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What's the Deference?: United States v. Hinkson Outlines a New Test For "Abuse of Discretion"

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CASE SUMMARY

WHAT'S THE DEFERENCE?: *UNITED STATES V. HINKSON* OUTLINES A NEW TEST FOR "ABUSE OF DISCRETION"

I. INTRODUCTION

Prior to *United States v. Hinkson*, under the prevailing analysis used to determine whether the trial court had engaged in an "abuse of discretion," there was arguably "no effective limit" on an appellate court's power to substitute its own judgment for that of the district court.[1] Rather, it was left to the appellate panel to decide whether it had a "definite and firm conviction that [a] mistake [had] been committed," or whether a trial court's factual finding was even "permissible."[2]

But in *Hinkson*, an en banc panel of the Ninth Circuit took the opportunity to elaborate on the abuse-of-discretion standard. The *Hinkson* court adopted a two-part test that appellate courts should follow to make an objective determination as to whether a district court abused its discretion in applying a rule of law to the facts in denying a motion for a new trial.[3] Although accompanied by a vigorous dissent, the *Hinkson* abuse-of-discretion test has quickly become a powerful influence and has been widely cited throughout the circuit.[4]

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[1] United States v. Hinkson, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).

[2] *Id.* (citing United States v. 4.85 Acres of Land, More or Less, Situated in Lincoln County, Mont., 546 F.3d 613, 617 (9th Cir. 2008)).

[3] *Hinkson*, 585 F.3d at 1261.

[4] In the two months following the decision, *Hinkson* was cited in twenty-one opinions by courts within the Ninth Circuit and in numerous briefs by counsel. *See, e.g.,*

II. FACTS AND PROCEDURAL HISTORY

A. FACTS

Idaho businessman David Hinkson owned and operated a water-bottling company called WaterOz.[5] In 2000, Hinkson hired Elven Joe Swisher, a water-safety tester, to periodically assess WaterOz water.[6] Hinkson and Swisher eventually became friends.[7] Over the course of their friendship, Hinkson learned that Swisher had served in the United States Marine Corps as a firearms expert and that during this service Swisher "had killed a number of people in the Korean War."[8]

According to Swisher, in April 2002, Hinkson offered him $10,000 per head if he were to torture and kill local attorney Dennis Albers and his family.[9] Hinkson allegedly told Swisher that Albers had been causing him legal troubles.[10]

During this same time period, Assistant United States Attorney Nancy Cook and Special Agent Steven Hines of the Internal Revenue Service spearheaded an investigation into Hinkson's failure to pay federal income tax on WaterOz profits.[11] In the summer of 2002, just a few months before Cook and Hines led a search of Hinkson's home, Hinkson allegedly asked that Swisher treat Cook, Hines, and their families "the same way as Albers."[12] In November of 2002, Cook and Hines executed search warrants on Hinkson's home, which led to Hinkson's eventual indictment and conviction for tax evasion.[13]

Judge Edward J. Lodge presided over the tax-evasion case.[14] While on pretrial release for the tax-evasion charges, Hinkson extended another request to Swisher.[15] This new offer of $10,000

Lemoge v. United States, 587 F.3d 1188, 1192 n.2 (9th Cir. 2009).

[5] *Hinkson*, 585 F.3d at 1251; *see also* WaterOz: About Us, http://www.wateroz.com/about-us.asp (last visited Apr. 23, 2010).

[6] *Id.* at 1251

[7] *Id.*

[8] *Id.* 1251-52.

[9] *Id.* at 1252.

[10] *Hinkson*, 585 F.3d at 1252.

[11] *Id.* at 1252.

[12] *Id*.

[13] *Id.*; *see also* United States *v.* Hinkson, 281 F. App'x 651, 653 (9th Cir. 2008).

[14] *Hinkson*, 585 F.3d at 1252.

[15] *Id*.

per head would now include Judge Lodge and his family.[16]

After several unsuccessful attempts to solicit Swisher's services, Hinkson approached James Harding.[17] Hinkson met Harding at a 2003 Health Forum in Southern California and subsequently offered the former bodyguard a job at WaterOz and invited him to stay at his home.[18] It was during this stay that Hinkson requested that Harding kill Cook, Hines, and Judge Lodge in exchange for $20,000.[19] Harding refused but was later re-approached by Hinkson with the same proposal in March 2003.[20] After refusing Hinkson's offer yet again, Harding reported the solicitations to the FBI.[21]

That same year, Swisher reported Hinkson's solicitation of his services to an Idaho state prosecutor and the FBI.[22] On September 21, 2004, a federal grand jury in Idaho indicted Hinkson for soliciting the murders of Attorney Cook, Special Agent Hines, and Judge Lodge.[23]

A. FACTS

1. Trial

Hinkson was charged under 18 U.S.C. § 373[24] with nine counts of solicitation to commit a crime of violence.[25]

The solicitation case against Hinkson went to trial on January 11, 2005, and lasted a total of two weeks.[26] A few days into the trial, Elven Joe Swisher, with a Purple Heart medal[27] pinned to his

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[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Hinkson*, 585 F.3d at 1252.

[21] *Id*.

[22] *Id.*

[23] *Id.*

[24] A person violates 18 U.S.C. § 373 if he or she "solicits, commands, induces, or otherwise endeavors to persuade [another] person to engage" in "conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States." 18 U.S.C.A. § 373(a) (Westlaw 2004).

[25] *Hinkson*, 585 F.3d at 1252-53.

[26] *Id.* at 1253.

[27] "The decoration known as the Purple Heart (authorized to be awarded pursuant to Executive Order 11016) may only be awarded to a person who is a member of the armed forces at the time the person is killed or wounded under circumstances otherwise qualifying

lapel, took the stand as a prosecutorial witness.[28] On direct examination, Swisher testified that he had served in the United States Marine Corps.[29] The prosecutor refrained from inquiry into Swisher's actual combat experience or commendations, but instead focused on what Swisher "had *told* Hinkson of his [Korean War] combat experience."[30] Swisher testified that, with this knowledge, Hinkson solicited his assistance in murdering Cook, Hines, and Judge Lodge.[31]

After cross-examining Swisher and attacking his credibility with inconsistencies in his testimony, Hinkson's attorney asked for a sidebar conference.[32] Hinkson's attorney indicated that Swisher could not have served in the Korean War as he would only have been 13 to 16 years old at the time.[33] Hinkson's attorney then presented to the court a letter he had received that morning from Bruce Tolbert, an archives technician with the National Personnel Records Center (Tolbert Letter).[34] The Tolbert Letter stated that Swisher's official military records did not indicate any honorable decorations such as the Purple Heart.[35]

Hinkson's attorney moved to re-open cross-examination in order to question Swisher on his military service and more specifically on the pin adorning his lapel.[36] The prosecution objected, arguing that direct examination was limited to what Hinkson was told and not Swisher's actual service nor his commendations.[37] When the court granted the defense's request to re-open the cross examination of Swisher, the prosecution

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that person for award of the Purple Heart." 10 U.S.C.A. § 1131 (Westlaw 2010).

[28] *Hinkson*, 585 F.3d at 1253.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 1253-54.

[33] The Korean War lasted from 1950-1953. Swisher was born in 1937 and therefore was only 13-16 years old during the Korean War.

[34] The National Personnel Records Center (NPCR) maintains the official military record of those in the Armed Forces. NPCR maintains the official military record of deceased and discharged veterans of the Armed Forces. The National Archives, Military Personnel Records, http://www.archives.gov/st-louis/military-personnel/ (last visited Apr. 23, 2010).

[35] *Hinkson*, 585 F.3d at 1254.

[36] *Id.*

[37] *Id.*

warned Hinkson's attorney not to "go there."[38] When cross-examination resumed, Swisher testified that he was awarded the Purple Heart by the United States military and, following the Korean War, he served on classified missions to free prisoners from secret North Korean prison camps.[39]

Hinkson's attorney then placed the Tolbert Letter before Swisher and asked him if he did in fact receive the Purple Heart.[40] Swisher answered "yes" and presented a piece of paper entitled "Replacement DD-214."[41] The form stated that Swisher was entitled to wear the Purple Heart because he was injured by shrapnel in combat.[42] The Replacement DD-214 was dated October 1957 and stamped certified by a Captain W.J. Woodring.[43] The court then learned that the prosecution had already known of the Replacement DD-214.[44] After denying the defense's motion for a mistrial, the court instructed the jury to "disregard completely all of Mr. Swisher's testimony with regard to that military commendation."[45]

Seven days after Swisher took the stand, Hinkson's lawyer brought forth a letter from Lt. Col. K.G. Dowling of the National Personnel Management Support Branch of the United States Marine Corps (Dowling Letter).[46] The Dowling Letter was addressed to Ron Keeley of the Idaho Veterans Affairs Services.[47] It stated that Swisher had tried to use the Replacement DD-214 to obtain benefits and that the Dowling Letter was a response to

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Hinkson*, 585 F.3d at 1254. The DD-214 Form is also known as a Report of Separation. It is routinely used to verify military service for the purposes of benefits, retirement, employment, and membership in veterans' organizations. Information contained in this report may include the service member's period of service, type of duty, rank, medals, awards, commendations, and any foreign tours. The National Archives, DD Form 214, Discharge Papers and Separation Documents, http://www.archives.gov/veterans/military-service-records/dd-214.html (last visited Apr. 23, 2010).

[42] *Hinkson*, 585 F.3d at 1254-55.

[43] *Id.*

[44] *Id.* at 1255.

[45] *Id.*

[46] *Id.*

[47] *Id*.

Keeley's inquiry into the form's authenticity.[48] The Dowling Letter stated that the medals listed in the Replacement DD-214 were not contained in Swisher's official file.[49] The letter went on to state that several of the medals contained in the Replacement DD-214 form did not even exist at the time it was dated.[50]

Swisher's military record was subsequently subpoenaed and reviewed *in camera*.[51] The file contained a Replacement DD-214 Form identical to Swisher's proffered copy except that it did not list any medals or commendations.[52] But the file also contained a letter from Captain Woodring, the officer who certified Swisher's version of the DD-214, stating Swisher was authorized to wear the Purple Heart and other medals.[53]

The court informed the parties that the record appeared to support Swisher's claims that he was involved in top-secret assignments and was awarded various commendations.[54] However, the court also noted that the record was complex and difficult to decipher, and that the documents were not self-authenticating or self-explanatory.[55] The court emphasized that testimony from the custodian of records as to the complex military file or Captain Woodring as to the authenticity of the DD-214 form would be required to authenticate it as admissible evidence.[56]

But instead of requesting a continuance to procure such testimony, Hinkson's attorney instead moved to admit Swisher's military file and the Dowling letter into evidence.[57] The court then denied both pieces of proffered evidence on the grounds that they were inadmissible under Rules 403[58] and 608(b)[59] of the Federal

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[48] *Hinkson*, 585 F.3d at 1255.

[49] *Id.*

[50] *Id.* at 1255-56.

[51] *Id.* at 1256.

[52] *Id.*

[53] *Id.*

[54] *Hinkson*, 585 F.3d at 1256.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] FED. R. EVID. 403 provides as follows:

> 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.

[59] FED. R. EVID. 608(b) states as follows:

> Specific instances of the conduct of a witness, for the purpose of attacking or

Rules of Evidence[60] as mere extrinsic evidence that would serve no purpose other than to attack Swisher's character for truthfulness.[61] The court noted that the evidence would distract and confuse the jury and ultimately be a waste of time.[62] Hinkson was subsequently convicted for soliciting Swisher to murder Cook, Hines, and Judge Lodge.[63]

2. Post-Trial

Based on new evidence, Hinkson made a motion for a new trial.[64] Hinkson offered a letter from Chief Warrant Officer W.E. Miller (Miller Affidavit).[65] Miller, the liaison to the National Personnel Records Center, stated that the Replacement DD-214 form offered by Swisher was forged and that Swisher's injuries were the result of a civilian car accident rather than military combat.[66] Hinkson also provided an affidavit from Captain Woodring (Woodring Affidavit).[67] In the affidavit, Woodring stated that he never signed the Replacement DD-214 nor did he submit the Woodring Letter located in Swisher's military record.[68]

Reviewing the motion and the evidence in light of the factors identified in *United States v. Harrington*,[69] the trial judge denied the motion for a new trial.[70] In the order denying the motion, the trial judge outlined his findings of facts that led him to conclude that Hinkson failed to meet the requirements of the *Harrington* test.[71]

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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.

[60] *Hinkson*, 585 F.3d at 1256.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1257.

[64] *Id.*

[65] *Id.*

[66] *Hinkson*, 585 F.3d at 1257.

[67] *Id.*

[68] *Id.*

[69] *Hinkson*, 585 F.3d at 1257*; see* United States v. Harrington, 410 F.3d 598 (9th Cir. 2005). For a discussion of the *Harrington* test, *see infra* Part III(B)(1).

[70] *Hinkson*, 585 F.3d at 1257.

[71] *Id.*

The lower court came to the conclusion that the evidence offered in support of the motion was not "newly discovered."[72] Rather, the trial judge found that the Woodring and Miller affidavits offered nothing substantively different from the evidence available at trial.[73] The trial court noted that Hinkson's lawyer mentioned that he had been investigating Swisher's military record for "quite some time" because Swisher's birth date made it doubtful that he had served in the Korean War.[74] The trial judge also highlighted the fact that, months prior to the criminal trial, defense counsel represented Hinkson in a civil suit against Swisher.[75]

The trial court went on to state that, prior to the criminal case going to trial, the prosecution also provided defense counsel with Swisher's grand jury testimony containing similar irregularities.[76] The trial judge concluded that Hinkson's attorney had not been diligent in following any of these leads.[77] The trial court also found the Miller Letter and the Woodring Affidavit to be cumulative of what had already been offered at trial and that the materials were offered for the sole purpose of impeaching Swisher.[78] The court concluded that the two documents were excludable under the Federal Rules of Evidence in that they constituted unfairly prejudicial evidence (Rule 403) and constituted extrinsic evidence of specific conduct offered to attack Swisher's character for truthfulness (Rule 608(b)).[79]

On appeal from the district court's ruling, a Ninth Circuit three-judge panel held that the trial court abused its discretion and reversed the ruling on the motion for a new trial, but the Ninth Circuit granted a rehearing en banc.[80] An en banc panel subsequently heard the appeal and affirmed the trial court's ruling.[81]

III. NINTH CIRCUIT ANALYSIS

[72] *Id.* at 1258.

[73] *Id.* at 1257-58.

[74] *Id.* at 1258.

[75] *Id*.

[76] *Hinkson*, 585 F.3d at 1258.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] United States v. Hinkson, 526 F.3d 1262 (9th Cir. 2008), *reh'g en banc granted,* 547 F.3d 993 (9th Cir. 2008).

[81] *Hinkson*, 585 F.3d at 1251.

A. IDENTIFYING THE APPROPRIATE STANDARD OF REVIEW

The first issue before the en banc court in *Hinkson* was identifying the appropriate standard of review. When the issue on appeal is purely a question of law, the appellate court reviews the case de novo.[82] If the court is to review factual findings, then the abuse-of-discretion standard is applied.[83] But determining the lens through which an appellate court must analyze the application of law in the context of a trial court's factual findings requires further inquiry into the substance of the issue on review.[84]

In *Cooter & Gell v. Hartmax Corp.*, the U.S. Supreme Court opined that in reviewing a trial court's factual findings, "the abuse-of-discretion and clearly erroneous standards are indistinguishable."[85] A clearly erroneous assessment of the facts would equate to a trial court abusing its discretion.[86] Thus, a court of appeals may conclude that a district court abused its discretion in making a factual finding only if the factual finding was clearly erroneous.[87]

The Supreme Court in *United States v. United States Gypsum Co.* held that, despite evidence supporting the trial court's factual finding, an appellate court may still find it clearly erroneous if the evidence as a whole gives rise to a "definite and a firm conviction that a mistake has been committed."[88] Therefore, under this type of review, an appellate court must ask "'whether, on the entire evidence,' it is 'left with a definite and firm conviction that a mistake has been committed.'"[89]

However, just a year later, in *United States v. Yellow Cab Co.*, the Supreme Court concluded that, when the factual evidence offers two permissible views, a trial court does not commit clear error in choosing between the two.[90] This affords a trial court greater discretion to adopt one factual conclusion, even if the weight of the evidence favors another conclusion, so long as

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[82] United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984) (en banc), *abrogated on other grounds,* Estate of Merchant v. Comm'r, 947 F.2d 1390 (9th Cir. 1991).

[83] *Id.* at 1200.

[84] *Hinkson*, 585 F.3d at 1259.

[85] *Hinkson*, 585 F.3d at 1259 (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)).

[86] *Id.*

[87] *Id.*

[88] United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

[89] Easley v. Cromartie, 532 U.S. 234, 242 (2001) (quoting *U.S. Gypsum*, 333 U.S. at 395).

[90] United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949).

there is sufficient evidence to support either conclusion.[91] This ruling contrasted with *Gypsum*'s authorization for an appellate court to reverse whenever it develops a "definite and firm conviction" that the trial court made a mistake.[92] Yet, despite being seemingly contradictory, both *Gypsum* and *Yellow Cab* formulations of the clear-error standard of review have been subsequently reaffirmed.[93]

In *Anderson v. City of Bessemer City, North Carolina,* the Supreme Court reviewed the Fourth Circuit's finding that a trial court committed clear error when it made a factual determination that a selection committee had skipped over a female candidate for a position as recreational director on the basis of her gender.[94] After weighing the evidence itself, the appellate court found that the selection committee had not in fact discriminated against the candidate because she was a woman.[95] The Supreme Court found that both lower courts' factual determinations were supported by the facts in the record and neither was "illogical or implausible."[96] The Court held that, although the Fourth Circuit's view was just as permissible as the trial court's conclusion, judicial deference in favor of a trial court's factual findings required reversal.[97] Thus, the Supreme Court ruled that a finding of clear error is appropriate when the trial court's factual determination is "illogical and implausible" or lacks "support in inferences that may be drawn from facts in the record."[98]

The *Hinkson* court noted that this series of decisions has led to confusion over when an appellate court should exercise its power to reverse a trial court's factual findings. The Ninth Circuit's standard prior to *Hinkson* stated that a trial court "abuses its discretion when it makes an error of law, when it rests its decision on clearly erroneous factual findings, or when [the appellate court is] left with a definite and firm conviction that the district court committed a clear error of judgment."[99]

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[91] *See id.*

[92] *Hinkson*, 585 F.3d at 1260.

[93] *Id.*; *see* Easley v. Cromartie, 532 U.S. 234, 242 (2001) (applying *U.S. Gypsum*'s formulation of clear-error standard of review); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400-01 (1990) (applying definition of "clearly erroneous" that was first articulated in *Yellow Cab*).

[94] Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 571 (1985).

[95] *Id.*

[96] *Id.* at 577.

[97] *Hinkson*, 585 F.3d at 1261.

[98] *Anderson*, 470 U.S. at 577.

[99] United States v. 4.85 Acres of Land, More or Less, Situated in Lincoln County,

But this meant that appellate panels had been left to themselves to decide whether they had reached a "definite and firm conviction that [a] mistake [had] been committed," or whether a trial court's factual finding was even "permissible."[100] The *Hinkson* majority opined that there were consequently no effective checks on an appellate court's power to substitute its own judgment for that of the district court.[101] In *Hinkson*, the Ninth Circuit adopted a new objective abuse-of-discretion standard that attempted to merge the *U.S. Gypsum*, *Yellow Cab*, and *Anderson* standards into one clear test.[102]

B. THE NEW ABUSE-OF-DISCRETION TEST

The new abuse-of-discretion test adopted in *Hinkson* provides a two-pronged approach to determining abuse of discretion.[103] First, the appellate court should look to whether the district court identified the correct legal standard; if the district court failed to do so, then it abused its discretion.[104] Second, the appellate court must determine whether the trial court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record; if any of these three applies, then the trial court abused its discretion by making a clearly erroneous finding of fact.[105]

1. Whether the Appropriate Legal Standard Was Applied

The United States Supreme Court has held that a district court abuses its discretion if it makes an "error of law."[106] Here, the district court denied Hinkson's new-trial motion.[107] By applying the *Harrington* test, the district court identified and applied the

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Mont., 546 F.3d 613, 617 (9th Cir. 2008) (internal quotation marks omitted).

[100] *Hinkson*, 585 F.3d at 1251 (citing *4.85 Acres of Land*, 546 F.3d at 617).

[101] *Hinkson*, 585 F.3d at 1251.

[102] *Id.* at 1261.

[103] *Id*.

[104] *Id*. at 1261-62.

[105] *Id.* at 1262-63.

[106] *Hinkson*, 585 F.3d at 1261 (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)).

[107] *Hinkson*, 585 F.3d at 1257.

relevant law related to a motion for a new trial.[108] The *Harrington* test requires a criminal defendant seeking a new trial to prove (1) the evidence is newly discovered, (2) the defendant was diligent in seeking the evidence, (3) the evidence is material to the issues at trial, (4) the evidence is not (a) cumulative or (b) merely impeaching, and (5) the evidence indicates the defendant would probably be acquitted in a new trial.[109] If the issue on appeal is "essentially factual," then the issue becomes whether the district court's findings of fact, and its application of those findings of fact to the rule of law were illogical, implausible, or without support in inferences that may be drawn from facts in the record.[110]

The *Hinkson* court concluded that the substance of Hinkson's appeal was one that was "essentially factual."[111] The question here did not turn on the definition or determination of legal concepts.[112] Rather, the district court's decision to deny the new-trial motion rested on the factual events that occurred at trial and the factual value of Hinkson's newly discovered evidence.[113] As a result, the Ninth Circuit turned to the question of whether the district court's findings of fact and its application of the *Harrington* factors to the facts were illogical, implausible, or lacking in support from the record.[114]

2. Illogical, Implausible, or Lacking in Support from the Record

The *Hinkson* majority held that the district court did not err in finding that the evidence offered in Hinkson's motion for a new trial was not newly discovered.[115] The majority found that, although the Miller and Woodring affidavits were newly written, they offered nothing new beyond what was known at trial.[116] Instead, the affidavits merely supported evidence that was deemed inadmissible at trial.[117] Therefore, the en banc panel concluded that the trial court's determination that the evidence

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[108] *Id.* at 1264.

[109] United States v. Harrington, 410 F.3d 598, 601 (9th Cir. 2005).

[110] United States v. McConney, 728 F.2d 1195, 1202 (9th Cir. 1984) (en banc), *abrogated on other grounds by* Estate of Merchant v. Comm'r, 947 F.2d 1390 (9th Cir. 1991).

[111] *Hinkson*, 585 F.3d at 1264.

[112] *Id.* at 1259.

[113] *Id.*

[114] *Id.* at 1264.

[115] *Id.*

[116] *Hinkson*, 585 F.3d at 1264.

[117] *Id.*

was not "newly discovered" was logical and plausible.[118]

The *Hinkson* court also concluded that the trial court's determination that Hinkson's attorney failed to exercise due diligence in discovery was logical, plausible, and based on inferences supported by the record.[119] The court noted that Hinkson's lawyer admitted to conducting an investigation of Swisher's military record for "quite some time."[120] In fact, months prior to the trial, current counsel represented Hinkson in a civil trial against Swisher.[121] In a civil deposition, Swisher mentioned his service in the Korean War, a war that occurred when he was too young to enlist in the armed forces.[122] Similar statements made by Swisher were also found in grand jury transcripts provided to defense counsel.[123] The trial court also noted the months that passed between Swisher's first cross-examination and the procurement of the affidavits, and that Hinkson's counsel failed to ask for a continuance.[124] Thus, the Ninth Circuit held that no clear error occurred in the trial court's determination that defense counsel failed to exercise due diligence.[125]

Similarly, the *Hinkson* court noted that the district court was well within its traditional powers of discretion when it determined that the evidence being offered was collateral and immaterial to the issues at trial.[126] The relevant issue was what Swisher had told Hinkson.[127] The trial court determined that the evidence of Swisher's actual military service record (or lack thereof) would have confused or misled the jury as to the relevant issues.[128] The trial court also determined that authenticating and explaining the documents would cause an unreasonable delay.[129]

Finally, the *Hinkson* court held that the district court did not err in ruling that the evidence would not result in an acquittal at re-trial.[130] The district court opined that the affidavits would prove

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[118] *Id.* at 1264-65.
[119] *Id.* at 1265.
[120] *Id.*
[121] *Id.*
[122] *Hinkson*, 585 F.3d at 1265.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Hinkson*, 585 F.3d at 1265-66.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 1265-66.
[130] *Id.* at 1267.

only that Swisher lied about his military service.[131] The collateral nature of this evidence would make it inadmissible under Rule 403 of the Federal Rules of Evidence, and the outcome of the trial would not change.[132] Therefore, the *Hinkson* court held that the trial court did not abuse its discretion, because this factual determination was based on reasonable inferences from the facts.[133]

Accordingly, the Ninth Circuit concluded that the district court identified the correct legal standard to analyze Hinkson's motion for a new trial and the court's findings of fact, and that the district court's application of the correct legal standard to those findings of fact was not illogical, implausible, or without support in inferences that could be drawn from the facts in the record.[134] Therefore, the *Hinkson* court ruled that the district court had not abused its discretion in denying Hinkson's new-trial motion.[135]

III. IMPLICATIONS OF THE DECISION

By applying the new objective test for an abuse-of-discretion determination, the *Hinkson* majority stated that it was simply clarifying the existing standard.[136] However, the new objective two-part test offers definite direction for future Ninth Circuit adjudications. In fact, in the two months following the decision, *U.S. v. Hinkson* was cited by twenty-one Ninth Circuit decisions and many more briefs by counsel.[137]

Litigants may have to be more creative in persuading appellate courts that particular factual findings are illogical, implausible, or without support in inferences from the facts in the record. The *Hinkson* majority made only cursory reference to these three terms and failed to shine any new light onto what kinds of findings would fit these descriptions. It is likely that subsequent cases will be required to fill in the lines drawn by *United States v. Hinkson*.

Focus will once again be placed on the "main event" of the

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[131] *Id.* at 1266-67.

[132] *Hinkson,* 585 F.3d at 1267.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* at 1251.

[137] *See, e.g.,* USAA Fed. Sav. Bank v. Thacker (In re Taylor), No. 08-60033, 2010 WL 1006927, at *4 (9th Cir. Mar. 22, 2010); Dominguez v. Schwarzenegger, 596 F.3d 1087, 1092 (9th Cir. 2010).

trial.[138] Litigants will be forced to concentrate their efforts and energies on the trial and convincing the trier of fact that their version of the events is right.[139] Judicial resources will be conserved in that only the trial court will be burdened with duplicative and lengthy factual determinations.[140]

One outcome from *Hinkson* is certain: it will afford more deference to the trial courts in their factual findings and the application of those facts to law. By announcing this new test, the *Hinkson* court was clear as to what level of deference appellate courts should afford trial courts in similar cases in the future.

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[138] Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575 (1985).

[139] *Id.*

[140] *Id.* at 574-75.

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