

No. _____

In The
Supreme Court of the United States

_____ Δ _____
GILBERT MENDEZ,,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent,

On Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Sixth Circuit

_____ Δ _____
PETITION FOR WRIT OF CERTIORARI

_____ Δ _____
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QUESTIONS PRESENTED:

- 1 Whether the Court of Appeals erred by failing to recognize that a U.S. District Court lacks subject-matter jurisdiction over a criminal prosecution when the plaintiff United States of America is not represented in that court by the United States Attorney or by a validly licensed and properly qualified Assistant United States Attorney.
2. Whether the Court of Appeals erred by failing to recognize that a felony prosecution violates the due process guarantee of the Fifth Amendment when it gives the appearance of impropriety because the counsel for the plaintiff United States of America knowingly and willfully perpetrated a fraud upon the trial court and the defendant when he falsely represented himself to possess a valid law license and where his employer, the United States Department of Justice, was grossly negligent by never making any reasonable attempt to verify independently that he was entitled to appear and practice before that trial court.

LIST OF ALL PARTIES TO THE PROCEEDING

Undersigned counsel of record hereby certifies in accordance with Rule 14.1(B) that the following persons have an interest in the outcome of this case:

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gilbert Mendez respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in this case, refusing to reverse the decision of the United States District Court for the Northern District of Ohio which dismissed Mr. Mendez' Motion to Vacate his criminal conviction for conspiracy to distribute, and possession of, a controlled substance.

OPINIONS BELOW

The Judgments and Opinions of the United States District Court for the Northern District of Ohio and of the United States Court of Appeals for the Sixth Circuit are included in Appendices "A", "B", "C", and "D" hereof.

JURISDICTION

This Court has jurisdiction to consider this case by way of Writ of Certiorari pursuant to 28 U.S.C. § 1254. The decision of the Court of Appeals for the Sixth Circuit was entered on September 26, 2018 (Appendix "D").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . .

28 U.S.C. § 516. Conduct of litigation reserved to Department of Justice

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. §530.B(a). Ethical standards for attorneys for the Government

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

Fed. R. Civ. Proc., Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

(a) FINDINGS AND CONCLUSIONS.

...
(6) Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

Fed. R. Crim. Proc., Rule 1. Scope; Definitions

...
(b) Definitions. The following definitions apply to these rules:

(1) "Attorney for the government" means:
(A) the Attorney General or an authorized assistant;
(B) a United States attorney or an authorized assistant;

...
(D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.

Fed. R. Crim. Proc., Rule 7. The Indictment and the Information**...
(c) Nature and Contents.**

(1) In General. The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. For purposes of an indictment referred to in section 3282 of title 18, United States Code, for which the identity of the defendant is unknown, it shall be sufficient for the indictment to describe the defendant as an individual whose name is unknown, but who has a particular DNA profile, as that term is defined in section 3282.

Local Criminal Rule 57.5. Admission of Attorneys to Practice in the Northern District of Ohio**(a) Roll of Attorneys.**

The Bar of this United States District Court for the Northern District of Ohio consists of those admitted to practice before this Court who have taken the oath prescribed by the Rules in force when they were admitted. No person shall be permitted to practice in this Court or before any officer thereof as an attorney or to commence, conduct, prosecute, or defend any action, proceeding, or claim in which such person is not a party concerned, either by using or subscribing his or her own name or the name of any

other person, unless he or she has been previously admitted to the Bar of this Court.

(b) Bar Admission.

It shall be requisite to the admission of attorneys to practice in this Court that they shall have been admitted to practice in the highest court of any state, territory, the District of Columbia, an insular possession, or in any district court of the United States, that they are currently in good standing with such court and that their private and professional characters appear to be good. All attorneys admitted to practice in this Court shall be bound by the ethical standards of the Ohio Rules of Professional Conduct adopted by the Supreme Court of Ohio, so far as they are not inconsistent with federal law.

...
(j) Continuing Maintenance of Good Standing.

It shall be requisite to the continuing eligibility of attorneys to practice in this Court that they are currently in good standing with the highest court of any state, territory, the District of Columbia, an insular possession, or in any district court of the United States, and that their private and professional characters appear to be good. All attorneys admitted to practice in this Court are deemed by their signature on any pleading, written motion, and other paper to certify that they are currently in good standing of the Bar of a Court of the United States or of the highest court of any state. Should the status of an attorney change so that they are no longer in good standing in such court, they shall notify the Clerk of Court of this Court in writing no later than 10 days from the change in status.

(k) Attorneys Funded from Judiciary Appropriations and Attorneys for the United States of America.

Attorneys funded from judiciary appropriations and attorneys for the United States are permitted to appear upon filing the applicant's personal

statement, on the form approved by the Court and furnished by the Clerk, and the Oath or Affirmation of Admission. The admission fee required by subsection (g) is waived.

CONCISE STATEMENT OF MATERIAL FACTS

On October 27, 2004, David P. Folmar, Jr., the Assistant U.S. Attorney assigned to the Northern District of Ohio who handled the prosecution of Mr. Mendez, signed and filed the indictment of Mr. Mendez that gave rise to these proceedings.

Although Folmar had, at various times, practiced law in Florida and North Carolina, at the time he signed that indictment—in fact, from November, 2003 until March, 2009—Folmar was ineligible to practice before any U.S. district court because he was only an retired member of the Florida bar and had been ruled ineligible to practice by the North Carolina Bar. *North Carolina Bar v. Folmar*, 09 DHC 31 (N.C. Discip. Hrg. Comm'n June 11, 2010), p. 2 (Appendix “E” at App.11-12).

However, at no time prior to the conclusion of Gilbert Mendez’ prosecution did either Folmar or his employer, the U.S. Department of Justice, disclose to Mendez that Folmar’s appearance in this case was unlawful or that this unlawfulness deprived the Northern District of Ohio of jurisdiction over Mendez’ indictment.

Further, Folmar not only failed to notify the district court and the defendant of his ineligibility to appear but he fraudulently attempted to conceal that ineligibility by knowingly filing annually with his employer false certificates of bar membership, *id.* (App.12). From the disciplinary proceedings against Folmar before the North Carolina bar (Appendix “E”), the clear implication is that his employer, the

U.S. D.o.J, also passively relied solely on Folmar's self-serving certificates of bar membership and utterly failed to take any independent steps to verify his status with either the Florida or North Carolina bars.

On June 2, 2005, still in ignorance of the jurisdictional defect in the proceedings against him, Mr. Mendez pled guilty to the October 27, 2004 indictment (Appendix "F" at App.22). On August 4, 2005, still in ignorance of Mr. Folmar's ineligibility, Mr. Mendez was sentenced in that case.

Subsequent to Mr. Mendez' plea and sentencing, he became aware that the United States was proposing to charge him in another case as a multiple offender and, on the basis of his 2005 plea, to seek an enhanced sentence against him. Thus Mr. Mendez has suffered substantial prejudice from Mr. Folmar's concealment of the Northern District's lack of jurisdiction to entertain that plea. Not only was Mr. Mendez denied Fifth Amendment due process by that proceeding's appearance of impropriety, but he was improperly exposed to criminal liability in the *ultra vires* initial criminal matter and also was further improperly placed in jeopardy of enhanced punishment in any later case.

On December 29, 2017, Mr. Mendez filed in that district court a motion to vacate his 2005 conviction. On February 28, 2018, the Northern District of Ohio denied his motion (Appendix "A"). From that denial, Mr. Mendez filed an appeal with the United States Court of Appeal for the Sixth Circuit.

On July 24, 2018, the Sixth Circuit *per curiam* remanded Mr. Mendez' appeal to the Northern District to grant or deny a certificate of appealability (Appendix "C"). On July 26, 2018, The Northern District of Ohio denied that certificate of appealability (Appendix "B").

Mister Mendez therefore moved the Sixth Circuit to grant the certificate of appealability but on September 26, 2018, that court likewise denied the requested certificate (Appendix “D”).

From that denial of an appeal and from the district court’s denial of his motion to vacate, Mr. Mendez is filing this Petition for a Writ of Certiorari.

REASONS FOR ALLOWING WRIT APPLICATION

Pursuant to Supreme Court Rule 12, the decision of the Sixth Circuit in this case deals with the important question of federal law, *viz.* whether the United States’ failure to be represented by a validly-licensed attorney deprives the district court of jurisdiction pursuant to *United States v. Providence Journal Co.*, 485 U.S. 693, 699, 707-08 (1988). This question has not been, but should be, settled by the United States Supreme Court.

Further, the Sixth Circuit decision here conflicts directly with the decision of the Fourth Circuit in *United States v. Bennett*, 464 Fed.Appx. 183, 184-85 (4th Cir. 2012) and the decisions of the Ninth Circuit in *United States v. Plesinski*, 912 F.3d 1033, 1038 (9th Cir. 1990) and *United States v. Durham*, 941 F.2d 886, 892 (9th Cir. 1991).

The Sixth Circuit’s instant decision also implicitly conflicts Appeals with this Court’s decision in *In re Murchison*, 349 U.S. 133, 136 (1955) and the Fifth Circuit’s decision in *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995) in that Mr. Folmar’s deliberate fraud and his employer’s reckless disregard for the prosecution’s constitutional obligations create the appearance of impropriety that these two cases held constitutes *ipso facto* the denial of constitutionally-guaranteed due process.

STANDARD OF REVIEW

The standard of review applicable to both the Questions Presented for Review herein is that of “clearly erroneous”, pursuant to Rule 52(a)(6), Fed. R. Civ. Proc. Petitioner Gilbert Mendez respectfully suggests that the errors of law set forth herein are, indeed, clearly erroneous.

QUESTION PRESENTED FOR REVIEW NO. 1

Whether the Court of Appeals erred by failing to recognize that a U.S. District Court lacks subject-matter jurisdiction over a criminal prosecution when the plaintiff United States of America is not represented in that court by the United States Attorney or by a validly licensed and properly qualified Assistant United States Attorney.

It is, of course, black letter law that any decision by a court that lacks jurisdiction over a matter is, *ipso facto*, null and void *ab initio*. Lack of a district court’s jurisdiction over any proceeding may be noticed at any time during the pendency of that proceeding, *United States v. Durham*, 941 F.2d 886, 892 (9th Cir. 1991). A U.S. district court does not have jurisdiction over a felony criminal prosecution unless a properly qualified representative of the Government participates in the action, *see United States v. Providence Journal Co.*, 485 U.S. 6693, 699, 707-08 (1988) (dismissing previously-granted writ of certiorari for lack of jurisdiction in a criminal case where special prosecutor lacked authority to represent United States); *United States v. Bennett*, 464 Fed. Appx. 183, 184-85 (4th Cir. 2012) (“A federal district court is without jurisdiction in a criminal prosecution where the Government lacks an authorized representative”, citing *Providence Journal Co.*, 485 U.S. at 708); *Durham*, 941 F.2d at 892 (“In

every case addressing the authority of a Special Assistant United States Attorney the jurisdiction of the district court was in question"); *United States v. Plesinski*, 912 F.3d 1033, 1038 (9th Cir. 1990) (analyzing whether the district court had jurisdiction over a prosecution when the Special Assistant U.S. Attorney was defectively appointed, and therefore unauthorized to participate).

While some courts—including those cited by the courts below in this instant case—have found that a prosecution brought by a prosecutor who lacked a current law license was still a valid proceeding because that prosecutor was a “*de facto* officer”, all of those opinions considered solely the unlicensed prosecutor’s manner of **appointment** but none of them addressed the effect of that unlicensed prosecutor’s appearance on the *district court’s jurisdiction* over the case.

By definition, a *de facto* officer is “[i]llegitimate because not legally recognized”, *Black’s Law Dictionary* 479 (9th ed. 2009), *s.v.* “*de facto*”. By itself, that suggests that a “*de facto* officer” cannot be a proper representative under *Providence Journal Co., supra*, for the purpose of establishing jurisdiction over a criminal matter.

“Except as otherwise authorized by law, the conduct of litigation in which the United States ... is a party ... is reserved to officers of the Department of Justice, under the direction of the Attorney General.” 28 U.S.C. § 516. An indictment “must be signed by an attorney for the government.” Fed. R. Crim. Proc., Rule 7(c)(1). “Attorney for the government” is defined as “(A) the Attorney General or an authorized assistant; (B) a United States attorney or an authorized assistant; ... and any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.” Fed. R. Crim. Proc., Rule 1(b)(1).

The Local Criminal Rules of the U.S. District Court for the Northern District of Ohio require attorneys appearing before that court to be active members of a state bar or the bar of another U.S. district court, Local Crim. R., Rule 57.5(b). Further, those rules stipulate that an attorney's signature on any pleading or document filed in that court constitutes a certificate to the court that he or she remains in good standing with the predicate bar and he or she is required to report to the court within ten days any change in his or her status with that predicate bar, Local Crim. R., Rule 57.5(j).

In the instant case, however, when Assistant U.S. Attorney David P. Folmar, Jr. signed the indictment of Gilbert Mendez, he falsely certified to the court that he remained in good standing when, in fact, he knew he was not eligible to practice in that court because he was in inactive status with the Florida bar and ineligible to practice with the North Carolina bar (App."E" at App.11-12). This simply compounded his fraudulent conduct when he filed a separate certificate with his employer, the U.S. Department of Justice, likewise affirmatively certifying that he remained in good standing with the North Carolina bar (App.12).

Because Mr. Folmar was not an active member of either the Florida or North Carolina bars on the day on which he obtained the indictment of Mr. Mendez, he was not a proper representative of the Government and, as a result, the Northern District of Ohio lacked jurisdiction over that defective indictment. Due to that lack of jurisdiction, that underlying indictment was a nullity and so must be dismissed. *See, e.g., United States v. Garcia-Andrade*, 2013 WL 4027859, p. 9 (S.D.Cal. 2013) (not reported in F.Supp.2d).

Thus, not only was Mr. Mendez fraudulently induced by Mr. Folmar to plead guilty, but the

district court's lack of jurisdiction over Mr. Folmar's prosecution of Mr. Mendez constituted exculpatory material that Mr. Folmar and his employer, the U.S. Department of Justice, were required to disclose to Mr. Mendez under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *Paradis v. Arave*, 240 F.3d 1169, 1177-78 (9th Cir. 2001) (evidence showing lack of jurisdiction is *Brady* material).

Therefore, even though the Sixth Circuit erred when it failed correctly to apply *Providence Journal Co., supra*, in its holding that Mr. Folmar's unlawful status by itself did not to have constitute a denial to Mr. Mendez of due process, the prosecution's failure to disclose to him that fact and the jurisdictional defect it created did, by violating his rights under *Brady, supra*, deny him constitutionally guaranteed due process.

QUESTION PRESENTED FOR REVIEW NO. 2

Whether the Court of Appeals erred by failing to recognize that a felony prosecution violates the due process guarantee of the Fifth Amendment when it gives the appearance of impropriety because the counsel for the plaintiff United States of America knowingly and willfully perpetrated a fraud upon the trial court and the defendant when he falsely represented himself to possess a valid law license and where his employer, the United States Department of Justice, was grossly negligent by never making any reasonable attempt to verify independently that he was entitled to appear and practice before that trial court.

While some courts, including those cited by the courts below in this instant case, have held that a criminal defendant does not have a constitutional

due process right to a properly-licensed prosecutor as such, there are other effects of Mr. Folmar's misconduct that appear to be *res novo*.

The North Carolina disciplinary authorities specifically found, and Mr. Folmar admitted (App. "E"), both that he was in inactive status with the Florida bar, and thus was ineligible to practice in federal court on the basis of that membership, and that he was ineligible to practice in North Carolina because he had, for many years, failed properly to report attendance at the mandatory number of hours of approved continuing legal education.

Further, it was found, and Mr. Folmar admitted, that he had filed false certifications with the U.S. Department of Justice, fraudulently claiming that he was eligible to practice in federal court (Appendix "E" at App.12).

It also appears from those proceedings' references to Mr. Folmar's false certifications to the DoJ that the DoJ itself merely passively accepted whatever Mr. Folmar represented to it and made no independent effort to verify his credentials, even though doing so would have taken only minimal effort.

Taken together, Mr. Folmar's active fraud on the court and on Mr. Mendez and the DoJ's gross negligence in failing to verify his bar standing inevitably and conclusively present the appearance of impropriety. But that appearance of impropriety itself constitutes *ipso facto* a denial of constitutionally guaranteed due process under *In re Murchison*, 349 U.S. 133, 136 (1955) and *U.S. v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995).

None of the cases cited by the courts below, for the proposition that a defendant has no right to a licensed prosecutor, gave any consideration to these issues of the appearance of impropriety caused by an unlicensed prosecutor's deliberate fraud and by his

employer's utter negligence in assuring Assistant U.S. Attorneys' qualifications to hold their appointments.

This problem is not mitigated, but indeed is only aggravated, by the Sixth Circuit's astonishing statement that any person is "authorized" to represent the United States, for the purposes of 28 U.S.C. § 516 and Fed. R. Crim. Proc., Rules 1(b)(1) and 7(c)(1), if that person is merely "assigned" to do so by officials within the Department of Justice. (Appendix "D" at App.8). If permitted to stand, this ruling means, *e.g.*, that any unlicensed paralegal or law clerk employed could be "assigned" to represent the government in litigation, in total disregard of the rules of the federal courts that define members of those courts' bars and regulate the right of audience therein.

CONCLUSION

For the reasons set forth above, the Petitioner Gilbert Mendez respectfully prays this Honorable Court to issue a Writ of Certiorari to review the Sixth Circuit's erroneous upholding of the district court's denial of his Motion to Vacate Conviction.

Dated: December 25, 2018

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APPENDIX INDEX

APPENDIX A

February 28, 2018. United States District Court for the Northern District of Ohio, Donald C. Nugent, Judge. Order denying Gilbert Mendez' Motion to Vacate Conviction.

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APPENDIX F

June 22, 2005. United States District Court for the Northern District of Ohio. Gilbert Mendez' Change of Plea from Not Guilty to Guilty.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:04-CR-0548
JUDGE DONALD C. NUGENT
[Dated February 27, 2018]

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.....)
)
GILBERT MENDEZ,)
Defendant.)

ORDER

This matter is before the Court upon a Motion to Vacate Conviction filed by Defendant, Gilbert Mendez (“Mr. Mendez”). (ECF #53). The United States of America filed a Response to the Motion to Vacate. (ECF #54). For the reasons set forth herein, Mr. Mendez’ Motion is DENIED.

On June 2, 2005, after being indicted by a grand jury, Mr. Mendez plead guilty before this Court to conspiracy to distribute and possession with intent to distribute a controlled substance. (See ECF #24). Mr. Mendez now asks that his conviction be vacated because the Assistant United States Attorney who prosecuted the case, David P. Folmar, Jr., ("Mr. Folmar"), was not properly licensed to practice law at the time. The United States cedes that Mr. Folmar's license to practice law was in fact suspended by the

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North Carolina State Bar when he prosecuted the case before the grand jury against Mr. Mendez. (See ECF #54, p. 2).

However, case law relating to this issue does not support vacating Mr. Mendez' conviction. First, a defendant does not have a constitutional right to a properly licensed prosecutor. *See, Hamilton v. Roehrich.* 628 F.Supp.2d 1033, 1050-54 (D.Minn. 2009). Therefore, the prosecution of a case by an unlicensed or improperly licensed prosecutor does not automatically violate a defendant's rights, absent a showing of some sort of prejudice. *Id.* A defendant would have to show that the prosecutor's "violation substantially influenced the grand jury's decision to indict" or that there is "grave doubt that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988). A post-conviction claim based on a prosecutor's lack of proper licensure must demonstrate prejudice, and courts must reject a claim where no prejudice is shown. *See United States v. McNeill*, 389 Fed.Appx. 233, 235 (4th Cir. 2010).

The Middle District of North Carolina has addressed similar cases involving David J. Folmar's practice as an attorney. In 2014, that court refused to dismiss an indictment based upon the fact that Mr. Folmar's law license had been suspended during the time that he presented the defendant's case to the grand jury, which technically made Mr. Folmar an unauthorized person present before the grand jury, pursuant to the rules of criminal procedure, because there is no federal constitutional right to a properly licensed prosecutor. *See Wyatt v. U.S.*, 2014 WL 1330300 (M.D. N.C. Mar. 28, 2014). Furthermore, the *Wyatt* Court found that the defendant

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could not show how this fact substantially influenced the grand jury's decision to indict him on drug charges, as required to show prejudice. The Middle District of North Carolina had previously denied another motion to vacate filed by a defendant who alleged his conviction was invalid following Mr. Folmar's prosecution while his law license was suspended. *See Thomas v. U.S.*, 2014 WL 1230217 (M.D. N.C. Mar. 25, 2014). Other federal districts have adhered to these findings and have denied motions to vacate under similar circumstances. *See, e.g., Clark v. Secretary, Dept. of Corrections*, 2016 WL 8453697 (N.D. Fla. Dec. 13, 2016).

Mr. Mendez is not entitled to a licensed prosecutor, and Mr. Mendez has not shown that he was prejudiced in any way by the fact that Mr. Folmar's law license was suspended at the time he prosecuted this case. Therefore, absent any evidence that Mr. Folmar's unlicensed status substantially affected the grand jury's decision to indict, Mr. Mendez' Motion (ECF #53) is DENIED.

IT IS SO ORDERED.

/s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: February 27, 2018

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CASE NO. 1:04-CR-0548
JUDGE DONALD C. NUGENT
[Dated July 26, 2018]

UNITED STATES OF AMERICA,)
 Plaintiff,)
)
 vs.....) ORDER
)
GILBERT MENDEZ,)
 Defendant.)
)

This matter is before the Court on a Remand from the Sixth Circuit Court of Appeals, directing the Court to determine whether a certificate of appealability should be granted to Mr. Mendez allowing him to appeal the denial of his Motion to Vacate Conviction. Therefore, this Court hereby certifies that there is no basis upon which to issue a certificate of appealability for an appeal from this Court's February 28, 2018 Order denying petitioner's Motion for to Vacate Conviction (ECF #55). IT IS SO ORDERED.

s/
DONALD C. NUGENT
United States District Judge

Dated: July 25, 2018

APPENDIX C

Case No. 18-3286

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ORDER

GILBERT MENDEZ

Petitioner - Appellant

v.

UNITED STATES OF AMERICA

Respondent – Appellee

This appeal is being held in abeyance and further **REMANDED** to the district court for the sole purpose of determining whether to grant or deny a certificate of appealability, pursuant to Federal Rules Of Appellate Procedure 22(b). If the court is inclined to issue a certificate, it should specify which issues are so certified. See 28 U.S.C.A § 2253(c)(3).

**ENTERED PURSUANT TO RULE 45(a),
RULES OF THE SIXTH CIRCUIT**

Deborah S. Hunt, Clerk

Issued: July 24, 2018 s/

Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-3286

[Filed September 26, 2018]

GILBERT MENDEZ,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

ORDER

Gilbert Mendez, a federal prisoner represented by counsel, appeals the district court's denial of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Mendez moves the court for a certificate of appealability (COA).

In 2005, Mendez pleaded guilty to conspiracy to possess with intent to distribute a controlled substance and received a sentence of seventy-eight months in prison and five years of supervised release. Mendez did not appeal. In 2008, the district court reduced Mendez's sentence to sixty-three months in prison pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure. Mendez was released from prison and started his term of supervised release in May 2009.

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In December 2012, Mendez's probation officer petitioned the district court to revoke Mendez's term of

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supervised release based on several alleged violations of the terms imposed by the court. The district court continued Mendez's revocation hearing several times. At some point, Mendez absconded to the Southern District of California, where he was arrested in March 2016. The district court eventually sentenced Mendez for his supervised release violations in May 2018.

In December 2017, while those revocation proceedings were still ongoing, Mendez filed a motion to vacate his underlying drug-trafficking conviction pursuant to § 2255. Mendez claimed that the indictment was invalid because the Assistant United States Attorney (AUSA) who prosecuted him was suspended from the practice of law in the State of North Carolina at the time and held no other valid law license. Mendez argued therefore that the district court lacked jurisdiction over his case because the prosecution had not been initiated "by a proper representative of the Government." *United States v. Providence Journal Co.*, 485 U.S. 693, 707-08 (1988). The government conceded that the AUSA's law license had been administratively suspended but argued that Mendez was not entitled to relief from his conviction because he could not show that he was prejudiced by being prosecuted by an unlicensed attorney. The district court agreed with the government, denied Mendez's motion on the merits, and denied Mendez a COA.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are ade-

quate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Reasonable jurists would not debate the district court’s resolution of Mendez’s motion to vacate. Mendez has not cited any authority that negates a district court’s jurisdiction over a criminal prosecution because the AUSA assigned to the case lacks a valid law license. Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires only that the indictment be “signed by an attorney for the government,” which includes “a United States attorney or *an authorized assistant*.” Fed. R. Crim. P. 1(b)(1)(B) (emphasis added); *cf. United States v. Forman*, 71 F.3d 1214, 1219-20 (6th Cir. 1995) (holding that “an authorized assistant of the Attorney General” for purposes of the Federal Rules of Criminal Procedure means “one whose superiors have assigned him or her to work in some official capacity on the criminal proceeding”). Mendez makes no claim that, though unlicensed, the AUSA who prosecuted him

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was not assigned by his superiors to work on his case in an official capacity. Reasonable jurists therefore would not debate whether Mendez’s prosecution was initiated “by a proper representative of the Government.”

Accordingly, the court **DENIES** Mendez’s application.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt

Deborah S. Hunt, Clerk

APPENDIX E

STATE OF NORTH CAROLINA

**BEFORE THE DISCIPLINARY
HEARINGCOMMISSION OF THE
WAKE COUNTY NORTH CAROLINA
STATE BAR**

09 DHC 31

**STAMPED
June 11, 2010
DHC**

**The North Carolina State Bar,
Plaintiff**

v.

**David P. Folmar, Jr., Attorney,
Defendant**

Consent Order of Discipline

This matter came before a hearing panel of the Disciplinary Hearing Commission composed of Tommy W. Jarrett, Chair, Theodore C. Edwards, III and Karen B. Ray. Leonor Bailey Hodge represented Plaintiff. Defendant was represented by Wade M. Smith. Defendant waives a formal hearing in the above referenced matter. The parties stipulate and agree to the findings of fact and conclusions of law recited in this consent order. The parties consent to the discipline imposed by this order. Defendant knowingly, freely and voluntarily waives his right to appeal this consent order or to challenge in any way the sufficiency of the

findings by consenting to the entry of this order.

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar (hereinafter "State Bar"), is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.

2. Defendant, David P. Folmar, Jr. (hereinafter "Defendant"), was admitted to the North Carolina State Bar on August 18, 1989 and at all times referred to herein, possessed a license to practice law in North Carolina, subject to the rules, regulations, and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina. Defendant is not now, and was not during the times referred to herein, an active member of the North Carolina State Bar authorized to practice law in North Carolina.

3. During the times relevant herein, Defendant actively engaged in the practice of law as an Assistant United States Attorney for the United States Department of Justice in

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the United States Attorney's Offices located in the Eastern District of North Carolina at Raleigh, the Eastern District of Tennessee at Knoxville, the Northern District of Ohio at Cleveland, and the Middle District of North Carolina at Greensboro.

4. Defendant is required to be an active member of a bar of any U.S. jurisdiction in

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order to practice law as an Assistant United States Attorney.

5. During the times relevant herein, Defendant possessed a license to practice law from two U.S. jurisdictions: Florida and North Carolina. However, from November 14, 2003 through March 2009 Defendant was not an active member of a bar of any U.S. jurisdiction and was not authorized by Florida or North Carolina to practice law.

6. Although Defendant is licensed to practice law by the Florida bar, Defendant's status with the Florida Bar is retired. Therefore, from November 14, 2003 through March 2009 Defendant was not eligible to practice law pursuant to his Florida license.

7. On or about July 18, 2003, the North Carolina State Bar deposited into the United States Mail, certified mail, return receipt requested, addressed to Defendant, a Notice to Show Cause why he should not be suspended from the practice of law by the North Carolina State Bar for his failure to comply with mandatory Continuing Legal Education Requirements.

8. The Notice to Show Cause was mailed to Defendant at his address of record with the North Carolina State Bar Membership Department which, at that time, was 2765 Oakview Circle, Cleveland, Ohio.

9. Defendant was suspended from the practice of law on November 5, 2003 pursuant to an Order of Suspension for Failure to Comply with Continuing Legal Education (CLE) Requirements dated November 5, 2003.

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10. Defendant became aware of his suspension for failure to comply with CLE requirements in or about early 2004.

11. Defendant knew that he was suspended from the practice of law for his failure to comply with mandatory CLE requirements.

13. *[Sic]* Despite the fact that Defendant was suspended from the practice of law, he continued to work as an Assistant United States Attorney, to appear in court on behalf of the United States Attorney and to prosecute cases on behalf of the United States from November 14, 2003 through March 2009.

14. *[Sic]* Defendant concealed his suspension from his supervisors.

15. *[Sic]* Defendant falsely held himself out to the courts, his colleagues and the public as authorized and qualified to practice law.

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16. *[Sic]* Defendant knew that he was required to have an active law license in order to prosecute cases as an Assistant United States Attorney.

17. *[Sic]* Defendant knew he had no active law license from November 14, 2003 through March 2009. Despite this fact, Defendant executed "Attorney's Bar Re-Certification" forms on March 22, 2005, March 14, 2006, April 16, 2007, November 6, 2007 and April 15, 2008 falsely certifying to his employer, the United States Department of Justice, that he was an active member of a state bar.

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Panel and the Panel has jurisdiction over De-

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fendant, David P. Folmar, Jr., and over the subject matter.

2. Defendant's conduct, as set forth in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-24(b)(2) in that Defendant violated the Rules of Professional Conduct as follows:

- a. by practicing law as an Assistant United States Attorney while his North Carolina law license was suspended and without being licensed to practice law in any other jurisdiction, Defendant engaged in the unauthorized practice of law in violation of Rule 5.5(a) and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d); and
- b. by concealing his suspension from the courts, his supervisors and his colleagues; by executing "Attorney's Bar Re-Certification" forms falsely certifying that he was an active member of a state bar; and by holding himself out to the courts, his colleagues and the public as authorized and qualified to practice law, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c).

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Panel enters the following:

FINDINGS OF FACT REGARDING DISCIPLINE

1. Defendant was suffering from depression and turned to alcohol during the time of his misconduct.
2. Defendant was having personal and family problems during the time of his misconduct.

3. Defendant has sought counseling for his depression.

4. Prior to the occurrence of the misconduct at issue in this case, Defendant's professional reputation among the federal prosecution and defense bars was unblemished.

5. Defendant has the professional reputation of being an honest lawyer.

6. Although Defendant's law license was administratively suspended for failure to comply with mandatory CLE, Defendant always maintained adequate CLE course credit throughout the period of his suspension although he failed to submit the necessary forms.

7. Defendant has exhibited extreme remorse for his misconduct.

8. Defendant was disciplined by the United States Department of Justice Office of Professional Responsibility for his misconduct that is at issue in this case.

Based on the foregoing Findings of Fact, the Hearing Panel enters the following:

CONCLUSIONS REGARDING DISCIPLINE

1. The Hearing Panel has carefully considered all of the different forms of discipline available to it, including admonition, reprimand, censure and suspension.

2. The Hearing Panel has considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(1) and (3) of the Rules and Regulations of the State Bar and finds the following factors are applicable.

- a. negative impact of the Defendant's actions on public's perception of the profession;
- b. negative impact of Defendant's actions on the administration of justice;

- c. acts of dishonesty, misrepresentation, deceit, or fabrication;
- d. experience in the practice of law;
- e. the absence of prior disciplinary offenses;
- f. effect of personal and emotional problems on the conduct in question;

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- g. full and free disclosure to the Hearing Panel and cooperative attitude toward the proceedings;
- h. remorse;
- i. character and reputation; and
- j. imposition of other penalties or sanctions.

3. Defendant's conduct caused significant harm to the legal profession in that his actions bring the legal profession into disrepute.

4. Defendant's conduct caused significant prejudice to the administration of justice in that, as a result of Defendant's misconduct, criminal defendants who have been convicted and are incarcerated have filed motions to set aside their convictions. This has resulted in burden *[sic]* on the court and upon Defendant's former colleagues.

5. The Hearing Panel has considered lesser alternatives and finds that a censure, reprimand or admonition would be insufficient discipline because of the gravity of the conduct and potential harm to the administration of justice and the legal profession caused by Defendant's conduct.

6. The Hearing Panel finds that discipline short of an active suspension would not adequately protect the public for the following reasons:

- a. Defendant's conduct reflects adversely on his trustworthiness or fitness as a lawyer.
- b. Entry of an order imposing less severe discipline would fail to acknowledge the seriousness of the misconduct and would send the wrong message

to attorneys about the importance of complying with all administrative licensing requirements and to attorneys and the public regarding the conduct expected of members of the Bar of this State.

Based on the foregoing Findings of Fact, Conclusions of Law, Findings of Fact Regarding Discipline and Conclusions of Law Regarding Discipline, the Hearing Panel hereby enters the following:

ORDER OF DISCIPLINE

1. The law license of Defendant, David P. Folmar, Jr., is hereby suspended for five (5) years effective thirty (30) days after service of this Order of Discipline on Defendant.

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2. Defendant shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than thirty (30) days following service of this Order on Defendant.

3. Defendant shall comply with the wind down provisions contained in 27 N.C.A.C. 1B § .0124, the North Carolina State Bar Discipline and Disability Rules.

4. Defendant shall file an affidavit with the Secretary of the North Carolina State Bar within ten days of the effective date of this Order of Discipline certifying that he has complied with the wind down rule.

5. Within fifteen (15) days of the effective date of this Order, Defendant will provide the State Bar with a street address and mailing address at which clients seeking return of their files and records in Defendant's possession or control may obtain such files and records and at which the State Bar may serve any notices or other matters upon him.

6. Defendant shall pay the costs of this proceeding with thirty (30) days of service of the statement of costs upon him by the Secretary of the State Bar.

7. After completion of eighteen (18) months of active suspension of his license, Defendant may apply for a stay of the remainder of the suspension upon filing a petition with the Secretary of the North Carolina State Bar at least thirty (30) days before any proposed effective date of the stay and demonstrating the following by clear, cogent and convincing evidence the following [*sic*]:

- a. That at the time of the petition Defendant is not suffering from any disability that would impair his ability to practice law.
- b. Defendant has continuously participated in mental health counseling provided by a licensed psychologist or psychiatrist, meeting at least monthly with this counselor;
- c. Defendant has provided the Office of Counsel with releases authorizing and instructing his psychological and mental health care providers to provide the Office of Counsel all medical records relating to his evaluation, prognosis, care or treatment, including psychological and mental health evaluations, and authorizing and instructing such providers to submit to interviews by the Office of Counsel;
- d. Defendant has kept the North Carolina State Bar Membership Department advised of his current business and home addresses and notified the Bar of any change in address within ten (10) days of such change;
- e. Defendant has responded to all communications from the North Carolina State Bar, including communications from the Attorney Client

Assistance Program, within thirty (30) days of receipt or by the deadline stated in the communication, whichever is sooner, and has participated in good faith in the State Bar's fee dispute resolution process for any petition of which he receives notice after the effective date of this Order;

- f. That at the time of his petition for stay, Defendant is current in payment of all membership dues, fees and costs, including all Client Security Fund assessments and other charges or surcharges the State Bar is authorized to collect from him, and including all judicial district dues, fees, and assessments.
- g. That at the time of his petition for stay, there is no deficit in Defendant's completion of mandatory Continuing Legal Education (CLE) hours, in reporting such hours or in payment of any fees associated with attendance at CLE programs.
- h. Defendant has not violated the Rules of Professional Conduct or the laws of the United States or of any state or local government during his suspension;
- i. Defendant has properly wound down his law practice and complied with the requirements of 27 N.C.A.C. 1B §.0124, the North Carolina State Bar Discipline and Disability Rules; and
- j. Defendant has paid the costs of this proceeding as reflected on the statement of costs served upon him by the Secretary of the State Bar.

8. If Defendant successfully seeks a stay of the suspension of his law license, such stay will continue in force only as long as Defendant complies with the following conditions:

- a. Defendant shall participate in mental health counseling provided by a licensed psychologist or psychiatrist, meeting at least monthly with this counselor; Defendant will authorize and instruct his counselor to provide quarterly written reports to the State Bar confirming Defendant's continued participation in mental health counseling; the first such report shall be submitted to the State Bar thirty (30) days from the initial date of stay of Defendant's suspension; subsequent reports shall be submitted on the first day of the month of each quarter thereafter; any costs associated with the counseling or reports shall be borne by Defendant;

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- b. Defendant shall provide the Office of Counsel with releases authorizing and instructing psychological and mental health care providers to provide the Office of Counsel all medical records relating to his evaluation, prognosis, care or treatment, including psychological and mental health evaluations, and authorizing and instructing such providers to submit to interviews by the Office of Counsel;
- c. Defendant shall keep the North Carolina State Bar Membership Department advised of his current business and home addresses and notified [*sic*] the Bar of any change of address within ten (10) days of such change;
- d. Defendant shall respond to all communications from the North Carolina State Bar, including communications from the Attorney Client Assistance Program, within thirty (30) days of receipt or by the deadline stated in the communication, whichever is sooner, and shall participate in good faith in the State Bar's fee

dispute resolution process for any petition of which he receives notice after the effective date of this Order;

- e. Defendant is current in payment of all Membership dues, fees and costs, including all Client Security Fund assessments and other charges or surcharges that the State Bar is authorized to collect from him, and including all judicial district dues, fees and assessments;
- f. That there is no deficit in Client's completion of mandatory CLE hours, in reporting of such hours, or in payment of any fees associated with attendance at CLE programs; and
- g. Defendant has not violated the Rules of Professional Conduct or the laws of the United States or of any state or local government during his suspension.

9. If Defendant fails to comply with any of the conditions of the stayed suspension provided in paragraph 8(a)-(g) above, the stay of the suspension may be lifted as provided in § .0114(x) of the North Carolina State Bar Discipline and Disability Rules.

Signed by the undersigned Chair with the full knowledge and consent of the other members of the Hearing Panel, this 9 day of June, 2010.

s/
Tommy W. Jarret, Chair
Hearing Panel

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CONSENTED TO BY:

s/
Leon or Bailey Hodge
Deputy Counsel
The North Carolina State Bar

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P.O. Box 25908
Raleigh, NC 27611
Attorney for Plaintiff

s/
Wade M. Smith
Attorney for Defendant

s/
David P. Folmar, Jr.
Defendant

APPENDIX F

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CASE NO: 1:04 CR 548
[Filed June 2, 2005]**

UNITED STATES OF AMERICA)
)
)
-VS)
)
GILBERT MENDEZ)
)

Minutes of Proceedings before
DONALD C. NUGENT
United States District Judge

COURT REPORTER: Bruce Matthews

Change of Plea

APPEARANCES: Plaintiff: David Folmar, Esq.
Defendant: Walter Madison, Esq.

PROCEEDINGS: The defendant changed his plea
to guilty to Count One of the Superseding In-
dictment. The defendant is referred to the U.S. Pro-
bation office for the preparation of a presentence
report. Sentencing is scheduled for August 11, 2005
at 10:00 a.m.

Jeane M. Wells Ruprecht
Courtroom Deputy