No. 10-869

In the Supreme Court of the United States

DAVID ROLAND HINKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TODD M. HINNEN
Acting Assistant Attorney General
JOHN F. DE PUE
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court permissibly excluded extrinsic evidence indicating that a government witness was not a decorated combat veteran.

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OPINIONS BELOW

The opinion of the limited en banc court of appeals (Pet. App. 92-224) is reported at 585 F.3d 1247. The earlier opinion of a three-judge panel of the court of appeals (Pet. App. 226-336), which was vacated upon the grant of rehearing en banc, is reported at 526 F.3d 1262.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 2009. A petition for further rehearing was denied on July 14, 2010 (Pet. App. 1-91). On September 27, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 11, 2010, and the petition was filed on November 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Idaho, petitioner was convicted on three counts of soliciting a crime of violence, in violation of 18 U.S.C. 373. Pet. App. 338. He was sentenced to consecutive 120-month terms of imprisonment on each of those counts, and a consecutive 36-month term of imprisonment for the commission of offenses while on release, all to be served consecutively to terms totaling ten years of imprisonment on prior convictions for tax evasion and related crimes. *Id.* at 340. A panel of the court of appeals reversed (*id.* at 226-336), but on rehearing a limited en banc court affirmed. *Id.* at 92-224.

1. a. Petitioner is a tax objector who refused to pay income tax on the profits of his business, which sold bottled water with alleged medicinal benefits. Pet. App. 93, 95. The government investigated petitioner for tax evasion and related offenses, for which petitioner was eventually arrested and convicted. *Id.* at 96-97 & n.1.

In 2004, a grand jury indicted petitioner on nine counts of soliciting a crime of violence, in violation of 18 U.S.C. 373, and two counts of threatening to murder the family of a federal official, in violation of 18 U.S.C. 115. Pet. App. 98-99. The indictment alleged that petitioner had solicited or threatened the murders of the Internal Revenue Service (IRS) agent, Assistant United States Attorney, and federal district judge assigned to his tax-evasion case. *Id.* at. 96, 98. Three of the Section 373 counts alleged that petitioner had solicited his employee and then-friend, Elven Joe Swisher, to torture and kill those federal officials. *Id.* at 99.

b. The government's theory at trial was that petitioner solicited Swisher because petitioner believed Swisher to be a military veteran who had killed in the line of duty.[1] Swisher testified on direct examination that he had served in the Marine Corps; that he had told petitioner about that service; and that he had claimed to petitioner that he had killed in combat. Pet. App. 100; E.R. 21-22.

Swisher further testified as follows: Petitioner had initially told Swisher that he would pay "$10,000 per 'head'" for Swisher to torture and kill a local attorney and his family because the attorney was adverse to petitioner in a legal dispute. Pet. App. 96. Swisher thought petitioner was joking. *Ibid.* A couple of months later, petitioner told Swisher that he wanted the IRS agent and prosecutor in his tax-evasion case, and their families, treated in the same way as he had suggested for the local attorney. *Ibid.*; see E.R. 24. When Swisher told petitioner "that he was out of his mind," petitioner responded, "Well, you know, I know you're used to it. I mean, you have killed people." E.R. 24; see Pet. App. 96. Swisher was less convinced this time that petitioner was joking and threatened to contact law enforcement. *Id.* at 97; see E.R. 24. Petitioner then came to Swisher a third time several months later and again asked him to torture and kill the prosecutor and agent, their families, and the federal judge assigned to the case for "[a]t least $10,000 a head." E.R. 24. Petitioner "pleaded" with

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[1] In its opening statement, the government described Swisher as "a Marine, a Combat Veteran from Korea during the Korean conflict." E.R. 19. Although the statement that petitioner saw combat in Korea turned out to be incorrect (for reasons explained in the text), petitioner did not object to that statement at the time and did not assign any error to it on appeal. Pet. App. 100 & n.8. No court has found any government misconduct with respect to that statement or any other aspect of the prosecution.

Swisher, whom he called his "best friend," to do this for him, but Swisher declined. Pet. App. 97.

c. On cross-examination, petitioner sought to impeach Swisher's credibility. Pet. App. 101. He elicited testimony that Swisher had reported petitioner to authorities only after the two had experienced a falling out; that the two had been adversaries in civil litigation; and that Swisher believed that petitioner had attempted to have him killed. *Ibid.*; see *id.* at 97-98, 319. Petitioner's counsel also sought to identify inconsistencies in Swisher's trial testimony. *Id.* at 101.

After completing his cross-examination, petitioner's counsel requested a sidebar conference. Pet. App. 101; E.R. 26. Counsel stated during the sidebar that "[f]or quite sometime [sic], we have been trying to dig into [Swisher's] military history because we don't believe it's accurate." E.R. 25. Counsel told the court that "[b]ecause of [Swisher's] age and because of the time of the [Korean] war, we don't believe he was in the war." E.R. 25. Counsel also noted that Swisher appeared to be wearing a Purple Heart—a medal given to servicemembers wounded in combat—on his lapel, and counsel said that he had a letter from the National Personnel Records Center (NPRC) indicating that Swisher had not received any medals. Pet. App. 101-102, 139; E.R. 25. The government observed that it had not inquired on direct examination "about winning medals or combat," but had instead primarily focused on what Swisher had represented to petitioner about Swisher's military service. E.R. 25; see Pet. App. 102.

The district court permitted petitioner's counsel to inquire about Swisher's military service and the object on Swisher's lapel. Pet. App. 102; E.R. 25. In response to cross-examination questions, Swisher testified that he was wearing a Purple Heart Medal awarded as a consequence of wounds he received while on a classified mission to free prisoners of war in North Korea following the armistice that terminated the Korean conflict. Pet. App. 103; E.R. 25-26. Petitioner's counsel then confronted Swisher with the NPRC letter (which was shown to Swisher but not to the jury). Pet. App. 102-103; E.R. 26. Swisher maintained that he had, indeed, received a Purple Heart and produced from his pocket what appeared to be a "replacement" military discharge form to that effect (which also was not introduced into evidence or shown to the jury). Pet. App. 103 & n.10; E.R. 26.

At a subsequent sidebar, the district court "agreed with the government that [petitioner's counsel] had tried for a 'grandstand play' that had backfired." Pet. App. 104; see E.R. 27-28. With the consent of the parties, the district court instructed the jury that the court had "made a mistake in allowing the questioning with regard to the Purple Heart medal" and that the jury should "disregard completely all of Mr. Swisher's testimony with regard to that military commendation." E.R. 29; see Pet. App. 104.

d. During presentation of the defense case, the government brought to petitioner's and the district court's attention a letter, of which the prosecutor had recently received a copy, from a Marine Corps official to the Idaho branch of the Department of Veterans Affairs. Pet. App. 103-105 & n.13. The letter discussed the replacement discharge form Swisher had produced at trial, which Swisher had also used for purposes of obtaining veteran benefits. *Id.* at 105. The letter said that the form did not appear in Swisher's official file; that Swisher's official file did not show him receiving any medals; that Swisher had not been injured in combat;

and that some of the medals listed on the form Swisher had produced had not existed on the date listed on the form. *Ibid.*

The same day, Swisher's official military personnel file arrived at the court via subpoena. Pet. App. 104-105. It contained an original copy of Swisher's discharge form, which listed no medals or combat wounds, and a copy of the Marine Corps letter that the government had brought to the court's attention. *Id.* at 105-106. It also contained photocopies of documents petitioner had presented to the Department of Veterans Affairs: (1) the replacement discharge form that he had produced at trial, and (2) what appeared to be a contemporaneous letter attesting to Swisher's entitlement to wear the Purple Heart and other medals. *Id.* at 106. Upon initially examining the file, the district court said that the file appeared to state that Swisher had participated in "top secret activities" and was "awarded the medals he says he was awarded." *Ibid.* But on further review, the court ultimately found the file to be "very difficult to decipher," with documents that were "neither self-authenticating nor self-explanatory." *Ibid.* The court was " 'not convinced' one way or the other whether the Swisher-produced [replacement discharge form] was credible," and it suggested that conclusive evidence on this point might come from a custodian of military records or from the person whose signature appeared on the documents Swisher had produced. *Ibid.*

Petitioner did not move for a continuance to obtain such evidence. Pet. App. 106-107. He instead moved to introduce Swisher's military personnel file, as well as the letter from the Marine Corps to the Department of Veterans Affairs, into evidence. *Id.* at 107.

The district court denied the motion on two grounds. Pet. App. 107. First, the court determined that the documents should be excluded under Federal Rule of Evidence 403, which provides that evidence, even if relevant, "may be excluded if its probative value is substantially outweighed by," *inter alia*, "the danger of * * * confusion of the issues, * * * [or] considerations of undue delay [or] waste of time." Fed. R. Evid. 403. The district court reasoned that the documents were unauthenticated and inconclusive; that "[w]ithout an adequate foundation, the jury would have no way to determine which documents to credit"; that establishing a foundation would "require considerable time"; and that "[t]he court is unwilling to allow this issue to become a distracting side show to the trial and so finds that it could be confusing to the jury to introduce these confusing documents and could distract the jury from their primary purpose." E.R. 47; see Pet. App. 107. Second, the district court concluded that the documents were inadmissible under Federal Rule of Evidence 608(b), which provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime * * * may not be proved by extrinsic evidence." Fed. R. Evid. 608(b). The court rejected petitioner's argument that the documents were probative of whether Swisher had committed "fraud on the court," observing that the relevant testimony had been stricken from the record, and instead concluded that the evidence would be directed at an alleged instance of prior fraud against the government. E.R. 46; see Pet. App. 107.

The district court did, however, offer that the defense could reopen cross-examination on Swisher's military record and could reference (though not introduce into evidence) the extrinsic documents in doing so. Pet. App. 107-108; E.R. 46-47. Petitioner's counsel chose not to reopen the cross-examination. Pet. App. 108.

e. During its summation, the government argued that petitioner solicited Swisher to kill the federal officials because "[h]e understood Mr. Swisher had a military record and that he had served in combat and killed people. It's the kind of person that he thinks will do such a thing." E.R. 52; see Pet. App. 108. The jury found petitioner guilty on the charges concerning his solicitation of Swisher. *Id.* at 99 & n.5. The jury deadlocked on three charges concerning petitioner's solicitation of another acquaintance to torture and kill the same federal officials. *Id.* at 99 & n.4. It acquitted petitioner on three additional solicitation charges and the charges of threatening to kill the children of two of the federal officials. *Id.* at 98-99 & nn.3, 7.

3. Following his conviction, petitioner moved for a new trial. Pet. App. 108. Among other things, he argued that he had "newly discovered evidence": two affidavits from military officials, including one from the officer who had allegedly signed the replacement discharge form produced by Swisher at trial, stating that the replacement discharge form was forged. *Id.* at 108-109.[2]

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[2] There is no longer any dispute that, although Swisher served in the military, he did not serve in Korea and did not receive the Purple Heart or any other decorations. Over two years after the district court proceedings concluded, Swisher was indicted and convicted of knowingly wearing a military decoration to which he knew he was not entitled, in violation of 18 U.S.C. 704(a); willfully and knowingly making false representations to obtain benefits to which he was not entitled, in violation of 18 U.S.C. 1001(a)(2) and (3); and presenting false testimony and a

The district court denied the motion. Pet. App. 352-382. It concluded that the substance of these affidavits was not "new" and was largely cumulative of the information petitioner possessed at trial; that petitioner's counsel had not been diligent in discovering it; that it would not be admissible in a new trial; and that it was not material. *Id.* at 352-362. The district court found "meritless" petitioner's "attempts to recharacterize the evidence as central to the Government's case by arguing that Swisher's silent wearing of a miniature Purple Heart lapel pin on his breast-pocket while testifying made his military record 'intrinsic to both his credibility and the Government's theory of the prosecution.'" *Id.* at 356 (brackets omitted). The district court reasoned that "the Government elicited on direct examination only that [petitioner] *believed* that Swisher had substantial combat experience; whether or not Swisher had *actually* served in combat or was wounded and decorated was never relevant to the key question as to whether [petitioner] thought Swisher to be a potential contract killer who would willingly agree to murder three federal officials [petitioner] wanted dead." *Id.* at 356-357.

4. A divided panel of the court of appeals reversed, remanding for a new trial on the basis of the newly produced affidavits. Pet. App. 228-336. The panel concluded, among other things, that the documents would allow the defense to undermine Swisher's testimony in a new trial. *Id.* at 309-312.

The panel did not, however, reach the issue of whether the district court had abused its discretion in

forged document to obtain benefits to which he was not entitled, in violation of 18 U.S.C. 641 and 642. Pet. App. 257-258. The Ninth Circuit affirmed his conviction. *United States* v. *Swisher*, 360 Fed. Appx. 784 (2009).

excluding the documentary evidence about Swisher that petitioner had sought to introduce at trial. Pet. App. 228. It did state, in passing, that exclusion had been improper under Rule 608(b), reasoning that the evidence was not addressed to an out-of-court incident of untruthfulness, but instead was relevant to impeach an in-court "statement" that Swisher had made by wearing a Purple Heart pin. *Id.* at 272-273. But the panel also stated that "the district court's evidentiary ruling under Rule 403 was almost certainly not an abuse of discretion." *Id.* at 272.

Judge McKeown dissented. Pet. App. 313-336. She stated, among other things, that "I cannot think of a clearer example of a collateral issue than Swisher's military service." *Id.* at 330. "[T]he real issue," she explained, was petitioner's "perception of Swisher's purported prowess and daring, not the truth of his military service." *Id.* at 331-332. She found the "majority's discussion of the wearing of the Purple Heart by Swisher" to be "misplaced," observing in part that the testimony regarding that issue had been stricken. *Id.* at 332 n.6; see *id.* at 331.

5. a. On rehearing en banc, the court vacated the panel decision, and a limited en banc court affirmed petitioner's convictions. Pet. App. 92-224; see 9th Cir. R. 35-3 (initial en banc court consists of chief judge and ten active circuit judges). The court first clarified that its abuse-of-discretion standard for reviewing the denial of a motion for a new trial consists of a two-part test: (1) whether the district court identified and applied the correct legal rule; and (2) whether any of the district court's ruling "resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." Pet.

App. 123. Applying that standard, the court affirmed the district court's conclusion that no new trial was warranted based on newly discovered evidence. *Id.* at 125-132. The court noted, among other things, that "the material point was whether Swisher *told* [petitioner] he had killed men in battle, not whether he had actually done so." *Id.* at 129; see *id.* at 130-132.

The court also addressed and rejected petitioner's argument that the district court had abused its discretion in excluding the documents about petitioner's military record. Pet. App. 133-134. The court concluded that exclusion had been permissible under Rule 403 (and therefore did not reach the alternative Rule 608(b) ground). *Ibid.* The court observed that deference was proper in reviewing Rule 403 rulings, because "considerations arising under Rule 403 are 'susceptible only to case-by-case determinations, requiring examination of the surrounding facts, circumstances, and issues.'" *Id.* at 133 (citation omitted). As to this case, it explained:

> Here, the district court weighed the limited probative value of the evidence—to impeach testimony by Swisher about his Purple Heart medal, which testimony the jury had already been instructed to disregard—against the time it would take to authenticate and explain the military file (which the court found facially indecipherable) and the risk of confusing the jury with the tangential evidence. The court concluded the risk substantially outweighed the reward, and this conclusion, which was not illogical nor implausible based on the record, did not exceed the bounds of the district court's discretion in applying Rule 403.

Id. at 133-134.

b. Judge William Fletcher (who had written the panel majority opinion), joined by four other judges, dissented. Pet. App. 136-224. He reiterated the original panel majority's reasoning for believing a new trial was warranted. *Id.* at 173-224. He also expressed the view that the district court had committed reversible error at trial by excluding the documentary evidence regarding Swisher's military record. *Id.* at 169-173. He believed that the evidence addressed the credibility of a "statement" Swisher had made in court by wearing a Purple Heart pin, and it was therefore not excludable under Rule 608(b) as extrinsic evidence of a prior untruthful statement. *Id.* at 170-171. He also departed from the original panel majority opinion to conclude that the district court abused its discretion by excluding the evidence under Rule 403. *Id.* at 172-173. In his view, it would have been relatively straightforward to present the evidence to the jury, and the evidence would have given the jury a "significantly different impression" of the credibility of a critical government witness. *Id.* at 173.

6. The court of appeals denied a petition for reconsideration by the limited en banc panel or rehearing by the full court. Pet. App. 1. Chief Judge Kozinski, who had previously been a member of the majority, dissented. *Id.* at 2. He stated that after reading *Porter* v. *McCollum*, 130 S. Ct. 447 (2009) (per curiam), and an amicus brief that had been filed in this case, he was of the opinion that he "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." Pet. App. 2. Chief Judge Kozinski therefore joined Judge Fletcher's dissent from the denial of rehearing, which replicated

Judge Fletcher's dissent from the decision of the limited en banc court. *Id.* at 2; see *id.* at 3-91.

ARGUMENT

Petitioner asserts (Pet. 10-22) that the district court abused its discretion in excluding documentary evidence concerning Swisher's military record.[3] The court of appeals' fact-bound decision is correct and does not conflict with any decision of this court or any other court of appeals. No further review is warranted.

1. As a threshold matter, certiorari is unwarranted because the petition does not raise a legal question of general application, but instead seeks review of the application of settled law to the particular facts of petitioner's case. Although petitioner expresses (Pet. 11-14) some disagreement with the court of appeals' formulation of the abuse-of-discretion standard, he does not ask this Court to review that standard, but instead merely seeks review of the *application* of the standard to these facts. Pet. i; see Pet. 14 ("[E]ven 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."). He suggests neither that the court of appeals misinterpreted the law nor that its application of the law to the unique facts of this case is likely to have a substantial impact on future cases. Cf. Pet. 11-12 (referring to previous defendant-favorable precedent in the

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[3] Petitioner does not appear to renew in this Court any of his other claims, including his request for a new trial based upon "newly discovered evidence." He does not, for example, argue that the court of appeals erred in affirming the district court's conclusion that he failed to exercise sufficient diligence in obtaining the additional evidence. See Pet. App. 127.

court of appeals).[4] This Court "rarely grant[s]" a petition for a writ of certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," Sup. Ct. R. 10, and there is no good reason to do so here.

2. Further review is unnecessary in any event because the district court did not abuse its discretion in excluding the documentary evidence of Swisher's military record.

Petitioner briefly contends (Pet. 14-15) that the district court misapplied the rules of evidence in arriving at its ruling. That contention lacks merit. His only argument that the district court abused its discretion by excluding the documents under Rule 403 is that the Rule 403 determination "plainly rested in part on [the court's] flawed conclusion that the evidence was inadmissible as a matter of law under Rule 608(b)." Pet. 14-15. But even assuming the correctness of petitioner's premise (that the Rule 608(b) ruling was flawed), his conclusion (that the Rule 403 ruling also was flawed) does not follow. Neither the majority nor the dissent in the court of appeals found the two grounds for exclusion to be so intertwined. The majority affirmed the evidentiary ruling on Rule 403 grounds, and it concluded that it therefore "need not reach the issue raised under Rule 608(b)." Pet. App. 133. The dissent perceived a need to address and reject both grounds separately in order to support its conclusion that the district court had erred. *Id.* at 169-173.

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[4] To the extent that petitioner is arguing that the outcome in his case is inconsistent with precedent from the same court of appeals, that argument is properly directed to the court of appeals rather than to this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

The court of appeals properly affirmed the court of appeals' Rule 403 determination. Petitioner asserts that the documents were offered "to show [Swisher's] bias, self-interest, and his particular substantive lies in this case." Pet. 14 (emphasis omitted). But petitioner does not explain how Swisher's military record would demonstrate bias or self-interest with respect to petitioner's prosecution. Nor is it clear what "substantive lies" Swisher told "in this case." The government did not elicit any testimony about petitioner's claimed medals or combat experience on direct examination. Pet. App. 100, 173; E.R. 21-22. Petitioner argued to the district court at the time of its evidentiary ruling that the documents were necessary to rebut statements that Swisher had made on cross-examination, but those statements had been stricken from the record and the jury had been instructed to disregard them. E.R. 39-43; see E.R. 29 (district court instructing jury that "everything from where I asked [petitioner's counsel] to re-open, please strike that from your minds; and you are not to consider it as evidence in the case").[5]

Counterbalanced against whatever probative value the documents might have had, the district court had substantial reason for its unwillingness "to allow this

[5] Petitioner did not argue at that time, and does not expressly argue now, that wearing the Purple Heart pin itself constituted an in-court statement to the jury, as the court of appeals dissenters believed. Pet. App. 170-171. And even if he had made that argument, and it were correct, it is unclear that the jury placed any weight on the pin, as the only time it was either pointed out that Swisher was wearing a pin or explained that the pin was a Purple Heart was during the cross-examination testimony that the jury was instructed to disregard. E.R. 25, 29; see *United States* v. *Olano*, 507 U.S. 725, 740 (1993) ("It is the almost invariable assumption of the law that jurors follow their instructions.") (brackets and citation omitted).

issue to become a distracting side show." E.R. 47. First, the documents were difficult for the jury to understand and of indeterminate usefulness to petitioner. The district court's initial determination was that the documents *supported* Swisher's claims; on further examination, the district court found the documents "not explanatory." Pet. App. 106; E.R. 47. Second, the documents were unauthenticated and foundation would need to be laid for them, an enterprise likely to consume considerable time and resources. Pet. App. 133; E.R. 47. Third, the district court noted that the government "would have to be allowed to introduce conflicting documents or testimony of military officers to explain them" if they were introduced, requiring that even more time and resources be devoted to this issue. E.R. 47.

Fourth, and perhaps most importantly, there was a risk "of confusing the jury with tangential evidence." Pet. App. 133-134; see E.R. 47. "[T]he material point was whether Swisher *told* [petitioner] he had killed men in battle, not whether he had actually done so." Pet. App. 129. The district court did not abuse its discretion in declining to allow petitioner to divert a substantial portion of the trial into examining the latter issue.

3. Petitioner also contends (Pet. 15-22) that even if the district court's evidentiary ruling was correct, he had a constitutional right to offer the documents into evidence. Neither the majority nor the dissenting judges on the court of appeals addressed that issue, and it would be a departure from the Court's normal practice to review it in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.9 (2005) ("[W]e are a court of review, not of first view.").

In any event, petitioner's constitutional argument lacks merit. Petitioner invokes the "constitutionally protected right of cross-examination" recognized in *Olden* v. *Kentucky*, 488 U.S. 227 (1988) (per curiam), and other cases. Pet. 15 (quoting *Olden*, 488 U.S. at 230-231). But "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). The district court in this case did in fact offer petitioner the opportunity to cross-examine Swisher on his military record. Pet. App. 107-108; E.R. 46-47. And it would have permitted him to use the extrinsic documents in doing so, as long as petitioner did not seek to introduce those documents into evidence. *Ibid.* Petitioner declined that offer. Pet. App. 108.

The district court's decision not to allow petitioner to introduce particular documents into evidence during cross-examination does not conflict with *Olden* or any other decision of this Court. The constitutional violation in *Olden* occurred when a trial court prohibited a defendant from introducing any evidence (including through cross-examination of the victim) about the victim's extramarital live-in relationship, when the relationship potentially gave the victim a motive to falsely accuse the defendant of rape and when the victim had lied on direct examination about her living arrangements. 488 U.S. 230-232; see *id.* at 232 (recognizing trial court's broad discretion reasonably to limit cross-examination, but concluding that "the limitation here was beyond reason"). This case differs from *Olden* because (1) the court *did* permit petitioner an opportunity for cross-examination on the disputed topic (which petitioner declined); (2) the witness did not make any false statements on direct examination; and (3) the topic on which petitioner sought to introduce evidence related to Swisher's credibility, rather than a specific motivation to lie.[6]

Petitioner suggests (Pet. 17-22) that the exclusion of Swisher's military record takes on constitutional dimension because the jury's view of Swisher would have changed so dramatically had the evidence been allowed. Petitioner asserts (Pet. 20) that Swisher "presented himself to the jury as * * * a combat hero wounded in the Korean War," and he argues that the jury would have turned on Swisher had it known such a presentation to be false. But petitioner's argument overlooks several issues: the only testimony in which Swisher asserted that he was a decorated combat veteran of the Korean conflict arose in cross-examination that the jury was instructed to disregard; the district court did not believe that the documents petitioner sought to introduce would necessarily have disproved Swisher's assertions; and petitioner voluntarily declined the opportunity to cross-examine Swisher on this issue.

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[6] Other cases cited in passing by petitioner likewise do not involve credibility evidence, but instead evidence that addresses the truth or falsity of issues directly before the jury. See *Holmes* v. *South Carolina*, 547 U.S. 319, 321 (2006) (defendant sought to introduce evidence of third-party guilt); *Crane* v. *Kentucky*, 476 U.S. 683, 684 (1986) (defendant sought to introduce evidence of circumstances of his confession to argue that it had been involuntary); *Davis* v. *Alaska*, 415 U.S. 308, 311 (1974) (defendant sought to introduce witness's probationary status not "as a general impeachment of [his] character as a truthful person," but to show that he "acted out of fear or concern of possible jeopardy to his probation" when he interacted with police); *Washington* v. *Texas*, 388 U.S. 14, 16 (1967) (defendant in murder case sought to introduce testimony of eyewitness who claimed to have shot the victim himself out of defendant's presence).

Even without admitting the documents into evidence, petitioner could have used them to cross-examine Swisher, and he furthermore could have used other evidence (such as Swisher's age at the time of the Korean conflict) to demonstrate to the jury that Swisher was not being truthful about his military record. See Pet. App. 101; E.R. 25. Petitioner's decision not to do so does not provide the basis either for an assertion of a constitutional violation or for review by this Court.

4. Finally, petitioner's request (Pet. 22) for summary reversal in light of *Porter* v. *McCollum*, 130 S. Ct. 447 (2009) (per curiam), lacks merit. In *Porter*, this Court concluded, on federal habeas review, that an attorney had been constitutionally ineffective in failing to introduce certain mitigating evidence in the penalty phase of a capital case. *Id.* at 448. The mitigating evidence that should have been presented included evidence of the defendant's heroic military service in Korea and the trauma caused by his participation in the war. *Ibid.*; *id.* at 455.

This Court's recognition that a penalty-phase jury could attach significant mitigating weight to a capital defendant's military service does not compel the conclusion that petitioner in this case was entitled to introduce documentary evidence of Swisher's military record. Unlike in a capital sentencing, in which a defendant has a constitutional right to present all available mitigating evidence in order to argue that he should not be sentenced to death, petitioner's military record was not directly at issue here. The government's case was based only on Swisher's *claim* to have a certain military record. See Pet. App. 106. The jury is presumed not to have attached any weight (in assessing Swisher's credibility or otherwise) to testimony about Swisher's military record that it was instructed to disregard, and petitioner declined the opportunity to reopen cross-examination in order to inquire into Swisher's military record. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TODD M. HINNEN
Acting Assistant Attorney General

JOHN F. DE PUE
Attorney

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