

**COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-270**

UNITED STATES OF AMERICA

By and Through the United States Attorneys
Eastern and Western Districts of Kentucky

Movant

v.

KENTUCKY BAR ASSOCIATION

Respondent

**BRIEF AMICUS CURIAE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
LAW PROFESSORS AND LEGAL ETHICS PRACTITIONERS
IN SUPPORT OF RESPONDENT**

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PURPOSE OF AMICUS BRIEF

The purpose of this amicus curiae brief filed on behalf of the National Association of Criminal Defense Lawyers (“NACDL”), Law Professors and Legal Ethics Practitioners in Support of the Respondent is to provide this Court with the experience and expertise on this issue that the amici have acquired over the years.

STATEMENT CONCERNING AMICUS PARTICIPATION IN ORAL ARGUMENT

NACDL, as amicus curiae, respectfully requests leave to participate in oral argument and be allowed to divide time with the respondent, the Kentucky Bar Association. NACDL’s participation in oral argument would benefit this Court because NACDL has been involved with both of the ethical issues contained in Kentucky Advisory Ethics Op. E-435 for more than ten years, addressing these issues in the context of criminal defense attorneys and prosecutors practicing in both federal and state courts. If allowed to participate, NACDL’s experience and expertise with regard to these ethical issues would be available to answer this Court’s questions and concerns.

INTEREST OF THE NACDL AS AMICUS

NACDL’s interest in this matter is substantial and important. NACDL, organized in 1958, is the preeminent bar association for criminal defense lawyers in the United States, representing 9,500 direct members and 32,000 members through its 85 affiliate organizations. NACDL’s mission:

Ensure justice and due process for persons accused of crime.
Foster the integrity, independence and expertise of the criminal defense profession.
Promote the proper and fair administration of criminal justice.¹

¹ <http://www.nacdl.org/about/mission-and-values/>.

NACDL has long maintained an Ethics Advisory Committee as a ready source of timely information and guidance for NACDL members with ethics issues relating to their representation of persons accused of crime, providing its membership with access to an Ethics Hotline and by issuing written Ethics Opinions.

Criminal defense lawyers have ethical concerns not faced by other lawyers, so the needs for advice and consultation of NACDL members are unique.

a. In confronting ethical issues, criminal defense lawyers have to consider the implications of the Sixth Amendment right to effective assistance of counsel, the governing state ethical rules, the law of criminal law and criminal procedure, and their personal moral code. Sometimes there may appear to be conflicting duties between ethical rules or between ethical rules and our constitutional duties to the client.”²

NACDL has long been involved in this issue. Upon recommendation of NACDL’s Ethics Advisory Committee, the NACDL Board of Directors ratified Ethics Opinion No. 12-02 on October 27, 2012 on Plea Agreements Barring Collateral Attack.³ That opinion follows an original 2003 informal opinion⁴ and Board of Directors discussion in the same vein, renewed in 2012, and formalized the prior conclusion. The opinion concludes:

It is the opinion of the NACDL Ethics Advisory Committee that, aside from whether the courts might give such waivers, the rules of professional ethics prohibit a criminal defense lawyer from signing a plea agreement limiting the client’s ability to claim ineffective assistance of counsel. The lawyer has a conflict of interest in agreeing to such a provision because it becomes a prospective limiting of liability. Therefore, the lawyer is duty bound to object to portions of a plea agreement that limit 2255 claims and refuse to assent to such an agreement with

² Mission Statement, Ethics Advisory Committee.

³ <http://www.nacdl.org/ethicsopinions/12-02/>.

⁴ NACDL’s 2003 informal opinion was cited with approval in the Florida Proposed Advisory Opinion 12-1 (June 22, 2012, voted late September 2012).

such language in it.⁵

The NACDL Opinion also believes that prosecutors have an ethical duty not to limit ineffective assistance claims.⁶ The NACDL Opinion was issued two weeks before the Kentucky Bar's Advisory Ethics Op. E-435 (Nov. 12, 2012).

This brief will assist the Court because: (1) NACDL has specific expertise in the area representing the criminal defense bar; (2) NACDL's Ethics Advisory Committee has dealt with this issue twice in ten years; and (3) legal scholars and ethicists stand in accord with NACDL's position.

INTEREST OF THE AMICUS ETHICS LAW PROFESSORS AND LEGAL ETHICS PRACTITIONERS

Amici are criminal justice and legal ethics scholars and legal ethics practitioners throughout the United States ("Ethics Amici"). Amici scholars have had extensive experience analyzing, studying, teaching and engaging in scholarship regarding the intersection of criminal law and procedure and legal ethics. Amici practitioners have had extensive experience formulating, interpreting and applying the Rules of Professional Conduct in various jurisdictions. They have served in leadership positions of numerous state and local bar associations, committees, task forces and organizations dedicated to legal ethics and the promulgation and enforcement of codes of professional conduct.

The case implicates the interests of Ethics Amici because it involves the standards and rules for professional conduct and the fair administration of justice. Ethics Amici submit this brief to underscore their support for the Kentucky Ethics Opinion and to pro-

⁵ NACDL Ethics Advisory Op. 12-02 (Oct. 27, 2012) at 1.

⁶ *Id.* at 6 (heading C).

vide a national overview of the significant problems that arise by the inclusion of waivers of ineffective assistance of counsel in both state and federal courts.

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ARGUMENT

A. Advisory Ethics Opinion E-435 does not conflict with controlling federal law. Federal statutes, regulations, and court rules recognize the lawyer conduct ethics rules of this state.

The U.S. Attorneys Offices (USAOs) argue that Kentucky Bar Association Ethics Opinion E-435 conflicts with controlling federal law. USAOs Br. at 6-9. It does not. U.S. Attorneys clearly must comply with the ethics rules of the states they practice in governing lawyer conduct.

1. 28 U.S.C. § 530B binds USAOs to state lawyer conduct rules

The McDade Amendment, 28 U.S.C. §530B (adopted in 1998, P.L. 105-277, §101(b), effective April 1999) provides:

(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.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

Under (b), DOJ adopted regulations in support, and 28 C.F.R. § 77.3, not cited by the USAOs, provides:

In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local 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, as these terms are defined in §77.2 of this part.

Even the Joint Local Rules of the U.S. District Courts for the Eastern and Western Districts of Kentucky adopt the professional conduct rules of this Court in their local rules LR 83.3(c) (civil cases) and LCrR 57.3(c) (criminal cases).

2. Evidentiary and procedural rules v. attorney conduct rules

Federal cases all make a distinction between ethics rules that become evidentiary or procedural rules in federal court and those that instead regulate attorney conduct in the courts. E-435 is an attorney conduct opinion.

The USAOs cite several cases, *e.g.*, *Stern v. U.S. District Court, D. Mass.*, 214 F.3d 4, 20 (1st Cir. 2000), on the lack of power, in the guise of regulating ethics, to impose strictures that are inconsistent with federal law. *See* 28 C.F.R. § 77.1(b) (directing that section 530B should not be construed in any way to alter federal substantive, procedural, or evidentiary law). The cases they cite, however, are limited to complaints against state ethics rules that become tantamount to rules of criminal procedure or evidentiary rules. USAO Br. at 8. This is the law and cases not even cited by the USAOs and in accord are: *United States v. Lopez-Avila*, 678 F.3d 955, 963-64 (9th Cir. 2012) (§530B does not support a really strained double jeopardy argument under the Fifth Amendment); *United States v. Lowery*, 166 F.3d 1119, 1124-25 (11th Cir. 1999) (Federal law, not state law, determines the admissibility of evidence in federal court; the rule against offering consideration to witnesses does not apply to witness immunity or leniency in exchange for testimony); *Ida v. United States*, 207 F. Supp. 2d 171 (S.D.N.Y. 2002) (attorney admission rules).

Amici also submit that USAO's reliance on *Grievance Comm. for the S.D.N.Y. v. Simels*, 48 F.3d 640 (2d Cir. 1995), is misplaced because it predates § 530B, so its holding now cannot be relied upon. (*See* the following sub points *infra* at 4–5.)

This Ethics Opinion regulates attorney conduct, is aimed directly at attorney conduct, and is hardly a rule of evidence or procedural law. Therefore, the USAOs must fol-

low it under § 530B.

3. Conduct of an attorney

a. Generally

It is within the power of the state to enforce state ethics rules, such as violations of the “no contact” with represented persons. The sole issue that determines the proper enforcement authority for rules directed at the conduct of lawyers is simple: is the attorney accountable for the alleged ethical violation or not? As the Tenth Circuit explained in *United States v. Colorado Supreme Court*, 189 F.3d 1281, 1287 (10th Cir. 1999):

The focus of the courts disciplinary powers is on attorney behavior that is an affront to the express authority of the court, or that shows an unfitness to discharge the attorney’s continuing obligations to the court or to clients. *Braley [v. Campbell]*, 832 F.2d [1504,] at 1510 n.5 [(10th Cir. 1987)(*en banc*)] (citing *In re Snyder*, 472 U.S. [634,] at 645 [(1985)]). Accordingly, when a rule of professional conduct is violated, members of the profession would agree that the violating attorney ought to be held personally accountable; whereas when a procedural or substantive rule is violated, any negative effect would be directed primarily at the progress of the claim itself.

See In re Telfair, 745 F. Supp. 2d 536, 567 n.28 (D.N.J. 2010) (considering various alleged ethical lapses of AUSAs and finding the complaints lacking); *Matter of Doe*, 801 F.Supp. 478, 488 (D.N.M. 1992) (also, other courts, both federal and state, have consistently stated Government attorneys are not immune from state bar disciplinary proceedings).

b. DOJ violations of the no contact rule, for example

For years, beginning with the Thornburgh Memorandum, the Department of Justice (DOJ) fought to exempt federal prosecutors from state ethics rules, notably in seeking to circumvent the no contact rule that prevents lawyers from direct contact with defendants known to be represented by counsel. (ABA Model Rules of Professional Con-

duct 4.2; here Kentucky SCR 3.130(4.2)). Essentially, former Attorney General Thornburgh determined that DOJ lawyers were not bound by state lawyers' ethics rules. In 1998, Congress stepped in and passed the McDade Amendment, 28 U.S.C. §530B, making plain that federal prosecutors are bound by state ethics rules. Before the passage of that law, ethics complaints were sustained against a few DOJ lawyers. *See, e.g., Matter of Howes*, 1997 NMSC 024, 123 N.M. 311, 940 P.2d 159 (1997) (federal prosecutor disciplined in licensing state for violating no contact rule in D.C. at the direction of supervisor), *Matter of Doe*, 801 F. Supp. 478 (D.N.M. 1992) (federal prosecutor could not remove state disciplinary action to federal court, and the argument it was procedural federal law was rejected).¹

Now, the U.S. Attorneys Manual § 9–13.200, *Communications with Represented Persons*, recognizes the limits imposed by state ethics rules and keeps DOJ attorneys from violating the no contact rule, and this is also the only place in the U.S. Attorneys Manual that mentions §530B. *See United States v. Bowman*, 277 F.Supp.2d 1239 (N.D. Ala. 2003), *vacated as moot by guilty plea*, 2003 U.S. Dist. LEXIS 24817 (N.D. Ala. (2003) (§ 530B(a) vitiated DOJ regulations (Thornburgh memorandum purportedly authorizing represented person contact notwithstanding 4.2)); *In re Amgen Inc.*, 2011 U.S. Dist. LEXIS 68960 *38–39 (E.D.N.Y. April 6, 2011), adopted 2011 U.S. Dist. LEXIS

¹ *Id.* at 486:

Similarly, John Doe's argument that the DOJ is vested with the authority to interpret when and how the code of ethics applies to an AUSA fails. The idea of placing the discretion for a rule's interpretation and enforcement solely in the hands of those governed by it not only renders the rule meaningless, but the notion of such an idea coming from the country's highest law enforcement official displays an arrogant disregard for and irresponsibly undermines ethics in the legal profession.

63043 (E.D.N.Y. June 10, 2011) (holding that the no contact rule of Rule 4.2 must be interpreted under New York's version of the rule, noting that *Simels* is no longer good law).

c. E-435 is a lawyer conduct rule

Kentucky Bar Ethics Opinion E-435 is purely a lawyer conduct rule: It deals with conflicts of interest in plea bargaining which resolves 97% of the cases handled by the USAOs. What is remotely procedural federal law about a criminal defense lawyer having a conflict of interest in negotiating a guilty plea for his or her client?

Criminal defense lawyers, deal with sensitive problems at the time of counseling a client about a guilty plea offer that arise from an oppressive plea agreement provision—the waiver of a statutory right that potentially benefits the lawyer but harms the client. They are not “agreements” as classically understood because they are effectively adhesion contracts that require the client to agree; otherwise he can “choose” go to trial and be penalized by the trial tax of losing, at the very least, the benefit of “acceptance of responsibility” under U.S. Sentencing Guidelines § 3E1.1, which provides for a reduction in sentence by 2 or 3 points off the Guideline range for the offense.

To be sure, the government benefits from a waiver of the ability to later claim ineffective assistance of counsel, but what about the defendant and defense counsel? The problem is that the person who would be one logical target of a post-conviction claim, defense counsel, is advising the client whether or not to take the plea agreement. What if the lawyer truly was ineffective at some point prior to the plea and knows it? That lawyer clearly has a conflict of interest in advising the client to waive the claim. Nowhere else in the law can a lawyer even presume to get away with such a limit on personal liability. Yet, the USAOs insist upon it in criminal cases in Kentucky and a few other jurisdictions

(*see infra*, p.10). The practical effect of the USAO's position would be that attorneys who fail to competently represent their clients will be able to more easily escape detection and shield themselves from potential bar discipline. Such attorneys represent a threat to the public and the integrity of the justice system.

B. Opinion E-435 correctly concludes that waiver of ineffective assistance claims at a guilty plea creates a conflict of interest for the defense lawyer that the prosecutor cannot impose on a pleading defendant.

1. Plea bargaining is the criminal justice system; 97% plead guilty in federal courts nationwide.

The U.S. Supreme Court directly acknowledged the nature of our criminal justice system: It is not one of trials, but of plea bargains. Ninety-seven percent of federal convictions and ninety-five percent of state convictions are the result of guilty pleas. *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012).² The reality is that plea bargains have become so central to the administration of the criminal justice system that plea bargains are not an adjunct to the criminal justice system; it *is* the criminal justice system. *Id.* (emphasis in original) (*quoting* Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992)).

This is the necessary context to understand why the U.S. Attorneys' requirement of a waiver of all ineffective assistance of counsel claims (a blanket waiver) in a plea agreement creates an inherent conflict for the criminal defense lawyer fulfilling the constitutionally mandated role of representing his or her client. In these waiver agreements, there is no distinction made for waivers of past or future conduct and there is no indica-

² Susan R. Klein, *Monitoring the Plea Bargain Process*, 51 DUQUESNE L. REV. 559, 582085 (2013) (97.4% of federal and 95% of state defendants plead guilty); J. Vincent Aprile II, *Waiving the Integrity of the Criminal Justice System*, 24 CRIM. JUST. 46 (Winter 2010).

tion of specifically identified allegations that are subject to the waiver.³ Therefore, everything is subject to these waivers. Thus, a defendant is required to waive a challenge to prospective conduct that he or she cannot yet know. And, the lawyer may be counseling a waiver of a *Brady/Kyles* violation⁴ or an actual innocence claim that will not be discovered for months or years. Moreover, recent studies demonstrate that most lawyers have an unconscious bias that causes them to act out of self-interest when potential conflicts of interest are present. Documented psychological biases impair their objectivity.⁵

At its logical conclusion, then, it is virtually impossible for the client to provide the lawyer with informed consent of a conflict waiver in this circumstance without bringing in another lawyer to assist in evaluating the waiver; the, the second lawyer would have to get up to speed and learn the entire case. SCR 3.130(1.7) on conflict of interest with current clients requires that a waiver be with “informed consent.” SCR 3.130(1.0)(e) defines informed consent as the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Unfortunately, there are number of cases where defendants may enter a guilty plea because the criminal defense lawyer has convinced the client to accept the plea offer even though that lawyer has not performed minimal investigation or otherwise provided a competent and diligent defense. In other instances, the criminal lawyer convinces a defendant to accept a guilty plea and the lawyer then engages in ineffective assistance at

³ J. Vincent Aprile II, *Plea Waivers that Shield Defense Counsel and Prosecutors*, CRIM. JUST. 46 (Summer 2013).

⁴ *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995).

⁵ Tigran W. Eldred, *The Psychology of Conflicts of Interest*, 58 KAN. L. REV. 43 (2009).

sentencing. Defendants, including those who did not commit the crime, have pleaded guilty under such circumstances. It is not possible to know the number of innocent people who have plead guilty to crimes to avoid lengthy prison terms, but studies in recent years have proven that the phenomenon occurs with greater frequency than once imagined.⁶ Currently “the incentives for defendants to plead guilty are greater than at any previous point in the history of our criminal justice system[,]” and “[t]oday, the incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilt in hopes of leniency and in fear of reprisal.”⁷

2. Collateral review by 2255 proceedings

In federal courts, it is only through a collateral proceeding under 28 U.S.C. § 2255 that an aggrieved defendant may litigate the ineffective assistance of his counsel.⁸ A 2255 motion in federal courts is far different from an appeal and quite limited in its focus. *Wall v. Kholi*, 131 S. Ct. 1278, 1282 (2011) (collateral review is judicial review of a judgment in a proceeding that is not part of the direct appeal). Following a guilty plea in federal court, the scope of the issues that may be raised on appeal is limited to issues left in a conditional plea. F.R.Crim.P. 11(a)(2). Jurisdictional issues such as a defect in the indict-

⁶ See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1343 (1997)(numbers of innocence cases do not reliably include innocent people who plead guilty prior to trial); See ABA Resolution 107 Adopted by the House of Delegates (August 2005) at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/20110325_aba_res107.authcheckdam.pdf.

⁷ Lucian E. Dervan, *Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 64, 56 (2012) (citing research literature to state “it is clear that plea-bargaining has an innocence problem.” *Id.* at 84 & n.257).

⁸ Defendants convicted in the state courts of Kentucky usually raise claims of ineffective assistance of counsel in guilty plea convictions pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. See *Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky. 1998).

ment, challenges to the plea procedure itself, and challenges to the sentence as provided for by statute, may be considered on appeal. 18 U.S.C. § 3742. The only issues that can be raised on appeal are those that appear on the face of the record.

Federal collateral attacks, on the other hand, proceed under 28 U.S.C. § 2255. They are almost always, and usually must be, filed after the appeal is completed, and cannot be used to litigate issues that were, or could have been, raised on appeal. *United States v. Brady*, 456 U.S. 152, 165 (1982). These §2255 proceedings enable the defendant to supplement the record with evidence that supports the claim that is not yet in the trial or appellate record. *See, e.g. Massaro v. United States*, 538 U.S. 500, 504–05 (1998).

The matters that can arise in a 2255 collateral attack are nearly infinite, but generally fall under categories of: defense counsel's ineffective assistance, jury misconduct, witnesses who later concede that they had been lying, discovery of evidence backing actual innocence, including DNA evidence that exonerates the defendant, exculpatory evidence that had not been disclosed by the prosecutors or police, or other claims of prosecutorial misconduct.

Because challenges to defense counsel's effectiveness and prosecutorial misconduct are almost always discovered after conviction, they must be raised in a collateral attack. The effect of waivers of any collateral attack, however, is obvious: that defendants may be unable to get judicial relief from any such lawyer ineffectiveness or government misconduct.

Significantly, the type of broad and problematic waivers found in the provisions advanced by Kentucky's U.S. Attorneys deviate from those of most USAOs across the country. Recently, the plea appeal and § 2255 waiver practices in all federal jurisdictions

were sampled by the Federal Defender in the Middle District of Florida in their Plea Appeal and Collateral Attack Waivers Chart to determine to what degree U.S. Attorneys have used these waivers. The results show that they have neither taken root nor thrived, and they appear in only 13% of the federal jurisdictions.

- 18 jurisdictions (19%) have no appeal nor §2255 waivers whatsoever.
- An additional 8 jurisdictions have waiver of appeal provisions, but no relinquishment of § 2255 rights, raising the number of jurisdictions up to 26, or from 19% to 28%.
- Even in jurisdictions that retain express 2255 waivers in their plea agreements, another 36 make exceptions for ineffective assistance of counsel or prosecutorial misconduct review, raising the number up to 62, or from 28% to 67%.
- Finally, 3 more jurisdictions maintain appeal and 2255 waivers, but except claims that the pleas were involuntary or invalid, both being positions that encompass ineffective assistance or misconduct, raising the number to 65 districts, or from 67% to 70%.

Therefore, in 70% of all federal jurisdictions, the U.S. Attorney's Offices do not bar defendants who enter into their standard plea agreements from pursuing ineffective assistance or misconduct claims. Of the remaining 29 jurisdictions, most allow for some exceptions to a waiver of all appeal and 2255 rights. A small minority of 12 U.S. Attorneys Offices (or 13% of the total) retains language that waives all such rights without exception. Waivers at issue here are definitely not the norm nor are they deemed necessary in most federal prosecution offices.⁹

⁹ The U.S. Attorneys' concern that the Ethics Opinion will create a huge burden

3. Defense counsel manifestly has a conflict of interest in acceding to a plea agreement imposing a waiver of 2255 claims.

a. *Strickland* does not apply

The USAO's brief starts from the premise that defense counsel is presumed effective. USAO Br. at 12–13. Their brief ironically conflates the standard for ineffective assistance of counsel in post-conviction proceedings with a lawyer's conflict-free duty in negotiating a plea and advising the client whether to take it. One is not the other.

Strickland v. Washington, 466 U.S. 668, 689 (1984), holds that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. That is the post-conviction standard, not the relevant one not when defense counsel is considering whether a conflict of interest exists *before* conviction.

Moreover, the *Strickland* presumption of sound strategy has utterly no application to defense counsel's pretrial determination of whether a conflict of interest exists when considering a plea agreement with a post-conviction waiver clause. Moreover, a guilty plea is not a mere strategic choice. *Florida v. Nixon*, 543 U.S. 175, 187–88 (2004) (quoting *Boykin v. Alabama*, 395 U.S. 238, 240–42 (1969) (the plea is not simply a strategic choice; it is itself a conviction, *id.*, at 242)).

By comparison, the standard of review for conflicts of interest on direct appeal is a *presumption of prejudice* when a pretrial objection is made. *Holloway v. Arkansas*, 435 U.S. 475, 488–90 (1978). It is, however, *actual prejudice* if it is raised for the first time in a post-conviction proceeding. *Cuyler v. Sullivan*, 466 U.S. 335, 350 (1980); *Mickens v.*

on the prosecution and courts is belied by the 70% of the districts without these waivers; their criminal justice systems have not collapsed due to their continued recognition of the ethical and policy issues raised by such waivers.

Taylor, 535 U.S. 162, 176 (2002).

Strategic decisions on conflicts of interest are presumed to favor the client over the lawyer. *Compare, e.g.*, F. R. Crim. P. 44 on multiple representation conflicts.

b. Defense counsel has a conflict of interest in counseling a client to waive a 2255 claim for ineffective assistance of counsel.

i. NACDL Ethics Advisory Op. 12-02

Upon recommendation of NACDL's Ethics Advisory Committee, the NACDL Board of Directors ratified NACDL Ethics Advisory Op. 12-02 on October 27, 2012, just two weeks before the Kentucky Bar issued E-435.

The NACDL Ethics Advisory Committee believes that defense counsel faced with a waiver of ineffective assistance claims in a proposed plea agreement has a conflict of interest forced on defense counsel by the government. (Model Rule of Professional Conduct 1.7(a). ...

In such plea agreements, the lawyer is advising the client to waive his or her rights to challenge the constitutional effectiveness of the lawyer. This is an obvious conflict of loyalty to the client. *Id.*, Comment ¶ 10. Model Code of Professional Responsibility DR 5-101(A) and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125 (2000) are in accord. Conflicts of interest between lawyer and client have constitutional implications.

NACDL Op. 12-02 at 5. The opinion also concludes: (1) that the lawyer is limiting liability in violation of Rule 1.8(h)(1) because an ineffective assistance claim must be successful before a legal malpractice claim will lie; NACDL Op. 12-02 at 5-6; and (2) prosecutors also cannot ethically offer such plea agreements and put defense counsel in that position. *Id.* at 6.

ii. The overwhelming majority of state opinions agree with E-435

Nine other state ethics opinions are in accord, and the Kentucky Bar Association cites them all: All of the state ethics authorities considering this issue are basically in ac-

cord: Alabama Informal Op. (Sept. 22, 2010); Missouri Op. 126 (May 19, 2009); North Carolina Op. PRC 139 (Jan. 15, 1993); Ohio Op. 2001-6 (Dec. 7, 2001); Tennessee Op. 94-A549 (1995); Vermont Op. 95-04 (1995). Florida's Ethics Committee approved its draft opinion, Proposed Advisory Opinion 12-1 (June 22, 2012, voted late September 2012), citing NACDL's Proposed Opinion 03-02.

The two states with differing opinions, Texas and Arizona, do not necessarily conclude that such waivers always pass muster. Even Texas Op. 571 (May 2006), cited with approval by the USAOs, mentions that the waiver has to be knowing, which could require that independent counsel is brought in to advise on the subject.¹⁰ Arizona Op. 95-08 (1995) for some reason does not even cite to the conflict of interest rule, relying solely on Rule 1.8(h). It also has a dissenting opinion.

The USAO's concern about balkanization of the ethics rules is answered by Congress's adoption of §530B which intends to do just that.

iii. Limitations on liability are also unethical under SCR 3.130(1.8(h))

Most of the state ethics opinions on this subject concluded that such a 2255 waiver amounts to an impermissible waiver of the lawyer's liability. This, we submit, also violates SCR 3.130(1.8(h)).

It is clear in almost all states that a defendant must set aside his conviction before he or she can sue for malpractice. NACDL Ethics Advisory Op. 12-02 at 5-6 recognizes this:

¹⁰ *Id.*:

... provided that in the particular case the defense lawyer fully complies with the applicable requirements of [the conflict rules] with respect to any conflict of interest arising from the waiver of post-conviction appeals based on ineffective assistance of counsel.

An ineffective assistance claim is not strictly a malpractice claim, but a successful ineffective assistance claim is a predicate to suing a criminal defense lawyer for malpractice in virtually all jurisdictions. RESTATEMENT § 53, Comment d (colorable claim of innocence must be made before malpractice action will lie against criminal defense lawyer); 3 RONALD E. MALLIN & JEFFERY M. SMITH, LEGAL MALPRACTICE § 27:13 (2012 ed.) (nearly universal rule); compare *Heck v. Humphrey*, 512 U.S. 477 (1994) (§ 1983 cannot be used to collaterally attack a conviction until the conviction is set aside).

Kentucky is in accord. *Ray v. Stone*, 952 S.W.2d 220, 225 (Ky. App. 1997); *Stephens v. Denison*, 150 S.W.3d 80, 83–84 (Ky. App. 2004) (because Stephens “had not obtained exoneration from his conviction and sentence through post-conviction relief, he may not maintain a cause of action against [defense counsel] for legal malpractice.”).

The USAOs argue that Rule 1.8(h), which prohibits lawyers from making an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented, is not analogous to the ethical issues addressed in E-435. USAO Br. at 16. However, when analyzed in connection with Kentucky’s legal malpractice law, the waivers of ineffective assistance of counsel, whether contained in a general or a specific waiver, do not simply limit the criminal defense attorney’s liability to the defendant for malpractice – indeed, they effectively immunize defense counsel from a malpractice judgment.

Therefore, under the USAO’s version a criminal defense lawyer could be completely ineffective, facilitate a wrongful conviction, and remain completely immune from civil liability¹¹ because the federal prosecutors seek to deny the defendant any ability to challenge his or her lawyer’s effectiveness in the events leading up to the guilty plea. This should be contrary to public policy.

¹¹ Or probably even disciplinary sanction without a record being made.

CONCLUSION

Kentucky Ethics Op. E-435 is a correct statement of the controlling ethical principles and does not conflict with any law. The governing of lawyer conduct is completely within the power of the State, and federal prosecutors are bound by the State's ethics rules under 28 U.S.C. §530b. This ethics opinion governs the conduct of prosecutors and criminal defense attorneys who practice in the state courts of Kentucky as well in the federal courts in Kentucky. Therefore, the U.S. Attorney's brief of United States in Support of Motion for Review of Ethics Opinion should be rejected and the ethics opinion as written should be affirmed.

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