NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

July 6, 2022

Eric Clingan, Esquire
Deputy Commonwealth's Attorney
Katherine K. Ballou, Esquire
Assistant Commonwealth's Attorney
OFFICE OF THE COMMONWEALTH'S ATTORNEY
4110 Chain Bridge Road
Fairfax, VA 22030
Eric.Clingan@fairfaxcounty.gov

Daniel Harvill, Esquire
DANIEL A. HARVILL, PLLC
9403 Grant Avenue, Suite 2020
Manassas, VA 20110
DanielHarvillPLLC@gmail.com
Counsel for Defendant

Glenn Wainer, Esquire
6231 Leesburg Pike, Suite 308
Falls Church, VA 22044
GlennWainer@hotmail.com
Co-Counsel for Defendant

Re: ***Commonwealth of Virginia v. Yovani Cardenas Flores***
Case No. FE–2021–388, -398[1]

Dear Counsel:

The Virginia State Bar suspended the law license of the Assistant Commonwealth's Attorney who prosecuted this Aggravated Sexual Battery case during the entire pendency of the

[1] The Court issued this Opinion Letter June 30, 2022. It reissues it today to fix some typographical errors.

OPINION LETTER

trial. She had failed to pay her Bar dues. The issue before the Court is whether the Court's guilty verdicts should be set aside because of her then-unlicensed status.

In this matter of first impression in Virginia, the Court holds a prosecutor's unlicensed status will not result in setting aside an otherwise valid felony conviction unless (1) the prosecutor engaged in improper conduct, and (2) that such conduct prejudiced the defendant's substantive rights, denying the defendant a fair trial.

The Court finds Defendant Yovani Cardenas Flores ("Cardenas Flores") failed to prove the prosecutor's administratively unlicensed status prejudiced any of his substantive rights and, therefore, will deny his "Motion to Set Aside Verdict and for a New Trial."

I. OVERVIEW.

A grand jury returned a true bill indicting Yovani Cardenas Flores on three counts of Aggravated Sexual Battery. The foreperson signed Indictments and the matter proceeded to a bench trial January 24-27, 2022. The Court found Mr. Cardenas Flores guilty of two counts, not guilty of one count, and scheduled a sentencing hearing.

In advance of the sentencing hearing, the Assistant Commonwealth's Attorney ("ACA") who prosecuted the case advised Mr. Cardenas Flores's counsel that she had been administratively suspended from the practice of law between October 1, 2021, and February 1, 2022, for failing to pay her Bar dues. She subsequently paid her dues and was immediately reinstated. On April 29, 2022, Defendant filed a "Motion to Set Aside the Verdict and for a New Trial." The Court continued the sentencing hearing so that it could consider the motion.

II. SHOULD THE CIVIL NULLITY RULE FOR ACTS BY UNLICENSED ATTORNEYS EXTEND TO CRIMINAL CASES?

A. Actions by Unlicensed Lawyers in Civil Actions are *Per Se* Void.

It is unlawful to practice law without being "authorized or licensed." VA. CODE ANN. § 54.1-3904; *see Nerri v. Adu-Gyamfi*, 270 Va. 28, 31 (2005) ("the status of an attorney during the time his or her license is administratively suspended is no different from that of an individual or an attorney who has never been licensed in Virginia—neither is authorized to practice law in this Commonwealth").

In the civil context, the law is settled. Representative actions in court are a legal nullity unless performed by a licensed attorney. *Shipe v. Hunter*, 280 Va. 480, 483 (2010) (collecting cases); *Aguilera v. Christian*, 280 Va. 486, 489 (2010); *Farmville Group, LLC v. Shapiro, Brown and Alt, LLP*, 101 Va. Cir. 81 (Fairfax, 2019). Application of this principle often leads to harsh results. Even a party unaware his lawyer is unlicensed with the Virginia State Bar will lose his case based on the fact the lawyer is not in good standing. *Nerri v. Adu-Gyamfi*, 270 Va. at 31. However, the existence of a settled rule in civil law does not mean that the rule should extend to

criminal law. In fact, application of the civil nullity rule has not been without controversy. *See id.* (Koontz, J., dissenting) ("The nullity rule is not carved in stone and is properly subject to exceptions when its strict application produces an unduly harsh result.")

The present case presents a matter of first impression: Mr. Cardenas Flores seeks to extend the civil nullity rule to criminal cases.

B. Most Jurisdictions Considering the Problem of Unlicensed Prosecutors do not Apply the Civil *Per Se* Voidness Rule to Criminal Cases.

While this may have been the first time an unlicensed lawyer prosecuted a criminal case in Virginia, this unfortunate occurrence happened in New York, Minnesota, Illinois, and in a handful of federal courts. In all those cases a convicted defendant asked for reversals of convictions, as does Mr. Cardenas Flores in the present case. Every jurisdiction to consider the question—except for Illinois—held that an unlicensed prosecuting lawyer does not cause the dismissal of the criminal case he or she prosecuted *per se*. There must be a showing of a particular prejudice to the defendant.

In New York, a veteran prosecutor of sixteen years had never been admitted to the Bar. *People v. Carter*, 77 N.Y.2d 95, 101 (1990). He graduated from law school, but never obtained a license to practice law. *Id.* New York's high court disapproved of the prosecutor's unlicensed status but reasoned that his unlicensed status did not deprive all the defendants he prosecuted over that decade and a half of any constitutional rights. *Id.* at 106. Simply stated, the defendants suffered no prejudice that would warrant dismissing the indictments against them. *Id.* at 107.

Minnesota reached the same conclusion. In *State v. Ali*, the Bar suspended a prosecutor for failure to complete continuing legal education ("CLE") requirements. 752 N.W.2d 98, 108-09 (Minn. Ct. App. 2008). Less shockingly than in *Carter*—but barely—the *Ali* prosecutor was administratively restricted for 20 years because she did not take her CLE classes. Nonetheless, the court held: (1) the defendant failed to show prejudice from his prosecution by an unlicensed lawyer, (2) the unlicensed prosecutor was not an imposter, as was the case in *Carter*, but was a previously admitted lawyer on restricted status for regulatory reasons, and (3) the integrity of the criminal justice system needs "a reluctance to set aside a criminal conviction when guilt was fairly established." *Id.*

By contrast, in Illinois, a defendant successfully moved to vacate his misdemeanor convictions because his prosecutor was unlicensed to practice law at the time of prosecution. *People v. Dunson*, 316 Ill.App.3d 760 (2000). Illinois' intermediate appellate court held that the conviction must be reversed. To reach this conclusion, the court extended its civil rule declaring void actions of unlicensed lawyers, which is very similar to that of Virginia's.

> The well-settled rule in Illinois is that, where one not licensed to practice law has instituted legal proceedings on behalf of another in a court of record, such action

> should be dismissed, and if the action has proceeded to judgment, the judgment is void and will be reversed.

Id. at 764. So, applying that rule to the criminal context, the court held that

> participation in the trial by a prosecuting assistant State's Attorney who was not licensed to practice law under the laws of Illinois requires that the trial be deemed null and void *ab initio* and that the resulting final judgment is also void.

Id. at 770. To make its decision, the court considered *People v. Munson*, where the Illinois Supreme Court imposed a requirement that a prosecuting attorney be licensed and vacated a criminal conviction on the ground that the prosecuting attorney was unlicensed at the time the state obtained a criminal indictment. 319 Ill. 596 (1925).

In considering whether to extend the civil rule to criminal cases—as Illinois did—or not—as New York and Minnesota did not do—federal courts offer additional persuasive guidance. The federal courts who considered the issue break in favor of New York—refusing to dismiss convictions procured through unlicensed prosecutors. As with *Carter*, the lynchpin is the absence of prejudice to the defendant. In *Munoz v. Keane*, the Southern District of New York found that a prosecution "conducted by an unlicensed attorney does not violate" a defendant's due process rights. 777 F. Supp. 282, 285 (S.D.N.Y. 1991), aff'd sub nom, *Linares v. Senkowski*, 964 F.2d 1295 (2d Cir. 1992). After noting that no federal court ever declared a right to a licensed prosecutor under the Due Process Clause of the Fourteenth Amendment, the court held there a defendant simply has no right to a licensed prosecutor. *See, e.g., Hancock v. United States*, 2014 WL 12726392 (M.D. NC 2014) (prosecutor suspended from the Bar for failure to complete CLE credits did not void the convictions he procured during his suspension); *United States v. McNeill*, 389 Fed.Appx. 233, 235 (4th Cir. 2010). In the present case, the parties offered no case—and the Court found none—where a federal court vacated a conviction procured by an unlicensed lawyer.

While the New York federal district court's *Munoz* decision preceded the Minnesota *Dunson* opinion, and obviously did not discuss it, the *Munoz* court distinguished the earlier Illinois case of *Munson*. The federal court wrote that *Munson* was guided by state common law inapplicable to the federal courts. *Munoz*, 777 F.Supp. at 285.

This Court infers the Supreme Court of Virginia would decline to extend the civil *per se* voidness rule to criminal cases by projecting the trajectory of the law from *Reed v. Commonwealth*, 281 Va. 471, 480-82 (2011). In *Reed*, a defendant sought to vacate his criminal conviction on the basis that the grand jury foreman did not sign his indictment. The high court declined to extend the civil *Aguilera* nullity rule then—even though it could have held that an unsigned indictment, like an unsigned civil complaint, was a legal nullity. It did not do this. *Id.* This is consistent with Virginia's modern relaxation of absolute rules resulting in overreactions to prejudice-free procedural trespasses. *See, e.g.*, VA. CODE ANN. § 8.01-271.1(G) (amended in 2020, the statute now gives a litigant the opportunity to cure a signature defect on a pleading

once brought to his attention); VA. R. SUP. CT. 5:1A(a) (permitting a litigant to cure an appellate filing defect).

In any event, all jurisdictions to directly consider the question, but one, oppose vacating otherwise valid criminal convictions based only on the unlicensed status of the prosecutor.

III. VIRGINIA SHOULD NOT EXTEND THE CIVIL NULLITY RULE TO CONVICTIONS PROCURED BY UNLICENSED PROSECUTORS.

The Court agrees with the conclusion of the state and federal courts which upheld convictions procured by prosecutors unlicensed to practice law. It declines to be the first Virginia court to extend the civil nullity rule to criminal cases. This Court holds that for a defendant to gain a new trial on the basis that the prosecutor was unlicensed, a defendant must show (1) the prosecutor engaged in improper conduct, and (2) that such conduct prejudiced the defendant's substantive rights, denying the defendant a fair trial. *Compare United States v. Allerre*, 430 F.3d 681, 689 (4th Cir. 2005) (applying elements of the analogous prosecutorial misconduct cause of action). There are three reasons for this conclusion: first, a defendant has no constitutional right to a licensed prosecutor as he does to a licensed defense attorney; second, it is common to treat civil procedure differently than criminal procedure; and, third, the dismissal of a conviction is unnecessary to police the unauthorized practice of law.

A. A Defendant has no Constitutional Right to a Licensed Prosecutor.

While a defendant lacks the constitutional right to a licensed prosecutor,[2] he enjoys the Sixth Amendment constitutional right to a licensed lawyer. *See Munoz*, 777 F. Supp. at 285-86. In *Munoz*, the court recognized that

> Assistance of counsel is mandated by the Sixth Amendment because lawyers are the means through which the other rights of the person on trial are secured, and through which the prosecution's case is subjected to 'meaningful adversarial testing.'

Id. (quoting *United States v. Novak*, 903 F.2d 883 (2d Cir. 1990)).

Of course, a licensed criminal defense attorney is necessary for a defendant who relies on the skill of his attorney for his liberty. Counterposed, an unlicensed prosecutor does not really affect the defendant's constitutional rights. As the *Munoz* court recognized, a prosecutor is a criminal defendant's adversary, seeking a conviction, and the defendant "does not rely on [the]

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[2] The United States Constitution is silent as to prosecutors. By contrast, it expressly mandates the assistance of counsel to defendants. U.S. CONST. AMEND. VI. Various federal jurisdictions held that a defendant does not have constitutional right to a licensed prosecutor. *See U.S. v. Garcia-Andrade*, No. 13-CR-993-IEG, 2013 WL 4027859, at *10 (S.D. Cal. Aug. 6, 2013); *Hamilton v. Roehrich*, 628 F. Supp. 2d 1033, 1050–54 (D. Minn. 2009); *Munoz*, 777 F. Supp. at 284–86.

prosecutor to protect his rights." *Id.* at 286. The entire *raison d'etre* of lawyer licensing is public protection from bad lawyers. *See Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond*, 167 Va. 327, 335 (1937) ("Limiting the members of the bar to those who possess the necessary moral and educational requirements is for the protection of the public and within the State's police power."). An unlicensed lawyer-prosecutor who fairly wins a conviction in a trial brought by a grand jury, defended by a licensed criminal defense attorney, and adjudicated by a judge is the antithesis of a poor performing attorney.

Of course, prosecutors have the obligation to do justice and not just win a conviction. *See Price v. Commonwealth*, 72 Va. App. 474, 485 (2020) ("The prosecutor is ultimately accountable not to any victim but to justice"). This characteristic distinguishes the ACA from both civil attorneys and defense attorneys who are beholden to their client. It is true that prosecutors exercise important prosecutorial discretion, and the Bar regulates their conduct. VA. R. S. CT. PT. 6 § 2 RPC PREAMBLE. However, licensure does not confer morality. On a case-by-case basis, an unlicensed lawyer could exercise prosecutorial discretion better than a licensed one. And, even suspended lawyers are bound by the Rules of Professional Conduct. *Barrett v. Virginia State Bar ex rel. Second Dist. Committee*, 277 Va. 412, 414 (2009) ("a lawyer whose license is suspended is still an active member of the bar and, although not in good standing, is subject to the Rules [of Professional Conduct]."). In the present case this does not even matter because there is no question that the elected Commonwealth's Attorney of this Circuit is a licensed lawyer. He ultimately is the font of prosecutorial discretion that flows to his ACAs. Any defendant concerned that an ACA is acting contrary to the Commonwealth's Attorney's philosophy can appeal to him for intercession. Bar licensure has no impact on that. Thus, an ACA is really exercising the Commonwealth's Attorney's prosecutorial discretion and not merely her own.

Virginia's constitution does not even clearly require that a prosecutor must have a Bar license. By contrast, the Constitution clearly requires Bar licensure for judges. Judges must "have been *admitted to the bar* of the Commonwealth." VA. CONST. art. VI, § 7 (emphasis supplied). The Commonwealth's Attorney has no such explicit bar admission requirement. VA. CONST. art. VII, § 4. The people elect as top prosecutor "an *attorney* for the Commonwealth" with no other qualification. *Id.* (emphasis supplied). Just as an elected sheriff need not have any law enforcement certification under the Constitution, the people may be free to elect a prosecutor with no law license. *See id.* One may infer that an "attorney" means a licensed attorney, but there must be some reason why the Constitution uses the term "admitted to the bar" for judges, but only "attorney" for prosecutors. *See Funkhouser v. Spahr*, 102 Va. 306, 310 (1904) (when interpreting statutes or constitutions, courts must give due effect to every word and not reject words as superfluous). One possible conclusion is that judges must be members of the Bar but that prosecutors need not.[3]

[3] To be clear, the Court does not hold a prosecutor or sheriff may serve without licensure. That issue is not before the Court. Rather, the Court raises this question to highlight the absence of a criminal defendant's express right to a licensed prosecutor in the Constitution.

Even if the Court extended a defendant's constitutional right to a licensed defense attorney to a right to a licensed prosecutor, it could not dismiss the present case on a *per se* basis any more than it could summarily dismiss a conviction defended by a deficient defense lawyer. Even in cases where a defense attorney is licensed but proven to be deficient courts will not automatically set aside otherwise valid convictions on *habeas corpus* grounds. Instead, the affected defendant must also prove the deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). It would be an odd state of the law, indeed, where a licensed but deficient criminal defense attorney does not necessitate the vacating of a criminal conviction, but that an experienced prosecutor who momentarily has an administrative suspension for unpaid Bar dues does, *per se*, without any showing of prejudice to the defendant.

In the present case, a retrial is possible because the trial was so recent. However, if *per se* reversal was mandated for trials conducted by an unlicensed prosecutor, then any indictments or convictions of that prosecutor would be subject to reversal. Imagine a scenario in Virginia—as actually happened in New York state and federal courts—where a prosecutor was unlicensed for twelve and twenty years, respectively. *See Carter*, 77 N.Y.2d at 101 (1990); *Munoz*, 777 F. Supp. at 286. This is Virginia's first experience with an unlicensed prosecutor—as far as we know. There may have been (or currently are) other prosecutors who, unlike the forthcoming Fairfax ACA in this case, are or were suspended but who hide their temporary unlicensed status from defendants. Extension of the civil nullity rule to criminal cases would incentivize a lot of current inmates to research the Bar records of their prosecutors. Should every indictment and conviction be subject to *per se* reversals, even if the trial court, defense counsel, and jury conducted a fair trial satisfying the due process clause? Most of those cases could never be prosecuted again. What would be the purpose for such a rule?

Likely for this reason, courts almost uniformly demand a showing of prejudice to a defendant before dismissing a conviction procured by an unlicensed prosecutor. *Munoz*, 777 F. Supp. at 286 (holding that, even if the Court accepted the right to be prosecuted by a licensed prosecutor, the petitioners could only reverse their convictions if they could demonstrate prejudice); *U.S. v. Ruffin*, 494 F. App'x 306, 307 (2012) (finding defendant did not prove prejudice based on allegations that the prosecuting attorney had a suspended license); *U.S. v. McNiell*, 389 F. App'x 233, 235 (2010) (finding defendant failed to prove prejudice occurred when unlicensed prosecutor entered plea agreement); *see also Jackson v. Clark*, 2018 WL 2440266, *2 (Sup. Ct. Va. 2018) (unpub.) (a habeas petitioner must show prejudice from representation by a deficient defense attorney).

Since Mr. Cardenas Flores does not have a constitutional right to a licensed prosecutor as he does have to a licensed defense attorney, and because the remedy for an unlicensed prosecutor should not logically exceed that of a deficient, but licensed, defense attorney, and because he can show no specific harm by his prosecution, it makes no sense to dismiss his conviction on the basis that his prosecutor was unlicensed.

B. Virginia Commonly Treats Civil Procedure Differently than Criminal Procedure.

Virginia commonly treats civil procedure differently than criminal procedure. For example, the number of jurors in a civil trial are different than that of a criminal trial by constitution. Twelve people sit on criminal juries. VA. CONST. art. I, § 8. At least five sit on civil juries. VA. CONST. art. I, § 11. The Rules of Evidence are different for the two classes of cases even though the quest for truth is critical for both cases.[4] So, there is no automatic reason to extend Virginia's civil nullity rule to criminal cases simply because it is a firmly rooted civil provision. There is some logic to this. A civil litigant has remedies against his civil attorney that he does not have against his prosecutor—the ability to sue for malpractice for recompense. An incarcerated defendant would find little solace in this remedy.

C. Remedies Short of a New Suppression Rule Exist to Discourage Prosecutions by Unlicensed Lawyers.

Setting aside a conviction without any apparent prejudice to the defendant is an extreme remedy. If the goal is to discourage unlicensed lawyers, the law already provides sufficient tools. The Virginia State Bar can and does discipline lawyers who practice law during a suspension. *Barrett v. Virginia State Bar ex rel. Second Dist. Committee*, 277 at 414. An unlicensed lawyer who practices without a license can be criminally prosecuted for doing so. *Nerri*, 270 Va. at 31. ("the status of an attorney during the time his or her license is administratively suspended… [is] subject to prosecution for practicing law without a license."). We are fortunate to live in a Commonwealth where lawyers are not disciplined or prosecuted for brief administrative trespasses such as unknowingly practicing law while under a suspension for failure to pay Bar dues. However, these remedies do exist and lessen the need to guard against unauthorized practice of law by vacating otherwise valid criminal convictions.

Setting aside a conviction is as absolute as the pre-trial exclusionary rule for the product of unconstitutional Fourth Amendment violations. *See Miranda v. Arizona*, 384 U.S. 436 (1966). The Court should not treat convictions by unlicensed prosecutors in the same way as it treats unlawful search and seizures. *Miranda* was rooted in the Fourth Amendment to the U.S. Constitution. As discussed above, a criminal defendant's right to a licensed prosecutor is not in

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[4] *See* Va. Sup. Ct. R. 2:106(b) (permitting truncating of lengthy documents in civil cases but not criminal cases), 2:202(b) (mandatory judicial notice of certain material in criminal cases but not civil cases), 2:406 (permitting habit evidence only in civil cases), 2:409 (permitting evidence of repeated abuse by a victim only in a criminal case), 2:413 (permitting evidence of prior felony sexual offenses against children only in criminal cases), 2:503 (setting different criminal and civil evidentiary rules for the clergy communication privilege), 2:504 (setting different criminal and civil evidentiary rules for the spousal communications privilege), 2:505 (limiting the doctor-patient privilege to civil cases), 2:614 (permitting the Court to call witnesses in a civil case, but not a criminal case), 2:702 (setting different criminal and civil evidentiary rules for using expert witnesses), 2:703 (same), 2:704 (same), 2:705 (same), 2:706 (same), and 2:803(10) (setting different hearsay exceptions for the admission of public records and reports).

the Constitution. Also, *Miranda* was needed to deter frequent constitutional violations in the absence of better remedies. As discussed above, there are two remedies to discourage and punish unlicensed prosecutions. The Court should not reach to a *Miranda*-like remedy for the present case.

Because it is unnecessary to dismiss an otherwise valid criminal conviction if the goal in doing so is to deter unlicensed prosecutors, the Court should not do so for exemplary reasons.

IV. CONCLUSION.

For the foregoing reasons, the Court declines to extend the civil law nullity rule to acts by an unlicensed prosecutor. The Court holds a defendant must show prosecutorial misconduct and actual prejudice before the Court may set aside an otherwise valid conviction procured by an unlicensed prosecutor. In the present case, Mr. Cardenas Flores' conclusory statements that the trial was "tainted" by an unlicensed prosecutor is an appeal for a *per se* rule and does not prove prejudice. From everything proffered and argued at the motion to set aside the verdict, there was not even misconduct—the prosecutor changed jobs, thought she properly notified the Bar, but the dues notice went to her old employer, and she was late in paying her Bar dues. Importantly, this did not affect the prosecutor's legal ability or any other aspect of her performance. As to the prosecutor's exercise of prosecutorial discretion, implicit in the Commonwealth's Attorney's opposition to Mr. Cardenas Flores' motion for a new trial is that his office avouches the formerly unlicensed ACA's actions to secure his conviction.

The Court will deny Mr. Cardenas Flores' Motion to Set Aside Verdict and for a New Trial. An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure.

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

v. FE-2021-388, -398

YOVANI CARDENAS FLORES

ORDER

This matter came before the Court May 6, 2022, on Defendant Yovani Cardenas Flores' "Motion to Set Aside Verdict and for a New Trial," and, for the reasons set forth in this Court's Opinion Letter of June 30, 2022, which is incorporated herein by reference, it is

ORDERED the "Motion to Set Aside Verdict and for a New Trial" is DENIED.

[redacted]

Judge David A. Oblon

JUN 30 2022

Date

Endorsement of this order by counsel of record for the parties is waived in the discretion of the Court pursuant to Rule 1:13 of the Supreme Court of Virginia.