COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2013-SC-000270

UNITED STATES OF AMERICA, MOVANT
BY AND THROUGH THE UNITED STATES ATTORNEYS
FOR THE EASTERN AND WESTERN DISTRICTS OF KENTUCKY

V. **BRIEF OF KENTUCKY BAR ASSOCIATION IN RESPONSE TO REPLY BRIEF OF THE UNITED STATES**

KENTUCKY BAR ASSOCIATION RESPONDENT

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Certificate of Service

This is to certify that on July 10, 2013, the following persons were served via U.S. Mail, postage pre-paid: David J. Hale, United States Attorney for the Western District of Kentucky, 717 W. Broadway, Louisville, KY 40202 and Kerry B. Harvey, United States Attorney for the Eastern District of Kentucky, 260 W. Vine St., Ste. 300, Lexington, KY 40507.

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TABLE OF POINTS AND AUTHORITIES

INTRODUCTION

Respondent, the Kentucky Bar Association (KBA), through counsel, files this Response to the Reply of the Movant, the United States of America, and respectfully responds to some of the statements made in the Reply Brief, and shows this Court additional authority why KBA Advisory Ethics Opinion E-435 should not be vacated.

ARGUMENT

I. The KBA Does Not Presume that Its Members Who Practice Criminal Defense Do Not Do So Competently – But Ethics Rules Must Be Construed to Protect Clients Who Do Have Attorneys Who Do Not Practice Competently.

Movant argues that the KBA – by stating the fact that "numerous criminal defendants [do] not have effective assistance of counsel – presumes the ineffective assistance of counsel. That is not the case. The KBA understands that most of the lawyers who practice in the Commonwealth do so competently. However, that does not mean that there are not a great number of defendants who do not get competent counsel.

The problem is that while competent counsel is presumed, a practice whereby a prospective waiver of ineffective assistance of counsel is routinely included within a plea agreement effectively can eliminate for an aggrieved defendant any possibility of rebutting the presumption. This is the reason there is an ethical prohibition against entering into agreements limiting malpractice liability, in spite of the fact that the Bar presumes that an attorney will represent a

client without committing malpractice. The prohibition is not there to protect a client from a competent, diligent attorney. It is there to protect a client from an incompetent, non-diligent attorney. That far more attorneys may be in the former rather than the latter category does not mean that the prospective waiver of malpractice – or in this case, of ineffective assistance of counsel – is neither prudent nor necessary.

As Movant points out, KBA acknowledges that an agreement to waive liability for malpractice is an agreement between the lawyer and client, whereas an agreement to waive ineffective assistance of counsel is an agreement between the prosecutor and the client. (Reply Brief at p. 6.) Nevertheless, the criminal defense attorney is clearly a third-party beneficiary of an agreement to waive ineffective assistance of counsel, who may benefit by having an examination of his or her effectiveness foreclosed simply by advising a client to accept the waiver. The damage to the client, who at this point may not possess the facts necessary to make him or herself aware of malpractice or ineffective assistance, is just as real.

Movant insists that another distinction between waivers of malpractice and ineffective assistance of counsel is that the latter is "supervised by the courts, where the malpractice is not." (Reply Brief at p. 6.) However, such supervision looks only to the voluntariness of the waiver; it cannot supervise and look forward to the merits of a claim of ineffective assistance of counsel that may be brought at a later time. This is axiomatic, because if the court has knowledge of facts giving rise to a meritorious ineffective assistance of counsel at the time of entry of the

plea, the court has a duty to not accept the plea bargain, and the issue of a voluntary waiver is never addressed, because there is no plea bargain.

Finally, Movant tries to distinguish malpractice waivers from ineffective assistance waivers by stating that "the rule prohibits 'prospective' waivers of malpractice claims, presumably entered into at the beginning of the representation," whereas in a criminal case, ineffective assistance waivers "come with the client's guilty plea at the end of the case," when "[a]ll that is left is sentencing, and sentencing issues are usually taken care of in the plea agreement." (Reply Brief at p. 6.) This is too narrow an interpretation of the word "prospective." The KBA urges that "prospective" refers not to an agreement which "presumably" is made at the beginning of the representation, but refers to *any time* before the client knows or has reason to know that he or she may have a claim. For instance, in a civil case where the client recovers a sum of money for settlement of a lawsuit, unless the client were independently represented by another counsel, SCR 3.130(1.8(h)(1)) would prohibit an agreement limiting the lawyer's liability to the client for malpractice even if the agreement were made at the time of the settlement, when the funds are being disbursed to the client, and all that remains is signing the release, and all civil liability issues are taken care of in the release agreements. The issue is not what stage of representation the case is in; rather, it is whether at the time of the entry of the agreement, does the client know that he or she has a malpractice claim? If not, SCR 3.130(1.8(h)(1)) prohibits the agreement. But if the client *does know* that he or she has a claim for malpractice,

SCR 3.130(1.8(h)(2)) likewise prohibits settlement of the known claim absent independent representation of counsel. In other words, the rule prohibits settlement of malpractice claims, absent independent representation of the client by another lawyer, regardless of when the claim arises, or when the client knows that he or she has a claim. The word "prospective" is meant only to indicate that period of time before a claim arises.

In short, Movant's distinctions are of no import, and do nothing to take away from the "spirit" of the rule; that spirit is that attorneys – even those attorneys who have no reason to believe, and there is no objective reason to believe, that they have rendered poor representation – may not enter into a contract with a client, or advise a client to enter into a contract with another party where the effect is to extinguish a client's potential remedy for poor representation in favor of the attorney's interests.

The United States says that KBA's recognition that numerous criminal defendants do not have effective assistance of counsel "ignores that criminal defendants who are truly harmed by ineffective assistance of counsel have a remedy." Yet, if there is no ethical impediment to the insertion by a prosecutor of a waiver of ineffective assistance of counsel into a plea agreement, or no ethical restraint placed upon the defense attorney from advising a client to agree to such a waiver, then there is no mechanism by which the "truly harmed" defendant can get relief from the ineffective assistance rendered to them.

II. KBA E-435 Does Not Alter Federal Substantive, Procedural, or Evidentiary Law.

Movant argues that "KBA's attempt to exempt ethical opinions from the supreme federal law is unsupported," because federal law "specifically provides that local rules of professional conduct 'should not be construed in any way to alter federal substantive, procedural, or evidentiary law…'" (Reply Brief at p. 9, citing 28 C.F.R. 77.1(b) and other cases.) Movant cites *Davila v. United States*, 258 F.3d 448, 451 (6th Circ. 2001) as authority that "[w]hen a defendant 'knowingly, intelligently, and voluntarily waives the right to collaterally attack his or her sentence, he or she is precluded from bring[ing] a claim of ineffective assistance of counsel,'" (Movant's Reply at p. 8) and points out that rules of professional conduct which prohibit attorneys from engaging in representation of clients when the attorney has a conflict of interest "were in place" at the time *Davila* was decided. (Movant's Reply at p. 8). In fact, in its original Brief, Movant states that "[a]s the Fourth Circuit observed: 'Every Circuit Court of Appeals to consider the issue… has held that the right to attack a sentence collaterally may be waived so long as the waiver is knowing and voluntary.'" (Movant's Brief at p. 6, citing *United States v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005).

Yet, KBA E-435 is not at odds with federal law, because the law is not as settled in the area as Movant believes. *Davila, Lemaster* and the other cases cited in Movant's Brief and Reply Brief addressed only the issue of whether a criminal

defendant could knowingly waive a prospective claim of ineffective assistance of counsel. The cases were *not* decided in the context of discussion about State Rules of Professional Ethics which may prevent a defense counsel from recommending that a client agree to a plea bargain which contains a prospective waiver of ineffective assistance of counsel. When the issue has been raised, however, the result has been quite different.

In *Watson v. United States*, 682 F.3d 740 (8th Cir. 2012), the Court of Appeals addressed the situation in which the defendant brought an action pursuant to 28 U.S.C. § 2255 to vacate a sentence he received for pleading guilty to a drug conspiracy charge. The district court had denied the motion because his plea agreement contained a waiver of ineffective assistance of counsel claims. The Court of Appeals noted that it had earlier decided *DeRoo v. United States,* 223 F.3d 919 (8th Cir. 2000) and had stated that the "[d]ismissal of a section 2255 motion on the basis of a waiver in the plea agreement is appropriate when the defendant's claims of ineffective assistance relating to the negotiation of, and entry into, the plea agreement and waiver." *Watson* at p. 743, citing *DeRoo*, 223 F.3d at 924. (*DeRoo* is cited in Movant's Original Brief at pp. 6 and 8.)

The Court then stated that in a later opinion, *Chesney v. United States*, 367 F.3d 1055, 1058 (8th Cir. 2004), it had noted the tension between a broad reading of *DeRoo* and the Supreme Court's long recognition of a defendant's ability to waive rights guaranteed by the Sixth Amendment, including the right to effective assistance of counsel. *Watson*, at p. 743. In *Chesney*, the Court had suggested that

DeRoo should be refined to mean that a general waiver of the right to bring post-conviction claims under 28 U.S.C. § 2255 would not be sufficient to waive such a claim of ineffective assistance of counsel, absent an explicit waiver of the Sixth Amendment right to counsel which explained the concept of ineffective assistance of counsel. Such a waiver would be considered "knowing and voluntary" under the law of that Circuit provided that such a waiver of the Sixth Amendment right to counsel did not result in a "miscarriage of justice." (*See Watson*, at p. 744.) However, *Chesney* did not adopt such a refinement of *DeRoo*, since in that case the defendant's waiver did not specifically mention the Sixth Amendment. *Watson*, at p. 744.

Then, the Court declined to adopt the *Chesney* refinement of *DeRoo* in the *Watson* case, and did so for a very interesting reason:

> We are not inclined to decide whether to adopt *Chesney*'s refinement of *DeRoo* in this particular case, however, because the parties failed to address an issue we find difficult to ignore in determining whether Watson knowingly and voluntarily waived his right to bring an ineffective assistance claim with respect to matters directly related to the plea agreement. ***Ethics opinions from various states have addressed whether a defendant's attorney labors under a conflict of interest when advising a client to waive an ineffective assistance of counsel claim, with conflicting results. Watson does not claim his counsel labored under a conflict of interest when advising him to enter the plea agreement, and the parties did not brief this issue. We therefore believe it prudent to forego the issue of whether* DeRoo *should be refined by* Chesney's *suggestions until this related issue on a potential conflict of interest is fully aired by the adversarial process.***
>
> Instead, we accept the government's invitation to determine whether the district court should be affirmed in any event because Watson's

ineffective assistance claim fails on the merits. (Watson at p. 744, emphasis added.)

It is questionable, then, whether *DeRoo* still stands on good footing, and whether any of the opinions cited by the Movant in favor of prospective waivers of claims of ineffective assistance would have been decided in the same way, had there been a fully briefed and argued discussion of the impact of state ethics opinions.

In *United States v. Deluca*, 2012 WL 5902555 (E.D. Pa. 2012), an unpublished case decided last November (attached to the Appendix of this Brief, but not cited as authority herein), the District Court had to decide the validity of a waiver of ineffective assistance of counsel without the benefit of a Third Circuit opinion on point. In so doing, the Court took note of state ethics opinions from the various states:

> Although the Pennsylvania Bar has not addressed this issue, there appears to be an emerging trend among state bar ethics committees to recognize a criminal defense lawyer's personal interest in avoiding ineffective assistance of counsel claims may create a conflict of interest for the lawyer in advising his client regarding a plea agreement that would waive such claims. These ethics opinions do not purport to address the legality or enforceability of waivers of ineffective assistance of counsel claims, in some instances recognizing these issues are for the courts…
>
> This Court has found scant case law addressing ineffective assistance of counsel claims predicated upon defense counsel's asserted conflict of interest in advising a defendant regarding a collateral review waiver. In a few cases, courts have characterized defense counsel's putative conflict in such circumstances as "theoretical" or "speculative," *see Washington v. Lampert,* 422 F.3d 864, 873 (9th Cir.2005); *United States v. Wells,* 97 F.3d 1463 (9th Cir.1996) (unpublished table decision), but these cases do not take

> into account the state bar ethics opinions to the contrary, many of which were decided only in the past two years. ***Although the Government urges this Court to likewise hold any conflict of interest in this case was merely speculative, the weight of ethics opinions to the contrary gives this Court pause in doing so.*** *Cf. Watson v. United States,* 682 F.3d 740, 744 (8th Cir.2012) (declining to decide whether a collateral review waiver that expressly encompassed ineffective assistance of counsel claims would be enforceable in light of ethics opinions regarding defense counsel's conflict of interest with respect to such a waiver, which had not been addressed by the parties). [Emphasis added.]

Clearly, courts which decide in a vacuum the issue of whether the constitutional right under the Sixth Amendment to challenge the ineffective assistance of counsel is waivable, the courts resort to answering the question by examining only the law of waiver. However, when faced with deciding the issue while being simultaneously confronted with the question of ethics in how the waiver is presented to a defendant, at least two courts have balked at simply holding that the waiver is allowable, and instead have decided on the merits the claims of ineffective assistance of counsel.

Thus, it appears that the answer is not as settled "under federal law" as Movant suggests.

III. The Government's Interest in "Finality of Convictions" is Outweighed by the Interest of Not Subjecting Attorneys to Conflicts of Interests by Advising Clients to Waive Valuable Constitutional Rights which Protect and Benefit the Attorneys.

Movant claims that "E-435 protects a narrow class of defendants who may have suffered some form of ineffective assistance that did not impact their guilty plea at the expense of the vast majority of defendants who receive effective

representation and who could benefit from a favorable plea agreement." (Reply Brief at p. 10.) Movant prefaces this statement with an observation that "[n]ot all defendants plead guilty, not all plead with a plea agreement, and not all agree to waive ineffective-assistance-of-counsel claims." (Reply Brief at 10.)

This Court can take judicial notice that, at least in Kentucky, a very small percentage of filed criminal cases result in a trial, but that the vast majority results in a plea bargain. Of those, only a few are entered as "open pleas" without the benefit of a plea bargain. While the practice in the federal courts may be somewhat different, given federal sentencing guidelines, it cannot reasonably be said that KBA E-435 protects a "narrow class of defendants." The KBA asserts that, at least in Kentucky courts, the widest class of defendants is those who plead pursuant to a plea bargain.

To say that "not all [defendants] agree to waive ineffective-assistance-of-counsel claims" begs the question at issue; the use of waivers in plea agreements is proliferating. KBA has already asserted in its Original Response Brief that the insertion of waivers of claims of ineffective assistance of counsel is a "trend" that is recently developing in the federal courts. (KBA Original Brief at p. 41, citing Ellis and Bussert, "Stemming the Tide of Post-Conviction Waivers," *Criminal Justice*, Vol. 25, No. 1, Spring 2010.) As KBA pointed out, six of the states who have addressed this ethical issue have done so in the past four years. (KBA Original Brief at. p. 42.) The question is not "how many waivers are there today," but "how many waivers will there be in the future if there are no ethical restraints

on a prosecutor's ability to offer plea bargains containing them, or on a defense attorney's ability to advise clients to accept the terms of a plea bargain, and prosecutors?"

The goal of E-435 is not to declare such prospective waivers as "evil" or "unfair" to defendants. Rather, the goal is to ensure that criminal defense attorneys are not placed in irresolvable conflicts of interest when faced with the task of advising a client to accept a plea bargain at the expense of giving up a right of relief if the attorney's performance has been ineffective. If E-435 is vacated, the potential for such a conflict of interest becoming routine is apparent.

Movant states that the KBA claims that the United States' only interest in including waivers in plea agreements is to "avoid paperwork" and that such a claim is "frivolous" and "insulting." (Reply Brief at. p. 11). Movant fails to point out, however, that avoidance of "paperwork" was the reason advanced by the trial court in a case approving the waiver, and more importantly, *was the only reason given to the defendant in that case who then agreed to the waiver which extinguished a very important constitutional right.* (See KBA Response Brief at p. 40, citing *Davila*, 258 F.3d 448 (6th Cir. 2001). If this explanation given to the criminal defendant is "flippant" (see Reply Brief at p. 11), then defendants such as the one in *Davila* are being offered no more than a "flippant" explanation of why they must prospectively waive post-conviction relief.

Movant then cites "the finality of convictions" as the compelling state interest "in avoiding the expense and uncertainty of further litigation."

However, the "expense" of further litigation is directly tied to the "filing of paperwork" described by the *Davila* trial court, plus any hearing that may occur as the result of a legitimate issue raised regarding the assistance of counsel.[1] As for the interest of avoiding the "uncertainty of further litigation," whatever compelling governmental interest there is in preserving convictions surely must be subordinate to the interest of undoing unjust convictions, where, to prevail under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the defendants' counsels' performances must have been so deficient that they must be deemed not to have had counsel, and the results of the outcomes cannot be held to be reliable. The *Strickland* standard is so high, it cannot be reasonably be said to be a threat to the finality of just convictions.

Finality of litigation is a laudable goal. Clearly, the courts and the government have an interest in seeing litigation come to an end. Admittedly, post-conviction actions in both state and federal courts can go on for years. However, the prospective waiver at issue does more than cut off years of protracted litigation. Rather, from the moment of the plea bargain, it immediately eliminates the ability of a defendant who truly has received ineffective assistance of counsel to even one time seek post-conviction relief. It precludes *ab initio* any examination of the reliability of the conviction based upon poor lawyering.

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[1]In Kentucky state courts, a hearing is granted only if the answer to a claim of ineffective assistance of counsel filed by either the Attorney General or the Commonwealth Attorney "raises a material issue of fact that cannot be determined on the face of the record." RCr 11.42(5).

Twice, Movant asserts that criminal defendants "benefit" from, or have an "interest" in, being able to waive claims of ineffective assistance of counsel in order "to secure favorable plea agreements." (Reply Brief at p. 11.) The implication is that the government cannot offer "favorable plea agreements" without the inclusion of a waiver of prospective claims of ineffective assistance of counsel. Or, alternatively, that plea agreements will not be *as* "favorable" if the government cannot include a waiver of post-conviction claims. If Movant is correct, then essentially criminal defendants will receive only the most favorable plea bargains where the bargainer is willing to agree to guarantee that the government can preserve its conviction in the future, regardless of whether the defendant received ineffective assistance of counsel, and despite the fact that the government's chances of losing the conviction are slim, given the high burden that the defendant would have to meet to get out from under an unjust conviction. In the process, the criminal defense attorney is placed in the untenable position of advising his client that, to get the plea bargain, the client must agree to waive any claim the client may have that the attorney did not competently represent the client.

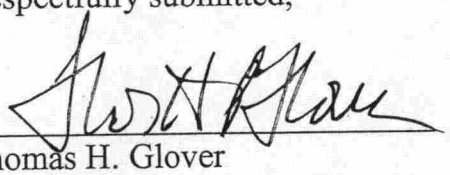
CONCLUSION

The KBA urges this Court not to vacate KBA E-435. Rules of Professional Conduct are designed to protect the clients not from scrupulous lawyers, but from unscrupulous ones. "To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated." SCR 3.130 (Preamble, XII). KBA E-435 interprets Kentucky's Rules of Professional Conduct in such a way that all criminal defendants are protected from an attorney's inherent conflict of interest in advising a client to accept a term of a plea bargain which will prospectively extinguish any right of that client to pursue post-conviction relief for the ineffective assistance of the lawyer.

Furthermore, the law is not as well-settled as Movant would suggest that federal substantive and procedural law stands in opposition to state bar ethics decisions which prohibit a prosecutor from offering, or a defense attorney from advising a client to accept, a waiver of post-conviction relief within a plea bargain. At least one circuit has paused to uphold a dismissal based upon a waiver in light of the existence of such state ethics opinions. In the event that the United States Supreme Court, or, at least, the Sixth Circuit Court of Appeals addresses the issue of prospective waivers of claims of ineffective assistance of counsel while considering the impact of state rules of professional conduct which limit the practice of defense counsel or prosecutors including them within plea bargains,

then this Court will have another opportunity to re-examine the issue, and decide whether federal law on the issue should cause KBA E-435 to be vacated.

Respectfully submitted,



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