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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2020AP29-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WESTLEY D. WHITAKER,

Defendant-Appellant-Petitioner.

**RESPONSE IN OPPOSITION TO
THE PETITION FOR REVIEW**

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The plaintiff-respondent State of Wisconsin opposes the petition for review filed by Westley D. Whitaker for the following reasons.

1. The State acknowledges that the decision, recommended for publication, satisfies several criteria for review set out at Wis. Stat. § (Rule) 809.62(1r) if it is ordered published. (Pet. 2.) Even so, “review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented.” Wis. Stat. § (Rule) 809.62(1r). Those special and important reasons are not presented in this unusual case.

2. The petition fails to demonstrate a need for this Court to second-guess the decision of the Court of Appeals that, in the final analysis, upheld the trial court’s exercise of sentencing discretion. It upheld the trial court’s imposition of two years of initial confinement followed by two years of extended supervision based on Whitaker’s guilty plea to one count of first-degree sexual assault of a child under age 13, resulting in the dismissal of five other counts of first-degree sexual assault of a child under age 13. The court of appeals properly upheld the sentence in conformity with *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

3. The trial court relied on several rationales for the sentence it imposed, only one of which related to Whitaker’s Amish upbringing in Vernon County. Moreover, that rationale was based on the following two facts that were undisputed by both the State and Whitaker and that make this case unique:

First, during the period in which Whitaker was committing the sexual assaults, adults in Whitaker’s Amish community became aware of his conduct but failed to take effective steps to end it. Second, this was not an isolated failure, but instead part of an ongoing pattern of similar failures by adults in the same Amish community to prevent child sexual assault.

State v. Westley D. Whitaker, No. 2020AP29-CR, slip op. ¶ 2 (Wis. Ct. App. Feb. 4, 2021); (Pet-App. 101). *See also id.* ¶¶ 19, 23–25, 38 n.10; (Pet-App 108, 111–113). So, this is not a case where the sentencing court intended to punish Whitaker for his religious affiliation or beliefs; or intended to punish the Amish community for its religious beliefs or practices. *Id.* ¶ 40 n.12; (Pet-App. 120).

4. Moreover, the court’s focus was only on a small, local Amish community. It consisted of,

the particular group or congregation of Amish adherents that Whitaker’s parents belonged to when Whitaker was aged around 12–14 (when the sexual assaults occurred) and that apparently continued to exist at the time of Whitaker’s sentencing. We are not referring broadly to all persons or groups in the Vernon County area who may have identified as Amish at any time between 2005 and the sentencing.

Id. ¶ 9; (Pet-App. 104).

5. This Court should decline to exercise its discretion to review the decision of the Court of Appeals because it is correct and analytically sound. The court of appeals properly applied this Court’s precedent in holding that Whitaker failed to prove by clear and convincing evidence that the trial court relied on an improper factor—Whitaker’s religious beliefs and affiliation—for the sentence it imposed. *See State v. Alexander*, 2015 WI 6, ¶ 17, 360 Wis. 2d 292, 858 N.W.2d 662; *State v. Ninham*, 2011 WI 33, ¶¶ 90, 94, 333 Wis. 2d 335, 797 N.W.2d 451.

6. The court of appeals properly applied its own precedent in holding that there was a reliable nexus between Whitaker’s admitted multiple sexual assaults of his three younger sisters over several years and the trial court’s intent “to encourage adults to protect girls in the Amish community from sexual assaults, including if necessary, by communicating with authorities outside the community such

as social workers or police.” *Whitaker*, slip op, ¶ 4; (Pet-App. 3). See also *id* ¶ 48. *State v. Fuerst*, 181 Wis. 2d 903, 910–13, 916, 512 N.W.2d 243 (Ct. App. 1994); *State v. J.E.B.*, 161 Wis. 2d 655, 673, 469 N.W.2d 192 (Ct. App. 1991). That is the essence of the decision. It is reasonable and correct.

7. There is no reason for this Court to second-guess the correct holding by the court of appeals that Whitaker’s bifurcated four-year sentence for first-degree sexual assault of a child under age 13, with a 60-year maximum (after five other such charges were dismissed as part of the plea agreement), was not cruel and unusual punishment in violation of the Eight Amendment. *Whitaker*, slip op, ¶¶ 57–62; (Pet-App. 3). See *Ninham*, 333 Wis. 2d 335, ¶¶ 45–46, 51–86. The trial court was properly moved by the multiple sexual assaults Whitaker admitted committing against his three younger sisters over several years, many of which involved penis-to-vagina intercourse, and their devastating impact on the victims. *Whitaker*, slip op, ¶¶ 6–7, 13; (Pet-App. 103, 106–107).

8. There is no reason for this Court to second-guess the correct holding by the court of appeals that the trial court imposed the two-year term of extended supervision in conformity with this Court’s *Gallion* decision. *Whitaker*, slip op, ¶¶ 63–70; (Pet-App. 134–137). See *Gallion*, 270 Wis. 2d 535, ¶¶ 43–44, 49–50, 54–55.

9. If this Court grants review, it will likely affirm after adopting most if not the entirety of the court of appeals’ factual and legal analysis. Assuming that is so, there is no reason to disturb its reasonable and legally sound decision. If

ordered published, the decision should be allowed to stand as the controlling Wisconsin case law for those rare occasions when future courts might be confronted with unusual facts like these.

This Court should deny review.

Dated this 9th day of March, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.62(4) for a response to petition for review produced with a proportional serif font. The length of this response is 950 words.

DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this response to petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic response to petition for review is identical in content and format to the printed form of the response to petition for review filed as of this date.

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

Dated this 9th day of March 2021.

DANIEL J. O'BRIEN
Assistant Attorney General