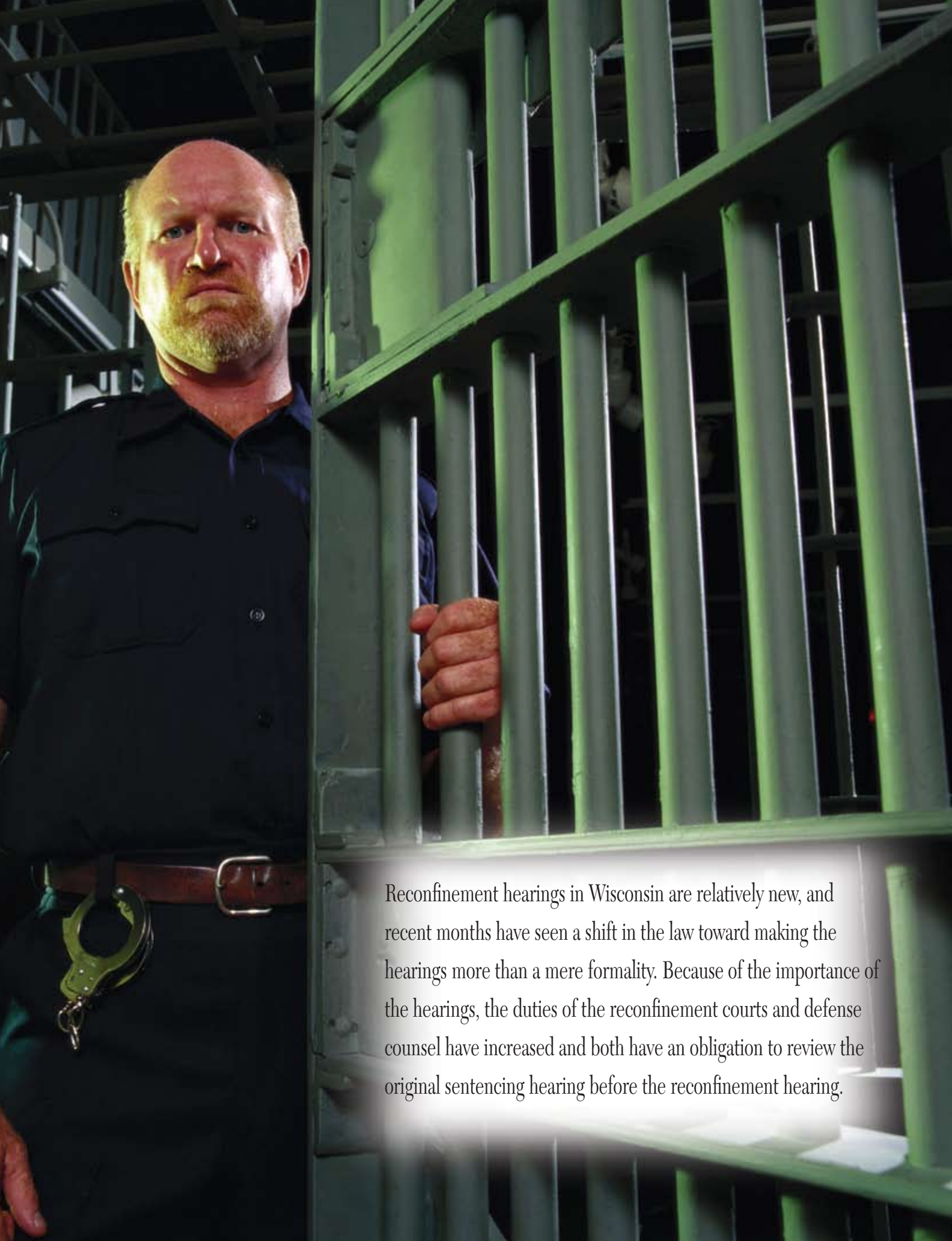
TAKING RECONFINEMENT HEARINGS SERIOUSLY

by Amelia L. Bizzaro

Reconfinement hearings, which the Wisconsin Legislature created as part of truth-in-sentencing (TIS) reforms that abolished parole, are relatively new to criminal jurisprudence. Under TIS, the sentencing court imposes a bifurcated sentence, consisting of a set period of incarceration followed by a period of extended supervision analogous to parole under pre-TIS law.[1] As it could do with parole, the Department of Corrections (DOC) may recommend revoking a defendant's extended supervision if the defendant violates the terms of extended supervision.[2] Under TIS the length of reconfinement is decided by the circuit court, not by an administrative law judge or the DOC,[3] who determined the length of reconfinement after parole was revoked.

Far too often, Wisconsin circuit courts have treated reconfinement hearings more like a nuisance to be quickly completed and forgotten than as a serious proceeding to determine how many additional years a person will spend behind bars. In Milwaukee County, for instance, attorneys newly appointed by the Office of the State Public Defender who are seeking adjournment to prepare for reconfinement hearings often have been told that "it's just a reconfinement," implying that the attorney's input (and thus preparation) is meaningless. However, that is all changing.



Reconfinement hearings in Wisconsin are relatively new, and recent months have seen a shift in the law toward making the hearings more than a mere formality. Because of the importance of the hearings, the duties of the reconfinement courts and defense counsel have increased and both have an obligation to review the original sentencing hearing before the reconfinement hearing.

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Two recent appellate court decisions have signaled a shift in the law of reconfinement hearings in Wisconsin, transforming such a hearing from a mere formality to a true sentencing hearing. As result of this shift, reconfinement attorneys have a greater responsibility to discover and present information to the circuit courts that may mitigate the length of time for which a defendant is returned to prison.

Background

The Wisconsin Court of Appeals first addressed reconfinement hearings in *State v. Swaims*,[4] in which it held that a reconfinement hearing is a sentencing for purposes of appellate review under Wis. Stat. (Rule) section 809.30. The court noted that the "need for meaningful appellate review of a trial court's decision to take away a person's liberty must be [the court's] polestar."[5] The *Swaims* court provided guidance regarding what happens *after* a reconfinement hearing, but it had little to say regarding what should happen *during* a reconfinement hearing.

The court of appeals addressed that question in its second published case concerning reconfinement hearings – *State v. Jones*.[6] The decision, however, only added to the confusion, rather than resolving it. The *Jones* decision seemed to acknowledge the need for circuit courts to fully explain reconfinement orders.[7] At the same time, however, the *Jones* court held that it can "reasonably infer that the [reconfinement] court considered the most important sentencing factors[,]" even when the reconfinement court did not say that it had done so.[8] This inference conflicted with the Wisconsin Supreme Court's seminal sentencing decisions in *McCleary v. State*[9] and *State v. Gallion*.[10]

The supreme court has long held that the discretion exercised by the sentencing judge "must be exercised on a rational and explainable basis."[11] For a sentence to be valid, "a statement by the trial judge detailing his reasons for selecting the particular sentence imposed" is required.[12] In response to a trend in circuit courts of skimping on this requirement, the supreme court addressed the principles of *McCleary* in *Gallion*. "Now, in the wake of truth-in-sentencing, we reinvigorate the *McCleary* directive that the exercise of sentencing discretion must be set forth on the record."[13] Accordingly, "[c]ourts must explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specified objectives."[14] The holdings of both *McCleary* and *Gallion* apply to reconfinement hearings.

McCleary held, and *Gallion* reaffirmed, that circuit courts have an obligation to explain their sentencing decisions on the record, taking into consideration three primary factors: the gravity of the offense, the character of the offender, and the need to protect the community.

The court of appeals in *State v. Brown* (*Brown I*) went even further by holding that, if the necessary factors were considered at the original sentencing, then they need not be considered at the reconfinement hearing, even if the reconfinement hearing was conducted before a different judge.[15] Thus, reconfinement courts were obligated to consider the necessary sentencing factors only if the factors were not considered at the original sentencing. But, *Brown I* never required the reconfinement courts to find out how, or even if, the original sentencing court considered the necessary sentencing factors at all.[16] This omission allowed for a drive-through method for reconfining defendants to the maximum amount of time available, because reconfinement courts were permitted to assume that the necessary sentencing factors had already been considered.

Signaling a Shift

The supreme court specifically addressed reconfinement hearings for the first time by accepting *Brown* for review. While the supreme court's decision (*Brown II*), released on Dec. 19, 2006, affirmed the reconfinement order in that case, it ultimately changed the landscape of reconfinement hearings.[17]

In *Brown II*, the supreme court provided guidelines regarding the circuit court's obligations during a reconfinement hearing.[18] The court said the goal of a reconfinement hearing, like that of the original sentencing hearing, is to "impose the minimum amount of confinement which is consistent with the protection of the public, the gravity of the offense, and the defendant's rehabilitative needs."[19]

The *Brown II* court stressed the circuit court's obligation to explain on the record how the factors it considered related to the particular circumstances of the case before it.[20] The court acknowledged that there are differences between a sentencing hearing and a reconfinement hearing, but noted that "[t]he relatively small investment of time that a circuit court will expend in providing reasoned explanations for reconfinement decisions is far outweighed by the benefits of insuring meaningful review of reconfinement decisions[.]"[21]

The *Brown II* court said it expected circuit courts to consider "the nature and severity of the original offense, the client's institutional conduct record, as well as the amount of incarceration necessary to protect the public from the risk of further criminal activity, taking into account the defendant's conduct and the nature

of the violation of terms and conditions during extended supervision."[22] The court noted that the reconfinement sentence imposed must be the least amount of custody necessary to protect the public, acknowledge the seriousness of the offense, and meet the defendant's needs, thereby invoking its landmark sentencing decision in *McCleary.*[23] Further, the court opined, it is important for reconfinement courts to consider "the defendant's record, attitude, and capacity for rehabilitation, and the rehabilitative goals to be accomplished by imprisonment for the time period in question in relation to the time left on the violator's original sentence."[24]

Counsel's Duties

Although the supreme court stressed that these factors were not a mandatory checklist for the reconfinement courts, reconfinement attorneys should follow the court's cues and treat them like a mandatory checklist, determine which factors apply to their clients, and stress those that do at the reconfinement hearing.

To prepare for the hearing, reconfinement attorneys should always review the readily available sentencing transcript from the original offense. As the *Brown II* court recognized, "[t]he original sentencing transcript is an important source of information on the defendant that discusses many of the factors that circuit courts should consider when making a reconfinement decision."[25] The reconfinement court is required to "set forth on the record" the relevant portions of the sentencing transcript at the reconfinement hearing.[26]

The importance of the original sentencing transcript was emphasized in the court of appeals' recent decision in *State v. Gee*.[27] In *Gee*, the court of appeals made quick work of the state's argument that *Brown II* let stand the holding in *Jones* that review of the sentencing transcript was not mandatory.[28] The *Gee* court concluded that the supreme court's direction that relevant portions of the sentencing transcript be referenced on the record assumes that the reconfinement court will read and consider the original sentencing transcript.[29] In *Gee*, the reconfinement court's failure to consider the sentencing transcript resulted in the court of appeals' decision to vacate the reconfinement order and remand the case to the circuit court for a new reconfinement hearing.

The supreme court, aware of the sheer volume of work performed by the circuit courts, noted in *Brown II* that it is up to the parties "to bring to the court's attention any factors and circumstances, which may be particularly relevant to the guidelines discussed herein."[30] The supreme court further emphasized the role of the attorneys, commenting that "as advocates, lawyers should point out to the court what facts and circumstances are relevant at a sentencing or reconfinement hearing."[31]

The supreme court's admonitions should signal to reconfinement attorneys that they have an obligation to review the sentencing transcript, the presentence investigation report (PSI) if there is one, and the defendant's DOC file before setting foot in a courtroom for a reconfinement hearing. Each of these sources contains a wealth of information, and while the courts have signaled an obligation for the reconfinement court to review only one of them (the sentencing transcript), reconfinement attorneys should be reviewing each of them.

Consider the example of a hypothetical case in which the original sentencing court commented extensively on the PSI, in which the client's mental health history was laid out in detail. In imposing the original sentence, the circuit court set conditions of extended supervision that included mental health treatment and possibly medication. In such a situation, it would be extremely important to determine if the failure to comply with the conditions of extended supervision was related to the client's mental health, and what, if any, support was provided by the client's DOC agent before revocation of extended supervision.

The facts of the original offense also may play a large role at the reconfinement hearing. If, for example, the client originally was sentenced for committing a vehicle-related offense and the client subsequently was revoked after being arrested while driving, the facts of the original offense may play a significant role. It is important, then, that counsel know these facts (as provided in the PSI, the sentencing transcript, and perhaps even the original discovery or trial evidence) so that he or she may rebut an inaccurate recitation of them by opposing counsel.

It also is important to be aware, before the reconfinement hearing, of information in the sentencing transcript that may do more harm than good to the defendant. Counsel must be prepared to answer to the reconfinement court regarding any information concerning aggravating circumstances. Refusing to look for fear of what one may find is not a valid defense strategy.

Obtaining any of these sources of information should not be difficult or time intensive. The sentencing transcript should be in the court file.[32] A copy of the PSI can be obtained through a letter or motion to the circuit court with a proposed order.[33] Access to the client's DOC file can be granted through agency authorization forms signed by the client and forwarded to the probation agent.

Clients might not appreciate these extra efforts, especially in cases in which the client just wants to "get it over with." However, the time the client spends in custody before the reconfinement hearing will be credited to his or her eventual reconfinement sentence. As a result, there is no reason not to take the necessary time to complete a thorough evaluation of all the information available.

The only question before the circuit court at a reconfinement hearing is how long the defendant will be returned to prison. As a result, the only thing standing between the client and the amount of time he or she spends in prison is the reconfinement attorney. Taking the

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time to do the leg work and investigate mitigating factors may shave years off the client's reconfinement sentence.

Under *Strickland v. Washington*,[34] defense counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[35] Inaction by counsel is excused only if he or she made a "rational decision that investigation is unnecessary."[36] The issue is not whether counsel would or should have presented the evidence an investigation would have produced, but whether the failure to investigate was itself unreasonable.[37] The failure to complete a reasonable investigation makes a fully informed strategic decision impossible.[38] As a result, failure to investigate mitigating factors is arguably ineffective assistance of counsel when an examination of these sources would reveal relevant information.

Conclusion

Reconfinement hearings in Wisconsin are relatively new, and recent months have seen a shift in the law toward making the hearings more than a mere formality. Because of the importance of the hearings, the duties of the reconfinement courts and defense counsel have increased and both have an obligation to review the original sentencing hearing before the reconfinement hearing. Counsel further has a duty to review the PSI and the DOC file and perhaps other documents as well to highlight information that supports mitigating the defendant's reconfinement sentence. The reconfinement court has a duty to fully explain the reasons for a particular reconfinement sentence on the record and to impose the minimum amount of custody necessary to meet the goals of reconfinement. In other words, both the attorney and the reconfinement court have an obligation to take reconfinement hearings seriously.

Endnotes

[1]Wis. Stat. § 973.01.
[2]Wis. Stat. § 302.113(9)(am).
[3]*See Id.* ("If the extended supervision of the person is revoked, the person shall be returned to the circuit court for the county in which the person was convicted of the offense for which he or she was on extended supervision, and the court shall order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence").
[4]*State v. Swaims,* 2004 WI App 217, 277 Wis. 2d 400, 600 N.W.2d 452.
[5]*Id.* ¶ 18.
[6]*State v. Jones,* 2005 WI App 259, 288 Wis. 2d 475, 707 N.W.2d 876 (review denied).
[7]*Id.* ¶ 8.
[8]*Id.* ¶ 12.
[9]*McCleary v. State,* 49 Wis. 2d 263, 182 N.W.2d 512 (1971) (for a sentence to be valid, "a statement by the trial judge detailing his reasons for selecting the particular sentence imposed" is required).
[10]*State v. Gallion,* 2004 WI 42, ¶ 4, 270 Wis. 2d 535, 678 N.W.2d 197.
[11]*McCleary*, 49 Wis. 2d at 276. "In all Anglo-American jurisprudence a principle 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." *Id.* at 280.
[12]*Id.* at 281.
[13]*Gallion,* 2004 WI 42, ¶ 4, 270 Wis. 2d 535.
[14]*Id.* ¶ 42; *see also* ¶ 45 ("[I]f a circuit court imposes jail or prison, it shall explain why the duration of incarceration should be expected to advance the objectives it has specified").
[15]*State v. Brown (Brown I)*, 2006 WI App 44, 289 Wis. 2d 691, 712 N.W.2d 899.
[16]*Id.* ¶ 17; *Jones,* 2005 WI App 259, ¶ 13, 288 Wis. 2d 475.
[17]*State v. Brown (Brown II)*, 2006 WI 131, __ Wis. 2d __, 725 N.W.2d 262.
[18]*Id.* ¶ 7.
[19]*Id.* ¶ 7 (citation omitted).
[20]*Id.*
[21]*Id.* ¶ 29.
[22]*Id.* ¶ 34 (citations omitted).
[23]*Id.*
[24]*Id.* ¶ 36.
[25]*Id.* ¶ 38.
[26]*Id.*
[27]*State v. Gee*, 2007 WI App 32, __ Wis. 2d __, __ N.W.2d __.
[28]*Id.* ¶ 15 ("Given the explanation of the importance of sentencing transcripts, we find it puzzling that the State would argue that the trial court need not review the original transcript").
[29]*Id.* (emphasis added).
[30]*Brown II,* 2006 WI 131, ¶ 40, __ Wis. 2d __.
[31]*Id.* ¶ 40 (citing oral argument by U.W. Law Professor Walter Dickey).
[32]*See* Wis. Stat. § 973.08(2) ("[t]he transcript of any portion of the proceedings relating to the prisoner's sentencing shall be filed at the institution within 120 days from the date sentence is imposed").
[33]*See* Wis. Stat. § 972.15(2), (4) (relating to confidentiality of report and its disclosure only on request); *Chambers v. State*, 54 Wis. 2d 460, 145 N.W.2d 477 (1972) (the circuit court has the obligation to make the PSI part of the record if it was in fact used in sentencing the defendant); *State ex rel. Oliver v. Guolee*, 179 Wis. 2d 376, 507 N.W.2d 145 (Ct. App. 1993) (postconviction counsel is entitled to a copy of the PSI).
[34]*Strickland v. Washington,* 466 U.S. 668, 690-91 (1984).
[35]*Id.*
[36]*Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984); *see Montgomery v. Petersen*, 846 F.2d 407, 412 (7th Cir. 1988) (nonstrategic decision not to investigate is inadequate performance).
[37]*See Wiggins v. Smith*, 539 U.S. 510, 522-24 (2003).
[38]*Id.* at 527-28; *see, e.g., Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997) (to be upheld as reasonable, counsel's decision not to call particular witnesses must be made "only after some inquiry or investigation by defense counsel"; the "attorney must look into readily available sources of evidence").

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