12-17-2013

# Green v. State Appellant's Brief Dckt. 41235

IN THE SUPREME COURT OF THE STATE OF IDAHO

LEE EDD GREEN JR.

Petitioner/Appellant

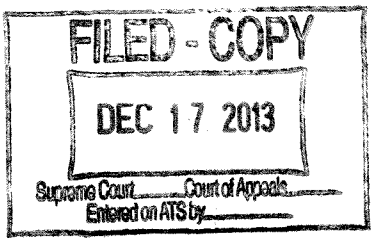
vs.

STATE OF IDAHO,

Respondent.

Supreme Court Case No. 41235

APPELLANT'S BRIEF




# APPELLANT'S BRIEF

Appeal from the District Division of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Owhyee

Honorable Molly J. Huskey
District Judge, Presiding

RICHARD L. HARRIS
Attorney At Law
P. O. BOX 1438
Caldwell, Idaho

LAWRENCE WASDEN
Attorney General
State of Idaho
P. O. Box 83720
Boise, Idaho 83702-0010

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## STATEMENT OF CASE

This is an appeal from an Order of the District Court dismissing an application for post-conviction relief. The underlying conviction was based upon a Rule 11 Plea Agreement which ultimately is the basis for this appeal. The Agreement was agreed to by the Prosecuting Attorney of Owyhee County and Mr. Green's attorney, The Owyhee County Public Defender. Under a provision of the Agreement entitled "Other terms and conditions of this plea agreement:" in someone's handwriting appear the words "Victims Restitution- Waiver of Rule 35, Appeal and Post Conviction." Specifically this Appeal deals with the legal effect of those Waivers as it relates to effective assistance of counsel.

## STATEMENT OF FACTS

Petitioner Green was charged with four counts of Lewd conduct with a minor child and one count of rape. Green's attorney, the Owyhee County public defender urged Green to accept a plea bargain he had worked out with the Prosecutor. The plea agreement was that Green would enter an Alford Plea to two counts of Lewd conduct and one count of injury to a child amended from the original charge of rape. The entry of the plea would be pursuant to Rule 11, **ICR** and would be binding on the judge who would pronounce sentence. A promise was made to Green that the sentence would be a retained jurisdiction commonly referred to as a rider and probation at the end of the rider. (See Green's second affidavit, paragraph 6, Clerk's record, page 70) Green states that there would be a guaranty of the rider and then probation. Green asserted that he did not commit the rape and could not plead guilty to something he did not do. Green's attorney

advised him that unless he plead to the amended charge of injury to a child, still a felony, the prosecutor would not agree to the rider. Green states he was advised by counsel the only way he was assured of probation was by agreeing to the Rule 11 Plea Agreement.

The Rule 11 Plea Agreement is set forth at page 19 of the Clerk's Record on Appeal. The Plea Agreement provides that "The defendant will plead to Counts I, II and pursuant to *North Carolina v. Alford* in Count III, as listed in the THIRD AMENDED INDICTMENT. The remaining counts will be dismissed upon acceptance by the Court of this Rule 11 Plea Agreement." Green would undergo a psychosexual evaluation, terms and length of sentencing would open for argument, the Court would retain jurisdiction for a period of up to 180 days; and the state was free to argue imposition sentence at the retained jurisdiction hearing. Then at some time after the typewritten document was prepared under a heading of "other terms and conditions of this plea agreement" in someone's handwriting appear the words "Victim Restitution- Waiver of Rule 35, Appeal, and Post Conviction. Below that appears the signature's of the prosecutor, public defender and the defendant.

Green states in his first affidavit that he does not remember of being advised that he waived his Rule 35, appeal or post-conviction rights by entering into the plea agreement. He states specifically: "I have no recollection of the handwriting being on the agreement at the time I signed the agreement or approved the agreement." (Clerk's Record, p. 10) Nor did he remember there being any mention of the waiver of those rights during the discussions with counsel regarding the agreement, just that it was emphasized that he was going to do a rider and be placed on probation.

Green was sentenced on December 20, 2011, to a term of fifteen years determinate, fifteen years indeterminate to run concurrently on Counts 1 and 2 with the court retaining jurisdiction for up to 365 days, and five plus five on the other count, consecutive to Counts 1 and 2 with the court retaining jurisdiction. Green served the period of retained jurisdiction, and received a probation recommendation from the review committee.

When it was the time for the Court to conduct a review hearing on the period of retained jurisdiction, another judge conducted the review and decided to drop jurisdiction and impose sentence. The public defender on Green's behalf filed a Rule 35 motion which was denied based upon the waiver in the plea agreement and the appeal to the Supreme Court which was denied on same grounds and a Remittitur was issued on September 12, 2012.

The Petition for Post Conviction relief was filed on March 13, 2013. An Amended Petition for Post Conviction relief was filed on May 28, 2013. The District Judge entered an Order of Dismissal of the Petition on June 21, 2013, and a Final Judgment entered June 21, 2013. A Motion to Reconsider the dismissal was timely filed but was also denied based upon the lack of timeliness in filing the Petition. The Court determined the waiver contained as part of the plea agreement operated to require the Court to dismiss the Petition. From the dismissal this appeal was taken.

## ISSUES ON APPEAL

### I.

**DOES THE CONDUCT OF DEFENSE COUNSEL IN ADVISING PETITIONER TO AGREE TO A PLEA AGREEMENT WHICH IN PART**

**REQUIRES PETITIONER TO WAIVE HIS RIGHTS TO APPEAL, RULE 35 MOTION AND POST CONVICTION RELIEF CONSTITUTE AN INHERENT CONFLICT OF INTEREST DEPRIVING PETITIONER OF EFFECTIVE ASSISTANCE OF COUNSEL UNDER ARTICLE 6 OF THE UNITED STATES CONSTITUTION?**

**II.**

**IS IT PERMISSABLE FOR THE PROSECUTING ATTORNEY TO REQUIRE A WAIVER OF A DEFENDANT'S RIGHTS PURSUANT TO I. C. SEC. 19-4901 WHEN ENTERING INTO A PLEA AGREEMENT?**

**III.**

**IS THE ONE YEAR LIMITATION FOR FILING A 19-4901 PETITION TOLLED DURING A PERIOD OF RETAINED JURISDICTION.**

ARGUMENT AND AUTHORITIES

Idaho Code Section 19-4901 establishes a remedy to "Any person who has been convicted of, or sentenced for, a crime..." One of the claims allowable under the statute considered by the court in reviewing a petition for post conviction relief is whether that person received in the course of the trial proceedings effective assistance of counsel.

One of the claims raised by Petitioner in his Amended Petition for relief is that:

> "Trial Counsel permitted and allowed the Rule 11 Plea Agreement to contain language which waived Defendant's right to appeal the Judgment and Commitment Retained jurisdiction entered on December 20, 2011; or appeal from the Order Relinquishing Jurisdiction entered June 15, 2012; or from filing a Rule 35 Motion for a modification of the sentence or even pursuing a post conviction relief proceeding.
>
> Trial counsel failed to ensure language was contained in the Rule 11 Plea Agreement that in the event the Review Committee recommended probation that the court would place the Defendant on probation." (Clerks Record, P. 52)

Petitioner asserts that he was denied effective assistance of counsel because counsel recommended and convinced him to accept the Rule 11 Plea Agreement even though the Agreement required him to waive his right to appeal, file a Rule 35 Motion or

pursue a post conviction relief proceeding because the recommendation contains an inherent conflict of interest rendering the entry of a guilty plea involuntary and unknowledgeable.

1. STANDARD OF REVIEW.

A claim of ineffective assistance of counsel may be pursued under the Uniform Post-Conviction Procedure Act. *Hughes v. State*, 148 Idaho 448, 224 P.3d 515 (Ct. App. 2009) On appeal from an order of summary dismissal, the appellate applies the same standard utilized by the trial court to determine if there existed admissible evidence raised by the petitioner which would entitle the petitioner relief. *Ridgley v. State*, 148 Idaho 671, 227P.3d 925 (2010); *Sheahan v. State*, 146 Idaho 101, 190 P.3d 920 (Ct. App. 2008) To prevail on an ineffective assistance of counsel claim, petitioner must show that counsel's performance was deficient but that he was prejudiced by the performance. To establish deficiency the petitioner must show that counsels performance fell below an objective standard of reasonableness and to establish prejudice petitioner must show a reasonable probability that, but for, the deficiency the outcome would have been different. An appellate court will not second guess counsel's strategy or tactics unless those decisions are based upon ignorance of the law, lack of preparation or other objective deficiency. *Hughes v. State*, 148 Idaho 448; *Aragon v, State*, 114 Idaho 758, 760 P.3d 1174 (1988); *Howard v. State*, 126 Idaho 231, 880 P.2d 261 (Ct. App. 1994)

On the other hand if the petition, affidavits and other information allege facts that if true entitle the petitioner to relief, then the petition may not be summarily dismissed. *Charboneau v. State*, 140 Idaho 789, 102 P.3d 1108 (2008) *Berg v. State*, 131 Idaho 517, 960 P.2d 738 (1998)

2. CONFLICT OF INTEREST CLAIM

Petitioner contends that his attorney, in convincing him to accept the Rule 11 Plea Agreement and the waiver, particularly of his 19-4901 rights which would include a claim of ineffective assistance of counsel, had an inherent conflict of interest which rendered the plea of guilty involuntary, unknowledgeable, and unintelligently made, and therefore defective.

The relevant part of Rule 11, **ICR,** provides that:

> (f) **Plea Agreement Procedure.**
> (1) **In general.** The prosecuting attorney and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement, which may include a waiver of the defendant's right to appeal the judgment and sentence of the court, that upon entering a plea of guilty to a charged offense or to a lesser or related offense, the prosecuting attorney will do any of the following:
> (A) move for a dismissal of other charges; or
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding on the court; or
> (C) agree that a specific sentence is the appropriate disposition of the case; or
> (D) agree to any other disposition of the case.
>
> The Court may participate in any such discussions.

**Rule 11(f)**

The rule specifically allows for a waiver of the defendant's right to appeal a judgment and sentence, but the rule makes no mention of a waiver of 19-4901 rights. The waiver of an appeal set forth in the rule makes sense because the defendant knows exactly what he can expect from a disposition of the case after a plea of guilty because the provisions related to the disposition and sentence are binding on the judge and the defendant knows that at the time of the judgment or sentence precisely what the sentence

will be otherwise the rule allows the defendant to withdraw his plea and the matter can then be set for trial. But here jurisdiction was retained and the final disposition was not known until the review hearing was conducted. The Rule 11 Plea Agreement failed to the extent that there were a number of unknowns to be contended with.

Prosecutors typically require a waiver of not only the judgment and sentence but Rule 35 and 19-4901 rights as well. By making such a requirement a part of the plea agreement the prosecutor has exceeded the authority granted by the rule. By doing so the prosecutor likewise has created a conflict of interest in that the waiver eliminates any post relief allegation of prosecutorial misconduct which might have not been known at the time the agreement was made. The defendant would by the waiver be precluded from raising that claim or any other claim on a post conviction relief proceeding.

In addition Rule 1.8(h)(1) of the Idaho Rules of Professional Conduct states that "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." When the waiver requires the defendant to waive his right of appeal and all post-conviction rights then arguably Rule 1.8(h)(1) comes into play.

Here the trial judge found a waiver of the right to appeal, although jurisdiction was retained. In dismissing the petition for post conviction the trial court began counting the one year limitation period from the date sentence was pronounced because of the waiver of a right to appeal, rather than from the jurisdictional review hearing when jurisdiction was dropped and the sentence imposed. The effect of the conflict of interest did not occur until jurisdiction was dropped.

In accord with the provisions of our Rule 11 is the case of *Rae v. State*, 03C01-9901-CC-00029, 2000WL, 30071 (Tenn. Crim. App. Jan. 18, 2000) which held as follows: "Although a criminal defendant may waive the right to a direct appeal as part of a plea agreement, we conclude today that a defendant may not waive his or her right to post-conviction remedies as part of a plea agreement." The rational of the holding was that post-conviction relief proceedings are significantly different from a direct appeal and could address other constitutional issues.

On August 12-13, 2013, the House of Delegates of the American Bar Association adopted Resolution 113E. That resolution provides:

> RESOLVED, THAT the American Bar Association opposes plea or sentencing agreements that waive a criminal defendant's post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct or destruction of evidence unless based upon past instances of such conduct that are specifically identified in the plea or sentencing agreement or transcript of the proceedings; and
>
> FURTHER RESLOVED THAT a defendant must be provided independent counsel before being permitted to waive those post-conviction claims of ineffective assistance of counsel that are specifically identified in the plea or sentencing agreement or transcript of the proceedings.
>
> FURTHER RESOLVED, THAT the American Bar Association urges judges in all jurisdictions to reject plea and sentencing agreements that include waivers of a criminal post conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence unless based upon past instances of such conduct that are specifically identified in the plea or sentencing agreement or transcript of the proceedings.

In *Burgess v. State*, 342 S.W.3d 325 (Miss. 2011) the Missouri Supreme Court was confronted with a post conviction relief proceeding. The defendant had entered into a plea agreement which provided that he waive his post conviction rights by entering plea of guilty to the charge of discharging a firearm at a building. He received a fifteen year sentence which was suspended and was placed on probation. He subsequently violated

his probation by discharging a firearm, his probation was revoked and the fifteen year sentence invoked. The defendant filed a petition for post conviction relief alleging among other things ineffective assistance of counsel because of the advice to waive his post conviction rights. The trial court summarily dismissed the petition without making any findings. The defendant appealed the decision of the trial court. While the issue of the waiver was an issue before the supreme court, the supreme court set aside the order revoking probation, and directed the trial court to conduct a hearing and make findings of fact. Since the appeal was decided on a matter other than the waiver, the waiver was not addressed. However, a concurring jurist filing a separate opinion stated the following:

> I concur in the principal opinion but write separately to point out that the findings of fact and conclusions of law to be made in the circuit court on remand should include findings as to whether defense counsel or the prosecutor went beyond the limits set forth in Formal Opinion 126 of the Advisory Committee of this Court. Specifically, the factual record should address these questions:
>
> 1) Whether defense counsel advised his client, Clarence Burgess, to waive the client's right to seek post conviction relief based upon ineffective assistance of defense counsel; and
>
> 2) Whether the prosecuting attorney required that Burgess waive all rights under rule 24.035 (The post conviction proceeding rule) when entering into this plea agreement.

Formal Opinion 126, interpreting Rules 4-1.7, 4-3.8 and 4-8.4 of the Rules of Professional Conduct, reads as follows:

> **WAIVER OF POST-CONVICTION RELIEF**
>
> We have been asked whether it is permissible for defense counsel in a criminal case to advise the defendant regarding waiver of a right to seek post-conviction relief under Rule 24.035 including claims of ineffective assistance of counsel. We understand that some prosecuting attorneys have expressed intent to require such a waiver as part of a plea agreement.

> It is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel. Providing such advice would violate Rule 4-1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel. Defense counsel is not a party to the post-conviction relief proceeding but defense counsel certainly has a personal interest related to the potential for a claim that defense counsel provided ineffective assistance to the defendant. It is not reasonable to believe that defense counsel will be able to provide competent and diligent representation to the defendant regarding effectiveness of defenses counsel's representation of the defendant. Therefore, under Rule 4-1.7(b)(1), this conflict is not waivable.
>
> We have also been asked whether it is permissible for a prosecuting attorney to require waiver of all rights under Rule 24.035 when entering into a plea agreement. We believe it is inconsistent with the prosecutor's duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice for a prosecutor to seek a waiver of post-conviction rights based on ineffective assistance of counsel or prosecutorial misconduct. See, Rules 4-3.8 and 8.4(d). We note that at least three other states have issued opinions consistent with our view.
>
> 342 S.W.2d at 329.

*United States v. Kentucky Bar Association*, 2013-SC-270 is a case pending in the Supreme Court of Kentucky. The United States Attorneys for the Eastern and Western Districts of Kentucky brought suit against the Kentucky Bar Association because the Kentucky Bar Association Ethics Opinion E-435 conflicts with federal law. Advisory Ethics Opinion KBA E-435, November 17, 2012 provides as follows:

**SUBJECT:** Plea Agreements Waiving the Right to Pursue an Ineffective Assistance of Counsel Claim.

**Question 1:** May a criminal defense lawyer advise with regard to a plea agreement that waives the client's right to pursue a claim of ineffective assistance of counsel as part of the waiver of the right to collaterally attack a conviction covered by the plea agreement?

**ANSWER:** **NO.**

**Question 2:** May a prosecutor propose a plea agreement that requires a waiver of the defendant's or potential defendant's right to pursue a claim of ineffective assistance of counsel relating to the matter that is the subject of the plea agreement?
**ANSWER: NO.**

A copy of the full text of KY. B. ASS'N., *Advisory Ethics Op. E-435*, 77 Bench & Bar 2 (March 2013) is attached to this brief as Addendum A.

The opinion has this concluding statement:

> It is the opinion of the NACDL Ethics Advisory Committee that, aside from whether courts might give such waivers, the rules of professional ethics prohibit a criminal defense lawyer from signing a plea agreement limiting the client's liability to claim ineffective assistance of counsel. The lawyer has a conflict of interest in agreeing 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 assent to such an agreement with such language in it. (Brief of Amicus Curie, p. 4-5)

It should be noted that a 2255 claim is the Federal provision for post-conviction relief.

( A copy of the Amicus Brief is attached hereto as Addendum B.)

In *Majors v. State*, 568 N.E. 2d 1065 (1991) the Indiana Appeals Court held concerning a case in which the plea agreement contained a provision waiving the defendant's post-conviction rights: "...we do hold that such provisions in plea agreements which waive the right to seek post-conviction relief are void and unenforceable." *Id.* at 1067.

The authorities cited above provide authority for the proposition that a plea agreement which waives the ability of a defendant to assert an ineffective assistance of counsel claim is inherently a significant conflict of interest and a plea of guilty to a charge containing such a provision cannot stand.

The Trial Court in the present case in its Notice of Intent to Dismiss dated May 4, 2013 gave notice to the waiver of right to file post-conviction relief even citing the

NACDL Ethics Advisory Committee Formal Opinion 12-02, October 27, 2012. The trial Court, however declined to "find the waiver of the right to pursue post-conviction relief was a knowing, intelligent and voluntary waiver." I believe the Trial Court should have conducted a hearing to make the determination if the waiver was knowingly, intelligently and voluntarily made. Any plea is by its very nature is coercive and is a contract of adhesion. That is the prosecutor dictates the terms of the agreement and in this case improperly inserted the waiver of post-conviction rights although reserving the right to recommend imposition of sentence at the review hearing assuming a favorable recommendation for the defendant by the Review Committee. I believe the Trial Court should have addressed the issue of the conflict of interest.

The Trial Court did deny relief to Green on the limited basis of timeliness of the filing of the Petition for Post-Conviction Relief. The Court stated that Green's one year statute of limitations to file such Petition began to run On December 20, 2011 and expired December 2012. The Court did not take into account the time Green spent on the retained jurisdiction. However, as a basis for not tolling the one year period while Green was on his rider, was the Court's statement that "Petitioner waived his right to file an appeal, therefore, the period of retained jurisdiction did not act to toll the time for filing the post-conviction petition." (Clerk's Record, P. 83) But whether the time limit was tolled or not goes to the heart of Petitioner's contention herein of the inherent conflict of counsel in agreeing to the waiver of Petitioner's right to appeal, file a Rule 35 motion, or post-conviction rights. The conflict occurred when the agreement was signed resulting in a failure of Petitioner to enter a voluntary, knowing and intelligent plea of guilty. The

conflict of interest was ab initio from the signing of the Plea Agreement and could not be an effective waiver of his appeal rights.

3. TIMELINESS OF THE FILING OF THE POST-CONVICTION PETITION.

The Trial Court essentially determined that the one year limitation period for the filing of a post-conviction proceeding commenced at the time judgment and sentence was entered on December 20, 2011 plus 42 days. However, the defendant served a rider and the Court refused to toll the one year statute during that period of time. The real and effective entry of judgment and sentence occurred when the Court dropped the retained jurisdiction and imposed sentence. That occurred on June 15, 2012. Idaho Code 19-4902 (a) establishes the time frame in which an application for post-conviction relief may be filed:

> "...An application may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, which ever is later."

In this case the ineffective assistance of counsel claim arose when counsel advised or permitted the Rule 11 Plea Agreement to contain the language waiving Green's right to appeal, file a Rule 35 motion or post-conviction relief proceedings. The Court followed the plea agreement by imposing a sentence but retaining jurisdiction. Retaining jurisdiction was key. When was the operative time to file a Rule 35 Motion? Rule 35, **ICR**, provides: "The court may reduce a sentence within 120 days after the filing of a judgment of conviction or 120 days after the court release retained jurisdiction. ...Motions to correct or modify sentences under this rule must be filed within 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction and shall be considered and determined by the court without the admission of additional evidence and

without oral argument, unless otherwise ordered by the court in its discretion; provided however, that no defendant may file more than one motion seeking a reduction of sentence under this Rule."

Although Rule 11 permits entry to a plea of guilty which may allow a waiver of a defendant's right to appeal a judgment and sentence, no mention is made of the effect of a Rule 35 motion not a 19-4901 claim. A right to appeal from a judgment and sentence would have to occur within forty-two days of the entry of the judgment. If the court retains jurisdiction the forty-two day appeal limitation would expire before the retained jurisdiction was determined. Because a defendant is only entitled to one Rule 35 motion, and Rule 35 specifically allows a defendant to file a motion to correct or modify a sentence within 120 days of release of the retained jurisdiction, reasonableness and common sense dictate that a defendant would not file such motion until after determination of the retained jurisdiction. If retained jurisdiction is released by the court, the right to file a Rule 35 motion is critical. In any event the final determination occurred when the court dropped jurisdiction. That should have been the time from which the filing of post conviction proceedings should be measured.

The usual circumstance where the court retains jurisdiction, and a defendant receives a favorable recommendation for probation, the court will place the defendant on probation. It is the extraordinary case where the court receives a favorable recommendation of probation and the court does not follow that recommendation. I do not have a statistical percentage available to me but my estimate would be that the courts follow the recommendation of the review committee if probation is recommended in the high ninety percentile. It is the experience of this attorney of having only one judge

release jurisdiction after a favorable recommendation for probation. And that occurred one time in approximately 250 cases involving retained jurisdiction handled by this counsel.

But two things occurred here. Counsel for Green negotiated a sentence to include a provision for retained jurisdiction. Counsel assumed that if there was a favorable probation recommendation, the client would be placed on probation. But the Plea Agreement also contained a waiver of Rule 35 and post-conviction rights. Again Counsel assumed if there was a favorable probation recommendation from the review committee the client would be placed on probation. But the prosecuting attorney reserved the right to argue for imposition of sentence rather than probation even if the review committee recommended probation. That is a position which constitutes a conflict of interest on the part of the prosecutor. But counsel for Green prospectively could not foresee that the court would release jurisdiction in spite of a favorable probation recommendation. But counsel did permit the right of the prosecutor to argue for imposition of sentence in spite of such recommendation And counsel did not protect his client from such a contingency by waiving his Rule 35 or post-conviction rights. By advising or permitting his client to waive both Rule 35 and post-conviction rights, an inherent conflict of interest occurred with counsel's representation of Green. Refer to the discussion above on conflict of interest.

Since a Rule 35 motion would not be used until the outcome of the retained jurisdiction was determined, the limitation time from which to file a Rule 35 motion was tolled until after completion of the rider. That would have been 120 days from June 8, 2012. The right to file a post-conviction proceeding would have began to run at the time

of the determination of the Rule 35 motion. The March 13, 2013 filing date of the Petitioner in this case was well within the one year period for the filing of a post-conviction relief proceeding using this reasoning.

But even if the Rule 35 motion is not available to the defendant, the Petition for Post-Conviction relief was still filed within one year from the determination of the retained jurisdiction proceeding.

The case law indicates that the time limitation to file an appeal is enlarged by the length of time the district court retains jurisdiction, however when the court releases jurisdiction in that instance the time limitation period begins to run from that date. *State v. Joyner*, 121 Idaho 376, (Ct. App. 1992); *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982)

The Court relinquished jurisdiction on June 15, 2012. Green, through counsel, filed within forty-two days a direct appeal from that determination. The Supreme Court dismissed the appeal on August 23, 2012. The Remittitur was filed on September 13, 2012. Counsel also filed a Rule 35 Motion which was dismissed on August 17, 2012.

Petitioner, Green, asserts based upon the inherent conflict of interest of counsel in permitting the Plea Agreement to contain the waivers of his right to appeal, file a rule 35 motion and post-conviction relief proceedings this Court should find on an equitable basis and such conflict of itnerest that the Petition for Post-Conviction relief was timely and grant to Petitioner a right to be heard.

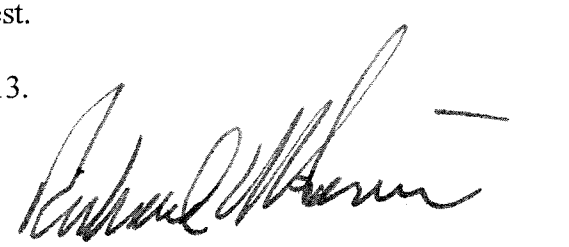
## CONCLUSION

Petitioner Green was denied effective assistance of counsel due to counsel's inherent conflict of interest in permitting and allowing Petitioner to enter into a Rule 11

Plea Agreement in which Petitioner waived his right to post judgment rights to appeal, file Rule 35 motion and post-conviction relief proceedings. The conflict of interest interfered with Petitioner's ability to make a knowing, intelligent and voluntary plea of guilty per the Plea Agreement.

The remedy this court should provide is to remand this matter back to the trial court to conduct a hearing for the express purpose of determining the validity of the plea taking into consideration the conflict of interest.

Dated this 11 day of December, 2013.



Richard L. Harris
Attorney for Appellant

CERTIFICATE OF SERVICE

I the undersigned do hereby certify that a true and correct copy of the foregoing instrument was served on the following this 17 day of December, 2013.

LAWRENCE WASDEN
Attorney General
State of Idaho
P. O. Box 83720
Boise, Idaho 83702-0010

✓ UNITED STATES MAIL

_____ COURTHOUSE BASKET

_____ FACSIMILE

RICHARD L. HARRIS

# ADDENDUM A

# ADVISORY ETHICS OPINION

## ETHICS OPINION KBA E-435

November 17, 2012

**Subject:** Plea Agreements Waiving the Right to Pursue an Ineffective Assistance of Counsel Claim

**Question 1:** May a criminal defense lawyer advise a client with regard to a plea agreement that waives the client's right to pursue a claim of ineffective assistance of counsel as part of the waiver of the right to collaterally attack a conviction covered by the plea agreement?

**Answer:** **No.**

**Question 2:** May a prosecutor propose a plea agreement that requires a waiver of the defendant's or potential defendant's right to pursue a claim of ineffective assistance of counsel relating to the matter that is the subject of the plea agreement?

**Answer:** **No.**

**References:** SCR 3.130 [Kentucky Rules of Professional Conduct] (1.7, 1.8(h)(1), 3.8(b), 3.8 Cmt 1, 8.4(a)); Va. State Bar Legal Eth. Op. 1857 (2011); Mo. S. Ct. Adv. Comm. Formal Op. 126 (2009); Ohio Adv. Op. 2001-6 (2001); Vt. Adv. Eth. Op. 95-04 (1995); N.C. Eth. Op. RPC 129 (1993). Tex. Eth. Op. 571 (2006) Az. Eth. Op. 95-08 (1995)

### Question 1 Discussion

*Defense Counsel May Not Advise a Client about a Plea Agreement Involving a Waiver of the Right to Pursue an Ineffective Assistance of Counsel Claim Related to the Subject of the Plea Agreement*

Prosecutors sometimes propose plea agreements that bar collateral attacks on convictions that result from the plea agreements. Sometimes these plea agreement proposals require the defendant to waive the right to pursue a claim of ineffective assistance of counsel. The question that has arisen is whether defense counsel may ethically advise the client about a plea agreement proposal that bars the client from later pursuing a claim of ineffective assistance of counsel related to the conviction that results from the plea agreement. In effect, the question is whether defense counsel may advise the client regarding a waiver of a claim of ineffective assistance of counsel that would be based on the attorney's own conduct in representing the client. Because the offered plea agreement creates a conflict of interest under SCR 3.130(1.7) for the attorney that cannot be waived, such an attorney ethically cannot advise a client about such an agreement.

SCR 3.130(1.7(a)) states in pertinent part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: ...
>
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The lawyer in the plea agreement setting has a "personal interest" that creates a "significant risk" that the representation of the client "will be materially limited." The lawyer has a clear interest in not having his or her representation of the client challenged on the basis of ineffective assistance of counsel. The lawyer certainly has a personal interest in not having his or her representation of the client found to be constitutionally ineffective.

Even in cases of concurrent conflict, SCR 3.130(1.7) allows a representation to occur if, among other requirements, "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." SCR(1.7(b)(1)). A lawyer cannot reasonably believe that he or she can provide competent representation when the lawyer is tasked with advising the client about a plea agreement involving a waiver of the right to pursue a claim of ineffective assistance of counsel when that claim would be based on the attorney's own conduct in representing the client.

This reasoning is consistent with the reasoning surrounding SCR 3.130(1.8(h)(1)). Rule 1.8(h)(1) states: "A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." Thus, a lawyer cannot ethically advise the client when the issue is the attorney's own conduct.

Rule 1.8(h)(1) does not directly apply to the plea agreement situation because the issue in the plea agreement situation is a waiver of the client's ineffective assistance claim, not a waiver or limitation of a malpractice claim. Yet, the underlying basis for a malpractice claim is the attorney's own professional conduct. Likewise, the underlying basis for an ineffective assistance of counsel claim is the attorney's own professional conduct. If a lawyer ethically cannot advise a client about a malpractice limitation, a lawyer ethically cannot advise a client about an ineffective assistance of counsel waiver.

Other ethics bodies have reached the conclusion that defense counsel may not advise the client on a plea agreement when the agreement involves a waiver of the right to later claim ineffective assistance of counsel. See, e.g., Va. State Bar Legal Eth. Op. 1857 (2011); Mo. S. Ct. Adv. Comm. Formal Op. 126 (2009); Ohio Adv. Op. 2001-6 (2001); Vt. Adv. Eth. Op. 95-04 (1995); N.C. Eth. Op. RPC 129 (1993). But see Tex. Eth. Op. 571 (2006) (conflict of interest must be evaluated on a case by case basis); Az. Eth. Op. 95-08 (1995)(Rule 1.8 not a bar to defense counsel's participation; no discussion of the conflict of interest).

**Question 2 Discussion**

*A Prosecutor May Not Propose a Plea Agreement Requiring a Waiver of the Right to Pursue an Ineffective Assistance of Counsel Claim Relating to the Matter that is the Subject of the Plea Agreement*

A prosecutor cannot ethically offer a plea agreement to a defendant or potential defendant that requires that the person waive his or her right to pursue an ineffective assistance of counsel claim relating to the representation in the matter that involves the plea agreement. Accord Va. State Bar Legal Eth. Op. 1857 (2011); Mo. S. Ct. Adv. Comm. Formal Op. 126 (2009); Ohio Adv. Op. 2001-6 (2001); N.C. Eth. Op. RPC 129 (1993).

As Comment 1 to SCR 3.130(3.8) states:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

SCR 3.130(3.8) Cmt 1. SCR 3.130(3.8(b)) requires a prosecutor to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel." In addition, SCR 3.130(8.4(a)) states:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

SCR 3.130(8.4(a)).

It is inconsistent with the prosecutor's role as a minister of justice and the spirit of SCR(3.8(b)) for a prosecutor to propose a plea agreement that requires the individual to waive his or her right to pursue a claim of ineffective assistance of counsel. Accord Mo. S. Ct. Adv. Comm. Formal Op. 126 (2009).

In making such a proposal, a prosecutor is assisting or inducing another lawyer, defense counsel, to violate the Rules of Professional Conduct, conduct proscribed by Rule 8.4(a). Accord Va. State Bar Legal Eth. Op. 1857 (2011).

***Note to Reader***

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. Note that the Rule provides: "Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act performed by that attorney in compliance with an informal opinion furnished by the Ethics Committee member pursuant to such attorney's written request, provided that the written request clearly, fairly, accurately and completely states such attorney's contemplated professional act."

# ADDENDUM B

# 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, LEGAL ETHICS PROFESSORS AND LEGAL ETHICS PRACTITIONERS IN SUPPORT OF RESPONDENT

JERRY W. COX
P.O. Box 1350
Mount Vernon, KY
40456
606-256-5111
jcox@kih.net

JOHN WESLEY HALL*
1202 Main St., Suite 210
Little Rock, AR 72202
501-371-9131
ForHall@aol.com

J. VINCENT APRILE II*
Lynch, Cox, Gilman
& Goodman P.S.C.
500 West Jefferson St.
Suite 2100
Louisville, KY 40202
502-451-8419
vaprile@lcgandm.com

ELLEN YAROSHEFSKY
Cardozo School of Law
Yeshiva University
55 Fifth Ave., Suite 1115
New York, NY 10003
212-790-0386
yaroshef@yu.edu

DAVID ELDRIDGE
Eldridge & Blakney, PC
400 W. Church Ave., Unit 101
Knoxville, TN 37902-2242
865-544-2010
deldridge@eblaw.us

*Counsel for Amicus Curiae :: * Counsel of Record*

## CERTIFICATE OF SERVICE

On July 17, 2013 the undersigned served a copy of this brief by Federal Express on John D. Myers, Kentucky Bar Association, 514 W. Main Street, Frankfort, KY 40601; David Hale, U.S. Attorney, 717 W. Broadway, Louisville, KY 40202; and Kerry Harvey, U.S. Attorney, 260 W. Vine St., Lexington, KY 40507.

John Wesley Hall

## 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 opinion[4] 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-

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[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.

**The following are the Amici Scholars:**


Professor Janet Ainsworth
Seattle University School of Law
Seattle, Washington

Professor Gabriel J. Chin
University of California
Davis School of Law
Davis, California

Professor Liz Ryan Cole
Vermont Law School
S. Royalton, Vermont

Associate Professor Tigran Eldred
New England School of Law
Boston, Massachusetts

Professor Andrew Guthrie Ferguson
David A. Clarke School of Law
University of the District of Columbia
Washington, D.C.

Professor Lawrence Fox
Yale Law School
New Haven, Connecticut

Professor Monroe Freedman
Hofstra University School of Law
Hempstead, New York

Professor Babe Howell
CUNY School of Law
Long Island City, New York

Professor Peter Joy
Washington University School of Law
St Louis, Missouri

Professor Susan Klein
University of Texas Law School
Austin, Texas

Professor Carol Langford
University of San Francisco Law School
San Francisco, California

Professor Richard A. Leo
University of San Francisco
San Francisco, California

Professor Michael J. Zydney Mannheimer
Salmon P. Chase College of Law
Highland Heights, Kentucky

Professor Milan Markovic
Texas Wesleyan University School
of LaFFort Worth, Texas

Professor Kevin Mohr
Western State College of Law
Fullerton, California

Professor Ellen Podgor
Stetson University College of Law
Gulfport, Florida

Associate Professor Keith Swisher
Phoenix School of Law
Phoenix, Arizona

Professor Richard Zitrin
Hastings College of the Law
San Francisco, California

**The Legal Ethics Practitioners are:**

James Ellis Arden
Law Offices of James Ellis Arden
North Hollywood,, California

David M. Bigeleisen
San Francisco, California

James Bolan
Brecher, Wyner, Simons, Fox
and Bolan, LLP
Boston, Massachusetts

Darren R. Cantor
Darren R. Cantor, P.C.
Denver, Colorado

David J. Chapman
D J Chapman Law, P.C.
Fargo, North Dakota

Edward X. Clinton, Jr.
The Clinton Law Firm
Chicago, Illinois

Richard A. Greenberg
Rumberger, Kirk & Caldwell, P.A.
Tallahassee, Florida

Harry H. Harkins, Jr.
Atlanta, Georgia

William Hodes
The William Hodes Law Firm
Indianapolis, Indiana

John J. Mueller
John J. Mueller LLC
Cincinnati, Ohio

Arden Olson
Harrang Long Gary Rudnick P.C.
Eugene, Oregon

Seth Rosner
Saratoga Springs, New York

Evan Shirley
Shirley and Associates
Honolulu, Hawaii

Neal R. Sonnett
Neal R. Sonnett, P.A.
Miami, Florida

Brian Tannenbaum
Tannenbaum Weiss, P.L.
Miami, Florida

Donald Wilson, Jr.
Broening Oberg Woods & Wilson
Phoenix, Arizona

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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

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[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-

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[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* violation[4] 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

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[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-

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[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.*

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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 are 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:

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[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. MALLEN & 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 liability[11] 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.

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

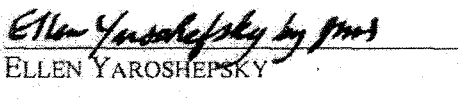
## CONCLUSION

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.

Respectfully submitted,

JOHN WESLEY HALL*

J. VINCENT APRILE II*



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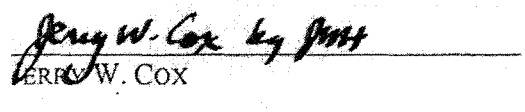

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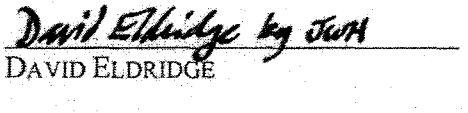

DAVID ELDRIDGE

*Counsel for Amicus Curiae*
**Counsel of Record*