STATE OF WISCONSIN

I N   S U P R E M E   C O U R T

Case No. 02-1203-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DERRYLE S. McDOWELL,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT FOR MILWAUKEE COUNTY, THE HONORABLE DENNIS P. MARONEY AND THE HONORABLE VICTOR MANIAN, PRESIDING

BRIEF OF NONPARTY WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FRANK J. REMINGTON CENTER, UNIV. OF WISCONSIN LAW SCHOOL

JOHN A. PRAY
Bar No. 01019121

KEITH A. FINDLEY
Bar No. 1012149

Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-1002

TABLE OF CONTENTS

AUTHORITIES CITED.. i

ARGUMENT 100

DEFENSE ATTORNEYS SHOULD NOT CONCLUDE THAT THEIR CLIENTS INTEND TO PRESENT PERJURY ABSENT AN ADMISSION OF SUCH INTENT BY THE CLIENT. 100

CONCLUSION 112

AUTHORITIES CITED

Cases

Commonwealth v. Alderman,
437 A.2d 36 (Pa.Super. 1981) 3

Commonwealth v. Mitchell,
SJC-08246 (Mass. Jan. 24, 2003)..3

Commonwealth v. Wolfe,
447 A.2d 305 (Pa.Super. 1982)...3

Doe v. Federal Grievance Committee,
847 F.2d 57 (2nd Cir. 1988) 2

Nix v. Whiteside,
475 U.S. 158 (1986) 4, 5

People v. Bartee,
566 N.E.2d 855 (Ill. App. 1991) 3

People v. Schultheis,
638 P.2d 8 (Colo. 1981) 3

Shockley v. State,
565 A.2d 1373 (Del. 1989) 3

State v. Bloodsworth,
543 A.2d 382 (1988) 6

State v. DeGuzman,
701 P.2d 1287 (Haw. 1985) 3

State v. Hischke,
639 N.W.2d 6 (Iowa 2002) 3

State v. McDowell,
2003 WI App 168, ___ Wis. 2d ___,
669 N.W.2d 204 .... 1, 10

State v. Saecker,
160 Wis. 2d 483,
466 N.W.23 911 (Table) (Ct. App. 1991) 7

United States ex rel. Wilcox v. Johnson,
555 F.2d 115 (3rd Cir. 1977) 2, 4

United States v. Long,
857 F.2d 436 (8th Cir. 1988) 2, 4, 8

Rules

Wisconsin Supreme Court Rule 20:3.3(a)(4) 1

Wisconsin Supreme Court Rule 20:3.4(b) 1

Other Authorities

Connors, *Convicted by Juries, Exonerated by Science*
35-36 (U.S. Dept. of Justice 1996) 7

Earle & Case, *The Prosecutorial Mandate, See That Justice Is Done,* 86 Judicature 69 (2002) 6

Findley & Pray, *Lessons from the Innocent*, Wisconsin Academy Review 33 (Fall 2001) 5

Freedman & Smith, UNDERSTANDING LAWYERS' ETHICS, §6.20 (2002) 3

Freedman, *But Only if you "Know,"* in Uphoff, ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER (1995) 2

Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 Geo.J. Legal Ethics 521 (1988) 3

Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn.L.Rev. 121 (1985) 3

Yellen, *"Thinking Like a Lawyer" or Acting Like a Judge?: A Response to Professor Simon*, 27 Hofstra L.Rev. 13, 18 (1998) 4, 5

ARGUMENT

DEFENSE ATTORNEYS SHOULD NOT CONCLUDE THAT THEIR CLIENTS INTEND TO PRESENT PERJURY ABSENT AN ADMISSION OF SUCH INTENT BY THE CLIENT.

How a criminal defense attorney should deal with the prospect of client perjury has generated significant debate among jurists and scholars. Among the thorny issues this ethical dilemma presents is this most basic question: When does a lawyer *know* a client will lie, with sufficient certainty to warrant breaching client confidence and the duties of loyalty and zealous advocacy?

In Wisconsin, the duty to refrain from assisting in the presentation of perjury stems from the ethical dictates of Wisconsin Supreme Court rules. Rule 20:3.3(a)(4) provides that a "lawyer shall not knowingly … offer evidence that the lawyer knows to be false." Similarly, Rule 20:3.4(b) provides that a lawyer shall not "counsel or assist a witness to testify falsely." Before the court of appeals decision in this case, however, no Wisconsin rule or case defined what standard should be used to determine whether a lawyer "knows" a client will lie.

The court of appeals adopted a bright-line rule to guide defense lawyers, a rule proposed by *amici*: "absent the most extraordinary circumstances, criminal defense counsel, as a matter of law, cannot *know* that a client is going to testify falsely absent the client's admission of the intent to do so." ***State v. McDowell***, 2003 WI App 168, ¶47, ___ Wis. 2d ___, 669 N.W.2d 204.

Amici urge this Court to adopt this standard, because anything less jeopardizes the defendant's right to have a jury decide the facts, undermines the relationship and role of defense counsel as zealous and loyal advocate, and is practically unworkable. No other standard—including the standard newly proposed by the State—provides the guidance needed by lawyers and lower courts, or respects the difficult and unique role played by counsel for a criminal defendant.

The court of appeals does not stand alone in recognizing the expressed-intent-to-commit-perjury standard. Despite some disagreement, courts "generally have set an extremely high standard" for evaluating potential client perjury. Freedman, *But Only if you "Know,"* in Uphoff, ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 138 (1995). In ***United States v. Long***, 857 F.2d 436, 444 (8th Cir. 1988), the court held that counsel must "take such measures as would give him 'a firm factual basis' for believing [his client] would testify falsely." The court explained, however, that "[i]t will be a rare case in which this factual requirement is met," and concluded that "a clear expression of intent to commit perjury is required before an attorney can reveal client confidences." *Id.* Under ***Long*** a direct admission of perjury by the client is required.

Similarly, the Second Circuit has held that the intended perjury must be "clearly established" and that the attorney must have "actual knowledge" based on an admission by the client. ***In re Grievance Committee of the U.S. District Court***, 847 F.2d 57, 62 (2nd Cir. 1988). The court further held that even the client's admission does not suffice unless corroborated by "other facts" establishing perjury. *Id.* at 63. *See also* ***United States ex rel. Wilcox v. Johnson***, 555 F.2d 115, 122 (3rd Cir. 1977) (mandating a similar "firm factual

basis" standard).

Courts and commentators have articulated various other standards, including requiring "absolutely no doubt," or knowledge "beyond a reasonable doubt," or that counsel know "for sure." *See* Freedman & Smith, UNDERSTANDING LAWYERS' ETHICS, §6.20 at 186 (2002); Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 Geo.J. Legal Ethics 521, 528 (1988) ("absolutely no doubt"); Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn.L.Rev. 121, 149 (1985) (beyond a reasonable doubt); ***Shockley v. State***, 565 A.2d 1373, 1379 (Del. 1989) (beyond a reasonable doubt); ***Commonwealth v. Alderman***, 437 A.2d 36, 39 (Pa.Super. 1981) (applying reasonable doubt standard); ***Commonwealth v. Wolfe***, 447 A.2d 305, 310 n.7 (Pa.Super. 1982) (counsel must know "for sure").

Other courts have required that the lawyer's belief be based on "independent investigation" or "distinct statements" of the client. *E.g.,* ***People v. Schultheis***, 638 P.2d 8, 11 (Colo. 1981); ***State v. DeGuzman***, 701 P.2d 1287, 1291 (Haw. 1985). These courts stress that a mere inconsistency in the client's story is insufficient in and of itself to support the conclusion that a witness will offer false testimony.

Finally, some courts have permitted counsel to abandon the client on a more relaxed standard. *See, e.g.,* ***Commonwealth v. Mitchell***, SJC-08246 (Mass. Jan. 24, 2003) (requiring "good faith based on objective circumstances firmly rooted in fact"); ***State v. Hischke***, 639 N.W.2d 6, 10 (Iowa 2002) (counsel must be "convinced with good cause"); ***People v. Bartee***, 566 N.E.2d 855, 857 (Ill. App. 1991) (requiring "good-faith determination").

Although the State in this case did not propose such a standard for Wisconsin in the court of appeals, it does so now as it urges this Court to adopt a standard that turns on counsel's "good faith" assessment of a "firm factual basis." State's Brief at 11-12.

Amici submit, however, that any standard lower than that adopted by the court of appeals is incompatible with defense counsel's role. While counsel has an ethical duty as officer of the court to refrain from knowingly participating in a fraud on the court, counsel's role fundamentally is not that of fact-finder. "It is the role of the judge or jury to determine the facts, not that of the attorney." ***Wilcox***, 555 F.2d at 122. As the Eighth Circuit in ***Long*** put it: "Counsel must remember that they are not triers of fact, but advocates. In most cases a client's credibility will be a question for the jury." 857 F.2d at 445. *See also* Yellen, *"Thinking Like a Lawyer" or Acting Like a Judge?: A Response to Professor Simon*, 27 Hofstra L.Rev. 13, 18 (1998).

Requiring an admission of perjury by the client is also consistent with the very limited departure from the role of zealous and loyal advocate that the Supreme Court contemplated in ***Nix v. Whiteside***, 475 U.S. 157 (1986). Although the Court did not decide what standard of certainty should govern, it repeatedly framed the issue as defining "the range of 'reasonable professional' responses to a criminal defendant client *who informs counsel that he will perjure himself on the stand*." 475 U.S. at 166 (emphasis added). *See also id*. at 167, 169, 170, 174. *See* ***Long***, 857 F.2d at 445 (the ***Whiteside*** "majority opinion carefully limits its holding to 'announced plans' to commit perjury").

The ***Long*** court further observed:

> The concurring opinions in ***Whiteside*** support this interpretation. Justice Stevens advised circumspection: "A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury … should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked." [***Whiteside***] at 190-91 ….

857 F.2d at 445.

Unless a client admits intent to commit perjury, the lawyer cannot know if the client proposes to tell the truth or not. The difficulty in "knowing" the truth has been dramatically demonstrated by recent cases showing that "even defense lawyers can sometimes mistakenly reject a defendant's claim of innocence." Yellen, *supra*, at 19. The growing number of cases in which postconviction DNA testing has proved that innocent persons were wrongly convicted—140 such cases to date—demonstrates this. *See http://www.innocenceproject.org/.*

The Wisconsin Innocence Project (WIP) of the Frank J. Remington Center has represented two of those exonerated individuals, and is aware of the hazards that arise when counsel attempts to determine whether a client's testimony will be perjury. In one case, Christopher Ochoa was convicted in Texas in 1989 of a brutal rape and murder. After lengthy interrogation, he fully confessed that he had committed the crimes. His six-page, single-spaced confession included details about that crime that, seemingly, only the perpetrator could have known. *See* Findley & Pray, *Lessons from the Innocent*, Wisconsin Academy Review 33 (Fall 2001).

WIP students contacted Ochoa's trial attorney who emphatically stated that his client was clearly guilty of the crimes. The attorney emphasized the "overwhelming" evidence, including Ochoa's confession, eyewitness testimony, and physical evidence. The attorney added that, while Ochoa protested his innocence for several months, he had finally confessed to him before ultimately pleading guilty.

The problem with counsel's firm belief in Ochoa's guilt was that it was flat wrong. New DNA testing proved beyond any doubt that Ochoa's confession was false and had been coerced. The District Attorney agreed that Ochoa was innocent, and the court released him in January 2001. Earle & Case, *The Prosecutorial Mandate, See That Justice Is Done,* 86 Judicature 69, 70-72 (2002). Ochoa pled guilty, but had he gone to trial his attorney would have had a "firm factual basis" for his belief that Ochoa was guilty. Under the State's proposed standard, the attorney would have been required to prevent Ochoa from "falsely" claiming innocence. But this would have contributed to an injustice.

Many of the stories of the exonerated follow similar patterns. Kirk Bloodsworth was convicted and sentenced to death in Maryland on the testimony of five eyewitnesses who said they saw him with the victim, a five-year-old girl who was raped and killed. *See* ***State v. Bloodsworth***, 543 A.2d 382 (Md. 1988). Bloodsworth also made highly incriminating statements that he had done something "terrible" and that he knew about a "bloody rock" that had been used in the murder. *Id*. at 31-32. His explanation for his statement about having done something "terrible" was implausible and unbelievable; he claimed he had just forgotten to get his wife a taco salad. Given the

overwhelming evidence against Bloodsworth, an attorney might have had a "firm factual basis" for believing that any testimony claiming innocence would have been perjury. Again, such a belief would have been wrong, as DNA tests exonerated Bloodsworth in 1997. *See* Connors, *Convicted by Juries, Exonerated by Science* 35-36 (U.S. Dept. of Justice 1996).

Counsel's task in assessing client credibility is further complicated in cases where the defendant himself may not be clear about important facts. A defendant suffering from mental illness or the influence of alcohol or other drugs may be incapable of distinguishing fact from fiction. For example, in ***State v. Saecker***, 160 Wis. 2d 483, 466 N.W.23 911 (Table) (Ct. App. 1991), a Wisconsin DNA exoneration case, the defendant was convicted of burglary, kidnapping, and sexual assault. At trial, Saecker testified that he was at his mother's home during the entire time that of the assault. Yet, at a postconviction hearing, he argued that he should be given a new trial because the state had failed to turn over a receipt in Saecker's pocket placing him at a different location shortly before the attack. Additional evidence showed that Saecker was a paranoid schizophrenic. The court of appeals affirmed the conviction, concluding that the receipt did not create a reasonable doubt of guilt, in part because it contradicted Saecker's alibi testimony.

Saecker was exonerated in 1996 when DNA testing proved that semen found on the victim was not his. *See http://www.innocenceproject.org/case/display_profile.php?id=40*. Had counsel known of the receipt at trial, should counsel have been permitted (or required) to refuse to present Saecker's testimony because his alibi conflicted with the receipt? Given Saecker's mental illness, and apparent

innocence, Saecker himself likely did not know what he had done that night. If the client is not even sure of such important facts, how can the attorney know the truth?

Requiring a lawyer to assume a role hostile to his client also inevitably interferes with the proper functioning of the attorney-client relationship. Developing a trusting relationship is often difficult, especially when the attorney has been appointed and is paid by the same State that is attempting to convict the defendant. As the court in ***Long*** observed,

> by taking a position contrary to his client's interest, the lawyer may irrevocably destroy the trust the attorney-client relationship is designed to foster. That lack of trust cannot easily be confined to the area of intended perjury. It may well carry over into other aspects of the lawyer's representation, including areas where the client needs and deserves zealous and loyal representation.

857 F.2d at 445. The result, inevitably, is impaired representation, and unnecessary disruptions in the proceedings, including last-minute motions for withdrawal by counsel.

Moreover, requiring attorneys to make perjury determinations about their clients' testimony is unnecessary to protect the integrity of the criminal justice system.[1] In almost every case, testimony that an attorney might

---

[1] The State has suggested that the standard adopted by the court of appeals, as opposed to the standard now proposed by the State, is flawed because it applies only to prospective perjury, and not also to past perjury. But the court of appeals' standard is equally adaptable to the past perjury scenario.

reasonably believe is perjury because of its inconsistency with other evidence will be recognized as such by the jury and judge. Indeed, in most such cases, the patent unbelievability of the testimony will lead counsel to urge the client strenuously not to present that testimony. But if the client insists that the testimony is the truth, and insists on presenting it to the jury, the client should not be denied his day in court based on the suspicions—however well founded they may be—of the attorney.

Any standard less than actual knowledge based on an admission by the client of an intent to present perjury unnecessarily compromises the client's constitutional rights and the attorney's duties as zealous and loyal advocate. Even a standard requiring that counsel be convinced beyond a reasonable doubt is inadequate. It makes little sense to charge an advocate with the responsibility for pre-screening testimony under the same reasonable doubt standard that a jury must then apply.

The State's "good faith" "firm factual basis" standard offers no advantages over the standard adopted by the court of appeals; it merely muddies the waters and threatens the role of defense counsel as zealous and loyal advocate for the defendant. Incongruously, that standard permits, even requires, the defendant's own advocate to employ a standard—a firm factual basis—less demanding than that demanded of the ultimate factfinder, the jury—proof beyond a reasonable doubt.

The State posits that the admission-of-intent-to-lie standard is too weak, because it is too easy for a lawyer to assert that he cannot "know" the truth, and because lawyers will advise clients not to tell them if their proposed testimony

is the truth.

Again, this argument misunderstands counsel's role—suggesting that counsel is first a truth-judger rather than advocate. In any event, the State's standard does nothing to alter the way that those lawyers who do not wish to limit their ability to present their clients' testimony will counsel their clients. Any lawyer who would advise her client not to tell her that proposed testimony is false, so as to avoid a direct admission, would behave precisely the same way under the State's "firm factual basis" standard. Any such lawyer will conclude she has no "firm factual basis" as long as the client refrains from admitting perjury. The State's standard does not restrain counsel in any way, but merely unnecessarily and unproductively breeds uncertainty, disparity, and a threat to loyal and zealous advocacy.

This point highlights the real problem with the State's standard: it is no standard at all. Leaving it up to individual lawyers to "take into account all relevant facts and circumstances" and decide whether a "firm factual basis" exists to believe the client will commit perjury tells lawyers virtually nothing about when they should compromise their role as advocate. Each individual attorney will be left to decide for himself whether he "firmly" believes that the client will lie or not. Most competent, committed lawyers will remain loath to find a "firm factual basis" unless the client admits it. The State's standard will merely invite those lawyers disinclined to advocate zealously for their clients to join the "pathetic parade" of lawyers, as the court of appeals put it, marching their clients to guilty pleas despite the client's claim of innocence. ***McDowell*** at ¶44. And they will inevitably do so even for clients who, it turns out, despite all appearances, are in fact innocent.

The unworkable nature of the State's standard is demonstrated by the record in this case. The State contends that Attorney Langford had a "firm factual basis" for a "good-faith belief" that his client would commit perjury. State's Brief at 12. But Langford himself never expressed a belief—good faith, firm, or otherwise—that his client would commit perjury. Rather, Langford admitted: "I did have strong serious concerns and reservations, but I could not say to the Court because of what McDowell told me that, yes, he was going to lie" (79:79). Was this enough or not? Was Langford free, was he *required*, to turn on his client under these circumstances? Under the State's standard, attorneys like Langford are given no guidance.

Certainly, counsel had reason to *suspect* his client's testimony might not be truthful. McDowell's story was improbable, and he did at one point tell Langford that, "if I have to say something untruthful I'll say that" (79:108-09). But McDowell never said he would in fact lie, or identify what any lie would be; indeed, when Langford counseled him against lying he assured Langford he would tell the truth (79:112). Ultimately Langford recognized he could not *know* if the testimony would be true or false. Absent an admission by McDowell that he intended to lie, his testimony just might have been the truth. It should have been for the jury, not counsel, to make that determination.

CONCLUSION

For these reasons, *amici* urge this court to adopt the standard enunciated by the court of appeals to guide defense attorneys in evaluating the prospect that their clients might commit perjury.

Dated this 16th day of January, 2004.

Respectfully submitted,

____

JOHN A. PRAY
Bar No. 01019121

____

KEITH A. FINDLEY
Bar No. 1012149

Frank J. Remington Center
University of Wis. Law School
975 Bascom Mall
Madison, Wisconsin 53706
(608) 262-1002

Attorneys for Amicus Curiae

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2968 words.

____

.... Keith A