No._____

OCTOBER TERM 2018

IN THE
SUPREME COURT OF THE UNITED STATES

BALDASSARE AMATO,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent

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

APPLICATION TO THE HONORABLE JUSTICE RUTH BADER GINSBURG FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* * * * * * * * * * * * *

To the Honorable Justice Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Second Circuit:

Baldassare Amato, by undersigned counsel, pursuant to Supreme Court Rules 13.5, 21, 22, 29, 30.2, 30.3, 33.2 respectfully requests that this Court grant him a 60-day extension of time to file his petition for a writ of certiorari.

The Petition will challenge the decision of the United States Court of Appeals for the Second Circuit in *Amato v. United States*, 763 Fed. Appx. 21, 2019 U.S. App. LEXIS 6375, 2019 WL 974675 (2d Cir., February 27, 2019, a copy of which is attached. This Court has jurisdiction under 28 U.S.C. § 1254(1).

In support of this application, Applicant states:

1. The United States Court of Appeals for the Second Circuit entered its decision in this case on February 27, 2019 [Attachment "A"] and denied rehearing and rehearing en banc on May 20, 2019. [Attachment "B"] Without an extension, the petition for writ of certiorari would be due to be filed on August 19, 2019. With the extension, the petition for writ of certiorari will be due to be filed on October 18, 2019.

RELEVANT BACKGROUND

2. This case is a serious candidate for review. Applicant was convicted of two murders, alleged to have been committed in furtherance of a racketeering enterprise. He has at all times absolutely maintained his innocence. He was represented at pre-trial, trial, post-trial, sentencing, and on appeal by a lawyer who at all times operated under an actual conflict of interests that adversely affected his representation and Mr. Amato's Fifth and Sixth Amendment rights. The lawyer's multiple conflicts and multiple examples of overwhelmingly adverse effect on Mr. Amato's defense are the clearest examples of conflicts that adversely affected a criminal defendant undersigned

counsel has encountered in over twenty-five years litigating conflict cases around the country.

3. Applicant's defense lawyer also represented a man who was alleged to be the leader of the charged racketeering enterprise at issue, Mr. Amato's co-conspirator, Mr. Amato's business partner, and who should have been the primary exculpatory and impeachment witness for the defense. This other client had become a cooperator with the government when the lawyer took on Mr. Amato's case.

Applicant's defense counsel twice notified the court of his conflicts and twice advised the court that a hearing was required to apprise Mr. Amato of the conflict, the potential consequences of proceeding with conflicted counsel, and his options.

Government counsel advised the court that Mr. Amato's defense attorney absolutely had to be disqualified based on his conflict of interests and that defense counsel's other client did not waive his privilege with the attorney.

However, the court never conducted any sort of hearing into the matter, kept Mr. Amato wholly in the dark about the conflicts, and the conflicted lawyer went on to represent Mr. Amato at all stages of the proceedings below.

4. The examples of plausible alternative strategies inherently or directly in conflict for the lawyer filled the record. Consider just this one example: The government had only one witness who attributed one of the two murders to Mr. Amato. The entire basis for the witness's testimony with respect to the murder was a conversation he claimed to have had with the defense lawyer's other client, then the head of the enterprise (and now a cooperating witness). However, defense counsel was provided with notes from

this other client of his, in which the former boss (now cooperator) unequivocally denied that any such conversation took place and completely put the lie to the government's witness.

Inexplicably, without consulting with Mr. Amato, defense counsel stipulated with the government to refrain from mentioning or using his other client's notes which would unequivocally have demonstrated that the only witness against Mr. Amato attributing the murder to him had completely fabricated the story. The lawyer could not and did not call his other client to testify.

When asked by the court to provide an affidavit explaining why he did not use the exculpatory and impeaching notes and why he did not call his other client to testify, defense counsel simply advised the court that he could not recall any reason.

5. Without conducting any evidentiary hearing or even oral argument, the district court denied Mr. Amato's §2255 motion, *Amato v. United States*, 2017 U.S. Dist. LEXIS 53144, 2017 WL 1293801 (E.D.N.Y., April 7, 2017); but it granted a Certificate of Appealability on the ineffective assistance of counsel claims. *Amato v. United States*, 2017 U.S. Dist. LEXIS 218035 (E.D.N.Y., June 7, 2017).

6. The Court of Appeals entered a Summary Order affirming the district court's denial of the §2255 motion. The Summary Order cannot be reconciled with this Court's primary decisions on conflicts of interests. *See e.g.*, *Cuyler v. Sullivan*, 446 U.S. 335 (1980), *Holloway v. Arkansas*, 435 U.S. 475 (1978), *Mickens v. Taylor*, 535 U.S. 162 (2002), *Wood v. Georgia*, 250 U.S. 261 (1981), *Glasser v. U.S.*, 315 U.S. 60 (1942) or

even with the well settled law in the Second Circuit on the subject. *See e.g, U.S. v. Schwarz*, 283 F.3d 76 (2d Cir. 2002), *Winkler v. Keane*, 7 F.3d 304 (2d Cir. 1993), *U.S. v. Malpiedi*, 62 F.3d 465 (2d Cir. 1995), *U.S. v. Levy*, 25 F.3d 146 (2d Cir. 1994), *U.S. v. Kliti*, 156 F.3d 150 (2d Cir. 1998), *U.S. v. Iorizzo*, 782 F.2d 52 (2d Cir. 1986), *U.S. v. Curcio*, 680 F.2d 881 (2d Cir. 1982), *U.S. v. Cancilla*, 725 F.2d 867 (2d Cir. 1984), *Ciak v. U.S.*, 59 F.3d 296 (2d Cir. 1995).

The denial of an evidentiary hearing in this case is irreconcilable with well settled authority from the Second Circuit and from courts around the country. *See e.g.*, *Raysor v. U.S.*, 647 F.3d 491 (2d Cir. 2011), *Quinones v. U.S.*, 637 Fed. Appx. 42 (2d Cir. 2016), *Puglisi v. U.S.*, 586 F.3d 209 (2d Cir. 2009), *Pham v. U.S.*, 317 F.3d 178 (2d Cir. 2003), *Pavel v. Hollins*, 261 F.3d 210 (2d Cir. 2001), *Lindstadt v. Keane*, 239 F.3d 191 (2d Cir. 2001), *Goldberg v. Tracy*, 366 Fed. Appx. 198 (2d Cir. 2010), and *Curshen v. U.S.*, 596 Fed. Appx. 14 (2d Cir. 2015); *Christopher v. U.S.*, 605 Fed. Appx. 533, 537-538 (6th Cir. 2015); *Smith v. Wainwright*, 737 F.2d 1036, 1037 (11th Cir. 1984); *Perillo v. Johnson*, 205 F.3d 775, 782 (5th Cir. 2000); *Maiden v. Bunnell*, 35 F.3d 477, 481 (9th Cir. 1994).

7. There are multiple exceptionally important constitutional issues in this case that this Court left open in *Mickens v. Taylor*, 535 U.S. 162 (2002), that regularly occur in criminal cases around the country and around which a mature and deep split of authority has developed.

8. For example, this Court in *Mickens* expressly left as an "open question" the

issue of whether the *Cuyler v. Sullivan*, 446 U.S. 335 (1980) analytical framework for conflict of interests type ineffective assistance of counsel claims applies only to concurrent representation conflicts or to successive representation conflicts as well. *Mickens*, 535 U.S. at 176. This has split courts within Circuits and between Circuits. *Compare, e.g., Houston v. Schomig*, 533 F.3d 1076, (9th Cir. 2008) ("Supreme Court . . . has left open the question whether conflicts in successive representation that affect an attorney's performance require a showing of prejudice for reversal."); *Alberni v. McDaniel*, 458 F.3d 860, 873 (9th Cir. 2006) (same); *with Lewis v. Mayle*, 391 F.3d 989 (9th Cir. 2004) (court applies *Sullivan* prejudice standard to conflict based on successive representation); *Woods v. Spearman*, 2014 U.S. Dist. LEXIS 101529, *25, 2014 WL 3689363 (9th Cir., July 24, 2014)(describing the split of authority). *Compare Moss v. U.S.*, 323 F.3d 445 (6th Cir. 2003)(questioning application of *Cuyler* analysis to successive representation) *with Harris v. Carter*, 337 F.3d 758, 762 (6th Cir. 2003)(*Cuyler* analysis applies to all conflict claims);

This case provides the perfect vehicle for answering the question and, indeed, highlights the split even within the Second Circuit. *Compare*, *Amato*, Attachment 'A" at 6 (opining that courts treat the analysis of concurrent representation conflicts differently from successive representation conflicts) *with Tueros v. Greiner*, 343 F.3d 587, 593 (2d Cir. 2003)(Sotomayor, J.), *cert. denied by, Tueros v. Phillips*, 2004 U.S. LEXIS 3485 (May 17, 2004).

9. Similarly, there is an important open question from *Mickens* as to what

triggers automatic reversal arising from a conflict. In *Mickens*, this Court expressly noted that while the automatic reversal of a conviction for a conflict of interests, without demonstrating adverse effect is the rare case, the concept still applies in a case in which the lower court fails to inquire into a conflict and has the defendant go forward with conflicted counsel, notwithstanding a timely objection. *Mickens*, 535 U.S. at 168.

The instant case deepens the conflict over this issue. As noted, here defense counsel apprised the court of the conflict and twice insisted that a hearing was required to apprise the defendant of his rights and options. Additionally, government counsel expressly demanded that defense counsel be disqualified based on his conflict and advised the court that his other client, by then a government cooperator, did not waive his privilege with the attorney. Government counsel conceded below, [A164], that prior to *Mickens* Mr. Amato's judgment of conviction and sentence would have to have been automatically reversed due to the clear conflict and the trial court's failure to fulfill even its inquiry duty after being made aware of the conflict by both the defense and the government. *See, e.g., U.S. v. Levy*, 25 F.3d 146, 153-154 (2d Cir. 1994); *Ciak v. U.S.*, 59 F.3d 296, 303 (2d Cir. 1995)(citing cases).

10. Supreme Court Rule 13.5 permits a Justice of this Court, "for good cause," to extend the time to file a petition for a writ of certiorari for a period not exceeding sixty (60) days. This application for an extension of time is being electronically filed and timely filed with the Clerk by mail pursuant to Rule 29.2, ten (10) days before the petition is due. Rules 13.5, 30.2.

REASONS THE EXTENSION IS NEEDED

11. Undersigned counsel respectfully submits that there is good cause to justify the requested extension of time. Undersigned counsel is a solo practitioner with no assistant or office staff. Undersigned counsel recently suffered a heart attack and is undergoing a course of cardiac rehabilitation several days each week and is not yet able to work a full day, making it difficult, without extensions of time to deal with this unexpected event, to meet all outstanding obligations to the courts before which the undersigned has cases pending.

12. The undersigned currently has a very heavy docket of cases in various stages of litigation in courts around the country, with pending obligations in those cases. These include, in the next several days and weeks, the filing of a brief in this Court, and briefs in the United States Court of Appeals for the Eleventh Circuit, the United States Court of Appeals for the Sixth Circuit, as well as filings in United States District Courts for the Southern District of New York and the New York Supreme Court, and others. The undersigned also serves as *pro bono* lead counsel in three capital cases and a non-capital murder case.

13. In addition, one of the country's leading law school Supreme Court clinics has expressed an interest in working with the undersigned on the Petition in this case, in light of the importance of the issues and the position taken by the court below; but school is still out of session for the Summer and the requested extension is required in order to enable the professors and students in the clinic to reconvene for the coming academic year and work on the Petition if, as anticipated based on discussions to date,

the clinic will be working with the undersigned on it.

CONCLUSION

Wherefore, based on all of the foregoing and in order to afford undersigned counsel the opportunity to best apprise this Court of the relevant facts and law in this exceptionally important case, implicating fundamental constitutional rights and a clear split of authority, as well as the opportunity to answer an important, frequently recurring open question, Petitioner respectfully requests that an order be entered extending his time to petition for certiorari by 60 days, rendering his petition due on or before Friday, October 18, 2019.

Respectfully submitted,

s/David Schoen
David Schoen
Attorney at Law
2800 Zelda Road, Suite 100-6
Montgomery, AL 36106
Tel.: 334-395-6611
Fax: 917-591-7586
Email: DSchoen593@aol.com
Schoenlawfirm@gmail.com
Counsel for Petitioner

Certificate of Service

I, David Schoen, hereby certify that on August 8, 2019, a copy of this Application for Extension of Time to File a Petition for Writ of Certiorari in the above entitled case was mailed to counsel for Respondent herein, listed below, by U.S. mail, first class postage pre-paid, to follow, in compliance with Rule 29(3). I further certify that all parties required to be served have been served:

Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001.

Counsel for the Respondent

s/David Schoen
David Schoen
Attorney at Law
2800 Zelda Road, Suite 100-6
Montgomery, AL 36106
Tel.: 334-395-6611
Fax: 917-591-7586
Email: Dschoen593@aol.com
Schoenlawfirm@gmail.com

ATTACHMENT “A”

17-1782
Amato v. United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of February, two thousand nineteen.

PRESENT: DENNIS JACOBS,
RICHARD J. SULLIVAN,
Circuit Judges,
EDWARD R. KORMAN,*
District Judge.

- - - - - - - - - - - - - - - - - - -X
BALDASSARE AMATO,
Petitioner-Appellant,

-v.- **17-1782**

* Judge Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

UNITED STATES OF AMERICA,
Respondent-Appellee.

- - - - - - - - - - - - - - - - - - -X

FOR APPELLANT:	David I. Schoen, Montgomery, AL.
FOR APPELLEE:	Andrey Spektor, Assistant United States Attorney (Susan Corkery, Assistant United States Attorney, on the brief), for Richard P. Donoghue, United States Attorney for the Eastern District of New York, Brooklyn, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Garaufis, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

Petitioner-Appellant Baldassare Amato appeals from the judgment of the United States District Court for the Eastern District of New York (Garaufis, J.) dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 (the "petition"). Amato contends that his trial counsel was conflicted and ineffective, and that the district court abused its discretion in failing to conduct a hearing. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review. For the reasons explained below, we now affirm.

In January 2004, Amato was indicted along with 27 other individuals for criminal activities of the Bonanno crime family. Amato was charged with three counts related to illegal gambling enterprises and a single count of racketeering conspiracy that was based on four predicate acts: the murder of Sebastiano

DiFalco (and conspiracy to do so), the murder of Robert Perrino (and conspiracy to do so), illegal gambling activities, and conspiracy to commit robbery.

Amato proceeded to trial in the Eastern District of New York (Garaufis, J.) alongside two co-defendants. He was initially represented by counsel appointed under the Criminal Justice Act, but later privately retained Diarmuid White, who represented him before and during the trial, at sentencing, and on appeal. Together with his notice of appearance, White filed a letter notifying the district court of a potential conflict of interest resulting from his previous representation of Joseph Massino, a former "boss" of the Bonanno family. White's representation of Massino lasted approximately eight months and involved providing support for Massino's primary defense counsel in preparation for Massino's trial. White assured the court that he recalled no material information, confidences, or secrets from his representation of Massino, but nevertheless stated his intention to engage co-counsel to cross-examine Massino if he were to testify against Amato at trial. White argued that there was no "serious potential conflict" requiring his disqualification, "and likely no potential conflict at all." Special Appendix ("SA") at 5. White further advised that Amato was prepared to waive any potential conflict of interest at a Curcio hearing.

In a second letter to the court, White stated that since Amato could not afford to retain co-counsel, White would cross-examine Massino himself if necessary, steering clear of any cross-examination based on his privileged communications with Massino. And since any potential conflict of interest remained waivable, Amato remained "prepared to make all appropriate Curcio waivers." SA at 7.

The court did not hold a Curcio hearing, and during the six-week trial, Massino was not called as a witness. All three defendants were convicted by a jury on all counts, with a specific jury finding that the government had proven Amato guilty of the predicate acts listed in the racketeering conspiracy count. Amato was sentenced principally to life imprisonment, and his conviction was affirmed by this Court on direct appeal. United States v. Amato, 306 F. App'x 630, 634-35 (2d Cir. 2009) (summary order).

The instant petition, filed in February 2011, asserts nine challenges to the conviction and requests discovery and an evidentiary hearing. On April 5, 2017, the district court denied discovery and an evidentiary hearing, and dismissed the petition in full. The court subsequently issued a certificate of appealability as to Amato's claim of ineffective assistance of counsel; accordingly, only that claim is before this Court. See Fed. R. App. P. 22(b).

On appeal, Amato argues that he was denied his Sixth Amendment right to effective assistance of counsel because White operated under an actual conflict of interest that adversely affected his performance, and otherwise failed to provide effective assistance at trial and on appeal. Amato additionally claims that the district court erred in failing to hold an evidentiary hearing on his ineffective assistance claims.

"In the § 2255 context, this Court reviews 'factual findings for clear error' and 'questions of law de novo.'" Triana v. United States, 205 F.3d 36, 40 (2d Cir. 2000) (quoting Scanio v. United States, 37 F.3d 858, 859 (2d Cir. 1994)). "The question of whether a defendant's lawyer's representation violates the Sixth Amendment right to effective assistance of counsel is a mixed question of law and fact that is reviewed de novo." Id. (quoting United States v. Blau, 159 F.3d 68, 74 (2d Cir.1998)).

1. The Sixth Amendment right to counsel includes a right to conflict-free representation. See Wood v. Georgia, 450 U.S. 261, 271 (1981) (citing Cuyler v. Sullivan, 446 U.S. 335 (1980) and Holloway v. Arkansas, 435 U.S. 475 (1978)). Nevertheless, the burden of proof rests on Amato to show a conflict of interest by a preponderance of the evidence. Triana, 205 F.3d at 40 (citing Harned v. Henderson, 588 F.2d 12, 22 (2d Cir. 1978)).

Amato first argues that he is entitled to automatic reversal of his conviction because the district court failed to take the required measures when it had notice of White's potential conflict. Specifically, Amato argues that the district court had an obligation to inquire further into the potential conflict; ensure that Amato understood the potential risks of White's representation; and deal with the conflict by appointing independent counsel to advise Amato

regarding the conflict, or protect Amato by other means.

However, a "trial court's failure to inquire into a potential conflict of interest on the part of the defendant's attorney, about which the court knew or reasonably should have known, does not automatically require reversal of the conviction." United States v. Blount, 291 F.3d 201, 211 (2d Cir.2002) (citing Mickens v. Taylor, 535 U.S. 162, 172 (2002)). Instead, "[t]he constitutional question must turn on whether trial counsel had a conflict of interest that hampered the representation, not on whether the trial judge should have been more assiduous in taking prophylactic measures." Id. at 212 (quoting Mickens, 535 U.S. at 179 (Kennedy, J., concurring)). "As the Sixth Amendment guarantees the defendant the assistance of counsel, the infringement of that right must depend on a deficiency of the lawyer, not of the trial judge. There is no reason to presume this guarantee unfulfilled when the purported conflict has had no effect on the representation." Id. (quoting Mickens, 535 U.S. at 179 (Kennedy, J., concurring)). A narrow exception requiring automatic reversal exists "only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." Mickens, 535 U.S. at 168 (citing Holloway, 435 U.S. at 488).

White certainly did not object to the representation. To the contrary, he affirmatively argued that any potential conflict was waivable, and repeatedly affirmed Amato's willingness to waive. Moreover, White did not represent Amato and Massino concurrently; his relatively brief representation of Massino terminated more than two years before he was retained by Amato. Automatic reversal is therefore unwarranted here. Mickens, 535 U.S. at 168.

Amato nevertheless argues that the writ should be granted because White had an actual conflict of interest that adversely affected his performance as counsel. A defendant claiming ineffective assistance of counsel on the basis of an actual conflict of interest must demonstrate that the conflict "affected counsel's performance." Id. at 171. In order to demonstrate that a conflict adversely affected White's representation, Amato must show that at least some plausible defense strategy was forgone as a consequence of White's conflict of interest. United States v. Schwarz, 283 F.3d 76, 92 (2d Cir. 2002). And the

plausibility of an alternative strategy must rise above mere speculation. See Eisemann v. Herbert, 401 F.3d 102, 108 (2d Cir. 2005).

According to Amato, the main government witness against him was Sal Vitale, an underboss of the Bonanno family, who testified about statements about Amato made to Vitale by Massino--Amato's co-conspirator. Amato argues that White's dual loyalties to Massino and Amato created the actual conflict, and that the conflict prevented him from adequately challenging that testimony by, inter alia, using allegedly exculpatory evidence, calling Massino as a defense witness, and otherwise employing defense strategies that could conflict with Massino's interests.

Although there is a "high probability of prejudice arising from multiple concurrent representation[,] . . . [n]ot all attorney conflicts present comparable difficulties"; therefore, "the Federal Rules of Criminal Procedure treat concurrent representation and prior representation differently." Mickens, 535 U.S. at 175. It is unclear under governing caselaw whether an actual conflict existed here based on successive representation, particularly given White's disclaimer of memory of confidential information from his representation of Massino.

In any event, Amato has failed to show that White's alleged conflict caused him to forgo a plausible defense strategy. On the contrary, White vigorously cross-examined Vitale at trial, including by impeaching his testimony against Amato with testimony he gave in Massino's trial. White went on to emphasize the inconsistencies in Vitale's testimony during summation.

As to White's decision to forgo calling Massino as a witness, it is "speculation to suggest that his testimony would have been exculpatory." See Eisemann, 401 F.3d at 108. Indeed, given that Massino, the former boss of the Bonanno family, had become a government cooperator by the time of Amato's trial, his testimony was much more likely to be damaging to Amato. And while Amato makes much of Massino's notations on FBI 302 reports ("302s")--which included handwritten notes that Vitale's statements were "all lies" and that Massino knew "nothing about [Amato's crimes]"--there is absolutely no evidence in the record to suggest that Massino--who by the time of Amato's trial had

become a cooperating witness--would testify in conformity with those pre-cooperation notes. Nor did White shy away from eliciting testimony at trial regarding Massino's crimes and general untrustworthiness.

While the district court assumed, without deciding, that Amato alleged plausible, alternative strategies, we see nothing in the record to suggest that such plausible alternative options existed. See Eisemann, 401 F.3d at 110 (dismissing 28 U.S.C. § 2254 petition where there was "nothing in the record to suggest that [counsel's] conflict caused him to forgo a plausible defense theory").

2. Amato argues that White provided ineffective assistance of counsel for additional reasons that are unrelated to the alleged conflict of interest. When "assessing a claim that a lawyer's representation did not meet the constitutional minimum, we indulge a strong presumption that counsel's conduct fell within the wide range of professional assistance." Lynch v. Dolce, 789 F.3d 303, 311 (2d Cir. 2015) (internal quotation marks and alterations omitted). This strong presumption may be overcome only by establishing that: (1) "counsel's representation fell below an objective standard of reasonableness"; and (2) "any deficiencies in counsel's performance [were] prejudicial to the defense." Strickland v. Washington, 466 U.S. 668, 688, 692 (1984).

To demonstrate White's allegedly ineffective assistance, Amato points to the precluded testimony of three witnesses who Amato contends would have testified about prior statements by Vitale that were inconsistent with his trial testimony. While the district court precluded this testimony because White failed to lay a proper foundation on cross-examination for Vitale's alleged prior inconsistent statements, the district court acknowledged that White reasonably expected the government to call these three witnesses in its case-in-chief. Given this "good-faith" expectation, White's failure to lay a proper foundation for Vitale's inconsistent statements during cross-examination did not fall below an "objective standard of reasonableness." Strickland, 466 U.S. at 688.

Additionally, Amato argues that White improperly failed to introduce Massino's handwritten notes on the 302s to defend against the murder charges. But it was not objectively unreasonable for White not to call Massino, since

calling him as a witness would have subjected Amato to the reasonable likelihood that Massino--by now a cooperator--would corroborate, not contradict, Vitale's statements. See, e.g., Greiner v. Wells, 417 F.3d 305, 323 (2d Cir. 2005) ("[D]eference is particularly apt where, as here, an attorney decides not to call an unfriendly witness to the stand and has precious little means of determining how the witness might testify.").

The evidence that White allegedly failed to obtain and use is described in Amato's brief in the sketchiest of detail. In any event, the district court evaluated it when considering Amato's petition, and found that it was cumulative, immaterial, or otherwise insufficient to show that White was objectively unreasonable in failing to introduce it at trial. We identify no error in the district court's conclusions.

Therefore, because Amato has failed to show that his counsel's representation fell below an objective standard of reasonableness, his ineffective assistance claim fails, and we need not evaluate the prejudice issue under Strickland. 466 U.S. at 697.

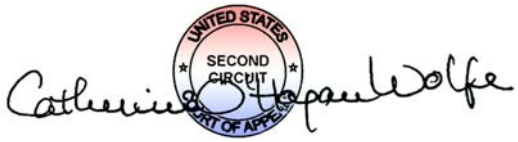
3. Finally, Amato argues that the district court erred in denying an evidentiary hearing with regard to his ineffective assistance claims. We review a district court's decision as to what kind of hearing, if any, is appropriate on a § 2255 motion for abuse of discretion. Gonzalez v. United States, 722 F.3d 118, 131 (2d Cir. 2013). "A court abuses its discretion when it takes an erroneous view of the law, makes a clearly erroneous assessment of the facts, or renders a decision that cannot be located within the range of permissible decisions." Id.

"[W]hen the judge who tried the underlying proceedings also presides over a § 2255 motion, a full-blown evidentiary hearing may not be necessary," Raysor v. United States, 647 F.3d 491, 494 (2d Cir. 2011) (citing Puglisi v. United States, 586 F.3d 209, 214-15 (2d Cir. 2009)), and our precedent "permits a 'middle road' of deciding disputed facts on the basis of written submissions," id. (quoting Pham v. United States, 317 F.3d 178, 184 (2d Cir. 2003)).

The district court determined 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 Amato failed to assert a plausible claim for ineffective assistance of counsel. In particular, White signed a sworn declaration stating that he could not recall why he decided not to call Massino, minimizing any potential benefits of holding an evidentiary hearing. The court therefore did not abuse its discretion when it concluded that Amato failed to meet the required showing for an evidentiary hearing.

We have considered Amato's remaining arguments and conclude they are without merit. Accordingly, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK



ATTACHMENT “B”

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of May, two thousand nineteen.

Baldassare Amato,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

ORDER

Docket No: 17-1782

Appellant, Baldassare Amato, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk