

IN THE SUPREME COURT OF THE UNITED STATES

STEPHON WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in determining that petitioner failed to demonstrate that his trial attorney labored under an actual conflict of interest that adversely affected his attorney's performance.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Ga.):

United States v. Jackson, No. 13-cr-51 (May 20, 2015)

United States Court of Appeals (11th Cir.):

United States v. Wesley, No. 14-12833 (Feb. 9, 2015)

United States v. Wynn, No. 15-11055 (Nov. 24, 2015)

United States v. Toombs, No. 15-12244 (Sept. 4, 2018)

United States v. Williams, No. 15-12130 (Sept. 4, 2018)

United States v. Williams, No. 15-12130 (Feb. 20, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A41) is not published in the Federal Reporter but is reprinted at 805 Fed. Appx. 672. The order of the district court (Pet. App. C1-C14) is unreported. A prior opinion of the court of appeals (Pet. App. B1-B19) is reported at 902 F.3d 1328.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2020. A petition for rehearing en banc was denied on May 5, 2020 (Pet. App. D1-D2). The petition for a writ of certiorari was

filed on August 3, 2020. 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 Middle District of Georgia, petitioner was convicted on one count of conspiring to possess cocaine and cocaine base with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), 846, and 851. Judgment 1. He was sentenced to 240 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals remanded for the district court to conduct a limited evidentiary hearing concerning petitioner's claim of ineffective assistance of counsel. Pet. App. B1-B19. After the district court did so, id. at C1-C14, the court of appeals affirmed, id. at A1-A41.

1. In 2010, law-enforcement agents began investigating the illegal drug activities of Curtis Donaldson in Albany, Georgia. Presentence Investigation Report (PSR) ¶ 6. Using a court-authorized wiretap, they identified dozens of Donaldson's customers as well as several people who facilitated his narcotics trafficking. PSR ¶¶ 6, 8. Evidence from the wiretap demonstrated that Donaldson supplied cocaine, cocaine base, and marijuana to customers who, in turn, distributed the drugs. Ibid. Donaldson's operation was based in his grandmother's home, which members of the conspiracy referred to as the "headquarters" or "precinct." 10/16/14 Tr. 26-29.

Petitioner served as Donaldson's driver and assisted him in his narcotics trafficking. PSR ¶ 9. In return for money or drugs, petitioner would drive Donaldson to buy or deliver multiple-kilogram quantities of cocaine. Ibid.; see, e.g., 10/16/14 Tr. 162-165. Occasionally, petitioner would deliver small, street-level quantities of cocaine to Donaldson's customers as well as conduct hand-to-hand transactions of cocaine at the home of Donaldson's grandmother when Donaldson was unavailable. PSR ¶ 9; see 10/16/14 Tr. 162-163. Petitioner also advertised that Donaldson had drugs to sell. See 10/16/14 Tr. 174. Over the course of the investigation, law-enforcement authorities intercepted seven telephone conversations between petitioner and Donaldson discussing the sale of cocaine. PSR ¶ 10.

2. In November 2013, a federal grand jury indicted petitioner and five others for conspiring to possess cocaine and cocaine base with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(ii) and (iii), and 846. Indictment 1-2. The district court appointed attorney Kim Minix to represent petitioner. Pet. App. A3.

In March 2014, the district court also appointed Minix to represent Tyree Bennett. Pet. App. A4. Bennett "did a lot of business" with Donaldson, and the two men had a mutually beneficial relationship in which they "took care" of each other's "people" when the other had "no work." 10/16/14 Tr. 154-155. Donaldson cooked most of the crack cocaine that Bennett sold, and Bennett

supplied the drugs to one of petitioner's co-defendants, Donterius Toombs, among others. 10/20/14 Tr. 165-168. In September 2013, Bennett had pleaded guilty to conspiring to possess cocaine and marijuana with the intent to distribute them, and had agreed to cooperate with the government in exchange for consideration of a reduced sentence. See Pet. App. A3; United States v. Bennett, 614 Fed. Appx. 403, 404 (11th Cir. 2015) (per curiam). When Bennett's attorney moved to withdraw following the plea, the district court appointed Minix to represent Bennett for his sentencing. See Pet. App. A4.

At Bennett's sentencing in June 2014, the parties addressed a letter he had written from prison the previous year encouraging Toombs to cooperate with the government on Bennett's behalf in exchange for a substantial payment and to market a cooperation-for-hire scheme to other inmates seeking sentence reductions. Pet. App. A4; see Bennett, 614 Fed. Appx. at 404. Minix conceded that there was "no dispute" that Bennett had sent the letter, but contended that he should not receive an enhancement for obstruction of justice and should still receive an adjustment for acceptance of responsibility. 13-cr-9 D. Ct. Doc. 379, at 3-5 (Aug. 28, 2014). The district court rejected Bennett's arguments, imposed an obstruction-of-justice enhancement, and denied an acceptance-of-responsibility adjustment. Id. at 13. Bennett appealed his sentence, and Minix continued to represent Bennett in that appeal. See Bennett, 614 Fed. Appx. at 404.

3. In October 2014, petitioner's case proceeded to a joint trial with co-defendant Toombs.

a. Of the six members of the conspiracy who testified for the government at trial, five -- Donaldson, Kenneth Reese, Willie Curry, Fred Shelton, and Demetrius Speed -- implicated or identified petitioner. See, e.g., 10/16/14 Tr. 162-167; 10/20/14 Tr. 125-128, 194, 202-205; 10/21/14 Tr. 75-87, 138-140. Minix cross-examined each of them, attempting to establish that they did not know petitioner or knew him minimally, that they did not witness petitioner actively participate in the conspiracy, or that petitioner purchased only small quantities of drugs for personal use or ran insignificant errands for Donaldson involving non-illicit substances. See, e.g., 10/20/14 Tr. 58-59, 143-147; 10/21/14 Tr. 11-12, 97, 141-144.

Other witnesses at trial, including law-enforcement officers, also testified that petitioner played an active role in the conspiracy. Minix cross-examined all of them except for the employee of a car-parts shop where petitioner's vehicle was towed after a traffic stop. See 10/16/14 Tr. 32-34, 90-113; 10/20/14 Tr. 76-84, 88-93, 96-98. That witness authenticated an invoice establishing when the vehicle was towed to the shop and when petitioner came to retrieve it. 10/20/14 Tr. 78-79. She testified that she did not know petitioner and "just dealt with him" that day. Ibid. Counsel for Toombs, who was also involved in the traffic stop, did not cross-examine her either. Id. at 79.

Other trial witnesses did not mention or identify petitioner as a member of the conspiracy. Those witnesses included officers involved in a traffic stop involving an unindicted co-conspirator, Hydarvis Hill, 10/15/14 Tr. 88-90; 10/20/14 Tr. 99-101, 152-154; an officer who testified about Donaldson's interactions with his co-conspirator Speed, 10/20/14 Tr. 106-107; an AT&T contractor who testified about wiretap-related orders, 10/15/14 Tr. 82-84; an associate of Toombs who testified about money that Toombs had at one time owed her, id. at 91-94; and two forensic chemists, 10/21/14 Tr. 103, 117. Minix did not cross-examine most of those witnesses, and Toombs's counsel also did not cross-examine several of them. See, e.g., 10/15/14 Tr. 90-91, 96; 10/20/14 Tr. 114, 157; 10/21/14 Tr. 115, 119.

Minix did, however, briefly cross-examine three of them. First, he questioned the AT&T contractor to confirm that the company had no knowledge of the content of the data collected from the wiretap. 10/15/14 Tr. 86-87. Second, he asked three questions of one of the officers involved in Hill's traffic stop to confirm that the officer had never seen petitioner, that petitioner was not at the stop, and that Hill had not mentioned petitioner to the officer. 10/20/14 Tr. 105. Third, Minix briefly asked one of the forensic chemists to confirm that a cutting agent that the chemist had referenced was not a controlled substance. 10/21/14 Tr. 116.

b. Bennett was the sixth co-conspirator to testify for the government. On the first morning of trial, the district court had the following exchange with counsel about Bennett's testimony:

[PROSECUTOR]: * * * There's one other issue I would like to address. We anticipate calling as one of our witnesses, Tyree Bennett, who is currently represented by Mr. Minix on appeal. To avoid any possible conflict of interest because Mr. Minix is representing a client in this case, I have interviewed Mr. Bennett only as to Mr. Toombs, who is Mr. Hamilton's client[], and we do not expect he'll provide any information about [petitioner] to the jury and I have discussed that with Mr. Minix.

MR. MINIX: For the record, I have discussed the same with [petitioner] about that, and that is true, everything else [the prosecutor] has said is true.

THE COURT: All right. Okay. All right.

13-cr-51 D. Ct. Doc. 410-1, at 7-8 (Nov. 26, 2018). Just before Bennett took the stand the following week, the court had another exchange with counsel at sidebar:

MR. MINIX: As the Court is aware, I'm representing Mr. Bennett on an appeal. I was his second counsel, and he's been sentenced. I think we had an agreement that there wasn't going to be any questions that would create a conflict.

[PROSECUTOR]: The government is not going to ask him any questions about [petitioner], Mr. Minix's client.

MR. MINIX: I just wanted to be sure the government wasn't going to ask him about anything I represented him on.

[PROSECUTOR]: We aren't.

THE COURT: I recall that's the understanding.

10/20/14 Tr. 158.

During direct examination, the government established that Bennett had pleaded guilty and that he could receive a sentence

reduction if he fulfilled his agreement to cooperate with the government. 10/20/14 Tr. 159-163. Bennett then testified that he sold cocaine, which Bennett had obtained from Donaldson and others, with Toombs. Id. at 163-166. Bennett further testified that when he was incarcerated, Toombs had "look[ed] after" and "taken care of" his customers. Id. at 170-171. Bennett explained that he had known Donaldson for roughly 15 to 20 years, and that Donaldson "did most of the cooking" of the drugs and supplied drugs to him. Id. at 167. As Bennett testified, he sold drugs to Shelton and others associated with the conspiracy. Id. at 166. Bennett never mentioned petitioner. See id. at 158-174.

Although Minix declined to cross-examine Bennett, Toombs's counsel cross-examined him about his prior convictions, and also elicited that he had met with the prosecutor prior to testifying and thus had "an opportunity to learn some of the questions that would be asked of [him]" and to "[go] over some of [his] answers." 10/20/14 Tr. 175; see id. at 174-175, 181. Toombs's counsel additionally questioned Bennett about his guilty plea and potential sentence reduction. Bennett testified that he had not received a sentencing reduction for acceptance of responsibility, although Toombs's counsel did not ask Bennett why that was so. Id. at 175-180.

On redirect, the government elicited that Bennett had not received a sentencing reduction for acceptance of responsibility because he had written a letter to Toombs. 10/20/14 Tr. 181-183.

The government did not ask Bennett about the additional sentencing enhancement he had received for obstruction of justice. See ibid.

c. The jury found petitioner guilty of conspiring to possess cocaine and cocaine base with the intent to distribute. 13-cr-51 D. Ct. Doc. 218, at 2 (Oct. 22, 2014). The district court sentenced him to 240 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3.

4. Petitioner appealed. Relying on the fact that Minix did not cross-examine Bennett, he contended that Minix's concurrent representation of Bennett constituted a conflict of interest that adversely affected his performance, in violation of the Sixth Amendment. See Pet. App. B15-B16. The court of appeals agreed that Minix "had a conflict of interest," id. at B12, and noted that, "on the existing record," petitioner had "made out a strong case of adverse effect," id. at B16. But rather than resolve whether the conflict had adversely affected Minix's performance, the court remanded so that the district court could "conduct an evidentiary hearing on whether Mr. Minix's conflict resulted in an adverse effect" and "prepare an order detailing its findings and conclusions." Id. at B18-B19.

On remand, the district court held such an evidentiary hearing. In a joint filing, the parties stipulated that if the prosecutor were called to testify, "her testimony would be consistent with, and would add no more to," the statement she made on the first morning of trial concerning Bennett's anticipated

testimony. 13-cr-51 D. Ct. Doc. 410-1, at 1 (Nov. 26, 2018); see id. at 7-8; p. 7, supra.

Minix testified that he could not be "exactly certain" when he learned that Bennett would be a witness at petitioner's trial, but that he recalled becoming aware of that information "just a matter of days before the trial started." 11/8/18 Tr. 13. Minix also could not recall whether he knew, at the time of Bennett's sentencing, that petitioner and Toombs would be tried together. Id. at 15. But Minix remembered "talking to" petitioner about Bennett's anticipated testimony "and explaining that [Bennett] would be testifying, but also explaining" that Minix had been "assured by the government that there's not going to be any questions related to" petitioner. Id. at 16.

Minix further testified that, even if he had not been representing Bennett at the time, he still would have declined to cross-examine him. 11/8/18 Tr. 17. Minix explained that "there were four government witnesses that [he] didn't cross exactly for the same reason [he] didn't cross Mr. Bennett" -- namely, because "they didn't say anything -- anything about the culpability of [petitioner]." Ibid.; see id. at 31-32. Minix added that "the government did a pretty good job of demeaning [Bennett's] credibility on direct, and since there was nothing said about [petitioner], his involvement or his alleged involvement in the conspiracy, there wasn't anything to question him on." Id. at 17-18; see id. at 20. Minix also testified that he did not believe

his concurrent representation of both men posed a conflict of interest, while acknowledging that he had received a bar complaint related to the issue. Id. at 20-21, 32; see id. at 23-24.

5. After the hearing, the district court issued its order. Pet. App. C1-C14. The court "d[id] not find, taken in context and [given] the supporting facts and circumstances, Mr. Minix to be untruthful or lacking credibility." Id. at C4. And the court found, among other things, that Minix had told petitioner "about his simultaneous representation" of Bennett; that Minix had learned about Bennett's anticipated testimony "'just a matter of days before the trial started'"; and that petitioner and Minix had an "understanding" that the government would interview Bennett "only as to [petitioner's] co-conspirator, Mr. Toombs, and not as to [petitioner]." Ibid. (citation omitted). The court also found that Minix "had other reasons -- aside from the asserted divided loyalties resulting from his simultaneous representation -- to forgo cross-examination of Mr. Bennett" -- namely, his "trial strategy of choosing not to cross-examine witnesses who did not implicate his client." Id. at C5. In the course of discussing that issue, the court stated that Minix had "cross-examined one witness" who "did not mention" petitioner, the officer involved in Hill's traffic stop. Ibid.

Observing that it was "questionable" whether cross-examining Bennett would have been "reasonable under the circumstances," particularly given the "risks associated with cross-examining a

witness who does not implicate one's client," the district court determined that "conflict-free counsel would have chosen to forgo cross-examination of Mr. Bennett because he did not implicate" petitioner. Pet. App. C7-C8. The court further determined that even if cross-examination was a viable trial strategy, petitioner had failed to establish that Minix's "decision to forgo cross-examination was linked to the actual conflict." Id. at C8. The court observed that Minix "chose the same strategy" -- "not to cross-examine a witness who had not given testimony adverse to his client" -- "with respect to four other such witnesses." Id. at C12. The court accordingly found that "Minix's trial strategy motivated his decision" and petitioner had failed "to show a sufficient link" between the purported conflict "and a decision based on the conflict to forego the alternative strategy of defense." Id. at C13-C14.

6. Based on the results of the evidentiary hearing, the court of appeals affirmed petitioner's conviction in an unpublished per curiam opinion. Pet. App. A1-A41.

As a preliminary matter, the court of appeals disagreed with the district court's conclusion that Minix's concurrent representation did not pose a conflict and the suggestion that cross-examining Bennett was not a viable alternative trial strategy. Pet. App. A25-A28. The court of appeals also rejected two of the district court's factual findings as clearly erroneous: (1) that Minix had learned about Bennett's anticipated testimony

only days before trial; and (2) that he had cross-examined only one witness whose testimony did not implicate petitioner. Id. at A33-A35.

The court of appeals explained, however, that petitioner had failed "to establish the requisite 'link' between Mr. Minix's decision to forgo cross-examination and his conflict of interest." Pet. App. A33. It determined the district court's "ultimate credibility determination and its findings regarding Mr. Minix's trial strategy were not clearly erroneous," and it "accept[ed]" that Minix "had a general trial strategy not to cross-examine witnesses who did not implicate" petitioner and that he "would not have cross-examined Mr. Bennett even if he had not been his client." Id. at A33, A35. The court of appeals observed that petitioner had not identified any "direct evidence in the record" establishing the necessary "'link'" between the conflict and any adverse effect sufficient to overcome that credibility determination. Id. at A35; see id. at A35-A37. And it explained that "[w]ithout evidence directly contradicting Mr. Minix's testimony, which the district court found credible," it could not "say that [petitioner] established an adverse effect," as necessary to prevail on his conflict-of-interest claim. Id. at A37. Accordingly, "his conflict-of-interest claim must fail." Ibid.

ARGUMENT

Petitioner contends (Pet. 10-24) that his conviction must be vacated on the theory that his trial counsel labored under a conflict of interest that affected his performance. The court of appeals correctly rejected that argument, and its unpublished fact-bound assessment of the record in this case does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly determined that petitioner's trial counsel did not provide ineffective assistance in violation of the Sixth Amendment.

a. 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. "As a general matter, a defendant alleging a Sixth Amendment violation" therefore "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." Mickens, 535 U.S. at 166. With respect to conflicts of interest, defendants may obtain automatic reversal in only 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." Id. at 168 (discussing Holloway v. Arkansas, 435 U.S. 475 (1978)). The presumption of prejudice under such circumstances reflects, in part, 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). In contrast, where counsel does not object to the representation of co-defendants at trial, "prejudice will be presumed only if the conflict has significantly affected counsel's performance -- thereby rendering the verdict unreliable." Id. at 173 (discussing Cuyler v. Sullivan, 446 U.S. 335 (1980)). To obtain relief under those circumstances, "a defendant must demonstrate that 'a conflict of interest actually affected the adequacy of his representation.'" Id. at 168 (quoting Sullivan, 446 U.S. at 349).

b. The court of appeals correctly applied that framework to the facts in this case. Pet. App. A22-A37.

Petitioner's trial counsel, Minix, testified that he did not believe that his concurrent representation of petitioner and Bennett -- who was a trial witness rather than a co-defendant -- posed a conflict and that he had discussed Bennett's impending

testimony with petitioner, including that his testimony would be limited to matters related to Toombs. 11/8/18 Tr. 16, 32-33. Neither petitioner nor Minix objected to Minix's concurrent representation of Bennett. Accordingly, even assuming that the rules applicable to concurrent representation of co-defendants also apply to concurrent representation of a defendant and trial witness, the court of appeals correctly required petitioner to "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Sullivan, 446 U.S. at 348. Indeed, petitioner does not contest the applicability of that standard to his claim.

The court of appeals also accurately described the showing of "adverse effect" petitioner was required to make under Sullivan. Pet. App. A23. The court acknowledged that, unlike in a case governed by this Court's decision in Strickland v. Washington, supra, petitioner "need not demonstrate prejudice in order to obtain relief." Pet. App. A23 (quoting Sullivan, 446 U.S. at 349-350). Petitioner therefore was not required to demonstrate that any alternative strategy Minix might have pursued absent a conflict of interest "would necessarily have been successful." Ibid. (citation omitted). Nevertheless, to demonstrate that Minix's performance was adversely affected, petitioner at a minimum had to "show 'some link' between the conflict" and Minix's trial strategy. Ibid. (citation omitted).

Although the court of appeals determined that Minix's concurrent representation of Bennett and petitioner represented an actual conflict of interest, it correctly found that petitioner had not demonstrated that this conflict had an adverse effect on Minix's performance. Pet. App. A33-A37. It acknowledged that cross-examining Bennett could cast doubt on his credibility, id. at A26-A33, but observed that Minix "in fact had a general trial strategy not to cross-examine witnesses who did not implicate [petitioner]," id. at A35. The trial record supports the court's determination that petitioner had shown no adverse effect, as Bennett (unlike other members of the conspiracy who testified) did not implicate or mention petitioner, see pp. 7-9, supra, and Minix generally declined to cross-examine the witnesses who did not mention petitioner. In only three other instances did Minix question a witness who had not mentioned petitioner -- and in each case, he asked just one to three questions to clarify the witness's testimony. See p. 6, supra. Most importantly, the district court found that Minix's testimony about his cross-examination strategy was credible, Pet. App. C4, and the court of appeals, seeing no basis to disturb that credibility finding, determined -- consistent with the record as a whole -- that Minix "would not have cross-examined Mr. Bennett even if he had not been [trial counsel's] client," id. at A35.

Thus, while petitioner contends (Pet. 18) that "[t]he only reason" that Minix "would not have cross-examined Bennett is

because he represented him," the district court and the court of appeals reasonably determined otherwise. That fact-bound determination was correct and does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925); see also Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in Johnston] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

2. Petitioner contends (Pet. 20) that the court of appeals' unpublished decision "created a heightened burden" that is inconsistent with this Court's precedent. That contention misunderstands the court of appeals' decision, which is in any event nonprecedential. See 11th Cir. R. 36-2.

Petitioner focuses almost exclusively (Pet. 20-23) on the court of appeals' statement that petitioner had identified "no direct evidence in the record establishing the necessary 'link' to complete the showing of 'adverse effect.'" Pet. App. A35. But that statement in no way purported to establish a heightened standard for ineffective-assistance claims based on a conflict of interest. Indeed, the statement -- which was made after a discussion of the record evidence showing no adverse effect -- simply reflects that in the context of this case, where the evidence otherwise cut against petitioner, the absence of direct

evidence in his favor confirmed that he had not met his burden. See id. at A35-A37. As the court of appeals later elaborated, “[w]ithout evidence directly contradicting Mr. Minix’s testimony, which the district court found credible, we cannot say that [petitioner] established an adverse effect, and his conflict-of-interest claim must fail.” Id. at A37.

Petitioner cannot show that the court of appeals misapplied the law. In particular, “when a trial judge’s finding is based on his decision to credit the testimony” of a witness, that finding “can virtually never be clear error” if the witness’s testimony “is not contradicted by extrinsic evidence” and is “not internally inconsistent.” Anderson v. Bessemer City, 470 U.S. 564, 575 (1985). Because the trial court is best positioned to assess credibility, its determination receives “great deference on appeal.” Hernandez v. New York, 500 U.S. 352, 364 (1991); see, e.g., Johnson v. Wilson, 960 F.3d 648, 653 (D.C. Cir. 2020) (affirming finding of no conflict of interest where district court found credible trial attorney’s testimony that he did not remember prior representation of government witness), petition for cert. pending, No. 20-707 (filed Oct. 26, 2020); United States v. Gambino, 864 F.2d 1064, 1071-1072 & n.5 (3d Cir. 1988) (affirming finding of no adverse effect where district court found credible trial counsel’s explanation for not calling potential trial witness that counsel concurrently represented), cert. denied, 492 U.S. 906 (1989).

Petitioner also asserts that he did identify "direct evidence contradicting Minix's testimony" in the form of a "transcript regarding the 'agreement' or 'understanding' between Minix and the government." Pet. 23. But, as the district court observed, the transcript excerpt petitioner relies on -- quoted above at page 7 -- shows that the prosecutor "did not state to the Court that the Parties had an agreement"; that it was only Minix who, "immediately before Mr. Bennett's testimony at trial," "referred to the government counsel's representation as an 'agreement'"; and that when the prosecutor confirmed that she would not ask "Bennett questions about" petitioner, the district court "acknowledged that was the 'understanding.'" Pet. App. C4-C5; see 13-cr-51 D. Ct. Doc. 410-1, at 3-8 (reproducing transcript). The court of appeals accordingly recognized that "the parties had only an informal 'understanding' which did not bind Mr. Minix or guide his trial strategy," Pet. App. A21, and that beyond "Minix's casual use of the word 'agreement,'" there is "no other evidence of a real agreement," "[n]or is there evidence that [Minix] based his trial strategy on such an agreement," id. at A36. It thus correctly declined to disturb the district court's credibility determination on the basis of that evidence. That fact-bound determination does not warrant further review.

3. Finally, petitioner contends that the decision below "sanctioned a practice" that "has never been permitted in this country" -- namely, allowing "a single attorney to represent both

a defendant at trial and a government witness against that defendant." Pet. 10-11, 23. But petitioner does not allege any conflict among the courts of appeals and, in any event, his experience is not unique; indeed, the Fifth Circuit addressed a similar scenario in United States v. Infante, 404 F.3d 376 (2005), and resolved it similarly to the court of appeals here.

In Infante, the defendant's trial counsel concurrently represented two witnesses who testified against the defendant at trial. 404 F.3d at 389-390. The attorney acknowledged that he would be seeking sentencing reductions for those witnesses based on their testimony against the defendant, and limited his cross-examination of those witnesses to eliciting that they "had no knowledge of any involvement" by the defendant "in the conspiracy." Id. at 390. Although the Fifth Circuit determined that the attorney labored under a conflict of interest, it was "not prepared to say" that the record showed that the conflict "adversely affected his performance," and thus remanded for the district court to resolve that issue. Id. at 392-393. And on remand, the district court found that the conflict had no adverse effect. See D. Ct. Doc. 121, at 1, 7, United States v. Infante, No. 01-cr-14 (W.D. Tex. Aug. 3, 2005). Here, the court of appeals likewise concluded that Minix's conflict did not adversely affect his performance. Pet. App. A33-A35. Petitioner has not established that any other court of appeals would have determined otherwise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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