

**In The United States District Court  
For The District Of Colorado**

Matthew Hale,

Applicant,

v.

Civil Action No.

David Berkebile, Warden,

Respondent.

**Brief in Support of Application for Writ of Habeas**

**Corpus Pursuant to 28 U.S.C. sec. 2241**

**Statement of the Case**

After a jury trial in which defense counsel called no witnesses, Matthew Hale was convicted on April 26, 2004 of having solicited a government informant to murder U.S. District Court Judge Joan Lefkow and having obstructed justice by virtue of that alleged solicitation, violations of 18 U.S.C. sec. 373 and 1503 respectively. However, there is no evidence that any such solicitation occurred. On the contrary, Hale is clearly an innocent man who in fact turned down involvement in the government informant's own proposed and propounded murder plot. Nevertheless, regardless of his clear innocence both factually and legally, he was sentenced to a whopping 40 years under the terrorism guideline, 3A1.4, and his convictions and sentence were affirmed by the Seventh Circuit in 2006. *See United States v. Hale*, 448 F.3d 971 (7th Cir. 2006). The Supreme Court of the United States subsequently denied certiorari. *Hale v. United States*, 549 U.S. 1158 (2007).

Hale then brought a motion pursuant to 28 U.S.C. sec. 2255 but that motion was denied without an evidentiary hearing in 2010. *Hale v. United States*, 2010 U.S. Dist. LEXIS 73604 (N.D. Ill. July 22, 2010); reconsideration denied, 2011 U.S. Dist. LEXIS

124657 (N.D. Ill. Oct. 27, 2011). Hale appealed to the 7th Circuit but the judgment was affirmed. *Hale v. United States*, 710 F. 3d 711 (7th Cir. 2013). The Supreme subsequently denied certiorari. *Hale v. United States*, ——— U.S. ——— (2013).

***Who is more deserving of his freedom than the innocent man?*** That is the core question presented by this extraordinary case. In this brief, Hale demonstrates both his innocence on the basis of the government's own case as well as the fact that this court has the power to free him pursuant to 28 U.S.C. sec. 2241, that this court has the inherent, equitable, and statutory power to remedy the fundamentally unjust incarceration that he has thus far suffered and hence fulfill the primary purpose for which the remedy of habeas corpus is intended: the freeing of the innocent man. Thus, since Hale is innocent as a matter of law and fact and this court has the power to free such a person, this court should exercise that power rather than permit a gross miscarriage of justice to continue. If Hale is innocent, as he will show, should he remain in prison for absolutely nothing or should he be freed? Who though is more deserving of his freedom than the innocent man?

### **Statement Of Jurisdiction**

Hale invokes the savings clause 28 U.S.C. sec. 2255(e) to bring this application for writ of habeas corpus pursuant to 28 U.S.C. sec. 2241. The remedy by motion under section 2255 was "inadequate or ineffective to test the legality of his detention" on numerous grounds as stated by his claims in his application as well as argued in this brief. As this is a genuine proceeding under 28 U.S.C. sec. 2241, it cannot be legally construed as a successive motion pursuant to 28 U.S.C. sec. 2255. Hence it cannot be transferred to the district of Hale's conviction and nor can it be dismissed under section 2255's prohibition on successive section 2255 motions. *See Collins v. Holinka*, 510 F. 3d 666, 667 (7th Cir. 2007). "[J]udges must respect the plaintiff's choice of statute to invoke...and give the action the treatment appropriate under that law." "Section 2241 by its terms covers any claim for release by a person who contends that his custody violates the Constitution or laws of the United States." *Id.* The validity of a prisoner's convictions is thus properly challenged under section 2241 and as Hale is a prisoner within the district of Colorado, this court has (sole) jurisdiction over this case.

### Statement of Facts

Hale was a well-known and controversial ideologue who routinely gave speeches, gave interviews to the news media, and held public meetings and street demonstrations around the country for his particular cause. On December 4, 2002, Hale asked government informant Tony Evola to obtain the home addresses of Judge Lefkow and lawyers James Amend, Paul Steadman, and Kevin O'Shea so as to post on the internet and for a possible street demonstration outside their respective homes in protest of an ongoing trademark lawsuit against his church.

The sum total of evidence that Hale supposedly solicited murder and obstructed justice is the following excerpt from a conversation between Evola and Hale the next day:

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

Hale: Right.

Evola: ...you wanting his address and the other rats' [addresses]. Ah...

Hale: That information [addresses] yes, for educational purposes and for whatever reason you wish it to be.

Evola: Are we gonna...I'm workin' on it. I, I got a way of getting it. Ah, when we get it [the information/addresses], we gonna exterminate the rat?

Hale: Well, whatever you wanna do...

Evola: Jew rat?

Hale: ...basically, it's, you know? Ah, my position's always been that I, you know, *I'm gonna fight within the law* and but ah, that information's been pro-, provided. If you wish to do anything yourself, you can, you know?

Evola: Okay.

Hale: So that makes it clear.

Evola: Consider it done.

Hale: Good.

(emphasis added)

## Argument

1. Since Hale is being imprisoned for conduct that the law does not make criminal, and since innocence is the core concern of the remedy of habeas corpus pursuant to 28 U.S.C. sec. 2241, this court has the power and duty to release him and thus end the violation of his constitutional rights. (Claim One)

A. Hale is being imprisoned for conduct that the law does not make criminal, violating his Fifth Amendment right to due process of law and his Eighth Amendment right to be free from cruel and unusual punishment.

The simple, straightforward problem presented by the above excerpt of the conversation between Hale and government informant Evola is that nothing Hale says constitutes a murder solicitation or obstruction in violation of 18 U.S.C. sections 373 and 1503. "Allowing" a government informant to commit murder, or telling that informant that he can do what he wants, or failing to stop the informant from committing the informant's fictitiously-desired crime, or failing to tell him *not* to commit the crime, as occurred in this case, does not violate 18 U.S.C. sec. 373 nor 18 U.S.C. sec. 1503. Thus Hale is being imprisoned for conduct that the law does not make criminal, violating his Fifth Amendment due process rights and his Eighth Amendment right to be free from cruel and unusual punishment. The fact that Hale left it up to Evola to decide what he, Evola, did is simply no violation of the solicitation (or obstruction) statute as a matter of law. Nor is it against the law to say "good" when someone else says that he is going to commit a crime and nor is it even a crime to *want* someone to commit a crime—without a request, demand, or order that someone commit a crime of violence, there is no violation of the solicitation statute. *Letting* someone do what that other person claims to want to do, as happened here, is not against the law regardless of any alleged intent.

Hale's continued imprisonment for conduct which the law does not make criminal presents "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Hill v. United States*, 368 U.S. 424, 428 (1968), quoting *Bowen v. Johnston*, 306 U.S. 19, 27 (1939). It is "a fundamental defect which inherently results in a complete miscarriage of justice." *Id.* "[A] conviction for conduct that the law does not make criminal would result in a complete miscarriage of justice." *United States v. Holland*, 116 F. 3d 1353, 1356 (10th Cir. 1997). "[T]he Due Process Clause of the Fifth Amendment does not permit federal convictions for conduct that does not violate a federal statute." *Hohn v. United States*, 99 F.3d 892, 894 (8th Cir. 1996) (McMillian, J.,

dissenting). "[A] conviction for engaging in conduct that the law does not make criminal is a denial of due process." *Buggs v. United States*, 153 F. 3d 439, 444 (7th Cir. 1997). It also violates the Eighth Amendment as a person "may not be convicted under the eighth amendment" of "innocent conduct." *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992). "Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California*, 370 U.S. 660, 667 (1962). It "may violate the Eighth Amendment to imprison someone who is actually innocent." *Herrera v. Collins*, 506 U.S. 390, 432 n.2 (1993) (Blackmun, J., dissenting). Thus, "before a man can be punished [without violating the Eighth Amendment] his case must be plainly and unmistakably within the statute." *Todd v. United States*, 158 U.S. 278, 282 (1895).

Such is not the case here: Hale's words quite simply do not fall within the statute. The solicitation statute criminalizes an "endeavor to persuade" another to commit a crime of violence, not allowing or merely tolerating someone to do so. There is no such thing as a solicitation by omission and even if Hale had responded "yes" when Evola asked, "we gonna exterminate the rat?," this would, at best, be an *agreement* to commit a crime, a *conspiracy*, not a solicitation, and the law forbids convictions for conspiring with government agents. *Evola* was the one who proposed that the (unknown) "Jew rat" be murdered and Hale was free, as a matter of law, to tell Evola that he could do whatever he, Evola, wanted to do. Furthermore, Hale specifically said that he himself was going to fight within the law. Thus, at best, Hale could possibly have been found liable under a negligence theory in a civil lawsuit, had Judge Lefkow actually been harmed, but that is a far cry from being a solicitation to commit murder under the criminal statute here. It was *Evola* who proposed the commission of a crime and once he did so, there cannot possibly be a solicitation on the part of Hale who was free to respond to Evola's proposition any way he wished.

Nor did the solicitation statute provide Hale fair warning of the legal consequences that his words would have. *See United States v. Farris*, 448 F. 3d 965, 968 (7th Cir. 2006). This is because merely *allowing* another person to commit a crime does not violate the statute by its clear terms. This is the case even if Hale had *hoped* that the informant would commit a crime because merely "hoping" that someone else would

commit a crime does not violate the statute either. "The touchstone [of due process] is whether the statute, either standing alone or construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997). Hale could not have reasonably known that he risked imprisonment by telling a man that he can do what he wants and nor does the statute make that conduct criminal. An actual "endeavor to persuade" is required that is not present here.

Thus Hale is being imprisoned for conduct that the law does not make criminal, violating his Fifth Amendment right to due process of law and his Eighth Amendment right to be free from cruel and unusual punishment. He said nothing for which he could legally be punished under the statutes in question.

**B. Since Hale is factually and verifiably innocent as a matter of law of having solicited Judge Lefkow's murder or obstructing her, this court has the power to release him via 28 U.S.C sec. 2241.**

"Although admittedly habeas corpus under section 2241 is now reserved for rare cases," *In re Dorsainvil*, 119 F. 3d 245, 250 (3rd Cir. 1997), Hale's predicament presents exactly such a case to this court since the imprisonment of an innocent person is the "exceptional case" in the criminal law. *San Roman v. Vaughn*, 442 Fed. Appx. 365, 368 (10th Cir. 2011). In interpreting the law of collateral review, courts should "accommodate [ ] both the systemic interests in finality...and conservation of judicial resources, and *the overriding individual interest in doing justice in the extraordinary case.*" *Schlup v. Delo*, 513 U.S. 298, 322 (1995) (emphasis added). Thus, since Hale is innocent, it is not justice to allow him to remain imprisoned, quite simply. Therefore this court has the power to release him in order to do justice in the extraordinary case of an innocent man. As the Supreme Court has further stated, it is "the clear intent of Congress that successive federal habeas corpus review should...be available when the ends of justice so require." *Kuhlman v. Wilson*, 477 U.S. 436, 454 (1986). The ends of justice inquiry "requires federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a 'colorable claim of factual innocence.' The miscarriage of justice exception [to procedural default] serves as 'an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty,' guaranteeing

that the ends of justice will be served in full." *McCleskey v. Zant*, 499 U.S. 467, 495 (1991), quoting *Stone v. Powell*, 428 U.S. 465, 492-493 (1976).

Thus, regardless of whether 28 U.S.C. sec. 2255 is ***normally*** the exclusive collateral remedy for a federal prisoner, as is indeed the case, this court may nevertheless review Hale's claim on the merits since he presents an extraordinary, colorable claim of innocence for which the ends of justice would be met by such a review. His claims may be heard on the merits, regardless of any possible default, since the failure to consider the claims would result in a fundamental miscarriage of justice. *Stanko v. Davis*, 617 F. 3d 1262, 1271 (10th Cir. 2010). Such a fundamental miscarriage of justice exists here since Hale makes a colorable claim of factual innocence. *Parks v. Reynolds*, 958 F. 2d 989, 995 (10th Cir. 1992). Since the freeing of an innocent man serves the ends of justice, Hale's claims may and should be heard.

Innocence has been explicitly recognized as a reason---*the* reason, in fact---for allowing section 2241 relief. "[R]ecourse to the section 2241 remedy will be unavailing ***unless accompanied by a clear showing of actual innocence.***" *United States v. Apodaca*, 90 Fed. Appx. 300, 304 note 10 (10th Cir. 2004). "But all prisoner remedies are not foreclosed because of limitations on section 2255 relief. A petition for a writ of habeas corpus under section 2241 demonstrating actual innocence may be an available remedy." *Id* at 304. "Section 2241 habeas corpus relief is available for a federal prisoner asserting a claim of actual innocence, not mere legal insufficiency." *Dillon v. Grandolsky*, 2012 U.S. Dist. LEXIS 106802 (July 31, 2012) (D. Mass. 2012). A prisoner "may proceed under section 2255(e) exception, or 'savings clause,' which requires him to show that section 2255 is inadequate or ineffective to test the legality of his detention. [He] may avail himself of the exception only by presenting a credible claim of actual innocence...". *Brown v. Hogsten*, 2012 U.S. App. LEXIS 22305 (6th Cir. 2012). "[A] prisoner may invoke section 2255's savings clause and seek relief under section 2241 if he can establish that he is actually innocent of the crime for which he was convicted." *Griffin v. Kessler*, 2011 U.S. Dist. LEXIS 75273 (W.D. Okla. 2011), citing *Prevatte v. Gunja*, 167 Fed. Appx. 39, 43 (10th Cir. 2006) and *Winfield v. Ray*, 74 Fed. Appx. 850, 851 and note 3 (10th Cir. 2003). "To show that section 2255 is inadequate or ineffective, many circuits require the petitioner to assert a claim of actual innocence—that is, a claim

that the petitioner is being detained for conduct that is not criminal." *Owens v. Jett*, 2011 U.S. Dist. LEXIS 118699 (D. Minn.2011), footnote 1(citing cases). "The 'core idea' of the actual innocence factor 'is that the petitioner may have been imprisoned for conduct that was not prohibited by law.' " *Potts v. Wilner*, 2009 U.S. Dist. LEXIS 102182 (D.Colo. 2009), citing *Reyes-Requena v. United States*, 243 F. 3d 893, 908 (5th Cir. 2001). A prisoner may bring a claim under section 2241 if he cites "extraordinary circumstances which reflect that he may be actually innocent of his crimes." *Duke v. Thoms*, 8 Fed. Appx. 498, 500 (6th Cir. 2001). When a fundamental defect exists in a criminal conviction, such as innocence, it may be corrected under section 2241. *Cooper v. United States*, 199 F. 3d 898, 901 (7th Cir. 1999).

Thus this court has the power to grant Hale the writ of habeas corpus on innocence grounds. It furthermore has the power to grant the writ by virtue of the plain language of 28 U.S.C. sec. 2241 itself: "writs of habeas corpus may be granted by...district courts...within their respective jurisdictions" to those prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States." Section 2241(a) and (c)(3). As shown above, imprisonment for conduct that the law does not make criminal is indeed a violation of the Constitution of the United States and the statute itself thus gives this court the power to release Hale.

**C. Since Hale is factually and legally innocent as a matter of law of having solicited Judge Lefkow's murder or obstructing her, serious constitutional concerns would arise were this court not to hear his claim of innocence on the merits.**

Hale clearly has a valid claim of actual, verifiable innocence since the statute does not criminalize anything he said to Evola, as discussed earlier. Therefore the question becomes: should Hale remain imprisoned all the same, regardless of his innocence, because he did not bring this claim of innocence via his section 2255? In other words, does the mere fact that Hale did not bring this claim via his section 2255 motion require that his claim not be heard on the merits now? Below, Hale argues that neither the case law, nor the purpose of the remedy of habeas corpus, nor the Constitution of the United States, would tolerate such an unjust result. Rather, the nature of Hale's claim——actual innocence as a matter of law of the crimes for which he is being imprisoned for up to 40 years of his life——requires that his claim be heard and resolved on its merits. This is, in



part, because the continued imprisonment of an actually innocent person is itself a violation of the Fifth and Eighth Amendments of the Constitution and would defeat the core purpose for which the remedy of habeas corpus exists.

Hale is unable to bring a successive section 2255 motion because he cannot meet the requirements of 2255(h): that he either has newly discovered evidence of his innocence or that a new rule of constitutional law applies to his case that was previously unavailable. Thus, since his direct appeal and section 2255 proceedings are over, section 2241 is the only available remedy he has left to secure his release. This is a remedy acknowledged to exist by the section 2255(e) "savings clause" and numerous cases have acknowledged that a claim of innocence may be heard pursuant to that savings clause, as indicated earlier. While it is true that most cases of actual innocence brought pursuant to section 2241 involve that of a new statutory interpretation made by a court that regards the prisoner's acts to be *no longer* criminal, this is a distinction without a difference in regards to Hale's case because he is just as innocent, indeed more so, and the continued imprisonment of a verifiably innocent man, for whatever reason, is constitutionally intolerable. In other words, the fact that Hale has *always* been innocent as a matter of law does not make his continued imprisonment any more just or constitutionally tolerable than that of the person whose innocence has only now been acknowledged as a result of a new statutory interpretation handed down by the Supreme Court or otherwise. Rather, his imprisonment was wrongful to begin with. "[A] constitutional claim that may establish innocence is clearly the most compelling case for habeas review...". *Murray v. Carrier*, 477 U.S. 478, 501 note 8 (Stevens, J., concurring). A new statutory interpretation that establishes innocence is not more compelling than innocence that had always existed under the statutes.

That said, in not bringing his claim of innocence via his section 2255 motion, Hale did rely on advice from his counsel and language in *Bateman v. United States*, 875 F. 2d 1304, 1306-1307 (7th Cir. 1989) stating that "the question of guilt or innocence is not cognizable on a Section 2255 motion."

The Seventh Circuit in *Bateman* also cites *United States v. Angelos*, 763 F. 2d 859, 861 (7th Cir. 1984), which states that the conviction of a prisoner will be set aside if "under no *possible* view of his conduct was he guilty of a federal crime." (emphasis added).

Thus, since according to the Seventh Circuit, "the question of guilt or innocence is not cognizable on a section 2255 motion," and since the Seventh Circuit had already denied Hale's challenge to the sufficiency of the evidence on direct appeal thus, in effect declaring his guilt "possible," it is fair to say that section 2255 was "inadequate or ineffective to test the legality of his detention" through his making his innocence claim. Adverse circuit precedent impeded his claim and thus Hale was denied an effective opportunity to make it. Relief under section 2241 is justified when "the unavailability of section 2255 effectively prevented [the defendants] from obtaining review of what may have been a fundamental flaw in their convictions--the possibility that the convictions hinged on conduct Congress never intended to criminalize. "*Kramer v. Olson*, 347 F. 3d 214, 218 (7th Cir. 2003). A claim may be heard under section 2241 when "an individual is incarcerated for conduct that is not criminal, but through no fault of his own, has no source of redress." *In re Jones*, 226 F. 3d 328, 333 note 3 (4th Cir. 2008). "A petition meets the escape hatch criteria [for bringing a claim via section 2241] where the petitioner (1) makes a claim of actual innocence, and (2) has not had an unobstructed shot at presenting that claim." *Alaimalo v. United States*, 645 F. 3d 1042, 1047 (9th Cir. 2010). "A petitioner is actually innocent when he was convicted for conduct not prohibited by law." *Id.* "Other circuits have [indeed] recognized that a federal prisoner who is actually innocent of the crime of conviction, but who never has had an unobstructed procedural shot at presenting a claim of innocence, may resort to section 2241 if the possibility of relief under section 2255 is foreclosed." *Davis v. Ledezma*, 393 Fed. Appx. 564, 565-566 (10th Cir.2010). Thus, since Seventh Circuit case law effectively barred Hale from making his constitutional claim of innocence by virtue of it being "not cognizable on a section 2255 motion," section 2255 was "inadequate or ineffective to test the legality of his detention." Thus Hale, under the savings clause of section 2255, must be allowed to bring his constitutional claim of innocence now so that claim may be heard. That said, even if it were true that Hale is in error about his section 2255 motion having been "inadequate or ineffective to test the legality of his detention" on the grounds of his innocence when he filed it in 2008, his claim that he is being imprisoned for conduct that the law does not make criminal should still be heard on the merits because serious constitutional concerns would arise were it not.

The Supreme Court has always recognized that there must be exceptions to the rules of unreviewability in order to prevent violations of fundamental fairness. As stated recently by the Eleventh Circuit in *Gilbert v. United States*, 609 F. 3d 1159, 1167-1168 (11th Cir. 2010):

"The animating principle underlying the writ of habeas corpus is fundamental fairness. *Engle v. Issac*, 456 U.S. 107, 126...(1982). Even as substantial roadblocks to collateral review of procedurally barred claims have been erected, the Supreme Court has consistently recognized that exceptions to these rules of unreviewability must exist to prevent violations of fundamental fairness. *Id.* at 135. The principle of finality 'must yield to the imperative of correcting a fundamentally unjust incarceration.' *Id.* Gilbert's sentence enhancement for a nonexistent offense was fundamentally defective and his incarceration for that enhancement is a miscarriage of justice. He is entitled to relief under section 2241."

If a sentencing *enhancement* for a nonexistent offense is a miscarriage of justice justifying the review of a procedurally barred claim, innocence of the charges altogether can only be more so.

[H]abeas corpus has traditionally been regarded as governed by equitable principles. The Court uniformly has been guided by the proposition that the writ should be available to afford relief to those persons whom society has grievously wronged in light of modern concepts of justice." *Kuhlman v. Wilson*, 477 U.S. 436, 447 (1986) [internal citations and internal quotations omitted]. If a person is consigned to 40 years in prison for conduct that is not against the law, he has clearly been grievously wronged and the law of habeas corpus should be interpreted as broadly as possible so as to enable the innocent man to obtain his freedom. "[A] claim of actual innocence [must] have a mechanism for review, including under section 2241 if section 2255 is unavailable." *Goldman v. Winn*, 565 F. Supp. 2d 200, 203-204 (D. Mass 2008). "[C]laims of 'actual innocence' deserve special protection." *Montenegro v. United States*, 248 F. 3d 585, 595 (7th Cir. 2001). "[W]hile recognizing that successive petitions are generally precluded from review," the Supreme Court itself has clearly stated that "the miscarriage of justice exception" to defaulted claims "would allow successive claims to be heard" in the "extraordinary case" where the petitioner is innocent. *Schlup v. Delo*, 513 U.S. 298, 320-322 (1995). Thus, Hale's valid claim of innocence *itself* requires that his claim be heard on the merits pursuant to section 2241 regardless of whether his section 2255 proceeding

was inadequate or ineffective in the view of this court. And to the extent that it could be found that section 2255 indeed bars Hale's innocence claim, he asserts that section 2255 is unconstitutional. This is because the keeping of a verifiably innocent man in prison is itself a violation of the Fifth and Eighth Amendments to the Constitution of the United States that overrides any statutory authority that would allow him to remain imprisoned. If an innocent person is denied his freedom because of a statutory prohibition, he is denied the process that he is due thus violating the Fifth Amendment. If he continues to be imprisoned for conduct that is not criminal, he suffers cruel and unusual punishment thus violating the Eighth Amendment; it is cruel because he is imprisoned for conduct he had a legal right to partake in and it is unusual because the imprisonment of an innocent man is the "exceptional case" in the criminal law. *See San Roman v. Vaughn*, 442 Fed. Appx. at 368. Since the continued imprisonment of a verifiably innocent man constitutes cruel and unusual punishment, a procedural rule that *requires* such continued imprisonment must *also* constitute cruel and unusual punishment in violation of the Eighth Amendment. Habeas corpus must always be available for the prisoner who presents a substantial claim of actual, factual, verifiable innocence. Constitutional guarantees cannot be superseded (or suspended) by a procedural rule or statute. If Hale cannot be constitutionally imprisoned for conduct that does not violate the law, a statute, procedural rule, or interpretation providing for that must also violate the Constitution. "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). To allow the continued imprisonment of a verifiably innocent man would be to impair the writ in its most important function.

Section 2241 review is available in that "set of cases in which the petitioner cannot, for whatever reason, utilize section 2255, and in which the failure to allow for collateral review **would raise serious constitutional questions**." *Triestman v. United States*, 124 F. 3d 361, 377 (2nd Cir. 1997) (emphasis added). "[W]e encourage the district courts to continue to find that habeas corpus [pursuant to section 2241] may be sought whenever situations arise in which a petitioner's inability to obtain collateral relief would raise serious questions as to section 2255's constitutionality." *Id.* Such questions would be raised here for the reasons stated above. In sum, a verifiably innocent man's

imprisonment is itself unconstitutional and a statute that requires that unconstitutional imprisonment to continue must also be unconstitutional. At the very least, a serious question as to its constitutionality would be raised by the foreclosing of relief for the verifiably innocent man. As *Triestman* states, "we find that serious Eighth Amendment and due process questions would arise with respect to the AEDPA if we were to conclude that, by amending section 2255 [to preclude a claim of innocence], Congress had denied [the prisoner] the right to collateral review in this case." *Id* at 378-379. There is a "distinct possibility that the continued incarceration of an innocent person violates the Eighth Amendment." *Id* at 379. "We also find an open and significant due process question. The Supreme Court has stated that a procedural limitation 'is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Medina v. California*, 505 U.S. 437, 445...(1992)...It is certainly arguable, therefore, that the continued imprisonment of an actually innocent person would violate just such a fundamental principle." *Id* at 379. This is furthermore true in the case of the innocent man who *could* have, but didn't, bring his claim of innocence earlier as at least one court has held. "The issue before this Court is...whether the federal habeas doors must, in effect, remain perpetually open to such a claim, at least until the claim has been adjudicated on the merits. Although *Triestman* did not address this issue, this Court believes...that procedural bars to hearing actual innocence claims—***even if there was some prior opportunity***...-----raises serious constitutional concerns." *Alexander v. Keene*, 991 F.Supp. 329, 335 (S.D.N.Y. 1998) (emphasis added) (Judge Sonya Sotomayor, presiding). Hale asks that this court adopt the reasoning of *Alexander v. Keene* in its entirety. See 991 F. Supp. 329, 334-338. "Section 2241 review is available when not doing so would pose a serious constitutional question and ***review is necessary to achieve justice in an extraordinary case, such as when a prisoner appears innocent...***". *Early v. Lamanna*, 1999 U.S. App. LEXIS 13992 (6th Cir. 1999) (emphasis added). Courts should respect Congress' decision to "preserve habeas corpus for federal prisoners in those extraordinary instances where justice demands it." *Triestman* at 378. "The Supreme Court has recognized that it is an unacceptable deviation from our fundamental system of justice to automatically prevent the assertion of actual innocence simply

because a defendant has not observed procedural avenues available to him." *United States v. Maybeck*, 23 F. 3d 888, 892 (4th Cir. 1994), citing *Engle v. Issac*, 456 U.S. 107, 135 (1982). *Accord: United States v. Pettiford*, 606 F. 3d 156, 169 (4th Cir. 2010).

#### **D. Conclusion**

For the foregoing reasons, Hale has demonstrated his innocence, that this Court has the power to release him, and that it should release him in order to end the gross miscarriage of justice that Hale remain imprisoned for 40 years for no crime.

#### **II. Since there is no evidence that Hale violated the elements of the solicitation or obstruction of justice statutes, Hale's imprisonment violates Fifth Amendment due process and constitutes cruel and unusual punishment in violation of the Eighth Amendment. (Claim Two)**

The solicitation statute, 18 U.S.C. sec. 373, requires three things for a valid conviction under it: that Hale endeavored to persuade Evola to commit a crime of violence, that Hale was serious that Evola actually commit the crime, and that the target was a federal officer or employee (i.e. Judge Lefkow). There is no evidence of any of these elements, let alone all of them in this case, and as for the obstruction statute, if Hale did not solicit Judge Lefkow's murder, he did not obstruct her either. At no time did Hale order, ask, or otherwise request or demand that Evola murder her and thus his convictions violate due process. It is "a violation of due process to convict and punish a man without evidence of his guilt." *Thompson v. Louisville*, 362 U.S. 199, 206 (1960).

For the copious reasons stated in the previous section of this brief, this Court has the constitutional and statutory power to free an innocent man from his unjust incarceration and should exercise that power here in the interests of justice.

#### **III. Since the judges of the district court and the Seventh Circuit panel that sat in judgment upon Hale's section 2255 motion deliberately falsified the actual nature of his ineffective assistance of counsel claim in order to justify the denial of that claim so as to keep Hale wrongfully imprisoned, thus violating his constitutional rights, his section 2255 motion was "inadequate or ineffective to test the legality of his detention" and relief must be available via section 2241. ( Claims Three, Four, and Five.)**

In 2008, Hale brought his motion pursuant to section 2255 alleging that he had received ineffective assistance of counsel and that he had been excluded from individual voir dire without a valid waiver of his presence and without his consent. In denying that

motion, Judge James Moody for the Northern Illinois district court made the following statements:

Hale is contending that it would have been a better defense for his attorney to admit that Hale wanted Evola to murder *someone*, essentially conceding the most difficult material elements of the crime---Hale's intent that Evola commit a felony involving physical force, and his solicitation of Evola to commit that felony---and hinging his entire defense on his supposed misunderstanding of who that someone was. Bluntly put, Hale's "bona fide" defense, as he describes it now, is that the jury should have been shown that he wanted Evola to murder lawyer James Amend, not Judge Lefkow.

It is hard to imagine any set of circumstances where admitting solicitation to commit murder, and arguing about the identity of the victim, would be such a better strategy that it would make a decision to contest the intent element...an unsound strategy.

[H]ad Hale conceded that he was soliciting Evola to murder someone other than Judge Lefkow, the government's case would have been made easier...

*See Hale v. United States*, 2010 WL 2921634, 2010 U.S. Dist. LEXIS 73604.

All of this is quite simply a gross and deliberate falsification of the facts of Hale's claim that his counsel at trial had rendered ineffective assistance. ***At no time did Hale ever argue that his trial counsel was ineffective for not conceding that he had solicited somebody else's murder.*** Indeed, the excerpt of the conversation between Hale and Evola on December 5, 2002, quoted and discussed above, itself demonstrates that no solicitation of anybody's murder took place and it thus would have been absurd for Hale to argue that his counsel at trial was ineffective for not conceding a murder solicitation. Hence Hale never made any such argument. Rather, Hale argued that his counsel was ***ineffective*** for ***conceding*** that Judge Lefkow was the "Jew rat" whose murder was supposedly solicited, not that his counsel should have conceded a solicitation of someone else's murder. Indeed, Hale made it abundantly clear in his section 2255 pleadings that he had solicited ***no one's*** murder and yet Judge Moody deliberately chose to falsify and make a mockery of his legitimate claim in order to deny it. Hale's ineffectiveness claim never had anything to do with the idea that his counsel should have conceded an intent by Hale that anybody be killed.

If Judge Moody's resolution of Hale's section 2255 motion was merely inadvertent or a mistake made in good faith, relief via section 2241 would likely be unavailable.

However, that is not the case here and Hale is forced to call a spade a spade: Judge Moody quite simply lied about Hale's argument in order to deny his claim. He was unwilling to obey his judicial oath to be fair and impartial in a case where the defendant had been convicted of soliciting the murder of a fellow judge and where the defendant was an adherent of a religious faith that he personally hated, regardless of that defendant's innocence. Hale asks that this court review the record of his section 2255 case; it will find that there was no argument by Hale, ever, that his counsel was ineffective at trial for failing to concede that he had solicited the murder of "somebody" or anything else that would justify such a bizarre contention on Judge Moody's part. Nor is there any record support for Judge Moody's assertions whatsoever. Rather, he conjured up a mythological basis for Hale's ineffective claim just so that he could ridicule and deny the claim. Since obviously many a reasonable lawyer would refrain from conceding a murder solicitation of any kind in a case where it is indisputable that Hale neither asked nor told the informant to kill anybody, Judge Moody mischaracterized Hale's claim altogether so that he could deny it and appear justified in so doing. There is obviously a vast difference between a claim that counsel was ineffective for conceding that a federal judge was the target of an alleged murder solicitation on the basis of a vague reference to a so-called "Jew rat"---which was Hale's actual claim--- and a claim that counsel should have conceded a solicitation of "someone" else's murder. Thus it is impossible that Judge Moody could possibly have been sincere.

If Hale is the one who is falsifying the facts of his ineffectiveness claim that he brought pursuant to section 2255, this court will no doubt rule against him on his claim that his section 2255 proceedings were "inadequate or ineffective to test the legality of his detention" due to Judge Moody's misconduct. On the other hand, if Hale is telling the **truth** about what happened here, as he is, it does afford a basis for holding that Hale's section 2255 proceedings were indeed inadequate or ineffective: if a judge outright lies about a prisoner's claim in order to deny him his freedom, and does so for reasons of religious and political hatred thus independently violating his Fifth Amendment due process and equal protection rights as well as his rights under the First Amendment, it is indeed fair to say that that proceeding was "inadequate or ineffective to test the legality of his detention." It is a violation of due process of law for a judge to deliberately falsify the



nature of a litigant's claim in order to deny it and it is a violation of equal protection of the law for a judge to treat a person worse than others on account of that person's religious faith. When a judge lies about a litigant's claim in order to deny it, that proceeding is rendered a sham that is "inadequate or ineffective" by its very definition. It is as if no proceeding occurred at all and Hale must be allowed to bring his claim of ineffective assistance now via section 2241 since no legitimate section 2255 proceeding was provided to him. It is, furthermore, not improper for Hale to allege misconduct on the part of Judge Moody when that misconduct indeed took place.

Hale appealed Judge Moody's denial of his section 2255 motion to the 7th Circuit. In his brief to that court, he stated as follows:

The district court erred in its understanding of the case as follows:

1. That Hale's argument for ineffective assistance was based on the idea that counsel should have admitted that Hale solicited James Amend's murder or that any such admission was ever in the offing. (Appx. 77-82, 84-85, 89, 92-93, 102.) This error greatly impacted the court's decision...Hale never solicited anyone's murder and thus the court's misapprehension that his argument was based on the idea that counsel should have admitted that he did in effect skewed its entire reasoning.

Case No. 11-3868, Seventh Circuit Court of Appeals, Doc.29.

Nevertheless, amazingly, the Seventh Circuit panel chose to pile on to Judge Moody's misconduct because it too had no intention of ever granting Hale relief regardless of the facts and the law compelling that relief. In its perfunctory opinion denying Hale's appeal, it amazingly said the following:

The approach that current counsel prefers---defending against a contract-murder charge by conceding that a hit had been contracted but disputing the identity of the target---was unlikely to appeal to jurors.

Hale's current lawyer insists...that trial counsel should have *conceded* that Hale told Evola to kill someone---but that the "someone" was not Judge Lefkow. According to Hale's current lawyer, Hale was using roundabout language to tell Evola to kill the principal lawyer for the plaintiff in the trademark suit.

*Hale v. United States*, 710 F. 3d 711 at 715-716.

What can Hale do but tell this court that these statements by the Seventh Circuit panel are blatantly false and devoid of any basis in reality, that judges on the bench of a federal appeals court are willing to blatantly lie about a man's case that is before them so

as to keep him, an innocent man, in prison? The misconduct here is breathtaking: neither Hale's counsel nor Hale personally ever claimed that his trial counsel should have conceded *anything* and the denial of Hale's appeal was thus, like Judge Moody's denial of his section 2255 motion, based on conjured-up fantasy rather than fact. If anything, the misconduct of the Seventh Circuit panel is even more glaring than that of Judge Moody since Hale, in his appellate brief, specifically pointed out that no concession of a solicitation of anybody's murder was ever in the offing and yet the Seventh Circuit panel attributed that to Hale's counsel on appeal all the same. Thus Hale was provided with what was in essence a sham section 2255 proceeding and a sham section 2255 proceeding is "inadequate or ineffective to test the legality of his detention." Again, there is obviously a massive difference between Hale's actual claim that his trial counsel was ineffective *for conceding a federal case that did not actually exist* and the bizarre notion that Hale's trial counsel should have conceded that Hale had solicited someone else's murder but alas the two courts misrepresented that the latter was Hale's claim thus violating his due process rights by doing so. ***Conceding a non-existent federal case is prima facie unreasonable*** and thus the reviewing courts twisted his claim into something else entirely so that the freedom that Hale was entitled to could be wrongly denied. They furthermore did so for a reason that itself violates the Constitution of the United States: disdain of Hale because of his religious beliefs. The Seventh Circuit panel actually went outside the record of the case to read up on Hale's religious beliefs and cited those beliefs in its perfunctory opinion denying his appeal. *See Hale v. United States*, 710 F. 3d at 712-713. There was no reason for the Seventh Circuit panel to do that other than the fact that they held those religious beliefs against him in denying him his freedom. Obviously a citizen's religious beliefs are supposed to be *irrelevant* in a court of law but that was not the case as far as the Seventh Circuit panel, and Judge Moody, were concerned.

Hale had a constitutional, due process right to have his section 2255 motion decided on its merits rather than on a fictitious, conjured-up basis. He also had a constitutional right to be treated equally to that of other litigants irrespective of his religion. Judge Moody and the Seventh Circuit panel clearly violated these rights and the fact that they were violated by the judges who sat in judgment of his section 2255 motion requires that he must be afforded a remedy pursuant to section 2241. Section 2211 relief

must be available to remedy a decision that was made on a basis that itself violates the Constitution of the United States. If judges deny a section 2255 motion on unconstitutional and hence illegal grounds, that motion was clearly "inadequate or ineffective to test the legality of [the] detention." Indeed, an illegal, unconstitutional decision is *ipso facto* "inadequate or ineffective." When judges themselves violate a prisoner's constitutional right to due process of law, and equal protection of the law irrespective of religious belief, that prisoner must be afforded a remedy. That remedy here is Hale's release from custody pursuant to section 2241. This court has the right, the power, and the obligation under section 2241 to remedy the violation of Hale's constitutional rights that has occurred. Its power under the statute is in no way impinged upon by the power of any other court.

Lying about a prisoner's claim in order to justify denying it is really no different than denying a claim because of the acceptance of a bribe. Both are proceedings that are "inadequate or ineffective to test the legality of the detention" and a hapless innocent man must have the opportunity, via section 2241, to obtain relief by a court that *is* willing to provide Hale with an adequate and effective review of the legality of his detention ***on their actual merits*** in conformance with the dictates of the Constitution. Hale is an innocent man imprisoned solely for the beliefs he holds which is a mockery of everything this country claims to stand for. He has never been treated fairly by either Judge Moody or the Seventh Circuit as is proven by the treatment of his criminal case and appeal and by his section 2255 proceedings and appeal. Those opinions reveal that Hale is a victim of sham proceedings, the twisting of facts and disregard of law, in order to maintain the imprisonment of a clearly innocent man whose release was required by the Constitution of the United States. No evidence has ever been cited throughout his legal proceedings showing that Hale actually committed a crime and yet he has remained imprisoned for political and ideological reasons regardless. The illegal falsification of the nature of his ineffective assistance of counsel claim and hence denial of that claim on a fictitious basis entitles him to relief via section 2241.

To the extent that section 2255 could be construed to bar claims made pursuant to section 2241 that the judges who decided that motion acted in violation of the Constitution of the United States, Hale asserts that such a construction would be violative

of the Fifth Amendment due process clause and the habeas corpus suspension clause, Article I section 9 clause 2. If judges violate the Constitution in denying a prisoner's section 2255 motion, those proceedings are essentially void thus requiring that additional proceedings be held that actually meet constitutional dictates. In other words, if the section 2255 proceedings were resolved in a way that violates the Constitution, it is as if no habeas corpus proceedings were held at all and Hale must thus be allowed to seek habeas corpus relief via section 2241 lest the due process clause and the prohibition on the suspension of habeas corpus be violated. A proceeding that violates the Constitution of the United States is no legal proceeding at all and thus Hale must be given his first opportunity at habeas corpus relief via section 2241.

The only real question for the court is whether the judges who denied Hale's section 2255 motion did in fact falsify the nature of Hale's ineffective assistance of counsel claim. If they did, section 2241 relief is indeed available for the reasons stated above.

#### **IV. Hale received ineffective assistance of counsel at his trial in violation of the Sixth Amendment. (Claim Six)**

At trial, Hale's counsel performed unreasonably and with prejudice to Hale as follows:

- 1) by conceding that Judge Lefkow was the subject of a supposed murder solicitation when she wasn't even the "Jew rat" that the informant was talking about,
- 2) by failing to present overwhelming testimonial evidence of Hale's innocence,
- 3) by admitting into evidence the scriptures of Hale's religious faith that were offensive and inflammatory to non-believers of that faith, and which were used by the prosecutors in their plea for a conviction, thus independently violating Hale's First and Fifth Amendment rights,
- 4) by selecting for the jury venirepersons predisposed to find Hale guilty and otherwise biased or prejudiced,
- 5) by deliberately eliciting non-admissible hearsay testimony that Hale had solicited someone else in the past to commit murder and by failing to object to evidence that his

*church* had likewise "orchestrated" a murder in the past before Hale had joined it, and 6) by failing to prepare any defense case and failing to prepare for the possibility that Hale would want to testify.

Hale acknowledges that this court can only review his claim of ineffective assistance of counsel if it first agrees that his section 2255 proceedings were "inadequate or ineffective to test the legality of his detention." Therefore, rather than set forth his entire copious argument and case law supporting his ineffectiveness claim here, Hale requests that this court first rule upon whether he has in fact met that section 2255 savings clause requirement and, if so, that the court provide him leave to file a separate brief supporting his ineffectiveness claim.

**V. Hale was denied a fair trial by an impartial jury in violation of the Fifth and Sixth Amendments. (Claim Seven)**

**A. Juror Hoffman's actions and state of mind reveal that he was a partial juror.**

Hale was denied his Fifth Amendment right to a fair trial, and his Sixth Amendment right to an impartial jury, because the foreman of his jury has subsequently admitted under oath in another trial that, while he was sitting as a juror in the case, he had fear for his life at the hands of Hale and his supporters before the trial even began due to his having disobeyed the trial judge's orders not to read media coverage about the case.

Hale's trial received massive news coverage throughout the Chicago area when it was held in Chicago in April 2004. Due to this fact, the trial judge ordered the jury venire and those jurors who were selected not to discuss the case with anyone or to read or watch or listen to any of the media coverage about the case and did so each day of the proceedings. Nevertheless, the day after being selected, Juror Hoffman disobeyed the judge's order and proceeded to read *The Chicago Tribune* newspaper where his selection on the jury was mentioned. He further discussed his selection on the jury and the case itself with his gay, African-American partner. Even though the article did not mention him by name, he and his partner were immediately upset and afraid for their physical safety---so upset and afraid for their physical safety that Hoffman rushed back to the campus of Northwestern University, where he worked, to take down the sign that he had

placed on his office door to inform the students that he was absent due to jury duty, his doing so for fear that it would get out that he was indeed the Assistant Dean at Northwestern University who was sitting as a juror in the Matt Hale case whom the article had mentioned. As Hoffman later testified:

Q: What were you concerned about?

A: I was worried about my safety and my partner's safety because it was--I'm a white person with an African-American man and we had known that Benjamin Smith went on a shooting rampage after being part of Matthew Hale's group, and so that was his way of showing obedience or faith to Matthew Hale, and I felt really vulnerable. I was afraid for myself and my partner--

Doc. # 184, 08-CR-00851, *United States v. White*, Vol. 1B, page 110, January 3, 2011 (E.D. Wisc.)

(The pertinent pages of Hoffman's testimony at White's trial are attached to this brief, pages 101, 109-111.)

Thus, not only had Hoffman disobeyed the judge's orders not to read about the case or discuss it with anyone, and was afraid for his life and that of his partner simply by virtue of his sitting on the jury, but ***he presumed that Smith had gone on his shooting spree as a means of showing "obedience" or faith to Hale.*** (Ben Smith had gone on an internationally-publicized racist shooting spree in 1999 in the Chicago area, killing two and wounding nine members of racial minority groups. Smith had been a member of Hale's white separatist church but Hale was never charged with and denied any involvement in Smith's crimes.) Furthermore, when the trial judge specifically polled the jurors deep into the trial as to whether any of them had disobeyed his orders not to discuss the case with anyone or to read, watch, or listen to media coverage about the case, Hoffman failed to raise his hand even though he had obviously done so. (See Doc.# 242, 03-CR-011, *United States v. Hale*, Vol. 10 at 2-4, April 20, 2004 (N.D. Ill.).

In a case where Hale was on trial for allegedly soliciting another supposed follower (informant Evola) to murder a federal judge, such misconduct, prejudice, and presumptions on a juror's part denied Hale a fair trial by an impartial finder of fact. A juror who presumes that his life is in danger at the hands of the defendant and his supporters before the trial has even begun because he has disobeyed the judge's orders not

to read the massive and negative press coverage concerning the case, and who lies to the court when asked whether he has in fact read media accounts about the case, as happened here, does not possess the necessary objective state of mind to meet the requirements of the Fifth and Sixth Amendments providing for a fair trial by an impartial jury. A juror cannot be deemed fair and impartial when he fears, before any evidence has even been presented, that he may be killed by one of the defendant's supposed followers. Hoffman also may have voiced his fears in the jury room, thus affecting the other jurors, and used his influence as foreman to affect their individual verdicts as well. Furthermore, since Hoffman was reading media accounts about the case in violation of the trial court's orders, it is possible that he shared those media accounts with the other jurors thus further contaminating the verdict. Notably, the very newspaper that Hoffman improperly read the day after he was selected as a juror, *The Chicago Tribune*, later contained an editorial calling for Hale's conviction and this is what prompted the trial judge to poll the jury as to whether any of the jurors had disobeyed his instructions not to read about the case. (See Doc. #242, 03-Cr-011, *United States v. Hale*, Vol. 9 at 2-11 and Vol. 10 at 2-4, April 19-20, 2004 (N.D. Ill.)). Thus it is possible that Hoffman also read that particular article since he had read coverage about the case in the same newspaper days earlier. Furthermore, since Hoffman was willing to disobey the judge's orders generally, it must be assumed that he also read or watched other media accounts about the case as well that may have contained information prejudicial to Hale. Indeed, as Hoffman himself states, the case "was in the news all the time." In order to say this, he was likely watching and reading the news on a regular basis.

At a minimum a hearing should be ordered, with Hoffman's attendance compelled, so that Hale can ask him what all he read, watched, and discussed about the case--and subsequently brought into the jury room--in violation of Judge Moody's orders. "This Court has long held that the remedy for allegations of jury partiality is a hearing in which the defendant has an opportunity to prove actual bias." *Smith v. Phillips*. 455 U.S. 209, 215 (1982).

**B. Since Hale was incapable of bringing this claim via his section 2255 motion, he must be allowed to bring it via section 2241.**

Hale filed his section 2255 motion in January 2008 in compliance with the one year

deadline for filing a motion pursuant to that section (the Supreme Court denied his petition for a writ of certiorari of his direct appeal in January 2007). In January 2011, Juror Hoffman made these admissions in a separate, unrelated criminal trial unbeknownst to Hale, *United States v. White*, 08-CR-00851, Doc. #184 (E.D. Wisc 2011). In October 2011, Hale first learned about these admissions. Thus, Hale had no way of knowing about the existence of this claim when he filed his section 2255 motion in January 2008 since he only reasonably discovered its existence when Juror Hoffman was compelled to testify in another case in January 2011. Thus Hale's section 2255 motion was "inadequate or ineffective to test the legality of his detention" since he was unable to bring this Fifth and Sixth Amendment claim when he filed his section 2255 motion and thus challenge the legality of his detention on this basis.

To the extent that section 2255 could be construed to bar this claim of juror prejudice and misconduct made pursuant to section 2241 because it was not discovered within the one year filing deadline for section 2255 motions and filed under section 2255 within that period, Hale asserts that such a construction is unconstitutional under Fifth Amendment due process as well as under the habeas corpus Suspension Clause, Article 1 section 9 Clause 2. Habeas corpus relief must always be available to address juror prejudice and bias. This is especially true where, as here, the thought processes of a juror are so rarely discernible and discoverable, let alone within a year after a defendant's convictions have become final. Habeas corpus relief must be available for those claims of juror prejudice and bias that are discovered after the one year statute of limitation lest habeas corpus relief be eliminated entirely for such claims. Juror prejudice and misconduct cast particularly grave doubt on the core fairness of the proceedings and thus are particularly deserving of the remedy of habeas corpus whenever such prejudice and misconduct are discovered. Other than the fact that Hoffman was fortuitously called to testify years after Hale was compelled to file his section 2255 motion, Hale simply had no way of knowing about Hoffman's prejudice, misconduct, and presumption that his life was in danger by Hale's supporters just by virtue of sitting as a juror in his case. It would have been deemed improper had Hale tried to contact Hoffman after the trial and nor of course had he any reason to think that he should. Rather, it is simply a matter of chance that Hoffman was later called as a witness in another case and asked, under oath, about



his jury service in Hale's case and that Hale found out about that testimony. Hale cannot be blamed for not bringing this claim via section 2255 when he had no reason to know about it. If he could not know about Hoffman's misconduct and prejudice when he filed his section 2255 motion, that proceeding *had to be* "inadequate or ineffective to challenge the legality of his detention." Since Hale had no reason to believe that Hoffman was disobeying Judge Moody's orders not to read about the case at the time of trial or subsequent to trial, and no reason to believe that Hoffman feared for his safety at the hands of his supporters, he had no reason to bring this claim earlier. *See Williams v. Taylor*, 529 U.S. 420, 440-444 (2000) ("The trial record contains no evidence which would have put a reasonable attorney on notice that [Hoffman's] nonresponse [to whether he had disobeyed Judge Moody's orders not to read about the case] was a deliberate omission of material information." *Id* at 442).

### **C. Hale is entitled to a new trial.**

Had Hale found out about Juror Hoffman's misconduct and fears for his personal safety during the trial, sufficient grounds would have existed to have him excused for cause and a new trial is thus required here. Jurors who are afraid for their personal safety because of preconceived notions about the defendant, and who presume a threat from his supporters, are not disinterested and impartial. Furthermore, the fact that Hoffman thought that his life was in danger by Hale's supporters implies that he had already made up his mind that he was guilty and that he would vote that way, for otherwise why would he be afraid that Hale's supporters would want to do him harm? Such a juror should clearly be excluded for cause and "the seating of any juror who should have been dismissed for cause...requires reversal." *United States v. Blitch*, 622 F. 3d 658, 665 (7th Cir. 2010), quoting *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000). ("This is not a case, then, of speculation about whether jury members might have feared for their safety. They did here." *Id.*). "That even one juror's 'peace of mind' was affected can be enough to deprive a defendant of a fair trial." *Blitch* at 665, citing *United States v. Simtob*, 485 F. 3d 1058, 1064 (9th Cir. 2007). "If there is a reasonable possibility that a jury's verdict has been affected by material not properly admitted as evidence, the criminal defendant is entitled to a new trial." *United States v. Davis*, 15 F.3d 1393, 1412

(7th Cir. 1994). There is indeed a reasonable possibility that Hoffman's disturbed mental state, brought on by his reading news media coverage that was not properly admitted into evidence against the trial judge's orders, affected his verdict. *See also Marshall v. United States*, 360 U.S. 310 (1959) (convictions reversed where several jurors had read newspaper accounts about the case while impanelled) and *Remmer v. United States*, 350 U.S. 377, 380-382 (1956) (The sitting on the jury of "a disturbed and troubled man" due to extraneous influences upon him requires that the defendant be provided with a new trial).

As in *Blitch* where the convictions were reversed, Hale is concerned that he did not "receive a fair trial from persons who might have prejudged the case or been motivated by fear or preconception." Since Hoffman was afraid for his personal safety at the hands of Hale's supporters, that in itself shows a fear and preconception about Hale that had to have colored the reception of the ensuing admission of any evidence against him. "Due process means a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Due to Hoffman's fears and his presumption that Smith had committed his crimes out of "obedience" or "faith" to Hale, there was no way that he was capable of deciding whether Hale had indeed solicited the government informant to murder Judge Lefkowitz, three years later, solely on the evidence produced at trial. There was no admissible evidence produced at trial that Hale had solicited Smith to commit his crimes and yet Hoffman had presumed from the outset of trial that Smith had committed his crimes out of "obedience" or "faith" to Hale. A juror who believes that a spree killer had committed his crimes years earlier due to having obeyed the defendant, now on trial for allegedly having solicited the murder of a federal judge, is not capable of deciding the defendant's guilt or innocence solely on the evidence at trial and thus Hale's due process rights were violated.

Furthermore, there is the possibility that, as in *Marshall*, Hoffman read about matters that had previously been ruled inadmissible at trial and that he was thus exposed to information that the trial judge thought important to keep from the jury in order for Hale to receive a fair trial. The Supreme Court in *Marshall* ordered a new trial on this basis because the jury, by reading the newspaper articles that discussed the evidence that the judge had ruled inadmissible, had thus been exposed to the evidence all the same--

evidence that the trial judge had thought important to exclude in order for the defendant to receive a fair trial. Since Hoffman was disobeying the judge's order not to read about the case, he likewise may have read about matters the judge thought critical to exclude. This is one of the reasons, after all, why jurors are admonished generally not to read about the cases they are sitting on. The entire evidentiary legitimacy of their verdicts is undermined if they do.

Since Hale's constitutional rights to a fair trial by an impartial jury was violated, and since his section 2255 proceedings were "inadequate or ineffective to test the legality of his detention" on this basis, habeas corpus should be granted now under section 2241.

**VI. Hale's Fifth Amendment right to be present at individual voir dire was violated because he neither waived his presence on the record nor acquiesced to his absence by clear conduct. (Claim Eight.)**

Hale acknowledges that this court can only review his claim that his Fifth Amendment right to be present at all critical stages of his trial was violated if it first agrees that his section 2255 proceedings were "inadequate or ineffective to test the legality of his detention." Therefore, rather than set forth his full argument and case law supporting his claim here, he requests that this court first rule upon whether he has in fact met that section 2255 savings clause requirement and, if so, that the court provide leave to him to file a separate brief supporting his absence from voir dire claim. That separate brief would consist of his ineffectiveness of counsel claim (Claim Six) and absence from voir dire claim only.

### **Conclusion**

For the foregoing reasons, Plaintiff Matthew Hale requests that this Honorable Court order the defendant to release him from his custody forthwith.

### **Certificate of Service**

I hereby certify that a copy of the foregoing document was mailed to AUSA Susan Prose, counsel for the defendant, at 1225 17th Street, Suite 700 Denver, CO. 80202 on April\_\_\_\_, 2014.

Respectfully submitted,

---

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