UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 08 C 94
	)	
Matthew Frederick Hale,	)	Judge James T. Moody
Defendant-Movant.	)	

EXHIBIT A

FOR

GOVERNMENT'S MOTION TO FILE *INSTANTER* ITS AMENDED RESPONSE TO DEFENDANT'S MOTION FOR RELIEF PURSUANT TO 28 U.S.C. §2255

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The defendant, Matthew Hale, was convicted of obstruction of justice (Count One), solicitation of the murder of U.S. District Court Judge Joan H. Lefkow (Count Two), and obstruction of justice (Count Four). The defendant was sentenced to 480 months incarceration. Defendant appealed his conviction and sentence. Both his conviction and his sentence were affirmed. *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006).

The defendant now seeks relief pursuant to 28 U.S.C. §2255, alleging ineffective assistance of counsel and a violation of his right to be present at all critical stages of the trial. Because defendant's trial counsel provided a meaningful defense that met and exceeded constitutional standards, and because defendant was not deprived of his right to participate in the jury selection process, defendant's motion should be denied.

I. Trial Counsel Performed Well Within the Range of Professional Competence.

The defendant asserts multiple bases that he alleges demonstrate ineffective assistance of counsel. The government addresses these contentions in turn.

A. Standard of Review

In seeking to prove that his counsel rendered ineffective assistance, the defendant "bears a heavy burden." *Jones v. Page*, 76 F.3d 831, 840 (7th Cir.1996)

(citation omitted). The burden requires the defendant to point to particular instances of action (or inaction) on the part of his attorneys which allegedly constitute ineffective assistance. *See Berkey v. United States,* 318 F.3d 768, 772 (7th Cir.2003); *United States v. Farr,* 297 F.3d 651, 657 (7th Cir.2002); *Fountain v. United States,* 211 F.3d 429, 434 (7th Cir.2000). Then, the defendant must show: (1) that his counsel's performance in those specified situation(s) was unreasonably deficient; and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The defendant must make the requisite showing on both elements. The Court should deny an ineffective assistance of counsel claim if the defendant has made an insufficient showing on either prong. *Id.* at 697; *Rastafari v. Anderson,* 278 F.3d 673, 688 (7th Cir.2002) ("A failure to establish either [*Strickland*] prong results in a denial of the ineffective assistance of counsel claim.").

When considering whether an attorney's conduct was unreasonably deficient under the first prong of the *Strickland* test, a court must operate under "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and treat counsel's performance with high deference. *Strickland,* 466 U.S. at 689; *see also Williams v. Washington,* 59 F.3d 673, 679 (7th Cir.1995) (the first prong of *Strickland* "contemplates deference to strategic decision-making"); *United States v. Stark,* 507 F.3d 512, 521 (7th Cir. 2007) (defendant "must overcome the presumption that under the circumstances, the challenged action might be considered sound, trial strategy"). In order to prevail on the first prong of the *Strickland* test, a defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687. "Generally when an attorney articulates a

strategic reason for a decision, the court defers to that choice." *United States v. Cieslowski,* 410 F.3d 353, 360 (7th Cir.2005) (citing *Strickland,* 466 U.S. at 690-91).

With regard to the second *Strickland* prong, the court should only disturb a criminal conviction if "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id.* at 694. In other words, "[i]n order to demonstrate that his federal constitutional right to effective assistance of counsel was violated, a defendant must show that effective assistance would have given him a reasonable shot at acquittal." *Gibbs v. VanNatta,* 329 F.3d 582, 584 (7th Cir.2003) (noting that the defendant does not need to prove actual innocence); *see also Kimmelman v. Morrison,* 477 U.S. 365, 374 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.").

While Hale claims multiple examples of ineffective assistance of counsel, the number of instances of alleged ineffective assistance is not part of the overall assessment of ineffective assistance. "[I]neffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed. Counsel's work must be assessed as a whole; it is the overall deficient performance, rather than a specific failing, that constitutes the ground of relief." *Peoples v. United States,* 403 F.3d 844, 848 (7th Cir.2005) (citing *Bell v. Cone,* 535 U.S. 685, 697 (2002); *Strickland,* 466 U.S. at 690; *Holman v. Gilmore,* 126 F.3d 876, 881-84 (7th Cir.1997)). Thus, in the end, it is "trial counsel's performance as a whole that must be judged." *Gaughan v. United States,* 2006 WL 2798155, N.D. Ind. (2006).

B. Defense Counsel Made a Sound, Strategic Decision Regarding a Theory of Defense

In his brief, defendant argues that defense counsel's performance was constitutionally deficient because counsel "failed to present Mr. Hale's actual, *bona fide* defense which was much stronger than the defense presented." Def. Br., p. 1. Specifically, defendant would have had his trial counsel argue that during a December 5, 2002 conversation between Hale and the government's cooperating witness, Tony Evola, Hale understood Evola to be discussing the 'extermination' of lawyer James Amend (who was lead counsel in the trademark infringement case before Judge Lefkow). Hale's primary contention is that he (Hale) never understood Evola to be discussing the 'extermination' of Judge Lefkow until a subsequent conversation on December 17, 2002. And, according to Hale, once he understood Evola to be discussing the extermination of a federal judge, Hale "categorically rejected Evola's new plan against Judge Lefkow's life." Def. Br., p. 2.[1]

1. Trial Counsel's Strategic Decision Not to Concede Hale Was Approving a Murder Was Reasonable.

Defendant argues that trial counsel stumbled because the jury was denied "evidence proving that Mr. Hale thought that the "Jew rat" [Evola discussed in the December 5 conversation] was lawyer [James] Amend," and that Hale thought "Evola was saying 'consider it done' to lawyer Amend's murder. . ." Def. Br., p. 2.

Understandably, defendant fails to fully extrapolate the logical implication of this argument. Because after Evola said "consider it done" to the proposed murder, the defendant responded with "good." In other words, under defendant's theory of the defense, trial counsel should have argued that Hale *had approved the murder of James*

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1 Defendant re-tools this same argument at Def. Br., pp. 8 - 9.

Amend, not of Judge Lefkow. For myriad reasons, trial counsel's strategic decision not to adopt this approach was imminently reasonable.

The most obvious strategic pitfall to this argument is that defendant's proposed strategy – the December 5 argument was about murdering James Amend – would have forced trial counsel to concede the most difficult aspect of the government's case – the defendant was soliciting a murder. The government would have been left to simply argue the target of the solicitation was Judge Lefkow. As this Court has previously noted, there was sufficient evidence to establish that Hale and Evola were discussing the murder of Judge Lefkow, and not some other individual. *See* R. 249, p. 15. The evidence to support this conclusion included that nowhere in the December 5, 2002 conversation does Hale inform Evola that Evola had misidentified the intended target. Similarly, after Evola sent the December 9 e-mail discussing the "femala rat," there is no evidence that Hale responded by correcting Evola's intended target, or clarifying some perceived confusion. *See* 4/15/04 T.Tr. 83 (Hale never responded). Finally, on December 17, amidst all of the other intentionally veiled statements that the defendant made to Evola, Hale never once suggested that there had been some misunderstanding or confusion during the December 5 conversation. This circumstantial evidence would have supported the conclusion that Evola had indeed received, understood, and acted on Hale's veiled message – kill Judge Lefkow. *See United States v. Garcia*, 272 F.3d 866, 874 (7th Cir. 2001) (circumstantial evidence alone, whether in conjunction with other inculpatory evidence or not, is sufficient to support a conviction); *United States v. Cassano*, 372 F.3d 868 (7th Cir. 2004), *cert. granted and vacated on other grounds* 125 S.Ct. 1018 (2005) (same). Trial counsel's decision not to concede that Hale had solicited a murder of James Amend was a strategic decision that was "rationally

based," and deserves "a strong presumption" of "reasonable professional judgment." *United States v. Farr*, 297 F.3d 651, 658 (7th Cir. 2002).

2. Trial Counsel Presented A Viable Theory of Defense In Light of the Facts of the Case

Under the rubric that trial counsel failed to present a correct theory of defense, defendant asserts multiple other examples of claimed "ineffective assistance," which are equally unavailing. Defendant asserts that trial counsel "failed to understand" that the December 5, 2002 e-mail sought the address of multiple individuals, not just Judge Lefkow's address. Def. Br., p. 4. In fact, trial counsel made that exact point during his cross examination of Evola. *See* 4/19/04 T.Tr., p. 76, 79 (noting that the lawyers were also considered "traitors," and that Hale was seeking multiple "addresses" in his December 4, 2002 e-mail to Evola; noting that Hale was in the process of obtaining multiple "people's home addresses").

Defendant also complains that trial counsel "failed to advocate the facts which supported" Hale's defense. Def. Br., p. 5. Specifically, defendant complains that trial counsel attempted to have Evola agree that during the December 5, 2002, "*Evola* had been talking about killing a judge." Def. Br., p. 5 (emphasis added). However, this line of questioning went directly to defendant's entrapment defense. *See United States v. Millet*, 510 F.3d 668, 676 (7th Cir. 2007) (factor to consider in entrapment defense is "whether the government initially suggested the criminal activity"). Evola's admission that he was talking about Judge Lefkow's murder would support defendant's claim that the government first suggested the criminal conduct, not Hale, and provided a basis for the defendant's entrapment defense.

Defendant also argues that trial counsel failed to call witnesses who would have supported Hale's assertion that Hale had referred to James Amend as a "Jew rat." However, trial counsel obtained this evidence from Evola on cross examination. *See* 4/19/04 T.Tr., p. 76. Thus, trial counsel's decision not to call additional witnesses to corroborate this fact cannot be ineffective, especially in light of the risks posed by these additional witnesses.[2]

The defendant also claims error because trial counsel failed to "argue in closing that the government had failed to . . . [prove] that "the rat, Jew rat" was Judge Lefkow. Def. Br., p. 7. However, trial counsel's argument at closing addressed this very issue. Trial counsel argued:

> So if you believe Fox, you have to believe that on December 4th of 2002 Hale wanted five people killed, he was so angry. But if you believe the Government's theory with respect to Tony Evola, somehow Hale must have have calmed down overnight because by the 5th he only wanted Lefkow killed.

T.Tr. 4/21/04, p. 97. Thus, trial counsel did argue that the government's evidence was internally inconsistent and casted doubt on whose murder the defendant was soliciting. Contrary to defendant's argument, trial counsel well understood the elements of the charged offense.

Defendant further complains that trial counsel's "stipulation" regarding the transcripts was constitutionally deficient. Def. Br., p. 7. The problem with this argument is that this Court religiously cautioned the jury that the transcripts were not

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[2] For example, in his affidavit, Glenn Greenwald states, "[d]uring my many conversations . . . with defendant Hale, he expressed to me his belief in non-violent and legal activism for his cause, and frequently made clear that he opposes violent and/or illegal action." *See* Declaration of Glen Greenwald. This type of testimony, however, would have presented a catch-22 situation for the defendant. If Hale truly opposed violence, then why did he not attempt to dissuade Evola from the violence proposed (whether against Judge Lefkow or against James Ahmend).

evidence and that the tape recordings were the evidence to be ultimately considered. *See e.g.*, 4/15/04 T.Tr., p. 9; *id.*, at 13; *id.*, at 18. *See also* R. 160 (jury instruction on transcripts). Thus, defendant's claim of error regarding the transcripts could not have caused prejudice because the jury is presumed to follow the instructions that have been proffered. *See United States v. Emerson*, 501 F.3d 804, 813 (7th Cir. 2007).

C. Trial Counsel Presented Potentially Exculpatory Evidence Through Recorded Conversations and Printed Materials, and Reasonably Chose Not to Call Witnesses.

Defendant next asserts a variety of arguments regarding the defense presented at trial. Each of these arguments is without merit.

First, defendant claims error in trial counsel's failure to have the tape of the December 5, 2002, conversation professionally analyzed. Initially, the government relies on those arguments articulated *supra* regarding why defendant's currently preferred theory that he was approving the murder of James Amend (and not Judge Lefkow) cannot be a basis for ineffective assistance of counsel as defendant cannot show prejudice. Moreover, defendant offers no credible evidence that the tapes were tampered or compromised. Defendant's reliance on draft transcripts that were refined during the trial preparation process does not raise sufficient concerns that would merit analysis of the tapes.

Defendant next complains that trial counsel failed to present exculpatory evidence, including failing to call a number of witnesses who could have offered

potentially exculpatory evidence.[3] Defendant's claim on this front is without merit for a variety of reasons.

Throughout the trial, defense counsel offered much of the same evidence that these so-called exculpatory witnesses would have presented. For example, many of the recorded conversations that were offered into evidence contained statements by the defendant that he disavowed violence.[4] These statements were included at trial counsel's request pursuant to Fed. R. Evid. 106. *See* 4/14/04 T.Tr., pp. 179 - 181. Second, through cross examination of the government's witnesses, trial counsel elicited testimony that supported the defendant's theory that he was obtaining Judge Lefkow's home address to facilitate non-violent protests at her residence.[5] *See* 4/21/04 T.Tr. pp. 97 - 98 (trial counsel arguing in closing that "they are looking for addresses because [Hale] wants to do some demonstration at the Judge's home").

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[3] Defendant itemizes these deficiencies in various ways – failure to present evidence on Hale's lack of predisposition (Def. Br., p. 12); failure to offer exculpatory documents, recordings and testimony (*id.*), etc. For brevity sake, the government has presented various ways in which trial counsel presented exculpatory evidence to support defendant's case at trial.

[4] *See e.g.* Gvt. Ex. 6/23-24/2000 Transcript, p. 1 ("[Hale] said [to Ben Smith] . . .we can accomplish a lot more peacefully and legally . . . basically that's the way the church operates. We're legal. We're peaceful. We're non-violent . . ."); Gvt. Ex. 6/29/00 Transcript, p. 9 ("personally it is still my intention" to follow the law); Gvt. Ex. 12/3/00, p. 2 ("we're gonna see how everything pans out and all we can do at thsi point is be legal and be peaceful and follow the rules. That's all we can do because, you know, if we weren't to do that then, it would be even worse . . .").

[5] *See e.g.* 4/13/04 T.Tr., p. 172 (cross examination of Jon Fox, "Hale wanted addresses for the demonstrations"), p. 231 (receiving Judge Lefkow's home address via e-mail "was consistent with the conversation you had about the demonstrations at her house"); 4/13/04 T.Tr., p. 29 (cross examination of James Burnett (describing "RAHOWA" not as a "racial holy war of violence" but "more of a mental holy war" – an understanding Burnett received from Hale).

Moreover, trial counsel's decision not to call witnesses was a sound, strategic decision. The above-outlined evidence was presented by trial counsel without any of the risk that calling the identified witnesses would have presented. For example, Hale suggests that Todd Reardon, who was counsel for the WCOTC in the trademark litigation, could have been called as a witness in Hale's defense. *See* Defendant's Addendum, p. 30. If called to testify, however, Reardon would have been forced to concede that Hale was intimately familiar with the litigation surrounding the trademark infringement, thus bolstering the government's evidence on Count One (obstructing justice by sending a letter to Judge Lefkow that contained a false statement). Specifically, Reardon would have bolstered the government's evidence that Hale acted knowingly because Reardon would have testified that he "talked with [Hale] extensively about the case." *Id. See United States v. Best*, 426 F.3d 937, 945 (7th Cir. 2006) (counsel's decision to call or not call a witness is "a strategic decision generally not subject to review"), *citing United States v. Williams*, 106 F.3d 1362 (7th Cir. 1997).

Similarly, the proposed testimony of Kathleen Robertazzo would have been similarly problematic. For example, Ms. Robertazzo recounts an incident where she reported "violent rhetoric" posted on the WCOTC's website to Hale, and Hale "immediately sent the member a scathing email" and warned that the member "would be removed" if the member ever spoke of violence again. *Id.*, at 34. Facially, this testimony (if admitted) would appear to lend credence to Hale's claims of non-violence.[6] However, on cross-examination, and surely at closing, the government would highlight

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[6] Whether the jury would find Robertazzo credible is another issue that Hale's own submissions call into question. *See* Def. Addendum, pp. 48 - 49 (Robertazzo describing an anti-racist group as "terrorists" and "doers of the JDL Kikes' dirty work").

the fact that Hale never sent Tony Evola a "scathing email," or warned Evola of removal from the WCOTC for 'speaking of violence.' Additionally, Robertazzo indicated that she warned Hale that "Evola was a spy for the government." *Id.* Again, this fact would bolster the government's case – if Hale had communications with Evola (a person who may be a government informant), one can only imagine the conversations Hale had with those who he fully trusted. Defendant's arguments on trial counsel's purported failures to call specific witnesses aptly demonstrates why "the Constitution does not oblige counsel to present each and every witness that is suggested to him." *Best*, 426 F.3d at 945.

Finally, defendant argues that trial counsel was deficient because counsel "failed to offer Hale's exculpatory testimony" and failed to offer "exculpatory testimony that Hale had condemned [Ben] Smith's crimes and violence . . ." Def. Br., p. 13. Defendant fails to explain how this testimony would have been admitted without the defendant testifying. *See generally* Fed. R. Evid. 801.[7] Also, as explained *infra*, defendant waived his right to testify, and there is nothing to suggest that such waiver was improper.

Because trial counsel's decision not to present evidence through other witnesses that Hale had disapproved violence was reasonable, defendant was not denied effective assistance at trial.

D. The Government's Search Warrant Was Not Defective, and Was Subject to the *Leon* Good-Faith Exception.

The defendant also argues that he was denied effective assistance counsel because trial counsel failed to move to suppress a search warrant executed at defendant's residence at the time of his arrest. *See* Def. Br., p. 16. On January 8,

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[7] Separately, defendant argues that he was not properly prepared to testify. The government addresses this claim *infra*.

2003, the government sought and received a search warrant for defendant's residence.[8] Defendant now argues, under the auspices of ineffective assistance of counsel,[9] that the search warrant was defective.

> The search warrant authorized agents to search for the following:
>
> This evidence includes computers and computer related equipment; letterhead, labels, signs, prints 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 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.

See Search Warrant, Attachment A.

a. The Search Warrant Was Not Facially Defective

Defendant offers a variety of attacks on the search warrant, none of which is supported by the law or the facts. In his first salvo, the defendant attacks the contents of the search warrant, characterizing the warrant as "deficient on its face." Defendant argues that: the search warrant failed to state that there was probable cause for any *crime* (emphasis added); failed to state any statute that had been violated; and failed

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[8] The search warrant and application are attached as exhibits to this filing.

[9] Defendant's failure to raise the issue on direct appeal precludes him from raising it directly in his §2255 motion. *See McCleese v. United States*, 75 F.3d 1174, 1177 (7th Cir. 1996) (failure to raise on direct appeal bars raising it in a §2255 context unless cause and prejudice or actual innocence can be demonstrated).

to incorporate the Application and Affidavit for Search Warrant.[10] *See* Def.Br., p. 16, 17.

Defendant cites to no authority mandating that a search warrant contain a statement that there is probable cause that a *crime* has occurred.[11] And while the application in support of the search warrant must establish probable cause that *(inter alia)* evidence of a crime will be found at a specific location, *Wiley*, 475 F.3d at 916, defendant cites to no authority requiring a search warrant contain a specific reference to the alleged crime that has occurred. Related to this argument, defendant also cries foul over the omission of any reference to a criminal statute. Again, defendant cites to no authority that a search warrant must contain reference to a criminal statute.[12]

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[10] The government acknowledges that the search warrant had typographical and copy errors. For example, the affidavit alleges that at 217 E. Randolph there is probable cause to believe that "property that constitutes evidence of the commission of a federal criminal offense, the fruits of crime, or other things otherwise criminally possessed with regard to violation of Title 18, United States Code, Section 2516(1), namely . . ." *See* Search Warrant Affidavit, p. 15. Reference to 18 U.S.C. §2516(1) is inappropriate as it is part of the Wire and Electronic Communications Interception portion of Title 18, and is not a substantive offense. However, these errors did not affect the basis for probable cause, and did not infect the search warrant itself.

[11] The law is well settled that in obtaining a search warrant the government must establish that probable cause "to induce a reasonably prudent person to believe that a search will uncover evidence of a crime." *United States v. Garcia*, 528 F.3d 481, 485 (7th Cir. 2008), *citing Illinois v. Gates*, 462 U.S. 213, 238 (1983); *United States v. Jones*, 208 F.3d 603, 608 (7th Cir.2000). However, to obtain a search warrant, government agents need not establish probable cause that a crime has occurred at a specific location, only that evidence of a criminal offense will be found at the location. *See United States v. Wiley*, 475 F.3d 908 (7th Cir. 2007) (probable cause does not require direct evidence linking a crime to a particular place). Indeed, the results of the search may often dictate whether sufficient evidence of criminal conduct exists to establish probable cause of a crime.

[12] It is the practice of the U.S. Attorney's Office in the Northern District of Illinois to include in the preamble, when describing items to be seized, a recitation to the offenses being investigated (*e.g.* "Evidence of violation of Title 21, United States Code, Section 846, including the following: . . ."). Because this warrant was obtained

Fed. R. Crim. P. 41(e)(2), which sets forth the required contents of a search warrant, only requires that the warrant "identify . . . the property to be searched, identify any . . . property to be seized, and designate any magistrate judge to whom it must be returned." Rule 41 does *not* require that the warrant state the crime which is being investigated. *See United States v. Brown*, 49 F.3d 1162, 1176, n. 10 (6th Cir. 1995) (dissenting opinion) (noting that Fed. R. Crim. P. 41 was amended to remove the requirement that the warrant itself "state the grounds for the warrant's issuance"). Thus, defendant's characterization that the "warrant was deficient on its face" is without legal merit.[13] *See* Def.Br., p. 18.

b. The Search Warrant Met the Particularity Requirement.

Defendant next contends that "a search warrant must list with particularity the items to be seized." *See* Def.Br., p. 19. The government has no quarrel with this legal proposition. *See United States v. Hall*, 142 F.3d 988, 996 (7th Cir. 1998). However, the search warrant in the instant case met the particularity requirement. As described *supra*, the warrant generally identified specific items: computers and related equipment; items containing the term "Church of the Creator;" items containing information on potential co-conspirators; documents pertaining to the WCOTC; documents pertaining to racial motivation to commit criminal activity;

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and assembled in the Central District of Illinois, the practice in that district may differ. The government acknowledges that specific reference to the statutes that form the basis for probable cause may be a preferred practice.

[13] Equally as baseless is defendant's assertion that the search warrant failed to incorporate the search warrant application. The failure to incorporate the application into the search warrant does not *per se* invalidate the warrant. *See United States v. Stefonek*, 179 F.3d 1030, 1033 (7th Cir. 1999) (upholding defective search warrant despite not incorporating affidavit into the warrant).

communications with white supremacists relating to criminal activity and violence against others; documents reflecting acts of violence by WCOTC members.

Defendant complains that the warrant was "very broad," provided for "undefined authorization to seize any and all items," and allowed for an "unlimited" search. *See* Def.Br., p. 20. Defendant further complains that the affidavit failed to establish a "nexus" between the items sought and the crimes being investigated. *See* Def.Br., pp. 22 - 23. In fact, with one exception (discussed *infra*), each category was narrowly defined, and a sufficient nexus was articulated in the supporting affidavit as to all categories of items seized.

The warrant sought seizure of all computers. As detailed throughout the supporting affidavit, Hale used a computer to communicate with Evola (who is identified as "source") and other WCOTC members, and many of those communications related to retaliation against Judge Lefkow for her rulings in the trademark infringement case. Because any computers found at the location may have electronic evidence of these communications (and others potentially incriminating evidence), the seizure of all computers found at the location was not overly broad. *See United States v. Vitek Supply Co.*, 144 F.3d 476, 481 (7th Cir. 1998) (description of items to be seized "only as precisely as the circumstances and nature of the alleged crime permit").

Items containing the term "Church of the Creator," was also a sufficiently particularlized description. The affidavit describes Judge Lefkow's order (Search Warrant Application, p. 6), and Hale's assertion that he has moved the "headquarters" of the WCOTC to Wyoming (*id.*, at pp. 12, 14). The search warrant tracks the language in Judge Lefkow's order as to the items that the WCOTC was forced to turn

over, destroy, or obliterate.[14] 4/12/04 Tr. 63 - 64; Ex. 29; 4/12/04 Tr. 138. Because the warrant tracked the language of Judge Lefkow's order, the particularity requirement is met.

The warrant also sought documents and records pertaining to the WCOTC. These records were relevant to the defendant's attempt to avoid Judge Lefkow's order by claiming that he was no longer directing the activities of the WCOTC. *See* Search Warrant Application, pp. 12, 14. Additionally, as detailed throughout the affidavit, the defendant sent multiple communications to WCOTC members that encouraged, or at the very least, approved of forms of retaliation and protest against Judge Lefkow. Thus, the government was warranted in seeking records of the WCOTC to identify documents that reflected who controlled the WCOTC, who controlled objects that violated the judge's order, Hale's knowledge of where these infringing objects were, and members who were possibly involved in criminal retaliation against Judge Lefkow.

The warrant also sought documents pertaining to various forms of violence, including acts of violence by WCOTC members. These documents were described with particularity, and the defendant does not even attempt to explain how these categories were overly broad.

There is one category of documents that could have been more specific – "newsletters, mailing lists, phone logs, address books, phone records that contain information regarding potential co-conspirators." Because the warrant does not identify a particular criminal statute being violated, the term "co-conspirator" is

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[14] While the affidavit includes reference to 18 U.S.C. §1503 (obstruction of justice), it fails to articulate a theory of criminal liability as alleged in Count One. However, that does not negate the existence of probable cause, and clearly does not impact the particularity requirement of the Fourth Amendment.

somewhat amorphous. However, in context, the term "co-conspirator" is defined (at a minimum) by the phrase "communications with other individuals associated with white supremacist groups relating to or discussing criminal activity and violence against others." *See United States v. Ventresca*, 380 U.S. 102, 108 (1965) (Fourth Amendment issues "must be tested and interpreted . . . in a commonsense and realistic fashion).

The defendant next attacks the warrant because the warrant sought First Amendment -protected material, and lacked "scrupulous exactitude" as defendant asserts was required.[15] *See* Def. Br., p. 21. Defendant argues that the warrant's inclusion of "labels, signs, prints, packages and books that contain the term 'Church of the Creator'" was overly broad because of First Amendment implications. *See* Def. Br., p. 21. While the racist positions adopted by the WCOTC are entitled to First Amendment protections, those materials possessed by Hale and other members of the WCOTC that contained the mark "Church of the Creator" were not. *See Te-Ta-Ma*, 297 F.3d at 667. Judge Lefkow's order forbade Hale and WCOTC members' continued possession of the materials containing the infringing mark (*e.g.* "Church of the Creator"). Therefore, the warrant's specificity of materials that contained "Church of the Creator" was sufficiently particular for Fourth Amendment purposes.

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[15] Because the government believes that the warrant, as drafted, met the "scrupulous exactitude" standard, the government does not argue the merits of whether the WCOTC is entitled to First Amendment protection as a religious organization. *See Te-Ta-Ma Truth Foundation v. World Church of the Creator*, 297 F.3d 662, 664 (7th Cir. 2002) (WCOTC is not entitled to status as religious charity because of its racists roots).

c. The *Leon* Good Faith Exception Would Have Prevented the Warrant from Being Suppressed.

Assuming *arguendo*, that the search warrant was defective, the warrant was still defensible under the *Leon* good-faith exception. As the Seventh Circuit stated in *United States v. Mykytiuk,* 402 F.3d 773, 777 (7th Cir. 2005):

> Even on the assumption that the warrant was bad and the search invalid, however, suppression of evidence is not the inevitable consequence. [Citation omitted.] A facially valid search warrant issued by a neutral, detached magistrate will be upheld if the police relied on the warrant in good faith. *See United States v. Leon,* 468 U.S. 897, 913 (1984). An officer's decision to obtain a warrant is *prima facie* evidence that she was acting in good faith. *See United States v. Merritt,* 361 F.3d 1005, 1013 (7th Cir.2004). A defendant can rebut the presumption of good faith only by showing that the issuing judge abandoned his role as a neutral and detached arbiter, that the officers were dishonest or reckless in preparing the supporting affidavit, or that the affidavit was so lacking in probable cause that no officer could have relied on it. *See Leon,* 468 U.S. at 923, 104 S.Ct. 3405; *Peck,* 317 F.3d at 757.

The good faith exception is applicable to warrants that lack sufficient particularity. *See Jones v. Wilhelm,* 425 F.3d 455, 464 (7th Cir. 2005). Defendant cannot make the necessary showing under *Leon* that would remove the warrant from the good-faith exception. Therefore, the warrant would not have been suppressed, and trial counsel's decision not to file a motion to suppress did not cause prejudice to the defendant. *United States v. Farr,* 297 F.3d 651, 658 (7th Cir. 2002) (prejudice exists when the result of the proceedings would have been different but far counsel's unprofessional errors).

Because the search warrant met Fourth Amendment standards, a motion to suppress would have been without merit. Moreover, even if there existed deficiencies within the warrant, the good faith exception would have applied, and the evidence recovered as a result of the warrant would not have been suppressed. Therefore, trial counsel was not ineffective in their decision not to file a motion to suppress.

E. Defendant's Assertions Regarding Trial Errors Are Either Factually Not Substantiated Or Are Without Merit.

Defendant next lists a litany of so-called "trial errors" committed by trial counsel. The government addresses each of these in turn.

1. Failure to Object to Admission of the Opinion in *TE-TA-MA Truth Foundation–Family of URI, Inc. v. World Church of the Creator*, 297 F.3d 662 (7th Cir. 2002).

Defendant complains that trial counsel failed to object to the government's use of the Seventh Circuit opinion in *Te-Ta-Ma Truth Foundation*. In fact, trial counsel did object to the government's use of the opinion during trial. The objection was overruled. 4/12/04 T.Tr., p. 113 - 116.

2. Trial Counsel's Use of *White Man's Bible* and *Nature's Eternal Religion* at Trial

Defendant next argues that trial counsel used the inflammatory language of writings from the *White Man's Bible*, and *Nature's Eternal Religion*, which prejudiced defendant. This argument is particularly ironic because trial counsel used these writings during the cross-examination of the government's witness, Jon Fox. 4/13/04 T.Tr., pp. 184 - 193. At the conclusion of the trial, the jury acquitted Hale of the conduct substantially premised on Jon Fox's testimony. Trial counsel's strategic decision to use these writings to impeach Fox were successful. Defendant's *post hoc* argument as the reasonableness of trial counsel's strategy call cannot be a basis for an ineffective assistance of counsel claim.

3. Failure to Seek Limiting Instruction on Ben Smith Evidence

Defendant properly points out that trial counsel was offered an opportunity for a limiting instruction regarding the evidence relating surrounding Ben Smith and his

murder spree. *See e.g.* 4/14/04 T.Tr., p. 194. But as this Court recognized during trial, there were strategic reasons why defense counsel could not ask for such an instruction. 4/14/04 T.Tr., p. 187 ("they may not want [a limiting instruction], though, because that puts in the minds of the jurors that thought alone"). When trial counsel has a legitimate strategic reason for a decision at trial, counsel's performance is not constitutionally deficient. *See United States v. Lindsay*, 157 F.3d 532, 535 (7th Cir. 1998) (decision not to request limiting instruction valid strategic decision under *Strickland*).

4. Trial Counsel Had an Articulated Strategic Reason to Solicit Testimony From Evola that John Younkers Was Approached By Hale to Commit Acts of Violence

Defendant next argues that trial counsel's decision to elicit statements from Tony Evola that suggested Evola was ingratiating himself to the FBI constituted ineffective assistance of counsel. Again, this argument is belied by the record itself. 4/15/04 T.Tr., pp. 105 - 117. During the trial itself, trial counsel articulated a sound strategy as to why the Younkers statement served the defendant's case. Ironically, the government objected to the statement's admission because the government believed that trial counsel's strategy had the potential of impeaching Evola. 4/15/04 T.Tr., p. 109.

5. Failure to Object to Government's Rebuttal Argument

Defendant argues that trial counsel failed to object to the government's improper rebuttal argument.[16] However, as this Court explained, the comment, taken in context

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[16] The government's misstep during rebuttal has been raised in post-trial motions, and on appeal. In ruling on post-trial motions, this Court properly concluded that the prosecutor "misspoke" during the "heat of the moment." R. 249, p. 40. Unfortunately, in defending this misstep, this prosecutor has taken legal positions that

was not seemingly improper, and even if taken in an improper context, the comment did not compromise the jury's verdict. *See* R. 249, p. 41.

F. Trial Counsel's Jury Selection Practice

Defendant next attacks trial counsel's jury selection decision. Legally, defendant's argument seems to ignore *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny. The underlying premise of defendant's argument is that more African-Americans should have been struck from the jury. Defendant makes this argument in the type of generalities that *Batson* forbids. In other words, defendant does not identify one specific statement by a juror that suggests the juror could not be fair. Instead, defendant premises his argument on racial stereotypes, which the law forbids. Trial counsel cannot be deficient in their representation by following legal ethics and Constitutional requirements. *United States v. Evans*, 92 F.3d 540, 544 (7th Cir. 1996) ("[t]he refusal to act unethically by making a groundless argument can never be a ground for arguing ineffective assistance of counsel").

G. Inadequate Closing Argument[17]

Defendant next attacks trial counsel's closing argument, identifying arguments that he believes should have been made. However, trial counsel's closing argument did

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this Court found "somewhat troubling" (*id.*), and the Seventh Circuit also has criticized. *United States v. Hale*, 448 F.3d 971, 987 (7th Cir. 2006). In fact, the prosecutor did misspeak in suggesting that Hale "had [as in caused] a member of his organization kill two people. R. 249, p. 40. The government did not intend to make the statement; did not intend to suggest that Hale caused the Ben Smith shootings; and did not intend to subvert "its promise to the Court." R. 249, p. 40. The government should have been more direct on this point.

[17] Defendant also argues that he was denied effective assistance because he was not present during the jury selection process. As discussed *infra*, this issue has been waived and there is no Constitutional error.

achieve an acquittal on one count, and attacked the overall credibility of the government's evidence. Defendant would have had counsel make other arguments, however, such strategic decisions cannot be a basis for ineffective assistance of counsel. *See United States v. Stark*, 507 F.3d 512, 521 (7th Cir. 2007) (trial counsel's decision as to the content and approach of closing argument reviewed with deference to sound strategy).

H. Failure to Prepare Hale to Testify at Trial

Defendant complains that he was not properly prepared to testify at trial, and therefore was forced to forego the opportunity of testifying. However, the record paints a much different picture. First, Hale waived his right to testify after substantial questioning by this Court. 4/20/04 T.Tr., pp. 34 - 36. The defendant never suggested that he wanted to testify, or that he and / or his counsel were not properly unprepared. *See Stark*, 507 F.3d at 519 (defendant's silence regarding desire to testify sufficient to waive right to testify). Similarly, trial counsel articulated compelling reasons why the defendant should not testify at trial. *Id.*, at pp. 38 - 39.

I. Trial Counsel Did Not Breach Their Duty of Loyalty To Defendant.

Defendant next argues that trial counsel breached their duty of loyalty to defendant by displaying "animosity and contempt" toward him, thus "evincing a conflict of interest." Def.Br., p. 32. Defendant itemizes various phrases that trial counsel used to describe the defendant before the jury, including analogizing the defendant to a dog. Def.Br., p. 32. It is true that during trial counsel's argument, trial counsel went out of his way to condemn the defendant's character. *See* 4/21/04 T.Tr., p. 48 ("venom that he spews," "lack of moral basis"), and p. 119 ("even the lowest, even

the most despised"). In context though, trial counsel was arguing that the jury should not convict Hale because of his immoral character, and his indefensible beliefs. Rather, trial counsel argued that the jury should acquit the defendant because the government failed to meet its burden of proof. Trial counsel's argument concluded as follows:

> "Give [the defendant] not a medal or anything else, but just give him the same standard of proof. Hold the government to the same standard of proof you would in any criminal case. Because if you do, then there's only one verdict that's possible in this case."

See 4/21/04 T.Tr., p. 120. Trial counsel's strategic decision in this vane was understandable, and reasonable. *See United States v. Woody*, 55 F.3d 1257, 1272 (7th Cir. 1995) (counsel's depiction of client "as a common thief" not necessarily ineffective); *Farr*, 297 F.3d at 659 (counsel's reference to client as "brother" while in "poor taste and questionable," but not sufficient to show prejudice).

II. Defendant's Right to Be Present During the Jury Selection Process Was Not Violated.

Defendant was not deprived of his due process rights when he was absent from a portion of *voir dire* conducted in the judge's chambers. Defendant received a full opportunity to defend himself against the charges, resulting in a fair trial. Although Defendant's rights under Rule 43(a) of the Federal Rules of Criminal Procedure may have been violated, the error was not prejudicial and did not affect the outcome of the trial. Therefore, Defendant's motion for a new trial should be denied.

A. Waiver of Claim

Defendant has waived his claim of error premised on not being present for all stages of the jury selection process. First, defendant, through counsel, affirmatively agreed that defendant did not need to be present. *See* Def. Br., p. 29. Waiver is "canonically defined as an intentional relinquishment of a right." *United States v.*

Murdock, 491 F.3d 694 (7th Cir. 2007). Second, defendant's failure to raise this issue on direct appeal waives the issue unless defendant can show cause and prejudice, or actual innocence, which he has failed to do. *Degaglia v. United States*, 7 F.3d 609, 612 (7th Cir. 1993).

B. Standard of Review

Defendant's claim will be reviewed for "plain error," as he did not raise the claim at the trial court level. *United States v. Olano*, 507 U.S. 725, 733-34 (1993); *United States v. Shukitis*, 877 F.2d 1322, 1330 (7th Cir. 1989). *But see United States v. Patterson*, 23 F.3d 1239, 1254-55 (7th Cir. 1994) (reviewing for "harmless error" when the defendant raised the claim for the first time on appeal). Under "plain error" review, Defendant bears the burden of proving that the error affected his "substantial rights" by likely altering the outcome of the case. *Olano*, 507 U.S. at 735. However, even if reviewed for "harmless error," [1] Defendant's claim should be dismissed because his absence was not prejudicial and did not affect the verdict in his case. *Patterson*, 23 F.3d at 1255.

C. Defendant's Fifth Amendment Rights Were Not Violated.

Defendant's absence from a portion of voir dire did not violate his due process rights under the Fifth Amendment. *Bland v. Sirmons*, 459 F.3d 999, 1020 (10th Cir. 2006). Defendant does not have the constitutional right to be present at all trial proceedings; rather he has the right to be present only "when his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charges." *Bland*, 459 F.3d at 1020, *quoting Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934).

Defendant's absence did not diminish his ability to fully defend against the charges. *Bland,* 459 F.3d at 1020; *see also United States v. Smith*, 230 F.3d 300, 310 (7th Cir. 2000). Defendant was present during a significant portion of voir dire, and his interests were adequately protected by counsel during his absence. *Smith*, 230 F.3d at 310. Because Defendant received a "fair and just" hearing, his due process claim must fail. *See United States v. Gagnon*, 470 U.S. 522, 526 (1985); *see also Bland*, 459 F.3d at 1020-21 (noting that a constitutional right to be present exists *only* to the extent that a "fair and just hearing would be thwarted" by the defendant's absence).

Defendant's Sixth Amendment rights were not implicated by his absence, further weakening his constitutional claim. The constitutional right to be present during trial is rooted, "to a large extent, in the Confrontation Clause of the Sixth Amendment," and only "*to some extent* by the Due Process Clause of the Fifth and Fourteenth Amendments." *Smith*, 230 F.3d at 309 (emphasis added); *United States v. Neff*, 10 F.3d 1321, 1323 (7th Cir. 1993). Therefore, courts are much less willing to grant a constitutional right when the defendant's absence—as in the instant case—does not implicate Sixth Amendment rights. *Compare Smith*, 230 F.3d at 309, and *Gagnon,* 470 U.S. at 527, *with Neff*, 10 F.3d at 1327, and *United States v. Camacho*, 955 F.2d 950, 953 (4th Cir. 1992).

In *Bland v. Sirmons*, the Fourth Circuit held the defendant's absence from chambers during the individual voir dire of potential jurors did not violate the defendant's due process rights. *Bland*, 459 F.3d at 1021. The court reasoned that the defendant's absence did not affect the outcome of the trial. *Id.* Also, the defendant had "ample opportunity during regular voir dire to observe jurors for the purpose of making peremptory challenges." *Id.*

Similarily, defendant fails to demonstrate that his presence in chambers would have impacted the result of the trial. Rather, defendant's requires it to be taken on faith that defendant would have insisted that certain jurors be excused, and that the resulting change would have altered the verdict. Defendant also freely exercised his use of peremptory challenges in open court, thus demonstrating he had "ample opportunity during regular voir dire" to provide input into the jury selection process. Thus, as in *Bland*, Defendant's ability to use peremptory challenges was not impeded by his absence during the "limited proceedings" conducted in chambers. *Id.* at 1021.

Defendant relies on *United States v. Camacho* to suggest that Defendant's absence during portions of voir dire necessarily frustrates the fairness of the trial, but the analogy is flawed. 955 F.2d 950 (4th Cir. 1992). The defendant in *Camacho* was not present for portions of the testimony presented against him, thus violating his Sixth Amendment rights. *Camacho*, 955 F.2d at 951-52. Also, the defendant in *Camacho* was absent for the *entire* voir dire, thus impeding the defendant's ability to exercise peremptory challenges. *Id. Compare United States v. Rolle*, 204 F.3d 133, 139-40 (4th Cir. 2000) (defendant's absence during a *portion* of the voir dire not prejudicial).

Defendant also relies on *Hopt*, a case which the Supreme Court has since limited due to its expansive interpretation of the defendant's rights during voir dire. *See Hopt v. People*, 110 U.S. 574, 579 (1884) (holding that the defendant's right to be present during voir dire is *non-waivable*). *See also Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 106 (1934) (explaining that *Hopt* has been "distinguished" and "limited").

Thus, Defendant does not identify any current cases where—under circumstances similar to the instant case—the court held that the defendant's absence

violated his or her due process rights. Rather, as there is ample authority demonstrating that Defendant's absence did not infringe upon his Fifth Amendment rights, Defendant's constitutional claim must fail. *See Gagnon,* 470 U.S. at 527; *Smith,* 230 F.3d at 310, *Bland,* 459 F.3d at 1021.

D. If Defendant's Rights Were Violated Under Rule 43(a), the Error Does Not Constitute Grounds for a New Trial.

As defendant did not raise the claim at the trial court level, his claim under Rule 43(a) of the Federal Rules of Criminal Procedure should be barred completely due to Defendant's "total failure to assert [his] rights." *Gagnon,* 470 U.S. at 529-30. As defendant properly concedes, trial counsel waived his presence during the portion of voir dire that occurred in chambers. *See* Def. Br., p. 29. However, even if Defendant's rights under Rule 43(a) are not considered waived, defendant is not entitled to a new trial.

The scope of Defendant's right to be present under Rule 43(a) is broader than Defendant's right to be present under the Fifth Amendment. *Smith,* 230 at 309-10. Thus, Defendant's absence during a portion of voir dire may have violated his rights under Rule 43(a). *Id.* Even assuming *arguendo* that this is the case, Defendant should not be granted a new trial because the error was not prejudicial and did not alter the outcome of the trial. *Olano,* 507 U.S. at 735.

The Seventh Circuit has explained that even if an error touches upon the "manner, nature and quality of deliberations" under Rule 43(a), the error will be considered "harmless" unless it likely affected the jury's verdict. *United States v. Pressley,* 100 F.3d 57, 59-60 (7th Cir. 1997). As defendant's absence is highly unlikely to have changed the result of the trial, defendant's motion should be dismissed under

either the "harmless error" or "plain error" standard. *See Olano*, 507 U.S. at 73435 (explaining that both standards require courts to dismiss the claims under Rule 43(a) unless the error affected the defendant's "substantial rights").

Conclusion

Defendant has posited a number of bases for ineffective assistance of counsel. These claims, neither individually nor collectively, rise near the level of ineffective assistance. Trial counsel performed both professionally and effectively during the trial and pre-trial stages. Judging"trial counsel's performance as a whole," the defendant received highly effective representation throughout this matter. Therefore, defendant's claim for relief should be denied.

Respectfully submitted,

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