No. _____

In The
Supreme Court of the United States

DAVID ROLAND HINKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. DOES A DEFENDANT HAVE A RIGHT TO PROVE THAT THE GOVERNMENT'S CHIEF WITNESS HAS TESTIFIED FALSELY AND TENDERED FORGED DOCUMENTS ON AN ISSUE CRITICAL TO THE GOVERNMENT'S CASE – HERE, WHETHER THE WITNESS SERVED HIS COUNTRY IN COMBAT?

II. DID THE DIVIDED EN BANC PANEL OF THE NINTH CIRCUIT ERR IN HOLDING THAT A WITNESS'S PERJURY AND FRAUD CONCERNING HIS MILITARY RECORD WOULD BE OF "LIMITED PROBATIVE VALUE" TO JURORS ASSESSING THAT WITNESS'S CREDIBILITY?

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INTRODUCTION

By a six to five vote, an en banc panel of the Ninth Circuit issued two extraordinary rulings in petitioner Hinkson's appeal of his convictions and forty-three year sentence. The majority held that, in exercising its discretion under Federal Rule of Evidence 403, a trial court may exclude conclusive proof that the government's principal witness came to the stand intending to, and did, perjure himself and tender forged documents concerning an issue crucial to the jury's determination of guilt or innocence. The majority below also found that dispositive evidence that the government's key witness was a military fraud would have been of "limited probative value" to jurors assessing his credibility.

The crimes of which defendant Hinkson stands convicted allegedly consisted of words – the solicitation of the murder of three federal officials – spoken in a conversation with a single party, Elven Swisher. Swisher testified at trial that when he told Hinkson about his military exploits – including "killing too many" men – Hinkson offered him $10,000 to kill the federal officials.

Testifying in his own defense, Hinkson denied that he had solicited murder, and denied that Swisher had told him about his vast military exploits. No physical evidence – written orders, tape recordings, money or weapons exchanged – corroborated Swisher's claim of having been solicited to kill. As Chief Judge Kozinski stated dissenting from the

denial of rehearing of the en banc opinion in this case, "[w]ithout Swisher, the government had no case." *United States v. Hinkson*, 611 F.3d 1098, 1099 (9th Cir. 2010) (Appendix 1-28, hereafter "App.").

The solicitation statute under which Hinkson was charged (18 U.S.C. § 1114) required proof of "circumstances strongly corroborative of" the commission of the charged solicitation. The government relied on Swisher's personal history as a combat-hardened veteran to corroborate its claim that Hinkson sought Swisher's assistance in the nefarious plot. "The prosecutor described Swisher in his opening statement as a 'Combat Veteran from Korea during the Korean Conflict' who 'was not averse to . . . violent, dangerous activity,' and stated in his closing argument that Hinkson 'understood' that Swisher 'had served in combat and killed people.'" 611 F.3d at 1132 (W. Fletcher, J., dissenting from the denial of rehearing en banc) (App. 26-27).

As the government now concedes, Swisher was a military fraud. Swisher had testified before the grand jury that indicted Hinkson that he (Swisher) was wounded during the Korean War, but as prosecutors discovered before putting him on the stand at trial, the Korean war was over before Swisher enlisted in the Marines. Caught in one lie, Swisher told the prosecutors another: that he was wounded during secret operations in North Korea after the 1953 truce. In fact, Swisher had never been either in combat or in Korea, but he showed prosecutors forged discharge documents to support this audacious claim. Swisher

previously had used the same documents in an ongoing scheme to fraudulently collect Veteran's Administration benefits for combat related injuries.

Swisher then committed a crime of moral turpitude by taking the witness stand at Hinkson's trial wearing a phony Purple Heart commendation; he lied under oath in claiming to have been in combat in Korea; and he displayed to Hinkson's jury the forged paperwork falsely attesting to his receipt of a slew of commendations earned in combat.

By the close of Hinkson's trial, the judge, prosecution team, and defense counsel were in possession of irrefutable confirmation that Swisher had perpetrated a fraud on the court. Swisher's military records by that time had been obtained by subpoena. Only the jury remained ignorant that they had been lied to, because the district court barred admission of the records, and the prosecution in closing relied on Swisher's tales of military heroics without warning jurors that the government's chief witness had lied to them under oath. Following his testimony against Hinkson, Swisher was convicted in the district court in Idaho of wearing fraudulent military commendations, of lying to federal officials by claiming service in combat, and of defrauding the Veteran's Administration of benefits for combat injuries. 611 F.3d at 1112 (App. 10-11).

The jury convicted Hinkson only because the defense was barred from presenting any evidence regarding Swisher's lies and fraud. The en banc

majority below upheld the trial court's exclusion as an exercise of discretion. Its ruling eviscerates the right to present a defense. Under the majority's analysis, a defendant possesses no meaningful statutory or constitutional right to present evidence; all is a matter of judicial grace. That ruling is flatly at odds with a number of seminal decisions of this Court on the right to present a defense under the Fifth and Sixth Amendments, as well as with many decisions from other circuits. Indeed, the six to five decision cannot even be said to represent the majority view of the Ninth Circuit. Because of the Circuit's size, an en banc panel consists of less than half of the full court's membership, and a previous en banc decision of the circuit on a similar issue reached a contrary result by a vote of ten to one.[1] A grant of certiorari is needed to both address the important constitutional issues concerning the right to present defense evidence that this appeal raises, as well as to resolve the precedential conflicts the opinion below has created.

Furthermore, the lower court's ruling that exposure of Swisher as a military fraud would have been of "limited probative value" to jurors assessing his credibility flies in the face of this country's political and social realities, as well as this Court's recent ruling in *Porter v. McCollum,* ___ U.S. ___, 130 S. Ct. 447 (2009). Chief Judge Kozinski initially voted to

[1] *See* Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831, 844 n. 52 (2009).

affirm Hinkson's conviction before later joining the dissenters who voted to vacate the en banc opinion and rehear the matter, stating:

> I had underestimated the trust some jurors would have placed in Swisher if they thought he was a decorated combat veteran, and the likely backlash if they had learned he was a fraud. My change of heart came about after I read the Supreme Court's summary reversal in *Porter v. McCollum,* ___ U.S. ___, 130 S. Ct. 447, 175 L.Ed.2d 398 (2009), and the amicus brief of William Mac Swain [the head of a combat veterans' association] filed in our case.

611 F.3d at 1099 (App. 1-2).

This Court can expeditiously remedy the majority's grave error by granting certiorari, summarily reversing the judgment below, and remanding this matter to the Court of Appeals for reconsideration in light of *Porter*.

CITATION OF OPINION BELOW

The official reporter citation of the en banc opinion, reproduced at Appendix 29-72, is *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009).

STATEMENT OF JURISDICTION

On May 30, 2008, a three-judge panel of the United States Court of Appeals for the Ninth Circuit issued a published opinion reversing petitioner's convictions for solicitation of murder and remanding the matter to the district court. *United States v. Hinkson*, 526 F.3d 1262 (9th Cir. 2008) (App. 74-106). On November 5, 2009, an en banc panel of the Ninth Circuit issued a published opinion in which they reversed the panel's decision. (App. 29-72). Hinkson's petition for rehearing of the en banc opinion was denied in a published order on July 14, 2010. *United States v. Hinkson*, 611 F.3d 1098 (9th Cir. 2010) (App. 1-28).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to

a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Federal Rule of Evidence 403, 28 U.S.C.A. provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

STATEMENT OF THE CASE

A. The Charges

On June 22, 2004, a superceding indictment was filed on September 21, 2004 in the District of Idaho charging defendant Hinkson with eleven counts involving threats to three federal officials: District Court Judge Edward Lodge; Assistant United States Attorney Nancy Cook; and IRS Special Agent Steven Hines. All three officials had been involved in the prosecution of Hinkson pursuant to an earlier

indictment on tax and currency structuring charges returned on July 18, 2002.[2]

Counts One, Two, and Three charged that in early to mid-January of 2003, Hinkson solicited James Harding to murder Lodge, Cook, and Hines respectively, "under circumstances strongly corroborative of" Hinkson's intent that Harding commit that crime, in violation of 18 U.S.C. § 1114. Counts Four, Five, and Six charged that in March 2003, Hinkson again solicited Harding to murder Lodge, Cook, and Hines in violation of 18 U.S.C. § 1114.

Counts Seven, Eight, and Nine charged that around January 2003, Hinkson solicited Elven Swisher to murder Lodge, Cook, and Hines "under circumstances strongly corroborative of" Hinkson's intent that Swisher commit that crime, in violation of 18 U.S.C. § 1114.

Counts Ten and Eleven charged that between January and March of 2003, Hinkson made unlawful threats to Ann Bates against Cook's family and Hines's family in violation of 18 U.S.C. § 115(a)(1)(B).

The jury found Hinkson not guilty of the first set of Harding solicitation charges (Counts One, Two, and Three) and the Bates threats charges (Counts

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[2] Hinkson was tried and convicted of 32 counts of tax and structuring charges on May 5, 2004. The solicitation offenses in the September 2004 indictment allegedly occurred while Hinkson was on pre-trial release.

Ten and Eleven), and deadlocked on the second set of charges involving Harding (Counts Four, Five, and Six). It convicted Hinkson of the Swisher solicitation charges (Counts Seven, Eight, and Nine).

B. Hinkson's New Trial Motion And Sentence

On March 3, 2005, defense counsel moved for a new trial under Federal Rule of Criminal Procedure 33. The motion relied on, *inter alia,* "newly discovered evidence." The district court denied the motion on April 22, 2005.

Hinkson was sentenced on June 3, 2005, for his solicitation convictions as well as for his tax-related and currency structuring convictions. He received a total of forty-three years in prison: ten years on the tax and structuring charges, ten years on each of the three solicitation charges, and an additional three years for having made the solicitations while on pretrial release in the tax case.

C. Appellate Proceedings In The Ninth Circuit Court Of Appeals

On May 30, 2008, the Ninth Circuit reversed the district court's denial of Hinkson's motion for a new trial on Counts Seven, Eight, and Nine. *United States v. Hinkson*, 526 F.3d 1262 (9th Cir. 2008) (App. 74-106). However, on November 5, 2009, an en banc panel of the Ninth Circuit reversed the panel's decision, holding, *inter alia*, that the district court had

not abused its discretion in denying Hinkson's new trial motion. *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009) (App. 29-72).

Hinkson thereafter petitioned the Ninth Circuit to order a rehearing of the limited en banc panel opinion either by the full Court or by the same limited en banc panel. Hinkson's petition for rehearing was denied on July 14, 2010. *See* Order on Rehearing, 611 F.3d 1098 (9th Cir. 2010) (App. 1-28). Circuit Justice Anthony Kennedy granted an extension of time for this petition for certiorari until November 11, 2010. A petition in forma pauperis was timely filed on that date. Because of problems relating to petitioner's in forma pauperis status, on November 16, 2010, this Court granted petitioner an additional sixty days, to resubmit his petition. The present petition is therefore timely.

REASONS FOR GRANTING REVIEW

I. DEFENDANT HINKSON WAS DENIED HIS CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE, TO CONFRONTATION, AND TO A FAIR TRIAL WHEN THE TRIAL COURT BARRED HIM FROM PROVING SWISHER'S PERJURY AND FORGERY OF DOCUMENTS

The Sixth Amendment guarantees the right "to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19

(1967); *see also Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986) (Under the due process, the compulsory process, or the confrontation clauses, a defendant possesses the "basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful testing'" (internal quotation marks omitted)). "Restrictions on a criminal defendant's rights . . . to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" *Michigan v. Lucas,* 500 U.S. 145, 151 (1991) (quoting *Rock v. Arkansas,* 483 U.S. 44, 56 (1987)).

The federal circuits well recognize the right to present a defense and reverse convictions resulting from its violation. *See, e.g.*, *Pettijohn v. Hall*, 599 F.2d 476 (1st Cir. 1979) (holding that the defendant's right to present a witness in his own defense was violated where the trial court excluded, on relevancy grounds, testimony intended to present a feasible defense that the jury should have been permitted to consider); *Noble v. Kelly*, 246 F.3d 93 (2nd Cir. 2001) (holding that exclusion of material witness testimony due to noncompliance with state court rule violated compulsory process clause absent finding of willful noncompliance); *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991) (finding reversible error in a sexual assault case where trial court did not permit cross examination of alleged victim regarding prior sexual activity with a third person, or cross examination of physician regarding whether symptoms were caused by defendant or third person).

Prior to the *Hinkson* decision, the Ninth Circuit had vigorously upheld the right to present relevant

defense evidence against the contention that such evidence could be excluded as a matter of judicial discretion. *See United States v. James*, 169 F.3d 1210, 1215 (9th Cir. 1999) (en banc) (holding that district court abused its discretion in excluding under Fed. R. Evid. 403 evidence corroborative of defendant's testimony that she acted in self-defense against violent predator). In *James*, ten judges of the Ninth Circuit, none of whom was part of the seven-judge *Hinkson* majority, and five of whom are still members of the court, rejected the single dissenting view of Judge Kleinfeld, who was one of the *Hinkson* majority, that this Court must "defer to a district judge's discretion, when the trial judge had a sensible reason for exercising his discretion as he did." 169 F.3d at 1215.

Hinkson argued to the Court of Appeals that under this Court's precedents and those of the Ninth Circuit itself, he was entitled as a matter of constitutional and statutory right to introduce documentary evidence that conclusively proved (a) that Swisher had never served and been wounded in, much less received commendations for, combat in Korea or anywhere else; (b) that his statements concerning his combat experience to Hinkson (if indeed Swisher made any such statements) and to government prosecutors were lies; (c) that his testimony on the same subject before the grand and petit juries was perjured; and (d) that at the time of his testimony Swisher was receiving fraudulently obtained financial benefits based on the same forged document that he proffered at trial. Hinkson argued that the district court had erred both in excluding during trial the

evidence that Swisher was a military fraud and by denying his motion for a new trial following his conviction, citing *United States v. Young*, 17 F.3d 1201, 1203 (9th Cir. 1994) (abuse of discretion to deny new trial motion where motion establishes that prosecution testified falsely on material matter).

In affirming Hinkson's convictions, the en banc majority did not discuss any of the constitutional precedents relied upon by Hinkson, simply finding that neither the mid-trial exclusion of evidence nor the denial of petitioner's new trial motion constituted an abuse of discretion under the en banc majority's reformulated definition[3] of that standard:

> [O]ur newly stated "abuse of discretion" test requires us first to consider whether the district court identified the correct legal standard for decision of the issue before it. Second, the test then requires us to determine whether the district court's findings of fact, and its application of those findings of fact to the correct legal standard, were illogical, implausible, or without support in inferences that may be drawn from facts in the record.

United States v. Hinkson, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc) (App. 4-5).

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[3] Only a few months before the en banc decision in this case in November of 2009, another en banc panel of the Ninth Circuit had stated the abuse of discretion standard of review in very different terms. *See United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1003 (9th Cir. 2009); *see also Pincay v. Andrews,* 389 F.3d 853, 858 (9th Cir. 2004) (en banc).

To quote Judge Henry Friendly, the majority's reformulation of the abuse of discretion standard requires that "the appellate court [must] come close to finding that the trial court had taken leave of its senses" before finding the standard met. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982). But even under the en banc majority's pinched standard of review, the district court's exclusionary ruling was deeply flawed in the first instance because the trial ruling rested on a fundamental error of law. The district court's principal rationale for exclusion was that the evidence dealt with a collateral matter, and thus was barred from admission by Rule 608(b). Rule 608(b), however, only covers evidence offered to show a witness's character for dishonesty. *See* Fed. R. Evid. 404(a)(3). The evidence in this case was not offered to show Swisher's general character for dishonesty – rather, it was offered to show his bias, self-interest, and his particular substantive lies *in this case*.

As the dissenters below cogently explained, the trial court's Rule 608(b) ruling was an obvious error of law because the evidence was admissible under Fed. R. Evid. 607, which "'permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence.'" *See* 611 F.3d at 1113 (App. 11-12), quoting *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999). Because the district court's ruling that the excluded evidence was more prejudicial than probative plainly rested in part on its flawed conclusion that the evidence was

inadmissible as a matter of law under Rule 608(b), the district court did indeed abuse its discretion.

Furthermore, this Court has not permitted the trial courts to exclude critical defense evidence so cavalierly. In *Olden v. Kentucky*, 488 U.S. 227 (1988), the Kentucky Court of Appeals, applying state Rule 403, upheld a trial court's bar on a line of cross examination tending to show that the state's chief witness, a white woman, had a motive to falsely accuse the defendant of rape – to hide from her husband an illicit affair she was having with a black man. The ruling that the impeaching evidence was more prejudicial than probative was not "illogical" or "implausible;" there are certainly jurors who would reject the testimony of a white woman sexually involved with a black man simply due to racism. That the state court ruling was reasonable could not save it from reversal by this Court, however, on the ground that it infringed on the defendant's "constitutionally protected right of cross-examination." 488 U.S. at 230-231.

Likewise, a trial court ruling barring cross examination on a witness's juvenile record is not irrational, especially when that record is protected by statute. Nor is it implausible to conclude principals, accomplices, or accessories in the same crime are so likely to lie that their testimony for one another might be inherently unreliable, as would be a defendant's testimony resulting from hypnosis. Yet this Court has overturned exclusionary orders resting on each of these reasonable bases as infringements on the respective defendants' right to a fair trial. *See*

Davis v. Alaska, 415 U.S. 308, 316-317 (1974); *Washington v. Texas*, 388 U.S. at 19; *Crane v. Kentucky*, 476 U.S. at 690-691 (1986); *see also Holmes v. South Carolina*, 547 U.S. 319 (2006) (holding that, because "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," state court erroneously excluded defense evidence of third-party culpability, requiring reversal of murder conviction and sentence of death).

According to the *Hinkson* en banc majority, there is no need to consider whether a criminal defendant has a constitutional right to present evidence so long as a rational basis exists to exclude that evidence under Rule 403. 585 F.3d at 1267 (App. 41-42). Yet even when there is a rational basis to exclude evidence, the exclusion will violate due process where the evidence is both reliable and crucial to the defense. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

In what was essentially a one-witness case, incontestable proof that Swisher came to court for the express purpose of lying under oath and proffering forged documents to the court was both reliable and crucial to the defense. Its admission was therefore required. Because the en banc majority's new abuse of discretion standard sustained the trial court's erroneous exclusion of that impeaching evidence, its application was unconstitutional in this case.

II. THE FINDING OF THE TRIAL COURT AND EN BANC MAJORITY THAT THE EXCLUDED EVIDENCE WOULD HAVE HAD "LIMITED" IMPACT ON THE JURY'S VIEW OF SWISHER'S CREDIBILITY MERITS SUMMARY REVERSAL

Given that Swisher's perjury is conceded by the government, this case thus turns on a judicial assessment of the attitudes of American jurors. Jurors are instructed that they may, but are not required to, reject all of the testimony of a witness if they determine that one part of that testimony is knowingly false. If one or more jurors would have deemed Swisher wholly unworthy of belief due to the lies he told in and out of court concerning his combat experience, then Hinkson is entitled to a new trial.

The cornerstone of both the en banc majority opinion and the district court's exclusionary order was the proposition that the excluded evidence exposing Swisher as a fraud had "limited probative value" in impeaching his credibility. 585 F.3d at 1267 (App. 41-42). That assessment necessarily assumes that even if the jurors at Hinkson's trial had learned Swisher was a military fraud, all twelve nevertheless would have accepted as credible Swisher's uncorroborated testimony that Hinkson made him a serious offer to pay for the murder of federal officials.

In contrast to the majority, the en banc dissenters asserted that (1) jurors would view the fact that a witness was "wounded in the service of his country" to be "an additional reason to believe his

testimony," but (2) the same jurors would consider fabricating military commendations to be an act of deceit "powerful enough" to render everything that person says "totally incredible." 611 F.3d at 1121 (App. 16-17). This nation's history of dealing with military frauds, as well as more recent events, demonstrate that the dissent's understanding of American jurors is correct.

After initially counting himself in the en banc majority, Chief Judge Kozinski joined the dissenters in voting to overturn Hinkson's solicitation convictions. He did so in part because of this Court's decision in *Porter v. McCollum*, where the Court found the state courts had acted unreasonably in discounting the impact that evidence of a defendant's "heroic military service" in combat in the Korean War would have had on a penalty phase jury in a capital case. This Court noted that: "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as [defendant] Porter did." 130 S. Ct. at 455.

When General George Washington instituted our nation's first military award, he stated, "Should any who are not entitled to these honors have the insolence to assume the badges of them, they shall be severely punished."[4] Since then, public outrage

[4] 152 Cong. Rec. H8821 (daily ed. Dec. 6, 2006) (statements of Reps. Salazar and Davis).

toward military imposters has remained strong. Veteran groups are so outraged by those who misrepresent their military service that they volunteer their time to "comb small newspapers searching for poseurs, file Freedom of Information requests for military files, and field requests for research help from employers, biographers and obituary writers," and even build their own on-line databases of verified valor-medal recipients.[5]

The Colorado Veterans Alliance disbanded after it was revealed that the organization's founder falsely claimed to have earned military commendations, including the Purple Heart. The board of directors explained that the founder's actions "permanently damaged the reputation of Colorado Veterans Alliance to the point that no future efforts can go forward."[6] In 2007, the mayor of Atlantic City resigned after it was revealed that he had embellished his military accomplishments.[7] When the director of a municipal water board in California was sentenced to three years probation and a $5,000 fine for making false claims of military valor, the public complained the penalty was inadequate.[8] The same was true when a

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[5] Urbina, *In Ranks Of Heroes, Finding The Fakes*, New York Times, Aug. 2, 2009, at A12.

[6] *Id.*

[7] *Embattled Colo. Man charged with violating Stolen Valor Act*, Marine Corps Times, Oct. 12, 2009, at 20.

[8] *See* Bigham, *Alvarez sentenced, can keep seat on water board*, San Bernardino County Sun, July 21, 2008.

local school committee member in Massachusetts was found to have lied about his military service.[9]

Here, Swisher presented himself to the jury as precisely what Porter was and Swisher was not: a combat hero wounded in the Korean War. The favorable impact of testimony on jurors had to have been enormous, as would have been the "backlash if they had learned he was a fraud," to use Chief Judge Kozinski's words. That fact was impressed upon Chief Judge Kozinski by the amicus brief in support of rehearing of the en banc opinion submitted by William Mac Swain, the President of the Korean War Veteran's Association. A quote from that brief is in order.

> What *amicus* is asking this Court to understand is that its reasoning and language are a slap in the face to veterans and jurors alike. For they imply – at a time when this nation is fighting two wars and losing more soldiers every month – that the average American no longer attaches any significance to a veteran's wartime service. That proposition is not merely unsubstantiated but unfathomable – profoundly out of step with the true views and sentiments of the citizens who serve on our juries.

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[9] *See* Harmacinski, *Stokes gets probation, community service for impersonating Marine; Judge says former School Committee member embarrassed entire community*, Eagle-Tribune (North Andover, MA), May 22, 2008.

> This *amicus*, for one, disputes the notion that the typical American juror attaches little or no significance to a witness's claim that he is a decorated combat veteran – especially when the Government endorses that claim, as it did here. As the dissent rightly points out, a jury is more likely to believe such a witness, and may penalize the defense for attacking his credibility or questioning his military bona fides. This receptiveness to a combat veteran's testimony is not surprising. Indeed, it is both natural and just. It is a token of the respect, trust, and gratitude that most people feel toward those who have sacrificed to defend them.
>
> With equal certainty, this *amicus* refuses to believe that an American jury would convict a defendant based primarily on the testimony of one witness if it knew that the witness had passed himself off as a decorated combat veteran in a fraudulent play for the jury's sympathies. Most jurors would not hesitate to write off that witness as being "totally incredible" and "'utterly unworthy of being believed.'" This reaction, too, is both natural and just.

The majority cited nothing to support its implicit conclusion that not a single juror would have voted to acquit Hinkson had the trial court permitted his jury to learn that Swisher was a military fraud. Its opinion was issued prior to the issuance of the *Porter*

decision. That fact merits a summary reversal and remand for reconsideration in light of *Porter*.

CONCLUSION

For the reasons stated, certiorari should be granted and the matter set down for full briefing, or the judgment of the Ninth Circuit should be summarily reversed and the matter remanded for reconsideration in light of this Court's decision in *Porter v. McCollum*.

Dated: December 28, 2010

Respectfully submitted,

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