No. 17-1330

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BALAZS TARNAI,

Defendant-Appellant.

On Appeal from the United States District Court
For the Western District of Pennsylvania
Honorable Donetta W. Ambrose

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT AND URGING REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

INTEREST OF *AMICUS CURIAE*

Amicus Curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1]

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and the courts of appeals, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL seeks to ensure that all criminal defendants are guaranteed their Sixth Amendment right to effective assistance of counsel and that all criminal

[1] Counsel for *amicus* state that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

defense attorneys provide legal services in a professional and ethical manner. In this regard, NACDL issued Formal Opinion 12-02 (October 2012), expressing its formal opinion that it is not ethical for a criminal defense lawyer to participate in a plea agreement that bars collateral attacks on convictions pursuant to 28 U.S.C. §2255, nor is it ethical for prosecutors to propose or require such a waiver in a plea agreement. NACDL has also submitted *amicus* briefs addressing this issue in cases, including *U.S., ex rel. U.S. Attorneys ex rel. E., W. Districts of Kentucky v. Kentucky Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014).

SUMMARY OF THE ARGUMENT

The NACDL, the American Bar Association, and fourteen of the sixteen states to have considered the issue have concluded that it is unethical in every case for a defense attorney to advise a criminal defendant to enter into a plea agreement that contains a waiver of a defendant's right to challenge his conviction on the grounds that such defendant was deprived of the Sixth Amendment's constitutionally mandated effective assistance of counsel. Specifically, these authorities have concluded that a defense attorney has an unwaivable conflict of interest in advising a criminal defendant to accept a plea agreement with an Ineffective Assistance of Counsel ("IAC") waiver because the defense attorney benefits from that waiver at the expense of his client. These same authorities have

concluded that it is also unethical for prosecutors to insist on plea agreements that contain IAC waivers, for a variety of ethical reasons.

The District Court ruled that the collateral attack waiver in this case did not permit Tarnai to bring an ineffective assistance of counsel claim. This Circuit has discussed, but never decided, whether an IAC waiver can ever surmount the barrier of being an unwaivable conflict, and, thus, is an inherent miscarriage of justice.

We urge that this Court should not enforce IAC waivers because of the consensus in the legal community that they are the product of unethical conduct by both the defense attorney and prosecutor. A defendant who was advised by a conflicted attorney to sign an IAC waiver cannot "knowingly and voluntarily" waive his right to claim challenge his attorney's performance. Moreover, since challenges to defense counsel's effectiveness and prosecutorial misconduct are almost always discovered after conviction, they must be raised in a collateral attack. Therefore, such a waiver deprives defendant from seeking judicial relief from a deprivation of his constitutional right to a fair trial. The public, too, is disadvantaged where a defendant has no judicial access to argue for his (and the public's) fundamental constitutional rights.

Since plea agreements occur in ninety-seven percent of criminal cases, enforcing IAC waivers results in a system-wide miscarriage of justice; they should never be enforced.

ARGUMENT

I. PLEA AGREEMENT WAIVERS PROHIBITING A DEFENDANT FROM SEEKING POST-CONVICTION RELIEF FROM DEPRIVATION OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL SHOULD NEVER BE ENFORCED

The Third Circuit has "not directly addressed whether ineffective assistance of counsel in the negotiation of an appellate waiver renders that waiver invalid," but it has "suggested that it could." *United States v. Grimes*, 739 F.3d. 125, 129 (citing *United States v. Mabry*, 536 F.3d 231, 243 (3d Cir. 2008); *United States v. Shedrick*, 493 F.3d 292, 298 (3d Cir. 2007)). Given that ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas, enforcing IAC waivers that were entered into upon the advice of attorneys who benefit from the waiver constitutes a miscarriage of justice not only in this case, but in essentially every criminal case. *See Missouri v. Frye*, 566 U.S. 134, 143 (2012) (stating that plea bargaining is "not some adjunct of the criminal justice system; it *is* the criminal justice system.").

A. A Defense Attorney Has An Inherent and Unwaivable Conflict

1. The Conflict

"Defense attorneys advising defendants to waive their constitutional claims of ineffective assistance of counsel have vested interests in obtaining those waivers to protect their reputations and jobs [and] avoid bar complaints[.]" Susan R. Klein, Aleza S. Remis, & Donna Lee Elm, *Waiving the Criminal Justice System: An*

Empirical and Constitutional Analysis, 52 AM. CRIM. L. REV. 73, 94 (2015). An IAC claim "may tarnish the attorney's professional reputation, may subject the attorney to discipline by the bar or courts, and may even have serious financial consequences for the attorney's practice." *U.S. v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 152 (Ky. 2014).

Where a plea agreement contains an IAC waiver, a defendant does not have his counsel's undivided loyalty because the defense attorney's own personal interests are also at stake and thus *American Bar Association Model Rule of Professional Conduct* 1.7 (hereinafter, "*ABA Model RPC*") is violated. *See NACDL Ethics Advisory Committee Formal Opinion* 12-02 (Oct. 2012)[2] (advising members that participating in a plea agreement that contains an IAC waiver "violates professional ethics as well as defense counsel's constitutional duty to provide unconflicted representation.")

An IAC waiver presents an actual and inherent conflict for defense attorneys, even though attorneys may strongly feel that they are not actually conflicted at all, and can effectively advise the client about the plea agreement:

> In most instances, automatic and controlled processes work together to make decisions. But when a conflict of interest is present, and self-interest and professional responsibility collide, the decision often results in an automatic preference for self-interest. This results in a critical observation: while the decision-maker will

[2] Available online at http://www.nacdl.org/ethicsopinions/12-02.

> believe that the decision comes from rational deliberation where all competing concerns are considered and weighed, in actuality the automatic bias toward self-interest will often create an error in judgment that favors self-interest, "automatically and without conscious awareness." In other words, the decision-maker will rationalize behavior as consistent with ethical norms, even when in actuality the decision preferences self-interest.
>
> [Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 68–69 (2009).]

"As a result, even an attorney acting in good faith, diligently attempting to provide the best advice for a client, is at risk of unconsciously painting an ethical gloss over his or her decision." *U.S. v. Kentucky Bar Ass'n*, 439 S.W.3d at 155.

2. Unwaivable

An IAC waiver is the analogous to an attorney insisting that his client must waive his right to sue for legal malpractice, which is barred by *ABA Model RPC* 1.8(h)(1). While an IAC claim is not in and of itself a malpractice claim, the waiver of an IAC claim essentially also amounts to the waiver of a malpractice claim. This is because "[i]n most states, a successful ineffective assistance claim is a prerequisite for a legal malpractice suit, and failure to prove ineffective assistance in court is often grounds to collaterally estop a malpractice claim." Klein, 52 AM. CRIM. L. REV. at 96 (citing 3 RONALD E. ALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE §27:13 (2012 ed.)); Peter A. Joy, Keven C.

McMunigal, *Waivers of Ineffective Assistance of Counsel As Condition of Negotiated Pleas*, CRIM. JUST., Spring 2014, at 32, 33 ("An ineffective assistance of counsel claim is not a malpractice claim, but nearly all jurisdictions that have considered the matter require a successful ineffective assistance of counsel claim as a precondition to suing a defense lawyer for malpractice.").

This is certainly true in Pennsylvania, where this case was originally tried. Waiver of a malpractice claim may only be made when the client has independent counsel. *PA R.P.C.* 1.8(h)(1), which mandates that:

> (h) 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;

Pennsylvania courts have held that a criminal defendant who cannot prove an IAC claim is barred from pursuing a malpractice claim. *See Alberici v. Tinari*, A.2d 127, 130 (Pa. 1988) ("A client who has unsuccessfully raised the constitutional claim of ineffective assistance of counsel in the underlying criminal action is estopped from re-litigating identical issues in a subsequent malpractice action against his defense attorney.").

Even if defendant had outside counsel to assist him in waiving both the conflict and the malpractice/IAC claim, which he did not, the conflict still would persist because that independent counsel too would be laboring under a conflict of

interest in advising the defendant to accept an IAC waiver and thus also waive any claims against the independent counsel. As the Kentucky Supreme Court explained,

> This conflict is unwaivable, however, because the conflict of interest is not local; that is, the conflict is not limited to the single attorney representing the defendant. [RPC 1.7] allows for independent counsel to step in when a conflict of interest is present. This procedure attempts to alleviate the impact of the conflict because, presumably, the independent counsel will not share the conflict. The United States concedes that an IAC claim challenging the knowingness or voluntariness of the plea entry would be allowed to proceed, notwithstanding the presence of a waiver provision. Ostensibly, independent counsel would provide advice for the defendant on the IAC waiver and, in doing so, would necessarily discuss independent counsel's own performance. A defendant, in theory, could then later bring an IAC claim attacking the entry of the plea because the independent counsel was ineffective. The conflict persists. Independent counsel does not alleviate its pervasiveness.
>
> [*U.S. v. Kentucky Bar Ass'n*, 439 S.W.3d at 153.]

Because the conflict simply cannot be cured, the only solution is for the Court to uniformly refuse to enforce IAC waivers in every case based on the serious ethical concerns addressed above, and simply apply *Strickland* to determine whether or not counsel was ineffective.

B. Criminal Defendants Are Entitled to Conflict-Free Counsel

A criminal defendant enjoys a Sixth Amendment right to effective assistance of counsel in connection with his or her decision to accept or reject a plea offer.

Padilla v. Kentucky, 130 S.Ct. 1473, 1481, 1486 (2010); *Lafler v. Cooper*, 130 S.Ct. 1376, 1384 (2013). A critical component of effective assistance of counsel is the "right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansa*s, 435 U.S. 475 (1978)). This Court has said that a criminal defendant has a constitutional "right to counsel's undivided loyalty." *Gov't of Virgin Islands v. Zepp*, 748 F.2d 125, 131 (3d Cir. 1984).

Each state's RPCs set forth the ethical requirements for attorneys and most states closely follow the Model RPCs established by the American Bar Association ("ABA"). Every state has RPCs which bar attorneys from practicing with undisclosed conflicts of interests. Pennsylvania's *RPC* 1.7 and 1.8(h)(1) are identical to the ABA's Model RPCs. *See ABA Model RPC* 1.7, and *ABA Model RPC* 1.8[3]

Pennsylvania *RPC* 1.7 governs conflicts of interests and provides in pertinent part that:

> (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:
> . . .

[3] Availabile online at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

> (2) there is a significant risk that the representation of one or more clients will be materially limited by . . . ***a personal interest of the lawyer.***

[*PA RPC* 1.7 (emphasis added).]

Counsel's personal interest in advising acceptance of the waiver is fully explained in Point I(A)(1) *supra.* at pages 5-7.

C. Prosecutors Also Violate Rules of Professional Conduct When They Insist on IAC Waivers in Plea Agreements

IAC waivers protect not only the interests of a defense attorney, but also the personal interests of a prosecutor. *See* Klein, 52 AM. CRIM. L. REV. at 95. "[P]rosecutors have a vested interest in protecting their reputations and jobs, as well as avoiding bar complaints, when they ask defendants to waive claims of prosecutorial misconduct." *Id.* at 94.

Even though *RPC* 1.7(a)(2)'s conflict of interest provisions are not applicable to prosecutors, nearly every ethics board to address the issue has concluded that prosecutors are ethically barred from requiring a defendant, as a routine condition of a plea bargain, to waive IAC claims. Pennsylvania, like other states, has ruled that prosecutors are precluded from insisting on plea agreements that contain IAC waivers.

The Pennsylvania Bar Association concluded that *PA RPC* 8.4 is violated when a prosecutor insists on an IAC waiver within a plea agreement because "any

effort to limit [IAC] claims is tantamount to engaging in conduct that is prejudicial to the administration of justice," and would be assisting the defense attorney in violating the rules of professional conduct concerning conflicts of interest and limitations on malpractice. *Formal Opinion* 2014-100 at 7-8.

Similarly, *New York State Bar Association Ethics Opinion* 1098 (2016) held that prosecutors *are* ethically barred from requiring a defendant to waive IAC claims as a matter of course, offering compelling reasons for this conclusion:

> Given the large volume of cases in the criminal justice system, and the high caseloads carried by many defense lawyers . . . a prosecutor's routine insistence on IAC waivers carries a substantial cost in time and money. Even more worrisome, these costs create enormous pressure for courts and defense lawyers to ignore the potential conflicts created by IAC waiver demands. Defense lawyers will reasonably fear that raising the conflict-of-interest issue at the point where a plea deal is about to be consummated will aggravate the court (or the prosecutor). Moreover, courts undoubtedly will be confused as to why the IAC waiver does not present a conflict as to some of the cases before it but does present a conflict as to others. To avoid aggravating and confusing the courts, defense lawyers will be sorely tempted to ignore conflicts they believe exist. (Indeed, we are concerned that, given the current, widespread use of these waivers, that is exactly what is going on now). And, if a defense lawyer believes that raising the conflict-of-interest issue will jeopardize a beneficial plea bargain for the client, the defense lawyer will be placed in the untenable position of deciding between ignoring ethical obligations and undermining the client's interests.
>
> [*N.Y. State Ethics Opinion 1098* at ¶9.]

Even more alarming is the risk that IAC waivers create an "incentive for prosecutors to employ them to conceal IAC claims that are known to prosecutors but unknown to defendants and their lawyers." *Id.* at ¶13. "An experienced prosecutor may well witness an inexperienced defense lawyer's unwitting ineffectiveness." *Id.* In such circumstances, a substantial injustice would occur if the prosecutor were permitted to use an IAC waiver to head off an ineffective assistance of counsel claim. *Id.*

Compounding the defect is when a defense counsel agrees to the waiver at or before the entry of the guilty plea, counsel is required to waive not only any past ineffective assistance, but also future possible ineffective assistance of counsel. There is no indication of specifically identified allegations that are subject to the waiver. *See* J. Vincent Aprile II, *Plea Waivers That Shield Defense Counsel And Proseutors*, CRIM.JUST. 46 (Summer 2013). Thus, defense counsel may be counseling or agreeing to a waiver for events that will not become known for years.

The U.S. Department of Justice ("DOJ") apparently took notice of the overwhelming consensus (discussed in Point II at pp 14 to 16, infra.*)* by state ethical boards, the ABA, and the NACDL that it is unethical for prosecutors to insist on IAC waivers in plea agreements. In October 2014, the DOJ issued a memorandum to all federal prosecutors stating that "[f]ederal prosecutors should

no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel[.]" Memorandum of James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, for all federal prosecutors, on Department Policy on Waivers of Claims of Ineffective Assitance of Counsel (Oct. 14, 2013), available at https://www.justice.gov/file/70111/download. Additionally, the DOJ instructed that for all waivers executed prior to the October 2014 memorandum, "prosecutors should decline to enforce the waiver when defense counsel rendered ineffective assistance resulting in prejudice or when the defendant's ineffective assistance claim raises a serious debatable issue that the court should resolve." *Id.*

II. The Majority of Ethics Authorities to Consider This Issue Have Ruled That Defense Attorneys Are Prohibited From Advising Clients to Accept IAC Waivers

Courts look at the "weight of professional norms" when determining whether an attorney's representation "fell below an objective standard of reasonableness." *Padilla*, 559 U.S. at 367. "[W]hen virtually all sources 'speak with one voice' as to what may constitute the boundaries of reasonable attorney performance, courts may consider ethical cannons and ABA guidelines indicative of what constitutes a deprivation of the Sixth Amendment right to counsel." J. Peter Veloski, *Bargain for Justice or Face the Prison of Privileges? The Ethical Dilemma in Plea Bargain Waivers of Collateral Relief*, 86 TEMP. L. REV. 429 (2014) (*citing McClure v. Thompso*n, 323 F.3d 1233, 1242 (9th Cir. 2003)).

The "weight of professional norms" has concluded that IAC waivers are unethical. As mentioned above, the NACDL advised its vast membership in 2012 that it is unethical for a defense attorney to participate in plea agreements that contain IAC waivers. *See NACDL Ethics Advisory Committee Formal Opinion* 12-02 (Oct. 2012). The ABA similarly has concluded that defense attorneys have a conflict of interest in advising clients to enter into IAC waivers. *ABA Resolution* 113*E* (Aug. 2013) ("The defense lawyer has an obvious interest in assuring the client that his or her performance is effective . . . [and] often faces a conflict between his or her own personal interest and that of the client's Sixth Amendment right to effective assistance of counsel.").

The NACDL and ABA opinions are in line with fourteen of the sixteen ethics board to have considered the issue:[4]

[4] Only Texas and New York have concluded that there is no *per se* conflict of interest in a defense attorney advising his client to enter into a plea agreement with an IAC waiver. *Texas Prof'l Ethics Comm. Op. 571 (2006)* concludes that so long as the attorney has no reasonable concern that he has provided ineffective assistance, he may advise his client to enter into an IAC waiver. This is obviously problematic, given that a defense attorney may not even be aware of the errors he has committed. In 2015, *New York State Bar Association Ethics Opinion 1058* found that there is no conflict "unless a reasonable lawyer would find a personal interest conflict of interest, *i.e.* a significant risk that the lawyer's professional judgment on behalf of the defendant would be adversely affected by the lawyer's own interest in avoiding an allegation of ineffective assistance of counsel." That opinion, however, was essentially overruled in late 2016 when *Ethics Opinion 1098* concluded that it was unethical for prosecutors to seek IAC waivers.

- Alabama: "Advising a criminal defendant to enter into an agreement prospectively waiving the client's right to bring an ineffective assistance of counsel claim against that lawyer would be a violation of *Rules* 1.7(b) and 1.8(h)." *Ala. State Bar, Ethics Op. RO* 2011-02 (2011).

- Arizona: "A defense attorney may not advise the client to waive claims of ineffective assistance of counsel because such advice involves an unwaivable conflict of interest." *State Bar of Ariz. Ethics Op.* 15-1 (June 2015).

- Florida: "A criminal defense lawyer has an unwaivable conflict of interest when advising a client about accepting a plea offer in which the client is required to expressly waive ineffective assistance of counsel and prosecutorial misconduct." *Fla. Bar Advisory Ethics Op.* 12-1 (2012).

- Kansas: "In negotiating a plea agreement, it is improper for a defense attorney to request, counsel, advise or recommend that his criminal defendant client release or waive the client's right to assert a claim that the defense attorney's representation has been ineffective or departed from the applicable standard of care." *Kansas Bar Assoc. Legal Ethics Op. No.* 17-02 (Mar. 2017).

- Kentucky: "Because the offered plea agreement creates a conflict of interest under [*RPC* 1.7] for the attorney that cannot be waived, such an attorney ethically cannot advise a client about such an agreement." *Kentucky Bar Assoc. Ethics Op. KBA E-435* (Nov. 2014)

- Mississippi: "Defense counsel has an undoubtable personal interest in the issue of whether he has provided constitutionally effective representation. That same defense lawyer cannot be expected to objectively evaluate his own representation in an ongoing case when considering and advising his client on a plea agreement that contains such a waiver. This is a conflict that cannot be waived by consent of the client." *Miss. Bar Ethics Op. No.* 260 (Nov. 20, 2014).

- Missourri: "It is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel." *Advisory Comm. of the S. Ct. of Mo., Formal Op.* 126 (2009).

- Nebraska: "[A] defense attorney may not advise a criminal defendant regarding a plea agreement which contains a waiver of the right to seek post-conviction relief on the basis of a claim of ineffective assistance of counsel." *Neb. Ethics Advisory Op. for Lawyers* 14-03 (2014) .

- Nevada: "A waiver must exclude all potential claims of ineffective assistance counsel, not only those claims limited to the plea agreement itself." *Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. No.* 48 (2011).

- North Carolina: "[T]he waiver of rights arising from the ineffective assistance of counsel or prosecutorial misconduct appears to be, and shall prospectively be deemed to be, in conflict with the ethical duties expressed or implied in the rules." *N.C. State Bar, RPC* 129 (1993)

- Ohio: "The Board advises that it is unethical under the Ohio Code of Professional Responsibility for a prosecutor to negotiate and a criminal defense attorney to advise a defendant to enter a plea agreement that waives the defendant's appellate or postconviction claims of ineffective assistance of trial counsel or prosecutorial misconduct." *Ohio Bd. of Comm'rs on Grievances & Discipline, Op.* 2001-6 (2001)

- Tennessee: IAC waivers cause both defense attorneys and prosecutors to violate rules of professional conduct. *Tenn. Bd. Prof'l Resp. Advisory Formal Op.* 94-*A*-549 (1994).

- Utah: "The Committee concludes that it is a violation of Rule of Professional Conduct 1.7 for an attorney to counsel his client to enter into a plea agreement which requires the client to waive the attorney's prospective possible ineffective assistance at sentencing or other post-conviction proceedings." *Utah State Bar Ethics Advisory Op.* 13-04 (Sept. 30, 2013)

- Virginia: "[T]o the extent that a plea agreement provision operates as a waiver of the client's right to claim ineffective assistance of counsel, a defense lawyer may not ethically counsel his client to accept that provision." *Va. State Bar, Legal Ethics Op.* 1857 (2011).

- Vermont: "[A]n attorney should not recommend to a defendant in a criminal case that the defendant enter into a plea agreement that contains a

provision limiting the client's right to assert a claim of ineffective assistance of counsel in a post-conviction proceeding." *Vt. Bar Ass'n, Advisory Ethics Op.* 95-04 (1995).

Importantly, the Pennsylvania Bar Association has also interpreted its own RPCs and has concluded that a defense attorney who advises his client to enter into a plea agreement with an IAC waiver violates *PA RPC* 1.7(a)(2):

> The Commtitee concludes that under PA RPC 1.7(a)(2), a criminal defense lawyer has a personal interest conflict in recommending acceptance of a plea agreement that limits the clients ability to bring an IAC claim at any time following the defendant's plea of guilty pursuant to a negotiated plea agreement. As between the criminal defense lawyer and the client, such a conflict is a nonconsentable conflict because the lawyer involved cannot reasonably conclude, given his or her personal interest, that the lawyer will be able to provide competent and diligent representation, and therefore, cannot properly seek the client's consent to proceed.
>
> . . .
>
> Clearly, a criminal defense lawyer has a personal interest in not having the lawyer's own representation challenged or determined to be constitutionally ineffective. Because there is a significant risk that the representation of the client will be materially limited by the lawyer's personal interest, representation is prohibited by both PA RPC 1.7(a)(2) unless the conflict can be waived by PA RPC 1.7(b).
>
> [*Pa. Bar Ass. Formal Op. 2014-100* (2014) at 1, 5.]

Ultimately, the Opinion also concludes that *PA RPC* 1.7(b) does not allow the conflict to be waived. "Such a conflict is a nonconsentable conflict because the lawyer involved cannot reasonably conclude, given his or her personal interest, that the lawyer will be able to provide competent and diligent representation, and therefore, cannot properly seek the client's consent to proceed." *Id.* at 5.

III. Congress Has Required Federal Prosecutors To Adhere to State Ethics Rules

28 U.S.C. 530B(a) provides that "[A]n 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 matter as other attorneys in that state." Thus, Congress has mandated that State rules "governing attorneys" in the State where the federal prosecutor is licensed must be followed by that prosecutor. A broad rule barring the waiver is the only method by which a clear rule, applicable to all counsel and parties, can be efficiently applied.

CONCLUSION

Amicus asks the Court to rule now that the ineffective assistance of counsel in the negotiation of a plea agreement renders a waiver unenforceable. Because defense attorneys have an actual and inherent conflict in advising clients to waive an IAC claim and because prosecutors are also ethically barred from insisting on IAC waivers in plea agreements, any plea agreement which contains an IAC

waiver is the work product of a defense attorney and prosecutor who were both violating the Rules of Professional Conduct. A criminal defendant cannot "knowingly and voluntarily" waive his rights under such circumstances and enforcing such IAC waivers constitutes a miscarriage of justice. Accordingly, this Court should hold that IAC waivers in plea agreements are unenforceable.

Dated: October 31, 2017

Respectfully submitted,

/s/ Alan Silber
Alan Silber
Attorney for *Amicus Curiae*
National Association of Criminal
Defense Lawyers

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 4,551 words as determined by Microsoft Word. I further certify that undersigned counsel is a member of the Bar of this Court, as is the brief's co-author, CJ Griffin.

/s/ Alan Silber
Alan Silber
Attorney for *Amicus Curiae*
National Association of Criminal
Defense Lawyers

CERTIFICATE OF SERVICE

I hereby certify that on this October 31, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Alan Silber
Alan Silber