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

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

v. REPLY BRIEF OF THE UNITED STATES OF AMERICA

KENTUCKY BAR ASSOCIATION RESPONDENT

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CERTIFICATE OF SERVICE

On June 24, 2013, I served John D. Meyers, Executive Director Kentucky Bar Association, 514 West Main Street, Frankfort, Kentucky 40601, with a hand-delivered copy of this reply brief.

David J. Hale

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

The United States seeks the Supreme Court's review of KBA Advisory Ethics Opinion E-435. E-435 opines that criminal defense attorneys and prosecutors violate ethical rules whenever a prosecutor offers, and a defense attorney advises a criminal defendant about, a plea agreement that contains a waiver of the defendant's right to collaterally attack his conviction. The violation comes, E-435 says, when such waivers include waiving ineffective-assistance-of-counsel claims.

The United States filed a brief, arguing that the KBA's opinion was an unreasonable interpretation of the ethics rules and conflicted with federal law. The KBA has responded, confirming that E-435 depends on its presumption that criminal defense attorneys provide ineffective assistance to criminal defendants. The Supreme Court of the United States, of course, presumes the opposite--the Supreme Court presumes that counsel perform effectively. E-435 was wrongly decided, and this Court should vacate it.

SUMMARY OF ARGUMENT

The questions before the Court are whether it's unethical for a criminal defense attorney to advise a client about a plea agreement that requires the defendant to waive ineffective-assistance-of-counsel claims and whether it's unethical for a prosecutor to offer an agreement containing such a requirement. E-

435 says yes to both questions. But E-435 depends on its presumption that criminal defense attorneys provide ineffective assistance to criminal defendants and so have a conflict of interest in every case. That's too broad.

Unquestionably, if an attorney has in fact committed ineffective assistance and knows it, that attorney has a concurrent conflict of interest and should withdraw from representing the client. But criminal defense attorneys in the vast majority of cases provide their clients competent, effective, and ethical representation. The Supreme Court of the United States presumes so. E-435's opposite presumption directly conflicts with the United States Supreme Court's jurisprudence on the subject, with federal criminal rules, and case law from the lower courts.

It also deprives the vast majority of criminal defendants of receiving favorable plea agreements for the sake of the few who might receive unredressable ineffective assistance of counsel. Contrary to the KBA's exaggeration, ineffective assistance of counsel can and will continue to be cured, even in cases where a defendant generally waives such claims. As the United States pointed out in its opening brief, ineffective assistance that infects the entry into the plea agreement and the plea is a claim outside of the waiver.

Because E-435 rests on a faulty premise, it should not stand.

ARGUMENT

I. The KBA Should Presume That Its Members Who Practice Criminal Defense Do So Competently.

In its brief, the KBA says: "[N]umerous criminal defendants [do] not have effective assistance of counsel." (KBA Br. at 3 (emphasis added)). E-435, the KBA says, protects those defendants. In making such a statement, the KBA exposes the fatal weakness in E-435--it presumes ineffective assistance of counsel. That presumption is unfounded, contrary to federal constitutional law, ignores that criminal defendants who are truly harmed by ineffective assistance of counsel have a remedy, and unjustifiably harms rather than protects the vast majority of criminal defendants.

A. The Ethics Rules Require a Concurrent Conflict of Interest Before an Attorney's Duty to Take Some Action Arises.

The relevant ethics rule provides:

> (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:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (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.

(b) Notwithstanding paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

SCR 3.130(1.7) (emphasis added).

Thus, the rule requires a "concurrent conflict" that presents a "significant risk" that counsel's representation "will be materially limited" by the lawyer's "personal interest." E-435, in contrast, perceives a potential conflict in all representations. The KBA says that "'[t]he 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.'" (KBA Br. at 5). The only authority the KBA cites for its proposition is E-435 itself. (Id.). Setting to one side the dubious practice of citing as authority the very opinion under review, the interest in not having one's representation found to be constitutionally ineffective can only exist if the lawyer has reason to believe his or

her representation was constitutionally ineffective. Otherwise, one must presume that counsel performs ineffectively. That presumption is unsupportable.

B. E-435's Presumption of Ineffective Assistance Is at Odds with Federal Constitutional Law.

In order to prove ineffective assistance of counsel, a defendant must show both (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 696 (1984). As this Court has observed, "A court making this evaluation 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance.'" Bowling v. Commonwealth, 981 S.W.2d 545, 551 (Ky. 1999) (quoting Strickland, 466 U.S. at 689) (emphasis added).

But E-435 indulges the opposite presumption. No actual ineffective assistance need have happened, in E-435's view; if counsel's performance is deemed ineffective in every case, the concurrent conflict exists. Nothing in SCR 3.130(1.7) justifies E-435's presumption that "numerous" members in the KBA provide ineffective assistance to criminal defendants. On the contrary, only when the attorney has committed ineffective assistance and knows it can his or her continued representation of a criminal defendant present "a substantial risk" that counsel's representation "will be materially limited" by the lawyer's "personal interest."

1. SCR 3.130(1.8(h)(1)) Does Not Apply Here.

The KBA tries to bolster its unsupported position in three ways. First, the KBA relies on the "spirit" of SCR 3.130(1.8(h)(1)), which prohibits a lawyer from "mak[ing] an agreement prospectively limiting the lawyer's liability to a client for malpractice." (KBA Br. at 6-7). The KBA's reliance is misplaced. The KBA acknowledges that the ethics rule does not apply to ineffective-assistance-of-counsel claims (explaining its reach to find relevance in the "spirit" of the rule). (Id. at 6). As the KBA recognizes, an ineffective-assistance-of-counsel claim is not a malpractice claim, and the agreement is between the client and the prosecution, not between the client and the attorney. (Id.). The ineffective-assistance-of-counsel waiver is also supervised by the courts, where the malpractice waiver is not.

Moreover, the rule prohibits "prospective" waivers of malpractice claims, presumably entered into at the beginning of the representation. In a criminal case, ineffective-assistance-of-counsel waivers come with the client's guilty plea at the end of the case. All that is left is sentencing, and sentencing issues are usually taken care of in the plea agreement.

2. E-435, Not the Ethics Rules, Conflicts with Federal Law.

Second, the KBA insists that E-435 does not conflict with federal law because it can make ethics rules designed to prevent harm as opposed to rules that

"forbid only situations in which the client suffers actual harm." (KBA Br. at 9). The KBA cites Nix v. Whiteside, 475 U.S. 157 (1986), in a misguided attempt to support that proposition. (KBA Br. at 13-15). But Nix addresses a lawyer's effectiveness in representing a client who wishes to commit an illegal act, 475 U.S. at 166, not a client who is encouraged by the criminal justice system to legally and ethically waive other constitutional rights, as defendants often do, by simply pleading guilty. The federal courts, which are designed to protect the defendant's rights, approve waivers of ineffective-assistance-of-counsel claims. See Fed. R. Crim. P. 11(b)(1)(N) (providing that court must determine that defendant understands the terms of any plea agreement provision waiving the right to appeal or collaterally attack the sentence).

While the KBA's argument that it can forbid collateral attack waivers because the prohibition is similar to an ethics opinion disallowing lawyers to make surreptitious recordings of telephone calls and the prohibition on sexual relations between an attorney and his or her client, upon examination it becomes clear that the KBA is comparing apples and penguins. (KBA Br. at 34-35). Collateral attack waivers occur in the unique legal arena of criminal law, where the defendant's constitutional rights are paramount and there is a significant body of law upon which to rely when condoning or forbidding conduct. In addition, when a lawyer advises a client about his rights in the criminal context, the lawyer is doing the job

he or she was hired to do. In contrast, attorneys who have sexual relations with clients are taking a professional relationship and transforming it into a personal and emotionally charged realm. Similarly, surreptitious recordings are not tactics lawyers typically need to take in the course of representing a client. As the Court can surely see, the KBA's attempt to convince it that collateral attack waivers are akin to nefarious behavior is clever, but shallow and not persuasive.

Moreover, the KBA's argument is beside the point. The United States does not argue that states cannot adopt rules of conduct that exceed constitutional minimums. The United States does not argue that the ethics rules, correctly interpreted, conflict with federal law. The United States points out that E-435 conflicts with federal law as part of its proofs that E-435 incorrectly interprets ethics rules. Rules prohibiting attorneys from engaging in representing clients when the attorney has a concurrent conflict of interest were in place when the United States Supreme Court adopted Fed. R. Crim. P. 11(b)(1)(N). They were in place when the Sixth Circuit ruled 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 based on 28 U.S.C. § 2255." Davila v. United States, 258 F.3d 448, 451 (6th Cir. 2001).

The KBA's attempt to exempt ethical opinions from the supreme federal law is unsupported. (See KBA Br. at 31-37). 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 . . . ." 28 C.F.R. 77.1(b); see Stern v. U.S. Dist. Court for Dist. Of Ma., 214 F.3d 4, 20 (1st Cir. 2000) (holding that local rules lack "[t]he power, in guise of regulating ethics, to impose strictures that are inconsistent with federal rules"); Grievance Comm. for the S. Dist. of N.Y. v. Simels, 48 F.3d 640, 646 (2d Cir. 1995) (holding that state court and bar association opinions concerning rules of professional conduct "should be relied upon only to extent that they are compatible with federal law and policy . . ." and that requiring federal court to follow various and often conflicting state court and bar association interpretations of a disciplinary rule may violate important federal policy concerns and threaten to Balkanize federal law); Cavender v. U.S. Xpress Enter., Inc., 191 F. Supp.2d 962, 966 (E.D. Tenn. 2002) (holding that federal court not bound by state court or attorney disciplinary board interpretations of Code of Professional Responsibility provisions). Nor may a local rule subvert the purpose of federal law. See Baylson v. Disciplinary Bd. of the Supreme Court of Pa., 975 F.2d 102, 108 (3d Cir. 1992).

The ethics rules aren't wrong. E-435 is.

3. Other Bar Interpretations Are Equally as Mistaken as E-435.

Third, the KBA says that nine other states have interpreted the ethics rules to prohibit attorneys from advising criminal defendants about plea agreements containing a waiver of ineffective-assistance-of-counsel claims. The KBA relies only on other bar associations' opinions. It cites no court agreeing with those opinions. Moreover, those bar opinions suffer the same flaw as E-435--they presume ineffective assistance in every case. Those opinions are thus not persuasive.

C. Defendants Continue to Have Relief from Ineffective Assistance of Counsel, Even if Ethics Rules Are Correctly Interpreted.

The KBA ends its brief by sounding the death-knell for ineffective-assistance-of-counsel claims if this Court does not uphold E-435. (KBA br. at 37-41). The KBA's fears are grossly overstated. Not all defendants plead guilty, not all plead with a plea agreement, and not all agree to waive ineffective-assistance-of-counsel claims. Even those who waive such claims have a remedy for ineffective assistance that infects the plea process itself. In Re Acosta, 480 F.3d 421, 422 (6th Cir. 2007). So 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. (See discussion in the United States's Opening Brief at 17, 21-22).

The KBA's claim that the United States's only interest in including waivers in plea agreements is to avoid paperwork is frivolous and is no excuse for its misinterpreting the ethics rules. (KBA Br. at 40-41). The KBA advances that argument without any basis in fact, and while conveniently insulting, serves to obfuscate the United States's legitimate interest in the finality of convictions.

As the United States pointed out in its opening brief, waivers of appeal and collateral attack serve the important interest in avoiding the expense and uncertainty of further litigation. (U.S. Opening Br. at 4 (citing United States v. Rosa, 123 F.3d 94, 97 (2d Cir. 1997)). They also serve the "well-recognized interest in the finality" of state and federal convictions. Duncan v. Walker, 533 U.S. 167, 179 (2001); see also Johnson v. United States, 544 U.S. 295, 307 (2005) (citing Duncan for the proposition that finality is "one of AEDPA's principal purposes"). And the KBA's flippant response to the United States's legitimate interests continues to ignore defendants' interests in waiving those rights to secure favorable plea agreements as discussed above.

D. E-435 Also Misinterprets Ethics Rules to Bar Prosecutors from Offering Plea Agreements Containing Ineffective-Assistance of Counsel Waivers.

E-435's conclusion that prosecutors act unethically when they offer an agreement that includes an ineffective-assistance-of-counsel waiver depends almost entirely on its erroneous view that criminal defense attorneys have an irreconcilable conflict with their clients in every case. (KBA Br. at 17). The United States's previous arguments cover that point.

But the KBA also says that SCR 3.130(3.8(b)) is applicable in the plea context. (KBA Br. at 16-17). Rule 3.8(b) is about a prosecutor's duties to an unrepresented defendant. ("[A] prosecutor in a criminal case shall 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.") At a plea proceeding, the defendant already has a lawyer who is informed on the facts of the case and the defendant's likelihood of success at trial. The case has proceeded far beyond the arrest, and the defendant has had counsel for some time. In addition, in the federal courts in Kentucky, judges do something akin to Rule 3.8(b) by asking the defendant if he is satisfied with his lawyer.

E-435 incorrectly interprets Kentucky's ethics rules to prohibit criminal defense lawyers from advising defendants about plea offers that require the

defendant to waive ineffective-assistance-of-counsel claims and prosecutors from offering such plea agreements. This Court should correct the KBA's error.

CONCLUSION

The Court should vacate Advisory Ethics Opinion E-435.

Respectfully submitted,

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