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.	)	

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

I. Counsel's Performance Was Deficient.

A. Counsel's Action Was Not a Strategic Decision.

The government claims that defense counsel were reasonable when they failed to utilize Mr. Hale's bona fide defense because "the logical implication" of that defense was that "Hale had approved the murder of James Amend, not Judge Lefkow." (GAR at 4-5.) First, in order to reasonably reject Mr. Hale's bona fide defense, counsel would have had to understand the fact that, on Dec. 5, 2002, Mr. Hale had believed that Evola had been referring to lawyer Amend. Since counsel did not realize that "rats' " in the conversation was *possessive*, counsel never understood this fact or this defense, and, thus, never could have considered this to be an option. Therefore, because counsel were not making a choice between options, there was no decision, much less a strategic decision. There can be no strategic decision without the recognition of a choice.

Secondly, the government misconstrues Mr. Hale's argument: counsel would not have been forced to concede that Mr. Hale had approved of or solicited Amend's murder. Rather, counsel, due to their failure to understand the facts, did not argue that Mr. Hale had no idea that Evola had designs on Judge Lefkow's life until receipt of the Dec. 9, 2002 email and that he thereafter rejected ***Evola's*** solicitation on Dec. 17, 2002. The government's entire case was geared to an alleged plot against Judge Lefkow and yet the jury was deprived of critical evidence that corroborated the fact that Mr. Hale rejected ***Evola's*** solicitation of the murder of that "femala rat" on Dec. 17, 2002. Instead, counsel disparaged Mr. Hale's rejection as "silliness." (Vol. 4 at 32.)

Thirdly, the exculpatory witnesses and information which counsel failed to present to the jury (*see* OB at 10-14) would clearly have tended to show that Mr. Hale did not approve of or solicit

anyone's murder.

Fourthly, during the very Dec. 5, 2002 exchange that the government claims is an approval of somebody's murder, Mr. Hale stated that he was "gonna fight within the law." (COB at 3.) The "logical implication" of this statement is that Mr. Hale lacked any intent or belief that he was violating the law or that he had a guilty mind. If Mr. Hale did not think that the was violating the law (*i.e.*, did not think that he was soliciting murder), counsel clearly would not have been forced to concede that Mr. Hale had approved of or solicited a murder. As for Mr. Hale's stating "good," this could just as easily have been Mr. Hale speaking facetiously (as Mr. Hale would have in fact testified). As the government has acknowledged, "the most difficult aspect of the government's case was that Mr. Hale "was soliciting a murder" (GAR at 5). This aspect would have remained just as difficult if the jury had known the fact that Evola had been talking about Amend on Dec. 5, 2002.

Because Evola was talking about Amend on Dec. 5, 2002, there was never a reason, as the government claims (GAR at 5), for Mr. Hale to "correct" or clarify Evola about his target. A man who had not solicited anyone's murder would have no need to do so. In other words, a man who has not solicited murder would hardly steer a would-be killer to a different target. The "circumstantial evidence" the government discusses would have been received by the jury very differently had the jury actually heard the facts of Mr. Hale's case, including the testimony of at least five uncalled witnesses who would have supported the fact that Mr. Hale did not learn that Evola had designs on the life of Judge Lefkow until the receipt of the Dec. 9, 2002 email (*see Decl. of M. Hale*, ¶¶ 4-5, 8, 10-15; *Decl. of G. Greenwald*, ¶ 6; *Aff. of T. Reardon*, ¶ 9; and *Aff. of K. Robertazzo*, ¶¶ 11 & 15) and, hence, that Mr. Hale rejected Evola's plans on Dec. 17, 2002. Thus, Mr. Hale's trial cannot possibly be relied upon as having produced a just result which is the rudimentary standard in assessing effectiveness of counsel under the 6th Amendment. *See Griffin v. Camp*, 40 F.3d 170, 173 (7th Cir. 1994). It was unreasonable for counsel to allow the jury to convict Mr. Hale on the basis that Judge Lefkow was the Dec. 5, 2002 "Jew rat" when she was not.

A lawyer cannot possibly provide effective assistance if he does not understand the facts of his client's case. In Mr. Hale's case, since his lawyers' failings were based on their mistaken beliefs, they were not "strategic" and thus are not entitled to any deference (*see Kimmelman v. Morrison*, 477 US 365, 385 (1986); *Link v. Luebbers*, 469 F.3d 1197, 1204 (8th Cir. 2006); *Loyd v. Whitley*, 977 F.2d 149, 158 (5th Cir.1992); *Rolan v. Vaughn*, 445 F.3d 671, 682 (3rd Cir. 2006)). Mr. Hale has spent the past four years in prison based on the misconception that Judge Lefkow was a "Jew rat."

The government claims that Mr. Hale is wrong when he "asserts that trial counsel 'failed to understand' that the Dec. 5, 2002 e-mail sought the address of multiple individuals, not just Judge Lefkow's address" because "trial counsel made that exact point during his cross-examination of Evola." (GAR at 6.) First, the government misrepresents and confounds the facts: Mr. Hale's email asking for the four addresses was sent on Dec. 4, not on Dec. 5, 2002, and Mr. Hale has never claimed that counsel did not understand that the Dec. 4 email sought four addresses. The critical point is that, not only was Mr. Hale referring to four addresses in the Dec. 4 email, but that he also believed that Evola was referring to the four addresses (and thus was referring to lawyer Amend) during the Dec. 5, 2002 conversation. Instead of realizing and stressing this, counsel attempted to get Evola to agree that Evola had been talking about killing Judge Lefkow on Dec. 5. When Evola and Mr. Hale conversed on Dec. 5, counsel failed to understand and realize that Evola's use of the words "rats' " was ***possessive*** and thus that ***Evola*** was again referring to Mr. Hale's wanting the ***four*** addresses (*see* OB at 3). Instead, the record shows that counsel thought that Evola was talking about only Judge Lefkow's address (*see*, *e.g.*, Vol. 8 at 89, ls. 16-24) and, notably, the government thought so too (*see*, *e.g.*, Vol. 4 at 20-21). In fact, counsel simply did not realize that there was doubt as to whom Evola was querying about exterminating on Dec. 5 and, therefore, counsel failed to argue or stress to the jury this very important point. Such a critical mistake of fact by Mr. Hale's counsel distorted the entire case and was plainly an unreasonable error having nothing to do with strategy and, thus, was deficient under *Strickland*. It was also prejudicial. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture ..." *Strickland*, 466 U.S. at 695-96.

Secondly, contrary to the government's assertion that Evola testified that he had heard Mr. Hale refer to lawyer Amend as a "Jew rat" (GAR at 7), Evola denied this (Vol. 9 at 75-76). Once Evola denied this, it was essential that counsel present witnesses to prove this fact. Furthermore, this was such an important fact that it could not be left to hearing it only from Evola (which did not occur), a person whom the defense was attempting to impeach.

The government also claims that counsel's attempts "to have Evola agree that during the Dec. 5, 2002 [sic], Evola had been talking about killing a judge" (Vol. 8 at 90) was reasonable because it supported Mr. Hale's entrapment defense. (GAR at 6.) There was no entrapment and there should never have been a claim of entrapment. In order to have been entrapped, Mr. Hale had to have agreed with Evola that he wanted Evola to kill Judge Lefkow, but that he had been entrapped into

agreeing to this. Mr. Hale never so agreed and, thus, there was no entrapment and there should never have been any claim that Mr. Hale had been entrapped. Clearly, Mr. Hale's actual, bona fide defense - that Judge Lefkow was not the person referred to on Dec. 5 and that Mr. Hale rejected Evola's new plans against her life on Dec. 17 - was far stronger and far more exculpatory than the entrapment defense which counsel presented. It was not reasonable to choose the defense of entrapment - thereby admitting the guilt of one's client - when there was available strong evidence that one's client was innocent. As this Court has previously found, no reasonable jury could have found that Mr. Hale had been entrapped (*see* Doc. 249, 11/10/04 *Mem. & Order* at 18-19 and n.18) and, thus, because no reasonable jury could have found that Mr. Hale had been entrapped, an entrapment defense was clearly unreasonable. Therefore, counsel performed unreasonably in choosing and pursuing this non-existent defense.

The government claims that, "[c]ontrary to defendant's argument, trial counsel well understood the elements of the charged offense." (GAR at 7.) Even if trial counsel understood the elements of the offenses, they failed to require the government to prove them. Counsel clearly did not hold the government to its burden of proving beyond a reasonable doubt that Judge Lefkow was the "Jew rat" whom Evola was targeting on Dec. 5, 2002.

The government claims that there can be no complaint about the tape transcripts because the "Court religiously cautioned the jury that the transcripts were not evidence and that the tape recordings were the evidence ..." (GAR at 7-8.) However, the tape recordings did not show punctuation and, thus, when the transcripts contained incorrect punctuation, it was necessary for counsel to object to the transcripts because, otherwise, they were submitted to the jury as accurate and the jury was much more likely to have accepted the government's incorrect and misleading version of the events.

B. Counsel Were Unreasonable in Failing to Present Exculpatory Evidence.

The government claims that it was reasonable for trial counsel to fail to call a number of witnesses who could have offered exculpatory evidence because "[t]hroughout the trial, defense counsel offered much of the same evidence that these so-called exculpatory witnesses would have presented." (GAR at 8-9.) In particular, the government claims that it was reasonable to fail to call witnesses who would have testified that Mr. Hale had repeatedly disavowed violence because "many of the recorded conversations that were offered into evidence contained statements by the defendant that he disavowed violence." (GAR at 9.) Although some of these recorded conversations were

helpful to Mr. Hale, it was still critical to present live witnesses who would have testified that, not only had Mr. Hale disavowed violence in his public statements, but that he had also disavowed violence in his private statements to his legal associates and close and trusted friends and followers. This was particularly necessary since the government claimed that Mr. Hale regularly made self-serving statements to the public (or when he thought he was being monitored) in order to protect and insulate himself. Thus, the defense needed to and should have called these exculpatory witnesses.

The government also claims that the evidence presented by Jon Fox regarding Mr. Hale wanting addresses for demonstrations was sufficient and that it was reasonable for the defense to fail to call other witnesses to prove this fact. (GAR at 9, n.5.) First, the defense attempted, and apparently succeeded, in discrediting Fox's testimony (since Mr. Hale was acquitted of the charge of soliciting Fox). Thus, since the defense needed to discredit Fox, it was not reasonable then to ask the jury to believe his testimony to prove facts beneficial to Mr. Hale. Secondly, this again was a critical fact that needed to be proven and stressed and it was unreasonable to rely on Fox to prove it. Further, other witnesses would have testified that Mr. Hale's specific reason for asking Evola for four addresses in Dec., 2002 was for the purpose of street demonstrations. Fox did not say this.

Regarding the government's claim that it was reasonable for counsel to fail to call any of the many witnesses that Mr. Hale wanted called to testify on his behalf (GAR at 10), the government states that it "was a sound, strategic decision" (GAR at 10). First , the government has failed to present any proof other than this bald, conclusory statement that this was counsel's strategy. Furthermore, even if it was counsel's "strategy," it was not, as explained above, reasonable strategy.

Next the government claims that it was reasonable to fail to offer evidence that Mr. Hale had condemned Ben Smith's crimes and violence because "[d]efendant fails to explain how this testimony would have been admitted without the defendant testifying." (GAR at 11.) To begin with, this evidence would have been admissible as mental state evidence pursuant to F.R.E. 803(c). Secondly, Mr. Hale has stated that he wanted to testify (*see Decl. of M. Hale* at 8, ¶ 26) and there is a reasonable probability that, had counsel prepared him to testify, he would have done so. Thus, this evidence would have been admissible.

Trial counsel's failure to present important, impactful and powerful exculpatory evidence was not reasonable and, thus, counsel's performance was deficient.

C. <u>The Search Warrant Was Defective and Was Not Subject to the *Leon* Good-Faith Exception</u>.

1. The Search Warrant Was Facially Defective.

The search warrant[1] in Mr. Hale's case was facially invalid because: (a) the evidence sought to be seized was not linked to any crime articulated in the warrant since the warrant failed to name an offense or even refer to an offense; (b) the affidavit was not incorporated into the warrant; and (c) even if the affidavit had been so incorporated, the warrant would still have failed the particularity requirement since it would have authorized the seizure of items unrelated to the named offense (in the affidavit) of threats toward Judge Lefkow's life.

The warrant in Mr. Hale's case failed to name any specific crime or even refer to a crime and it failed to state that the items sought were related to a crime. The warrant stated:

> ... there is now concealed a certain property, namely (describe the person or property): items more fully described in Attachment A[2]
>
> 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). "Establishing grounds" does not state any crime.

The government claims that the search warrant was not facially defective because a search warrant does not have to "contain a statement that there is probable cause that a *crime* has occurred." (GAR at 11; emphasis in original.) In support of this claim, the government referred the Court to "*U.S. v. Wiley*, 475 F.3d 980 (7th Cir.2007) (probable cause does not require direct evidence linking a crime to a particular place)." (GAR at 13.) *Wiley* is inapplicable; the issue is not whether a particular crime is linked to a place, but rather, whether the evidence sought at a place is linked to a particular crime. To be sufficiently "particular," a warrant must articulate a particular crime to which the sought evidence is linked. As the Ninth Circuit has stated:

> [i]n light of the expansive and open-ended language used in the search warrant to describe its purpose and scope, we hold that this ***warrant's failure to specify what criminal activity was being investigated***, or suspected of having been perpetrated, ***renders its legitimacy constitutionally defective.***

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[1] The government states that the "search warrant and application are attached as exhibits" to its filing. (GAR at 12, n.8.) Although the government attached the warrant and all but two pages of the application, *Attachment A* (the list of items to be seized) was not included in the government's filing. The *Warrant* and its *Attachment A* and the two *Applications & Affidavits* are attached as exhibits to this filing.

[2] This is the attachment referred to above in footnote 1 in which the items sought were listed; it ***is not the affidavit*** in support of the search warrant.

U.S. v. Bridges, 344 F.3d 1010, 1016 (9th Cir.2003) (emphasis added). *See also*, *U.S. v. Groh*, 540 U.S. 551, 563 (2004) (the Court referred to "*Stefonek*, 179 F.3d, [1030] at 1032-33 [(7th Cir.1999)] (holding that a ***search warrant for 'evidence of crime***' was '[s]o open-ended' in its description that it ***could 'only be described as a general warrant***')") (emphasis added) and *U.S. v. Spears*, 965 F.2d 262 (7th Cir.2006) (the Fourth Amendment guarantee against unreasonable searches and seizures prescribes general or open-ended warrants, and officers executing a warrant must be able to identify the things to be seized with reasonable certainty). The warrant in Mr. Hale's case failed to state a crime and, thus, was so clearly general and non-particular that any reasonable officer executing the warrant could and should have recognized this and thus would not have executed the warrant.

Because the affidavit was not attached to or incorporated into the warrant, it cannot be considered when determining whether the warrant was deficient on its face. As the Supreme Court has stated:

> [w]e do not say that the Fourth Amendment prohibits a warrant from cross-referencing other documents. Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant. [Citations omitted.] But in this case ***the warrant did not incorporate other documents by reference, nor did either the affidavit or the application*** (which had been placed under seal) ***accompany the warrant. Hence, we need not further explore the matter of incorporation***.

U.S. v. Groh, 540 U.S. at 557-58 (emphasis added).

In Mr. Hale's case, the affidavit was not incorporated into the warrant and the affidavit was neither attached to the warrant nor accompanied the officers executing the warrant. The only potentially favorable factor is that one of the officers who executed the warrant was the person who signed the affidavit. This, however, failed to place the recipient of the warrant on notice as to the scope or the basis for the search. *See Groh*, 540 U.S. at 557 (" '[t]he presence of a search warrant serves a high function,' [citation omitted], and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection"); *U.S. v. Brown*, 49 F.3d 1162, 1176 (6th Cir.1995) ("[t]he requirement that the affidavit be attached to or inserted in the warrant is not a mere formality. It ***makes the affidavit of probable cause immediately available to the person whose premises are entered, and explains to him at the outset the reason for this intrusion on his privacy***") (*quoting Moore v. U.S.*, 461 F.2d 1236, 1239 (D.C. Cir. 1972)) (Batchelder, J., dissenting) (emphasis added). Furthermore, the

affidavit clearly did not instruct the officers as to any limit on the search (*i.e.*, limiting the search to evidence related to a specific crime) since the officers seized everything they saw. *See U.S. v. Leary*, 846 F.2d 592, 604, n.21 (10th Cir.1988) ("[t]he ***manner of the warrant's execution demonstrates its breadth***") (*quoting* District Court Judge Matsch) (emphasis added).

The government's citation to the dissenting opinion in *Brown* (GAR at 14) is misplaced. The cited footnote and the dissenting opinion in general make clear that a warrant may fail to "state the grounds for the warrant's issuance" only when the affidavit ***is incorporated into the warrant***:

> [t]his ***Circuit has adopted the express incorporation rule*** for cases in which the ***warrant does not, on its face, meet the Fourth Amendment's particularity requirements***. [Citations omitted.] Although a "fundamental distinction" exists between a warrant and its underlying affidavit [citation omitted], a court may construe a warrant with reference to its affidavit for the purposes of the particularity requirement ***if the magistrate manifested an explicit intention to incorporate the affidavit***.

Brown, 49 F.3d at 1174 (Batchelder, J., dissenting) (emphasis added).

Because the affidavit in Mr. Hale's case was ***neither attached nor incorporated*** into the warrant, it cannot be considered part of the warrant. The warrant's failure to state a crime rendered it a general warrant and, thus, facially defective. The warrant's failure to name any crime was so apparent that no reasonable officer executing the warrant could have relied on the warrant.

2. <u>The Search Warrant Was Not Sufficiently Particular</u>.

The government claims that, except for one item, the items listed to be seized were "narrowly defined" with sufficient particularity and that " a sufficient nexus was articulated in the supporting affidavit" between the items sought and the crimes being investigated. (GAR at 15.) This certainly was not true since the affidavit was not incorporated into the warrant. Even assuming, *arguendo*, that the affidavit was incorporated, the warrant was still facially defective with regard to those items seized which were related to the WCOTC since the affidavit failed to state a crime to which these items were supposed to relate.

With regard to the listed items pertaining to the WCOTC and to the term "Church of the Creator," the government admits that, "[w]hile 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." The government then claims that this "does not negate the existence of probable cause, and clearly does not impact the particularity requirement of the Fourth Amendment." (GAR at 16, n. 14.) In fact, this does impact the particularity requirement because, when the affidavit did not "articulate a

theory of criminal liability" of obstruction of justice, there was no showing that the general inventory of the Church materials had a nexus to a crime.

The government also admits that, when listing items to be seized as "newsletters, mailing lists, phone logs, address books, phone records that contain information ***regarding potential co-conspirators***, ... , the term 'co-conspirator' is somewhat amorphous" since "***the warrant does not identify a particular criminal statute being violated***." (GAR at 16-17; emphasis added.) The government then claims that this is permissible since "the term 'co-conspirator' is defined ... by the phrase 'communications with other individuals associated with white supremacist groups relating to or discussing criminal activity and violence against others.' " (GAR at 17.) This, however, does not solve the problem of the lack of particularity in this request: there was no showing that any of the items on this very broad and unlimited list were related to "communications." At the very most, "newsletters" may have been related to "communications;" certainly "mailing lists, phone logs, address books, [and] phone records" did not relate to "communications." Thus, this unrestricted list of items lacked particularity and was clearly overbroad on its face was so apparent that no reasonable officer executing the warrant could have relied on it. "The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Groh*, 540 U.S. at 559 (citations and quotation marks omitted).

The government claims that, "[w]hile 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." (GAR at 17.) There is nothing in *Te-Ta-Ma* that supports the government's position.[3] The government does not cite to any other case law to support this claim. These materials were protected by the First Amendment. Furthermore, Judge Lefkow's Nov. 19, 2002 order by no means prohibited the Church from possessing material that ***"contain*** the term 'Church of the Creator' "(*Attachment A*), it only prohibited the Church from using the name as a ***trademark***. (*See Appl. & Aff. for Search Warrant* at 13.) Where law enforcement's purpose is to seize material presumptively protected by First Amendment, the items to be seized must be described in warrant with increased particularity.

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[3] The only wording even remotely related to this issue in that case was: "[i]t is questionable whether the World Church is a religion (not all philosophical beliefs are religious), but, if it is, still Congress need not exempt religions from generally applicable laws." *Te-Ta-Ma*, 297 F.3d 662, 667 (7th Cir.2002). The First Amendment is not a "generally applicable law."

See U.S. v. Hall, 142 F.3d 988 (7th Cir.1998). The warrant's authorization to seize all items "***containing***" these terms was facially overbroad and thus deficient.

3. The *Leon* Good Faith Exception Does Not Apply.

A ***facially valid*** search warrant can be rebutted "by showing ... that ***the affidavit was so lacking in probable cause that no officer could have relied on it***." *U.S. v. Mykytiuk*, 402 F.3d 773, 777 (7th Cir.2005) (emphasis added). *See also*, *U.S. v. Leon*, 468 U.S. 897, 922 (1984) "... depending on the circumstances of the particular case, a warrant may be ***so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized*** – that the executing officer cannot reasonably presume it to be valid") (emphasis added); *Brown*, 49 F.3d at 1175 ("***a warrant is facially invalid if*** it neither particularly describes the places to be searched and the things to be seized ***nor adequately describes the suspected criminal conduct to which the search is related***") (emphasis added); and *U.S. v. Kow*, 58 F.3d 423, 427-28 (9th Cir.1995) (the good faith exception is unavailable when the government "did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place" and failed "to describe ... the specific criminal activity suspected"). As the Second Circuit has stated,

> ... it is obvious that a general warrant authorizing the seizure of "evidence" without mentioning a particular crime or criminal activity to which the evidence must relate is void under the Fourth Amendment. ... Since it was quite clear when this warrant was executed that "limits" to a search consisting only of a broad criminal statute were invalid, *a fortiori,* ***a warrant not limited in scope to any crime at all is so unconstitutionally broad that no reasonably well-trained police officer could believe otherwise***.

U.S. v. George, 975 F.2d 72, 77 (2nd Cir.1992) (emphasis added).

Aside from the fact that there was no objective good faith in this case since Agent Coughenour herself at least partially prepared the affidavit and the warrant, "the affidavit was so lacking in probable cause that no officer could have relied on it" per *Mykytiuk*. This is the case because Agent Coughenour made ***no reference whatsoever to there being probable cause for the seizure of anything having to do with Judge Lefkow's court order***. (*See Aff. for Search Warrant* at ¶ 28.) Thus, even though the government repeatedly defends the warrant by saying how it wanted or needed every document the WCOTC possessed (*e.g.*, "documents and records pertaining to the WCOTC") apparently out of some kind of belief that it should enforce Judge Lefkow's civil court order by use of a criminal search warrant (*see* GAR at 14-17), ***the probable cause upon which the warrant was based had nothing to do with anything other than a supposed plot against Judge***

Lefkow's life. Thus Agent Coughenour's own affidavit was lacking in probable cause since the general inventory of the Church's possessions certainly did not constitute evidence of a plot against Judge Lefkow's life. Therefore, no reasonable officer could have relied upon it. This is true even if Agent Coughenour had not been involved in its creation. (*See* Vol. 9B at 106-148, Coughenour's testimony).

Because no reasonable officer could have relied on the warrant in Mr. Hale's case, the *Leon* exception does not apply.

D. Counsel Committed Other Significant Trial Errors.

The government claims that is was reasonable to use the *White Man's Bible* and *Nature's Eternal Religion* because "[t]rial counsel's strategic decision to use these writings to impeach Fox were successful." (GAR at 19.) Counsel did not need the entire books in evidence in order to use them to cross-examine witnesses. Further, whatever extremely dubious impeachment value the books had regarding Fox was vastly outweighed by their prejudicial effect on Mr. Hale. Certainly, counsel should have foreseen that the prosecutors would use the books' contents as justification for the jury to find Mr. Hale guilty, which is in fact what happened. Thus, counsel's use of these books was not justified and counsel's actions were unreasonable.

As for the argument that it was a strategic decision not to ask for a limiting instruction on the Smith evidence (GAR at 19-20), the government could be correct if this decision were reviewed in a vacuum; rather, counsel's omission must be viewed in conjunction with the facts that:

(1) counsel had failed to object to the admission into evidence of the 7th Circuit opinion (reversing Judge Lefkow) which stated that the Church of the Creator had previously orchestrated a murder (Vol. 4 at 99-101);

(2) counsel had put a person on the jury who had heard that "Smith said something like he was told to go do what he had done" (Vol. 1 at 225);

(3) counsel later intentionally elicited testimony that Mr. Hale had solicited Yonkers to do what Smith did (Vol. 7B at 105-117); and

(4) without objection by counsel, the government in rebuttal told the jury that it "had evidence that the defendant had a member of his organization kill two people and shoot lots of others" (Vol. 11 at 140).

The unreasonableness and prejudice of counsel's actions are obvious: counsel essentially allowed and encouraged the jury to find that Mr. Hale solicited Smith's killing spree on the basis of inadmissible hearsay and, without any limiting instruction, the jury was allowed and encouraged to use Mr. Hale's earlier supposed solicitations of Smith and Yonkers as propensity, habit, or common

plan or scheme for the alleged solicitation of Evola. Regardless of whether these particular actions were "strategic," it cannot possibly be reasonable to elicit such damaging testimony. Evidence that Mr. Hale had solicited somebody else to commit murders was extremely prejudicial and counsel should have asked for a limiting instruction on this evidence.

E. Counsel's Jury Selection Practice Was Deficient.

The government claims that:

> [t]he 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.

(GAR at 21.) Mr. Hale did not talk about generalities or stereotypes related to race; rather, Mr. Hale discussed the fact that it was unreasonable for defense counsel to prefer and to leave on the jury individuals whose race had been attacked and vilified by Mr. Hale. These were real and specific attacks on those individuals' race as a whole and, as such, were attacks on those individuals themselves. These potential jurors should have been struck rather than favored, not because there was something insidious in them being members of the African-American race, but rather because Mr. Hale had made statements about their race that certainly prejudiced them against him.

The government then failed to address Mr. Hale's claim that counsel should have challenged white juror Mark Hoffman.

F. Counsel Failed to Prepare Mr. Hale to Testify.

The government claims that the record belies this claim because Mr. Hale "waived his right to testify" and "never suggested that he wanted to testify." (GAR at 22.) As he has explained, Mr. Hale waived his right to testify because he was not prepared to testify due to his counsel's failure to meet with him or to discuss his potential testimony. Mr. Hale "never suggested that he wanted to testify" because he certainly did not want to testify cold without having discussed and reviewed his testimony with his counsel.

With regard to any waiver of his right to testify, the basis given by his counsel at trial as to why Mr. Hale should not testify (that if Mr. Hale testified, his beliefs would be exposed to the jury) was unreasonable. Obviously, Mr. Hale's beliefs had already been exposed to the jury throughout the trial and counsel themselves had, remarkably, read from and admitted into evidence the two books embodying his beliefs. Thus, counsel could not reasonably claim that preventing Mr. Hale

from testifying was necessary to prevent the jury's exposure to his beliefs. Further, and decisively, counsel did not want Mr. Hale to testify concerning the solicitation count because counsel failed to understand and realize that Mr. Hale did not know of Evola's designs on Judge Lefkow's life until Dec. 9, 2002. As case law makes clear, this ignorance of the facts of Mr. Hale's case precludes a finding that counsel were reasonable in advising Mr. Hale to waive his right to testify. Lastly, it is not the waiver itself that is at issue here, but rather, the errors of counsel that prompted it.

G. Counsel Breached Their Duty of Loyalty to Mr. Hale.

The government claims that it was appropriate for defense counsel to go "out of his way to condemn the defendant's character" because "[t]rial counsel's strategic decision in this vane was understandable and reasonable." (GAR at 22-23.) In Mr. Hale's case, defense counsel's slandering of Mr. Hale was much more serious than in the cases cited by the government in its response brief. Even if this alone did not amount to ineffective assistance, it added to the cumulative effect.

II. Mr. Hale's Rights to Be Present During the Jury Selection Process Were Violated.

The government claims that "[d]efendant has waived his claim of error premised on not being present for all stages of the jury selection process." (GAR at 23.) The government first claims that "defendant, through counsel, affirmatively agreed that defendant did not need to be present." (GAR at 23.) However, any actions by Mr. Hale's counsel were insufficient to waive Mr. Hale's right to be present and any waiver by counsel did not inure to Mr. Hale. *See U.S. v. Rodriguez*, 67 F.3d 1312, 1316 (7th Cir.1995) ("[a] defendant may waive his right to be present [citation omitted] but a purported waiver by counsel is not adequate to effect a waiver") and *U.S. v. Gordon*, 829 F.2d 119, 122-24 (D.C. Cir.1987) (the right of a defendant in custody prior to trial to be present at the impaneling of the jury ***could not be waived by a naked representation of defense counsel*** that the defendant waived his right).

"To be a knowing and voluntary waiver, a defendant 'must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away.' " *U.S. v. Marshall*, 248 F.3d 525, 534 (6th Cir.2001) (*quoting Taylor v. U.S.*, 414 U.S. 17, 19-20 n. 3) (1973) (additional citations omitted). Furthermore, courts must indulge every reasonable presumption against the waiver of constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *See also*, *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir.2004) (every reasonable presumption should be indulged against the waiver of a fundamental trial right). Thus, to obtain a knowing and voluntary waiver of his constitutional right to be present for voir dire, the Court was

required to obtain Mr. Hale's personal waiver and place that waiver on the record. *See U.S. v. Gordon*, 829 F.2d at 122-24 (requiring a personal on-the-record waiver; the impaneling of the jury in the defendant's absence without an on-the-record waiver violated the defendant's statutory and due process rights); *Larson v. Tansy*, 911 F.2d 392, 396-97 (10th Cir.1990) (the ***defendant who was silent when defense counsel waived the defendant's right*** to be present during the remainder of trial ***had not waived his right to be present***; the court never directly addressed the defendant concerning his counsel's request to conduct the remainder of trial in the defendant's absence and the defendant was "in custody"); and *U.S. v. Alikpo*, 944 F.2d 206, 209 (5th Cir.1991) (the court erred by conducting most of the jury selection process in the absence of the defendant, ***without his express waiver*** of his statutory and constitutional right to be present). The court ***must make factual findings to determine whether a defendant's absence is knowing and voluntary*** and the court should, at the same time, make a record inquiry to attempt to ascertain the explanation for the absence of the accused. *U.S. v. St. James*, 415 F.3d 800, 803-805 (8th Cir.2005). *See also*, *U.S. v. Achbani*, 507 F.3d 598, 601 (7th Cir.2007) ("[i]n the trial context, we have explained that the district court should indulge every reasonable inference against a finding of voluntary absence"). *But see*, *Cohen v. Senkowski*, 290 F.3d 485, 491-93 (2nd Cir.2002) (a defendant has a constitutional right to be present at the pre-screening voir dire but the defendant waived that right because he gave no indication on the record that he wanted to be there).

Because counsel's waiver did not inure to Mr. Hale and because Mr. Hale never personally waived his right, Mr. Hale did not voluntarily and knowingly waive his right to be present at voir dire.

The government next claims that "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." (GAR at 24.) Mr. Hale showed cause on page 34, n.8 of his opening brief and prejudice on pages 30-31. He also showed actual innocence on pages 1-14.

Next the government claims that Mr. Hale's "absence from a portion of voir dire did not violate his due process rights under the Fifth Amendment" (GAR at 24) since his "absence did not diminish his ability to fully defend against the charges" (GAR at 25). The government then repeatedly cited to *Bland v. Sirmons*, 459 F.3d 999 (10th Cir.2006). (GAR at 24-26.) This reliance on *Bland* is misplaced. In *Bland*, all of the individual voir dire questioning was done by the judge, unlike here, and thus the defendant's presence could not have had any effect on the outcome. Key

to the holding in *Bland* was that the defendant's presence there would have been useless or a mere shadow since the judge did all of the questioning. *See Bland*, 459 F.3d at 1021. Here, counsel for both sides also asked questions and thus Mr. Hale could have participated through his counsel. Further, the individual voir dire in *Bland* was far less extensive than here where Mr. Hale was absent for 41% of the voir dire proceedings.

The government then claims that Mr. Hale "does not identify any current cases where ... the court held that the defendant's absence violated his or her due process rights." (GAR at 26-27.) There is modern authority to this effect. *See U.S. v. Alikpo*, 944 F.2d 206, 209 (5th Cir.1991) (it was reversible error to conduct most of the jury selection process in the absence of the defendant, without his express waiver of his statutory and constitutional right to be present); *United States v. Camacho*, 955 F.2d 950 (4th Cir.1992) (the defendant had a constitutional and statutory right to be present at his trial, including the empaneling of jury and error from the commencement of the trial in the defendant's absence was not harmless beyond a reasonable doubt); and *United States v. Gordon*, 829 F.2d 119 (D.C. Cir.1987) (the defendant's absence from the impaneling of the jury in violation of his statutory and constitutional rights was not harmless error).

The government also claims that Mr. Hale "fails to demonstrate that his presence would have impacted the result of trial" because his "ability to use peremptory challenges was not impeded by his absence ..." (GAR at 26.) In his opening brief, Mr. Hale explained at length how a number of jurors were seated who were very prejudicial to him and that he had been unaware of their prejudices because he had been absent from their in-chambers interviews. (OB at 28-29, 35-38.) Mr. Hale had wanted to and had reason to be present for jury selection, and, in fact, expressed his concerns to the Court regarding the potential seating of jurors who might adjudge him by his "beliefs and not on the evidence" because of the admission into evidence of statements made by Mr. Hale "talking in a derogatory way towards Blacks and then be sat in judgment by Blacks." (Vol. III at 26-27.) This is exactly what did occur and it occurred without Mr. Hale being aware of the extent of these jurors' prejudices since he had not been permitted to be present in-chambers when the jurors were questioned .

Mr. Hale's 5th Amendment due process rights were violated by his absence from voir dire.

III. EVIDENTIARY HEARING

Mr. Hale requests that an evidentiary hearing be held on the following issues:

A. counsel's failure to call witnesses on Mr. Hale's behalf;

B. counsel's failure to prepare Mr. Hale to testify;

C. counsel's failure to call Mr. Hale to testify; and

D. the facts surrounding the jury selection process.

DATED this 8th day of September, 2008.

Respectfully submitted,

s/Clifford J. Barnard

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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-MOVANT, MATTHEW HALE, by and through his attorney, Clifford J. Barnard, hereby certifies that the following documents:

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

were served on this 8th day of September, 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 8th day of September, 2008.

Respectfully submitted,

s/Clifford J. Barnard

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