Case No. 11-3868

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

MATTHEW HALE,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
For the Northern District of Illinois
Civil Case No. 08-cv-00094-JTM
The Honorable Judge James T. Moody

REPLY BRIEF OF PETITIONER-APPELLANT MATTHEW HALE

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REPLY BRIEF OF PETITIONER-APPELLANT MATTHEW HALE[1]

I. ARGUMENTS

A. Absence – Due Process Violation.

1. Standard of review.

Plain error (Gov't.Brief 12) does not apply because this was structural error (Hale Brief 11-13). Thus, the legal findings are reviewed *de novo* and the underlying findings of fact are reviewed for clear error.

If it was not structural error, because there was a due process violation, the standard of review is for harmless error. *United States v. Patterson*, 23 F.3d 1239, 1255 (7th Cir. 1994) ("[w]e have previously held, ..., that the Rule 43(a) violation is subject to the harmless

[1] Although Hale does not address all issues presented in his opening brief, he does not abandon or withdraw any of those issues or arguments.

error standard, even in a case where the issue was not presented to the trial court").

> ... The difference between [harmless and plain error] is that under the harmless error standard the government has the burden of showing that the error was not prejudicial, whereas under the more stringent plain error test, the defendant must show that the error was prejudicial. [Citation omitted.]

Patterson, 23 F.3d at 1255. *But see*, *United States v. Silverstein*, 732 F.2d 1338, 1348-49 (7th Cir. 1984) (applying plain error to absence from responding to jury question).

2. Fifth Amendment due process violation

Of the government's seven cases cited to support its claim that Hale's absence did not violate due process, only two involved a defendant's absence from voir dire and none involved a defendant's absence for a substantial portion of the jury selection process. In *Snyder v. Massachusetts*, 291 U.S. 97, 107-108 (1934), the defendant was not present for a jury view of the crime scene. In *United States v. Gagnon*, 470 U.S. 522, 526, 527 (1985) (*per curiam*), the contact involved a minor, short *in camera* conference between the judge, counsel and a juror who expressed concern about the defendant drawing sketches of the jury. In *Illinois v. Allen*, 397 U.S. 337, 338 (1970), the defendant's removal and absence was due to his persistent disruptive conduct. In *United States v. Shukitis*, 877 F.2d 1322, 1330 (7th Cir. 1989), the defendant was absent for two *in camera* conferences regarding potential violations of the court's separation-of-witness orders. In *United States v. Smith*, 230 F.3d 300, 310 (7th Cir. 2000), the defendant was absent for an in-chambers conference to decide whether to wait for or excuse a missing juror.

Of the two cases dealing with a defendant's absence from part of jury selection,

United States v. McCoy, 8 F.3d 495, 496 (7th Cir. 1993) involved nine sidebars without the defendant present, of which only two dealt with minor jury selection issues of employment at a prison and recognizing the defendant as a former inmate and defense counsel's being acquainted with a potential juror. This was nothing like Hale's absence[2] from the questioning of 65 venirepersons over the course of more than a day about exposure to prejudicial pre-trial publicity, as admitted by the government. (Gov't.Brief 13, 21).

In the Tenth Circuit case of *Bland v. Sirmons*, 459 F.3d 999, 1020-21 (10th Cir. 2006), the court found no due process violation because: (1) the absence was "brief, limited;" (2) the judge conducted the entire questioning; (3) the judge "personally determined whether each juror should be excused for cause" and only one was excused for cause; (4) the defendant had "ample opportunity to observe jurors during *voir dire* and exercise challenges accordingly;" and (5) the potential jurors were questioned generally about "whether they watched the news or heard about any news reports involving the case."

Hale's case was very different: (1) Hale's absence was extensive as he was absent for nearly half of the jury selection process; (2) the judge and the attorneys asked questions (this was the only portion of voir dire in which the attorneys were permitted to ask questions); (3) nineteen potential jurors on the first day (Vol. 1 at 274-275) and two potential jurors on the

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[2] The government claims that Hale "was not absent from jury selection" because he "was absent from the limited proceedings to determine if there was bias from exposure to pretrial publicity." (Gov't.Brief 21.) Hale was absent from jury selection: the *in camera* questioning was part of jury selection and Hale was extensively absent from it. *See Gomez v. United States*, 490 U.S. 858, 873 (1989) (indicating voir dire and jury selection are one and the same).

second day (Vol. 2 at 57) were excused for cause; (4) Hale did not have the opportunity to observe these venirepersons while they answered important, detailed questions about their exposure to very prejudicial publicity; and (5) the potential jurors were discussing multiple news coverages and were specifically discussing their exposure to reports of Smith's killing spree.

3. No consent or waiver. (Gov't.Brief 19-22.)

The government argues that Hale waived his presence.[3] (Gov't.Brief 19-22.) However, Hale stated in his declaration that he was not consulted about and did not consent to being absent and he was not advised of his right to be present. No on-the-record waiver from Hale was obtained.

Although the government is correct that "'[t]he district court need not get an express 'on the record' waiver from the defendant for every trial conference which a defendant may have a right to attend.' [*Gagnon*, 470 U.S.] at 528" (Gov't.Brief 20-21), in the circumstances of Hale's absence, any alleged implied waiver was insufficient and the court was required to obtain Hale's personal waiver on the record. This and other circuits (in post-*Gagnon* cases) have held that "[a] defendant may waive his right to be present [citation omitted] but a purported waiver by counsel is not adequate to effect a waiver." *United States v. Rodriguez*,

[3] The government also claims that "[t]he ***district court*** did not simply accept a waiver made through counsel without ***believing*** that petitioner had been consulted and had personally agreed with the procedure." Gov't.Brief 21 (emphasis added). What the district court "believed" is not important; the question is whether Hale knowingly waived his constitutional right. "Where constitutional rights are involved, the standard for determining whether a criminal defendant has validly waived such a right is considerably more stringent than that provided by Rule 43(b)." *United States v. Gordon*, 829 F.2d 119, 126 (D.C. Cir. 1987).

67 F.3d 1312, 1316 (7th Cir. 1995). *See also*, *United States v. Billingsley*, 766 F.2d 1015, 1020 (7th Cir. 1985) ("the preferred procedure would be to hold an on-the-record hearing in which the trial judge could explain to the defendant his rights, and the defendant could personally waive these rights if he so wished"); *Gordon*, 829 F.2d at 122-124 (the right of a defendant to be present at the impaneling of the jury could not be waived by a naked representation of defense counsel); *Larson v. Tansy*, 911 F.2d 392, 396 (10th Cir. 1990) ("[n]ormally the court obtains a waiver of a defendant's presence at trial from the defendant personally, in open court, and on the record"); and *United States v. Alikpo*, 944 F.2d 206, 209 (5th Cir. 1991) ("reversible error to conduct most of jury selection process in absence of defendant, without his express waiver of statutory and constitutional right to be present").

4. Prejudice.

The government claims that Hale "has never made a showing of how his presence at the *in camera* proceedings could have contributed to his defense, other than a claim that he would have insisted" on a cause challenge to Hoffman (Gov't.Brief 16) and then quoted the Supreme Court: "[t]he [*Gagnon*] Court held that exclusion of the defendants from the conference was not a due process violation because they 'could have done nothing had they been at the conference, nor would they have gained anything by attending.' [Citation omitted.]" Gov't.Brief 15.

If this Court determines that Hale must show prejudice, Hale has shown it in his opening brief. Furthermore, Hale only has to show that "his presence would contribute to the

fairness of the procedure" (*Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)) and/or that "a fair and just hearing would be thwarted by his absence" (*Snyder*, 291 U.S. at 107-108).

Hale's presence would have made a difference: he could and would have participated in weeding out potential jurors who were biased and inappropriate to sit on his jury by challenging at least one (Hoffman) for cause and peremptorily excusing several others (Phillips, Kinder and/or McClellan). *See Snyder*, 291 U.S. at 106 ("defense may be made easier if the accused is permitted to be present at the examination of jurors ..., for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself"); *Gordon*, 829 F.2d at 125 ("defendant's presence at voir dire is essential not only because it is necessary to the appearance of impartiality but because the defendant has unique knowledge which is important at all stages of the trial, including the *voir dire*"); *Larson*, 911 F.2d at 396 ("defendant was deprived of his due process right to exert a psychological influence upon the jury, completely aside from any assistance he might have provided to his counsel").

The government argues that Hale's absence for more than a day of voir dire did not matter because Hale's "objection to this juror, Mark Hoffman, is not based Hoffman's exposure to pretrial publicity, which was the limited purpose of the *in camera* voir dire." Gov't.Brief 16. Although the scope of the *in camera* hearing was for exposure to publicity, important information regarding Hoffman's (and other potential jurors') exposure to publicity and other matters was revealed, including: (1) Hoffman thought that Smith had

"said something like he was told to go do what he had done" (Appx. 189-190); (2) juror Phillips had read and heard that "Matthew Hale had indicated that he wanted Smith to do the crimes that he did" (Appx. 195-196); and (3) jurors Kinder and McClellan expressed affection for Smith's murder victim Byrdsong (Vol. 1 at 205-210; Vol. 2 at 48-51). Phillips' statement was worse than Hoffman's since Phillips specifically identified Hale as reportedly having "wanted" Smith to murder people. As it was, Hale had no knowledge of these statements, the jurors were seated, and thus his absence materially hindered his receiving a just and fair trial which affected the framework in which the trial proceeded. The government cannot show beyond a reasonable doubt that the seating of these jurors was not harmful – that the jurors did not hold against Hale what they had heard through pretrial publicity – and nor can the government show that Hale might not have persuaded counsel to challenge them had he been present to hear what they said. Thus, Hale has met the prejudice requirement.

5. Cause and actual innocence.

The government argues that this issue is procedurally barred because Hale failed to raise it on direct appeal. (Gov't.Brief 22-24.) Hale's cause for not previously bringing this claim is: (a) in order to prove the claim, matters outside the record were necessary; (b) Hale did not have the transcripts necessary to bring this issue on appeal; and (c) Hale was innocent.

a. Matters outside the record.

In order to establish his claim, Hale needed to present evidence outside the trial record

to prove that his absence from voir dire was involuntary and, if prejudice was necessary, to prove his absence prejudiced him. *See United States v. Taglia*, 922 F.2d 413, 419 (7th Cir. 1991) ("if [a defendant] wants to support the claim with facts that require evidence to establish he will be well advised to wait till the postconviction stage and will be safe in doing so"). With regard to involuntariness, the record on appeal, without Hale's § 2255 declarations, was insufficient to prove involuntariness. In fact, the government argues that the record in the § 2255 proceeding (after discounting Hale's declarations) shows that Hale was voluntarily absent. (Gov't.Brief 8, 21.)

b. No transcripts to bring this issue on appeal.

The voir dire transcripts were only belatedly made part of the district court record on May 25 and June 2, 2005, long after the other transcripts had already been included in the record on July 22 and October 22, 2004 (as the government also notes; Gov't.Brief 23). Since Hale had been told earlier by his post-trial counsel that the voir dire transcripts were sealed and that he was not allowed to have them, their not being made part of the record with the other trial transcripts indicated to Hale that that statement was correct because otherwise, they also would have originally been part of the record. Furthermore, Hale was told that the voir dire transcripts were sealed because of concerns about ***him***. Thus, the district court's speculation as to what Hale could have done to obtain the transcripts is inapposite. (Appx. 150-151.) It was reasonable for Hale to refrain from making a claim based upon transcripts he had been informed he was not permitted to have.

Because he was absent, Hale did not know what damaging things had been said and thus he did not know that he had a grievance to appeal. Furthermore, had Hale made his absence-from-voir-dire claim on direct appeal without the voir dire transcripts, he could not have known or shown what the potential jurors had said about him and he would not have been able to show that his presence was necessary. Without the voir dire transcripts or further evidence outside the appeal record, there was a "reasonable unavailability of the factual basis for the claim." *McCleskey v. Zant*, 499 U.S. 467, 497 (1991). Thus, Hale could not have knowingly and intelligently relinquished this claim since he did not know that it existed. "A waived claim or defense is one that a party has ***knowingly and intelligently relinquished*** ..." *Wood v. Milyard*, 132 S.Ct. 1826, 1832 (2012) (emphasis added).

"Cause" means some impediment to making an argument. *Ryan v. United States*, 645 F.3d 913, 916 (7th Cir. 2011). Hale has shown "cause for the failure to advance the argument sooner." *Kelly v. United States*, 29 F.3d 1107, 1112 (7th Cir. 1994).

c. Hale was innocent.

In addition, Hale has fulfilled the narrow exception to the cause and prejudice requirement because the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). To invoke this exception, Hale must make a "colorable showing of factual innocence." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). "The *Carrier* standard reflects the proposition ... that the line between innocence and guilt is drawn with reference to a reasonable doubt."

Schlup v. Delo, 513 U.S. 298, 328 (1995). Thus, a petitioner must "show a fair probability that, in light of all of the evidence ..., the trier of facts would have entertained a reasonable doubt of his guilt." *Kuhlmann v. Wilson*, 477 U.S. 436, 455 n.17 (1986). A petitioner is entitled to have the merits of the claim considered if he has raised "sufficient doubt about [his] guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error." *Schlup* at 317. Hale's burden is thus to demonstrate "that more likely than not any reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006). The evidence withheld from the jury that Judge Lefkow was not the "Jew rat," that Hale knew that Evola was a government informant, and that Hale routinely sought addresses of lawyers and judges for non-violent purposes, among counsel's other errors, meets this test by showing Hale's actual, factual innocence.[4]

Hale has overcome the procedural default because it is the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free" (*Schlup*, 513 U.S. at 325) and because "a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he is incarcerated." *Kuhlmann*, 477 U.S. at 452. Thus, because Hale has made a substantially supported claim of factual innocence, to not hear his claim risks the miscarriage of justice that he will remain imprisoned for crimes he did not commit. *See Engle v. Isaac*,

[4] The government claimed that Hale "does not argue the point" of his innocence. (Gov't.Brief 23-24.) Hale devoted a section of his opening brief to establish his actual innocence (Hale Brief 28-29) and the government responded to his claim (Gov't.Brief. 34). The fact that he did not reargue it does not mean that he did not argue it.

456 U.S. 107, 135 (1982) (procedural default "must yield to the imperative of correcting a fundamentally unjust incarceration"). "Factual innocence indeed relieves a petitioner of a procedural default ..." *Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005). Where there is a "substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination," to not consider the procedurally defaulted claim presents "the risk of a manifest miscarriage of justice." *Smith v. Murray*, 477 U.S. 527, 538 (1986).

B. Ineffective Assistance of Counsel.

1. Standard of review. (Gov't.Brief 25-26.)

The government cites *Swanson v. United States*, 692 F.3d 708, 717 (7th Cir. 2012) for the proposition that "[t]he performance component of the ineffective assistance standard may be more demanding on the petitioner than the test for plain error" (Gov't.Brief 26) but that case dealt only with a failure to object to an error made by the trial court rather than with a general ineffective assistance of counsel claim. The Supreme Court was essentially saying that there should not be a lessened burden in a § 2255 than in a direct appeal for a failure to ***object to a court's decision*** since it should not be easier to win relief on the same underlying error through ineffective assistance of counsel than through direct appeal. Such reasoning does not apply to the performance component of *Strickland* to those errors of ***counsel*** that are based on ignorance and which thus are not entitled to a presumption of reasonableness and since an error of the ***court*** is not the issue in an ineffective assistance of ***counsel*** claim generally. Thus, the standard of review is for objective unreasonableness for the deficient

performance prong of Hale's claim which is not analogous to the plain error standard used in the context of a claim of the ***court's*** erroneous actions.

The government also cites *Swanson* to establish its claim that the ineffective assistance prejudice prong is "nearly identical" to plain error review. Gov't.Brief 26. Again, the government is wrong since this was in the context of an underlying error of the ***court***, not of ***counsel***. As *Swanson* (citing *Gordon v. United States*, 518 F.3d 1291, 1298 (11th Cir. 2008)) states "[w]hen a claim of ineffective assistance is based on ***a failure to object to an error committed by the district court***, that underlying error must at least satisfy the standard for prejudice that we employ in our review for plain error" (emphasis added).

Also, the government is wrong because plain error may be found only when absence of the error probably would have resulted in an acquittal (*United States v. Banks*, 405 F.3d 559, 566 (7th Cir. 2004)) while *Strickland* specifically states that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). Thus, the "probability" of a different outcome in plain error review is directly contrary to *Strickland's* admonition that a defendant need *not* show that the error "more likely than not altered the outcome."

Furthermore, under plain error, a court is allowed "to correct only particularly egregious errors for the purpose of preventing a miscarriage of justice, which implies the conviction of one who ***but for*** the error would have been ***acquitted***." *United States v. Krankel*, 164 F.3d 1046, 1053 (7th Cir. 1998) (emphasis added). This is a different standard

than a "reasonable probability" of a ***different outcome*** as required by *Strickland* and defined as that which is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 494. A reasonable probability of a different outcome is merely that which would give the defendant "a reasonable shot at acquittal" absent the error or chances that are "better than negligible." *Gibbs v. Van Natta*, 329 F.3d 582, 584 (7th Cir. 2003) and *Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003). This is a markedly lighter burden for Hale than the plain error "but for" test and Hale has met it, especially since Hale already had a reasonable shot at acquittal and better than negligible chance of being acquitted at trial even with all of counsel's errors since there was no direct, unambiguous solicitation in this case.

2. Ineffective performance regarding absence. (Gov't.Brief 26-27.)

Counsel's representation that they told Hale that it was "okay" that he not be there does not mean that counsel consulted with him about whether he should be present or advised him about his right to be present. Counsel's brief representation is too vague to draw the conclusion that counsel performed objectively reasonably.

3. Ineffective jury selection. (Gov't.Brief 27-28.)

In response to Hale's arguments, the government omits the full basis of Hale's claim that counsel were ineffective by leaving Hoffman on the jury: that Hoffman worked at the same place as one of Smith's murdered victims, that Hoffman lived in the same neighborhood as Smith's victims, and that Hoffman thought that Smith had "said something like he was told to do what he had done." Thus, Hoffman had several, unique incentives and

a predisposition to find Hale guilty and it was objectively unreasonable to leave him on the jury or, at least, not to have further questioned him on these matters.

As for the court's saying that a challenge for cause would have been overruled (Appx. 134), this was stated six years after-the-fact and does not take into account other information and possible admissions counsel could have gleaned from Hoffman had counsel conducted further inquiry after consulting with Hale about Hoffman's and other jurors' statements. Furthermore, since the government is correct that "there was no instance in which a defense cause challenge was rejected by the district court" (Gov't.Brief 14), it is likely that challenging Hoffman (and possibly Phillips) for cause would have been successful.

Counsel's performance was also deficient when, in the unique circumstances of Hale's racial views, counsel failed to further question the African-American venirepersons as to whether they could be fair and impartial to a person who called them "niggers," "mud people" and who wished for their elimination according to his Church's Bibles. All of the jurors struck by counsel were white, none were African-American. Considering Hale's extreme beliefs and statements against African-Americans, it was imperative to have learned what the five African-Americans left on the jury felt about Hale's racial statements. Although it is unknown what answers may have been elicited, it is unlikely that all the African-American jurors would have said that they could have ignored those statements. To pretend that African-American jurors could hear evidence of Hale's vociferous racism over-and-over and yet not hold that against him is unrealistic. It is hard to see how such a preference could

have been a reasonable strategic decision. Objectively reasonable counsel would have requested further questioning of those jurors to determine if Hale's statements and views would have prevented them from being fair.

This Court should order in evidentiary hearing to determine if trial counsel had a legitimate strategic decision to leave ***all*** the African-Americans on the jury. "Ineffective assistance claims often require an evidentiary hearing because they frequently allege facts that the record does not fully disclosed." *Osagiede v.United States*, 543 F.3d 399, 408 (7th Cir. 2008).

4. Ineffective to concede the existence of a federal case that did not exist. (Gov't.Brief 28-34.)

The government does not disagree that there was no federal case here – that trial counsel conceded the existence of a federal case that did not exist. This though is the crux of the issue. Due to counsel's actions, Hale was convicted of having solicited the murder of Judge Lefkow and having obstructed her when a federal judge was not the person being talked about and Hale had told counsel this in advance of trial. Nor does the government offer any evidence or argument that Hale is wrong. The "plausibility" of the government's case against Hale (Gov't.Brief 9, 11, 29-30, 34) does not matter; what matters is that Hale's case of actual innocence was never heard. Counsel should not simply acquiesce in the plausibility of the government's case and counsel's acquiescence does not somehow render that performance constitutionally effective. The constitutional guarantee of effective assistance requires that the government's claims be ***challenged***, not acquiesced to merely

because they are plausible on their face. Otherwise, every counsel who simply went along with the government's claims would be performing effectively. That is not the law. Furthermore, the defense that Hale ***turned down*** involvement in Evola's new plans against a "femala" rat, Judge Lefkow, is highly plausible and indeed supported by the evidence. As Hale told Evola, "I can't be a party to such a thing." (Appx. 334.) Notably, since Evola himself was talking about Amend on December 5th, there was no reason for Hale to tell him that on December 17th. That Evola had switched ***his*** target from a Jew rat/lawyer rat to a "femala" rat was understood by both men.

Effective assistance of ***counsel*** is what is at issue here, not whether the government's view of the evidence is plausible, and it cannot have been effective assistance where counsel failed to understand that Evola was talking about getting four addresses on December 5th and thus failed to realize and argue that the very foundation of the government's case was open to question. Nor can it have been effective assistance where counsel failed to present copious evidence of innocence. Again, the government does not challenge the evidence; it simply assumes that the plausibility of the government's case is sufficient. Such plausibility is irrelevant to the issue, however. Nor is the issue whether the jury ultimately would have agreed or disagreed with Hale's evidence. The question, rather, is whether counsel's ignorance of Hale's case for innocence and withholding of evidence of that innocence was objectively reasonable and without prejudice to him. The answer is no. "An attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical

or other consideration justified it." *Pavel v. Hollins*, 261 F.3d 210, 220 (2nd Cir. 2001). There is no suggestion of any such justification here. The government fails to appreciate that the purpose of a criminal trial is the advocacy of both sides of a controversy and it fails to appreciate that Hale has amply demonstrated that his trial was an unreliable indicator of guilt, thus meeting the *Strickland* test.

The government claims that "[c]ounsel did not fail to understand the facts" (Gov't.Brief 29) about the December 5th conversation but offers no evidence that Hale is wrong in that regard. Its conclusory statement is unsupported by the record whereas Hale's claim that counsel failed to understand that four addresses were at issue on December 5th and that Evola was not even talking about Judge Lefkow does have record support and furthermore was supposed to have been taken as true by the district court for purposes of holding an evidentiary hearing. "A § 2255 petitioner is entitled to an evidentiary hearing on his claims, when he alleges facts that, if proven, would entitle him to relief." *Hall v. United States*, 371 F.3d 969, 972 (7th Cir. 2004). If proven, Hale's claim of ignorance on the part of counsel would indeed entitle him to relief under the case law cited in his opening brief. (Hale Brief 26-27.) Thus, ***at a minimum***, an evidentiary hearing should have been held since Hale alleged a failure by counsel to understand the facts of his case and the files and records did not "conclusively show" that he was wrong in that regard.

Contrary to the government's argument, it was not Hale's burden to make a "showing that counsel were not familiar with what the evidence was" (Gov't.Brief 29-30) absent an

evidentiary hearing, but rather that Hale was entitled to the hearing unless the record conclusively showed that he was wrong, which it did not. Indeed, counsel's actions are not entitled to a presumption that they were made in the exercise of reasonable professional judgment when they are shown to be the result of oversight and confusion. *Sussman v. Jenkins*, 636 F.3d 329, 350 (7th Cir. 2010). Hale has already shown this oversight and confusion here even ***without*** a hearing. "Where, as here, an attorney fails to raise an important, obvious defense [that Judge Lefkow was not the subject of any solicitation] without any imaginable strategic or tactical reason for the omission, his performance falls below the standard of proficient representation that the Constitution demands." *Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999). Here, Evola did not even ***ask*** whether they were going to exterminate Judge Lefkow and thus the defense that she was not the subject of any solicitation and obstruction was indeed obvious. *See also*, *Richey v. Mitchell*, 395 F.3d 660, 681 (6th Cir. 2005) (ineffectiveness where counsel raised no challenge to lack of proof of required statutory element that defendant specifically intended to cause death of person killed), *analysis reaff'd by Ricky v. Bradshaw*, 498 F.3d 344, 362 (6th Cir. 2007). Even the government now acknowledges that Evola was talking about getting four addresses, not just Judge Lefkow's (Gov't.Brief 31), and thus "the rat, Jew rat" could have been one of four people. The problem is that ***counsel*** did not realize this or if they did, did nothing with this reasonable doubt that existed on its face. The government mentions the ***email of December 4th*** (Gov't.Brief 31) but that is not the issue; counsel's cross-examination concerning the

conversation of December 5th was entirely focused on Judge Lefkow's address without any reference to the other addresses that Hale was wanting. Thus, the failure to understand the evidence is obvious. Hale agrees with the government that the notion that Evola was actually talking about Amend is supported (Gov't.Brief 31-32); the problem is that the ***jury*** had no inkling of this.

Contrary to what the government says (Gov't.Brief 29-30), no "informed strategic decision" was made here owed deference since counsel did not realize that Evola's "it" was composed of four addresses. A decision based in ignorance is not "strategic." Nor was counsel's ignorance dispelled by Hale's having told counsel that the Jew rat was Amend since counsel were under the mistaken impression that the "it" was confined to the address of Judge Lefkow alone and thus ***could not***, under their mistaken impression, have been Amend. Counsel cannot be deemed to have made an informed strategic decision based upon what Hale told them when they mistakenly thought that what Hale told them was impossible: that Amend could be the person Evola asked about killing at "the judge's" address.

As for Evola's referrence to a "lawyer rat" on December 5th, it was not necessary that Hale "prove" that the "Jew rat" was indeed one and the same person as this "lawyer rat." (Gov't.Brief 33.) In any case, the erroneous insertion of a comma between "lawyer" and "rat" does not change the fact that the only person on December 5th whom Evola clearly and specifically called a rat was indeed a lawyer, not a judge. Punctuation is not evidence; the recording was the evidence as the jury was instructed. (Vol. 12 at 8.)

As for cumulative evidence (Gov't.Brief 33), evidence and argument that the "Jew rat" supposedly the subject of a murder solicitation and obstruction was not Judge Lefkow would not have been "cumulative" since no such evidence or argument were presented to the jury. Hence, evidence of Amend's nickname was significant and not cumulative.

As for Hale's citation to the declarations and affidavits filed in the case, this was not an "incorporation by reference" or waiver as the government claims. (Gov't.Brief 34.) Hale provided a summation of the cited exculpatory evidence that was indeed unheard by the jury.

Lastly, the government yet again states incorrectly that Hale's argument is that he solicited somebody else's murder and wanted someone else killed (Gov't.Brief 9, 28-29) whereas Hale's opening brief specifically rejected such an untrue claim (Hale Brief 32-33).

5. Tampering-of-the-recording allegation is not unfounded. (Gov't.Brief 10, 34-35.)

The indicia that tampering indeed took place is that the original transcript, on its face, precluded Judge Lefkow from being the "Jew rat" since the "rats" were the lawyers alone ("and all his rats'"); it was the change of "all his" to "the ***other***" rats that, conveniently, added Judge Lefkow to the group of "rats." Hale's allegation is clearly not unfounded. Hale had intended to have the recording analyzed once the evidentiary hearing was scheduled.

6. Government's weak case. (Gov't.Brief 35-36.)

This was a case where the evidence presented to the jury was far from overwhelming. Hale neither asked nor told Evola to kill anybody, refused to give Evola money, an alibi, or the names of "two trusted brothers" for the purpose of killing anybody, and even expressed

concern that he may legally be required to inform on ***Evola*** to law enforcement due to Evola's telling him about ***Evola's*** stated plans. (Appx. 329-359.) Nor did Hale have an affirmative duty to tell Evola not to do what Evola claimed that he, Evola, wanted to do. Thus, Hale's chances of acquittal clearly would have been better than negligible had counsel contested the government's notion that Judge Lefkow was the subject of a solicitation in the first place and prejudice is thus established. It would not even have been necessary for Hale to testify.

7. Hale's declarations should not have been discounted. (Gov't.Brief 37-38.)

Hale's waiver of his right to testify is of no consequence since it was counsel who advised him to do so. In other words, if counsel were ineffective, the fact that Hale waived his right to testify does not change that. Thus it was error for the district court to discount Hale's personal declarations. Hale's declarations go to the unreasonableness of counsel's performance and the prejudice he suffered thereby. This is in no way changed by the fact that, heeding his counsel's advice, he waived his right to testify. The waiver ***supports*** the claim of ineffective assistance rather than bars it.

8. Church books. (Gov't.Brief 10, 38-39.)

It is certainly untrue that "the content of the books told the jurors nothing they did not already know" (Gov't.Brief 10) since it was the admission of the books into evidence that provided the government with its "terrorism" argument that was extremely prejudicial to Hale. Nor would the government have made its terrorism argument had it not thought that

Hale would be hurt thereby. Furthermore, even though the jury heard other evidence of Hale's racist views, the presence of the books themselves in the jury room – as opposed to mere testimony about racism – was much more powerful and much more devastating. These books contain a great deal of other statements such as anti-government and anti-Christian averments which were not in evidence. *See* Exhibits 15 and 16 and the actual books themselves.[5]

Nothing was gained by reading the passages from the books to Fox. Furthermore, the only person who talked about "exterminating a 'Jew rat'" was Evola, not Hale, and nor did Hale ever "declare war on Judge Lefkow." (Gov't.Brief 38) ("Rigged Court System Declares War *on Church*;" Appx. 312.)

9. Trademark opinion. (Gov't.Brief 39-40.)

Obviously the government was free to use the opinion once counsel failed to object to its admission. Thus it was the failure to object to its admission that was the problem and the difference is plain. Furthermore, there is no basis for the government's claim that "the court was not going to sustain an objection to its 'admission'" (Gov't.Brief 40) since objection to the "use" of the opinion, once admitted, was not a viable objection whereas objection to its admission in the first place was. Counsel ***could*** have stopped the admission of the opinion into evidence.

10. Elicitation of alleged Yonkers solicitation. (Gov't.Brief 11, 41-42.)

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[5] The actual books were made a part of the record on appeal so that this Court could look at them (as the jury did) to see how prejudicial they were to Hale.

The problem with the government's argument is that the case against Hale was based on the ***recordings***, not on whether Evola was truthful. Therefore, an attempt to show Evola as "a chronic liar" (Gov't.Brief 11) was of little value to Hale since whatever was said on the recordings was unaffected by that.

As to it being plainly objectively unreasonable to elicit evidence of another supposed murder solicitation in a murder solicitation case, the government itself aptly put it at trial as follows: "I've never been a defense attorney but I wouldn't bring that stuff out." (Vol. 1 at 112-113.)

11. Failure to prepare Hale to testify. (Gov't.Brief 42-43.)

Counsel's representation at trial that Hale only wanted to testify as to certain counts was untrue but Hale was prevented from testifying about this at the evidentiary hearing because no hearing was held. As for the quotation from the district court, it is not only possible but likely that a client would not raise his counsel's ineffectiveness during a waiver-of-the-right-to-testify colloquy since the trial was still ongoing and counsel were immediately present. Nor was Hale required to do so. Furthermore, while Hale did graduate from law school, he was denied a law license and had no trial experience that could in any way change the analysis. Lastly, the district court obviously did not ask Hale whether counsel's failures contributed to his waiver and thus it is not surprising that Hale would not raise that on his own.

12. Attacking Hale in closing argument. (Gov't.Brief 11-12, 43-44.)

Hale disagrees that it is objectively reasonable to suggest to the jury that one's client "deserves" to be convicted on a moral basis because if counsel suggests this, whether morally or otherwise, some jurors, at least, will vote guilty because of that. Furthermore, the supposed strategy of attacking Hale in order to build rapport with the jury was objectively unreasonable in that it was a result of counsel's ignorance that Hale had a much stronger defense of actual innocence that, had it been pursued, would have made such attacks by Hale's counsel unnecessary.

13. Cumulative effect. (Gov't.Brief 44-45.)

The cumulative effect of all of trial counsel's deficient performance was so substantial and injurious as to have affected Hale's substantial rights, denied him of a fair trial and seriously affected the fairness, integrity and public reputation of the judicial proceedings.

14. Need for evidentiary hearing. (Gov't.Brief 45-46.)

Hale's opening brief demonstrated that the record does not "conclusively show" that he was entitled to no relief and Hale repeatedly identified specific facts that set forth bases for relief. The failure of counsel to understand and advocate the facts of the case, the concession of a federal case that did not exist, the failure to present evidence of innocence, the failure to call any witnesses in Hale's defense, Hale's involuntary absence from voir dire, the failure to make a challenge to Hoffman and why counsel failed to follow up on Hoffman's exposure to negative pre-trial publicity, the failure to further question venirepersons, the failure to read the trademark opinion, and other allegations required an

evidentiary hearing because, if proven, Hale would not be denied relief.

For example, an evidentiary hearing could have resolved the question of who juror Hoffman believed told Smith to kill Ricky Byrdsong and others. Hale claims that juror Hoffman indicated that he believed he had heard that it was WCOTC leader Hale who told WCOTC member Benjamin Smith to kill Byrdson and others. (Appx. 188-189.) The government claims that Hoffman never stated or implied this. (Gov't.Brief 17, 24.) Thus, a factual dispute exists.

It is reasonable to believe that Hoffman was indicating that he believed that Hale told Smith this because the news media had repeatedly reported Hale as the leader of Smith's church and Smith's intimate associate. Because this is a reasonable inference, counsel should have asked Hoffman who he believed told Smith this and it was deficient for counsel to fail to ask this question.

If Hoffman states at an evidentiary hearing that he believed that Hale told Smith to kill Byrdsong, Hoffman was biased, as admitted by the government ("[s]urely, Hoffman would have been excused for cause if anybody at the voir dire had sensed that Hoffman believed that;" Gov't.Brief 17). If Hoffman was biased, he should have been stricken from the jury and Hale was prejudiced by counsel's failure to ask this question, elicit this response and then strike him for cause. This went to the heart of the government's theory of the case, *i.e.*, that Hale would manipulate others to do his dirty work while hiding behind plausible deniability. The district court affirmed this when it said: "[t]he government's theory was that

Hale encouraged his acolytes to commit violent acts while at the same time denying personal involvement to create plausible deniability." Appx. 81. If Hoffman believed that Hale had manipulated Smith to kill Byrdsong, he was predisposed to believe that Hale had manipulated Evola to kill Judge Lefkow.

These and other factual matters are in dispute. The district court abused its discretion by dismissing Hale's § 2255 motion without an evidentiary hearing.

II. CONCLUSION

This Court should vacate Hale's convictions and sentences and order a new trial, or, in the alternative, remand the case for an evidentiary hearing.

DATED: November 30, 2012.

Respectfully submitted,

s/Clifford J. Barnard

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PROOF OF SERVICE

I hereby certify that on this 30th day of November, 2012, I electronically filed the foregoing *Reply Brief of Petitioner-Appellant Matthew Hale* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address(es):

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