No. 21173 - State of West Virginia v. Timothy Layton

Miller, Justice, dissenting:

Although the majority gives lip service to the Sixth Amendment right to counsel, it fails to understand its application to the facts of this case where the defendant wished to proceed pro se and waive his right to assistance of counsel. We discussed this question at some length in State v. Sheppard, 172 W. Va. 656, 310 S.E.2d 173 (1983), where we relied on Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), and its progeny. We concluded in Syllabus Point 8 of Sheppard:

> "A defendant in a criminal proceeding who is mentally competent and sui juris, has a constitutional right to appear and defend in person without the assistance of counsel, provided that (1) he voices his desire to represent himself in a timely and unequivocal manner; (2) he elects to do so with full knowledge and understanding of his rights and of the risks involved in self-representation; and (3) he exercises the right in a manner which does not disrupt or create undue delay at trial."

Sheppard went on to explicitly outline the type of inquiries that should be made by a circuit judge in order to determine on the record that the accused has made a knowing and voluntary waiver of his Sixth Amendment right to counsel:

> "It is the primary duty of the trial court in conducting its inquiry to ascertain whether the defendant is cognizant of and willing to relinquish his right to assistance of counsel, since there can be no valid exercise of the right of self-representation absent a competent and intelligent waiver of the right to counsel. . . . The trial court should also

> insure that the accused is aware of the nature, complexity and seriousness of the charges against him and of the possible penalties that might be imposed. . . .
>
> "It is incumbent upon the trial court to warn the accused of the 'dangers and disadvantages of self-representation.' . . . In this context it has been held that the trial court has an obligation to warn the accused that self-representation is almost always detrimental, that he will be afforded no special indulgence or advocacy privileges by the court; that he will be subject to all the technical rules of substantive, procedural and evidentiary law; that the prosecution will be represented by an experienced attorney; that misbehavior or disruption at trial may vacate his right to represent himself; and that in spite of his efforts he cannot later claim ineffective assistance of counsel. . . . In addition, the trial court should advise the defendant that he waives his right to refuse to testify by going outside the scope of argument and testifying directly to the jury. . . .
>
> "Finally, the trial court should make some inquiry into the defendant's intelligence and capacity to appreciate the consequences of his decision. In this respect, the defendant's background, education, experience and familiarity with the legal system are relevant considerations in the trial court's determination of the validity of the defendant's election to proceed pro se." 172 W. Va. at 671-72, 310 S.E.2d 188-89. (Citations omitted).

This type of searching inquiry was not made in this case by the trial court. However, the majority decimates Sheppard by concocting a hybrid test where standby counsel is utilized. The only problem is that the standby counsel in this case was at odds with the defendant. No consideration is given to this fact by the majority. Finally, I believe the majority has improperly analyzed the perjury

issue, as did the trial court, to the extent that the defendant's right to testify was seriously impaired.

I.

The Sixth Amendment of the United States Constitution, applicable to the states by virtue of the Fourteenth Amendment, clearly guarantees any defendant brought to trial the right to assistance of counsel before he may be validly convicted and punished by imprisonment.[1] As the United States Supreme Court has stated: "'[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done."' Johnson v. Zerbst, 304 U.S. 458, 462 [58 S. Ct. 1019, 1022, 82 L. Ed. 1461, 1465] (1938)." Gideon v. Wainwright, 372 U.S. 335, 343, 83 S. Ct. 792, 796, 9 L. Ed. 2d 799, 804-05 (1963). A corollary of this safeguard to one's fundamental human rights of life and liberty is the right of an accused to reject assistance of counsel, and to defend himself at trial. Faretta v. California, supra; State v. Sheppard, supra. As the Faretta court stated:

> "Personal liberties are not rooted in the law of averages. The right to defend is

[1]See Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

> personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' Illinois v. Allen, 397 U.S. 337, 350-351, 25 L. Ed. 2d 353, [363,] 90 S. Ct. 1057 [, 1064 (1970)] (Brennan, J., concurring)." 422 U.S. at 835, 95 S. Ct. at 2540-41, 45 L. Ed. 2d at 581.

As the majority purports to recognize, the United States Supreme Court in Faretta and our holding in Sheppard, supra, have made clear that before one may waive "many of the traditional benefits associated with the right to counsel . . . the accused must, 'knowingly and intelligently' forego those relinquished benefits." Faretta v. California, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581, citing Johnson v. Zerbst, 304 U.S. at 464-65, 58 S. Ct. at 1023, 82 L. Ed. at 1466-67. (Emphasis added).[2] From the record, it is clear to me that the defendant was upset with his counsel's representation and his counsel was equally frustrated with the defendant. It reached the point where several days prior to trial, counsel delivered his file to the defendant who was in jail, indicating to him that he could

[2]The Sixth Circuit Court of Appeals in United States v. McDowell, 814 F.2d 245 (6th Cir.), cert. denied, 484 U.S. 980, 108 S. Ct. 478, 98 L. Ed. 2d 492 (1987), required that district courts under its jurisdiction question defendants who wished to proceed pro se in accordance with guidelines for such an inquiry found in 1 Bench Book for United States District Judges 1.02-2 to -5 (3d ed. 1986). Only if such an inquiry is made in accordance with the Bench Book will a defendant be found to have knowingly waived his right to counsel.

represent himself. Counsel was aware that the defendant could neither read nor write. This matter was brought to the attention of the trial court, but I do not believe it fully grasped the extent of their disagreement nor of the defendant's illiteracy.

The majority also fails to grasp these key facts. It spends four pages of its opinion discussing the procedural aspects of the defendant's first trial which ended in a hung jury. ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 4-7). This is not relevant to the issues raised at the second trial except to indicate to the reader that the defendant had difficulties with other counsel and, according to his trial counsel, intended to commit perjury. I do not believe even the majority would sanction this type of information being given to the jury in the second trial, which it now details at great length to the reader of its opinion.

The majority does not address the critical lapse that occurred in the trial court's failure to ascertain whether a true breakdown had occurred between the defendant and his attorney, as required under Syllabus Point 5 of Watson v. Black, 161 W. Va. 46, 239 S.E.2d 664 (1977).[3] Moreover, the majority circumvents Sheppard

[3]Syllabus Point 5 of Watson states:

> "Good cause for the relief of a court-appointed counsel consists of: (1) a conflict of interest; (2) a complete breakdown in communication with court-appointed counsel after the exhaustion of good faith efforts to work with counsel; or, (3) an irreconcilable

by holding that the presence of and assistance by counsel at trial avoids the necessity of a full Sheppard inquiry when the defendant elects self-representation. I find the cases used by the majority easily distinguishable.

A.

None of the cases cited by the majority deal with the factual situation presented here where there was a substantial breakdown between the defendant and his counsel and the defendant was allowed the right to pro se representation. Moreover, none of the cases cited by the majority dealt with a situation where the defendant was as illiterate as the defendant in this case. The majority cites extensively from the Washington intermediate court's decision in State v. Barker, 35 Wash. App. 388, 667 P.2d 108 (1983), where it concluded that the defendant, despite actively participating in his own defense, had been "fully represented by counsel," such that the issue of waiver never arose. 35 Wash. App. at ___, 667 P.2d at 113. This conclusion seems to fly in the face of logic. Certainly, one who actively undertakes his own defense was not "fully represented by counsel."

Commonwealth v. Palmer, 315 Pa. Super. 601, 462 A.2d 755 (1983), also cited by the majority, is clearly not on point. That

(..continued)
conflict which might lead to an unjust verdict."

intermediate court noted that although the trial court therein had not "fully explor[ed] all matters relating to waiver during the colloquy," 315 Pa. Super. at ___, 462 A.2d at 758-59, neither had the defendant fully waived his right to counsel. The majority distorts Palmer by merely noting that the intermediate court held "that in a partial waiver of right to counsel, where standby counsel has been appointed, the full requirements of 318(c) [a Pennsylvania criminal rule which required a Shepard-type colloquy] need not be met." ___ W. Va. at ___, ___ S.E.2d at ___ (Majority op. at 18), citing 315 Pa. Super. at ___, 462 A.2d at 759. The majority fails to recognize, however, that the Palmer court went on to state in the next sentence that "[i]t is sufficient if the court instructs the accused on those aspects of the trial for which he seeks to represent himself." 315 Pa. Super. at ___, 462 A.2d at 759. Unlike Palmer, the trial court herein did not instruct Mr. Layton on any aspect on the trial for which he chose to represent himself, beyond a general discouragement and notice that Mr. Layton would be held to appropriate standards of conduct.

Another case cited by the majority which is not on point is United States v. Robinson, 783 F.2d 64 (7th Cir. 1986). In that case, the defendant never sought to waive counsel. He merely requested, with the advice and guidance of his counsel, that he be permitted to make an unsworn statement to the jury during closing arguments. That request was granted. Robinson is clearly

distinguishable from this case because the defendant neither sought to waive his right to counsel nor did he so waive that right.

The same problems exists as to Clark v. State, 717 S.W.2d 910 (Tex. Crim. App. 1986), cert. denied, 481 U.S. 1059, 107 S. Ct. 2202, 95 L. Ed. 2d 857 (1987), where the Texas Court of Criminal Appeals found that the defendant had not "ever actually made demand of the trial judge that he be permitted to personally represent himself, but . . . that at times the [defendant] was permitted to personally inject himself and his views into the case." 717 S.W.2d at 918. Again, Clark is obviously different from the present case where Mr. Layton specifically demanded that he be permitted to represent himself and did more than merely personally inject himself and his views into the case.

The final case cited by the majority in support of its view that Faretta warnings are unnecessary in a hybrid counsel situation is People v. McKinney, 62 Ill. App. 3d 61, 19 Ill. Dec. 250, 378 N.E.2d 1125 (1978). In that case, the Illinois intermediate court relied on a pre-Faretta decision, People v. Lindsey, 17 Ill. App. 3d 137, 308 N.E.2d 111 (1974), in its interpretation of the Illinois statute, Rule 401(a), Ill. Rev. Stat. ch. 110A, para. 401(a) (1975). This statutory provision codified the procedure to be used before permitting an accused to waive his right to counsel. The intermediate court adopted the Lindsey court's finding that a waiver of counsel

is ineffective unless an accused "informs a court that he does not wish counsel; that he wants to stand alone." 62 Ill. App. 3d at 65, 19 Ill. Dec. at ___, 378 N.E.2d at 1128, citing Lindsey, 17 Ill. App. 3d at 140, 308 N.E.2d at 114. No discussion of Faretta or an accused's rights under the Sixth Amendment is found in either case. Consequently, in the absence of such a discussion, McKinney is meaningless to our present case.

B.

On the other hand, several courts that have squarely addressed the Sixth Amendment issue of waiver have found that Sheppard-type warnings are necessary whenever an accused receives less than "full representation" by counsel, even if counsel undertakes "substantial" representation of the accused. See Hamilton v. State, 30 Md. App. 202, 205-06, 351 A.2d 153, 155 (1976), citing Faretta, supra (where the record of the case established that "assigned counsel participated substantially but not exclusively in the management of the conduct of the trial . . . . [T]he fact that an accused was assisted by counsel in the course of the ensuing trial is of no moment in the determination whether the right to self-representation has been denied." [Emphasis added]).

Moreover, several federal courts have addressed the waiver of counsel question whereby standby counsel participated. These courts are of the view that a full explanation must be given of the

waiver of the right to counsel. The First Circuit Court of Appeals in Maynard v. Meachum, 545 F.2d 273, 277 (1st Cir. 1976), stated:

> "We can conceive of no reason why the standard for waiving part of a constitutional right should be different from the standard for waiver of the entire right. Respondent argues, and we agree, that it is within the discretion of a trial court to allow the sort of hybrid arrangement that was adopted in this case, see, e.g., United States v. Hill, 526 F.2d 1019 (10th Cir. 1975); United States v. Guanti, 421 F.2d 792 (2d Cir. 1970). But it does not follow that such an arrangement is the equivalent of full representation by counsel for purposes of waiver. . . . On respondent's analysis, the right to counsel is satisfied, regardless of the reality of self-representation, so long as counsel is not formally allowed to withdraw and remains in the courtroom. We do not believe that the protections of this right that have evolved from Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), can be so casually swept away."

The Tenth Circuit Court of Appeals endorsed the Maynard court's view in United States v. Padilla, 819 F.2d 952, 960 (10th Cir. 1987), where it stated:

"Anything less than full representation by counsel raises the question of valid waiver of the right to counsel. . . . Even if appointment of standby counsel is contemplated, the district court must fulfill its affirmative responsibility of ensuring defendant is aware of the hazards and disadvantages of self-representation."

Applying the foregoing reasoning to the instant case, it seems clear that the amount of participation in the trial by standby counsel is not the correct criteria upon which to base a determination of whether or not an accused has adequately waived his Sixth Amendment

right to counsel. Rather, such a decision must be based upon a determination of who maintains "actual control" over the presentation of the accused's defense. If, as in this case, the trial court places the "actual control" of the case in the hands of the accused, allowing him to decide strategy and what use to make of counsel, it is clear that the accused has relinquished "many of the traditional benefits associated with the right to counsel." Faretta, supra. In such a situation, "the accused must 'knowingly and intelligently' forego those relinquished benefits."

The foregoing analysis was recently adopted by the Supreme Court of California in People v. Jones, 53 Cal. 3d 1115, 1142, 282 Cal. Rptr. 465, 481, 811 P.2d 757, 773 (1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1491, 117 L. Ed. 2d 631 (1992), wherein it was stated:

> "A defendant's entitlement to Faretta warnings turns on which form of representation the defendant selects. If the defendant chooses self-representation, Faretta requires that the defendant be warned of the dangers and pitfalls of doing so. (Faretta v. California, supra, 422 U.S. at p. 835, 95 S. Ct. at p. 2541 [45 L. Ed. 2d at pp. 581-82].) These warnings must be given even when the defendant has counsel to assist in an advisory capacity. So long as the defendant, by choosing to act as his or her own attorney, has assumed responsibility for the case, the defendant has forfeited the right to have an attorney make the critical strategic and tactical decisions pertaining to the defense and has thus waived the right to counsel. In such a situation, the record must show that the defendant 'understood the disadvantages of self-representation, including the risks and complexities of the particular case.' (People

v. Bloom, supra, 48 Cal. 3d at p. 1225, 259 Cal. Rptr. 669, 774 P.2d 698.)

> "If, on the other hand, a defendant chooses to be represented by counsel and the trial court allows the defendant a limited role as cocounsel, the defendant has not waived the right to counsel. The defense attorney retains control over the case and can prevent the defendant from taking actions that may seriously harm the defense. In that situation, the trial court may, but need not, warn the defendant of the problems of being cocounsel."

I believe the approach of the Supreme Court of California in People v. Jones, supra, is preferable to that chosen by the majority. Rather than merely quantifying the amount of participation by standby counsel, as does the majority, the California test goes to the heart of the right to be protected, the right to assistance of counsel, which as we have seen is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. People v. Jones, Faretta, and in my opinion Sheppard, as well, require that where an accused requests that he be permitted to proceed pro se and is permitted by the trial court to either proceed pro se or to exercise actual control over his defense and does, in fact, exercise actual control over his defense, he must make a knowing and intelligent waiver of his right to counsel.

In this case, the accused requested that he be permitted to proceed pro se. The trial court granted him this right, but allowed him to make use of standby counsel if he desired. The defendant proceeded to actively represent himself through the examination of

several witnesses. It appears from the record that the defendant chose how to make use of standby counsel. Certainly, the defendant did not receive full representation by counsel. I find the failure to give a full explanation to the defendant as to his Sixth Amendment right to counsel resulted in a lack of a knowing and intelligent waiver of this right. This failure constituted reversible error.

II.

Section II of the majority opinion discusses the conflicting obligations imposed upon a lawyer when he suspects that his client may offer perjured testimony to the court. On the one hand, a lawyer has a duty to zealously represent his client and to keep all discussions with his client confidential. On the other hand, a lawyer has a duty, as an officer of the court, to guard against a knowing subornation of perjury. The complexity of this issue raises not only questions of attorney-client relations, but also more serious constitutional implications as well, including an accused's right to testify, his right to counsel, and his fundamental due process rights. The majority has failed to understand these complexities as well as the facts surrounding the alleged attempted perjury.

The Supreme Court in Harris v. New York, 401 U.S. 222, 225, 91 S. Ct. 643, 645, 28 L. Ed. 2d 1, 4 (1971), stated that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include

the right to commit perjury." (Citations omitted).[4] The foregoing principle is embodied in Rule 3.3 of the Rules of Professional Conduct, which states, in pertinent part:

> "(a) A lawyer shall not knowingly:
>
> * * *
>
> (4) offer evidence that the lawyer knows to be false. . . .
>
> * * *
>
> "(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false."

It is clear that a lawyer has an affirmative duty not to offer evidence he knows to be false.[5] Furthermore, a lawyer may, at his discretion, refuse to offer evidence he "reasonably believes" to be false. Neither the Rules of Professional Conduct nor the Official Comment thereto addresses the more difficult question of upon what basis a lawyer may "reasonably believe" that his client's intended testimony will be false and thereby refuse to offer such evidence to the court.

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[4]In Faretta, the Supreme Court stated that "[t]his Court has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right . . . to testify on his own behalf[.]" 422 U.S. at 819 n.15, 95 S. Ct. at 2533 n.15, 45 L. Ed. 2d at 572 n.15. (Citations omitted). See also Rock v. Arkansas, 483 U.S. 44, 49, 107 S. Ct. 2704, 2708-09, 97 L. Ed. 2d 37, 44-45 (1987); Nix v. Whiteside, 475 U.S. 157, 164, 106 S. Ct. 988, 993, 89 L. Ed. 2d 123, 133 (1986).

[5]It has been stated, for obvious reasons, that a lawyer will rarely "know" that his client intends to commit perjury. Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984), rev'd on other grounds sub nom., Nix v. Whiteside, supra.

The majority glosses over this issue by simply assuming that Mr. Layton's appointed counsel had a "reasonable belief" that Mr. Layton would testify falsely. Upon what basis this assumption is made is unclear. A review of the record shows that far from defense counsel approaching the trial court with his suspicion that Mr. Layton may testify falsely, it was the trial court that instigated the initial discussion thereon sua sponte. The majority recognizes that the trial court engaged defense counsel in the following discussion:

> "THE COURT: Mr. Ollar, you and your [co-]counsel are advised that if you do believe your client wants to take the stand and wants to perjure himself, you and your associate will not participate in the question and answer period.
>
> "MR. OLLAR: Yes, sir. As you know, we've brought a potential conflict to the Court's attention once in the past, and I'd appreciate some instruction on how you actually wanted this to occur.
>
> "THE COURT: Well, if he desires to take the stand and his testimony is not going to be truthful, then you will not participate whatsoever in the questioning of this witness."

What the majority conveniently neglects to mention is that defense counsel then responded to the trial court: "MR. OLLAR: Your Honor, I have no knowledge of what [the defendant] intends to say on the stand." Nonetheless, the majority erroneously asserts that "the defendant [had] apparently [at that time] informed . . . his attorney during his second trial, that he . . . intended to perjure himself." ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 45).

Clearly, at that stage of the trial, defense counsel had no suspicion that Mr. Layton intended to commit perjury for he did not know what Mr. Layton would say. The trial court, again taking the initiative, went on to state:

"THE COURT: Well, you'll have ample time to find out between now and the time that he takes the stand. You can take him back in the conference room here and discuss it with him and he will have to tell you so that you can ask the appropriate questions . . .

"MR. OLLAR: Thank you, sir.

"THE COURT: . . . as to what he wants to tell the jury."

Later during the trial, after the State rested, a bench conference was held where the defendant sought to delay the trial in order to obtain the testimony of witnesses absent from the trial. The trial court refused. Apparently believing the bench conference ended, Mr. Layton left the bench conference. Immediately thereafter, still out of the presence of the jury, defendant's counsel briefly addressed the trial court as follows:

"MR. OLLAR: Your Honor, I want to put something on the record here. I do not want to put on a witness that insists on putting on--knowing what's going to be said, I want an instruction from you indicating that I can put him on the stand.

"THE COURT: If you will ask him what he remembers?

"MR. OLLAR: I don't want to ask him anything.

"THE COURT: Okay. You may go back down."

The foregoing is the complete extent of the record showing the basis upon which defense counsel believed that Mr. Layton would testify falsely. In essence, defense counsel offered no basis, nor was one asked for by the trial court.

The majority cites to Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986). Nix, however, is patently distinguishable from this case. In Nix, the defendant moved for a new trial after the jury convicted him of second-degree murder. The motion for a new trial was based upon the defendant's assertion that he was denied a fair trial because his defense counsel had threatened to withdraw if the defendant committed perjury. That issue was not raised before the trial court during trial. The trial court, in a post-trial hearing, made specific findings that the facts surrounding the potential perjury were as related by defense counsel, thus rejecting the defendant's allegations. Nix, 475 U.S. at 162, 106 S. Ct. at 992, 89 L. Ed. 2d at 131-32.

Nix provides no guidance for situations where no record is made concerning the validity of a defense counsel's "reasonable belief" that his client may commit perjury. However, the Eighth Circuit Court of Appeals squarely addressed this issue in United States v. Long, 857 F.2d 436 (1988), cert. denied sub nom., Jackson v. United States, ___ U.S. ___, 112 S. Ct. 98, 116 L. Ed. 2d 69 (1991). The facts in Long bear resemblance to those in the present case. In Long,

defense counsel approached the trial court after the government rested its case and informed the court that he was "concerned" about the potential testimony of the defendant. He also informed the trial court that he had advised the defendant not to take the stand. At that point, the trial court excused everyone from the courtroom but defense counsel, the defendant, and a United States Marshal. Defense counsel then informed the trial court that he may have to withdraw based upon the potential testimony of the defendant. The trial court informed the defendant that (1) he had a right to testify, but (2) defense counsel could not elicit untrue evidence. The defendant responded that he understood.

The trial court also informed the defendant that, if he elected to testify, he only could do so by giving a narrative statement without questioning by defense counsel. The trial court then cryptically stated to the defendant that if defense counsel found "things which he believes to be not true . . . he may have other obligations at that point." 857 F.2d at 444. The trial court cautioned the defendant again about the "obligations" of defense counsel and defendant's right to testify. The defendant informed the court that he would not testify.

Upon appeal, the Eighth Circuit Court of Appeals noted that, unlike Nix, there was nothing in the record of Long to show that the defendant would have testified falsely if he took the stand. The

Long court described the absence of such a showing as "crucial": "In terms of a possible violation of [the defendant's] rights, this is crucial. If . . . [defense counsel] had no basis for believing [the defendant] would testify falsely and [the defendant], in fact, wanted to testify truthfully, a violation of his rights would occur." 857 P.2d at 445. The Court of Appeals noted its rule that defense counsel must have a "firm factual basis" for believing his client will testify falsely before taking any action to prevent such testimony:

> "Counsel must act if, but only if, he or she has 'a firm factual basis' for believing that the defendant intends to testify falsely or has testified falsely. . . . It will be a rare case in which this factual requirement is met. 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, citing Whiteside v. Scurr, 744 F.2d 1323, 1328, rev'd on other grounds sub nom., Nix v. Whiteside, supra. (Emphasis added).

The Court of Appeals held that an evidentiary hearing on that issue would be necessary because the record did not reveal whether defense counsel had a "firm factual basis" for his belief that the defendant may testify falsely.

In this case, the record reveals no basis whatsoever for defense counsel's belief that Mr. Layton would testify falsely. In such a situation, the need for an evidentiary hearing, as ordered in Long, is obvious. At a minimum, the record should reveal that defense counsel attempted to persuade the defendant not to testify

perjuriously. As the Supreme Court stated in Nix: "It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct." 475 U.S. at 169, 106 S. Ct. at 996, 89 L. Ed. 2d at 136.[6] (Citations omitted). In this case, there is simply nothing in the record to suggest that defense counsel performed this minimum duty. The need for an evidentiary hearing is thus even stronger here than in Long.

III.

A.

The majority unexplicably proceeds to a conclusion that the defendant made a knowing and intelligent waiver of his right not to be present at the bench conference. At this bench conference, the trial court permitted defense counsel to withdraw from questioning the defendant when he testified on his own behalf.

The bench conference occurred when the defendant sought a brief recess to determine whether several of his witnesses would be available to testify. This recess was denied by the court.

[6]The majority cites with approval The Committee on Professional Ethics of the Connecticut Bar Association's conclusion that, where a client insists on committing perjury, a lawyer "should attempt to persuade the defendant to testify in narrative fashion." It is clear from the record in this case that the defendant was completely surprised by the trial court's ruling that he must testify in narrative form, and that no such discussion with his lawyer as advocated by the Connecticut Bar Association Committee occurred.

Angered at this ruling, the defendant left the bench conference and returned to counsel table. His counsel remained at the bench and then brought up the question of not desiring to examine the defendant. It was at this point that the court informed defense counsel that he should not examine the defendant. The defendant had no knowledge of this ruling, as evidenced by his remarks in the record when he took the stand to testify.[7]

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[7]The record reveals the following colloquy:

"THE COURT: Do you desire to testify in this proceeding?

"THE DEFENDANT: Yes, I do.

"THE COURT: You do?

"THE DEFENDANT: Yes, sir.

"THE COURT: You may proceed with your testimony. Come and take the stand and be sworn.

"WHEREUPON, TIMOTHY LAYTON, having been duly sworn in open court by the Clerk of the Court, testified as follows:

"THE COURT: Mr. Ollar has requested that he not be required to ask you any questions.

"[THE DEFENDANT]: You mean my counsel is not going to assist me on the stand?

"THE COURT: That's correct. You may tell the jury your name and address and what you want them to know.

"THE DEFENDANT: But you're asking me to testify here and violate my 6th Amendment right to counsel.

"THE COURT: No. I told you what your rights were and advised you of that this morning, and your attorney has certain rules that he has to go by. If you desire to tell the jury what you want them to hear about this proceeding, you may now

The cases cited by the majority involving the waiver of a defendant's right to be present at trial involve those situations where a defendant voluntarily absents himself from the trial after being informed of his obligation and right to be present. Here, the defendant could not waive what he did not know had occurred. It is incredible to me that the majority could find a waiver in this case.

This case bears some analogy to State ex rel. Grob v. Blair, 158 W. Va. 647, 214 S.E.2d 330 (1975), where the attorneys convened in the judge's office to consider how to deal with a witness who wished to recant earlier testimony. The defendant was not invited to this

(..continued)

tell them.

"THE DEFENDANT: But without counsel . . .

"THE COURT: Your counsel will not ask the questions to you.

"THE DEFENDANT: Well, don't you think, sir, don't you think that would cast a doubt on this jury?

"THE COURT: Sir?

"THE DEFENDANT: Don't you think that casts a doubt on this jury?

"THE COURT: No.

"THE DEFENDANT: Why my counsel won't talk to me?

* * *

"THE COURT: You may proceed."

conference and we held this violated his constitutional right to be present. Our rule on this point is contained in Syllabus Point 6 of State v. Boyd, 160 W. Va. 234, 233 S.E.2d 710 (1977):

> "The defendant has a right under Article III, Section 14 of the West Virginia Constitution to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless."

I cannot conceive of any reasonable argument that could be made to justify this critical decision of whether counsel should examine the defendant being made without the presence of the defendant. There is absolutely no claim made that the defendant was asked to return to the bench and refused to do so. The only conclusion that can be rationally made is that his constitutional right to be present was simply ignored.

B.

Moreover, the related question of the defendant's Sixth Amendment right to have his counsel examine him is brushed away by the majority by citing Syllabus Point 7 of State v. Neuman, 179 W. Va. 580, 371 S.E.2d 77 (1988).[8] In Neuman, we dealt with a trial

[8]Syllabus Point 7 of Neuman states:

> "A trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that a defendant's waiver is voluntary, knowing, and intelligent by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent

court's obligation to inform the defendant of the rights he would be giving up if he elected not to testify on his own behalf at trial. Here, the defendant elected to testify; thus, the Neuman principle is not applicable and cannot be applied to waive defendant's Sixth Amendment right to the assistance of counsel when he took the stand. What we have said in Part I, supra, regarding the Sixth Amendment right to counsel and its waiver applies with equal force here.

C.

The trial court compounded its error even further when, in essence, it announced, in open court with the jury present, that defense counsel believed the defendant would commit perjury on the stand. This announcement occurred after the defendant agreed to testify and was sworn in. The trial court stated in the jury's presence that defense counsel had requested that he not be required to ask the defendant any questions. When the defendant expressed his surprise at this pronouncement and protested, the trial court responded that defense counsel "has certain rules that he has to go by."

(..continued)

> him from doing so, that if he testifies the prosecution will be allowed to cross-examine him. In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right."

A similar situation arose in Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978), where the trial court sat without a jury. In that case, defense counsel was in the process of examining the defendant when defense counsel abruptly asked for a recess and the trial court removed defense counsel to its chambers. There, the defense counsel sought to withdraw. No explanation was given, but his request for a recess came immediately after the defendant denied committing the crime for which he was charged. The Ninth Circuit Court of Appeals found that where a fact-finder is warned by defense counsel, either explicitly or implicitly, that the defendant's defense is based upon false testimony, the fact-finder becomes "disabled . . . from judging the merits of the defendant's defense." 575 F.2d at 730. That court made a distinction between cases where a defense counsel declines to take action and situations where the ethical quandary is all but announced to the fact-finder:

> "In our view, mere failure to pursue actively a certain course of defense, which counsel ethically is precluded from actively pursuing, cannot be said to constitute denial of fair trial. While a knowledgeable judge or juror, alert to the ethical problems faced by attorneys and the manner in which they traditionally are met, might infer perjury from inaction, counsel's belief would not appear in the clear and unequivocal manner presented by the facts here. There may be many reasons for failure actively to pursue a particular line of defense. And in the weighing of competing values in which we are engaged . . . the integrity of the judicial process must be allowed to play a respectable role; the concept of due process must allow room for it.
>
> "The distinction we draw is between a passive refusal to lend aid to perjury and such direct action as we find here--the addressing

> of the court in pursuit of court order granting leave to withdraw. By calling for a judicial decision upon counsel's motion in a case in which the judge served as fact finder, this conduct affirmatively and emphatically called the attention of the fact finder to the problem counsel was facing." 575 F.2d at 731. (Footnote omitted).

In this case, the trial court implicitly informed the jury that defense counsel was, at the very least, at odds with his client. The fact that defense counsel refused to examine his own client and that this was due to "rules that he has to go by," all but announced to the jury that defense counsel believed his client would lie to the jury. Such a situation clearly disabled the jurors from judging the merits of the defendant's defense, and he was denied a fair trial.

D.

After the defendant testified in narrative form, and after the State was permitted to cross-examine him, defense counsel sought permission of the trial court to allow the defendant to continue his narrative testimony, stating: "Sir, if I might, [the defendant] has not fully had an opportunity to fully describe what he alleges happened that day." This was, in essence, a request for redirect examination. The trial court denied the foregoing request.

In his very brief narrative testimony, the defendant made only cursory remarks relating to the facts of the case although he

did deny participating in the crime. It seems abundantly clear that the defendant's testimony was brief and disjointed, mostly because he was completely unprepared to testify in narrative form without the aid of questioning by his stand-by counsel. Defense counsel sought to limit the already measurable prejudice to the defendant by asking that the defendant be permitted to fully tell his story. The trial court denied this request, stating simply that the defendant had his opportunity the testify and the State already had cross-examined him. Clearly, the Sixth Amendment right to counsel, which has been previously discussed, was violated at this point.

Although a trial court may exercise reasonable control over the mode and order of interrogating witnesses, under Rule 611(a) of the West Virginia Rules of Evidence, this control may not be exercised in such a way that the trial court abuses its discretion. In State v. Armstrong, 179 W. Va. 435, 442, 369 S.E.2d 870, 877 (1988), we stated:

> "Rule 611(a) of the West Virginia Rules of Evidence provides: 'The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.' This evidentiary rule is consistent with the common law in this State: 'A trial court has wide latitude in the conduct of a trial, and particularly in matters pertaining to the examination of witnesses, and its rulings in relation to the examination of witnesses will not be reversed except when there has been a plain abuse of its discretion.' Syl. pt. 2, Payne v. Kinder, 147 W. Va. 352, 127 S.E.2d

> 726 (1962). The discretion of the trial court to control the mode of interrogation of witnesses has been recognized in criminal cases in this State. See Syl. pt. 6, State v. Fairchild, 171 W. Va. 137, 298 S.E.2d 110 (1982) (leading questions). In practice, abuse of this discretion is more often found when the trial court has unduly curbed the examination than when the trial court has permitted an undue extension of the examination. State v. Altergott, 57 Haw. 492, 506, 559 P.2d 728, 737 (1977)." (Emphasis added).

It is clear to me that the trial court abused its discretion when it denied the defendant an opportunity to present his testimony, albeit in the form of a redirect examination to the jury. Preventing such testimony of the defendant did not further any of the goals outlined in Rule 611(a) of the Rules of Evidence. Rather, it had the effect of denying the unprepared defendant, who already was prejudiced by the surprise responsibility of testifying in narrative form, his right to testify.

IV.

Finally, the majority makes the bizarre assertion that, "[i]f the question of perjury had arisen for the first time during the trial which underlies the present appeal, it could have been appropriate for the trial court to have declared a mistrial." ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 35). Again, I must disagree. The foregoing assertion is entirely groundless in any law that I can find.

When a question of perjury arises, whether it be in an initial trial or a subsequent retrial, the procedure followed by the trial court should be the same. In my opinion, if, and only if the defense counsel has a "firm factual basis" for his assertion that his client may commit perjury, and if he has attempted to dissuade his client from so testifying, the trial court may permit defense counsel to forego questioning the defendant.

Prior to placing the defendant on the stand, however, the defendant must be made aware that his counsel will be unavailable to question him and, if he chooses to testify, such testimony must be in narrative form.[9] I can see no reason to declare a mistrial every

[9]There is debate among authorities and commentators regarding the propriety of narrative testimony in situations where a lawyer suspects his client may commit perjury. Several courts have approved the use of narrative testimony in such a situation. See People v. Guzman, 45 Cal. 3d 915, 248 Cal. Rptr. 467, 755 P.2d 917 (1988), cert. denied, 488 U.S. 1050, 109 S. Ct. 380, 102 L. Ed. 2d 365 (1989); Coleman v. State, 621 P.2d 869 (Alaska 1980), cert. denied, 454 U.S. 1090, 102 S. Ct. 653, 70 L. Ed. 2d 628 (1981); State v. Fosnight, 235 Kan. 52, 679 P.2d 174 (1984); People v. Lowery, 52 Ill. App. 3d 44, 9 Ill. Dec. 41, 366 N.E.2d 155 (1977). However, as the majority notes, the Official Comment to Rule 3.3 of the Rules of Professional Conduct expressly disapproves of a narrative approach, stating: "[T]his compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel." Another commentator has stated the following:

> "The narrative approach allows the lawyer to refrain from active participation in the client's testimony while giving the client the opportunity to testify, thereby avoiding direct examination on matters in which the lawyer believes the client will commit perjury. Moreover, the lawyer may not argue to the jury the client's known false version of the facts as worthy of belief. Butler v. United States,

time a defendant threatens to commit perjury in an initial trial. If the foregoing procedure is followed, there will be no need to declare a mistrial at either an initial trial or any subsequent retrial.

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> 414 A.2d 844 (D.C. 1980). One commentator, who prefers the narrative approach to mandatory withdrawal, points out that withdrawal raises the danger of a succession of withdrawal motions and consequent trial delays. Lefstein, Client Perjury in Criminal Cases: Still in Search of an Answer, 1 Geo. J. Legal Ethics 521 (1988). Nevertheless, the narrative approach does not necessarily protect the client from an implicit disclosure of confidential communications, at least to the trial judge and the prosecutor, who may easily surmise the most likely reason for the lawyer's approach. Because of this implicit disclosure, the prosecutor may be barred from inviting the jury to draw inferences from defense counsel's conduct. See State v. Long, 714 P.2d 465 (Ariz. Ct. App. 1986).
>
> "Arguably, this approach undermines the lawyer's duty not to assist, even passively, in the client's attempt to perpetrate a fraud or mislead the court."

Center for Professional Responsibility, American Bar Association, Annotated Model Rules of Professional Conduct 341 (2d ed. 1992). See 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 3.3:212-220 (1992); Carol T. Rieger, Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues, 70 Minn. L. Rev. 121 (1985); Brent R. Appel, The Limited Impact of Nix v. Whiteside on Attorney-Client Relations, 136 U. Penn. L. Rev. 1913 (1988).

In State v. Armstrong, 179 W. Va. 435, 369 S.E.2d 870 (1988), we stated in Syllabus Point 3: "The trial court is vested with sound discretion to permit a witness to testify in narrative form, rather than by question and answer." In Armstrong, the State's expert witness sought to testify in narrative form and was permitted to do so. We affirmed this mode of testimony based upon the fact that the testimony was expert in nature. 179 W. Va. at 443, 369 S.E.2d at 878. See W.Va.R.Evid. 702.

V.

For the foregoing reasons, I would reverse the defendant's conviction and remand this case for a new trial. I am authorized to state that Justice Thomas E. McHugh joins me in this dissent.