No. 17-624

In the Supreme Court of the United States

ENRICO PONZO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOHN P. CRONAN
Acting Assistant Attorney General
WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner is entitled to plain-error relief based on his argument that he did not knowingly or voluntarily waive his right to testify because the district court declined to advise him whether his prior convictions would be admissible for impeachment if he took the stand.

2. Whether a defendant who claims, contrary to the determinations of his attorney and the district court, that his attorney has a conflict of interest from a prior representation can establish a violation of the Sixth Amendment without demonstrating that the asserted conflict had an adverse impact on his attorney's representation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and rules:

In the Supreme Court of the United States

No. 17-624

ENRICO PONZO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-66) is reported at 853 F.3d 558.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2017. A petition for rehearing was denied on June 2, 2017 (Pet. App. 67). On July 26, 2017, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including October 30, 2017, and the petition was filed on October 25, 2017. 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 District of Massachusetts, petitioner was convicted of conspiracy to commit racketeering, in violation of 18 U.S.C. 1962(c) and (d); conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C.

1959(a)(5); using or carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (1994); conspiracy to distribute and to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 846 and 21 U.S.C. 841(a)(1) and (b)(1)(B) (1994); conspiracy to collect extensions of credit by extortionate means, in violation of 18 U.S.C. 894(a)(1); use of extortionate means to collect extensions of credit, in violation of 18 U.S.C. 894(a)(1) (1988); unlawful flight to avoid prosecution, in violation of 18 U.S.C. 1073; conspiracy to distribute and to possess with intent to distribute at least 1000 kilograms of marijuana, in violation of 21 U.S.C. 846 and 21 U.S.C. 841(a)(1) and (b)(1)(A) (1994 & Supp. IV 1998); conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (h) (1994); laundering of monetary instruments, in violation of 18 U.S.C. 1956(a)(1)(B)(i) (2000); and attempting to tamper with a witness, in violation of 18 U.S.C. 1512(b)(1). Pet. App. 6-7; Judgment 1-2. He was sentenced to 336 months of imprisonment, to be followed by three years of supervised release. Judgment 3, 5. The court of appeals affirmed. Pet. App. 1-66.

1. From the late 1980s through the mid-1990s, petitioner committed crimes as a Boston-area associate of the Patriarca "family" of La Cosa Nostra (LCN). Pet. App. 2-3. LCN is a crime network that has funded its activities through "trafficking drugs, loansharking, extortion, and illegal gambling." *Id.* at 3. Petitioner's role included "collecting envelopes—that is, using threats and intimidation to extort money from bookies and drug dealers" and "collect[ing] debts owed from loan sharking." *Ibid.* Petitioner was "also involved in drug dealing." *Id.* at 4.

In the 1980s, Frank Salemme tried to take control of the Boston-area LCN. Pet. App. 4. Petitioner belonged to the anti-Salemme faction, and in 1989, he and other LCN members shot at Salemme, but failed to kill him. *Ibid.* In 1994, the power struggle again came to head. While petitioner and another LCN member, Michael Romano, Jr., were attempting to "collect an envelope," members of the pro-Salemme faction shot and killed Romano. *Ibid.* Petitioner has asserted that a man named David Clark intended to kill him but killed Romano instead. *Id.* at 5. About a month after the murder of Romano, petitioner and other LCN members shot (but failed to kill) Joseph Cirame, a member of the pro-Salemme faction believed to be responsible for Romano's death. *Ibid.*

Petitioner, who faced state-court drug and assault charges that did not stem from the events above, fled in November 1994 to Arizona, where he supervised the packing and shipment of marijuana to LCN members in Massachusetts. Pet. App. 5.

In 1997, a federal grand jury in the District of Massachusetts indicted petitioner and 14 other LCN members on a variety of charges stemming from LCN's criminal activities. Pet. App. 6. Petitioner remained at large until 2011, when authorities located him in Marsing, Idaho, living under the name of Jeffrey Shaw. *Ibid.* Around the time that petitioner was arrested in Idaho, agents searched his home pursuant to a warrant and found 33 firearms in addition to false identity documents. Gov't C.A. Br. 12-13, 56. That search led to federal charges of identity theft, unlawfully possessing firearms, and related offenses in the District of Idaho. Indictment at 1-14, *United States* v. *Ponzo,* No. 12-cr-35

(Feb. 14, 2012). Petitioner later pressured his girlfriend, in calls from a jail, to falsely claim that the firearms belonged to her. Gov't C.A. Br. 14.

2. Following petitioner's arrest, a federal grand jury in Massachusetts returned a superseding indictment charging petitioner with conspiracy to commit racketeering, in violation of 18 U.S.C. 1962(c) and (d) (Count 1); conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5) (Count 2); three counts of using or carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (1994) (Counts 3, 5, and 8); attempt to commit murder and assault with a dangerous weapon, in violation of 18 U.S.C. 1959(a)(3) and (a)(5) (Count 4); conspiracy to distribute and to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 846 and 21 U.S.C. 841(a)(1) and (b)(1)(B) (1994) (Count 6); possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count 7); conspiracy to collect extensions of credit by extortionate means, in violation of 18 U.S.C. 894(a)(1) (Count 9); use of extortionate means to collect extensions of credit, in violation of 18 U.S.C. 894(a)(1) (1988) (Count 10); conspiracy to commit extortion, in violation of 18 U.S.C. 1951 (Count 11); extortion or attempted extortion, in violation of 18 U.S.C. 1951 (Count 12); unlawful flight to avoid prosecution, in violation of 18 U.S.C. 1073 (Count 13); conspiracy to distribute and to possess with intent to distribute at least 1000 kilograms of marijuana, in violation of 21 U.S.C. 846 and 21 U.S.C. 841(a)(1) and (b)(1)(A) (1994 & Supp. IV 1998) (Count 14); conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (h) (1994) (Count 15); laundering of monetary instruments, in violation of 18 U.S.C. 1956(a)(1)(B)(i) (2000) (Counts 16 and

17); and attempting to tamper with a witness, in violation of 18 U.S.C. 1512(b)(1) (Count 18). Superseding Indictment 1-35.

A magistrate judge initially appointed David Duncan, an attorney of petitioner's choosing, to represent petitioner. 6/1/11 Tr. 4-7. Petitioner eventually became dissatisfied with Duncan's representation and moved for hybrid representation in which he would act as pro se co-counsel. Pet. App. 27-28. The magistrate judge denied the motion, and Duncan withdrew as counsel. *Id.* at 28. The district court then appointed John Cunha, Jr. to represent petitioner. *Id.* at 24, 28.

On the first day of trial, 13 months into Cunha's representation, petitioner filed a pro se motion for a new attorney. Pet. App. 28; see 3 C.A. App. 35-36. Petitioner stated that he believed Cunha had a conflict of interest because 12 years earlier, Cunha had served as appellate counsel for David Clark in an appeal from Clark's state-court conviction for killing a state trooper. Pet. App. 28; see 3 C.A. App. 36. Petitioner asserted that Clark had allegedly killed "Michael Romano, Junior, and allegedly was trying to kill me." 3 C.A. App. 36. Petitioner stated that Clark's alleged involvement in the killing of Romano was relevant to matters of defense strategy, and stated that he "discussed many issues with counsel concerning my—defenses that I wanted to raise, and he would say that would not be applicable." *Ibid.*; see *id.* at 37-38.

Cunha responded that he was aware of "allegations * * * that Mr. Clark may have been one of the ones who shot at Michael Romano, Junior," but that he didn't "know that there's ever been anything more than sort of intelligence that has been reported to the government." 3 C.A. App. 36-37. In any event, Cunha stated,

he did not see a conflict between his prior representation of Clark on appeal and his current representation of petitioner. *Id.* at 37. He added that he had "strong disagreements" with petitioner about trial strategy throughout the representation. *Ibid.* The district court found no conflict of interest and denied petitioner's day-of-trial motion for new counsel. Pet. App. 28; see 3 C.A. App. 38.

At the end of the defense case, the district court asked petitioner whether he intended to testify. 11/12/13 Tr. 174. Petitioner responded by asking whether the government would be able to cross-examine him on the "federal Indictment for the guns and the identification documents" in Idaho. *Ibid.* The court stated that it was "not in a position to advise" petitioner, but that he "ha[d] an attorney who c[ould] do that." *Ibid.* The court then asked petitioner whether he "underst[ood] that [he] ha[d] a right to testify in this case," and petitioner responded that he understood. *Ibid.* Petitioner next asked the court whether the government would be able to offer evidence of any of his prior convictions. *Id.* at 174-175. The court stated that petitioner would "have to ask that question of [his] counsel" and again asked petitioner whether he "intend[ed] to testify today." *Id.* at 175. Petitioner expressed concern that his "Fifth Amendment right to remain silent" was "going to be affected by those issues," and stated that he did not wish to "implicate myself in this trial on another Indictment I have." *Id.* at 175-176. The court afforded petitioner an opportunity to confer with his counsel off the record. *Id.* at 176. After conferring with his counsel, petitioner stated that he was "waiving [his] right to testify." *Ibid.*

The government dismissed Counts 4, 5, and 8 at trial. 2 C.A. App. 159. The jury acquitted petitioner of Counts

7, 11, and 12, but found him guilty on the remaining counts. Judgment 1. The district court sentenced petitioner to a total of 336 months of imprisonment. *Id.* at 3.

3. The court of appeals affirmed. Pet. App. 1-66. As relevant here, the court rejected petitioner's argument that his counsel labored under a disqualifying conflict of interest because of his previous appellate representation of Clark as well as petitioner's argument that his waiver of his right to testify was not knowing and voluntary.

a. The court of appeals observed that, as relevant here, petitioner alleged that his attorney had a conflict of interest that violated petitioner's Sixth Amendment rights as a result of "Cunha's prior appellate representation of David Clark, the man [petitioner] alleges tried to kill him." Pet. App. 24.

The court of appeals analyzed this claim under the test in *Mickens* v. *Taylor*, 535 U.S. 162 (2002), which requires that a defendant "show that 'a conflict of interest actually affected' the lawyer's 'performance—as opposed to a mere theoretical division of loyalties.'" Pet. App. 25 (quoting *Mickens*, 535 U.S. at 168, 171). The court noted that both the Supreme Court and court of appeals had reserved decision on whether a defendant could establish a constitutional violation under the *Mickens* test in cases like petitioner's that involve successive rather than concurrent representations, but it concluded that it need not decide that question because petitioner could not prevail even if the court "provide[d] him the benefit of" the *Mickens* standard. *Id.* at 26-27. The court also observed that petitioner had not preserved any argument for a test more stringent than *Mickens*. Petitioner had not contended that an automatic-reversal rule applied. *Id.* at 25. And while two

sentences in his brief "suggest[ed]," "without offering any legal authority," "that because [petitioner] raised the conflict-of-interest issue pre-trial, he only had to show 'a division of loyalties' on Cunha's part, not a conflict that affected Cunha's performance," the court found that the "suggestion [was] so little developed that it is waived." *Id.* at 27 n.11 (internal quotation marks omitted).

The court of appeals concluded that petitioner had not demonstrated a Sixth Amendment violation under *Mickens*. It observed that petitioner's basic complaint was that, as a result of Cunha's prior appellate representation of Clark, Cunha did not argue that petitioner had fled Massachusetts because he feared for his life following the killing of Romano. Pet. App. 28-29. Petitioner argued that this explanation of his flight from Massachusetts would have aided his case because some charges against him fell within the statute of limitations only based on the application of 18 U.S.C. 3290, which tolls the statute of limitations against defendants who flee from justice. *Id.* at 29 & n.12.

The court of appeals rejected petitioner's argument that Cunha's declining to pursue this strategy demonstrated that Cunha's prior appellate representation of Clark created a conflict "that adversely affect[ed] counsel's performance." Pet. App. 30 (quoting *Mickens*, 535 U.S. at 172 n.5). The court described the strategy as "an implausible strategy or a strategy that could inculpate the defendant." *Ibid.* In particular, the court concluded, petitioner's argument "that he hightailed it to Arizona not to duck prosecution but because he feared for his life" was "hard to reconcile with the fact that instead of leaving Massachusetts immediately after the threat to his life, he stayed and tried to kill [another

LCN member] two weeks later." *Id.* at 29. Further, the court observed, "[p]resenting the evidence advocated by [petitioner] would have placed [petitioner] right in the middle of the intra-LCN conflicts" and "inculpated him." *Id.* at 29-30. It concluded that "Cunha's actions [were] easily explained as strategic attempt to distance [petitioner] from LCN." *Id.* at 29.

b. The court of appeals also rejected petitioner's argument that his waiver of his right to testify was not knowing and voluntary because the district court did not answer petitioner's on-the-spot inquiries about the extent to which he could be cross-examined on prior convictions. Pet. App. 43-44. The court reviewed this claim for plain error because petitioner had not raised his claim in the district court. *Id.* at 43.

The court of appeals first noted that "[t]he defendant's lawyer, rather than the trial judge, bears the primary responsibility of informing and advising the defendant" regarding the right to testify, "including its strategic ramifications." Pet. App. 43 (quoting *Casiano-Jiménez* v. *United States*, 817 F.3d 816, 820 (1st Cir. 2016)). Accordingly, the court wrote, "a trial judge is not required to apprise a defendant of his right to testify or inquire whether he has waived it." *Id.* at 43-44 (quoting *Owens* v. *United States*, 483 F.3d 48, 58 (1st Cir. 2007), abrogated on other grounds by *Weaver* v. *Massachusetts*, 137 S. Ct. 1899 (2017)). The court determined that petitioner "offer[ed] no convincing arguments for how the [district] court plainly erred given *Casiano-Jiménez* and *Owens*." *Id.* at 44. And because petitioner cited "no controlling authority showing that the court had to answer his questions," he had not "show[n] plain error." *Ibid.*

ARGUMENT

Petitioner contends that his waiver of his right to testify was not knowing and voluntary (Pet. 5-15) and that a defendant who objects before trial to a perceived attorney conflict can establish a Sixth Amendment violation without showing any effect on counsel's representation, even when defense counsel and the district court determined that no conflict existed (Pet. 16-24). The court of appeals correctly denied relief on those claims, applying plain-error review to the first contention and determining that the second contention had been forfeited. The court's case-specific grounds for rejecting each of these arguments makes petitioner's case an unsuitable vehicle for considering the broad legal questions on which petitioner seeks review, and there is no conflict among the courts of appeals on those questions in any event. Further review is unwarranted.

1. a. Applying plain-error review, the court of appeals correctly rejected petitioner's argument that he could not knowingly and voluntarily waive his right to testify in the absence of an anticipatory ruling by the district court about whether certain prior convictions would be admissible as impeachment evidence. As the court of appeals determined, and petitioner does not dispute, that claim is reviewed for plain error because petitioner did not raise it in the district court. Pet. App. 43; see Fed. R. Crim. P. 52(b). As a result, petitioner would be entitled to relief only if he could show (1) an error (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."

United States v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted). The court of appeals correctly found no reversible plain error here.

This Court has recognized a "right to testify on one's own behalf at a criminal trial" that is grounded in "several provisions of the Constitution." *Rock* v. *Arkansas*, 483 U.S. 44, 51 (1987). Courts of appeals have concluded that the right is a fundamental right that must be waived by the defendant personally.[*] Waiver, in turn, requires the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); see *United States* v. *Olano*, 507 U.S. 725, 733 (1993).

Here, the record reflects that petitioner did intentionally relinquish his right to testify: he was advised on the record that he had the right, he consulted with counsel about whether to exercise it, and he then stated that he wished to forgo testifying. 11/12/13 Tr. 174-176. Petitioner suggests (Pet. 15) that his waiver was not actually "knowing and voluntary" because the district court declined to make an on-the-spot ruling at the time of petitioner's decision on whether to testify as to

---

[*] See *United States* v. *Mullins*, 315 F.3d 449, 454 (5th Cir. 2002), cert. denied, 541 U.S. 1031 (2004); *Uber* v. *Guarino*, 293 F.3d 19, 31 (1st Cir. 2002); *United States* v. *Manjarrez*, 258 F.3d 618, 623 (7th Cir. 2001); *United States* v. *Webber*, 208 F.3d 545, 550-551 (6th Cir.), cert. denied, 531 U.S. 882 (2000); *Brown* v. *Artuz*, 124 F.3d 73, 77-78 (2d Cir. 1997), cert. denied, 522 U.S. 1128 (1998); *United States* v. *Ortiz*, 82 F.3d 1066, 1070 (D.C. Cir. 1996); *United States* v. *Pennycooke*, 65 F.3d 9, 10-11 (3d Cir. 1995); *United States* v. *Teague*, 953 F.2d 1525, 1532 (11th Cir.), cert. denied, 506 U.S. 842 (1992); *United States* v. *McMeans*, 927 F.2d 162, 163 (4th Cir. 1991) (per curiam); *United States* v. *Martinez*, 883 F.2d 750, 756 (9th Cir. 1989), vacated on other grounds, 928 F.2d 1470 (9th Cir. 1991); *United States* v. *Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987).

whether the government would be able to cross-examine petitioner about his prior convictions. But he identifies no authorizing holding that a decision whether to exercise a right is not knowing or voluntary simply because of uncertainty concerning how a judge would resolve evidentiary disputes that might arise later in the trial if the defendant elected to exercise the right in question. Indeed, he acknowledges that circuit precedent had held for more than 40 years "that a judge need not make an advance ruling on the admissibility of a defendant's prior convictions before requiring the defendant to elect whether or not to testify." Pet. 10 (citing *United States* v. *Oakes*, 565 F.2d 170 (1st Cir. 1977)); see *United States* v. *Hickey*, 596 F.2d 1082, 1087 (1st Cir.), cert. denied, 444 U.S. 853 (1979). At minimum, petitioner cannot show error that was "clear or obvious, rather than subject to reasonable dispute," *Marcus*, 560 U.S. at 262 (citation omitted).

Even if petitioner could show an error that was "clear," he would not be able to show reversible plain error because he cannot demonstrate that any error affected his "substantial rights." *Marcus*, 560 U.S. at 262. This Court has explained that "in the ordinary case," the requirement that an error "affected the appellant's substantial rights" requires that the error "affected the outcome of the district court proceedings." *Ibid.* (citation omitted). Here, petitioner has not demonstrated that the district court's declining to make the advance ruling that petitioner sought altered his decision on whether to testify—let alone altered the outcome of the trial. The court afforded petitioner the opportunity to obtain advice from his counsel regarding the scope of permissible cross-examination, and petitioner has never suggested that his counsel provided him with inaccurate

or insufficiently definitive advice. Moreover, petitioner expressly stated that he would not testify if he could be questioned on matters that would inculpate him in his pending case in the District of Idaho. 11/12/13 Tr. 175-176. But petitioner offers no basis to conclude that it would have been improper for prosecutors to question him about the false identity documents and firearms at the center of the Idaho case, given those items' relevance to the charges of flight to avoid prosecution and witness tampering in the Massachusetts indictment.

b. Petitioner's constitutional argument does not implicate any conflict among the courts of appeals. Every circuit to address the issue has concluded that the constitutional right to testify does not carry with it a right to a ruling on the permissible scope of impeachment before the defendant decides whether to testify. *United States* v. *Strickland*, 935 F.2d 822, 832 (7th Cir.), cert. denied, 502 U.S. 917 (1991) and 502 U.S. 1036 (1992); *United States* v. *Masters*, 840 F.2d 587, 590 (8th Cir. 1988); *United States* v. *Kennedy*, 714 F.2d 968, 975 (9th Cir. 1983), cert. denied, 465 U.S. 1034 (1984); *United States* v. *Pfingst*, 477 F.2d 177, 193 (2d Cir.), cert. denied, 412 U.S. 941 (1973).

The cases that petitioner invokes (Pet. 10-12) do not conflict with those decisions. The Seventh Circuit's decision in *United States* v. *Fountain*, 642 F.2d 1083, cert. denied, 451 U.S. 993 (1981), rejected a defendant's claims that the district court had "handicapp[ed] his trial preparation" in a manner that violated Federal Rule of Criminal Procedure 12(e) (1981) by declining to rule on a motion to exclude prior convictions at a pretrial conference, and instead ruling on the motion after a later evidentiary hearing. 642 F.2d at 1086-1087. The Fourth Circuit's decision in *United States* v. *Cavender*,

578 F.2d 528 (1978), reversed a conviction on the ground that the district court had not made adequate findings to support its ruling that certain convictions could be used to impeach a defendant under Federal Rule of Evidence 609, 578 F.2d at 531-532, and the ground that the record did not support admission of one of the convictions, *id.* at 533-534. And the Tenth Circuit in *United States* v. *Halbert*, 668 F.2d 489, cert. denied, 456 U.S. 934 (1982), found reviewable—and upheld—a district court's "advance ruling" that a defendant could be impeached with certain evidence under Federal Rule of Evidence 609 if he testified, *id.* at 494-495. These decisions applying Federal Rule of Evidence 609 and considering whether the timing of a decision comported with Federal Rule of Evidence 12(e) (1981) do not conflict with the constitutional holdings of the courts that have addressed whether failure to provide an advance ruling on impeachment violates the constitutional right to testify.

Petitioner is also incorrect in asserting (Pet. 12) that the Eighth Circuit has been "internally inconsistent" in its holdings on the constitutional claim that petitioner presents. The Eighth Circuit has consistently held that "a defendant generally is not entitled to an advance determination of the scope of cross-examination concerning convictions prior to taking the stand." *United States* v. *Key*, 717 F.2d 1206, 1208 (1983) (per curiam) (citing cases). It affirmed that principle in the decision on which petitioner relies. *United States* v. *Rivers*, 693 F.2d 52, 54 (8th Cir. 1982) ("In the usual case, it is only after a defendant takes the stand that a court has a 'duty to rule on a pretrial motion regarding the admissibility of evidence of his prior convictions for purposes of impeachment.'") (citation omitted). The court has also

held that certain trials may present circumstances "so far outside the ordinary situation that the district court's failure to rule" on a motion to preclude convictions before a defendant testified would "amount[] to an abuse of discretion." *United States* v. *Burkhead*, 646 F.2d 1283, 1285 (8th Cir.), cert. denied, 454 U.S. 898 (1981); see *id.* at 1285-1286 (finding such "special circumstances" when the district court bifurcated trial of related conspiracy and substantive counts, and the government sought to impeach a defendant at the conspiracy trial with his convictions at the bifurcated trial on the substantive counts). But petitioner makes no argument that his case presents extraordinary circumstances under the Eighth Circuit's approach, and the Eighth Circuit gave no indication that its decision rested on the constitutional grounds that petitioner advances, rather than the bounds of courts' discretion in applying the Federal Rules of Evidence.

c. In any event, petitioner's case would be an unsuitable vehicle for considering any disagreement over his constitutional argument, because petitioner's constitutional claim is subject only to plain-error review as a result of petitioner's failure to raise the claim in the district court. Pet. App. 43-44. None of the cases that petitioner invokes found reversible plain error. And if this Court granted review, it could affirm the judgment below simply on the ground that petitioner had not satisfied the plain-error standard, without deciding whether defendants are constitutionally entitled to have a court rule on the admissibility of prior convictions as impeachment before making the decision whether to testify.

2. Petitioner separately contends (Pet. 16-24) that a defendant can establish a Sixth Amendment violation without demonstrating an actual conflict of interest that

affected his attorney's performance so long as the defendant raised his conflict claim at trial—even when defense counsel and the district court determined that no conflict existed. That contention also does not warrant further review.

a. As an initial matter, petitioner's case would be an inappropriate vehicle for reviewing his argument regarding the standard for conflict claims because, as the court of appeals recognized, petitioner forfeited the argument he now presses. Pet. App. 27 n.11. As a result, the court of appeals did not assess the merits of petitioner's argument that he need not show that an alleged conflict adversely affected counsel's performance. *Ibid.* This Court's "traditional rule * * * precludes a grant of certiorari" when "'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner has not challenged the determination below that he forfeited his claim by failing to adequately develop it in his brief on appeal and he has offered no reason why this Court should dispense with its traditional rule in this case.

b. In any event, petitioner is mistaken in asserting that when a defendant alleges his attorney has a conflict of interest from a prior representation but defense counsel and the district court determined otherwise, the defendant can establish a violation of his Sixth Amendment rights without showing an actual conflict that affected counsel's conduct of the trial.

Because 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,'" "defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation." *Mickens* v. *Taylor*,

535 U.S. 162, 166 (2002) (citation omitted). Accordingly, "[a]s a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Ibid.* (quoting *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984)).

A defendant is relieved of the need to demonstrate prejudice 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, as this Court explained in *Mickens*, defendants may obtain automatic reversal in one circumstance: when "defense counsel [was] forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." *Id.* at 168 (discussing *Holloway* v. *Arkansas*, 435 U.S. 475 (1978)). This Court has stated that the presumption of prejudice under such circumstances reflects, in part, the fact that "defense counsel 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, this Court has held that when no objection to representation of co-defendants was raised at trial, "prejudice will be presumed only if the conflict has significantly affected counsel's performance—thereby rendering the verdict unreliable." *Mickens*, 535 U.S. at 173 (discussing *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980)). The requirement that a defendant show that a conflict significantly affected counsel's performance applies even when "the trial court fail[ed] to inquire into a potential conflict of interest about which it knew or reasonably should have known." *Id.* at 164. "The trial

court's awareness of a potential conflict," this Court has reasoned, "neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable." *Id.* at 173.

Those principles undermine petitioner's contention that a defendant can establish a Sixth Amendment violation from an attorney's prior representation without showing any adverse impact, in cases in which the defendant asserted a conflict before the district court but the court and defense counsel each concluded that no conflict existed. See Pet. 21 (suggesting that in these circumstances a defendant should be required to show "division of loyalties" but not "[a]dverse impact"). As a threshold matter, this Court has reserved the question whether even a showing of adverse impact suffices to demonstrate a Sixth Amendment violation in a case involving successive representations, leaving open the possibility that a defendant must instead meet the higher standard of showing prejudice to the outcome of the trial. See *Sullivan*, 446 U.S. at 350; *Mickens*, 535 U.S. at 175-176.

At minimum, however, a defendant in petitioner's circumstances cannot obtain relief without showing at least some adverse impact on his attorney's representation. This Court has presumed prejudice only in circumstances in which "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry [into prejudice] is unnecessary." *Mickens*, 535 U.S. at 166. A case in which defense counsel and the district court have considered a claim of a conflict and found that no conflict exists is not one that rises to that level. Cf. *id.* at 167 (recognizing that "a defense attorney is in the best position to determine when a conflict exists"). And it is hard to see how a presumption of prejudice in such

cases could be squared with *Mickens*, which declined to apply a presumption where a district court was on notice of a conflict but conducted no inquiry—circumstances that seem substantially more likely to involve a risk of prejudice. See *id.* at 164-165, 173-174.

c. Petitioner's contention does not implicate any conflict in the courts of appeals. Petitioner identifies no court that has held that cases such as his are governed by petitioner's proposed division-of-loyalties standard. Instead, he asserts that a conflict exists "on the related issue" of when forgoing "an otherwise available avenue of defense constitutes 'adverse impact.'" Pet. 22; see Pet. 22-23 (asserting that the court below and the Second Circuit require only that a "foregone avenue of defense must be 'plausible'" but that other courts apply a more stringent standard) (citation omitted). Any conflict on the meaning of the adverse-impact standard, however, does not support review of the distinct question whether the adverse-impact standard applies at all in cases such as petitioner's. And petitioner has appropriately not sought review in this case of the meaning of the adverse-impact standard. Because the court below held that petitioner did not satisfy the standard that petitioner regards as most favorable to defendants, this case would not be a suitable vehicle for reviewing any discrepancy among courts' formulations of the adverse-impact standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOHN P. CRONAN
Acting Assistant Attorney General
WILLIAM A. GLASER
Attorney

DECEMBER 2017