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
MOTION TO RECONSIDER AND
ALTER FINDINGS PURSUANT TO F.R.C.P. RULE 59

THE DEFENDANT-MOVANT, MATTHEW HALE, by and through his attorney, Clifford J. Barnard, hereby moves this Court, pursuant to F.R.C.P. Rule 59, to reconsider and alter its findings in its *Opinion and Order* (DE # 50) entered on July 22, 2010. As grounds for this motion, Mr. Hale states as follows:

I. Federal Rules of Civil Procedure Rule 59

A motion pursuant to F.R.C.P. Rule 59 is the proper procedure for asking the Court to correct errors in law and/or fact. *See McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir.1999) (*en banc*) (*per curiam*), *cert. denied*, 529 U.S. 1082 (2000) (in habeas corpus proceedings, as in other proceedings, a Rule 59(e) motion may be used to "'correct manifest errors of law or fact upon which the judgment is based'" (*quoting* 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2810.1 (2d ed. 1995)).

A motion pursuant to F.R.C.P. Rule 59 is the proper procedure for asking the Court to reconsider its denial of an evidentiary hearing. *See Browder v. Director*, 434 U.S. 257, 266 & n.10, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) (denial of an evidentiary hearing is a proper basis for

reconsideration).

II. Matters Needing and Deserving Resolution at an Evidentiary Hearing.

A. Legal Standard for Evidentiary Hearings

A court should hold an evidentiary hearing on a § 2255 motion "unless the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. "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) (emphasis added). "While [the petitioner] is correct that this court requires a district court to grant an evidentiary hearing if a § 2255 petitioner ***alleges*** facts that, if proven would entitle him to relief, the threshold determination that the petitioner has sufficiently alleged such facts requires the petitioner to submit a sworn affidavit showing what specific facts support the petitioner's assertions." *Galbraith v. United States*, 313 F.3d 1001, 1009 (7th Cir.2002) (emphasis added) (internal citations and quotation marks omitted). "[T]he verification requirement serves to ensure that a petitioner can provide *some evidence* beyond conclusory and speculative allegations, even if that evidence is his verified statement alone." *Kafo v. United States*, 467 F.3d 1063, 1068 (7th Cir.2006) (italics in original). *See also*, *Bruce v. United States*, *supra*, 256 F.3d 592, 598-99 (7th Cir.2001) (the district court abused its discretion in refusing to conduct an evidentiary hearing on a failure to investigate claim made under 28 U.S.C. § 2255, where the affidavits of trial counsel, defendant, and the prospective alibi witnesses presented questions of fact as to whether counsel adequately assessed the potential testimony of these witnesses).

In Mr. Hale's case, the "files and records" including numerous affidavits and declarations (including the *Declaration of Matthew Hale*) clearly show that Mr. Hale has made specific factual

allegations that, when assumed proven, state a claim on which relief could be granted. Therefore, the Court should have granted him an evidentiary hearing.

B. <u>The Court Erred by Repeatedly Presuming to Know What Was on the Mind of Defense Counsel</u>.

The Court erred by repeatedly presuming to know what was on the mind of defense counsel – whether their thoughts were guided by a reasonable strategy, an unreasonable strategy, or by ignorance – without holding an evidentiary hearing to determine through testimony what those thoughts and strategies or non-strategies were. Without an evidentiary hearing, one simply does not know why counsel performed, or failed to perform, many, if not most, of their actions. For example, why did counsel not interview prosecution witness Burnett (*Opinion and Order* at 33-34)? Why did counsel not call any witnesses on Mr. Hale's behalf? Was it really because they did not think it was necessary (*Opinion and Order* at 19) – and if so, what does that mean exactly – or did counsel shortchange Mr. Hale's defense in order to begin work on a "new big case" (*see Declaration of Matthew Hale* at para. 28)? Testimony at an evidentiary hearing is indeed necessary to determine the following:

(1) Whether it never crossed defense counsel's minds to interview Burnett, consequently failing to find out that he had indeed been coerced into giving false testimony damaging to Mr. Hale (present counsel had planned to produce Burnett at the evidentiary hearing via subpoena thereby hoping and intending to provide the Court with the present corroboration it desires).

(2) Whether counsel did not put any case on in Mr. Hale's behalf for reasons likewise having nothing to do with strategy but rather because they wanted to get the trial over with in order to begin work on the "new big case" and because they did not feel that

Mr. Hale's family had paid them enough money (*Declaration of Matthew Hale*, para. 3 at 7-9.)

(3) Whether counsel actually ***did*** believe that Evola was talking about only one address on December 5, 2002, thus upending the Court's entire copious reasoning in holding that counsel had made a strategic choice as to defenses. The record in fact indicates that counsel thought that Evola was talking about only one address (Judge Lefkow's) (*see* Vol. 8 at 89, lines 16-24) and Mr. Hale's allegation of this ignorance on the part of his counsel must be taken as proven and true unless and until an evidentiary hearing shows otherwise. (Whether the Court finds this "doubtful" (*Opinion and Order* at 16) or not simply demonstrates that an evidentiary hearing is needed.) Further, whatever counsel likewise actually believed concerning the best strategy (*Opinion and Order* at 7, note 3) is also a matter especially tailored for an evidentiary hearing.

(4) Whether counsel did ***not*** in fact secure Mr. Hale's acquiescence to his absence from individual voir dire, thus rebutting the Court's supposition that he did (*Opinion and Order* at 65-68). Indeed, counsel never did "report back" to Mr. Hale to garner his acquiescence.

(5) Whether counsel actually misrepresented to the Court Mr. Hale's wishes to testify as to only certain counts (*Opinion and Order* at 71).

(6) Whether counsel's personal contempt for Mr. Hale negatively affected their legal judgment concerning jury selection, choice of defense, investigation, and putting on a case.

(7) Whether counsel did discriminate against white jurors on purely racial grounds during jury selection (*Opinion and Order* at 61, note 37). The "record support" the Court desires can only come through testimony from counsel and Mr. Hale at the evidentiary hearing, this being especially applicable on this issue.

(8) Whether counsel's concern about opening up Mr. Hale to cross-examination (*Opinion and Order* at 73) was in fact greatly exaggerated, the concern stemming largely from counsel's personal contempt for Mr. Hale rather than based on reasoned legal judgment. The Court cannot presently know without an evidentiary hearing whether it was a "wise decision" to have Mr. Hale testify or not testify.

In sum, the Court found that any time counsel ***could*** have been guided by a reasonable strategy that counsel ***was*** guided by a reasonable strategy rather than taking Mr. Hale's allegations as true as the law requires for purposes of holding an evidentiary hearing. An evidentiary hearing was necessary to resolve these (and many other) issues and the Court should have conducted one. Mr. Hale requests that the Court reconsider this matter and alter its findings by ordering that an evidentiary hearing be held.

C. Mr. Hale's Contention That He Believed That Evola Was a Government Informant During the Events in Question Is Especially Deserving of an Evidentiary Hearing.

Mr. Hale's contention (*Opinion and Order* at 29-31), supported by substantial evidence, that he believed that Evola was an informant, even believing that Evola was specifically working for the F.B.I. at the time that he, Mr. Hale, allegedly solicited murder from him, is an issue especially deserving of the evidentiary hearing so that Mr. Hale can explain the detailed basis for this belief and so that trial counsel can explain their actions in not utilizing Mr. Hale's belief (corroborated by

various witnesses) to undercut what the government (erroneously) claimed was a murderous intent to his words to Evola. In essence, Mr. Hale has been consigned to prison for telling a (correctly) believed government informant that the informant could do what he wanted – ***and in fact it was Evola's believed status as an informant that prompted Mr. Hale to make this statement to him***. In other words, when Mr. Hale said "whatever you wanna do" and "good" on December 5, 2002, it was precisely ***because*** Mr. Hale ***knew that Evola was not going to do anything*** and this also explains why, as the Court noted (*Opinion and Order* at 10), he did not tell Evola on December 17, 2002 to ***not*** commit a crime against Judge Lefkow: the man was insincere and was not going to harm ***anybody*** (which of course was the reality of the situation).

Although present counsel for Mr. Hale could have, and possibly should have, submitted Mr. Hale's lengthy testimony on this point in Mr. Hale's declaration attached to his § 2255 brief, he did not do so because he believed he had submitted sufficient evidence and because he anticipated that the Court would indeed order an evidentiary hearing to take place at which Mr. Hale would testify to it live. Essentially, it was not deemed necessary to present every single fact in written form in support of Mr. Hale's § 2255 motion because counsel thought that sufficient facts were already adduced to make a hearing necessary. (Attached is the *Second Declaration of Matthew Hale* which notably also answers, among other salient matters, the Court's query – *Opinion and Order* at 31 – as to why Mr. Hale left Evola in charge of the "White Berets" when he indeed believed that Evola was an informant.)

It would be in the interest of justice for Mr. Hale to explain at an evidentiary hearing why his words which were otherwise considered egregious by the Court take on a different light in view of his mental attitude toward Evola at the time of the events in question. This testimony bears upon

Mr. Hale's intent more than any other evidence. Mr. Hale believes that the Court will find his attached second declaration persuasive in regards to the reconsideration of his case in the interests of justice.

III. The Court Employed the Wrong Legal Standard in Deciding Mr. Hale's 28 U.S.C. § 2255 Motion.

The Court improperly treated Mr. Hale's § 2255 motion as a mixture between a motion pursuant to 28 U.S.C. § 2255 (which it is) and a motion for judgment of acquittal (which it is not), holding that, anytime a reasonable ***jury*** could have found ***guilt***, Mr. Hale's counsel also *ipso facto* acted ***reasonably***. This is of course not the issue. Whether a reasonable jury could still have found Mr. Hale guilty ***without*** the alleged errors of counsel is not relevant as to whether the errors of the counsel were themselves ***unreasonable*** (and thus deficient) and undermined confidence in the outcome (and thus prejudicial). For example, concerning one alleged error, if counsel did not realize that Evola was talking about four addresses on December 5, 2002 (as Vol. 8 at 89, lines 16-24 clearly indicate), this was indeed an error having nothing to do with reason and, further, undermines confidence in the notion that Judge Lefkow was the particular "rat" whose murder ***Evola*** had in mind (of the passel of four rats) and hence that Mr. Hale could have solicited her murder.

Mr. Hale directs the Court to the following passages whereby the legal standard for a motion for judgment of acquittal (whether ***any*** jury could have found guilt beyond a reasonable doubt) improperly intrudes upon the Court's analysis:

> ***Viewing the evidence most favorably to the government***, however, a reasonable jury could, and did, find that Hale inveigled Evola.

Opinion and Order at 70, note 41 (emphasis added).

> [T]he court has already painstakingly explained why, ***when the evidence is viewed as a whole, the most plausible interpretation*** of the initial conversation between

> Hale and Evola is that Hale understood Evola to be referring to the "extermination" of Judge Lefkow.

Opinion and Order at 13 (emphasis added).

> Nowhere on the audio recordings or e-mail messages admitted into evidence does Hale tell Evola ***not*** to commit such an atrocious crime.

Opinion and Order at 10 (emphasis added).

> [N]othing ... persuades the court that the evidence should be ***viewed*** differently.

Opinion and Order at 13 (emphasis added).

> As has been the explained previously and again herein, while that might be a ***reasonable view*** of the evidence, it is ***not the only reasonable view*** and is one the jury rejected.

Opinion and Order at 14 (emphasis added).

> A ***reasonable view*** of this conversation is that Hale encouraged Evola to continue with the plan by reminding him that whatever he was going to do was his "own business" while engaging in the "plausible deniability" tactic ...

Opinion and Order at 14, note 8 (emphasis added).

> [A] ***completely plausible view of the evidence*** is that Hale understood the discussion to concern Judge Lefkow from the start.

Opinion and Order at 15 (emphasis added).

> The argument ignores the fact that cases can be proved entirely by circumstantial evidence, and ... there was ample circumstantial evidence to allow a ***reasonable jury*** to conclude that Hale and Evola were referring to Judge Lefkow.

Opinion and Order at 22 (emphasis added).

> Either way, the "rat" to be exterminated ***could*** have meant Judge Lefkow.

Opinion and Order at 26 (emphasis added).

> The 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."

Opinion and Order at 10 (emphasis added).

These statements evince that the Court applied the wrong legal standard to Mr. Hale's § 2255 motion. The issue is not what a "reasonable view" of the evidence might be nor what a reasonable jury ***could*** have found "[v]iewing the evidence most favorable to the government" but rather whether ***counsel*** were unreasonable in failing to challenge key elements of the government's case. (For example, counsel clearly did not challenge the notion that Evola was referring to Judge Lefkow as the "Jew rat" on December 5, 2002.) Simply put, the government is not supposed to receive the benefit of any evidentiary inferences against Mr. Hale pursuant to the resolution of a § 2255 motion. By allowing the standard for a motion for judgment of acquittal to repeatedly seep into its reasoning, the Court subjected Mr. Hale to a much higher burden than the law for ineffective assistance provides, namely forcing him to prove that ***no*** jury would have seen matters other than as he claims, which is an impossible standard on its face. Reconsideration is thus merited.

IV. Mr. Hale Attempts to Clarify His Argument That Was Unappreciated by the Court.

The Court states with regard to Mr. Hale's argument that counsel would not have been forced to concede that Mr. Hale approved or solicited Amend's murder, "[w]hatever the nuances of this argument may be, the Court fails to appreciate them." (*Opinion and Order* at 8). Mr. Hale takes this as an invitation to clarify. The clarification is thus: the December 17, 2002 conversation was the only conversation in which Evola communicated an intention to murder Judge Lefkow and, standing alone (without the December 5, 2002 conversation added to it), Mr. Hale could not have reasonably been convicted of soliciting Evola to murder her. A reasonable lawyer, in other words, would have tried to discount the December 5, 2002 conversation entirely and establish that what was said on December 5th was irrelevant to the charges.

The fact that Evola, starting on December 9, 2002, switched ***his*** target to a "femala" rat (Judge Lefkow) does not mean that Mr. Hale ever had a target at all. He could reject Evola's new plan on December 17, 2002 without ever having solicited the old one. It is not an either/or proposition – that he either solicited Amend's murder or that he solicited Judge Lefkow's murder. There is another option: Mr. Hale solicited nobody's murder and, when he learned on December 9, 2002 that Evola had (fictional) intent to murder Judge Lefkow, he refused to join Evola's plans in the conversation on December 17, 2002. In other words, since Mr. Hale did not know of any plan against Judge Lefkow until December 9, 2002, he could not have solicited her murder. Mr. Hale has never in any form admitted with his arguments a solicitation to murder anybody. Rather, he has merely shown why and how the December 5, 2002 conversation should have been discounted as it was the very gravamen of the government's claim that Mr. Hale solicited Evola to murder Judge Lefkow. Without it, the bottom would have fallen out of the government's case. There would have been nothing contradictory about attacking both the intent element and the alleged target element of the charges.

The issue is not, and never has been, Mr. Hale supposedly soliciting Amend's murder but rather whether the jury should have been made aware that Mr. Hale did not know about Evola having any purported designs on Judge Lefkow's life until his receipt of the December 9, 2002 email. It is inconceivable that the jury would not have found this to be an important fact in its deliberations. To be sure, although the Court may not be persuaded that this indeed was a fact, the jury might well have been.

Mr. Hale's version of events (which the jury never heard) is actually more strongly supported by the evidence than the Court (*Opinion and Order* at 9-10) realizes: since there was strong

evidence adduced at trial that Mr. Hale had had much conflict with the Kirkland & Ellis lawyers, evidence and argument that Mr. Hale had thought that the "Jew rat" was one of those lawyers would likely have been more persuasive to the jury than the Court has fathomed. Evidence at trial to this effect follows.

In January 2002, ***Judge Lefkow granted summary judgment in Mr. Hale's Church's favor***. (Vol. 4 at 59.) The Kirkland & Ellis lawyers decided to appeal. Mr. Hale was upset about this and tried to discourage them from doing so. (Vo1. 4 at 126-132.) He called them "scoundrels," labeled Amend a "definite Jew," and Steadman a "probable Jew." (Vol. 4 at 121, 128.) He had impugned the motives of the lawyers consistently since the filing of the lawsuit, calling the latter "malicious" and "frivolous." (Vol. 4 at 128.) Amend claimed that Mr. Hale urged his followers to call and harass the three lawyers throughout the litigation. (Vol. 4 at 118-121, 129.) At Mr. Hale's request, members of the Church made harassing telephone calls and sent harassing emails to Amend and the other lawyers. The lawyers in turn asked Judge Lefkow to award attorney fees, partially on this basis (Vol. 4 at 90-93) but ***she declined to do so*** in March 2003 (Vol. 4 at 107).

Judge Lefkow's granting of summary judgment in the Church's favor was reversed by the Seventh Circuit in July 2002, ***ordering Judge Lefkow*** to order the Church to quit using the name "Church of the Creator." (Vol. 4 at 61, 137.) Following this, the Church and Mr. Hale accused the lawyers of fraud in bringing the case and moved to disqualify them from continuing to represent TE-TA-MA. (Vol. 4 at 83-85.)

Mr. Hale expressed his hope that Judge Lefkow would hear the motion they had pending to dismiss the trademark case and award judgment in the Church's favor based on the alleged fraud the other side had committed in getting a trademark on what they felt was their rightful name. (7th

para., Gov't Ex. 11/29/02 email.)

Kirkland & Ellis lawyer James Amend filed a motion seeking to hold the Church and Mr. Hale in contempt through a rule to show cause (Vol. 4 at 73) alleging that the Church had failed to comply with Judge Lefkow's order (Vol. 4 at 67).

On December 12, 2002, Mr. Hale wrote Judge Lefkow reporting the fraud of Kirkland & Ellis lawyer Kevin O'Shea, imploring her to hear the Church's pending motion for judgment in the Church's favor, referring to her in the sixth paragraph as "Your Honor" and "thank[ing] (her) for (her) time and consideration." (Gov't Ex.11; Vo1.4 at 142-146.)

It would be a stretch indeed – in light of all of the evidence including testimony that "Jew rat" was Mr. Hale's personal nickname for Amend (*see Brief in Support of § 2255 Motion*, DE # 18 at 18) and testimony that Mr. Hale did not think that Judge Lefkow was Jewish (*see e.g.*, *Affidavit of Kathleen Robertazzo*, DE # 8-4 at 37) – that the jury would have assumed that ***Judge Lefkow*** was the "Jew rat" in the mind of Mr. Hale rather than one of the lawyers.

Incidentally, at no time has Mr. Hale alleged ***deficient performance*** of his counsel on the basis that they failed to pursue his "best" defense as the Court repeatedly chastised and put in quotation marks (*see Opinion and Order* at 4-5, 9, 26 and 37). Rather, Mr. Hale has alleged error on the basis that, in sum, counsel used an ***in***culpatory defense – for non-strategic reasons – rather than the ***ex***culpatory one that was available.

V. The Court of Appeals Could Not Have Decided Mr. Hale's Absence-from-Voir-Dire Issue Because the *Involuntariness* of his Absence Was Not Clear from the Record.

The ***involuntariness*** of Mr. Hale's absence from the individualized voir dire was not clear from the trial record. Because it was not clear that Mr. Hale's absence from the voir dire was involuntary, and because the Court of Appeals obviously does not take testimony to resolve such

issues of fact, the Court of Appeals could not have decided Mr. Hale's absence-from-voir-dire issue. Since the Court of Appeals could not have decided this issue, Mr. Hale was foreclosed from bringing it on direct appeal. Therefore, there was no waiver when he did not raise this issue in his direct appeal.

VI. The Court Overlooked an Important Transcript in its Decision, Likewise Meriting Reconsideration.

The Court erred in overlooking the transcript of the recorded conversation of Mr. Hale in which he said that he wished that Smith had shot him, Mr. Hale, in the leg instead (*Opinion and Order* at 32 and Note 21). This important exhibit is found in the Addendum Doc. 8-3 at 69 as assigned by the CM/ECF system. Because Evola was indeed the one recording the conversation, he could not have denied that the conversation took place as the Court suggested he might do. (The recording was part of the government's discovery in the case.)

Evidence that Mr. Hale wished that Ben Smith had shot him, Hale, in the leg rather than engaging in his shooting spree directly and strongly contradicts the notion that Mr. Hale ever wanted his followers to commit violence. In other words, the jury was denied direct evidence that Mr. Hale would rather that Smith had done violence to ***him*** rather than his minority victims and this bears directly on the very core of the government's case that Mr. Hale was trying to have another presumed follower, Evola, commit violence against Judge Lefkow. Such evidence would give any reasonable jury – or any other reasonable jurist – pause and, standing alone, merits reconsideration of Mr. Hale's case.

The government made great hay out of the fact that Mr. Hale had been caught laughing on tape about Smith's spree. Cross-examination of Evola concerning the above recording – and the testimony of numerous witnesses never called – would have painted a very different picture. The

reality is that, just as many people laughed when Vice President Cheney shot his friend – making jokes about it – this does not mean that they were glad, that they had wanted it to happen, or that they would want it to happen again. The same applies to Mr. Hale, but in fact more strongly: he laughed about Smith's actions but wished that Smith had done violence to him instead, and it cannot reasonably be said that a man who would rather have been the victim of Smith's violence would want someone else to follow suit.

VII. Conclusion

For the above-stated reasons, this Court should reconsider its *Opinion and Order* (DE # 50) and alter its findings by ordering that an evidentiary hearing be conducted prior to the rendering of a decision on Mr. Hale's § 2255 motion.

DATED this 19th day of August, 2010.

Respectfully submitted,

s/Clifford J. Barnard

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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
MOTION TO RECONSIDER AND
ALTER FINDINGS PURSUANT TO F.R.C.P. RULE 59

and

SECOND DECLARATION OF MATTHEW HALE

were served on this 19th day of August, 2010, 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 19th day of August, 2010.

Respectfully submitted,

s/Clifford J. Barnard

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