No. 18-842

In the Supreme Court of the United States

GILBERT MENDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to a certificate of appealability on the claim that his 2005 guilty plea should be set aside because the law license of his federal prosecutor had been administratively suspended at the time of the indictment.

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OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability (Pet. App. 6-8) is unreported. The order of the district court denying a certificate of appealability (Pet. App. 4) is unreported. The previous order of the district court (Pet. App. 1-3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2018. The petition for a writ of certiorari was timely filed on Wednesday, December 26, 2018 (following a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C.

841(a)(1) and (b)(1)(A) (2000 & Supp. IV 2004), and 846 (2000). Judgment 1. He was sentenced to 78 months of imprisonment, later reduced to 63 months, to be followed by five years of supervised release. Judgment 2-3; Am. Judgment 2. Petitioner subsequently filed a motion to vacate his conviction and sentence under 28 U.S.C. 2255. D. Ct. Doc. 53 (Dec. 29, 2017). The district court denied the motion and denied a certificate of appealability (COA). Pet. App. 1-3. The court of appeals also denied a COA. *Id.* at 6-8.

1. a. In October and November 2004, a grand jury in the United States District Court for the Northern District of Ohio returned a five-count indictment and superseding indictment, respectively, charging petitioner with various controlled-substance offenses. Indictment 1-5; Superseding Indictment 1-5. Count 1 in both indictments charged petitioner with conspiring to possess with intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2000 & Supp. IV 2004), and 846 (2000). Indictment 1-3; Superseding Indictment 1-3. Under a June 2005 plea agreement, petitioner pleaded guilty to Count 1 and the government dismissed the remaining counts. D. Ct. Doc. 25 (June 2, 2005); Judgment 1. Petitioner was sentenced to 78 months of imprisonment, to be followed by five years of supervised release. Judgment 2.

Although his supervisors were not aware of it at the time, the Assistant United States Attorney (AUSA) assigned to prosecute petitioner's case was not properly licensed to practice law during this period. Pet. App. 1-2. His license had been administratively suspended for failure to keep current with the continuing legal education requirements of the North Carolina State Bar. *Ibid.*; see *id.* at 11-12. The AUSA did not, however, sign

either of the indictments; instead, both were signed by then-United States Attorney Gregory A. White, as well as by the grand jury foreperson. See Indictment 5; Superseding Indictment 5. The AUSA did sign the plea agreement along with petitioner, petitioner's counsel, and the district judge. D. Ct. Doc. 25, at 11, 13.

b. In 2008, the district court reduced petitioner's sentence under Rule 35(b) of the Federal Rules of Criminal Procedure to 63 months of imprisonment. Am. Judgment 2. Petitioner was released from prison in May 2009 and commenced his supervised release term. Pet. App. 6.

In 2012, petitioner's probation officer moved for revocation because petitioner had violated the terms of his supervised release. Pet. App. 6-7; see D. Ct. Doc. 39 (Dec. 7, 2012). "The district court continued [petitioner's] revocation hearing several times. At some point, [petitioner] absconded to the Southern District of California, where he was arrested in March 2016." Pet. App. 7. In May 2018, the district court ordered 24 months of imprisonment for the supervised release violations, to run consecutively to a term of imprisonment imposed in a separate federal criminal case. D. Ct. Doc. 59, at 2; see Judgment at 2-3, *United States* v. *Mendez*, No. 15-cr-68 (N.D. Ohio May 31, 2018), ECF No. 210-2 (sentencing petitioner to 192 months of imprisonment, to be followed by eight years of supervised release, for various controlled-substance offenses).

2. On December 29, 2017, in the midst of the revocation proceedings, petitioner filed a motion under 28 U.S.C. 2255 to vacate his 2005 conviction and sentence, noting that the AUSA had been unlicensed during the proceedings and arguing that "the district court lacked jurisdiction over his case because the prosecution had not been

initiated 'by a proper representative of the Government.'" Pet. App. 7 (citation omitted); see D. Ct. Doc. 53, at 1-2.

The district court denied the motion. Pet. App. 1-3. The court determined that petitioner "does not have a constitutional right to a properly licensed prosecutor." *Id.* at 2. It accordingly reasoned that to prevail on his claim, petitioner "must demonstrate prejudice." *Ibid.* The court denied relief because petitioner "has not shown that he was prejudiced in any way by the fact that [the AUSA's] law license was suspended at the time he prosecuted this case." *Id.* at 3. The court observed that other federal courts had "addressed similar cases" involving this AUSA's "practice as an attorney" and likewise had denied relief. *Id.* at 2; see *id.* at 2-3 (citing cases). The district court thereafter declined to grant petitioner a COA. *Id.* at 4.

3. The court of appeals denied petitioner's motion for a COA in an unpublished order. Pet. App. 6-8. In his motion, petitioner asserted that the AUSA had "signed the indictment" and that the district court lacked subject-matter jurisdiction over his 2005 criminal case because "the indictment was not signed 'by the United States Attorney or a properly appointed assistant.'" C.A. Doc. 7, at 2-3 (Aug. 22, 2018) (citation omitted). The court of appeals observed that "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*.'" Pet. App. 8 (citation omitted). The court found it undisputed that the AUSA, even if unlicensed, had been "assigned by his superiors to work on [petitioner's] case in an official capacity," and thus determined that "[r]easonable jurists * * *

would not debate whether [petitioner's] prosecution was initiated 'by a proper representative of the Government.'" *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 8-11) that the district court lacked subject matter jurisdiction over his 2005 criminal case on the theory that the indictment was defective, and for the first time contends (Pet. 11-13) that his 2005 prosecution violated due process on the theory that the AUSA purportedly defrauded the court. Neither contention has merit; the court of appeals did not err in declining to issue a COA; and no conflict exists in the courts of appeals on the issues petitioner raises. No further review is warranted.

1. A federal prisoner seeking to appeal the denial of a motion to vacate his conviction and sentence under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2)—that is, a "showing that reasonable jurists could debate whether" his constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further,'" *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000) (citation and internal quotation marks omitted); see *Miller-El* v. *Cockrell*, 537 U.S. 322, 336-337 (2003).

The court of appeals did not err in denying a COA on petitioner's claim that the district court lacked subject-matter jurisdiction over his criminal case because of the AUSA's lack of an active law license. "Subject matter jurisdiction defines the court's authority to hear a given type of case." *United States* v. *Morton*, 467 U.S. 822,

828 (1984). The district courts have subject-matter jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. 3231; see *United States* v. *Cotton*, 535 U.S. 625, 630-631 (2002). Because the superseding indictment in this case charged a federal offense under Title 21 of the United States Code, the district court had subject-matter jurisdiction. Cf. *Levine* v. *United States*, 221 F.3d 941, 943-944 (7th Cir. 2000) (district court had jurisdiction even when the prosecutor did not satisfy the residency requirement of 28 U.S.C. 545(a) (1988)), cert. denied, 532 U.S. 1013 (2001).

Citing *United States* v. *Providence Journal Co.*, 485 U.S. 693 (1988), petitioner contends that a district court "does not have jurisdiction over a felony criminal prosecution unless a properly qualified representative of the Government participates in the action," Pet. 8, and that the district court lacked subject-matter jurisdiction over his 2005 criminal case because the unlicensed AUSA "signed the indictment" but was not "a proper representative of the government," Pet. 10. That contention, however, rests on an erroneous factual premise; neither the indictment nor the superseding indictment in this case was signed by the unlicensed AUSA. Instead, both indictments were signed by then-United States Attorney Gregory A. White on behalf of the government. See Indictment 5; Superseding Indictment 5.

In any event, petitioner's contention also is legally incorrect. This Court has long held "that defects in an indictment do not deprive a court of its power to adjudicate a case." *Cotton*, 535 U.S. at 630; accord *United States* v. *Williams*, 341 U.S. 58, 66 (1951) ("[T]hat the indictment is defective does not affect the jurisdiction

of the trial court to determine the case presented by the indictment."); *Lamar* v. *United States*, 240 U.S. 60, 65 (1916) (explaining that "objection" to an indictment "goes only to the merits of the case," not to the court's jurisdiction). Accordingly, even if the superseding indictment had been defective, it would not have deprived the district court of subject-matter jurisdiction over petitioner's criminal case.

Providence Journal, *supra*, does not suggest otherwise. The district court in that case had appointed a private party as special prosecutor to prosecute a criminal contempt. 485 U.S. at 696-697. After the court of appeals reversed the contempt order, the special prosecutor sought permission from the Solicitor General to file a petition for a writ of certiorari on behalf of the United States. *Id.* at 698. The Solicitor General denied that request, but the special prosecutor filed a petition for a writ of certiorari anyway. *Ibid.* Applying 28 U.S.C. 518(a), which vests the power to "conduct and argue suits and appeals in the Supreme Court" in the Solicitor General, the Court determined that it had no jurisdiction to hear the case "[a]bsent a proper representative of the Government as a petitioner in this criminal prosecution." *Providence Journal*, 485 U.S. at 708.

Unlike *Providence Journal*, the prosecution here was authorized by "a proper representative of the Government," namely, the United States Attorney, who signed both the indictment and the superseding indictment. Also, petitioner "makes no claim that, though unlicensed, the AUSA who prosecuted him was not assigned by his superiors to work on his case in an official capacity." Pet. App. 8. As the court of appeals correctly determined, "[r]easonable jurists therefore would not

debate whether [petitioner's] prosecution was initiated 'by a proper representative of the Government.'" *Ibid.*

2. Petitioner's suggestion (Pet. 7-9) that the court of appeals' decision here conflicts with decisions of the Fourth and Ninth Circuits is incorrect. In accord with the result here, the Fourth Circuit in *United States* v. *Bennett*, 464 Fed. Appx. 183 (per curiam), cert. denied, 568 U.S. 864 (2012), rejected a jurisdictional challenge to a prosecution based on a prosecutor's lack of a law license because "the United States Attorney, an authorized representative of the Government, also signed the indictment." *Id.* at 185.

Nor do the Ninth Circuit's decisions in *United States* v. *Plesinski*, 912 F.2d 1033 (1990), cert. denied, 499 U.S. 919 (1991), and *United States* v. *Durham*, 941 F.2d 886 (1991), conflict with the decision below. Each case involved a challenge to the defective appointment of a Special Assistant United States Attorney (SAUSA) who participated in the prosecution. Consistent with the court of appeals' reasoning here, *Plesinski* declined to dismiss the indictment because the SAUSA "was at all times acting under the direction and supervision of an Assistant U.S. Attorney," and so his "unauthorized appearance on behalf of the government did not deprive the district court of jurisdiction over the criminal proceeding." 912 F.2d at 1038.

Similarly, *Durham* understood the determinative question to be whether the improperly appointed SAUSA "was operating under the direction and supervision of the United States Attorney." 941 F.2d at 892. *Durham* remanded for further findings on that issue, *ibid.*, and the Ninth Circuit later affirmed the defendants' convictions following the district court's findings

on remand, determining that the SAUSA "was adequately supervised and directed by the U.S. Attorney's Office," *United States* v. *Durham*, 990 F.2d 1262, 1993 WL 89056, at *2 (Tbl.), cert. denied, 510 U.S. 1018 (1993), and 510 U.S. 1128 (1994). Both *Plesinski* and *Durham* are thus consistent with the court of appeals' conclusion here that petitioner is not entitled to any relief given that he "makes no claim" that the AUSA "was not assigned by his superiors to work on his case in an official capacity." Pet. App. 8.

Indeed, other courts have rejected similar challenges to this particular AUSA's participation in a criminal prosecution. See, *e.g.*, *United States* v. *Ruffin*, 494 Fed. Appx. 306 (4th Cir. 2012) (per curiam), cert. denied, 568 U.S. 1185 (2013); *Wyatt* v. *United States*, 2014 WL 1330300 (M.D.N.C. Mar. 28, 2014); *Thomas* v. *United States*, 2014 WL 1230217 (M.D.N.C. Mar. 25, 2014). In light of that uniform authority and the incorrect factual and legal premises underlying petitioner's assertions, no further review of petitioner's jurisdictional claim is warranted.

3. For the first time, petitioner contends (Pet. 11-13) that the AUSA's "active fraud on the court and on [petitioner]" by holding himself out as a licensed attorney, and the Department of Justice's "negligence in failing to verify his bar standing," violated due process because it "present[ed] the appearance of impropriety." Pet. 12. Petitioner failed to raise a due process claim in the lower courts, and neither the court of appeals nor the district court addressed a claim based on the appearance of impropriety. See Pet. App. 1-3, 6-8. This Court is one "of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it does not ordinarily grant certiorari to review issues that were "not pressed

or passed upon below," *Duignan* v. *United States*, 274 U.S. 195, 200 (1927); see *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Petitioner offers no reason to depart from that longstanding practice here.

Regardless, the circumstances here do not establish an appearance of impropriety sufficient to warrant setting aside petitioner's conviction. Petitioner's reliance (Pet. 12) on *In re Murchison*, 349 U.S. 133 (1955), is misplaced. *Murchison* found a violation of the due-process right to a "fair trial in a fair tribunal" when a single judge initiated, prosecuted, and adjudicated criminal charges as a "one-man grand jury." *Id.* at 136; see *id.* at 136-139. That situation bears no resemblance to the one here; the administrative suspension of the AUSA's law license for failing to keep up with the state bar's continuing legal education requirements does not suggest an appearance of impropriety or lack of impartiality or fairness in petitioner's 2005 criminal proceedings. Petitioner's reliance (Pet. 12) on *United States* v. *Jordan*, 49 F.3d 152 (5th Cir. 1995), is similarly unsound. *Jordan* involved a judge's failure to recuse under 28 U.S.C. 455(a) after the defendant became "embroiled in a series of vindictive legal actions" against the judge's close friend and former client. 49 F.3d at 157. Petitioner nowhere suggests that the AUSA here (let alone the judge) labored under any such conflicts of interest.

Finally, petitioner briefly asserts (Pet. 11) that the government's failure to disclose that the AUSA lacked a proper license violated petitioner's due process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Like his other due process claim, this claim is not properly before the Court because petitioner never raised it below. Furthermore, petitioner has not attempted to satisfy his burden of demonstrating that such information

would have been "material either to guilt or to punishment," as required to press a claim under *Brady*. *Id.* at 87; see *Kyles* v. *Whitley*, 514 U.S. 419, 434-437 (1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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