No. 03-30303

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID RONALD HINKSON

Defendant-Appellant.

FILED

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U.S. COURT OF APPEALS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO, D.C. No. CR-04-00127-RCT
The Honorable Richard C. Tallman, *U.S. Circuit Judge for the Ninth Circuit*
(sitting by designation)

PETITION FOR REHEARING EN BANC

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INTRODUCTION

A divided panel of this Court reversed the decision of the Honorable Richard C. Tallman denying appellant's motion for retrial based on newly-discovered evidence. In reaching that result, the majority's individual rulings raise questions of substantial importance as to the standard of review for the denial of such motions, and its approach is at odds with the decisions of this Court in United States v. Harrington, 410 F.3d 598, 410 (9th Cir. 2005), cert. denied, 546 U.S. 1115

(2006), and United States v. George, 420 F.3d 991 (9th Cir. 2005). En banc review is therefore warranted under Fed. R. App. P. 32(b).

First, although the majority paid lip service to the principle that the abuse of discretion standard applies and that, absent clear error, an appellate court will not overturn the denial of a new trial, (Add. 15)[1] – as Judge McKeown observed in her dissent – it "assumed the role of a super trial court rather than a reviewing court . . . nowhere . . . giv[ing] any deference to the district court's detailed findings." Add. 35. In practical effect, the majority's approach effectively revises the standard of review that governs new trial motions. Further review is necessary to clarify that the proper standard is the abuse of discretion standard, and to ensure that it is to be applied in fact, not only in theory.

The majority also erred in disregarding Judge Tallman's crucial determination that the "newly discovered" evidence at issue was not "material" to any issue at trial and related solely to a collateral issue. The majority committed this error by eliding three of the five separate components that Harrington prescribes for evaluating such motions. Thus, instead of assessing whether the "newly discovered" evidence was merely collateral or impeaching, the majority

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[1] "Add." refers to panel decision, contained in the Addendum to our petition. "ER" refers to the defendant's Excerpts of Record on appeal. "SER" refers to the Supplemental Excerpts of Record.

pretermitted that inquiry because, in its view, the evidence could result in an acquittal in a hypothetical retrial. As Judge McKeown observed, (Add. 42 n.5), such an approach is inconsistent with that followed by another panel of this Court in United States v. George, 420 F.3d 991. Further review is warranted to ensure consistency in this Court's caselaw governing application of the Harrington factors.

STATEMENT

A. Trial Testimony Concerning the Murder Solicitations

Following a jury trial in the District of Idaho, the defendant was convicted on three counts of soliciting Elvin Joe Swisher to murder United States District Court Judge Edward J. Lodge,[2/] AUSA Nancy Cook, and IRS Agent Steven Hines all of whom had been involved in the defendant's tax investigation and ultimate prosecution (Counts 7-9). The jury acquitted the defendant of counts alleging that he had solicited James Harding to murder the officials and of counts alleging that he had threatened the children of Cook and Hines (Counts 1-3, 10-11). It deadlocked on counts alleging a second solicitation of Harding (Counts 4-6). Add. 4.

[2/] Judge Lodge did not preside at the defendant's tax evasion trial but compelled grand jury testimony leading to the defendant's indictment.

At trial, Swisher, Harding, and Rich Bellon, a legal researcher who had worked for Hinkson, all testified concerning the defendant's solicitations to murder federal officials. Harding testified that in January 2003, the defendant solicited him to kill the three officials, offering $10,000 per victim. According to an eyewitness, the defendant handed Harding $10,000 in cash and said that it could be his if he killed the officials. Harding added that from January to March 2003, the defendant repeatedly stated that the officials should be tortured and killed, and repeated his offer to pay Harding to do so. Add. 25-27.

Bellon testified that, after the defendant's November 2002 arrest on tax charges, anger toward the officials became the central focus of his life. He told Bellon that the officials were conspiring to steal his business and that he "would pay to see them dead." SER 123-132.

The government's theory at trial was that the defendant had also solicited Swisher to commit the murders because he knew Swisher to be an excellent marksman and he believed that Swisher was a Marine Corps combat veteran who had killed in the line of duty. Bellon testified that the defendant had told him that Swisher had "an extensive military background, that he had been in combat, and that he had killed people during war." SER 132. Swisher testified that in July or August 2002, the defendant, referring to his combat experience, solicited him to

kill Cook and Hines. Swisher further testified that in January 2003, the defendant again offered him $10,000 a head to torture and murder Cook and Hines and their families, this time adding Judge Lodge to the list. Swisher stated that he reported the solicitations to a local prosecutor and that, by the time of trial, he and the defendant were bitter enemies. Add. 5. Finally, an FBI agent testified that the defendant admitted to him that it would be worth $10,000 to see the agents dead. SER 192-193.

B. Developments During and After Trial Concerning Swisher's Military Record.

During his testimony, Swisher wore a lapel pin that appeared to be a replica of the Purple Heart Medal. Add. 4. Following Swisher's cross-examination (which did not include inquiry concerning his military record but which focused on his feud with the defendant), defense counsel requested a sidebar. He stated that he had just received a letter from the National Personnel Records Center ("NPRC") reflecting that Swisher had never been awarded the Purple Heart. Add. 5. Judge Tallman then permitted defense counsel to reopen cross examination to ask Swisher about his military record. Swisher testified that he had been wounded while engaged in a secret mission to free POWs in North Korea. Add. 6. Defense counsel then showed Swisher the NPRC letter. In response, Swisher produced a

"replacement copy" of a Department of Defense Form 214 ("DD 214"),[3] purportedly signed by a Captain W.J. Woodring. It reflected that he had been wounded and had received a number of decorations, including the Purple Heart. Add. 7. At another sidebar, the prosecutor stated that he had received the replacement DD 214 from Swisher that morning but he had not disclosed it to the defense because, in his view, it was neither exculpatory nor the subject of inquiry on direct examination. Judge Tallman denied a defense motion for a mistrial finding that the non-disclosed form was not impeaching. At the request of the defense, Judge Tallman instructed the jury to disregard Swisher's testimony concerning the Purple Heart. Add. 8.

On January 19, 2005, during presentation of the defense case, defense counsel informed the court that he had reason to believe that the "replacement" DD 214 Swisher had produced in court was a forgery.[4] Later that day, Judge Tallman directed the NPRC to produce Swisher's military personnel record, which he received on January 21st. Also on January 21st, the government provided Judge Tallman with a letter issued by the Assistant Chief of the Military Awards

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[3] A DD 214 is a document issued to members of the armed forces upon discharge that summarizes their military record, including awards, decorations and wounds received in action.

[4] Defense counsel obtained from the State of Idaho another copy of Swisher's DD Form 214. It was devoid of references to awards or combat wounds. Add. 8

Branch, Lieutenant Colonel K.G. Dowling (hereafter "Dowling letter"). It verified that the DD 214 Swisher had produced at trial was fraudulent. ER 71 [5] On January 21st, the prosecutor represented to the court that he understood that an FBI agent had obtained the letter "the day before" from the State Veterans' Affairs Office. ER 41; Add. 9.[6]

Judge Tallman then reviewed Swisher's military personnel file, which included an original copy of his DD 214. None of the documents in the file substantiated his entitlement to the Purple Heart Medal .[7] Add. 10. On January 24th, Judge Tallman announced that, after reviewing Swisher's military record, he could not conclude with certainty where the truth lay with respect to Swisher's military history, particularly as the documents recorded events that occurred 50 years ago and purported to involve classified activities. Add. 11. Judge Tallman observed that to resolve the authenticity of Swisher's "replacement" DD 214, he would need to hear from a records custodian; the prosecutor added that, in order

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[5] The Dowling letter was stamped "received" January 10, 2005, four days before Swisher took the stand; and indicated that it had been faxed to an unknown destination on January 13th, the day before he testified.

[6] By a subsequent letter, the prosecutor represented to the panel that the agents saw the letter on January 18 or 19 and obtained a copy on January 19th.

[7] The "replacement" DD 214 purportedly signed by Capt. Woodring was included, along with the Dowling letter, in the file. It had been sent to Dowling for evaluation. Add. 10.

for the issue of authenticity to be resolved, defense counsel would have to prove that the document was forged. Add. 11-12.

Judge Tallman granted defense counsel's request to further cross-examine Swisher and, during that examination, specifically allowed the defense to refer to the "impeaching documents." Expressing reluctance to hold a "peripheral mini-trial" on what he viewed as a collateral matter, however, he excluded the documents under Fed. R. Evid. 608(b) and 403. On January 25, the defense rested. It informed the court that it did not wish to recall Swisher. Add. 11-12.

C. Defendant's New Trial Motion

On March 3, 2005, defense counsel moved for a new trial based upon newly-discovered evidence. In support of the motion, the defendant proffered the affidavit of now-retired Colonel W.J. Woodring who stated that his purported signature on Swisher's "replacement" DD 214was a forgery; and the affidavit of Chief Warrant Officer W.E. Miller, the Marine Corps liaison at the NPRC, who stated that, after reviewing Swisher's records, he concluded that Swisher's "replacement" DD 214 was not authentic. Add. 13.

Judge Tallman denied the new trial motion. Addressing each component of the multi-factor test explicated in United States v. Harrington, 410 F.3d 598 (9th Cir. 2005), cert. denied, 546 U.S. 1115 (2006), he concluded that defense counsel

had not been diligent in seeking the evidence; that the evidence was generally cumulative of previously available information concerning Swisher's military record; that the "newly-discovered" evidence was not "material" to the trial because whether Swisher was actually a decorated combat veteran was never relevant to whether the defendant thought Swisher was a seasoned killer; that the alleged evidence was merely cumulative impeachment material; and that, because, the newly-discovered evidence would be inadmissible at a new trial under Fed. R. Evid. 608(b) and Fed. R. Evid. 403, a retrial probably would not result in an acquittal. ER 134-137.[8]

D. The Opinion of the Panel

A divided panel of this Court (Fletcher & Hug, J.J., McKeown, J., dissenting) reversed. Add. 1-44. The majority purported to review Judge Tallman's decision by reference to the five factors set out in Harrington, upon which Judge Tallman had relied:

> (1) the evidence must be newly discovered; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial; (4) the evidence must be neither merely cumulative nor

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[8] In July 2007, the government indicted Swisher for wearing military decorations to which he was not entitled, making misrepresentations concerning his military record to obtain benefits, and giving false testimony. He was convicted of those offenses in April 2008. Add. 15.

impeaching; (5) the evidence must indicate that a new trial would probably result in an acquittal.

Harrington, 410 F.3d at 601. Nonetheless, the panel majority observed that "we have recognized that requirements (3), (4) and (5) are duplicative. That is, newly discovered evidence is material when the result of the newly discovered evidence is that a new trial would probably result in an acquittal, a condition that is not usually met when the newly discovered evidence is cumulative [ ] or merely impeaching." Add. 15 (internal quotation marks deleted).

The panel majority then conducted a detailed review of the evidence presented at trial and the events surrounding the discovery that Swisher had falsified his military record, finding that the defendant had satisfied each of the Harrington factors. Add. 16. With respect to the materiality component, the majority conceded that Judge Tallman's "ruling under Rule 403 [that the newly-discovered Woodring and Miller affidavits were inadmissible] was almost certainly not an abuse of discretion" (Add. 20). Nonetheless, it reasoned that, even if not admitted, the mere use of such information to cross examine Swisher would probably result in an acquittal on retrial. Ibid.

With respect to the "merely impeaching" prong of the Harrington test, the panel majority reasoned that "sometimes 'newly-discovered impeachment

evidence may be so powerful that, if it were to be believed by the trier of fact, it could render the witness' testimony totally incredible.'" Add. 35 (quoting United States v. Davis, 960 F.2d 820, 825 (9th Cir. 1992)). It concluded that was the case here. Add. 22-23. Finally, as to the likelihood of an acquittal, the majority determined that "a new trial would be a disaster for the government." Add. 35. Despite acknowledging that the evidence showed that the defendant had asked multiple people, including Swisher, to kill Cook, Hines and Lodge, and that the defendant repeatedly told others he wanted to torture and kill the officials as well as the children of Cook and Hines (id. at 25, 28), the majority observed that "Swisher was the only witness to provide direct evidence that Hinkson solicited him to commit the killings." Add. 34. Specifically, it observed that Swisher was the only witness who testified as to whether the defendant's solicitations of him were made seriously, rendering his credibility of crucial significance on the element of intent. Add. 23. The majority reasoned that, as to Swisher's credibility, "[a] new jury would not only learn, as the first jury did, that Swisher and Hinkson, once friends, had become bitter enemies . . . . It would also learn, as the first jury did not, that Swisher has no compunction about lying under oath to serve his ends, and that he lied under oath and produced forged documents at Hinkson's first trial." Id. at 34-35.

Judge McKeown dissented (Add. 35-44). In her view, the majority had effectively substituted its judgment for that of Judge Tallman in determining whether the defendant was entitled to a new trial and that the defense satisfied none of the Harrington factors entitling him to such relief. She further observed that, in reviewing the Harrington factors, the panel majority erred by characterizing the issue of the materiality of the "newly-discovered" evidence as coextensive with the ultimate issue whether acquittal would be probable, when such evidence was only pertinent to a collateral point. Add. 42 n.5.

Addressing the majority's reliance upon the proposition that, in limited cases, impeachment evidence may constitute a basis for a new trial, she observed that, while a district court may find it probable that an acquittal would result when the bulk of key witness testimony is shown to be false, Swisher's testimony concerning his Purple Heart spanned only three out of over 100 pages of record and that those pages had been stricken from jury consideration. Add. 41-42.

REASONS FOR GRANTING EN BANC REVIEW

1. As Judge McKeown observed, "[i]n granting a new trial, the majority has assumed the role of a super trial court rather than a reviewing court" and, in doing so, has failed "to give deference to any of the district court's detailed findings." It did so in disregard of the settled principle that "'[u]nder the abuse of discretion

standard, [appellate courts] cannot simply substitute [their judgment] for that of the dstrict court.'" Add. 35-36 (McKeown, J., dissenting), quoting United States v. BNS Inc, 858 F.2d 456, 464 (9th Cir. 1988). See, e.g., United States v. George, 420 F.3d 991, 1000 (9th Cir. 2005) ("[t]his court reviews a denial of a motion fornew trial based on newly-discovered evidence for an abuse of discretion") (collecting cases); Harman v. Apfel, 211 F.3d 1172, 1175 (9th Cir. 2001) (reversal of a new trial motion is only permissible "when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances"). Thus, although the panel majority paid lip service to the "abuse of discretion" standard, at no point in its virtually de novo analysis of the trial record, did it actually find that any of Judge Tallman's rulings concerning the Harrington factors were clearly erroneous. Instead, it substituted it own judgment for that of Judge Tallman who actually heard the evidence and was therefore in a unique position to evaluate the credibility of the witnesses, the impact of their testimony upon the jury, and the likely significance of the "newly-discovered" evidence upon its deliberations.[9]

[9] Although our petition focuses primarily upon the question whether the panel majority erred in determining that the newly discovered evidence was material and likely to result in an acquittal, we join Judge McKeown's view that the panel majority erred in its de novo reassessment of each of the Harrington factors.

2. Moreover, by combining several discrete components of the Harrington multi-factor test – most significantly, the issue of materiality and that of the likely outcome of a retrial – the majority's analysis sidestepped the most crucial component of Judge Tallman's determination in denying the motion: that the "newly-discovered" evidence would not and could not have an effect upon a new trial because it was entirely collateral and would have been inadmissible in any event.

The panel majority's analysis of the question of materiality stands in stark contrast with that of a different panel of this Court in United States v. George, 420 F.3d at 1000-01. In George, the defendant was prosecuted for filing tax returns which failed to include fees he had earned as a court-appointed receiver, the defendant testified that his failure to do so was not willful because the omission was based upon the advice of an accountant. The government called the accountant who testified that George had never retained him prepare his personal tax returns. On cross-examination defense counsel proffered the unsigned receivership tax returns of one of the firms for which George was the receiver and asked the accountant whether his firm had prepared it. Because the returns were unsigned, he refused to acknowledge that his firm had done so. Following his conviction, George sought a new trial based upon newly discovered evidence –

signed copies of the receivership tax returns. Although the court acknowledged that, had the signed returns been shown to the accountant at trial, he would have had to acknowledge that his firm prepared them, it observed that the concession "would only have established a collateral point – who prepared the receivership returns." 420 F.3d at 1001. Moreover, even if the returns impeached the accountant's credibility, this would not merit a new trial because "evidence that would merely impeach a witness cannot support a motion for a new trial." Ibid. (internal quotation marks omitted). Only after the court concluded that the evidence at issue lacked materiality, did it reach the question of likelihood of acquittal and conclude that the district court did not abuse its discretion in finding that the evidence would not likely have produced such a result.

Application of a similar analytical approach as that in George compels the conclusion that the panel majority erred in holding that the defendant was entitled to a new trial on the basis of two affidavits demonstrating that Swisher was not, as he represented at trial, a recipient of the Purple Heart. As Judge McKeown, aptly put it, the veracity of Swisher's actual military record was "a classic sideshow."[10] Add. 42. As her dissent explained, that record was neither germane to any

[10] Indeed, the panel majority recognized as much by holding that the district court did not abuse its discretion in finding that the "newly discovered" evidence concerning the defendant's misrepresentations concerning his military record would not be admissible under Fed. R. Evid. 403.

essential element of the government's solicitation case against the defendant nor would evidence concerning the falsity of Swisher's representations concerning his military experience be central to a new trial. Rather, in this case, the crucial issue was whether the defendant solicited Swisher *believing* that his military record made him an apt candidate for service as a hit man. Swisher's *actual* military record, and whether he was truthful about representing it to others, was entirely collateral to that determination. So viewed, even if extrinsic evidence of Swisher's misrepresentations were placed before the jury, it would not have undercut the government's theory of guilt but, as Judge McKeown observed (Add. 35) would likely have made it more likely that, taken in by Swisher's false resume as a combat-hardened killer, the defendant would have hired him to murder public officials he perceived as his enemies.

3. The panel majority's conclusion that Judge Tallman erred in determining that, if available at a retrial, the "newly-discovered" evidence would not have resulted in acquittal was itself fatally flawed. Even if the two affidavits were deemed to satisfy the third Harrington requirement of materiality, their significance at a hypothetical retrial would be contingent upon their limited value as impeachment material. In the event of a retrial, the government surely would not elicit testimony concerning Swisher's fictitious military record or countenance

his wearing a military decoration to which he was not entitled. Consequently, the defendant would have no occasion to employ such evidence for impeachment.

At the most, at a hypothetical retrial, the "newly discovered" affidavits would provide the defendant the predicate for one additional line of impeachment inquiry – whether, at the defendant's prior trial, he had misrepresented his entitlement to the Purple Heart. Even in the unlikely event that the defendant denied doing so, such extrinsic evidence could not be introduced to impeach him under Fed. R. Evid. 403 and 608(b).

On the other hand, Swisher's admission, during a hypothetical retrial, that he had previously testified falsely concerning his military record could not possibly constitute one of the rare instances contemplated by the panel majority in which the impeachment renders the witness's testimony totally incredible and where the impeached witness provides *the only evidence* of an essential element of the government's case. In the first place, a jury would not likely perceive an admission by Swisher that he falsely testified concerning his military record as a basis for the wholesale rejection of his testimony but merely as further evidence of the fiction Swisher created concerning that record and to which the defendant had succumbed.

Moreover, Swisher's testimony was not the *only* evidence establishing the requisite element of intent, *i.e.,* that the defendant was serious in asking him to kill Lodge, Cook and Hines. As Judge McKeown observed, "[t]he government had ample evidence against Hinkson to establish beyond reasonable doubt that Hinkson solicited Swisher" and that the solicitation was not in jest. Add. 43. Thus, it is undisputed that the defendant believed that Swisher was a skilled marksman and an experienced combat veteran and therefore "had the wherewithal to execute a hit." Add. 43 (McKeown, J., dissenting). Indeed, the defendant told Bellon that Swisher had an extensive combat record and had killed people. SER 132.

Likewise, there was abundant testimony from third parties (who would likely testify at a hypothetical retrial) from which the jury could readily infer that the defendant's solicitation of Swisher was the product of hatred toward the federal officials and a genuine desire to have them killed. Thus, during the same period the defendant extolled Swisher's qualifications as a potential hit man to Bellon, he told Bellon that his anger toward the three officials "became the central focus of his life" and that he wanted them killed. SER 124, 132. He likewise told an employee, Lonnie Birmingham, that he hated the officials and "wanted them killed." SER 124. And, as if to verify the bona fides of his solicitations, he

punctuated his solicitation of James Harding to kill the trio with the offer of a "wad of money," totaling $10,000, if Harding would carry out the hits. SER 113. A witness testified that the defendant did nothing to indicate that the offer was a joke, SER 111-113, and an FBI Agent testified that the defendant admitted that the officials' deaths was worth $10,000. SER 193. As a consequence, the panel majority's conclusion that Swisher's testimony was essential to establishing the defendant's intent simply cannot withstand scrutiny when considered from the perspective of the trial record.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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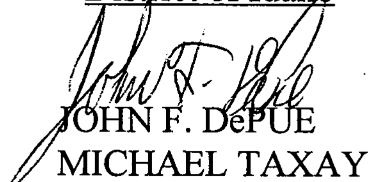

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RESPONSE TO PETITION FOR REHEARING EN BANC

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A. Introduction

This case involves consolidated appeals arising from separate trials of defendant David Hinkson. The panel affirmed the convictions returned at defendant's first trial,[1] but reversed those from his second. *United States v. Hinkson*, 526 F.3d 1263 (9th Cir. 2008). Stung by the partial loss, the government now seeks en banc review.

The convictions set aside by the panel certainly concerned serious charges –the solicitation of the murders of three federal officials. Nonetheless it is surprising that the government would pursue the matter further. The solicitation convictions necessarily rested on the testimony of a witness, Elvin Swisher, whom the government almost surely knew, and certainly should have known, took the stand carrying forged documents and intending to perjure himself on a subject critical to the government's case. Swisher since has been convicted of multiple federal offenses for telling the same lies he told under oath at Hinkson's trial, and for defrauding the government by use of the same forged documents he laid in front of Hinkson's jury. Swisher is awaiting sentencing on those convictions,

The government's petition should be denied for several reasons. First, the

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[1] Hinkson received a ten year sentence on the convictions for tax evasion and structuring transactions from his initial trial.

case presents no legal question of first impression or exceptional importance. While the panel's decision has real consequences for the parties, as a legal matter the decision was insignificant. The legal standard applied to reverse the solicitation convictions —namely, the five-part *Berry-Harrington* test for new trial motions—is not disputed by the parties, and it was not disputed by the divided three-judge panel. The only dispute is how that standard should be applied to the facts of this case. The dispute, in other words, is entirely fact-specific.

And as everyone familiar with this case already knows, the case of David Roland Hinkson is sui generis. The facts are unusual to the point of freakishness. The bizarre characters contained herein would make excellent fodder for a pulp legal novel or a made-for-TV movie. There has never been a case like this one, and hopefully there will never be another case like this one.

Of equal importance, both the United States Supreme Court and this Court consistently have denounced as unconstitutional convictions obtained by reliance on perjury. Swisher's wearing of a phony Purple Heart on the stand and his lies under oath concerning his military experience-- a matter central to the government's opening statement--dishonored those American soldiers who truly have been wounded in combat. "The government of a strong and free nation does not need convictions based on such testimony." *Mesarosh v. United States*, 352

U.S. 1, 14 (1956).

Nothing about this case makes it an appropriate candidate for en banc review. The sooner the book is closed on this sorry chapter in the history of the United States Department of Justice, the better.

B. The Rule 35 Standard

Federal Rule of Appellate Procedure 35 prescribes en banc review in only two circumstances: (1) when en banc review is necessary to settle a question of exceptional importance, and (2) when en banc review is necessary to settle an intra circuit split. This Court has explained the rationale for those limitations.

> Because they are so cumbersome, en banc procedures are seldom used merely to correct the errors of individual panels: "We do not take cases en banc merely because of disagreement with a panel's decision, or rather a piece of a decision . . . . We take cases en banc to answer questions of general importance likely to recur, or to resolve intracircuit conflicts, or to address issues of transcendent public significance--perhaps even to curb a 'runaway' panel--but not just to review a panel opinion for error, even in cases that particularly agitate judges . . . ." *EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516, 529 (7th Cir. 2001) (en banc) (Posner, J., concurring). . . .; [Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. App. Prac. & Process 29, 36 (2001)] ("Petitions for rehearing are generally denied unless something of unusual importance--such as a life--is at stake, or a real and significant error was made by the original panel, or there is conflict within the circuit on a point of law.").

Hart v. Massanari, 266 F.3d 1155, 1172 n.29 (9th Cir. 2001) (Kozinski, J.) (first

two alterations in original) .

What the government seeks here is the use of the en banc procedure to correct an alleged error of an individual panel. The government does not make any contention that this case presents a legal question of exceptional importance. Instead, in a half-hearted attempt to comply with Rule 35, the government argues that en banc review is necessary to resolve an intra circuit conflict. The purported intra circuit conflict is between the panel's opinion and the *Harrington* test itself.

Of course, there was never any dispute about the applicability of the *Harrington* test. The only dispute is about how it should be applied to the unique facts of this case. The government argues that by misapplying the *Harrington* test, the panel created some sort of intra circuit conflict: "the majority's approach effectively revises the standard of review that governs new trial motions." (Petition at 2.) It argues that "[e]n banc review is therefore warranted under Fed. R. App. P. 32(b) [sic]."

Of course, that argument could work in any case: "Because the panel misapplied the [fill in the blank] standard for [fill in the blank] cases, it effectively revised the standards for such cases." If that argument were to carry the day, then any case at all would be appropriate for en banc review. The limits of Rule 35 would be meaningless.

The government's petition, moreover, serves only to underscore how inappropriate this case would be for en banc review. The petition is almost entirely devoid of law. Instead, the petition sets forth pages and pages of facts in an effort to show that the majority misapplied the *Harrington* test to the facts of this case. Like the competing arguments of the panel majority and dissent, the government's arguments are fact-bound and context-specific. Whatever the merits of that argument, it does not justify en banc review.

C. Summary of the Relevant Facts

In any event, even if en banc review were appropriate for fact-specific cases, it would not be appropriate here because the majority correctly applied the *Harrington* test to the facts of this case.

It is said that the devil is in the details, and it is impossible to understand this case without descending into the abyss of the trial record. The panel majority's recitation of the relevant facts filled over twenty pages of the federal reporter. *See* 526 F.3d at 1265-76, 1286-98. Before voting on the government's petition, every judge of this Court will have to read that lengthy recitation carefully. Mr. Hinkson will here offer a mere overview.

The government alleged that Mr. Hinkson tried to hire Elvin Swisher to commit three murders of federal officials. By statute, such a charge must be

supported by proof of " circumstances strongly corroborative of" Hinkson's intent to commit the murders. 18 U.S.C. section 1114. But no witness but Swisher testified to the conversations in which Hinkson supposedly solicited Swisher to commit the charged killings, nor was physical evidence of those conversations–recordings, telephone records, etc.-- introduced. The government's theory of corroborating circumstances lay in Swisher's purported personal history: Hinkson understood that Swisher was a decorated veteran who had killed many enemies as part of an elite special forces crew in Korea, and Hinkson therefore believed Swisher to be the best man for the job.

In its opening argument, the government told the jury that Swisher "was a Marine, a Combat Veteran from Korea during the Korean conflict. He was not adverse to this kind of violent, dangerous activity; but he wanted no part of murdering federal officials."

The evidence establishes that before putting Swisher on the stand on January 14, 2005, the government learned that grand jury testimony he had given about being wounded in the Korean War was false; Swisher was still a minor and not in the service when the war ended. Furthermore, the record strongly suggests that before calling Swisher the government had also learned that its witness was lying about his claims of being wounded during special operations behind enemy

lines at a date after the Korean War ended. At some point, the government received the "Dowling letter," which put the lie to Swisher's claims of combat duty and injury. The Dowling letter in the court record has a stamp indicating that it was "received" on January 10, four days before Swisher testified. The prosecution has given inconsistent responses about when it actually received the letter. *See* 526 F.3d at 1270-71

Even under the most charitable findings regarding timing, it is now clear that the government delayed disclosing the Dowling letter to the defense for several days. This delay formed part of the basis of Mr. Hinkson's Due Process claim, which the panel declined to reach. The defense, meanwhile, had been making inquiries to government agencies in an attempt to uncover the facts about Swisher's record. The agencies' response was predictably and understandably slow, and the defense was without the Dowling letter when Swisher took the stand.

In any event, when Swisher took the stand, the prosecution trod carefully. While never disavowing its statement in opening that Swisher was, in fact, a combat vet, the prosecution assiduously avoided asking him any questions about his combat record. Instead, it only asked him what he had told Hinkson about his record.

When the defense attempted to challenge Swisher about his claims, the witness pounced. In a surreal moment of courtroom melodrama, Swisher pulled out of his pocket a document that purported to verify his claims about his service, valor, and awards, including the Purple Heart he was wearing on the stand. Swisher earlier had used the same document to obtain from the government financial benefits reserved for wounded combat veterans.

A week after Swisher's testimony, the district court received a stack of official military records that clearly rebutted Swisher's claims, but the court deemed them inconclusive. In fact, if anything, the district court remained credulous of Swisher's claims.

> It is not at all clear to me what the truth of the matter is; and I suspect it has something to do with the fact that we are dealing with events that occurred fifty years ago and that, at the time they occurred, were involving top secret military activities.

Based on an erroneous interpretation of Rule 608(b), the district court refused to allow the defense to introduce any of the documents contradicting Swisher's testimony. Rule 608(b), and its extrinsic evidence bar, applies only to impeachment based on character for truthfulness. It does not apply to other methods of impeachment, such as contradiction of the witness's testimony in the case at bar, bias, and self-interest. *United States v. Smith*, 232 F.3d 236, 242 (D.C.

Cir. 2000); *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999); George Fisher, *Evidence* 242 (2002); Mueller & Kirkpatrick, *Evidence* § 6.28 (3d ed. 2003). In fact, the Rule was amended in 2003 precisely to correct the very mistake made by the district court below. *See* Fed. R. Evid. 608(b) advisory committee's note to 2003 amendment.

We now know—the government now concedes—that Swisher was lying about his heroic experts. He repeatedly perjured himself at Hinkson's trial. His document was a forgery. He was lying about his combat service. He was lying about his killing expertise. He was lying about his Purple Heart. Earlier this year, Swisher was prosecuted and convicted for the very same conduct he engaged in at Hinkson's trial—wearing a fraudulent military decoration, proffering forged documents, and lying about his military record. Why would Swisher have told such outrageous lies unless he was trying to frame Hinkson? The military documents were clearly admissible to impeach Swisher.

For its part, the government remained cagey. To the jury, it never corrected its false statement in opening argument, and to the court, it continued to express uncertainty about Swisher's true record. In its closing argument, by which time the government's own records had proven Swisher a charlatan, the prosecution relied on canny and ambiguous phrasing to vouch for Swisher's continuing

credibility—it avoided making direct claims about Swisher's service, but simultaneously sought to maintain and exploit the false impression in the jurors' minds. For example:

> Mr. Swisher's testimony was powerful. He talked about how Mr. Hinkson understood that Mr. Swisher had been in the military and had killed a lot of people. He was very impressed by that.

The defense was not able to conclusively establish Swisher's lies until after trial. It was at that point that the defense was able obtain affidavits from government and military officials proving Swisher's perjury and forgery. Based on that evidence, the defense filed a new trial motion, which the district court denied.

"'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 effected the judgment of the jury.'" *United States v. Young*, 17 F.3d 1201, 1203 (9th Cir. 1994), (*quoting United States v. Agurs*, 427 U.S. 97, 103 (1976)) After noting that the "appearance of misconduct in this case is serious" because "Young presented competent evidence that the prosecutor knew Sheldon's testimony was false," this Circuit held that the trial court's denial of a new trial was an abuse of discretion even if the use of the false

testimony had been unknowing. *Young,* 17 F.3d at 1203; *see also Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (conviction must be reversed when it is based on testimony which gave the jury a "false impression" and which the prosecutor knew was misleading). Given the centrality of Swisher's testimony, the scope of his lies, the use made of those lies in the government's closing argument, and the power of the newly discovered evidence, the district court's denial of a new trial was an abuse of discretion.

D. Evidentiary Significance

The panel majority and dissent disagreed at every step of the five-part *Harrington* test. At bottom, however, those disagreements boil down to a single point about the evidentiary significance of Swisher's lies and his true military record. The dissent contended, as the government argues now, that all of the information set forth above was "collateral" and "unimportant" and "merely impeaching." Those arguments are unconvincing for two legal reasons.

First, the evidence is directly relevant—and not "merely impeaching"—under the theory of relevance adopted by this Court in *United States v. James*, 169 F.3d 1210 (9th Cir. 1999) (en banc) ; *see United States v. Burks*, 470 F.2d 432, 434-35 & n.5 (D.C. Cir. 1972) (Wright, J.); *see also* George Fisher, *Evidence* 28-29 (2002) (discussing *James*); Richard D. Friedman, *Route*

Analysis of Credibility and Hearsay, 96 Yale L.J. 667, 679-81 (1987) (discussing the same theory of relevance). That Swisher had no combat experience nor was a skilled killer supported Hinkson's testimony that Swisher never told him that Swisher did have those experiences. Neither the dissent nor the government has ever so much as responded to this point.

Second, as previous cases have made clear, particularly powerful impeachment evidence may require granting new trial motions. *United States v. Davis*, 960 F.2d 820, 825 (9th Cir. 1992); *United States v. Taglia*, 922 F.2d 413, 415 (7th Cir. 1991). Quite simply, no impeaching evidence could be more powerful than conclusive proof that a witness entered the courtroom wearing a lie on his chest, carrying others in his pocket, with the fixed intention to commit perjury as soon as he took the stand. Thus, even if the evidence had been "merely impeaching," the panel majority broke no new ground by reversing the conviction. *See, e.g., Young,* 17 F.3d at 1203.

Even setting those two formal legal points to one side, the more central fact is that the government never could have obtained a conviction had the jury seen the evidence proving Swisher's lies. No jury in this country would convict based on the uncorroborated testimony of a witness wearing a pilfered Purple Heart who proffers forged documents also used to steal benefits to which only wounded

veterans are entitled. Given that the government would have to transport Swisher to a retrial from the prison cell he will soon occupy, the panel majority was quite correct in reaching this blunt conclusion: "a new trial would be a disaster for the government." 526 F.3d at 1298.

E. Conclusion

There is a certain irony in the government's petition for en banc review. Mr. Hinkson's central and still most powerful claim on appeal is that the prosecution committed misconduct by obfuscating and hiding evidence regarding Swisher's military record. Through the course of appellate proceedings, the extent of the government's shameful behavior became even clearer, as the government was forced to concede that it knew about Swisher's lies earlier than it had previously admitted.

In an apparent effort to spare the government further embarrassment, the three-judge panel declined to rule on those claims of misconduct, or to remand for further investigation.[2] The panel instead focused on the narrower, less incendiary claim regarding the new trial motion. Not content to quit while it is behind, the government now seeks to re-open and re-litigate all of these claims. It is, to say

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[2] Judge McKeown indicated that she would have ordered a "remand for further factfinding on the issue of when the government knew, or should have known, of the Dowling letter." 526 F.3d at 1308 (McKeown, J., dissenting).

the least, a questionable tactical decision.

Perhaps the government hopes that this Court will grant relief where it otherwise would not because Hinkson's trial was presided over by a member of this court sitting by designation. But the rulings of a pro tem trial judge are afforded no greater deference simply because his day job is on an appellate bench. *See Heislup v. Town of Colonial Beach*, 813 F.2d 401, 1986 WL 18609 (4th Cir. 1986) (Fourth Circuit per curiam reverses judgment entered by then-Associate Supreme Court Justice William Rehnquist sitting as a trial judge for the first time), cert.denied, 482 U.S. 909 (1987)(Chief Justice Rehnquist did not participate in decision on certiorari)

But this Court need not tarry in an effort to decipher the enigmatic motives of the Department of Justice. The simpler point is simply that this case does not fit the requirements of Rule 35. This case involves the application of an undisputed legal standard to a unique set of facts, and it is therefore not the sort of case for

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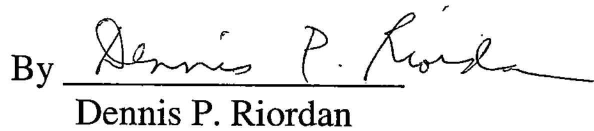
which the en banc procedure is designed and suited. En banc review should be denied.

Dated: August 18, 2008

Respectfully Submitted,

DENNIS P. RIORDAN
DONALD M. HORGAN

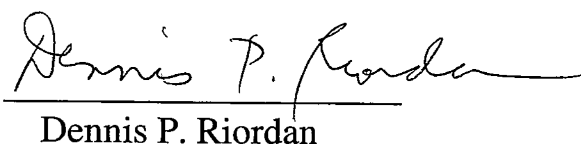
By 
Dennis P. Riordan

Attorneys for Defendant-Appellant
DAVID ROLAND HINKSON

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32(e)(4)

I, Dennis P. Riordan, hereby certify that the foregoing Appellant's Response to Petition for Rehearing En Banc is proportionately spaced, has a typeface of 14 points, and contains 3,169 words.

Dated: August 18, 2008



Dennis P. Riordan

PROOF OF SERVICE BY MAIL -- 1013(a), 2015.5 C.C.P.

Re: **United States v. Hinkson 05-30303**
(Idaho District Court No. 04-127)

I am a citizen of the United States; my business address is 523 Octavia Street, San Francisco, California 94102. I am employed in the City and County of San Francisco, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served the within:

RESPONSE TO PETITION FOR REHEARING EN BANC

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

John F. De Pue
Michael D. Taxay
Assistant U.S. Attorneys
Department of Justice
Criminal Division
10th and Constitution Avenue NW
Washington, DC 20530

[x] BY MAIL: By depositing said envelope, with postage thereon fully prepaid, in the United States mail in San Francisco, California, addressed to said party(ies);

[ ] BY PERSONAL SERVICE: By causing said envelope to be personally served on said party(ies), as follows: **[ ] FEDEX** **[ ] HAND DELIVERY**

I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on August 18, 2008 at San Francisco, California.

Natassja Trujillo