STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case Nos. 2020AP0000-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WESTLEY D. WHITAKER,

Defendant-Appellant

On Appeal from Judgment of Conviction
Entered in the Vernon County Circuit Court,
The Honorable Darcy J. Rood, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Did the trial court improperly consider Mr. Whitaker's religious beliefs and association with a religious community when it held that a goal of sentencing was to deter sexual assault within the Amish community?

The trial court answered that it did not.

II. Was it cruel and unusual punishment to sentence Mr. Whitaker at the age of twenty-six to a term of four years of imprisonment for offenses he committed between the ages of twelve and fourteen, when at the time he committed the offenses the maximum term of punitive incarceration was thirty days?

The trial court held that the sentence was not cruel and unusual.

III. Did the sentence in this case comply with *State v. Gallion*?

The trial court held that the sentence adhered to the requirements of *State v. Gallion*.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Whitaker welcomes oral argument if the Court believes that it will clarify the issues in this appeal. While most of the issues in this appeal rely on well-established law, publication may be appropriate to clarify whether a sentencing goal of deterring crime only within a religious community improperly considers a defendant's faith and protected religious association.

STATEMENT OF THE CASE AND FACTS

Westley Whitaker was raised in the Old Order Amish church, and for much of his childhood lived in a cloistered Amish community in rural Vernon County, Wisconsin. (54:14; App. 117). When he was between the ages of twelve and

fourteen years old, Mr. Whitaker committed a series of sexual assaults against two of his younger sisters. (1). Elders in the Amish community were aware of this conduct, but did not report it to secular authorities. (54:16; App. 119). Around the time that Mr. Whitaker turned fourteen years old, the offenses stopped without further intervention (54:17; App. 120). Mr. Whitaker has not sexually offended in any manner since turning fourteen. (54:17).

As a member of the Amish community, Mr. Whitaker did not attend secular school. (54:15-16; App. 118-119). Mr. Whitaker's education was limited to attending a conservative Amish primary school through the eighth grade. (54:15; 19:13; App. 118). Children, including teenagers, were forbidden to discuss their sexuality or sexual development. (54:15; 19:11; App. 118). Feelings of sexual desire, and masturbation were viewed as sins. (54:15; 19:11; App. 118). Mr. Whitaker did not receive any sexual education or counseling to address his sexual behavior with his sisters. (54:15-16; App. 118-119). The PSI writer, Trevor Salmon, noted Mr. Whitaker's struggle to cope with his adolescent sexual development in a conservative Amish community:

> "He stated he knew one thing for certain, "I did not know what I was doing. I remember not knowing what sex was. It was simply going through puberty, my hormones, my instincts were coming alive." Growing up in a conservative home, sex was considered "taboo" and not discussable. Shortly after puberty began, he started developing "those types of feelings" for the first time and he knew he was curious about them. As a result, he started "dabbling" in the idea of sex." (19:3).

A. Confession and Criminal Complaint

Mr. Whitaker and several other members of his immediate family left the Amish church after he reached adulthood (19:11).[1] When Mr. Whitaker was twenty-five years old, one of his sisters began seeing a counselor to address childhood emotional trauma stemming from his acts. (54:13; 21:2; App. 116). She contacted Mr. Whitaker and urged him

[1] The Pre-Sentence investigation narrows this timeframe to when Mr. Whitaker was approximately the age of nineteen years old, noting that Mr. Whitaker did not know what alcohol was until he reached this age.

to confess to sexually assaulting her when the two were children. (54:13; 21:2; App. 116). Mr. Whitaker believed that admitting to his childhood offenses would further his sister's emotional recovery, and called Vernon County Sheriff's Sergeant Matt Sutton to confess. (54:13-14; 21:2; App. 116). Following his confession Mr. Whitaker was charged with six counts of First Degree Sexual Assault of a child, all for acts he committed against his sisters when he was between twelve and fourteen years old. (1).

When he was criminally charged, Mr. Whitaker was twenty-five years old, living in the State of New York, and working full time as a construction worker. (54:9; 23; App. 112). He was married, but separated from his wife. (19:12; App. 112). Mr. Whitaker is the primary caregiver for his four-year-old[2] son, and shares joint custody with the mother, who lives in Canada. (19:12; 54:21; App. 125). Beyond the charges in Vernon County case 17CF163, Mr. Whitaker has never been arrested, charged, or convicted of any offense as a juvenile or adult. (54:21; App. 125). Mr. Whitaker remained free on bond from January 4, 2018 to the present without incident. (5).[3]

On January 25, 2019, Mr. Whitaker pleaded no contest to one count of First Degree Sexual Assault of a Child, with the remainder of the information being dismissed but read-in. (55; App. 101-102). Judge Darcy Rood ordered a pre-sentence investigation (hereafter "PSI), and Mr. Whitaker remained free pending sentencing. (55). The PSI recommended withholding sentence and placing Mr. Whitaker on probation for three years, with thirty days of jail as a condition of probation. (19:24). No special conditions of supervision were recommended in the PSI. (19:24).

B. Sentencing and Motion to Exempt Mr. Whitaker from Sex Offender Reporting Requirements

Before he was sentenced, Mr. Whitaker was evaluated by licensed counselor William Kelly to determine his risk of sexually reoffending. (21). Mr. Whitaker submitted his sexual

[2] Now five years old.

[3] The record is devoid of any subsequent arrests or modifications to bond based on any violation.

risk assessment to the trial court, along with a cover letter highlighting Mr. Kelly's findings. (21; 23). The assessment noted that upwards of ninety percent of adolescent males engage in behavior that would be considered criminal if committed by an adult. (21:3). Mr. Kelly was advised of Mr. Whitaker's social history, reviewed the criminal complaint in Vernon County case 17CF163, and completed a standard patient interview. (21:1). From these facts, Mr. Kelly concluded that Mr. Whitaker would have scored low risk for sexually reoffending at the end of his adolescence,[4] and currently posed no more risk of sexually offending than any other twenty-five-year-old male. (21:3-4). The assessment also noted that Mr. Whitaker displayed no observable traits consistent with psychopathy or antisocial personality disorder. (21:3-4).

Mr. Whitaker submitted the sexual risk assessment in support of a motion to relieve him from sex offender reporting requirements pursuant to Wisconsin statute section 301.45(1m). (20). District Attorney Gaskell noted that the victim was "not wholly opposed" to exempting Mr. Whitaker from sex offender reporting requirements, and as such he did not object to exempting Mr. Whitaker from sex offender registration. (54:5; App. 109). The trial court granted Mr. Whitaker's motion to exempt him from sex offender reporting requirements before moving on to sentencing. (54:5-6; 31; App. 109-110).

Mr. Whitaker was sentenced on April 18, 2019. (29; App. 101-102). The trial court concluded on the record that Mr. Whitaker presented "zero" risk of reoffending. (54:30; App. 134). COMPAS scores in the PSI also concluded that Mr. Whitaker's risk to the community is low, and that he has no ongoing criminogenic needs to be addressed by supervision. (19:21-22; 54:20, 22; App. 124, 126). The trial court also found that Mr. Whitaker did not have any ongoing rehabilitative needs, stating:

[4] Limited in Mr. Kelly's report as the age for administering a juvenile actuarial risk assessment. In Mr. Whitaker's case, the age of eighteen. (21:4).

> "I don't believe that Mr. Whitaker is a threat to the public. I don't believe he needs rehabilitation." (54:31; App. 135).

The trial court also found that Mr. Whitaker took responsibility by his plea, and noted its belief that he was remorseful and sincere. (54:30-31; App. 134-135). However, the trial court determined that the gravity of the offense was too significant to justify a sentence of probation, and imposed a bifurcated term of imprisonment consisting of two years of initial confinement and two years of extended supervision. (54:32; App. 136). The trial court did not make a record of why a four-year prison sentence was the minimal amount of confinement necessary to achieve the goals of sentencing, or more specifically why two years of extended supervision were necessary to achieve the goals of sentencing in light of its findings that Mr. Whitaker was not a risk to the public and had no rehabilitative needs. (54:32; 61:26; App. 136).

C. Sentencing Goal of Deterring Sexual Assault Within the Amish Community

The trial court acknowledged Mr. Whitaker's childhood membership in the Amish faith and community during the sentencing hearing. (54:29, 31; App. 133, 135). On multiple occasions, the trial court stated its intent to send a message to elders in the Amish community by imposing a prison sentence, specifically stating that she hoped to deter similar behavior by Amish boys and men. (54:29-32; App. 133-135). In part, the trial court stated:

> "I believe the relevant Gallion[5] factors are punishment, and also deterrence of others, hopefully deterrence of others in the Amish community. I happen to live in the midst of an Amish community. I purchased an Amish house. They're my neighbors.
>
> And sexual assault of sisters is not something that is accepted. I understand that it happens often and it is dealt with in the community. And that's not sufficient. That's not sufficient when it is a one-time thing and not when the women, daughters, the wives in the Amish community are

[5] *Gallion* is misspelled as "Galleon" in the sentencing transcript. This brief substitutes the correct spelling in quoted segments.

> not empowered to come forward. They do not have the ability because of their upbringing. They are discouraged from bringing these issues forward.
>
> So I believe deterrence – now I hope it's not deterrence of reporting them. I hope it's the deterrence of the community from permitting their sons, their husbands to engage in this. But generally, in my experience, it's the sons." (54:29-30; App. 133-134).

Shortly thereafter, the trial court again stated one intent of Mr. Whitaker's sentence was to deter the Amish community, stating:

> "I'm hoping that this sentence deters, as I said, the community."[6] (54:31; App. 135).

One final time, the trial court clarified that it intended to deter members of the Amish community, expressing that the court hoped that Amish elders would take note of Mr. Whitaker's sentence:

> "I think that is – a prison sentence is the only way to send the message to Mr. Whitaker and to the community that this is totally unacceptable behavior. And perhaps it now can help the family heal. And I hope that the elders in the community pay attention to this." (54:32; App. 136).

D. Post-Conviction Motion and Order Denying Relief

Mr. Whitaker immediately moved for a stay of the sentence pending post-conviction litigation, and the trial court granted his motion. (26). On August 16, 2019, Mr. Whitaker filed a post-conviction motion, alleging multiple grounds[7] for resentencing. (35). Counsel argued that a sentence intended to deter criminal conduct only within a closed religious

[6] Immediately preceding this use of the word "community," Judge Rood stated, in part: "every Amish young man is raised in that type of community…" (54:31)

[7] Mr. Whitaker asserted that resentencing was required because (1) the trial court improperly relied on his religious beliefs and association with a religious community during sentencing, (2) the sentence was cruel and unusual, in particular, because at the time of the offenses the maximum term of punitive confinement was thirty days in jail, (3) that the sentence did not comply with *State v. Gallion*, and (4) that new factors required resentencing. Mr. Whitaker appeals on the first three grounds.

community violated Mr. Whitaker's First Amendment rights to free exercise of his religion and association within the Amish community. (35). Mr. Whitaker argued that he was only a proper subject to deter criminal behavior within the Amish community because of his religious beliefs and former affiliation with the Amish community, and as such, the sentencing purpose of deterrence improperly considered his protected religious beliefs and association. (61:6). The trial court concluded at the post-conviction hearing that it had not considered Mr. Whitaker's religious beliefs, but focused its attention on his ties to the Amish community, stating, in part:

> "[M]y concern was the – not any acceptance of this behavior, but the failure – or the desire to deal with this issue when it occurred in the community. And that – I want women to be able to come forward out of that community…this is not the first case I've had with someone from the Amish community. And the desire of the elders to keep it within the community and which means, you know, wouldn't be before any of our judicial system." (61:9-10; App. 154-155)

The trial court concluded that since it intended to focus deterrence on the Amish community, and not Amish beliefs, Mr. Whitaker's constitutional rights were not implicated. (61:14; App. 159). The trial court denied Mr. Whitaker's motion on this ground. (61:14; App. 159).

Mr. Whitaker also argued that a four-year term of imprisonment for crimes he committed when he was twelve, thirteen, and fourteen years old constituted cruel and unusual punishment. He directed the trial court to Wisconsin Statute § 938.34(3)(f)1 (2005-2006), which set a maximum term of thirty days of[8] punitive confinement for a juvenile offender at the time that Mr. Whitaker committed the offense he was convicted of. (36; 61:19-20; App. 164-165, 178).[9] Mr. Whitaker argued that a term of twenty-four months of confinement was disproportionate to the thirty-day maximum punitive sentence he could have received at the time he

[8] For the course of conduct leading to adjudication.

[9] Mr. Whitaker argued in his post-conviction motion that section 938.34(3)(f)1 (2005-2006) was relevant to assessing whether the sentence was cruel and unusual under the Eighth Amendment, but also constituted a new factor.

committed the offenses. (35; 61:20; App. 165). At several points the trial court noted that had Mr. Whitaker come forward earlier, he could have received rehabilitative treatment, presumably in lieu of punitive confinement. (61:17, 22-23; App. 162, 167-168). Citing *State v. Annalla*, 168 Wis. 2d 453 (Wis. 1991), the State argued that Mr. Whitaker was properly treated as an adult because he did not confess until he reached adult jurisdiction. (61:22; App. 167). Mr. Whitaker argued that it was unrealistic to expect a twelve to fourteen-year-old Amish child to know that he would need to confess his conduct to secular authorities to receive rehabilitative treatment instead of a prison sentence later in life. (61:17; App. 162). The trial court noted during sentencing that Mr. Whitaker did not confess until he reached adulthood, holding that this delay weighed against considering the maximum punitive sanction that would have been available for a juvenile delinquency adjudication:

> "So here – my concern is that had Mr. Whitaker come to – if he had addressed this earlier, he would have been able to take advantage of the rehabilitative aspects of the juvenile justice system, but he didn't. And his sister – and I believe there was more than just her as the victim, if I recall, there was action with other siblings, I believe as well.
>
> Clearly Mr. Whitaker had a problem and he would have been able to address that in a different system, but he didn't come forward and that probably has exacerbated his sister's issues because she was not able to deal with him at a much earlier age. And so I don't believe it's fair to her to sentence him according to the juvenile code, especially when we don't know how that would have been charged, we don't know what that disposition would have been in that case." (61:23; App. 128)

Following these comments, the trial court denied Mr. Whitaker relief on the ground that the adult prison sentence constituted cruel and unusual punishment. (61:24; App. 169).

Finally, Mr. Whitaker argued that the rationale offered on the record for his prison sentence did not comply with *State v. Gallion*. (35; 61:26-27; App. 171-172). Mr. Whitaker noted that the trial court did not explain its rationale for imposing a total four-year term of imprisonment, or why this term of

imprisonment was the least amount necessary to achieve the goals of sentencing. (61:26-27; App. 171-172). He also argued that the trial court did not explain why it imposed two years of extended supervision after finding on the record that Mr. Whitaker presented "zero" risk of reoffending, and had no rehabilitative needs. (61:26-27; App. 171-172).

The trial court denied Mr. Whitaker's post-conviction motion on the ground that the sentence did not comply with *Gallion*. (61:28; 44; App. 103, 173). However, before ruling, the trial court noted that it did not thoroughly explain its rationale for imposing a bifurcated four-year term of imprisonment,[10] and particularly, did not explain why two years of extended supervision were necessary in light of its prior findings that Mr. Whitaker did not present a public safety threat or require rehabilitation. (61:28; App. 173).[11] However, the trial court ultimately held that its original sentence complied with *State v. Gallion*. (61:28; App. 173). The trial court signed a written order incorporating its oral ruling and denying Mr. Whitaker's post-conviction motion on December 30, 2019. (44; App. 103). Mr. Whitaker appeals from this order, and the incorporated oral ruling.

ARGUMENT

I. THE SENTENCE IMPROPERLY RELIED ON MR. WHITAKER'S RELIGIOUS BELIEFS AND HIS ASSOCIATION WITH THE AMISH COMMUNITY

"No liberty guaranteed by our constitution is more important or vital to our society than is a religious liberty protected by the free exercise clause of the first amendment." *State v. Yoder*, 49 Wis. 2d 430, 434 (Wis. 1970). The First Amendment guarantee to religious freedom is intended to guard against three distinct evils: (1) state sponsorship of religion, (2) state prohibition of religion, and (3) state

[10] "I think you have the best argument that I didn't explain it [the length of the sentence] in great detail, but I am going to deny your request for a new sentencing hearing." (61:28).

[11] "Well the argument that I found the most persuasive in your memorandum is that I didn't address the extended supervision in particular." (61:27).

involvement in sovereign religious activity. *See e.g. Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). Article I, Section 18 of the Wisconsin Constitution is interpreted in concert with the relevant clauses of the First Amendment to the U.S. Constitution. *Jackson v. Benson*, 218 Wis. 2d 835, 876-7 (Wis. 1998).

Closely related is the First Amendment right to associate with like-minded people and communities. The First Amendment to the U.S. Constitution, and Article I, Sections 3, 4, and 18 of the Wisconsin Constitution protect the right to associate within religious communities. *See e.g. Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 25, 358 Wis. 2d 1. Freedom of association with like-minded citizens is "an indispensable means of preserving other individual liberties." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

> "Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id*.

The U.S. Supreme Court has long restricted consideration of an actor's religious faith, origin, race, and deeply-held beliefs in criminal litigation. *See Oyler v. Boles*, 368 U.S. 448, 456 (1962) (religion improper to consider when weighing whether to prosecute); *Wade v. U.S.*, 504 U.S. 181, 186 (1992) (religion improper factor for federal prosecutors to consider when offering leniency to cooperators); *U.S. v. Leung*, 40 F.3d 577, 586 (2nd Cir. 1994) ("A defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing."); *U.S. v. Trujillo-Castillon*, 692 F.3d 575, 579 (7th Cir. 2012) ("The [U.S. Sentencing Guidelines] make clear that race…[and] national origin…are not relevant in the determination of a sentence."). *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (defendant's religion "totally irrelevant" to the sentencing process).

Wisconsin authority follows suit. In *State v. Ninham*, the Wisconsin Supreme Court held, in part, "that a circuit court may not base its sentencing decision upon the defendant's or

victim's religion." 2011 WI 33, ¶ 96, 333 Wis. 2d 225. Relying on *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, *Ninham* concluded that a circuit court abuses its discretion when it relies on improper factors, like religious belief or association. *Id*. ¶ 95. *See also State v. Miller*, 175 Wis. 2d 204, 213 (Ct. App. 1993) citing *Huggett v. State*, 83 Wis. 2d 790, 796 (Wis. 1978) (conditions of supervision may not be imposed if incompatible with free exercise of religion).[12] While the criminal conduct of a devout defendant may be punished, the defendant's religious beliefs and association with a community of faith may not. *See State v. Neumann*, 2013 WI 58, ¶ 125, 348 Wis. 2d 455. [13] The Defendant bears the burden of showing by clear and convincing evidence that the circuit court relied on his religious beliefs or affiliation during sentencing. *Harris*, 2010 WI 79, ¶ 30.

A. ***State v. Fuerst* and *U.S. v. Lemon***

The test for determining whether a trial court improperly considered a defendant's protected religious beliefs and associations at sentencing was discussed in *State v. Fuerst*, 181 Wis. 2d 903 (Ct. App. 1994). *Fuerst* addressed whether the trial court properly considered a defendant's lack of religious affiliation as an aggravating sentencing factor. *Id*. at 909. The Court of Appeals broadly applied the rule in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to address whether considering the defendant's lack of religious affiliation constituted an abuse of sentencing discretion. *Id*. at 911.

Lemon v. Kurtzman established a three-part inquiry to determine whether a State action improperly interfered with religion. *Lemon v. Kurtzman*, 403 U.S. at 612-13.[14] First, the law or regulation must have a secular purpose. *Id*. Second, the law or regulation must neither advance nor inhibit religion. *Id*. Third the government action or regulation must not foster

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[12] *cf. Von Arx v. Schwarz*, 185 Wis. 2d 645, 660-1 (Ct. App. 1994) (reasonably tailored rules of probation may contradict a supervisee's religious beliefs if intended to rehabilitate).

[13] *Neumann* involved Christian Science practitioners who treated their daughter's diabetes through prayer. When their daughter died, the parents were prosecuted for second degree reckless homicide.

[14] Full case citations are used to distinguish *Lemon v. Kurtzman* from *U.S. v. Lemon*, which is also cited throughout this filing.

excessive government entanglement with religion. *Id*. Entanglement is tested by examining the character, nature, and purpose of the government action, and the resulting relationship between the government and religion. *Id*. at 615. The test in *Lemon v. Kurtzmann* was adopted by the Wisconsin Supreme Court. *State ex. rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 322 (Wis. 1974).

Fuerst concluded that a sentence based, in part, on a defendant's lack of religious affiliation violated the *Lemon* test, specifically holding that viewing religious affiliation as a mitigating factor violated the second and third prongs of the *Lemon* test. 181 Wis. 2d at 911. However, *Fuerst* did not conclude that religious beliefs may never be considered during sentencing. *Id*. at 913. Rather, it held that a sentencing court may consider broad statements about religion in a pre-sentence investigation, and whether there was an established nexus between a defendant's religious affiliation and his criminal conduct.[15] *Id*. *Fuerst* adopted the approach of the Court of Appeals in *U.S. v. Lemon*, 723 F.2d 922 (D.C. Cir. 1983), to determine whether a trial court improperly considered a defendant's protected beliefs or association at sentencing. *Id*. at 912-913.

U.S. v. Lemon addressed whether the defendant's alleged affiliation with the "Black Hebrews," a radical political and religious organization that sought to repatriate its members in Israel, could constitutionally be considered during sentencing. *U.S. v. Lemon*, 723 F.2d at 924-926. The U.S. government contended that multiple members of the Black Hebrews were in fugitive status, and had committed acts of fraud to further its goal of repatriating members in Israel, and asked the District Court to consider the defendant's acts as part of a larger pattern of criminality by the Black Hebrews. *Id*. at 926. On appeal the Court concluded that the Black Hebrews were a religious organization whose beliefs were protected by the First Amendment, holding:

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[15] As an example, *Fuerst* would allow a sentencing court to consider a drug defendant's affiliation with a church that promotes the religious use of narcotics. *See also Employment Division., Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990) (permitting the State to deny unemployment benefits to petitioners who used peyote for religious reasons).

> "the government cannot punish an individual for mere membership in a religious or political organization that embraces both illegal and legal aims unless the individual specifically intends to further the group's illegal aims." *Id*. at 938-9.

Relying on *U.S. v. Lemon*, *Fuerst* held that a sentencing court may consider a defendant's religious beliefs and practices only if a reliable nexus exists between the defendant's religious beliefs and his criminal conduct. 181 Wis. 2d at 913.

B. The Trial Court Improperly Considered Mr. Whitaker's Religious Beliefs and Associations When Deterrence was Limited to a Religious Community

It is undisputed that at the time of his offenses Mr. Whitaker was a practicing member of the Amish church, and associated exclusively with the Amish community. Mr. Whitaker's beliefs and association with the Amish community are protected by the First Amendment to the U.S. Constitution and Article I, Section 18 of the Wisconsin Constitution. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *State v. Yoder*, 49 Wis. 2d 430 (Wis. 1970). The relevant issue on appeal is whether the trial court considered Mr. Whitaker's constitutionally protected religious beliefs and association with the Amish community when he was sentenced. *Fuerst*, 181 Wis. 2d at 913.

Mr. Whitaker does not dispute that general and specific deterrence are lawful purposes of sentencing. *See e.g. State v. Ziegler*, 2006 WI App 49, ¶ 23, 289 Wis. 2d 594; *U.S. v. Barker*, 771 F.2d 1362, 1368 (9th Cir. 1985). Nor does he dispute that deterrence can be directed towards individual offenders, or categories of offenders. *See State v. Gallion*, 2004 WI 42, ¶ 61, 270 Wis. 2d 535. However, this case is not one of general deterrence, in which the court intended to deter sexual assault across the population of Wisconsin. Nor does specific deterrence apply, since the court recognized that Mr. Whitaker presented "zero" risk to the community if released. Instead, the intended deterrence was directed solely towards preventing sexual assault and encouraging reporting of offenses within a religious community.

The record is clear that the trial court considered Mr. Whitaker's religious beliefs and upbringing in the Amish church when crafting its sentence. After all, if Mr. Whitaker had not been Amish, he would not have been an appropriate subject to deter sexual assault within this community, or influence the behavior of its elders. It logically follows that a similarly-situated defendant who was not Amish would not receive a prison sentence that is premised, in part, on deterring sexual misconduct in this community. Even if Mr. Whitaker accepted the trial court's explanation that it was targeting the Amish community without considering their religious beliefs, deterrence was still directly premised on his constitutionally protected association with the Amish community.[16] Identifying Mr. Whitaker as a proper subject for criminally deterring the Amish community boils down to consideration of a prohibited factor: the fact that he was Amish himself. As such Mr. Whitaker's prison sentence is necessarily premised, in part, on his faith and association with a protected religious community.

Applying the test in *Lemon v. Kurtzman*, this court should reach the same conclusion as *Fuerst*, that the criminal sentence improperly entangled secular interests with those of the Amish church, and that the interests of secular defendants were advanced over those of Amish defendants. The trial court intended its sentence to influence the values of the Amish community and upbringing of Amish children, effectively entangling the court's secular goals with the customs and priorities of the Amish community.[17] *Fuerst*, 181 Wis. 2d at 911. Additionally, since the goal of deterrence was directed only to the Amish community, and not towards child sexual offenses generally, the sentence serves to specifically inhibit followers of the Amish faith, as only members of this

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[16] Mr. Whitaker disagrees with the trial court's distinction between deterrence of religious belief and deterrence of a religious community. The Amish are a homogenous religious community, and membership is premised on their religious practices and beliefs. To consider a defendant's membership in the Amish community necessarily acknowledges the beliefs that make him Amish.

[17] Mr. Whitaker does not argue that sexual assault is an acceptable practice. However, a secular court's attempt to influence the priorities and mindset of the Amish community improperly entangles the State with a protected religious community.

community are intended to feel the effect of the intended deterrence. *See Id*. at 911-912. In comparison, similarly-situated offenders raised outside of the Amish community would not be subject to the same deterrence interest, and a trial court would not have as compelling of a rationale to impose a prison sentence on a secular offender. This rationale advances the interests of secular offenders not appropriate for deterring the Amish community over the interests of offenders raised in the Amish faith. *Id*. Accordingly, the goal of deterrence in Mr. Whitaker's case fails the second and third prongs of the test in *Lemon v. Kurtzman*. *Id*.

Moreover, the sentence did not identify an appropriate nexus between Mr. Whitaker's criminal conduct and his association with the Amish community. *Id*. at 913. Unlike the hypothetical defendant in *Fuerst* who uses illegal drugs with the encouragement of his religious faith, there is no nexus between Mr. Whitaker's faith and his criminal offenses. *Id*. There is no evidence in the record suggesting that Mr. Whitaker was prompted to sexually assault his sisters for religious reasons, or that elders in the community deemed his behavior acceptable. Nor is there any evidence that Mr. Whitaker committed these offenses to further any illegal aims of the Amish faith or community. *Id*. To the contrary, the record illustrates that all expressions of adolescent sexuality were heavily shunned and viewed by the elders as sins.

The facts of Mr. Whitaker's offense are most analogous to *U.S. v. Lemon*, which the Court of Appeals applied in *Fuerst*. 181 Wis. 2d at 912-13. Like *U.S. v. Lemon*, Mr. Whitaker belonged to a religious group, and several members of this group committed similar offenses. *U.S. v. Lemon*, 723 F.2d at 937. However, the fact that some members of a protected community commit crimes does not mean they were committed to further some coordinated illegal goal of the community. *Id*. Like *U.S. v. Lemon*, Mr. Whitaker's offenses were committed as an individual, and not to further any unlawful aim of the Amish community. *Id*. As such, it is unlawful for the trial court to consider his protected affiliation when sentencing him for individual crimes. *Id*.

In *State v. David*, the Hawaii Court of Appeals came to a similar conclusion, holding not only that a prohibited factor

was considered, but that the mere appearance of improper consideration required resentencing. 333 P.3d 1090, 1092 (2014), 134 Hawaii 289. The prosecutor in *David* stressed the need to harshly sentence the defendant in a domestic abuse case to send a message to the Micronesian Chuuk religious community, particularly men, to prevent alcoholism and violence.[18] 333 P.3d at 1092, 1102. Even though the circuit court denied considering the defendant's race and origins as relevant factors, the Hawaii Court of Appeals held that the mere appearance of basing a sentence on a protected factor violated the defendant's constitutional rights and required a new sentencing. *Id*. at 1104. "***Justice must satisfy the appearance of justice***." [emphasis added] *Id*. citing *Offutt v. U.S.*, 348 U.S. 11, 14 (1954).

Like *David*, the remarks used to justify deterrence in Mr. Whitaker's case overtly considered his faith and upbringing in the Amish community. Mr. Whitaker asserts that the record established by clear and convincing evidence that the trial court relied on his religious beliefs and association with a religious community as its basis for deterrence. However, at the very least, the remarks raise the appearance that improper factors were considered during the sentencing process. *Id*. For all of these reasons, Mr. Whitaker asks this court to conclude that an improper factor was considered, that such consideration constitutes an abuse of sentencing discretion, and remand the matter for a new sentencing hearing.

II. THE SENTENCE IS CRUEL AND UNUSUAL AND VIOLATES MR. WHITAKER'S DUE PROCESS RIGHTS

"[T]he differences between juveniles and adults mean that juvenile offenders "cannot with reliability be classified among the worst offenders."" *Ninham*, 2011 WI 33, ¶ 104 (Abrahamson, C.J., dissenting) quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005). The culpability of an adult offender differs fundamentally from that of a child. *Roper*, 543 U.S. at

[18] "The prosecutor then stated that "we're talking Micronesians who get inebriated on alcohol, then become violent with their own family members, their own friends and they involve knives."" *Id*. at 1092. The prosecutor urged the circuit court to impose a twenty-year sentence to "send a message to the Micronesian community." *Id*.

569-70. The U.S. Supreme Court recognizes that teenage offenders have "[a] lack of maturity and an underdeveloped sense of responsibility," are "more vulnerable or susceptible to negative influences and outside pressures," and their character "is not as well formed." *Id*. While retribution for a criminal act is a legitimate goal of sentencing, it "must be directly related to the personal culpability of the offender." *Ninham*, 2011 WI 33, ¶ 104 citing *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 2028 (2010).

While the trial court sentenced a twenty-six-year-old man, Mr. Whitaker was not an adult offender. The moral culpability for Mr. Whitaker's crimes rests with the twelve to fourteen-year-old boy who was coping with adolescence and sexual development in the confines of a cloistered Amish community. When he committed these offenses, Mr. Whitaker was a child in every legal sense. At the ages of twelve, thirteen, and fourteen, Mr. Whitaker himself was incapable of consenting to sexual activity. Wis. Stats. §§ 948.01 & 948.02 & 948.09. He could not consent to marriage, even with the approval of his parents. Wis. Stat. § 765.02. He was not old enough to obtain a driver's license or learner's permit. Wis. Stats. §§ 343.06 & 343.07. Nor could he legally donate blood or organs. Wis. Stats. §§ 146.33 & 157.06. As a defendant, Mr. Whitaker would have been too young to be housed with adult offenders. Wis. Stat. § 302.08. Most importantly, had these offenses been reported within three years of when they were committed, Mr. Whitaker would have been subject to disposition in the juvenile justice system, designed for rehabilitation, not punitive sanction. Wis. Stat. § 938.01(2).

Mr. Whitaker acknowledges that his conduct was morally and legally wrong. However, Mr. Whitaker asserts that imposing a four-year term of imprisonment in an adult institution for acts he committed in early adolescence is grossly disproportionate and cruel and unusual. Particularly so when the term of initial confinement he received is twenty-four times the maximum term of punitive confinement he could have received as a juvenile offender when he committed these offenses. Wis. Stat. § 938.34(3)(f)1 (2005-2006).

A. Cruel and Unusual Punishment Generally

The Eighth Amendment and Article I, Section 6 of the Wisconsin Constitution prohibit cruel and unusual punishment, and are interpreted identically under state and federal law. *State v. Pratt*, 36 Wis. 2d 312, 321-23 (Wis. 1967). Appellate courts do not interfere in a trial court's judgment of what constitutes an appropriate punishment unless the sentence is cruel and unusual. *Id*. at 322. A sentence is cruel and unusual when it is:

> "so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ninham*, 2011 WI 33, ¶ 85 quoting *State v. Paske*, 163 Wis. 2d 52, 69 (Wis. 1991).

The policy underlying cruel and unusual punishment is one of proportionality: "that punishment for the crime should be graduated and proportional to both the offender and the offense." *State v. Barbeau*, 2016 WI App 51, ¶ 28, 370 Wis. 2d 736 citing *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). What constitutes cruel and unusual is subject to "evolving standards of decency that mark the progress of a maturing society." *Ninham*, 2011 WI 33, ¶ 46 citing *Ford v. Wainwright*, 477 U.S. 399, 405-6 (1986). While the standard of cruel and unusual punishment remains steadfast, its applicability adapts as the "mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008).

When examining whether a scheme of punishment is unconstitutional, a reviewing court looks first to "objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue." *Ninham*, 2011 WI 33, ¶ 50. Second, notwithstanding objective evidence of societal standards, the court independently determines whether a punishment violates the Constitution. *Id*. At this stage, the court questions whether there is reason to disagree with the judgment of the citizenry and legislature. *Id*. citing *Atkins*, 536 U.S. at 313.

B. Evolving Standards of Juvenile Justice

The U.S. Supreme Court has regularly addressed Eighth Amendment challenges to the proportionality of juvenile sentences. First, in *Thompson v. Oklahoma,* 487 U.S. 815, 835 (1988), the Court held that the Eighth Amendment prohibits executing people who committed a capital offense when under the age of sixteen. The Court extended this age limit to eighteen in *Roper v. Simmons*, 543 U.S. 551 (2005). In *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010) the Court held that it violated the Eighth Amendment to presumptively sentence a juvenile offender to life imprisonment without the possibility of parole for non-homicide offenses, and two years later, the Court extended *Graham* to homicides. *Miller v. Alabama*, 567 U.S. 460, 130 S. Ct. 2455, 2460 (2012).

When addressing how societal viewpoints have created an evolving view of when a juvenile punishment becomes cruel and unusual, the Supreme Court repeatedly stressed the difference between juvenile and adult offenders. In *Graham*, the Court embraced brain research that shows brain development continues from adolescence into a person's twenties, and criticized deterrence in juvenile sentencing decisions as ineffective. 130 S. Ct. at 2026-29; *Miller* concluded that because of these brain deficits, juvenile offenders are inherently less culpable than their adult counterparts. 132 S. Ct. at 2460.

In *State v. Barbeau*, the Wisconsin Court of Appeals adopted *Graham* and *Miller*, but held that the decisions were not inconsistent with the Wisconsin Supreme Court decision in *Ninham*. 2016 WI App 51, ¶¶ 31-32. However, *Barbeau* recognizes that a failure to consider the characteristics of youth, "and the way they weaken the rationale for punishment," can render a sentence of a youthful offender unconstitutional. *Id*. ¶ 31.

C. The Legislature Established a Social Standard of a Maximum 30-Day Punitive Term of Confinement for Juvenile Offenders

When analyzing Mr. Whitaker's sentence through the lens of the Eighth Amendment, this court has direct guidance from the legislature on the term of punitive confinement that was socially acceptable for a juvenile offender. At the time of Mr. Whitaker's offenses, the legislature had designated by statute the maximum term of punitive confinement that could be imposed per offense. When he committed these offenses, Mr. Whitaker could not have received more than thirty days of punitive incarceration per offense. Wis. Stat. § 938.34(3)(f)1 (2005-2006).[19] Moreover, Mr. Whitaker could not have received a juvenile disposition to the Lincoln Hills Secure Detention Facility unless the juvenile court concluded that (1) he committed an offense that allowed for more than six months imprisonment if committed by an adult, (2) the juvenile was an active danger to the public, and (3) the juvenile was in need of restrictive custodial treatment. Wis. Stats. §§ 938.34(4d) & 938.34(4m) (2005-2006).

Mr. Whitaker corrected his behavior, without intervention, when he reached the age of fourteen. There is no evidence that he would have been actively dangerous or in need of custodial treatment when the offenses ended. *See* Wis. Stat. § 938.34(4d). Under these circumstances, the maximum term of punitive confinement that the juvenile court could have imposed on Mr. Whitaker for a single count of sexual assault of a child is thirty days in detention. Wis. Stat. § 938.34(3)(f)1 (2005-2006). Even though Mr. Whitaker reached adulthood by the time he was sentenced, the trial court is still directed to apply punitive sanction that addresses the "personal culpability of the offender," who in this case, remains a twelve to fourteen-year old child. *Ninham*, 2011 WI 33, ¶ 104. As the U.S. Supreme Court noted in *Miller*, due to his age alone, Mr.

[19] Institutional placement was not a punitive measure, and required the disposition judge to find that a juvenile was actively dangerous and in need of residential rehabilitative programming. Secure detention, as codified by 938.34(3)(f)1 allowed punitive placement for a maximum of 30 days for the "course of conduct" leading to a delinquency adjudication.

Whitaker is not as culpable as a similarly-situated adult offender. 132 S. Ct. at 2460.

As such, when Mr. Whitaker was sentenced as an adult, the trial court had a far less compelling rationale to impose confinement than it would have if he had been adjudicated delinquent shortly after the offenses. The trial court found that Mr. Whitaker had no rehabilitative needs, presented "zero" risk of reoffending, and that he met the statutory standards to be relieved from sex offender reporting requirements. Indeed, Mr. Whitaker was only charged and convicted at age twenty-five because his conscience compelled him to confess. Under these facts, the juvenile court would not have likely had cause to impose a disposition of imprisonment at the time of the offenses. Wis. Stat. § 938.34(4d) & 938.34(4m) (2005-2006).

While the trial court held that the primary goal of sentencing was a punitive one, the adult who confessed bears no greater degree of moral culpability for childhood offenses simply because he grew older. "The susceptibility to juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult."" (Kennedy, J.) *Roper*, 543 U.S. at 570. For a juvenile offender like Mr. Whitaker, the legislature capped the maximum term of punitive confinement at thirty days of custodial detention. Wis. Stat. § 938.34(3)(f)1 (2005-2006). Coincidentally, this was the term of imprisonment recommended by the PSI. This term of confinement is proportionate to an offense committed by a twelve to fourteen-year-old child, and section 938.34(3)(f)1 (2005-2006) serves as plain evidence that society, by way of the legislature, had accepted this standard as a maximum term of punitive confinement. *Ninham*, 2011 WI 33, ¶ 50.

D. The Sentence is Disproportionate and Fails to Account for Mr. Whitaker's Youth at the Time of the Offense

In addition to the legislative limit of thirty days punitive confinement, this court must independently evaluate the proportionality of imposing a four-year term of imprisonment on a twenty-six-year-old man for offenses he committed in early adolescence. *Id*. Nothing in the record suggests that Mr.

Whitaker become increasingly dangerous with age. Rather, he successfully transitioned into adulthood, obtained fulltime employment, established a stable residence, and raised his young son as a single parent without violating the law once. A licensed counselor concluded that Mr. Whitaker presents little present danger to the community and that he displays no traits consistent with psychopathy or an antisocial personality. The record is devoid of any fact that suggests Mr. Whitaker's moral culpability for his childhood offenses increased with age. However, the sentence reflects as much, as the term of initial confinement is twenty-four times the maximum punitive sanction Mr. Whitaker could have received when he committed the offenses.

Mr. Whitaker acknowledges that the State prosecuted this matter within its jurisdiction and the statute of limitations. *See State v. Annala*, 168 Wis. 2d 453, 465 (Wis. 1991).[20] However, he disputes that the decision to confess at the age of twenty-five can be fairly used to aggravate his childhood acts. Nothing in the record suggests that Mr. Whitaker intentionally frustrated the discovery of his offenses in the hope that the statute of limitations would run, or that he intended for his sister to suffer in the absence of his confession.

Independent of the thirty-day statutory punitive limit that informs the Eighth Amendment analysis in this case, Mr. Whitaker's criminal sentence as an adult is grossly disproportionate to the actions of the child offender. The sentence is twenty-four times the maximum penalty that Mr. Whitaker could have been imposed when the acts were committed.[21] If Mr. Whitaker had been sentenced at the age of twelve, thirteen, or fourteen, a four-year prison sentence would be objectively shocking given his youth, lack of prior criminal history, lack of ongoing risk to the community, and the circumstances leading to his offense. Indeed, the sentence that Mr. Whitaker received as an adult would have been illegal

[20] The defendant in *Annala* committed a childhood sexual assault, but was prosecuted after he reached adulthood. The trial court ordered the same sentence recommended by Mr. Whitaker's PSI: three years of probation and thirty days jail. *Id*. at 459.

[21] If the entire bifurcated term is included, Mr. Whitaker's penalty is forty-eight times the maximum penalty he could have received at the time of the offenses.

for the child who committed the offenses. Wis. Stat. § 938.34(3)(f)1 (2005-2006). For these reasons, Mr. Whitaker asks this court to conclude that the sentence is contrary to the Eighth and Fourteenth Amendments to the U.S. Constitution, and Article I, Section 6 of the Wisconsin Constitution, and order the matter remanded for a new sentencing hearing.

III. THE SENTENCE DOES NOT COMPLY WITH *STATE V. GALLION*

A criminal sentence must be consistent with the minimal amount of confinement consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the offender. *McCleary v. State*, 49 Wis. 2d 263, 276 (Wis. 1971). While sentencing courts are afforded significant discretion when crafting a sentence, the court must provide a "rational and explainable basis" for the sentence imposed. *Id*. As detailed in *State v. Gallion*, the sentencing court must specify the primary objective of a sentence on the record.[22] 2004 WI 42, ¶ 40, 270 Wis. 2d 535; *See also* Wis. Stat. § 973.017(2). The sentencing court must specify the objective of greatest importance and explain the facts relevant to this determination. *Id*. ¶¶ 41-42. It must explain the factors that it considered when imposing a sentence. *Id*. ¶ 43. A sentencing court is required to explain how the length of a bifurcated prison sentence is expected to advance the previously identified sentencing objectives. *Id*. ¶ 45.

A sentence must be individualized to the defendant based on identified sentencing objectives, and the facts most relevant to serving those objectives. *State v. Harris*, 2010 WI 79, ¶ 29, 326 Wis. 2d 685. Defendants have a constitutional right to have the facts relevant to a sentence explained on the record. *See State v. Hall*, 2002 WI App 108, ¶ 21, 255 Wis. 2d 662. "A trial court misuses its discretion when it fails to state the relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one factor in the face of other contravening factors." *State v. Steele*, 2001 WI App 160, ¶ 10, 246 Wis. 2d 744.

[22] Protection of the public, gravity of the offense, the rehabilitative needs of the offender, and any other applicable aggravating or mitigating factors.

Mr. Whitaker agrees that the sentencing court identified the primary purposes of sentencing and properly articulated its rationale for a punitive goal. However, the sentence did not specify why a term of two years of initial confinement and two years of extended supervision were the minimum terms necessary to achieve the goals of sentencing. *Gallion* 2004 WI 42, ¶ 45; *McCleary*, 49 Wis. 2d at 276. "We are not permitted to engage in "implied reasoning" by the sentencing court when we review a sentence. Rather, we must have an "on-the-record explanation for the particular sentence imposed."" *Ziegler*, 2006 WI App 49, ¶ 25. Since the record is devoid of the trial court's explanation for why this sentence constituted the minimal term of confinement necessary to achieve the goals of sentencing, the sentence does not comply with *Gallion*. 2004 WI 42, ¶ 45; *McCleary*, 49 Wis. 2d at 276.

On a related note, the sentencing court erred by not explaining why two years of extended supervision were necessary to achieve the goals of sentencing. *Id*. Before pronouncing sentence, the trial court made a factual determination that Mr. Whitaker presents "zero" danger to the community, and had no ongoing rehabilitative needs. In support of this determination, the court granted Mr. Whitaker's motion to exempt him from sex offender reporting and registration requirements. However, in addition to the term of initial confinement, Mr. Whitaker received a bifurcated term of two years of extended supervision. A term of two years extended supervision is more than twice the minimum term of supervision that could be imposed, even if the trial court maintained two years of initial confinement was necessary to achieve the punitive goal of sentencing. Wis. Stat. § 973.01(2)(d). This term of extended supervision runs contrary to the sentencing court's determination that Mr. Whitaker has no public safety or rehabilitative needs, and the trial court did not explain why the term of supervision was the least amount necessary to achieve the punitive and deterrent goals of sentencing. *Id*.

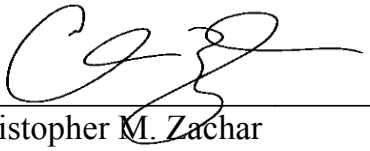
During the post-conviction hearing the trial court acknowledged that Mr. Whitaker's "best argument" stemmed from the lack of an on the record explanation as to why the terms of initial confinement and extended supervision were the

least amount necessary to achieve the goals of sentencing. This explanation is completely absent from the record. As such, the sentence does not comply with *State v. Gallion*, and Mr. Whitaker is entitled to a new sentencing hearing. *Id*.

CONCLUSION

For these reasons, Mr. Whitaker respectfully requests that this court reverse the sentence of the trial court, and remand the matter for a new sentencing hearing.

Respectfully submitted this 12th day of May, 2020.



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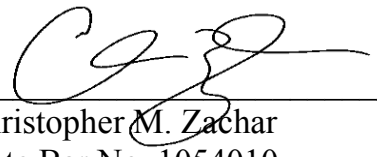

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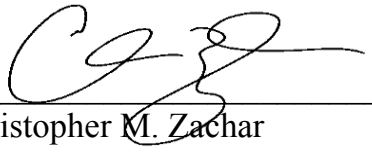

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