

No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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**BALDASSARE AMATO,**  
*Petitioner,*

v.

**UNITED STATES OF AMERICA,**  
*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

Since this Court's decision in *Mickens v. Taylor*, 535 U.S. 162 (2002), the lower courts have been split over several important constitutional issues that regularly arise in the context of ineffective assistance of counsel claims based on a conflict of interests. This case presents the following questions concerning those issues:

1. Under what circumstances is the automatic reversal rule from the decision in *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978) triggered after *Mickens*?
2. Does Sixth Amendment analysis under *Cuyler v. Sullivan*, 446 U.S. 335 (1980) apply to both successive and concurrent conflicts - a question expressly left open by this Court in *Mickens*?
3. Under what circumstances is an evidentiary hearing required when a claim sel based on a conflict of interests is raised?
4. Does a showing of "adverse effect" under *Cuyler v. Sullivan*, 446 U.S. 335 (1980) require proof that a plausible alternative strategy expressly was foregone because of the conflict under which counsel was operating or is it sufficient to show that it was inherently in conflict with the attorney's duties to the other client?

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## PETITION FOR WRIT OF CERTIORARI

Baldassare Amato respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

### OPINIONS BELOW

The unpublished summary order of the United States Court of Appeals for the Second Circuit (App. 1a-11a)<sup>1</sup> is reported at *Amato v. United States*, 763 Fed. Appx. 21 (2d Cir. February 27, 2019). The district court's decision denying Mr. Amato the relief sought in his motion under 28 U.S.C. § 2255 (App. 14a-89a) is reported at *Amato v. United States*, 2017 U.S. Dist. LEXIS 53144, 2017 WL 1293801 (E.D.N.Y., April 7, 2017). The district court's order granting a Certificate of Appealability (App. 12a-13a) is reported at *Amato v. United States*, 2017 U.S. Dist. LEXIS 218035 (E.D.N.Y., June 7, 2017).

### JURISDICTION

The judgment of the court of appeals was entered on February 27, 2019 (App. 1a). A timely petition for rehearing and rehearing en banc was denied on May 20, 2019 (App. 90a). On August 16, 2019, Justice Ginsburg extended the time within which to file a petition for writ of certiorari to and including October 17, 2019. *See* 19A164. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). *See also, Hohn v. United States*, 524 U.S. 236 (1998).

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<sup>1</sup> Reference to the Appendix to this Petition is reflected as "App. Xa." Reference to the Appendix before the Court of Appeals is reflected as "Axxx." Reference to any other docket entries in the district court is reflected as "ECF#."

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.”

### INTRODUCTION

For over a half century, this Court has recognized that when a trial judge in a criminal case is made aware in advance of trial of the probable risks arising from a conflict of interests attending defense counsel’s representation of the defendant in the case and fails to take adequate steps to ensure the defendant has the effective assistance of conflict-free counsel, the automatic reversal of a conviction is required. *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978).

This Court in *Mickens v. Taylor*, 535 U.S. 162, 168 (2002), recognized the continued viability of *Holloway*’s automatic reversal rule; but appeared to narrow the application of the rule, such that something more than just the trial judge’s awareness of the conflict is required to trigger automatic reversal. Lower courts have varied in their application of the rule since *Mickens* and this confusion must be resolved on this fundamentally important issue.

In addition to representing Mr. Amato, defense counsel, White, represented Joseph Massino. Massino was alleged to be the leader of the charged enterprise, Amato’s co-conspirator,<sup>2</sup> and his business

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<sup>2</sup> *United States v. Amato*, 2006 U.S. Dist. LEXIS 38176, \*4 (E.D.N.Y., June 8, 2006)(finding Massino and Amato co-conspirators for DiFalco murder and that Massino was the “boss”

partner. Defense counsel (and government counsel) knew that his client, Massino, who by the time of Mr. Amato's case had become a government cooperating witness, had vitally important exculpatory and impeachment evidence to give with respect to the charges against Mr. Amato.

White twice wrote to the district judge to advise the judge of his conflict of interests and the need to hold a hearing. In his first letter to the district court, defense counsel assured the court that he would have the assistance of co-counsel to help him avoid the conflict. In his second letter, defense counsel advised that he would not have co-counsel, but that he would conduct the defense in such a way as to avoid implicating his conflicts. [A135-40]

At the same time, government counsel advised the district court that the conflicts under which White operated could not be waived and absolutely required defense counsel's disqualification based on the conflicts. Government counsel further advised the district court that Massino had not waived the continuing privilege he shared with White. [A164; 341]]

The district judge did absolutely nothing, conducted no hearing, and never even advised Mr. Amato of the conflict, the demands for a hearing, or the government's insistence that defense counsel was operating under a disqualifying conflict of interests.

All parties agree that prior to the decision in *Mickens*, Mr. Amato's conviction would have to be automatically reversed based on the district judge's

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of the racketeering enterprise on whose agenda Mr. Amato was alleged to have acted).

failure to fulfill his inquiry duty concerning the conflict of interests about which he had been made aware on multiple occasions by both parties. *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).

The Second Circuit in this case construed *Mickens* to require that the defendant himself formally object to conflicted counsel's representation to trigger the automatic and that defense counsel's multiple demands for a conflict hearing and advice to the district judge that if he were permitted to stay in the case, he would channel Mr. Amato's defense in such a way as to avoid his own conflict, coupled with the government's insistence that defense counsel's unwaivable conflicts required his disqualification are irrelevant to the automatic reversal rule.

This position by the Second Circuit and some other courts, purportedly based on the decision in *Mickens* is irreconcilable with this Court's decision in *Holloway*, 315 U.S. 60 (1942), which focused on the steps defense counsel took to make the court aware of the conflict. It placed no such requirement on the defendant himself as some lower courts have recognized.

Indeed, the position adopted by the Second Circuit in this case and by other Circuits gives an incentive to keep the defendant in the dark about the conflicts attending his lawyer's representation in the case and ignores the underlying fundamental constitutional concerns that led to the development of the automatic reversal rule. It also ignores the well-settled affirmative duty of the trial judge to ensure the integrity of the criminal process and specifically to ensure that the constitutional guarantee of the right

to the effective assistance of conflict-free counsel is fulfilled.

Almost forty years ago, this Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), established that the analysis in conflict-of-interests type ineffective assistance of counsel claims differs from the analysis in other types of ineffective assistance of counsel claims, such that once a conflict is demonstrated, if the automatic reversal rule does not apply, the defendant need simply show some adverse effect from the conflict and need not show prejudice, as that term is used in *Strickland v. Washington*, 466 U.S. 668 (1984).

However, in *Mickens*, 535 U.S. at 176, this Court left open the question as to whether *Cuyler* analysis applies only in concurrent conflict of interests cases or in successive conflict cases and other conflicts scenarios as well. This important, regularly recurring, open question has led to a split of authority between Circuits and even within some Circuits and must be resolved. It is respectfully submitted that *Cuyler* analysis must be applied in all conflict cases.

This case also provides the right vehicle for resolving these two regularly recurring important issues in Sixth Amendment conflict-of-interests jurisprudence that have led to confusion among the lower courts.

This case was wrongly decided by the court below and particularly so with respect to two other fundamentally important principles in this area of the law.

The lower court erred in refusing to permit an evidentiary hearing on Amato's § 2255 motion and it

erred in its analysis of what constitutes “adverse effect” under the *Cuyler* standard.

Amato provided the court with multiple, extraordinary examples of adverse effect, including conflicted counsel’s inexplicable agreement with the government to avoid mentioning or in any way using the fully exculpatory evidence provided by Massino, which also would have completely impeached the credibility of the government’s primary witness against Amato.(and unexplained). The lower court got the analysis on this issue exactly backwards, requiring Amato to demonstrate that Massino would have re-affirmed his definitively exculpatory and impeachment evidence and ignoring the government’s exclusive control over Massino and its failure to provide any evidence whatsoever contradicting Massino’s exculpatory and impeachment statements.

The decision in this case cannot be reconciled with this Court’s Sixth Amendment conflict-of-interests jurisprudence.

### **STATEMENT OF THE CASE**

This Petition arises from the denial of Baldassare Amato’s (“Amato) Motion, filed under 28 U.S.C. § 2255, to vacate the judgment of conviction and sentence imposed in his case. Although it denied relief, the district court issued a Certificate of Appealability with respect to Mr. Amato’s contention that he was denied his Sixth Amendment right to the effective assistance of counsel, based on a finding, under 28 U.S.C. § 2253(c)(2), that Mr. Amato has made a “substantial showing of the denial of a constitutional right.”

On January 3, 2006, Mr. Amato was convicted, after a jury trial, of a RICO count and three counts related to illegal gambling enterprises. The RICO count was based, *inter alia*, on two murder/murder conspiracies (“Perrino” and “DiFalco”), illegal gambling and robbery conspiracy, alleged to have been committed in furtherance of the Bonnano crime family enterprise. He was sentenced to life imprisonment. [App.4a]

Amato adamantly has professed his innocence of the crimes charged at all times. He has contended at all times that Sal Vitale, the Bonnano family underboss turned government witness, the primary witness against him, ordered his (Vitale’s) close associates to commit the Perrino murder to stop Perrino from reporting his (Vitale’s) son’s illegal activity and that Amato had nothing to do with it. He has contended that Vitale gratuitously accused him of committing the unsolved DiFalco murder in order to enhance his (Vitale’s) cooperation value. Vitale based his “evidence” on conversations he claimed to have had with Bonnano family boss, turned government cooperating witness (and Vitale brother-in-law) Joseph Massino. The following facts are undisputed:

Five months before trial, White entered the case as Mr. Amato’s sole defense attorney. White represented Amato through pre-trial, trial, and appeal proceedings.

On the day White entered the case, he wrote a letter to the trial judge advising the court that he suffered under a conflict of interests from his representation of Joseph Massino. White told the court that he believed his conflict was waiveable and he assured the court that he would have co-counsel

deal with any conflict that arose, but that, in any event, a *Curcio*<sup>3</sup> hearing was required. [A135].<sup>4</sup> The court ignored the letter.

Massino was alleged to be the boss of the Bonnano family enterprise (referred to by the trial judge at times as the “Massino crime family”).<sup>5</sup>

When the court failed to conduct the requested *Curcio* hearing, White wrote a second letter again advising the court that he was operating under a conflict of interests and again requesting a *Curcio* hearing. This time White retracted his earlier assurance that co-counsel would be present to help avoid any adverse effect from the conflict at trial; but

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<sup>3</sup> “At ... (a *Curcio*) hearing, the trial court (1) advises the defendant of his right to representation by an attorney who has no conflict of interest, (2) instructs the defendant as to the dangers arising from particular conflicts, (3) permits the defendant to confer with his chosen counsel, (4) encourages the defendant to seek advice from independent counsel, (5) allows a reasonable time for the defendant to make a decision, and (6) determines, preferably by means of questions that are likely to be answered in narrative form, whether the defendant understands the risk of representation by his present counsel and freely chooses to run them. [See *United States v. Curcio*, 680 F.2d 881, 888-90 (2d Cir. 1992)]. The ultimate goal of these procedures is to permit the court to determine whether the defendant's waiver of his right to conflict-free counsel is knowing and intelligent. *See id.* at 888.” *United States v. Perez*, 325 F.3d 115, 119 (2d Cir. 2003).

<sup>4</sup> A court cannot rely on the views of the attorney whose conflict is at issue for an assurance that the conflict is waiveable or would be waived. *See Wood v. Georgia*, 250 U.S. 261, 265 n.5 (1981); *United States v. Levy*, 25 F.3d 146, 158 (2d Cir. 1994); *United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986).

<sup>5</sup> *United States v. Urso*, 369 F. Supp. 2d 254 (E.D.N.Y. 2005).

he promised, if allowed to continue, to avoid going into areas that implicated the conflict. [A139]

Again the court ignored White's letter and held no *Curcio* hearing. Curiously, the court held *Curcio* hearings for Mr. Amato's co-defendants and in Massino's own case and actually disqualified conflicted counsel in these other instances. [A22]; *U.S. v. Massino*, 303 F. Supp. 2d 258 (E.D.N.Y. 2003).

In addition to the two letters from defense counsel apprising the court of his conflict of interests and requesting a *Curcio* hearing, government counsel also weighed in on the issue. At a July 23, 2006 pre-trial conference the government advised the trial court that White absolutely had to be disqualified from representing Mr. Amato, based on White's representation of Massino and that Massino had not waived his privilege. [A344-45] Once again, the court ignored the conflict, made no inquiry of Mr. Amato, and the case proceeded to trial with White as Amato's sole defense attorney.

At trial, information supposedly provided by Massino and testified to by Vitale (based on a finding by the trial court that Massino was Mr. Amato's co-conspirator), provided the most damning evidence against Mr. Amato. Because of his conflict, White did nothing to confront the testimony; nor could he even evaluate how best to confront it because of his conflict from being Massino's lawyer.

For example, Vitale claimed that Massino told him that Amato had killed DiFalco and had admitted it to him (Massino). The defense was provided with a report of a government interview of Vitale in which Vitale made this claim. On the interview form provided to the defense, Massino had made

handwritten notes that Vitale was lying, that Amato had never made any such statement to him (Massino), and more. [A307-08]

Not only did White fail to use this evidence to put the lie to Vitale's testimony, he inexplicably made an agreement with the government (without consulting Amato) to avoid even mentioning Massino's notes. [A725] When directed by the court to provide an affidavit explaining his decisions and omission, White was wholly unable to provide any explanation - either for his failure to use the completely exculpatory Massino notes that would have put the lie to Vitale's claims or for any other decision he made. [A534-35] Of course, White had assured the court earlier that he would at all times avoid anything that implicated his conflict. This was all the explanation the court should have needed.

Because of this, Mr. Amato was denied the most important evidence that was available to be used in his defense. The foregone evidence was fully exculpatory and would have completely impeached the government's primary witness, Vitale.

Obviously, White's inability to explain a single act or omission that was in conflict with his conflicting duties to Massino and Massino's competing interests undermines any claim that these failures to pursue plausible alternative strategies had any strategic basis. It also highlighted the need for the requested evidentiary hearing so that, among other things, White could have been confronted, under oath, with evidence of this and other specific adverse effects from his conflicts.

In his filings below, Mr. Amato chronicled in detail the overwhelming adverse effects that arose from

White's conflicts. [See e.g. A23-51; A89-94; A107-134; A324-330; A506-522].

On direct appeal from Amato's conviction, White himself had made clear that Massino was the key figure in the case, even though he had not testified at trial and that the claim Vitale attributed to Massino about Mr. Amato's alleged role in the murder was the most critically important fact the government adduced at trial against Mr. Amato. [A25]. White knew all along that Massino had made clear in writing that Vitale's attribution to him was a complete lie; yet White made a side agreement with the government not to use Massino's notes reflecting the same, in order to avoid implicating his own conflict of interests, allowing his client, Amato to suffer the devastating consequences.

The district court denied the § 2255 motion without any evidentiary hearing.

These and other issues will be described in greater detail herein; there are many vitally important reasons review must be granted in this case.

#### **REASONS FOR GRANTING THE PETITION**

##### **I. There is a split of authority over the application of *Holloway's* Automatic Reversal Rule and this issue is important and regularly arises.**

All parties in this case agree that prior to the decision in *Mickens v. Taylor*, 535 U.S. 162 (2002), Mr. Amato's conviction automatically would have to be reversed, based on the district court's complete failure to fulfill its inquiry duty or take any step whatsoever to assure Mr. Amato's Sixth Amendment right to conflict-free counsel, after being made aware of the

conflict, the need for a hearing, and the government's demand that his conflicted counsel be disqualified. *Ciak v. United States*, 59 F.3d 296, 303 (2d Cir. 1995)(citing cases); *United States v. Levy*, 25 F.3d 146, 153-54 (2d Cir. 1994).

While this Court in *Mickens* rejected the rule of automatic reversal generally, it still left it intact in situations just like the one presented by the facts here. *Mickens*, 535 U.S. 167-168.

The *Mickens* Court expressly distinguished the facts in *Mickens* from the case presented in *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978). In *Holloway*, as here, conflicted counsel brought the conflict to the court's attention. Here, White insisted that a hearing was required, and advised the court that in representing Mr. Amato, he would avoid any area that could implicate his conflict or his other client's privilege. Additionally, the government demanded that defense counsel be disqualified and advised the court that defense counsel's other client, now a government cooperating witness, did not waive his privilege with defense counsel. Clearly, both defense and government counsel gave the court notice of the conflict. White objected to going forward without a conflict hearing. The government objected to allowing White to proceed as defense counsel under any circumstances because of his conflicts.

The court failed to conduct any kind of hearing or make any inquiry. Under *Mickens*, that scenario still triggers the automatic reversal rule. *Mickens*, 535 U.S. at 173-74; 194 (Souter, J., dissenting). The defendant was kept wholly in the dark. Defense counsel made clear to the court that while he wanted to stay on the case, in doing so he would completely

avoid any issue that might implicate his conflicting duties to his other client, Massino, even if that meant foregoing a plausible defense strategy for Amato. The government also made it clear that defense counsel could not act in a conflict-free manner.

The trial judge recognized as much; yet by relying on a tortured difference without distinction analysis, rejected the automatic reversal rule here. [App. 46a] The trial court recognized the rule from *Holloway* and clearly recalled the two letters from defense counsel; but it found that since White asserted in his letters that through a *Curcio* hearing, his conflict should be waiveable, he did not really “protest” the conflict within the meaning of the *Holloway* exception to *Mickens* and therefore the automatic reversal scenario that *Mickens* had left open did not apply. [Id.]

The court completely omitted from its analysis the facts that (1) White had twice insisted that a hearing was required to deal with the conflict - and the second time he expressly advised the court that if he were allowed to proceed he would avoid any issue that might implicate his conflict [A135-40],<sup>6</sup> (2) the government unequivocally protested the conflict which it believed to be unwaivable, advised that Massino had not waived his privilege with White, and

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<sup>6</sup> It is axiomatic that an attorney’s participation, over a claim of conflicts, cannot be conditioned on foregoing the pursuit of some avenue of defense. *U.S. v. Levy*, 25 F.3d 146, 158 (2d Cir. 1994); *U.S. v. Cancilla*, 725 F.2d 867, 871 (2d Cir. 1984); *Massino*, 303 F. Supp. 2d at 262-263, *citing*, *U.S. v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995); *U.S. v. Iorizzo*, 782 F.2d 52, 59 (2d Cir. 1986); *U.S. v. Schwarz*, 283 F.3d 76, 92 (2d Cir. 2002). It is of no legal significance that Massino did not testify at trial. *Levy*, 25 F.3d at 156-158.

demanded White's disqualification. The court also ignored the well settled principle that a court cannot rely on the views of the attorney whose conflict is at issue for an assurance that the conflict is waiveable or would be waived. *See Wood v. Georgia*, 250 U.S. 261, 265 n.5 (1981); *United States v. Levy*, 25 F.3d 146, 158 (2d Cir. 1994); *United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986).

The lower court's rejection of the automatic reversal rule, based on a false distinction between counsel's insistence on a *Curcio* hearing (coupled with the government's demands) and the "protest" referred to in *Mickens* [App. 6a-7a] is confounding for a number of reasons. Not only did this same district judge conduct *Curcio* hearings for other defendants in Mr. Amato's case, he disqualified another of Massino's lawyers from representing Massino and, in doing so, recognized that his failure to conduct a hearing under the exact same circumstances would trigger the automatic reversal rule after *Mickens*. *United States v. Massino*, 303 F. Supp. 2d 258, 260 (E.D.N.Y. 2003)(Garaufis, J.).<sup>7</sup>

Automatic reversal is required here under *Holloway*, *Wood v. Georgia*, 450 U.S. 261, 272 n.18 (1981) and *Mickens*; *see also*, *United States v. DiPietro*, 2004 U.S. Dist. LEXIS 5067, \*7-\*15 (S.D.N.Y., March 29, 2004); *United States v. Galestro*,

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<sup>7</sup> "Because a defendant has a Sixth Amendment right to conflict-free counsel, the court must inquire into the nature of a conflict as soon as it is brought to the court's attention .... Neglecting this inquiry obligation is grounds for reversal. *See Wood*, 450 U.S. at 272-274." *United States v. Massino*, 303 F. Supp. 2d at 260 (Emphasis added)(disqualifying counsel notwithstanding his insistence he had no conflict).

2006 U.S. Dist. LEXIS 57416, \*5-\*6 (E.D.N.Y., August 16, 2006)(Garaufis, J.)(emphasizing court's independent duty to maintain the integrity of the system, free from conflicts of interests).

The trial court clearly had notice of the conflicts under which White was operating, White insisted a hearing was required before he could proceed and the government objected to White proceeding at all based on his unwaivable conflicts. This is exactly the situation in which this Court in *Holloway, Wood, Glasser*, and their progeny emphasized the need for the trial judge to affirmatively act to ensure the integrity of the process and the sanctity of the defendant's constitutionally guaranteed right to conflict-free effective assistance of counsel. *See e.g.*, *Holloway*, 435 U.S. at 484; *Glasser v. United States*, 315 U.S. 60, 71 (1942).

Instead, this trial judge kept the defendant in the dark, despite knowing about the conflict and the caveat by White himself that in order to stay in the case he would avoid pursuing any strategy that would implicate his conflicts.

The conviction in this case clearly triggered the automatic reversal rule. It is of no legal significance that the notice and objections came from defense and government counsel, rather than from the defendant who was kept in the dark.

The following reflects the current split of authority and confusion among the courts of appeals as to when *Holloway*'s automatic reversal rule applies after *Mickens* that must be resolved by granting review in the instant case:

There is post-*Mickens* authority in the First, Sixth, and Tenth Circuits 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. *See, e.g., United States v. Diaz-Rodriguez*, 745 F.3d 586 (1st Cir. 2014); *Salts v. Epps*, 676 F.3d 468 (5th Cir. 2012) (applying automatic reversal rule, despite trial court claim objection not timely; *Holloway* does not require showing of actual conflict); *Moss v. United States*, 323 F.3d 445, 455 (6th Cir. 2003) (objection can be from defendant or his counsel); *United States v. Williamson*, 859 F.3d 843, 853 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1324, 200 L. Ed. 2d 516 (2018) (automatic reversal applies to multiple representation conflicts, whether concurrent or successive where court gets notice and fails to inquire).

Other Circuits, however, have created a post-*Mickens* rule that automatic reversal only applies to concurrent representation conflicts, even where a timely objection to a successive representation conflict has been made and the judge failed to inquire. *See e.g., United States v. Lafuente*, 426 F.3d 894, 897 (7th Cir. 2005); *United States v. Esparza-Serrano*, 81 F. App'x 111, 115 (9th Cir. 2003); *United States v. Williams*, 902 F.3d 1328 (11th Cir. 2018).

At least two Circuits continue to puzzle over the question: *McDaniels v. Olmstead Cty.*, 402 F. App'x 155 (8th Cir. 2010) (question whether successive representation raised real conflict); *Houston v. Schomig*, 533 F.3d 1076, 1081-82 (9th Cir. 2008), *cert. denied*, 555 U.S. 1187 (2009) (automatic reversal applied based on notice of conflict and no inquiry; but

questions whether it applies to successive representation conflicts).

**II. This Court should resolve the question expressly left open in *Mickens* - whether *Cuyler* analysis applies to both concurrent and successive Conflicts**

This Court in *Mickens* expressly left open the question as to whether *Cuyler* analysis applies both successive and concurrent representation cases or only to the latter. *Mickens*, 535 U.S. at 176. The open question regularly arises, has confused the lower courts, and is vitally important to resolve. This case presents the right vehicle for resolving it.

The Second Circuit in the instant case suggests that after *Mickens*, there is no authority that a successive representation conflict can constitute an actual conflict. [App. 7a-8a]

This decision highlights the fact that there is not only a split of authority on this issue between Circuits; there is a split of authority even within Circuits.

In the Second Circuit, for example, compare the decision here with post-*Mickens* decisions *Tueros v. Greiner*, 343 F.3d 587, 593-593 (2d Cir. 2003)(Sotomayor, J.), cert. denied by *Tueros v. Phillips*, 2004 U.S. LEXIS 3485 (May 17, 2004)(noting that *Mickens* itself was a successive representation case and opining that *Cuyler* applies to both kinds of conflicts after *Mickens*); *Hunter v. Duncan*, 82 Fed Appx. 246 (2d Cir. 2003); see also, *United States v. Massino*, 303 F. Supp. 2d 258 (E.D.N.Y. 2003)(Garaufis, J.)(applying *Cuyler* to disqualify

defense counsel for Massino based on a successive representation conflict).

Similarly, in the Sixth Circuit, compare *Harris v. Carter*, 337 F.3d 758, 762 (6th Cir. 2003)(post-*Mickens*, *Cuyler* applies to all Sixth Amendment conflict claims); *United States v. Rugiero*, 2004 U.S. Dist. LEXIS 16574, \*38 (E.D. Mich., April 30, 2004)(confirming that the Sixth Circuit applies *Cuyler* to all conflict claims; and applies automatic reversal to conflict claims in which the court fails to satisfy its inquiry duty) with *Moss v. United States*, 323 F.3d 445 (6th Cir. 2003)(questioning application of *Cuyler* analysis to successive representation) *United States v. Taylor*, 489 Fed. App'x 34, 41 (6th Cir. 2012)(prejudice required in successive representation cases).

Authority in other Circuits further reflects a direct split of authority between circuits, even while the intra-circuit disputes remain.

The Fifth Circuit has indicated it sees no basis for a distinction in this context between concurrent and successive representation conflicts. *Wilkins v. Stephens*, 560 F. App'x 299, 309 (5th Cir. 2014), cert. denied, 135 S. Ct. 1397 (2015); *United States v. Infante*, 404 F.3d 376, 391 n.5 (5th Cir. 2005).

Similarly, the Third and Fourth Circuits have indicated that *Cuyler* is not limited to concurrent representation cases. *Tillery v. Horn*, 142 F. App'x 66, 70 (3d Cir.), cert. denied, 546 U.S. 1043 (2005); *Rubin v. Gee*, 292 F.3d 396 (4th Cir.), cert. denied, 537 U.S. 1048 (2002).

But other Circuits continue to express their uncertainty as to how to resolve this open question.

*United States v. Wright*, 745 F.3d 1231, 1233 (D.C. Cir. 2014) (declining to address whether *Cuyler* applies to successive representation after *Mickens*); *Dansby v. Hobbs*, 766 F.3d 809, 837 (8th Cir. 2014), cert. denied, 136 S. Ct. 297 (2015)(open question); *Williams v. Ludwick*, 761 F.3d 841, 846 (8th Cir. 2014), cert. denied, 135 S. Ct. 1184 (2015) (Assumes without deciding *Cuyler* applies to all conflicts); *Houston v. Schomig*, 533 F.3d 1076, 1081, (9th Cir. 2008), cert. denied, 555 U.S. 1187 (2009) (open question); *Esparza-Serrano*, 81 F. App'x 11, 115-16 (9th Cir. 2003) (9<sup>th</sup> Circuit has applied *Cuyler* to conflicts other than joint representation, but leaving decision open on remand); *Woods v. Spearman*, 2014 U.S. Dist. LEXIS 101529, \*25, 2014 WL 3689363 (9th Cir., July 24, 2014)(describing the split of authority); *But see, Lewis v. Mayle*, 391 F.3d 989 (9th Cir. 2004) (court applies *Sullivan* standard to conflict based on successive representation).

This case provides the right vehicle to resolve this important open question.

### **III. This case was wrongly decided.**

#### **A. The denial of an evidentiary hearing was wrong.**

Mr. Amato asked for an evidentiary hearing in this case in his § 2255 motion and on several additional occasions while the motion was pending. The lower court flatly refused, notwithstanding the directive in 28 U.S.C. § 2255(b) and the long-standing mandate from courts of appeals around the country requiring a hearing on claims of ineffectiveness with genuine disputes on material facts and important Sixth Amendment issues. *Id.*

It was wrong to deny an evidentiary hearing in this case. Amato raised compelling issues that go to fundamentally important constitutional rights and he supported his assertions with detailed facts and legal arguments that demonstrate the constitutional errors that led to his conviction for crimes he did not commit, resulting in a life sentence.

Prior to the decision in this case, the law was clearly established that a defendant seeking a hearing on an ineffective assistance of counsel claim "need establish only that he has a 'plausible' claim of ineffective assistance of counsel, not that he will necessarily succeed on the claim." *Raysor*, 647 F.3d at 494, quoting from *Puglisi v. United States*, 586 F.3d 209, 213 (2d Cir. 2009).

Determining whether an actual conflict and adverse effect exists requires a factually intensive inquiry that turns on 'the particular[s] of the case at hand.' *Rugiero*, *Id.* at \*60, citing *Perillo v. Johnson*, 205 F. 3d 775, 782 (5th Cir. 2000); *Maiden v. Bunnell*, 35 F. 3d 477, 481 (9th Cir. 1994).

Courts around the country have affirmed the critical importance of having the trial court develop a full record through an evidentiary hearing. See e.g., *Raysor v. United States*, 647 F.3d 491 (2d Cir. 2011)(remanding for evidentiary hearing on ineffectiveness claim); *Curshen v. United States*, 596 Fed. Appx. 14 (2d Cir. 2015)(reversing denial of § 2255 motion; remanding for evidentiary hearing); *Thompson v. United States*, 2018 U.S. App. LEXIS 7724, \*24-\*26 (6th Cir., March 28, 2018)(burden for right to evidentiary hearing in ineffectiveness claim is "relatively light;" defendant's narrative enough, even if contradicted by government; denial of § 2255

vacated and remanded for evidentiary hearing); *Huff v. United States*, 734 F.3d 600, 607 (6th Cir. 2013); *MacLloyd v. United States*, 684 Fed. Appx. 555, 562 (6th Cir. 2017)(“light” burden for evidentiary hearing); *Christopher v. United States*, 605 Fed. Appx. 533, 537-538 (6th Cir. 2015)(reversing denial of § 2255; remanding for evidentiary hearing); *Goldberg v. Tracy*, 366 Fed. Appx. 198 (2d Cir. 2010); *Smith v. Wainwright*, 737 F.2d 1036, 1037 (11th Cir. 1984)(COA granted for failure to grant evidentiary hearing).<sup>8</sup>

Mr. Amato did far more than establish a “plausible” claim of ineffectiveness with respect to his conflict claims and his ineffectiveness claims not directly related to the conflicts and there is nothing speculative about the showing he has made in his

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<sup>8</sup> This case presents far more compelling reasons demanding an evidentiary hearing than in any of the reported cases in the Second Circuit finding that a hearing absolutely had to be held. See e.g., *Curshen v. United States*, 596 Fed. Appx. 14 (2d Cir., January 7, 2015); *Quinones v. United States*, 637 Fed Appx. 42 (2d Cir. 2016); *Raynor v. United States*, 647 F.3d 491 (2d Cir. 2011); *Guerrero v. United States*, 2011 U.S. Dist. LEXIS 49115; 2011 WL 1560829 (S.D.N.Y., April 20, 2011); *Mui v. United States*, 2011 U.S. Dist. LEXIS 72442; 2011 WL 2650673 (E.D.N.Y., July 6, 2011); *Ivamov v. Taylor*, 2005 U.S. Dist. LEXIS 33175, \*12-\*13 (E.D.N.Y., December 16, 2005); *Pham v. United States*, 317 F.3d 178, 184 (2d Cir. 2003); *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)..

motion. This case demanded a full evidentiary hearing. This is not a close question.

Mr. Amato was denied the tools to adduce the relevant facts through subpoena power and live testimony. He had no way to compel counsel to answer the relevant questions or provide the full truth concerning the overwhelming ways his conflicts from representing Massino irretrievably impacted Amato's defense.

White did not just make a "decision not to call Massino as a defense witness" as his purportedly "reasonable strategy;" he inexplicably, and without consulting Mr. Amato, agreed to stipulate to refrain from even mentioning, let alone using, Massino's fully exculpatory notes, relevant exculpatory tapes from Massino's conversations, and other evidence related to Massino.

In the declaration the court ordered as an insufficient substitute for an evidentiary hearing, White could not explain the reason for any of his inexplicable decisions and provided no strategic reason for any of the cited omissions.

It is was especially wrong for the court to deny an evidentiary hearing after the court was informed that White had refused to provide a declaration to Mr. Amato concerning his omissions. In so refusing, as the court was informed, White said in a defense interview, that the conviction should be reversed because of his conflicts but he would not provide a declaration because he did not think he should have to be his own "executioner." [A537]

Instead of granting an evidentiary hearing, the court entered an Order directing the government to

obtain an affidavit from Mr. White, the attorney whose conflict is at issue in this case, addressing “the issues raised in the Petition.”

Amato objected to the use of an affidavit to be procured by the government as a substitute for an evidentiary hearing, complaining, among other things about the limited nature of the court’s ordered inquiry and Mr. Amato’s inability to require White to answer questions on each of the areas of adverse effect Mr. Amato had identified.<sup>9</sup> [A523-532]

White’s Declaration, [A534-535], provided absolutely no relevant evidence whatsoever and perfectly highlighted inadequacy of the court’s use of an affidavit limited to the court’s questions, in lieu of an evidentiary hearing at which Mr. Amato could have explored all of the factual examples he has given of the adverse impact of White’s conflicts. It certainly did not provide any claim of a strategic or other justifiable reason to explain the grave examples of adverse impact from White’s conflicts that Mr. Amato had cited. White offered no reason for any act or omission at issue. [Id.]

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<sup>9</sup> “An attorney who is prevented from pursuing a strategy or tactic because of the cannon of ethics, is hardly an objective judge of whether that strategy is sound trial practice. Counsel’s inability to make such a conflict-free decision is itself a lapse in representation.” *Massino*, 303 F. Supp. 2d at 262-263, *citing*, *U.S. v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995). *See also, U.S. v. Levy*, 25 F.3d 146, 158 (2d Cir. 1994); *U.S. v. Iorizzo*, 782 F.2d 52, 59 (2d Cir. 1986); *Jiles v. United States*, 72 Fed. Appx. 493, 494 (7th Cir. 2003), *citing*, *Taylor v. United States*, 287 F.3d 658 (7th Cir. 2002), *United States v. Schwarz*, 283 F.3d 76, 92 (2d Cir. 2002). White had to be subjected to cross-examination and had to be examined on the truly relevant issues.

Each of the examples of adverse effect cited in detail by Mr. Amato at trial and pre-trial, including the ethical limitations on White with respect to plea negotiation advice and other matters which required live record development must be addressed through an evidentiary hearing with an opportunity to compel the testimony of the witnesses who are relevant to the detailed factual support provided for the issues raised.

This case is not a case like *Chang v. United States*, 250 F.3d 79, 85-86 (2d Cir. 2001), with a single discrete question and just “blanket statements” by the movant against a detailed submission by the government. *See e.g., Quinones v. United States*, 637 Fed Appx. 42 (2d Cir. 2016)(rejecting the use of a *Chang* “affidavit” from counsel to resolve a claim based on an alleged conflict of interest and requiring a full evidentiary hearing); *Raynor v. United States*, 647 F.3d 491 (2d Cir. 2011)(requiring an evidentiary hearing even in light of an affidavit from trial counsel disputing the defendant’s claim that counsel failed to properly advise him with respect to the prospect of a plea); *Guerrero v. United States*, 2011 U.S. Dist. LEXIS 49115; 2011 WL 1560829 (S.D.N.Y., April 20, 2011)(rejecting the idea of deciding the case based on a *Chang* affidavit that contradicted the defendant/movant’s claim even in a single issue case); *Mui v. United States*, 2011 U.S. Dist. LEXIS 72442; 2011 WL 2650673 (E.D.N.Y., July 6, 2011); *Ivamov v. Taylor*, 2005 U.S. Dist. LEXIS 33175, \*12-\*13 (E.D.N.Y., December 16, 2005).

It was crystal clear that Massino, his purported statements, his role, his authority as “boss” of what this Court characterized as the “Massino family,” his role as an alleged co-conspirator with Mr. Amato in

this case, his purported statements through Vitale (some of the most inculpatory and completely un-confronted testimony in the case), and much more directly related to and dependent on Massino, were central to this case from pre-trial<sup>10</sup> through trial<sup>11</sup> and the appeal.

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<sup>10</sup> Submissions throughout the pre-trial period demonstrate beyond any question the major and ever-present role Massino's conduct and statements played in the government's case against Mr. Amato. *See e.g.*, ECF# 690 at 4-6 (5/18/06 letter from White to Court regarding the government's use of Massino's statements purportedly inculpating Mr. Amato in the DiFalco murder); ECF# 713 at 4-6 (Govt. Motion in Limine to prohibit Mr. Amato from being able to put on evidence of Massino's handwritten notes which were exculpatory vis a vis Mr. Amato and undermined the credibility of another key government witness); ECF# 725 at 1-2 (5/25/06 Agreement by White not to refer to Massino's exculpatory notes and, at least preliminarily, not to go into Massino's cooperation agreement - both positions he was ethically unable to even evaluate due to his conflicts); ECF# 728 at 9-10 (5/26/06 Govt.'s insistence that it must be allowed to use Massino's purported statements to Vitale inculpating Mr. Amato in the DiFalco murder, emphasizing that Massino was the boss of the "family" and that Massino, Vitale, and Amato were all co-conspirators with respect to the charges against Mr. Amato); ECF# 731 at 3, 14-15 (5/26/06 Court's Memorandum & Order regarding Massino's notes exculpating Mr. Amato, Massino's cooperation agreement, and Massino's statements to Vitale inculpating Mr. Amato); ECF# 734 (5/27/06 letter from White to the Court regarding Massino's notes exculpating Mr. Amato and undermining Vitale's credibility about what Massino purportedly told him about Mr. Amato and the DiFalco murder and the government's proffer that Massino had a conversation with Mr. Amato in which Mr. Amato purportedly made inculpatory statements about the murder)

<sup>11</sup> Just about all key testimony against Mr. Amato - and certainly Vitale's testimony at trial - was based on what Massino supposedly said. He was a central figure in the trial and the conviction. Statements attributed to Massino that, as presented

Amato laid out for the Court in specific detail many examples of the way in which Mr. White suffered under a conflict of interests that adversely impacted Mr. Amato.<sup>12</sup> He had to be given an

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by Vitale inculpated Amato, went without any confrontation at all and other statements and actions by Massino that exculpated Amato and undermined Vitale's credibility on the key issues were never presented to the jury. White was prohibited as a matter of law from objectively assessing what do to or refrain from doing in either instance and, more to the point, he certainly could not assess them and proceed in the manner he was required to - exclusively in Mr. Amato's best interests - because of his conflict, his competing duties to Massino, privilege owed to Massino and never waived, and the inherent conflict between those interests and privilege and Mr. Amato's best interests.

Similarly, Massino was the subject of important written submissions during trial. *See e.g.*, ECF# 829 (7/8/06 letter from White regarding government argument on whether and when Massino and Mr. Amato were incarcerated together - to give them an opportunity to talk about the DiFalco murder and to become so close that they entered into an illegal gambling business partnership with each other and the prejudice from the same); ECF# 830 (7/9/06 Govt response to ECF# 829, in which the government opposes a curative instruction in relation to its erroneous argument and emphasizes the importance of the relationship and discussions between Massino and Mr. Amato and the materiality of the same to the jury's deliberations).

<sup>12</sup> The following are specific examples of "adverse effect" from White's conflicts that Amato cited:

1. The decision as to whether to call Massino as a witness and ultimately his unilateral decision not to call him was a decision it was impossible for White to make free from conflict. The conflicts inherent in this decision included drawing on confidences and secrets, the effect calling him and any cross-examination, exposing a story Massino had told the government as false or having Massino expose Vitale as a liar, might have on Massino's own deal; the risk of and need for exposing Massino's role in undisclosed crimes White knew about as his lawyer if he

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called him and wanted to impeach him, and much more [A21, 24, 25, 93];

2. The decision to agree not to use Massino's exculpatory notes to undermine Vitale's credibility in accusing Amato in the DiFalco murder [A21, 25,27; 60; 90];

3. The decision as to how to challenge Massino's credibility concerning inculpatory statements attributed to him as a co-conspirator by Vitale and whether to ask for a hearing to challenge it [A23, 26];

4. How to deal with tape recorded conversations in which Massino blamed Vitale for the Perrino murder and made clear it was against the enterprise's agenda that Massino as the boss would have set [A24, 82-84];

5. How to deal with the illegal gambling charges in which Massino was alleged to be a partner (e.g. expose the whole business as Massino's and risk making Massino a lawyer in his cooperation; interpose a duress defense, given Massino's status as the boss) [A24]

6. How to deal with the false claim that Amato and Massino were in jail together so as to purportedly give Amato the opportunity to "admit" the murder to Massino [A26];

7. How to use evidence that Massino had told government witness Coppa, Jr. that Vitale killed Perrino on his own agenda and with his inner circle and Amato had nothing to do with it - a key fact which never surfaced at trial [A29]

8. The inability to enter into plea negotiations insofar as they could have impacted on Massino's deal, credibility, role in the underlying charges, undisclosed crimes by Massino known to Amato (or White), illegal money Massino still had out on the street from the gambling business [A29-30]

9. Showing alternatives as to how Massino would have gotten the idea and opportunity to falsely tell Vitale Amato was involved in the DiFalco murder that would have exposed Massino as a liar [A63];

evidentiary hearing to fully examine White, Massino, and the other witnesses who are directly relevant to the issues raised.

The decision below omits many facts relevant to the need for an evidentiary hearing. Perhaps most significantly, it entirely omits reference to the interview in which White acknowledged that his conflicts were reversible error, but said he would not give a sworn statement so admitting because he did not want to be his “own executioner.” [A537]

The denial of an evidentiary hearing provides this Court an important opportunity to establish the fundamental requirement for an evidentiary hearing on disputed constitutional claims of ineffective assistance of counsel raised in a § 2255 motion.

**B. The lower court’s analysis under *Cuyler v. Sullivan* is wrong.**

The most striking example of the court’s errors and omissions of material facts and misapprehension of the law is its analysis of the actual conflict. [App. 5a-9a]

The court misapprehended the long-established analytical framework for conflict claims, the definition of “plausible alternative strategy” and the burden with respect to the same and it omitted the most material facts concerning the proof in the record of the plausible alternative strategies Amato identified and the resulting adverse effect as a matter of law and fact.

The court wrote that to show that a conflict adversely affected White’s representation, Amato must show “at least some plausible defense strategy

was foregone as a consequence of White's conflict of interest.<sup>13</sup>" [App. 7a](emphasis added).

That is wrong. The Second Circuit for well over 20 years has held that to show adverse effect in a conflicts case, the defendant need only show that the plausible defense strategy was foregone as a consequence of the conflict or that the plausible defense strategy was inherently in conflict with the attorney's other loyalties and duties. It has consistently reaffirmed this important principle. *U.S. v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995); *U.S. v. Schwarz*, 283 F.3d 76, 92 (2d Cir. 2002); *Curshen v. U.S.*, 596 Fed. Appx. 14 (2d Cir. 2015). The following excerpt from this Court's decision in *Schwarz*, reaffirmed in *Curshen*, demonstrates the court's critical error:

“... a defendant claiming that he was denied his right to conflict-free counsel based on an actual conflict **need not** establish a reasonable probability that, but for the conflict or a deficiency in counsel's performance caused by the conflict, the outcome of the trial would have been different. Rather, he need only establish (1) an actual conflict of interest that (2) aversely (sic) affected his counsel's performance.”

“To prove a lapse in representation, a defendant must ‘demonstrate that some ‘plausible alternative defense strategy or tactic **might have been pursued**,’ and that the ‘alternative defense was inherently in conflict with or not undertaken due to the attorney’s other

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<sup>13</sup> Similarly, the court found that “... Amato has failed to show that White's alleged conflict **caused** him to forgo a plausible defense strategy.” [App. 8a](Emphasis added)

loyalties or interests.” “A defendant is not required to show that the lapse in representation affected the outcome of the trial or that, but for the conflict, counsel’s conduct of the trial would have been different. The foregone strategy or tactic is not even subject to a requirement of reasonableness. As we have previously recognized, the test is a strict one because a defendant has a right to an attorney who can make strategic and tactical choices free from any conflict of interest. An attorney who is prevented from pursuing a strategy or tactic because of the canons of ethics is hardly an objective judge of whether that strategy is sound trial practice.” *Schwarz*, *Id.*, at 92, citing *Malpiedi* 62 F.3d at 469. (Emphasis added; other citations omitted).”

*See also, Cursken v. U.S.*, 596 Fed. Appx. 14 (2d Cir. 2015).

The plausible alternative strategy need not be reasonable, nor need it reflect objectively sound strategy or be likely to succeed. Indeed, to prove it is not plausible, the government must prove that even unconflicted counsel “**would never pursue it.**” *Malpiedi*, 62 F.3d at 470. (Emphasis added).

The court ignored these fundamental principles. It purported to consider one of the primary examples of adverse effect - White’s agreement to stipulate that he would not use Massino’s notes on Vitale’s 302s, in which Massino expressly wrote that Vitale’s claim that he (Massino) in any way implicated Amato in the DiFalco murder or that Amato ever indicated he was involved was a lie - evidence that was indisputably exculpatory

and impeachment evidence of the first order. But the court omitted mention of the stipulation and addresses only the decision by White not to call Massino as a witness. [App. 7a-8a]

The court engrafted its own subjective view of the plausible alternative strategy without any basis in fact or law for the same. It opined that it was mere “speculation” to believe that Massino’s testimony would have been exculpatory and that, in the court’s view, it was more likely that Massino, by then a government cooperator, would not testify in conformity with his exculpatory/impeachment notes. [*Id.*]

Again, the court got this backwards. Massino has been in the government’s exclusive control for the entire time Mr. Amato’s § 2255 has been litigated. If there were any basis to believe either that Massino would have denied the accuracy of his exculpatory/impeachment notes or that if called to testify he would have disclaimed them, the government had every opportunity and incentive to submit an affidavit from Massino so providing. It never did.

It is not legally relevant whether, in the court’s opinion, calling Massino or using his exculpatory notes would have been a good or reasonable strategy or how it speculates that might have worked out. It is a plausible defense strategy that was directly and inherently in conflict with White’s continuing duties to Massino. Calling cooperators as defense witnesses actually was an important part of White’s strategy and a primary issue he raised on direct appeal. There is nothing in the record to explain White’s decision to stipulate away the most damning impeachment evidence a defendant possibly could hope for - a statement from the enterprise’s boss and co-conspirator - that the

government's primary witness inculpating the defendant (based on the boss's alleged statements) was all a lie.<sup>14</sup>

Finally on this subject, the court wrote that they see "nothing in the record to suggest that such plausible alternative options existed." [App. 9a] This is baffling and appears to reflect the court's complete misapprehension of the definition of "plausible alternative strategies" and their relationship to adverse effect under controlling law, as enunciated in *Schwarz* and *Curshen* and the long line of cases on which they are based.

The court omitted reference to the other many examples of plausible alternative strategies provided by Amato, all of which were inherently in conflict with White's duties to Massino. [See e.g. *infra* at n.12]

The fact that White cross-examined Vitale on other subjects is completely irrelevant to this issue.<sup>15</sup> [SO at 7]

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<sup>14</sup> The court's reference, [App. 7a], to the decision in *Eisenmann v. Herbert*, 401 F.3d 102 (2d Cir. 2005) is misplaced. *Eisenmann* was a §2254 case, not under §2255. The entire analytic framework and ultimate inquiry are completely different (e.g. the question for a §2254 motion is whether the state court made an "unreasonable application of Supreme Court precedent"). The Court did not even purport to apply the law of the Circuit to the conflict). Additionally, *Eisenmann* is entirely distinguishable on the facts. There was not even the " slightest indication" as to what the other client's could have testified to if called, 401 F.3d at 108. The exact opposite is true here.

<sup>15</sup> At oral argument, the Court asked whether one of the identified "plausible alternative strategies" - calling a cooperating witness to testify - was "plausible." It was White's strategy to call cooperators as defense witnesses, making it more than "plausible." *U.S. v. Amato*, 2006 U.S. Dist. LEXIS 43366

To the extent the court suggested that there might not even have been a conflict here because the case involves successive, rather than concurrent representation, [App. 8a], this has been addressed herein. [*Infra.* at 17-20]

### **CONCLUSION**

The issues raised herein clearly deserve review by this Court. The case involves important, regularly recurring issues that have split the lower courts. The case also was wrongly decided, leaving Mr. Amato serving a life sentence in prison on a conviction that was the product of fatal constitutional flaws.

Respectfully Submitted,

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(E.D.N.Y., 6/27/2006) But calling Massino implicated his conflict.  
[Brief 26-30]

There is no basis for a finding that White's decision not to call Massino as a witness or use Massino's exculpatory/impeachment notes were strategic decisions. *Pavel v. Hollins*, 261 F.3d 210, 217-218 (2d Cir. 2001); *Moore v. Johnson*, 194 F.3d 586, 610 (9th Cir. 1999)(decision cannot be "strategic" where attorney had "no idea" why decision was taken). [See A535]