STATE OF WISCONSIN
IN SUPREME COURT

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Appeal No. 2005AP584-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN C. BROWN,

Defendant-Appellant-Petitioner.

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**On Review of the Decision of the Court of Appeals, District I, Affirming the Order of Reconfinement After Revocation of Extended Supervision and the Order Denying Post-Conviction Relief Entered in the Circuit Court for Milwaukee County, the Honorable David A. Hansher, Presiding**

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**NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

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**NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

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## ARGUMENT

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits that, regardless whether a reconfinement hearing is technically a "sentencing," the practical effect on both the defendant and the public is indistinguishable from a sentencing. The practical and constitutional rationale for imposing the procedural protections required at sentencing hearings apply equally to reconfinement hearings, as does the need for meaningful appellate review. The failure of the lower courts to take reconfinement seriously, however, leaves it to this Court to establish standards the circuit courts must follow in ordering a defendant's return to prison.

WACDL urges this Court to require the lower courts to take reconfinement hearings seriously by mandating, at a minimum, that they comply with the common sense requirements for the proper exercise of discretion in *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971), and *State v. Gallion*, 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197. Reconfinement, in other words, must be for the minimum

amount of time necessary to meet the goals of reconfinement, the reconfinement court must explain the reasons for the reconfinement imposed, and the Court of Appeals must provide meaningful review of reconfinement decisions.

WACDL also concurs with Brown's position that *State v. Jones*, 2005 WI App 259, 288 Wis.2d 475, 707 N.W.2d 876, *State v. Stenzel*, 2004 WI App 181, 276 Wis.2d 224, 688 N.W.2d 20, and *State v. Brown*, 2006 WI App 44, ___ Wis.2d ___, 712 N.W.2d 899, should be overturned because they directly conflict with the rationale of this Court's decisions in *McCleary* and *Gallion*.

### A. This Court Should Require the Lower Courts to Take Reconfinement Hearings Seriously

Far too often, the lower courts treat reconfinement hearings more like a nuisance to be quickly completed and forgotten than as a serious proceeding to determine how many years a person will spend behind bars. In Milwaukee County, for instance, newly appointed attorneys seeking adjournment in order to prepare for the reconfinement hearing often are told that "it's just a reconfinement," implying that the attorney's input (and thus preparation) is meaningless.

Rather than taking the time necessary to obtain or review information necessary to exercise their discretion properly, the circuit courts too often cut corners, truncating the proceedings in the name of judicial economy. *E.g.*, *State v. Swaims*, 2004 WI App 217, ¶23, 277 Wis.2d 400, 690 N.W.2d 452 (rejecting the State's attempted expediency-based justification for truncation of reconfinement hearings). As was true with sentencing proceedings prior to *Gallion*, the circuit courts likewise fail meaningfully to explain their reconfinement decisions, let alone to explain why the punishment imposed is the least consistent with the purposes of reconfinement.

The Court of Appeals encourages the circuit courts' disregard for the seriousness of reconfinement hearings. Except for *Swaims*, its reconfinement decisions – especially *Jones* and *Brown* – provide no incentive for circuit courts to follow the requirements for a proper exercise of discretion outlined in *Gallion* and *McCleary*. That court has so far managed to side step this Court's directives in *Gallion* by holding

that no "momentous changes" were made by that decision. *Stenzel* at ¶9.

Currently, the Court of Appeals' reconfinement decisions serve to encourage the circuit courts to rubber-stamp defendants back to prison without any individualized analysis. Under *Jones* and *Brown* the circuit court is not required to consider the necessary sentencing factors if they were considered (even by a different judge) at the original sentencing. *See Jones* at ¶10; *Brown* at ¶17. And there is no duty to determine if in fact the sentencing factors were considered because there is no requirement that the sentencing transcript be reviewed prior to an order for reconfinement. *Jones* at ¶9, *Brown* at ¶17.

This Court must put a stop to the lower courts' fast-food drive-thru method of conducting reconfinement hearings. This Court must step in and require that the lower courts truly exercise their discretion, and that the Court of Appeals actually hold the lower courts to the standard of review laid out in *Gallion*. This means remanding cases back to the circuit courts for new reconfinement hearings where *Gallion* has been ignored. Short of that, the lower courts will not get the message that this Court, at least, is taking reconfinement hearings seriously.

**1. A Sentencing by any Other Name . . . .**

Contrary to the state's attempt to elevate labels over substance, the question of what procedural protections apply at reconfinement hearings is not so much one of semantics, but common sense and the interests at stake. If the circuit court is to imprison someone, possibly for several years, the precise label placed on the proceeding is meaningless. Rather, "[i]n determining the nature and extent of the process due, we balance the private interest that will be affected, the government's interest, and 'the risk of an erroneous deprivation of those interests through the procedures used.'" *In re Commitment of Schulpius*, 2006 WI 1, ¶38, 287 Wis.2d 44, 707 N.W.2d 495, *quoting Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

The interests and risks at stake in a reconfinement hearing are identical to those at a "sentencing." The effect of a three-year prison term, for example, is the same whether imposed at the original

sentencing hearing or a reconfinement hearing. That the reconfinement be justified and based on accurate information is as critical to both the defendant and the state as they are at the original sentencing. *Cf.*, *Wolff v. McDonnell*, 418 U.S. 539, 561 (1974). And finally, no legitimate state interests are harmed by requiring reconfinement courts to obtain and consider relevant information, to impose the least punishment consistent with the purposes of reconfinement, or to explain their decisions.

The Court of Appeals recognized this in *State v. Swaims*, 2004 WI App 217, 277 Wis.2d 400, 690 N.W.2d 452, in determining that a reconfinement hearing is, in effect, a "sentencing." "If anything is clear it is that the word 'sentence' is not; the word is colored by the light with which it is viewed." *Id.* at ¶16. The *Swaims* court recognized that there were no adverse consequences to requiring the circuit courts to adequately explain the reasons for its reconfinement order. *Id.* at ¶23. The state's attempts to narrowly construe what constitutes a "sentencing" thus must fail.

### B. Wisconsin Courts Must Explain Why the Reconfinement Imposed is the Least Punishment Consistent with the Purposes of Reconfinement

Reconfinement, like sentencing, is a discretionary act. *Brown*, ¶9; *see Gallion*, 2004 WI 42 at ¶3; *McCleary*, 182 N.W.2d at 519. This Court has emphasized that "[d]iscretion is not synonymous with decision-making." *McCleary* at 519. Rather, "the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." *Id.*

Inherent in a sound exercise of discretion is the ability to explain in some rational way the specific punishment imposed, regardless whether that punishment is labeled a "sentence" or "reconfinement." "'[A] good sentence is one which can be reasonably explained.'" *McCleary*, 182 N.W.2d at 522 (quoting Judge Luther Youngdahl's Remarks opening the Sentencing Institute Program, Denver, Colorado, 35 F.R.D. 387, 388 (1964)). *See id.* at 522 ("'The sentencing judge should be required in every case to state his reasons for selecting the

particular sentence imposed,'" (citation omitted). *See also State v. Borrell*, 167 Wis.2d 749, 482 N.W.2d 883, 895 (1992) ("The trial judge is required to articulate the basis for the sentence imposed on the facts of record" (citation omitted)).

The requirement of a reasoned explanation for the punishment imposed is not merely a matter of public policy. As this Court held in *Borrell, supra*, the right to such an explanation is incorporated into the constitutional right to be sentenced only upon true and accurate information. 482 N.W.2d at 891. *See also State v. Hall*, 2002 WI App 108, ¶21, 255 Wis.2d 662, 648 N.W.2d 21 (defendant has a "constitutional right to have the relevant and material factors which influence sentencing explained on the record by the trial court).

Several important purposes are served by requiring a full explanation for the particular punishment imposed. First and foremost, a statement of the reasons guards against arbitrariness. More than thirty years ago, Judge Marvin Frankel expressed one rationale for rejecting the historical practice of imposing punishment without a statement of reasons:

> "The question 'Why?' states a primitive and consistent human need. The small child, punished or deprived, demands an explanation. The existence of a rationale cannot make the hurt pleasant, or even just. But the absence, or refusal, of reasons is a hallmark of injustice . . . The despot is not bound by rules. He need not account for what he does.
>
> Criminal sentences, as our judges commonly pronounce them, are in these vital aspects tyrannical."

*ABA Standards for Criminal Justice -- Sentencing* §18-5.19 at 213 (3d ed. 1994), *quoting* Frankel, Marvin E., *Criminal Sentences: Law Without Order* 39 (1973).

Second, "the perceived equity of the judicial process is undercut when the court in effect sentences in silence." III *ABA Standards for Criminal Justice* §18-6.6 at 18-485 to 486 (2d ed. 1980). Resort to boilerplate statements of reasons or, at worst, failure to state reasons at all, undermines the perceived integrity and fairness of the courts, both in the eyes of the public and those of the defendant. "The quality of the

explanation given by the court measures the seriousness with which the goal of individualization has been pursued." *Id.* at 18-488.

Third, a statement of reasons is critical to meaningful appellate review. "Especially where there is likely to be considerable discretion in decision making, it is imperative that the record reflect the factors that influenced judgment. Without this, it is difficult to see how any meaningful review can occur, except for extreme cases of abuse of discretion." IV *ABA Standards for Criminal Justice* §20-2.3 at 20-23 (2d ed. 1980); *see, e.g., State v. Speer*, 176 Wis.2d 1101, 501 N.W.2d 429, 439 (1993).

Fourth, the statement requirement helps the court reach a proper decision. "[T]he disciplining effect of such an obligation on the sentencing court's own thought processes can be significant. The court is thereby induced to systematize and order its reasons, to avoid irrelevancies, and to develop a more consistent sentencing philosophy." III *ABA Standards* at 18-486.

Finally, a statement of the reasons for a particular punishment is necessary to determine whether the judge relied upon accurate or improper considerations in imposing punishment. Contrary to the Court of Appeals' assumption that "an appellate court may infer from the record what relevant factors were considered," *Jones*, ¶14 n.5, "[i]t is, of course, impossible to assess what considerations underlie the court's decision unless some duty is imposed on the court to explain them." III *ABA Standards* at 18-486. The rights to be free from punishment based upon improper factors or inaccurate information have "only an abstract significance unless an adequate means exists by which to determine what information the court has in fact relied upon." *Id.* (footnote omitted). Indeed, this Court relied upon this very reason in holding that *McCleary's* explanation requirement is incorporated within the due process right to be sentenced on the basis of true and accurate information. *Borrell*, 482 N.W.2d at 891.

Requiring an explanation of the particular punishment imposed also serves to enforce the overriding principle that the court is to impose the least amount of punishment consistent with the purposes of sentencing. This Court adopted that principle as a fundamental component of Wisconsin sentencing law in *McCleary*, 182 N.W.2d at

519, and has reiterated that holding ever since. *E.g.*, *Gallion*, ¶44; *State v. Setagord*, 211 Wis.2d 397, 565 N.W.2d 506, 513 (1997); *Borrell*, 482 N.W.2d at 888; *State v. Krueger*, 119 Wis.2d 327, 351 N.W.2d 738, 743 (1984). *See also* Wis. J.I.–Crim. SM-34 at 3 (1999).

Once again, this principle is consistent with generally recognized sentencing principles. III *ABA Standards for Criminal Justice – Sentencing* §18-2.2 at 18-58 (2d ed. 1980); *see, e.g., id.* 18-2.2(a) (punishment imposed should be the minimum necessary to meet the goals of sentencing); 18 U.S.C. §3553(a) (same).[1]

### C. Effective Appellate Review is Necessary to Enforce Purposes of Explanation Requirement

Discretion contemplates that, except at the extremes, there are no right or wrong answers. Hofer, Ronald R., *Standards of Review – Looking Beyond the Labels*, 74 Marquette L. Rev. 231, 246-48 (1991). Appellate review of discretionary decisions thus must focus, not on the result, but on the process or considerations leading to the decision. "Judicial review of a judge's exercise of sentencing discretion is available in the appellate courts to prevent arbitrariness, capriciousness, and unjustified disparity." *Re Judicial Administration: Felony Sentencing Guidelines*, 120 Wis.2d 198, 353 N.W.2d 793, 796 (1984).

A rational standard of appellate review will focus on the underlying purposes served by the rules alleged to have been violated by the lower court. Where the sentencing decision is in inadequately or unexplained, however, the appellate court cannot meaningfully review that decision. Without an explanation on the record, the appellate court can only speculate that a decision was based on

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[1] *See also ABA Standards for Criminal Justice -- Sentencing* §18-6.1(a) (3d ed. 1994):

> The sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized. The sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account.

reasonable grounds and accurate facts.

If the appellate court may merely infer the reconfinement court's rationale from a virtually silent record or boilerplate assertion of reasons, then there is nothing to protect the defendant from arbitrariness, nothing to insure that the reconfinement period is the least punishment consistent with the purposes of reconfinement, and nothing to insure that the decision was based only on accurate and proper considerations.

In that sense, the current standards for appellate review conflict both with the standards applied in appellate review of other discretionary acts and with the manner in which imposition of punishment is construed in other contexts.

The current standards are counterproductive, encouraging secrecy rather than transparency, elevating decision-making over the sound exercise of discretion, and usurping to the appellate courts the sentencing discretion properly left in the hands of the circuit courts. *See McCleary, supra; Gallion, supra; State v. Wickstrom*, 118 Wis.2d 339, 348 N.W.2d 183 (Ct. App. 1984) (demonstrable consideration of the primary sentencing factors necessary for an exercise of discretion); *State v. Echols*, 175 Wis.2d 653, 487 N.W.2d 631 (1993) (same).

An example of this was apparent in *Jones*, which reiterated the need for circuit courts to fully explain reconfinement orders, *Jones* at ¶8, while at the same time holding that it can "reasonably infer that the [reconfinement] court considered the most important sentencing factors to be the gravity of Jones' offenses and his character." *Id.* at ¶12.[2]

Where the circuit court fails adequately to explain why the reconfinement sentence imposed constitutes the least punishment consistent with the purposes of reconfinement, and the record does not

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[2] See also *Jones* at ¶14, FN 5 "[b]ecause every person deprived of his or her liberty is entitled to an explanation, we encourage courts imposing a reconfinement sentence to make a complete record of the underlying facts, sentencing objectives, and how the sentence imposed fulfills those objectives. While an appellate court may infer from the record what relevant factors were considered, sentencing courts should be mindful of the need for a sufficient on-the-record rationale when imposing terms of reconfinement."

otherwise establish the court's reasoning, the only appropriate appellate response is to vacate the order for reconfinement and remand for a new reconfinement hearing.

Application of the current deferential standard of review to unexplained or inadequately explained reconfinement decisions requires the appellate courts to speculate that, despite the reconfinement court's failure adequately to explain its actions, it in fact relied only upon proper considerations and facts of record and based its conclusion on a logical rationale founded upon proper legal standards. Such speculation has no place in the courts, whether at reconfinement or on appeal.

The assumption implicit in the current appellate standard that the reconfinement court in fact relied upon factors beyond those set forth in its explanation of the sentence also directly conflicts with this Court's decisions that a punishment is not based upon a given factor unless the circuit court expressly says so. *E.g., State v. Franklin*, 148 Wis.2d 1, 434 N.W.2d 609, 614 (1989):

> In order for a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing. It is not a relevant factor unless the court expressly relies on parole eligibility. . . . Because it was not expressly considered by the court in sentencing, parole policy was not relevant to the imposition of this sentence.

If, as the Court held in *Franklin*, a factor is not relevant to sentencing unless expressly relied upon by the sentencing court, how can such an unstated factor be relevant to the sentence when reviewing the sentence on appeal? If an unstated factor is irrelevant to imposition of punishment in one context, it presumably would be equally irrelevant to that decision in any other context.

## CONCLUSION

For these reasons, as well as the reasons stated in Brown's Briefs, WACDL asks that the Court require the lower courts to take reconfinement hearings seriously. Whether labeled a "sentencing" or "just a reconfinement," the deprivation of one's freedom for months or years requires imposition of the least amount of punishment consistent

with its purposes, a full explanation for the punishment imposed, knowledge and consideration of all relevant facts, and *meaningful* appellate review rather than a mere rubber stamp.

Because *Jones*, *Stenzel*, and *Brown*, fail to take reconfinements seriously, and because they conflict with this Court's decisions in *McCleary* and *Gallion*, WACDL asks this Court to overrule them.

Dated at Milwaukee, Wisconsin, August 31, 2006.

Respectfully submitted,

WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Amicus Curiae

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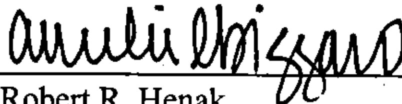

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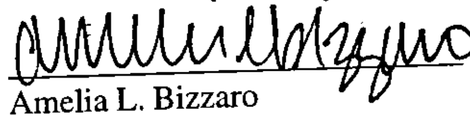
## RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,000 words.

Amelia L. Bizzaro

## CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 31st day of August, 2006, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.



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