

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. CR-O4-127-C-(RCT)
v.	)	
	)	<b>Affidavit of Wesley W. Hoyt</b>
DAVID ROLAND HINKSON,	)	<b>As to Newly Discovered Evidence</b>
	)	
Defendant.	)	

I, Wesley W. Hoyt, of Kooskia, Idaho, one of the attorneys for defendant in the trial of the above case which took place January 10-27, 2005, upon oath, depose and state as follows:

1. I am over the age of eighteen years at the time of signing this Affidavit and I am qualified, competent and knowledgeable to provide the information regarding the newly discovered evidence as set forth herein.

2. Defendant sought Brady/Giglio materials from the government in July, 2004. The government responded that it considered grand jury transcripts of government witnesses to be Jencks materials and would only produce them one week before trial. The Court, after a hearing and in contravention of its own Procedural Order (which required the production of grand jury transcripts within seven days of defendant's request) exempted the government from producing said grand jury transcripts until January 3, 2005, one week before trial. Early production of those transcripts along with the production of the military records for government witness Elven Joe Swisher (herein "Swisher") under the Brady/Giglio doctrine likely would have led to the location of what defendant is now offering as newly discovered evidence but which was kept from defendant by the government.

3. The newly discovered evidence that Swisher's military record is a forgery. In order to support the theory of its case, the government relied upon Swisher's Replacement DD 214 (see document marked as defendant's trial Exhibit M, which has been attached hereto and marked as Exhibit 1) to show that Swisher was credible because he was a decorated combat veteran. In order to show that he was a believable witness, Swisher pulled from inside his coat on January 14, 2005 a paper which he said was a "certified copy of his DD 214." That forged document was relied upon by the government in support of its theory that Hinkson wanted to hire Swisher as a hitman because of Swisher's Korean combat experience where he had killed "too many" people.

4. Swisher claimed that his Replacement DD 214 constituted proof that he was awarded medals for his part in a "Top Secret" mission to rescue POWs in Korea where he saw

action and was wounded. It was on this mission that Swisher alleged he became an experienced killer. Thus, the government's theory was that Swisher's combat military experience made Swisher a suitable hitman candidate for Mr. Hinkson to use in his supposed plot to kill federal officials.

5. Because of the newly discovered evidence, this theory has no basis as it has now been discovered that all of Swisher's testimony about Top Secret missions, combat experience in Korea and medals earned because of combat injuries is a total and complete fabrication.

6. If defendant had timely received Brady/Giglio/Jencks materials and thus known that Swisher was a liar as to his military record, combat experience and medals, defendant would have been able to effectively cross examine and impeach Swisher at trial and thus, defendant would not have been prevented from having a fair trial.

7. Before he testified, the government knew about the existence of the Replacement DD 214 and should have known that the same was a forgery. The evidence of forgery is now the basis of Defendant's Rule 33 Motion for New Trial. Because of the late disclosure of Brady/Giglio/Jencks material by the government, especially as to Swisher's grand jury testimony of February 10, 2004 and because of the complete failure of the government to produce at the time of his examination a determination letter (see document marked as defendant's trial Exhibit \_\_, which has been attached hereto as Exhibit 2) denying Swisher's claim for recognition of the validity of his medal entitlement as a result of a non-existent Top Secret POW rescue mission in Korea during his U.S. Marine Corps active tour of duty, which determination letter was issued by the Headquarters of the U.S. Marine Corps dated December 30, 2004, until January 24, 2005, ten days after Swisher testified, defendant was not able to discover the existence of the forged document, prepare adequately to confront his accusers or effectively cross examine Swisher.

8. Trial preparation time was very short after the initial Jencks material was provided by the government a day late, on January 4, 2005. It was critical to defendant's ability to have a fair trial that the government produce all of the documents as ordered by the Court, yet, the government chose not to produce the military record of Swisher, critical to defendant's understanding of Swisher's testimony and the government's theory of the case, necessary to assist defendant in completing his pretrial investigation and crucial to preparation for confrontation of defendant's accusers by knowledgeable and effective cross examination. When the government's violation of the Court's prior order by a one-day delay in production of Jencks materials was called to the Court's attention at the pre-trial conference of January 7, 2005, the Court refused to grant a one-day delay in the commencement of the jury trial which would have assisted defendant

in completing his investigation. Defendant was prejudiced by the government's late disclosure of Brady/Giglio/Jencks material, especially Swisher's military record. The prejudice was that defendant did not have adequate time to complete his investigation, prepare for effective cross examination of all government witnesses, especially Swisher and thus was denied a fair trial. The newly discovered evidence was located after Swisher testified and after the conclusion of the trial as a result of evidence finally produced by the government January 24, 2005 which was available to the government prior to trial.

9. The government also failed to produce any Jencks materials regarding Swisher's military record after the close of his direct examination on January 14, 2004, as required by the Jencks Act, 18 USC 3500.

10. Prior to his testimony, the defense had no information regarding Mr. Swisher's military record except for some limited information casually supplied by him on October 14, 2004 during a recess after a Court Status Conference in Grangeville, Idaho on another case. At that time, Mr. Swisher informed the undersigned that he sustained combat wounds to his legs and hearing as a result of two hand grenade explosions during a secret mission about which he was prohibited from disclosing that occurred during the Korean War. At that time, Mr. Swisher wore a dark green fishing vest with a U.S. Marine Corps patch sewn on and several U.S. military medals including a Purple Heart.

11. Swisher was very adamant that his combat injuries were occurred during the Korean War and at the time the undersigned made a mental note to check the dates of the Korean War to see if was old enough to have been in the U.S. Marine Corps. The undersigned determined that, based on his birthday of January 2, 1937, Swisher would have been approximately age 13 at the outbreak of the Korean War and approximately age 16 at the time of the signing of the Korean War Armistice, and thus, he would have been under age and ineligible for participation during the entire Korean War conflict.

12. The undersigned sought to obtain documentary proof from the National Personnel Records Center (NPRC) as to the time period of Swisher's military service to be ready and able to impeach any assertion made by Swisher that he fought in the Korean War, if he should make any such assertion during his upcoming testimony at the Hinkson criminal trial in the above case scheduled to commence January 10, 2005.

13. In order to prove the dates of Mr. Swisher's military service, the undersigned hired a private investigator to apply for and obtain a copy of Mr. Swisher's DD Form 214 military

record in early November, 2004 in anticipation of the need to produce such record in order or impeach Mr. Swisher at said trial.

14. Starting in late-November 2004, the undersigned received periodic reports from his private investigator that the NPRC could not provide the copy of Mr. Swisher's DD 214 until the file was returned from Marine Corps Headquarters to the NPRC offices in St. Louis, Missouri, because that file had been requisitioned and was being held by the Headquarters of the US Marine Corps for an undisclosed purpose, which the undersigned later learned was to investigate the claims of Swisher related to acceptance and approval of his claims that he participated in an alleged secret rescue mission in Korea, sustained combat injuries and is entitled to be decorated with medals. Throughout December 2004, NPRC indicated that it expected Swisher's file to be returned at any time and that it would provide a copy of Swisher's DD Form 214 to the undersigned. (See attached Exhibit I, letter from NPRC dated \_\_\_\_.)

15. Based on a ruling as set forth in a determination letter from USMCR Lieutenant Colonel K.G. Dowling (Assistant Head of the Military Awards Branch at the Headquarters of the USMC at 320 Russell Road, Quantico, Virginia 22134-5103) acting at the direction of Commandant of the USMC a determination letter was issued dated 30 Dec 2004 regarding Swisher's claims (herein "USMC Determination Letter;" for copy of said letter see US v. Hinkson, CR-04-0127, trial Exhibit \_\_, or a copy of said USMC Determination Letter is also attached as Exhibit A to the Affidavit of U.S. Marine Corps Chief Warrant Officer W. E. Miller: Chief Miller's Affidavit is attached to Defendant's Rule 33 Motion for New Trial as Exhibit A, incorporated herein by reference). It is apparent that the Headquarters of the U.S. Marine Corps retained possession of Swisher's military record file until its final determination was made on December 30, 2004.

16. The USMC Determination Letter provides that the U.S. Marine Corps denied Swisher's claims for commendatory medals arising out of his alleged combat injuries in a secret mission to Korea during the post-War Era.

17. Circumstances such as a slow down in associated with the New Year holiday deprived the undersigned of information about Swisher's military service record until January 14, 2005, when the letter of Bruce R. Tolbert, Archives Technician at the NPRC in the Military Personnel Records Department, addressed to "Leslie [sic] Hoyt Law Office" was provided in response to the undersigned's request for Swisher's military service record marked as trial Exhibit L. (For another copy of the NPRC January 14, 2005 letter, see Exhibit B to Chief Miller's Affidavit.) Ironically, January 14, 2005 was the day Swisher testified in the Hinkson case, the

day that he produced in open court a document he claimed was a “certified copy” of his DD 214 (herein “Swisher’s Replacement DD-214”) which Chief Miller states in his Affidavit is a forgery (see Chief Miller Affidavit, paragraph 23, page 8).

18. During the entire time that the undersigned sought Swisher’s military service record, from November, 2004 through January 14, 2005, the defendant’s team (including lawyers and investigators) had no knowledge that Swisher’s Replacement DD-214 existed. Of greater significance, the defense team had no idea that Swisher’s Replacement DD-214 was a forgery. Id. In fact, it was not until February 24, 2005 that Chief Miller confirmed the undersigned’s suspicions about the Swisher Replacement DD-214 being a forgery. (See Chief Miller’s Affidavit for confirmation that Swisher’s Replacement DD-214 is a forgery; which Affidavit was signed February 24, 2005.)

19. While Swisher was testifying the NPRC letter (Exhibit I attached) was delivered to the courtroom and was marked as trial Exhibit L. Said letter only suggested that Swisher’s Replacement DD-214 was a forgery and the Court was impressed that if Swisher had been on a secret mission that was classified, the records of such a mission would not show up with the other records. What was clear from the January 14, 2005 letter from NPRC (Exhibit I attached) was that from the perspective of the NPRC Swisher was not entitled to any medals listed on Swisher’s Replacement DD-214. As of January 14, 2005, the government had not voluntarily produced an authentic copy of Swisher’s original DD-214 or even Swisher’s Replacement DD-214. Further, and making matters more difficult for both the Court and defendant to sort out, the government failed to produce a copy of the USMC Determination Letter issued December 30, 2004.

20. Until the undersigned received the NPRC letter of January 14, 2005, the defense team was operating under a cloud of ignorance. The defense team believed that by merely obtaining a copy of Swisher’s authentic DD Form 214 that Swisher could be impeached as to his claim that he was a wounded combat veteran from the Korean War by virtue of the dates of his active duty in relation to the Korean War based on our assessment of his relative age at the time of the Korean War.

21. By the time Swisher testified at the Hinkson trial on January 14, 2004, Swisher had changed his story. He no longer claimed to have been a combat participant in the Korean War, rather his new claim was that he was a participant in post-War combat operations in Korea. The change by Swisher in his story caused the undersigned’s original impeachment approach to be inapplicable as Swisher’s age relative to the Korean War was no longer a factor.

22. During cross examination in the Hinkson case, as Swisher was being questioned about the statements contained in the NPRC letter (Exhibit I attached) and while in front of the jury on January 14, 2005, in a most dramatic fashion, Swisher pulled from inside his black leather coat (upon the lapel of which he displayed a Purple Heart Medal) a paper that he decisively proclaimed, under oath, was a ‘certified copy’ of his DD 214. That paper was marked in the Hinkson trial as Defendant’s Exhibit M (which was the Swisher’s Replacement DD-214 that now has been identified as a forgery; another copy of said paper is marked as Exhibit C and attached to Chief Miller’s Affidavit).

23. Swisher’s Replacement DD-214, although a forgery, had the appearance of authenticity (see Chief Miller’s Affidavit, paragraph \_\_, page \_\_) and caused the Court and the defense team to falter as to what action should be taken. Clearly, it was unknown to defendant on January 14, 2005 that Swisher’s Replacement DD-214 was forged. The government, on the other hand, had access to the USMC Determination Letter of December 30, 2004 and kept silent as to the existence of said Determination Letter and the effect it had on the paper Swisher pulled from inside his coat. The government also had a copy of the forged Swisher’s Replacement DD-214 in its possession as early as the morning of January 14, 2005, the day of Swisher’s testimony, which counsel for the government produced at side-bar once Swisher produced what he referred to as a “certified copy.”

24. Upon review of the face of Swisher’s Replacement DD-214 (Hinkson trial Exhibit M) it states on the face of the document that it was recorded by Swisher in the records of Idaho County, Idaho. In order for the Recorder of Idaho County, Idaho to certify the same, a copy of the forged document as recorded by Swisher was made and then the Idaho County Recorder, not the United States National Personnel Records Center, certified that copy as being an authentic copy of the forged document that was previously recorded by Swisher in Idaho County.

25. When the undersigned heard the testimony of Swisher in the Hinkson case and his statement that he was involved in a secret post-War Korean expedition, the undersigned decided to abandon the original plan to impeach Swisher on the basis that his age which would have precluded him from participating in the Korean War. However, as one avenue of impeachment closed because Swisher no longer claimed he was a combatant in the Korean War, another pathway to impeachment opened. The new impeachment path was opened when Swisher produced, from inside his black coat, bedecked with Purple Heart Medal, a paper which he misrepresented to be a “certified copy of his DD 214” which is *misleading conduct* as that term is

defined under Title 18, United States Code, Crimes and Procedure, Part 1 Crimes, pursuant to 18 USC 1515(a)(3) which provides, the term “misleading conduct” means --

- (A) knowingly making a false statement;
- (B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;
- (C) with intent to mislead, knowingly submitting or inviting reliance on a writing ... that is false, forged, altered, or otherwise lacking in authenticity;
- ...
- (E) knowingly using a trick, scheme, or device with intent to mislead;

26. Swisher’s misleading conduct was that he (i) knowingly made false statements regarding his service in the US Marine Corps, saying that he had served in a Top Secret mission, in Korea, was in combat, was injured in combat, killed many people – “too many;” (ii) intentionally omitted information as to his Replacement DD 214 by merely stating that it was a “certified copy of my DD 214” and omitting the fact that said document was only certified by the local Idaho County Recorder to be a true and correct copy of the document Swisher had recorded and creating the misimpression that the document was certified by the United States government. to the Court to be a “certified copy of his DD-214” and tendering a forged document to the Court in the presence of the jury; (iii) with intent to mislead, Swisher knowingly submitted and/or invited reliance on his written Replacement DD 214 that was false, forged, altered, or otherwise lacked authenticity; and (iv) knowingly pulled a forged document from his inside his coat that he had recorded himself and then obtained a certified copy thereof as a trick, scheme, or device with intent to mislead the Court and the jury as to his military record, all of which constitutes obstruction of justice and involves a string of criminal acts which violated the following laws:

- A. 18 USC §1621. **Perjury generally.** Whoever – (1) having taken an oath before a competent officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly ...willfully and contrary to such oath states ... any material matter which he does not believe to be true ... is guilty of perjury and shall ... be fined under this title or imprisoned not more than five years, or both.

Swisher, who had taken a oath that meets with Section 1621, willfully lied about his military record, contrary to such oath, by stating matters he did not know to be true, i.e., that he had combat experience in the military, that he killed people while in the military, that he was entitled to wear a Purple Heart medal which he received as a result of wounds sustained from enemy fire, that he participated in a classified mission to rescue POWs,

that while on active duty as a US Marine he served in Korea and that he had a “certified copy of his DD 214” which lent credibility and support and stood as proof of these claims.

- B. 18 USC §1503(a): **Influencing or injuring officer or juror generally.** Whoever corruptly ... endeavors to influence ... or impede ... any court of the United States ... or corruptly ... influences, obstructs or impedes, or endeavors to influence, obstruct or impede the due administration of justice shall be punished as provided in subsection (b).

For an analysis of Swisher’s criminal conduct in obstructing the due administration of justice by improperly attempting to and influencing and impeding the Hinkson case, see the analysis below related to subparagraph C concerning 18 USC §1505.

- C. 18 USC § 1505: **Obstruction of proceedings before departments, agencies, and committees.** [Paragraph 2] Whoever corruptly...influences, obstructs, or impedes or endeavors to influence, obstruct or impede the due and proper administration of the law under which any pending proceeding is being had before any department ... of the United States ... Shall be fined under this title or imprisoned not more than five years, or both.

18 USC 1515(b): As used in section 1505, the term “corruptly” means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or ... altering ... a document or other information.

Swisher obstructed the Hinkson case, which was a proceeding before the Judicial Department of the United States in violation of Sections 1503(a) and 1505, by perjury and corruptly attempting to influence and influencing Judge Tallman to believe that he was a decorated US Marine Corps combat soldier experienced in killing others in battle who had participated in a classified “Top Secret” mission to Korea, after the Korean War to secure the release of American prisoners of war, and was injured by enemy fire and decorated with, *inter alia*, the Purple Heart Medal; the purpose of which was to enhance Swisher’s credibility and believability with the Court so that said Judge would not utilize the due and proper administration of law and justice in the pending Hinkson proceeding by denying defendant the opportunity to engage in full and complete cross examination of Swisher for the purposed of impeaching him; in addition, improperly disallow defendant the opportunity to call as a witness a representative of the US Marine Corps to show that Swisher’s claimed military record as to combat experience, medals and classified “Top Secret” missions in Korea was a complete fabrication and that the forged DD 214 was a fraud upon the Court, which act of influencing was performed by Swisher when he committed perjury by stating that the forged Replacement DD 214 was a “certified copy” and he submitted said forged document to the Court and by making false and misleading statements as to his military experience and said document, including the concealing and withholding of evidence concerning said document and altering said document by forgery to create the appearance of a valid and authentic DD 214. Swisher attempted to impede and impeded the due and proper administration of law and justice by presenting to the Court during his testimony the forged Replacement DD 214, which caused the trial of Mr. Hinkson to come to a halt to consider said document and its effect upon the trial, which caused the Court, its staff and the attorneys and their staffs to waste hundreds of hours



over the last thirteen days of trial and during the past month and a half since the trial, for the purpose of investigation of the truth and voracity of Swisher's claims.

D. 18 USC §704(a): **Military medals or decorations.** Whoever knowingly wears ... any ... medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both.

Swisher, on the day of his testimony, knowingly wore into court upon the lapel of his black leather coat, a Purple Heart medal, authorized by Congress for the armed forces of the United States. Swisher's testimony shows that he knew he was wearing said medal and claimed, contrary to the determination of the US Marine Corps, he was entitled.

27. On January 14, 2005, during cross examination, at the moment that Swisher pulled from inside his coat what he represented to the Court and jury was a 'certified copy' of his DD 214, it was impossible to effectively cross examine Mr. Swisher because of the forged document foreclosed numerous issues of cross examination because it, or the authority it represented, stood as an answer most of the questions that defendant intended to ask. Until the issue of the authenticity of Swisher's Replacement DD 214 was resolved, the validity of Swisher's claims that Hinkson solicited him to kill federal officials, from the defense perspective, could not be resolved by a jury. Thus, defendant was denied the opportunity to effective assistance of counsel, to effectively confront witnesses against him by cross examining them for the purpose of impeachment.

28. The government knew in advance that Swisher would use and rely upon his Replacement DD 214 as a basis for claiming that his combat experience and participation in classified missions as highlighted by his alleged award of medals, and knowing that Mr. Swisher was going to use the forged military record as a basis for testifying that Mr. Hinkson thought him to be a good candidate as a 'hitman,' had failed to provide full disclosure of Mr. Swisher's military record in a timely manner consistent with its duties under Brady/Giglio, the Court's Procedural Order, defendant's discovery requests, the Courts Order requiring presentation of Jencks materials one week before trial or the Jencks Act, 18 USC 3500.

29. Presenting Swisher's Replacement DD 214, which was a forged document, was a surprise, constituted ambush by the prosecution, interfered with the due and proper administration of law and justice and effectively shut down cross examination as defendant commenced the

process of attempting to determine the truth of Swisher's claims relative to said document for impeachment purposes.

30. During defendant's case in chief, and pursuant to an order of January 20, 2005, a subpoena was sent to NPRC requesting that a copy of Mr. Swisher's military record be produced. The record that was produced included a copy of a claim submitted by Swisher (through his VA representative Mr. Ben Keeling of Lewiston, Idaho). No documents contained within the package of documents submitted by the NPRC was certified so that the Court and counsel could not discern which documents were considered authentic by the US Marine Corps and which were not. From the submission by NPRC it was apparent that Swisher had been seeking recognition from the Marine Corps of his claim to medals and participation in "Top Secret" missions in Korea while on active duty. At issue before the U.S. Marine Corps was Mr. Swisher's claim that he had been injured in combat while participating in a purported secret mission to rescue prisoners of war from Korea during Swisher's tour of active duty and decorative medals and commendations associated therewith. On December 30, 2004, the Commandant's of the US Marine Corps, through Lt. Col. Dowling, issued its determination that none of the medals claimed by Swisher were awarded to him. Swisher, who was copied on said letter, was aware of its contents on January 14, 2005 when he testified. (See Affidavit of Ben Keeling.)

31. Although not produced as Jencks materials either prior to trial and not produced immediately after Swisher's direct testimony, defendant was provided with a copy of the Commandant's determination letter by Lt. Col. Dowling dated 30 Dec. 2004, on January 24, 2005, during the defense case in chief.

32. While said determination letter of the U.S. Marine Corps provided new subject matter for potential impeachment, which previously had been unknown to the defense team, defendant was not provided with a meaningful opportunity to cross examine Swisher because he was effectively denied the opportunity to bring to the trial a representative of the US Marine Corps to explain the status of Swisher's Replacement DD 214.

33. After having held the Swisher record over the weekend so that defense counsel would not have an adequate opportunity to review the same and otherwise prepare an effective approach, on Monday January 24, 2005, at the commencement of trial, the trial court gave defendant from 8:30 a.m. until 9:00 to review the NPRC provided record and offered defendant an unacceptable Hobson's choice with respect to this matter; defendant was required to choose between 1) recalling Swisher or 2) calling a person qualified to testify about Swisher's military

records, when both items should have been allowed by the Court to determine the truth and to solve the question of a fraud upon the Court and the jury and defendant.

34. Instead of allowing defendant to call both 1) a records witness regarding Swisher's Replacement DD 214 and 2) Swisher for additional cross examination after the records witness testified, the Court permitted a brief argument and then ruled that since defendant did not have a qualified records witness ready and waiting to testify as to Swisher's Replacement DD 214, then the Court made a finding that the proffered document was not, *per se*, a fraud on the Court and even if Swisher lied, it was harmless error. The Court did not consider, because the Court would not allow defendant time to develop the facts relative to Swisher's Replacement DD 214, whether said document was a forgery and since the same was presented to defendant without adequate time for investigation and preparation, defendant was unable to make an offer of proof, because defendant did not know the facts and circumstances at that time.

35. Defendant has discovered new evidence that merits a new trial on the basis of the submission of Swisher's forged Replacement DD 214, his perjury and his obstruction of justice which caused defendant to be denied a fair trial in January, 2005.

36. As proof that the jury would have voted differently on Counts Seven, Eight and Nine of the Superseding Indictment, defendant has offered the Affidavit of Ben S. Casey, one of the jurors in the January 10-27, 2005 trial in this matter who confirms that he, as a juror would not have voted to convict Mr. Hinkson, if he had known of Swisher's forged Replacement DD 214 and that Swisher's testimony as to his war record was fraudulent, thus destroying Swisher's credibility on the issue of his military background which made him not believable on the issue of Mr. Hinkson soliciting him to murder federal officials.

37. Because of the conflict in information from the NPRC letter of January 14, 2005 and Swisher's 'replacement DD 214,' the Court struck certain references to Swisher's military record. However, an issue that is inextricably intertwined with the theory of the Prosecution's case that Mr. Hinkson was so impressed by Swisher's military record that defendant wanted to hire Swisher to murder federal officials was not throw-away testimony. Especially now that the truth is known that the Replacement DD 214 was simply a forgery.

38. Defense counsel again raised the issue of Swisher's military record in defendant's case in chief and advised the Court that in order to obtain Mr. Swisher's military record, the NPRC required a subpoena bearing the signature of a judge.

39. Not knowing what would be received, a packet of information was delivered to the Court for *in camera* inspection which did not contain a certified copy of the authentic DD 214.

There being no sworn evidence as indicated above, and no opportunity to obtain a witness to testify as to the authenticity of Swisher's Replacement DD 214, two Affidavits of CWO W. E. Miller attached as Exhibit B, the determination letter prepared at the directive of the Commandant of the U.S. Marine Corps by Lt. Col. Dowling, was made a part of the official U.S. military record of Mr. Swisher. According to that determination, Mr. Swisher was not entitled to any medals.

40. According to the Chief Miller's Affidavit,
  - a. The U.S. Marine Corps did not engage in any secret missions in Korea in the post-war period when Mr. Swisher served his active duty and no part of Mr. Swisher's military record has ever been classified;
  - b. There is no evidence to corroborate Mr. Swisher's claim that he was involved in any specialized operations, such as POW rescue missions, which are reserved for Special Forces, nor did Mr. Swisher receive any schooling which would have qualified him for Special Forces operations; and Mr. Swisher was demoted from Corporal to Private First Class because of a discipline problem and otherwise had no qualifications suitable for the mission in which he claims to have participated;
  - c. Mr. Swisher was not injured in Korea, nor was he ever in Korea, or injured in combat, nor had he engaged in combat.
  - d. In fact, from CWO Miller's analysis of the record, it was apparent that.

41. The materials sent by the NPRC were received by the Court for *in camera* inspection on Friday, January 21, 2005. However, the Court withheld Mr. Swisher's military record from inspection by the defense team until Monday, January 24, 2005 and then only permitted a cursory review of the same then, immediately ruled that defendant had not produced a witness to testify about the status of said military records, there was no opportunity to obtain an authoritative witness from the NPRC or the U.S. Marine Corps by the time of the Court's ruling.

42. From the Affidavit of CWO W.E. Miller the following have been established:
  - A. Mr. Swisher's replacement DD 214 which he produced from his pocket during testimony was a forgery;
  - B. Mr. Swisher story about being involved in a secret operation in Korea after the Korean War to rescue POWs was false because the U.S. Marine Corps did not engage in any secret operations;

- C. Mr. Swisher's claims of having killed "too many" people in combat while in Korea was fraudulent;
- D. Mr. Swisher's claims of having been injured while in combat were false; and
- E. Mr. Swisher's claims to military medals were all false.

The military record to be a forgery, which record was produced by prosecution witness Elven Joe Swisher (which he waved in front of the jury stating that it was a "certified copy.") I am also advised that Mr. Swisher did not participate in a secret mission, did not have combat experience and did not sustain injuries in Korea as he testified.

43. From the Affidavit of W. J. Woodring, Jr. it is clear that he did not sign Swisher's Replacement DD 214 nor did he sign the purported supporting letter which Swisher had submitted to the US Marine Corps Headquarters in an effort to obtain the recognition of his claims of combat participation, injury and medals.

44. I was surprised that Mr. Swisher was allowed to tell such lies which created the misimpression that he would be a good "hit-man" candidate based on having been a decorated combat veteran and having participated in secret post-Korean War rescue operations. I am now informed such missions never occurred. These lies discredit him as a witness and therefore discredit the rest of his testimony.

45. I relied upon the credibility of Mr. Swisher when I cast my vote to convict Mr. Hinkson of Counts Seven, Eight and Nine.

46. If I had known that Mr. Swisher was not a credible witness as to his U.S. Marine Corps service in secret missions, or that he lied about having had combat experience, or that he was not entitled to wear a Purple Heart, or that the military record he waved in front of the jury as a "certified copy" of his DD 214 was a forgery, I would not have voted for a guilty verdict on Counts Seven, Eight and Nine.

FURTHER AFFIANT SAYETH NAUGHT.

Signed and sworn to under penalty of perjury this \_\_ day of February 2005.

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Wesley W. Hoyt