STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 01-0051-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CURTIS E. GALLION,

Defendant-Appellant-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Review of the Decision of the Court of Appeals, District I, Affirming a Judgment and Order Entered in the Circuit Court for Milwaukee County, the Honorable John DiMotto, Presiding

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ARGUMENT

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") concurs in Mr. Gallion's position that the sentencing court must provide a rational explanation why the sentence imposed, rather than some lesser punishment, is the least amount of punishment which is consistent with the purposes of sentencing. This Court so held in *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971). *See also State v. Borrell*, 167 Wis.2d 749, 482 N.W.2d 883, 891 (1992) (Due process incorporates *McCleary's* requirement of explanation for sentence imposed). The possibility that a sentencing court may be unable to provide such an explanation in a particular case is not, as asserted by the state and the Court of Appeals, reason to ignore this requirement, but to enforce it. If a sentencing court cannot explain its imposition of one sentence rather than a lesser sentence, it has no business imposing the greater one.

WACDL also concurs in Gallion's position that the current practice of avoiding effective appellate review of sentences when the

court below erroneously exercised its discretion is inappropriate, counter-productive, and inconsistent with how the Court addresses sentencing decisions in other contexts. Rather than abdicating its obligation to review sentences, substituting speculation as to the sentencing court's rationale, or interfering with the sentencing court's discretion by substituting its own, the Court should remand for appropriate proceedings when the sentencing court has erroneously exercised its discretion.

A. Wisconsin Courts Must Provide Reasonable Explanations Why the Sentences They Impose are the Least Punishment Consistent With the Purposes of Sentencing

Sentencing is a discretionary act. *McCleary*, 182 N.W.2d at 519. However, "[d]iscretion is not synonymous with decision-making." *Id.* 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.

1. A proper exercise of discretion requires a reasonable explanation of the particular sentence imposed

Inherent in a sound exercise of discretion is the ability rationally to explain the specific sentence imposed. "'[A] good sentence is one which can be reasonably explained.'" *McCleary*, 182 N.W.2d at 522 (citation omitted).

> In all Anglo-American jurisprudence a principal obligation of the judge is to explain the reasons for his actions. His decisions will not be understood by the people and

> cannot be reviewed by the appellate courts unless the reasons for decisions can be examined. *It is thus apparent that requisite to a prima facie valid sentence is a statement by the trial judge detailing his reasons for selecting the particular sentence imposed.*

Id. at 521 (emphasis added); *see id.* at 522. *See also Borrell*, 482 N.W.2d at 895 ("The trial judge is required to articulate the basis for the sentence imposed on the facts of record" (citation omitted)).

The ABA Standards emphasize that the sentencing court "should state the reasons for selection of the type of sanction and the level of severity of the sanction in the sentence."*ABA Standards for Criminal Justice -- Sentencing*, §18-5.19 (3rd ed. 1994) (emphasis added) ("*ABA Standards* (3rd ed.)"). The requirement of a reasonable explanation of the sentence imposed likewise is an essential component of federal sentencing practice. *See* 18 U.S.C. §3553(c).

Far from just a matter of public policy, the right to such an explanation is incorporated into the constitutional right to be sentenced only upon true and accurate information. *Borrell*, 482 N.W.2d at 891. *See also State v. Hall*, 2002 WI App 108 ¶21, 255 Wis.2d 662, 648 N.W.2d 41 (Defendant has a "constitutional right to have the relevant and material factors which influence sentencing explained on the record by the trial court").

2. The sufficiency of a particular explanation turns on its underlying purposes

In assessing the sufficiency of a statement of reasons, the Court must assess the statement in light of the purposes the statement is to serve. *E.g.*, *United States v. Jackson*, 921 F.2d 985, 989 (10th Cir. 1990) (en banc) ("On appeal, we review the reasonableness of a district court's explanation of the departure from the [Federal Sentencing] Guidelines range in light of the Guidelines' purposes"); *Gerrits v. Gerrits*, 167 Wis.2d 424, 482 N.W.2d 134, 136, 140 (Ct. App. 1992) (trial court misused discretion in failing to explain how degree of increase in maintenance award related to purpose of maintenance;

remanded for further proceedings).

a. Institutional purposes served by the statement of reasons

A number of important purposes are served by the requirement of a full explanation for the particular sentence imposed. First and foremost, a statement of the reasons guards against arbitrariness.

> "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."

ABA Standards (3rd ed.) (Commentary) at 213, 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 18-486 (2d ed. 1980) ("*ABA Standards* (2d ed.)"). Resort to hackneyed phrases and boilerplate statements of reasons likewise undermine 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* (2d ed.) §20-2.3 at 20-23.

Fourth, the explanation requirement helps the sentencing 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* (2d ed.) §18-6.6 at 18-486. *See also McCleary*, 182 N.W.2d at 522 ("The requirement that the reasons for sentencing be stated will make it easier for trial judges to focus on relevant factors that lead to their conclusions").

Finally, explanation for a particular sentence is necessary to determine whether the sentencing judge relied upon accurate or improper considerations in imposing the sentence. "It 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* (2d ed.) §18-6.6 at 18-486. The rights to be free from sentencing based upon improper factors or an accurate 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). The 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.

b. Enforcement of the "least restrictive alternative" principle

The requirement of an explanation of the particular sentence imposed also enforces the overriding principle that the court 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.*, *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).

Once again, this principle is consistent with generally recognized sentencing principles. III *ABA Standards* (2d ed.) §18-2.2 (Commentary) at 18-58; *see, e.g., ABA Standards* (3rd ed.) §18-6.1(a); 18 U.S.C. §3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing).

3. The explanation requirement's purposes mandate a reasonable explanation why the sentence imposed, and no lesser punishment, is the least necessary to meet the purposes of sentencing

The requirement of a reasonable explanation for the sentence imposed, and for why that sentence constitutes the least amount of punishment consistent with the purposes of sentencing, thus is not a new one under Wisconsin law. *See also* Wis. J.I.–Crim. SM-34 at 8-9 (1999) ("The justification for the length of the sentence should always be set forth in the record, as well as the reasons for not imposing a sentence of lesser duration").

Given the purposes of the explanation requirement, it is not sufficient merely to cite to certain facts and then assert a conclusion. *E.g.*, *Hall*, *supra* ¶17 (sentencing court misused discretion when stated sentencing rationale equally would justify variety of different sentences). Nor is it sufficient merely to explain why incarceration is necessary without explaining the reasons for the extent of imprisonment imposed. *McCleary*, 182 N.W.2d at 522, 523 (although court properly explained need for incarceration, it abused discretion by failing to explain need for period of incarceration imposed). Rather, the court must explain why those particular factors require that no lesser punishment would be sufficient to meet the purposes of sentencing. *E.g.*, *McCleary*, 182 N.W.2d at 523 n.3; *Hall*, *supra* ¶¶5, 15-17.[1]

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[1] To the extent that language in *State v. Hamm*, 146 Wis.2d 130, 430 N.W.2d 584, 595-96 (Ct App. 1988), suggests that the sentencing court need not explain the reasons for both the nature and the extent of its sentence, that decision (continued...)

If, as the Court of Appeals asserts (App. 105), a sentencing court cannot rationally explain why the sentence imposed, and nothing less, constitutes the least punishment consistent with the purposes of sentencing, it thus must impose a lesser sentence which it can explain. Absent such an explanation, neither the defendant, the public nor the appellate court can know whether the sentencing court in fact exercised its discretion and whether the sentencing in fact was the result of a process of reasoning founded upon appropriate considerations and proper legal standards.

B. Effective Appellate Review is Necessary to Enforce the Purposes of the Explanation Requirement

The many beneficial purposes of the explanation requirement cannot be furthered absent effective appellate review and enforcement of that requirement. In that sense, the current standards for appellate review of sentences 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. Those standards, moreover, conflict both with the standards applied in appellate review of other discretionary acts and with the manner in which sentencing decisions are construed in other contexts.

Gallion is correct that upholding the purposes of the explanation requirement requires more than appellate deference to an unexplained or inadequately explained sentencing decision. Rather, where the sentencing court fails adequately to explain why the sentence imposed constitutes the least punishment consistent with the purposes of sentencing, and the record does not otherwise establish the court's reasoning, the only appropriate appellate response is to vacate the sentence and remand for resentencing. To do otherwise is to usurp the sentencing court's discretion and undermine the purposes of the

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[1](...continued)
conflicts with both controlling authority and the purposes for the explanation requirement and accordingly should be overruled.

explanation requirement.

A sentencing court's failure to explain the type and length of the sentence imposed is an erroneous use of discretion. *McCleary*, 182 N.W.2d at 522. *McCleary*, however, held that such a failure does not alone mandate reversal "if from the facts of record it is sustainable as a proper discretionary act." *Id.*. The courts since *McCleary* often construe this language as requiring the appellate court to uphold a decision if a court reasonably *could* have made such a decision in the exercise of its discretion, even absent suggestion in the record that the court in fact relied upon such grounds. *E.g.*, *State v. Kirschbaum*, 195 Wis.2d 11, 535 N.W.2d 462, 465 (Ct. App. 1995).

The Court should reconsider this standard for a number of reasons. First, the issue in *McCleary* was not whether the facts were sufficient that a court reasonably could have imposed the sentence in question, but whether the record reflected that the sentencing court *in fact* properly exercised its discretion despite its failure to state sufficient reasons. *See McCleary*, 182 N.W.2d at 524 ("We are satisfied that in the instant case there is no evidence that judicial discretion was exercised in a manner that justifies a near-maximum sentence"); *id.* ("The sentence is therefore set aside on the grounds that the trial judge failed to exercise any discretion justifying so lengthy a sentence"). The logic of the "strong policy against interference with the discretion of the trial court in passing sentence," applies only "where the exercise of discretion has been demonstrated." *McCleary*, 182 N.W.2d at 521-22. *See also Hall*, *supra* ¶19 n.9.

Even if the current standard were consistent with *McCleary*, however, deferring to a sentencing court's decision absent demonstration of a reasoned exercise of discretion elevates bald decision-making over the sound exercise of discretion. "Discretion is not synonymous with decision-making," *McCleary*, 182 N.W.2d at 519, and only the former is entitled to deference. Yet, deferential review of unexplained or inadequately explained sentences equates the two.

Application of the current deferential standard of review to unexplained or inadequately explained sentences also requires the

Court to speculate that, despite the sentencing 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. Yet, such speculation has no place in the courts, whether at sentencing or on appeal.

The assumption that the sentencing court in fact relied upon factors beyond those set forth in its explanation of the sentence also conflicts with this Court's decisions holding that a sentence is not based upon a given factor unless the sentencing court expressly says so. *E.g.*, *State v. Franklin*, 148 Wis.2d 1, 434 N.W.2d 609, 614 (1989) ("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, it should be equally irrelevant to that decision in any other context.

If the deferential review standard is deemed not to involve speculation regarding what the sentencing court in fact did when imposing the unexplained or inadequately explained sentence, then it necessarily involves the appellate court usurping the role of the sentencing court. That is, if the appellate court is not reviewing the rationale in fact used by the sentencing court, then it is taking on the sentencing role itself. This, the appellate court must not do. *E.g.*, *Barrera v. State*, 99 Wis.2d 269, 298 N.W.2d 820, 826 (1980); *McCleary*, 182 N.W.2d at 521 ("An appellate court should not supplant the predilections of a trial judge with its own").

Finally, a rational standard of appellate review will focus on the underlying purposes served by the rules alleged to have been violated.

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).

Where the sentencing decision is unexplained or inadequately explained, the appellate court cannot meaningfully review that decision. Without an explanation in the record, it can only speculate whether the sentencing decision was a sound exercise of discretion.

Affirming an unexplained or inadequately explained sentence because it *might* have been based on reasonable grounds and accurate facts likewise denies the defendant, the victim, and the public the sentencing court's actual reasons, thereby undermining confidence in the integrity of the sentencing decision. It deprives the sentencing court of the benefit of the discipline of thought which is fostered by the process of articulating its reasons. And, it encourages sentencing courts to limit their explanations at sentencing to minimize the possibility of reversal on appeal.

When the record reflects mere decision-making, and not a reasoned exercise of discretion, only reversal and remand for a proper exercise of discretion can serve the purposes of *McCleary's* explanation requirement. "'The court which is to exercise the discretion is the trial, not the appellate, court.'" *Wis. Ass'n of Food Dealers v. City of Madison*, 97 Wis.2d 426, 293 N.W.2d 540, 545 (1980) (citation omitted). Thus, absent evidence of a proper exercise of discretion, the appellate court should reverse and remand for the trial court to exercise its discretion. *Id. See also King v. King*, 224 Wis.2d 235, 590 N.W.2d 480, 487 (1999) (where trial court misuses discretion in setting maintenance award, remand required for exercise of discretion); *Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 326 N.W.2d 727, 732 (1982).

To enforce *McCleary's* explanation requirement and to clarify the applicable appellate standard, therefore, WACDL asks that the Court mandate that standard of review.

CONCLUSION

For these reasons, as well as for those stated in Mr. Gallion's Briefs, WACDL asks that the Court implement a meaningful system of reviewing sentences and enforcing the requirement of a reasoned

explanation for the particular sentence imposed.

Dated at Milwaukee, Wisconsin, June 19, 2003.

Respectfully submitted,

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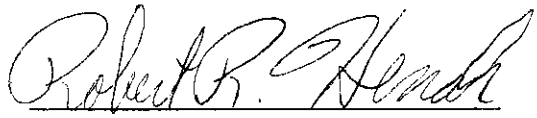
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a nonparty brief produced with a proportional serif font. The length of this brief is 2,990 words.



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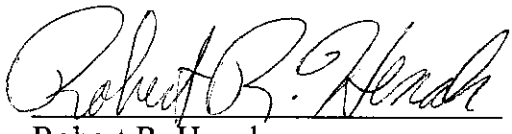

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