United States Court of Appeals
For the First Circuit

No. 18-1412

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN SILVIA, JR.,
a/k/a/ JOHN SILVIA,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. George A. O'Toole, Jr., U.S. District Judge]

Before

Howard, Chief Judge,
Lynch and Barron, Circuit Judges.

Henry B. Brennan for appellant.
Alexia R. De Vincentis, Assistant United States Attorney, with whom Andrew E. Lelling, United States Attorney, was on brief, for appellee.

March 20, 2020

BARRON, Circuit Judge. John Silvia, Jr. appeals from the denial of his motion for a new trial, in which he sought to vacate the seventeen convictions that he received and that resulted from two separate trials, each of which were held in the District of Massachusetts before the same judge in, respectively, 2016 and 2017. We affirm.

I.

We begin with the rather involved procedural history so that we may properly frame the issues before us. In March of 2014, the United States charged Silvia in an eighteen-count indictment. The indictment included nine counts of securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff(a), and 17 C.F.R. § 240.10b-5; four counts of wire fraud in violation of 18 U.S.C. § 1343; and five counts of mail fraud in violation of 18 U.S.C. § 1341.

Silvia moved, in March of 2015, to sever his trial on the nine securities fraud counts and two of the wire fraud counts from his trial on the other two wire fraud counts and the five mail fraud counts. The District Court granted the motion to sever in January of 2016. As a result, Silvia faced trial, initially, on the nine securities fraud counts and only two of the four wire fraud counts. Before his trial on those eleven counts began, however, the government dropped one of the nine counts of

securities fraud. Thus, Silvia faced, in the first trial, eight securities fraud counts and two wire fraud counts.

The trial on those ten counts began soon thereafter, and, on February 11, 2016, a jury found Silvia guilty of each of the eight counts of securities fraud but not guilty of the two counts of wire fraud. Before a judgment of conviction had been entered on any of the eight securities fraud counts, however, Silvia filed, on February 24, 2016, a motion for the appointment of new counsel and a motion for a new trial. He based the motion for a new trial on a claim of ineffective assistance of trial counsel in violation of his right to counsel under the Sixth Amendment to the federal Constitution.

The District Court granted Silvia's motion for new counsel on March 15, 2016. But, on January 9, 2017, the District Court denied without prejudice Silvia's motion for a new trial.

In the interim, on July 19, 2016, a grand jury handed up a superseding indictment that set forth the counts that Silvia was slated to face in the second trial, which had not yet begun. The superseding indictment charged Silvia with one count of structuring transactions to evade reporting requirements in violation of 31 U.S.C. § 5324(a)(3); one count of witness tampering in violation of 18 U.S.C. § 1512(b)(1); and the two counts of wire fraud and five counts of mail fraud that had been set forth in the initial indictment but for which he had not yet been tried.

On January 5, 2017, Silvia filed a motion in limine concerning the trial on the nine counts set forth in that superseding indictment that loomed. In that motion, he sought to preclude his guilty verdicts from the first trial -- for which no judgment of conviction yet had been entered -- from being used to impeach him, should he testify, in his upcoming trial. Silvia argued, in part, that the ineffective assistance of trial counsel that he claimed that he had received at his first trial had so tainted those guilty verdicts that they could not be used to impeach his testimony at the upcoming trial. Silvia also argued, though, that those guilty verdicts could not be used to impeach his testimony at the upcoming trial for the distinct reason that no judgment of conviction yet had been entered on any of them.

The District Court denied Silvia's motion in limine on January 9, 2017. The trial on the nine counts in the superseding indictment then began, and on February 15, 2017, the jury rendered guilty verdicts on each of those counts.

Following those verdicts in the second trial, Silvia, on February 28, 2017, filed a motion for a new trial. The District Court held an evidentiary hearing on this motion. The District Court appeared to treat that motion as challenging not only the nine counts for which he had been found guilty in the most recent trial but also the eight counts for which he had been found guilty in the first trial, but for which no judgment of conviction had

yet been entered. The District Court denied this motion in a written opinion on April 23, 2018. This appeal then followed.

II.

The parties -- in briefing before the District Court and in briefing before this Court -- appear to proceed on the understanding that the District Court treated the motion for a new trial that Silvia filed on February 28, 2017 as challenging all seventeen of the convictions that resulted from the two separate trials. We follow suit in considering the merits of Silvia's challenge to the District Court's denial of that motion.

We begin with Silvia's contention that the District Court erred in denying the motion because it erred in finding that he failed to show that he received ineffective assistance of counsel at his first trial. We see no merit to the argument.

A District Court may "grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). When a motion for a new trial is premised on a claim of ineffective assistance of trial counsel, we apply the two-part test laid out in Strickland v. Washington, 466 U.S. 668 (1984), to determine whether the district court erred in denying the motion. United States v. Wilkerson, 251 F.3d 273, 279 (1st Cir. 2001). Thus, to succeed in his challenge to the District Court's denial of that motion, Silvia must show that: (1) his "counsel's performance fell below an objective standard of reasonableness," id. (citing Strickland, 466

U.S. at 687); and (2) that this deficient performance prejudiced the defense such that "there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. (quoting Strickland, 466 U.S. at 693-94). The parties agree that our review of the District Court's legal conclusions with respect to the ineffective assistance of counsel claim is de novo and that our review of its findings of fact with respect to that claim is for clear error. See Turner v. United States, 699 F.3d 578, 584 (1st Cir. 2012).

We ordinarily do not consider an ineffective assistance of trial counsel claim, however, on direct appeal. See United States v. Miller, 911 F.3d 638, 642 (1st Cir. 2018). But, we may do so where, as here, a district court has taken steps "to marshal and evaluate evidentiary facts required to place the adequacy of a defendant's representation into proper perspective." United States v. Natanel, 938 F.2d 302, 309 (1st Cir. 1991); see also United States v. Colón-Torres, 382 F.3d 76, 85 (1st Cir. 2004) (explaining that this Court can hear ineffective assistance of counsel claims on direct appeal "where the critical facts are not genuinely in dispute and the record is sufficiently developed to allow reasoned consideration" of the claim (quoting Natanel, 938 F.2d at 309)).

Silvia asserts that the record shows that his trial counsel failed to obtain exculpatory evidence, interview and call

witnesses on his behalf, retain and consult with a securities expert, review discovery, adequately prepare the defendant to testify, and that his trial counsel created an adversarial relationship with Silvia that prevented the counsel from adequately and zealously representing Silvia. On that basis, he contends that he has satisfied the Strickland standard.

For substantially the same reasons that the District Court set forth in the order issued on April 23, 2018, however, we conclude that Silvia has not satisfied his burden under Strickland to support his claim that he received ineffective assistance of counsel at his first trial. We thus reject Silvia's challenge to the District Court's denial of his February 28, 2017 motion for new trial, insofar as it is premised on that claim of ineffective assistance of trial counsel. See Loc. R. 27(c).

That still leaves, though, Silvia's challenge to the District Court's denial of that motion, insofar as it is premised on the contention that it was error for the District Court to deny his motion in limine for reasons independent of his assertions of ineffective assistance of trial counsel and that this error unduly prejudiced his ability to testify on his own behalf at his second trial. Silvia premises this contention on the argument that the jury's guilty verdicts from the first trial could not be used for impeachment purposes at his second trial because those verdicts were not final convictions at the time of that second trial.

Silvia provides no authority from this court or any other to support his premise that, because no judgment of conviction had been entered on any of the counts for which the jury at the first trial had rendered guilty verdicts, the District Court erred in denying his motion in limine to preclude those guilty verdicts from being used to impeach him at his second trial. Nor does he address the substantial contrary authority from other circuits that indicates that the guilty verdicts from the first trial could have been used to impeach him at the second. See, e.g., United States v. Vanderbosch, 610 F.2d 95, 96-97 (2d Cir. 1979) (explaining that "there is no distinction between a jury's finding of guilty and the entry of judgment for impeachment purposes" and upholding the district court's determination that the defendant could have been impeached with the guilty verdict, had he testified); United States v. Klein, 560 F.2d 1236, 1239-41 (5th Cir. 1977) (finding that "[a] jury's verdict of guilty prior to entry of judgment is no less final than a conviction during the pendency of an appeal," and that "[i]n both cases the finding of guilt should be competent as impeachment evidence," and upholding the district court's determination that the defendant could have been impeached with a guilty verdict if he had testified).

In addition, Silvia fails to respond persuasively to the government's assertion that, because he did not testify at his second trial, his challenge must fail under Luce v. United States,

469 U.S. 38, 43 (1984). Silvia contends in response only that an exception to Luce should be made because he testified to the charges that he faced at his first trial and at the hearing for his motion for a new trial and thus that "there is a sufficient record of [his] potential testimony and his reasoning for not testifying." But, the charges that Silvia faced at his first trial concerned a distinct fraudulent scheme, while the testimony that he points to from his hearing on the motion for new trial amounted to little more than a representation that he would have testified at the second trial if the guilty verdicts from the first trial could not have been used against him. Thus, we do not see how Silvia's testimony either from his first trial or from his hearing on the motion for a new trial enables us "to determine the impact any erroneous impeachment may have had in light of the record as a whole," id. at 42, such that, even if we were to assume that Luce might allow for an exception for a non-testifying defendant in some circumstance, we could conclude that he is entitled to the exception to Luce that he asks us to make.

III.

The District Court's denial of Silvia's motion for a new trial is **affirmed.**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 14-10082-GAO

UNITED STATES OF AMERICA,

v.

JOHN SILVIA, JR.,
Defendant.

OPINION AND ORDER
April 23, 2018

O'TOOLE, D.J.

Following two jury trials, the defendant, John "Jack" Silvia, Jr., stands convicted of eight counts of securities fraud, five counts of mail fraud, two counts of wire fraud, and one count each of structuring transactions to evade reporting requirements and witness tampering. Pursuant to Federal Rule of Criminal Procedure 33, Silvia has moved for a new trial based largely on claims of ineffective assistance of counsel who represented him during his first trial.

I. Procedural Background

On February 7, 2014, the FBI arrested Silvia on a criminal complaint charging him with wire and mail fraud. At his initial appearance, then-Assistant Federal Public Defender Behzad Mirhashem was appointed to represent him. On March 27, 2014, a grand jury returned the first indictment charging Silvia with securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff (Counts One through Nine), wire fraud in violation of 18 U.S.C. § 1343 (Counts Ten through Thirteen), and mail fraud in violation of 18 U.S.C. § 1341 (Counts Fourteen through Eighteen).

On November 20, 2014, a second Assistant Federal Public Defender, Joshua Hanye, filed a notice of appearance on behalf of Silvia, and the next month Mirhashem was granted leave to withdraw.

On March 27, 2015, and April 3, 2015, Hanye filed on the defendant's behalf a motion to sever certain counts and a motion to suppress, respectively. The motion to sever was ultimately granted, and the Court ordered separate trials on Counts One through Eleven (the "stock assignment counts") and Counts Twelve through Eighteen (the "loan counts"). United States v. Silvia, Criminal No. 14-10082-GAO, 2016 WL 234801, at *3 (D. Mass. Jan. 20, 2016). The motion to suppress was denied after an evidentiary hearing.

A jury trial was originally scheduled for October 5, 2015, but shortly afterward was continued to November 16, 2015. On October 19, 2015, Hanye filed an assented-to motion to continue the trial date on the basis that he needed additional time to prepare, citing as support his high caseload, diminished available support at the Federal Defender's Office, the volume of discovery materials, and the number of potential witnesses in the matter. The Court granted the motion.

Trial on the stock assignment counts began on February 1, 2016. On February 11, 2016, the jury convicted Silvia of securities fraud (Counts Two through Nine), and acquitted him of wire fraud (Counts Ten and Eleven).[1] On February 24, 2016, the defendant filed three *pro se* motions: a motion for new trial, a motion for judgment of acquittal, and a motion for appointment of new counsel. At a status conference on March 14, 2016, the Court granted the defendant's motion to appoint new counsel, and subsequently appointed Henry Brennan to represent the defendant. At a status conference on May 24, 2016, the Court reserved ruling on the motion for new trial and set

[1] The government dismissed Count One prior to trial.

a trial date for the remaining counts for November 14, 2016. The Court later denied the defendant's motion for judgment of acquittal and denied without prejudice his motion for new trial.

On July 19, 2016, a grand jury returned a superseding indictment that added witness tampering and illegal structuring charges to the existing loan counts.

On September 28, 2016, the defendant sought a continuance of the second trial. About a week later, the Court granted the motion over the government's objection and set a trial date of January 9, 2017. The defendant filed several motions *in limine*, including a motion to preclude evidence of the defendant's conviction on the stock assignment counts from the first trial. The Court denied the motion.

On January 10, 2017, the trial was continued at the defendant's request. Trial ultimately commenced on February 6, 2017. On February 15, 2017, a jury convicted Silvia on all counts of the superseding indictment.

On February 28, 2017, Silvia filed the presently pending motion for new trial (dkt. no. 250), which the government opposed. An evidentiary hearing on the motion was held on July 6, 7, 17, 18, and 19, 2017. The parties filed post-hearing briefs on October 27, 2017, and December 11, 2017, and further stipulations of testimony and exhibits on December 21, 2017.

II. Legal Framework

Rule 33 of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." The remedy of a new trial is used "sparingly" and only where there would be "a miscarriage of justice and where the evidence preponderates heavily against the verdict." United States v. Gonzalez-Perez, 778 F.3d 3, 17 (1st Cir. 2015) (citation omitted). "When determining the prejudicial effect of challenged acts, a court should not grant a motion for a new trial where a

process, although imperfect, adequately protected the defendant's rights." Id. (citation omitted). "Rather, the court must decide whether the alleged errors affected the defendant's substantial rights." Id. (citation omitted). After all, "the Constitution entitles a criminal defendant to a fair trial, not a mistake-free trial." Id. (citation omitted).

Although ineffective assistance of counsel claims are usually litigated in collateral attack of a judgment under 28 U.S.C. § 2255, the parties appear to agree that ineffectiveness may constitute a basis for ordering a new trial under Rule 33 prior to the entry of judgment. They further agree that to sustain his burden under Rule 33, the defendant must satisfy the familiar two-part standard set forth in Strickland v. Washington, 466 U.S. 668 (1984).[2] Under Strickland, the defendant must show that (1) counsel's performance was deficient, meaning it "fell below an objective standard of reasonableness," and (2) prejudice resulted, meaning a "reasonable probability that, absent the errors, the [jury] would have had a reasonable doubt respecting guilt." 466 U.S. at 687–88, 695.

The relevant question is "whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011) (quoting Strickland, 466 U.S. at 690). "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [should] be made to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that,

[2] Rule 33 authorizes a court to grant a new trial "if the interest of justice so requires." If the basis for the new trial motion is the alleged ineffectiveness of counsel, the Strickland test is applied. See United States v. Wilkerson, 251 F.3d 273, 278–79 (1st Cir. 2001).

under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quotation omitted).

As to prejudice, a reasonable probability is one "sufficient to undermine confidence in the outcome." Id. at 693. It is insufficient to show that errors had some "conceivable effect on the outcome," but a defendant need not prove that they were more likely than not to have affected the verdict. Id.

III. The First Trial

Silvia advances a variety of arguments in favor of a finding of ineffective assistance of counsel.

A. Lack of Experience with Securities Fraud

Silvia first stresses the fact that Hanye was new to the Federal Defender's Office and had had no prior specific experience handling a securities fraud case. He does not cite legal authority, however, for the simplistic proposition that the lack of direct experience in trying a case involving a particular charged crime is sufficient by itself to establish—or even propose—deficient performance constituting ineffective assistance. The relevant question is not prior experience but actual performance measured against the Strickland standard.

B. Preparedness

Silvia argues broadly that Hanye failed to adequately prepare for trial.[3] However, the facts Silvia marshals in support of his argument (see, e.g., Def.'s Br. 50–51 (dkt. no. 299)) relate more specifically to the original November 2015 trial date, for which Hanye sought and obtained a continuance. According to Hanye, he considered the additional time he obtained sufficient to

[3] Specific arguments connected to preparedness, such as the failure to review the defendant's hard drive, are addressed below.

become prepared for the actual trial[4] and after that point did not have difficulty giving the defendant's case the attention it needed. (Ev. Hr'g Tr. Day 1, at 81–83 (dkt. no. 291).) He also felt that he and his team "were ready for trial" and, if they were not ready, he "would have moved for another continuance." (Id. at 139.) Those self-evaluations are consistent with my observations as the presiding judge at the trial.

Hanye's performance at trial and his description of his preparation during the evidentiary hearing bear out his self-assessment that he was adequately prepared. By the time of trial, he had assembled to assist him a team of two paralegals and two investigators. He had filed a motion to suppress and motion to sever, the latter of which succeeded. He had also filed multiple trial-related pleadings, including motions *in limine*, *ex parte* motions related to potential trial witnesses, proposed *voir dire* questions, proposed jury instructions, and witness and exhibit lists. He had reviewed the government's extensive documentary discovery,[5] either on his own or in coordination with other members of his team. He subpoenaed records and interviewed numerous potential witnesses. Throughout the two months prior to trial, Hanye and Silvia were in close contact in person, by telephone, and by extensive email traffic. During the course of trial, Hanye appeared to have a command of the facts of the case. He cross-examined government witnesses, examined the defendant, introduced exhibits, made objections, and developed a defense for the jury's consideration. Ultimately, the jury acquitted the defendant on some counts, suggesting that Hanye successfully undermined the government's case at least to that extent.

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[4] At the time, the defendant agreed with Hanye. (Ev. Hr'g Ex. 40 ("This should give us proper time to prepare.").)

[5] His October motion to continue the trial indicated that discovery materials provided by the government included over 14,000 Bates-numbered documents. (Mot. to Continue Trial 1 (dkt. no. 110).)

The defendant has failed to demonstrate that Hanye's preparation fell below an objective standard of reasonableness under prevailing professional norms.

C. Failure to Obtain Supposedly Exculpatory Evidence

One of the issues in the case was whether Silvia had, as he claimed, a legitimate Subscription Agreement with respect to Advance Space Monitor ("ASM") signed by ASM CEO Dale Tommer, or whether he had created a fake agreement and forged Tommer's signature to it. The defendant now contends that Hanye failed to obtain various documents he maintains are exculpatory, including an allegedly original Subscription Agreement kept in ASM's "corporate book" that had been actually signed by Tommer. The existence of a genuine Subscription Agreement bearing Tommer's genuine signature would, Silvia claims, refute the government's contention that he had forged the document.[6] That proposition is likely true, but there was no evidence that such a document exists other than Silvia's assertion that it does. The same is true of other evidence Silvia claims Hanye failed to muster. The only source of information about such potential evidence is Silvia.

Let me put it bluntly. Silvia is not a credible witness. I have formed that conclusion based both on the content of his testimony at trial and the evidentiary hearing and on his demeanor while testifying. I would not make a finding of fact in sole reliance on his testimony or on documents produced by him that themselves lack support for their authenticity other than his own testimony.

One of Silvia's principal arguments on the present motion is that his original, genuine Subscription Agreement, as well as his purported Employment Agreement, should have been in

[6] At trial, Silvia did not deny that there was a forged Subscription Agreement bearing a cut-and-paste simile of Tommer's signature, rather than an actual signature. His argument was rather that Tommer himself had created the false document to protect himself and cast suspicion on Silvia. (Trial Tr. Day 6, at 103–06 (dkt. no. 289).)

the corporate book, but that Hanye failed to obtain the corporate book, to find the agreements in it, and to introduce them or interrogate witnesses using them. Hanye testified that he was aware that the corporate book was missing, and he intended to suggest that Tommer was responsible for that, just as he was responsible for the forged Subscription Agreement. (Ev. Hr'g Tr. Day 2, at 51–52 (dkt. no. 292).) However, when Hanye asked a witness about the corporate book at trial, the witness reported that although the corporate book was supposed to be kept at ASM's office it actually had been kept for a time at the defendant's house. (Trial Tr. Day 2, at 101 (dkt. no. 285).) Hanye decided to refrain from further questioning about the corporate book after that testimony drew suspicion for its absence to his own client, rather than Tommer. (Ev. Hr'g Tr. Day 2, at 73–74.) That was a reasonable tactical decision. Again, the only source for the proposition that the corporate book, if available, would have been the source of relevant exculpatory evidence is Silvia. Accordingly, I am unable to make such a finding.

Similarly, Silvia contends that ASM forwarded documents, including the putative genuine Subscription Agreement, to a potential investor, GreenHills Ventures, via email sent by Tommer. He asserts that Hanye should have obtained a copy of the Subscription Agreement by subpoenaing GreenHills, Tommer himself, or Google, to obtain access to the email by which the Subscription Agreement was purportedly sent to GreenHills. With respect to the potential investor, Hanye did serve a subpoena *duces tecum*, but the investor did not have any documents and its principal manager had no independent memory of the transactions with Silvia and ASM. (Ev. Hr'g Tr. Day 3, at 21, 64–65 (dkt. no. 293).) To the extent that the defendant argues the subpoena was untimely, the evidence suggests that even had Hanye issued a subpoena when he was first appointed in 2014, such efforts would have been futile because it appears the documents would have been destroyed by that time according to a GreenHills company policy. (See Ev. Hr'g Tr. Day 1, at 26–27.)

With respect to Google, Hanye understood that there were possibly three methods of obtaining Tommer's email records from his Gmail account at Google, considered each of them, and then rejected them as either futile or counterproductive. First, he could have again requested them through the government, which his predecessor counsel had already tried without success. Second, Silvia argues Hanye could have tried to utilize the Stored Communications Act (the "SCA") to request a search warrant or court order for Google to produce Tommer's emails, but Hanye concluded—and Silvia does not now dispute—that the SCA is only available to governmental entities, not private persons. Third, he could have requested them directly from Tommer, which Hanye determined would be unproductive because Tommer would be in a position to be selective in producing information, and it was a defense theory that Tommer was hostile to Silvia. Hanye's explanation of his decisions is reasonable and demonstrates an intentional, strategic conclusion under the circumstances. See Strickland, 466 U.S. at 691 ("[A] particular decision not to investigate must be directly assessed for the reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.").

Finally, Silvia wanted Hanye to subpoena bank account records for ASM and Tommer, contending that the records would support Silvia's testimony about how much he had advanced to ASM and impeach Tommer's different testimony. The evidence, if it was as Silvia described (a condition which could never be taken for granted), would have been mildly impeaching, but Tommer had acknowledged that Silvia had contributed substantial sums to the ASM project, and the difference in the testimony concerning the exact amount was largely immaterial. Further, Silvia's own banking records were available to Silvia and should have shown the checks, wires, and other purported contributions. Additionally, Hanye was able to impeach Tommer in other areas, (see, e.g., Gov't's Opp'n 26–27 (dkt. no. 304)), and Silvia has not shown how any additional

points Hanye may have scored with the bank records would significantly undermine confidence in the outcome of the trial, particularly considering all the evidence from other witnesses and the overall strength of the government's case.

D. Failure to Retain Necessary Securities Law Expert[7]

Silvia asserts that Hanye was ineffective because he failed to consult and retain a securities law expert who would have been able to demonstrate that Silvia's efforts were not in violation of any securities law, that "pooling" money to fund a privately held stock subscription agreement is not a violation, and that assigning interest in shares of stock is not dissimilar to assigning interest in any other asset. The defendant's argument reflects the significant discrepancy between his view of the case and everyone else's.

The government's theory hinged not on technicalities of the various securities laws and regulations, but rather on Silvia's lack of authority to transfer shares of ASM and the falsehoods he told to investors about his authority. Indeed, the government raised the forged Subscription Agreement, which it attributed to Silvia, in the first moments of its opening statement:

> Jack Silvia got people who knew and liked him to give him money to invest in ASM. And what he did behind the company's back is he told investor after investor something that was not true: He told these investors that he had 500,000 shares of stock in the company and that he had the full authority to sell these shares and assign these shares to others. None of that was true; in fact, the document in which he predicated his authority, that he showed to his investors to say that "I have these shares, 500,000 shares of stock, and I can sell these shares to you," was a fake. A literal cut-and-paste job with the signature of the CEO of the company, Dale Tommer, cut out from another document and Scotch-taped onto the document, on the signature line, like a third-grade art project. It was a fake project and Jack Silvia knew it because it was a document that he gave to his investors and it was a document that was found in his office at the end of this case.
>
> What Jack Silvia did was found people to give him money, and lots of it, based on a lie. And that document was the subscription agreement that we're going to hear

[7] The defendant makes brief references to Hanye's failure to retain or to adequately consult with forensic accounting, real estate, and handwriting experts, but does not develop an argument as to why that may have been constitutionally ineffective. (See Def.'s Br. 54.)

> about again and again during this case. It was dated June 30, 2009. It was called a subscription agreement. It was fake and it was in his office.

(Trial Tr. Day 2, at 12–13.)

Similarly, Silvia's first lawyer, Mirhashem, understood correctly that the case "didn't turn on the technicalities of securities law." (Ev. Hr'g Tr. Day 1, at 35.) Rather, "[t]his was Tommer saying this is a forged document and Mr. Silvia saying this is a genuine document, and the allegation was that showing that document to people who were giving money to Mr. Silvia was a misrepresentation made with a fraudulent intent." (Id.) Consequently, he "didn't think that, based on those reasons, a securities expert was needed in this case." (Id.; see also id. at 38 ("[T]he government was saying he never had a subscription agreement so he couldn't do anything. He never had the authority to do anything with ASM shares.").)

Hanye's view of the case was consistent with this, and accordingly he decided that a securities expert would not advance the defense. "[I]t's that the question was whether that was Dale Tommer's signature or not. It was a factual defense. So a securities expert wasn't going to tell us whether that was Dale Tommer's signature or not." (Id. at 116; see also Ev. Hr'g Tr. Day 3, at 23–24 ("[A]n expert wouldn't be able to testify that fabricating a signature was not securities fraud. That was ultimately the issue. An expert wasn't going to be able to say that that was legitimate anyway.").)

Because the decision to call a witness is "almost always strategic," it is difficult for a defendant to overcome the strong presumption that declining to call a witness was "sound trial strategy." Lema v. United States, 987 F.2d 48, 54 (1st Cir. 1993) (citation omitted). Silvia has made no convincing argument that Hanye's decision was objectively unreasonable or, indeed, anything but sound trial strategy in light of Hanye's view of the case, which was consistent with that of prior counsel and the government.

E. Fact Witnesses

Silvia argues that Hanye's decisions not to interview and call various potential witnesses undercut his defense. However, he has failed to demonstrate that Hanye's investigation and decisions with respect to witnesses were constitutionally deficient. The record reflects that Hanye's team made contact with and interviewed many of the defendant's requested witnesses. Some potential witnesses were reluctant to be interviewed. (Ev. Hr'g Tr. Day 3, at 61–62.) Some of those interviewed made statements contrary to what Silvia had told Hanye he expected them to say.[8] (Ev. Hr'g Tr. Day 1, at 138.) For others, Hanye considered Silvia's requests and determined the proposed testimony was irrelevant or not helpful. He made those determinations by studying the discovery and considering the theory of defense. (Ev. Hr'g Tr. Day 1, at 105.) Hanye's decision not to personally interview and call every witness the defendant requested was an informed and strategic one, and the defendant has not demonstrated it was unreasonable.[9] See, e.g., Lema, 987 F.2d at 54–55 (1st Cir. 1993) (finding strategic decision was reasonable where counsel balanced benefits and risks); accord Strickland, 466 U.S. at 690.

F. Failure to Review Discovery

Silvia argues that Hanye failed to review Silvia's computer hard drive and, consequently, Hanye was not receptive to his attempt to highlight important documents at the start of and middle of trial and was not able to use various documents effectively at trial.

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[8] For instance, Ben Cerilli was interviewed by the defense team and offered a statement damaging to the defendant. (Ev. Hr'g Tr. Day 2, at 17; id. Day 3, at 76–77.) Similarly, Phil Lurie was interviewed by the defense team and Hanye determined that his testimony would not further the defense in the way Silvia had suggested it might. (Id. Day 3, at 78–79; Ev. Hr'g Ex. 144.)

[9] And, as with other claims, the defendant does not now offer the testimony of the actual witnesses, but rather, asks the Court to simply credit what he says they would say. Such information, as Hanye's team found in their investigation, is not necessarily reliable.

To begin with, to the extent that Silvia contends that prevailing professional norms would have required Hanye to comb through every file on the defendant's hard drive to evaluate all for possible relevance to the case, he submits no case law in support of that implausible proposition. Silvia, a former lawyer, was *very* actively involved in the preparation of his defense, especially in the two months before trial began. He regularly provided documents and information to Hanye, and Hanye in turn repeatedly asked the defendant to provide material relevant to the case. Hanye was understandably skeptical when new documents were provided by Silvia on the eve of and during trial,[10] and Silvia has not explained his bringing the documents to Hanye's attention so late in the proceedings. Ultimately, despite the late disclosure to the Court, Hanye was able to introduce many of the documents the defendant belatedly provided.[11]

In sum, the defendant has failed to demonstrate that Hanye's representation under the circumstances was unreasonable under prevailing professional norms and that he suffered prejudice from the alleged errors individually or in the aggregate.

IV. The Second Trial

In support of his motion relating to his convictions at the second trial, the defendant makes two arguments: (1) the Court erred in denying his motion to preclude evidence of the jury's guilty verdicts from the first trial because those verdicts were the product of Hanye's ineffective

[10] The defendant had been disbarred by the Massachusetts Supreme Judicial Court in part for submitting false and fraudulent documents to the court. See In re: John Silvia, Jr., SJC No. BD-1997-011 (Dec. 5, 2003).

[11] Furthermore, Hanye had to make a strategic decision regarding the introduction of some evidence because the presentation of questionable documents could have potentially opened the door to the introduction of the defendant's disbarment. (See, e.g. Trial Tr. Day 5, at 111–12 (dkt. no. 288).)

assistance of counsel;[12] and (2) the testimony of defense witness Mark Mollicone during cross-examination that the defendant was an attorney created a risk of unfair prejudice.

With respect to the defendant's contention that it was error to deny the defendant's motion to preclude evidence of the jury's verdict in the first trial, I stand by my decision for the reasons previously articulated on the record. See Fed. R. Ev. 609(a)(2); SEC v. Sargent, 229 F.3d 68, 80 (1st Cir. 2000) (citations omitted) (holding that "district courts do not have discretion to exclude prior convictions involving dishonesty or false statements"). Furthermore, as discussed above, I do not find that the first jury verdict was the product of ineffective assistance.

The defendant's contention regarding Mollicone's testimony also fails. In a series of questions, the government asked the witness about his relationship with the defendant, such as whether they socialized together or vacationed together, and the witness's knowledge about the defendant, such as if he knew where the defendant spent his vacation time. When he asked whether he knew what the defendant did for a living, the witness responded that he knew the defendant was a lawyer at one point. The prosecutor instructed the witness not to answer any further and then changed subject.

Although evidence that he was an attorney was provisionally excluded, the defendant does not convincingly explain what unfair prejudice may have resulted from the witness's limited testimony to that effect. The reference to the defendant's former occupation was brief and appeared not to have been intentionally elicited by the government. Moreover, the government did not ultimately try to use the testimony as it had initially sought (i.e., to argue that Silvia's specialized knowledge of the law and legal process was relevant to the structuring and witness tampering

[12] Silvia maintains that he elected not to testify at the second trial because he would have been impeached by the fact of his prior conviction for fraud.

counts). Further, any suggestion that the jury likely hypothesized about the nature and status of the defendant's bar membership is speculative and contrary to the presumption that jurors follow the Court's instructions, as pertinent here, to base their judgment solely on the evidence presented in the case and to not go beyond the evidence to speculate or guess what other things might also be true.

V. Conclusion

Because Silvia has failed to satisfy his burden under Strickland, he has not shown that it is in the interest of justice to vacate his convictions and award a new trial, as is necessary under Rule 33. Consequently, his motion for a new trial is DENIED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge