STATE OF WISCONSIN

IN THE SUPREME COURT

Appeal No. 2020AP29-CR

STATE OF WISCONSIN

Plaintiff-Respondent

v.

WESTLEY D. WHITAKER

Defendant-Appellant-Petitioner

PETITION FOR REVIEW OF DEFENDANT-APPELLANT-PETITIONER

Christopher M. Zachar
Attorney at Law
State Bar No. 1054010

Zachar Law Office, LLC
115 5th Ave. So. Ste. 420
La Crosse, WI 54601
(608) 518-3224

Attorney for the Petitioner

TABLE OF CONTENTS

STATE OF WISCONSIN

IN THE SUPREME COURT

Appeal No. 2020AP29-CR

STATE OF WISCONSIN

Plaintiff-Respondent

v.

WESTLEY D. WHITAKER

Defendant-Appellant-Petitioner

PETITION FOR REVIEW

Westley D. Whitaker, Defendant-Appellant, respectfully petitions the Supreme Court of the State of Wisconsin, pursuant to Wisconsin statutes §§ 808.20 and 809.62, to review the decision of the Court of Appeals, District IV, in *State of Wisconsin v. Westley Whitaker*, appeal number 2020AP29-CR, filed on February 4, 2021.

ISSUES PRESENTED FOR REVIEW

1. **Does it violate the First and Fourteenth Amendments and Article I Section 18 of the Wisconsin Constitution to consider a defendant's religious identity and impose a sentence intended to deter crime solely within his religious community?**

The trial court concluded that it was proper to consider Mr. Whitaker's religious association at the time of his offense because it intended to deter sexual assaults within the Amish community, and encourage Amish elders to report interfamilial sexual assault to secular authorities.

The Court of Appeals presumed in its analysis that the sentencing court relied on an improper factor, but held that there was sufficient relationship between Mr. Whitaker's offenses and inaction by Amish elders that permitted consideration of his religious association at sentencing. Additionally, the Court of Appeals concluded that general deterrence may be employed to encourage the reporting of crime, and could be directed solely to a religious community.

2. **If a sentencing court may consider a defendant's religious association to deter other members of a religious community does the "reliable nexus" test in *State v. Fuerst* and *State v. J.E.B.* require congruity between the offense and the activity protected by the First Amendment?**

The trial court explained that it hoped Mr. Whitaker's prison sentence would encourage members of the Amish community to report similar underage sexual activity to secular authorities.

Unlike prior cases that applied the "reliable nexus" test in Wisconsin, the Court of Appeals noted there was not congruity between Mr. Whitaker's religious association and his offenses. The Court of Appeals found that a sufficient relationship existed between Mr. Whitaker's offenses and inaction by Amish elders to conclude that the sentencing court properly considered his religious association at sentencing.

3. **Do the Eighth and Fourteenth Amendments require consideration of a statute capping the term of punitive confinement at thirty days for a juvenile offender when an adult defendant is sentenced to twenty-four times the maximum term of confinement that was in place when the offense was committed?**

The trial court determined that the sentence was not cruel and unusual and declined to consider the thirty-day maximum punitive penalty at the time of Mr. Whitaker's offense as evidence that his four-year prison sentence was disproportionate.

The Court of Appeals did not specifically address whether the maximum penalty in Wisconsin statute § 938.34(3)(f)1 (2005-2006) constituted a legislative determination of proportionate punishment for juvenile offenders, and determined that the sentence did not shock public sentiment and as such did not violate the Eighth Amendment prohibition against cruel and unusual punishment.

4. **Does *State v. Gallion* require explanation for a term of extended supervision that exceeds the statutory minimum when the sentencing court finds that the defendant is not dangerous and has no rehabilitative needs?**

The circuit court concluded that Mr. Whitaker's "best argument" was that the sentence violated *State v. Gallion*, but declined to vacate the sentence.

The Court of Appeals called the two-year term of extended supervision a "close question" when the sentencing court explicitly found that Mr. Whitaker presented no ongoing risk to the public, had no rehabilitative needs, was not subject to any court-ordered conditions of supervision, and the bifurcated sentence was based solely on the objectives of punishment and general deterrence. Inferring that the term of supervision would give the victims a sense of security, the Court of Appeals concluded that the sentence satisfied *State v. Gallion*.

CRITERIA FOR GRANTING REVIEW

This appeal presents a real, significant, and novel issue of state and federal constitutional law requiring examination of the relationship between general deterrence, and the constitutional prohibition on considering a defendant's faith and religious associations. It requires this Court to determine under which circumstances, if any, a trial court may consider the religious affiliation of a defendant to set an objective of deterring crime or influencing the behavior solely within a religious community. This case presents an issue of first impression that will have statewide impact on the use of general deterrence as a sentencing factor, and define the limits on when the constitutionally protected religious affiliations of a defendant may be properly considered solely to set a deterrent

objective of sentencing. Furthermore, since the decision of the Court of Appeals seemingly conflicts with *State v. Fuerst*, *State v. J.E.B.* and *State v. Wickstrom*, on whether congruity between activity protected by the First Amendment and a criminal offense required to meet the "reliable nexus" test, review is necessary to harmonize prior authority and clarify when a protected First Amendment interest may be considered at sentencing. Wis. Stat. § 809.62(1r).

Additionally, this case presents an issue with statewide impact on the application of how Wisconsin courts examine the objective indicia of social standards when determining whether a sentence for a juvenile offender is cruel and unusual. Particularly, whether a statute capping the term of punitive confinement for a child offender constitutes objective indicia of proportionality to be applied to a child offender who is sentenced many years after his childhood offenses as an adult. Wis. Stat. § 809.62(1r).

Finally, Supreme Court review is appropriate to address what the Court of Appeals termed a "close question," whether *State v. Gallion* requires a sentencing court to explain its rationale for a term of extended supervision that exceeds the statutory minimum, when the sole objectives of a bifurcated sentence are punishment and general deterrence, and the defendant presents no risk to the public and has no ongoing rehabilitative or supervisory needs. *Gallion* requires an explanation of why the duration and terms of extended supervision are expected to advance the objectives of sentencing, but does not address the explanation required when the sole objectives of sentencing are punishment and general deterrence. Review by this Court is an opportunity to develop the law and harmonize the statutory purpose of extended supervision with the requirements of *Gallion*. Wis. Stat. § 809.62(1r).

STATEMENT OF THE CASE AND FACTS

On January 25, 2019, at the age of twenty-five, Westley Whitaker pleaded guilty to a single sexual assault he committed against his then twelve-year-old sister when he was fourteen years old. (1; 29). Mr. Whitaker was raised in a

conservative Amish community,[1] and during the period of his offenses he and his family were members of the Amish church in Vernon County, Wisconsin. (54:14; App. 154). When he was between the ages of twelve and fourteen, Mr. Whitaker committed a series of sexual assaults against 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. 156). Around the time that Mr. Whitaker turned fourteen years old, the offenses stopped without further intervention (54:17; App. 157). Mr. Whitaker has not sexually offended since turning fourteen. (54:17; App. 157).

Mr. Whitaker's education was limited to attending a conservative Amish primary school through the eighth grade. (54:15-16; 19:13; App. 155-6). Children were forbidden from discussing their sexuality or sexual development. (54:15; 19:11; App. 155). Feelings of sexual desire, and masturbation were viewed as sins. (54:15; 19:11; App. 155). Mr. Whitaker did not receive any sexual education in school, or counseling at the time of his offenses. (54:15-16; App. 155-6).

Confession and Criminal Complaint

Mr. Whitaker and several other members of his immediate family left the Amish church after he reached adulthood (19:11). When Mr. Whitaker was twenty-five years old, one of his sisters began seeing a counselor to address emotional trauma stemming from the sexual assaults. (54:13; 21:2; App. 153). She contacted Mr. Whitaker and urged him to confess to sexually assaulting her when the two were children. (54:13; 21:2; App. 153). Mr. Whitaker confessed to a Vernon County investigator by telephone. (54:13-14; 21:2; App. 153-4). 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 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. 149). Mr. Whitaker is the sole caregiver for his young son. (19:12; 54:21; App. 161). Beyond

[1] As membership in the Amish community is based on membership in the Amish church, the two terms are used interchangeably throughout this filing.

his conviction in this matter, Mr. Whitaker has never been arrested, charged, or convicted of any offense as a juvenile or adult. (54:21; App. 161).

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. (29; App. 138-9). 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). COMPAS scores included in the PSI noted that Mr. Whitaker was low risk for violent and general recidivism. (19:21). No specific conditions of supervision were recommended in the PSI. (19:24).

Sentencing and exemption from sex offender registration

Mr. Whitaker was evaluated before sentencing to determine his risk of sexually reoffending, and submitted this risk assessment to the trial court. (21; 23). The assessment concluded that Mr. Whitaker would have scored low risk for sexually reoffending at the end of his adolescence, and at the time of sentencing posed no more risk of sexually offending than any other twenty-five-year-old male. (21:3-4). Mr. Whitaker submitted the sexual risk assessment in support of a motion to relieve him from sex offender reporting requirements. (20). District Attorney Tim Gaskell did not object to exempting Mr. Whitaker from sex offender registration. (54:5; App. 145). The trial court granted Mr. Whitaker's motion to exempt him from sex offender reporting requirements immediately before sentencing on April 18, 2019, holding: (29; 54:5-6; 31; App. 145-6).

> "Mr. Whitaker committed these very serious offenses, but he was between the age of 12 to 14. He was in an Amish community. And…I don't believe he poses a risk. I believe…this was a juvenile, hormone-driven [behavior] in … a community and [in] a family that wasn't protecting its daughters." (App. 6, ¶ 11).

Relying on the record and the sexual risk assessment, the trial court explicitly concluded that Mr. Whitaker presented

"zero" risk of reoffending. (54:30; App. 170). The trial court also found that Mr. Whitaker did not have any ongoing rehabilitative needs, stating:

> "I don't believe that Mr. Whitaker is a threat to the public. I don't believe he needs rehabilitation." (54:31; App. 171).

The trial court found that Mr. Whitaker was remorseful and sincere but determined that the gravity of the offense was too serious 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. (54:30-32; App. 170-172). Beyond imposing the length of extended supervision, the trial court did not set any conditions of extended supervision, order Mr. Whitaker not to have contact with the victims, or make any record of how two years of extended supervision was expected to fulfill the sole sentencing objectives of punishment and deterrence. (54:32; App. 172).

Deterrence intended to influence the behavior of Amish elders

During sentencing the trial court repeatedly acknowledged Mr. Whitaker's childhood association with the Amish community. (54:29, 31; App. 169). On multiple occasions, the trial court stated its intent to send a message to elders in the Amish community by imprisoning Mr. Whitaker for his childhood offenses, hoping that the sentence would deter others within the Amish faith. (54:29-32; App. 169-172). The trial court stated, in part:

> "I believe the relevant Gallion[2] 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

[2] *Gallion* is misspelled as "Galleon" in the sentencing transcript. This petition 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. 169-70).

Shortly thereafter the trial court once more stated its intent to deter the Amish community:

> "I'm hoping that this sentence deters, as I said, the community."[3] (54:31; App. 171).

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. 172).

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 that the deterrent objective improperly considered his faith and religious association with the Amish community, that the four-year term of imprisonment violated the Eighth and Fourteenth Amendments when the maximum term of punitive confinement at the time of the offense was thirty days in custody, and that the explanation of the bifurcated sentence did not comply with *State v. Gallion*. (35). The trial court stated 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:

[3] 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; App. 171)

> "[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).

The trial court concluded that since it intended to focus deterrence on the Amish community, rather than their religious beliefs, Mr. Whitaker's constitutional rights were not violated. (61:14).

Mr. Whitaker 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 when Wisconsin Statute § 938.34(3)(f)1 (2005-2006), set a maximum term of thirty days of[4] punitive confinement for a juvenile offender at the time that Mr. Whitaker committed the offense he was convicted of. (36; 61:19-20). Mr. Whitaker argued that a term of twenty-four months of confinement was disproportionate to the thirty-day maximum punitive sentence he would have received at the time he committed the offenses. (35; 61:20). 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. (61:23).

Mr. Whitaker also argued that the rationale offered on the record for his prison sentence did not comply with *State v. Gallion*, specifically that the trial court did not explain why it imposed two years of extended supervision after finding that Mr. Whitaker presented "zero" risk of reoffending, was exempt from sex offender reporting requirements, and had no rehabilitative needs. (35; 61:26-27).

The trial court denied Mr. Whitaker's post-conviction motion on all grounds. (44). Before ruling, the trial court noted that it did not thoroughly explain its rationale for imposing a bifurcated four-year term of imprisonment, and did not explain why two years of extended supervision were necessary when

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

considering its prior findings that Mr. Whitaker did not present a public safety threat or require rehabilitation. (61:28).[5] The trial court signed a written order incorporating its oral rulings, and denying Mr. Whitaker's post-conviction motion on December 30, 2019. (44; App. 140).

Court of Appeals decision

Mr. Whitaker appealed from the written order denying his post-conviction motion and on February 4, 2021, the District IV Court of Appeals issued a decision on Mr. Whitaker's appeal affirming sentence and the post-conviction motion on all grounds.[6] (App. 100) The panel recommended that the opinion be published. (App. 137, ¶ 71).

Throughout the decision the Court of Appeals assumed without deciding that the sentencing court considered a prohibited factor, specifically Mr. Whitaker's religious beliefs and association with the Amish community at the time of the offenses. (App. 102, ¶ 4). The Court of Appeals held that the objective of encouraging Amish elders to report sexual abuse between children in their community was a form of general deterrence.[7] (App. 116, ¶ 33). This general deterrent objective was intended to apply solely to the Amish community.[8] (App. 116, ¶ 33). While the Court of Appeals concluded that the trial court properly attempted to deter sexual assault within the Amish community, it also held that the deterrent goal was better characterized as considering the rights of the public at sentencing. (App. 116-17, ¶¶ 33-34). Specifically, the Court

[5] "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).

[6] Mr. Whitaker raised three of the four grounds in his post-conviction motion: (1) that the trial court improperly considered his religious beliefs and association, (2) the sentence was cruel and unusual, and (3) the trial court's explanation of the term of extended supervision did not comply with *Gallion*.

[7] The Court of Appeals noted that general deterrence is typically understood to "directly deter potential offenders from committing the same kind of crime as the person being sentenced…" citing *State v. Gallion*, 2004 WI 42, ¶ 40, 270 Wis. 2d 535, 678 N.W.2d 197.

[8] Since Mr. Whitaker was not at risk of sexually offending in the future the Court of Appeals held that specific deterrence did not apply. (App. 116, ¶ 33).

of Appeals noted that the rights of the public included the right of Amish children to be protected from sexual assault, permitting sentencing objectives aimed at increasing cooperation between Amish elders and secular authorities.[9] (App. 116-19, ¶¶ 33-36).

> "One basis for this approach was the apparent view that a prison sentence is needed in part to teach or remind adults in the Amish community that a potential prison sentence awaits a man who, as a boy, sexually assaulted a child, but who avoided involvement in the juvenile justice system because his delinquent conduct was not adequately addressed while he was younger than 17." (App. 118-19, ¶ 36).

Relying on a combined reading of *State v. J.E.B.*, *State v. Fuerst*, and *Dawson v. Delaware*, 503 U.S. 159 (1992), the Court of Appeals concluded that there was a reliable nexus between Mr. Whitaker's constitutionally-protected association with the Amish church, and his offenses.

> "[T]he court considered the relationship between the circumstances of the child sexual assaults – which it found were not prevented by adults with contemporaneous knowledge and not disclosed to authorities such as social workers or police – and religious and associational rights that we assume without deciding prohibit or discourage communication with authorities about child sexual assaults under all circumstances. That is, there is a reliable nexus between the circumstances of the sexual assaults and the exercise of what we assume are constitutional rights that the sentencing court decided calls for a harsher sentence, even if the added harshness potentially infringed on those rights." [citations omitted]. (App. 126, ¶ 48).

The Court of Appeals noted that unlike *J.E.B.*, there was not congruity between Mr. Whitaker's offenses and his beliefs and associations protected by the First Amendment. (App. 126-128, ¶¶ 49, 51). Holding that the "reliable nexus" test requires only a link to a legitimate sentencing rationale, the Court of

[9] The Court of Appeals echoed a concern expressed by the trial court, that a prison sentence may have the opposite effect, and "cause members of the Amish community to *refrain* from alerting authorities to child sexual assaults, to avoid potential prison sentences." (App. 114, ¶ 28).

Appeals determined that Mr. Whitaker's membership in the Amish church and community were sufficient to permit consideration of his religious association at sentencing to achieve the sentencing objective of deterring the Amish community. (App.126-27, ¶ 49). The Court of Appeals rejected as undeveloped Mr. Whitaker's position that selecting a defendant for deterrence based solely on his religious association falls outside of the parameters of *Lemon v. Kurtzman*, by inhibiting only Amish defendants because of their faith, and constituted excessive entanglement by using a criminal sentence to force social change within the Amish community. (App. 128-29, ¶¶ 52-54).

The Court of Appeals also addressed and denied Mr. Whitaker's argument that the sentence violated the Eighth and Fourteenth Amendment prohibitions against cruel and unusual punishment. (App. 131, ¶ 57). While Mr. Whitaker identified numerous mitigating factors, including his youth, the Court of Appeals also discussed aggravating factors and held that the sentence was not so disproportionate that it shocked the public sentiment. (App.132-134, ¶¶ 60-62). The Court rejected Mr. Whitaker's argument that weight should have been given to Wisconsin statute 938.34(3)(f)1 (2005-2006) when determining whether the adult prison sentence violated the Eighth Amendment. (App. 132, ¶ 59).

Finally, the Court of Appeals addressed whether the term of extended supervision complied with *State v. Gallion*. (App. 135, ¶ 64). Noting that the "circuit court's comments were slight regarding extended supervision," the Court of Appeals called the issue a "close question" but rejected Mr. Whitaker's challenge to the term of initial confinement on the basis that the duration and terms of extended supervision were not adequately explained as required by *Gallion*. (App. 135, ¶ 66). The Court of Appeals rejected Mr. Whitaker's argument on two grounds: (1) the sentencing court was required to impose a term of extended supervision in any bifurcated sentence, and (2) the circuit court could have reasonable concluded that the term of extended supervision would provide the victims with a sense of security. (App. 136, ¶¶ 67-68).

ARGUMENT

I. Review is appropriate to determine whether a sentencing objective of deterring crime and increasing police reporting solely within a religious community improperly considers the defendant's constitutionally protected religious beliefs and associations

"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). 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).

For these reasons, "a circuit court may not base its sentencing decision upon the defendant's or victim's religion." *State v. Ninham*, 2011 WI 33, ¶ 96, 333 Wis. 2d 335, 797 N.W.2d 451; *See also 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); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (defendant's religion "totally irrelevant" to the sentencing process).

The primary issue in this petition concerns the ability of a trial court to set an objective of "limited" general deterrence based solely on the defendant's religious beliefs and association with a religious community. A deterrent objective can form the basis for criminal sentences ranging from fines to imprisonment. *See State v. Gallion*, 2004 WI 42, ¶ 40, 270 Wis. 2d 535, 678 N.W.2d 197. As applied by the Court of Appeals, a circuit court may explicitly consider a defendant's religious beliefs and associations, and justify a deterrent

objective intended solely for a religious community. As the deterrent objective by itself may justify a prison sentence or increase its length, this application of criminal creates a direct link between a defendant's religious practices and the severity of his sentence. *Id*. In this case it was only Mr. Whitaker's former membership in the Amish community that made him a proper subject for influencing the behavior of Amish elders. Whether it is characterized as a form of limited general deterrence, or ensuring that the rights of the community are protected at sentencing, the link between Mr. Whitaker's former membership in the Amish church and the prison sentence premised on deterrence is clear: he received a prison sentence that explicitly relied, in part, on his religious association.

When a deterrent or other sentencing objective requires membership in a specific community of faith as a predicate to finding grounds to justify a criminal sentence, defendants of the targeted faith are plainly inhibited by a criminal justice system that does not assign the same sentencing objective to defendants who do not deter the targeted community. A government action that inhibits a person or group because of their religious beliefs or associations is addressed by the test established in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *Lemon v. Kurtzman*[10] evaluates whether government action violates the religious protections of the First Amendment by examining whether the action passes a three-part test: (1) the action must have a secular purpose, (2) the principal primary effect must neither advance nor inhibit religion, and (3) the action must not foster excessive government entanglement with religion. *Id*. adopted by *State ex rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 322, 219 N.W.2d 577, 582 (Wis. 1974).

The Court of Appeals applied *Lemon v. Kurtzman* to the sentence in *State v. Fuerst*, where the circuit court rejected probation for a defendant also convicted of first degree sexual assault of a child, in part, because the defendant had little religious conviction and did not attend church. 181 Wis. 2d 903, 911, 512 N.W.2d 243 (Ct. App. 1994). From the trial

[10] This petition uses complaint case titles to distinguish *Lemon v. Kurtzman* from *U.S. v. Lemon*.

court's comments alone, *Fuerst* held that it violated the second and third prongs of the test in *Lemon v. Kurtzman* to advance the interests of devout defendants who attended church, inhibiting the interests of defendants not involved in a community of faith, and substantially entangling the interests of the government with a defendant who chose not to practice religion. *Id*. The Court of Appeals was explicit in its determination that such consideration of a defendant's faith was improper in *Fuerst*:

> "A sexual assault of a child is a serious offense. The court may properly view as an aggravating factor Fuerst's betrayal of the trust placed in him…We do, however, require that the sentence imposed be determined without consideration of Fuerst's religious beliefs or practices or matters of personal conscience." *Id*. at 916.

Like *Fuerst*, the trial court justified a prison sentence that explicitly relied on Mr. Whitaker's religious beliefs and practices, yet in this matter the Court of Appeals reached the opposite result. If *Lemon v. Kurtzman* is to be applied consistently, this Court should conclude that a deterrent objective cannot survive First Amendment scrutiny when it is applied only to defendants practicing a specific religion and is intended only to impact specific religious communities.

For the same reasons, targeting only a specific religious community for the limited general deterrence adopted by the Court of Appeals directly inhibits the interests of Amish defendants facing similar prosecutions, advances the interests of non-Amish defendants charged with sexual assault, and is aimed at forcing the Amish to interact with secular authorities, enmeshing government priorities with those of a closed religious community. *See Lemon v. Kurtzman*, 403 U.S. at 613; *See also Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (religious beliefs of the Amish include not conforming to the outside world).[11] The Court of Appeals determined that Mr. Whitaker had not developed this argument, however, like *Fuerst*, his complaint is based on a common-sense interpretation of the plain language used by the sentencing court. Mr. Whitaker was disadvantaged at sentencing solely

[11] The Court of Appeals cited *Yoder* for this practice in its decision. (App. 122, ¶ 41 fn. 13).

because of his former religious practices, because without considering this factor, the trial court could not have set an objective of deterring crime only within the Amish community. *See Fuerst*. 181 Wis. 2d at 910.

Examining whether a deterrent objective entangles the interests of the State with those of the Amish community is tied to the question of whether criminal deterrence may be employed to encourage behavior that is not otherwise required by law. *Lemon v. Kurtzman*, 403 U.S. at 613. The Court of Appeals described general deterrence in this case as sentencing an individual defendant to warn would-be offenders against committing a similar crime. (App. 116, ¶ 33); *See State v. Gallion*, 2004 WI 42, ¶¶ 40, 61, 270 Wis. 2d 535, 678 N.W.2d 197 (general deterrence intended to prevent others from committing similar offenses). However, the deterrent goal identified by the Court of Appeals was not limited to dissuading others from committing sexual assault, but also encouraging elders to report sexual assaults between Amish children. (App. 118-19, ¶ 36). As Amish elders are not statutory reporters of sexual assault, the deterrent objective does not enforce existing laws, but instead promotes social behavior that the trial court believed desirable. *See* Wis. Stat. § 48.981(6). By its very nature, forcing a religious community to comply with the behavioral expectations of an individual circuit court judge that are not otherwise required by law risks entangling the prerogatives of the State with those of the Amish. *Lemon v. Kurtzman*, 403 U.S. at 613. For these reasons review is appropriate to address whether deterrence can ever apply to a religious community.

II. Review is appropriate to clarify the "reliable nexus" test in *J.E.B.* and *Fuerst* and determine the degree of congruity required between an interest protected by the First Amendment and a criminal offense before the protected interest may be considered at sentencing

If criminal deterrence may be constitutionally limited to a religious community, review is necessary to determine the degree of the connection required between an offense and membership in a religious community that is required before basing a sentencing objective on the defendant's faith. The

Court of Appeals applied a combined reading of *Dawson v. Delaware*,[12] *State v. Fuerst*,[13] and *State v. J.E.B.*[14] to determine that there was a sufficient link between Mr. Whitaker's offenses and a failure by Amish elders to act, that justified consideration of an otherwise prohibited factor at sentencing. *Id*. In doing so, the Court of Appeals extended its prior decisions to hold that a sentencing court may find a reliable nexus between an offender and a prohibited sentencing consideration so long as there is any connection between a crime and inaction by elders within a faith. If this court determines that it is proper to limit deterrence to religious communities, review is necessary to clarify contradictory authority in the Court of Appeals, and establish whether a circuit court may rely on a defendant's protected beliefs and associations when a protected trait is not congruent with the circumstances of the offense.

In *J.E.B.*, the Court of Appeals addressed whether consideration of the defendant's interest in pornographic novels containing graphic descriptions of sexual encounters between adults and children otherwise protected by the First Amendment constituted an improper factor to consider at sentencing. 161 Wis. 2d at 660-1. *J.E.B.* relied largely on the rationale in *U.S. v. Lemon*, 723 F.2d 922 (D.C. Cir. 1983). *U.S. v. Lemon* addressed whether the defendant's alleged affiliation with the Black Hebrews, a radical political and religious organization, 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:

> "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

[12] 503 U.S. 159 (1992).

[13] 181 Wis. 2d 903, 512 N.W.2d 243 (Ct. App. 1994).

[14] 161 Wis. 2d 655, 469 N.W.2d 192 (Ct. App. 1991).

> specifically intends to further the group's illegal aims." *Id*. at 938-9.

Adopting the rationale of *U.S. v. Lemon*, the Court of Appeals determined that the defendant's offense of sexually assaulting his daughter closely paralleled the content of his pornographic stories, and determined that there was a "reliable showing of a sufficient relationship between the two" that permitted consideration of an activity protected by the First Amendment at sentencing. *Id*. at 673.

Fuerst adopted *J.E.B.* and *U.S. v. Lemon*, holding that it was error for the sentencing court to negatively consider the defendant's lack of religious convictions. 181 Wis. 2d at 912. The Court of Appeals reiterated the rule that "a sentencing court may consider a defendant's religious beliefs and practices only if a reliable nexus exists between the defendant's criminal conduct and the defendant's beliefs and practices." *Id*. at 913. Since there was no rational connection between the defendant's lack of religious affiliation and offense, *Fuerst* determined that no reliable nexus existed. *Id*. at 915.

Whether a reliable nexus exists between the exercise of a First Amendment right and a criminal offense has turned on what the Court of Appeals describes as "congruity" between the protected act and the offense. *See e.g. State v. Wickstrom*, 118 Wis. 2d. 339, 357, 348 N.W.2d 183 (Ct. App. 1984) (sufficient relationship between defendant's political belief that elected government was illegitimate and convictions for falsely assuming to act as a government official); *J.E.B.*, 161 Wis. 2d at 661 (clear parallels between written pornography describing child sexual assault and the offenses committed); *Fuerst*, 181 Wis. 2d at 913 (it would be permissible to consider drug offender's religious practices at sentencing if faith involved the use of illegal drugs); *U.S. v. Lemon*, 723 F.2d at 939-40 (membership in Black Hebrews not sufficiently tied to offense when no proof that defendant committed offenses to further illegal aims of the organization); *Wisconsin v. Mitchell*, 508 U.S. 476, 486 (racist beliefs can be considered when the defendant committed a battery in furtherance of those beliefs); *Dawson v. Delaware*, 503 U.S. 159, 166 (1992) (affiliation with white supremacy gang could not be considered when the offense was not committed to further racist beliefs).

Every prior decision issued or adopted by the Court of Appeals on this issue relied on whether there was similar congruity between the interest protected by the First Amendment. While *J.E.B.* does not require a showing of cause and effect between a protected First Amendment interest and a criminal offense, the "reliable nexus" test has consistently focused on whether the protected belief or association formed a motive to offend, or otherwise closely paralleled the criminal act. 161 Wis. 2d at 670. The Court of Appeals acknowledged that there is no such congruity between Mr. Whitaker's religious association and the offenses that he committed, and noted that no controlling or persuasive authority addresses the issues in this case. (App. 123-24, ¶ 44).

It is undisputed that Mr. Whitaker was not driven to commit his offenses to further illegal aims of the Amish community, and unlike *J.E.B.*, his interests protected by the First Amendment did not mirror his crimes. *See also U.S. v. Lemon*, 723 F.2d at 939 (unless crimes are committed to further illegal aims of an organization, membership is protected by the First Amendment). The sole alleged relationship between Mr. Whitaker's protected religious affiliation and his offenses is institutional inaction among the elders in his community, a factor that did not motivate his offenses and was entirely beyond his control. Review is appropriate to harmonize the applications of *J.E.B.* and *Fuerst* with this case, and clarify the degree of the relationship between an offense and an interest protected by the First Amendment that must exist, particularly whether congruity is required between the two, before religious belief or association may for the basis of a sentencing objective.

III. A four-year term of imprisonment is cruel and unusual for an adult defendant when the maximum term of punitive confinement at the age he committed the offense was thirty days of incarceration

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). A sentence violates the Eighth and Fourteenth Amendments 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, 333 Wis. 2d at 474-5 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, 883 N.W.2d 520 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, 333 Wis. 2d at 465 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 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, 333 Wis. 2d at 466. 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.

When Mr. Whitaker committed his offenses, the legislature had established the maximum term of punitive confinement that could be imposed. Wisconsin statute § 938.34(3)(f)1 (2005-2006) effectively recognized that the moral culpability for a child offender was significantly less than similarly-situated adult offenders. While he was twenty-five years old when sentence, Mr. Whitaker was being punished for crimes he committed as a child. The maximum term of punitive confinement at the time he committed his offenses is relevant

to whether Mr. Whitaker's sentence as an adult recognized the diminished culpability of the child offender. *Barbeau*, 2016 WI App 51, ¶ 28, 370 Wis. 2d at 530. Review is appropriate to determine whether a statutory cap on punitive confinement for juvenile offenders in effect when a child committed an offense constitutes a social standard that must be considered when sentencing a child offender as an adult.

IV. Review is appropriate to address whether *State v. Gallion* requires the trial court to explain the length of extended supervision imposed when the sentence lacks public safety and rehabilitative objectives

State v. Gallion establishes the baseline requirements that a sentencing court must follow when imposing any criminal sentence. 2004 WI 42, ¶ 40, 270 Wis. 2d at 556-7; *See also* Wis. Stat. § 973.017(2). Mr. Whitaker does not dispute that the trial court identified the primary objectives of sentencing. However, when imposing a bifurcated sentence of imprisonment, *Gallion* also requires that the sentencing court "explain why its duration and terms of extended supervision should be expected to advance the objectives." *Id.* ¶ 45.[15]

The Court of Appeals acknowledged that the record presented a "close question" of whether the term of extended supervision imposed in this case complied with *Gallion*. When imposing sentence the trial court explicitly noted that Mr. Whitaker had no rehabilitative needs, was not dangerous, and presented "zero" risk of reoffending. The sole stated objectives of the sentence were punishment and deterrence within the Amish community. Restitution was not ordered, and the trial court did not set any conditions for Mr. Whitaker on extended supervision. Beyond imposing the bifurcated term, the trial court did not explain how the two-year term of extended supervision was expected to fulfill the objectives of sentencing at any point during the hearing.

[15] The Court of Appeals previously held that *Gallion* requires a minimal explanation for the length of extended supervision. *State v. Klubertanz*, 2006 WI App 71, 291 Wis. 2d 751, 713 N.W.2d 116.

While the trial court was required to impose a sentence that consists of at least twenty-five percent extended supervision, the term of extended supervision in this case exceeds the minimum term required in a bifurcated sentence. Wis. Stat. § 973.01(2)(d). The Court of Appeals has explained that the purpose of extended supervision involves the dual goals of advancing public safety and rehabilitating the offender. *State v. Fisher*, 2005 WI App 175, ¶ 12, 285 Wis. 2d 433, 702 N.W.2d 56.[16] Neither objective applies to this case as the trial court explicitly concluded that Mr. Whitaker was not dangerous and did not need rehabilitation.[17] The sole objectives of the sentence, punishment and general deterrence, are not intended to be addressed by extended supervision. *Id*.

Gallion requires some minimal explanation for how the length of extended supervision furthers the objectives of sentencing. 2004 WI 42, ¶ 45, 270 Wis. 2d at 560. However, the degree of explanation required is unclear. When a defendant is not sentenced for any of the objectives extended supervision exists to address, it becomes particularly important to explain the purpose of a term of extended supervision greater than the statutory minimum.[18] An explanation for why Mr. Whitaker received more than the statutory minimum term of extended supervision in this case is entirely absent from the trial court's remarks at sentencing. While the Court of Appeals inferred the trial court's intention that the term of extended supervision would provide the victims a sense of security, such rationale does not appear anywhere in the record, and is directly contradicted by the fact that the trial court did not order Mr. Whitaker not to contact his sisters while on supervision. (App. 136, ¶ 69). Since the *Gallion* obligation to explain the length of extended supervision absent ongoing public safety or rehabilitative needs has not been addressed, review is appropriate to develop and clarify the law on this issue.

---

[16] Citing Wisconsin Criminal Studies Committee, Final Report, August 31, 1999, at 19.

[17] Additionally, Mr. Whitaker was not required to pay restitution.

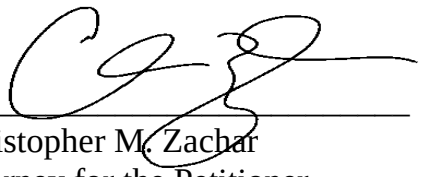
[18] Since a defendant may be confined for up to the maximum term upon violation, the duration of extended supervision directly impacts the defendant's liberty interests.

CONCLUSION

Mr. Whitaker respectfully requests that the Court grant his petition for review.

Respectfully submitted this 22nd day of February, 2021.

Respectfully submitted,

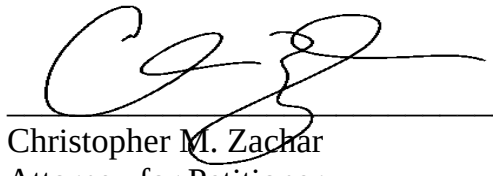


Christopher M. Zachar
Attorney for the Petitioner
State Bar No. 1054010
Zachar Law Office, LLC
115 5th Ave. So. Ste. 420
La Crosse, WI 54601
(608) 518-3224
chris@zacharlawoffice.com

CERTIFICATION

In accordance with Wisconsin statute § 809.19(8), I certify that this petition satisfies the form and length requirements for a petition for review prepared using a proportional font: minimal printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line and a length of 7,429 words.

Dated this 22nd day of February, 2021.



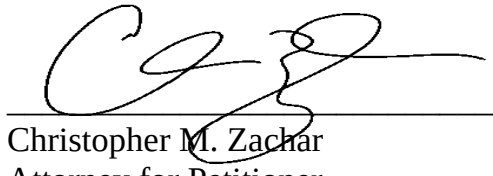
Christopher M. Zachar
Attorney for Petitioner
State Bar No. 1054010

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of 809.19(12). I further certify that this electronic brief is identical in content and in format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 22nd day of February, 2021.



Christopher M. Zachar
Attorney for Petitioner
State Bar No. 1054010