher could be asked about being prosecuted by an Assistant US Attorney from Montana, instead of Idaho, related to his 2008 conviction. He also could be asked about the misrepresentations of fact that were made by him to the VA Office in Lewiston, Idaho where Ben Keeley was the representative and where the crimes of perjury, forgery and theft of benefits stolen from the Veterans Administration, and Stolen Valor were committed in front of the ALJ. Failure to prosecute the same crimes that Swisher committed in the Hinkson case means that the Idaho US Attorney has been deliberately allowing a known criminal, who has done much damage, to walk free, while the innocent, Mr. Hinkson remains in prison.

f. **Prosecutorial Misconduct Not to Disclose Grand Jury Perjury**. The prosecution in the Hinkson Solicitation case knew or had a duty to inquire and thus was on "inquiry notice" that Swisher had perpetrated a fraud on the Government in both the 2002 and 2004 Grand Juries. It was the prosecution's job to disclose those lies to the defendant.[46]

   i. *Starting in 2002 the Government had Information of Swisher's Fraud.* Because of the difference in Swisher's age compared to the start and end of the Korean War, we know he lied to the 2002 Grand Jury testimony about military service for which he was ineligible because of his age, and would have to have been 15 or 16 years old at the "end of the Korean War;" supposedly he was injured by a grenade blast (see ¶ 32).

   ii. *Continuing in 2004 the Government had Information of Swisher's Fraud*. Swisher claimed he had been solicited by Hinkson to torture murder various people every time they met from 1999 to 2002. Swisher lied about how long he had known Hinkson in both 2002 or in 2004 Grand Jury, he lied about being "best friends" with Hinkson in 2004 when, Swisher claimed they were mere acquaintances in 2002 and Swisher told the 2004 Grand Jury that he was constantly solicited by Hinkson from 1999 to 2002 to torture-murder various people, but failed to mention it to the 2002 Grand Jury or to

46 *US v. Basurto*, 479 F.2d 781, 785-86 (9th Cir. 1974) "Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel…".)

the federal officials who supposedly were the targets, who met with him in 2002 (i.e., AUSA Nancy Cook and SA Hines). (Compare Ex B-6 to B-8).

iii. *Prosecution Failed to Disclose Although Swisher's Lies Proven by His Birthday*. Swisher's date of birth was January 13, 1937 as disclosed on his actual DD-214 (the one that showed no medals, no combat, no Korea, etc. see attachments to Ex B-9, Aff. Miller) The change in Swisher's Story from being "in" the Korean War (see 2002 Grand Jury testimony) to a "post-War" secret mission was obvious perjury. The change probably came about when it was pointed out to Swisher would have been age 13 at the start of the Korean War (1950) and age 16 when the Armistice was signed, making him ineligible for service "…at the end of" the Korean War because of his age). (See fn 50, *US v. Basurto*, 479 F.2d 781, 785-86 (9th Cir. 1974)). The prosecutors never notified Hinkson or his counsel that Swisher committed perjury in the 2002 and 2004 Grand Juries. Failure to so notify the defendant is prosecutorial misconduct The point is that well before the prosecution's closing argument, and in the middle of trial, the prosecution received the Dowling Report (which it handed to Hinkson's defense team) and was fully aware that Swisher's Korean combat story was a complete and total fraud and all of it constituted perjury before both Grand Juries and the Swisher testimony before the Hinkson petit jury and thus, the prosecution had a duty to correct the false testimony and failed to do so. (See *Alcorta* and *Hayes*, supra.).

vi. *Ninth Circuit Puts Responsibility on Prosecution to Disclose Fraud*. One further item of prosecutorial misconduct should be noted, that when he produced his "replacement DD-214" Swisher testified that he had to go to the Commandant's Office of the US Marine Corps to have it "certified" which was an absolute falsehood. The prosecution failed to disclose the fraud. Interestingly, one need look no further than the face of the document itself to see that it was certified by the Recorder of Idaho County, Idaho not the Commandant's Office of the USMC. A lie that is so easily disproven, but nevertheless spoken with such great conviction as by Swisher must emanate from one who either a very skilled liar or is quite delusional, or both. (A prosecutor has a special duty to prevent and disclose frauds upon the court and to guard against due process violations caused by false testimony. See *Comm. of N. Mariana Islands v. Bowie*, 234 F.3d 1109, 1116-1117 (9th Cir. 2002).)

f. **Prosecutor Sullivan Pointed out that the Medallion Worn on Swisher's Lapel was of No Consequence**. Prosecutor Sullivan tried to get the court to overlook the Purple Heart medallion worn by Swisher on the witness stand by minimizing it, denigrating it and degrading the service of those who earned it, not only was that an insult to Veterans who had earned the honor to wear that medal, it was also an attempt to cover up the prosecution's own misconduct. (See Ex B-3, Tr. 1115, ll 10-14).

34. **JUDICIAL BIAS Offends Due Process-Judge Tallman's Misconduct a Cause of Hinkson's Wrongful Conviction - Law Violations Committed while on the Bench; Summary.** Judge Tallman established a pattern of favoritism for the prosecution and antagonism against Hinkson that was often manifest by retaliation, all of which shows judicial bias that deprived Hinkson of a fair trial, before a fair tribunal with a fair jury:

a. **Refusal to Enforce His Own Pretrial Disclosure Order against the Government**. Before trial, Judge Tallman entered a July 2004 Pretrial Order requiring the production of documents including Grand Jury Transcripts. When the Government refused to produce the Transcripts in July 2004, a motion to compel production was filed and Judge Tallman, instead of enforcing his own order and requiring that the prosecution to produce for Hinkson the 2004 transcript, instead modified his Order to favor the Government by protecting the prosecution from early disclosure and ruled that production of said evidence did not have to occur until six months later, only seven days before the January 10, 2005 trial (and even then, Judge Tallman's modified order was not enforced by him, depriving Hinkson of adequate time to prepare a defense).

b. **Conducting Private Ex Parte Meeting with Swisher Immediately before he Testified.** It was not above the appearance of impropriety for Judge Tallman to conduct a private, *ex parte* meeting with Swisher immediately before he mounted the witness stand (see ¶ 35(a) below).

c. **Judge Tallman Made Up False Information and Injected it into the Record at Trial**. Judge Tallman made a record stating that Swisher had traveled to Korea by ship, entered Korea by amphibious transport, and was the member of a specific rifle company when he went to Korea by (Tr. 2309, ll 6-10; all of which was absolutely false see ¶ 35(a)(vi) A, B and C below).

d. **Failure to Correct False Evidence**. Judge Tallman, who became a protector of Swisher and a promoter of his Korean combat story, lost sight of his job as a neutral; he failed in his gatekeeper function to keep the jury from hearing perjured testimony, or at least correcting it once the falsehoods were presented, offering an ineffective limiting instruction the only purpose of which was to cover up Swisher's lies, all apparently because he had personally bought into Swisher's bogus Korean combat story in the *ex parte* meeting. (See ¶ 22(d)).

e. **Permitting Witness Swisher to Commit Felonies in Courtroom**. Swisher used the Courtroom in the Hinkson case as a platform to establish his false claims for VA benefits, which also served to develop Swisher's virtually unassailable credibility so that he could convince the jury of his bogus torture-murder for hire story.

f. **Judge Tallman Knew Exactly How to Handle False Testimony, he had Just Participated in the Decision in the Seminal Case in the Ninth Circuit**. Judge Tallman wrote the dissenting opinion on materiality in *Hayes v. Brown*, see fn 17 & 18, involving correcting false evidence. This was no simple judicial mistake for Judge Tallman not to instruct the prosecution to correct the false evidence, or for him, *sua sponte*, to make the correction.

g. **Compounding Swisher's Felonies with Curative Instruction**. The limiting instruction given by Judge Tallman served only to cover up Swisher's crimes committed on the witness stand and did not relate to the other lies told by Swisher on direct examination by the Government.

h. **Declaring that Swisher's Perjury is not Fraud on the Court when Judge Tallman Openly Relied on the Swisher Story and Based Critical Rulings on Swisher's Lies**. Judge Tallman failed to take into account the cumulative effect of all the evidence showing that Swisher's fraud was inextricably tied to the Government's case when he ruled that "[p]erjury is not normally a fraud on the court." (Tr. 2608, ll 23-25). But, where the fraud was, in this case intrinsic to Judge Tallman and he embraced it and recited various facts from the Swisher Story that were not in the record, enabled Swisher to lie and failing to require the prosecution to notify the jury of Swisher's false testimony, was protectionism for the prosecution witness.

i. **Failing to Declare Mistrial when Jurors Disclosed they had Deliberated Mid-Trial**. On his own, Judge Tallman had a duty to inquire as to whether the juror's deliberated *(Resko*, supra) and if so whether the jurors had been prejudiced and Hinkson's guilty been determined based only on the testimony or evidence at that point in the trial. Failure to so enquire was structural error that denied Hinkson constitutional due process and a fair trial. *Resko*, supra (cited by the Ninth Circuit as controlling law). It is obvious from the juror's note (see ¶ 32) that they had deliberated and found Hinkson guilty during the prosecution's case in chief and before the close of all the evidence. Deliberation was in direct violation of the instruction given by Judge Tallman prohibiting the jury from deliberating until instructed to do so and was a violation of the juror's oath.

j. **Favoritism toward Prosecution**. Coaching from bench; refusal to enforce his own Orders against the prosecution as to discovery holding private *ex parte* discussion with star witnesses during trial, making up facts that did not exist previously in the proceeding, placing Swisher's 'replacement DD-214' in Swisher's official military record once is was received in answer to subpoena and declaring it to be an authentic document when Government's experts had declared that it "did not exist" in the official file, all of which was a part of the scheme of Judge Tallman to wrongfully convict Hinkson, but to make it appear that Hinkson was getting a fair trial with a pretense of due process, giving lip service to orders that would be fair to Hinkson, then pulling them away, to give an unfair advantage to the prosecution and denying Hinkson the opportunity to defend himself.

k. **Antagonism toward Hinkson.** Judge Tallman used words of distain to describe Hinkson (see ¶ 13, Ex B-2, pgs. 3-5) because Hinkson had previously petitioned his government for redress of grievances and made himself, as Judge Tallman saw it, a 'nuisance'. That expression of distain demonstrated Judge Tallman's antagonism toward Hinkson for extra-judicial reasons (see ¶ 13 above)

l. **Retaliation toward Hinkson** by Judge Tallman who perceived that Hinkson's motions, such as his §2255 Petition for Habeas Corpus relief were merely intended to 'game the system.' Retaliation against Hinkson for petitioning his Government for redress of grievances and the chilling effect that Judge Tallman's comments are calculated to have upon Hinkson.

m. **Retaliatory Sentence in ADMAX**. Sentencing him to solitary confinement was another one of the many signs of Judge Tallman's retaliation toward Hinkson.

n. **Refusal to Require Pretrial Services to Produce Hinkson's Passport**. Although under his control, Judge Tallman refused to require Pretrial Services to produce Hinkson's Passport to be used as exculpatory evidence proving when Hinkson was out of the country.

o. **Blocking Impeachment of Swisher on Cross Examination and Allowing Swisher to 'Correct' Prior Grand Jury Testimony**. Judge Tallman, apparently on cue, announced he would allow Swisher to 'correct' his prior testimony, which was given before a Grand Jury, and a different judicial official. (See Exhibit B-3, 2005 Trial Tr. where Swisher said he would "I would like to correct one thing." pg. 1022, ln. 19) and then Judge Tallman carefully arranged for Swisher to "correct" his 2004 Grand Jury testimony which blurred the effect of the attempted impeachment on his prior inconsistent statement.

p. **Inserting Swisher's Forged Replacement DD-214 into his Official Military Record**. The USMC and NPRC authorities stated in their reports that Swisher's "replacement DD-214" did not exist in his official military record, but, somehow, after Judge Tallman received that record by subpoena, the "replacement DD-214 which did not "exist" in his file, materialized as if it was a part of Swisher's official military record. It appears that Judge Tallman inserted a copy of Swisher's forged "replacement DD-214" into the file and then erroneously considered it to be a part of Swisher's official military record and used it as the basis for denying Hinkson the opportunity to cross examine Swisher using his official military record for impeachment purposes.

q. **Blaming the Defense Team for not Obtaining Official Record when Delay Caused by USMC**. Judge Tallman falsely placed blame on Hinkson and his defense team for the delay in obtaining Swisher's official military record when the same had been sequestered by the USMC. (Tr. 2603, ll 6-11 and see Ex B-13).

r. **Refusing Defense Cross Examination of Swisher Based on His Official Military Record**. Hinkson was denied the opportunity to confront his accuser with cross examination based on Swisher's official military record which had been produced pursuant to the Judges subpoena by NPRC directly to Judge Tallman, who pretended that the authenticity of said record was in question in order to favor the prosecution and prevent effective cross examination of Swisher by Hinkson

s. **Relying on Swisher's Backwoods Shooter Story as if it was a Valid Account when Swisher was Convicted of Perjury**. Seven years after Hinkson's trial, and four years after Swisher was convicted of perjury and forgery etc., Judge Tallman used an incident that Swisher speculated was caused by Hinkson, the "backwoods shooting" incident, as part of Judge Tallman's rationale for erroneously denying Hinkson's §2255 petition when the same was speculative and false.

t. **Excluding Exculpatory Evidence**. Judge Tallman excluded Hinkson's Passport proving Hinkson was out of the USA when he was accused by Swisher of attending solicitation meetings together with Swisher's military record all of which were relevant to Hinkson's innocence. Judge Tallman deliberately misconstrued FRE Rule 608(b) in order to exclude

Swisher's military record, which had been recently amended to permit the use of collateral evidence to impeach a direct statement of the witness on the record. (Tr. 2608, ll 11-12).

u. **Refusal to Recognize that the official Dowling Report was the Authentic Explanation of Swisher's "Replacement DD-214."** Judge Tallman ruled: "I don't have any way to determine that [authenticity of military Swisher's "replacement DD-214"]; but it appears to be genuine, at least in appearance." (Ex B-3, Tr. 1128 ll 14-17.) Judge Tallman had both the original military file and the Dowling Report, he had more than enough to determine the authenticity of trial Ex M, the Swisher "replacement DD-214" the problem was that his level of bias was so high, that he could not credit anything that might favor Hinkson. Thus, Judge Tallman was enabling Swisher to lie.

35. **Ex Parte Meeting – Element of Judicial Bias that Offends Due Process-Details.** Obstruction of justice from the bench by judicial vouching for Swisher placing the prestige of the Court behind the witness by supporting the Swisher Story with false statements that showed the Court believed in the voracity of Swisher's claim to Korean combat.

a. ***Ex Parte*** **Meeting with Swisher was Misconduct Per Se and Gave Judge Tallman "Insider" Information.** On January 14, 2005, immediately before Swisher testified, Judge Tallman granted Swisher a private audience in chambers (see Ex B-7, Affidavit of Wesley W. Hoyt dated April 13, 2012, ¶¶ 8-10, filed in conjunction Hinkson's Recusal Motion filed contemporaneously with Hinkson's §2255 Habeas Corpus Petition in the Solicitation Case).

i. *Judge Tallman Admits Ex Parte Meeting with Swisher*. While refusing to grant Hinkson's recusal motion, Judge Tallman conceded in an 'adoptive admission' that he had conducted an *ex parte* meeting with Swisher.[47] Judge Tallman's position became, that such a meeting was 'harmless error,' as if to say, 'so what, you didn't hear what transpired in the meeting, therefore, without more, the bare accusation is insufficient and equivalent to' "rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion and similar non-factual matters that do not form the basis of a successful recusal motion." (Ex B-2, at pgs. 11- 12).

ii. *Judge Tallman Refers to Accusation as "Innocuous*." In addressing my affidavit which identified this meeting between Judge Tallman and Swisher (Ex B-7) it is important to remember that Judge Tallman did not deny that the meeting took place (which if it did not take place he should have immediately denied it, see fn 51); rather, he tried to minimize it by stating that my assertions contained only "innocuous content." (Ex B-2, at pg. 11.) Because it was a secret meeting, the undersigned counsel could not have seen or heard what transpired (just like the defense team did not and could not have known that Swisher's official military record had been checked out and sequestered by the USMC)

47 U.S. v. Henke, 222 F.3d 633, 642 (9th Cir 2000) the failure to respond to an accusation is an "adoptive admission by silence;" and see U.S. v. Hove, 52 F.3d 233, 236-37 (9th Cir 1995) silence is an admission of a belief in the truth of a statement if an innocent person would have responded to the statement; and see U.S. v. Giese, 597 F.2d 1170, 1196 (9th Cir 1979) when an accusatory statement is made in the presence and hearing of an accused, and he understands and has an opportunity to deny it, the "statement and his failure to deny are admissible against him."

but the after-effects were visible to the objective observer and were felt like a shock wave.

iii. *Judge Tallman was Curious that this Ex Parte Meeting was Not Brought Up Before*. Judge Tallman mused, "[i]t is curious that Hoyt would view such an exchange but fail to contemporaneously raise the issue and seek clarification with this Court." (Ex B-2, pg. 11.) It is not curious when the objective observer becomes aware that the delayed response was caused by an FBI false report blaming me for a murder-for-hire plot during trial accused me of plotting to murder 22 people, one of whom was Judge Tallman. That false accusation kept me so busy defending myself that I did not have time to deal with other issues in the Hinkson case effectively; certainly, bringing up that *ex parte* meeting was not at the top of the list when trying to debunk another false FBI report. Further, at no other stage of the proceeding was it appropriate for me to bring up the *ex parte* meeting until the Petition for Habeas Corpus under §2255 filed in 2012.

iv. *Incorrect for Judge Tallman to Assert He had Not Been Seen*. Judge Tallman made the following erroneous statement: "Hoyt…acknowledges that he did not see anyone else present besides Swisher." This statement was incorrect because my affidavit of April 13, 2012 (see Ex B-7) clearly stated that Judge Tallman had been seen in the background as Swisher was leaving chambers; I definitely saw Judge Tallman behind Swisher and my statement was: "Judge Tallman, who was further inside the door of the judge's chambers…." Clearly, I stated that Judge Tallman was visible to me in my Affidavit of April 13, 2012.[48]

v. *Impropriety from the Meeting Itself.* Judge Tallman then took the position that unless I had personally observed some improper conduct, the mere fact that he had an *ex parte* meeting with Swisher was not evidence of impropriety. To the contrary, misconduct arises from the impropriety of Judge Tallman having a meeting with the prosecution's witness without any prior notice to Hinkson or at least post meeting disclosure as soon as possible, revealing the information that was shared at the *ex parte* meeting. It is not harmless error just because it is a secret meeting in chambers where no one else can hear or see what transpires, in fact, precisely the opposite because it was a secret meeting,

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48 Rather than denying that the *ex parte* meeting took place, Judge Tallman took the position that my Affidavit did not specify that he was present in his chambers when Swisher was seen leaving by the side door, which is a misreading of my April 13, 2012 Affidavit (see ¶8, which clearly states: "…I saw government witness, Elven Joe Swisher coming out the door to the Judges (sic) chambers and he was in an attitude of turning his head and gesturing and while I could not hear the words spoken, it was as if he was saying "good bye" to **Judge Richard C. Tallman, who was further inside the door of the judge's chambers** and was gesturing as if to say: "good bye" to Swisher.") (Emphasis added.) In my Affidavit of April 13, 2012, what was stated is that I did not see "anyone else" in the judge's chambers such as a representative from the prosecution. (Id., see ¶10.) Note also that: it was a material error for Judge Tallman to have held an *ex parte* meeting with Swisher, it was not harmless error simply because I was not able to hear what was said between Swisher and Judge Tallman in said *ex parte* meeting. While it is true that I was not included in the *ex parte* meeting and did not hear what transpired, such a meeting was not above the appearance of judicial impropriety and reasonable inferences as to what transpired can be drawn from the subsequent events in the case, such as the unique knowledge Judge Tallman gained about Swisher's false Korean military assignment; i.e., the only way he could have known certain details such as Swisher sustaining "gunshot" wounds and being transported by amphibious landing craft in September 1955 when these facts were not in the record; the reasonable inference is that these came from the *ex parte* meeting Swisher. Judge Tallman was introducing into the trial collateral information in an effort to validate, support and promote the Swisher Story, when the whole story was a fraud as we learned in Swisher's 2008 conviction.

disclosure is required. (Cannon 3, Cannons of Judicial Conduct.) Reasonable inferences of impropriety can be drawn therefrom.

vi. *Evidence that Judge Tallman was 'Taken-in' and Heavily Influenced by Swisher's Fraud*. The record contains evidence of extreme prejudice to Hinkson resulting from the *ex parte* meeting between Judge Tallman and Swisher and shows the extent to which Judge Tallman accepted Swisher as a genuine combat hero and demonstrates the amount of influence Swisher had upon Judge Tallman. Actually, it should be embarrassing to Judge Tallman that he was duped by such a low-life con-artist as Swisher, the child molester. After the *ex parte* meeting occurred, Judge Tallman repeatedly spoke of matters outside the scope of the trial record, which could only have been learned from Swisher in the *ex parte* meeting, and these matters can only be attributed to Judge Tallman as a part of his personal view of the case, such as: "*The Court finds as a matter of fact that if Exhibit M (Swisher's forged "replacement DD-214) is a copy of a genuine military record, … it indicates consistently with how the witness has testified; that he did, in fact receive multiple shrapnel and gunshot wounds in September 1955 in Korea; and that he was awarded commendations and medals including the Purple Heart.*" (Ex B-3, Tr. 1128, ll 14-22.) Judge Tallman just proved that he bought into 'a pack of lies' that he obtained in his private audience and *ex parte* meeting with Swisher, not to mention that the whole Swisher Story was all "a pack of lies" as proven by Swisher's 2008 conviction and Judge Tallman had the Dowling report to help him discern the truth. There were certain items stated as facts by Judge Tallman that were never mentioned in the grand jury transcripts or in the 2005 trial until Judge Tallman brought them up, as follows:

A. Judge Tallman stated that Swisher had traveled (Tr. 2309, ll 6-10) to **North Korea by ship in September 1955 and received gunshot wounds;** it was subsequently proven by Swisher's 2008 conviction[49] that Swisher never went to Korea by ship or otherwise and never was in combat (see Tr. pg.1128 ln 20.)

B. Judge Tallman stated that Swisher had traveled with the Marine **Amphibious Rifle Company which is carried on naval vessels to engage in landings on the coast of North Korea** when that fact was never presented in the trial, and it has been absolutely proven, by Swisher's 2008 conviction, that Swisher never went to Korea (see Tr. 2309 ll 6-10). It is obvious that he obtained this information about transport by Marine Amphibious Rifle Company from Swisher in the *ex parte* meeting.

C. Judge Tallman gives credit to **Swisher for being involved in a classified or top secret activity,** when Swisher's 2008 conviction proves he had never been in combat and never in a classified or top secret mission. (Tr. 2604, ll 20-25 and 2605, ll 1-4.) The truth was that it aided Swisher's story to say his mission was top secret because then he could not be pressed on details of what we now know this was a fake mission, which he pretended to be top secret so that he did not have to answer questions about it (Swisher used the same technique in the deposition in the TRO case, when he did not want to answer, he feigned that the information being inquired about was top

49 The objective observer must remember that part of Swisher's conviction for perjury and forgery was because he claimed he had traveled to and served in Korea, which the USMC proved he did not, so all of Judge Tallman's suppositions to the contrary are false.

secret). Since we now know it's all a lie that explains why he wanted to keep it a secret.

b. **Ex Parte Meeting Created Other Unfair Prejudice for Hinkson and was Not Harmless Error.** Judge Tallman repeatedly showed favoritism for the prosecution and defended its 'star witness,' Swisher, protecting him from impeachment and preventing the defense from effectively cross examining Swisher (a violation of Hinkson's Constitutional right of confrontation) and it appears that the protection given by Judge Tallman seemed to be based on the information Judge Tallman obtained in the *ex parte* meeting that no one else was privy to. Once Judge Tallman allowed his mind to be "poisoned" by Swisher telling stories of fake military heroism in Korea, and once Judge Tallman showed that he had 'bought into' the bogus Swisher Story, an objective observer reviewer see the consequences, such as, Judge Tallman refused to allow Swisher to be impeached as he deflected the efforts by defendant to have an effective cross examination and refused to allow Hinkson to present his case. Judge Tallman repeatedly favored Swisher by making up information to justify the Swisher Story. A trial court is not to be an investigator of facts and not permitted to distort of add to information and must take great care not to mislead the parties.[50] The effect of Judge Tallman's *ex parte* meeting and his advocacy for Swisher destroyed any hope that Hinkson might have had to a fair trial where he had a reasonable opportunity to show that he was not guilty:

i. *Judge's Ex Parte Meeting with Government Witness Swisher Shows Favoritism*. It is a mark of blatant favoritism for the prosecution that Judge Tallman held a secret meeting with the Government's star witness, especially when it occurred immediately prior to his testimony (see ¶ 35(a)).

ii. *Coaching or Conducting Trial for the Benefit of the Prosecution Shows Favoritism*. Judge Tallman regularly coached the prosecution from the bench or simply took over for the prosecution, interrupting defense counsel and entering rulings when no objection was made.[51] It was as if Judge Tallman was the 'alter ego' of the prosecution, anticipating the greatest advantage for the prosecution and then repeatedly ruling in its favor.

iii. *Protecting Government Witness From Impeachment*. In order to protect Swisher, the Government's 'star witness,' from impeachment by effective cross examination, Judge Tallman interfered and blocked defense counsel from asking effective questions as to Swisher's prior inconsistent Grand Jury testimony. (See Exhibit B-3, where Swisher said "I would like to correct one thing." Tr. 1022, ln. 19) and then Judge Tallman carefully arranged for Swisher to "correct" his 2004 Grand Jury testimony. Swisher knew the "correction" he wanted to make was on page 9 of his 2004 Grand Jury transcript, which

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50 The "Advocate/Witness Rule" prohibits a trial judge from becoming either and advocate or witness in the case. Notwithstanding, Judge Tallman presented facts that only he (and possibly Swisher) knew about, i.e., Amphibious Transport to Korea, gunshot wounds and service in Korea in September 1955, all facts introduced by Judge Tallman and never mentioned by anyone else in the record. *Quercial v. U.S.*, 289 US 466, 467 (1993).

51 Unsolicited, during Swisher's cross examination, the following occurred: when defense counsel asked Swisher about his testimony in the 2004 Grand Jury: Nolan Q: "And you told the truth?" [without an objection by the prosecution Judge Tallman interrupted] THE COURT: "Counsel, you are arguing with the witness." See 2005 Trial Tr. Pg. 1021, lns. 16-18. The record is replete with other examples of Judge Tallman acting as an extension of the prosecution rather than a neutral judicial official.

is highly unusual that a witness would be so well coached that he has his own copy of his Grand Jury testimony. The effect of the attempted impeachment on his prior inconsistent statement was completely nullified by Judge Tallman who did not allow the defense to hold Swisher accountable for his lies, which was the switch from describing Hinkson as being mild-mannered in 2002 to a raging mad-man in 2004. In what was a clear indication of favoritism for the prosecution, Judge Tallman "foamed the runway" for Swisher so that he would not experience a 'crash-landing' by impeachment because his prior Grand Jury testimony was grossly inconsistent. That explains why the Government refused to allow Hinkson to see copies of Swisher's 2004 Grand Jury in July 2004 as ordered by the Court and in fact did not release it until immediately prior to trial (with Judge Tallman countermanding his own pretrial order requiring production of that transcript in July 2004). Swisher would not have been able to explain those prior inconsistent statements[52] and would have suffered a loss of credibility in the eyes of the jury if it had not been for the interference by Judge Tallman. The facts that Swisher changed were: (1) Swisher's mere acquaintanceship in 2002 was changed to "best friendship" by 2004; (2) how the mild-mannered Hinkson from 2000 to 2002, as Swisher explained in 2002 suddenly became a ravings maniac demanding the torture-murder of all those designated as his 'tormentors;' and (3) how the raving maniac described in 2004 who had since 1999 been demanding torture-murder for everyone, suddenly was toned down by Swisher's 2005 trial testimony and didn't really demand the torture-murder of anyone until after Swisher's April 16, 2002 Grand Jury testimony. It was the interference by Judge Tallman that blocked an effective cross examination on these and other subjects allowing Swisher to 'get off the hook' without any consequences or reduction in his credibility.

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52 **Swisher Lies to the Grand Jury Establishing Pattern of Falsely Testifying**. Swisher testified at the February 10, 2004 Grand Jury (see Ex B-4, Swisher 2004 GJ testimony pg. 9, lns. 12-25 and pgs. 10-13) that Hinkson had been soliciting him to torture-murder attorney Dennis Albers and family and others, including his ex-wife Marie, since Annette Hasalone's $100,000 judgment was entered against Hinkson in the "summer" of 1999. However, in Swisher's prior Grand Jury testimony of April 16, 2002, he said nothing about Hinkson's purported fixation on having people torture-murdered between prior to 2002, instead, Swisher, at the 2002 Grand Jury said he had originally met Hinkson in 2000 and stated that he had "no problems" with him and "did not expect" to have any in the future (see Ex B-6, Swisher 2002 GJ testimony pg. 18, lns. 19-20). Then Swisher changed his testimony in the 2004 Grand Jury. In that 2002 Grand Jury hearing, Swisher also described a casual acquaintanceship with Hinkson over the period from 2000 to 2002 saying that Hinkson talked to Swisher, maybe a year before (in 2001) about an investigation (Id., at pg. 35, ll 1-2); stating that in the period from 2000 to 2002 they had spoken to each other maybe a "dozen times" (2002 Grand Jury at pg. 18, ln. 7) and indicated that he tried to avoid speaking with Hinkson because he did not want to be "cornered" by him (id., at pg. 35, ln. 6). Stating that there was "no problems" with Hinkson is directly contrary to the "problem" created by one who is fixated on the torture-murder various human beings (unless Swisher is a sociopath that thinks such conduct is acceptable). Certainly, this was the time to tell this Grand Jury, called for the specific purpose of looking into Hinkson's activities. Keeping silent about such aberrant behavior means that Swisher was either lying to the Grand Jury in 2002 (when he gave an oath to tell the whole truth) or that he simply had not fabricated the idea of being solicited by Hinkson to torture-murder others until the 2004 Grand Jury. Either way, Swisher was lying to one of these two Grand Juries about Hinkson's conduct and his behavior. Lying to the 2004 Grand Jury is perjury by Swisher and shows a willingness to lie under oath and establishes a pattern of deception, making his subsequent 2005 trial testimony unreliable. Swisher's deceptiveness with the 2004 Grand Jury and at the 2005 trial about Hinkson soliciting him to torture-murder various people actually supports Hinkson's *actual innocence* claim because it proves that Swisher's testimony on the subject of his military career and with reference to murder-solicitation was unreliable. It was prosecutorial misconduct aided by the trial court to purposefully prevent defendant from having a copy of Swisher's 2004 Grand Jury transcript that the Court originally ordered had to be produced in July 2004 but changed his order to accommodate the prosecution.

iv. *Planned Ruse To Correct Swisher's Testimony*. Shortly after cross examination started, Swisher blurted out that he wanted to "correct" his testimony and said, "What I wanted to correct was - - and I mentioned page 9, before this testimony began, before the Grand Jury." (Tr. at pg. 1032, ll 11-13; Swisher was referring to page 9 of the 2004 transcript). Most people who want to correct their testimony are referring to their current testimony that day and are not concerned about the technical aspects of impeachment by a prior inconsistent statement. But, what Swisher wanted was to reach back into his prior Grand Jury testimony from a year before that was given in front of a different judicial official. Swisher's idea of "correcting" his testimony was that he should be allowed to reverse the position he had previously taken without any consequences. Notice how the volley took place: Swisher randomly blurted out he wanted to "correct" his testimony. Judge Tallman ruled picked it several minutes later and said: "*…I am going to give a witness who says in open court that he would like to correct his testimony an opportunity to do that ….*" (Tr. 1032 ll 2-4) and then he enforces that 'permissive' correction with this directive: "*I will permit the Government, on redirect, if it wishes, to elicit that clarification or you can ask him, Mr. Nolan*." (Tr. 1033, lns. 4-6). At page 1036, the Court tries to moderate the effect of its ruling by saying: "*You can attempt to impeach the witness, the Government can attempt to rehabilitate the witness, and the jury can decide whether he is telling the truth*." (Id. at pg. 1036, lns. 3-6). While this was the correct ruling, the problem was that the Court had already interfered and softened the effect of impeachment by indicating that he intended to protect Swisher so that he would have the opportunity to "correct" his prior testimony, rather than allowing him to be impeached by it.

v. *Judge Tallman Curries Favor with Prosecution*. Judge Tallman then engaged in the process of protecting Swisher from effective cross examination and impeachment by a prior inconsistent statement, since by correcting his testimony from the Grand Jury hearing of February 10, 2004, there would be nothing to impeach[53]. Here, Judge Tallman, *sua sponte*, created an exception to his strict rule prohibiting mid-testimony witness conferences, and allowed the prosecution the right to communicate with Swisher during the recess. Then, he went further by allowing Swisher to "correct" his prior Grand Jury testimony with no accountability and told Hinkson's counsel to help him do it. That simply is not 'correction of testimony' it was Judge Tallman arranging for Swisher to avoid a 'crash landing' from impeachment, and being given a 'do-over' by Judge Tallman as to a prior inconsistent statement before the Grand Jury that was 180 degrees opposite what he was telling the Hinkson petit jury. But what was even more egregious was that Judge Tallman was so aligned with the prosecution that he was willing to make an

53 Again, unsolicited, Judge Tallman said: THE COURT: "I am going to make an exception to my rule about the Government, in this case, being allowed to talk to Swisher during the break. I would like you [the prosecutor] to talk to him about what it was that he wanted to correct, to determine whether or not it's proper to allow him to do that. I'm not sure where he was going with his answer." See 2005 Trial Tr. Pg. 1030, lns. 22-24. The judge put the prosecutor in charge of determining the correction (so the prosecutor could have yet another opportunity to coach Swisher. Then, after a short colloquy, and an objection from defense counsel Judge Tallman, without a motion from the prosecution, interjects as follows: THE COURT: "For the record, I am going to give a witness who says in open court that he would like to correct his testimony an opportunity to do that if it's relevant and permissible testimony. The only way I know – well, I guess we can do it right here." See 2005 Trail Tr. Pg. 1032, lns. 2-6. Judge Tallman queries Swisher who says he wants to correct his 2004 Grand Jury testimony, not his testimony in the 2005 trial and Judge Tallman directs the prosecution or defense to be the instrumentality to facilitate Swisher in "correcting" his prior testimony. THE COURT: I will permit the Government, on redirect, if it wishes, to elicit that clarification or you can ask him, Nolan." See 2005 Trial Tr. Pg. 1033, lns. 4-6.

exception to his rule so that the prosecution could have a mid-testimony discussion with Swisher during a recess, and so aligned that Swisher was allowed him to re-state his prior Grand Jury testimony as if that was a normal procedure and should not be subject to any consequences. (Tr. pg 1032 lns. 11-13.)

vi. *Passport Withheld by Judge*. An example of Judge Tallman's favoritism of the prosecution was that Hinkson was denied the opportunity to present his Passport as exculpatory evidence to show he was not in the country in late-April 2002 or in August through November 1, 2002. Judge Tallman's failure to make the Passport available when it was under his control created a Constitutional due process violation. Judge Tallman was asked to have Hinkson's Passport produced as an exhibit during trial. Pretrial Services, the agency that had taken charge of Hinkson's Passport when he was initially arrested had to surrender the Passport as a condition of his 'OR' recognizance release. Hinkson's Passport was under the direct control of Judge Tallman, who could have simply lifted the telephone and ordered the Passport to be produced in his courtroom. Judge Tallman denied the request by ruling: "it [the Passport] would confuse the jury." The only 'confusion' would have been that the Government's theory would have been made less believable for the jury (i.e., that possibility of an April 2002 and an August 2002 solicitation would have been made impossible). The failure to order the Passport supports Hinkson's §2241 Petition which asserts that if all exculpatory evidence had been produced, no reasonable juror would have voted to convict.

vii. *Judge Tallman Permitted Swisher to Commit Felonies in His Courtroom*. Permitting Swisher to commit numerous felonies in his courtroom with the acquiescence of Judge Tallman was judicial misconduct, to wit: Perjury, Forgery and Theft of Valor and thus made the court an accessory to Swisher's crimes when Judge Tallman knew or had reason to know that Swisher was lying according to the Dowling Report (Ex B-5).

viii. *Judge Tallman **Compounded the Felonies** Committed by Swisher.* When Judge Tallman gave his limiting instruction to the jury to disregard the testimony concerning the Purple Heart, he covered up more than a dozen felonies committed by Swisher (see ¶ 22(f) above).

ix. *Judge Tallman Relied Upon **Fake Backwoods Shooter** Story*. To demonstrate that the favoritism for the prosecution by Judge Tallman was then, and is now deep-seated (*Hurles,* supra, at 1039-1040) and that Judge Tallman's antagonism toward Hinkson continues, in an Order dated August 28, 2012 denied Hinkson habeas relief, Judge Tallman bought up Swisher's 'backwoods shooter' story as a reason to deny Hinkson's petition (see 1:04-cr-00127-RCT, Document No. 326, pg 7 and ¶ 30(c)). The Backwoods Shooter Story was bogus on its face, and as any objective observer can see, was based solely on speculation ("…Swisher suspected Hinkson had "put a contract out" on his life and that someone had recently fired a shot at him in the woods of rural Idaho." Ex B-3, Tr.1067). Now, the "backwoods shooter" story has been debunked as a false report by the Deputy Sheriff who investigated the incident (Ex B-4) and as the fallacies were exposed, showed extremely poor judgment by Judge Tallman to have adopted this bogus story four years after Swisher was convicted of perjury in 2008 in his 2012 Memorandum Decision and Order. Repeating the bogus backwoods shooter story made it appear that Judge

Tallman was not able to clear his thoughts of the prejudice he has against Hinkson (*U.S. Philips Corp. v. U.S. Dist. Court for the Cent. Dist. of Calif*., Case# 12-71696 (9th Cir. March 5, 2013). "The district judge had shown substantial difficulty in putting out of his mind his previously expressed views…." where the Ninth Circuit Appeals Court found that this was a good enough reason to assign a new judge) nor can he get out of his mind the favorable bias he feels for the prosecution that he would deliberately chose to adopt a story so obviously false by a convicted liar rather than seek the truth. (See Ex B-13, Order Denying Recusal Motion, Idaho Federal District Court Case 1:04-cr-00127-RCT Doc. #326, filed 08-28-12 pg. 7).

c. **Judge Tallman's Antagonism toward Hinkson and Favoritism toward Prosecution Prevented Hinkson from Receiving a Fair Trial**. Judge Tallman's deep-seated antagonism toward Hinkson (see Ex B-2) related to extra-judicial matters (concerning Hinkson's other civil petitions) was "both wrongful and inappropriate" because it is not relevant to the Solicitation Case and, in fact, shows that Judge Tallman was being retaliatory.

i *Hinkson Sees His Challenges to Government as Seeking Redress of Grievances*. Due process was offended when Hinkson's prior petitioning for redress of grievances was used against him to deny recusal by Judge Tallman, and had a profound effect on his exercise of his First Amendment right. These prior petitions were irrelevant to the Solicitation Case presented before Judge Tallman, but Judge Tallman's response to the Recusal Motion was evidence of retaliation for Judge Tallman to use them as the basis to deny Hinkson's motion. *Brodheim v. Cry*, 584 F.3d 1262, 1269-71 (9th Cir. 2009).

ii. *Judge Tallman Saw Hinkson's Challenges as Nuisance*. Judge Tallman viewed Hinkson's petitions as an "obstruction of justice," as "misconduct," as "abuse of the legal system," as "frivolous civil litigation" and as "seeking to abuse the legal process to intimidate federal officials from performing their duties." (See Exhibit B-1, Order Denying Recusal Motion pgs. 3-5). But, that view by Judge Tallman in the Solicitation case as to what he did in other cases was irrelevant and stands as evidence of Judge Tallman's judicial bias.

iii. *Some Challenges Prepared by Attorneys*. Ironically, some of the challenges to government entities filed by Hinkson referred to by Judge Tallman were prepared at the direction of or upon advice of legal counsel, such as the multiple motions to recuse judges in the Solicitation Case (at least one of which was prepared and filed by the highly esteemed Sean Connelly, now a Colorado Appeals Court Judge (see Footnote 5, *supra*).

iv. *Proof of Retaliation by Judge Tallman's Rulings*. The proof of deep-seated antagonism comes from his own writings, as Judge Tallman has indicated that he has no tolerance for Hinkson, because he is a person who had the unmitigated temerity to exercise his First Amendment right to petition for redress of grievances. In the context of this case, Judge Tallman retaliated against Hinkson by denying him the right to introduce exculpatory evidence, denying him the opportunity to impeach the Government's 'star witness,' by using Swisher's official military record to impeach his direct testimony and sending Hinkson to solitary confinement in SuperMax prison.

v. *Judge Tallman did Not Follow the Law*. By definition, judicial bias is manifested when the trial judge has a non-judicial reason for antagonism and then delivers adverse rulings that do not follow the law, such as Judge Tallman's erroneous ruling that Swisher's official military record was "extrinsic" evidence under F.R.E. Rule 608(b) when a specific amendment to Rule provides that if the evidence impeaches the testimony of the witness in trial, it is not extrinsic. Prohibiting Hinkson from using Swisher's official military record to impeach him with respect to Swisher's false testimony was not in this case extrinsic and Hinkson should have been allowed to admit that military record as an exhibit and show it to Swisher and ask him questions about it based on the paperwork.

vi. *Retaliation Throughout Judge Tallman's Actions*. Judicial bias manifested by a repeated hostile rulings against Hinkson and his case, with an approach favoring the prosecution and then denial of post-trial relief that was well-founded and provided the proof Judge Tallman said he would accept, i.e., a qualified person from the N.P.R.C. to interpret Hinksons official military file which was presented in Hinkson's Motion for New Trial he brought forth the affidavit of CWO Miller interpreting Swisher's official military record, which was new evidence backing up the Dowling Report as requested by Judge Tallman showing that Swisher had never been to Korea, had never been in combat and was never injured with war wounds or received any medals, awards or decorations (see Ex B-9). Judge Tallman had stated during trial that the only way he could admit Swisher's official military record into evidence was if someone in CWO Miller's position was to come forward and offer testimony interpreting Swisher's military record. Hinkson produced the Miller Affidavit after the trial ended, Judge Tallman denied Hinkson's Motion for New Trial, holding that Hinkson had not been diligent in obtaining that information (which was a retaliatory ruling because Judge Tallman knew that Hinkson's defense team had no access to the information prior to trial because it was kept secret by the same Government that the prosecutor worked for). The effect of this ruling was retaliatory in nature when the objective observer can see that Hinkson did everything in his power to obtain Swisher's military record, including hiring a private investigator, while his defense team sought the information daily and was continually told that it was sequestered by an undisclosed party (that we now know was the Commandant's Office of the USMC, i.e., that Swisher's official military record was checked out to an undisclosed location by an undisclosed party) that was not the fault of Hinkson or his defense team that it was secreted for investigation to expose Swisher's fraud on the VA. Hinkson's inability to obtain that information sooner than it appeared in trial was caused by the fact that another branch of the US Government had sequestered the record for its own purposes until December 30, 2004, only four business days prior to the commencement of the Hinkson trial (see Ex B-5). Diligence of Hinkson and his defense team was not the issue when the USMC secretly checked out the file and sequestered it until December 30, 2004; but rather, Judge Tallman's favoritism for the prosecution and antagonism for Hinkson was the crux of the issue. It was retaliation to falsely accuse Hinkson's defense team of lack of due diligence when Judge Tallman knew exactly that it was the Government which kept it secret and would not release information as to its whereabouts until the middle of trial.

vii. *Judge Tallman Could Not Put Out of His Mind His Hostile Feelings toward Hinkson*. In retrospect it can be seen that Judge Tallman had hostile feelings toward Hinkson, which

denied Hinkson due process of law and were "wrongful and inappropriate." *Hurles*, supra at 1039-1040; and see also *Liteky v. United States*, 510 U.S. 540, finding error if judge had deep-seated favoritism for or antagonism towards a party; *c.f. U.S. Philips Corp. v. U.S. Dist. Court for the Cent. Dist. of Calif*., Case# 12-71696 (9th Cir. March 5, 2013). "The district judge had shown substantial difficulty in putting out of his mind his previously expressed views…." where the Ninth Circuit Appeals Court found that this was a good enough reason to assign a new judge. Thus, Judge Tallman, by his own admission in his 2012 Order Denying Recusal Motion should have recused himself and allowed an objective judicial official decide Hinkson's Petition for Habeas under §2255.

viii. *New Judge Required.* Applying the law here, Judge Tallman's refusal to recuse himself even at the §2255 stage of the proceedings, in light of his openly expressed antagonism toward Hinkson over extra-judicial matters and his deep seated favoritism toward the prosecution, provides the nexus for an assignment of a new trial judge in this case.

ix. *Judge Tallman's Insertion of "Replacement DD-214" into Official Record.* In his August 28, 2012 Order Denying Hinkson §2255 relief, at page 7, Judge Tallman stated, (referring to Swisher's official military personnel file) "[t]he file contained copies of the Dowling letter, the official DD-214, and the "Replacement DD-214" that Swisher had displayed on the witness stand." When Swisher's official military record arrived in the courtroom during trial via overnight delivery in response to a subpoena issued by Judge Tallman, from the National Personnel Records Center, the "replacement DD-214" did not exist as a part of the file. Yet, Judge Tallman had his own copy of the "replacement DD-214" and took the file with him. Somehow, that "replacement DD-214" was inserted into the file by the time Judge Tallman discussed it with counsel on the next court day. Note that according to the Dowling Report to Ben Keeley, SVSO, State of Idaho Division of Veterans Services, Lewiston, ID at ¶ 2, page 1, Col. Dowling observed: "The documents you provided [Swisher's "replacement DD-214 and letter purportedly from Cpt. Woodring dated 16 Oct 1957] do not exist in Swisher's official file." (Emphasis added.) Further, in the February 24, 2005 Affidavit of CWO W.E. Miller (see Exhibit B-9, the person from the National Personnel Records Center in charge of verifying the authenticity of military files such as Swisher's file[54] with attached exhibits: Ex A: the Dowling Report; Ex B: the Tolbert Letter; Ex C: Swisher's forged "replacement DD-214;" Ex D: Swisher's actual DD-214), made the specific finding that Swisher's "replacement DD-214" did not exist as a part of his official military record, Miller stated at ¶ 9: "I have ascertained that Exhibit C [Swisher's "replacement DD-214"] does not exist in Swisher's official file of his U.S. military record and there is no independent confirmation Exhibit C has, previous to the 2004 submission to USMC Headquarters, ever been seen, recognized or filed in Swisher's official military record." (Emphasis added.) The problem is that Judge Tallman treated the "replacement DD-214," of which he had his own copy, as if it was a part of the official military record. Judge Tallman gave deference to the document and ruled that the file with the fake "replacement DD-214" raised a question whether Swisher served in Korea, when there was

54 See the Miller Affidavit, Exhibit B-9, at ¶ 12 "As a part of my official duties, it is my responsibility to determine if Exhibit C is authentic [Exhibit C being a copy of Swisher's "Replacement DD-214."]

absolutely no question as borne out by Swisher's 2008 conviction, that Swisher never set foot in Korea.

x. *Judicial Favoritism toward Prosecution*. As an example of a specific instance of Judge Tallman's deep-seated favoritism for the prosecution, it should be considered that in the 2005 trial he protected Swisher as the prosecution's witness from cross examination and impeachment; when Swisher said he was under oath at the 2002 Grand Jury, defense counsel asked the follow-up question, "And you told the truth?" Without an objection, Judge Tallman (unsolicited by the prosecution) interrupted the defense cross examination with the statement, "Counsel, you are arguing with the witness." (Tr. 2005 Trial, pg. 1021, lns. 17-18). Then, when Swisher was being pressed about the inconsistencies between his 2002 and 2004 Grand Jury testimony, and the different stories regarding torture-murder solicitations between 1999 and 2002, as the foundation was being laid, Swisher, out of context, said he would "like to correct one thing." (Tr. 2005 pg. 1022 ln. 19). It was as if Swisher had said a 'code word,' at which time Judge Tallman said that he would allow Swisher to "correct" his testimony (Tr. 2005 pg. 1032, lns. 8-10). Swisher then gave a weak explanation about not having consulted his wife's calendar before he testified in the 2004 Grand Jury and skated right out of a huge impeachment issue for Swisher thanks to the help of Judge Tallman, who made it look as if it was normal procedure to 'correct' prior Grand Jury testimony. Swisher would have had to have admitted that he had not mentioned the gruesome solicitation of murder to the 2002 Grand Jury if it had not been for the intervention of Judge Tallman, who violated defendant's right to confront and cross examine and impeach Swisher on prior Grand Jury testimony.

xi. *Personal Belief of Judge Tallman that Swisher Served in Korea Kept Jury from Hearing the Truth-Evidence that Swisher Never Served in Korea would have Swayed Jury*. In spite of mounting evidence to the contrary, of the many misconceptions entertained by Judge Tallman as a part of his personal view of Swisher's military service included a tour of duty in Korea in September 1955, arriving as a part of a rifle company and having received gunshot wounds, all of which was new information as proven by the USMC Col. Dowling, NPRC authentication expert Miller and Swisher's 2008 conviction. The point is that Judge Tallman was dead wrong in his personal views contrary to the Advocate/Witness Rule, *Quercia, supra.*

d. **Judge Tallman's Personal Views.** Judges are to be neutral and apply an objective standard and are not allowed to make decisions based on their personal views. Judge Tallman injected into the Hinkson case facts from his personal views (see ¶ 35(a)(vi) A, B and C above, i.e., three completely false, fabricated and untrue facts: (1) Swisher traveled to Korea by ship; (2) Swisher arrived in Korea by amphibious transport; and (3) Swisher was a member of a specific rifle company (Tr. 2309, ll 6-10).

e. **Reliance upon Personal Views**. Judge Tallman relied upon his personal belief that Swisher served in Korea as the basis for excluding Swisher's official military record from the jury's

consideration, finding that there was evidence in Swisher's official military record that Swisher served in Korea, which simply was not true, unless Judge Tallman put it there.

f. "**Replacement DD-214" Did Not Exist as a Part of Swisher's Official Military Record**. As pointed out above, Swisher's "replacement DD-214" did "not exist in Swisher's official military record". It is not clear how Judge Tallman could have reconciled his personal beliefs that the Swisher "replacement DD-214" was a part of his official military record when he was specifically informed that it "does not exist in Swisher's official military record." (See Dowling Report and Miller Affidavit.)

g. **At the time of Hinkson's Motion for New Trial, Judge Tallman Was Informed as to the Truth**. By the time the Motion for New Trial was filed in March 2005, Judge Tallman was on notice that the signatures of Cptn. Woodring on the 1957 Marine Corps letter and the "replacement DD-214" were forgeries. Further, the very official that Judge Tallman described in the Hinkson trial (see Ex B-3 Tr. 2599 ll 18-21) that he said needed to come forward to authenticate Swisher's official military record and to authenticate whether Swisher's "replacement DD-214" was a fraudulent document was CWO Miller, who said it did "not exist" in Swisher's official military record. The questions that immediately come to mind are: (1) how much clearer did it need to be for Judge Tallman to understand the truth? (2) When is it that Judge Tallman will understand that Swisher was a con-artist who used fraud and duped him, the prosecution, the jury and the VA? The problem is that Judge Tallman has now demonstrated that he is unwilling to change his paradigm, that he views Swisher as a credible witness in spite of all that has transpired and that Swisher will be relied upon in all of Judge Tallman's decisions, which are retaliatory toward Hinkson and deny him relief to which he is entitled.

h. **Convicting Swisher of Perjury did not Convince Judge Tallman**. One wonders how it is that when Swisher was convicted of forgery, perjury, theft and stolen valor, Judge Tallman could be convinced that Swisher is an experienced liar under oath and everything he says, is, for that reason, suspect? What does it mean to David Hinkson sitting in prison, if Judge Tallman was wrong in his personal belief that Swisher served in Korea? Doesn't it mean that Hinkson is entitled to a new trial because Judge Tallman committed an egregious error by having an *ex parte* meeting with Swisher and then becoming Swisher's advocate in the Hinkson trial? Apparently not, because for Judge Tallman, the Swisher deception continued even until August 28, 2012 (the date of the Denial of the Recusal Motion) and probably continues to this day, because his mind has been focused on his favoritism for the prosecution and antagonism for Hinkson. It was that same antagonism that put Hinkson in solitary confinement in SuperMax prison for crimes that he did not commit and in fact, crimes that were fictitious and were never committed by anyone.

i. **Judge Tallman, as of his Last Writing Remains Unmoved by the Facts and Circumstances of the Case, the Applicable Law and the Impact of His Decisions on Justice.** Judge Tallman remains unrepentant of his wrongful actions, and instead has chosen to hold to his mistaken belief, perhaps because of loyalty to Swisher developed in the *ex parte* meeting, and still considers him to be a credible witness, even after his 2008 conviction (see Ex B-2, where Judge Tallman credited Swisher's fake "backwoods shooter" story in the Order Denying Recusal Motion as if it was true).

j. **Truth is the Daughter of Time And Truth Should Overcome Trial by Ambush**. The impact that the truth about Swisher's military record would have had on Hinkson's jury is substantial (see Exhibit A-8, Affidavit of juror Ben Casey, who says he would not have voted to convict Hinkson if he had known that Swisher's claims of military valor were false). In all probability, Hinkson believes that if Swisher's original military record had been shown to the jury, he may have been acquitted of the Swisher Counts. At least, considering the Affidavit of juror Ben Casey (see Ex A-8) there would have been hung jury forcing a new trial, when Hinkson would have been informed of all the lies so that he would have been able to defend himself. As it was, the prosecution kept it a secret and succeeded in 'pulling the wool over the eyes of the jury' and conducting a 'trial by ambush.'

k. **Swisher's Official Military Record Addresses More than the Purple Heart Issue**. Swisher's official military record addressed more than just the Purple Heart issue. It was a significant piece of exculpatory evidence and it went not only to rebutting Swisher's claims to wear the Purple Heart, but also goes to Swisher's dozen lies (see ¶ 22(d) above) some of which were not Purple Heart related as well as, his official military record negated Swisher's direct testimony that he told Hinkson he had killed "many" in combat in Korea. Further, Swisher's official military record went to the very heart of the prosecution's theory of the case, which was stated and needed to be corrected from the Government's false statements in its opening remarks. The jury should have been able to consider Swisher's official military record, without the forged "replacement DD-214" since it "does not exist as a part of" the file so that they would have had the opportunity to consider Swisher's credibility and then they could have considered whether both Swisher and the Government had been lying to them regarding his Korean combat mission. Once the jury understood that they had been lied to about Swisher's military career, they could more easily have seen that they had been lied to about the torture-murder for hire scheme.

l. **Exculpatory Evidence Excluded by Judge Tallman**. Hinkson has petitioned this Court for Habeas relief under 28 USC §2241 because, at trial, the evidence herein listed herein (except the newly discovered evidence of Swisher's 2008 conviction) such as his Passport was erroneously excluded by the judge who said that it would "only confuse the jury" and Swisher's official military record was not admitted because the judge, who had subpoenaed it from the National Personnel Records Center declared there was no proof that it was authentic and he found that there was evidence in that official military file that indicated Swisher had served in Korea, when no such evidence existed in the file per the Dowling Report (Ex B-5) and the Affidavit of CWO W.E. Miller (Ex B-9). Impeaching Judge Tallman's findings as to Swisher is his 2008 criminal conviction. That conviction stands for the proposition that there was absolutely no evidence in Swisher's official military record indicating that he had served in Korea which is proof that Judge Tallman's findings about Swisher's military career were erroneous. Viewing the cumulative effect of all such evidence, Hinkson's claim of *actual innocence* is well supported.

36. **HINKSON'S ONE PROCEDURAL OPPORTUNITY TO PURSUE ACTUAL INNOCENCE**

a. **Prior Appeal and §2255 Did Not Deal With Actual Innocence Issues**. Hinkson's case was appealed from the trial court, but only the conviction related to the three solicitation Counts were appealed (the Structuring conviction from the Tax Case was not appealed). A three-judge panel of the Ninth Circuit Court of Appeals reversed the conviction in the Solicitation Case on a 2-1 majority.[55] The Government obtained a re-hearing before an eleven member *en banc* panel and Hinkson's conviction was affirmed 7-4. After request for further re-hearing, Chief Judge Kozinski, changed his position and because of outrage by the Veterans of the Korean War expressed in their Amicus brief and the effect of the US Supreme Court decision in *Porter v. McCollum*, 558 US 30 (2009), deciding that the true military status of the prosecution's star witness, Swisher, was not, as the majority assumed, a minor matter. Rather, it was a significant factor that should have been presented to the jury and it was his belief that the case should have been reversed. When Judge Kozinski changed his vote to reverse Hinkson's conviction, the *en banc* tally was reduced to a 6-5 margin in favor of conviction. None of the Ninth Circuit Court judges ruled on the cumulative effect doctrine or the effect of failing to inform the jury of the false testimony and evidence. Therefore, the thin margin easily could change in the Ninth Circuit in light of being presented with the full body of evidence in Hinkson's favor.

b. **Evidentiary Hearing Needed**. An evidentiary hearing is needed in order for the defendant to be able to show that Swisher, as Hinkson's only accuser, had lied about his military career, which lies conferred on him extraordinary credibility before the jury as he claimed to have been a wounded and then decorated as a Korean combat hero on a mission to rescue American POWs after the Korean War. The Government's theory was that Swisher told Hinkson a false story of how Swisher had killed "many" in his military career as the supposed attractant that drew Hinkson to Swisher as a hit-man. . The military valor aspect of Swisher's fake combat career presented a "Super-Hero" that the jury could look up to and believe. Swisher's claim that he and Hinkson were "best friends" when they were mere acquaintances, gave Swisher entre to a purported confidential relationship. Swisher's tale of being solicited by Hinkson to torture-murder other individuals would have been very hard for the jury to believe without the cape of a "Super-Hero" that bridged over the parts of the "Swisher Story" that did not follow logic and the significant inconsistent statements made in Swisher's Grand Jury testimony. The strategy behind the Swisher Story was to convince the jury that Hinkson was a bad man who needed to be taken off the streets (when in fact the evidence proves that it is Swisher who is evil). If Hinkson had been permitted to introduce the impeachment evidence cited above using Swisher's official military record as an exhibit, Hinkson contends that it is more likely than not, no reasonable juror would have voted to convict, which meets the actual innocence standard. Acquitting or deadlocking on the Swisher Counts at trial would have given Hinkson the opportunity to have a new trial, and the opportunity to prepare an effective defense because all the secrets that the Government held (which should have been disclosed as *Brady* information) were out of the bag and Hinkson would not be caught unawares. Swisher's 2008 conviction would play a large role in showing that Swisher lied about the same matters in the VA case as in the Hinkson case.[56]

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55 *Hinkson v. U.S*. 526 F.3d 1262 (9th Cir. 2009).

56 *US v. Swisher*, 760 F. Supp. 2d 1215 (D. Idaho 2011) see also 360 Fed. Appx. 784 (9th Cir. 2009).

c. **Actual Innocence.** It is clear that when all the evidence is considered together and the judicial bias, Governmental misconduct, prosecutorial misconduct and juror misconduct is removed from the case, with due process restored, and to the extent Hinkson should be granted an evidentiary hearing or a new trial that allows him to have a full and fair opportunity to submit all the exculpatory evidence to a fair tribunal in a fair trial,[57] the cumulative effect will be to show that he is *actually innocent* of the Swisher Counts. It is clear that Judge Tallman can no longer serve effectively as a jurist on this case because of judicial bias and should be recused or removed because of his conduct in the Hinkson trial was not above the appearance of impropriety. It is also apparent that from his August 28, 2012 Order Denying Recusal Motion, he perceived Hinkson as "vexatious" and Hinkson's extra-judicial activities to petition his government for grievances as efforts to "game the system." Certainly, Judge Tallman should not have been considering extra-judicial matters such as Hinkson's petitions to his government for redress of grievances which are in accord with his First Amendment right to do so (the chilling effect of Tallman's extra-judicial attack on Hinkson demonstrates retaliation. *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009) and especially when such matters are not a part of this Solicitation Case. To the extent that he has done so in past proceedings, he has deprived Hinkson of a "fair trial by a fair tribunal."

FURTHER AFFIANT SAYETH NAUGHT.

I declare under penalty of perjury pursuant to 28 USC §1746 that the foregoing is true and correct.

Executed March 11, 2014.

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Wesley W. Hoyt

57 *Bracy v.Gramley,* 520 US 899, 940, 117 S.Ct. 1793, 138 L.Ed 2d 97 (1997)and *Hurles v. Ryan*, 706 F.3d 1021,1039