

No. _____

In the Supreme Court of the United States

JOHN SILVIA, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case raises the question of whether an attorney can be found to have rendered effective assistance of counsel where he failed to review a significant portion of discovery, failed to interview and call witnesses provided by a defendant who asserted the witnesses would provide exculpatory evidence, failed to consult and call an expert at trial to support the defense where the government called an expert witness and the jury instructions involved securities laws, failed to subpoena, preserve and obtain evidence that the defendant informed was exculpatory and went to the heart of the matter, and where the attorney created an adversarial relationship with his client that prevented him from adequately and zealously representing his client, and in consequence, impeded the attorney from properly preparing his client to testify at his first trial.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Silvia, Jr., respectfully petitions for a writ of certiorari to review the opinion and judgment entered by the United States Court of Appeals for the First Circuit on March 20, 2020.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is available at 953 F.3d 139 (1st Cir. 2020), and is reproduced in the Appendix at A.1-A.9. The opinion of the District Court for the District of Massachusetts concerning the defendant's motion for new trial based on ineffective assistance of counsel is reproduced in the Appendix at A. 10.

JURISDICTION

The First Circuit's judgment was entered on March 20, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), as this Petition for a Writ of Certiorari was filed within ninety days of the Court of Appeals' judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

The instant Petition involves the Sixth Amendment's right to the effective assistance of counsel:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. VI.

STATEMENT OF THE CASE

A. District Court Proceedings

On February 7, 2014, John Silvia, Jr., appeared in Court for his initial appearance, and Federal Public Defender Behzad Mirhashem was appointed to represent him. (A./4). On March 27, 2014, Mr. Silvia was indicted and charged with nine counts of securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff and 17 C.F.R. §240.10b-5;¹ 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. (A./28-45).

On November 20, 2014, trial counsel, Joshua Hayne entered his notice of appearance, and on December 4, 2014, Attorney Mirhashem moved to withdraw his appearance because he was leaving the Boston Federal Defender's Office. (A./9). The trial date was set initially for October 5, 2015.

Trial counsel moved to continue the trial first to November 16, 2015, then to December 7, 2015 making clear he was not prepared for trial and citing his overwhelming case load; the trial date was then set to February 8, 2016. (A./10-11). After the case was continued to February 7, trial counsel advised Mr. Silvia that the case was moved up to February 1 because the

¹ Count 1 was dismissed at the Government's request on January 28, 2016. (A./12).

prosecutor was going on vacation the third week of February. (Hr'g. Tr. 4/45). Trial counsel was going on vacation after trial as well. (Hr'g. Tr. 3/46). Mr. Silvia testified that he told trial counsel that there would not be enough time to prepare necessary matters, and to interview and call the defense witness. (Hr'g. Tr. 4/46).

On March 27, 2015, trial counsel filed a motion to sever counts, which was allowed eleven days before the beginning of trial. (A./9, 11). The first trial lasted February 1 until February 11, 2016. (A./12-13). Mr. Silvia was convicted of counts 2 through 9 (securities fraud), and acquitted of counts 10 and 11 (wire fraud). (A./79-81).

On February 24, 2016, Mr. Silvia filed a pro se motion for new trial and motion to appoint new counsel. (A./14, A.82). Undersigned counsel was appointed on March 15, 2016. (A./14).

On July 19, 2016, a superseding indictment issued charging Mr. Silvia with the two counts of wire fraud and five counts of mail fraud that had previously been severed, a count of structuring, in violation of 31 U.S.C. § 5324(a)(3), and a count of witness tampering, in violation of 18 U.S.C. § 1512(b)(1). (A./46-61).

A jury was seated for the second trial on February 6, 2017. (A./18). The jury returned its verdict on February 15, 2017, convicting Mr. Silvia on all counts. (A./19, 102-104). The defendant filed a motion for new trial on February 28, 2017. (A./19, 105). An evidentiary hearing on this motion was

held on July 6, 7, 17, 18, and 19, 2017. (A./21). Mr. Silvia filed a memorandum in support of his motion for a new trial on October 27, 2017, and the government filed its opposition on December 11, 2017. (A./24, 113-174, 175-217). The defendant's motion for new trial was denied on April 23, 2018, and the defendant was sentenced on April 26, 2018. (A./24-25, 224-238, 239).

B. Statement of the Facts

This appeal centers on Defendant's motion for a new trial based on the ineffectiveness of his counsel during the first trial. That motion asserts that Mr. Silvia was denied a fair trial due to his attorney's failure (1) to obtain exculpatory evidence; (2) to interview and call witnesses on behalf of the accused; (3) to retain and consult a securities expert; (4) to review discovery; (5) to adequately prepare the defendant to testify; and (6) by creating an adversarial relationship with his client that prevented him from adequately and zealously representing his client. Counsel's lack of preparation was so extensive and cumulative that it rendered the trial unfair and the result unreliable. Without these errors, there is a reasonable probability that the result of the proceeding would have been different.

The alleged conduct underlying the securities fraud charges is that Mr. Silvia owned shares of Advance Space Monitor, LLC ("ASM"), which he was not permitted to sell, and that Mr. Silvia received money from alleged victims in exchange for fraudulently promising his victims shares in exchange for

money. (A./28-45). The government alleged that Mr. Silvia did not have any right to sell shares of ASM and instead forged the owner of ASM's signature ("Dale Tommer") on a fraudulent Subscription Agreement, dated June 30, 2009. (A./28-45). Mr. Silvia maintained that he, through his company Richardson Consulting, had a properly signed Stock Subscription Agreement, from which his company obtained ASM shares, and that he never sold any of these shares but merely assigned an interest in those shares as collateral for certain documented loans to Richardson Consulting. (Hr'g. Tr. 4/84-86). Mr. Silvia asserted that the shares were exempt from registration, and that he informed all parties that made him personal loans that when ASM acquired funding, that ASM would buy-out Richardson Consulting's shares, and Richardson would then be able to repay the loans plus any increase on the value of the shares. (Hr'g. Tr. 4/84). See also Tr. I 2/25-30 (defense opening statement explaining that Silvia partially assigned his interest in stock as collateral for a loan, and did not sell stock). Mr. Silvia maintained that he never altered the Stock Subscription signature page and that Tommer's emails with attachments would contradict Toomer. Silvia insisted that the emails and attachments would demonstrate that it was Tommer who altered the document in an attempt to extricate himself from civil liability.

Silvia argued that one of the alleged victims was his relative, Frank Sousa, who gave him a loan. When Mr. Sousa died his estate sought the return of the loan. Silvia maintained that it was after Dale Tommer became

aware of the Sousa estate seeking return of the loan monies that Tommer became concerned that his IRA retirement monies could be subject to lien and attachment. In consequence, Silvia alleged that Tommer sought to set up Silvia in order to insulate himself and his company from liability claiming that Tommer testified before the Secretary of State and presented an altered Stock Subscription Agreement to falsely make it appear that Silvia attempted to cut and paste Tommer's signature. Silvia also claimed that Tommer lied when he denied that Silvia had an employment contract with ASM to try to refocus the Secretary of State away from Tommer and ASM and upon Silvia. (Hr'g. Tr. 4/100).

Prior to Mr. Silvia's arraignment, he had been a party to a Secretary of State's Office Securities Division hearing against him, Dale Tommer, and ASM, and became aware of some of the accusations against him that were later alleged in the indictments. Mr. Silvia testified that at one of his initial meetings he asked Attorney Mirhashem to subpoena all of ASM's bank records, Mr. Tommer's personal bank records and records of Mansfield Consulting because informing the documents were critical because he knew from the Secretary of State deposition that the issue of capital contributions and stock rights were an issue and to show that Mr. Tommer's testimony before the Secretary of State and expected trial testimony was and would be untrue. (Hr'g. Tr. 4/26-27).

C. Evidentiary Hearing

Prior to October 6, 2014, Mr. Silvia told Mirhashem that Mr. Tommer had emailed copies of his company's subscription agreement and employment agreement to various potential investors and had attached the subscription agreement to emails. (Hr'g. Tr. 1/20). Mr. Silvia expressed the importance of Mr. Tommer's email account to Mirhashem at least twice. (Hr'g. Tr. 1/21). On October 6, 2014 Attorney Mirhashem sent the United States Attorney's Office a discovery request (Hr'g. Tr. 1/17; A./70). On October 13, 2014 Attorney Mirhashem received a written response. (A./74). He was annoyed by the response and had "difficulty understanding what they had and didn't have." (Hr'g. Tr. 1/18). On October 21, 2014, Attorney Mirhashem filed a discovery request with the Court. (A./62).

It was clear to the Federal Defender's Office that the prosecution would not be providing the requested discovery and that the Court would not mandate the prosecution to provide the same. (Hr'g. Tr. 1/23-24, A./116, Ex. 4, 5). Despite the Court's order, Attorney Mirhashem was aware that the corporate book and the email account were things that he thought he should obtain and agreed that it would be helpful to obtain them. (Hr'g. Tr. 1/25, A./62). Mirhashem so left notes to successor counsel to pursue these matters.

The trial date was set for November 16, 2015. (Hr'g. Tr. 1/70). Through September 2015, trial counsel was not available to consult with Mr. Silvia and cancelled numerous meetings. (Hr'g. Tr. 1/71). With trial six weeks away, an investigator working with trial counsel had only interviewed one witness;

counsel had not retained a handwriting expert to address the purportedly fraudulent subscription agreement, and had not consulted with a securities expert. (Hr'g. Tr. 1/70-71, 74). Trial counsel had not read or reviewed all of the 14,000 pages of discovery, and in fact never reviewed each page of the discovery provided to him. (Hr'g. Tr. 1/90-91). Trial counsel was unaware that the government provided the Federal Defender's Office a copy of Silvia's hard drive and was unaware of the existence of the hard drive throughout the eventual trial. (A./218).

On October 13, 2015, about one month before trial, Mr. Silvia hand delivered a written letter to trial counsel outlining numerous concerns about counsel's lack of preparation. (Hr'g. Tr. 1/75, Ex. 29). In the letter Mr. Silvia identified 31 potential witnesses to be interviewed, requested that trial counsel retain a securities expert and a real estate law expert, and reminded him of the documents that needed to be subpoenaed, including Mr. Tommer's Gmail account, and GreenHills Ventures records. (See Ex. 29). On October 13, 2015, trial counsel's awareness about the scope of his investigator's progress was limited to the contents of an October 13, 2015 email. (Hr'g. Tr. 1/78, Ex. 31). By then, trial counsel's investigator spoke to one witness, Anthony Rondeau, and trial counsel testified that the investigator had made contact with two other witnesses that he could not name. (A./121, Ex. 31).

Mr. Silvia consistently expressed concern about trial counsel's preparation. (Hr'g. Tr. 1/79). Trial counsel acknowledged Mr. Silvia's

concerns and promised that his case load would be lighter in November and he would be fully prepared for trial. Trial counsel apologized for his lack of past response and cited his busy caseload and hearings over the prior two weeks as reasons. (See Ex. 33).

On October 19, 2015, trial counsel filed a motion to continue the trial date. (A./77-78). In his motion, counsel attested that “[s]ince being assigned to this case in November 2014, counsel has faced an unusually high case load due to the full-time assignment from the federal defender’s office of three trial attorneys, as well as support staff and investigators,” to another trial. (A./77). He stated that, “During the pendency of that case, other new cases have been divided among fewer attorneys and staff than otherwise would have been available.” (A./77). Trial counsel told the Court that he “also received new cases from two attorneys who have left the office in this time period. Several of these cases required immediate attention on short notice. These departures also further reduced the pool of attorneys available for new cases and increased the frequency of counsel’s assignment to new cases.” (A./77). Trial counsel stated that he currently had 35 open cases, (A./77), and listed obligations over the prior several months that prevented him from being able to adequately prepare for trial on November 16. (A./78). Trial counsel further noted that the paralegal who had been assigned to Silvia’s case left the office unexpectedly and just returned on October 13. (A./78).

At the time trial counsel filed the motion he was unaware of how many of the potential 25 witnesses had been interviewed. (Hr'g. Tr. 1/81). Trial counsel opined that he would be ready for a February 2016 trial date. (Hr'g. Tr. 1/82-83). However, the problems that his schedule, workload, and lack of proper staff support created continued right up until the trial, which commenced on February 1, 2016. (Hr'g. Tr. 1/9-13, 71-98).

Silvia testified that he engaged in due diligence by attempting to get advice from the Rhode Island Secretary of State's Office and New Hampshire to ensure that his efforts were not sales of securities and that his conduct was exempt from securities laws. (Hr'g. Tr. 4/42-44). He testified that he meticulously made sure that he adhered to securities laws so he would not be in violation of an existing Massachusetts Secretary of State's order against him. (Hr'g. Tr. 4/40).

Silvia testified that he met with trial counsel and explained his prior due diligence, consultation with officials in Rhode Island and New Hampshire Secretary of State Offices, and explained that he adhered to securities laws. (Hr'g. Tr. 4/40-41). Silvia testified that he tried to explain securities rules to trial counsel, and provided trial counsel regulations and materials to review including general securities law. (Hr'g. Tr. 4/43-44). Mr. Silvia testified that he spoke to counsel about the difference between selling stock and assigning an interest in shares as collateral for a loan, and that he

repeatedly asked trial counsel to retain a securities expert. (Hr'g. Tr. 4/42-44, Ex. 216-221, 223, 227).

Mr. Silvia testified that he attempted to explain to trial counsel his position that Silvia's company, Richardson Consulting, would obtain shares of ASM and then assign an interest in those shares as collateral for loans to Richardson Consulting. (Hr'g. Tr. 4/84). He further attempted to explain to trial counsel that the assignment of interest on those shares would be a non-registered security exempt under Reg. D and Richardson Consulting would then be obligated to pay back the loan plus increase in value of the Richardson Consulting owned shares. Mr. Silvia urged trial counsel to speak to witnesses to confirm his position and defense. (Hr'g. Tr. 4/84, Ex. 137)

Mr. Silvia was concerned about the government's claim that he sold stock and after explaining the difference between selling stock and assigning an interest in shares he asked trial counsel to retain a securities expert. (Hr'g. Tr. 4/42-43, A./123). Mr. Silvia provided trial counsel with the names of two men he spoke to from government agencies about securities law. Trial counsel did not interview either man and did not recall if anyone in his office contacted either of them. (Hr'g. Tr. 2/9, A./123-124). Trial counsel never spoke to a securities law expert. (Hr'g. Tr. 1/77, A./123). Trial counsel did not engage in any type of research on the law of exemptions. (Hr'g. Tr. 1/115-16). Although Mr. Silvia was asserting that he wanted to pursue exemptions as

part of his defense, neither trial counsel nor his staff sought any consultation on this issue. (Hr'g. Tr. 1/116, A./124).

Mr. Silvia identified ways that trial counsel could obtain the original signed stock subscription agreement between Tommer and Silvia to show that Tommer lied about its existence. Silvia testified that the ASM corporate book would contain the original signed stock subscription agreement and other important documents. (Hr'g. Tr. 4/16). Silvia requested that trial counsel obtain this information in a number of different ways including obtaining the corporate book, obtaining Tommer's emails that would contain the original signed stock subscription agreement that was sent to clients as attachments, and to contact witnesses who would have a copy of the original subscription agreement or would have been seen the agreement during solicitations. (Hr'g. Tr. 1/89, 3/128, 4/16, 4/20). Trial counsel understood that the corporate book would have original documents in it, and was aware that it was a subject of discovery motions prior to his representation, but made no efforts to obtain it. (Hr'g. Tr. 1/89). Trial counsel agreed if the corporate book contained subscription agreements, that would have been better for Mr. Silvia than impeaching Mr. Tommer with the suggestion that the book was missing. (Hr'g. Tr. 2/52). Trial counsel did not call any witnesses to evidence the stock subscription agreement, made no effort to obtain the corporate book and did not try to obtain Tommer's emails.

Another example of available exculpatory evidence and impeachment evidence relative to Tommer was evidence to contradict Tommer's claim that Silvia made minimal financial contributions to ASM. Mr. Silvia disputed the government's calculations, which were based in part on Tommer's assertions that Silvia invested far less money in ASM than he actually did; trial counsel was aware this exculpatory evidence may exist and knew that Silvia had asked him many times to subpoena ASM bank records to show his contributions. (Hr'g. Tr. 2/23, 3/121). Trial counsel testified that he did not recall Silvia asking him to subpoena Mr. Tommer's personal bank accounts, but agreed that even during trial Mr. Silvia was requesting that these records be subpoenaed. (Hr'g Tr. 2/24, Ex. 145).

Trial counsel did not make any efforts to acquire these records. (Hr'g. Tr. 2/86). The government's case centered around the accusation that Silvia took money that was meant to be an investment in ASM and instead spent it on his personal expenses. (Tr. I 2/13). Mr. Silvia contended that the loan matters were to meet his personal ongoing financial and cash flow needs, and that the monies were ultimately paid to ASM as part of the funding of the stock subscription agreement. The records verify that the loans totaled \$300,000, and that Silvia ultimately funded \$379,000 to ASM. (Tr. I 5/82-8; Hr'g. Tr. 3/12). Trial counsel did not consider hiring a forensic examiner to determine the accuracy of the government's accounting. (Hr'g. Tr. 2/95). When asked if he subpoenaed records to do a forensic accounting so he could

see how much Mr. Silvia put into ASM, trial counsel's answer was "nope." (Hr'g. Tr. 2/23, A./127). Trial counsel never considered hiring a forensic examiner to look through the records or determine the accuracy of the government's assessment. (Hr'g. Tr. 2/95). At trial the government made an error in its forensic accounting that went unchecked by both trial counsel and the government. Trial counsel did not recall that it was Mr. Silvia who alerted him about the errors. (Hr'g. Tr. 2/96, A./127, Ex. 149).

After trial counsel failed to subpoena bank records, Mr. Silvia provided partial records from ASM. (Hr'g. Tr. 2/26). Trial counsel was aggravated and surprised that he was receiving these records right before trial, and reprimanded Mr. Silvia for what he believed were late disclosures. (Hr'g. Tr. 2/90-96). Trial counsel looked at the partial records, but did not make notes or memorialize the amount of money Silvia gave to Tommer and ASM. (Hr'g. Tr. 2/92). Mr. Silvia's testimony was the only defense evidence regarding the amount of his contributions to ASM. (Hr'g. Tr. 2/120). Mr. Silvia felt compelled to testify because otherwise there would have been no rebuttal to the government's version of his capital contributions. (Hr'g. Tr. 2/88, 93). Trial counsel agreed that if Mr. Silvia did not testify, there would be no evidence of his contributions to ASM introduced independently of Mr. Tommer and the government. (Hr'g. Tr. 2/93). He recognized that a defendant trying to contradict another witness without any independent evidence is one of the most dangerous forms of testimony, and agreed that obtaining

independent evidence is the most critical thing a lawyer can do to support a defendant's version. (Hr'g. Tr. 2/94).

Despite Mr. Silvia's insistence that Mr. Tommer's emails would be crucial, and would contain copies of the original signed subscription agreement at issue in the case, which were sent to a company called GreenHills Ventures, (Hr'g. Tr. 4/13; Ex. 64), trial counsel never attempted to acquire Mr. Tommer's email records, despite repeatedly assuring Mr. Silvia he would do so and despite his acknowledgment that if these materials were in Mr. Tommer's email, they would be critical in cross-examination. (Hr'g. Tr. 1/77, 1/96, 4/47). Trial counsel delayed an attempt to obtain the GreenHills records, which would presumably contain emails and attachments from ASM including the original signed Stock Subscription Agreement and Silvia employment agreements. When counsel subpoenaed the records from GreenHills, the records no longer existed. (Hr'g. Tr. 2/50-51). Trial counsel refused to call any GreenHill employee as a witness to inquire about the prior existence of the records.

On May 19, 2014, the government alerted the Federal Defender's Office that it had seized and copied Mr. Silvia's computer hard drive pursuant to a search warrant. (A./222). Trial counsel testified at the motion hearing that he looked through the documents the government produced regarding the information on Silvia's hard drive, though he never requested a copy of the hard drive and one was not provided to him. (Hr'g. Tr. 3/9-10).

Trial counsel testified that Silvia told him there were documents that would show his capital contributions to ASM that were different from what Mr. Tommer claimed and as the government alleged but trial counsel did not attempt to find those documents. (Hr'g. Tr. 3/11). Trial counsel agreed that this would have been an important topic for cross-examination of Tommer. (Hr'g. Tr. 3/11).

A defense exhibit showing Silvia's capital contributions to ASM was not permitted to be introduced at Mr. Silvia's first trial. The government argued against admission citing that the evidence was late disclosure. (Tr. I 5/108-112, 117-118). Mr. Silvia maintains that these documents were located on his hard drive, and that the documents that he provided to his attorney to use as exhibits were not provided late, since they were on his seized laptop, which the government had in its possession. (Hr'g. Tr. 3/8, 4/62-63, 5/44).

Prior to trial, Mr. Silvia directed trial counsel's attention to Ex. 209, an FBI report memorializing a statement by Mr. Tommer reporting that he had a spreadsheet noting that Mr. Silvia invested \$379,308 into ASM. (Ex. 199). Trial counsel did not attempt to obtain this spreadsheet, and could not cross-examine Mr. Tommer or the government's forensic examiner about this inconsistent testimony. (Hr'g. Tr. 3/12-13).

Trial counsel testified that he was concerned about authenticating the documents Mr. Silvia provided him, though the only specific document he testified being concerned about authenticating was related to an investment

group called Kingbridge. (Hr'g. Tr. 2/39). Trial counsel admitted he did not call a Keeper of Records from Kingbridge to authenticate the documents, or ask Attorney Cerilli from Kingbridge to look at them. (Hr'g. Tr. 2/40).

Trial counsel testified that he was concerned that Mr. Silvia was involved in ASM in ways that were inappropriate, including taking records and the corporate book home. (Hr'g. Tr. 3/122-123, A./137). Again, trial counsel's negative conclusions against his client were based on what Mr. Tommer said about Mr. Silvia rather than relying on what Silvia told him, which was that the business records were part of the work product that Richardson Consulting and Mr. Silvia had a right to access and to maintain, (Hr'g. Tr. 3/122-23, A./137), and the corporate book was only at Mr. Silvia's home for a few days in 2009, just after it was purchased by Richardson Consulting for ASM, and thereafter the corporate book was located in Tommer's office. (Hr'g Tr. 4/19-21). This was verified by Mr. Tuttle's testimony that he left the employ of ASM in the second half of 2009 (Tr. 1 2/76). When questioned to provide actual examples of concerns that prevented trial counsel from trying to obtain records requested by Mr. Silvia, counsel could not articulate a specific concern and instead offered generalized concern that the records would not support what Mr. Silvia said they would support. (Hr'g. Tr. 3/123, A./137).

The breakdown in the attorney client relationship was obvious and compounded the cumulative errors and ineffectiveness of counsel. Prior to the

February 1, 2016 trial date, Mr. Silvia asked trial counsel more than once to move for a further continuance, as he believed counsel was not ready for trial. (Hr'g. Tr. 4/49). Mr. Silvia said that trial counsel was defensive and a little angry during this conversation. (Hr'g. Tr. 4/49). On January 20, 2016, Mr. Silvia sent an email to trial counsel asking if he could drop documents off at his office and expressed concern about trial counsel's readiness for trial. (See Ex. 95). Trial counsel spoke with Mr. Silvia about the email (Ex. 95) but did not remember the conversation or whether Mr. Silvia expressed concern that he did not subpoena any witnesses for trial, Mr. Tommer's email account, or personal bank records. (Hr'g. Tr. 1/135). When trial counsel was asked to specifically describe what Mr. Silvia's concerns were about trial counsel's unreadiness for trial, trial counsel responded, "interview witnesses". (Hr'g. Tr. 1/139).

Trial counsel disregarded Mr. Silvia's concerns by saying that they "were not rooted in reality." (Hr'g. Tr. 1/139). Trial counsel could not specify what Mr. Silvia's concerns were. (Hr'g. Tr. 1/140). Mr. Silvia testified that he again spoke to trial counsel on January 20, 2016 after court when trial counsel represented to the Court that he was ready for trial. (Hr'g. Tr. 4/49). Mr. Silvia testified that when he urged trial counsel to ask for a continuance, counsel said if he sought a continuance "they'd throw me out." (Hr'g. Tr. 4/50).

In a meeting on February 7, 2016, after the government rested, Mr. Silvia expressed his discontent with trial counsel for not subpoenaing any of the records he requested. (Hr'g. Tr. 4/105). Mr. Silvia was upset that trial counsel had not introduced any of the exhibits he asked him to introduce to impeach prosecution witnesses, and Mr. Silvia wanted to fire his attorney. (Hr'g. Tr. 2/100, 4/102-103). Mr. Silvia still urged trial counsel to call witnesses, but he declined. (Hr'g. Tr. 2/103). The government had called 13 witnesses against Mr. Silvia and trial counsel had not called any witnesses on behalf of Mr. Silvia.

Mr. Silvia asserts that he informed trial counsel he wanted him to withdraw and testified that trial counsel told him that he did not think the Court would allow him to be removed as counsel and mentioned this would probably allow the previously excluded evidence to be introduced against him at trial. (Hr'g. Tr. 4/103). Silvia testified that this affected his decision in trying to remove trial counsel. (Hr'g. Tr. 4/103). Trial counsel told Silvia it was too late to designate expert witnesses. (Hr'g. Tr. 4/103).

After that Sunday meeting at trial counsel's office, trial counsel called Mr. Silvia and was suspicious that he could not find certain documents, and accused Mr. Silvia of taking them, and cited suspicious circumstances surrounding this meeting. (Hr'g. Tr. 2/105, 3/146). Trial counsel believed he asked Silvia if he took the documents, but was concerned that Silvia was going to accuse him of losing the documents. (Hr'g. Tr. 2/107). Trial counsel

was concerned about allegations that he believed Mr. Silvia would make against him, and believed this made for a more difficult client relationship. (Hr'g. Tr. 2/105). Trial counsel was also suspicious because, according to him, Silvia parked in an area where his car would be towed, he was warned but left his car there, and then when he left the office, he asked to leave his briefcase behind. (Hr'g. Tr. 3/147). Counsel was concerned that Silvia would complain that an important piece of evidence had gone missing from his briefcase while his attorney had it. (Hr'g. Tr. 3/147). Trial counsel found the documents in his office that he had misplaced shortly after he accused his client. (Hr'g. Tr. 3/146).

At trial, trial counsel demonstrated a lack of understanding of Silvia's defense and the securities related concepts. Trial counsel mentioned the distinction between selling stock and assigning an interest in shares of stock, but did not explain the concept or call an expert in securities to demonstrate to the jury the legality of such an arrangement and how this was different than the government's claim against Mr. Silvia. (Tr. I 2/25). Trial counsel's cross-examination of prosecution witness Glenn Shealey failed to establish a record to contradict Mr. Tommer's testimony; trial counsel failed to ask Shealey about the purpose of meetings with Mr. Tommer and the content of discussions with him during those meetings, particularly that Tommer specifically assented and acknowledged that shares were to be "assigned." (Tr. I 2/67-69). This was contradictory to Tommer's previous testimony before

the Secretary of State and his testimony at trial. (Tr. I 2/67-69, Hr'g. Tr. 4/138).

ASM company attorney Tim Maguire, a prosecution witness, had prepared Amended Operating Agreements that Silvia gave to trial counsel on January 19, 2016. (Ex. 92). The agreements noted that Silvia had over a million shares of ASM stock, which was different from Mr. Tommer's testimony. Trial counsel and his team did not speak to Attorney Maguire before trial, and, when he was called by the prosecution, trial counsel did not cross-examine him with the documents Silvia provided or ask him about the shares Mr. Silvia had in the company. (Hr'g. Tr. 2/20-22).

Trial counsel agreed that it was important to establish that Mr. Silvia had received a salary from ASM to provide support to Silvia's contention that he had an employment contract. (Hr'g. Tr. 3/27). Mr. Silvia provided documents showing that he had a salary. (Hr'g. Tr. 3/29). Trial counsel did not question witnesses about Mr. Silvia's salary or attempt to get any document to show that he was salaried. (Hr'g. Tr. 3/29).

Mr. Tommer's testimony went unchallenged even when trial counsel had basic and obvious evidence available to demonstrate Mr. Tommer's lack of veracity. For example, Mr. Tommer testified that the CALTECH license was cancelled because of legal action from the Sousa estate. (Tr. I 4/47). Trial counsel was in possession of Ex. 255, which made clear the cancellation of the CALTECH license predated the Sousa complaints by some five months and

the license was instead cancelled because of Tommer's failure to pay the \$38,000.00 license fee and used the money for his own personal use. (Hr'g. Tr. 2/72, 3/44, 3/45, Ex. 255). Trial counsel also decided not to contact Attorney Hannah Dvorak-Carbone, the lawyer for CALTECH, or subpoena her as a witness. (Hr'g. Tr. 3/41; 3/42, Ex. 255).

Mr. Silvia provided a list of 31 potential witnesses to trial counsel. Most of the witnesses were not interviewed or attempted to be interviewed. (Hr'g. Tr. 1/103). Trial counsel did not prepare any of the potential witnesses for trial, and ultimately did not call any witnesses to support Mr. Silvia's testimony. (Hr'g. Tr. 1/106-107).

Trial counsel agreed that it would have been better to admit Mr. Silvia's exhibits through other witnesses and advised him not to testify, (Hr'g. Tr. 2/80, 3/144), but because no other witnesses were called, Mr. Silvia had to testify. Trial counsel originally stated that he invited Mr. Silvia to meet with him to prepare his testimony and Mr. Silvia refused. (Hr'g. Tr. 2/110-111). However, trial counsel ultimately agreed that he never invited Silvia to prepare after the February 7, 2016, meeting, during which the defendant's testimony was not discussed. (Hr'g. Tr. 2/111-112).

D. The District Court's Order

The District Court (O'Toole, J.) found that Mr. Silvia had not met his burden to demonstrate that his trial counsel was ineffective. (A./224-38). The Court found that trial counsel had filed motions, reviewed the government's

discovery, despite trial counsel's testimony to the contrary, (Hr'g. Tr. 1/90), had a command of the facts of the case, cross-examined witnesses and direct examined Silvia, made objections, and introduced exhibits. (A./229). The Court also found that Silvia was not a credible witness, so the Court disbelieved his testimony regarding the existence of an original Subscription Agreement and his employment agreement. (A./230-31). The Court found that trial counsel's decision not to attempt to subpoena Tommer's emails from Tommer was reasonable because Tommer may have been selective in producing information, and, according to the defense, Tommer was hostile to Silvia. (A./232). The Court found that trial counsel's failure to subpoena ASM and Tommer bank account records, if it was as described, would have been "mildly impeaching." (A./232). The Court found that the failure to call a securities law expert was reasonable, as was trial counsel's decision not to call any of the fact witnesses Silvia requested. (A./233-35). Finally, the Court found that it was reasonable for trial counsel to fail to review Silvia's hard drive. (A./235-36).

E. The First Circuit's Decision

The First Circuit affirmed the District Court's Order finding that Silvia did not satisfy his burden of showing counsel was ineffective, for substantially the same reasons as the District Court. The Court further found that the District Court correctly determined that Silvia's convictions from his first trial could be used to impeach him at the second trial.

REASON FOR GRANTING THE PETITION

The First Circuit erred by affirming the District Court's denial of Mr. Silvia's Motion for New Trial.

The Sixth Amendment to the United States Constitution guarantees the right to the effective assistance of counsel. U.S. Const. amend. VI. This right can be violated if "the government wrongly hinders the defense's ability to conduct its case or when defense counsel fails to perform with a reasonable degree of proficiency." United States v. Natanel, 938 F.2d 302, 309 (1st Cir. 1991). To show ineffective assistance of counsel, the defendant must show that: (1) his "counsel's performance fell below an objective standard of reasonableness," 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." United States v. Wilkerson, 251 F.3d 273, 279 (1st Cir. 2001) (quoting Strickland v. Washington, 466 U.S. 668, 687, 693-94 (1984)). "The benchmark for determining whether a trial lawyer's performance has been constitutionally deficient is whether 'counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Natanel*, 938 F.2d at 309 (quoting *Strickland*, 466 U.S. at 686).

To establish prejudice, the petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Rivera*, 879 F.3d at 12, quoting

Strickland, 466 U.S. at 688. He is “not required to ‘prove that the errors were more likely than not to have affected the verdict.’” *Id.*, quoting *González-Soberal v. United States*, 244 F.3d 273, 278 (1st Cir. 2001). The prejudice prong weighs “the fundamental fairness of the proceeding.” *Id.* (quoting *Strickland*, 466 U.S. at 696).

Counsel’s failure to investigate, contact, or interview potential defense witnesses, review discovery, prepare his client to testify, the hostile relationship between client and attorney, and counsel’s failure to acquire exculpatory information was ineffective. Mr. Silvia provided a list of potential witnesses to trial counsel, most of whom were not interviewed or attempted to be interviewed. (Hr’g. Tr. 1/103). A failure to investigate must be reasonable:

[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.

Dugas v. Coplan, 428 F.3d 317, 327–28 (1st Cir. 2005), quoting *Strickland*, 466 U.S. at 690-91. A failure to investigate potentially exculpatory evidence points towards ineffectiveness. *Lema v. United States*, 987 F.2d 48, 55 (1st Cir. 1993), quoting *McCoy v. Newsome*, 953 F.2d 1252, 1263 (11th Cir.)

(“[f]ailure to investigate evidence that would be helpful to the defense is an indication of ineffective assistance”), *cert. denied*, 504 U.S. 944 (1992).

As is evident from the fact section, trial counsel failed to review discovery, refused to attempt to timely subpoena exculpatory evidence, did not interview the defendant’s proposed witnesses, and failed to speak with an expert to educate himself (and later the jury) about the defense.

The failure of Silvia’s trial attorney to challenge the government’s evidence and theory of the case prejudiced Silvia, as it rendered the trial unfair and the result unreliable. *Cf. United States v. Ademaj*, 170 F.3d 58, 64 (1st Cir. 1999). Trial counsel failed to seek exculpatory evidence and instead accepted the statements and accountings of the government’s witnesses as true without performing any independent investigation or engaging an independent expert. Despite being provided names of dozens of potential witnesses, most were not interviewed and none were called. The government capitalized on this lack of corroboration in closing, stating, “for Jack Silvia to be telling you the truth, the following people would have to not be telling you the truth: Glenn Shealey, John Clarke, Dale Tommer and Sue Nedar.” (Tr. I 6/99).

Trial counsel’s theory of the defense was that Tommer was a liar, Tommer had told four different versions of where and when he found the “altered” signature page of the stock subscription agreement, and these assertions would prove that it was Tommer who had altered the document

himself. (Tr. I 6/105). This strategy was extremely dangerous, particularly when Silvia had directed him to where he could find the documents that would verify these assertions. Trial counsel promised the jury in opening:

Dale Tommer, the president of ASM, is at the very center of this case. He's the government's star witness. He's going to be the one who's going to get up on that stand right there and tell you that Jack Silvia never had a stock subscription agreement or an employment contract, and the evidence is going to show you that when Dale Tommer does that, he's going to be lying.

(Tr. I 2/21). However, trial counsel failed to acquire the exculpatory and impeachment evidence necessary to deliver on this promise, and much of Mr. Tommer's testimony remained unchallenged. Counsel's failure to deliver on a promise in opening is deficient performance and prejudicial. *Ouber v. Guarino*, 293 F.3d 19, 35 (1st Cir. 2002) (defense counsel "made a promise, hammered it home, and then broke it" when he promised the defendant's testimony in opening and she failed to testify; this was ineffective); *Anderson v. Butler*, 858 F.2d 16, 19 (1st Cir. 1988) ("... we cannot but conclude that to promise even a condensed recital of such powerful evidence, and then not produce it, could not be disregarded as harmless. We find it prejudicial as matter of law.").

Further, trial counsel failed to appreciate that Tommer's credibility was only part of the case. Of the three alleged victims, only Shealey testified contrary to Mr. Silvia's assertion that he assigned his interest in ASM in exchange for a loan, although cross examination showed that Shealey included it in his loan documents with Silvia, referred to it with other loans

and expected to be paid back in addition to getting other benefits, which were more characteristic of a loan. (Tr. I 2/68-71). Mr. Sousa had passed, so he could not testify as to his understanding of his arrangement with Silvia. Mr. Clarke testified that the money he gave to Silvia was a loan, stating “. . . I was, in essence, lending Richardson Consulting the money. And I had an agreement with him for an assignment of his interest in ASM to protect that investment; in other words, the collateral for the loan was the partial assignment of his interest in that company.” (Tr. I 4/103). However, trial counsel failed to maximize on this aspect of the defense, and, having not consulted a securities expert, was unprepared to do so.

The case for Mr. Silvia’s guilt was not overwhelming, as evidenced by one of the alleged victims testifying consistently with Mr. Silvia and by the jury acquitting Mr. Silvia on the mail fraud charges relating to the alleged victim Rondeau. Cf. *Gonzalez-Soberal v. United States*, 244 F.3d 273, 278 (1st Cir. 2001). It is likely that, had trial counsel introduced evidence to support Silvia’s testimony that his conduct in taking loans and assigning shares of his company’s stock as collateral for the loans was legal, the outcome of the trial would have been different.

The combination of trial counsel’s failures resulted in an unfair trial, deprived Silvia of the effective assistance of counsel, and resulted in prejudice. Had trial counsel reviewed Silvia’s hard drive which contained exculpatory documents, interviewed witnesses and prepared them to testify,

consulted with a securities expert and offered support for the distinction between the selling of stock and the assignment of shares, and prepared himself with the documents necessary to cross-examine Dale Tommer and prove that he was lying, as promised in the defense's opening argument, there is a reasonable probability that the result of the proceeding would have been different.

The effects from the first trial also infected the second trial. Silvia moved *in limine* to preclude the government from impeaching him with the jury's verdicts from his first trial at his second trial. (A./98). The jury verdicts were not final convictions at that time, as no entry of judgment of conviction or sentence had been entered yet. Silvia argued that the District Court had agreed to sever the counts due to the indictment hinting at a "propensity theory of criminal responsibility." (A./99). Silvia argued that the evidence was more unfairly prejudicial than it was probative, and that, because the verdicts were secured as a result of ineffective assistance, it would be fundamentally unfair for the charges to be used against him. (A./99-100). Finally, Silvia argued that the evidence was inadmissible under Rule 404(b). (A./100-101). Silvia's motion in limine was denied and, as a result of the risk of this powerful impeachment evidence, Mr. Silvia chose not to testify at his second trial.

Silvia raised this issue in his motion for a new trial. (A./106). Generally, a defendant must testify to preserve this claim for appellate

review, *Luce v. United States*, 469 U.S. 38, 43 (1984), however, here, where Mr. Silvia testified at his first trial and at the hearing on his motion for new trial, this general prohibition should not apply, as there is a sufficient record of Silvia's potential testimony and his reasoning for not testifying. Silvia testified at the hearing on his motion for new trial that he did not testify because of his fear of being impeached with his convictions from the first trial. (Hr'g. Tr. 5/66).

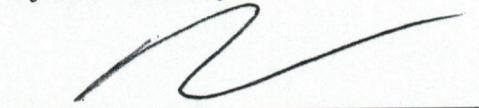
Because, as described above, Silvia's convictions at his first trial were the result of trial counsel's failures, including but not limited to his failure to investigate and locate exculpatory evidence, call favorable witnesses, and consult with expert witnesses to educate himself and the jury on Silvia's defense, Silvia should have been able to testify at his second trial free of the taint from his first trial, and as a result, the prejudice from the ineffective assistance at his first trial infected his second trial.

For these reasons, the First Circuit erred in affirming the District Court's finding that trial counsel rendered effective assistance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted
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