IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**Case No. 08 C 00094**
vs.	)	
	)	**Judge James T. Moody**
MATTHEW HALE,	)	
	)	
Defendant-Movant.	)	

DEFENDANT-MOVANT HALE'S
BRIEF IN SUPPORT OF § 2255 MOTION

Clifford J. Barnard # 8195
Attorney at Law
1790 30th Street, Suite 280
Boulder, Colorado 80301-1020
Telephone: (303) 449-2543
Facsimile: (303) 444-6349
Email: cliffbarnard@earthlink.net

Attorney for Defendant-Movant Hale

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**Case No. 08 C 00094**
vs.	)	
	)	**Judge James T. Moody**
MATTHEW HALE,	)	
	)	
Defendant-Movant.	)	

BRIEF IN SUPPORT OF § 2255 MOTION

I. STATEMENT OF THE CASE

Matthew Hale was convicted of obstruction of justice (Count 1), solicitation of the murder of U.S. District Court Judge Lefkow (Count 2) and obstruction of justice (Count 4). He was sentenced to 480 months, his convictions were affirmed by the 7th Circuit in *U.S. v. Hale*, 448 F.3d 971 (7th Cir.2006) and certiorari was denied in *Hale v. U.S.*, 127 S.Ct. 1020 (2007).

II. GROUND ONE: INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

The standard of review for ineffective assistance of counsel is: (1) counsel's performance was deficient under prevailing professional standards; and (2) because of counsel's deficiencies, the defendant was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Even if the odds that the defendant would have been acquitted had he received effective representation appear to be less than fifty percent, prejudice has been established ***so long as the chances of acquittal are better than negligible.***" *U.S. ex rel Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir.2003) (emphasis added). Deficiency is present where counsel's failure "was not based on 'strategy,' but on counsel's mistaken beliefs ..." *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

B. INSTANCES OF INEFFECTIVE ASSISTANCE

1. FAILURE TO PRESENT THE CORRECT THEORY OF DEFENSE

Counsel failed to present Mr. Hale's actual, *bona fide* defense which was much stronger than the defense presented. Had the correct defense been presented, it would likely have resulted in Mr. Hale's exoneration from crimes he did not commit. Counsel failed to recognize and present the defense that, at the original Dec. 5, 2002 meeting, Mr. Hale believed that government cooperating

witness Tony Evola was talking about lawyer James Amend when Evola asked him about "exterminating" the "rat, Jew rat." Evola's Dec. 9, 2002 email then, however, told Mr. Hale that Evola had switched his target from lawyer Amend to Judge Lefkow. On Dec. 17, 2002, Mr. Hale then categorically rejected Evola's new plan against Judge Lefkow's life. (*See Declaration of Matthew Hale*.) Thus, Mr. Hale's entire trial and hence his convictions were based on the misconception that Judge Lefkow was the "Jew rat" referenced in the Dec. 5, 2002 conversation.

At trial, defense counsel conceded that Judge Lefkow was the "jew rat." In doing so, counsel failed to subject the prosecution to a meaningful adversarial hearing on a key element of the charges and relieved the prosecution of its burden of proof. Counsel had, but failed to present, the testimony of Glenn Greenwald, Todd Reardon and Mr. Hale himself that would have refuted the government's claim. Because counsel disregarded Mr. Hale's repeated protests to counsel regarding the truth about the Dec. 5, 2002 conversation, the jury was denied critical exculpatory information and labored under the assumption that both Mr. Hale and Evola were talking about Judge Lefkow on Dec. 5, 2002 when they ***were not***. Thus, the jury found Mr. Hale guilty without the benefit of evidence proving ***that Mr. Hale thought that the "Jew rat" was lawyer Amend***, that Mr. Hale thought Evola was saying "consider it done" to lawyer Amend's murder, that the Dec. 9, 2002 email told Mr. Hale that Evola had ***changed*** his target from a "***Jew*** rat" (lawyer Amend) to a "***femala*** rat" (Judge Lefkow); and hence when Mr. Hale repeatedly said on Dec. 17, 2002 that he could not be a party to Evola's plot against Judge Lefkow, he was absolutely rejecting Evola's new proposal to kill Judge Lefkow rather than indulging in "plausible deniability." Certainly the jury needed to know this.

On the evening of Dec. 4, 2002, Mr. Hale sent Evola an email in which he requested that Evola obtain the home addresses of four individuals. In that email, Mr. Hale stated:

> I need you to find out the home ***addresses*** of the following individuals:
>
> ***Judge*** Joan H. Lefkow, PROBABLE JEW OR MARRIED TO JEW
> United States Courthouse
> 219 South Dearborn, Room 1956
> Chicago, Illinois 60604
>
> James Amend, ***attorney***, JEW
> Paul Steadman, ***attorney***, JEW
> Kevin O'Shea, ***attorney***, TRAITOR WHITE
> Kirkland & Ellis, Law Firm
> 200 East Randolph, Suite 5400
> Chicago, Illinois 60601

Gov't. Ex. E-mail 12-4-02 (emphasis added). On Dec. 5, 2002, Evola unexpectedly appeared at Mr. Hale's house at which time the following dialogue took place:

Evola:	Well, I got your email about the Jew judge, ...
Hale:	Right.
Evola:	... you wanting ***his address and the other rats'*** [***all his rats'***].[1] Ah ...
Hale:	That information yes, for educational purposes and for whatever reason you wish it to be.
Evola:	Are we gonna ... I'm workin' on it. I, I got a way of getting it. Ah, when we get it, we gonna exterminate the rat?
Hale:	Well, whatever you wanna do ...
Evola:	Jew rat?
Hale:	... basically, it's, you know? Ah, my position's always been that I, you know, I'm gonna fight within the law and but ah, that information's been pro-, provided. If you wish to, ah, do anything yourself, you can, you know?
Evola:	Okay.
Hale:	So that makes it clear.
Evola:	Consider it done.
Hale:	Good.

Gov't Tr. 12/05/02 at 4, line 26 – 5, line 20 (emphasis added). Evola then stated that he would get the address of the "Jew judge, ***lawyer rat*** ..." at which point Mr. Hale cut him off. Mr. Hale then told Evola to send him the addresses of the Judge and the attorneys as soon as he obtained that "information" so that Mr. Hale could post it on the internet:

> ... you know, you can and ***all that stuff*** is, I mean yeah, as soon as you get ***it***, I mean send ***it*** certainly. I'll post ***it*** on the internet. We want our people to know and, and ah, ***information about these people*** and ...

Gov't Tr. 12-5-02 at 7, lines 1-6 (emphasis added). After Evola had told Mr. Hale that he would obtain the addresses, Mr. Hale sent an email that evening saying that they were in the process of obtaining the home addresses:

> The following is information concerning the conspirators out to destroy our religious liberties. In case my emails are being monitored, let me make it clear that I provide this for

[1] "[T]he other rats" was in the transcript the government provided to the jury but there is evidence that Evola actually said "all his rats." In either case, there should have been an apostrophe after the "s" in "rats" although this was omitted in the government's transcript.

educational purposes only. We are in the process of getting ***their home addresses*** as well. Gov't. Ex. E-mail 12-5-02 (emphasis added).

Four days later on Dec. 9, 2002, Mr. Hale received an email from Evola indicating for the first time that he, Evola, had murderous designs toward a "***femala*** rat."

On Dec. 12, 2002, Mr. Hale wrote Judge Lefkow reporting a fraud of Kirkland & Ellis lawyer Kevin O'Shea, imploring her to hear the Church's pending motion for judgment in its favor.

On Dec. 17, 2002, Evola again appeared at Mr. Hale's house. Mr. Hale told Evola that he could not be a part of any plot to kill Judge Lefkow and that he could not "be a party to such a thing." When Evola asked for an alibi, "two trusted brothers," and money, Mr. Hale refused. Rather, Mr. Hale told Evola that he had not ordered, instructed or encouraged Judge Lefkow's murder. When Evola told Mr. Hale that "she's gotta go down, I guess," Mr. Hale replied, "Well, ***I don't***." Mr. Hale then told Evola that Evola's plans were "too serious," "incredible" (unbelievable), and that he, Mr. Hale, did not "want anything." Mr. Hale denied having ordered Judge Lefkow's murder. The conversation ended, Evola left and Evola never made any attempt on Judge Lefkow's life

Mr. Hale was arrested on January 8, 2003 and was charged with soliciting Judge Lefkow's murder and with obstruction of justice by virtue of that alleged solicitation.

a. Failure to Understand the Facts of Mr. Hale's Case

Counsel failed to understand that, on Dec. 5, 2002, the "information" Mr. Hale had requested consisted of the addresses of Judge Lefkow ***and of the three trademark case attorneys***, and, hence, that Evola's use of the word "it" referred to the "information" Mr. Hale wanted, the addresses of the ***four*** people, not Judge Lefkow's address alone. Thus, counsel never understood that Mr. Hale thought on Dec. 5, 2002 that the "Jew rat" Evola wanted to kill was lawyer Amend and not Judge Lefkow, never understood that Evola's Dec. 9, 2002 "femala rat" email told Mr. Hale ***for the first time*** that Evola was switching his target from Amend to Judge Lefkow, and, thus, never understood that Mr. Hale's statements on Dec. 17, 2002 were ***an absolute rejection of Evola's new plans to kill Judge Lefkow***. "Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories." *Foster v. Lockhart,* 9 F.3d 722, 726 (8th Cir.1993). "At the least, defense counsel in a criminal case should understand the elements of the offenses with which his client is charged and should display some appreciation of the recognized defenses thereto." *Scarpa v. Dubois*, 38 F.3d 1, 10 (1st Cir.1994).

Part of the reason counsel failed to understand the facts of Mr. Hale's case was because they

failed to adequately consult with Mr. Hale prior to trial, refusing to visit him in jail and ***refusing to investigate*** Mr. Hale's adamant and repeated statement to counsel that Judge Lefkow was not "the rat" or "Jew rat" referred to by Evola on Dec. 5, 2002 , that lawyer Amend was the "Jew rat." (*See Decl. of M. Hale* at 8, ¶ 26 and *Aff. of E. Hutcheson* at 2, ¶ 7.) It was unreasonable for counsel to ignore their client and fail to investigate his claim. Counsel's decision to not present a particular defense is not entitled to presumption of validity when that decision is uninformed. *Rolan v. Vaughn*, 445 F.3d 671, 682 (3rd Cir.2006).

Furthermore, counsel apparently failed to present this defense because, as counsel told the jury, "[w]e didn't put any case on because I didn't think it was necessary," thus testing the fates with Mr. Hale's freedom. In *Harris v. Reed*, 894 F.2d 871, 878-79 (7th Cir.1989), counsel's decision not to call any witnesses constituted deficient performance: "counsel tested the fates when he decided to rest on the perceived weakness of the prosecution's case." *See also*, *Chambers v. Armontrout*, 885 F.2d 1318, 1323 (8th Cir.1989) ("[counsel's] decision not to call [exculpatory witnesses] at trial and to rely only on his ability to cross-examine the [government's] witness[es] ..., was unreasonable. The decision manifested both arrogance and a failure to adequately appraise his client's situation") and *U.S. v. Beard*, 354 F.3d 691, 693 (7th Cir.2004) ("the duty of a criminal defendant's lawyer to investigate is not satisfied just by looking for ways of poking holes in the government's case. There must also be a reasonable search for evidence that would support an alternative theory of the case"). Had such evidence been presented in Mr. Hale's case, the jury might well have believed this alternate defense.

b. <u>Failure to Advocate the Truth of Mr. Hale's Case</u>

At trial, counsel failed to advocate the facts which supported both the truth and what should have been Mr. Hale's defense. Instead, counsel, in cross-examining Evola, asked him to agree that, on Dec. 5, 2002, Evola had been talking about killing a judge. Evola, however, did not explicitly agree. Counsel's sought-after testimony was adverse to the truth and very detrimental to the defense. Furthermore, counsel totally misled the jury as to the significance of the Dec. 9, 2002 "femala rat" email - that that email had told Mr. Hale that Evola had switched his target from Amend to Judge Lefkow - and, thus, counsel failed to realize and argue that Mr. Hale had rejected Evola's plan on Dec. 17, 2002. "Where defense counsel is so ill-prepared that he fails to understand his client's factual claims ..., we have held that counsel fails to provide service within the range of competency expected of members of the criminal defense bar." *Young v. Zant*, 677 F.2d 792, 798 (11th

Cir.1982). *See also*, *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir.2001) (defense counsel have a duty to adequately investigate the defendant's most important defense, and a duty to introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine confidence in the verdict). "'[T]ruth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.'" The underlying purpose of the Constitution's guarantee of the effective assistance of counsel is truth. *U.S. v. Cronic,* 466 U.S. 648, 655 (1984). "Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is sine qua non of a fair trial." *Estes v. Texas*, 381 U.S. 532, 540 (1965). Due to counsel's failure to understand the facts of Mr. Hale's case, Mr. Hale's trial had no relationship to the truth and Mr. Hale was thus denied effective assistance.

c. Failure to Call Exculpatory Witnesses Greenwald, Schlismann, Reardon and Mr. Hale Himself to Support this Defense

Had counsel called attorney Glenn Greenwald, John Schlismann, attorney Todd Reardon and Mr. Hale to testify at trial, they all would have confirmed that Mr. Hale had previously used the term "Jew rat" as a nickname for ***lawyer Amend*** (*see Decl. of G. Greenwald*; *Decl. of M. Hale* and *Aff. of T. Reardon*), thus contradicting the government's claim that Judge Lefkow was the target of the alleged Dec. 5, 2002 solicitation. Mr. Hale and Schlismann would also have testified that Evola, himself, had referred to lawyer Amend as a "Jew rat." Furthermore, counsel failed to inform Mr. Hale that Greenwald had corroborated Mr. Hale's claim that, when Mr. Hale referred to the "Jew rat," he was referring to lawyer Amend. Mr. Hale learned of this corroboration only after his trial was over. (*See Decl. of M. Hale* at ¶¶ 17, 18.) "Counsel's function is to assist the defendant ... [which includes] the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688.

d. Failure to Hold the Government to its Burden of Proving That Evola Was Referring to Judge Lefkow and Not Lawyer Amend on Dec. 5, 2002

There was no direct evidence – only attorney argument – that "the rat," "Jew rat" referred to in the Dec. 5, 2002 conversation was Judge Lefkow. Evola did not say that she was. The most he said was that, when he was "talking on December 5th about the Jew judge, it was about the judge," but he never testified who the "rat," "Jew rat" was or that the "Jew rat" was the Judge:

Q: Isn't it a fact that the term ***Jew rat*** was a term that was ***not limited to just Judge Lefkow***?

A: No, it ***couldn't be just limited to one person***. But when I was talking on December 5th about the Jew ***judge***, it was about the ***judge***.

Vol. 9 at 75 (emphasis added). In fact, Evola may well have been hinting that he ***was not*** talking about Judge Lefkow while ***counsel*** instead wrongly assumed that he was and, indeed, assumed so throughout the trial.

Defense counsel failed to argue in closing that the government had failed to meet its burden of proof that "the rat, Jew rat" was Judge Lefkow. Due to counsel's failure to understand the facts of Mr. Hale's case and counsel's other failures, counsel totally, unwittingly relieved the government of its burden to prove that Judge Lefkow was indeed Mr. Hale's target, which was an element and thus mandatory for a conviction on Counts 2 and 4. *See U.S. v. Glover*, 97 F.3d 1345, 1349 (10th Cir.1996), *quoting Strickland*, 466 U.S. at 686 ("[w]hen counsel has unwittingly relieved the government of its burden of proof, particularly when the evidence of record does not satisfy that burden, it is fair to say counsel has 'so undermined the proper functioning of the adversarial process that [it] cannot be relied on as having produced a just result.'" "This is, of course, '[t]he benchmark for judging any claim of ineffectiveness.'" *Id*. "The failure to understand the elements of the charged offenses and hold the [government] to proving those elements is among the most basic responsibilities of competent counsel." *Richey v. Mitchell*, 395 F.3d 660, 681 (6th Cir.2005) (ineffectiveness where counsel raised no challenge whatever to the lack of proof of a required statutory element that defendant specifically intended to cause the death of the person killed). "At the least, defense counsel in a criminal case should understand the elements of the offenses with which his client is charged and should display some appreciation of the recognized defenses thereto." *Scarpa v. Dubois*, 38 F.3d at 10.

e. Erroneous Stipulation to the Accuracy of the Government's Transcripts

Because Mr. Hale had told counsel repeatedly that the "Jew judge" and "lawyer rat" were ***two different people*** and that the "Jew rat" whom, on Dec. 5, 2002, Evola proposed "exterminating" was ***lawyer*** Amend and ***not*** Judge Lefkow, counsel was aware that there should not have been a comma between "lawyer" and "rat" since the "rat" was a ***lawyer*** and ***not*** the "Jew judge." The transcript presented to the jury erroneously inserted a comma between the words "lawyer" and "rat" when, in fact, the word "lawyer" modified the word "rat" just as the word "Jew" modified the word "judge" immediately before it. There was no break between the words on the recording and the court reporter at trial correctly transcribed this statement as "lawyer rat." Thus, when Evola said "***lawyer rat***," he

was talking about ***lawyer Amend***. (*See Decl. of M. Hale* at 1, ¶ 4 and at 4, ¶¶ 12, 13.) Counsel did not object to the erroneously inserted comma and the jury was misled by this error.

Furthermore, there should have been an apostrophe after the "s" when Evola stated that he was "wanting his address and the other rats' " on Dec. 5, 2002 since Evola was clearly stating that Mr. Hale wanted "his" and "the other rats' " (possessive) ***addresses***. This would have illustrated that the "information" Mr. Hale wanted consisted of the ***four addresses*** and, consequently, there would have been no proof that Judge Lefkow was "the rat, Jew rat" in question on Dec. 5, 2002.

In addition, the transcript of the Dec. 17, 2002 conversation incorrectly stated that Mr. Hale had "chuckle[d]" when Evola orally expressed his new designs on Judge Lefkow's life. By incorrectly stating that Mr. Hale had "chuckle[d]," the transcript inaccurately portrayed Mr. Hale as someone arguably supportive of Evola's plans to kill Judge Lefkow. Mr. Hale's counsel should have objected to this error and their failure to do so, or to argue to the jury that it was erroneous, presented the jury with a misleading understanding of what was said in this conversation.

f. Failure to Impeach the F.B.I. Agent Regarding the Transcripts' Inaccuracies

Counsel failed to object to F.B.I. Agent Deterding's version of the transcripts which were used at trial. Counsel also failed to have the Dec. 5, 2002 recording professionally analyzed even though the government's original transcript confirmed that the "rat," "Jew rat" whom Evola proposed "exterminating" was an attorney and not Judge Lefkow. (*See Decl. of M. Hale*). As stated earlier, the Dec. 5, 2002 conversation actually went as follows:

Evola: Well, I got your email about the Jew judge, ...

Hale: Right.

Evola: ... you wanting ***his address and all his rats'***. Ah ...

Gov't Tr. 12-5-02 at 4, line 26 - 5, line 2 (emphasis added).

Counsel failed to impeach Deterding by demonstrating that the original government transcript confirmed that both Evola and Mr. Hale had been talking about an attorney and not Judge Lefkow. Presenting the original transcript would have helped establish that Judge Lefkow was not one of the "rats" referred to on Dec. 5, 2002, but, rather, that the "rats" were the three Kirkland & Ellis attorneys whose addresses Mr. Hale had requested the previous day.

g. Defense Counsel Rendered Mr. Hale Ineffective Assistance.

Counsel called no witnesses although many very favorable to the defense were available. The failure to offer what could be exculpatory evidence and evidence that could raise a reasonable

doubt constitutes ineffective assistance. *Helton v. Secretary for Dept. of Corrections*, 233 F.3d 1322, 1327 (11th Cir.2000). *See also*, *Currier v. U.S.,* 160 F.Supp.2d 159, 166 (D.Mass. 2001) (ineffectiveness was found where lawyer failed to raise, prepare or present only viable defense to charge and failed to prepare his client to testify despite his client's desire to do so; "[i]t is this failure to do anything at all in preparing a defense, this failure to raise or present any evidence of self-defense, that denied the petitioner his constitutional right to effective assistance of counsel").

Counsel's performance may be deficient and prejudicial when counsel fails to present a viable defense that would have been strongly supported by the evidence. For example, in *Capps v. Sullivan*, 921 F.2d 260 (10th Cir.1990), the defendant took the stand and admitted all the elements of the crime. Counsel, however, failed to argue entrapment even though there was evidence to support that theory. Counsel instead essentially requested the jury to "ignore the law out of sympathy for his client." *Capps*, 921 F.2d at 262. The 10th Circuit found this to be ineffective. Similarly, in *Henderson v. Sergeant*, 926 F.2d 706 (8th Cir.1991), counsel failed to investigate, present evidence or argue that three people other than the defendant had the motive, opportunity and ability to commit the offense. The 8th Circuit found counsel's "complete failure to pursue a viable defense" and his failure to assert the defense at trial to be ineffective assistance. In both *Henderson* and *Capps*, the defense that counsel did present was weak to nonexistent and the defense that counsel failed to present was legally viable and supported by the evidence.

This is exactly what happened in Mr. Hale's case: rather than pursuing his bona fide defense that he thought the "Jew rat" whom Evola queried about exterminating on Dec. 5, 2002 was ***lawyer Amend***, that he did not learn of Evola's intent to murder Judge Lefkow until he received the Dec. 9, 2002 email and that he then refused on Dec. 17, 2002 to join this plot, counsel essentially conceded the government's case but argued that the government was out to get Mr. Hale. Counsel failed to pursue a viable defense and, in its stead, presented a weak to nonexistent defense. When counsel chose to pursue this weaker defense, counsel's performance fell below the standard of a reasonably competent attorney and was unreasonable under the circumstances. *See U.S. v. Chambers*, 918 F.2d 1455, 1461 (9th Cir.1990) (the inquiry regarding the adequacy of counsel's performance in selecting a line of defense is whether counsel's decision was reasonable under the circumstances).

Furthermore, counsel's grammatical misunderstanding (*i.e.*, not realizing that "rats'" in the Dec. 5, 2002 conversation was possessive) was, ***by definition***, an ***un***-professional error. Because of counsel's failure to understand the facts of Mr. Hale's case, his choices had nothing to do with

professional judgement or strategy. The presumption of a sound trial strategy founders when it stems from ignorance. *See Link v. Luebbers*, 469 F.3d 1197, 1204 (8th Cir.2006). Although a court should not "second guess strategic and tactical choices made by trial counsel ..., when counsel's choices are uninformed ..., a defendant is denied the effective assistance of counsel." *U.S. v. DeCoster*, 487 F.2d 1197, 1201 (D.C. Cir.1973).

Counsel acted unreasonably and Mr. Hale was prejudiced by counsel's failure to present the proper defense because there is a better than negligible chance that the outcome of Mr. Hale's trial would have been different had the jury known that lawyer Amend was "the rat, Jew rat" referred to on Dec. 5, 2002 and that Evola's Dec. 9, 2002 email told Mr. Hale for the first time that Evola had switched his target from the lawyer to the judge. *See Leibach*, 347 F.3d at 246. Counsel's failures deprived Mr. Hale of a fair trial, that is, a trial whose result is reliable. *See Strickland*, 466 U.S. at 687. "Our appreciation of the ***consequences*** of counsel's actions may well help us to evaluate the ***reasonableness*** of those actions." *U.S. ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1014 (7th Cir.1987) (emphasis added).

2. FAILURE TO FULLY INVESTIGATE AND FAILURE TO PRESENT EXCULPATORY WITNESSES AND INFORMATION

a. Failure to Have the Dec. 5, 2002 Tape Professionally Analyzed

Counsel failed to have the Dec. 5, 2002 recording of the conversation between Mr. Hale and Evola professionally analyzed even though the government's original transcript confirmed that the "rat," "Jew rat" whom Evola proposed "exterminating" was an attorney and ***not*** Judge Lefkow (the attorneys were the "rats" ("all his rats' "), not Judge Lefkow).

b. Failure to Call Exculpatory Witnesses Peterson, Moudry, Attorney Greenwald, Robertazzo, Logsdon, Powers, Attorney Reardon and Russell Hale, Jr.[2]

Brian Moudry could have testified that: (1) Mr. Hale was seeking Judge Lefkow's address for the purpose of a mere street demonstration outside her home; (2) signs and placards had been made for these demonstrations; (3) for some time prior to his arrest, Mr. Hale had been working on legal motions to present to Judge Lefkow, this being inconsistent with Mr. Hale's intending Judge Lefkow's murder; and (4) he was present at a church gathering where Mr. Hale stated that the Church's reaction to Judge Lefkow's Nov. 19, 2002 order would be ***entirely non-violent***, consisting

[2] In addition to these witnesses, counsel could have interviewed and called numerous other witnesses who would and could have testified similarly to these witnesses.

of peaceful street demonstrations, lawsuits and media interviews. (*See Decl. of B. Moudry*.)

Attorney Glenn Greenwald could have testified that: (1) the "Jew rat" was in fact ***lawyer Amend***, thus refuting the notion that Judge Lefkow was Evola's original target of the alleged solicitation; and (2) Mr. Hale's statement to Judge Lefkow in his Dec. 12, 2002 letter (which formed the basis of the Count 1 obstruction of justice charge) was based on legal advice from Greenwald. (*See Decl. of G. Greenwald* and *Decl. of M. Hale* at 9, ¶ 30). Thus, the jury was denied clear evidence that it was not Mr. Hale's intent to obstruct justice, but rather that he had, in good faith, relied on counsel's advice when he made these statements to Judge Lefkow.

Attorney Todd Reardon could have testified that: (1) for several weeks leading up to Mr. Hale's arrest, Mr. Hale had been working on legal motions to present to Judge Lefkow; (2) Mr. Hale praised Judge Lefkow in his presence ***after*** her Nov. 19, 2002 order, described her as an "ally" in the still-ongoing trademark case and said that he had high hopes that Judge Lefkow would grant his Church's pending motions; (3) Mr. Hale had told him that it was the 7th Circuit who had tied Judge Lefkow's hands in that case, thus showing that Mr. Hale's state of mind was inconsistent with solicitation of her murder; and (4) the "Jew rat" was Amend. (*See Affi. of T. Reardon*.)

James Logsdon could have testified that: (1) he was present at a church gathering where Mr. Hale stated that the Church's reaction to Judge Lefkow's Nov. 19, 2002 order would be ***non-violent***, consisting of peaceful street demonstrations, lawsuits and media interviews; and (2) signs and placards had been made for demonstrations in front of Judge Lefkow's house. (*See Aff. of J. Logsdon*.) Peaceful street demonstrations would have explained Mr. Hale's request for addresses and would have impeached Evola's claim that he knew nothing about the demonstrations.

Kathleen Robertazzo could have testified that: (1) for several weeks prior to his arrest, Mr. Hale had been working on legal motions to present to Judge Lefkow; and (2) Mr. Hale's Church regularly sought and published on the internet addresses of attorneys, judges and others so that supporters could non-violently protest their actions. (*See Aff. of K. Robertazzo*, emails 7387-7388, 6196-6197, 4821, 4069-4070, 6159 and 7332.)

Shawn Powers could have testified that he was present at a church gathering where Mr. Hale stated that the Church's reaction to Judge Lefkow's Nov. 19, 2002 order would be ***non-violent***, consisting of peaceful street demonstrations, lawsuits and media interviews. Upon information and belief, Mr. Powers would have testified that signs and placards had been made for peaceful demonstrations in front of Judge Lefkow's house.

Christopher Peterson could have testified that: (1) the religious doctrine of Mr. Hale's church advocated violence by its adherents only in the event that violence was first used against ***them*** in an effort to take away their constitutional rights, thereby rebutting Burnett's testimony inferring the contrary; and (2) for several weeks prior to his arrest, Mr. Hale had been working on legal motions to present to Judge Lefkow. (*See Aff. of C. Peterson*.)

Russell Hale, Jr. would have testified that on the evening of Dec. 17, 2002, Matthew Hale had told him that Evola had "wanted [him] to do something wrong" (*see Aff. of R. Hale, Jr.*), thus again showing that Mr. Hale's state of mind was inconsistent with that of someone soliciting murder.

c. Failure to Present Evidence on Mr. Hale's Lack of Predisposition

Counsel failed to present exculpatory testimony showing Mr. Hale's history of condemning violence. Although counsel asked for and received an entrapment jury instruction, counsel failed to call attorney Glenn Greenwald, Russell Hale, Jr., Christopher Peterson, Kathleen Robertazzo and/or Lukas Sikorski (among others) who would have testified to Mr. Hale's dedication to non-violence, thus providing doubt that Mr. Hale was predisposed to solicit murder prior to his meeting with government agent Evola. Counsel also failed to offer exculpatory testimony that Mr. Hale had condemned Smith's crimes and violence in general on numerous occasions and further failed to impeach Evola or introduce evidence that Mr. Hale had said in Evola's presence that he ***wished that Smith had shot him (Mr. Hale) in the leg*** instead. This evidence would have shown that Mr. Hale did not support or agree with Smith's actions but the jury was denied evidence establishing this fact. Thus, the jury was denied evidence that would have supported a finding of entrapment.

d. Failure to Offer Exculpatory Documents, Recordings and Testimony

Counsel could have, but failed to, call witnesses or present documents which would have shown that Mr. Hale's "state of war" with Judge Lefkow was a legal and non-violent war, having nothing to do with violence and that Mr. Hale habitually used the word "war" in a legal context. Thus, the government's claim that Mr. Hale's use of "state of war" language concerning Judge Lefkow was part of the alleged murder solicitation went unrefuted.

e. Failure to Interview Witnesses John Schlismann and James Burnett

Even though Schlismann would have testified that Mr. Hale had referred to lawyer Amend as a "Jew rat" and that Evola had done so as well, counsel failed to interview or call Schlismann to testify. Counsel also failed to interview key prosecution witness James Burnett. Had counsel interviewed him, they may have learned that the government coerced Burnett into giving false

testimony. (*See Aff. of David Hale*.) Nor did counsel ask Burnett on cross-examination whether he had been coerced. The failure to interview or attempt to interview key prosecution witnesses constitutes deficient performance. *U.S. v. Tucker*, 716 F.2d 576, 583 (9th Cir.1983).

f. Failure to Offer Mr. Hale's Exculpatory Testimony

Counsel failed to offer Mr. Hale's exculpatory testimony (or at least impeach government witness Evola by confronting him with the fact) that Evola had, in an internet instant message exchange with Mr. Hale, ***specifically requested that Mr. Hale give him Ken Dippold's address for non-violent purposes***. Mr. Hale had told counsel prior to trial that Evola had sent him an instant message in late 2000 or early 2001 requesting Dippold's address for his "files" only and that since he, Evola, already had the entire Church mailing list, he should be given Dippold's address as well. This would have explained why Mr. Hale made the statements he made about Dippold's address which, due to counsel's failure to offer Mr. Hale's testimony or impeach Evola on this point, the government was then able to persuasively claim that Mr. Hale had sent Dippold's address to Evola so that Evola could murder him and hence that Mr. Hale had given Judge Lefkow's courthouse address to Evola so that he could murder her as well. Thus, the jury was denied evidence that Mr. Hale had sent Dippold's address to Evola only because Evola had asked for it and that Evola had asked for it only for a non-violent purpose.[3] (*See Decl. of M. Hale*.)

g. Failure to Rebut Government Evidence

Even though the government introduced into evidence Mr. Hale's highly prejudicial comments on Smith and his shooting spree, arguing that these comments showed that Mr. Hale intended that government informant Evola murder Judge Lefkow and that Mr. Hale was predisposed to do so, counsel ***failed to offer exculpatory testimony*** that Mr. Hale had condemned Smith's crimes and violence in general on numerous occasions (*see Addendum* throughout) and further failed to introduce evidence that Mr. Hale had said in the presence of Evola that he ***wished that Smith had shot him (Mr. Hale) in the leg instead***. This evidence would have shown that Mr. Hale did not

[3] The fact that a printed copy of the instant message was not produced by the government is of little account since Evola testified that he only "usually" printed out instant messages. Furthermore, counsel failed to act on this statement to impeach Evola. Counsel should have used the fact that Evola did not always turn over instant messages to the F.B.I. in order to cause doubt on the inference that Mr. Hale had sent Dippold's address to Evola for the purpose of murder. Evola had been asking Mr. Hale for Dippold's address for nothing having to do with violence and not telling the F.B.I. about this so that the F.B.I. would think that Mr. Hale was trying to "solicit" Evola to kill Dippold by sending Dippold's address to Evola.

support or agree with Smith's actions. However, since counsel did not present this evidence at trial, the jury was denied proof of these facts.

h. Defense Counsel's Representation Was Deficient and Prejudicial.

"[E]ffective representation of a criminal defendant requires pretrial preparation and investigation ... In most cases that preparation and investigation will include consultation between attorney and client, interviews with important witnesses for the defense and prosecution, and investigation of potentially fruitful defenses." *U.S. v. Weaver,* 882 F.2d 1128, 1138 (7th Cir.1989), *citing Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir.1984). Defense counsel should make reasonable investigations into all defenses. *Arrowood v. Clusen*, 732 F.2d 1364, 1370 (7th Cir.1984). A breach of the duty to investigate can occur when counsel fails to ***familiarize*** himself with evidence in his possession. *Williams v. Washington*, 59 F.3d 673, 680 (7th Cir.1993). "A lawyer who fails adequately to investigate, and introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance. *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir.1999). Counsel's failure to investigate and call witnesses who could have bolstered his client's defense of innocence constituted ineffective assistance of counsel in *Williams v. Washington*, 59 F.3d at 681-85: "[c]ounsel's lack of familiarity with the case, combined with his failure to investigate, provided [the defendant] with a trial significantly different than she might have received if represented by a competent attorney."

Counsel's failure to investigate and failure to call ***any*** of numerous exculpatory witnesses to testify on Mr. Hale's behalf was ineffective assistance. The testimony of those witnesses would have corroborated his claim that he had refused Evola's Dec. 17, 2002 offer to murder the judge and would have given the jury evidence to negate the government's claim that Mr. Hale had a predisposition or intent to solicit the judge's murder. "[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F. 2d 1449, 1462 (11th Cir.1991).

Furthermore, "[t]he fact that the trial counsel's performance was otherwise admirable would not excuse the failure to conduct a proper investigation ... 'representation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case ...'" *Rogers v. Israel*, 746 F. 2d 1288, 1295, n.3 (7th Cir.1984) (citation omitteed). Defense counsel has a duty to

reasonably investigate all defenses. *Crisp,* 743 F. 2d at 583 and n.2.

Mr. Hale attempted to assist and to discuss his case with counsel, but counsel rejected these offers and substituted their own beliefs. (*See Decl. of M. Hale*.) *See Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir.1981) ("[i]nformed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are [the] cornerstones of effective assistance of counsel." "The reasonableness of a trial counsel's acts ..., depends critically upon what information the client communicated to counsel." *Chandler v. U.S.*, 218 F.3d 1305, 1325 (11th Cir.2000) (*en banc*). The scope of counsel's duty to investigate is in part determined by the facts of which counsel is aware at the time. *Ames v. Endell*, 856 F.2d 1441 (9th Cir.1988). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691.

The 7th Circuit has stated in *Washington v. Smith*, 219 F.3d 620 (7th Cir.2000) that the failure to call witnesses with exculpatory testimony is deficient and prejudicial. While the witnesses in *Washington* were alibi witnesses and the witnesses in Mr. Hale's case were intent witnesses, both would have negated an element of the charges. As the 7th Circuit stated, "[e]valuated individually, these errors may or may not have been prejudicial to [the defendant], but we must assess 'the totality of the omitted evidence' under *Strickland* rather than the individual errors." *Washington v. Smith*, 219 F.3d at 635, *citing Williams v. Taylor*, 529 U.S. 362 (2000). "All [the defendant] needed to do was establish a reasonable doubt, and having [exculpatory] witnesses would have covered a lot of ground toward that goal." *Strickland*, 466 U.S. at 635. "An attorney's failure to present available exculpatory evidence is ordinarily deficient unless some cogent tactical or other consideration justified it." *Eze v. Senkowski*, 321 F.3d 110, 133 (2nd Cir. 2003).

Mr. Hale was prejudiced by counsel's inadequate pretrial preparation. Counsel had the obligation to pre-view the Dec. 5, 2002 transcript of the Hale/Evola conversation and the 7th Circuit's July 25, 2002 opinion ruling against the Church in the trademark case in advance of trial (*see* below) so that they could have consulted with Mr. Hale regarding their representations or misrepresentations and could have properly evaluated their positive or adverse affect in presenting them to the jury. The failure to pre-view and professionally analyze the tape and the subsequent failure to review the transcript of the Dec. 5, 2002 Hale/Evola conversation and the failure to then consult with Mr. Hale regarding its contents and inaccurate transcription prejudiced Mr. Hale because it permitted the government to argue, and permitted the jury to conclude, that Mr. Hale had

been talking about Judge Lefkow on Dec. 5, 2002 when, in fact, he had not. Had counsel conducted an effective pretrial investigation, he would have learned facts which: (1) would have served as a significant basis for impeachment of government witnesses; and (2) that the Dec. 5, 2002 transcript, as presented by the government to the jury, was inaccurate and extremely misleading. Furthermore, the failure to read and review the 7th Circuit trademark case opinion and the failure to call any of numerous exculpatory witnesses were not acts involving strategic decisions which would be made by a reasonably competent criminal defense attorney.

When counsel in Mr. Hale's case failed to analyze and introduce important physical evidence and failed to perform a complete direct examination and/or cross-examination of several witnesses, they rendered Mr. Hale ineffective assistance. The failure to investigate key evidence and failure to call important exculpatory witnesses was not a reasonable strategic decision and thus fell below the standard of a reasonable attorney in the community and, but for these actions by defense counsel, there is a reasonable probability that the jury's verdict would have been different.

3. FAILURE TO FILE A MERITORIOUS MOTION TO SUPPRESS

Counsel's representation was constitutionally deficient when they failed to file a meritorious motion to suppress evidence illegally seized from Mr. Hale's residence. No reasonably competent attorney would have failed to file this motion and there is a reasonable probability that Mr. Hale would have been acquitted on Counts 1, 2 and 4 had a suppression motion been filed. "When the claim of ineffective assistance is based on counsel's failure to present a motion to suppress, we have required that a defendant prove the motion was meritorious." *U.S. v. Cieslowski*, 410 F.3d 353, 360 (7th Cir.2005). A defendant must also prove that there is a reasonable probability that the verdict would have been different absent the excluded evidence. *Kimmelman,* 477 U.S. at 382.

"Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with scrupulous exactitude." *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978), *quoting Stanford v. Texas*, 379 U.S. 476, 485 (1965). In Mr. Hale's case, much of the material sought to be seized and actually seized was so protected and, therefore, the "scrupulous exactitude" standard applies.

On Jan. 8, 2003, the government obtained a search warrant for Mr. Hale's 217 E. Randolph, East Peoria, Illinois residence. The issuing judicial officer stated in the *Search Warrant* that,

> I am satisfied that the affidavit(s) and any recorded testimony ***establish probable cause to believe that the property so described is now concealed on the premises above-described***

and establish grounds for the issuance of this warrant.

Search Warrant at 1 (emphasis added). The *Search Warrant* failed to state that there was probable cause for any crime, failed to state any statute that had been violated and failed to incorporate by reference the *Application and Affidavit for Search Warrant* [*A.A.S.W.*] into the *Search Warrant*.

The magistrate's reference in the warrant to "the property so described" referred to the property listed in *Attachment A* which delineated the items to be seized as follows:

> This evidence includes ***computers and computer related equipment***; letterhead, labels, signs, prints [sic] packages, and ***books that contain the term "Church of the Creator;"*** newsletters, mailing lists, phone logs, address books, phone records that contain information regarding potential co-conspirators; ***documents and records pertaining to the WCOTC***; documents and records pertaining to racial motivation to commit criminal activity and violence against others, because of their race, color [sic] religion, or national origin, including books, booklets, fliers, and financial records pertaining thereto; communications with other individuals associated with white supremacists groups relating to or discussing criminal activity and violence against others; documents, including but not limited to media accounts, of acts of violence by members of the WCOTC.

Search Warrant, *Attachment A* (emphasis added). Notably, this list did ***not*** make any reference to Mr. Hale or Judge Lefkow , nor did it limit the search to items belonging or relating to Mr. Hale.

In the *Application*, the government requested the warrant in order to search for:

> ... evidence of the commission of a federal criminal offense, the fruits of crime, or other things otherwise criminally possessed with regard to violation fo Title 18, United States Code, Section 2516(1), namely: threatening to assault or murder a federal judge ..., and conspiracy to do so in violation of Title 18 U.S.C. § 115 and § 371; and threatening a federal judge ..., and conspiring to do so in violation of Title 18 U.S.C. § 1503 and § 371; and soliciting another to commit a crime of violence, and conspiring to do so in violation of Title 18 U.S.C. § 373 and § 371.

A.A.S.W. at 1. The *Affidavit* in support of the *Application* then stated that "[t]here exists probable cause to believe that there is evidence located within the residence ... that constitutes evidence ... that will link Matthew Hale to the crime of threatening to assault or murder a federal judge ..., threatening a federal judge ..., and conspiring to do so ...; and soliciting another to commit a crime of violence ..." *A.A.S.W.* at 2-3, ¶ 4.

The *Search Warrant* in the instant case authorized the seizure of everything Mr. Hale and the Church possessed and that is exactly how the F.B.I. construed it. Based on the warrant, agents searched Mr. Hale's residence and seized approximately 100 boxes of items. As testified to at trial, the agents seized everything they "saw:"

Q: But you took every scrap of paper that belonged to the World Church of the Creator,

didn't you?

A: What we saw we took.

Vol. 9B at 133. Among the vast amount of material seized were items bearing the name "Church of the Creator" and an audio tape of a July 1999 speech in which Mr. Hale gave a sermon at a memorial service praising Ben Smith shortly after Smith's deadly murder spree. Before and after the audiotape had been played at trial, the government successfully argued that Mr. Hale's praise of Smith in July of 1999 "strongly corroborated" the government's claim that Mr. Hale intended to solicit Evola in Dec. of 2002 to murder Judge Lefkow. The 7th Circuit subsequently relied heavily on this recording in affirming Mr. Hale's convictions when it stated that, "the government, as expected, reminded the jury that Hale had made a hero out of a follower who killed two people" (*Hale*, 448 F.3d at 981), that "Hale's remarks consisted of kind words about a man who had briefly terrorized the community just a few years before" (*id.* at 985-86), and that Mr. Hale's "reaction to the Smith shootings sent a message to his followers about how he expected them to proceed in the future, about who a model 'brother' was" (*id.* at 985). The 7th Circuit also quoted the audio recording at length, replete with racial slurs. *Id.* at 975-76.

The government also used the material bearing the name "Church of the Creator" to prove that Mr. Hale had obstructed justice by writing in his Dec. 12, 2002 letter: "from my understanding of the Court's order, I have no material in my control or possession that falls afoul of it."

Defense counsel were well aware prior to trial that government intended to use the seized items against Mr. Hale at his trial.

a. <u>The Search Warrant Was Deficient on Its Face</u>.

The *Search Warrant* itself did not state any offense at all, did not state there was probable cause that any offense, much less a specific offense, had been committed, did not recite any statute which allegedly had been violated and did not incorporate by reference the *A.A.S.W.* Thus, the *A.A.S.W.* is of no legal relevance regardless of its contents since "[a] sufficiently specific affidavit will not itself cure an overbroad warrant ... Resort to an affidavit to remedy a warrant's lack of particularity is only available when it is incorporated by reference in the warrant itself and attached to it ..." *U.S. v. George*, 975 F.2d 72, 76 (2nd Cir.1992). Furthermore, the warrant did not "direct the executing officers to refer to the affidavit for guidance concerning the scope of the search and hence does not amount to incorporation by reference." *George*, 975 F.2d at 76. *See also*, *In re Grand Jury Proceedings*, 716 F.2d 493, 497 (8th Cir.1983) (an affidavit not incorporated into a

warrant does not cure lack of particularity).

b. The Search Warrant Lacked Particularity and Was Overbroad.

> The fourth amendment imposes a particularity requirement on warrants to prevent the use of general warrants to conduct overly sweeping searches. The scope of a search is limited by the events establishing probable cause.

U.S. v. Peterson, 867 F.2d 1110, 1113 (8th Cir.1989), *citing Andresen v. Maryland,* 427 U.S. 463, 480 (1976). To meet 4th Amendment requirements, a search warrant must list with particularity the items to be seized: "[t]he particularity requirement ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). A warrant violates the 4th Amendment when it is broader in scope than justified by the "probable cause established by the affidavit upon which the warrant issued." *U.S. v. Christine*, 687 F.2d 749, 753 (3rd Cir.1982).

A search warrant is "written with sufficient particularity [if] the items listed on the warrants [are] qualified by phrases that emphasize that the items sought [are] those related" to the alleged crime being investigated. *U.S. v. Hall*, 142 F.3d 988, 996-97 (7th Cir.1998) ("[p]olice officers executing the warrants were not unguided and free to rummage through [the defendant's] property ..."). *See also*, *U.S. v. Ford*, 184 F.3d 566, 574 (6th Cir.1999) (the seizure of the documents violated the defendant's 4th Amendment rights because the items authorized to be seized were not limited to the crimes at issue and the officers admitted that they seized "basically most of the documents" and "pretty much took everything" at the address).

The purpose of the particularity requirement of the 4th Amendment is to avoid "a general, exploratory rummaging in a person's belongings." *Andresen*, 427 U.S. at 480. *See also, Coolidge*, 403 U.S. at 467 ("[a] general, exploratory rummaging in a person's belongings offends the Fourth Amendment"); *U.S. v. Beckett*, 321 F.3d 26, 33 (1st Cir.2003) (a search warrant that provides law enforcement agents free reign to rummage through a defendant's papers at will renders the warrant overly broad and vague); and *In re Grand Jury Proceedings*, 716 F.2d at 499 ("[t]he crucial question is whether the warrant authorized too much under the law. ... In the instant case, the warrant did not even include a reference to [the] statute or to the other statutes that [the defendant] was suspected of violating. ..."). The constitutional requirement that the things to be seized pursuant to a search warrant be particularly described protects against "the use of general warrants as instruments of oppression." *Stanford v. Texas,* 379 U.S. at 510. As the Supreme Court has stated,

> ... in *Stanford v. Texas,* the Court invalidated a warrant authorizing the search of a private home for ***all books, records, and other materials relating to the Communist Party***, on the ground that whether or not the warrant would have been sufficient in other contexts, it ***authorized the searchers to rummage among and make judgements about books and papers and was the functional equivalent of a general warrant***, one of the principal targets of the Fourth Amendment. Where ***presumptively protected materials*** are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.

Zurcher, 436 U.S. at 564 (emphasis added).

In Mr. Hale's case, the *Search Warrant* authorized the agents to seize, *inter alia*, any and all "computers and computer related equipment," any and all "newsletters, mailing lists, phone logs, address books, phone records that contain information regarding potential co-conspirators," and any and all "documents and records pertaining to the WCOTC." This very broad and undefined authorization to seize any and all items in no way confined the scope of the search to any particularly described evidence relating to anything set forth in the *Search Warrant*, nor to the specific crimes described in the *A.A.S.W.* The authorization to seize any and all "newsletters, mailing lists, phone logs, address books, phone records that contain information regarding potential co-conspirators," did not relate to any potential co-conspirators since none were alleged either in the *Search Warrant* or in the *A.A.S.W.*. The authorization to seize any and all "documents and records pertaining to the WCOTC" did not relate to any crime set forth in the *A.A.S.W.*. Because the warrant did not list the items to be seized with sufficient particularity, the search violated Mr. Hale's 4th Amendment rights.

The scope of the search in Mr. Hale's case was unlimited: the warrant did not indicate that the documents sought pertained to any specific transactions, did not identify the offenses for which evidence was sought, and did not confine the search to any particular files or categories of documents. The terms "computers and computer related equipment" set forth in *Attachment A* were too vague and too broad to pass 4th Amendment constitutional scrutiny. Furthermore, the warrant was too broad when its listing of "documents and records pertaining to the WCOTC" allowed the agents to seize everything the Church possessed. The F.B.I. clearly treated the warrant as a general warrant, and, accordingly, seized everything that the Church had, including the Church's flag. Because the *Search Warrant* authorized the seizure of literally ***everything*** Mr. Hale and the Church possessed, it permitted a "general search," was overbroad and, thus, violated the 4th Amendment.

Like the illegal search in *Stanford*, numerous books of Mr. Hale's personal library, his diary and numerous recordings were seized. *Attachment A* also authorized the seizure of "letterhead,

labels, signs, prints [sic] packages, and books that contain the term 'Church of the Creator.'" Because the seizure of these items implicated 1st Amendment rights, the search warrant had to list these items with the "most scrupulous exactitude:"

> [i]ndeed, where papers or books are the subject of a government intrusion, our cases uniformly hold that the Fourth Amendment prohibition against a general search requires that warrants contain descriptions reflecting "the most scrupulous exactitude ...," *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). Those cases proscribe general language in a warrant - or a statute - of "indiscriminate sweep ..."

Nixon v. Administrator of General Services, 433 U.S. 425, 530-31 (1977) (dissenting opinion). *See also*, *Voss v. Bergsgaard*, 774 F.2d 402, 405 (10th Cir.1985) (items seized from a tax protest organization pursuant to overbroad search warrants lacked sufficient particularity to satisfy the 4th Amendment; furthermore, they were particularly infirm given that speech and associational rights of the members were necessarily implicated). Thus, because the warrant in Mr. Hale's case called for the seizure of papers and books, the descriptions of these items had to be described with "scrupulous exactitude." However, the warrant did not so describe them and, thus, amounted to an impermissible general warrant.

Voss is persuasive authority that the search of Mr. Hale's home violated the 4th Amendment. The list of the items to be seized in *Voss* (see *id.*, at 404) was similar to the list in Mr. Hale's case and, as the *Voss* court stated, what the warrant "gave was carte blanche for government agents to take anything that they saw, whether it was nailed down or otherwise, and, indeed, as best I can find from the returns and the pleadings, that's precisely what did happen." In Mr. Hale's case, the agents were given "carte blanche' to take anything they saw, and, in fact, that is precisely what they did. *See also*, *Davis v. Gracey*, 111 F.3d 1472, 1479 (10th Cir.1997) ("[w]e have invalidated warrants for overbreadth where the language of the warrants authorized the seizure of virtually every document that one might expect to find in a ... company's office, including those with no connection to the criminal activity providing the probable cause for the search") and *U.S. v. Kow*, 58 F.3d 423, 427 (9th Cir.1995) (a warrant that similarly "authorized the seizure of virtually every document and computer file" at a target company is insufficiently particular; the court emphasized that the warrant "contained no limitations on which documents within each category could be seized or suggested how they related to specific criminal activity"). A warrant authorizing the seizure of ***all*** of the property of an organization is valid only if there is probable cause that all of the organization's property is evidence of a crime and it is a "rare case" where such a warrant will be valid. *U.S. v.*

Bentley, 825 F.2d 1104, 1109-10 (7th Cir.1987). In Mr. Hale's case, there was no probable cause to establish that all of the property of Mr. Hale or the WCOTC was evidence of a crime.

Furthermore, the "failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad." *Ford*, 184 F.3d at 576. In Mr. Hale's case, the government's *Attachment A* did not mention any time period at all.

The search warrant in Mr. Hale's case amounted to a general search warrant authorizing the agents to rummage through all of the WCOTC's and Mr. Hale's papers and to seize everything they saw. Because the warrant was an overbroad, general warrant, a motion to suppress would have been meritorious and should have been filed. *See Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979) (evidence seized pursuant to a general warrant must be suppressed)..

c. <u>There Was No Nexus Between the Crimes for Which There Was Probable Cause and Many of the Items Seized</u>.

The *A.A.S.W.* made no claim whatsoever that there was probable cause to believe that the items saying "Church of the Creator" were related to any crime or criminal activity. Thus, there was no nexus between these items and the crimes alleged in the *A.A.S.W.*[4]

> The particularity requirement insures that a search is confined in scope to ***particularly described evidence relating to a specific crime for which there is demonstrated probable cause***. The government affidavit supporting the warrants at issue alleged a scheme of tax fraud, and the district court found that probable cause existed. ***The bulk of the warrant was not restricted to evidence relating to tax fraud***, however. It authorized government agents to rummage through all of NCBA's customer files, bank records, employee records, precious metal records, marketing and promotional literature, and more, seeking any information pertaining to any federal crime.

Voss, 774 F.2d at 405 (emphasis added). As the Supreme Court has stated, "***[t]here must***, of course, ***be a nexus ... between the item to be seized and criminal behavior***." *Warden v. Hayden*, 387 U.S. 294, 307 (1967) (emphasis added). Here, there was no probable cause that ***anything*** listed in *Attachment A* regarding "computers" or "documents and records pertaining to the WCOTC" were connected with the criminal activity alleged in the *A.A.S.W.* Furthermore, *Attachment A* limited nothing to Judge Lefkow, to a plot against Judge Lefkow or to Mr. Hale.

"Probable cause exists when there is a fair probability, given the totality of the circumstances,

---

[4] Because the *Search Warrant* itself did not state any criminal activity or probable cause for any criminal activity, there was no probable cause that ***anything*** listed in *Attachment A* was connected with criminal activity set forth in the *Search Warrant* itself.

that contraband or ***evidence of a crime*** will be found in a particular place." *U.S. v. McCraven,* 401 F. 3d 693, 697 (6th Cir.2005) (emphasis added). As the Supreme Court has stated:

> ... It does not follow, however, that probable cause for arrest would justify the issuance of a search warrant, or on the other hand, that probable cause for a search warrant would necessarily justify an arrest. Each requires probabilities as to somewhat different facts and circumstances ...
>
> ... Search warrants may be issued only by a neutral and detached judicial officer, upon a showing of probable cause – that is, ***reasonable grounds to believe – that criminally related objects are in the place which the warrant authorizes to be searched at the time when the search is authorized to be conducted*** ...
>
> Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence: that ***the items sought are in fact seizable by virtue of being connected with criminal activity*** and that ***the items will be found in the place to be searched***.

Zurcher, 436 U.S. at 556 (citations and quotation marks omitted; emphasis added). Thus, a warrant is proper if it specifies the crime and the enterprise to which the items listed were to pertain. *U.S. v. Hillyard*, 677 F.2d 1336, 1340 (9th Cir.1982), *citing Andresen*, 427 U.S. at 479-82. A search warrant is not sufficiently particular if it contains no guidelines to aid officers in determining what may or may not constitute evidence of a violation of the statute at issue. *U.S. v. Cardwell*, 680 F.2d 75, 77-78 (9th Cir.1982) (the search was suppressed even though the warrant cited a specific statute; in Mr. Hale's case, the warrant cited neither statute nor crime).

The *Search Warrant*, *Attachment A* and the *A.A.S.W.* in Mr. Hale's case failed to establish the requisite nexus between the items to be seized and the crime for which Mr. Hale was being investigated. Neither Judge Lefkow nor Mr. Hale were mentioned and the warrant was not limited to items relating to him or her. Instead, the focus was on Mr. Hale's ***Church***, just as the *Stanford* warrant focused on the Communist Party of Texas. Nor does the warrant mention any statute. No relationship was established between "documents and records pertaining to the WCOTC" and any solicitation or conspiracy to murder Judge Lefkow. Thus, the eleven agents rummaging through Mr. Hale's house and Church were not put on notice as to any limit to their search.

The *A.A.S.W.* provided no basis for a claim that items saying "Church of the Creator" were evidence of a crime. Nor was there a connection on its face between an audio tape marked "Church Services July 23, 1999, July 30, 1999" and the basis for the warrant, a purported plot to kill Judge Lefkow in late 2002. Further, the *A.A.S.W.* was not incorporated into the warrant and the warrant did not even remotely establish particularity nor probable cause that an audio tape marked "Church

services July 23, 1999, July 30, 1999" or items saying "Church of the Creator" were evidence of a crime. The search in Mr. Hale's case was an improper exploratory search.

d. Defense Counsel Rendered Mr. Hale Ineffective Assistance.

Mr. Hale must show under *Kimmelman* and *Cieslowski* that the motion would have been meritorious and that there is a reasonable probability that, had this evidence been suppressed, the outcome of the trial would have been different. Mr. Hale has met this standard: the motion would have been meritorious and Count 1 (obstruction) would not have existed and Counts 2 and 4 (solicitation of murder and obstruction through the alleged solicitation) would have been undermined without the evidence that Mr. Hale had praised Smith following his crimes. It was unreasonable not to file a suppression motion when there was much to gain and nothing to lose.

In failing to file a meritorious motion to suppress, counsel was not functioning as "counsel" under the 6th Amendment. The proper function of a reasonably competent defense attorney is to stop, if possible, the admission of evidence that is harmful to his client. By filing a suppression motion, counsel could have prevented the jury, before it was ever impaneled, from hearing Mr. Hale's praise of Smith following his shooting spree. The government in its closing argument relied heavily on the 1999 tape to argue that Mr. Hale intended Evola to murder Judge Lefkow in late 2002. That Mr. Hale was prejudiced by the admission and playing of the July 1999 audio tape is further demonstrated by the 7th Circuit's substantial reliance on it in its decision upholding Mr. Hale's convictions. Without the playing of this tape both to incite the jury's passions against Mr. Hale and to prove Mr. Hale's intent to have Judge Lefkow killed, there is better than a negligible chance that Mr. Hale would not have been convicted on Counts 2 and 4. *See Leibach*, 347 F.3d at 246.

Mr. Hale was also prejudiced by the admission of the items which contained the name "Church of the Creator." Without the introduction of the books and documents containing the words "Church of the Creator," there was no evidence that Mr. Hale had obstructed justice with his Dec. 12, 2002 letter since this count was entirely based on the illegal seizure of the "Church of the Creator" material and there is, therefore, a better than negligible chance that Mr. Hale would not have been convicted on Count 1.

Furthermore, since the search involved that of a Church and the bulk of the items sought in *Attachment A* related to 1st Amendment materials, the validity of the search was subject to heightened, "most scrupulous exactitude" scrutiny under *Zurcher* and *Stanford*. The search was an unconstitutional "fishing expedition" designed to find "something" that could be used against Mr.

Hale. Clearly, the government succeeded - by virtue of Count 1 and the sermon of Mr. Hale praising Smith - evidence that would not have been seized without the unconstitutional search and a result of which Mr. Hale is now serving a 40 year prison term.

4. TRIAL ERRORS

a. Failure to Adequately Prepare for Trial by Failing to Carefully Read and Then Failing to Object to the Admission of the Entire Trademark Appeal Opinion and the "Judgment-Proof" Questioning

Counsel failed to adequately prepare for trial by failing to carefully read the 7th Circuit opinion reversing Judge Lefkow's ruling in favor of Mr. Hale's Church in the trademark case. Apparently unbeknownst to counsel, this opinion contained a statement saying: "Note the change from 'Church of the Creator, Inc.' to 'World Church of the Creator,' an unincorporated association. This is apparently part of a ***judgment-proofing strategy*** after a court held in 1994 that Klassen's organization must pay damages ***for orchestrating a murder***." This wording allowed the jury to infer that the Church and its leadership had a habit, plan or practice of soliciting murder, an extremely prejudicial proposition considering Mr. Hale's charges. Furthermore, this portion of the opinion was highlighted in the jury's copy without objection by counsel. Counsel consequently failed to object to the admission of the opinion into evidence, leaving only for plain error review on appeal.

Counsel also failed to object to the "judgment-proofing" line of questioning that led to testimony that "Church of the Creator," which the government proceeded to characterize as the same organization as Mr. Hale's organization, "sponsored" a murder. Counsel then failed to ask the court for an instruction admonishing the jury that it could not use this "sponsoring" of murder in 1994 as evidence against Mr. Hale in the present case, leaving review only for plain error.

b. Introduction into Evidence and Reading Extensively from *The White Man's Bible* and *Nature's Eternal Religion*, the Church's Two Bibles

Counsel introduced into evidence and then read extensively from these two books despite the fact that the passages said that "Jews," "niggers," and "mud races" were "natural enemies" and called for the "Elimination of the Black Plague," and despite *The White Man's Bible*'s seeming justification of violence and terrorism. It was ***defense counsel*** who mentioned the terrorism chapter, and then, not surprisingly, both prosecutors cited it in closing argument and relied heavily on the book in arguing to the jury that Mr. Hale had acted and intended in conformance with its teachings when he supposedly solicited Judge Lefkow's murder and that he was predisposed to do so. Further, counsel introduced into evidence and read the above passages from the two books even though five

of the jury members were African-American and one was Hispanic. Thus not only did counsel admit into evidence highly inflammatory material, but they also encouraged the prosecutors to use the terrorism chapter as justification to find Mr. Hale guilty.

c. Failure to Ask for a Limiting Jury Instruction on the Smith Evidence

Despite the court offering and encouraging on four separate occasions the giving of a limiting instruction on the Smith evidence, counsel refused to ask for such an instruction. Thus, the jury was left free to use the Smith evidence for improper purposes such as character, propensity, habit or common plan or scheme. The failure to make an objection thus leaving review only for plain error, failure to ask for curative instructions and failure to ask for a mistrial, was found deficient and prejudicial in *Vela v. Estelle*, 708 F.2d 954, 957, 962-66 (5th Cir.1983). Counsel's similar failures amounted to ineffective assistance in Mr. Hale's case.

d. Elicitation of Testimony from Informant Evola That a Person Had Told Him That Mr. Hale Had Solicited That Person to Murder People

Counsel elicited prejudicial testimony from government informant Evola that John Yonkers had told him (Evola) that Mr. Hale had solicited him "to do what Ben [Smith] did," namely, to murder people. Recognizing the significant, prejudicial effect of this testimony, the court stated, "[t]hat was pretty damaging" and recommended that counsel move to strike this testimony, but counsel failed to do so. Furthermore, after the government subsequently stated in its closing rebuttal argument that, "[t]he government had evidence that the defendant had a member of his organization kill two people and shoot lots of others," it relied in post-trial proceedings on this testimony as justification for this prejudicial statement. The 7th Circuit rejected this position and found this remark to be improper, but also found that it was not plain error. *Hale*, 448 F.3d at 987.

The testimony by Evola was inadmissible and highly prejudicial and counsel had no legitimate reason for eliciting this testimony. The 6th Circuit found that defense counsel's strategy of affirmatively eliciting testimony from witnesses regarding an uncharged act in a professed attempt to show that the victim was lying about the act and thus to call into question her testimony about the charged act and counsel's failure to request a limiting instruction on the use of this evidence, fell outside the range of professionally competent assistance and was prejudicial. *White v. McAninch* 235 F.3d 988, 997-1000 (6th Cir.2000). This is what happened in Mr. Hale's case.

e. Failure to Challenge the Government's Comments in Closing Argument

Counsel failed to object to a highly prejudicial and inflammatory portion of the prosecution's

closing argument when the prosecutor told the jury that, "[t]he government had evidence that the defendant had a member of his organization kill two people and shoot lots of others." The 7th Circuit found this remark improper but since there had been no objection, reviewed only for plain error and, because Mr. Hale could not show that the outcome of his trial would have been different ***but for*** the remark, the 7th Circuit did not find plain error. (*Hale*, 448 F.3d at 987, 988.)

Counsel failed to object to the prosecutor arguing following facts in this statement which were not in evidence: (1) Mr. Hale had a member "kill two people;" (2) Mr Hale had a member "shoot lots of others;" (3) Smith was a member of Mr. Hale's organization; (4) Smith "shot lots of others;" and (5) Smith "killed two people." The presumption of innocence is violated when "the jury is encouraged (or allowed) to consider facts which have not been received in evidence." *U.S. v. Garcia*, 439 F.3d 363, 367 (7th Cir.2006). Furthermore, counsel failed to move for mistrial after the prosecutor made the above-quoted improper statements, again leaving review only for plain error.

Counsel also failed to object to the prosecutor's prejudicial claim that, because *The White Man's Bible* justified "illegal terrorism," Mr. Hale did too. The prosecutor stated: "[a]nd what does *The White Man's Bible* teach is the appropriate response when their survival is put at risk? ... Survival at all costs, the end justifies the means, any means. ... If our survival is at stake, is so-called illegal terrorism justified, and the answer overwhelmingly is yes. .... That weapon is terrorism and violence, taking the law into our own hands." Counsel failed to object to the prosecutor's improper attempt to inflame the jury through an appeal to passion in light of the actual, ongoing war against terrorism, leaving review only for plain error.

The government's statement that, "[t]he ***government had evidence*** that the ***defendant had a member of his organization kill two people and shoot lots of others***" was clearly improper, as found by the 7th Circuit. *Hale*, 448 F.3d at 987. Even if "Hale was not prejudiced" (*Hale*, 448 F.3d at 987) by the statement for purposes of the stringent plain error standard of review, it certainly added to the cumulative effect of the trial errors. Furthermore, when the 7th Circuit made this ruling, it was not considering the fact that the government had been arguing facts not in evidence.

5. JURY SELECTION ERRORS

Counsel committed errors during jury selection when they struck numerous white jurors but refused to strike a single African-American juror, despite knowing that substantial evidence would be presented regarding Mr. Hale's being a white supremacist, despite certainty that Mr. Hale's white

supremacist beliefs and speaking engagements with the Ku Klux Klan[5] would permeate the entire trial, despite the government's expressed intent to elicit evidence that Mr. Hale supposedly had "dreams to hunt and kill Jews and African-Americans" and had supposedly praised one of his followers for killing minorities, and despite the government's intention to admit evidence of Mr. Hale using racial slurs including the word "nigger." At a minimum, counsel should have explored any possible prejudice of the potential African-American jurors but they did not even do this.

While it is commonly believed that African-American jurors are more sympathetic to criminal defendants and thus preference for African-American jurors may fall within the bounds of a reasonable trial tactic, such a tactic by Mr. Hale's counsel was profoundly ***unreasonable*** considering the circumstances of ***his*** case. It was objectively unreasonable to ***favor*** African-Americans over whites as jurors since it was obvious that his client's white supremacist beliefs would inflame African-American jurors against him. It was unreasonable to leave on the jury people who not only disagreed with Mr. Hale's beliefs but who were personally attacked and insulted by them. That is to say, it is hardly ***reasonable*** to expect that African-American jurors would be more sympathetic to a white supremacist defendant than would white jurors. A reasonably competent counsel would instead expect that African-American jurors would be biased in favor of the prosecution whose aim was the conviction of the racial slur-using "white supremacist." If discrimination against African-American jurors in a trial involving an African-American defendant is constitutionally suspect, so too should it be constitutionally suspect for a white defendant's lawyer to discriminate against white jurors in favor of African-American jurors.

Furthermore, counsel did not peremptorily or for-cause challenge white juror Mark Hoffman (the subsequent jury foreperson), despite the facts that Hoffman: (1) had stated during jury selection (outside of Mr. Hale's presence) that he had heard that, "Smith said something like he was ***told to go do what he had done***;" (2) had an African-American "partner;" (3) was an Assistant Dean at Northwestern University where Smith's murder victim, Ricky Byrdsong, had coached basketball; and (4) was a resident of West Rogers Park, the same town where Smith had committed his shooting spree. Counsel failed to challenge Hoffman even though he knew that evidence would be presented showing that Mr. Hale held animosity toward white people involved in interracial relationships. The

---

[5] On the other hand, defense counsel failed to present evidence that Mr. Hale had implored the KKK to ***refrain*** from committing crimes and, thus, the half-African-American jury was denied evidence of this fact. (*See* transcript of "Nordicfest 2001" speech not offered at trial.)

fact that Hoffman was left on the jury prejudiced Mr. Hale because, considering juror Hoffman's personal background in conjunction with Mr. Hale's beliefs, his being present on the jury certainly undermines confidence that he could have been an unbiased juror and, thus, undermines confidence in the verdict. *See Strickland*, 466 U.S. at 694. The failure to challenge biased jurors can be considered constitutionally deficient performance. *See Virgil v. Dretke*, 446 F.3d 598, 609-611 (5th Cir.2006). The right to a trial free of biased jurors is of constitutional magnitude. *See Smith v. Phillips*, 455 U.S. 209 (1982).

6. VIOLATION OF MR. HALE'S RIGHT TO BE PRESENT FOR AND PARTICIPATE IN ALL OF VOIR DIRE

Counsel's performance was deficient when they failed to object to the trial court's excluding Mr. Hale from a significant portion of voir dire during questioning regarding the juror's exposure to publicity. Voir dire itself is a critical stage of a criminal jury trial and it was particularly important in this case because counsel knew that the government was going to present a substantial amount of evidence regarding the very emotionally-charged issues of racial bias and the racially motivated Smith killings. It was extremely important for Mr. Hale to have been present for these juror interviews so that he could hear the jurors' responses and could then assist his attorneys in determining whether to excuse any of these jurors.

Mr. Hale was excluded, without his consent, from the entire in-chambers, individual voir dire proceedings regarding the potential jurors' exposure to publicity. Counsel failed to object to this violation of Mr. Hale's 5th Amendment and F.R.Crim.P. 43(a) rights. At trial, the court determined that the individual voir dire would be done in chambers outside of Mr. Hale's presence. Counsel and the court had the following discussion in-chambers regarding Mr. Hale's absence:

MR. DURKIN: ... Mr. Hale had asked whether I thought he should come here. I said I would report back. I said I thought it okay if he was not here.

THE COURT: Yes, tell him.

Vol. 1 at 41, line 25 – 42, line 3. There is nothing more in the record regarding Mr. Hale's or his counsel's acquiescence in Mr. Hale's absence. Mr. Hale subsequently remained in the courtroom without counsel, alone with the remaining potential jurors, while the court and counsel privately conducted this portion of the voir dire.[6]

[6] Out of the approximately 17,993 lines of voir dire, approximately 10,627 were done in open court in Mr. Hale's presence and approximately 7,366 were done in private outside of Mr. Hale's presence. Thus,

Mr. Hale had the right to be present and had the right to participate in the selection of those persons who would determine his fate.[7] Counsel failed to explain these rights to Mr. Hale and counsel and the court failed to obtain a waiver of these rights from Mr. Hale. This violated Mr. Hale's 5th Amendment and Rule 43(a) rights.

Mr. Hale was generally prejudiced by not being present during the individual voir dire questioning because: (1) he was denied the opportunity to ask questions of and provide input to his counsel in determining the qualifications of those jurors who were ultimately chosen to hear his case; (2) he was denied the opportunity to comment or raise objections through counsel when the court, in-camera, struck certain jurors for cause and when counsel sought to rehabilitate others; and (3) his presence in the courtroom after the in-camera proceedings was insufficient to address these deficiencies, since he lacked the information necessary to participate in the jury selection.

Mr. Hale was specifically prejudiced when he did not hear juror Hoffman state his belief that "Smith said something like ***he was told to go do what he had done***" and when he was not present to hear the answers that jurors Hoffman, Kinder and McClellan gave regarding their exposure to publicity surrounding Smith's killing of coach Byrdsong, about their affection for Byrdsong, or regarding Smith's relationship to Mr. Hale. If Mr. Hale had been present to these matters, he would have insisted that Hoffman be removed for cause, or if a for-cause challenge had not succeeded, excused with a peremptory challenge. (*Decl. of M. Hale* at 8, ¶ 24.) Furthermore, if Mr. Hale had been present to hear Hoffman, Kinder and McClellan describe their exposure to the publicity, he would have insisted that they be peremptorily excused. However, Mr. Hale was not present and all three of these individuals were subsequently left on the jury. Thus, the denial of Mr. Hale's right to be present for this portion of his voir dire enabled the seating of jurors already predisposed to find Mr. Hale guilty based on Mr. Hale's background as a white supremacist and his connections to Smith. The presence of these jurors on the jury was prejudicial because their background and exposure to publicity undermines confidence that these jurors could have been unbiased and, thus, undermines confidence in the verdict. *See Strickland*, 466 U.S. at 694.

Mr. Hale was absent from his trial proceedings for approximately 41% of the jury selection process.

[7] Even counsel acknowledged the importance of jury selection, stating during voir dire (but Mr. Hale's absence), "[t]his [voir dire] is the most important part of this case" and "from my standpoint, there's nothing more important in this whole trial than what were doing [voir dire] right now." And yet counsel did not require Mr. Hales's presence for this "most important part of the case."

7. AN INADEQUATE CLOSING ARGUMENT

Counsel gave an inadequate closing argument when they failed to argue the proper defense in this case. Counsel then failed to argue that much of the evidence supported this explanation of events. Furthermore, counsel failed to argue that Mr. Hale's "state of war" with Judge Lefkow had no connection to violence whatsoever, but rather simply consisted of "***fighting in the courts***" and that when Mr. Hale spoke about going to "war," he was referring to a war of words, a war of protest, a war of paperwork and a war against the system. (*See Aff. of J. Logdson* at 1-2, ¶ 6 and *Decl. of B. Moudry* at 2, ¶ 8). Counsel also failed to argue to the jury that Mr. Hale wanted Judge Lefkow's address for ***a street demonstration*** in front of her house, ***not*** in order to facilitate her murder.

Counsel's failure to argue the true facts to the jury to explain Mr. Hale's innocence fell below the standard of a reasonably competent attorney. A lawyer's failure to press several points critical to the defense in his closing argument to the jury can constitute professionally deficient performance. *Washington v. Murray*, 952 F.2d 1472, 1481 (4th Cir.1991). Mr. Hale was prejudiced by counsel's failure to argue his strongest and best defense and to argue the facts which supported this defense because, absent these arguments, facts apparently inculpatory to Mr. Hale were left unexplained and this left the jury to believe the government's unrefuted theory of the case and to convict Mr. Hale. Had counsel properly argued Mr. Hale's defense, there is a reasonable probability that the outcome of the trial would have been different.

8. FAILURE TO PREPARE MR. HALE TO TESTIFY AT TRIAL

Although Mr. Hale had repeatedly expressed a desire to testify, counsel failed to prepare him in case he chose to do so. Counsel's failure to prepare Mr. Hale for testifying (or the possibility of testifying) was based, at least in part, on counsel's failure to understand the facts of Mr. Hale's case and, thus, was deficient since these omissions were not based on reasoned strategic judgment. In other words, the jury was denied the truth of Mr. Hale's case from Mr. Hale's own testimony due to counsel's lack of preparation and this lack of preparation was due to counsel's failure to understand the facts of Mr. Hale's case. Although Mr. Hale waived his right to testify, this waiver was based on counsel's advice, which was again deficient due to counsel's failure to understand the facts and, thus, the proper defense in Mr. Hale's case. Furthermore, after failing to prepare for even the ***possibility*** that Mr. Hale testify, counsel told Mr. Hale during trial that, "I'm not prepared to ask you anything." (*See Decl. of M. Hale* at 8, ¶¶ 26, 27.) Thus, Mr. Hale was denied an informed, reasoned, effective choice in deciding whether to testify.

The right to testify in one's own behalf is fundamental. *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987) (noting substantial historical foundation and its basis in several clauses of the 5th, 6th and 14th Amendments). The Supreme Court has held that the right to testify is a "necessary ingredient" of the 5th Amendment Due Process Clause, noting that "[i]t is one of the rights that [is] 'essential to due process of law in a fair adversary process.' " *Rock*, 483 U.S. at 51, *quoting Faretta v. California*, 422 U.S. 806, 819, n.15 (1975). In Mr. Hale's case, counsel's failures thus constructively denied him his constitutional right to testify and thus fell below the standard of reasonable conduct for a defense attorney. Had Mr. Hale testified, there is a better than a negligible chance that his trial would have had a different result and that he would have been acquitted.

9. BREACH OF DUTY OF LOYALTY TO MR. HALE

Counsel breached their duty of loyalty to Mr. Hale when they repeatedly displayed animosity and contempt toward him in front of the jury, thus evincing a conflict of interest. In particular, counsel called Mr. Hale a "jerk," called his yard "stupid," referred to his straightforward, exculpatory Dec. 17, 2002 refusal to join Evola's plot against Judge Lefkow's life as "silliness," referred to his "filth" and "lack of moral basis," said that Mr. Hale "deserves to be convicted on a moral basis," and implied that Mr. Hale was a "dog." "Effective assistance also requires that an attorney adhere to his duty of undivided loyalty to his client." *Fisher v. Gibson*, 282 F.3d 1283, 1291 (10th Cir.2002), *citing Strickland*, 466 U.S. at 692. A defendant may be able to show that his counsel was ineffective as a result of animosity harbored by counsel. *Hale v. Gibson*, 227 F.3d 1298, 1313 n.4 (10th Cir.2000). An attorney's display of animosity makes it "appropriate to scrutinize counsel's performance with a somewhat more critical eye." *Id.*, at 1314. In Mr. Hale's case, derisive comments against him added fuel to a jury that already was unsympathetic and antagonistic to Mr. Hale due to his beliefs. When his own counsel showed no respect for him, it had to negatively effect the jury and prejudice Mr. Hale.

C. THE CUMULATIVE EFFECT OF COUNSEL'S ERRORS RENDERED THE JURY TRIAL FUNDAMENTALLY UNRELIABLE AND HENCE UNFAIR.

Mr. Hale's jury trial was permeated with so many errors and with errors of such magnitude that his trial was rendered fundamentally unfair and his convictions were therefore unreliable. Although many of the above-described errors are reversible in their own right, if the court finds that some of the errors are individually harmless, the ***cumulative*** effect of all of the errors was so substantial and injurious that they affected Mr. Hale's substantial rights and undermined and infected

his right to a fair and reliable trial and, therefore, cannot be considered harmless. "All of the evidence against [the defendant] was affected by his counsel's failures, and but for those failures, the prosecution's case quite likely would have collapsed altogether." *Lindstadt v. Keane*, 239 F.3d 191, 205 (2nd Cir.2001). As the 7th Circuit has stated,

> [t]hough we examine each example of incompetence individually, we must also consider their cumulative effect in light of the totality of circumstances

Crisp, 743 F.2d at 583, *citing Strickland*. *See also*, *Williams v. Washington,* 59 F.3d at 682, ("a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet *Strickland*'s test"); *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir.) ("[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair"), *cert. denied*, 464 U.S. 951 (1983); and *U.S. v. Rivera*, 900 F.2d 1462, 1469-70 (10th Cir.1990) (*en banc*) ("[u]nless an aggregate harmlessness determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless").

In a case remarkably similar to Mr. Hale's, retained counsel was ineffective by failing to call numerous witnesses who would have provided exculpatory testimony, by failing to understand petitioner's defense theory, by assuming a general blasé attitude toward the defense and by failing to challenge potentially biased jurors. *See Berry v. Gramley*, 74 F.Supp.2d 808, 811, 817 (N.D. Ill. 1999) ("[h]ad [counsel] taken the time and made the effort to prepare his case, [counsel] would have understood the nature of petitioner's defense theory ...;" "[t]he prejudice to defendant is obvious: the jury that convicted him never considered material evidence that supported petitioner's version of the facts and directly contradicted the prosecution's evidence;" "petitioner has made the required showing that 'there is at least a reasonable probability that the jury would have seen matters differently had the defense presented the corroborating and exculpatory evidence discussed above").

In Mr.Hale's case, the cumulative effect of the above-described errors and the non-reversible errors raised on direct appeal affected Mr. Hale's substantial rights and infected his right to a fair trial. Therefore, the cumulative effect of these errors cannot be considered harmless and Mr. Hale should be granted a new trial on all counts.

IV. GROUND TWO: VIOLATION OF THE RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE TRIAL

Mr. Hale was deprived of his 5th Amendment and Federal Rules of Criminal Procedure 43(a)

right to be present at all critical stages of his trial when he was excluded from a significant portion of voir dire dealing with potential jurors' exposure to publicity.

A. CAUSE/ACTUAL INNOCENCE

Although Mr. Hale can show cause,[8] he need not do so because he has made a showing of actual innocence. *See Bousley v. U.S.*, 523 U.S. 614, 622 (1998) ("[w]here a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' ... or ***that he is 'actually innocent'*** ...;" internal citations omitted and emphasis added). To establish actual innocence, a defendant must show that "'it is more likely than not that no reasonable juror would have convicted him.'" *Bousley*, 523 U.S. at 623 (*quoting Schulp v. Delo*, 513 U.S. 298, 327-28 (1995)). Because Mr. Hale has proven actual innocence, this issue may be adjudicated on the merits.

B. STANDARD OF REVIEW

Because voir dire is a critical stage of a trial, the proper standard of review for Mr. Hale's Rule 43(a) and 5th Amendment claims is for harmless error. As the 7th Circuit has stated,

> The defendant, however, failed to raise [this] issue[] when he was given a chance to make his objections of record in the trial court. Consequently he has forfeited [this] error[]. In such a case we would normally review [it] for plain error only. [Citation omitted.]. We have previously held ... that the ***Rule 43(a) violation is subject to the harmless error standard, even in a case where the issue was not presented to the trial court***. [Citation omitted.]

U.S. v. Patterson, 23 F.3d 1239, 1254-55 (7th Cir.1994) (emphasis added).

A deprivation of the 5th Amendment ***constitutional*** right to be present at every critical stage of the trial is subject, however, to a *Chapman v. California* harmless error analysis. *See U.S. v. Neff*, 10 F.3d 1321, 1326 (7th Cir.1993) ("[t]his being a constitutional error we must assess its harmlessness under the elevated standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires that before we dismiss the error as harmless, we must be able to 'declare a belief that it was

---

[8] The "cause" for Mr. Hale's failure to bring this issue in the district court was that counsel were ineffective for failing to raise this issue before or during trial. The "cause" for Mr. Hale's failure to bring this issue in a post-trial motion was because Mr. Hale's attorney in this stage of the proceedings did not have access to the voir dire transcripts when he filed Mr. Hale's post-trial motion on June 24, 2004. The "cause" for Mr. Hale's failure to bring this issue on appeal was that he did not have access to the voir dire transcripts. The district court did not make these transcripts a part of the record until May 25, 2005 and June 2, 2005. Mr. Hale did not then receive copies of the transcripts until after June 9, 2005, the date he filed his opening appeal brief. (*See Decl. of M. Hale* at 10, ¶ 34.) Without access to and possession of the voir dire transcripts, Mr. Hale could not have raised this issue on appeal.

harmless beyond a reasonable doubt;'" citation omitted).

> Because we are reviewing a constitutional violation, not simply a violation of Rule 43(a), we apply the harmless-error standard enunciated by the Court in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1966). We may uphold the conviction only if the error was "harmless beyond a reasonable doubt." *Id* at 24 ...

U.S. v. Gomez, 67 F.3d 1515, 1528 (10th Cir.1995) (*citing U.S. v. Widgery*, 778 F.2d 325, 329-30 (7th Cir.1985)). Thus, the 5th Amendment violation places the heavy burden on the government to prove beyond a reasonable doubt that this error was ***not*** harmless. *U.S. v. Watkins*, 983 F.2d 1413, 1422 (7th Cir.1993).

As stated above, a Rule 43(a) violation is subject to harmless error analysis (*Rogers v. U.S.*, 422 U.S. 35, 40 (1975) and *U.S. v. Smith*, 31 F.3d 469, 473 (7th Cir.1994)) and "a violation of Rule 43(a) is subject to harmless error analysis even when no objection was made in the trial court" (*U.S. v. Rodriguez*, 67 F.3d 1312, 1316 (7th Cir.1995)). *But see*, *U.S. v. Gagnon*, 470 U.S. 522, 529 (1985) (*per curiam*) (a defendant may not assert his Rule 43 right for the first time on appeal); *U.S. v. Shukitis*, 877 F.2d 1322, 1330 (7th Cir.1989) (same); and *U.S. v. Smith*, 230 F.3d 300, 309 (7th Cir.2000) ("[s]ince neither [the defendant] nor his attorney objected to [the defendant's] absence from the in-chambers conference at any time prior to this appeal, we review for plain error").

"A defendant's absence from a stage of the trial is harmless ***if the issue involved is not one 'on which counsel would be likely to consult [the defendant]***'..." *U.S. v. Degraffenried*, 339 F.3d 576, 580 (7th Cir.2003) (emphasis added), *quoting U.S. v. Silverstein*, 732 F.2d 1338, 1348 (7th Cir.1984). "Nonetheless, a violation of Rule 43(a) requires reversal of a defendant's conviction unless the 'record completely negatives any reasonable possibility of prejudice arising from such error.'" *U.S. v. Smith*, 31 F.3d at 473, *quoting U.S. v. Santiago*, 977 F.2d 517, 523 (10th Cir.1992).

C. MR. HALE'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF HIS TRIAL WERE VIOLATED.

1. Mr. Hale's 5th Amendment Right Was Violated.

An accused has the right to be present at his own trial, including the impaneling of the jury. An accused ***"has a [constitutional] right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings***." *Faretta*, 422 U.S. at 819, n.15. *See also*, *Kentucky v. Stincer*, 482 U.S. 730, 756 (1987) ("[t]hus, a defendant is guaranteed the right to be present at any stage of a criminal proceeding that is critical to its outcome if the defendant's presence would ***contribute to the fairness of the procedure***") and *Tennessee v. Lane*, 541 U.S. 509, 523

(2004) (a defendant has a due process right to be present at all stages of a trial where defendant's absence "***might*** frustrate the fairness of the proceedings;" emphasis added). "The challenging of prospective jurors is an essential part of the trial ...'" *U.S. v. Miller*, 463 F.2d 600, 603 (1st Cir.l972).

> ... ***A defendant's absence during the impaneling of the jury certainly frustrates the fairness of the trial***. The absent defendant is ***denied the opportunity to give advice or suggestions to his lawyer*** concerning potential jurors. A defendant's presence is also necessary so that he may ***effectively exercise his peremptory challenges***, a process that is ***essential to an impartial trial***.

U.S. v. Camacho, 955 F.2d 950, 953 (4th Cir.1992) (emphasis added).

The Supreme Court has recognized that: (1) "the defense may be made easier if the accused is permitted to be present at the examination of jurors ..., ***for it will be in his power, if present, to give advice or suggestions or even to supersede his lawyers altogether and conduct the trial himself***;" and (2) under such circumstances it could be assumed that, "in a prosecution for a felony, the defendant has the privilege, under the Fourteenth Amendment, to be present in person in his own defense whenever his ***presence has a relation reasonably substantial, to the fullness of his opportunity to defend against the charges***." *Snyder v. Comm. of Mass.*, 291 U.S. 97, 105-106 (1934) (emphasis added). Thus, the Supreme Court has held that, "the presence of a defendant is a ***condition of due process*** to the extent that a fair and just hearing would be thwarted by [the defendant's] absence." *Snyder*, 291 U.S. at 107-108 (emphasis added).

The Supreme Court has also stated that a defendant "is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, ***by his personal presence***, he may give to counsel and to the court and triers, in the selection of jurors. The ***necessities of the defense may not be met by the presence of his counsel only***." *Hopt v. Utah*, 110 U.S. 574, 578 (1884) (emphasis added). Furthermore, "[j]ury selection is the primary means by which a court may enforce a defendant's ***right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability***." *Gomez v. U.S.*, 490 U.S. 858, 873 (1989) (citations omitted; emphasis added).

Mr. Hale, therefore, had the right to be present during the impaneling of his jury and his absence vitiated the verdict and judgment:

> ... if [the defendant] be deprived of his life or liberty without being so present, such deprivation would be without due process of law required by the Constitution. For these reasons, we are of the opinion that it was error, ***which vitiated the verdict and judgement***, to permit the trial of the [competency] to take place in the absence of the accused.

Hopt, 110 U.S. at 579.

2. Mr. Hale's Rule 43(a) Right to Be Present at Critical Trial Stages Was Violated.

The Federal Rule of Criminal Procedure 43(a) gives a defendant an explicit right to be present at voir dire when it states, "[t]he defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial ***including the impaneling of the jury*** and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." *See also*, *Camacho*, 955 F.2d at 953 (emphasis added; citations omitted) ("... Rule 43 has traditionally been understood to codify both a defendant's constitutional right and his common law right to presence").

D. CONCLUSION

Mr. Hale does not need to show prejudice regarding the constitutional, 5th Amendment due process violation resulting from his exclusion from a significant portion of the voir dire. Rather, the government must show beyond a reasonable doubt that his absence was harmless. *See Neff*, 10 F.3d at 1326 and *United States v. Alikpo*, 944 F.2d 206, 209 (5th Cir.1991) (the government did not prove that the error was harmless even though the defendant was present at the exercise of the jury strikes, as the defendant could be of little assistance to counsel when he had neither heard the venire's responses to questions nor observed their reactions to him and to the proceedings). Because voir dire is critical, it itself affects the outcome of the proceedings. Voir dire may in fact be more critical than ***any other*** stage of the proceedings. These are the people who decide a defendant's fate. As the Supreme Court in *Snyder* pointed out, a defendant must be present to offer suggestions and/or to fire his lawyers, if necessary, to stop them from seating inappropriate people on his jury. Notably, *Snyder* did not concern itself with whether any specific juror's presence made the process critical but rather focused on whether the ***voir dire process as a whole*** was critical.

With regard to the Rule 43(a) violation, Mr. Hale does need to establish prejudice. As shown above, Mr. Hale was prejudiced by not being present during the individual voir dire questioning because he was not present to hear how jurors Hoffman, Kinder and McClellan described their exposure to publicity regarding Smith's murder spree. When the statement by Hoffman is coupled with counsel's later elicitation of testimony from Evola that a person had told Evola that Mr. Hale had solicited that person to do what Smith did, the prejudice of Hoffman sitting on the jury was magnified. If Mr. Hale had been present to hear these matters, he would have insisted that these jurors be excused from the jury. (*See Decl. of M. Hale* at 8, ¶ 24.) However, Mr. Hale was not present and these three individuals sat on his jury and convicted him. The denial of Mr. Hale's right

to be present for an important portion of the voir dire enabled the seating of jurors already predisposed to find Mr. Hale guilty. The presence of these jurors was prejudicial because it undermines confidence that these jurors could have been unbiased and, thus, undermines confidence in the verdict and frustrated the fairness of Mr. Hale's trial. *See Strickland*, 466 U.S. at 694.

Because Matthew Hale was deprived of his 5th Amendment and Rule 43(a) right to be present at all critical stages of his trial, his right to a fair trial was frustrated, any confidence in the verdict was undermined, and, therefore, he should be granted a new trial.

IV. CONCLUSION

For all of the above-stated reasons, Matthew Hale's convictions on all three counts should be set aside, his sentence vacated and he should be granted a new trial.

DATED this 11th day of April, 2008.

Respectfully submitted,

s/Clifford J. Barnard

Clifford J. Barnard # 8195
Attorney at Law
1790 30th Street, Suite 280
Boulder, Colorado 80301-1020
Telephone: (303) 449-2543
Facsimile: (303) 444-6349
Email: cliffbarnard@earthlink.net

Attorney for Defendant-Movant Hale

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	
	)	Case No. 08 C 00094
MATTHEW HALE,	)	
	)	Judge James T. Moody
Defendant-Movant.	)	

CERTIFICATE OF SERVICE

THE DEFENDANT, MATTHEW HALE, by and through his attorney, Clifford J. Barnard, hereby certifies that the following document:

DEFENDANT-MOVANT HALE'S
BRIEF IN SUPPORT OF MOTION TO VACATE AND SET ASIDE
CONVICTIONS AND SENTENCES PURSUANT TO 28 U.S.C. § 2255

was served on this 11th day of April, 2008, in accordance with Fed. R. Crim. P. 49, Fed. R. Civ. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

DATED this 11th day of April, 2008.

Respectfully submitted,

s/Clifford J. Barnard

Clifford J. Barnard # 8195
Attorney for Defendant-Movant Hale
1790 30th Street, Suite 280
Boulder, Colorado 80301-1033
Telephone: (303) 449-2543
Facsimile: (303) 444-6981
Email: cliffbarnard@earthlink.net