

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

UNITED STATES OF AMERICA,  
By and Through the United States Attorneys  
for the Eastern and Western Districts of Kentucky

MOVANT

V.

KENTUCKY BAR ASSOCIATION

RESPONDENT

**BRIEF AMICUS CURIAE OF THE INNOCENCE  
NETWORK IN SUPPORT OF RESPONDENT**

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**CERTIFICATE OF SERVICE**

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LARRY D. SIMON

## INTRODUCTION

This is an *amicus curiae* brief in support of the Kentucky Bar Association in its effort to uphold Kentucky Bar Association Advisory Ethics Op. E-435, holding that a prosecutor may not ethically propose and a defense counsel may not ethically advise upon 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.

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## STATEMENT OF THE CASE

The Innocence Network respectfully submits this amicus curiae brief in opposition to the petition of the United States of America seeking review of Advisory Ethics Opinion E-435 issued by the Kentucky Bar Association (“KBA”) in March 2013 (the “Opinion”). The Opinion states that “a criminal defense lawyer [may not] 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.” Ky. Bar Ass’n Advisory Ethics Op. E-435, 77 Bench & Bar 2, 34 (March 2013). The Opinion also prohibits “a prosecutor [from] propos[ing] 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.” Id. The Innocence Network agrees with the KBA’s conclusion and respectfully submits that this Court should deny the government’s motion to vacate the Opinion.

Evidence shows that innocent people plead guilty. It is therefore critical that a defendant not be forced to waive a future ineffective assistance of counsel claim when entering into a plea agreement with the government. The right to competent and non-conflicted counsel is implicated when a defendant is entering into a plea agreement, even more so than at trial. Because at the pre-trial stage the Court’s oversight of the case and ability to protect the defendant is minimal, it is particularly important that defense counsel fulfill its duties to assure that innocent defendants do not falsely plead guilty. Those duties may require counsel to investigate alternate suspects, visit the crime scene, and understand potential forensic issues—all of which may prove innocence. Additionally, the Innocence Network’s exoneration cases reveal that certain groups of people, particularly the mentally

ill, are especially vulnerable to pleading guilty even when they are innocent. By waiving an ineffective assistance of counsel claim, an innocent person who pleads guilty will have no basis to challenge his conviction if it is later determined there is exculpatory evidence that counsel failed to discover.

For these reasons, and as further discussed below, the Opinion should be upheld.

### **INTEREST OF AMICUS**

The Innocence Network is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom post-conviction evidence can provide conclusive proof of innocence. The 63 current members of the Innocence Network represent hundreds of prisoners with innocence claims in all 50 States and the District of Columbia, as well as Canada, the United Kingdom, Australia, and New Zealand. Many of those prisoners pled guilty to crimes they did not commit.

The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from prior cases in which the system convicted innocent individuals, the Innocence Network promotes further study, advocating reform to improve the truth-seeking functions of the criminal justice system in an effort to prevent future wrongful convictions.

### **ARGUMENT**

#### **I. THE RIGHT TO EFFECTIVE COUNSEL WHEN EVALUATING AND ENTERING INTO A PLEA AGREEMENT IS CRITICAL AND CANNOT BE WAIVED.**

Innocent people plead guilty, often upon the advice of counsel who failed to investigate his client's claim of innocence, assumed the client must be guilty, and then urged

the client to accept a plea bargain with no independent or adequate factual basis for doing so. This happens not only in serious felony cases, but with increasing frequency in misdemeanor courts where public defenders and assigned counsel are underfunded and overwhelmed by excessive caseloads. Furthermore, there can no longer be any doubt that “[d]uring plea negotiations defendants are ‘entitled to the effective assistance of competent counsel.’” Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).<sup>1</sup> It is therefore critical to prohibit the waiver of an ineffective assistance of counsel claim contained in a plea agreement, as is provided for in the Opinion.

As the Supreme Court aptly noted, “the reality [is] that the criminal justice system today is for the most part a system of pleas.” Lafler, 132 S.Ct. at 1388 (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”). The Supreme Court has also recognized that defense counsel must fulfill a range of duties in order to satisfy a criminal defendant’s constitutional right to effective assistance of counsel. See, e.g., Padilla v. Kentucky, 599 U.S. 356 (2010) (concluding that counsel was ineffective where he incorrectly advised client that deportation was a consequence of pleading guilty). Given the reality of our plea-based system, the variety of ways in which counsel can be ineffective at the plea stage, and the evidence demonstrating that innocent people plead guilty, this Court should uphold the Opinion in order to preserve the rights of those innocent people who would otherwise have no opportunity to seek exoneration without the ability to bring an ineffective assistance of counsel claim.

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<sup>1</sup> Lafler is also an example of a case where, while actual innocence was not at issue, the Supreme Court acknowledged the significance a defendant’s Sixth Amendment right to counsel during plea negotiations, and remanded the case where a defendant had pled guilty and raised an ineffective assistance of counsel claim in his petition for federal habeas relief. Lafler, 132 S.Ct. at 1391; see also Missouri v. Frye, 132 S.Ct. 1399 (2012) (Sixth Amendment right to effective counsel was implicated at plea stage, and remanded where counsel did not advise defendant of a plea offer, then defendant later pled guilty on less favorable terms).

The National Registry of Exonerations, a comprehensive study of criminal convictions that resulted in exonerations, demonstrates that between 1989 and 2012, 114 people were wrongfully convicted and imprisoned after having pled guilty. Nat'l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx#> (last visited August 14, 2013). The Innocence Network's own data and experience, drawn exclusively from DNA exonerations, support those findings. Of the Innocence Network's database of 311 individuals who were proven innocent with DNA evidence, 29 of them had pled guilty to crimes they did not commit. Innocence Project, *When the Innocent Plead Guilty*, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited August 14, 2013). Several of those cases illustrate the significance of a defense attorney's role in properly investigating claims of innocence before considering and entering into a plea agreement, including cases presently before the courts of Kentucky.

**A. Juan Carlos Gonzales-Barboza**

In 1994, Juan Carlos Gonzales-Barboza pled guilty to rape. The police took his DNA and submitted it for testing. Although Gonzales-Barboza was represented by counsel, he nevertheless entered a guilty plea while the DNA test results were pending. He was deported as a result of the plea, but subsequently returned to the United States and was convicted for illegally reentering the country. In connection with that case, Gonzales-Barboza explained to his new attorneys that he was innocent of the rape to which he pled guilty. As a result, the prior DNA testing was completed and excluded Gonzales-Barboza as the offender. Gonzales-Barboza is now seeking to have his guilty plea vacated on the basis of ineffective assistance of counsel (due to counsel's failure to investigate, *i.e.*, advising Gonzales-Barboza to plead guilty while the DNA test results were pending) and actual

innocence. The case is currently pending in Kentucky before the Henderson Circuit Court, Division I. Commonwealth of Kentucky v. Gonzales-Barboza, No. 94-CR-00113 (Henderson Cir. Ct.).

### **B. Jaqulynn Faye Green**

In 2000, Jaqulynn Faye Green's husband, Dillard Green, physically abused their three-month-old daughter while Jaqulynn was asleep, resulting in serious injuries including a skull fracture, multiple bruises, and injuries to her rib cage. When Jaqulynn awoke and discovered her daughter in a lifeless state, she immediately attempted to bring her to the hospital for treatment. Dillard and his parents, with whom Jaqulynn and Dillard lived, refused to assist Jaqulynn (who did not drive) and warned her that she risked losing her child if she sought medical assistance. Eventually, Dillard's stepfather drove Jaqulynn to her mother's house, where they called an ambulance. The next morning, at the hospital, her daughter died from the injuries. Dillard was arrested immediately and charged with Murder. A month later Jaqulynn was indicted on charges of "Criminal Complicity to Commit Murder."

Despite Jaqulynn's innocence, she turned herself in to the police and pled guilty to "Complicity to Commit Murder Under Extreme Emotional Disturbance" upon the advice of her attorney. The crime to which she pled was not even a crime in the Kentucky Penal Code. Jaqulynn thought she was pleading to a Murder charge. In addition to the confusion about her plea, Jaqulynn's attorney assured her that she would receive shock probation, but her application was later denied.

Jaqulynn was sentenced to 18 years. However, in 2005, Dillard issued three statements where he took full responsibility for the murder of his daughter and explained that

Jaqulynn did not assist him or know about what he was doing in any way. Jaqulynn moved to vacate or modify her sentence, but that motion was denied because she had entered a guilty plea. Commonwealth of Kentucky v. Jaqulynn Faye Green, No. 00-CR-00041-002 (McCreary Circuit Court). Eventually, in 2007, the governor of Kentucky granted Jaqulynn clemency.

### **C. Christopher Ochoa**

Christopher Ochoa pled guilty to the rape, murder, and robbery of Nancy DePriest while she was opening the Pizza Hut where she worked in Austin, Texas in 1988. After a coercive two-day interrogation, which included threats that Ochoa would ultimately be “needled” (executed) and “feeding” him “facts” known to the police (including what turned out to be inaccurate “facts” the police believed to be true), Ochoa gave a confession detailing his own involvement in the crime and further implicated, at the urging of police, his roommate as a co-assailant. The state offered to give him a life sentence if he agreed to plead guilty and testify against his roommate. Although Ochoa told his attorney the confession was false and coerced, he was ultimately persuaded, given the prospect of the death penalty and with the advice of an attorney who believed the confession was true, to agree to the state’s proposal.<sup>2</sup>

Years later, Achim Marino, a convicted murderer and inmate, wrote to the Austin American Statesman and the Travis County police confessing that he alone had murdered Ms. DePriest and robbed the Pizza Hut. The police re-opened the investigation and

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<sup>2</sup> It is not unusual for defense attorneys to perform erroneous and substandard work after being biased by a false confession. Indeed, cognitive bias of defense counsel arising from assumptions about the guilt of criminal defendants who are depressed, overwhelmed, illiterate, intellectually impaired, or mentally ill and cannot persuasively communicate their innocence to counsel often leads to ineffective assistance in cases where defendants are factually innocent.

corroborated Marino's claims with physical evidence and DNA testing. When investigators approached Ochoa in prison during their re-investigation, he initially maintained his guilt, fearing detectives were setting him up for additional capital murder charges. Secretly, however, Ochoa had been writing the Wisconsin Innocence Project and the Innocence Project in New York, seeking DNA testing and proclaiming his innocence. Ochoa had no prior criminal record and was attending community college at the time of his arrest and false confession. Eventually, in 2002 Ochoa was exonerated with the enthusiastic endorsement of the Travis County District Attorney's Office and help from the Wisconsin Innocence Project, the Innocence Project in New York, and University of Texas Law Professor William Allison. Ochoa later recovered a substantial civil settlement, graduated from the University of Wisconsin Law School, and was admitted to practice in Wisconsin.

#### **D. John Dixon**

On December 23, 1990, a twenty-one year old woman was sexually assaulted at gunpoint. She maintained that she looked at the attacker's face throughout the incident. After the attack, the assailant took sixty dollars and ran off, directing the victim to remain for ten minutes. She made her way to a nearby home, called the police, and was taken to a nearby hospital, where a rape kit was collected. Three days later, the victim was shown a photo array and she picked out John Dixon's picture and gave the police a signed statement. On January 4, 1991, the victim was shown another photo array and again positively identified Dixon as her attacker. Dixon was arrested on January 18, 1991.

In July 1991, Dixon pled guilty to first degree kidnapping, first degree robbery, two counts of first degree aggravated sexual assault, and unlawful possession of a weapon in the third degree. He later asked the judge to withdraw his plea and perform DNA

testing, claiming his plea was induced by fear of a harsher sentence if convicted by jury. The prosecution maintained that DNA testing would be irrelevant, and the court denied Dixon's motion, although the prosecution also claimed that there was forensic evidence included in the proof against him. DNA testing was not commonly used in the jurisdiction at the time. Dixon was sentenced to forty-five years with a fifteen year parole eligibility disqualifier.

Dixon's appeals were unsuccessful. In 1995, he contacted the Innocence Project. In 1996, the Innocence Project located the DNA evidence, and the local police laboratory completed the testing of the rape kit samples in 2001. The results indicated that Dixon could not have been the attacker. After having been imprisoned for ten years, Dixon's conviction was vacated on November 28, 2001.

#### **E. Stephen Schulz**

Stephen Schulz was convicted at trial in 1999 for the robbery of a Long Island diner. Schulz v. Marshall, 528 F.Supp. 2d 77, 81–84 (E.D.N.Y. 2007) (granting Schulz's federal habeas petition challenging his conviction on the basis of ineffective assistance of counsel), aff'd 345 F.App'x 627 (2d Cir. 2009). At the trial in New York Supreme Court, the diner's owner and cook identified Schulz as the robber, but the waitress (who the robber forced to empty the cash register at knife-point) stated that the robber was not in the courtroom. Id. Schulz's attorney was deficient in several respects, including his failure to interview the waitress before trial and cross-examine her at trial, and his failure to explore Schulz's alibi (his roommate who claims he was with Schulz at their apartment at the time of the crime). Id. at 80–81. The United States District Court of the Eastern District of New York granted Schulz's habeas petition on that basis. Id. at 91. The Second Circuit affirmed that decision. 345 F. App'x at 628.

Before trial, the state prosecutor offered Schulz the opportunity to plead guilty to a lesser crime and serve three-year prison sentence. Daniel S. Medwed, *Up the River without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence*, 47 Ariz. L. Rev. 655, 662–64 (2005). Schulz’s case illustrates the potential consequences of waiving an ineffective assistance of counsel claim with a plea agreement. Had Schulz accepted the plea offer, and had he agreed to waive a claim for ineffective assistance of counsel, he would have had no opportunity to challenge the plea, even when it was evident that his attorney failed to properly investigate Schulz’s claim of innocence.

**II. WAIVER OF AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM LEAVES INNOCENT PEOPLE WHO PLEAD GUILTY WITHOUT A REMEDY TO SEEK EXONERATION.**

An innocent person who pleads guilty is entitled to a new trial or to withdraw the plea under limited circumstances, including when there is newly discovered evidence that could not have been previously identified with due diligence. Commonwealth v. Carneal, 274 S.W.3d 420, 432 (Ky. 2009) (denying motion for new trial based on “a lack of diligence in discovering the supposed new evidence”). Although the burden to prevail on an ineffective assistance of counsel claim is high, “failure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of counsel under the Sixth Amendment.” Beuke v. Houk, 537 F.3d 618, 643 (6th Cir. 2008) (citing Coleman v. Mitchell, 244 F.3d 533, 545 (6th Cir. 2001)). And, as pointed out by the KBA, it is standard practice in Kentucky that a person pleading guilty waives all right to appeals. (Resp’t Br. at 41.) Therefore, a criminal defendant’s waiver of his right to collaterally attack his conviction through an ineffective assistance of counsel claim effectively precludes that individual of any remedy for his wrongful conviction. In other

words, by waiving an ineffective assistance of counsel claim, an innocent person who pleads guilty has no legal recourse if it is later discovered that his defense counsel failed to properly investigate and could have identified exculpatory evidence with due diligence.

### **CONCLUSION**

For the foregoing reasons and for the reasons set forth in the Respondent KBA's brief and the other amici, the Innocence Network respectfully submits that this Court should deny the motion of Movant and uphold the Opinion in its entirety.

Respectfully submitted,

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