No. 19-515

In the Supreme Court of the United States

BALDASSARE AMATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the rule of automatic reversal in *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), applies when neither the defendant nor defense counsel objects to an asserted conflict of interest and the asserted conflict does not involve counsel's joint representation of co-defendants.

2. Whether the court of appeals erred in determining that petitioner failed to demonstrate that his attorney labored under an actual conflict of interest.

3. Whether the district court abused its discretion in declining to hold an evidentiary hearing on petitioner's motion to vacate his sentence.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D.N.Y.):

United States v. *Amato*, No. 03-cr-1382 (Oct. 27, 2006)

Amato v. *United States*, No. 11-cv-5355 (Apr. 6, 2017)

United States Court of Appeals (2d Cir.):

United States v. *Amato*, No. 06-5117 (Jan. 12, 2009)

United States v. *Basile*, No. 06-1882 (Aug. 19, 2008) (appeal of co-defendant)

Amato v. *United States*, No. 17-1782 (Feb. 27, 2019)

Supreme Court of the United States:

LoCurto v. *United States*, No. 09-5503 (Oct. 5, 2009) (appeal of co-defendant)

Amato v. *United States*, No. 09-375 (Feb. 22, 2010)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-11a) is not published in the Federal Reporter but is reprinted at 763 Fed. Appx. 21. The order of the district court (Pet. App. 14a-89a) is not published in the Federal Supplement but is available at 2017 WL 1293801.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2019. A petition for rehearing was denied on May 20, 2019 (Pet. App. 90a). On August 16, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 17, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiracy to engage in racketeering, in violation of 18 U.S.C. 1962(d); two counts of engaging in an illegal gambling business, in violation of 18 U.S.C. 1955; and one count of conspiracy to engage in an illegal gambling business, in violation of 18 U.S.C. 371. Judgment 1. The district court sentenced petitioner to life imprisonment. Judgment 2. The court of appeals affirmed, 306 Fed. Appx. 630, and this Court denied a petition for a writ of certiorari, 559 U.S. 962. In 2011, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. See C.A. App. 7-51. The district court dismissed the motion, Pet. App. 14a-89a, but granted a certificate of appealability as to petitioner's claims of ineffective assistance of counsel, *id.* at 12a-13a. The court of appeals affirmed. *Id.* at 1a-11a.

1. For more than 40 years, petitioner was a "made" member of the Bonanno crime family, a criminal organization and part of La Cosa Nostra operating in the United States and Canada. Gov't C.A. Br. 3-4; Trial Tr. 295-296, 335-336; Presentence Investigation Report (PSR) ¶¶ 14, 18. In that role, petitioner participated in a variety of crimes including murders, armed robbery, and illegal gambling operations. Gov't C.A. Br. 4; Trial Tr. 340, 983, 1212-1213, 1320-1325; PSR ¶¶ 49-51, 59-60, 68-76, 85-87. In particular, petitioner was involved in the 1992 murders of two associates of the Bonanno family: Sebastiano DiFalco and Robert Perrino. See Gov't C.A. Br. 5-10. Petitioner ordered DiFalco's murder following a dispute over money. *Id.* at 5; Trial Tr. 1288, 1295-1305; PSR ¶¶ 68-72. Shortly thereafter, DiFalco's

decomposed body was found in the trunk of his daughter's car. Gov't C.A. Br. 6; Trial Tr. 1693-1698, 2743-2746; PSR ¶ 72. Petitioner subsequently shot Perrino based on concerns that he might cooperate with law enforcement. Gov't C.A. Br. 9-10; Trial Tr. 313-321, 330; PSR ¶¶ 73-76. Perrino survived the shooting, but another Bonanno associate tasked with cleaning up the scene killed Perrino by plunging an ice pick into his ear. Gov't C.A. Br. 9-10; Trial Tr. 2185-2187; PSR ¶ 76.

In 2004, a federal grand jury in the Eastern District of New York returned a superseding indictment charging petitioner and 26 other members of the Bonanno crime family with a variety of offenses stemming from the organization's criminal activities. Superseding Indictment 1-52. Petitioner was charged with one count of conspiracy to engage in racketeering, in violation of 18 U.S.C. 1962(d); two counts of engaging in an illegal gambling business, in violation of 18 U.S.C. 1955; and one count of conspiracy to engage in an illegal gambling business, in violation of 18 U.S.C. 371. Superseding Indictment 7-43. Among the predicate acts alleged to have been committed as part of the racketeering conspiracy were the murders of (and conspiracies to murder) DiFalco and Perrino. *Id.* at 29-30.

2. Two years later, petitioner retained Diarmuid White as defense counsel. Pet. App. 3a; 03-cr-1382 D. Ct. Doc. 577 (Jan. 9, 2006). Along with his notice of appearance, White filed a letter notifying the district court of his prior, pre-trial representation of Joseph Massino, the former "boss" of the Bonanno family, who had since become a cooperating witness for the government. Pet. App. 3a; C.A. App. 135-138. White explained that his representation of Massino had lasted only eight months, during which White assisted Massino's lead

counsel by making discovery requests, facilitating jail visits, moving to consolidate two indictments, and opposing the government's motion to disqualify counsel. C.A. App. 136-137. White could "recall no material information or confidences and secrets conferred upon [him] by Massino," and represented that if Massino were called at petitioner's trial, "which [was] by no means certain," White's co-counsel would conduct any cross-examination. *Id.* at 135-136. White concluded that "there [wa]s no 'serious potential conflict' in [his] representing petitioner, and likely no potential conflict at all." *Id.* at 137. And White explained that, in any event, "any potential conflict of interest [wa]s clearly waivable," and that petitioner was prepared to make any necessary waiver at a hearing before the district court. *Id.* at 135-136.

At a status conference later that month, the government explained that Massino was a potential witness and that Massino's current counsel had not indicated whether Massino was willing to waive any privileges or duties arising from White's prior representation. Pet. App. 18a; Gov't C.A. App. 64. The government argued that unless Massino was willing to waive those privileges and duties, White should be disqualified from serving as petitioner's counsel. *Ibid.*

Following the conference, White notified the district court in a second letter that petitioner could not afford to retain a second attorney and thus White would, if necessary, cross-examine Massino himself. Pet. App. 4a, 19a; C.A. App. 139-140. White stated, however, that he would not do so on the basis of any privileged communication unless Massino waived the privilege, and he maintained that this development "[did] not render any potential conflict of interest unwaivable." C.A. App.

139. He reiterated that petitioner was prepared to make any necessary waivers. *Id.* at 140.

The district court did not hold a hearing to inquire further into any potential conflict of interest, and neither party informed the court as to whether Massino had waived any privileges or duties arising from White's representation. Pet. App. 4a, 19a. Before trial, however, the government indicated that it would not call Massino as a witness. *Id.* at 19a; Gov't C.A. App. 87.

Petitioner and two co-defendants proceeded to a six-week jury trial, during which Massino was not called as a witness. Pet. App. 4a. When the government attempted to elicit from a co-conspirator a statement by Massino that petitioner arranged for DiFalco's murder, White objected and requested an evidentiary hearing at which Massino would testify as to the basis of his knowledge. *Id.* at 24a; Trial Tr. 385-387. The district court overruled the objection. Pet. App. 25a; Trial Tr. 388. White thereafter impeached Massino's credibility through the testifying co-conspirator, including by eliciting that Massino had committed "many crimes" and had previously lied about murders. Trial Tr. 403-406.

Petitioner was convicted on all charges. Pet. App. 4a. As part of its verdict, the jury found that the government had proved petitioner guilty of the DiFalco and Perrino murders. *Ibid.*; Trial Tr. 4102-4106. The district court sentenced petitioner to life imprisonment, Judgment 2, and the court of appeals affirmed, 306 Fed. Appx. 630. This Court denied certiorari. 559 U.S. 962.

3. a. In 2011, petitioner, represented by a new attorney, filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. C.A. App. 7-51. Petitioner argued that he had received ineffective assistance of counsel at trial and on appeal because White operated at all times

under an actual conflict of interest due to his prior representation of Massino. *Id.* at 18-51.

At the district court's request, White filed a declaration in connection with petitioner's application. C.A. App. 534-535; see Pet. App. 42a. White stated that he had "no recollection" of any information learned while representing Massino and was "unable to identify information obtained from Mr. Massino that could have been used in support of [petitioner's] defense." C.A. App. 535. White added that he could "not recall a specific reason" for not calling Massino as a defense witness "other than," he "imagine[d]," "maintaining focus on the reliability, veracity and consistency of the prosecution witnesses." *Ibid.*

b. The district court denied petitioner's request for an evidentiary hearing and dismissed the motion. Pet. App. 14a-89a.

The district court explained that a defendant alleging ineffective assistance of counsel ordinarily must establish both that his attorney's performance was inadequate and that he suffered prejudice as a result. Pet. App. 43a-44a (citing *Strickland* v. *Washington*, 466 U.S. 668 (1984)). The court acknowledged that, under *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), automatic reversal is required when defense counsel "protest[s] his inability" to represent multiple defendants simultaneously. Pet. App. 45a-46a (quoting *Mickens* v. *Taylor*, 535 U.S. 162, 173 (2002)). But it determined that this case did not present any such circumstance. Although petitioner argued that White had "object[ed]" to the representation here, the court observed that not only had White not protested his representation of petitioner, he had maintained that any potential conflict

arising from his prior representation was "clearly waivable" and that petitioner was prepared to make any necessary waiver. *Id.* at 46a (citations omitted).

The district court further determined that petitioner was not entitled to a presumption of prejudice under *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). The court explained that such a presumption is appropriate if defense counsel labored under an actual conflict of interest —*i.e.*, a conflict that adversely affected defense counsel's performance, as opposed to a "mere theoretical division of loyalties." Pet. App. 47a (quoting *Mickens*, 535 U.S. at 171). Under Second Circuit precedent, the court explained, such a conflict may be established where "some plausible alternative defense strategy or tactic might have been pursued, and the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Id.* at 47a (citation omitted). But the court found that, even assuming White had declined to pursue plausible defense strategies, those strategies were not inherently in conflict with White's ethical obligations to Massino. *Id.* at 49a-62a.

The district court explained that White's obligations to his former client Massino included (1) not revealing or using the former client's confidential information to the disadvantage of the former client; and (2) not representing a new client in a related matter in which the new client's interests are "materially adverse to the interests of the former client." Pet. App. 51a (citation omitted). The court found that petitioner failed to allege—and the record did not reveal—any pertinent information that White learned from Massino that was or could have been used to petitioner's benefit. *Id.* at 52a-53a. And the court determined that petitioner also

failed to establish that his interests materially diverged from Massino's in this case. *Id.* at 56a-62a. It reasoned that, as long as Massino was truthful, White could have called on him to testify in petitioner's favor without jeopardizing Massino's cooperation agreement. *Id.* at 57a-58a. It rejected petitioner's "purely speculative" argument that White might have suborned perjury had he called Massino to testify. *Id.* at 58a-59a. And it rejected petitioner's contention that calling Massino to testify might have revealed other crimes Massino had committed, observing that petitioner failed to allege that either he or White actually knew of any undisclosed crimes and that, in any event, Massino would have been entitled to invoke the privilege against self-incrimination had he testified. *Id.* at 59a-60a.

Finally, the district court determined that petitioner could not establish that he received ineffective assistance of counsel under *Strickland* v. *Washington*, *supra*, based on the asserted conflict of interest or otherwise. Pet. App. 63a-83a. As relevant here, the district court found that White reasonably opted to attack the credibility of the cooperating witnesses rather than call Massino to the stand and risk the possibility that he would corroborate the government's case against petitioner. *Id.* at 63a-66a. The court rejected petitioner's speculation that Massino would have testified in petitioner's favor based on notes that Massino had made in preparing for his own trial, in which Massino denied saying that petitioner had arranged for the DiFalco murder. *Id.* at 65a. The court reasoned that it was "eminently possible" that Massino had repudiated those notes since becoming a cooperating witness, and would offer only inculpatory testimony. *Ibid.*

The district court also denied petitioner's request for an evidentiary hearing. Pet. App. 79a-82a. The court observed that petitioner had failed to identify the specific facts to be adjudicated at a hearing, instead requesting a hearing "on all issues," *id.* at 80a (citation omitted), and that petitioner's claims concerning White's obligations to Massino were based not on concrete allegations but "airy generalities, conclusory assertions and hearsay statements," *id.* at 81a (brackets and citation omitted). The court also noted that, to the extent that petitioner raised factual questions regarding White's knowledge and intent, it had already expanded the record through White's declaration, which indicated that White would have nothing to add if called to testify. *Id.* at 82a.

c. In a separate order, the district court granted petitioner a certificate of appealability as to his claims of ineffective assistance of counsel. Pet. App. 12a-13a.

4. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-11a.

The court of appeals agreed with the district court that petitioner was not entitled to automatic reversal under *Holloway*. Pet. App. 6a-7a. It reasoned that unlike in *Holloway*, White was not "forced to represent codefendants over his timely objection." *Id.* at 6a (quoting *Mickens*, 535 U.S. at 168). The court of appeals observed that White, in fact, "affirmatively argued that any potential conflict was waivable, and repeatedly affirmed [petitioner's] willingness to waive." *Ibid.* And it noted that White did not represent petitioner and Massino concurrently, but had stopped representing Massino more than two years before his representation of petitioner began. *Ibid.*

The court of appeals also agreed with the district court that petitioner had not established an actual conflict of interest that adversely affected White's performance. Pet. App. 7a-9a. The court of appeals reasoned that, even assuming a conflict of interest existed based on White's successive representation of Massino and petitioner, petitioner had failed to show that the alleged conflict caused White to forgo a plausible defense strategy, as "nothing in the record * * * suggest[s] that such plausible alternative options existed." *Id.* at 9a; see *id.* at 8a-9a. Specifically, the court reasoned that calling Massino as a witness was not a plausible alternative strategy because it was "much more likely" that Massino, a government cooperator, would offer testimony damaging to petitioner's case even if confronted with his pre-cooperation notes. *Id.* at 8a. The court observed that White had instead "vigorously cross-examined" petitioner's co-conspirator regarding Massino's earlier statements and had elicited testimony regarding Massino's "crimes and general untrustworthiness." *Ibid.*

Finally, the court of appeals found that the district court had not abused its discretion in denying petitioner an evidentiary hearing. Pet. App. 10a-11a. The court of appeals reasoned that "given the existing record and White's sworn statement to the court addressing the petition's claims, there was a sufficient basis to find that [petitioner] failed to assert a plausible claim for ineffective assistance of counsel." *Id.* at 11a.

ARGUMENT

Petitioner contends (Pet. 11-17) that he is entitled to automatic reversal of his convictions on the theory that the district court failed to inquire adequately into an asserted conflict of interest. Alternatively, he contends (Pet. 28-33) that his convictions must be vacated on the

theory that his attorney labored under an actual conflict of interest. Finally, he contends (Pet. 19-28) that he was entitled to an evidentiary hearing on his motion to vacate his sentence. The court of appeals correctly rejected each contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is unwarranted.

1. Petitioner first contends (Pet. 11-17) that he is entitled to automatic reversal of his convictions based on the district court's allegedly inadequate inquiry into an asserted conflict of interest based on White's prior representation of Massino. The court of appeals correctly rejected that contention, and its determination does not warrant this Court's review.

The right to the assistance of counsel exists "because of the effect it has on the ability of the accused to receive a fair trial." *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002) (citation omitted). Accordingly, "defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation." *Ibid.* Therefore, "[a]s a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Ibid.* (quoting *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984)). A defendant is relieved of the need to demonstrate prejudice only in a narrow set of cases in which "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Ibid.*

With respect to conflicts of interests, this Court explained in *Mickens* that defendants may obtain automatic reversal in one circumstance: when "defense counsel [was] forced to represent codefendants over his timely objection, unless the trial court has determined

that there is no conflict." 535 U.S. at 168 (discussing *Holloway* v. *Arkansas*, 435 U.S. 475 (1978)). This Court has stated that the presumption of prejudice in such circumstances reflects, in part, the fact that "a defense attorney is in the best position to determine when a conflict exists," and "his declarations to the court are 'virtually made under oath.'" *Id.* at 167-168 (quoting *Holloway*, 435 U.S. at 486). It is "justified because joint representation of conflicting interests is inherently suspect, and because counsel's conflicting obligations to multiple defendants 'effectively sea[l] his lips on crucial matters' and make it difficult to measure the precise harm arising from counsel's errors." *Id.* at 168 (quoting *Holloway*, 435 U.S. at 490) (brackets in original). That rule has no application here.

Petitioner contends (Pet. 11-15) that he is entitled to automatic reversal under *Holloway* because the trial court had "notice of the conflicts under which White was operating" through White's letters and the government's objection and did not "affirmatively act to ensure the integrity of the process." Pet. 15. But this Court in *Mickens* rejected a "rule of automatic reversal when[ever] there existed a conflict that did not affect counsel's performance, but the trial judge failed to" inquire into the propriety of the representation. 535 U.S. at 172; see *id.* at 170-172 & n.3. Instead, the Court explained that *Holloway* "creates an automatic reversal rule *only* where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." *Id.* at 168 (emphasis added).

Here, White notified the district court of his prior representation of Massino, but he did not object to representing petitioner. To the contrary, he informed the

court that he saw "likely no potential conflict at all." C.A. App. 137. To the extent that he sought a hearing, it was only to establish that he could remain petitioner's counsel and permit petitioner to make any necessary waiver. See Pet. App. 3a-4a. Moreover, he did not represent petitioner and Massino concurrently, but instead completed his brief representation of Massino more than two years before being retained by petitioner. *Id.* at 6a-7a. And he represented to the district court before trial and during the Section 2255 proceedings that he did not recall any information learned during the earlier representation that could have been used in support of petitioner's defense. C.A. App. 135-138, 534-535. As the lower courts recognized, automatic reversal is not warranted in these circumstances.

Petitioner errs in suggesting (Pet. 16) that four courts of appeals have held that "once an objection to a conflict, whether concurrent or successive, is brought to the court's attention from any source, the failure by the court to inquire further or take adequate steps to ensure conflict-free counsel requires automatic reversal." Two of the four decisions petitioner cites expressly declined to apply an automatic-reversal rule, instead reviewing and rejecting the defendants' requests for vacatur of their convictions under the actual-conflict standard from *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). See *United States* v. *Williamson*, 859 F.3d 843, 856-857 (10th Cir. 2017), cert. denied, 138 S. Ct. 1324 (2018) (considering potential conflict based on defense attorney's relationship with prosecutor); *Moss* v. *United States*, 323 F.3d 445, 463-471 (6th Cir.), cert. denied, 540 U.S. 879 (2003) (considering potential conflict based on defense attorney's representation of co-defendants during different stages of the same proceedings). A

third decision, *United States* v. *Díaz-Rodríguez*, 745 F.3d 586 (1st Cir. 2014), concerned a breakdown in an attorney-client relationship, not a conflict of interest, and the court expressly noted that the government had waived any argument that the defendant had failed to establish prejudice. *Id.* at 591-592 & n.8. And although the fourth decision did involve the automatic reversal of the defendants' convictions based on their timely objection to concurrent representation, the court of appeals did not address whether the same rule would apply to a successive representation to which neither the defendant nor defense counsel objects. See *Salts* v. *Epps*, 676 F.3d 468, 480-483 (5th Cir. 2012).

2. Petitioner next contends (Pet. 28-33) that his convictions must be vacated under *Cuyler* v. *Sullivan*, *supra*, because he demonstrated an actual conflict of interest that adversely affected his defense. Petitioner urges (Pet. 17-19) this Court to review whether the actual-conflict standard from *Sullivan* applies to cases of successive representation. But the court of appeals here did apply the *Sullivan* standard, and it correctly determined that petitioner had not established an actual conflict of interest that affected White's performance. Petitioner's factbound objections to the application of petitioner's own preferred standard do not warrant this Court's review. And because petitioner did not prevail even under the standard he advocates, this case would be an unsuitable vehicle for resolving any conflict among the courts of appeals concerning the proper standard governing cases of successive representation.

This Court has reserved the question whether a showing of an actual conflict based on successive (as opposed to concurrent) representations suffices to demonstrate a Sixth Amendment violation, or whether a

defendant must still show prejudice to the outcome of the trial to establish a claim in those circumstances. See *Sullivan*, 446 U.S. at 350; *Mickens*, 535 U.S. at 175-176. The court of appeals applied the actual-conflict standard to the successive representations at issue here, and correctly determined that petitioner had not established an adverse effect on his defense. Pet. App. 7a-9a; see *id.* at 47a-62a (district court applying the same standard and reaching the same conclusion).

Although the *Sullivan* standard does not require "a showing of probable effect upon the outcome of trial," it does require "a showing of defective performance." *Mickens*, 535 U.S. at 174; see *Sullivan*, 446 U.S. at 350. The court of appeals found that petitioner could not demonstrate that White's alleged conflict of interest caused him to forgo a plausible alternative defense strategy because nothing in the record suggested that any plausible alternative strategies existed. Pet. App. 7a-9a. The court specifically rejected petitioner's argument—renewed in his petition (Pet. 31-32)—that White could have called Massino as a witness and used his notes regarding the DiFalco murder to impeach his credibility, as Massino, a government cooperator, was "much more likely" to offer testimony damaging to petitioner. Pet. App. 8a.[*] That factbound determination does not warrant this Court's review.

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[*] Petitioner repeatedly suggests that White "stipulated" to the exclusion of Massino's notes. See, *e.g.*, Pet. 10, 22, 31. White initially suggested only that he would refrain from referring to the notes if Massino did not testify, and he did not even adhere to that initial suggestion. See Pet. App. 23a. Instead, he later argued on petitioner's behalf that the notes *would* be admissible if Massino's statement regarding the DiFalco murder were admitted through a testifying co-conspirator. See *ibid.*

Petitioner contends that the court of appeals misapplied its own precedent by not considering whether any of petitioner's proffered defense strategies were "inherently in conflict with [White's] other loyalties and duties." Pet. 29 (emphasis omitted). But the court found that no plausible alternative strategies existed, Pet. App. 9a, and therefore had no occasion to consider whether any such strategies conflicted with White's pre-existing duties. See also *id.* at 49a-62a (district court assuming that petitioner had alleged plausible alternative strategies but finding that none was inherently in conflict with White's obligations to Massino). In any event, this Court does not grant review to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Petitioner does not suggest that any other court of appeals would have found a Sixth Amendment violation under *Sullivan*'s actual-conflict standard on the facts here. Instead, he contends (Pet. 17-19) that a conflict exists among the courts of appeals on whether the actual-conflict standard applies to successive representations. In this case, however, the court of appeals applied the actual-conflict standard that petitioner advocates, and determined that petitioner was not entitled to relief even under that standard. See Pet. App. 7a-9a. This case therefore would be an unsuitable vehicle for resolving any disagreement in the lower courts on the proper standard.

3. Finally, petitioner renews his contention (Pet. 19-28) that the district abused its discretion in declining his request for an evidentiary hearing on his motion to vacate his sentence. He argues (Pet. 22) that he was "denied the tools to adduce the relevant facts through sub-

poena power and live testimony." But as petitioner recognizes (Pet. 23), White provided the district court with a declaration stating that he could not recall any confidential information provided to him by Massino or any reasons why he decided not to call Massino other than "maintaining focus on the reliability, veracity and consistency of the prosecution witnesses." C.A. App. 535. Under those circumstances, when the relevant witness has indicated that he has no further information to provide, holding an evidentiary hearing would have little value, particularly given that "the judge who tried the underlying proceedings also preside[d] over [the] § 2255 motion." Pet. App. 11a (citation omitted); see, *e.g.*, *Schriro* v. *Landigran*, 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."). The court of appeals' decision affirming the district court's factbound determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2019