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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID R. HINKSON, Defendant	Case No.: CR-04-0127-C-RCT MEMORANDUM IN SUPPORT OF DEFENDANT'S RULE 33 MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE, TO DISMISS

Defendant, David Roland Hinkson, by and through his attorney, Wesley W. Hoyt, hereby submits his Memorandum in Support of Motion Defendant's Rule 33 Motion for New Trial or in the Alternative, Motion to Dismiss, on Counts Seven, Eight and Nine of the Superseding Indictment, pursuant to Fed. R. Crim. P. Rule 33, or in the alternative, for a complete dismissal of this case, on the grounds and for the reasons set forth below, as follows:

Argument 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 his 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;

When the prosecution allowed Elven Joe Swisher (herein "Swisher") to present a forged document (see Exhibit RR) and offer false testimony pertaining thereto regarding a non-existent classified "Top Secret" mission, combat experience and medals he was not awarded (Id.), the prosecution allowed Swisher to engage in criminal activity (see Affidavit of Wesley W. Hoyt attached as Exhibit 4 to the Defendant's Rule 33 Motion for a New trial, pp. 9-10, ¶28-29; a

violation of 18 USC §§704A, 1503(b), 1505 and 1621 according to definitions found in §1515(a)(3)(A), (B), (C), (E) and (b)).

The presentation of Swisher's forged Replacement DD 214 constitutes a fraud upon the court which, standing alone, merits reversal of the verdict on Counts Seven, Eight and Nine, (the "Swisher Counts".) Additionally, Swisher's assertion that his Replacement DD 214 was certified by the U.S. Marine Corps Headquarters was a blatant lie, as it was only certified as a copy in Idaho County Idaho.

Presenting false or forged documents constitutes a fraud upon the court. *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) and the action of the prosecutor condoning the use of a forged document constitutes prosecutorial misconduct. Corrupt conduct by prosecuting attorneys in relying on false testimony also constitutes a fraud upon the court. *Fierro v. Johnson*, 197 F.2d 147, 155 (5th Cir. 1999), *cert. denied*, 530 U.S. 1206 (2000). As discussed in *Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109 (9th Cir. 2001):

> In *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), a case in which a defense attorney balked at his client's insistence on committing perjury, the Supreme Court amplified the dimensions of every lawyer's duty to prevent fraud upon a court. In upholding the attorney's ethical decision against his client's claim that the attorney's conduct violated his Sixth Amendment right to effective representation of counsel, the Court articulated standards found in the Canons of Professional Ethics of the American Bar Association and the Model Code of Professional Responsibility, in stating:
>
> *These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence. This special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice. Id. at 168-69, 106 S.Ct. 988 (emphasis added).*

Federal courts possess the inherent power to vacate their own judgments upon proof that a fraud has been perpetrated upon the court. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991). "Fraud upon the court" embraces that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform, in the usual manner, its impartial task of adjudging cases that are presented for adjudication. *In re Intermagnetics America, Inc.*, 926 F.2d 912, 916 (9th Cir. 1991). The distinction between extrinsic and intrinsic fraud generally does not apply to fraud upon the court. *Id.* at 916.

Here, Swisher brazenly presented a forged document which purported to corroborate his false testimony that he was entitled to awards earned in combat while on a classified mission that did not exist and could not have existed because the U.S. Marines engaged in no such missions in Korea after the Korean War. (See Exhibit RR, Affidavit of Chief Miller, pg. 6, ¶ 20E.)

As *Bowie* demonstrates, the presentation of a forged document alone is a fraud upon the court. Here, in addition, the prosecution appears to have been complicit in this fraud, at least to the extent that it did not question or investigate the authenticity of the document. Such conduct constitutes a fraud upon the court and requires reversal of defendant's conviction. (See Affidavit of Wesley W. Hoyt, Exhibit 4 to Defendant's Rule 33 Motion, Pp. 8-9.)

Moreover, Swisher's false testimony and presentation of a forged document also constitutes obstruction of justice in violation of 18 U.S.C. ' 1503(a). *United States v. Langella*, 776 F.2d 1078 (2d Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986) (false testimony a violation of ' 1503); *United States v. Faudman*, 640 F.2d 20 (6th Cir. 1981) (altering records sought by grand jury violated ' 1503); *see* 18 U.S.C. v 1515 (setting forth applicable definitions). And, if the prosecution was complicit in such conduct, it, too, may have violated ' 1503. *See United States v. Mullins*, 22 F.3d 1365 (6th Cir. 1994) (conspiracy to obstruct justice); *United States v. Barber*, 881 F.2d 345 (7th Cir. 1989) (attorney sent false letters to court relating to sentencing of his former client), *cert. denied*,

495 U.S. 922 (1990). The above-cited prosecutorial misconduct constituted unfair prejudice and denied defendant a fair trial. (See Exhibit VV, pg. 1; and Exhibit UU pg. 147.)

Argument #2

The government's failure to meet its Brady/Giglio/Jencks disclosure obligations with respect to the military record of Swisher created unfair prejudice and denied defendant a fair trial and thus a new trial should be granted;

The government's duty to disclose has evolved and expanded over the years. Brady v. Maryland 373 U. S. 83 (1963) held that due process requires the government to disclose evidence favorable to the accused, upon his request, when the evidence is material to his guilt or punishment Untied States v. Augurs, 427 U.S. 97, 107-11 (1976) subsequently held that the government's duty exits whether or not defendant makes a request. Giglio v. United States, 405 U.S. 150, 154 (1973) further expanded the government's disclosure requirements to encompass not only exculpatory evidence but also information that could be used to impeach government witnesses whose testimony is central to the government's case. (Promise of immunity made to defendant's coconspirator where government's case depended almost entirely on the witness' testimony.)

A recent Ninth Circuit case discussing the applicable principles is *United States v. Blanco*, 392 F.3d 382 (9th Cir. 2004), which held, in a drug prosecution, that the government failed to disclose material impeachment evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). The court set forth the various principles applicable under *Brady* and *Giglio*, as follows:

> The government has an obligation under *Brady v. Maryland* to provide exculpatory evidence to a criminal defendant. To establish a *Brady* violation, the evidence must be (1) favorable to the accused because it is either exculpatory or impeachment material; (2) suppressed by the government, either willfully or inadvertently; and (3) material or prejudicial. *Benn v. Lambert*, 283 F.3d 1040, 1052-53 (9th Cir.2002). The government has a duty to disclose *Brady* material even in the absence of a request by the defense. See *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995). For purposes of Brady, materiality is

measured "in terms of suppressed evidence considered collectively, not item by item." *Id.* at 436, 115 S. Ct. 1555. That is, the reviewing court should assess the "cumulative effect" of the suppressed evidence. *Id.* at 421, 115 S. Ct. 1555.

Impeachment evidence is exculpatory evidence within the meaning of *Brady*. See *Giglio*, 405 U.S. at 154, 92 S. Ct. 763; *see also United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985). *Brady/Giglio* information includes "material . . . that bears on the credibility of a significant witness in the case." *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1461 (9th Cir.1993), *amending* 976 F.2d 1235 (9th Cir.1992) (quoting *United States v. Strifler*, 851 F.2d 1197, 1201 (9th Cir.1988)) (alteration in original). Impeachment evidence is favorable *Brady/Giglio* material "when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence." Id. at 1458 (citing *Giglio*, 405 U.S. at 154, 92 S. Ct. 763); *see also United States v. Serv. Deli Inc.*, 151 F.3d 938, 943 (9th Cir.1998).

Id. at 387-88. The court continued:

"Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned." *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir.1997) (en banc). A prosecutor's duty under *Brady* necessarily requires the cooperation of other government agents who might possess *Brady* material. In *United States v. Zuno-Arce*, 44 F.3d 1420 (9th Cir.1995) (as amended), we explained why "it is the government's, not just the prosecutor's, conduct which may give rise to a *Brady* violation." *Id.* at 1427.

Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them. *Id.*; see also *United States v. Monroe*, 943 F.2d 1007, 1011 n. 2 (9th Cir.1991) (stating that "the prosecution must disclose any [*Brady*] information within the possession or control of law enforcement personnel") (quoting *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir.1985)).

Id. at 388. On this point, and in regard to the case before it, the court observed:

There is no ambiguity in our law. The obligation under *Brady* and *Giglio* is the obligation of the government, not merely the obligation of the prosecutor. As we wrote in *Zuno-Arce*, "Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does." 44 F.3d at 1427. The JDS, the form agreement by the United States Attorney's office used in this case, misstates the obligation of the government under *Brady* and *Giglio* when it provides, "Such disclosure [under *Brady* and *Giglio*] is

> limited to evidence which is known by Government counsel or which could become known by the exercise of due diligence." The government has not discharged its obligation if the AUSA ("Government counsel") has exercised due diligence by asking the DEA for all *Brady* and *Giglio* material, and the DEA has refused to provide such information in its possession. To repeat, Brady and Giglio impose obligations not only on the prosecutor, but on the government as a whole. As we said in *Zuno-Arce*, the DEA cannot undermine *Brady* by keeping exculpatory evidence "out of the prosecutor's hands until the [DEA] decide[s] the prosecutor ought to have it." Id. The DEA agents in this case should have knownCand the DEA counsel with whom the AUSA conferred almost certainly did knowCthe extent of the government's Brady obligation. *Id.* at 393-94.

In *United States v. Ross*, 372 F.3d 1097 (9th Cir. 2004), the court observed that under *Brady*,

> a defendant's due process rights are violated if the government failed to disclose evidence that is material and favorable. 373 U.S. at 87, 83 S. Ct. 1194. Evidence is material and favorable if there is a reasonable probability that the disclosure of the evidence would have changed the trial's result. *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985). The materiality of omitted evidence is assessed in the light of other evidence, not merely in terms of its probative value standing alone. *Kyles v. Whitley*, 514 U.S. 419, 436, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995); *United States v. Agurs,* 427 U.S. 97, 112-13, 96 S. Ct. 2392, 49 L. Ed.2d 342 (1976) ("[T]he omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." (footnote omitted)). The reasonable probability standard ultimately asks us to determine whether, in the absence of the undisclosed evidence, the defendant received a fair trial, "understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434, 115 S. Ct. 1555. *Id.* at 1107-08.

It is now generally held that while the importance of a witness in the government's case may be a factor, the rule extends to all government witnesses, not only to witnesses who are "central" to the government's case. United States v. Devin, 918 F.2d 280,289 (lst Cir. 1990) ("information useful to impeach prosecution witnesses falls within this rubric"); United Sates v. Osorio 929 F2d 753, 758 (lst Cir. 1991.) United States v. Bagley 473 U.S. 667, 682 (1985) (plurality opinion) announced the now familiar test of what constitutes material evidence which must be disclosed to a defendant: "favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-34 (1995) quoting Bagley, 473 U.S. at 682 (opinion of Blackmun, J.). Or, as the Supreme Court put it in Kyles, the ultimate question is whether the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles 514 U.S. at 434-35 quoting Bagley 473 U.S. at 678 ("'a reasonable probability' of a different result in accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'".) Kyles 514 U.S. at 433-34 quoting Bagley 473 U.S. at 682 (plurality opinion); explicitly "disavowed any difference between exculpatory and impeachment evidence for Brady purposes. See United States v. Osorio, 929 F.2d 753, 758 (lst Cir. 1991.)

Moreover, Kyles made explicit that Bagley materiality must be looked at "in terms of the cumulative effect of suppression" which, while "leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. Kyles at 514 U.S. at 437. Kyles stressed that it is the prosecution which has "the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached" and that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case including the police." Id. (emphasis added.) Finally, while the Court stated that procedures and regulations can be established to carry the prosecutors burden, it is the individual prosecutor who must make the judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." Id. At 439 (emphasis added); See United States v. Owens, 933 F. Supp. 76, 88(D.Ma. 1996) ("this document review has got to be carried out by an Assistant U.S. Attorney".) "A prosecutor's office cannot get around Brady by keeping itself in ignorance, or compartmentalizing information about

different aspects of the case." Carey v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984); Osorio 929 F3d at 761 ('the prosecutor cannot avoid finding out what 'the government' knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge.")

The ultimate determination of must be disclosed as Brady is whether the information in the files, along with any other information favorable to defendants rises to the level of Brady material.[1] This includes any information in those files which may be relevant to the integrity of the underlying investigation and the manner in which it was conducted. See Kyles 514 U.S. at 446 and notes 15 and 19. Kyles alone makes clear that the government's duty is to review its files for Brady/Giglio/Bagley/Kyles.

The directive in Kyles to prosecutors – assess what information exists, it cumulative effect and determine if it rises to the level of Brady material requiring disclosure – can be complied with only if the prosecutors review the files. Contrary to the government's view, Kyles and Augurs make clear that it is not the defendants' duty to identify exculpatory Brady material withheld by the government. Augurs 427 U.S. at 107-11. Rather, it is the government's duty to search for it, assess it and disclose it if necessary. See e.g. Osorio 929 F.2d 753, 761 (1st Cir. 1991) ("an Assistant U.S. Attorney using a witness with an impeachable past has a constitutional derived duty to search for and produce impeachment information.") Here, the prosecution had a duty to investigate Swisher's military record and disclose its findings as impeachment information to the defendant.

The Confrontation Clause of the Sixth Amendment secures a defendant's right to cross-examine government witnesses. *Crawford v. Washington*, _ U.S. _, (March 8, 2004); *United States v. Adamson*, 291 F.3d 606 (9th Cir. 2002); *see Davis v. Alaska*, 415 U.S. 308 (1974). Although the Confrontation Clause does not guarantee unbounded scope in cross-examination, it does guarantee

[1] See United States v. Leung. 40 F3d 77, 582-83 (2nd Cir. 1994) (government file of non-testifying informant who was government witness' brother ordered reviewed in camera where government agreed to bring witness' cooperation to the attention of his brother's sentencing judge.

an opportunity for effective cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *United States v. Adamson*. Central to the Confrontation Clause is the right of a defendant to examine a witness's credibility. *United States v. Adamson*. While a district court has discretion to limit cross-examination, it may not impose restrictions that limit relevant testimony and prejudice the defendant. *United States v. Wilmore*, 381 F.3d 868 (9th Cir. 2004); *see United States v. Harris*, 185 F.3d 999, 1088 (9th Cir.) (although "the district court can exercise discretion to avoid undue consumption of time and confusion of issues in the cross-examination, these legitimate concerns cannot justify so severe a limitation as to prevent the jury from finding out what it needs in order to judge rationally whether the witness might be lying or shading the truth"), *cert. denied*, 528 U.S. 1055 (1999). See Affidavit of Wesley W. Hoyt, Ex. 4 to Defendant's Rule 33 Motion as to newly discovered evidence and what the jury in this matter needed to know.

When the case against the defendant turns on the credibility of a witness, the defendant has broad cross-examination rights. *United States v. Brooke*, 4 F.3d 1480, 1489 (9th Cir. 1993); *United States v. Ray*, 731 F.2d 1361, 1364 (9th Cir. 1984). As explained in *United States v. Brooke*:

> We cannot overemphasize the importance of allowing full and fair cross-examination of government witnesses whose testimony is important to the outcome of the case. Out of necessity, the government frequently relies on witnesses who have themselves engaged in criminal activity and whose record for truthfulness is far from exemplary. These witnesses often have a major personal stake in their credibility contest with the defendant. **Full disclosure of all relevant information concerning their past record and activities through cross-examination and otherwise is indisputably in the interests of justice**. Ordinarily, such inquiries do not require the expenditure of an inordinate amount of time, and courts should not be reluctant to invest the minimal judicial resources necessary to ensure that the jury receives as much relevant information as possible. Nor should unwarranted fear of juror confusion present any impediment. Federal jurors, who are expected to follow the complex testimony and even more intricate instructions that are presented in many of our criminal cases, such as multiple conspiracy prosecutions, are unlikely to be confounded by a defendant's inquiry into the bias and credibility of a key government witness. In any retrial, the district court should afford Brooke [the defendant] a full and fair opportunity to question Kearney regarding any of his past activities that are probative as to the credibility of his testimony or as to any bias that may underlie it. 4 F.3d at 1489, emphasis supplied.

In this case, the district court severely limited defendant's right to cross-examine the government's key witness as to his credibility, particularly with respect to the forged DD 214 which Swisher claimed established the truthfulness of his testimony and which was the basis for the government's theory that defendant wanted to hire him as a hitman. The court did not permit defendant the opportunity to fully explore this matter as to authenticity and by cross-examination of Swisher. Such limitations violated defendant's Confrontation Clause right to cross-examine the witness as to his credibility. *See, e.g.*, *United States v. Schoneberg*, 396 F.3d 1036 (9th Cir. 2005); *United States v. Adamson*; *United States v. Ray*.

Contrary to the district court's ruling, defendant's proffered cross-examination was not precluded by Fed. R. Evid. 608(b). Rule 608(b) provides as follows:

> **b) Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Rule 608(b) allows a party to inquire on cross-examination into specific instances of a witness's conduct provided those instances concern the witness's character for truthfulness or untruthfulness. *United States v. Munoz*, 233 F.3d 1117, 11135 (9th Cir. 2000). Evidence of a witness's forgery is probative of character for truthfulness and cross-examination concerning such misconduct is proper under Rule 608(b). *United States v. Waldrip*, 981 F.2d 799 (5th Cir. 1993); *see United States v. Leake*, 642 F.2d 715 (4th Cir. 1981); *United States v. Munoz*, 233 F.3d at 1135 (evidence of prior frauds perpetrated by the witness is generally considered probative of the witness's truthfulness and thus cross-examination into specific incident of fraud was proper). Furthermore, although Rule 608(b) generally precludes the admission of extrinsic evidence of

specific instances of conduct of the witness when offered for the purpose of attacking credibility, such Rule does not apply to direct impeachment when extrinsic evidence is used to show that a statement made by a witness on direct examination is false, even if the statement is about a collateral issue. *See United States v. Fleming*, 19 F.3d 1325, 1331 (10th Cir.), *cert. denied*, 513 U.S. 826 (1994); *Carter v. Hewitt*, 617 F.2d 961 (3d Cir. 1980) (when extrinsic evidence concerns specifically mentioned instances raised by a witness and is obtained from and through the direct examination of the very witness whose credibility is under attack, the core concerns of Rule 608(b) are not implicated and the Rule is not violated).

Swisher's wearing of a Purple Heart Medal is silent testimony (Rule 801(a))as set forth in Defendant's Rule 33 Motion and the matter changes to a Rule 607 analysis. Similar silent testimony of badges worn during trial has been held to deprive the defendant of cross-examination and allowing the wearing of an item which generates a non-verbal message has been held reversible error. *Norris v. Risley*, 918 Fed 828, 833 (9th Cir 1990).

Post-trial, defendant has obtained the Affidavit of Chief Warrant Officer W. E. Miller on February 24, 2005, stating that Swisher's Replacement DD 214 was a forgery and that he had received no awards or medals. The Court did not permit an adequate inquiry into the foundational document that Swisher claimed was the basis for him to wear the Purple Heart, even though there was *prima facie* evidence to call in question the authenticity of that document. To the extent that defendant would have been able to show that the Swisher's Replacement DD 214 was a forgery defendant would also have been able to have drawn the strong inference that Swisher's testimony about Hinkson was false. Such cross-examination was proper under Rule 607 and not precluded by 608(b), and the Court's ruling allowing defendant only to recall Swisher or call a military records expert was an unreasonable restriction on the confrontation right. *See United States v. Waldrip*; *United States v. Ray*; *United States v. Calle*, 822 F.2d 1016 (11th Cir. 1987); *United States v. Leake*.

A confrontation clause violation is subject to harmless error analysis. *Delaware v. Van Arsdall*; *United States v. Schoneberg*. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, the court might nevertheless say that the error was harmless beyond a reasonable doubt. *Delaware v. Vanarsdall*; *United States v. Schoneberg*. The importance of the testimony to the case, presence or absence of other evidence corroborating or contradicting the witness, the extent of permitted cross-examination, and overall strength of the prosecutor's case are among the factors in determining whether the error was harmless. *Delaware v. Vanarsdall*; *United States v. Schoneberg*.

Applying these factors in this case, it is clear that the error in so limiting cross-examination was not harmless. Swisher was the key government witness and the only witness as to Counts Seven, Eight and Nine and the case boiled down to a question of his credibility. The prohibited cross-examination, if predicated by the testimony of a military records expert, would have shown Swisher to be a liar and a fraud. Therefore, the error cannot be considered harmless. *See United States v. Schoneberg* (district court's limitation on defendant's cross-examination as to witness's credibility, in violation of confrontation clause, was not harmless and required reversal, where case came down to relative credibility of coconspirator and defendant); *United States v. Adamson*, 291 F.3d at 614 (district court's improper limitation on defendant's cross-examination of important government witness with respect to credibility was not harmless; defendant's "inability to attack [witness's] credibility could have been the defense's fatal flaw"); *United States v. Ray*, 731 F.2d at 1364-65 (court's refusal to permit cross-examination of crucial government's witness's illegal activities deprived jury of important information of witness's bias and constituted reversible error); *United States v. Calle*, 822 F.2d at 1020-21 (district court committed reversible error in refusing to allow a rebuttal witness to testify that the government's star witness was a major drug-trafficking and not the "small-time drug user" as he portrayed); *United States v. Leake*, 642 F.2d at 719 (district

court's refusal to permit defendant to cross-examine crucial government witness about allegations that he obtained money under false pretenses, defrauded on innkeeper, wrote six insufficient checks, and had a number of default judgments entered against him constituted reversible error). Therefore, a new trial should be granted on the Swisher Counts and wide latitude given to Swisher for impeachment by a military records expert and by cross examination.

Argument #3

The government's willful refusal to disclose Swisher's replacement DD 214 when it knew that Swisher was likely to present the same to the court to bolster his credibility was yet another case-related instance of 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 in this case, is sufficient cause to dismiss the entire case

This portion of Defendant's Motion is supported by the attached Exhibits A-YY, which are incorporated herein by reference. A further example of this unfair prejudicial conduct was demonstrated by AUSA Sullivan who willfully failed to disclose the existence of Swisher's (forged) Replacement DD 214 and when asked why he did not do so said, "Why should I?" (Excerpt of testimony of Elven Joe Swisher, January 14, 2005, pgs. 148, ll. 1-5.)

Why should he have? Because justice, fairness, the rules of discovery and an Order of this Court all required it so that defendant might have been able to prepare a defense, that's why. Asking the question "Why should I?" in this context is the very essence of willfulness.

A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States v. Agurs*, 427 U.S. 97 (1976); *Allen v. Woodford*, 395 F.3d 979 (9th Cir. 2005). The prosecutor has an independent, constitutional duty to correct testimony he knows to be false. *Napue v. Illinois*, 360 U.S. 264 (1959); *Belmontes v. Woodford*, 350 F.3d 861 (9th Cir. 2003). *Napue* requires the prosecutor to act when put on notice of the real possibility of

false testimony. *Belmontes v. Woodford*. If the prosecutor knowingly uses perjured testimony or knowingly fails to disclose that the testimony is false, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury verdict. *United States v. Alli*, 344 F.3d 1002 (9th Cir. 2003). (See Exhibit VV, Affidavit of juror Ben S. Casey.) The prosecutor's obligation obtains even though the government does not solicit the false testimony, and the false testimony goes only to the credibility of the witness, not substantive evidence. *Napue v. Illinois*; *United States v. Alli*. The scope of this duty reflects the prosecution's fundamental responsibility to promote justice, fairness, and truth, rather than simply to win. *United States v. Alli*. Furthermore, the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false. *Id.* To prevail on such a claim, the defendant must show that (1) the testimony was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material. *United States v. Zuno-Arce*, 339 F.3d 886 (9th Cir. 2003), *cert. denied*, 540 U.S. 1208 (2004); *see Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109 (9th Cir. 2001) (prosecutor had a duty to investigate letter which appeared to be written by informant, indicating that informant was guilty of crimes for which defendant was charged, and which would have alerted prosecutor to strong possibility that witness agreed to testify falsely against defendant in order to benefit informant; failure to investigate violated due process rights of defendant and required a new trial); *United States v. LaPage*, 231 F.3d 488 (9th Cir. 2000) (even though false testimony only went to witness's credibility, prosecutor's knowing failure to correct the testimony was denial of due process and required a new trial).

It is noted with regard to dismissal of the indictment, the court in *United States v. Ross* stated:

> Dismissal of an indictment is warranted where outrageous law enforcement conduct violates due process. *See United States v. Simpson*, 813 F.2d 1462, 1464-65 (9th Cir.1987) ("*Simpson I* "). Even where no due process violation exists, a federal court may dismiss an indictment pursuant to its supervisory powers. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255, 108 S. Ct. 2369, 101 L. Ed.2d 228 (1988). As with the power to dismiss an indictment for due process violations, supervisory powers do not flow from Rule 33. Supervisory powers are a means by which the federal courts fulfill their role in the criminal justice system: "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States,* 318 U.S. 332, 340, 63 S. Ct. 608, 87 L. Ed. 819 (1943). The supervisory powers provide a wider range of remedial options than would otherwise exist, but are not typically considered to be an independent basis for post-conviction review. *See id.* (observing that "the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity"). 372 F.3d at 1107.

The entire case against Mr. Hinkson should be dismissed, as he has clearly shown by obtaining the Affidavit of Marine Corps Chief Miller that (1) Swisher's testimony as to his military career and record was absolutely false, (2) the prosecution knew or should have known that his testimony d was actually false, and (3) that his false testimony was absolutely material to his conviction. Certainly, Mr. Hinkson's conviction on the Swisher Counts was inextricably tied to Swisher's false and fraudulent testimony, both verbal and silent by his wearing of a military award to which he was not entitled. Therefore, dismissal of the entire case is warranted and defendant so moves.

Argument #4

The failure of the trial judge to recuse himself when personally presented with a death threat that was concocted by government informant Chad Croner shortly before trial was unfairly prejudicial and denied defendant a fair trial, especially in light of the Court's inconsistent response to said threat and its continual show of bias in favor of the government and prejudice against the defendant, as found in the trial record.

Prior to trial, at the Pretrial Conference of January 7, 2005, the Court considered Defendant's Motion for Recusal which was based on recently disclosed statement by jailhouse snitch, Chad Croner that defendant had solicited him to kill, *inter alia*, the sitting trial judge in this

case, Richard C. Tallman of the 9th Circuit Court of Appeals, sitting by designation as a Federal District Court judge in this case.

At said Pretrial Conference, Judge Tallman called to order the assembled parties and their attorneys and directed that the first order of business should be the Motion to Recuse. Whereupon, Judge Nelson, also a judge of the 9th Circuit assumed the bench and a hearing of approximately twenty minutes in length was held on defendant's Motion to Recuse. (No transcript of said hearing is available because Judge Nelson entered an order sealing the same.)

The Motion to Recuse was denied by Judge Nelson on the basis that (paraphrasing for lack of an exact transcript which has been sealed) 'a defendant should not be able to manipulate the selection of a judge by a death threat, especially just prior to trial.' Judge Nelson's ruling assumed that Mr. Hinkson had indeed made a death threat against Judge Tallman solely on the basis of Croner's statements, which were not corroborated and in fact were later impeached.

Judge Tallman then assumed the bench and proceeded with the pretrial conference, at the conclusion of which he stated that he knew the defendant and that he was not concerned with the threats and was not prejudiced by them, indicating that he did not take the Croner statements seriously.

However, in his post-trial order regarding defendant's continued detention, Judge Tallman stated, "In addition, the court credited the testimony introduced at trial that, while the defendant has been incarcerated pending sentencing in the tax case and trial on theses charges here, the defendant has continued to engage in efforts to solicit murders as recently as November, 2004. The Court finds that this past misconduct demonstrates, beyond question, that's to release the defendant would place the lives and safety of others and the community at large in jeopardy." (Rough Draft Excerpt of Proceedings held Thursday, January 27, 2005, at page 7023.)

The Court should recuse itself under 28 U.S.C. § 455(a) from any further participation in this case because it has been shown that where false threats were allegedly made against the Judge by a non-credible government informant which may affect his security, an open and obvious attempt by the government to prejudice Judge Tallman against defendant has existed. In this instance, there was no showing or finding that the Court decided to credit Croner and therefore the Court should have, *sua sponte*, notified council of the date and time of that decision so that a Motion to Recuse could have been submitted. Judge Tallman, in crediting the Croner testimony, was either prejudiced at the outset of trial, or became so during the trial. In either event, the prejudice created by the government requires recusal.

Defendant respectfully moves that this Court to recuse itself pursuant to 28 U.S.C. § 455(a), which provides that a federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The "substantive standard for recusal" is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997) (internal quotations and punctuation omitted). Recusal thus may be required "even absent any evidence of actual bias." Mangini v. United States, 314 F.3d 1158, 1161 (9th Cir. 2003).

Here, the Court has demonstrated actual bias for the government and prejudice against the defendant as demonstrated throughout the proceedings, as outlined in defendant's Exhibits A-YY and under 28 USC 455(b) if the Court has knowledge of information about the case, then he is obligated to recuse himself. On January 7, 2005, the Court stated that he knew defendant and did not take seriously the threat, demonstrating that that it had actual knowledge of the case.

The Court was "informed of the alleged threat" on December 8, 2004 and was "told that the U.S. Marshals Service was conducting an investigation into its legitimacy, but has thus far received no assessment of the credibility of any alleged threat." (See Dkt. #113, Order.) The Court

presumably had off-the-record, *ex parte* communications with the U.S. Marshals Service of Boise, Idaho, which naturally drew the attention of the Court to an investigation and away from its judicial function. Such communications may have resulted in this Court obtaining "personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1); see generally Edgar v. K.L., 93 F.3d 256, 259-62 (7th Cir. 1996) (holding that a district judge's in-chambers, off-the-record discussions with experts required disqualification).

How the Court is to be advised of the legitimacy of any alleged threat, when the Court is to be advised thereof, who will do the advising, under what circumstances the advisement will take place as well as the other facts and circumstances of this case, are all issues that may undercut the appearance of impartiality required of a judicial officer evaluating and ruling upon the entire panoply of other necessary issues, including motions in limine, voir dire, the admissibility of in-court evidence in the case against defendant, jury instructions, etc.

A reasonable person might well question the impartiality of the sitting judge reviewing the sufficiency of the evidence regarding a crime allegedly committed against the Judge himself. Where the presiding judicial official in a case is said to be the target of a threat, recusal is usually a certain result. Even where a judicial colleague is threatened, Federal courts have been sensitive to recusal issues. For example, in the mail bombing murder of former Eleventh Circuit Judge Robert Vance, all Eleventh Circuit judges recused themselves from the appeal and a special panel from outside the Circuit was appointed. United States v. Moody, 977 F.2d 1420, 1423 (11th Cir. 1992). And, in the Oklahoma City bombing case, the Tenth Circuit ordered recusal of an Oklahoma City federal district judge – and assigned the case to a judge from outside the entire state of Oklahoma – where the Oklahoma City federal courthouse and some staff had been affected by the crime, even though the judge himself had not been injured. Nichols v. Alley, 71 F.3d 347 (10th Cir. 1995). One exception to this trend is United States v. Harrelson, 754 F.2d 1153, 1164-66 (5th Cir. 1985), where

the court declined to require recusal of an in-District colleague of the murdered federal judge; that decision seems aberrational and later Fifth Circuit case law more strictly requires an appearance of impartiality. See, e.g., United States v. Jordan, 49 F.3d 152, 156-58 (5th Cir. 1995).

A reasonable observer could question virtually every aspect of how the proceedings have been handled after the Court was provided with the ex-parte advisement on December 8, 2004. In making this statement, we suggest that the Court has now demonstrated actual bias, as it has been reported by jurors that after the verdict was entered Judge Tallman said, "he [defendant Hinkson] hasn't learned his lesson yet." The test is not how the judiciary would view the situation, however, and a court must be "mindful that an observer of our judicial system is less likely to credit judges' impartiality than the judiciary." Jordan, 49 F.3d at 157. With this standard in mind, a reasonable outside observer could question not simply the general propriety of this Court's presiding over issues raised by pretrial motion which were all denied both before and after December 8, 2004. However, once the alleged threat had been communicated ex-parte and defendant was not advised of the alleged threats, not given notice of the advisement, no record was made of the advisement and no hearing was held concerning said advisement, and the trial became a showcase for the prosecution's theory in the most unevenhanded manner possible, then, in hindsight, it can be said of the Court presiding over the entire case from that point forward, that he did so in a prejudiced state of mine and at his peril and should have recused himself.

CONCLUSION

For the foregoing reasons, defendant prays for reversal of his conviction on Counts Seven, Eight and Nine, a new trial or in the alternative,dismissal of the entire case and the recusal of Judge Richard C. Tallman.

Respectfully submitted this ___ 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 *Memorandum of Law in Support of Defendant's Rule 33 Motion for New Trial or in the Alternative Motion to Dismiss* upon the persons named below by the method so indicated:

Michael P. Sullivan, Esquire Michael Taxay, Esquire United States Department of Justice 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 G United States certified mail, postage paid G Federal Express G Hand delivery G Facsimile: (206) 553-6306

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