

Using *Gallion* to Organize Sentencing Arguments: “*McCleary* Requires More.”

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SPD Conference 2011 Presenter’s Note: Attorney Randy Paulson originally authored and published this article following his litigation of the Gallion case. Since that time, I have rarely failed to consult it - and place a copy in my sentencing file - during any large case in which I anticipate a sentencing hearing. It is a concise and insightful outline of Wisconsin sentencing law.
– Craig Mastantuono

Introduction.

This outline argues that defense attorneys should consider using *State v. Gallion*, 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197 as a framework for developing, organizing and presenting sentencing arguments. After a glossary of sentencing terms, the outline will summarize *Gallion*, and then make suggestions for sentencing strategies in light of specific passages from the opinion.

Glossary of Sentencing Terms:

Discretion: Trial courts entrusted with discretion tend to define it as a license to refuse reasons. *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971), and *Gallion*, however, emphasize the difference between sheer “decision making,” and the true “exercise of discretion,” which is characterized by giving clear and understandable reasons for that decision. *Gallion*, ¶¶ 1-2. The sound exercise of discretion thus requires more than the announcement of the decision.

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). It is precisely because the record might support a variety of decisions that those decisions should be well explained. A persuasively presented and credible recommendation can help form the basis for an adequate explanation.

Sentencing factors: legal criteria for determining a sentence. The primary factors are the severity of the offense, the rehabilitative needs of the defendant, and the need to protect the public. Wis. Stat. §§ 973.017(2) (ad) to (ak). The statutory, “rehabilitative needs of the defendant” criterion is arguably more specific, but closely related, to the “character of the offender” factor found in case law. There

does not seem to be any authority saying that the factors are substantively different. A recent case holds—apparently in erroneous contradiction of the statute—that rehabilitation is a secondary factor. *State v. Fisher*, 2004AP1289-CR, 2004AP2488-CR (Wis. Ct. App. June 15, 2005) (recommended for publication). *Gallion* re-affirms the primary factors, and 12 secondary ones, tracking the statute, as well as *Harris v. State*, 75 Wis.2d 513, 519-20, 250 N.W.2d 7 (1977). *Gallion*, ¶ 43.

Sentencing facts: facts that aggravate or mitigate a sentencing factor (*e.g.*, defendant used violence, defendant has no prior record, or crime was motivated by addiction or lack of employment skills). While the rules of evidence do not apply at sentencing, due process demands that a sentence be based on accurate information. This contemplates (1) the presentation of accurate information and (2) a sentencing explanation demonstrating that the sentence is “based on” it. *State v. Hall*, 2002 WI App.108, ¶ 21, 255 Wis. 2d 662, 648 N.W.2d 41, held that every criminal defendant “has a constitutional right to have the relevant and material factors which influence a sentencing explained on the record by the trial court.” *State v. Borrell*, 167 Wis.2d 749, 772, 482 N.W.2d 883 (1992), held that the due process right to be sentenced on the basis of accurate information incorporates *McCleary’s* requirement that sentences be adequately explained.

Sentencing objectives: goals sought to be accomplished by the sentencing scheme. Some scholars argue that there are, in the end, only two objectives: punishment (for its own sake and for specific and general deterrence) and public protection (through isolation and/or rehabilitation of the offender—*e.g.*, treating an addiction or addressing lack of job skills that motivated an offender to steal). It might be appropriate to point out that, despite the mandate of truth-in-sentencing legislation, it is impossible for judges to predict an offender’s behavior and the concomitant value of isolating that offender beyond a window of perhaps a few years—coincidentally the time in which the offender could be given treatment—so that isolation beyond a few years meets only the objective of punishment. A vague explanation for a lengthy sentence might state that the sentence is imposed in furtherance of all the objectives, but an honest and specific explanation would in most cases admit that lengthy incarceration is imposed for punishment only—a valid objective in some cases, but not all.

Minimum Custody Standard: “In each case, the sentence imposed shall call for the minimum amount of custody or confinement which is consistent with the [three primary sentencing factors].” *Gallion*, ¶ 44. *See also, State v. Hall*, 2002 WI App 108, ¶ 14, 255 Wis.2d 662, 648 N.W.2d 41: *Hall* adopts a presumption favoring concurrent sentences unless an explanation is provided for consecutive sentences. This presumption is consistent with the minimum-custody standard. It seems appropriate to view the minimum custody standard as a restatement of the

due process principle that all custody be “based on” accurate information, rather than being “based on” caprice or vengeance.

Sentencing Decision: A sentencing decision is more than just a recitation of facts and factors, followed by the announcement of numbers:

973.017 “DEFINITION: In this section, “sentencing decision” means a decision as to whether to impose a bifurcated sentence under s. 973.01 or place a person on probation and a decision as to the length of a bifurcated sentence, including the length of each component of the bifurcated sentence, the amount of a fine, and the length of a term of probation.

The trial court must give reasons for this “decision,” and the reasons given must be for the length of durations imposed, Wis. Stat. § 973.017(10m). “Courts must explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specified objectives.” *Gallion*, ¶ 42.

I. Summary of *Gallion*’s Mandate:

Gallion’s most significant “reinvigoration” (*Gallion*, ¶ 4) of *McCleary* is its clarification of the following passage:

It is thus apparent that requisite to a prima facie valid sentence is a statement by the trial court detailing his reasons for selecting *the particular sentence imposed*.

McCleary, 49 Wis.2d at 281 (emphasis added).

Essentially, *Gallion* requires courts to (1) identify salient sentencing facts (2) apply the appropriate factors to the evaluation of the facts (3) from that process identify what sentencing objectives should be reflected by the sentencing decision (4) determine whether probation is possible, and impose probation if doing so can accomplish the sentencing objectives (5) determine appropriate conditions and length of probation if imposed and (6) if probation is not imposed, determine the length of the component parts (initial confinement and extended supervision) of any prison sentences imposed, and determine whether multiple sentences are to be served concurrently or consecutively, as well as whether the defendant should be made eligible for the Challenge Incarceration Program or the Earned Release Program.

Defense attorneys can promote careful sentencing under *Gallion* by organizing and presenting their arguments using *Gallion*’s framework.

The following requirements imposed by Gallion are intended to breath new life into *McCleary*:

A. Courts must:

--identify the general objectives of greatest importance in the case, *Gallion*, ¶ 41

--describe the facts relevant to these objectives, ¶ 42

--identify the factors considered in arriving at the sentence, ¶ 43

--in particular, consider the aggravating factors in Wis. Stat. §§ 973.017(3)-(8); ¶ 43, n.12.

--consider any applicable sentencing guidelines, as required by Wis. Stat. § 973.017(2)(a), ¶ 47

--indicate how the identified factors fit the objectives and influence the decision, *Id.*

--impose a sentence calling for the minimum amount of custody that is consistent with protecting the public, the gravity of the offense, and the rehabilitative needs of the defendant, ¶ 44

--to meet this minimum-custody standard, consider probation as the first alternative, *Id.*

--impose probation unless confinement is necessary to protect the public, the offender needs treatment available only in confinement, or probation would unduly depreciate the seriousness of the offense, *Id.*

--if probation is imposed, explain why the conditions of probation should be expected to advance the specified sentencing objectives, ¶ 45

--if jail or prison is imposed, “...**explain why the duration of incarceration should be expected to advance the objectives it has specified.**” *Id.* (emphasis added)

--if the sentence includes extended supervision, explain why its duration and terms should be expected to advance sentencing objectives. *Id.*

B. Courts are encouraged to:

--“refer to information provided by others. Courts may use counsels’ recommendations for the nature and duration of the sentence and the recommendations of the presentence report as touchstones in their reasoning.” ¶ 47.

--“request more complete presentence reports.” ¶ 34

See also, Bruneau v. State, 77 Wis.2d 166, 252 N.W.2d 347 (1977) (encouraging courts to use pre-sentence reports to ensure that sentencing is based on accurate information, as required by due process), *and, Elias v. State*, 93 Wis.2d 278, 286 N.W.2d 559 (1980) (court has duty to acquire knowledge of defendant’s character and background before imposing sentence)

C. Courts may:

--“consider information about the distribution of sentences in cases similar to the case before it.” *Gallion*, ¶ 47. (This apparently refers to information in addition to any information available in sentencing guidelines, which, again, the court must consider, *Id.*)

D. Courts need not:

--**follow** sentencing guidelines: “Individualized sentencing has long been a cornerstone to Wisconsin’s criminal justice jurisprudence. ... Sentencing guidelines will provide useful information and serve as a touchstone for explaining the reasons for the particular sentence imposed.” ¶ 48 *Gallion* notes that a court’s departure from sentencing guidelines does not automatically provide a basis for appeal. ¶ 48, n. 13, However, a court’s failure to even address and consider such guidelines, given the importance *Gallion* places on adequate explanations, should be grounds for a sentencing challenge.

--“explain, for instance, the difference between sentences of 15 and 17 years. We do expect, however, an explanation for the general range of the sentence imposed.” ¶ 49 (“We are mindful that the exercise of discretion does not lend itself to mathematical precision.”)

II. Practice Tips in Light of Specific Passages:

1. Clearly explain why your recommendation makes sense, in order to help the court give a direct explanation for the sentence.

McCleary and its progeny established standards to assist and assess the exercise of sentencing discretion. Until now, adherence to these standards has been implied as long as the ‘magic words’ were stated, some facts were detailed, and the sentence imposed was within the statutory limits. *McCleary*, however, requires more.

Gallion, ¶ 37(emphasis added)

“...What has previously been satisfied with implied rationale must now be set forth on the record.” *Gallion*, ¶38.

“...[S]entencing courts have strayed from the directive [of *McCleary*]. ...[F]or some, merely uttering the facts, invoking sentencing factors, and pronouncing a sentence is deemed sufficient. Such an approach confuses the exercise of discretion with decision-making.” *Id.* at ¶ 2.

“Discretion is not synonymous with decision-making. Rather the term contemplates a process of reasoning...” *McCleary*, 49 Wis.2d at 277.

“...[T]here has been a regrettable disconnect between [*McCleary’s*] principles as-stated and its principles as-applied.” *Gallion*, ¶ 55.

“Although we do not change the appellate standard of review, appellate courts are required to more closely scrutinize the record to ensure that discretion was in fact exercised and the basis of that discretion is set forth.” *Id.* at ¶ 4 (quotations omitted).

“In this case, we neither decide nor address the application of the independent review doctrine.” *Id.* at ¶ 18, n.6. This doctrine required appellate courts to “search the record” for reasons to affirm, even if the sentencing decision was not adequately explained by the trial court. It felled *McCleary*. Will it also cause the demise of *Gallion*? If so, trial courts will make *decisions* only, and appellate courts will furnish the *discretion*-rationale. *Gallion’s* refusal to re-affirm the doctrine is some cause for hope that the court is serious about requiring that better sentencing explanations be provided at the trial level.

2. Move beyond your arguments about the facts and factors to discuss the objectives of a sentence and why your recommendation meets them.

Amazingly, even as reviewing courts purportedly applied *McCleary*, they did not require sentencing courts to say much of anything about the **actual length** of the sentence imposed. Instead, the case law only “...emphasized the delineation of the

primary sentencing factors to the particular facts...” followed by imposition of a sentence. *Gallion*, ¶ 58. After recognizing that the abolition of parole puts courts in complete control of the sentences that will be served, and agreeing that this added power and responsibility required sentencing law to be revisited, ¶¶ 4, 8, 28, and 29, *Gallion* finally has required that durations and sentence-lengths be directly explained in light of specified facts, factors and objectives:

In short, we require that the court, by reference to the relevant facts and factors, explain how the sentence’s component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion.

Gallion, ¶ 46. *See also*, ¶ 45 (“duration” must be explained).

Defense counsel should criticize prosecutors’ recommendations and PSI recommendations that lack this “linkage” and propose an alternative that contains it.

3. Use guidelines and statutory criteria—including the absence of factors deemed aggravating under the statutes and case law.

A defense recommendation might be more persuasive if it is structured, just as *Gallion* exhorts sentencing courts to adhere to a structure when they make their decisions:

Experience has taught us to be cautious when reaching high consequence conclusions about human nature that seem to be intuitively correct at the moment. Better instead is a conclusion that is based on more complete and accurate information and **reached by an organized framework for the exercise of discretion.**

Id. at ¶ 36 (emphasis added).

The statutes do not equip defendants with a list of mitigating factors, but consider arguing that the absence of one or more statutory aggravating factors is either mitigating, or precludes a finding that the offense is aggravated. For example, a Milwaukee County Circuit Judge recently characterized as “aggravated in every respect” two armed robberies where no weapon was used, no mask or bullet proof vest was used, the victim was not vulnerable or elderly... *See*, Wis. Stat. § 973.017 (3) (“Aggravating Factors; Generally”).

III. Whether *Gallion's* promises are kept—more faithfully than *McCleary's* promises were kept—will depend in part on our advocacy.

A. The need for imagination—and advocacy.

Here's a good example of how a trial attorney used *Gallion* in a sentencing memorandum:

...As *Gallion* noted, experience teaches courts to be cautious when reaching "high consequence conclusions about human nature that seem to be intuitively correct at the moment." *Id.* at ¶ 36. Severe sentencing for a serious crime, especially a homicide, can easily be justified in highly emotional terms. Rough moral calculi may even seem to cry out for some rough equivalency: an eye for an eye, a lifetime for a life. But the law, as Justice Frankfurter once observed, calls for drawing lines "more fine than nice." *McCleary* and again *Gallion* call for a sentence reflecting the minimum necessary to achieve the pertinent penal purposes. That still leaves the difficult task of assaying that minimum.

An intelligent discretion frankly calls for imagination. *Gallion* indeed recognizes that in acknowledging the defense argument, "imprisonment for even one day has a substantial impact on a man's liberty," citing *United States ex rel. Miller v. Twomey*, 497 F.2d 701, 715 (7th Dist. 1973). The fact is that this and every court must think in imaginative, empathetic terms what a year, what 10 years or in this case 15 to 20 years in prison actually means and would feel like.

"Defense Brief on Sentencing." Peter D. Goldberg, Assistant State Public Defender, Milwaukee Trial Office.

Counsel should consider whether to file a sentencing brief that emphasizes the principles in *McCleary* and *Gallion* and uses *Gallion's* framework to advocate for the best possible sentence. Strategically, in a given case or with a given court, it might be more effective to obtain an alternative PSI whose presentation of facts and whose recommendation tracks *Gallion*. For example, *Gallion*, re-affirming *Bastian v. State*, 54 Wis.2d 240, 194 N.W.2d 687 (1972), requires courts to impose probation unless certain findings are made. *Gallion*, ¶¶ 25, 44. An alternative PSI showing the appropriate community-based treatment programs, combined with argument at sentencing that reinforces the legal standard, might be the most efficacious approach.

The history of *McCleary's* weak enforcement adumbrates judicial hostility to meeting and enforcing *Gallion's* grand guarantees. Indeed, even as the *Gallion* court scolded trial courts for “stray[ing]” from *McCleary's* directive, ¶ 2, it took no blame itself, and assigned none to the court of appeals. Underscoring the court’s reluctance to accept the duty of careful review it mandated for “future cases,” ¶ 8, and apparently concerned about floodgates issues, the “reinvigoration” of *McCleary* was withheld from Curtis Gallion and other “TIS-I” defendants, *i.e.*, defendants convicted of committing crimes between December 31, 1999 and February 1, 2003.

If *Gallion* is to mean more than *McCleary* came to mean, the Wisconsin Supreme Court and Wisconsin Court of Appeals will have to show greater fortitude than they have to date. The threat of mandatory sentencing grids—that would replace judicial discretion with prosecutorial-charging discretion—should motivate the judicial branch, collectively, to demonstrate that sentencing decisions can be made in a rational, explainable and reviewable manner. Another source of motivation can be provided in individual cases: If the defense attorney has presented well-thought-out proposals to the trial court, the appellate court should be more reluctant to make excuses for perfunctory analysis by the sentencing judge. If, on the other hand, defense counsel joins the prosecutor and the PSI writer, if any, in proposing dispositions or durations that are poorly explained, a lack of specificity by the trial court will be less surprising to the appellate court: garbage in, garbage out.

Recently, three justices joined an opinion essentially blaming defense counsel for deficient reasoning by a trial judge who was making a discretionary determination about the impeachment of a witness with prior convictions:

We note that the trial record is admittedly sparse. ... However, defense counsel’s motion in limine [and argument at the hearing are] equally sparse... We review the circuit court’s determination in light of the actual objections defense counsel raised. ...

State v. Gary M.B., 2004 WI 33, ¶ 24, __Wis.2d__, 676 N.W.2d 475 (opinion of Wilcox, J., joined by Prosser and Roggensack, JJ.)

Other justices rejected this reasoning, but beware. Even as they guard judicial power to impose sentences, the courts expect counsel to be active participants. *See, State v. Anderson*, 222 Wis.2d 403, 410, 588 N.W.2d 75 (Ct. App. 1998) (counsel ineffective for declining court’s offer of a continuance, where client disputed important parts of pre-sentence report, court relied on report, and counsel did not “see that the accuracy of those matters was fully resolved by a proper hearing”), and *State v. Pote*, 2003 WI App 31, ¶¶33-35, 39; 260 Wis.2d 426, 448-

49, 451, 659 N.W.2d 82: Counsel was ineffective when he failed to argue known mitigating factors. Counsel was found ineffective even though the client had threatened him, and instructed him to “do nothing.” Counsel should either have argued on the client’s behalf or, if seriously concerned about threats, moved to withdraw.

B. Be careful what you advocate for.

“Because defendant affirmatively approved the sentence, he cannot attack it on appeal.” *State v. Scherreiks*, 153 Wis.2d 510, 518, 451 N.W.2d 759 (1989).

“[The defendant] cannot agree to the recommendation of an imposed and stayed sentence, violate probation, and then take the position on appeal that the sentence was excessive. [Or inadequately explained?] If Magnuson objected to the recommendation, he should not have entered into the agreement.” *State v. Magnuson*, 220 Wis.2d 468, 472, 583 N.W.2d 843 (Ct. App. 1998).

It often makes sense to join in sentencing recommendations made by the State or the pre-sentence report, but doing so might preclude an appeal.