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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,)	Case No. CR-04-0127-C-RCT
)	
Plaintiff,)	
)	DEFENDANT’S RULE 33
v.)	MOTION FOR NEW TRIAL
)	OR IN THE ALTERNATIVE
DAVID ROLAND HINKSON,)	MOTION TO DISMISS
)	
Defendant.)	

Defendant, David Roland Hinkson, by and through his attorney, Wesley W. Hoyt, hereby moves for a new trial on Counts Seven, Eight and Nine of the Superseding Indictment, pursuant to Fed. R. Crim. P. Rule 33 on the basis of newly discovered evidence or in the alternative, for a complete dismissal of this case as a result of prosecutorial misconduct, outrageous government conduct and/or vindictive prosecution, all as set forth in defendant’s *Memorandum in Support of Defendant’s Motion for New Trial or in the Alternative Motion to Dismiss* and the exhibits attached thereto, as well as the exhibits attached hereto, as follows:

- Exhibit 1: Affidavit of United States Marine Corps Chief Warrant Officer W. E. Miller, as to the forgery of Elven Joe Swisher’s Replacement DD 214;
- Exhibit 2: Affidavit of Colonel W. J. Woodring, Jr. USMC Ret. as to the forgery of his signature on Swisher’s Replacement DD 214;
- Exhibit 3: Affidavit of Ben S. Casey, a juror in this matter, regarding Swisher’s credibility and the effect that a showing of fraud and forgery of military record would have had on his vote for guilty verdicts if such evidence been presented during trial; and

Exhibit 4: Affidavit of Wesley W. Hoyt as to newly discovered evidence.

The grounds for this motion are as follows:

Newly discovered evidence proves that prosecution witness Elven Joe Swisher (herein “Swisher”) obstructed justice and committed *fraud on the Court* by presenting a forged military record, and further testified that such DD 214 military record was “certified” by the Headquarters of the U.S. Marine Corps, when he knew it was not. These criminal acts obstructed justice by the misleading of the Court and the jury under 18 USC §§1503(a) and 1505 as defined in 18 USC §§1515(a)(3)(A), (B), (C), (E) and 1515(b) and are, by themselves, sufficient to justify a new trial. (See Exhibit 1, *Affidavit of Chief Miller*, pg. 8, ¶23; Exhibit 2, *Affidavit of Col. Woodring*, pg. 1, ¶4; and Certification found in Exhibit YY of *Memorandum in Support of Defendant’s Rule 33 Motion for New Trial or in the Alternative, Motion to Dismiss* showing that Swisher only recorded same in Idaho County, Idaho and then obtained the certified copy thereof from the Recorder of Idaho County, *not* with the Marine Corps.)

Presentation of the forged instrument to the Court justifies a new trial whether such action constitutes intrinsic or extrinsic evidence of impeachment under a Rule 608(b) analysis, because the egregious conduct of presenting a forged document is deemed to have interfered with the due administration of justice. *See Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944), overruled on other grounds, *Standard Oil v. United States*, 429 U.S. 18 (1976); *Oxford Clothes XX, Inc. v. Expeditors Int’l of Washington, Inc.*, 127 F.3d 574 (7th Cir. 1997). Fraud on the Court embraces attempts to defile the Court and interferes with the impartial task of adjudicating cases. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991). The distinction between intrinsic and extrinsic does not apply in the case of a fraud upon the Court. *In re Intermagnetics America, Inc.*, 926 F.2d 912, 916 (9th Cir. 1991).

If the Court had known that the document was a forgery, it would not have ruled that impeachment regarding the Purple Heart and Swisher's Replacement DD 214 was extrinsic under Rule 608(b) nor would it have limited defendant's cross examination to either the further cross examination of Swisher or the calling of a military records expert for two reasons:

1. Swisher placed his military record at issue during direct examination by wearing a Purple Heart making it intrinsic to both his credibility and the government's theory of prosecution; and
2. In order to effectively cross examine Swisher on his forged Replacement DD 214 in defendant's case in chief, it would have been necessary for defendant to have presented the testimony of a military-records expert first and to then have re-called Swisher for further cross examination in order to have laid a proper foundation for the impeaching questions to be asked of Swisher. Defense counsel would have otherwise run the risk of simply re-hashing the same argument with Swisher, had the jury not heard the testimony of such an expert as a predicate to the further cross examination.

If the Court did not know the document was forged, upon discovery of the new evidence, it is obligated to grant a new trial.

Further, Swisher's wearing of a Purple Heart medal during his testimony obstructed justice by improperly having the effect of influencing the jury when he was not entitled to wear such medal under 18 USC §704(a). (See Exhibit 1, Affidavit of Chief Miller, pg. 5, ¶¶ 20-21.) Wearing the Purple Heart made a silent "statement" to the jury regarding Swisher's credibility as a veteran injured by enemy fire which was not accurate. A statement is defined as "...nonverbal conduct of a person if it is intended by the person as an assertion." Fed. R. of Evid., Rule 801(a). The act of illegally wearing a military medal or decoration that Swisher was not entitled to wear for the purpose of asserting to the jury that he was a decorated veteran who had been injured by enemy fire in order to bolster his credibility when he knew he was not entitled to wear same was a fraud on the Court and justifies a new trial.

Swisher's alleged representations to defendant as to his experience in the military was central to the prosecution's theory in the trial of Counts Seven, Eight and Nine (the "Swisher Counts") and the jury's conviction of defendant was based upon Swisher's credibility. (See Exhibit 3 attached, Affidavit of juror Ben S. Casey.) In his direct exam, Swisher's wearing of the Purple Heart was silent testimony to the jury that he was credible as to the truth of his proclamation that he had been injured in combat. While the government asserts that it cabined its examination as to the representations Swisher made to defendant concerning his military record, and thus confined the issue to what defendant understood Swisher's capabilities were as to past military experiences, the silent testimony from the nonverbal conduct of wearing such a medal placed Swisher's entire military record at issue. The Rule 608(b) analysis changes to a Rule 607 analysis, once Swisher placed his military record at issue by Swisher on direct, the defendant is entitled to cross-examine on the witnesses' military record as it becomes relevant to the theory of the prosecution's case and the witnesses' prior testimony and is thus intrinsic.

Ruling that defendant had to choose between re-calling Swisher and calling a military-records expert was a Hobson's Choice and a denial of defendant's due process and Constitutional right to confront his accusers. The Court gave no consideration to how long it would have taken to subpoena and transport the military-records expert from St. Louis, Missouri or Washington, D.C. to Boise for trial, and after a brief argument, simply ruled that there was not enough time to produce such a witness. In summary, the newly discovered evidence establishes:

1. That Swisher's Replacement DD 214 is a forgery (See Exhibit 1, Affidavit of Marine Corps Chief Warrant Officer W. E. Miller);
2. That W. J. Woodring, Jr. who was a Captain in the USMC in 1957 did not sign either Swisher's Replacement DD 214 or the supporting letter related thereto. (See Exhibit C, Affidavit of W. J. Woodring, Jr.); and

3. That at least one of the jurors would not have voted for defendant's conviction on the Swisher Counts if the evidence regarding the fraud and/or forgery by Swisher had been presented in trial (See Exhibit 3, Affidavit of Ben S. Casey).

The prosecution prevailed on Counts Seven, Eight and Nine based on Swisher's credible delivery of a grotesque story that Mr. Hinkson pleaded with him to torture-murder the three named federal officials. His wearing of the combat-related Purple Heart medal and display of a (forged) DD 214 military record which enumerated other awards associated with killing people imparted the impression to the jury that defendant thought Swisher would entertain such a notion. Regardless of this line of reasoning, effective impeachment of Swisher's testimony could have only been based on defendant's advance knowledge of Swisher's forged military record in time for defendant to have studied the related documents and to have subpoenaed a military-records expert. Swisher's credibility would have made a difference in whether or not the jury believed Swisher's allegations. (See Exhibit 3, Affidavit of juror Ben S. Casey.) The fact that Swisher asserted that his military experiences indicated to Mr. Hinkson that he was a person capable of killing others was inextricably connected to the government's theory that defendant solicited Swisher as a hit man to murder the federal officials.

Because the prosecution was aware Swisher changed his testimony from that of being an injured combatant in the Korean War to serving a post-war classified mission in Korea that involved combat some four years after the Korean War ended, they had a duty to investigate same and produce Swisher's entire military record as Brady/Giglio material well before trial in order to allow defendant to develop his defense and avoid "trial by ambush." AUSA Sullivan had a willful attitude about disclosure even on the day of Swisher's testimony, when asked why he had not produced the Replacement DD 214, he asked: "Why should I? Swisher was busy causing people to think that he had served in the Korean War, yet he changed his story when he came to trial.

...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, ll. 21-23, and pg. 14, ll. 22-23, attached as Exhibit XX to the Memorandum in Support of this Motion.)

- Q. Did you serve in combat in the United States --- did you serve in combat in the Korean War?
- A. Not in the Korean War but following the Korean War. (Transcript of Proceedings Excerpt Re: Examination of Elven Joe Swisher January 14, 2005, attached as Exhibit UU to the Memorandum in Support of this Motion.)

The prosecution was also aware that because Swisher was born January 13, 1937 he was sixteen years old at the time of the Armistice and could not have been involved in the Korean War as he stated in his Grand Jury testimony.

Although defendant's challenge of the Swisher testimony as to the Purple Heart and the Replacement DD 214 was stricken by the Court [see Exhibit 4 attached, Affidavit of Wesley W. Hoyt concerning newly discovered evidence] defendant was not allowed to fully investigate the issue of a forgery or Swisher's acts of wearing the Purple Heart and presenting the (forged) DD Replacement DD 214 as if it was "certified" by the Headquarters of the U.S. Marine Corps inured to his credibility. Merely striking the testimony by judicial fiat could not 'un-ring' the bell. Further, defendant was discredited by his unsuccessful attempt to impeach Swisher and simply striking the testimony, even if the court took the onus upon itself, could not 'un-ring' the bell that discredited defendant.

Defendant's grounds for a new trial or alternatively, for a complete dismissal of this case are set forth in his *Memorandum of Authorities in Support of Defendant's Rule 33 Motion for New Trial or in the Alternative Motion to Dismiss* filed contemporaneously herewith and include:

1. The prosecutor's knowledge of swisher's intended use of his "certified" replacement DD 214 when he had reason to suspect that such document was a forgery and its failure to investigate the authenticity of said document before the witness presented it to the court in the presence of the jury as a credibility enhancer, was unfairly prejudicial and denied

defendant a fair trial and thus a new trial should be granted.

2. The government's willful refusal to disclose the existence of Swisher's forged Replacement DD 214 when it knew that Swisher was likely to present the same to the Court to support his credibility was prosecutorial misconduct that caused unfair prejudice to defendant and denied him a fair trial, which, along with the cumulative effect of other past prosecutorial misconduct, outrageous governmental conduct and vindictive prosecution that has occurred in this case, is sufficient cause the dismissal of the entire case;
3. The Court's ruling under 608(b) offering to allow the defense to choose between recalling Swisher or calling a military records expert was a fundamentally unfair choice and denied defendant effective cross examination, effective impeachment of Swisher and a fair trial, thus a new trial should be granted; and
4. The failure of the trial judge to recuse himself before trial when presented with a death threat directed at him personally, which came from a government informant, Chad Croner, prejudiced the trial judge against defendant, which prejudice he denied in the first instance, but subsequently admitted, after the trial was completed, thus depriving defendant a fair trial, thus, the trial judge should recuse himself and a new trial should be granted.

WHEREFORE, Defendant David Roland Hinkson moves the Court for a new trial on Counts Seven, Eight and Nine of the Superseding Indictment, pursuant to Fed. R. Crim. P. Rule 33 on the basis of newly discovered evidence or in the alternative, for a complete dismissal of this case as a result of prosecutorial misconduct, outrageous government conduct and/or vindictive prosecution.

Respectfully submitted this _____ day of March, 2005

Wesley W. Hoyt

CERTIFICATE OF SERVICE

I certify that on this ____ day of March, 2005 I have served a true and correct copy of the foregoing *DEFENDANT'S RULE 33 MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE, TO DISMISS*, upon the persons named below by the method so indicated:

Michael P. Sullivan, Esquire
Michael Taxay, Esquire
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Washington, DC 20530

G United States mail, first-class postage paid
G United States certified mail, postage paid
G Federal Express
G Hand delivery
G Facsimile: (202) 514-8714

The Honorable Richard Tallman
United States Courthouse
21st Floor
1200 6th Avenue
Seattle, WA 98101

G United States mail, first-class postage paid
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