No. _____

IN THE
Supreme Court of the United States

MICHAEL COSCIA,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

TERENCE H. CAMPBELL
Counsel of Record
JOHN N. PAVLETIC, JR.
COTSIRILOS, TIGHE, STREICKER, POULOS & CAMPBELL, LTD.
33 North Dearborn Street
Suite 600
Chicago, IL 60602
(312) 263-0345
tcampbell@cotsiriloslaw.com

QUESTION PRESENTED

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), this Court held that when a petitioner shows that his counsel (a) his counsel had a conflict of interest; and (b) counsel's performance was adversely affected because of that conflict, the petitioner is entitled to a new trial. In *Machibroda v. United States*, 368 U.S. 487 (1962), this Court held that 28 U.S.C. § 2255 requires courts to grant hearings to those who make specific and detailed factual allegations that, even if improbable, would entitle them to relief if true.

The question presented is:

Whether a petitioner is entitled to an evidentiary hearing under 28 U.S.C. § 2255 to resolve his claim under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), where the petitioner establishes his trial counsel had an actual conflict of interest and seeks to prove the conflict "adversely affected" his counsel's performance.

STATEMENT OF RELATED CASES

- United States Supreme Court: *Michael Coscia v. United States*, No. 17-1099
- United States Court of Appeals for the Seventh Circuit: *Michael Coscia v. United States*, No. 20-1032
- United States Court of Appeals for the Seventh Circuit: *United States v. Coscia*, No. 19-2010
- United States Court of Appeals for the Seventh Circuit: *United States v. Coscia*, No. 16-3017
- United States District Court for the Northern District of Illinois: *United States v. Coscia*, No. 19-CV-5003
- United States District Court for the Northern District of Illinois: *United States v. Coscia*, No. 14-CR-551

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PETITION FOR WRIT OF CERTIORARI

Michael Coscia petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Seventh Circuit (Pet. App. 1a–60a) is reported at 4 F.4th 454 (7th Cir. 2021). The decision of the Seventh Circuit on Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* (Pet. App. 68a–69a) is unreported. The District Court's Order regarding Petitioner's motion to vacate his conviction under 28 U.S.C. § 2255 (Pet. App. 61a–67a) is unreported.

JURISDICTION

The decision of the Seventh Circuit on Petitioner's appeal was entered on July 13, 2021. The final judgment of the Seventh Circuit on the Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered on September 24, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent provision of 28 U.S.C. § 2255(b) provides:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall … grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

INTRODUCTION

In the decision below, the Seventh Circuit denied Petitioner's appeal of his § 2255 motion based on his trial counsel's actual conflict of interest under *Cuyler v. Sullivan*, 446 U.S. 335 (1980) without holding an evidentiary hearing. Specifically, despite finding that Petitioner's trial counsel did in fact have at least one actual and undisclosed conflict of interest under the principles of *Cuyler* and its progeny (Pet. App. 42a), the Seventh Circuit denied Petitioner's request for an evidentiary hearing at which Petitioner could seek to adduce evidence proving the second prong of *Cuyler*, an "adverse effect" on his counsel's performance resulting from counsel's demonstrated conflict(s) of interest, as well as establishing additional actual conflicts of interest his counsel may have had. The Seventh Circuit denied Petitioner an evidentiary hearing or any discovery under Habeas Rule 6 even though the evidence of various conflicts of interest and "adverse effect" is solely in the possession of his trial counsel, who has *never* been on record addressing his actual conflict of interest or the potential adverse effect(s) it had on his representation of Petitioner.

Petitioner now asks this Court to review that ruling and grant his request for an evidentiary hearing so that he may adduce proof both of his counsel's conflicts of interest and the "adverse effect" that such conflicts had on his trial counsel's performance. Petitioner does so for two primary reasons: (1) because the Seventh Circuit's decision directly conflicts with the uniform law of its sister circuits regarding a petitioner's entitlement to an

evidentiary hearing to establish his *Cuyler* claims when he has properly alleged a conflict of interest and adverse effect that, if proved, would entitle him to relief; and (2) because the Seventh Circuit's decision is inconsistent with this Court's decision in *Machibroda*, 368 U.S. at 487. This Court's review is warranted to resolve that circuit split, and to address the conflict with *Machibroda*.

STATEMENT OF THE CASE

A. The Underlying Criminal Case and Direct Appeal

In October 2014, a federal grand jury indicted Petitioner on six counts each of commodities fraud and "spoofing" related to his automated trading, from August to October 2011, on the Intercontinental Exchange (ICE) and Chicago Mercantile Exchange (CME) markets, in violation of 18 U.S.C. § 1348 and 7 U.S.C. §§ 6c(a)(5)(C), 13(a)(2). According to a press release from the U.S. Attorney's Office dated October 2, 2014, Petitioner's indictment was "the first federal prosecution nationwide under the anti-spoofing provision" of the 2010 Dodd-Frank Act, effective on July 16, 2011, less than a month before the trading alleged in the indictment began. (https://www.justice.gov/usao-ndil/pr/high-frequency-trader-indicted-manipulating-commodities-futures-markets-first-federal).

At trial, the government repeatedly emphasized that Petitioner's trading was "unique" and that he was an "outlier" in his trading practices—indeed, that Petitioner was the only person who traded as he did—all of which, argued the government, was powerful

evidence of his fraudulent intent. The government relied heavily on testimony from, and summary charts prepared by, its witnesses to argue to the jury that Petitioner's trading was "one of a kind," an "outlier," and that he was "the only trader in the market" who traded the way he did in four particular metrics: *first*, that Petitioner accounted for an outlandish 96% of all cancellations on the ICE Brent Crude Futures Exchange during the relevant period; *second*, that Petitioner's cancellation rates for large orders were unusually high in comparison to other traders; *third*, that the ratio of Petitioner's average order size to average trade size—his "Order-to-Trade-Size Ratio"—was unusually high in comparison to other traders; and *fourth*, that Petitioner was unique in placing both large and small orders, but in filling small orders at a substantially different rate than large orders. Based on data Petitioner obtained only after his trial, these assertions are highly questionable, but none of them were tested, challenged, or disproven by Petitioner's trial counsel.

After hearing this evidence and argument from the government at trial, the jury convicted Petitioner on all twelve counts of the indictment. (Pet. App. 13a). The Seventh Circuit affirmed his conviction on direct appeal. (Pet. App. 14a–16a).

B. Petitioner's Motion for Relief Pursuant to Section 2255

On July 15, 2019, Petitioner filed a motion, and then an amended motion for relief under 28 U.S.C. § 2255 on August 5, 2019, alleging, *inter alia*, that his counsel had provided ineffective assistance of counsel

under *Cuyler*, 446 U.S. at 335.

Petitioner argued, *inter alia*, that his counsel had provided ineffective assistance under *Cuyler*, 446 U.S. at 349, because: (1) his trial counsel had actual (and undisclosed) conflicts of interest because they represented several entities who were alleged to be victims of Petitioner's trading offenses, and whose representatives testified for the prosecution against Petitioner at trial; and (2) his counsel's performance was "adversely affected" as a result of those conflicts.

In support of this claim—and notably without benefit of any discovery or an evidentiary hearing—Petitioner was able to put forward evidence gleaned from public information proving that his trial counsel represented several entities whose high-ranking representatives testified for the government at trial. For example, ICE is one of the exchanges on which Petitioner was alleged to have perpetrated his fraudulent trading. The evidence was undisputed that Petitioner's trial counsel, Sullivan & Cromwell (S&C), had represented ICE on multiple billion dollar-plus deals and several litigation matters over more than a decade. (Pet. App. 39a, 42a–43a). In fact, S&C was *contemporaneously* representing ICE on a $5.2 billion deal that closed the very same morning that Petitioner's trial began. (Pet. App. 39a). Moreover, Petitioner's lead trial counsel from S&C, Kenneth Raisler, was personally involved in representing ICE in several of these matters. *Id*.

Petitioner's trial counsel, however, never disclosed this conflict of interest to Petitioner or to the district court, and never sought or obtained a waiver from

Petitioner.

Similarly, and again without benefit of an evidentiary hearing, Petitioner put forward undisputed evidence that S&C also represented two other entities, D.E. Shaw and Citadel, who were alleged to be victims of Petitioner's offense and whose high-level representatives likewise testified for the government and against Coscia at trial.

Regarding "adverse effect," Petitioner cited multiple instances of material failures by his trial counsel to pursue information or confront his other current and/or former corporate clients. For instance, trial counsel: (1) failed to obtain from his client and government witness, ICE, the data underlying its summary charts which were offered at trial against Petitioner so they could investigate the accuracy of those summary charts; (2) failed to pursue and obtain information which may have been damaging to their other-client-government-witnesses, such as evidence that they had trading programs that operated similarly to Petitioner's, which the government now claimed was criminal; and (3) failed to cross-examine their other-client-government-witnesses with readily available impeachment evidence. (Pet. App. 39a–40a, 44a & n.62, 50a n.69, 55a, 63a).

In addition to the evidence Petitioner had been able to cobble together solely from searches of publicly available information – and despite his trial counsel's refusal to provide relevant information related to their conflict(s) of interest (Pet. App. 40a & n.59) – he requested an evidentiary hearing should the court not be convinced of his position on the current record.

(Pet. App. 4a, 58a, 60a, 66a). He also filed a motion for leave to conduct discovery under Habeas Rule 6 in advance of such a hearing. (Pet. App. 3a-4a, 58a, 62a). The district court denied his request for to hold an evidentiary hearing and denied his motion for discovery on the conflict and adverse effect issues. (Pet. App. 67a).

Based on the evidence put forward by Petitioner, the district court found that S&C, and specifically Petitioner's lead trial counsel, did have an actual conflict of interest: *"The Government's first argument [that there was no actual conflict of interest] is wrong factually. The Petitioner has in fact provided evidence that Kenneth Raisler, a SC partner that participated in the trial, was actively engaged in providing legal services to ICE at the time of the trial."* (Pet. App. 63a (emphasis added)). Despite this finding and without holding an evidentiary hearing, the district court nevertheless ruled that Petitioner had not proven this actual conflict of interest had an "adverse effect" on counsel's performance, and thus denied the § 2255 petition, while at the same time denying both Petitioner's request for an evidentiary hearing and his motion for leave to conduct discovery on the issue. (Pet. App. 61a, 67a).

C. Seventh Circuit's Decision

The Seventh Circuit affirmed the district court's denial of the § 2255 petition. Even though the Seventh Circuit agreed with the district court that Petitioner's trial counsel operated under an actual and contemporaneous conflict of interest (Pet. App. 42a), the Seventh Circuit concluded that the district court

correctly determined that Petitioner had not proven an "adverse effect" on his counsel's performance.

With respect to trial counsel's conflict of interest base on their simultaneous representation of ICE, the court pointed to the fact that S&C was contemporaneously providing legal services to ICE while trial counsel was representing Petitioner, and to trial counsel's long-running provision of legal and lobbying services to ICE in the years prior to Petitioner's indictment and trial. (Pet. App. 42a–43a). Trial counsel's prior direct involvement and his firm's simultaneous involvement in the representation of ICE in other matters at the time of Petitioner's trial, and the failure to disclose such conflicts, concerned the court that trial counsel's loyalties may have been divided. (Pet. App. 42 –43a). Ultimately, however, the Seventh Circuit decided based on the current record—again, without benefit of an evidentiary hearing or any statement from the admittedly conflicted lawyer—that trial counsel's conflict of interest did not have an "adverse effect" on his performance. (Pet. App. 44a–46a, 59a).

Turning to Petitioner's request for an evidentiary hearing, the Seventh Circuit concluded that the district court did not abuse its discretion in denying Petitioner a hearing. (Pet. App. 57a–59a). In so doing, the court acknowledged that a district court *must* grant an evidentiary hearing when a movant alleges facts that, if proven, would entitle him to relief. (Pet. App. 57a). Nonetheless, the court ruled that trial counsel's failure to obtain data or elicit testimony from the relevant trial counsel's other government-

witness-clients to show, for example, that Petitioner's trading patters were *not* abnormal, or that those trading patterns were consistent with trial counsel's other government-witness-clients was essentially irrelevant because that was not the defense strategy pursued at trial. (Pet. App. 58a–59a). Rather, the court said, Petitioner's strategy at trial—that is, his conflicted trial counsel's strategy at trial—was to admit the trading practices but argue that they were lawful. (Pet. App. 58a–59a). The court found this strategy reasonable without addressing the relevant question under *Cuyler*: whether there was a reasonable *alternative* strategy that could have been pursued; and faulted Petitioner for not showing what specific confidential information about the government-client-witnesses that trial counsel possessed or how such information would have affected his case. (Pet. App. 59a). This, of course, was precisely the reason Petitioner sought an evidentiary hearing.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for three important and independent reasons. First, there is a circuit split on the question presented. Second, the Seventh Circuit's decision conflicts with prior decisions of this Court. And third, this case is an ideal vehicle to resolve this division of authority.

I. THERE IS A CIRCUIT SPLIT ON THE QUESTION PRESENTED.

The Seventh Circuit's decision conflicts with decisions from nine other circuits, which have uniformly held in similar circumstances that an

evidentiary hearing is *required* to allow a § 2255 movant to pursue the evidence necessary to establish his *Cuyler* claim.

For example, in *United States v. Bowie* from the Tenth Circuit, the defendant claimed that his trial "counsel may have been laboring under conflicts of interest" based on his prior representation of a prosecution witness which adversely affected his performance in violation of *Cuyler*. 892 F.2d 1494, 1500 (10th Cir. 1990). While skeptical of whether counsel's performance was adversely affected, the Court determined it was duty-bound to order an evidentiary hearing on the issue:

> Although defense counsel's cross-examination of [his former client and now Government witness] was vigorous, and we see no obvious indication that defense counsel's prior representation of the witness adversely affected counsel's performance, [counsel's former client and government witness] was an important witness whose testimony tied defendant to the conspiracy in several respects. *We cannot discern from the record the precise scope of the prior representation*, *whether the witness waived any attorney-client privilege that might have restricted defense counsel's cross-examination*. Nor can we determine whether *defendant* had knowledge of his counsel's prior representation of the government

> witness and waived his right to counsel free of such conflicts …. Consequently, under the circumstances, *we are hesitant to dispose of the conflict claim without an evidentiary hearing on the matter by the district court.*

Id. at 1502 (some emphasis in original, some emphasis added). "Therefore, we will remand this case so the district court can determine whether an actual conflict adversely affected defense counsel's performance—*that is, a conflict existed that might have foreclosed a specific and seemingly valid or genuine strategy or tactic in the handling of this witness*." *Id*. (emphasis added).

In *United States v. Magini* from the Fourth Circuit, the petitioner alleged that "her Sixth Amendment right to counsel was violated because [her trial counsel] was operating under a private, pecuniary conflict of interest while representing her." 973 F.2d 261, 263 (4th Cir. 1992). After noting that "Section 2255 provides for an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief …", the Fourth Circuit held "Magini is *entitled to an evidentiary hearing* to resolve the factual disputes and to analyze her conflict of interest claim according to the *Cuyler* standard." *Id*. at 265. Importantly on this point, the Court stated, "When a colorable sixth Amendment claim is presented, and *where material facts are in dispute involving inconsistencies beyond the record, a hearing is necessary*." *Id*. at 264 (emphasis added) (citing *Becton*

v. Barnett, 920 F.2d 1190, 1192 (4th Cir. 1990); *Moore v. United States*, 950 F.2d 656, 661 (10th Cir. 1991)).

Similarly, in *Buenoano v. Singletary,* the Eleventh Circuit held the habeas petitioner was entitled to a "*full evidentiary hearing*" on her claims that her trial counsel had a conflict of interest under *Cuyler*. 963 F.2d 1433, 1438–39 (11th Cir. 1992). "We hold that [petitioner's] allegations are sufficient to warrant a full evidentiary hearing on the claim that her attorney was burdened by a conflict of interest that adversely affected her representation during both phases of her trial and on direct appeal." *Id*. Indeed, the Court ordered that petitioner was entitled to that "full evidentiary hearing" despite the fact that the district court had already held a more limited evidentiary hearing at which petitioner's attorney testified, and based on that hearing, had "concluded that there was no actual conflict of interest which adversely affected the adequacy of [petitioner's] representation." *Id*. at 1439; *see also id*. at 1438 ("Although the district court did hold a hearing on this issue, we conclude that the hearing was too restrictive."). With respect to the scope of the evidentiary hearing, the Court ruled:

> *A full evidentiary hearing is required on these issues before determinations of this kind can be made*. During the [prior] hearing, [petitioner] was allowed only to call [her attorney] Johnson to the stand to prove her claims. *With regard to her conflict of interest claim, [petitioner] should have been allowed to call other witnesses and develop facts* in addition to

> those directly relating to the contract [a book deal petitioner's attorney had a financial interest in].

Id. at 1439 (emphasis added).

Likewise, in the First Circuit case of *United States v. Rodriguez*, the defendant alleged that his trial counsel was operating under a conflict of interest because of divided loyalties. 929 F.2d 747 (1st Cir. 1991). The *Rodriguez* Court first noted the baseline for requiring an evidentiary hearing set forth in the statute: "section 2255 provides that a petitioner is *entitled to an evidentiary hearing* '[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief ...." *Id*. at 749. The Court found that "Rodriguez' allegations concerning [his counsel's] divided loyalty"—just like Petitioner's allegations here—"relate to matters outside the record of his conviction, are not inherently incredible, and are not conclusory." *Id*. at 750. Accordingly, his *Cuyler* claim of conflict and adverse effect could not be dispatched without an evidentiary hearing. *Id*.

Similar decisions from the Second, Third, Fifth, Eighth, and Ninth Circuits abound. *See Curshen v. United States*, 596 F. App'x 14, 16 (2d Cir. 2015) (holding that the district court erred by summarily denying defendant's § 2255 motion without determining whether to hold a hearing and noting that a showing of prejudice is not necessary because "an alternative defense strategy is plausible even if unreasonable"); *Armienti v. United States*, 234 F.3d 820, 825 (2d Cir. 2000) (concluding that defendant

made a sufficient showing to require the district court to hold an evidentiary hearing to dispose of conflict claim because "[t]hese issues implicate actions taken by counsel outside the presence of the trial judge and therefore could not ordinarily be resolved by him without such a hearing"); *Briguglio v. United States,* 675 F.2d 81, 83 (3d Cir. 1982) (remanding the case to the district court to afford the defendant the evidentiary hearing he sought, even though the district court was of the opinion that counsel was "aggressive" and showed no signs that any conflict affected the adequacy of his representation); *Perillo v. Johnson*, 79 F.3d 441, 444–45 (5th Cir. 1996) (holding that whether a conflict adversely affected trial counsel's performance is "a factual dispute which, if resolved in [defendant's] favor, would entitle her to relief," and therefore an evidentiary hearing was necessary for her to examine her trial counsel); *Edgemon v. Lockhart*, 768 F.2d 252, 255–56 (8th Cir. 1985) (determining that dismissal of a conflict claim without an evidentiary hearing was premature, notwithstanding the fact that petitioner gave no specific example "of any respect in which counsel's cross-examination of prosecution witnesses may have fallen short"); *Quintero v. United States*, 33 F.3d 1133, 1135 (9th Cir. 1994) (ruling an evidentiary hearing in the district court was required where petitioner had alleged a conflict of interest and adverse effect).

Clearly, the Seventh Circuit's decision in this case ruling no evidentiary hearing is required when a credible *Cuyler* claim is made conflicts with the decisions of every other court of appeals to address the issue. This conflict should be resolved by this Court,

particularly because it involves such structurally indispensable process necessary to provide the "fundamental fairness" required in post-conviction proceedings. See *Kaufman v. United States*, 394 U.S. 217, 228 (1969) ("With regard to [post-conviction petitions], Congress has determined that the full protection of their constitutional rights requires the availability of a mechanism for collateral attack. The right then is not merely to a federal forum but to full and fair consideration of constitutional claims.") (overruled on other grounds). Whether a petitioner is entitled to an evidentiary hearing to prove his claim under *Cuyler* when he has alleged (and even proven) his trial counsel was operating under an actual conflict of interest should not depend on whether the person was charged in Illinois versus New York or Colorado or Maine.

II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS.

This Court should grant certiorari to resolve the split between the Seventh Circuit and the First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits. Certiorari is also warranted because the Seventh Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

In relevant part, 28 U.S.C. § 2255(b) provides: "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court *shall* … grant a prompt hearing thereon, determine the issues and make findings of

fact and conclusions of law with respect thereto." (Emphasis added). Interpreting the plain language of this provision, this Court has said: "The statute in terms requires that a prisoner shall be granted a hearing on a motion which alleges sufficient facts to support a claim for relief unless the motion and the files and records of the case 'conclusively show' that the claim is without merit." *Sanders v. United States*, 373 U.S. 1, 6 (1963); *see also id.* at 20 (the statute requires a conclusive showing that there is no merit to the claim). In other words, the statutory standard ("conclusively show") requires "assurance … that under no circumstances could the petitioner establish facts warranting relief under § 2255." *Fontaine v. United States*, 411 U.S. 213, 215 (1973).

Under this Court's precedents construing the statutory standard, "[t]he critical question is whether the[] allegations, when viewed against the record …, were so 'palpably incredible,' so 'patently frivolous or false', as to warrant summary dismissal." *Blackledge v. Allison*, 431 U.S. 63, 76 (1977). Only allegations that are vague or conclusory warrant dismissal for that reason alone. *See id.* at 75. To be sure, "[t]here will always be marginal cases." *Machibroda v. United States*, 368 U.S. 487, 496 (1962). *Machibroda* was one such case that was "not far from the line." *Id.* But, even there, "the specific and detailed factual assertions of the petitioner, while improbable, [could not] at th[at] juncture be said to be incredible." *Id.* This Court thought that *"the function of 28 U.S.C. § 2255 can be served … only by affording the hearing which its provisions require." Id.* (emphasis added).

In circumstances like those in this case, this Court ruled that an evidentiary hearing under § 2255 is required to address whether a defendant's trial counsel had a conflict of interest because counsel had represented a government witness in another case. *See United States v. Hayman*, 342 U.S. 205, 219–20 (1952). There, the defendant alleged that his trial counsel, while representing him at trial, also represented a witness who testified against him. *Id.* at 266. The defendant further alleged "that he was not told of the dual representation and that he had no way of discovering the conflict until after the trial was over." *Id.* at 266–67. This Court described this allegation as "[t]he crucial issue of fact" presented by his motion under § 2255. *Id.* at 219. Reasoning that such an issue was "not determined by the 'files and records' in the trial court," this Court concluded that the district court erred by making "findings on controverted issues of fact," and it accordingly remanded the case for § 2255's "indispensable" evidentiary hearing. *Id.* at 219–24.

In the decision below, the Seventh Circuit did not grant Petitioner that to which he is clearly entitled: the "careful consideration and plenary processing of his claim, including full opportunity for presentation of the relevant facts." *Blackledge*, 431 U.S. at 82–83. The statutory text and this Court's decisions require no less.

III. THIS CASE IS A STRONG VEHICLE.

This case is an ideal vehicle to resolve the circuit split. Petitioner cleanly preserved this issue, as he raised it multiple times in the district court and again

in the Seventh Circuit. Moreover, the Seventh Circuit's application of the legal standard was outcome-determinative. The Seventh Circuit never disputed that Petitioner's trial counsel labored under a conflict of interest. Instead, the relevant portion of its decision turned entirely on its determinations that the trial strategy chosen by his conflicted counsel was "reasonable" (notwithstanding there were reasonable alternative strategies), and that Petitioner needed to allege what confidential information his trial counsel knew about the government witnesses and how such information would have affected his case (notwithstanding that information was solely in the possession of his trial counsel). The Seventh Circuit made no effort to reconcile its holding with the statutory text, this Court's holdings, or the courts of appeals' holdings in similar situations.

Finally, the question presented is important and recurring: numerous courts have considered it, dating back decades. The division of authority implicates the interpretation of a federal statute, and only this Court can definitively clarify the meaning of a federal statute and harmonize federal law nationwide. For these reasons, additional percolation would not be helpful. This Court's review is needed now.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

TERENCE H. CAMPBELL
Counsel of Record
JOHN N. PAVLETIC, JR.
COTSIRILOS, TIGHE, STREICKER,
POULOS & CAMPBELL, LTD.
33 North Dearborn Street
Suite 600
Chicago, IL 60602
(312) 263-0345
tcampbell@cotsiriloslaw.com

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 19-2010

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL COSCIA,

Defendant-Appellant.

No. 20-1032

MICHAEL COSCIA,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 14-cr-00551-1 & 19-cv-05003 — **Harry D. Leinenweber**, *Judge*.

ARGUED DECEMBER 2, 2020 — DECIDED JULY 12, 2021

Before EASTERBROOK, RIPPLE, and ROVNER, *Circuit Judges*.

RIPPLE, *Circuit Judge*. A jury convicted Michael Coscia of six counts of commodities fraud, in violation of 18 U.S.C. § 1348, and six counts of spoofing,[1] in violation of 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2). On direct appeal, we affirmed his conviction.[2] We now have before us the appeals of two proceedings that Mr. Coscia initiated after we resolved his direct appeal. The first is a motion for a new trial on the basis of new evidence in which he alleges (1) that data discovered after trial establishes that there were errors in the data presented to the jury and (2) that subsequent indictments against other traders for similar spoofing activities undercut the Government's characterization of Mr. Coscia as "unique" or a trading "outlier." The second proceeding is a motion to vacate his conviction pursuant to 28 U.S.C. § 2255, in which Mr. Coscia claims that his trial counsel,

---

[1] Spoofing is a disruptive trading practice in which a person submits bids or offers with the intent to cancel the bid or offer before it is executed. See 7 U.S.C. § 6c(a)(5).

[2] *United States v. Coscia*, 866 F.3d 782 (7th Cir. 2017).

Sullivan & Cromwell LLP, provided ineffective assistance of counsel. Specifically, he alleges that Sullivan & Cromwell had an undisclosed conflict of interest with several of the Government's witnesses and that this conflict adversely affected counsel's performance. He also alleges that, even if there was no conflict of interest, his trial counsel nevertheless provided constitutionally deficient representation.

The district court denied both motions, and Mr. Coscia now appeals.[3] He submits that the district court abused its discretion when it denied his new trial motion. In his view, the newly discovered evidence demonstrated that key evidence relied on by the Government to establish his intent to spoof was false and inaccurate. As for his habeas motion, he contends that the district court correctly found that counsel had a conflict of interest, but incorrectly concluded that there was no adverse effect on counsel's performance. He further submits that the district court erred in rejecting his argument that, even in the absence of a conflict of interest, his defense counsel's performance was constitutionally deficient. In the alternative, Mr. Coscia requests

---

[3] Mr. Coscia filed two separate notices of appeal for each of the two motions denied by the district court. For the sake of judicial economy, we consolidated his appeals. We employ the standard "R." and "Appellant's Br." when referring to Mr. Coscia's appeal of his new trial motion, and "2255 R." and "Appellant's 2255 Br." when referring to Mr. Coscia's appeal of his § 2255 motion.

further discovery and an evidentiary hearing on his ineffective assistance of counsel claims.

We now affirm the district court's judgments on both the new trial and § 2255 motions. We conclude that the district court did not abuse its discretion in denying Mr. Coscia's motion for a new trial on newly discovered evidence grounds. We further conclude that the district court correctly determined that Mr. Coscia failed to demonstrate an adverse effect or prejudice in either of his ineffective assistance of counsel claims.

I

BACKGROUND

A.

Mr. Coscia's Trading Activity

Michael Coscia was the principal of a futures trading firm, Panther Trading LLC. He traded commodity futures contracts on electronic exchanges operated by CME Group, Inc. ("CME") and the Intercontinental Exchange, Inc. ("ICE"). Trading firms such as Mr. Coscia's use computer programs to execute trades that are carried out in fractions of a second. In our opinion affirming Mr. Coscia's conviction, we described the basic process of high-frequency trading:

> The simplest approaches take advantage of the minor discrepancies in the price of a security or commodity that often emerge across national exchanges. These

> price discrepancies allow traders to arbitrage between exchanges by buying low on one and selling high on another. Because any such price fluctuations are often very small, significant profit can be made only on a high volume of transactions. Moreover, the discrepancies often last a very short period of time (i.e., fractions of a second); speed in execution is therefore an essential attribute for firms engaged in this business.

United States v. Coscia, 866 F.3d 782, 786 (7th Cir. 2017).

High-frequency trading can also be used "to artificially move the market price of a stock or commodity up and down, instead of taking advantage of natural market events." *Id.* at 787. This artificial movement can be accomplished "by placing large and small orders on opposite sides of the market." *Id.* For example, if an unscrupulous trader wanted to buy, he would place a small order below the current market price. He would simultaneously place large orders to sell on the opposite side of the market. He would place these large sell orders at progressively lower prices until the purchase price matched the price at which the small buy order had been placed. The small order then would be executed, and the large orders would be cancelled. "Importantly, the large, market-shifting orders that he places to create this illusion are ones that he never intends to execute; if they were

executed, our unscrupulous trader would risk extremely large amounts of money by selling at suboptimal prices." *Id.*

Congress criminalized this practice, called "spoofing," in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). It became unlawful "to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that ... is, is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)." 7 U.S.C. § 6c(a)(5).[4]

B.

Mr. Coscia's Trial

In August 2011, Mr. Coscia implemented two high-frequency trading programs that followed a specific pattern:

> When he wanted to purchase, Mr. Coscia would begin by placing a small order requesting to trade at a price below the current market price. He then would place large-volume orders, known as "quote orders," on the other side of the market. A small order could be as small as five futures contracts, whereas a large

---

4 "[A] bid is an order to buy and an offer is an order to sell." *Coscia*, 866 F.3d at 787.

> order would represent as many as fifty or more futures contracts. At times, his large orders risked up to $50 million. The large orders were generally placed in increments that quickly approached the price of the small orders.

Coscia, 866 F.3d at 788 (footnotes omitted).

A grand jury indicted Mr. Coscia for six counts of spoofing and six counts of commodities fraud based on his 2011 trading activity. Trial began on October 26, 2015. The Government set forth Mr. Coscia's pattern of trading: placing small orders and large orders on opposite sides of the market, with the small orders filling once the desired price was met and the large orders immediately cancelled. The same pattern would then repeat in the opposite direction. Each of these patterns took place within one second or less. To establish Mr. Coscia's fraudulent intent, the Government presented (1) the testimony of Jeremiah Park, Mr. Coscia's computer programmer; (2) testimony of representatives of ICE and CME, who described Mr. Coscia's trading activities and presented charts summarizing relevant trading data; (3) testimony of other traders on the effect of Mr. Coscia's trading on their businesses; (4) Mr. Coscia's deposition testimony taken by the Commodity Futures Trading Commission; and (5) the rebuttal testimony of financial markets expert Hank Bessembinder.

Park testified that he created, at Mr. Coscia's direction, two programs: Flash Trader and Quote

Trader. He confirmed that Mr. Coscia had specified that the programs were to act "[l]ike a decoy" to "pump [the] market."[5] Specifically, the large-volume orders were designed to avoid being filled and would be cancelled based on (1) the passage of time, (2) the partial filling of large orders, or (3) the complete filling of a small order. These cancellation settings were intended to reduce the risk that the large orders would be filled. After the large orders were cancelled, the program would reenact the trades in reverse.

The Government also presented representatives of ICE and CME who testified about trading data summarized in data charts. The court admitted, without objection, six ICE summary charts and six CME summary charts. John Redman, the director of compliance for ICE, testified about the ICE data and summary charts. Ryan Cobb, a data scientist for CME, testified about the CME data and summary charts. Both Redman's and Cobb's testimony supported the Government's view that Mr. Coscia had engaged in a specific trading pattern that was outside trading norms. We briefly review the charts relevant to this appeal.

ICE Summary Chart 2 compared the rate at which Mr. Coscia filled his large orders to the rate at which he filled his small orders on the ICE market. Redman testified that between August and October 2011, Mr. Coscia had placed 24,814 large orders and had traded on 0.5% of those orders. In contrast, Mr. Coscia had

---

5 R.86 at 231, 235 (Tr. 498, 502).

placed 6,782 small orders and had traded on approximately 52% of those orders.[6]

ICE Summary Chart 3 displayed Mr. Coscia's "order-to-trade ratio," or "the average size of the order he showed to the market divided by the average size of the orders filled."[7] This chart compared the activity of Mr. Coscia's firm on the ICE market to the activity of others trading at approximately the same volume. ICE Summary Chart 3 showed that Mr. Coscia's average order size was 39.8 lots, but his average trade size was 2.5 lots. Thus, Mr. Coscia's order-to-trade ratio was 1,592%. According to the chart, other trading entities had ratios between 91% to 264%.

ICE Summary Chart 6 displayed Mr. Coscia's share of cancellations of large orders that followed the trade of a small order in the opposite direction. This chart showed that, between September and October 2011, Mr. Coscia cancelled large orders 14,563 times following the execution of small-order trades; other market participants followed this pattern only 671 times combined. Thus, according to the chart, Mr. Coscia accounted for 96% of all of the cancelled large orders that followed the execution of a small order in the opposite direction on the ICE exchange.

CME Summary Charts 2 and 3 compared the rates at which Mr. Coscia filled large and small orders,

---

6 *See* R.177-31.

7 *Coscia*, 866 F.3d at 789; *see also* R.177-32.

referred to as a "fill-rate differential." These charts showed that, on the CME markets, Mr. Coscia filled 35.61% of his small orders, but only 0.08% of his large orders, resulting in a 35.53% fill-rate differential.

CME Summary Chart 5 showed how Mr. Coscia ranked among all trading entities in the same markets in terms of large orders placed ("large order entry rank") and large orders actually traded ("volume rank").[8] Mr. Coscia ranked first, entering the most large orders in eleven of the seventeen CME commodities. Mr. Coscia's volume rank for large orders actually traded, however, was significantly lower across all commodities.[9]

Finally, the Government introduced testimony of other traders, some of whom lost hundreds of thousands of dollars as a result of Mr. Coscia's trading activity. Anand Twells, a trading supervisor at Citadel, LLC, testified that in a transaction with Panther Trading, it lost "about $480" in "roughly 400 milliseconds."[10] Hovannes Dermenchyan, the global head of trading and markets at Teza Technologies, testified that his firm "lost $10,000 over the course of

---

8 *See* R.177-5.

9 To illustrate, Ryan Cobb testified that in the Australian dollar market, Mr. Coscia ranked first, entering more large orders than any other participant, but was only the thirty-third highest participant "in terms of actual trade volume." R.86 at 135 (Tr. 402).

10 R.88 at 30 (Tr. 635).

an hour" because its programs were "induced into trading" by this single participant's behavior. [11] "[E]very time that participant placed a very large order," he went on, "it would induce this specific strategy to trade on the opposite side."[12] Alexander Gerko, who was previously a portfolio manager at GSA Capital, testified that he "noticed a pattern of activity" where "very, very large orders appear[ed] on the market ..., and then these orders would disappear from the bid and appear on the offer."[13] Gerko stated that his firm noticed this activity "because [they] started to lose a substantial amount of money" from "trading with the small trade."[14] Finally, Jonathan Eddy, senior vice president at D.E. Shaw & Company, testified that his firm's computer program considered "order imbalance" in the market as a factor in whether it trades.[15] Eddy explained that its program was "more likely to want to sell" when there were more orders to sell in the market; after multiple large orders to sell were placed at decreasing prices, its program also placed an order to sell.[16]

---

11 *Id.* at 51 (Tr. 656).

12 *Id.*

13 *Id.* at 90 (Tr. 695).

14 *Id.* at 91, 105 (Tr. 696, 710).

15 R.89 at 5 (Tr. 762).

16 *Id.*

In his defense, Mr. Coscia maintained that his trading was legitimate because each order placed was an order capable of being filled prior to its cancellation. He testified that the strategy of his programs was to "make a lopsided market and hope to get traded on the better of the offer."[17] If the small order was executed, the large order would be cancelled; if the large order was executed, the small order would be cancelled. Mr. Coscia also testified that he had no preference, and sometimes did not even know, whether his small or large orders were filled.

In rebuttal, the Government presented testimony from financial markets expert Hank Bessembinder. He testified that Mr. Coscia's trading was materially different from that of other high-frequency traders. In contrast to Mr. Coscia's claims of indifference as to which of his orders were filled, Bessembinder testified that "[t]he outcomes don't seem to reflect that same sort of even balance" of an indifferent trader. [18] Rather, "the outcomes are far, far from being 50/50 or equal outcomes on both sides of the market." [19] Bessembinder added that "[t]here were more than 10 times as many contracts traded on the small orders as

---

17 *Id.* at 119–20 (Tr. 876–77).

18 R.91 at 117 (Tr. 1363).

19 *Id.*

compared to the large orders."[20] Mr. Coscia "was entering over 60 percent of his orders as large orders, whereas, the other high-frequency traders were entering only about a quarter of one percent of their orders as large orders."[21] But Mr. Coscia cancelled "[a] little over 97 percent" of his large orders within one second, while other high-frequency trading firms canceled their large orders within one second "[j]ust under 35 percent" of the time.[22] Further, Bessembinder testified that Mr. Coscia's large-order fill rate did not account for his successive attempts to cancel orders that failed because the order had already fully executed milliseconds earlier.[23]

The jury convicted Mr. Coscia on all twelve counts. The court sentenced Mr. Coscia to a term of thirty-six months' imprisonment, followed by two years' supervised release. Mr. Coscia filed a motion for judgment of acquittal and for a new trial, both of which the district court denied.[24]

---

[20] *Id.* at 117–18 (Tr. 1363–64).

[21] *Id.* at 123 (Tr. 1369).

[22] *Id.* at 125 (Tr. 1371).

[23] *Id.* at 106–09 (Tr. 1352–55) (describing an exhibit that showed an entry that an order had filled, followed by two cancellation entries that appeared milliseconds after that generated "order not found error code[s]").

[24] Mr. Coscia's first new trial motion, which is not before us, was made on the basis that Mr. Coscia's convictions were "against the weight of the evidence, the jury was not properly

C.

Direct Appeal

Mr. Coscia appealed his conviction and sentence, and we affirmed. Coscia, 866 F.3d at 782. In his appeal, Mr. Coscia challenged the anti-spoofing statute as unconstitutionally vague. He also contended that the Government produced insufficient evidence to support his spoofing conviction.

We first held that the anti-spoofing statute provided sufficient notice and that "Mr. Coscia's actions [fell] well within the core of the anti-spoofing provision's prohibited conduct, precluding any claim that he was subject to arbitrary enforcement." *Id.* at 795. With respect to the sufficiency of the evidence, we observed:

> As we have noted earlier, a conviction for spoofing requires that the prosecution prove beyond a reasonable doubt that Mr. Coscia knowingly entered bids or offers with the present intent to cancel the bid or offer prior to execution. Mr. Coscia's trading history clearly indicates that he cancelled the vast majority of his large orders. Accordingly, the only issue is whether a rational trier of fact could

---

instructed, and the Government introduced inadmissible, false, and prejudicial testimony." R.96 at 1. The motion before us is Mr. Coscia's second new trial motion on the basis of newly discovered evidence. *See* R.219; R.220.

have found that Mr. Coscia possessed an intent to cancel the large orders at the time he placed them.

A review of the trial evidence reveals the following. First, Mr. Coscia's cancellations represented 96% of all Brent futures cancellations on the Intercontinental Exchange during the two-month period in which he employed his software. Second, on the Chicago Mercantile Exchange, 35.61% of his small orders were filled, whereas only 0.08% of his large orders were filled. Similarly, only 0.5% of his large orders were filled on the Intercontinental Exchange. Third, the designer of the programs, Jeremiah Park, testified that the programs were designed to avoid large orders being filled. Fourth, Park further testified that the "quote orders" were "[u]sed to pump [the] market," suggesting that they were designed to inflate prices through illusory orders. Fifth, according to one study, only 0.57% of Coscia's large orders were on the market for more than one second, whereas 65% of large orders entered by other high-frequency traders were open for more than a second. Finally, Mathew Evans, the senior vice president of NERA Economic Consulting, testified that Coscia's order-to-trade ratio was 1,592%,

> whereas the order-to-trade ratio for other market participants ranged from 91% to 264%.

Id. at 795–96 (alterations in original) (footnotes omitted). We therefore concluded that, "when evaluated in its totality, the cumulative evidence certainly allowed a rational trier of fact to determine that Mr. Coscia entered his orders with the intent to cancel them before their execution." *Id.* at 796.

We decided Mr. Coscia's direct appeal on August 7, 2017. On January 10, 2019, Mr. Coscia filed in the district court a second motion for a new trial. The district court denied this motion on May 15, 2019. Two months later, Mr. Coscia filed a motion to vacate his conviction under 28 U.S.C. § 2255. The district court denied this motion on December 12, 2019. The district court's decisions on these two motions are before us today. For ease of reading, we discuss each separately in this opinion. We first will address the district court's denial of the second motion for a new trial; we then turn to the motion under § 2255. In each discussion, we will set forth additional particular facts pertinent to our analysis.

II

The Motion for A New Trial

A.

Governing Standards

We review a district court's denial of a motion for new trial based on newly discovered evidence for an

abuse of discretion. *United States v. Reyes*, 542 F.3d 588, 595 (7th Cir. 2008). District courts may "grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Granting a new trial in the "interest of justice" is "'reserved for only the most extreme cases,' and we 'approach such motions with great caution and are wary of second-guessing the determinations of both judge and jury.'" *United States v. Hagler*, 700 F.3d 1091, 1101 (7th Cir. 2012) (first quoting *United States v. Linwood*, 142 F.3d 418, 422 (7th Cir. 1998); and then quoting *United States v. McGee*, 408 F.3d 966, 979 (7th Cir. 2005)).[25]

In seeking a new trial, based on newly discovered evidence, the defendant must demonstrate that the new evidence "(1) was discovered after trial, (2) could not have been discovered sooner through the exercise of due diligence, (3) is material and not merely impeaching or cumulative, and (4) probably would have led to acquittal." *United States v. O'Malley*, 833 F.3d 810, 813 (7th Cir. 2016). In an effort to meet these criteria, Mr. Coscia presents two categories of "newly discovered" evidence: (1) ICE and CME data disclosed post-trial, and (2) subsequent indictments

---

[25] *See also United States v. Kamel*, 965 F.2d 484, 490 (7th Cir. 1992) ("Because of the importance accorded to considerations of repose, regularity of decision-making and conservation of scarce judicial resources, courts exercise 'great caution' in setting aside a verdict reached after fully-conducted proceedings; this is particularly appropriate when, as here, the action has been tried before a jury." (footnotes omitted)).

against other traders for similar activities. We address each of these categories in turn.

B.

Newly Discovered Data

The first category of newly discovered evidence proffered by Mr. Coscia is data disclosed post-trial by ICE and CME. In Mr. Coscia's view, this newly discovered information raises a significant question regarding the accuracy of the charts that the Government employed at trial to establish that he intentionally had engaged in spoofing.

1. Background

During pretrial discovery, ICE and CME produced certain data that the Government intended to use at trial through the summary charts that we described earlier. One month before trial, Mr. Coscia's counsel requested production of these charts. The Government responded that it had not yet prepared the summary charts but that "the information that they summarize ha[d] already been produced" to the defense.[26]

Mr. Coscia's counsel independently issued four subpoenas: one subpoena to ICE for the audit trail of ten market participants on the ICE Brent Crude Futures market over a two-month period;[27] and three

---

[26] R.227-8 at 2.

[27] *See* R.227-4.

subpoenas to CME for, among other things, the full audit trail for Mr. Coscia's orders, [28] audit trail information from August to October 2011 covering eight contracts,[29] and more specific information about the activity of eight high-frequency trading companies.

Following trial but before sentencing, CME produced a complete record of all market participants' order and trading histories covering approximately ten weeks in all seventeen markets in which Mr. Coscia had traded.[30] Through Sullivan & Cromwell, and later Kobre & Kim LLP, Mr. Coscia attempted to obtain the full audit trail data of all market participants on the Brent Crude Futures market for the period between September 6, 2011 and October 18, 2011, as well as personal and confidential information relating to government witness

---

28 *See* R.227-2.

29 *See* R.227-3.

30 It is not clear from the record how Mr. Coscia obtained the CME data post-trial. The Government notes that Mr. Coscia received data from CME that neither he nor the Government possessed at the time of trial, and that "[d]efense counsel refused to explain how defendant obtained this new CME data." Appellee's Br. 24 n.7; *see also* R.224 at 2 n.2 ("On January 18, 2019, the [Government] requested that defense counsel disclose when and how defendant sought this data from CME. Defense counsel responded, on January 22, that it would be a 'substantial burden' to obtain this information, but confirmed that defendant did not have before trial the CME data on which his [second motion for a new trial] relies.").

Hovannes Dermenchyan. During Mr. Coscia's attempt to obtain additional data from ICE, that exchange disclosed that it had inadvertently failed to produce all of the data underlying ICE Summary Chart 6 to either the Government or the defense before trial. The court denied Mr. Coscia's request to subpoena ICE for its full audit trail data but ordered ICE to produce the information that had been used to create ICE Summary Chart 6.

ICE complied with the court's order to produce the data used to create ICE Summary Chart 6. In its letter producing the data, ICE explained that the order cancellations displayed in ICE Summary Chart 6 are "based on an ICE system tool that, for regulatory purposes, generates an alert when the tool detects suspicious trading activity."[31] ICE also disclosed that, "due to an inadvertent error in calculating the total alerts from the Backup Data to create Summary Chart 6, the totals for the alerts for Mr. Coscia and 'All other participants' ... were misstated."[32] Specifically, Mr. Coscia accounted for 14,141 of the alerts (not 14,563), and "All other participants" accounted for 1,328 of the alerts (not 671).

2. The Present Motion

On January 10, 2019, Mr. Coscia filed a second motion for a new trial based on newly discovered

---

[31] R.222-3 at 2.

[32] *Id.* at 3.

evidence, the motion now before us. In this motion, Mr. Coscia first submitted that the newly disclosed ICE and CME data established that there were errors in the data presented to the jury. Mr. Coscia also submitted that subsequent indictments against other traders for similar spoofing activities undercut the Government's characterization of Mr. Coscia as "unique" or that he was a trading "outlier."

In response, the Government submitted that Mr. Coscia had failed to establish that this data would have been unavailable to him prior to trial if he had exercised due diligence. The Government pointed out that Mr. Coscia did not subpoena ICE for its trading data until five months after the conclusion of trial. Thus, the Government submitted that Mr. Coscia's lack of due diligence alone was fatal to his request for a new trial.

Mr. Coscia replied that the data that he received after trial proved that there were material errors in the evidence presented to the jury. In particular, he invited the court's attention to five charts: ICE Summary Charts 3 and 6, and CME Charts 2, 3, and 5. We therefore briefly review each of the alleged errors that Mr. Coscia identified and the Government's response.

ICE Summary Chart 3. ICE Summary Chart 3 showed that, on the ICE New Brent crude market, Mr. Coscia's order-to-trade ratio of 1,592% was significantly greater than the ratio of any other market participant. The closest firm had a ratio of 264%. Mr. Coscia maintained that the new CME data

conclusively establishes that there were actually dozens and even hundreds of traders with order-to-trade ratios greater than 1,592% for each of the seventeen commodities traded on the CME.

The Government responded that Mr. Coscia "glosses over his misleading juxtaposition of data from CME markets against data from ICE markets[ ] without ever establishing: (1) that CME and ICE markets are comparable (i.e., 'apples-to-apples'); or (2) what defendant's order-to-trade-size ratios were for each of the seventeen CME commodities."[33]

ICE Summary Chart 6. ICE Summary Chart 6 reflected that Mr. Coscia accounted for 96% of all large orders cancelled after a small order was filled in the opposite direction. Mr. Coscia contends, however, that the new data presents two issues. First, he stated that ICE Summary Chart 6 was presented to the jury as a summary of all order cancellations, when actually it was based on a limited set of data based on ICE's regulatory tool that generated alerts when the tool detected suspicious activity. The full data, he submitted, actually shows that his transactions "represented a fraction of one percent of all order cancellations." [34] Second, he noted that, as ICE disclosed post-trial, the numbers generated in the

---

[33] R.224 at 9.

[34] R.220 at 7.

chart were inaccurate. Mr. Coscia represented 91%, as opposed to 96%, of the alerts.

In reply, the Government first submitted that Mr. Coscia misunderstood and misrepresented the testimony at trial. Redman specifically testified that ICE Summary Chart 6 showed a specific type of cancellations: cancellations of large orders that followed the trading of a small order in the other direction. In any event, suggested the Government, demonstrating Mr. Coscia's overall cancellation rate of less than one percent and ICE's inadvertent, and minor, counting error only served to impeach the data presented at trial.

CME Summary Charts 2 and 3. CME Summary Charts 2 and 3 demonstrated that Mr. Coscia filled 35.61% of his small orders, but only 0.08% of his large orders, resulting in a 35.53% fill-rate differential. Mr. Coscia submitted that the post-trial CME data shows that Mr. Coscia's 35.53% fill rate was not abnormal or uncommon, as there were "dozens and even hundreds of traders" in each of the seventeen CME markets who had fill-rate differentials greater than 35.53%.[35] In his view, it was simply untrue that his trading patterns were unique.

In reply, the Government submitted that Mr. Coscia's updated data analysis misleadingly "pitt[ed] defendant's aggregate differential against the

---

[35] *Id.* at 19.

commodity-specific differentials of other traders."[36] The Government further observed that "defendant's newly-proffered evidence does not demonstrate that any other trader across the CME markets had an aggregate fill-rate differential higher than 35.53%."[37] In the Government's view, then, tallying the number of individual traders with higher fill-rate differentials in a single commodity market—without knowing what each trader's aggregate fill-rate differential was across all markets or if each trader traded in all seventeen markets as Mr. Coscia—was of little value when compared against Mr. Coscia's aggregate fill-rate differential for all seventeen markets.

CME Summary Chart 5. Finally, Mr. Coscia contended that the newly-produced data demonstrated that CME Summary Chart 5, which reflected that Mr. Coscia was a market leader in placing large orders but ranked lower in filling large orders, was inaccurate in three ways. First, the chart failed to include modifications of orders. Second, the data compared Mr. Coscia's individual trading activity to trading activity of firms, which were comprised of dozens of individual traders. Third, the chart showed how Mr. Coscia ranked in large orders placed compared to both large and small orders filled. Mr. Coscia's updated analysis included order modifications, which reduced Mr. Coscia's overall

---

[36] R.224 at 10.

[37] *Id.* (emphasis added).

cancellation rate. Moreover, considering only large orders filled, as opposed to large and small orders, Mr. Coscia had among the highest fill rates of anyone in the industry, and much more comparable order and fill rankings relative to other traders.

The Government countered that including modifications is misleading, as "defendant's spoofing algorithm was not programmed to modify—but to cancel—large orders." [38] And in any event, the exclusion of modifications was discussed on cross-examination. Further, the Government submitted that its rebuttal witness, Bessembinder, "testified that defendant's large-order fill rate offers only a partial picture, overlooking his successive attempts to cancel orders filled milliseconds before his cancellation instructions arrived."[39]

3. District Court's Ruling

The district court found Mr. Coscia's presentation of this new evidence problematic because it was not relevant to the actual defense that he had presented at trial. Mr. Coscia's defense "admitted the substance of his trading activity," "claimed that this was a legitimate trading strategy," and "argued that many traders pursued trading strategies similar to his."[40] Observing that "the most likely use of the so-called

---

38 *Id.* at 8.

39 *Id.* at 9.

40 R.233 at 4.

newly discovered evidence would be to impeach the government's witnesses," which could not serve as the basis for a new trial, the district court concluded that the new statistical evidence would probably not lead to an acquittal.[41] The district court also rejected the subsequent indictments, concluding that "[a]ny such evidence would hardly be relevant or material."[42] As the district court saw it, "[t]hat others may have employed illegal trading strategies does not constitute a defense to a criminal indictment based on the employment of illegal trading strategies."[43] Finding that none of the new evidence satisfied the requirements for a new trial and that the jury was completely justified in concluding that Mr. Coscia was guilty, the district court denied Mr. Coscia's motion for a new trial.

4. Our Assessment

We now evaluate Mr. Coscia's arguments. We ask first whether he established that the ICE and CME data disclosed after trial constitutes new evidence. In short, Mr. Coscia must demonstrate that he could not have discovered the data sooner through the exercise of due diligence. *See United States v. Westmoreland*, 712 F.3d 1066, 1073 (7th Cir. 2013). A claim of diligence, however, is seriously undermined when the

---

41 *Id.* at 5.

42 *Id.* at 7.

43 *Id.*

defendant fails to have a subpoena issued or fails to request a continuance because critical evidence was not available. *See United States v. Oliver*, 683 F.2d 224, 228 (7th Cir. 1982) (holding that failure to exercise diligence in locating witnesses before trial precluded new trial based on newly discovered evidence). Mr. Coscia must show that the failure to obtain production of this new information was not due to his lack of diligence.

Recall that, after trial concluded, Mr. Coscia obtained from CME a complete audit trail covering approximately ten weeks of all market participants for every market in which he traded. In addition, while the court was considering the Government's motion to quash Mr. Coscia's post-trial subpoena, ICE disclosed that it inadvertently had failed to turn over the data underlying ICE Summary Chart 6, which set out Mr. Coscia's share of cancellations of large orders following the trade of a small order in the opposite direction. In accordance with the court's order, ICE then produced the data underlying ICE Summary Chart 6 and disclosed that the original numbers on the chart were misstated: Mr. Coscia accounted for 14,141, not 14,563, of such cancellations, and all other participants accounted for 1,328, not 671, of such cancellations.

Mr. Coscia submits that this information constitutes new evidence because he was entitled to rely at trial on the Government's representations that he had all of the data. He points out that, in response to his request for the summary charts, the

Government had responded: "We have not yet prepared the summary charts, but the information that they summarize has already been produced to you."[44] He also notes that ICE witness John Redman confirmed at trial that he had reviewed the data on the ICE disk and that the summary charts were true and accurate summaries of the data on the ICE disk.

First of all, to the extent Mr. Coscia intimates that he was not provided any of the data underlying any of the summary charts, that contention is, to put it mildly, overblown. [45] Prior to trial, Mr. Coscia obtained data through discovery and his own independent subpoenas. Indeed, Mr. Coscia's own expert witness used that data to create his own summary charts. We therefore cannot accept Mr. Coscia's suggestion that he was deprived of complete data underlying all of the ICE and CME summary charts. Indeed, the representations made to him were in large part true. It was only the underlying data for ICE Summary Chart 6 that was lacking as revealed by ICE's post-trial disclosure that it inadvertently had failed to produce that material to either party. The newly discovered material with respect to Summary Chart 6 disclosed errors, but those errors can be characterized accurately as de minimis. Of all the large order cancellations following small order trades in the opposite direction, Mr. Coscia accounted

---

44 R.227-8 at 2.

45 *See* Appellant's Br. 39–40, 45–46.

for 91%, not 96% of such trades. Importantly, the data continues to show that Mr. Coscia, more than any other market participant, engaged in a pattern of cancelling large orders after trading a small order in the opposite direction.

Mr. Coscia simply has not demonstrated how the limited non-disclosure of ICE Summary Chart 6 casts doubt on all of the summary charts from both ICE and CME. Nor has he connected the missing data from ICE Summary Chart 6 to any explanation of why he failed to obtain earlier the data he sought after trial. In an effort to meet the latter burden, he points to the four subpoenas that he issued prior to trial as proof of his diligence. [46] These subpoenas were crafted, however, to produce specifically described information. For example, Mr. Coscia's single ICE subpoena requested the audit trail data for only ten trading firms between September 6, 2011 and October 18, 2011, as well as the data underlying the statistics in its Suspicious Trading Report. [47] Mr. Coscia's subpoenas to CME were cabined to his own orders and trades, orders and trade data of specific entities, and audit trail data for eight markets on four dates. It was not until well after trial that Mr. Coscia sought the full audit trail of all CME transactions and all ICE transactions. Mr. Coscia has not demonstrated why he was unable to obtain, through compulsory process,

---

46 *See* R.227-2; R.227-3; R.227-4; R.227-5.

47 *See* R.227-4.

the full audit trail data he has since obtained or why he did not request a continuance prior to trial to obtain those records.

Even if we were to assume that this new evidence could not have been discovered sooner through the exercise of due diligence, Mr. Coscia fails to explain convincingly how this new information is material. In the context of a motion for a new trial, evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Mr. Coscia has not carried his burden of demonstrating that the new information here seriously called into question the jury verdict. Instead, the new information would serve only as impeachment evidence against some of the Government's witnesses. Given the amount and strength of the other evidence against Mr. Coscia, this simply does not warrant a new trial.[48]

---

[48] *See Kamel*, 965 F.2d at 493 ("A new trial will not be granted if the evidence offered is merely impeaching or cumulative; it must be material."). Although "[i]t is true that, typically, newly discovered impeachment evidence does not warrant relief under Rule 33," *United States v. Reyes*, 542 F.3d 588, 596 (7th Cir. 2008), we have cautioned that this is not a categorical rule, *see United States v. Taglia*, 922 F.2d 413, 415–16 (7th Cir. 1991). For example, "[i]f the government's case rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed ..., the district judge would have the power to grant a new trial in order to prevent an innocent person from

Moreover, his materiality arguments with respect to the post-trial information fail because his proposed modifications to the data analysis presented at trial are either inaccurate or misleading. Additionally, many of the purported issues with the data could have been elicited on cross-examination at trial. We first examine Mr. Coscia's attempts to recharacterize the analyses presented at trial. We then turn to those matters that could have been examined through cross-examination.

Mr. Coscia relies on the post-trial data to recast the summary charts presented at trial. The new data analysis Mr. Coscia urges us to adopt, however, misrepresents the data or requires us to make unjustified inferences. For instance, Mr. Coscia requests that we make comparisons between different sets of data that can be compared only by accepting false equivalencies. ICE Summary Chart 3 showed Mr. Coscia's order-to-trade ratio to be 1,592% on the ICE Brent Futures market, whereas the next firm down had a ratio of only 264%. To undermine the ICE data summarized in ICE Summary Chart 3, Mr. Coscia invites our attention to the CME data that he obtained post-trial and asks us to conclude that "literally dozens, and sometimes hundreds" of traders had order-to-trade ratios greater than 1,592%.[49] Mr. Coscia reasons, without any support, that "[g]iven the

---

being convicted." *Id.* at 415. This simply is not the case here.

[49] Appellant's Br. 33.

robustness of the CME data," we may assume that the additional ICE data would show similar results to the CME data.[50] Focusing on this evidence, he asserts that he was not the outlier the Government made him out to be. We decline to rely on CME data to make unsupported assumptions about the validity of the ICE data. Notably, Mr. Coscia has hampered our ability to compare the CME order-to-trade ratios by not sharing what his own order-to-trade ratio was for each of the CME commodities.

Mr. Coscia attempts to discredit CME Summary Charts 2 and 3 with another apples-to-oranges comparison. CME Summary Charts 2 and 3 showed that Mr. Coscia had an aggregate 35.53% "fill-rate differential," the difference between Mr. Coscia's small-order fill rate and large-order fill rate, across all seventeen CME markets. Mr. Coscia, with the new CME data in hand, observes that "dozens and even hundreds of traders" had fill-rate differentials greater than his 35.53%, counting 1,189 "unique traders" with larger fill-rate differentials.[51] This summation, however, is achieved by counting each trader with a commodity-specific differential greater than Mr. Coscia's aggregate fill-rate differential across all markets. For us to see it Mr. Coscia's way, we must compare the fill-rate differentials of specific traders in single commodity markets against his aggregate fill-

---

50 *Id.* at 33 n.8.

51 *Id.* at 34–35.

rate differential across seventeen markets. Without establishing whether the other traders traded in each of the same seventeen markets as Mr. Coscia or what the aggregate fill-rate differentials were for each of the "unique traders" Mr. Coscia identifies, Mr. Coscia has not met his burden demonstrating that this is an apt comparison.

Mr. Coscia also attempts to use the data to support propositions that we do not think can be fairly maintained. Mr. Coscia challenges several aspects of ICE Summary Chart 6, which showed Mr. Coscia's share of cancellations of large orders following a small order filled in the opposite direction. Mr. Coscia first contends that ICE Summary Chart 6 was presented to the jury as a chart showing all order cancellations among all other participants. Relying on the post-trial data, Mr. Coscia observes that, "of the 71,785,276 cancellations in the Brent contracts market traded on ICE, Coscia only accounted for 47,649 or .066% of those canceled orders."[52] But it is clear that ICE Summary Chart 6 did not display market-wide order data of all cancellations but only revealed a specific subset of cancellations: cancellations of large orders following the fill of a small order in the opposite direction. The very first page of the exhibit reflects this subset of cancellations: "Instances where Mr. Coscia cancelled large orders following an opposite

---

[52] *Id.* at 25.

trade."[53] In addition, Redman clearly confirmed this characterization at trial:

> So what we did to get to this chart was we looked at how frequently a large order was canceled following the trading of a small order in the other direction.
>
> ... It looks at everybody else who's—who had the same instance of large order—small order trades, large orders canceled.[54]

Thus, Mr. Coscia's submission that he actually represented less than 1% of all market-wide cancellations is not at all supported by the evidence. The record is clear that ICE Summary Chart 6 referred to a subset of cancellations only: Mr. Coscia accounted for over 90% of cancellations of large orders that followed the fill of a small order in the opposite direction. The post-trial data correction simply reflects that Mr. Coscia represented 91%, as opposed to 96%, of large order cancellations following the

---

[53] R.177-35 at 1. Mr. Coscia contends that "the presumption that the jury understood the 96% figure" to represent only this subset of cancellations, as opposed to *all* cancellations, "is belied both by the chart's more sweeping title of 'Order cancellation comparison.' " Appellant's Reply Br. 12 n.6. We are unpersuaded by Mr. Coscia's concerns, as the first page of the exhibit contains the very heading Mr. Coscia claims is lacking; Mr. Coscia has chosen to excerpt the first page of the exhibit from his lead brief. *See* Appellant's Br. 23–24.

[54] R.86 at 37–38 (Tr. 304–05).

trade of a small order in the other direction. We find it difficult to see how this de minimis error probably could have led to an acquittal. Mr. Coscia offers no other justification why this minor error should cast doubt on all of the data evidence.

Finally, Mr. Coscia attacks CME Summary Chart 5 by suggesting three ways the data could have been calculated differently. He contends: (1) that order modifications should have been included in the cancellation count; (2) that small and large firms should have been treated differently; (3) and that large orders placed only should have been compared to large orders filled. But where the data or the calculations may have fallen short are matters that should have been dealt with on cross-examination. Indeed, Mr. Coscia's trial counsel did cross-examine CME witness Ryan Cobb on the exclusion of modifications from the chart.[55]

Mr. Coscia also fails to carry his burden of demonstrating that he likely would have been acquitted if the jury had been presented this data or his updated charts. First, as we have discussed, Mr. Coscia's proposed presentation of the evidence does not present the new evidence fairly or accurately. It is a safe assumption that Government counsel would have exposed these shortcomings. More fundamentally, there was a significant amount of other evidence against Mr. Coscia that established his intent to spoof. The jury considered Mr. Coscia's own

---

55 *Id.* at 150–52 (Tr. 417–19).

testimony, the testimony of programmer Jeremiah Park, the testimony of other traders, and the rebuttal testimony of Hank Bessembinder.

For these reasons, we conclude that the district court did not abuse its discretion in denying Mr. Coscia's motion for a new trial based on the post-trial data.

C.

Subsequent Indictments of Other Traders

Mr. Coscia also submits that subsequent indictments of other traders for spoofing materially undercuts the Government's key theory at trial: that Mr. Coscia was an "outlier." In his view, these subsequent indictments establish that the Government had asserted falsely that Mr. Coscia's trading activities were unique and that this uniqueness demonstrated his criminal intent. Mr. Coscia also submits a new trial is warranted in his case because the Government treated Park's testimony differently in the prosecution of another trader, *see United States v. Jitesh Thakkar*, No. 18-cr-00036 (N.D. Ill.), where it argued that Park's testimony did not support a finding of intent to spoof.

As to whether the subsequent indictments contradict the Government's characterization of Mr. Coscia as "unique" or as an "outlier," the district court was entitled to conclude, in the context of a motion for a new trial, that the fact "[t]hat others may have employed illegal trading strategies does not constitute a defense to a criminal indictment based on

the employment of illegal trading strategies."[56] From our review of the record, the case against Mr. Coscia was not built exclusively around the Government's characterization of Mr. Coscia's trading strategy as "unique." Significantly, it included Mr. Coscia's own admissions about his trading patterns, Park's testimony, and the testimony of other traders.

With respect to the *Thakkar* prosecution, Mr. Coscia contends that the Government took a position contrary to the one it took against him. Specifically, Thakkar alleged that the Government engaged in selective prosecution because it declined to prosecute Jeremiah Park, the computer programmer who built Mr. Coscia's trading program. In reply, the Government stated that "Park's awareness of Coscia's intent to spoof is not supported by Park's own testimony in Coscia.... Park testified that Coscia never suggested to Park that Coscia was doing something wrong or fraudulent when using Park's trading programs."[57] Whether Park was subjectively aware of Mr. Coscia's intent to spoof or whether Park had a subjective intent to spoof, however, is irrelevant to Mr. Coscia's intent to spoof. We cannot accept Mr. Coscia's attempt to conflate his own intent with that of Park.

---

[56] R.233 at 7.

[57] Government's Resp. to Def. Jitesh Thakkar's Mot. to Dismiss Indictment with Prejudice at 9 n.4, *United States v. Thakkar*, No. 18-cr-00036 (N.D. Ill.).

Mr. Coscia has failed to establish that the interests of justice warrant a new trial, for either the post-trial data or the subsequent indictments. The district court therefore did not abuse its discretion in denying Mr. Coscia's new trial motion.

III

The Section 2255 Motion

After the district court denied the motion for a new trial, Mr. Coscia filed a motion under 28 U.S.C. § 2255 to vacate his conviction. In this motion, he alleged that his trial counsel, Sullivan & Cromwell, had provided ineffective assistance of counsel in two ways. He first submitted that Sullivan & Cromwell had undisclosed conflicts of interest that adversely affected his trial counsel's performance. Secondly, he alleged that Sullivan & Cromwell had provided ineffective assistance by failing to object to, investigate, or challenge the Government's statistical evidence. The district court denied his § 2255 motion.

We will review each of those allegations in turn. We review de novo a district court's denial of a defendant's motion to vacate or set aside his convictions pursuant to 28 U.S.C. § 2255. *Hall v. United States*, 371 F.3d 969, 972 (7th Cir. 2004). We review the district court's factual findings for clear error. *Id.*

A.

The Conflict-of-Interest Allegation

1. Background

Mr. Coscia submits that, at the time of his trial, Sullivan & Cromwell represented, either simultaneously or in the past, several government witnesses, including ICE, D.E. Shaw, and Citadel. He further alleges that Sullivan & Cromwell never disclosed such conflict to him and that its representation of an adverse witness constituted an actual conflict of interest. In his view, this conflict of interest incentivized Sullivan & Cromwell to neglect critical discovery because the information derived from such a discovery process necessarily would impact adversely these clients.

Mr. Coscia supported these allegations by noting that, with respect to ICE, Sullivan & Cromwell's website revealed that it had represented ICE in various transactions over a fourteen-year period. Notably, it represented ICE in a $5.2 billion acquisition that had been finalized on the first day of Mr. Coscia's trial. Sullivan & Cromwell never disclosed that representation. Furthermore, Sullivan & Cromwell's lead counsel, Attorney Kenneth Raisler, personally had represented ICE in prior matters. According to Mr. Coscia, Attorney Raisler therefore knew that Sullivan & Cromwell had a long-term and valuable attorney-client relationship with ICE. Mr. Coscia contended that, because of its concurrent representation of ICE, Sullivan & Cromwell chose trial strategies that would not create difficulties for its long-standing client by failing to ascertain the completeness or accuracy of the summary charts and by failing to cross-examine effectively Redman, the ICE representative.

Mr. Coscia also alleged that Sullivan & Cromwell previously had represented D.E. Shaw and Citadel, entities whose representatives testified for the Government at his trial. He supported this allegation by submitting attorney profile pages from the Sullivan & Cromwell website showing that various attorneys from the firm had represented D.E. Shaw and Citadel in various transactions.[58] This situation, in Mr. Coscia's view, amounted to an actual conflict of interest because Sullivan & Cromwell attorneys faced the possibility of having to cross-examine their former clients. Mr. Coscia further speculates that Sullivan & Cromwell "represented other persons or entities who testified at trial, and therefore had yet further conflicts of interest."[59] Mr. Coscia contended that Sullivan & Cromwell, wary of creating difficulty for these clients, had failed to obtain data from them or cross-examine their representatives effectively.

The district court ruled that Mr. Coscia had demonstrated successfully that the firm actively

---

[58] *See* 2255 R.8-2; R.8-3.

[59] Appellant's 2255 Br. 19 n.3 ("In response to a question from one of Coscia's post-trial attorneys asking whether [Sullivan & Cromwell] had represented any of 28 specific entities who were involved in Coscia's trial and/or the transactions at issue in Coscia's case, [Sullivan & Cromwell] provided the following vague but suggestive response: 'We can confirm that Sullivan & Cromwell LLP represented certain entities (or their affiliates) listed in your April 3, 2019 letter prior to or during Sullivan & Cromwell's representation of Mr. Coscia.' " (emphasis omitted)).

provided legal services to ICE at the time of the trial. It nevertheless concluded that Mr. Coscia failed to show that this simultaneous representation had affected adversely Attorney Raisler's performance during trial. Taking the same view as it had in disposing of the second motion for a new trial, the district court determined that Sullivan & Cromwell's strategy was to acknowledge Mr. Coscia's trading conduct and to justify that trading conduct as legitimate. The court therefore concluded that Mr. Coscia failed to demonstrate that any alleged conflict adversely affected Sullivan & Cromwell's representation of him.

2. Governing Principles

The Sixth Amendment guarantees criminal defendants effective assistance of counsel. Included within this right is the right to representation "free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981).

An allegation of the sort presented here is governed by the rule established by the Supreme Court in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Under this rule, the defendant must first establish the existence of a conflict of interest. Once the defendant has established such a conflict, he must further establish that the conflict "adversely affected his lawyer's performance." *Id.* at 348. "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* at 350 (emphasis added). This

showing, although not as difficult to meet as the *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice standard, is nevertheless a significant burden. *See Spreitzer v. Peters*, 114 F.3d 1435, 1450 (7th Cir. 1997); *see also Hall*, 371 F.3d at 973 (observing that the Sullivan adverse-effect standard is significantly easier to meet than the Strickland prejudice standard).

In sum, "[a]n 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002). An "adverse effect" can be demonstrated "by showing that 'but for the attorney's actual conflict of interest, there is a reasonable likelihood that counsel's performance somehow would have been different.'" *Gonzales v. Mize*, 565 F.3d 373, 381 (7th Cir. 2009) (quoting *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994)).

3. Our Assessment

We first consider Mr. Coscia's conflict of interest claim as to ICE, and we agree with the district court that there was a conflict of interest with respect to ICE. We conclude, however, that Attorney Raisler's conflict of interest did not adversely affect his performance.

With respect to the conflict of interest, Mr. Coscia presented evidence that his trial attorney, Kenneth Raisler, was involved in providing legal and lobbying services to ICE in the years prior to Mr. Coscia's criminal proceeding. In addition, Sullivan &

Cromwell was directly providing legal services to ICE while Attorney Raisler was representing Mr. Coscia.[60] We have noted the importance of "the presumption that the lawyer will subordinate his pecuniary interests and honor his primary professional responsibility to his clients in the matter at hand." *United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975). Attorney Raisler's prior direct involvement and his firm's simultaneous involvement in the representation of ICE in other matters at the time of Mr. Coscia's trial, and the failure to disclose such conflict, is cause for concern that loyalties may have been divided. *See Rosenwald v. United States*, 898 F.2d 585, 587 (7th Cir. 1990) ("The pragmatic pressure on counsel in cases such as these is purely financial—the lawyer does not want to lose a client whether that client is seeking advice on civil or on criminal matters. The ethical dilemma is also the same—the attorney must still guard secrets and confidences and must seek to promote the client's interests ...."). Here, Redmond's testimony about Mr. Coscia's trading conduct on ICE's exchange, the role that Attorney Raisler had played in advising ICE on regulatory and lobbying matters, and the financial stake Sullivan & Cromwell had in the simultaneous matters concerning ICE, support the district court's determination.

As we noted earlier, the presence of a conflict of interest, standing alone, does not carry the day for

---

60 *See* 2255 R.8-1.

Mr. Coscia. Having established that Sullivan & Cromwell had a conflict with respect to ICE, Mr. Coscia still must demonstrate that there is a reasonable possibility that, absent this conflict of interest, his counsel's representation was adversely affected. In an effort to carry this burden, Mr. Coscia submits that, because his counsel's firm had a conflict of interest, the attorney did not obtain or verify the data underlying the ICE summary charts. If this underlying statistical evidence had been available, Mr. Coscia continues, it would have "expose[d] the objective inaccuracies in the prosecution's charts" and demonstrated that his trading strategy was not unique. [61] Mr. Coscia also maintains that an unconflicted lawyer would have, through more effective cross-examination, rebutted the Government's assertion that Mr. Coscia was an outlier in his trading activity.[62]

---

61 Appellant's 2255 Br. 29.

62 For example, Mr. Coscia points to his trial counsel's failure to cross-examine ICE representative Redman about a $122,180 loss he incurred. At trial, Redman testified that this loss resulted from a large order being filled; Mr. Coscia now alleges that this loss actually resulted from multiple small orders. Redman's testimony, however, supported Mr. Coscia's defense theory: he was indifferent to whether large or small orders were filled, and that he "wanted to trade" each large order he placed on the market. R.89 at 183 (Tr. 940). In closing, Mr. Coscia's defense counsel told the jury: "[J]ust because the small side actually trades more often than the large side that you really didn't have anything at stake .... But the truth is, and we're going to see this, the large side was filled in full or in part more than 8,000 times." R.92 at 94 (Tr. 1507). Defense counsel

Mr. Coscia's argument encounters some very strong headwinds. At the outset, the newly discovered post-trial data does not uncover the large inaccuracies he claims.[63] It demonstrates, at most, a mild variation in the cancellation of large trades following small orders in the opposite direction. Moreover, Mr. Coscia's defense at trial was to acknowledge that his trading activity was unique, but wholly above board.[64]

---

went on: "Sometimes the large side was profitable. Sometimes it was not. Sometimes you make money in trading. Sometimes you don't." *Id.* at 103 (Tr. 1516).

[63] Mr. Coscia again insists that ICE Summary Chart 6 falsely "claimed that Coscia was responsible for 96% of all order cancellations on the Brent Crude futures market," and that it was not until post-trial that ICE disclosed that ICE Summary Chart 6 represented a subset of cancellations flagged by an ICE system alert tool. Appellant's 2255 Br. 26–27. Mr. Coscia urges that not only was the methodology of the alert tool "never fully explained either during trial or after," but that trial counsel failed to contest the "devastating statistic ... that Coscia accounted for 96% of all cancellations on the Brent Crude market." *Id.* at 27. As we discussed with respect to Mr. Coscia's new trial motion, the record indicates that ICE Summary Chart 6 was clearly presented to the jury for what it was: large orders cancelled after small orders filled in the opposite direction. The chart's title and Redman's testimony clearly describe that ICE Summary Chart 6 reflected a subset of, not all, cancellations.

[64] *See, e.g.*, R.82 at 170 (Tr. 170) ("Every order to buy or sell a futures contract that he placed into the market was a real, legitimate order that was available for others in the market to trade. ... Sometimes he lost money. Sometimes he made money."); R.92 at 52 (Tr. 1465) ("We don't dispute, in short, that he had a different strategy, but there's nothing wrong or unlawful about having a different strategy. There's nothing wrong or unlawful about having an unusual strategy.").

His approach, quite understandably, was to present his trading activity as legitimate and to argue that there was no evidence that his trading behavior manifested an intent to spoof. He submitted that he was indifferent as to whether his large or small orders were filled and that every order he placed, regardless of size, was capable of being filled and therefore legitimate.

The focus of Mr. Coscia's defense was that he was not attempting to rig the market through spoofing. The post-trial statistical evidence recovered is only mildly relevant and probative to this defense. By diluting, somewhat, the Government's assertion that he was an outlier in his trading methodology, the new evidence provides some circumstantial evidence relevant to whether he was attempting to rig the market. In light of the other evidence, however, this mild variation of ICE Summary Chart 6 could not have made a significant difference in the jury's determination. Considering the design of the program and the testimony of Park, Mr. Coscia's programmer, that Mr. Coscia wanted the program to act "[l]ike a decoy" to "pump [the] market," it was entirely reasonable for trial counsel to pursue the chosen strategy.[65] In the end, Mr. Coscia set up a system designed to spoof the market.

The situation is somewhat different with respect to D.E. Shaw or Citadel. Here, Mr. Coscia has not demonstrated that a conflict of interest existed.

---

65 R.86 at 231, 235 (Tr. 498, 502).

Relying on *Hall* and *Enoch v. Gramley*, 70 F.3d 1490 (7th Cir. 1995), Mr. Coscia contends that "even the possibility of cross-examining a former client constitutes an actual conflict."[66] This position misses the mark: In *Enoch*, 70 F.3d at 1498, we declined to adopt a rule "that any lawyer has a conflict of interest when he cross-examines a former client." Although the possibility of having to cross-examine a former client may lead to an actual conflict of interest, we have held that the defendant must show one of two things: "(1) that the attorney's representation of the first client was 'substantially and particularly related to his later representation of defendant' or (2) that the attorney actually 'learned particular confidential information during the prior representation of the witness that was relevant to defendant's later case.'" *Hall*, 371 F.3d at 973 (quoting *Enoch*, 70 F.3d at 1496–97).

Mr. Coscia has not established that Sullivan & Cromwell's representation of D.E. Shaw in its unrelated structured private transactions or of Citadel in its unrelated investment transactions was substantially and particularly related to the representation of Mr. Coscia. The cases to which Mr. Coscia invites our attention involve the same matter or concern co-defendants, and therefore do not govern the situation before us. For instance, in Hall, we held that there was an actual conflict of interest when an attorney's representation of a witness "enabled him to

---

66 Appellant's 2255 Br. 18.

learn confidential information pertaining directly to Hall's case." *Id.* at 973. In *Ross v. Heyne*, 638 F.2d 979, 982 (7th Cir. 1980), "one attorney represented the defendant while his law partner represented co-defendants who testified for the prosecution." This type of multiple representation presented an actual conflict because the "two co-defendants testified against Ross in exchange for favorable treatment by the state," and the defendant's attorney "was unable to cross-examine them effectively." *Id.* at 983.[67] And in *United States v. Moscony*, 927 F.2d 742, 747–51 (3d Cir. 1991), the Third Circuit held that an actual conflict of interest existed when defense counsel previously had represented employees of the defendant who would be testifying for the government. Defense counsel could not effectively impeach the witnesses "without revealing information 'relating to' his representation of them." *Id.* at 750.

Mr. Coscia has not established that Sullivan & Cromwell learned of relevant and confidential

---

[67] *See also McElrath v. Simpson*, 595 F.3d 624 (6th Cir. 2010) (finding an actual conflict of interest in joint representation of multiple defendants in same case); *Boykin v. Webb*, 541 F.3d 638 (6th Cir. 2008) (same); *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004) (same); *United States v. Basham*, 918 F. Supp. 2d 787 (C.D. Ill. 2013) (finding an actual conflict of interest when prior client and defendant were charged with the same offense, and prior client admitted defendant's involvement); *United States v. Ring*, 878 F. Supp. 134 (C.D. Ill. 1995) (finding an actual conflict of interest when counsel previously represented in *related* matter client who would be testifying as material government witness).

information from its representations of D.E. Shaw and Citadel in unrelated transactions. He has presented no facts to suggest that Mr. Coscia's trial lawyers were torn between the duty of confidentiality to their firm's former client and their duty of loyalty to Mr. Coscia.

Inviting our attention to *United States v. Alex*, 788 F. Supp. 359 (N.D. Ill. 1992), Mr. Coscia further contends that "a lawyer cannot represent a defendant if he previously represented a victim of the crime."[68] Alex is not binding precedent, but, in any event, Mr. Coscia overstates the district court's conclusion. In Alex, an attorney undertook representation of a criminal defendant while simultaneously representing several of the alleged victims of the defendant's extortionate conduct in a grand jury investigation. *Id.* at 362. The court concluded that, because of his representation of the victims, counsel was "aware of certain matters which could be used to attack the credibility of the witnesses at trial." *Id.* at 364. The court's concern was grounded in the fact that the attorney sought "to represent one of the alleged perpetrators of the criminal activity when he and his firm previously represented individuals who were allegedly victims of the very same criminal activity." *Id.*

Even if we were to assume that D.E. Shaw and Citadel can be characterized as victims of Mr. Coscia's spoofing conduct, Mr. Coscia does not allege, and

---

68 Appellant's 2255 Br. 21–22.

there is nothing in the record to suggest, that Sullivan & Cromwell represented D.E. Shaw or Citadel as victims in the context of Mr. Coscia's criminal activity. *See Enoch*, 70 F.3d at 1497 (concluding no actual conflict when attorney represented adverse witness for "entirely separate" matters "four years apart, and none of the relevant people involved had cross-cutting relationships"). Here, Mr. Coscia has offered only speculation that Sullivan & Cromwell's prior representation of D.E. Shaw and Citadel involved a possible conflict of interest. "[T]he possibility of conflict," however, "is insufficient to impugn a criminal conviction." *Sullivan*, 446 U.S. at 350.[69]

---

[69] Mr. Coscia insists that his trial counsel "took a disturbingly light touch" by failing to obtain the algorithm program logic of the trading firms. Appellant's 2255 Br. 29. He submits that "[t]he program logic from D.E. Shaw would likely have shown that it, too, was designed to cancel orders ... which would have been important to show Coscia was not an 'outlier' or 'unique' in his trading." *Id.* at 30. But again, Mr. Coscia's defense theory was to not dispute his algorithm or that he was an outlier. *See* R.82 at 172 (Tr. 172) ("Let me get one thing right out of the way. We don't disagree that Michael Coscia came up with the idea for a computer-driven trading program. He's admitted that. We don't dispute that it worked generally as the prosecution has described."); R.92 at 53 (Tr. 1465) ("We don't dispute how Michael's strategy worked. We don't dispute that it worked differently from other high-frequency traders. We don't dispute that Michael placed more large orders than other high-frequency traders, and we don't dispute that Michael traded ... more large orders than other high-frequency traders."); *Id.* at 129 (Tr. 1542) ("Now, as Michael told you and Professor Bessembinder also confirmed, there's really no dispute about how the algorithm worked.").

B.

Ineffective Assistance of Counsel

1. Background

As a second ground for relief under § 2255, Mr. Coscia also brings an ineffective assistance of counsel claim on the ground that, even in the absence of a conflict of interest, his trial counsel provided ineffective assistance. His petition alleged that trial counsel's failure to object to, investigate, and challenge certain evidence rendered his trial counsel's performance constitutionally deficient. The Government countered that Mr. Coscia failed to satisfy either the deficient-performance or prejudice prong of *Strickland v. Washington*, 466 U.S. at 668. It emphasized that trial counsel's decisions were strategic: He characterized Mr. Coscia's conduct as a legitimate trading strategy. And in any event, the jury saw and heard a significant amount of evidence, including Mr. Coscia's own testimony, along with that of his programmer, Park.

The district court agreed with the Government that Mr. Coscia could not establish either Strickland prong. In its view, Mr. Coscia's case presented "the common situation" where an attorney concludes that "the client stands a better chance of success by admitting the underlying actions alleged to have been taken by the client which appear to be easily provable, and instead argue to the jury that the actions do not

amount to a crime."[70] The court concluded that trial counsel's strategic decision was objectively reasonable, and there was no reasonable probability that a different strategy would have led to a different outcome. Accordingly, the district court denied Mr. Coscia's § 2255 motion.

2. Governing Principles

It is well established that the right to counsel is the right to effective assistance of counsel. *Id.* at 686. Under the two-prong test set forth in *Strickland*, 466 U.S. at 687–88, ineffective assistance of counsel is established by showing that trial counsel's performance fell below an objective standard of reasonableness and that the deficient performance was prejudicial. To satisfy the first prong, the petitioner must first "show that counsel provided constitutionally deficient performance, meaning counsel made errors so serious he was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Winfield v. Dorethy*, 956 F.3d 442, 451 (7th Cir. 2020) (internal quotations omitted). In evaluating such claims, we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. To satisfy the second prong, the petitioner also must "show that this deficient performance prejudiced his defense—meaning there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the

---

[70] 2255 R.15 at 6–7.

proceeding would have been different.'" *Winfield*, 956 F.3d at 451 (quoting *Strickland*, 466 U.S. at 694).

3. Mr. Coscia's Contentions

Mr. Coscia submits that his trial counsel failed to investigate and offer probative evidence to undermine the Government's case by (1) failing to investigate or challenge inaccurate summary charts; (2) failing to obtain and introduce evidence supporting Mr. Coscia's good faith; and (3) failing to impeach Government witnesses.

The Government submits that Mr. Coscia's "claims of deficient performance relate to strategic choices made by defendant's trial counsel."[71] The data and summary charts indicated clearly that Mr. Coscia's trading practices were different and unusual from that of other high-frequency trading firms.

We already have rejected Mr. Coscia's argument that the data was as inaccurate as he claims. More importantly, the strategic choice to accept the trading data as presented but argue that nothing was wrong with his trading practices was a reasonable decision in light of other evidence against Mr. Coscia. Park's testimony that Mr. Coscia directed him to design a program to avoid large orders being filled made it difficult for Mr. Coscia to deny his trading choices. Mr. Coscia's prior deposition testimony for the Commodity Futures Trading Commission confirms

---

71 Appellee's 2255 Br. 49.

that the choice to admit Mr. Coscia's conduct but to argue that it was legal was entirely reasonable.

Mr. Coscia insists that his trial counsel failed to pursue a good-faith defense. But, as the Government submits and the district court recognized, Mr. Coscia's defense strategy at trial was a good-faith defense.[72] From the outset, Mr. Coscia's defense acknowledged the differences between his trading activities and that of other traders. Trial counsel submitted that Mr. Coscia's choice of conduct was "just good trading."[73]

Mr. Coscia next asserts that trial counsel failed to impeach various government witnesses. For example, he points to counsel's failure to use prior inconsistent statements to impeach Dermenchyan, an employee at Teza Technologies. In an earlier interview with the Financial Services Authority, Dermenchyan stated that he did not know whether the same participant who placed the large orders was the same participant

---

[72] 2255 R.15 at 5 ("At trial, Petitioner's defense was to acknowledge his trading activity, which was testified to by employees of ICE and the other entities he claims created the conflict. Petitioner attempted to justify his trading activities as being wholly legal and proper. ... His defense was that each and every order he placed, both large and small, was a legitimate order that was capable of being filled prior to cancelation." (citations omitted)).

[73] R.82 at 186 (Tr. 186).

placing small orders on the other side.[74] At trial, Dermenchyan stated:

> [L]arge size[ ] [orders] were placed in the market in order to induce participants to trade on the opposite side, and ... it was clear it was an individual participant doing this. And if you follow the logic, it was clear that it was a participant playing with supply and demand in order to push prices in one direction and then push them back in the other direction.[75]

These statements, however, are not inconsistent with one another. Dermenchyan's testimony at trial concerned large orders only, not whether the same participant was placing large orders and small orders in the opposite direction. Mr. Coscia further complains that his trial counsel did not adequately dispute the trading practice; yet his defense before the jury was to acknowledge and admit to his trading practices.

Mr. Coscia also submits that his trial counsel was deficient in failing to cross-examine Alex Gerko of GSA Capital about GSA Capital's settlement with CME regarding matched orders. Gerko testified to his observation of a particular pattern of activity, where he "would see very, very large orders appearing on the

---

74 *See* 2255 R.5-22 at 15.

75 R.88 at 80 (Tr. 685).

market indicating some kind of very sharp imbalance between buyers and sellers, and then these orders would disappear from the bid and appear on the offer and ... repeat tens of times in a row." [76] Cross-examining Gerko on GSA Capital's settlement with CME, however, would have done little for Mr. Coscia's defense because his defense strategy was to admit to his trading practices. The failure to cross-examine here is insufficient to overcome the "strong presumption" that counsel's decisions fell "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

We agree with the district court's assessment that Mr. Coscia's trial counsel was presented with "the common situation" where "the client stands a better chance of success by admitting the underlying actions alleged to have been taken by the client which appear to be easily provable, and instead argue to the jury that the actions do not amount to a crime."[77] That the jury did not accept his defense does not render it constitutionally deficient. We cannot conclude that his trial counsel's performance was so deficient as to fall below an objective standard of reasonableness.

Even if we were to assume that trial counsel's performance was deficient, Mr. Coscia has not demonstrated prejudice. Given the strong evidence of Mr. Coscia's intent, it is highly improbable that the

---

76 *Id.* at 90 (Tr. 695).

77 2255 R.15 at 6–7.

introduction of a weak statistical characterization of Mr. Coscia's trading patterns would have led to a different outcome. Not only did Park testify as to his instructions, but Mr. Coscia, himself, testified to how he designed his trading programs to work. His ineffective assistance of counsel claim therefore must fail.

C.

Evidentiary Hearing

Finally, we turn to the district court's denial of Mr. Coscia's request for an evidentiary hearing. We review this denial for abuse of discretion. *See Kafo v. United States*, 467 F.3d 1063, 1067 (7th Cir. 2006). When a petitioner "alleges facts that, if proven, would entitle him to relief," the district court must grant an evidentiary hearing. *Bruce v. United States*, 256 F.3d 592, 597 (7th Cir. 2001) (quoting *Stoia*, 22 F.3d at 768). The court, however, is not required to grant an evidentiary hearing when "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). "In addition, a hearing is not necessary if the petitioner makes conclusory or speculative allegations rather than specific factual allegations." *Daniels v. United States*, 54 F.3d 290, 293 (7th Cir. 1995); *see also Aleman v. United States*, 878 F.2d 1009 (7th Cir. 1989) (rejecting hearing request when petitioner "offer[ed] conjecture, not facts" that certain witnesses were informants).

Mr. Coscia submitted that he became aware only after trial that trial counsel simultaneously or previously represented ICE, D.E. Shaw, and Citadel. He sought an evidentiary hearing and requested discovery in the form of a document subpoena to Sullivan & Cromwell to determine, among other things, whether Sullivan & Cromwell represented ICE, D.E. Shaw, Citadel, or any other government witnesses or trading firms identified in the indictment; the subject matter and time period of those representations; which attorneys were involved or knew about those representations; the conflict check procedures at Sullivan & Cromwell; and the communications between, and the fees obtained from, any parties Sullivan & Cromwell represented. Mr. Coscia also requested to depose his trial counsel.

As we already have concluded that trial counsel presented an actual conflict with ICE, we evaluate whether the district court erred in denying his request for an evidentiary hearing concerning his conflict allegations related to D.E. Shaw and Citadel. He contends that Sullivan & Cromwell's prior representation of these entities explains what he characterizes as the "disturbingly light touch" given by trial counsel.[78] Mr. Coscia submits that, without such a conflict of interest, his trial counsel would have obtained data or elicited testimony from these entities to show that Mr. Coscia's trading patterns were not abnormal or an outlier.

---

78 Appellant's 2255 Br. 29.

This defense, however, was the opposite of Mr. Coscia's actual defense strategy to admit Mr. Coscia's trading practices but submit that they were above board. And as we have discussed, in light of Park's testimony and Mr. Coscia's own testimony, Mr. Coscia's good-faith defense was a more than reasonable strategy.

Mr. Coscia has submitted only that trial counsel had previously represented adverse witnesses in unrelated transactional matters and that they therefore must have obtained confidential information. He has not provided any specific allegations as to what relevant information might have been obtained from those transactions or how such information would have affected this case. We therefore conclude that the district court did not abuse its discretion in denying Mr. Coscia's request for an evidentiary hearing.

Conclusion

The district court did not abuse its discretion in denying Mr. Coscia's new trial motion on the basis of new evidence. We also affirm the district court's denial of Mr. Coscia's § 2255 motion. Even though we agree with the district court that Mr. Coscia's trial counsel had a conflict, the district court properly concluded that counsel's performance was not adversely affected. Finally, Mr. Coscia cannot establish either prong of his ineffective assistance claim. For these reasons, we affirm the judgments of the district court.

AFFIRMED

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA, **Respondent,** **v.** **MICHAEL COSCIA,** **Petitioner.**	**Case No. 19 CV 5003** **Judge Harry D. Leinenweber**

MEMORANDUM OPINION AND ORDER

For the reasons stated herein, Petitioner Michael Coscia's Section 2255 Amended Motion (Dkt. No. 5) and Motion for Discovery (Dkt. No. 9) are denied.

I. BACKGROUND

On October 26, 2015, Petitioner proceeded to a jury trial on twelve counts of commodities fraud and spoofing, in violation of Title 18, U.S.C. § 1348 and Title 7, U.S.C. §§ 6c(A)(5)(C) and 13(a)(2). The jury found Petitioner guilty on all counts, and the Court sentenced Petitioner to 36 months' imprisonment. After losing the direct appeal of his conviction, Petitioner has now filed an amended motion under 28

U.S.C. § 2255, seeking to vacate, set aside, or correct his conviction and sentence. His main contentions are that: (1) his trial counsel had an actual conflict of interest that adversely affected the attorney's performance; and (2) his counsel's performance was objectively deficient in various ways that prejudiced him to the extent that there was a reasonable probability that the results of his trial would have been different. Petitioner also asks for leave to conduct discovery.

II. DISCUSSION

A. Conflict of Interest

Petitioner was represented at the trial by attorneys of the law firm of Sullivan and Cromwell ("SC"), a well-known New York firm. SC, a firm with hundreds of lawyers scattered around the country, has an extensive legal practice involving the commodities industry. It turns out that SC, at the time of the trial, had an ongoing professional relationship with the International Exchange ("ICE"), one of the commodity markets where Petitioner traded, and in the past had professional relationships with other entities, such as Citadel, D.E. Shaw, and GSA Capital, all of whom provided witnesses who gave testimony for the Government. Petitioner contends that SC, by representing him at trial where he confronted witnesses employed by entities that were simultaneously or were previously represented by SC lawyers, without disclosing such representation, created a conflict of interest for SC attorneys when they were called upon to cross

examine these witnesses, and which conflict of interest adversely affected their performances. Petitioner cites *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980), and *Rosenwald v. United States*, 898 F.2d 585, 587 (7th Cir. 1990), for the proposition that when a defendant establishes an actual conflict of interest, he need only show that the conflict of interest adversely affected his lawyer's performance.

The Government contends that this claim falls short because Petitioner has not shown that the SC attorneys were aware of the simultaneous representation, that the conflict had an adverse effect on the attorneys' performance, nor that there was a "reasonable likelihood that counsel's performance somehow would have been different" without the conflict. *Gonzales v. Mize*, 565 F.3d 373, 384 (7th Cir. 2009) (citation omitted). It is considerably easier to establish an adverse effect than it is to show prejudice. *Id.*

The Government's first argument is wrong factually. The Petitioner has in fact provided evidence that Kenneth Raisler, a SC partner that participated in the trial, was actively engaged in providing legal services to ICE at the time of the trial. (*See* Ex. A to Petitioner's Reply, Dkt. No. 8.) However, the evidence establishing the conflict of interest fails to demonstrate that this joint representation "adversely affected" his lawyer's performance.

Petitioner argues strenuously that Raisler's simultaneous representation did affect SC's performance, and he cites what he considers SC's

shortcomings: the failure properly to investigate or cross-examine the ICE witness concerning the analysis of Petitioner's trading activities and the data underlying the summary charts ICE prepared for the Government, all of which the Government relied on to show that Petitioner's trading activity made him an outlier among active traders on the ICE; the failure to insist on production of requested data from ICE and SC's agreement to settle for a fraction of the requested data; the failure to obtain algorithm program logics for some of the other entities who were called to testify and which Petitioner specifically asked SC to obtain; and the failure to obtain certain documents from Citadel relevant to the impact of spoofing on Citadel's trades.

The problem with these alleged shortcomings is similar to the problem with the alleged shortcomings presented by Petitioner in his unsuccessful motion for a new trial based on newly discovered evidence. (*See United States v. Coscia*, No. 14-CR-00551, Mot. For New Trial, Dkt. No. 219.) In that motion the alleged newly discovered evidence was essentially the same as what Petitioner now contends his counsel failed to obtain due to the alleged conflict of interest. The fact of the matter is that the information newly discovered after trial and which was not discovered by his attorneys prior to the trial was immaterial to the defense that was presented at trial. *See United States v. Coscia*, No. 14 CR 551, 2019 WL 2121287 (N.D. Ill. May 15, 2019) (denying Petitioner's motion for new trial).

At trial, Petitioner's defense was to acknowledge his trading activity, which was testified to by employees of ICE and the other entities he claims created the conflict. *See United States v. Coscia*, 866 F.3d 782, 786-87 (7th Cir. 2017) (describing Petitioner's trading activity in detail and affirming his conviction), *reh'g and suggestion for reh'g en banc* denied (Sept. 5, 2017), *cert. denied*, 138 S. Ct. 1989 (2018). Petitioner attempted to justify his trading activities as being wholly legal and proper. He presented this defense through direct examination when he took the stand in his own defense and was subject to cross examination, and through the testimony of his expert witness who opined that Petitioner's trading activity was legal and wholly above board. His defense was that each and every order he placed, both large and small, was a legitimate order that was capable of being filled prior to cancelation. As explained by his counsel in her closing argument, Petitioner's defense was that he "placed real orders that were exactly that, orders that were tradeable." (*United States v. Coscia*, No. 14-CR-00551, 11/3/15 Trial Tr. at 1472.) The problem was that the jury did not buy this defense. Therefore, Petitioner has failed to demonstrate that the alleged conflict adversely affected SC's representation of him.

B. Ineffective Assistance

As an alternative argument Petitioner attempts to claim ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). Under this case Petitioner must show that his attorney's

representation fell below an objective standard of reasonableness and that the deficient performance was prejudicial. *Id.* at 687-88. There is a strong presumption that counsel was effective. *United States v. Pergler*, 233 F.3d 1005, 1008-9 (7th Cir. 2000). In addition, Petitioner must demonstrate, but for the professional errors, "there is a reasonable probability" that the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Petitioner cannot establish either of the Strickland prongs.

Here we have the common situation where an attorney, analyzing the factual situation faced by the client, concludes that the client stands a better chance of success by admitting the underlying actions alleged to have been taken by the client which appear to be easily provable, and instead argue to the jury that the actions do not amount to a crime. Even assuming that the so-called ICE charts setting forth Petitioner's alleged trading activity were in some respects not totally accurate (they were reasonably so, *see Coscia*, 2019 WL 2121287, at *2), it was a proper strategic decision to admit to the substance and deny the illegality. Certainly, a counter strategy might have been to sit by quietly and force the Government to prove him guilty, without assisting the Government with his testimony. However, the Petitioner decided to testify in his own defense and acknowledge his trading activity. He does not contend that his lawyers did not adequately explain the risks of taking the stand in his own defense or that he did not in fact understand the risks in so doing. The Court concludes that the decision to contest the alleged illegality of

Petitioner's trading activities rather than contest the activities themselves was an objectively reasonable decision to make and there is no reasonable probability that the outcome would have been different, if another strategy was adopted.

Petitioner raises several other alleged deficiencies in SC's representation, but none are either objectively unreasonable or prejudicial.

III. CONCLUSION

For the reasons stated herein, Petitioner Michael Coscia's Section 2255 Amended Motion (Dkt. No. 5) is denied. Petitioner also moved for leave to conduct additional discovery related to the claims alleged in his Section 2255 Motion; because the Court is denying the Petitioner's Section 2255 Motion, there is no need for discovery. The Motion for Discovery (Dkt. No. 9) is denied.

IT IS SO ORDERED.

/s/ Harry Leinenweber

Harry D. Leinenweber, Judge
United States District Court

Dated: 12/12/2019

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 50504

September 24, 2021

Before

FRANK H. EASTERBROOK, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 20-1032

MICHAEL COSCIA, *Petitioner-Appellant*, *v.* UNITED STATES OF AMERICA, *Respondent-Appellee*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:19-cv-05003 Harry D. Leinenweber, *Judge*.

O R D E R

Upon consideration of Plaintiff-Appellant's petition for rehearing en banc filed on September 9, 2021, no judge in active service has requested a vote on the petition for rehearing en banc,* thereon, and the judges on the original panel have voted to deny the petition.

IT IS ORDERED that the petition for rehearing en banc is hereby **DENIED**.

---

* Circuit Judge Jackson-Akiwumi did not participate in the consideration of this petition.