STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 03-1253-CR
(Brown County Case No. 01-CF-624)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. DELAIN,

Defendant-Appellant-Petitioner.

Appeal From The Final Judgment And Order Entered In The Circuit Court For Brown County, The Honorable Richard J. Dietz, Circuit Judge, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ROBERT R. HENAK
State Bar No. 1016803
HENAK LAW OFFICE, S.C.
1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant-Petitioner

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ARGUMENT

BECAUSE THERE WAS NO THERAPIST-PATIENT RELATIONSHIP AT THE TIME OF THE ALLEGED OFFENSE, THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION UNDER COUNT 3

A. Conviction Under Wis. Stat. §940.22(2) Requires Proof of an Actual, Ongoing Therapist-Patient Relationship, Not Merely a Feigned Relationship.

The state concedes, albeit in an unnecessarily and misleadingly convoluted way, that the Court of Appeals' analysis of the sufficiency issue makes no sense. State's Brief at 7-14. The bottom line is that, contrary to the Court of Appeals' conclusion, satisfaction of the *mens rea* element of an offense does not obviate the need for proof beyond a reasonable doubt of the remaining essential elements of the offense. A mistaken belief that certain facts necessary to a completed crime

exist may justify conviction for an attempt, but cannot support conviction for the completed offense. *E.g.*, *State v. Kordas*, 191 Wis.2d 124, 528 N.W.2d 483, 485 (Ct. App. 1995) (mistaken belief property stolen supports *attempt* to receive stolen property, but not completed offense).

Belief, in other words, is no substitute for fact. Section 939.23(3) of the Wisconsin Statutes makes clear that conviction of an intentional crime, such as exploitation by a therapist under Wis. Stat. §940.22(2), requires not just the defendant's purpose to cause a particular result and knowledge , but also the actual existence of "those facts which are necessary to make his or her conduct criminal." If mere belief regarding certain "facts" were sufficient, those facts themselves would not be "necessary to make [the] conduct criminal."

The issue thus is not, as the state suggests, whether "knowledge" means something different than "knows." For purposes of the *mens rea* element of the offense, it probably makes no sense to distinguish between the two. Rather, the issue is whether a defendant's *mens rea* renders irrelevant proof on the other "facts which are necessary to make his or her conduct criminal." For the reasons already stated, proof of *mens rea* cannot rationally substitute for the other necessary elements of the offense. *See also* Wisconsin Legislative Council, *V Judiciary Committee Report on the Criminal Code* 21 (1953) ("'Intentionally' is used to indicate that certain objective facts must occur while 'with intent to' or 'with intent that' is used to indicate that the mental state must be present but that the desired thing or result need not actually occur.") (R-Ap. 156).

Dr. DeLain was charged with a completed act of sexual exploitation by a therapist based on the May 2, 2001 incident. Both the statute, Wis. Stat. §940.22(2) and the jury instructions (R105:159-61) thus required proof that Ms. Ford in fact was his patient or client at the time of the alleged contact, and that they in fact were involved in an ongoing therapist-patient or therapist-client relationship at that time. His mistaken belief that those were the facts accordingly was insuffi-

cient for conviction on that count.

B. Because Ford Did Not Attend the May 2, 2001 Session as a Patient for Purposes of Treatment, but Only to Obtain Evidence for the Police, the Evidence Is Insufficient to Prove the Necessary Element That the Alleged Assault Occurred During an "Ongoing Therapist-patient or Therapist-client Relationship."

The state suggests that "judicial estoppel," a procedural mechanism for preventing misuse of the courts, should be applied here to uphold conviction for a crime which Dr. DeLain simply did not commit. State's Brief at 14-16. This is not a case in which fairness requires that DeLain's arguments here be barred. In fact, fairness requires just the opposite. *Cf. State v. Smith*, 202 Wis.2d 21, 549 N.W.2d 232 (1996) (defendant entitled to withdraw his *Alford* plea where undisputed facts demonstrated that it was "legally impossible" for defendant to have committed the crime).

Nor is this a case in which "a party asserts irreconcilably inconsistent positions at trial and on appeal" for strategic reasons. *State v. Edmunds*, 229 Wis.2d 67, 598 N.W.2d 290, 299 n.3 (1999). DeLain's stipulation at trial that his activities on the May 2 video constituted "psychotherapy" is in no way inconsistent with the fact that Ms. Ford had withdrawn from the therapist/patient relationship a week earlier. The fact that DeLain was acting as a therapist on May 2 does not control the question of whether Ford remained a "patient" when she attended the session on that date, not for therapy, but as an agent of the police.

Whether DeLain was performing "therapy" turned on his actions and intent alone, while the separate question of whether there was an ongoing therapist/patient relationship necessarily turned on their *mutual* agreement or consent to that relationship. *See* DeLain's Brief at 15, and cases cited. Since Ford had withdrawn, she was no longer DeLain's patient and there was no ongoing therapist-patient relationship, regardless what DeLain may have thought.

The state does not dispute that Ms. Ford had withdrawn consent to the therapist-patient relationship prior to the May 2, 2001 session, nor does it dispute that she attended that session solely as an agent of the police and not as DeLain's patient seeking treatment. It merely asserts that the therapist-patient relationship nonetheless continued to exist as a matter of law because, despite Ford's withdrawal from it, she had not told DeLain of her withdrawal and he mistakenly believed she was still his patient.

According to the state,

> once a therapist and a patient consensually establish a therapist-patient relationship (as DeLain and Jennifer F. did here), the relationship continues as a matter of law until one of the parties explicitly and openly advises the other party that the relationship has terminated.

State's Brief at 20.

Contrary to the central assumption of the state's argument, the existence of a therapist-client relationship turns, not on notice or unilateral belief, but on mutual consent. Absent mutual consent, there is no "relationship." *See, e.g., Ande v. Rock*, 2002 WI App 136, ¶10, 256 Wis.2d 365, 647 N.W.2d 265 ("A physician-patient relationship is a trust relationship, created when professional services are provided by a physician and accepted by a patient" (citation omitted)), *cert. denied*, 537 U.S. 1107 (2003); *Bovara v. St. Francis Hospital*, 700 N.E.2d 143, 146 (Ill App. 1998) ("The physician-patient relationship is a consensual relationship in which the patient knowingly seeks the physician's assistance and in which the physician knowingly accepts the person as a patient ").

Moreover, *McManus v. Donlin*, 23 Wis.2d 289, 127 N.W.2d 22 (1964), the authority cited for the state's proposition that a consensual relationship continues to exist despite the patient's withdrawal of consent, says no such thing.

The relevant issue in *McManus* was whether a doctor was guilty of malpractice by negligently discharging a patient from the hospital or

by wrongfully withdrawing from the case. The evidence reflected that there was a mutual understanding that the patient would be discharged and that the doctor would no longer be treating him. The Court held that there was no evidence that the doctor had wrongfully withdrawn. 127 N.W.2d at 27-28.

It is in this context, and only in this context, that the Court found a requirement of notice in order to terminate a doctor-patient relationship. The Court identified the rule cited by the state here, not as a general rule for terminating such a relationship, but as "[t]he applicable rule of law with respect to withdrawal from a case *by a physician* . . .." 127 N.W.2d at 27 (emphasis added). The rule itself applies to the physician's "'obligation of continuing attention.'" *Id.* at 28 (citation omitted).

McManus thus reflects merely that notice is required for a health care provider to terminate the relationship so as to prevent abandonment or resulting injury to the patient:

> "We believe the law is well settled that a physician or surgeon, upon undertaking an operation or other case, is under the duty, in the absence of an agreement limiting the service, of continuing his attention, after the first operation or first treatment, so long as the case requires attention. The obligation of continuing attention can be terminated only by the cessation of the necessity which gave rise to the relationship, or by the discharge of the physician by the patient, or by the withdrawal from the case by the physician after giving the patient reasonable notice so as to enable the patient to secure other medical attention. A physician has the right to withdraw from the case, but if the case is such as to still require further medical or surgical attention, he must, before withdrawing from the case, give the patient sufficient notice so the patient can procure other medical attention if he desires."

127 N.W.2d at 27-28, quoting *Ricks v. Budge*, 64 P.2d 208, 211 (Utah

1937).[1]

However, these considerations, which are intended to protect the patient, do not apply to termination *by* the patient. Rather, the patient may unilaterally terminate the relationship by her own actions inconsistent with the consent necessary to a continuing physician-patient relationship, without regard to notice to the medical provider. *E.g.*, *Toxey v. State of New York*, 279 A.D.2d 927, 719 N.Y.S.2d 765, 766 (App. Div. 2001); *Lyons v. Grether*, 239 S.E.2d 103, 106 (Va. 1977).

In *Allende v. New York City Health & Hospitals Corp.*, 90 N.Y.2d 333, 660 N.Y.S.2d 695, 683 N.E.2d 317 (1997), for instance, the New York Court of Appeals addressed termination of a physician-patient relationship and concluded that notice to the provider was unnecessary where the patient had decided unilaterally not to continue treatment with that health care provider.

Under New York law, a notice of claim in a medical malpractice action must be filed within 90 days after the claim arises. 683 N.E.2d at 319. That period is stayed, however, "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint." *Id.* at 320 (citations and internal markings omitted).[2]

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[1] The only other authority cited by the state for its "notice" requirement, *Commonwealth v. Frank*, 516 A.2d 64 (Pa. Super. Ct. 1986), *overruled on other grounds*, *Commonwealth v. Schaeffer*, 536 A.2d 354 (Pa. Super. Ct. 1987), likewise says no such thing. The defendant in that case was charged with unlawfully distributing a prescription for a controlled substance. Like here, an agent of the police pretended to be a patient and the defendant, Dr. Frank, gave her a prescription even though she said she did not use the medicine and only gave it to her boyfriend.

Unlike here, however, the charge in *Frank* did not require proof of a medical provider-patient relationship, *see* 35 Pa. Stat. §780-113(a)(14), and the case did not turn on the existence of such a relationship. Indeed, the Court observed that there was only an "artificial" physician-patient relationship. 516 A.2d at 67. Rather, the only question was whether Dr. Frank had been entrapped, and the Court held that he had not.

[2] In *Tamminen v. Aetna Casualty & Surety Co.*, 109 Wis.2d 536, 327 N.W.2d 55 (1982), this Court rejected the "continuing treatment" doctrine for (continued...)

New York's "continuing treatment" doctrine thus directly parallels the "ongoing therapist-patient relationship" requirement under §920.22(2). So long as there is a continuing doctor-patient relationship, the requirement of a notice of claim is stayed.

In *Allende*, the New York Court of Appeals recognized that the ongoing doctor-patient relationship underlying the "continuing treatment" doctrine existed only so long as "'further treatment is explicitly anticipated by *both* physician and patient . . ..'" 683 N.E.2d at 320 (citations omitted, emphasis in original). The Court held that the continuing relationship did not exist in *Allende's* case because, although "there is ample support for the finding that the doctors at Lincoln expected plaintiff to return, there is no evidence that plaintiff herself shared that intention." *Id.* In language directly applicable here, the Court stated that, "[a]s plaintiff herself no longer had any faith in Lincoln she cannot be said to have had the '"continuing trust and confidence"' in her health care providers that underlies the continuous treatment doctrine," *id.* at 321, or, as here, an ongoing therapist-patient relationship.

When a patient, as here, withdraws consent to the therapist-patient relationship, therefore, that relationship is over, regardless whether that withdrawal is communicated to the therapist and regardless of the patient's reason for terminating the relationship.

The state's analogy to Wisconsin conspiracy law is likewise misplaced. State's Brief at 17-18. As the state concedes, "a therapist-patient relationship cannot come into existence unless both parties consent to it," while "Wisconsin does not require bilateral symmetry before a conspiracy can come into existence . . .." *Id.* at 17. Since Wisconsin conspiracy law does not require mutual consent or agreement in the first place, *State v. Sample*, 215 Wis.2d 487, 573 N.W.2d 187, 193 (1998), it can provide no helpful guidance regarding termina-

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[2] (...continued)
purposes of the Wisconsin statute of limitations, requiring instead a continuum of negligent medical care to extend the applicable statute of limitations.

tion of a relationship based upon mutual consent.

Rather, the more helpful analogy is to *federal* conspiracy law. A federal conspiracy, like a therapist-patient relationship, requires a mutual understanding between two participants. When one of those participants becomes a government informant, that understanding or relationship ends as a matter of law. *E.g.*, *United States v. Mahkimetas*, 991 F.2d 379, 383 (7th Cir. 1993).

The state's suggestion that the statutory requirement of an actual, ongoing therapist-patient relationship rather than a merely feigned relationship somehow undermines the legislative purpose to protect patients from predatory therapist or creates absurd results is equally misplaced. State's Brief at 20-22. The legislature's intent to impose strict liability on a therapist who has sexual contact "with a patient or client during any ongoing therapist-patient or therapist-client relationship," Wis. Stat. §940.22(2), does not, as the state insists, suggest intent to impose similar liability when, as here, the alleged victim is neither a patient nor a client, but instead merely a police agent, and had previously ended any therapist-patient relationship.

Had the legislature intended the statute to have the expansive scope urged by the state, it would not have required either an "ongoing" therapist-patient relationship or that the victim be a patient or client at the time of the alleged sexual contact. *Compare* Wis. Stat. §895.70(2) (granting a civil cause of action for any person who suffers injury as a result of "sexual contact with a therapist who is rendering or has rendered [therapy] to that person"); DeLain's Brief at 11, fn 2.

The state's suggestion also ignores the fact that the statutory requirement of an *actual* ongoing relationship will not immunize from criminal liability sexual contact by a therapist with one he or she believes to be a patient. While the completed offense of sexual exploitation by a therapist would not apply under those circumstances, the therapist could be guilty of *attempted* exploitation. *See* DeLain's Brief at 11.

Nor does applying the statute by its terms create any absurd

result. State's Brief at 21-22. There is nothing absurd about the therapist-patient relationship continuing despite alleged misconduct by the therapist so long as both parties continue to consent to the relationship. On the theory of subtle control by the therapist underlying the exploitation statute, the patient remains in need of protection under such circumstances despite his or her consent to the relationship.

Nor is there anything absurd about the patient unilaterally terminating the relationship by withdrawing her consent to it. A relationship based on mutual consent, after all, cannot logically continue when one party to it withdraws the consent upon which the relationship is based. *E.g.*, *Allende*, *supra*. And, if the person is no longer a patient, and thus no longer subject to the subtle control of the therapist, there is no longer any purpose served by a strict liability offense.

The state's theory, on the other hand, does create absurd results which the legislature could not have intended. A patient, for instance, could stop attending therapy with a particular therapist, either because she decided she no longer requires treatment or because she has switched to a different therapist. Under the state's theory, she would nonetheless remain in an unwanted, "ongoing therapist-patient relationship" with her original therapist forever, despite the absence of the subtle control to which the statute is directed, so long as she did not specifically tell the therapist that she was ending the relationship. That simply makes no sense.

Finally, and contrary to the state's suggestion, State's Brief at 20-21, it must bear the burden of proving the necessary elements of the offense beyond a reasonable doubt. *E.g.*, *Jackson v. Virginia*, 443 U.S. 307 (1979). It is the state, therefore, which must prove that the purported victim was the defendant's client or patient (and not a mere police agent) at the time of the alleged sexual contact, and that the two were in an "ongoing therapist-patient ... relationship" at that time.

On the undisputed evidence here, the state failed to meet that burden. The evidence accordingly was insufficient for conviction

under Count 3.

CONCLUSION

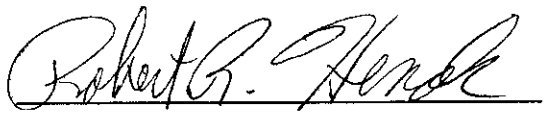
For these reasons, as well as for those in his opening brief, Dr. DeLain asks that the Court reverse his conviction under Count 3 and order that count dismissed.

Dated at Milwaukee, Wisconsin, September 20, 2004

Respectfully submitted,

MICHAEL A. DELAIN,
Defendant-Appellant-Petitioner

HENAK LAW OFFICE, S.C.



Robert R. Henak
State Bar No. 1016803

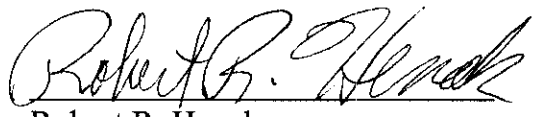
P.O. ADDRESS:

1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

S.Ct. Reply Brf.wpd

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,849 words.



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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 20th day of September, 2004, I caused 22 copies of the Reply Brief of Defendant-Appellant Michael A. DeLain to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Robert R. Henak

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