1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2011

4 (Argued: January 31, 2012 Decided: May 23, 2012)

5 Docket No. 10-4498-pr

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7 ABAD ELFGEEH,
8
9 Petitioner-Appellant,

10 v.

11 UNITED STATES OF AMERICA,
12
13 Respondent-Appellee.

14 -

15 B e f o r e: WINTER, RAGGI, and CHIN, Circuit Judges.

16 Appeal from the denial by the United States District Court
17 for the Eastern District of New York (Sterling Johnson Jr.,
18 Judge) of a petition for habeas corpus. Appellant claims that
19 his legal representation was per se ineffective because,
20 although he had a licensed attorney of record, a disbarred
21 attorney acted as his de facto counsel. We affirm.

22 JAMES M. BRANDEN, Law Office of James
23 M. Branden, New York, New York, for
24 Petitioner-Appellant,
25
26 PAMELA K. CHEN, Assistant United
27 States Attorney, of counsel (David C.
28 James, Assistant United States
29 Attorney, of counsel, on the brief),

1 for Loretta E. Lynch, United States
2 Attorney for the Eastern District of
3 New York, Brooklyn, New York, for
4 Respondent-Appellee.
5

6 WINTER, Circuit Judge:

7 Abad Elfgeeh appeals from Judge Johnson's denial of his
8 petition for a writ of habeas corpus. We granted a certificate
9 of appealability as to whether appellant's representation was
10 per se ineffective under the Sixth Amendment when, although he
11 had a licensed attorney of record, a disbarred attorney acted
12 as his de facto counsel. We affirm.

13 BACKGROUND

14 Our description of the facts is limited to those pertinent
15 to the issue specified by the certificate of appealability,
16 Valverde v. Stinson, 224 F.3d 129, 136 (2d Cir. 2000) (citing
17 28 U.S.C. § 2253(c)(3)), namely, whether a per se
18 ineffectiveness rule applies when a defendant, although having
19 a licensed attorney of record, relies on the advice of a
20 disbarred attorney.[1]

21 In February 2003, appellant was indicted for operating,
22 and conspiring to operate, a money transmitting business
23 without a license. 18 U.S.C. §§ 371, 1960. Appellant was
24 originally represented by Dawn Cardi, who had been appointed

[1] Appellant moved for a supplemental certificate of appealability regarding the issue of whether Pugach and Hancock unreasonably encouraged appellant to withdraw his guilty plea, which this court denied.

1 pursuant to the Criminal Justice Act. Cardi filed a motion to
2 suppress certain evidence, which was denied, and, on Cardi's
3 advice, appellant pleaded guilty without a written plea
4 agreement in October 2003.

5 Prior to sentencing, a friend referred appellant to Burton
6 Pugach, telling appellant that Pugach was handling an appeal
7 for someone the friend knew. Pugach had been disbarred in 1960
8 after being convicted of criminal possession of a weapon.

9 Appellant contacted Pugach and scheduled a meeting. After
10 meeting with appellant, Pugach advised him that the government
11 had a weak case and recommended withdrawal of the guilty plea.
12 Pugach told appellant that it would cost $10,000 to file the
13 motion to withdraw. Appellant, and members of his family who
14 were present at the meeting, stated that Pugach charged a $500
15 fee for the consultation and an additional $500 when appellant
16 gave him a fairly thick file on the case.

17 A few days later, Pugach contacted appellant again and
18 told him that, after further review, he still believed
19 appellant should move to vacate the plea. Pugach stated that
20 it would cost $10,000 to do so. Appellant agreed to pay the
21 fee, and a few days later Pugach arrived to collect it. Pugach
22 told appellant to make the check out to Frank Hancock. Hancock
23 was a licensed attorney.

24 Shortly thereafter, Pugach, Hancock, and appellant met at
25 Hancock's office. Pugach opined that there was a basis for

withdrawing the plea, and Hancock agreed. Pugach did not advise appellant of possible negative consequences for withdrawing the plea or that the indictment could be amended to add additional charges. Hancock advised against withdrawing the plea because appellant could ultimately get a higher sentence. Appellant decided to withdraw the guilty plea. After the meeting, Hancock contacted Cardi and informed her that he had been retained to represent appellant.

In February 2004, Hancock filed the motion to vacate the guilty plea and to dismiss the indictment. That motion was denied. Nevertheless, the district court sua sponte vacated the plea because the magistrate judge had not properly advised appellant of the maximum possible prison term if he were to be sentenced consecutively on the counts charged.

After the plea was vacated, the government filed a superseding indictment that added a charge for structuring in violation of 31 U.S.C. § 5324. Appellant moved to dismiss the indictment, but the motion was denied.

Throughout the various proceedings, appellant met with Pugach and Hancock on numerous occasions. Appellant described these meetings as ones in which Hancock spoke very little, often only to express agreement with Pugach, pose a legal question, or advise Pugach to explain a particular point to appellant. Hancock was also aware that Pugach and appellant had discussed matters relating to the case and would often

1 decide the course of action before speaking with Hancock.
2 Nevertheless, Hancock signed all documents filed with the
3 court, and only Hancock appeared on behalf of appellant at
4 court proceedings, other than one instance where Pugach
5 informed the court that Hancock was unavailable.

6 After the motions to dismiss the indictment were denied,
7 Hancock contacted the government regarding a new plea deal.
8 The government declined to offer a plea, and, in September
9 2005, appellant was tried and convicted on all counts. He
10 received a sentence of 188 months' incarceration, allegedly
11 some 90 months in excess of appellant's expected sentence on
12 his guilty plea.

13 Hancock was subsequently disbarred in 2008. The order of
14 disbarment was based on multiple grounds, including Hancock's
15 aiding Pugach in the unauthorized practice of law by signing
16 court documents prepared by Pugach without any oversight and by
17 conducting an oral argument where Pugach was effectively acting
18 as the attorney. In Re Hancock, 863 N.Y.S.2d 804, 805-07 (2d
19 Dep't 2008).

20 In April 2009, appellant filed the present habeas petition
21 claiming ineffective assistance of counsel in the various pre-
22 trial proceedings. He argued that although Hancock was the
23 attorney of record, Pugach was his de facto attorney during the
24 withdrawal of his plea agreement and other pre-trial
25 proceedings. The district court denied the petition on

1 September 15, 2010. Elfgeeh v. United States, No. 09-CV-
2 2015(SJ), 2010 WL 3780216, at *1 (E.D.N.Y. Sept. 21, 2010).
3 The district court concluded that the per se
4 ineffectiveness rule, originated in Solina v. United States,
5 709 F.2d 160 (2d Cir. 1983), did not apply because Hancock had
6 been admitted to practice when he represented appellant.
7 Elfgeeh, 2010 WL 3780216, at *4. The court concluded that even
8 if appellant received unreasonable advice from Pugach in
9 suggesting that appellant withdraw his plea, thus fulfilling
10 Strickland v. Washington's first requirement of a departure
11 from professional standards, 466 U.S. 668, 687 (1984),
12 Hancock's warning that appellant could receive a longer
13 sentence after a trial negated Strickland's second requirement
14 of a prejudicial effect, id.
15 We granted a certificate of appealability limited to
16 appellant's argument that his representation in the pre-trial
17 proceedings was per se ineffective because, even though his
18 attorney of record, Hancock, was licensed throughout the time
19 period of appellant's case, Pugach acted as de facto counsel
20 during pre-trial proceedings.
21 DISCUSSION
22 "We review a district court's findings of fact for clear
23 error, and its denial of a Section 2255 petition de novo."
24 Yick Man Mui v. United States, 614 F.3d 50, 53 (2d Cir. 2010)
25 (citing Rega v. United States, 263 F.3d 18, 21 (2d Cir. 2001)).

1 We hold that a per se ineffectiveness rule does not govern
2 appellant's claims.

3 Generally, a claim of ineffective assistance of counsel
4 must satisfy the two-prong test of Strickland: (i) the
5 performance of counsel was so deficient that it was not "within
6 the range of competence demanded of attorneys," and (ii) the
7 deficiency of counsel was prejudicial to the defense. 466 U.S.
8 at 687, 691–92.

9 However, the right to counsel is intended to ensure
10 "representation by a licensed practitioner." Solina, 709 F.2d
11 at 167. When a defendant has been represented by someone who
12 has never been licensed to practice law, that representation is
13 per se ineffective and thus need not satisfy Strickland's dual
14 requirements. See United States v. Novak, 903 F.2d 883, 887
15 (2d Cir. 1990). The rationale for the per se rule is two-fold:

> 16 The first is "jurisdictional" and applies in
> 17 cases where the attorney is not duly licensed
> 18 at the time of trial. It stems from the
> 19 Supreme Court's decision in Johnson v.
> 20 Zerbst, 304 U.S. 458, 468 (1938), that the
> 21 failure to provide a criminal defendant with
> 22 counsel created "a jurisdictional bar to a
> 23 valid conviction." See Solina, 709 F.2d at
> 24 168-69 (discerning no meaningful distinction
> 25 between total absence of representation and
> 26 representation by unlicensed counsel). The
> 27 second rationale is based on notions of
> 28 conflict of interest, and applies in cases
> 29 both where the lawyer is not duly licensed,
> 30 see Novak, 903 F.2d at 890; Solina, 709 F.2d
> 31 at 164, and where the lawyer is implicated in
> 32 the crimes of his or her client, see United
> 33 States v. Cancilla, 725 F.2d 867, 870 (2d
> 34 Cir. 1984). In these circumstances, the

1 defense is necessarily compromised because
2 the advocate ordinarily "cannot be wholly
3 free from fear of what might happen if a
4 vigorous defense should lead the prosecutor
5 or the trial judge to inquire into his [or
6 her] background and discover his [or her]
7 lack of credentials[,]" Solina, 709 F.2d at
8 164, or own wrongdoing. Regardless of the
9 facts presented, application of the per se
10 rule must be justified under one or both of
11 these rationales. See United States v.
12 Aiello, 900 F.2d 528, 532 (2d Cir. 1990).
13
14 Bellamy v. Cogdell, 974 F.2d 302, 306-07 (2d Cir. 1992) (en
15 banc) (alterations in original, internal citations modified).
16 The per se ineffectiveness rule is limited to situations
17 "where, unbeknown to the defendant, his representative was not
18 authorized to practice law in any state, and the lack of such
19 authorization stemmed from failure to seek it or from its
20 denial for a reason going to legal ability, such as failure to
21 pass a bar examination, or want of moral character,"[2] Solina,
22 709 F.2d at 167, or where the attorney was "implicated in the
23 defendant's crimes," Bellamy, 974 F.2d at 306.

[2] The per se rule does not apply where an attorney is not admitted in the jurisdiction of the criminal proceeding but is licensed elsewhere, or where an attorney is licensed to practice at the start of a case and immediately withdraws upon notice of disbarment. See Hurel Guerrero v. United States, 186 F.3d 275, 279-81 (2d Cir. 1999) (counsel suspended from practicing in federal district court, but still admitted in New York State and Puerto Rico); Bellamy, 974 F.2d at 306-08 (counsel suspended from practice after trial based on pretrial admission of mental and physical incapacity); Kieser v. New York, 56 F.3d 16, 17-18 (2d Cir. 1995) (per curiam) (counsel not admitted to practice pro hac vice in New York and, at arraignment, temporarily suspended from practice in New Jersey for failure to pay bar dues); Waterhouse v. Rodriguez, 848 F.2d 375, 382-83 (2d Cir. 1988) (attorney was licensed to practice law at the beginning of the case, was disbarred during pretrial proceedings, and withdrew upon becoming aware of the disbarment).

1 Notwithstanding dicta in decisions of other circuits,[3] we
2 conclude that our rationale for a per se ineffectiveness rule
3 applies to representation by an individual who, before the
4 representation in question, has been disbarred in all
5 jurisdictions where he or she was once admitted. In such
6 circumstances, the defendant lacks licensed representation, and
7 a disbarred attorney has as much, or more, to fear from the
8 court or prosecution discovering counsel's violation of the law
9 against the unauthorized practice of law as one who has never
10 been licensed.

11 By reading the right to counsel as a right to
12 representation by someone who may legally represent criminal
13 defendants, a per se ineffectiveness rule gives the most
14 rational meaning to the Sixth Amendment's right to the
15 assistance of counsel. The legal profession is highly
16 regulated, and reading the right to refer to the assistance of
17 someone who can legally practice law satisfies the language and
18 policy of the Amendment. See Mitchell, 216 F.3d at 1132

[3] See United States v. Mitchell, 216 F.3d 1126, 1132–33 (D.C. Cir. 2000) ("[T]here is no logical reason to extend the per se ineffectiveness rule beyond those instances already covered in [prior precedent] - when a defendant is represented by a person never properly admitted to the practice of law."; see also United States v. Ross, 338 F.3d 1054, 1056 (9th Cir. 2003) ("That Ross's lawyer was suspended before trial, rather than during it, is a distinction without a difference. Hoffman and Mouzin both held that, so long as the lawyer had been admitted to practice at one point in time, his bar status at trial was not dispositive of the ineffective assistance issue: the one-time admission was enough to overcome a claim of status-based per se ineffective assistance." (emphasis in original)).

1 ("Admission to the bar allows us to assume that counsel has the
2 training, knowledge, and ability to represent a client
3 . . . .") (quoting United States v. Mouzin, 785 F.2d 682, 698
4 (9th Cir. 1986)). A per se ineffectiveness rule also avoids
5 the need to scrutinize every detail of the representative's
6 conduct for the presence of an impermissible motive of
7 preserving the unlicensed representative's secret at the
8 expense of serving the best interests of the defendant. The
9 unlicensed representative has a pervasive conflict that will
10 have largely indeterminate effects on the representation of a
11 client. It is this indeterminacy that has caused us to extend
12 the per se rule to circumstances in which licensed counsel is
13 implicated in the crimes for which his or her client is on
14 trial. See United States v. Fulton, 5 F.3d 605, 613 (2d Cir.
15 1993) ("[W]e must assume that counsel's fear of, and desire to
16 avoid, criminal charges . . . will affect virtually every
17 aspect of his or her representation of the defendant.").
18 These reasons, however, offer no basis for applying a per
19 se ineffectiveness rule where, as here, the defendant has a
20 licensed attorney of record who signs all relevant papers and
21 makes all relevant court appearances.[4] Bellamy stated that
22 "application of the per se rule must be justified under one or
23 both of [the given] rationales," 974 F.2d at 307, but neither

[4] Pugach's single court appearance to announce Hancock's unavailability does not implicate the right to effective counsel.

1 rationale applies where a defendant has licensed counsel of
2 record and the unlicensed individual privately provides advice
3 on which the defendant claims to have relied.

4 With regard to the first rationale -- the so-called
5 jurisdictional bar, Solina, 709 F.2d at 168–69 -- the court
6 here had no need to secure counsel for appellant because he had
7 a licensed attorney of record, who signed relevant papers and
8 made relevant court appearances. Nor should the court have
9 inquired into appellant's acceptance of advice from others. A
10 court cannot -- and, where a decision is one for the client to
11 make, should not -- ensure that a defendant accepts advice only
12 from his attorney of record. Indeed, many defendants may well
13 take advice from friends or family, including persons claiming
14 legal knowledge, when deciding to accept or reject a plea
15 agreement, to testify at trial, etc. These decisions are for
16 the defendant to make, see Purdy v. United States, 208 F.3d 41,
17 44–45 (2d Cir. 2000), after receiving the informed advice of
18 licensed counsel. That advice may be defective, even non-
19 existent, but the Strickland two-prong test is fully adequate
20 to protect defendants in such cases.

21 Nor does the second rationale for the per se
22 ineffectiveness rule –- the difficulty in determining whether
23 conduct in the representation resulted from a conflict of
24 interest -- apply where the defendant has a licensed attorney
25 of record. Indeed, the shoe is on the other foot with regard

1 to the need to avoid inquiry into conduct for largely
2 indeterminable influences. If a per se ineffectiveness rule
3 joined with a de facto attorney claim were adopted, defendants
4 such as appellant would have great incentive to claim reliance
5 on advice from unlicensed sources. The extent of such reliance
6 would almost always be indeterminable,[5] and the claimed
7 reliance would, in and of itself, tend to constitute the
8 advisor as a de facto attorney.
9 We conclude, therefore, that if the performance of the
10 licensed attorney passes muster under Strickland, the
11 defendant's decision to rely upon other sources does not
12 violate the Sixth Amendment. If the licensed attorney's
13 performance does not pass muster under Strickland, the
14 defendant's rights are protected.
15 CONCLUSION
16 For the foregoing reasons, we conclude that the per se
17 ineffectiveness rule does not apply and affirm.

[5] In the present matter, for example, appellant's contacting Pugach suggests a pre-existing dissatisfaction with his plea.